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THE PLACE OF DOMESTIC WORK IN EUROPE:

An analysis of current policy in the light of the Council Decision authorising

Member States to ratify ILO Convention No.189

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Abstract

The recent Decision of the Council recommending ratification of ILO Convention No. 189 fails to recognise the ways in which European Union (EU) law has facilitated cheap informal labour in the domestic sphere so as to enable participation in the formal labour market. This article examines the approach taken by EU Member States to the drafting of Convention No. 189 and argues that, despite its resultant diluted content, this instrument requires certain fundamental changes to the current treatment of domestic workers in the EU. We further propose a reorientation of the 'flexicurity' principle to enable reform, such that contemporary modes of work can be reconsidered and transformed.

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Key words: domestic work, flexicurity, women, employment status, working time, health and safety

1. INTRODUCTION

In a Council Decision of 28 January 2014, ‘Member States are hereby authorised to ratify... the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189)’.¹ This Decision was explicitly issued on the basis that: ‘Most of the rules under Convention No 189 concerning decent work for domestic workers, 2011, of the International Labour Organisation (ILO)... are covered to a large extent by Union *acquis* in the areas of social policy, anti-discrimination, judicial cooperation in criminal matters and asylum and immigration’.²

In this article, we do not purport to provide an exhaustive analysis of how ILO Convention No. 189 impacts on all these areas of EU law, but focus on the implications for social policy and labour law. We argue that, despite the attempt of EU States in the ILO drafting processes to tame the content of ILO Convention No. 189 and limit its impact on the labour laws of European States, the Convention prompts a rethink of certain elements of EU social policy. In particular, we challenge the assumption that the EU laws relating to working time and health and safety meet the standards of decent work for domestic workers. There is, we contend, an inherent conflict between recognition of the legal entitlements of domestic workers and the

¹ (2014/51/EU) [2014] OJ L 32/32, Art. 1.

² *Ibid.*, Preamble, recital 2.

ways in which employment promotion and flexicurity are currently pursued. Cheap labour provided by domestic workers currently provides an insecure foundation for European labour markets. In order to encourage greater female participation in the formal labour market, it may be preferable to allow for more flexible working arrangements to enable skilled work and family life to be reconciled more easily, and it may also be better for the state to be prepared to shoulder more of the burden of child and other care.

This article begins by considering the phenomenon of domestic work and the role that such work currently plays in European labour markets, and notes the hesitance of the EU to regulate in this field. The second part analyses the role that EU States played in the process of drafting of ILO Convention No. 189 (and the accompanying Recommendation No. 201), observing how they succeeded in imposing some limitations on the coverage of the Convention, and on the extent to which working time and health and safety standards are to apply to domestic workers. The third and final part argues that the EU has to consider more broadly whether current policies associated with employment promotion are sustainable when domestic workers are subject to greater legal protections. Flexicurity should not equate to ‘flexi-precarity’,³ but should involve a genuine attempt to re-orientate working conditions to reconcile work and home life.

³ J. López, S. Canalda & A. de le Court, ‘Flexiprecarity: A Spanish Version of Flexicurity’, paper delivered at LLRN inaugural conference, Barcelona (2013) available at: http://www.upf.edu/gredtiss/pdf/2013-LLRNConf_LopezEtAl_xv2x.pdf; see also S. Fredman, ‘Women at Work: The Broken Promise of Flexicurity’, (2004) 33(4) *Industrial Law Journal* 299.

2. DOMESTIC WORK AS A FOUNDATION FOR EU EMPLOYMENT PROMOTION

Paid domestic work has been a hidden, but vital aspect of employment promotion within Europe under the European Employment Strategy (EES). Domestic workers enable certain women, previously excluded from the labour market (by social prejudices regarding their role within the home), to be able to engage in paid work, even though they continue to ‘shoulder a disproportionate amount of unpaid care work’.⁴ Additionally, as women’s previous (and continuing) unpaid work in the household enabled men to be economic actors, so too does the phenomenon of paid domestic work.⁵ This section considers how EU ‘employment promotion’ policies have increased the demand for domestic work. However, despite ever-increasing demand for their labour, the EU and certain Member States remain reluctant to regulate such matters as working time and health and safety for domestic workers.

⁴ Report of the Director-General, Report I(A), *A New Era of Social Justice*, ILC, 100th Session, 2011 (Geneva: International Labour Office, 2011) at 15.

⁵ ILO, *Decent Work for Domestic Workers*, Report No. IV(1) ILC 99th Session, 2010 (Geneva: ILO, 2010) at 9.

Employment promotion, flexicurity and women's working patterns

In the 1990s, it became evident that if the EU was to enhance economic productivity it needed to make the best use of its entire workforce.⁶ Accordingly, women's employment became 'a key issue to the enhancement and effectiveness of European welfare states', and the European Employment Strategy introduced 'equal employment policies in Europe'.⁷ An active employment promotion policy has continued to be pursued in Europe through the elusive ideal of 'flexicurity', a combination of flexibility of the job market (which allows employers to dismiss more freely than was previously the case) combined with forms of security for workers (in terms of access to retraining, reskilling and thereby rehiring within the labour market).⁸ As Günther Schmid has observed: 'Despite many conceptual drawbacks of the flexicurity strategy... its central objective of increasing employment and labour

⁶ See Commission White Paper, *Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century* COM(93)700, 5 December 1993.

⁷ S. Betzelt and S. Bothfeld, 'Incoherent Strategies – Fragmented Outcomes: Raising Women's Employment Rate in Germany', (2011) 7(1) *German Policy Studies* 73 at 74.

⁸ See *Annex to the Communication from the Commission to the Spring European Council, Time to Move up a Gear* (2006) Brussels. See also Commission Communication, *Towards Common Principles of Flexicurity*, COM(2007)359. For a discussion of how flexicurity could be implemented nationally, see T. Wilthagen and S. Bekker, 'Flexicurity: Is Europe Right on Track?', in F. Hendrickx (ed.), *Flexicurity and the Lisbon Agenda: A Cross-Disciplinary Perspective* (Intersentia, 2008).

force participation is still valid.⁹ It has been observed that ‘the flexicurity strategy assumes an individualized “adult worker model family” ... with both women and men in the labour market.’¹⁰ In other words, it is now widely accepted that two incomes are required to support a family and a woman’s place is not only in the home but in work. This is the ‘dual-earner household’ identified as the new ‘gender contract’ by Judy Fudge.¹¹

The result of active employment policies, which are designed to place certain women in paid work outside the home, is that someone has to do at least some of their care and other home work for them. Certainly, the evidence is that, in order to pursue careers in professional occupations such as accountancy or medicine, women have to be prepared to take on existing male work patterns which involve long hours.¹² The capacity of women to engage in this type of ‘high status’ paid work outside the home is, accordingly, dependent on extensive replacement labour for the traditional

⁹ G. Schmid, ‘Non-Standard Employment in Europe: Its Development and Consequences for the European Employment Strategy’, (2011) 7 *German Policy Studies* 171 at 172.

¹⁰ J. Lewis and A. Plomien, “‘Flexicurity’ as a Policy Strategy: The Implications for Gender Equality”, (2009) 38 *Economy and Society* 433 at 434.

¹¹ J. Fudge, ‘A New Gender Contract? Work/Life Balance and Working-Time Flexibility’, in J. Conaghan and K. Rittich (eds), *Labour Law, Work and Family* (Oxford University Press, 2005) at 269 – 272.

¹² R. Crompton and C. Lyonette, ‘Women's Career Success and Work–life Adaptations in the Accountancy and Medical Professions in Britain’, (2010) 18 *Gender Work & Organization* 231.

reproductive roles taken on by women in the home, namely those services which enable production outside the home. These include housework, child care and care for the elderly and other dependants.¹³ The majority of the replacement workers are women, though a significant number of men are paid to do domestic work as gardeners, guards and chauffeurs.¹⁴

There seem to be a number of alternative ways in which employment promotion could be achieved. First, employment patterns in the formal labour market could be

¹³ P. Emmenegger, 'Gendering Insiders and Outsiders: Labour Market Status and Preferences for Job Security' REC-WP 02/2010, 12-14. See also for a discussion of the Spanish experience, M. León, 'A Real Job? Regulating Household Work: The Case of Spain', (2013) 20 *European Journal of Women's Studies* 170 at 173. Note also the potential to make distinctions between different forms of care work, giving more status to nursing or childcare as opposed to housework. We do not seek to draw such distinctions here, as all such work is enabling of paid work outside the household. See A. Blackett, 'Introduction: Regulating Decent Work for Domestic Workers', (2011) 23 *Canadian Journal of Women and the Law* 1 at 1

¹⁴ See ILO, *Decent Work for Domestic Workers*, Report No. IV(1) ILC 99th Session, 2010 (Geneva: ILO, 2010) at 6. There are of course issues of status and not only replacement labour involved in some domestic work provided to high income households (for which see B. Anderson, 'Just Another Job? The Commodification of Domestic Work', in E. Ehrenreich and A. R. Hochschild, *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (Granta, 2002)), but our concern here is with the larger grouping of middle class professional workers in respect of which we are genuinely describing the phenomenon of replacement labour.

changed, and made more flexible, so that it becomes easier to take on such jobs without the need for (so much) replacement reproductive labour. Second, replacement reproductive labour could be made available in the shape of high quality, state subsidised care for children and the elderly, as it is in those EU States which initially offered a model of flexicurity such as Denmark and Sweden.¹⁵ However, state spending on child care is by no means common to all Member States; in the UK for example, working hours for full time employees tend to be long, state subsidised care is limited, and domestic workers are usually hired either through private providers (such as agencies), or on an individual basis.

The situation is exacerbated by the economic crisis. The recession across Europe has led to a marked decline in the State provision of childcare.¹⁶ And, as rates of ‘skilled pay’ decline in real terms within the professions,¹⁷ the wage squeeze (and a reduction

¹⁵ L. L. Hansen, ‘From Flexicurity to FlexicArity? Gendered Perspectives on the Danish Model’, (2007) 3(2) *Journal of Social Sciences* 88 at 91.

¹⁶ A. McKay, J. Campbell, E. Thomson and S. Ross, ‘Economic Recession and Recovery in the UK: What's Gender Got to Do with It?’, (2013) 19(3) *Feminist Economics* 108; P. Blackburn, ‘Future Directions for a UK Childcare Market’, in E. Lloyd and H. Penn (eds), *Childcare Markets: Can They Deliver an Equitable Service?* (Policy Press, 2013)

¹⁷ J.E. Foster and M.C. Wolfson, ‘Polarization and the Decline of the Middle Class: Canada and the U.S.’, (2010) 8(2) *The Journal of Economic Inequality* 247; T. Piketty, *Capital in the Twenty-First Century* (Belknap/Harvard University Press, 2014).

in the quality of terms and conditions) then also occurs for the domestic workforce drawn in to plug the gap in reproductive labour.

The literature has identified significant ‘gendered’ effects.¹⁸ One of the effects of the flexicurity paradigm, has been the creation of a number of part-time, temporary and agency worker-related jobs. These have been taken on predominantly by women, who have suffered as regards their earnings and a loss of job security.¹⁹ There appears to have been a high-skill/low-skill polarization of labour in European labour markets. Where women cannot take on the high time demands of skilled professional work, they suffer the consequences in terms of the type of work they can do, as well as remuneration and other terms and conditions.²⁰ In the recent financial crisis, there has been a further decline of what Leah Vosko has described as the ‘Standard Employment Relationship’, so that many women are engaged in precarious work outside the home.²¹

¹⁸ Hansen (2007) n15 at 90 and 92.

¹⁹ Fredman (2004) n3.

²⁰ M. Goos and A. Manning, ‘Lousy and Lovely Jobs: The rising polarization of work in Britain’, (2007) 89(1) *The Review of Economics and Statistics* 118.

²¹ L. Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford University Press, 2010).

The result of this vulnerability is an understandable anxiety among the ‘flexible’ workforce, which is now identified in relevant literature.²² With the over-representation of women in ever more flexible and even ‘zero-hours contracts’ working arrangements,²³ it is a brave worker who is prepared to tell an employer that she will not work on a particular day when suddenly called upon to do so.²⁴ Further, many such women are now taking on roles as if they were in business on their ‘own account’,²⁵ but again are required by the ‘client’ for whom they work, at any moment, to dedicate their services on-call. Again, this means that cover has to be found at short

²² T. Berglund, B. Furåker, P. Vulkan, ‘Is Job Insecurity Compensated for by Employment and Income Security?’, (2014) 35(1) *Economic and Industrial Democracy* 165.

²³ Office for National Statistics, *Analysis of Employee Contracts that do not Guarantee a Minimum Number of Hours* (2014) available at: http://www.ons.gov.uk/ons/dcp171776_361578.pdf. See also T. Warren, ‘Economic Crisis, Work-Life Balance and Class’, in K. Farnsworth, Z. Irving and M. Fenger (eds) *Social Policy Review 26: Analysis and debate in social policy 2014* (Policy Press, 2014).

²⁴ Occupational instability thereby operates as a disciplinary mechanism. See M. Pedaci, ‘The Flexibility Trap: Temporary Jobs and Precarity as a Disciplinary Mechanism’ (2010) 13 *The Journal of Labor and Society* 245 especially at 255 onwards.

²⁵ G. Schmid, ‘Non-Standard Employment in Europe: Its Development and Consequences for the European Employment Strategy’, (2011) 7 *German Policy Studies* 171 at 184-6 who is more optimistic than we are regarding the capacity of this type of work to facilitate integration of female workers into the labour market.

notice for standard caring responsibilities. As this work is typically poorly paid and ad hoc, the amount that any worker can pay a child minder, or a carer for any other dependant, is likewise limited and the hours demanded will likewise be lengthy and erratic.

If these precarious workers are our secondary female workforce, domestic workers become the vulnerable female underclass;²⁶ and, as we shall see, their situation has conventionally lain outside EU policy concerns or the notion of ‘flexicurity’. They are often in receipt of low pay, long working hours and poor conditions,²⁷ which have the potential to harm their health and safety.²⁸ This is compounded by the fact that they tend not to be covered by basic protective employment laws (as we shall see). Even if protected under basic working time and health and safety legislation, it would be difficult for domestic workers to enforce their rights. The informality and isolation in which domestic workers often work²⁹ is not conducive to inspection or collective

²⁶ M. Gallotti, *The Gender Dimension of Domestic Work in Western Europe* (ILO, 2009) at 5.

²⁷ ILO, *Decent Work for Domestic Workers*, Report No. IV(1) ILC 99th Session, 2010 (ILO, 2010) at 7, which may be for discriminatory reasons not only in terms of gender but of ethnicity or race.

²⁸ *Ibid.*, at 61-3.

²⁹ See P. Smith, ‘The Pitfalls of Home: Protecting the Health and Safety of Paid Domestic Workers’, (2011) 23 *Canadian Journal of Women and the Law* 309; also B. Anderson, *Doing the Dirty Work: The Global Politics of Domestic Labour* (London: Zed Books, 2000) especially chs 1 and 2.

action.³⁰ Further, domestic workers are often from ethnic minorities or recent immigrants,³¹ which may mean that they have limited ability to contest their treatment; not only due to language difficulties, but also as a result of their visa status, which may make them vulnerable to deportation if they challenge their current employer.³² Being some distance from home, they may also be dependent on their employer for housing, making it difficult to contest their employer's instructions (when unreasonable)³³ and even, in the worst cases, being made a prisoner in a home (when their passport is taken or they are locked in).³⁴ Yet, the reluctance of the EU to even begin to offer them basic rights, let alone make particular provision for their protection, hardly seems conducive to the idea of 'decent work'.³⁵

³⁰ See discussion in M. Thompson, 'Workers – not Maids – Organising Household Workers in Mexico', (2009) 17(2) *Gender and Development* 281.

³¹ S. Van Walsum, 'Regulating Migrant Domestic Work in the Netherlands: Opportunities and Pitfalls' in (2011) 23(1) *Canadian Journal of Women and the Law* 141.

³² This was recognised in the establishment of the UK NGO Kalayaan (meaning 'freedom' or 'liberty') in 1987 which focuses on provision of assistance to migrant domestic workers. See <http://www.kalayaan.org.uk/>.

³³ See Thompson n30. See, for example, the facts of *Hounga v Allen* [2014] UKSC 47, [2014] ICR 847.

³⁴ M. Lalani, *Ending the Abuse: Policies that work to protect migrant workers* (Kalayaan, 2011) 34-5.

³⁵ See the wording of the Council Decision cited at n.1.

The EU response to women's experience of work and domestic work

Women's work in spheres outside the household has come to be heavily regulated under EU law, such that they are for example provided with protection from discrimination and offered access to equal pay.³⁶ These may, indeed, be regarded as forms of incentive for leaving care of children and others to engage in what is regarded as more productive economic activity. The same has not been true of domestic work, which has remained in the regulatory shadows, despite growing evidence of exploitation some amounting to human rights abuses and failure to apply normal labour standards.³⁷

Like the Council of Europe, the EU has now shown signs of addressing such abuses. The Council of Europe, through application of the European Convention on Human Rights, and the case law of the European Court of Human Rights, has initiated action

³⁶ E.g. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204/23.

³⁷ V. Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor', (2012) 34(1) *Comparative Labor Law Journal* 101 especially at 111-112 and C. Murphy, 'The Enduring Vulnerability of Migrant Domestic Workers in Europe', (2013) 62(3) *International and Comparative Law Quarterly* 599.

to address trafficking, slavery and other forms of servitude.³⁸ The EU has now followed the Council of Europe's lead, via the 2011 EU Directive on Human Trafficking³⁹ and the accompanying European Commission strategy for 2012-16.⁴⁰

However, other opportunities to regulate domestic work have not been taken. The European Parliament has been more eager for EU action than the Council of Ministers. As early as 2000, a European Parliament resolution on regulating domestic help in the informal sector,⁴¹ called for a European definition of domestic work to be drawn up; took the view that the domestic work sector in principle falls within the scope of existing directives on employment; called for due account to be taken, when drawing up directives and other legislation, of the specific work situations and employment relationships of domestic workers, including their isolation and their atypical relationship with their employer(s); and called on the Member States to

³⁸ See Council of Europe Convention on Action against Trafficking in Human Beings 2005 (CETS No. 197 – entry into force 2008); and the judgment of the European Court of Human Rights in *Siliadin v France* Application No. 73316/01, 26 July 2006; also, for discussion of these developments, see V. Mantouvalou, 'Modern Slavery: The UK Response' (2010) 39 *Industrial Law Journal* 425.

³⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA; [2011] OJ L 101/1.

⁴⁰ Commission Communication, *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016* COM(2012) 286 final.

⁴¹ 2000/2021(INI) 30 November 2000.

involve the social partners closely in the implementation of the guidelines for the domestic work sector.

Further, Article 31(1) of the EU Charter of Fundamental Rights 2000 (EUCFR) states that '[e]very worker has the right to working conditions which respect his or her health, safety and dignity'. Under Article 31(2) 'every worker' also 'has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'. The explanatory notes indicate that these provisions are based on Directives relating to health and safety⁴² and to working time;⁴³ but both instruments allow exceptions for domestic work.

Article 3 of the Health and Safety 'Framework' Directive specifically excludes 'domestic servants'.⁴⁴ The UK has used the opportunity afforded by the EU legal framework to ensure that domestic workers in the UK are not covered by standard

⁴² Art. 31(1) is said to be 'based on Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work' and to draw also on European Social Charter and Community Charter provisions.

⁴³ Article 31(2) is said to be 'based on Directive 93/104/EC concerning certain aspects of the organisation of working time, Article 2 of the European Social Charter and point 8 of the Community Charter on the rights of workers'.

⁴⁴ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, [1989] OJ L 183/1, Article 3.

health and safety standards.⁴⁵ Article 17 of the Working Time Directive allows for derogations for ‘family workers’, as well as a general derogation where ‘on account of the specific characteristics of the activity concerned the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves’.⁴⁶ The UK has interpreted this provision as providing the basis for a general exclusion of domestic workers from coverage by the Directive. Regulation 19 of the Working Time Regulations 1998 excludes any ‘worker employed as a domestic servant in a private household’ from certain key entitlements to regulation of working time, such as maximum weekly working time, length of night work, and restrictions that can be set by employers when there is a risk to health and safety of a worker. There is no sign of imminent legal reform in the UK on this issue – or the threat of Commission enforcement proceedings against the UK. The status quo seems to be deemed acceptable.

There is an interesting legal question as to whether these legislative exceptions regarding domestic work are consistent with the statement in Article 31 of the EUCFR that health and safety and working time entitlements are applicable to ‘every worker’. Could Article 31 thereby be invoked by domestic workers to challenge their apparent exclusion from coverage by the Directives or the implementation of those exceptions? The answer seems to us to be unclear from the *AMS* judgment of the

⁴⁵ This is the result of s 51 of the Health and Safety at Work Act 1974.

⁴⁶ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, [2003] OJ L 299/9.

Court of Justice of the European Union (CJEU).⁴⁷ In that case, it was said that Article 27 of the EUCFR only guaranteed information and consultation ‘in the cases and under the conditions provided for by European Union law and national laws and practices’,⁴⁸ had in order to be ‘fully effective’ to ‘be given more specific expression in European Union or national law’.⁴⁹ Article 27 was not itself considered ‘sufficient to confer on individuals an individual right which they may invoke as such’.⁵⁰

The CJEU acknowledged that different treatment was afforded to non-discrimination on grounds of age, which was treated as an ‘individual right’ in *Küçükdeveci*.⁵¹ The latter case seems distinguishable on the basis that Article 21(1) has a broad pedigree. This is apparent from the explanatory notes, which do not refer to the Directives concerning equality rights, but rather the foundational EC Treaty and also Article 14 of the European Convention on Human Rights. By way of contrast, the explanatory notes accompanying Articles 27 and 31 in the Solidarity Chapter of the EUCFR mention explicitly the connection to relevant Directives, but also the less generally ratified Social Charter and Community Charter provisions on which the rights are based.

⁴⁷ Case C-176/12 *Association de médiation sociale (AMS) v CGT*, Judgment of 15 January 2014 (*AMS*).

⁴⁸ *Ibid.*, para. 44.

⁴⁹ *Ibid.*, para. 45.

⁵⁰ *Ibid.*, para. 49.

⁵¹ Case C-555/07 *Küçükdeveci v Sweden GmbH & Co. KG* [2010] ECR I-365; *AMS*, para. 47.

We consider that right to health and safety and to constraints on working time have a significant individual dimension and can be regarded as freestanding, given that no express reference is included in Article 31 of the EUCFR to other provisions in EU law (as is the case in respect of Article 27).⁵² Even if the content of health and safety or the scope of working time, rest and annual leave provisions might need to be further determined by legislation (possibly allowing differences in respect of certain categories of workers, such as those engaged in domestic work), Article 31 does not seem from its reference to ‘every worker’ to allow the wholesale exclusion of any category of worker. However, our interpretation of Article 31 presumes that domestic workers are to be properly regarded as ‘workers’, which as we shall see below is contested by some EU Member States.⁵³ Further, the outcome in *AMS* does not encourage us to think that Article 31 will be regarded by the CJEU as suitable for citation in ‘a dispute between individuals’; the ‘specific expression’ requirement imposed by the Court suggesting a high hurdle for any litigant to overcome.⁵⁴ In this context, it is state compliance with the relevant Directives that seems likely to

⁵² Furthermore, the reference in Article 16 to EU law and national laws and practices has not impeded the often controversial application of Article 16 of the EUCFR. See Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd* [2013] IRLR 744, Judgment of 18 July 2013.

⁵³ See Case C-256/01, *Allonby v Accrington and Rosedale Community College* [2004] ECR I-873, para. 67; also Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, unrep. Judgment of 4 December 2014.

⁵⁴ E. Frantziou, ‘Case C-176/12 *Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Rights in the European Union’ (2014) 10 *European Constitutional L. Rev.* 332, at 341-2.

matter.⁵⁵ Addressing issues for domestic workers regarding health and safety alongside working time may therefore require shifts in policy approaches accompanied by legislative reform. They are unlikely to be resolved simply by human rights based litigation.

3. EU PARTICIPATION IN THE DRAFTING OF THE ILO CONVENTION AND RECOMMENDATION CONCERNING DOMESTIC WORK

It should be acknowledged that, like the EU, the ILO had not previously demanded regulation of domestic work, but rather had allowed States to derogate from standard employment law norms in relation to particular types of work. A resolution adopted by the ILO in 1965 stated the ‘urgent need’ for standards pertaining to domestic work which were ‘compatible with the self-respect and human dignity which are essential to social justice for domestic workers’;⁵⁶ but acknowledgement of that need did not lead to the adoption of any specific ILO convention or recommendation to establish such standards. Instead, scope was given to Member States to derogate from ILO Convention standards, which was often exercised in respect of domestic workers.

Several EU Member States known more generally for their extensive protection of labour standards have, significantly, taken advantage of these exceptions in relation to domestic work. For example, in relation to the Holidays with Pay Convention

⁵⁵ *AMS*, para. 51.

⁵⁶ Reported *Official Bulletin* (Geneva) Vol. XLVIII, No. 3, July 1965, Supplement I, 20-1 as discussed in Blackett (2011) n.13 at 7.

(Revised) 1970 (No. 132), Article 2(2) was relied upon by Belgium in its first report on application of Convention so as to exclude coverage of domestic workers. That Article stated that: ‘In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention limited categories of employed persons in respect of whose employment special problems of a substantial nature, relating to enforcement or to legislative or constitutional matters, arise.’ Likewise, the Netherlands relied on Article 3(1) of the Part-Time Work Convention 1994 (No. 175) in a declaration accompanying ratification on 5 October 2001, again on the basis that domestic workers constituted a ‘particular category of worker’, to whom the application of standards ‘would raise particular problems of a substantial nature’; and Luxembourg relied on Article 5 of the Medical Care and Sickness Benefits Convention 1969 (No. 130) so as to exclude workers employed for less than 16 hours per week.

Domestic workers can, at least in principle, claim the more far-reaching human rights protection of the ILO Declaration on Fundamental Principles and Rights at Work 1998. Given that they are norms embedded in the ILO Constitution, the following core labour standards must apply to domestic workers:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

These are entitlements of domestic workers as ‘workers’ and they acquire rights under the European Convention on Human Rights which are applicable to ‘every one’.

With this in mind, ILO International Programme for the Elimination of Child Labour (IPEC) project work has included combating child labour in the domestic work sector.⁵⁷ This is in line with broader UN requirements, for example the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000. The UN Special Rapporteur has made specific comments on situation of migrant and other domestic workers.⁵⁸ The UN Committee on the Elimination of Racial Discrimination also commented on the predicaments faced by domestic workers in 2004.⁵⁹ Moreover, UNICEF has been active on child domestic work.⁶⁰ By 2010 there were indications that previously tolerated exclusion of

⁵⁷ See, for e.g., IPEC, *Helping Hands or Shackled Lives? Understanding child domestic labour and responses to it* (ILO, 2004); IPEC, *Guidelines on the Design of Direct Action Strategies to combat Child Domestic Labour* (ILO, 2007).

⁵⁸ See for the specific role and findings of the Special Rapporteur on the human rights of migrants:

<http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx>

⁵⁹ See <http://www1.umn.edu/humanrts/country/lebanon2004.html>; see also CERD, General Recommendation 30, Discrimination against non-citizens, para. 34.

⁶⁰ ILO/UNICEF, *Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation* (International Labour Office, 2009).

domestic workers from labour standards was now unacceptable.⁶¹

This section considers how ILO Convention No. 189 and the accompanying Recommendation offer domestic workers protections beyond those applicable under standard human rights provisions and special measures relating to trafficking. We consider the role that EU Member States played in the process of drafting the Convention and the norms that have ultimately been concretised by the ILO instruments on domestic work.

It should be noted that an ILO Convention or Recommendation is adopted by a two-thirds majority of the tripartite delegation present at the annual ILO International Labour Conference or ‘ILC’ (so that each country is represented by two government delegates and one employer and one worker delegate).⁶² The Convention constitutes a formally binding legal instrument in respect of those States which ratify the instrument. Further, even when not ratified, there is also an obligation to report at ‘appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention’.⁶³ An ILO Recommendation, by way of contrast, operates as a softer

⁶¹ ILO, *Decent Work for Domestic Workers*, Report No. IV(1) ILC 99th Session, 2010 (ILO, 2010) at 24.

⁶² See ILO Constitution, Art. 3(1) and Art. 19(2).

⁶³ ILO Constitution, Art. 19(5).

form of international law. There is no suggestion of ratification, but the ILO Constitution still requires members to bring a Recommendation adopted by the ILO 'before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action' and again to report 'at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them'.⁶⁴

Compliance with Conventions and Recommendations is considered by an ILO Committee of Experts and Conference Committee,⁶⁵ which may lead ultimately to the adoption of a 'special paragraph' (a public condemnatory statement) by the ILC. Further measures are possible for enforcement of Conventions.⁶⁶ By way of contrast, the ILO Constitution is regarded as binding on all ILO Member States (and the guarantee of 'freedom of association' has its own special supervisory machinery before a tripartite ILO Governing Body Committee). Notably, the supervisory systems are all concerned with exposing concerns rather than taking concrete punitive measures against certain countries; with a solitary resolution taken in respect of forced

⁶⁴ ILO Constitution, Art. 19(6).

⁶⁵ Established by ILC Resolution in 1926. For controversy over the current process, see C. La Hovary, 'Employers' Group 2012 Challenge to the Right to Strike', (2013) 42(4) *Industrial Law Journal* 338; and Janice Bellace, 'The ILO and the Right to Strike', (2014) 153(1) *International Labour Review* 29.

⁶⁶ ILO Constitution, Arts 24 onwards.

labour in Myanmar/Burma being the one exception to this rule.⁶⁷

Traditionally, due to its restricted competence in the social sphere, EU engagement in the ILO was extremely limited. Indeed, such matters were understood to lie within the prerogative of individual EU member states. While the Commission has long had a voice at the ILC, the capacity to vote on adoption of Conventions and Recommendations lies in the hands not only of representatives of the governments of EU Member States, but also employer and worker representatives from those countries. Ratification lies with the actual governments of EU Member States unless matters which come within the sphere of exclusive EU competence are affected,⁶⁸ and there remains uncertainty as to matters of shared competence such as EU social policy.⁶⁹ In practice, EU Member States aligned as a distinctive group in debates

⁶⁷ Under Article 33 of the ILO Constitution, lifted in 2013 – see http://www.ilo.org/ilc/ILCSessions/102/media-centre/news/WCMS_216355/lang-en/index.htm. See also Robyn Layton QC, ‘Forced Labour in Burma: A Summary of the International Labour Organisation Report & Subsequent Developments’, (2000) 4 *Southern Cross University Law Review* 148.

⁶⁸ Where there is a clear conflict between an ILO norm and a key EU legislative instrument, then it would see that the EU Member State will be obliged to denounce the relevant ILO Convention. See C-203/03 *Commission v Austria* [2005] ECR I-935, discussed by P. Herzfeld Olsson, ‘The ILO Acquis and EU Labour Law’, in M. Rönmar (ed.), *Labour Law: Fundamental Rights and Social Europe* (Hart, 2011) at 52-3.

⁶⁹ (2014/51/EU) [2014] OJ L 32/32, Recitals (2), (3) and (4). Cf. *Opinion 2/91* regarding ILO Convention No. 170 on Chemicals at Work [1993] ECR I-1061.

relating to domestic work, speaking sometimes as a collective EU voice⁷⁰ and at others as individual governments.

Acknowledgement of the need for employment promotion and protection

The ILO Convention recognises explicitly the role domestic work plays in employment promotion. The Preamble recognises, in particular, ‘the significant contribution of domestic workers to the global economy, which includes increasing paid job opportunities for women and men workers with family responsibilities, greater scope caring for ageing populations, children and persons with a disability...’ This was an aspect stressed by the EU Government representatives early in the drafting process. They argued that domestic work ‘contributed to the creation of wealth by allowing family members to work and to balance their personal, family and professional life’.⁷¹ This is in line with the EU policies relating to employment promotion discussed above.

In the Recommendation there is also acknowledgement of the need for further integrating domestic workers into the formal workforce and allowing them opportunities to progress towards other kinds of work. Article 25 of the

⁷⁰ Note the reference to ‘speaking on behalf of Government members of the Member States of the EU’ registered in the drafting Committee on Domestic workers referred to in ILO, Report of the Committee on Domestic Workers, *Record of Proceedings*, ILC, 100th Session (ILO, 2011), 15/4 at para. 15.

⁷¹ ILO, Report of the Committee on Domestic Workers, *Record of Proceedings*, ILC, 99th Session (ILO, 2010), 12/7.

Recommendation provides that ratifying States should ‘encourage the continuing development of the competencies and qualifications of domestic workers, including literacy training as appropriate, in order to enhance their professional development and employment opportunities’, as well as ‘address the work-life balance needs of domestic workers’ and attempt to ‘reconcile work and family responsibilities’.

Statistics should be compiled, alongside development of ‘appropriate indicators and measurement systems for this purpose’.⁷² Such an approach seems consistent with the EU endorsement of forms of flexicurity which involve ongoing training, and flexible working which assists participation in working life.

Human rights protections versus labour standards

The governments of EU Member States were emphatic that human rights of domestic workers should be protected, for example resisting removal of reference to key ILO Conventions which protected against child labour on the basis that ‘those Conventions were fundamental labour standards’.⁷³ Their view was that the Convention should ‘... focus on fundamental principles and rights concerning domestic work, while

⁷² Note that this was at the initiative of the ILO Workers’ Group, rather than the EU. The Worker Vice-Chairperson would rather have seen this provision included in the Convention, but compromised with the Employer Vice-Chairperson to allow its inclusion in the Recommendation. See Report of the Committee on Domestic Workers (2011), 15/73, paras 756-8.

⁷³ Report of the Committee on Domestic Workers (2011) 15/29, para. 248, opposing a proposed amendment made by the Employer Vice-Chairman.

remaining flexible enough to ensure wide ratification'.⁷⁴ As far as labour standards were concerned, they accepted the need to consider 'working time arrangements for domestic workers' and 'occupational health and safety'; this would also be consistent with Article 31 of the EU Charter of Fundamental Rights as noted above.⁷⁵ Yet, as we shall see, the EU countries were eager to limit the workers to whom such standards should apply and, indeed, the content of the standards themselves.

Application to all 'domestic workers'?

The coverage of Convention No. 189 is problematic for two reasons. First, there is a potential difficulty with the definition of 'domestic worker'. Article 1(b) of the Convention states that: 'the term "domestic worker" means any person engaged in domestic worker within an employment relationship'. That employment relationship would not, it seems, cover those engaged in casual work. Under Article 1(c) 'a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker'. This was the position argued for by the Government member of Spain on behalf of EU Member States at an early stage of

⁷⁴ Ibid. 15/4, para. 15. Cf. note at 15/13, para. 54 the concerns of the Worker Vice-Chairperson who 'recognized that the instruments should provide flexibility and indicated that the notion was already embedded in some of the proposed provisions. However, a proper balance needed to be struck as flexibility should not weaken the protection of domestic workers in these instruments.' See reiteration of this principle at the end of the drafting process: Report of the Committee on Domestic Workers (2011), 15/118, para. 1257.

⁷⁵ Ibid., 15/4, para. 15.

drafting, so that those who performed occasional domestic work ‘as a marginal activity’ and not as ‘professional domestic workers’ would not be covered by the Convention.⁷⁶

Perhaps more worrying is the second potential exemption which is permitted in Article 2 after the statement in paragraph (1) that ‘The Convention applies to all domestic workers’. It is then said that States may ‘after consulting with the most representative organizations of employers and workers and, where they exist, with organizations representative of domestic workers and those representative of employers of domestic workers, exclude wholly or partially from its scope

- (a) categories of workers who are otherwise provided with at least equivalent protection;
- (b) limited categories of workers in respect of which special problems of a substantial nature arise.’

Any ratifying State who thus excludes a category of domestic work from coverage will be required under its first report on the application of the Convention explain fully ‘the reasons for such exclusion’ and in subsequent reports elaborate on the measures taken ‘with a view to extending the application of the Convention to the workers concerned’. What is immediately obvious, though, is that while *consultation* of representative organisations is required, there is no requirement for their *agreement*. Exclusion thereby lies at the discretion of the State and experience under previous ILO Conventions suggests that States, including EU Member States such as Belgium and the Netherlands, are likely to avail themselves of this option. In other

⁷⁶ ILO, Report of the Committee on Domestic Workers (2010), 12/28-31.

words, the drafters will allow States to retain the practice of derogating from standards in respect of domestic workers, because they create ‘special problems’. This may be all the more likely in times of economic crisis when domestic work props up an already fragile labour market. It also creates the irony, that while Member States acknowledge domestic workers to be amongst the most vulnerable of those in employment, they may be treated as exceptional, even without the consent of the social partners.

Working time

Under ILO Convention No. 189, Article 7 requires that domestic workers are to be informed of their ‘terms and conditions of employment in an appropriate and verifiable manner’ including their ‘normal hours of work’, ‘paid annual leave and daily and weekly rest periods’.⁷⁷ Article 10 makes the change most likely to affect EU regulation of working time.

⁷⁷ Notably, the EU member States opposed this list of detailed information which a domestic worker was to be entitled to receive. They wished merely to opt for a formulation whereby the domestic worker was entitled to be notified of the ‘essential aspects of the employment relationship’. This objection was withdrawn after debate which suggested that other members of the Committee opposed the amendment. See Report of the Committee on Domestic Workers (2011), 15/34, para. 309 and 312. Yet see the continuation of the essence of this debate regarding ‘terms and conditions of employment’ et seq to para. 398.

Article 10(1) states that: ‘Each Member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work’. Obviously, the crucial question here is what ‘special characteristics of domestic work’ would justify an exception to the principle of equal treatment. The EU member States said that they broadly supported the principle of equal treatment, but not, for example, where the live-in domestic worker could not easily delineate between working and non-working time. They wanted collective agreements to provide exceptions, as they did in the EU context.⁷⁸

There are however some important substantive standards imposed by Article 10, which do not seem to be subject to the ‘special characteristics’ proviso (in Article 10(1)). Article 10(2) requires weekly rest to be at least 24 consecutive hours, while under Article 10(3) on-call time is to be regarded as ‘hours of work’.⁷⁹ This may be relevant to pay as well as regulation of hours of work, as Article 11 obliges States to

⁷⁸ Report of the Committee on Domestic Workers (2011), 15/51, para. 508 et seq. The wholesale exclusion by the UK of domestic workers from working time protection was not referred to, however.

⁷⁹ A. Blackett, ‘Introductory Note to the Decent Work for Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201)’, 53 *International Legal Materials* 250 at 251 observes that: ‘The provisions on working time... challenge the customary or implicit norms in which domestic workers’ availability is presumed.’

take measures to ensure that domestic workers ‘enjoy minimum wage coverage where such coverage exists’, as it does in the UK.⁸⁰

The Recommendation goes further, providing much more extensive provision in respect of working time, although one might well question how effective its provisions are likely to be given its secondary status as ‘soft law’. Article 5(2), for example, states that domestic workers under the age of 18 should receive particular protection by ‘(a) strictly limiting their hours of work to ensure adequate time for rest, education and training, leisure activities and family contacts’ and ‘(b) prohibiting nightwork’, while also ‘establishing or strengthening mechanisms to monitor their terms and conditions of employment’. The Recommendation’s indication (in Article 6) that all domestic workers should ‘understand their terms and conditions of employment’, ideally through provision of a ‘model contract’ or at least particulars of employment, would also help such workers to make sense of their contractual obligations as regards working time. Under Article 8, hours of work are to be ‘accurately recorded’, and under Article 9 on-call time is to be regulated, while under Article 10, ‘suitable periods of rest’ are to be made available for meals and other breaks, and weekly rest is to be similarly regulated so as not to be accumulated for a period longer than fourteen days.⁸¹ Furthermore, Article 13 provides that ‘time spent

⁸⁰ In this regard, note regulation of methods and regularity of payment of domestic workers in Article 12.

⁸¹ Notably, the idea of a ‘fixed day’ of rest was rejected by EU Member States, leading to adoption of the current wording. See Report of the Committee on Domestic Workers (2011), 15/99, para. 1031. Cf. Case C-484/04 *Commission v UK* [2006] ECR I-7471.

by domestic workers accompanying the household members on holiday should not be counted as part of their paid annual leave'. Again, these entitlements regarding working time are applicable to all domestic workers covered by Article 1 of the Convention, providing what might be regarded as a valuable supplement to the more sparse provisions set out in the Convention, but of course this is a Recommendation, as opposed to an instrument binding on States under international law.

However, even in the Recommendation, there are exceptions. Article 12 for example contemplates that there may be exceptions to the standard working time rules for domestic workers, but at least provides that: 'National laws, regulations or collective agreements should define the grounds on which domestic workers may be required to work during the period of daily or weekly rest and provide for adequate compensatory rest irrespective of any financial compensation.'

While this might seem to be an extremely moderate set of measures regarding working time, it is notable that this was not the view taken by the representative of UK employers who expressed considerable concern regarding the status (under Article 10(3) of the Convention) of 'stand by time' as working time, which was said to be an open legal question 'unresolved at EU level'.⁸² He concluded that: 'We cannot risk bringing this uncertainty into the family home and compromising the

⁸² The Court of Justice has found that on-call time can be working time by virtue of Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] I-7963; but not where the worker is completely inactive: Case C-151/02 *Landeshauptstadt Kiel v Jaeger* [2003] ECR I-8389.

benefits of domestic work to families, women in the workforce and communities throughout the United Kingdom.’ By virtue of its treatment of working time, then, ‘this is simply too prescriptive a Convention to be ratified’.⁸³ Certainly, what the ILO Convention does indicate is that the requirement of a weekly 24 hours consecutive rest is compulsory and should not be evaded by exclusion of domestic workers from the Working Time Directive.

Health and safety

While nearly all governments responding to the International Labour Conference consultation were in support of some provision on health and safety, and most respondents advocated equality of treatment with other workers.⁸⁴ The EU asked for a nuanced approach. While occupational health and safety should be secured for domestic workers, ‘the treatment for domestic workers might be specific to the circumstances in which the domestic work took place. In particular, the domestic worker’s workplace should be taken into account when setting up conditions of protection for domestic workers, in other words making them subject to [I]imited restrictions and exclusions’.⁸⁵ Their proposals were supported by the employer representatives in the first drafting Committee on Domestic Workers.⁸⁶

⁸³ *Record of Proceedings*, ILC, 100th Session, Eighteenth Sitting, 15 June 2011, 25(Rev.)/20.

⁸⁴ ILO, *Decent Work for Domestic Workers* Report IV(2), ILC, 99th Session, 2010 (ILO, 2010) at 396-7 and 409.

⁸⁵ Report of the Committee on Domestic Workers (2010), 12/74.

⁸⁶ *Ibid.*

More explicit protection of health and safety is included in Article 13 of the Convention which makes the broad statement in the first paragraph that: ‘Every domestic worker has the right to a safe and healthy working environment’. However, the same paragraph goes on to allow exceptions to this rule such that the ‘effective measures’ which States are to take is to be subject to ‘due regard for the specific circumstances of domestic work’. This was a proviso asked for by the EU governments,⁸⁷ and later welcomed by the employer representative from the Netherlands in terms of the ‘flexibility’.⁸⁸

This final text amounts to the dilution of an initial ‘equal treatment’ approach, that change to the wording having been initiated by the EU.⁸⁹ Curiously, the UK government does not seem to have been in support of the general EU line on the issue, with a statement to the Conference at large, that while the UK ‘already provides comprehensive employment and social protection to domestic workers’,... ‘it is occasionally not appropriate to treat domestic workers identically’, giving the example of health and safety laws and inspections, which the UK does not consider appropriate ‘to cover private households employing domestic workers’.⁹⁰ It was on this basis that the UK said that it ‘will be unable to ratify this Convention in the foreseeable future’.⁹¹

⁸⁷ Ibid.

⁸⁸ *Record of Proceedings* (2011), 25(Rev.)/19.

⁸⁹ See Report of the Committee on Domestic Workers (2011), 15/62, para. 631 et seq.

⁹⁰ *Record of Proceedings* (2011), 25(Rev.)/22 and 30/7.

⁹¹ Ibid., 30/7.

Moreover, the UK does not acknowledge that these measures may further be applied ‘progressively’ under Article 13(2), militating it seems against the recognition of an immediate ‘right’. That gradual approach to implementation can be adopted ‘in consultation with the most representative organisations of employers and workers and, where they exist, with organisations representative of domestic workers and those representative of employers of domestic workers’. Once again, there is no requirement to actually obtain the consent of these representatives.⁹²

Also relevant to health and safety are the conditions in which a domestic worker is housed. This is not tackled in the Convention, which merely makes provision under Article 9 for action by States to ensure that domestic workers (a) ‘are free to reach agreement’ with their employer as to whether to reside in the household, (b) are not obliged to remain in the household during daily or weekly rest periods, and (c) are entitled to keep possession of their travel documents. The quality of any actual accommodation is only dealt with under Article 17 of the Recommendation, such that accommodation should entail ‘a separate, private room that is suitably furnished, adequately ventilated and equipped with a lock, the key to which should be provided to the domestic worker’, that there should be ‘access to suitable sanitary facilities’, adequate lighting, heating and air conditioning, as well as ‘meals of good quality and sufficient quantity’ adapted ‘to the extent reasonable’ to cultural and religious requirements.⁹³

⁹² See Report of the Committee on Domestic Workers (2011), paras 645-9.

⁹³ *Ibid.*, para. 1103 et seq.

There is also further elaboration in the Recommendation on what is appropriate regarding the health and safety of domestic workers. More attention may need to be paid to the specific hazards faced by domestic workers, as opposed to the relaxed standards one might read into the Convention. Under Article 19 of the Recommendation, States, in consultation with representative organisations, ‘should take measures’ to ‘(a) protect domestic workers by eliminating or minimizing, so far as is reasonably practicable, work-related hazards and risks, in order to prevent injuries, diseases and deaths and promote occupational safety and health in the household workplace’ and ‘(b) provide an adequate and appropriate system of inspection’, consistent with Article 17 of the Convention [concerning ‘measures for labour inspection, enforcement and penalties’] and adequate penalties for violation of occupational safety and health laws and regulations.⁹⁴

Thus, the Convention establishes the principle that domestic workers should be covered by health and safety laws, while the Recommendation elaborates on measures particular to their circumstances which should be taken. Arguably, both indicate that action is required on the part of the EU. Namely, at the very least, to remove the wholesale exclusion of domestic workers from EU (and UK) health and safety laws.

4. FUTURE PROSPECTS FOR EU REGULATION OF DOMESTIC WORK – TRUE FLEXICURITY?

We suggest that the reason for the current paucity of regulation at EU level is the place of domestic work within the European Employment Strategy (EES), designed to

⁹⁴ Ibid., para. 1109 et seq.

promote female employment participation within EU Member States so as to enhance productivity. The EES has, in this context, used the language of ‘flexicurity’, offering a blend of flexibility and security at work to facilitate engagement in paid labour. However, thus far, the EES has been premised on the notion that women, in gaining access to the mainstream skilled workforce, should replicate male modes of working (to achieve security) or suffer the consequences of more flexible casual or independent contractor employment status, which would mean that usual employment laws would not cover them. As Fredman has observed, the UK provides an excellent example of the ways in which pressure to join the workforce has led to no general reform of modes of professional or skilled work associated with security, but rather the creation of an expedient secondary peripheral and precarious workforce.⁹⁵ We have observed that this secondary workforce itself relies on a tertiary, and even more precarious, domestic workforce, which performs the reproductive work otherwise required in the household.

While domestic workers are entitled to certain human rights protections, they are not apparently entitled to standard EU labour law protections regarding working time or health and safety, despite the apparently generous entitlement set out in Article 31 of the EU Charter of Fundamental Rights. In this light, we have examined the content of the recent ILO Convention No. 189 and Recommendation No. 201 in some detail so as to consider the role that EU Member States played in the shaping of these norms. We have also considered the extent that the ILO Convention, in particular, indicates grounds for reform of the EES or EU social policy directives on working time and health and safety.

⁹⁵ Fredman (2004) n.3.

It is evident that EU Member States have, in the context of Convention No. 189, sought to replicate the kinds of exceptions for the ‘special circumstances’ of domestic work previously applicable in ILO Conventions on the basis that these are workers for whom ‘special problems of a substantial nature arise’. Reference is therefore made, both in relation to working time and health and safety to ‘the special circumstances of domestic work’. Commentators like Albin and Mantouvalou have reiterated the ILO notion that domestic work is ‘work like no other’,⁹⁶ but their concern is with trying to address the specific circumstances of domestic workers so as to enhance their entitlements, as indeed ILO Recommendation No. 201 notably seeks to do, if not wholly successfully. They would certainly not consider that the exceptional nature of domestic work justifies wholesale exclusion of domestic workers from basic labour law protections.

Convention No. 189 and Recommendation No. 201, in part because of the way in which their terms have been diluted by EU Government and employer representatives, do not create a large body of rights for domestic workers, but nevertheless, there are some substantive protections. We find these, for example, in Article 10(2) on weekly rest and 10(3) regarding on-call time. Further, there is the statement in Article 13(1) that ‘Every domestic worker has the right to a safe and healthy working environment’ which can be implemented ‘progressively, but if so only in consultation with representative organisations of employers and workers’. This suggests that treatment of domestic workers needs to be revisited by the EU in the context of social dialogue.

⁹⁶ E. Albin and V. Mantouvalou, ‘The ILO Convention on Domestic Workers: From the Shadows to the Light’, (2012) 41(1) *Industrial Law Journal* 67 at 75-7.

We seek to address the extent to which it is feasible for the EU to change the approach taken to domestic work in the light of ‘flexicurity’.

To date ‘flexicurity’ has been largely concerned with enabling a more flexible labour market, which enables employers to dismiss with relative ease and to hire in response to fluctuations in their economic circumstances, while workers are offered forms of social security and training which enable them to be excellent candidates for future work where employers can afford to hire. The flexibility envisaged is more concerned with movement in and out of jobs, as they become available, but less with the forms that jobs take. While formal legal treatment of part time jobs and fixed term work as ‘equal’ to conventional full time and ongoing work, there are flaws in the EU legislative instruments and inadequate protection is given to those engaged in forms of agency and casual work in which women are over-represented.⁹⁷ We consider that this needs to change.

There are two justifications for paying more attention to flexibility of hours, location and other forms of work. One is the pragmatic argument linked to employment promotion. If you want people to enter certain forms of paid work where there is a skill shortage, you may need to offer them significant incentives to do so, such as shorter working time. If domestic workers are to be given ‘decent work’ which is fairly paid, does not involve excessive on call hours or unsafe working conditions,

⁹⁷ See the analysis of M. Rönmar, ‘Flexicurity, Labour Law and the Notion of Equal Treatment’, in M. Rönmar (ed.), *Labour Law: Fundamental Rights and Social Europe* (Hart, 2011). See also N. Countouris and R. Horton, ‘The Temporary Agency Work Directive: Another Broken Promise?’ (2009) *38 Industrial Law Journal* 329.

their labour becomes more expensive and workers may need flexibility in jobs to do housework and caring work themselves. Further, it would be naïve to see incentives to work as purely monetary, given the very natural desire that most workers have to reconcile home and family life, for example to spending some significant periods of time each week caring for their own children. This can be linked to the second, arguably stronger, normative argument, namely Busby's identification of a 'right to care' which, as a right of all people and therefore all workers, should be recognised in the EU labour market and under EU law.⁹⁸ In this way, 'equality issues emerge not as a discrete specialism within the field of labour law, but rather as a pervasive theme which penetrates both its inner core and outer reaches'.⁹⁹ This not only entails, as Busby suggests, 'radical change to or overhaul of the regulatory framework within which the employment relationship operates' so as to allow greater scope for male and female caring relationships for dependants such as children and the elderly,¹⁰⁰ but also addressing the undervaluation of the work done by those who provide care.¹⁰¹ In this way, 'flexicurity' as a policy could be informed by the importance of allowing workers flexibility to fulfil caring responsibilities; potentially entailing shorter

⁹⁸ N. Busby, *A Right to Care? Unpaid Work in European Employment Law* (OUP, 2011).

⁹⁹ J. Conaghan, 'Contesting the Terrain' in A. Morris and T. O'Donnell (eds), *Feminist Perspectives on Employment Law* (Cavendish, 1999), 21.

¹⁰⁰ Busby n.98 at 4.

¹⁰¹ *Ibid* at 15. An idea developed further in J. Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction', (2014) 22(1) *Feminist Legal Studies* 1.

working time and different working patterns to those which dominate in traditionally prestigious well-paid occupations.

To what extent, then, does it seem that the EU may adapt in the future to the pressing demands of ‘flexicurity’ in the context of employment promotion? There are two key Commission policy documents that offer us pointers in this regard.

The first is the 2010 Communication from the Commission on ‘Europe 2020: A strategy for smart, sustainable and inclusive growth’ issued in 2010, in which the objective of getting women into work continues to be stressed, following the financial and economic crisis.¹⁰² The only allowance made for the structural difficulties in female engagement in male work patterns seems to be appreciation that: ‘Access to childcare facilities and care for other dependents will be important in this respect.’¹⁰³ Fundamentally changing working hours for all workers so that they can accommodate their own housework and care is not contemplated; nor is a recommendation made for greater provision of state resources to assist with caring responsibilities. Indeed, the latter would have been anomalous given advocacy of reduction of public spending in the context of Commission authorised austerity packages.¹⁰⁴ Instead, greater recourse

¹⁰² See Commission Communication, ‘Europe 2020: A strategy for smart, sustainable and inclusive growth’ COM(2010) 2020 at 3 notes that only 63% of women are in work compared to 76% of men’, which is seen as unsatisfactory. See also 16.

¹⁰³ COM(2010)2020 at 16.

¹⁰⁴ See for e.g. A. Koukiadaki and L. Kretsos, ‘Opening Pandora’s Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece’, (2012) 41 *Industrial Law Journal* 276.

to migrant and potentially cheaper labour seems to be accepted, with a commitment by the Commission to ‘promote a forward-looking and comprehensive labour migration policy which would respond in a flexible way to the priorities and needs of labour markets’.¹⁰⁵ In our view this document seems pragmatically naïve and normatively impoverished. There is an absence of a concrete commitment to provide ‘decent’ work for either the secondary (predominantly female) precarious workforce or the underclass of domestic workers which traditional ‘male’ work patterns render necessary.

The second document is the Communication from the Commission ‘Towards a Job-Rich Recovery’ issued in 2012.¹⁰⁶ This is a policy document more directly informed by the experience of the recent European recession and continuing financial crisis. Once again the aim is to support ‘job creation’, but in so doing, to ‘improve the labour market situation of more vulnerable groups, such as young, female, less-skilled, older workers as well as those from a minority background’.¹⁰⁷ This seems potentially in tune with our analysis of what ‘flexicurity’ could become in the EU, but much of the document entails a repetition of what we have come to expect as formulaic regarding the significance of relocation and retraining, particularly in relation to green jobs, the EU health workforce and Information and Communication Technology (ICT) employment.¹⁰⁸ There is more promise in the ‘Commission Staff Working Document on an Action Plan for the EU Health Workforce’ which accompanies the 2012

¹⁰⁵ COM(2010)2020 at 17.

¹⁰⁶ COM(2012)173.

¹⁰⁷ *Ibid.* at 3.

¹⁰⁸ *Ibid.*, Annex.

Communication.¹⁰⁹ It is concerned with addressing ‘the shortages of the EU health workforce’ and boosting ‘job creation’.¹¹⁰ One difficulty lies in how to recruit and retain highly skilled health care workers, such as specialists, doctors and nurses, in the light of more tempting job opportunities abroad. There is recognition in the document that a failure to address the increase of female doctors in terms of long working hours appears to operate as ‘a disincentive in this sector’.¹¹¹ There seems to be appreciation here, not voiced in the Commission Communication, of an actual need to reshape working practices: ‘The EU could assist in further exploration of factors that contribute to a supportive working environment’.¹¹² This perhaps could lead to a reshaping of working norms to enable those workers who are also ‘carers’ to accommodate work and family life.

Less is said about the role of unskilled care workers, but there is recognition that while 55% of those in the healthcare sector have a post-secondary school degree, there will be extensive opportunities also for the medium and unskilled in the sector. There is also a suggestion that use of (even skilled) migrant labour to deal with shortages should be dealt with through forms of ‘ethical recruitment’.¹¹³ Active attention is also to be paid to the registration and training of healthcare assistants under a pilot project to offer longer term opportunities in the sector. Clearly however, there is much more which could be said in order for EU policy to have the

¹⁰⁹ SWD(2012) 93, 18 April 2012.

¹¹⁰ *Ibid.* at 1.

¹¹¹ *Ibid.* at 5.

¹¹² *Ibid.* at 12.

¹¹³ *Ibid.*

transformative effect required to enable both the secondary and tertiary workforce to enjoy decent terms and conditions of work.

There is however no indication that basic health and safety rights and working time regulation will apply to low-skilled care workers. The document is also strangely silent on how the contracting out of care will operate at a time when there have been significant cuts in public spending. The matter will be kept under review and be the subject of ‘social dialogue’, but scope for engaging isolated home care workers in forms of collective representation is not discussed.

We conclude, therefore, that while domestic workers may welcome the EU’s endorsement of ratification of Convention No. 189, there is scope for further EU action to enable the application of labour standards to their work. There is an emergent but still limited appreciation of the need for the EU to lead on transforming patterns of work and offering more genuine forms of flexible working. At present, the EU risks accusations of hypocrisy insofar as cheap domestic labour maintains current employment promotion policies. EU institutions need to revisit and rethink the place of domestic work in Europe.