J.K. v TP S.A. and the 'Universal' Scope of EU Anti-Discrimination Law at Work: A Paradigm Shift?

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A pre-edited work accepted for publication in the *Industrial Law Journal.* Please refer to the final version for any purposes: doi.org/10.1093/indlaw/dwad025

1. INTRODUCTION

Case C-356/21 *J.K. v TP S.A.* has been hailed as a transformative step forward in defining the personal scope of application of European anti-discrimination law and, potentially, determining the wider construction of labour rights.[1] Its significance relates to several aspects. First, the ruling clarified the personal scope of application of Directive 2000/78/EC concerning equal treatment in employment and occupation,[2] which the Court considered to explicitly extends to self-employed workers such as the claimant, an audio-visual editor engaged by one client via multiple short-term contracts. Second, it asserted that refusal to conclude or renew a contract for services with a freelancer on the grounds of their sexual orientation falls within the prohibition of discrimination contained in Directive 2000/78/EC. Third, it stated that Polish law has failed to correctly implement the Framework Directive due to permitting a derogation from the general prohibition of discrimination based on sexual orientation that is purported to be justified by the need to protect the rights and freedoms of others (i.e. the parties' freedom of contract).

I am very grateful to Professor Deirdre McCann, Marc Steiert and an anonymous reviewer for their stimulating and insightful comments on earlier versions of this article.

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[1] Case C-356/21 *J.K. v TP S.A.* EU:C:2023:9.

[2] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (also referred to as the Framework Directive).

The ruling in *J.K. v TP S.A.* has also attracted significant attention in academia,[3] but what is the reason for this interest? Broadly speaking, labour rights have traditionally been afforded in an all-or-nothing fashion. Indeed, in the European Union (EU), most employment-related secondary legislation has largely granted such rights solely to 'workers' who are hired via an employment contract or relationship, with the role of defining these concepts typically being reserved for national law.[4] By contrast, self-employed persons generally fall outside the scope of protection and, therefore, can only rely on private or commercial law remedies. However, this rigid system is currently facing intense scrutiny and pressure due to its limited ability to recognise and address situations that are not fully compatible with standard contractual templates. In certain areas of EU social law, the binary divide between subordination and independence has now been complemented by a more *universalistic* approach whereby employment status is not a factor that can be used to exclude workers from substantive rights. Anti-discrimination law and the *J.K. v TP S.A.* ruling are cases in point here, allowing us to visualise the ongoing elaboration of a concept of self-employment that is covered by certain pieces of EU legislation.

[3] Nicola Countouris, Mark Freedland and Valerio De Stefano, 'Making Labour Law Fit for All Those Who Labour' (*Social Europe*, 17 January 2023) <https://www.socialeurope.eu/making-labour-law-fit-for-all-those-who-labour> accessed 7 August 2023; Lenka Křičková and Iva Fellerová Palkovská, 'Battling the Hydra in EU Anti-Discrimination Law: ECJ Judgment Raises More Questions about Discrimination against Self-Employed Workers' (*VerfBlog*, 31 January 2023) <https://verfassungsblog.de/battling-the-hydra/> accessed 7 August 2023; Marta Lasek-Markey, 'EU Law Protection from Discrimination Extends to Self-Employed Workers, Confirmed the CJEU in a Landmark Judgment with LGBT+ Rights in the Background' (*European Law Blog*, 6 February 2023) <http://bit.ly/3Irg0X3> accessed 7 August 2023; Uladzislau Belavusau, 'Filling a Gap in EU Anti-Discrimination Law for Short Contracts: Case C-356/21, TP (Monteur Audiovisuel Pour la Television Publique)' (*EU Law Live*, 16 March 2023) <https://bit.ly/43F6TKM> accessed 7 August 2023; Suzanne Kali, 'Ruling in JK vs. TP SA Regarding Discrimination of a Self-Employed Worker Based on Sexual Orientation' (2023) 9 *International Labor Rights Case Law* 188.

[4] See, for example, Article 2(2) of 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. For an example of more universal ambition, see 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.

Notably, the ruling indirectly offers the opportunity to test for the very first time the notion of 'personal work'[5] both advocated by scholars and extensively discussed (and progressed) in the opinion of the Advocate General.[6] In fact, the ruling could have a domino effect on other areas of EU law, thereby transforming the configuration of the traditional binary divide between employment and self-employment into a more status-neutral conceptualisation of social rights. Yet, the case has certain distinctive elements that prevent straightforward interpretative analogies.

The remainder of this brief note is organised as follows. Section 2 provides an overview of the facts of *J.K. v TP S.A.* and a description of the applicable national law that prompted the local court to refer the case to the Court of Justice of the European Union (CJEU). In line with the questions that required a preliminary ruling, Section 3 unravels the main arguments developed by the CJEU to define the autonomous scope of anti-discrimination legislation following Case C-587/20 *HK/Danmark and HK/Privat*, regardless of the legal form in which work is provided.[7] Section 4 then critically explores the wider lessons that can be learned from *J.K. v TP S.A.* and reflects on both its limits and its potential to trigger an ambitious recalibration of the scope of labour rights. Finally, Section 5 concludes that, while some interpretative issues regarding the inclusion of some self-employed workers within the scope of equality law can be easily overcome via jurisprudence, as occurred in the case at hand, the inability of certain EU tools to include non-standard forms of employment must be addressed through legislative intervention.

[5] Mark Freedland, *The Personal Employment Contract* (OUP 2003); Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 393; Mark Freedland and Nicola Kountouris, 'Some Reflections on the "Personal Scope" of Collective Labour Law' (2017) 46 *Industrial Law Journal* 52. See also Nicola Countouris and Valerio De Stefano, *New Trade Union Strategies for New Forms of Employment* (ETUC 2019).

[6] Case C-356/21 *J.K. v TP S.A.*, opinion of AG Ćapeta.

[7] Case C-587/20 *Ligebehandlingsnævnet acting on behalf of A v HK/Danmark and HK/Privat*, EU:C:2022:419.

2. ‘I LOST MY JOB OVER A YOUTUBE VIDEO AND AN INTOLERANT CLIENT’

The ruling concerns JK, a Polish audio-visual editor, who had entered into a strikingly long sequence of short-term contracts for the provision of specific services with Telewizja Polska (TP), a state-owned company operating a public television channel, between 2010 and 2017. Importantly, the case should be considered against the backdrop of the Polish government having actively promoted openly anti-LGBTIQ+ campaigns, particularly via state-owned media.[8]

In November 2017, the claimant entered into a new contract to work on material, trailers and features for TP’s promotional programmes after having been positively reviewed by an assessment committee following an internal restructuring process. Subsequently, the claimant uploaded a Christmas song promoting support for same-sex couples to a popular YouTube channel.[9] The video starts with some statements, allegedly made by Polish politicians, such as ‘This rainbow is a symbol of perversion’ and ‘Something is a family and something else is not’. These intolerant proclamations are followed by open-minded verses chanted by people in a convivial setting who are

[8] Commissioner for Human Rights, ‘Memorandum on the Stigmatisation of LGBTI People in Poland’ (*The Commissioner*, 3 December 2020) <https://rm.coe.int/memorandum-on-the-stigmatisation-of-lgbti-people-in-poland/1680a08b8e> accessed 7 August 2023. In this climate, the European Commission considered that Polish authorities had failed to fully and appropriately respond to its inquiry regarding the nature and impact of the so-called ‘LGBT-ideology free zone’ resolutions adopted by several regions and municipalities. European Commission, ‘EU Founding Values: Commission Starts Legal Action against Hungary and Poland for Violations of Fundamental Rights of LGBTIQ People’ (*European Commission*, 15 July 2021) <https://digital-strategy.ec.europa.eu/en/news/eu-founding-values-commission-starts-legal-action-against-hungary-and-poland-violations-fundamental> accessed 7 August 2023. As explained by Belavusau, due to the Commission’s threat of funds removal, Poland has gradually eliminated the LGBT-ideology free zones, leading to the cessation of infringement procedures against the country on the grounds of homophobia. See Belavusau (n 3).

[9] Jakub & Dawid, ‘Pokochaj Nas W Święta’ (4 December 2017) <https://youtu.be/b7fpUj9zxfs> accessed 7 August 2023. This section’s heading was inspired by Virginia Mantouvalou, ‘“I Lost My Job over a Facebook Post: Was That Fair?” Discipline and Dismissal for Social Media Activity’ (2019) 35 *International Journal of Comparative Labour Law and Industrial Relations* 101.

celebrating the festive season. After the song was posted, the video maker received a message from his manager informing him that his upcoming one-week shift had been cancelled, just one day before the shift was meant to begin. His next shift was also cancelled. As a result of this double cancellation, no work was performed and, due to him being a self-employed worker, JK's contract was discontinued.

JK brought a claim for compensation and non-material harm against his hirer before the District Court of Warsaw, alleging a breach of the principle of non-discrimination on the grounds of sexual orientation in respect of the conditions for accessing and pursuing an economic activity as an independent worker. He contended that the most plausible cause of the shift cancellation and, therefore, the termination of his collaboration was the posting of the video portraying happy same-sex couples singing Christmas songs. In response, TP stated that Polish law does not provide any guarantee that a contract for specific work will be renewed.

Directive 2000/78/EC applies 'to *all persons*, as regards both the public and private sectors, including public bodies, in relation to: (a) conditions for *access* to employment, to *self-employment* or to *occupation*, including selection criteria and recruitment conditions; […] (c) employment and working conditions, including *dismissal* and pay' (Article 3(1)).[10] In Polish law, the law implementing the Directive applies to 'the conditions for taking up and pursuing economic or professional activities, including in particular in the context of an employment relationship or work performed under a

[10] Emphasis added. See also Dagmar Schiek, 'A New Framework on Equal Treatment of Persons in EC Law? Directives 2000/43/EC, 2000/78/EC and 2002/73/EC Changing Directive 76/207/EEC in Context' (2002) 8 *European Law Journal* 290; Sandra Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 145.

civil-law contract'.[11] Furthermore, in line with the EU Directive, sexual orientation is included among the list of protected grounds, along with sex, race, ethnic origin, nationality, religion, creed, belief, disability and age (Article 8(1)(2)). However, according to Polish national law, the principle of equal treatment does not apply to 'the freedom of choice of the parties to a contract so long as that choice is not based on sex, race, ethnic origin or nationality' (Article 5).

The District Court of Warsaw decided that the case fell within the scope of EU law and asked the CJEU (i) whether the applicant may be classified as 'self-employed' within the meaning of Article 3(1)(a) and (c) of the Directive (paragraph 27) and (ii) if the refusal to renew a contract with a self-employed person based on their sexual orientation constitutes a restriction on the conditions for access to self-employment (paragraph 28). The domestic court was uncertain regarding the compatibility of Polish national law with EU equality law insofar as the Polish law governing equal treatment excludes parties' freedom of choice from its scope provided that the related choice is not grounded on factors such as sex, race, ethnic origin or nationality in a case where an allegedly discriminatory choice results in the refusal to enter into a contract for services due to the sexual orientation of the other contracting party.

3. REASONING OF THE COURT

A. Self-Employment Falls within the Scope of Directive 2000/78/EC…

In its ruling, the CJEU began with a textual interpretation of the wording of the Framework Directive, emphasising that Article 3(1)(a) applies to 'all persons, as regards

[11] Article 4 of the ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania (Law on the transposition of certain provisions of EU law regarding equal treatment) of 3 December 2010, in its consolidated version (also referred to as the Polish Law on equal treatment).

both the public and private sectors, including public bodies' (paragraph 39). Importantly, there is no reference to national law as there is in other EU directives,[12] including recent ones (paragraph 34).[13] The 'conditions for access to employment, to self-employment or to occupation' must be interpreted according to their ordinary meaning and not 'restrictively' (paragraph 39).

In addition, both the need to apply EU law uniformly and the very essence of the principle of equality, which has played a crucial role in the construction of the edifice of EU social law,[14] imply that the meaning and scope of the Framework Directive's terms must be subject to an 'autonomous and uniform interpretation throughout the European Union' (paragraph 34). Here, the CJEU referred to a recent anti-discrimination case,[15] *HK/Danmark and HK/Privat*, in which the notion of a 'worker', a conventional battlefield for labour lawyers,[16] was interpreted as being autonomous in respect of Directive 2000/78/EC and needing to be distinguished from Article 45 of the Treaty on the Functioning of the European Union (TFEU) and the linked case law. Furthermore, a review of the different language versions of the Directive corroborated the view that any occupational activity, 'whatever the nature and the characteristics of such activity'

[12] Article 3(1)(a) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (where '"worker" means any person who, in the Member State concerned, is protected as a worker under national employment law').

[13] Article 1(2) of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union ('… as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice').

[14] Mark Bell, 'The Principle of Equal Treatment: Widening and Deepening' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 611.

[15] *HK/Danmark and HK/Privat* (n 7) para 25. For a detailed review, see Marc Steiert, 'A Renewed Architecture for EU Anti-Discrimination Law at Work? – C-587/20 HK/Privat' (*EU Law Live*, 9 June 2022) <https://eulawlive.com/op-ed-a-renewed-architecture-for-eu-anti-discrimination-law-at-work-c-587-20-hk-privat-by-marc-steiert/> accessed 7 August 2023.

[16] Nicola Kountouris, 'The Concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope' (2018) 47 *Industrial Law Journal* 192.

(paragraph 36), falls within its scope. Indeed, the 'employment, self-employment and occupation' tryptic, when read in conjunction with the comprehensive reference to different sectors, bodies, branches and levels of hierarchy, appears intended to encompass the entire range of professional activities, including those beyond the activities performed by 'workers' within the meaning of freedom of movement (Article 45 of the TFEU) (paragraphs 3–38).[17] The textual and substantive similarities in the reasoning used in the two cases arguably suggest that *J.K. v TP S.A.* and *HK/Danmark and HK/Privat* could represent a jurisprudential shift. Moreover, such similarities point towards a meaningful evolution in the case law rather than merely isolated advancements.

As the Court pointed out, the legal basis of the Directive is Article 19(1) of the TFEU—not, as is the case for other secondary legislation in the social field, Article 153(2) (paragraph 40)—which is intended to protect 'workers as the weaker party in an employment relationship' (paragraph 43). Its goal is to remove any discriminatory barriers preventing workers from pursuing livelihoods and fully realising their capacity to contribute to society through work (paragraph 43).[18] In short, the Directive aims to protect all persons irrespective of their employment status and regardless of the legal form in which their professional activity is provided (paragraph 43). Importantly, discrimination-free access to work must be guaranteed to 'everyone', as a narrower scope would hinder the attainment of the TFEU's paramount objective of ensuring a high level

[17] As noted by the Advocate General, Recital 4 of the Framework Directive refers to Convention No. 111 of the International Labour Organisation (ILO), which also uses that wording. C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111) prohibits discrimination in the field of employment and occupation, which is understood as covering 'all workers', including those in self-employment. Ćapeta (n 6) para 51.

[18] *HK/Danmark and HK/Privat* (n 7) para 34.

of employment and social protection and increasing the quality of life, level of economic and social cohesion, and degree of solidarity within the EU (paragraph 42).[19]

Next, the CJEU sought to distinguish between self-employment within the meaning of Directive 2000/78/EC and 'the mere provision of goods and services to one or more recipients' in order to establish the outer limit of such an ample scope (paragraph 45). The determinants of self-employment, the Court concluded, are the genuineness and effectivity of the activities in question and the fact that they are pursued in the context of a legal relationship characterised by a degree of stability 'enabling the applicant to earn his livelihood, in whole or in part' (paragraphs 45 and 47).[20] Unsurprisingly, the task of performing a concrete assessment in this regard was assigned to the referring court, although the CJEU noted that the factual circumstances of the relationship between JK and his hirer militated in favour of the existence of the abovementioned factors and, therefore, of self-employment (paragraph 46). Accordingly, as is apparent from the order for reference, the applicant was engaged in a genuine and effective occupational activity pursued personally and regularly for the same recipient (paragraph 47). Given the broad scope of the Directive, the classification of this activity as employment or self-employment is not a decisive issue (paragraph 47).

Contrary to the narrow interpretation proposed by the Polish government, according to which the conclusion of sequential contracts is not covered by the Directive, the Court held that the 'conditions for access' to self-employment refer to all of the circumstances or facts deemed essential for a person to be able to pursue a professional activity (paragraph 49). In other words, the phrase encompasses all of the distinct phases

[19] Case C-507/18 *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford* EU:C:2020:289, para 73.

[20] Case C-432/14 *O v Bio Philippe Auguste SARL* EU:C:2015:643.

necessary to complete a given service, including the conclusion of a new contract, its renewal or the refusal thereof.[21] This broad interpretation of the phrase 'conditions for access' is meant to help achieve the goals of the Directive, thereby allowing the applicant to effectively pursue his occupational activity and enjoy his labour market membership (paragraph 50).

B. …as Does the Refusal to Fulfil or Renew the Contract of a Self-Employed Worker

What does the reference to 'employment and working conditions, including dismissal and pay', in Article 3(1) of Directive 2000/78/EC entail? The lack of any explicit mention of self-employment here may initially seem puzzling (paragraph 53). However, as the purpose of the Directive is to promote participation in the labour market through the removal of any discriminatory barriers, the formal categorisation of an employment relationship within national law,[22] or of the choice made by a party with regard to the type of contract, cannot affect its application (paragraphs 54–58).

On closer scrutiny, interpreting the elimination of discrimination concerning sexual orientation in a strict manner and only in respect of the 'conditions for access' to professional activities would undermine the standard of protection offered by the Directive.[23] Thus, the CJEU clarified that interpreters must opt for a broad, teleological reading of the Directive so as to protect 'the professional relationship concerned in its

[21] Regarding public statements excluding the recruitment of homosexual persons, see *Associazione Avvocatura per i Diritti LGBTI – Rete Lenford* (n 19).

[22] Case C-232/09 *Dita Danosa v LKB Līzings SIA* EU:C:2010:674, para 63.

[23] Regarding self-employed workers, some scholars have warned that 'it seems the [directives'] protection is limited to rights of access to a profession or activity, not equal treatment once access has been obtained (i.e. during the exercise of the activity)'. Catherine Barnard and Alysia Blackham, 'Discrimination and the Self-Employed: The Scope of Protection in an Interconnected Age' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Right* (CUP 2018) 206.

entirety' (paragraph 56). Moreover, the Court stated that the decision to not fulfil or renew a contract for specific work falls within the concept of 'employment and working conditions' (paragraph 59) regardless of the legal form in which such activity is pursued.

An even more tantalising doubt here centres on whether the notion of dismissal within the meaning of Article 3(1)(1) extends to self-employed workers. It is clear that this term generally refers to the termination of an employment contract or relationship (paragraph 61),[24] whereas, in the case at hand, the worker was engaged in a series of short-term contracts of an independent nature with TP. However, since 'dismissal' is included in the Directive as a mere example of working conditions within a short and non-exhaustive list, the Court held that the term must be construed as covering the unilateral and involuntary termination of any activity, including the activities of the self-employed (paragraph 62). In fact, the cancellation of the agreed shift by the hirer resulted in a situation of vulnerability for JK that did not differ much from that of an 'employed worker who has been dismissed' (paragraph 63).[25] Thus, the Court held that the cancellation of previously agreed shifts and the non-renewal of a contract fall within the scope of the Directive (paragraph 64). The effect of this—namely, the worker's inability 'to complete any of the one-week shifts provided for in the contract for specific work which he had concluded with TP'—'appears to constitute […] an involuntary termination of activity of a self-employed person which may be assimilated to dismissal of an employee', although this is a matter for the referring court to decide (paragraph 65).

[24] Bernd Waas and Guus Heerma van Voss (eds), *Restatement of Labour Law in Europe Volume III: Dismissal Protection* (Hart Publishing 2021).

[25] Case C-442/16 *Florea Gusa v Minister for Social Protection and Others* EU:C:2017:1004.

C. Incorrect Implementation at the National Level

Finally, the CJEU ruled on the exclusion of the freedom of choice of contracting parties from the scope of Polish national anti-discrimination law, provided it is not motivated by sex, race, ethnic origin or nationality. This carve-out is specifically intended to protect the rights and freedoms of contracting parties (Article 5(3) of the Polish Law on equal treatment). This value is recognised within the Directive itself, with Article 2(5) permitting 'measures laid down by national law, in a democratic society, […] for the protection of the rights and freedoms of others'. The Court stated that the EU legislature had *a priori* addressed and calmed the potential tension between the principle of equal treatment within the labour market and the protection of individual freedoms (paragraph 70). Therefore, any exceptions to the general principle of equality must be narrowly construed (paragraph 71).[26]

The CJEU noted that, at first glance, the Polish derogation met the Directive's criteria due to being designed to protect the parties' freedom of contract (paragraph 73). The foundation for such freedom can be found in Article 16 of the Charter of Fundamental Rights of the European Union (CFREU), which covers the freedom to choose with whom to do business (paragraph 74).[27] Yet, such freedom is not unfettered and must be viewed in light of its social function (paragraph 75).[28]

Building on the Advocate General's opinion (paragraph 111), the reasoning of the CJEU in this regard points to the gaps and mismatches in Polish law (paragraph 76). On

[26] Case C-396/18, *Gennaro Cafaro v DQ* EU:C:2019:929, para 42.

[27] Case C-124/20 *Bank Melli Iran v Telekom Deutschland GmbH* EU:C:2021:1035.

[28] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* EU:C:2013:28. See also Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"' (2014) 10 *European Review of Contract Law* 167.

closer inspection, the Polish legislature struck a balance between the principle of equality and the freedom of enterprise that advantages the former when discrimination is based on sex, race, ethnic origin or nationality. Discrimination based on sexual orientation is 'tolerated' by Polish law when it comes to ensuring the freedom of choice of contracting parties, whereas sex, race, ethnic origin or nationality cannot justify the dominance of freedom of contract over the principle of equality. This approach, the CJEU concluded, constitutes an example of incorrect transposition. According to the Court and in agreement with the Advocate General's opinion,[29] there is nothing to suggest that discrimination based on sexual orientation should receive different treatment from that reserved for addressing discrimination based on other protected characteristics (paragraph 76).[30] Indeed, a divergent interpretation would deprive Article 3(1)(a) of its effects 'in so far as that provision specifically prohibits any discrimination based on that ground as regards access to self-employment' (paragraph 77). Thus, national law cannot justify the deliberate but unnecessary exclusion from anti-discrimination protection of the refusal to conclude or renew a contract with a self-employed person based on their sexual orientation (paragraphs 78 and 79).

Ultimately, *J.K. v TP S.A.* has given the CJEU an opportunity to address some 'interpretational gaps' concerning the Framework Directive.[31] The responsibility for evaluating the circumstances in the main proceedings and rendering a decision, considering the CJEU's response to the preliminary question, now lies with the referring court.

[29] Ćapeta (n 6) paras 110–113.

[30] This reasoning might also affect the interpretation of the other protected grounds, such as religion, creed, belief, disability and age.

[31] Belavusau (n 3).

4. BROADENING THE SCOPE OF SOCIAL RIGHTS?

It is a truism that the personal ambit of EU social law is overly fragmented due to being construed in a context-specific fashion.[32] Still, in those areas in which the scoping exercise is not conferred on Member States, several CJEU rulings have contributed to shaping an autonomous EU-wide meaning of the concept of a 'worker'[33] that also includes self-employed workers whose independence is merely notional.[34] Moreover, the CJEU has interpreted the concept of 'subordination' as extending beyond the classical idea of a stringent command-and-control relationship.[35] It has also avoided the potential for national definitions to jeopardise the goals pursued by EU secondary legislation[36] and pierced the veil of contractual designations that are inconsistent with factual conditions.[37] In addition, recent legislative initiatives have embedded a reference to the case law of the CJEU in an attempt to crystallise the Court's jurisprudential landmarks.[38] While this uneven process has resulted in a partial expansion of the EU's understanding of a

[32] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* EU:C:2004:18, para 63 ('In that connection, it must be pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied').

[33] Case C-428/09 *Union syndicale Solidaires Isère v Premier ministre and Others* EU:C:2010:612, para 28.

[34] *Debra Allonby* (n 32) para 71.

[35] Case C-232/09 *Dita Danosa v LKB Līzings SIA* EU:C:2010:674.

[36] Case C-393/10 *Dermod Patrick O'Brien v Ministry of Justice, formerly Department for Constitutional Affairs* EU:C:2012:110, para 35.

[37] *Debra Allonby* (n 32). See also Emanuele Menegatti, 'Taking EU Labour Law beyond the Employment Contract: The Role Played by the European Court of Justice' (2020) 11 *European Labour Law Journal* 26.

[38] They apply to 'workers in the Union who have an employment contract or employment relationship as defined by law, collective agreements or practice in force in each Member State, with consideration to the case-law of the Court of Justice'. See Article 1(2) of Directive (EU) 2019/1152 of the European Parliament and of the Council on transparent and predictable working conditions in the European Union; Article 2 of Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU; Article 2 of Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union.

'worker', a binary distinction still governs the allocation of employment rights and obligations.

Furthermore, in recent decades, labour market shifts have made it apparent that an all-or-nothing approach both increases parcellation and opens the door to unscrupulous attempts to game the system for a panoply of reasons, including cost-cutting and tax-avoidance measures.[39] In some cases, however, the strategies associated with the reclassification of bogus self-employed workers are insufficient to remedy the lack of protection. It is the very drafting and design of certain current pieces of EU legislation that fail to provide compelling answers to the questions concerning protection expressed by those workers whose contractual arrangements do not neatly fit within the classical category (or categories, at the national level) of employment.[40] Hence, new solutions are needed to avoid exclusionary effects.

By and large, the *J.K. v TP S.A.* judgment builds on prior attempts to broaden the scope of employment law, providing an opportunity to test the suitability of an 'upgraded' notion of 'personal work' in the field of non-discrimination. Legal scholars have advanced, both independently and jointly, the idea of recalibrating labour law to better

[39] For an overview of the debate, see Sandra Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26 *Industrial Law Journal* 337; Judy Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44 *Osgoode Hall Law Journal* 4, 622; Mark Freedland, 'Application of Labour and Employment Law beyond the Contract of Employment' (2007) 146 *International Labour Review* 1–2, 3–20; Deirdre McCann, 'Equality Through Precarious Work Regulation: Lessons from the Domestic Work Debates in Defence of the Standard Employment Relationship' (2014) 10 *International Journal of Law in Context* 4, 507–521; Abi Adams-Prassl, Jeremias Adams-Prassl, and Diane Coyle. 'Uber and Beyond: Policy Implications for the UK' (*Bennett Institute for Public Policy*, 31 March 2021) <https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2020/12/PIP001_Uber_and_Beyond_FINAL_.pdf> accessed 7 August 2023.

[40] Consider working time, to offer but one example: Deirdre McCann, "Travel Time as Working Time: Tyco, the Unitary Model and the Route to Casualization" (2016) 45 *Industrial Law Journal* 2, 244–250. See also Zahra Jeanne Boudalaoui-Buresi and Monika Marzena Szpejna, 'The Scope of EU Labour Law: Who Is (Not) Covered by Key Directives?' (*European Parliament*, October 2020) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/658181/IPOL_IDA(2020)658181_EN.pdf > accessed 7 August 2023; Einat Albin and Jeremias Prassl, 'Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion' in Mark Freedland and others (eds), *The Contract of Employment* (OUP 2016).

capture unorthodox forms of work beyond the standard employment relationship.[41] Here, space constraints do not allow for a deeper analysis of the merits and pitfalls of such a proposal, although one thing is certain: its persuasiveness lies in its premise—namely, the decreasing ability of labour law 'to perform its historical task of redressing inequality of bargaining power in works relations'.[42] The aim of a new and status-agnostic scope in this regard would not be to subvert or destabilise the notion(s) of employment and self-employment; rather, it would seek to ensure access to a protective regime for all workers who predominantly provide units of personal labour without significant reliance on other factors of production. This category would exclude only persons 'who are genuinely operating a business on [their] own account'.[43] Importantly, a unitary approach would avoid a casuistic and selective extension of rights, as has occurred in those countries that have previously experimented with intermediate categories,[44] where the outcomes have been mixed, stratified and, sometimes, dysfunctional.

The Advocate General took the concept of 'personal work' as the starting point in *J.K. v TP S.A.* and asserted that '[t]he 21st century requires a wider conception of a person who works'.[45] She then extended and strengthened this idea, arguing that EU anti-discrimination law should not exclude businesses if a business owner provides their personal work (paragraph 69). This is not an ill-advised approach. According to the

[41] Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Bloomsbury Publishing 2012).

[42] Simon Deakin, 'What Exactly Is Happening to the Contract of Employment? Reflections on Mark Freedland and Nicola Kountouris's Legal Construction of Personal Work Relations' (2013) 7 *Jerusalem Review of Legal Studies* 135.

[43] Countouris and De Stefano (n 5) 11.

[44] Claudia Schubert, *Economically-Dependent Workers as Part of a Decent Economy* (Hart 2022). See also Guy Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34 *Oxford Journal of Legal Studies* 543.

[45] Ćapeta (n 6) para 60, with reference to Mark Freedland and Nicola Countouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 5 and 42; Alain Supiot, 'Towards a European Policy on Work' in Mark Freedland and Nicola Countouris (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013) 35.

Advocate General, the concept of 'self-employment' within the equality framework is broader than (her reading of) the 'scholarly' notion of 'personal work', which includes 'all workers who provide services personally, but exclude[s] those who are "genuinely operating a business on his or her own account"'.[46] In short, the Advocate General's position is that 'EU anti-discrimination law should rely on an even wider understanding of personal work.[47] In contrast to what might initially seem apparent, the two definitions are complementary and mutually reinforcing, as the Advocate General uses the notion of 'personal work' to include a group of business owners within the scope of anti-discrimination legislation.

On further reflection, the Framework Directive expressly applies 'in relation to conditions for access to self-employment or to occupation'. However, in defining its scope, the CJEU relies on the notion of occupational activities that 'are genuine and are pursued in the context of a legal relationship characterized by a degree of stability'. Adding very little in terms of clarity, these criteria reflect the arguments used in the past to characterise sham self-employment.[48] Moreover, these criteria recall the pursuit of 'real, genuine activities to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary', as in the case of 'workers'.[49] Genuineness,[50]

[46] The Advocate General makes reference to Countouris and De Stefano (n 5) 64.

[47] The Advocate General makes reference to Barnard's understanding that the reference to 'self-employed' covers, in the area of equality law, even independent self-employed persons (entrepreneurs). See Catherine Barnard, *EU Employment Law* (4th edn, OUP 2012) 348.

[48] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* EU:C:2014:2411. Silvia Borelli, 'Il Diritto Antidiscriminatorio Si Applica anche al Lavoro Autonomo, Commento alla Sentenza della Corte di Giustizia del 12.1.2023, C-356/21, J.K. c. TP s.a.' (*Italian Equality Network*, 11 February 2023) <https://bit.ly/3EwEs8i> accessed 7 August 2023; Silvia Borelli and Maura Ranieri, 'La Discriminazione nel Lavoro Autonomo. Riflessioni a Partire dall'Algoritmo Frank' (2021) 7 *Labour & Law Issues* 1. See also Kountouris (n 15).

[49] Case C-316/13 *Gérard Fenoll v Centre d'aide par le travail "La Jouvene" and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon* EU:C:2015:200, para 27.

[50] Douglas Brodie, 'The Contract for Work' (1998) 27 *Scottish Law and Practice Quarterly* 2, 142–144; Deirdre McCann, *Regulating Flexible Work* (OUP 2008) 47.

effectivity, stability and regularity are rather abstract connotations, which renders them unsuitable to appropriately delineate the category of independent work, which is highly heterogeneous due to encompassing various arrangements that often have little in common. In particular, stability and regularity risk raising the bar for the self-employed to be protected under the Framework Directive, thereby excluding unstable and discontinuous contractual patterns.

Returning to the crux of the matter, equality law has long been seen as a 'slightly different "legal order" to traditional labour law' due to its capacity to surpass conventional taxonomical boundaries.[51] Despite the peculiarities of the case at hand, the ruling could provide the foundations for a renewed architectural layout of this area of law. Such an approach would be in line with *HK/Danmark and HK/Privat*, in which the CJEU construed the scope of the Framework Directive in an 'autonomous and potentially dynamic' fashion.[52] Based on these two landmark cases, it follows that, when defining the ambit of employment-related equality law, the focus should be on professional relations rather than contractual designations.[53] As stressed by the Advocate General, the Directive's preamble explains that 'employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential'.[54] As a consequence, discrimination must be removed from all dimensions of working life due to

[51] Anne CL Davies, *EU Labour Law* (Edward Elgar Publishing 2012) 113. See also Articles 20 and 21 of the Charter of Fundamental Rights of the European Union; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity (where Article 2(a) defines the self-employed as 'all persons pursuing a gainful activity of their own account, under the conditions laid down by national law').

[52] Steiert (n 15).

[53] Mark Freedland and Nicola Kountouris, 'Employment Equality and Personal Work Relations—A Critique of Jivraj v Hashwani' (2012) 41 *Industrial Law Journal* 56.

[54] Ćapeta (n 6) para 52.

threatening the very fabric of social market-based democracies. Suggesting that the notion of contractual freedom could be unconstrainedly mobilised to establish a derogation from the principle of equality would amount to interpreting it as offering 'freedom to discriminate' based on sexual orientation (paragraph 111).

In a similar vein, the CJEU marshalled both textual and teleological arguments to answer the questions referred by the Polish court, ultimately concluding that the Directive does not depend on a worker-protective rationale in the same way as secondary legislation adopted to safeguard 'workers' as the weaker party in an employment relationship enacted on the basis of Article 153(2) of the TFEU.[55] The obvious conclusion here is that the personal scope of application of EU equality law at work is autonomous rather than dichotomous.[56] The objective of the principle of non-discrimination is to provide every individual with an equal and fair chance to access the opportunities available in society. In this regard, the EU legal framework pursues the goal of 'combating social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child' (Article 3(3) of the Treaty on European Union). Given the 'human rights'[57] basis of the Directive and the 'market-unifying role'[58] of the principle of equal treatment, it remains to be seen whether the CJEU will be prone to adopting a similar approach in other fields

[55] Lasek-Markey (n 3).

[56] Sandra Fredman, 'Equality Law: Labour Law or an Autonomous Field?' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 257–274.

[57] Barnard (n 47) 347.

[58] Gillian More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP 1999) 517. See also Elise Muir, 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins' (2019) 20 *German Law Journal* 817.

of EU social law. It certainly could, however, at least with regard to other equality directives with a scope phrased in the same way as that of the Equality Directive.[59]

5. FINAL REMARKS

J.K. v TP S.A. is illustrative of several important issues that occur at the intersection between discrimination against members of the LGBTIQ+ communities at work and contractual formats that exacerbate both precariousness and vulnerability.

The parties involved did not find a way to 'de-casualise' their near-decennial relationship, leaving it vulnerable to the whimsical and discriminatory choices of the state-owned television station. This eccentric work organisation at the media company, based on the use of consecutive yet discontinuous bimonthly 'shifts', fits the model of the ostensibly novel task-based businesses that have promised to disrupt entire sectors while wildly misapplying the law with varying levels of success.[60] There is no denying that these peculiar work-related arrangements were common in the creative, audio-visual and artistic industries long before the advent of digital labour platforms.[61] Moreover, the claimant's contract closely resembled the experimentation with fixed-term contracts through which the 'at-will' doctrine is applied, offering the possibility for employers to fire workers with no justifications or due-process safeguards.[62] This situation encapsulates all of the paradoxes of the non-application of provisions intended to prevent

[59] Article 3 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Article 14 of 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).

[60] International Labour Organization, *The Role of Digital Labour Platforms in Transforming the World of Work* (ILO Flagship Report 2021); Christina Hiessl, 'The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis' (2022) 42 *Comparative Labor Law & Policy Journal* 465.

[61] It is no coincidence that the term 'gig' is derived from one-off engagements for live performances. See Antonio Aloisi and Valerio De Stefano, *Your Boss is an Algorithm: Artificial Intelligence, Platform Work and Labour* (Bloomsbury Publishing 2022).

[62] Case C-86/14 *Marta León Medialdea v Ayuntamiento de Huétor Vega* EU:C:2014:2447.

abuses of the renewal of temporary contracts and avoid dismissal protection. Even if both parties are content with it, such an arrangement should not be used to restrict the application of non-discrimination law by facilitating the possibility 'to "buy" goods or services rather than employ a [worker]', as the Advocate General observed.[63] Such a stratagem would deprive Directive 2000/78/EC of its practical effect.[64]

Moreover, the ruling does not simply revolve around the incorrect implementation of Directive 2000/78/EC in Polish law, as the questions addressed by the CJEU, whether directly or obliquely, are more far-reaching than that. In fact, the case touches upon issues such as the assessment of proportionality between freedom of contract and anti-discrimination legislation,[65] the socially oriented function of contractual autonomy, the blurred boundaries between self-employment and the provision of goods and services, and the notion of the termination of short-term contracts for services. Indeed, after providing a captivating overview of the modern labour market,[66] the Advocate General tested and expanded the concept of 'personal work'. In this regard, the CJEU agreed to the adoption of a comprehensive approach: when it comes to rendering business choices 'blind' to discriminatory practices, consideration must be given to workers' labour market membership rather than to their contractual status.[67] This conclusion is also attributable to the legal basis of Directive 2000/78/EC, which promotes participation in the labour market, regardless of specific contractual forms, within a discrimination-free economy.

[63] Ćapeta (n 6) paras 80–83.

[64] *Marta León Medialdea* (n 62) para 84.

[65] For a broader discussion, see Ćapeta (n 6) paras 108–114.

[66] Ćapeta (n 6). See also Countouris, Freedland and De Stefano (n 3).

[67] Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP 2001).

J.K. v TP S.A. reinforces the shift in the EU case law prompted by *HK/Danmark and HK/Privat* and pushes it even further to include workers conventionally situated outside the core of the scope of traditional labour law under the ambit of equality law. As such, the two rulings could lay the foundations for transcending the crude binary divide between employment and self-employment in order to protect 'everyone who works' from discrimination. In fact, the cases offer certain hints as to how best to reframe the 'architecture'[68] of anti-discrimination law and, possibly, EU labour law. It is questionable whether the ability to move beyond the *status quo* binary divide is a distinctive aspect of equality law, which can be further justified by the 'instant sense of unfairness' that arises in respect of a heinous case of homophobia against a self-employed worker.[69] Undoubtedly, the *J.K. v TP S.A.* judgment displays several idiosyncrasies that do not allow for easy generalisations. It remains to be seen whether and to what extent the expansive treatment of the personal scope in the EU anti-discrimination field could have relevance to the interpretation of instruments more conventionally situated within the 'mainstream' of labour law,[70] potentially paving the way for a much-needed retargeting of the personal and material scopes of other EU secondary legislation.

It must be noted that, in certain segments of EU social law, the bilinear conception of the existing legislation and the conventional model for identifying its beneficiaries do not suit non-standard forms of work, which means that the legislation fails to provide protection for the constellation of casual templates that diverge from the regulatory

[68] Claire Kilpatrick, 'The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture' (2011) 40 *Industrial Law Journal* 280.

[69] Křičková and Fellerová Palkovská (n 3).

[70] Raphaele Xenidis, 'Tuning EU Equality Law to Algorithmic Discrimination: Three Pathways to Resilience' (2020) 27 *Maastricht Journal of European and Comparative Law* 736.

'prototype' in the space, time and employment protection legislative dimensions.[71] Currently, the paradox is that any minor deviation from such a narrowly defined model would be deemed out of reach of social protection. Such a stricture should be addressed via legislative intervention to render the EU social *acquis* fit for the current labour market and allow it to address the new challenges posed by both flexibilisation and the green and digital transitions. Hence, the successful reinvention of the current regulatory model necessitates a shift towards less dichotomous and more status-agnostic personal scopes.

Interestingly, the EU co-legislators appear to be developing a similarly expansive approach. The second chapter of the proposed Platform Work Directive extends data transparency rights to self-employed platform workers, who would gain the right to be informed about the adoption of automated monitoring and decision-making tools as well as about the categories of information and actions that are tracked and assessed, the main parameters considered by such systems, and their relative weights.[72] Similarly, a comprehensive personal scope is also embraced in the field of protection for whistleblowers,[73] with the new Directive applying to 'at least […] (a) persons having the status of worker, within the meaning of Article 45(1) TFEU, including civil servants; (b) persons having self-employed status, within the meaning of Article 49 TFEU; (c) shareholders and persons belonging to the administrative, management or supervisory

[71] Jill Murray, "Normalising Temporary Work" (1999) 28 *Industrial Law Journal* 269; Leah F Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (OUP 2011).

[72] Article 10 of Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM/2021/762 final ('Article 6 [Transparency on and use of automated monitoring and decision-making systems], Article 7(1) and (3) [Human monitoring of automated systems] and Article 8 [Human review of significant decisions] shall also apply to persons performing platform work who *do not have an employment contract or employment relationship*' [emphasis added]). See also Antonio Aloisi and Nastazja Potocka-Sionek, 'De-Gigging the Labour Market? An Analysis of the "Algorithmic Management" Provisions in the Proposed Platform Work Directive' (2022) 15 *Italian Labour Law e-Journal* 29.

[73] Article 4(1)(b) of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

body of an undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees; [and] (d) any persons working under the supervision and direction of contractors, subcontractors and suppliers'. In an attempt to overcome the purported[74] tension between competition law and collective labour rights, the EU Commission has adopted 'Guidelines' concerning 'solo' self-employed persons (i.e. those who are in a position 'comparable to workers')[75] who do not have an employment contract, who are not in an employment relationship and who rely primarily on their 'personal labour' for the provision of the relevant services.[76] These Guidelines exempt collective bargaining agreements intended to improve the working conditions of relevant self-employed persons from the application of established competition law constraints (Article 101 of the TFEU). At the national level, during the severest phases of the COVID-19 pandemic, governments adopted emergency support measures for the self-employed, including one-off cash payments, unemployment benefits, income subsidies and both tax and mortgage breaks. Promising though such developments may be, this current piecemeal method of extending the scope of labour law may actually increase the level of regulatory fragmentation. Moreover, despite attempts to include self-employment within the various protective regimes,[77] the traditional categories have not been abandoned.

On the judicial front, there are encouraging signs that the EU institutions are cautiously widening the personal scopes of new legal instruments by incorporating the

[74] Sanjukta Paul, Shae McCrystal, and Ewan McGaughey (eds), *The Cambridge Handbook of Labor in Competition Law* (CUP 2022).

[75] Article 3 of the Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons.

[76] Victoria Daskalova, 'Rethinking Collective Bargaining for the Self-Employed: European Commission Publishes Guidelines on Exemption and Non-Enforcement' (*Kluwer Competition Law Blog*, 7 October 2022) <http://bit.ly/3SlOn6p> accessed 7 August 2023.

[77] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed 2019/C 387/01.

expansive notion of a ‘worker’. Indeed, the desire for a paradigm shift is also gaining traction in the regulatory and policy spheres, precipitated by profound transformations in the labour market. Admittedly, such moves may prompt a Copernican leap in relation to labour law, although there is still a lot more to accomplish. Only time will tell whether EU social law will move beyond the classical split and towards a universalistic conception delivered in a convergent and horizontal manner. Without a doubt, the race towards the universal coverage of social and labour rights, which has really only just begun, promises to be a marathon rather than a sprint.