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Labour Rights for Live-In Care Workers: The Long and Bumpy Road Ahead

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Abstract: Domestic work, as one of the most feminised occupations in existence, is also one of those least likely to offer a prospect of equal treatment with workers in other sectors. Notably, live-in domestic workers are regularly excluded from even the most fundamental entitlements such as that to an hourly minimum wage. The rise of an international industry organising live-in care work for the frail and disabled brings the questions of how to regulate this sector back to the table also and especially in the most affluent countries. Departing from a prominent recent court decision in Germany, the contribution explores how jurisdictions around the globe approach the key legal questions determining the labour rights of live-ins. On this basis, it offers a discussion of the way forward in a policy area which urgently requires an honest discussion of how to balance conflicting vital interest of different disadvantaged groups in a fair and realistic way.

Keywords: care work; domestic work; live-in work; labour rights; equal treatment; long-term care; minimum wage; labour law; social security; labour migration

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1. Introduction

After a four-year legal battle, Dobrina Alekseva has achieved what is out of reach for the vast majority of live-in care workers today: a minimum wage entitlement, for every single hour she was required to stay with her client, confirmed by the highest court of her country of work. In June 2021, the German Federal Labour Court handed down a judgment[1] containing an almost mundanely simple conclusion, which has nonetheless sent alarm bells going off among many observers: live-in care workers are just that—*workers*. And like any worker put to work 24/7 at the employer's premises, in circumstances where abandoning the workplace even very briefly during a standby shift could have grave consequences, they need to be paid the statutory minimum wage for every hour spent there.

Domestic care work belongs to the most feminised industries in existence. Women are (strongly) overrepresented not only among the workforce,[2] but also clients and beneficiaries,[3] intermediaries,[4] and the social workers who may be involved if the arrangement is part of a public long-term care (hereinafter: LTC) scheme. On the one hand, the fact that the arrangement effectively transforms traditional forms of unpaid female labour into paid work can be seen as progress both for those freed from the pressure to provide care for their relatives and for those enabled to use their skills for paid rather than exclusively unpaid housework and care.[5] And yet, the idea that this should imply an assimilation of the workers' legal position to that of any "regular" worker is still alien to numerous jurisdictions around the world.[6]

In what follows, this contribution will discuss the mechanisms through which—more than half a century after women began to triumph in equal pay cases before the courts of various countries—live-in care workers are still regularly barred from demanding equality of treatment with other categories of workers. These mechanisms are explored by means

of a step-by-step examination of the preconditions for a case like Dobrina Alekseva's to succeed, with illustrative references to inter- and supranational as well as domestic legal regulation, case law and practice. After a brief insight into present-day realities of live-in domestic work in Section 2, Section 3 is devoted to various areas of law of relevance for determining the rights of these workers. This includes questions of the applicability of legal standards; the legality of stay and work, and the consequences of claims brought by those classified as irregular migrants or irregular workers; the qualification of the contractual relationships, and notably the question whether employee status is recognised for domestic workers either in relation to the household or an agency/intermediary; the applicability of minimum wage and social security standards; and the concept of working time—notably in relation to on-call or standby shifts as well as travel time. Finally, in regard to all theoretically applicable standards, issues of enforcement, liable to put their relevance into perspective, will be raised.

2. Live-In Care Work

Domestic work is on the rise worldwide,[7] and live-in domestic work has not only expanded in those regions of the world where economic development took place in a context of particularly pronounced inequality,[8] but has also very much returned to many of the "most developed" countries in the context of care for the frail and disabled (Boris and Klein 2012). The pertinent literature (e.g., Iecovich 2011, p. 617; Christensen and Manthorpe 2016, p. 137; Fischl 2016, pp. 23, 36) speaks of "tremendous" or "dramatic" growth, and numbers which double within just 15 years. A combination of demographic developments, preferences for ageing at home and the frequent absence of family members able and willing to provide informal care has led to the rise of an industry, typically focusing on cross-border placement of workers to provide around-the-clock care (Shamir 2013, p. 194; Romero 2012, p. 48 et seqq.; Fischl 2016, p. 36). In 2019, there were 6.3 million long-term care workers in the EU, amounting to 3.2% of overall workforce—a percentage which varied from fewer than 0.2 LTC workers per 100 people in Greece to 12.5 in Sweden. Eighty-eight per cent of them were female, 20% foreign-born (Eurofound 2020).

Consequently, the economic importance of the care sector has been growing for a long time (e.g., Razavi and Staab 2010, p. 408), and tends to be invoked as the first and foremost driver of the "feminisation of migration" (UN-INSTRAW 2007; Oelz 2014, p. 145).[9] In this context, an industry increasingly dominated by agencies operating cross-border, workers are moved over increasing distances to fill care gaps around the world (Turnpenny and Hussein 2022, p. 23), whereby the vital tasks they fulfil tend to be trivialised as unskilled work (Liang 2014, p. 233). The astonishing measures taken by several countries to enable continued cross-border live-in care at the heights of the COVID-19 crisis (see Leiblfinger et al. 2020; Hopfgartner et al. 2022, p. 16; Turnpenny and Hussein 2022, p. 27) evidence just how vital this type of care has become to the social functioning of many societies.

Apart from the clear preponderance of females, empirical studies report different characteristics of care workers, e.g., in relation to age or social status. While notably inner-European migration for care work seems to be dominated by middle-aged women in their 40s to 60s (e.g., Schmidt et al. 2016, p. 742; Hopfgartner et al. 2022, p. 301), studies on other regions of the world indicate the prevalence of younger workers.[10] A remarkable commonality of findings for different regions are indications of a comparatively high level of education, whereby a professional specialisation in care work is most commonly found to be rare (e.g., Lamura et al. 2010, p. 3; Christensen and Manthorpe 2016, p. 143; Ayalon and Rapolien 2021, p. 1).

Studies indicate that at least in some countries a significant portion of care workers finds the profession rewarding and would choose it again,[11] whereas the same is indicated only by a small minority in other contexts,[12] and even those not regretting the choice for themselves would not necessarily want their children to work in the sector (Ayalon and Rapolien 2021, p. 3). Working conditions as described by interviewees

in various studies almost invariably include aspects that seem at least concerning, if not gruelling. Apart from the near-universal experience of isolation and missing out on own family life (Ayalon and Rapolien 2021, p. 6; Chau and Schwiter 2021, p. 730; Turnpenny and Hussein 2022, p. 33), language barriers and difficulties notably with demented clients (Hopfgartner et al. 2022, p. 309; Turnpenny and Hussein 2022, p. 33), as well as regular instructions to perform tasks unrelated to care (Romero 2012, p. 53; Christensen and Manthorpe 2016, p. 144; Hopfgartner et al. 2022, p. 311), there are multiple accounts of starvation (Hopfgartner et al. 2022, p. 309; Mantouvalou 2015, p. 329), subjection to dangerous or health-endangering work patterns (Ayalon and Rapolien 2021, p. 6; Chung and Mak 2020, p. 804), verbal or physical assaults and sexual harassment (Appelbaum 2010, p. 4; Green and Ayalon 2018, p. 4; Masuda 2019, p. 1 et seqq.), belated or incorrect wage payment (Chung and Mak 2020, p. 811; Rodríguez Ortiz 2018, p. 1) or even slavery-like conditions (Blofield and Jokela 2018, p. 533; Mantouvalou 2015, p. 329 et seqq.). And just as relationships with care beneficiaries may vary from those characterised by mutual respect and genuine emotional connection (Zelizer 2000; Boris and Parreñas 2011) to those rife with exploitation and abuse, workers may have experienced "good and bad agencies" (Hopfgartner et al. 2022, p. 310). The latter may employ practices such as dishonesty about the beneficiary's actual condition, charging unreasonably high fees for recruitment and placement, failing to provide training and/or to pay mandatory social security contributions (e.g., Christensen and Manthorpe 2016, p. 144 et seqq.; Leiber and Rossow 2017, p. 4; Schmidt et al. 2016, p. 754).

3. The Relevant Legal Framework—Theory and Practice

There is a vast body of legal regulation of relevance in relation to domestic work. The spectrum effectively reaches from the detailed intricacies of administrative law to the very core of criminal law provisions. Note that domestic law has i.a. found it to be the sector most affected by human trafficking for the purposes of labour exploitation (ILO 2012b; Rodríguez Ortiz 2018, p. 11). Various international bodies have in fact indicated a necessity of specific regulation to ensure even the most basic human rights for domestic workers (cf. statements in CESCR 2006, p. 4; CEDAW 2008; UN 2010); a binding judgment has been issued in Siliadin v. France[13] by the European Court of Human Rights (ECtHR), which found signatory states under a positive obligation to implement "practical and effective protection" against servitude and forced labour.[14]

The urgence of identifying the most blatant violations, such as those involving forced labour, child labour and deprivation of liberty, can barely be stressed enough. Expecting these issues to be addressed may, however, be illusionary as long as domestic work is generally perceived as falling outside the public sphere, in analogy to the unpaid work by family members which it has come to replace. In this context, the focus of the present article will not mainly lie on the assessment of the worst forms of human rights violations which continue to occur in the context of domestic work. Instead, it aims to explore those fields of law which are necessarily affected in typical contexts of such work, most notably as regards migration and welfare regimes, so as to illustrate how far these arrangements are from being treated just like any other labour relationship (Turnpenny and Hussein 2022, p. 23).

The entry into force of the ILO's Domestic Workers Convention 2011 (hereinafter: Convention No. 189), with its supplementing Recommendation (No. 201), on 5 September 2013, has been hailed as an "unprecedented dedicated international framework of minimum standards" (Oelz 2014, p. 144; see also Fish 2017), in the face of a century-long tradition of building exemptions for domestic work into international instruments on even the most basic labour standards.[15] Although the current number of ratifications[16] does not reasonably allow for reclaiming it as a part of mandatory customary international law, the standards set by this Convention will be used as a point of reference throughout this contribution, as a representation of the minimum rights on which consensus was basically reached in a near-universal[17] international organisation such as the ILO.

3.1. Applicability of National and International Law

Considering the relevance of cross-border situations in live-in arrangements (see next subsection), an important preliminary question frequently concerns the applicability of legal norms.

In principle, it is for the national legislator to delineate the scope of domestic law, and this will regularly imply the application of essentially all relevant rules to labour relationships where the place of work is located on the national territory. International agreements may provide for exceptions, though. In the EU, free movement principles have opposite implications depending on whether the case comes under the rules for the free movement of workers or of services. The former is the case if a domestic worker enters into an employment contract for the purpose of working in a country other than their own—regardless whether they are employed directly by the household or by an agency, which may even have its seat abroad. In such a case, Article 45 of the Treaty on the Functioning of the European Union (TFEU) requires equal treatment with nationals, and thus i.a. the full application of social security and labour law. Conversely, the free movement of services would be concerned in the unlikely case that the carer would be considered self-employed under EU law,[18] or—more likely—employed by an agency for work which is not primarily meant to take place in the state to which the worker is currently posted. Such was considered to be the case when Dobrina Alekseva was posted to Germany by a Bulgarian agency.[19] In such case, the applicability of the host country's law needs a specific justification for the burden thereby imposed on the entrepreneur wishing to provide services cross-border. For social security law, this means that the law of the country of origin continues to apply for up to two years[20]—enabling agencies to avoid the typically much higher contribution rates prescribed in the country of work. For labour law, only certain areas enlisted in Article 3 of the Posting of Workers Directive 96/71/EC are subject to the host state's law. Importantly, this includes issues such as minimum wage, working time and leave rights—which must thus in principle be observed just as in any other employment contract in the country of employment.[21]

As noted by Chau and Schwiter in relation to Switzerland, agencies engaging in the posting of care workers are also no strangers to strategies which ensure the duration of posting remains just below the legally stipulated duration, triggering the applicability of host country regulation to migration, social security and occupational welfare (Chau and Schwiter 2021, p. 727).

One group of domestic workers finding itself virtually deprived of any protection in the country of work are the personnel of diplomats. The near-universally ratified 1961 Vienna Convention on Diplomatic Relations grants their employers immunity from criminal and civil jurisdiction—which can make it impossible for authorities in the country of work to investigate even the most blatant forms of human rights violations vis-à-vis their staff. Mantouvalou (2015, p. 337 et seqq.) notes on diplomatic domestic workers that "it was always clear that the incidence of exploitation and abuse affecting them was higher", and describes how this opens the doors to the effective import of practices of impunity. Among those are national systems which effectively leave domestic workers in a "legal vacuum", with the Qatari kafala system among those having raised international attention.

As regards the applicability of standards of international law, it suffices to emphasise again that widely ratified minimum human rights standards are basically applicable to a large majority of domestic workers around the world, while crucial labour and social security rights as laid down notably in the ILO's conventions frequently allow for an exemption of domestic workers. The fact that the courts could base their decisions on pertinent international standards in Dobrina Alekseva's case was made possible by Germany's decision to ratify Convention No. 189—which the overwhelming majority of countries has not done to this day.

3.2. Legality of Stay and Work

Live-in domestic work could not function the way it does around the world without capitalising on transnational inequalities (Parreñas 2012; Chau and Schwiter 2021, p. 733; Turnpenny and Hussein 2022, p. 34). In various countries, the majority or even virtually all domestic live-ins are migrants,[22] and this is most notably the case for live-in LTC workers.[23]

Conditions for the development of a cross-border labour market of this kind are particularly favourable in Europe, where geographical proximity and legal regulation (see infra in this subsection) ease the movement of workers between territories with different economic conditions (Leiber and Rossow 2017, p. 7). The EU's 2018 Labour Force survey evidences the key role of migration for supplying various countries' care workforce, whereby in almost all countries the share of foreign-born "social care" workers is significantly higher than that of doctors and trained nurses (the two groups usually included in numbers for comparative research on the "health workforce"[24]). Migrants constitute a quarter of all social care workforce in Austria and Ireland, almost a third in Switzerland, and close to half of social care workers in Italy (Fernández-Reino and Vargas-Silva 2020). Discussing Brexit-related risks of labour shortages, Turnpenny and Hussein (2022, p. 35) find that a reduction of net migration to zero could result in a 400,000 shortfall of care workers.

In this context, Convention No. 189 contains specific regulation regarding cross-border situations. Article 8 requires that the worker be provided a written contract or job offer before travelling; Article 9 stipulates their right to keep their personal documents. More details are included in the accompanying Recommendation No. 201, which calls for the establishment of a protective framework entailing pre-placement visits, information, legal assistance and specialised social or consular service.

The fact that seemingly self-evident rights such as a person's continuous disposition over their own personal documents while abroad even require mention in the Convention may already give a sense of just how precarious the situation of live-in workers may look in reality—and that national law may not necessarily offer protection on its own account. In fact, it has been described for various legal systems that their core concern seems to be to keep live-in domestic workers separate from the general national labour market—so as to ensure that their entry in large numbers does not trigger a responsibility of the state to accept them on the national territory any longer than necessary for the concrete contract for which they have been brought in. All too often, this is ensured by putting workers into a situation of excessive dependence on their employer.

For instance, Shamir (2013, p. 198 et seq.) describes how the Israeli system—which relies on the availability of particularly large numbers of live-in carers for the provision of LTC (see infra in Section 4)—has gone through stages of granting visas only for stay with a particular employer, limiting the number of permitted employer changes, and/or limiting the employee to a particular geographical area. Various countries and territories, including Hong Kong (Masuda 2019, p. 13), Israel (Shamir 2013, p. 198 et seq.), Singapore (Ayalon and Rapolien 2021, p. 13) and Taiwan (Liang 2014, p. 232 et seqq.), exclude domestic workers from general immigration schemes which offer a track to permanent residence in the country of work. There is an abundance of empirical literature describing the consequences of vulnerability to exploitation at the hands of the employing household resulting from the absence of legal alternatives—such as the existence of strong incentives to stay illegally so as to escape the threat of expulsion (e.g., Green and Ayalon 2015, p. 472; Romero 2012, p. 51). The latter is naturally equivalent to foregoing essentially any form of legally prescribed protection.

This is not to say that there are no examples of countries which ensure migrant care workers-to-be a transparent trajectory of stay with options of long-term career development in the country. Canada for instance abolished many of the previous restrictions and introduced a regular track to permanent residence depending on the total hours of work spent in care work after obtaining mandatory training (Chowdhury and Gutman 2012, pp. 217, 227). The latest amendment has further improved carers' rights during that period, notably in terms of separate accommodation and being joined by family members.[25] Developments

are by no means necessarily moving in this direction, though. For the UK, Mantouvalou (2015, p. 334 et seq.) describes the withdrawal of previously comparatively high standards for domestic workers by a reform in 2012, which meant i.a. that those accompanying their employers when migrating to the UK became effectively tied to their employers, without any possibility to change employers or even to renew their visa for continuous work with their present employer. Considering the implication of that system, it is argued that instituting a visa regime which does not make it effectively impossible for domestic workers having suffered severe abuse to approach authorities should be recognised as an inherent part of implementing the 1926 UN Slavery Convention (Mantouvalou 2015, p. 348 et seqq.).[26]

Apart from actual legal hurdles, Chau and Schwiter (2021, p. 729) observe in relation to Switzerland that agencies may develop strategies to avoid situations in which a carer pursues long-term settlement in the host country, e.g., by selection processes which prefer applicants with strong family ties to the country of origin. While these workers are not necessarily highly dependent on a specific household, they regularly depend on the agency in a way that severely limits their bargaining power in relation to the terms of their placement.

All of the mentioned issues are effectively losing much of their relevance in cases that take place within the European Union, such as that of Dobrina Alexeva's. The above-mentioned free movement of workers and services in the EU allows migrant workers to take up work in any Member State without a visa or work permit,[27] and permanent residence is a mandatory right for everyone having legally stayed in one country's territory for five years.[28] EU law is also highly relevant for situations in which carers from outside the EU have been hired without the necessary legal foundation (work and residence permit). The Employer Sanctions Directive (2009/52/EC) does not only prescribe a minimum level of deterrent sanctions for employers of illegally staying migrants, but notably aims to ensure that workers are protected and rather rewarded than punished in the process. This naturally includes the mandatory back payment of outstanding wages, taxes and social security benefits, whereby the main contractor undertaking is liable for all outstanding payments of a subcontractor. Additionally, the Directive intends to facilitate the filing of claims by the TCN concerned against their employer, which may even include the issuing of a temporary residence permit. This is combined with the employee's systematic information about their rights and a legal presumption of an employment duration of at least three months in case of difficulties of proof.

Needless to say, though, comparable rules are lacking in many other destination countries for domestic workers, which has immediate consequences for the degree to which the worker is forced to avoid any contact with authorities, for fear of the consequences that a revelation of their work activity will have for them (Fischl 2016, p. 37). Even where they exist, workers may rarely trust their own knowledge of the law (if any) enough to not fear punishment for staying or working illegally, and the fact remains that disclosure to authorities will regularly mean the end of their possibility to work in the country at issue.

3.3. Contractual Relationships and Employee Status

Even where domestic law is in principle applicable and not thwarted by the illegality of stay or work, coverage by key protective provisions still depends on the qualification of the contractual relationship(s) at issue—and notably the question whether employee status is recognised for domestic workers either in relation to the household or an agency/intermediary. The importance of this classification can hardly be overstated. Even Convention No. 189 excludes the self-employed from its scope (see Article 1(b)), without defining the meaning of the notion of employee for this purpose.

Fundamentally, as different as national definitions of employee status may be (see Hiessl 2022a), it seems difficult to conceive how they could possibly fail to extend to a worker subject to a live-in care agreement. Arguably, few professions require an even nearly as far-going commitment to be available for work depending on the principal's ad hoc requests and needs. Live-in care work regularly leaves no room for the individual's

own determination of where, when and how to fulfil their tasks, let alone organise them in any genuinely entrepreneurial way that would allow them to reap the benefits of an effective business structure.

This has in the outcome been acknowledged in German case law—including the most recent decision on purportedly self-employed live-in care work[29]—which identified the concrete situation as bogus self-employment, while expressly not declaring such a construction unthinkable, though. In the light of such case law (and the resulting high risk that contracts for self-employed work will not stand up to judicial scrutiny), the German "model" of live-in care has in the recent past relied on posting employed carers (Leiber and Rossow 2017, p. 11 et seq.). As opposed to this, neighbouring Austria's model might best be described as one of condoned misclassification—based on a legal basis explicitly referring to the option of self-employed live-in care provision.[30] In practice, over 99% of live-in carers in Austria are contracted for self-employed service provision (Schmidt et al. 2016, p. 757).

While there are important variations as regards the legal position of the self-employed, and some countries' laws ensure them (or subcategories of them) important protections such as social security coverage or collective bargaining rights, they are regularly excluded from the bulk of protections under labour law and frequently also social insurance. Notably, minimum wages, working time and health and safety standards are regularly inapplicable (Hiessl 2022b).

In case employee status is recognised in principle, another key question relates to the identification of the employer. Private households are often subject to simplified or less extensive obligations vis-à-vis their workers compared to commercial employers. Additionally, a change of employers is usually connected to the loss of various rights dependent on length of employment. Consequently, workers' position would regularly benefit significantly from being classified as employees of the agency in charge of their placement, rather than being hired directly by the care beneficiary.

The role of such agencies in the domestic work industry can barely be overestimated. Arrangements between households and workers are unlikely to be concluded without some form of intermediary, which may be public or non-profit, but the global market appears to be increasingly dominated by private for-profit providers. The latter are reported to constitute the vast majority in various national contexts where live-in care is used on a large scale.[31] Research on the practical workings of such agencies in those countries establishes a rather unequivocal picture: whatever the nature of the contracts relations eventually concluded, they are effectively set up in full accordance with the standard terms and conditions set up by the agency, without any significant influence by either the worker or the client. In such a context, it may become questionable whether the agency's role can still be seen exclusively in terms of the provision of support for both parties—rather than the actual centre of control and domination, which is characteristic of the function of employer. The latter is indicated by numerous practices as described in the literature evidencing a gross imbalance of bargaining power between agencies and the workers they place (Fischl 2016, p. 22), information asymmetries which agencies know to exploit for their benefit (e.g., Schmidt et al. 2016, p. 755), and strategies exacerbating workers' dependency on them (Chau and Schwiter 2021, p. 732). Fischl (2016, p. 54 et seq.) argues that concepts which see care recipients as employers when using care services in line with the provider's meticulously set up and controlled system bear evidence of "nineteenth-century understandings of the employment relation".

In Dobrina Alekseva's case, two intermediaries played a role: a Bulgarian agency assuming the role of employer and a German agency with no formal role in the contractual relationship, arranging the placement and acting as the single point of contact for client. This is typical for the German context, whereby much of its popularity stems from putting a foreign agency in charge of complying with German labour law and the applicable (regularly foreign) social security standards,[32] which Leiber and Rossow (2017, p. 12) identify as "strategic lack of knowledge" on the German side regarding compliance. This

may illustrate how different forms of "legal trickery" may act as functional equivalents, all of which lead to depriving workers of the rights they should basically enjoy under national law. One trusts in the absence of judicial scrutiny over the actual exercise of employer functions by the actors involved; the other assumes that the (presumably correctly identified) employer's practical non-compliance with national labour law will hardly be proved successfully.[33]

Materially speaking, an arrangement in which the agency continues to have the "organisational authority" over the worker, but a client is empowered to give (very) concrete instructions to the worker, should probably be classified as temporary agency work—resulting in the applicability of the relevant provisions, including Directive 2008/104/EC in EU Member States. This would ensure that both the agency and the client are subject to certain concrete obligations in relation to the employee (e.g., as concerns health and safety). In practice, though, providers which actively position themselves as temporary work agencies when placing live-in domestic workers do not appear to be a significant phenomenon in any country.[34]

3.4. Minimum Wage and Social Security Standards

Even when classified as employees, domestic workers' rights may still fall short of those granted to other workers. Apart from the already mentioned (see last subsection) issue of provisions which exempt private households from various provisions when they act as employers, domestic workers may be expressly referred to in various legal sources as a group exempt from their scope. The ILO found that, in 2019, 22.2 per cent of domestic workers globally did not enjoy any minimum wage protection, and another 9.3 per cent were subject to separate, lower minimum wage levels than other workers (ILO 2021, p. 99).

Regarding this key question of minimum wage protection, Convention No. 189 basically requires in its Article 11 that domestic workers be covered by a standard "established without discrimination based on sex", as also envisaged in the almost universally ratified ILO Equal Remuneration Convention, 1951 (No. 100). Considering the degree to which domestic work is dominated by females (see supra at Section 2) across countries, it seems difficult to conceive how lower wage standards for this category would not constitute an indirect form of discrimination, which would require a particular justification (ILO 2012a). Article 12 of Convention No. 189 stipulates that payments in kind may only represent a limited proportion of the total, that the monetary value attributed to them must be fair and reasonable and that rules on this issue cannot be less favourable than those applicable to other categories. These provisions were eventually referred to by the German Federal Labour Court when finding that, contrary to certain opinions in the legal literature, there could be no implicit exemption from the German minimum wage for carers like Dobrina Alekseva.

At the same time, these provisions may be among the core reasons for various other countries to refrain from a ratification of the Convention. The effective exclusion of (certain) domestic workers from general minimum wage standards in many of them may be based on express provisions (as in the UK and US: see Appelbaum 2010, p. 3 et seqq.; Mantouvalou 2015, p. 332) or factually result from the wage setting system (as in Austria, where it is based on collective bargaining with an organisation with mandatory membership for virtually all commercial employers, but not private households). Many of these exemptions are specifically targeted at live-ins, frequently without more specific regulation on how the provision of board and lodging should be factored into their aggregate remuneration. For the US, where the rationale of the broad exclusion of categories of domestic workers[35] from basic labour standards had long been barely discussed (Fischl 2016, p. 27 et seqq.), it appears significant to note that a growing number of states has included domestic workers in the scope of labour law protection via a "domestic workers' bill of rights" since 2010 (Appelbaum 2010, p. 6 et seq.; Rodríguez Ortiz 2018, pp. 4, 16).

Article 14 of the Convention basically stipulates equal treatment also with regard to social security, with specific reference to maternity benefits, but allows for a progressive

implementation for domestic workers. Recommendation No. 201 raises the important issue of cross-border situations, encouraging international agreements on social security, as well as the creation of simplified systems for payment—which may be crucial when the role of employer is imposed on the private household. In practice, the ILO found that 23.1% of domestic workers are legally excluded from entitlements to maternity cash benefits, and 8.4% have benefit rights inferior to other groups of workers (ILO 2021, p. 136). A recent decision by the CJEU illustrates how the exclusion of domestic workers from certain schemes under national law may seem arbitrary when comparing their situation to that of other groups of workers.[36]

Comparison of monetary entitlements is compounded by the frequent failure to distinguish between monthly and hourly wages. Clearly, where monthly wages are found to amount to less than half the average wage in the area at issue (Blofield and Jokela 2018, p. 534),[37] one may imagine that their *hourly* wage is but a fraction of that received by others working normal full-time hours rather than virtually around the clock. The correspondingly low amount of contributions to social security is liable to perpetuate this income gap to times when the worker becomes dependent on monetary benefits.

3.5. Working Time

The issue mentioned in the last paragraph already indicates that the excessive disadvantage faced by live-in domestic workers regularly results from an interaction of wage and working time regulation. According to the ILO's assessment, globally 48.9 per cent of domestic workers do not enjoy a statutory limit on their normal weekly hours (ILO 2021, p. 73). Observers of the situation in various countries present accounts of domestic workers, and most notably live-ins, being subject to excessive working hours (Blofield and Jokela 2018, p. 533; Chung and Mak 2020, p. 810 et seq.; Hopfgartner et al. 2022, p. 301), a lack of regular rest time (Chung and Mak 2020, p. 810 et seqq.; Green and Ayalon 2018, p. 4; Liang 2014, p. 235 et seq.), constant on-call duty at night (Shamir 2013, p. 203), and long travel under difficult conditions (Chau and Schwiter 2021, p. 729 et seq.), which is not counted as working time (Schmidt et al. 2016, p. 743). Dobrina Alekseva's contract stipulated a working time of 30 h per week, and an express instruction to work no overtime—in an employment relationship obliging her to provide comprehensive care for a woman who could not get up or use a bathroom without her help, with an express duty to keep her room's door open all night so as to respond to calls immediately.

Clearly, working time is an area in which full equal treatment of live-in carers may seem unrealistic, making this issue the single most contentious one in the negotiations on Convention No. 189. The approach eventually adopted is correspondingly cautious—with Article 10 of the Convention now providing that weekly rest should be at least 24 consecutive hours, and that standby periods shall be regarded as hours of work "to the extent determined" at the national level. General working time standards at ILO and EU level simply exclude domestic workers from their scope.[38]

Germany is one of those countries where the situation of live-in domestic work was never actually addressed by the lawmaker—resulting in the courts' findings that every hour Dobrina Alekseva was forced to spend at her workplace counted as an hour of work—just as it would be the case for any other worker. Where legislators do give consideration to this type of work—and attempt to make its performance legally possible—they tend to introduce exemptions, which may even amount to a flat-out denial of any limitations to round-the-clock availability (e.g., see, Masuda 2019, p. 13 et seq. for Singapore).

One key issue in this regard is the appreciation of standby and on-call hours. Where national law does not provide specific rules for such hours, courts are confronted with an all-or-nothing choice of either viewing them as regular working time—as in Dobrina Alekseva's case—or, conversely, rest time. The latter was effectively implied by the UK Supreme Court when it found that domestic workers' "sleep-in shifts" with clients were not covered by minimum wage entitlements—so that paying GBP 30 in total for a shift between 22:00 and 07:00, and no additional compensation for the first hour of actual work when

called, was lawful.[39] In the UK, this has raised concerns that the wage improvements which agencies implemented for these workers after the first-instance judgment had considered them entitled to minimum wage back in 2017 may be withdrawn (Butler 2021; Lord 2021). Considering the overall development of the Court's case law, it seems noteworthy that the same Court which insisted that (the male-dominated profession of) Uber drivers be considered working and entitled to minimum wage when waiting for a ride request[40] came to the opposite conclusion for care workers, who—other than drivers—were actually obliged to stay in one place and react upon every single call to work.

Another question deserving attention in relation to live-in worker's schedules is whether and to what extent rotation schemes, which ensure them prolonged uninterrupted periods without work, may compensate for the lack of rest while obliged to be present in the beneficiary's home. Rota systems with comparatively frequently alternating rest/work periods have been established notably in Europe, where they are facilitated by the above-mentioned (supra at Section 3.2) favourable conditions for frequent cross-border movement. For Austria, Germany and Switzerland, observers have found typical work shifts to extend over two to twelve weeks (Chau and Schwiter 2021, p. 727; Leiblfinger et al. 2020, p. 144), with the overwhelming majority of live-in care recipients being assigned two carers who are usually alternating in a two-week or one-month rhythm. Seamless care provision for the beneficiary is ensured as the carer currently on duty is picked up by the same vehicle by which the other carer arrives.

However, even in Europe, schemes based on relatively frequent rotation—and accordingly relatively short periods of non-stop duty for the individual carer—appear increasingly difficult to uphold. Notably, central European workers have become increasingly less willing to seek employment in the industry, at least for the offered pay levels, prompting agencies to move further east in search for workers (Schmidt et al. 2016, p. 744; Turnpenny and Hussein 2022, p. 26). In Austria—arguably the geo-economically most privileged country in terms of sourcing workers from less affluent neighbouring territories—the market used to be dominated by care workers from Slovakia,[41] but at present almost half of them come from Romania. To illustrate the difference: Bratislava is located at one hour's drive from Vienna, whereas the route from Bucharest takes 11 h. Nonetheless, two out of three carers on the Austrian market are still placed in rotations of 2–4 weeks (Hopfgartner et al. 2022, p. 301). Distances between other European countries with a significant demand for live-in carers and possible source countries are generally much longer, making short rotation cycles virtually impossible. Also, the rising German demand has long become impossible to satisfy by supply from the closest possible sending state Poland (Leiber and Rossow 2017, p. 9 et seq.).

In other regions, the physical distance between the countries of origin and work has always made regular rotation illusionary. Worldwide, the majority of social care workers is constituted by Filipino women, who make up the largest group in countries such as Israel, the UK, the US, Canada, Hong Kong and Singapore (Green and Ayalon 2018, p. 1; Masuda 2019, p. 14). Such contexts make it unlikely that workers themselves will insist on protracted rest periods while working abroad—as their loved ones are far away, and their financial means will regularly be insufficient to finance either the travel back and forth or meaningful leisure time activities in the country of work. Rather, their primary goal will frequently be to work and earn as much as possible before returning for good, or at least for a long time. The sacrifice made by these workers in terms of private and family life, and the resulting dangers for their health and wellbeing, can barely be fully apprehended based on the numerous individual accounts reported in the pertinent empirical literature (see Ayalon and Rapolien 2021, p. 5 et seqq.; Liang 2014, p. 229 et seqq.; Rodríguez Ortiz 2018, p. 1 et seqq.).

3.6. Enforcement

Convention No. 189 evidences a keen awareness of the difficulties of enforcement for a group so inherently characterised by its much-cited "invisibility" (Blofield and Jokela

2018, p. 532; Menon 2020). Article 18 requires that its provisions be implemented "through laws and regulations, as well as collective agreements or additional measures consistent with national practice"; Article 8 calls for measures that contribute to ensuring their effective application to migrant domestic workers. Article 7 mandates workers' information on their terms and conditions of employment "in an appropriate, verifiable and easily understandable manner", preferably through written contracts, and Recommendation No. 201 encourages the use of wage statements and working time records. Article 16 demands domestic workers' "effective access to court, tribunals or other dispute resolution mechanisms", Article 17 "effective and accessible complaints mechanisms" and Article 15 "adequate machinery and procedures [. . .] for the investigation of complaints, alleged abuses and fraudulent practices". Regarding the particularly sensitive issue of labour inspection, though, Article 17(2) limits itself to maintaining that national law "shall specify the conditions under which access to household premises may be granted, having due respect for privacy".

In practice, respect for privacy is clearly a key issue, apart from the sheer practical problems, which prevent the establishment of ordinary inspection action to verify compliance with labour law in domestic work (Romero 2012, p. 55; Fischl 2016, p. 49; Green and Ayalon 2015, p. 472). Various countries' laws simply exclude domestic and care work from the mandate of the labour inspectorate in the first place (Hopfgartner et al. 2022, p. 301). Insofar as lawmakers strive to establish functional equivalents, e.g., in the framework of quality visits as part of a long-term care system, day-to-day practice regularly indicates a light-touch approach unlikely to lead to the condemnation of an agency for non-compliance (Schmidt et al. 2016, p. 744). Even more substantial doubts are raised in relation to legal systems which outsource control activities to the agencies placing the workers, for whom a clear conflict of interest can be assumed in relation to this function (Green and Ayalon 2018, p. 8).

As a result, the pertinent literature on various countries has regularly characterised oversight and enforcement as "minimal" or "(virtually) non-existent" (Green and Ayalon 2015, p. 471; Masuda 2019, p. 19; Shamir 2013, p. 203), and the likelihood of an individual arrangement to be subject to enforcement proceedings as "vanishingly small" (Fischl 2016, p. 48). Many observers have few doubts that the overwhelming majority of those arrangements is riddled with (partly gross) violations of the applicable law (Leiber and Rossow 2017, p. 10 et seq.; Shamir 2013, p. 198). Informal domestic work is widespread in effectively every single country, and estimated to constitute the majority of arrangements in many of them (Blofield and Jokela 2018, p. 536; Razavi and Staab 2010, p. 415).[42]

In this context, many commenters identify collective organisation as the most promising pathway to ensuring compliance with the law (and pushing for regulatory improvements: Fischl 2016, p. 48 et seq.). Yet, also in this regard, domestic workers are in a particularly disadvantaged position when aiming to organise, in relation to almost any other profession. This starts from legal hurdles, as domestic workers may find themselves excluded from collective bargaining rights for various reasons as discussed supra—illegality of stay, informality of the employment relationship, categorisation as self-employed or specific exemptions (e.g., Fischl 2016, p. 32 et seqq.; Masuda 2019, p. 13 et seq.; Rodríguez Ortiz 2018). On top of such legal barriers, numerous accounts illustrate the practical difficulties of unionisation (e.g., Appelbaum 2010, p. 5; Mantouvalou 2015, p. 332; Turnpenny and Hussein 2022, p. 24), which—beyond the common problems of lack of knowledge and fear of job loss or expulsion—include difficulties of networking among a workforce characterised by isolation (Fischl 2016, p. 51; Green and Ayalon 2015, p. 474 et seqq.), but notably also the sense of responsibility that makes many shy away from considering strike action that would amount to abandoning their helpless clients (e.g., Mantouvalou 2015, p. 331; Shamir 2013, p. 203).

And yet, a number of impressive results have been reported in relation to domestic workers' collective organisation and the impact of unions from different parts of the world. For Italy, Meyer (2015, p. 2 et seq.) notes that unions play an invaluable role by offering

counselling and support for the legalisation of informal work relationships. In Hong Kong, civil society has long been actively involved in the push for reforms of a system riddled with exploitation, and workers' representatives have an active voice in this debate (Masuda 2019, p. 24). The number of organisations promoting the rights of domestic workers in the US has been growing fast and steadily (Appelbaum 2010, p. 7). Dobrina Alekseva's judicial action, initiated in 2018, was moved forward by the German trade union movement, which also provided legal aid (Scheiwe 2022, p. 86).

Fischl (2016, p. 40 et seqq.) details an impressive story of political victories in favour of domestic workers in more than half of states across the US. One of the key conclusions drawn based on that development concerns the importance of "creating an employer" for purposes of collective bargaining. In other words, while the representation of care beneficiaries is important for a bargaining process that brings the relevant interests to the table, it is crucial for workers to have a professional counterpart who is actually in a position to implement systemic change. Ideally, this may be a public entity whose role in financing and supervising care arrangements enables it to determine the applicable conditions (ibid., p. 46). In countries where the state does not assume such a role, it may be very difficult to make private agencies form a bargaining unit for negotiating collectively with care workers, notably if the latter cannot mount a believable threat of strike action.[43] Considering that formal rights to collective bargaining regularly exist only in relation to the legal employer, this underlines once more the importance of the above-discussed (supra at Section 3.3) classification of contractual relations and identification of the employer.

Perhaps most remarkably, domestic workers have managed to organise in every single country in Latin America—the region where employment in private households is more common than in any other (Blofield and Jokela 2018, p. 537 et seqq.). The International Trade Union Confederation (ITUC) reported in 2013 that domestic workers' unions had been established in Paraguay, the Dominican Republic, Egypt, Angola and Sri Lanka (see Oelz 2014, p. 164). Unions from that region were particularly instrumental in the establishment of the international cooperation which led to the foundation of the International Domestic Workers Federation in October 2013 (IDWF 2014). Effectively, international cooperation between this and various other movements has been the driving force behind the drafting of Convention No. 189, which entered into force in 2013.

4. Discussion

In the end, the fact that Dobrina Alekseva could secure a right to be paid close to EUR 100,000 for the two years in which she spent most months working non-stop is due, more than anything else, to the fact that Germany's approach to its private home care market has long come down to a pretend-you-don't-see-it strategy.[44] The country's LTC insurance has been expressly designed to provide only partial relief for the costs faced as a result of dependence on care (Leiber and Rossow 2017, p. 6). Around 3.3 million individuals, i.e., four out of five of those with a recognised need for care, are cared for in their homes, and less than one million of them receive any in-kind outpatient services. The rest claim exclusively cash benefits, and need to arrange their care informally—just as those hundreds of thousands whose care needs are considered below the threshold for receiving benefits, or who have never applied for an assessment (which may be expected to occur particularly frequently in cases of dementia).[45]

The number of care agencies in Germany is unknown, for lack of a central registry or database; crude online research found advertising stemming from at least 70 distinctive agencies back in 2008; estimates put the number at 250 to 300. The number of carers can only be roughly estimated and is believed to amount to "at least 100,000–200,000" (Leiber and Rossow 2017, pp. 3, 13). While the previously common practice of advertising these carer's services as "24-h care" has in the meantime been actively discouraged by the sector's most representative association (ibid.), one may doubt whether this has corresponded to any actual change in expectations that a live-in carer is essentially available around the clock when needed.

To illustrate the financial means needed to finance legal 24/7 care service in Germany, it suffices to point out that four full-time workers are basically needed to cover all the hours there are in one month. If those four workers are paid the minimum wage—which rose to EUR 12 per hour as of 1 October 2022[46]—this equals an amount of EUR 8640 for a 30-day month, with additional costs for taxes and social security contributions (half of which—over 20% of the gross wage—are borne by the employer). Overall costs would thus approach EUR 10,000 per month in cases where only a negligible number of hours is covered by professional care received as an in-kind insurance benefit and/or informal family care. At the same time, average pension levels in 2021 have ranged from EUR 1249 per month for male pensioners in former West Germany to as little as EUR 741 per month for female pensioners living on the territory of the former GDR. In 2022, beneficiaries with substantial care needs (categories 2–5) are entitled to cash benefits between EUR 316 and EUR 901.[47] In other words, live-in care should in theory be affordable only to a very small segment of the wealthiest households, rather than an industry catering to the middle class. The fact that much broader affordability is achieved via systematic violations of basic labour standards is by no means a new finding, but a conclusion drawn by the German consumer organisation foundation years ago for all of the 13 agencies it observed (see Stiftung 2017).

Examples of countries which have consciously implemented reforms that make legal live-in care affordable for a significant share of care recipients show that this can bring certain major improvements also for the workers involved.[48] Such improvements have, however, typically been a far cry from equality with "regular" workers as regards pay, social security and working time. Austria chose this path back in 2007, in the framework of a large-scale amnesty programme for formerly informal (illegal) live-in care posting workers from neighbouring countries.[49] The system put in place at that point constitutes an exception in Europe in terms of the explicit nature of including live-in care arrangements in the state's LTC policy (Schmidt et al. 2016, p. 742). While the provision of publicly provided outpatient care services remains underdeveloped, fragmented and subject to high out-of-pocket expenditure to this day (Pichlbauer 2018, p. 15 et seq.; Schmidt et al. 2016, p. 742 et seq.), a combination of higher pension levels,[50] generally higher cash benefits[51] and a special subsidy for live-in carers[52] enables a (relatively speaking) larger share of households than in Germany to invest substantially more into privately organised live-in care.[53] The fact that wage offers have improved after the introduction of the special subsidy is in fact one of the ways in which care workers report to have benefitted from the reform, apart from obtaining social security coverage, a contractual framework with clearer rights and remedies for workers and escaping the uncertainties and anxieties of working irregularly (Schmidt et al. 2016, p. 756 et seqq.). Yet, any such wage improvements are due to market forces (high demand coupled with enhanced ability to pay) rather than any legal entitlement to a minimum wage for live-in carers.[54] Accordingly, actual incomes vary widely (Hopfgartner et al. 2022, p. 306; Schmidt et al. 2016, p. 752).

Another internationally much noticed case of express inclusion of live-in care services into the state's social policy approach to LTC is that of Israel, where every severely impaired elderly person is entitled to a generous (about 70%) state subsidy for hiring a live-in carer (Green and Ayalon 2018, p. 2). It is one of the few areas for which work permits are effectively distributed without an upper cap. Domestic workers are entitled to the monthly minimum wage, but no overtime pay, and can legally face a deduction of up to 25% for board and lodging in the client household (Shamir 2013, p. 195 et seq.). In the UK, as the second largest European receiving country of migrant carers, domiciliary care represents half of care jobs, with the majority of care arrangements funded through cash benefits, while 35–40% remain entirely self-funded, including a small but growing live-in sector (Turnpenny and Hussein 2022, p. 24 et seqq.). In the US, the growth of the sector was crucially connected to the expansion of Medicaid funding for live-in arrangements (Fischl 2016, p. 36).

This is not to say that specific consideration in a country's policies is a sine qua non for a large-scale domestic care market to develop. Apart from the situation in Latin America—

where the affordability of domestic work is notably due to particularly pronounced income inequalities (Blofield and Jokela 2018, p. 531)—Italy may constitute a particularly illustrative case. The expansion of migrant care in Italy to levels unparalleled in Europe (see supra at Section 3.2) has happened in a context of a fragmented (and partly non-existent) policy approach to LTC, aided by various cash benefits targeting the old, poor and disabled (Lamura et al. 2010, p. 2 et seq.). A similar situation of an expanding domestic care market developing outside state intervention or supervision is described for Spain (Romero 2012, p. 51; Schmidt et al. 2016, p. 758). But even in the minority of countries where the state offers a rather comprehensive set of in-kind LTC benefits, households may prefer to hire a live-in carer so as to ensure around-the-clock care rather than a combination of visiting services for the beneficiary—as illustrated for Belgium by Hoens and Smetcoren (2021). Since, in this case, the costs for the carer will need to be paid largely out of pocket, wage offers may turn out particularly low—making live-in care a more rare but particularly precarious form of employment in those countries.

5. Conclusions

What seems to be missing from many countries' policy approach to live-in (care) work is an honest conversation about the interests involved and the sacrifices to be tolerated in relation to workers, beneficiaries, relatives and the other public and private stakeholders. Dependence on care is a phenomenon of rapidly mounting importance in societies characterised by rising life expectancy, pushes to de-institutionalise LTC and a dwindling likelihood of informal care by family members to be an option. At present, all too many jurisdictions seem to avoid this conversation, by providing no or insufficient options of in-kind benefits for those dependent on care, and leaving it to the market to come up with "solutions". Thereby, a blind eye is turned on the fact that the very concept of live-in work as an instrument to ensure care provision for the average care-dependent person is almost inevitably conditional on a blatant disregard of core protective regulations applicable to labour relationships.

Existing discussions about the regulation of care work tend to be characterised by a discourse which plays off one vulnerable group against the other (Shamir 2013, p. 196), pitting advocates of workers' rights against those of protection for the frail and disabled, and/or of women's liberation from informal care obligations for their family members. This has resulted in the failure of many an attempt to regulate labour rights for domestic workers,[55] and observations about states deliberately sidestepping their own labour regulations (Razavi and Staab 2010, p. 418). Consequentially, the market for live-in care services has more often than not been left to develop in the grey economy, characterised by informal channels, a lack of comparable information and, as a result, competition on price only, which almost inevitably triggers a race to the bottom in terms of both care quality and worker protection (Schmidt et al. 2016, p. 747). The role of cash-for-care benefits in this context is ambiguous: while these enable more families to offer, if not fair remuneration, then at least a living wage to live-in carers, they are also liable to contribute to the expansion and "normalisation" of live-in care work as the answer to gaps in formal LTC provision. And while superficially advantageous for the beneficiaries and their families, who obtain access to an affordable form of comprehensive care, it has been cautioned by various observers that care quality is suffering significantly in a context marked by often insufficient training and high turnover among the workforce (Shamir 2013, p. 198; Turnpenny and Hussein 2022, p. 24).[56] This comes on top of the inherent uncertainty and anxiety connected to entering into an agreement which beneficiaries may sense to be concluded in violation of a number of legal norms.

The COVID-19 crisis has evidenced just how important live-in care work had become for various countries' approaches to LTC over the past years. Leiblfinger et al. (2020) describe how those countries struggled to uphold care provision in a context where the smooth, constant cross-border rotation of tens of thousands of carers came to a halt, and every exchange signified a potential risk of infection for a highly vulnerable population of

care recipients. All in all, the situation was marked by much declaratory recognition for the sacrifices made by carers who agreed to extend their rotas and were put through agonising procedures of isolation, testing, extended travel through particularly established routes, etc., but little actual support or monetary recognition for additional strains (Schmidt et al. 2016, pp. 744, 753). An issue barely ever mentioned in the discussion is the flip side of one country's reliance of foreign labour in terms of the care drain produced in the countries of origin (see Firus et al. 2017, p. 9 et seqq.; Ayalon and Rapolien 2021, p. 2).

The German Federal Labour Court ruling in Dobrina Alekseva's case has by far not been the only judicial body to expressly call for the legislator to resolve a situation in which widespread illegal practices are effectively a precondition for the system to work as it does (cf. Blofield and Jokela 2018, p. 532). Rarely do courts have the power to force legislative change—one of those rare examples being the Colombian Constitutional Court in 1998 (see Blofield and Jokela 2018, p. 532). But what could a fair, legal and transparent way forward in this matter look like?

While there is clearly no universal answer to this question, an imperative starting point would seem to be an LTC policy approach which fully acknowledges the consequences which the design of benefit options has on the labour market. The increasingly popular use of cash benefits amounts to a responsibilisation of beneficiaries (Christensen and Manthorpe 2016, p. 137; Turnpenny and Hussein 2022, p. 24), which dilutes the visibility of the fact that these benefits are regularly far below the level needed to cover actual care needs by hiring professional labour. The truth that social security systems can politically afford to provide such partial benefits—which would be unthinkable in relation to, say, healthcare benefits in many of the countries at issue—bears proof of the expectation that care services will as a rule be provided by (regularly female) family members, and that the value of such service is but a fraction of any "regular" work on the labour market. As long as this uncomfortable truth is not confronted in policies, it seems difficult to develop an approach to the growing number of situations in which the beneficiary's family situation does not conform to such expectations.

Moreover, there is a need to examine the "win–win claim" relating to cross-border care work, i.e., whether and under what preconditions all interested parties benefit from structures matching care-dependent households in richer countries with jobseekers from less affluent countries willing to engage in care work. Undeniably, all parties may benefit in ways that could be hard to achieve by any other means. Beneficiaries gain access to a wholistic form of care at home, which may be easier to accept (notably for demented patients) than either institutional care or a piecemeal model of visiting support services. Their relatives are largely relieved from the burden of ensuring and coordinating continuous care, which facilitates female labour market participation (Meyer 2015, p. 3 et seq.; Shamir 2013, p. 200 et seq.). The host state can avoid paying the true costs of care, or sustaining the political repercussions of failing to do so. Workers may be able to earn an aggregate income well above what they could achieve on the local labour market in their country of origin. And sending countries may benefit significantly from remittances which transfer substantial amounts of money from richer countries to their territory (e.g., Chung and Mak 2020, p. 810; Firus et al. 2017, p. 9 et seqq.; Leiber and Rossow 2017, p. 3). At the same time, there is abundant proof that, in a context of low-cost competition, the reality of live-in care work is all too often far from achieving either the quality promised to the clients or the decent work standards expected by workers. And notably for the workers, the non-negligible initial investment connected to becoming a care worker may make it very hard to backtrack from this choice.

For the receiving countries, the question remains whether a democratic society should tolerate that a segment of the economy fulfilling a vital societal role is effectively unconceivable without a blatant disregard for otherwise recognised labour standards. Legally speaking, even if a state makes sure to "back up" such deviations by express legislative exemptions, the fact remains that each of those exemptions is liable to violate the prohibition of indirect sex discrimination as recognised in supra- and international law (ILO 2012a).

For some of these exemptions, a legally viable justification may be given. For instance, the worker's own interest in keeping their stay abroad short should justify work beyond the generally applicable maximum thresholds of daily and weekly working hours, as long as at least some degree of regular interruption of around-the-clock availability is ensured. Regarding remuneration, providing lower pay rates for standby duty than for active work appears justified—though only to the degree that the laws of the state in question would allow the same for standby work in other sectors of the economy. As regards migration law, it seems difficult to justify rules which bar care workers from seeking a more permanent trajectory of work and stay in the host country—e.g., if a former live-in carer uses the socio-linguistic skills acquired in that profession to apply for a job which allows her to move into independent accommodation and potentially bring her family. In practice, it seems that a number of former live-ins are ready to continue to work in the domestic work sector, but as live-out workers who are not forced to give up on their own private and family life for protracted periods (Romero 2012, p. 53; Rodríguez Ortiz 2018; Turnpenny and Hussein 2022, p. 23 et seqq.).[57] Thereby, live-in domestic work could actually act as a stepping stone for those willing to engage in work for which there is a high demand, but who would face difficulties to immediately establish themselves on the general labour market of the country at issue.

However, such models—which would offer a long-term perspective to those ready to subject themselves temporarily to the inherent deprivations connected to live-in domestic work—are frequently thwarted by the national legal context. This is not only true for those countries which simply exclude domestic workers from the long-term immigration opportunities offered to other migrant workers as described supra at Section 3.2. Rather, the fact that states often choose a hands-off approach as to how care benefit recipients organise their care prevents the emergence of effective structures which ensure that live-in care is only supported in those cases where it appears as the only or the most reasonable option. One of the few states to have put in place such structures is Israel, where the decision on whether a beneficiary should be entitled to live-in or live-out support is an inherent part of the procedure of assessing care needs. This has resulted in a state-sanctioned care market which, while still heavily relying on females with a migration background, aims to avoid situations in which live-in care is chosen for lack of other options. According to Green and Ayalon (2018, p. 1), in the current market about 70,000 persons providing (usually part-time) live-out care work compare to about 48,000 live-in carers. This is not to say that the Israeli system should more generally be seen as a positive role model (notably with a view to the severe migration law restrictions which cause an estimated 12,000 workers to opt to stay illegally), but it shows that a state's active involvement could contribute very significantly to avoiding workers' unnecessary trapping in live-in arrangements, without depriving them from the possibilities of using cross-border care work for improving their incomes.

Among the many aspects deserving mention in this context, one may note for instance that an exploration of digital and remote contact options appears to remain outside consideration in most cases. In practice, a large share of live-in agreements are reported to be arranged for demented beneficiaries (see, e.g., Leiblfinger et al. 2020, p. 147)—who may not even face mobility restrictions or comparable conditions which would actually make around-the-clock availability of physical support necessary. And while it self-evidently constitutes a challenge to familiarise a demented person with any form of unfamiliar technology, numerous studies (e.g., Astell et al. 2019; Lorenz et al. 2019; Moyle 2019) indicate the potential of the development and mainstreaming of instruments improving safety, quality of life and effortless establishment of contact, which could enable many to continue to live on their own, complemented by various visiting services. Solutions relying on real-time connectability could enable the seamless coordination of different elements of well-organised integrated care—including remote help for simple issues as well as requesting the services of household or healthcare professionals, neighbourhood volunteers or family members when needed. Considering the much-cited "uberisation" of

the economy in virtually all other economic sectors, the hitherto very limited attempts to optimise technological solutions to ease the burden of carers are remarkable. More than anything, it bears evidence of, on the one hand, the public's general unlikeliness to lead or even steer the development of technologies that turn out vital for public infrastructure,[58] and, on the other, the fact that providers in the present market have little incentive to look for smart solutions—as long as the "simple and secure" option of relying on "all-in" care by workers with little bargaining power is available.[59]

In conclusion, while the development of valid approaches to the organisation of LTC will require more effort and probably phases of trial and error, there are indications that ending the most blatant forms of workers' exploitation in this context would neither require a large-scale move to institutionalisation against the will of care-dependent individuals, nor the organisation of four full-time equivalents in order to provide around-the-clock care for each of those individuals under the general rules of labour and social security law. The latter would in fact hardly be sustainable either from a public finance point of view nor with a view to the immense labour supply which would be required in a sector already riddled by serious staff shortages. Especially with a view to such shortages, it would seem that governments not "intrinsically motivated" to address workers' exploitation would also be well advised to start looking for solutions likely to be sustainable in the longer term, so as to design care work as a rewarding profession which workers do not choose mainly out of desperation or lack of other options.

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Notes

1 Bundesarbeitsgericht, judgment of 24 June 2021, 5 AZR 505/20, ECLI:DE:BAG:2021:240621.

2 See, e.g., Hopfgartner et al. (2022, p. 301) for Austria; Chowdhury and Gutman (2012, p. 217) for Canada, Iecovich (2011, p. 622) for Israel; Agrela Romero (2012, pp. 47, 51) for Spain; Turnpenny and Hussein (2022, p. 24) for the UK.

3 See, e.g., Chowdhury and Gutman (2012, p. 222) for Canada; Agrela Romero (2012, pp. 47, 50) for Spain.

4 Including both the family members sometimes acting as contract partners/employers (e.g., Meyer 2015, p. 6).

5 Cf. also the concept of replacement migration as coined by (UN-DESA 2001).

6 Based on a review of the pertinent literature, Oelz (2014, p. 161) concludes that "discrimination based on sex, race or social origin, as well as the historic roots of domestic work [. . .] have influenced and shaped social attitudes and practices vis-à-vis domestic workers, including their exclusion from the labour rights enjoyed by workers in other economic sectors".

7 ILO estimates of 2021 put the overall number of domestic workers worldwide at 75.6 million in 2019, up from 53 million in 2010, indicating that those numbers had more than doubled since 1995. Of them, 76.2 per cent were women—a slight decrease from the 83 per cent estimated for 2010 (ILO 2021, p. 10 et seqq.; ILO 2013, p. 20 et seqq.). For ongoing trends in the further development, see (Blofield and Jokela 2018, p. 532; Bauleo et al. 2018, p. 450).

8 Cf. the situation in Latin America, where richer households are still regularly recruiting live-in domestic servants for varied household tasks—in over 95% of cases even in their own country (Blofield and Jokela 2018, p. 533). The just-cited estimate by the ILO (ILO 2021, p. 12 et seqq.) points to a proportion of one in five women in paid employment Latin America engaged in domestic work—compared to only one in 22 worldwide.

9 For instance, in Hong Kong, MDWs make up more than 4% of the country's general population (see Chung and Mak 2020, p. 804).

10 A majority are found to be in their thirties by Chung and Mak (2020, p. 810); Iecovich (2011, p. 622) indicates a mean age of 36 years; and (Bauleo et al. 2018, p. 452) even reports that 45% are under 30 years in Argentina, while only 15% are 50 years or older.

11 See Hopfgartner et al. (2022, p. 313 et seq.) on Austria, Chowdhury and Gutman (2012, p. 225 et seqq.) on Canada, Meyer (2015, p. 7) on Italy and Iecovich (2011, p. 622) on the UK.

12 e.g., (Lamura et al. 2010, p. 4) on Italy.

13 [2006] 43 EHRR 16, 73316/01, [2005] ECHR 545, [2005] 20 BHRC 654.

14 For more examples and details, see (Oelz 2014, p. 146).

15 e.g., from legal instruments on maternity protection, night work, work accidents and working time, in a way characterised as "fragmented and illogical" by the ILO's Governing Body (Minutes of the 111th Session, Mar. 1950, p. 136). See also (Mantouvalou 2015, p. 353).

16 35 ratifications. See https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460 (accessed on 4 August 2022).

17 The ILO's membership extends to 187 of the 193 member states of the UN—the exemptions being Andorra, Bhutan, the DPRK, Liechtenstein, Micronesia, Monaco and Nauru.

18 See infra at Section 3.3 regarding the characterisation of the contractual relationship. Considering the CJEU's approach to the notion of worker under EU law (e.g., cf. case C-232/09–Danosa, ECLI:EU:C:2010:674), it seems hard to see how the criterion of "direction and control" should not be fulfilled in a relationship which is so crucially dependent on one party's "all-in" commitment to do whatever is necessary to keep the care beneficiary healthy, safe and comfortable.

19 In this case, the question whether the employment contract was genuinely not about work meant to take place habitually in Germany (see Article 8 "Rome I" Regulation No 593/2008) was not raised by the claimants. In many cases, the genuineness of posting may be questionable in practice.

20 See Article 12 of Regulation 883/2008.

21 Other labour rights are subject exclusively to the laws of the country of origin at least initially for 12–18 months, and in case of dismissal protection and second-pillar pension rights even indefinitely (as long as the posting is still considered temporary).

22 e.g., Agrela Romero (2012, p. 52) for the European context; Green and Ayalon (2018, p. 1) for Israel.

23 Note that demand for such services is usually most pronounced in societies whose economic and societal development makes it unlikely that live-in care work would seem an acceptable prospect for the resident workforce (cf. Iecovich 2011, p. 617; Green and Ayalon 2015, p. 471).

24 See OECD statistics at https://stats.oecd.org/Index.aspx?DataSetCode=HEALTH_WFMI# (accessed on 4 August 2022).

25 See the Home Support Worker pilot programme introduced in 2019.

26 See also the examples brought by Masuda (2019, p. 1 et seqq.) regarding the gruelling abuse which care workers will suffer rather than trying to return to their family with no plan how to provide for them.

27 See Articles 45 and 56 of the Treaty on the Functioning of the European Union. Note that the accession of 13 countries to the EU in the last three "enlargement rounds" between 2004 and 2013 has meant the legalisation of stay for countless active live-in carers. See also (Leiber and Rossow 2017, p. 7).

28 See Article 16 of Directive 2004/38/EC.

29 Higher Regional Court Frankfurt 1. Criminal Division, verdict file No. 1 Ws 179/13.

30 See the 2007 Hausbetreuungsgesetz. Case law has taken a similar stance as in Germany (i.e., considering self-employed work conceivable in theory without ever confirming it in a particular case)—see the Supreme Court's judgment in 8ObA17/11z. Cf. (Hopfgartner et al. 2022, p. 301; Sell 2021; Markovic 2021).

31 For Israel, see (Iecovich 2011, p. 618); for different European contexts, e.g., (Leiber and Rossow 2017, p. 3; Agrela Romero 2012, p. 51; Chau and Schwiter 2021, p. 725).

32 Note that posted workers remain insured in their state of origin for up to two years before having to enrol for social insurance in the country of work, according to Regulation 883/2008. On the cost-saving potential of this rule for internationally active agencies (regime shopping), see also (Leiber and Rossow 2017, p. 8 et seqq).

33 The latter is actually a gamble not only for the employer but also for further parties such as the just-mentioned German agency: since the entry into force of Directive 2014/67/EU, they arguably run the risk of being identified as a main contractor, which is (partly) liable for outstanding wage and social security payments from a subcontractor (the foreign agency acting as employer: see Article 12).

34 A recent ruling of a Dutch second-instance court (Gerechtshof Amsterdam 13 September 2021, ECLI:NL:GHAMS:2021:2741) seems to be the first to consider a group of domestic workers (cleaners working via the platform Helpling) as temporary agency workers. For a discussion of the judgment's significance, see (Hiessl 2022a, p. 496).

35 Note that live-in care work in the US is institutionalised in the Medicaid benefit system, so that a major share of these workers do not fall under the exemptions discussed here.

36 CJEU, case C-843/19, January 2021, ECLI:EU:C:2021:55.

37 Cf. also Turnpenny and Hussein (2022, p. 24 et seq.), who refers to average pay levels close to the minimum wage in the social care workforce as a whole—in a context where coverage by minimum wage regulation is reserved for live-outs.

38 See, e.g., Article 1(3) of Directive 2003/88/EC i.c.w. Article 3(a) of Directive 89/391/EEC.

39 Royal Mencap Society v Tomlinson-Blake & Shannon v Rampersad and another (T/A Clifton House Residential Home) [2021] UKSC 8.

40 Uber BV & Ors v Aslam & Ors [2021] WLR(D) 108, [2021] ICR 657, [2021] UKSC 5.

41 With a share of 70% still in 2013 (Schmidt et al. 2016, p. 744).

42 Note that, as stressed supra at Section 3.2, there may be important factors drawing or pushing domestic workers to the grey or black economy (Leiber and Rossow 2017, p. 6).

[43] It may be worth noting, though, that care agencies have formed interest associations in some countries, and that, e.g., in Germany those have developed voluntary codes of conduct which also concern the treatment of their workers. See (Leiber and Rossow 2017, pp. 4, 13).

[44] Political actors had largely ignored the issue before the judgment, and the changes subsequently announced in the current government's coalition agreement do not seem to have been pursued further so far (see also Scheiwe 2022, p. 89).

[45] See statistics for 2019 at https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Pflege/Publikationen/Downloads-Pflege/pflege-deutschlandergebnisse-5224001199004.pdf?__blob=publicationFile (accessed on 4 August 2022). Schmidt et al. (2016, p. 75) estimate that around 2–3 per cent of LTC beneficiaries spend their cash benefits to employ live-in migrant carers.

[46] See the Gesetz zur Erhöhung des Schutzes durch den gesetzlichen Mindestlohn.

[47] Although beneficiaries may opt to transform 40% of the value of non-used in-kind benefits (i.e., between EUR 28,960 and 83,800) into a cash benefit, that money can only be used for accredited providers, which excludes the vast majority of live-in care agencies.

[48] e.g., (Razavi and Staab 2010, p. 416) on South Africa and Argentina; (Meyer 2015, p. 3) for Italy.

[49] By means of a constitutional law amendment (see BGBl. I Nr. 43/2008) as well as a dedicated law on live-in care (Hausbetreuungsgesetz, BGBl. I Nr. 33/2007). See (Hopfgartner et al. 2022, p. 301; Schmidt et al. 2016, p. 742).

[50] EUR 1.355 on average in 2019.

[51] EUR 165.40-1776.50, dependent on the assessment of care needs. See https://www.oesterreich.gv.at/themen/soziales/pflege/4/Seite.360516.html (accessed on 4 August 2022).

[52] Twenty to thirty per cent of the costs. In 2015, it was paid to close to 22,000 beneficiaries. This amounts to the clear majority, but not all of presumably about 30,000 beneficiaries who are cared for by the currently registered live-in carers in rotation. Conversely, almost 100,000 persons with a need for four hours or more of care per day did not make use of live-in care (see Pichlbauer 2018, p. 14; Schmidt et al. 2016, p. 744).

[53] Sixty thousand carers are registered for work in Austria. Many (though not all) of them are placed by 886 agencies. See (Hopfgartner et al. 2022, p. 301 et seq).

[54] Even where carers are not (as in a majority of cases) classified as self-employed, the collective bargaining-based Austrian minimum wage model excludes those whose employers are private individuals and thus exempt from affiliation in the Economic Chamber.

[55] See, e.g., the repeatedly rejected legislative proposals in Taiwan (Liang 2014, p. 239).

[56] Not to mention the risk that a carer collapsing under the excessive strains put on her poses a risk in terms of dangerously neglecting or even harming the care-dependent person (Liang 2014, p. 231 et seqq.).

[57] Turnpenny and Hussein (2022, p. 32 et seq.) describe how having gone through an initial phase of live-in domestic work is part of the arrival narrative of many of those regular UK residents working in the care sector.

[58] Up to the point where it has arguably become difficult to re-establish public oversight over vital services in sectors such as communication and transport in the face of the powerful position of multinational tech giants.

[59] Note that the use of "Uber-style platforms" (Turnpenny and Hussein 2022, p. 24) is not alien to care agencies in the current market, and neither are references to software with "secret algorithms" for the perfect matching of supply and demand (Chau and Schwiter 2021, p. 728 et seq.). Yet, any role of such technologies seems limited to the initial matching of workers and clients. An interesting alternative account of self-organised placement services by union-like structures, which particularly consider worker's interest to be able to change to a different client, is provided by Fischl (2016, p. 43). Note, however, that the mechanism in question was based on a "fair share" financing mechanism, which was eventually not upheld by pertinent case law (ibid., pp. 43, 53).

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