Core and Contingent Work in the European Union

A Comparative Analysis

Edited by
Edoardo Ales, Olaf Deinert and Jeff Kenner

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15

Contingent Work and Social Cohesion: Some Outcomes and One Proposal

EDOARDO ALES AND OLAF DEINERT

I. The Retrenchment of Core Workforce in the Company

As will be apparent from the preceding chapters, a drift towards contingent work is ongoing in all the countries considered in this book, although the form the drift takes differs from country to country. In France, for instance, the trend is towards outsourcing, while in Spain, self-employment is likely to replace employment relationships, and in Germany, temporary agency work has played and still plays a crucial role. Even if a certain variety of contingent work does exist, overall, the core workforce, defined as that one working under an open-ended employment contract with the 'core' company, is shrinking.

It goes without saying, that it is a matter of definition whether some kind of work arrangements can be described as contingent. In his chapter, for instance, Lo Faro has built a concept of contingent work by contrast to the employment relationship. Self-employment, and triangular employment relationships such as temporary agency work or service contracting-out are seen as typical cases of contingent work, while part-time and fixed-term contracts fall within the category of core work because, in those cases, work is performed under an employment contract. Therefore, following Lo Faro's concept, the core workforce is not, by definition, a group of employees who work under a standard employment relationship.

Nevertheless, even within Lo Faro's definition of core workforce, a diversification between different groups of employees has to be made, taking into account the fact that non-standard employment relationships may be a root of uncertainty and insecurity for the employee, put, anyhow, at the margin of the company organisation. The same European Social Partners have been aware of that. In fact, as expressly advocated in the 6th 'general consideration' of the Framework

Agreement on Fixed-Term Contract,[1] they have emphasised the fact that the contract is intended to open the way towards a standard employment relationship.

Consistently, the CJEU holds that an open-ended contract has to be regarded as the general form of employment contract,[2] while fixed-term contracts should be an exception, not to be abused.

Dorssemont has highlighted this point in his contribution, proposing Belgium as 'cognitive prototype' for making the use of fixed-term contract conditional. On the other hand, as he has clearly demonstrated by reference to part-time work, flexible work is not, per se, contingent.

Against such background, his chapter aims at analysing how the countries seen as 'cognitive prototypes' in this volume have reacted vis-a-vis the increase of contingent work and the subsequent retrenchment of core workforce, taking also into account the role Social Partners may play in this field. It also aims at making some proposals for a better regulation of the recourse to contingent workforce within the company.

II. Contingent Work and the Legal Order

As we have seen in previous chapters, EU legislation has already reacted to some typologies of what we understand as contingent work. However, this has happened only selectively, with reference to atypical work arrangements like part-time, fixed-term and temporary agency work.[3] Furthermore, this legislation has only partially dealt with the problem that contingent workers have to be regarded as part of a whole—the workforce of a particular company.

This has happened, for instance, from the equal treatment perspective, although with the relevant exception of temporary agency work, as confirmed by Deinert with reference to Germany, where, in the first years after the deregulation of temporary agency work, the new legislation opened up the way for a practice towards a 'two-classes-workforce' (once again core and contingent). Collective bargaining and case law have been instrumental in reshaping agency work to be used only in case of extraordinary production need.[4]

If, according to national law, a selection between workers is necessary before dismissal when it comes to the application of the collective redundancies

[1] Framework Agreement on Fixed-Term Work concluded by ETUC, UNICE and CEEP, as implemented by Council Directive 1999/70/EC of 28 June 1999 OJ L175/43.

[2] Case C-586/10, *Kücük*, ECJ, 26 January 2012, ECLI:EU:C:2012:39, para. 37; Case C-212/04, *Adeneler and others*, ECJ, [2006] ECR I-06057, para. 61.

[3] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, [2008] OJ L327/9.

[4] T J Bartkiw, 'Labour Law and Triangular Employment Growth: A Theory of Regulatory Differentials' 30 (2014) *Int J Comp LLIR* (2014) 413, provides a brief comparative overview on legal situations in triangular work relations.

directive[5] the "foreign workforce" is not included. In fact, since the Directive does not regulate that matter, no EU priority rule exists with reference to core and contingent work. Consequently, EU Law is not able to make any stipulation on the question of whether the dismissals of the core workforce should be preceded by the termination of the temporary agency work contracts in place. As Lokiec pointed out in his chapter, something similar happens with reference to the Transfer of Undertaking Directive.[6]

Of course, the lack of an EU legal framework on core/contingent work does not prevent Member States from elaborating national solutions aiming at guaranteeing a certain level of protection for contingent work. However, these solutions will not follow a common concept within the EU Law meaning, thus putting into question the same minimum requirements effect attached to EU Directives on atypical work as far as non-discrimination is concerned.

In any case, as the German experience on temporary agency work shows, it is not easy to find balanced solutions that take into consideration contingent workers' protection and companies' competitiveness.

In some countries, although no attention has been paid to contingent work as such, existing legislation has had an impact on it. As Lokiec stresses in his chapter, this has been the case of France, with reference to outsourcing, which has been made conditional upon the exercise of information and consultation rights by works councils. The outsourcing case also shows that other EU legislation may be applicable to (regulate) contingent work, eg the Posted Workers Directive[7] and, its Enforcement Directive.[8] In the same vein, in Germany, the use of zero-hours contracts, although not explicitly regulated, is subject to rule restrictions, as reflected in the rules on unfair contract clauses and on part-time and fixed-term contracts.[9]

On the other hand, with reference to self-employment as contingent work, Member States normally refrain from legislative protection. This is true in the United Kingdom, the 'paradise' of deregulated labour law. Germany too has no specific legislation on the service contract.[10] Spain, on the contrary, which seeks

[5] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, [1998] OJ L225/98.

[6] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, [2001] OJ L82/16.

[7] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, [1997] OJ L18/1.

[8] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L159/11.

[9] Cf U Preis, 'Flexicurity und Abrufarbeit' (2015) *Recht der Arbeit* 244; M Bieder, 'Der Nullstundenvertrag—zulässiges Flexibilisierungsinstrument oder Wegbereiter für eine modernes Tagelöhnertum?' (2015) *Recht der Arbeit* 388; also G Forst, 'Null-Stunden-Verträge' (2014) *Neue Zeitschrift für Arbeitsrecht* 998.

[10] Cf with reference to the legal situation of solo self-employed persons: O Deinert, *Soloselbsständige zwischen Arbeitsrecht und Wirtschaftsrecht* (Baden-Baden, Nomos Verlagsgesellschaft, 2015).

to promote self-employment as an alternative to the employment contract, provides a certain level of (social security) protection for economically dependent self-employed persons. As Gómez Muñoz pointed out, the idea of protecting self-employed persons, by giving them employee-like status, is not new from a comparative point of view. In fact, the employee-like concept is also known in Germany and in Austria where employee-like self-employed persons are well protected by social security law.

Other Member States have adopted specific pieces of legislation in order to fight social dumping deriving from the core workforce retrenchment. As reported by Del Conte, this is true for Italy, where the legislator, in recent times, has enacted provisions aiming at protecting self-employed persons whose performance is, in reality, organised by the contractor, as far as working time and working place are concerned. In a similar perspective, the French jurisprudence enacting the co-employment concept should be mentioned. In the UK, as Kenner notes, outrage over the abuse of zero-hour contracts has persuaded the Government to act to ban egregious exclusivity clauses that coerce a worker to remain attached to an employer even when no minimum hours of work are guaranteed.

Halfway between these two positions, we can place Germany, where the legislation did not react to the segmentation of the workforce into core and contingent. Nevertheless, case law has developed an approach that allows considering the horizontal connections between the different typologies of workforce operating within the company, whatever their juridical status.[11]

From what has been mentioned, we can conclude that none of the countries taken into account in this volume has developed an overall legislative strategy in order to deal with contingent work. Legislation, if any, normally focuses on specific issues. Only in the field of occupational health and safety, can one register an exception from this general remark, because of the 'risk approach' as proposed by Ales in his chapter. Indeed, the personal scope of application of health and safety law is not dependent upon the juridical qualification under which anyone performs their activity within and for the benefit of the company.

III. National Occupational Strategies and the Drift Towards Contingent Work

As described before, national legislators neither take the segmentation of the workforce into core and contingent as given nor establish a conceptual matrix for it. Indeed, although considered within the framework of the European Employment Strategy and of the flexicurity approach, national legislations promote different forms of work and/or restrict them for purposes of national employment policy.

[11] Cf W Linsenmaier H Kiel, 'Der Leiharbeitnehmer in der Betriebsverfassung—, Zwei-Komponenten-Lehre und normzweckorientierte Gesetzesauslegung' (2014) *Recht der Arbeit* 135.

With reference to fixed-term contract and to the temporary character of agency work Dorssemont has shown that national legislation may also proactively react to the potential abuse of contingent work, by making it conditional on meeting certain legislative criteria.

In recent times, national parliaments have focused on the 'simplification' and 'modernisation' of labour law in order to promote occupation (labour relations).[12] That is for instance, the case in Spain where the conclusion of self-employed arrangements has been promoted by tax and social security law after the economic crisis, as Gómez Muñoz highlights in his chapter. The same was true for the German experience with temporary agency work, liberalised in order to reduce the unemployment rate, and for Belgium, where temporary agency work has been understood as a stepping stone towards permanent employment in the user firm. Rönnmar reported on it for Sweden by reference to fixed-term contracts concluded with young and elderly people, while open-ended contracts with elderly workers have been terminated.

Whatever the intent, these examples show that the adoption of such occupational policies has the effect of increasing the number of unprotected work relationships. Bearing that in mind, national legislators can intervene to reduce the pressure on the core workforce resulting from the growth in competitive contingent work. A good example of this is the Italian experience with the Increasing Protection Contract, as described by Del Conte in his chapter. In fact, the Renzi reform aims at promoting open-ended employment contracts just in order to increase the core workforce, although with a reduced dismissal protection and, at the same time, at restricting the recourse to self-employment, by increasing its level of protection. As for the latter, the same is true in Austria, where self-employment is accompanied by a sound social security legislation, as illustrated by Marhold.

The idea behind these approaches seems to be that of contingent work becoming (more) acceptable if it is accompanied by some kind of social protection. This protection must be provided either by the legislator or by the courts: that is the case in France where 'umbrella' work has been adopted as to the former and that of co-employment as to the latter.

IV. The role of Social Partners

As Rönnmar points out in her chapter on intergenerational bargaining, using Sweden as 'cognitive prototype', social partners may be able to cope with the challenge of regulating a responsible use of contingent work at company or even at branch level.

[12] Cf for a comparative view, I Schömann S Clauwaert, 'Temps de travail et travail atypique au cœur des réformes du droit du travail en Europe' (2014) Revue de Droit de Travail 582.

In the same vein, Klebe and Heuschmid draw, with reference to Germany, a precise picture of how strong trade unions can bargain not only on re-regulation of agency workers' rights but also on the regulation of the use of temporary agency work or service contracts by user firms. In such a perspective, Social partners deal not only with the working conditions of contingent workers but, indirectly, also with those of the core workforce. This shows that it would be wrong to argue that such agreements tend just to regulate economic decisions of the user and not the working conditions of its employees.[13]

As Klebe and Heuschmid demonstrate in their chapter, the collective regulation of the work status of crowdworkers could also be a trade union goal since, as we have learned from the recent case law of the CJEU,[14] collective agreements for 'false' self-employed (as crowdworkers could be regarded) would not per se violate EU Competition Law. On top of that, it should be stressed, that the crowdworker issue shows how the collective defence of interests is not in its nature restricted to collective bargaining. In such a perspective, crowdworkers' platforms are a good example of other forms of self-protection of workers' rights. The Spanish experience too, with the professional interest agreements, which cannot be regarded as collective agreements, underlines this.

As the German case shows, works councils too could have an influence in shaping the workforce structure in the company if they are able to reach plant agreements on quotas for contingent work and to prevent its use when exceeding the quota agreed. Worth mentioning in this context are also the Besservereinbarungen that are intended to ensure the equal treatment principle for agency workers.

V. Contingent Work and the 'New Forms of Employment'

The example of crowdworkers shows that the segmentation of the workforce into core and contingent is likely to exceed the 'traditional' forms of work and of outsourcing. Although crowdwork might fall under different existing work typologies (employment, distance work, self-employment—real or 'false'), one should take view crowdworking as a new and independent type of contingent work.

As Klebe and Heuschmid have clearly pointed out, crowdworking has a new 'quality' because of two aspects: it entails, on the one hand, a potentially global labour market and on the other, rather short time periods for micro-tasks, both

[13] Cf in the same vein, R Krause, 'Tarifverträge zur Widerherstellung von Equal Pay' (2012) *Arbeit und Recht* 55.

[14] Case C-413/13, *FNV Kunsten, Informatie en Media*, CJEU, 4 December 2014, ECLI:EU:C:2014:2411.

supported by the possibility of using digital media for initiation of the contract and performance/delivery of the work. This is exactly in line with Kovács' observations on crowdwork.

The German legal system, as analysed in Klebe's and Heuschmid's chapter, does not provide any specific and appropriate rule for crowdworking. The same is true, for the time being, for other legal orders. We cannot look into the future but it is not hard to imagine that further new forms of contingent work will appear.

Indeed, both Lo Faro and Lokiec consider the *Uber* case which seems not to exemplify a typical crowdsourcing situation.

VI. How to Cope with the Drift Towards Contingent Work: A Combined Approach for a Specially Sensitive Social Group

A considerable number of answers to the question of how to cope with the drift towards contingent work stem from the chapters of this volume.

A first, in a way traditional, answer comes from the 'conditionality approach' namely as Dorssemont pointed out in his chapter using Belgium as 'cognitive prototype', the fact that the recourse to contingent work can be made conditional, by the legislator, to the fulfilment of certain qualitative and/or quantitative criteria defined by the law. This has been and still is the case in many countries as far as fixed-term work and agency work are concerned. The 'conditionality approach' is strongly linked to the fight against abuse of non-standard work and aims at avoiding an uncontrolled recourse to such forms of contingent work. By consequence, it does not influence outsourcing of companies' activities. An alternative, more flexible approach, suggested for the United Kingdom by Kenner would be to identify indicators drawn from ILO Recommendation No 198 to establish proof of the existence of a contract of employment. This would be useful for zero-hours workers who are often uncertain about their employment status.

The 'conditionality approach' has been followed also by workers' representatives, such as trade unions or works councils, in order to bargain, at any level (company, sectoral and inter-sectoral; local, national or transnational), conditions (limits) to the use of non-standard work and also to mitigate the social consequences of outsourcing. Where strong trade unions or works council operate, this could be, of course, the most effective way to cope with the drift towards contingent work, providing a shared balance between competitiveness and social protection and guaranteeing a reasonable degree of social cohesion within the company.

A second, social security related, answer comes from the 'tax payer approach', as elaborated by Marhold in his chapter, using Austria as 'cognitive prototype'.

Instead of being linked to a certain juridical status, social insurance in Austria is more and more bound to the income earned by the worker from his/her activity.

This mainly reflects the change of values regarding the economic and social condition of self-employed persons, who now enjoy a comprehensive protection of a level comparable to the one of employees. More generally, Austria has followed the clear concept of a gradual extension of its social insurance system to cover also persons operating within the framework of non-standard employment. Therefore, the gap in protection, in terms of personal scope, has been mainly closed in the last couple of decades.

The condition to be fulfilled in order to be insured within the social security system are personal and economic dependency. To the extent that contingent workers fulfil these two criteria, they will enjoy a substantive social protection.

From such a perspective, outsourcing should not present an obstacle to the 'tax payer approach' in producing its positive effects on contingent workers, as it remains unaffected by any changes from the management side.

A third, EU Law-rooted answer comes from the 'equal treatment approach', as illustrated by Deinert, using Germany as 'cognitive prototype'. The same EU Law root, however, allowing Member States to provide for relevant exclusions to the equal treatment principle, is likely to put its effectiveness into debate, as the temporary agency work example shows. Nevertheless, in many countries, this principle remains crucial, guiding the legislator as well as case law, although within the framework of the 'objective grounds' exception. On the other hand, one have to admit that the 'equal treatment approach' is strongly limited by the fact that a general principle of equal treatment, not linked to specific discrimination grounds or situations, such as being in a fixed-term contract, is not recognised as such.

A fourth, once again EU Law-rooted answer comes from the 'risk approach', as elaborated by Ales in his theoretical-practical chapter, using Italy as 'cognitive prototype'. According to his analysis, it is rather clear that, as far as the personal scope of application of EU as well as Italian Occupational Health and Safety Law is concerned, despite any formal reference to the 'employer', the "risk approach" focuses on 'anyone who organises a productive activity and/or exercises the managerial prerogatives', ie the 'entrepreneur'. The same can be said with reference to 'anyone who works within the premises of somebody who organises a productive activity even outside a traditional employment relationship', ie the 'worker' instead of the 'employee'.

Therefore, one may even wonder whether, within the Occupational Health and Safety domain, the 'risk approach' may deprive the dichotomy of core/contingent work, assumed in this volume, of its explicative power.

This might be true from a formal point of view, since the 'risk approach' regards differences in the 'personal work nexus'[15] as irrelevant. However, by focusing on 'specifically sensitive risk groups' and by qualifying them according to the typology of work relationship they entertain with the entrepreneur (fixed-term and agency work, for instance), the 'risk approach' too recognises the existence of a

[15] M Freedland, 'From the Contract of Employment to the Personal Work Nexus' (2006) 35 *ILJ* 1.

dichotomy based either on some objective feature of the work relationship or on a personal character of the worker. In doing so, it enriches the core/contingent perspective, adding features that may echo the so called 'margin approach',[16] in which gender and nationality play a decisive role in highlighting workers' specificities (weaknesses?) that should be taken into account within a labour law perspective.

Thus, only apparently, the 'risk approach' seems to reverse the 'core/contingent approach' as assumed in this volume. Actually, it just shows a (positive) way to handle contingent workers, regarded as especially sensitive workers, to whom the entrepreneur shall guarantee a qualitative and quantitative level of protection, which takes into account their specificities.

The question is then rather, whether such a 'sensitivity' from the entrepreneur's side should be limited to OHS or whether it should extend to the working conditions of contingent workers as a whole.

A fifth, innovative answer is one coming from what we can call the 'end beneficiary approach' which elaborates on Lo Faro's and Lokiec's chapters.

Both chapters deal with the question of who the employer is or, more precisely, of who is responsible for the definition and the guarantee of the economic and normative conditions under which the work is performed. In both chapters, by what seems a coincidence of thought, the concept of the 'end beneficiary' of the work performed has been raised, that is the person or the legal entity held responsible for the working conditions, not only of its core workforce but also for the contingent workforce, whatever the kind of direct or indirect relationship may exist between the parties involved.

From a technical point of view, the 'end user approach' is concretised by the joint-employer (co-employeur) juridical construction, elaborated by case law (France) or directly introduced by the legislator (Italy) and/or by the joint and several liability concept. Both underline the need to preserve or establish the link not only between core and contingent work but also between core and contingent employers (entrepreneurs), which represent, at least in case of outsourcing, the other side of the coin of the core/contingent dichotomy.

In view of what has been said so far, to cope with the drift towards contingent work, our proposal would be to adopt a combined approach that takes into account the different problematic aspects that the approaches mentioned in the above have emphasised. These are: (i) the fight against abuse of contingent work; (i) the struggle for equal treatment between core and contingent workers; (iii) the need for a full social security coverage for contingent workers; (iv) the recognition of contingent workers as a specifically sensitive risk group; (v) the preservation or the establishment of a link between core and contingent employers (entrepreneur).

[16] See LF Vosko, *Managing the Margins. Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford, OUP, 2010).

At its turn, such a combined approach includes both, the recognition of contingent workers as a specially sensitive social group on the one hand and the protection of social and economic cohesion within the company and within the society on the other hand. This might occur through the law (labour law) or, if strong enough, through collective bargaining, preserving or establishing links between core and contingent work and employership (entrepreneurship), above all.

In the view of the economic, social and territorial cohesion commitment enshrined within the Treaty on the Functioning of the European Union (Articles 174–178), the specific protection of contingent workers should, primarily, be a task for the European Institutions to provide and to stimulate legislation and social dialogue, at all relevant levels, in such a direction.

Indeed, social and economic cohesion is the right answer to social and economic exclusion which is likely, at present, not only to increase poverty but also to fuel extremism and radicalism among those put at the margin of European society.