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Fixed-term workers: entitled to (un)fair and (un)predictable working conditions?

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Contents

Summary

The balance between increasingly flexible working forms and sufficiently strong social protection for workers within the EU is a complex balancing act that exposes legislators at EU level to major challenges, especially in light of the EU's limited competence in labour law. In recent years, however, the focus on the most modern forms of precarious employment has overshadowed other forms of atypical employment, which nevertheless runs the risk of being exposed to unfair working conditions.

This essay thus intends to examine the protection of fixed-term employees against unfair working conditions. Through an EU legal perspective, this essay examines how working conditions are defined at EU level and to what extent fixed-term employees can rely on rights to fair working conditions. The term ‘working conditions’ is not defined in EU legal sources or practice and a study of the terminology shows that despite the attempts to strengthen the right to fair working conditions conducted through various legal instruments, there is still a lack of clarity about what the terminology principally means, which consequently affects opportunity to invoke the right to fair working conditions. Particularly in relation to fixed-term employees, the results of the thesis also shed light on the vague difference between the term ‘working conditions’ and ‘employment conditions’, which risks of compromising the protection of fixed-term employees as remains it is unclear to what extent fixed-term employees can rely on the right to fair working conditions.

Sammanfattning

Avvägningen mellan alltmer flexibla arbetsformer och tillräckligt starkt socialt skydd för arbetare inom EU är en komplex balansgång som utsätter lagstiftarna på EU-nivå för stora utmaningar, speciellt mot bakgrund av den begränsade kompetensen som EU har inom arbetsrätten. De senaste årens fokus på de allra modernaste formerna av utsatta arbetstyper har dock lämnat andra former av atypiska anställningar i skymundan, som likväl löper risken för att utsättas för orättvisa arbetsförhållanden.

Denna uppsats ämnar därmed att undersöka just visstidsanställdas skydd mot orättvisa arbetsvillkor. Genom ett EU-rättsligt perspektiv undersöker denna uppsats hur arbetsvillkor definieras på EU-nivå samt till vilken grad visstidsanställda kan förlita sig på denna rätt. Termen ’arbetsvillkor’ definieras inte i de EU-rättsliga källorna eller praxis och en undersökning av terminologin visar på att trots de försök att stärka rätten till rättvisa arbetsförhållanden som har bedrivits genom olika lagliga instrument så föreligger fortfarande en oklarhet kring vad termen huvudsakligen innebär, vilket i sin tur också påverkar möjligheterna att åberopa rätten till rättvisa arbetsförhållanden. I synnerhet i förhållande till visstidsanställda så belyser uppsatsens resultat även otydlighet i skillnaden mellan termen ’arbetsvillkor’ och ’anställningsvillkor’, som riskerar att belasta de visstidsanställda och det råder oklarhet till vilken grad visstidsanställda därmed fakiskt kan förlita sig på rätten till rättvisa arbetsvillkor.

Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
EU	The European Union
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union

1 Introduction

1.1 Background

In the recent debate regarding unjust working conditions, platform and on-demand workers have become the ultimate example of such. Long working days, unstable wages and exposure to health and security risks are only some of the numerous features that reflect the insecure reality of these employees and the increasingly raised concerns regarding the precarious working conditions of such workers calls for the need for change by many.[1] However, given that permanent employment relationships are considered to be the general form of employment in the EU, there are several other atypical forms of employment relationships that remain in the shadow of the discussions. [2] In that regard, fixed-term employments are also considered to be a form of atypical contracts, which are not encouraged except for situations that suit the needs of both employers and employees, as they are more vulnerable against the risk of abuse by the employers.[3]

As a consequence to the major structural changes on the employment market during the last decades, European policymakers have made numerous efforts in the attempt to strengthen the protection of workers within the field of EU law, the latest example being the Directive 2019/1152 for Transparent and Predictable Working Conditions (Hereinafter referred to as "Directive

[1] Harald Hauben (ed.), Karolien Lenaerts and Willem Waeyaert, *The platform economy and precarious work*, Publication for the committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020 p. 8.< http://www.europarl.europa.eu/supporting-analyses > accessed 25 May 2022

[2] See preamble of the Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (hereinafter referred to as the "Fixed-term Workers Directive")

[3] Sophie Robin-Olivier and Antonio Lo Faro 'Atypical forms of employment' in in Teun Jaspers, Frans Pennings and Saskia Peters (eds) *European Labour Law* (Intersentia 2019) p. 216. It also follows from Hauben (ed.) Lenaerts and Waeyaert (1) 2020, 30 that fixed-term workers run a medium-high risk of precariousness in terms of working conditions.

2019/1152").[4] Directive 2019/1152 is based on Article 31(1) of the Charter of Fundamental Rights (referred to hereinafter as "the Charter")[5] which states that that every worker has the right to fair working conditions, and the Directive aims at regulating the written information that should be provided to workers in respect of their working conditions. However, neither the Directive nor Article 31(1) of the Charter provide any definition of what constitutes as "working conditions" as well as the essence and the practical enforcement of the right to fair working conditions.[6] Moreover, the confusion regarding the term further extends to the protection of fixed term-workers, which are shielded against differential treatment in respect of their employment conditions. Yet, the development in case-law shows that certain differential treatment between fixed-term employees and their permanent equivalent is still permitted and as such this raises the question as to what these employment conditions are and how far this right stretches?

1.2 Purpose and reseach question

In the light of the aforementioned, the purpose of this essay is to investigate the extent to which fixed-term workers may rely on Article 31(1) of the Charter and the right to fair working conditions. More specifically, the aim is to elaborate on the right to fair working conditions and to which extent this right can be enforced, especially as a fixed-term worker.

Hence, the research question that will be answered in this essay is the following:
To what extent can fixed-term workers rely on the right to fair working conditions?

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[4] 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 ("Directive 2019/1152")
[5] Recital 1 Dir 2019/1152; Article 31(1) of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/02
[6] Márton Leo Zaccaria, 'Old Problems and New Solutions? Some Current Questions of Labour and Social Rights regarding the European Pillar of Social Rights and the Actual Case Law of the Court of Justice of the European Union' (2020) 27 Lex ET Scientia Int'l J 85, 94

1.3 Method and material

This essay will be examined through a legal dogmatic method, used to find answers to legal problems by analysing the accepted legal sources through an approach of *de lege lata,* in this case merely the extent of a certain legal terminology that remains uncertain.[7] Furthermore, the essay holds an EU perspective by focusing on terminology developed in the field of EU law. Hence, the question will be examined through the EU legal method of interpretation and as well as sources of EU law. As already established in the case of *Van Gend der Loos,* "the [EU] constitutes a new legal order in international law", which consequently impacts the way in which EU legislation is to be understood.[8] However, as mentioned by Jane Reichel, there is not one exhaustive EU legal method several and other methods can be used in a supportive manner to interpret questions relating to EU law, such the comparative method or critical method. Hence, the EU legal method is primarily to be understood as approach when dealing with legislation and legal sources at EU-level. [9]

The definition of the terminology "working conditions" remains a question that is present in both primary and secondary EU law and falls within the supported competence of the Union which will thus be the main sources for this essay. In that regard, EU primary law will be of focus to this essay, referring here to the Treaties as well as the Charter of Fundamental Rights, which hold the same legal value as the Treaties. [10] The essay will also focus on binding secondary law by focusing on directives of relevance for the interpretation of the terminology.

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[7] Jan Kleineman, 'Rättsdogmatisk metod', in Maria Nääv and Mauro Zamboni (eds), *Juridisk metodlära.* (Studentlitteratur Lund 2018) 21; 36-37

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

[9] Jane Reichel, 'EU-rättslig metod', in Maria Nääv, and Mauro Zamboni, (eds.), *Juridisk metodlära'* (Studentlitteratur Lund 2018) 109-110

[10] Article 6 of the Consolidated Version of the Treaty on European Union [2008] OJ C115/13 ("TEU")

As case-law is also central to this essay, it serves to mention that the Court of Justice of the European Union (Hereinafter referred to as "the Court") similarly uses numerous different methods of interpretation, although the teleological method remains central and is often used when a certain formulation of a rule or context remains unclear.[11]

Moreover, due to the unclarity of the terms "working condition" in primary and secondary EU law, doctrine in the form of literature and legal articles will be used be used to further investigate the scope of the terms. Although doctrine is not used in the case law of the Court, this does not automatically mean that it does not bare any importance as doctrine is often used in the opinions of the Advocate Generals, which will also be used in this essay to further elaborate on the interpretation of the right.

1.4 Previous research

The research conducted on the field employment law within the EU is vast. Nevertheless, the studies relating to the definition of working conditions are by far more limited, mostly due to the scope of the limited competence within the field of EU law. Indeed, most studies on the subject concern the quality of working conditions, but do not provide for a specific definition to the terminology, or alternatively focusing on a specific form of employment. Hence, this essay aims at serving as a contribution to the current gap on the subject.

[11] Jörgen Hettne and Ida Otken Eriksson, *EU-rättslig metod-Teori och genomslag i svensk rättstillämpning*. (2nd edn., Norstedts Juridik AB Stockholm 2011) 168

1.5 Delimitations

This essay focuses on the terminology of 'working conditions' in relation to fixed-term workers in the meaning of the Fixed-Term Workers Directive. Hence, all other forms of employment fall outside the scope of this essay and focus will remain on Clause 4 of the Fixed-Term Workers Directive. In that regard, the term 'permanent employer' will not be further developed.

Concerning the Directive 2019/1152, its predecessor[12] will not be further elaborated upon.

As for all rights conferred to individuals, the notions of direct and indirect effect are central to the understanding of their enforcement, which also impacts the enforcement of the right to fair working conditions. However, the discussion regarding direct effect is far too vast to elaborate on for the scope of this essay. Hence, it will not be discussed in depth but only for the purposes of the provisions brought up here.

Similarly, a central provision that relates to the enforcement of rights is the national procedural autonomy of the Member States and the effective judicial protection stemming from Articles 19 TEU and 47 of the Charter. These provisions will only be touched upon in a broader discussion concerning employment rights and will therefore not be further developed.

1.6 Disposition

In the following sections, a brief discussion regarding the fundamentals of employment law in EU legislation will be provided in chapter two, focusing

[12] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288/32

on the competence of the Union and the main sources governing the field. Thereafter, chapter three focuses on the terminology of working conditions in Articles 31 (1) of the Charter and the supporting Treaty Provisions as well as Directive 2019/1152. Finally, chapter four will focus around the Fixed-Term Workers Directive, especially in relation to Clause 4.

2 Employment law in the EU

2.1 Competence and sources of EU labour Law

2.1.1 General Remarks

The competence of the Union within the field social policy is intricate in nature. As there is no general mandate that the Union holds to enact legislation, the competence of the EU to legislate depends on the specific competence that it has been conferred to and any legislative power that is not conferred to the Union remains for the Member States to hold[13]. Thus, as follows from Articles 2-6 TFEU[14], the Union has either *exclusive, shared* or *supplementing* competence within the different legal fields. [15] As derives from Article 2-3 TFEU, the exclusive competence of the Union is limited in scope to the policy areas mentioned by that article relating to, amongst others to customs union, competition law and monetary policy, common fisheries policy and common commercial policy.[16] However, the social dimension of the EU has been severely widened the last decades, amongst other through the case of *Defrenne II,* where the CJEU decided on its own account to introduce the social objectives of the community as an objective of the community besides the economic objective, as well as the intention of the Community to "ensure social progress and seek the constant improvement of the living and working condition of their people". [17] This social dimension is

[13] Paul Craig and Grainne De Búrca, *EU Law: Text, Cases, and Materials UK Version*. (Oxford University Press USA 2020) 106

[14] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01 ("TFEU")

[15] Paul Craig and Grainne De Búrca (13) 2020, 106-107

[16] See Articles 2 and 3 TFEU

[17] Case C 43-75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* (Defrenne II) [1976] ECLI:EU:C:1976:56 para 10*;* see also Sarah Tas, 'Defrenne v SABENA: a landmark case with untapped potential*'* [2021] vol 6 European Papers 881 < https://doi.org/10.15166/2499-8249/501 > accessed 25 May 2022

now codified in in Article 3(3) TEU which states that one of the main aims of the Union is to ensure "full employment".[18]

Nevertheless, the influence of the Union on the field of social policy remains restricted. According to Article 4 TFEU, the Union has shared competence within the field of social policy.[19] Still, as derived from Article 5 TFEU the Union only has the competence "take measures to ensure **coordination** of the employment policies of the Member States, in particular by defining guidelines for these policies." The meaning of supporting action varies in the different areas according to other provisions in the Treaty and does not exclude the EU from adopting legally binding acts within the specific area. [20] To that regard, Craig and De Búrca argue that the creation of a separate category has been made in relation to employment law, as it has been given a placement after shared power, but before the category of supporting, coordinating, and supplementary action."[21] According to the authors, the reason for this is mainly political – the lack of agreement of granting the EU a shared competence in the field, but also the opinion of others that the third category of competence would be too feeble to provide protection.[22] In practice, this form of competence entails that, while there is no harmonization of the Member States' laws the EU has a significant degree of power in these areas.[23] In the field of employment law, the exact extent derives from Articles 147-161 TFEU.[24] The nature of such acts will be further elaborated upon in section 2.1.2.

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[18] Frans Pennings, 'How do Social and Economic Rights Relate to Each Other in the Social Market Economy: An Introduction to this Special Issue' (2019)15 Utrecht Law Review 7 <https://ssrn.com/abstract=3473864> accessed 25 May 2022

[19] Frans Pennings and Saskia Peters, 'An introduction to European Labour law' in Teun. Jaspers, Frans, Pennings and Saskia. Peters (eds*) European Labour Law* (Intersentia 2019) 15-18

[20] Paul Craig and Grainne De Búrca,. *EU Law: Text, Cases, and Materials UK Version*. (Oxford University Press USA 2020) 120

[21] Ibid.

[22] Ibid. p. 122.

[23] Ibid. p. 120.

[24] Frans Pennings and Saskia Peters (19) 2019, 15-18

2.1.2 Legislative powers within employment law

As stated above, the Union holds a specific form of supplementing competence within the field of labour law, that excludes the possibility to harmonize the laws and regulations of the Member States, which remain free to legislate in the absence of Union action. However, this does not entirely rule out the adoption of legislation by the Union, which may still adopt legally binding acts in such fields.[25] Within EU labour law, the exact legal basis follows from Article 153(2) TFEU, which states that the Parliament and the European Council may adopt "requirements for gradual form of implementation through the form of minimum directives", however without imposing administrative, financial and legal constraints that would compromise with the creation of undertakings.[26] This applies the field of amongst others a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions and (c) social security and social protection of workers, which is done through an ordinary legislative procedure according to Article 294 TFEU after consulting the Economic and Social Committee.[27] Article 153(2) also gives way for a specific procedure as set out in article relating to other aspects of employment law. [28] Nevertheless, Member States are free to maintain or introduce more stringent measures.[29]As for the Commission, it follows from Article 156 TFEU that it "shall encourage cooperation between the Member States" and "facilitate the coordination of their action in all social policy fields", particularly in certain matters, i.e. working conditions.[30] Examples of measures within that meaning are the Green Paper on Modernizing Labour

[25] Frans Pennings and Saskia Peters, *'*An introduction to European Labour law'', in Teun Jaspers, Frans Pennings and Saskia Peters (eds) *European Labour Law* (Intersentia 2019) 15-18
[26] See Article 153(2) TFEU
[27] Frans Pennings and Saskia Peters (25) 2019, 15-18
[28] See Article 153(2) TFEU
[29] Frans Pennings and Saskia Peters (25) 2019, 15
[30] See Article 156 TFEU

Law[31], as well as The European Pillar of Social Rights, which will be further elaborated upon.

However, there is also another feature of legislative process within EU labour law that relates to the specific nature of the field. To that regard, Articles 153-155 give way for social partners at EU, national, regional, sectoral and undertaking level to reach agreements on the field, which are either implemented trough a Council Directive or so-called autonomous Agreements.[32]. Such Framework Agreements that have become Directives become in that way a part of EU law and to this day, there are a few examples of such, such as the Fixed-Term Work Directive,[33] Parental Leave Directive[34] and the Part-Time Work Directive [35]. As such, Framework Agreements leave a considerable amount of discretion to the Member States and the social partners.[36]

Consequently, except from the Treaty provisions, the social field of EU and particularly employment law are a result of several legal instruments that have and continue to influence its development, as well as the development of different legal concepts developed by the EU. To that extent, the Charter of Fundamental Rights is an important source of primary law that confers rights to workers and will be further elaborated upon in the following section.

[31] Commission, 'Modernising Labour Law to Meet the Challenges of the 21st Century' (Green Paper) COM (06) 708 final, 22 November 2006
[32] This follows from the terminology "management and labour, which is explained by Frans Pennings and Peters as a formal terminology used when referring to the social partners, see Frans Pennings and Saskia Peters , 'Introduction to European EU law', in Teun Jaspers, Frans Pennings and Saskia. Peters (eds) *European Labour Law* (2019) p. 19.
[33] See Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (1999) OJ L 175
[34] See Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance) (2010) OJ L 68
[35] See Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work (1997) OJ L14 ("Part-Time Work Directive")
[36] See Frans Pennings, 'Collective bargaining in EU law', in Teun Jaspers, Frans Pennings and Saskia Peters (eds) *European Labour Law* (2019) , pp. 19.

2.1.3 The social rights of the Charter of Fundamental Rights

The Charter of Fundamental Rights (hereinafter referred to as the Charter), was drafted in 1999-2000 on the initiative of the European Council. It was jointly proclaimed by the Commission, Parliament, and Council and finally approved through vote by the Member States in December 2000.[37] The aim was then to illustrate the achievements made by the Union in the field. [38]When passed, the Charter assumed the same legal value as the Treaties per Article 6 TFEU. However, the Charter does not create any new rights, but rather to consolidate the rights already established by the Union.[39] Furthermore, as evident from Article 51(1) of the Charter that it is only applicable insofar that EU Law is applicable. The Charter is divided in 6 different chapters, whereas the fourth chapter (*IV Solidarity*) contains labour rights. The solidarity chapter has been criticised by many for its "weak formulation of rights", mainly due to the fact that many of the provisions contain the of the phrase "in accordance with Community law and national laws and Practices " which grants the Member States a considerable amount of discretion when implementing the provisions of the Charter.[40] Consequently, there has been a wide discussion in the debate as to the actual legal value of the Charter as "the fundamental rights laid down cannot ensure real and effective legal protection to the workers." Yet, the author also points out that this does not mean however that they are worthless ore cannot be used in practice. [41]

[37]Carl Lebeck, "*EU-stadgan om grundläggande rättigheter: en introduktion*." (Studentlitteratur AB Lund 2013). p. 52-53
[38] Paul Craig and Grainne De Búrca,. *EU Law: Text, Cases, and Materials UK Version*. (Oxford University Press USA 2020) 443-444
[39] Ibid. 445
[40] Ibid. 446; See also Márton Leo Zaccaria, 'Old Problems and New Solutions? Some Current Questions of Labour and Social Rights regarding the European Pillar of Social Rights and the Actual Case Law of the Court of Justice of the European Union' (2020) 27 Lex ET Scientia Int'l J 85 p. 87
[41] Ibid.

2.1.4 The European Pillar of Social Rights

Besides the legally binding sources presented above, recent instrument that has gained traction the last years is The European Pillar of Social Rights (hereinafter referred to as "The Pillar"). The Pillar is not itself a part of primary or secondary law, but merely a political policy programme introduced by the Commission in 2017. [42] With its 20 principles, the Pillar aims at serving "as a guide towards efficient employment and social outcome [and] towards ensuring better enactment and implementation of social rights."[43] The Pillar does not aim at replacing the Charter, nor does it extend any of the Union's conferred powers.[44] Yet, while reaffirming some of the rights already pursued by Union, the Pillar also adds new principles.[45] The Pillar holds no legal value, however secondary law may be based on provisions stemming from the Pillar. [46] Moreover, specifically relating to employment law, the Italian referring court asked in a preliminary ruling for an interpretation of several Treaty and Charter provisions, while also including principles 3 and 5 of the Pillar in its referred question.[47] While the Court is yet to deliver its final ruling on the matter, it would indicate the possibility for the Court to take a stance on the use of the Provisions of the Pillar and to clarify its legal value. As for the Pillar in relation to workers' rights, Chapter II of the titled "fair working conditions" contains five principles which protect the right to secure and adaptable employment (no 5); wages (no 6); information about employment conditions and protection against dismissal (no 7); social dialogue and involvement of workers (no 8),

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[42] Klaus Lörcher and Isabelle Schömann. 'The European pillar of social rights: critical legal analysis and proposals.' (2016) ETUI Research Paper-Report 139 Brussels, 5 < https://www.etui.org/Publications2/Reports/The-European-pillar-of-social-rights-critical-legal-analysis-andproposals> accessed 25 May 2022

[43] Recital 14 of Preamble of the European Pillar of Social Rights

[44] Márton Leo Zaccaria, 'Old Problems and New Solutions? Some Current Questions of Labour and Social Rights regarding the European Pillar of Social Rights and the Actual Case Law of the Court of Justice of the European Union' (2020) 27 Lex ET Scientia Int'l J 85 p.

[45] Recital 14 of Preamble of the European Pillars of Social Rights

[46] Klaus Lörcher and Isabelle Schömann. 'The European pillar of social rights: critical legal analysis and proposals.' (2016) ETUI Research Paper-Report 139 Brussels, 7 < https://www.etui.org/Publications2/Reports/The-European-pillar-of-social-rights-critical-legal-analysis-andproposals> accessed 25 May 2022

[47] Joined Cases C-789/18 and C-790/*18 AQ and ZQ v Corte dei Conti and others* [2019] ECLI:EU:C:2019:417

work-life balance (n.9) and health, safe and well-adapted work environment (no 10).

The above-mentioned sources have an impact in the understanding of the concept of “working conditions”, which will be further discussed in the following section.

3 Working Conditions in EU law

3.1 Working conditions in primary law

In order to ensure high levels of employment, Article 151 TFEU requires that the Union shall work towards ensuring "improved living and working conditions." [48] As such, the terminology of "working conditions" is central to many of the provisions in the TFEU, notably to Articles 151, 153 and 156 TFEU. Indeed, Article 153 TFEU stipulates that:

> "With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:
> (a) improvement in particular of the working environment to protect workers' health and safety and (b) working conditions[…]"

The same formulation is also used in Article 156 TFEU in relation to the Commission's task to ensure the cooperation between the Member States and facilitate their in relation to the task of Member States in relation to, amongst other aspects, the one on working conditions.[49] The right to fair and just working conditions is also enshrined in Article 31 of the Charter, which states that:

> "(1) "Every worker has the right to working conditions which respect his or her health, safety and dignity and
> 2) Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. "

Article 31(1) finds its origins in Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, while the second paragraph is based on the Working Time Directive.[50]

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[48] See Article 151 TFEU.
[49] See Article 156 TFEU.
[50] Alan Bogg ´Fair and Just Working Conditions.' In S. Peers, T. Hervey, J. Kenner & A. Ward (Eds.). *The EU Charter of Fundamental Rights: A Commentary* (London: Hart

Additionally, the formulation of "working conditions which respect his or her health, safety and dignity" also indicates that the Article also has an intrinsic connection to Article 1 and 3 of the Charter. Article 1 holds that human dignity is inviolable and must be respected and protected. According to Bogg, the specific reference to the term "dignity" in Article 31(1) thus indicates the connection between the articles, while Article 3 enshrines the right to physical and mental integrity. Here, the connection to the article is made through the formulation of "health and safety".[51]

3.1.1 Scope and interpretation of 'working conditions'

The expression 'working conditions' in Article 31(1) is to be understood in the sense of Article 156 TFEU. [52] Yet, this does not provide much guidance as to the meaning of the terms given that none of the provisions provide a definition of the actual terminology. To that regard, although Article 31(2) is to be seen as a partial clarification of 'working conditions', the list is not exhaustive. [53] Conversely, the case-law as well as the provisions' relation to Article 13 of the Directive on Equal Treatment[54] is argued to provide some guidance as to what is to be included in the term in relation to Article 156 TFEU, involving conditions concerning dismissals and pay.[55] Furthermore the Court argued in the case of *Impac*t, that fair level of remuneration is to be comprised in the term in the light of Article 151 TFEU.[56] Nevertheless, the Court has also held that other conditions should be included in the

Publishing 2021) p. See also Explanations relating to the Charter of Fundamental Rights of the European Union [2007] OJ C 303/17

[51] Alan Bogg ´Fair and Just Working Conditions.' In Steve Peers et al. (eds.). *The EU Charter of Fundamental Rights: A Commentary* (London, Hart Publishing 2021) p.879-880 and 889-902

[52] See Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17

[53] Alan Bogg (51) 2021, 879

[54] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

[55] Alan Bogg (51) 2021, 902-903

[56] Case C-268/06 *Impact v. Minister for Agriculture and Food and Others* [2008] ECLI:EU:C:2008:223, para 113

terminology, and thus not only conditions set out in the contract of employment and that thus the terminology is to be interpreted broadly.[57] Hence, the characteristic of the terminology has been held to be rather expansive, which has also been accentuated by numerous scholars. According to Bogg the legal width is further explained by its connection to provisions such as Article 1 and 3 of the Charter, which although widening the range the interpretation, also indicates the fundamental importance of the provision.[58] Indeed a not unsignificant normative weight that springs from such a connection to fundamental provisions, especially considering that Articles 1 and 3 also form a part of the preamble of the Charter, apart from the inviolable nature of Article 1. Indeed, the right to dignity marks one of the fundamental values of the Charter. [59]Indeed, similar reasoning has been held in the AG opinion of *King v Sash Window* in relation to Article 31 (2) [60] and The Court has ruled in the case of *Bauer* that, in relation to Article 31(2), it reflects an "essential principle of EU law" which should have direct effect, considering its "mandatory and unconditional nature."[61] Consequently the provision is deemed to have horizontal effect and could be relied upon by workers against both public and private employers. This logic has not been applied to any other provision yet, although there are certain dissenting AG opinions on the matter in relation to Article 31(1). In fact, the broad scope of the provision has also been held in the case law of the Court, although the opinions of the consequences of that broadness differs and raises questions as to whether the article is sufficiently precise to be relied upon.[62] While the question has been

[57] Case C-116/94 *Jennifer Meyers v Adjudication Officer* [1995] ECLI:EU:C:1995:247 .para 24
[58] Alan Bogg ´Fair and Just Working Conditions.' In Steve Peers et al. (eds.). *The EU Charter of Fundamental Rights: A Commentary* (London, Hart Publishing 2021) 889-902
[59] Ibid p. 880;. see also Carl Lebeck, "*EU-stadgan om grundläggande rättigheter: en introduktion*." (Studentlitteratur AB Lund 2013) 85-89
[60] Alan Bogg ´Fair and Just Working Conditions.' In Steve Peers et al. (eds.). *The EU Charter of Fundamental Rights: A Commentary* (London, Hart Publishing 2021) 889-902; see also Case C-214/16 *King v Sash Window Workshop* [2017] EU:CL2017:439 para 36.
[61] Joined cases C-569/16 and C-670/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018] EU:C:2018:871 para 83-85
[62] See Case C-232/20 *NP v Daimler AG, Mercedes-Benz Werk Berlin* [2021] ECLI:EU:C:2021:727, Opinion of Advocate General Tanchev, para 66; Case C-681/18, JH v KG [2020] EU:C:2020:300, Opinion of Advocate General Sharpston, para 44

answered in regard to Article 31(2), which has been held to have direct effect, the Court is yet to rule on the application of Article 31(1).

3.2 Directive on Transparent and Predictable Working Conditions

On June 20, 2019, the Directive 2019/1152 passed, which replaces the 91/533/EC Directive.[63] As stated in the first recital of the preamble, the Directive is based mainly on Article 31(1) of the Charter. Furthermore, as follows from the preamble, principles no. 5 and 7 of the Pillar are central to its interpretation.[64] The preamble also states that the Directive's aim is to address the changes on the market that has occurred since the adoption of its predecessor. Hence, the purpose of the Directive is twofold: to safeguard the right to written information about the working conditions of workers, especially the most precarious ones, but also to extend this right to the employment types were not covered by the previous directive in order to also avoid a "race to the bottom in standards".[65]

Similarly to the provisions in primary law, the Directive also does not specifically define the term 'working conditions'. However, Article 4(2) of the Directive provides a non-exhaustive, yet far-reaching list of "essential aspects of the employment relationship" that should be provided into the employees, including length, working time and information about remuneration.[66] The Directive further lays down minimum requirements for working conditions in Chapter III, which relate to i.e. probatory periods,[67] and

[63] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship
[64] See recitals 1-3 of the Directive 2019/1152.
[65] See recitals 4 and 6 of the Directive 2019/1152 ;See also Georgiou Despoina. 'The new EU Directive on Transparent and Predictable Working Conditions in the context of new forms of employment' (2022) 28(2) European Journal of Industrial Relations 193 <doi:10.1177/09596801211043717> Accessed 25 May 2022
[66] Ibid ; see also Article 4(2) of the Directive 2019/1152
[67] Article 8 of Dir 2019/1152

transition to more predictable working conditions[68]. Indeed, according to Article 12, workers that have been of at least six month's service with the same employer may request a form of more "predictable and secure working conditions". While there is no further explanation to what such conditions entail, there are no limitations set in the article as to which of the workers this applies to. [69] In addition, the directive also contains provisions concerning dismissal or equivalent grounds.[70] As the deadline of the transposition of the Framework Agreement has not yet passed, there Court has not yet had a chance to interpret any of the provisions of the Directive and its effects remains to be seen.

[68] Article 12 of Dir 2019/1152

[69] The Directive applies to 'every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State'. See also Georgiou Despoina. 'The new EU Directive on Transparent and Predictable Working Conditions in the context of new forms of employment' (2022) 28(2) European Journal of Industrial Relations 193 <doi:10.1177/09596801211043717> Accessed 25 May 2022

[70] Article 18 of Dir 2019/1152

4 Fixed-term workers

4.1 Introduction

As mentioned in the previous section, the employment regulation of the Union has long been trying to balance the wellbeing of workers with the flexibility that the operators on the market have required in order to pursue its objective of a high level of employment. As such, this has remarkably shaped the forms of employment forms which is set as default and in contrast, those that have been deemed to need further protection - long before the Directive 2019/1152.[71] To that regard, permanent employment contracts were recognized already in the 1989 Community Charter as the general form of employment as they contribute to the quality of life of the workers concerned and improve performance.[72] Nevertheless, the Union also recognized the need for other forms of employment that answer the need of for more flexible and specific needs of both employees and employers.[73]. Consequently, this bargain resulted in the creation of three forms of so-called atypical forms of employment: part-time work, temporary work agency and fixed-term employment relationships.

Yet, the Fixed-Term Workers Directive contracts differs from the two first-mentioned forms of employment in the meaning that fixed-term employment was never perceived by the EU as a phenomenon to be unconditionally encouraged with a view to reaching the objective of a more flexible labour market".[74] Indeed, fixed-term workers have been in recognized both legislation, as well as case-law to be more prone to become victims of abuse.

[71] Sophie Robin-Oliver and Antonio Lo Faro 'Atypical forms of employment' in Teun Jaspers, Frans Pennings and Saskia. Peters (eds) *European Labour Law* (2019), pp. 202
[72] See preamble of the Fixed-Term Workers Directive.
[73] Sophie Robin-Oliver and Antonio Lo Faro (71) 2019, 202

As held by Jaspers, "Fixed-term work has less to do with the "positive" notion of flexibility than the "negative concept of precariousness. [75]Indeed, the weakness of the worker vis-à-vis their employer has been recognized in case-law as a concern to take into account when assessing i.e. the abuse of successive fixed-term contracts.[76] Hence, the Framework Agreement was introduced as a means to limit the possibilities for Member States to introduce measures that would allow for the circumvention or rights otherwise conferred to fixed-term workers, as well to ensure the equal treatment of fixed-term workers.[77]

4.2 Clause 4 of the Framework Agreement

4.2.1 Scope of Article 4(1)

According to Clause 4(1) of the Framework Agreement:

> "In respect of employment conditions, fixed-term workers shall not be treated in a less favorable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds."

The provision gives expression to the principle of equal treatment or non-discrimination, which is a general principle of EU law and codified in the Treaty.[78] Furthermore, Clause 4 has been held by case-law to have direct effect as is is deemed to be sufficiently clear, precise and unconditional to be

[75] See Robin-Oliver and Lo Faro "Atypical forms of employment in *in T. Jaspers, F. Pennings and S. Peters (eds) (2019),*European Labour Law, pp. 19.
[76] Joined Cases C-103/18 and C-429/18 *Domingo Sánchez Ruiz and Others v Comunidad de Madrid (Servicio Madrileño de Salud) and Consejería de Sanidad de la Comunidad de Madrid* [2020] ECLI:EU:C:2020:219 para 112-113
[77] See article 5(4) TEU. See also Anne Pieter Van der Mei, Anne Pieter. Fixed-Term work: Recent developments in the case law of the Court of Justice of the European Union (2020) 11(1) European Labour Law Journal 66 <doi:10.1177/2031952519883487> Accessed 25 May 2022
[78] Ibid.

directly relied upon by individuals. [79] Thus, in order for Clause 4 to be applicable, several criteria need to be fulfilled: Firstly, the employer needs to fall within the scope of the Directive in accordance with Clause 2 and 3 of the Directive. Secondly, there must be a comparable permanent worker in the meaning of Clause 3(2) of the Fixed-Term Workers Directive. Thirdly, the differential treatment must relate to employment conditions and lastly, the employer must lack objective grounds to justify such differential behavior.[80]

4.2.2 Clause 4(1) and employment conditions

As stated in above the Clause 4(1) of the Framework Agreement prohibits differential treatment in terms of employment conditions between a fixed-term worker and a comparable permanent worker within the meaning of 3(2) of the Framework Agreement.

While the Framework Agreement does not expressly define the term of ”employment conditions”, which is also confirmed by the Court in the case of *Carratú*,[81] it is also mentioned in that same ruling that the Court has previously interpreted the terminology, which is almost identical in clause 4(1) of the Part-Time Work Directive per the case of *Bruno*.[82] In that case, it can be derived that it can be derived that the concept of employment conditions within the meaning of the Framework agreement is:

> “a decisive criterion for determining whether a measure comes within the scope of that concept is, precisely, the criterion of employment, that is to say, the employment relationship between a worker and his employer”. [83]

[79] Case C-268/06 *Impact v. Minister for Agriculture and Food and Others* [2008] ECLI:EU:C:2008:223, para 68
[80] Anne Pieter Van der Mei. ’Fixed-Term work: Recent developments in the case law of the Court of Justice of the European Union’ (2020) 11(1) European Labour Law Journal 66 <doi:10.1177/2031952519883487> Accessed 25 May 2022
[81] C-361/12 *Carmela Carratù v Poste Italiane SpA* [2013] ECLI:EU:C:2013:830 Para 34-35
[82] Joined Cases C-395/08 and C-396/08 *Bruno and Others* [2010] ECLI:EU:C:2010:329 para 46
[83] ibid.

This view has later been confirmed on several other cases concerning Clause 4(1) of the Framework Agreement on Fixed-Term workers, notably the cases of *Vernaza Ayovi*[84] and *Grupo Norte Facility*.[85] Hence, as also held by AG Kokott in the case *of Vernaza Ayovi*, the concept of employment conditions consequently does not only include the term 'working conditions'.[86] This view is supported by the fact that the case law also mentions that the assessment of whether a fixed-term worker is considered to engage in same or similar work as a comparable permanent worker, a number of factors needs to be assessed, "such as the nature of the work, training requirements and working conditions"[87]. Here, 'working conditions' serves as only one out of three aspects that relate to the employment conditions. However, it is not only objective grounds that indicate the differential treatment of fixed-term workers – already per the case of *Melgar*, it was ruled that a non-extension of a fixed-term contract is not to be considered as a dismissal, if the refusal does not relate to grounds of direct discrimination. [88]

[84] Case C-96/17 *Gardenia Vernaza Ayovi v Consorci Sanitari de Terrassa*,[2018]. ECLI:EU:C:2018:603 para 27
[85] C 574/16, *Grupo Norte Facility SA v Angel Manuel Moreira Gómez*
[2018] EU:C:2018:390 para 41
[86] Case C-96/17 *Gardenia Vernaza Ayovi v Consorci Sanitari de Terrassa*,[2018] ECLI:EU:C:2018:43 Opinion of Advocate General Kokott para 50-59
[87] Ibid.
[88] Case C-438/99 *Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios* [2001] ECLI:EU:C:2001:509 para 45

5 Analysis

This thesis has investigated to what extent a fixed-term worker can rely on the right to fair working conditions. The analysis of the findings will be conducted in the order following the chapters presented above. As such, first the competences and sources of EU labour law will be discussed, followed by a discussion on working conditions and lastly the relationship between the fixed-term workers and working conditions.

First, the powers conferred to the Union within the field of employment law, altough maintaining certain special characteristics, remain limited. As has been held, even if maintaining the possibility to legislate in the area, minimum-directives and Framework Agreements still leave a wide margin of discretion to the Member States to define and promote working conditions. Altough Member States have the possibility to adopt more stringent measures, the development towards an increasingly flexible labour market indicates a will for the Member States to do the exact opposite and the call for a higher level of employment has mainly lead to more insecure forms of employment. Indeed, this would indicate that lack of regulation actually poses a risk of a so-called "race to the bottom" in terms of employment conditions".

Secondly, the terminology 'working conditions' is scattered between different regulatory frameworks in the EU and consequently scope, but also remains hard to dechiffre its exact meaning. Although the Court has had the opportunity to give an more overarching definition on numerous occasions, and notably the AG opinions, the interpretation shall remain broad in order not to limit the scope of the term. The broadness of the terminology does not precicely favour an interpretation of the extent and the nature of the right. This would would indicate a reluctancy on the part of the Union to give an exact definition of the term working conditions and legislative acts and the rulings of the Court seem to also avoid an exact definition and the terminology. Moreover, it would seem as the connection to more fundamental

principles or values such as the principle of non-discrimination and human dignity seems to remarcably widen the interpretation of the clause, however the question remains as to if such a connection actually brings about a real difference in legal consequences. Indeed, maybe the provisions that may specify the terminology in the most clear way are paradoxally the one that hold the least legal value. However, it also seems as some of the same aspects, such as pay, remuneration and dismissal are often brought up as aspects falling under the term, which may indicate that altough the term is not defined, there is still a general understanding of what may constitute as such conditions.

Lastly, the findings of this thesis also indicate that the relationship between the employment conditions in connection to fixed-term workers and the more general notion of fair working conditions remains unclear. More specifically, the questions remains as to whether the for example Article 12 of the new Directive 2019/1152 would give way for a fixed-term worker for example to ask for a more predictable form of employment. Moreover, it remains unclear as to whether employment conditions are a part of working conditions or vice versa.

6 Conclusion

This thesis has aimed at investigating to what extent fixed-term workers may rely on the right to fair working conditions. In the light of the findings presented above, the result of this essay seems to suggest that the right of fixed term workers to rely on the right to fair working conditions is limited in several regards, notably by:

- The limited competence of the Union in the field of employment law and the wide discretion left to Member States in the area
- The lack of clarity in relation to the term "working conditions"
- The unclear relationship between seemingly similar legal terminology
- The lack of uniformity between the different forms of legislation

All the aspects listed above indicate a difficulty in defining the delimitations of what constitutes as working conditions, let alone what are considered to be just and fair such conditions. Indeed, what becomes of paramount importance is ultimately whether the discrepancy between the terminology may lead to any negative consequences to the individual that would otherwise rely on the right. Indeed, if the divergence would benefit or leave the right unaffected, a certain level of discrepancy may be tolerated. However, the opposite situation should be avoided at all costs as it otherwise leaves the rights ineffective. The result may also indicate the need to further investigate on other terms in EU law that may need ulterior clarification.

Lastly, the findings of thesis raise the question of the legal value and the future role of the Pillar. Of course, the principles enshrined needs to be implemented in legislation for it to be relied upon. However, in accordance with the findings of this thesis, such a development is not unimaginable and seemingly already starting to take shape, such as through the 2019/1152 Directive. It thus remains to be seen how the Court will rule in cases relating to the Directive and the Pillar.

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