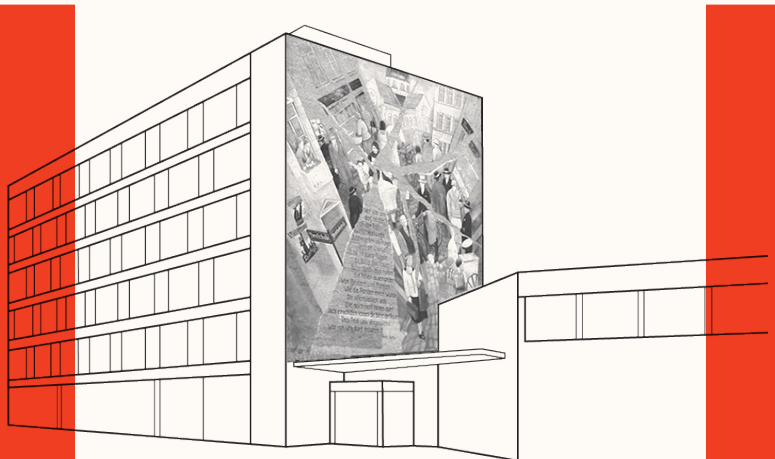

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Prof. Avinash Govindjee, Port Elizabeth

A. Introduction to South African law

Modern South African common law is a mixed legal system. It is based on Roman-Dutch common law, but it includes rules and principles from both Roman-Dutch law and English law. The mixing of Roman-Dutch and English rules and principles was not always a natural occurrence: in fact, for much of the 20th century there was a "bellum juridicum" (a war about the rules) between judges and lawyers who wanted to use the English rules that had crept into South African law during the 19th century, and those who wanted to get rid of all English rules and replace them with Roman-Dutch ones.[1] During the 19th century, the English-trained judges of the Supreme Court of the Cape Colony often used English rules and principles to solve the legal problems they faced, preferring to use up-to-date English books and court judgments instead of the rules set out by Roman-Dutch writers such as Voet (who had been dead for more than a hundred years).[2]

By the mid-20th Century, however, something of a crusade to sanitise South African law from this English influence was waged, replacing English rules with practices from Roman-Dutch sources. Between 1948 and 1990, of course, the South African legal landscape was blighted by the apartheid system, which also affected the interpretation and application of the common law. The system was repealed in the 1990s and the common law no longer contains rules that obviously discriminate on the basis of race.[3]

The outstanding feature of the present legal system is the supremacy of the Constitution of the Republic of South Africa, 1996, (the Constitution) which contains a justiciable Bill of Rights.[4] This provides, *inter alia*, that the common law must be developed so that it is in accordance with the values and principles contained in the Bill of Rights. This ensures that South African law is a "living system", able to adapt to changing times and to remain relevant to the challenges of modern life, while building upon the existing legal framework.

1 Meintjes-Van der Walt *et al Introduction to South Africa Law* (2nd Ed) (2011) (Heinemann) 35.
2 *Ibid*.
3 Meintjes-Van der Walt 36.
4 The drafters of the Constitution relied on the constitutions of countries such as Germany, Canada and India in developing this supreme law.

As far as labour law is concerned, reference has been made to the "convergence school" of comparative labour relations, given that the legal system is rooted in the civil law traditions of Europe as well as English law, with the body of labour law influenced strongly by international and European labour law (where the process of convergence has become increasingly systematic).[5] South Africa's Constitution and its labour statutes are based on the same international instruments that serve as sources of law in other countries from different parts of the world. As a result, it is perhaps unsurprising that the drafters of the South African Labour Relations Act, 1995, (LRA)[6] drew heavily from Italian, UK, German and Dutch law in designing the post-apartheid labour law system.[7] Similarly, in developing the common law, South African courts continue to draw on the jurisprudence of other common law systems (and decisions of South African courts are referred to in these countries).[8]

B. The scope of labour law protection

Section 23(1) of the Constitution provides that "Everyone has the right to fair labour practices" (own emphasis).[9] In addition, "everyone" has the right to have access to social security including, if they are unable to support themselves and their dependants, appropriate social assistance.[10] Despite this, only persons defined as "employees" have recourse to the dispute-resolution provisions of the LRA.[11] Furthermore, only persons classed as employees can be victims of unfair labour practices or be dismissed for purposes of the statutory definition of that term.[12] It is "employees" who are protected against unfair discrimination by the Employment Equity Act, 1998 (although applicants for employment are included in this regard)[13] and against victimisation in terms of the LRA.[14]

Certain employees are expressly excluded from the scope of labour legislation, even if they fall within the statutory definition of "employee". These include members of the National Defence Force, the National Intelligence Agency, the SA Secret Service and the SA National Academy of Intelligence.[15] The courts have also accepted that judges do not fall within the scope of the LRA, although the position of magistrates may be different.[16]

It is clear that in every labour dispute it is necessary to decide whether the referring party was an employee at the time of his or her alleged dismissal or unfair labour practice.

5 D du Toit "Enterprise responsibility for sexual harassment in the workplace: Comparing Dutch and South Africa law" in F Pennings, Y Konijn and A Veldman (eds) *Social responsibility in labour relations: European and Comparative Perspectives* (2008) (Kluwer) 186.

6 Act 66 of 1995. Section 39 of the Constitution provides that, when interpreting the Bill of Rights, international law must be considered and foreign law may be considered.

7 *Ibid*.

8 *Ibid*.

9 The section goes on to provide for worker and employer rights, as well as for rights applicable to trade unions and employer's organisations.

10 S 27(1) of the Constitution.

11 Section 36 of the Constitution provides that (all) the rights of the Bill of Rights may be limited by a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on constitutional values. Applicants for employment are included only for purposes of unfair discrimination (in terms of the EEA) and alleged vitimisation claims (in terms of the LRA).

12 J Grogan *Employment Rights* (2014) (Juta) 16.

13 Section 6(1) read with section 9 of the EEA, Act 55 of 1998.

14 Section 5(2) and (3).

15 Section 2 of the LRA. See Grogan 17.

16 Grogan 17.

Both the LRA and the Basic Conditions of Employment Act, 1997 (BCEA)[17] contain the following definition of "employee":

a) "any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and
b) any other person who in any manner assists in carrying on or conducting the business of an employer".

The major debate that has arisen from this definition relates to the dividing line between "independent contractors" and "employees" (also because the second part of the above-mentioned definition is apparently wide enough to encompass independent contractors in labour law protection). The courts have relied on tests developed under the common law when seeking to apply these definitions in particular cases, in order to determine whether the contractual relationship between the parties is more in accordance with the requirements of *locatio conduction operarum* (the contract of work) or *locatio conduction operis* (the Roman law contract of service).[18] The application of these tests has resulted in the following workers being classified as *employees* by the courts:[19] managing directors, freelance writers, fishing boat skippers, radio personalities, directors of companies and sole members of close corporations who hire out their labour through the close corporation. By contrast, insurance salesmen, sales agents, consultants, and market-research field workers have been held to be *independent contractors*, and there have been conflicting judgments in relation to priests.[20]

To assist with the process of separating "employees" and "independent contractors", the legislature introduced a statutory "presumption of employment" in 2002, which applies to persons earning less than an amount (presently R205433,30) specified from time to time by the Minister of Labour. A person earning below this amount and who renders service to another is presumed, regardless of the form of the contract, to be an employee if one or more of a number of "factors" are present.[21] In addition, the Department of Labour has issued guidelines (known as the "Code of Good Practice: Who is an Employee?") to which all persons determining whether a person is an employee must adhere.[22] The BCEA, in addition, permits the Minister of Labour to "deem" any category of persons as employees for purposes of this Act. The courts have also played their part, with judgments confirming, for example, that the definition of "employee" is broad enough to encompass people due to commence work, and receive remuneration in the future,[23] and even persons employed in contravention of statutory prescripts.[24]

17 Act 75 of 1997.

18 Grogan 19. The tests applied by the courts include the "supervision and control test", the "organization" or "integration" test and the "dominant impression" test, which considers the relationship between the parties as a whole in order to decide whether the relationship amounts to one of employment or not. A number of judgments have focused on applying these tests in South African labour law: see, for example, *Smit v Workman's Compensation Commissioner* 1979 (1) SA 51 (A); *SABC v McKenzie* (1999) 20 *ILJ* 585 (LAC).

19 It is understood that the position in Germany, similarly, has been heavily influenced by the court's view of whether or not a person is an employee, as developed over the past few decades.

20 See, in general, Grogan 20-21.

21 The factors include whether: the manner in which the person works is subject to the control or direction of another person; the person's hours of work are subjected to the direction or control of another person; in the case of a person who works for an organization, the person forms part of that organization; the person has worked for that other person for an average of 40 hours per month for the last three months; the person is economically dependent on the other person for whom he or she renders services; the person is provided with the tools of the trade or work equipment by the other person; or the person only works for or renders services to one other person.

22 GN 1774 in *GG* 29445 of 1 December 2006.

23 *Wyeth SA (Pty) Ltd v Manqele* [2003] ZALC 60; [2005] ZALAC 1. In other words, people who have concluded employment contracts that are cancelled prior to their commencement of employment are considered to have been dismissed by their future employers.

24 *Discovery Health Ltd v CCMA* [2008] 7 BLLR 633 (LC). In this case, a foreign national working without a work permit issued under the Immigration Act, was nevertheless considered to be an "employee" for purposes of the LRA (interpreting, in the alternative, the definition of 'employee" in s 213 of the LRA to not be dependent on the existence of a

From the perspective of social security law, the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA) covers casual workers, apprentices, labour broker employees, but not domestic workers and categories of state employees. The Unemployment Insurance Act, 2001, (UIA) is undergoing amendment so that public servants and foreign workers will be covered in future. Coverage is, nonetheless, restricted to traditionally-defined "employees", and special measures still need to be developed in order to incorporate the self- and informally employed (as per the requirements of the International Covenant on Economic, Social and Cultural Rights).

C. Issues for discussion

But what of the application of the definition, guidelines and presumption in South Africa to categories of vulnerable workers, including workers engaged in a tripartite relationship involving a labour broker (now referred to as a "temporary employment service" in South Africa) and the labour broker's client, fixed-term contract workers and part-time workers? The LRA now limits labour broking arrangements to three months, after which the client is "deemed" to be the employer of the labour broker's employees if they earn below the statutory threshold.[25] The emerging legal position in such situations requires discussion, also following the most recent amendments to the LRA (which focus particularly on these categories of workers) and the recent decision of the Labour Court in the *Assign Services* matter. The social security position in respect of these categories of workers will also be noted. Finally, the contribution will consider the position of those workers who are excluded by the definition of "employee" (as per the courts' interpretation) and reflect upon whether such exclusion is justifiable in the light of the constitutional promise of fair labour practices for "everyone".

D. Vulnerable workers[26]

Labour-related legislation has undergone significant change during the past 12 months, with the introduction of amendments to the Basic Conditions of Employment Act, Employment Equity Act and Labour Relations Act. A new piece of legislation, the Employment Services Act, 2014, has also been signed into law.[27]

Amendments to the Unemployment Insurance Act (focusing on utilising the large surplus which has accumulated in the Unemployment Insurance Fund) and the Compensation for

valid and enforceable contract of employment); also see *Kylie v CCMA* [2010] ZALAC 8, pertaining to a sex worker operating in contravention of the Sexual Offences Act, 1957.

25 This is currently set at R205433,30 per annum.

26 This section is drawn from Van der Walt and Govindjee *Labour law in context* (2nd Ed) (Pearson) (forthcoming).

27 This Act provides specifically for public employment services and for the establishment of schemes to promote the employment of young workseekers and other vulnerable persons. The purpose of the Act is to promote employment; improve access to the labour market for workseekers; provide opportunities for new entrants to the labour market to gain work experience; improve the employment prospects of workseekers, in particular vulnerable workseekers; improve the employment and re-employment prospects of employees facing retrenchments; faciliate access to education and training for workseekers, in particular vulnerable workseekers; promote employment, growth and workplace productivity; and facilitate the employment of foreign nationals in the South African economy where their contribution is needed in a manner that gives effect to the right to fair labour practices, does not impact adversely on existing labour standards or the rights and expectations of South African workers; and that promotes the training of South African citizens and permanent residents.

Occupational Injuries and Diseases Act (for example, so as to introduce early return-to-work interventions in South Africa) are also expected.

The amendments to section 198 of the LRA, dealing with the regulation of non-standard work, are arguably the most contentious of these developments. After much negotiation amongst government, labour and business, the final version of this section appears to seek to strike a balance between the competing considerations of labour flexibility and employment security.

In permitting employment through temporary service providers (labour brokers) to continue, rather than banning this outright, the legislature appears to have acknowledged the need for flexibility in the realm of employment. Similarly, work in terms of limited duration contracts and part-time work is regulated, rather than abolished. Measures are, however, introduced in order to ensure that non-standard employment is permitted only with reference to objective factors, which are discussed below. The focus of the amendments is on preventing the abuse of workers considered to be "vulnerable", so that protection, in the form of enhanced employment security, is generally reserved for lower-income earners (those presently earning below the statutory threshold of R205 433,30). The key amendments to the applicable legislation (contained in section 198 of the Labour Relations Act), are summarised in the context of their impact on the employment position of categories of vulnerable workers.

Section 198

Section 198 governs employment through an intermediary (temporary employment service (TES) or so-called "labour broker" employment). Although the section has been amended to some extent, the key characteristic remains unchanged: a person whose services have been procured for or provided to a client by a TES is the employee of that TES, and the TES is that person's employer. There remain certain instances where a TES and its client are jointly and severally liable in terms of this section. This is the case where a TES, in respect of any of its employees, contravenes:

- A collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
- A binding arbitration award that regulates terms and conditions of employment;
- The BCEA; or
- In terms of the amendments, a sectoral determination made in terms of the BCEA.

Should this be the case, or in instances where a client is deemed to be the employer of an employee in terms of section 198A (3)(b) (discussed, below), the following are the consequences:

- The employee may institute proceedings against either the TES or the client or both the TES and the client;
- A labour inspector acting in terms of the BCEA may secure a compliance order against the TES or the client, or both; and
- Any order or award made against a TES or client may be enforced against either.

Other pertinent amendments to section 198 include the requirement that a TES must provide an employee whose services have been procured for a client with written particulars of employment in compliance with section 29 of the BCEA. It goes without saying that an employee may not be employed by a TES on terms and conditions of employment which are not permitted by any employment law, or any sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services. The question of whether a TES employee is covered by a bargaining council agreement

or sectoral determination must, following the amendments, be decided with reference to the sector and area in which the *client* is engaged.

Three new sections have been added immediately after these amendments to section 198, dealing with deemed employment in the TES context, fixed-term contracts and part-time employment respectively. As indicated above, for the most part, the focus is on extending protection for low-income earners (i.e. those earning under the threshold) on the basis that employment security is particularly important for this category of employee.

S 198A and the consequences of "deeming"

A "temporary service" is defined to mean work for a client by an employee –

a) for a period not exceeding three months;
b) as a substitute for an employee of the client who is temporarily absent; or
c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister.

An employee performing a temporary service for the client is the employee of the TES (in terms of s 198(2)). Once an employee is *not performing* a temporary service for the client (for example because the period of service has exceeded three months in circumstances where the employee is not a substitute for an employee who is temporarily absent), the employee is deemed to be the employee *of the client* and the client is deemed to be the employer (s 198A(3)(b)). Such a (deemed) employee must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment. A 'justifiable reason' includes that the different treatment is a result of the application of a system that takes into account:

a) seniority, experience or length of service;
b) merit;
c) the quality or quantity of work performed; or
d) any other criteria of a similar nature.

It must be remembered that various other consequences flowing from the s 198A deeming provision are referred to in s 198, as mentioned above, relating to instituting proceedings, compliance and enforcement.

An employee *not* performing a temporary service for the client is, subject to the provisions of s 198B, discussed below, employed on an *indefinite* basis by the client. Should the TES terminate the employee's service with the client (even at the instance of the client) *for the purpose of avoiding the operation of the deeming provision*, or because the employee exercised a right in terms of the LRA, this will amount to a dismissal.

The amendments have also influenced the exercise of organisational rights. If a trade union seeks to exercise these rights in respect of employees of a TES, it may seek to exercise them in a workplace of either the TES or one or more of the clients of the TES (s 21(12)).

Section 198A does not apply to employees earning in excess of the threshold. Employees whose services were procured for or provided to a client by a TES in terms of section 198(1) before the commencement of the LRA Amendment Act, 2014, acquired the rights mentioned above from 1 April 2015 (three months after the commencement of the Amendment Act). This three month window period was also applicable to fixed-term contracts and part-time employees, discussed below.

Aspects of s 198A were considered by the Labour Court in the recent decision in *Assign*

Services (Pty) Ltd v CCMA.[28] The court, in essence, concluded as follows:[29]

- Labour broking involves a triangular relationship, and amounts to a commercial contract between the TES and the client, as well as a contract of employment between the TES and the placed work, and an assignment by the TES of the placed worker to the client;
- Where a placed worker concludes a contract of employment with a TES and commences employment with it, the placed worker is afforded rights and protections vis-à-vis the TES, in terms of the LRA;
- Should the deeming provision be applicable, following the three-month period discussed above, there exist two employment relationships: the first involves a continuation of the relationship between the TES and the placed worker so that the statutory rights and protections afforded to the placed worker vis-à-vis the TES continues; the second involves a statutory relationship between the client and the TES for the purposes of the LRA alone;
- These two employment relationships operate on separate lines, with each employer having its own particular relationship with the placed worker. Significantly, in the view of Brassey J, the dismissal of a placed worker by the client will not result in the employment relationship between the placed worker and the TES terminating;
- Should the deeming provision be triggered, the TES continues to have the power of control over the placed worker (Because the source of the power of control is the contract of employment between the TES and the placed worker, which remains in existence). While the client can set tasks that the placed worker must perform, it does so in its capacity as an agent or representative of the TES, in whom such power originally vested and continues to vest;
- As such, and given the language of the deeming provision itself, the word "deemed" in s 198A(3)(b)(i) has the effect of augmenting (i.e. supplementing) the term "employer" so as to include the client, as opposed to substituting the client for the TES as the employer.

S 198B: Fixed-term contracts

A fixed-term contract is defined, for purposes of this section, to mean a contract of employment that terminates on –

a) the occurrence of a specified event;
b) the completion of a specified task or project; or
c) a fixed date, other than an employee's normal or agreed retirement age.

As with s 198A, this section does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of the BCEA. It also does not apply, generally, to employers that employ less than 10 employees, or that employ less than 50 employees and whose business has been in operation for less than two years. Finally, the section does not apply to employees employed in terms of a fixed-term contract which is permitted by statute, sectoral determination or collective agreement (s 198B(2)).

28 [2015] 11 BLLR 1160 (LC); (2015) 36 *ILJ* 2853 (LC).
29 See, in general, Van der Walt and Govindjee (eds) ch 7, from where this summary has been drawn.

Following the amendments, an employer may employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months of employment only if –

a) the nature of the work for which the employee is employed is of a limited or definite duration; or
b) the employer can demonstrate any other justifiable reason for fixing the term of the contract. Examples of justifiable reasons for concluding a fixed-term contract longer than three months are provided by the LRA. These include instances where the employee:
    i) is replacing another employee who is temporarily absent from work;
    ii) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
    iii) is a student or recent graduate employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
    iv) is employed to work exclusively on a specific project that has a limited or defined duration (although an employee is now entitled to severance pay should this period exceed 24 months);
    v) is a non-citizen who has been granted a work permit for a defined period;
    vi) is employed to perform seasonal work;
    vii) is employed for the purpose of an official public works scheme or similar public job creation scheme;
    viii) is employed in a position which is funded by an external source for a limited period; or
    ix) has reached the normal or agreed retirement age applicable in the employer's business.

Employment not considered to be of a limited or defined duration, including instances when an employer is unable to demonstrate a justifiable reason for fixing the term of the contract is *deemed to be of indefinite duration*. An employee employed in terms of a fixed-term contract for longer than three months (presumably where there is no justifiable reason for an extension of this period) must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a *justifiable reason* for different treatment. The "justifiable reasons" referred to are precisely the same as listed above, in the context of TES employment. Although the applicable section makes no reference to treatment "on the whole" no less favourable, it is arguable, when considering the Memorandum to the Labour Relations Amendment Bill, that this was indeed the intention.

Interestingly, an offer to employ an employee on a fixed-term contract or to renew or extend a fixed-term contract *must* be in writing and state the reasons for employment beyond a three-month period. However, no direct consequences for non-compliance with this provision are stipulated, and it is uncertain whether the subsection is to be applied only to contracts in excess of three months (when the employer seeks to justify such a contract) or to all fixed-term contracts. There is a proviso that the onus is on the employer to prove that there was a justifiable reason for fixing the term of the contract *and that the term was agreed* (s 198B(7)).

Employers must also now provide an employee employed in terms of a fixed-term contract with equal access to opportunities to apply for vacancies as enjoyed by an employee employed on a permanent basis (s 198B(9)).

A number of possibly contentious provisions are contained in this subsection of the amended law. Given that the provisions have only recently been introduced into South African law, guidance from the courts has not yet been forthcoming. In particular, scenarios in which an employment contract might exceed the stipulated three-month period because "the nature of

the work for which the employee is employed is of a limited or definite duration" are difficult to contemplate. The legislature's intention must have been to provide an opening for employment contracts in situations that are different from the nine examples provided in the second subsection of the provision, quoted above. In addition, given that these nine examples are not part of a closed list, what other instances would be considered to be an acceptable basis for a worker earning under the threshold to be employed for longer than a three-month period (without the deeming provision being triggered)?

Section 198C – Part-time employees

For the purpose of this section, a "part-time employee" is an employee who is remunerated wholly or partly by reference to the time that he / she works and who works less hours than a *comparable full-time employee*. This "comparable employee" is an employee who is remunerated wholly or partly by reference to the time that the employee works and who is identifiable as a full-time employee in terms of the custom and practice of the employer (not including an employee whose hours of work are temporarily reduced by agreement due to operational requirements) (s 198C(1)). In identifying a comparable full-time employee, regard is had to a person employed on the same type of employment relationship and who performs the same or similar work in the same workplace as the part-time employee. Only if there is no comparable full-time employee working in the same workplace does the Act permit other workplaces to be considered (s 198C(6)(b)).

Employers must, while taking into account the working hours of part-time employees, "treat a part-time employee on the whole not less favourably than a comparable full-time employee doing the same or similar work", unless there is a justifiable reason for different treatment (based on the same considerations applicable in the case of TES and fixed-term contract employees, discussed above). Part-time employees must also be provided with equal access to training and skills development, as well as the same opportunities to apply for vacancies (s 198C(3) and (5)).

This section does not apply to employees earning in excess of the set threshold and during the employee's first three months of continuous employment with an employer. As with fixed-term contracts, small employers and businesses in operation for less than two years are also excluded in general. Finally, in this regard, employees who ordinarily work less than 24 hours a month for an employer do not enjoy protection in terms of s198C.

S 198D – General provisions

The amendments grant the Commission for Conciliation, Mediation and Arbitration (CCMA) and Bargaining Councils jurisdiction to conciliate and arbitrate disputes emanating from interpretation or application of sections 198A, 198B and 198C. Such disputes, other than dismissal cases, may be referred in writing within six months after the act or omission concerned. Disputes remaining unresolved after conciliation may be referred for arbitration within 90 days, although late referrals may be condoned.

E. Analysis and conclusion

The recent statutory developments in South Africa, in particular the amendment of section 198 of the LRA, demonstrate a deliberate attempt by the legislature to enhance the scope of protection of categories of vulnerable workers. This has been achieved by use of a "deeming" provision in the case of labour broker employees and employees on a fixed-term contract, in certain scenarios, and by the introduction of additional protection for part-time employees. The result is enhanced labour and social security protection for such employees, who typically must not be treated less favourably than other employees. The amendments pose fresh challenges for those employers who have traditionally relied on outsourced services (at least in respect of certain dimensions of their business), and those who have historically made use of fixed-term contracts as a tool to lower the salary bill of the organisation and to employ staff for a few months or a year (often without any benefits whatsoever), for example, before relying on the end date of the contract for justifying termination of employment. Now, even the label of being a "casual" or "temporary" worker may not hold water if a person is employed for more than three months (unless one of the listed grounds for exception applies). When coupled with the fairly broad manner in which the courts have read and understood the definition of "employee" in South African legislation, for example permitting even those operating in terms of unlawful contracts to enjoy recognition, the impact of the trend becomes even stronger. While it is true that the latest layer of protection is designed specifically for "vulnerable" workers earning below a prescribed threshold of income, South African employment law (unlike the position in other developing countries such as India) permits even high-income earners, supervisors and managers to access the (very effective) labour dispute tribunal (the CCMA) and Labour Court in order to press their rights in relation to labour disputes. Probationary employees, namely those employed on a trial basis in order for the employer to ascertain whether they are suited for a job, are somewhat less protected (given that there are less rigorous requirements for employer to justify dismissal for poor work performance).

Independent contractors, however, namely those providing a distinct service to the organisation (and who do not qualify as "employees" because of the nature of their task and the independent manner in which this is performed, such as Uber drivers), remain excluded from such protection, as do the list of workers specifically excluded from the ambit of the various labour legislation cited above (such as South African soldiers and secret service members). Although this exclusion brings into question the adherence to the constitutional promise of fair labour practices for "everyone", it is likely that such exclusions are constitutionally valid as a result of the application of the limitations clause contained in section 36 of the Constitution, which notes that rights in the Bill of Rights may be limited by a law of general application, provided that the limitation is "reasonable and justifiable in an open and democratic society" based on constitutional values.

Similarly, self-employed persons operate in a different paradigm altogether (also from a social security perspective). The absence, to date, of a national pension fund and compulsory medical aid / health insurance contribution requirement results in large-scale reliance on private savings and insurance contributions (which some persons fail to provide for), and use of public (health care) facilities, and the absence of much of the protection provided to employees in terms of legislation. As noted above, certain categories of workers also remain excluded from the ambit of social security legislation such as the UIA and COIDA.

Atypical Employment in German Labour and Social Security Law

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A. Introduction

Before addressing the situation in German labour law concerning atypical employment, it seems useful to briefly introduce the pertinent legal framework. In comparison to the South African framework[1] the significance of international regulation on labour law (e.g. ILO-Conventions, UN-Conventions) is relatively weak in Germany.[2] Instead, fundamental rights in the German Constitution, the Grundgesetz (Basic Law) play an important role in labour law. This is especially true for the occupational freedom (Berufsfreiheit), as guaranteed by Art. 12 of the Basic Law, and the freedom to organise and to bargain collectively (Koalitionsfreiheit), as guaranteed by Art. 9 (3) of the Basic Law.[3] Having said that, fundamental rights are not of particular interest with regard to atypical employment. In this field, the influence of European regulation is much more important[4] as also shown by the contribution of Manfred Walser[5].

This paper will concentrate on the situation set by statutory labour law. Meanwhile, the ruling by social partners is characteristic for German labour law.[6] One should be aware that the regulation in labour law is diverse and fragmented as there is no one cohesive labour code but a large number of legal acts, mainly parliamentary laws.[7] And it must be noted that regulations are not always consistent, at times contradicting each other or at least pursuing conflicting

1 See *Govindjee*, p. 5.
2 *Dütz* and *Thüsing*, Arbeitsrecht, 20th ed. Munich 2015, § 1 no. 21 with further references.
3 E.g. *Schmidt*, in: Erfurter Kommentar zum Arbeitsrecht, 16th ed. Munich 2016, Einleitung No. 1-3; *Linck* in: Schaub, Arbeitsrechts-Handbuch, 16th ed. Munich 2015 § 3 and *Oetker*, in: Richardi et al., Münchener Handbuch zum Arbeitsrecht, 3rd ed. Munich 2009, § 12 Grundrechte im Arbeitsverhältnis.
4 See *Fuchs*, Die Bedeutung und der Einfluss der Arbeitnehmerfreizügigkeit auf das nationale Arbeits-, Sozial- und Steuerrecht, in: Devetzi/Janda, Freiheit, Gerechtigkeit, Sozial(es) Recht, Festschrift für Eberhard Eichenhofer, Baden-Baden 2015, 172 (174 et seqq.). Concerning the growing importance of European fundamental rights see *Junker*, Europäische Grund- und Menschenrechte und das deutsche Arbeitsrecht (unter besonderer Berücksichtigung der Koalitionsfreiheit), ZFA 2013, 91-136.
5 P. 24.
6 *Linck* in: Schaub, Arbeitsrechts-Handbuch, 16th ed. Munich 2015, § 1 No. 9 et seqq.; in general *Däubler*, Individuum und Kollektiv im Arbeitsrecht, NZA 1988, 857 et seqq.
7 *Rüthers*, Methoden im Arbeitsrecht 2010 – Rückblick auf ein halbes Jahrhundert, NZA-Beil. 2011, 100 et seqq.; instructive *Wroblewski*: Sachstand „Arbeitsvertragsgesetz" – Verwirklichungschancen einer Kodifikation, rechtspolitische Gemengelage und Positionen, NZA 2008, 622-626.

aims.[8] However, several of the questions discussed hereafter are also addressed in collective agreements that may influence the legal situation.

Concerning atypical employment, we can distinguish "classical" problems in labour law from the challenges due to new forms of work and working conditions such as mobile offices, crowd work, or solo self-employment. After a short introduction of the standard model for working relations that is the starting point of German labour law and social security law (B), the paper will introduce the "classical" forms of atypical employment and discuss challenges in labour law (C). Also, the protection of non-standard workers and developments in social security law are critically analysed (D), before conclusions may be drawn, also in regard to new forms of non-standard work (E).

B. A standard model for working relations

The legal standards are set with regard to a "regular" or "standard" employment contract that will typically entail a full time (usually 39 to 40 hrs)[9] open-ended contract that is (ideally) providing a living wage and granting access to the Social Security system.[10] This is a normatively set standard[11] that does not necessarily any longer reflect the reality of employment relations. Many reasons can be identified for the changing patterns on the labour market leading to changed demands in the labour markets in the last decades.[12] One important factor is changing demographics, e.g. an increase in the labour population through the participation of women.[13] Also, an influence of new concepts of work and labour relations on the European level can be noticed, for example the ideas of flexicurity[14] or the adult worker model[15].

The question has been asked whether the atypical was the new typical form of employment in Germany[16]. Germany has experienced a 'dualisation' of the labour market.[17] There is still a stable part of typical and well protected employment. But in the last 10 to 15 years, there

8 *Rüthers*, Methoden im Arbeitsrecht 2010 – Rückblick auf ein halbes Jahrhundert, NZA-Beil. 2011, 100 et seqq.

9 Sometimes, part-time employment with an amount of at least half of the full time hours worked is considered to be a standard employment.

10 *Waltermann*, Abschied vom Normalarbeitsverhältnis, in: Deutscher Juristentag e. V. (djt), Verhandlungen des 68. Deutschen Juristentages, Berlin 2010, Band I: Gutachten / Teil B, p. B 1, see also *Allmendinger, Hipp & Stuth*, Atypical Employment in Europe 1996 - 2011, Discussion Paper, P 2013-003, 7, available at www.wzb.eu/atypical.

11 See *Wank*, Abschied vom Normalarbeitsverhältnis, RdA 2010, 191, 195.

12 See *Eichhorst* and *Tobsch*, Not So Standard Anymore? Employment Duality in Germany, J Labour Market Res (2015) 48, 81-95.

13 *Kocher*, Diskontinuität von Erwerbsbiografien und das Normalarbeitsrecht, NZA 2010, 841, 842.

14 See COM(2007) 359 final, Towards Common Principles of Flexicurity: More and better jobs through flexibility and security; lately COUNCIL DECISION (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015, guideline 7, OJEU, L 268/28, p. 3 and *Rönnmar*, Labour and equality law, in: Bardnard & Peers (eds.), European Union Law, 2014, 592 and 604 et seqq. with further references.

15 *Annesly*, Lisbon and social Europe: towards a European 'adult worker model' welfare system, JESP 2007, Vol. 17(3), 195-205; *Daly*, What Adult Worker Model? A Critical Look at Recent Social Policy Reform in Europe from a Gender and Family Perspective, Social Politics 2011, Vol. 18 No. 1, 1-23; *Klenner and Schmidt*, Minijobs – Eine riskante Beschäftigungsform beim normativen Übergang zum „Adult-Worker-Model", WSI-Mitt. 2012, 22-31.

16 *Eichhorst* and *Tobsch* , Has Atypical Work Become Typical in Germany?, IZA DP No. 7609, 2013 available at http://ftp.iza.org/dp7609.pdf .

17 See in depth *Eichhorst* and *Tobsch*, Not So Standard Anymore? Employment Duality in Germany, J Labour Market Res (2015) 48, 81-95 and *Eichhorst* and *Marx*, Reforming German labour market institutions: A dual path to flexibility, JESP 2011, Vol. 21(1), 73-87.

is a growing part of atypical employment contracts and precarious working relations.[18] The percentage of atypical employment today makes up for about 21% of the active population.[19]

C. Atypical employment and labour law regulation

Labour relations that differ from the standard model have been considered atypical employment under German labour law for a long time. Three major aspects in labour law contracts lead to a precarious position for the employees despite the idea of equal treatment.[20] Those are fixed-term contracts characterised by modifications in the contract period; part-time work with modifications of the amount of working-hours; and the triangular relationship of temporary employment with two parties that "share" the role of the employer.

Most forms of atypical employment very clearly fall under the scope of labour law. In general, within the German legal system, labour law is seen as a protective law for dependent workers under a private labour contract.[21] This explains the importance of case law distinguishing dependent from independent workers. It must be stressed that the concept of the employee as a dependent worker is defined by a limited set of relevant elements: submission under the orders of the employer; and the integration in the employer's organisation. These criteria of dependence have to be established in every individual case relying on different indices like regulations concerning working time, working place, tasks, execution of tasks, use of supplies, material of the employer etc.

Fixed-term contracts and part-time contracts are, without doubt, labour contracts. This might be less obvious when it comes to temporary work.[22] Here, the contractual relation between employer and employee differs from the relation where the work is executed. But if the general conditions of dependence are fulfilled, they too fall in the category of labour contracts. The only particularity in these forms of employment is the delegation of the managerial prerogatives to the hiring business. The three forms of atypical employment and the respective problems and challenges in labour law will be described in more detail below.

I. Fixed-term contracts

The overall percentage of fixed-term contracts is only about 7%. This does not immediately reveal the significance: statistical data show that in the beginning of 2013 about 40% of all new contracts were fixed-term contracts and 37% of fixed-term contracts were continued as open-ended contracts once the time-limit was reached. Even if these contracts imply an initial lack of security for the employees, they are described as having the potential to serve as a stepping stone in entering the labour market and ultimately obtaining a standard labour contract.

18 *Arnold*, *Mattes* and *Wagner*, Normale Arbeitsverhältnisse sind weiterhin die Regel, DIW Wochenbericht Nr. 19 2016, 419-427. This said, one should be aware that not every atypical contract leads to a precarious situation, see in depth *Tophoven* and *Tisch*, Dimensionen präkerer Beschäftigung und Gesundheit im mittleren Lebensalter, WSI-Mitteilungen 2/2016, 105.

19 Statistisches Bundesamt and Bundeszentrale für politische Bildung, Datenreport 2016, 133 (latest statistics available date from 2014).

20 In general *Walwei*, Arbeitsmarktreformen im internationalen Vergleich, Deutschland hat die Nase vorn, IAB-Forum 2/2015, 4, 5.

21 *Linck* in: Schaub, Arbeitsrechts-Handbuch, 16th ed. Munich 2015 § 1 no. 4 et seq. and in depth *Forst*, Arbeitnehmer – Beschäftigter – Mitarbeiter, RdA 2014, 157 et seqq.

22 See in depth *Forst*, Arbeitnehmer – Beschäftigter – Mitarbeiter, RdA 2014, 157 et seqq.

This holds true for highly skilled employees. Lower skilled and younger employees, however, often stay employed in precarious conditions.[23]

Originally conceived as an exception, an extension of possibilities for entering fixed-term contracts can be observed. The general rule set in Art. 14 Sec. 1 TzBfG (Law on Part-time Work and Fixed-term Employment Relationships) states that the limitation of the duration of a labour contract needs an objective justification. Additional rules for fixed-term contracts in particular fields such as research[24] or the specialisation of medical doctors[25] are provided for in the law. Following the derogating rule of Art. 14 Sec. 2 TzBfG, fixed-term contracts without justification may be agreed upon up to an overall period of two years. This is put under the condition that the parties have not been previously bound by any (fixed-term or open-ended) labour contract. More recently, however, a ruling of the Federal Labour Court has eased the restrictions set up by the law. The Federal Court considers that this condition only applies for a three-year period of time prior to the conclusion of the fixed-term contract.[26] The sanction in case of disregard of the legal condition implies a reversion to the standard model: contracts are then deemed to be open-ended (see Art. 16 TzBfG). On the other hand, this rule only applies if the employee introduces an action into court at least three weeks after the supposed termination of the fixed-term contract (Art. 17 TzBfG). Moreover, following the settled case-law of the Federal Labour Court, judicial control is limited to the last contract entered upon by the parties[27]. In terms of security and protection, the principle of equal treatment applies, along with a *pro rata temporis* principle (see Art. 4 Sec. 2 TzBfG). This does not prevent the discrimination of employees on fixed-term contracts from of the (*de factis*) exclusion from training and further qualification.

II. Part-time Work

Part-time work as such is an instrument of flexibility, not only for employers but also for employees. This is especially true when reconciling remunerated work and care work, such as parenting or taking care of elderly relatives. Under gender aspects, part-time work can be considered as a female phenomenon.[28] The share of women working part-time is significantly higher than that of men.[29]

In official statistics, it is considered as atypical employment if the amount of hours is equal or less than 20 hours per week.[30] In terms of security and protection, the principle of equal treatment applies, along with a *pro rata temporis* principle (see Art. 4 Sec. 1 TzBfG). But the mobilisation of rights is particularly weak in this field. Even though equal treatment is guaranteed under the law, inequalities concerning the remuneration of sick leave or annual leave seem to be wide spread, especially for contracts with low amounts of hours.[31]

23 Cf. *Gundert*, Atypische Beschäftigung von Frauen und Männern in Deutschland, NZFam 2015, p. 1093, p. 1095.

24 Cf. *Düwell*, Das Erste Gesetz zur Änderung des Wissenschaftszeitvertragsgesetzes (WissZeitVG-E), jurisPR-ArbR 2/2016, Anm. 1.

25 Gesetz über befristete Arbeitsverträge mit Ärzten in der Weiterbildung (ÄArbVtrG), BGBl I 1986, 742, revised version as of Art. 3 G v. 12.4.2007, BGBl. I 2007, 506.

26 BAG, 06 april 2011 – 7 AZR 716/09 – BAGE 137, 275 et seqq.

27 For example BAG, 24 february 2016 – 7 AZR 182/14 –, no. 14 (juris); BAG, 25 march 2009 – 7 AZR 34/08 –, no. 9 (with further references), NZA 2010, 34-37.

28 *Nassibi*, *Wenckebach* and *Zeibig*, Geschlechtergleichstellung durch Arbeitszeitsouveränität – Arbeits- und sozialrechtliche Regulierung für Übergänge im Lebenslauf, djbz 2012, 111.

29 See for example Teilzeit auf dem Vormarsch, Böckler Impuls, 7/2016, 7.

30 *Lakies*, Zunahme der „atypischen Beschäftigung" – Abschied vom „Normalarbeitsverhältnis"?, ArbRaktuell 2013, 459 (460).

31 *Gundert*, Atypische Beschäftigung von Frauen und Männern in Deutschland, NZFam 2015, 1093 (1096); *Hohendanner* and *Walwei*, Arbeitsmarkteffekte atypischer Beschäftigung, WSI-Mitt. 2013, 239 (242); *Klenner*, Niedriglohnfalle

Besides the general rules, different laws provide special regulation on part-time work to allow childcare or care for elderly relatives. The general rules of Art. 8 TzBfG stipulate that employees may ask for a reduction of their working hours by reducing the contracted hours. This reduction is permanent and there is no right to go back to a full-time contract or to augment the contracted hours.[32] However, special rules also allow for a temporary reduction for childcare or caretaking for elderly relatives. In these cases, the employee may return to the original amount of hours after completion of the caretaking.[33]

Problems arise when employees are "trapped" in part-time.[34] Statistic data show that the majority of part- time employees work less hours than they would like.[35] And unlike the quasi unilateral right to a reduction of working time on part of the employee, there is no corresponding right to an augmentation of the contractually fixed hours. This can easily be explained by organisational concerns of the employer. Replacing missing workforce due to a reduction in hours is far less complex than it would be to ensure that workforce is really needed were there a right to extend the amount of hours provided in the original contract. However, that right would definitely raise the flexibility of the employees and enforce gender equality.[36] Coming into office, the current government was planning to propose amendments to the TzBfG to foster this principle,[37] which was also supported by several trade unions[38] and the German Association of Female Jurists (Deutsche Juristinnenbund)[39], but this part of the coalition contract of the governing parties seems unlikely to be put into law during the current legislative session.

III. Temporary Agency Work

The instances of temporary employment have increased dramatically during the last 20 years, having risen by 500%. In 2014, 2.5% of German employees affiliated to compulsory social security were employed under temporary employment contracts. The legal conditions for temporary work have been tightened by recent reforms,[40] to ensure it does not replace regular labour contracts and to increase the likelihood of granting access to a standard labour contract through these contracts. The reforms were driven by the obligation to adhere to the European directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008

Minijob, WSI-Mitt. 2012, 5 (19 et seq.).

32 E.g. BAG, 12 september 2006 – 9 AZR 686/05 – BAGE 119, 254-261.

33 See art. 16 sec. 4-7 BEEG for part-time in combination with parental leave and art. 3 PflegeZG and art. 2 and 2a FPfZG for part-time during a "caretaking leave".

34 *Lakies*, Zunahme der „atypischen Beschäftigung" – Abschied vom „Normalarbeitsverhältnis"?, ArbRaktuell 2013, 459 (460).

35 Stastisches Bundesamt and Bundeszentrale für politische Bildung, Datenreport 2016, 132; IAB (ed.), Situation atypisch Beschäftigter und Arbeitszeitwünsche von Teilzeitbeschäftigten, Nürnberg 2015 (passim).

36 Djb-Kommission für Arbeits-, Gleichstellungs- und Wirtschaftsrecht, Konzept für ein Wahlarbeiteszeitgesetz, djbZ 2015, 121-129 (see https://www.djb.de/themen/wahlarbeitszeit/wazg-konzept/ for an updated version); *Nassibi*, *Wenckebach* and *Zeibig*, Geschlechtergleichstellung durch Arbeitszeitsouveränität – Arbeits- und sozialrechtliche Regulierung für Übergänge im Lebenslauf, djbz 2012, 111 et seqq.

37 Deutschlands Zukunft gestalten, Koalitionsvertrag zwischen CDU, CSU und SPD, 18. Legislaturperiode, 2013 (https://www.bundesregierung.de/Content/DE/_Anlagen/2013/2013-12-17-koalitionsvertrag.pdf?__blob=publicationFile), 11 and 70.

38 E.g. IG Metall, https://www.igmetall.de/rueckkehrrecht-von-teilzeit-in-vollzeit-18495.htm (4 august 2016); DGB, Beschlüsse des 18. Ordentlichen Bundeskongresses, G 001, Arbeit der Zukunft – humane und gute Arbeit stärken, available at http://www.dgb.de/themen/++co++1fde3e3a-17c3-11df-5c52-00093d10fae2; DGB, Koalition im Enspurt, Diese Gesetze müssen kommen, einblick 14/2016 available at http://www.dgb.de/themen/++co++96ec3a76-6dd0-11e6-b05f-525400e5a74a.

39 See Deutscher Juristinnenbund, Wir haben die Wahl – Forderungskatalog des djb, Kommission Arbeits-, Gleichstellungs- und Wirtschaftsrecht, djbz 2013, 55 (57).

40 Cf. Erstes Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes – Verhinderung von Missbrauch der Arbeitnehmerüberlassung (AÜGÄndG 1) as of 28 april 2011, BGBl I 2011, 642.

on temporary agency work in German law. Hiring a temporary worker is only legal if the assignment is limited in time, but the law does not clarify which period should be considered as "temporary". A draft law to amend the Act on Temporary Agency Work that is actually discussed by the legislative proposes to limit the assignment to 18 months with a possibility for the social partners to extend this period by collective agreement.[41]

The fulfilment of equal treatment is an important challenge. There is no strict principle of equal pay legislated by German law but the possibility to derogate from this principle by collective agreement (see Art. 9 No. 2 and Art. 10 Sec. 4 AÜG). This has been subject to multiple court proceedings.[42]

Moreover, the situation of temporary employment workers concerning workers' representation is not regulated by Art. 14 AÜG. Insofar, additional regulation is provided by the current draft law,[43] but it does not cover all legal questions.[44]

IV. Extension of labour law protection

As mentioned before, independent workers including solo self-employed persons do not fall under the scope of labour law. However, certain protective rules have been traditionally extended to so-called "arbeitnehmerähnliche Personen" (quasi-subordinate employees). The term is only defined in the regulation concerning collective agreements. It covers workers who are formally independent but economically dependent; need social protection; and fulfil certain conditions. Certain protective rules in labour law are extended to this (vulnerable) group of workers. This is especially true for collective agreements (cf. art. 12a TVG) and regulation on health and safety at work (e.g. art. 2 BUrlG; art. 2 sec. 2 ArbSchG), as well as anti-discrimination law (art. 6 sec. 1 (1) no. 3 AGG). Also, in these cases, labour courts are the competent jurisdiction in case of conflicts (art. 5 sec. 1 ArbGG). Instead of rules that deem independent workers to be dependent,[45] the outlined legal technique to extend the application of protective labour law rules seems to be a promising avenue to pursue to ensure protection for this group.[46] The legislator already came to an extension by broadening the scope of some legal rules, using the terms of "Beschäftigte" or "Mitarbeiter".[47] This seems consequent with regard to EU regulation.[48]

41 Gesetzentwurf der Bundesregierung; Entwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze as of 20 july 2016, BT-Drs. 18/9232, available on http://dipbt.bundestag.de/dip21/btd/18/092/1809232.pdf.

42 See e.g. *Schüren*, in: Hamann/Schüren (eds.), Arbeitnehmerüberlassungsgesetz, 4rd ed. Munich 2010, § 9 No. 96-102; *Schindele* and *Söhl*, Die CGZP-Entscheidung und ihre Folgen, ArbR 2013, pp. 63-65; *Feuerborn*, Die Rechtsprechung des Bundesarbeitsgerichts zur Arbeitnehmerüberlassung im Jahr 2013, JbArbR 51, pp. 89-107 (2014).

43 Gesetzentwurf der Bundesregierung; Entwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze as of 20 july 2016, BT-Drs. 18/9232, available at http://dipbt.bundestag.de/dip21/btd/18/092/1809232.pdf.

44 Stellungnahme des Deutschen Anwaltvereins durch den Ausschuss Arbeitsrecht zum Referentenentwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze, Stellungnahme Nr. 15/2016 Berlin, March 2016, available at https://anwaltverein.de/de/newsroom/sn-15-16-zum-entwurf-eines-gesetzes-zur-aenderung-des-arbeitnehmerueberlassungsgesetzes-aueg-34422.

45 This has been proposed in the draft law to amend the AÜG for (independent) contractual workers in triangular situations similar to temporary agency work, see Referentenentwurf des Bundesministeriums für Arbeit und Soziales Entwurf eines Gesetzes zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze (first version as of 16 november 2015) available on http://www.portal-sozialpolitik.de/uploads/sopo/pdf/2015/2015-11-16_Referententwurf_AUEG_Werkvertraege.pdf (11 august 2016).

46 In detail: *Deinert*, Soloselbstständige zwischen Arbeitsrecht und Wirtschaftsrecht, 2015, 89 no. 143 et seqq.

47 *Forst*, Arbeitnehmer – Beschäftigter – Mitarbeiter, RdA 2014, 157 et seqq.

48 See *Walser*, p. 24.

D. Social security for atypical workers

Social Security systems in Germany traditionally were set up to protect employees in a labour law relationship.[49] Thus, the regulation on social security in Germany can be characterised as incoherent. On the one hand, an important number of atypical labour law contracts are explicitly excluded from social security (4.1). On the other hand, we can observe tendencies to include vulnerable groups of non-standard workers in statutory social security systems (4.2).

I. The denial of social security for mini-jobbers

Even if equal treatment in labour law for atypical labour contracts were in effect, an important inequality is to be considered when it comes to social security. This is especially true for so-called minimal employment or "mini-jobs"[50]. The regulation provides that employment producing incomes lower than €450 per month is exempted from the statutory Social Security systems such as health and social long-term care insurance, as well as unemployment insurance.[51] The traditional exemption from pension schemes has been removed, so that "mini-jobbers" are affiliated to pension schemes but have a possibility to ask to be released from it (see Art. 6 Sec 1b SGB VI).

Overall, the fundamental principle of the German Social Security system, namely that employment demands and should lead to social security, is broken. Originally, the idea of minimal employment was to provide additional employment opportunities to a person already affiliated to social security by another contract or for other reasons (e.g. family members, students, or retired persons). This often concerned women as secondary wage earners. However, today there is a significant number of so-called "mini-jobbers" without other substantial sources of income.[52] This is partly due to the so called Hartz IV legislation concerning basic provision for job-seekers and employees.[53] It could be said that Hartz IV promoted or condoned poorly paid and low-income generating employments,[54] leading to precarious situations for a significant group of employees (and self-employed persons) with low incomes. Even if those who receive basic provision under the Hartz IV legislation are affiliated to the statutory health insurance, their employment does not lead to any claims or entitlements in terms of unemployment insurance or, even more important, pension schemes. The latter is particularly precarious for the employees in the long term. On a positive note, the recent introduction of a legal minimum wage seems to have had positive effects on the affiliation to compulsory social security by augmenting incomes.[55]

An interesting aspect of the particular status in social security law is the fact that "mini-jobbers" seem to be considered as "second class employees" with regard to the rights of

49 *Schubert*, Das Normalarbeitsverhältnis in der arbeits- und sozialrechtlichen Wirklichkeit, NJW 2010, 2613 (2614).

50 As defined by Art. 8 SGB IV.

51 Cf. Art. 7 SGB V for health insurance; Art. 20 sec. 1 phrase 1 SGB XI together with Art. 7 SGB V for long-term care insurance; Art. 27 Sec. 2 SGB III for unemployment insurance.

52 Cf. *Bäcker* and *Neuffer*, Von der Sonderregelung zur Beschäftigungsnorm: Minijobs im deutschen Sozialstaat, WSI-Mitt. 2012, 13 et seqq. and *Körner*, *Meinken* and *Puch*, Wer sind die ausschließlich geringfügig Beschäftigen? Eine Analyse nach sozialer Lebenslage, in: Statistisches Bundesamt (ed.), Wirtschaft und Statistik January 2013, 42 et seqq.

53 Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt as of 24 Dezember 2003, BGBl. I, 2954.

54 *Promberger* and *Ramos Lobato*, Zehn Jahre Hartz IV – eine kritische Würdigung, in: WSI-Mitt. 5/2016, 330 et seq.; *Lakies*, Zunahme der „atypischen Beschäftigung" – Abschied vom „Normalarbeitsverhältnis"?, ArbRaktuell 2013, 459 (460).

55 Cf. IAB (ed.), Arbeitsmarktspiegel: Entwicklungen nach Einführung des Mindestlohns (IAB-Forschungsbericht, 01/2016), Nürnberg 2016, 21 et seqq. for details.

workers. Violation of labour law regulation, entirely applicable to mini-jobbers who usually are part-time workers in the sense of the TzBfG (see art. 2 sec. 2 TzBfG), seems to be wide spread.[56]

II. The inclusion of non-standard workers in statutory social security

Traditionally, independent workers do not fall under the scope of statutory social security in Germany. For some branches like the statutory health insurance, the pension schemes, and the statutory accident insurance (covering accidents at work and occupational diseases) regulation provided and still provides (limited) possibilities of voluntary insurance for independent workers.[57] Today, also the unemployment insurance provides the possibility for former members of the compulsory insurance to opt for voluntary insurance,[58] even if this seems hardly compatible with the idea of independent work. However, a tendency can be observed to render these insurances compulsory also for vulnerable independent workers. This is especially true for the (generalised) long-term care insurance[59] but also for the health insurance. The latter is based on Art. 5 Sec. 1 No. 13 SGB V which provides that a person without a statutory or private health insurance is affiliated to the compulsory health insurance system under certain conditions.[60] Particular groups of independent workers such as solo self-employed persons are affiliated to the compulsory pension schemes.[61] Other independent workers may voluntarily become members of the statutory pension schemes.[62] This shows that the legislator sees a growing necessity to include independent workers into social security. Until now, this did not lead to a change of system but to a multitude of exceptional rules.[63]

E. New working arrangements

More recently, labour law emerges due to particular work arrangements.[64] This is the case with crowd-work[65] or arrangements that go with the idea of an "economy on demand"[66] such as "UBER"[67]. These new forms of self-employment or extremely short term project-related employment brings up the well-established question of disguised employment, and how and where to draw the line between work under a labour contract and independent work.[68]

56 *Waltermann*, Abschied vom Normalarbeitsverhältnis, in: Deutscher Juristentag e. V. (djt), Verhandlungen des 68. Deutschen Juristentages, Berlin 2010, Band I: Gutachten / Teil B, B 32 with further references.
57 See e.g. art. 9 SGB V for health insurance; art. 7 SGB VI for pension schemes; art. 6 SGB VII for accident insurance.
58 Art. 28a (1) 1 No. 2 SGB III.
59 See art. 20 to 26a SGB XI.
60 See also *Peters* in: KassKomm SGB V, § 5 No. 160-163.
61 Art. 2 SGB VI, especially phrase 1 no. 9 for solo self-employed persons.
62 Art. 4 Sec. 2 SGB VI.
63 For a general overview see *Axer*, in: von Maydell, Ruhland and Becker (eds.), Sozialrechtshandbuch, 5th ed. Baden-Baden 2012, § 14 No. 3 et seqq.
64 In general *Walton*, The Shifting Nature of Work and Its Implications, in: The Industrial Law Journal, 2016, 1.
65 See *Deinert*, Soloselbstständige zwischen Arbeitsrecht und Wirtschaftsrecht, 2015, 20 no. 17 et seqq.; *Däubler* and *Klebe*, Crowdwork, Die neue Form der Arbeit – Arbeitgeber auf der Flucht, NZA 2015, 1032 et seqq.; *Waas*, Arbeitsrecht 4.0, in: Fachbereich Rechtswissenschaft der Universität Frankfurt a.M. (ed.), 100 Jahre Rechtswissenschaft in Frankfurt, 2014, 549 et seqq; *Leimeister et al.*, Systematisierung und Analyse von Crowd-Sourcing-Anbietern und Crowd-Work-Projekten, Düsseldorf 2016 (available on http://www.boeckler.de/pdf/p_study_hbs_324.pdf).
66 *Lingemann* and *Otte*, Arbeitsrechtliche Fragen einer „economy on demand", NZA 2015, 1042.
67 One should know that, for the time being, UBER does not pursue first attempts to enter the German market.
68 See *Bücker*, Externe Arbeitskräfte in einer vernetzten Arbeitswelt – Schlüsselbegriffe und Leitbilder zur Diskussion einer aktuellen Herausforderung des Arbeitsrechts, in: Kohte and Absenger, Menschenrecht und Solidarität im

Similarly, phenomena like the mobile office, where working hours and work place may vary significantly and are mostly left to the employee, raises new questions concerning the employers' responsibility to provide fair and healthy working conditions.[69]

F. Conclusions

Atypical employment plays an important and increasing role on the German labour market and consequently in the regulation of application of labour law. There are various advantages of atypical contracts from the employer's perspective and also for employees, such as the opportunities to obtain typical or "regular" labour contracts via atypical employment. From a wider perspective, the German labour market and German labour law have widely been spared by mid-term or long-term effects of the European economic and financial crisis, compared to other Member States. The flexibility introduced by forms of atypical employment may have contributed to this.[70]

However, big challenges in terms of equal treatment, job security, and social security for the employees need to be foregrounded. Overall, the current legal situation in Germany may serve as a deterrent for more than one reason: (1) fragmented and partly fragmentary regulation; (2) lack of application and enforcement of the principle of equal treatment; and maybe most importantly (3) the legislation on social security matters when it comes to minimal employment.

Finally, it should be stressed that even if there is a growing number of atypically employed persons, this does not mean that "the atypical is the new typical", because while there was a notable increase in the atypical labour market, the overall share of persons participating in the general labour market compared to the entire population has also risen. So the number of traditional, standard labour contracts is quite stable and even slightly increasing, even if it is "topped-up" by different kinds of atypical employment.[71] Still, the forms of atypical employment need special regulatory and legal attention, because the need of social protection for people working under these contracts is comparatively high. Other forms of work that are not (yet) included in the scope of labour law pose new challenges. The possible extension of protective rules of labour law is one possibility that should be thoroughly considered.

internationalen Diskurs, Festschrift für Armin Höland, 2016, 477 et seqq; *Lingemann* and *Otte*, Arbeitsrechtliche Fragen einer „economy on demand", NZA 2015, 1042 et seqq.

69 *Däubler* and *Klebe*, Crowdwork, Die neue Form der Arbeit – Arbeitgeber auf der Flucht, NZA 2015, 1032 (1041); *Waas*, Arbeitsrecht 4.0, in: Fachbereich Rechtswissenschaft der Universität Frankfurt a.M. (ed.), 100 Jahre Rechtswissenschaft in Frankfurt, 2014, 549 et seqq.

70 See *Walwei*, Arbeitsmarktreformen im internationalen Vergleich – Deutschland hat die Nase vorn, IAB-Forum 2/2015, 4 (7).

71 Statistisches Bundesamt, Pressemitteilung vom 20. Juli 2016 – 255/16: Anteil der Normalarbeitsverhältnisse nimmt weiter zu (https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2016/07/PD16_255_132.html); *Arnold*, *Mattes* and *Wagner*, Normale Arbeitsverhältnisse sind weiterhin die Regel, DIW Wochenbericht Nr. 19/2016, 419-427.

Atypical Employment: Judicial and Regulatory Attempts at European and International Level

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A. Introduction

The concept of "atypical employment" already from a terminological point of view implies a divergence to the "standard employment relationship". This divergence provokes the follow-up questions of what is to be regarded as being the "standard" and what is to be regarded as "atypical". Obviously, both terms do not qualify as legal concepts but constitute normative models. In Germany the term "standard employment relationship" ("*Normalarbeitsverhältnis*") has been introduced in 1985 by the Hamburg scholar *Ulrich Mückenberger*.[1] However, the debate origins in the United States in the late 1960s[2] and the concept of "atypical employment" has already been accepted on an international level at that time as well.[3]

The debate aims at setting a certain type of dependent employment as standard – and deviations from it as atypical. It sets benchmarks for an idealised (historic) model of working relationships that has been developed especially after the Second World War. It encompasses qualitative criteria for designing working conditions as standard. Those should ideally be generally accepted. Its main characteristics are – according to the definition of Eurofound[4] – full-time work, regular, open-ended employment with a single employer over a long time span full-time, a permanent contract, regular and sufficient remuneration, collective representation of interests, identity of working and contractual relationship and integration in social security systems. Apart from its declining relevance in practice, the standard employment relationship is still the reference-model for national and supranational legislators.

However, already the criteria mentioned are not only Eurocentric, but mainly follow the continental European model of the employment-relationship – the definition cannot be universally applied.[5] While, e.g., employment protection is not part of the "standard employment

1 *Mückenberger,* Die Krise des Normalarbeitsverhältnisses (1985) 31 Zeitschrift für Sozialreform 415 passim.
2 In particular *Morse,* The Peripheral Worker in the Affluent Society (1968) 91 Monthly Labor Review 17 passim, who used the term "peripheral worker".
3 See e.g. *Córdova,* From full-time wage employment to atypical employment: A major shift in the evolution of labour relations? (1986) 125 International Labour Review 641 passim.
4 Eurofound, Very atypical work, Exploratory analysis of fourth European Working Conditions Survey, Dublin 2010, p. 7.
5 See e.g. the comparison of the Anglo-Saxon model: *Ogura,* International Comparison of Atypical Employment:

relationship" in the Anglo-Saxon model, it plays an important role in the continental European model and is of importance in Japan as well. However, e.g. in France it is realised mainly via collective agreements and legislation, and in Japan via customs and jurisprudence. This simple example illustrates how difficult it is to find a definition of typical and atypical employment from an international and even from a European perspective.

This paper tries to examine, which regulatory and judicial reactions on European and international level followed the development of an increasing number of atypical employment relationships and which policy concepts the legislators followed in this regard. The range of possible atypical forms of employment is rather broad. Certain forms, like fixed-term contracts, part-time work and temporary agency work seem to be legally and socially rather accepted meanwhile. Furthermore, a large range of "new" types popped up in recent years that challenge traditional labour law institutes.[6] All those forms commonly raise the questions of who is protected by labour (and social security) law – and to what extent. In this regard, I will try to argue, that traditional forms of labour law regulation do not fulfil their function with regard to social protection for large groups of "workers".

I will pick two examples that shall illustrate shortcomings of legislation especially on European level but on international level as well. I will thereby focus on EU and ILO legal instruments. First, I will analyse which groups of workers are protected by (and excluded from) collective bargaining, as labour law regulation in many legal orders still lies on the shoulders of social partners. Second, I chose for one specific form of atypical employment: telework. This ambivalent type of employment perfectly shows the difficulty of legislators in setting minimum standards. They are confronted with an almost impossible balance of interests as are faced with the need of flexibility and security on the part of workers as well as of employers.

B. Atypical Employment

I. Atypical employment in the EU

1. Empirical Background

Already back in the year 2000 a comparative study on atypical employment in the EU Member States was published by the European Parliament. Its main finding was – hardly surprising: "Atypical workers in the EU are less protected and have fewer rights to benefits. The nature of these differences in formal positions, such as unemployment benefit, paid sickness leave, pensions and health insurance is mainly a matter of thresholds before an atypical worker is entitled to rights or benefits and exclusion from rights and benefits."[7]

If the EU is looked at as a whole, 36,4 % of all employees worked in 2014 in atypical employment relationships.[8] However, a closer look shows substantial differences between the Member States, between different sectors, between the different forms of atypical employment and between different groups of employees. While in Malta, e.g., only 46 % of the workers hold indefinite contracts, in the EU-27 (2010) 80 % of the workers have hold an indefinite contract. On the other hand, in countries like Cyprus, Austria, the UK, Luxembourg and Romania

Differing Concepts and Realities in Industrialized Countries (2005) 2 Japan labor review 5, 9.

6 See for an overview in the European context e.g. Eurofound, New forms of employment, Luxembourg 2015.

7 European Parliament, Atypical work in the EU, Working Paper, SOCI 106 EN 3-2000, p. 9.

8 *Schulze Buschoff,* „Atypical Employment" is Becoming a Norm, but have Pension Systems Responded Yet? A Comparison of Six European Countries, Berlin 2015, p. 2.

fixed-term contracts are rare – the share is only between 6 and 8 %.[9] Considering age, in the group of workers aged less than 25, only 50 % could rely on an indefinite contract.[10] Obviously, this raises questions regarding age differentiation, gender (in)equality, differences between sectors, level of education, gaps in the employment biographies[11] etc.

In addition, the number of self-employed persons varies considerably between EU-Member States. Regarding atypical employment, a specific group of self-employed persons is of special interest: the solo-self-employed. Those are persons working on own account without employing other persons. In many cases, their employment situation has to be considered as precarious. In 2011 71,1 % of the 16,6 % self-employed persons were solo-self-employed. In Romania, e.g., 32,7 % of the economically active population were self-employed and 94,2 of those solo-self-employed. On the other hand, in Estonia only 8,4 % of the economically active population were self-employed and 53,8 of those solo-self-employed.[12] This again shows how heterogeneous the employment models within the EU are.

2. Regulatory framework

The European legislator is therefore confronted with a great variety of interests. It has to take the challenge to find rules fitting to the different labour law systems and labour markets of (yet) 28 Member.

Nevertheless, in the course of European integration, already a long legislative tradition exists in the area of atypical employment. As atypical forms of employment started to increase in the 1980s and 1990s throughout Europe, first legislative initiatives already started in 1982 when a draft directive on voluntary part-time work was submitted to the European Council[13], which, however, has not been approved. In 1982, a draft directive on temporary work[14] failed as well. Nevertheless, those attempts already show a regulatory need. They recognise that workers on such contracts experience a lower quality of working conditions than "typical" employment contracts.[15]

It then took until 1995 that the Commission started a new initiative. It launched consultations on "flexibility in working time and security for workers".[16] Meanwhile the Social Policy Agreement of 2 February 1992 had entered into force, which was annexed to the Protocol on Social Policy of the Treaty of Maastricht,[17] which was subsequently integrated in the Treaty of the European Community (TEC) by the Treaty of Amsterdam.[18] It required and requires the Commission to consult the social partners on new legislative proposals concerning social policy issues (Art. 151 et seqq. of the Treaty on the Functioning of the European Union (TFEU)). The social partners then have the possibility to inform the Commission that they wish to initiate a procedure according to Art. 155 TFEU which may result in a European collective agreement (framework agreement) and may tackle issues on both cross-industry and sectoral level.

9 Eurofound, 5th European Working Conditions Survey, Overview report, Luxembourg 2012, p. 17.
10 Eurofound, 5th European Working Conditions Survey, Overview report, Luxembourg 2012, p. 19.
11 See in this regard for Germany *Groskreutz et al.,* Das Recht auf eine selbstbestimmte Erwerbsbiografie, Arbeits- und sozialrechtliche Regulierung für Übergänge im Lebenslauf: Ein Beitrag zu einem Sozialen Recht der Arbeit, Baden-Baden 2013.
12 *Brenke,* Allein tätige Selbständige: starkes Beschäftigungswachstum, oft nur geringe Einkommen (2013) 80 DIW Wochenbericht 3, 4.
13 Commission Proposal for a Council Directive on voluntary part-time work, COM (1981) 775.
14 Proposal for a Council Directive concerning temporary work, OJ 1982, C 128/2.
15 See for a historical overview *Zappalà,* in: Ahlberg et al., Transnational Labour Regulation, Brussels et al. 2008, p. 155 et seq.
16 See Commission press release IP 96/318 available on http://europa.eu/rapid/press-release_IP-96-318_en.htm (10 October 2016).
17 Signed at Maastricht on 7 February 1992, OJ C191/1.
18 See *Rönnmar,* in: Barnard, European Union Law, Oxford 2014, p. 591, 595.

A framework agreement on part-time work was signed by the European Social Partners in June 1997 and was implemented in Council Directive 97/81/EC[19]. In March 1999, the European social partners also signed a framework agreement on the rights of workers on fixed-term employment contracts. It was transposed into EU legislation by Council Directive 1999/70/EC[20]. At the same time, negotiations on a framework agreement on temporary agency work took place. However, the social partners haven´t been successful in reaching an agreement, therefore the Commission took own initiative in 2002.[21] The topic was highly controversial between the Member States[22] and it took until 2008 for Directive 2008/104/EC[23] to be adopted. Core of all three Directives are on the one hand the principle of equal treatment and the prevention of abuse of flexibilisation. On the other hand, the three Directives recognise part time work, temporary contracts and temporary agency work as principally acceptable forms of employment. Furthermore, a framework agreement on telework was concluded in 2002[24] but was not transposed into a directive. Its implementation is left to the social partners on Member State level. Recently, a directive on seasonal workers from third countries has been enacted which contains a right to equal treatment but mainly deals with aspects of residence.[25]

When the Lisbon Strategy[26] – the economic programme of the EU between 2000 and 2010 – has been reviewed in 2005, the European Commission emphasised the (in its view) need for modernising Europe's social model.[27] In November 2006 it issued the – harshly criticised – Green Paper "Modernising labour law to meet the challenges of the 21st century"[28], which highlights the "proliferation of different contractual forms" as a major challenge posed by increased competition and globalisation.[29] In its "Communication on the Outcome of the public consultation on the Green Paper", the Commission concluded that achieving a balance between security and flexibility ("flexicurity") is the way forward. The flexicurity-concept has been invented as a model for the social agenda in Denmark[30] and was broadly took over and modified by The Netherlands[31]. It was intensely debated in the aftermath of the Green Paper on European and Member State-level[32] – meanwhile the debate calmed down. However, it still forms part of the EU Social Agenda in the Europe 2020 Strategy, which followed The Lisbon Strategy.[33] It also forms part of the Agenda for new skills and jobs[34] and was taken up again in the recent consultation on the European Pillar of Social Rights[35].

19 OJ 1998, L 14/9.
20 OJ 1999, L175/43.
21 Proposal for a Directive on working conditions for Temporary Workers, COM (2002) 149.
22 See *Storrie,* Temporary agency work in the European Union, Dublin 2002.
23 OJ 2008, L 327/9.
24 Full text: http://www.ueapme.com/docs/joint_position/Telework%20agreement.pdf (10 October 2016).
25 Directive 2014/36/EU, OJ 2014 L94/375.
26 See the report of the European Parliament, The Lisbon Strategy 2000 – 2010 An analysis and evaluation of the methods used and results achieved, IP/A/EMPL/ST/2008-07.
27 See e.g. the speech of Commissioner Špidla, Modernising the European Social Model (SPEECH/05/365), available at http://europa.eu/rapid/press-release_SPEECH-05-365_en.pdf (10 October 2016).
28 COM (2006) 708.
29 See p. 7 of the Green Paper.
30 See e.g. *Bredgaard et al.,* Flexicurity and atypical employment in Denmark, Aalborg 2009.
31 *Bovenberg/Wilthagen/Bekker,* Flexicurity: Lessons and Proposals from the Netherlands (2008 (4)) 6 CESinfo DICE Report 9 passim.
32 See e.g. *Tangian,* Flexibility–Flexicurity–Flexinsurance: Response to the European Commission's Green Paper "Modernising Labour Law to Meet the Challenges of the 21st Century", Dusseldorf 2007.
33 A strategy for smart, sustainable and inclusive growth, COM (2010) 2020.
34 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on New Skills for New jobs Anticipating and matching labour market and skills needs of 16 December 2008, COM (2008) 868.
35 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Launching a consultation on a European Pillar of Social Rights of 8

II. Atypical employment in an international perspective

The picture becomes even more diverse if the whole world is taken into consideration. As will be seen further below, definitions of a standard employment relationship and atypical employment are quite vague on international level. Nonetheless, atypical employment is spreading in many regions of the world, especially in industrialized countries, while in emerging economies, the larger part of newly created employment relationships falls in the category of the standard employment relationship. According to the ILO, in low-income countries, self-employment and casual work still are the dominant forms of work.[36]

The ILO titles its political mission with "Decent Work Agenda" that consists of four pillars: employment creation, social protection, rights at work, and social dialogue. Although today 188 Conventions and 198 Recommendations of the ILO exist, legislation remains scattered. On the one hand, it is up to the Member countries if they ratify an instrument or not – apart from the eight core principles. On the other hand, it is virtually impossible to have a coherent legislative approach within the framework of an international organisation of the size of the ILO.

However, when it comes to atypical employment, a twofold approach can be observed. On the one hand, the scope of most instruments is rather broad – as will be seen later. It means that in workers fall within the scope of the instruments irrespective to the question if the employment relationship is typical or atypical.

On the other hand, the ILO established a number of instruments that fully or partly explicitly address atypical employment relationships.[37] Remarkably, none of these instruments has been ratified by Germany:

- Termination of Employment Convention, 1982 (No. 158), regulates and provides guidance on the use of fixed-term or temporary employment. The Convention stipulates inter alia that "[a]dequate safeguards shall be provided against recourse to contracts of employment for a specified period of time".

- The Private Employment Agencies Convention, 1997 (No. 181), highlights in its Preamble the role that private employment agencies may play in a well-functioning labour market, but also recalls the need to protect workers.

- The Employment Relationship Convention, 2006 (No. 198) provides guidance on establishing the existence of an employment relationship and on the distinction between employed and self-employed workers; it especially focuses on effective protection of workers' rights.

- The Part-Time Work Convention, 1994 (No. 175), is aimed at promoting access to productive, freely chosen part-time work that meets the needs of both employers and workers, and ensures protection for part-time workers.

March 2016, COM (2016) 127, p. 5.

36 International Labour Office, Non-standard forms of employment, Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment (Geneva, 16-19 February 2015), Geneva 2015, p. 4.

37 Ibid. 33 et seq.

C. Collective Bargaining

Collective bargaining plays a major role in setting labour standards in most (democratic) countries. Scandinavian countries, e.g. mainly refer to this form of regulation of labour relations, in others, like France, the national legislator claims much more influence. However, labour law finds its historic roots in the union struggle for just and fair working conditions.[38] Therefore, it is hardly surprising, that two of the eight core principles of the ILO, ILO convention No. 87 and 98 deal with right to collective bargaining. Strong collective representation of workers usually results in better working conditions.[39] The main function of collective bargaining is to balance power between workers and employers and leads to more democratic working relationships. Subjects of collective bargaining govern a variety of topics such as wages, benefits, seniority, working conditions, grievance procedures.[40]

The rise of atypical employment affects collective bargaining considerably – in most cases to the detriment of workers.[41] Most obviously, practical reasons hinder effective organisational attempts. It is more difficult to organise a temporary agency worker who frequently changes his place of working and who is less integrated into the company than a traditional worker in a plant. This is even more true for teleworkers.[42] Often persons in atypical working relationships furthermore lack awareness of their collective interests.[43] On the other hand, also legal barriers exist. Unions are organisations that primarily represent the interests of workers.[44] Collective agreements are therefore in many countries only eligible for workers, e.g. in Germany.[45] As a result, solo-self-employed persons earn less and are less protected.[46] Other countries, e.g. The Netherlands, also allow for collective agreements of other categories, particularly for solo self-employed persons.[47] This raises a number of issues, inter alia the relationship of collective agreements and competition law, conflict of interests as potential employers may be union members etc.

In the following it therefore shall be assessed which groups of persons fall within the scope of collective bargaining rights – first from a European and then from an international perspective.

38 See eg. *Zeitlin,* From Labour History to the History of Industrial Relations (1986) 39 The Economic History Review 159 et seq.

39 See e.g. *Schulten/Bispinck,* Re-Stabilisierung des deutschen Flächentarifvertragssystems (2009) 16 WSI Mitteilunge 201 et seq.

40 *Lowe/Schellenberg/Davidman,* Re-Thinking Employment Relationships, Ottawa 1999, p. 15.

41 Organisation for Economic Co-operation and Development, OECD Employment Outlook, June 1999, Washington 1999, p. 196.

42 See, e.g., *Daniels/Lamond/Standen,* Teleworking: Frameworks for Organizational Research (2001) 38 Journal of Management Studies 1151 *passim*.

43 See, e.g., for a study dealing with the situation in Germany and Austria *Pernicka,* The Evolution of Union Politics for Atypical Employees: A Comparison between German and Austrian Trade Unions in the Private Service Sector (2005) 26 Economic and Industrial Democracy 201, 210.

44 *Pernicka,* Organizing the Self-Employed: Theoretical Considerations and Empirical Findings (2006) 12 European Journal of Industrial Relations 125, 127 et seq.

45 There are, however, some exemption; German trade unions may also organise pensioners, public servants, students and comparable groups of persons not being workers without running the risk of losing the status of a trade union, see in more detail *Walser,* Einfluss der Rechtsordnung auf die Tarifbindung der Arbeitgeberseite, Frankfurt/M 2015, 176 et seq.

46 *Brenke,* Allein tätige Selbständige: starkes Beschäftigungswachstum, oft nur geringe Einkommen (2013) 80 DIW Wochenbericht 3, 12.

47 *Westerveld,* The ‚New' Self-Employed: An Issue for Social Policy? (2012) 14 European Journal of Social Security 156, 164 et seq.

I. EU-level

About 15 % of working people in Europe have been self-employed in 2010. In Greece, this percentage was considerably higher (30 %), in Denmark, Latvia and Sweden it was below 10 %.[48] The 4th EWCS showed, that the greater share of those consists of self-employed persons without employees.[49]

1. The notion of „worker" in the EU-Treaties

As on national level, the question of who qualifies as a worker is highly disputed in the EU as well. The question is further complicated as no uniform definition of a worker exists on EU-level. On the one hand, different EU-instruments refer to a national definition of worker while others require an autonomous union wide definition. On the other hand, differences also exist between different union instruments as well as primary EU law. Nevertheless, it can be constituted that the European Court Justice follows a rather broad concept of a worker, which is not surprising as this leads to a broad scope of application of EU law.[50]

On the other hand, a strict dichotomy between either self-employed persons or workers in EU law exists. EU-legislation on EU level still mainly focuses on dependent "workers". There have been several attempts to establish a Directive for "solo self-employed" persons, i.e. self-employed persons without employees, which have not been successful. Therefore, self-employed persons are usually not subject to social protection in the EU. Only a small number of instruments aims at this group.[51]

In this regard, a recent court ruling is of special interest, which shall be presented in the following.

2. ECJ ruling in FNV Kunsten Informatie and media

The ECJ had to deal with the question, if a Dutch collective agreement setting minimum wages is exempted from EU competition law (Art. 101 para. 1 TFEU).[52] Already more than 15 years ago, the ECJ decided (in a Dutch case as well) in a fundamental decision, that rules of competition law are not applicable to collective labour agreements. It argued, that the social policy objectives perused by such agreements are not compatible with rules of competition law. It then held: "It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives perused by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment."[53]

These findings are hardly disputed ever since and have been confirmed by the ECJ several times.[54] However, in the case at hand, the situation is slightly different. It deals with a collec-

48 Eurofound, 5th European Working Conditions Survey, Overview report, Luxembourg 2012, p. 26.

49 Eurofound, Fourth European Working Conditions Survey, Dublin 2007, p. 7.

50 *Temming,* Systemverschiebungen durch den unionsrechtlichen Arbeitnehmerbegriff – Entwicklungen, Herausforderungen und Perspektiven (2016) 6 Soziales Recht [forthcoming].

51 Especially Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ 1986 L 359/56; the directive was recently replaced by 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, OJ 2010 L 180/1.

52 ECJ, 4 December 2014 – C-413/13 OJ 2015 C 46/11 (*FNV Kunsten Informatie and media*).

53 ECJ, 21 September 1999 – C-67/96 ECR 1999, I-5751 (*Albany International BV*), 59.

54 Inter alia ECJ, 3 March 2011 – C-437/09 ECR 2011, I-00973 (*AG2R Prévoyance*), 29; ECJ, 21 September 1999

tive labour agreement relating to musicians substituting for members of an orchestra (called substitutes). It was concluded between two unions on the one hand and an employers' association on the other hand.

The collective agreement contains minimum fees for substitutes hired under employment contract and substitutes who work under a contract for professional services who are therefore self-employed.[55] The fact, that not only the contractual situation of employees in the strict sense is regulated by the collective agreement, led to a debate in the Netherlands whether such agreements should be made subject to Dutch as well as European competition law.[56] Dutch competition authorities were of the opinion that the exemption of collective agreements from competition law does not apply to minimum fees for self-employed persons.[57]

The Court held in this regard: "so far as an organisation representing workers carries out negotiations acting in the name, and on behalf, of those self-employed persons who are its members, it does not act as a trade union association and therefore as a social partner, but, in reality, acts as an association of undertakings."[58] Irrespective to the fact that persons perform the same activities as employees, service providers have to be regarded as "undertakings" in the meaning of Art. 101 para. 1 TFEU if they perform their services on a given market for remuneration as independent economic operators in relation to their principal.[59] The Court therefore follows a quite broad concept of self-employed persons.

However, it does not stop here but introduces a category of workers that he calls „false self-employed"[60]. In the Dutch version of the judgement, which is the original language of the case, these persons are called "schijnzelfstandigen", in French "faux indépendants" and in German "Scheinselbständige". The Court defines them as "service providers in a situation comparable to that of employees"[61] The terminology used by the ECJ seems to be a bit unfortunate. Those terms are connoted with specific legal concepts in the Member States, which mostly are much narrower than the understanding of the Court.[62] In German labour law, e.g., "Scheinselbständige" are in fact employees but their contractual relationship is irregularly called a self-employed working relationship.

The Court, however, seems to hint at a "third" category of workers somewhere in between employees in the strict sense and self-employed persons. Such a conception is known to many legal orders that nevertheless follow different attempts. English labour law operates a graded concept of three categories: on the one hand there are "real" self-employed persons who work under a "contract for services" while on the other hand employees work under a "contract of services". The third category comprises of "workers" who work under a contract of services as well but who do not qualify as employees in each case, due to the fact that they do not fulfil all characteristics of an employee. German labour law only knows two categories: employees and self-employed persons. Some labour law and social security law instruments are nevertheless extended to a specific group of self-employed called "arbeitnehmerähnliche Personen",

– C-115/97 ECR 1999, I-6025 (*Brentjens*), 57; ECJ, 11 April 2001 – C-475/00 ECR 2001, I-2953, 22.

55 For the facts of the case compare opinion of GA *Wahl* in ECJ, 4 December 2014 – C-413/13 OJ 2015 C 46/11 (*FNV Kunsten Informatie and media*), 6.

56 The Dutch competition authorities have been very critical in that regard, see Nederlandse Mededingingsautoriteit, Cao-tariefbepalingen voor zelfstandigen en de Mededingingswet, Den Haag 2007, 28 et seq.

57 Compare opinion of GA *Wahl* in ECJ, 4 December 2014 – C-413/13 OJ 2015 C 46/11 (*FNV Kunsten Informatie and media*), 6

58 ECJ, 4 December 2014 – C-413/13 OJ 2015 C 46/11 (*FNV Kunsten Informatie and media*), 28.

59 Ibid. para. 27.

60 Ibid. para. 31.

61 Ibid.

62 *Deinert/Walser,* Tarifvertragliche Bindung der Arbeitgeber, Bindungswille und -fähigkeit der Arbeitgeber und ihrer Verbände als juristisches und rechtspolitisches Problem, Baden-Baden 2015, p. 254.

persons comparable to an employee. Sweden, e.g., shows a very wide notion of employee. Self-employed persons are not hindered to join a trade union insofar.[63]

Consequently, national legal orders can be categorised in three categories:

- 3-way system: employees, self-employed persons + a third category
- Extension of the concept of an employee
- Extending certain labour law and social security schemes to self-employed persons.

It is not definitely clear which of these conceptions the ECJ follows. However, it at least hints a direction that might also form as a model for the European legislator: to open up the strict concept of the worker and to extend social protection to other groups in need of social protection. In this regard, I would like to mention a study of the European Parliament from 2013 that comes to the conclusion that solo self-employed persons need to be legally protected.[64]

II. International level

The plurality of legal orders and labour law systems implies even more than on national level the difficulty to come to a universally acceptable definition of a worker. The United Nations Statistical Commission, e.g., approved in 1958 a threefold classification of employer, employees and "own-account workers". The latter are persons, who operate in their own economic enterprise, or engage independently in a profession or trade, and hire no employees.[65]

The ILO operates a somewhat more detailed definition[66], which nevertheless results in a rather broad understanding of the term. If an instrument does not explicitly exclude certain categories of workers, the term has to be interpreted as covering all workers.[67]

When it comes to the definition of the worker in specific ILO-instruments, the manual for lawyers of the ILO starts with the sentence "It is difficult to define the word ´worker´ in ILO instruments in terms of one single meaning".[68] Therefore, the definitions in the instruments differ considerably, depending on the goal of the specific instrument.[69] Furthermore, next to the term "worker", the instruments make use of the terms employee and employed person as well. That usually hints at a more restricted meaning.[70]

With regard to collective bargaining, Art. 2 of Convention No. 87 states that: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation." This, obviously, still does not answer the question of who is to

63 See *Edling*, Trade unions open their doors to the self-employed (27.7.1999), http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations/trade-unions-open-their-doors-to-the-self-employed (10 October 2016).

64 *Eichhorst et al.,* Social protection rights of economically dependent self-employed workers, IP/A/EMPL/ST/2012-02, Luxembourg 2013, p. 98.

65 United Nations Statistical Office, Supplementary principles and recommendations for population and housing censuses, Statistical Papers (doc. ST/ESA/STAT/SER./M/67/Add.1), New York 1990.

66 International Labour Office, Fifteenth International Conference of Labour Statisticians, Geneva, 19-28 January 1993, Report of the conference (ICLS/15/D.6 (Rev.1)), Geneva 1993, 65 et seq.

67 International Labour Office, Manual for drafting ILO instruments, Geneva 2006, para. 125 including further references.

68 Ibid. para. 124.

69 Ibid. para. 124.

70 Ibid. para. 126 including further references.

be regarded as a worker. Both Conventions No. 87 and No. 98 do not provide for a definition of the term and the question is more or less left to the discretion of the national legislations.[71]

Following up on the Section on EU-law above, it may be asked whether self-employed persons are protected under Conventions No. 87 and 98 as well so that they may also claim a right of concluding collective agreements. Remarkably, in certain instruments regarding the right of association, self-employed persons are explicitly mentioned as falling within the scope. This holds true e.g. for Art. 3 para. 1 of Rural Workers' organisations Convention No. 141 from 1975.[72]

The complaint-based monitoring body of the ILO regarding Conventions No. 87 and 98, the Committee on Freedom of Association, already in 1983 stated that self-employed workers were not specifically excluded from Convention No. 87 and that they should, in particular, have the right to establish and join organisations.[73] In the ILO Digest on Freedom of Association, more than 60 paragraphs deal with the question of who is eligible to that right. It follows a quite broad approach. In para. 254 it first states, that all workers, except from members of the armed forces and the police should have the right to establish and join organisations of their own choosing. It further says: "The criterion for determining the persons covered by that right, therefore, 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."[74] It also assessed sales agents as falling within the scope of Convention No. 87,[75] as well as managerial and supervisory staff[76]. The workers´ right to organize therefore is closely interlinked with the right of association in general.[77] A decisive element may be seen in the fact that an organisation claims the occupational demands of its members.[78]

The Committee of Expert also closely followed the above-mentioned case of the Dutch musicians. In its latest report, the case has still been marked as pending. The Committee however recalled in this respect Art. 4 of Convention No. 98 which establishes the principle of free and voluntary collective bargaining and the autonomy of the bargaining parties. Although a final assessment still has to be awaited, the Committee clearly indicates that competition law should not prevent self-employed workers from organising and subsequently from concluding collective agreements.[79]

It may be concluded that the ILO instruments as well as the ILO bodies take a far less categorical view in defining the scope of application of the freedom of association than the ECJ and most national legal orders do. It is therefore easier to tackle new phenomena of atypical employment with existing legal instruments.

71 *Rubiano,* Collective Bargaining and Competition Law: A Comparative Study on the Media, Arts and Entertainment Sectors, Paris 2013, p. 7.

72 See as well Art. 2 and 3 of the Rural Workers' organisations Recommendation No. 149 from 1975.

73 See *Rubiano,* Collective Bargaining and Competition Law: A Comparative Study on the Media, Arts and Entertainment Sectors, Paris 2013, p. 7.

74 International Labour Organisation, Freedom of Association, Digest to decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 6 ed., Geneva 2006, para. 254.

75 Ibid. para. 263.

76 Ibid. para. 247-253.

77 *Engblom,* Self-employment and the Personal Scope of Labour Law, Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States, Florence 2003, p. 77.

78 *Gernigon/Odero/Guido,* ILO principles concerning the right to strike, Geneva 2000, p. 14.

79 ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), International Labour Conference, 104th Session, Geneva 2015, p. 123; see as well *Rubiano,* Collective Bargaining and Competition Law: A Comparative Study on the Media, Arts and Entertainment Sectors, Paris 2013, p. 7.

D. Telework

I. Background

In the age of digitalisation mobile work steadily gains importance. This quite young phenomenon is already on the agenda already since the 1980s,[80] but it increasingly gained importance due to the revolutionary developments in information technology from the late 1990s onwards.[81]

Accordingly, Eurofound pronounces: "The development of information technologies allows for more mobile work and work outside the traditional place of work, and therefore outside traditional working hours. Of course, this can lead to the blurring of the boundaries delimiting working time, making the measurement of such time quite difficult."[82] However, clear figures are hardly available. One reason may be, that the definition of the phenomenon varies: "[C]ounting depends on how far you stretch".[83] According to the preliminary findings of the latest European Working Conditions Survey (6th EWCS) 30 % of the workers divide their working time across multiple locations. However, the number of teleworkers would be considerably lower due to the fact that the greatest share of those 30 % is formed by workers in construction, transport and agriculture – they regularly would not be regarded as teleworkers.[84] The 5th EWCS from 2010 has labelled a quarter of the European workers as "e-nomads", i.e. "people who do not work all the time at their employers' or their own business premises and habitually use computers, the internet or email for professional purposes."[85]

Apart from its growing relevance, it is especially its ambivalence that raises interest. In Germany, e.g., it is still being viewed very sceptical.[86] 60 % of the workers indicated in 2014 that working at home was not possible in their case, 40 % saw at least the possibility. However, these figures vary between different professions and functions. Functions that require academic education are more likely to be fulfilled in home office.[87] In other EU Member States, telework is much more accepted and popular. This is especially true for western European and Scandinavian countries while in southern and eastern European countries the share of telework is lower.[88]

Working outside the premises of the employer results in a number of legal and practical issues. Depending on the definition of a worker in the respective legal order, persons may be protected by labour law or not. Especially the level of dependency may be questionable. Usually a person working at home has more freedom in deciding when and where to work and it may be questionable in certain cases if a worker is sufficiently integration into the organisation of the employer.

80 *Di Martino/Wirth,* Telework: A new way of working and living (1990) 129 International Labour Review 529.
81 *Körner,* Telearbeit - neue Form der Erwerbsarbeit, alte Regeln? (1999) 16 Neue Zeitschrift für Arbeitsrecht 1190 et seq.
82 Eurofound, 5th European Working Conditions Survey, Overview report, Luxembourg 2012, p. 33.
83 *Lowe/Schellenberg/Davidman,* Re-Thinking Employment Relationships, Ottawa 1999, p. 13.
84 Eurofound, First findings: Sixth European Working Conditions Survey, Luxembourg 2015, p. 7.
85 Eurofound, 5th European Working Conditions Survey, Overview report, Luxembourg 2012, p. 95.
86 Only 8 % of all employees mainly or occasionally work at home. Figures are declining in Germany since 2008, compare *Brenke,* Heimarbeit: Immer weniger Menschen in Deutschland gehen ihrem Beruf von zu Hause aus nach (2014) 82 DIW Wochenbericht 130, 132; it is more common in bigger companies, compare *Weitzel et al.,* Recruiting Trends 2014, Eine empirische Untersuchung mit den Top-1.000-Unternehmen aus Deutschland sowie den Top-300-Unternehmen aus den Branchen Health Care, IT und Maschinenbau, Bamberg 2014, p. 14.
87 *Brenke,* Home Office: Möglichkeiten werden bei weitem nicht ausgeschöpft (2016) 83 DIW Wochenbericht 95, 98.
88 Ibid., 97.

One of the main challenges with regard to telework is safeguarding occupational health and safety.[89] The 5th EWCS constitutes: "On average, e-nomads work longer hours, more often on Sundays and more often in the evenings than other workers. They also report having to work during their free time more often than the average […]. In addition, e-nomads (particularly men) experience changes in their working schedules more often than others."[90] *Di Martino* and *Wirth* already in 1990 concluded that the "wide range of sectors, occupations and countries in which telework is found inevitably means an uneven pattern of pay and other working conditions."[91] That obviously has not changed so far. One reason may be that teleworkers face a low level of collective representation and collective bargaining. Studies show that teleworkers are less likely to become union members for various reasons.[92]

On the other side, obviously a need for more flexibility with regard to working time and working place exits in praxis. Notwithstanding the risks that go along with telework, it may be advantageous for employers as well as for employees. The employer gains flexibility and efficiency regarding the organisation of work. He furthermore may save money with regard to estate related costs.[93] Workers on telework are less absent from work and work more, longer and more efficient.[94] Workers may especially profit from a better work/life balance and less commuting.[95]

II. EU-level

1. Background

The need for a regulatory framework has already been discussed in the early 1990s.[96] The European Commission announced several times to issue a recommendation on telework.[97] In the European Parliament, attempts on pushing the issues are visible as well.[98] Remarkably however, telework never gained the importance in the political debate or the legislative process that part-time work, temporary agency work and fixed-term contracts have achieved.

Based on Art. 138 para. 2 TEC, the Commission launched in 2000 its consultation on modernising and improving employment relations including an invitation to the social partners to start negotiations on telework.[99] It finally resulted, as already mentioned above, in a framework agreement on telework on 16 July 2002 (FATW). Unlike the framework agreements on part-time work and fixed-term-contracts, the FATW has not been sent to the Council for adoption. It was the first time, that the social partners explicitly indicated not to seek for a Council Directive to implement their agreement, and it therefore was the first *cross-industry* "autonomous agreement" that has been concluded on European level.[100] For the Member States, it is of

89 An analysis on possible causes of risk can be found *Brandt* (Hrsg.), Mobile Arbeit - Gute Arbeit? 2010; differentiating: *Wedde,* Chance und Risiko (2015 (6)) 37 Arbeitsrecht im Betrieb 10 ff.; dealing with the situation in Austria: Bundesministerium für Wirtschaft und Arbeit, Status Bericht - Auf dem Weg von Telearbeit zu eWork, Zum Stand von Telearbeit und eWork in Österreich vor dem Hintergrund der Entwicklungen in der EU, Vienna 1999.

90 Eurofound, 5th European Working Conditions Survey, Overview report, Luxembourg 2012, p. 96.

91 *Di Martino/Wirth,* Telework: A new way of working and living (1990) 129 International Labour Review 529, 538.

92 See above n. 44 and 45.

93 Kennisinstituut voor Mobiliteitsbeleid, Meer tijd- en plaatsonafhankelijk werken: kansen en barriéres, Den Haag 2011; Hugo Sinzheimer Instituut, 'Het Nieuwe Werken' en de arbeidsrechtelijke regelgeving, Amsterdam 2010.

94 *Bloom,* To Raise Productivity, Let More Employees Work from Home (2014) 92 Harvard Business Review 28 passim.

95 See, e.g., the legislative materials with regard to the legal reforms in the Netherlands, Kamerstukken II 2010/11, 32 855, No. 1-6.

96 *Ruiz,* Home work: Towards a new regulatory framework? (1992) 131 International Labour Review 197 passim.

97 See European Commission, Social Europe, Progress report on the implementation of the medium-term social action programme 1995-97, Supplement 4/96, p. 43.

98 See, e.g., Written Question No. 1951/97 by MEP Waddington to the Commission of 4 June 1997.

99 First Stage Consultation of social partners on modernising and improving employment relations.

100 *Bercusson,* European Labour Law, 2 ed., Cambridge 2009, p. 547; *Hießl/Runggaldier,* Grundzüge des europäischen

non-binding nature, it has to be implemented by social partners on national level.[101] That might be a reason why – compared to other framework agreements – it was comparably swiftly negotiated – for the social partners it took only approximately one year to come to the agreement.[102]

2. The legal instrument

The legal status of the FATW is still controversial.[103] According to Art. 155 para. 2 TFEU, such agreements shall be "implemented either in accordance with the procedures and practices specific to management and labour and the Member States". However, the Treaty does not contain a specific obligation to implement it – neither for the social partners nor the Member States.[104]

Framework agreements are specific instruments in the social policy section of the TFEU (Art. 154, 155 TFEU) which are concluded by the European social partners and in principle follow two different procedures:

- The social partners may ask the Council to adopt a decision. Up to now this was done by Directive on proposition of the Commission.[105] Remarkably, two of the three Directives adopted so far deal with atypical forms of employment.
- The social partners may also conclude "autonomous" agreements. In that case, they themselves take responsibility for implementing the measures mentioned in the agreement at national, sectoral and/or enterprise level. So far, four autonomous agreements have been concluded which mainly deal with specific question with regard to the organisation of work and work related impacts.[106]

Apparently, the lacking binding effect of autonomous agreements is the Achilles´ heel of autonomous agreements. The Commission questioned its effectiveness already in its Communication of 26 June 2002.[107] And even the social partners themselves have identified shortcomings of the social dialogue instruments so far: "They recognise that greater efforts are needed to ensure an effective and efficient implementation of the commitments taken through the negotiation process of autonomous agreements in all the Member States, in accordance with the procedures and practices specific to management and labour in the Member States."[108] In their current work programme, they mainly focus on the one hand on the qualitative regulation of the employment relationship and on the other hand on the effective implementation of the existing instruments.[109] The process is therefore sometimes described as having stagnated.[110]

Arbeits- und Sozialrechts, 4 ed., Vienna 2014, p. 94.

101 E.g. In the Netherlands by the *Stichting van de Arbeid* (Foundation for work, members are unions and employers organisations) by *Aanbeveling inzake telewerken,* Stichting van de Arbeid, Aanbeveling inzake telewerk, Den Haag 2003; see *Kroon,* in: Casparis/Cremers-Hartman, Praktijkboek Flexibele Arbeidsrelaties, Deventer 2015, K.1.7.

102 *Hießl/Runggaldier,* Grundzüge des europäischen Arbeits- und Sozialrechts, 4 ed., Vienna 2014, p. 94.

103 *Bercusson,* European Labour Law, 2 ed., Cambridge 2009, p. 547.

104 *Hießl/Runggaldier,* Grundzüge des europäischen Arbeits- und Sozialrechts, 4 ed., Vienna 2014, p. 94.

105 Framework agreement on parental leave (revised) (2009) adopted by Directive 2010/18/EU; Framework agreement on fixed-term contracts (1999) adopted by Directive 99/70/EC; Framework agreement on part-time work (1997) adopted by Directive 97/81/EC; Framework agreement on parental leave (1996) adopted by Directive 96/34/EC; as well as European Agreement concerning certain aspects of the organisation of working time in inland waterway transport (2014) adopted by Directive 2014/112/EU.

106 Framework agreement on inclusive labour markets (2010); Framework agreement on harassment and violence at work (2007); Framework agreement on work-related stress (2004); Framework agreement on telework (2002).

107 See as well *Bercusson,* European Labour Law, 2 ed., Cambridge 2009, p. 547.

108 ETUC et al., The 2015-2017 Work Programme of the European Social Partners, Partnership for inclusive growth and employment, Brussels 2015, p. 10.

109 Ibid. passim.

110 *Rönnmar,* in: Barnard, European Union Law, Oxford 2014, p. 591, 595.

3. Content and implementation

According to Art. 2 FATW, "[t]elework is a form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis."

As regards the content of the 12 articles of the FATW, it is not as detailed as the other three Directives dealing with atypical types of work. However, common to all Framework Agreements on atypical employment relationships as well as the Temporary Agency Work Directive 2008/104/EC, the FATW contains a right to equal treatment for teleworkers with regard to the employment conditions (§ 4). The same applies to collective rights (§ 11 FATW). Two very important aspects in practice of telework are issues on data protection and privacy (§§ 5 and 7 FATW; see Directive 90/270/EEC as well) and the protection of occupational health and safety (§ 8 FATW; see Directive 89/391/EEC as well). Finally, the FATW contains provisions on the equipment (§ 7 FATW), organisation of work (§ 9 FATW) and training (§ 10 FATW). Unlike the legislative attempts in some countries – like the UK or certain US-states and to a less degree The Netherlands –,[111] § 3 FATW explicitly does not contain a legal claim for telework – neither of the employer nor for the worker. The provision emphasises its voluntary character for both sides.

Despite its non-binding nature, FATW had to be implemented by 2005 (§ 12). Measures for implementation opted for by the Member States are manifold. Some Member States decided to include parts of the FATW into national legislation, others chose for nonbinding recommendations and guidelines, still others have left it to their national social partner to implement the FATW via collective agreements.[112]

III. International level

The term "telework" is not used in any ILO-instrument. That does not mean that telework is out of sight of the ILO. The Home Work Convention No. 177 of 1996 entered into force on 22 April 2000. Its main goal is to fight poverty in developing countries by setting minimum standards for fair wages. The convention was strictly opposed by the employer's organisations.[113] The convention was established before the background of the fact that in many countries hardly any social or any other legal protection applies to homeworkers.[114] Furthermore, like in the case of many forms of atypical employment, homework mainly concerns women.[115]

However, in the drafting process the Dutch union FNV has been an important promoter of the convention. It is therefore of principle relevance for industrialised countries as well. Even in those countries, homework frequently forms part of the informal sector.[116] Consequently, Convention No. 177 played an important role in the debate on telework right from the beginning – especially within the EU (rep. EEC). A campaign of the European Commission to foster

111 See for The Netherlands in more detail *Walser,* Home Office in den Niederlanden (2016) 64 Arbeit und Recht 338 passim; for a comparative view *Thüsing,* Digitalisierung der Arbeitswelt – Impulse zur rechtlichen Bewältigung der Herausforderung gewandelter Arbeitsformen (2016) 6 Soziales Recht 87, 100 et seq.

112 ETUC et al., Implementation of the European Framework Agreement on Telework, Brussels 2006, p. 7.

113 Compare e.g. Intervention of *Becraft*, Employers delegate, United States, International Labour Conference, Record of Proceedings, 83th Session, Geneva 1996, p. 223.

114 *Gallin, Dan,* The ILO Home Work Convention - Ten Years Later, 2007.

115 *Jhabvala/Tate,* Out of the Shadows: Homebased Workers Organize for International Recognition (1996 (18)) SEEDS passim.

116 *Gallin, Dan,* The ILO Home Work Convention - Ten Years Later, 2007.

the ratification of the Home Work Convention No. 177 by its Member States formed part of its approach on telework already in the 1990s.[117]

Interestingly, according to ILO-convention No. 177 homeworkers have to be regarded as employees. If they do not fulfil the criteria of an employee with regard to personal dependency, they fall beyond the scope of application of the convention. From a German perspective, this seems to be remarkable, since "Heimarbeiter" – the literal translation of home worker – are not regarded to be workers in the German sense of the meaning.[118]

Persons falling under its scope may claim a number of rights. According to Art. 4 para. 2, inter alia equal treatment, they may unionize, they have a right protection in the field of occupational safety and health, to training, maternity protection etc. Different to most other ILO instruments, Convention No. 177 encompasses a definition of the employer as well.[119]

The practical relevance of the Convention is limited, however. It has been ratified neither by Germany nor by South Africa. Remarkably, the South African government strongly advocated the adoption of the convention. The government delegated *Johannes* said, "It is our belief that this Convention is a step in the right direction, to extend the existing legislation to cover homeworkers."[120] Nevertheless, only five EU-Member States have ratified the convention so far, next to three candidate or potential countries as well as Argentina and Tajikistan.[121]

National legislators are quite reluctant in setting specific rules on mobile work. As already mentioned above, the Netherlands nevertheless have taken an attempt in this regard. According to the new flexibility Act, which was put into force on 1 January 2016, employer at least has the duty to consider a demand of a Dutch worker for working at home.[122] In the legislative process the Dutch legislator explicitly referred ILO-convention No. 177, which was ratified by The Netherlands on 31 October 2002.[123]

E. Conclusions

If I may summarise, it can be recognized that most legal instruments on European and international level address atypical forms of employment within the traditional concept of an employee. Temporary agency work may form an exception in this regard, as in certain legal orders the status of temporary agency workers is still unclear. However, both legal orders have a tendency of broadening the understanding of the terms employee and/or worker in order to claim a greater scope of application for their instruments. On European Level, this development is mainly driven by the European Court of Justice while on behalf of the European legislator hardly any activity may be recognised in the field of labour law in recent years. Nevertheless, especially the increasing number of solo self-employed persons shows that social protection has to be extended beyond the traditional understanding of labour law. Cautious attempts can be recognized on European and international level but they should be intensified and – even more important – they should form part of an overall strategy.

117 European Commission, Social Europe, Progress report on the implementation of the medium-term social action programme 1995-97, Supplement 4/96, p. 28.

118 German Federal Labour Court, 10.07.1963 – 4 AZR 273/62 Arbeit und Recht 1964 91.

119 See International Labour Office, Manual for drafting ILO instruments, Geneva 2006, para. 131.

120 International Labour Conference, Record of Proceedings, 83th Session, Geneva 1996, p. 231.

121 See fort the ratification status of the convention, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312322 (10 October 2016).

122 Wet van 9 juni 2015 tot wijziging van de Wet aanpassing arbeidsduur ten einde flexibel werken te bevorderen, Stb. 2015, Nr. 245. Wet van 19 februari 2000, houdende regels inzake het recht op aanpassing van de arbeidsduur (Wet aanpassing arbeidsduur), Stb. 2000, Nr. 114.

123 *Kroon,* in: Casparis/Cremers-Hartman, Praktijkboek Flexibele Arbeidsrelaties, Deventer 2015, K.1.1. 2.

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