Taking EU labour law beyond the employment contract: The role played by the European Court of Justice

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Abstract
The ongoing transformation of work has been increasing the number of working relationships not falling within the domain of labour law. Nonstandard and contingent working arrangements, most recently those prompted by the so-called gig economy, struggle to meet customary employment tests, since the employee/self-employed dichotomy has long been eclipsed. As this article will argue, the Court of Justice of the European Union, in shaping the scope of EU labour law, has been looking beyond the traditional categories. Starting from the area of the free movement of workers, the Court has built a common European concept of worker, broader than that of "employee" endorsed by national jurisdictions, applying it to an increasing body of EU social legislation. Because of the primacy of EU law, the Court's approach is bound to influence national laws.

Keywords
Atypical work arrangements, free movement of workers, equal pay, employment protection directives, antitrust law, scope of application, Court of Justice of the European Union, subordination (employer/employee relationship), functional and operational dependence

1. Introduction

The increasing significance of nonstandard and contingent work in European countries is nothing new. Scholars, trade unions, politicians, and institutions have been discussing it over the past twenty years or so.[1] And yet, despite the efforts of some national legislatures,[2] we still lack effective solutions by which to address the issues posed by atypical working arrangements. In the meantime, the "digital revolution" has created new casual occupations in the framework of the so-called gig economy, entailing a

[1] Among the many contributions and documents, see Supiot A., *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford: OUP, 2001; Blanpain R. (ed.), *Non-standard Work and Industrial Relations*, Kluwer Law International, Kluwer, 1999; Hepple B., Veneziani B., *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945–2004*, Oxford: Hart; Schömann I., Clauwaert S., "Atypical Forms of Employment Contracts in Times of Crisis", ETUI Working Paper, 2013. More recently, Hendrickx F., De Stefano V. (eds.), *Game Changers in Labour Law: Shaping the Future of Work*, Kluwer, 2018. As for policy documents, see ILO, Decent Work Agenda, https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (accessed 28 June 2019); European Commission, Green Paper—Modernising Labour Law to Meet the Challenges of the 21st Century, COM(2006) 708 final, 2006.

[2] I am referring here to legislative frameworks—in Britain, Spain, and Germany, for example, and in a way in Italy as well—that have introduced an intermediate worker category falling somewhere between employee and self-employed worker. See the overview in Perulli A., "Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries", in G. Casale (ed.), *The Employment Relationship: A Comparative Overview*, Hart Publishing, 2011, pp. 137–187. See also the analysis of the Italian and Spanish cases in Cherry M.A., Aloisi A., "'Dependent Contractors' in the Gig Economy: A Comparative Approach"', in *American University Law Review*, 2017, 66 (3), pp. 637–689. Davidov G., *A Purposive Approach to Labour Law*, Oxford University Press, 2016.

(relatively) new model of work referred as app-based work on demand and crowdwork.[3] Most notably, we are witnessing a growing number of work relationships that fall outside the scope of labour law, where supposedly independent contractors are functionally, and quite often even economically, dependent on a single main client.[4] What casual workers—including those matched to clients by way of digital platforms—often have in common with "dependent" contractors is that both groups lack the employment and social protections typically intended for subordinate employment. In this respect, casual work arrangements do not meet the criterion of legal commitment to ongoing engagement (continuity and permanence in the working relation) which many national labour courts consider to be a basic ingredient of the employment relationship.[5] And even where the relationship is stable and continuous, involving a functional and operational subordination to the principal's business organization, into which the contractor is integrated,[6] the lack of any strict control on the way the work is to be performed has led labour courts to exclude a relationship of subordination.[7] One might argue that the classification of these workers is rather controversial. Some national court, for example, have recently recognised the "employee" status of persons working on demand via apps providing food delivery and transportation services.[8] However, the outcomes of legal disputes involving the legal status of gig workers as well as the other previously mentioned work arrangements remain rather conflicting. Much seems to hang on the judge's personal attitude toward the case at issue. This gives rise to a high degree of legal uncertainty, which is obviously not good for the legal system and its legitimacy—and not good for the players involved, foremost among them workers.

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[3] Gig workers and their qualification are the subject of a vast literature. Among the many fine works available, see De Stefano V., "The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowdwork and Labour Protection in the 'Gig-Economy'", *ILO Paper Series*, 2016, 71; Prassl J., *Humans as a Service: The Promise and Perils of Work in the Gig Economy*, Oxford University Press, 2018; Ales E., "Protecting Work in the Digital Transformation: Rethinking the Typological Approach in the Intrinsically Triangular Relationship Perspective", in *Working in Digital and Smart Organizations: Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave Macmillan, 2018, p. 11; and Cherry M.A., Aloisi A., nt. 2, 636; Harris S.D., Krueger A.B., "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: the 'Independent Worker'", *The Hamilton Project: Discussion Paper*, Washington, DC, 2015.

[4] See European Union Labour Force Survey, available at https://ec.europa.eu/eurostat/web/microdata/european-union-labour-force-survey, based on the findings of the Eurofound analysis reported in *Exploring Self-Employment in the European Union*, Luxembourg, Publications Office of the European Union, 2017. Individuals classified as "vulnerable" self-employed workers—with a high economic dependence on one main client, low income, little discretion at work, financially insecure, etc.—number 5.4 million, representing 17% of self-employed workers. Self-employed individuals classified as "concealed" workers ("disguised employment")—with a high operational dependence and little autonomy at work, coupled with economic uncertainty—number 2.6 million, corresponding to 8% of self-employed workers.

[5] Countouris N., "The Employment Relationship: A Comparative Analysis of National Judicial Approaches", in Casale G. (ed.), *The Employment Relationship: A Comparative Overview*, Oxford, Hart Publishing, 2011, pp. 35–68.

[6] Collins H., "Market Power, Bureaucratic Power and the Contract of Employment", *Industrial Relations Journal*, 1986, p. 15 defines this dependence as "bureaucratic": independent contractors' activities are integrated into the client's "bureaucratic structure," which gives the latter a "bureaucratic control"—something *de facto* similar to direction and supervision—over the former.

[7] See the example of Italy provided by Menegatti E., 'Mending the Fissured Workplace: The Solutions Provided by Italian law', *Comparative Labor Law & Policy Journal*, 2015, 37 (1), pp. 112–116.

[8] See for example, the Cour d'appel de Paris, pôle 6 – ch. 2, arrêt du 10 janvier 2019, https://www.legalis.net/jurisprudences/cour-dappel-de-paris-pole-6-ch-2-arret-du-10-janvier-2019/ (accessed 28 June 2019); Cour de cassation, Chambre sociale, Arrêt n° 1737 du 28 novembre 2018, https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/1737_28_40778.html (accessed 28 June 2019). Juzgado de lo social numero seis Valencia, Sentencia 01 June 2018, No. 244/2018, https://www.isdc.ch/media/1590/13-juzgado-valencia-1-junio.pdf (accessed 28 June 2019).

Commentators have proposed different ways to move past the uncertain classification of nonstandard work relations and the poor working conditions (including pay)[9] they entail. Many of these solutions proceed from the assumption that the time is ripe to think about a new allocation of rights and protections between employment and self-employment.[10] The prevailing idea for much of the twentieth century was to provide protections only for those who had to accept subordinate employment in order to make a living, while ignoring those who, for the same purpose, invested in going into business for themselves. But this idea has already become outdated, passing into obsolescence over the course of the 1980s. It would be now appropriate and desirable to equip all workers performing personal work, whether employees or not, with some "core rights." This has already been proposed by highly authoritative scholars, like Marco Biagi with the "Statuto dei lavori" ("Jobs Statute"),[11] and Mark Freedland with the "personal employment contract" construction.[12]

The Court of Justice of the European Union (CJEU) appears to be pushing EU labour law precisely in this direction. As this article is going to argue, the Court, starting from the field of the free movement of workers, has built a broad concept of worker, beyond that endorsed by national courts (Sec. 2). The same concept was then further developed for the purpose of extending the scope of employment-protection directives (Sec. 3) and formulating the labour exception to antitrust law (Sec. 4). This has set in motion a process that is extending EU social rights beyond the employment contract—a process supported by the Charter of Fundamental Rights of the European Union (CFREU) and ultimately reinforced by the Commission's initiative on a European Pillar of Social Rights (Secs. 5 and 6). Because European Union law takes precedence over that of the Member States, the CJEU approach to the scope of employment rights enshrined in EU labour law is bound to influence national labour laws and their understating of the traditional dichotomy between employees and self-employed workers (Sec. 7).

2. The Concept of Worker as Part of the Making of the Single Market

EU law has never provided a clear definition of *worker* or *employment contract*, thus making it difficult to gauge the scope of its system of employment protection.[13] The CJEU has therefore had to construct a definition on its own.

In this respect, beginning with *Hoekstra*,[14] the Court imparted a "community meaning" to the concept with a view to enhancing the free movement of workers within the Union, enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU). The Court expressly recognized that if this concept was based on national

[9] According to EU-SILC (Statistics on Income and Living Conditions), a solo self-employed worker is three times as likely to risk joining the ranks of the working poor than is a standard employee.

[10] Supiot A., "Les nouveaux visages de la subordination", *Droit Social*, 2000 (2), pp. 131–45; Bronstein A., *International and Comparative Labour Law: Current Challenges*, Basingstoke, Palgrave Macmillan, 2009; Freedland M., *The Personal Employment Contract*, Oxford, OUP, 2003; Deakin S., Wilkinson F., *The Law of the Labour Market: Industrialization, Employment and Legal Evolution*, Oxford, OUP, 2005; Davidov G., nt. 2.

[11] Biagi M., "Le ragioni in favore di uno statuto dei nuovi lavoratori", *Stato e Mercato*, 1998, p. 46.

[12] Freedland M., "Application of Labour and Employment Law Beyond the Contract of Employment", *International Labour Review*, 2007, 146 (1–2), pp. 3 – 20. Freedland M., Countouris N., *The Legal Construction of Personal Work Relations*. Oxford: Oxford University Press, 2011.

[13] The only reference to something resembling a definition is contained in Directive 89/391, Article 1(1)(c): "worker: any person employed by an employer, including trainees and apprentices but excluding domestic servants."

[14] CJEU, Case C-75/63 Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses), ECLI:EU:C:1964:19.

laws, Member States would be able discretionarily strip away the protections that EU affords for migrant workers.
The content of the concept was first set out in *Lawrie-Blum*,[15] where it designates any person who over a given period of time performs services

[a] "for and under the direction of another person"
[b] "in return for which he receives remuneration" and who
[c] is engaged in "effective and genuine activities."

The CJEU's subsequent jurisprudence has thoroughly investigated and developed elements (b) and (c).
The economic nature of the activity being performed has thus been considered the relevant element for the purpose of according the rights attached to free circulation. This element has been widely recognized, and it excludes only activities carried out "on such a small scale as to be regarded as 'purely marginal and ancillary'" (*Levin, Meeusen*).[16] These marginal activities in principle do not include: temporary work of two and a half months (*Ninni-Orasche*);[17] part-time employment providing an income below what is considered to be the subsistence level (*Levin*); on-call workers without any obligation to show up for work when requested and no guarantee as to the hours to be worked (*Raulin*);[18] professional traineeship performed by a trainee lawyer (*Kranemann*);[19] activities performed by members of a community based on religion or another form of philosophy (*Udo Steymann*).[20]
A quite "generous" approach also concerned the "remuneration" indicator, since it has been considered irrelevant that the wage had been supplemented by financial assistance payable out of public funds (*Kempf*).[21]
The reference made in *Lawrie-Blum* under point (a) above—namely, "direction", which is the trait by which to distinguish traditionally an employee from a self-employed person—has never received any real consideration for the purpose of the freedom of circulation.[22] A worker can move freely as an employee or a self-employed person alike. As the Court made clear in *Asscher*,[23] when someone performs a working activity in a foreign country, the nondiscrimination guaranteed under Article 45(2) TFEU applies to national employees and self-employed persons alike, regardless of how a worker is classified by the Member State in question.
At the end of the day, once a minimum amount of work is performed and some kind of remuneration is provided in exchange for that work, very few activities fall outside the Court's definition of a worker. One of the few cases in which the Court has held that an activity does fall outside that definition is that of work performed as a part of

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[15] CJEU, Case C-66/85 *Deborah Lawrie-Blum* v *Land Baden- Württemberg* ECLI:EU:C:1986:284. See Nogler L., "Rethinking the Lawrie-Blum Doctrine of Subordination: A Critical Analysis Prompted by Recent Developments in Italian Employment Law", *International Journal of Comparative Labour Law and Industrial Relations*, 2010, 26 (1), pp. 83–102.
[16] CJEU, Case C-53/81 D. M. Levin v Staatssecretaris van Justitie, [1982] ECR 1035; CJEU, Case C-337/97 C. P. M. Meeusen v Hoofddirectie van de Informatie Beheer Groep, ECLI:EU:C:1982:105.
[17] CJEU, C-413/01 Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst, ECLI:EU:C:2003:600.
[18] CJEU, Case C-357/89 J. M. Raulin v Minister van Onderwijs en Wetenschappen, ECLI:EU:C:1992:87.
[19] CJEU, Case C-109/04 Karl Robert Kranemann v Land Nordrhein-Westfalen, ECLI:EU:C:2005:187.
[20] CJEU, Case C-196/87 *Udo Steymann* v *Staatssecretaris van Justitie*, ECLI:EU:C:1988:475.
[21] CJEU, Case C-139/85 *R. H. Kempf* v *Staatssecretaris van Justitie*, ECLI:EU:C:1986:223.
[22] See Countouris N., "The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope", *Industrial Law Journal*, 2017, 47, 202.
[23] CJEU, Case C-107/94 *P. H. Asscher* v *Staatssecretaris van Financiën*, ECLI:EU:C:1996:251.

a rehabilitation program for drug addicts (*Bettray* C-344/87).[24] The CJEU concern in this case was to bolster the economic freedoms and sound functioning of the single market. In this vein, a common set of rules was promoted that Member States could share on the basis of a EU concept of worker: this was part of a "market-making" process,[25] and had little to do with the social purposes of labour law. This is precisely why the Court focused its attention mainly on the pursuit of genuinely economic activities, however remunerated, leaving aside the question of whether a relation of dependence exists between the two parties.

Again for the purpose of securing the sound functioning of the common market, and in particular to ensure a condition undistorted competition, the European concept of worker was subsequently endorsed by the Court with regard to the application of the principle of equal pay for equal work for male and female workers enshrined in Article 157 TFEU (ex Article 141 TEC). The concern, addressed in *Allonby*,[26] was more precisely to ensure conditions of undistorted competition by preventing social dumping. Having emphasized the importance of the principle of equal pay, forming "part of the fundamental principles protected by the Community legal order," the Court concluded that the term *worker* "cannot be defined by reference to the legislation of the Member States but has a Community meaning." As for the definition, the Court moved beyond the *Lawrie-Blum* approach, this in two ways: it emphasised the employer's "hetero-organisation," over and above the traditional criterion of "direction," making relevant "the extent of any limitation on [workers'] freedom to choose their timetable, and the place and content of their work"; and it excluded that any relevance could be accorded to "the fact that no obligation is imposed on [workers] to accept an assignment."[27] This last holding seems extremely important for the purpose of the present analysis: while the commitment to an ongoing engagement (a continuing working relationship) has led some national courts to rule out the possibility of classifying casual work arrangements as "employee", most recently for gig workers,[28] the same commitment bears no relevance in the eyes of the CJEU.

The tendency emerging out of *Allonby* is that of according to the principle of equality the same scope as Article 45 TFEU, to the benefit of all active citizens engaged in economic activities in exchange for some kind of remuneration. The same trend is reflected in EU secondary law. Directive 2010/41 (repealing Directive 86/613) ensures application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. The "second generation" directives on discrimination—Directive 2000/43, dealing with equal treatment between persons irrespective of racial or ethnic origin, and Directive 2000/78, combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation in employment

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[24] CJEU, Case C-344/87 *Bettray* v *Staatssecretaris van Justitie*, ECLI:EU:C:1989:226.

[25] See Barnard C., *EU Employment Law*, Oxford University Press, 2012, pp. 35–39. In this regard see also Giubboni S., "Being a Worker", in *European Labour Law Journal*, 2018, p. 2, recalling the distinction proposed in D'Antona M., "Sistema giuridico comunitario", in Caruso B., Sciarra S. (eds.), *Scritti sul metodo e sulla evoluzione del diritto del lavoro: Scritti sul diritto del lavoro comparato e comunitario*, Milano, Giuffrè, 2000, 1, pp. 377–80, between "cohesive" harmonization and "functional" harmonization, the latter "aimed at promoting the Union's autonomous social values (and not directly targeted at regulating the market)."

[26] CJEU, Case C-256/01 Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment, ECLI:EU:C:2004:18.

[27] *Allonby*, para 72.

[28] Tribunale di Milano 10 September 2018, http://www.bollettinoadapt.it/wp-content/uploads/2018/09/28009967s.pdf (accessed 11 July 2019); Tribunale di Torino, 7 May 2018, http://www.bollettinoadapt.it/wp-content/uploads/2018/05/7782018.pdf (accessed 11 July 2019); Juzgado de lo Social de Madrid, 4 April 2019, sentencia no. 53/19, http://www.ugt.es/sites/default/files/sentenciaestimatoriaglovovictor.pdf (accessed 11 July 2019).

and occupation—apply to all persons, expressly including the self-employed and those engaged in independent occupations. Finally, as concerns the regulatory framework for social security, we have Directive 2006/54, on the principle of equality between men and women: significantly, Chapter 2 of this directive, providing for equal treatment in occupational social security schemes, applies to "members of the working population, including self-employed persons."

3. The Concept of Worker as a Gateway to EU Employment Protection

The previously mentioned "market-making" process led the Court to a different approach when it first dealt with employment protection directives. As stated in *Danmols*,[29] Directive 77/187—designed to safegard the rights of employees involved in transfers of undertakings—is not intended "to establish a uniform level of protection throughout the community on the basis of common criteria." It just seeks a "partial" harmonisation intended to smooth out intractable discrepancies between the laws of different Member State, since that could hinder the creation of the single market. This did not include the directive's scope of application, which—as stated in Article 2 of Directive 2001/23 (replacing Directive 77/187)[30]—was to apply only to those who were "protected as an employee under national employment law."

The Court's approach changed at the beginning of the new millennium with the growing relevance of the EU's social sphere. Social protection began to be been considered in its own right an aim Union action, no longer being viewed as merely instrumental to the creation of a common market. Here, labour law directives play an important "market-correcting" function, steering the economic system towards social results it would not achieve on its own.[31]

Against this new background, and in the face of the increasing impact and multiplication of atypical work arrangements, the Court began to grow increasingly concerned about Member States narrowly restricting the scope of employment rights provided for in EU labour law, as this trend could jeopardise its social aims. The Court then moved away from the "minimalist approach" in *Danmols*, this pursuing two lines of development:[32]

(a) Extending the application of the EU concept of worker across an increasing number of EU labour laws.
(b) Expanding the EU concept itself, with the Court progressively refining it and adapting it to different peculiar situations, beyond the categorizations provided at the national level. To this end, the Court made express use of the primacy-of-facts principle: "formal categorization as a self-employed person under national law does not exclude the possibility that a person may have to be treated as a worker [...] if that person's independence is merely notional, thereby

[29] CJEU, Case C-105/84, Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar, ECLI:EU:C:1985:331.
[30] See Countouris N., nt. 22, p. 203, referring to this Court's approach as the "Danmols Ortodhoxy."
[31] C. Barnard nt. 25, p. 35.
[32] The development of the EU concept of worker has been extensively analyzed in Countouris N., nt. 22; Risak M., Dullinger T., "The Concept of 'Worker' in EU Law: Status Quo and Potential for Change", ETUI Research Paper - Report 140, 2018; Giubboni S., nt. 25; Van Peijpe T., "EU Limits for the Personal Scope of Employment Law", E*uropean Labour Law Journal*, 2012, 3, 35.

disguising an employment relationship within the meaning of EU Directives" (*Danosa*, *Union syndicale Solidaires Isère, Allonby*).[33]

It was not easy for the CJEU to abandon the *Danmols* approach, considering that it was the most intuitive solution in light of a textual interpretation of the majority of labour law directives, determining their scope by reference to national definitions of *employee*. More to the point, the language of the directives suggests that they can be sorted into four different groups:

(I) A first group includes Directive 2001/23, on transfers of undertaking, and Directive 2008/104, on temporary agency work, where reference is made to the Member States' national definitions—*employee* shall mean any person who, in the Member State concerned, is protected as an employee under national employment law—and where this idea is reinforced by adding that the directive "shall be without prejudice to national law as regards the definition of contract of employment or employment relationship." The reference made to national definitions, however, is accompanied by a "safeguard clause," preventing national laws from unduly restricting the scope of the directives with regard to part-time, fixed-term, temporary agency workers: they cannot be excluded solely because they work under these atypical engagements.

(II) In the second group are directives that merely refer to the national definitions of *employee*. Two of these—Directive 2010/18, on parental leaves, and Directive 2008/94, on the protection of employees in the event of employers' insolvency—include the safeguard clause for part-time, fixed-term, and temporary agency workers, while Directive 2002/14, establishing a general framework for informing and consulting employees, refers to national concepts but does not include the safeguard clause.

(III) In the third group we find an inverse approach. We can see this in Directive 91/533, on the employer's duty to inform employees on working conditions, and Directive 97/81, on part-time work. These directives refer to Member State definitions of *employee*, opening up the possibility for Member States to exclude casual relationships from the scope of the directives themselves, and so to exclude the rights these directives introduce. Directive 1999/79, on fixed-term contracts, does the same, precisely by identifying the exclusions allowed in vocational training relationships and apprenticeship schemes.

(IV) Finally, in the fourth group we find directives that neither point to Member State definitions nor provide their own. This is true of Directive 2003/88, on working time; Directive 98/59, on collective redundancies; and Directive 92/85, on the workplace safety and health of pregnant workers. They only set out some specific exclusions (e.g., temporary contracts in Directive 98/59, seafarers in Directive 2003/88). In this group we can include the Framework Directive 89/391, on health and safety at work. Even if this directive formally provides its own definition of *worker*, this definition is so broad and general ("any person employed by an employer") that it winds up being essentially meaningless.

[33] CJEU, Case C-232/09 *Dita Danosa v LKB Līzings SIA*, ECLI:EU:C:2010:674, para 41; CJEU, Case C-428/09 *Union syndicale Solidaires Isère* v *Premier ministre and Others*, ECLI:EU:C:2010:612, para 28; CJEU, Case C-256/01 *Debra Allonby* v *Accrington & Rossendale College and Others*, ECLI:EU:C:2004:18, para 72.

Not surprisingly, an autonomous concept of worker has been put forward in the first place by the Court, for which this task was easier with the directives in his fourth group. The first case that came up was *Danosa*,[34] where at issue was the protection that Directive 92/85 affords to pregnant workers. Here the Court, proceeding from its holding in *Lawrie-Blum*, called for a common concept of worker, while excluding that the issue (of protection) could depend on the way a worker is categorized under national law.[35] As for the content of the concept, having recalled its "bare bones" in *Lawrie-Blum*—"a person [who] performs services for and under the direction of another person in return for which he receives remuneration"—the Court seized the opportunity to expand the concept significantly.

The case concerned the sole member of a capital company's board of directors, responsible for managing the company's assets and for directing and representing the company. Under the national legislation at issue (Latvian), as well as under the law of most Member States, she was not deemed a "worker." Even so, the CJEU, taking into account "all the factors and circumstances characterizing the relationship between the parties,"[36] opened up the possibility that she was in a relationship of subordination to the company. The Court observed that "even though Ms Danosa enjoyed a margin of discretion in the performance of her duties, she had to report on her management to the supervisory board and to cooperate with that board."[37] Moreover, under the national law in question, she could "be removed from his or her duties by a decision of the shareholders, in some circumstances following suspension from those duties by the supervisory board,"[38] as indeed happened. In particular, she was dismissed "by a body which, by definition, she did not control and which was able at any time to take decisions contrary to her wishes."[39]

Similar conclusions were reached in *Holterman*,[40] again involving the director and manager of a capital company. The case concerned the establishment of jurisdiction pursuant to Regulation (EC) No. 44/2001. In this regard, according to the relevant conflict-of-law rules set forth in Section 5 of the regulation, it was necessary to understand whether the manager could be classified as a worker. Even if the decision did not involve the application of employment protections, the Court decided to rely on the same notion of worker as the one used in *Danosa*, provided that "the regulation aims to provide the weaker parties to contracts, including contracts of employment, with enhanced protection by derogating from the general rules of jurisdiction."[41]

Two very relevant aspects emerge from the cases just mentioned: common social protection objectives justify the endorsement of a common concept of worker in different regulatory contexts; the EU concept of worker is broader than the one in use in many national employment tests,[42] this owing to the "diluted" meaning given to the notion of "direction" (control over the manner the work is to be performed).

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[34] CJEU, Case C-232/09 *Dita Danosa* v *LKB Lizings SIA*, ECLI:EU:C:2010:674.
[35] *Danosa*, para 41.
[36] Para 46.
[37] Para 49.
[38] Para 50.
[39] Para 50.
[40] CJEU, Case C-47/14 Holterman Ferho Exploitatie BV and Others v F. L. F. Spies von Büllesheim, ECLI:EU:C:2015:574.
[41] Para 43.
[42] For an overview on the concept of employee in different national jurisdictions, see Waas B., Heerma van Voss G. (eds.), *Restatement of Labour Law in Europe*, I, *The Concept of Employee*, Hart, 2017; Nogler L., *The Concept of "Subordination" in European and Comparative Law*, Università degli Studi di Trento, 2009; Perulli A., "Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries", in Casale G. (ed.), *The Employment Relationship: A Comparative Overview*, Hart Publishing, 2011, p. 137; Countouris N., "The Employment Relationship: A Comparative Analysis

In *Balkaya*,[43] as well as in *Commission* v *Italy*,[44] the common concept of worker involved the interpretation of Directive 98/59 on the approximation of the laws of the Member States relating to collective redundancies. Once more the Court, aided by the absence of any reference to national concepts of worker, concluded that the concept "must be given an autonomous and independent meaning in the EU legal order,"[45] and that "the nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law."[46]

In *Commission* v *Italy*, the CJEU had no difficulty applying the usual *Lawrie-Blum* approach in such a way as to include "executives" within the meaning of *worker*. It went even further in *Balkaya*, moving once more beyond the traditional understanding of the employment relation, and once more dealing with a member of a capital company's board of directors. Even if the plaintiff (Mr. Balkaya) was not deemed an employee in German case-law, the Court concluded otherwise in light of the same elements it took into account in *Danosa*: he was appointed by the general meeting of the company shareholders, which "may revoke his mandate at any time, even against his will"; he was subject to the direction and supervision of the same body; and he did not hold any shares in the company for which he carried out his functions.[47] In *Balkaya*, too, the Court recognised the status of worker even for a person working under a traineeship scheme funded in part by the government. To this end, the Court invoked the jurisprudence it had developed for Article 45 TFEU, under which it is irrelevant that a person "does not carry out full duties" and "works only a small number of hours per week and thus receives limited remuneration," and that "remuneration comes through public grants."[48]

Interestingly, these conclusions were based on a purposive interpretation of Directive 98/59 aimed at ensuring for the directive an *effet utile*. In this regard, the Court stated that its objective of affording a "greater protection to workers in the event of collective redundancies" would be undermined by a narrow definition of *worker*.[49]

An autonomous EU concept of worker was also formulated in *Union Syndicale Solidaires Isère* for the purpose of applying Directive 2003/88, concerning certain aspects of the organisation of working time.[50] The case involved atypical workers employed under the peculiar for of "educational commitment contracts," designed so that these workers could carry out casual and seasonal activities for a maximum of eighty days a year, and at issue was their claim that they were entitled to the minimum daily rest period that workers had a right to under the French Labour Code. Invoking the *Lawrie-Blum* doctrine, and specifically what in that doctrine is described as the essential feature of an employment relationship (the previously discussed "bare-bones" definition), the Court concluded that these working activities were to be deemed to fall within the scope of the Working Time Directive.

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of National Judicial Approaches", in Casale G. (ed.), *The Employment Relationship: A Comparative Overview*, Oxford, Hart Publishing, 2011, p. 35.

[43] CJEU, Case C-229/14 Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH, ECLI:EU:C:2015:455.

[44] CJEU, Case C-596/12 *European Commission* v *Italian Republic*, ECLI:EU:C:2014:77.

[45] *Balkaya*, para 33.

[46] Para 35.

[47] Para 40.

[48] Para 50.

[49] Balkaya para 44; *Commission* v *Italy*, para 47.

[50] CJEU, Case C-428/09 Union syndicale Solidaires Isère v Premier ministre and Others, ECLI:EU:C:2010:612.

A broader concept of worker was endorsed by the CJEU in *Fenoll* as well,[51] dealing with another entitlement set forth in Directive 2003/88, namely, the right to annual paid holidays. The decision concerned people admitted to a special work rehabilitation centre where seriously disabled persons who could not hold an ordinary job would be able to achieve personal fulfilment by being offered opportunities for various working activities, as well as medical, social, and educational support, and also living arrangements. According to the Court, they could be classified as workers within the meaning of the directive in question, despite the peculiar characteristics of their work activity, the low productivity of the individuals concerned, and the limited pay they received.

As mentioned at the outset, the Court's decisions had hitherto been concerned with labour law directives that fail to determine their own scope by referring to national concepts of employee. Absent that specification, it was not difficult for the Court to introduce an autonomous European concept of worker. However, even recently, when the Court has had to interpret directives whose application turns on national definitions, it has chosen to give little weight to the reference a directive makes to national definitions, thereby going beyond the wording of the legislative text.

This was partially done in *O'Brein*,[52] concerning the application of the principle of equal treatment between part-time workers and comparable full-time workers set forth in Directive 97/81, implementing a Framework Agreement on Part-Time Work. Clause 2 of the framework agreement identifies the scope of the right through an unequivocal reference made to national definitions of the employment relationship, stating that the agreement applies to "part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State."

Here the Court can be seen to have returned to its own "minimalist" approach in *Danmols* (1985), having previously done that when dealing with the same directive in *Wippel*.[53] In *O'Brien* the Court stressed again that the Part-Time Agreement, just like the previously discussed Transfers of Undertakings Directive, is not designed to fully harmonize national laws but is merely aimed at "setting out the general principles and minimum requirements for part-time working, to establish a general framework for eliminating discrimination against part-time workers."[54] At the same time, however, the Court qualified this statement by noting that, in any event, "the discretion granted to the Member States by Directive 97/81 in order to define the concepts used in the Framework Agreement on part-time work is not unlimited."[55] The reference made to national law and practices cannot jeopardise "the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness [...]. In particular, a Member State cannot remove at will, in violation of the effectiveness of Directive 97/81, certain categories of persons from the protection offered by that directive."[56] In short, exclusions provided by national laws may be permitted, but only so long as they

[51] CJEU, Case C-316/13 Gérard Fenoll v Centre d'aide par le travail "La Jouvene" and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon, ECLI:EU:C:2015:200.

[52] CJEU, C-393/10 Dermod Patrick O'Brien v Ministry of Justice, formerly Department for Constitutional Affairs, ECLI:EU:C:2012:110.

[53] CJEU, Case C-313/02 Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG, ECLI:EU:C:2004:607.

[54] *O'Brien*, para 31.

[55] Para 34.

[56] Para 36.

cannot be deemed to be "arbitrary,"[57] and the Court of Justice will keep a watch over these exclusions.

Subsequently, in *Betriebsrat der Ruhrlandklinik*,[58] the Court went even further. The case involved a member of a not-for-profit association who in return for a remuneration worked as a nurse in a clinic under a secondment agreement between her association and the clinic. Since she did not enjoy the status of "worker" under national law, the Court was asked whether the same was true under EU law for the purpose of applying Directive 2008/104, on temporary agency work. Interestingly, the directive in question not only determines its own scope referring to national definitions of *worker*; it also reinforces this reference by specifying that its rules shall not affect "national law as regards the definition of pay, contract of employment, employment relationship or worker." That is precisely the same language we saw in the directive on transfers of undertakings, which gave birth to the "minimalist" approach in *Danmols*. The Court therefore clearly changed its mind, holding that the reference made to the national concept of worker cannot "be interpreted as a waiver on the part of the EU legislature of its power itself to determine the scope of that concept for the purposes of Directive 2008/104."[59] On the contrary, the concept designates "any person who has an employment relationship" in the sense set out by the Court itself in its jurisprudence.[60] The conclusion is expressly supported by a purposive interpretation of the directive. In the Court's view, the purpose of the directive, namely, to "ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied," would be undermined if the concept of worker were restricted to persons falling within the scope of that concept under national law.[61] If in *O'Brein* the safeguard of the effect of EU law led the Court to place some limits on the discretion of national laws, in *Betriebsrat der Ruhrlandklinik* that discretion has been excluded completely.

It is not much of a stretch to say that the Court has inaugurated a new approach, opposite to the "minimalist" one in *Danmols*, potentially applicable to all directives dealing with employment protections, regardless of whether or not the determine the scope of their own application by referring to national concepts of worker: since the directives at issue, including the directive on temporary agency work, are not all aimed at establishing "a protective framework for [...] workers," the *Betriebsrat der Ruhrlandklinik* conclusions on the need to determine the scope labour of law directives by linking them to an autonomous EU concept of workers looks suitable for them all, even despite their wording.

4. The Consolidation of an Autonomous EU Concept of Worker

The concept of worker developed in the CJEU's case-law would eventually be crystalized in *FNV Kunsten*.[62] The decision dealt with the boundaries of the so-called labour exception to antitrust law. The basic antitrust principle is set forth in Article 101 TFEU, which prohibits "agreements between undertakings, decisions by associations

[57] That is to say, "if the nature of the employment relationship concerned is substantially different from the relationship between employers and their employees which fall within the category of 'workers' under national law" (para 42).

[58] CJEU, Case C-216/15 Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH, ECLI:EU:C:2016:883.

[59] Para 32.

[60] Para 33.

[61] Para 35.

[62] CJEU, Case C-413/13 FNV Kunsten Informatie en Media v Staat der Nederlanden, ECLI:EU:C:2014:2411.

of undertakings and concerted practices, which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market." However, as the Court had held in *Albany*,[63] even if collective bargaining aimed at "the improvement of conditions of work and employment" introduces some restrictions on competition, it does not count among the limitations imposed by Article 101, for otherwise the social policy objectives pursued by collective bargaining agreements would be seriously compromised.

In *FNV Kunsten*, the Court considered a collective agreement securing minimum fees for self-employed musicians substituting for tenured members of an orchestra. The Court held that even when service providers, in providing their services, are performing activities similar to those performed by employees, they are in principle deemed "undertakings" within the meaning of EU law;[64] therefore, an organisation carrying out negotiations in their name or on their behalf is acting not as a trade union but as an association of undertakings, its activity therefore falling within the scope of Article 101(1) TFEU.[65] The labour exception can instead apply in cases where it turns out that independent contractors are in fact working as employees: as the Court puts it, they are "false self-employed".

The therefore Court took the opportunity to synthesize the concept of worker in light of its settled case-law, describing it as a person who (a) acts "under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work"; and (b) "does not share in the employer's commercial risks and, for the duration of that relationship, forms an integral part of that employer's undertaking, [thus] forming an economic unit with that undertaking."[66] As for this last requirement, a service provider should not be considered an independent contractor "if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking."[67]

Looking back from this last approach to the path undertaken by the CJEU, we can see that no distinction can be drawn between the concepts of worker the Court has elaborated for different bodies of EU law. From the initial purpose of granting uniformity of rules and practices under Articles 45 and 157 TFEU, the expansion of the concept does not present any leap of logic from one decision to another, regardless of the fact they deal with different legislative purposes. Across the Court's various decisions, the glue that consistently holds their reasoning together lies in the *Lawrie-Blum* concept of worker, which the Court has tweaked for each individual case.

The idea of a single definition of *worker* for the different purposes of EU law seems expressly borne out by the recent decisions we have looked at, referring to "the term 'employee' for the purpose of EU law,"[68] thus breaking away from a former approach, according to which, on the contrary, "there is no single definition of worker in

[63] CJEU, Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, ECLI:EU:C:1999:430.

[64] *FNV Kunsten*, para 27.

[65] Para 30.

[66] Para 36.

[67] Para 33.

[68] *FNV Kunsten* para 34, *Union Syndicale Solidaires Isère* para 28, *Betriebsrat der Ruhrlandklinik*, para 32. The concept seems to implicitly also underpin the reasoning in *Danosa*, *Balkaya*, and *Commission* v *Italy*.

Community law: it varies according to the area in which the definition is to be applied"[69]—the latter a view shared by some commentators.[70]

5. The Implications of the CJEU's Elaboration of the Concept of Worker: Employment Protection beyond Traditional Employment Contracts

In light of the foregoing discussion, the concept of worker can, on closer inspection, be summarized on the basis of three traditional employment tests.

(a) Direction/control: the employer dictates the manner in which the work is to be carried out (this includes the time and place of work).
(b) Integration into the employer's business organisation.
(c) Economic reality: the worker does not bear any risk of loss, does not employ anyone, and does not act directly in the market concerned.

Even if this concept seems very similar to that of employee which many different national jurisdictions share, it differs from the latter in two very important respects: (*i*) *direction* has been significantly watered down by the Court of Justice so as to coincide with the idea of coordination, examples being—in *Danosa* and *Balkaya*—a duty to report to and cooperate with corporate bodies; and (*ii*) the fact that little, if any, relevance attaches to the commitment to an ongoing engagement, whether understood in light of the mutuality of obligation test developed by English courts[71] or as the continuity of the employment relationship in other countries.[72]
These differences make the EU notion of worker much broader than that of employee commonly used by national courts, to the point of including intermediate category workers—variously referred to in different jurisdictions as dependent contractors, economically dependent workers, "parasubordinate" workers, or employee-like persons[73]—and, more in general, all workers who (*i*) are engaged in "effective and genuine activities"; (*ii*) are economically, functionally, and/or operationally dependent on a client/principal; and (*iii*) receive some kind of remuneration in exchange for such activities.
As discussed, there is a wide variety of atypical work arrangements—not falling within the purview of what in national law is deemed "employment" proper—that in the case-law of the CJEU have already been found to be encompassed within the single EU notion of worker. These arrangements include

- casual work, where work is irregular or intermittent, with no expectation of continuity, as in the case of lecturers paid by the hour (*Allonby*);
- mixed work/training schemes (*Lawrie-Blum*), even where the remuneration does not come from the employer (*Kranemann*, *Balkaya*);

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[69] Martinex Sala, para 31; Allonby, para 63; CJEU, Case C-543/03, Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse, ECLI:EU:C:2005:364, para 27.
[70] This is the opinion of Giubboni S., nt. 25, p. 12, arguing that "it is impossible to identify—in the framework of EU law—an organic and unitary employee/worker status that is actually comparable, not only in terms of scope, with those defined in the national legal systems." Contrast that with Risak M., Dullinger T., nt. 32, pp. 18–20, arguing (as I am) that there is a "tendency to unify the concept of 'worker' not only with regard to primary law but also in the field of secondary law."
[71] Deakin S., Wilkinson F., The Law of the Labour Market: Industrialization, Employment and Legal Evolution, Oxford University Press, 2005, pp. 306–07.
[72] Perulli A. nt. 42, p. 146.
[73] See Razzolini O., "The Need to Go Beyond the Contract: 'Economic' and 'Bureaucratic' Dependence in Personal Work Relations", *Comparative Labor Law & Policy Journal*, 2010, 31 (2), pp. 289–301.

- directors in capital companies (*Danosa* and *Balkaya*);
- short-term seasonal activities carried out under special "educational commitment contracts" (*Union syndicale Solidaires Isère*); and
- special work and rehabilitation schemes providing severely disabled persons with an opportunity to engage in various work activities, as well as with medico-social and educational support and living arrangements (*Fenoll*).

This list can be expanded, by analogy, so as to include various forms of casual work such as gig work or zero-hour contracts, where workers perform their activity within the business cycle of a single main client.

The capacious "container" that is the single EU concept of worker can be applied to workers "without adjectives", excluding only genuinely self-employed workers and entrepreneurs, that is to say, workers with "direct" access to the markets they work in, where they normally perform services for multiple clients, without any functional and operational subordination to any other business entity. In this way, the CJEU's jurisprudence has wound up entitling dependent contractors, including casually engaged ones, to a good share of the employment protections provided for in EU primary and secondary law. These are protections the Court has so far expressly located in matters relating to pay, equality between male and female workers, pregnant workers, the organisation of working time, the regulation of collective dismissal (mass layoff) procedures, temporary agency workers, and the right to collective bargaining, which may work in derogation of antitrust law.

6. The Foreseeable Further Development of the CJEU's Reasoning

The process of extending employment protections beyond the employment contract has probably not run its full course yet: the CJEU's case-law still seems to be moving toward extending the single EU concept of worker to other EU social welfare laws.

As mentioned, behind the development of the concept of worker as a gateway to the employment rights enshrined in EU primary and secondary law lies a purposive method of interpretation—something that is not unusual for EU law. The CJEU has always made extensive use of this method, so much so as to make it the predominant criterion of legal interpretation.[74] Literal interpretation, for its part, carries little weight in EU law by comparison with the prevailing canons of interpretation in national law. The main reason for that difference lies in the multilingual nature of EU law: all languages are original languages, and the different versions of EU acts may contain inconsistences.

Interpretation based on the words themselves has therefore, understandably, been considered just the starting point. It provides clue to the decisive factor, namely, the *purpose* of EU acts.[75] With particular regard to directives, by considering their aims in light of the overreaching ones of Union law, the purposive approach serves a dual function: to reconcile the divergent versions of EU legislative texts in different languages, while securing the harmonized development of EU law toward the achievement of the Union objectives. This gives to the CJEU a quasi-normative role.[76]

In the previously discussed decisions, the Court's interpretation of labour law directives has been guided by the principle of effectiveness (so-called *effet utile*), which is a core

[74] Rösler H., "Interpretation of EU Law", in Basedow J., Hopt K. J., and Zimmermann R. (Eds.), *The Max Planck Encyclopedia of European Private Law*, 2012, p. 979. Joussen J., "L'interpretazione (teleologica) del diritto comunitario", *Rivista Critica del Diritto Privato*, 2001, 4, pp. 491–93. Fennelly F., "Legal Interpretation at the European Court of Justice", *Fordham International Law Journal*, 1997, 20, p. 656.

[75] Joussen J., nt. 74, p. 525.

[76] Joussen J., p. 500.

part of the purposive method of interpretation.[77] This has led the Luxembourg judges to move past the "minimalist" approach in *Danmols*, even if for many labour law directives this was the approach best suited to a literal interpretation of the text.[78]
An already considered example is *O'Brein*, where the Court argued that the reference a directive makes to the national definitions of employment contract or employment relationship does not mean that Member States can deprive the directive of its effectiveness by arbitrarily excluding certain categories of workers from its scope.[79] Thus, the purpose of the directives suggested to the Court that the Member States' ought to be restricted in their ability to redraw the scope of those directives.
Another, more explicit use of the purposive approach, far beyond the wording of the directive at issue, can be found in *Betriebsrat der Ruhrlandklinik*, concerning the interpretation of Directive 2008/104. Reasoning from the objectives stated in the directive—namely, to "ensure protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to those workers, and by recognising temporary-work agencies as employers"—the Court concluded that the restriction of the concept of worker in the directive "to persons falling within the scope of that concept under national law [...] is liable to jeopardise the attainment of those objectives and, therefore, to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive."[80]
However, as noted, extensive use of the purposive method of interpretation is nothing really new. The most relevant novelty emerging from the CJEU's jurisprudence we have looked at lies in the increasing relevance accorded to the Union's social objectives by interpreting directives through a purposive method. The process of buttressing the Union's social sphere has indeed been facilitated by the new role which the CFREU gained with the Lisbon Treaty and by the overall greater consideration the same treaty gives to a social Europe.[81]
The new understanding of the EU's social dimension, leading to an expansion of the single EU concept of worker, can be appreciated by comparing the conclusions reached in *Bettray* and *Fenoll*. Whereas in *Bettray* the Court, interpreting the free movement of persons, held that the concept of worker excludes activities carried out within the framework of a rehabilitation program for drug addicts—"where the work represented merely a means of rehabilitation or reintegration for the persons concerned"—in *Fenoll*, interpreting the right to paid annual holydays, the Court embraced the possibility that when severely disabled persons perform activities in special work rehabilitation centres that also provide these persons with medico-social and educational support and living arrangements, these persons can be deemed workers. But in fact the nature and the purpose of the working activities involved in the two cases look quite similar, both involving persons who are unable to work in normal conditions, and both involving work performed under schemes designed to achieve social integration. What could have made the difference, rather, is the reference that in *Fenoll* is made to Article 31

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[77] Rösler H., nt. 74, p. 979. On the application of the *effet utile* argument in the interpretation of EU social welfare law, see Ratti L., "L'argomento dell'effet utile nell'espansione del diritto del lavoro europeo", *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 2017, pp. 479–521.
[78] Similar conclusions are endorsed by Risak M., Dullinger T., nt. 32, p. 40.
[79] *O'Brein*, para 36 and 42.
[80] Betriebsrat der Ruhrlandklinik, para 36.
[81] The amended version of Article 3(2) TEU (Treaty on European Union) promotes the creation of "a highly competitive social market economy, aiming at full employment and social progress" in place of the traditional "system of undistorted competition," relegated to an annex; and the horizontal social clause contained in Article 9 TFEU requires the Union to "take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion" in its framing and implementing of policies and activities.

CFREU—in which, as the Court subsequently made clear in *Bauer* v *Broßonn*,[82] is embodied "an essential principle of EU social law," and one that is "mandatory in nature."[83] Since at stake, therefore, was the implementation of a fundamental right, the Court adopted a more inclusive concept of worker. A far-reaching concept to be used in all cases where the unbalance of bargaining power owed to the legal subordination of employees, as well as to the functional and operational dependence of many independent contractors, could jeopardize the purpose of labour law directives implementing fundamental rights.

This conclusion seems to be borne out by the fact that the scope of employment rights and social protections included in the CFREU does not appear to be confined to "employees" but extends broadly to workers "without adjectives." So, in Article 23 CFREU, stating that equality between women and men must be ensured "*in all areas*, including employment, work and pay." The same can be argued for most of the rights included in Title IV CFREU (Solidarity), and in particular for Article 31, guaranteeing fair and just working conditions for all workers, including respect for their health, safety, and dignity, a limit on working hours, daily and weekly rest periods, and an annual paid leave. Falling within the same scope is the right to protection against unjustified dismissal recognized in Article 30, and probably also the right to collective bargaining and action (Article 28), bearing in mind the broad view of the labour exception to Article 101 TFEU which the CJEU took in *FNV Kunsten*. Lastly, by express provision of the Charter, some of its protections extend to "everyone": this goes for the right to access placement services (Article 29); the prohibition on child labour and the protection of young people at work (Article 32); protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave (Article 33); and entitlement to social security benefits and social services, including the right to social and housing assistance (Article 34).

This broad interpretation of the scope of some of the rights and protections contained in the CFREU falls perfectly into line with their underlying justifications and purposes. Take, for example, the right to a cap on working hours enshrined in Article 31(2) CFREU, commonly understood as being designed to protect workers' health and safety, which may be put at risk by overwork: this protection is clearly appropriate for anyone who performs any work or service for another, regardless of whether such services are rendered by an employee under the employer's control or by a self-employed person, whose working time is set by a principal on which he or she depends economically and functionally.

7. The Single Concept of Worker: Its Impact on National Labour Laws

So far, we have considered the role played by the CJEU's broad, single concept of worker: to secure the effectiveness of the employment rights enshrined in the Treaties and the CFREU and regulated by labour law directives. The Court's doctrine is influencing the Member States' labour laws, both indirectly—by requiring national courts to interpret domestic law consistently with the pertinent directives, and so with Article 288(3) TFEU[84]—and directly, as happens with provisions of primary law (and less frequently of secondary law) having direct effect.

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[82] CJEU, Case C-596/16 Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn, ECLI:EU:C:2018:871, para 83.

[83] This seems to be the opinion of Countouris N., nt. 22, p. 24, arguing that the CJEU has pushed "the boundaries of the 'worker' concept further, partly on the back of the fundamental nature of the right in question."

[84] This is the provision that defines the binding force of EU directives: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the

More to the point, in keeping with well-established jurisprudence by the Court, when national courts apply provisions of domestic law enacted for the purpose of transposing obligations laid down by a directive, they are bound to interpret national law in light of the wording and purpose of the directive in order to achieve the result pursued by it.[85] In our case, this involves proceeding from the concept of workers developed by the CJEU when it comes to determining the scope of the employment protections laid down by any pertinent directive. Otherwise, if the concept is restricted to persons falling within the scope of that concept under national law, then, as the Court itself repeatedly underscores, the objectives set out in the directives would be undermined.
The duty of consistent interpretation, however, is itself limited in its scope: it cannot serve as a basis for interpreting national law *contra legem*.[86] This is not a very likely outcome, if we consider the scope of national laws transposing EU directives. National laws have rarely defined *employee* or *employment contract*,[87] leaving it to the courts to determine what those terms mean. Therefore, when the CJEU concludes that employment protections based on EU law must be extended beyond the concept of employee, the national courts bound to implement that doctrine are unlikely to do so in ways that collide with any legal provision: they simply have to revise their established case-law, which means moving past the traditional employment tests previously in use for recognizing employment rights.[88]
If there is no room for interpreting national law in conformity with EU law, the party injured by the domestic law in conflict with EU law still has the option of resorting to the "palliative" provided by the *Francovich* doctrine,[89] making it possible for that person to seek damages for the loss sustained from the Member State's noncompliance.[90]
Sometimes, as hinted at, it may even be possible for the individual worker to invoke the application of the European provision before the national court, which will have to set aside the contrasting national rules if the conditions specified in the CJEU's jurisprudence obtain. For primary legislation, these conditions are met when the provisions at issue are precise, clear, and unconditional and do not call for any additional implementing measures, whether national or European (*Van Gend & Loos*).[91] For directives, these conditions are met when their provisions are unconditional and sufficiently clear and precise and when the EU country in question has not transposed the directive into its national by the deadline (*Van Duyn*).[92] However, whereas provisions of primary law provisions may have both vertical and horizontal effects—

national authorities the choice of form and methods." As the CJEU has made clear on several occasions (*inter alia*, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, para 26; and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-0000, para 106), the obligation to achieve the result envisaged by a directive falls on *all* of a Member State's authorities, including the courts for matters within their jurisdiction.

[85] CJEU Case C-14/83, Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, ECLI:EU:C:1984:153, para 26.

[86] CJEU, Case C-80/86 Criminal proceedings against Kolpinghuis Nijmegen BV ECLI:EU:C:1987:431; CJEU C-212/04 Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG), ECLI:EU:C:2006:443.

[87] Casale G., nt. 2, pp. 17–29.

[88] As the CJEU has recently clarified (Case C-414/16 *Vera Egenberger* v *Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257, paras 72–73), the national courts' obligation to interpret national law in conformity with EU law means that, where necessary, "national courts should change established case-law, where it is based on an interpretation of national law that is incompatible with the objectives of a directive."

[89] CJEU, Case C-479/93 *Andrea Francovich* v *Italian Republic*, ECLI:EU:C:1995:372.

[90] See the Opinion of Advocate General Bot in *Bauer and Broßonn* CLI:EU:C:2018:337, para 60.

[91] CJEU, Case C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, ECLI:EU:C:1963:1.

[92] CJEU, Case C-41/74 *Yvonne van Duyn* v *Home Office*, ECLI:EU:C:1974:133.

the former invokable in relations between an individual and an EU country, the latter invokable in relations between individuals—directives can only have vertical effects. It follows that employment rights can be claimed against a state or a public employer. When the dispute is instead between a worker and a private employer, and it is not possible to interpret national law in conformity with EU law, the only option available to the individual is, again, to seek damages for the injury sustained from the state's failure to correctly implement EU law.

As for social rights, direct effects have recently been excluded by the CJEU for Article 27 CFREU, giving workers the right to be informed and consulted within the undertakings (companies) they work for, because the provision lacks self-sufficiency, requiring action by the legislature, at both EU and Member State level (*Association de mediation sociale*).[93] For the same reasons, vertical effects have been excluded in *Glatezel*,[94] concerned with Article 26 CFREU, under which persons with disabilities are recognised as having a right to occupational integration.

The Court seems to have it in its head that it is not possible to rely directly on Title IV provisions of the Charter (Solidarity) in disputes between individuals—even if, as the advocate general observes in the recent *Bauer* v *Broßonn*, labour law remains "undoubtedly one of the main fields in which EU rules may be relied on in disputes between private individuals."[95] Indeed, the conditions for direct effect have been recognised by the CJEU with regard to the principle of equal pay for equal work between women and men enshrined in Article 157 TFEU (*Defrenne*,[96] *Allonby*), and now also included in Article 23 CFREU. Direct application has also been recognized for the principle of nondiscrimination, in particular on grounds of age, to be understood as a general principle of Community law, being contained in various international instruments and in the Member States' constitutional common traditions (*Mangold*).[97] More recently, the Court explicitly recognised direct effects under a provision in Article 21 CFREU, also dealing with the principle of nondiscrimination, in a case involving an occupational requirement alleged to constitute discriminatory treatment on grounds of religion (*Egenberger*).

Lastly, in *Bauer* v *Broßonn* the CJEU definitely let go of its concerns about a possible narrow implementation of Solidarity Title IV in the CFREU. Here, too, the joined cases dealt with the right to annual paid holidays set forth in Article 7 of Directive 2003/88, on which is based Article 31(2) CFREU. Having first excluded, in accordance with its own precedent, and in particular with *Fenoll*, that that directive provision can be invoked in a dispute between individuals by setting national conflicting provisions aside if needed, the Court proceeded to consider whether the same right could instead be asserted under Article 31(2) CFREU.

In the Court's opinion, the provision in Article 7 of Directive 2003/88 meets all the requirements for deploying full direct effects. More specifically, the right to paid annual holidays is considered an essential principle of EU social law (and is mandatory in nature), being contained not only in the CFREU but also in the 1989 Community Charter of the Fundamental Social Rights of Workers, as well as in two other international instruments on which the Member States have cooperated or to which they are parties, namely, Convention No. 132 of the International Labour Organisation of 24 June 1970 and the European Social Charter. The provision is also unconditional,

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[93] CJEU, Case C-176/12 Association de médiation sociale v Union locale des syndicats CGT and Others, ECLI:EU:C:2014:2, para 49.

[94] CJEU, Case C-356/12 *Wolfgang Glatzel* v *Freistaat Bayern*, ECLI:EU:C:2014:350.

[95] Opinion of Advocate General Bot in *Bauer and Broßonn*, para 3.

[96] CJEU, Case C-43/75 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, ECLI:EU:C:1976:56.

[97] CJEU, Case C-144/04 *Werner Mangold* v *Rüdiger Helm*, ECLI:EU:C:2005:709, paras 74–75.

and does not call for additional implementing measures of EU or national law, "which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right." Clearly, the Court here took a relaxed view of the unconditionality requirement by comparison with the strict criteria on which it appears to have based its judgment in *Van Gen den Loos*. However, this is not unusual in the Court's thinking on direct effect: the same shifting attitude can also be observed elsewhere, including in the previously mentioned *Defrenne* case, on equal pay between men and women.[98]

The CJEU seems to be definitely trending toward a broad recognition of direct effect for all "mandatory" and "unconditional" Charter provisions, as it has done with a wide range of Treaty provisions. This approach of the Court—coupled with the approach it has taken in working out an EU concept of worker—suggests that the menu of employment rights and protections that can be claimed even outside the subordinate employment relationship is bound to increase.

The same trend seems to find support in the a recent initiative of the European Commission called "Establishing a European Pillar of Social Rights," for among the various policy proposals included in this document there is one that would give self-employed workers full access to social protection—covering both social assistance and social security—providing them with entitlements comparable to those enjoyed by employees.[99] More significantly, one of the initiatives the European Commission has put forward with a view to implementing the "Pillar" proposes a directive for securing more transparent and predictable working conditions.[100] The directive, finally adopted on 20 June 2019,[101] is intended to provide "new forms of employment [...] with a number of new minimum rights aiming to promote security and predictability in employment relationships while achieving upward convergence across Member States and preserving labour market adaptability" (Recital No. 4). To this end, as set out in the Commission's proposal and clarified in the directive's recitals, and in order to determine the directive's personal scope of application,

it was necessary to consider the CJEU's criteria for determining the status of a worker. Accordingly, the proposal introduced a definition of worker—"a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration" (Article 2(1))—based on criteria that would "ensure a uniform implementation of the personal scope of the Directive while leaving it to national authorities and courts to apply it to specific situations" (Whereas 7). A full endorsement of the single EU concept of worker, beyond the Member States' concept of employee and of employment contract, seemed to find confirmation in Article 1(2) of the proposal, stating that it ought to be the purpose of the directive to grant minimum rights applicable to "every worker in the Union."

If the proposal had been carried through, it would have yielded the first EU definition of *worker* to crystallise the notion developed by the CJEU. Unfortunately, things took

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[98] Craig P., Burca G., *EU Law, Text, Cases and Materials*, Oxford, fifth edition, 2011, pp. 186–88.

[99] See European Commission, "Commission Staff Working Document Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, Establishing a European Pillar of Social Rights", http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:250:FIN, 2017 (accessed 28 June 2019). On the development of the EU framework towards the grant of employment rights to vulnerable self-employed workers, see M. Risak, T. Dullinger nt. 30, 13–16. Williams C., Lapeyre F., "Dependent Self-Employment: Trends, Challenges and Policy Responses in the EU', *ILO Working Paper,* 2017.

[100] Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union, COM/2017/0797 final - 2017/0355 (COD).

[101] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186, 11.7.2019, pp. 105–21.

a different turn in the final text of the directive such as it was eventually adopted. The reference to the Court's case-law as the basis for defining the concept of worker has been softened: the CJEU's criteria for determining worker status need only "be taken into account in the implementation of this Directive." Accordingly, the *Lawrie-Blum* doctrine was taken out of commission, and the proposed purpose of laying down "minimum rights that apply to every worker in the Union" was sharply restricted to those workers who have "an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice" (Article 1(2) of Directive 2019/1152). That formula is very ambiguous. For it is unclear to what extent the Court will be allowed to make use of its jurisprudence against the narrow national definitions of employment.

8. Conclusions

The CJEU's case-law has been recognizing some core employment protections beyond the employment contract by giving currency to the use of a broad concept of workers for the purpose of determining the scope of several pieces of EU social legislation. Behind the Court's attitude lies an extensive use of a purposive method of interpretation, supported by the increasing relevance gained by the Union's social objectives, most recently fortified by the CFREU'S entry into force with the Lisbon Treaty.

It was pointed out in particular that the EU concept of worker firmed up by the Court appears to be broader than the one commonly used in national employment tests, this owing to the Court's more relaxed view of the "direction" or control requirement, and its setting aside the element of legal continuity of the employment relationship. This development, then, has led to a concept inclusive of workers commonly regarded as "quasi-subordinate", whose work is characterized by a functional and operational dependence on a principal's business.

In this respect, the CJEU's broader concept of worker is well representative of the ongoing shift toward a new gateway to labour law protection, moving into territory beyond that of traditional subordination. In the current environment—with its steady move toward an "autonomisation" of work - the control test has been losing its primacy in favour of the element of integration into the client's business cycle.[102] This way the CJEU has been pushing the boundaries of employment protection beyond the employment contract. Two significant examples we have looked at are *Danosa* and *Balkaya*: in the former, it was held that the sole member of a capital company's board of directors may be eligible to claim maternity rights under Directive 92/85; in the latter, also involving a capital company's board member, it was likewise held that he enjoyed worker status and was thus protected under Collective Redundancies Directive 98/59.

[102] The trend has been referred to as "autonomisation," in which regard see Ales E., "Subordination at Risk (of 'Autonomisation'): Evidences and Solutions from Three European Countries", *Italian Labour Law e-Journal*, 2019, 12 (1), pp. 66–67, making the case that the effectiveness of labour law is being put at risk by the fact that in many national jurisdictions the employment relationship is still essentially viewed through the lens of "hetero-direction" (control). As a "reasonable solution" to this problem, he proposes depriving that criterion of its traditional exclusivity as a condition for entitling workers to employment protections: in its place, where "autonomised" (independent) work is concerned, we ought to introduce a "notion of (immaterial) integration within the organization," in which integration serves the function of "contributing to the accomplishment of the mission as designed by the organizer, who bears its risk."

Member states, for their part, have no option but to follow the route taken by the CJEU: in determining the scope of employment protections based on EU law, they are to follow the line of interpretation established by the CJEU. And whenever a conforming interpretation is disallowed by domestic law, it falls to the national legislature to change the law, or face the risk that affected workers should sue for damages, being entitled to compensation for the loss resulting from the state's failure to properly implement EU law. Furthermore, when a dispute arises between individuals—and at issue are the EU social rights to nondiscrimination, equal pay between women and men, or annual paid leave—it is even possible to invoke their direct application to the case. Here national courts have the power to set aside national provisions that stand in conflict with EU law.

At the domestic level, for example, economically dependent contractors—including casual workers, but excluding those who are free to set their own working time—will have to be recognized by law as having the right to rest periods, a ceiling on the weekly hours they can be requested to work, and safety and health protections for night work set forth in Working Time Directive 2003/88. The right to annual paid leave, recognized by the same directive and by Article 31(2) CRFEU, cannot be denied even to those who can freely set their own working time, like gig workers. With no exceptions, the same workers are entitled to the rights that come with maternity, e.g., annual leaves, rest periods, and protection from dismissal while on maternity, as well as the specific health and safety protections recognised in Directive 92/58. In keeping with the antitrust provisions contained in Article 101 TFEU, economically dependent and casual workers cannot be barred from collective bargaining. The list of suitable employment rights which can be extended to non-employee workers is still open. As the recent judgment in *Betriebsrat der Ruhrlandklinik* suggests, the scope of employment protection directives is likely to be interpreted by the CJEU in such a way as to extend the use of the EU concept of worker beyond their wording. In keeping with that trend, many Member States will probably be compelled to move beyond the rigid employee / self-emplyed worker dichotomy, and beyond the outmoded all-or-nothing approach by which that approach is informed. This could improve circumstances for an increasing number of underprotected workers who do not fit the "employment" category. And it could also, at the same time, prove beneficial to national courts, which have often been asked to find remedies against the exploitation of workers, when the instruments at the courts' disposal are the often inadequate ones of traditional employment tests: the courts would finally be relieved of the necessity to stretch the concept of employee beyond its reasonable boundaries in order to provide nondependent workers with the employment protections they currently lack.