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'Equal' Yet Poor: The ineffective protection of atypical workers under EU law

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Abstract

Statistical data show that on average almost one in every 12 workers in the EU is living in a poor household. This reality illustrates the gaps in the existing legal framework for protecting workers, particularly the most precarious ones, from poverty. The present contribution aims to identify some of the reasons for that. In so doing, we focus on atypical work —perceived as particularly problematic from an in-work poverty perspective — and specifically on the EU regulatory approach towards it, which heavily relies on the principle of equal treatment as a means to protect workers. The article engages with the question of whether the principle of equal treatment enshrined in the atypical work Directives is enough or, on the contrary, if it is failing in its declared intention to protect atypical workers. In its analysis as well as in its propositive part, this contribution builds on the findings of the research done in the H2020 Working Yet Poor research project.[1] *We engage in a critical assessment of the current EU Directives on atypical work, highlighting*

1. The Working Yet Poor research project has identified four groups of workers who are especially vulnerable to experience a higher risk of in-work poverty. These are low- or unskilled employees with standard employment contracts employed in poor sectors (VUP Group 1), solo and dependent self-employed persons and bogus self-employed (VUP Group 2),

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existing gaps, shortcomings, and challenges. This assessment shows the limits of the Directives in general and the principle of equal treatment in particular in combating in-work poverty. We therefore advance some regulatory proposals to implement the EU Pillar of Social Rights and further enhance the current EU approach to atypical work by rendering it better equipped to prevent in-work poverty.

Keywords
Atypical work, equal principle in EU law, in-work poverty, involuntary part-time work, temporary work contracts

1. Introduction

In-work poverty is a complex phenomenon that currently affects 8.5% of workers across the EU.[2] The spread of in-work poverty is influenced by a multitude of factors. Among the various aspects determining the regulatory environment of poverty risks, such as economic, tax, infrastructural, housing and family policy, this article focuses on the regulation of atypical work at EU level. The main characteristics of atypical work, such as temporariness (fixed-term work), low work intensity (part-time work), and contingency[3] (temporary agency work), are very often associated with precariousness and vulnerability, which is simultaneously symptomatic of a higher risk of in-work poverty.[4] Atypical employment has increased in recent years in Europe and this increase seems correlated with a parallel growth of in-work poverty levels.[5]

The regulation of atypical work in the EU has traditionally[6] been provided for in the three Directives regulating part-time work (Directive 97/81, hereinafter the PTWD), fixed-term work (Directive 99/70, hereinafter the FTWD) and temporary agency work (Directive 2008/104, hereinafter the TAWD). To varying degrees, all of these Directives aim at achieving a balance between the use of flexible or atypical work and the protection of the workers engaged in such contractual arrangements.[7] The protective dimension of these Directives is primarily based on the principle of equal treatment entitling those employed in such 'traditional' forms of atypical employment (fixed-term, part-time and agency work) to be treated equally —albeit subject to limitations— to

flexibly-employed workers (VUP Group 3), and casual and platform workers (VUP Group 4). In this article we build on findings on VUP group 3. See, for more detail, Ratti (Ed.), *In-Work Poverty in Europe. Vulnerable and Underrepresented Persons in a Comparative Perspective*. 111 Bulletin of Comparative Labour Relations (Kluwer Law International, 2022); Ratti, Schoukens (Eds.), *Working Yet Poor. Challenges to EU Social Citizenship* (Hart Publishing 2023). An introduction to the subject, the summarised version of country reports and a comparative analysis we draw on in this article, is published in www.workingyetpoor.eu.

2. The percentage of the working population that was at risk of poverty (AROP) in the EU in 2022 was 8.5%, down slightly from 8.9% in 2021 and 8.8% in 2020. Cf. 'In-work at-risk-of-poverty rate by age and sex' - EU-SILC survey (online data code: ILC_IW01).
3. For the concept of 'contingent work' in labour law and its usage, see Lo Faro, 'Contingent work: a conceptual framework' in Ales, Deinert and Kenner (Eds.), *Core and contingent work in the European Union: a comparative analysis* (Hart Publishing, 2017).
4. E.g., Lang, Schömann and Clauwaert, *Atypical Forms of Employment Contracts in Times of Crisis* (ETUI, 2013).
5. European Parliament, Resolution of 10 February 2021 on reducing inequalities with a special focus on in-work poverty (2019/2188 (INI)), paras AZ and BF.
6. Note that recent initiatives, in particular, the Transparent and Predictable Working Conditions Directive also deal with some aspects of atypical work, but only set some minimums of predictability and do not have the purpose to regulate the use of atypical contracts more generally, which is the focus of this contribution.
7. For a critique on this balance, see McCann, *Regulating flexible work* (Oxford: OUP, 2009).

standard comparable employees. In the case of the FTWD, and to a lesser extent also the TAWD, the EU *acquis* also contributes to fighting abuses in the use of such atypical contracts.

However, as existing literature has already stressed, loopholes in the protection of atypical workers urge to go beyond the simple application of the equality principle.[8] The most recent statistical findings on the spread of in-work poverty among atypical workers call, in our view, for the elaboration of an additional (set of) principle(s), aimed at building sustainable labour markets, capable of delivering on the promise of fair working conditions embedded in Article 31(1) of the EU Charter of Fundamental Rights (CFR) and the expectations of fair and decent employment relationships as enshrined in the European Pillar of Social Rights (EPSR). Specifically, Article 5(§4) EPSR states that 'employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts'. Furthermore, Article 6(§2) solemnly proclaims that 'In-work poverty shall be prevented'. Read against this background, the promises contained in the EPSR are yet to be fulfilled.

Although the scope of the present analysis is limited to the three 'traditional' atypical work forms covered currently by EU secondary law, the additional set of principles proposed will be relevant for other forms of atypical work, which are largely excluded from protection at EU level, such as on-demand and zero-hours contracts, and work performed via online platforms.[9]

The remainder of the article is presented in five building blocks. Section 2 analyses recent (albeit pre-Covid-19) statistical findings on in-work poverty among atypical workers in the EU. Section 3 focuses on the current state of the EU regulatory framework on atypical work, contextualising its rationale and evolution. Subsequently, Section 4 develops an analysis of the protective function of EU law on atypical work and focuses on the principle of equal treatment as the main tool for achieving this protection. In this analysis the article departs from the acknowledgment that while the principle of equality has been very important in limiting the most blatant forms of abuse of atypical work, it comes with notable limitations to protect atypical workers. Section 5 puts together the main shortcomings of the EU regulatory approach from the point of view of in-work poverty and puts forward a series of proposals to complement the principle of equal treatment with equally important aspects to better protect atypical workers. Lastly, Section 6 concludes.

2. Atypical work as an incubator of in-work poverty

This section presents the state of the art regarding in-work poverty among atypical workers in the EU. It illustrates, through statistical data, how widespread in-work poverty is among temporary, part-time and agency workers.

8. See, among many others, Davies, 'Regulating atypical work: beyond equality' in Countouris and Freedland (Eds.), *Resocialising Europe* (Cambridge: CUP, 2013), 230.
9. See e.g., Delfino, 'Work in the Age of Collaborative Platforms between Innovation and Tradition', (2018) 9 *European Labour Law Journal*, 346–353. Recently, Aloisi argued that the narrow scope of application of the atypical work Directives represents an obstacle to apply this regulation to platform workers, but that an adaptive and purposive approach of the Court of Justice of the European Union (CJEU) could, however, result in the classification of platform workers as falling within the scope of at least some parts of this 'first round' of regulation of atypical work at EU level. See: Aloisi, 'Platform work in Europe: Lessons learned, legal developments and challenges ahead', (2022) 13 *European Labour Law Journal,* 4–29, at 18–22. See also Durri, 'The intersection of casual work and platform work: Lessons learned from the casual work agenda for the labour protection of platform workers', (2023) 14(4) *European Labour Law Journal*, 474 ff., where it is argued that only addressing platform workers' employment status, working hours, job, and income uncertainty may reduce their precarity.

The *in-work at-risk-of-poverty rate* used by Eurostat measures the share of workers (i.e., persons in employment for at least seven months during the year of reference) who are living in a household with equivalised incomes below the poverty line.[10] In-work poverty is, therefore, a concept embodying both an individual (work) and collective (household needs and resources) dimension. Being working poor does not necessarily mean having a low wage or a precarious job but may be related to high needs of the household and/or low work intensity of other household members. Conversely, a person with a low wage may not be poor if the income of other household members and/or the level of national social protection of workers is high enough to exceed the poverty line. Although the factors affecting in-work poverty go well beyond the type of contract workers have, this will remain the focus of our contribution.[11] The percentage of in-work poverty in the EU progressively escalated over a period of years[12] and reached a peak of 9% in 2019, then slowly decreased until 2022, a decrease that was also influenced by the financial transfers that were made in response to the Covid-19 pandemic restrictions.[13] Stark variations still exist across EU Member States.[14] Among the reasons that may make individuals more prone to in-work poverty, we find their positioning in the labour market, where there is a concentration of in-work poverty among particular groups.[15]

The rise of in-work poverty during the years following the 2008 financial crisis is associated, among several other factors, with an increase in the use of atypical employment. Research shows that temporary workers, and particularly part-time workers, are at a much higher risk of experiencing in-work poverty than full-time workers with permanent contracts.[16] More recently, employment creation after the crisis has not resulted in a decrease in in-work poverty levels. As observed by Hiessl, the share of people living in households with very low-work intensity (i.e., where working-age household members' combined working time is equal or less than 20% of their total work-time potential)[17] – as one component of the EU's at-risk-of-poverty (AROP) indicator – has been on the decline since 2014.[18] This declining tendency can also be observed at least as from 2016 in all countries studied except Luxembourg and Sweden (which had under-average

10. Lohmann, 'The concept and measurement of in-work poverty', in Lohmann and Marx (Eds.), *Handbook on In-Work Poverty*, (Edward Elgar Publishing, 2018) 7–25.
11. See in more detail Ratti, García-Muñoz, Vergnat, 'The Challenge of Defining, Measuring, and Overcoming In-Work Poverty', in Ratti (Ed.), *In-Work Poverty in Europe. Vulnerable and Underrepresented Persons in a Comparative Perspective,* cit., 2 ff and 9 ff.
12. In 2007 the percentage of at risk of in-work poverty in the EU-27 (excluding Croatia, but including the UK) was 8.3%, whereas in the following years, particularly between 2010 and 2014, the percentage increased every year until 2016 before stabilising at around 9%.
13. EU-SILC survey -In-work at-risk-of-poverty rate by age and sex.
14. Note, however, that significant differences remain both between and within the Member States. For example, for the same year (2019), in-work poverty levels varied from a minimum of 2.9% in Finland to a maximum of 15.7% in Romania.
15. Peña-Casas, Ghailani, Spasova and Vanhercke (Eds.), *In-work poverty in Europe: A study of national policies,* (2019) ESPN, 49–51.
16. Ahrendt, Sándor, Revello, Jungblut, Anderson, *In-work poverty in the EU* (Publications Office of the European Union, 2017) Eurofound, pp. 18–25, using Eurostat EU-LFS (ilc_iw05). See also: European Parliament, Resolution (2019/2188 (INI)) of 10 February 2021.
17. See Eurostat definition at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Persons_living_in_households_with_low_work_intensity.
18. See the comparative analysis by Hiessl, 'Vulnerable and Under-Represented Persons in a Comparative Perspective', in Ratti (Ed.), *In-Work Poverty in Europe. Vulnerable and Underrepresented Persons in a Comparative Perspective,* cit., 314.

values to begin with).[19] During the same period, AROP rates for the general population have remained largely unchanged, even increasing slightly according to provisional data for the most recent years.[20] In other words, moving more people into employment has not resulted in a reduction in poverty rates – indicating that, for many, 'out-of-work poverty has been replaced by in-work poverty.'[21] This is true for all EU Member States, despite important differences between them.[22]

For the purposes of statistical analysis in this article, 'atypical' workers, including fixed-term, temporary agency, and (involuntary) part-time workers, need to be divided into two groups: (1) *Temporary workers,* defined in EU-SILC as workers with work contracts of limited duration;[23] and (2) *Involuntary part-timers,* understood as people who spend at least half of the period of work (during the reference period) in part-time work and want to work more hours, but either cannot find a job(s) for more hours, cannot work longer due to domestic or caring responsibilities, or have claimed 'other reasons' inhibit them from taking a full-time position.[24] Some part-timers worked 30 hours or more (if the legal working time is more than 30 hours a week) and therefore were not asked why they were working part-time. Still, they may have been involuntarily part-timers. Other part-timers simply did not answer the question as to why this was the case. The category of involuntary part-timers is, therefore, not perfectly captured. Consequently, there is a considerable risk of underestimating the total number of involuntary part-timers. It is also important to note that some workers are included in both subgroups: temporary workers who are also involuntary part-timers.[25]

In 2019, temporary workers in the EU represented 11.3% of the total population of workers and involuntary part-timers represented 4.9% (with the risk of underestimation explained above).[26] In total, the group of fixed-term workers, temporary agency workers and involuntary part time workers thus represented 15.2% of the total number of persons at work in the EU.

Eurostat data from before and during the Covid-19 pandemic report an increase in temporary jobs[27] and part-time contracts,[28] with peaks of 'involuntary part-time'[29] in Italy (66.2%) and

19. See Eurostat data at https://ec.europa.eu/eurostat/databrowser/view/tipslc40/default/table?lang=en.
20. See Eurostat data at https://ec.europa.eu/eurostat/databrowser/view/tespm010/default/table?lang=en.
21. Hiessl op. cit. 18, at 314.
22. A sample of seven EU countries, analysed in detail in the context of the Working Yet Poor project, shows a multifaceted picture.
23. Eurostat, 'Methodological guidelines and description of EU-SILC target variables- 2019 operation' (2020), p. 302, available at: https://circabc.europa.eu/sd/a/b862932f-2209-450f-a76d-9cfe842936b4/DOCSILC065%20operation%202019_V9.pdf (last accessed 15 Dec 2021).
24. Note, however, that part-timers who are also in education, people with disabilities, those who have multiple part-time jobs (that are equivalent to a full-time job), or those who do not want to work more are not considered to be involuntary part-timers.
25. In 2019, around one involuntary part-timer in five was on a temporary contract.
26. *Source*: EU-SILC/Eurostat.
27. According to Eurostat (LFSI_PT_A), in 2020 the number of workers in 'temporary employment' was higher in Spain (20.1%), Portugal (15%), and Poland (14.4%), and much lower (< 3%) in Romania, Lithuania, Estonia, and Latvia.
28. Eurostat data from 2019 ([lfsa_eppgacob]), referred to 'Part-time employment as percentage of the total employment', place the Netherlands (45.6%), Austria (29.8%), Germany (29.5%), Belgium (23.1%), and Iceland (21.6%) above the EU-28 average (21.1%).
29. According to the OECD glossary, 'involuntary part-time' is when the employee: a) usually works full-time but is working part-time because of economic slack; b) usually works part-time but is working fewer hours because of economic slack; c) is working part-time because full-time work cannot be found.

Greece (65.4%).[30] Moreover, the number of marginal part-time workers – i.e., those who work less than 20 hours per week – has substantially increased over the last decade, bringing with it a higher risk of precariousness, lower levels of job security, fewer career opportunities, and lower salaries for those workers.[31]

Statistics show that fixed-term workers, temporary agency workers, and involuntary part-time workers are at greater risk of in-work poverty than the total employed population.[32] In 2019, the risk of in-work poverty reached 15.7% among these atypical workers compared to 9% among the total employed population. The same findings emerge when considering non-monetary indicators. The index of severe material deprivation in 2019 was 5.6% for these atypical workers, as against 3.3% for the total employed; the index of material and social deprivation was 12.4% for atypical workers, as against 8.1% for the employed.

Atypical workers are a heterogeneous group and not all workers in this group are affected by in-work poverty to the same extent. For instance, in 2019, men in this group reported being more strongly affected by in-work poverty than women in the EU (17.6% for men compared to 14.4% for women). Similarly, migrants experience a risk of in-work poverty more than twice as high as nationals (28.1% compared to 13.7% among these groups of atypical workers). Education protects against the risk of in-work poverty. However, atypical workers with tertiary education are more affected by poverty than tertiary graduates among the employed (9.1% of university graduates in these atypical workers groups as against 4.3% in the employed population). As with the other groups, single-person households are more affected by poverty (26.8% compared to 13.2% of those living in a two-person household among these atypical workers groups in 2019). Similarly, fixed-term workers, temporary agency workers and involuntary part-time workers living in single-worker households are three times as likely to be at risk of poverty than those living in multi-worker households (30.2% versus 8.5%).

3. The EU Directives on atypical work and the challenge to combine their conflicting aims

This section explores the rationale behind the regulation of atypical work at EU level and its evolution, highlighting the tension that exists between the different aims of the relevant EU Directives, which seek to promote the use of atypical employment arrangements while trying to protect atypical workers at the same time.

To understand correctly the functioning and limitations of the principle of equality as embedded in the Directives on atypical work, it is necessary to have in mind their aims and structure. To this end, we must put them in context, considering the policy discourse at the time of adoption and the subsequent evolution, as well as its interpretation by the CJEU.

Even though the evolution towards regulating atypical work at EU level started as early as the 1970s, it was only in the 1980s that the initial distrust on fixed-term and part-time contracts faded in some EU Member States, once it was shown that these 'atypical' contract forms could be a source

30. With an EU-27 average of 24.4% in 2020, countries other than Italy and Greece had high rates of involuntary part-timers: Cyprus (57.4%), Romania (56.9%), Bulgaria (55.6%), Spain (52.2%), Portugal (44.4%), France (38.2%). See Eurostat 2020 ([lfsa_eppgai]).

31. European Parliament, 'Precarious Employment in Europe: Patterns, Trends and Policy Strategies' (PE 587.285) (2016), 77–78.

32. *Source*: EU-SILC/Eurostat (see table 1.6 in Ratti, García-Muñoz, Vergnat, 'The Challenge of Defining, Measuring, and Overcoming In-Work Poverty', cit., 32).

of job creation.[33] Yet, there were persistent worries about the discrimination between full-time workers with open-ended contracts on the one hand, and part-time workers and workers with fixed-term contracts on the other hand, which could also be a source of unfair (gender-related) competition.[34]

At the end of the 1980s, the Community Charter of Fundamental Social Rights for Workers[35] identified the need to both allow forms of employment other than open-ended contracts, such as contracts for fixed-term, part-time, temporary and seasonal work, and enhance the protection of workers employed under these atypical contracts. According to Article 7 of the 1989 Community Charter, 'forms of employment other than open-contracts' should be given the same legislative attention as 'standard' work.' This declaration was part of what was called at the time the 'social dimension' of the single internal market operation, launched in 1985 by Jacques Delors, then President of the European Commission.

For a long while, TAW remained even more controversial. Until the 1980s, TAW was practically outlawed in most Member States.[36] The first European policy documents on TAW emphasised the need to eliminate the abuses characterising the activities of temporary work agencies (TWAs) at that time.[37] It was only in 1997 that the ILO Convention No. 181 on private employment agencies marked the end of the 'prohibitive/restrictive' regulatory model for TAW from a global perspective.[38] At the European level, it was the CJEU that pushed for the legitimation of TAW and the need for an accompanying regulatory framework in its landmark rulings in the 1990s on the incompatibility of public monopolies in employment services with EU competition policy.[39]

Eventually, the EU legislator covered the regulation of atypical work by enacting the PTWD in 1997,[40] the FTWD in 1999[41] and the TAWD in 2008,[42] the first two implementing framework agreements concluded by the social partners and the third deriving directly from the EU

33. For an analysis of the three instruments, see in particular: Countouris, *The changing law of the employment relationship. Comparative analyses in the European context*, (Routledge 2016), at 246–266; Avilés and García Viña, 'Regulation of the Labour Market' in Hepple and Veneziani (Eds.), *The Transformation of Labour Law in Europe*, (Hart Publishing, 2009), at 74–75.
34. Case C-43/75 – *Defrenne v SABENA,* EU:C:1976:56.
35. The Community Charter of Fundamental Social Rights for Workers was adopted on 9 December 1989 by a declaration of all Member States, with the exception of the United Kingdom. It established the major principles on which the European labour law model is based and shaped the development of the European social model in the following decade.
36. During the 1950s, the ILO had clearly stated (in response to a question from the Swedish Government) that *temporary agency work* was prohibited by ILO Convention No. 96 of 1949 regarding fee-charging placement. See Blanpain and Graham (Eds), *Temporary Agency Work and the Information Society,* (Kluwer Law International, 2004).
37. As pointed out by Delfino, 'Interpretation and Enforcement Questions in the EU Temporary Agency Work Regulation: An Italian Point of View' (2011) 2 *European Labour Law Journal*, at 287–298, referring to Council Resolution of 21 January 1974, concerning a social action programme, which was the first EC document that referred to temporary agency work among the measures to attain a full and better employment in the Community.
38. ILO C 181 replaced ILO C 96 See Thuy, 'ILO Convention on Private Employment Agencies (no. 181)', in Blanpain (Ed.), *Private Employment Agencies*, (Kluwer Law International, 1999), 77–103.
39. *See* Case C-55/96 - *Job Centre,* EU:C:1997:60 and the related Case C-41/90, *Höfner v. Macroton*, EU:C:1991:161.
40. Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14.
41. Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175.
42. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327.

Commission and as a consequence of the so-called 'flexicurity approach' undertaken in the field of EU social policy.

The EU recognised atypical work 'as suiting the needs of both employers and workers.'[43] The three atypical work Directives, to varying degrees, recognise on the one hand the *status aparte* of atypical workers in comparison with standard workers in relation to their rights on job protection, and, on the other hand, emphasise the importance of the application of the principle of equal treatment and the need for supplementary protection. Accordingly, they seek to promote flexible arrangements, while safeguarding some protective minima for these workers. For the purpose of this contribution, we focus on the latter.

4. Equal treatment and non-discrimination at the core of the EU regulatory framework

From its inception, the strategy on the regulation of atypical work was grounded on the affirmation of the principle of equal treatment as one of the main pillars of EU law.[44] This was intended to avoid systematic deregulation and precarisation. From a policy perspective, the Directives managed to normalise the use of atypical work[45] across the EU, leaving the principle of equal treatment to stand as a rather lonely sentinel, aimed at limiting the abuse of atypical work and sustaining its entire legislative edifice. Apart from Clause 5 of the FTWD and Articles 5(5) and 10 of the TAWD, which aim to prevent abuses, the Directives do not provide effective remedies for the abusive use of the atypical work. Still, the principle of equal treatment allowed the CJEU to protect atypical workers in a variety of circumstances.

In the following subsections, we sketch the contours of the three Directives, focusing on the merits of the equal treatment principle through references to the most relevant cases decided by the CJEU.

4.1 The PTWD and equal treatment

Depending on their household composition and whether they have (an)other job(s), involuntary part-timers may have difficulty making ends meet, risking falling below the poverty line. Still, even though the PTWD aims to facilitate voluntary part-time work (clause 1(b)), the framework agreement provides no effective tools for distinguishing between voluntary or involuntary, let alone to preventing abuses of involuntary part-time work.

In the PTWD, discrimination with regard to employment conditions is prohibited unless different treatment is objectively justified.[46] Where appropriate, this requires the application of the principle of *pro rata temporis*. Equal treatment in part-time cases is often linked to sex discrimination

43. General consideration no. 6 Council Directive 1999/70/EC.
44. Zaccaroni, *Equality and Non-Discrimination in the EU. The Foundations of the EU Legal Order* (Edward Elgar, 2021), *passim*; O'Cinneide, 'Completing the Picture: The Complex Relationship between EU Anti-Discrimination Law and "Social Europe"' in Countouris and Freedland op. cit. 6; Barnard, *EU Employment Law,* (OUP, 2012), Ch 5 'Equality Law – An Introduction'; McCrudden, 'Theorising European Equality Law' in Costello and Barry (Eds.), *Equality in Diversity: The New Equality Directives* (ICEL Dublin, 2003), 1–38.
45. See Murray, 'Normalising Temporary Work' (1999) 28 *Industrial Labour Journal*, 269–275.
46. According to Clause 4(1), 'Part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds'.

issues. However, as then recognised by Directive 2019/1158 on work-life balance, 'while working part-time has been shown to be useful in allowing some women to remain in the labour market after having children or caring for relatives with care or support needs, long periods of reduced working hours can lead to lower social security contributions and thus reduced or non-existing pension entitlements'.[47]

4.1.1. Equal treatment and its limits. The notion of 'comparable full-time worker' has effectively limited the application of equal treatment. In the *Wippel* case, based on both the PTWD and Article 157 TFEU (equal pay between men and women), comparison was impossible due to the fact that the claimant did not qualify as 'worker' under EU law. Ms Wippel worked under a contract that did not specify her weekly working hours nor the way they were to be organised, but left it up to her to decide whether to accept work or not. Her salary was not fixed. Instead, she was paid for the hours she chose to work. In its judgment, the Court denied the right to equal pay to on-call workers.[48]

The PTWD gives Member States the option of excluding casual workers from its scope[49] and allows Member States to make the access to particular conditions of employment subject to a period of service, time worked or to certain earnings qualification. According to the Directive, these requirements should be reviewed periodically having regard to the principle of non-discrimination. In addition, social security falls outside the scope of the Directive.[50] This option to derogate from the principle of equal pay concerning sickness or unemployment benefits may be practical from an administrative point of view, but leaves workers with mini-jobs and casual workers unprotected in case social risks such as illness, disability or unemployment occur.

From the point of view of in-work poverty, the PTWD offers rather limited protection. Certainly, equal treatment can be key in ensuring that part-time work is not being used to completely circumvent employment protections. However, the fact that abundant limitations exist both in the material and personal scope of the Directive effectively limits its protective aim. Even in circumstances in which the principle of equal treatment applies, it might not be sufficient to address inequality between full-time and part-time workers. The expansive interpretation of the CJEU in some cases may have mitigated some of these concerns, but where casualisation of work is particularly significant, national jurisdictions have been confronted with the need to provide answers to

47. Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers, Recital 35.
48. Case C-313/02 – *Wippel*, EU:C:2004:607, para.33. With regard to Art. 157 TFEU, the Court noted that the fact that the type of contract has financial consequences for the worker concerned is not sufficient to bring such conditions within the scope of the Article or of (the then) Directive 75/117, those provisions being based on the close connection which exists between the nature of the work done and the level of the worker's pay (see, to that effect, Case C-77/02 *Steinicke*, EU:C:2003:458, para. 51).
49. Clause 2(2), PTWD: 'Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis. Such exclusions should be reviewed periodically to establish if the objective reasons for making them remain valid.'
50. Note, however, that the Court has implemented equal treatment in social security for part-time workers through the gender anti-discrimination law, as a consequence of women representing the overwhelming majority of part-time workers.

vulnerable groups of part-timers. This is the case of Germany where a discussion is ongoing regarding the possible phasing-out of the mini-job-scheme. This scheme was implemented in 2004 as part of the so-called Hartz reform and has apparently failed to achieve its core goals of acting as a stepping stone towards a better employment position.[51] The position of marginal part-timers has also been criticised in the Netherlands. As part of a larger package to rebalance flexibility and security in the labour market, measures to enhance job certainty and predictability of on-call workers were put in place in 2020.[52]

The fact remains that without distinguishing between actual involuntary part-time and voluntary part-time work, this type of flexible contract may still be used to lower the working conditions entitlements of part of the workforce. In fact, more than 20% of the total amount of part-time work in the EU seems to be done on an involuntary basis,[53] showing that a large number of workers are 'under-employed'. Without recognising this division, the provisions to facilitate part-time work seem to tip the balance between the two aims of the Directive in favour of the use of part-time contracts over the aim to protect working conditions.

4.2 The FTWD and equal treatment

In the case of the FTWD, precarity does not derive from a low (hours and therefore) pay perspective, as is the case with the part-time contracts, but rather from the lack of employment and economic security. More than with part-time employment, the party interested in concluding an employment contract for a fixed term is commonly the employer, benefitting from the non-applicability of (the core of) dismissal law. For the employee, fixed-term work can therefore be considered, in principle, as involuntary. This explains why the FTWD builds on two principal axes: equal treatment and the prohibition of the abuse of successive fixed-term contracts. The protection offered by this Directive, and particularly the prevention of abuse, clearly point to the idea that fixed-term contracts should be seen as the exception, rather than the rule.[54]

51. See Hiessl, 'In-Work Poverty in Germany', in Ratti (Ed.), *In-Work Poverty in Europe. Vulnerable and Underrepresented Persons in a Comparative Perspective,* cit., 110–113, referring to Rat der Arbeitswelt, 'Erster Arbeitswelt-Bericht: Vielfältige Ressourcen stäken – Zukunft gestalten. Impulse für eine nachhaltige Arbeitswelt zwischen Pandemie und Wandel' (2021), at 70 et seqq.; Bruckmeier and Hohmeyer, 'Arbeitsaufnahmen von Arbeitslosengeld-II-Empfängern: Nachhaltige Integration bleibt schwierig'(2018) IAB-Kurzbericht, No. 2/2018, Institut für Arbeitsmarkt- und Berufsforschung.
52. (Article 7: 610b DCC). If an employment contract has lasted at least three months, the agreed working hours in any month are presumed to be equal to the average number of working hours per month in the three preceding months. Notably, the EU Directive for Transparent and Predictable Working Conditions provides for an option to establish a rebuttable presumption of employment with a minimum number of paid hours based on the average hours worked during a given period (see Art. 11 sub b). Since 1 January 2020, for an on-call contract that has lasted 12 months, the employer is obliged to offer the employee an employment agreement with fixed hours at least equal to the average amount of working hours in the preceding 12-month period (Article 7:628a sub 5 DCC (civil code, particular agreements)). See extensively Houwerzijl, Bekker, Evers, Zekic, 'In-Work Poverty in the Netherlands', in Ratti (Ed.), *In-Work Poverty in Europe. Vulnerable and Underrepresented Persons in a Comparative Perspective,* cit., 229–230.
53. Source: Eurostat figures EU-SILC 2017: 20,9%.
54. Already in *Adeneler*, but more clearly in *Deutsche Lutfhansa*, the Court held that 'the use of fixed-term contracts as opposed to contracts of indefinite duration is therefore exceptional' Case C-212/04, *Adeneler and Others,* EU:C:2006:443, para 61; Case C-109/09, *Deutsche Lufthansa*, EU:C:2011:129, para 30.

    See also the Opinion of Advocate General Kokott delivered on 9 January 2008 in Case C-268/06, *Impact*, EU:C:2008:2, para 117.

The agreement negotiated by the European social partners on which the FTWD is based, just like with the PTWD, was preceded by challenging negotiations, primarily because accepting fixed-term contracts implied a departure from the traditional idea that work should be continuous and that dismissal must have a just cause.[55] Whether the worker will be rehired, is not tested against the common (national) criteria for fair or unfair dismissal but remains the prerogative of the employer.[56] The fixed ending of the employment contract covers any irrelevant or unfair reason the employer has for not renewing the contract. To tackle this side effect of flexibilisation, EU law offers some limited protection. This was the compromise between management and labour: the Directive allows fixed-term contracts, and thus certain flexibilisation of the market, but it also provides some protection on the basis of equal treatment and the prevention of the abuse of successive fixed-term contracts.

These two pillars are complemented by a rather broad personal scope. Accordingly, the CJEU has rejected all limitations to the personal scope that are not explicitly contemplated in the Directive. As such, only initial vocational training and apprenticeships may be excluded from the scope of the Directive (Clause 2(2)(b)). Furthermore, workers who are placed by temporary work agencies are also explicitly excluded from the scope of the FTWD.[57]

4.2.1. Equal treatment and its limits. The FTWD seeks to set minimum standards for fixed-term contracts by applying the principle of equal treatment. According to the Agreement, discrimination in employment conditions is prohibited, unless different treatment is objectively justified (Clause 4 fixed-term Directive). This protection has been scrutinised abundantly by the CJEU, making the fixed-term Directive one of the most contested instruments before the Court.[58] Clause 4 has been given direct effect in cases where the employer in question represents the public administration, thus giving vertical direct effect to the provision.[59] It must be noted, nonetheless, that the notion of public employer has been interpreted broadly, as including public services, bodies with exceptional powers or those under the control of public authorities.[60]

The Directive only prohibits discrimination between fixed-term workers and permanent workers in employment conditions, thus excluding discrimination between different categories of fixed-term workers.[61] Much like the PTWD, equal treatment requires a comparable standard worker, in this case with a permanent contract (Clause 3.2 of the Agreement). Where there is no comparable worker in the same establishment, reference can be made to the applicable collective labour agreement, or where there is no collective agreement, to national law or practice. There is, however, no 'hypothetical comparator', which can be an obstacle to applying the equal treatment provision where permanent workers cannot be found. The CJEU has also ruled that the scope of the Directive does not extend to cover discrimination between permanent workers, even when this discrimination is rooted in the conversion of a fixed-term contract to a permanent one. In this vein, the

55. Preamble, recital 1; general considerations to the Framework Agreement, para. 6.
56. Houwerzijl and Aranguiz, 'Labour law harmonization in EU Law and its (limited) protection of VUP Groups' (2021) *WorkYP Deliverable 4.1*, available at: www.workingyetpoor.eu.
57. Case C-290/12, *Della Rocca*, EU:C:2013:235, para 44; Case C-681/18, *JH*, EU:C:2020:823, para 45.
58. Robin-Olivier and Lo Faro, 'Atypical Forms of Employment' in Jasper, Pennings and Peters (eds), *European Labour Law* (Intersentia: 2018), at 222. Examples of recent Italian and Spanish case law, in particular, are discussed in Houwerzijl and Aranguiz, cit., 63.
59. Case C-268/06, *Impact,* ECLI:EU:C:2008:223, para 61.
60. Case C-152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*, EU:C:1986:84; Case C-361/12 – *Carratù*, EU:C:2013:830; Case C-188/89 - *Foster and Others v British Gas*, EU:C:1990:313.
61. Case C- 245/17, *Viejobueno Ibáñez,* EU:C:2018:934.

Court has held that 'the principle of non-discrimination has been implemented and specifically applied (…) solely as regards differences in treatment as between fixed-term and permanent workers who are in a comparable situation. Consequently, any differences in treatment between specific categories of permanent staff are not covered by the principle of non-discrimination'.[62] The Court has accepted, differently, discrimination suffered by a permanent worker when this is rooted in periods of service completed under previous fixed-term contracts.[63]

Though not on the basis of the agreement *per se*, the CJEU has also ruled that direct sex discrimination on the grounds of pregnancy does not suffice as a reason for ending or not renewing a fixed-term contract.[64] This case law confirms that other forms of direct discrimination are also not valid considerations. The right to equal treatment is, however, limited to employment conditions. Other equally significant areas, such as social security rights, are excluded from the scope of the Directive.[65]

4.2.2. Prevention of abuse. The equal treatment provision of the fixed-term Directive is complemented by the prevention of abuse clause (Clause 5). This provision does not require an objective reason for the initial fixed-term contract, but it prohibits the abuse of successive fixed-term contracts and obliges Member States to take legal measures to prevent abuse. More specifically, it requires Member States to adopt measures providing for objective justifications for renewal, the maximum duration of successive fixed-term employment contracts, or the maximum number of renewals of such contracts.[66] Whereas the last two measures have a clear meaning and require interpretation of the actual limits of the maximum duration and number of renewals, the first measure on 'objective reasons' is formulated more abstractly. In this vein, the CJEU has clarified that objective justifications can be found in the presence of specific factors relating, in particular, to the precise and concrete circumstances characterising a given activity.[67] These circumstances may, according to the CJEU, lay in the specific nature of the tasks or in pursuit of a legitimate social-policy objective of a Member State. The CJEU clearly ruled in *Adeneler* that the mere fact that the use of fixed-term contracts is provided for in national law cannot constitute an objective reason for the use of a succession of fixed-term contracts.[68] Other than this, however, the discretion that Member States enjoy in setting the objective justifications has proven to be rather broad.[69]

The prevention of abuse clause applies *only* to successive contracts and thus the initial contract falls outside the scope of the Directive. Accordingly, it requires Member States to determine under what conditions fixed-term contracts can be defined as successive and when they shall be deemed contracts of indefinite duration (Clause 5(2)). In this respect, the CJEU has explained that a certain period between the contracts must be considered. Otherwise, in practice, the worker would be obliged to accept breaks during a series of contracts with her employer in order to avoid the

62. Case C-652/19, *Consulmarketing*, EU:C:2021:208, para 66.
63. Case C-177/10, *Rosado Santana*, EU:C:2011:557
64. In particular, it was considered to be in breach of Art. 2(1) and (3) Directive 76/207/EEC, now Directive 2006/54/EC. Case C-207/98, *Mahlburg*, EU:C:2000:64
65. Van Der Mei, 'Fixed-term work: Recent developments in the case law of the Court of Justice of the European Union', 11(1) *European Labour Law Journal* (2020), 66.
66. The potential of this clause to reduce job insecurity for causal workers has been highlighted by Durri, op. cit. 9, at 16.
67. Gundt, 'The limitations of fixed-term contract regulation', 14(3) *ELLJ* (2023), 428.
68. Case C-212/04, *Adeneler and Others,* EU:C:2006:443, para 61.
69. Case C-586/10, *Kücük*, ECLI:EU:C:2012:39.

succession of contracts. In any case, the CJEU has considered a period of 60 days[70] or even three months[71] to be potentially sufficient to avoid abuse, which may be problematic considering hiring practices in certain sectors, such as education.

The extensive leeway that the FTWD still leaves Member States to use temporary contracts to meet structural needs has been particularly contested in the southern Member States, where the use of fixed-term contracts in the public sector is well above the average. In *IMIDRA,* the CJEU found the use of specific temporary contracts to fill job vacancies in the Spanish public sector, which had remained unfilled because the selection process (public competitions) had not yet been finalised, to be in breach of the FTWD, as these contracts could be used for an indefinite (and unpredictable) period of time (in practice they were sometimes extended for decades). Importantly, the CJEU added that purely economic considerations, related for instance to the 2008 financial crisis, cannot justify the absence of measures directed to prevent and sanction abuse in the national context.[72] After an initial mixed reception at the national level, and prompted by an important judgment of the Spanish Supreme Court,[73] the government adopted measures to limit the (ab)use of fixed-term contracts, both in the public and the private sector.[74]

Other Member States have also started to acknowledge that 'equal treatment is not enough', leading to new (proposed) restrictions. In Italy, an upper threshold for the share of fixed-term workers in the workforce of a company (20% with exceptions) has been introduced,[75] and in Germany, a bill published by the Labour Ministry in early 2021 detailed plans to introduce a strict threshold on the share of fixed-term workers hired without an objective reason, to be set at 2.5% of the total workforce.[76]

4.3 The TAWD and equal treatment

The TAWD was adopted about a decade after the other two Directives, following the failure of two rounds of consultation between the European social partners, and thus has a strong compromise character to it.[77] The preamble of the Directive states that temporary agency work '[…] meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market'.[78] Hence, the aim of the Directive is to ensure the protection of temporary agency workers, improve the quality of TAW and recognise temporary work agencies as employers. It takes into account the need to establish a suitable framework for the use of temporary agency work which contributes to the creation of jobs and the development of flexible forms of working (Article 2).

70. Joined Cases C-362/13, C-363/13 and C-407/13, *Fiamingo and Others*, EU:C:2014:2044, para 71.
71. Case C-378/07, *Angelidaki*, EU:C:2009:250, para 157.
72. Case C-726/19, *IMIDRA v JN,* EU:C:2021:439, paras 91–92.
73. Tribunal Supremo, STS 1137/2020, de 29 de diciembre de 2020, ECLI:ES:TS:2020:4383.
74. Law 20/2021 of 28 December on urgent measures to reduce fixed-term contracts in the public sector (*Ley 20/2021, de 28 de diciembre, de medidas urgentes para la reducción de la temporalidad en el empleo público*). It is worth noting that this legislative change is not a result of the case law of the European courts, but rather a direct consequence of the European Commission's demands in the context of accessing the funds of the Recovery and Resilience Facility. Nevertheless, it also brings Spanish legislation more in line with the case law of the CJEU and the Spanish jurisprudence.
75. See extensively Hiessl, 'In-Work Poverty in Germany', cit., 107–108.
76. *Ibid*., section 3.04[A][2] and 3.04[A][1].
77. Frenzel, 'The Temporary Agency Work Directive' (2010) 1 *European Labour Law Journal*, 119–134.
78. Directive 2008/104/EC, preamble para. 11.

The main obligations which should contribute to these goals are those arising from the equal treatment clause on basic working conditions (Article 5) and the obligation for Member States to review existing national restrictions and prohibitions on the use of temporary agency work (Article 4). Therefore, like the PTWD, the TAWD includes provisions on the *promotion* of temporary agency work. However, if Member States wish to impose or maintain restrictions on the use of temporary agency work, Article 4(1) should in any case serve as a framework for such restrictions.[79] Thus, prohibitions or restrictions on the use of temporary agency work are justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.[80]

4.3.1. Scope of application. Triangular employment has been growing in recent years, following not only the typical pattern of an agency supplying workforce to a user undertaking, but also taking different forms and including a variety of contractual arrangements. The risk that such arrangements may fall outside the scope of the TAWD was initially somewhat averted by a progressive interpretation of Article 3 by the CJEU.[81] In *Ruhrlandklinik*, the CJEU rejected the limitation of the concept of 'worker' to the national definition and, in particular, to those who have a contract of employment with the temporary work agency, since such a restrictive approach would undermine the effectiveness of the Directive by 'inordinately and unjustifiably' limiting its scope of application.[82] According to Article 3(1)(a), the concept of 'worker' covers any person who carries out work and who is protected on that basis in the Member State concerned, two criteria that cannot be interpreted as a 'waiver on the part of the EU legislature of its power to determine the scope' of the TAWD.[83] However, questions still remain regarding the scope of the TAWD, for example, concerning workers in triangular employment relationships who are assigned to work with a user undertaking on a more permanent basis. In *ALB FILS Kliniken*, the Court ruled that the employer must intend to assign the worker to work temporarily for a user undertaking both when the contract of employment is concluded and when each of the assignments is effectively made.[84] When this is not the case, a triangular employment relationship risks falling outside the scope of the TAWD.

Questions also still exist about the user undertakings. According to Article 3 of the TAWD, a user undertaking is any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily.[85] However, Article 1(2) TAWD states that the user undertaking needs to be engaged in *economic activities*. In *Ruhrlandklinik*, the Court ruled that 'any activity consisting in offering goods or services on a given market is economic in nature'.[86] That seems to be a broad approach. However, the question is whether households who make use of services provided through online platforms, like platforms for cleaning services, are

79. Cf. Case C-681/18, *KG (Missions successives dans le cadre du travail intérimaire),* EU:C:2020:823.
80. CJEU 17 March 2015, C-553/13, *AKT/Shell Aviation*, EU:C:2015:149.
81. Bartkiw, 'Labour Law and Triangular Employment Growth: A Theory of Regulatory Differentials' (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations,* 413–434.
82. Case C-216/15 - *Betriebsrat der Ruhrlandklinik*, EU:C:2016:883, para. 36.
83. *Ibid*. para. 32.
84. CJEU 22 June 2023, C-427/21, *ALB FILS Kliniken*, EU:C:2023:505, para 44.
85. Defined in Article 3(1)d) of Directive 91/383/EC.
86. Case C-216/15 - *Betriebsrat der Ruhrlandklinik*, EU:C:2016:883, para. 44.

deemed to be user undertakings. The Directive states that a user undertaking can be a natural person as well, but it is unclear whether households engaged in economic activities are included in this definition. Moreover, the distribution of responsibilities between the TAW and the user undertaking remains unclear under the TAWD. As a result, large variations across different jurisdictions are hardly limited, let alone excluded. In contrast with this approach, regarding liability for the protection of workers' health and safety, Directive 91/383/EEC concerning safety and health at work of temporary workers includes provisions on the respective responsibilities of the TWA and the user company: in addition to the responsibility of the TWA that may result from national legislation, under the Directive, the user undertaking is responsible for the conditions governing the performance of the work during the assignment.[87] Beyond health and safety, the recognition at EU level of a rule, under which the TWA and the user underaking are jointly responsible for labour and employment law rules applying to temporary agency workers, would be a more favourable solution for workers.[88]

4.3.2. Equal treatment and its limits. Article 5, TAWD provides that the basic working and employment conditions of agency workers shall be at least those that would apply if they had been recruited directly by the user undertaking to occupy the same job. The Directive conceives the principle of equal treatment narrowly, to the extent that only the *basic* working conditions should be (at least) equal. What constitutes such basic conditions is described in Article 3(1)(f); it refers to working and employment conditions mostly laid down by legislation or collective agreements relating to working time, holidays, and pay.[89] Although the Court has favoured a broad interpretation of the term 'working conditions',[90] Member States are still free to interpret what constitutes 'pay', the most far-reaching of these conditions according to Article 3(2) of the Directive.

Regarding the basic working conditions, there is no possibility for direct discrimination on the basis of objective reasons, as is the case under the PTWD and the FTWD. However, other derogations are possible. Member States may exempt temporary agency workers who have a permanent contract of employment with a TWA and continue to be paid between assignments. Social partners can derogate as well, for example in collective agreements, but must respect the 'overall protection' of working and employment conditions. It is apparent that the concept of overall protection is quite vague and it is still unclear what it entails. A case decided by the CJEU has clarified the concept of 'overall protection of temporary agency workers'.[91] In addition, the German *Bundesarbeitsgericht* has asked the CJEU what conditions must be met for such a derogation. Is it necessary to carry out an evaluative analysis comparing the collectively agreed working conditions with the working conditions existing in the user undertaking, or should it be a more abstract

87. Article 7 of Directive 91/383/EC.
88. Chacartegui, 'Resocialising temporary agency work through a theory of reinforced employers liability' in Countouris and Freedland, op. cit. 6, at 213.
89. Agency workers should also be given access to the amenities or collective facilities in the user undertaking under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons, see Article 6, section 4, TAWD.
90. Case C-681/18, *KG (Missions successives dans le cadre du travail intérimaire),* EU:C:2020:823. The Court referred to Article 31 of the Charter of Fundamental Rights of the EU.
91. Case C-311/21, *TimePartner Personalmanagement,* EU:C:2022:983. The case concerned the compatibility of one public sector-specific exemption. The exemption permitted a collective agreement in the public sector to provide for a permanent assignment of an employee to a company to which that employee's tasks had been outsourced.

assessment? The CJEU interprets Article 5(3) of the TAW in a narrow sense, meaning that any derogation from the equal treatment principle in respect of the basic working conditions to the detriment of the temporary agency workers must be counterbalanced by advantages as regards other basic working and employment conditions.

4.3.3. Prevention of misuse. Article 5(5) provides that appropriate measures must be taken, in accordance with national law and/or practice, to prevent misuse in the application of Article 5 and, in particular, to prevent successive assignments designed to circumvent the provisions of this Directive. In its case law, the Court has considered Article 5(5) as involving two separate obligations for the Member States:[92] a) to prevent abuse of the derogations granted under Article 5(2) to (4); and b) to prevent, in particular, successive assignments designed to circumvent the provisions of the Directive in its entirety. According to the Court, this second obligation covers all provisions of the TAWD. So, under the heading of equal treatment, we also find obligations for Member States to prevent successive assignments designed to circumvent the TAWD as such. The purpose of the TAWD, the Court has held, is to ensure that Member States do not make temporary employment with the same user enterprise a permanent situation for a temporary agency worker.[93]

Regarding the meaning of 'temporary' under Articles 1(1) and 5(5), the Court ruled, in *KG*, that it does not mean that national legislation must limit the number of successive assignments at the same user undertaking.[94] However, it does preclude a Member State from taking *no measures at all* to preserve the temporary nature of temporary agency work. In a more recent case, the CJEU held that the word 'temporarily' is not intended to limit the application of agency work to posts that would not exist on a long-term basis, because temporariness refers not to the job held at the user undertaking, but to the circumstances under which a worker is assigned to this undertaking.[95] On the question of whether 55 months of temporary agency work can be considered as a misuse of successive assignments, the Court held that national courts need to assess this having regard to all the relevant circumstances, such as, in particular, the specific features of the sector and, in the context of the national legal framework, whether any objective explanation is being given for the fact that the user undertaking concerned uses a series of successive temporary agency employment contracts.[96] Also, in the absence of a provision of national law that imposes the sanction of an employment relationship being presumed between the worker and the user when the working relationship is no longer temporary, the Court ruled that no such individual right to an employment relationship can be derived from the Directive.[97]

Due to different abuses of temporary agency contracts some national jurisdictions have had to introduce new safeguards restricting this type of employment. This is the case in the Netherlands, a traditionally rather liberalised market, which is considering the introduction of an obligatory admission system because of notorious abuses and non-compliance, particularly

92. Case C-681/18, *KG (Missions successives dans le cadre du travail intérimaire),* EU:C:2020:823.
93. *Ibid.*, para. 60.
94. *Ibid.*, para. 42, 44, confirmed in Case C-232/20, *Daimler*, EU:C:2022:196, para. 54 and C-427/21, *ABL FILS Kliniken*, EU:C:2023:505, para. 43.
95. *Ibid. (Daimler),* para. 36–38.
96. *Ibid.*, para. 63.
97. *Ibid.*, para. 100,

among those employing labour migrants.[98] Measures also needed to be taken because of the fragmentation of temporary agency contracts, now also used in 'payrolling' or 'contracting'.[99] In Germany, where strong restrictions were already in place regarding mandatory licensing, prohibitions in the construction industry and maximum assignment periods (limited to 18 months), [100] temporary agency work was recently banned in the meat industry in response to a Covid-19 health and safety scandal. [101]

5. Towards the development of new regulatory tools for governing atypical work? A challenge for the implementation of the EPSR

From the above it should be clear that equal treatment alone —and even in combination with clauses on the prevention of abuse— falls short in bearing the weight of protecting atypical workers in the EU. In most cases low-wage workers with flexible contracts are compared to low-wage workers with open-ended contracts, *if* indeed a suitable comparator can be found. At best, equal treatment grants these workers access to similar employment conditions, although the discretion given to Member States is far too broad in the justifications, and the material scope designed by the atypical work Directives is too limited to truly fight precariousness in atypical work. Arguably, most troublesome in this respect is the fact that the atypical work Directives do not deal with areas like social security, which are key to tackling in-work poverty. This is partly justified by the unanimity requirement attached to social security issues according to Article 153(2) TFEU. Yet, it has resulted in the defective regulation of atypical work, especially considering its effects on the relevant levels of in-work poverty. In the case of the TAWD, the bulk of equal treatment is restricted to basic working conditions. The personal scope is also problematic in some cases. For example, the possibility of excluding casual workers, such as under the PTWD, effectively limits minimum protection for a considerable part of the workforce. Indeed, the (almost)[102] unrestricted use of on-demand and zero-hours contracts in some EU countries has further amplified the precarities of flexible employment relationships and has contributed to deepening the furrow between standard work and the constellation of atypical contracts. In this respect, pre-Covid-19 analyses revealed a certain activism by EU Member States in reforming their atypical work regulations, with controversial effects on the perpetuation of labour market segmentation.[103]

98. On the basis of two advisory reports that have been endorsed by the government from the 'Booster Team Protection Labour Migrants' on the working and housing conditions of labour migrants during COVID-19 in The Netherlands.
99. Payrolling even became so problematic that as of 2020 new provisions specifically for payrolling needed to be included in the Dutch Civil Code in order to improve the working position of payroll-workers.
100. The information in this paragraph is drawn from Hiessl, In-Work Poverty in Germany, cit., 107–108.
101. Ruling of the Federal Constitutional Court (BVerfG) of 29 December 2020. Companies in the butcher's trade with up to 49 employees are exempt. Four of the companies affected submitted a constitutional complaint, supported by the temporary agency industry. This was based primarily on a an alleged violation of the fundamental right of choosing an occupation under Article 12(1) of the German Constitution. See IGZ, Verfassungsbeschwerde gegen sektorales Zeitarbeitsverbot eingelegt, Press release of 12/5/2021 (2021), https://www.ig-zeitarbeit.de/presse/artikel/verfassungsbeschwerde-gegen-sektorales-zeitarbeitsverbot-eingelegt.
102. Note, however, that the more recent Transparent and Predictable Working Conditions Directive does provide some limits to the use of these unpredictable contracts, most clearly under Article 11. However, this provision still does not ensure that abuses will not occur, as it is geared primarily at providing certain predictability.
103. Eichhorst and Marx 'How stable is labour market dualism? Reforms of employment protection in nine European countries' (2021) 27 *European Journal of Industrial Relations* 2021, 93–110.

The provisions on fighting abuses of fixed-term and TAW contracts do not compensate for the lack of protection offered by equal treatment since Member States still enjoy considerable leeway on not only how, but also to what extent, they may choose to fight abuses (e.g., in the TAWD), with the PTWD not even including an anti-abuse clause. While the fact that an individual works part-time involuntarily does not necessarily mean that the contract is abusive, the lack of consideration of the effects of involuntary part-time on in-work poverty levels deserves regulatory attention. This may be achieved, for instance, providing with more effectiveness the obligation for an employer to transform part-time into full-time and vice versa as per Clause 5(2) PTWD.[104]

An overall consideration of the EU atypical work Directives, the CJEU's interpretation and the national developments exposed above points to the conclusion that significant issues remain unresolved and need to be addressed. This is important for the 'traditional' atypical workers but also for the increasingly prevalent new forms of work and overall diversification of employment. As they stand, atypical work Directives fall short of meeting the objective of protecting this part of the workforce, and facilitate the opening of the market to flexible arrangements. In this vein, we cannot fail to note that the context in which these Directives operate has significantly changed since their adoption. What used to be atypical in the sense of 'marginal' or even 'exceptional' has become the new normal in contemporary labour relations, structuralising the so-called 'labour market segmentation'.[105] As a result, workplaces have 'fissured', with companies responding to changing market pressures and cutting labour costs as part of a broader strategy to become leaner and more agile.[106] This has contributed to structuralising, rather than discouraging, the precarisation of employment relationships.[107] Moreover, several collective bargaining systems have become more flexible under the influence of a highly competitive business climate: fewer *erga omnes* extensions, more opt-out and derogation clauses, and less continuation of collective agreements on expiry. Besides that, employees' work–life balance was been negatively impacted by an increase in work done during unsocial hours and a reduction in the share of full-time standard employment.[108]

A first step in addressing the current weaknesses lies in extending the material and personal scope of the equal treatment principle itself. However, equality can only go so far. An involuntary part-timer in a low-paying employment, even when earning *pro rata temporis*, is likely to struggle

104. The same CJEU did not interpret this obligation strictly, as is apparent from Case C-221/13, *Mascellani*, EU: C:2014:2286, para 23, where the Court held that 'It is clear from that clause that it does not require the Member States to adopt rules making the conversion of a worker's part-time employment relationship to a full-time employment relationship subject to his consent'.

105. Boeri, '2011 Institutional reforms and dualism in European labor markets' in: Card and Ashenfelter (Eds.) *Handbook of Labor Economics*, (Elsevier, 2014), 1173–1236; OECD, '*OECD Employment Outlook 2014'* (OECD, 2014). Available at: http://dx.doi.org/10.1787/empl_outlook-2014-en; Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26 *Industrial Law Journal, 337–352*.

106. Under this organisation model, crucial social risks are transferred away from larger companies or public entities (sometimes the former employer) to SMEs. Unequal bargaining power in these chains (networks) of companies can lead to questionable commercial contracts that define the market transactions between the different levels, with – at the lower ends – sometimes abnormally low-priced outsourcing and tendering, with the help of TWA and subcontractors. Weil, *The Fissured Workplace. Why Work Became So Bad for So Many and What Can Be Done to Improve It*, (Harvard University Press, 2014).

107. European Parliament, 'Precarious Employment in Europe: Patterns, Trends and Policy Strategies' (2016) (PE 587.285).

108. A compelling example is the liberalisation of shop opening hours in most EU Member States around the end of the 20th century. Longer working days and Sunday opening had a negative effect on pay outcomes of collective bargaining processes. See Eurofound, 'Working conditions in the retail sector' (2013).

to make an adequate living on their own. A temporary worker —either through fixed-term or agency work — who loses their job without compensation, and who faces obstacles in accessing income replacement schemes as a consequence of not having accrued sufficient time or contributions due to the temporary nature of the employment relationship, has no chance of overcoming potential economic hardships by reverting to the principle of equal treatment. For all groups, this also is likely to impact on their saving capacity, thus effectively limiting their ability to buy property or pursue other kinds of investments. In the context of the cost-of-living crisis, addressing these limitations and, overall, the fact that atypical employment departs in general from a disadvantaged position, becomes an imperative.[109]

Against this background, in what follows we suggest four key areas where attention should be drawn to when restoring the balance between a sustainable flexibility and a necessary protection of atypical work.

5.1. Effectively fighting abusive practices

One of the risks of atypical contracts relates to the idea that they are solely used to improve a company's competitive advantage through the cutting of costs and limiting employer's obligations vis-à-vis the worker without considering how this affects the latter. In this sense, employers may opt for the repetitive use of atypical contracts where the need is not temporary or seasonal or does not require solely part-time work. As a result of the widespread use of atypical employment contracts, atypical workers are increasingly trapped in in-work poverty due to the lack of transition chances, which has consequences at the individual and sectoral levels.

Regarding individuals, the approach chosen by the EU legislator is through anti-abuse clauses, which we find in both the FTWD and the TAWD. The effectiveness of such clauses, however, risks being undermined by the arguably overly broad leeway given to the Member States, which ultimately conflicts with the solemn commitment contained in the EPSR, according to which precariousness shall be prevented 'by prohibiting abuse of atypical contracts' (Principle 5 (§4) EPSR). In this sense, only successive contracts can be seen as abusive, opening the door to lengthy —though not repetitive— uses of atypical contracts.

In the case of the FTWD, how 'successive' is defined is also left to the Member States, and whereas Member States do need to choose from three options to prevent abuse, the case law shows how much flexibility they have in implementing such conditions, where the use of successive fixed-term contracts over a 15-year period has not been considered to amount to a violation of Article 5.[110] Guidance regarding how 'successive contracts' and 'objective reasons' have to be understood together with some absolute maximum limit (in time or number of contracts over a period of time), could be effective in tackling abuses. At the sectoral level, limiting the number of successive fixed-term contracts has little effect in sectors where workers can easily be replaced by other workers (jobs requiring low skills) and where the costs of recruiting and training new workers are low. Contrary to promises made regarding the promotional approach in the atypical work Directives, atypical contracts often do not function as a stepping stone, but rather as dead-end jobs, particularly for certain low-wage, labour-intensive sectors.[111] Where this is the

109. Cf. Mantouvalou, Structural Injustice and Workers' Rights (Oxford OUP, 2023), 89 ff.
110. C-586/10 – *Kücük*, EU:C:2012:39; C-265/20 - *Universiteit Antwerpen and Others*, EU:C:2022:361
111. Davies, at n. 8, 231.

case, either by collective agreements or by law, the use of atypical contracts could be made conditional on meeting 'stepping stone targets'. Some Member States have already introduced (or plan to introduce) new restrictions, such as thresholds on the share of atypical workers as a percentage of the workforce.[112]

In the case of the TAWD, the obligations imposed on Member States are much weaker, although the vagueness of the anti-abuse clause has not prevented the Court from establishing important guiding principles. What emerges from the recent ruling in the *JH* case is that anti-abusive measures must exist in the light of a set of circumstances that the national judge should consider, all of which point to a period of service 'longer than what can reasonably be regarded as "temporary"' without any objective explanation. This leaves to the national court the task of examining 'whether any of the provisions of Directive 2008/104 have been circumvented, especially where the series of contracts in question has assigned the same temporary agency worker to the user undertaking.'[113] The case shows that one of the weaknesses of atypical work, namely its repetitive use between the same parties, may already be addressed by an extensive interpretation of existing legislation. Still, a more robust understanding of the 'measures to prevent abuses' tool may help overcome growing abuses, particularly when other provisions in the Directive aim at removing obstacles to the use of TAW contracts (Art. 4 TAWD).

In the case of the PTWD, flexibilisation is seen as something mostly positive for the labour market. Part-time work as an additional income opportunity might help preventing poverty at the household level. The 2019 Directive on Transparent and Predictable Working Conditions supports this view by limiting exclusivity clauses in employment contracts (Article 9). But facilitating part-time positions should be pursued only when it is beneficial for both workers and employers. For involuntary part-timers, being forced to take on part-time work limits the opportunities to make a decent living. The lack of an anti-abuse clause in the PTWD ignores the existence of involuntary part-time workers who have no real alternative to accessing full-time positions. The inclusion of an anti-abuse clause in this context would limit the possibility for employers to have multiple part-time workers to carry out similar tasks instead of hiring a full-time employee, while strengthening the worker's ability to move from a part-time to full-time position. This would require, in addition, the introduction of a clear notion of involuntary part-time work in the Directive and the imposition of a strong duty on the employer to consider an employee's wish to transfer from full-time to part-time and vice versa.

5.2. Sectoral approaches strengthening the protection of atypical workers

In light of the risks of in-work poverty in several specific sectors with many atypical workers, Member States could (better) stimulate sectoral collective bargaining. For example, collective agreements could limit the number of subcontractors in a services supply chain. For sectors in which frequent (public) tendering is commonplace, the introduction of penalties and termination conditions for contracting bodies should be considered to ensure respect for the principle of equal treatment, compliance with anti-abuse clauses and/or other social protection measures for atypical workers. The existing optional exclusion grounds under Directive 2014/23/EU,

112. Italy is an example, where the law provides that employers can hire up to maximum 20% of their workforce through temporary contracts, with some derogations that can be introduced by collective agreements.

113. Case C-681/18, *KG (Missions successives dans le cadre du travail intérimaire),* EU:C:2020:823, paras. 69–71.

Directive 2014/24/EU, and Directive 2014/25/EU on public procurement could be used to exclude operators violating the principle of equal pay (and possibly other social rights).[114]

A key aspect of collective agreements could be tackling the problems arising from the 'comparable worker' issue by establishing what constitutes a comparable full-time or permanent worker constitutes. In light of the rapid emergence of flexible working practices in many sectors and across Member States, often a worker will have no effective remedy against unequal treatment because there is no worker who actually works full-time or permanently. Hence, the requirement of a 'comparable worker' remains a flaw in the Directives. Arguably, a worker should be able to bring a discrimination claim by making a hypothetical comparison with a full-time worker. In this respect, collective agreements at sectoral level could help with identifying comparable workers to better operationalise the principle of equal treatment and avoid loopholes in its practical enforcement.

5.3. The need for an adequate income replacement and safety net for atypical workers

It was mentioned above that atypical workers struggle to access adequate income replacement measures as a consequence of schemes being designed primarily for the benefit of 'traditional' workers. In this vein, it is first and foremost necessary to extend the protection of equal treatment to the field of social security. The EPSR states that 'regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection' (Principle 12 EPSR). On this basis, the 2019 Council Recommendation on access to social protection for workers and the self-employed[115] highlights the importance of social protection as key 'to protect people against the financial implications of social risks' and, in particular, as a means 'to prevent and alleviate poverty and to uphold a decent standard of living.'[116] Article 11 of the Recommendation specifically suggests that an adequate level of social protection schemes results in 'maintaining a decent standard of living and providing appropriate income replacement, while always preventing those members from falling into poverty. When assessing adequacy, the Member State's social protection system needs to be taken into account as a whole.'[117] Regrettably, the personal scope of the Recommendation was considerably watered down during the negotiations,[118] although the monitoring framework should still serve to provide formal and effective coverage for the more traditional forms of atypical employment.

Granting access on an equal footing for atypical workers is the first step in providing an adequate income replacement, but this alone will not address the more specific work-risks faced by atypical

114. For the options to set applicable obligations in the field of social and labour law, see in Articles 18(2) and 71(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance [2014] OJ L 94; Articles 36(2) and 88(1) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance [2014]OJ L 94;and Articles 30(3) and 42(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance [2014]OJ L 94.

115. Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01).

116. *Ibid*., Preambles no. 8, 14, and 17.

117. *Ibid*., no. 11.

118. Aranguiz and Bednarowicz, 'Adapt or perish: Recent developments on social protection in the EU under a gig deal of pressure' (2018) 9 *European Labour Law Journal,* 329–345.

workers. Social security systems should, in addition, be able to provide atypical workers with decent income replacement during periods of 'underemployment' or 'in-between jobs' to ensure decent transitions and necessary top-ups for those who do not earn sufficient income to cover their basic needs. In terms of sustainability, such benefits may also serve as an incentive for individuals to take up jobs instead of remaining in more stable social assistance safety nets, hence, enabling active labour inclusion while securing contributions to the social security nets. Such efforts should be enhanced by facilitating possibilities for (adequate) re-employment through personalised advice and training. Differently, Member States should ensure that access to essential social rights, such as healthcare or old-age income, are not (fully) dependent on having an employment contract.[119]

5.4. Targeting structural precarity

In addition to the impact of atypical work in gaining an adequate income, these types of contracts may also have a negative influence on other aspects of living and working conditions. The accruement of benefits, occupational or statutory, mentioned above is one example of this. Low working hours or (repeated) interruptions of employment or work placements without access to compensation may also result in unpredictable working schedules and uncertain employment prospects.[120]

In the context of the implementation of the EPSR, the EU legislator enacted Directive (EU) 2019/1152 on transparent and predictable working conditions which contains some minimum entitlements that do not grant additional rights to the different forms of atypical work, but may help overcome the extreme precarity thereof.[121] Such measures include the maximum duration of probationary periods[122] – sometimes abusively conceived as functional substitutes for fixed-term contracts – as well as requirements for predictable working patterns[123] and measures to prevent abuses in the use of on-demand or similar employment contracts.[124] With the goal to reduce in-work poverty in mind, Member States should have implemented Directive 2019/1152 to limit opportunities for employers to make use of atypical work when the business need is neither temporary nor unpredictable. Practices that involve the use of flexible contracts in unjustified situations, and which therefore qualify as abusive, should be sanctioned. This may require, in first instance, Member States to produce and share detailed statistical information the use of such contracts and employers to justify such practices and, secondly, to install an effective sanctioning system. Consequences other than sanctions, such as the establishment of a legal presumption of working hours like that in place for on-call workers in the Netherlands (see above), can also be effective tools for limiting abuses of atypical contracts.

Collective agreements may further help with identifying concrete cases and/or sectors where the recourse to atypical contracts is prohibited precisely because it may excessively expose workers to the risk of in-work poverty.

119. See already the plead by Manfred Weiss in 2011, referring to Sinzheimer, in: Weiss, 'Re-Inventing Labour Law' in Davidov and Langille, *The future of Labour Law*, (Oxford University Press, 2011), at 49. For a general report of in-work poverty and access to social protection see Schoukens, De Becker, Bruynseraede and Dockx, 'Comparative report – social security' (2022), *WorkYP Deliverable 4.2*, available at www.workingyetpoor.eu.
120. Davies, op. cit. 6, at 244–245.
121. For the potential of this Directive in protecting casual workers broadly conceived see Durri, op. cit. 9, at 14.
122. Directive 2019/1152, Article 4(2)(g) and Article 8.
123. Directive 2019/1152, Article 4(2)(m) and Article 10.
124. Directive 2019/1152, Article 11.

Flexibility for employers can also be offered without compromising the worker's protection. The permanent albeit intermittent contracts in Spain for fighting temporariness, or the short-time work and working accounts in Germany[125] that avoid redundancies, are examples of such practices. Here as well, social partners could play a key role in identifying potential avenues that benefit both workers and employers.

6. Concluding remarks

The spread of in-work poverty has put the social contract under pressure by highlighting that work is not a guarantee of a life lived with dignity and that consequently, the creation of (any) employment does not suffice as a strategy. The quality of the employment created is equally if not more important than quantity. The need to foster quality employment ('good jobs') is one of the key messages of the EPSR and the initiatives taken in its context, and the EU seems to be departing from the traditional 'jobs, jobs, jobs' mantra of the last three decades.

Being a very complex phenomenon that is driven by several factors, in-work poverty affects groups of individuals in the labour market differently. Among these, available statistics show that the incidence of in-work poverty among atypical workers is significantly higher than that of standard employees (section 2). This seems to indicate that, among other factors, the existing regulation of atypical work (harmonized, to a great extent, at EU level) does not adequately protect atypical workers from those forms of precariousness leading to in-work poverty. More specifically, the principle of equal treatment on which the regulation of atypical work rests, is not strong enough to shield flexible workers from in-work poverty.

This article has articulated a critique on the effectiveness of the atypical work regulation and the imbalance between the aims that the Directives pursue (sections 3 and 4). This critical assessment has triggered the formulation of a number of recommendations (section 5) that aim to contribute to the academic debate on how to achieve 'fair employment relationships' as intended in EPSR's Principle 5. These recommendations attempt to help policymakers develop regulations that tackle more effectively the problem of in-work poverty among atypical workers.

A reassessment of the EU *acquis* and a systemic unfolding of the EPSR's full potential will offer a better protection to atypical workers and thus help reduce in-work poverty in the EU. The main argument that the article developed is that the principle of equality is not sufficiently broad to address atypical workers' disproportionally higher risk of experiencing in-work poverty. Therefore, if atypical forms of employment are to be maintained while fighting in-work poverty, EU law should complement the (more ambitiously conceived) principle of equality with other principles and measures, potentially already existing in EU law. The Europeanised space for debate, created by the EPSR to update and create new tools to make labour law and social policy fit for the current labour market, offers the ideal context to this end. Only such a regulatory self-evaluation exercise will be consistent with a quality over quantity employment strategy.

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125. Weiss, 'Job security: a challenge for EU social policy' in Countouris and Freedland op. cit., 278–289.

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