Migrant domestic workers in the European Union.

The role of law in constructing vulnerability

Vera Pavlou

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 10 June 2016

European University Institute
Department of Law

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Acknowledgements

Even though writing a PhD thesis is notorious for being a solitary journey, there are many people who have accompanied me, one way or another, during my years as a PhD student in Florence. I wish to thank them and acknowledge their help and support.

First of all, I would like to thank my supervisor, Claire Kilpatrick. Working under her supervision during these years has been a great privilege. Claire gave me solid and generous advice at all stages of my doctoral training and knew exactly when to challenge and when to encourage me. I am genuinely grateful for all the inspiration and support I have received from Claire.

An extensive conversation I had with Judy Fudge about at the early stages of this thesis project was particularly helpful and encouraging. The other members of the Examining Board, Bruno de Witt and Mark Bell, are to be warmly thanked for their valuable comments and suggestions.

I would also like to thank Petra Herzfeld Olsson for hosting me at the University of Uppsala in 2013. During my time in Uppsala, Petra very generously integrated me in the activities of the Law Department, discussed aspects of Swedish labour and immigration law with me and helped me arrange interviews. While in Sweden, I have also benefitted from discussions and feedback from Catharina Calleman from the University of Örebro.

I am also grateful to María Luz Rodríguez Fernández for hosting me at the University of Castilla-la Mancha and for sharing with me her knowledge and expertise on the domestic work sector in Spain. Many thanks are also due to Margarita Baranano Cid and to Antonio Baylos Grau for their friendship and support during my stay in Madrid.

The years I spent in Florence gave me much more than a PhD thesis. I am leaving the EUI with many happy memories shared with good friends in this wonderful city. I would like to thank Chloé and Chiara for being friends, flatmates and travel companions – all in one. Many other Florence-based friends have also contributed in making these years memorable: Joldon and Gulzat (as well, as the rest of their vivacious team), Tessa, Ewa, Hanna, Robin, Andreas, Vincent, Aphrodite, Frank and others. I am grateful for having met all of them.

Lastly, I am grateful to my family – especially my parents and Persa – and friends in Cyprus and elsewhere for their love, support and care throughout the years. Many thanks are also due to Antonio for reading and commenting on earlier drafts of this thesis, for listening and taking care of me during the last months.

Florence, 24 May 2016

Thesis Summary

Due to the interplay of factors such as population ageing, women's entry into paid employment and the decline of the welfare state, EU Member States face increasing needs for domestic work services – primarily care but also cleaning and other housekeeping services. The majority of domestic workers in Europe today are migrants, both EU and third-country nationals. They tend to work under precarious conditions that make them vulnerable to day-to-day exploitation. Migrant domestic workers face low wages, long and unregulated working hours, workplace harassment, lack of protection if they become pregnant, and unlawful dismissals. Such vulnerabilities are to some extent attributed to intersections of race, class and gender-based prejudices. Yet law, in particular migration and labour law, has an important role in constructing and sustaining vulnerabilities. My aim in this thesis is twofold: to examine the role of law in structuring vulnerability and to identify legal sources that can challenge and reduce certain aspects of this vulnerability. In the first part of the thesis I identify the key dimensions of migration law that make domestic workers vulnerable to then build a typology of the different migration law regimes of EU Member States. To examine the role of labour law, I compare the labour law regulation of domestic work in four Member States: Spain, Sweden, Cyprus and the UK. The analysis sheds light to labour law's very different ways in structuring and, in certain instances, reducing vulnerability. In the second part of the thesis I examine the treatment of migrant domestic workers under EU law. I first give an overview of EU migration law sources to locate and evaluate norms relevant to domestic workers. Then I revisit a debate on the personal scope of EU employment law and challenge the flawed assumption that it does not apply to domestic work. I finally argue that EU employment law is a useful but largely misunderstood resource for domestic workers.

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Introduction

This thesis starts from the premise that legal regulation has an important role in structuring the vulnerability of migrant domestic workers. My purpose is firstly to explore how law constructs vulnerability by conducting a comparative examination of this group's treatment under the national immigration and labour laws of selected EU Member States and under EU law. The analysis reveals variations and different scales of vulnerability. Secondly, the thesis aims at identifying legal sources and norms that can most adequately challenge and remedy some of migrant domestic workers' day-to-day vulnerabilities.

I start this introductory chapter by giving, in the first section, a brief overview of the characteristics of migrant domestic workers in the EU and the premises for their disadvantage. Once neglected in legal scholarship, the vulnerability of migrant domestic workers in law has been receiving growing scholarly interest during the last decade. Much of the related European legal scholarship has used an international and European human rights law lens to analyse this group's vulnerability and to articulate solutions to remedy disadvantage. In the second section, I give an overview of the legal debate in Europe and discuss the contributions and limits of this scholarship. I argue that while human rights law can be a useful lens it has significant limitations when it comes to comprehensively capturing the role of law in structuring the vulnerability of migrant domestic workers who live and work in the EU. Thus, my thesis proposes to broaden by including in the debate national as well as EU immigration and labour law regimes. In the third section I explain the scope of the thesis and provide a chapter overview. In the final section, I look at some methodological issues.

I. Characterising domestic workers in the EU: a vulnerable, female and migrant-dominated group

As the gender historian Rafaella Sarti writes, even though scholars had for long wrongly assumed that paid domestic work[1] would become obsolete, during the last

[1] For the purpose of this thesis I follow the ILO definition of domestic work as endorsed in Article 1 (a), ILO Convention 189: "the term *domestic work* means work performed in or for a household or households". I therefore use the term "domestic work" in a broad sense as encompassing both care as well as other household work such as cleaning and cooking. In favour of using "care work" and "domestic

thirty years we have been witnessing its resurgence.[2] EU Member States are experiencing this revival as well; demands for paid domestic work are persistent across Europe despite the current economic downturn.[3] The increase in demands for paid domestic work services is due to the interplay of various factors such as the ageing of the population,[4] women's entry into paid employment, the decline of the welfare state, the increase of dual-earner households, as well as working patterns and expectations that are based on an outdated sexual division of labour.[5] Demands for paid domestic work, however, are not met by native workers who are overall reluctant to take up employment in this sector. This is because work in the household is physically and emotionally demanding, tends to be poorly remunerated, and has a low social standing.[6] Moreover domestic work, especially when it involves care, is normally expected to be live-in,[7] but this is a working arrangement that national workers in developed countries are likely to reject. As a result, those engaging in paid domestic work in the EU today are, to a large extent, migrant workers.[8]

Several issues arise as regards domestic workers' limited rights and lack of protection. They are paid notoriously low wages, work long and unregulated hours, are exposed to heightened risks to be harassed at the workplace, may lack protection if they

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work" interchangeably, see Adelle Blackett, "Introduction: Regulating Decent Work for Domestic Workers" (2011) 23 *Canadian Journal of Women and the Law*, 1-46.

[2] Rafaella Sarti, "Historians, Social Scientists, Servants and Domestic Workers: Fifty Years of Research on Domestic and Care Work" in Dirk Hoerder, Elise van Nederveen Meerkerk, Silke Neunsinger (eds), *Towards a Global History of Domestic and Caregiving Workers* (Leiden: Brill, 2015), 25-60.

[3] In Spain for instance, there is no evidence of considerable actual loss of employment in the domestic work sector during the last five years; there is however more precariousness and informality due to the crisis and austerity measures. See, Juan López Gandía and Daniel Toscani Giménez, "*El nuevo régimen laboral y de seguridad social de los trabajadores al servicio del hogar familiar*", (Albacete: Bomarzo, 2012); María Luz Rodríguez Fernández, "Efectos de la crisis económica sobre el trabajo de las mujeres" (2014) 1 *Relaciones Laborales*, 69-83; Zyab Ibañez and Margarita León, "Resisting Crisis at What Cost? Migrant Care Workers in Private Househols" in Bridget Anderson and Isabel Shutes (eds) *Migration and Care Labour: Theory, Policy and Politics* (Basingstoke: Palgrave, 2014) 110-129.

[4] According to statistical data by Eurostat the number of people over 65 in the EU27 was 84.6 million in 2008 and it is expected to steadily rise reaching 151.5 million by 2060. Moreover, the old-age-dependency ratio is projected to double from 25.4% in 2008, to 53.5% by 2060. This means that while at the moment there are four people working for every person over 65, by 2060 this share will only be two to one, thus elderly care needs will augment. Eurostat (2008), Ageing characterizes the demographic perspectives of the European societies, *Statistics in Focus* 72/2008.

[5] See generally, Judy Fudge, "A New Gender Contract? Work/Life Balance and Working-Time Flexibility", in Joanne Conaghan and Kerry Rittich (eds.), *Labour Law, Work, and Family: Critical and Comparative Perspectives*, (New York: Oxford University Press, 2005), 261-288.

[6] Bridget Anderson, "Who needs them? Care Work, Migration and Public Policy" (2012) 30 *Cuadernos de Relaciones Laborales*, 45-61.

[7] Or requires long night shifts and a lot of physical proximity between the carer and the person being taken care of.

[8] Maria Gallotti and Jesse Mertens, Promoting integration for migrant domestic workers in Europe. A synthesis of Belgium, France, Italy and Spain (2013) *ILO International Migration Papers* No118.

become pregnant and are often unlawfully dismissed, to name a few. If they are non-EU nationals, migrant domestic workers may suffer additional disadvantage related to migration status such as deportability, restricted access to social services and lack of paths to permanent residence and citizenship. As for most migrants in general, language and cultural barriers add to the vulnerability of migrant domestic workers as well.

The reasons for domestic workers' disadvantage are various, complex and often attributed to intersections of race, gender and class prejudices.[9] As Martha Nussbaum writes, domestic work may carry a certain "social stigma".[10] This is linked to domestic work's legacy of "slavery, colonialism and other forms of servitude".[11] In addition, the location of the work – the private household – is a crucially important factor for domestic workers' vulnerability. This is because of the ideologically constructed binary between the public sphere of work and the private sphere of the home; historically, this binary has been the premise of conceptualising work within the household as unproductive as opposed to productive, market work. Work within the household, considered as part of women's innate duties, has been carried out by women on an unpaid basis throughout the centuries. This has contributed to domestic work's social devaluation and those who perform it – women. The ideological construction of domestic work as unproductive persists even when it is performed on a remunerated basis.

Dorothy Roberts emphasises the additional "ideological split" that characterises household work. On the one hand, there is what she refers to as "spiritual work" – this is comprised of tasks socially constructed as morally superior because they are related to child rearing and sustaining the family unit. On the other hand, there is "menial work" which encompasses all those tasks that depart from the values and tasks associated to motherhood[12] and are thus constructed as less valuable and requiring little or no skill. It is the less socially valued housework, as Roberts explains, that "is associated with minority, immigrant and working class women".[13] While the distinction is ideological

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[9] Irene Browne and Joya Misra, "The Intersection of Gender and Race in the Labor Market" (2003) 29 *Annual Review of Sociology*, 487-513; Bridget Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour*, (London/New York: Zed, 2000).

[10] Martha C. Nussbaum, *Sex and Social Justice*, (New York/Oxford: Oxford University Press, 1999), page 282.

[11] ILO, Decent Work for Domestic Workers, Report no IV (1), at the International Labour Conference, 99th Session, 2010 (Geneva: ILO, 2009), page 1.

[12] Martha Fineman, "The Neutered Mother", *46 University of Miami Law Review* (1992), 653.

[13] Dorothy E. Roberts, "Spiritual and Menial Housework", (1997) 9 *Yale Journal of Law & Feminism*, 1.

and socially constructed, it serves to attach less value to the work delegated to migrant women from poorer countries.

Law – in particular immigration and labour law – not only reflects these ideological biases around paid domestic work, but has an important role in constructing and sustaining different aspects of migrant domestic workers' vulnerability. On the one hand, immigration law restricts migrant domestic worker's freedom, while on the other hand, labour law excludes or partially includes domestic workers in the personal scope of protections and rights at work. These two systems – immigration and labour law – work in synergy to produce vulnerability. My thesis aims to show, through comparative analysis, the role of law in the construction of vulnerability, as well as the comparative variance and scales of such vulnerability.

II. The legal debate on migrant domestic workers in the EU: where to look for change?

During the last ten years, the issue of migrant domestic workers has seen a significant growth of interest in legal scholarship. In the global struggle to reduce domestic workers' many vulnerabilities, scholars and activists alike have sought change through the use of different legal sources. Much of the European legal scholarship has examined the problem of migrant domestic workers' vulnerability through the lenses of modern slavery, forced labour and trafficking. Due to its focus, this line of scholarship has thus far centred its efforts mainly on the possibilities of using international law sources – such as the newly adopted ILO Convention 189 on Decent Work for Domestic Workers (C.189)[14] – and European human rights law to challenge vulnerability.[15] While this is an important and valuable focus, my thesis suggests that the almost exclusive focus on international sources as tools to challenge or reduce migrant domestic workers' vulnerability is problematic for a series of reasons.

To begin with, human rights law tends to address the most extreme and egregious forms of abuse such as slavery, forced labour and trafficking. While, as

[14] ILO, Convention concerning decent work for domestic workers, C 189, 1 June 2011.

[15] See generally, Clíodhna Murphy, "The enduring vulnerability of migrant domestic workers in Europe" (2013) 62 *International & Comparative Law Quarterly*, 599-627; Virginia Mantouvalou, "Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor" (2012) 34 *Comparative Labor Law and Policy Journal*, 133; Siobhan Mullally, "Migration, gender and the limits of rights" in Ruth Rubio Marín (ed.), *Human Rights and Immigration*, (Oxford: Oxford University Press, 2014), 145-177.

outlined below, this is important, it does not capture the day-to-day forms of vulnerability and abuse migrant domestic workers face. However, ILO C.189 can be distinguished from other international law instruments; the Convention's specific focus on domestic workers – both migrants and nationals – addresses the vulnerabilities of this group in a much more holistic way than other international law standards. I analyse the added value of ILO C.189 later in this introduction.

Second, using international instruments has limitations in terms of effectiveness. These limitations include, for instance, dependence on state ratification, limited possibilities for individuals to invoke rights, as well as lack of state compliance with adverse findings and the ineffectiveness of implementation mechanisms. International law sources, even those designed to protect migrant workers such as the UN Convention on Migrant Workers and Members of their Family, have limitations to fully deliver their promise because of states' sovereignty claims.[16] As Catherine Dauvergne writes "once an argument is shifted to the terrain of rights, the right of the nation to shut its borders tends to overshadow the rights claims of individuals".[17] I explore the issue of the limits of international instruments' effectiveness below by focusing in particular on the ILO C.189.

Third, the human rights lens tends to underanalyse the fact that some national systems may provide better protection against vulnerability than others. A comparative analysis on the treatment of migrant domestic workers under different national legal regimes provides for a corrective view and helps to shed light on what kind of legal norms can in fact reduce some dimensions of vulnerability.

Fourth, the scholarship that focuses on international instruments has not effectively analysed the contribution of EU law in creating and, alternatively, reducing migrant domestic workers' vulnerability. Domestic workers in the EU, while usually non-nationals, are not necessarily all Third-Country Nationals (TCNs), but they can also be EU citizens. In addition, TCNs are not a homogeneous category; different categories of TCNs are treated differently under EU law; thus there is need for a more nuanced

[16] Judy Fudge, "Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers" (2012) 34(1) *Comparative Labor Law and Policy Journal*, 95-131.
[17] Catherine Dauvergne, *Making people illegal. What Globalization Means for Migration and Law*, (New York: Oxford University Press, 2008), page 27.

analysis of their statuses. Finally, EU employment law sources open important avenues to challenge migrant domestic worker's vulnerability.

The focus on international and European human rights is, I would suggest, due to two flawed assumptions that concern the profile of migrant domestic workers in Europe today and the personal scope of EU labour law. These two misconceptions have directed scholars in turning to international or Council of Europe legal sources, instead of EU law, when looking for transformative changes for migrant domestic workers. For instance, as regards the profile of domestic workers Virginia Mantouvalou writes, "Domestic workers are also very often migrant, and immigration legislation in many national legal orders also disadvantages them. The lack of citizenship status (as legal status) leads to their exclusion from additional labour rights."[18] This view, however, conflates the notions of migrant worker with that of TCN and overlooks the diverse migration statuses domestic workers hold. As evidence from the case studies in this thesis suggests, domestic workers are, also very often, EU migrants. Domestic workers who are EU migrants fall under the personal scope of EU rules on the free movement of workers that restrict Member States' margin to apply national rules that disadvantage workers on the basis of (EU) migration status. In addition, the flawed assumption that EU employment law does not apply to domestic workers has made scholars neglect the relevance of EU employment law sources as tools to reduce vulnerability. I reassess these two assumptions later in this thesis to argue that EU law is a useful but misunderstood resource for migrant domestic workers.

The emphasis of the legal debate on migrant domestic workers on the issues of modern slavery, forced labour and trafficking is also related to a line of judgements handed down by the European Court of Human Rights (ECtHR or Strasbourg Court) during the last decade. This case law started with the *Siliadin v France* judgement in 2005 that engaged Article 4 of the European Convention on Human Rights (ECHR) and held that states are under a positive obligation to prohibit slavery, servitude and forced labour. The ECtHR later on confirmed states' positive obligation under Article 4 to protect individuals from servitude in *C.N. v UK*. Both *Siliadin v France* and *C.N. v UK* were litigated by migrant domestic workers who were illegally resident. Subsequently,

[18] Virginia Mantouvalou, "Workers without rights as citizens at the margins, (2013) 16(3) *Critical Review of International Social and Political Philosophy*, 366-382.

in *Rantsev v Cyprus and Russia* the Court expanded its doctrine on states' positive obligations under Article 4 to include the prohibition of trafficking.[19]

In what follows, I present the ECtHR's case law on Article 4 and discuss the contributions and limits of the strategy of invoking the forced labour and trafficking paradigms to remedy migrant domestic workers' vulnerability. I then examine the added value and limitations of using ILO C.189 as a legal source to reduce the vulnerability of migrant domestic workers. My aim is not to provide a comprehensive analysis of the Convention's provisions. I instead focus on selected provisions that are indicative of the Convention's added value and highlight some key limitations of the Convention's transformative power in the context of EU Member States.

i. The turn to human rights for domestic workers: contribution and limits of modern slavery, servitude, forced labour and trafficking discourses

Siliadin v France concerns the case of a Togolese 15-year old girl who was recruited in her country of origin to work as a live-in domestic worker in Paris for a French family of Togolese origin; she was promised schooling and regularisation of her migration status in exchange. [20] It was agreed that at the beginning Siliadin would receive no salary in order to pay off the cost of her plane ticket. She arrived in France in 1994 on a tourist visa but instead of sending her to school, the employers withheld her passport and made no arrangements to change her visa. After working for some months without pay, the employers "lent" her to another family. Siliadin's working and living conditions were abusive and exploitative; she worked for about 15 hours per day, seven day per week taking care of the family's children, cooking and cleaning. She was allowed out of the house only occasionally, received no pay and instead of a private room, she slept on a mattress in the children's room. When she managed to escape, the Committee against Modern Slavery – a platform of French civil society organisations – assisted her in bringing claims against the employers in domestic courts. Siliadin's civil action succeeded and the Paris Employment Tribunal awarded her compensation amounting to approximately 30 000 Euro for unpaid wages, holiday leave and notice period.[21] However, relying on Article 4 of the European Convention on Human Rights,

[19] *Rantsev v Cyprus and Russia*, European Court of Human Rights, App. No 25965/04, Judgement of 7 January 2010.
[20] *Siliadin v France*, European Court of Human Rights, App No 73316/01 Judgement of 26 July 2005.
[21] *Siliadin v France*, paras 9-45.

Siliadin brought her case to the Strasbourg Court. She complained that French criminal law contained no effective protection against slavery, forced or compulsory labour. The ECtHR rejected the claim that Siliadin was a victim of slavery and held instead that she was a victim of servitude.[22] The novelty of the judgement was that the Strasbourg Court held for the first time that Article 4 ECHR imposed a positive obligation on states to enact legislation that effectively protects individuals from servitude.[23]

Siliadin v France was celebrated in human rights scholarship. For Mantouvalou, the judgement "showed the potential of the European Convention on Human Rights to address violations of labour rights" because it established that Article 4 can be applied horizontally in relations between individuals which implies the state's positive duty to intervene in the employment relationship so as to protect the vulnerable party.[24] On an even more optimistic assessment, the judgment was also seen as a step towards bridging the gap between civil and social rights' protection in Europe.[25]

The facts in *C.N. v UK* are very similar to those in *Siliadin.*[26] The applicant, a young woman from Uganda and allegedly a victim of sexual violence, entered the UK on a false passport that she obtained with the help of a so-called S., a wealthy relative of hers. When C.N. arrived in London, S. confiscated her travel documents and through an agent, arranged for her to work as a live-in carer for an elderly couple. C.N. worked long hours seven days a week, was permanently on-call and was given only a few hours per month time-off. Her freedom of movement was effectively restricted; S. controlled and constantly threatened her with violence and expulsion. C.N. received no wages for her work as S. withheld all payments the elderly couple made to the agent. When she finally escaped, C.N. was in a very bad conditions with frail physical and mental health. She unsuccessfully applied for asylum and then filed a complaint to the police stating that she was a victim of domestic servitude.[27] UK legislation as it stood at the time contained no criminal offence of domestic servitude and, accordingly, the police could

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[22] *Siliadin v France*, para 129.
[23] The Strasbourg Court already had established case law on positive obligations deriving from Article 2 on the right to life and Article 3 on the prohibition of torture.
[24] Virginia Mantouvalou, "Servitude and forced labour in the 21st century: the human rights of domestic workers" (2006) 35 *Industrial Law Journal*, page 395.
[25] Virginia Mantouvalou, Labour Rights in the European Convention of Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation, (2013) 13(3) *Human Rights Law Review*, 529-555.
[26] *C.N. v UK*, European Court of Human Rights, App. No 4239/08, Judgement of 13 November 2012.
[27] *C.N. v UK*, paras 4-31.

not investigate her allegations. C.N. brought her case to the ECtHR and complained that the UK had failed to protect her rights under Article 4 ECHR. The Strasbourg Court confirmed its case law in *Siliadin* and found that the UK was in breach of Article 4 ECHR because when the facts of the case arose, it had no adequate criminal legislation to effectively protect the applicant against slavery.[28] While *C.N. v UK* was pending in Strasbourg, the UK enacted legislation that explicitly made slavery, servitude and forced or compulsory labour a criminal offence punishable with a fine and/or imprisonment of up to 14 years; Section 71 of the Coroners and Justice Act came into force on 6 April 2010.

In 2010 the ECtHR handed down the *Rantsev v Cyprus and Russia* judgement. This case did not concern domestic work but trafficking for the purpose of sexual exploitation. The applicant's daughter, Oxana Rantseva a young Russian woman, arrived in Cyprus through a so-called "artiste" visa scheme to work as a dancer in a cabaret nightclub. It was widely known that the "artiste" visa was channelling migrant women to prostitution. When Oxana Rantseva sought protection, the police handed her back to the cabaret owner. In her second attempt to escape, she tragically died by falling from the building where she was kept. The Court, building on its previous case law on Article 4, held that states' positive obligations extend to penalising and prosecuting trafficking as well as to taking effective measures to protect individuals from trafficking and exploitation.[29] Cyprus was *inter alia* condemned for enacting and maintaining a migration scheme that exposed migrant women to great vulnerability; the state was found to be complicit because the authorities were well aware that the artiste visa was a disguised route to prostitution but did nothing to stop migrant women's sexual exploitation.

But to what extent is the kind of intervention the Strasbourg Court envisions truly transformative for migrant domestic workers? According to the jurisprudence on Article 4, states' positive obligations do not extend beyond the obligation to enact and effectively enforce criminal laws against slavery, servitude, forced labour and trafficking. Yet, a criminal law approach has many limitations and falls short of addressing the kind of day-to-day vulnerability of migrant domestic workers. Because slavery, servitude and forced labour are criminal offences they set a very high threshold

[28] *C.N. v UK*, paras 76-77.
[29] *Rantsev v Cyprus and Russia*, paras 283-286.

of abuse before protection can be afforded; thus only egregiously bad treatment will be sanctioned under this framework. In addition, criminal laws entail strict rules on proof and liability which limit even more criminal law's reach. Arguably, an effective criminal law machinery may deter employers from engaging in highly abusive behaviour. On the other hand, even if the employer's criminal liability is established, the only remedy available to the migrant domestic worker would be compensation for the harm suffered.[30] In addition, the expansion of criminal law does little in terms of ensuring domestic workers' rights at work; positive obligations under Article 4 ECHR do not extend to guaranteeing access to labour law rights and protections. For instance, in *C.N. v UK* the ECtHR did not challenge the common law doctrine of illegality that bars migrants employed in breach of immigration rules from enforcing their contracts of employment.[31]

Moreover, the discourses on slavery, force labour and trafficking do not pay enough attention to the crucial role of immigration law in constructing migrant domestic workers' vulnerability. The Strasbourg jurisprudence on Article 4, while acknowledging that there is a link between migration regimes and vulnerability, falls short of envisaging the kind of positive obligations that could address the vulnerability of domestic workers holistically; it fails to articulate positive obligations with the potential to be truly transformative. A transformative positive obligation would be, for instance, to establish independent migration routes that allow migrant domestic workers to enter the national labour market under conditions of freedom and equality, while having prospects of acquiring permanent residence and eventually, full citizenship.

When the *Rantsev* case was brought to the Strasbourg Court, the complicity of the Cypriot state in the sexual exploitation of migrant women became widely known; it was partly due to this international pressure that the government gradually abolished the artiste visa regime.[32] Therefore, litigation at the ECtHR had a positive impact that went

[30]Judy Fudge and Kendra Strauss, "Migrants, unfree labour and the legal construction of domestic servitude. Migrant domestic workers in the UK" in Cathryn Costello and Mark Freedland M (eds.), *Migrants at Work. Immigration and Vulnerability in Labour law* (Oxford University Press, 2014).

[31] I discuss the illegality doctrine in Chapter II of this thesis.

[32] I would suggest that there were also internal factors that contributed to the abolition of the visa. For instance, the work of the Office of the Ombudsman gave visibility to the problem, campaigning by local NGOs and the change to a somewhat more gender equality-committed government in 2008. The accession of Cyprus to the EU in 2004 was also a contributing factor. On the one hand, the process of accession gave the impetus for legal and policy changes in various fields. On the other hand, the simultaneous accession of eight Central and Eastern European states as well as of Bulgaria and Romania

beyond providing relief to an individual victim[33] and to provide overarching results for vulnerable female migrants as group. The features of the artiste visa scheme the Court found most problematic were the fact that it tied the migrant to the cabaret owner/employer who had to lodge a bank guarantee to cover any potential costs related to the migrant's stay and to inform the authorities in case the migrant left the place of work. The bank guarantee was often used as a tool of coercion and control.[34] But while this problematic immigration path was closed down, there was no obligation on the state to guarantee any safe alternatives. Importantly, the Cypriot visa scheme on migrant domestic workers, which shares striking similarities to the abolished artiste visa, has not been challenged.

As I discuss in Chapter One of this thesis, the three elements the Court found problematic as regards artistes visas – tied status, bank guarantee and employer's obligation to inform the authorities – form also part of the Cypriot visa regime on TCN domestic workers. In this respect, Siobhán Mullally is right to argue that "as in other areas of international law, it is primarily the moments of crisis – incidents of human trafficking, slavery, or forced labour – that have captured the attention of human rights law".[35] In addition, for the ECtHR to intervene there is a need for an identified, individual victim to first exhaust all domestic remedies before filing a claim to Strasbourg. In other words, it seems that we would need another victim like Oxana Rantseva but on a domestic worker visa for the ECtHR to pressure the Cypriot state to abolish or reform this visa scheme. Therefore, even if the Strasbourg Court has made steps towards acknowledging the nexus between immigration and vulnerability, the approach it contemplates is not effective in remedying migrant domestic workers' vulnerability in a holistic and most importantly, preventive way.

The discourses on slavery, servitude, forced labour and trafficking not only fall short of articulating transformative solutions for migrant domestic workers; in addition, they carry certain risks of reinforcing their vulnerability. One risk is that states use these discourses as a pretext to close down or restrict legal migration routes. Second, the very high threshold these discourses set risks trivialising other forms of daily abuse that are

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in 2007 and the liberalisation of migration rules meant that demands for migrant women in the sex industry were partly covered from intra-EU migration.

[33] Of course, in the *Rantsev* case, the relief was not granted to the actual victim of the violations but to her father.

[34] *Rantsev v Cyprus and Russia*, para 292.

[35] Mullally, "Migration, gender and the limits of rights" in *Human Rights and Immigration,* 2014, above, page 169.

not as severe as servitude or trafficking. The third risk this approach entails is that it puts the blame on individual – normally "foreign" – employers for the abuse while disguising the role of the state in creating this vulnerability in the first place through its migration regime.[36]

Virginia Mantouvalou has argued that the reception of the jurisprudence on positive obligations under Article 4 ECHR in the UK shows the "transformative power of human rights law" and cites the enactment of the UK's 2009 Bill on Slavery – the law that criminalises slavery – as an example.[37] Yet, the enactment of criminal law provisions against modern slavery was coupled with a reform of the UK's visa regime for migrant domestic workers; as of April 2012 the entry rules on non-EU domestic workers became more restrictive than ever.[38] The UK government justified the restrictive turn partly through the need to protect migrant women from forced labour. In the words of Theresa May, Home Secretary of the coalition government that reformed the migrant domestic workers' visa:

> "We recognise that the overseas domestic worker visa can at times result in the import of abusive employer/employee relationships to the UK. It is important that those who use these routes to bring their staff here understand what is and what is not acceptable. […] *But the biggest protection for these workers will be delivered by limiting access to the UK through these routes*. We are restoring them to their original purpose to allow visitors and diplomats to be accompanied by their domestic staff – not to provide permanent access to the UK for unskilled workers."[39] (emphasis added)

We thus see that the UK, through this paternalistic response to vulnerability, manipulated legitimate claims by migrant women to be free from abuse so as to restrict their access to a legal migration status.[40] The excerpt above also illustrates the state's attempt to portray the problem with the abuse of domestic workers as one that is foreign to the UK and imported.

Grounding the debate on migrant domestic workers on the modern slavery or trafficking paradigms can be tempting. The cases that reached the Strasbourg Court

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[36] Fudge and Straus, "Migrants, unfree labour and the legal construction of domestic servitude. Migrant domestic workers in the UK", in *Migrants at Work. Immigration and Vulnerability in Labour law*, 2014.
[37] Mantouvalou, "Workers without rights as citizens at the margins" (2013) 16(3), above.
[38] I discuss the reform of the UK overseas domestic worker visa in detail in Chapter One of this thesis.
[39] Theresa May, Written Statement to the Parliament: Immigration (employment-related settlement, overseas domestic workers, tier 5 of the points-based system and visitors), 29 February 2012, at https://www.gov.uk/government/speeches/immigration-employment-related-settlement-overseas-domestic-workers-tier-5-of-the-points-based-system-and-visitors-wms (accessed 1 March 2016).
[40] See also, Mullally, "Migration, gender and the limits of rights" in *Human Rights and Immigration* (2014), 145-177, above.

provide powerful narratives of extreme abuse and appalling exploitation. The need to eradicate such injustice is self-evident, thus the modern slavery lens with its strong symbolic connotations provides for compelling arguments. As Judy Fudge and Kendra Strauss note, "by invoking slavery, human and labour rights advocates sought to engage a powerful legal obligation; in international treaty and customary law, slavery is both *erga omnes* and part of *jus cogens*".[41] Yet, the lenses of slavery and trafficking is narrow and thus unsuitable for addressing the full range of migrant domestic workers' vulnerabilities, particularly the more day-to-day forms of exploitation. When juxtaposed to the plight of migrant domestic workers who were trafficked or worked in slavery-like conditions such as Rantseva or Siliadin, abuse that is not as extreme looks less like abuse. Through the slavery lens, other issues of crucial importance to domestic workers such as low pay, long and unregulated hours of work, and lack of access to a regular migration status no longer seem so acute.

ii. The added value and limitations of ILO C.189

At the ILO, the debate on domestic work started as early as 1948 with the adoption of a Resolution concerning the conditions of employment in domestic work, followed by a second Resolution in 1965.[42] It was only several decades later that a legally binding international instrument was adopted. In June 2011 the ILO's International Labour Conference adopted Convention 189 on Decent Work for Domestic Workers, along with the supplementing Recommendation 201. The Convention is a hard law instrument, open to ratification by member states of the ILO. Ratifying states commit to incorporate all provisions in their domestic legal order and report regularly to the ILO on the measures they take for implementation.[43] States enjoy flexibility as regards implementation; this can be done by adopting new laws, by amending existing legislation, through collective agreements, or with any other measure.[44] C.189 entered into force on 05 September 2013. Unlike the Convention, Recommendation 201 is not open to ratification and it can thus be characterised as a soft law instrument. The provisions of the Recommendation, despite their non-legally

[41] Fudge and Strauss, "Migrants, unfree labour and the legal construction of domestic servitude. Migrant domestic workers in the UK" in Migrants at work (2014), above, page 6.
[42] ILO, Decent Work for Domestic Workers, Report no IV, 2009, above.
[43] Article 22, ILO Constitution.
[44] Article 18, C.189.

binding nature, must be considered along with those of the Convention.[45] The Recommendation's purpose is twofold: to supplement the Convention's provisions and give practical guidance as regards implementation.[46]

As Adelle Blackett has argued – more than a decade before the adoption of ILO C.189 – domestic workers were to a large extent already included in the personal scope of most ILO Conventions, the only limited exceptions being when a Convention explicitly exempts domestic workers or when a ratifying state exempted domestic workers on the basis of general flexibility clauses.[47] In the debates prior to the adoption of C.189, the ILO reiterated that domestic workers are to a large extent covered by most of its Conventions.[48] What is then the added value of a Convention on domestic workers? The most important contributions of C.189 in the struggle to reduce domestic workers' vulnerability are its acknowledgment of the sector's specificity and its participatory process of adoption.

C.189 is the first international legal source that sets minimum standards for the regulation of the domestic work sector. Even though domestic work is one of the largest sectors of employment globally with around 53 million workers, the vast majority of whom are women,[49] it has been to a large extent ignored in international standard-setting. The Convention and supplementing Recommendation fill an important regulatory gap in international labour law through a sectoral approach – the adoption of minimum standards dedicated to a specific sector.

The sectoral approach allows the Convention to give visibility and address those vulnerabilities that are unique to domestic workers in general and to migrant domestic workers in particular. For example, Article 9 contains three provisions that are crucial in safeguarding the autonomy of domestic workers and ensuring the exercise of their agency. Paragraph (a) challenges national rules that oblige domestic workers to live-in and states that decisions on accommodation arrangements should be taken freely between the parties. In addition, the Recommendation sets an extensive list of quality

[45] Recital 1, Recommendation 201.
[46] Preamble and Article 1, Recommendation 201.
[47] Adelle Blackett, "Making domestic work visible: The case for specific regulation" (Geneva: ILO, Labour Law and Labour Relations Programme Working Paper 2, 1998).
[48] ILO, Decent Work for Domestic Workers, Report no IV, 2009, above.
[49] ILO, *Domestic workers across the world: Global and regional statistics and the extent of legal protection* (2013).

standards as regards living conditions for live-in domestic workers.[50] Paragraph (b) makes clear that domestic workers should be able to spend their free time as they wish, away from the employer. This provision challenges common paternalistic practices that oblige domestic workers to spend their annual leave with the employer or remain in the household after completing their hours of work. Paragraph (c) seeks to protect migrant domestic workers from the not so uncommon practice of confiscation of their travel and identity documents. As Adelle Blackett rightly notes, such provisions would seem unnecessary and absurd for the regulation of any other employment relationship but to domestic workers are of utmost importance.[51] A second important example is Article 13. It challenges the classic exclusion of domestic workers from the personal scope of health and safety laws and requires states to take measures adapted to the specificities of working in a household so as to ensure a safe and healthy working environment for domestic workers.

Apart from being the first international law instrument to explicitly address domestic workers' "sectoral disadvantage",[52] the value of C.189 also lies in the fact that it is the product of domestic workers' struggles, campaigning and claiming of rights.[53] The ILO's tripartite system that involves states, employers' and workers' associations allowed the active participation of domestic workers' groups in the negotiation process leading to the adoption of the Convention. Domestic workers' input and participation has been crucial in both shaping the Convention's content and in fostering the creation of a global domestic workers' movement that created international labour law. The Convention emerges from and is the product of this movement.[54] This in itself has very important symbolic connotations as it removes domestic work from the hidden, largely unregulated private household and places it in the process of international law setting. The adoption of C.189 created a much needed momentum for groups and associations of domestic workers in different EU Member States to initiate debates and strive for change at the local level.[55]

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[50] Recital 17, Recommendation 201.
[51] Adelle Blackett, "The Decent Work for Domestic Workers Convention and Recommendation" (2012) 106 *The American Journal of International Law*,778-794.
[52] Einat Albin and Virginia Mantouvalou, "The ILO Convention on Domestic Workers. From the Shadows to the Light" (2012) 41 *Industrial Law Journal*, 67-78.
[53] Blackett, (2012),above.
[54] Blackett, (2012), above; Martin Oelz, The ILO's Domestic Workers Convention and Recommendation: A window of opportunity for social justice, (2014) 153(1) *International Labour Review*, 143-172.
[55] Look, for instance, the campaigning of a national NGO in Ireland, Migrant Rights Centre Ireland (MRCI) http://www.mrci.ie/?s=ILO&submit= (28 March 2015).

Despite its undisputable importance, C.189 has certain limitations that may compromise its potential to be truly transformative for domestic workers in the EU. A first limitation is its personal scope. Article 2 (1) states that the Convention applies to "all domestic workers". Yet the definitions section challenges the Convention's claim of inclusiveness. Article 1 (b) provides that the "term domestic worker means any person engaged in domestic work within an employment relationship."[56] The reference to the existence of an employment relationship excludes domestic workers who are self-employed.[57] This is bound to create problems of legal characterisation due to the contested boundaries between employment and self-employment. For example, Sandra Fredman notes that it is unclear whether the Convention applies to agency workers who in some jurisdictions may be considered self-employed.[58]

A second limitation is that the Convention does not go far enough in challenging the exclusion or partial inclusion of domestic workers from protective labour law provisions. For example, there is no provision to address domestic workers' vulnerability as regards dismissal rules. As evidence from my case studies suggests, labour law regimes often allow for domestic workers' dismissal on more flexible terms than other workers;[59] the Convention, however, seems to overlook this aspect of their vulnerability. Another example is Article 7 on domestic workers' right to receive information on their terms and conditions of employment. This is an important provision that can help formalising a work relationship often not regarded as proper employment by the very parties participating in it. There is however no obligation to provide domestic workers with written particulars; Article 7 merely states that written information is preferred where possible. Thus, while the Convention certainly takes some crucial steps, it does not wholly disrupt the paradigm of exceptionalism as regards domestic work's labour regulation.

A third limitation is that the Convention's immigration aspect is not fully fledged. In principle C.189 does not exclude domestic workers on the basis of migration status; thus temporary migrants or even those who work in breach of immigration rules

[56] Article 1 (b), ILO C.189.
[57] Albin and Mantouvalou, "The ILO Convention on Domestic Workers. From the Shadows to the Light", (2012) 41 *Industrial Law Journal*, 67-78, above.
[58] Sandra Fredman, "Home from Home. Migrant Domestic Workers and the International Labour Organisation Convention on Domestic Workers" in *Migrants at Work, Immigration and Vulnerability in Labour Law* (2014), above.
[59] See discussion in Chapter II of this thesis.

are covered by the Convention's provisions.[60] Yet the Convention pays no specific attention to how immigration law restrictions may impair domestic workers' access to labour rights; it does not challenge for instance immigration rules that prohibit migrant domestic workers to change employers or restrict access to permanent residence. Adelle Blackett is right to note that C.189 is not a migrant workers instrument.[61] On the other hand, given that globally such a large share of domestic workers are migrants, an approach that is more sensitive to migration-related vulnerabilities would have been preferred.

But the most critical limitation of C.189 is its lack of an effective enforcement mechanism. As an international organisation, the ILO does not have judicial mechanisms to impose the implementation of its Conventions on states; this is a limitation intrinsic to international law. To be sure, the ILO has a supervisory system; under Article 22 of the ILO Constitution, states commit to submit annual reports on the Conventions they ratify. Workers' and employers' organisations as well as other states may file representations or complaints against another state for failure to comply with a ratified Convention.[62] But there are no effective sanctions against states that fail to submit reports or to comply with their obligations. In addition, to be bound by an ILO Convention a state must first ratify it. Thus far only six EU Member States have ratified C.189, namely Belgium, Finland, Germany, Italy, Ireland and Portugal. At least the UK – one of the eight countries that abstained from voting in its adoption –[63] Spanish and Swedish governments have explicitly expressed their lack of interest in ratifying C.189.

The limitations highlighted above indicate that it is useful to both comparatively examine national legal regimes, as well as to test the potential of EU law sources in reducing migrant domestic workers' vulnerability. Bringing national and EU law into the discussion on migrant domestic workers complements the analysis as regards the role of law in creating vulnerability and sheds light on different avenues to challenge this vulnerability. Thus, my thesis urges a broadening of perspective away from international human rights law and the ILO C.189 but without denying their utility.

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[60] Oelz, "The ILO's Domestic Workers Convention and Recommendation: A window of opportunity for social justice" (2014) 153(1) *International Labour Review*, 143-172, above.
[61] Blackett, "The Decent Work for Domestic Workers Convention and Recommendation" (2012) 106 *The American Journal of International Law*,778-794, above.
[62] Articles 24 and 26, ILO Constitution.
[63] Along with the Czech Republic, El Salvador, Malaysia, Panama, Thailand, Sudan and Singapore. The only country that voted against the Convention was Swaziland.

III. The scope of the thesis and chapter overview

Judy Fudge and Kendra Strauss' critique of the slavery and trafficking paradigms reminds us to be attentive of how migrant workers' vulnerability is constructed "through systemic and institutional features of state policies and practices relating to immigration and labour law regulation".[64] As regards the nexus between immigration and labour regulation in the production of vulnerability, Bridget Anderson and Judy Fudge have demonstrated that immigration law goes beyond controlling entry to shape migrant workers' position in the labour market and *vis à vis* employers.[65] Immigration law not only regulates who gets to enter the state and who is left out; most importantly, immigration law sets conditions on the basis of which entry is granted. These conditions create "a variety of different migration statuses, some of which are highly precarious that in turn generate a differentiated supply of labor that produces precarious workers and precarious employment norms."[66]

It is the law's constitutive role in structuring the vulnerability of migrant domestic in the EU that I wish to explore. My purpose is twofold. First, to show how immigration and labour law interact to create conditions of vulnerability for migrant domestic workers. Second, to identify legal sources that can adequately challenge – at least some aspects of these – vulnerabilities.

I structure the discussion as follows. **Chapter One** examines the role of national immigration law in structuring vulnerability. I begin by identifying key dimensions of migration law that make migrant domestic workers vulnerable and then use these dimensions as indicators to evaluate to what extent the migration regimes of selected EU Member States create vulnerability. My aim is not carry an in-depth analysis of the situation of migrant domestic workers in all Member States; rather, I am interested in showing divergences in the way national immigration rules in the EU approach migrant domestic labour. This evaluation allows me to build a typology of the different migration law regimes of EU Member States as regards migrant domestic workers.

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[64] Fudge and Strauss, "Migrants, unfree labour and the legal construction of domestic servitude. Migrant domestic workers in the UK" in Migrants at Work (2014), above.

[65] Bridget Anderson, "Migration, immigration controls and the fashioning of precarious workers (2010) 24 (2) *Work, Employment and Society*, 300-317; Fudge, "Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers" *Comparative Labor Law and Policy Journal*, above.

[66] Fudge, (2012), above, page 96.

Chapter Two examines the role of national labour law in creating or reducing domestic workers' vulnerability. I select one Member State from each immigration regime type and compare their labour law regulation of domestic work. I focus on Spain, Sweden, Cyprus and the UK and locate any norms of specific importance to migrant domestic workers. A comparative perspective on the treatment of domestic work sheds light on labour law's very different ways of structuring and, in certain instances, reducing vulnerability.

In **Chapter Three** I examine the treatment of migrant domestic workers under EU migration law. I start by giving an overview of EU migration law sources to locate and evaluate norms relevant to domestic workers. My analysis indicates that while there are some sources in EU migration law that could challenge vulnerability structured in national migration law, these are largely unavailable to migrant domestic workers.

In **Chapter Four** I examine the relevance of EU employment law sources in addressing some aspects of domestic workers' vulnerability. I revisit a debate on the exclusion of domestic work from the personal scope of EU employment law to argue that EU employment law is a useful but largely misunderstood resource for migrant domestic workers. EU employment law sources are particularly promising due to their broad personal scope; except for the law on the free movement of workers that applies only to EU nationals, all other employment law sources apply to all workers in the EU and can thus be invoked by migrant domestic workers including those who are illegally resident.

IV. Some methodological considerations

This thesis draws on analysing primary and secondary legal sources. Because of the specificities of domestic work some kinds of legal sources tend to be scarce. Apart from labour and immigration legislation there is, for instance, very limited case law on domestic workers in general and on migrant domestic workers in particular. The UK presents an exception in this respect; recently, there has been a growing number of litigation by migrant domestic workers in UK Employment Tribunals and Courts; I analyse this recent case law extensively.

For the cases of Cyprus, Sweden and Spain, where case law on migrant domestic workers is scarce to non-existent, I rely on alternative sources in order to analyse the legal and institutional context of migrant domestic labour. As regards Cyprus, I use the reports of the Ombudsman, an Institution that has received numerous claims by non-EU domestic workers. To complement the information as regards the law and policy context in the Spanish and Swedish cases, I conducted a series of interviews with key informants: trade union representatives (Sweden and Spain) and a domestic workers' association (Spain).

The interviewees were selected because of their expertise on the situation of migrants in the domestic work sectors in the respective national contexts. In Sweden, I interviewed representatives of the trade union Kommunal, the largest trade union in Sweden, because it organises service workers, including caretakers for the elderly and children. In addition, I conducted an interview with the legal advisor of the Swedish Confederation of Professional Employees (TCO), Samuel Engblom. Even though TCO does not organise domestic workers, Samuel Engblom is a legal expert on issues of labour migration in Sweden and was thus well-placed to provide important insights on the questions of my research. In Spain, the interviewees were representatives of two major trade unions, *Comisiones Obreras* (CC.OO) and *Union General de Trabajadores* (UGT), because they organise service workers and have been involved in a recent process of reforming the labour law regulation of the Spanish domestic work sector. The interviews with CC.OO and UGT revealed that, even though trade unions take part in the debates concerning the regulation of domestic work, domestic workers themselves, especially migrants, rarely become union members. Migrant domestic workers in Spain have instead formed alternative groups and associations. In order to complement the information, I interviewed the representatives of one such association, *Servicio Domestico Activo* (SEDOAC), whose members are mainly domestic workers from Latin America. SEDOAC, despite being a small association, was a key informant on the Spanish domestic work sector for a study prepared by the EU Fundamental Rights Agency.[67] I used semi-structured interviews with open-ended questions that allowed a focused but flexible communication. All interviews were conducted in the

[67] Fundamental Rights Agency, *Migrants in an irregular situation employed in domestic work: Fundamental Rights Challenges for the European Union and its Member States* (Luxembourg: EU Publications Office, 2011).

period between September 2013 and March 2014 in Stockholm and Madrid in English and Spanish.

Throughout the thesis I examine both legally and illegally resident migrant domestic workers. As Cecilia Menjívar and Daniel Kanstroom emphasise there is "historical permeability of the line between 'legal' and 'illegal' categories".[68] This is certainly true for non-EU domestic workers who often drift from legal to illegal migration law status and *vice versa*. Moreover, in some jurisdictions working in breach of immigration law impairs access to employment rights and protections, thus migrant illegality can be a very important vulnerability vector. As I wish to capture the whole spectrum of vulnerabilities I include both categories in the analysis. This approach also allows me to test whether a legal migration status is a guarantee for better rights at work.

[68] Cecilia Menjívar and Daniel Kanstroom, "Introduction – Immigrant "Illegality: Constructions and Critiques"in Cecilia Menjívar and Daniel Kanstroom (eds), Immigrant 'Illegality': Critique, Experiences and Responses (New York: Cambridge University Press, 2014), page 3.

Chapter One: Mapping the entry routes of migrant domestic workers in EU Member States: national immigration laws as vectors of vulnerability and typology of regimes

I. Introduction

In this chapter I examine the role of national migration law in producing migrant domestic workers' vulnerability. To examine this role I mainly focus on the law governing TCNs domestic workers' first entry in an EU Member State. EU Member States differ on the migration regimes they apply to regulate the first entry of migrant domestic workers. In some Member States, migration law and policy explicitly and actively target migrant domestic workers; other Member States facilitate migrant domestic workers' entry, while a third group of Member States have restrictive entry regimes on paper coupled with a more *laissez-faire* approach in practice. Even though the focus of my analysis in this chapter is on national law, it should be noted that EU migration law on TCNs, such as the Blue Card or Returns Directives, impact on Member States' regimes.[69]

The categories of the TCN and of the EU citizen under transitional arrangements are the most useful ones to examine the role of national immigration law in creating vulnerability. The treatment of EU migrants with full access to the EU free movement of workers regime is not analysed here. Similarly, I do not analyse the case of TCNs who are related to an EU national and thus fall under the scope of Directive 2004/38/EC on the rights of Union citizens and members of their family. Nor do I examine TCNs who are family members of another TCN already residing in the EU and therefore enter the Union under the provisions of Directive 2003/86/EC on family reunification. These two categories of TCNs, as well as EU nationals with full mobility rights, fall under legal frameworks that regulate their movement for work purposes across the EU in a harmonised way.[70] My aim, however, in this chapter, is to examine divergences in the way national migration rules construct vulnerability; that is why I focus on those TCNs for whom Member States have exclusive competence to regulate entry.

[69] These Directives as well as the migration law framework of the EU is examined in Chapter Three of this thesis.
[70] These EU law frameworks will instead be examined in Chapter Three of this thesis.

The discussion is organised as follows. Part II identifies the key dimensions of migration law that make domestic workers vulnerable. I identify and examine the following dimensions: deportability, dependence on the employer, sectoral restriction, obligation to live-in, dependence on recruitment and placement agencies, lack of access to permanent residence, lack of access to family reunification and the role of the au pair scheme. In Part III these dimensions are used as indicators to evaluate to what extent norms for domestic workers in the migration regimes of selected Member States construct vulnerability. My focus is on Western EU Member States instead of Eastern and Central ones. This is because Western EU Member States are generally more important destinations for migrant domestic workers.[71] Also, my linguistic skills determined and limited the choice of countries; thus, I selected Member States on which there are sources available in Greek, English, Spanish and Italian.[72] The evaluation allows me to develop a typology of the different migration regimes in EU Members States. I have identified four types of national migration models on the entry of TCN domestic workers: *i) Regulated Entry/Liberal Treatment*, ii) *Open Entry/Restrictive Treatment*, iii) *Employer-Led/Mixed Treatment* and iv) *Restrictive/Au Pair Only.* In part IV comparatively analyse these regimes and discuss to what extent they create vulnerability. The final part concludes.

II. Dimensions of migrant domestic workers' vulnerability

i. Deportability

A considerable number of EU Member States provide no legal migration paths for domestic workers. Lack of legal access can be a major vector of vulnerability because it accentuates non-citizens' deportability. While all non-citizens are in principle deportable, illegally resident TCNs face an enhanced danger.[73] However, even migration regimes that are more open in terms of entry do not always guarantee a secure

[71] For comparative data and information, see ILO, *Domestic workers across the world: Global and regional statistics and the extent of legal protection* (Geneva: International Labour Office, 2013) particularly Chapter 3 on global and regional estimates.
[72] For instance, I have not included France despite being a major destination state for migrant domestic workers because information is available mostly in French.
[73] Also because of the EU Directive 2008/115/EC on common standards and procedures for returning illegally resident TCNs.

migration status. A common cause of irregularity in terms of residence is the bureaucracy around the issuing and renewal of visas especially when these procedures depend on the employer. Employers are not always willing to go through the process of regularising their domestic workers, especially when they have no particular incentives to do so. Often the administrative costs for regularisation are such for both the employer and the domestic worker that remaining in the underground economy seems more appealing. [74]

The major danger an irregular status entails is deportation; however, deportation in the case of illegally resident domestic workers rarely takes place. On the other hand, deportability has many side effects. Fear of deportation can be used as a coercion and intimidation tool in the hands of an abusive or exploitative employer. Illegally resident workers are inevitably pushed into invisibility and marginalisation; their access to healthcare and other basic services may be restricted,[75] and even though they run a high risk to experience discrimination, are deterred from resorting to justice.[76]

ii. Restrictions on the right to change employer

In a good number of EU Member States, migration law ties migrant domestic workers, as well as other low-skilled migrant workers, to the specific employer who was initially authorised to hire them. Restrictions on the right to change employers can be temporary – during for instance the first months of residence – or throughout the whole duration of the migrant's permit. It is also often the case that the change of employers, even if permitted, is factually difficult as it requires a procedure that is complicated, lengthy, costly, or not clearly explained to migrant workers. As Anderson accurately argues, binding migrant workers to their employers is a very good example of how

[74] Martin Ruhs, Bridget Anderson, Ben Rogaly and Sarah Spencer, *Fair enough? Central and East European migrants in low-wage employment in the UK* (York: Joseph Rowntree Foundation, 2006); Franca Van Hooren, 'Caring Migrants in European Welfare Regimes: The policies and practice of migrant labour filling the gaps in social care' (unpublished PhD thesis,Florence: European University Institute, 2011).

[75] Especially in times of financial instability and austerity, restricting irregular migrants' access to public healthcare is a common measure that governments take. See for example the Royal Decree-Act 16/2012 issued by the Spanish government in April 2012.

[76] Mark Bell, 'Invisible Actors? Irregular Migrants and Discrimination' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff Publishers, 2004), 345-362.

immigration law grants employers "additional means of control" over workers.[77] By attaching restrictions on migrant workers' permits, impermissible for national or EU workers, immigration law encroaches on labour law and distorts the employment relationship between employer and TCN worker. The restriction on a migrant worker's freedom to change employers is an infringement of contractual freedom, of one's capacity to freely sell her labour.

For migrants in domestic work the right to change employers is crucial also due to the specificities of their employment.[78] Migrant domestic workers often arrive in the host state without any previous contact with the employer to enter into an employment relationship that is intimate, emotionally charged and involves deeply asymmetrical power relations. As it is further explained in Chapter II of this thesis, dismissal rules often give to the employers of domestic workers' flexibility that is more than normal; domestic workers may thus be more exposed to unlawful or wrongful dismissals. If in addition are legally restricted to change employers, domestic workers become even more dependent on luck, on the employer's good will.[79] In a sector where collective organising is extremely limited, the right to change employers is a key tool of protection and negotiation; it allows domestic workers to leave exploitative employers without jeopardising the legality of their migration status and fosters a much needed sense of emancipation.

iii. Restrictions on sectoral mobility

Another condition migration law typically attaches to domestic workers' permits is sectoral mobility restriction – that is the obligation to work only in the domestic work sector. While this requirement does not restrict personal freedom as much as the prohibition to change employers, it is still a condition that negatively impacts the position of TCN workers. Channelling migrant workers in low-skilled

[77] Anderson, 'Migration, immigration controls and the fashioning of precarious workers '(2010) 24 (2) Work, Employment and Society, above.

[78] The United Nations Special Rapporteur on modern forms of slavery has identified the prohibition of changing employers, which is applied in a good number of countries around the world, as one of the main drivers of forced labour in the case of migrant domestic workers. United Nations, Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences* (2009).

[79] Or, as the ILO debates highlight, on a paternalistic conception of the good employer's the employer's *noblesse oblige* to respect domestic workers' labour rights. ILO, Decent Work for Domestic Workers, Report no IV (1) at the International Labour Conference, 99th Session, 2010 (Geneva: ILO 2009).

sectors and restricting their labour market mobility contributes to what scholars have termed as the "emergence of a service caste"[80] and "migrant enclave character" of certain types of work.[81] This process produces, in other words, the racialisation of these sectors, as well as the creation of a sub-class of migrant workers. Bridget Anderson and Judy Fudge explain that once law has restricted a migrant worker to a particular low-skilled, underpaid sector, it is very difficult or even impossible to move into better jobs even when the restriction ceases.[82] Thus, legal restrictions on domestic workers' sectoral mobility construct and perpetuate the migrant-dominated character and precariousness of domestic work.

iv. Obligation to rely on a recruitment agency

Migrants make use of different networks in order to arrange their entry and work in the destination state. Such networks can be informal; they often include family members already living in the destination country, or religious organisations.[83] When no social or family networks are available, prospective migrants may have to rely on private recruitment and placement agencies that act as intermediaries. Migration law may influence a migrant worker's dependency on an agency. This is evidently the case when migration law provisions require the use of an agency. Such provisions are not common in the EU; no Member State requires domestic workers to use agencies as intermediaries. Yet, agencies may still play a significant role in the transnational recruitment of domestic workers in the EU. Typically, the migration law of first entry requires migrant workers to submit permit applications in the country of origin; also, no EU Member State grants jobseeker visas to TCN domestic workers. Thus migrant

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[80] Jacqueline Andall, 'Hierarchy and Interdependence: The Emergence of a Service Caste in Europe' in Jacqueline Andall (ed), *Gender and Ethnicity in Contemporary Europe* (Oxford: Berg, 2003), 39-60.

[81] Daiva Stasiulis, "Revisiting the permanent-temporary labour migration dichotomy", in Christina Gabriel and Hélène Pellerin (eds), *Governing international labour migration : current issues, challenges and dilemmas* (London/New York: Routledge, 2008), 95-111, at 103.

[82] Fudge, "Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers" (2012) 34(1) *Comparative Labor Law and Policy Journal,* above;Anderson, 'Migration, immigration controls and the fashioning of precarious workers '(2010) 24 (2) Work, Employment and Society, above.

[83] For example in Italy and Spain, organisations affiliated to the Catholic Church have been very important in the transnational recruitment of migrant domestic workers. Francesca Scrinzi, 'Migrations and the Restructuring of the Welfare State in Italy: Change and Continuity in the Domestic Work Sector' in Helma Lutz (ed), *Migration and Domestic Work: a European Perspective on a Global Theme* (Aldershot: Ashgate, 2008)

domestic workers, especially if they have no alternative networks in the destination country, are *de facto* obliged to resort to an agency to arrange their recruitment, relocation and placement.

Several studies reveal agencies' exploitative practices. These range from charging exorbitant fees for placement and travelling arrangements, lowering labour standards, giving false information as regards the type and conditions of work, to practices that amount to human trafficking such as channelling migrants to illegal sex work or sweatshops. [84] Particularly in the case of domestic workers, agencies have been identified as key actors in the perpetuation of racial and ethnic stereotypes in the sector.[85] When dependent on an agency migrant domestic workers may be reluctant to claim rights out of fear of losing both the employment and the support of the agency. As Judy Fudge writes "the employment agencies that recruit and place [domestic] workers operate simultaneously in a transnational space – creating networks between states – and within two national spaces – the sending and the receiving countries."[86] This makes their regulation and monitoring of their practices particularly difficult.

v. Obligation to live in the employer's household

The immigration law of EU Member States do not typically require migrant domestic workers to live in the employer's household.[87] However, there are exceptions such as the au pair scheme that normally requires living in with the host family. The requirement to live in is another example of how immigration law empowers employers to exercise extended control over migrant workers.[88] But even when immigration law

[84]Margaret Satterwaite, 'Beyond Nannygate: Using Human Rights Law to empower migrant domestic workers in the Inter-American System' in Nicola Piper (ed), *New Perspectives on Gender and Migration: Empowerment, Rights and Entitlements* (New York: Routledge, 2008), 275-322; International Labour Organization, *Preventing Discrimination, Exploitation and Abuse of Migrant Workers: An Information Guide- Booklet 3: Recruitment and the Journey of Employment Abroad,* (Geneva: ILO, 2003).

[85] Abigail B. Bakan and Daiva K. Stasiulis, 'Making the Match: Domestic Placement Agencies and the Racialization of Women's Household Work' (1995) 20 (2) *Signs*, 303-335.

[86] Judy Fudge, 'Global Care Chains, Employment Agencies and the Conudrum of Jurisdiction: Decent Work for Domestic Workers in Canada' (2011) 23(1) *Canadian Journal of Women and the Law,* 235-264, at 244.

[87] A contrasting example is the Live-in Caregivers Programme (LCP) in Canada; migrants admitted under this scheme can apply for a permanent residence after completing two years of live-in employment as carers for children or the elderly. See, Fudge, "Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers" (2012) 34(1) *Comparative Labor Law and Policy Journal*, above.

[88] Anderson, 'Migration, immigration controls and the fashioning of precarious workers '(2010) 24 (2) *Work, Employment and Society*, above.

does not require domestic workers to live in, the particularly low wages set for domestic work, give migrant workers practically no other option but to live-in.[89]

Anderson's pioneer study on the conditions of domestic workers in Europe revealed the many vulnerabilities live-in employment entails: sharing the same living space with the employer exposes domestic workers to abuses like sexual harassment, physical and verbal violence, lack of privacy, excessive control, as well as isolation at the workplace.[90] In addition, live-in employment blurs the limits between working and free time and may results in the worker being constantly on call.[91] Cox accurately points-out that live-in employment frames domestic work as inherently exceptional – more associated with women's unpaid work in the household than to a proper employment relationship.[92] This framing of domestic work as "work like no other" serves to further exclude workers from statutory employment protections such as overtime pay or compensation for night work.[93] Also, the private household, normally out of reach for labour inspectorates, is not monitored for the suitability to accommodate a domestic worker nor for the conditions of work.

vi. Access to permanent residence

There is a tendency among EU Member States to use the temporary character of the work permits granted to the so-called unskilled migrant workforce as a means of hindering access to long-term residence and consequently to citizenship rights.[94] This is the case for example of the United Kingdom and of Cyprus that exclude temporary migrant workers from the right to settle.

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[89] Live-in employment may be preferred by a lot of migrant domestic workers, especially newcomers. As Anderson explains, in this way they find accommodation immediately and can minimize their expenses; for illegally resident TCNs, live-in employment is also a way to avoid being detected by the police. Anderson, *Doing the dirty work?: the global politics of domestic labour*, (2000) above.

[90] Anderson, 2010, above.

[91] Anderson, 2010, above.

[92] Rosie Cox, "Gendered Work and Migration Regimes" in Ragnhild Aslaug Sollund (ed), *Transnational Migration, Gender and Rights* (Bradford: Emerald Publishing, 2012) 33-52.

[93] Guy Mundlak, "Gender, migration and class: why are live-in domestic workers not compensated for overtime?" in Sarah van Walsum and Thomas Spijkerboer (eds), *Women and immigration law: new variations on classical feminist themes,* (Cavendish: Routledge, 2007); Guy Mundlak and Hila Shamir, 'Bringing Together or Drifting Apart? Targeting Care Work as "Work Like No Other"' (2011) 23(1) *Canadian Journal of Women and the Law,* 289-308.

[94] Eleonor Kofman, "Managing migration and citizenship in Europe. Towards an overarching framework." in Christina Gabriel and Pellerin Helene (eds), *Governing international labour migration: current issues, challenges and dilemmas* (London: Routledge, 2008) 13-26.

The right of TCNs to acquire permanent (or long-term) residence in a Member State where they have been residing and working for a considerable period of time is enshrined in Directive 2003/109/EC. A stable residence is considered a tool of integration and of achieving social cohesion.[95] Securing a stable resident status facilitates migrants to become more independent and empowered. Moreover, as Groenedjik emphasises, the status of long-term resident carries a strong message directed to the host state's native population: the long-term resident has a status approximating that of nationals and thus, discriminatory treatment can no longer be justified.[96]

vii. Access to family reunification rights

Even though the EU enacted common rules on the right of TCNs to family reunification,[97] it is not uncommon for Member States to restrict access for certain categories of TCN workers through the migration law of first entry. Access to family reunification guarantees TCNs effective recognition of the right to respect for their private and family life, a fundamental right enshrined in the EU Charter of Fundamental Right and the European Convention on Human Rights,[98] and "helps to create socio-cultural stability facilitating the integration of third-country nationals in the Member State, which also serves to promote economic and social cohesion, fundamental Community objective state in the Treaty."[99]

viii. When the au pair scheme is the only labour migration route

Officially the aim of the au pair scheme is to facilitate cultural exchange for young people by offering them an opportunity to live abroad and study a foreign language. Most EU countries allow the entry of TCNs as au pairs and formally frame the scheme as a cultural exchange programme. Evidence suggests, however, that the

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[95] Recital 4, Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44.
[96] Kees Groenendijk, Elspeth Guild and Halil Dogan, 'Security of Residence of Long-Term Migrants. A Comparative study of law and practice in European countries' (Strasbourg:Council of Europe, 1998).

[97] Council Directive 2003/86/EC on the right to family reunification [2003] OJ L 251/12. I analyse the access of migrant domestic workers to the rights under this Directive in Chapter Three of this thesis.
[98] Articles 7 and 8 respectively.
[99] Recital 4, Family Reunification Directive.

scheme's function as cultural exchange is changing in the EU.[100] Especially in countries with a restrictive labour migration regime that does not allow the entry of TCN domestic workers, the au pair scheme is increasingly becoming a source of cheap domestic labour and an ambiguous entry route for workers.[101] For host families it is a way to access low-cost domestic work services, and for the TCNs, the only way to enter the country legally.

The au pair scheme can be problematic for various reasons. The permit usually tie the au pair to the host family. Even when migration law allows the change of host family, there may be significant practical difficulties: the short-term duration of the permit, language barriers, as well as having no support from the au pair agency. Living in with the host family is an intrinsic feature of the programme, thus au pairs are exposed to all risks normally associated with live-in employment. Very importantly, the au pair scheme is ambiguously located between cultural exchange and domestic work. Its official framing as a cultural exchange programme instead of work[102] makes the application of labour rights and protections seem superfluous.[103] Thus it is not uncommon for au pairs to be excluded from the personal scope of labour legislation such as laws on minimum wage.[104]

In 1971 the Council of Europe drew up an instrument – the European Agreement on Au Pairs – that sets rules and minimum standards for the placement of au pairs.[105]

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[100] Helle Stenum, *Abused Domestic Workers in Europe: The case of au pairs* (Brussels: European Parliament, 2011).

[101] Helma Lutz and Ewa Palenga, "Care Work Migration in Germany: Semi-Compliance and Complicity" (2010) 9(3) *Social Policy & Society* 419–430, 2010; Sabine Hess and Annette Puckhaber, "Big sisters are better domestic servants? comments on the booming au pair business' (2004) 77 *Feminist Review,* 65-78; Anderson, *Doing the dirty work?: the global politics of domestic labour* (2000), above; Fundamental Rights Agency, *Migrants in an irregular situation employed in domestic work: Fundamental Rights Challenges for the European Union and its Member States* (Luxembourg: EU Publications Office, 2011); Fiona Williams and Anna Gavanas, 'The intersection of childcare regimes and migration regimes: A three-country study' in Helma Lutz (ed) *Migration and domestic work: a European perspective on a global theme* (Aldershot: Ashgate, 2008),13-28.

[102] Even though in some countries such as Sweden and Belgium the au pair is considered employment, thus prospective TCN au pairs have to apply for a work permit.

[103] Hess and Puckhaber, "Big sisters are better domestic servants? comments on the booming au pair business' (2004) 77 *Feminist Review*, above.

[104] For example in the UK, au pairs are exempted from the statutory minimum wage. For a more detailed discussion, see Chapter Two of this thesis.

[105] It is notable that already in 1969 the Council of Europe recognised the different turn that the scheme was taking. In its Explanatory Report, the Social Committee which drafted the Agreement states: "But although that form of placement is not new, its nature has changed. Arranged in the past on a friendly basis between families known to each other, or through mutual acquaintances, it has now become a unique social phenomenon because of the frequency and large number of persons involved. It is now by tens of thousands that the candidates travel throughout Europe and it is quite obvious that the uncontrolled development of such temporary migration cannot be allowed to continue if only in the

The Agreement contains provisions on the duration of the placement,[106] on the au pairs minimum and maximum age,[107] as well as on the rights and responsibilities of the parties.[108] However, the Agreement has various limitations. It is ratified by only five EU member states – Denmark, France, Italy and Spain – contains no provisions on the admission of au pairs and crucially, stipulates no mechanisms to monitor placements. For these reasons, the Agreement has very limited importance in the regulation of the au pair; the scheme is instead mainly regulated through Member States' diverse rules and practices.

III. A typology of national immigration law regimes on migrant domestic workers

After having discussed the main drivers of migrant domestic workers' vulnerability in national migration law, I now use these drivers as indicators to evaluate the construction of vulnerabilities under the migration regimes of selected EU Member States: Italy, Spain, Cyprus, Sweden, the UK, the Netherlands, Denmark, Germany and Austria. In light of this evaluation, I develop a typology of national migration regimes on migrant domestic workers in the EU. First, a model which combines a straightforward and regulated access as well as a relatively good set of rights once the migrant domestic worker is in the country; I name this model *Regulated Entry/Liberal Treatment* and propose to examine it in the context of Italy and Spain. Second, there is a model which grants entry very easily but attaches very restrictive conditions to TCN domestic worker status: I name this model *Open Entry/Restrictive Treatment* and examine it in the context of Cyprus. In the third model, entry is employer-led and the treatment combines both restrictive and liberal elements; I name this model *Employer-Led/Mixed Treatment* and examine it in the context of Sweden. The fourth model is overly restrictive; Member States applying this regime either give no independent entry rights to migrant domestic workers, or allow their migration only through the au pair

interests of the parties concerned. Hence the need to seek a solution of this international problem by international regulation in the case in point, a European agreement". Council of Europe, European Treaty Series No.68, Explanatory Report to the European Agreement on Au Pair Placement, 1969.

[106] Between one and two years, Article 3 of the Agreement.

[107] Between 17 and 30 years old, Article 8 of the Agreement.

[108] The host family must offer accommodation, arrange health and accident insurance, allow the au pair sufficient time to attend language courses, grant at least one full day off per week and offer an allowance. In exchange, the au pair is expected to assist with light household chores for up to five hours per day.

scheme. I name this model *Restrictive/Au Pair only* and examine its main features by drawing on the examples of the UK, the Netherlands, Denmark, Germany and Austria.

It is important to clarify that migration regimes are not necessarily stable over time; on the contrary, the examples discussed here demonstrate that migration regimes can change considerably and states often shift from liberal to restrictive approaches as regards their labour migration choices. Regimes are, therefore, not attached to each country in a permanent way but rather reflect their current choices.

	Regulated Entry/Liberal Treatment (IT, ES)	**Open Entry/Restrictive Treatment (CY)**	**Employer-Led/Mixed Treatment (SE)**	**Restrictive/Au Pair Only (UK, NL, DK, DE, AT)**
Access to legal migration status	Yes	Yes	Yes	No/Limited access only in the UK
Duration of permit	1-2 years renewable	4 years non-renewable	2 years renewable	6 months only in the UK
Right to change employers	Yes	Restricted	Limited in the first 2 years	No
Right to change sector	No	No	No	No
Private agency required	No	No, but probable	No	No
Live-in Requirement	No	No, but probable	No	No
Permanent residence path	Yes	No	Yes	No
Family reunification	Yes	No	Yes	No

Table 1. An overview of national immigration regimes.

Table 1 gives an overview of the main features of national immigration regimes applicable to migrant domestic workers. The rows show the eight dimensions of vulnerability typically found in immigration laws regulating migrant domestic labour. The columns show the four different types of regimes identified and analysed in this chapter as well as the countries currently applying them. With the exception of UK, the rest of the *Restrictive/Au Pair Only* countries provide for no access to a legal migration status; thus the dimensions in the table are applicable only in the UK while not available for the rest of the countries. In what follows, I analyse each one of the regimes and then provide a comparative evaluation of how they create or reduce vulnerability.

i. Regulated Entry/Liberal Treatment

The countries applying this model – Italy and Spain – belong, along with Portugal and Greece, to the cluster of Southern Mediterranean countries; they share many similarities in terms of welfare, gender and care regimes.[109] These similarities contribute to the shaping of a, to a certain extent, common migration regime. In terms of welfare regime, Southern Mediterranean countries are characterised as 'familialistic' in the sense that the family is primarily charged with the responsibility of providing both elder and child care.[110] For this reason, the provision of care tends to be highly informal.[111] As regards family and gender regimes, in Southern Mediterranean countries, women have traditionally been responsible for unpaid, reproductive work in the household with low levels of participation in the labour market; inadequate public provision of care has hindered women's participation in the labour market. However, as it is becoming increasingly difficult to rely on the traditional family model of care – in other words, families can no longer take care of their dependent members entirely by themselves – and the already weak welfare state is declining, the solution is provided by migrant workers. Scholars emphasise the emergence of the phenomenon of shifting from the 'family-model of care' where unpaid care is directly provided for by family members, to a 'migrant-in-the-family' model where the family employs a usually live-in domestic

[109] Francesca Bettio, Annamaria Simonazzi and Paola Villa, "Change in care regimes and female migration: the 'care drain' in the Mediterranean" (2006) 16(3) *Journal of European Social Policy*, 271-285.
[110] Francesca Bettio and Hanneke Platenga, "Comparing care regimes in Europe" (2004) 10(1) *Feminist Economics*, 85-113.
[111] Bettio and Platenga, 2004, above.

worker to provide paid care. [112] States have also actively favoured this shift and stimulated the privatization of care through various cash-for-care and tax reduction schemes.[113] The employment of a private caregiver who can provide home-based care services around the clock for affordable prices becomes the ideal alternative solution to the gaps of the welfare state. In this way families are able to keep care home-based, while native women can spend more time at work.[114]

Thus, Southern Mediterranean EU Member States encourage and facilitate the migration of TCN domestic workers. Italy uses quotas for domestic workers while Spain occasionally includes domestic work in the lists of sectors with occupational shortage.[115]

Italy: Quotas

In Italy at the end of November each year the Council of Ministers sets an annual migration quota on the basis of which TCNs can enter and work in certain sectors of employment without having to hold a so-called residence contract (*contratto di soggiorno*).[116] The quotas set specifically for the domestic and care sectors tend to be considerably higher than the quotas for other non-seasonal workers.[117] As a sector-

[112] For studies documenting this new shift in the context of Italy, see Bettio et al. "Change in care regimes and female migration: the 'care drain' in the Mediterranean", 2006, above ; On Greece, Antigone Lyberaki, "Dea ex Machina: migrant women, care work and women's employment in Greece", (London School of Economics, Hellenic Observatory Papers, 2008). On Spain , Margarita León, "Migration and Care Work in Spain: The Domestic Sector Revisited" (2010) 9(3) *Social Policy and Society,* 409-418. To a certain extent, Portugal diverges from the migrant-in-the-family care model. Wall and Nunes observe that despite increased entry of migrant women in Portugal, the domestic work sector is still dominated by native Portuguese women; the employment of a migrant domestic worker a viable solution only for high-income families. Diverse care arrangements have led to a mixed model which combines home-based care and institutionalisation, publicly subsidised and private services, both native and migrant workers. The authors report that among the low-skilled sectors in Portugal, domestic work is considered well-paid and with good working conditions, thus it attracts native workers as well. Karin Wall and Cátia Nunes, 'Immigration, Welfare and Care in Portugal: Mapping the New Plurality of Female Migration Trajectories'(2010) 9(3) *Social Policy and Society* 397-408.

[113]Joya Misra, Jonathan Woodring and Sabine N. Merz, 'The globalization of care work: Neoliberal economic restructuring and migration policy' (2006) 3(3) *Globalizations*, 317-332; Alice Anderson, 'Europe's Care Regimes and the Role of Migrant Care Workers Within Them' (2012) 5(2) *Population Ageing,* 135-146.

[114] Guglielmo Barone, Sauro Mocetti, "With a little help from abroad: The effect of low-skilled immigration to the female labour supply", (2011) 18(5) *Labour Economics,* 664-675.

[115] Occupational shortage lists are also used in Greece and Portugal, see FRA 2011.

[116] The basic piece of immigration legislation in Italy is Law No.189 of 30 July 2002, or as it is often called, the "Bossi-Finni Law".

[117] The Presidential Decree of 2010 set 98 0980 quotas for the entry of TCNs, of which 30 000 were reserved exclusively for the domestic work and personal care sectors. Articles 1 and 3 of Decreto Flussi 2010, available at Ministry of Interior, https://nullaostalavoro.interno.it/Ministero/legislazioni (consulted

specific migration arrangement, the scheme does not allow change of sector; however domestic workers can change employers. Another important feature of the Italian scheme is the fact that the residence and work permits are independent. Loss of employment, even if voluntarily, does not annul the residence permit; the migrant can instead register in a jobseekers list for the remaining period of validity of her residence permit.[118] This provision is crucial in securing domestic workers a legal status under migration law and in reducing their vulnerability to become deportable.

While during the first two years of the accession of Central and Eastern European countries, Italy restricted access to its labour market for A8 migrant workers,[119] it set exceptional quotas for domestic and care workers exclusively for the new EU citizens.[120] In the 2007 Enlargement even though Italy enacted transitional arrangements for Bulgarians and Romanians (EU2), domestic workers along with a few other occupations were exceptionally granted unrestricted access to the Italian labour market. [121]

Italian immigration policies seem contradictory. On the one hand, restrictive policies such as detentions and the general use of penal law are used as tools to control and manage migration.[122] On the other hand, immigration provisions such as the quota system encourage and facilitate the entry and stay of care workers.[123] This inconsistency is understood better when we consider the role of migrant domestic workers in Italian society – to fill in gaps in the provision of care for the elderly. In addition, domestic workers tend to be viewed as benevolent and unthreatening migrants who carry out an important social task and thus, their presence in the country, whether regular or

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10 January 2012). For a detailed analysis of the distribution of quotas and the exceptional position of domestic workers, see: Franca van Hooren, 'When Families Need Immigrants: The Exceptional Position of Migrant Domestic Workers and Care Assistants in Italian Immigration Policy' (2010) 2 (2) *Bulletin of Italian Politics* ,21-38.

[118] Art. 18 (11) , LAW 189, above.

[119] The term 'A8 migrants' refers to the nationals of the EU Member States that joined the EU in 2004 except for the nationals of Malta and Cyprus.

[120] 79 500 quotas for domestic workers for new EU nationals were granted in 2005, followed by an impressive number of 170 000 quotas in 2006. To a large extent these quotas allowed for the regularization of Polish domestic workers who were already living and working in Italy without permits.

[121] The other exceptions are for workers in agriculture, construction, the tourism industry and engineers.

[122] Feruccio Pastore, "Report from Italy" in Jeroen Doomernik and Michael Jandl (eds.), *Modes of Migration Regulation and Control in Europe*, (Amsterdam: Amsterdam University Press, 2008),105-123.

[123] Van Hooren, 'When Families Need Immigrants: The Exceptional Position of Migrant Domestic Workers and Care Assistants in Italian Immigration Policy' (2010) 2 (2) *Bulletin of Italian Politics*, 21-38, above.

irregular, is welcomed by a large part of the local population and even tolerated by the highly xenophobic extreme right.[124]

The Italian quota system offers several good practices for the treatment of migrant domestic workers under migration law. Domestic workers have a legal route to enter and work in Italy, are able to change employers and have the possibility to remain in the country as jobseekers in the event of unemployment which allows them a relative residence security. Scholars have criticised the quota scheme for serving as a 'continuous regularisation programme' because applications for a work and residence permit often come from illegally resident migrants who are already working in Italy.[125] In that case the objective of the scheme to facilitate the legal *entry* of TCN domestic workers is annulled. Another problem is that employers may not be so keen on going through the administrative procedure of acquiring permits for their domestic workers; bureaucracy, in other words, can be a vector of vulnerability.

Spain: Lists of occupational shortage

Spain used to have a quota system for domestic workers similar to the Italian one, but recently changed to a different policy – the list of occupations with labour shortage (*catálogo de ocupaciones de difícil cobertura*).[126] Every three months, the Public Employment Services in each autonomous region assess the needs of the regional labour markets and release a list of occupations that face workforce shortages.[127] Based on this list employers receive authorisation to hire non-EU nationals for employment in those occupations.[128] The domestic work sector is occasionally included in the list.

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[124] See discussion in Van Hooren, 2010, above.

[125] Norbert Cyrus, "Being Illegal in Europe: Strategies and Policies for Fairer Treatment of Migrant Domestic Workers", in Helma Lutz (ed.) *Migration and Domestic Work. A European Perspective on a Global Theme*, (Aldershot/Burlington: Ashgate, 2008); Anna Triandafyllidou and Maurizio Abrosini, 'Irregular Immigration Control in Italy and Greece: Strong Fencing and Weak Gate-keeping serving the Labour Market' (2011) 13 *European Journal of Migration and Law*, 251-273.

[126] For an overview of the Spanish quota system see, Angeles Escriva, 'The position and status of Migrant Women in Spain,' in Floya Anthias and Gabriella Lazarides (eds), *Gender and Migration in Southern Europe Women on the move* (Berg: Oxford 2000), pp.199-225.

[127] Organic Law 4/2000 of 11 January, On the Rights and Freedoms of Aliens in Spain and their Social Integration.

[128] For occupations not included in the list the employer has to follow a more lengthy procedure: advertise the vacant post to the Public Employment Services which, after concluding that there is no available national workforce, grant permission for the employment of a TCN.

Migrants' permits have an initial duration of one year and are renewable.[129] During the first year, the migrant worker is restricted in the sector and the geographical region for which the permit was granted.[130] To ensure that migrant workers are effectively employed – to avoid, in other words, fraudulent work permits – immigration law requires registration with social security for the residence and work permits to be valid.[131] The permit does not restrict the right to change employer. In addition, there are no legal restrictions on qualifying for long-term residence and family reunification under the provisions of the relevant EU Directives.[132] After completing one year of residence, domestic workers may apply for family reunification and for long-term resident status after five years of continuous legal residence. Also, it is relatively easy for migrants from certain Latin American countries to access citizenship through facilitated naturalisation processes.[133] The easier paths to naturalisation in Spain have turned many non-EU workers into nationals; as nationals, these domestic workers, face no additional immigration restrictions limiting their bargaining power at work and are shielded from deportability and its side effects.

ii. Open Entry/ Restrictive Treatment: Cyprus

Cyprus grants a more generous access to TCN domestic workers than Italy and Spain. Since the early 1990's the state has been explicitly targeting migrants to be employed in domestic services through a specific visa scheme for domestic workers which is unique in the EU. The scheme is employer-driven and open-entry. There are no quotas or caps for the recruitment of TCN domestic workers; entry is granted to as many workers employers can sponsor. There are different categories of eligible employers but in fact the eligibility criteria are so broad that include a very large share of the population;[134] employers are in reality authorized to recruit a migrant domestic

[129] Irregular presence in Spain is a ground for the inadmissibility of the application for a work permit; thus, in principle the permit system does not function as a hidden regularisation programme as in Italy. Article 64 (5), Organic Law 4/2000.
[130] Art. 63(1), Organic Law 4/2000.
[131] Art 36 (2), Organic Law 4/2000.
[132] Though factual barriers certainly do exist. Also, as discussed in Chapter III of this thesis, the requirement to prove stable financial means and adequate accommodation so as to qualify for family reunification is an important barrier for domestic workers.
[133] Interview with UGT representatives, Madrid, 29 January 2014.
[134] Eligible employers are a) families with a child under 12 when both parents work, b) families with no children when both partners work and have an annual taxable income of at least 52 000 Euro, c) single parent families when the parent works and contributes to the Social Insurance Fund, d) families with one

worker without the need to carry out an effective labour market test.[135] The Cypriot immigration regime is exceptionally open to domestic workers while being very restrictive towards other types of labour migrants. A non-EU national has very limited options to enter the country for the purpose of employment. Against this background, the domestic worker visa is often the only option of independent entry for a TCN worker, especially a female one.

But while entry is relatively easy and straightforward, the conditions and restrictions attached to the permit are particularly onerous. First, the right to stay is limited to a maximum of four years; the permit is in principle non-renewable.[136] Contrary to Italy, in Cyprus residence is linked to employment. If employment is for some reason terminated, the migrant has a one-month time-limit to find a new employer; failing to do so, she loses the residence permit and is deported. Second, domestic workers are tied to their employer; change of employer is allowed only in exceptional circumstances following a formal complaint and approval of the Immigration Department. Moreover, there can be only up to two changes of employer during the TCN's stay and no change is allowed during the first six month of employment.[137] It is important to mention that the model employment contract for migrant domestic workers, prepared and distributed by the Immigration Department,[138] clearly states that change of employers is not allowed.[139] This is indicative of the vagueness and uncertainty regarding the conditions of employment of migrant domestic workers; the state not only fails to provide them all necessary information but moreover gives – against the principles of good administration and legal certainty – contradictory and misleading information. Closely related to their tied status is the issue of the

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working partner provided that the annual taxable income is at least 86 000 Euro, e) elderly people above the age of 75, f) people with special needs, g) infirm persons, i) handicapped persons and j) and couples with more than three children of whom one at least is under 12 and provided that both partners work.

[135] According to the Community Preference Rule, EU Member States are obliged to offer any vacancy to nationals, EU nationals and legally resident TCNs before recruiting any TCN from outside the EU. See, The Community Preference Rule Council Resolution [1996] OJ C274/3. There is, however, no obligation to recruit a specific individual and Member States apply this principle in divergent ways. The principle is implemented in Cyprus and advertisements for domestic workers are published in local newspapers. However, there is no data regarding the people who reply to these vacancies and whether they are rejected.

[136] Some exceptions apply in case the domestic worker is employed to take care of disabled or permanently ill persons, elderly people over the age of 75 or employed by families with three or more children of which one is under 12 years old. In such cases the permit can be in principle renewed beyond the four years limit.

[137] Office of the Ombudsman, *Report of the Ombudsman as National Independent Human Rights Authority as regards the status of domestic workers in Cyprus* (Nicosia, 2 July 2013)

[138] I analyse the features and content of the model employment contract in Chapter Two of this thesis.

[139] Article 2(a), model employment contract for domestic workers.

employer's guarantee; the employers of migrant domestic workers have to deposit a bank guarantee which in essence makes them responsible during the TCN's stay in Cyprus; this practice makes domestic workers vulnerable to the exercise of excessive control by the employers.[140]

Third, following a decision of the Supreme Court, migrants on a domestic worker visa are currently barred from accessing permanent residence. In *Cresencia Cabotaje Motilla vs. The Republic of Cyprus* the Supreme Court held that a Filipino domestic worker – legally and continuously residing in the country for nine years – was not eligible for long-term residence.[141] The Court reached this conclusion following a broad interpretation of an exemption on the personal scope of EU Directive 2003/109/EC on the status of TCNs who are long-term residents that allows Member States to exclude TCNs "whose residence permit has been formally limited".[142] As I discuss in Chapter Three of this thesis, *Motilla* raises issues of compatibility with EU law;[143] at the time of writing the judgement has not been reversed and migrant domestic workers – as well most categories of TCN workers – are effectively excluded from acquiring the status of long-term resident. Subsequently, they do not qualify for family reunification because one of the requirements is that the applicant has reasonable prospects to acquire long-term residence.

Even though the domestic worker visa does not legally require TCNs to live in the employer's household, the large majority tends to live in. This is a consequence of the exceptionally low wages the visa scheme on migrant domestic workers stipulates. For example, in 2015 the Immigration Department set the monthly salary for migrant domestic workers at 309 Euro net which is approximately 1/3 of the salaries stipulated for comparable occupations such as caretakers in nursery homes who are entitled to a minimum of 920 Euro net per month.[144]

Despite the fact that the use of private recruitment agencies is not legally required, studies show that in practice, agencies play a key and usually problematic role

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[140] Ombudsman, *Report of the Ombudsman as National Independent Human Rights Authority as regards the status of domestic workers in Cyprus,* 2013, above.

[141] *Cresencia Cabotaje Motilla vs. The Republic of Cyprus*, Case no.673/2006, Full Bench of the Supreme Court, January 2008.

[142] Article 3 para 2 (e), Directive 2003/109/EC. For a detailed discussion, see Chapter III of this thesis.

[143] See also the commentary by Kees Groenendijk, 'Equal treatment of workers under EU law and remedies against violations by employers' (2010) 1 *Online Journal on free movement of workers within the European Union*, 16-22 .

[144] For a detailed discussion on domestic workers' wage regulation in Cyprus, see the discussion in Chapter Two of this thesis.

in the recruitment and employment of migrant domestic workers.[145] The Office of the Ombudsman, an independent body of extra-judicial mechanism for public administration, has received several complaints that concern the practice of private recruitment agencies.[146] The Ombudsman reports that migrant domestic workers become indebted to agencies in the country of origin that arrange their travel; they are then received by agents in Cyprus who often confiscate their travel documents, charge illegal fees and overall take advantage of their vulnerability. The Ombudsman further notes in her report that the Cypriot legislation that regulates private recruitment agencies is largely not enforced which makes domestic workers practically dependent on agents' good will. In light of these problematic findings, the Ombudsman recommended that the Cypriot authorities take measures to effectively monitor the conduct of private recruitment agencies in relation to migrant domestic workers.[147]

Overall, domestic workers in Cyprus pay a high price for having access to a regular migration status because the very same migration status subjects them to conditions of subordination vis-à-vis the employer and denies them paths to permanent residence and family reunification.

iii. Employer-Led/Mixed Treatment: Sweden

Sweden, despite its strong social-democratic welfare and feminist traditions, is increasingly facing needs for private domestic work and care services. This is due to the interplay of various factors. At the outset, cutbacks in the provision of public care services have contributed to a certain shifting of care responsibilities from the state to private households.[148] Secondly, a policy of a 50% tax deduction on the purchase of domestic work and personal care services was introduced in 2007. The deduction made domestic work affordable and accessible to a large part of the population which boosted

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[145] Mediterranean Institute for Gender Studies, Integration of Female Migrant Domestic Workers: Strategies for Employment and Civic Participation (Nicosia: University of Nicosia Press, 2008); Office of the Ombudsman, *Report of the Ombudsman as National Independent Human Rights Authority as regards the status of domestic workers in Cyprus* (Nicosia, 2 July 2013).

[146] In Chapter Two of this thesis examine in more detail the work of the Cypriot Ombudsman as regards migrants on a domestic worker visa.

[147] Ombudsman, 2013, above.

[148] Catharina Calleman, 'From status via contract and Social Private Law to the Free Movement. Regulation of Domestic Work in Sweden' (2007) 50 *Journal of Scandinavian Studies in Law,* 347-366; Catharina Calleman, 'Domestic Services in a "Land of Equality": The Case of Sweden' (2011) 23(1) *Canadian Journal of Women and the Law*, 121-140.

the demand.[149] Thirdly, dual-career families face increased expectations at work and this have given rise to a claim to be 'relieved from housework' in order to enjoy more quality time.[150] As a result, demand for domestic services is on the rise in Sweden despite public provision of care;[151] to a large extent migrant women meet these demands.[152]

In 2008 Swedish labour immigration law and policy underwent a significant reform that made the employment of migrant workers from outside the EU employer-driven. The OECD has praised Sweden's transition from one of the most restrictive to one of the most liberal labour migration regimes in the world.[153] The reform was the result of pressures from employers who demanded a more liberal migration policy and simplified procedures so as to attract workers of all skill levels from outside the EU and improve the competiveness of Swedish firms on the global market.[154] Prior to the reform, the Public Employment Service would carry out a labour market needs test; in addition, it would consult trade unions on whether the wage and working conditions offered were up to level and on the labour market situation of the sector before the Migration Board could grant employers the authorisation to recruit a TCN worker.[155] Employers were also responsible to arrange housing before the worker's arrival in Sweden. The 2008 reform abolished the labour test system – and as a result, eliminated the trade unions' involvement in the process – and made the Migration Board the only

[149] Anna Gavanas, *Who Cleans the Welfare State?: Migration, Informalization, Social Exclusion and Domestic Services in Stockholm* (Stockholm: Institute for Futures Studies, 2010); Calleman, 2007, above; Anna Gavanas, 'Migrant domestic workers, social network strategies and informal markets for domestic services in Sweden' (2012) 36 *Women's Studies International Forum*, 54-64.
[150] Gavanas, 2010, above; Ellinor Platzer, 'From Private Solutions to Public Responsibility and Back Again: The New Domestic Services in Sweden' (2006) 18 (2) *Gender & History,* 211-221; Calleman, 2011, above.
[151] Williams and Gavanas, 2008, above.
[152] Calleman, "From status via contract and Social Private Law to the Free Movement. Regulation of Domestic Work in Sweden", 2007, above; Interview with representatives of the Swedish trade union Kommunal which organises service workers, Stockholm, 1 October 2013. For a detailed analysis of Kommunal's work with domestic workers, see the analysis in Chapter Two of this thesis.
[153] OECD, *Recruiting Immigrant Workers: Sweden 2011* (OECD Publishing).
[154] Lucie Cerna, 'Changes in Swedish Labour Immigration Policy: A Slight Revolution?' (Working Paper n.10, Stockholm: Stockholm University, 2009).
[155] Samuel Engblom, "Reconciling Openness and High Labour Standards? Sweden's Attempts to Regulate Labour Migration and Trade in Services" in Cathryn Costello and Mark Freedland (eds.) *Migrants at Work: Immigration and Vulnerability in Labour Law,* (Oxford: Oxford University Press, 2014) 341-361.

responsible authority to issue work permits to TCN workers.[156] The requirement to arrange housing was also abolished.

Under the current immigration law, employers may directly recruit TCN workers for any position, at any skill level and without having to apply a labour market needs test.[157] Prospective TCN workers must hold an employment offer and apply for a work permit before entering Sweden;[158]domestic workers can also apply for a work permit under these rules.[159] But even though entry is now straightforward it is not without trade-offs. First, the conditions attached to the permit restrict the migrant worker's freedom in the labour market. Second, the liberalisation of labour migration rules in Sweden has created problems as regards the enforcement of labour standards in the sectors where TCNs predominantly work and has made migrant workers precarious and vulnerable to exploitation.

Initially, the migrant worker receives a permit for two years; during the first two years there is no right to change employers.[160] After two years the permit can be renewed and the TCN can change employers but only within the same sector.[161] The work and residence permits are linked, thus in case of unemployment the migrant must find a new employer within four months;[162] failing to do so, the Migration Board can annul the residence permit and require the TCN to leave Sweden. [163] TCN workers in Sweden can sponsor their family members immediately and become eligible for long-term residence after five years of continuous legal stay.

When they make an employment offer to a prospective TCN worker, employers must commit to offer terms of employment equal to those of national workers and a

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[156] Interview with Samuel Engblom, representative of the Swedish confederation of trade unions for professionals, TCO, Stockholm, 18 September 2013.

[157] There is a requirement for the employer to advertise the post for at least ten days in Sweden and the EU prior to offering employment to a TCN. There is however no obligation to give priority to a national or EU national over a TCN.

[158] Chapter 6, Section 4 Aliens Act (2005:716) as amended by Government Bill 2007/08:147.

[159] Prospective au pairs also need to hold work permits and are therefore required to follow the same procedure. In order to be eligible, the applicant must be between 18 and 30 years old, have a demonstrated interest in Swedish language, have been admitted to a language school and hold an invitation from the host family. The host family can engage the au pair in a maximum of 25 hours weekly of light household and childcare tasks; in addition it has to offer accommodation and food, studies in Swedish and a minimum of 3500SEK gross salary (approximately 383 Euro). The maximum duration of stay is one year. See, Swedish Migration Board, Special rules for certain occupations and citizens of certain countries: au pairs.

[160] Chapter 6, Section 2a, Aliens Act.

[161] Chapter 6, Section 2a, Aliens Act.

[162] Chapter 7, Section 3, Aliens Act as amended by Government Bill 2013/14:227.

[163] Chapter 7, Section 16, Aliens Act.

minimum monthly salary of 13 000 SEK – 1475 Euro approximately.[164] The problem however is that the offer of employment is not legally binding and as a result the migrant may not legally enforce it against the employer. In reality, an employer may promise a certain level of pay and working conditions before the migrant worker's entry and then provide lower standards post entry.[165] While on the one hand immigration law stipulates no effective sanctions against employers who do not adhere to the terms of the employment offer; on the other hand, the Migration Board may withdraw the work permit of a TCN who is found working under conditions that undercut Swedish labour standards.[166] This incoherence exposes TCN workers to the risk of being deceived and even exploited by unscrupulous employers; what is more, instead of having access to a remedy for the mistreatment, TCNs risk expulsion.

In addition, the specificities of the Swedish model of industrial relations create further gaps in the protection of TCN workers after they have been admitted in the country. In Sweden, the monitoring and enforcement of labour standards at the workplaces is to a large extent carried out by trade unions. High unionisation levels and the coverage of workplaces by collective agreement are prerequisites for the effective enforcement of labour rights and protections; basic protections such as minimum wages are stipulated only in collective agreements.[167] However, some of the sectors where migrant workers are primarily being recruited since the reform – agriculture, as well as household services and hospitality –[168] are losing union density.[169] In the private sector of cleaning and other household services the unionisation level is as low as 10%.[170] Woolfson, Fudge and Thornqvist warn that the Swedish liberal turn in labour migration law and policy is serving the creation of a "segmented labour market".[171] This secondary labour market is dominated by migrant workers who enter into precarious

[164] Chapter 2, Section 2, Aliens Act. Normally, however, the full-time pay stipulated in collective agreements is much higher. Engblom, S. 2014, above.
[165] Engblom, "Reconciling Openness and High Labour Standards? Sweden's Attempts to Regulate Labour Migration and Trade in Services" in *Migrants at Work: Immigration and Vulnerability in Labour Law,* (2014), 341-361.
[166] Interview with Samuel Engblom, representative of the trade union confederation TCO, Stockholm, 18 September 2013; Engblom, 2014, above.
[167] I discuss the problems related to the lack of trade unions for domestic workers directly employed by a household and the low unionisation in the private cleaning companies sector in Chapter II of this thesis.
[168] The OCED in its 2011 report on the Swedish migration law reform noted that the three main sectors where TCNs were recruited post-2008 were agriculture (27%), IT services (18%) and domestic work and hospitality (18%). OECD, *Recruiting Immigrant Workers: Sweden*, 2011, above.
[169] Charles Alexander Woolfson, Judy Fudge and Christer Thornqvist, "Migrant precarity and future challenges to labour standards in Sweden", *Economic and Industrial Democracy*, August 2013, 1-21.
[170] Interview with Kommunal representatives, Stockholm, 1 October 2013.
[171] Woolfson, Fudge and Thornqvist, 2013, above.

sectors, with their labour market mobility heavily restricted and thus have no possibility to move into better jobs.[172]

iv. Restrictive/Au Pair Only regimes

I now turn to examine the regimes of Member States that either ban the entry of TCN domestic workers or allow it only under the au pair scheme. I look at the cases of the UK, Ireland, Germany, Austria, the Netherlands and Denmark to examine the following issues: the implications of a selective immigration policy for the entry of TCNs classified as low-skilled, the East-West dimensions of labour migration as illustrated by the priority given to EU citizens under transitional arrangements to take up employment in domestic services and the relevance of the au pair in the construction of vulnerabilities especially when this is the only route available and the aggregated vulnerabilities faced by illegally resident migrants in a restrictive migration law setting.

Austria, Germany, Denmark and the Netherlands can be characterised as au pair-only regimes since the au pair is the only available route for a TCN's independent entry. The UK and Ireland, on the other hand, are even more restrictive; to keep in line with the policy of closing down all entry routes for low-skilled migrant workers, they abolished au pair visas for TCNs. Ireland only allows TCNs who are already in the country on student visas to take up au pair positions, while the UK replaced the au pair visa with a Youth Mobility Scheme which is only available to nationals of certain countries that have signed bilateral agreements. [173]

Selective immigration: attracting the highly-skilled, restricting the low-skilled

[172] Judy Fudge, Speech at the seminar "Migrants – the new subclass?" organised by GlobalUtmaning, FAS and ABF, Sweden, 2 June 2012, available at https://www.youtube.com/watch?v=RSw8bYibERs (20 March 2014).

[173] According to Cox even though under the previous au pair visa regime there were still cases of abuse and mistreatment, the existence of the visa gave a definition of the au pair, set the terms and conditions for both parties and crucially, made the Home Office responsible to monitor placements. Cox, "Gendered Work and Migration Regimes" in *Transnational Migration, Gender and Rights* (2012), 33-52, above.

As I discuss in more detail in Chapter III of this thesis, all EU Member States are under the obligation to encourage and facilitate the entry of highly-skilled TCNs.[174] While in the Southern Mediterranean countries and in Sweden the aim of attracting highly-skilled TCNs co-exists with routes for domestic workers, in the restrictive regimes discussed here, the introduction of immigration categories for the highly-skilled has had the side-effect of or, at any rate, been accompanied by closing or restricting routes for low-skilled.

The countries with restrictive immigration regimes share the trend of setting different entry rules for highly-skilled TCNs in typically male-dominated fields and for low-skilled workers in often female-dominated sectors such as domestic work. The former are framed as skilful, educated and valued migrants who benefit the economy, while the latter are classified as undervalued, unwanted migrants.[175] Immigration rules to attract highly-skilled tend to be less controversial – thus easier to justify to public opinion – than those on low-skilled migrant workers.[176]

It is in this context that in April 2012 the UK amended the terms of the terms of the overseas domestic worker visa; the change of rules made the entry of TCN domestic workers difficult and precarious. This visa scheme was introduced in the 1990s following a long process of mobilization by domestic workers organisations in the 1980's and 1990's that strived to secure a legal migration status and to be recognised as workers.[177] As a migration route, the overseas domestic worker visa was already restrictive because it was open only to domestic workers accompanying their wealthy non-EU employers. But despite its limitations, the visa was an important source for thousands of TCN domestic workers in the UK because it granted them a legal migration status independent of that of the employer and afforded them along some rights and protections: the right to change employers, the right to apply for family reunification, as well as the possibility to acquire permanent residence.

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[174] This is because of the EU Blue Card Directive (full reference provided in Chapter Three).

[175] In the words of the former UK Minister of State for Policing and Criminal Justice Damien Green: 'We need to know not just that the right number of people are coming here, but that the right people are coming here. People that will benefit Britain- not just those who will benefit by Britain'. Speech on "Making Immigration work for Britain" delivered on 2 February 2012 on Policy Exchange, https://www.gov.uk/government/speeches/damian-greens-speech-on-making-immigration-work-for-britain (consulted on 21 February 2015).

[176] International Organisation for Migration, "Comparative Study of the Laws in the 27 EU Member States for Legal Immigration" (Geneva: IOM, International Migration Law, 2008).

[177] For an overview and analysis of this struggle see, Bridget Anderson, 'Mobilising Migratnts, Making Citizens: Migrant Domestic Workers as Political Agents' (2010) 33(1) *Journal of Ethnic and Racial Studies* 60-74.

Under the newly introduced rules, TCN domestic workers accompanying their TCN employer may enter the UK only on a six-month, non-renewable visa. They are tied to the employer and the right to change employers is abolished. They are no longer allowed to apply for long-term residence and have no rights to family reunification.[178] Scholars and activists alike have strongly criticized the reform of the UK overseas domestic worker visa for being a significant regression for domestic workers rights' and for condemning them to conditions of acute vulnerability.[179]

Similarly, Dutch migration law distinguishes between highly-demanded employees and those who are not; [180] a highly-demanded employee is one who can secure a high annual income approximately between 35.000 and 50.000 Euro.[181] Those who can meet this income requirement can enter the Netherlands for the purpose of work without having to apply for a work permit.[182] It is practically impossible that a private household could meet this requirement in order to recruit a TCN domestic worker without a work permit. Thus, prospective employers have to follow the procedure for acquiring a work permit which in practice excludes TCNs; the permit is issued only if there is no Dutch, EU-national or legally resident TCN available.[183] As a result, and despite the fact that migration law does not explicitly exclude the recruitment of migrant domestic workers, it renders it *de facto* impossible.

The Dutch government has repeatedly stated that the needs in care and household services can be met by Dutch, EU nationals or TCNs already residing legally in the Netherlands so that there is no need to facilitate the entry of more low-skilled migrants to be employed as domestic workers.[184] This, however, does not seem to be true. As Sarah van Walsum explained, previous attempts to encourage unemployed

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[178] Regarding domestic workers in diplomatic households, they enter on the same terms, but are allowed to extend their stay for twelve months at a time for up to a maximum of five years or the length of the diplomat's stay (whichever is shorter).

[179] Mumtaz Lalani, *Ending the abuse. Policies that work to protect migrant domestic workers,* (London: Kalayaan, 2011); Siobhán Mullally and Clíodhna Murphy, Migrant Domestic Workers in the UK: Enacting Exemptions, Exclusions, and Rights, (2014) 36 Human Rights Quarterly, 397- 429.

[180] Sarah van Walsum, 'Regulating Migrant Domestic Work in the Netherlands: Opportunities and Pitfalls (2011) 23 (1) *Canadian Journal of Women and the Law,* 141-165.

[181] Van Walsum, 2011, above.

[182] Wet Arbeid Vreemdelingen (Dutch law on foreign labour), Article 1(d), cited in van Walsum, 2011 above.

[183] Art. 8, para. 1(a), Dutch law on foreign labour, cited in Van Walsum, 'Regulating Migrant Domestic Work in the Netherlands: Opportunities and Pitfalls (2011) 23 (1) *Canadian Journal of Women and the Law,* 141-165, above.

[183] Van Walsum, 2011, above.

[184] Van Walsum, 2011, above.

people in the Netherlands to take up employment in the sector did not succeed, probably due to the low status and poor conditions in domestic work.[185]

However, when immigration law restricts the entry to migrant domestic workers, people in need of these services and migrants in need of work find solutions on the informal market. Such solutions, while convenient for employers because of the access to low cost care, make migrant domestic workers vulnerable by denying them a legal status under migration law.

Priority to EU citizens under transitional arrangements

Another common feature of the restrictive regimes discussed is that while they limit access to low-skilled TCNs, they give priority to citizens from new EU Member States to enter for the purpose of working as domestic workers in private households; this is despite applying transitional restrictions to workers from the acceding countries.[186] Germany and Austria enacted transitional arrangements for both A8 and EU2 nationals but admitted them exceptionally for employment as live-in carers for the elderly. [187] Ireland, prior to opening its labour market to Bulgarian and Romanian nationals in January 2012, had in place specific arrangements for employment in the care sector. Similarly in the UK until January 2014, Bulgarian and Romanian nationals had to obtain a 'work authorisation' before they could take up employment; nonetheless, they could exceptionally work as domestic workers in private households without having to apply for a permit.

The exception granted to migrants from the new Member States to take up employment as domestic workers indicates that older Member States expected that low-skilled positions would be filled by the new EU nationals, thus TCN workers would no longer be necessary. This can work to a certain extent; new EU migrants, especially those subjected to transitional arrangements, are easily channelled to low-skilled and

[185] Van Walsum, 2011, above.
[186] For a discussion of the EU regime on transitional arrangements see Chapter III of this thesis.
[187] The German programme was introduced in 2002 as a partial response to political campaigning that demanded a legal route for the recruitment of care workers from Central and Eastern Europe. With the accession of Bulgaria and Romania the programme was extended to cover nationals from these two countries as well. See generally Helma Lutz, 'When Home Becomes a Workplace: Domestic Work as an Ordinary Job in Germany?' in Helma Lutz (ed), *Migration and Domestic Work: a European Perspective on a Global Theme* (Burlington, Ashgate 2008) 43-60; Fundamental Rights Agency, *Migrants in an irregular situation employed in domestic work: Fundamental Rights Challenges for the European Union and its Member States* (Luxembourg: EU Publications Office, 2011)

precarious jobs such as domestic work.[188] However, transitional citizens eventually become fully mobile on the labour market and are thus likely to move on to related sectors and types of work that are not as precarious and underpaid as domestic work in private households such as institutional-based care; being fully mobile, EU citizens can also benefit from intra-EU mobility and move in a different Member State.[189]

The au pair scheme as an only route

Interestingly, countries that have a restrictive migration regime on the entry of TCN domestic workers tend to facilitate instead TCNs' entry through the au pair scheme. Austria for example, allows an unlimited number of TCNs to enter on au pair visas entry. In addition, the state subsidises the purchase of au pair services as a form of childcare.[190] Thus, Austria facilitates and encourages the entry of TCNs as au pairs as a way to balance the tensions created from restrictive immigration policies and the reduction of social care services.[191] Scholars note that as in Southern Mediterranean states and Germany, in Austria care is traditionally family-based as well, thus a migrant live-in caregiver like an au pair becomes the ideal alternative when families can no longer fully respond to care responsibilities.[192] The Netherlands allows TCNs to enter as live-in au pairs; but au pairs fall outside the personal scope of labour and social security law.[193] Similarly, in Germany the only independent entry route for a TCN domestic

[188] Bridget Anderson, Martin Ruhs, Ben Rogaly, Sarah Spencer, "*Fair enough? Central and East European migrants in low-wage employment in the UK"* (York: Joseph Rowntree Foundation, 2006).

[189] Moreover, the assumption that migrants who have been established and working in a country for some time will give up on their migratory projects and leave because an abrupt change in immigration rules illegalizes their stay, pays no attention to migrant's agency and its role in shaping migratory flows. See, Stephen Castles, 'Why migration policies fail' (2004) 27 (2) *Ethnic and Racial Studies,* 205-227. Also, this assumption pays little attention to the issue of trust between employer and domestic worker – an essential element in domestic work especially when it involves personal care. It is taken for granted that employers will be willing to dispose of the domestic workers they had been employing and entrusting them with the care of their family for years and replace them with newly arrived migrants. This is however, unlikely. On the contrary, what is more likely to take place is to push TCNs already residing in the country to an illegal status under migration law and in further precariousness.

[190] Stenum, *Abused Domestic Workers in Europe: The case of au pairs* (2011), above.

[191] Bettina Haidinger, 'Transnational contingency: the domestic work of migrant women in Austria' in Sarah Van Walsum and Thomas Spijkerboer (eds), *Women and Immigration Law New variations on classical feminist themes* (New York: Routledge, 2007), 163-182.

[192] Bernhard Weicht, "Embodying the ideal carer: the Austrian discourse on migrant carers" (2010) 5(2) *International Journal of Ageing and Later Life*, 17-52.

[193] Van Walsum, 'Regulating Migrant Domestic Work in the Netherlands: Opportunities and Pitfalls (2011) *Canadian Journal of Women and the Law,* 141-165 , above.

worker is the au pair scheme; au pair are again legally required to live-in, are tied to the host family and the relationship falls outside the scope of labour law.[194]

Denmark is another good example of a country where the absence of an immigration route for TCN domestic workers results in extensive use of the au pair scheme. Denmark manages labour migration on the basis of a list of occupations that face shortage of workforce – the so-called positive list. TCNs can only apply for a work permit for one of the posts in the list; the list does not include domestic work.[195] One would expect that in Denmark, the Nordic welfare regime with high levels of public care provision offsets demands for private domestic workers. Yet, the number of TCNs entering Denmark on au pair permits has sharply increased; Helle Stenum reports that while in 1996 there were only 318 au pair permits, in 2007 there were 2207 permits, of which 1510 were granted to Filipino nationals.[196] The lack of alternative independent entry paths pushes TCNs to enter Denmark as au pairs.

In Nordic countries the traditionally strong egalitarian and feminist traditions contribute to a negative ideological standpoint towards buying domestic work services. The au pair on the other hand, because it is framed as cultural exchange, provides a less negatively charged alternative. For example, Sollund's research in Norway highlights the tensions of employing domestic help in a state with strong egalitarian traditions and discourse and explains how the au pair's intrinsically ambiguous character allows families to surpass their ideological constraints and access domestic work through the scheme.[197] Through the au pair, host families can claim that they are not really outsourcing care, but they are instead engaging in family-based cultural exchange while offering "aid at the micro level" to migrants from much poorer states.[198]

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[194] Stenum, *Abused Domestic Workers in Europe: The case of au pairs*, 2011, above.

[195] See, New to Denmark, Official Portal for foreigners and integration, http://www.nyidanmark.dk/en-us/coming_to_dk/work/positivelist/positive-list.htm (10 February 2015).

[196] Helle Stenum, "*Au pair in Denmark: cheap labour or cultural exchange*" (Copenhagen: FOA- Trade and Labour, 2008).

[197] Ragnihild Sollund, 'Regarding Au Pairs in the Norwegian Welfare State' (2010) 17 (2) *European Journal of Women's Studies*, 143-160.

[198] Sollund analyses various discourses employed by host families to legitimize their purchase of domestic and child care services like the member-of-the-family rhetoric. See, Sollund, 2010, above. Gavanas observes similar strategies in the way Swedish families approach the au pair. See Anna Gavanas, 2006, cited in Sollund, above.

IV. Comparing the construction of vulnerabilities under national immigration regimes

The acknowledged need for domestic work services in Southern Mediterranean EU Member States shapes migration laws that are more open and flexible as regards the entry of TCN workers. In the cases of Italy, Spain and Cyprus this is evident in the way migration regimes explicitly target TCN domestic workers. In addition, Sweden, even though not explicitly targeting domestic workers, is also liberal in terms of allowing their entry. Thus, under these three models – *Regulated Entry/Liberal Treatment* in Italy and Spain, *Open Entry/Restrictive Treatment* in Cyprus and *Employer-Led/Mixed Treatment* in Sweden – TCN domestic workers have an independent route to legal entry and access to a legal migration status. Access is granted through a variety of immigration schemes such as quotas, shortage lists, specific visas and the general labour migration rules. Another commonality these regimes share is that their openness is sector-specific; migrants can enter on the condition that they take up employment in domestic work without the right to change for a different sector.

Despite active recruitment policies in Southern Mediterranean countries, there are still large numbers of domestic workers who lack residence permits.[199] In Italy and Spain this can be partly explained by the fact that quotas and shortage lists tend to be lower than actual needs for paid domestic work,[200] and in Cyprus by TCNs' precarious migration law status – tied to the employer, loss of residence right in case of unemployment. On the other hand, the reliance on migrant domestic labour for the provision of care creates a background of tacit social acceptance of illegally resident domestic workers.[201] This acceptance eventually makes the day-to-day life of an illegally resident domestic worker easier in a Southern Mediterranean country than in

[199] While it is not possible to give exact numbers of illegally resident migrants, it is estimated that the numbers of the undocumented surpass those of documented domestic workers. See, Patrick R. Ireland, 'Female Migrant Domestic Workers in Southern Europe and the Levant: Towards an Expanded Mediterranean Model?' (2011) 16 (3) *Mediterranean Politics*, 343-363.

[200] Anna Triandafyllidou and Maurizio Abrosini, 'Irregular Immigration Control in Italy and Greece: Strong Fencing and Weak Gate-keeping serving the Labour Market' (2011) 13 *European Journal of Migration and Law*, 251-273; Fundamental Rights Agency, *Migrants in an irregular situation employed in domestic work: Fundamental Rights Challenges for the European Union and its Member States* (Luxembourg: EU Publications Office, 2011).

[201] Maria Kontos, 'Negotiating the Social Citizenship Rights of Migrant Domestic Workers: The Right to Family Reunification and a Family Life in Policies and Debates' (2013) 39 (3) *Journal of Ethnic and Migration Studies,* 1-16; Interview with representatives of the trade union CC.OO, Madrid, 5 February 2014.

Sweden where performing work in breach of immigration rules is not tolerated.[202] As illegal residence is generally tolerated by the authorities and society, migrant domestic workers may find it easier to circulate in the labour market, find work and change employers. To be sure, deportation is still a real threat for any illegally resident TCN domestic worker; in Southern Mediterranean countries, the side-effects of illegal residence however may be somewhat more subtle.

While, Italy and Spain do not restrict migrant domestic workers' right to change employers, Cyprus and Sweden restrict this right. None of the four countries allows TCN domestic workers to change sectors. Research in Italy, Spain and Cyprus suggests that this has contributed to the strong racialisation of domestic services.[203] This phenomenon is also taking place in Sweden especially since the 2008 liberalisation; Kommunal, the trade union organising service workers, states that 1/3 of the workers in the private sector of companies offering household services come from neighbouring Baltic countries but also from Russia, Ukraine and Thailand; one finds no Swedish workers in these companies but in managerial positions. [204]

In all three models the work and residence permits are temporary. In Cyprus temporariness constitutes a legal barrier in accessing long-term residence and family reunification. In contrast, in Italy, Spain and Sweden the temporary nature of the permits does not restrict access to a more stable residence status and family reunification.

The Italian and the Spanish regimes are characterised by a liberal approach towards migrant domestic workers; they are welcoming in terms of entry and grant a set of right after entry that can ease vulnerability. The trade-off however is that liberal entry is sector-specific; it is granted provided that TCNs take up employment in domestic work. Cyprus' regime on the other hand, is a hybrid one; it shares characteristics of both liberal and restrictive regimes. It is characterised by openness in terms of entry, but the conditions attached to the permit are very onerous and restrict domestic workers' rights and personal freedom.

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[202] Interview with a representative of the trade union confederation TCO, Stockholm, 18 September 2013.
[203] Mediterranean Institute for Gender Studies, Integration of Female Migrant Domestic Workers: Strategies for Employment and Civic Participation (2008), above.
[204] Interview with representatives of the trade union Kommunal, Stockholm, 1 October 2013.

It also noted that all Member States with closed, or almost closed, doors for TCN domestic workers are Northern European countries; Sweden on the other hand stands out as having a liberal regime in terms of entry that approximates those of Southern Member States. Paradoxically, Sweden's treatment of migrant domestic workers once they are in the country shares some similarities with the restrictiveness of the Cypriot regime.

Closed borders for migrant domestic workers, especially when care needs are not effectively met by public provision, create 'twilight zones of informal labour markets'.[205] Migrant domestic workers, in the absence of a legal entry path, will likely use other routes such as taking up employment on a tourist visa or entering under the ambiguous au pair scheme. Restrictive states generally seem to tolerate the irregular employment of migrant carers and rarely penalize private employers; for example Lutz and Palenga illustrate the complicity of the German state: 'knowing and pretending ignorance at the same time; officially acting in a restrictive way, while tacitly accepting the violation of self-made rules'.[206] Restrictive policies instead of curbing migration flows may instead lead to semi-compliance practices that push migrant workers into informality.[207] According to the ILO, the mismatch between demand and supply through legal and safe immigration paths turns irregular migrant workers into a "buffer zone between the political demands for closed borders and the economic realities existing in destination countries".[208] Overall, overly restrictive migration regimes – that often lack effective enforcement – tend to create a large supply of illegally resident and precarious workers.[209]

The status of illegally resident workers translates into increased deportability. In addition, as discussed in detail in Chapter II, in some countries taking up employment in breach of immigration law apart from constituting a criminal offence may adversely

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[205] Helma Lutz, "*The New Maids: Transnational Women and the Care Economy"* (London: Zed Books 2011).

[206] Lutz and Palenga, "Care Work Migration in Germany: Semi-Compliance and Complicity" *Social Policy and Society,*above.

[207] Ettore Recchi and Anna Triandafyllidou, 'Heading West and South: Mobility, Citizenship and Employment in the Enlarged Europe' in Georg Menz and Caviedes Alexander (eds), *Labour Migration in Europe* (New York: Macmillan, 2010), 127-149; Anderson, Rogaly, and Spencer, *Fair enough? Central and East European migrants in low-wage employment in the UK* (2006), above.

[208] ILO, *International labour migration : a rights-based approach* (Geneva: International Labour Office, 2010).

[209] Van Walsum, 2011, above; Hila Shamir, 'What's the Border Got to Do With It? How Immigration Regimes affect Familial Care Provision-A Comparative Analysis' (2011) 19 (2) *American University Journal of Gender Social Policy and Law*, 601-669.

impact the migrant worker's access to labour rights and protections. This is especially true for legal systems that apply the common law doctrine of illegality such as Ireland, Cyprus and the UK.

On the other hand, illegally resident TCN domestic workers are not restricted by immigration rules to change employers or sector; paradoxically, they have more freedom on the labour market and are thus in a better bargaining position than domestic workers who hold work permits.[210] Their advantage is nonetheless an oxymoron, an illustration of "the way the immigration regime that endows migrant workers with "legality" as migrants, concurrently strips them off their bargaining power as workers".[211]

V. Conclusion

In this Chapter I examined the position of TCN domestic workers under the national migration regimes of selected EU Member States. The map of domestic workers' independent entry routes in the EU, as well as the conditions attached to these routes, shows great divergences among Member States. I have identified four different types of regimes: *Regulated Entry/Liberal Treatment* with relatively open entry and a good set of rights, *Open Entry/Restrictive Treatment* with an even more liberal entry but more restrictive treatment post entry, *Employer-Led/Mixed Treatment* with a relatively easy entry but treatment that combines restrictive and liberal elements and a *Restrictive/Au Pair Only* that is restrictive. The typology shows that there is a range of different national migration regime possibilities and illustrates the different implications of each regime type for migrant domestic workers' vulnerability.

Illustrating the divergence of migration regimes is very important because this demonstrates the range of regime choices states have and the fact that they make very different choices over time. Juxtaposing national migration regimes illuminates a different view to the one that might be assumed if one only examined migrant domestic workers' vulnerability through the human rights lenses, that is, that all migration regimes are equally problematic; thus, comparative analysis provides a

[210] Shamir, 'What's the Border Got to Do With It? How Immigration Regimes affect Familial Care Provision-A Comparative Analysis' (2011) 19 (2) *American University Journal of Gender Policy and Law,* 601-669.
[211] Shamir, above, 667.

corrective lens. Moreover, national immigration law differences provide arguments and open up paths to challenge the inevitability or the necessity of restrictive immigration regimes and statuses. For instance, the more liberal paradigm of Spain and Italy can be used to challenge the restrictiveness of the Cypriot regime; these three states have similar welfare models and needs for paid domestic work services yet afford a sharply distinctive treatment to migrant domestic workers; when juxtaposed, such sharp differences do not seem justified.

While no regime examined in this Chapter is ideal or even desirable, it is clear that they expose migrant domestic workers to different kinds of risks and sharply different scales of vulnerability. It is in the *Regulated Entry/Liberal Treatment* type of regime in Spain and Italy where immigration law accentuates less these vulnerabilities. This is because this type apart from occupational restrictions – no right to change sector – impose no other restrictions on migrant domestic workers' mobility in the labour market. The analysis of the Employer-Led/Mixed Treatment regime illustrates that liberalising entry is no guarantee for migrant workers. Open entry comes with a trade-off, that of signing away crucial freedoms and protections. This inconsistency in migration law challenges the binary between vulnerable illegally resident and protected legally resident workers. The case of TCN domestic workers in EU Member States shows that the trade-off of having a legal status under migration law may result in more vulnerability because the conditions to access this status are onerous and restrict personal freedom.

Chapter Two: National labour law regimes and vulnerabilities: domestic workers in the UK, Cyprus, Sweden and Spain

I. Introduction

The adoption of the ILO Convention 189 on Decent Work for Domestic Workers signals a global struggle to improve the working conditions of a sector which has been historically excluded on partially included in the scope of labour law. This development at the international level has created momentum to put national labour law regimes under scrutiny, to identify legal norms structuring the vulnerability of domestic workers and pursue the reform of such regimes. The pursuit of reform has given rise to a debate on whether domestic work should be regulated as "a work like any other" or "a work like no other". In other words, are domestic workers better protected if they are included in the personal scope of generally applicable labour legislation or under legislation that is designed and enacted specifically for them?

Analyses of domestic workers' status and treatment under national labour law have thus far tended to focus on only one national case to explore the role of labour regulation in structuring their vulnerability. Due to the fact that domestic work is an overall unprotected type of work, single-state analyses normally conclude that national labour law creates conditions of precariousness and vulnerability for domestic workers *vis à vis* other workers. I do not contest this finding; domestic work is indeed one of the most precarious forms of work. However, a comparative analysis provides for a more nuanced picture. Comparing and contrasting the substance of labour law norms in different countries sheds light to the very different ways in which law structures and, in certain instances, may contribute in reducing domestic workers' vulnerability.

Thus, in this Chapter I propose to examine the role of labour law regimes in a comparative perspective. I take the example of four EU Member States, namely, the UK, Cyprus, Spain, Cyprus and Sweden, to identify norms that structure or reduce domestic workers' day-to-day vulnerability at work. The four states are selected because of their variance in terms of labour and immigration regimes. As far as labour regimes are concerned, Sweden and Spain have enacted special laws for domestic work; thus, they follow a "work like no other" approach. On the other hand, the UK and Cyprus do not have any special laws on domestic work; hence, they – at least in principle – include

domestic workers in the personal scope of generally applicable labour legislation. The regulatory approach of the UK and Cyprus is of the "work like any other" type. Comparing and contrasting the models and substance of protections and entitlements in the four countries allows me to assess whether domestic workers are better protected under a "work like any other" or a "work like no other" approach. In other words, is the model necessarily related to the protection level?

The selected Member States represent examples of the four different migration regimes in relation to migrant domestic workers identified and discussed in Chapter One. The UK belongs to the *Restrictive/Au Pair Only* regimes as it allows very limited entry of TCN domestic workers and on very restrictive conditions. Cyprus is an *Open Entry/Restrictive* type because, while TCN domestic workers are granted easy entry, very restrictive conditions are attached to their status once they are in the country. Sweden's regime is *Employer-Led/Mixed Treatment* in the sense that employers can freely recruit TCN domestic workers and the worker's treatment after entry combines both liberal and restrictive elements. Spain's regime is one of *Regulated Entry/Liberal Treatment* as there is some state regulation on entry while still being open and a relatively good set of rights after entry. Examining the nexus of migration and labour law regimes allows for a more holistic assessment of the legal frameworks particular states apply to migrant domestic workers.

In addition, because of their immigration regime variation, the comparison of the selected Member States is also useful in order to examine to what extent immigration law encroaches on labour law as well as the variances and scales of such encroachment. Labour law normally applies to workers without any distinction based on nationality or status under immigration law; as an autonomous discipline, labour law, defines its personal scope independently. Yet, as the cases of Cyprus and the UK best illustrate, immigration law often enters the terrain of labour law to create special norms for migrant domestic workers. Immigration law encroachment on labour law has major implications for the vulnerability of illegally resident TCNs. As discussed in Chapter One, migrant domestic workers, due to immigration law restrictions, very often move from having a regular to having an irregular status under immigration law; the precariousness of their immigration status is an important vector of vulnerability. It is thus important to examine to what extent illegality regimes – that is to say, the rules applicable to irregular migrants – may impact migrant workers' entitlements and protections under labour law.

I structure the discussion as follows. In Section II, I review the debate on whether domestic work should be treated as a work like any other or as a work like no other. Then in Section III, I proceed to analyse the regulatory models and substance of labour protection in the UK, Cyprus, Sweden and Spain. Section IV discusses the four countries' illegality regimes and their impact on the rights at work of irregular migrant domestic workers. Finally, the last section examines the different processes of reform and of challenging the labour law regimes governing domestic work that have recently emerged in some of the national cases discussed.

II. On labour law regimes for domestic work: "work like no other" or "work like any other"?

Historically, domestic workers have been either excluded or only partially included in the personal scope of labour legislation across many different jurisdictions.[212] Mantouvalou has aptly termed the sum of these exclusions and partial inclusions as "legislative precariousness".[213] A classic example is the exclusion of domestic workers from the personal scope of occupational health and safety legislation.[214] Domestic workers are also often excluded from key provisions of working time regulation such as protections in relation to night work, maximum working time and remuneration for overtime. Discriminatory wage regulations, as well as dismissal rules that give flexibility to the employer are also typical vectors of vulnerability for domestic workers.

Domestic workers' exclusion or partial inclusion in the personal scope of labour law has been formally justified on two grounds: the special character of the employment relationship which supposedly entails a higher degree of trust and the exceptionality of the household as a workplace which is unfit for labour law regulation. Feminist scholars across disciplines have challenged this exceptionalism which results in substandard labour rights and protections for domestic workers.[215] They argue that the foundations

[212] For a global overview see ILO, *Domestic workers across the world: Global and regional statistics and the extent of legal protection* (Geneva: ILO, 2013).
[213] Virginia Mantouvalou, "Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor" (2012) 34 *Comparative Labor Law and Policy Journal*, 133- 166.
[214] See for example article 3 of the EU Framework Directive on Health and Safety 89/391/EEC.
[215] For a comprehensive account of these critiques see Judy Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction' (2014) 22(1) *Feminist Legal Studies*, 1-23.

of exceptionalism are ideological and draw attention to the fact that the public/private binary and the notion of non-intervention of the state into the private sphere are constructed ideas, so strongly embedded in legal culture that mainstream scholarship seldom questions. Exceptionalism stems from deeply rooted societal ideas that view caring and domestic labour as expressions of love and affection, part of the innate duties of women as wives, mothers and daughters. Viewed through this lens, care and domestic labour may not be fully commodified and regulated on labour market terms.

In addition to being an expression of the public/private division in law, Catharina Calleman argues that the exemption of the employer's household from the scope of labour law, essentially reflects the low value the legislator assigns to work within the household for being traditionally women's work.[216] For her, the exceptionalism of domestic work is premised on the fact that the tasks are associated with women's unpaid reproductive labour and that both the worker and the employer are often women which undervalues their employment relationship even more.[217] Similarly, Guy Mundlak and Hila Shamir argue that there is nothing essentially exceptional in domestic work to justify its legal regulation on different terms than other types of work. On the contrary, they consider that the legal construction of domestic work as exceptional with less labour rights is dictated by states' socio-economic interests to keep care private and affordable.[218] Their analysis further illustrates how law has both a reflective and a constitutive role; law reflects social perceptions around care work, but law also constructs and perpetuates such perceptions by according them legitimacy and solidifying them.[219]

The design of labour laws to remedy domestic workers' historical disadvantage raises the question of whether domestic work should be regulated as "work like no other"- under tailored-made legal instruments, or as "work like any other"- inclusion in the personal scope of generally applicable labour law. In other words, should we strive for equality of treatment or for specific measurers? Scholars like Einat Albin and

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[216]Catharina Calleman, "Challenging one Fundamental Norm in Labour Law-the Exception of the Employer's Family and Home" in Assa Gunnarsson, Eva-Maria Svensson and Margaret Davies (eds), *Exploitting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (Aldershot: Ashgate, 2007), 153-170.
[217] Calleman, "Challenging one…", 2007, above.
[218] Guy Mundlak and Hila Shamir, "Between Intimacy and Alienage: The Legal Construction of Domestic and Carework in the Welfare State" in Helma Lutz (ed), *Migration and Domestic: Work A European Perspective on a Global Theme* (Aldershot/Burlington: Ashgate, 2008).
[219] Mundlak and Shamir, 2008, above.

Virginia Mantouvalou argue that separate statutory instruments which take into account the specificities of domestic work are necessary in order to make employment rights meaningful to domestic workers; by merely including domestic workers in the personal scope of generally applicable employment norms, they argue, would not solve the problem because of enforcement difficulties.[220] The counter-argument, however, is that enacting special employment laws for domestic work exacerbates the sector's disadvantage as specially tailored models tend to grant substandard rights and protections.[221]

The sharp line between the two approaches appears somewhat misleading because the debate seems to focuse primarily on models. I propose instead to look beyond the model and scrutinize more carefully the substance of labour law protections and entitlements under each model. Comparing the substance of labour law protections and entitlements in the UK, Cyprus, Sweden and Spain informs and opens new questions in the debate as to whether domestic work should be treated as "work like no other" or as "work like any other".

III. Approaches to labour law regulation in the UK, Cyprus, Sweden and Spain

In this section I first look at the regulatory models that the UK, Cyprus, Sweden and Spain implement in relation to domestic workers when they are directly employed by a private individual. I then analyse the substance of labour law protection under each of these regimes.

Models of regulation and substance of labour law protection

When we look at the labour law regulation of domestic work in the four countries in this study, we note two divergent models: a model of specific regulation – a

[220] Einat Albin, 'From 'Domestic Servant' to 'Domestic Worker' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Oñati International Series in Law and Society, 2012), 231-251; Virginia Mantouvalou and Einat Albin, 'The ILO Convention on Domestic Workers: from the Shadows to the Light' (2012) 41(1) *Industrial Law Journal*,67-78.

[221] Mundlak and Shamir, 'Bringing Together or Drifting Apart? Targeting Care Work as "Work Like No Other" (2011) *Canadian Journal of Women and the Law*, above; José María Machado Ramirez, *Domestic work, conditions of work and employment. A legal perspective* (Geneva: International Labour Office, 2003).

special law which regulates exclusively domestic work, or inclusion in the personal scope of generally applicable labour law. Sweden and Spain have a special law regulating the employment relationship of domestic workers employed directly by a household: the Domestic Work Act of 1970 and the Royal Decree 1620/2011 respectively. At the same time domestic workers and the private household are exempted from the personal scope of generally applicable labour legislation. On the other hand, the UK and Cyprus have not enacted any specific legislative instrument and thus formally include domestic workers in the personal scope of generally applicable employment legislation.

Regardless of the regulatory model each country applies to domestic workers, the substance of labour law protections and entitlements varies significantly under each model. This section identifies and discusses three different approaches: i) the formally normal protection but with key exceptions in the UK, ii) the less than normal protection approach in Cyprus and Sweden and iii) the Spanish approach which is a special model adapted to deliver normal level of labour protection.

i. Formally normal but with key exceptions: the UK

The UK has not enacted any specific law for domestic workers; thus domestic workers are formally included in the personal scope of generally applicable labour legislation. Yet, a closer scrutiny reveals that generally applicable legislation contains several key exceptions for domestic workers who are directly employed in private households.

To begin with, Section 51 of the 1974 Health and Safety Work Act introduces a blanket exclusion of domestic workers from the scope of workplace health and safety provisions.[222] Secondly, Regulation 19 of the 1998 Working Time Regulations introduces a number of key exemptions for domestic workers. In particular, domestic workers in private households are not entitled to the 48-hour weekly limit, to limits to

[222] It reads: "Exclusion of application to domestic employment. Nothing in this Part shall apply in relation to a person by reason only that he employs another, or is himself employed, as a domestic servant in a private household."

the length of night work, to health and safety entitlements during night work and to limits on patterns of work that can pose risks to the health of employees.[223]

Thirdly, apart from explicit exemptions, Courts have furthermore interpreted labour legislation in ways that restrict domestic workers' inclusion therein. Notably, UK Employment Tribunals and the Court of Appeal have interpreted Regulation 2(2) of the National Minimum Wage Act as excluding live-in domestic workers when they are treated "as a member of the family". Regulation 2(2) reads:

> "work" does not include work (of whatever description) relating to the employer's family household done by a worker where the conditions in sub-paragraphs (a) or (b) are satisfied.
> (a) The conditions to be satisfied under this sub-paragraph are-
> (i) that the worker resides in the family home of the employer for whom he works,
> that the worker is not a member of the family but is treated as such in particular as regards to the provision of accommodation and meals and the sharing of tasks and leisure activities; [...].

Bridget Anderson notes that the "as a member of the family" exemption was introduced in the National Minimum Wage Regulations following the successful lobbying of au pair agencies that did not want their clients, the host families, to be bound by the obligation to pay the minimum wage to au pairs. Initially, Employment Tribunals were careful not to apply the exemption to cases that involved elements of exploitation.[224] Recent case law, however, indicates a very significant widening of the exemption's scope; Courts have extended this ambiguous exemption to practically all live-in domestic workers even if their conditions of work do not fall under the au pair scheme and are clearly exploitative.[225]

In *Jose v Julio* the Employment Appeal Tribunal held that the claimants, three live-in TCN domestic workers, were not entitled to the national minimum wage.[226] Paradoxically, this was despite the Tribunal's acknowledgement that the employers took advantage of the workers' vulnerable position as temporary migrants with little

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[223] Novitz and Syrpis note that the legal basis of these exclusions is Article 17 of the EU Working Time Directive which allows Member States to exempt categories of workers whose working time is "unmeasured" from protective provisions on rest periods, maximum weekly time and night work. See, Tonia Novitz and Phil Syrpis, "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", (2015) 6(2) *European Labour Law Journal,*104-127. However, as I argue in more detail in Chapter Four, the UK's interpretation of Article 17 EU Directive is flawed as domestic workers do not fall under any of the categories of workers that can be excluded.

[224] See for instance the case *G Sujatha v A Manwaring* 2202606/2002 [ET] 17/7/03, cited in Albin, "From 'Domestic Servant' to 'Domestic Worker'" in *Challenging the Legal Boundaries of Work Regulation,* (2012), above.

[225] It must be noted however that the wording of Regulation 2(2) does not indicate that the exemption applies only to all au pairs; the provision is ambiguously wide. See also, Bob Simpson (1999) 'Implementing the national minimum wage - the 1999 regulations' 28 *Industrial Law Journal* 171-182.

[226] *Jose v Julio* [2012] ICR 487 UKEAT.

knowledge of their rights in the UK; the employers had systematically exploited the claimants and at times, denied them suitable accommodation. According to the Employment Appeal Tribunal, exploitation and ill-treatment do not necessarily rule out the possibility that the claimants were treated as members of the employer's family. By adopting a so-called "holistic approach" the Tribunal looked into different aspects of the relationship between the claimants and their employers to conclude that the "as a member of the family" criterion was met in all three cases: not complaining of the ill-treatment straightaway, sharing meals and then cleaning up together, watching television with the members of the family, occasionally joining the family for social activities and spending time with the children.[227] Two of these cases were jointly appealed to the Court of Appeal which endorsed the Tribunal's judgment despite acknowledging that the exemption entails the danger of concealing cases of labour exploitation.[228]

The exemption and its interpretation by the Courts is highly problematic. The only clear-cut criterion Regulation 2(2) sets is the live-in requirement. All other aspects which must be assessed – to what extent the claimant was part of the rest of the family regarding accommodation and daily life activities – are so broad that there is room for ambiguous interpretations. It is hard to imagine that a domestic worker, whose duties involve providing care for family members, will not be spending a substantial amount of time with the family and will not be sharing certain daily activities and tasks; these are integral aspects of the day-to-day life of a live-in domestic worker. Essentially, any live-in domestic worker whose accommodation is not appallingly inadequate could fall under the exemption.

Moreover, the Courts' reading of the exemption fails to take into account the imbalance of power which is inherent in any employment relationship and particularly acute in the case of migrant live-in domestic workers. The interpretation, for instance, of the worker's lack of complaint of ill-treatment as an indication of integration in the family is a clear failure to acknowledge the structural dependence on the employer to provide a job, a residence permit and a roof.[229] This structural dependency, apart from

[227] *Jose v Julio* [2012] ICR 487 UKEAT, paras 50 to 57.
[228] Jointly decided in the case *Ms T Nambalat v Mr Taher and Mrs Tayeb* [2012] EWCA Civ 1249, para 48.
[229] To support the argument that Ms Jose was treated as a member of the employers family, the Employment Appeal Tribunal said at paragraph 50 of its judgment: "Even after the claimant must have become aware that she was not receiving what had been agreed she did not complain and only did so after she had left the respondent's employment".

rendering it particularly difficult for the domestic worker to challenge the employer, further questions the assumption that she can be treated "as a member of the family". Such considerations, however, are not taken into account by Tribunals and Courts. The exemption is deemed to impact TCN workers disproportionately; it is migrants on an Overseas Domestic Worker Visa who are most likely to live-in due to the fact that they tend to have fewer alternatives to live-out.[230]

The way the exemption in structured in the legislation and the way Courts have interpret it implies the exclusion of live-in domestic workers as a group from the National Minimum Wage. However, if one takes into account the purpose and the spirit of the Minimum Wage Regulations which is to protect low-paid workers from exploitation, then the exemption ought to be interpreted and applied in the narrowest possible way. It is also discriminatory against migrant women who are, as noted earlier, most likely to fall under the exemption's personal scope.

Mullally and Murphy note the wider social perceptions that underpin domestic workers' exclusion from the personal scope of minimum wage laws; according to them, when types of work resemble intimate, domestic life, they tend to fall outside the scope of protective employment legislation.[231] In essence, the exclusion of paid domestic workers from minimum wage legislation when they are supposedly treated as members of the employer's family results in imposing on domestic workers societal expectations and responsibilities that are normally shared between family members. In other words, the domestic worker is expected to behave in the same way as family members who may have mutual moral duties to love and take care of each other. A domestic worker, however, is never a member of the employer's family and may be dismissed at any moment. By treating the relationship between employer and domestic worker as one between family members distorts its employment nature. As the case law discussed above illustrates, Courts have an important role in upholding and reinforcing these social perceptions.

The structure of legal provisions aimed at providing protections against discrimination pose significant barriers to domestic workers in bringing claims; legal barriers stem from the grounds of discrimination as well as the specificities of the employment relationship between domestic workers and employers. The Equality Act

[230]Anderson, "Who needs them? Care Work, Migration and Public Policy" (2012) *Cuadernos de Relaciones Laborales*, 45-61, above.

[231] Siobhán Mullally and Clíodhna Murphy, "Migrant Domestic Workers in the UK: Enacting Exemptions, Exclusions, and Rights" (2014) 36 *Human Rights Quarterly*, 397- 429.

of 2010 prohibits direct and indirect discrimination in employment.[232] Direct discrimination occurs when an individual is treated disparately on the basis of a protected characteristic, while indirect discrimination occurs when an apparently neutral provision has adverse effects on a group of people who share a protected characteristic. The two forms of discrimination are mutually exclusive and their fundamental difference is that indirect discrimination, if justified, can be legal. The contravention of prohibition of direct or indirect discrimination gives rise to a claim in tort.[233] The protected characteristics under the Act are: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation.[234] The term race is understood to encompass 'colour, race, nationality and ethnic or national origin'.[235] Immigration status is not stated as a ground of racial discrimination. However, immigration status – being subjected to immigration rules and controls – is in fact a crucial vector of discrimination for migrant domestic workers. Employers may be indifferent to a migrant worker's nationality *per se*, but they may nonetheless take advantage of a TCN's vulnerability stemming precisely from precarious immigration status. Recent case law shows that it is not uncommon for employers of migrant domestic workers to use immigration status as an intimidation tool. Tribunals, while admitting that being subject to immigration controls is indeed a vector of migrant domestic workers' vulnerability, fail to acknowledge the centrality of immigration status in the facts substantiating a discrimination claim.

In *Taiwo v Olaigbe* the claimant, a Nigerian live-in domestic worker brought claims against her employers *inter alia* for race discrimination. The employers had subjected Ms. Taiwo to "systematic and callous exploitation" imposing onerous working and living conditions-including verbal and physical abuse and restricting her access to food.[236] The Employment and Employment Appeal Tribunals rejected the claim that the employers' treatment amounted to race discrimination. The Appeal Tribunal found that Ms. Taiwo's vulnerability stemmed from a variety of factors: her poor socio-economic background, her limited English, lack of support network in the country and the fact that, as a TCN she was entirely dependent on the employers for the permit to remain in the country. But instead of remedying Ms. Taiwo's vulnerability to

[232] Sections 13 and 19, EqA 2010.
[233] Simon Deakin and Gillian S Morris, *Labour Law*, 6th edn(Oxford: Hart, 2012), 684.
[234] Section 19(3) EqA 2010.
[235] Section 9 (1) ibid.
[236] *Taiwo v Olaigbe* [2013] WL 617439 Employment Appeal Tribunal, para 5.

exploitation by granting her protection against discrimination, the Tribunal held that being a migrant subjected to immigration controls and dependent on the employer for continued employment and residence is only a 'background circumstance' to that vulnerability and cannot be accounted as 'a reason in itself for the treatment'.[237] The judgement thus creates an odd outcome where the interplay of various vectors of vulnerability instead of being the basis to afford protection to migrant domestic workers, it never suffices to establish discrimination.

In *Onu v Akwiwu* a case with facts similar to those in *Taiwo* the Employment Appeal Tribunal followed the same reasoning and rejected the race discrimination claim.[238] Both judgements were jointly appealed at the Court of Appeal which endorsed the rulings of the Employment Appeal Tribunals.[239]

In cases of direct discrimination, since the prohibited conduct is disparate treatment, there is a need for a comparator in order to substantiate a claim. [240] The comparator can be actual o hypothetical. An actual comparator is someone who is working under the same employer and circumstances, does not share the claimant's protected characteristic and who has received a more favourable treatment. The fact that employers are natural persons who do not normally employ other workers makes it particularly difficult, if not impossible, for domestic workers to substantiate discrimination claims as finding a suitable, actual comparator is unlikely. Fulfilling the comparator requirement is a common difficulty for domestic workers in private households, as well as for workers in small establishments, when seeking discrimination protection.[241] The possibility to compare themselves to a hypothetical comparator in the absence of an actual one is an alternative avenue for domestic workers to substantiate a discrimination claim. But even in this case, the potential of antidiscrimination legislation to improve the situation of a domestic worker is limited since, as discussed earlier, domestic workers are entitled to less rights and protections at work than other workers.

Thus, even though domestic workers in the UK are formally covered by the labour legislation applied to other categories of workers, they are in fact excluded from

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[237] *Taiwo v Olaigbe*, [2013] WL 617439 Employment Appeal Tribunal, para 46.
[238] *Onu v Akwiwu* [2013] WL 1841654 Employment Appeal Tribunal.
[239] *Onu v Akwiwu &Anr and Taiwo v Olaigbe & Anr* [2014] EW CA Civ 279.
[240] Section 13 (1) EqA 2010.
[241] Albin, "From 'Domestic Servant' to 'Domestic Worker'" in *Challenging the Legal Boundaries of Work Regulation,* (2012), above.

entitlements and protections at work in the crucial areas of health and safety, wage regulation, working time and protection from discrimination. These exclusions make domestic workers in private households particularly vulnerable.

ii. A very special vulnerability: Cyprus

Cyprus *prima facie* includes domestic workers in the personal scope of generally applicable labour legislation; there is no special law for the regulation of domestic work and labour legislation does not normally contain any exemptions for domestic workers. Yet, the state has designed an employment regime with a very exclusive personal scope as it is only applied to TCNs on a domestic worker visa. The source of this regime is a model contract of employment designed by the Immigration Department.[242] As a source of employment law, the contract is atypical and problematic. It was drafted by immigration authorities to regulate a private law relationship, while diverging from the generally applicable employment regulatory framework, statutory legislation and collective agreements, in many respects.

In 1991 following consultations with the social partners, the Council of Ministers adopted a policy decision setting the general framework for the entry and employment of aliens in Cyprus.[243] According to the policy decision, migrant workers are entitled to the same rights as national workers except for the right to change employer, place of work and sector. Also, migrant workers are expressly granted the freedom to join a Trade Union and are entitled to salaries and benefits equal to those set for Cypriots in collective agreement.[244] The authorities in charge of the implementation and supervision of the decision are the Department of Labour, which is part of the Labour and Social Insurance Ministry, and the Immigration Department, which is part of the Home Affairs Ministry. The Labour and Immigration Departments are expected to work in close cooperation; Labour is responsible for examining whether the model

[242] In addition, a Ministerial Committee composed of the Ministers of Interior, Labour and Social Insurance, Justice, Tourism and Trade which designs and implements the national policy on migrant labour, issues decisions which are relevant to migrant domestic workers. The Committee's decisions are not open to parliamentary debate.

[243] Prior to this, Cyprus had an almost closed-doors approach to labour migration and granted work visas only in very limited situations such as to exceptionally highly skilled technical or managerial staff in foreign companies.

[244] Council of Ministers decision of 6 December 1991.

contracts of employment which Immigration prepares and disseminates to migrant workers and their employers are in accordance with employment legislation.

While the cooperation between the two Departments is a procedure that has been followed for all categories of labour migrants, the contract on TCN domestic workers has never received any input from Labour. Immigration consistently rejects requests of the Labour Department to review the contract and ensure compliance with labour law; Immigration is of the view that migrant domestic workers' employment has no effects on the national labour market and thus, the Labour Department need not be consulted.[245] In practice, Immigration became the sole authority regulating both the entry rules and the employment conditions of migrants on a domestic worker visa. The Immigration's exclusive competence has great bearing on the content of the contract for migrant domestic workers. It seems that the contract for migrant domestic workers is drafted not to regulate an employment sector but a group of migrant workers; it makes plentiful references to immigration restrictions while lowering generally applicable labour rights and protections.

Crucially, the contract is available only in Greek and English which makes it inaccessible to the large majority of migrant domestic workers who come from South East Asia and are not native English speakers. Thus, by distributing contracts in languages domestic workers do not understand the state thus fails to provide them information on the terms of employment. Also, employers, who are normally native Greek speakers, have an advantage against domestic workers. In terms of content, the contract includes provisions unsuitable to an employment contract. First, there are abundant references to immigration rules and controls emphasizing in the most explicit way the status of the employee as a migrant. A prominent example in this respect is the inclusion in the contract of the prohibition to change employers.[246] In some instances references to immigration rules have even a threatening tone; for example clause 5 (c) adverts that: "breach of any clause of the contract will automatically cause the termination of the contract as well as the validity of the Employment and Residence

[245]Office of the Ombudsman, *Report of the Ombudsman as National Independent Human Rights Authority as regards the status of domestic workers in Cyprus* (Nicosia, 2 July 2013).

[246] " [the Employee] shall not be allowed to change Employer and place of employment during the validity of this contract and his Temporary Residence/Work Permit", Clause 2 (a).

Permit." In fact, it is clearly established that the terms of the permit form an integral part of the contract.[247]

Second, equally unusual are also certain clauses concerning the worker's obligations which go beyond the setting of normal disciplinary rules relevant to the employment relationship. These include provisions which require the worker to "in all respects and all times conduct himself with propriety and decorum"[248] and to abstain from participating in any "political action or activity".[249]

Third, the contract limits the worker's bargaining power by ruling out the right to negotiate a better salary. Clause 2(g) states in the most categorical way that the employee "shall not be entitled in any way and for any reason to any increase of his fixed salary [...]".[250] Fourth, what one would expect to find in an employment agreement but is remarkably absent from this particular one, is at least a brief description of the tasks the worker is expected to carry out. Instead, the contract makes a vague reference to the obligation to "obey and comply with all orders and instructions of the Employer and faithfully observe the rules, regulations and arrangements for the time being in force […]".[251] Fifth, the contract lowers the level of protection in relation to working time because, contrary to the framework for other sectors, there is no provision for daily rest breaks, no guarantees in relation to night work and no provision on maximum overtime hours or any guidance on how should overtime hours be remunerated.

Finally, the contract even restricts migrant domestic workers' freedom of association, a constitutionally protected freedom. The provision in question is clause 5 (h), which in the English version of the contract, states that the employee:

> "shall not engage, contribute or in any way directly or indirectly take part in any *political action or activity* during the course of his stay in Cyprus […]" (Clause 2(h))

Notably, the Greek version of the contract imposes an even more general prohibition because the word "political" is omitted. Hence, according to the Greek version, the migrant is prohibited from taking part directly or indirectly in *any* kind of action or activity. In essence, the way this provision is articulated, prohibits TCN domestic

[247] Clause 5 (f) states that: "The conditions included in such Permit [Residence/Work] shall form part of this contract and shall be binding on both parties".
[248] Clause 2(f).
[249] Clause 5(h).
[250] This can be juxtaposed to the Spanish case where the corresponding provision on domestic workers' wages states that the minimum wage can be increased through a collective or a private agreement.
[251] Clause 2(c).

workers to take part in any kind of political, trade union or even social activity. The Office of the Ombudsman addressed this issue in a 2005 report and urged the Immigration Department to remove the provision; the Ombudsman's report further highlighted the peculiarity of a constitutional freedom being restricted by the contract of employment which is a private law document but which was nonetheless prepared by the state.[252] Regrettably, even though ten years have passed since then, there was no compliance and the prohibition is still included in the contract. Given the constitutional, international and European law guarantees of the freedom of association, the prohibition imposed in the contract, is not lawful and as such it could not be invoked against the migrant to withdraw her residence permit. However, one should not underestimate the symbolic connotations of this prohibition as well as its effects in discouraging domestic workers from forming their trade unions or participating in existing ones. This prohibition is crucial when one considers that the contract clearly states that any violation of its terms can lead to loss of residence permit and deportation.

Another highly problematic aspect of migrant domestic workers' employment regime in Cyprus is wage regulation. As there is no statutory national minimum wage, wages are set in collective agreements at the sectoral or enterprise level and in individual employment contracts. The state only intervenes annually to set minimum wages for certain low pay and not collectively organised professions. The minimum wage applies *inter alia* to caretakers in elderly and nursery homes, private safety guards and clerks. Domestic workers employed in private households are not covered, but the Immigration Department sets a wage for migrants on a domestic worker visa. The contract of employment under clause 2(g) states categorically that the salary is "fixed" and the employee "shall not be entitled in any way and for any reason to any increase of his fixed salary, unless it is provided under this contract or it is considered appropriate by the employer".

For 2015 the gross salary for migrant domestic workers was set at 460 Euro per month (309 Euro net) which corresponds to less than 2 Euro (1.40 net) per hour provided that normal working hours are respected; in case of overtime work the hourly net rate would be even lower. The two groups of workers covered by the statutory minimum wage and with tasks comparable to those of domestic workers in private

[252] Office of the Ombudsman, *Report of the Ombudsman as Equality Body in relation to a complaint on restrictions of the freedom of association of migrant domestic workers, complaint No. 2/2005* (Nicosia, 2005).

households, are caretakers and cleaners. For example in 2015, the monthly minimum salary for caretakers in nursing homes was set at 870 Euro and at 920 Euro after six consecutive months of employment with the same employer. For cleaners employed in business and corporate premises the hourly minimum rate was set at 4, 55 Euro and at 4, 86 Euro after six months of continuous employment.

The disparity between the remuneration of domestic workers in private households and that of workers with comparable tasks employed by businesses is obvious and highly problematic; such vast discrepancy cannot be justified even if one takes into account deductions for accommodation and food in the case of live-in workers. The regulation of domestic workers' wages in Cyprus illustrates well Adelle Blackett's argument that "work has been constructed around racialized, patriarchal norms attached to the bodies undertaking the work in someone else's home rather than to skill".[253] The Ombudsman has considered that the wage disparity constitutes race discrimination given that the vast majority of domestic workers in private households are migrants. One can of course further argue that it also constitutes discrimination on the basis of sex given that statistically the vast majority of domestic workers are women. The exceptionally low wage the state sets for migrant domestic workers clearly determines their accommodation options and explains the high percentages of live-in employment in Cyprus. [254]

A final problematic aspect of the Cypriot regime concerns the procedure of Labour Dispute Settlement. Disputes arising out of the employment of non-EU workers are settled through a special procedure. According to the current practice, when a work-related dispute arises, the migrant must first file a complaint at the Immigration Department of the police and then at the Labour Department of their district. If the domestic workers has abandoned the workplace, she has a time-limit of fifteen days to file a complaint; should she fail to do so, she is declared illegal and a deportation order is issued. The Labour Department invites the two parties to a joint meeting to express their views and submit any relevant documentation. Both parties may be represented by a lawyer and/or have an interpreter. The Labour Department reports to the Labour Disputes Committee. This Committee was set in 2000 with a decision of the Council of Ministers with the purpose of examining complaints of TCN workers against their

[253] Adelle Blackett, "Introduction: Regulating Decent Work for Domestic Workers" (2011) 23 (1) *Canadian Journal of Women and the Law*, 1-45.
[254] Office of the Ombudsman, *Report of the Ombudsman as National Independent Human Rights Authority as regards the status of domestic workers in Cyprus* (Nicosia: 2 July 2013).

employers. It is constituted by representatives of the police, Labour and Immigration. The Committee deliberates on the case and reports back to Immigration which is the competent authority to take a final decision. If negotiations fail both parties have may resort to an Employment Tribunal.

The linkage of labour dispute settlement to immigration law enforcement and especially the involvement of the Immigration Department are highly problematic. The structure and the way the procedure functions may deter migrant workers to resort to it in the first place and is factually inaccessible to irregular migrants who would face criminal charges and the risk of deportation.

Between 2006 and 2009 the Ombudsman received 18 complaints from migrant workers, the majority of whom were domestic workers, concerning the procedure and practice of labour dispute settlement. The complaints concerned issues such as long delays to deliver a decision, lack of interpreters during procedures, biased treatment of migrant workers and poor investigation of their complaints, as well as a general inefficiency of the system.[255] The Ombudsman's report analyses the many problematic aspects of the system in relation specifically to domestic workers.[256] The report identifies lack of clarity regarding the procedure's rules, the rights and obligations of each party as well as the mandate of each authority. Lack of clarity has led in many occasions to arbitrary decisions against migrants' interests. For example, in the case of two domestic workers who filed complaints against their employers for breach of contract, the authorities instead of thoroughly examining the allegations, brought criminal charges against the migrants who were deported. It is a common practice, the report highlights, that when a migrant files a complaint the employer then accuses her of committing a crime, usually theft. Instead of keeping the two procedures separate- labour dispute settlement and criminal, the authorities normally stop the procedure on labour settlement and deport the migrant as a result of the criminal charges.[257]

Secondly, the report highlights that the disproportionate power of the employer is rarely taken into account in the examination of complaints. For instance, there have been many cases of domestic workers who complained that the employer in breach of the contract required them to work for additional employers; the workers were considered equally liable for breach of work and residence permit, requiring them to

[255] Office of the Ombudsman, *Report on the procedure of Labour Dispute Settlement between migrant workers and their employers* (Nicosia: 12 March 2010).
[256] Ombudsman, *Report on the procedure*…, 2010, above.
[257] Ombudsman, *Report on the procedure*…, 2010, above.

work only for one employer, and were deported as a result. Often, the authorities demonstrate bias against migrant domestic workers; the employer's claims are normally accepted in a straightforward way, while those of the worker are rejected without any serious efforts to investigate them further.[258] As Siobhán Mullaly notes, establishing credibility is a very common obstacle for migrant women to access justice mechanisms.[259]

Thirdly, the report point outs that there is no effective and impartial enforcement of the decisions. For example, when a decision concludes that the migrant has violated immigration rules the authorities deport her with due diligence; however, if the employer has breached the contract and must, for example, pay overtime, there is no enforcement whatsoever.

Thus, we see that while Cyprus grants through the immigration regime easy entry to domestic workers, this is accompanied with major trade-offs and restrictions for this group of migrant workers. The status of TCN domestic worker subjects them to a very particular and highly problematic labour law regime which is separated from and provides lower protection than both the generally applicable labour law regime and the regime on other migrant workers. The very synchronized way immigration and labour law regimes regulate migrant domestic labour create conditions of special vulnerability. The state has an active role in keeping migrant domestic labour very cheap as a way of facilating private and affordable care.

iii. Domestic workers in private households in Sweden: exclusion from the Swedish model

Two of the main features of the Swedish model of industrial relations are self-regulation and state non-intervention.[260] Collective agreements are very important instruments for the regulation of work relations as most working conditions are regulated not through legislation but in collective agreements. The efficiency of the Swedish model presupposes strong trade unions. Trade unions are very important actors; they provide financial support to their members when they become unemployed, provide legal advice and support in the management of workplace conflicts, ensure

[258] Ombudsman, *Report on the procedure*…, 2010, above.
[259] Siobhan Mullally, 'Migration, Gender and the Limits of Rights' in Ruth Rubio Marin (ed), *Migration and Human Rights: Collected Courses of the Academy of European Law* (Oxford University Press 2013).
[260] Mia Rönnmar, "Sweden" in Mark Freedland and Jeremias Prassl (eds.) *Viking, Laval and beyond* (Oxford: Hart Publishing, 2014) 241-261.

workers' representation at the workplace and take industrial action when negotiations fail. Crucially, trade unions supervise and guarantee the enforcement of labour standards set in collective agreements.[261] As there is no minimum wage legislation, trade unions are responsible for wage regulation; wages are set in collective agreements and trade unions carry out their enforcement at the workplaces.

Domestic workers when directly employed by a household are in a uniquely vulnerable position *vis à vis* other workers in relation to what Catharina Calleman refers to as "social context".[262] Even though in Sweden – as opposed to Cyprus – there are no legal constraints for domestic workers employed in private households to form a trade union or join established ones, this group of workers still faces practical challenges to unionise as in most parts of the world. Given that the employer is a natural person, trade unions have difficulties in locating and approaching domestic workers especially if they are migrants with language barriers or negative experiences with trade unions in their home countries. Representatives from Kommunal, the Swedish trade union for service workers, report that they have been unable to reach out to domestic workers when directly recruited by households; their members from the domestic services sector are only those workers employed by private agencies or municipalities.[263] As there are no trade unions or collective agreements for them, domestic workers in private households fall essentially outside the Swedish model of industrial relations and its key entitlements and protections.[264] They enjoy no worker participation or industrial action rights, have no access to trade union support in case of unemployment or in settling disputes with their employers.[265] Due to the absence of unions and of a statutory minimum wage legislation, there is no baseline for domestic workers' wages or any limits to deductions for food and accommodation.[266] In practice, domestic workers must negotiate their wages individually with the employer and are thus highly conditioned by the imbalance of power between them and the employer. In addition, the vulnerable position of domestic workers in private households is exacerbated by the liberalisation of immigration rules following the 2008 reform. As discussed in Chapter One, the reform

[261] Rönnmar, 2014, above.
[262] Catharina Calleman, 'Domestic Services in a "Land of Equality": the case of Sweden' (2011) 23(1) *Canadian Journal of Women and the Law*, 121-139.
[263] Kommunal interview, Stockholm, 1 October 2013. I explain in detail the work of Kommunal and their efforts to unionise domestic worker later in this Chapter.
[264]Calleman, 2011, above; Kommunal interviewees.
[265] Calleman, 2011, above.
[266] Trade unionists interviewed said that live-in employment is uncommon in Sweden; due however to recent migratory flows there might be a resurgence.

made the recruitment of non-EU migrant workers employer-led and weakened the role of trade unions in monitoring labour migration.

In addition to the *de facto* exclusion from the Swedish model of industrial relations, some important pieces of labour legislation explicitly exclude from their scope of application domestic workers when employed by natural persons. These are the Working Hours Act on the organisation of working time[267] and the Employment Protection Act which sets *inter alia* protective rules on dismissals and on fixed-term work.[268]

The 1970 Domestic Work Act regulates the employment relationship between domestic workers and employers who are natural persons.[269] This instrument applies also to au pairs. But while the Domestic Work Act is supposed to fill-in the gaps in statutory legislation highlighted above, it departs from generally applicable employment law in many aspects.

At the outset, under the Domestic Work Act, normal working hours are 40 per week which is generally in line with the average contemplated in collective agreements. However, when the tasks involve personal care, the normal working hours can be extended to up to 52 hours per week according to the employer's needs.[270] Second, the employer of a domestic worker has no obligation to provide information on the terms of employment. Third, contrary to other types of workers falling under the personal scope of the Employment Protection Act, domestic workers may be dismissed without just cause and on a shorter notice; they also enjoy no limits in relation to fixed-term contracts. Finally, the Work Environment Authority, which carries out ex officio inspections at workplaces to ensure compliance with health and safety and working time regulations, can only exceptionally inspect a private household if one of the parties so demands, or for other "special reasons".[271] This poses challenges to the effective enforcement of protective labour legislation to domestic workers directly employed in private households.

Overall, the Domestic Work Act constitutes an anomaly in the Swedish labour law and policy context. The disadvantageous positions of vis a vis other workers was

[267] Working Hours Act (1982:673), Section 2(3).
[268] Employment Protection Act (1982:80).
[269] SFS (1970:943)Lag om arbetstid m.m. i husligt arbete.
[270] Section 2, Domestic Work Act.
[271] Section 15 Domestic Work Act.

manifested in a recent Labour Tribunal case concerning dismissal protection.[272] The claimant, a caregiver for a disabled person, was directly employed by her employer; thus their employment relationship fell under the scope of the Domestic Work Act. Following her unlawful dismissal, the claimant filed a claim for pecuniary damages. The Court held that personal damages in unlawful dismissal for workers under the scope of the Domestic Work Act are not comparable to the damages suffered by workers under generally applicable labour law – the Employment Protection Act. As a result, the claimant's personal damage was calculated on a lower rate.

In Sweden domestic workers' vulnerability stems from a double exclusion; they are de facto excluded from the Swedish model of industrial relations, while their entitlements and protections under the Domestic Work Act are significantly lower than those normally enjoyed by the rest of workers in the Swedish labour market. These exclusions place domestic workers in private households in a uniquely vulnerable and precarious position.

iv. Separate regime, but near-normal protection: Spain

Domestic work for a private household (*servicio del hogar familiar*) is one of the employment relationships Article 2 of the Spanish Workers' Statute considers to be of a "special character" and thus subjects it to a separate regulatory regime. The provisions of the special regime, which are left to be set through a separate legislative instrument, precede those of the Workers' Statue which are applicable only when the matter in question is not dealt with in the special regime. Historically, the recruitment of domestic workers in Spain was conceived outside the scope of labour law as a contract for services and was thus regulated under the corresponding provisions of the Civil Code.[273] The first legislative instrument to regulate paid domestic work as an employment relationship was Royal Decree 1424/1985.[274] While that first instrument did acknowledge the employment character of the relationship between domestic

[272]Labour Court Judgment AD 2/13 on 16 January 2013 (Application No B 65/12). I acknowledge the help of Hanna Eklund in translating this decision from Swedish to English.
[273] María del Carmen Cueva Puente, *La relación laboral de los empleados de hogar* (Valladolid: Lex Nova, 2005).
[274] Margarita Miñarro Yanini, *El trabajo al servicio del hogar familiar: analysis de su nueva regulación* (Madrid: Editorial Reus, 2013).

worker and employer, it was more orientated towards upholding the autonomy of the parties than setting employment protections for the worker. As a result, labour law rights in the domestic work sector were significantly lower than in other sectors. Royal Decree 1424/1985 regulated paid domestic work in private households for 26 years.

In 2011 Spain reformed the labour and social security legislation on domestic work responding to long-standing claims to improve the conditions of sector and end the discriminatory treatment.[275] The objectives of the reform were to progressively equalize the employment rights and social protections of domestic workers with those of other sectors and to put an end to the perennial problem of informality by facilitating domestic workers' affiliation to social security.[276] The new employment legislation, Royal Decree 1620/2011, introduces significant improvements for the sector's working conditions.[277]

Under the new legislation domestic workers have an enhanced protection in relation to their salaries when compared to the previous legislation. Decree 1620/2011 reaffirms domestic workers' entitlement to the national minimum wage and further sets that this may not be subjected to reductions for payments in kind.[278] Payments in kind, normally granted in the form of nutrition and/or accommodation, are now subjected to a maximum limit of 30% of the total salary which constitutes a significant improvement from the previous regime and brings domestic work at the same level as sectors under the general regime in terms of payments in kind.[279] In contrast to Cyprus, Spanish legislation explicitly gives domestic workers the possibility to negotiate a raise from the minimum wage through a collective or private agreement.[280] The payment of two extraordinary monthly salaries per year as for other categories of workers is guaranteed also for domestic workers.[281]

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[275] Juan López Gandía and Daniel Toscani Giménez, *El nuevo régimen laboral y de seguridad social de los trabajadores al servicio del hogar familiar* (Albacete:Bomarzo, 2012).
2012; Margarita Miñarro Yanini, "La nueva regulación de la relación laboral de carácter especial del servicio de hogar familiar: una mejora mejorable I y II" (2012) 4 *Relaciones Laborales*,49-60.
[276] María Luz Rodríguez Fernández, "Efectos de la crisis económica sobre el trabajo de las mujeres" (2014) 1 *Relaciones Laborales*, 69-83.
[277] For a comprehensive comparison between the previous and current legislation see Margarita León 'A real job? Regulating household work: the case of Spain' (2013) 20(2) *European Journal of Women's Studies*, 170-188.
[278] Art. 8(2), Royal Decree 1620/2011.
[279] The previous Decree allowed in-kind payments for up to 45% of the total salary while the National Minimum Wage was not guaranteed. The rate is adjusted annually; for 2016 it is set at 655, 20 Euro per month.
[280] Art. 8(1), Royal Decree 1620/2011.
[281] Art. 8 (4), Royal Decree 1620/2011.

In relation to working time, Decree 1620/2011 establishes a maximum of 40 hours of work per week which is equal to that of other sectors.[282] In addition to the normal working hours, the parties may also agree on certain hours of standby time. The legislation does not define standby time but it is understood that this refers to the time during which the worker is available to the employer without carrying out any tasks. Contrary to the previous regime, the new legislation sets some standards for standby time that help to reduce domestic workers' risk of exploitation.[283] In particular, the Decree sets a weekly limit of 20 hours for standby and requires that these hours are remunerated at the same rate as normal hours or, alternatively, compensated with additional rest time.[284] Here, Spanish legislation addresses one of the thorniest issues in the regulation of working time in general which is very relevant to domestic workers. Standby time, illustratively described by Alain Supiot as a "third kind of time", blurs the boundaries between work and rest time and poses regulatory challenges especially for live in domestic workers.[285] Having no regulation of standby time, as in the case of Cyprus, is an important driver of vulnerability as live in domestic workers may end up being constantly available to the employer without an entitlement to pay.

The Decree further stipulates a minimum of twelve consecutive hours of rest between work shifts. There is however a degree of flexibility in relation to rest for live-in domestic workers; their daily rest can be reduced to ten consecutive hours and the remaining two hours may distributed in the course of four weeks.[286] Some authors consider that the provisions on working time for live-in domestic workers reflect a tendency to encourage flexibility in the distribution of working time as a means of accommodating the employer's needs.[287] It must be noted however, that the Spanish framework is in line with the international standards on working time.[288]

Regarding weekly rest, there is a provision of 36 consecutive hours and a specification that it is customary to enjoy these on Sunday and Saturday evening or Monday morning. The claim to specify the days of weekly rest was successfully put

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[282] Art. 9(1) Royal Decree 1620/2011 and Art. 34(1), Workers' Statute.
[283] Miñaro Yanini, *El trabajo al servicio del hogar familiar: analysis de su nueva regulación,* 2013.
[284] Art. 9(2), Royal Decree 1620/2011.
[285] Alain Supiot, *Beyond Employment. Changes in Work and the Future of Labour Law in Europe*, (Oxford: Oxford University Press, 2001), page 81.
[286] This is an improvement from the previous regime which granted ten and eight hours of rest for live-out and live-in domestic workers respectively.
[287] López Gandía and Toscani Giménez, *El nuevo régimen laboral y de seguridad social de los trabajadores al servicio del hogar familiar*, 2012.
[288] Deirdre McCann and Jill Murray, *The legal regulation of working time in domestic work*, (Geneva: ILO, 2010; ILO C. 189.

forward by domestic workers' associations. Having a set day off during the week is particularly important for domestic workers who normally work in isolated workplaces without any peer support. Sunday as a full day off gives domestic workers the opportunity to meet and socialise with their peers; this is an essential condition for collective organisation and mobilising. The Decree also brings domestic workers' entitlement to paid annual leave at the same level as other works, that is stipulates 30 days of paid annual leave of which at least fifteen must be consecutive.[289]

When it comes to strengthening personal autonomy we can note the following two provisions which address concerns specific to domestic workers. Article 9(1) stipulates that once the worker has completed the normal hours of work and the agreed standby time, she is not obliged to remain in the household. This is a good example of a provision aiming at protecting the autonomy of workers who live-in. The second provision is Article 9(7) which states that during paid leave, the worker may not be obliged to reside in the household or to follow the family at their place of holiday. This is an innovative provision, introduced for the first time in Spanish legislation; even though still not ratified by Spain, the influence of ILO C.189 which contains a similar provision is evident.[290]

Overall, the reformed labour law regime in Spain has introduced many positive elements for the labour protection of domestic workers and has advanced their approximation to the generally applicable employment law framework. There remain however certain issues where domestic workers' protections and entitlements are lower than those of other workers. One example is the rules on the termination of employment. In case of wrongful dismissal the domestic worker is entitled to less compensation than other workers and has no right to be readmitted to work.[291] The employer may also dismiss the domestic worker with a written declaration of withdrawal (*desistimiento*) and without just cause, which is a requirement in other employment relationships; this form of dismissal is unique to domestic work.[292] The

[289] Art. 9(7), Royal Decree 1620/2011.
[290] López Gandía and Toscani Giménez, 2012, above.
[291] Under generally applicable labour legislation – that is Art. 56 Workers' Statute – the wrongfully dismissed worker may be readmitted to work or receive compensation of 33 days payment per year of employment for up to 24 monthly salaries. Under the Decree – Art. 11 para 2 – domestic workers receive only 20 days of payment per year worked for up to 12 monthly salaries and may not be readmitted to work.
[292] In this case the employer must give 20 days of notice if the employment relationship lasted more than a year and seven days for shorter employment periods. In addition, the worker is entitled to compensation of 12 days payment per year worked.

Decree does not contemplate the consequences of unlawful dismissal. Under the generally applicable labour legislation, in case of unlawful dismissal the employer must readmit the worker and pay any arrears.[293] Courts however have held that domestic workers are not entitled to readmission because that would constitute interference in the employer's private sphere and have opted instead to treat the unlawful dismissal as a wrongful one with the right to compensation as for other workers.[294] The flexibility and special rules on the termination of employment are persistent reflections the so-called "special character" of domestic work.

The second example is domestic workers' exemption from the scope of legislation on health and safety at the workplace under Article 3(4) Law 31/1995. This exemption, however, is certainly not absolute; the second limb of the article introduces the employer's obligation to ensure that domestic workers carry out their tasks in adequate health and safety conditions. Thus, the second limb of article 3(4) opens up the possibility to argue in favour of health and safety measures adapted to the context of the private household. Such an interpretation would be in line with article 13 of ILO C.189.[295] Spanish law on health and safety may be juxtaposed to the EU Framework Directive on Health and Safety 89/391/EEC which introduces an absolute exemption of domestic workers from personal scope; we see that Spanish law is in fact more favourable.[296]

Thus in the Spanish case we see that while the regulation of domestic work is formally under a separate legislative instrument, the legislation is in fact adapted to deliver nearly the same level of protection as in other sectors and certain provisions are introduced to address problems specific to domestic workers.

We thus see that in the UK, the restrictive immigration model is also coupled with key exclusions for migrant domestic workers under the labour law regime. In Cyprus, easy access to a legal migration status paradoxically creates conditions of special vulnerability for TCN domestic workers; they are granted an immigration status with a range of restrictions. This status further subjects them to a labour law regime that offers exceptionally low protection and exposes them to many vulnerabilities. In Sweden, the

[293] Art. 55 para 6, Workers' Statute.
[294] TSJ Cataluña, Sala de lo Social, *Sentencia* 286/2013 of 15 January 2013.
[295] Article 13(1) ILO C.189 reads: "Every domestic worker has the right to a safe and healthy working environment. Each Member shall take, in accordance with national laws, regulations and practice, effective measures, with due regard for the specific characteristics of domestic work, to ensure the occupational safety and health of domestic workers."
[296]Article 3(a) Framework Directive 89/391/EEC on the introduction of measures to encourage improvements in the health and safety of workers at work, [1989], OJ L183/1.

employer-led immigration regime increases migrant domestic workers' chances to fall under the personal scope of the Domestic Work Act, a labour law instrument with exceptionally low protections and rights as per Swedish standards. In Spain, on the other hand – while the picture is certainly not ideal – the combination of a relatively liberal immigration regime with some state regulation on entry conditions and of a labour law regime that affords protection that is near to the one afforded to other types of work, makes migrant domestic workers less vulnerable.

IV. Approaches to illegally employed migrant domestic workers

In this section I turn to examine the legal regimes that regulate the work of migrants who work in breach of immigration rules. This is an important area of law for domestic workers who, as highlighted in Chapter One, are often fall under these legal regimes due to various reasons such as lack of legal immigration paths, bureaucracy around issuing and renewing permits and restrictions on the right to change employers. Working in breach of immigration law is, as discussed below, an important driver of vulnerability.

Migrant workers who work in breach of immigration rules face numerous practical obstacles in seeking redress for breaches of their contracts or of labour law. Such obstacles are strongly related to the criminalisation or sanctioning of working without a permit. A bottom-up study conducted by the EU Fundamental Rights Agency on the situation of irregular migrant domestic workers in nine Member States found that fear of expulsion and insecurity of residence during procedures are two of the most common obstacles in filing claims and accessing justice.[297]

Beyond criminal liability and obstacles to file a claim, a further issue concerns the treatment of irregular migrants under labour law. Are migrants who have no right to work under immigration law entitled to rights and protections under labour law? Can they enforce their employment contracts and seek, for instance, redress in case of wage deductions or unfair dismissal? Are they covered by fundamental rights such as non-discrimination in employment or associational rights?

[297] Fundamental Rights Agency, *Migrants in an irregular situation employed in domestic work: Fundamental Rights Challenges for the European Union and its Member States* (Luxembourg: EU Publications Office, 2011). For a follow up of this study see, Anna Triandafyllidou (ed.), *Irregular Migrant Domestic Workers in Europe: Who cares?* (Burlington:Ashgate, 2013).

This sections gives an overview of the sanctions' regimes against employers and migrant workers and then examines the different approaches to the work of illegally resident workers in the four countries. To discuss the coverage of illegally resident migrants by labour law I look at two different approaches: the overriding principle of worker's protection in civil law systems (Sweden and Spain) and the common law doctrine of illegality (Cyprus and the UK).

Criminal liability and sanctions against employers and workers

Ryan notes that in the UK criminal law has been historically the main tool used to respond to the phenomenon of migrant workers' unauthorised employment; but even though immigration law contained several criminal offences against workers since 1971, sanctions against employers were introduced for the first time only in 1996.[298] However, as that first regime on employers' sanctions was heavily focused on criminal law and required a high threshold of culpability, it was not effective in curbing the phenomenon.[299] In 2008 a system of civil penalties (fines) for those employing migrant workers in violation of immigration rules came into force.[300] Under this scheme, employers receive a notice of liability to a fine of up to 20 000 pounds per worker. Employers may bring a defence against the fine or its amount if they prove that they had diligently checked the workers' immigration law status. A criminal offence, punishable with imprisonment of up to two years and a fine, is committed if the employer "knowingly employed" a migrant in breach of immigration rules.[301] Migrants found working in breach of immigration rules are subject to deportation, that is, detention until removal,[302] or removal.[303] The new proposed Immigration Bill provisions making

[298] Bernard Ryan, 'The evolving legal regime on unauthorized work by migrants in Britain' (2005-6) 27 *Comparative Labor Law & Policy*, 27-58.
[299] Bernard Ryan, 'Employer Checks of Immigration Status and Employment Law' in Cathryn Costello and Mark Freedland (eds.) *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014), 239-259.
[300] Immigration, Asylum and Nationality Act of 2006, Section 15 and Immigration (Restrictions on Employment) Order SI 2007/3290.
[301] UKBA, https://www.gov.uk/penalties-for-employing-illegal-workers (13 January 2016).
[302] Paragraph 362, UK Immigration Rules.
[303] Section 10 of the 1999 Act as amended by Section 1 of the Immigration Act 2014.

working illegally a criminal offence which will be punishable with up to six months imprisonment.[304]

In Cyprus the employment of an illegally resident TCN is a criminal offence punishable with imprisonment of up to three years and/or a fine for the employer.[305] The Supreme Court has steadily sanctioned employers with imprisonment instead of a fine, underlining in this way the gravity of the offence for the employer's side. The Court bases its reasoning explicitly on the acknowledgement that the weak party is the irregular migrant worker whose status implies an inherent risk of exploitation. For migrants taking up employment in violation of immigration rules, the law provisions imprisonment of up to twelve months and/or a fine.[306] In its jurisprudence the Supreme Court takes a different position depending on the migrant's legality of stay. If the migrant lacks a residence permit, the Court adopts a stricter approach and imposes imprisonment, while when the migrant has a legal right to stay but lacks a work permit or works in violation of the permit's terms, the preferred penalty is normally a fine.

In Sweden, the recruitment of a migrant who lacks a work permit constitutes a crime under the Aliens Act punishable with a fine and, in aggravating circumstances, with imprisonment of up to one year. A migrant who takes up employment without a work permit is sanctioned with a fine.[307]

Spanish immigration law establishes three grades of offences: minor, grave and very serious. Employing an illegally resident TCN is classified as a very serious offence, punishable with a fine between 10 000 and 100 000 Euro.[308] Employing unauthorised workers under conditions which restrict their rights stipulated in law, collective agreements or contract carries a criminal offence punishable with two to five years of imprisonment.[309] Taking up employment while being illegally-resident is classified as a grave offence and carries a fine between 500 and 10 000 Euro.

It is highly improbable that penalising illegally resident migrants who take up employment, especially when this is not accompanied with effective sanctions against

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[304] Labour market and illegal working, Immigration Bill 2015-16, https://www.gov.uk/government/publications/immigration-bill-part-1-labour-market-and-illegal-working (13 January 2016).
[305] Article 14 B (1) Aliens and Immigration Law.
[306] Article 19(1)(κ) Aliens and Immigration Law.
[307] Aliens Act (2005:716) Chapter 20, Sections 3 and 5.
[308] Articles 54 (d) and 55(c), Law 4/2000 on the rights and freedoms of foreigners and their social integration.
[309] Article 312(2), Spanish Penal Code.

employers who take advantage of their need to work, can eliminate the phenomenon of working in breach of immigration rules.

Illegality doctrines and migrant workers' rights under labour law

The protection of the worker is an overriding principle in the legal order of the majority of EU Member States.[310] In essence, this principle means that a migrant's lack of permit under immigration law should not impair her rights as a worker under labour law. The principle's starting point is the autonomy of labour law; it holds that as long as an individual is a worker for the purpose of labour law, she is entitled to all rights and protections therein. While the protection of the worker tends to be a consolidated principle in civil law systems, this is not the case in common law tradition countries where the private law doctrine of illegality bars irregular migrant workers from accessing otherwise legitimate labour law rights and protections.[311]

i. The principle of worker's protection: Sweden and Spain

In Sweden there is very limited case law concerning the labour law treatment of those who work in breach of immigration law; thus the discussion is still at somewhat theoretical level. The implementation of the EU Directive on Employers' Sanctions gave rise to a legal debate concerning the labour law status of irregular migrant workers;[312] this was mainly because of the Directive's article 6 on employers' obligation to pay back payments to workers they employed in breach of immigration law.[313] Overall, the application of labour law to irregular migrant workers is not disputed in Sweden, the only exception being provisions on dismissal.[314]

[310] For an overview of the legislation on criminal sanctions in the EU27 see Fundamental Rights Agency, *Fundamental rights of migrants in an irregular situation in the European Union. Comparative report* (Luxembourg: EU Publications Office, 2011).
[311] Ryan, The evolving legal regime on unauthorized work by migrants in Britain' (2005-6) 27 *Comparative Labor Law & Policy,* above. For a comparative analysis between civil and common law systems see Mark Freedland and Nicola Kountouris, *The legal construction of personal work relations* (Oxford: Oxford University Press, 2011),147-152.
[312] Directive 2009/52/EC of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24. I provide a full analysis of the Directive's provisions in Chapter Three of this thesis.
[313] Interview with Samuel Engblom, TCO legal officer, Stockholm, 18 September 2013.
[314] Interview with Samuel Engblom, above.

The point of departure in Swedish legal scholarship concerning the labour rights of illegally employed migrants was a general principle of contract law, *pactum turpe*, or the "immoral contract" concept.[315] When applied in an employment law context, the *pactum turpe* principle holds that an employment contract which is prohibited by law - in the case of illegally employed TCNs by immigration and criminal law, is illegal. Being illegal, the contract produces no legal effects and may not be enforced by the courts.[316] On the assumption that the contract is illegal, scholars have argued in favor of a more flexible application of the *pactum turpe* principle; they consider that the contract must not be considered entirely void, but should be instead considered "partly valid" and allow irregular migrants to derive "a hard core of labour rights".[317] In that case, "core labour rights" would include rights to wages, working time and paid leave, protection against discrimination, health and safety at the workplace, but would exclude protection from dismissal.[318] Protection from dismissal, however, according to this line of scholarship, may not be granted to those who lack a work permit because requiring the employer to continue an employment relationship against the law would constitute a "legal paradox".[319]

Swedish courts follow the same stance. A 1979 case concerned a migrant worker employed under a fixed-term work permit. When the Migration Board rejected his application for renewal of the work permit, the employer dismissed him on the grounds that he was no longer authorised to work in Sweden. Because he was dismissed without due notice, the worker claimed damages arising out of wrongful dismissal. In its assessment, the Labour Court held that the Employment Protection Act, which lays down dismissals' rules, did not apply in this case as the employer could not be legally required to maintain an employment contract that was in breach of immigration rules.[320]

On the other hand, another line of scholarship makes the case for the complete separation of immigration and labour law. Instead of assuming that contracts are illegal

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[315] The theoretical foundations and application of *pactum turpe* are similar to those of the common law illegality doctrine discussed next.

[316] Niklas Selberg, 'The Laws of "Illegal" Work and Dilemmas in Interest Representation on Segmented Labor Markets: À propos irregular migrants in Sweden' (2014) 35 *Comparative Labor Law & Policy Journal,* 247-288.

[317] Andreas Inghammar, 'The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law' (2010) 12 *European Journal of Migration and the Law*, 193-214.

[318] Inghammar, 2010, above.

[319] Inghammar, 2010, above.

[320] The facts and the Court's verdict is discussed in Inghammar, 2010, above and in Selberg, 2014, above.

and unenforceable, this line of scholarship relies on the lesser importance Swedish law normally attaches to the employment contract and the need to safeguard Labour Law's autonomy to argue in favor of the disapplication of *pactum turpe* rules. Thus those who work in breach of immigration law would be able to enforce all rights flowing from their status as workers under labour law including protection from dismissal.[321]

In the Spanish legal order the entitlement of irregular migrant workers to fundamental rights at work is not challenged. According to Constitutional Tribunal jurisprudence on a case concerning associational rights, migrant workers regardless of their status under immigration law are entitled to the same collective rights as Spanish workers.[322] The judgement led to an amendment of the Immigration Law which previously restricted irregular migrants' right to join a Trade Union; freedom of association and the right to strike for all migrant workers are now consolidated in Article 11 of the Immigration Law. Thus, irregular migrant workers in Spain are included in the personal scope of constitutionally protected rights and freedoms at work such as non-discrimination, privacy and associational rights.

Regarding the enforceability of contracts, Article 36(5) of the Spanish Immigration Law states that "the lack of residence and work permit […] does not nullify the employment contract in relation to the rights of the migrant worker."[323] The explicit recognition of irregular migrant workers' contracts was included for the first time in the Spanish legal order with the enactment of the Immigration Law in 2000. Prior to this, Employment Tribunals considered such contracts illegal and void of legal effects, but recognised the migrants' right to pay for work already carried out in order to avoid the unjust enrichment of the employer.[324] Courts have reiterated the legal validity and enforceability of the contracts of irregular migrant workers.[325]

As in the case of Sweden, dismissal is the area of law that poses problems. Under general labour law the remedy contemplated in case of unlawful dismissal is readmission to work. As noted earlier, domestic workers are not entitled to be readmitted; Courts have instead held that a domestic workers' unlawful dismissal should be treated under the rules of wrongful dismissal and grant damages. Thus, if for

[321] Selberg, 2014, above.
[322] STC 259/2007; STC 236/2007.
[323] Article 36 (5), Law 4/2000.
[324] María Teresa Díaz Aznarte, 'El trabajador extranjero en situación administrative irregular' in J. L. Monereo Pérez (ed), *Protección jurídico-social de los trabajadores extranjeros* (Granada: Comares, 2010).
[325] STS Madrid, Sala de lo Social, Sentencia 5439/2011; STS Madrid, Sala de lo Social, Sentencia 3940/2003.

instance a domestic worker who works in violation of immigration rules is dismissed while pregnant she will not be able to return to work, but she will be entitled to damages.[326]

Comparing the Swedish and Spanish approaches, one can observe that, both jurisdictions generally accept that irregular migrants are entitled to labour law protections and may also enforce their employment contracts.

ii. Claims under the common law doctrine of illegality: Cyprus and the UK

The common law doctrine of illegality is premised on a principle of public policy prohibiting individuals to profit from their wrongdoing. It is normally invoked in Court proceedings to bar the enforcement of a contract which derives from the parties' illegal conduct. Controversially, the doctrine of illegality is interpreted and applied by Courts in such a way that in essence bars access to otherwise legitimate labour law rights and protections. [327]

In Cyprus, Courts have not yet addressed the enforcement of employment contracts by migrants employed in breach of immigration law. It must be noted though that Cyprus uses common law principles in the interpretation of contracts; the Cypriot Contract Law explicitly states that it must be interpreted in accordance with English law.[328] In addition, Cypriot Courts invoke relevant UK jurisprudence in the field of Contract Law.[329] Therefore, if such a case arises, Cypriot Courts are most likely to follow the illegality doctrine path and hold contracts unenforceable. Cyprus has fully implemented the EU Employers Sanctions Directive provision on employers' obligation to pay back payments to illegally employed TCNs;[330] how this provision is enforced remains, nonetheless, unclear. Given that there has been no relevant litigation in

[326] For illegally resident migrants whose work falls under generally applicable legislation, readmission in case of unlawful dismissal is again denied on the basis that it implies the regularisation of the migrant; readmission to work of a migrant who did not have the right to work in the first place would constitute, according to this view, interference of labour law in the terrain of immigration law. Courts have consistently held that there can be no readmission to work of a migrant who lacks a work permit and grant damages instead.
[327] Deakin and Morris, *Labour Law,* 2012, above.
[328] Article 2 (1), Cyprus Contract Law, Chapter 149.
[329] Nikitas Hatzimihail, "Reconstructing Mixity: Sources of Law and Legal Method in Cyprus" in Vernon Palmer, Mohamed Mattar, Anna Koppel (eds.) *Mixed Legal Systems, East and West,* (Farnham: Ashgate, 2015), 75-99.
[330] Article 18 PE-1, Aliens and Immigration Law.

Cyprus, the common law position can be best examined by examining a number of very interesting and recent UK cases on this issue.

The leading UK cases on the application of the illegality doctrine in an employment law context are *Hall v Woolston Hall Leisure* and *Vakante v Governing Body of Addey and Stanhope School*.[331]

In *Hall* the employer had arranged the applicant's terms of employment so as to avoid paying tax contributions; the applicant was aware of the employer's fraud. When dismissed on the basis of pregnancy, Mrs. Hall brought a sex discrimination claim; the employer raised the illegality defence arguing that the claim should be dismissed because it was based on an illegal contract. The Court of Appeal rejected the employer's illegality defence and accepted Mrs. Hall's sex discrimination claim. The Court clarified the three instances when a contract is 'inextricably bound up' with illegality, and thus rendered unenforceable. These are when: a) the contract is entered into with the intention of permitting an illegal act; b) the contract is expressly or impliedly prohibited by statue; and c) the contract was lawful when made but has been illegally performed and the party who seeks enforcement knowingly participated in the illegal performance. [332] In the first two cases the contract is unlawful from the outset and courts may not enforce it. In the third case, however, the contract is unenforceable only if a test of knowledge and participation is applied; this test is met if the party who seeks enforcement was not only aware of the illegality, but actively participated in the illegal conduct as well. Only if a test of knowledge and participation is fulfilled may the contract be rendered unenforceable.

Hall confirms that a further requirement must be fulfilled before the illegality defence can bar a claim based on statutory tort such as that of sex discrimination; the claimant's illegal conduct and claim must be causally linked. In his analysis Justice Gibson states:

> "…the correct approach of the tribunal in a sex discrimination case should be to consider whether the applicant's claim arises out of or is so clearly connected with or inextricably bound up or linked with the illegal conduct of the applicant that the court could not permit the applicant to recover compensation without appearing to condone the conduct."[333]

In *Vakante* a migrant who was lawfully resident in the UK but without permission to work took up employment as a teacher after falsely stating to his

[331] *Vakante v Addey and Stanhope School* [2004] 4 All ER 1056, [2005] ICR 231.
[332] Judge Peter Gibson in *Hall v Woolston Hall*.
[333] *Hall,* para 42.

employer that he did not need a work permit. Following his dismissal on grounds unrelated to the lack of work permit, Mr. Vakante brought a race discrimination claim. The Employment Tribunals and the Court of Appeal rejected his claim on the basis of the illegality doctrine. Although, the Court of Appeal proposed directly applying the principles laid down in *Hall*, the strict causality *Hall* required between the illegal conduct and the claim that must be met to defeat a claim of tort was disregarded. The Court of Appeal concluded that the claim – race discrimination – was bound up with illegality even though it was unrelated to the claimant's unlawful conduct – working without a permit. Thus *Vakante* widened the scope of the doctrine by relaxing the causal link requirement; the judgement created negative legal precedent for the protection of irregular migrant workers' fundamental rights.[334]

Recent litigation by migrant domestic workers shows how the illegality doctrine, when applied in an employment law context, becomes a crucial vector of vulnerability for migrants working in breach of immigration rules. In *Zarkasi v. Anindita* [335] the claimant, an Indonesian, was approached by the employers in her home country and was offered to travel to the UK to work as a domestic worker. The employers instructed Ms. Zarkasi to make false statements to the UK immigration authorities regarding her identity in order to obtain a passport and a visa. During her employment she took care of the employers' child and carried out domestic chores. She was a live-in but did not have a room of her own and had to sleep in the living room. Her payment was less than what the employers had promised and below the minimum wage. After completing two years of employment, Ms. Zarkasi asked to return to Indonesia but the employers refused. Following a quarrel with the employers, she left the household and brought claims for unfair dismissal and unlawful deductions of wages.

The Employment Tribunals acknowledged that the claimant was in a vulnerable position and exploited by the employers:

> 'There is no doubt from our findings that in general terms the claimant was exploited. She was young, relatively poorly educated and vulnerable in a foreign country in which she had no right to be, let alone to work.' [336]

Yet, following a stringent application of the illegality doctrine both the Employment and Employment Appeal Tribunals rejected the claims on the basis of the contract's

[334] See also, Alan Bogg and Tonia Novitz, 'Race discrimination and the doctrine of illegality' (2013) 129 *Law Quarterly Review,* 12-17.
[335] *Zarkasi v. Anindita and another* [2012] ICR 788 Employment Appeal Tribunal.
[336] *Zarkasi v. Anindita and another*, para 7 citing the Employment Tribunal.

illegality. The Appeal Tribunal reiterated that the contract fell under the second category in the test set in *Hall,* a contract expressly prohibited by statute, and thus was unenforceable from the outset. Ms. Zarkasi counter-argued that the UK Border Agency had recognised her as victim of trafficking and asked the Tribunals to set aside the illegality doctrine to afford her protection against the perpetrators. While acknowledging that the strict application of illegality in Zarkasi's case constitutes "injustice", the Appeal Tribunal affirmed that illegality is a not a principle of justice but one of public policy which leaves "no room for holding lawful a contract as a matter of discretion or interpretation".[337]

The facts in *Hounga v Allen*[338] unfold in a very similar manner. Mary Hounga, a Nigerian national, illiterate and of a poor socioeconomic background, was approached in Nigeria by the Allens, a British-Nigerian couple, who offered her work as a live-in domestic worker in the UK. She was promised 50GBP per month, free accommodation and food as well as the possibility to receive schooling. On the instruction of the Allens, she made false statements regarding her identity and the purpose of her travel and obtained a six-month tourist visa but no work permit; Ms. Hounga was a minor when she arrived in the UK. When her tourist visa expired she continued working for the Allens as a domestic worker and caregiver for their three children. During her time with the Allens, Ms. Hounga received no payment for her service and was repeatedly abused physically. After 18 months of employment, she was dismissed and expelled from the Allens' household.

Assisted by a Law Centre, Ms. Hounga brought claims for breach of contract, unfair dismissal and unpaid wages and holiday pay. In addition to contractual claims she also brought a tort claim for race discrimination. Following a strict application of the illegality doctrine the Employment and Employment Appeal Tribunals rejected all contractual claims. The Employment Appeal Tribunal considered that Ms. Hounga was aware of and actively participated in the illegality; this was despite acknowledging that the employers' conduct was instrumental to the illegality.[339] The argument that Ms. Hounga's active participation could be questioned due to the fact that she was a minor and in a vulnerable situation was not accepted; the Employment Appeal Tribunal reiterated instead that illegality is:

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[337] *Zarkasi v. Anindita and another*, paras 27 and 28.
[338] *Allen v Hounga* [2011] UKEAT/0326/10/LA.
[339] *Allen v Hounga* [2011] UKEAT 0326/10/LA, para 36.

'not a principle of justice: it is a principle of policy whose application is indiscriminate and can lead to unfair consequences as between the parties' litigation. Moreover the principle allows no room for the exercise of any discretion by the Courts in favour of one party or the other'. [340]

Ms. Hounga's race discrimination claim had a different fate; initially accepted by the Employment and the Employment Appeal Tribunals given that it flows from tort and does not depend on the existence of a valid contract, it was then struck down by the Court of Appeal. In a much criticised judgement, the Court of Appeal decided that Ms. Hounga's race discrimination claim was "inextricably bound up" with her own illegal conduct and as such it had to be dismissed.[341] As was the case in *Vakante* the Court of Appeal failed to establish a strict causal link between the appellant's illegal conduct and the harm she complained of which is required to defeat a claim in tort such as that of race discrimination.

The Supreme Court has recently reversed the judgement of the Court of Appeal on the basis that there is "insufficiently close connection between her immigration offences and her claims for the statutory tort of discrimination".[342] The disapplication of illegality rules in order to afford protection against discrimination is certainly a positive development. It is, however, highly problematic that the Supreme Court was willing to set aside the illegality doctrine only because elements of trafficking and forced labour were detected in Ms. Hounga's case. In essence, what the Supreme Court held is that the public policy of illegality should give way to the public policy against trafficking.[343] It is thus still unclear what will be the fate of the statutory claims of a migrant working in breach of immigration rules but who, contrary to Hounga, is not a victim of trafficking.

V. Comparing processes of reform and avenues to challenge domestic workers' vulnerability

This section examines the different processes of reform and evaluates avenues to challenge domestic workers' vulnerability in the four studied countries. I start by examining an important legislative reform of the Spanish labour law regime on

[340] *Allen v Hounga* [2011] UKEAT 0326/10/LA, para 36 citing *Tinsley v Milligan* [1994] 1 AC 340.
[341] Hounga [2012] EWCA Civ 609, para 61.
[342] *Hounga v Allen and another* [2014] UKSC, para 67.
[343] *Hounga v Allen and another* [2014] UKSC, para 52.

domestic work in 2011. Then I look at an opportunity to improve working conditions for domestic workers through agency work that emerged in Sweden. Finally, I contrast the Spanish and Swedish cases to the less dynamic processes in the Cyprus and the UK and argue that limited opportunities for reform are due to their restrictive immigration law context.

i. Spain: Mobilisation and labour law reform

In Spain, the opportunity to reform domestic work's labour regime emerged in the process of modernising the Social Security system. In 2011 Spain was already in deep economic crisis, unemployment was on the rise and Social Security was losing affiliations at an accelerated pace. The socialist government of the time was seeking ways to increase employment rates and Social Security affiliations. It was generally known that domestic work was a large but informal sector; thus the government saw an opportunity there to create employment by facilitating the inclusion of domestic workers into the Social Security system.[344] The reform of the legislation on domestic work was certainly not high on the government's political agenda; the opportunity was rather created by certain individuals in key positions in the government who worked in close cooperation with the Trade Unions and showed determination to advance the project of improving the Social Security protection of domestic workers.

The result of these concerted efforts was Law 27/2011 on the update, adequacy and modernization of the social security system[345] which integrated the Special Social Security regime for domestic workers dating from 1969[346] into the General Social Security regime albeit under a separate system.[347]

As the project of reforming the Social Security system was progressing, UGT, one of the two largest Trade Unions, started negotiating with the government for a parallel reform of the labour regulation. With significantly improved social protection for domestic workers, the provisions of the 1985 Decree which regulated the working

[344] Interview with UGT representatives, Madrid, 29 January 2014.

[345] Ley 27/2011, de 1 de agosto, sobre actualización, adecuación y modernización del sistema de Seguridad Social

[346] As the Special Social Security Regime was set before domestic workers were even included in the scope of labour law it provided significantly lower protection. See, Gandía and Giménez, *El nuevo régimen laboral y de seguridad social de los trabajadores al servicio del hogar familiar*, 2012.

[347]This integration is significant because it granted domestic workers all protections Social Security contemplates except unemployment benefits.

conditions now seemed outdated and inadequate.[348] The Social Security reform therefore triggered the labour law reform. While the reforms were not the product of an over-arching and long-term plan on dealing with the care deficit, they did achieve, at least nominally, significant improvements for the domestic work sector.

Initially, the other large trade union, CC.OO, was not completely in tune with UGT's approach. CC.OO was in favor of a different solution to domestic work's low labour law protection and advocated instead for the sector's reorganisation and industrialisation through agencies or cooperatives. In CC.OO's view, industrialisation instead of direct recruitment would create more favorable conditions to unionise domestic workers.[349] UGT was and still is against domestic workers being exclusively recruited though agencies and believe that direct recruitment by private employers should not be restricted in any way.[350] UGT also perceives agency work as problematic for the regularisation of immigrants as self-employed workers. The divergent views of the two Trade Unions on agency work may also indicate a power struggle between them; if domestic work is reorganised through agencies, CC.OO which traditionally organises service sector workers, would have more control over the newly- formed collective of workers.

Despite the disagreement between the two Trade Unions, the process of reform has been particularly important for the mobilisation of domestic workers' groups; they actively participated in the debate and articulated concrete proposals on the proposed Decree. A large number of domestic workers' groups across Spain formed the National Platform of domestic workers' organisations which was then called to comment and position itself on the proposal for the new labour legislation.[351]

At the same time, the adoption of the ILO Convention 189 at the international level created a very much needed impetus for the reforms at the national level.[352] Domestic workers' organisations mobilised, and continue to do so, for the ratification of C.189.[353] The ILO Convention gives these organisations a normative vocabulary to

[348] Interview with UGT representatives, Madrid, 29 January 2014.
[349] Interview with CC.OO representative, Madrid, 5 February 2014.
[350] Interview with UGT representatives, Madrid, 29 January 2014.
[351] Aportaciones de la plataforma estatal de asociaciones de trabajadoras de hogar al borrador de proyecto de real decreto por el que se regula la relación laboral de carácter especial de servicio del hogar familiar (21 July 2011) .
[352] Margarita León, 'A real job? Regulating household work: the case of Spain' (2013) 20(2) *European Journal of Women's Studies*, 170-188.
[353] See for example, 18 March 2013 La marea, 'Las empleadas de hogar denuncian que España no protege sus derechos' (accessed 13 February 2014).

articulate their claims and affords legitimisation to their struggles. Ratification is now a fundamental claim put forward by domestic workers' associations as a way to endorse and consolidate their rights at the national level.[354]

Domestic workers in Spain may not have been able to organise collectively in the traditional sense, that is, in a Trade Union. This may make their achievements more volatile to changes;[355] but their active participation in NGOs surely turns them into "active industrial citizens".[356] Domestic workers' groups and associations across the country seized the opportunity of the reform to promote their interests and consolidate their presence in the debate concerning the sector in alternative ways. The presence of these groups is very important as they are the actors who can advocate for the implementation of the new labour legislation and seek further improvements of the legal framework.

ii. Sweden: Reducing legislative precariousness and promoting organising through agency work

In Sweden the change of institutional setting in the provision of domestic services has had the effect of reducing some of domestic workers' vulnerabilities structured in the Domestic Work Act as discussed above. This was not an overarching reform aiming at improving the working conditions for domestic workers, but rather a side-effect of a controversial tax reform.

In 2007 the centre-right government introduced a tax deduction of 50% on labour costs for the purchase of different personal services including domestic work.[357] The stated aims of the tax deduction were to tackle unemployment by creating new jobs in domestic services, to professionalise the domestic work sector, to tackle tax evasion by reducing undeclared work and to promote gender equality by helping women to

[354] Interview with SEDOAC representatives 22, March 2014.

[355] A few months after the Social Security reform, a right-wing government came into power. The new government passed Royal Decree 29/2012 introducing changes which setback domestic workers' Social Security protection; under the new Decree, domestic workers employed on a casual basis for less than 60 hours per month are now responsible to pay Social Security contributions themselves.

[356] Virginia Mantouvalou and Einat Albin, "Active Industrial Citizenship of Domestic Workers: Lessons Learned from Unionising Attempts in Israel and the United Kingdom" (2016) 17 *Theoretical Inquiries in Law*, 321-350.

[357] Known as RUT which *stands for 'rengöring, underhåll och tvätt'* (cleaning, maintenance and laundry).

outsource domestic tasks and balance work and family responsibilities.[358] However, the new tax policy did not explicitly aim at improving the working conditions of domestic workers. As Calleman notes, considerations regarding the quality of jobs the tax reduction policy strived to create did not form part of the debate;[359] improvement in domestic workers' labour protection was seen more as a potential spill-over effect.[360] The tax deduction policy has been much criticised. Scholars have argued that the measure undermines Swedish egualitarian and social democratic traditions and highlight the distributive consequences of the state's withdrawal from the public provision of care and subsidising the purchase of services in the private market.[361]

Despite the controversy surrounding the so-called "maid debate", the new tax policy advanced domestic workers' inclusion in the personal scope of generally applicable labour law and brought them closer to the Swedish model of industrial relations. This is because, for a household to receive the tax deduction, it must purchase domestic services through an agency, normally a cleaning company. As a result the institutional setting of domestic work has to a large extent changed; many domestic workers instead of being employed by natural persons and thus falling under the scope of the Domestic Work Act or working as self-employed and thus falling outside the scope of labour law, could now be employed by an agency. Essentially, the agency becomes the employer, directs and pays the domestic worker for the services she provides, while the natural person becomes the client/services-recipient. The change of institutional setting facilitates trade unions' efforts to unionise domestic workers. Kommunal, the trade union organising care workers employed in the public sector via municipalities and domestic workers employed in the private sector via companies, can access agency workers easier than those directly employed by private households.

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[358] Karin Carlsson, 'Public care work in private contexts. A historical perspective on the Swedish welfare state' in Lise Widdinh Isaksen (ed), *Global Care Work Gender and Migration in Nordic Societies* (Lund: Nordic Academic Press, 2010) 195-216; Ellinor Platzer, 'Care work and migration politics in Sweden ' in Lise Widding Isaksen (ed), *Global Care Work Gender and Migration in Nordic Societies* (Lund: Nordic Academic Press, 2010), 159-172.

[359] Calleman, 'Domestic Services in a "Land of Equality": the case of Sweden' (2011) *Canadian Journal of Women and the Law*, 121-139.

[360] Elin Kvist, Maria Carbin and Hannele Harjunen, 'Domestic Services or Maid? Discourses on Gender Equality, Work and Integration in Nordic Policy Debate' (Conference: Quality in Gender Equality and Politics, Budapest, 2-3 October 2009).

[361] Anna Gavanas, 'Migrant domestic workers, social network strategies and informal markets for domestic services in Sweden' (2012) Women's Studies International Forum; Nathalie Morel, *The political economy of domestic work in France and Sweden in a European perspective* (LIEPP Working Paper, 2012); Kvist, Carbin and Harjunen, 2009, above.

The tax deduction combined with the 2008 new labour immigration regime and the 2004 Enlargement of the EU expanded significantly the relatively new private sector of domestic services. As noted in Chapter 1 however, the liberalization of labour immigration rules weakened Trade Unions' role and ability to oversee the enforcement of labour law standards at the workplaces where there is predominance of migrant workers. Kommunal is trying to mitigate the adverse effects of these changes by developing different strategies to reach out to newly arrived migrant workers, inform them about their rights and obtain information from them about the conditions in their workplaces. Since domestic workers are isolated in private households, Kommunal tries to approach them outside the workplace. To achieve a first contact with potential members they have been using various proactive strategies. Their strategies involve using social media as contact points where domestic workers can post work-related questions and concerns and get information directly from a Union member as well as organising informal social events. For example they recently organised an evening out to the theater to watch a play on the life of a cleaner; the Union rented the theatre for one night, invited domestic workers and then organised a discussion on their work experience. Kommunal also prepares multilingual information material on labour legislation and practice and the work of the Union and disseminates it regularly at the workplaces and in the areas where migrant communities live. Kommunal representatives report that their efforts have been fruitful and that they see their members increasing significantly every year; for example between 2012 and 2013 Kommunal managed to double its members in the cleaning sector. The Union also tries to use employers as contact points to approach and recruit new members; this is evidently easier when the employer is a company than a private individual.[362]

The organisation of domestic work in Sweden raises the following question: to what extent can employment by an agency reduce vulnerability? Certainly, shifting from employment by a private individual to employment by a company does not automatically resolve all working conditions problems in the sector. Yet, the change of institutional setting does have the potential to bring improvement for several reasons. First of all, agency work lessens the highly personalised character of the employment relationship between employer and domestic worker. Secondly, it brings workers within the personal scope of generally applicable labour law and crucially, of collective

[362] Interviews with Kommunal representatives, Stockholm, September 2013.

agreements. Thirdly, it opens up vital space for trade unions to act and develop more inclusive strategies. As illustrated in the discussion of the Swedish case, unionising becomes easier, albeit still challenging, when the employer is a company instead of a private individual. Fourthly, the organisation of domestic work through agencies makes it easier for workers to substantiate workplace discrimination claims as the problem of finding a comparator is eliminated; contrary to an employer who is a natural person, the agency would normally employ other workers to whom the domestic worker could be compared.[363] Finally, employment through agencies can help to address important immigration-related vulnerabilities such as binding the worker to the employer; in this setting, workers could enjoy more freedom to move between clients and eventually, between agencies.[364]

iii. Constrained by immigration status: Cyprus and the UK

In Cyprus there have been no dynamic processes of legislative or policy change. This can be explained by domestic workers' "social location"[365] in the Cypriot labour market. Being migrants, on temporary guest-worker type visas, tied and dependent on their employers, domestic workers employed in private households are located at the lowest segment of the labour market. As noted earlier, the standard contract of employment for migrants on a domestic worker visa imposes formal restrictions on associational rights. Added to these, the general ambivalence of local Trade Unions towards migrants[366]and their indifference towards domestic work because it is a feminised sector, explain why there have been no efforts to organise domestic workers.

Thus, migrant domestic workers in Cyprus have only been able to form and participate in some nationality-based associations which act as support networks for

[363] It is important to note however that it is possible to bring such claims only against the agency who is the employer and not against the recipient of the services who is the client.
[364]Einat Albin, "The Sectoral Regulatory Regime: When Work Migration Controls and the Sectorally Differentiated Market Meet" in Cathryn Costello and Mark Freedland (ed.) *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014), 134-160.
[365] Leah Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2010), at 102; Fudge, "The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers", (2012) *Comparative Labor Law and Policy Journal,* above.
[366] Nicos Trimikliniotis, "Racism and New Migration to Cyprus: The racialisation of migrant workers" in Floya Anthias and Gabriella Lazarides (eds) Into the margins: Exclusion and Migration in Southern Europe (Aldershot: Ashgate, 1999); PICUM, Migrants and the right to equal treatment in Cyprus (Workshop Report, 2013).

migrant communities but have no leverage in public debates. For example, in 2013 the Ministerial Committee which sets rules on the employment of migrant workers reduced migrant domestic workers' minimum wage by 5% and eliminated the entitlement to an annual raise.[367] In 2014, following an amendment of Social Security law, the net minimum wage was further reduced. Overall, between 2012 and 2014 migrant domestic workers' monthly net salary was reduced from 326 Euro to 309 Euro. These reductions to the already extremely low wages were not challenged by any Union or association. Occasionally, some local NGOs publish reports and organise events with the purpose of initiating debate on the situation of migrant domestic workers. Much of this debate however focuses primarily on trafficking and forced labour without any sustained efforts – such as strategic litigation, political mobilisation or other means – to challenge migrant domestic workers' structural, day-to-day exploitation.[368]

The Office of the Ombudsman has issued numerous reports on issues concerning the rights of domestic workers. Most reports were issued following individual complaints filed by domestic workers and migrant-support NGOs. The Ombudsman has also conducted wider studies which identify problematic aspects of the legal and policy framework on migrant domestic labour in Cyprus. This Institution has steadily been receptive to the claims of migrant domestic workers. With its expertise on human rights, the Ombudsman has been able to place the language of rights in the heart of the problem and to show the relevance of international and European legal instruments as sources of rights for migrant domestic workers and of obligations for the state.

However, there are important limitations to the change the Ombudsman can achieve. As it has no legal standing in court and no power to produce legally binding decisions, the Ombudsman can essentially only make non-legally binding, policy and legislative recommendations to the relevant state authorities. In addition, as highlighted earlier in this Chapter, state authorities have tended to disregard the Ombudsman's recommendations; prominently, there have been no corrective responses to the Ombudsman's calls to end wage discrimination against migrant domestic workers and to eliminate the prohibition of engaging in political activities from the model contracts of employment.

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[367] Ministerial Committee on the Employment of TCNs in Cyprus, 11 June 2013, at (in Greek, 13 January 2015).

[368] See for example the projects of two local NGOs http://www.medinstgenderstudies.org/new-eu-project-stop-traffic-for-domestic-work/ and http://kisa.org.cy/wp-content/uploads/2014/12/map_report.pdf (13 January 2015).

Despite having no legal effects, these reports and recommendations draw attention to the problematic aspects of the law and policy concerning the terms of stay and employment of migrant domestic workers in Cyprus. During the process of examining complaints or conducting studies, the Ombudsman requests state authorities to provide information and justify their conduct towards migrant domestic workers. This creates a limited, but still important, sense of control and accountability.

The Ombudsman is practically the only receptive Institution migrant domestic workers can access but it does not have the capacity to prompt any dynamic processes of legislative and policy change; there is an urgent need for other actors, such as Trade Unions and NGOs, to start using the Ombudsman's findings and recommendations as tools to seek change through mobilisation.

As in Cyprus, migrant domestic workers in the UK are also highly conditioned by their immigration status in challenging the law and the policies that regulate their working conditions. As noted in Chapter 1, following immigration law amendments in 2012, migrants on an overseas domestic worker visa are now tied to their wealthy employers and have a very precarious immigration status as they can stay in the UK for only up to six months. The main migrant domestic worker-support NGO, Kalayaan, which successfully campaigned to ensure a legal entry route and basic rights for domestic workers in the 1990s[369] continues campaigns to reverse the 2012 immigration changes and restore the right to change employers. Kalayaan also offers legal advice, training, practical support and organises occasional meetings and events for migrant domestic workers.[370] In 2009 a group of migrants formed J4DW which stands for Justice for Domestic Workers, a self-organized group and branch of the trade union Unite. J4DW has approximately one thousand members. It mainly engages in campaigning for the ratification of ILO C.189, offers English and trade union classes to members, organises campaigns to raise public awareness and provides practical support to migrants who escape abusive employers.[371] Since the 2012 immigration changes to visa for overseas domestic workers, J4DW has been actively campaigning – invoking

[369] Anderson, 'Mobilising Migratnts, Making Citizens: Migrant Domestic Workers as Political Agents', (2010) 33(1) *Ethnic and Racial Studies*, 60-74, above.
[370] See generally the work of the NGO Kalayaan at http://www.kalayaan.org.uk/ (13 January 2015).
[371] See, http://www.j4dw.com/ (13 January 2015).

mainly the modern slavery discourse – to restore migrant domestic workers' right to change employers and a more stable residence right.[372]

These organisations are certainly important because they give a safe forum to migrant domestic workers to meet and a voice in public debates especially in relation to immigration law reforms. As Mantouvalou and Albin find in their study of domestic workers' organising in Israel and the UK, NGOs and other associations may in fact be more approachable than Trade Unions for migrant domestic workers, especially those who lack a legal migration status.[373] Participation in these groups can be an empowering experience for marginalised, non-citizen workers. However, the fact that they are workers subjected to immigration control seems to condition the change they can achieve. Also, because of the immigration law restrictions migrant domestic workers face in the UK are so pressing, especially since 2012, the focus of NGOs' activities has been primarily challenging the visa rules rather than pursuing labour law changes. The experience of domestic workers participation in NGOs in the UK may be contrasted to the more successful similar experience in Spain; the fact that in Spain domestic workers are not all temporary, deportable migrants, has probably made their mobilization both possible and more effective.

As discussed earlier, other, primarily anti-trafficking, NGOs have engaged in litigation on crucial issues for migrant domestic workers such the entitlement to minimum wage, non-discrimination at work and access to employment rights for irregular migrants.[374] These efforts, however, have had limited success and have not managed to bring any overarching legal changes for migrant domestic workers as a group. This is an indication that for migrant domestic workers, litigation is a difficult means of achieving change.

VI. Conclusions

In this Chapter I examined the labour law regimes of Cyprus, Spain, Sweden and the UK and identified norms that structure or may potentially reduce domestic workers'

[372] See for, instance, a recent petition to the Home Secretary http://www.unitetheunion.org/news/domestic-workers-in-government-call-to-end-modern-day-slavery/ (28 March 2016).

[373] Mantouvalou and Albin, "Active Industrial Citizenship of Domestic Workers: Lessons Learned from Unionising Attempts in Israel and the United Kingdom" (2016) *Theoretical Inquiries in Law*, above.

[374] In all cases discussed under the UK sections claimants were assisted by charity community-based associations in bringing their claims to Court.

vulnerability. While labour laws in all four countries contain norms that disadvantage domestic workers in private households there are crucial qualitative differences. Spain, following the 2011 reform of the labour law regime for domestic work, is the national case with the most favourable regulation. Domestic workers in Spain have now a robust set of rights and protections which is almost equal to that of other sectors; the persisting difference being rules on dismissals. Crucially, domestic workers in Spain are entitled, at least on paper, to all stipulated rights and protections regardless of immigration status.

The comparison of the four countries challenges the premises of the debate on whether domestic work should be regulated as a "work like any other" or a "work like no other". It follows that the divisive line between the two approaches is somewhat flawed because much of the debate focuses on *models*. We instead need to look beyond the model and scrutinize the *substance* of employment law protections and entitlements under each model. Spain has a separate instrument but grants substantially more labour protection to domestic workers than the UK which seems to include domestic workers in the personal scope of generally applicable legislation but then enacts exclusions from crucial entitlements such as minimum wage and working time. On the other hand in Sweden, in spite of the enactment of a special law, domestic workers in private households face special vulnerabilities.

The extent of immigration law encroachment in the field of labour law is also a crucial vector of vulnerability for migrant domestic workers; thus, it must be taken into account when assessing national regimes. In Cyprus, the state has created a special regime for migrant domestic workers that deviates substantially from generally applicable norms; this regime is enacted to regulate not an employment sector, but a specific migrant category – that of migrants on a domestic worker visa. A similar pattern is noted also in the UK where norms such the "as a member of the family" exemption from the minimum wage as well as the illegality doctrine are a crucial sources of disadvantage for migrant domestic workers.

Hence, what the comparative analysis of national immigration and labour law regimes in the EU contributes to the analysis of migrant domestic workers' vulnerability is that it demonstrates that not all regimes are equally problematic. Even though there are elements of disadvantage in all regimes, there are crucial variations of how national laws create vulnerability. These variations are very important when one considers that all four countries this thesis focuses on are members of the EU; the good practices of

the more protective regimes can become relevant tools in challenging – if not judicially, at least in political mobilisation – the more restrictive regimes.

Chapter Three: Migrant domestic workers under EU migration law: fragmentation and the value of work

I. Introduction

There is a rich legal scholarship examining different aspect of EU migration law. Little attention has been, however, paid on the position of migrant domestic workers in EU migration law. In addition, most analyses of EU migration law tend to focus on the category of TCNs. However, migrant domestic workers include EU nationals as well as TCNs. Therefore, a wider and more nuanced comparative analysis of the different migrant statuses and rights EU migration law creates is missing. This is what this Chapter aims to provide.

EU migration law encompasses a plethora of legal sources governing the conditions of entry, stay and mobility of EU and TCN workers. The position of migrant workers under the migration law regime of the EU is far from homogeneous. The various primary and secondary EU law sources on the movement of workers introduce very different conditions of admission and employment norms for each category of migrant worker. One important legal source to consider is Article 45 TFEU on the free movement of EU workers; Article 45 TFEU grants a comprehensive and robust set of rights to those falling under its personal scope.[375] The free movement of workers has been an essential aspect of the European integration project since the Treaty of Rome.[376] Over the years, the Court's jurisprudence has been pivotal in giving content and strengthening the position of EU citizens when they reside and work in other Member States. The recent Enlargements of the EU in 2004, 2007 and 2013 challenged to some extent the comprehensiveness of this regime; the imposition of transitional arrangements on the free movement of workers for the citizens of the acceding states introduced a new category of EU migrant worker- that of transitional citizen.

[375] On the personal scope of Article 45 TFEU see my analysis in Chapter 4.

[376] Article 48 was inserted into the Treaty of Rome due to pressures from Italy which was experiencing high unemployment rates and was seeking to export its low-skilled national workforce to the more industrialized markets of the other EEC partners: Belgium, the Netherlands, Luxembourg, France and Germany finally accepted the provision on the free movement of workers, notwithstanding their divergent national preferences over the mobility of labour, to ensure the success of the integration of the market project. See, Simone Goedings, *Labor migration in an integrating Europe: national migration policies and the free movement of workers, 1950-1968* (Hague: Sdu uitgevers, 2005). But despite being initially a mere compromise between the founding members, the free movement of workers evolved into a staple feature of the internal market and, especially since the introduction of the citizenship of the Union concept, of the EU integration project broadly conceived.

Another set of EU law sources on the status of migrant workers are the association and cooperation agreements the EU has signed with third countries for the establishment of bilateral relations. The EU has signed such agreements with many third countries: EEA states and Switzerland, with Turkey, the states of Morocco, Algeria and Tunisia, as well as with African, Caribbean and Pacific States, Russia and most ex-Soviet states.[377] The agreements liberalise trade relations or prepare the partner country's future accession to the EU. In addition, they contain provisions on the rights of resident TCN workers from the partner countries. These are typically clauses on equal treatment with nationals in relation to wages, working conditions and social security. These equal treatment provisions have been characterised as "bargaining chips" in the context of trade and external relations.[378] Less cynically, the insertion of equality clauses in the Agreements with third countries is attributed to European trade unions' lobbying for better protection both to avoid TCNs' labour exploitation and to safeguard the domestic labour market from social dumping practices.[379] Overall, while equality of treatment might have been an objective –a rather marginal one– it is clearly not the underlying aim pursued under the different agreements especially those orientated towards cooperation rather than association. The extent of rights varies greatly under the different agreements and the status of TCNs therein is highly fragmented.

Contrary to the solid foundations of the regime on the free movement of EU workers, the EU had initially no competence to legislate on the treatment of non-EU workers. In 1993 the Treaty of Maastricht equipped the EU with some limited powers over immigration matters. In the period between the Maastricht and Amsterdam Treaties, the EU adopted some non-binding, soft law measures in the form of resolutions and recommendations on immigration law.[380] It is only in 1999 and the entry into force of the Treaty of Amsterdam that the EU acquires formal competence to legislate on immigration issues.[381]

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[377] Steve Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (1996) 33 *Common Market Law Review*,7-50.

[378] Martin Hedemann Robinson, 'An overview of recent legal developments at Community level in relation to Third-Country Nationals resident within the European Union, with particular reference to the case law of the European Court of Justice' (2001) 38 *Common Market Law Review* 525-586, 532.

[379] K.A. Dahlber, 'The EEC Commission and the Politics of Free Movement of Labour' (1968) 6 *Journal of Common Market Studies,* 330.

[380] Steve Peers and others, *EU Immigration and Asylum Law* (Leiden: Nijhoff Publishers, 2012).

[381] Article 63(3) and (4) EC afforded the EU competence to adopt measures in:

" (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,

Currently, Article 79 TFEU sets out the EU's legislative competence in the field of immigration law; this competence covers *inter alia* the conditions of entry, residence and intra-EU mobility of TCNs, the rights of legally resident TCNs, as well as illegal immigration and unauthorised residence.[382] During the last decade the EU has adopted a number of legislative instruments that concern regular and irregular TCN workers. These include several sectoral Directives on the conditions of entry, stay and work by category of migrant worker, a Directive on sanctions against the employers of illegally employed TCNs, a Directive on the return of illegally resident TCNs, as well as Directives on long-term residents and on family reunification.[383] While generally these sources aim at "bridging the rights gap between EU nationals and TCNs", in practice they create separate employment regimes for TCN workers on the basis of their perceived market value.

My purpose in this chapter is twofold: to locate norms relevant to migrant domestic workers in the EU's labour migration regime and to evaluate to what extent they create or, potentially, reduce vulnerability. I structure the discussion as follows. Part II starts by giving an overview of the different legal sources that make up the EU's labour migration regime and examines their relevance for migrant domestic workers. I first examine the rules on the free movement of EU workers and that of transitional citizens and then turn at the sources on TCN workers. As regards the status of TCN

(b) illegal immigration and illegal residence, including repatriation of illegal residents;
(4) measures defining the rights and conditions under which nationals of third countries wo are legally resident in a Member State may reside in other Member States.

[382] Article 79 TFEU reads: 1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; (d) combating trafficking in persons, in particular women and children.
3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.
4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.
5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

[383] Full references are provided for each source when they are discussed more fully later in this Chapter.

workers under agreements with third countries, I propose to distinguish between four types. First, agreements that grant first entry rights along with a comprehensive set of citizenship-like entitlements; these are the EEA and Swiss agreements. Second, agreements with no first entry rights but with a relatively robust set of rights for resident workers as in the Turkey agreement. Third, the Euro-Med agreements with Maghreb states that grant no first entry rights but include an equal treatment guarantee with some implications for residence rights. Fourth, agreements with the rest of the world that are very limited in terms of rights for resident migrant workers. As regards the sectoral Directives on labour migration I give an overview of key provisions of the Blue Card, the Seasonal Workers, the Intra-corporate transferees and Single Permit Directives. While the sectoral Directives do not concern domestic workers, it is important to examine them because of the light they shed to the fragmentation of the EU migration regime on TCN workers. I then argue in part III that the EU regime on the entry and movement of workers is highly fragmented and rests on a hierarchy of statuses; this hierarchy reflects to a large extent a bias on the value of work. Part IV discusses the sources on TCNs integration and part V the Directive on sanctions against employers of illegally resident TCNs. Part VI concludes by drawing broader conclusions of this analysis for the position of migrant domestic workers under EU migration law.

II. EU sources on the movement of EU and non-EU workers

EU migrants with full mobility rights

The EU regime on the mobility of EU national workers is considerably liberal especially when juxtaposed to Member States' national immigration regimes.[384] Article 45 TFEU on the free movement, mobility and other rights of workers,[385] Regulation

[384] Steve Peers, 'Aliens, Workers, Citizens or Humans? Models for Community Immigration Law' in Elspeth Guild and Carol Harlow (eds), *Implementing Amsterdam Immigration and Asylum rights in EC Law* (Hart Publishing 2001), pp. 291-308.

[385] Article 45 TFEU reads: "1. Freedom of movement for workers shall be secured within the Union. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the rights, subject to limitations justified on grounds of public policy, public security or public health: a) to accept offers of employment actually made; b)to move freely within the territory of Member States for this purpose; c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; d)to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission. 4. The provisions of this Article should not apply to employment in the public service."

492/2011 on freedom of movement of workers within the Union, as well as secondary law – the Citizens' Directive 2004/38/EC[386] – shape a very unique regime on migrant workers. Article 45 TFEU stipulates EU migrant workers' "core rights".[387] EU citizens, regardless of skill level, can enter another Member States as jobseekers,[388] take up employment, be fully mobile in the labour market and reside there even after employment has ended. In addition, they are entitled to equal treatment with national workers in relation to pay and other conditions of work and strong protection against removal including access to justice mechanisms to challenge an expulsion decision.[389] EU migrant workers may not be entirely shielded from removal as complete protection is reserved only for a state's own nationals; however, they enjoy a high level of protection. The circumstances under which an EU national can become irregular and removable while working in another Member State are narrowly construed under EU law which guarantees EU workers a high level of residence stability. Residence stability places EU migrant workers in a uniquely privileged position *vis à vis* most categories of TCN workers whose right to reside is highly precarious. To facilitate intra-EU mobility, the family members of EU workers, including those who are TCNs, also have entry, residence and labour market rights.

Overall, an EU migrant domestic worker moves and takes up employment under a legal framework that reduces the vulnerabilities typically associated with the migration experience. An EU migrant domestic worker does not need to be sponsored by an employer, may enter in the Member State as a jobseeker and explore different employment opportunities, can freely change employers, move into a sector with better terms and conditions while being entitled to the same rights and protections as national workers. In addition, EU migrants enjoy intra-EU mobility which means that they can move freely between Member States for the purpose of employment or become circular migrants and move back and forth between their country of origin and place of work.[390]

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[386] Regulation (EU) No 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union [2011] OJ L141/1.

[387] Elspeth Guild, 'The EU's Internal Market and the Fragmented Nature of EU Labour Migration' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014) 98-121.

[388] The right to "accept offers of employment actually made" under Article 45 TFEU entails the right to enter a Member State and stay for up to three months for the purpose of looking for employment. See Case C-292/89 *Antonissen* [1991] ECR I-00745 and Recital 9 of Directive 2004/38/EC.

[389] Article 31 Directive 2004/38.

[390] Marchetti's study on care-givers in Italy shows that circularity is a very much preferred migration and employment pattern for eastern European women in the sector. Sabrina Marchetti, "Dreaming

As fully mobile and protected, EU migrant domestic workers are not normally exposed to more vulnerabilities than national domestic workers; this partly explains why this category is not a major source of migrant domestic labour in the EU Member States today. However, while there are not yet many domestic workers able to fully access the EU regime on the free movement of workers, there are significant numbers of migrant domestic workers who are EU nationals. This apparent paradox is explained because EU migrant domestic workers have to date been caught by transitional arrangements on workers' free movement

EU migrant workers under transitional arrangements: A8, EU2 and Croatian nationals

Transitional arrangements are temporary restrictions of up to seven years on workers' free movement. In the context of EU Enlargements, Member States have the discretion to temporarily derogate from EU free movement provisions and apply national immigration rules to workers from acceding countries. The enactment of transitional arrangements in the Enlargements of 2004 and 2007 attracted attention. It was the first time that such large numbers of people from significantly lower income countries became EU nationals. Yet, transitional arrangements are not a novelty for the EU. The Treaty of Rome had postponed Member States' obligation to give full effect to the free movement of workers until 1968.[391] In subsequent Enlargements transitional arrangements were enacted every time existing Member States feared an influx of workers from poorer acceding Member States. In 1981 a seven-year period of transitional arrangements was implemented for Greek workers, same as for Spanish and Portuguese workers in 1986. Conversely, no transitional arrangements were enacted in 1973 when the UK, Ireland and Denmark joined the Union, or in 1995 when the accession of Sweden, Finland and Austria took place.[392]

In 2004 ten new Member States joined the EU: the Czech Republic, Slovakia, Hungary, Slovenia, Estonia, Poland, Lithuania, Latvia, Malta and Cyprus. All Member States had the possibility to enact a seven-year period of transitional arrangements for workers from the Central and Eastern European states (A8), while workers from Malta

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circularity?: Eastern European women and job-sharing in paid home care" (2013) 11 (4) *Journal of Immigrant and Refugee Studies*,347-363.

[391] Guild, 'The EU's Internal Market and the Fragmented Nature of EU Labour Migration' in *Migrants at Work: Immigration and Vulnerability in Labour Law* (2014), 98-121.

[392] Guild, 2014, above.

and Cyprus were immediately granted full mobility rights. The formula of the arrangements was the following: during the first two years of accession each Member State had to notify the Commission of its intention to apply transitional arrangements. After two years -in 2006- Member States had to notify the Commission of their intention to continue applying arrangements for three more years; at this point their decision had to be justified on the basis of a real threat of disturbance to their labour market. For the remaining two years any decision to continue applying mobility restrictions had to be based on well-founded indications that free movement of workers would lead to serious disturbances in the labour market. Adinolfi notes that the right conferred on Member States to derogate from free movement provisions was exceptionally wide in the context of the 2004 Enlargement when compared to the previous ones.[393]

Member States did not use the discretion to apply transitional arrangements in a homogenous way. The UK, Ireland and Sweden as well as all acceding countries opened their labour markets immediately to A8 nationals. This did influence the direction of migration flows; the UK -and to a lesser extent Ireland- that offers more opportunities for casual employment had a disproportionately higher share of A8 nationals than Sweden.[394]

In 2007 Bulgaria and Romania joined the EU. This time Enlargement coincided with the beginning of the economic downturn in Europe which might have influenced Member States' decision to impose restrictions on Bulgarian and Romanian workers. As with the 2004 Enlargement, Member States had once more a wide margin to enact transitional arrangements on the mobility of EU2 workers. But again, not all Member States made use of this possibility. Sweden and Cyprus along with Finland and all A8 countries except Hungary fully opened their labour markets. Member States that enacted transitional arrangements did so in very divergent ways. Italy for example allowed Bulgarian and Romanian workers access but only for certain sectors of employment including elderly care.[395] Spain requested a job offer and employer's authorisation in order to grant a work permit. At the end of the first phase in January 2009, Spain

[393] Adelina Adinolfi, 'Free movement and access to work of citizens of the new Member States: the transitional measures' (2005) 42 *Common Market Law Review*, 469-498.
[394]Jennifer Gordon, *Free movement and equal rights for low wage workers? What the United States can learn from the new EU migration to Britain* (Fordham Law Legal Studies Research Paper No1864628, May 2011).
[395] Samantha Currie, *Migration, work and citizenship in the enlarged European Union* (Farnham: Ashgate, 2008).

decided to fully open its labour market to EU2 nationals. However in July 2011 Spanish authorities following an emergency procedure reintroduced the work permit system for Romanian workers only. The reintroduced restrictions were applicable only to new entrants seeking employment and did not affect the status of Romanians workers already residing and working in Spain. However, the hasty change of rules in relation to the workers of a single Member State and the Commission's lax reaction received negative criticism.[396] Given that during transitional arrangements Romanian citizens could still enter either as jobseekers, students or self-employed might have pushed new entrants who did not obtain a work permit into informality.

On the other hand, the UK implemented a restrictive work permit system towards Bulgarians and Romanians; this was probably an attempt to counterbalance the much more open approach towards A8 nationals three years earlier.[397]

The same formula of transitional arrangements applied in relation to Croatian workers in 2013. Member States made different use of the possibility to impose transitional arrangements on Croatian workers. Spain and Cyprus, as well as the majority of Member States, initially applied restrictions but lifted them in July 2015 after the first two years elapsed. The UK on the other hand, along with Austria and the Netherlands, are the only Member States currently requiring Croatian nationals to hold a work permit before they can take up employment. All Member States must fully open their labour markets to Croatian workers by July 2020.

Transitional citizens differ both from fully mobile EU nationals and from TCNs. Because restrictions concern only the right to take up employment, transitional citizens are still entitled to free movement and can thus enter a Member State for up to three months as jobseekers. To remain in the Member State beyond the three-month period, transitional citizens need to obtain a work permit according to national immigration rules. In this respect, they are less vulnerable than those TCNs who have no first entry rights under EU law. However, transitional citizens' intra-EU mobility rights are compromised because to move to another Member State they need to apply for a work permit according to that country's immigration rules; this is a significant difference between transitional and fully mobile EU citizens. Eventually though, transitional citizens become EU citizens with full mobility rights and protections under EU law.

[396] Elspeth Guild and Sergio Carrera, *Labour Migration and Unemployment. What can we learn from EU rules on the free movement of workers?* (CEPS Paper in 'Liberty and Security in Europe' Series, February 2012).
[397] Currie, *Migration, work and citizenship in the enlarged European Union*, 2008, above.

Conversely, for TCNs the route to full legal inclusion is much more uncertain and highly dependent on Member States' discretion.

Overall, few nationals from the old Member States (EU15) are employed as domestic workers in the EU today. On the other hand, nationals from newer Member States (A8 and EU2) are an important source of domestic labour, in the states I focus on in this thesis namely, Sweden, the UK and Spain.

In Sweden, many women from the neighbouring Baltic countries and Poland are employed by private cleaning companies; EU nationals are the majority of workers in this sector.[398] In fact Sweden's decision to open its labour market to new EU citizens in 2004 was one of the reasons that triggered the boom of private cleaning companies.[399] Currently, about 1/3 of workers who provide home-based care for the elderly and the disabled are mainly A8 nationals.[400] A8 nationals are also an important source of labour for the au pair sector. The fact that in Sweden EU free movement rules became applicable from the first day of accession equipped EU migrant domestic workers with an important legal source that can help diminish immigration law-related vulnerabilities.

Similarly in the UK, since the 2004 Enlargement, many A8 nationals work as agency workers in social care services and as au pairs.[401] Therefore EU free movement rules apply to them. As discussed in Chapter I of this thesis, the specificities of the Overseas Domestic Worker visa means that it is exclusively TCNs who move under this regime. Indicatively, in September 2015 the UK Home Office issued 17 000 permits to overseas domestic workers. They are the most vulnerable group of migrant domestic workers but fall outside the personal scope of EU migration law sources.

In Spain, a significant component of the domestic work sector is composed of TCNs but there has been a recent shift with Romanian nationals becoming the most representative migrant group. According to the latest Social Security data, in December 2015 there were 427,029 workers employed as domestic workers in private households.[402] About half of them (202, 168) were migrants of whom 50, 498 were EU

[398] Kommunal interview, Stockholm, 1 October 2013.
[399] Kommunal interview, above.
[400] Kommunal interview, above.
[401] Anderson, Ruhs, Rogaly, Spencer, "Fair enough? Central and Eastern European migrants in low-wage employment in the UK" (2006), above.
[402] This figure refers only those workers registered with Social Security; it does not give the full picture of the Spanish domestic work sector as it does not include illegally resident TCNs or other workers without Social Security. According to the Labour Force Survey (*Encuesta de Población Activa*, EPA) in 2015 there were approximately 635, 900 people employed by private households as domestic workers. Comparing Social Security and Labour Force Survey data gives an estimation of informality; thus in 2015 there were approximately 208, 871 domestic workers in the informal economy.

nationals and 151, 670 TCNs. Among EU nationals, the most representative countries of origin were Romania (38, 263), Bulgaria (6, 601), Poland (2, 241) and Portugal (1, 618). TCNs were mainly from Bolivia (24, 462), Paraguay (19, 081), Morocco (14, 402) and Ukraine (10,494). [403]

In Cyprus the domestic worker visa explicitly targets TCNs for employment in private households; at the same time, alternative entry routes for other types of work are very limited. As a result, the immigration regime shapes a sector where the presence of TCNs working as domestics in private households is nearly exclusive. According to the latest social insurance data, in 2014 there were 20 303 foreigners registered as household employees, out of which only 300 were EU migrants, while the number of nationals was 250.[404] State authorities do not publish disaggregated data on the nationality of visa holders; secondary sources, however, report that there are approximately 30 000 female migrants on a domestic worker visa; the main countries of origin are the Philippines, Vietnam, Sri Lanka and India.[405]

Domestic workers under the Association and Cooperation Agreements with third countries

i. EFTA workers

The EU and the states of Iceland, Liechtenstein and Norway signed the EEA agreement in 1992.[406] The objective of the agreement is "to promote continuous and balanced strengthening of trade and economic relations between the contracting parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogenous European Economic Area.[407] Article 28 of the EEA agreement on the freedom of movement of workers replicates Article 45 of the TFEU; thus workers who are EEA nationals enjoy free movement rights akin to those of EU nationals.

[403] Ministry of Employment and Social Security, *Social Security, foreigners' affiliation, December 2015.*
[404] Department of social insurance registry, Ministry of Labour, *Total aliens and Europeans Data*, 2014. These figures include only workers who have a legal migrant status and are registered with social security.
[405] Immigration Department data cited in Ombudsman, 2013.
[406] Agreement on the European Economic Area OJ No L1, 3 January 1994.
[407] Article 1 EEA Agreement.

Similarly, the Free Movement of Persons Agreement between on the one hand the EU and the Member States and Switzerland on the other hand was concluded in 2002.[408] The Agreement stipulates a set of coterminous rights: the right of first entry,[409] non-discrimination on the basis of nationality,[410] unrestricted access to the labour market including full occupational and geographical mobility,[411] equality of treatment in employment conditions,[412] residence rights,[413] as well as family reunification rights comprising of both a right to reside in the Member State and labour market access for family members irrespective of their nationality.[414] The Free Movement of Persons Agreement also contains a standstill clause prohibiting the imposition of further restrictive measures between the parties.[415] It should be mentioned, however, that this Agreement is currently in crisis following a controversial Swiss referendum passed in 2014 that proposed *inter alia* the imposition of annual immigration quotas on the entry of EU workers in Switzerland. As the result of the referendum is expected to be implemented in Switzerland by February 2017, the fate of the Agreement is uncertain.[416]

Given that domestic work is a generally low paid occupation, migrants from high income countries such as Switzerland and the rest of EFTA countries, do not normally work as domestic workers; in the unlikely event that they did, their privileged status guarantees them the same rights and protections as EU and national workers. EFTA citizens are nonetheless more likely to move as au pairs; the agreements contain no specific provisions on au pairs, but do not exclude them from their personal scope either. Given their quasi-EU migrant status EEA au pairs have more chances to experience genuine cultural exchange through the scheme than to find themselves working as a cheap substitute for domestic work. On the other hand, EFTA states, being prosperous countries, offer ample work opportunities; thus, as long as free movement

[408] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons OJ No L11/6, 30 April 2002.
[409] Article 3, Free Movement of Persons Agreement.
[410] Article 2, Free Movement of Persons Agreement.
[411] Article 7(b), Free Movement of Persons Agreement
[412] Article 7 (a), Free Movement of Persons Agreement.
[413] Articles 4 and 7(c), Free Movement of Persons Agreement.
[414] Article 7 (d) and (e), Free Movement of Persons Agreement.
[415] Article 13, Free Movement of Persons Agreement.
[416] For an analysis of different scenarios see, Sergio Carrera, Elspeth Guild, Katharina Eisele "No Move without Free Movement: the EU-Swiss controversy over quotas for free movement of persons" (CEPS Policy Brief No 331, April 2015).

agreements are in place, EU national domestic workers – as all workers – can move there freely and take up employment with a full range of rights as nationals.

ii. Turkish workers

Turkish workers residing in an EU Member State enjoy a privileged status under EU law. The EU and Turkey signed an association agreement in 1963, the Ankara Agreement, complemented by the Association Council Decision 1/80. Because the aim is to prepare Turkey's future accession to the EU, Turkish workers residing in a Member State enjoy an important set of rights and discrimination protection. Contrary to EFTA nationals, Turkish workers have no first entry rights under EU law; they are admitted under Member States' national immigration rules. But one admitted for at least a year, they derive certain rights and protections from EU law.

Labour market access is gradual for Turkish workers. After the first year of stay, they are entitled to the renewal of the work permit with the same employer provided that a job is available. After three years of legal employment, they may change employer as long as they work within the same sector. After four years of legal employment, they gain full access to any paid employment.[417] The EU-Turkey agreement does not provide for family reunification rights; however, as all other TCNs, Turkish workers can benefit from the provisions of the Family Reunification Directive. Once admitted, the family members of a Turkish worker can take up any employment after being legally resident for at least three years provided that the Community Preference Rule is applied. After five years of legal residence family members can access any paid employment without restrictions.[418] A standstill clause stipulated in Article 13 of Decision 1/80 prohibits Member States from imposing any new restrictions on Turkish workers and their family members in relation to labour market access.

Hence Turkish workers, once admitted, gradually access a status comparable to that of EU nationals; the important differences are that they have no first-entry and no intra-EU mobility rights.[419] EU law sources on Turkish workers are an important resource to challenge domestic workers' vulnerability under national regimes; their

[417] Article 6(1) Decision 1/80.
[418] Article 7 Decision 1/80.
[419] They can access intra-EU mobility rights if they qualify for long-term residence status.

application will be triggered after a Member State has admitted a Turkish worker under national immigration rules. Currently, there are no indications of significant numbers of Turkish nationals employed as domestic workers in the four Member States this thesis focuses on. Nonetheless, this is a potentially relevant source for Member States where there are established Turkish communities, such as Germany, Austria and the Netherlands.

iii. Maghreb nationals

In 1978 the EU signed cooperation agreements with Algeria[420], Morocco[421] and Tunisia;[422] these have now been replaced by the Euro-Mediterranean Agreements concluded with Tunisia in 1998, with Morocco 2000 and Algeria 2005.[423] None of these Agreements grants first entry rights. However, labour migrants from the Maghreb once legally admitted in an EU Member State can derive certain, albeit limited, rights from EU law. In particular, they are entitled to equal treatment with nationals in relation to working conditions, pay and social security; equal treatment covers temporary workers as well.[424] The CJEU held that the non-discrimination clause in the Euro-Med agreements has direct effect and thus, "individuals to whom that provision applies are entitled to rely on it before the national courts".[425] The Euro-Med agreements are a relevant legal source for the Spanish domestic work sector where, as mentioned earlier, a considerable number of Moroccan workers are employed.

On the other hand the CJEU has refused to grant Maghreb nationals a similar EU law status to that of Turkish resident workers. In *El Yassini* the Court was asked whether certain provisions of Decision 1/80 could be applied by analogy to Maghreb nationals. The Court held that the Decision 1/80 is qualitatively different because of the

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[420] Council Regulation (EEC-Algeria) No 2210/78 of 27 September 1978.
[421] Council Regulation (EEC-Morocco) No 2211/78 of 27 September 1978.
[422] Council Regulation (EEC-Tunisia) No 2212/78 of 27 September 1978.
[423] Euro-Med Agreements with Tunisia [1998] OJ L97, Morocco [2000] OJ L70 and Algeria [2005] OJ L265.
[424] Joanna Apap, *The Right of Immigrant Workers in the European Union. An Evaluation of the EU Public Policy Process and the Legal Status of Labour Immigrants from the Maghreb Countries in the New Receiving States* (Hague: Kluwer Law International, 2002).
[425] Case C-416/96 *El Yassini* [1999] ECR I-1290, para 32. See also the discussion in Bernard Ryan, 'The European Union and Labour Migration: Regulating Admission or Treatment?' in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Oxford/Portland: Hart, 2007), 512-513.

prospect of Turkey's accession to the EU and of the progressive realisation of the free movement of workers regime in the case of Turkish nationals.[426]

iv. rest of the world

All other cooperation agreements the EU has signed with third countries contain little in terms of rights for resident workers. As Thym argues since the CJEU has used the agreement with Turkey as a source to strengthen the position of Turkish workers, Member States have been particularly careful when drafting migration provisions in agreements with partner countries.[427] As a result, instead of including provisions on the movement and rights of migrant workers, agreements now focus on "migration control and social policy at home".[428]

TCN workers under labour migration Directives

The admission of migrant workers is traditionally a very sensitive issue for Member States. Attempts to harmonise the entry and stay conditions of labour migrants at the EU level are generally met with resistance. The reluctance of Member States to cede to the EU some of their sovereign powers in relation to the admission of labour migrants was manifested in 2001 when the Commission proposed a single, horizontal Directive to regulate conditions of entry and stay for all TCN workers irrespective of skill.[429] Member States rejected the proposal and the Commission finally withdrew it in 2005.[430] The rejection was due to Member States' very diverse labour migration regimes and the Commission's inability to convince of the added value of harmonisation at the EU level.[431]

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[426] *El Yassini*, paras 57 and 58.
[427] Daniel Thym, Constitutional Foundations of the judgements on the EEC-Turkey Association Agreement in Thym D., Zoeteweij-Turhan M. (eds) *Right of Third-Country National under EU Association Agreements. Degrees of Free Movement and Citizenship* (Leiden/Boston: Brill, 2015).
[428] Thym, 2015, above, 35.
[429] European Commission, Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM (2001)386 final, 11 November 2001.
[430] European Commission, Communication from the Commission to the Council and the European Parliament: Outcome of the Screening of Legislative Proposals Pending before the Legislator, COM (2005)462 final, 27 September 2009.
[431] Bernard Ryan , 'The European Union and Labour Migration: Regulating Admission or Treatment?' in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Oxford/Portland: Hart, 2007) 512-513.

Following the failure to attract support for the initial proposal, in 2005 the Commission adopted a Policy Plan on Legal Migration[432] in the framework of the Hague Programme,[433] According to the 2005 Policy Plan, the comprehensive approach to labour immigration was to be abandoned in favour of a sectoral approach; the new approach consists of setting differentiated conditions and procedures for admission as well as rights for a few selected categories of economic migrants. The 2005 Plan proposed the adoption of four sectoral Directives in the field of labour immigration, each targeting one of the following categories of migrant workers: highly skilled, seasonal workers, remunerated trainees and intra-corporate transferees. A Framework Directive for a single permit and residence rights for TCNs workers was also proposed. The choice of legislative tool – that is, Directives instead of Regulations even though the adoption of the later would have been legally permissible –[434] is also telling of Member States' eagerness to maintain control over immigration issues and particularly over the admission of TCN migrant workers. The UK, along with Ireland and Denmark, opted-out from all Directives on immigration and thus apply exclusively their national immigration rules.

Currently, the EU legal framework on labour migration aims at ensuring, on the one hand, that Member States attract highly-skilled TCNs who can be beneficial for the economic prosperity of the EU and on the other hand, that they facilitate the admission of low-skilled TCNs for employment in specific sectors with fluctuating needs.[435] Petra Herzfeld Olsson accurately notes that the trend in EU labour migration law is to grant more favourable conditions and a robust set of rights to TCNs in high-pay jobs and substandard conditions and labour protections for TCNs in low-pay sectors.[436] This approach has significant implications for domestic workers who are considered low skilled and are thus excluded from both the scope of Directives targeting skill and from

[432] European Commission, Communication from the Commission: Policy Plan on Legal Migration, COM(2005) 669 final, 21 December 2005.

[433] The Hague Programme is a multi-annual agenda which sets the Union's priorities in the field of freedom, security and justice. It was approved by the European Council in 2004 following the expiration of the Tampere Programme which lasted from 1999 to 2004. Council of the European Union, *The Hague Programme: strengthening freedom, security and justice in the European Union* (16054/04 JAI 559 of 13 December 2004).

[434] Article 288 TFEU stipulates that: "To exercise Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions".

[435] The Hague Programme in 2004 made the link between migration and economic prosperity when it highlighted that legal migration has an important role in advancing economic development.

[436] Petra Herzfeld Olsson, "The development of an EU policy on workers from third countries- adding new categories of workers to the EU labour market with new combinations of rights" in Stein Evju (ed) *Regulating transnational labour in Europe: the quandaries of multilevel governance* (Oslo: University of Oslo, 2014).

the Directive on seasonal workers. Even though the labour immigration Directives, to a large extent, do not apply to domestic workers, it is still relevant to examine their provisions because they shed light to the position and treatment of migrant domestic workers under EU migration law and reveal a certain bias on the value of work.

i. The Blue Card Directive

Directive 2009/50/EC on the admission of highly skilled TCN workers[437] was adopted in May 2009.[438] The Directive introduces a new migrant category, that of Blue Card holder. This is a privileged status that entitles the holder to important rights and protections. It is available only to TCNs who possess "high professional qualifications" -a higher education degree or relevant professional experience of at least five years.[439] Member States grant Blue Card holders residence and work permits for a period between one and four years.[440] During the first two years, the TCN is restricted to a specific sector; after this period, the TCN may take up employment in another highly skilled sector.[441] Crucially, EU Blue Card holders can legally change employers.[442] In addition, they enjoy security of residence Article 13 stipulates that temporary unemployment of up to three months may not lead to loss of status; while seeking new employment, the Blue Card holder may legally reside in the Member State. Article 14 entitles Blue Card holders to equal treatment with nationals in relation to wages, dismissals, health and safety, associational rights, education and vocational training, social security, access to services and goods, as well as in relation to full geographical mobility in the territory of the Member State.[443]

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[437] Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17.

[438] Even though the Blue Card Directive concerns highly skilled migrants, a less controversial issue than low skill migration, this instrument was adopted in a heated political debate. See, Sabina Anne Espinoza and Claude Moraes, 'The law and politics of migration and asylum: the Lisbon Treaty and the EU' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge: Cambridge University Press 2012), 156-184.

[439] Article 2(g) Blue Card Directive.

[440] Article 7(2) Blue Card Directive.

[441] Article 12(1) Blue Card Directive.

[442] During the first two years, change of employer is subject to permission by the Member State's authorities. Article 12(2) Blue Card Directive.

[443] Working time and paid leave are not expressly mentioned. However, the word "including" indicates that the list of working conditions is open-ended thus working time and paid leave equal could be included as well.

Blue Card holders have a right to intra-EU mobility; after 18 months of residence in a Member State, they may relocate with their family to another Member State for the purpose of highly skilled work.[444] They also enjoy facilitated access to long-term residence; under Article 16 Blue Card holders can accumulate stays in order to qualify for long-term residence under Directive 2003/109/EC. Blue Card holders have a privileged treatment in relation to family reunification rights; Article 15 establishes a derogation from Directive 2003/86/EC on family reunification that exempts Blue Card holders from the requirement to have prospects of acquiring long-term residence so as to qualify for family reunification and sets a fast-track procedure to examine applications.

In sum, the Directive on highly-skilled workers reduces migrant vulnerability by granting security of residence during unemployment, mobility in the labour market - rights to change employer and sectors-, equal treatment in working conditions and in a range of other fields, as well as facilitated access to family reunification and paths to permanent residence. The intra-EU mobility right, reserved for Blue Card holders and their family members, expands the migrant worker's personal freedom and can thus be an important vector in reducing vulnerability. The status of Blue Card holder may not be as robust as that of EU and quasi-EU nationals but it certainly places highly skilled TCNs to a comparable position.

ii. Intra-corporate transferees

The second instrument adopted that targets highly skilled workers is Directive 2014/66/EU on intra-corporate transferees; it was adopted on 15 May 2014 and must be transposed by 29 November 2016.[445] The Directive sets conditions of entry and residence for non-EU managers, specialists and trainee employees for the purpose of temporary secondment in a Member State. The minimum duration of an intra-corporate transferee permit is one year; it can be extended to up to three years for managers and specialists and up to one year for trainees.[446] Article 18 entitles intra-corporate transferees to equal treatment with the host states' nationals with regard to *inter alia* terms and conditions of employment, freedom of association and collective organizing

[444] Article 18 Blue Card Directive.
[445] Directive 2014/66/EU of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transferee [2014] OJ L157/1.
[446] Article 13(2) Intra-Corporate Transferees Directive.

rights and branches of social security. Like Blue Card holders, intra-corporate transferees have access to facilitated family reunification provisions and enjoy intra-EU mobility rights.[447]

iii. Seasonal Workers Directive

Directive 2014/36/EU on seasonal workers is the first Directive that regulates low skilled work.[448] For the purpose of the Directive, seasonal work is work that is dependent on the passing of the seasons.[449] While the Directive gives discretion to each Member State to determine which sectors are in need of seasonal workers, it is expected to be relevant mainly for agriculture and tourism.[450]

Member States can determine the maximum duration of the permit for seasonal work at anywhere between five and nine months in any 12-month period.[451] Article 9 lists the reasons that can cause the withdrawal of the permit. These include the falsification of documents and the violation of the permit's terms by the worker. Article 9 (3) contemplates loss of permit for reasons entirely related to the conduct of the employer such as employing illegally resident TCNs, failing to pay Social Security contributions or not complying with labour legislation and contractual obligations. This is very problematic because it undermines security of residence and deters the seasonal worker from filing complaints against the employer.

The Directive introduces various provisions that aim at protecting seasonal workers. Article 20, a novelty for EU labour immigration Directives, specifies standards in relation to seasonal workers' living conditions and obliges Member States to require proof that these standards are met throughout the whole duration of stay. Article 23 stipulates seasonal workers' right to equal treatment as national workers in relation to wages, dismissals, working time, paid leave, health and safety, freedom of association,

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[447] Articles 19 and 20 Intra-Corporate Transferees Directive.
[448] Directive 2014/36/EU of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375.
[449] Article 2(2) Seasonal Workers Directive.
[450] Recital 13 Seasonal Workers Directive.
[451] Article 14 Seasonal Workers Directive. The procedure for granting seasonal work permits is different for stays of up to 90 days and for stays beyond 90 days. See Article 12 Seasonal Workers Directive. In any case the maximum period of stay is the one stipulated in Article 14.

collective bargaining and the right to strike.[452] Crucially, seasonal workers are entitled to back payments.[453] To ensure effective enforcement of seasonal workers' rights, Article 25 requires Member States to set mechanisms where they can lodge complaints against employers directly or through representatives;[454] seasonal workers should also be protected from victimisation and retaliation when they file a complaint against the employer.[455] Member States are also required to ensure the effective inspection of seasonal workers' workplaces either through national Labour Inspection authorities or worker's organisations.[456]

The Preamble states that addressing seasonal workers' vulnerability and risk of exploitation is a central aim for the Directive.[457] At some points the text of the Directive clearly articulates seasonal workers' protection – for instance Articles 20, 23, 24 and 25. Yet there are instances where this focus is lost. Whereas Blue Card holders have the right to take change employment sectors, seasonal workers are restricted to work only in the sector specified on their permit.[458] In addition, Article 15(4) stipulates that Member States *may*, but are not obliged to, allow seasonal workers to change employers. Fudge and Herzfeld Olsson note that disagreement between the Council and the Parliament during pre-adoption negotiations led to the articulation of a discretionary provision on the right to change employers instead of a mandatory one.[459]

The right to change employers is, however, a key protection for migrant workers. It is especially important for migrants in low skilled employment who are generally at a greater disadvantage *vis à vis* the employer than highly skilled workers. Yet, EU labour migration Directives afford this protection only to Blue Card holders. If

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[452] The rationale of equality of treatment is not only to guarantee seasonal workers' labour rights but also to protect national workers from social dumping practices. Jo Hunt, 'Making the CAP fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU' (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations,* 131-152. In general, the fair treatment of TCN workers is seen as a means of establishing a level playing field within the EU by reducing the unfair competition between the nationals of a Member State and TCNs. This point was highlighted by the Commission in its 2005 Policy Plan on Legal Immigration and is reiterated in the Directive's Recital 19. See also the joint statement by a number of civil society organisations, *Joint NGO statement, EU Seasonal Migrant Workers Directive: Full Respect of Equal Treatment Necessary*, (20 April 2011). Member States can, however, restrict seasonal workers' equal treatment in relation to unemployment and family benefits, to education and vocational training.
[453] Article 23(c) Seasonal Workers Directive.
[454] Article 25 (2) Seasonal Workers Directive.
[455] Article 25(3) Seasonal Workers Directive.
[456] Article 24 Seasonal Workers Directive.
[457] Recital 43 Seasonal Workers Directive.
[458] Article 22(c) Seasonal Workers Directive.
[459] Judy Fudge and Petra Herzfeld Olsson, 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights' (2014) 16 *European Journal of Migration and Law*, 439-466.

the right to change employers is discretionary under EU law, then it has no added value for the protection of TCN workers. Thus we see that EU labour migration law restricts the freedom of low skilled TCNs. This seriously undermines the effectiveness of provisions that aim at guaranteeing TCNs rights; as long as law does not make migrant workers as mobile as nationals, their vulnerability will not be fully and effectively addressed.[460]

The Seasonal Workers Directive provides for no family reunification rights. Given that the maximum duration of the permit is nine months, the seasonal worker cannot rely on the Family Reunification Directive either as it requires at least one year of continuous legal residence before the TCN can sponsor family members. Given the temporariness of their stay, seasonal workers are expressly excluded from accessing long-term residence status.[461] Thus rights under the Seasonal Workers' Directive are not as fully fledged as under the Blue Card Directive. Juxtaposing the provisions of the Blue Card and Seasonal Workers Directives gives an indication of how low-skilled work is less protected than highly-skilled work under EU law. This is relevant for migrant domestic workers as well as it illustrates a certain bias towards low-skilled work. If we think, for instance, how a potential EU Directive on domestic workers would look like there is probably no doubt that it would resemble the Seasonal Workers one rather the Blue Card.

iv. Single Permit Directive

Directive 2011/98/EU on a single permit was adopted on 13 December 2011 and its transposition date expired on 25 December 2013.[462] It sets certain common procedural rules for Member States to issue combined work and residence permits, as well as a common set of rights for legally resident TCN workers. The Directive does not

[460] See also Fudge and Olsson, 2014, above, page 459.
[461] Article 3 Long-Term Residence Directive.
[462] Directive 2011/98/EU of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1.

harmonise the different national immigration rules on the admission of TCN workers; it only simplifies the procedure by creating a one-stop shop to handle applications.[463]

In contrast to the sectoral Directives that apply to specific categories of workers, the Single Permit Directive is meant to be a horizontal instrument applicable to all TCN workers. Recital 19 states that the Directive aims at "developing further a coherent immigration policy and narrowing the rights gap between citizens of the Union and third-country nationals legally working in a Member State". But despite the claim of horizontality, there are several exemptions to the Directive's personal scope. Article 3(2) introduces a long list of excluded TCN categories such as: family members of EU nationals, long-term residents, intra-corporate transferees, posted workers, seasonal workers and au pairs. In addition, Article 3 (3) and (4) exempts migrants admitted for up to six months or on the basis of a visa from the application of the Directive's Chapter II.[464] For some of these categories such as family members of EU citizens or long-term residents the exclusion is justified as they are covered by more favourable EU law provisions. For others though, such as seasonal workers and au pairs, the exclusion does not seem justified and clearly weakens the Directive's claim of horizontality.

Single permit holders may reside and circulate freely within the territory of the granting Member State, carry out the specific employment activity indicated on their permit and receive information on their rights under the Directive.[465] Article 12 entitles single permit holders to equal treatment as nationals in relation to *inter alia* pay, dismissal, health and safety and associational rights. Contrary to the Blue Card Directive, the Single Permit contemplates no intra-EU mobility, no rights to change employer and sector, no residence security during unemployment periods. Thus, TCN workers falling under the scope of the Single Permit Directive have fewer rights than highly skilled workers; this adds to the fragmentation of the EU regime on TCN workers.

While it is probably too soon to assess the impact of the Single Permit Directive on national immigration law systems, the equality provision under Article 12 carries some potential. Article 12 could be a source to challenge the Cypriot regime on TCN domestic workers. As discussed in Chapters One and Two of this thesis, the terms of the

[463] Recital 6 and Article 1 (2) of the Directive reiterates Member States' exclusive competence in regulating and determining the volumes of admission. Under Article 8(3) national authorities may declare an application as inadmissible and reject it on this basis.
[464] It thus follows that Chapter III of the Directive on the right to equal treatment still applies to TCNs admitted for up to six months or on the basis of a visa.
[465] Article 11, Single Permit Directive.

domestic worker visa in Cyprus restrict associational rights and stipulate wages that are far below the statutory minimum for nationals in comparable sectors; a correct implementation of Article 12 of the Single Permit Directive would require an amendment of these terms to guarantee migrant domestic workers' equal treatment.

III. Fragmentation, different hierarchies and the value of work: implications for migrant domestic workers

The analysis of the different EU legal sources on the entry and the rights of migrant workers points to a very fragmented and complex regime. This fragmentation creates different hierarchies of statuses with implications for migrant domestic workers as well. Migrant workers who are EU nationals not subjected to transitional arrangements are clearly first in the hierarchy of EU migrant statuses; they enjoy independent rights of first entry, a security of residence, full mobility in the labour market – the only narrow exception being positions with public authority – equality of treatment in employment and in a range of other fields, as well as family reunification rights. The same holds true for EEA and Swiss nationals. In the framework of the Association and Cooperation Agreements the differentiation between TCNs takes place on the basis of their nationality. Hence, EEA and Swiss workers are the most favoured ones and hold a status comparable to that of EU citizens; in fact, EEA and Swiss workers are paradoxically placed even higher in the hierarchy than EU citizens under transitional arrangements. Then Turkish workers follow holding a relatively robust set of entitlements. Established Turkish workers enjoy a special status and a comprehensive set of rights under EU primary law. Crucially though, Turkish workers have no first-entry rights under EU law; they are admitted in the EU under the diverse national immigration rules of Member States. Maghreb nationals under the Euro-Med Agreements could be placed next; their only entitlement under the agreements is a right to equal treatment with some limited implications for residence rights. Then TCNs from the rest of the world follow; the agreements with the rest of the world bring no added value in terms of resident workers' rights.

It has been argued that the fragmentation on the rights of TCNs reflects the state of external relations the EU maintains with the respective country; if the Agreement is

part of a long-term plan of association with the EU, Turkey for instance, then the set of rights granted to the nationals of that country tends to be comprehensive, while when the aim is that of cooperation and of enhancing trade relations, then the rights' aspect is much weaker.[466] However, the EEA and Swiss Agreements constitute exceptions. Despite the fact that there is no prospect of EU accession, the bundle of rights granted to EEA and Swiss workers is robust, extensive and as close as it can get to that of EU citizens and this turns EEA and Swiss into quasi-EU nationals. This indicates that the discrepancies of the regimes under each Agreement cannot be explained only by taking into account the prospect or not of accession; the geographical proximity to the EU and most importantly, the economic prosperity of the partner country are also decisive factors when granting labour immigration rights to TCNs.

The overview of the secondary labour immigration legislation adopted on the new legal basis provided by the Treaty of Amsterdam shows that the EU has opened up piecemeal paths for the entry of different categories of TCN workers. Despite these developments, the personal scope of the adopted legislation remains very restricted and the status of TCNs very much fragmented. A TCN seeking first independent entry into an EU Member State for the purpose of working in the domestic work sector cannot rely on any of the labour immigration Directives because they cover either highly skilled or seasonal workers. She will instead depend on national immigration rules and therefore her admission conditions will not be covered by EU law.

Under the labour immigration Directives, the differentiation on the status and entitlements of TCN workers takes place on the basis of their perceived market value. The economic and market value of the migrant worker is tightly associated to skill; the more highly skilled the more desirable and welcome the migrant worker is. However, the skill of the migrant worker is not always relevant for EU law. In the case of EU and quasi-EU citizens –Swiss and EFTA nationals – skill is irrelevant when it comes to admission for the purpose of employment. The same holds true for TCNs falling under the scope of Association and Cooperation Agreements; their skill level is again irrelevant for EU law but Member States may determine to what extent skill is relevant when deciding for what kind of jobs they grant first entry rights. Once entry is granted, though, EU law comes into play and may restrict the application of national regimes on migrant workers.

[466] Katharina Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Leiden: Brill Nijhoff, 2014).

For the rest of TCN workers, skill is of utmost importance and determines the position and rights the migrant worker has under EU law. The EU labour immigration regime favours the immigration of highly skilled TCN workers by carving out exceptions to facilitate their admission and stay in the Member States. As more options exist for the highly skilled, those classified as low-skilled run more risks of becoming irregular due to fewer opportunities to access an independent and stable legal migration status. But as skill is a gendered concept, prioritising the admission of the highly-skilled becomes a gendered exercise.

Thus, it is observed that EU law grants a robust set of rights to admission and stay to those TCNs who can find employment in mostly male-dominated sectors, while the entry of lower-skilled workers in the female-dominated sector of domestic and care work takes place through the often restrictive national immigration regimes of the Member States. Such an approach, as Elspeth Guild argues, falls short both of serving the diverse labour market realities of the Member States;[467] it also fails to guarantee a fair treatment to those TCN workers who are actually relevant to the EU and its Member States. Paradoxically, under the EU labour migration Directives those TCN workers who most need protection because they are vulnerable to exploitation – that is, low-skilled ones – end up getting less rights than highly-skilled workers who have more bargaining leverage *vis à vis* the employer.

The example of Cyprus illustrates my claim. As a matter of fulfilling EU law obligations, Cyprus amended its Aliens Law and incorporated word-by-word the provisions of the EU Blue Card Directive. However, a separate Parliamentary decision set the volumes of admissions at zero. Article 79 (5) TFEU reserves Member States' right to decide how many TCNs they admit under EU labour migration Directives. Even though zero admissions in essence mean that Cyprus grants no highly skilled permits, the Commission has not challenged this practice which clearly contravenes the effectiveness of the Blue Card Directive. At the same time, the majority of non-EU workers in Cyprus today move and work as domestic workers in private households under a highly problematic national immigration regime which is not scrutinised for its compatibility with EU fundamental rights.

[467] Elspeth Guild, Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European Union (Nijmegen Migration Law Working Paper Series 2010/05, 2010).

IV. Domestic workers under EU law sources on the integration of TCNs

With the newly acquired legislative competences in the field of immigration under the Treaty of Amsterdam, the EU adopted two new instruments on the treatment of TCNs who are legally residing in the Member States: Directive 2003/109/EC on long-term residence and Directive 2003/86/EC on family reunification.

i. Directive on long-term residents

The first instrument the Commission proposed was the long-term residence Directive.[468] It was adopted in November 2003 following a long period of negotiations. The Directive's central aims are two: to integrate TCNs who have been lawfully residing in the EU on a long-term basis and approximate their status and rights to those of EU nationals.[469] The Directive establishes a new status for TCNs, that of long-term resident, and harmonises the rules and procedures for its acquisition across the Member States.[470] The status of long-term resident is an innovative legal source for the integration of non-nationals; it gives visibility to TCNs and, as Kostakopoulou argues, allows them to become part of the European polity.[471]

Once granted, it is meant to be permanent.[472] Member States can exceptionally withdraw the status of long-term resident under the narrow circumstances laid down in Article 9: if the status was acquired fraudulently, if an expulsion order is adopted, or in case of absence from the territory of the EU for 12 consecutive months. Long-term residents enjoy an enhanced protection against expulsion in comparison with other

[468] European Commission, Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM (2001)127 final, 13 March 2001.
[469] Recitals (4) and (12) Long-Term Residence Directive.
[470] Council of the European Union Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, [2004] OJ L16/44.
[471] Theodora Kostakopoulou, 'Invisible citizens? Long-term resident third-country nationals in the EU and their struggle for recognition' in Richard Bellamy and Alex Warleigh (eds.) *Citizenship and governance in the European Union* (London/New York: Continuum, 2001).
[472] Article 8 (1) Long-Term Residence Directive.

TCNs; Article 12 stipulates that expulsion may take place only if the TCN poses an actual and serious threat to public policy or public security. Thus, long-term residents enjoy residence security akin to that of EU nationals. In addition, they are entitled to equality of treatment with nationals in access to employment, self-employment, wages, dismissal, associational rights and in a range of other fields.[473] Crucially, long term residents have full intra-EU mobility rights; they may enter another Member State as jobseekers, reside there for the purpose of employment and be joined by family members while enjoying equality of treatment with national workers. Overall, the rights of long-term residents are robust and turn the holders to quasi-EU citizens.

But what are the conditions for accessing this prestigious status and to what extent can domestic workers meet those conditions? Article 4 (1) stipulates that a TCN *may* qualify for the status after five years of legal and continuous residence in an EU Member State.[474] Apart from the duration of residence, the TCN must also prove "stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned." [475] This requirement poses a significant hurdle for migrant domestic workers as their wages are generally low and often below the statutory minimum.

Another obstacle for domestic workers' access to long-term resident status is Article 3 that introduces several exemptions from the Directive's personal scope. The most relevant to domestic workers is the exemption under Article 3 paragraph 2(e). It reads:

> "the Directive does not apply to TCNs who reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited".

It follows clearly from the provision's wording that au pairs and other workers whose residence is of a temporary nature are excluded. What is less clear, however, is the meaning of the phrase "where their permit has been formally limited" and its implications for migrant domestic workers. As we saw in Chapter One, national immigration laws on first entry never grant domestic workers unlimited residence permits. On the contrary, domestic workers' permits are formally limited in many

[473] Specified in Article 11(1) and subject to the derogations in Article 11, paragraphs 2, 3 and 4, Long-Term Residence Directive.
[474] Article 4(1) Long-Term Residence Directive.
[475] Article 5 para 1 (a) Long-Term Residence Directive.

respects: length of stay, sector of employment and often employer. Despite such formal limitations, domestic workers may still renew their permits and end up residing in the same Member State on a long-term basis. Does the "formally limited" exemption mean that Member States can deny long-term residence status to a TCN domestic worker who was admitted on a limited permit but who has nonetheless effectively resided in that Member States for five years or more? As Elspeth Guild rightly argues:

> "the qualification of five years residence would be meaningless if the Member States can nonetheless and after the five-year period exclude a TCN who has resided lawfully on the territory for five years, for instance a domestic worker, on the basis that he or more likely she only has a limited residence permit and thus is excluded from the scope of the Directive".[476]

The Commission in its first implementation report also pointed out that such a broad interpretation of the exemption goes against the effectiveness of the Directive.[477]

The CJEU was recently called to clarify the meaning of the exemption. *Singh* concerned a TCN residing in the Netherlands since 2001 on a fixed-term residence permit; the permit was restricted to the exercise of activities as a spiritual leader.[478] Despite being fixed-term, the permit was renewed twice. In 2007 Mr. Singh applied for long-term residence status. The Dutch authorities rejected his application on the basis that his permit, being fixed-term, fell under the "formally limited" exemption in Article 3 para 2(e) of the Long-Term Residence Directive.

When inquired on the correct interpretation of the exemption under Article 3 para 2(e), the Court first noted that, as there is no reference to national law, the phrase "formally limited" is an autonomous EU law concept; as such it must be interpreted uniformly across the Member States. The Court then differentiated between, on the one hand, residence "solely on temporary grounds" such in the case of au pairs or seasonal workers and on the other hand, permits with a "formal restriction".[479] In the first case it is clear, according to the Court, that the temporary nature of those permits prevents the TCN's long-term residence. In the second case however, the permit's formal limitation is not an indication of whether the TCN can settle or not. The Court concluded that if the "formal limitation *does not prevent* the long-term residence" then the TCN is

[476] Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, (Hague: Kluwer International, 2014), 224.
[477] European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011)585 final, 28 September 2011.
[478] *Staatssecretaris van Justitie v Mangat Singh* (C-502/10) [2012] paras 42-43.
[479] *Singh*, para 50.

covered by the Directive's personal scope.[480] Thus *Singh* establishes a test to determine if a particular TCN falls under the exemption: whether the formal limitation prevents or not long-term residence. National courts are to apply this test on a case-by-case basis.[481]

Singh is largely a positive development but does not fully clarify the matter. The judgement is a message to Member States that Article 3 para 2 (e) is not a *carte blanche* for the blanket exclusion of categories of TCNs from long-term residence; Member States may not circumvent their obligations under the Directive simply by labelling certain permits as temporary when the permits are in practice extended.[482] However, the Court did not unequivocally hold that all TCNs whose permits are renewed beyond the five-year period will automatically qualify for long-term residence. For the Court renewal is only a "strong indication" that the limitation in question does not preclude the TCN's long-term residence.[483] After *Singh* there are still doubts on the meaning of "formally limited" permit.

In his Opinion Advocate General Bot proposed a clearer stance than the one finally adopted by the Court. He argued that a "formally limited" permit is just another type of temporary permit; to the extent that it is renewed beyond the five years, it follows that the TCN has fulfilled the duration of residence requirement to be eligible for long-term residence status.

Even though the law after *Singh* is not entirely clear, the judgment still challenges the implementation of the long-term residence Directive in Cyprus. As discussed in Chapter One of this thesis, the Cyprus Supreme Court in *Motilla*[484] – a case decided before *Singh* – [485] held that a TCN domestic worker who was legally residing in the country for nine years on successive temporary permits fell under the exemption of Article 3 para 2 (e) and thus did not qualify for long-term residence status. In 2011 the Commission criticised the broad interpretation of the exemption in Cyprus and in a number of other Member States but took no measures as the *Singh* judgement was

[480] *Singh*, para 51.
[481] *Singh*, para 52.
[482] See also, Steve Peers, 'The Court of Justice lays the foundation for the Long-Term Residents Directive: Kambaraj, Commission v. Netherlands, Mangat Singh' (2013) 50 *Common Market Law Review*, 529-552.
[483] *Singh*, para 52.
[484] *Cresencia Cabotaje Motilla vs. The Republic of Cyprus*, Case no.673/2006, Full Bench of the Supreme Court, January 2008.
[485] This shows that on deciding *Motilla* the Supreme Court overlooked the CJEU's exclusive competence in interpreting EU law and instead of sending a reference for a preliminary ruling, proceeded in a wrongful interpretation of the Long-Term Residence Directive.

pending at the time.[486] It seems that the result in *Singh* has prompted the Commission to initiate infringement procedures against Cyprus for incorrect application of the long-term residence Directive; at the time of writing the Commission has issued a formal notice but the content is still not publicly available.[487]

Overall, the long-term residence Directive introduces important citizenship-like provisions for TCNs who are long-term residents: security of residence, full equality with nationals and intra-EU mobility.[488] Carrera and Wiesbrock have argued that this is an "indication of the loss of discretionary power by the nation-state as well as a signal that a new European citizenship of TCNs is already in the making."[489] It is true that once granted, long-term residence status, approximates considerably the position of TCNs to that of EU citizens, and consequently to that of nationals.[490] However it is crucial that the conditions of first entry are not set at EU but at Member State level. National immigration law determines whether a TCN will be able to reach the five years of legal and continuous residence threshold, fulfill the income requirements and qualify thus for the status. For example, it is practically impossible for a TCN under the Cypriot special domestic work regime which stipulates salaries way below comparable minimum wages applied to other occupations, to fulfill the Directive minimum income requirements. In addition, the fact that EU labour immigration Directives set differentiated paths to long-term residence is another indication that the status is not inclusive but selective, favouring those whose market value is perceived to be higher. Furthermore, the conditions on the renewal of work/residence permits are set in national immigration law which is not scrutinized for compatibility with the EU antidiscrimination Directives.

ii. Directive on family reunification

[486] COM(2011) 585 final, above, at page 2.
[487] Infringement number: 2000844229, Decision date 19/11/2015.
[488] In this respect, Acosta has characterised the LTRD as a form of subsidiary EU citizenship. Diego Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Martinus Nijhoff Publishers 2011).
[489] Sergio Carrera and Anja Wiesbrock, "Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third-Country Nationals in the EU" (2010) 12 European Journal of Migration and Law, 337-359, at 358.
[490] Groenedjik identifies three narrow aspects where the treatment of long-term residents can still diverge from that of EU nationals: political participation in local elections, access to jobs in the public service and equal treatment in relation to social assistance. See, Kees Groenendijk, 'Citizens and third country nationals : differential treatment or discrimination ? ' in Jean Yves Carlier and Elspeth Guild (eds), *The Future of Free Movement of Persons in the EU* (Brussels: Bruylant, 2006).

Directive 2003/86/EC provides for common rules on the right of legally resident TCNs to be joined by their family members in the Member State where they reside.[491] It establishes the conditions under which Member States are to grant family reunification[492] and sets the rights TCNs' family members should enjoy.[493]

To qualify as sponsor, the TCN must hold a residence permit valid for a year or more and have "reasonable prospects of obtaining the right to permanent residence".[494] As the Commission reports, the implementation of this provision varies significantly among Member States. In Sweden TCNs must have permanent residence to be eligible, while in Cyprus they must have reasonable prospects to acquire permanent residence. Sweden's implementation introduces a more restrictive condition that does not seem compatible with the Directive. As noted in Chapter One of this thesis, TCN domestic workers in Cyprus are granted non-renewable four-year permits and are denied long-term residence; it thus follows that they are excluded from the scope of family reunification as well. In Spain on the other hand, TCNs on temporary permits can act as sponsors as long as they have secured renewal of their permit for at least another year.[495] In addition, under Article 7 Member States may – but are not obliged to – require that sponsors provide proof of suitable accommodation, as well as, stable and regular resources to support themselves and their family members without recourse to public funds. Again, Members States made different use of the possibilities under Article 7. Sweden for instance introduces no accommodation and no income requirements, while Spain and Cyprus do but without further specifying any accommodation standards or income levels.[496]

Overall, domestic workers face significant obstacles in qualifying as sponsors for the purposes of the EU Directive on family reunification. The requirements to have prospects of long-term residence, adequate financial means and suitable accommodation are incompatible with the migrant domestic workers' working and living conditions. It seems that the requirements to qualify for family reunification under EU law were drafted with the highly-skilled, well-paid TCN worker in mind.

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[491] Council Directive 2003/86/EC on the right to family reunification [2003] OJ L251/12.
[492] Article 1, Family Reunification Directive.
[493] Articles 13, 14 and 15, Family Reunification Directive.
[494] Article 3, Family Reunification Directive.
[495] European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008)610 final, 8 October 2008.
[496] European Commission, 2008, above.

V. EU migration law norms on irregular domestic workers

Prior to the adoption of the Treaty of Amsterdam the EU lacked competence to legislate on irregular immigration. Instead, the Members States' Home Affairs Ministers adopted soft law measures in the framework of intergovernmental cooperation. On a discourse level these soft law measures pursued a twofold aim: to prevent irregular immigration and to guarantee the rights of irregular migrants. In practice though, the measures favoured a security-based approach to immigration matters over one that would ensure TCNs' protection.[497] As Heli Askola notes, the security-based approach to the regulation of TCNs' status which "conflates security, criminality and migration" persists in the post-Amsterdam era.[498]

Currently, the EU's competence to legislate on illegal immigration is based on Article 79(2) (c) TFEU.[499] The Returns and Employers Sanctions Directives are the two instruments that form part of the EU's legal framework on fighting illegal immigration.[500] Directive 2008/115/EC on common standards and procedures for returning illegally resident TCNs[501] requires Member States to issue a return decision against irregularly staying TCNs, remove them and under certain circumstance, to impose entry ban on removed TCNs.[502]

Directive 2009/52/EC on sanctions against employers[503] aims at curbing the flow of irregular migrant workers into the EU by addressing what the European Commission perceives as the "pull factor" of illegal migration, that is, the prospects of finding employment despite the lack of authorisation.[504] The Directive requires Member States to prohibit the employment of illegally resident TCNs and impose "effective,

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[497] Ryszard Cholewinski, 'The EU *Acquis* on Irregular Migration Ten Years On: Still Reinforcing Security at the Expense of Rights?' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Leiden: Nijhoff Publishers 2012).

[498] Heli Askola, ''Illegal Migrants', Gender and Vulnerability: The case of the EU's Returns Directive' (2010) 18 (2) *Feminist Legal Studies*, 159-178.

[499] It reads: "The European Parliament and the Council acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: …c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without legal authorisation;"

[500] The fight against illegal immigration is one central aims of the EU's common immigration policy decided with the Tampere Conclusions in 1999.

[501] Directive 2008/115/EC of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

[502] See Articles 6(1), 8(1) and 11, Returns Directive.

[503] Directive 2009/52/EC of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168/24.

[504] European Commission, Commission Staff Working Document, Accompanying document to the Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, Impact Assessment, SEC(2007)603, 16 May 2007.

proportionate and dissuasive sanctions" against employers who violate this prohibition.[505] The sanctions are primarily financial; Article 5 stipulates fines proportional to the number of illegally resident TCNs employed and the payment of costs incurring from the TCN's return. There are also provisions on imposing criminal and administrative sanctions.[506]

In addition, the Directive requires Member states to impose several obligations on employers when hiring TCNs: to check that the TCN possess the required permit before taking up employment, to keep copies of the permit during employment so as to allow inspection by national authorities and to notify national authorities when hiring a TCN.[507] In essence, these obligations put an onus on the employer to carry out immigration checks. Mark Bell warns that such administrative burdens can have a discriminatory effect on employers' recruiting practices; discrimination can also have spill-over effects on legally resident TCNs and other ethnic communities as employers who are not familiar with immigration rules and procedures may be reluctant to employ them altogether.[508] It is regrettable that the Commission's report on the implementation of the Directive does not examine whether the implementation of the Directive has had any negative impacts on TCNs.[509]

The Directive establishes more lenient rules and obligations for the employers of domestic workers. For example Article 5(3) gives Member States discretion to "provide for reduced financial sanctions where the employer is a natural person who employs an illegally staying third-country national for his or her private purposes and where no particularly exploitative working conditions are involved". Members States can also simplify employers' obligations to notify national authorities when they employ a migrant domestic worker.[510] While such provisions may make it easier for domestic

[505] Articles 3(1) and 5. The Employers Sanctions Directive requires the imposition of sanctions against private employers, legal persons (Article 8) and subcontractors (Article 11).
[506] Article 9 requires Member States to establish criminal offences in the following cases: a) the employment of the irregular TCN is continuous or persistent, b) the infringement involves the employment of a significant number of irregular TCNs, c) the employer is knowingly employing a TCN who is a victim of human trafficking and d) the irregular TCN is a minor. On administrative sanctions, see Article 7.
[507] Article 3 (1) Employers Sanctions Directive.
[508] Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford: Oxford University Press, 2002).
[509] European Commission, Communication from the Commission to the European Parliament on the application Directive 2009/52/EC, COM (2014)286 final, 25 May 2014.
[510] Article 4 (2), Employers Sanctions Directive.

workers to find work, they mirror gendered ideas around household work not belonging to the labour market.[511]

In its proposal for the adoption of the Employer Sanctions Directive, the Commission acknowledged that "illegally employed third-country nationals are in an additionally vulnerable position because if apprehended they are likely to be returned to their country of origin".[512] While the adopted text does not explicitly engage with TCNs' vulnerability or the need to protect them, there are certain provisions with a worker's protection basis. Article 6 (1) requires Member States to ensure that employers are liable to pay back payments to their illegally employed TCN workers; Member States must also enact mechanisms so that illegally employed TCNs can file unpaid wages claims and be able to enforce judgements against their employers even if they have been returned to the country of origin.[513] Under Article 13 Member States must establish effective mechanisms to facilitate illegally employed TCNs to file complaints against employers directly or through their representatives- trade unions, associations or other. But apart from the right to receive back payments the Directive does not contemplate the enforcement of any other rights at work.[514]

The Commission's implementation report draws attention to the fact that the protective measures stipulated in Articles 6 (2) to (5) and 13 lack robust implementation in the Member States.[515] Crucially, the potential of Articles 6 and 13 to reduce vulnerability is seriously undermined because of TCNs' deportability. If illegally employed TCNs have no security of residence it is highly unlikely that they will make use of these provisions to recover unpaid wages or complain of the employer's failure to comply with labour law; fear of deportation makes irregular migrants reluctant to seek legal protection. Without a "firewall" – to use Joseph Carens' term – between immigration law enforcement and legal protection, TCNs employed in breach of immigration rules cannot access their rights effectively.

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[511] Bridget Anderson, 'Precarious Pasts Precarious Futures' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press 2014).

[512] Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals,* COM 2007(249) final, 16.05.2007, page 2.

[513] Article 6 (2), Employers Sanctions Directive.

[514] Mark Bell, *Racism and Equality in the European Union* (Oxford: Oxford University Press, 2008) 143.

[515] European Commission, Communication from the Commission to the European Parliament and the Council, on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM(2014)286, 22 May 2014.

The Directive contemplates the possibility for Member States to grant short-term permits to irregular migrants who initiate legal proceedings against employers.[516] However this possibility, apart from depending entirely on national discretion, is limited to situations where the employer has committed a criminal offence covered by Article 9(1) (c) or (e) of the Directive, namely employing an irregular TCN under "particularly exploitative working conditions" or employing a minor. Article 2(i) defines the term "particularly exploitative conditions" as "working conditions, including those resulting from gender based or other discrimination, where there is a *striking* disproportion compared with the terms of employment of legally employed workers which, for example, affects workers' health and safety, and which offends against human dignity." (emphasis added). The provision's wording implies that a certain level of discriminatory treatment at work between illegally and legally employed workers would be allowed as long as it is not strikingly disproportionate. What kind of treatment would amount to "particularly exploitative conditions" is unclear. Clearly, an illegally staying TCN domestic worker who files a complaint against her employer must meet a very high threshold before she can have residence security during proceedings. It seems that a short-term residence permit is contemplated only for those TCNs who were employed in slavery-like conditions.

Overall, the Employers Sanctions Directive concerns first and foremost immigration law enforcement and does not establish a comprehensive employment law regime for illegally employed TCNs. The application of the Directive's limited worker-protective provisions is triggered only after the TCN has been detected and faces return; EU migration law norms fall short of reducing vulnerability. It thus follows that TCN domestic workers working in breach of immigration rules have very limited protections under EU migration law; it is the norms of national illegality regimes, discussed in Chapter Two of this thesis, that are most relevant in regulating their status and determining their access to labour rights. In the case of the UK, national illegality norms apply exclusively because of the UK's opt-out from the Employers Sanctions Directive. It is relevant to mention that one of the main reasons that motivated the UK's opt-out was precisely the Directive's worker-protective norms. As the UK Home Affairs Minister framed the government's position at the parliamentary debate concerning the opt-out:

[516] Article 13 (4), Employers Sanctions Directive.

> "The directive also guaranteed additional rights to illegally staying employees, including provision of back payments where an employee has earned less than the minimum national wage, which would be difficult to administer and would send the wrong message by rewarding breaches of immigration legislation." [517]

We therefore see that states show singificant resistance in accepting supranational norms that challenge their immigration regimes.

VI. Conclusions

The map of migrant statuses under the EU legal sources reveals a highly fragmented picture. As opposed to the regime on the free movement of domestic workers who are EU nationals that is comprehensive and protective, most categories of TCN domestic workers must navigate a much more complex and fragmented legal landscape. It is the secondary sources on TCN workers, that is, the sectoral labour migration Directives that reflect gender-based ideologies on the value and non-value of different types of work. Most protective norms in EU migration law, norms that could challenge migrant vulnerability produced in national law, are to a large extent inaccessible to TCN domestic workers.

[517] Damian Green, HC Deb, 24 May 2011, c50WS.

Chapter Four: The relevance of EU employment law sources in challenging domestic workers' vulnerability

I. Introduction

In the growing legal scholarship on paid domestic work in Europe the importance and relevance of EU employment law sources has surprisingly been a neglected theme. Yet the EU employment law regime includes numerous legal sources stipulating important rights and protections for workers: non-discrimination, limits on working time, paid leave, parental leave, maternity protection, to name a few. These sources are promising tools in reducing vulnerability because of the supremacy of EU law; whenever there is a mismatch EU law prevails over national law.

The first important step is to clarify domestic workers' inclusion in the personal scope of EU employment law. Identifying who is entitled to EU employment rights and protections is a complex endeavor; this rich body of law has developed in a piecemeal way, under different Treaty bases and encompasses diverse definitions of the term worker. The result is a "kaleidoscopic"[518] and far from homogenous personal scope.

When trying to position paid domestic work within the personal scope of EU employment law, the picture becomes even more complex; some pieces of secondary legislation explicitly allow for the exemption of domestic workers, while others are silent. I argue that the analysis of this issue has been thus far misplaced. Most analyses on the personal scope of EU employment law tend to overlook the issue all together, while those few accounts examining the location of domestic workers conclude that EU employment law does not apply to them. I provide a more nuanced picture. My aim is twofold: to show clearly when EU employment law applies to domestic workers and what rights and protections they can derive. From this follows the broader conclusion that EU employment law is an important but misunderstood resource for domestic workers.

It is, however, not possible to examine in detail all EU employment law sources. Collective labour law is not considered because the focus of this thesis the employment relationship between a domestic worker and an individual employer who does not normally employ other workers. I instead focus the analysis of substantive rights on

[518] Nicola Countouris, *The changing law of the employment relationship: Comparative analyses in the European context* (Burlington: Ashgate, 2007), 171.

selected areas of EU law: free movement of workers, equal pay, protection of pregnancy and maternity, the prohibition of harassment, the right to receive information on the essential aspects of the employment relationship and the regulation of working time. These themes are selected because they address important vectors of vulnerability. Discrimination, unequal pay, no protection in the event of pregnancy, workplace harassment, lack of information and unregulated working time are particularly pressing issues in domestic work.

Nevertheless, EU law intervention is limited. Dismissals and deductions from wages, two crucial aspects of domestic workers' vulnerability, are not regulated under EU law; thus workers may not rely on EU law for protection in these areas. In addition, a distinction must be drawn between EU and TCN domestic workers as some EU law protections apply only to workers who are EU nationals. Nonetheless, this distinction must not be overstated. As explained in Chapter Three of this thesis, at least in Spain, Sweden and the UK many domestic workers are EU nationals and are thus covered by EU rules on the free movement of workers. Also, as we shall see in this Chapter, except for free movement all other areas of EU employment law apply to workers irrespective of nationality and even illegally resident TCNs can claim rights flowing from EU law.

The analysis proceeds as follows. Part II discusses the inclusion of domestic workers in the personal scope of EU employment law. I identify three types of inclusion: First, *straightforward inclusion* as in the case of free movement and gender equality law which have broad and autonomous personal scopes; Second, *non-straightforward inclusion* as in the case of the Framework Directive on Health and Safety[519] and its individual Directives. In this context, I revisit an important debate on the relationship between the personal scopes of the Framework and individual Directives and argue that the Pregnant Workers[520] and the Working Time Directives[521] apply fully to domestic workers. Third, *inclusion linked to national law* as in the case of Directives delegating the definition of "worker" to national law. The third cluster includes the Directives on employer's insolvency,[522] the obligation to inform,[523]

[519] Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (Health and Safety Directive) [1989] OJ L183/1.
[520] Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (Pregnant Workers Directive) [1992] OJ L348/1.
[521] Directive 2003/88/EC concerning certain aspects of the organisation of working time (Working Time Directive) [2003] OJ L299/9.
[522] Directive 2008/94/EC on the protection of employees in the event of inslolvency of their employer (Insolvency Directive) [2008] OJ L283/36.

atypical work[524] and parental leave.[525] Even though I do not examine the substantive provisions of the employer's insolvency, atypical work and parental leave Directives, I include them in my analysis of personal scope because of the light they shed. The specificities of domestic work limit the potential of certain pieces of EU legislation to reduce vulnerability. Given that employers are natural persons, normally not employing other workers, it is highly unlikely that a domestic worker will substantiate an equal pay claim due to the lack of comparator, or a claim for insolvency benefits because it is unlikely that the employer become insolvent. But despite limited relevance in terms of substantive rights, the insolvency directive, elucidates the discussion on personal scope because of its standstill provision limiting Member States' discretion to exclude domestic workers. Equal pay provisions offer little help to domestic workers in bringing a claim horizontally, but can nonetheless challenge pay discrimination structured in legislation. I also examine the inclusion of illegally staying TCN domestic workers in the personal scope of EU employment law in light of the CJEU judgment in *Tümer*. Part III focuses on the selected themes of free movement, equality, right to information regarding employment and working time to show domestic workers' substantive rights. Part IV concludes.

II. Domestic workers and the personal scope of EU employment law

Straightforward inclusion

Free movement of workers and gender equality have broad and autonomous personal scopes so that they fully include domestic workers. These sources do not allow for any exemptions entrenched in national law; thus national rules with more restricted personal scopes contravene EU law and must be disapplied.

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

[524] Directive 97/81/EC concerning the framework agreement on part-time work concluded by UNICE, CEEP and ETUC (Part-Time Work Directive) [1997] OJ L14; Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Fixed-Term Work Directive) [1999] OJ L 175/43; Directive 2008/104/EC on temporary agency work [2008] OJ L327/9.

[525] Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Parental Leave Directive) [2010] OJ L68/13.

i. Free movement of EU workers

Article 45(1) TFEU lays down the free movement of workers, one of the EU's fundamental freedoms. It reads: "freedom of movement for workers shall be secured with the Union". The beneficiaries are thus, workers. But who is a worker? Given that primary EU law gives no definition, the CJEU has been called on to interpret the term. In *Martínez Sala* it noted that "there is no single definition of the term worker in Community law: it varies according to the area in which the definition is to be applied."[526] The fact that free movement of workers is a cornerstone of the internal market, underpinned a broad, inclusive and autonomous understanding of "worker" for the purposes of art. 45. In *Unger* the Court stated that to guarantee the objectives of free movement, the term must be defined autonomously at the EU level and applied homogenously across Member States.[527] The authority on the definition of worker under art. 45 is *Lawrie Blum.* In this case, the Court set out three essential criteria for an individual to be considered a worker under free movement law: a) be under the direction or supervision of another, b) provide services for a certain period of time and c) receive some remuneration for these services.[528]

Over the years, the Court has consistently applied the broad *Lawrie Blum* definition to strike down narrower national definitions and grant EU law protection to a variety of employment relationships. In *Vatsouras* the Court recalls its settled case law on the personal scope of art. 45. The term worker has an EU law meaning which prevails over national law. As long as someone engages in real and genuine activities under the supervision of another and for a certain period, she is considered a worker. The level of remuneration or the duration of the activities bears no significance on the existence of an employment relationship under EU law.[529] As Barnard argues, the jurisprudence on art. 45 "tends to suggest that the Court will favour a finding that an individual is a worker where possible".[530] While not explicitly spelled out in art. 45, according to settled case law the beneficiaries of free movement are EU workers.[531] Thus, given the broadness and inclusiveness of the definition of worker, those mobile EU citizens

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[526] *Martínez Sala v Freistat Bayern* (C-85/96) [1998] para 31.
[527] *Unger v Bedrijfsvereniging voor Detailhandel en Ambachten* (C-75/63) [1964]; *Levin v Staatssecretaris van Justitie* (C-53/81) [1982] para 17.
[528] *Lawrie Blum v Land Baden-Württemberg* (C-66/85) [1986], paras 16-18.
[529] Joined cases *Vatsouras/Koupatantze v Arbeitsgemeinschaft* (C-22/08 and C-23/08) [2009] paras 26-30.
[530] Catherine Barnard, *EU Employment Law*, 4th edn (Oxford: Oxford University Press, 2012), 149.

[531] *Caisse d'Allocations Familiales v Mr and Mrs Meade* (C-238/83) [1984].

engaging in paid domestic work, even on a casual basis or for a low salary, undoubtedly fall under the personal scope of art. 45.

ii. Equality Themes: equal pay and harassment

Overall, because gender equality constitutes a general principle of EU law, its personal scope is akin to that of free movement.[532] When we look at specific themes of gender equality legislation such as equal pay and protection from workplace harassment, we find broad and inclusive personal scopes. To determine the personal scope of equal pay the CJEU drew from its case law on free movement. In *Allonby* it affirmed that the concept of worker under art. 157(1) TFEU has an EU law meaning corresponding to that in *Lawrie Blum* and may not be interpreted restrictively by the Member States.[533] This is because the right to equal pay is "a specific expression of the principle of equality for men and women, which forms part of the fundamental principles protected by the Community legal order".[534] The fundamentality of the equal pay principle calls for a universal personal scope which includes domestic workers as well. Thus to the extent that they perform services for and under the supervision of another in return for remuneration, domestic workers may rely on art. 157 TFEU to challenge unequal pay.

Under EU law, workplace harassment is a form of prohibited discrimination. The Race Equality[535] and Recast Directives[536] prohibit racial and gender-based harassment respectively. Harassment is defined as unwanted conduct related to a person's protected characteristic which occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The Recast Directive further prohibits sexual harassment as unwanted conduct of a sexual nature with the same purpose or effect. The combination of the Race Equality and Recast Directives can address intersectional discrimination based on gender and race. In addition, as Claire Kilpatrick notes, the structure of art. 21

[532] I do not examine the personal scope of all EU legislation on gender equality but focus instead on the themes of equal pay and harassment at the workplace. The personal scope of pregnancy/maternity-related rights are discussed next in the context of the Pregnant Workers Directive.
[533] *Debra Allonby v Accrington & Rossendale College* (C-256/01) [2004], paras 66-67.
[534] *Allonby*, para 65.
[535] Directive 2000/43/EC implementing the principle of equal treatment of persons irrespective of racial or ethnic origin, [2000] OJ L180/22.
[536] Directive 2006/54/EC 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 L204/23.

of the EU Charter of Fundamental Rights (EUCFR) that puts together nationality and other grounds of discrimination, "could provide an important overarching resource for adapting EU discrimination legislation to the specificities of intersectional discrimination".[537]

The protection from workplace harassment applies to *everyone* for two reasons: its foundation and purpose. The prohibition of harassment stems from the equality principle and thus enjoys the broadest personal scope possible; its purpose - safeguarding a person's dignity - points to a universal personal scope. The universality of the right to be free from harassment is incompatible with *any* exemptions in personal scope. It thus follows that all domestic workers, without any exceptions, are entitled to be protected from harassment at work.

Non-straightforward inclusion: reconsidering the Health and Safety and individual Directives

At the outset the personal scope of the Health and Safety Directive is broad; it applies to "all sectors of activity, both public and private".[538] However, Article 3 introduces an exemption: "For the purposes of this Directive the following terms shall have the following meanings: (a) worker: any person employed by an employer, including trainees and apprentices but *excluding domestic servants*;".(emphasis added)

Interestingly, in its draft proposal, the Commission did not intend to exclude any category; the concept of worker was defined as "any person who performs work in some form, including students undergoing training and apprentices".[539] But Member States, in the legislative process, explicitly excluded domestic workers from the Directive's personal scope. Domestic workers are in fact the only excluded category. The motivation was probably the idea that private households cannot adhere to health and safety standards as businesses can and that enforcing such laws is not feasible. While these concerns were perhaps defendable at the time the Directive was adopted, contemporary understandings of health and safety, require that regulation to be adapted

[537] Claire Kilpatrick, "Article 21 – Non-Discrimination", in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, *The EU Charter of Fundamental Rights. A Commentary*, (Portland/ Oxford: Hart, 2014), 579-603.
[538] Art. 2 Health and Safety Directive.
[539] European Commission, Proposal for a Council Directive on the introduction of measures to encourage improvements in the safety and health of workers at the workplace, COM (88)73 final, 7 March 1988.

to include domestic workers and private households.[540] Another reason for the exclusion might have been that the Directive's drafters thought that domestic work was disappearing and that the exclusion would affect an insignificant number of workers in an obsolete occupation. This is evidently not the case anymore given the resurgence of domestic work across the EU during the last twenty years. It is thus pressing to rethink whether the exclusion is defendable.

Directive 89/391 stipulates the adoption of individual directives to address specific health and safety issues. Two are most relevant to domestic workers: the Pregnant Workers Directive and the Working Time Directive. An issue that arises is whether the individual directives apply to domestic workers given the restrictive definition of worker in the Framework Directive. Or in other words, what is the relation between the personal scope of Directive 89/391 and that of the individual directives?

Most doctrinal analyses consider the definition of worker in Directive 89/391 directly applicable to the individual directives.[541] None of these analyses, however, reflect on what the relation between these directives implies for domestic workers. Deirdre McCann and Catherine Barnard in their critiques assume that the individual Directives do not apply to domestic work.[542] McCann explores the interface of the Framework and Individual Directives and its implications specifically for domestic workers, while Barnard discusses personal scope more generally. I present both critiques and challenge the assumption that the individual Directives do not apply to domestic workers.

McCann's critique rests upon the normative assumption that because domestic workers are excluded from the Framework Directive, they are as a consequence

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[540] For example Article 13(1) of ILO C.189 on Domestic Workers stipulates: "Every domestic worker has the right to a safe and healthy working environment. Each Member shall take, in accordance with national laws, regulations and practice, effective measures with due regard for the specific characteristics of domestic work to ensure the occupational safety and health of domestic workers." See also a resolution of the European Parliament asking the Commission and the Member States to apply the Health and Safety Directive and relevant provisions to a range of sectors at risk including domestic work, European Parliament resolution of 15 January 2008 on the Community strategy 2007-2012 on health and safety at work , point 42.

[541] Giancarlo Ricci, Tutela della salute e orario di lavoro in Silvana Sciarra (ed), *Manuale di Diritto Sociale Europeo* (Torino: G. Giappichelli Editore, 2010) 51-87; Karl Riesenhuber, *European Employment Law. A Systematic Exposition* (Cambridge: Intersentia, 2012); Berta Valdés de la Vega, Occupational Health and Safety: An EU law perspective in Edoardo Ales (ed) *Health and Safety at Work. European and Comparative Perspective* (Alphen aan den Rijn: Kluwer Law International, 2012) 1-27.

[542] Also, national law analyses tend to take for granted that EU employment Directives exempt domestic workers and conclude that EU law reinforces lower standards for domestic work. See for instance the analysis of the Swedish case in Catharina Calleman, "Domestic Services in a Land of Equality: the case of Sweden" (2011)*Canadian Journal of Women and the Law*, above.

excluded from the scope of the individual Directives as well.[543] She states: "although Directive 89/391 defines its coverage relatively broadly, it singles out domestic workers as its sole explicit exclusion. These workers are consequently excluded from the Directive's progeny including the Working Time Directive and the Pregnant Workers Directive."[544] This assumption leads McCann to classify the employment law model of the EU as "exclusionary" towards domestic workers.[545] This is the starting point of her analysis which mainly explores challenges to the EU's "exclusionary model". She traces these challenges to what she considers a "dispute" between the EU Institutions on whether EU legislation on working conditions should be expanded to cover domestic workers.[546] McCann notes that in its 2008 proposal to amend the Pregnant Workers Directive, the Commission did not alter the Directive´s wording on personal scope. Then the European Parliament in its Legislative Resolution on the proposal changed the definition of pregnant worker to explicitly include domestic workers. This however does not indicate a disagreement between the Institutions on whether the Directive should cover domestic workers as McCann argues. As I show here, the Commission never considered domestic workers excluded from the Directive's scope; already in 1999 it explicitly stated that the Pregnant Workers Directive unequivocally applies to domestic workers. McCann's starting point is flawed, conflates the two personal scopes and leads the author to develop a set of erroneous interpretations.

Barnard's view challenges McCann but is at the same time inconsistent. In her analysis of the Pregnant Workers Directive, Barnard argues that the term "worker" corresponds to the inclusive, EU-law definition the CJEU developed in free movement law and pay equality law.[547] This interpretation would include domestic workers. Understanding the personal scope of the Pregnant Workers Directive as broader than the Framework's, she implicitly disagrees with McCann. However, when Barnard analyses the Working Time Directive, she argues that the Framework Directive determines personal scope. She states: "The Directive applies to 'workers' which are defined in Article 3 of Directive 89/391 as any person employed by an employer, including

[543] The same arguments is also advanced in Mantouvalou, "Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor" (2012) *Comparative Labor Law and Policy Journal*, above.
[544] Deirdre McCann, "New Frontiers of Regulation: Domestic Work, Working Conditions and the Holistic Assessment of Nonstandard Work Norms" (2012) 34 *Comparative Labor Law & Policy* 167-184, pp.183.
[545]McCann, 2012, above, p. 182.
[546] McCann, 2012, above, p. 183.
[547] Barnard, *EU Employment Law*, 2012, pp. 410-411.

trainees and apprentices but excluding domestic servants."[548] This reading excludes domestic workers. Barnard does not, however, explain why the concept of worker would have different interpretations, one inclusive and one restrictive, under two Directives originating from the same source and sharing the same social objectives.

A more careful scrutiny I believe reveals enough evidence to argue that both individual Directives apply fully to domestic workers. My critique draws on four different sources: the structure of the Directives themselves, CJEU case law on the definition of worker, the status of working conditions as fundamental rights in the EU legal order, and finally, Commission practice.

i. The Directives' structure

Article 16 Directive 89/391 is the starting point to examine the relationship between the personal scopes of the Framework and individual Directives. Paragraph 3 reads: "The provisions of this Directive shall apply in full to all the areas covered by the individual Directives, *without prejudice to more stringent and/or specific provisions contained in these individual Directives*" (my emphasis). The same formulation is then repeated in both individual Directives.[549] This clause is central to the relationship between Framework and individual Directives and must be taken into account when reflecting on personal scope. Paragraph 3 opens up possibilities for a more expansive interpretation of the individual Directives' personal scope. It provides textual evidence that the Framework Directive does not determine the personal scope of the individuals. The Court took this road as well.

ii. The term "worker" in the case law of the CJEU

While the Court has not examined whether any of the individual Directives are meant to exclude domestic workers, its case law on whether other categories of workers can be excluded from the scope of EU employment law legislation provide us with solid indications. On numerous occasions the Court reiterated the notion of worker previously developed in free movement law jurisprudence and applied it in the context of equal treatment between male and female workers and to determine the scope of application

[548] Barnard, 2012, above, p. 537.
[549] Recital 3 Working Time Directive and art. 1 (2) Pregnant Workers Directive.

of the Working Time Directive and the Pregnant Workers Directive. I provide some examples illustrating the Court's consistence in the application of the three essential criteria and argue that to be coherent, the Court, if asked, would most likely state that domestic workers are workers, fully covered by the personal scope of both individual Directives. It may not always be the case that the Court applies the free movement definition in the field of social law; it is nonetheless very likely that it will do so at least in relation to the Pregnant Workers and Working Time Directives.

In relation to the notion of worker under the Pregnant Workers Directive, the CJEU held in *Kiiski* that "the Community legislature, with a view to the implementation of Directive 92/85, intended to give the concept of 'pregnant worker' a Community meaning" and then restated the three essential criteria to be considered a worker: be under the supervision or direction of another, provide services for a certain period of time and receive some remuneration for those services.[550] In *Danosa* the Court held that a woman who was the only member of a company's Board of Directors falls under the definition of worker and can derive protection from dismissal because of pregnancy.[551] This was despite the fact that Danosa's subordination was minimal; she was essentially the company's director and was removed from her position by the shareholders when she became pregnant. This shows the CJEU's commitment to interpret the Directive's personal scope in the widest possible way to protect pregnant women. If a director falls under the definition of worker, then there seems to be no good reason that a domestic worker, whose subordination is unambiguous, does not.

In *Isère* the CJEU gave a strong indication of how it sees the relation between Article 3 (a) Directive 89/391 and the personal scope of the individual Directives:

"It must be borne in mind that while the concept of a worker is defined in Article 3(a) of Directive 89/391 to mean any person employed by an employer, including trainees and apprentices but excluding domestic servants, Directive 2003/88 made no reference to either that provision of Directive 89/391 or the definition of a worker to be derived from national legislation and/or practices. The consequences of that is that, for the purposes of applying Directive 2003/88 that concept may not be interpreted differently according to the law of the Member States but has an *autonomous meaning specific to EU law*. The concept must be defined in accordance with objective criteria which distinguish the employment relationship by

[550] *Sari Kiiski v Tampereen Kaupunki* (C-116/06) [2007], paras 24-25.
[551] *Dita Danosa v LKB Līzings SIA* (C-232/09) [2010].

reference to the rights and duties of the persons concerned. The essential features of an employment relationship, however, is that for *a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration*."[552] (emphasis added).

Two conclusions can be drawn from this excerpt. First, it is clear that the Court does not consider the definition of worker under Directive 89/391 directly applicable to the Working Time Directive. The Court draws instead from the broader construction of the term worker under free movement and equality law and applies that definition to determine the Directive's personal scope. Second, regardless of national definitions of the term worker and regardless of any exemptions they may apply in relation to certain occupations, the provisions of the Working Time Directive will be applicable to all those fulfilling the three essential criteria. The Court firmly reiterated the same definition in its recent judgment in *Fenoll*.[553] Thus we see continuity and consistence in this respect.

Any person recruited to provide care or other tasks (a), for or in a private household (b), in exchange for remuneration (c) must therefore be considered a worker and is entitled to the rights and protections stipulated in the two Directives. Member States must ensure that the provisions of the Working Time and Pregnant Workers Directives apply to domestic workers as well. It follows, that special labour law regimes on domestic work, administrative acts regulating the working conditions of migrant domestic workers and exemptions enacted in generally applicable legislation which lower the protection and entitlements deriving from these EU employment law sources are incompatible with EU law.

iii. Conditions of Work as Fundamental Rights

Another reason supporting the view that domestic workers are covered by the Working Time and Pregnant Workers Directives, is that the entitlements and protections stipulated therein, have the status of fundamental rights in EU law.

The Pregnant Workers Directive, beyond a health and safety aspect, clearly serves a gender equality objective. This social objective cannot be overlooked, but must be taken into account when interpreting personal scope. Equal treatment between male

[552] *Union syndicale Solidaires Isère v Premier ministre and Others* (C-428/09) [2010], paras 27-28.
[553] *Gérard Fenoll v Centre d'aide par le travail* (C-316/13) [2015], para 27.

and female workers is a well-established principle of EU law; hence the equality dimension must inform the interpretation of personal scope.[554]

Following the adoption of the Working Time Directive the Court clarified the notion of workplace health and safety. In *UK v. Council* the UK challenged the Directive on the ground that its legal basis, art. 118a EEC, was incorrect. The UK argued that the organisation of working time was not genuinely related to the objectives of art. 118a and following a narrow understanding of health and safety, claimed that legislation adopted on that basis "must be concerned only with physical conditions and risks at the workplace."[555] The Court, however, adopted a much broader and more wide-ranging interpretation of the notion. Drawing inspiration from the Constitution of the World Health Organisation, the Court defined health and safety "as a state of complete physical, mental and social-wellbeing that does not consist only in the absence of illness or infirmity."[556] The Court's definition is an expression of what Davies describes as "dignitarian understanding of health and safety".[557] A broad conception of health and safety, intrinsically linked to workers' dignity, as opposed to one confined in the prevention of occupational risks, further implies a universality of the norms adopted on that basis. In other words, provisions whose purpose is to safeguard dignity at work must be understood as having the broadest personal scope possible. The Court placed this broad understanding of health and safety at the heart of its Working Time jurisprudence.

Four years after the landmark judgment in *UK v Council* the EU Charter of Fundamental Rights (EUCFR) was adopted. Art. 31 EUCFR on Fair and Just Working Conditions, very much reflects the Court's all-embracing approach to health and safety by relating it expressly to the notion of dignity. It reads:

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

[554] The need to establish an explicit link between the Directive and the principle of equality is also reflected in efforts, albeit unsuccessful ones, to improve maternity protection. In its 2008 proposal for the amendment of Directive 92/85/EEC, the Commission, argued that the legal basis can no longer be only health and safety; its equality dimension requires that it is also expressly based on art. 157 TFEU.
[555] *UK v Council* (C-84/94) [1996], para 13.
[556] Above, para 15.
[557] Anne. C.L. Davies, *EU Labour Law* (Cheltenham: Edward Elgar Publishing, 2012), 201.

The provision's personal scope is broad as the phrase "every worker", repeated in both limbs, indicates. Thus the beneficiaries of art. 31 are all workers within the meaning of EU law.[558] Bogg characterises art. 31 as "the most fundamental of the labour rights set down in the Charter" because of its common normative foundation with art. 1 on human dignity and art. 3 on the right to the integrity of the person. [559] The idea that the inviolable rights to dignity and integrity are the normative underpinnings of art. 31 reinforces the view that the provision applies universally to all workers. This does not imply that art. 31 extends the personal scope of EU legislation as it stands; rather, it provides an important interpretative tool supporting the argument that, as long as there is no explicit restriction in personal scope, then that piece of legislation applies to all workers including domestic workers.

Noticeably, the CJEU deployed a fundamental rights language to interpret the provisions of the Working Time Directive before the EUCFR was legally binding. In *BECTU* the Court highlighted the social rights' dimensions of the right to paid annual leave. It stated: "the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogation […]."[560] Famously, Advocate General Tizzano invoked art. 31 of the, then non-legally binding, Charter, to argue that the right to paid annual leave is a fundamental social right.[561] Paid annual leave as a non-derogable principle of EU law was reiterated and consolidated in the Court's jurisprudence in various subsequent judgments.[562]

Additionally, the Court gave the same fundamental flavour to other entitlements of the Working Time Directive. In numerous judgments it held that "maximum working time and minimum rest periods constitute rules of Community social law of particular

[558] Alan Bogg, "Article 31 - Fair and Just Working Conditions " in Steve Peers and others (eds), *The EU Charter of Fundametal Rights A Commentary* (Oxford/Portland: Hart Publishing, 2014), 833-868.
[559] Bogg, 2014, above, 845.
[560] *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* C-173/99 [2001].
[561] Opinion of Advocate General Tizzano in *BECTU*, paras 22 and 26.
[562] *Merino Gomez* v *Continental Industrias del Caucho SA* C-342/01 [2004] para 29; Joined cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] para 48; C-124/05 *Federatie Nederlandse Vakbeweging* [2006], para 28; Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Stringer and Others* [2009] ECR I-179, paras 22 and 54.

importance, from which *every worker* must benefit as a minimum requirement necessary to ensure protection of his safety and health". [563]

In the post-Lisbon era, the Charter's role as an interpretative tool has become stronger than it was before.[564] Art. 31 EUCFR provides a source to challenge derogations introduced in EU law and their implementation in national law. An example is art.17 Working Time Directive, which allows Member States to exempt categories of workers whose working time is "unmeasured" from protective provisions on rest periods, maximum weekly time and night work. At first sight, the blanket exclusion introduced by art.17, seems incompatible with art. 31 EUCFR's broad personal scope and health and safety underpinnings.[565] But as Novitz and Syrpis note, the UK has used art.17 to exclude domestic workers from key protections of the 1998 Working Time Regulations.[566] It is nonetheless questionable whether domestic workers fall under the category of workers with unmeasured working time; that category most likely includes workers with complete control over the organisation of their working time. This reading is supported by art. 17 itself indicating three examples of workers in an unmeasured work situation: "managing executives", "family workers" and "religious workers". All three are workers with a high degree of independence, who typically organise their hours autonomously. This is clearly not the case of domestic workers who have hardly

[563] *BECTU* above, paras 43,47; Joined cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004]para 100; C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co KG* [2004] para 47; C-14/04 *Abdelkader Dellas and others v. Premier minister des Affairs socials du travail et de la Solidarité* [2005] para 49.

[564] A different legal question concerns the justiciability of art.31 EUCFR. Can an individual domestic worker rely on art.31 to challenge her exclusion from EU law Directives and their national implementing measures? The Court's judgement in C-176/12 *Association de Mediation Sociale v CGT (AMS)* [2014] ECR I-000 may seem as limiting the Charter's potential to be invoked by individuals in social rights litigation. In *AMS* the Court held that for art. 27 EUCFR on workers' right to information and consultation "to be fully effective, it must be given more specific expression in European Union or national law" (para 45); art.27 does not grant individuals an enforceable right (para 49). *AMS* thus rules out individuals' possibility to rely directly on art.27. The Court is yet to decide whether Art.31, a much more relevant provision for domestic workers than art.27, is judicially enforceable by individuals. Leading scholars such as Barnard, Craig, Bogg, Novitz and Syrpis consider that art.31 contains enforceable individual rights. See, Barnard, 2012, above p.29; Paul Craig, 'The Charter, the ECJ and National Courts' in Diamond Ashiagbor, Nicola Countouris, and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2012) p.98; Bogg, "Article 31- Fair and Just Working Conditions" in *The EU Charter of Fundamental Rights. A Commentary* (2014), above, at 848-50; Novitz and Syrpis, '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', (2015) *European Labour Law Journal*, p. 112, above. Given that it is still early days for the Charter's social rights jurisprudence, we can expect the Court to give a positive answer on art.'s 31 justiciability vis-à-vis the Union and the Member States when applying EU law.

[565] Tonia Novitz and Phil Syrpis, 2015, above; Bogg, "Article 31- Fair and Just Working Conditions" in *The EU Charter of Fundamental Rights. A Commentary* (2014), above.

[566] Novitz and Syrpis, 2015, above.

any control over their working hours.[567] Domestic workers may not be exempted on the basis of the "family worker" derogation either as they do not fall under that category. According to ILO definitions, a family worker "holds a self-employment job in a market-oriented establishment operated by a *related* person living in the same household."[568]

Thus, even if we assume that the Working Time and the Pregnant Workers Directives meant to exempt domestic workers, art. 31 EUCFR poses a normative challenge to this assumption.

iv. Commission practice

While the Commission has not contested domestic workers' exclusion from national measures implementing the Working Time Directive,[569] it did so in relation to the Pregnant Workers Directive. Its first implementation report affirmed that the Pregnant Workers Directive does not exempt any category of worker.[570] The Greek implementing measure exempted the armed forces, police and domestic workers. The Commission considered the exclusions against EU law. It stated: "The Directive applies to workers who are pregnant, have recently given birth or are breastfeeding in all fields and occupations, with no exceptions. The exclusion of certain groups of women from the Directive's scope is contrary to Community law and infringement proceedings will be commenced."[571] This clearly indicates that the Pregnant Workers Directive personal scope is broader than that of the Framework Directive. Consequently, Greece lifted the exemption.[572] Thus, Commission practice challenged effectively an aspect of domestic workers' vulnerability structured in national legislation.

In view of the above, the position that EU employment sources on working conditions exempt domestic workers in private households from their personal scope seems untenable. That assumption rests too heavily on the textual reading of only one provision of the Framework Directive without taking into account the specificities of

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[567] ILO, Report IV(1) Decent work for domestic workers, 2010.
[568] ILO, International Classification by Status in Employment, 1993.
[569] On the UK see Novitz and Syrpis, 2015, above.
[570] Commission of the European Communities, Report of the Commission on the implementation of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM(1999)100 final, 15 March 1999.
[571] European Commission, 1999, above, page 7.
[572] Presidential Decree No.41/2003.

the individual Directives, the case law of the Court or the Commission practice. Against this background, we can conclude that both the Pregnant Workers and the Working Time Directives apply fully to domestic workers.

Inclusion linked to national law

A third category of EU employment law sources have no autonomous personal scope; their personal scope depends on national definitions of the term worker. This cluster includes Directives on employer's insolvency, the obligation to inform, atypical work and parental leave. It may seem that the technique of linking application to national law definitions debilitates protection because Member States may exclude domestic workers. However, this discretion is not limitless; the Employer's Insolvency and the Obligation to Inform Directives allow the exemption of domestic workers but only under certain circumstances, while the Atypical Work and Parental Leave Directives, overall, include no provisions justifying domestic workers' exclusion.

i. Insolvency Directive

Directive 2008/94/EC provides minimum guarantees, especially for unpaid wages claims, to workers in case their employer becomes insolvent.[573] It applies to "employees"[574] as defined in national law.[575] The Directive introduces an interesting standstill provision concerning domestic workers; Member States may exempt domestic workers provided that the exemption already existed in their national legislation prior to the adoption of the Directive.[576] The Member States excluding domestic workers from the scope of application are France, Malta, the Netherlands, Poland and Spain.

ii. The Obligation to Inform Directive

Directive 91/533/EEC obliges employers to provide workers with written information on their contract or employment relationship.[577] It applies to "every paid employee having a contract or employment relationship defined by the law in force in a

[573] Recital 3 Directive 2008/94/EC.
[574] Art. 1(1) above.
[575] Art. 2(2) above reads: "This Directive is without prejudice to national law as regards the definition of the terms 'employee' […]".
[576] Art. 1(3) above.
[577] Art.2(1) above.

Member State".[578] The generally broad personal scope is restricted; under art. 1 paragraph 2 Member States may enact exemptions in relation to: a) to workers who have a contract of employment or relationship of a total duration of up to one month and/or do not work for more than eight hours per week and b) those whose employment contracts or relationships are of a casual and/or *specific nature* provided that the exemption is justified by *objective considerations*.[579] Art. 1 paragraph 2 (b) could be used to exclude domestic workers.

Implementation diverges. Some Member States have used art. 1 paragraph 2 (b) to exclude only domestic workers, other Member States exclude domestic workers along with other categories and a third group of Member States makes no use of the exemption. The Netherlands, for example, excludes only part-time employment contracts/relationships of up to three days per week when they involve household work or personal services for a natural person. Austria excludes household employees along with some other categories of workers, while Portugal applies no exception even for employment relationships which are regulated under a special regime. Sweden explicitly exempts domestic workers employed by a natural person from the Directive's scope. The UK implementing measure, Part I of the 1996 Employment Rights Act, does not apply any specific exception for domestic workers in respect of their right to receive statements of employment particulars. The Cypriot implementing measure reproduces the exact same wording of the derogation under art. 1 paragraph 2 (b) but without further specifying which employment relationships or contracts may be considered to be of a casual or specific nature or what objective considerations can justify the derogation.[580] It thus remains ambiguous to what extent domestic workers in Cyprus are included in the personal scope. Until recently, Spain also exempted the employers of domestic workers from the obligation to provide information; however, the 2011 legislative reform of the Special Regime regulating domestic work, lifted the exemption and brought domestic workers under the personal scope of the national provision transposing Directive 91/533/EEC.

It is important to emphasise that the casual/specific nature derogation is not a *carte blanche* to Member States; objective considerations must justify exemptions. What the objective considerations are is a matter of interpretation. The Spanish example

[578] Art.1(1) above.
[579] Art.1(2) above.
[580] Art. 3(2) Law N. 100(I)/2000.

of including a previously excluded group of workers strongly supports the argument that there seem to be no objective considerations justifying the exemption of domestic workers especially when their employment is on neither a short-term nor a part-time basis. The legislative change shows that it is feasible to establish an obligation binding domestic workers' employers to provide information.

iii. Atypical Work and Parental Leave Directives

The purpose of the Part-Time Work Directive is to promote, on the one hand, the development of part-time work and, on the other, to eliminate the discrimination against part-time workers *vis-à-vis* "comparable full-time workers".[581] While the Directive defines the term "part-time worker",[582] the notion of "worker" is essentially a matter of national law. Thus, Clause 2 paragraph 1 stipulates that the Directive "applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State." Under Clause 2 paragraph 2, Member States may exempt part-time workers who work on a casual basis from the Directive's personal scope provided that the exemption is justified by "objective reasons". Member States must review periodically the exemption of casual workers to make sure that it is still justified.[583]

The Fixed-Term Work Directive follows the same pattern; Clause 2 refers back to Member States' law to define the term "worker", while the Directive lays down the definition of "fixed-time worker",[584] thus restricting to a certain extent national discretion. Member States may exempt two types of workers: trainees/apprentices and workers on public or publicly funded training or integration programmes.[585]

The Temporary Agency Work Directive defines personal scope using the same technique: national law defines the term "worker"[586] whilst the Directive applies to

[581] Preamble and Clause 1 Part-Time Work Directive.
[582] Clause 3 above.
[583] Clause 2(2) above.
[584] Clause 3(1) reads: "[…] 'fixed-term worker' means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task or the occurrence of a specific event".
[585]Clause 2 para 2 above.
[586] Art. 3(1)(a) Temporary Agency Work Directive.

"temporary agency workers", a term expressly defined in the instrument.[587] As with the Fixed-Term Work Directive, under certain circumstances Member States may exclude workers on public or publicly funded training or integration programmes.[588]

Similarly, the Parental Leave Directive links its personal scope to national law. It "applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State".[589]

It is observed that neither the atypical work Directives nor the Parental Leave Directive allow for any derogations which could justify exempting domestic workers, the only possible exception being domestic workers engaged on a casual basis under the Part-Time Work Directive. It thus follows that the abovementioned EU sources do apply to domestic workers to the extent that national law considers them "workers". Given the trend of convergence in the definition of worker across different jurisdictions,[590] it will often be the case that those engaging in paid domestic work for a private household are considered workers under national law. Besides, according to the CJEU's judgement in *O'Brien* Member States, when applying national definitions of the term worker, must respect the effectiveness of the Directive and have due regard to its objectives.[591] It is thus safe to conclude that the Directives on atypical work and parental leave apply to domestic workers.

Illegally resident TCN workers and the personal scope of EU employment law

Thus far I have examined the inclusion of domestic workers in the personal scope of selected EU employment legislation. I now turn to the question of whether illegally staying migrant domestic workers fall within the personal scope of EU employment law. At the outset, no EU employment law Directive explicitly excludes illegally staying TCNs from its scope.[592] As observed above, when delimiting their personal scope, some Directives refer back to the definition of worker under national

[587] Art.1(1) and art. 3(1)(c) above.
[588] Art. 1 para 3 above.
[589] Clause 1(2) Parental Leave Directive.
[590] Guy Davidov, Mark Freedland, Nicola Kountouris, "The subjects of labor law: "employees" and other workers" in Matthew Finkin and Guy Mundlak (eds.) *Research Handbook in Comparative Labor Law* (Cheltenham: Edward Elgar, 2015), 115-131.
[591] *O'Brien v Ministry of Justice* (C-393/10) [2012] paras 34 and 35.
[592] Steve Peers, "Legislative Update: EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directive" (2009) 11 *European Journal of Migration and Law,* 387.

law. A further issue that arises is whether Member States enjoy discretion to apply national definitions excluding illegally staying TCNs from the personal scope of EU employment law. The CJEU has recently clarified this.

Tümer concerned a Turkish national living and working in the Netherlands on a series of fixed-term residence permits.[593] When national authorities refused to renew his residence permit, Tümer became an illegally staying TCN, lost his right to work but continued nonetheless his employment. When his employer was declared insolvent, Tümer applied for an insolvency benefit under Dutch Unemployment Law, the national measure implementing the Insolvency Directive. His application was rejected on the basis that the Dutch Unemployment Law did not consider illegally staying TCNs employees and thus exempted them from the insolvency benefit.

When asked if illegally staying TCNs could be excluded from the personal scope of national legislation implementing the Insolvency Directive, the CJEU firstly noted that EU competence under Article 151 TFEU to adopt standards for the improvement of living and working conditions, is not limited to the conditions of EU workers but includes those of TCNs as well.[594] Secondly, while Member States enjoy discretion to define the term "employee", said discretion is not unlimited.[595] Member States, must take into account and uphold the social objectives of EU legislation.[596] The Court affirmed that the social objective of the Insolvency Directive, to guarantee employees a minimum of EU law protection when the employer becomes insolvent, does not allow for the exemption of individuals who are normally employees under civil law terms.[597] Under Dutch civil law Mr. Tümer was an employee; he had a contract with an employer entitling him to wages for his work. He was thus entitled to all employment protections flowing from EU law regardless of the legality of his stay under immigration law. Therefore national legislation restricting his EU law rights as an employee was contrary to EU law and had to be set aside.

Advocate General Bot comprehensively analyses why illegally resident TCNs cannot be excluded from the personal scope of EU social legislation. Firstly, he divides EU law provisions into three categories: provisions applying specifically to TCNs,

[593] *O Tümer v Raad van bestuur* (C-311/13) [2014].
[594] Above, para 32.
[595] Above, para 35.
[596] Above, para 42.
[597] Above, para 45.

provisions applying exclusively to EU nationals and provisions applying irrespective of nationality. Secondly, he notes that the personal scope of the third type provisions is determined in light of their pursued objectives. EU social law covers individuals regardless of nationality; its objectives do not justify the exemption of TCN workers from personal scope. [598] Turning finally to the case of illegally resident TCNs, he affirms that they must also be covered by protective EU employment legislation for two reasons. First, if Member States were allowed to make the right to receive insolvency benefits conditional upon legal residence, the objectives and effectiveness of the Directive would be compromised.[599] And second, exclusion would be incompatible with equal treatment and non-discrimination, an EU law general principle enshrined in art. 20 and 21 of the Charter.[600]

Tümer's implications clearly go beyond the Insolvency Directive and encompass all of EU social law Directives. The judgment upholds the autonomy of employment law against immigration law interferences and makes clear to Member States that they may not exclude illegally resident TCN workers from the application of EU employment legislation. *Tümer* provides a buffer, albeit limited, against immigration law intrusions in the terrain of employment law. The effect of the judgment is that TCNs, regardless of their immigration status, may enforce all claims flowing from EU law, but not those claims with no clear EU law link such as pay deductions or dismissals outside the material scope of EU Directives. When an area of law has a broad, EU-defined personal scope – such as gender equality law – then there is no doubt that it applies to illegally resident migrants as well. But even when a piece of EU legislation gives Member States the discretion to define the term worker and thus the personal scope, the judgment in *Tümer* requires Member States to exercise such discretion while having due regard to the legislation's social objectives. However, *Tümer* cannot remedy any lacunae of legal protection outside the material scope of EU law. To illustrate, an illegally resident migrant domestic worker who is caught under the UK's illegality doctrine rules can rely on EU law to bring a workplace harassment claim; she will not, however, be able to rely on EU law to enforce contractual claims such as pay deductions as these fall outside the material scope of EU law.

[598] Opinion of Advocate General Bot in *Tümer*, para 52.
[599] Above, para 60.
[600] Above, paras 69 and 70.

The inclusion of domestic workers into the personal scope of EU employment law may be summed up as follows. Free movement law applies fully to EU national domestic workers. Similarly, equality law applies to domestic workers without any exemptions. For example a TCN domestic worker, regardless of immigration status, is covered by equal pay provisions and the prohibition of workplace harassment. The Pregnant Workers and Working Time Directives apply fully to domestic workers. Regarding the health and safety Directive, it is indeed difficult to challenge domestic workers' exemption as it is categorically enshrined in the text; a modification of the Directive is needed to encompass domestic workers and bring this legislation in line with contemporary understandings of health and safety.

When the personal scope of EU employment law depends on national definitions of "worker", domestic workers' protection could be weakened. However, Member States are not unhampered when applying national definitions. Thus, domestic workers working on a casual basis may be exempted from the scope of Directive 91/533/EC but only if exemption is justified by objective grounds; moreover, Member States must periodically check whether the exemption continues to be justified. Member States may not exclude domestic workers from the personal scope of the Employer's Insolvency Directive unless national law already provisioned the exemption; this is the case only for a handful of Member States. The Atypical Work and Parental Leave Directives apply to domestic workers when falling under the national definition of worker; this will often be the case. In any case, when defining the term worker, Member States, must uphold the effectiveness and objectives of each Directive. Finally, except in the case of free movement law, all other sources apply to domestic workers irrespective of nationality or migration status.

III. Substantive provisions

Having clarified the inclusion of domestic workers in the personal scope of EU employment law, I now review the substance of protections and entitlements in the areas of free movement law, equality and in particular equal pay, protection of pregnancy and maternity, the prohibition of harassment at the workplace, information rights regarding the employment relationship and the regulation of working time.

Free movement of workers

The EU free movement of workers regime grants mobile EU citizens a comprehensive set of rights and protections. These include the right to look for employment in another Member State, to enter freely as workers or jobseekers and crucially, to equal treatment as nationals in relation to employment, pay and working conditions. The provisions on the free movement of workers are directly applicable so that individuals may enact their rights in national court proceedings. The CJEU has also confirmed the horizontal applicability of the provisions so that EU workers can invoke them against private employers.[601]

Thus, an EU national may move to another Member State for the purpose of looking for employment as a domestic worker, may reside anywhere in the territory of the host state and may work under the same terms and conditions as national workers. The importance of free movement law in reducing the vulnerability of domestic workers is evident when we compare the status of an EU national and that of a TCN domestic worker; while national immigration rules may, for instance, prevent a TCN from changing employers or sector, such restrictions would clearly contravene EU law if imposed on EU migrants.

Equality Themes

i. Equal Pay

Art. 157 (1) TFEU guarantees equal pay for work of equal value between female and male workers. The principle of equal pay is directly applicable[602] and binds public and private employers alike. To bring a claim of pay discrimination under art. 157 (1) TFEU, the applicant must identify another individual of the opposite sex, a comparator, who, even though he or she is engaged in equal work or work of equal value, receives

[601] *Angonese* C-281/98 [2000] ECR I-4139, para 36.
[602] *Defrenne v Sabena (No 2)* (C-43/75) [1976] para 24.

better pay. The comparator must be actual and not hypothetical.[603] The Court has further ruled that art. 157 (1) TFEU covers only those cases where pay discrimination is attributed to a single source.[604] While the single source rule does not mean that the applicant and the comparator must necessarily work for the same employer, they should be engaged in the same establishment or service. The criterion of the comparator poses significant barriers to domestic workers in bringing pay discrimination claims especially against an employer who is a natural person. Domestic workers' employers often do not employ any other individuals; this practically rules out the possibility to bring an equal pay claim. When the employer is a legal person, a cleaning company for instance, the applicant normally has a wider pool of co-workers in order to choose a comparator, thus increasing her chances to claim pay discrimination successfully. However, given that domestic services is a highly gender segregated sector, identifying a suitable, male comparator working in the same industry is still, at best, highly unlikely.

A much more promising use of art. 157 (1) to tackle discriminatory pay in domestic work is to challenge discrimination structured in legislation. The Court consistently held that "the principle of equal pay may be invoked before national courts in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements".[605] This use of art. 157 (1) TFEU opens up possibilities to challenge wage-setting regimes, such as those of Cyprus and the UK for example, where pay inequality is clearly attributed to state-designed rules. In Cyprus the Immigration Department has designed a model contract of employment for migrants on a domestic worker visa; the contract sets a fixed monthly wage which is significantly lower than the minimum wage stipulated in comparable sectors. In the UK, the Minimum Wage Act exempts domestic workers from the minimum wage entitlement when they live-in with their employer and are treated as a "member of the family".[606] Art. 157 (1) TFEU challenges both the Cypriot and the UK wage-setting regimes on the basis that they discriminate indirectly against migrant women who are most likely to hold visas as domestic workers and to engage in live-in employment.

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[603] It should be noted, though, that the definition of direct discrimination under Art. 2(1) (a) of the Equal Treatment (Recast) Directive 2006/54/EC seems to allow the use of a hypothetical comparator in bringing an equal pay claim. I am grateful to Mark Bell for bringing this to my attention.
[604] *Lawrence v Regent Office Care Ltd* (C-320/00) [2002] para 18.
[605] Above, para 17.
[606] Mullaly, "Migrant domestic Workers in the UK: Enacting Exclusions, Exemptions and Rights", (2014) *Human Rights Quarterly*, 36(2), above.

However, the EU equal pay model does not address low pay; EU law can challenge pay discrimination but it cannot help domestic workers to get higher salaries. The EUCFR may play an interpretative role in challenging low pay. When wage-setting regimes, while not discriminating against female domestic workers, stipulate very low salaries which fail to guarantee decent living standards, Art. 31 EUCFR may be used to argue in favour of a right to fair pay.[607]

ii. Protection of pregnancy and maternity

Directive 92/85/EEC confers pregnant and breastfeeding workers various protections to safeguard their health and safety at the workplace. Art. 7 requires Member States to ensure that women who are pregnant or have recently given birth may not be obliged to perform night work. Art. 8 stipulates at least 14 continuous weeks maternity leave, of which, two must be taken before and/or after delivery and art. 9 grants paid time off to undergo ante natal-examinations.

Crucially, art. 10 prohibits dismissal during the period starting from the beginning of pregnancy and until the end of maternity leave.[608] Unlike equal pay law, the Pregnant Workers Directive diverges from the classic anti-discrimination model; pregnancy and maternity are protected as such, thus dismissing a worker who is pregnant or has recently given birth, is direct discrimination without the need to identify a comparator. The non-comparator approach makes the Directive meaningful to domestic workers and allows them to substantiate discrimination claims.

The prohibition of dismissal has generated rich case law. I do not examine this case law extensively, but focus on selected cases with implications for migrant domestic workers. According to the Court, Art.10 has direct effect and thus individuals may invoke this protection in national courts.[609] This is important when the national law in question does not protect against pregnancy-related dismissal; domestic workers can rely directly on art. 10. In *Webb* the Court affirmed that the prohibition of dismissal allows no exceptions or derogations.[610] This feature of art. 10 challenges national rules limiting the scope of protection for certain groups of women such as irregular migrants.

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[607] Bogg, "Article 31" in the EU Charter of Fundamental Rights: A commentary (2014), above.
[608] Article 10 Directive 92/85/EEC.
[609] Jiménez *Melgar v Ayuntamiento de Los Barrios* (C-438/99)[2001] para 34.
[610] *Webb v EMO Air Cargo (UK) Ltd* (C-32/93) [1994] para 22.

For example, an illegally resident domestic worker who is dismissed on the basis of pregnancy is protected under EU law even if she is not under the national regime.

Additionally, according to established case law the prohibition of dismissal covers workers with fixed-term contracts. In *Tele Danmark* the Court said that "the duration of the employment relationship has no bearing to the extent of the protection guaranteed to pregnant workers".[611] Thus the dismissal of a worker who was hired on a six-month fixed-term contract and notified her employer of her pregnancy one month after recruitment was contrary to the Directive despite the fact that the pregnancy prevented the worker from performing her tasks during a substantial part of the contract's term. TCN domestic workers on temporary residence/work permits fall under the definition of fixed-term worker, hence the prohibition to dismiss them in the event of pregnancy is crucial, not least because their residence permit often depends on continuous employment. Thus art. 10 protects TCN domestic workers from losing their employment and becoming irregular due to pregnancy.

The prohibition of dismissal has the potential to address the kind of precarious situations immigration law structures; however, this potential is not unlimited. One of the questions addressed to the Court in *Jiménez Melgar* was whether the non-renewal of a pregnant worker's fixed-term contract was prohibited under art. 10 of the Pregnant Workers Directive. The Court said that while the prohibition covers both workers on indefinite and fixed-term contracts, "non-renewal of a [fixed-term] contract when it comes to an end as stipulated cannot be regarded as dismissal prohibited by that provision."[612] Non-renewal of a fixed-term contract can exceptionally constitute sex discrimination only if it was motivated by the worker's pregnancy.[613] To illustrate the practical effects of the *Jiménez Melgar* judgment in the TCN domestic worker scenario, we can use the UK case as an example. Under the recently amended UK immigration rules a TCN on a domestic worker visa is granted a non-renewable permit of six months. What protection can she derive from EU law if she is or becomes pregnant during the six months of her permit? Art. 10 clearly prohibits her dismissal; however she will probably not be able to extend her permit beyond the six months stipulated.

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[611] *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark* (C-109/00) [2001] para 38.
[612] *Melgar* para 47.
[613] Above.

iii. Workplace harassment

EU law prohibits harassment and sexual harassment at the workplace as forms of discrimination. It also requires Member States to protect complainants from victimisation.[614] While harassment is normally prohibited under Member States' criminal laws, EU law introduces an innovative element, the reversal of the burden of proof,[615] which allows for easier access to redress mechanisms than criminal procedures with stricter rules of evidence.

Another innovative element is the provision on national equality bodies; under art. 20 Recast Directive Member States must set equality bodies to promote gender equality and assist victims of discrimination to pursue claims. In some Member States the national equality bodies have become important actors in documenting and addressing the vulnerability of migrant domestic workers. For example, as discussed in Chapter in II of this thesis, the Cypriot national equality body has on numerous occasions drawn attention to the many problematic aspects of the regulation of TCN domestic work. In 2011 it issued a report condemning the way Cypriot authorities dealt with a claim of workplace sexual harassment. The case concerned a TCN on a domestic worker visa facing deportation after complaining of sexual harassment by her employer. The report, highlighted the vulnerability of domestic workers to harassment, clarified the applicable legal framework, underlined the importance of upholding the reversal of the burden of proof and urged the authorities to review how they dealt with the claim.[616] The report was followed by a more comprehensive pro-active study on the legal and policy framework concerning the employment conditions of TCN domestic workers in Cyprus.[617] As Bruno de Witte argues, it is difficult to say whether equality bodies have brought any tangible improvement in the lives of vulnerable groups.[618] Nonetheless, in Cyprus, the equality body certainly has an important role in giving visibility to the structural discrimination of a marginalised group such as migrant domestic workers. As

[614] Art. 24 Recast Directive.
[615] Art. 19 above.
[616] Office of the Ombudsman, *Report of the Equality Body as regards the investigation of a domestic worker's sexual harassment complaint*, Complaint Number A.K.I. 67/2010, (Nicosia: 19 April 2011), in Greek.
[617] Office of the Ombudsman, *Report of the Omdusman as National Independent Human Rights Authority as regards the status of domestic workers in Cyprus* (Nicosia: 2 July 2013), in Greek.
[618] Bruno de Witte," National equality institutions and the domestication of EU non-discrimination law" (2011) 18 *Maastricht Journal of European and Comparative Law*, 157-178.

discussed in detail in Chapter Two of this thesis, despite its institutional limitations, the Cypriot equality body is an important and receptive forum for the claims of migrant domestic workers.

Right to receive information on employment terms and conditions

Directive 91/533/EEC obliges employers to provide workers with information regarding the essential elements of the employment relationship or contract.[619] Employers should provide information on a range of aspects listed in Article 2. As the wording of the provision indicates, the list is non-exhaustive; Article 2 (2) states that "the information […] shall cover *at least* the following": the identities of the parties, the place of work, the nature of work along with a description of the tasks, the date the employment begins, the amount of paid leave, the length of the period of notice for the termination of the employment, the wage and its frequency, the length of the normal working day or week and information on any collective agreements applicable to the employment relationship. The information must be provided in written form; either in a written contract, a letter of engagement or other written document.[620]

In its limited case law on the Directive, the CJEU said that the employer must provide information on every essential aspect of the employment relationship. The obligation to inform extends for instance to overtime despite the fact that overtime is not explicitly mentioned in the Directive.[621] Similarly, immigration rules which may impact the employment relationship between employer and migrant domestic worker, as well as procedures for workplace dispute settlement, could also be considered essential aspects on which information must be granted.

Lack of information is a major source of vulnerability for domestic workers, especially migrants with additional linguistic and cultural barriers, when navigating complex legal systems to make sense of their rights and obligations. Their having no accurate information on important aspects of their employment relationship can lead to lax enforcement of protective legislation and exploitation. The Directive is an important source to reduce this aspect of domestic workers' vulnerability as it entitles them to

[619] Art. 2 (1) Directive 91/533/EEC.
[620] Art. 3 above.
[621] *Wolfang Lange v Georg Schunemann GmbH* (C-305/99) [2001] paras 21 and 25.

written, timely and accurate information regarding their rights and obligations. The Directive's symbolic value should not be underestimated; a binding obligation on employers to provide workers with written statements helps formalise an employment relationship often not regarded as proper employment by the very parties participating in it. Employers tend not to view themselves as real employers and workers are often not aware of the full range of their employment rights. Directive 91/533/EEC addresses this lack of awareness by framing the relationship between employer and domestic worker in employment law terms.

Working time

The Working Time Directive sets minimum standards on normal working hours, rest periods, paid annual leave and night work. It has also generated important case law concerning on call service. In terms of normal working hours, the Directive stipulates a maximum of 48hours per week including any overtime.[622] The worker is entitled to at least 11 consecutive hours of daily rest[623] and 35 hours of uninterrupted weekly rest consisting of 24 hours plus the 11 hours of daily rest.[624] When the working day is longer than 6 hours, the worker is also entitled to a daily break, the regulation of which should be laid down in collective agreements or statue.[625] Regarding annual leave, the directive entitles the worker to a minimum of four weeks of paid leave per year.[626] The directive limits night work to up to 8 hours per 24 hours[627] and requires that the health of workers who perform night work on a regular basis be assessed.[628]

On-call service is not explicitly regulated. Working time is defined as: "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties" and rest period is any time which is not working time.[629] Whether on-call time should be counted and remunerated as normal working time was raised before the CJEU. *SIMAP* concerned doctors' on-call time in a Spanish hospital. The Court held that "the fact that such doctors are obliged to be present and available at the

[622] Art. 6 Working Time Directive.
[623] Art. 3 above.
[624] Art. 5 above.
[625] Art. 4 above.
[626] Art. 7 above.
[627] Art. 8 above.
[628] Art. 9 above.
[629] Art. 2 (1) and (2) above.

workplace with a view to providing their professional services means that they are carrying out their duties in that instance." The Court held that in view of the Directive's objective to guarantee health and safety by stipulating maximum working time and minimum rest breaks, "to exclude duty on call from working time if physical presence is required would seriously undermine that objective".[630] Thus, according to the judgment in *SIMAP* the time during which the worker is required to be physically present at the workplace should count as working time.

Subsequently *Jaeger* further refined the physical presence criterion. The case concerned a doctor in a Germany who had to spend certain hours on call at the hospital. During his on-call time he had to be at the hospital but was allocated a room with a bed where he could rest while his services were not required. German law on working time distinguished between three types of on-call service: readiness for work, on call service and standby. In the readiness for work setting, the worker must be available at the workplace and be continuously attentive to any calls for work. During on-call service the worker must be present at a place determined by the employer; he may dispose of that time as he wishes (rest, for example) but must be available to respond to the employer's calls for work. During stand-by the worker does not have to be at a place specified by the employer, but must be simply reachable by the employer in case of need. German law as it stood at the time considered only the readiness for work arrangement as active working time, while the inactive hours during on-call service and stand-by were treated as rest time. Mr. Jaeger's working arrangement fell under the on-call service type and therefore the hours spent at his room in the hospital when not carrying out his duties did not count as working time even though his presence was required. The Court found this to be in breach of the Working Time Directive. The Court held that "an employee available at a place determined by the employer cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional activity." Thus, even though he could in theory rest while on call, the fact that Mr. Jaeger had to be present at a place determined by the employer was the decisive factor in distinguishing between rest and normal working hours.[631]

SIMAP and *Jaeger* have important implications for domestic workers. On-call service in domestic work is particularly complex; the very notions of working time and

[630] *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, (C-303/98) [2000],para 49.
[631] *Landeshauptstadt Kiel v Norbert Jaeger* (C-151/02) [2003].

rest, workplace and private space, merge to an extent that is unknown in any other type of work. The two judgments establish a useful framework for the regulation of on call hours in the domestic work scenario. Following *SIMAP* the time the employer requires the domestic worker to be physically present at the workplace counts as active working time. According to *Jaeger* even if the worker is able to rest, as long as she has to be present at a place determined by the employer, a place which could be the normal workplace or somewhere else accompanying, for instance, the employer, she is working. Thus, the critical question to pose when distinguishing between active and inactive time is whether the worker enjoys autonomy and is able to dispose of her time freely.[632]

IV. Conclusion

I have argued that analyses concerning the position of paid domestic workers in the personal scope of EU employment law have thus far been misplaced; EU employment law sources are in fact much more relevant for domestic workers than is normally assumed. The legal sources identified can challenge various aspects of domestic workers' vulnerability structured in Member States' immigration and employment laws. EU employment law sources are thus useful but underused tools in the struggle to improve the sector's working conditions. My claim is not that domestic workers in the EU enjoy all these protections and entitlements; domestic work is indeed a very good example of the gap between "law in the books" and "law in action". Nor do I claim that EU sources grant domestic workers the full range of employment rights; some very important issues for domestic workers are not regulated under EU law, thus protection remains limited. Nonetheless, the protection domestic workers can derive from EU law is certainly more generous and more nuanced than what has been normally assumed. Clarifying the applicability of EU employment law sources to domestic workers is essential; these sources can be useful tools not only for individual litigants, but also for advocates pursuing legal and policy changes at national level.

[632] Similarly art. 10 (3) of ILO C.189 reads: "periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work […]."

Conclusions

This thesis set out to examine the role of law in structuring the vulnerability of migrant domestic workers in the EU and to identify legal sources that can challenge this vulnerability.

In the first chapter, I examined the role of national immigration law by focusing on the rules governing the first independent entry of TCN domestic workers. This area of law reveals significant divergences among EU Member States. I have identified four distinctive regimes. A *Regulated Entry/Liberal Treatment* regime, as in the cases of Italy and Spain, that grants TCNs domestic workers a relatively easy access and a good set of rights once the migrant is in the country. Under this regime, laws on TCN domestic workers' entry are generally open and welcoming but this openness is sector-specific; access is granted as long as TCNs are employed as domestic workers in private households. Then there is an *Open Entry/Restrictive Treatment* regime that is even more liberal in terms of entry but imposes a range of conditions and restrictions once the migrant is in the country. Cyprus applies this regime attaching very restrictive conditions to TCN domestic worker status, while granting no paths to permanent residence nor access to family reunification. A third type of regime, *Employer-Led/Mixed Treatment,* is applied in Sweden. Under this regime, TCN domestic workers can access a legal migration status under employer-led, general labour migration rules. The treatment of domestic workers once in the country combines restrictive and liberal elements; on the one hand, they face key restrictions such as no right to change employers during the first two years and sectoral restrictions, but on the other hand, domestic workers have some paths permanent residence and access to family reunification. The fourth type, *Restrictive/Au Pair Only*, is restrictive in terms of entry. Countries under this model either prohibit the entry of TCN domestic workers or only allow it under the au pair scheme. A good number of EU Member States fall under this type: Germany, Austria, Denmark, the Netherlands, Ireland and the UK.

The divergence in the way EU Member States regulate the migration of TCN domestic workers seems to blur the so-called North-South boundaries. While all the countries that have closed or almost closed doors for TCN domestic workers are Northern European countries, Sweden stands out as having a liberal in terms of entry regime which approximates those of Southern EU Member States such as Italy, Spain and Cyprus. Then, when it comes to the treatment of TCN domestic workers after they

have entered the country, there again seem to be divergences that blur these boundaries. While Spain and Italy in the South have a relatively welcoming approach towards TCN domestic workers, their other Southern counterpart, Cyprus, follows a much more restrictive approach in terms of post-entry treatment. Paradoxically, the restrictive way Cyprus treats migrant domestic workers shares significant similarities with that of Sweden.

In the second chapter, I selected one country from each type of model – Spain, Cyprus, Sweden and the UK – and comparatively examined the labour law regulation of domestic work, emphasising any norms with implications for migrant domestic workers. I revisited a debate on whether domestic work should be treated as "work like no other" or "work like any other" and argued that this debate is somewhat flawed because it focuses too much on models instead of the substance of regulation. In Sweden, the separation of domestic work from the Swedish model of industrial relations creates special vulnerabilities for domestic workers; these vulnerabilities are not effectively addressed by the Domestic Work Act, the special law enacted to regulate domestic work in private households. The interference of immigration law in the employment relationship is a major vector of vulnerability for migrant domestic workers; the implications of this phenomenon are best reflected in the cases of Cyprus and the UK. Spain on the other hand, is the country where immigration and labour law regimes best protect migrant domestic workers. The chapter demonstrated that there are variations of the construction of vulnerability in the legal regimes of EU Member States. These variations can be important tools to advocate against the necessity of restrictive regimes

In the third chapter, I examined the treatment of migrant – EU and TCNs – domestic workers under EU migration law. The analysis of EU law sources on the entry, stay and mobility of workers reveals different hierarchies of migrant statuses and a great level of fragmentation. While EU domestic workers move and work under a comprehensive set of EU rules, TCN domestic workers must navigate a much more complex and fragmented legal landscape. It has also been noted that most protective norms in EU migration law are not accessible to TCN domestic workers; this reveals a certain bias on the non-value of domestic work.

In the fourth chapter, I revisited a debate on the personal scope of EU employment law sources and argued that – contrary to what has been normally assumed – these apply to domestic workers including those who are illegally resident migrants.

Thus, EU employment law sources are an important but misunderstood and underused resource for migrant domestic workers. The relevance and usefulness of EU employment sources as tools to reduce migrant domestic workers' vulnerability has important implications for those advocating for the rights of this group. Instead of looking for change in international or European human rights law, or focusing their efforts exclusively in promoting the ratification of ILO C.189, activists could put more emphasis on compliance with EU employment law. With this I do not mean to disregard the importance of ILO C.189. Rather, what I suggest is the complementarity of EU employment law sources and of C.189 in designing a legal framework that can effectively and holistically address migrant domestic workers' vulnerability.

But even the combination of EU employment law and of C.189 could not address all the vulnerabilities migrant domestic workers face; there would still be important issues not covered such as deductions from wages and dismissals. That is why it would be useful to think of ways, taking into account the particular context of each country, to change domestic work's institutional setting. To move, in other words, from the highly personalised direct recruitment – that is when a private employer directly hires a domestic worker – to the professionalisation of domestic work services. Organising domestic work services through agency work, as for instance in Sweden, shows how the change of institutional setting could be an effective way to bring domestic workers within the personal scope of generally applicable labour legislation and most crucially, facilitate their unionisation.

Migrant domestic workers' vulnerabilities structured in national immigration law are more difficult to challenge, be it through supranational sources or through professionalisation. This is because EU Member States still have important margin to determine the entry conditions of TCN domestic workers and, at times, even of EU transitional citizens. In the case of Cyprus, for instance, while desirable, it would be very difficult to achieve a fundamental reform of the visa regime on migrant domestic workers as there is simply no such pressure on the state. An alternative way forward – at the least in the short run and while more comprehensive changes are being advocated for – would be to turn immigration restrictions around. The control the state exercises through the hyper-regulation of TCN domestic workers' entry creates certain opportunities. In contrast to the case of EU migrants who can enter and reside in another Member State without being subject to immigration controls, states register TCN domestic workers and their employers through visa schemes. Therefore, these visas

could function as contact points for the state to track employers and monitor domestic workers' employment and living conditions both before and after entry. In addition, visas could be very important contact points also for Trade Unions in order to locate migrant domestic workers through the employers. For this strategy of course to be successful it requires Trade Unions that are keen on organising this group.

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