Some suggestions and recommendations

A first suggestion is that if this vast "seismic" area of national job markets is to undergo effective, substantial reinforcement of the protection guaranteed by the European regulations through the co-ordination approach, it will be necessary to take "upstream" action, with a small degree of harmonisation between the national social protection systems or the introduction of common minimum protection standards.

It goes without saying that this option would be extremely difficult to implement. It is in contrast with the EU's long-standing approach to social security measures[47], not to mention the choices made recently by EU legislators with the atypical work directives (for part-time, fixed-term and agency work)[48]. Nonetheless, it is crucial to bear in mind that the co-ordination method can achieve very little for forms of atypical work that are fully or partially exempt from social security obligations, as is the case with the significant examples taken from the national reports. As such, the method is structurally incapable of providing transnational protection for employment relationships that are essentially excluded from the social security circuits in the systems of the EU Member States.

The path to partial harmonisation – which is theoretically allowed pursuant to Art. 153, par. 1 (c) and par. 2 (b) of the TFEU – is probably the most difficult route, due to the substantial differences between the national social protection systems, including in terms of welfare and social security for atypical workers. These organisational differences mirror structural diversities among the national systems, which are well documented in comparative literature about the *welfare state* models in Europe.

There is a rather clear cut-off which still seems to 'differentiate' between the various national systems. The Member States can be classified according to the social security model that they adopt, which will either be universalistic or category-related, with a mainly insurance-based approach (for instance, take the differences between countries such as Italy and Sweden in this respect). Another important distinguishing factor, as universally highlighted in the national reports, concerns the connection of social protection schemes for atypical workers to each country's overall system, i.e. the role of social protection for the workers in question in the framework of special systems, with varying degrees of difference – and disadvantageousness – compared to the general system. Partly connected to this issue is the separate matter of the eligibility of atypical work for social security purposes. Whether it is deemed subordinate or self-employed work can make a big difference.

These significant differences in the arrangements of the Member States – in addition to the others highlighted by the national reports – constitute a serious obstacle to the idea of even partial harmonisation, which for the above-mentioned reasons should have an impact on the broader "institutional infrastructures" of national social security systems. The latter are increasingly

[47] All of this was covered most recently in C. Caldarini, Il coordinamento dei sistemi di sicurezza sociale. Ovvero, perché in Europa i regimi di welfare sono così diversi tra loro, forthcoming, in Quaderni di Rassegna Sindacale and S. Giubboni, L'azione comunitaria in materia di sicurezza sociale in prospettiva storica. Omaggio a Lionello Levi Sandri, in A. Varsori, L. Mechi (Eds.), Lionello Levi Sandri e la politica sociale europea, Franco Angeli, Milan, 2008, p. 175 ff.

[48] Of the many publications, it is perhaps worth reading S. Giubboni, La protezione dei lavoratori non-standard nel diritto dell'Unione europea. Note introduttive, in Studi in onore di Tiziano Treu, Jovene, Napoli, 2011, vol. III, p. 1449 ff.

differentiated today following the enlargement processes that have taken place over the last decade.

Therefore, it seems more feasible to plan a regulatory standardisation pathway around the lowest common denominator of fundamental principles. The fundamental principle on which the European Union and its Member States should focus is guaranteed access to social security systems – irrespective of their structure – that is also available to atypical workers, thus overcoming the typical gaps and exclusion in many national systems, which are also detrimental to the transnational mobility of such workers. The only exceptions should be for objective reasons specifically identified by the Member States, with regular checks as to whether the conditions still apply.

This principle would require an obligation to provide social protection on a par with the national system for any working activity, including "atypical" jobs. It should then be complemented by equality with standard workers in terms of social security, in accordance with the current European directives concerning part-time, fixed-term and agency work. Once again, exceptions could apply for any provisions that are objectively justified by differences in the working relationship, such as the '*pro rata temporis'* criterion.

Given their fundamental nature (and bearing in mind the provisions of Art. 34 of the Charter of Fundamental Rights of the European Union), these principles should be established by a binding directive, although a first draft could be envisaged as a recommendation, in connection with the open co-ordination tools which are basically responsible for the implementation of the *flexicurity* policies within the "Europe 2020" strategy.

The second *policy* suggestion concerns the co-ordination of national social security systems, as required by EU regulations. For instance, many national reports highlight how difficult it is for atypical workers to effectively qualify for the aggregation of insurance or working periods due to the restrictive rules for pensions and unemployment benefits pursuant to Articles 51 and 61 (respectively) of Regulation no. 883/2004. If the general provisions of Art. 6 of the regulation were applied with no limitations, it would be possible to apply for aggregation without being subject to the equivalence requirements which in all probability disproportionately penalise atypical workers. Reforming the regulations in order to remove this detrimental condition – at least for atypical workers – might lead to a strategy to strengthen their (transnational) social protection within the framework of co-ordination of national social security systems.

Another line of action mainly involves the sensitiveness and helpfulness of trade unions and institutions providing advice and social assistance. It consists of more active use of the interpretative resources currently available to legal practitioners, following innovative paths of *strategic litigation* that are developed in accordance with atypical workers' social security needs. In this case, it is difficult to make specific suggestions, but useful input is provided by the national reports.

It is only really possible to make the general observation that interpretation of the social security regulations – especially when their application is specifically detrimental to certain categories of people – always needs to take into account the general principle that the coordination technique for national systems typified by Art. 48 of the TFEU must serve as the principal guarantee of free movement for workers, pursuant to Art. 45 of the TFEU and Art. 15 of the Charter of Fundamental Rights of the European Union. In well-known cases (albeit ones unrelated to atypical work), the European Court of Justice has proved to be willing to overcome the restrictions of the regulations

when they present unjustifiable obstacles to effective access to the transnational social security of the workers entitled to the fundamental right of free movement. For example, take the case that led to the full extension of the regulations to public employees, even those covered by special social security systems, along with the gradual legal expansion of the abovementioned freedom of movement for these individuals.

It is necessary to consider active use of the rules (whose general principles have already been significantly revised) and the fundamental provisions of the Treaties and the Charter of Fundamental Rights of the European Union, in an attempt to open fresh social security channels for the new subcategories of protection that can be identified in the varied sphere of atypical work.