On the open borders of information and consultation rights in the EU acquis

Lidia Gil Otero. University of Santiago de Compostela
Christina Schnittler. University of Vienna

Developments in the world of work in the last few years have led to an increasing number of working patterns that fall outside the scope of standard employment. Particularly in the area of digital work, more and more economically dependent employee-like persons can be found. The question therefore arises as to whether persons who are not typical employees are included in the protection of EU labour law. So far, it is unclear, for example, whether one of the most important labour rights – the right to information and consultation – also applies to non-standard workers (section 1). The paper addresses the question of the extent to which EU labour law de lege lata permits or even provides for the inclusion of non-standard employees in information and consultation rights. To answer this question, relevant legal acts are first analyzed. In most cases it is up to the Member States to regulate the respective scope of application and thus to include non-standard workers (sections 2 and 3).[1] Subsequently, a possible solution for an extension of information and consultation rights for non-standard workers is proposed. The developed risk approach shows, that a solution should also be found at Union level for the inclusion of non-standard workers, especially in the case of employee-like persons, as they are often subject to the same risks as employees. However, a broad interpretation of Art. 27 CFR can lead to the fact that employee-like persons must be included at both Union and national level (section 4).

Keywords: Information and consultation rights, non-standard workers, economically-dependent workers, personal scope of application, definition of employee

[1] It will not be discussed whether non-standard workers are included in information and consultation rights under national law and whether the respective national employee representatives (in exercising information and consultation rights) are authorized to represent non-standard workers.

1. Introduction and preliminary remarks

1.1. Definition of an employee/worker in EU law

The meaning of the term 'employee' or 'worker' depends on the applicable Union legislation. In the absence of a definition, for example, the term 'worker' in Art. 45 TFEU (freedom of movement for workers) has to be interpreted autonomously.[2] Some secondary Union law Directives do not define 'employee' or 'worker' either, whilst in others, reference is made to the national concepts of employment. Some scholars are of the opinion that the ECJ uses the formula developed for the concept of worker in Art. 45 TFEU[3] as a uniform definition of an employee in European labour law, especially, when Union law does not refer to national legislative definitions.[4] More recent directives[5] refer to a twofold concept of worker; according to this 'new' formula a worker covered by the respective directive is a person who has 'an employment contract or employment relationship as defined by law, collective agreements and/or practice in force in each MS with consideration to the case-law of the Court of Justice'.[6] Most interestingly, in some of these 'new generation'-directives, in a footnote to the recitals

[2] Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* (3 July 1986), para 17.
[3] Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* (3 July 1986), para 17.
[4] U. *Preis/ K. Morgenbrodt*, 'Die Rotkreuzschwester zwischen Arbeitnehmerbegriff und Beschäftigungsverhältnis' (2017) EuZA 418, 422; *T. Dullinger*, 'Arbeitnehmerbegriff(e) des Unionsrechts und das österreichische Arbeitsrecht' (2018) ZAS 4, 5; on the question of whether such a uniform definition exists, see *M. Risak/ T. Dullinger*, The concept of ‚worker' in EU law: Status quo and potential for change (2018) ETUI Report 140, 2018; *A. Sagan*, 'Der Begriff des Arbeitnehmers im Unionsrecht: Entwicklungslinien, Tendenzen und Umbrüche' (2020) ZESAR 3.
[5] 2019/2251, 2019/1158, 2022/2041, for example.
[6] See e.g. most recently Article 2 para 2 Directive 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (Text with EEA relevance).

reference is made to the Court's case law that the legislator apparently refers to, including the contentious *FNV Kunsten* case.[7] Although there is no reference to particular paragraphs in the cited judgements, one could well argue that by doing so, the EU legislator opens up to a potentially broader interpretation of the term worker, or at least giving leeway to the Court to do so.

Irrespective of this potential broadening of the term *worker*, up until now the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.[8] Indications for the latter are, for example, a short working time per week or a low remuneration.[9] It is questionable whether this 'uniform' definition of an employee is also suitable for platform workers such as crowdworkers, for example, as they regularly work on micro-jobs, i.e. jobs of very short duration.

This brief description of the development of the term 'worker' in EU labour law, and in particular the proposal for a Directive on platform work, show that in various fields of the labour market, working patterns that fall outside the scope of standard employment exist. This is also reflected by less recent legislation (application of the principle of non-discrimination also to self-employed activities, e.g.; see in this respect Directive 2000/78/EC, Art. 3(1)a; Directive 2000/43/EC, Art. 3(1)a; Directive 2010/41/EU). Furthermore, also the Commission's Draft Guidelines clarifying the application of EU competition law to collective agreements of solo self-employed people (C(2021) 8838 final[10]) and the legal situation in some Member States can be brought forward as recognising the need to extend – even collective – labour law protection to non-standard employment relationships. In Poland, e.g., remote workers who are not employees enjoy trade union rights if they perform paid work for another person/entity, do not employ other people and have collective rights that can be represented by trade unions. In Germany, Art. 12a TVG allows for collective bargaining for certain economically-dependent self-employed.

The definition of non-standard workers in this article is based on the definition of solo self-employed persons comparable to workers from the Commissions Guidelines for collective bargaining. The Guidelines distinguish between economically dependent solo self-employed

[7] See recital 18, footnote 5 Directive 2023/970, e.g.
[8] E.g. Case C-316/13 *Gérard Fenoll v Centre d'aide par le travail 'La Jouvene',Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon* (6 March 2015), para 27.
[9] Case C-14/09 *Hava Genc v Land Berlin* (4 February 2010).
[10] See for a first analysis Brameshuber in Miranda Boto/Brameshuber (Hart 2022) 227ff.

persons who provide their services exclusively or predominantly to one counterparty and solo self-employed persons who perform the same or similar tasks 'side-by-side' with workers for the same counterparty.

Yet, it is still unclear whether core fundamental labour rights, such as the one on information and consultation (Art. 27 EU Charter of Fundamental Rights (CFR)), apply to non-standard workers too, and in particular to economically dependent self-employed. The same difficulties exist as regards the respective Directives, e.g. Directive 2002/14/EC. Could – and should – it be that certain non-standard workers have the right to collective bargaining, but are not covered by information and consultation rights? If Art. 27 CFR is interpreted broadly, guaranteeing for such rights also for non-employees would even be required at national level. Furthermore, it could be argued that the fundamental right to democracy (see, e.g., Art. 21 Universal Declaration of Human Rights) should also cover workplace democracy for non-standard workers, including economically dependent self-employed, in particular in those cases where the economic dependency derives from an integration into the contract partner's business.

In the area of Information and Consultation of Workers (ICW), in addition to Art. 27 of the Charter of Fundamental Rights (see section 2), there are eighteen key Directives that will be analyzed in more detail with respect to the personal scope of application (see section 3). Subsequently, possible solutions for the inclusion of non-standard workers will be examined (see section 4).

1.2. Information, consultation, participation?

Before discussing the scope of application of the individual EU legal acts in detail, it must be outlined what is meant by information, consultation and participation in general. The terms are understood differently in the individual MS. This may also be the reason for certain concepts of an employee at national level with regard to a specific directive (note that the paper only addresses the question to what extent EU legislation permits for the inclusion of self-employed or employee-like persons and not with national concepts of employee).

Information and consultation in a narrower sense are part of the broader topic of worker involvement in the company's decision-making. Like worker participation in general, information and consultation are characterized by both a human rights approach (see the guarantees granted for in the CFR; section 2) and an economic approach.[11] In particular, the latter becomes clear when taking the Framework Directive 2002/14/EC (section 3.1) into

[11] See more generally for these two perspectives *Davies*, A.C.L. (2014), Perspectives on Labour Law, Cambridge, UK: Cambridge University Press, xv and xvi.

account which pursues a threefold approach to achieve its goals (Recitals 7 to 10): regularly informing employees regarding the undertaking's/establishment's development to further employee protection (1), improving the company's competitiveness by providing employers with tools to access employees' knowledge of the company's internal problems (2) and maintaining employment at a high level as combination of the first two aims (3).

Directive 2002/14/EC also contains a definition of "information" and "consultation". "Information" means transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it (Art. 2(f)). "Consultation" means the exchange of views and establishment of dialogue between the employees' representatives and the employer (Art. 2(g)). This presupposes a willingness to listen to the opinion of the other party and to state their position. Employees' representatives are therefore also entitled to ask questions, for example.[12] Consultation therefore means more than a mere statement by the employee' representatives.[13] Also, the anticipatory nature of the directive is worth mentioning. "Real-time ICW" might lead to risk-prevention and protection of employees.[14] These definitions can probably also be transferred in their basic elements to other directives, provided they do not contain a definitions on their own (which is the case e.g. in Art. 2(1)(f) and (g) of Directive 2009/38/EC[15] as well as Art. 2(i) and (j) of Directives 2001/86/EC and 2003/72/EC; Art. 8 of Directive 2008/104/EC contains a reference to Directive 2002/14/EC). Thus, for example, the right of employees or their representatives under Directive 89/391/EEC to make proposals within consultation (Art 11(1)) may be more than a simple statement.

2. Art. 27 CFR – Workers' right to information and consultation

Art. 27 CFR guarantees a right to information and consultation of workers or their representatives at various levels, in the cases and under the conditions provided for by EU law and national laws and practices. The *personal scope of application* covers employees *or* their representatives, so that Art. 27 has a double character as an individual and collective right.[16]

[12] K. Riesenhuber, 'Europäisches Arbeitsrecht[2]' (De GRUYTER 2021) para 12; P. Lorber, 'Commentary on Dir. 2002/14' in E. Ales, M. Bell, O. Deinert, S. Robin-Olivier (eds), *International and European Labour Law* (Beck 2018) para 23.
[13] C. Weber, 'Commentary on Dir. 2002/14/EC' in M. Franzen, I. Gallner, H. Oetker (eds), *Kommentar zum europäischen Arbeitsrecht*[5] (C.H Beck 2024), para 23.
[14] M. Biagi, 'Quality of Work, Industrial Relations and Employee Involvement in Europe: Thinking the Unthinkable? ' in Marco Biagi, (ed), *Quality of Work and Employee Involvement in Europe* (The Hague, NL: Kluwer Law International 2002) 3-22 (11-12).
[15] Art. 9(2) of Directive 2002/14/EC regulates the correlation with Directive 2009/38/EC.
[16] T. Blanke, 'Workers´ right to information and consultation within the undertaking (Article 27)' in B. Bercusson (ed), *European labour law ant the EU Charter of Fundamental Rights* (Nomos, 2002) 284ff.

The fact that the CFR does not refer to national definitions of workers indicates an autonomous understanding.[17] Some scholars consider interpreting the term 'worker' in a similar way to the ('uniform') definition of an employee in Art. 45 TFEU (see section 1 above).[18] An argument against this interpretation is, however, that the wording of Art. 27 CFR clearly states that, for this article to be fully effective, it must be given a more specific expression in EU law or national law.[19] In particular, Directive 2002/14/EC is based on the concept of an employee under national employment law (see section 3.1). Furthermore, with respect to the purpose of the provision, referring to a 'uniform European definition' of an employee is considered problematic. For instance, management bodies of a corporation are employees within the meaning of Art. 45 TFEU.[20] If the term 'worker' in Art. 27 CFR were interpreted (only) in the sense of Art. 45 TFEU, management bodies would therefore have to consult and inform themselves. A more suitable solution proposed in literature is a standard-specific interpretation of the norm. This means that a separate right to information and consultation, e.g. for management bodies, would therefore be excluded.[21]

As a preliminary conclusion, it can therefore be stated that the definition of an 'employee' in Art. 27 CFR can certainly be used as a starting point: the scope of protection of Art. 27 CFR includes persons which performs services for and under the direction of another person in return for which they receives remuneration (according to *Lawrie-Blum*; see section 1). However, with respect to the purpose of Art. 27 CFR, namely to ensure that a person is informed and consulted about developments within the undertaking that affect that person in the role as an employee, a standard-specific interpretation is also required. Therefore, in contrast to the definition of an employee of Art. 45 TFEU (see section 1), employees in minor employment are also covered within the scope of application of Art. 27 CFR.[22]

More superficially, it has been argued that Art. 27 CFR might cover persons *comparable to employees* because of their (economic) dependence on the employer.[23] Furthermore, the Commission's Draft Guidelines clarifying the application of EU competition law to collective

[17] C. Schubert, 'Commentary of Art 27 GRC' in M. Franzen, I. Gallner and H. Oetker (eds), *Kommentar zum europäischen Arbeitsrecht* (C.H. Beck, 2024) Art 27 GRC para 18ff.
[18] H. D. Jarass, "Charta der Grundrechte der Europäischen Union unter Einbeziehung der vom EuGH entwickelten Grundrechte, der Grundrechtsregelung der Verträge und der EMRK" (C.H. Beck 2021) Art 27 GRC para 7; cf. also S. Lembke, 'Commentary of Article 27' in H. von der Groeben, J. Schwarze and A. Hatje (eds), *Europäisches Unionsrecht* (Nomos 2019) Art. 27, para. 5; also, Schubert, 'Commentary of Art 27 GRC', Art 27 GRC para 19.
[19] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* (15 January 2014), para 45.
[20] Case 232/09 *Dita Danosa v LKB Līzings SIA* (11 November 2010). Although the decision concerned the scope of Directive 92/85/EEC, the ECJ referred to the definition of worker in Art 45 and confirmed the status of an employee (para 39).
[21] Ct. Holoubek, 'Commentary of Article 27' in J. Schwarze et al (eds), *EU-Kommentar* (Nomos 2019) Art. 27, para 10; C. Köchle, 'Commentary on Art 27 GRC' in M. Holoubek and G. Lienbacher (eds), *GRC-Kommentar* (MANZ 2019) Art 27 para 19.
[22] Holoubek, 'Commentary of Article 27', Art. 27, para 10.
[23] Holoubek, 'Commentary of Article 27', Art. 27, para 10.

agreements of solo self-employed people[24] can generally be seen as recognition of the need to extend labor law protection to non-standard employment relationships. In some MS, as mentioned introductory, certain non-employees already have collective rights (e.g. trade union rights). Excluding non-standard-workers of ICW would be difficult to uphold in this case. However, it is also stated that a broad interpretation of the term 'employee' in Art. 27 CFR would require a reorganization of workplace representation in the Member States. In this case, the interests of persons with different backgrounds, and therefore different needs, would be treated the same, which is considered to be an unwelcome outcome.[25]

Even if, according to the ECJ,[26] Art. 27 CFR does not have an horizontal effect and does not take precedence, Art. 27 CFR can nevertheless be used for *interpretation*.[27] If Art. 27 CFR is interpreted broadly, for persons *comparable to employees* the rights it standardizes must be guaranteed at *national level*. This also results from the fact that, as mentioned above, Art. 27 CFR is only given effect by Union law or national law. As most of the Directives are based on the national definitions of an employee (see section 3), the question of whether employee-like persons are (currrently) also covered must therefore in most cases be determined on the basis of national law. However, if Art. 27 is used for interpretation of the scope of application of the directives, the following must be clarified from a competence law perspective: can directives issued under Art. 153 TFEU cover self-employed workers (for details see 3.1)?

3. Secondary legislation

Specifically, there is a total of eighteen Directives which are directly related to the field of ICW, although some of them do not only cover ICW provisions. Those Directives can be grouped as follows:

- Directives whose **main purpose** is to ensure **ICW:** Directive 2002/14/EC and the Euro Works Council Directive 2009/38/EC.
- Directives that regulate ICW, but have a **different main purpose:**

[24] C(2021) 8838 final.
[25] R. Rebhahn, F. Schörghofer, '§ 21 Rechte des Arbeitslebens' in C. Grabenwarter (ed), *Enzyklopädie Europarecht: Europäischer Grundrechteschutz* (Nomos 2022) § 21, para 45 (footnote 109).
[26] The ECJ, Case C-176/12 *AMS*, para 50, is probably of the opinion that Art. 27 CFR is to be considered a principle. In literature, it is debated whether it is a fundamental right or a principle. In favour of a principle e.g. C. Schubert, 'Commentary of Art 27 GRC', Art 27 GRC para 12; in favour of a fundamential right e.g. E. Felten, 'Arbeit und Soziales' in G. Herzig (ed), *Jahrbuch Europarecht 2015* (NWV 2015) 245, 248; A. Sagan, 'Arbeitsrecht als Gegenstand des Unionsrechts' in Oetker/Preis (eds) EAS, B 1100, para 99. According to the wording and title, Art. 27 is clearly a 'right' (see E. Brameshuber, 'Commentary of Article 27', in Korinek/Holoubek/Bezemek et al (eds), *Österreichisches Bundesverfassungsrecht* (Verlag Österreich 2024) Art. 27, para 18).
[27] For details see Holoubek, 'Commentary of Article 27', Art. 27, para 18.

    - Restructuring of companies: Collective Redundancy Directive 98/59/EC and Acquired Rights Directive 2001/23/EC.
    - OSH Directive 89/391/EEC.
    - Non-standard employment relationships: Part-time Work Directive 97/81/EC, Fixed-term Work Directive 1999/70/EC, Temporary Agency Work Directive 2008/104/EC.
    - Platform Work Directive.
- Directives that belong to a policy **area other than social policy:**
    - Company co-determination: SE and SCE Directives 2001/86/EC and 2003/72/EC, Directive 2017/1132 on cross-border mergers and CSR-Directive 2022/2464.
    - Anti-discrimination and equality: Directive 2006/54/EC, Directive 2000/78/EC, Directive 2000/43/EC, Directive 2010/41 and Directive 2023/970.

In addition to the above, ICW provisions also take centre stage in the Artificial Intelligence Act (Regulation 2024/1689), as a measure to improve algorithmic transparency.

Lastly, as mentioned in the Introduction, the 'new generation directives' leave quite ample space for interpretation as regards their personal scope of application, yet, they do not explicitly refer to a definition of worker that encompasses economically, but not necessarily personally dependent workers. The Platform Work Directive goes one step further; some of its rules also apply to platform workers who are not employees stricto sensu. From a teleological point of view, the Commission seems to follow a similar approach as within the Guidelines on Collective Bargaining for solo self-employed: In case non-workers face the same challenges and difficulties as (co-)workers and thus are in the same need of protection, the same rules apply. One could also state that by doing so, the Commission has adopted a more purposive approach.

3.1. Directives whose main purpose is to ensure ICW

3.1.1. Directive 2002/14/EC (ICFD) – General framework for informing and consulting employees

Directive 2002/14/EC aims to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community. Consequently, this Directive is the strongest and the clearest indicator of how the personal scope of ICW rights is interpreted in the EU law.

As mentioned before, the *definition of an employee* in Art. 2(d) refers to the national employment law's definitions and practices (this also applies to *employee representatives* (Art. 2(e)): 'employee' means any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practices. Thus, if a person is an employee under the general definition in national labour law, that person must also be an employee within the scope of provisions implementing Directive 2002/14/EC in that MS and must therefore be included in the above-mentioned threshold values.[28] The MS are not authorized to exempt a specific category of employees from the Directive's scope of application;[29] otherwise this would undermine its effectiveness.[30] In other words, the Directive precludes any national legislation exempting a specific category of employees from its scope of application, unless national labour legislation excludes this group from the general definition of an 'employee'.[31] Thus, non-standard workers such as economically dependent self-employed persons are not entitled to the information and consultation rights defined in the Directive if they are not employees according to the general definition of an employee in the MS.

There are other directives outside social policy that refer to the above directives to regulate ICW rights on the subject they address. For example, throughout its articles, the Directive (UE) 2019/1023 urges Member States to ensure that the information and consultation rights provided for in Directives 2002/14/EC and 2009/38/EC are respected in scenarios of restructuring, insolvency and debt discharge (Art. 13(1)). This Directive does not contain any reference to the concepts of *employee* or *workers' representative*. However, on the understanding that it expressly refers to Directives 2002/14/EC, the definitions contained in the latter will apply when defining its scope.

It should be noted that Directive 2002/14/EC must be interpreted in the light of Art. 27 CFR. If Art. 27 CFR is interpreted broadly, the rights should also apply to employee-like persons (see section 2.1). In order to do so, it is necessary to clarify whether the competence bases of the directive, i.e. Art. 151 and 153 TFEU, only cover employees or also the self-employed. There are reasons to believe that Art. 153 TFEU is only limited to employees; for example, its wording or its very genesis.[32] However, there are already some instruments that have been adopted under the competence title of Art. 153 TFEU and deal with self-employed workers, such as the

[28] C. Weber, 'Commentary of Directive 2002/14/EC' in M. Franzen, I. Gallner and H. Oetker (eds), *Kommentar zum europäischen Arbeitsrecht* (C.H. Beck 2024) Art 2 para 15.
[29] M. Schlachter, 'Die europäische Dimension betrieblicher Arbeitnehmerbeteiligung' (2015) EuZA, 148, 152.
[30] Case C-385/05 C*onfédération générale du travail (CGT) and Others v Premier ministre and Ministre de l'Emploi, de la Cohésion sociale et du Logement* (18 January 2007) paras 41, 48 (Exclusion of employees under the age of 26).
[31] E. Brameshuber, Information and Consultation rights, 2021, 239 (245).
[32] N. Martínez Yañez, 'La Carta de Derechos Fundamentales de la UE y los derechos profesionales de los trabajadores autónomos' (2020), Temas Laborales, 151*,* 106.

Directive 2017/159/EU implementing the Agreement concerning the implementation of the Work in Fishing Convention of the ILO (1), the Directive 2002/15/EC on the organization of the working time of persons performing mobile road transport activities[33] (2) and the Council Recommendation of 8 November 2019 on access to social protection for employed and self-employed workers (3).

The EU is moving towards equal rights for employees and vulnerable self-employed workers in the area of free movement.[34] In our opinion, taking as an example the above rules and the case law of the Court of Justice on vulnerable self-employment in the field of free movement[35], it is possible to understand that the Directives issued under Art. 153 TFEU, which contain ICW provisions, could cover non-standard and self-employed workers who are in a position of vulnerability comparable to that of employees. This is, however, a legislative policy choice that the EU institutions are not willing to take on board, as, for example, the Platform Work Directive recognizes that ICW rights should not apply to self-employed workers, as they are "specific to workers under EU law".[36]

3.1.2. Directive 2009/38/EC (EWC) – Establishment of a European Works Council for the purposes of informing and consulting employees

Directive 2009/38/EC[37] provides for the involvement of employees in transnational companies based on subsidiary involvement procedures. To that end, a European Works Council, or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings with the purpose of informing and consulting employees (Art. 1(2)). According to Art. 2(1)a 'Community-scale undertaking' of the company, means any undertaking with at least 1.000 employees within the MS and at least 150 employees in each of at least two MS. The term is thus based on the *number of employees* and not on other factors (turnover etc.).[38]

[33] The ECJ settled the claims of some MS on the grounds that Art. 19 TFUE, which was also a competence basis of the Directive, allowed for the regulation of the rights of self-employed workers, but the CJEU did not expressly reject the basis of Art. 153 TFEU for self-employed workers (Cases 184/02 and 223/02 *Spain and Finland v Parliament and Council* (9 September 2004)).

[34] J.M. Miranda Boto, 'Breves notas sobre la posición de los trabajadores por cuenta propia frente al Derecho Social Comunitario' in AA.VV., Actas *XII Jornadas Luso-Hispano-Brasiñelas de Derecho del Trabajo* (A Coruña GESBIBLO 2007), 120-121.

[35] Case C-507/12 *Saint Prix* (19 June 2014); also Case C-442/16 *Gusa* (20 December 2017).

[36] Recital 53.

[37] Directive 94/45/EC was revised by Directive 2009/38/EC.

[38] H. Oetker, 'Commentary of Directive 2009/38/EG' in M. Franzen, I. Gallner and H. Oetker (eds), *Kommentar zum europäischen Arbeitsrecht*, Art. 2 para 5.

The Directive does *not define the term 'employee'*; however, it can be derived indirectly from Art. 2(2),[39] which states, for the purpose of the Directive, that thresholds for the size of the workforce shall be based on the average number of employees, including part-time employees, employed during the previous two years calculated *according to national legislation and/or practice*. Therefore, in determining whether a person working for the company is an employee, the law of the MS where the person works is applicable and not the law of the company's registered office.[40] As a result, this can lead to a situation where a group of persons – such as managing employees or non-standard employees – is included in one MS when determining the thresholds, while this is not the case in another MS.[41] A general extension of the scope of application to non-standard workers and thus representation by a European Works Council would not be possible from a competence law perspective, although ICW rights granted to the European Works Council may also be relevant for non-standard workers (see 4.1).

3.2. Directives that regulate ICW as a complementary measure

In order to determine whether non-standard workers are covered by ICW rights regulated by some directives as a complementary measure, it is necessary to analyse two aspects: (1) the personal scope of application of each directive and, specially, its interpretation by the ECJ; and (2) the main objective of each directive, to check whether the extension of ICW rights to the non-standard workers is compatible with it from a teleological point of view.

3.2.1. Directives in the field of restructuring of companies

The Collective Redundancy Directive 98/59/EC does not limit the termination powers of employers to carry out collective redundancies, but it does oblige them to open a period of reflection with the workers' representatives.[42] To this end, it recognises the right of information and consultation in favour of workers' representatives with a view to reaching an agreement with the employer (Art. 2). For its part, the Acquired Rights Directive 2001/23/EC recognises the right of the representatives of the transferor's and transferee's workers (Art. 7(1)) or of the companies' own employees, if there are no representatives (Art. 7(6)), to be informed about the transfer process. The workers' representatives of both companies also have the right to be

[39] Oetker, 'Commentary of Directive 2009/38/EG', Art. 2 para 5 with further references. C. Engels, 'Transnational Information and Consultation: The Recast European Works Council Directive' in R. Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (Wolters Kluwer 2014) 652ff.
[40] Oetker, 'Commentary of Directive 2009/38/EG', Art. 2 para 9.
[41] Oetker, 'Commentary of Directive 2009/38/EG', Art. 2 para 5 with further references; K. Riesenhuber, *Europäisches Arbeitsrecht* (De Gruyter, 2021) § 31 Rn. 12ff.
[42] Case C-201/15 *AGET Iraklis* (21 December 2016).

consulted if it is envisaged that the transferee or the transferor will take measures in relation to their respective employees (Art. 7(3)).

The Collective Redundancy Directive 98/59/EC and the Acquired Rights Directive 2001/23/EC are not, *per se,* aimed at protecting economically dependent self-employed workers who provide services for a main undertaking. However, such workers will be directly or indirectly affected by this company restructuring process and they will also have an interest comparable to employees in knowing how the economic situation of the company will affect them. As economically dependent self-employed workers often have only one or a few contractors, they will also have a comparable interest in being informed and consulted (also see 4.1). Despite such an interest, ICW rights provided for in these directives cannot currently extended to self-employed workers according to the scope of application of these Directives, limited to the employment relationship.

The Directive 98/59/EC does not define the concept of worker who would be entitled to such ICW rights, but the personal scope of application of the Directive 98/59/EC is influenced by the very concept of collective redundancies (Art. 1(1)), which itself implies the existence of an employment relationship between the employer and the employee affected by the measure. The ECJ emphasised that the concept of employee in the Directive is a concept specific to EU law, referring to the traditional requirements of the case-law on the free movement of workers, which cannot be interpreted in a restricted manner[43] on a case-by-case basis.[44] For its part, the Directive 2001/23/EC expressly refers to the concept of *employee* understood as such in the labour law of the MS concerned (Art. 2(1)d). The application of the Directive will therefore be subject to what MS understand by an employee. It should be stressed that this Directive only requires the protection of the person as an employee within the framework of the national legislation but does not require a certain content or level of protection.[45] This allows employees engaged in marginal or small-scale activities to be protected by the provisions of the Directive if they are classified as employees by the Member States.[46]

It seems clear, in any case, that only non-standard workers who qualify as *employees* in the Member State (1), workers who have the status of employee according to the EU concept, even though they are classified by national law as self-employed (2) and bogus self-employed

[43] J. Cabeza Pereiro, 'El concepto de trabajador en la jurisprudencia del Tribunal de Justicia de la Unión Europea' (2018), Documentación Laboral 113, 51-52.
[44] Case C-596/12 *Comision v Italia* (13 February 2010).
[45] Case C-317/18 *Correia Moreira* (13 June 2019).
[46] E. Rodríguez Rodríguez, 'El concepto de trabajador y el mantenimiento de sus derechos en los casos de remunicipalización. Comentario a la STJUE de 13 de junio de 2019, C-317/18, asunto "Correia Moreira"' (2019), Revista de Derecho Social 88, 95-117.

workers (3) will be covered by the ICW rights of these Directives, but not self-employed workers[47].

3.2.2. Directive 89/391/EEC (OSH) – Measures to encourage improvements in the safety and health of workers at work

The concept of ICW is also recognized by Directive 89/391/EEC, particularly in Art. 10 (information of employees) and Art. 11 (consultation and participation of employees and employees representatives) [48]. The *personal scope of application* of the Directive is basically determined by the concept of *employee* and *employer* according to Art. 3(a) and (b). Art. 3(c). So far, there is no ECJ case law on Directive 89/391/EEC regarding the interpretation of the term "employee". Thus, it is unclear whether it must be determined autonomously under European Union law[49] and, if so, whether the definition of Art. 45 TFEU (see section 1.1) applies.[50] Framework parameters pointing in this direction can be found in the individual Directives issued under Directive 89/391/EEC.[51] It is also argued that the term 'employee' must be understood very broadly[52] and that socio-political considerations such as those of the internal market favor a close reference to the definition in Art 45 TFEU.[53] Ales points out, for example, that a decisive criterion for whether the Directive applies to new forms of employment could be that the employees perform tasks within the employer's or undertakings' premises, even if this leaves open the problem of work performed on platforms (or even, simpler, of teleworkers). Furthermore, he refers to Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites which defines self-employed as any person other than those referred to in Art. 3(a) and (b) of Directive 89/391/EEC whose professional activity contributes to the completion of a project. The Directive provides for relevant obligations for self-employed workers both regarding their own safety and health at work and the risk that their activities may create against employees.[54] However, it should be noted, that Directive 92/57/EEC only applies to "temporary or mobile construction sites", i.e. to "all construction sites on which building or civil engineering works are carried out" (Art. 2a). Certainly, platform work cannot be compared to excavation, earthworks or the like (see Annex

[47] Case C-229/14 *Balkaya* (9 July 2015).
[48] T. Klindt/C. Schucht, 'Commentary of Directive 89/391/EWG' in M. Franzen, I. Gallner and H. Oetker (eds), *Kommentar zum europäischen Arbeitsrecht* (Berlin, C.H. Beck, 2024) Art. 2 para 15ff.
[49] Cf. for this interpretation Klindt/Schucht, 'Directive 89/391/EWG', Art. 2 para 11 with further references.
[50] K. Riesenhuber, *Europäisches Arbeitsrecht* § 16 para 9.
[51] M. Fuchs, F. Marhold and M. Friedrich, *Europäisches Arbeitsrecht* (Verlag Österreich 2020) 602; see e.g. Case 116/06 *Sari Kiiski v Tampereen kaupunki* (20 September 2007), para 25 on the individual Directive 92/85/EEC on maternity protection based on Directive 89/391/EEC with reference to an autonomous interpretation.
[52] Schucht, 'Commentary of Directive 89/391/EWG', Art. 2 para 11.
[53] M. Fuchs, F. Marhold, M. Friedrich, *Europäisches Arbeitsrecht* 602; K. Riesenhuber, *Europäisches Arbeitsrecht* § 16 para 9.
[54] E. Ales, 'Commentary of Directive 89/391/EEC' in E. Ales, M. Bell, Mark, O. Deinert, S. Robin-Olivier (eds), *International and European Labour Law: Article-by-Article Commentary* (Nomos Verlag 2018) Art. 3, para 30.

1 to the Directive for a non-exhaustive list of building and civil engineering works referred to in Art. 2a). While the EU Action Plan under the Social Pillar recognizes that "the acceleration of digitalization is changing the very notion of the working environment", initiatives such as the proposal for a Directive on improving working conditions in platform work affirm that "the provisions on health and safety at work (...) are specific to workers" (explanations to Art.10). This seems to be a strong indicator that OSH rules do not apply to economically dependent employee-like workers. However, a teleological, risks-based approach might lead to a different outcome, bearing in mind that their situation could be comparable to that of 'real' teleworkers in terms of integration into the platform's business (also see the risk approach in section 4.1).

3.2.3. Directives on non-standard employment relationships

The Framework Agreement on part-time work (Directive 97/81/EC) and the Framework Agreement on fixed-term work (Directive 1999/70/EC) do not explicitly recognise a right of information in favour of workers' representatives, but they do call on employers to take into consideration, as far as possible, the provision of adequate information to workers' representatives on part-time work (cl 5(3)e of Directive 97/81/EC) and on fixed-term work in the undertaking (cl 7.3 of Directive 1999/70/EC). The scope of these Agreements focusses on the concept of *employee, employment contract* or *employment relationship,* but, in order to define such concepts, they refer to refers to national law, i.e. the legislation, collective agreements, or practices in force in each MS. Only persons who are *employees* according to national legislation would fall within the scope of application,[55] which may therefore differ from one MS to another.[56] However, the ECJ emphasises that the discretion attributed by the Agreements to the MS to define what constitutes an *employment contract* or an *employment relationship* is not an unlimited power, since they must respect the effectiveness of the Directive and the general principles of EU law.[57] Moreover, the personal scope of application of the Agreements must be understood in an extensive manner because of the link between its content and the principle of equality and non-discrimination.[58] This means that the exclusion of certain categories of workers on the basis of formal qualifications[59] made by the national legislator

[55] Case C-313/02 *Wippel* (12 October 2004).
[56] K. Riesenhuber, *Europäisches Arbeitsrecht* § 2 para 1.
[57] J.F. Lousada Arochena, 'El trabajo a tiempo parcial (Directiva 97/81/CE del Consejo de 15 de diciembre de 1997)' in AA.VV., *Derecho Social de la Unión Europea. Aplicación por el Tribunal de Justicia* (BOE 2023), 1073-1074; J.-P. Lhernould, 'Commentary of Directive 97/81/EC' in E. Ales, M. Bell, Mark, O. Deinert, S. Robin-Olivier (eds), *International and European Labour Law: Article-by-Article Commentary* (Nomos Verlag 2018) cl 2 and 3, para 15.
[58] Cases C-444/09 and C-456/09 *Gavieiro Gavieiro and Iglesias Torres* (22 December 2010) and Case C-307/05 *Del Cerro Alonso* (13 September 2007).
[59] Such as the "honorary" appointment of a justice of the peace who, in the course of his duties, actually performed real and effective services which were not merely marginal or ancillary and for which he received compensation in the form of remuneration. Case C-658/18 *Governo della Repubblica Italiana* (16 July 2020).

must be rejected if they do not correspond to the true nature of the relationship[60], i.e. false self-employment. However, this interpretation does not allow ICW rights to be recognised for self-employed workers who are qualified as such according to MS te legislation and EU law.

A different result could be envisaged regarding the Temporary Agency Work Directive 2008/104/EC. Art. 8 requires the user undertaking to provide appropriate information on the use of temporary agency work when informing workers' representatives about the employment situation in the undertaking in implementation of the obligations of Directive 2002/14/EC. For the purposes of this right of information, the scope of application of the Directive can be delimited by one element: *Worker who has a contract of employment or an employment relationship with a temporary-work agency in order to assign them to user undertakings to work there temporarily under their supervision and direction*. In relation to the concept of *worker*, Art. 3(1)a defines workers as "any person who, in the MS concerned, is protected as a worker under national employment law". Also, Art. 3(2) states that the provisions of the Directive may not prejudice national law as regards the definition of employment contract, employment relationship or employee. Despite these provisions, the ECJ has determined the scope of the concept of worker within the meaning of this Directive to prevent MS from excluding certain categories of persons at will. Consequently, according to the ECJ, the Directive applies not only to persons who have an employment relationship, classified as such by the MS, with a temporary-work agency. It also applies to persons who fulfil two conditions: a) they provide an employment service, as interpreted by the ECJ, that is to say, a supply of services for a certain period of time for and under the direction of another person in return for remuneration; and b) they are protected by that service in the MS concerned, irrespective of the legal classification of their relationship under national law, the nature of the legal link between the two parties and the form of that relationship. This allows persons who do not have the status of employee in the MS where they provide services to be included in the scope of application of the Directive, e.g. members of a non-profit foundation, volunteers or trainees [61] or even certain types of self-employed workers[62].

These ECJ's rulings have a particular impact on economically dependent self-employed workers, as they usually meet both above criteria, working under the instructions of the main client and benefiting from certain guarantees applicable to employees (contributions,

[60] J. Pérez Rey, E. Rodríguez Rodríguez, 'La contratación de duración determinada (Directiva 1999/70/CE del Consejo, de 28 de junio de 1999)', in AA.VV., *Derecho Social de la Unión Europea. Aplicación por el Tribunal de Justicia* (BOE 2023), 1017-1019.
[61] N. Martínez Yáñez, 'La Carta de Derechos Fundamentales de la UE y los derechos profesionales de los trabajadores autónomos' (2020) Temas Laborales 151, 114-115.
[62] Case C-216/15 *Ruhrlandklinik* (17 November 2016).

unemployment benefits, etc.). It would then be possible to include within the scope of the Directive and, specifically, of the information rights, workers who provide services as economically dependent self-employed workers for a main undertaking which, temporarily, transferred them to another company. Such an extension would be consistent with the main objective of the Directive, as it would ensure the protection of "atypical agency workers" while respecting the diversity of industrial relations and the development of flexible working arrangements.[63]

3.2.4. Platform Work Directive

The Directive on Improving Working Conditions in Platform Work, in its final version of March 2024, seemed to move towards equal ICW rights for employees and self-employed workers. However, a closer look shows that the ICW rights granted to the latter are more limited. The Directive recognises the rights of *persons performing platform work*, i.e. persons who provide organised work through a digital labour platform in the EU irrespective of the nature of the contractual relationship or their designation by the parties (Art. 2(2) and (3)), to be informed about the use of automated monitoring or decision-making systems (Art. 9(1) and (4)) and the assessment of the impact of individual decisions taken or supported by such systems (Art. 10(4)). It should be noted that these information rights do not have the same basis as the «traditional» ICW rights. Their aim is not to give platform workers influence over company decision-making, but to ensure the transparency of automated decisions and situation of the platform work. In fact, *representatives of persons performing platform work*, and, specifically, representatives of self-employed platform workers (Art. 2(7)), can only exercise such rights on behalf of self-employed workers regarding the protection of their personal data (Art. 15), and they only have the right to be informed about the number of persons who perform work on platforms on a regular basis, their contractual or employment status, the general conditions applicable to contractual relations and the intermediaries with whom the platform has a contractual relationship (Art. 17(1)).

Co-determination in the introduction and modification of automated systems is ensured through the ICW rights recognised in Arts. 13 and 14 of the Directives. However, these rights are only granted to *representatives of platform workers,* i.e. to the representatives of those workers who have an employment relationship with the platform (Art. 2(6)), and, in the absence of such

[63] Case C-216/15 *Ruhrlandklinik* (17 November 2016): 'To restrict the concept of worker (...) to those who have a contract of employment with the temporary-work agency, is liable (...) to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive' (para 36).

representatives, to the *platform workers*, i.e. to workers who have an employment relationship with the platform as defined by the legislation, collective agreements or practices in force in the Member States, taking into account the case law of the ECJ (Art. 2(4)).

The restriction of ICW to the self-employed workers' representatives is justified by the competence basis of the Directive since the rights of self-employed workers are based on Art. 16 TFEU, while the rights of employees are based on Art. 153 TFEU.[64] Recital 53 of the Directive recognizes that ICW rights should not apply to self-employed workers, as they are "specific to workers under EU law". In our view, this Directive is an indication that the EU has no interest, in the short term, in recognising ICW for atypical or non-standard workers, or, specifically, for self-employed workers, even though they may be affected by the same algorithmic risks as workers with an employment contract (see section 4.1).

3.3. Directives that belong to a policy area other than social policy

3.3.1. Company co-determination

Although its main objective is not the recognition of ICW, provisions in this respect can also be found in Directive 2001/86/EC and Directive 2003/72/EC supplementing the Statute for a European Company and a European Cooperative Society regarding the involvement of employees. The provisions are basically following the model of subsidiary participation procedures as provided for in Directive 2009/38/EC.[65] In parallel to the aforementioned Directive, a separate definition of *'employee'* is missing. According to literature, this does not mean that the term must be interpreted autonomously, but that the law of the MS is decisive (see section 3.1.2).[66] One can derive this not only from the similarity to Directive 2009/38/EC, but possibly also from the wording of Art. 3(2)a of both Directives:[67] For the definition and representation of an employee, reference is therefore made to the respective Member State's law and practice. The same conclusion can be found with regard to Directive (UE) 2017/1132, amended by Directive (EU) 2019/2121 as regards cross-border transformations, mergers and divisions, which recognises the right of employees or their representatives to be informed and

[64] Recital 17: "As regards Article 153(1), point (b), TFEU, this Directive sets out rules aimed at supporting the correct determination of the employment status of persons performing platform work and improving working conditions and transparency on platform work (…). As regards Article 16 TFEU, this Directive establishes rules to improve the protection of natural persons performing platform work regarding the processing of their personal data".
[65] E. Brameshuber, Information and Consultation Rights, 2022, para 1.
[66] Without further explanation H. Oetker, 'Commentary of Directive 2001/86/EG' in M. Franzen, I. Gallner and H. Oetker (eds), *Kommentar zum europäischen Arbeitsrecht* (C.H. Beck 2024) Art. 2 para 24; Oetker 'Commentary of Directive 2003/72/EC', para 1.
[67] See also Article 8 of the Directives which refers to Articles 3 to 7. For this purpose, there must be one seat per Member State per each portion of *employees employed in that Member State* which equals 10 % or a fraction thereof, of the number of employees employed in all the Member States taken together.

consulted on cross-border procedures for conversion (Art. 86k(2)), merger (Art. 126d(2)) and division of limited liability companies (Art. 160k(2)) was expressly included in the first one.

3.3.2. Anti-discrimination and equality

One of the areas in which it is now possible to extend ICW rights to self-employed workers, without the obstacle of the competence bases of the directives, is that of anti-discrimination. Directives 2000/43/EC (on the principle of equal treatment between persons irrespective of racial or ethnic origin) and 2000/78/EC (establishing a general framework for equal treatment in employment and occupation) do not specifically provide for information and consultation rights for workers' representatives. They only insist on the need for the provisions adopted under them to be brought to the attention of persons concerned by all appropriate means, including, specifically, the workplace (Art. 10 of Directive 2000/43 and Art. 12 of Directive 2000/78). However, the interpretation of the personal scope of application of these directives may be useful in analysing the scope of application of the ICW rights contained in Directive 2006/54/EC.

Directive 2006/54/EC calls on Member States to encourage employers to provide employees and/or their representatives with adequate information on the equal treatment of men and women in the company (Art. 21(4)).

This Directive, as was the case for Directives 2000/43/EC and 2000/78/EC, has a universal personal scope of application, in favour of "all persons" (Art. 3(1) of Directives 2000/43/EC and 2000/78/EC). It is the objective or material scope of the Directives, i.e. each of the measures they contain, which determines their selective application to groups or sets of addressees, within this universal subjective scope.[68] For example, the prohibition of discrimination in relation to the conditions of access to employment, self-employment, or occupation (Art. 3(1)a of Directives 2000/43/EC and 2000/78/EC and Art. 14(1)a of Directive 2006/54/EC) allows the measure of the Directives to apply not only to posts occupied by a worker within the meaning of Art. 45 TFEU,[69] but also to self-employed activities that are real and personally carried out within the framework of a legal relationship characterised by a certain degree of stability[70] in this particular field. This interpretation, which is largely concerned with self-employed workers comparable to employees, makes it possible to include economically dependent self-employed

[68] M. E. Casas Baamonde, 'Igualdad y prohibición de discriminación por origen racial o étnico (Directiva 2000/43/CE del Consejo, de 29 de junio de 2000)', in AA.VV., *Derecho Social de la Unión Europea. Aplicación por el Tribunal de Justicia* (BOE 2023), 549-551.
[69] Case C-587/20 *HK/Danmark and HK/Privat* (2 June 2022).
[70] Case C-356/21 *J.K. and TP, SA* (12 January 2023).

workers and employee-like persons.[71] However, there are another measures that do not specifically relate to self-employment, e.g. the prohibition of discrimination in relation to "employment and working conditions" (Art. 3(1)d of Directives 2000/43/EC and 2000/78/EC and Art. 14(1)a of Directive 2006/54/EC). To determine the scope of application of these measures, it must be assumed that the link between Directives and fundamental rights requires that their scope be interpreted broadly[72] and in a teleological manner[73]. This interpretation allowed self-employed workers who are in a situation of vulnerability comparable to that of employees to be included in measures traditionally intended for employees of Directive 2000/78/EC by analogy.[74] The similarities between the objective scope of Directive 2006/54/EC and Directive 2000/78/EC and the protection of fundamental rights make it feasible to transpose the ECJ doctrine with regard to the latter and to include self-employed workers within the personal scope of certain measures of Directive 2006/54/EC which do not expressly provide for it, such as, for example, dismissal or even ICW rights.[75] In our opinion, this would not be incompatible with the competence bases of the Directive, since, along with the competence base of Art. 153 TFEU, Art. 19 TFEU is not limited to the discrimination in a employment relationship. Such an extension would be consistent with the objectives of the Directive, which aims to remove all obstacles based on discriminatory grounds to contributing to society through work, "irrespective of the legal form in which it is provided".[76]

The latter issue is particularly important due to the lack of provisions on the ICW rights in Directive 2010/41, which deals with equal treatment on grounds of sex between men and women engaged in an activity in a self-employed capacity.[77] The broad and analogical interpretation of the scope of Directive 2006/54 is the best option for economically dependent self-employed workers and employee-like persons to be covered by the IC rights of the workers' representatives of the main company, because the problems of these workers in relation to discrimination will not be so much in relation to the creation or expansion of their activity – a field protected by Directive 2010/41 (Art. 4 and 6) – but in relation to the treatment accorded to them by the company with which they provide services.

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[71] M. Rodríguez-Piñero y Bravo-Ferrer, 'Libertad de empresa y prohibición de discriminación en el trabajo por cuenta propia (Notas a la STJUE de 12 de enero de 2023, J.K; Asunto C-356/21)' (2023), Trabajo y Empresa. Revista de Derecho del Trabajo, 1, 12-15.
[72] N. Martínez Yáñez, 'Abordando el autoempleo precario desde la Unión Europea: sinergias entre el concepto de trabajador y la eficacia horizontal de los derechos fundamentales' (2019), Revista de Trabajo y Seguridad Social. CEF, 440, 47-54.
[73] Case 356/21 *J.K. and TP, SA* (12 January 2023).
[74] D. Pérez del Prado, 'La aplicación del Derecho del Trabajo al empleo autónomo: reflexiones en torno a la STJUE de 12 de enero de 2023 (asunto C-356/21)', *El Foro de Labos.* available online at: https://www.elforodelabos.es/2023/09/la-aplicacion-del-derecho-del-trabajo-al-empleo-autonomo-reflexiones-en-torno-a-la-stjue-de-12-de-enero-de-2023-asunto-c-356-21/.
[75] D. Pérez del Prado, op. cit.
[76] Case C-356/21 *J.K. and TP, SA* (12 January 2023), para 54.
[77] R. Krauser, 'Recognition of Economically-dependent Workers within EU Law – In Search for a Unicorn?' in C. Schubert (ed), *Economically-depedent Workers. Employment in a Decent Economy – International, European and Comparative Law Perspective* (C.H. Beck 2022) 260-262.

In line with the drive for social dialogue in the EU, provisions on ICW rights can also be found in the recent Directive EU 2023/970 which insists on the need for companies to adopt a policy of transparency with regard to pay structures in order to give effect to the principle of equal pay. With this objective in mind, the Directive includes a series of measures through which the information rights of individual workers on the gender pay gap (Art. 9(1) and (9)) and the participation rights of workers' representatives (Art. 9(6)) are strengthened. This Directive applies only to those '*who have a contract of employment or an employment relationship as defined by the law, collective agreements or practices in force in each Member State with consideration to the case-law of the Court of Justice'* (Art. 2(2)). Recital 18 specifies that this concept of worker should include: part-time workers, fixed-terms workers, persons in an employment relationship with a temporary-work agency, workers in managerial positions, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, workers in sheltered employment, trainees and apprentices. The definition and the list shows that the reference to national law is not unlimited[78] and the intention of the EU legislator was to include within the scope of the directive atypical employment forms of work that might be qualified as self-employment in the Member States but fit within the broad concept of worker in the EU. Without prejudice to the above, some authors consider that the reference to the *case law of the Court of Justice* contained in the definition of *worker* in this Directive allows not only judgments relating to the concept of EU worker to be taken into consideration. In their opinion, this reference could also include judgment of the ECJ extending the protection regime of employees to self-employed workers in a comparable situation, as was the case with Directive 2000/78.[79]

3.4.Regulation on Artificial Intelligence

Similar to the Platform Work Directive, the Artificial Intelligence Act (Regulation (EU) 2024/1689) also contains a right of information for workers and their representatives. According to Art. 26(7), employers shall inform the workers' representatives and the workers concerned that they are exposed to the use of a high-risk artificial intelligence system before putting it into service or using it. According to this provision, such information must be provided, where appropriate, in accordance with the rules and procedures laid down in Union and national law and practice on information of workers and their representatives.

[78] C. Weber, 'Commentary of Directive (EU) 2023/970, in M. Franzen, I. Gallner and H. Oetker (eds), *Kommentar zum europäischen Arbeitsrecht* (C.H. Beck 2024) Art 2 para 5.
[79] With regard to this assessment in Directives (EU) 2019/1152 and 2019/1158: D. Pérez del Prado, op. cit.

Recital 92 of the Proposal for a Regulation makes it clear that this information obligation, although fulfilled through the traditional ICW rights, does not serve the purpose of the latter, as it is an ”ancillary“ and ”necessary“ measure for transparency and the protection of fundamental rights. Based on the above consideration, we understand that this obligation to provide information is not limited to representatives or workers in an employment relationship, despite the literal wording of Art. 26(7), and also covers self-employed workers who provide services for a company using artificial intelligence systems. There are two reasons for this theory: from a literal point of view, the high-risk artificial intelligence systems, on which such information must be provided, include those affecting access to self-employment, according to Annex II of the proposal for a Regulation (1); and from a teleological point of view, the risks to which self-employed workers are exposed are the same as those to which employees exposed (2) (see section 4.1); indeed, Recital 92 provides that information on the deployment of high-risk AI systems at the workplace must be provided, *even if the conditions of the information or information and consultation obligations provided for in other legal instruments are not fulfilled.*

4. Possible solutions as regards the extension of ICW rights to non-standard workers

4.1. Risk approach

ICW rights do not only act, in a negative sense, as restrictions on the employer’s right to freely organise his productive organisation. They are rights which simultaneously pursue two objectives. Firstly, a general objective: they enable workers’ representatives to exercise their representative mandate in an appropriate manner and to assess the implications of company decisions.[80] Secondly, a specific objective: they allow workers and their representatives to intervene in some of the company’s decisions.[81]

The previous analysis of the directives shows how, in certain areas, ICW rights protect the specific interest of employees against the interest of the employer, i.e. against company decisions affecting working conditions. There are several risks against which ICW rights can provide effective protection. This leads to the question of whether the rights in the directives can be extended to self-employed on the basis that they are a community affected by the same risks:

[80] European Parliament Resolution of 16 December 2021 on democracy at work: a European framework for employees’ participation rights and the revision of the European Works Council Directive, para. 18-20 [2021/2005(INI)].
[81] M. L. Molero Marañón, F. Valdés Dal-Ré (2014), Los derechos de información y consulta en las reestructuraciones de empresa, Madrid, Ministerio de Empleo y Seguridad Social, 62-63.

1) Threat to employment and protection of rights and claims. Developments in the economic situation of the company and/or the employment structure within the company involve the risk of losing rights and claims or even employment itself. Assuming that economically dependent non-employees in particular often have only one or a few contractors and are therefore wage-dependent and/or dependent on the company's operational infrastructure and means of production, they will also have an interest comparable to employees in being informed and consulted about such developments (e.g. Art. 4(2)a–c Directive 2002/14/EC).

This applies in particular in the field of restructuring of companies (see section 3.2): If, for example, (restructuring-related) mass redundancies affect not only employees but also employee-like persons of a company that falls within the scope of Directive 98/59, they also have an interest in being informed. This is also reflected in certain national laws. In Austria, for example, certain employee-like persons are covered by unemployment insurance and are entitled to appropriate placement on the labour market.[82] In Spain, self-employed workers are covered by a specific system of compulsory unemployment protection and are entitled to a monthly financial benefit if the cessation of their activity is due to economic, technical, organizational or production reasons.[83] Therefore, the competent authorities also have an interest in such information.

Likewise, ICW rights in the event of transfers of undertakings will be of equal interest to employee-like persons (e.g. the date or proposed date of transfer, the reasons for the transfer, the legal, economic and social implications of the transfer for the employees; Art. 7(1) Directive 2001/23/EC) in order to be able to prepare for the new situation accordingly. Transferring these ICW rights to non-standard workers specially makes sense assuming – despite economic dependence – that the transferor´s rights and obligations arising from the contract existing on the date of the transfer are not automatically transferred to the transferee (Art. 3 of the Directive), i.e. the entire directive does not apply. However, the prerequisite for ICW rights is that the non-standard worker is affected by the transfer. For this reason, it is necessary that they can be clearly assigned to the transferring undertaking, business or parts of undertakings or businesses, e.g. because they work side by side with the employees.

Furthermore, economically dependent employee-like persons in particular are exposed to the same risks as employees in the event of a company's insolvency. The associated risks of losing unfulfilled entitlements are to be secured by the provisions of Directive 2019/1023/EC. ICW

[82] See section 2(8) Unemployment Insurance Act.
[83] See Title V of the General Law on Social Security (Royal Legislative Decree 8/2015 of 30 October).

rights are a first step in this direction. This applies in particular to the rights in restructuring plans, especially to inform (employees' representatives) on all preventive restructuring procedures that could have an impact on employment, such as the possibility for employees to enforce their wages and any future payments (Art. 13(1)(b)iii).

ICW rights granted to the European Works Council for decisions taken outside the Member State in which the employees of Community-scale undertakings are employed (Recital 11 and 12 of Directive 2009/38/EC) are also relevant for (economically dependent) non-standard employees with respect to threat of "employment" and protection of rights and entitlements. Dialogue is particularly important on matters that have a significant impact on employees' interests, such as the relocation or closure of establishments or companies or collective redundancies (see Annex I (3) of the Directive and the comments above on collective redundancies). Whether employee-like persons can be represented by the European Works Council is questionable. However, the Directive also provides that another procedure for informing and consulting can be installed (Art. 1(2) of the Directive).

2) Loss of already existing ICW rights through the establishment of an SE/SCE. The protection of acquired employee rights is a fundamental principle and objective of the Directives 2001/86/EC and 2003/72/EC. Existing ICW rights under national member state law should not be eliminated or restricted when an SE/SCE is formed.[84] The acquired rights form the starting point for the organization of participation rights in the SE/SCE (Recital 18/21). If ICW rights exist for employee-like persons at national level, these rights should not get lost or limited for them either when an SE/SCE is established.

3) Safety and health at the workplace. Not only employees, but also employee-like persons will have an interest in receiving information concerning safety and health risks at the workplace (Art. 10 and 11 Directive 89/391/EEC). This applies in particular to non-employees who are integrated into the company and work side by side with the employees. They will also be interested in information on the latest technology and scientific developments in the field of workplace organization, which the employer must be aware of to ensure better health and safety for employees (see the Recitals of Directive 89/391/EEC).

4) Discrimination and unequal treatment in employment and in the determination of working conditions. Employees, as the traditionally weaker party in an employment relationship, are not the only victims of discrimination in the field of work or occupation. Self-

[84] M. Fuchs, F. Marhold, M. Friedrich, *Europäisches Arbeitsrecht* 521.

employed workers may also see the conditions under which they provide their services affected by discriminatory motives or decisions taken by the main company with which they collaborate or for which they work. This is clear from the most recent case-law of the CJEU, in Case C-356/21[85], and from certain national laws, which expressly recognise the right of self-employed workers not to be treated unequally in their relations with other companies in which they carry out their activity. In Spain, Art. 11 of Law 15/2022 expressly prohibits the establishment of limitations, segregation or exclusions on discriminatory grounds in the agreements individually established between the self-employed worker and the client for whom he or she carries out his or her professional activity. In Italy, the Law No. 128 of 2 November 2019, on work on digital platforms, extends to the platform's self-employed "collaborators" the protections of equality, freedom and dignity provided for employees in relation to work opportunities, access to and expulsion from the platform. In Austria, Part I of the Equal Treatment Act on the equal treatment of women and men in work pursuant Section 1(3)2 and Part II on equal treatment in work without discrimination on ethnicity, religion or belief, age or sexual orientation pursuant Section 16(3)2 also expressly apply to economically dependent self-employed.

The similarity between the ways in which employees and employee-like persons provide services means that the latter may also suffer from unequal treatment that has traditionally been linked to the former, such as the decision to terminate the contractual relationship on discriminatory grounds. The extension of ICW rights in favour of the self-employed would allow all persons working for the same company or employer to have the necessary information to address bias and discrimination in a systematic way[86] and to claim the effective application of the principle of equality.[87]

5) Algorithmic work management. New ways of working, including digital platform work, are based on the use of algorithms to manage production processes. Companies base their activity on automated systems that monitor and make decisions about all the persons who work in the company. Algorithmic work management reaches both employees and self-employed workers in the company, as both are managed by the same technological framework that organises the provision of services and determines individual working conditions. Despite the nature of the relationship, both employees and self-employed workers are in an unbalanced position vis-à-vis the company, as the latter takes automated decisions that can have a

[85] Case C-356/21 *J.K. and TP, SA* (12 January 2023).
[86] Recital 39 of the Directive (EU) 2023/970: "Reporting and joint pay assessment contribute to an increased awareness of gender bias in pay structures and of pay discrimination and contribute to addressing such bias and discrimination in an effective and systemic way, thereby benefitting all workers employed by the same employer".
[87] European Parliament Resolution of 8 October 2015 on the application of Directive 2006/54/EC, para. 25 [2014/2160(INI)].

significant impact even on occupational safety and health or the right to equal treatment. In such scenarios, ICW rights (as suggested in the Proposal for a Directive on improving working conditions in platform work; see section 3.8) on algorithmic work management could protect both types of workers against misuse of automated systems that impact equally on personal data, employment stability and conditions for employees and self-employed workers, especially discrimination, undue exploitation and surveillance of workers.

6) Information asymmetry between employer, workers, and workers' representatives. ICW rights can be a useful tool to enable employees and self-employed workers to be aware of company policies that affect them equally and to hold the company accountable for decisions that impact on them, i.e. on their working conditions, on third parties and on the environment (as suggested, for example, in the Directive (EU) 2022/2464, on corporate sustainability reporting; see section 3.7).

7) Fraudulent recruitment. Part-time work, fixed-term work, temporary agency work and decentralised production can be flexibility mechanisms that benefit workers and employers. However, such working arrangements can also give rise to unlawful conditions, through their abusive use. Adequate information to workers' representatives on the employment situation in the company could enable them to report anomalies affecting not only employees, but also self-employed workers who have been fraudulently recruited.

4.2. Employer-focused approach

Another possible approach is to ask of whether employers could also benefit from ICW rights for non-standard employees. This can already be affirmed on a general level in many respects. Dissemination of information to and involvement of this group of persons can lead to greater awareness and understanding of risks and opportunities in the company. Information and consultation rights could create a space of convergence on issues where the interests of employees, self-employed workers and employers are not *per se* contradictory, for example, in relation to effective equality, non-discrimination, innovation or sustainability. Involvement of all employees and non-standard workers respectively self-employed workers in the company could also channel social conflict and facilitate cooperation on certain measures; not least, for example, in the management of restructuring processes and the successful adaptation of companies to new conditions resulting from the globalization of work.

5. Conclusion

Who is covered by the scope of application of ICW rights as a worker or employee under EU law depends in the vast majority of the cases on national law and/or practice, particularly under the relevant secondary union law. In some cases, explicit reference is made to the concept of employee under national law (see Directives 2002/14/EC, 2001/23/EC, 97/81/EC, 1999/70/EC, 2008/104/EC, 2023/970), in other cases this interpretation can be derived from the Directives themselves (see Directives 2009/38/EC, 2001/86/EC and 2003/72/EC, 89/391/EEC, 2019/1023/EC, 2006/54/EC). It is therefore necessary to have a look at national law to determine whether employee-like persons are also covered.

Yet, even if the national definition of employee applies, the ECJ imposes restrictions in certain cases: in summary, Member States may not undermine the effectiveness of the Directive by restricting it to certain categories of employees (see Directives 2002/14/EC, 1999/70/EC, 2008/104/EC). The fact that the reference to national law is not unlimited is also shown by the twofold concept of worker in more recent Directives, according to which the case-law of the Court of Justice must be considered (regarding ICW see Directive (EU) 2023/970). However, particularly when Directives do not expressly refer to national law, it is not always clear which definition of employee applies (see e.g. Directive 98/59/EC). In some cases, the 'uniform European definition' of an employee in Art. 45 TFEU (see section 1) is used. This also applies to Art. 27 CFR, whereby a standard-specific interpretation is required. Art. 27 CFR must also be concretized by Union law or national law to be fully effective. Although Art. 27 CFR does not take precedence according to the ECJ, it can be used for interpretation. If Art. 27 CFR is interpreted broadly, employee-like persons would therefore also have to be included in ICW rights at Union and national level.

A possible solution for the inclusion of non-standard workers in ICW rights could (also) be a risk-specific extension of the scope of application of the analysed directives. The described risk-based approach (section 4.1) was also chosen by the EU Commission in relation to the question of the exemption of collective agreements for solo-self-employed from Art 101 TFEU. In areas where especially employee-like persons are subject to the same risks as comparable employees and therefore also require corresponding protection, parallel legal solutions should be found. In addition, it may also be beneficial for employers to include non-standard employees in the ICW rights (section 4.2).