



NEWEFIN Project

New Employment Forms and Challenges to Industrial Relations – Reference: VS/2018/0046
Improving expertise in the field of industrial relations

Final report: overview and comparatives

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1. Introduction and research approach

Although labour law and social security law have always adapted to labour market developments, the transformation of the labour market has been particularly fast in the last few decades. This derives from the accelerated fragmentation and increased flexibility of the economy, emergence of new business forms like digital platforms and growth of the number of self-employed people in many EU countries. This raises questions about the desired level of protection and regulatory framework for groups like all kinds of flexible workers, platform workers and solo self-employed people. Those responsible for labour market regulations are trying to offer new legal designs of the different 'work relationships'.

A major development in the labour markets in recent decades has been the increasing flexibility of labour contracts and the emergence and further growth of new forms of employment, other than those regulated in full-time, permanent (open-ended) employment contracts. In particular, part-time work has been encouraged by increasing the representation of women in the labour market. Further, self-employment can be an attractive alternative for employees in which they can enjoy more autonomy in the execution of their professions and new platform-based work can be attractive for (younger generations of) workers by allowing them more freedom of engagement. Nevertheless, demands for more flexibility in labour contracting are coming much more from the sides of the employers, from old as well as new (platform based) company sides aiming to reduce labour costs and increase the flexibility of work forces in numbers, working hours and the organisation of tasks. Working with higher proportions of non-standard employment contracts is reducing the employers' risks in responding to changes in economic and technological conditions. These employer strategies and practices have problematic effects in the vulnerability and even precarious positions of flexible workers as regards low and unstable income and unemployment.

Rising numbers of flexible jobs and self-employed people in Europe is not a problem per se. But it becomes problematic if workers in these flexible, atypical contracts are excluded from income protection in case of not having work (any more) or becoming sick or longer term disabled or excluded from access to social security systems altogether. It becomes also problematic if employees are being falsely classified as self-employed by employers in order to circumvent collective agreements, labour

laws (e.g., minimum wages, working hours legislation), employment tax and other employer liabilities implied in the standard contract of employment (Williams & Lapeyre, 2017). Further, parts of the phenomenon of self-employed work raise challenges in terms of low pay, unpredictability of work and working hours and low access to training or career development possibilities.

New business forms like digital platforms seem to ignore existing regulations in the field of employment. This development is referred to as the crowd economy, using terms such as sharing economy, collaborative economy, collaborative consumption, peer-to-peer economy, gig economy, platform economics or on-demand economics. An example of the latter is the provision of transport by the company Uber. Many of these initiatives are linked to the opportunities offered by information technology and at the same time create significant dilemmas for society that are largely linked to labour law, including equal treatment, dismissal protection, decent wages, social dialogue and welfare systems. The emergence of the gig or platform economy has lots of implications for workers, employment and industrial relations in general. Platform work has resulted in increasing numbers of workers with no employment contract, zero-hours contracts, contracts with a very limited number of hours or very short temporary contracts.

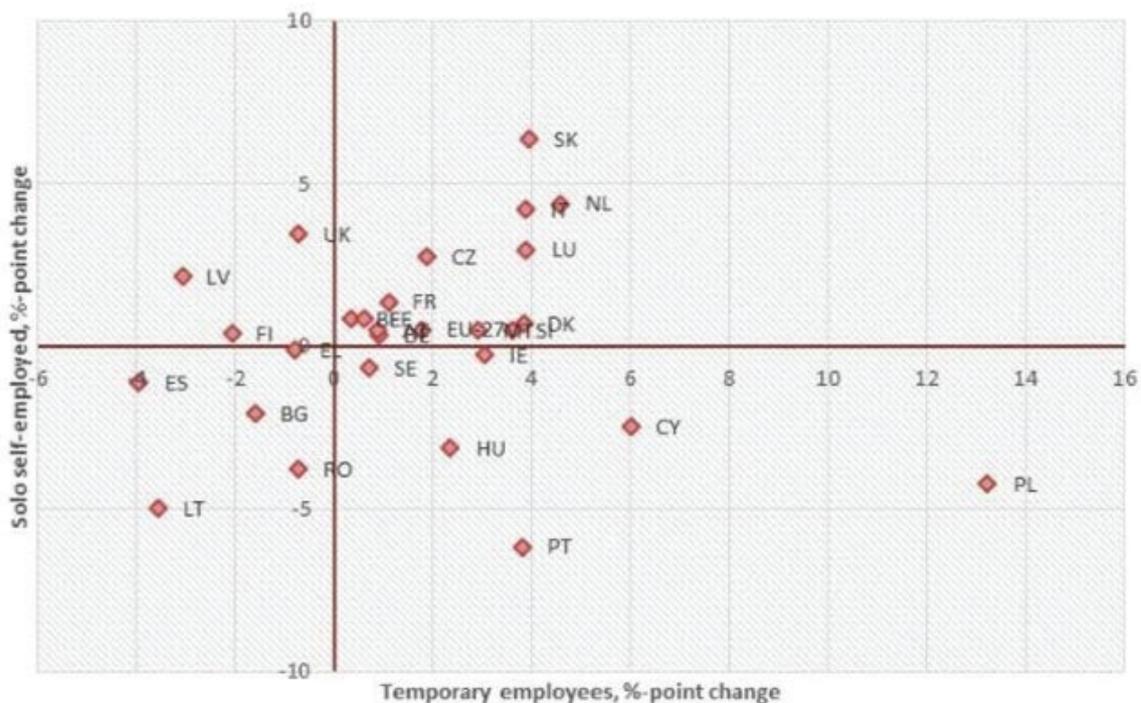
Besides problems of bad terms and conditions of employment and limited access to social protection, there is the problem of low representation of workers in non-standard contracts and self-employed workers (Eurofound, 2020), not only because of low trade union membership among these groups but also because of limitations in representing self-employed workers in collective bargaining and in making collective regulations for this group that do not violate free competition rules. Classifications of self-employed persons as entrepreneurs or as dependent workers are not clear, which hinders their inclusion in social dialogue and collective bargaining.

1.2 New forms of employment in European countries

The shares of non-standard forms of employment in the labour markets – e.g. all forms of employment other than a full-time permanent contract – have increased over the past few decades in European countries, and their use has become more widespread across economic sectors and occupations. The country reports in this project confirm the picture that atypical labour relations are really ‘competing’ with the standard employment relationship in the labour markets of EU countries. However, it is important to stress here that there are marked divergences among the EU States in the use and rise of specific types and forms of non-standard forms of employment. Figure 1 shows that many EU

countries witnessed an increase in temporary employment, as well an increase in solo self-employment in the period 2001-2016. But not all EU Member States did. Both types of flexible employment has grown relatively high in the Netherlands, while France, Germany and Belgium are also in the cluster of countries where both forms of work have grown. In Poland, Portugal, Hungary and Ireland however, the share of temporary employees has grown but not the share of the solo self-employed. In Spain, both types of employment have declined.

Figure 1. The rise in temporary employment and solo self-employment as a share of total employment, 2001-2016

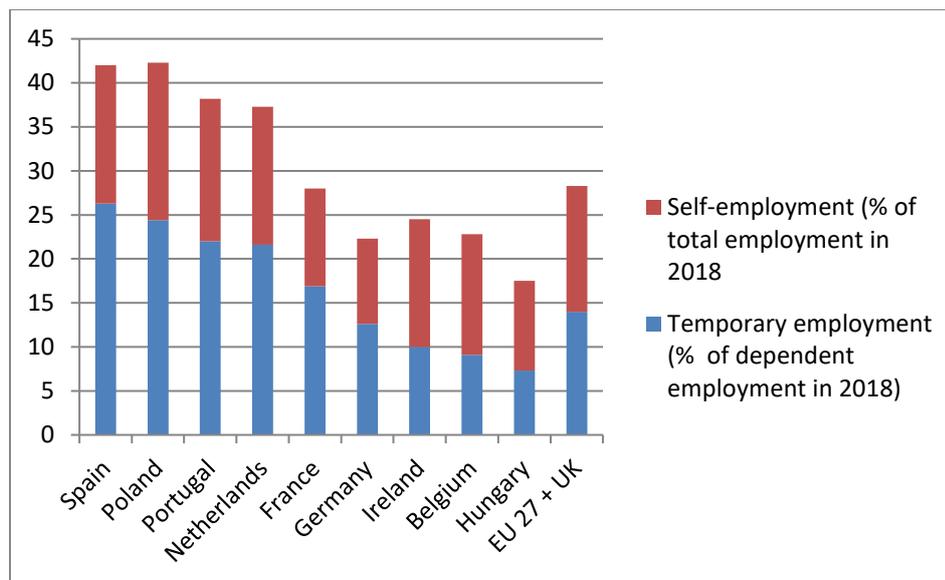


Source: Conen (2018) based on Eurostat/labour Force Survey, 2018.

Also according to recent research from Eurofound (2020), based on the EU Labour Force Survey, it can stressed that figures for all European Member States hide high variations among countries regarding levels and developments in standard and non-standard employment contracts. Considering the countries that are involved in this NEWEFIN project, we see (slightly) rising shares of workers with standard employment contracts ('core employment') in Portugal, Spain, Hungary, Poland and Ireland between 2008-2018. In the Netherlands and Belgium however, these shares of core employment have decreased. In the Netherlands from 39.3% to just 34.4% and in Belgium from 60.2% to 57.5% in the period 2008-2018.

Figure 2 shows more details of the shares of two types of non-standard employment in the NEWEFIN countries in 2018: temporary employment and self-employed people in the labour market. In Spain, Poland, Portugal and the Netherlands, the percentages of temporary employment contracts are high and above 20% of the total dependent employment in 2018. These three countries have also the highest shares of self-employment in their working population. The statistics of Hungary show the highest share of standard employment contracts (79.7%) and lowest shares of temporary employment contracts (7.3%) as well as self-employment (10.2%). Comparing these countries, we cannot conclude a trade-off between temporary employment and self-employment: we see countries with high scores on both types of flexible employment and countries with low scores on both types of flexible work.

Figure 2. Temporary employment and self-employment in the NEWEFIN countries in 2018



Source: EU-LFS (<https://www.eurofound.europa.eu/data/employment>)

It is very difficult to measure the share of workers in the platform economy because of problems of definition and problems of data access (European Parliament, 2017; Pesole et al., 2018; Urzì Brancati et al. 2020; Valenduc & Vendramin, 2016). Academic literature – and also the authors of the NEWEFIN country reports – suggest an emerging phenomenon in the labour market with high impacts on rethinking labour law and employment relations, but still modest in size. In order of the ranking of 2018: Spain, the Netherlands, Portugal, Ireland, (UK) and Germany are the countries with the highest incidence of platform work (Urzì Brancati et al. 2020). France and Hungary (together with other Eastern European countries) show very low numbers (idem). The labour market status of platform workers remains unclear, even to themselves: most of the platform workers seems to see themselves as employees (idem). Groups of platform workers have very flexible wages and working hours

(Valenduc & Vendramin, 2016) and low access to social protection systems because they are not defined as workers or work so few hours that they do not reach the thresholds to access social benefits (European Parliament, 2017).

Also as regards solo self-employed people and workers with all kinds of temporary employment contracts and other flexible contracts (like temporary agency work, zero-hours contracts, on-demand work etc.), adaptations in labour and social security law and social partners' strategies are needed and here again there seem to be significant discrepancies across the countries regarding their access to social protection and inclusion in the social security systems.

Besides stressing the importance of recent, high dynamics in atypical employment, it is also worth drawing the conclusion here that some of the 'new' employment forms covered by the NEWEFIN research project are not that new in many countries. Temporary employment contracts were already in high numbers in the 1990s in Spain and the Netherlands and there is a very long history of people working as solo self-employed in many professions. Again, subcontracting is nothing new. However, digital platform work is by definition new because of technological progress and business models of companies like UBER, DELIVEROO etc. Country reports also conclude that other (hybrid) types of employment than temporary employment contract and self-employment are emerging, such as payrolling or contracts with high variable numbers of hours. In other words, the whole 'container' of atypical and flexible contracts in the labour markets has become more and more diverse and has recently been topped up with new kinds of contracts. Furthermore, flexible forms that emerged in the past can nowadays be growing phenomena (such as subcontracting, temporary agency work and solo self-employment).

1.3 Research approach of NEWEFIN and structure of this report

The main aim of the NEWEFIN project and this Final report is to provide a multilevel comparative analysis of how the challenges to labour law and social protection systems, generated by the above-described trends in labour market flexibility and emerging non-standard/new forms of employment, are addressed through innovative policy responses and social dialogue. The non-standard/new forms of employment that will be addressed in the NEWEFIN project are temporary employment, triangular employment relations, (dependent) self-employment, posted workers, multiple activities companies/subcontracting, and new jobs and platform workers in the gig economy.

This final and comparative report is based on analyses in the Netherlands, Germany, Spain, Ireland, Portugal, Belgium, Poland, Hungary and France. The NEWEFIN research team has examined the development of these new forms of work at Member State level – in particular in the Netherlands, Germany, Spain, Ireland, Portugal, Belgium, Poland, Hungary and France – in the light of (i) the impact of this trend on the levels of labour/social protection of workers, (ii) the risks to the sustainability and affordability of the welfare system and (iii) the consequences for industrial relations and social dialogue in general. The NEWEFIN research project has also investigated the role and initiatives of the social partners at EU and national levels in the reform of collective bargaining systems to adapt them to the above-described new forms of employment and the changing composition of the workforce.

The research analyses and the structure of this comparative report includes the following main dimensions:

- EU dimension of the research in chapter 2 of this report. The questions here are: what is the vision of the EU on the research issues and how are the EU institutions reacting to the trend of increasing labour market flexibility/advancement of non-standard employment? Further, this chapter addresses several legal reforms and initiatives in the social field that have been recently proposed by the Commission;
- cross-country comparisons that examine how national legal systems deal with fixed-term and temporary employment contracts, how dependent and/or bogus self-employment is defined, and how new forms of employment such as gig economy jobs and crowd-funding are regulated. This is the subject of chapter 3 of this report;
- cross-country comparisons about the social partners' responses to increasing the flexibility of the labour market and to the emergence and growth of new forms of employment in chapter 3. This analysis includes a scan of new and innovative strategies of trade unions, employers' associations, other collective bargaining parties and maybe new actors in industrial relations regarding all kinds of flex workers, self-employed and platform workers;
- in chapter 5, bridges are made between the EU dimension and the Member States;
- chapter 6 contains general conclusions and recommendations.

1.4 Sources and references to the eight/nine country reports

In chapters 3 and 4 of this report, we present and conclude the key findings of the eight/nine country reports in comparative and overview perspectives. The country reports present (very) detailed

information and can be accessed at the website of AIAS-HIS under the project NEWEFIN: <https://aias-hsi.uva.nl/en/projects-a-z/newefin/newefin-project.html>.

All information in chapters 3 and 4 comes directly from the country reports, even when we do not make the references in the texts of chapters 3 and 4. The country reports were written by:

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- A. Kun – Hungary;
- M. Wróblewski & M. Kuruś – Poland.

Chapter 2 is based on interviews and literature research in the NEWEFIN project at the EU level. Chapter 5 combines the research carried out by the team in the NEWEFIN-countries with desk research at EU. Chapter 6 brings together all the research and findings in the NEWEFIN project in the country reports and in this final report in the final recommendations.

2. European dimension

The European institutions have recognised that from an economic and social standpoint, the term ‘uberisation’ has actually emerged¹. The advantages of the collaborative economy have been assessed by the European Union: it generates new employment opportunities, revenues beyond traditional linear employment relationships, and it enables people to work according to flexible arrangements. This makes it possible for them to become economically active where more traditional forms of employment are not suitable or available to them. At the same time, the more flexible work arrangements may not be as regular or stable as traditional employment relationships. This may create uncertainty as to applicable rights and the level of social protection. Working arrangements in the context of the collaborative economy are often based on individual tasks performed on an ad hoc basis rather than tasks regularly performed in a pre-defined environment and time frame².

2.1. The real possibilities of the European Union to regulate platform work at an EU level

While most labour law falls under national competence, the European Union has nonetheless developed certain minimum standards in the field of social policy. In accordance with its competences, set in Article 153 of the Treaty on the Functioning of the Union EU, labour law includes Directives regulating workers’ rights and obligations. They refer to limits on working time, including the right to paid annual leave, to daily and weekly rest and protection in case of night work, as well as information on individual employment conditions, rights for posted workers, prohibition of discrimination against workers in non-standard forms of employment (e.g. part-time, fixed-term or workers employed under temporary agencies), protection in case of insolvency of employers, protection against discrimination on protected grounds such as gender, ethnicity, sexual orientation. They also include protection in case of collective redundancies or in cases of transfer of undertakings or of cross-border mergers. It provides for the involvement of workers — information and consultation, as well as board-level worker participation in some circumstances. In the area of health and safety at work, general

¹ Judgment of the Court (Grand Chamber) of 20 December 2017 (request for a preliminary ruling from the Juzgado de lo Mercantil No 3 de Barcelona — Spain) — Asociación Profesional Élite Taxi v Uber Systems Spain SL (Case C-434/15).

² Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions A European agenda for the collaborative economy. Brussels, 2.6.2016 COM (2016) 356 final.

principles concern the prevention of occupational risks and the protection of the safety and health of workers in the workplace. In general, EU labour law only sets minimum standards and does not cover all aspects of social legislation applicable to work relationships, which implies that Member States may in principle set higher ones in their national legislation³.

The example of platform work is not an exception to the competences of the European Union because the issue is an element of Labour Law. However, the emergency of platform work means a disruption in comparison with the traditional approach to the employment relationship.

2.2. The steps adopted by the European Union to address platform work

The European Union has adopted some steps in order to address platform work. Firstly, the European Union have tried to clarify the types of platform work and the activity provided by them. Secondly, it has approved a new Directive which may be applicable to platform workers. The approach of the European Union is mixed in the sense that soft and hard law instruments are used.

The clarification of platform work

The European Union has provided some elements in order to clarify the meaning of digital platforms. Firstly, the European Commission has established the difference between digital platforms that only provide information and digital platforms that provide services as such as a transport service. As long as collaborative platforms provide a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services, they are providing an information society service. Therefore, they cannot be subjected to prior authorisations or any equivalent requirements that are specifically and exclusively targeting those services. However, there may be cases in which collaborative platforms can be considered as offering other services in addition to the information society services that they offer as intermediaries between the providers of underlying services and their users. In particular, in certain circumstances, a platform may also be a provider of the underlying service (e.g. transport or short-term rental service).

Whether a collaborative platform also provides the underlying service will normally have to be established on a case-by-case basis. However, the European Commission has proposed some criteria

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A European agenda for the collaborative economy. Brussels, 2.6.2016 COM (2016) 356 final.

which may contribute towards clarification. The level of control or influence that the collaborative platform exerts over the provider of such services will generally be of significant importance. It can specifically be established in light of the following key criteria. Price: does the collaborative platform set the final price to be paid by the user, as the recipient of the underlying service? Where the collaborative platform is only recommending a price or where the underlying services provider is otherwise free to adapt the price set by a collaborative platform, this indicates that this criterion may not be met. Other key contractual terms: does the collaborative platform set terms and conditions, other than price, which determine the contractual relationship between the underlying services provider and the user (such as for example setting mandatory instructions for the provision of the underlying service, including any obligation to provide the service)? Ownership of key assets: does the collaborative platform own the key assets used to provide the underlying service?

According to the European Commission, when these three criteria are all met, there are strong indications that the collaborative platform exercises significant influence or control over the provider of the underlying service, which may in turn indicate that it should be considered as also providing the underlying service (in addition to an information society service). Fundamentally, Employment Law is involved when the platform work provides more than information and hire to collaborators in order to carry out the service.

Secondly, the Court of Justice of the European Union (CJEU), in two judgments, has clarified the main activity of some platforms. The Judgment of the Court (Grand Chamber) of 20 December 2017⁴ concluded that the Article 56 TFEU - read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, referred to by Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') - must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect non-professional drivers using their own vehicle with persons who wish to make urban journeys, by means of a smart phone application and for remuneration, must be regarded as being inherently linked to a

⁴ Request for a preliminary ruling from the Juzgado de lo Mercantil No 3 de Barcelona — Spain) — Asociación Profesional Élite Taxi v Uber Systems Spain SL (Case C-434/15).

transport service and, accordingly, must be classified as ‘a service in the field of transport’ within the meaning of Article 58(1) TFEU. Consequently, such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

It is interesting to point out that the above finding does not, however, mean that Uber’s drivers must necessarily be regarded as its employees. The company may very well provide its services through independent traders who act on its behalf as subcontractors. The controversy surrounding the status of drivers with respect to Uber, which has already resulted in court judgments in some Member States, is wholly unrelated to the legal questions before the Court in this case⁵.

In the second judgment, on 10 April 2018, the Court of Justice of the European Union (Grand Chamber)⁶, confirmed the previous judgment concluding that Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998, laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, and Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, must be interpreted as meaning that a provision of national law that lays down criminal penalties for the organisation of a system for putting customers in contact with persons carrying passengers by road for remuneration using vehicles with fewer than 10 seats, without being authorised to do so, is a ‘service in the field of transport’ insofar as it is an intermediary service that is provided by means of a smart phone application and forms an integral part of an overall service, the principal element of which is the transport service. Such a service is excluded from the scope of application of those Directives.

The Directive on Transparent and Predictable Working Conditions

The 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 is the first piece of EU legislation explicitly to address the risks of variable work schedules such as on-demand work, platform work or zero-hour contracts.

⁵ Opinion of Advocate General Szpunar delivered on 11 May 2017, Case C-434/15.

⁶ Case C-320/16.

In recital 8 of the new Directive, the situation of platform work is mentioned as well as these workers may be considered as employees and be covered by the new regulation: "The Court of Justice of the European Union (Court of Justice) has established criteria for determining the status of a worker. The interpretation of the Court of Justice of those criteria should be taken into account in the implementation of this Directive. Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive. Genuinely self-employed persons should not fall within the scope of this Directive since they do not fulfil those criteria. The abuse of the status of self-employed persons, as defined in national law, either at national level or in cross-border situations, is a form of falsely declared work that is frequently associated with undeclared work. Bogus self-employment occurs when a person is declared to be self-employed while fulfilling the conditions characteristic of an employment relationship, in order to avoid certain legal or fiscal obligations. Such persons should fall within the scope of this Directive. The determination of the existence of an employment relationship should be guided by the facts relating to the actual performance of the work and not by the parties' description of the relationship".

One of the most significant protections for platform workers and on-demand workers is developed by article 11 of this new Directive. In particular, article 11 sets out some complementary measures for on-demand contracts where Member States allow for the use of on-demand or similar employment contracts. The Member States shall take one or more of the following measures to prevent abusive practices: "(a) limitations to the use and duration of on-demand or similar employment contracts; (b) rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period; (c) other equivalent measures that ensure effective prevention of abusive practices. Member States shall inform the Commission of such measures."

European trade unions have recognised that this Directive is certainly a progressive step, yet it replicates some of the paradoxes of current EU employment policy. It juggles a high level of protection for workers with greater flexibility for employers and a greater predictability of work with no barriers to the development of new forms of work. Thus, the revised Directive does not contain a ban on zero-hours contracts, but instead looks for solutions to provide a modicum of protection to workers and, at least to some extent, to increase the predictability of their work yet without really acting on the issue of the variability of hours. Meanwhile, the intensified demands for increased flexibility in the labour market also accentuate the problem of workers in precarious positions who are rarely able to

avail themselves of their formal rights and thus access the protections promised by existing EU employment regulations⁷.

⁷ ETUI, Regulating uncertainty: variable work schedules and zero-hour work in EU employment policy, no. 5, 2019. For several years now, the European Trade Union Institute (ETUI) has been focusing its research on the digitalisation of the economy and on the platform economy, mainly from a work and employment perspective. What working conditions are platform workers subjected to? How are they trying to organise? What rights do they have? What can they do to uphold them? ETUI, The platform economy and social law: Key issues in comparative perspective, working paper, 2019.10.

3. Comparative dimension in legal frameworks and legal responses

3.1 Introduction

The country reports show that the legal framework of the countries which are part of the Newefin research project differ substantially (and sometimes less substantially) in the areas of labour and social security law. Nonetheless, there are also important similarities in the legal frameworks which, in the context of this study on (the regulation of) new employment forms, lead to similar challenges for the different legislatures in the countries concerned. This introduction touches on four topics which will be explored in more detail in the following paragraphs and will also form the structure of this comparison. These topics can also be seen as the various tracks along which the discussion about regulating new employment forms travels.

Track 1

It follows from the studies undertaken that in all of the countries involved, the legal framework is built around or upon the full-time employment contract for an indefinite period of time, which serves as the 'standard' or norm. This standard is often referred to as typical and labour relationships that deviate from the norm are then logically qualified as atypical. The examined legal frameworks already take account of the existence of some atypical forms of work. These atypical forms of work are often classified as special employment contracts or relationships to which only parts of the standard legal framework apply or from which certain exceptions are permitted or introduced. Think about temporary agency work or on-call work. The way in which atypical work is regulated differs from country to country and depends to a large extent on specific socio-economic and political circumstances. New employment forms often refer to forms of work or employment relationships that may not have been regulated yet (or not yet sufficiently regulated) or have not been sufficiently taken into account in the existing legal framework and that therefore create tension within the system. A striking example of a new form of work is platform work. In discussions about regulating new employment forms and which rules should apply to these forms, the standard legal framework often plays an important role as the starting point in those regulatory discussions.

Track 2

The second track concerns the definition of employee within the different legal frameworks. It follows from the studies that the definition of employee appears to be an important facet in discussions about regulating new employment forms and furthermore that all countries apply similar definitions of an employee or an employment contract which, in short, mean that employment is deemed to exist when

work is carried out under the authority of another person in return for remuneration. Subordination is the most distinctive criterion within the judicial definitions. With the emergence of new forms of work, such as platform work, the question arises in all countries first and foremost whether the new form of work can (within the law) be classified as (special) employment or not.

Track 3

The third track concerns the distinction in the existing legal frameworks between employees on the one hand and the self-employed on the other hand. The different studies show that all legal frameworks have what may be termed a binary system in which there is either an employment contract and employee status or a service contract and entrepreneurship. Although there is no explicit intermediate category in the legal frameworks, most legal frameworks have some sort of an intermediate position for dependent self-employed workers, in the sense that they fall within the scope of a part of the national labour and social security law. Economically dependent self-employed workers are sometimes entitled to holiday leave and protection against sickness and incapacity for work and fall within the scope of health and safety. In all of the countries surveyed, certain groups of economically dependent self-employed workers are thus subject to labour and social security standards to a greater or lesser extent. The emergence of new groups of workers whose status cannot clearly be classified as being an employee creates renewed attention to the introduction of an intermediate category. The question is often whether the extension of labour and social security law to some groups of solo self-employed is appropriate and desirable? Discussion on this topic often takes place in parallel with the discussion about the classification of the employee status of new workers. Tracks 2 and 3 are to a large extent linked in this sense.

Track 4

The last track concerns the improper use and abuse of special employment contracts and sham constructions. Counteracting the misuse, abuse and sham constructions is a challenge for all countries and this challenge increases as the use of atypical forms of work increases. In this context, the different studies have paid special attention to forms of atypical work that are not new in themselves, but that are growing in size and are now used in sectors, enterprises and professions where this was previously not the case. Think, for example, of the growth of contracting (contract of service) in Spain and the Netherlands. The avoidance of costs and risks can be dominant in the choice by employers and companies of how to design the working relationship in practice and this can lead to unfair competition and an uneven playing field. It is considered undesirable in the various studies.

3.2 Typical and atypical work

It follows from the different studies that the legal framework of the countries concerned are all based upon the full-time employment contract for an indefinite period of time. This type of work or this type of labour relationship is often referred to as typical or standard and all forms of work or labour relations that deviate from this norm are then logically qualified as atypical or non-standard or flexible. "Traditionally, labour law has widely been based on the standard employment relationship, which is defined as a job that is continuous, full-time, with a direct relationship between employer and employee. A job is considered non-standard if its features differ from those of standard employment." (Dutch country report, page 1)

In Germany, for example, the core element of the debate on atypical employment is the question what constitutes 'standard employment'. "In a normative sense, they list a number of criteria including 1) a dependent employment relationship, 2) with a full-time character, 3) open-ended, 4) offering a regular and living wage, 5) offering social security protection and 6) a direct activity in the firm one concluded the contract with. Based on those criteria, other flexible or atypical working arrangements differ from that ideal, e.g. a limited amount of hours worked, for part-time workers usually a fixed number of hours below full-time; an employment contract for a fixed period of time (fixed-term workers); in a different kind of employment relationship (temporary agency workers employed by an agency and seconded to a company for a certain period of time working alongside permanent and other company staff); and finally, marginal workers working for short periods and/or minimum or low wages earning marginal incomes." (German country report, page 11)

Besides that, it needs to be stressed that within the existing legal frameworks, it is in general a given fact that atypical labour relationships or atypical forms of work that are already regulated in the existing legal framework are most often classed as special employment relationships. So the workers in these forms of work do qualify as employees and as a result they enjoy, in principle, all employment and social insurance legislation and regulations in full, unless exceptions are made within the law. Portugal and the Netherlands can be given as examples on this. "Social protection provisions for workers in standard and non-standard labour contracts are defined by the general regime of social protection. Full-time and part-time employees, in open-ended or fixed-term contracts, temporary agency workers, casual and seasonal workers and paid trainees are all, in principle, fully covered by the wide range of existing benefits: healthcare, sickness, maternity/paternity, preretirement and old age pensions, survivors' pensions and death grants, unemployment benefits, social assistance, long-term care and invalidity benefits, and accidents at work and occupational injuries benefits." (Portuguese country report, page 13).

Netherlands country report (table 5):

Contract classification	Employment contract				Contract for services		
Employed?	Directly employed by employer			Outsourced to a third party (triangular relationship)		Not employed: principal - contractor	
Type	Permanent	Fixed term	On-call	Agency	Payrolling	Self-employed (as professional or business)	Self-employed (not a business or profession)

As soon as non-standard work is classed as employment within the legal framework, the question inevitably arises whether all employment law and the whole social security regime should apply, or whether exceptions to the law and this regime are appropriate and justifiable. The different studies show that in the process of regulating atypical work, the legislatures (and of course this is a challenge) look for a framework that fits the atypical form of work and at the same time strikes a balance between flexibility and security. What this framework looks like will vary according to the nature of the relationship and the purpose of the kind of work in the labour market. For example, in the case of fixed-term contracts, the right of dismissal does not apply in full as it does in the case of open-ended contracts, and exceptions are also permitted to the right of dismissal in the case of temporary agency work because of the allocation and stepping-stone function of temporary agency work.

It also follows from the studies undertaken that some forms of non-standard work do occur in all countries and are already part of the legal framework, such as part-time work, temporary work and temporary agency work. In addition, it follows from the studies that each system has – besides the forms mentioned already – some special atypical forms of work. Germany, for example, has the mini-job (earnings up to a maximum of EUR 450) which is a special form of part-time work. "In this form of employment, workers are not included in the usual social security insurance schemes for sickness, long-term care and unemployment and the employer pays a reduced fixed amount for social security contributions and deducts reduced tax rate." (German country report, page 15) The

Belgian legal framework has the flexi-job and the untaxed second job. 'A flexi-job includes the possibility of doing a second job as well as your own job. You need to have an 4/5 employment in a job other than the flexi-job. The Act of 25 December 2017 has extended the scope of the flexi-jobs to retired people. Flexi-jobs offer the possibility for this group of employees or retired persons to earn some money without being taxed for it. The wage costs equals the earnings of the flexi-job worker. Furthermore, you do not have to declare your revenue and you build up social security rights with regard to pension, annual leave and unemployment benefits. The application of a flexi-job is limited to certain sectors. [...] Another important innovation under Belgian law includes the introduction of the possibility to make some untaxed extra money. The Act of 18 July 2018 introduced the opportunity for persons with the status of employees, public servants, self-employed or pensioners to earn up to EUR 6000 a year without being taxed for it." (Belgian country report, pages 34-36)

3.3 Definition of employment

Regulating new employment forms (and the revision of the framework of already existing employment forms) is strongly connected to the national definition of the employment contract and employee. It follows from the different country reports that all countries use a similar definition of employee and employment which, in short, means that employment is deemed to exist when work is carried out under the authority of another person in return for remuneration. Subordination is the most distinctive criterion within the judicial definitions.

For example, Hungary has a brief statutory definition in the Labour Code. "Accordingly, an employment relationship is deemed established by entering into an employment contract. Under an employment contract: a) the employee is required to work as instructed by the employer; b) the employer is required to provide work for the employee and to pay wages." (Hungarian country report, page 28). In the Netherlands, 'an agreement will be classified as an employment contract if it meets the following three criteria: 1) labour: the employee provides services; 2) wage: the employer pays the employee for the work; 3) a subordinate relationship.' (Dutch country report)

With the emergence of new forms of work such as platform work, the question that arises in all countries is first and foremost whether or not the new form of work can legally be classified as (special) employment. Regarding the classification, it follows from the studies that in all countries, in the event of a dispute or lack of clarity between contracting parties about the status of the contractual relationship, it is left to court to give a final judgment. Judges weigh all relevant facts and circumstances and no single aspect is decisive. It is often the result of what can be described as a

holistic weighing. It also follows from the studies that, as a rule, the intention of parties plays a role in the classification, but at the same time it is not clear from the studies how big that role is.

In Belgium, article 337/2 of The Employment Relations Act of 27 December 2006 introduces four major criteria to distinguish the employment relationship from the contractual relationship of a service provider. Those four criteria are the following:

- the will of the parties as expressed in their agreement;
- the freedom to organise the work time;
- the freedom to organise the work;
- the possibility to exercise hierarchical control.

Depending on this criteria, judges can decide whether or not a contract should be classed as a contract of employment. (Belgian country report page 30)

In Spain, the general definition of employee is vague, based on factors and aspects that are not formal, exact or mathematical. It means that the factors that have be taken into consideration are, on the whole, substantial and real facts. ‘Therefore, the label, what the parties themselves say in the contract about their own relationship, is almost (but not completely) irrelevant. In conclusion, legal classification will depend on the result of a multi-factorial test that will be based on the facts emerging from the relationship between the platform and the service provider (‘collaborator’).’ (Spanish country report, page 6).

In the Netherlands, an employment contract can exist even when parties give the relationship a different name. The court takes all circumstances of the case in relation to each other in account. Since an employment relationship implies the existence of a hierarchical relationship between the worker and his employer, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties. Not only the intention of the parties is relevant, but also the way the labour relationship is performed. Relevant elements are the way the worker gets paid, whether the worker bears entrepreneurial risks and whether or not the worker is free to decide when and where he provides his services. (Dutch country report)

It also follows from the studies that the criteria and aspects taken into account by judges when balancing their decisions are more or less comparable. Examples are: how free the worker is to determine his own working time and work content and whether he has more freedom on these

issues than an employee; the extent to which the worker is part of the organisation; the extent to which the worker is subordinate and receives instructions; the extent to which the worker makes use of the organisation's means of production; the extent to which the worker can arrange to be deputised and how free the worker is to refuse work. Besides this, studies state that these criteria have been shaped and elaborated in case law. There has been partial codification in some countries. Hungary is a good example of this way of codification and in Hungary the criteria have been divided into primary and subsidiary criteria. There is a tradition of differentiating between primary and secondary evaluation criteria of an employment relationship in Hungary. "The system of primary and secondary criteria was introduced by a Government Decree in 2005, which was a non-binding policy document ("Guidelines") issued by the Ministries of Employment and Finance to introduce a uniform interpretation by labour and tax inspectors: Joint Decree of the Ministry of Employment and the Ministry of Finance No. 7001/2005 on the evaluation of legal employment relationships. This decree was used by the tax and labour authorities as well as by labour courts. The decree was repealed on 1 January 2011 (by Act No. 130 of 2010). Even though these "Guidelines" are not formally in force any more, judicial practice still relies on them heavily. This set of guidelines has never been a legally binding formal legal source in itself. It is rather a form of "soft law". The "Guidelines" were trying to accurately define the inherent attributes (or tests) of a dependent, traditional employment relationship. By doing so they were also facilitating a more accurate and thorough legal practice concerning the differentiation among the various types of contracts eventually underlying a work-related relationship. This catalogue of criteria is of great assistance and importance for the users of law as it lists clear-cut decisive factors in one single document that can be used to make authority supervision more efficient. The "Guidelines" define a list of primary and secondary criteria based on formerly published decisions of the Supreme Court." (Hungarian country report, page 28)

By answering the question whether a worker qualifies as an employee, the courts take the definition of the employment contract as the starting point and thus assess whether the worker and the working relationship satisfy the elements of the national definition of employment. At the same time, it follows from the studies that all countries have what is known as a binary system in which work is carried out either under an employment contract as an employee or in the context of the exercise of an undertaking. This binary system, which will be discussed in more detail in the next section, means that if an employment relationship does not qualify as employment and a worker does not qualify as an employee, he is thus classed as an entrepreneur (self-employed) and vice versa.

In this context and because of the lack of one-to-one real-time employer instructions in new employment forms, which makes it hard to determine whether or not a worker is in a subordinate relationship, judges are increasingly willing to look for new criteria and take a somewhat new starting point when classifying a working relationship. Some judges look at criteria that can indicate entrepreneurship or not. Using more criteria that are connected to entrepreneurship in the process of determining whether or not a worker is an employee can be seen as a modern way to look at subordination and employment.

The country report shows that elements indicating the presence or absence of an undertaking are also taken into account in Ireland in the classification of the employment contract. "During the discussions on the Social Partnership agreement known as the *Programme for Prosperity and Fairness*, concern was expressed that there were increasing numbers of individuals categorised as "self-employed" where the indicators may be that "employee" status would be more appropriate. Accordingly, in 2001, the Government established the Employment Status Group which comprised representatives from the relevant government Departments, the Revenue Commissioners and the Social Partners. The Group issued a *Code of Practice on determining employment status*, the express purpose of which was "to eliminate misconceptions and provide clarity". [...] The Code of Practice sets out a variety of criteria on whether an individual is an employee or is self-employed but emphasises the importance of looking at the job as a whole and the reality of the relationship. The overriding consideration "will always be whether the person performing the work does so as a person in business on their own account" and the fundamental question is whether that person is "a free agent with an economic independence of the person engaging the service?"

The Code of Practice indicates that an individual would normally be self-employed if he or she:

- owns his or her own business;
- is exposed to financial risk, by having to bear the cost of making good faulty or substandard work carried out under the contract;
- assumes responsibility for investment and management in the enterprise;
- has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks;
- has control over what is done, how it is done, when and where it is done and whether he or she does it personally;
- is free to have other people, on his or her terms, do the work which has been agreed to be undertaken;
- can provide the same services to more than one person or business at the same time;

- provides the materials, equipment and/or machinery for the job, other than the small tools of the trade;
- provides his or her own insurance cover." (Ireland country report, page 19-20)

In the Netherlands, support for this 'modern' approach can be found in the advice of the Borstlap committee set up by the Minister of Social Affairs and Employment.⁸

There is no ready-made answer to the question whether platform workers in the various countries can be regarded as employees. In the first place, the modalities of the work differ for each platform in such a way that what applies to one platform worker does not automatically apply to another platform worker. Secondly, although the way courts classify workers in the different countries is similar, the outcomes differ because the classification of an employment relationship often involves details and nuances. Think, for example, of the influence of the parties' intentions on this. Finally, the answer to the classification question is provided by a holistic weighing of facts and circumstances carried out by the court. Although the platform worker is not explicitly designated an employee by the legislature in the legal framework in any of the countries, it follows from the studies that judges in the various countries tend to classify platform workers as employees.

3.4 Binary system

As mentioned above, it follows from the studies that the countries surveyed all have what is termed a binary system in which there is either an employment contract and employee status or a contract of service and entrepreneurship.

A few examples to illustrate:

Hungary: "As was mentioned before, the Hungarian structure of working relationships is based on a binary system of employment contracts and civil law contracts (see the Labour Code and the Civil Code); there is no 'third category'." (Hungary country report, page 30).

Ireland: 'Employment relationships fall into two broad categories, namely employment under a contract of service or under a contract for services. If the former, the person is an "employee"

⁸ Final report by the Commission on Regulation of Labour: "In wat voor land willen wij werken? Naar een nieuw ontwerp voor de regulering van werk "[*What kind of country do we want to work in? Towards a new design for the regulation of employment, (in Dutch)*], 23 January 2020.

whereas, if the latter, the person is self-employed as an “independent contractor”." (Ireland country report, page 18).

In a binary system, self-employed persons who do not work on the basis of an employment contract cannot, in principle, claim protection under employment law against e.g. dismissal and do not have any social security claims.

To illustrate:

"Generally speaking, German law makes a strict distinction as regards labour law and social security protection between dependent employees on the one hand and self-employed persons on the other hand. The former are covered by both labour law and social security, while the latter are, generally speaking, not covered (although certain social security regulations may apply to some groups among the self-employed, see below)." (German country report, page 21)

It follows from the studies that the complete absence of labour law protection and lack of social security entitlements is considered undesirable for some groups of self-employed persons, like dependant self-employed. Although there is no explicit intermediate category in most legal frameworks, in most legal frameworks dependent self-employed workers do occupy some sort of an intermediate position, in the sense that they fall within the scope of a part of the national labour and social security law. Economically dependent self-employed workers are sometimes entitled to holiday leave and protection against sickness and incapacity for work and fall within the scope of health and safety. In all the countries surveyed, certain groups of economically dependent self-employed workers are thus subject to labour and social security standards to a greater or lesser extent.

Some examples to illustrate:

Spain: "Spanish Law recognises two types of independent contracts. First of all, the one used in practice so far is to identify them as independent contractors, that is to say self-employed who are in business on their own account. This implies the absence of any specific guarantees beyond the basic ones recognised by common private law between parties or contained in the Self-Employed Workers' Statute (Act 20/2007). Secondly, service-providers could be classified as economically-dependent self-employed workers [trabajadores autónomos económicamente dependientes, TRADEs]. The institutionalisation of the TRADE figure is justified in the preamble of the Self-

employed Workers Statute as a result of the diversity of self-employment existing in Spain. [...] Self-Employed Workers Statute conferred TRADE status a higher social protection compared to genuine self-employment in relation to three aspects." (Spain country report, page 6)

Portugal: "Although, until 2012, self-employed were excluded from unemployment benefit provisions, some steps in that direction have been taken, configuring the emergence of a third "in-between" category between employees and self-employed (Eurofound, 2017) i.e. the "self-employed economically dependent" (Silva e Pereira, 2012; Perista and Baptista, 2017)." (Portugal country report, page 15).

Germany:

	Part-time and fixed-term	Marginal part-time/mini-jobs	Temp agency workers	Employee-like persons	self-employed
Labour law	Yes	Yes	Yes	Partially	No
Social security	Yes (Per rato coverage for part-time)	Partially, special rules apply to mini-jobs	Yes	Yes (home-workers), partially for others	Responsible for risk coverage

(Germany country report, page 21)

The emergence of new groups of workers whose status cannot clearly be classified as being an employee in a legal sense is creating renewed attention for the introduction of an intermediate category. The question is often whether the extension of labour and social security law to some groups of solo self-employed is appropriate and desirable? Discussion on this topic often takes place in parallel with the discussion about the classification of the employee status of new workers. Tracks 2 and 3 are to a large extent linked in this sense.

3.5 Abuse, misuse and sham

The last track concerns the improper use and abuse of special employment contracts and sham constructions. Counteracting the misuse, abuse and sham constructions is a challenge for all countries and this challenge increases as the use of atypical forms of work increases. In this context, the different studies have paid special attention to forms of atypical work that are not new in

themselves, but that are growing in size and are used in sectors, enterprises and professions now where this was previously not the case. Think, for example, of the growth of contracting (contract of service) in Spain and the Netherlands. The avoidance of costs and risks can be dominant in the choice by employers and companies of the design of the working relationship in practice, when atypical forms of work are permitted on a broad scale. This can lead to unfair competition and an uneven playing field and is considered undesirable in the various studies. Many of the reforms in the legal framework in the different countries in recent years tend to restrict atypical work, in the sense that these forms can only being used for the intended purpose and at the same time legislatures have tightened the exceptions to the standard legal framework for atypical work in order to narrow the gap between typical an atypical work.

4. Comparative dimensions in responses and strategies of the social partners ⁹

4.1 Challenges in responding to new forms of employment

All country reports conclude that the traditional actors in industrial relations systems are experiencing great difficulty in keeping a grip on the emergence and rise in new, flexible employment forms in labour markets. In general, one can say that all legislatures always lag behind new phenomena in society, but when it comes to atypical labour contracts in the labour market it seems to take a really long time to define strategic responses, not to mention effective interventions. In Spain for example, employers, trade unions and governments are highly aware of the fact that they have been ‘champions’ of temporary employment since 1990. Social partners have over the last 10 years repeated the same desire for ‘an adequate lower use of temporary contracts’, but statistics on employment contracts continue to show high proportions of temporary contracts. Also the impact of several reforms by the Spanish government has been very limited in labour market practices. The same can be concluded for low implementation of the social partners’ and governments’ recommendations and attempts to limit the use of flexible and temporary labour contracts in the Netherlands and in Germany. Furthermore, the report on the Netherlands illustrates a problematic mechanism; once a certain kind of flexible labour contract is better regulated, these contracts can be replaced by using less well-regulated (cheaper) work contracts. For example, because of the ‘success’ of the social partners in regulating temporary agency work in the Netherlands during the 1990s, using temporary agency contracts became more expensive and employers started to look for alternatives, such as ‘payrolling’ or outsourcing and removing jobs to subcontractors.

The difficulties in social dialogue regarding platform work are also caused by the lack of clarity of the existing regulations and in the classifications of employment and labour relationships, which is illustrated well in the cab drivers’ sector and Uber (see e.g. the Belgium and Netherlands reports). Also in other sectors – such as in Health, Construction, Hotels and restaurants and Transport – social partners are being challenged by (increasing) grey zones between self-employed people and

⁹ All information in this chapter comes directly from the country reports in the NEWEFIN project, even when there is no reference made in the text. Sources: N. Jansen & I. Zaal with the cooperation of F. Tros (report on The Netherlands); JR. Mercader Uguina, F.J. Gómez Abelleira, A.B. Muñoz Ruiz & P. Gimeno Díaz de Atauri (report on Spain); M. da Paz Campos Lima & H. Perista (report on Portugal); A. De Becker & M. De Coninck (report on Belgium); H. Bennaars and N.E. Ramos Martin (report on France); S. Stiller (report on Germany); A. Kerr & R. Mooney (report on Ireland); A. Kun (report on Hungary); M. Wróblewski & M. Kuruś (report on Poland). This chapter 4 is written by F.H. Tros.

employees and by conversions in work from employment contracts into contracts for the self-employed.

An extra problem for social dialogue is that this group of solo self-employed people – including those working in dependent and/or subordinate working condition – does not fit into the traditional dichotomy of organisations of employers (capital) versus workers (labour). Some associations for self-employed workers are more of a business organisation, others are more of a trade union striving for better working conditions. The Dutch ‘polder model’ tried to create some sort of solution by including two organisations for solo self-employed people in the traditional national tripartite advisory body ‘The Social and Economic Council of the Netherlands’ (SER); one related to the seats of the trade unions, the other to the seats of the employers.

A specific source of tension between trade unions and employers’ organisations can be seen in France where the high turnover of (very) short-term contracts, with open access to unemployment benefits, impacts significantly on the overall unemployment benefit budgetary balance. All unions were in favour of these contracts being subject to higher rates of employers’ contributions, whereas employers were against this.

Trade unions in the NEWEFIN countries have become increasingly aware of labour market schisms through (growing) inequality between more secure and better paid employment on the one hand and less secure and precarious working situations on the other hand. The kind of contracts and forms of employment are very important factors that create and preserve these inequalities in the labour market. The weakening of trade unions since the 1980s has been accompanied by an increase in precariousness (Kalleberg, 2018), for example in Spain, Germany and the Netherlands. During recent decades, trade unions in European countries have never been great advocates of many flexible work and atypical employment arrangements. In their view, many new forms of employment are instruments that let employers contract out of their responsibilities in providing for sufficient working hours, job security and social security in case of (long-term) illness and pension. For trade unions, responding to new forms of employment such as platform workers and new types of workers with flexible working patterns is a big challenge. This is clearly visible in the Ireland country report of NEWEFIN: here campaigning and collective bargaining for groups other than those with standard employment contracts is an extra problem on top of the more general problem in decreasing unionisation of workers and the problem of attracting younger generations of workers. Also, in other European countries, union membership levels among flex-workers are relatively low and flex-workers

are to a greater extent excluded from collective bargaining coverage. It is too simple to claim that trade unions are not representative for atypical workers or that they act only for 'insiders', because there are more forms of representation of trade unions (Meardi et al: 2019). Traditional trade unions can negotiate (new) collective agreements for flex-workers, such as German and Dutch trade unions have started to do for temporary agency workers - that *might* lead to growth in membership levels among flex-workers - but would at least make trade unions experts and develop expertise to produce tangible outcomes through e.g. collective bargaining (see also: Meardi et al. 2019). Alongside established trade unions, new voices and new movements can also develop, such as those specifically for self-employed or platform workers, that can make ad hoc or strategic alliances with the traditional trade union movement (see 4.4).

4.2 Cross-country variations

The strategies of social partners towards new forms of employment depend on national traditions, legal frameworks and power relationships in industrial relations. Ireland and Hungary show very low activities in industrial relations on the matter of new forms of employment. In both countries, this is mainly because of a wider problem of a very weak trade union movement and high degrees of fragmented social dialogue and collective bargaining structures. If it is already difficult for social partners and collective bargaining parties to 'survive' in these countries, it is not surprising that dialogue and bargaining in relation to new forms of employment is even more absent or weak. In the other countries, we see more activities in industrial relations (including public campaigning and political lobbying) regarding new forms of employment. The trade unions in Belgium are traditionally strong because of high membership levels. The rise of new forms of employment has had limited effects on the institutionalised collective bargaining system (which is still strong) and the related social security system in Belgium. Despite some erosion of the collective bargaining system in Germany, especially on the employers' sides, we see in Germany a continuing, quite elaborate and integrated mix of strategies and actions by trade unions at sectoral levels in response to the rise of flexible and precarious employment contracts:

- i) lobbying for new legislation;
- ii) collective bargaining to limit the use of these contracts or to improve the conditions and terms of flexible employment (especially temporary agency work);
- iii) organizing workers in precarious employment; and
- iv) developing and promoting an ideological view on 'gute Arbeit' (meaning decent and good quality work) as a counter project against precarious forms of work (see Stiller, 2020).

German trade unions such as IG Metall and Ver.di are trying to adapt to changing member profiles and people's needs in new forms of employment through new membership campaigns, new member services and new regulations. In Spain, Portugal and France, the trade unions are also following a mix of strategies and actions, although the impacts in new regulations there seem to be more limited. France – as a country with a high tradition in state interventions – also illustrates in the matters of self-employment and platform workers that if these are not tackled (quickly enough) by social partners, the government will step in quite readily.

National social dialogue

There are high variations among the NEWEFIN countries in the involvement and functioning of national, tripartite social dialogue. Generally speaking, one can say that in all countries employers and trade unions have different views and languages on (the necessity for) flexible forms of work (Ilsoe, 2017). Nevertheless, the report in Portugal made very clear how different consecutive coalitions can change the involvements of social partners on new forms of employment. This led to the Portuguese tripartite agreement in 2018, regarding – in part – limits on the use and duration of fixed term contracts and temporary agency work, promoting these workers' rights and financially penalising companies that use fixed term contracts more than average (Tripartite agreement on combating precarious work and labour market segmentation and promoting greater dynamism in collective bargaining'). Another result of – here bipartite – social dialogue can be seen in the Netherlands where social partners in the Labour Foundation in 2020 agreed on a joint recommendation to the government to oblige solo self-employed workers to have a basic income insurance in case of long-term sickness and disability. There are fewer results and no consensus at the national level in Germany and in France about platform work and other new forms of employment. This reflects their institutional traditions: in Germany there are some joint policies of social partners in some of the sectors and, in France, social dialogue is slower than the legislature.

Regarding platform workers, there is a representation problem not only on the side of trade unions, but also on the side of employers. In France, for example, platform companies are not consistently represented in employers' organisations. So, instead of organising themselves along the lines of the traditional social dialogue, platform companies still work together but via lobbying the government. This has even been set up at the initiative of the French government, which could not turn to the usual traditional social partners (Bennaars & Ramos Martin, 2020: 29).

Diverse strategic choices of trade unions

Trade unions in Europe are facing the more fundamental question of whether and how they want to represent workers with contracts other than those with the preferred and legally clearer (full-time) employment contracts of indefinite duration. What strategic actions do they want to develop for (bogus) solo self-employed people, digital platform workers and other flexible and new forms of employment? Based on the findings in the NEWEFIN country reports, we can conclude that their responses to growing numbers of atypical labour contracts are related to their views and strategy towards the standard labour relationship, based on employment contracts of indefinite duration. Do trade unions see this traditional kind of relationship as the norm and standard into which most of the workers and labour contractual relationships have to fit? Based on the NEWEFIN country reports, it can be concluded here that trade unions in different countries, but also different trade unions in the same country, do have different views and strategies on these matters. We see a conceptual dichotomy in the strategic choices for trade unions in this field.

On the one hand, there is an argument that these new types of workers – including the solo self-employed – need organisation and protection in the labour market, just as the old type of workers do, but then in their own types of contracts and their own contexts. In the NEWEFIN reports, we see examples of such views and related actions in organising, binding and representing platform workers and solo self-employed persons among classic trade unions in Europe. Examples are given with *UGT* (General Workers' Union) in Portugal, *FNV Zelfstandigen* in the Netherlands, *Ver.di* in Germany, *CFDT* in France and the Christian Democrat and socialist trade unions in Belgium (*CSC/ACV* and *FGTB/ABVV*). Here, strategies are targeted at differentiated and tailor-made legislation, protection and security for flexible workers in new forms of employment and also for solo self-employed people with high dependencies and in subordination. In some countries – such as in Belgium and the Netherlands – the direct actions of trade union in respect of these new groups of workers are supplemented by an (indirect) strategy to enlarge and transform the existing frameworks of protection to include new platform workers and (groups of) self-employed workers.

The trade unions in France, in particular, are a good example of organising several initiatives aimed at platform workers, after a hesitant start. The country report on France states that: *"Union initiatives mainly concern the organisation of platform workers and the development of services for workers. Some unions welcome them as members and other create specific branches. UNSA¹⁰ has for example created a specific branch aiming at Uber drivers. Another initiative regarding Uber drivers is SCP-VTC,¹¹*

¹⁰ Union nationale des syndicats autonomes.

¹¹ Syndicats des chauffeurs privé-vtc

an organisation aiming to defend the interest of Uber drivers. CGT¹² stimulates local unions, noteworthy is the bike courier union of CGT in Bordeaux. The Federation 3c, one of the divisions of the largest French trade union CFDT,¹³ that is involved in various branches (postal services, distribution, telecom, culture, media, sport) has launched an association for platform workers. As well as these initiatives, there are more informal initiatives such as Facebook groups or groups that find each other via other social media (e.g. Collectif#PETT or la communauté solidaire de chauffeur indépendant VTC) (Bennaars and Ramos Martin, 2020: 28-29). Another example can be found in Belgium, although there the example relates more to collaborations among trade unions and new, informal actors in the platform economy (see further section 4.4).

On the other hand, there is an argument that trade unions should keep focusing on the norm and standard of the employment relationship as defined in labour law, because these new forms of employment risk a decline in labour rights (e.g. expressed by CGTP in Portugal, the trade unions in Hungary, IG Metall in Germany). Fighting abuses of temporary agency work and bogus self-employment is an important strategy of trade unions in all countries. The main strategy of trade unions in the Netherlands in respect of platform workers is to start legal procedures in which they claim that (i) platform workers are – in fact – employees and not self-employed and (ii) platform workers fall under the scope of existing collective labour agreements in the industry. Because of this strategy, FNV does not want to negotiate with platform employees about a collective agreement for platform workers.

In general, employers' associations - including those in Germany and the Netherlands – are reluctant about any further legal regulation of self-employment and platform/crowd work as it sets limits on entrepreneurial freedom and increases labour costs.

4.3 Collective bargaining

Is there a legitimate role for collective bargaining for workers in new forms of work like digital platform work or other new types of flexible labour contracts? Apart from the limitations set out in competition legislation in relation to self-employment, this also depends – as previously described (in the section above) – on the strategic choices of trade unions towards interrelated approaches to typical and atypical employment. It assumes innovation in workers' representation, internal debates and distribution of resources and capacities to non-traditional workers' groups within trade unions' organisations, as well as innovation in the approaches by employers and representation of traditional

¹² Confédération générale du travail.

¹³ Confédération française démocratique du travail.

employers' associations to new forms of employment, digital platform companies and (bogus) solo self-employed people.

The NEWEFIN reports have reported some good cases of collective bargaining. Particularly in Germany and the Netherlands, over the last two decades, social partners have established collective bargaining practices for temporary agency workers, including better payments and more sovereignty over working time. Furthermore, Dutch trade unions are at the same time trying to agree on maximum numbers of temporary agency workers and other flexible workers in companies.

Collective bargaining practices for more recent phenomena such as for platform workers are in more of an exploratory phase in all the NEWEFIN countries. One of the barriers seems to be the limited number of platform workers (this is explicitly mentioned in the country reports of Germany and Ireland). Other barriers are the lack of clarity in definitions and classifications of being self-employed or being an independent worker and for platform companies being an employer or not. Trade unions in Spain are very worried about precarious work of digital workers and other new forms of employment. In Spain, the trade unions *UGT* and *CCOO* have adopted the strategy of modifying the scope of some sectoral collective agreements in order to cover the workers in digital platforms, e.g. in the catering sector. This is just one of their strategies, as they also provide services to platform workers, create specific trade union structures for the platform and promote legal actions against the platform. Instead of direct bargaining with platform companies, the largest trade union in the Netherlands (*FNV*), initiated legal proceedings, with more or less success, to claim that *Deliveroo* riders and *Helpling* cleaners are not self-employed but should be working under a normal employment contract because of not having the freedom to reject an order and being in an authority relationship with the platform. If these workers were classified as employees, than they should fall automatically under sectoral agreements. Interestingly, the trade union for the hotel and catering industry (*FNV Horecabond*), agreed a pilot with the platform *Temper*, a platform that brings together freelance workers and hotels, restaurants and bars. They agreed on abolishing the 'user fee' that platform workers had to pay to *Temper* to increase the workers' income, without changing their status into employees with an employment contract.

Collective bargaining for self-employed workers faces several problems, such as regulations in competition law, no clarity about bogus and real self-employment and no clear distinctions between being an employer/entrepreneur or an employee/dependent worker. What also complicates the situation is the marked diversity in the quality of employment among the group of solo self-employed

workers, varying between highly paid and satisfied professionals on the one hand and unskilled and very dependent and unsatisfied workers on the other hand. This diversity is a barrier in developing general policies and strategies for this group. The report from Ireland in particular highlights that trade unions are reluctant to engage in collective bargaining on behalf of the 'dependent self-employed' for fear of being fined for breaching the Competition Act. This limitation is also apparent in other NEWEFIN countries, although there are some practices that involve making regulations about conditions and terms of work in collective agreements (such as in the collective agreement for architects in the Netherlands).

Limits and barriers in collective bargaining

As well as some practices in collective bargaining for better working condition for atypical workers and new groups of workers, there are also some conditions and trends in collective bargaining that hinder good practices. We have already mentioned the ideological differences between employers and trade unions about flexible work and the lower number of flex-workers among the rank and file of trade unions. In addition, trade unions and traditional employers' associations in many EU countries are not prepared for many new forms of employment and continue to focus on typical employment (mentioned in the Ireland report). Another barrier mentioned in the report for Spain is decentralisation of collective bargaining (supported by the 2012 Labour Reform) that stimulated the subcontracting trend and wage levels of subcontracted workers that are below the minimum sectoral wage levels. The barriers and limits of collective bargaining raise the question whether collective bargaining will be a good instrument for regulating flexible work and new forms of employment. Social dialogue and workers' rights in these new forms of employment therefore need to be supported by legislation.

Furthermore, there is of course a role for the State to ensure that new groups of workers are included in national systems and safety nets of basic social security protection (see chapter 3).

4.4 New actors

The country reports highlight the emergence of formal organisations or informal social movements of platform workers in the gig economy, such as the – still marginal – *Sharing Economy Association* in Hungary (2017) or *Deutscher Crowdsourcing Verband e.V.* that drafted a Code of Conduct in 2017 aimed at promoting a fair and trust-based collaboration between platforms and crowd workers in Germany. The country reports also identify protests by platform linked workers and other related employees in the taxi sector (against UBER) and hospitality sector in the last years (e.g. in Portugal, Hungary and Belgium). But these mostly spontaneous actions seem not to develop as established

networks or associations, or only to a very limited degree. Furthermore, social movements and alternative labour movements are no substitutes for traditional labour unions as they do not have the right and ability to bargaining collectively on behalf of their members, or indeed to sign and deliver a collective agreement.

Are traditional social partners collaborating with new actors in regulating new forms of employment? The NEWEFIN country reports provide some examples of unions collaborating with platform workers, e.g. in Germany, where in 2019 '*Freie Arbeiterinnen- und Arbeiterunion*' (FAU) supported platform workers to show their grievances in a public protest and join an international campaign, and offered a platform for couriers to cooperate internationally and get information about their rights. Another example is given in the Belgium report, where the three major trade unions in Belgium supported the informal *Couriers' Collective*. *Couriers' Collective* organised a strike among Deliveroo drivers when Deliveroo announced in late 2017 that it wanted to modify its payment method from an hourly rate to an amount payable on delivery of a parcel to a client, implying that Deliveroo drivers were no longer considered as employees of SMart.¹⁴ One of the barriers facing platform workers who are keen to get more employment contracts is the drive by individual enterprises to be competitive; contracts of employment are mostly more expensive than using just self-employed people because of higher employers' contributions for social security (while self-employed people have to insure themselves). These ad hoc collaborations between the Belgian trade unions and informal networks of platform workers for Deliveroo in Belgium also aimed to stimulate public debate, which was successful at that point. In other countries, these actions are not always successful. The social partners in Portugal had more problems becoming involved in the consultations, let alone bargaining for platform workers, in spite of spontaneous protests by platform linked workers in the taxi sector and in the hospitality sector in Portugal. More successful in Portugal was the collaboration between social movements and social partners in the field of combating precarious work in the *public sector* of Portugal.

Apart from social movements and informal groups relating to platform workers, we see 'think tanks' and other groups collecting information on platform work and wanting to stimulate public debates. These initiatives can be linked to tripartite social dialogue, especially when these working groups are initiated or endorsed by the government, such as in the 'working group on new regulation of *the*

¹⁴ SMart is a Belgian Cooperation, originally for artists, which allows self-employed artists to opt for a contract of employment with SMart as employer. With the rise of platform work, SMart extended its scope to platform workers and started collaborating with Deliveroo in Belgium in 2016.

*digital*¹⁵ in France and the ‘*Commissie Regulering van werk*’¹⁶ in the Netherlands, both delivering their findings in 2020.

What about including organisations for self-employed people in the traditional industrial relations systems? Especially in Germany and the Netherlands there is a large variety of associations of and for self-employed workers. Some are general, others are specialist organisations for professional groups, more or less focussing on business only. In general, these associations do not make argue for better social security protection, although some of the organisations for the self-employed have supported recent recommendation by the social partners in the Netherlands to compel the self-employed to hold insurance for long-term disability.

4.5 Concluding remarks

In summary, traditional social partners and collective bargaining parties in all the NEWEFIN countries follow a mix of strategies in addressing the issue of better legislation for new forms of employment. Trade unions want to improve the working conditions and social security provisions for atypical workers directly, through targeted actions for platform workers, self-employed workers or other flex-workers, or indirectly through extending the cover of collective agreements to atypical workers (or guiding them towards traditional employment contracts). Although increasingly aware of the problems of precariousness, trade unions (and employers’ associations) are facing many barriers and limits in trying to improve their terms and conditions of employment, such as low numbers of members and lack of clarity in the national legal frameworks. Social dialogue and collective bargaining for groups like the bogus self-employed, digital platform workers and those on extreme flexible contracts (like on-call work and zero-hours contracts etc.) therefore need to be supported by governmental policies, legislation and legal clarity. New actors in industrial relations, like social movements among platform workers or associations of self-employed persons, are important for stimulating public debate but are no substitutes for the traditional social partners because they cannot bargain or sign collective agreements.

¹⁵ <https://cnnumerique.fr/index.php/le-conseil>.

¹⁶ <https://www.rijksoverheid.nl/actueel/nieuws/2020/01/23/koolmees-evenwichtige-analyse-commissie-borstlap>

5. Bridge EU dimension and the Member States

The research carried out by the team pointed out that some lessons can be learned from the European countries which may be very useful in order to address the issue of platform workers at a European and/or national level.

5.1. The failure of the intermediate categories

The intermediate categories between the employer or the employee have not offered an adequate answer to new forms of the employment. The Spanish situation is an illustrative example. According to the Spanish trade unions, the intermediate category called trade is a method for avoiding the application of the employment law. In addition, the European employers represented by BusinessEurope have stated that they are “strongly against introducing a broad EU definition of a ‘worker’ (...) It must remain a political decision in Member States to define in national legislation who is an employee and who is self-employed”¹⁷. In the same sense, most Member States and social partners have opposed the introduction of any third intermediate category, such as the ‘economically dependent worker’, alongside those of dependent workers and independent self-employed workers. Even in Member States where such a concept already exists in national law, such as Spain and Italy, there are reservations about whether an unequivocal definition could be devised at a European level¹⁸.

5.2. The escape routes from the application of national legislation to on-call jobs

Some of the European countries had legislated on call jobs before the Directive 2019/1152. For example, in Netherlands, the legislation included more requirements than the minimum set by the European Union. According to the Dutch legislation, there are also some special obligations regarding on-call work. The main obligation of the employee is to be permanently available, regardless of whether they are called upon. If the employee is called upon for work, the employer is obliged to pay at least three hours' wages. From the point of view of the employers, this obligatory three hours of working time is a significant obstacle to the use of on-call contracts for, for instance, platform work.

¹⁷ BusinessEurope 2018.

¹⁸ ETUI, The concept of ‘worker’ in EU law. Status quo and potential for change, report 140, 2018.

The example mentioned is useful in confirming that more measures are needed for platform workers at the European level.

5.3. The need to clarify the meaning of the employee at the EU level

EU law guaranteeing workers' rights only applies to people who are in an employment relationship, i.e. who are considered to be 'workers'. While EU Member States are responsible for deciding who is to be considered a worker in their national legal system, at the EU level the Court of Justice has defined the concept of worker for the purpose of applying EU law. This definition has primarily been developed within the framework of the free movement of workers. The CJEU stated that "the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration". The CJEU notably confirmed that this definition should also be used to determine who is to be considered as a worker when applying certain EU Directives in the social field.

Following the criteria set by the CJEU, the European Commission has said that whether an employment relationship exists or not has to be established on the basis of a case-by-case assessment, considering the facts characterising the relationship between the platform and the underlying service provider, and the performance of the related tasks, looking cumulatively in particular at the following three essential criteria: the existence of a subordination link; the nature of the work; and the presence of remuneration.

Firstly, for the criterion of subordination to be met, the service provider must act under the direction of the collaborative platform, the latter determining the choice of activity, remuneration and working conditions. In other words, the provider of the underlying service is not free to choose which services it will provide and how, e.g. in terms of the contractual relationship it entered with the collaborative platform. Where the collaborative platform is merely processing the payment deposited by a user and passes it on to the provider of the underlying service, this does not imply that the collaborative platform is determining the remuneration. The existence of subordination is not necessarily dependent on the actual exercise of management or supervision on a continuous basis.

Secondly, for the nature of the work criterion to be met, the provider of the underlying service must pursue an activity of economic value that is effective and genuine, excluding services on such a small scale as to be regarded as purely marginal and accessory. National courts have adopted divergent approaches in identifying what is marginal and accessory even within the context of more traditional employment relationships. There is a mix of the use of thresholds (hour or wage-based) and ad hoc

assessments of the features of a given relationship. In the context of the collaborative economy, where people actually provide purely marginal and accessory services through collaborative platforms, this is an indication that such persons' duration, or hours, would not qualify them as workers, although short limited working work productivity, at a discontinuous or low level, cannot in itself exclude an employment relationship. At the same time, people providing services on more than an occasional basis may be either workers or self-employed, as the actual classification of their status results from a comprehensive test of all three criteria.

Ant the remuneration criterion is primarily used for distinguishing a volunteer from a worker. Thus, where the provider does not receive any remuneration or receives merely a compensation of costs incurred for his activities, the remuneration criterion would not be met¹⁹.

In the recent judgment by the Court (Eighth Chamber) on 22 April 2020,²⁰ the Court of Justice of the European Union applied the criteria mentioned above to platform workers. The description of the facts is essential because the case discloses the platform work. B was a neighbourhood parcel delivery courier. He had carried out his business exclusively for the undertaking Yodel, a parcel delivery undertaking, since July 2017. In order to carry out his activity, B had to undergo training in order to familiarise himself with the use of the handheld delivery device provided by Yodel. Neighbourhood couriers who carried out their activity for the benefit of that undertaking were engaged on the basis of a courier services agreement which stipulated that they were 'self-employed independent contractors'. They used their own vehicles to deliver the parcels handled by Yodel and used their own mobile telephones to communicate with that undertaking. Under that courier services agreement, couriers were not required to perform the delivery personally, but could appoint a subcontractor or a substitute for the whole or part of the service provided and Yodel could veto the substitution if the person chosen did not have a level of skills and qualification which was at least equivalent to that required of a courier engaged by Yodel. In any event, the courier remained personally liable for any acts or omissions of any appointed subcontractor or substitute. That courier services agreement also provided that the courier was free to deliver parcels for the benefit of third parties at the same time as providing services for Yodel. Under that agreement, Yodel was not required to use the services of the couriers with whom it had concluded a services agreement, just as those couriers were not required to accept any parcel for delivery. In addition, those couriers could fix a maximum number of parcels which they were willing to deliver. As regards working hours, the couriers with whom Yodel

¹⁹ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions A European agenda for the collaborative economy. Brussels, 2.6.2016 COM (2016) 356 final.

²⁰ Case C-692/19.

had concluded a services agreement received the parcels to be delivered at their home between Monday and Saturday of each week. The parcels had to be delivered between 7.30 and 21.00. However, the couriers remained free to decide the time of delivery, except for fixed-time deliveries, and the appropriate order and route to suit their personal convenience. As for remuneration, a fixed rate, which varied according to the place of delivery, was set for each parcel. Although the services agreement concluded between Yodel and the couriers classified those couriers as 'self-employed independent contractors', B claimed that his status was that of a 'worker' for the purposes of Directive 2003/88. He considered that, although he was self-employed for tax purposes and accounted for his own business expenses, he was an employee of Yodel.

The main problem was whether it was possible to establish the existence of a subordinate relationship between B and Yodel. In that regard, concerning firstly the discretion of a person such as B to appoint subcontractors or substitutes to carry out the tasks at issue, it was common ground that the exercise of that discretion was subject only to the condition that the subcontractor or substitute concerned had the basic skills and qualifications equivalent to the person with whom the putative employer had concluded a services agreement, such as the person at issue in the main proceedings. Thus, the putative employer could exercise only limited control over the choice of subcontractor or substitute by that person, on the basis of a purely objective criterion, and could not give precedence to any personal choices and preferences.

Second, it was apparent from the file submitted to the Court that, under the services agreement at issue in the main proceedings, B had an absolute right not to accept the tasks assigned to him. In addition, he could himself set a binding limit on the number of tasks which he was prepared to perform.

Third, as regards the discretion of a person such as B to provide similar services to third parties, it appeared that that discretion might be exercised for the benefit of any third party, including for the benefit of direct competitors of his putative employer, it being understood that that discretion might be exercised in parallel and simultaneously for the benefit of a number of third parties.

Fourthly, as regards 'working' time, while it was true that a service such as that at issue in the main proceedings must be provided during specific time slots, the fact remains that such a requirement was inherent to the very nature of that service, since compliance with those times slots appeared to be essential in order to ensure the proper performance of that service.

In the light of all these factors, the CJEU decided that the independence of a courier, such as that at issue in the main proceedings, did not appear to be fictitious and secondly that there did not appear, a priori, to be a relationship of subordination between him and his putative employer. In conclusion, the European judgment established that Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a ‘worker’ for the purposes of that Directive, where that person is afforded discretion to use subcontractors or substitutes to perform the service which he has undertaken to provide; to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks; to provide his services to any third party, including direct competitors of the putative employer; and to fix his own hours of ‘work’ within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer, provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it was for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carried on, to classify that person’s professional status under Directive 2003/88.

It is appropriate to indicate that the judgment has received some critical comments from the legal profession. Some authors have pointed out that although the judgment has not closed the door to concluding that there was an employment relationship, the answer given may be contrary to Directive 2019/1152. In this sense, it is necessary to remember that the freedom to refuse a job is not a criterion which permits the exclusion of the existence of an employment relationship (article 10 of the Directive 2019/1152). In addition, an employee may work for several employers at the same time (article 9 of the Directive)²¹.

In addition, other authors have mentioned that the European judgment has not paid attention to some relevant factors. On the one hand, the particular digital platform sector may be a crucial element in the case of platform workers. However, there is no reference to it. On the other hand, the digital

²¹ Beltrán De Heredia, I., El trabajo en la economía de las plataformas: un primer criterio (decepcionante) del TJUE (asunto ‘Yodel Delivery Network’), Blog Una mirada crítica a las relaciones laborales, 2020, <https://ignasibeltran.com/2020/05/05/el-trabajo-en-la-economia-de-las-plataformas-un-primer-criterio-decepcionante-del-tjue-asunto-yodel-delivery-network/>

application is not analysed by the Court of Justice of the European Union. It is appropriate to remember that the digital application was decisive a few years ago in resolving the question of the nature of transport companies based on digital platforms in the European Judgments on 20 December 2017, C 434/15, and 10 April 2018, C 320/1622.

5.4. The non-revision of the Working Time Directive as a pending issue

The issue of the platform workers is directly linked to working time. One of most salient characteristics for the drivers is the availability during time that is usually not paid. Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time came into force more than twenty years ago, in a society where, overall, employment was more stable and work organisation more standardised in the common '9 to 5' working day. The revision of the said Directive has not been possible due to the lack of agreement among the Member States. The proposals from workers' representatives at the EU level to address the problem of precarious work, irregular hours and working time under-employment — with zero-hours contracts as a prime example — were resisted by the European employers' organisations, which claimed they exceeded the provision of minimum standards for health and safety reasons. Thus, the suggestions by trade unions and others to compel employers to give notice to workers about the scheduling of their working hours, sufficiently in advance to allow them to arrange their private life, were consistently opposed. Instead, the Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time 2017/C 165/01 has been approved. This is not binding on the EU Member States and neither does it create any new rules²³.

The Interpretative Communication on the Directive recognised that although there had been no specific case law to date on the situation of 'volunteers', 'trainees' or of persons under zero-hours or civil law contracts in respect of the Working Time Directive, the same assessment could lead to individuals under any form of contractual relationships being categorised as 'workers' and therefore being covered by the Working Time Directive. The same interpretation may be applied to platform workers.

²² Goerlich Peset, J.M., Los repartidores a través de plataformas ante el TJUE: ¿seguimos dónde estábamos? , Foro de Labos, 2020. See link: <https://forodelabos.blogspot.com/2020/05/los-repartidores-traves-de-plataformas.html>

²³ ETUI, Regulating uncertainty: variable work schedules and zero-hour work in EU employment policy, no. 5, 2019.

Although Directive 2019/1152 introduced some limits for on-demand contracts, there are pending issues as regards platform workers such as employees. In our opinion, the platform workers have the closest connection with the Working Time Directive. In this sense, a review of the Working Time Directive would be very welcome in order to set a minimum regulation for those workers, which could be improved by the national legislation (by public regulation or collective agreements).

6. Concluding recommendations

1.

Workers in new employment forms need protection and representation from the government and the social partners. More than that, because of the vulnerable and precarious position of many of these workers in atypical labour contracts, there is a need for relatively more protection, inspection and workers' voice. It can be expected that workers for digital platforms, solo self-employed and many other flexible workers will increase further in quantity and that this trend needs reconsideration and fundamental innovation in labour law, social security law and industrial relations.

2.

More clarity is needed in the legislation at both EU and national levels regarding platforms (such as Uber, Deliveroo etc.) and platform linked workers, bearing in mind the responsibilities of the platforms in terms of labour rights and social protection of the workers. Clear definitions are also needed in relation to access to social welfare provision and tax related rights. Finally, more clarity is also needed for the better functioning and definitions of responsibilities in social dialogue and collective bargaining.

3.

The role of social partners should be included in the debates about reforming labour law and social security law, having regard to the emergence and growth of new non-traditional forms of employment.

4.

New forms of social dialogue – including different constellations of actors, such as associations for solo self-employed workers and networks of platform workers – should be encouraged.

5.

Trade union organisations should reconsider their strategies on organising and representing non-traditional workers and regulating new forms of employment.

6.

In the countries with weak powers for trade unions and/or poor results from social dialogue and collective bargaining on new forms of employment, it is extra important for workers in non-traditional labour contracts to be supported and protected by legislation.

7.

Discussing social security rights for self-employed people cannot be confined to discussing contributions towards social security provisions and tax policies.

8.

Social dialogue at the EU level may be a useful tool for incorporating the issue of platform workers into the agreements. Although the European agreements are not binding, those agreements may help to establish a set of homogeneous criteria in the Member States and enhance the social dialogue at a national level.

9.

The platform workers have the closest connection with the Working Time Directive because one of most salient characteristics of the drivers is their availability during time that is usually not paid. While some countries have regulated on-call work, including more limits than the Directive 2019/1152 specifies, other countries have prohibited on-call work and zero-hours contracts. However, platform work is a controversial issue in all of them. In this sense, it would be very welcome to review the Working Time Directive in order to set a minimum regulation for those platforms workers, which could be improved in the national legislation (public regulation or collective agreements).

10.

At the EU level, more steps are needed than the European framework agreement on transparency and predictability. It seems clear that it would be necessary to establish some clear criteria in order to clarify the meaning of the 'employee' at a European level, taking into account how this issue has been addressed by the European Court of Justice. A sharp definition of 'employee' with useful and manageable criteria help to make a clear distinction between employees and entrepreneurs and might help in the application of European employment law to workers, avoiding the reference to national legislation. If this measure is not adopted, there is a risk of non-protection for different groups of workers because the application of EU employment law will depend on the definition of 'employee' under national law.

11.

A clear definition of employee on European level should take into account that working relations have been changed over time. Subordination (as the most important criterion to qualify a working relation as employment) needs to be looked at on a different, more modern way. All countries struggle with the evolve of working relations and the limitations that come along with 'subordination' as decisive criterion to establish employment and the way this criterion is filled in nowadays. All countries can take advantage if and when Europe leads the way in formulating new modern criteria to clarify the meaning of employee. Modern criteria should not only include modern elements of subordination, such as being part of an organisation, but should also include contra-indicators like to what extent workers are economic independent, to what extent they are exposed to financial risk and have control over what is done, how it is done, when and where it is done and whether he or she does it personally.

12.

All countries struggle with the misuse and abuse of the legal framework and more precise with those parts of the framework that regulate flexible forms of work. Some of the more familiar forms of flexible work are already regulated by the European Union in the form of directives, for example the Posting of Workers Directive and the Directive on fixed-term agreements. To what extent the use of temporary agency work or fixed-term contracts is allowed, is however - more or less - on to the member states. To overcome difficulties fighting against abuse and misuse, the already existing directives might be tightened in the first place. One can think about the introduction of a limited extend of time a company can use temporary agency work and the introduction of the criterion that in any case of use of flexible work, there must be an objective reason to justify this. In the second place the European Union can think about adopting a new Directive that states that only some explicitly mentioned forms of flexible work are permitted, such as temporary agency work, fixed term contracts and on-call work.

Literature and references

This final report of the NEWEFIN-project is based the country reports of the project NEWEFIN. The country reports were written by:

- N. Jansen and I. Zaal with the cooperation of F. Tros – the Netherlands;
- JR. Mercader Uguina, F.J. Gómez Abelleira, A.B. Muñoz Ruiz and P. Gimeno Diaz de Atauri - Spain;
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- A. Kerr & R. Mooney - Ireland;
- A. Kun – Hungary;
- M. Wróblewski & M. Kuruś – Poland.

Beltrán De Heredia, I. (2020), El trabajo en la economía de las plataformas: un primer criterio (decepcionante) del TJUE (asunto ‘Yodel Delivery Network’), Blog Una mirada crítica a las relaciones laborales, <https://ignasibeltran.com/2020/05/05/el-trabajo-en-la-economia-de-las-plataformas-un-primer-criterio-decepcionante-del-tjue-asunto-yodel-delivery-network/>

Beuker, L., M. Franssen, V. Kirov & F. Naedenoen (2019) Digitalisation and Restructuring: which social Dialogue? Synthesis report, project Diresoc. Sofia – Liège.

Conen, W. (2018). Do we have to worry about the ‘new’ solo self-employed? Self-sufficiency and precariousness among workers with different types of contract : Host Country Discussion Paper – The Netherlands. Paper presented at Peer Review on “The rise of precarious work (including some forms of solo self-employment) – causes, challenges and policy option”, The Hague, Netherlands.

ETUI (2018). The concept of ‘worker’ in EU law. Status quo and potential for change, report 140, Brussels.

ETUI (2019). Regulating uncertainty: variable work schedules and zero-hour work in EU employment policy, no. 5, Brussels.

ETUI (2019). The platform economy and social law: Key issues in comparative perspective, working paper, Brussels.

Eurofound (2020). Labour market change: Trends and policy approaches towards flexibilisation, Challenges and prospects in the EU series, Publications Office of the European Union, Luxembourg.

European Commission (2018). Employment and social developments in Europe 2018. DG EMPL, Luxembourg Publication Office.

European Parliament (2017). The social protection of workers in the platform economy. Directorate General for Internal Policies, Policy department Economic and Scientific Policy (A).

Temporary and part-time jobs on the rise:

<https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/WDN-20180813-1>

Goerlich Peset, J.M. (2020), Los repartidores a través de plataformas ante el TJUE: ¿seguimos dónde estábamos?, Foro de Labos, 2020. See link: <https://forodelabos.blogspot.com/2020/05/los-repartidores-traves-de-plataformas.html>

Ilsoe, A. (2017). The digitalisation of service work – social partner responses in Denmark, Sweden and Germany. *Transfer*, vol. 23 (3) 333-348.

Kalleberg, A. (2018). *Precarious Lives Job Insecurity and Well-Being in Rich Democracies*. Oxford: Polity Press.

Klosse, S. & S. Montebovi (2019). Sociale zekerheid voor zelfstandigen: hoe regel je dat? Een blik over de grenzen. *Tijdschrift Recht en Arbeid* 20/3.

Meardi, G., M. Simms & D. Adam (2019). Trade unions and precariat in Europe: Representative claims, *European Journal of Industrial Relations*, (doi: [10.1177/0959680119863585](https://doi.org/10.1177/0959680119863585)) (Early Online Publication).

ECD (2018). Issues note: The emergence of new forms of work and their implications for labour relations, Paper presented at the 1st meeting of the G20) Employment Working Group. 20-21 February 2018, Buenos Aires, Argentina. <http://www.oecd.org/g20/topics/employment-education-and-social-policies/OECD-Note-on-The-emergence-of-new-forms-of-work.pdf>

OECD (2019a) Policy responses to new form of work. Paper prepared for the second meeting of the G20 Employment Working Group under the Japanese G20 Presidency 22-24 April 2019, Tokyo Paris: OECD Publishing.

OECD (2019b) The future of work: employment outlook 2019. Paris: OECD Publishing

Pesole, A., Urzì Brancati, M.C, Fernández-Macías, E., Biagi, F., González Vázquez, I., (2018) Platform Workers in Europe, Publications Office of the European Union, Luxembourg.

Todoli-Signes, A. (2017), 'The "gig economy": Employee, self-employed or the need for a special employment regulation?', Transfer: The European Review of Labour and Research, Vol. 23, No. 2, pp. 193–205.

Todoli Signes, A., (2020), Opinion on the Order of the Court (Eighth Chamber) 22 April 2020, Argumentos en Derecho Laboral, <https://adriantodoli.com/>

Urzì Brancati, C., Pesole, A., Fernández-Macías, E. New evidence on platform workers in Europe. Results from the second COLLEEM survey, EUR 29958 EN, Publications Office of the European Union, Luxembourg, 2020, ISBN 978-92-76-12949-3, doi:10.2760/459278, JRC118570

Valenduc, G. & P. Vendramin (2016). Work in the digital economy: sorting the old from the new. Brussels: ETUI.

Vandaele, K. (2018). Will trade unions survive in the platform economy? Working paper. ETUI, Brussels.

Williams, C. & F. Lapeyre (2017). Dependent self-employment: Trends, challenges and policy responses in the EU. EMPLOYMENT Working Paper No. 228 Employment Policy Department 2017. ILO.