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Empresas Transnacionales Y Debida Diligencia

1. Estamos instalados en el tráfico de las palabras que definen los procesos económicos y sociales más recientes y le dan sentido. La primera de ellas es "globalización". Es un lugar común constatar que la globalización económica y financiera ha alterado una buena parte de los esquemas sobre los que se construye el derecho del trabajo en la medida en que ha desterritorializado el ámbito de aplicación de aquél. Se ha creado "un espacio jurídico global surcado y fertilizado por un flujo normativo de densidad y geometría variable originado por fuentes que, obedeciendo a secretos criterios de ordenación, no se disponen de acuerdo a las seguras jerarquías del tradicional sistema estado-céntrico de la legalidad"[1]. Desde el punto de vista del principio político de soberanía que se puede aplicar al dominio de lo social a través de la mediación de la regulación del trabajo como un elemento básico configurador de la comunidad nacional – estatal que lo mantiene, la globalización ha presionado sobre la territorialidad que está en la base de la soberanía estatal, disolviendo en una cierta medida el paradigma estatal que las sostenía.

Se ha dicho que la globalización se define como un *no limit* o más bien *beyond any limit*[2]. Hay sin embargo una diferencia entre las nociones de límite y de frontera. Un límite es una división física o simbólica que separa dos naciones o territorios. La frontera se refiere a un concepto territorial, es una región o franja que sirve de límite entre dos regiones y define el espacio de intercambio entre ambos territorios. La globalización ha ido construyendo un "concepto de frontera desarraigada de las circunscripciones nacionales" mediante la generación de sistemas regulativos autónomos a través de auto-

[1] Romagnoli, *El derecho del trabajo en la era de la globalización*, en *RDS*, 2003, n. 24, p. 18.

[2] Supiot, *La sovranitá del limite. Giustizia, lavoro e ambiente nell'orizzonte della mondializzazione (a cura di Allamprese, D'Ambrosio)*, Mimesis, 2020, p. 158.

ridades privadas o autorreferenciales que tienen sus propias funciones de frontera, sin que su demarcación coincida la delimitación de los sistemas nacionales[3]. Junto a fenómenos de "desnacionalización" de las transacciones económicas y financieras, la nueva "geografía del poder" se define por la formación de un orden institucional privado proveniente de la economía global que resulta sumamente característico y que se ubica solo parcialmente dentro del sistema internacional, un "orden institucional paralelo" en el que se manejan importantes operaciones económicas y financieras transnacionales[4]. El arbitraje privado como resolución de los litigios intercomerciales, la emersión de autoridades privadas autosuficientes en sectores importantes de la economía global, son manifestaciones de este orden institucional privado intermediario.

2. En este orden global, emerge como sujeto prominente la empresa transnacional. No sólo a través de su capacidad de actuación económica en un espacio sin fronteras, sino por su evidente importancia en los procesos de regulación del trabajo que lo acompañan. Se trata posiblemente del agente hegemónico global más visible , que no sólo evidencia una fuerte capacidad de influencia sobre la producción normativa de los distintos Estados en los que se asientan en materia laboral, sino también sobre en los distintos niveles en que se articulan formas estables y definidas de orientación supranacional o internacional de las políticas estatales en materia social, en gran medida con el apoyo de las instituciones financieras internacionales, como el Banco Mundial o el Fondo Monetario Internacional, o a través de las instituciones de gobierno de organismos internacionales como la Organización Mundial de Comercio, o en fin sobre la propia conformación de la acción y de las políticas en el nivel supranacional de la Unión Europea.

La fuerza simbólica de esta figura del orden global es evidente, y no sólo porque representa la "promesa del poder privado"[5] que desborda cualquier límite, porque la empresa transnacional deviene organizadora total de la producción de reglas en todos los ámbitos que le afectan, también y de manera

[3] Sassen, *Una sociología de la globalización*, Katz ed., 2007, p. 280.

[4] Sassen, cit.

[5] Locke, *The promise and the limits of private power. Promoting labor standards in a global economy,* Cambridge University Press, 2013.

decisiva las que se refieren a la situación laboral de la empresa, más allá de las diferentes normas laborales nacionales que sirven de referencia fragmentada de las condiciones de trabajo y empleo de sus trabajadores en los diferentes lugares en los que ésta se implante. Es asimismo la encarnación de un poder construido de manera autorreferencial sobre su autoridad privada capaz de regular las relaciones laborales en el espacio delimitado por el perímetro de la organización empresarial y productiva tal como resulta diseñado por ella misma, de manera que ese centro de imputación normativo vendría a coincidir con la subjetividad de la empresa y los elementos de cooperación interempresarial que ella misma defina[6].

Posee la virtud de tener múltiples localizaciones, lo que le permite elegir las normas aplicables en materia tributaria, social y ambiental, aprovechando las diferencias normativas que existen respecto al nivel de estándares de trabajo y de protección social en un espacio normativo dividido en Estados como ventajas comparativas en costes de trabajo y en suministro de mano de obra, en un proceso en el que la competencia se ha hecho global y no sólo afecta a bienes o servicios, sino a las normas y ordenamientos jurídicos que se escogen por las empresas transnacionales a su conveniencia en función de su menor coste operativo y social. En ese proceso, los contornos de la empresa se difuminan ahora de manera diferente, porque la Empresa Transnacional es diversa en cada lugar en el que se asiente, puede actuar – y normalmente lo hará – de manera diferente en cada uno de sus emplazamientos, tiene formas jurídicas diferenciadas – sociedades independientes formalmente aunque conectadas materialmente – y sin embargo es la misma empresa, sustancialmente la misma firma, que cobra una fisonomía distinta en cada lugar en donde se materializa / localiza. Por lo demás, cada vez con mayor frecuencia, las corporaciones se estructuran frecuentemente en torno a una cadena de contratas y subcontratas de actividad y de producción, cadenas de valor que a su vez complejizan la figura resultante de la empresa difuminando sus contornos, ante la opacidad y la no trazabilidad de estas cadenas de producción globales.

[6] RODOTÁ, *Diritto e diritti nell'area della globalizzazione*, en SCARPONI (ed.) *Globalizzazione e diritto del lavoro: il ruolo degli ordinamenti sopranazionali*, Giuffré, 2001, p. 43 ss.

3. El crecimiento de la importancia de este fenómeno plantea un problema principal para los juristas y la regulación jurídica. Cómo lograr que la empresa transnacional se haga responsable de los actos que efectúa fuera de las fronteras en las que se asienta la casa matriz de la misma. O, lo que es lo mismo, en qué medida el derecho es capaz de hacerse cargo de toda su "realidad significativa", es decir transnacional, de la empresa, localizando y precisando su "centro de poder" a efectos de fijar obligaciones que aseguren que la empresa responde por su actuación[7]. La cuestión se planteó en un primer momento respecto de la necesidad de hacer cumplir estándares laborales mínimos sobre la base de una consideración universalista de los principios y derechos fundamentales en el trabajo, en cuya determinación la Declaración de la OIT de 1998 desempeñó un rol determinante, que luego culminaría en la elaboración de la noción de trabajo decente como una reivindicación de la dignidad de la persona que trabaja no sólo frente a la capacidad normativa de los estados nacionales, sino también como una exigencia de actuación responsable de las empresas transnacionales como principales actores económicos de la globalización.

La respuesta a esta cuestión se desplazó al espacio de la autorregulación y de la creación de reglas presididas por el principio de voluntariedad, lo que resaltó la importancia de la responsabilidad social de las empresas, primero bajo un formato plenamente unilateral como el que suministraba los códigos de conducta, para posteriormente situarse en un terreno contractual en el que se reconocía la presencia del sindicato internacional como interlocutor y que dio lugar a la conclusión de acuerdos marcos globales de empresa. En este ámbito, la autonomía colectiva global a través de los Acuerdos Marco Globales busca, mediante el acuerdo colectivo, la imputación de responsabilidad mediante el vínculo obligacional que une a la empresa con los sindicatos globales o internacionales. Una responsabilidad que ya no es social sólo sino también contractual, voluntariamente asumida. Por eso son muy importantes los acuerdos globales que definen un mecanismo de extensión de esta responsabilidad a lo largo de la cadena de suministro , porque este objetivo requiere a su vez el establecimiento de obligaciones de información por parte de la empresa en orden a la identificación de las empresas contratistas y subcontratistas, lo que permitirá seguir los caminos que ha recorrido el producto a lo largo de las cadenas de suministro, en lo que se ha venido

[7] VERGE, DUFOUR, *Entreprises transnationales et droits du travail*, en *IR*, 2002, vol. 57-I.

en llamar la "trazabilidad social" de éstos. El esquema regulatorio en estos casos se centra en imponer una "cláusula social" a sus contratistas y subcontratistas para que sometan sus compromisos a la cadena de subcontratas que dependen de sus encargos en el proceso global de producción de bienes o de servicios[8].

El paso es importante porque con esta figura cambia el sentido de la regulación, que no se basa ya en la declaración unilateral de una empresa o grupo de empresas sino en el acuerdo a través de un proceso de diálogo entre la empresa transnacional y la federación sindical internacional – la unión global – sobre condiciones mínimas de trabajo que se deben mantener en cualquier lugar en el que se asiente la empresa, con mecanismos de monitorización de su cumplimiento y seguimiento de los compromisos adoptados. Este fenómeno implica la aplicación de un principio esencial de autonomía colectiva y se basa en la capacidad de control de las empresas en la cadena de valor que éstas sostienen. Además, este desarrollo relativamente lineal del espacio privado de la empresa global como un ámbito de regulación progresivamente atraído hacia la esfera de la negociación colectiva, se ha enriquecido recientemente con nuevas experiencias que han conducido a un acuerdo global multilateral y multiempresa rial que establece la responsabilidad de éstas frente a los riesgos para la salud y la vida de las y los trabajadores de las contratas derivados de sus condiciones de trabajo. Es el caso del Acuerdo Multilateral que tiene su origen en la tragedia de Rana Plaza en Bangladés que firmaron 200 empresas transnacionales del textil y de la moda[9].

4. Es cierto sin embargo que la peculiar estructura de la implantación de la empresa transnacional a partir de la elaboración de una cadena de contratas y subcontratas del producto dificulta seriamente tanto el esquema de la responsabilidad social unilateral de la empresa expresada a través del código de conducta, como la relación contractual fijada mediante el acuerdo colectivo estipulado comúnmente entre las federaciones internacionales de sector

[8] Baylos, *La responsabilidad de las empresas transnacionales en los procesos de externalizacion. Las cláusulas sociales internacionales*, en Monereo, Perán (ed.), *La externalización productiva a través de la subcontratación empresarial*, Comares, 2018.

[9] García-Muñoz, *Acuerdos Marco Globales multilaterales*, en *RDL*, 2015, n. 70.

y la empresa transnacional, puesto que la externalización de la producción también implica la del vínculo responsable. De esta manera, el problema se centra en definir un mecanismo de extensión de esta responsabilidad a lo largo de la cadena de suministro, pero este objetivo requiere a su vez el establecimiento de obligaciones de información por parte de la empresa en orden a la identificación de las empresas contratistas y subcontratistas, lo que permitirá seguir los caminos que ha recorrido el producto a lo largo de las cadenas de suministro, lo que se ha venido en llamar la "trazabilidad social" de éstos.

Ahora bien, lo que se está llevando a cabo a través de este tipo de operaciones es realmente un intento de trasladar al ámbito laboral el marco civilizatorio de alcance universal que obliga a respetar y garantizar los derechos fundamentales de las personas en todo el planeta, también de aquellas que trabajan. En la consecución de este objetivo están interesadas, en grado y condiciones diversas, las organizaciones internacionales de derechos humanos y la OIT, el sindicalismo global y nacional, las ONGs y, posiblemente por motivos distintos de los anteriores, las propias Empresas Transnacionales. Para ellas la confrontación entre sobreexplotación laboral y derechos humanos se presentó en su comienzo como un problema moral – no someter el trabajo a condiciones abusivas, degradantes o nocivas para el ambiente, consideradas como "no éticas" – frente al cual era la empresa transnacional la que debía reaccionar ajustando su conducta a unos estándares éticos que se correspondieran con el respeto a los estándares mínimos que se correspondían con los derechos humanos laborales reconocidos en los textos internacionales vigentes para los estados de la comunidad internacional, porque ese compromiso permitía obtener una reputación en el mercado que fortalecía su posición en el mismo[10]. Es claro que esa concepción unilateralista y autorreferenciada de la empresa transnacional como ordenamiento cerrado, que elabora una noción de responsabilidad moral que compromete a la persona jurídica de la empresa y su propia imagen reputacional, enlaza con la noción del poder privado no comprometido por la intervención estatal o internacional que caracteriza a la empresa transnacional. En una fase posterior, el problema se ha tecnificado mediante los llamados sistemas de certificación y el recurso a las normas de excelencia empresarial, normas ISO, etc., de ma-

[10] Barañano, *Contexto, concepto y dilemas de la responsabilidad social de las empresas transnacionales europeas: una aproximación sociológica*, en *CRL*, 2009, vol. 27, n. 1.

nera que la certificación a cargo de un organismo técnico garantiza las condiciones de "sostenibilidad" o de actuación responsable de la empresa.

5. La entrada en escena de la consideración de la vertiente colectiva de las relaciones laborales y la reivindicación sindical de su presencia en el espacio global ocupado por la empresa transnacional ha supuesto un paso adelante extraordinario, pero la urgencia de involucrar en la respuesta ante las violaciones de derechos humanos por parte de las transnacionales a los Estados, ha generado tendencias en paralelo para que el derecho global de los derechos humanos laborales se reapropie de los mismos mediante la previsión de fórmulas de "anclaje" de éstos en el ordenamiento supranacional europeo como ha propuesto el Parlamento Europeo en un informe sobre las cadenas de subcontratación en las empresas transnacionales del textil, o, de manera más insistente, a través de la disposición de instrumentos internacionales vinculantes que originen obligaciones estatales de vigilancia y control sobre la actuación de las empresas transnacionales en materia de derechos humanos laborales, de manera que por esta vía se complete la efectividad de los estándares de trabajo a los que se ha comprometido la empresa transnacional mediante el acuerdo global con los sindicatos.

Realmente la diligencia debida en derechos humanos se ha convertido en poco tiempo en un concepto en expansión con un elevado grado de aceptación.Y no solo ni exclusivamente por la iniciativa de poner en marcha un tratado internacional vinculante, que se remonta a junio de 2014, aunque el primer borrador se elaboró en 2018[11]. El proceso de discusión de este instrumento internacional que recoja las ideas básicas del Informe Ruggie y las concrete en obligaciones para los Estados garantizadas por sus obligaciones internacionales es lento y no parece por el momento que pueda generar muchos consensos en lo que ya supone la octava ronda de negociaciones en Ginebra. Sin embargo, si se está produciendo un cierto movimiento en el nivel de los ordenamientos nacionales sobre la base de incorporar mecanismos de exigencia de la diligencia debida por las empresas transnacionales en el cumplimiento y garantía de los derechos humanos laborales y ambientales.

La primera y más conocida norma al respecto fue la Ley francesa 2017-

[11] Guamán, González, *Empresas Transnacionales y Derechos Humanos. La necesidad de un instrumento vinculante*, Editorial bomarzo, 2019.

399, de 27 de marzo, relativa al deber de vigilancia de las sociedades matrices y las empresas contratistas, un texto legal cuyo alumbramiento resultó complicado, siendo objeto de la depuración constitucional por parte del Consejo Constitucional y cuyo desarrollo actual ofrece supuestos concretos ante los cuales se han producido fallos judiciales muy interesantes en aplicación de la misma[12], pero a ella han seguido otras iniciativas legislativas en esa misma dirección. Así, la Ley de Debida Diligencia en el trabajo forzoso infantil de Holanda en 2019, o la Ley noruega de Transparencia de las empresas en derechos humanos en el trabajo y condiciones de trabajo decente de octubre de 2021 que ha entrado en vigor en julio de este año, la Ley de Debida Diligencia Corporativa en las Cadenas de Suministro alemana de julio de 2021, cuya influencia sobre la propuesta de Directiva a la que más adelante se aludirá es muy importante, o la propuesta de ley en Holanda que establece reglas sobre la debida diligencia en las cadenas de valor para combatir las violaciones de los derechos humanos, laborales y ambientales en la realización del comercio exterior[13]. Y ello sin mencionar los ejemplos previos y pioneros de la ley de transparencia en las cadenas de valor de California (2010) o las leyes del Reino Unido (2015), o de Australia (2018) centradas en la transparencia de información y fundamentalmente en las cuestiones relativas a la esclavitud moderna.

Es un proceso que también en España se está iniciando. En efecto, en el marco del continuado proceso de rejuridificación de las relaciones laborales que se viene desarrollando en España desde el inicio de 2020 sobre la base de una mayoría social que sostiene el primer gobierno de coalición entre fuerzas de izquierda desde la transición a la democracia, se está también promoviendo un proyecto legislativo sobre diligencia debida de las empresas transnacionales en derechos humanos, donde se define ésta como "un proceso continuo, de ejecución sucesiva, que realiza una empresa de una manera prudente y razonable, a la luz de las circunstancias y en el sector en que opera, para hacer frente a su responsabilidad de respetar los derechos humanos y el medio ambiente. La diligencia debida variará de complejidad en función del tamaño de la empresa, del riesgo de graves consecuencias negativas para los derechos humanos y el medio ambiente, y de la naturaleza y el

[12] DAUGAREILH, *La legge francese sul dovere di vigilanza al vaglio della giurisprudenza*, en *DLRI*, 2021, vol. 43, n. 2, p. 170.

[13] Ley de Conducta Empresarial Internacional Responsable y Sostenible, también de 2021.

contexto de sus operaciones". Coherentemente, el plan de diligencia pretende "identificar, evaluar todos los efectos adversos; prevenir y mitigar los efectos adversos potenciales; y cesar y en su caso reparar los efectos adversos reales sobre los derechos humanos, el trabajo decente y el medio ambiente de sus propias actividades, de las actividades de sus filiales y de las que se realicen a lo largo de su cadena de valor".

El texto aprovecha la experiencia de las normas comparadas y, en esta fase primaria en la que se encuentra, presenta una regulación minuciosa y completa. Es especialmente interesante el relieve que se otorga a la participación sindical y a la integración que se pretende entre los posibles acuerdos marco globales y los planes de diligencia de las empresas transnacionales. Se garantiza así el derecho de los sindicatos, al nivel adecuado, incluido el de empresa, sector, nacional, europeo y mundial, y de los representantes de los trabajadores, a ser informados de los procesos de diligencia debida y a participar en la elaboración y evaluación del plan de diligencia debida, y, de forma específica, cuando la empresa haya firmado o sea parte de un Acuerdo Marco Internacional, el Plan de diligencia deberá contener, como mínimo, las obligaciones pactadas en dicho acuerdo cuyo contenido se integrará por completo en el Plan, estableciendo asi una correlación directa entre el acuerdo colectivo y el contenido de la obligación legal.

6. Ese mismo *trend* se ha corroborado por los procesos normativos que se han ido produciendo en la Unión Europea, en cuyo ámbito se han producido iniciativas muy interesantes a este respecto. Así, en virtud del artículo 21 del Tratado de la Unión Europea que establece que la acción exterior de la Unión se basará en el respeto de los principios de la Carta de las Naciones Unidas y del Derecho Internacional, se han adoptado instrumentos jurídicos como son el Reglamento (UE) 995/20104, por el que se establecen las obligaciones de los agentes que comercializan madera y productos de la madera, incluyendo obligaciones en materia de diligencia debida; el Reglamento (UE) 2017/8215 que asimismo establece obligaciones para un comercio responsable de minerales de zonas de conflicto o alto riesgo; o la Directiva 214/95/UE, por la cual se establecen obligaciones para las empresas de hacer pública información sobre aspectos de carácter social y medioambiental vinculados con su actividad empresarial. En abril de 2020, el Comisario de Comercio de la UE anunció su propósito de impulsar una iniciativa legislativa

sobre diligencia debida obligatoria para las empresas en relación con los posibles impactos de su actuación sobre derechos humanos y ambientales en sus operaciones mercantiles y en las de sus cadenas de producción, una iniciativa que fue bien acogida por el Parlamento europeo en su Resolución de 10 de marzo de 2021, con recomendaciones destinadas a la Comisión sobre diligencia debida de las empresas y responsabilidad corporativa (2020/2129(INL)) que incluía un texto articulado como propuesta para una Directiva no sectorial sobre diligencia debida. Sobre este mandato, la Comisión presentó en febrero de 2022 un proyecto de Directiva COM (2022) 71: sobre diligencia debida de las empresas en materia de sostenibilidad y por la que se modifica la Directiva (UE) 2019/1937[14]. La discusión sobre el alcance y el sentido de esta propuesta está siendo objeto de un vivo debate entre los especialistas actualmente, pero su previsible aprobación obligará a todos los países de la Unión Europea a adoptar una medida legislativa en esta dirección.

7. ¿Es posible, en fin, considerar que "la diligencia debida debe ser considerada un "meta-principio regulador", capaz de obligar a las empresas matrices a convertirse en el sujeto privilegiado (obligado) para proteger los derechos humanos laborales, más allá de las fronteras del contrato de trabajo y del derecho estatal", como ha afirmado una parte muy reputada de la doctrina[15]? Con todas las precauciones del caso, lo que hay que anotar es la importancia que el respeto a los derechos humanos va cobrando como elemento determinante de los contenidos que necesariamente deben integrar el espacio global, como una manifestación más de un principio de universalidad que se afirma transversalmente también en ese nivel de regulación. Y la relevancia de un esquema de articulación de tutelas en las que el Estado obliga a los sujetos privados transnacionales a la confección de un plan de prevención como condición para eximirles de la responsabilidad por la vulneración de bienes y derechos fundamentales tanto en materia de relaciones

[14] GUAMÁN, *El borrador de Directiva sobre diligencia debida de las empresas en materia de sostenibilidad. Un análisis a la luz de las normas estatales y de la propuesta del Parlamento europeo*, en *Trabajo y Derecho*, 2022, n. 88.

[15] SANGUINETI, *La construcción de un nuevo derecho transnacional del trabajo para las cadenas globales de valor*, en SANGUINETI, VIVERO (ed.), *Diligencia debida y trabajo en las cadenas globales de valor*, Editorial Aranzadi, 2022.

laborales como en protección del medio ambiente. Es por tanto una fase nueva, que se solapa sobre las anteriores, en un largo y sinuoso camino hacia la progresiva conformación del espacio de la globalización como un área en la que vayan asegurando su vigencia los derechos ciudadanos y la tutela de los bienes comunes.

Olaf Deinert

The legal effect of the EPSR*

Summary: **1.** The way to the Pillar of Social Rights. **2.** Content and legal character. **3.** The Pillar as a political compass. **4.** The legal effects. **5.** Conclusion.

1. *The way to the Pillar of Social Rights*

The European Pillar of Social Rights was adopted at the Gothenburg Social Summit on 17 November 2017. It took the form of a Commission recommendation on the one hand[1], and an institutional proclamation by European Parliament, Commission and Council on the other[2]. It is declared to be a compass for a renewed convergence process towards better working and living conditions. As such, it is at the same time a response to Europe's deep political crisis in the second decade of this millennium[3].

The idea of the Pillar of Social Rights has its roots in Commission President Juncker's State of the Union Address to the European Parliament of 9 September 2015[4]. It was intended to reflect and complement what had been

* The following reflections built the basis for a report on the 57th Conference of the Austrian Society for Labor Law and Social Law in Zell am See on 7 April 2022 which was published under the title *Die europäische Säule sozialer Rechte: Rechtsnatur und Implikationen für das nationale Arbeitsrecht*, in *DRA*, 2022, p. 282 ff.

[1] Commission Recommendation (EU) 2017/761 of 26 April 2017, OJ L 113/56 .

[2] Interinstitutional Proclamation on the European Pillar of Social Rights, 2017/C-428/09.

[3] See DEINERT, *cit.*, with further reference.

[4] In parts printed in: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Launching a consultation on a European Pillar of Social Rights, COM (2016) 127 final, COM (2016) 127 final, p. 2.

achieved to protect workers under the changed realities of society and the labour world. It was initially conceived for the Euro area, but should not close off the possibility for other Member States to join in. In March 2016 the Commission launched a public consultation in which it presented a first proposal for a European Pillar of Social Rights[5]. In the opinion of the Commission this instrument seemed to be necessary to cope with the crisis on the one hand, and to pass over to a deeper and fairer Economic and Monetary Union (EMU) on the other[6]. It should create a framework for performance screening in the fields of employment and social affairs. The Commission stressed the concept of "flexicurity" for the European labour markets and the necessity to develop ways for the transposition of the concept in praxis[7].

On 19 January 2017 the European Parliament adopted a resolution to the draft[8].

After the consultation, on 26 April 2017 the Commission presented the communication "Establishing a European Pillar of Social Rights"[9]. Like in the consultation, it stressed the economic policy context. It was meant as guidance for Member States. The Commission admitted that the principles and rights were not directly applicable and needed to be transposed at the appropriate levels[10]. It emphasized the responsibility of all institutions to safeguard the principles and rights of the Pillar. Many of the instruments were to be used by national authorities and social partners but the Union could show the proper direction[11]. Additionally, the Commission highlighted a need for better enforcement of existing rights, inter alia by promoting better awareness[12].

The communication was linked to a draft Commission recommendation. At the same time, the Commission proposed an inter-institutional proclamation[13]. Besides, it presented a working document with explanations

[5] Ivi.

[6] Ivi, pp. 2 and 9.

[7] Ivi, p. 5.

[8] European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)), 2018/C 242/05.

[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Establishing a European Pillar of Social Rights, COM (2017) 250 final.

[10] Ivi, p. 8.

[11] Ivi, pp. 2-3.

[12] Ivi, p. 10.

[13] Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights, COM (2017) 251 final.

for all principles and rights describing the legal acquis Communautaire including the EU's competences and explaining the envisaged transposition measures and the possibilities and necessities for transposition at the Member State's level[14]. Additionally, a social scoreboard was implemented, with an aim of converging into political guidance for coordination of economic policy in connection with the European Semester[15].

In 2018 the Commission adopted the communication "Monitoring the implementation of the European Pillar of Social Rights"[16] with a focus on considering this data in the European Semester with the help of the social scoreboard.

At the beginning of 2020, the Commission again launched a wide-range consultation[17]. Based on the results of it, the Commission adopted in 2021 an Action Plan[18] which highlights three goals for 2030: at least 78% of people between 20 and 64 years old in employment, at least 60% of adults participating in training every year and the reduction by at least 15 million of the number of people with risk of poverty or social exclusion.

2. *Content and legal character*

The European Pillar of Social Rights has been established in a bi-directional manner. It is a dual form of legal source[19]. Firstly, the Commission

[14] Commission Staff Working Document Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights, SWD (2017) 201 final.

[15] Commission Staff Working Document Social Scoreboard Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights, SWD (2017) 200 final.

[16] Commission Staff Working Document Accompanying the Document Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Monitoring the implementation of the European Pillar of Social Rights, COM (2018) 130 final.

[17] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Strong Social Europe For Just Transitions, COM (2020) 14 final.

[18] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Empty the European Pillar of Social Rights Action Plan, COM (2021) 102 final.

[19] Laulom, *Quelle Europe sociale nous prépare le socle des droits sociaux?*, in *RDT*, 2017, p. 455 ff.

adopted a recommendation[20]. Secondly, the Commission, the Council and the European Parliament commonly adopted a solemn inter-institutional proclamation. The Commission recommendation follows the idea of an instrument promoting stability in EMU and, therefore, is directed towards the Euro-area without excluding other Member States from voluntary participation[21]. The restriction on its application to the EMU was from the very beginning not understandable[22] and it is perhaps explicable in the light of the political wish not to create further influence on the Brexit referendum[23]. On the other hand, the inter-institutional proclamation is still not formally restricted to the Euro-area and addresses every Member State, although it is designed for the Euro-Member States[24]. This seems to be the biggest difference between both instruments. Although there exist some further minor verbal differences between the texts the Commission has – as far as can be seen – not yet adjusted to the younger proclamation text as foreseen in the recommendation[25].

The Pillar shall give Member States guidance to promote social rights through concrete legal enactments[26]. Recital (18) stresses that this will not lead to an expansion of EU competences, and rather the implementation has to take place within the existing competences of EU and the Member States. Furthermore, the Pillar highlights the crucial role of social partners for implementing its rights "in accordance with their autonomy and the right to collective action"[27].

The principles and rights of the Pillar are inspired by EU primary law like the EU-Treaty, Treaty of the Functioning of the EU, Charter of Fundamental Rights, the 1989 Community Charter of Fundamental Social Rights of Workers, the case law of the CJEU, international instruments like the European Social Charter and ILO recommendations. By nature, it is an instru-

[20] 2017/C 428/09.

[21] Recital (13).

[22] Kingreen, *Ein Sockel für die Europäische Säule sozialer Rechte: zur Zuständigkeit der EU für einen verbindlichen Rechtsrahmen für soziale Grundsicherungssysteme in den Mitgliedstaaten*, in *SR*, 2018, p. 2.

[23] Brameshuber, Prassl, *Die "europäische Säule sozialer Rechte"*, in Kieser, Lendfers (eds.), *Jahrbuch Sozialversicherungsrecht*, Dike Verlag, 2017, pp. 85 and 92.

[24] Cf. Recital (13).

[25] COM (2017) 250 final, p. 9. See Deinert, *cit.*, pp. 282 and 285.

[26] Recital (12).

[27] Recital (20).

ment of enabling enforcement rather than a mere recognition of social rights. Furthermore, the Pillar does not restrict itself to the existing *acquis*. It goes beyond in a spirit of modernizing, deepening and expansion. Moreover, the social *acquis* is not covered completely as, *e.g.*, the right to working time limitation according to Article 31 (2) of the Charter of Fundamental Rights does not appear[28].

As far as it goes beyond existing social rights, the Pillar depends on implementation through EU legislation within the existing competences and on harmonized national legislation. It does not entitle people to transfer benefits. Moreover, the Pillar shall exclude affection of the equilibriums of social security systems in the Member States.

The Pillar is composed of three chapters: "Equal opportunities and access to the labour market", "Fair working conditions", "Social protection and inclusion". The first chapter focusses on equality and education/training. The second includes the core of working conditions like fair wages, dismissal protection, health and safety, data protection or questions of work family balance and aims at balancing the flexibility interests of employers with the security interests of employees, namely those under atypical labour contracts. The third chapter contains a wide range of social protection rights like poverty protection for children, unemployment benefits or minimum income and promises, moreover, access to housing or housing assistance and to essential services "of good quality".

The Pillar considers minimum rights and does not prohibit Member States from guaranteeing better social rights. Additionally, it shall not by interpreted as restricting or adversely affecting social rights by EU or international law.

3. *The Pillar as a political compass*

Although the text changed from the first draft and shifted towards a formulation of enforceable rights[29], the Pillar cannot and does not guarantee social rights and it as such is not a pillar in the sense of the word as it is used

[28] Lörcher, *Die Europäische Säule sozialer Rechte - Rechtsfortschritt oder Alibi?*, in *AuR*, 2017, pp. 387-388.

[29] Cf. Becker, *Die Europäische Säule sozialer Rechte*, in *ZöR, 2018*, 73, pp. 525 and 529-530.

in the EU legal system. It is rather a pillar for the social rights guaranteed therein. Social rights are not realized be the mere fact of being written down. Anyone may enjoy freedom of religion by the mere text of a fundamental right because authorities have to respect this freedom. For social rights it is different: *e.g.* children are not protected against poverty by a mere legal text. The public authorities must implement such rights because otherwise those rights will be worthless. The Commission, Council and European Parliament promise to implement the rights set out in the Pillar. This may happen by EU legislation or by national legal measures.

This shows that the Pillar does not create social rights, but rather that it strengthens such rights. The emphasis on the compliance with the Treaty's competence order makes this clear. This makes sense also for those rights that are not yet part of the social *acquis* and which will be shaped by the Pillar: it may give rise to new social rights or specifications of existing rights through implementation measures by the Union, Member States and/or social partners of all levels.

Social policy secondary law instruments and drafts of the last few years show how the Commission understands the Pillar as a compass for the renewed convergence[30]. The Commission draft for a regulation establishing a European Labour Authority[31] was presented on the same day as the monitoring communication from 2018[32] and it highlights, like the later adopted regulation itself[33], its importance for the implementation of the Pillar of Social Rights. The same is true for the draft of a Council recommendation from the same date on access to social protection for workers and the self-employed[34] in which the Pillar, in particular the right to adequate social protection, is envisaged several times.

[30] Cf. Garben, *The European Pillar of Social Rights: An Assessment of its Meaning and Significance*, in *CYBELS*, 2019, 21, pp. 101 and 116 ff.; Robin-Olivier, *Chronique Politique sociale de l'UE - Un nouveau départ pou la politique sociale de l'Union: premier bilan des effets du socle européen des droits sociaux*, in *RTDE*, 2018, p. 403; Hendrickx, *The European Pillar of Social Rights: prospects for the future of labour law*, in Funk, Melzer-Adanlo (eds.), *Arbeiten in Würde, liber amicorum Walter Löschnigg*, 2019, pp. 503 and 514 ff.

[31] Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority, COM (2018) 131 final.

[32] COM (2020) 14 final.

[33] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, recital (3).

[34] COM (2018) 132 final.

The work-life balance principle (9) of the Pillar of Social Rights reads as a blueprint of the Work-Life Balance Directive[35]. The latter refers in its recital (9) to this principle as to the Pillar principle (2) of equal opportunities irrespective of sex.

Similarly, the Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union[36] is to be understood as a transposition of Pillar principle (5) on secure and adaptable employment. This principle includes promotion of transition into open-ended forms of employment, facilitation of professional mobility and reasonable duration of probation periods. The directive takes these goals into account by regulating probationary periods in Article 8, parallel employment in Article 9 and transition to another form of employment in Article 12. Information rights as envisaged in principle (7) of the Pillar are adapted in the new directive in the sense of enforcing under the new conditions of a changed labour world in Articles 4 et seq. of the directive.

Similarly, the principles in no. 6 concerning wages may be understood as a forecast for the proposal for the Minimum Wages Directive[37]. The justification of the proposal as well as recital (4) refers to the Pillar of Social Rights. The proposed directive shall oblige the Member States to ensure adequate minimum wages and to promote collective bargaining on wages. Quite interestingly, the proposal claims for effective access and right to redress and protection just like the Pillar aims at improving enforcement of social rights.

In the same way the proposed Platform Work Directive[38] must be seen in the light of principal no. 5 of the Pillar on secure and adaptable employment. The proposal aims at guaranteeing fair and equal treatment with concern to the working conditions and social protection and training while ensuring flexibility for employers.

To summarise, the proposals of the Commission in the field of social law refer to the Pillar of Social Rights. The Pillar must, therefore, be under-

[35] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

[36] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

[37] COM (2020) 682 final.

[38] Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM (2021) 762 final.

stood as a political agenda[39]. It may strengthen primary and secondary law and serve as a blueprint for new secondary law[40]. Moreover, it may be a self-commitment to prevent the Commission from disregarding social rights when using its influence in the coordination of Member States' economic and budgetary policy during the European Semester[41]. It will safeguard social rights *vis-a-vis* economic governance[43]. The Pillar encourages the Commission furthermore to claim for realisation of social rights towards the Member States[43].

4. *The legal effects*

According to article 288 (5) TFEU a recommendation has no binding effects. Neither it has binding effects for the Member States, nor for the Commission. But this does not mean that a recommendation has no legal effect at all. The CJEU has established that courts in the Member States have to consider recommendations in their decisions, especially when interpreting national transposition measures or supplementary law[44]. In the same way the Pillar must be used as an interpretive guide for national law[45]. But it follows from the fact that the Pillar intends to invoke a renewed convergence that it must be considered only in the case that national law is subject to EU-co-ordination or -harmonisation and not in cases without any reference to the implementation of EU law[46]. According to article 267 TFEU, the Court of Justice has jurisdiction on EU law and may therefore, *e.g.* when invoked by a preliminary ruling, interpret the recommendation but the Court has no

[39] Laulom, *cit.*, p. 455 ff.; see also Rasnaca, *Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-Level policymaking*, 2017, p. 19 ff.

[40] Becker, *cit.*, pp. 525 and 530.

[41] Seikel, *WSI Policy Brief*, November 2017, pp. 8-9.

[42] Garben, *cit.*, pp. 101-102.

[43] Cf. Robin-Olivier, *cit*, p. 403.

[44] CJEU of 13 December 1989, *Salvatore Grimaldi v Fonds des maladies professionnelles*, Case C-322/88, ECLI:EU:1989:64; CJEU of 18 March 2010, *Rosalba Alassini v Telecom Italia SpA*, Case C-317/08 and others, ECLI:EU:2010:146.

[45] Brameshuber, *Die Europäische Säule sozialer Rechte, oder: Zur Konstitutionalisierung von Sozialen Rechten*, in Auer-Mayer, Felten, Mosler, Schrattbauer (eds.), *Liber amicorum Walter Pfeil*, pp. 307 and 312; Deinert, *cit.*, pp. 283 and 291.

[46] Deinert, *cit.*, pp. 283 and 291.

competence to interpret Member States' laws by considering the Pillar of Social Rights.

It seems a bit more complicated to define the legal effects of the interinstitutional proclamation. According to article 295, 2 TFEU inter-institutional agreements may have binding effects although those are normally meant to be not binding on third parties like Member States or private persons. This follows normally already from the content. And the same is true for the proclamation of the Pillar of Social Rights. The institutions assumed that the pillar will not create directly enforceable rights[47]. Therefore, it is of no further significance that the terms of "rights" and "principles" are used like they are in the Charter of fundamental rights (cf. article 52) and seem to use the word "principle" especially in the case of new positions which actually have a need for implementation[48].

This leads to the question if binding effects may exist between the involved institutions, *i.e.* the Commission, European Parliament and Member States. One could think that the self-binding nature of the Pillar of Social Rights may restrict the political discretion of the parties in the lawmaking process. To a certain degree it would seem to be contradictory if the Member States would promise to foster work-life balance in the Council on the one hand, and reject any proposal for a work-life balance directive on the other, although it would not be contradictory if the dispute arises on the details of such a proposal. Nevertheless, a binding effect does not exist for the simple reason that, otherwise, the Pillar would prejudice the vote of Member States in the Council, even in cases of unanimity according to article 153 (2) subsection 3 TFEU[49]. Furthermore, a binding effect in fields of competence of Member States leverage the competition structure. Therefore, in addition, the restricted competence in the field of social policy according to articles 153 *et seq*. excludes binding effects of the Pillar[50]. This seems to be in line with the Commission's opinion that the rights and principles of the Pillar should be implemented in diverse ways[51].

It follows from the self-binding effect of the interinstitutional procla-

[47] Cf. LHERNOULD, *Quelle Europe sociale nous prépare le socle des droits sociaux?*, in *RDT,* 2017, p. 455 ff.; HENDRICKX, *cit.*, pp. 503, 504.

[48] Cf. recital (14); for the differentiation between rights and principles insofar BECKER, *cit.,* pp. 525 and 536–537.

[49] DEINERT, *cit.*, pp. 283 and 289–290.

[50] BECKER, *cit.*, pp. 525 and 535.

[51] COM (2017) 250 final, p. 4.

mation of the Pillar of Social Rights that secondary law which refers to the Pillar must be interpreted in the light of the Pillar rights and principles[52]. Furthermore, the Pillar wants to be a benchmark for promoting social rights. The institutions should take it into account whenever they create legal rules. This leads to the conclusion that considering the Pillar when interpreting secondary legislation is not excluded for acts which, like *e.g.* the Revised Posting Directive[53], do not refer to the Pillar[54]. Moreover, the Pillar is a political compass which goes beyond the field of social law[55]. It aims at effectuating social rights without restriction to certain fields of policy. This becomes clear when looking on the importance for economic and budgetary policy during the European Semester. Therefore, interpreting in the light of the Pillar is obligatory for application of laws beyond social policy.

Because the need for interpreting in the light of the Pillar follows from the self-binding effect of it, the interpretation of secondary law from before the solemn proclamation of the Pillar cannot refer to it. The institutions could not want to implement a Pillar which was unknown to them when they adopted acts in earlier days. And the institutions cannot change what happened in the past through the Pillar. The only way to give the Pillar's rights and principles effect also for older acts would be to amend such acts. But this did not happen. On the other hand, the CJEU was not involved in the proclamation of the Pillar. It can, therefore, not be an instrument for revision of case law of the Court of Justice in the sense of a social protocol as claimed for by the European Parliament[56] or in the sense of a social progress protocol as proposed by the European Trade Union Confederation[57].

However, the Pillar may give rise to more social sensitivity for social rights in the case of balancing these economic rights and freedoms by judges[58]. More-

[52] Cf. GARBEN, *cit.,* pp. 101 and 105; BRAMESHUBER, *Die Europäische Säule,* cit., pp. 307, 309 and 312.

[53] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

[54] Cf. for possible reasons for the missing references in the Directive GARBEN, *cit.*, pp. 101 and 109-110.

[55] RASNACA, *cit.*, pp. 29 ff.

[56] OJ C 2018 242/24, no. 31.

[57] Protocol on the relation between economic freedoms and fundamental social rights in the light of social progress, https://www.etuc.org/en/proposal-social-progress-protocol.

[58] Cf. BECKER, *cit.*, pp. 525 and 541.

over, it may have the function to underline an interpretation found by other means, *i.e.* the pillar may be a legal interpretation source like the CJEU referred to the Charter of Fundamental Rights in the *Viking case* in times when the Charter was not yet part of primary law but only a mere solemn proclamation[59].

5. *Conclusion*

The Pillar of Social Rights is no additional Charter of fundamental rights in the sense of social rights. It is rather an instrument for effective implementation of social rights. This follows from the fact that the European institutions discovered that social rights will not find realisation by a mere proclamation in the Official Journal, but rather need implementation in EU and Member State's law. The Pillar is the instrument to invoke effective implementation of social rights[60]. As demonstrated before, it is a political program and a promise to the people of Europe. But the new start-up for a social Europe will fail without enough efforts for implementing the Pillar's rights and principles. The European Parliament was definitely right when claiming for a solid Pillar as instrumental for the strengthening of social rights[61]. If the involved institutions overcome this challenge, the Pillar will get added value by overcoming frictions through divided competences between EU and the Member States[62]. A week point of the Pillar is the lack of judicial accompaniment. If it is on the political agenda to strengthen social rights this may not exclude jurisprudence. Insofar as this is true, the Pillar of Social Rights has a white spot.

[59] CJEU of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, ECLI:EU:C:2007:772.

[60] Cf. Ales, *The European Pillar of Social Rights: an ambitious 'soft-law guide' to efficient employment and social outcomes*, in Singer, Bazzani (eds.), *European Employment Policies: Current Challenges*, 2017, pp. 43 and 51 ff.

[61] OJ 2018 C 242/24, no. 1.

[62] Hendrickx, *cit.*, pp. 503 ff.

Abstract

In the article the Author discovers that the European Pillar of Social Rights is an instrument for effective implementation of social rights as laid down in several instruments of primary and secondary law, as set out in the pillar itself for future legislation at union level as well as at national level. The pillar includes a political program and promise to the people of Europe and intends to overcome insofar frictions through divided competences between the Union and the Member States. A "white spot" is that it cannot bind jurisprudence.

Keywords

Pillar of Social Rights, social rights, social policy, soft law instrument, interpretation of EU law.

Leonardo Battista

European Works Council Directive: Brexit first victim?

Summary: **1.** Preliminary remarks. **2.** United Kingdom and EWCs: a problematic context even before Brexit. **3.** European Works Council and Brexit: applicable law and quantitative requirements. **4.** European Commission's intervention. **5.** British amendment to EWC Regulation: a new piece to the puzzle? **6.** Conclusions.

1. *Preliminary remarks*

After six years from the results of the 2016 Referendum on the permanence of United Kingdom in the European Union, many commentators are still engaged in evaluating the consequences of the Brexit. From a political perspective, the outcome was surprising, both domestically and internationally, with only a 3.8% divide between "leavers" and "remainers". On the legal perspective, Brexit, and the implicit status of third-country gained by United Kingdom, had a profound effect on the lives of EU citizens in the UK and UK nationals living in European Union[1], but its consequences at large spectrum are still unpredictable.

Due to the transition period between UK and European Union – ceased on the 1st of January 2021 – and to the dramatic effects of COVID-

[1] One of the main debated issues regards the citizenship of EU individuals and the freedom of movement to and from UK, Cfr. Barnard, Leinarte, *Brexit & free movement of workers*, in *LD*, 2020, 3, p. 442; Gumbrell-McCormick, Hyman, *What about the workers? The implication of Brexit for British and European Labour*, in *C& C*, 2017, vol. 21, 3, pp. 169-284; More, *From Union Citizen to Third-Country National: Brexit, the Uk Whitdrawal Agreement, No-Deal Preparations and Britons Living in the European Union*, in Cambien, Kochenov, Muir (eds.), *European Citizenship under Stress. Social Justice, Brexit and Other Challenges*, in *Nijoff Studies in European Union Law*, 2020, vol. 16, p. 458 ff.

19 on the labour market, the impact of Brexit over British workers has still to be assessed in the medium and long run[2]. However, the debate on workers' rights related to the Brexit is already a fluent one.

From one side, there is an ongoing discussion about the effects on domestic workers with the threat of a devaluation in terms of employment rights[3]. A devaluation that poses the question whether the British government would dismantle or not the European social *acquis*[4].

From the other side, Brexit can have some indirect effects[5] on some specific rules belonging to the sphere of transnational rights. Among these stands the application of the Directive 2009/38/EC on European Works Councils[6]. Not only within the British boundaries, but with regard to the entire European Union, as for the participation of British workers to meetings and for the calculation of the thresholds for the creation of such bodies.

Since 1973, when UK joined the European Communities[7], it is undeniable that European Union played a relevant role in increasing the level of protection of British workers. As noted by some commentators, "it is un-

[2] Peers, Harvey, *Brexit: the legal dimension*, in Barnard, Peers (eds.), *European Union Law*, 2020, 2nd ed., pp. 850-874; Craig, *Brexit a Drama in six Acts*, in *ELR*, 2016, 41, 4, pp. 447-468.

[3] Giovannone, *Social protection in the UK after Brexit: the Agreements' provisions and the role of the European Social Charter*, in *Federalismi.it*, 2021, 6 October 2021, 23, pp. 91-102.

[4] For a skeptic comment please see Ford, *The effect of Brexit on workers' rights*, in *King's Law Journal*, 2016, vol. 27, 3, pp. 398-415, especially p. 400. On the promises to not dismantle the EU acquis please refer to Theresa May's announcement at the Conservative conference in 2016. See May, *Brexit Speech to Conservative Conference in Birmingham*, 2nd October 2016. Please refer to https://www.astrid-online.it/static/upload/protected/a73b/a73b6ebe0c227f6807d65785ee16faf7.pdf.

[5] On the effect of the Brexit over the European Labour Law, refer to Kenner, *Il potenziale impatto della Brexit sul Diritto del lavoro europeo e britannico*, in this Journal, 2017, 1, pp. 5-12.

[6] Senatori, *Directive 2009/38/EC on the establishment of a European Works Council*, in Ales, Bell, Deinert, Robin-Olivier (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos, Baden-Baden, 2018, p. 1601 ff.; Dorssemmont and Blanke (eds.), *The Recast of the Europea Works Council Directive*, Intersentia, Antwerp-Portland, 2010. For a criticism on the Recast Directive 2009/38/Ce see Alaimo, *The New Directive on European Works Councils: Innovation and Omission*, in *IJCL*, 2010, vol. 26, 2, pp. 217-230.

[7] From 1 January 1973, UK became a Member State of the European Communities (now EU), principally the European Economic Community (EEC), Europe an Coal and Steel Community and Euratom. On 29 March 2017, the British prime Minister May triggered art. 50 TEU for the exit from European Union. After two years of intensive negotiations and threatened by a No-Deal scenario, both parties agreed on a Withdrawal Agreement that sets the exit from the EU on 31 January 2020.

questionably the case that without EU influence, British labour law textbooks would be very much thinner, lighter and cheaper"[8]. Working time, Business restructuring, equality, atypical forms of work are some of the areas where the European Union influence over the British legislation has been tangible. It entailed the creation of a floor of employment protection for British workers. This consideration was confirmed in a 2016 survey, where TUC (Trade Union Congress) noted that, since their EU membership, British workers improved their working conditions in many areas of labour law, sadly concluding that "remaining in the European Union may provide significant opportunities to extend employment protection for working people"[9].

While most of these areas will be tough to be dismantled in the short run because already translated in the domestic legislation and daily applied in workers' life, Brexit, instead, has been having a dramatic and instant effect over the EWC Directive and the rights of transnational information and consultation enshrined in it.

Since Brexit, there are no more rules concerning the information and consultation of British employees working in European Community-scale undertakings as the Country regained the status of non-European Country (third Country)[10]. As stated by a European Commission's communication, entitled "UK withdrawal and EU rules on European Works Councils", issued in April 2020, British workers should be excluded from the calculation of the workforce that applies in the context of the establishment of an EWC.

According to the Directive 2009/38/EC, an EWC is a permanent body, set up following negotiations between the company's central management and a transnational delegation of employees from every Member State where a Multinational Companies has its own branches. Its function is to engage in "discussions on topics that concern the workforce as a whole, or that at least encompass employees' interests with a cross-border reach or impact"[11].

[8] Countouris, Ewing, *Brexit and Workers' Rights*, Institute of Employment Rights 2019, p. 8.

[9] Trade Union Congress, *UK Employment Rights and the EU: Assessment of the Impact of Membership of the European Union on Employment Rights in the UK*, 2016, p. 17.

[10] Except the case when a national legislation expressly refers to the United Kingdom instead of the generic "Member State".

[11] Senatori, Rauseo, *European Works Councils*, in ter Haar, Kun (eds.), *EU Collective Labour Law*, Edward Elgar, 2021, p. 257.

European Works Council shall be established where there are at least 1000 employees in the European Union or in the European Economic Area and when at least two establishment in two different Countries have minimum 150 employees each (or two companies in case of a group)[12].

Due to the exclusion of British workers from this calculation mechanism, there are obvious implications that could hinder not only the effectiveness of European Works Council for British workers, but indirectly, also the existence of EWCs in other Member States.

Firstly, an implicit consequence for already existing EWCs in European Union will regard the loss of a consistent piece of workforce for their legitimacy, both from the quantitative perspective, related to the 1000-workers threshold and the consideration about their existence and from the qualitative one, losing British representatives that could be strategic in case of consultation with a British Central Management of a Community-scale undertaking. Secondly and directly related to the first point, there are concerns about the fate of British representatives in these bodies, their role and their powers and prerogatives. Lastly, the modification of the applicable legislation for EWCs based on UK Law or with the central management in UK will have a clear impact on the reorganization of existing European Works Councils and consequences on new one.

These topics will be pivotal in the essay, evaluating the effect of Brexit over the set of provisions for a European Works Council (hereinafter EWC) or a transnational information and consultation procedure concerning Community-scale undertakings and groups of undertaking, looking at the context and the new status of Non-European Country regained by United Kingdom.

2. *United Kingdom and EWCs: a problematic context even before Brexit*

As briefly anticipated, Brexit will have an immediate effect on the application of the Directive 2009/38/EC[13] in the entire European Union,

[12] Senatori, *cit.*, p. 1601 ff.; Laulom, Dorssemmont, *Fundamental principles of EWC Directive 2009/38/EC*, in Jagodzinski (ed.), *Variations on a Theme? The implementation of the EWC Recast Directive*, ETUI, 2015, p. 33 ff.

[13] For a criticism on the Recast Directive 2009/38/Ce see De Spiegelaere, *Too little, too late? Evaluating the European Works Councils Recast Directive*, ETUI, 2016.

mainly due to the importance of British workforce for the creation and functioning of EWCs. An impact that some commentators defined as an example of "hard Brexit"[14].

However, before looking at the current problems deriving from the Brexit, it seems useful to recall that the ambigous relationship between UK and the European Works Council, seen as a measure to grant information and consultation within undertakings with a European dimension, was problematic already in the framework of the original Directive 94/45/EC.

That Directive was adopted under the Maastricht 'Social Chapter' from which the UK imposed an opt-out clause[15]. Due to the British refusal to agree on the revision of the Social Chapter at Maastricht, as promoted by the Dutch Presidency, the EEC adopted a Protocol, added to the Maastricht Treaty, containing an "Agreement on Social Policy concluded between the Member States of the European Community with the exception of the United Kingdom". An agreement that granted an opt-out clause to the United Kingdom from 1 November 1993 when the Maastricht Treaty came into force, that ceased on the 1 May 1999 when the Amsterdam Treaty, agreed by the Labour Government in 1997, substituted the former[16]. Ironically, the

[14] GUMBELL-MCCORMICK, HYMAN, *cit.*, p. 9. Cfr. PISARCZYK, *The consequences of Brexit for the labour and employment law: challenges for the EU from a Polish perspective*, in *NILQ*, 2018, vol. 69, 3, p. 317.

[15] CARLEY, HALL, *The implementation of the European Works Councils Directive*, in *ILJ*, 2000, vol. 29, 2, pp. 103-124.

[16] Such opt-out clause was hailed as a "negotiating triumph" (LOURIE, *Employment Law and the Social Chapter*, in GIDDINS, DREWRY (eds.), *Britain in the European Union. Law, Policy and Parliament*, Palgrave Macmillan, 2004, p. 122) by Conservative Ministers and politicians, because applying to such clause they could "protect" the British labour market from an excessive regulation prompted by EU Law, especially in the field of working time on which the Tories were involved in an unsuccessful challenge to postpone it after the Maastricht Treaty came into force. A dramatic opposition that brought the Conservative Government to challenge the Working Time Directive at the European Court of Justice, arguing that the legal basis on which was adopted the Directive could not be the one disposed by art. 118, with the Qualified Majority Voting system. A challenge that was rejected by the ECJ. Case C-84/1994, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, 12 November 1996. A decision that effectively weakened the opt-out clause disposed by the Social Protocol. Cfr. FRIEDHOLM, *The United Kingdom and European Labor Policy: Inevitable Participation and the Social Chapter Opportunity*, in B*oston College International and Comparative Law Review*, 1999, vol. 22, 1, pp. 229-248. On the contrary, Labour politicians highlighted that British workers would be excluded from the ongoing improvement in employment standards in European labour market, with a negative effect on national competitiveness.

first topic that experienced the effect of the opt-out clause was the European Commission proposal for a European Works Council Directive. The proposal, presented by the European Commission fifteen days before the Maastricht Treaty came into force, immediately raised the issue about how the UK Parliament should deal with draft proposal from the European Community that would not apply to the UK, due to the adoption procedure still to be started. According to the Conservative perspective and recalling the ratio belonging to the opt-out clause, the British Parliament had no scrutiny power/interest on something that would not apply to British law. On the contrary, the European Legislation Committee requested a Parliamentary debate and scrutiny on the applicability or not of the proposal. A scrutiny that was voluntarily postponed and arranged from the Government after the adoption on the Directive on 22 September 1994 in accordance with the previous "dismissive line stating that the operation of the Agreement on Social Policy is not matter for the United Kingdom Government"[17].

The situation evolved with the election of 1 May 1997, won by the Labour party and one of the firsts actions of the new Premier Tony Blair was the appointment of a Minister of Europe with the announcement of the future conclusion of the opt-out experience[18]. This was achieved already during the Amsterdam Summit in June 1997 and effective after the Amsterdam Treaty came into Force on 1 May 1999. The main reason for this action was primarily related to the direct consequences borne by British Multinational Enterprises that were obliged to apply rules based on a Directive adopted during the opt-out regime with an indirect effect on domestic workers that were denied of such rights and protections. Moreover, the idea of a dual-speed Europe was detrimental for the accomplishment of a fair and healthy internal market. In light of that, the Council of European Union adopted the Directive 97/74/EC regarding the application of the Directive 94/45/EC on European Works Council to the United Kingdom, setting a two-year period for its implementation in British law. In fact, the previous Directive on EWCs came into force on 15 January 2000, after a motion for annulment by the Conservative opposition in the House of Commons, still threatened by the impact that a mechanism for a transnational information and consultation procedure could have brought in their industrial relations systems[19].

[17] Lourie, *cit.*, p 124.

[18] Kampfner, *First Steps Taken Towards Social Chapter*, in *Financial Times*, 6 May 1997.

[19] Mrs. Browning' speech for the annulment requested on the Transnational Information

However, the UK Multinationals even before the adoption in British law were already obliged to establish EWCs in Member States where they were employing workers according to the workforce requirements, so the need to protect British companies proclaimed by the Conservatives was a false claim.

3. *European Works Council and Brexit: applicable law and quantitative requirements*

After almost two decades and after the transposition of the Recast Directive, the bound between UK and EWCs has begun really impressive in terms of numbers and to the importance gained by British representatives in existing bodies. Due to that, it is undoubtable that Brexit dramatically impacted on the transnational provisions granted by the Recast Directive.

In fact, as noted by ETUI, Brexit impacted on more than two third of EWCs due to the presence of UK representatives in these bodies[20]. According to the EWCDB (European Works Councils Database) and the last data available, there are 1206 EWC still active[21], so more than 800 EWCs are interested by a mutation in their legitimacy related to workforce or by a revision of the managing body with the presence of British representatives[22].

Moreover, about 15% of EWCs were based on United Kingdom with the choice of the British law as the applicable law for legal actions and legal

and Consultation of Employees Regulations 1999, transposing the Directive 94/45/EC: "The Government think that works councils are right for the United Kingdom, but they are not. Their attitude displays a lack of understanding of the way in which British companies have developed. The Government have not acknowledged how management and work forces work together. They do communicate. Representations are officially placed on the table when there is a matter for negotiation or discussion. One of the Government's first acts was to sign up to the social chapter as part of the Amsterdam treaty. We are not discussing a new measure. It has already been imposed by Europe. The Government signed up not just for legislation that is yet to come-I am sure that there are more horrors in store-but for retrospective legislation". For the verbatim please refer to: https://publications.parliament.uk/pa/cm199900/cmstand/deleg7/st000203/-00203s01.htm.

[20] De Spiegelaere, Jagodzi ski, *Are European Works Councils ready for Brexit? An inside look*, in *ETUI Policy Brief - European Economic, Employment and Social Policy*, 2020, no. 6, p. 2.

[21] Even if the European Works Council is the main body, there could be other forms of consultation and information body.

[22] Https://www.ewcdb.eu/stats-and-graphs (Last access 29 March 2022).

procedures. Brexit obliged these bodies to switch to a new legal basis to avoid future problems with the Central management of the undertaking (or groups of undertakings) or being in breach of EU Law. In fact, the Recast Directive states at art. 3, points 6-7 that a new or already existing EWC shall have as applicable law the one of the Member State where is situated the controlling undertaking[23].

As expected, due to nearness between UK and Republic of Ireland, around 150 companies moved their Central management to the latter, from a third County (UK) to a Member States[24]. It happened with many MNEs from US, China or British MNEs with operations in European Union and obliged to respect the EWC Directive[25]. Therefore, Ireland has become one of the Member States with the largest number of EWCs, following Germany and France. One may think that the main reason for this movement is related to the language or to culture. However, as stressed by the EWC Academy GmbH, "Irish EWC law appears particularly attractive because it is considered deficient and does not meet the standards of the EU Directive, especially when it comes to taking legal action"[26]. In fact, according to the Transnational Information and Consultation of Employees Act 1996, as reviewed after the Recast Directive, in case of legal disputes the Central Management and EWC representatives shall submit to an independent arbitrator, ap-

[23] De Spiegelaere, Jagodzi ski, *cit.*, p. 3.

[24] Https://www.siptu.ie/services/europeanworkscouncil/ewcdirectivetranspositionintoirishlaw/ (Last access 30 March 2022).

[25] That is the case of the Bank HSBC or Verizon. The US Management of Verizon, an IT group, dissolved the EWC in UK as of 20 October 2020. Consequently, it moved the European headquarters to Dublin to initiate the procedure to set a new Council. A procedure that was too long and created a lack of EWC and, during this period, the management could be free to carry out any restructuring without information and consultation. The British EWC, even if ceased, filed a complaint against this choice made by the Management against the Central Arbitration Committee CAC in London (15 December 2020) who was set as the forum for legal disputes. According to the CAC, the Central Management was free to switch the applicable law due to the expiration of the previous EWC's agreement, regardless of the Brexit. However, the CAC pronounced in the sense that due to the long and failed negotiations for the renewal of the EWC, the subsidiarity requirement, namely the "default EWC", could come into force since that date, in order to avoid any obstacle to the respect of transnational information and consultation procedure, as stated by art. 7 of the Recast Directive. For the Decision of the Central Arbitration Committee no. EWC/33/2020: https://www.gov.uk/government/publications/cac-outcome-verizon-ewc-verizon-media/application-progress.

[26] EWC news, 1-2021: https://www.ewc-news.com/en012.

pointed by both parties or established by the section 10 of the Industrial Relations Act of 1946, with unclear powers and prerogatives. Moreover, such legal procedure hinders the possibility for a trade union or employee representative to take legal action for the establishment of an EWC in court. A gap that according to the Irish trade union SIPTU, Service Industrial Professional and Technical Union, is attracting MNEs Companies due to the miniscule penalties for any obstacle to the negotiations with the EWCs representatives. Due to that, SIPTU requested to the Irish Government to review the Transnational Information and Consultation of Employees Act 1996 in order to properly transpose the EU Directive on EWCs. A request that was not followed by any actions, bringing to an official complaint to the European Commission, made by the Unions. A complaint that was translated by the EU Commission in an infringement notice launched against Irish Government for the failure to properly transpose the Directive on EWC[27]. Even if expected, the fact that the notice was mainly driven by the Brexit represents a failure of the transposition of the Directive in Ireland and in terms of monitoring process of EU institutions over EU Law.

The situation is still evolving, however it is so far clear that the Brexit impact over the Irish EWCs legislation, and the abuse of its gaps, could have repercussions on transnational rights for workers[28], affecting also other Member States[29].

Another issue related to the impact of Brexit over EWCs is the implicit consequence on the future possibility for the creation of new EWCs in the Union. In fact, UK will no longer be included in the calculations regarding the employee thresholds that determine whether a company falls within the scope of the EWC Directive or not. Some undertakings, due to the exclusion of British workers, will no longer be subject to the rights and obligations stemming from the Directive 2009/38/EC, so leading to the exclusion of the possibility for European workers to exercise their rights to cross-borders information and consultation.

European Commission is aware of the possible consequences brought

[27] European Commission, Non-conformity of Irish legislation with the European Works Councils Directive, Formal Infringement INFR (2022) 4021.

[28] Https://www.siptu.ie/media/media_22381_en.pdf.

[29] Letter sent by SIPTU Deputy General Mr. McCormack to the Minister for Enterprise, Trade and Employment, 20 November 2020: https://www.siptu.ie/services/europeanworkscouncil/ewcdirectivetranspositionintoirishlaw/.

by the exit of UK from European Union, even in reference to the conspicuous number of British workers employed in MNEs and in Community-scale undertakings.

4. *European Commission's intervention*

European Commission set out a specific Communication[30] with the aim of clarifying how to deal with Brexit in the short run as for EWCs.

Firstly, according to art. 2 of the Directive 2009/38/EC, an EWC could be created if there are at least 1000 employees in the European Union or in the European Economic Area and when at least two establishments in two different Countries have at least 150 employees each (or two companies in case of a group).

Due to Brexit, the exclusion of British workers will definitely affect the existing EWCs and in case "the relevant thresholds [would] no longer be met at the end of the transition period, a European Works Council, even if already established, will no longer be subject to the rights and obligations stemming from the application of Directive 2009/38/EC". However, the abolition of an EWC is not automatic and it seems quite controversial that the Central management of a Community-scale undertaking (or group of undertakings) could invoke Brexit for the closure of already existing EWCs, being more an option than an obligation. In fact, during the transition period and even before the publication of the "Withdrawal agreement" between UK and European Union, the impact of Brexit has been discussed and, in some cases, already resolved. Some Community-scale undertakings, such as General Electric, Cargill, Coca Cola and Centrotec[31] have already negotiated a renewal for their EWCs, even deciding the fate of British workers and representatives[32].

The destiny of British workers and their representatives is in a certain

[30] European Commission, Notice to Stakeholders – Withdrawal of the United Kingdom and EU Rules on European Works Councils, 21 April 2020, REV3: https://ec.europa.eu/info/sites/default/files/brexit_files/info_site/transnational_workers_council_en_0.pdf (Last Access: 30 March 2022).

[31] Centrotec excluded British Workers from the European Works Council. Please refer to: https://www.ewc-news.com/en042019.htm.

[32] De Spiegelaere, Jagodzi ski, *cit.*, p. 2.

sense, the biggest challenge for Trade unions, alongside with their role and voting prerogatives.

Even if British workers are not taken into consideration for the calculation related to the establishment of an EWC or its existence, the Directive 2009/38/EC, namely art. 1 (6) in conjunction with art. 6 (2) (a), allows for the participation of representatives from third Countries in such body. However, the possibility granted by the Directive needs to be negotiated during the establishment of the EWC with the central management, or renegotiated for an already existing one, to determine the role of UK representatives within this transnational body. Such negotiations should refer to the participation of UK representatives as ordinary member with voting rights or as simple observers, defining specific rules for their participation, terms for their renewal and specific methods of appointment, as reported by a Joint European Trade Union Federations' Recommendation to EWC in 2021[33].

General Electric and Coca Cola, for example, introduced a clause stating that UK representative could continue to be members of the already existing EWC, maintaining their voting right and granting consultation and information rights for British workers, even after Brexit.

There's only one case in which such negotiation is ultroneous, namely when the domestic legislation expressly refers to United Kingdom in the scope of application of the relevant EWC transposition being, at the same time, the applicable legal basis for that specific EWC. A situation that is quite peculiar and inapplicable in European Countries such as Italy[34] or France[35] where there is only a generic reference to Member State. However, in case of a national revision of the domestic legislation on EWCs such direct reference could be inserted if there's the willingness to include British workers without any need for negotiations. Though it seems quite impossible at the time for quite obvious political reasons.

A third implication is referred to the already mentioned legal basis applicable to the existing EWC. According to the European Works Councils Database (EWCDB), UK was one of the EU Country with the highest

[33] ETUC recommendations on Brexit. Https://www.etuc.org/sites/default/files/2021-02/ETUF%20recommendations%20to%20EWC%20SE%20on%20Brexit_Jan%202021%20update%20EN.pdf (Last access 30 March 2022).

[34] Art. 2, Legislative Decree no. 113/2012.

[35] Articles L. 2341-1 and seq. of the French Labour Code.

number of Community-scale undertakings[36]. These undertakings, having their headquarter in UK and referring to the British Law as the legal basis for disputes between central management and EWC's representatives, are now obliged to move their headquarters to other EU Member States. Normally during the negotiation between Central management and the Special negotiating body, namely the committee formed by representatives from each Country with the role of determining the scope, composition and function of the EWC, the legal basis for the EWC is appointed considering the Country where there is the Controlling undertaking, seen as the one that can "exercise a dominant influence over another undertaking by virtue, for example, of ownership, financial participation or the rules which govern it". The EC Communication clarified the need to set a new legal basis for the already existing EWC in another European Union Member State, to ensure that the rights of employees under Directive 2009/38/EC remain enforceable within European Union. A provision that has been respected by the majority of UK MNEs or Non-EU MNEs by switching to Irish Law with the mentioned gaps in terms of legal actions and sanctions in case of breaches of the transposed Directive, or in other Member States such as Germany and France.

To this issue is refereed also the location requirements set by the Directive no. 2009/38/EC. In fact, according to art. 4 (1-2), the Central Management of the Undertaking or group of undertakings shall be situated in the European Union, obliging those with the Central management in UK to relocate its offices within an EU-27 jurisdiction. To avoid any delay in this relocation, the EU Commission imposes an automatic transfer in the Member State already indicated by Directive 2009/38/EC, as specifically set by art. 4 (2) and art. 4 (3), that is to say that Member State hosting the undertaking with the largest workforce[37]. The automatic change[38] could be avoided by an unilateral decision by the Central Management[39], made before the

[36] At the time of writing there are 1206 EWCs and other procedures of information and consultation in EU. For detailed data please refer to: http://www.ewcdb.eu/stats-and-graphs (Last access 30 March 2022).

[37] The relocated Central Management is named "Deemed central management" and will act as the official one. A new Central management could be appointed after a new round of negotiation at EWC level.

[38] As readable also in Point no. 50, CJEU, C-440/00, *Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG vs Kühne & Nagel AG & Co. KG*.

[39] See HSBC's case in Paragraph no. 5.

Brexit according to the decision taken by the British Central Arbitration Committee (CAC) on 15 February 2021 for a complaint filed by the Adecco EWC against the choice of the Central Management (US/Swiss) to choose the applicable law or the EU headquarters without any negotiations[40]. Not surprisingly, also in the Adecco case, the selected applicable law was the Irish one.

5. *British amendment to EWC Regulation: a new piece to the puzzle?*

In light of Brexit, the British Government amended the Transnational Information and Consultation of Employees Regulation 1999 (hereinafter TICER) with the aim of maintaining on its territory at least some of the EWCs belonging to British Community-scale undertakings. The Employment Rights Amendment Regulation no. 535/2019 modified the previous regulation replacing the recipient of the EWC legal framework from "Member States" to "Relevant States" with the idea of giving the opportunity for EWC established under British law to be compliant with the law and not infringing any EU veto. The rewording was aimed at keeping jurisdiction over already established EWC as happened with the very specific easyJet case disputed before the Central Arbitration Committee (CAC)[41].

According to the amended wording, "Relevant State" means any "State which is a Contracting Party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993" and the United Kingdom. Due to that, according to the UK Government, the UK EWC regulations could still be applied to EU Member States due to their participation to the Oporto's conference.

[40] Central Arbitration Committee, Case No. EWC/34/2020, Adecco Group European Works Council and Adecco Group: https://www.gov.uk/government/publications/cac-outcome-adecco-group-ewc-adecco-group-2/application-progress (Last Access 1 April 2022).

[41] The Easy jet PLC's case is not so relevant because the Agreement was not set by the parties but as a result of Subsidiarity procedures. Due to that it was still governed by UK Law. Easy jet PLC to overcome the issue decided to create a European based (in Germany) EWC maintaining the two, with the first only refereed to UK workers. See Central Arbitration Committe, Case Number EWC/36/2021, *easyJet European Works Council and easyJet PLC*, 1 June 2021: https://www.gov.uk/government/publications/cac-outcome-easyjet-ewc-easyjet-plc/application-progress.

On the other side, the Transposition of the EWC Directive in all Member States covers only other Member States and there is no reference to any other Country. Just think that even if Switzerland was part of EFTA but not part of European Economic Area, the EWC constituted in HSBC did not include Swiss workers although the workforce was consistent in terms of numbers. Moreover, UK ceased to be part of the European Economic Area since the 31st of December 2021, intricating the situation. So the rewording could not be as successful as expected by the British Government.

In this scenario there is still another problem on the table, mainly related to the existing EWC and the applicable law.

United Kingdom is actually the unique non-EU Country nor EEA Country to have an EWC legislation still in force and presumable applicable to all UK companies operating in Europe. Due to that, according to British law, British mother company with UK based EWC should respect it and remain under the British jurisdiction. On the other side, EU stressed the fact that EWC should have a new headquarters in another EU Country, or in any Member of EEA, and a corresponding new jurisdiction.

However, a first decisive case has been disputed before the Central Arbitration Committee (CAC) and has the merit to stress the relevant implications that a Company, even if based in UK, should consider after Brexit.

The complaint was disputed by the HSBC European Works Council, based in UK with a British representative agent against the HSBC Continental Europe, the new central management of the company after Brexit.

The problem arises from the decision of the HSBC management to transfer the EWC to Ireland and set the Irish jurisdiction as new applicable law without communicating any information to the existing EWC or requesting any vote for the amendment to the EWC agreement. According to the British representative, it constituted a breach of the EWC agreement, and he complained also on the decision to the exclusion of British workers from the EWC.

The CAC, in his decision started from the fact that "it is common ground between the parties that the Employer was required by EU law to designate a representative agent within an EU Member State for the purposes of the Directive once the transition period following the UK's withdrawal from the EU ended"[42]. So, any amendment to the existing agreement,

[42] Central Arbitration Committee, Case Number EWC/38/2021, 11 August 2021, *HSBC*

namely the one setting the new center of operation in EU and HSBC Ireland as representative agent, "was a necessary consequence of the change" related to the mutating scenario post Brexit. Moreover, being an amendment "required by law rather than being proposed at the will of the parties", it constituted an exception to the procedure for amendment by the parties as disposed by the EWC agreement. As stressed by the HSBC Continental Europe, the amendment, and the corresponding transfer to Irish jurisdiction, "occurred as a matter of law rather than as a matter of choice to the parties to the Agreement and that the amendments to Articles 2 and 19 merely informed reader of the accurate situation".

For what concerns the application of UK law, according to the CAC "once the Employer's central management ceased to be situated in the UK for the purposes of the Directive, HSBC Ireland being the 'deemed central management' for those purposes, the Agreement ceased, under the terms of that Agreement, to be subject to TICER": meaning that it ceased its effects over British workers.

In the end, the unilateral decision of HSBC's central management was considered lawful, giving the possibility to conclude the relocation of the EWC to Dublin.

In fact, the HSBC Bank by moving the Central Management to Ireland excluded "its entire workforce [40000 employees in UK] from its European Works Council". Due to this exclusion, the Company excluded from its role 8 British representative out of 20 EWC members.

The novelty of this situation could still create some unknown scenarios that need to be observed in the future. While some EWCs decided to maintain their British representative as reported in the previous paragraph, some others, as the HSBC's case, decided to exclude them even if there was a British legislation on EWC still in force. A riddle that only the future could solve.

6. *Conclusions*

Even though the ECWs have never acted as trade unions, they are a

European Works Council and HSBC Continental Europe: https://www.gov.uk/government/publications/cac-outcome-hsbc-ewc-hsbc-continental-europe/decision.

"symbolic and significant development in the history of social partnership"[43]. Their main role is to share information about changes, investments and closures of undertakings belonging to the same company, taken abroad. An information mechanism that is highly beneficial to discuss and solve problems before they turn conflictual and, in a certain sense, European or global. A right that is also enshrined in the article 27 of the Charter for Fundamental Rights in the European Union[44] and that is more and more topical after the Covid-19 Pandemic, where information about strategies adopted by partner companies located abroad played an important role in evaluating the effect of specific actions at the workplace, providing data on the remote-work experiences, about agreements at different levels on short-time work arrangements with a fair wage compensation or about the measures adopted for a safe return to work[45]. Information that even during the Pandemic have been shared among EWC's national representatives digitally, through video-call and video-meeting, or through surveys submitted among them, allowing the EWC to actively play an essential role in managing this unprecedent health crisis and protecting workers' interests[46].

Brexit has been depriving British workers of this transnational social dialogue net, apart from the limited cases in which the Central management decided to maintain British representatives in their EWCs. However, while most of British workers are now excluded by the rights of information and consultation, UK Companies employing more than 1,000 workers with operations employing 150 workers or more in two or more other European Union member States will still be bound by the obligation to set up an EWC and pay for its operations. This is one of the several loopholes that British workers and companies will have to deal with after the Brexit. A *deja-vu* if

[43] MacShane, *European Works Councils - Another Brexit Victim,* in *Social Europe*, 5 January 2017, https://socialeurope.eu/european-works-councils-another-brexit-victim (Last access 1 April 2022).

[44] Ales, *Article 27 CFREU*, in Ales, Bell, Deinert Robin-Olivier (eds.), *International and European Labour Law. Article-by-Article Commentary*, Nomos, , 2018, p. 217 ff.

[45] Https://www.epsu.org/article/updated-joint-etufs-recommendations-ewcse-members-during-covid-19.

[46] This is the case of BASF where the EWC requested to share information through a survey. Similarly, Lafarge Holcim, a Swiss multinational company in the manufacturing sector, shared information to EWC representatives not only about internal strategies but also about supply chains: https://www.epsu.org/sites/default/files/article/files/ETUF%20joint%20reco%20to%20EWC%20SE%20on%20Covid-19%20EN.pdf.

we recall the opt-out clause appointed to the original EWC Directive in 1994. While EWCs and the transnational rights of information and consultation have been sacrificed for British workers, British companies, instead, are still obliged to comply with EU law and regulations, including European Works Councils, if they want to operate in Europe. An unexpected result that is even more loud due to the obligation to set new Central management location within EU, outside British boarders, and to pay for the EWC operation in another Country with presumable languages barriers and higher operation costs, apart from Ireland. Controversial would be the situation where a British Company would be obliged to have a EWC, based in another European Country, granting information and consultation rights for European workers while depriving domestic workers from the participation to this body.

Recalling the words of Denis MacShane, former British Minister for Europe until 2012, EWCs and the rights they were protecting are the first visible victims of the Brexit[47], paving the road for the future employment rights devaluation in UK, mainly related to the areas where EU labour law has been more effective[48]. In a nutshell, European Works Councils are the first victims of an ongoing Labour Brexit, that will be achieved at the expenses of the British workers in the future years. And ironically, while depriving British workers from such rights, the absence of UK and its obstructive behavior on information and consultation rights – among the constant British reluctancy for a deeper EU Social Policy – could actually facilitate the process of expansion of social rights in the European Union[49], as we are already experiencing since the proclamation of the European Pillar of Social Rights.

[47] MacShane, *cit.*

[48] Countouris, Ewing, *cit.*, p. 8 ff.

[49] Novitz, *Re-introducing a human face - the future of EU Collective Labour Law*, in ter Haar, Kun (eds.), *EU Collective Labour Law*, Edward Elgar, 2021, pp. 455-459.

Abstract

Brexit has finally arrived, and its consequences are still unpredictable. The art. 50 TEU notice triggered by the British Government has been unique in European Union history and unique are the effects over economies, transports, and workers.

While the Withdrawal agreements signed by European Union and United Kingdom has the aim of softening the economic effects and granting a stable collaboration, there are some loopholes that could deprive British workers of some rights that they were exploiting during their membership to European Union, such as transnational information and consultation rights enshrined in the art. 27 of the Charter of Fundamental Rights in the European Union and disposed by Directive no. 2009/38/EC: a Directive that no longer applies in United Kingdom since January 2021.

The essay retraces and contextualizes the effect of Brexit on the Directive no. 2009/38/EC, mainly known as European Works Councils Directive. The analysis deals with the exclusion of British workers and British representatives from the rights of information and consultation granted by such Directive. Apart from the position of British representatives in many European Works Councils, also the fate of some of these bodies is at the stake due to the exclusion of British workers from the calculation threshold for their creation. This issue will be dealt looking at the clarifications set out by the European Commission to face the several legal implications brought by Brexit in the context of European Works Councils.

Keywords

Brexit, European Works Councils, Information and consultations procedure, Withdrawal Agreement, European Labour Law.

Emilia D'Avino

Workers' representation and union rights in the fourth industrial revolution: the Spanish case*

Summary: **1.** The resilience of the Spanish Trade Union System: adaptation and transformation in a context of change. **2.** "Libertad de sindicación": a milestone. **3.** Structural conditions and open points of the workers' representation in Spain. **4.** The collective bargaining: a weakened right for digital unions. **5.** Union rights within the undertaking. The link with a "material workplace". **6.** Right to strike. Current challenges. **7.** Collective rights of self-employed. **8.** Collective rights of economically dependent self-employed (TRADE). **9.** Some comparative conclusions.

1. *The resilience of the Spanish Trade Union System: adaptation and transformation in a context of change*

The digital revolution imposes new reflections on the role of Collective Labour Law and relaunches the debate over the need of an adequate regulation in the field of the collective bargaining[1].

While in Italy this debate leads right back to the lack of implementation of Arts. 39 and 40 Italian Constitution[2], on the contrary, in other jurisdiction – such as the Spanish system – the issue is linked to the need to reform an over-regulated workers' representation system[3].

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[1] ILO, *Social Dialogue Report*, *Collective bargaining for an inclusive, sustainable and resilient recovery*, 5 May 2022.

[2] Gottardi, *I perimetri contrattuali e la rappresentatività datoriale*, in *DLRI*, 2021, 4, p. 627; Poggi, *Lavoro, persona e tecnologia: riflessioni attorno alle garanzie e ai diritti costituzionali nella rivoluzione digitale*, in *Federalismi.it*, 2022, 9.

[3] Garrido Pérez, *La representación de los trabajadores al servicio de plataformas colaborativas*,

From this perspective, Spanish legal system provides opportunities for a wider reflection on the pros and cons of the introduction of a legislative framework in this field. Analysing that system, with its peculiarities, will also provide an opportunity to reflect on the "state of the art" of the Italian system. Indeed, one of the peculiarities of the Spanish unionism is the integration of different level of sources governing union rights (i.e., Constitution, legislation and case law). The problem is that this framework is very strict, and it is linked to an old model of union democracy, which is difficult to adapt to modern society without some reforms. It is enough to think that the main feature of Spanish trade union system is the link between their action and a "material" place to exercise their activity. Obviously, digital work has questioned this principle, undermining the legislative framework.

As it is well known, new employment relationships lead to a deterritorialization, which makes the exercise of freedom of association more difficult, because the concentration of workers in the same place is a key element for unionisation[4]. Practically, technological transformations intensify the risk of processed-unionisation, spreading mistrust and individualism[5]. Deterritorialization revolutionizes the structure of Spanish Collective Labour Law, unions activity and their rights, which are formally linked with the element of the territoriality.

in *Der. Soc.*, 2017, 80, p. 221; Esteban Legarreta, *Cuestiones sobre la articulación de la representación del personal al servicio de las plataformas colaborativas*, in Asociación Española de Derecho del Trabajo y de la Seguridad Social (eds.), *Descentralización productiva: nuevas formas de trabajo y organización empresarial*, Cinca, 2018, p. 377; Nieto Rojas, *Acción colectiva en las plataformas digitales. ¿Sindicatos tradicionales y movimientos de base para representar idénticos intereses?*, in Ministerio de Trabajo (ed.), *El futuro del trabajo: 100 años de la OIT*, 2019, p. 1502.

[4] Borelli *et al.*, *Lavoro e tecnologie. Dizionario che cambia, "Digital Workplace"*, Giappichelli, 2022, p. 81; Baylos Grau, Valdés de La Vega, *El efecto de las nuevas tecnologías en las relaciones colectivas de trabajo*, in Alarcón Caracuel, Esteban Legarreta (eds.), *Nuevas Tecnologías de la información y la comunicación u Derecho del Trabajo*, Ed. Bomarzo, 2004; Cruz Villalón, *25 años de relaciones laborales colectivas. Regulación del derecho de huelga: balance y propuestas normativas*, in *Rel. Lab.*, 2010, 23; Monda, *Lo Statuto alla prova di "Industria 4.0": brevi riflessioni sulla c.d. disintermediazione sindacale*, in Rusciano, Gaeta, Zoppoli (eds.), *Mezzo secolo dallo Statuto dei lavoratori*, *QDLM*, 2020, p. 345; Montoya Media, *Nuevas relaciones de trabajo, disrupción tecnólogica y su impacto en las condiciones de trabajo y de empleo*, in *RDTES*, 2019, p. 92; Pinto, *Los derechos de libertad sindical de los trabajadores de plataformas digitales*, in *Der. Lab.*, 2021, 284, p. 755.

[5] Guindo Morales, *Libertad sindical. El sindicalismo ante las nuevas realidades productivas en el marco de la revolución tecnólogica*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), *Innovación tecnólogica, cambio social y sistema de relaciones laborales*, Editorial Comares, 2021, p. 57.

For example, the *Real Decreto Legislativo* 23 October 2015 No. 2 (ET), "*por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores and the Ley Orgánica 11/1985, de 2 de agosto, de Libertad Sindical* (LOLS)" continually refer to the belonging of a worker to a material workplace to constitute representations (Arts. 62, 63 and 66 ET). It is the same for the representations electoral processes, as well as for the exercise of union rights. The difficulty to establish a representation without a material place, obviously, impacts on the effectiveness of collective bargaining directly. Furthermore, as it will be seen, digital market makes more difficult to enforce the prohibition to replace workers on strike, considering both the wide diffusion of self-employed – which are not entitled to this right – and the legitimate practice of "*esquirolaje tecnólogico*": the strikebreaking through electronic devices (technological strikebreaking).

Finally, digital work enhances the debate regarding the difficulties to access union rights for precarious workers and self-employed, despite any formal acknowledgements (self-employed are entitled to freedom of association, s.c. "*derechos sindicales basicos*")[6].

The latest reforms did not intervene in this matter. They have only introduced a presumption of subordination for food delivery riders, a strengthening of the right of information in case of use of algorithm and a wider competence of collective bargaining on the disconnection right[7].

Despite those difficulties, there is a trend of Spanish unions to create "union platforms". Dynamic organizational tools have been introduced, using platforms and digital technology itself, organizing digital movement,

[6] Baylos Grau, *Gobernanza laboral, crisis y cambio tecnológico en la acción colectiva*, in *Doc. Lab.*, 2019, 117, p. 95; San Manrtín Mazzucconi, *Tecnología de la información y la comunicación en las relaciones de trabajo: nuevas dimensiones del conflicto jurídico*, ed. EOLAS, 2014; Ferradans Caramés, *Los derechos colectivos de los trabajadores al servicio de plataformas colaborativas*, in Gómez Muñoz (ed.), *El trabajo autónomo en España tras la crisis: Perspectivas y propuestas*, Bomarzo, 2019, p. 323; Fernández Villazón, *Canales de representación del personal en los nuevos modelos de gestión empresarial*, in Moreno-Gené, Torres-Coronas, Belzunegui Eraso (eds.), *Finding solutions to societal problems*, URV, 2018, p. 122; Goerlich Peset, *Economía digital y acción sindical*, in Piñero Miguel, Todolí Signes (eds.), *Trabajo en plataformas digitales: innovación, derecho y mercado*, Thomson Reuters Aranzadi, 2018, p. 592; Tormos Pérez, *Digitalización y derechos colectivos: retos y propuestas*, in *Arias Domínguez et al.*, *Nuevas tecnologías y trabajo sostenible*, Laborum, 2020, p. 293.

[7] *Decreto-Ley 9/2021, de 11 de mayo*; *Ley 12/2021, de 28 de septiembre*; *Real Decreto-ley 32/2021, de 28 December 2021*; *Real Decreto-ley 28/2020, de 22 de septiembre.*

as opposed to the traditional union, by promoting for example the s.c. "net-strike" or the "virtual strike" and by creating collective platforms and cyber unions[8]. It is possible to make reference to the "*RidersXDerechos platform*", created in May 2017, within of the union *Intersindical Alternativa de Cataluña*, or the platform "*turespuestasindical.es*". However, there are problems of representativeness feedback and on their democratic nature, due to their introduction outside the ordinary channels. It is also true that association through networks or applications does not imply the same level of commitment as the classic organizational links. On the other hand, these techniques are not adequate to solve all the problems arising from the diversification of digital workers' interests: considering the high prevalence of autonomous workers, in direct competition with each other, and the risk of workers isolation, in very wide geographical spaces potentially[9].

2. "Libertad de sindicación": *a milestone*

To understand if the Spanish trade union system can be applied to the gig economy, it is necessary to investigate the concept of "*Libertad de sindicación*"[10]. Indeed, this concept is so wide as to guarantee any form of unionisation, even if it is digital. Art. 28.1 of Spanish Constitution (SC) states that "Everyone has the right to freedom of association. The law may limit the exercise of this right or introduce exceptions for the Armed Forces or Institutes or other bodies subject to military discipline and it shall regulate the special conditions of its exercise by civil servants.

Union freedom includes the right to set up unions and to association, as well as the union right to form confederations and to found international union organisations, or to become members. No one may be compelled to associate".

[8] Borelli *et al., cit.,* pp. 65 and 216; Rota, *Il web come luogo e veicolo del conflitto collettivo: nuove frontiere della lotta sindacale*, in Tullini (ed.), *Web e Lavoro. Profili evolutivi e di tutela*, Giappichelli, 2017, p. 197.

[9] Valle Muñoz, *Las representaciones colectivas de trabajadores en las plataformas digitales*, in *TL*, 2021, 157, p. 59.

[10] Freedom of association plays a crucial role in all unions system. In a comparative view Ales, *The Collective Dimensions of the Employment Relationship: Ways Beyond Traditional Views*, in Addabbo et al., *The Collective Dimensions of Employment Relations*, Palgrave, 2021, p. 63.

This Article should be read in conjunction with Art. 7 SC according to "Unions and employers associations contribute to the defence and promotion of the economic and social interests which they represent. Their creation and the exercise of their activities shall be unrestricted in so far as they respect the Constitution and the law. Their internal structure and operation must be democratic".

In other terms, similarly to the Italian system, the "positive" and "negative" freedom of association is ensured, both in a collective and individual perspective. Unlike the Italian system, the LOLS gives full implementation to these constitutional articles. This Act specifies: the content and the scope of freedom union; the union registration system; the representativeness criteria.

The LOLS clarifies that all workers have the right to association to defend their economic and social interests. The concept is broad, and it also includes unemployed workers, although they cannot set up unions (Art. 3 LOLS). Nevertheless, self-employed are entitled to minimal union's right (*derechos sindicales basìcos*), as it will be seen shortly.

According to the LOLS freedom of association includes: a) The right to set up, suspend or extinguish unions, without prior authorization and with democratic procedures; b) The right to join or leave the union, freely and without constraint; c) The right to freely elect their union representatives; d) The right to exercise union activity.

Furthermore, unions and organizations have the right to: a) Draft its statutes, organize their internal administration and their activities, and formulate their program of action; b) Establish federations, confederations and international organizations, as well as join or leave them; c) Not to be suspended or dissolved except by means of a definitive resolution of the Judicial Authority, based on serious non-compliance with the legislations; d) Exercise union activity within the undertaking or outside it, which shall include, in any case, the right to collective bargaining, the right to strike, to raise individual and collective disputes and to submit candidatures for the election of *Comités de Empresa* and *Delegados de Personal* and corresponding bodies in the Public Administrations (Art. 2 LOLS).

The exercise of these rights is affected by digital challenges, due to the "material production unit" (or establishment) requirement.

3. *Structural conditions and open points of the workers' representation in Spain*

It is difficult to identify new representativeness criteria for unions' constitution, without the existence of a material workplace.

According to Arts. 7 and 28 SC unions and employers' associations contribute to the defence and promotion of economic and social interests. Their setting up and their activities shall be unrestricted in so far as they respect the Constitution and the law. Their internal structure and their activity must be democratic. However, public authorities shall efficiently promote this kind of workers' participation within companies, according to Art. 129.2 SC[11].

So, the Constitution does not regulate any procedure to constitute unions. It is regulated by the Law.

The ET and the LOLS provide a double channel of workers representation, identifying the most representative unions and giving voice to elected workers representation bodies within the companies. So, there is an emphasis on the unions at "establishment level". Title II of the ET regulates the *Delegados de personal* (workers' delegate, in companies or work centres with less than fifty and more than ten workers) and the *Comité de empresa* (works committees, in companies employed more than fifty worker), which oversees defending collective interest[12]. Representativeness criteria are directly linked with the "unit production". Even unions electoral process is conditional on workers' belonging to a material workplace.

In other terms, the ET provides for a union constitution procedure built around the concept of workplace. Thus, a systematic interpretation leads to consider the workplace as the unit of reference (see also Art. 63.2 ET)[13]. Indeed, this is the main criterion to determine the existence of unitary representations, the number of representatives and their configuration, the type of union to be constituted (Arts. 62, 63 and 66 ET).

The notion of establishment provided for by the law and by the Spanish

[11] The translation is the official one. On this issue see Judgment Const. Court. No. 74/1983; No. 118/1983; No. 98/1985; No. 189/1993. Monereo Pérez, *El futuro de la representación y participación de los trabajadores ante el cambio tecnológico y las nuevas formas de empresa*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), *cit.*, p. 115.

[12] See Articles 61-76 ET and the LOLS. Article 63.2 ET provides for the cases in which it is possible elect a joint works council in the same administrative geographical division.

[13] Pastor Martínez, *Una aproximación a la problemática de la representación de los trabajadores de las plataformas colabroativas y en entornos virtuales*, in *IUSLab*, 2018, 2.

Courts is that of "production unit"[14]. According to Art. 1.5 ET the workplace is a production unit with a specific organization that is registered as such by the labour authority. This concept is mandatory. Obviously, also platform workers, if employees, could set up unions or associate or participate in elections. Thanks to the subordination presumption introduced by the *Real Decreto-Ley* 11 May 2021 No. 9 for the digital cycle couriers[15], riders are entitled to the rights provided by ET and LOLS[16].

However, digital workers do not belong formally to any workplace as defined by article 1.5 ET, especially if they are contingent workers. Virtual place, typical of platform work, is not contemplated. So, it is also difficult to consider them in the threshold values on which the type of union to be formed depends. Consequently, in a concrete perspective, just the emphasis on the production unit makes it difficult to create digital unions.

Despite this, the technological development could potentially implement a virtual and remote electoral process, facilitating the participation of all workers.

In this perspective, the Spanish legal system does not prohibit electronic vote, if it is personal, direct, free and secret. Despite this, it is not always possible. Even in the case of teleworking, formally Art. 19.4 *Ley* 9 June 2021 No. 10 "*de trabajo a distancia*" provides for the effective participation of the

[14] Ysàs Molinero, *Is the Structure of Employee Representation Institutions in Europe Adapted to the Economic Transformations? Analysis and Proposals from the Spanish Case*, Addabbo et al., *cit*., p. 160.

[15] Baylos Grau, *Una breve nota sobre la ley española de la laboralidad de los riders*, in *LLI,* 2021, 1; Cruz Villalón, *Una presunción plena de laboralidad para los 'rider*s', https://elpais.com/economia/2021-05-12/una-presuncion-plena-de-laboralidadpara-los-riders.html; Rojo Torrecilla, *Y llegó la norma que declara la relación laboral de 'las personas dedicadas al reparto en el ámbito de las plataformas digitales'. Primeras notas y comentarios al RDL 9/2021 de 11 de mayo*, http://www.eduardorojotorrecilla.es/2021/05/y-llego-la-norma-quedeclarala.html).

[16] It is now presumed that an employment relationship exists in the delivery or distribution of any kind of product or good where the service or the working conditions are managed algorithmically over a digital platform. That presumption is subject to: (i) organisation, (ii) management, and (iii) control by the corporate entity concerned using a digital platform. The criteria of the Spanish Supreme Court's ruling in Judgment 25 September 2020 No. 805 have also been included; that ruling recognises the need to adapt the features of any employment relationship (dependence and working for a third party) to digital platforms services sector. Gil Otero, *Plataformas digitales y la dimensión colectiva de la presunta relación laboral*, in Ministerio de Trabajo (ed.), *El futuro del trabajo: 100 años de la OIT*, 2019, p. 1381; Pastor Martínez, *La representación de los trabajadores en la empresa digital*, in *Anuario IET de trabajo y relaciones laborales*, 2018, 5, p. 112.

remote workers in all activities organized or convened by their legal representation or by the other workers, in defence of their work interests.

However, their participation in representatives' bodies elections should be "in person". In other words, this rule imposes the physical presence. Nevertheless, it must be interpreted as meaning that the teleworker is entitled to choose to vote at his workplace. Interpreting in a different way, the legal provision would be totally anachronistic and in conflict with the possibility of the worker to vote by mail, introduced by Arts. 10 *Real Decreto* of 9 September 1994, No. 1844 and 69 ET.

All these aspects require finding new representative structures.

To find a solution, scientific doctrine focuses on the similarities between digital work and remote work. To identify collective representation, in the case of remote work, workers are assigned to a workplace, and they have the same collective rights of other workers within the undertaking[17]. Naturally, for digital workers, there are issues on the form and criteria to carry out this assignment. Different solutions have also been pointed out. A first theory identifies the formal workplace with the place where the activity is carried out. Consequently, factors such as the orders' place, the employers' instructions and the service recipients must be enhanced. However, this theory could generate some problems. It could extend the territorial area to the whole national – or even international – territory. Obviously, again, the representative system could be difficult to implement.

Another solution consists of moving from the concept of workplace to the concept of undertaking. But this interpretation does not hide the issues to identify the national or international material headquarter.

The third solution, to be favoured, recognises a primary role to collective bargaining, allowing it to introduce specific rules in this area[18]. Even in the case of teleworking the *Real Decreto-ley* 22 September 2020 No. 28, Art. 19.1, provides for collective bargaining guarantees remote workers' collective rights, considering its peculiarity and ensuring equal treatment.

[17] See *Marco Europeo sobre el teletrabajo del 16 de julio de 2002* and Art. 13 ET, which regulates collective rights of teleworking. Art. 19 *Real Decreto-ley 28/2020, de 22 de septiembre, de trabajo a distancia*, amended this article. Mercader Uguina, *Ejercicio de los derechos colectivos/sindicales en el trabajo a distancia*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), cit., p. 755. Ron Latas, *Los derechos colectivos de las personas que trabajan a distancia*, in *DSE*, 2021, 15.

[18] About the theories described see Pastor Martínez, *La representación de los trabajadores…* cit.

Naturally, in order to have legitimacy and qualified representation also in the digital market, this option is as well conditional on the revision of union's constitution criteria. It is a vicious circle.

4. *The collective bargaining: a weakened right for digital unions*

As mentioned, also the sign of a collective agreement by platform workers' union representations will be more complicated, due to the lack of formal recognition of representativeness. Essentially, in a pathological perspective, this lack could represent a license for establishing the so-called "yellow unions". Furthermore, this is a central point because collective agreements in Spain are legally binding on all employees in their scope if the negotiating parties are entitled to sign the agreement. The right to collective bargaining is recognized to unions and to representatives elected according to Artt. 4.1 c) and 82 ET. At the plant level the appropriate negotiating bodies are the *Comité de empresa*. The *Delegados de Personal* at plant level can sign agreements, if they hold a majority of seats in the *Comitè de empresa*. At a higher level, only unions affiliated to the "most representative unions" at national or regional level (if it is a regional or provincial agreement), or other unions with a specific level of support in the negotiations scope, can sign the agreement on behalf of all the employees in the concerned trade. In other words, the status of "most representative union" depends on support in the *Comité de empresa* elections. Indeed, Art. 6 LOLS provides for unions considered as the most representative ones at national level are those: (a) accrediting a special audience of 10% or more of the total number of *Delegados de Personal de los miembros de los Comité de empresa* and of the corresponding bodies of the Public Administrations; (b) unions or trade union bodies, affiliated, federated or confederated to a national level union considered the most representative in accordance with point (a).

Nationally only the CCOO and UGT are most representative unions. So, once again, everything revolves around the undertaking and unit production concepts. This is even more true after the introduction of the *Ley* 6 July 2012, No. 3, which gave a greater role to collective bargaining within the undertaking.

Obviously, in this perspective, the difficulties to identify the workplace of digital platforms impact directly on the (in)effectiveness of collective bar-

gaining right, introduced by Art. 37 SC: "The law shall guarantee the right to collective labour bargaining between worker and employer representatives, as well as the binding force of the agreements. The right of workers and employers to adopt collective labour dispute measures is hereby recognised. The law regulating the exercise of this right shall, without prejudice to the restrictions which it may establish, include the safeguards necessary to ensure the operation of essential community services"[19].

Nevertheless, the latest reform[20] does not make steps to solve these problems, albeit was aimed to modernize collective bargaining. The reform focuses on collective bargaining "ultra-activity", after the expiration term[21], and on the relationship between collective agreements at the industry level and at plant level. Therefore, agreements at plant level must behave as regulatory instruments for organizational aspects (such as schedules or professional classification), while collective bargaining at industry level regulates salary, remuneration and working-time.

There are no adequate measures for digital work[22]. In this perspective, appropriate measures aimed at including digital union representativeness and at ensuring collective agreements effectiveness are required.

Nevertheless, the most representative unions (among others, U.G.T. and *Comisiones Obreras*, CC.OO.) do not renounce to represent the platform workers, promoting union activity through digital tools, especially to protect precarious workers. Indeed, the sum of robotics, digitalization and artificial

[19] The translate is the official one.

[20] *Real Decreto-ley 28 December 2021 No. 32, de medidas urgentes para la reforma laboral, la garantía de la estabilidad en el empleo y la transformación del mercado de trabajo*.

[21] The ultra-activity, previously limited to one year, is now of indefinite duration.

[22] Fita Ortega, *I diritti sindacali dei lavoratori delle piattaforme digitali in Spagna*, in Ludovico, Fita Ortega, Naha (eds.), *Nuove tecnologie e diritto del lavoro. Un'analisi comparata degli ordinamenti italiano, spagnolo e brasiliano*, Milano University Press, 2021, p. 144 ff. A Spanish collective agreement in the field of platforms work is the *V Acuerdo Laboral* for the hotel and restaurant, approved by resolution of 19 March 2019 of the *Dirección General de Trabajo* (B.O.E. 29 March 2019). This agreement is only an integration of an original agreement and extends its scope, including the activity of distribution of food and beverages through digital platforms. In practice, it is a framework agreement, negotiated pursuant to Art. 83.2 ET aimed at establishing the collective bargaining structure. The agreement was signed by the unions CC.OO., U.G.T. and C.I.G. (*Central Sindical Galega*), by the *Confederación Empresarial de Hostelería de España*) and the *Confederación Española de Hoteles y Alojamientos Turísticos* (CEHAT). In this case, problems do not arise because the signatories are considered representative unions. Considering their most representativeness, they have the right to sign collective agreement (Art. 87.2 ET).

intelligence could cause significant job losses or indecent working conditions and unions must face the workers' fear of losing their jobs[23].

Collective bargaining could regulate these new phenomena. Even in the field of teleworking[24] collective agreements could ensure health security and all the other individual rights[25]. Until now, priority is given to the right to privacy or the right to digital disconnection, thanks to the *Real Decreto-ley 29/2020*[26]. Regarding this right the collective agreements have certainly a primary role. As an integration of individual contract, collective bargaining has a specifical competence in the field of workers' rights: specially in the matter of supplying and maintaining equipment and digital devices, or of expense reimbursements[27].

Furthermore, rights of information and consultation before introducing teleworking have been introduced[28]. Clearly, in the absence of collective bargaining every right would be left to an individual agreement. In this way, there is a high risk that the consent given by the worker is the result of a "mere adherence to conditions arranged unilaterally by the entrepreneur", as assumed several times in Judgement of *Audiencia Nacional*, *Madrid, Sala de lo Social* 22 March 2022 No. 44.

[23] Rodrìguez Fernàndez, *Sindicalismo y negociación colectiva 4.0*, in *TL*, 2018, 144, p. 27.

[24] Art. 5 Ley 10/2021. See Monereo Pérez, López Vico, *El Teletrabajo tras la pandemia del Covid-19. Una reflexión sobre su ordenación y normalización jurìdica*, Ediciones Laborum, 2022.

[25] See Art. 88, *Ley Orgánica 3/2018 de Protección de Datos Personales y garantía de los derechos digitales* and Art. 20.*bis* ET; Art. 18 *Ley* 10/2021. Barrio Andrés, *Garantía de los derechos digitales en la LOPDGDD*, in López Calvo, *La adaptación al nuevo marco de protección de datos tras el RGPD y la LOPDGDD*, Wolters Kluwer, 2019, p. 217; Barrios Baudor, *El derecho a la desconexión digital en el ámbito laboral español: primeras aproximaciones*, in *Rev. Ar. Doc.*, 2019, 1, p. 16; Sànchez Castro, *El derecho de desconexión digital, el revés de la aplicación de nuevas tecnologías sobre la relación laboral*, in *Noticias Cielo*, 2019, 3; Sierra Hernaiz, *El papel de la negociación colectiva en el tratamiento de los datos personales de los trabajadores*, in *TL*, 2020, 152, p. 115; Vega Ruiz, *Revolución digital, trabajo y derechos: el gran reto para el futuro del trabajo*, in *IUSLab*, 2019, 2.

[26] *Decreto ley* 22 September 2020 No. 28, *de trabajo a distancia*; *Real Decreto ley* 29 September 2020 No. 29, *de medidas urgentes en materia de teletrabajo en las Administraciones Públicas y de recursos humanos en el Sistema Nacional de Salud para hacer frente a la crisis sanitaria ocasionada por la COVID-19*. See also *Real Decreto-ley* 11 May 2021 No. 9, *por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales*; *Ley* 9 July 2021 No. 10.

[27] Arts. 11 and 12 *Ley* 10/2021.

[28] Art. 19 *Ley* 10/2021.

5. *Union rights within the undertaking. The link with a "material workplace"*

Unions have the right to hold periodic meetings; the right of assembly or to provide advice in some situations; information rights in certain subject and, finally, consultation rights[29]. Material workplace is also required to ensure these union rights within the undertaking. For this reason, the information and consultation rights (Art. 64 ET), the rights to hold a meeting (Arts. 77-80) and to a notice board (Art. 81 ET), as well as the guarantees in the representative activities (Art. 68 ET) will require adaptation to digital platforms characteristics.

The exercise of these rights could be ensured through a digital space; by replacing in this way material workplace. In this regard, Spanish Courts have several times addressed the issue of the possibility of using digital devices. For example, in the Judgement 13 December 2005 No. 281 the Constitutional Court recognized the right to use these communication tools and ruled that "it would be constitutionally legitimate that the company predetermines the conditions of use of electronic communications for unions purposes". This ruling also supports the thesis according to which the company digital tools used for unions purposes cannot entail additional burdens for the employer and cannot significantly aggravate the costs.

The issue also emerged in the field of remote working, where the legislator introduced a reform aimed at ensuring all collective rights, especially information rights. Indeed, Art. 19.2 RDL 28/2020 provides that remote workers are entitled to access to all collective rights. The company must provide the necessary means, including access to communications and electronic addresses, and the implementation of a virtual notice board. However, the "compatibility with the provision of remote work" is the limit.

In this field, the *Real Decreto-Ley 9/2021* and the *Ley* 12/2021 made progress, modifying Art. 64 ET and introducing an information right for the workers representation in the field of employee's algorithm. Indeed, a new paragraph is introduced in Art. 64.4 ET[30]. According to the current article 64.4 ET, the *Comité de empresa* will have the right to: "d) Be informed of algorithms or artificial intelligence systems affecting working conditions or the access to employment, or the continued work, including profile building.

[29] Arts. 64 and 77 ff. ET; Art. 8 LOLS.

[30] See Baylos Grau, *L'accidentato viaggio dei riders in Spagna. Analisi della legge 12/2021*, in *LLI*, 2022, 1.

So, the reform is aimed at regulating workers' representatives right to information in a digitised working environment[31]. It is important to point out that the new Art. 64.4 scope includes all digital platforms. The legislator directs his attention to the algorithms, especially because alterations and evasion of labour rights through digital mechanisms are taking place outside the traditional scheme of workers participation within the undertaking.

It is an innovative approach because this Article allows a "democratic" interference in management decisions. However, this right is collocated at the "weakest" level of participation, referring to the information rights, rather than the most incisive duty of consultation.

6. *Right to strike. Current Challenges*

The right to strike is guaranteed by Art. 28.2 SC[32] and it is regulated by *Real Decreto Ley* No. 17 of 4 March 1977. The latter is a pre-constitutional Act, and it was interpreted in accordance with constitutional principles by the Constitutional Court in Judgement 8 April 1981 No. 11. The latter rules that "strike is a disturbance which occurs during the normal course of social life and in the process of production of rights and services, carried out in a peaceful and non-violent manner, by a group of workers. In this wider sense strikes may be designed to claim improvements in the financial or general working conditions and may presuppose a protest with repercussions in other spheres or areas"[33]. In Spanish legal system the strike is qualified as an individual subjective right, which can be performed only collectively by an association, group, or organisation[34]. According to Art. 28.2 SC only employees are entitled to it, and this is closely linked to union freedom and collective bargaining right. From a practical point of view, unions could achieve effective collective bargaining just through the exercise of their right to strike[35].

[31] On the information right Monereo Pérez; Ortega Lozano, *Libertad de información y nuevas tecnologias*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), cit., p. 377. See Const. Court 21 January 1988 No. 6; 15 December 1983 No. 120; 9 July 1986 No. 88.

[32] Art. 28.2 Const. states that the law regulating the exercise of this right shall establish the guarantees necessary to ensure the maintenance of essential community services.

[33] The translate is the official one, available in tribunalconstitucional.es.

[34] Const. Court 28 September 1992 No. 92.

[35] Monereo Pérez, Ortega Lonzano, *El derecho de huelga. Configuración y régimen juridico*, Aranzadi, 2019.

At constitutional level there is a distinction between the ownership of the right, belonging to workers, and the entitlement to exercise it. Only unions are entitled to exercise the right to collective action. In this perspective, we are dealing with an instrumental right to the safeguard of collective interests. For this reasons, members of organisations not recognised as unions or workers who are not members of any organisation have no legal right to take collective action[36].

Some problems for the exercise of this right by platform workers are evident. There are difficulties in convening and holding an assembly to submit the decision to strike: considering the lack of a material space shared by the workers to debate and to vote on this relevant decision. Indeed, there is not a legal possibility of holding the meeting in a virtual way.

Additionally, only the *Delegados de Personal* or *Comité de empresa* can convene assembly, or no less than thirty-three percent of workers (Article 77 ET); in the case of digital platforms, it is very difficult to know the number of workers to consider, as everyone moves individually. Furthermore, the problem of the bogus self-employed could lead to exclude some workers.

Moreover, the simple majority on secret vote is required to proclaim the strike (Art. 3.2.b RDL 17/1977). So, it is required a virtual assembly that guarantees the anonymous vote and workers' rights in the field of protection data (in accordance with Arts. 6 and 9 of Regulation (EU) 2016/679 of 27 April 2016). Therefore, if a strike is declared through a mobile application, such as Whatsapp, without any prior agreement, it must be declared illegal, with the consequence that the dismissal of a worker who actively participates in it cannot be declared null[37].

Another important issue concerns the chance, for the employer, to avoid the limits on the strikebreaking, using self-employed or even electronic devices[38]. Indeed, on the one hand, the strike effectiveness is compromised due to digital work characteristics. It is easy to replace the striking workers in a context where workers provide their service on a competitive basis, with an

[36] Perán Quesada, *Cuestiones crìticas del ejercicio del derecho a huelga en el contexto de la economìa digitalizada*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), *cit.*, p. 89.

[37] Fita Ortega, *cit.*, p. 161.

[38] Perán Quesada, *Cuestiones crìticas del ejercicio del derecho a huelga en el contexto de la economìa digitalizada*, in Monereo Pérez, Vila Tierno, Esposito, Perán Quesada (eds.), cit., p. 89.

individualistic spirit. In other terms, the entrepreneur could rely on many workers willing to accept a temporary provision of services[39].

On the other hand, practically, technological devices use allows to continue an economic activity without directly occupy other workers, avoiding the strikebreaking prohibition and at the same time cancelling or reducing the effects of the strike[40].

Consequently, in a context where humans and machines are closely intertwined this right is weakened. Digital platforms help to continue economic activity promoting the use of technology during the strike[41]. This problem could not be solved from the strikebreaking prohibition introduced by Art. 6.5 RDL 17/1977, because the latter is obsolete.

Constitutional jurisprudence ruled on the strikebreaking limits several times. Originally, only the "external" strikebreaking was forbidden; that is to say the replacement with workers not hired by the company during the strike. This principle was extended to the procurement and subcontracting cases (s.c. "*esquirolaje impropio*")[42]. Moreover, the prohibition of functional and geographical mobility[43] during the strike is debated[44]. Nevertheless, according to the Constitutional Court, "primacy of the right to strike produces, during its exercise, the effect of reducing and in a certain way anesthetizing, paralyzing, or maintaining in a vegetative, latent life, other rights that in normal situations can and should display their full potential capacity (s.a. the s.c. '*jus variandi*')"[45]. In a broad sense, the Constitutional

[39] Fita Ortega, *cit.*, p. 139.

[40] See also Rota, *Il crumiraggio tecnologico: una lettura comparata*, in *LLI*, 2018, 4.

[41] Aguilar Del Castillo, *El uso de la tecnología y el derecho de huelga: realidades en conflict*, in *LLI*, 2018, 1; Perez Rey, *El Tribunal Constitucional, ante el esquirolaje tecnológico (o que la huelga no impida el futbol)*, in *Der. Soc.*, 2017, 77, p. 151; Tascon Lopez, *El esquirolaje tecnologico*, Aranzadi, 2018; Sala Franco, *Los mecanismos empresariales de defensa frente a una huelga*, in Borrajo Dacruz (ed.), *Controversias vivas del nuevo Derecho del Trabajo*, La Ley, 2015.

[42] Const. Court 18 November 2010 No. 75.

[43] Const. Court 28 March 2011 No. 33; 28 September 1992 No. 92.

[44] Alzaga Ruíz, *La sustitución interna de los trabajadores huelguistas: un supuesto de vulneración del derecho de huelga*, in *Comentario a la STSJ Cataluña 16 de Abril de 2002 (AS 2002, 1847)*, in *ASoc*, 2002, 2; Pérez Rey, *El esquirolaje tecnológico: un importante cambio de rumbo de la doctrina del Tribunal Supremo (STS de 5 de diciembre de 2012)*, in *Der. Soc.*, 2013, n. 61; Pérez Rey J., *El Tribunal Constitucional, ante el esquirolaje tecnológico*, cit., in *Der. Soc.*, 2017, n. 77; Todolí Signes, *El esquirolaje tecnológico como método de defensa ante una huelga (1)*, in *AL*, 2014, 7-8; Toscani Giménez, *La prohibición de esquirolaje durante la huelga con especial mención al esquirolaje tecnológico*, in *Tr. Der.*, 2017, 30, p. 1.

[45] Const. Court 28 September 1992 No. 123; 21 March 2002 No. 66; 19 June 2006 No. 183.

Court prohibits any behaviour undermining strike effectiveness. Nevertheless, there are opposite Court rulings that create ambiguity, interpreting in a restrictive sense the internal strikebreaking[46], even in the matter of technological strikebreaking. The Constitutional Court ruling 2 February 2017 No. 17 states that strikebreaking prohibition does not includes companies' technological devices use[47]. The Court focuses exclusively on the legitimacy of this behaviour, ignoring the perspective adopted in Judgement No. 123/92. According to the Constitutional Court, the use of technical instruments available in the company is legitimate: the right to strike is not aimed at prohibiting to carry out a productive activity that could potentially compromise the achievement of the strike objectives; as well as it does not oblige the other workers to contribute to the success of the protest. "The Constitution guarantees the right to carry out the strike, not the result or the success of it"[48].

However, the analysis does not consider the effects on the essential content of the right to strike. That Judgement, basing only on the existence or the absence of a legal precept, risks to nullify the enjoyment of the strike.

7. *Collective rights of self-employed*

Until now attention has been paid to employers. However, it is important to say that digital work is often provided by self-employed (or bogus self-employed) and by economically dependents self-employers (s.c. *TRADE*). The legislator introduced the subordinate presumption for delivery workers, and then faces in some ways the problem of bogus self-employed.

The issue of collective rights of genuine self-employed remains open,

[46] The analysis of national case law in Alzaga Ruíz, *cit.*, p. 2261.

[47] This ruling closes an open debate between the Constitutional Court and the *Tribunal Supremo*. See *Tribunal Supremo* 27 September 1999 No. 7304; 4 July 2000 No. 75; Const. Court. 19 June 2006 No. 183 and No. 191; *Tribunal Supremo* 11 June 2012 (*Rec.* 110/2011) and 5 December 2012 (*Rec.* 265/2011); *Tribunal Supremo* 30 April 2013 (*Rec.* 2465/2012). See Lopez Lluch, *El derecho de huelga: nueva doctrina sobre el "esquirolaje tecnológico" en la STS de fecha 5 de diciembre de 2012*, in *AD*, 2013, p. 15; Pérez Rey, *Tertulias, reportajes de actualidad y esquirolaje tecnológico en la huelga general (a propósito de la STS de 11 de junio de 2012)*, in *Der. Soc.*, 2012, 59, p. 195; Pérez Rey, *El esquirolaje tecnológico*, cit., p. 163; Pérez Rey, *El Tribunal Constitucional*, cit., p. 15.

[48] Const. Court No. 11/1981; No. 72/1982; No. 41/1984; No. 189/1993; No. 41/2006.

especially if they are economically dependents. These rights are regulated by Art. 19 ff. of *Estatuto del Trabajo Autónomo* (*Ley* No. 20 of 11 July 2007, LETA). This Article covers the fundamental collective rights of self-employed (*derechos colectivos básicos*). It includes the right to establish a federation, confederation or union. By contrast, according to an individual perspective, the self-employed who has not employees has: the right to join a union or business association under conditions laid down by the law; the right to set up professional associations of self-employed (*asociaciones profesionales específicas de trabajadores autónomos*), without prior authorisation[49]; the right to take collective action to defend their professional interests.

Regarding the procedures for setting up the associations and their functioning, the *Ley Organica* No. 1 of 22 March 2002 requires the respect of the Constitution and of the laws. Their internal organization and their functioning must therefore be inspired by democratic principles, in full respect of pluralism (Art. 2, par. 4 and 5), avoiding that the status of association member makes a reason of discrimination.

However, Art. 3.1 LOLS provides that self-employed without employees may associate but cannot set up unions whose goal is to protect their singular interests. Nevertheless, they could set up specific professional associations under special legislation[50].

Despite these legal provisions, there are structural difficulties for the exercise of union action. Indeed, self-employed are considered as entrepreneurs from the perspective of Competition Law, and this will hinder the exercise of their union rights[51].

Indeed, the right to defend self-employed interests derives from Article 22 SC[52], rather than from the freedom of association. In other terms, it is a collective protection with a conflictual resonance, different from the union representation and which, although it cannot be legally considered as the

[49] See Arts. 2 LO 1/2002 ff.

[50] Lousada Arochena, *Derechos colectivos en el trabajo autónomo*, Ed. Bomarzo, 2010, p. 31; Moreno Vida, *Los instrumentos de «presión colectiva» y su singularidad en el trabajo autónomo*, in Monereo Pérez, Vila Tierno (eds.), *El trabajo autónomo en el marco del Derecho del Trabajo y de la Seguridad Social: Estudio de su régimen jurídico. Actualizado a la Ley 6/2017, de 24 de octubre de Reformas Urgentes del Trabajo Autónomo*, Editorial Comares, 2017, p. 633; Todolí-Signes, *Workers, the Self-employed and TRADEs: Conceptualisation and Collective Rights in Spain*, in *ELLJ*, 2019, 10, 3, p. 254.

[51] García Murcia, *Los derechos colectivos del trabajador autónomo*, in *AL*, 2009, 9, p. 3.

[52] Todolí-Signes, *Workers, the Self-employed and TRADEs*, cit., p. 260.

strike, excludes contractual liability for non-compliance with the contractual commitments undertaken towards its customers.

That right and the strike are on a different constitutional level[53]. In Judgement No. 11/1981, the Spanish Constitutional Court clarifies that: "the right to strike is ensured to workers who provide remunerated work if its exercise is aimed at renegotiating working condition. The Art. 28 SC makes a very clear connection between constitutional recognition and the idea of obtaining financial and social equality. We are not facing the strike as protected by Art. 28 SC in case of disruptions to the production of goods and services or in the normal operation of the latter, aimed at pressurising the Public Authorities to ensure governmental measures or to introduce new measures, more favourable, for the interests of a category (for example, employers, services concessionaries etc.). A strike is characterised by the strikers deliberate wish to suspend their work obligations. The constitutional right to strike is granted so that workers may temporarily suspend their legal and contractual obligations. Here there is an important difference between the strike constitutionally protected under Art. 28 and the right to suspend other activities. In the case of business or professional activity there is the freedom to suspend it, but there is no guarantee against the consequences of the disruptions"[54].

Based on the same logic, the Spanish system recognizes the right to negotiate to self-employed, if they are employers, but it is not considered as a tool to improve or regulate their working conditions. The right to negotiate is an employer prerogative, opposed to the collective bargaining right.

Regarding self-employed, no employers, the right to collective bargaining is not ensured[55]. Self-employed associations are not qualified as unions. Their collective action instruments (negotiation, conflict) are not protected by the fundamental right of freedom of association recognized by Art. 28.1 SC. Obviously, different negotiation right scope is justified by the inexistence of a counterparty, against which it is possible to exercise collective rights (collective bargaining, strike and conflict)[56].

[53] Self-employed have not the right to strike and so they have no guarantee in case of retaliatory behaviour, except in the case of judicial assessment of employment relationship. See for example *Tribunal Supremo* 25 September 2020 No. 805.

[54] The translate is the official one.

[55] Rodríguez Rodríguez, *The Right to Collective Bargaining of the Self-Employed at New Digital Economy*, in *HLL*, 2020, 2, p. 41.

[56] Const. Court 29 July 1985 No. 98.

8. *Collective rights of economically dependent self-employed (TRADE)*

According to the LETA, economically dependent self-employed workers (TRADE, *trabajadores autónomos económicamente dependientes*)[57] could be members of a union and they could be in the scope of Art. 28.1 SC and of the LOLS. Furthermore, according to Art. 22 SC, on the right of association, and to the *Ley Orgánica* No. 1/2002, their right to be a member of a professional organisation is also granted. This is confirmed by Art. 3.2 LETA, which states – with regard to professional interests agreements (*acuerdos de interés profesional*) – that "any clause in the individual contract of a TRADE affiliated to a 'union' or to a 'self-employed association' will be null and void if it infringes the terms of the professional interest agreement or professional association to which he belongs".

However, the LETA did not introduce any TRADE's unitary representation. For this reason, the possibility of joining to workers unions cannot be ignored[58]. Nevertheless, it would not imply their total equality with employed workers.

Obviously, it could imply their right to participate in their meetings, their right to information or to use the bulletin board. It is a set of essential instruments to effectively exercise the collective activity for defending their professional interests.

Even the right to collective bargaining has been extended to that group, but with substantial specificities. Professional agreements, signed between the associations or unions that represent TRADEs and the companies for which they carry out their activity, are the regulation source of TRADE's working conditions (Article 13.1 LETA). Unlike self-employed, TRADEs have a counterpart against which to exert pressure to enforce their claims. Indeed, economic dependence of these workers places them in a position of weakness with their contractual partner. As indicated in the LETA, negotiation rights also operate between these workers and their customers. Nev-

[57] The TRADE is regulated by the *Ley* 20/2007. It is considered as a self-employed who generates most of his or her income from a single client, specifically, at least 75% of that income. This circumstance creates a situation of dependence on this client aimed to protect by establishing basic rights.

[58] Trillo, *Derechos colectivos del trabajador autonomo dependiente economicamente*, in *Doc. Lab.*, 2009, 85, p. 89 ff.

ertheless, the recognition of the value of the professional interest agreements does not transfers the characteristics of collective bargaining to this area. Indeed, it is recognized the possibility of concluding agreements, but with a limited subjective efficacy. These agreements bind only the signatory parties. The most important problems arise from the provision: "Professional interest agreements shall be concluded under the provisions of the Civil Code. The personal effectiveness of said agreements 'shall be limited to the signatory parties and, if appropriate, to those affiliated to self-employed associations or signatory unions' that have expressly given their consent to do so" (Art. 13.4 LETA). This paragraph shows the real nature of professional agreements. Indeed, it is a hybrid negotiation characterised by the convergence of labour, civil, and union regulations. A special scheme is introduced. The issue seems to be complicated, because there is an essential difference from the *erga omnes* effectiveness of the collective agreements[59].

Furthermore, unlike the collective agreements' content (under Art. 85 ET), Art. 13 LETA limits the negotiation exclusively to the field of TRADEs' professional conditions, within the limits of Competition Law. These limits, which does not appear in labour legislation, are justified by the TRADE's autonomous position.

Even the levels of professional agreement are different from that of collective bargaining. It is not clear if it is possible to contract a national agreement, in the absence of jurisprudential criteria[60].

Lastly, the right to strike is still to be investigated. As for the "classic" self-employed, the right to strike has been excluded for the TRADEs[61].

However, the economic dependence imposes a wider reflection on the dualistically approach focused only on autonomous and subordinate work. In this line, the theoretical approach already adopted by the Constitutional Court in Judgment No. 11/1981 is justified because the self-employed is in a position of parity with its client. It is not the same for the TRADEs. In this perspective, it is useful to analyse an old and less-known Judgement of the Court for the defence of competition[62]. That Judgement excluded the

[59] Tyc, *Collective labour rights of self-employed persons on the example of Spain: is there any lesson for Poland?*, *Acta Universitatis Lodziensis Folia Iuridica*, 2021, 95, p. 135.

[60] Fita Ortega, cit., p. 147. See also Nieto Rojas, *Los acuerdos de interés profesional. Balance tras diez años del estatuto del trabajo autónomo*, in *RIL*, 2018, 3, p. 6.

[61] Moreno Vida, cit., p. 647.

[62] RTDC 18 February 1999, 434/98, Prensa Segovia.

sanction for a group of freelancers, newspaper boys, who refrained from carrying out their activity to force the distribution company, dominant in the market[63]. Competition authority assessed that the case presented an "asymmetrical and highly unbalanced relationship between the only provider (the Distributor) and the many small sellers that operate in it". It is logical, and not contrary to competition, that these newspaper boys are able to negotiate and to change certain working conditions unilaterally imposed. Indeed, these conditions produces frictional effects on the activity, characterized by a very strong personal involvement. It is admissible, regardless of the abusive or not behaviour of the Distributor, because "market efficiency" requires "in this case a moderation of the existing imbalance in the relations between the only one provider and the multiple small freelancers"[64]. Projected into modern times, these reflections could undoubtedly be made for all digital freelancers.

For this reason, it is necessary to review the considerations on the strike of independent, self-employed or professional workers, developed by the Constitutional Court Judgement No. 11/1981 of 8 April: in particular in the statement that "Here there is an important difference which separates the strike constitutionally protected by Art. 28 and the self-employed workers' strike. The self-employed in a broad sense are workers, but they are not employed workers with a salaried work contract". If it is true for "classic" autonomous workers, it is not the same for the TRADEs. It is no longer possible to argue that for this category the "strike" is simply tolerated. It must be recognized and protected as a right. For this reason, it is necessary to recognise entirely and effectively all measures referred to in Art. 19 LETA, as well as the right to strike[65].

9. *Some comparative conclusions*

As seen to date, digital work brings up old and new problems in the trade unions system. After reconstructing the problems of Spanish Collective Labour Law, it is interesting to conclude with some suggestions, considering the Italian debate on the highlighted issues.

[63] Göerlich Peset, *Digitalización y derecho de huelga*, in *TL*, 2020, 155, p. 93 ff.
[64] RTDC 434/98, Prensa Segovia.
[65] Fita Ortega, *cit.*, p. 166 ff.

Indeed, the Spanish case helps to reflect on a different way, in comparison to the Italian way, of regulating all union rights.

A comparison between the Italian system and the Spanish one helps to perceive that the lack of implementation of Art. 39 Italian Constitution makes it a more resilient union system, despite the continuous challenges of labour market. It is confirmed by the collective agreement on industrial relations reached by Amazon and the unions in Italy on 15 September 2021, and by the other collective agreements containing digital union rights also at plant level[66]. In a system still characterized by a low level of rules, the unions consolidated their activity in a dynamic way[67]. Nevertheless, in practice, this dynamism does not exclude a high risk of yellow unions[68] or a difficulty to introduce adequate representativeness criteria. On the contrary, Spanish legislative framework risks paralysing union activity, especially as regard representativeness criteria and collective rights ownership. It even risks frustrating the right to collective bargaining in the absence of an adequate and democratic digital representative model, entirely independent of a material workplace. However, it is not simple to introduce a new representative system, because Spanish model is inspired by a proximity criterion: starting from the plant level and projecting itself to the national level. On the other hand, for part of literature this is a structure also desirable in the Italian system[69].

But, certainly, some issues of the Spanish system need to be emphasized, because they are very innovative, and they respond to European demands. First, it is important to pay attention on the primary role given to unions through the information right in case of algorithm use impacting on working conditions[70]. As it is known, algorithmic work management is one of

[66] See Italian *CCNL "Lavanderie, tintorie, industria, artigianato*" of 28 February 2022.

[67] Regalia, *Note sul Protocollo Amazon per la definizione di un sistema condiviso di relazioni industriali,* in *LLI*, 2022, 2. See also Centamore, *I Protocolli Amazon e la "moderna" concertazione sociale*, in *LLI*, 2022, 2.

[68] See, among others, *Tribunale Firenze* 24 November 2021 No. 781; *C. App. Palermo* 23 September 2021; *Tribunale Bologna* 30 June 2021; *Tribunale Milano* 28 March 2021; *Tribunale Firenze* 9 February 2021. Among other, Cordella, *Le relazioni sindacali nel settore del food delivery: la prospettiva interna*, in *LDE,* 2022, 1; Donini, *Condotta antisindacale e collaborazioni autonome: tre decreti a confronto*, in *LLI*, 2021, 1, p. 1; Ferraresi, *Qual è la categoria contrattuale relativa al "food delivery"?*, in *Labor*, 2022, 1; Martelloni, *Riders: la repressione della condotta antisindacale allarga il suo raggio*, in *LLI*, 2021, 2.

[69] Carrieri, *Primo di tutto le relazioni industriali*, in *DLRI*, 2021, 4, p. 585.

[70] Borelli *et al.*, cit., *Contrattazione dell'algoritmo*, p. 44.

the most sensitive matters, because raises the issue of balancing between the economic freedom and the high risk of discrimination or damaging privacy. It determines the essential conditions of the employment relationship in a way not necessarily transparent. In this perspective, Spanish legislative framework already pursues one of the aims of European Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work: that is to say the objective of ensuring fairness, transparency, and accountability in algorithmic management by introducing new material rights for people performing platform work[71].

It is appreciable that in this area the legislator tries to strengthen worker participation, albeit only through the information, rather than the consultation. Indeed, digital changes require a general rethinking of the unions' role[72] and Spanish legislator takes an important first step in this direction. Italian legal system could be inspired by this model, given that now the main way for Italian unions to claim rights and to protect workers in these areas is to apply to the courts[73], with all the limitations that this involves. In Italy the right to information and the participation of workers are still undervalued, except for certain topics[74]. For this reason, a theory that emphasises the role

[71] COM(2021) 762 final. See also *European Pillar of social rights Action Plan* and Directive (EU) 2019/1152, on transparent and predictable working conditions and *European Framework Agreement on the digitalization of work* of 22 June 2020 signed by BusinessEurope, ETUC, CEEP and SME united to support the successful digital transformation of Europe's economy and to manage its large implications for labour markets, the world of work and society at large. This topic cannot be discussed here, but see among the most recent, Bronzini, *La proposta di Direttiva sul lavoro nelle piattaforme digitali tra esigenze di tutela immediata e le sfide dell'"umanesimo digitale"*, in *LDE*, 2022, 1; Gaudio, *Alghoritmic Management, sindacato e tutela giurisdizionale*, in *DRI*, 2022, 1, p. 30 and the references referred to therein; Isceri, Luppi, *L'impatto dell'intelligenza artificiale nella sostituzione dei lavoratori: riflessioni a margine di una ricerca*, in *LDE*, 2022, 1.

[72] See Treu, *Diritto del lavoro e transizione digitale: politiche europee e attori sindacali*, in *DRI*, 2022, 1, p. 18.

[73] An example is given by the "class action" promoted by CGIL before the Milan Court: https://www.cgil.it/la-cgil/aree-politiche/contrattazione-e-mercato-del-lavoro/2021/08/17/news/rider_cgil_presentata_la_prima_class_action_in_materia_di_lavoro-1409744/. On the legal action as collective self-defence see Lassandari, *L'azione giudiziale come forma di autotutela collettiva*, in *LD*, 2014, 2-3, p. 309.

[74] On worker's participation D'Antona, *Partecipazione dei lavoratori alla gestione delle imprese*, in *EGT*, vol. XXII, 1990, 2; Mengoni, *I limiti ai poteri dell'imprenditore: confronto tra il modello dello Statuto dei Lavoratori e il modello dell'art. 46 Costituzione*, in mazzoni et al., *La posizione dei lavoratori nell'impresa. Conflittualità o partecipazione responsabile?*, Franco Angeli, 1977, p. 152; Pedrazzoli, *Partecipazione, costituzione economica e art. 46 della Costituzione. Chiose e distinzioni sul*

of company-based trade unions in Italy must be supported. In other terms, the Law, relying on Art. 19 and Art. 35 of Law No. 300 of 20 May 1970, should support both a more specific unions negotiating function and an information and consultation procedure in this field[75].

The second, no less important, issue concerns the TRADEs collective rights. Their entitlement of collective rights, also at the plant level, is an important first step: especially in a digital system, characterised by a wide spread of self-employed and precarious workers. This acknowledgement is even more important than the recent introduction of the subordination presumption for the riders. Unlike Art. 2 of Italian Legislative Decree No. 81 of 15 June 2015, Spanish legislative framework gives dignity to a specific category of workers, without drawing them into the area of subordination to provide minimum protection.

It would be very important starting from these principles to guarantee a uniform minimum protection and to overcome the traditional problem of digital workers qualification.

However, it cannot be overlooked that in Spain the problem relating to the relationship between Labour Law and Competition Law for the self-employed – already known at European level[76] – is also significant: impacting on the right to strike and especially on the subjective effectiveness of professional agreements. As seen, to avoid competition distortion, the strike is only tolerated, and the effectiveness of the agreements is limited to the signatory parties. It is evident that there is a strong weakening of the right, considering that Spanish system is characterized by collective agreements "*erga omnes*".

declino di un'idea, in *RIDL*, 2005, I, p. 427; Zoppoli L., *Rappresentanza collettiva dei lavoratori e diritti di partecipazione alla gestione delle imprese*, in *DLRI*, 2005, p. 347. Most recently, Ales, *La partecipazione (bilanciata) nello Statuto dei Lavoratori: riflessioni sulle rappresentanze ex art. 9*, in *DLM*, 2020, 1, p. 15; Bavaro, *Appunti sul diritto del potere collettivo del lavoro*, in *LD*, 2021, 3-4, pp. 563-582; Guarriello, *La concertazione: prospettive euro-unitarie*, in *DLRI*, 2021, 4, p. 703; Lunardon (eds.), *Conflitto, concertazione e partecipazione*, Cedam, 2011, p. 780.

[75] Faioli, *Data Analytics, robot intelligenti e regolazione del lavoro*, in *Federalismi.it*, 2022, 9, p. 164.

[76] On this topic Monda, *Tutele collettive e riders: quali vincoli dal diritto euro-unitario?*, in *LDE*, 2022, 1.

Abstract

The Article deals with the Spanish trade union system in a critical perspective. The A. describes the legislative framework on unions' freedom, right to strike, union rights within the undertaking, and collective bargaining rights, with reference also to the minimum trade union rights granted to self-employed. After the regulatory reconstruction, the A. identifies its strengths and weaknesses. Analysing that system, with its peculiarities, provides an opportunity to reflect on the "state of the art" of the Italian system.

Keywords

Technological revolution, platform economy, unions, collective bargaining, right to strike, technological strikebreaking.

Eva Lacková

Fragility of pre-contractual labour relations in the light of algorithmic recruitment

Summary: **1.** In defence of pre-contractual employment relationship and its relevance for labour law. **2.** Profiling through data and information dyad. **3.** Recruitment practices involving automated profiling of the candidates in the light of right not to be subject to a decision based merely on automated processing ex Article 22 GDPR. Cleaving power of the algorithm-driven hiring tools. **4.** Algorithm cannot be lied to. Right to lie as a defence mechanism. Exception from *culpa in contrahendo* and its problematic application in automated profiling. **5.** Final remarks.

1. *In defence of pre-contractual employment relationship and its relevance for labour law*

Effects of digital revolution stretch over all types of work-related contractual relationships and penetrate all the phases of their existence, preparatory stage being no exception.

The actual signing of an employment contract is preceded by relatively complex social and legal relations between the potential contracting parties. The totality of rights and obligations that arise between parties in the process of negotiating of an employment contract will be further referred to as pre-contractual relationship[1]. This phase is characterised by rather concise legal regulation that oversees the realization of one of the fundamental human

[1] Concept borrowed from terminology of Article 41 of the Slovak Labour Code Law No. 311/2001. The term is consistently used also among Czech and Slovak legal scholarship. For the Czech part see classical textbook GREGOROVÁ, *Pracovneprávní vztahy*, in GALVAS *ET AL.*, *Pracovní právo 2., dopl. a p eprac. vydání*, Masarykova univerzita, 2015, pp. 107-109. As for the Slovak doctrine see BARANCOVÁ, SCHRONK, *Pracovné právo*, Sprint dva, 2018, pp. 210-211.

rights – right to work[2]. It begins with announcement of the selection procedure and lasts until the employer selects a particular candidate and provides to inform the others who failed, *ipso facto* closing the selection procedure.

Nowadays recruitment processes are increasingly oriented towards abandoning traditional evaluation methods based on subjective judgments, to be based instead on the automated and robotic analysis of data[3]. Generally, when employers use algorithms, the goal is to gather and apply data to make decisions in a faster, more efficient, and more objective manner. Their use is, paradoxically, directly linked to increase in volume of job applications thanks to technological tools involved in the recruitment. The more the algorithms are deployed in the recruitment, the faster and more effective the selection process can get in elaborating the applications, thus resulting in the vicious circle of ever increasing demand for better technology capable of elaborating growing number of job applications.

Present analysis will concern precisely the deepening of factual asymmetry between the parties of pre-contractual employment relationship, with regards to increased automation of decision-making processes. Firstly, in order to provide some solid basis to the argument the article illustrates the conceptual differences between the notions "data" and "information" depending on whether they are used in automated profiling or not, as well as their improper use by the European legislator. Subsequent paragraphs further develop the thesis of technological influence in the recruitment: automatic profiling takes form through the critical scrutiny of Article 22 GDPR, followed by the hypothesis of the right to lie as a lawful tool if used as a legitimate defence against banned investigations by the potential employer – here the paper will try to demonstrate how this right fails when algorithms take over.

However, one question must be preliminary answered before focusing on the digitalisation of pre-contractual relationships in labour law: one shall ask as to why so little interest is shown from the (Italian) legal scholarship

[2] Article 23 of Universal declaration of human rights states that everyone has the right to work and to free choice of employment, and Article 4 of Italian Constitution recognizes the right of all citizens to work. For representative Italian scholarly literature see D'Antona, *Il diritto al lavoro nella Costituzione e nell'ordinamento comunitario*, in *RGL*, 1999, No. 3, p. 15 ff.

[3] Ficarella, *La tutela della privacy del lavoratore nell'era dei big data*, in Cucciovino *et al.* (eds.), *Flexicurity e mercati transizionali del lavoro. Una nuova stagione per il diritto del mercato del lavoro?*, ADAPT University Press, 2021, p. 123 ff.

(and case-law) on the issue of relevance of pre-contractual employment relationship.

The issue of indifference of labour law doctrine towards the pre-contractual labour relations stems from some of the fundamental legal questions the branch is trying to answer for some time. The power asymmetry between jobseeker and potential employer is lacking the stamp of subordination *ex* Article 2094 Civil Code which still seems to be the preferential gateway to the single and inseparable block of labour protections[4]. However, while subordination offers a fertile ground for allocating the protection to the weaker party, it certainly does not have monopoly on it, considering antidiscrimination provisions' coverage of pre-contractual relations contained in articles 8 and 15 of Workers' Statute, let alone the private law sphere[5]. Therefore it seems rather wise to turn to enlightened work of Italian scholar Gaetano Vardaro (in classical essay from 1986 called *Tecnica, tecnologia e ideologia della tecnica nel diritto del lavoro)* in order to grasp a concept of subordination he envisioned for the labour law of the twenty-first century – the labour law bold enough to venture beyond the limits of the known world, making use of the subordination to distribute protection to the weaker party and at the same time free of rigid dogmatism that prevents from expanding the protection where it is needed[6]. For the pre-contractual relations preceding the employment relationship it could mean their assimilation to the employment

[4] The inseparability of the labour protections has been criticized by legal scholarship in Caruso, Del Punta, Treu, *Manifesto. Per un diritto del lavoro sostenibile*, in *WP C.S.D.L.E. "Massimo D'Antona".IT*, No. 21/2020; with regards to welfare coverage see also Razzolini, *La subordinazione ritrovata e la lunga marcia del lavoro autonomo*, in *LLI*, 2020, Vol. 6, No. 2, pp. 141–144.

[5] Private law has lost its domain of will and pure individualism and it is no longer indifferent to the problems of social justice and the distributive effects of wealth. Nowadays civil law scholarship legitimises the intervention of public authority in order to create rules governing a private contract when – such as in case of tenants, consumers or users of essential services – the need to take into account the conditions of social or economic weakness is pungent. As a consequence of legislator's intervention the regulation does not cease to be contractual, neither it affects the relevance of the decisions of the private contracting parties in defining the contractual program, and only entails a "functionalization" of the latter for the simultaneous realization of interests of a social nature. See Perulli, *Droit des contracts et droit du travail*, in *RDT*, 2007, No. 4, Vol. I, p. 438 ff.; Trib. di Lucca 29 April 1991, note of Di Mauro, *In tema di integrazione legale del contratto ex art. 1339 c.c.*, in *GC*, 1992, Vol. I, p. 246.

[6] By "throwing the ladder after one has climbed it". Vardaro, *Tecnica, tecnologia e ideologia della tecnica nel diritto del lavoro*, in *Politica del Diritto*, 1986, No. 1, p. 128.

relationship with the purposive approach technique[7], i.e. identifying the goals behind the law and making sure that chosen legal instruments are suitable to achieve these goals, especially focusing on the vulnerabilities that require response; all this by contextual analysis that in case of pre-contractual relations would take into account elements of democratic deficit rather than of subordination. Democratic deficit refers to a party being governed by someone whilst unable to participate in this government[8], which easily applies in most employment relation dynamics between employees and employers. But in some cases the job seekers in the recruitment process suffer the democratic deficits as well – namely when employer's decision-making process that affects the other partecipant is flawed and the party is unable to contest the decision and force an amendment[9].

Closer inspection of the theory of democratic deficits reveals that it simultaneously does not preclude the traditional binary division between subordination and employement, but rather it modifies their separation criterion. Similarly as in, for instance, consumer protection relations, it allows for capturing the vulnerability that justifies legal protection. Indeed, the foregoing does not want to suggest to extend the notion of tecnological subordination *in toto* where it does not belong – in the pre-contractual employement relationships – but rather it tries to challenge the labour law viewpoint on subordination conditioning all the protection allocation.

Then again, undeniable ongoing changes (both social and technological) seem to have an emptying effect on the traditional concepts of worker/employee. Some comentators see the reasons in vanishing perception of the labour as a collective movement or a class; the labels that seem to suit better to contemporary workers are the identities such as consumer or investor[10]. Less and less rare are becoming suggestions about including labour protection to these new worker types, irrespectively of legal transaction on which are founded[11].

Vardaro's reasoning in this regard offers a deeper perspective; according

[7] Davidov, *A purposive approach to labour law*, OUP Oxford, 2016.

[8] Davidov, *Subordination vs domination: exploring the differences*, in *IJCL*, 2017, Vol. 3, Iss. 3, p. 8.

[9] Davidov, *Subordination vs domination*, cit., p. 13.

[10] Arthurs, *Labor Law as the law of economic subordination and resistance: a thought experiment*, in *CLLPJ*, 2013, Vol. 34, No. 3, pp. 589-590.

[11] Arthurs, *op. cit.*, also, as one of the first among Italian scholars Vardaro, *cit.*, p. 75.

to the scholar "the study of the relationship between man, work and technology cannot be exhausted within the spatial or even temporal borders of the working performance: the estrangement (*rectius*: alienation) of the worker refers to that of the consumer and this and that of the tenant, in a circle of alienations and subordinations of modern man"[12]. Indeed, the relationship between man, work and technology is crucial to Vardaro – the inside power struggle between those elements depends on how the technology can be employed within the production process dominated by others[13]. However, while he does not deny the transversal effect of technological innovation in both subordinated and self-employed working relations[14], he makes no mention of such effects on the negotiation phase preceding any working relationship. After all, the paper written more than thirty years ago could not have grasp "every" future development of labour – and technology invading the recruitment phase has had quite overwhelming effects on power imbalance between the job seekers and employers.

2. *Profiling through data and information dyad*

Modern hiring practices make diverse use of internet and technologies in order to understand the suitability of individual candidates for the job positions. Ranging from the analysis of social media accounts to the use of machine-learning algorithms, new technologies enable extensive profiling of future employees.

When seeking appropriate regulatory mechanisms to tackle technological challenges in pre-contractual relationship, data protection regulation has been generally considered to be a key regulatory response to a problem[15] (at

[12] Vardaro, *cit.*, p. 126.

[13] Bavaro, *Questioni in diritto su lavoro digitale, tempo e libertà*, in *RGL*, 2018, No. 1, p. 13.

[14] Bavaro, *cit.*

[15] European Commission, *White paper on artificial intelligence – a European approach to excellence and trust*, Brussels, 2020, claims that GDPR addresses the risks of discrimination and violation of fundamental rights, however there is a necessity for assessing additional risks linked to AI; the conviction confirmed also in Sartor, *The impact of the General Data Protection Regulation (GDPR) on artificial intelligence*, European Parliament Research Service, Brussels, 2020. In that sense also legal scholarship Aloisi, Gramano, *Artificial intelligence is watching you at work: digital surveillance, employee monitoring, and regulatory issues in the EU context*, in *CLLPJ*, *Special Issue "Automation, Artificial Intelligence and Labour Protection"*, De Stefano (ed.), 2019, Vol. 41, No. 1, p. 103.

least until draft of the proposal for the AI act was published in April 2021[16]). One probable reason for this is the centrality of the notions of information and data for GDPR as well as for machine learning algorithms. The crucial starting point for the analysis thus should be clarification of the meaning and mutual relation of data and information in context of information and communication technology (ICT) to ensure the sensible application of law in the face of technological change.

According to popular understanding, interconnection of two notions can be expressed by the following equation: information equals data plus meaning[17]. Given that data are facts, patterns, characters or symbols representing something from the real world, then information denote the meaning assigned to data[18]. Information must necessarily contain data, and therefore cannot exist without it. In relation to knowledge, information represents bigger and more complete concept than data.

This theory, however widespread and linear, does not suffice to explain the use of data/information concepts in the definition of personal data *ex* Article 4 paragraph 1 of GDPR stating as such "any information relating to an identified or identifiable natural person". The reference to "any information" encompasses "data providing any sort of information", that are "available in whatever form, be it alphabetical, numerical, graphical, photographical or acoustic" regardless if "kept on paper or stored in a computer memory by means of binary code"[19]. Personal data definition overturns the logic of the previously mentioned equation when it treats information as signs representing the reality. In other words, information does not merely include data – information stands for data. *Ergo*, information/data dichotomy upon which GDPR is built seems to be only illusory. Whole regulatory framework

[16] Proposal for a Regulation of the European Parliament and the Council laying down harmonised rules on artificial intelligence (Artificial intelligence act) and amending certain Union legislative acts.

[17] Floridi, *Information: a very short introduction*, Oxford University Press, 2010, p. 17. Floridi's account have likely popularised this definition of information, although its origins can be traced to other authors such as Davis, Olson, *Management Information Systems: Conceptual Foundations, Structure, and Development,* McGraw-Hill, 1985, p. 200, claiming that "information is data that has been processed into a form that is meaningful to the recipient".

[18] Bygrave, *Information concepts in law: generic dreams and definitional daylight*, in *OJLS, 2015*, Vol. 35, No. 1, p. 95.

[19] Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data, 2007, pp. 7-9.

of data protection is founded on the syntactic dimension of information (i.e. information as a sign representative of the knowledge it is meant to convey[20]), while notion of data becomes redundant.

Contrary to this, in the context of machine learning algorithms a clear and fundamental distinction exists between data and information. Here data are "abstractions of real-world entities not because they are signs that represent such entity, but because they are an ensemble of features or attributes, which, put together, will allow for a representation of such entity"[21]. The representation of real world entities, on the other hand, makes sense only when data are organised in useful patterns. "One can argue that data is transformed into information when the chosen ensemble of features of the concept are meaningful for the overall goal of the processing operation (which is to make predictions on the basis of available information)"[22]. Hence, if the theory that information is meaningful data (information = data + meaning) is valid, in the context of machine learning algorithms information would represent only partial reflexion of the real world because based on mere abstractions and not linear representations. The concept could seem more comprehensive if explained as a famous Plato's allegory about the Cave and Ideas[23]. Algorithm processes large quantities of data during the training ("learning") phase, the result of which is Idea in Platonic sense, corresponding to the concept of information herein. Idea is then used in the execution phase of the algorithm to verify the compliance with a new set of data – the positive outcome would mean that new data are ascribable to the same concept/Idea; instead, the negative result stands for data being considered irrelevant to the concept/Idea.

Above described theories find their purpose when treating regulatory frameworks of different hiring practices.

In the light of Article 4 paragraph 4 GDPR profiling means "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that person's performance at work, economic situation, health, personal preferences, interests, reliability,

[20] Gellert, *Comparing definitions of data and information in data protection law and machine learning: a useful way forward to meaningfully regulate algorithms?*, in *RG*, 2020, p. 7.

[21] Gellert, *cit.*, p. 14.

[22] Gellert, *cit.*

[23] Plato, *The Republic*, Oxford University Press, 1970.

behaviour, location or movements". Clearly, the provision refers to only one of possible kinds of profiling – automated profiling – which is a result of a process of data mining. Data mining, in turn, entails algorithmic analysis of large databases in order to reveal patterns of correlations between data[24].

Contrary to its automated form, non-automated profiling evaluates the datasets by means of strictly human-powered reasoning. Both processes present drawbacks. Automated profiling finds associations among data that are likely to reproduce in future, but ignores the causes and reasons of such associations[25]. Human profiling, vice versa, entails for the most part actions performed unintentionally and unconsciously. As a result, human profiling is also done "automatically" to large extent[26]. The reason for this is the existence of very human feature that illustrates how we operate (besides another very typical human capacity for reflection and intentional action) – a tacit knowledge – "we know more than we can tell"[27].

In the light of above described data/information theories, use of automated or non-automated profiling techniques will determine different outcomes with regards to meaning of data/information.

3. *(Follows) Recruitment practices involving automated profiling of the candidates in the light of right not to be subject to a decision based merely on automated processing* ex *Article 22 GDPR. Cleaving power of the algorithm-driven hiring tools*

As opposed to its purely human form, profiling *ex* Article 4 paragraph 4 GDPR applies to all the practices aimed at gaining information via correlations. Automated profiling is involved in selection process that deploys for instance the algorithm screening candidates' *curricula vitae*. This generally happens in the initial stage of the recruitment process in order to create a shortlist of candidates for interview. The algorithm scans the CVs of job candidates for keywords and other information believed to be correlated with

[24] See HILDEBRANDT, *Defining Profiling: A New Type of Knowledge?*, in HILDEBRANDT, GUTWIRTH (eds.), *Profiling the European citizen*, 2008, p. 18.

[25] HILDEBRANDT, *cit.*, pp. 23-30, The author indicates taxonomy of profiling processes divided into following categories: organic, human, automated and autonomic.

[26] HILDEBRANDT, *cit.*

[27] POLANYI, *The Tacit Dimension*, Anchor Books, 1966.

successful hires, such as experience, job titles, former employers, universities and qualifications. The system then creates a structured profile of the candidate and all the candidates are evaluated and classified[28]. Depending on company practice, all profiles may be subsequently controlled by humans or the company can focus solely on higher-ranked candidates.

From regulatory standpoint GDPR addresses the issue in the Article 22, according to which individuals are attributed a right not to be subject to a decision based merely on automated processing[29], including profiling, which produces legal effects or similarly significantly affects them. This provision is sometimes referred to as "Kafkaesque provision"[30], because of the way it is supposed to combat the suffocating powerlessness and vulnerability deriving from the inscrutability of personal data usage. The metaphor is inspired by Kafka's masterpiece The Trial, where the State's bureaucracy with inscrutable purposes used people's information to make important decisions about them, while at the same time denying the people the ability to participate in how their information was used. Automated decision-making enables employers to make decisions by purely technological means based on any type of data. It is irrelevant whether the automated decision-making is the result of an assessment of the data provided by the candidates themselves, or data deriving from observation or deduction. The important thing is that it is a decision without human intervention. Automated decision-making can be done with or without profiling, and vice versa, profiling can be executed without automated decision making; nevertheless, in the latter case GDPR provisions would not apply due to their relevance only for automated profiling.

Automated decision-making is involved in a vast number of situations ranging from low to high impact, the latter including the employment area and access to it. In order to avoid its negative consequences, Article 22 paragraph 3 allows for such process only if certain legal safeguards are met.

[28] SHEARD, *Employment discrimination by algorithm: can anyone be held accountable*?, in *UNSWLJ*, 2022, Vol. 45, No. 2, (Forthcoming), p. 6.

[29] The term right should not be interpreted as requiring prior opposition of the interested party, but rather as general prohibition for decision-making applicable whether or not the interested data subject takes an action regarding the processing of their personal data. Article 29 Data Protection Working Party, 02/2017, p. 19.

[30] ZUIDERVEEN BORGESIUS, *Discrimination, artificial intelligence and algorithmic decision-making*, Directorate General of Democracy, Council of Europe, 2018, p. 40.

In primis, the right to obtain human intervention[31] acts like a guarantee against the decisions of not-really-intelligent artificial intelligence (AI) and it presumably stems from (fully justified) diffidence with regards to automated decision-making[32]. Certain level of apprehension has been expressed also by European Commission when stating that humans could tend to rely too much on the apparently objective and incontrovertible decisions generated by AI, thus abdicating their own responsibilities to investigate and determine the matters involved[33]. By voicing such concerns, European institutions made claims that go deeper than a simple fear of biased algorithms – claims that see at stake "upholding of very human dignity, by ensuring humans (and not their 'data shadows') to maintain the primary role in constituting themselves"[34]. Relevant observations are strictly linked to data/information distinction in relation to the use of sophisticated algorithms. As previously stated with regards to algorithmic profiling, when data convey the abstractions of real-world entities – as opposed to a linear representation of such entities in human profiling – they fail to disclose complete image of what they represent. The main difference between human and au-

[31] Human intervention should be qualified as such when the review is carried out by someone who has the appropriate authority and capability to change the decision. Furthermore, the reviewer should undertake a thorough assessment of all the relevant data, including any additional information provided by the data subject. Article 29 Data Protection Working Party, 02/2017, p. 27. However, it is not clear who this human should be and whether he or she will be able to review a process that may have been based on third party algorithms, pre-learned models or data sets including other individuals' personal data or on opaque machine learning models. Nor is it clear whether the human tasked with reviewing the decision could be the same person who made the decision in the first place, still potentially subject to the same conscious or subconscious biases and prejudices in respect of the data subject as before. MAYER-SCHOENBERGER, PADOVA, *Regime change? Enabling big data through Europe's new Data Protection Regulation*, in *STLR*, 2016, Vol. 17, No. 2.

[32] Human evaluation involved in the process act as a guarantee, if not of transparency, at least of major "legibility" of employer's decision-making process. Legibility shortage appears in scholarly literature as a main disadvantage of algorithmic deployment, i.e. when automated decision-making is involved. MALGIERI, COMANDÈ, *Why a right to legibility of automated decision-making exists in the General Data Protection Regulation*, in *IDPL*, Vol. 7, No. 3, 2017.

[33] Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data. COM (92) 422 final, 18 October 1992, p. 26.

[34] MENDOZA, BYGRAVE, *The right not to be subject to automated decisions based on profiling*, in SYNODINOU, JOUGLEUX, MARKOU, PRASTITOU, *EU Internet Law: Regulation and Enforcement*, Springer, 2017, p. 77.

tomated profiling lies precisely in the understanding of data/information dyad. Hence, automated decision-making can be potentially executed against the backdrop of an incomplete portrait of natural persons[35].

Secondly, the existence of the right to explanation, yet explicitly missing from the legal provision of Article 22, has been repeatedly defended by scholarly interpretation[36]. Even the recital 71 GDPR mentions among other things that the use of automated decision-making, also in "e-recruiting practices", should entail "the right of data subject to obtain an explanation of the decision reached after such assessment". However, recitals generally lack an actual prescriptive content and therefore are not enforceable[37], although they do have an impact on the interpretative outcomes of the operative part of the regulation[38]. In any case, if the concept present in the recital is not given concrete expression in the actual body of the act, it is the terms of the latter that must predominate[39]. Legal scholarship has tried to deduce the right to explanation from Articles 13 and 14 GDPR, both dealing with the right to be informed[40]. These provisions establish the duty to inform individuals – clearly and with simplicity – about processing their data as well as to provide clarification about the logic involved and its possible consequences. Yet, this

[35] Even broader explanation has been offered in support of this theory, when arguing that algorithms are incapable of reflecting some aspects for human personality not merely because of inadequate modelling issue, but rather as a necessary consequence of the human condition. See HILDEBRANDT, *Privacy as protection of the incomputable self: from agnostic to agonistic machine learning*, in *TIL*, 2019, Vol. 20, No. 1.

[36] The first ever mention of the alleged existence of right to explanation could be found here GOODMAN, FLAXMAN, *EU Regulations on algorithmic decision making and a "right to explanation"*, in *IDPL*, 2017, Vol. 7, No. 4; the discourse drew from the experience of already previously existing right to explanation in the EU data protection directive which preceded GDPR, Directive No. 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

[37] See CJEU, Case C-162/97, *Nilsson*, 1998, para. 54, according to which the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question.

[38] CJEU, Case C-215/88, *Casa Fleischhandels*, 1989, para. 31: "recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule".

[39] See BARATTA, *Complexity of EU law in the domestic implementing process, 19th quality of legislation seminar* "EU legislative drafting: views from those applying EU law in the Member States", Brussels, 2014.

[40] DROZDZ, *Protection of natural persons with regards to automated individual decision-making in the GDPR*, Kluwer Law International, 2020, pp. 74-82.

theory has been proven insufficient in its reasoning[41]. Given that the duty to inform *ex* Articles 13 and 14 has to be fulfilled when the data is collected or within a reasonable period of time after obtaining the personal data, such notification duty would conceivably precede the decision-making process. On the contrary, right to explanation would require *ex post* inquiry about the decision taken by automatic means, to allow the interested party to understand the reasons for the specific decision[42]. Similarly failed the doctrinal theory founding the right to explanation in right to access under the provision of Article 15 GDPR. Article 15, paragraph 1 letter h), in the same manner as the Articles 13 and 14, grants the right to be informed about the existence of automated decision-making and to obtain meaningful information about the significance, logic involved and envisaged consequences, but – lacking said provision any time limits – it allegedly allows to invoke such right also *ex post*, after the decision has been made. Nonetheless, this interpretation has found its weak spot in the literal analysis of the provision's wording, suggesting the collocation of the right to explanation before actual decision-making process occurs[43].

The last but not least, rights to express the point of view and to contest the decision pursuant to Article 22, paragraph 3 seem to be strictly linked to the alleged right to explanation. Since they are both related to substance of the decision, impossibility to decipher the logic behind the specific automated decision make the rights to contest and to express the point of view merely "the empty shells"[44].

In the light of previous considerations, the actual enforcement of the right to explanation seems like a bleak prospect. And yet, one could argue that without the power to invoke opening of the black box behind the automated decision, the other safeguards listed in Article 22 lose their feasibility.

[41] Drozdz, *cit*.

[42] *Ex post* explanation represents the only feasible kind for the purposes addressing the *rationale* of a specific decision, without precluding the importance of *ex ante* explanation. The latter takes place before the specific decision has been made and thus falls under the scope of Articles 13 and 14 – the duty to inform which addresses the system functionality, the general logic, purpose, significance and envisaged consequences. Wachter, Mittelstadt, Floridi, *Why a right to explanation of automated decision-making does not exist in the General Data Protection Regulation*, in *IDPL*, 2017, Vol. 7, No. 2, p. 78.

[43] For the exhaustive explanation see Wachter, Mittelstadt, Floridi, *cit*., pp. 83-84.

[44] Brkan, *Do algorithms rule the world? Algorithmic decision-making in the framework of the GDPR and beyond*, in *IJLIT*, 2019, Vol. 27, No. 2, p. 107.

The only hope could come from the future CJEU case-law ensuring the broader interpretation of Article 22, inclusive of the right to explanation.

Consequently, the said GDPR provision does not constrain the use of algorithmic decision-making systems, but obliges the subject who processes the data to provide for certain technical mechanisms that ensure the humanisation of the final decision, thus rebalancing the disproportion of contractual power on site of job candidates/employees exposed to automated algorithmic decisions.

Scholarship addressed another harsh critique towards the provision of Article 22, stating its inefficiency in the context of machine learning algorithms and the fact that it can be easily sidestepped[45]. The reference to "decisions based solely on automated processing" indicates the total absence of human involvement in the decision process[46]. Any form of routine human intervention involved would mean that Article 22 is not applicable, even if such routine decisions may have the same result as entirely automated decision making.

Considering the abovementioned discrepancy between information/data meaning in GDPR provisions as opposed the concepts that machine-learning algorithms work with, one could consider inverting the logic behind Article 22 application. Algorithmic reasoning through correlations may not seem always acceptable from human perspective since it is not able to detect the causal relationships between real world phenomena. For instance, if company with majority of male staff searches for new recruitment, algorithm could attribute higher ranking to men candidates based on their affinity to previously hired candidates that listed interest in football in their CVs. Algorithms would not question human decisions implied in dataset, it could be probably even set to ignore the gender of applicants, but eventually it would result in discriminatory ranking. For this reason, the safeguards enshrined in Article 22 should apply whenever the algorithmic automated reasoning is involved at any stage of decision making. Rather than human intervention in the process excluding the protection of Article 22, *mutatis mutandis,* its safeguards should activate with every partially algorithmic intervention.

Algorithm-driven hiring tools reflect the cleaving power of digital tech-

[45] See for instance ZARSKY, *Incompatible: The GDPR in the Age of Big-data*, in *SHLR*, 2017, p. 995.

[46] Article 29 Data Protection Working Party, 02/2017, pp. 20-21.

nologies – i.e. their ability to modify the nature and our understanding of real world phenomena[47]. This seems to be particularly true in reference to the way they build the candidates' profiles elaborating partially representative information about them. The algorithms analysing CVs' content produce synthetic, inferential and predictive information referable to a single individual or a group; candidate's profile is therefore artificial and constitutes an information content that corresponds to the partial technological reproduction of some traits of personal or professional experience referable to an individual[48]. Rather than opposing this tendency humans tend to adjust their behaviour to algorithmic *ratio*, for instance by learning how to write a resume or CV that would not fail through the algorithmic filter[49]. Although such strategies may result in successful hiring in individual cases, in a long run they exacerbate homogeneity among candidates' profiles and thus further reinforce the risk of potential bias towards elements of uniqueness.

The more sophisticated or invasive AI technologies are involved in the process, the more will individuals resemble their digital interpretations of themselves – the inforgs[50]. The link between the person, his data and his identity is weakened precisely by the new technological processes of construction of personal identity; the processes separated from the individual insofar as they are delivered to the computational power of the technological apparatus and therefore to the self-referential figure of its computer-statistical code[51].

[47] Short explanation of this philosophical neologism can be found in Floridi, *Dizionario Floridi*, in *Corriere della sera*, 26 November 2021, available online: https://corriereinnovazione.corriere.it/cards/da-inforg-onlife-termini-linguaggio-digitale-spiegato-filosofo-floridi/cleaving-power.shtml where the author attributes to the digital the power to "re-ontologize" and to "re-epistomologize" the concept from reality through free operation of cutting and pasting. For instance, the GDPR has been "cut" from typical territoriality of the law and personal data has been pasted to personal identity of the subjects. For the more comprehensive reading see Floridi, *Digital's cleaving power and its consequences*, in *PT*, 2017, Vol. 30, pp. 123-129.

[48] Donini, *Profilazione reputazionale e tutela del lavoratore: la parola al Garante della Privacy*, in *LLI*, 2017, Vol. 3, No. 1, p. 40.

[49] Job seekers can easily find some advice concerning particular adequate wording matching the job description in the job advertisement, see for instance: https://www.linkedin.com/pulse/how-beat-applicant-tracking-system-ats-lee/.

[50] Floridi, *Dizionario Floridi*, cit.

[51] Messinetti, *La Privacy e il controllo dell'identità algoritmica*, in *CIE*, 2021, No. 1, p. 127.

4. *Algorithm cannot be lied to. Right to lie as a defence mechanism. Exception from* culpa in contrahendo *and its problematic application in automated profiling*

Now, so far, the use of modern technologies in the recruitment has been put under the scrutiny from the regulatory standpoint, carefully weighing the adequacy of individual legal provisions with relation to a degree of automation implied in the process. However, it is clear that the exposition about the "algocratic"[52] recruitment would not be complete without further analysis of its consequences and possible remedies, starting with rather classical legal issue – the right to tell a defensive lie.

Italian regulation of pre-contractual employment relationship is traditionally composed of Article 8 and 15 of Workers' Statute, both containing the negative legal obligation for the employer not to act in a certain way prescribed by law[53]; whereas legal basis determining the positive obligation towards another subject of the pre-contractual relationship is found in principles valid for all contracts, in particular general clauses of fairness and good faith *ex* Articles 1175 and 1375 Civil Code[54]. With regards to preliminary stage to employment contract, Article 1337 Civil Code imposes on the parties the obligation to behave in good faith when conducting the negotiations. This provision represents an open-ended clause "destined to materialise in the context of other norms[55]" and allowing the broadest use of the good faith principle beyond the individual Civil Code provisions. Moreover, non-

[52] For the concept of algocracy see in general DANAHER, *The threat of algocracy: reality, resistance and accomodation*, in *PT*, 2016, Vol. 29, No. 3; the author claims, rather pessimistically, that system in which algorithms have a decisive influence on the ways human interact is spreading fast and is growing into a complicated ecosystem slipping out of control of its human creators.

[53] Both provisions constitute antidiscrimination corpus of Workers' Statute particularly resistant to digital revolution thanks to its "amplitude of perspective" that anticipates the evolution of law; see LAZZERONI, *Lo Statuto tra vecchie e nuove sfide del diritto antidiscriminatorio*, in RUSCIANO, GAETA, ZOPPOLI (eds.), *Mezzo secolo dallo Statuto dei lavoratori. Politiche del diritto e cultura giuridica, QDLM*, 2020, pp. 254-255.

[54] In particular, Italian legal system offers general clauses as a remedy to asymmetry of bargaining power, which have made it possible to scrutinise the employer's actions in terms of abuse or reasonableness and have in fact subrogated to some extent the solidarity function of non-discrimination law. FONTANA, *Statuto e tutela antidiscriminatoria (1970-2020),* in RUSCIANO, GAETA, ZOPPOLI (eds.), *cit.*, p. 212.

[55] NUZZO, *La norma oltre la legge. Causali e forma del licenziamento nell'interpretazione del giudice*, Satura editrice, p. 47.

compliance with the good faith principle leads to liability for fault in the formation of contract – *culpa in contrahendo*[56].

Since by virtue of said general clause the negotiating parties "have left the realm of purely negative duties and entered the field of positive obligations in the contractual sphere"[57], the exchange of information in the recruitment process become relevant also under another profile – the truthfulness of information given to another party.

First of all, one must distinguish between the duty to inform and the duty of inform truthfully in a pre-contractual relationship. The former represents the duty to inform the other contracting party about the essential facts of the legal transaction; while the latter obligation means that party must refrain from transmitting incorrect information about essential facts. In fact, if one of the parties is obliged to inform the other party, then it makes sense that it does so in a correct and truthful manner. Otherwise, we would be faced with a distortion of the duty of information. What would be the advantage of a duty of information if the party could transmit wrong information? However, when negotiations of an employment contract are involved, the same legal issue seems of rather complex solution.

Truthful information must be provided in the employment contract negotiation stage under penalty of *culpa in contrahendo*. Yet, it is important to emphasise that this egalitarian perspective cannot disguise the different position in which the parties are in an employment contract. Introducing symmetrical duties when the parties are from the outset in a position of asymmetry means simply to perpetuate inequality. Thus, the interpretation of this legal precept cannot in any way ignore the social inequality and the extreme vulnerability in which the potential worker finds himself.

It should be noted that the information provided by the parties in the pre-contractual phase follows partially different objectives. This is because, if the information provided by the employer is relevant for the worker to form

[56] The concept of *culpa in contrahendo* has its origin in German legal doctrine of Rudolf von Jhering that postulates that in precontractual negotiations prospective parties must employ the necessary *diligentia*. See COLOMBO, *The present differences between the civil law and common law worlds with regard to culpa in contrahendo*, in *TFLR*, 1993, Vol. 2, No. 4, pp. 349-353. Author's comparative review shows uniqueness of Italian legal framework in incorporating the concept directly into Civil Code. COLOMBO, *cit.*, pp. 356-357.

[57] VON JHERING, *Culpa in Contrahendo oder Schadenersatz bei nichtigen oder nicht zu Perfektion gelangten Vertragen*, in *Jahrbuch fuer die Dogmatik des Privat-Rechts*, 1861, pp. 1-112.

his negotiating will in the first moment, it is also relevant for the purpose of clarifying the content of the contract and for the purpose of its proof. However, the information provided by the employee only proves to be important for the first purpose.

For this reason, employer must refrain from asking certain types of information that could potentially harm candidate's chances for obtaining the job. But what if the candidate "did get asked" to provide information banned by Article 8 Workers' Statute? One can envisage different consequences depending in candidate's reaction to illegal request. First of all, candidate can simply refuse to answer and remain silent but bearing in mind that silence will inevitably jeopardise the job opportunity with a risk of removing him or her from the selection process. By violating the ban *ex* Article 8 the employer no more incurs penal liability (the Legislative Decree No. 196/2003 that provided the amendment of Article 38 paragraph 1) but he will still respond before a judge in case of candidate's contestation. Nonetheless, having chosen silence and/or suing the employer, offers fully legitimate yet arduous alternatives – *cum tacent, clamant*, hence, the unanswered question could lead to unfavourable and equally tacit conclusions on employer's site, basing consequently the potential trial on the elusive evidence.

Given the factual inequality of the bargaining power between the parties the right to lie shall be advocated here as a functional defence mechanism against the illegitimate recruitment practices. Conversely, any false statements regarding requisites required for carrying out the work performance will constitute *culpa in contrahendo* for breaching of good faith principle; conclusion further confirmed in Supreme Court case-law[58]. Only if the lie acts as a response to inadmissible information request, only then it will not represent an unlawful conduct. Good faith does not require that a truthful answer be given to someone who asks illegitimate questions.

Given this premise, one can re-think with greater awareness the right to lie in the context of algorithmic hiring. Operational parameters and con-

[58] Cass. 7 July 2019 No. 18699. According to Supreme Court judges it is allowed to dismiss the employee who lied at the job interview only when, if he had told the truth, he would never have been hired. It is therefore necessary to verify the impact that the lie had in the employer's assessment. If this was decisive, it is possible to recall the violation of the duty of good faith in the conclusion of the negotiations and therefore the termination of the contractual relationship. If, on the contrary, the lie did not change the outcome of the job interview, which in any case would have resulted in hiring, then the new employee shall preserve the employment contract.

figuration of algorithms may not guarantee lawful practices, let alone ethically acceptable ones. The reason for this is that algorithm collects input data that can be not sensitive *per se,* but through its "reasoning" it will generate output data with sensitive content – like for example from the Facebook statuses and group memberships it can infer conclusions about possible pregnancy of the candidate[59]. Moreover, complicated reasoning of machine learning algorithms based on unknown associations leads to humanly "non-decomposable" decisions[60].

As a result, legally available defence mechanism against potential employer loses any practical meaning when such unlawful behaviour will stay hidden in the meanders of algorithm. With an obvious exaggeration it can be affirmed that, according to Sun Tzu's Art of War, employers obtain predominant position, since they – through the weapon of algorithms – behold the power to confuse potential worker so that he cannot fathom the real intent behind employer's actions[61].

Lying as legitimate self-defence against the hegemony of algorithmic employer could find a solid background in the plethora of empirically proven defensive practices. The first evidence about workers' defence mechanisms against algorithmic power shows us that to some extent successful manipulation or subversion on workers' site already exists[62]. While by manipulation workers point to circumvent the rules of algorithmic platforms, with subversion they creatively exploit the algorithmic loopholes. An example of the manipulation is Uber drivers using dark web GPS bots, enabling them to manipulate orders by misinterpreting fake data flows as genuine movement of the car[63]. Conversely, Uber drivers collectively and simultaneously turning

[59] Neutral data that are closely related to sensitive personal characteristics are called "proxy variables" and it can lead to eventual proxy discrimination. WACHTER, MITTELSTADT, *A right to reasonable inferences: rethinking data protection law in the age of big data and AI*, in *CBLR*, 2019, Vol. 2, No. 2, p. 22.

[60] WACHTER, MITTELSTADT, RUSSEL, *Why fairness cannot be automated: bridging the gap between EU non discrimination law and AI*, in *CLSR*, 2021, Vol. 41, p.12.

[61] SUN TZU, *Art of war*, Allandale Online Publishing, 2000.

[62] FERRARI, GRAHAM, *Fissures in algorithmic power: platforms, code and contestation*, in *Cultural Studies*, Taylor and Francis Online, 2021, Vol. 35, Iss. 4-5, pp. 814-832. Authors have conducted a research to find some forms of counter power in the hands of platform workers, namely manipulation, subversion and disruption.

[63] ADEGOKE, *Uber drivers in Lagos are using a fake GPS app to inflate rider fares*, in *Quartz Africa*, 13 November 2017, available online: https://qz.com/africa/1127853/uber-drivers-in-lagos-nigeria-use-fake-lockito-app-to-boost-fares/.

off ride-hailing app for a minute in a previously chosen location, deceives the app into boosting prices in what seems to be high request and low demand zone, hence turning into subversive practice[64].

As opposed to lying as a defence mechanism, such practices defying algorithmic management are not always legitimate or even addressing employer's unlawful behaviour (even if they must be considered in a broader context of precariousness of platform workers, who are the ones using them). In addition, in both above described circumstances the workers are well aware of the functioning of algorithm. *Vice versa*, if the mechanisms behind the hiring algorithm are unclear, it shall be extremely difficult for a potential employee to manipulate it with a lie. As a result, non transparency and obscurity embedded in algorithms remove the possibility to execute the right to lie against illegitimate recruitment practices.

5. *Final remarks*

Digitalisation of pre-contractual employment relationships has effects of further deteriorating the intrinsic imbalance between the parties. Said asymmetry does not stem from the relationship of subordination and therefore cannot benefit from the protective labour law regulation as a whole; instead, data availability about the work candidates and automated decision-making constitute *de facto* inequality between the employer and the weaker party that is not (yet) in the position of an employee. Fortunately, *corpus* of privacy protection norms in GDPR comes to the rescue. In particular when automated profiling is involved in the process of recruitment, Article 22 GDPR offers a set of rights to attenuate strictly automated decision. However, the right to explanation, albeit missing from the provision, seems to be the only remedy in order to address the "black box" nature of algorithms: any human intervention in the process or the right to contest the decision, even the right to lie as a legitimate defence against unlawful employer's inquiries, they all become unrealistic if the workers do not have the possibility to decipher the logic behind the specific automated decision; more

[64] Mamiit, *Uber drivers reportedly triggering higher fares through Surge Club*, in *Digitaltrends.com*, 16 June 2019, available online: https://www.digitaltrends.com/cars/uber-drivers-surge-club-triggers-higher-fares/.

transparency could, in addition, diminish the number of biased decisions that go undetected.

In conclusion, distorted, partial or obscure information and, *vice versa*, excessive knowledge of candidate's data, oversharing on social networks or machine-learning algorithm generating new information – all of this represents "information war" unfolding in the background of today's pre-contractual negotiations, and it is a sign of weaker party's democratic deficit in the "conflict".

Abstract

The essay deals with the pre-contractual phase of the employment relationship, the subject-matter largely neglected by labouristic doctrine which however deserves a more in-depth analysis in relation to new technologies. It starts with the acknowledgment of doctrinal indifference towards of this phase of the employment relationship and its roots; the Author then justifies the protective interventions of the legislator in the matter by so called theory of democratic deficit. The analysis provides some insight into the conceptual differences between the notions "data" and "information" depending on whether they are used in automated or human profiling, and underlines their improper use by the European legislator. Against this backdrop the inquiry addresses automatic profiling through the critical scrutiny of Article 22 GDPR. It concludes with the hypothesis of the right to lie as a lawful tool if used as a legitimate defence against banned investigations by the potential employer, and its failure when algorithms take over.

Keywords

Pre-contractual employment relationship, data and information, automated profiling, right to explanation, right to lie.

Pasquale Monda

The notion of the worker in EU Labour Law: "expansive tendencies" and harmonisation techniques*

Summary: **1.** Why an "age-old" debate turns "up to date". **2.** Notion of the worker and free movement. **3.** The scope of the European notion of the worker: from "restrictive thesis" to "expansive thesis". **4.** The case law on non-discrimination and safety at workplaces. **5.** *Follows*. The legal basis and the "non-said" of EU case law on the notion of the worker. **6.** *Follows*. From a necessary European notion of the worker to its contents: the role of analogy. **7.** European notion of the worker and directive on collective redundancy: the core of partial harmonisation. **8.** Notion of the worker and "minimum harmonisation": the "expansive tendencies" and their limitations. **9.** Case law on the referral to national laws of the notion of the worker: the *Sibilio* case. **10.** *Follows*. The *Betriebsrat der Ruhrlandklinik* case. **11.** Subordinated-employment and self-employment: sector-based approach and the *Danosa* case. **12.** Law on competitiveness and the notion of the worker. **13.** *Follows*. The Court's reasons in the *FNV* case. **14.** *Follows*. Following the *FNV* case, also the Commission takes a stake. **15.** Conclusions: recent developments of EU law.

1. *Why an "age-old" debate turns "up to date"*

As many considerations highlight, the digital revolution is changing "social and economic structures" in such a deep and disruptive way as to trigger – as we often read – a "context shock"[1]: a "shock" that is gradually disclosing "a new horizon, if not even a well-defined paradigm". It is thus not a surprise, that also Labour Law is being exposed to huge changes: the digital reality is transforming the way work is organized and even conceived,

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[1] TREU, *La digitalizzazione del lavoro: proposte europee e piste di ricerca*, in *Federalismi.it*, 2022, n. 9, p. 194.

while "meaningful reviews of traditional techniques of labour regulation"[2] are required. The discussion on these reviews is still open and marked by age-old never solved questions: rather emblematic are those concerning the relationship between national and EU law, that are now bursting in.

Let's try to explain it more carefully.

Once more, platform-based work ends up sitting in the dock. Despite the unquestionable opportunities it offers, it is also fuelling some severe gaslighting[3]. The autonomous way the task is performed makes the qualification of the platform worker undefined, though no one is questioning that his/her weak condition mirrors that of subordinated employment. Similarly, to this latter, also platform workers are depending on an employer's organisation, thus missing the chance of developing a mature and independent economic subjectivity: the traditional identity profile of a self-employed.

The awareness of these issues is quite widespread, particularly following the massive disputes of recent years, which pushes national legislation to search for solutions "adjusted to this newly changed reality". Multiple are the legal pathways covered, though they mainly converge in expanding some, or, at times, all the subordinated employment rights: it is enough to consider the Italian experience, mainly focused on the construction of "external cases" bordering with subordinated employment and the Spanish experience basing on the use of the presumption of subordination. The platform economy is, thus, forcing the limits of labour rights; a phenomenon that had already started a while ago, according to some authors[4]: the problems of compatibility with EU law – featuring an age-old soul, as mentioned earlier – acquire, as such, a new shape.

There has long been a mature awareness that, differently from national law, EU law has not been developed around a positive notion of workers, who should be given the role of systemic centre of gravity of social protec-

[2] Zoppoli L, *Valori, diritti e lavori flessibili: storicità, bilanciamento, declinabilità, negoziabilità*, in *WP CSDLE "Massimo D'Antona".IT - 400/2019.*

[3] Literature on the matter is now rich, for a recent reconstruction of the discussion see also the proceedings of the Meeting held in Venice at the University Ca' Foscari on January 13th and 14th 2022 on "Lavoro e Diritti nella Rivoluzione di Internet" and published in n. 1/2022 of the journal *Lavoro Diritti Europa*. On the development of platform work in Europe see Hauben (ed.), Lenaerts, Waeyaert, *The platform economy and precarious work*, Publication for the committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020.

[4] Perulli, *Oltre la subordinazione. La nuova tendenza espansiva del diritto*, Giappichelli, 2021.

tions[5]. The subjective scope of these protections was instructed by the Court of Justice, whose lavish production has been influencing, possibly not by little, the discretion power of national legislations. Hence, the urgency to start over by reflecting on the terms of such an influence, with a view to clarifying the extent to which the ongoing expansive tendencies in national legislations are consistent with EU law.

The above would already be a relevant profile per se, but this is not over.

Among the most meaningful effects of the mentioned expansive tendencies, there is the wide use of collective bargaining agreement: a full of potential dynamic, as demonstrated by the growing initiatives taken by platform workers that risks to conflict with the European competition law, thus making an issue, which appeared to be pushed aside among and in the end having a very limited practical relevance, resurface[6].

The framework is the balance between collective bargaining agreement, as an instrument to meet the objectives of social policy, and competition. A balance at the heart of the well-known *Albany*[7] doctrine which starts from a double assumption when dealing with it: a restriction of competition is among the inherent effects of collective bargaining; the social policy objectives would be "seriously undermined if, when seeking jointly to adopt measures to improve the conditions of work and employment", collective bargaining agreements would always be subject to art. 85 TEC (now 101 TFEU). Based on this preamble, the Court derives that "the agreements concluded in the context of collective negotiations among social partners" are exempt from the law on competition when "they have to be considered by virtue of their nature and purpose, falling outside the scope of art. 85, n. 1 of the Treaty".

Such an approach has been extensively challenged, both because it

[5] The point is dealt with extensively in literature, among the others see Aimo, *Subordinazione e autonomia: che cosa ha da dire l'Unione europea?*, in Aimo, Fenoglio, Izzi (edited by), *Studi in memoria di Massimo Roccella*, 2021, p. 655; Countouris, *The concept of "Worker" in European Labour Law: Fragmentation, Autonomy and Scope*, in *ILJ*, 2017, 47, p. 202; Davidov, Freedland, Countouris, *The Subjects of Labor law: "Employees" and Other Workers*, in Finkin, Mundlak (edited by) *Comparative Labor Law*, Edward Elgar, 2015; Giubboni, *Being a worker*, in *ELLJ*, 2018, p. 1; Menegatti, *The Evolving Concept of "worker" in EU law*, in *ILLEJ*, 2019, p. 71.

[6] Pallini, *Libertà di contrattazione collettiva dei lavoratori autonomi e tutela della concorrenza: apologia della giurisprudenza della Corte di giustizia dell'UE*, in Aimo, Fenoglio, Izzi, *cit.*, p. 858.

[7] Court of Justice, September 21st 999, *Albany International BV e Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/97.

would facilitate a review of the same scope and purposes of a collective agreement, which remains unknown in many national legal systems, and – this being the most relevant point here – because of the incertitude on its operation[8]. The *Albany* judgement only considers the "employed workers" and does not even mention the autonomous ones: above all, it does not specify how to expand further these notions regarding competition, and in what way they interact with each other. Not even the subsequent European case law provides any clarification on the matter, thus giving birth to not a few problems arising in the national legislation. The same *FNV*[9] decision from 2014, when affirming that "the collective work agreement … falls outside the scope of article 101, par. 1, TFEU, even when the "workers are false self-employed", introduces a still debated phrasing that leads to an even more uncertain scenario.

2. *Notion of the worker and free movement*

After having clarified the reasons that require us to go back to "age-old debates", our analysis cannot but take the first steps from the case law on the free movement of workers: a complete notion of worker can be, in fact, derived from this case law we will often have to confront with.

It all started back in the '60s: with the famous *Unger* case[10]. The provision stresses the need to provide the notion of worker given in art. 48 of the Treaty with a "community meaning", as to prevent the Member States to "rule out at their discretion specific groups of people from warranties provided by the Treaty"[11]: only the European notion of worker – as emerges

[8] Latest and for all see Biasi, *Ripensando il rapporto tra il diritto della concorrenza e la contrattazione collettiva relativa al lavoro autonomo all'indomani della l. n. 81 del 2017*, in *ADL*, 2018, p. 472 ff.; Countouris, De Stefano, *New Trade Unions strategies for new forms of employment*, Brussels 2019; Countouris, De Stefano, *The Labour Law Framework: Self-Employed and Their Right to Bargain*, in Waas, Hiessl (edited by), *Collective bargaining for self-employed workers in Europe*, The Netherlands 2021, pp. 3-17; Pallini, *cit.*, pp. 857-862; Razzolini, *Collective action for self-employed workers: a necessary response to increasing income inequality*, in *WP CSDLE "Massimo D'Antona".INT - 155/2021*.

[9] Court of Justice, December 4th 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, Case C-413/13.

[10] Court of Justice March 19th 1964, *M.K.H. Unger in Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, Case C-75/63.

[11] Case C-75/63, *Ungher.*

from the *Unger* case – grants an effective and even functioning of rules making up one of the four fundamental freedoms. As the outcome of a rich evolution of case law[12], a similar need is exalted by the likewise famous judgment *Lawrie-Blum*[13]: a true leading case marking a turning point in the creation of a European notion of employed worker. The judgement identifies it for the first time in a "natural person who, for a specific period of time, performs services for and under the direction of another person in return for which he receives remuneration": a notion – it reads further – to be verified "on the basis of objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned".

When discussing the content of the "*Lawrie-Blum* formula" more in-depth, the Court has long dwelt on its "onerous nature", considering such a requirement as met in presence of any form of remuneration, irrespective of: the amount; possible integrations with incomes deriving from other goods or work activity of a member of the family; it being disbursed in indirect form[14]. Indeed, though being interpreted with an extensive meaning, the onerousness of the performance remains an indispensable requirement, right like the "real and effective" nature of the work activity: with regard to free movement, cannot be a worker a person, who performs a work that is so limited as to become "marginal and ancillary"[15].

The reference to the concept of "direction" deserves some additional remarks.

The Court assigns to it EU-relevant content and functional to the mentioned needs for an effective and even operation of the rules under examination. Full awareness is required here, so to avoid transposing at the

[12] Reconstructed lately in VINCIERI, *Libera circolazione dei lavoratori e nozione eurounitaria di subordinazione*, in *MGL*, 2020, p. 195.

[13] Court of Justice July 3rd 1986, *Deborah Lawrie-Blum e Land Baden-Württemberg*, Case C-66/85.

[14] Remarkable on the matter Court of Justice October 5th 1988, *Udo Steymann v. Staatssecretaris van Justitie*, Case 196-87; Court of Justice June 3rd 1986, *R. H. Kempf v. Staatssecretaris van Justitie*, Case C-139/85.

[15] Large production is available on this requirement: the Court, for instance, specifies that the activities functional to re-skilling or reinsertion of the interested shall not be considered as real and effective, since in this case the subordinated employment "has as a goal the recovery, in a more or less short period of time, of the ability to occupy an ordinary employment or the access to a normal life as much as possible" (Court of Justice, May 31st 1989, *Bettray v. Staatssecretaris Van Justitie*, Case C-344/87). For a reconstruction of EU case law, see GIUBBONI, ORLANDINI, *La libera circolazione dei lavoratori nell'Unione europea*, il Mulino, 2017.

European level the categories typical of national laws: an activity of interpretation – it is observed – that is not uncommon, but which misrepresents the reconstructions made by the Court of Justice[16]. Reconstructions that attach the concept of direction a meaning anything but coincidental with an external direction: revealing is the *Agegate*[17] judgment that places an emphasis on the limitation of the freedom for a person to choose his/her working hours, the place or the work content and the limitation of the freedom to engage his/her own assistants. These clarifications do not represent indicators of a broader and more pervasive power: they are not, to use a typical wording of some national legislations, "symptomatic" indicators of the power to modify the *quid* and *quomodo* of a performance. The elements used by the Court express, vice versa, a more general limitation of the freedom to organize the performance: that's the content the Court aims at attaching to the concept of direction.

The above is confirmed by case law that distinguishes a subjective scope of free movement and of freedom of establishment. According to the Court[18], the essential feature of the "working relationship pursuant to art. 48 of the EC Treaty (successively art. 39 EC)" lies in the circumstance that "a person provides a service, for a specific period, for and under the direction of another person", the *proprium* of self-employment, pursuant to art. 52 of the Treaty, is an activity performed "outside a relationship of subordination". Hence, the Court highlights a very clear contrast, and, in very terse terms, it adds that subordination is missing, and leaves room for autonomy when the person who performs "the activity is free to organize his/her working conditions".

3. *The scope of the European notion of the worker: from "restrictive thesis" to "expansive thesis"*

Based on the examined judgments, what surfaces is a notion of worker totally lacking any regulatory basis and, yet, considering the effectiveness of

[16] Similarly GIUBBONI, *Per una voce sullo status di lavoratore subordinato nel diritto dell'Unione europea*, in *RDSS*, 2018, p. 207 ff.; NOGLER, *The Concept of "subordination" in European and comparative law*, 2009, p. 13 ff.; PALLINI, *cit.*, p. 863.

[17] Court of Justice, December 14th 1989, *The Queen v. Ministry of Agriculture, Fisheries and Food*, Case C-3/87.

[18] See judgment June 27th 1996, *P. H. Asscher v. Staatssecretaris van Financiën*, Case C-107/94.

the preliminary ruling on interpretation, equally relevant: it represents the necessary subjective reference of the rules on free movement. With a view to their operation, all elements employed by the Court to give shape to the said notion shall recur starting from the already judged cases, we should go back to this latter which becomes a common decision-making scheme where facts are conducted following the typical rationale of the judgement of subsumption.

The legislation on free movement becomes, thus, independent from national systems which are deprived of a discretional choice in the selection of beneficiaries: basically, EU law has primacy over national law. That's why this notion has long been at the heart of a plentiful debate, challenging its traditionally limited scope and seeking to expand it to the entire European social law. A debate that, as said, was reinforced by the fourth industrial revolution and – it shall be added – by very uncertain rulings by the Court of Justice: the outcome is a plethora of solutions, ranging from a general reconstruction of the notion of the worker to a more traditional limited scope.

Some authors affirm the European case law on the notion of worker does not meet any of the typical purposes and ambitions of national legislations and, instead, it meets the need to define the cases governed by EU law on the matters it is competent for[19]. It would be more accurate to use the plural form for the notion of subordination and the specular one of self-employment, since the Court confirmed one notion for each "subject-matter" for which the EU is competent, and depending on the different legal objects subjected to protection within each legislation area: for example – the author writes – competition right, free movement of people and services, anti-discrimination right, mental and physical health protection of the worker[20].

A different thesis argues that starting from the *Betriebsrat der Ruhrlandklinik* judgment, some of the obstacles to the common application of the notion of the worker related to free movement would falter. A new phase of EU case law is inaugurated since the Court modifies its precedents on the referral to national legislation as for the scope *ratione personae*: a technique broadly employed for the directives based on the current art. 153 TFEU. According to the mentioned judgment, the referral shall not be "interpreted as a waiver by the EU legislator to its power to establish the extent of this notion within directive

[19] Pallini, *cit.*, p. 864.
[20] Pallini, *cit.*, p. 864.

2008/104": therefore, also existing this, the notion of worker shall be derived from EU law and identified in any individual having a working relationship in the meaning attached by the same Court in its case law[21].

Still different is the opinion of those who distinguish three relevant notions of employee in EU law: the first (the only *stricto sensu* euro-unitary) is instrumental to the functioning of free movement and basically it projects outside its original area; the second having relevance for the coordination of national judicial schemes of social security; the third is deferred to national laws, and aims at defining the scope of a significant part of the directives on labour matters. For this latter case – it reads further – EU law restricts the freedom of national legislation by setting external limitations that, though not falling fully under the control of EU law, delimit the discretion left to the Member States when transposing the directives. But then, it adds that also in this field the Court of Justice tends at times to refer to an EU notion of subordination which confirms and also reinforces its expansive tendency[22].

4. *The case law on non-discrimination and safety at workplaces*

Dealing with such a structured framework crucially requires an analysis of case law and, above all, of the rulings addressing the topic of the notion of the worker as related to directives on non-discrimination along with those on the protection of health and safety at workplaces[23]. By adopting them – it is believed – EU law aimed at implementing a cohesive harmonisation that is directed towards an alignment of national systems to European social standards and a promotion of the identification of common social values[24].

[21] In this sense see MENEGATTI, *cit.*, p. 36.

[22] GIUBBONI, *Per una voce sullo status*, *cit.*, p. 211. See also TOSI, LUNARDON, *Introduzione al diritto del lavoro. 2. L'ordinamento europeo*, Editori Laterza, 2005, pp. 93-94, the same GIUBBONI refers to.

[23] Among the many, see Court of Justice September 20th 2007, *Sari Kiiski v. Tampereen kaupunki*, Case C-116/06; Court of Justice December 14th 1995, *Inge Nolte v. Landesversicherungsanstalt Hannover*, Case C-317/93; Court of Justice January 13th 2004, *Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional e Secretary of State for Education and Employment*, Case C-256/01; Court of Justice April 7th 2011, *Dieter May v. AOK Rheinland/Hamburg - Die Gesundheitskasse*, Case C-519/09.

[24] D'ANTONA, *Armonizzazione del diritto del lavoro e federalismo nell'Unione europea*, in *RTDPC*, 1994, p. 700 ff. and ID., *Sistema giuridico comunitario*, in BAYLOS GRAU, CARUSO, D'ANTONA, SCIARRA, *Dizionario di diritto del lavoro comunitario*, Monduzzi Editore, 1996, p. 22.

Hence, since this regulatory harmonisation has also gone through the notion of worker, a reconstruction of the said and, above all, the unsaid of such a similar case law represents the first step towards a reflection on the previously identified thesis and on the doubts sometimes fed by the same European case law when confronted with functional directives[25].

Once specified the above, it is worth clarifying from the outset that the Court extended the "notion *Lawrie-Blum"* to the directives on non-discrimination and safety. Coming to the arguments, they are first based on the *effet utile*. Plenty is the publications on the subject[26], it is basically a technique aiming at preserving the effectiveness of EU law, both primary and secondary. Essentially, two interpretations were identified of it: a weak one, having to do with the construction of the rule which needs to be instrumental to the goal; and a strong one that goes beyond the formulation of the rule and involves its interpretation with a view to fully achieving its function. In the second interpretation, the argument of the *effet utile* governs the application phase of EU law, outweighing the other interpretation canons and sticking to these judgements, enabling the Court to empty the national systems of any competence in the definition of the *ratione personae* aspect of the said directives.

Starting from the last explanation, the Court affirms that the notion of worker, though lacking or being generic, "cannot be defined by recurring to … [the] legislation of Member States, instead, it needs to find an autonomous and an even interpretation in the EU judicial system: differently – it is added – the power to modify the scope of directives would be referred to the discretion of Member States, thus depriving them of their full effectiveness"[27]. It is, indeed, the full achievement of the purposes inherent to the

[25] D'Antona, *cit.,* p. 700 ff., uses this expression to refer to the non-cohesive directives that are intended to remove the barriers and distortions to "Community freedoms", including those generated by differences in protections and cost of labour.

[26] Ingravallo, *L'effetto utile nell'interpretazione del diritto dell'Unione europea*, Cacucci, 2017; Ratti, *L'argomento dell'effet utile nell'espansione del diritto del lavoro europeo*, in *DLRI*, 2017. But, see also Cruz Villaça, *Le principe de l'effet utile du droit de l'Union dans la jurisprudence de la Cour*, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Springer, 2013, p. 279 ff; De Simone, *L'effettività del diritto come obiettivo e come argomento. La giurisprudenza della Corte di Giustizia Europea, tra interventismo e* self restraint, in *LD*, 2014, p. 489 ff.; Tichy, Potacs, Dumbrovsky (edited by), *Effet Utile*, Charles University, 2014.

[27] Revealing is the case *Nolte*, though its approach can also be found in other judgments mentioned under footnote 23.

said directives that justifies a European notion of worker: it represents an extremely relevant interpretation and, considering the outcomes it obtains, some further clarifications are needed. In its stronger meaning, actually, the *effet utile* contributes to making the EU law effective, whereas, as an interpretation technique, it remains bound to its legal basis: foundation – as it reads – of an "attribution of jurisdiction"[28] that detects the regulatory competence and, simultaneously, regulates its exercise. It becomes, thus, crucial to assess, whether the results obtained by the Court are then permitted by the legal basis of these directives. In other words – this is the "non-said" of the case law under examination – it shall be assessed whether the legal basis allows for the enforcement of a European notion of worker based on the recourse to *effet utile* in the meanings described above.

5. Follows. *The legal basis and the "non-said" of EU case law on the notion of the worker*

The legal basis of directives on non-discrimination and safety is neither evident under art. 115 nor art. 153, lett. b), TFEU – which, as we are about to see below, governs a partial and minimum harmonisation – instead, it can be found under art. 141 TEC (currently art. 157 TFEU) as for directives on non-discrimination and under art. 118A of the Single European Act as for directives on safety: provisions that have so far formed the subject of an intense and "creative" interpretation by the Court.

As for art. 141 TEC, we can be very brief, having the rule undergone a well-known evolution and, in many cases, symmetric to free movement[29]: similarly, to this latter, indeed, also for the equal pay, a principle of non-discrimination was introduced featuring a marked economic nature, since its aim was to prevent distortions of competition and, ultimately, grant a proper functioning of the market. This similarity – though not also neglecting the social soul of the rule – enabled the Court, already back in the '70s, to consider art. 141 TEC as an expression of a "fundamental principle of EU law"

[28] Tizzano, Roberti, *La giurisprudenza della Corte di giustizia sulla «base giuridica» degli atti comunitari*, in *FI*, Vol. 114, 1991, p. 101.

[29] A large literature is available on the matter, for a recent reconstruction see Santagata, *Le discriminazioni su lavoro nel «diritto vivente». Nozione, giustificazione, prova*, Edizioni Scientifiche Italiane, 2019, particularly chapters 1 and 2.

which shall be provided with the "broadest possible application", "irrespective of any national legislation"[30]. Such a preamble makes it evident that the provision under examination, not only allows but even urges a European notion of worker: by introducing a constitutive principle of EU law that every national law is required to enforce, the notion of the worker becomes a "mean" for its "broadest application possible", thus allowing to invoke the *effet utile* and to deprive the Member States of any power to identify its beneficiaries. This rationale does not get weaker when from art. 141 TEC, it comes to the directives based on the same rule, since these latter envisaged to set out the principle of non-discrimination: hence if the principle needs the "broadest application possible", the same shall also be true for the provisions directly developed from it.

Getting to art. 118A, the issue becomes more complicated, since the provision limits European intervention to the sole "minimum requirements". On the matter, though, the Court has taken major steps[31]: since the provision aims at "improving with a view to progress" the protection of worker's health and safety matters – it shall be clarified – the reference to the "minimum requirements do not prohibit to adjust the intensity of the action if necessary" to achieve the purpose. But there's more, considering that the Court also strays into the judgement on the necessity: if a European intervention "shall be intended to achieve the purpose" and shall not "go beyond what is needed to achieve the said purpose" – the Court clarifies – the requirement of necessity is only met, so far European action "contributes to improving the protection" of safety. The Court, in other words, is reinterpreting the principle of necessity according to the purposes of the rule, to finally acknowledge – notwithstanding the manifest error and the misuse of power – a pervasive advance of EU law over a consequent retreat of national laws. Ultimately, a model of harmonisation is surfacing; one adjusted on progress, whose features are peculiar: so far, the protection of health in the workplace is improved – the Court seems to affirm – a European intervention shall not be ruled out and it represents a binding, along with necessary "minimum requirement".

Such an interpretation, at times under criticism, cannot be dealt with

[30] Court of Justice April 8th 1976, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, Case C-43/75.

[31] On that, see the major judgment by the Court of Justice November 12th 1996, *United Kingdom of Great Britain and Ireland vs Council of the EU*, Case C-84/94.

any further. And yet, it is hard to deny that the same allows for a prevalence of EU law over national law that is also reached by the same Court when imposing a European notion of worker for the directives on matters of safety. The reconstruction of its subjective scope allows the Court to rule out any competence of the national legislation not just and not so much based on unambiguous formal data – the reference here shall be to the lack of a referral to national laws – but because this reconstruction shall be conducted in line with a precise model of harmonisation. A model, where the European notion of worker, by contributing to an "improvement of protection" of health, satisfies the principle of proportionality, while making a valorisation of the purpose of the directives by means of the *effet utile*, so far as to nullify any room for national legislations in the scope of *ratione personae*. It does not surprise that some manifest traces of this harmonisation model can be found in the directives based on art. 118A: revealing is the so-called mother directive, where, in a prospect of "improvement", the worker is identified with a formula that is only apparently generic and which, indeed, conveys a clearly expansive approach.

6. Follows. *From a necessary European notion of the worker to its contents: the role of analogy*

After reconstructing the grounds that justify a European notion of worker, what is left to be clarified is the way the Court defines its content. A separate issue from the first one that cannot be dealt with by recurring to the *effet utile*: the point is no longer the prevalence of EU law over national law.

This is the reason why the Court makes recourse to the analogy: as an interpretation principle generally used in national legislations, it enables to make use of principles developed for free movement and gives shape to a European notion of worker that is considered relevant to attain its regulatory purposes. The Court makes recourse, thus, to the analogy to solve the issues deriving from a gap or a "doubtful case" by resorting to one or more positive existing rules, whose *ratio* is such as to understand even the judicial case or a totally unregulated case[32]. This option shall not be considered unavailable,

[32] Caiani, *Analogia*, in *ED*, Vol. II, 1958, p. 350.

when the identity of the *ratio* between the legislation on free movement and that on non-discrimination, along with the one on health protection, is missing. In both cases, in fact, a fundamental right applies that is equal to that of non-discrimination inherent to free movement. Precisely this analogy satisfies the identity of *ratio.* With a view to a better understanding, a few more clarifications, though very brief since these topics were extensively dealt with, might be of help.

As for non-discrimination, it has already been affirmed that it represents a "constitutive principle" of EU law, similarly to free movement: ultimately, right because of this, the directives under object are deemed to embrace a broader notion of work, by tracing a meaningful area of protection around the person, above all thanks to new generation law[33].

Getting to the issue of health in work relationships and workplaces, many authors state that EU law considers this as a core of a fundamental social right[34]: a right whose "constitutionalisation"[35] shall be deemed achieved.

7. *European notion of the worker and directive on collective redundancy: the core of partial harmonisation*

At this point, we shall verify whether the line of argument reconstructed, and its results can be extended beyond the borders of non-discrimination and safety. The first doubts, not always expressed, come from the directive on collective redundancy: it does not contain anything on its subjective scope and, yet, is this sufficient – by invoking the *effet utile* – to impose a European notion of worker?

To answer this question – as demonstrated with the above – we shall clarify whether this is permitted by the directive's legal basis. Starting from this assumption it is not of secondary importance that the directive on collective redundancy, similarly to the others on company crisis, finds its judicial basis in art. 115 TFEU: a provision – this is no minor aspect – enabling only

[33] On the point, also referred to successively, literature available is quite abundant: latest and for all, see Barbera, Borelli, *Principio di eguaglianza e divieti di discriminazione*, in *WP CSDLE "Massimo D'Antona".IT - 451/2022*.

[34] Ales, *Diritti sociali e discrezionalità del legislatore nell'ordinamento multilivello: una prospettiva giuslavoristica*, in *DLRI*, 2015, p. 473.

[35] Ales, *cit.*, p. 474.

a partial harmonisation. The same Court of Justice restates this[36]: according to it and based on the mentioned provision, the directive shall be interpreted in the sense that national law can intervene in all the areas "non-occupied by EU law". The consequences of such an approach were only analysed for the procedures of dismissal, whereas, if art 115 TFEU admits only partial harmonisation, it is honestly hard to fill up the "void" on the notion of the worker when nullifying the national intervention. If, "anything not regulated by the directive shall not fall under its scope and shall remain the competence of Member States"[37], that void should be read as an implicit referral to the notions of Member States. Hence, the recourse to the *effet utile* becomes unviable under the same terms observed for the directives on non-discrimination and protection of safety, because we would end up readjusting the same meaning of partial harmonisation: an outcome that the Court does not admit to pursuing and anyway not permitted by art. 115 TFEU. Beyond its formal aspect, the directive on collective redundancy does not differ so much from the directives which, when implementing a minimum harmonisation, are referring to the Member States for the notion of worker: hence, as for this latter, the *effet utile* could only facilitate control over the reasonableness of the choices made in the moment of enforcement.

Doubts are far from being dispelled.

Also, the recourse to the analogy to justify the extension of the *Laurie-Blum* formula would be troublesome: with a view to mitigating social dumping, directive 98/59 envisages facilitating the functioning of the market by intervening only in the dismissal procedure, while refraining from regulating a fundamental right. The consequence is a difficulty in meeting the requirement of the identity of *ratio* that – its reasons were already explained – represents a crucial prerequisite to use an analogy between case law and free movement.

8. *Notion of the worker and "minimum harmonisation": the "expansive tendencies" and their limits*

The general picture is made even more complex when getting to directives based on art. 153 TFEU.

[36] Court of Justice March 17th 2021, *KO vs Consulmarketing SpA*, Case C-652/19.

[37] This is how judgment *KO* deals with the issue.

Starting from the Treaty of Maastricht, EU integration on social matters was broadened and, at the same time, provided with a form of harmonisation: no longer that of current articles 114 and 115 TFEU and neither that of art. 118A, instead the one contained in the current art. 153 TFEU. It is basically a model of harmonisation, neither partial nor oriented towards progress: this is confirmed by letter b) under its paragraph 2 and paragraph 4, containing a clear option towards the technique of the minimum level of rights, the so-called floor of rights[38]. For clarity purposes, the precise meaning of this model of harmonisation is still debated, but, for sure, it does not intend to level out, even only potentially, the levels of protection deriving from EU law: instead, the harmonisation envisaged by the provision allows the national legislations to adjust the EU protections to their domestic systems including – no instruction to the contrary applies – also those on the notion of the worker.

This is how the doubts part of the reconstructions connecting the extension of the notion of worker and the fundamental rights – and mainly the Charter of Fundamental rights – raise[39]: each time a fundamental right has come into play – it reads – the *Lawrie-Blum* formula got expanded[40]. The case law on health and non-discrimination clearly shows – as already said – that the extension of case law on free movement goes through two different moments: the possibility for a European notion of the worker to be assessed according to the legal basis of the directive; the reconstruction of its content that requires to assess the "identity of the *ratio*" by focusing on the analogical extension of the "*Lawrie-Blum* formula". Keeping in mind these two different levels is crucial; the relevance of the fundamental right, in fact, is limited to the second and does not influence the enquiry on the possibility for a notion to be carried out only starting from art. 153 TFEU. A provision that – it is not of secondary importance stressing it again – grounds the European social policy on only minimum harmonisation. Not either the judicial value of the Charter is able to change this approach, both because art. 153 TFEU represents a provision of primary law and because the Charter entails an inherent operation limit: it applies to the Member States only in the enforcement of EU law.

[38] Ratti, *L'argomento dell'*effet utile *nell'espansione del diritto del lavoro europeo*, in *DLRI*, 2017, p. 516. But see also Hepple, *Harmonisation of labour law: Level playing field or minimum? De Jure - University of Pretoria*, 2009, p. 7.

[39] Menegatti, *cit.*

[40] Aimo, *cit.*, pp. 661-662.

And there is more since similar arguments also trigger serious doubts on the extension of the European notion of the worker to directive 2003/88. The legal basis of this directive is no longer art. 118A, as for directive 93/104, but art. 137 TEC (currently 153 TFEU). Hence, if the *ratione personae* scope of directive 93/104 had to be reconstructed according to a rationale of progressive harmonisation, that of directive 2003/88 shall be defined in the prospect of a minimum harmonisation: it is not by chance that – as observed also by the Court – the latter lacks any reference to the notion of worker contained in directive 89/391. Directive 2003/88 does not either refer to national legislation. But, yet, the "void" that is generated – having to interpret it in the light of art. 153 TFEU – would not allow transferring the notion of the worker to EU law, without paying the price of altering the meaning of minimum harmonisation: an outcome, indeed, attained by the Court without even having to make recourse to the *effet utile*, as in other precedents; instead only by reconstructing *sic et simpliciter* the "silence of legislation" in terms of a tacit default referral to EU law[41]. Problems are not either solved by resorting to the analogy that is, instead, employed by the Court: it is indisputable that the legislation on working hours crosses a fundamental right[42], but the point is upstream, and it concerns the possibility for a European notion. Precisely there the Court's argument appears weak since any comparison with the legal basis of the directive and with the deriving constraints is missing[43].

No doubt the minimum harmonisation is prone to risky degenerations,

[41] Revealing expression of this approach is Court of Justice October 14th 2010, *Union syndicale Solidaires Isère v. Premier ministre, Ministère du Travail, des Relations sociales, de la Famille, de la Solidarité et de la Ville, Ministère de la Santé et des Sports*, Case C-428/09.

[42] Purpose of the directive is protecting the health of workers, that, intended as mental and physical wellbeing, also involves the organisation of the working hours, and, more specifically, the minimum rest periods, the appropriate break periods and the maximum threshold for the duration of a working week. (Court of Justice May 14th 2019, *Federación de Servicios de Comisiones Obreras (CCOO) vs Deutsche Bank SAE*, Case C-55/18). Therefore introducing limitations to the maximum work duration and scheduling daily and weekly rest periods means "s*pecifying* a fundamental right to health, expressly enshrined article 31 of the EU Charter of fundamental rights". Also with regards to the legislation on working hours – the Court concludes – "independent social values, every worker should enjoy" shall find a place (Court of Justice September 10th 2015, *Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) vs Tyco Integrated Security SL* and *Tyco Integrated Fire & Security Corporation Servicios SA*, Case C-266/14).

[43] Our analysis does not dwell too long on the controversial order *Yodel* from 2020, getting closer to gig economy, since the Court declares in it not to be willing to modify the principles developed in its precedents and object of this analysis.

tending to make EU law ineffective and also the Bill of rights that aims at changing the economic soul of the EU. And yet, the path EU law envisages to follow for the achievement of integration on social matters, is the following[44]: a path, by the way, that the Court of Justice has not passed up the opportunity to make "safer". We are referring to the firm step forward as regards the stiffness of the so-called *Danmols*[45] orthodoxy: the interpretation that, when facing a national level-based notion of worker, would rule out any "European control", thus laying the foundations for dealing with "identical circumstances in different ways, uniquely by reason of the qualification of the working relationship" conducted by national law.

This case law is developed from the directives that refer to the notion of the worker to national legislation. The Court still makes recourse to the *effet utile*, but not to transfer the responsibility of the notion of the worker to EU law: what prevents this – as the judges clarify – is the referral to national systems[46]. Though in its strong meaning, the *effet utile* allows introducing a limitation to the discretion of Member States which, when identifying the beneficiaries of EU protections, are making discretionary assessments without sacrificing its purpose. A circumstance that occurs when internal choices go beyond the boundary of reasonableness and do not include among the beneficiaries of EU protections those individuals that are considered workers under national law. A distortion that tends to sacrifice the purposes of the directives: that is, protecting *all* those qualified as workers under national legislation. This is what the Court intends when affirming that the referral to national legislation is not unconditional, instead it is limited "by the arbitrary exclusion of individuals from the benefit of protection offered by the directive"[47].

[44] Cf. COUNTOURIS, *cit.*, p. 200.

[45] Court of Justice July 11th 1985, *Foreningen af Arbejdsledere i Danmark v. Fallimento A/S Danmols Inventar*, Case C-105/84.

[46] Court of Justice July November 5th 2014, *O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Case C-311/13.

[47] Such an approach finds a rich ground in the directives on the so-called non-standard work that is "facilitated" in view of removing discriminations based on its employment. Highlighted that "the discretion power of Member States to set the implementation conditions of the directive is not unlimited" and that the "terms used shall be defined based on national law, insofar the *effet utile* of the directive is satisfied", the Court thinks the "choice of ruling out from the scope of directive those work relationships lacking a substantial difference from that relating employees to their employers, who, based on national legislations, fall under the category of workers" is prejudicial to the "*effet utile* of the principle of equal treatment": only the differ-

The path drawn by case law shall not be neglected and offers possibilities that deserve great attention. If art. 153 TFEU makes it troublesome to impose a European notion of worker, it is not unusual to deem it applicable also for the directives which, though not referring the notion of the worker to national legislations, are anyway the expression of a minimum harmonisation of social policies: also, in this case, the *effet utile* can be pleaded, but only within the limit of reasonableness.

9. *Case law on the referral to national laws of the notion of the worker: the* Sibilio *case*

Before moving any further in the analysis, we shall deal with two judgments that are considered expanding the European notion of worker also to the directives referring their scope *ratione personae* to national laws: here the reference is to the *Sibilio*[48] cases and *Betriebsrat der Ruhrlandklinik* that, by depriving the Member States of any margin of movement, would overturn the literary phrasing of legal texts and would make the proposed considerations falter.

In the first judgment – as it reads[49] – the Court acknowledges a supposed "objective" notion of subordination leading to consequences on the discretion margin left to the Member States: this outcome is justified based on the purposes of the framework agreement on fixed-term employment contracts requiring an EU notion of work relationship "in its minimum meaning", as defined in *Lawrie-Blum* case law. Under these terms, the judgment should have a disruptive effect, since it excludes that the application of the general principle of equal treatment can be denied to the "objectively" subordinated work relationships, under penalty of a significant loss of the same sense of the directive. According to this reconstruction[50], the *Sibilio* case

entiations the directives intend to prevent would be allowed. See Court of Justice March 1st 2012, *Dermod Patrick O'Brien v Ministry of Justice, formerly Department for Constitutional Affairs*, Case C-393/10; Court of Justice October 12th 2004, *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*, Case C-313/02; Court of Justice 16th July 2020, *UX v Governo della Repubblica italiana*, Case C-358/18; Court of Justice September 13th 2007, *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud*, Case C-307/05.

[48] Court of Justice March 15th 2012, *Giuseppe Sibilio v. Comune di Afragola*, Case C-157/11.

[49] Ratti, *cit.*, p. 514.

[50] Proposed by A. with a heavily critical note: Ratti, *cit.*, pp. 515-516.

would reinforce the tendency to turn the so-called floor of rights into a ceiling[51].

The issue, as the mentioned doctrine does not fail to observe, is unquestionably real, and yet it does not seem to recur in the judgment *Sibilio*. As proof of this is point 43, which specifies that "where the EU legislator expressly refers to the legislation, to collective agreements or to the practices in force in the Member States, it is not up to the Court to give the used terminology an autonomous and even definition of this notion, pursuant to EU law". Similar is the content of point 48, where it is specified that pursuant to "Italian law the performances carried out within the context of works of social utility can report the typical features of a subordinated work performance. If this is the case, the Italian legislator cannot deny the legal qualification of the subordinated working relationship to those relationships objectively taking on such a nature".

Ultimately, the *Sibilio* case stands in continuity with the Court's precedents when deriving the power of Member States to make discretionary, though reasonable choices from the referral to national legislations of the notion of worker: basically, these shall refer to their internal systems, without sacrificing the one, who – according to national law – is deemed a worker. Hence, the Court continues making recourse to the *effet utile* to set an "external limitation" to the implementation of the directive. The notion of "objective subordination" is used for this purpose: when referred to as national law instead of EU law, it prevents the fixed-time workers from being applied to less favourable work conditions than permanent contract workers. The two are comparable to each other only for the fact of having a contract or a fixed-term work relationship.

10. Follows. *The* Betriebsrat der Ruhrlandklinik *case*

More structured is the *Betriebsrat der Ruhrlandklinik* case, since the Court when judging on the scope of the directive no. 2008/104/CE, really seems going beyond its same precedents[52].

[51] See on that *amplius* RATTI, *cit.*, p. 516, going back to the critical enquiry of COUNTOURIS, KOUKIADAKI, *The Purpose Of European Labour Law: Floor Of Rights - Or Ceiling*? *Social Europe*, 2016, in *https://socialeurope.eu*.

[52] MENEGATTI, *cit.*, p. 36.

The directive – as specified by the Court – preserves "the power of Member States to decide which individuals are falling under the notion of 'worker', pursuant to National law and are beneficiaries of a protection within their internal legislation". But – it adds – that this does not imply "a waiver by the EU legislator to define the scope of this notion pursuant to directive 2008/104 and, consequently, the scope *ratione personae* of the latter". Vice versa – the Court continues – it shall not be referred to national legislation for "the task to define this notion unilaterally, instead only the boundaries of article 3, paragraph 1, letter a) of the same directive are outlined, as indeed it has been done also for the definition of 'temporary agency worker' under paragraph 1, letter c), of the same article". The notion of worker endorsed by directive 2008/104 – the Court concludes – "includes any person having a working relationship in the meaning mentioned *supra,* under point 27 [reference to *Lawrie-Blum* formula] and enjoying of a protection in the concerned Member State in exchange of a work performance".

Differently from *Sibilio* case, in the *Betriebsrat der Ruhrlandklinik* case, the Court seems to impose a European notion of the worker on National laws, whose discretion is limited and almost cancelled. Behind this argument, there is again the *effet utile* of the directive: narrowing the notion of worker "to the individuals falling under this notion pursuant to national law" – it reads in the provision – would distort the purpose of the directive by admitting unjustified restrictions to its scope. Nevertheless, beyond the "appearances", a clear break from the precedents can hardly be found in this judgment: not only do they find application in the case law successive to *Betriebsrat der Ruhrlandklinik*, but the solutions proposed here are indeed referring to those precedents, at a closer look.

The intention, clearly expressed in the provision, to "reserve" to EU law the scope *ratione personae* of directive 2008/104, does not reach its extreme consequences, since the Court specifies that the European legislation of agency work contract shall be applied if the performance is "protected as such" by national law. The principles set out by the Court appeared unprecedented and not coherent, since a clear return to national legislation is combined with an element derived from EU law – the notion of worker: the "protection in the concerned Member State in exchange of the work performance offered". And more than an inconsistency, this return conveys the awareness of not being able to go beyond the key role played by national laws, where directives are reserving the scope *ratione personae* to them. The

stress over the European notion of worker gets, thus, heavily downsized and acquires more the value of an aspiration which, *de jure condito*, shall be compared with the regulatory structure of the directive and the institutional one of its legal bases, up to the point of losing its consistency.

11. *Subordinated-employment and self-employment: sector-based approach and the* Danosa *case*

Times are mature to draw the first conclusions.

Although not all doubts were dispelled, – the reference is here to the working hours and the collective redundancy – EU case law, after developing a full notion of workers regarding free movement, extends it to a set number of directives. Once exceeded this limited number, it does not expand any longer and stops at the referrals to national laws and the institutional systems contained in the same referrals.

The conclusion is remarkable since against it, both the thesis supporting the existence of a notion of worker for every matter under European competence and the interpretations tending to an expansion of the "*Lawrie-Blum* formula", crash. And yet – as said before – it is only a first conclusion, not sufficient to conclude our analysis: EU case law, in fact, did not just broaden the scope of *Lawrie-Blum* notion, it went much further. Starting from the *Danosa* case[53], the Court changes its position on this notion; a change was introduced on the occasion of the directive on "health and safety of pregnant workers" and then extended to the directives collective redundancy[54] and the same free movement[55].

More specifically, after identifying the factual elements of the considered relationship – the tasks assigned, the environment where they are carried out, the extent of powers enjoyed by the concerned subject and the super-

[53] Court of Justice November 11th 2010, *Dita Danosa v. LKB L zings SIA*, Case C-232/09.

[54] Court of Justice July 9th 2015, *Ender Balkaya v. Kiesel Abbruch - und Recycling Technik GmbH*, Case C-229/14, Court of Justice February 13th 2014, *European Commission vs Italian Republik*, Case C-596/12.

[55] Court of Justice September 10th 2014, *Iraklis Haralambidis vs Calogero Casilli, against: Brindisi Port Authority, Italian Ministry of Infrastructures and Transportation, Regione Puglia, Province of Brindisi, Municipality of Brindisi, Brindisi Chamber of Commerce, Industry, Craftsmanship and Agriculture*, Case C-270/13.

vision he/she undergoes and the circumstances, occurring in which his/her contract can be terminated – the *Danosa* judgment specifies that the author of a performance "under the direction or supervision … and who can be revoked from his tasks at any time without limitations, satisfies, at a glance, the conditions to be qualified as a worker". The Court beside the notion of direction in its EU meaning places also the supervision and the revocation of tasks, but, of course, the two are considered as alternatives to the direction itself: lacking this latter – it reads in *Danosa* – supervision and unilateral revocation are sufficient to "be qualified as worker". This, indeed, is the same as turning the direction into a non-necessary element of the notion of worker, being it replaceable by generic supervision and an even more generic unilateral revocation of tasks. The *Danosa* case, ultimately, ends up including the notion of workers also those individuals, who carry out performance under a condition of freedom to organize urges us to wonder, whether this approach may influence the opposition between subordinated employment and self-employment taken over – according to some authors – by EU law.

Before answering this question, it is useful to highlight an aspect which already partly came to the fore of the analysis and which will be to the benefit of clarity, in view of the successive considerations. EU law has, on several occasions, "established a comparison" between subordinated employment and self-employment, urging case law to regard the direction as a distinction criterion: the case law on the right to settlement speaks for itself. This "establishment of a comparison", though, did never land in the construction of a dichotomous legal model equivalent to that of many national systems. When even this was the case, it was used to delimit the scope of specific legislation. Hence, neither subordinated employment nor self-employment was placed at the centre of an organic system of protections: similar "system-based" approaches shall leave room for "sector-based" approaches in EU law.

Having said that, a sub-area can be observed within the perimeter of the directives for which the "traditional" notion of employee is applied, where the social protections – it is hard to deny that – follow a marked cross-cutting vocation and overstep the boundaries of the said notion, by working also for the executed autonomous job, that is under conditions of freedom of organisation. Let's consider the directives on non-discrimination rights and on safety in the workplace. And other sub-areas can be observed where the contrast – in the specified meaning – between subordinated employment and self-employment is set out in primary law – it is useful to consider once

more the free movement and the right to settlement – as well as in secondary law: extremely telling is the directive on working hours[56], despite the doubts mentioned several times.

Only in the case of the first sub-area, a notion of worker where the EU concept of direction is no longer decisive is not unreasonable: it is not by chance that a move towards its use comes from one of the so-called "daughter" directives on health and safety at the workplace. The whole changes when it comes to the second sub-area: in this case, the *Danosa* approach becomes troublesome since the current regulatory framework makes it difficult to disregard a notion of self-employment or if you prefer, non-direct.

The sector-based approach of the European social right, ultimately, would not exclude a "double speed" notion of worker, as far as the reference legislation allows it: difficulties would not still be missing, and yet, making a crosscutting recourse to a "broad notion" of worker, as apparently, the Court of Justice is doing, is even more complicated.

12. *Law on competitiveness and notion of the worker*

An additional and likewise revealing consequence of the sector-based approach surfaces from the case law on competitiveness and collective bargaining and it is worth dealing with it also for the reasons expressed in the opening.

It was already mentioned that the legislation of social policy - collective bargaining is a major instrument - shall be reconciled with the rules on competition. This balance is impacted also by the broad notion of the company developed by the Court that increases further its complexity: in the context of competition law, the qualification of the company shall be applied to any organisation carrying out an economic activity, irrespective of its legal status and its funding modalities and any activity, which is directed to the supply of goods and services on a specific market, can be deemed an economic activity[57]. The said notion, by restricting the area of articles 101 and following,

[56] Cf. FERRANTE, *La nozione di lavoro subordinato nella dir. 2019/1152 e nella proposta di direttiva europea rivolta a tutelare i lavoratori "delle piattaforme"*, in *WP C.S.D.L.E. "Massimo D'Antona".INT - 158/2022*.

[57] PALLINI, *cit.*, p. 866.

contributes to specifying the cases when the rules on social policy are prevailing over the competition rules, thus making collective bargaining possible. And here comes the problem, since the *Albany* judgment, holding collective bargaining as legitimate when its nature and object exempt it from the law on competition, does not specify how these principles apply: it just – as we mentioned in the first pages – admits collective bargaining for subordinated employment in the meaning set forth in *Lawrie-Blum*, but does not even mention self-employment, that is, the employment lacking any direction.

Apart from the already risen criticism, a bright juxtaposition is engendered: within the area of subordinated employment, that is, unilaterally organized, rules prevail over social policy and bargaining is made possible. Whereas, within the area of self-employment, where the unilateral organisation is missing, the rules prevail over the competition, because the notion of the company is expanded. But everything changed after the FNV judgement from 2014 that redraws the perimeter of the so-called labour exemption[58].

The Court once again mentions the *Albany* doctrine and defines the subjective scope, where rules on social policy prevail over articles 101 and successive "negatively", thus leaving free room for collective bargaining. The Judgment, ultimately, specifies when the "nature" of a contract prevents – this is why negatively – to deprive the "rules on competition of collective bargaining": a circumstance that occurs when the contract refers to someone, who carries out an economic activity entrepreneurial[59].

Such an approach, it is more than evident, requires us to specify when we are falling out of the notion of company. With a view to this, the Court equates the employee to a service provider lacking any independence in the market: in both cases collective bargaining is permitted by European law, not being targeted to individuals involved in economic activities that make them a company[60]. This is the point of the comparison the Court dwells upon, by

[58] To be considered as an exception to the competition rules, among the others those ruling out the recourse to collective agreement: Arena, *La labor antitrust exemption al vaglio della Corte di giustizia: quale contrattazione collettiva per i lavoratori c.d. falsi autonomi?*, in *DLM*, 2016, p. 144.

[59] See points 28 and 29 of *FNV* judgment.

[60] See also Delfino, *Statutory minimum wage and subordination. FNV Kunsten Informatie Judgmet and Beyond*, in Łaga, Bellomo, Gundt, Miranda Boto (edited by), *Labour law and social rights in Europe: the jurisprudence of international courts, selected judgements*, Gda sk University Press, 2017.

equalling to "someone who for a specific period executes a performance in favour of someone and under his/her direction in exchange of an economic compensation" a service provider, who loses "the quality of independent economic operator and of a company when he/she does not fix autonomously his/her own behaviour on the market"[61]. Basically, more than a dichotomy between subordination – autonomy, what comes out of the *FNV* judgment is a dichotomy of work-business.

13. Follows. *The Court's reasons in the* FNV *case*

Full comprehension of the path followed by the Court requires attention to its key steps.

The judgment originates from the *Allonby* case, where, based on a traditional approach, the employee is identified as someone, who lacks the "freedom to set his/her working hours, place and object"[62]. This level is, though, juxtaposed to another one: to have the mentioned "negative" approach, the centre of gravity of the analysis moves towards the market side by engendering the said work-business dichotomy.

More specifically, the Court concentrates its attention on a service provider, who is not free to set his/her own behaviour on the market, since, by establishing "a relationship based on an economic unit with the principal", this one falls out the notion of the company: this assumption gives birth to the concept of "false self-employed". Differently from what also written before[63], it does not identify someone who performs employment in a direct form, nor either this formula is used to deal with the cases of wrong qualification or simulated work: a non-negligible need which is, though, dealt with using the principle of the primacy of facts. When talking about "false self-employed", the Court refers to a worker, who, irrespective of the direction, is exempt from the rules on the competition: a circumstance that allows to include, on a residual basis, anything that is not "a company". This approach is by far different from the one observed in *Danosa*: the traditional

[61] See respectively points 33 and 34 of *FNV* judgment.

[62] See point 71, the judgment *FNV* refers to.

[63] Perulli, *Il diritto del lavoro "oltre la subordinazione": le collaborazioni etero-organizzate e le tutele minime per i riders autonomi*, in *WP CSDLE "Massimo D'Antona".IT - 410/2020*, p. 34 more recently *Oltre la subordinazione*, cit., pp. 70-73 and pp. 200-204.

concept of subordinated employment based on the direction, shall not match with that of a worker undergoing supervision and a unilateral revocation. Instead, someone who's not autonomous on the market. This is the reason why the judgment *FNV* draws upon the precedents on the notion of the company: the purpose is to specify in which case this autonomy ceases and drags with it the qualification of the company, leading to the notion of "false self-employed".

In the above-mentioned precedents – key references for the issues under examination – it is specified that ceases to be qualified as a company, someone who, though providing services and goods on the market, "is acting on behalf of a principal, by working as a subsidiary body, part of the business of the principal and forming with the said company a single economic entity"[64]. The Court has repeatedly covered the concept of an economic entity, setting out that it applies when a "principal includes the contribution of a service provider in the final product" and "it is the sole to operate on the goods and services market by setting the price and the terms of the product offer": in this hypothesis the service provider forms part of the production process organized by the principal and, with regard to competition, it represents a single company acting on the market[65]. In addition, the Court specifies that the service provider acts as a subsidiary of the principal when also pursuant to specific agreements, only the latter enjoys of the "economic functions of an independent economic operator", that is, among the others, fixing "sales price of a service". This has as a consequence that "the prevalence of financial and commercial risks related to the same economic transaction is ascribed to the principal"[66].

Against the background of these principles, it is not strange to think that the autonomy in choosing one's own behaviour on the market – the *ubi consistam* of the "false self-employed" – exists, when the one providing a service is not setting the sales conditions of a product and more specifically the price. A "false self-employed", thus, identifies with a subject who, after losing the qualification of the company, has never completely escaped the

[64] Court of Justice December 16th 1975, *Coöperatieve Vereniging "Suiker Unie" UA and others vs Commission of European Community, Joint*, Case 40 a 48, 50, 54 a 56, 111, 113 and 114-73.

[65] Court of Justice September 16th 1999, *Jean Claude Becu, Annie Verweire, Smeg NV, Adia Interim NV*, Case C-22/98.

[66] Court of Justice December 14th 2006, *Confederación Española de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA.*, Case C-217/05.

analysis of the Court: as demonstrated by the mentioned precedents. A major innovation brought about by *FNV* is that it draws the due consequences in terms of balance between competition and social policy. When the working activity does not fit with the notion of the company, going on enforcing a ban on negotiating is pointless: the free competition – seems to conclude the *FNV* judgment – is not here affected.

14. Follows. *Following the* FNV *case, also the Commission takes a stake*

The proposed assumptions have been confirmed in a recent European Commission Communication[67]: a soft law act that shall not be underestimated. If under point 5 of the document, the thesis identifying a "false self-employed" in someone "acting under the direction of an Employer" seems re-surfacing, under points 22 and successive, the Commission calls back the *FNV* Judgment[68] and places the focus on the workers, who is comparable to "employees", are falling out of the "scope of article 101 TFEU".

Against the background of such an approach, the Commission considers it difficult both to "identify … the status of company" and to identify "when this status ceases to apply" and, thus, it "draws up a list" of cases where the service provider is comparable to a worker. It represents the most interesting part of the Communication, based on which the said circumstance occurs, when someone performing individual self-employment: a) is economically dependent; b) works "side by side" with employees; c) is a platform worker.

Apart from the second group, which seems to advance the idea of self-employment only "nominally" autonomous, the Commission refers to individuals who are not bearing the commercial risks and are not "fully

[67] European Commission, Communication from the Commission, *Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons*, 2022/C 123/01.

[68] The reference is specifically to the passage where it is clarified that "a collective agreement concerning independent service providers can be considered as the outcome of a social dialogue, when the said providers are in a position similar to those of employees" and the other where it is specified also that "a service provider may lose its quality of independent economic operator and, hence, of company, when it is not free to establish its own behaviour on the market … for not bearing any of the financial and commercial risks deriving from the economic activity he/she performs and for acting as a subsidiary incorporated in the company of the said principal".

autonomous in carrying out their activity". The first and third groups represent consistent interpretations of the proposed reconstructions. The first includes those who "provide services only or mainly for a single counterpart" and "whose overall annual income depends for at least 50% on a single counterpart": they – the Commission adds – are not autonomous in the definition of their behaviour on the market and, instead, depend on their principal. The third group includes those, who, working via platforms, can be confronted with "a take it or leave it offer", where the negotiating margin for the performance terms is limited or non-existing at all: platforms impose the "sales terms of a service on the market without even informing nor asking the individual self-workers", who in turn only must accept them.

15. *Conclusions: recent developments of EU law*

Before concluding the analysis, a final question must be raised: to what extent the recent developments of EU law are affecting the reconstructed balance?

The question is not negligible, since, according to some authors, directive 2019/1152, with recital 8[69], would entail a meaningful and unprecedented opening to EU case law as for the notion of worker: it has been defined as "a break with the past", but it shall be clarified that it is more apparent than real.

Firstly, according to the Court of Justice, "the 'recitals' of an EU act have no binding judicial value"[70]. And, above all, art 1, par. 2, specifies that the directive "sets out minimum rights applied to all EU workers having a work contract or a working relationship as defined by law, by collective contracts or the practices in force in each Member States, considering the case law of the Court of Justice". Similarly, to the other directives based on

[69] Where it reads that "In its case law, the Court of Justice of the European Union (Court of Justice) has established criteria for determining the status of a worker. The interpretation of the Court of Justice of those criteria should be taken into account in the implementation of this Directive. Provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive. Genuinely self-employed persons should not fall within the scope of this Directive since they do not fulfil those criteria".

[70] Court of Justice February 25th2010, *Müller Fleisch GmbH v Land Baden-Württemberg*, Case C-562/08.

art. 153 TFEU, also the directive on "transparent and predictable working conditions" marks a floor of right that can be adjusted to the national level according to the "existing technical rules", including the rules on the notion of the employee. It is not marginal to stress it again, since the "applicable" case law can only be the one which derives from a referral to national systems the possibility for autonomous and discretionary choices, without prejudice to the constraint of reasonableness: the only consistent solution with the approach of the minimum harmonisation, based on the grounds explained.

Another "break with the past", only partial for the moment, has been observed in the draft directive on platform work. Under art. 4, to get to the core of the issue is considered as subordinated[71], and, consequently, the national legislation applies, a relationship, where the platform controls the execution of a performance: a control that arises in the presence of at least two of the elements listed under art. 4. A discussion is now ongoing on these two elements and some authors recognize in it an echo of EU case law on the employee notion. Hence, the question: would this draft directive, if approved, strengthen this notion?

This question is not trivial, since, if the hypothesis in object would really strengthen the European notion of worker, this would heavily impact the national legislations, becoming the national legislation on employee extended even to relationships lacking any external direction: that is, what in many Members States still represents the core of subordination and that is not mentioned at all under art. 4. The risk of altering the minimum harmonisation – legal basis of the proposed directive is once again art. 153 TFEU – would be real, since the latter, as repeatedly affirmed, would not allow this outcome.

[71] This is how the hypothesis as under art. 4 is interpreted, see ALLAMPRESE, BORELLI, *Prime note sulla proposta di direttiva della Commissione sul miglioramento delle condizioni di lavoro su piattaforma*, in *RGL online*, 2021, n. 12; BARBIERI, *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni nel lavoro con piattaforma*, in *LLI*, 2021, n. 2; BRONZINI, *La proposta di Direttiva sul lavoro nelle piattaforme digitali tra esigenze di tutela immediata e le sfide dell'"umanesimo digitale"*, in *LDE*, 2022, n. 1; FERRANTE, *La nozione di lavoratore subordinato nella dir. 2019/1152 e nella proposta di direttiva europea rivolta a tutelare i lavoratori "delle piattaforme"*, in *WP CSDLE "Massimo D'Antona"* - 158/2022; MAGNANI, *La proposta di direttiva sul lavoro mediante piattaforme digitali*, in *Bollettino Adapt*, May 9th 2022, n. 18; PONTERIO, *La direzione della direttiva*, in *LDE*, 2022, n. 1; TOSI, *Riflessioni brevi sulla Proposta di Direttiva sul lavoro su piattaforme*, in *LDE*, 2022, n. 1.

Despite the existing doubts on the appropriateness of the hypothesis[72], the draft directive does not apparently go that far since the same hypothesis has no absolute but a relative nature. A clarification comes from art. 5 par. 2, allowing platforms to reject this hypothesis, if "the contract-based relationship is not a working relationship as defined under law, under collective contracts or under the practices in force in each Member State concerned, considering the case law of the Court of Justice; the burden of proof is on the digital work platform". Along with challenging the hypothesis, this rule reopens the issue of qualification: the evidence to the contrary is not limited to the non-existence of the elements listed under art. 4, and yet, in the event of their existence, it can be supported also by proving that the working relationship does not fall under the national notion of the employee. The scenario does not become different when referred to the case law of the Court of Justice that, for the reasons just explained, acquires a similar meaning to the one already mentioned for art. 1, par. 2, of directive 2019/1152.

[72] Tosi, *Riflessioni brevi sulla Proposta di Direttiva sul lavoro su piattaforme*, in *LDE*, 2022, n. 1.

Abstract

The Author retraced the historical origins of the *Lawrie-Blum* formula, investigates recent trends to broaden its scope and make it the fulcrum of the entire European social protection system. Having highlighted the problematic issues of these reconstructions, the A. identifies in the jurisprudence of the Court of Justice an approach to the notion of the worker which is markedly sectoral and examines its implications in the controversial relationship between competition and collective bargaining.

Keywords

Labour law, worker, free movement, minimum harmonisation, competition.

Paolo Tomassetti

The law-technology cycle in the French legal and industrial relations system. From government to governance and return*

Summary: **1.** Introduction. **2.** Technological change and trajectories of change in the French legal and industrial relations system. **2.1.** The French way to responsive regulation. **2.2.** State-led decentralisation of collective bargaining as a channel for responsive regulation. **3.** State and trade union responses to the *uberization* of labour relations. **3.1.** Responsive regulation within and beyond the "great dichotomy". **4.** Invisibility of new-generation technologies and their externalities. **4.1.** The social utility and the social function of the corporation reconsidered. **5.** Discussion and conclusions.

1. *Introduction*

Questions concerning the setting of optimal regulation have cyclically emerged in response to both radical and incremental transformations in society, led by technology as a main driver of change[1]. Labour law and industrial relations have been particularly exposed to the law-technology cycle. With the rise of industrial capitalism, labour law was rationalised as "a technique for the humanisation of the technique"[2]. Due to the impact of a new

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[1] KOLACZ, QUINTAVALLA, *The Conduit between Technological Change and Regulation*, in *ELR*, 2018, p. 143. *See* also BROWNSWORD, YEUNG, *Regulating Technologies: Legal Futures Regulatory Frames and Technological Fixes*, Hart Publishing, 2008.

[2] SUPIOT, *Travail, droit et technique*, in *DS*, 2002, p. 13. *See* also RAY, *Nouvelles technologies, nouveau droit du travail ?*, in *DS*, 1992, p. 519.

wave of technological change on the division of labour, the law-technology cycle has come again under the spotlight of labour law scholarship in recent debates on the future of work and its regulation[3]. Labour law and technology have been construed as social systems that interact and co-evolve systemically, although in uneven and unpredictable ways[4]. This implies that labour law "does not simply respond to technological change; it also facilitates and mediates it"[5].

The idea of law and technology as mutually interacting systems resonates with systemic approaches to the analysis of industrial relations institutions[6]. According to Dunlop, any system of industrial relations is shaped by three interrelated forces: technology, the market, and power relations among the State, employers, and trade unions. In contrast to technological determinism and the ideology of social predestination, Dunlop argued that industrial relations are not determined, in some narrow and mechanical way, by technology. The technical variable "is only a part of the whole context and interacts with the other two aspects in varying patterns"[7]. However, he maintained that technology is decisive to the outcomes of any industrial relations system, namely the creation of a complex network of rules regulating the employment relationship. While the technical context is given, it might be expected to change. And technological change "tend to alter the rules, the organization of the hierarchies, and the operations of an industrial relations system"[8].

Drawing on responsive regulation theory, as elaborated by Ayres and Braithwaite[9], this article looks at the French legal and industrial relations systems' adjustments to technological change as an example of how law and tech-

[3] Deakin, Markou, *The law technology cycle and the future of work*, in *DLRI*, 2018, pp. 445-462. See *also* Aloisi, De Stefano, *Your Boss Is an Algorithm. Artificial Intelligence, Platform Work and Labour*, Hart, 2022 and, for questions concerning the impact of new technologies on unions and worker representation, Forsyth, *The Future of Unions and Worker Representation. The Digital Picket Line*, Hart, 2022.

[4] Deakin, Markou, *cit.*, p. 447.

[5] Deakin, Markou, *cit.*, p. 445.

[6] In addition to Dunlop, *Industrial Relations Systems*, Holt, 1958, *passim*; see Sorge, Streeck, *Industrial Relations and Technical Change: The Case for an Extended Perspective*, in Hyman, Streeck (eds.), *New Technology and Industrial Relations*, Basil Blackwell, 1987.

[7] Dunlop, *cit.*, p. 34.

[8] *Ibid.*

[9] Ayres, Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, 1992.

nology develop in parallel with each other in a mutually constitutive way. Apparently, during the last three decades the French State has given up significant shares of power to market forces because of technological innovation and the following reconfiguration of the division of labour. More recently, the rationale of the major labour market reforms enacted by French governments was to make labour law and collective bargaining more responsive to technological change, on the grounds that "faced with the digital revolution and the "uberization" of our economy, the wage relationship, in the conception forged by our labour law, is expected to disappear"[10]. A reorientation of labour law towards the contested idea of flexicurity[11] and on the labour market as a core normative referent is consistent with this assumption[12].

Arguably, the seeming erosion of the French legal and industrial relations system has followed, like in other Western countries, what Alain Supiot defines as the "governance by numbers"[13], which seeks to "subject the law to calculations of utility, where traditional liberalism made calculations of utility subject to the rule of law. Once presented as a product in competition on a market of norms, the law is transformed into pure technique, to be assessed in terms of effectiveness and no longer of justice"[14]. In the context of a state-centric jurisdiction and industrial relations system, this institutional change has contributed to workers' and union disempowerment vis-à-vis firms[15]. The overturning of legal sources' hierarchy in favour of firm-level collective agreements, and the rise of "managerial social dialogue" are both emblematic of this process[16], in which collective bargaining is manipulated as a tool for deregulation[17].

[10] Combrexelle, *La négociation collective, le travail et l'emploi*, 2015, p. 13. Similar claims have been advanced by Bruno Mettling in his report *Transformation numérique et vie au travail*, 2015.

[11] Bugada, *La flexisécurité, fille des politiques sociales comparées*, in Albarian, Moréteau (eds.), *Le droit comparé et /Comparative law and..Actes du congrès annuel de Juris Diversita*s, Presse Universitaire d'Aix-Marseille, 2016.

[12] *See* Sachs, *La consolidation d'un droit du marché du travail*, in *RDT*, 2016, pp. 748-753.

[13] Supiot, *Governance by Numbers: The Making of a Legal Model of Allegiance*, Hart Publishing, 2017.

[14] Supiot, *Labour is not a commodity: The content and meaning of work in the twenty-first century*, in *ILR*, 2021, p. 3.

[15] *See* Amable, *The political economy of the neoliberal transformation of French industrial relations*, in *ILR*, 2016, pp. 523-550 and Howell, *The transformation of French industrial relations: Labor representation and the state in a post-dirigiste era*, in *PS*, 2009, pp. 229-256.

[16] Giraud, *Derrière la vitrine du dialogue social: les techniques managériales de domestication des conflits du travail*, in *Agone*, 2013, pp. 33-63.

[17] Lokiec, *Collective bargaining as a tool of deregulation*, in *IUR*, 2014, pp. 16-18.

Yet, on closer inspection, the analysis of the French case offers the opportunity to provide a complementary interpretation of how legal and industrial relations institutions mediate and evolve in response to technological change. Rather than a redistribution of power relations in favour of the market, greater contamination and porosity of roles and functions between the actors of the industrial relations system is observable. If, on the one hand, new technologies allow employers to gain normative power over the discipline and the management of the employment relationship, this power is still conditional to institutional control by the trade unions and the State. Tripartite institutions participated by workers' representatives and other relevant stakeholders have been established, at different levels, to address emerging labour market challenges. Moreover, a new generation of rights have been enacted to adapt labour market regulation to technological change and likewise attune its impact on the globalised division of labour beyond the "great dichotomy". Empowered by information and communication technologies, governance has championed a new normative ideal of attaining public policy objectives. These objectives, however, are not necessarily economic. The *long durée* "sacralisation" of the right to property and economic freedom in the French civil code was questioned. Legislation was passed in the field of civil law and commercial law to rationalise the rising of the solidarity economy and to steer traditional economic activities towards broader societal goals. In line with a responsive regulation model, this institutional change not only resulted in an uncertain shift from government to governance[18]. But the emphasis of statutory regulation shifted also from the pursue of the firms' *social utility* (in terms of employment growth and redistribution of power and economic resources from capital to labour) to the promotion of the firms' *social function* (in terms of contribution to socially and environmental progressive goals).

2. *Technological change and trajectories of change in the French legal and industrial relations system*

In 1907, Paul Louis noted that French unionism did not fit anymore the Webbs' popular definition of trade unions as a "continuous association

[18] SUPIOT, *Governance by Numbers*, cit., *passim*.

of wage earners for the purpose of maintaining and improving the conditions of their working lives"[19]. The programme of French unions had broadened and radicalised so much that, ultimately, they aimed at capitalism collapse[20]. This revolutionary turn was presented as paradoxical, as long as trade unions were, like in any other country[21], "the direct product of capitalist concentration"[22]. Instead of "killing the father", French unionism evolved plurally within capitalism[23], and divided itself along ideological orientations[24]. Overall, it has continued to reflect the broader contradictions of the country's state-centric model of capitalism, the lights and shadows of its social democracy, and its unique tension between change and conservation.

In both legal[25] and industrial relations scholarship[26], the specificity of France is associated with the lack of an historical compromise between capital and labour in the post-World War I period[27]. If before World War II the State

[19] WEBB, *Industrial democracy*, in Green and Co., 1894, p. 1.

[20] LOUIS, *Historie du mouvement syndical en France (1789-1906)*, Félix Alcan, 1907, pp. 1-2.

[21] HYMAN, *Industrial relations: a Marxist introduction*, Macmillan, 1975 and HYMAN, *Marxism and the sociology of trade unionism*, Pluto Press, 1971.

[22] LOUIS, *cit.*, p. 3.

[23] Drawing on John R. Commons and Selig Perlman scholarship, Peter Stearns deconstructed the thesis of the intellectual and revolutionary origin of French unionism: STEARNS, *Revolutionary Syndicalism and French Labor: A Cause without Rebels*, Rutgers University Press, 1971, *passim*. *Contra*, *see* MITCHELL, *The Practical Revolutionaries: A New Interpretation of the French Anarchosyndicalists*, Greenwood Press, 1987.

[24] CLARK, *A History of the French Labor Movement (1910-1928)*, University of California Press, 1930; REYNAUD, *Trade Unions and Political Parties in France: Some Recent Trends*, in *ILR*, 1975, pp. 208-225; HYMAN, *Understanding European Trade Unionism: Between Market, Class and Society*, Sage, 2001, pp. 44-45; HOWELL, *Regulating Labor: The State and Industrial Relations Reform in Postwar France*, Princeton University Press, 1992, pp. 44-49. For a legal discussion of trade union pluralism in France, *see* FORDE, *Trade Union Pluralism and Labour Law in France*, in *ICLQ*, 1984, *passim*.

[25] According to Fuchs, French unions "have been indisposed to foster such instrument of compromise with capitalism as collective agreements" (FUCHS, *The French Law of Collective Labor Agreements*, in *YLJ*, 1932, p. 1006).

[26] Howell notes that, unlike Germany, Italy and Britain, "France did not develop an institutionalized collective bargaining system, its trade unions were weak and legally insecure in the workplace, wage determination occurred primarily through the labour market, and leftist parties played little or no role in the political life of the country" (HOWELL, *Regulating Labor: The State and Industrial Relations*, cit., p. 37).

[27] Among the root causes of such development, Reynard mentioned "the French spirit of individualistic liberty" as opposed to "the very basic concept of collective bargaining", the theory of class struggle that framed collective bargaining "as a reprehensible form of collaboration",

had kept out of trade unions and employers' associations affairs, French legal and industrial relations traditions have long remained dependent on the hegemony of the political power since the post-war period. Unlike what could be observed in market-oriented (e.g., Great Britain) or meso-corporatist regulation models (e.g., Germany and Italy)[28], the role of the State has aimed at stabilising and promoting good labour-management relationships – a purpose that French unions and employers failed to achieve autonomously.

Faced with a conflicting trade union culture, and with the employers' reluctance to engage in social partnerships, the regulatory centralism typical of the French legal tradition has been reflected in the legislation on collective bargaining. From the post-war period to the end of the Nineties, French governments have extensively intervened in the regulation of trade union activity and collective bargaining. Based on the respect of sources' hierarchy and of the principle of *favor*[29], the system of industrial relations itself has been embedded within the State realm, with sectoral level collective bargaining construed as a functional equivalent of the law. In the name of protecting the so-called *order public social*, the collective interest mediated by the industrial relations institutions has been encompassed and rationalised within the broader category of the general interest[30]. One of the consequences of this state-centric approach is the mechanism to provide *erga omnes* power to sectoral collective agreements: by extension of the Ministry of labour, collective agreements become binding for any employee and company whose activity falls within their scope.

This institutional acquis has gradually changed in parallel to technological evolution. The long and winding transition away from the Fordist model of production in the period 1970-2000, has come with significant restructuring of economic activities, and the reconfiguration of the overall division of labour in firms and society[31]. The struggles of May and June 1968

"inter- and intraunion friction of a political nature", and "the rapid and early growth of social legislation": REYNARD, *Collective Bargaining and Industrial Peace in France*, in *AJCL*, 1952, p. 216.

[28] BOYER, *How and Why Capitalisms Differ,* in *ES*, 2005, pp. 509-557.

[29] LAULOM, MERLEY, *La fabrication du principe de faveur*, in *RDT*, 2009, pp. 219-227.

[30] For extensive discussion of this issue, *see* REYNARD, *Collective Bargaining and Industrial*, cit. and NYE, *The Status of Collective Labor Agreement in France*, in *MLR*, 1957, pp. 655 and 672. For broader historical examination of French legal theories on collective agreements, see PIROU, *The Theory of the Collective Labour Contract in France*, in *ILR*, 1922, 5, p. 35.

[31] PARSONS, *French Industrial Relations in the New World Economy*, Routledge, 2005, pp. 6-24 and 94-101.

marked the peak of working-class militancy in France, as well as a symbolic exhaustion of the post-war model[32]. The strike wave of 1968 was not translated into sustainable material gains for workers[33]. To the contrary, since the end of the 1970s, France has been plagued with persistent high levels of unemployment, coupled with a dual labour market with an explosion of very short-term contract jobs in the last two decades[34].

Such developments have contributed to reshape the role of the State and the contours of social dialogue, increasingly faced with demands of economic competitiveness[35]. The withdrawal of the State from authoritative regulation went hand in hand with an increasing regulatory responsibility devolved to the social partners and civil society[36]. Although this goal was largely achieved in the decade following 1978, there was an *increase* in State intervention and involvement in labour regulation at certain critical moments[37]. While the rationale of State regulation to promote firm-level collective bargaining was, originally, to democratise industry by reinforcing the position of employees and their collective organisations within the workplace[38], things started to change in the Eighties[39].

When the government of François Mitterrand came to power in May 1981, high on its agenda was a plan to fundamentally restructure French industrial relations. With the 1982 Collective Bargaining Act firms were obliged to negotiate annually over hours and pay at company level. This was seen as encouraging employers to become more aware of their social responsibilities, and trade unions more aware of the technological and economic constraints within which the firm operated[40]. The then Ministry of Labour was clear that the reform aimed to "adapt to the variety of economic and human sit-

[32] Howell, *Regulating Labor: The State and Industrial Relations*, cit., p. 27.

[33] *Ibid*.

[34] Gazier, *Opportunities or Tensions: Assessing French Labour Market Reforms from 2012 to 2018*, in *IJCLLIR*, 2019, p. 333.

[35] Groux, *Le grand chambardement. De l'État à l'entreprise*, in Groux, Noblecourt, Simonpoli (eds.), *Le dialogue social en France. Entre blocages et Big Bang*, Odile Jacob, 2018, pp. 107-108 *See* also Howell, *Regulating Labor: The State and Industrial Relations* cit., p. 28.

[36] Howell, *Regulating Labor: The State and Industrial Relations*, cit., p. 29.

[37] *Ibid*.

[38] Andolfatto, Labbé, *The Future of the French Trade Unions*, in *MR*, 2012, p. 351.

[39] Parsons, *cit*., pp. 120-124.

[40] In addition to Parsons, *cit*., p. 120, *see* Glendon, *French Labor Law Reform 1982-1983: The Struggle for Collective Bargaining*, in *AJCL*, 1984, pp. 449-491.

uations, to inevitable technological advances, and, finally, to the emergence of new social aspirations"[41]. Since the Nineties, French governments have adopted measures consistent with such aspirations, giving more functional autonomy to collective bargaining vis-à-vis the legislator and the law[42]. It is in this context that firm-level collective bargaining has become central in French industrial relations, along with the gradual reconfiguration of the favourability principle and the hierarchy of labour law sources[43].

While this normative pattern paralleled a trajectory of change followed by other EU countries, including Germany and Italy, the French political power continued to reflect a tension between State interventionism in industrial relations (as inherited from the post-war period) and respect for the autonomy of the social partners and collective bargaining[44]. Greater autonomy of firm-level collective bargaining did not come in a normative vacuum. To accommodate market pressures stemming from globalisation and technological change, instead, France have embraced a model of responsive regulation that has contributed to reform the overall system of industrial relations and beyond.

2.1. The French way to responsive regulation

Responsive regulation theory sets a pathway between regulation and deregulation in which State and non-State actors can work in tandem towards the enforcement of legislation and policies[45]. By questioning the conceptual contraposition between public intervention in the economy and laissez-faire approaches to policy, responsive regulation reproduces some of the main features of "reflexive law"[46], under which the State role is not to

[41] Auroux, *Un nouveau droit du travail?*, in *DS*, 1983, p. 3.

[42] Béthoux, Mias, *How does state-led decentralization affect workplace employment relations? The French case in a comparative perspective* in *EJIR*, 2019, 27, 1, pp. 5-21 and Amable, *cit.*

[43] French scholars refer to this process in terms of "inversion of norms": *see* for example Gazier, *Opportunities or Tensions,* cit., p. 337.

[44] Freyssinet claims that this tension is the main *spécificité* of French labour law: Freyssinet, *Les modes de production des normes de la relation d'emploi*, in *RDT*, 2016, p. 745. *See* also Groux, *Le grand chambardement*, cit., pp. 107-108.

[45] Ayres, Braithwaite, *cit.*

[46] Teubner, *Substantive and Reflexive Elements in Modern Law*, in *L&S Rev*, 1983, pp. 251 and 254-55. For broader discussion of reflexive law applied to labour law, *see* Rogowski, *Reflexive Labour Law in the World Society*, Edward Elgar, 2013, *passim*.

prescribe normative goals or taking regulatory responsibility for substantive outcomes. The role of the State is to provide an institutional basis for self-regulation and the coordination of interaction between subsystems, preventing the inequities that both laissez-faire and authoritative models of regulation involve.

The central tenet of responsive regulation lies in the possibility to transcend the deregulation debate because "in equilibrium regulatory tasks are privatized and carried out in a practical sense by markets – but the community does not need to cede judgments about welfare wholly to the unconstrained forces of the market"[47]. The focus of responsive regulation is not on the presence or absence of rules posed by central authorities that is the State or national collective bargaining as a functional equivalent of the law. The focus is on how the regulation process is shaped, how different levels of regulation interact, how regulatory goals are achieved and enforced. For example, in his analysis of French labour market reforms from 2012 to 2018, Gazier argues that "the French specificity lies in a paradox: a deregulating and high spending State"[48]. Yet, the paradox exists only if deregulation is contrasted with public intervention in the economy, on the grounds that the two processes are conceptually and practically alternative. As noted by Amable, instead, State intervention in the process of promoting the decentralisation of collective bargaining is not a contradiction in terms: "neoliberalism should not be mistaken for laissez-faire"[49].

In contrast to the vague reference to neoliberalism as an analytical category[50], two concepts are key to understanding responsive regulation: tripartism and delegation. Tripartism is conceptualised as a process in which "relevant public interest groups (PIGs) become the fully fledged third player in the game" of regulation[51]. According to Ayres and Braithwaite, PIGs include trade unions empowered to defend the interests of their members in employment regulation at both national and decentralised level. Complementary to tripartism, delegation is defined as the process through which certain regulatory tasks are delegated to private parties (e.g., to the PIGs or firms themselves). Contextually, this delegation is reinforced by traditional

[47] Ayres, Braithwaite, *cit.*, p. 162.

[48] Gazier, *Opportunities or Tensions*, cit., p. 335.

[49] Amable, *cit.*, p. 546.

[50] Dunn, *Against neoliberalism as a concept*, in *Cap&Class*, 2017, pp. 435-454.

[51] Ayres, Braithwaite, *cit.*, p. 56.

forms of regulatory monitoring to prevent market inefficiency. Gino Giugni looked at delegation as a form of devolution technique, which is used to achieve increased flexibility while avoiding deregulation *sic et simpliciter*[52].

2.2. State-led decentralisation of collective bargaining as a channel for responsive regulation

Reforms of the labour code promoted by French governments in the decade 2007-2018 are consistent with a responsive regulation model, and so are the most relevant policy documents underpinning them[53]. In terms of tripartism, the so-called Larcher Act of 2007[54] made the government obliged to consult the most representative trade union confederations when a legislative intervention in the field of social policy was undertaken[55]. In line with the EU model of social dialogue, if social partners reach an agreement, this is transposed into legislation and presented to Parliament for approval. If not, the government directly elaborates and enacts the law through the normal legislative procedure.

Access to tripartite policy making is subject to the representative status of social partners. In 2013, a formal system for measuring the representativeness of trade unions and employers' associations was introduced, overcoming the vague and updated criteria established in 1950[56]. The representative status of social partners is also functional to the validity of collective bargaining, as well as to the possibility for the extension of sectoral collective agreements, if their potential economic consequences are positively assessed and specific provisions for small firms are provided therein.

In harmony with the delegation technique, statutory norms empowered collective bargaining with normative tasks over many subjects. While industry level collective bargaining is now entitled to cover topics that were previously regulated by law, decentralised collective bargaining has gradually become a

[52] GIUGNI, *Juridification: Labour Relations in Italy*, in TEUBNER (ed.), *Juridification of Social Spheres*, Walter de Gruyter, 1987, p. 203.

[53] *See* for example COMBREXELLE, *cit.*, and METTLING, *Transformation numérique et vie au travail*, 2015.

[54] Law No. 2007-130 of 31 January 2007 on the Modernisation of Social Dialogue.

[55] SUPIOT, *La loi Larcher ou les avatars de la démocratie représentative*, in *DS*, 2010, pp. 525-532.

[56] *See* NYE, *cit.*, pp. 670-671 and FORDE, *cit.*, pp. 138-140.

key element of labour regulation in France[57]. As a result of such a "state-led model of decentralization"[58], the nexus between the labour code, sectoral collective bargaining and firm-level collective bargaining is currently articulated into three types of relationships based on the imperative or semi-imperative character of central regulation. The first category refers to provisions that the labour code explicitly excludes from firm-level collective bargaining derogation, including minimum wage, job classification systems, part-time work, training funds, and social protection measures. The second type of relationship involves subjects that can only be regulated by firm-level collective bargaining if sectoral level collective bargaining provides so (e.g., policies to hire disabled workers). Beyond these two categories, firm level collective bargaining prevails over sectoral collective bargaining, which has become a secondary source of regulation with respect to many relevant subjects, including the controversial issues of working time limits, the regulation of fixed-term contracts and new generation rights such as the right to disconnect.

Despite being endowed with more functional autonomy, firm-level collective bargaining remains a highly regulated institution in France. The cornerstone of industrial relations at firm level is the Comité Économique et Social (*i.e.,* the economic and social committee), which now encompasses the information and consultation functions that were previously assigned to different workers' representation bodies[59]. In firms where it is established, the social and economic committee is the central institution for workers' information and consultation when new technologies[60], automatised systems of human resource management[61] and any means that imply control-

[57] VINCENT, *France: the rush towards prioritizing the enterprise level*, in MULLER, VANDAELE, WADDINGTON (eds.), *Collective bargaining in Europe: towards an endgame. Volume II*, Etui, 2019, pp. 217-238. *See* also MIAS, *Quelles négociations collectives dans les entreprises ?*, in *RDT*, 2017, pp. 317-323.

[58] BÉTHOUX, MIAS, *How does state-led decentralization affect workplace employment relations? The French case in a comparative perspective*, in *EJIR*, 2019, pp. 5-21.

[59] Precisely, the Comité d'Entreprise (*i.e.,* the works council), the Comité d'Hygiène et de Sécurité et des Conditions de Travail (*i.e.*, the hygiene, safety and working conditions committee), and the Délégués du Personnel (*i.e.*, the personnel representatives) have been merged into a single Comité Économique et Social (*i.e.*, the economic and social committee).

[60] Article L.2312-8 of the labour code provides that the social and economic committee shall be informed and consulted prior to the introduction of new technologies.

[61] Article L. 2312-38 of the labour code provides that the social and economic committee

ling employees' activities are introduced[62]. In addition to such direct competences over technological innovation[63], the social and economic committee is entitled to play an indirect role when it comes to preventing and possibly contrasting the risks of new technologies on workers' health and safety, as well as in the context of mandatory collective bargaining on quality of life at workplace and on forecast management of occupations and competences[64].

Along with the economic and social committee, union delegates are entitled to negotiate with the employer, provided that they are set up by representative trade unions. Unlike other jurisdictions, firm-level collective bargaining in France is mandatory: firms are required to bargaining (but not to conclude an agreement) periodically over compulsory subjects, such as the annual negotiation on wages, profit sharing and working time. Although firm-level collective bargaining is now entitled to redefine the scope and timing of regulation, the labour code provides that negotiation over mandatory subjects shall take place at least once every four years. Furthermore, the validity of firm-level collective bargaining is subject to majority-based rules linked to the representative status of trade unions. To be valid, any agreement must be signed by one or more trade unions that received 50% of the votes' cast. In case the signatory trade unions only have 30 to 50% of the votes, other democratic mechanisms apply, including the referendum approval by the majority of the company's workers. Specific rules apply to enable access to collective bargaining for micro-businesses and small and medium-sized enterprises (SMEs) without union representation by allowing direct negotiation on all subjects, with an elected staff representative for SMEs or with employees for micro-businesses that do not have elected staff representatives.

shall be informed in advance about the introduction or modification of any automatized system of human resources management.

[62] Article L. 2312-38 of the labour code provides that the social and economic committee shall be informed and consulted prior to the implementation of any means that imply controlling the employees' activities.

[63] For further analysis on the role of the social and economic committee regarding the introduction and management of new technologies, including the artificial intelligence, *see* Leroy, *Le comité social et économique face à l'intelligence artificielle*, in Adam et al. (eds.), *Intelligence artificielle, gestion algorithmique du personnel et droit du travail*, Dalloz, 2020, pp. 131-138.

3. *State and trade union responses to the* uberization *of labour relations*

If any industrial relations system is "bound together by an ideology or understandings shared by all the actors"[65], the digital transformation of the economy and society is *a fait accompli* of the French twenty-first century capitalism. Fuelled by State-led industrial policies and massive public incentives, the *transformation numérique* has come with large consensus of both employers and trade unions. Despite none of the actors of the French industrial relations system arguing against the digitalisation, digital technologies have brought about significant changes in the division of labour and in the labour-management relationship[66]. Supiot, for example, claims that "the digital revolution on the organization and division of labour is at least as significant as that of the second Industrial Revolution, which led to the emergence of the welfare state"[67].

Technological change cannot be neutral in terms of power balances[68]. The effects on labour power are at best ambivalent. Newly emerging technologies and organisations are not just about whether existing jobs will be maintained or automated. New statuses and new labour relationships emerge[69], questioning some of the traditional features of wage labour[70], along with the classical trade union logics of collective action[71].

[64] *See* Articles L2242-1, L2242-13, L2242-17 and L2242-20 of the labour code.

[65] Dunlop, *cit.*, p. 8.

[66] Mettling, *cit.*, *passim*. For comments drawing on this report, *see* Pontif, *Transformation numérique et vie au travail: les pistes du rapport Mettling*, in *RDT*, 2016, p.185; Bidet, Porta, *Le travail à l'épreuve du numérique*, in *RDT*, 2016, p. 328 and Gratton, *Révolution numérique et négociation collective*, in *DS*, 2016, p. 1050. Before the debate on the Mettling report, *see* Ray, *À propose de la revolution numérique*, in *DS*, 2012, 934.

[67] Supiot, *Labour is not a commodity: The content and meaning of work in the twenty-first century*, in *ILR*, 2021, p. 2.

[68] Aloisi, De Stefano, *cit.*, *passim*.

[69] *See* Abdelnour, Méda, *Les nouveaux travailleurs des applis*, Presses Universitaires de France, 2019, *passim*; Méda, *The future of work: The meaning and value of work in Europe,* ILO Research Paper, 2016, n. 8, pp. 10-15; Gaulard, *La Fin du salariat*, Bourin, 2013.

[70] In addition to the Mettling and Combrexelle reports, *see* also Groux, *Le grand chambardement*, cit., pp. 122-123 ; Pasquier, *Sens et limites de la qualification de contrat de travail. De l'arrêt Formacad aux travailleurs "ubérisés"*, in *RDT*, 2017, n. 2, p. 95 and Bento de Carvalho, Tourneaux, *Actualité du régime du contrat de travail*, in *DS*, 2019, p. 57.

[71] Vicente, *Les conflicts collectifs ayant pour support l'algorithme*, in Adam et al. (eds.), *cit.*, pp. 187-197.

As part of an historical process started with the computerisation of society in the 1970s, the "transformation numérique" has threatened unskilled jobs, but at the same time the integration of digital technologies into the economy has created new jobs that are highly qualified[72]. On the one side, high-skilled workers are internalised, both as independent contractors or subordinate employees with higher spaces of autonomy and self-coordination. On the other side, labour intensive activities are mainly outsourced. As a result, highly qualified workers tend to be managed-by-objectives and, to a great extent, are expected to self-organize their working time patterns, with their work organisation being more and more decoupled from time and space limits. To the contrary, low-skilled workers are contracted with non-standard employment schemes or self-employment contracts falling outside traditional labour law protections[73].

French scholarship and policy making qualify this pattern in terms of "uberization" of the employment relationship, in which the contested boundaries between subordination and self-employment blurs. As anticipated by Supiot, within traditional, high-skilled jobs, workers' autonomy increases; within the area of self-employment, workers' autonomy reduces[74]. Irrespective of their employment status, both categories of workers benefit from the increased spaces of freedom and capability stemming from technological innovation. The so-called "digital picket line" can certainly be used by workers and unions to contest exploitation and develop collective strength[75]. But both categories of workers remain at the same time exposed to the *governance by numbers*, under which human work is modelled on computers, and physical control over workers is being compounded by intellectual control over them[76].

To anticipate and contrast market imbalances and inefficiencies linked

[72] Groux, *Le grand chambardement*, cit., pp. 120-121.

[73] Lokiec, *Externalising the Workforce: Lessons from France*, in Ales, Deinfert, Kenner (eds.), *Core and Contingent Work in the European Union: A Comparative Analysis*, Hart Publishing, 2017, *passim*.

[74] Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford University Press, 2001, *passim*.

[75] Forsyth, *cit.*, *passim*. In the French debate, *see* Vicente, *cit.*, *passim* and Gratton, *cit.*, spec. Section II.

[76] Supiot, *Labour is not a commodity*, cit., p. 4. *See* also Lokiec, Rochfeld, *Nouvelle surveillance, nouvelle subordination. Travail sous* Big Data*: les transformations du pouvoir*, in Jeammaud, Le Friant, Lokiec, Wolmark, *À droit ouvert. Mélanges en l'honneur d'A. Lyon-Caen*, Dalloz, 2018, p. 545.

to this technology-led shift of labour relations, the State has embraced responsive regulation in the field of individual and collective labour rights, by either transposing existing provisions introduced via collective agreements, delegating detailed regulation to collective bargaining, or introducing promotional legislation in both self-employment and subordination domains.

3.1. Responsive regulation within and beyond the "great dichotomy"

Despite France belonging to "those countries where there is a binary distinction between self-employed and employees with employment rights only afforded to employees"[77], exceptions to the sharp dichotomy exist for certain categories of (self-employed) workers, including journalists, artists, models, caregivers, home workers, employees of building, attendants and nursing assistants. Depending on the different occupations, these workers are selectively entitled with the protections recognised to employees, including collective labour rights. Unlike other jurisdictions where judges and legislators are still struggling to accommodate competition law to collective bargaining out of subordination[78], promotional legislation in France has introduced representation rights for certain types of self-employed workers[79], entitling those who perform jobs using digital platforms to establish and join a trade union with the aim to defend their collective interests[80]. Consistent with a responsive regulation approach, State intervention in the area of self-employment was primarily aimed at setting the institutional conditions for

[77] Adams-Prassl, Laulom, Maneiro Vázquezat, *The Role of National Courts in Protecting Platform Workers: A Comparative Analysis*, in Miranda Boto, Brameshuber (eds.), *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models*, Hart Publishing, 2022, p. 76. *See* also Digennaro, *Subordination or subjection? A study about the dividing line between subordinate work and self-employment in six European legal systems*, in *LLI*, 2020, p. 26.

[78] Paul, McCrystal, McGaughey, *Labor in Competition Law*, Cambridge University Press, 2022. *See* also Forsyth, *cit.*, pp. 150 and 222.

[79] *See* Loiseau, *Travailleurs des plateformes de mobilité: où va-t-on ?*, in *SJ,* 2021, pp. 1-7, Gomes, Sachs, *The Battle between the Legislator and Judges over Platform Worker Accountability: The French Case*, in Carinci, Dorssemont (eds.), *Platform Work in Europe. Towards Armonisation?*, Intersentia, 2021, pp. 83-94 and Chatzilaou, *Can digital platforms challenge French Labour Law?*, in Bellomo, Ferraro (eds.), *Modern Forms of Work. A European Comparative Study*, Sapienza Università Editrice, 2020, pp. 93-106.

[80] *See* Article L.7342-6 of the French labour code, as amended by Ordonnance No 2021-484 of 21 April 2021.

workers' and employers' associations to regulate the platform economy, and giving legal recognition to existing autonomous initiatives by trade unions[81].

In addition to protective measures granted to platform workers' representatives, including training and paid leaves to engage in union-related activities, the labour code was amended in 2022[82] to introduce mandatory[83] and voluntary[84] collective bargaining at sectoral level. Pursuant to article L7343-49 of the labour code, such collective agreements can be extended to all the platforms and the self-employed workers falling within their scope, upon decision taken by the "Authority for social relations of employment platforms". Created on 21 April 2021[85], this authority is a public institution supervised by the Ministry of labour and the Ministry of transportation, whose goal is to regulate and enhance social dialogue between the platforms and the workers bound to them by a commercial contract[86]. As another example of responsive regulation achieved through a decentralised form of tripartism, the authority relies on an ecosystem of actors representing a wide variety of interests, such as associations for the defence of consumers and users, officials from local public authorities, qualified experts in the fields of digitalisation, transportation and social dialogue, as well as representatives of self-employed workers and platforms.

Turning to the area of subordination, telework stands out as an example of normative porosity between statutory legislation and collective bargaining[87].

[81] VICENTE, *cit.*

[82] *See* article 2, Ordonnance n. 2022-492 of 6 April 2022.

[83] Mandatory provisions shall regulate the modalities to compensate platform workers, including the price of their service, as well as the conditions to exercise their professional activity, the working time arrangements and the implications of algorithms on the organisation and performance of work. *See* article L7343-36 of the labour code.

[84] Voluntary collective bargaining provisions are expected to cover all the other elements of the work organisation, including the ways through which platforms and workers exchange information on their commercial relationships, the modalities through which platforms control the performance of work, and the conditions to terminate the contract. See article L7343-37 of the labour code.

[85] Autorité des relations sociales des plateformes d'emploi. *See* Article L7345-1 of the labour code, modified by article 3 of Ordonnance No 2022-492 of 6 April 2022.

[86] Core functions of the authority include support in the process of measuring the representative status of platform workers' trade unions, organisation of training courses, mediation activities, data collection and analysis, and other administrative functions linked to the governance of commercial contracts.

[87] For discussion about the relationship between the law and collective bargaining in

Since the so-called Warsmann Law of 22 March 2012, teleworking has been governed by legal provisions that apply to all employers and employees in the private sector[88], as well as by the national interprofessional agreement of 19 July 2005 that transposed the European framework agreement on telework[89]. While some collective agreements had already regulated telework, Article 57 of the Loi Travail launched a consultation with the social partners on how to adapt the discipline of remote working to technological innovations and their impact on the employment relationship. As an outcome of this consultation, and the extensive use of remote working made compulsory during the pandemic because of imposed confinement, on 26 November 2020, French social partners concluded a national interprofessional agreement on telework[90], seeking to provide a framework on the rules and conditions governing teleworking both as a normal practice and in exceptional circumstances[91]. In line with a responsive regulation model, rather than setting prescriptive or normative binding rules on firms, the agreement emphasises the importance of social partnership and negotiations between employers and trade unions as a means of implementing teleworking arrangements. In case trade union representatives are not present or an agreement with them has not been concluded, telework shall be regulated through an employer's charter after due consultation of the social and economic committee (if such a body exists). In the absence of both a firm-level collective agreement and a charter, where employees and employers decide to implement working from home outside the company premises, they are allowed to formalise their agreement by any means[92].

The right to disconnect is a further example of how responsive regulation mediates technological change[93]. As early as 2013, a national cross-sec-

the regulation of telework, *see* Ray, *Légaliser le télétravail: une bonne idée ?*, in *DS*, 2012, pp. 443-457.

[88] *See* articles L1222-9 and following of the labour code, as amended by Ordinance No. 2017-1387.

[89] ETUC, UNICE, UEAPME, CEEP, *Framework agreement on telework*, 16 July 2022.

[90] Ray, *De l'ANI du 26 novembre 2020 sur le télétravail à l'avenir du travail à distance*, in *DS*, 2021, pp. 236-243 and Véricel, *L'accord sur le télétravail: un accord de compromis qui reste à la marge du normatif*, in *RDT*, 2021, pp. 59-63.

[91] *See* Article L. 1222-11 of the French labour code.

[92] Article L. 1222-9 of the French labour code.

[93] For early conceptualisation of the right to disconnect, *see* Ray, *Naissance et avis de décès du droit à la déconnexion: le droit à la vie privée du XXIème siècle*, in *DS*, 2002, p. 939. *See* also Mathieu, *Pas de droit à la déconnexion (du salarié) sans devoir de déconnexion (de l'employeur)*, in *RDT*,

toral agreement on quality of life and of working conditions encouraged firms to refrain from any intrusion in employees' private lives by introducing time slots and periods when ICT devices should be switched off. On the one side, this national agreement was informed by provisions already introduced via firm-level collective bargaining[94]. On the other side, it gave further impetus to negotiations over limits to use digital devices and communication tools out of the core working hours, in both telework[95] and normal work arrangements[96]. The provisions laid down by collective bargaining were then qualified as the "right to disconnect", as regulated by the El Khomri law of 8 August 2016, precisely at article 55 of chapter II, named *Adaptation du droit du travail à l'ère numérique*. The right to disconnect is currently consolidated in the labour code as a mandatory subject of negotiation, within the section concerning the annual collective bargaining on gender equality and the quality of life and of working conditions[97]. In case an agreement is not concluded, the employer shall draw up a charter in consultation with the social and economic committee. This charter shall define procedures for exercising the right to disconnect and provide training and awareness-raising actions on how digital devices should be used reasonably.

Beyond the "great dichotomy", industrial relations institutions are involved in the governance of professional training through several institutional

2016, n. 10, p. 592 and Péretié, Picault, *Le droit à la déconnexion répond à un besoin de régulation*, in *RDT*, 2016, p. 595. For further references to the French debate on the right to disconnect, see Morel, *Le droit à la déconnexion en droit français. La question de l'effectivité du droit au repos à l'ère du numérique*, in *LLI*, pp. 4-16.

[94] See, for example, Article 7, section 3, of the firm-level collective agreement on professional equality between women and men and diversity at workplace, concluded at Renault on 16 May 2012.

[95] See, for example, Article 9 of the firm-level collective agreement on telework, concluded at Thales on 25 April 2015.

[96] See, for example, Article 4, section 4 of the firm-level collective agreement on the control of the workload of managerial staff in forfeit regime, concluded at Michelin on 16 Mars 2016.

[97] According to article L2242-17, firm-level collective bargaining shall introduce procedures for the full exercise of the right to disconnect, along with mechanisms for regulating the use of digital devices, with a view to ensuring compliance with workers' rights to take rest and leave times while respecting their personal and family life. Among the first implementations of this provision is the firm-level collective agreement on digital transformation signed at Orange on 27 September 2016. See Turlan, *France: First company-level agreement on digital transformation signed at Orange*, Eurofound, 13 January 2017.

channels, covering all types of work activities, irrespective of the employment status. Recent reforms have endorsed the EU idea of lifelong learning and active labour market policies as tools to promote transitions between occupations in response to rapid obsolescence of jobs and competences induced by technological innovation[98]. The individual learning account system (*compte personnel de formation*, CPF) is exemplificative in this respect[99]. This is an individual right recognised to every member of the active population, whose aim is to enhancing access to training and to promoting lifelong learning. Since its creation in 2015[100], the scope of this scheme has been expanded to include self-employed workers as of January 2018, and new training programs have become eligible to tackle the labour market challenges of the digital transformation. The account is entirely transferable from one occupation to another. It is preserved when changing or losing one's job. The emphasis on governance is particularly evident in the management of the personal training account and its funding system. This is based on a network of institution and bilateral bodies consisting of workers and employer's representatives, including the joint bodies entitled to collect the training levies enterprises need to pay[101], those financing the individual training leave and collecting enterprises' mandatory contributions for training purpose[102], and the bilateral funds for securing professional career paths[103]. At a higher level of coordination, the law n. 2018-771 of 5 September 2018[104] established *France compétences*, a public institution whose goal is to improve the efficiency of the professional training and apprenticeship system, and to promote equal access to increase skills development. As an example of responsive regulation via tripartism, the governance of *France compétences* is constituted by the State, the Regions, and social partners at a national and inter-professional level, with the aim to facilitating social dialogue between key actors of the vocational-education and training system.

[98] For critical assessment, *see* GAZIER, *Opportunities or Tensions*, cit., p. 342.

[99] LUTTRINGER, *Le compte personnel de formation rénové*, in *DS*, 2018, pp. 994-999 and MAGGI-GERMAIN, *L'accompagnement des travailleurs*, in *DS*, 2018, pp. 999-1006.

[100] *See* also MAGGI-GERMAIN, *Vocational Training in the Context of Law of June 14th 2013 on Employment Security: The "Personal Learning Account"*, in *E-JICLS*, 2015, pp. 1-35.

[101] Organisme paritaire collecteur agréé (OPCA).

[102] Organisme paritaire agréé au titre du congé individual de formation (OPACIF).

[103] Fonds paritaire de sécurisation des parcours professionnels (FPSPP).

[104] Law No 2018-771 of 5 September 2018 (pour la liberté de choisir son avenir professionnel).

4. *Invisibility of new-generation technologies and their externalities*

Not only technological change has reshaped the organisation of the employment relationship and the labour market internally. It has also changed the external contours of the division of labour, prompting the rise of business models vertically disintegrated[105], where the firm is organised as a dispersed network[106]. Unlike the idea of "mondialisation", in which communities in different areas and jurisdictions join in cooperative and solidaristic networks[107], this development was mainly the outcome of competitive pressures, and came with new market cleavages and inequalities along geographical lines. As noted by Forsyth, "putting organised labour even further on the defensive, in the last 30 years, employers have adopted a range of business models to distance themselves from responsibility for minimum employment standards – and keep unions at bay"[108].

Driven by new generation technologies, this evolution of the market economy has made the social (and environmental) externalities of technological production increasingly invisible. State and industrial relations responses to invisibility of new generation technologies have primarily sought to make French companies accountable and responsible by limiting the possibility to externalise the negative effects of their operations on society and the environment. Along with Germans' companies, French multinationals and (global) trade unions pioneered the rise of transnational collective bargaining as a regulatory channel transcending the national boundaries[109]. In parallel to attempts to regulate nomad capitalism through transnational collective agreements, a proposal to encourage collective bargaining in supply chains was put forward at a policy level[110], despite remaining uncharted in

[105] GOLDIN, *Enterprise Transformations, Externalization Processes and Productive Decentralization*, in PERULLI, TREU (eds.), *Enterprise and Social Rights*, Kluwer Law International, 2017, pp. 75-91.

[106] LOKIEC, *Externalising the Workforce*, cit., p. 63.

[107] *See* Supiot's analysis of the concept of *mondialisation* as opposed to the one of globalization: SUPIOT, *Homo faber: continuità e rotture*, in HONNETH, SENNETT, SUPIOT, *Perché lavoro? Narrative e diritti per lavoratrici e lavoratori del XXI secolo*, Fondazione Giangiacomo Feltrinelli, 2020, pp. 53-54.

[108] FORSYTH, *cit.*, p. 22.

[109] SPINELLI, *Regulating Corporate Due Diligence: from Transnational Social Dialogue to EU Binding Rules (and Back?)*, in *this journal*, 2022, pp. 103-118 and RIBEIRO, *Collective Bargaining and MNEs and Their Supply Chains*, in this journal, 2022, pp. 119-128.

[110] *See* COMBREXELLE, *cit.*, p. 99.

practice[111]. To overcome the limits of autonomous regulation, French governments enacted new pieces of legislation in different normative domains, including civil law and corporate law. Although this new legislation has not always direct implications for industrial relations institutions, it has potential to steer technological innovation towards socially and environmentally progressive ends, thus contributing to labour (and environmental) sustainability.

4.1. The social utility and the social function of the corporation reconsidered

In the wake of the Rana Plaza disaster in Bangladesh, a law on corporate duty of vigilance was passed on 27 March 2017[112], with large consensus by trade unions[113]. The law applies to any company employing at least five thousand employees (including those employed in direct and indirect subsidiaries), whose head office is in France, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located eighter in France or abroad. Legislation on duty of vigilance can be seen as a further example of responsive regulation as long as it involves mechanisms for self-regulation and forms of tripartism and delegation to enforce it. In collaboration with the stakeholders, including trade unions, the companies shall establish a "vigilance pla" providing measures to identify and prevent violations of human rights and fundamental freedoms in their supply chains. *Inter alia*, the plan must provide an alert mechanism regarding the existence or materialisation of risks, established in consultation with the representative trade unions within the company. Failure to comply with the relevant duties shall be liable and oblige the firm to compensate for the harm that due diligence would have permitted to avoid. The action to establish liability shall be filed before the relevant jurisdiction by any person with a legitimate interest to do so. Remedies might involve the constituent parties

[111] Lokiec, *Externalising the Workforce*, cit., p. 80.

[112] *See* Article L. 225-102-4 of the French commercial code.

[113] Spinelli, *cit.*, p. 111. For critical appraisal to the French law on duty of vigilance, and further references to the French debate, *see* Savourey, Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption*, in *BHRJ*, 2021, *passim* and Gualandi, *Addressing MNEs' Violations of Workers' Rights through Human Rights Due Diligence. The Proposal for an EU Directive on Sustainable Corporate Governance*, in this journal, 2022, pp. 85 and 97-100.

of the company (i.e., employees, managers and shareholders), as well as the stakeholders of the entities targeted by the law, such as employees of a subcontractor, trade unions and NGOs.

In addition to alert procedures provided by the law on duty of vigilance, and those laid down in occupational health and safety legislation[114], workers and workers' representatives have also been involved in the prevention of technological disasters. Precisely, the Law n. 2013-316 of 16 April 2013[115] integrated the labour code with special provisions concerning the alert in the event of "serious" risks for public health and the environment[116]. This is also a typical example of responsive regulation, in which relevant public interest groups are actively involved in law enforcement. Articles L4133-1 and L4133-2 of the French labour code provide that the worker or the workers' representative elected in the social and economic committee shall immediately alert the employer if they consider that the products or the manufacturing processes used in the plant might expose public health or the environment to serious risks. Once the alert is registered under conditions determined by regulation, the employer shall inform the worker or examine the risk jointly with the workers' representative to the social and economic committee. In case of disagreement, or in the absence of employers' follow-up within one month, the worker or the workers' representative might refer the procedure to a state agent of the relevant district.

Further to specific provisions to rationalise the development of the so-called social and solidarity economy[117], normative efforts to increase corporate accountability and responsibility have led to the enactment of new legislation beyond labour law, with the aim to promote the social function of economic activities or at least to make it more visible. In revising the definition of "corporate purpose" in the civil code for the first time since it was drafted in 1804, the so-called "Action Plan for Business Growth and Transformation"[118] made mandatory for corporations to consider the social

[114] From article L4131-1 to article L4131-4 of the labour code.

[115] Law No 2013-316 of 16 April 2013.

[116] For an early conceptualisation of the droit d'alerte, see SUPIOT, *L'alerte écologique dans l'entreprise*, in *DV*, 1994, pp. 91-110. *See* also VERICEL, *Institution d'un droit d'alerte en matière de santé publique et d'environnement*, in *RDT*, 2013, pp. 415-417 and VANULS, *Regards sur la précaution en droit du travail*, in *RDT*, 2016, pp. 16-26.

[117] Law No 2014-856 of 31 July 2014 (relative à l'économie sociale et solidaire).

[118] The "Plan d'Action pour la Croissance et la Transformation des Entreprises" (so-called Loi "PACTE") of 22 May 2019. For discussion about the labour law implications of the Loi

and environmental implications of their operations[119]. Voluntarily, instead, corporations might introduce a purpose beyond profits. The revised Article 1835 of the French civil code provides that a corporation can specify in its by-laws a *raison d'être* – the principles it gives to itself to guide its business policy and strategic decisions[120]. The law also created a new corporate statute called *société à mission*. According to Article 210-10 of the commercial code, a public or a private company is entitled to register as *société à mission* provided that the corporate by-laws define a mission, or a social or environmental goal beyond profit, and the procedures for monitoring how the execution of the mission is achieved. Consistent with a responsive regulation model, these procedures shall establish a mission board, distinct from the board of directors, including at least one employee, with the aim to assessing and monitoring whether and how the company's mission is fulfilled.

5. *Discussion and conclusions*

Despite legal pluralism supplanting state-centric legislation, and governance displacing government, adjustment of French industrial relations to technological change can hardly be rationalised in terms of liberalisation or deregulation *only*. Undoubtedly, many of the French reforms passed in the last decades are vulnerable to criticism. One might always claim that "the devil is in the details". Regulatory flaws are visible in all the provisions mentioned, and many other normative examples might be critically discussed to show how legislation has surrendered to the "forces of the market" and the

"PACTE", *see* Géa, *Loi PACTE: quelle contribution au renouveau du droit du travail ?*, in *RDT*, 2019, pp. 99-110 and the dossier *Loi PACTE*, in *DS*, 2019, especially Desbarats, *De l'entrée de la RSE dans le code civil*, in *DS*, 2019, pp. 47-56.

[119] The revised version of Article 1833 of the civil code provides that "Every company must have a lawful purpose and be incorporated in the common interest of the shareholders. The company is managed in its corporate interest, while taking into account the social and environmental issues related to its activity".

[120] The revised version of Article 1835 of the French civil code provides that "The by-laws must be established in writing. In addition to determining the contributions made by each shareholder, they set out the form, corporate purpose, name, registered office, share capital, and term of the company, and the rules governing how it functions. The by-laws may specify a raison d'être, comprised of the principles that the company adopts and will allocate resources to uphold in the conduct of its business".

technique. Yet, arguments on liberalisation or deregulation of the French legal and industrial relations system lack of analytical capacity when they tend to underestimate that law and technology are both part of the problem and part of the solution. And so are industrial relations institutions.

The narrative on the seeming neoliberal turn of the French legal and industrial relations system is a popular one[121], but it is unconvincing. Among the most cited essays of *Capital & Class*[122], Bill Dunn's article criticises the use of neoliberalism as a slippery concept, neither intellectually precise nor politically useful[123]. The author observes how this concept was mainstreamed by the academic left, which used it as a category that catches selectively whatever a particular author chooses and disapproves, with a tendency to reproduce the binary idea that the State is good, and the market is bad. The reality is that State-society (and market) boundaries are erected internally, as an aspect of more complex power relations. Their appearance can certainly be historically traced to technical innovations of the modem social order, whereby varieties of organisation, regulation, and control internal to the social processes they govern create the effect of a state structure external to those processes[124]. But on closer inspection, the analysis of the evolution of French industrial relations confirms that the State should not be construed as a free-standing entity, located apart from and opposed to another entity called "society". Although the State might seem to stand apart from society, the boundaries between the two dimensions do not mark a real edge. They are not the border of an actual object[125].

A "reconfiguration of state institutions and practices"[126] in the light of technological change seems a better approximation. Although the rationale of the French reform process was mainly to make collective bargaining more responsive to competitive pressures and technological innovation, the State upheld its regulatory prerogatives, despite now being exercised in a less cen-

[121] In addition to AMABLE, *cit.*, *see* DENORD, *French neoliberalism and its divisions. From the Colloque Walter Lippmann to the 5th Republic*, in MIROWSKI, PLEHWE (eds.), *The Road from Mont-Pelerin: The Making of the Neoliberal Thought Collective*, Harvard University Press, 2009 and DENORD, *Néo-libéralisme version française. Histoire d'une idéologie politique*, Demopolis, 2007.

[122] *Capital & Class* is among the most influential scientific reviews of Marxist critique.

[123] DUNN, *cit.*

[124] MITCHELL, *The limits of the State: beyond statist approaches and their critics*, in *American Political Science Review*, 1991, p. 78.

[125] MITCHELL, *The limits of the State*, cit., p. 95.

[126] HARVEY, *A Brief History of Neoliberalism*, Oxford University Press, 2015, p. 78.

tralistic manner. Gazier is right in pointing to "strong and visible continuity" between labour market reforms enacted by left and centre-right governments in France[127]. But this is exactly because both governments have embraced responsive regulation as a model to respond to and mediate innovation and technological change, whose significant and impactful advances move at a much more rapid pace than it used to be in the past[128]. While debates on deregulation stem from distrust to the efficacy of the contemporary regulatory State, responsive regulation shows that a more dynamic interplay between statutory norms, self-regulation and enforcement exists. An interplay that, in principle, might overcome the alternative between laissez-faire approaches to policy of the right and the regulatory centralism of the left[129].

As Ayres and Braithwaite suggest, by delegating certain regulatory tasks to private parties, "government can more closely harmonize regulatory goals with laissez-faire notions of market efficiency"[130]. This implies that if the regulatory role of the State is vulnerable to the deregulatory capacity of the firm, business is also vulnerable to the associational order of public interest groups (like trade unions, tripartite institutions, and state agencies), provided they are empowered with adequate rights and channels of voice[131]. Probably this also explains why the rush towards prioritising the enterprise level of collective bargaining has remained largely ineffective in France[132]. Firm-level collective bargaining has made scant use of the derogatory functions recognised by the law[133], making it difficult to claim that the French system of industrial relations has fully followed the common European neoliberal trajectory identified by Baccaro and Howell[134]. Unlike liberalisation processes

[127] Gazier, *Opportunities or Tensions*, cit., p. 336.

[128] Kolacz, Quintavalla, *cit.*, p. 143.

[129] Groux, *L'action publique négociée. Un nouveau mode de régulation ? Pour une sociologie politique de la négociation*, in *Négociations*, 2005, pp. 57-70.

[130] Ayres, Braithwaite, *cit.*, p. 158.

[131] Ayres, Braithwaite, *cit.*, p. 14.

[132] Vincent, *France: the rush towards prioritizing the enterprise level*, in Muller, Vandaele, Waddington (eds.), cit.

[133] Béthoux, Mias, *How does state-led decentralization affect workplace employment relations? The French case in a comparative perspective*, in *EJIR*, 2019, p. 18 and Leonardi, Pedersini (eds.), *Multi-Employer Bargaining Under Pressure. Decentralisation Trends in Five European Countries*, ETUI, 2018, p. 34.

[134] Baccaro, Howell, *Trajectories of Neoliberal Transformation. European Industrial Relations Since the 1970s*, Cambridge University Press, 2017.

promoted in other countries, whose trajectories of change paralleled deregulation *sic et simpliciter* (low coordination and low coverage) or dualization patterns (high coordination and low coverage), France has probably followed what Thelen defines as a "socially embedded model of flexibilization" (low coordination and high coverage), contributing to disentangle the broad relationship between coordinated and egalitarian varieties of capitalism and industrial relations systems[135].

The achievement of this institutional balance was not painless. Arguably, it was the result of mobilisations by trade unions and other social forces that were promoted throughout the reform process, especially in the context of the so-called El Khomri law, which entitled firm-level collective bargaining to derogate from the legislation on the 35-hour week – one of the symbols of the French labour movement. However, in spite of the recrudescence of such protests, and their impact on social media, the social-movement reminiscence of French trade unionism overshadows an undeniable reality: over the past thirty years, the intensity of social conflicts has fallen considerably in France, and the amount of strikes is at an extremely low level compared to that of the 1950s and 1970s. Between the image of a very conflictual society and the reality of industrial relations, there is a gap which constitutes an important paradox[136]. The idea that «*il faut faire saigner les patrons*» does not work anymore in French industrial relations.

This paradox is probably the most relevant obstacle for responsive regulation to succeed in bringing justice in a post-industrial era. Extensive State interventionism in French industrial relations resulted in an ever-increasing production of texts, laws, standards. Yet, ironically, *L'État de droit* has turned itself into the *State of rights*, whose exponential growth has often blurred their actual implementation and effectiveness[137]. Rights and subsidies of all kinds that French governments granted to the unions were sold as a public good aimed at benefiting workers[138]. But at the same time, they have reduced the incentive for union activism and independence from both the State and employers. This reflects the eternal tension in the identity of unions as both social movements and institutionalised organisations which has wider

[135] Thelen, *Varieties of Liberalization and the New Politics of Social Solidarity*, Cambridge University Press, 2014.

[136] Groux, *Le grand chambardement*, cit., p. 107.

[137] *Ibid.*

[138] Andolfatto, Labbé, *cit.*, p. 351.

implications for understanding the possibilities and limitations of human emancipation in capitalism[139].

On the one side, any idea of legal pluralism cannot be divorced from the premises of a conflict of interests underpinning the labour-management relationship, and the existence of a power balance between the social forces that are supposed to represent and regulate those interests[140]. This lesson was learnt in the Eighties and the Nineties. Economic crisis, employer pressure and labour vulnerability all conspired to ensure that the outcomes of the French socialist reform of collective bargaining were not as initially intended[141]. The history seems now to repeat itself. For the first time, French delivery workers and ride-hailing drivers were called to cast votes online to elect their representatives between May 9 and May 16, 2022. The participation in the vote, however, was far below the expectations: only 1.83% of delivery workers and 3.91% of ride-hailing drivers took part in the election, thus undermining the representative status and collective bargaining power of the elected unions[142].

On the other side, the mix between globalisation, deindustrialisation and technological change has moved a significant share of conflicts of interest out of the area of wage labour, further fragmenting and weakening the trade unions outreach and power. This is "indicative of a growing representation gap, because the trade unions must switch from a focused spearhead strategy to dispersed forms of action"[143]. But like legislators and courts[144], industrial relations institutions require a certain amount of time to handle the challenges that technological change brings about. Perhaps unsurprisingly, new trade union movements, alternative to the historical confederations, are emerging from the ashes of the French industrial era to fill that representation and solidarity gap[145]. While these movements seek to give voice to broader

[139] Connolly, *Union renewal in France and Hyman's universal dualism*, in *CC*, 2012, *passim*.

[140] Kahn-Freund, *Labour and the Law*, Stevens, 1983, *passim*.

[141] Howell, *The Contradictions of French Industrial Relations Reform*, in *CP*, 1992, 24, 2, p. 182.

[142] Petit, *Les travailleurs des plateformes ont largement délaissé l'élection de leurs représentants*, in *CJ*, 2022, p. 1.

[143] Mundlak, *Organizing Matters. Two Logics of Trade Union Representation*, Edward Elgar, 2020, pp. 87-88.

[144] Kolacz, Quintavalla, *cit.*, p. 143 and Deakin, Markou, *cit.*, p. 446.

[145] Connolly, *Renewal in the French Trade Union Movement: A grassroots Perspective*, Peter Lang, 2010, *passim* and Connolly, *Union renewal in France,* cit., for further references too.

societal needs that seemingly outdo workers' material interests[146], they are actually contributing to tackle the root causes of labour vulnerability and disempowerment.

[146] For example, *Le Printemps écologique* was founded in January 2020, with the aim to reinventing trade unionism, by engaging employees in the socio-ecological shift.

Abstract

Drawing on responsive regulation theory, this article analyses the trajectories of change in the French legal and industrial relations system over time. Empowered by information and communication technologies, governance has championed a new normative ideal of attaining public policy objectives, in which social actors are given primacy in the regulation of the labour market. Although the rationale of the French reform process was mainly to make legal and industrial relations institutions more responsive to competitive pressures and technological innovation, the State upheld its regulatory prerogatives, despite now being exercised in a less centralistic manner. However, in spite of the seeming solidity and internal consistency of the French legal and industrial relations system, social cohesion shows signs of erosion, questioning the ability of the regulatory shift from government to governance to succeed in bringing justice in a post-industrial era.

Keywords

France, responsive regulation, technological change, labour market, industrial relations.

Stefano Bellomo

Platform work, protection needs and the labour market in the Labour law debate of recent years*

Summary: **1.** The link between Digital Economy and Labour Law. Aspects of novelty and elements of continuity. **2.** A general outline of the opinions of Labour Law scholars. **3.** Platform work within the dichotomy of employment/independent freelance work. **4.** Is Platform Work in need of a new regulation? **5.** Platform Work and related changes in Social Security Systems. **6.** Platform Work and new (or redefined) protection needs. **7.** Platform Work as Labour Law crisis factor… **8.** …and Platform Work as a possible vehicle of employment growth and social progress.

1. *The link between Digital Economy and Labour Law. Aspects of novelty and elements of continuity*

It is undoubtedly true that, nowadays, several unheard labour issues are connected to the online platform economy. In many respects, new ways of working require a radical rethinking of the traditional statutory protection concept and the approaches unions must adopt to implement effective strategies to organise and represent gig workers[1].

* With regard to the contents and references of the essay, this is a development of the closing speech given by the author at the 6th International Seminar on International and Comparative Labour Law "*The Future of Labour Law and Labour Market Regulation in the Digital Era*".

[1] Among the different research projects see, recently, the one entitled *Don't GIG up! Extending social protection to GIG workers in Europe*, aimed to Identify policy options ensuring social protection and guarantee adequate labour rights to gig workers, commissioned by the DG Employment Social Affairs and Inclusion of the European Commission and carried out by Fondazione Giacomo Brodolini, IPA (Poland), IRES (France), UGT (Spain) and UIL (Italy), whose results might be found at http://www.fondazionebrodolini.it/en/projects/don-t-gig-extend-

In the conference given during the ISLSSL Congress held in Turin in September 2018, Thomas A. Kochan pointed out some of the most extraordinary challenges posed by the digital economy to the traditional schemes of workers' protection, which include the ones of providing lifelong learning to prepare workers to participate in the digital economy, ensuring workers have influential voices in shaping the early-stage decisions on technology and work systems and providing suitable and equitable transition and income support policies[2].

Adopting this digital economy perspective as a new ground for labour law could allow to properly deal with some specific features of these new forms of work, where the use and the role of digital tools deeply influence the content of the employment relationship.

At the same time, nevertheless, many scholars point out that considering the labour issues in the digital economy (and especially in the more circumscribed area of the gig economy' jobs) as a sort of "parallel universe" could result in a misleading path, given that "…whilst it is true that some of its dimensions are peculiar, and that the chief role of technologies in matching demand and supply of work is certainly one of those, it would be wrong to assume that the gig-economy is a sort of watertight dimension of the economy and the labour market. Nor would it be correct to take for granted that existing labour market institutions are entirely outdated in its respect or unsuitable to govern it and that, therefore, we would necessarily have to abandon existing institutions and regulations and introduce new, and possibly 'lighter' ones to keep pace with the challenges presented by the gig-economy"[3].

If we look at the labour issues of the platform economy from this more orthodox point of view, the problems that scholars are called to solve to adapt traditional categories and institutes of Labour Law to platform work reveal

ing-social-protection-gig-workers-europe. See also ILO Working paper n. 27, entitled *Platform work and the employment relationship* and edited by De Stefano, Durri, Stylogiannis, Wouters, 2021.

[2] Kochan, *Learning from our Past: What Would our most Respected Fore-Fathers and Mothers want us to do in our Time of Crisis?* (www.islssltorino2018.org/papers/). The paper has been drawn from remarks made at the Frances Perkins Center Annual Garden Party, Newcastle Maine on August 19, 2018. The Author informs that an abridged version is published in The Boston Review online edition, August 30, 2018. http://bostonreview.net/.

[3] De Stefano, *The rise of the "just-in-time workforce": on-demand work, crowd work, and labor protection in the "gig-economy"*, in *CLLPJ*, 2016, p. 480.

a remarkable degree of complexity, due in most cases to the link between labour activity and the functioning of the software applications.

The reference is to the influence wielded by the platform power to "deactivate" drivers, riders, etc., who refuse some calls, on the traditional distinction between employees and self-employees and the high control power of the platform over working time and its intensity. Another difficulty in all situations, characterised simultaneously by significant enterprise fragmentation and a high degree of the immateriality of the companies' structure, could be identifying the subject who could be defined as the employer.

Lastly, and in connection with the issue mentioned above of promoting the dialogue between workers and platform management, another aspect that draws scholars' attention is the promotion of representative bodies among the platform' workers[4].

At a deeper look, all the above approaches are inspired by a shared vision of the platform work diffusion as a disruptive factor regarding the theoretical reconstructions and patterns of employment relationships and the distinction between employment and self-employment relationships[5]. Furthermore, in the broader perspective orientated towards social values which Labour Law is aimed to promote, the concern that, under many aspects, traditional legal schemes and consolidated forms of statutory and collective protections might not guarantee an adequate safeguard concerning the risks of precariousness and social and economic exploitation of the digital economy workers, is a pervasive worry[6].

2. *A general outline of the opinions of Labour Law scholars*

An overall view of the latest studies about platform work suggests that the scholars who handled this matter alternatively moved along two general paths.

[4] As regards all these issues, see, recently, Weiss, *La platform economy e le principali sfide per il diritto del lavoro*, in *DRI,* 2018, p. 715 ff.

[5] With reference to the changes in Labour Law basic concepts and categories due to globalization and diffusion of new technologies see, among others Rosioru, *The changing concept of subordination*, www.adapt.it, 2015.

[6] The challenge that Labour Law scholars face is the one "*d'éviter que ces travailleurs deviennent des sortes de sous-salariés, sous-payés et surexploités*", as recently emphasized by Dockes, *Le salariat des plateformes*, in *LLI*, 2019, Vol. 5, No. 1, p. 1 ff.

The first approach appears to be one of the implementation/adaptations of traditional labour law protection schemes to the various workers that it is possible to meet in the landscape of the platform[7].

The analysis of these peculiar labour relationships may lead to identify the need to adjust or integrate the regulation of the most crucial forms of workers' protection (e.g., the dismissal's one) as well as to introduce or improve some rights that could better fit the characteristic of workers who at the same time constantly stay outside the workplaces (in the traditional meaning of this term) and consequently are not part of a firm's workforce. A good example is a French law (*Loi* no. 2016-1088 of 8 August 2016) that expressly recognises platform workers a specific right to training to favour the acquisition of new skills and consequently reduce the degree of economic dependence[8] on the platform.

Therefore, from a general point of view, it seems possible to acknowledge that platform work could represent one entire field of experimentation "to recognise diversity and multiplicity of employment forms in today's labour market, and secure better measurement of the evolution and development of work patterns and working relationships to develop fact-based policies"[9].

The second approach, which results complementary to the first, relies on the positive value of platform work as a tool to favour access to work or the improvement of working conditions of some individuals that otherwise could be at risk of exclusion or in danger of severe marginalisation in the labour market, with a consequent high probability of total exclusion from labour law scope.

So, considering the phenomenon from a global perspective, the view that assigns platform work a sort of "erosive value" concerning the promotional and protective potential of everyday work and its regulation does not have a universal significance.

[7] For an example of this approach, see the ILO recent Report on *Digital labour platforms and the future of work: Towards decent work in the online world*, International Labour Office - Geneva, ILO, 2018.

[8] With reference to the current relevance of economic dependence in the definition of labour relationships see, among others, Davidov, Freedland, Kountouris, *The Subjects of Labor law: "Employees" and Other Workers*, in *Comparative labor law*, edited by Finkin & Mundlak, Edward Elgar 2015, p. 115 ff.

[9] As stated in the conclusions of the 2017 IOE Report on the issue *Understanding the future of work*, www.ioe-emp.org.

This finding could not be referred only to the geographical and ethnic origin of the workers but also to several other different factors (sex/gender, age, physical conditions etc.), whose consideration may be relevant to evaluate the impact and the contribution that involvement in platform work could give to individual lives.

3. *Platform Work within the dichotomy of employment/independent-freelance work*

Within the first of the approaches described above, the more traditional/traditionalist method to situate platform work inside the existing Labour Law framework is to categorise it in the pre-existing patterns based on those used to distinguish employment relationships from the figures of independent workers, frequently applied in many recent case-law worldwide. As pointed out by many authors[10], platform work is conceivably born as self-employment but develops in many cases according to schemes close to employment. What is the role played by the platform? Are we in front of *a*) a client, *b*) an employer, or *c*) an intermediary, with all the consequences that each function brings?[11] And if platforms can be considered employers, how should we qualify the employment relationship between the companies that operate the platform and workers? Are the traditional methods/-procedures/instruments adequate to such an endeavour?

These issues remain controversial, and scholars propose different answers: many express the idea that a new specific regulation on platform work might favour companies' opportunistic behaviour, which could be encouraged to hire workers as self-employed[12].

The debate on platform work qualification and regulation has recently

[10] De Nardo, *Platform work: Legal Categories and Protection Perspectives*, in Perulli, Bellomo, *Platform work and work 4.0: new challenges for labour law*, CEDAM, 2021, p. 3 ff.; Aloisi, *Platform work in Europe: lessons learned, legal developments and challenges ahead*, in *ELLJ*, 2021, p. 8.

[11] On this issue, see Prassl, Risak, *Uber, Taskrabbit, & co: Platforms as employers? Rethinking the legal analysis of crowdwork*, in *CLLPJ*, 2016.

[12] Valenti, *The importance of a solid legal framework for Platform Works: a not-so-new challenge for Labour Law and its traditional forms of employment,* in Perulli, Bellomo, *Platform work and work 4.0*, cit., p. 45; cfr. Biasi, *L'inquadramento giuridico dei rider alla prova della giurisprudenza*, in *LDE*, 2018, p. 14.

intensified with the proposal for a Directive by the European Commission[13], which includes measures to determine the employment status of people working through platforms. The proposal aims to introduce a legal presumption implying that if the platform controls work performance regarding some requirements identified by the directive, the contractual relationship shall be legally presumed to be an employment relationship.

This proposal, if passed, can have a disruptive effect on the Member States' legislation and policies regarding platform work.

4. *Is Platform Work in need of a new regulation?*

Other scholars are oriented on quite different sides. They start from the assumption that the diffusion of platform work represents the clue (or the beginning) of a broader transformation of the whole, or at least of the most significant part of the labour market and ask for more radical adaptative regulatory interventions.

Within such a perspective, many observers support the opportunity of a specific regulation of the jobs related to the gig economy[14]. Platform work feeds the debate on the boundaries between self-employment and employment, which are increasingly blurred and uncertain. Subsequently, many scholars propose that Labour Law regulations ensure these workers an essential core of rights and prerogatives, regardless of identifying the reference category[15].

Following the same trail, a scholar observes that "the phenomenon of digital work is nowadays so rooted and widespread that it needs precise regulation, above all, to guarantee rights, protection and dignity to the population of digital workers"[16]. She affirms that some instruments/solutions could

[13] Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, 9.12.2021, COM(2021) 762.

[14] According to Guadagno, *Addressing Inequalities and Delivering Protection in Key Areas of Platform Work*, in Perulli, Bellomo, *Platform work and work 4.0*, cit., p. 133, "some of the features of the work by platform need to be specifically addressed".

[15] De Petris, *On demand economy: the new face of work*, in Perulli, Bellomo, *Platform work and work 4.0*, cit., p. 49 ff.; cfr. Ichino, *Le conseguenze dell'innovazione tecnologica sul diritto del lavoro*, in *RIDL*, 2017, pp. 533-534. On this trail, see the decision of the Italian Supreme Court (Cass., 24 gennaio 2020, n. 1663) that seems to focus more on protections than categories.

[16] Talarico, *Platforms: how to protect and ensure Working Conditions in these hybrids of markets*

be adopted to ensure platform workers a higher level of protection (in terms e.g. of the establishment of the employee's social security position and the payment of social security contributions, annual rest or paid sick leave) and, when referring to these matters, she mentions the experimented model of the so-called "Umbrella companies"; in addition, she recalls the various experiences of associational unionism of platform workers promoted in several European countries as well as in the United States, either with the support of Trade Unions or autonomously and spontaneously through Facebook or WhatsApp groups or other social media. In the end, she admits that these initiatives could allow to achieve "just temporary and precarious solutions" and do not erase the need for a specific regulatory intervention.

The stances recalled in this paragraph are the basis of the new Italian regulation regarding platform work, deeply inspired by the above-mentioned French law. Despite the optimistic prospects, introducing some protections – only referring to self-employed platform workers – did not end the discussion on (mis)classification, which is still the main topic in the Italian digital work debate.

5. *Platform Work and related changes in Social Security Systems*

Partially overlooking the issue of the specific nature of the working relationship with the platform, other scholars point more specifically their gaze toward the changing needs on which social security systems are called to intervene. Beginning from the reality that in most cases platform workers fall into the definition of self-employment, one author examines the possible reform paths of social security systems that could lead to a more effective inclusion of non-standard workers, among which platform workers will become the majority in the future. Given this preponderance, she recalls the specific solution of Digital Social Security, which ILO has proposed. More generally, she positively views the proposal to extend the scope of the rule of aggregation to cover all the periods related to labour force membership, which is also different from effective labour activity. Labour reality is undoubtedly changing, and this could not but have it reflected in social security schemes too.

and firms? examples of new mutualism, in PERULLI, BELLOMO, *Platform work and work 4.0*, cit., p. 20.

Another author[17] examines the pushes for the transformation of social security systems originated by the advent of technologies and the digital revolution and their effects on the increasing phenomena like the one of the so-called "working poor"[18]. Moving from the Italian experience, the author gives an overview of the adopted measures (such as the form of unemployment allowance introduced in 2017 for self-employed) and further reforms that could be undertaken explicitly for platforms and digital workers (for instance, the already mentioned umbrella-company model). More in general, the author observes that the significant development and the increasingly massive spread of forms of non-standard work result in a tendency of growth of assistance instruments besides the classical security schemes because "the extension and implementation of assistance models is, therefore, a useful and essential tool to protect all active individuals". She ends her analysis by emphasising that the exponential increase of workers outside the subordination (significantly boosted by the massive expansion of platform work) suggests that the legislators are aware of having to intervene to guarantee protection to workers regardless of the type of contract.

6. *Platform Work and new (or redefined) protection needs*

Besides the profiles connected to social security, some scholars turned their attention to other specific implications of platform work which could require a particular focus and some adjustments.

On the one hand, an author[19] proposes some considerations on the link between the increased use of ITC technologies and the corresponding expansion of the power of control exercised by the employer, in a direct way or through a Big Data System, also in the pre-employment phase. About these matters, she expresses the idea that a lack of attention and coordination persists both on a supranational and national level, even after the entry into force of the New GDPR (UE Regulation 2016/679) and highlights some

[17] Garbuio, *The impact of digitalization on the labour market and the uncertain responses of the Italian social security system*, in Perulli, Bellomo, *Platform work and work 4.0: new challenges for labour law,* p. 157 ff.

[18] Among other, on this issue, see Occhino, *Povertà e lavoro atipico*, in *LD*, 2019, p. 103 ff.

[19] Forino, *Power of control and competition in the era of digitisation of economic processes*, in Perulli, Bellomo, *Platform work and work 4.0*, cit., p. 61 ff.

critical uncertainties about the balance between the right to privacy and economic freedom. Due to the crucial importance of these matters within an employment landscape more and more linked to ICT use, she remarks that the need for a more specific discipline appears even more evident and urgent.

On the other hand, some scholars[20] identify an item closely related to new forms of work: the health and safety protection of digital workers. The first question is whether and when platform workers could fall into the scope of the general legislation on workers' health and safety protection and how the security organisation could ensure an adequate safeguard. As for these aims, many scholars believe that it continues to be essential a collective action in conjunction and connection with the specific figure of the workers' representative. This issue has become even more critical with the onset of the pandemic crisis. Especially during the early months of the emergency, many platform workers complained about the lack of personal protective equipment required to work safely[21].

7. *Platform Work as Labour Law crisis factor…*

A considerable part of platform workers is indeed residing outside Europe and, in many cases, suffers to an even greater extent the already existing structural weaknesses of their national Labour Law Systems.

That is, for instance, the case of the Russian Federation well described by a local author[22]. The Russian situation is characterised by high uncertainty and disparities in relevant case law about whether platform workers can be classified as employees. That extremely relativistic approach, which does not

[20] Elmo, *Techniques to protect the right to health and safety of digital workers*, in Perulli, Bellomo, *Platform work and work 4.0*, cit., p. 103 ff.; cfr. Dagnino, *L'ambito applicativo delle tutele in materia di salute e sicurezza sul lavoro. Spunti da una sentenza d'oltremanica tra piattaforme e lavoro precario*, in *DRI*, 2021, p. 582 ff.

[21] On this issue, see Spinelli, *Le nuove tutele dei riders al vaglio della giurisprudenza: prime indicazioni applicative*, in *LLI*, 2020, p. 95 ff. Workers' demands on this item have been satisfied during the first months of the pandemic by two different Italian courts (*Trib. Firenze, 1° aprile 2020, n. 886*; *Trib. Bologna, 14 aprile 2020, n. 745*).

[22] Kizilov, *Employment in the Gig-Economy: New Challenges for Russian Labour Law*, in Perulli, Bellomo, *Platform work and work 4.0*, cit., p. 171 ff.

seem to draw legislators' attention, could also lead to different classifications depending on the specific context (labour relationship, social security, immigration law) where such a category becomes relevant. This situation dramatically reduces the chances for each worker to attain the status of an employee.

Another paper[23] examines the issue of work in digital platforms in Latin America. From this viewpoint, according to the author, the digital economy, aimed at bringing benefits to people and societies, provoked opposite effects. He assumes that the massification of this type of work at unsuspected levels has taken workers and their labour benefits practically to the nineteenth century, at the time of industrialisation.

The author explains that significant development of platform work took place in a general context with many critical elements (weakness of labour institutions, insufficient administrative controls, issues linked to low levels of education, crime, state corruption, low wages, informality) that create a perfect combination for these platforms to "play at ease" in Latin America legal systems, reducing or ignoring labour protections. So, according to his opinion and as indeed it was also demonstrated by the unfolding of the few trials against them in front of Latin American Courts, the entrance of specific platforms seriously put the future of work in that area.

8. *…and Platform Work as a possible vehicle of employment growth and social progress*

Despite the above-mentioned critical situations, many scholars tend, however, to highlight a range of positive issues connected with platform work and, in general, with the changes related to the impact of new technologies on the labour market.

Many suggest some connections between the special protection/promotion needs of some vulnerable socio-economic groups of workers (parents, caregivers, disabled people, aged persons), recognised by several international sources, and the potentially inclusive outcomes that could be achieved through some promotional measures that facilitate access for mem-

[23] Suárez Astacio, *Works on platforms, an approach to the Latin American Situation*, in Perulli, Bellomo, *Platform work and work 4.0*, cit., p. 181 ff.

bers of disadvantaged and vulnerable groups to these types of work by guaranteeing them adequate working condition and appropriate remuneration. Hence, "the challenge is to adapt labour and social protection policies to foster an inclusive labour market for the future, without forgetting to consider the different needs of the most disadvantaged groups of workers"[24].

Others focused their attention on the new technologies impact on the gender gap in the Labour Market. An author notes that in broad terms, the new forms of work such as telework, electronic homework, offshore data processing, and office administrative services offer new employment opportunities for women and points out that there is some evidence of the fact that "emerging digital workers force is providing a much-needed solution by breaking down physical, geographic, and social barriers within the workforce. Remote work platforms allow millions of women to work from anywhere for anyone in the world"[25]. Nevertheless, in order to avoid the re-occurrence of situations of marginalisation, women's access to these works should be complemented by appropriate skills training and retraining and by the development of specific social protection for those suffering technological unemployment.

There is a very close connection and an evident complementarity between these assumptions and the contents of another paper by a South African scholar[26] that examines the phenomenon of platform work in the context of her country, characterised by a general high unemployment and underemployment rate, a remarkable gender inequality exacerbated by the limited access to ICT job opportunities in the rural areas and a critical inadequacy of the education system. The focus on this latter deficiency and the priority assigned to interventions to overcome it appears as the main hint of the originality of the paper. She notes that the "education system in Africa plays a pivotal role in transforming the country. Society is at a crossroads, and while rapid technology-driven change may threaten existing em-

[24] Carchio, *Addressing Platform Work to promote Labour Market inclusiveness,* in Perulli, Bellomo, *Platform work and work 4.0,* cit., p. 153; cfr. Bronzini, *Economia della condivisione e lavoro autonomo: una prospettiva europea*, in Perulli (a cura di), *Lavoro autonomo e capitalismo delle piattaforme*, CEDAM, 2018, p. 7-9.

[25] Franconi, *New technologies and women's labour force participation*, in Perulli, Bellomo, *Platform work and work 4.0*, cit., p. 117-118.

[26] Xhallie, *The future of work and its impact on women and Africa*, in Perulli, Bellomo, *Platform work and work 4.0*, cit., p. 189 ff.

ployment structures, many opportunities are also becoming available for blue-collar workers and employers".

The considerations referred to platform work may apply even more to other new forms of employment related to ICT, and that's the Italian case of agile working. An author[27] describes the legislative signs of progress on this matter in the private and public sectors and points out that this form of work shows both its strength (a reduction in commuting time, better overall work-life balance, more flexibility in terms of working time organisation, higher productivity…) and its weaknesses (risk of social isolation, "hyper-connectivity" and abnormal expansion of working time, difficulties in complying to employer's safety obligations towards the agile worker). Concerning the latter, she considers that the best way to prevent these risks could be the involvement of Trade Unions and workers' representatives in guaranteeing agile workers further and more detailed rules and orderly development of remote work through telematic devices. The outbreak of Covid-19 has undoubtedly speeded up the digitalisation of work, but, on the other hand, emergency regulations have profoundly changed the nature and the structure of remote working[28].

In conclusion, it seems possible to summarise the ultimate meaning of the latest research by Labour Law scholars by recognising that the pushes and the demands for change arising from platform work suggest that legislators and scholars are called to choose between three different paths.

The first is to maintain traditional categories, types of machinery and regulations, trying to adapt them to the new realities of work; the second is the creation of specific regulatory areas taking into account the peculiar features of the emerging forms of work (remaining aware that these jobs are currently undergoing a significant expansion and could one day replace standard work relationships); the third is the way of a complete restructuring of the whole regulatory system or at least of some legal institutions which historically represent a fundamental part of it, as the Social Security schemes. The debate remains open, and opinions from scholars worldwide provide attractive clues for its continuation.

[27] Russo, *Smart Working: Private and public Sector compared*, in Perulli, Bellomo, *Platform work and work 4.0*, cit., p. 75 ff.

[28] On this issue, with regards to the Italian regulation, see, among others, Biasi, *Brevi spunti sul lavoro da remoto post-emergenziale, tra legge (lavoro agile) e contrattazione (smart working)*, in *LPO*, 2021, p. 160 ff.

Abstract

The essay takes into consideration the results of the latest research by Labour Law scholars in the field of platform work and its protection needs. It is indeed appropriate to question whether it's needed to address these issues, maintaining the traditional categories and regulations or creating a specific regulatory area. Otherwise, another way could consist of a complete restructuring of the whole regulatory system or at least of some legal institutions which historically represent a fundamental part of it, such as the Social Security schemes. The debate remains open, and opinions from scholars worldwide provide attractive clues for its continuation.

Keywords

Platform work, protection needs, digital economy, social security, new forms of work.

Costantino Cordella

ILO's actions against the exploitation of agricultural work in Italy

Summary: **1.** At the origins of ILO: why Italy wanted to extend International Labour Standards to the agricultural sector. **2.** ILO Conventions ratified by Italy on agricultural work: what happened from the constitution of the Organization to the Post-War period. **2.1.** From the Philadelphia Declaration to the 1980s. **3.** The policies of change and the recent ILO actions on agricultural work. **4.** The Observations of the CEACR: compliance with Convention 129 of 1969 on agricultural inspections. **4.1.** The Observations of the CEACR: compliance with Convention 143 of 1975 on the protection of migrant workers. **5.** Recent regulatory instruments and their limitations in combating irregular work. **6.** ILO's good practices in the fight against exploitation and forced labour in agriculture. **7.** Going down different roads: more openness to the private sector and more public control to combat exploitation.

1. *At the origins of ILO: why Italy wanted to extend International Labour Standards to the agricultural sector*

Since the establishment of the International Labour Organization (hereafter "ILO"), Italy, as a member country, has, for distinct reasons, shown a particular inclination towards the protection of agricultural work.

A demonstration of this inclination can be found in a paper written shortly before the 2nd International ILO Conference (held in Geneva a century ago)[1], in which a trade unionist of the time analysed the ongoing discussion on whether international labour standards should be extended to the agricultural sector and explained the reasons of the favourable position of the Italian delegates[2].

[1] Sacco, *La regolamentazione del lavoro agricolo e la II conferenza internazionale del lavoro*, in *RISSDA*, 1921, vol. 91, fasc. 345, pp. 33-42.

[2] Ivi, p. 34. For an account of the Italian contribution to the foundation of the ILO

In this regard, he highlighted the agricultural vocation of the Italian economy and recommended the introduction of the international standards in that sector to bring together the opposing interests of workers and companies[3]. In his work, Sacco pointed out that Italy was a country that mainly exported agricultural products and, unlike the other European countries that had already enjoyed a significant industrial development (mainly, the United Kingdom, France and Germany)[4], it was obliged to import a large proportion of industrial products[5]: it followed that greater protection of agricultural labour would have increased the value of the food exported abroad and made it possible to recognise better economic treatment for Italian agricultural workers.

On the contrary the author emphasised that the exclusion of the agricultural sector from international rules would have caused a derangement in the goods trade balance traded with foreign countries[6].

As is well known, at the First International Conference of 1919 were approved distinct Conventions, the ratification of which, by our country, has led to a clear increase in the level of protection for Italian workers: for example, the issues of working hours, night work or protection for women workers during childcare leave[7]. However, at the 1919 conference, nothing

see CASTIGLIONE, *L'organizzazione permanente internazionale del lavoro*, in *RISS*, 1934, 6, p. 811 ff.

[3] SACCO, *cit.*, p. 36 ff.

[4] See FEDERICO, NATOLI, TATTARA, VASTA, *Il Commercio Estero Italiano 1862-1950*, Laterza, 2011, p. 15; see also BORZAGA, *Le politiche dell'Organizzazione Internazionale del Lavoro e dell'Unione Europea in tema di contrasto alla povertà*, in *LD*, 2019, p. 66, who recalls that some ILO member countries, including France, in the years immediately following the adoption of the founding treaty of the Organization, gave a "restrictive" interpretation of the "legislative" competence, limiting it to the industrial sector.

[5] See the studies and statistical data of the Bank of Italy, proposed in the volume FEDERICO, NATOLI, TATTARA, VASTA, *cit.*, pp. 15-17, where table 1.3 shows the percentage distribution of Italian imports, and it emerges that, until the 1940s, the total of imported manufactured products had maintained a percentage more than 30%.

[6] SACCO, *cit.*, p. 39.

[7] There are five conventions approved in 1919 by the ILO and then ratified by Italy: Convention no. 1 on working hours (ratified by Royal Decree no. 1429 of 29 March 1923, no longer applied today), Convention no. 2 on unemployment (Royal Decree no. 1021 of 29 March 1923), Convention No. 3 on maternity protection (ratified only by Law no. 1305 of 2 August 1952), Convention no. 4 on women's night work (ratified by Royal Decree no. 1021 of March 29, 1923, but, most recently, repealed at the 106th International Labour Conference in 2017), Convention no. 6 on children's night work (R.d. no. 1021 of 29 March 1923).

was set up for the agricultural sector, and it was only with the 1921 Conference that specific rules were extended to it, especially, on the minimum age of employment, rights of association and compensation for injuries[8].

Since then, international attention to agricultural work has been a constant feature of the Organization's work and has led to Conventions also on aspects strictly related to economic working conditions – such as minimum wages[9] or holidays[10] – as well as social security and inspection profiles[11].

On the other hand, the problems of the sector are still many and occur, across the board, at the international level: for example, the employment of particularly vulnerable people, such as migrants, women, and minors[12] or the cost-cutting practices of farmers that damage workers' wages[13], or the wide informality of labour relations, favoured by activities outside urban centres[14].

Our country, for its part, has followed the development of these rules with interest and has ratified, from 1921, the main part of the Conventions appointed to the sector[15]: nevertheless, it's important highlights that the

[8] Respectively, Conventions no. 10, 11 and 12, ratified in Italy by Royal Decree-Laws no. 585 of 20 March 1924, no. 601 of 20 March 1924 and no. 878 of 26 April 1930.

[9] Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (no. 99).

[10] Holidays with Pay (Agriculture) Convention, 1952 (no. 101).

[11] See the Conventions on Sickness (25 of 1927), Old Age Insurance (36 of 1933), Invalidity (38 of 1933), Survivors' Insurance (40 of 1933), and Convention 129 of 1969 on Labour Inspection.

[12] With reference to the three categories, see ILO report, *Decent work in agriculture*, International Labour Office, 2003, pp. 5, 14 and 17; on minors in agriculture see especially pp. 25-30, on gender discrimination see p. 34 ff. Stresses the specific contractual weakness of workers in agriculture Faleri, *Il lavoro agricolo. Modelli e strumenti di regolazione*, Giappichelli, 2020, pp. 87-88.

[13] From an international perspective, on the effects of globalisation, see again the ILO report, *Decent work in agriculture*, cit., p. 8 ff; in the national perspective, instead, see, recently, Pinto, *Rapporti lavorativi e legalità in agricoltura. Analisi e proposte*, in *DLRI*, 2019, p. 9 ff.; Canfora, Leccese, *Lavoro irregolare e agricoltura. Il Piano triennale per il contrasto allo sfruttamento lavorativo, tra diritto nazionale e regole di mercato della nuova CAP*, in *DA*, 2021, 1, p. 39 ff.; Jannarelli, *La "giustizia contrattuale" nella filiera agro-alimentare: considerazioni in limine all'attuazione della direttiva n. 633 del 2019*, in *GC*, 2021, p. 199 ff.

[14] See Carr, Alter Chen, *Globalization and the informal economy: How global trade and investment impact on the working poor*, Employment Sector Working Paper, Geneva, ILO, 2002. More recently, with reference to Italy, see Cornice, Innamorati, Pomponi, *Campo aperto: azioni di contrasto allo sfruttamento degli immigrati in agricoltura*, Inapp paper, 2020, p. 7 ff.; Pinto, *cit.*, pp. 8-9.

[15] Italy has not ratified two of the 12 Conventions for the agricultural sector: the 25 of 1927, on health insurance, and the 110 of 1958, on plantations.

choice to ratify these Conventions was motivated by reasons other than the 'mercantilist' ones highlighted by Sacco.

Although its ability to export agricultural products was kept[16], Italy had made industrial and tertiary sectors its main economic items by the 1960s thanks to the transformations in the production of goods and services that had affected it. Consequently, the need to apply international labour rules to the agricultural sector didn't come from a desire to increase the value of agricultural products for export, through increased labour costs (to offset the value of imports of industrial products purchased from industrialized countries); rather, it is evident that, by joining the industrialized countries, Italy continued to be interested in the agricultural sector because of the high rate of the ineffectiveness of the rules that had characterized it over time, as well as the social alarm caused by deaths at work and numerous episodes of exploitation[17].

It is worth noting that the way in which the work is performed in agriculture has a significant impact on the bargaining power of the workforce, since a large part of the production process is conducted by workers who lack specific skills and are, therefore, easily interchangeable. In addition, there is a complicating element linked to global competition with less developed or developing countries, which, regardless of their adherence to international Conventions, guarantee a substantial reduction in labour costs[18].

[16] See the data on export growth in GOMELLINI, *Il commercio estero dell'Italia negli anni Sessanta: specializzazione internazionale e tecnologia*, in *Quaderni dell'Ufficio Ricerche Storiche, Banca di Italia*, 2004, no. 7, p. 18; see also FAURI, *Struttura e orientamento del commercio estero italiano negli anni Cinquanta: alle origini del "boom" economico*, in *StS*, 1996, pp. 191-225.

[17] On these issues, see the ISTAT and INPS data collected in the introductory part (p. 1 ff.) of the "National Plan to tackle labour exploitation in agriculture", available here: https://www.lavoro.gov.it/priorita/Documents/Piano-Triennale-contrasto-a-sfruttamento-lavorativo-in-agricoltura-e-al-caporalato-2020-2022.pdf; in literature, on the same issues, see CORNICE, INNAMORATI, POMPONI, *cit.*, p. 7 ff.; PINTO, *cit.*, p. 9 ff.

[18] Not surprisingly, according to the 2016 report of the Land Matrix organization (NOLTE, CHAMBERLAIN, GIGER, *International Land Deals for Agriculture. Fresh insights from the Land Matrix: Analytical Report II*, 2016), more than a thousand land deals (around 26.7 million hectares) have been concluded in recent years, of which 553 – covering an area of more than 9 million hectares – concern the cultivation of food products. The crops grown are typically industrial ones, namely oilseeds, cereals, and sugar. The land of Africa, particularly along its main river courses and in East Africa, stays the prevailing target for over 40% of these agreements, covering 10 million hectares. A further 5 million hectares covered by these contracts are in Eastern Europe. On the

As we intend to highlight in this paper, the limits of the approach of the Italian legislator derive from the substantial "hypocrisy" with which, on the one hand, Italy has formally ratified the international Conventions on labour standards in agriculture (focusing on the stiffening of criminal sanctions in cases of violation)[19], but, on the other, still fails to prevent that the processes of recruitment and employment of workers occur illegally, and still seems far from an effective compliance with international policies for decent work.

In this context, the changes to the ILO's organization and goals have pointed out the limits and distortions of the national discipline of agricultural labour, but have also been able to better focus attention on the existing problems and to adopting intervention tools. This paper will show how ILO – with an approach that we would define as "two-way" – has firstly succeeded in highlighting, in a critical key and thanks to the work of its internal commission (the CEACR), the points of friction concerning the application of some principles and rules in the Conventions ratified by Italy. Secondly, it will highlight that the function of technical collaboration, on which the Organization have concentrated its efforts in recent decades, has made it possible, from a "collaborative" perspective, to exercise a fundamental work of moral suasion to recognise labour exploitation and propose solutions in this regard.

In this sense, in the first part, we will examine the Conventions for the agricultural sector ratified by Italy and will pay attention to the contextual historical changes on the functioning of the ILO. Next, we will focus on the recent technical activity of the CEACR, highlighting that two procedures of verification are currently underway against Italy, related to the Conventions 129 of 1969 and 143 of 1975.

Finally, after a brief review of the measures adopted by Italy to combat exploitation and illegal recruitment in agriculture recently, the results of the call launched by the ILO Office for Italy – in the context of the "National Plan to tackle labour exploitation in agriculture 2020-2022" – will be discussed to highlight useful actions to better control these labour dynamics.

topic of the effects of globalisation, see ROMANO, *L'impatto della globalizzazione asimmetrica sull'agricoltura dei PVS*, in *Agriregionieuropa*, 2007, no. 8; DE FILIPPIS, *L'agricoltura tra vecchia e nuova globalizzazione*, in *Agriregionieuropa*, 2018, no. 52.

[19] See *amplius*, *infra*, par. 5.

2. *ILO Conventions ratified by Italy on agricultural work: what happened from the constitution of the Organization to the Post-War period*

In this perspective it is necessary to examine the first ILO Conventions on agricultural labour ratified by Italy. Apart from the first, Convention 10 of 1921 – no longer applied today because replaced by Convention 138 of 1973, which has prohibited the work of minors in all economic sectors and has set the minimum age for working at fifteen years of age[20] –, two other Conventions on agricultural work adopted at the 1921 ILO Conference are still applied in Italy today: 11 and 12, respectively on the right of association and compensation for damages in the event of an injury[21].

These Conventions are not particularly important for the – very few – guarantee rules they contain, but rather for having traced the path of inclusion of the agricultural labour in the Organization's sphere of observation. The main goal of this path was to oblige States to extend to the agricultural sector the labour rules already in place in the industrial sector, so that foster fair trade competition among Member States.

According to Convention 11, the rights of union organization and coalition should be recognised "on the same terms as those provided for the industrial sector" (Art. 1). Since, at that time, a specific Convention on trade union organization and coalition rights for the industrial sector had not yet been established, it follows that the real objective of the Convention 11 wasn't to extend at the international level to agricultural workers the guarantees already applied to industrial workers, but only to affect trade relations between States, favouring those with an agricultural vocation.

The Convention would have had the effect of increasing the cost of agricultural products only in industrialized countries, where the recognition of union guarantees would have increased the cost of labour. On the contrary, States with an agricultural vocation – in which Convention 11 would not have produced significant effects given the lack of rules on trade union

[20] See, extensively, BORZAGA, *Contrasto al lavoro infantile e decent work*, Editoriale Scientifica, 2018, but also MAUL, *The International Labour Organization. One hundred years of social policy at the global level*, Ilo, 2020, p. 64 ff.

[21] In the historical context of the period, the question of the objective field of application of the ILO's competences was part of the debate, with some important member states (France and Germany in particular) attempting to limit it to the industrial sector and other specific sectors, such as the maritime sector; see MAUL, *cit.*, p. 70 ff.

rights for the industrial sector to extend to the agricultural one – would have enjoyed a greater ability to export their products abroad thanks to their lower labour costs.

Taking only this Convention into account, however, one might think that the failure to recognise specific guarantees for trade union freedom at the international level was caused by the political context of the 1920s, in which the presence of totalitarian regimes had certainly prevented the affirmation of this type of freedom[22]: it is no coincidence, in fact, that only after the end of World War II ILO approved the Conventions 87 of 1948 and 98 of 1949, defining, in favour of trade unions and workers, the trade union freedom and the right to collective bargaining with public authorities and employer organizations of all economic sectors[23].

However, the mercantilist aims of the first agricultural Conventions are confirmed in the third instrument issued in 1921. After having established that the rules on compensation for damages in case of accidents to industrial sector's workers shall be also applied to the agricultural sector (Art. 1), Convention 12 did not provide anything else to impose this protection in countries that were still exclusively agricultural, with the effect, as in the case of Convention 11, of limiting the action of the instrument only to countries where compensation for industrial work had already been recognised[24].

[22] The intention to regulate trade union freedom and the right to collective bargaining through a convention applicable to all sectors was inevitably revisited during the Second World War precisely because of the totalitarian regimes that characterised that period, see, *amplius*, FERRARA, *Libertà sindacale e tutela internazionale: il ruolo dell'ILO nel centenario della sua fondazione*, in *VTDL*, 2019, p. 749, nt. 12.

[23] See, more extensively, FERRARA, *cit.*, p. 750 ff; MAUL, *cit.,* p. 203 ff; see also the essays by BARRETO GHIONE, BAYLOS GRAU, *Il ruolo dei principi internazionali e del Comitato ILO sulla libertà di associazione*, and by RUSSO, *Le Convenzioni ILO*, in *La libertà sindacale nel mondo: nuovi profili e vecchi problemi. In memoria di Giulio Regeni*, in *QDLM*, n. 6, respectively at p. 43 ff. and 63 ff.

[24] It is worth noting that the tendency of international Conventions on agricultural work to impose the application of rules already in place in other sectors, especially in the industrial sector, has also concerned social security matters. In the 1933 International Conference were adopted three Conventions, no. 36, 38 and 40, respectively on Old Age, Invalidity and Survivors' Pensions, in which there were a reproduction of what said with Conventions no. 35, 37 and 39 for industrial and commercial sectors.

2.1. From the Philadelphia Declaration to the 1980s

In the following years, there were changes in the functioning of the Organization that affected the goals and techniques used to approve Conventions[25]: now we will try to briefly mention them before continuing the examination of the individual Conventions of interest.

First of all, it should be noted that the fervent wave of liberation of poor and developing countries from the imperialist power of Western States – in the context of the second half of the last century decolonisation processes[26] –, together with the UN's action in favour of the self-determination of peoples[27], have favoured an increase in the number of Member States[28] and, in this way, have also affected the functioning of the Organization[29].

The number of Member States rose from 52 in 1946 to more than 130 in the early 1980s, with the double consequence that western states lost their leadership within the Organization and became more difficult to reach a qualified majority of Delegates to approve Conventions[30].

It isn't, therefore, just a coincidence that between the 1950s and 1980s,

[25] For a historical reading on ILO's organizational evolution see SORGONÀ, *Sapere e politica. L'organizzazione internazionale del lavoro nelle ricerche di Franco De Felice*, in *StS*, 2021, pp. 835-855; in the same journal see *etiam* BRIZZI, *La battaglia delle 40 ore. Un aspetto delle relazioni tra l'Organizzazione internazionale del lavoro e l'Italia fascista negli anni Trenta*, 2021, pp. 941-965, and SETTIS, *Between Rationalization and Internationalism. The International Labour Organization and the United States from Wilson to Roosevelt*, 2021, pp. 967-994.

[26] On which see HEPPLE, *Labour Laws and Global Trade*, Hart, 2005, p. 33 ff.

[27] This principle was already provided in the UN Charter and, after, was reaffirmed, in 1960, by UN Declaration on Decolonisation.

[28] With decolonisation, the "liberated" States joined international formations (especially, in the UN) because of their need to find support in the fight against exploitation (caused by the more developed countries) and in favour of fair economic and social development at a global level.

[29] It must be taken into account that, starting from 1945, by joining the UN, States had the possibility to apply for membership in the ILO through a "simplified" procedure, consisting in the mere acceptance by the State of the obligations of the ILO Constitution, without going through the more elaborate process of Ordinary Membership, with the favourable vote of the International Labour Conference by a majority of two thirds of the Delegates – the process of Ordinary Membership is regulated by Art. 1, paragraph 4, of the ILO Constitution, while the process of Simplified Membership is regulated by Art. 1 paragraph 3. This was supplied for by the United Nations Charter, which, under the joint provisions of Articles 57 and 63, set up helped forms of liaison between the United Nations and specialised institutions, including ILO.

[30] Article 19(2), Constitution ILO.

even for the agricultural sector, the number of new Conventions approved was lower than in the earlier period (1919-1940s): 5 Conventions, compared to 7 (including social security Conventions) in the previous period[31].

Secondly, it should be borne in mind that following the proclamation of the Philadelphia Declaration[32] at the 26th International Conference, the goals of ILO were separated from the policy of competitive advantages between states – which, as we have seen before, had favoured the approximation of the rules of industry to the agricultural sector – and the reasons for social justice were better determined and made more ambitious[33].

In this perspective, focusing on the instruments introduced, the first Convention of this period, *i.e.* Convention 99 of 1951 on minimum wage-setting methods, is the first successful example of the protective intentions just mentioned. For the first time at the international level and concerning the agricultural sector, a Convention intervened on wage profiles, affirming the principle of the minimum wage, and requiring the plural intervention of stakeholders, starting with employers' and workers' organisations, to es-

[31] Borzaga, *Contrasto al lavoro infantile*, cit., p. 88, points to the existence of a relationship between the increase in the number of member states and the decrease in the number of Conventions approved.

[32] See the Declaration Concerning the Purposes and Objectives of the International Labour Organization, adopted by the International Labour Conference at its Twenty-sixth Session in Philadelphia on 10 May 1944, at the following address: https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-rome/documents/publication/wcms_151915.pdf ; the Declaration was included as an appendix to the text of the ILO Constitution and, with it, lines of action as "fight against the need", "material progress and spiritual development of human beings beyond all discrimination", etc., placed the protection of workers at the centre of international debate. See Hepple, *cit.*, p. 32 ff; Borzaga, *Contrasto al lavoro infantile*, cit., p. 21; de Mozzi, Mechi, Sitzia, *The International Labour Organization: an introduction in the Centenary*, in *LDE*, 2019, no. 2; Maul, *cit.*, p. 118 ff.

[33] In the Declarations there are statements of principle – including "labour is not a commodity" or "poverty, wherever it exists, is dangerous to the prosperity of all" –, which have remained as iconic expressions of the struggle against exploitation and in favour of the dignity of the workforce. See Rodgers, Lee, Swepston, Van daele, *The Ilo and the quest for social justice 1919-2009*, Ithaca, 2009; de Mozzi, Mechi, Sitzia, *cit.*, p. 5. From a technical point of view, its approval has led to: *a*) the introduction of the non-regression clause in the ILO Constitution, which clarifies that the provision and/or ratification of international rules cannot be a pretext for removing more protective provisions from national laws (Art. 19(8)); and *b*) the strengthening of the monitoring system, with the obligation of Member States to communicate reports, not only for ratified Conventions, but also for non-ratified ones and for recommendations (Art. 19(5) and (6)). In this regard, see Borzaga, *Contrasto al lavoro infantile*, cit., chap. IV; Hepple, *cit.*, p. 47 ff.

tablish the appropriate method in wage determinatio[34].This not only equates to what was provided for the industrial sector by Convention 26 of 1928 – *i.e.* the commitment of States to establish or maintain "appropriate methods for fixing minimum wage levels" –, but the Convention acquires specific relevance if its content is read in conjunction with Convention 95 of 1949, which had defined the contours of the concept of Wages and the methods that could be used to pay them[35].

The prospect of enriching the international rules for the agricultural sector with labour protections is also confirmed by Conventions 101 of 1952 and 129 of 1969: the former, introduced the first international regulation of paid leave[36], and the latter – came after a long period of regulatory inertia – set up techniques and principles that will be fundamental for the construction of the modern national inspection systems[37].

The last Convention of this second period, Convention 141 of 1975, also aims to raise international labour standards and does so by updating what had previously been set up on trade union freedom by the 1921 Convention and the other Conventions approved on the subject[38]. Unlike the latter,

[34] Although the powers to define the treatment of workers and the cases of derogation from minimum wages for specific sectors are left to the national level – for essential and intuitable legal-operational reasons – the Convention confirms the intentions of the Philadelphia Declaration to promote higher social standards, regardless of competitive goals. See Hepple, *cit.,* p. 74 and the bibliography cited there: for an analysis of the changes in the organization's structure that followed the Philadelphia Declaration, see also pp. 76-77.

[35] The definition of wages under the 1949 Convention is as follows: "remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered."; see the comment in Ales, Bell, Deinert, Robin-Olivier, *International and European Labour Law. A Commentary*, Bloomsbury Publishing, 2018, p. 1093 ff.

[36] However, a minimum number of days' holiday was also not set up. This result was achieved only with Convention 132 of 1970, which extends the field of application to all economic sectors and recognises the right of workers to paid annual leave for at least three weeks.

[37] One thinks in particular of the need to make inspections compulsory in a series of fundamental areas (art. 6), to recognise the principle of the autonomy of inspectors with respect to changes in government and external influences (art. 8) or, again, to provide for an adequate number of inspectors to guarantee an efficient control service (art. 14) – the latter condition which, although without measurable parameters, captures one of the most critical problems still common to many developed countries, including our own.

[38] Particular attention is paid to workers' trade unions, saying, in an innovative way, that

where the focus was on actions to promote freedom as such (indicated as a goal), Convention 141 aims to encourage the creation and development of organizations as a tool to strengthen workers' political power in the social and economic choices of State, thus raising the bar on national protection obligations associated with its ratification.

3. *The policies of change and the recent ILO actions on agricultural work*

As we have tried to highlight so far, in the first thirty years of the ILO's activity, the Conventions had a generic content and were mostly aimed at extending the protections of the industrial sector to the agricultural one, to encourage fair competition between agricultural countries (as Italy was) and industrialized ones.

After the Philadelphia Declaration, Conventions on agricultural labour, though numerically reduced, have received greater technical-legal detail, and have regulated fundamental aspects of labour relations in a more incisive and guaranteeing manner, in line with the more general trend due to changes in the functioning and goals of the Organization.

To better represent what happened after the 1980s, it is necessary to stress on one common feature of the work carried out by the ILO until then, namely the fact that, regardless of the different purposes for which the Conventions (as well as the Recommendations) were approved, Organization's work was aimed at establishing new standards to which States would have to comply with through the formal act of ratification. The most recent period, instead, will see the Organization pursue an even more ambitious goal, putting the aim of approving new standards on the back burner, and giving priority to monitoring and technical cooperation activities, aimed at ensuring an effective application of the rules already established.

The decision to put the approval of new instruments on the back burner has certainly been helped by the fact that the number of Member Countries

the improvement of working and living conditions of the manpower should be intended as a prerequisite for the economic and social development of the agricultural sector. States are obliged to disapply incompatible regulations with the Convention but also to fulfil their programmatic obligations supporting trade union organizations, especially in the fight against discrimination (Article 4), and to improve employment opportunities and working conditions (Article 6).

has continued to grow and with it the difficulties in reaching majorities to approve Conventions. It was also noted that, over time, Conventions have covered most of the major labour law issues, making more complex to define new rules[39]. Referring only to the agricultural sector – although the same applies to conventions for all economic sectors – since the second half of the 1990s the figure has practically disappeared, with only the adoption of Convention 184 of 2001, on health and safety (which Italy has not ratified)[40].

After a long critical debate on how to revitalize the role of the Organization[41], which led to the approval first of the core labour standards – in 1998 with the Declaration on Fundamental Principles and Rights at Work and its follow-up[42] – and then, subsequently, of the Decent work agenda[43], since the second half of the 1990s the tendency to invest in technical cooperation and the implementation of existing rules has been in evidence.

The 1998 Declaration, by finding specific matters on which States were called upon to respect – irrespective of whether they chose to ratify them – the Eight Fundamental Conventions that governed those matters[44], adopted

[39] Referring to the ILO's internal position of business representatives, an "overproduction" of rules is mentioned in HEPPLE, *cit.*, p. 35 ff., see also the bibliography cited there.

[40] In the field of occupational health and safety, Italy is late in approving the well-known Occupational Safety and Health Convention, 1981 (No. 155), whose ratification process began in 2021 and is still ongoing today.

[41] See *ex plurimis* BORZAGA, *Contrasto al lavoro infantile,* cit., p. 80 ff., and the bibliography cited there. On the critical aspects of the ILO set-up and the fact that until 1998 there was no indication of the regulatory areas and Conventions to which States should give priority in ratification activities, see CHARNOVITZ, *The International Labour Organization in Its Second Century*, in Max Planck Yearbook of United Nations Law, 2000, p. 154.

[42] The text in Italian is available at: https://www.ilo.org/wcmsp5/groups/public/—-europe/—-ro-geneva/—-ilo-rome/documents/publication/wcms_151918.pdf; in literature see, *inter aliis*, BROWN, *International Trade and Core Labour Standards: A Survey of the Recent Literature*, in *Labour market and social policy*, Occasional papers, OECD, 2000, no. 43; LEE, *Globalization and labour standards: A review of issues*, in *ILR,* 1997, 2; SINGH, ZAMMIT, *The global labour standards controversy: critical issues for developing countries*, in Munich Personal RePEc Archive, 6 November 2000.

[43] See SENGENBERGER, *Decent Work: The International Labour Organization Agenda*, in *D&C*, 2001, no. 2; VOSKO, *"Decent Work": The Shifting Role of the ILO and the Struggle for Global Social Justice*, in *GSP*, 2002.

[44] The Core Labour Standards and related Conventions, which States were obliged to comply with, were: 1. Freedom of association and effective recognition of the right to collective bargaining (Freedom of Association and Protection of the Right to Organize Convention 87, 1948 and Right to Organize and Collective Bargaining Convention 98, 1949); 2. Elimination

a decisive method for bringing national legislation closer and raising standards of protection[45]. The Decent work agenda policy – launched in 1999, following a speech by the then Director-General of the International Labour Office, Juan Somavìa, and subsequently implemented with the 2008 Declaration on Social Justice for a Just Globalisation[46] – broadened the list of priority matters on which States should concentrate their efforts[47], defining a series of substantive and procedural goals.

The "strategic" changes resulting from these instruments do not need to be considered here in an analytical manner, but it is useful to highlight at least those that form the background and are intertwined with the recent monitoring and technical cooperation activities conducted by the ILO in the field of agricultural labour.

of all forms of forced or compulsory labour (Forced Labour Convention 29, 1930, with its Additional Protocol of 2014, and Abolition of Forced Labour Convention 105, 1957); 3. Effective abolition of child labour (Minimum Age Convention 138 of 1973 and Worst Forms of Child Labour Convention 182 of 1999); 4. Elimination of discrimination in respect of employment and occupation (Equal Remuneration Convention 100 of 1951 and Convention on Discrimination in Respect of Employment and Occupation 111 of 1958). In the literature, *ex plurimis*, see ALSTON, *"Core Labour Standards" and the Transformation of the International Labour Rights Regime*, in *EJIL,* 2004, vol. 15, no. 3, p. 464 ff.; KELLERSON, *The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future*, in *ILR,* 1998, p. 223 ff.; SWEPSTON, *Human Rights Law and Freedom of Association: Development through ILO Supervision*, in *ILR*, 1998, p. 169 ff.; CHARNOVITZ, *The International Labour Organization*, cit., p. 147 ff.

[45] States were obliged to respect the eight Core Conventions regardless of the choice to ratify them: in this sense, the interest for the fundamental protections of workers was considered preeminent in confront of the compliance of the binding mechanisms of the Conventions' ratification on which the Organization was based. Not least, the Core Labour Standards made it possible to overcome the impasse of many Developing Countries that, after joining the Organization, had refrained from ratifying most of the Conventions, considering them excessive in number and unsuitable to their level of legal development.

[46] On which see MAUPAIN, *New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalisation*, in *EJIL*, 2009, p. 834 ff.

[47] In this regard, it is sufficient to say that this policy was composed of four pillars – later transposed in the 2008 Declaration –, the last of which has the aim to promote Core Labour Standards (already identified in 1998) and the other three based on more programmatic and general scopes, as: 1. the creation of greater opportunities for women and men to obtain decent employment and income; 2. the strengthening of the scope and effectiveness of social security instruments; 3. the strengthening of tripartism and social dialogue. See HEPPLE, *cit.*, p. 63 ff.; BORZAGA, *Core Labour Standards (International Labour Law)*, and BRINO, *International Labour Organization and the Global Market*, in PEDRAZZOLI (ed.), *Lessico Giuslavoristico. 3. Labour Law of the European Union and the Globalized World*, Bononia University Press, 2011, p. 74 ff. and 142 ff. respectively.

It is worth noting, first of all, the attention paid in the 2008 Declaration to compliance with "procedural" Conventions, understood as those which (while not directly recognising specific rights for workers) lay the foundations for promoting respect for the rules set out in other Conventions and for the functioning of national surveillance systems: the recent observation of the CEACR to the Italian government on Convention 129 of 1969 on labour inspections[48] – which we will discuss in the next paragraph – is part of this activity, as well as the analysis dedicated in the Three-year Plan to tackle labour exploitation and unlawful recruitment in agriculture, to the tools used in Italy to recruit and employ agricultural workers regularly – to which the final paragraphs of this paper are devoted.

Secondly, the actions for the development of a "fair" globalisation, promoted with the 2008 Declaration, have also outlined the perimeter within which to address the issue of migration – increasingly at the centre of public debate in Western countries and, more recently, addressed by ILO in its 2016 General Survey –, to guarantee migrants equal working conditions and decent work[49]. The CEACR's monitoring activity on Convention 143 of 1975, which also culminated in a recent observation against Italy – which is discussed in paragraph 6 – is part of this context.

4. *The Observations of the CEACR: compliance with Convention 129 of 1969 on agricultural inspections*

Regarding the 1969 Convention 129, the CEACR noted that in Italy the number of inspections carried out – between 2015 and 2018 – in all economic sectors has undergone a decrease of more than 20%[50], which was ac-

[48] The results achieved thanks to Core Labour Standards Strategy was extended through the Decent Work Agenda to a wider range of Conventions, including those that, although not aimed to introduce specific rights for workers, ended up affecting labour relations because aimed to improve national labour markets and people's employment opportunities. In fact, the Procedural Part of the 2008 Declaration includes the so-called four "Governance" Conventions – including the 129 of 1969 mentioned above – to facilitate the implementation of labour rules and make more effective the compliance with (also) other Conventions. See MAUPAIN, *cit.,* p. 843 ff.

[49] See ILO, *Promoting fair migration: General Survey concerning the migrant workers instruments*, 105th session, 2016; CHOLEWINSKI, TAYAH, *Promoting decent work for migrant workers*, Ilo, 2015.

companied by an increase in the number of violations compared to the inspections carried out in the same period[51].

The Italian government has been asked to explain the reasons of this trend and to comply, among other provisions, with Article 21, which provides that companies must be "inspected as often and meticulously as necessary to ensure the effective application of the relevant rules of law"[52].

For the 1969 Convention, further worrying evidence has appeared for the illogical legislative choice to entrust Inspectors the power, indiscriminately, to check compliance with labour standards and to verify that workers are in order with their residence documents. This dual function has been criticized for the problems it creates in getting workers to cooperate with Inspectors.

On this subject, it should be considered that the condition of foreigners' irregular residence generates an attitude of natural distrust towards the control authorities, which does not retreat to labour inspectors, who, while fight against the labour exploitation of foreigners, maintain the qualification and exercise the functions of Judicial Police Officers[53].

[50] The number of inspections reported by the Italian Government for the year 2015 was 145,697, while the number reported for the year 2018 was 116,846. See the Direct Request (CEACR), adopted in 2019 and published in 2021, available on the institutional website of the Organization.

[51] The percentage of violations detected compared to the inspections conducted was 60.29% in 2015 and 65.01% in 2018. See the Direct Request (CEACR), cited in the previous footnote. It should also be considered – as it emerges from the INL report for the year 2019 – that the agricultural sector accounts for just 5% of the total number of inspections carried out in Italy. See further, *infra*, paragraph 5, in footnote 70. On the Convention 129 see Ales, Bell, Deinert, Robin-Olivier, *International and European Labour Law. A Commentary*, p. 1106 ff.

[52] On the need for more controls by inspection bodies see, in literature, Leccese, Schiuma, *Strumenti legislativi di contrasto al lavoro sommerso, allo sfruttamento e al caporalato in agricoltura*, in *Agriregionieuropa,* 2018, p. 5; D'Avino, *Emersione e tutele del lavoro irregolare: una prospettiva comparata di sicurezza sociale*, Satura, 2018; Chiaromonte, *Le misure sanzionatorie di contrasto al lavoro sommerso e la regolamentazione del lavoro immigrato: due mondi lontanissimi*, in Ferrante (ed.), *Economia "informale" e politiche di trasparenza*, Vita e Pensiero, 2017, p. 138; Giaconi, *Le politiche europee di contrasto al lavoro sommerso. Tra (molto) soft law e (poco) hard law*, in *LD*, 2016, p. 439; Viscomi, *La disciplina delle migrazioni economiche tra protezione dei mercati e promozione dei diritti. Spunti per una discussione*, in *Studi in memoria di Mario Giovanni Garofalo*, Cacucci, 2015, II, p. 1029. On this topic see the recent ILO report, intended as a guide for the work of inspectors in the agricultural sector, *Conducting Occupational Safety and Health Inspections in Agricultural Undertakings*, International Labour Organization, 2021.

[53] See the joint provisions of Article 57 of the Code of Criminal Procedure, Article 6(2)

The fact that Inspectors are obliged, in the presence of clandestine workers, to report their presence on Italian territory to the Public Security Authorities[54], hinders the creation of any bond of trust between the control body and the workers, who should instead receive help from the intervention of the authority. In other words, the judicial police functions of the Inspectors make their investigative work more complicated, because favour the development of the (common) interest of the Irregular Workers and Gangmasters (and/or *De Facto* Employers[55]) to "staying away" from controls and the bodies that carry them out.

Noting the illogicality of this legislation and dwelling on the worrying spread of labour exploitation in agriculture, the CEACR, in its Observation of 2019, called on the Italian government to comply with Article 6, paragraph 1 of the Convention, stressing the need for Italian law not to give inspectors powers that could undermine the main function assigned to them, namely, to be guarantors of compliance with labour rules.

As the CEACR had previously raised doubts on different aspects of the national legislation, the Italian Government had already taken steps to highlight that the reform of Legislative Decree 149 of 2015 has contributed to ensuring that inspections in Italy are carried out in such a way as to ensure that irregular workers enjoy the same protections recognised for regular foreigners, binding employers to take on, in any case, pay, social security contributions and comply other obligations related to the employment relationship[56]: however, these reasons have not overcome the uncertainties

of Legislative Decree No 124 of 23 April 2004 and Article 1(2) of Legislative Decree No 149 of 14 September 2015.

[54] For identification and ritual controls for the verification of the crime of art. 10 *bis* of the Legislative Decree no. 286 of 23 July 1998, as well as for the purposes of the possible administrative expulsion, pursuant to art. 13 of the same decree.

[55] See COSTANTINI, *Soggiorno, residenza, contratto*, in CAMPANELLA (ed.), *Vite sottocosto. 2° Rapporto Presidio*, Aracne, 2018, p. 230 ff., who points out how the requirement of a residence permit becomes an element of further vulnerability of the immigrant labour employed in agriculture; in the same sense see also GRECO, *Relazioni tra imprese e rapporti di lavoro in agricoltura*, in CAMPANELLA (ed.), *cit.*, p. 358; NAZZARO, *Misure di contrasto al fenomeno del caporalato: il nuovo art. 603-bis c.p. e l'ardua compatibilità tra le strategie di emersione del lavoro sommerso e le politiche migratorie dell'esclusione*, in *CP*, 2017, n. 7-8, p. 2617 ff.

[56] See the Report of the Italian Government on the Application of Convention No. 129/1969 - Year 2017 "Labour Inspection in Agriculture", available online at: http://ilocentenary.lavoro.gov.it/Il-Ministero-e-lILO/Rapporti-dell-ILO-in-materia-di-lavoro/Documents/Rapporto-Convenzione-n-129-1969-anno- 2017.pdf.

of conformity specifically concerning the contextual attribution to the Inspectors both competences of protection and control on the regular stay in Italian territory.

While waiting for further government feedback, a useful regulatory reference can be found in Legislative Decree no. 109 of 16 July 2012[57], which has introduced a reward mechanism to encourage the cooperation of irregular workers with the supervisory authorities; according to it, in cases of serious labour exploitation, irregular workers who report their condition to the authorities, choosing to cooperate in criminal proceedings against the employer, are entitled to a Special Residence Permit, valid for the duration of the proceedings[58].

It is an instrument aimed at encouraging the cooperation of irregular migrants during the supervisory activities of the inspectors, which, in the presence of other conditions, such as at least the willingness of the foreigner to stay in Italy and to find alternative employment, may be able to break the collusion migrant-exploited/employer-exploiter, which instead socio-economic conditions and also – as noted by the CEACR – legal conditions, may favour.

However, the measure does not seem to be able to achieve exactly the objectives of the Convention, briefly recalled by the CEACR in the Observation: it is one thing to intervene in the competencies of the control bodies, to give priority to the actions of protection of vulnerable labour, it is another thing to reward the collaborative behaviour of foreigners. The intervention plans and the effects are not superimposable since there is an appreciable gap in the series of cases in which, for different reasons – lack of legal and linguistic knowledge, mistrust of the authorities, lack of alternative work opportunities, etc.[59] –, the foreigner does not intend to expose himself by filing a criminal complaint, but there is still a need to be "freed" from the exploitative condition in which he finds himself.

In other words, the choice of the irregular worker, who is a victim of

[57] With which the European Directive 2009/52/EC was implemented and paragraphs 12 *bis* and following were added to Art. 22, paragraph 12, of the Legislative Decree no. 286 of 25 July 1998. For a comment see FALERI, *Il lavoro agricolo*, cit., p. 96 and the bibliography cited there.

[58] On the requisites for the issuance of the aforementioned Special Residence Permit see Cass. sez. un. 11 December 2018 no. 32044 and Cass. 20 March 2019 no. 7845.

[59] On the "reticence" of irregular workers, see FALERI, *Il lavoro agricolo*, cit. p. 107.

exploitation, not to denounce the employer, under Article 22, paragraph 12 *quater*, does not change the fact that his prosecution by labour inspectors, due to the absence of regular residence documents, is contrary to Article 6 of the Convention.

4.1. The Observations of the CEACR: compliance with Convention 143 of 1975 on the protection of migrant workers

Since data on inspections carried out in Italy reveal that the highest number of foreigners who are victims of labour exploitation is in the agricultural sector[60], the recent Observation of the CEACR on the compliance of Italian regulations with Convention 143 of 1975 on the labour rights of migrants makes the Convention relevant for our purposes, even though it isn't one of those intended for agricultural work only.

The Observation of the CEACR concerned the compliance, among others, with Articles 1 and 9, which require the commitment of the Ratifying States to preserve the Fundamental Human Rights of Migrants (Art. 1) and to grant them, even if they are irregular, equal treatment concerning the labour guarantees of the host State (Art. 9). At the end of these observations, the Commission then formulated a series of information questions to the Italian Government, including the one asking to indicate how irregular workers can access information on labour rights in an understandable language and in a confidential manner and, in particular, those on how to obtain a Special Residence Permit under art. 22, par. 12 *quater*, Legislative Decree no. 286/98, in case of a complaint against the employer for serious labour exploitation.

As already mentioned, the Special Residence Permit is a tool that can help break the umbilical cord that binds migrants' vulnerability to the opportunism of Gangmasters and *De Facto* Employers: what Italy has been asked in this case, however, is not only to prove its abstract capacity to combat the exploitation of migrants, but also to demonstrate how far it

[60] According to National Labour Inspectorate, in 2018 migrant workers ascertained as victims of exploitation based on a labour inspection was 478, 350 of whom were employed in the agricultural sector. In addition, agricultural sector appears the sector with the highest percentage of irregular labour relationships: the 7160 inspections carried out in companies engaged in agriculture in 2018 showed that in 50% of cases work had been carried out in an irregular manner.

has been able to achieve the objective and, where this has not happened – as it appears to be in the concrete case –, to examine the causes of its poor expansive capacity.

From this point of view, the CEACR's Observations seem, in short, to call into question the techniques used by the legislator to make foreign workers aware of their rights and, more generally, to bring labour relations out of irregularity.

5. *Recent regulatory instruments and their limitations in combating irregular work*

However, the issues on which ILO, through the CEACR, has intervened in a critical sense concerning the regulations in our country have also been at the centre of the technical collaboration provided by the Organization to the Italian government, in the context of the tasks carried out to implement the Three-Year Plan to Tackle Labour Exploitation and Unlawful Recruitment in Agriculture (2020-2022), which we will shortly examine for the part relating to the Call on proposals for change in the sector. Before verifying the results of this activity, it is also right to briefly explain why the instruments adopted by the Italian legislator before the Three-Year Plan have not succeeded in eradicating exploitation and informality of labour relations.

In this regard, looking at the choices made in recent years we can speak of a Multidirectional Legislative Approach, based on instruments with distinct functions, but complementary from a teleological point of view. First, it is necessary to refer to Article 603 *bis* of the Criminal Code, as amended by Law No. 199 of 29 October 2016, which has made the sanctioning apparatus more incisive, going down the road of criminal repression against both gangmasters and employers[61]. Without going into an in-depth exegetical exami-

[61] The first version of Article 603 *bis* of the Criminal Code – introduced by Law Decree no. 138 of 13 August 2011, converted into Law no. 148 of 14 September 2011 – provided for a new type of offence to punish those who carried out organized intermediation activities, recruiting labour or organizing labour activities characterised by exploitation, by means of violence, threats, or intimidation, taking advantage of the workers' state of need or necessity. There were three main limitations to this offence. The first was related to its lack of effectiveness against the employer/user, who could only be held liable for complicity in the offence if it was

nation of the legislation – which has already been extensively commented –, it is sufficient to highlight the majority opinion according to which the use of criminal sanctions would not be sufficient to combat cases of violations of labour law that don't also constitute offences[62].

In other words, it has been pointed out that the rigidity of criminal sanctions doesn't intercept and address the phenomenon in its complexity, doesn't act directly on the causes that determine it and, among other things, doesn't resolve the "grey" situations in which companies resort to gimmicks to evade the law: think of cases in which part-time labour relationships are set up in order to use manpower for much longer hours, or cases in which wages are set on a piecework basis, and/or those in which they are calculated according to a collective agreement that recognises them in a way that seriously differs from what is laid down in national or territorial collective

proved that he was aware of the methods used by the intermediary. The second was the condition of criminal liability relating to the existence of an organizational structure on the part of the intermediary, such as to leave unpunished those who occasionally carried out illegal recruitment activities, without a structure of means and persons. The third limitation concerned the fact that violence and threats were identifiable elements of the case, so that all the hypotheses of exploitation of workers where they did not occur, or where the acceptance of the offer of work was voluntary, although induced by the condition of vulnerability, were excluded. Art. 1, law no. of 29 October 2016 amended the provision by establishing first of all two distinct offences, one attributable to the gangmaster for the recruitment of manpower for the purpose of assigning it to work for third parties in exploitative conditions, the other to the employer, who uses, hires, or employs labour subjecting workers to exploitative conditions and taking advantage of their state of need. In addition, the state of necessity has been replaced by the less serious state of need and the requirements of violence or threats have been excluded as constituent elements of the offence. See *amplius* Garofalo D., *Il contrasto al fenomeno dello sfruttamento del lavoro (non solo in agricoltura)*, in *RDSS*, 2018, p. 229 ff.; de Martino, D'Onghia, *Gli strumenti giuslavoristici di contrasto allo sfruttamento del lavoro in agricoltura nella legge n. 199/2016: ancora timide risposte a un fenomeno molto più complesso*, in *VTDL*, 2018, no. 1, p. 157 ff; de Santis, *Caporalato e sfruttamento di lavoro: politiche criminali in tema di protezione del lavoratore. Pregi e limiti dell'attuale disciplina. II Parte*, in *RCP*, 2018, no. 5, p. 1759; Chiaromonte, *"We were looking for arms, men arrived". Il lavoro dei migranti in agricoltura fra sfruttamento e istanze di tutela*, in *DLRI*, 2018, no. 2, p. 321 ff; Greco, *cit.*, p. 356 ff.

[62] In a critical sense, starting from the concept of labour exploitation, see Calafà, *Per un approccio multidimensionale allo sfruttamento lavorativo*, in *LD*, 2021, no. 2, p. 200 ff.; in the same sense see also, Faleri, *Il lavoro agricolo*, cit., p. 101 ff.; Id., *"Non basta la repressione". A proposito di caporalato e sfruttamento del lavoro in agricoltura*, in *LD*, 2021, p. 258 ff; Papa, *Paradossi regolativi e patologie occupazionali nel lavoro agricolo degli stranieri*, in Campanella (ed.), *cit.*, p. 253; Masini, *Neo-colonizzazione delle campagne: tutela del lavoro e diritti all'esistenza*, in *GC*, 2020, no. 4, p. 815 ff.

contracts stipulated by the most representative trade unions at the national level[63].

Similarly, practices aimed at encouraging the sale of goods produced only by agricultural enterprises belonging to production chains that comply with labour standards have so far not achieved the desired results. These are the so-called Ethical Marks or Labels Showing Goods Produced without Labour Exploitation, with which public and private authorities, using awareness-raising campaigns in favour of the culture of legality and quality of work, are trying to guide consumer preferences by promoting the commercial reputation of companies that adhere to such campaigns and/or certified consortia[64].

These instruments have the limitation of assuming that consumers spontaneously adopt responsible purchasing choices[65], and are, therefore, hindered by the fact that these choices are, instead, based on ethical logic only in a circumscribed number of cases, while the broader tendency is to prefer the quality and/or convenience of the goods bought. Moreover, it should be considered that today the cost of products from certified supply chains is, on average, higher than that of companies that don't belong to them. In short term, it doesn't seem that these instruments can be the key to ousting, or even circumscribing, the market space of companies that use irregular labour[66].

Another incentive tool that was supposed to guarantee compliance with labour standards by businesses is the Quality Agricultural Labour Network, introduced by Article 6 of Legislative Decree No. 91 of 24 June 2014 and

[63] Finally, on the differences between the cases of labour exploitation and those in which the criminal offence of exploitation of labour is committed, see FALERI, *"Non basta la repression". A proposito di caporalato e sfruttamento del lavoro in agricoltura*, in *LD*, 2021, pp. 258-260; cf. *etiam* NUZZO, *L'utilizzazione di manodopera altrui in agricoltura e in edilizia: possibilità, rischi e rimedi sanzionatori*, in *WP CSDLE "Massimo D'Antona".IT*, - 357/2018, p. 25 ff.

[64] Among the best known are the "No Cap" label and the certification of products sold by companies that are members of the World Fair Trade Organization (WFTO).

[65] PINTO, *Rapporti lavorativi e legalità*, cit., p. 26; FALERI, *"Non basta la repressione"*, cit., p. 271.

[66] These instruments could certainly be more successful if they were included in the context of supply chain agreements whereby large-scale distribution companies undertake to buy products exclusively from companies that respect the parameters of legal work. In this sense CANFORA, LECCESE, *cit.*, pp. 76-77.

amended by Article 8 of Law No. 199 of 2016[67]. This is a tool that allows Member Companies to enjoy different advantages, including that of being less subject to inspections by the authorities. In other words, in exchange for compliance with a series of parameters of legality – among which the compliance with the provisions of collective agreements entered into by the most representative trade unions at the national level[68]–, the companies belonging to the Network are exempt from ordinary supervision by authorities and benefit – following the amendments introduced in 2016 – from the possibility of enjoying any funding provided at the local level for the transport of workers.

Again, however, these measures have not been very convincing so far. One of the reasons why companies are reluctant to join the Network[69] is its low attractiveness, given that the main advantage – *i.e.*, exemption from ordinary inspections – is strongly mitigated by the low intensity with which the inspection bodies already conduct their surveillance activities on the territory. If we cross the data on the number of inspections carried out each year in Italy with those relating to the number of agricultural enterprises operating, it becomes clear – as mentioned above – that agriculture is the sector where fewer inspections are carried out than in any other sector[70]; moreover, considering that there are about five thousand inspections in agriculture every year and that there are more than seventy thousand companies[71], it is clear how rare it is to be subjected to a scheduled inspection by the authorities; in addition, membership of the Network does not guarantee, of course, that the company is not subject to inspections due to complaints or claims.

[67] Battistelli, Pascucci, *La promozione dell'impresa agricola di qualità*, in Campanella (ed.), *cit.*, p. 399 ff.; D'Onghia, de Martino, *cit.*, p. 14 ff.

[68] Among others, the absence of criminal convictions and administrative sanctions for violations of labour and social legislation and the regular payment of social security and insurance contributions.

[69] From the date of establishment of Quality Agricultural Work Network until January 2022, just over 5,000 farms have joined it; the total number of active farms in Italy – considering only those organized in corporate form – exceeds 70,000 (according to the latest ISTAT census, 2016).

[70] The data published by the National Inspectorate in the Annual Report on Labour and Social Legislation Surveillance Activity - Year 2019, p. 9, shows that out of more than 113,000 inspections conducted in all economic sectors, only 5806 involved enterprises working in agriculture (just 5%).

[71] Only those organized as companies are considered (Istat, 2016).

6. *ILO's good practices in the fight against exploitation and forced labour in agriculture*

Turning now to the second type of function carried out by the ILO for the protection of agricultural workers, that is, Technical Cooperation, within the framework of which, as mentioned, the Three-Year Plan to Tackle Labour Exploitation and Unlawful Recruitment in Agriculture (2020-2022) was adopted; for our purposes, it will be useful to examine in particular the outcome of the Call launched at the end of 2020[72], which aimed to receive, from public and private actors operating in the agricultural sector, concrete indications on the practices in place against labour exploitation.

From a practical point of view, the Call required participants to show the funding received to implement the practices, the operational context in which they took place, and the lessons learned in their implementation. To take part, participants were also expected to refer to at least one of the Ten Priority Actions predetermined by the Three-year Plan, which can be classified into three areas, depending on whether they are to be conducted before, during or after the workforce activity.

The first group includes Actions relating to the creation of an Information System for the Agricultural Labour Market, with which to map the territories and the agri-food chain and thus describe the areas at greatest risk of irregular employment of labour[73]. In the second group – destined for the "contextual" Actions – there are the Actions necessary for the Transportation of Workers by the Right Means and their Stay in Decent Housing Solutions[74]. In the third group, Actions following the Detection and/or De-

[72] The Call proposed by the ILO's Italy Office, in collaboration with the Ministry of Labour and the European Commission, can be found at the following address: https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-rome/documents/publication/wcms_764054.pdf ; the results of this Call are published in the report "The promotion of Decent Work in agriculture. Analysis of promising practices in Italy": https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-rome/documents/genericdocument/wcms_803403.pdf.

[73] Priority Actions 1 to 4 belong to this group, namely: Action 1. Information system for the agricultural labour market; Action 2. Investments in innovation and enhancement of agricultural products; Action 3. Quality agricultural work network and measures for the certification of agricultural products; Action 4. Planning of labour flows and improvement of intermediary services.

[74] Priority Actions 5 to 8 belong to this group, namely: Action 5. Decent transport solu-

nunciation of Exploitative Conditions, such as protection and assistance to victims[75].

For our purposes, it is important to analyse the number of practices reported against each of the Priority Actions: this figure is indicative of the propensity with which operators are currently dealing with each of the Actions indicated in the Three-year Plan and also makes it possible to identify – in the presence of actions for which a small number of dossiers were reported – for which of them, operators have more problems implementing them. Looking at the ratio between the total number of practices presented – 67, of which 40 were presented by non-governmental organizations – and those proposed for each Priority Action, a significant element comes to the fore: there are two specific Actions for which the number of practices implemented was very low, namely actions 5 and 6 (two practices for action 5 and one for Action 6), which are devoted respectively to decent transport and housing solutions.

It is well known how important these Actions are to protect the lives of agricultural workers, especially if they are foreigners and irregular, and therefore in conditions of vulnerability that make them more likely to be victims of forced or compulsory labour and, in general, of labour exploitation by Gangmasters[76].

The inadequate satisfaction of basic needs related to housing or transport is, not by chance, among the characteristics to which the Referral Mechanisms refer the activation of protection and assistance procedures for victims of labour exploitation[77], and to which the Italian legislator has, con-

tions; Action 6. Decent housing solutions; Action 7. Communication campaign; Action 8. Strengthening of surveillance activities and fight against labour exploitation.

[75] Priority Actions 9 (Protection and assistance of victims of labour exploitation) and 10 (National system for the socio-occupational reintegration of victims) belong to this group. See Corbanese, Rosas, *Decent work and social inclusion of victims of labour exploitation*, Ilo, 2020.

[76] On the concepts of labour exploitation and forced or compulsory labour, see Calafà, *cit.*, p. 193 ff.

[77] See the recent Guidelines of 8 October 2021, approved by the State-Regions Conference in implementation of the Three-Year Plan to Tackle Labour Exploitation and Unlawful Recruitment in Agriculture (2020-22), designed to uniformly regulate the operations of those who are involved in various ways in the protection of and assistance to victims of labour exploitation in agriculture. On Referral Mechanisms, (also) from a comparative point of view, see Corbanese, Rosas, *Protezione e assistenza delle vittime di sfruttamento lavorativo. Un'analisi comparativa*, Ilo, 2020.

sequently, made reference when defining the indexes to apply criminal sanctions due to labour exploitation[78].

Capitalising the scarce financial resources made available by National and Local Governments[79], the operators who implement the practices attributable to these actions provide concrete support to the workers and, at the same time, exclude the illegal recruitment operations: the small number of cases in which this happens confirms, on the other hand, the wide scope of action left to the gangmasters, which adapt and operate by taking into account the differences between Regions, but also in crops, production cycles and the characteristics of workers[80].

Although well known, the *status quo* has not changed with the public investments and regulatory interventions proposed so far[81]. Farmers today

[78] Indeed, it's worth noting noted that the indices of exploitation identified in Article 603 *bis* of the Criminal Code – including "subjection of the worker to degrading working conditions, surveillance methods or housing situations", which the Inl Circular 5 of 2019 has specified is also attributable to the psycho-physical work stress due to the "transport to the workplace carried out with totally inadequate vehicles and exceeding the number of people allowed" – take up those that the ILO has defined, in collaboration with the European Commission, to identify cases of trafficking for labour exploitation (see ILO, *Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children*, 2012; ILO and EC, *Operational of Trafficking of Human Beings*, 2009, UE-ADF, *Severe Labour Exploitition: Workers Moving within or into the European Union: States' Obligations and Victims' Rights*, 2015).

[79] ILO's research on national policies and programmes to combat forced labour has shown that for many European countries, including Italy, the priority is still the initial assistance of foreigners through temporary housing, health care, psychological counselling, while there is a lack of long-term support, such as work inclusion programmes, which would be essential for the reintegration of these people: in this sense, see Corbanese, Rosas, *Decent work and social inclusion*, cit., p. 19 ff.

[80] In Lazio, for example, and particularly in the Agro Pontino area, foreigners working in fruit and vegetable cultivation and flower production are generally Indian workers from the Punjab region who are recruited by fellow countrymen who offer "packages" that include travel, accommodation, residence, and work permits. In Puglia, where the exploitation of workers in agriculture particularly concerns the provinces of Foggia and Bari and the production of fruit and vegetables, the widespread presence of informal settlements, even large ones, means that the gangmasters draw on labour already present in the area. In these terms see, *Participatory analysis of regional and local initiatives on preventing and combating labour exploitation in agriculture. Summary of the final report*, published on 25 January 2021 at the following link: https://www.ilo.org/rome/risorse-informative/articles/WCMS_779037/-lang—it/index.htm.

[81] According to the two Regions mentioned above, in Lazio, law no. 18 of 14 August 2019 (and the subsequent implementing regulation no. 24 of 5 October 2020) was approved, with the

are called upon to recruit a number of workers that no public service can guarantee over time, to the extent and for the periods necessary, as the Gangmasters do[82], and this happens in the agricultural sector for factors that are also known, which have to do with three main reasons: (*a*) the seasonality of agricultural production, which imposes rapid recruitment; (*b*) the wearing nature of the activity, which involves the intervention mostly of foreigners who are easily found only by the gangmasters; (*c*) the distance of the fields from urban centres, which requires workers to live in neighbouring areas and to use means of transport to get to work.

Although the institutional effort and the intervention of private non-profit bodies (for the latter, especially about the protection and assistance of the victims of exploitation) have so far been vast and the recent Three-Year Plan – thanks also to the technical role of ILO – has brought the problems of exploitation in agriculture back to the centre of the debate, a development perspective such as the current one in which the control of compliance with labour standards is left to the intervention *ex post* of Inspectors seems insufficient to meet the needs of the fight against exploitation and, consequently, also to solve the problem of illegal recruitment.

In other words, the dominance of Gangmasters in recruitment and employment of labour in agriculture seems to be also a consequence of the lack of adequate rules to allow a preventive control on the lawfulness of the activities.

The legislative "hypocrisy", to which reference was initially made, lies in the distortion of our legislation, which limits the exercise of intermediation activity to a restricted circuit of mainly public subjects – see Art. 6 Legislative Decree 276/2003 –[83] and, at the same time, allows the recruitment/employ-

provision of Computerised Booking Lists – aimed precisely at encouraging intermediation –, and of Congruity Indices intended to verify the relationship between the quantity and quality of goods and services offered by employers and the quantity of hours worked. Puglia, instead, has recently approved Regional Law no. 29 of 29 June 2018, with which it proposed to promote active labour policies and the fight against undeclared work and gangmaster, defining the functioning of Employment Centres and setting up the Regional Agency for Active Labour Policies (Arpal).

[82] In an adhesive sense, see Faleri, *Il lavoro agricolo*, cit., p. 89, which addresses the thinking of those who believe that gangmasters are entities that generate a benefit for workers and manufacturing firms. In the same sense, with reference to the tomato chain, see Ciconte, Liberti, Spolpati, *La crisi dell'industria del pomodoro tra sfruttamento e insostenibilità*, Third report #FilieraSporca, 2016, p. 16 ff.

[83] And, where it allows private individuals to carry it out for profit (as, for example, in the

ment activities to be provided by private persons without establishing specific rules of preventive control and, in this manner, leaving to Gangmasters a wide space of action.

If one takes into account how our legislation has intervened in liberalising the forms of labour interposition by private individuals, it's important to remind that legislative decree 276 of 2003 allowed outsourced labour without any distinction among economic sectors and this has meant for the agricultural sector – in which the rate of irregular work is higher – (continuing to) leave the control on compliance with labour regulations to subsequent checks by inspectors – who, as mentioned above, manage to do so with very limited frequency.

In this regard, in the light of the confirmations offered by the monitoring and technical cooperation activities carried out by ILO, a useful contribution to combating the problem of illegal recruitment in agriculture could come from "special" rules to strengthen controls, upstream of the establishment of companies, with the constraint for these companies to demonstrate that they can also meet the basic needs (mainly transport and accommodation) of seasonal workers[84].

7. *Going down different roads: more openness to the private sector and more public control to combat exploitation*

In this perspective, a useful inspiration can be derived from the British example of the Gangmasters and Labour Abuse Authority[85], which is a governmental body through which the recruitment of labour is controlled in highly exploitative sectors such as agriculture.

case of staffing agencies), it requires them to meet a series of particularly demanding requirements (high social capital, carrying out the activity in several regions, etc.) or to be accredited under Article 7 of Legislative Decree 276/2003 and according to rules established in a diversified manner at regional level.

[84] On the lack of Employment Centres capable of efficiently recruiting labour, see also PINTO, *cit.*, p. 28.

[85] Considered an example of best practices in ANDREES, NASRI, SWINIARSKI, *Regulating labour recruitment to prevent human trafficking and to foster fair migration: models, challenges and opportunities*, Ilo, 2015, p. 79; on the evolution of the Gangmasters and Labour Abuse Authority see SCHENNER, *The Gangmaster Licensing Authority: An Institution Able to Tackle Labour Exploitation?*, in *EAA*, 2017, p. 357 ff. On labour brokering at a comparative level, see the work commissioned by ILO to ANDREES, NASRI, SWINIARSKI, *cit*.

With a glance to that experience, it could be requested to private individuals interested in recruiting and employing workers to obtain a licence, issued by the public authority, against payment and subject to renewal, after proving some requirements, including the opening of a VAT number, payment of registration fees, prior checking of means of transport and accommodation for workers.

The requirements for such licences would have to be different from those needed to obtain Ministerial Authorisation to carry out Intermediation Services according to Article 5(4) of Legislative Decree No. 276/2003, since the applicants would act as labour contractors, constituting the labour relations with the workforce themselves and, therefore, not being subject to the limitations provided for undertakings that only carry out intermediation activity. However, the licensing system would allow them to be subject to a fruitful preventive control of compliance with the conditions considered essential to protect those working in agriculture, including control over means of transport and the availability of adequate premises for housing workers.

In other words, it would be a question of linking the issuance of licences to certain conditions to which agricultural labour contractors must be subject, but compliance with which would also allow them to protect their economic interests. The existence of a certain regulatory boundary could facilitate the detection of offences by the authorities, dictating the differences between the hypotheses of recruitment and use of labour that are lawful and those that, since they are carried out without a licence – providing regulatory coordination with Article 603 *bis* of the Criminal Code – would flow back among the conduct to be criminally punished.

Secondly, the issuance of licences would allow an effective control – and not only documentary control as is the case today – on one of the requirements for the issuance of the residence contract for subordinate work which, according to art. 5 *bis* of Legislative Decree no. 286 of 25 July 1998, requires the employer who intends to employ a non-EU citizen to give a guarantee "of the availability of accommodation" (art. 5 *bis*).

Regulating recruitment activity through licensing could, among other things, supply a fundamental advantage to the long-standing issue of determining the prices of agricultural products and their fair distribution in the supply chain.

Today, as is well known, the price of agricultural products is strongly influenced by the problems linked to the low negotiation capacity of pro-

ducers who, due to the high perishability of their products, but also to the wide extension of the supply chain and the participation in it of companies with high capital, have extremely reduced negotiation margins and are very often forced to suffer the price imposed by purchasing companies, offloading the effects of their lack of profit on the cost of labour[86]. In this regard, the recent legislative decree no. 198 of 8 November 2021 implemented the European Directive 2019/633 of 17 April 2019[87], and the rules for the validity of sales contracts were thus revised to ensure greater guarantees for producers against unfair practices: among the rules introduced, there is also that of using the average production costs, indicated by ISMEA, as a parameter for the fair definition of the sale price of products[88].

In this context, a licensing system for the employment of labour in agriculture could have positive effects (also) on these negotiation dynamics, if the cost to be paid for the services of recruitment, employment, transport, and accommodation were imposed by law as an item – distinct from the sale price of the products – which the buyer must bear, paying the amount to the producer who has advanced it. In other words, the amount for recruitment and employment services in the sales contract of agricultural products should be written as an obligatory clause to the validity of the contract[89], and the task to find a minimum amount could be left to an *ad hoc* body[90]. This would make the cost of labour in its broadest sense more transparent and easier to decipher and would include those incidental expenses (transport and accommodation, above all) that are motivated by the peculiarities of the sector.

[86] On these issues the literature is extensive; see, for example, Canfora, Leccese, *cit.,* p. 58 ff.; Cornice, Innamorati, Pomponi, *cit.*, p. 12 ff.; Canfora, *La filiera agroalimentare tra politiche europee e disciplina dei rapporti contrattuali: i riflessi sul lavoro in agricoltura*, in *DLRI*, 2018, p. 259 ff.; Senatori, *Filiera agroalimentare, tutela del lavoro agricolo e modelli contrattuali di regolazione collettiva: una geografia negoziale dello sviluppo sostenibile*, in *DLRI*, 2019, p. 593 ff.

[87] For a comment on the implementation of the directive before legislative decree 198 of 2021 see Jannarelli, *cit.*, p. 199 ff.

[88] Article 7(3) of the Decree.

[89] Unless the manufacturer does not already have the workforce to fulfil the contract for the sale of the products.

[90] For example, a joint body – composed of the most representative social partners – could be set up with the task of differentiating the amount of these costs by homogeneous territorial areas and reviewing them at set intervals. Defining the cost of recruitment services in relation to the workers would also encourage regular work, since the farmer, to obtain the largest possible reimbursement from the buyer, would be interested in showing the actual number of workers needed to carry out the activity.

Abstract

In its first part, the paper offers a diachronic examination of the conventions on agricultural labour approved by the International Labour Organization and ratified by Italy. These conventions are examined by considering the changing purposes of the Organization, initially focused (in a mercantilist perspective) on ensuring economic development even for States with a predominantly agricultural vocation and, only later, oriented toward ensuring effective protections for workers.

The second part of the paper deals with more recent implications on the subject. CEACR's Critical Observations on the capacity of Italian legislation to ensure compliance with the standards of Conventions 129 of 1969 and 143 of 1975 are analyzed. Starting with an examination of the recent Plan to Combat Labor Exploitation in Agriculture, some of the causes that facilitate the activities of gangmasters are also highlighted and – drawing from comparative experience – possible solutions to combat them are proposed.

Keywords

International labour law, agricultural labour, ILO conventions, labour exploitation, gangmasters.

Thomas Dullinger

Home office and remote work in Austria

Summary: **1.** Introduction. **2.** Terminology. **3.** Implementing home office. **4.** Work equipment and reimbursement of costs. **5.** Other aspects regarding home office. **6.** Collective agreements regarding home office. **7.** Terminating home office. **8.** Conclusion and evaluation.

1. *Introduction*

Working from home and remote work have been discussed by legal doctrine in Austria since at least the 1990s[1]. Also, working from home and remote work to some degree have been the object of interest in the practice and in a few collective bargaining agreements, to the extent that some specific rules were introduced for this kind of work. However, working from home only became a widespread phenomenon due to COVID-19. With effect from 01.04.2021, Austrian legislation reacted to this development by implementing new provisions regarding "home office"[2]. This essay addresses the most relevant legal aspects of working from home under the old and the new legislative rules, highlighting the achievements and shortcomings of the new legislation.

[1] TROST, *Der Arbeitnehmer in eigener Wohnung*, in *ZAS*, 1991, p. 187.

[2] Federal Act amending the Employment Contract Law Amendment Act, the Labor Constitution Act, the Employee Liability Act, the Labor Inspection Act 1993, the General Social Insurance Act and the Civil Servants' Health and Accident Insurance Act (*Bundesgesetz, mit dem das Arbeitsvertragsrechts-Anpassungsgesetz, das Arbeitsverfassungsgesetz, das Dienstnehmerhaftpflichtgesetz, das Arbeitsinspektionsgesetz 1993, das Allgemeine Sozialversicherungsgesetz und das Beamten-Kranken- und Unfallversicherungsgesetz geändert werden*; BGBl I 61/2021).

2. *Terminology*

Before the implementation of the rules regarding home office, different terms had been used for forms of work where the employee is not present at the employer's facilities, including telework and home office. There was no legally binding definition and those terms ended up meaning different things in different contexts[3].

Since 01.04.2021 there is a statutory definition of "working in a home office". The statutory requirements of home office are that an employee regularly performs services in the home (section 2h paragraph 1 AVRAG[4]). Therefore, three criteria have to be met to qualify the services of an employee as home office: the regularity, the performance of services and the home.

Legislation does not expatiate on the exact meaning of "regularly". In German, (*regelmäßig*), this could mean that there needs to be a minimum extent of home office (e.g. 10 hours per week on average) or that there has to be a specific rhythm/routine (e.g. every Monday and every Friday). However, legal literature suggests that every mode of working from home can be qualified as home office, as long as it is not performed as such only exceptionally[5]. The explanatory notes to the law support this view[6]. From the perspective of tax law, on the other hand, a certain minimum number of days must be spent in the home office for certain benefits to apply (section 16 paragraph 1 number 7a litera a) EStG[7]).

The term "services" refers to all services under the employment contract. Whether the employee is obliged to provide this type of service is not relevant, as long as the employee performs the services to fulfill his or her employment contract[8]. Whether the activity is performed using information and communication technology is not relevant[9].

[3] Felten, *Home-Office und Arbeitsrecht*, in *DRdA,* 2020, p. 512 ff.

[4] Employment Contract Law Amendment Act (*Arbeitsvertragsrechts-Anpassungsgesetz*, BGBl 459/1993).

[5] Gruber-Risak, *Homeoffice-Maßnahmenpaket 2021 (Stand IA 1301/A) - Eine erste Einschätzung der arbeitsrechtlichen Inhalte*, in *CuRe*, 2021/5; Dullinger in Köck, *Der Homeoffice-Kommentar*, Manz Verlag, 2021, § 2h AVRAG, paras. 18 ff.

[6] Initiativantrag 1301/A BlgNR 27. GP p. 5.

[7] Federal Law of July 7, 1988 on the Taxation of the Income of Individuals (*Bundesgesetz vom 7. Juli 1988 über die Besteuerung des Einkommens natürlicher Personen*, BGBl 400/1988).

[8] Dullinger in Köck, *Der Homeoffice-Kommentar*, cit., § 2h AVRAG, para. 22.

[9] Initiativantrag 1301/A BlgNR 27. GP p. 4.

"Home" means the apartment or house where the employee lives, including a balcony or garden and the cellar or the garage[10]. The apartment or house of the partner or a close relative is covered too. However, this does not include, for example, working from a cafe, on a train, or from a coworking space[11]. Although this distinction is widely challenged in legal literature[12], it clearly conveys the legislation intention[13].

Forms of work where the employee is not present at the employer's facilities and does not regularly perform services in the home are not covered by the latest legislation and are defined as remote work in the following sections.

3. *Implementing home office*

The implementation of home office primarily concerns the place of work. According to general rules, the place of work is either specified in the employment contract or results from usage and circumstances of the employment contract[14]. In case of doubts, the work shall be performed at the employer's premises[15].

In Austria, employment contracts typically explicit the place of work. It is usually also agreed upon that the employer can modify this place of work unilaterally (at least to some extent). According to the prevailing interpretation, however, such a general transfer clause does not permit the unilateral implementation of home office[16]. It cannot be assumed that the employee, by agreeing upon such a general clause, intended to allow the employer the right to dispose over his/her living space. This would require a special agreement, although part of the literature even considers such an

[10] Dullinger, in Köck, *Der Homeoffice-Kommentar,* cit., § 2h AVRAG, para. 27.

[11] Initiativantrag 1301/A BlgNR 27. GP p. 4.

[12] Körber-Risak, *Home-Office als neue Arbeitsform*, in Körber-Risak, *Praxishandbuch Home-Office*, 2021, p. 9.

[13] Initiativantrag 1301/A BlgNR 27. GP p. 4; Felten, *"Mobile" Arbeit - eine arbeitsrechtliche Annäherung*, in *DRdA*, 2022, p. 163.

[14] Kietaibl, Rebhahn in Neumayr, Reissner, *Zeller Kommentar zum Arbeitsrecht*, Manz Verlag, 2018, § 1153 ABGB para. 22.

[15] OGH 16.9.1987, 9 ObA 92/87.

[16] Bartmann, Ondrejka, *Home-Office in Zeiten von COVID-19*, in *ZAS*, 2020, p. 165; Felten, *Home-Office und Arbeitsrecht*, cit., p. 516.

agreement to be inadmissible[17]. Other parts of the legal literature tend to allow such agreements in principle, provided that such a provision is appropriate for the employee in the specific individual case[18].

When COVID-19 started to spread in Austria, one part of legal literature argued, therefore, that an obligation to work from home under certain circumstances follows, as a matter of fact, from the employee's accessory contractual obligations (*Treuepflicht*)[19]. In emergency situations, employees are in fact obliged to provide services that they would not be obliged to provide under normal circumstances[20]. Since then, however, what was supposed to be a temporary answer to this crisis, became a permanent *status quo* in many sectors, which can by no means be based on the duty of loyalty. The other part of legal literature argues that the unilateral implementation of home office was unlawful even at the beginning of the crisis[21].

The newly adopted section 2h paragraph 2 AVRAG stipulates that home office can only be implemented upon a mutual agreement between the employer and the employee. Therefore, there is neither a statutory right to work from home, nor an obligation to work from home. The parties to the employment contract also cannot agree that the employer has the right to unilaterally order home office[22].

According to the explicit wording of section 2 paragraph 2 AVRAG, the agreement has to be in writing. However, an oral agreement or an agreement by conduct is still valid and there is no direct sanction for its absence[23]. Nevertheless, it could be that some uncertainties regarding the exact content of the agreement are to be borne by the employer, if he or she fails to comply with the requirement that the agreement is in writing[24].

This provision is not applicable to remote work; nevertheless the general

[17] Felten, *Home-Office und Arbeitsrecht*, cit., p. 518.

[18] Auer-Mayer in Köck, *Der Homeoffice-Kommentar*, cit., § 2h AVRAG, paras. 118 ff; Dullinger, *Vertragsgestaltung bei der Einführung und Ausgestaltung von Homeoffice*, in *ZAS*, 2021, p. 189.

[19] Friedrich, *Entgeltfortzahlung nach § 1155 ABGB und COVID-19*, in *ZAS*, 2020, p. 157 ff; Eichmeyer, Egger, *Ausgewählte Praxisrechtsfragen zum Homeoffice,* in *RdW*, 2020, p. 849.

[20] OGH 20.4.1994, 9 ObA 23/94; Kietaibl, Rebhahn in Neumayr, Reissner, *Zeller Kommentar zum Arbeitsrecht*, cit., § 1153 ABGB, para. 38.

[21] Felten, *Home-Office und Arbeitsrecht*, cit., p. 516 ff.

[22] Dullinger, *Vertragsgestaltung bei der Einführung,* cit., p. 189; Auer-Mayer in Köck, *Der Homeoffice-Kommentar*, cit., § 2h AVRAG, paras. 120 ff.

[23] Initiativantrag 1301/A BlgNR 27. GP p. 4.

[24] Auer-Mayer, in Köck, *Der Homeoffice-Kommentar,* cit., § 2h AVRAG, para. 112.

rules of contract law in most cases lead to the same result. The most significant difference is probably that the contracting parties may in principle also establish a right of the employer to issue an instruction to work remotely.

4. *Work equipment and reimbursement of costs*

Once home office is successfully implemented, the first question that arises is that of cost bearing. Who has to provide the necessary equipment and who has to bear the costs associated with home office?

According to general rules, the employer has to provide all the necessary equipment and has to pay for it[25]. However, the parties to the employment contract can agree otherwise. Therefore, it is possible that the employee has to provide the necessary equipment or parts thereof (e.g. a table and a chair or an internet connection)[26]. It is still not clear to what extent the costs can be passed on to the employee. However, there are good reasons to believe that, at least additional costs actually incurred, cannot be passed on to the employee in most cases. However, if the home office work is in the sole or predominant interest of the employee, it may be possible to further limit the employer's obligation to reimbursement of expenses[27].

With regard to digital work equipment, the newly adopted section 2h paragraph 3 AVRAG strengthened the rights of employees. If the parties agree on home office, the employer has to provide all necessary digital work equipment (e.g. a notebook, a smart phone or an internet connection). If the parties agree that the employee shall use his or her own equipment, the employer has to reimburse the corresponding costs. The costs may also be borne by means of an appropriate[28] lump sum. Deviations from this rule are only permitted if they are more favourable for the employee. A limitation of the reimbursement entitlement is therefore in general not possible.

[25] Windisch-Graetz, *Arbeitsrecht II*, new academic press, 2020, p. 67; Risak, *Home Office I - Arbeitsrecht - Vertragsgestaltung, Arbeitszeit und ArbeitnehmerInnenschutz*, in *ZAS*, 2016, p. 206; Eichmeyer, Egger, *Ausgewählte Praxisrechtsfragen zum Homeoffice*, in *RdW*, 2020, p. 851.

[26] Haider in Kozak, *ABGB und Arbeitsrecht*, ÖGB Verlag, 2019, §§ 1014–1016 ABGB, para. 24.

[27] Dullinger, *Vertragsgestaltung bei der Einführung,* cit., p. 191.

[28] Gruber-Risak, *Homeoffice-Maßnahmenpaket 2021 (Stand IA 1301/A) - Eine erste Einschätzung der arbeitsrechtlichen Inhalte*, cit.

In respect of non-digital work equipment, the general rule mentioned above is still relevant. The same is true for all forms of work equipment in the case of remote work.

5. *Other aspects regarding home office*

Several other legal aspects were discussed in relation to home office, and some of them were addressed by the newest legislative measures.

If an employee unintentionally causes damage to the employer while working, the compensation for damages can be reduced or omitted (section 2 paragraph 1 DHG[29]). There is no reason why this should not be the case for damages occurring while working from home[30]. However, it was unclear whether or how this privilege could be extended to other persons living with the employee (e.g. a spouse or kids) if, for example, they should damage the employer's work equipment. New legislation (section 2 paragraph 4 DHG) stipulates that this privilege also covers persons living in the same household as the employee who cause damage to the employer in relation to the work performed in the home office (in the sense of section 2h paragraph 1 AVRAG). However, due to the somewhat ambiguous wording and omitted clarifications, the scope of this privilege is unclear in detail[31].

Similar questions arise concerning occupational accidents. Occupational accidents are accidents that occur in a local, temporal and causal connection with the employment (section 175 paragraph 1 ASVG[32]). Because of some older decisions of the Supreme Court, it was unclear how far the protection against occupational accidents in the home office reaches[33]. Therefore section 175 paragraph 1a ASVG now expressly states that accidents occurring during home office are protected as well. Recently, the Supreme Court also recog-

[29] Federal Act of March 31, 1965 on the Limitation of Liability for Damages owed by Employees (*Bundesgesetz vom 31. März 1965 über die Beschränkung der Schadenersatzpflicht der Dienstnehmer*, BGBl 80/1965).

[30] Brodil in Köck, *Der Homeoffice-Kommentar*, cit., § 2 DHG, paras. 5, 17; *Brodil*, *Home Office II - Haftung bei entgrenzter Arbeit*, in *ZAS*, 2016, p. 210 ff.

[31] Brodil in Köck, *Der Homeoffice-Kommentar*, cit., § 2 DHG, paras. 19 ff.

[32] Federal Law of September 9, 1955 regarding General Social Security (*Bundesgesetz vom 9. September 1955 über die Allgemeine Sozialversicherung*, BGBl 189/1955).

[33] Brodil, *Neue Arbeitsformen und Unfallversicherung - Versicherungsschutz bei entgrenzter Arbeit*, in *ZAS*, 2019, p. 14 ff.

nised a social security protection under the general provision as a general rule[34]. However, the precise distinction between an occupational accident and a non-protected accident remains difficult in cases regarding home office[35]. The same is true for remote work[36].

There is a dispute in the literature as to whether the provisions on occupational health and safety (especially the ASchG[37]) must be complied with in the home office. The legislation only comments on this matter in the explanatory notes to the new law[38], but it makes no legally binding decision. The legislator regulated only one specific aspect: the control bodies of the labour inspectorate are not entitled to enter the home of an employee working in home office (section 4 paragraph 10 ArbIG[39]). In literature, the view prevails that the provisions of the ASchG are generally not applicable in the home office. Only in the case the employer designs the workplace by himself/herself do some of the provisions apply[40]. However, there is a growing number of voices in recent literature arguing that at least the general provisions of the ASchG apply to work in the home office as well[41]. A key argument in favour of this view is the interpretation of the scope of the ASchG in accordance with Directive 89/391/EEC[42-43].

It is largely undisputed, though, that the regulations regarding working time apply to home office. Therefore, both the maximum daily working time limits and the minimum rest periods must be observed. The same is true for

[34] OGH 27.4.2021, 10 ObS 15/21k.

[35] Brodil in Köck, *Der Homeoffice-Kommentar*, cit., § 2 DHG, paras. 35 ff.

[36] Brodil in Köck, *Der Homeoffice-Kommentar*, cit., § 2 DHG, paras. 59 ff.

[37] Federal Law on Safety and Health at Work (*Bundesgesetz über Sicherheit und Gesundheitsschutz bei der Arbeit*, BGBl 450/1994).

[38] Initiativantrag 1301/A BlgNR 27. GP p. 4.

[39] Federal law on labor inspection (*Bundesgesetz über die Arbeitsinspektion*, BGBl 27/1993).

[40] Bartmann, Ondrejka, *Home-Office in Zeiten von COVID-19*, cit., p. 164; Köck, Prasser, *Checkliste: Home-Office-Vereinbarung*, in *ZAS*, 2016, p. 247; Risak, *Home Office I - Arbeitsrecht - Vertragsgestaltung, Arbeitszeit und ArbeitnehmerInnenschutz*, cit., p. 208 ff. See also Gruber, *Arbeitnehmerschutz bei Teleheimarbeit*, in *ZAS*, 1998, p. 67 ff.; Trost, *Der Arbeitnehmer in eigener Wohnung*, cit., p. 184.

[41] Stinauer, *Arbeitnehmerinnenschutz im Home-Office*, in Körber-Risak, *Praxishandbuch Home-Office*, 2021, p. 83 ff; Felten, *Home-Office und Arbeitsrecht*, cit., p. 520 ff; Dullinger, *Vertragsgestaltung bei der Einführung*, cit., p. 191 ff.

[42] Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183/1989, p. 1.

[43] Dullinger, *Vertragsgestaltung bei der Einführung*, cit., p. 191 ff.

weekend rest and national holidays[44]. According to the general rules, working time records must also be kept in the home office (section 26 AZG[45]). The beginning and end of the working time must be clearly documented in this record. According to section 26 paragraph 3 AZG, however, only the duration of daily working time must be recorded for employees who perform their work predominantly from their home. Since the ECJ, based on the Working Time Directive[46], stipulates an obligation to keep detailed records of daily working time[47] and since it is not possible to check whether the minimum rest periods have been observed using this form of recording – since it is not evident when the work began and when it ended – this option is not compatible with EU law[48].

Finally, there is a substantial debate about data protection in the home office. On the one hand this concerns the safety of the employer's data, on the other hand it concerns the processing of employee data. Again, there are no specific legal provisions on the matter[49].

6. *Collective agreements regarding home office*

In Austria, there are two different types of collective agreements. On the one hand there are collective bargaining agreements (*Kollektivverträge*), on the other hand there are works agreements (*Betriebsvereinbarungen*). While the former typically cover entire industrial sectors, the latter are applicable at the level of the individual company or plant[50]. Neither a collective bargaining agreement, nor a works agreement is necessary to implement home office.

Prior to the aforementioned legal changes, collective bargaining

[44] Bartmann in Köck, *Der Homeoffice-Kommentar*, cit., 2. Teil, paras. 2 ff.

[45] Federal Law of December 11, 1969 on the Regulation of Working Hours (*Bundesgesetz vom 11. Dezember 1969 über die Regelung der Arbeitszeit*, BGBl 461/1969).

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

[47] ECJ 14.5.2019, C-55/18, *CCOO* paras. 40 ff.

[48] Mazal, *Neue Arbeitszeitaufzeichnung: Wahrheit statt Schönung - Konsequenzen auch für Home-Office*, in *ecolex*, 2019, p. 657 ff.

[49] Leissle, Terharen in Köck, *Der Homeoffice-Kommentar*, cit., 4. Teil, paras. 1 ff.

[50] Kietaibl, *Arbeitsrecht I*, new academic press, 2020, p. 196 ff, 262 ff.

agreements could already contain comprehensive provisions on home office[51]. In practice, however, this was only the case in a few sectors and the stipulated rules in most cases were rather general[52]. Whether and to what extent works agreements could contain regulations on home office was controversial. However, it is relatively certain that at least some aspects of home office could be regulated by company agreement (for example aspects of working time and the use of the employer's equipment taken home)[53].

These uncertainties have been largely eliminated by the legislator. Pursuant to section 97 paragraph 1 number 27 ArbVG[54], the works agreement may now regulate the general conditions of the home office. This section includes, in particular, regulations regarding the necessary equipment and the bearing of the corresponding costs[55]. More detailed specifications regarding the place of work and modifications to working hours are also possible. Finally, it is also possible to specify occupational health and safety, data protection and the protection of equipment by means of a works agreement. However, an agreement that directly regulates remuneration would be inadmissible[56]. An obligation on the part of the employee to work from home would also not be permissible, because this would conflict with the principle of voluntary participation set forth in section 2h paragraph 2 AVRAG[57]. Whether a right to home office for the employee can be part of a works agreement is, yet, disputed[58].

[51] Felten, *Home-Office und Arbeitsrecht*, cit., p. 513 ff.

[52] Felten, *Home-Office und Arbeitsrecht*, cit., p. 513.

[53] Gruber-Risak, *Homeoffice-Maßnahmenpaket 2021 (Stand IA 1301/A) - Eine erste Einschätzung der arbeitsrechtlichen Inhalte*, cit.; Dullinger in Köck, *Der Homeoffice-Kommentar*, cit., § 97 ArbVG, paras. 14 ff; Felten, *Home-Office und Arbeitsrecht*, cit., p. 514 ff.

[54] Federal Law of December 14, 1973 concerning the Labor Constitution (*Bundesgesetz vom 14. Dezember 1973 betreffend die Arbeitsverfassung*, BGBl 22/1974).

[55] Initiativantrag 1301/A BlgNR 27. GP p. 5.

[56] Dullinger in Köck, *Der Homeoffice-Kommentar*, cit., § 97 ArbVG, paras. 5 ff.

[57] Auer-Mayer, in Köck, *Der Homeoffice-Kommentar*, cit., § 2h AVRAG, paras. 122 ff.

[58] Against this possibility: Gerhartl, *Gesetzliche Regelung des Homeoffice - Arbeitsrechtliche Aspekte der Neuregelung*, in *ASoK*, 2021, p. 164. In favor of this possibility: Auer-Mayer, in Köck, *Der Homeoffice-Kommentar*, cit., § 2h AVRAG, para. 125.

7. *Terminating home office*

According to general rules, an agreement regarding home office, which is an integral part of the employment contract, cannot be unilaterally terminated or cancelled by one of the two parties. This would only be the case if the agreement contained a reservation of the right to change or revoke the agreement[59].

However, the newly created provisions regarding home office provide for a deviation from this principle: according to section 2h paragraph 4 AVRAG, an agreement on home office may be terminated by either party to the employment contract for good cause by giving one month's notice on the last day of a calendar month. The agreement may also be concluded for a fixed term or contain termination provisions. This provision is noteworthy for two reasons. On the one hand, it provides for the possibility of terminating only a part of the employment contract, which is not possible under the general rules of Austrian labor law. On the other hand, it combines termination for good cause with a notice period and a termination date, which is inconsistent with Austrian labor law[60]. This particularity causes serious problems. There are situations in which at least one party cannot be expected to continue with the home office arrangement even on a temporary basis. And, yet, the wording of the law, which is clear in this respect, also requires compliance with the notice period and the termination date in these cases. The affected party to the employment contract, then, has no other option than to seek agreement with the other party or to terminate the entire contract in order to overcome this situation.

This problem can be somewhat mitigated by clever contract design. The parties to the employment contract are free to agree upon regulations regarding termination. However, the details about the extent of individual freedom are not clear. For example, it is not manifest whether a termination option can be created without a notice period and without a date, and whether a termination option can be created that is only open to the employer, but not to the employee[61].

However, problems will arise in practice for other reasons as well. When

[59] Reissner in Neumayr/Reissner, *Zeller Kommentar*, cit., § 20 AngG, paras. 96 ff.
[60] Auer-Mayer, in Köck, *Der Homeoffice-Kommentar*, cit., paras. 180 ff.
[61] Dullinger, *Vertragsgestaltung bei der Einführung*, cit., p. 193 ff.

this new regulation came into force, home office was practiced in many companies in Austria due to the pandemic, without the legal basis for this being clear. However, the new regulations also apply to these agreements. Employers in particular, however, generally speaking, will not be eager to establish a home office option that cannot be terminated without good reason. These cases can only be solved by assuming a conclusive fixed term depending on the pandemic situation.

8. *Conclusion and evaluation*

Some legal aspects of the home office can be solved with already existing general regulations, although these results are not always in line with reality. A perfect example of this is the unilateral instruction to work from home. The awareness of the unlawfulness of these directions was probably not particularly well developed. Other legal aspects of the home office could also be solved with existing law, but under the old legislation there used to be room to weaken the corresponding standard of protection under the agreement. Although this possibility was subject to legal constraints, in practice it could be overused by many employers due to the existing legal uncertainty. The perfect example for this is bearing of costs. Other problems could not be solved adequately on the basis of the old legislation, such as the liability of the employee's relatives for damage to equipment.

The introduction of specific regulations for the home office is, therefore, in principle to be welcomed and has the merit of having to deal with the matter of homeoffice in the light of a changed socio-economic scenario. However, the details are problematic. This starts with the fact that new regulations have led to the creation of new differentiations. Above all, the differentiation between home office and remote work, that raises not only practical, but also constitutional problems. It is questionable, whether a justification can be found for this different treatment of otherwise comparable situations or whether there is a violation of the fundamental right to equal treatment (Article 7 paragraph 1 B-VG[62]) here[63]. The same is true, *mutatis mutandis*, for the distinction between digital and non-digital work equipment.

[62] Federal Constitutional Act (*Bundes-Verfassungsgesetz*, BGBl 1/1930).

[63] DULLINGER in KÖCK, *Der Homeoffice-Kommentar*, cit., § 2h AVRAG, paras. 37 ff.

Another major point of criticism is the fact that the legislator did not explicitly address problems that it should have or even did recognize. In particular, the applicability of the ASchG for the home office should have been clarified by law, as this issue has a direct and far-reaching impact on the work performed in the home office.

Finally, new regulations were created that are inconsistent with the existing legal system. These rules may have pursued legitimate objectives, but, in doing so, they neglected other legitimate concerns. This creates legal uncertainty and the potential for inappropriate outcomes in individual cases.

Abstract

Working from home and remote work have been discussed by legal doctrine in Austria since at least the 1990s. Also, working from home and remote work to some degree have been the object of interest in the practice and in a few collective bargaining agreements, to the extent that some specific rules were introduced for this kind of work. However, working from home only became a widespread phenomenon due to COVID-19. With effect from 01.04.2021, Austrian legislation reacted to this development by implementing new provisions regarding "home office". This essay addresses the most relevant legal aspects of working from home under the old and the new legislative rules, highlighting the achievements and shortcomings of the new legislation.

Keywords

Remote work, home office, reimbursement of work costs, risks for employer and employee, legal uncertainty.

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Telework in Portugal

Summary: **1.** Introduction. **2.** The new legal framework. **3.** Telework and collective agreements. **4.** Conclusion.

1. *Introduction*

The world is currently going through unique times of great uncertainty, experiencing one of the most turbulent periods in world history.

We are witnessing major changes at various levels that lead to confinement, quarantine, social distancing and a change in people' behaviour. Given this situation, countries had to adopt measures – and Portugal made no exception – to emphasise the role of digital technologies-based labour and, thus, telework in the modality of telework from home.

"Going to work" usually means that a worker will physically head to a production unit (the factory, the shop, the office, the bank) owned and managed by someone else, where the worker will spend a few hours a day, fulfilling the obligations arising from the respective contract. In fact, the provision of work typically takes place within a company, where the worker's activity is coordinated with that of his colleagues and where the employer's powers of management, supervision and discipline are exercised. By working in a company that belongs to someone else, the worker is fully aware that he/she is in a professional space-time, a space-time of hetero-availability, which ends when, at the end of the working day, the worker leaves the company and returns home, to his/her own space-time of self-availability, privacy and intimacy.

However, this is not always the case. In fact, more and more workers are providing their activity outside the company, including from their own home. And this phenomenon has progressively been intensified in the post-industrial societies in which we live (the so-called "information society") – marked by strong scientific and technological progress – through the so-called telework. It is often referred to as a virtual society.

Right now, in the era of pandemic, more and more people is working from home, is teleworking. And Portugal was not an exception in this scenario.

Telework is regulated under the Labour Code as an atypical and marginal Labour Law contractual modality, and is distinguished from the typical work, which implies a delimited space-time, located somewhere else outside one's home[1]. This new modality started to be used in all activities and functions compatible with it as a strategy to face the spread of Covid-19 virus, and as a way to prevent contagion. It became the new normal for many employees.

In fact, 2020 was the year of the big remote work shift and Covid-19 pandemic marked a before and an after for Remote Work.

The adoption of remote work had been already growing at a fast pace in the last few years and the Covid pandemic lockdown restrictions worldwide ended up highly accelerating its adoption via "work from home" policies set forth in record time across companies of all types and industries all over the world.

We think that, although many people will return to the workplace as economies will reopen, several employers share the idea that hybrid models of remote work for some employees can continue to apply.

The virus has disrupted cultural and technological barriers that prevented remote work from spreading in the past, thus setting in motion a structural shift in where work takes place, at least for some people.

The experience of these last months of widespread practice of telework has shown that Portuguese law, which already contained very relevant principles on this matter, needed to be reviewed and strenghtened, drawing some

[1] In 2014, according to data from *Green Book of the Employment Market* of the Portuguese Ministry of Labour (Dray et al., *Livro Verde sobre as Relações Laborais*, Gabinete de Estratégia e Planejamento do Ministério do Trabalho, Solidariedade e Segurança Social, 2016), only 0,05% of the Portuguese population was working under the telework regime, which compares with the EU average of 8%.

lessons from the pandemic. And this is precisely what the legislator did with Law 83/2021 of 6th December, which came into force on 1st January 2022. Based on our personal opinion, that was a good option, since we have always maintained that the time for change was now. We do not think that this is a biased vision of reality, because if it is true that telework got accentuated in a time of pandemic, it is also true that it is deemed to stay relevant, although in different ways in the future. Therefore, it is clear that the main challenge is to increase the existing advantages of telework and reduce its disadvantages. And we think that this Law is a good way to go in this direction.

The Portuguese legal regime on telework changed under many aspects. This Law introduces several changes in telework regime, in the form of amendments and additions to the Labour Code, as well as to Law 98/2009 of 4th September – the law that regulates accidents at work and occupational illnesses.

The major issues raised in Portugal by the fruitful experience of compulsory telework during the pandemic can, in our view, be condensed around the following topics, which constituted the different challenges for the legislator and that were dealt with in Law 83/2021 of 6th December:

i) Solving problems of a conceptual nature, namely regarding the definition of telework within the broader framework of distance work. Teleworking seems to be profiled as one of the possible types of distance work (teleworking = distance work + ICT) and, within teleworking, its provision from the worker's home is the most common type, but not the only one;

ii) Clarifying the possible sources of telework, by reiterating that, in principle, it requires the mutual agreement between the parties, without prejudice to the fact that there are cases in which the law recognises the right of the worker to telework, namely in the context of parenthood. On the contrary, under no circumstances may telework be imposed by the employer to the worker, supposedly based on his/her management powers;

iii) Densifying and clarifying the limits of the employer's powers of control and surveillance in comparison with the protection of teleworker's privacy. The employment contract is, as we know, a contract featured by the legal subordination of the worker in relation to the employer, who has the power to direct, supervise and control the way in which he/she carries out his/her work; but the law, at the same time, protects the privacy of the teleworker, which raises several questions, starting with the extent and intensity of the employer's control in home teleworking. The home is our space of

greatest privacy and intimacy, being, at the same time, the workplace for many teleworkers. In this context, what type of control and monitoring of the worker may be carried out by the employer? Will it be admissible, for example, to impose on the teleworker to keep the video camera permanently on? According to the National Commission for Data Protection, in a guideline issued right upon the outbreak of pandemic, the answer is no. But the questions, in this regard, are numerous and complex, lacking some specific regulatory framework;

iv) Reviewing the regime of visits to the workplace, when this coincides with the teleworker's home. According to the current law, the visit of the employer must only have the purpose of controlling the work activity and the work tools and may only take place between 9 a.m. and 7 p.m., with the assistance of the employee or of a person appointed by him/her. There are, however, several bills under discussion in the Portuguese parliament, some of which require, in all cases, the indispensable agreement of the employee for this purpose; others allow, in the absence of an agreement, the employer's visit, but only provided that a specific minimum notice period is observed. There are also proposals concerning the inspection of working conditions by the Labour Inspectorate, establishing that inspection actions, which imply visits to the home of the teleworker, must be carried out within the period of 9 to 19 hours, within working hours and with a minimum of 24 hours' notice to the worker;

v) Addressing the issue of the relationship between working time and life time. In fact, teleworking and time have an ambivalent relationship: indeed, does this represent an advantage or a disadvantage of teleworking? Does telework promote and facilitate the conciliation between professional life and the worker's personal and family life? Or, on the contrary, does telework promote confusion between these two parts of the life of a person (especially a woman) who works from home, causing harmful effects? According to the current Labour Code, the teleworker enjoys the same rights and duties as other workers, namely as regards the limits of normal working hours, but the teleworker may be exempted from specific working constraints. The doubt arises as to whether, in telework, people is not working even more. And the challenge of the "right to disconnection" loudly comes back to the fore;

vi) Clarifying the meaning and extent of the principle of equal treatment between teleworkers and presential workers, namely in issues such as

work accidents or the payment or non-payment to the teleworker of certain capital conferement of a non wage-based nature, such as meal or food subsidy;

vii) Regarding the work tools: who has to own them and who is paying for the expenses? According to Portuguese law, the individual telework contract shall specify the ownership of the work tools, as well as who is responsible for their installation and maintenance and for paying the inherent expenses of consumption and use. In the absence of such stipulation in the contract, it shall be presumed that the work tools belong to the employer, who must ensure their installation and pay for the related expenses of use and maintenance. However, this supplementary rule, leaving the matter at the parties' free discretion, has been the object of many criticisms (between the strong and the weak, may this freedom oppress?), requiring a review by the legislator and by collective bargaining, in the sense that teleworking costs must be fully borne by the employer (after all, who's the beneficiary of the work developed, the one who profits from paid teleworking). There are even proposals going in the direction of legally establishing a minimum monthly amount to be paid, compulsorily, by the employer, as compensation for expenses;

viii) Seeking to mitigate the condition of isolation of the teleworker, one of the most serious inconvenience of telework. Indeed, facing the dystopia of a viral world, of human distancing, of virtual relationships, of loneliness, what solidarity is left? Home teleworking reinforces the tendency towards individualisation of the employment relationship, weakens the mesh that binds workers together and constitutes a further, particularly complex, challenge for the structures of collective representation of workers – after all, labour law is a product of solidarity and the solitary man tends to be less keen to solidarity[2]...

2. *The new legal framework*

Changes related to the notion of telework, as made under article 165, providing that, in order for telework to be considered as such, the employer

[2] For more developments, see Leal Amado, Coelho Moreira, *O regime jurídico do contrato de teletrabalho subordinado no ordenamento português*, in *LTR*, 85, 12, 2022, and Coelho Moreira, *Teletrabalho em tempos de pandemia: algumas questões*, in *RIDT*, I, 1, 2021.

is not entitled to predetermine the place where it will be exercised. And the new rules also explicitly recognise mixed or hybrid work arrangements to be considered as telework.

Likewise, with the new regime, some parts of the legal framework under article 165, no. 2, are applicable to workers and not only to employees, where there is not legal subordination but economic dependency.

On the other hand, while telework can improve employees' quality of life, it can also constitute a constraint for both the employee or the employer. It is thus crucial that, outside exceptional circumstances such as the Covid-19 lockdowns, telework remains of a voluntary and reversible nature and cannot be forced upon the employee. This was reinforced under articles 166 and 167, which sets forth that teleworking agreements must be fixed in writing, either as a part of the employment contract or as a separate agreement and the duration of the agreements may be indefinite or having a fixed term of up to six months, automatically renewed for the same period. Before these amendments were introduced, agreements required for a fixed duration of up to three years.

The minimum notice period by either party to terminate a fixed agreement is 15 days prior to the end of the term and 60 days for indefinite agreements.

It shall also be noted that, according to article 166, no. 6, in cases in which the proposal is made upon employer's initiative, the employee can challenge it, without the need to justify it, and his/her refusal cannot constitute a ground for the imposition of any sanction, including dismissal.

If the proposal comes from the employee, the employer may also refuse it in some cases, and must do so in writing, by reporting the grounds for refusal. However, according to article 166-A, there are cases where the employer cannot reject the employees' request and those cases – where there is a unilateral right to telework – have also been expanded when compared to the previous regime. Before the introduction of these changes, this possibility existed for employees who were victims of domestic violence or with children under the age of three. Now it was broadened to include employees with children aged between three and eight, provided the company has 10 or more employees and the claimant meets further family status conditions. It is applicable if both parents meet the conditions for telework, by fulfilling other requirements, more precisely they shall exercise this right in sequential periods of equal time and

within a maximum timeframe of 12 months, which means that both parents cannot benefit of the telework at the same time. It is also valid for single-parent families or cases where only one parent meets the conditions for telework. And also, in some cases, for carers, pursuant to number 5 of this article.

All the above appears as being in line with Directive (EU) 2019/1158 of the European Parliament and of the Council from 20th June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

Of course, these last cases are related to work-life balance. Indeed, if telework can make it easier to balance work and private life and reduce the costs of commuting, it can also lead to the blurring of professional and private life, making very difficult to guarantee this conciliation[3].

On the other hand, it can also lead to an increase in the number of hours actually worked and in the intensity of work, along with difficulties in disconnecting from work, thus causing detrimental effects on family time[4].

One of the biggest issues, as previously mentioned, is related to costs and to who pays for the expenses.

In fact, telework raises the issue of the availability and costs of both hardware and software needed for the workers to perform their tasks. It can also stress unequal access to efficient communication networks and can imply additional costs for telework. This all urges for greater clarification about how employers can contribute to expenses linked to working from home. This is precisely what article 168 tried to deal with, though leaving space to several questions that can only be solved by case law and also by collective

[3] See European Economic and Social Committee, *Teleworking and gender equality - conditions so that teleworking does not exacerbate the unequal distribution of unpaid care and domestic work between women and men and for it to be an engine for promoting gender equality*, 2021, and EIGE, *Gender equality and the socio-economic impact of the COVID-19 pandemic*, 2021.

[4] Like the European Parliament stated in *Flash Eurobarometer 2022:Women in times of Covid-19*, the share of women agreeing that because of the pandemic's impact on the job market, they could do less paid work (meaning less work for a salary or wage) than they wanted to, is largest in Portugal – 42%. It is also important to highlight that women in Portugal – 36% – are the most likely to find that school and childcare closures and the need for home-schooling / caring for children at home had a major negative impact on their mental health. And also in all EU "Four in ten respondents (38%) say the pandemic has also had a negative impact on women's income, as well as on their work-life balance (44%) and on the amount of time they allocate to paid work (21%)". Available online: https://data.europa.eu/data/datasets/s2712_null_eng?locale=en.

agreements. We think that in many of these cases collective bargaining can play a major role by setting the rules of collective agreements.

However, we also think that the legislator should have been clearer on this because this article paves the way to several practical problems. It provides that the teleworking agreement should decide who shall acquire the equipment and systems necessary for the performance of the work in this regime and for the interaction between the employee and the employer. Additional documented expenses incurred by the employee as a result of teleworking – which include increased energy and internet costs – should be paid by the employer. These additional expenses may be calculated by comparison with the employee expenses in the same month of the previous year, to the application of this agreement, and are considered, for tax purposes, as costs of the employer and not as income of the employee.

The question that immediately arises is what are the "additional expenses" that can be documented? How can we document them? Simply by comparison with the same month of the previous year? And what if the year in object was a year of pandemic like 2021? Would the costs be the same? It seems to us that the legislator forgot to consider this scenario.

In many cases applying this comparison can lead to the increase in costs being residual or null. And there will be cases in which the calculation will be even more difficult, for example in the case of two or more workers from different companies, teleworking.

Employees engaged in telework should have equal access to training and continuing professional development and the same opportunities for promotion and professional advancement.

It is vital, that equal pay and treatment are guaranteed, and there should be no difference in terms of wages or contracts between those teleworking and those working physically in the office, nor prejudice when it comes to promotion of workers.

This principle of equality between teleworkers and employees is set forth under art. 169, establishing that they have the same rights and duties of the other employees with the same category or performing an identical activity, including training, career promotion, limits on working time, rest periods, paid leave, health and safety protection at work, compensation for accidents at work and occupational illnesses, and access to information from workers' representative structures.

We shall also not forget that freedom of association and collective bar-

gaining rights are fundamental and must be guaranteed also in a remote work setting – including employers putting all tools at the trade unions' disposal to be able to organise and communicate with workers also in this working mode.

Bearing this in mind, art. 465, no. 2, recognises the right to the workers' representative structures to post, in a place made available on the company's internal portal, notices, communications, information or other texts relating to trade union life and to the socio-professional interests of workers, as well as proceed to circulate them via an electronic mailing list to all employees in teleworking regime[5-6].

Very welcomed, at least in our view, is one of the biggest changes introduced by the law and related to the right to privacy, especially if telework is performed from home[7]. Besides, because it is performed mainly via ICTs, telework brings new challenges in terms of data protection. Remote working may imply the use of monitoring and tracking systems which breach the employee's privacy and liberty. The use of surveillance tools to monitor remote workers and store their data can create excessive control. This is the reason why art. 170 is so important. It establishes the right to privacy and, specifically, it forbids the capture and use of images, sound, writing and the computers' history. Also, it strengthens the principle of transparency and pro-

[5] This is very important because as noted by the European Economic and Social Committee "the EESC takes the view that the concept of equal treatment among comparable workers in the same company applies to conditions for health and safety at work, to organising work in such a way as to ensure that the workload is comparable and to the right for trade unions/workers' representatives to access the place where telework is carried out within the limits set by national laws and collective bargaining agreements". European Economic and Social Committee, *Challenges of teleworking: organisation of working time, work-life balance and the right to disconnect*, 2021, p. 10.

[6] This is also pointed out in the *European Social Partners Framework Agreement on Digitalisation* "Providing workers representatives with facilities and (digital) tools, e.g. digital notice boards, to fulfil their duties in a digital era". *Framework agreement on Digitalisation*, signed on 22 June 2020 by BusinessEUrope, SMEunited, CEEP, ETUC and EUROCADRES/CEC, available online: https://www.etuc.org/system/files/document/file2020-06/Final%2022%2006%2020_-Agreement%20on%20Digitalisation%202020.pdf.

[7] Like the European Economic and Social Committee, *Challenges of teleworking*, cit., p. 4, pointed out "The EESC believes that the methods of monitoring and recording working time should be strictly geared to this objective. They should be known to workers, be non-intrusive and avoid breaching workers' privacy, while taking into account the applicable data protection principles".

portionality by clarifying that covert surveillance is totally forbidden. It also establishes under article 169-A, nos. 4 and 5, and under art. 169-B, no. 1, par. a), that work must be controlled by means of communication and information equipment and systems dedicated to employees' activity, following procedures that the employee is aware of and that are compatible with the respect for privacy.

And, yet, even complying with the principle of transparency, not all forms of control are allowed because it is fundamental to assess its proportionality.

Now therefore, what set forth under art. 169-A, no. 5, where it is "forbidden to impose a permanent connection, during working hours, by means of image or sound" is totally acceptable.

Telework shall not end up being an invasion of the employee's privacy. Thus, it shall be verified that the place where telework is performed does not undergo a degree of control greater than necessary.

The question that may arise is how to control the employee, who is in a telework regime, since we are dealing with a subordinate employment contract and the employer has the power to control how the activity is being provided. However, in this modality, as in others, the question is not related to the existence or non-existence of this power, that is essential, but to the establishment of limits to its exercise. Also considering that, the employer may control, *inter alia*, by setting goals and objectives to be met by the employee and reported daily through e-mails, calls, as well as scheduling meetings via teleconference to monitor the work. These are also ways to avoid social isolation that is one of the great disadvantages associated with this type of telework, always respecting the limits enshrined in art. 169-A, no. 5.

This seems precisely the meaning that shall be given to the provisions of art. 169-A, par. 4, when it states that "the powers of direction and control of the provision of work at telework are exercised preferably by means of the equipment and communication and information systems allocated to the activity of the worker, according to procedures previously known by him and compatible with respect for his privacy". Here it seems to us that the legislator decided to enshrine the possibility of controlling the professional performance of the teleworker through the work instrument itself because, given the characteristics of this type of work, it is often the only way to do so. However, it sets limits that seem correct to us: respect for privacy and transparency.

The wording of this article allows for a remote control of the employee's performance through the work instruments themselves, insofar as there is no other possibility of control and subordinated to the requirements that are provided by this article.

Precisely concerning this power of control and the obligation of its transparency, the provision under art. 169-B, no. 1, par. a) expressly sets forth the duty of the employer to inform the employee, whenever necessary, about the characteristics and the way how to use all devices, programs and systems adopted to remotely monitor his/her activity. This article is very interesting, both because it underlines, once again, the importance of compliance with the duty of transparency and the prohibition of covert control, and because this duty is understood in a broad sense, as it covers all information on the devices used, including their characteristics and the way they are used. It is a duty of the employers and a right of the employees to receive this information, and, if violated, it constitutes a serious administrative offence, under the terms of paragraph 4 of this article.

It is also established under art. 170 that any visit of the employer to the telework location, requires at least 24 hours notice, as well as to receive the agreement of the employee.

In the new wording of this article, the legislator consecrated in the first place the obligation of prior notice for the visit, which will have to be of 24 hours, as well as the reference to the working hours. This clarification is deemed positive by us, especially because it was one of the aspects that was still lacking under the previous regime.

The visit shall also be subject to the agreement of the employee. However, although we totally understand this need for an agreement, given the very personal nature of the place where the work is carried out, we have some doubts as to the necessity of such agreement. And even more doubtful is concerning the need for an agreement, what could the employer do in case of refusal by the employee. He/she cannot sanction this latter, because this is a right he/she enjoys under the terms of art. 170, no. 2, final part. Can he/she be held liable for the misuse of work equipment? We cannot fail to notice the difference in the wording of this article compared to art. 170-A, no. 4, concerning the visit of professionals designated by the employer for the evaluation and control of safety and health conditions at work, which states that "the employee gives access to the place where he carries out his work". Here it seems to us that the employee, despite still having a certain

freedom, should allow access: the option given by the legislator is here quite clear, which is also understandable considering the duties on matters of safety and health at work to which the employer and even the employee are bound.

The compliance with these rules should be inspected by the Authority for Working Conditions, whose visits to the home of the employees should be communicated at least 48 hours in advance and authorised by it, according to art. 171.

One of the major disadvantages of teleworking from home is the risk of isolation, for this reason the amendment introduced under art. 169-B, no. 1, par. c), requires the arrangement of face-to-face contacts with the employees and it is the employer's duty to ensure this, based on the frequency convened in the agreement, which cannot exceed two months.

Art. 169-A, no. 1 and 2, provides for the obligation of the employee to attend, even with 24 hours' notice, by heading to the company or other designated location for meetings, training sessions and other situations requiring physical presence.

Another controversial issue is the notion of accident at work and there was an amendment also in art. 8, no. 2, par. c), of Law 98/2009, establishing that in the case of teleworking or distance working, the place of work is considered to be the one specified in the telework agreement and the one where the employee usually carries out the activity. And the working time is considered to be all the hours when he/she is performing his/her work for the employer.

However, again, there are some very difficult questions – e.g. if the employee goes away for a few days to work in another place, or if he/she has two homes, there can be some problems in determining the workplace that can only be solved on a case-by-case basis, according with the circumstances of the case. But if the employer is unaware of this situation, can it be considered an accident at work? Our idea is that the employees should promptly warn the employee about this change.

Another very sensitive point is the right to disconnect. Conflicting views exist as of the introduction of a right to disconnect in European Member States.

At European level, the Framework Agreement on Digitalisation signed in June 2020, includes, *inter alia*, the arrangements for exercising the right to disconnect, the compliance with the working time arrangements in the legislation and collective agreements, as well as other contractual arrangements,

and it makes sure the worker is not required to be reachable by their employer outside working hours.

In Portugal, we think that a very important article, directly related to this, is art. 199-A, that establishes the duty to "refrain from contact" by the employer in all cases and not only in the telework contract. This duty goes beyond the right to disconnect, because it imposes over employers the duty to avoid disturbing the employees during their rest period, outside their normal working hours. It has also been defined as discriminatory any unfavourable treatment – namely in terms of working conditions or career progress – reserved to an employee exercising this right. This means that employers should not contact the employee outside working hours, except for reasons of *force majeure*. We shall admit that this article has a major relevance but, again, it raises a few issues. One of these issues concerns what *force majeure* is, because it is not defined under the law. Based on the classical definition of Civil Law, it is an unforeseen and urgent situation, such as fires, accidents, or similar circumstances. But we believe that *force majeure*, a classic undetermined concept, should be interpreted here with some flexibility, in order to cover perhaps situations such as those provided for under Labour Code, in paragraph 2 of the art. 227, regarding overtime work. Not only traditional cases of *force majeure* or fortuitous events (fire, earthquake, flood, etc.), but all those that cannot be postponed, in which immediate contact proves to be "essential to prevent or repair serious damage to the company or its viability".

Another aspect that the new law also fails to clarify is how this duty to refrain from contact will apply to professionals who are not subjected to any working schedule constraint or others who, by nature of their job, work with teams operating in different time zones.

Of course, "the devil is always in the details... but also in the implementation". But, in the end, although some controversial issues are still open, the conclusion that we draw from this article is a very positive one, being it a big step in the recognition of a real "right to disconnect" and in a modality that really allows it. Indeed, this article can only exist, if the burden is on the employer's side and not on the employee's side.

3. *Telework and collective agreements*

Telework did not experience any major development in 2020, considering the decrease in the number of provisions in collective bargaining.

The regulation of telework appears in only 7 conventions – 12 in 2019, which is in line with the decrease in activity based on collective autonomy.

In this context, there are collective agreements that regulate the concept of telework, equal treatment of teleworkers, form and content of the telework contract, both internal and external, and the responsibility for the tools involved in the the activity of telework and they are limited to the regulation of the shift to telework for a worker previously linked/subordinated to the employer and the duration of this situation.

In Public Administration, basically, most of the collective agreements regulate the duration and organisation of working time, health and safety at work and the parity/equity commission. There are also conventions that develop further these matters, including telework, rights and duties, individual protection equipment, professional training, the representation and participation of workers[8].

However, we think that collective agreements could regulate many of the aspects of telework. Portuguese law establishes in article 3, no. 3, that all these collective agreements can only regulate for the better, not for the worse, in relation to employees that have a contract of telework, but also, under article 492, no. 2, par. i), that the content of these agreements should set the "conditions of work in telework".

However, we also think that it could be more ambitious and setting forth for example, that, in the cases of control established under art. 169-A, no. 4 and 5, the workers' representative shall be involved.

If we remember article 88 of the GDPR, social partners can set up more specific rules to ensure the protection of the rights and freedom with regards to the processing of personal data of employees in the context of employment relationships. So, in case of telework, like pointed out in the European Social Partners Framework Agreement on Digitalisation, one of the measures might be to enable workers' representatives to address issues related to data, consent, privacy protection and surveillance.

[8] All this in Centro de Relações Laborais, *Relatório Anual sobre a Evolução da Negociação Coletiva em 2020*, 2021.

4. *Conclusion*

We think that this new legislation provided Portugal with a better legal framework in relation to telework and, specifically, as for the organisation of working time, the risks to health and safety at work, work-life balance, the right to disconnect and the effectiveness of labour rights when teleworking.

We also recognise that further effort is needed, specifically concerning some points that we already highlighted, and that, in some cases, it is going to be the jurisprudence in a case-by-case analysis to make the way.

However, we also think that the participation and involvement of the social partners at all levels, including through collective bargaining, can probably represent the key to finding balanced, decent and fair solutions.

Social partners can play a significant role in advancing teleworking in a way that contributes to gender equality, promotion of well-being at work and productivity, e.g., through collective bargaining. In some cases, bearing in mind the wide variety of workplaces, the best results can be achieved with measures tailored at enterprise and workplace level.

Abstract

The outbreak of Covid-19 pandemic turned teleworking into the "new normal" in work relationships. Our idea is that even after the pandemic this centrality of teleworking will not disappear with it. The Portuguese labour law has already introduced some rules for the provision of telework, and this legislation was recently even revised and strengthened by Law No. 83/2021 of 6th December. This text aims at providing the reader with a general overview of the major novelties introduced by the new law, in terms of teleworking and the right to disconnect.

Keywords

Telework, control and surveillance, right to disconnect, privacy, new employer's duties and obligations.

Łukasz Pisarczyk

Poland in the Search for an Appropriate Legal Framework of Distant Work

Summary: **1.** Opening Remarks. **2.** Legal Forms of Distant Work. **3.** Sources of Regulation of Distant Work. **4.** Implementing Distant Work. **5.** Work Equipment and Costs of Distant Work. **6.** The Organization and Performance of Distant Work. **7.** Conclusions.

1. *Opening Remark*

Working outside employer's premises in its various forms enters, especially after the pandemic experience, a new era. The role which is played by the distant work in the contemporary world of work requires the adoption of an adequate legal framework that enables effective organization of work but also safeguards the employee's well-being[1]. The law should search for an equilibrium between the organizational needs of employers and appropriate protection of workers who perform work in special circumstances – outside employer's premises.

The core of the existing legal framework of istant work in Poland is the Labour Code (LC)[2] providing for "telework", which is a form of work outside employer's premises performed with the use of information technology only.

[1] For more see e.g., *Teleworking during the COVID-19 pandemic and beyond. A practical guide*, Geneva: International Labour Office, July 2020, p. 2 ff., https://www.ilo.org/wcmsp5/-groups/public/—-ed_protect/—-protrav/—-travail/documents/instructionalmaterial/-wcms_751232.pdf.

[2] The Law of 26 June 1974 - Labour Code, *Journal of Laws*, 2020, item 1320, as amended. Translations of the Labour Code used in the text: LEX (https://sip.lex.pl/#/act-translation/1459619806).

The anti-Covid legislation adopted in 2020[3] introduced a special form of distant work – "pandemic remote work" which is based on special rules aimed at counteracting the consequences of the pandemic. The existing law is considered insufficient especially after a pandemic "explosion" in remote working. The need to create a new, comprehensive and adequate legal framework is obvious. Politicians, social partners and labour law scholars are considering how to reorganize the law on distant work to make it adequate to the changing reality[4]. In spring 2022, the government submitted a bill amending the Labour Code[5] ("Bill") and initiated consultation with social partners (trade unions and employers' organizations representative at the national level). Currently the Bill is proceeded by the Parliament[6]. However the government has proposed some amendments recently (the beginning of October). Additionally, there are still some disputes between trade unions and employers' organizations about the final form of the future regulation[7].

The Polish case may be interesting when identifying obstacles in developing distant work and searching for solutions which may contribute to the improvement of the situation. To achieve this goal the author confronts the existing and future regulations and evaluates them from the perspective of standards essential for the sustainable development of distant work. At the same time, several features characterizing the Polish economy and the labour market, which affect the legal framework of distant work, should be remembered. New forms of work appeared in Poland later and are not as common as in some Western countries[8]. Still the sector of new technologies

[3] The Law of 2 March 2020 on Special Measures to Counteract COVID-19, *Journal of Laws*, 2021, item 2095, as amended.

[4] See e.g., MITRUS, *Praca zdalna de lege lata i de lege ferenda – zmiana miejsca wykonywania pracy czy nowa koncepcja stosunku pracy?* (*Remote work de lege lata and de lege ferenda – a change of the place of work or a new concept of the employment relationship*), in *Praca i Zabezpieczenie Społeczne,* 2020, Nos. 10 and 11; FLOREK, *Prawne ramy pracy zdalnej* (*Legal Framework of Remote Work*), in *Z Problematyki Prawa Pracy i Polityki Socjalnej*, 2021, Vol. 19, No. 2; TER HAAR, *Badanie aspektów pracy zdalnej w dobie pandemii COVID-19 i w perspektywie przyszło ci* (*Studies on the Aspects of Remote Work during the COVID-19 Pandemic and for the Future*), https://calg.pl/?s=Badanie+aspekt%C3%B3w+pracy+zdalnej+w+dobie+pandemii+COVID-19+i+w+perspektywie+przysz%C5%820%C5%9Bci.

[5] Https://legislacja.rcl.gov.pl/projekt/12354104.

[6] Https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2335.

[7] Https://www.rp.pl/prawo-pracy/art37181491-rzad-chce-rozszerzyc-prace-zdalna-bedzie-nie-tylko-na-umowie-o-prace.

[8] EUROFOUND, *New Forms of Employment: 2020 Update*, Publications Office of the European Union, 2020, pp. 8-9.

develops fast. At the same time, Poland has achieved steady economic growth[9]. The legal system is characterized by the weakness of collective bargaining and (which can be considered a consequence) by extensive legislation. The Polish labour market is one of the largest in Europe. However, a large part of working people are non-employees (working under civil law contracts or self-employed with the status of entrepreneurs)[10]. All these phenomena make the Polish case unique and affect the legal framework of distant work.

There is no ideal and universal model of distant work applicable in each legal system. However, taking into account international standards, including the ILO's Convention No. 177 concerning Home Work ("Convention") – Poland has not ratified the Convention – and Recommendation No. 184 concerning Home Work ("Recommendation"), the Framework agreement of the European social partners on telework, (FA) – implemented to the Polish law, the Framework agreement of the European social partners on digitalisation as well as other principles and standards that should affect the legal status of remote workers it is possible to set up a number of conditions that should be met by the legislation to contribute to the harmonious development of distant work "ensuring the well-being of workers and continued productivity while teleworking"[11]: 1) voluntary character of distant work; 2) the maintenance of the legal status of distant workers, in particular as employees; 3) the promotion of employee' representatives, involvement in implementing distant work and shaping its conditions; 4) the right of employees to be informed in writing about specific conditions of employment; 5) the protection of workers against additional cost of work; 6) appropriate working conditions, including OHS, working time, and the right to be disconnected (including appropriate working conditions for workers in a special situation, e.g. work-life balance); 7) equal treatment of distant workers; 8) the protection of employees privacy, which must be confronted with the employer's managerial prerogatives; 9) the protection of data, including personal data;

[9] Https://stat.gov.pl/obszary-tematyczne/rachunki-narodowe/roczne-rachunki-narodowe/produkt-krajowy-brutto-w-2021-roku-szacunek-wstepny,2,11.html.

[10] See the data published by the Central Statistical Office, https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-bezrobotni-bierni-zawodowo-wg-bael/aktywnosc-ekonomiczna-ludnosci-polski-3-kwartal-2021-roku,4,43.html.

[11] *Teleworking during the COVID-19 pandemic and beyond. A practical guide*, Geneva: International Labour Office, July 2020, p. 5 ff. From the Polish perspective see e.g., TER HAAR, *cit*.

10) the protection of employees against isolation; 11) support for the development of employees' skills to perform distant work; 12) the safeguarding of collective rights of distant workers.

The article begins with an analysis of the legal forms of distant work possible under Polish law (Section 2). Section 3 depicts an interplay between legislation, autonomous sources of labour law, and individual acts in implementing and shaping various forms of distant work. Next, the analysis concerns the most important components of distant work to answer the question whether Polish law, existing and future, enables harmonious development of distant work. The subjects of the analysis are: 1) the way of implementing distant work, including freedom of implementing distant work and the legal status of distant workers (Section 4); 2) work equipment and costs of performing distant work (Section 5); and 3) rights and duties connected with performing distant work, including working time, OHS, managerial competences of employers and employee's privacy (Section 6). There are also some intersectional questions, including the protection of some groups of workers (e.g., work-life balance) and the role of employee representatives in the development of distant work.

The analysis focuses on those legal forms that have been tailored to performing work outside employer's premises. However, one should not overlook the fact that in many cases distant work is performed outside this framework. Distant work is provided by the parties to employment as well as civil law contracts with reference neither to telework nor to pandemic remote work (informal remote work). Due to the variety of the existing and future forms of distant work there are terminilogical problems with describing and classifying various phenomena. The most general concept used in the article is distant work, describing all forms of work performed outside employer's premises, irrespective of their nature and legal classification.

2. *Legal Forms of Distant Work*

The existing Polish law provides for two main forms of work outside employer's premises: telework and pandemic remote work.

The legal framework for telework is set up by the Labour Code (LC). The regulation dates back to 2007, when Poland implemented the Frame-

work Agreement[12]. Telework is defined as a form of organizing and performing work: 1) away from employer's premises 2) involving the use of information technology 3) on a regular basis (Art. 67^5 § 1 LC). The definition has two significant implications. First, only work involving the use of information technology can be treated as telework. Those who perform work outside employer's premises but without using this type of technologies fall outside the scope of regulation. Second, telework must be regular. Even if this condition is interpreted quite flexibly, (telework performed, e.g., one day per week), occasional activities are excluded. Due to both limitations, the practical importance of telework remains significantly restricted. It is one of the reasons for a growing popularity of informal distant work. Moreover, it may be applied in employment contracts only while the Polish law provides also for other bases of the employment relationship, like nomination (teachers, civil servants), appointment and election.

The special anti-Covid legislation, aiming at counteracting negative consequences of the pandemic, established an extraordinary form of distant work: pandemic remote work. This form of distant work can be applied during the state of epidemic or epidemic emergency as well as three months after the state of epidemic (epidemic emergency) is cancelled[13]. Pandemic remote work is performed away from employer's premises. However, there are no requirements concerning the use of information technology and the regularity of performance. The legislature intended to enable performing work remotely in any situation when it was needed due to the state of pandemic and possible due to the nature of work. As a result, the spectrum of activities covered by pandemic remote work is much wider than in the case of telework.

If parties to the employment relationship decide to use either the telework or the pandemic remote work model, they fall under a legal regime adapted to the nature of work outside employer's premises. However, it is also possible to agree that the place of work will be situated outside the establishment organized by the employer and apply neither telework nor pandemic remote work ("informal distant work"). It can be, however, detrimental to employees (who have no right to the reimbursement of cost incurred in connection with performing work) as well as risky for employers

[12] The Law of 24/08/2007 amending the Labour Code and some other laws (*Journal of Laws* 181, item 1288).

[13] The state of epidemic emergency has not been cancelled yet (9 October 2022) so employers are still entitled to impose pandemic remote work.

(who bears full responsibility in the area of OHS). Without a doubt, such a form of distant work was not intended and promoted by the legislature. However, informal distant work is not prohibited and, consequently, it is considered legal and possible. Moreover, informal distant work has gained great popularity in practice. First, it can be applied to each case of performing work outside employer's premises (while the scope of application telework is limited – see below). Second, it is very flexible since its application depends on the will of the parties only.

Finally, discussing the existing legal framework of distant work would not be complete without reference to the phenomenon of working outside the employment relationship – on the basis of civil law contracts without entrepreneurs status (workers) or of the basis of civil law contracts as entrepreneurs (self-employed). The Polish labour market is characterized by a relatively high (higher than in other countries) percentage of people employed under civil law contracts including those who enjoy the status of entrepreneurs (self-employed *sensu stricto*). Undoubtedly, some of them perform distant work. Even if they work in conditions similar to employees, they are not covered by labour law standards concerning telework and pandemic remote work. Their terms of work are shaped freely by the parties (freedom of contracts) with limited statutory intervention.

The Bill, which can be treated as a response to the current unsatisfactory situation, aims at creating a comprehensive model of performing distant work in various circumstances. It is intended to reconcile the needs of both: the employers and the employees[14]. The "remote work" provided for by the Bill may be perceived as a synthesis of the current concepts of telework and pandemic remote work. The main feature of the remote work will be work outside employer's premises. There are no requirements concerning the use of information technologies (they can be, of course, used) and regularity. The new law will bring a significant change in approach to remote work – a shift from telework in a strict sense (performed only via electronic technologies) to a broader concept of work performed outside employer's premises (closer to the ILO's perspective). The new remote work will cover teleworking in the strict sense as well as jobs involving modern technologies. Work may be performed remotly, either entirely (only outside employer's premises) or partially (e.g., on certain days of the week).

[14] See the explanatory statement to the Bill, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2335.

Although the Bill provides for one concept of remote work it will be internally diversified. The future law distinguishes three situations when remote work may be applied. The basic variant is "typical remote work" which may constitute a permanent element of the employment relationship. It replaces, in fact, the current concept of telework as a basic legal form of performing work outside employer's premises. It will have, however, much broader scope of application (rather home work instead of telework *sensu stricto*). The parties to the employment relationship will be able to apply typical remote work in almost each case when work is perfomed outside employer's premises. The place of work will be agreed by the parties (employee's proposal and the employer's approval). The employee is free when proposing a future workplace. The organization of telework (requirements concerning OHS standards, controls performed by the employer) suggests, however, that the place should by rather stable and somehow controllable by the employee (e.g., the employee's home or a telecentre, but rather not cafes). Moreover, in exceptional situations, when the performance of work is impossible or considerably difficult the employer will be entitled to impose "extraordinary remote work". A new construction is "occasional remote work" – a form of distant work applied on the employee's request up to 24 days in a calendar year[15]. The main goal of the new institution is to create a flexible possibility of using distant work when it is convenient for employees, e.g., due to their personal or family situation and acceptable for the employer. The legal regime of each form of remote work will be slightly different.

The Bill does not concern in any way remote work performed on the basis of civil law contracts. The new model of remote work will not be applied within the legal relationships regulated by the civil law[16]. It will be possible to perform remote work on the basis on civil law contracts but without amenities arising from the new law.

[15] The number in the initial draft was twelve days. The social partners still argue about the number of days of occasional remote work. Employers propose to increase while trade unions to reduce it.

[16] Https://www.rp.pl/prawo-pracy/art37181491-rzad-chce-rozszerzyc-prace-zdalna-bedzie-nie-tylko-na-umowie-o-prace.

Table 1: *Legal forms of distant work in Poland*

Existing legal framework	Telework (Labour Code)	Pandemic remote work (anti-Covid law)	Informal remote work within employment relationship	Remote work based on civil law contracts
The legal framework provided for by the Bill	Remote work		Informal remote work within employment relationship (on the current terms)	Remote work based on civil law contracts (on the current terms)
	a synthesis of current telework and pandemic remote work			
	a) typical remote work			
	b)extraordinary remote work			
	c) occasional remote work			

The existing system of distant work in Poland is complex and complicated. In many cases, distant work is performed beyond the legal framework tailored to work performed outside employer's premises (informal distant work in employment relationships, distant work in civil law contracts). Due to the factual position of the parties, it may lead to a situation when a proper balance is not achieved. The Bill gives an opportunity to create a comprehensive and more flexible legal framework for distant work. It gives hope that employers and employees will choose the new (hopefully efficient legal framework) and abandon the practice of informal distant work. However, the informal remote (in both: employment as well as civil law relationships) will be still possible. The result will depend on how the new rules prove

themselves in practice. Finally, the problem of evading labour law standards by using civil law contracts remains unsolved.

3. *Sources of Regulation of Distant Work*

The conditions of performing telework may be set forth at various levels. The basic standards are determined by the law. Some statutory rules are mandatory while others may be modified or supplemented by the social partners and parties to the employment relationship (see more in section 4 *and further*). Autonomous collective sources of distant work regulations are: 1) typical collective agreements concluded according to the rules set forth by the LC (Chapter eleven), 2) agreements on telework concluded with a company trade union organization (their content is limited to distant work matters only), and 3) regulations issued by employers for the whole company or its part.

Important for an appropriate development of distant work is the involvement of employee representatives whose negotiating position enables them to reach a real compromise. In theory, the principles of implementing and applying telework may be determined by typical collective agreements negotiated at the company or supra-company (e.g., branch or sectoral) level. Typical collective agreements may regulate the content of the employment relationships in their entirety, provided that they are not less favourable for employees and do not infringe the rights of third parties (Art. 240 §§ 1 and 2 LC). However, research carried out in years 2019-2022 has revealed that the issue of distant work (including telework) is generally absent from typical collective bargaining. Multi-company collective agreements are almost non-existent. Surprisingly, provisions concerning distant work are also very rare in company-level collective agreements which are more popular. None of the examined collective agreements regulated remote work to a greater extent[17]. One of the latest company-level collective agreements registered in Warsaw (a large enterprise, manufacturing) provides for a possibility of remote work without references to electronic means of communication. The

[17] Pisarczyk, Rumian, Wieczorek, *Zakładowe układy zbiorowe – nadzieja na dialog społeczny?* (*Company-level collective agreements – a glimmer of hope for social dialogue*), in *Praca i Zabezpieczenie Społeczne*, 2021/6, https://www.pwe.com.pl/czasopisma/praca-i-zabezpieczenie-spoleczne/zakladowe-uklady-zbiorowe-nadzieja-na-dialog-spoleczny,a1992889691.

employer is obliged to inform employees about the occupational risk and safety measures.

In order to avoid a regulatory vacuum and to involve somehow employees' representatives the law provides for an alternative mechanism of setting forth "principles of performing telework". The principles are adopted at the company level (Art. 67^6 LC). Their content, contrary e.g., to typical collective agreements, is limited to telework matters only (collective agreements on telework). The agreement is negotiated with a company trade union organization (organizations). If no agreement is reached, the employer may issue unilaterally regulations on telework (the employer may take into account the opinion submitted by trade unions). If there are no company trade union organizations, the employer issues regulations on telework after consulting employee representatives elected according to the rules adopted in the company (the law does not lay dawn any principles of the election). The agreements on telework and employer's regulations apply to a group of employees who perform (are going to perform) telework. In practice agreements with trade unions are very rare (if only because company trade union organizations exist in a few enterprises). Usually, employers set up principles of telework unilaterally after consulting employees' representatives. If there are no collective standards, the rules of performing telework can be determineted by the employer and employee in an individual agreement.

The Bill does not provide for any incentives to conclude typical collective agreements regulating remote work, in particular for larger groups of employers. The government did not use the popularity and importance of remote work to promote collective bargaining.

"The principles of performing remote work" (replacing current principles of performing telework) will possibly remain the main regulatory instrument. The procedure for adopting the principles remains unchanged: an agreement with company trade union organizations, regulations issued by the employer (if the agreement is not reached or there are no trade unions in the company), individual agreement between the employer and the employee. The Bill specifies, however, the content of the principles. They should lay down in particular: 1) the group or groups of employees who may perform remote work; 2) the reimbursement of the cost incurred by the employee; 3) the rules for calculating the cash equivalent for the employee (e.g. for the use of their own equipment); 4) rules of communication between

the parties, including the method of confirming the employee's presence at the workplace; 5) rules for monitoring the performance of work; 6) rules for monitoring OHS standards; 7) rules for monitoring compliance with the requirements in the field of information security and protection, including procedures for the protection of personal data; 8) principles of installation, inventory, maintenance, software update and service of the work tools entrusted to the employee, including technical devices.

The conditions of extraordinary and occasional remote work will be laid down in a special way – appropriate to their character. Principles of performing extraordinary remote work will be determined unilaterally by the employer – in its decision imposing remote work. Such a solution may be justified by the circumstances in which the remote work is imposed (*force majeure*) and the lack of time to follow the procedure. In the case of occasional remote work (up to 24 days per year), there is no obligation to lay down the principles. The employer and the employee should, however, agree upon selected issues connected with the organization of work (in particular the monitoring and communication).

One of the most important features of the Polish law, also in the field of remote work, is the deficit of collective (democratic) procedures. Typical collective bargaining is undergoing (in general) a very deep crisis. It is not used to create the legal framework for distant work. Collective agreements on telework are concluded rarely. The main regulatory sources are, therefore, regulations issued by employers and individual agreements with employees. The Bill will not change this situation. There are no incentives to engage in collective bargaining. Regulations issued by employers and individual agreements between the parties to the employment relationship will remain the chief regulatory instrument. It leads to the deficit of democracy and weakening of employees protection. One of the most important conditions for a proper development of distant work has not been met.

4. *Implementing Distant Work*

Telework must be provided for as an element of the employment contract. The employer cannot impose telework by means of unilateral decision (Art. 67^7 § 4 LC). The telework may be adopted: 1) as a part of a worker's initial job description (the parties from the very beginning intended for the

work to be performed remotely), or 2) as a subsequent voluntary arrangement. The law provides for a detailed framework for implementing telework during the employment relationship. The main goal is to protect the voluntary character of distant work threatened by the factual position of the parties to the employment relationship. The implementation of telework may be initiated by both: the employer and the employee. As a rule, the employee's application to implement the telework is not binding on the employer. However, in some cases refusal is possible only in justified cases (privileged employees[18]). If the employer cannot (objectively) accept the application of privileged employees, it is obliged to justify the decision. The employee may appeal to the labour court. Moreover, if telework has been agreed when concluding the employment contract, each party, within three months of the date of the commencement of work in the form of telework, may submit a binding request to opt out of telework. Outside this time frame, the employer should accept the employee's request as far as possible (this condition is not very clear and precise). The employer itself may restore previous conditions (no telework) by means of unilateral declaration of will with period of notice while the employee's refusal leads to the termination of the employment contract (Art. 42 § 1–3 LC). This mechanism, in the particular in case of distant work, violates somehow the freedom to work (not to work) remotely.

The employee's proposal to implement telework, the refusal to accept telework proposed by the employer, as well as the decision to opt out of telework cannot entail any negative consequences for the employee, e.g., dismissal (Art. 67^7 LC).

Pandemic remote work is imposed unilaterally by the employer. The law sets up the conditions that have to be met. Remote work may be imposed: 1) to counteract the effects of the pandemic; 2) if the type of work allows for

[18] The following are in privileged position: 1) an employee-spouse or an employee-parent of a child in the prenatal stage of development, in the case of a pregnancy with complications; an employee-parent of a child holding a certificate provided for by the Law on Support for Pregnant Women and Families "For Life"; an employee-parent: a) of a child holding a disability certificate or a certificate of a moderate or severe degree of disability, provided for in regulations on occupational and social rehabilitation and on employing disabled persons, and b) of a child holding an expert opinion on the need for the early support of the child's development, a certificate of the need for special education, or a certificate of the need for revalidation and education activities (Art. 142^1 LC).

it, and 3) if the employee has the technical and organizational conditions to perform such work (e.g., necessary equipment). If these conditions are met, the decision of the employer is binding on the employee[19]. Pandemic remote work may not be treated as voluntary in a strict sense (the employee follows the decision of the employer). In this case, however, other values, in particular the protection of human life and health prevail. The same or similar solutions (distant work on employer's demand or even by virtue of law) have been adopted since the outbreak of the pandemic also in other legal systems[20]. The employer's right to impose pandemic remote work exists only as long as the state of pandemic threat exists. When imposing remote work, the employer must specify how long it is going to be performed (e.g., one month). Moreover, the employer's power does not go beyond the type of work agreed by the parties: the employer's decision may concern only the work that has been agreed upon in the employment contract.

Implementing both: telework as well as pandemic remote work does not change the legal status of the employee. Despite the change of the place of work the employment relationship is maintained. Another problem (discussed in Section 2) is the phenomenon of evading labour law by concluding civil law contracts. This is, however, a consequence of the parties' decision and the lack of efficient mechanisms to qualify civil law contracts as employment contracts.

The method of implementing the new model of remote work provided for by the Bill will depend on the circumstances.

Typical remote work will be implemented similarly to telework – as an element of the employment relationship – agreed on at the beginning or during the employment relationship. The Bill protects the voluntary nature of remote work in the same way as in case of telework. An important difference is the extension of the group of privileged employees whose application should be accepted, unless it is not possible due to the type or organization of work (as now the employer will have to explain the reasons for the refusal). Compared to the current provisions, the privileged status will be granted, *inter alia*, to pregnant women, employees taking care of children under the age of four and employees taking care of other family

[19] The employer's order may be issued in any form. The employer is also entitled to cancel remote work at any time.

[20] See more national reports in *ILLEJ*, 2020, Vol. 13, No. 1S.

members with a diagnosed disability. In parallel, the draft implementing Directive 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU provides that employees taking care of children up to eight years will be entitled to apply for flexible working arrangements, including telework (which probably will be converted into remote work).

An additional guarantee for the voluntary nature of remote work remains the possibility to resign from remote work introduced during the employment relationship (within three months of the moment when remote work was adopted). In such a situation, each party to the employment contract[21] may submit a binding application to restore previous (non-remote) conditions of work. An important amendment is the lack of explicit employer's right to restore previous working conditions beyond this period via a unilateral legal act (nowadays, the employee's refusal leads to the termination of the employment contract). Moreover, the Bill provides explicitly that the employer cannot opt out of remote work in relation to privileged employees who applied for this work organization (unless it is objectively justified). An application for the introduction of remote work, refusal to work remotely, and resignation from it may not be the cause of reprisals against the employee, including dismissal from work.

In extraordinary circumstances, the employer will be entitled to oblige the employee (by issuing an order) to perform telework: during the period of a state of emergency, epidemic threat, or a state of epidemic[22] as well as during the period in which the employer, they are not able to ensure health and safety at its premises. The employee will have to submit a declaration that they have the accommodation and technical conditions to perform remote work. The employer will be: entitled to cancel the decision at any time (with at least one day's notice), and obliged to resign from remote work, if the employee notifies it that due to a change in technical and accommodation conditions is not able to perform remote work any longer. The special, unilateral way of imposing remote work is justified, just as with the existing concept pandemic remote work, by extraordinary circumstances in which it is applied. As a result, it should be treated as an exception, but not violation

[21] In the case of privileged employees, who applied for remote work, the employer may restore previous working conditions only in justified cases.

[22] And within three months after their cancellation.

of the voluntary nature of distant work. Moreover, the performance of remote work will depend on employee's a factual situation (technical and accommodation conditions necessary to perform work).

Occasional telework will be based on an *ad hoc* agreement of the parties without changing the content of the employment relationship. The employee will be entitled to apply for the implementation of occasional telework. The employee will specify the number of days and the dates of remote work (within the annual limit of 24 days). The employee does not have to substantiate the request. However, the employer will not be bound by the request. Moreover, no justification of the refusal is required. In the event of occasional remote work, the parties do not agree on the place of work. Its choice is up to the employee. As a rule, the employer's approval is not needed. This allows the employee to work from various locations, even from abroad.

The Bill, similarly to the existing law, does not provide for a change of the worker's legal status.

Both the current and the draft Polish law, protect the voluntary nature of distant work. The rules for implementing telework are consistent with the standards arising from the Framework Agreement (telework provided for by the agreement, requests to implement telework, the right to opt out of telework). The same will apply to remote work provided by in the Bill. The new concept of occasional remote work will be applied on employee's request. The employer is entitled to impose distant work unilaterally only under special circumstances when it is justified by the need to protect human life and health. In theory, Polish law guarantees the maintenance of the employee's status at implementing distant work. In practice, it is quite common to conclude civil law contracts in conditions typical for the employment relationship. Solving this problem, however, goes beyond the legal framework of remote work. It constitutes a part of a broader social and legal phenomenon.

5. *Work Equipment and Costs of Distant Work*

The LC sets forth the rules for providing teleworkers with equipment and tools (based on the Framework Agreement). The employer is obliged: 1) to provide the teleworker with the equipment necessary to perform tele-

work; 2) to provide insurance for that equipment; 3) to cover the expenses related to the installation, servicing, operation and maintenance of the equipment; and 4) to provide the teleworker with the technical support and the necessary training in operating the equipment. The parties may decide otherwise in an agreement concluded besides the employment contract. In such a case the teleworker is entitled to a cash equivalent for the use of its private equipment (Art. 67^{11} LC) – according to statutory standards and the principles of performing telework (Section 3).

As far as pandemic remote work is concerned, the employee should be provided with tools and materials needed to perform remote work, as well as logistic support for working outside employer's premises. However, the law does not specify the content of this obligation. At the same time, the employee is not prohibited from using tools or materials that have not been provided by the employer (as long as they meet the safety conditions). In practice, due to the general nature of the regulations there are disputes as to whether and what tools and equipment should be provided by the employer (e.g., who is responsible for the organization of the workplace at the employee's home). The general character of the provisions can be only explained by the extraordinary nature of pandemic remote work.

The Bill clarifies and extends the employer's obligations in the field of work equipment and cost. The new law differs in some important aspects from the LC's standards concerning telework (as presented above). The employer will be obliged to: 1) provide the employee with materials and work tools, including technical devices, necessary to perform remote work; 2) provide installation, service, and maintenance of work tools, including technical devices necessary to perform remote work, or cover the necessary costs related to the installation, service, operation and maintenance of work tools, including technical devices, necessary to perform remote work, as well as cover the costs of electricity and telecommunications services necessary to perform remote work; and 3) cover other costs directly related to the performance of remote work, if the reimbursement of such costs has been specified in the principles of performing remote work. First, the Bill clearly resolves it is the employer who is responsible for the costs of electricity and Internet used by the employee. Second, the employer may cover also other cost (e.g., specific for this type of remote work) related to remote work.

The parties may stipulate that the employee performing remote work will use materials and work tools, including technical devices necessary to perform remote work, not provided by the employer, as far as they meet the requirements set out by the Labour Code. In such a case the employee is entitled to a cash equivalent in the amount agreed with the employer. The obligation to cover the costs related to the performance of remote work and to pay the equivalent for the use of employee's equipment may be replaced by the obligation to pay a lump sum. The amount of the lump sum should correspond to the expected costs incurred by the employee[23].

The current regulations give rise to some interpretation doubts. In some cases, this may cause that the employee incurs excessive costs of distant work (contrary to the standards arising from the Framework Agreement). During the pandemic, due to the mass nature of remote work, there was a large-scale problem of energy and internet costs, which many employees incurred themselves. The Bill intends to create more transparent rules in terms of equipment and costs in order to make the protection of distant workers more efficient. In particular, the new law is expected to resolve the most common problems, like electricity and Internet costs.

6. *The Organization and Performance of Distant Work*

The Labour Code provides for a comprehensive legal framework for performing telework, in particular to find a balance between the managerial competences of the employer, on the one hand and the employees, HS and privacy on the other (according to the rules stipulated by the Framework Agreement). The practice of the application has revealed, however, that some mechanisms need to be clarified or modified.

First of all, the law requires the clarification of the position of teleworkers in the company's structure. The employer should inform the employee about the organizational unit to which the teleworker's workplace is assigned

[23] When determining the amount of the equivalent or lump sum, account should be taken, in particular, of the consumption standards of materials and tools, including technical devices, their documented market prices and the amount of material used for the employer's needs, and the market prices of this material, as well as electricity consumption standards and costs of telecommunications services.

and about the person representing the employer responsible for cooperation with the employee (Art. 67^{10} § 1 LC). The employer and the teleworker may conclude an agreement (apart from the employment contract) setting out the rules of communication between them, including the methods of confirming the teleworker's presence at the workplace as well as the method and form of the monitoring of work performed by the teleworker.

The employer remains responsible for the occupational health and safety of teleworkers (Art. 67^{17} LC). However, some of the employer's obligations, due to the circumstances of performing telework, are excluded: the responsibility for the state of buildings and their parts (e.g., rooms) in which work is performed and the obligation to provide the appropriate hygiene and sanitation facilities (e.g., toilets). In practice, employers believe that the scope of the exemptions is insufficient (an example being the need to assess occupational risk for each separate workplace).

As regards working time, general provisions of the Labour Code apply, including the length of the working day, rest periods, and overtime work. There are no special rules about time management by the employee (sec. 9 FA). It means that working time is organized by the employer (schedules of working time). The employer acting unilaterally or both parties acting together may resign from setting up the schedules (Art. 140 LC). It is not, however, obligatory. Work may be performed in its entirety outside employer's premises – no requirement that a part of working hours should be performed at the workplace. The law does not provide for the employee's right to disconnect (to be offline). However, the employees are protected by general working time standards (mentioned above). Work exceeding regular working hours is treated as overtime, which is permissible only in thecase of a special need on the part of the employer[24]. The question arises, however, whether such guarantees are sufficient in view of the specificity of distant work.

The employer has the right to monitor: 1) performance of the telework by the employee; 2) compliance with OHS regulations (Art. 67^{16} LC); 3) compliance with regulations concerning security and information protection. The monitoring is carried out in consultation with the employee at the place where telework is performed, during the employee's working hours. The employer has to adapt the way of monitoring to the place of work (e.g., employee's home) and its type. If telework is performed at home,

[24] Https://www.sejm.gov.pl/sejm9.nsf/InterpelacjaTresc.xsp?key=CCSJEY.

the teleworker's prior consent is necessary (without employee's consent the inspection cannot be carried out). Inspections must neither affect the privacy of the teleworker and their family nor interfere with the use of the private premises (Art. 67^{14} LC). Moreover, the employer has the right to access the place of work in order to verify, whether the applicable health and safety provisions are correctly in place.

The Labour Code provides that the employee doing telework may not be treated less favourably in terms of: entering into and terminating the employment relationship, terms of employment (including remuneration), and promotion and access to professional training, compared to other employees doing the same or similar work; albeit, taking into account the special nature of telework (which may lead to some modifications). As regards the isolation risk, the employer has to allow teleworkers to enter the workplace premises, to contact other employees, as well as to use the employer's premises and equipment, company social facilities and social activities under the same conditions that apply to all (other) employees.

Teleworkers enjoy the same collective rights as comparable workers at employer's premises. As employees they can establish and join trade unions. They are represented by trade unions in individual (e.g., the employer's intention to terminate the employment contract must be consulted with a trade union organization which represents the employee) as well as collective matters (negotiating collective agreements). The law provides for the same conditions for participating in and standing for elections to bodies representing workers. Teleworkers are included in calculations for determining thresholds for bodies with worker representation. Teleworkers may freely communicate with their representatives (compare sec. 11 FA).

The conditions of performing remote work in the future will be based on rules similar to the existing ones. The government plans, however, some amendments intended to improve protective standards for workers as well as to make distant work better adjusted to the organization of work outside employer's premises.

The employer will still be obliged to inform the employee about their organizational unit and the person from the employer's part responsible for cooperation with the employee. The employer will be obliged to provide the employee performing remote work with training and technical assistance necessary to perform this work. The Bill modifies slightly the data protection principles. The employee and the employer provide information

necessary for mutual communication. The employer defines the procedures for the protection of personal data and organizes, if necessary, training in this regard. To make communication more efficient and flexible, the parties will be able to submit all declarations not only in paper, but also in electronic form.

There are significant changes in the field of OHS. To increase the level of safety, the Bill prohibits distant work in dangerous or hazardous conditions. The drafters assume that in such circumstances, an employee working outside the establishment cannot be provided with appropriate protective measures. However, the main idea of amendments in the field of OHS is to better align the employer's obligations with off-site work – mainly to cancel, mitigate or modify those duties whose performance outside the plant is impossible or difficult. First, the Bill modifies the rules of preparing the occupational risk assessment by the employer. The employer will be entitled to submit such an assessment for groups of employees performing the same work (nowadays the assessment must be prepared separately for each workplace). Second, the draft contains provision stipulating explicitly that the employee should organize the workplace taking into account the requirements of ergonomics in the case of computer workstations. The employee will be required to submit a declaration that the place of work meets the requirements of occupational health and safety. The intention of the legislator is to exclude the employer's liability in areas beyond its control. At the same time, however, it may lead to the worsening of employee's position and limiting their rights. Third, some modifications concerning work accident procedure are planned. The inspection of the accident scene should be agreed with the employee or another household member (if the accident happens in the employee's home). Moreover, the team that examines the causes of the accident may refrain from inspecting the workplace (e.g., employee's premises), if the circumstances of the accident are clear. Fourth, the OHS training organized for employees may be conducted entirely with the use of electronic communication means.

The government does not see a need to adopt any changes in the field of working time. The parties will be free (as they are now) to resign from applying working time schedules. Otherwise, work will be performed according to the schedule. There will be no guarantee that a specific part of work will be performed in the establishment. Finally, the government has dismissed the suggestions to implement an explicit em-

ployee's right to be disconnected. According to the Minister of Family and Social Policy, employees are protected sufficiently by regulations on working time – they can be disconnected after their working hours, while overtime work is limited to extraordinary circumstances and compensated in a more favourable manner[25]. However, due to the nature of remote work and the risks associated with it (interfering with the employee's private sphere by sending e-mails or other forms of remote contact), the general regulations on working time are not always fully adequate and effective.

The new law recognizes *expressis verbis* unequal treatment based on telework as a discrimination. This resolves doubts as to whether the teleworker may use the privileged path of pursuing claims (with the burden of proof being shifted to the employer). The Bill maintains the legal mechanisms of protection against isolation. The government intends to clarify the rules of protection against unequal treatment. The Bill prohibits unequal treatment of distant workers unless it is objectively justified (by the nature of their work).

Since occasional remote work is an exception employers and employees will not need to apply most of the rules for the organization of remote work. The Bill only expects the parties to agree on the principles of monitoring compliance with occupational health and safety and data protection, including personal data protection.

7. *Conclusions*

The existing Polish law provides for two legal forms of distant work: telework and pandemic remote work. The legal framework of telework reflects, in the main, the Framework Agreement. It concerns the definition of telework, its voluntary character for both sides and its reversibility, equal employment conditions, rules on equipment (provision, maintenance, costs and technical assistance), right to privacy, data protection, health and safety, training, and collective rights, in particular as regards the requirement to discuss the introduction and practical details of telework with employee representatives. In some areas, Polish law is considered to go even beyond the Agree-

[25] Https://www.sejm.gov.pl/sejm9.nsf/InterpelacjaTresc.xsp?key=CCSJEY.

ment's standards[26]. The anti-Covid law created an extraordinary legal mechanism to counteract the consequences of the pandemic. However, the current model of telework and pandemic remote work are insufficient. Telework is an exclusive employment form – limited to working with the use of information technologies only. As a result, the existing legal framework is not adapted to the growing demand for work outside employer's premises. In practice, employers and employees create their autonomous framework of distant work – parallel to the law.

The Bill submitted in Spring 2022 by the government intends to establish a new comprehensive legal framework for distant work. First, the Bill extends the scope of application of distant work. The new law will apply to all the employees performing work outside employer's premises as far as the remote work is properly implemented. The new law should limit the phenomenon of autonomous (informal) distant work shaped by employers and employees. In the future, it will be more advantageous for them to use the provisions adapted to the characteristics of concept of remote work. However, the draft does not resolve the problem of circumventing the employment relationship by concluding civil law contracts. A comprehensive (system) solution is needed in this regard. At the same time, the Bill does not promote civil law contracts since they are not covered by special rules adapted to remote work. An interesting novelty is the concept of occasional remote work (up to 24 days a year), which is characterized by a high degree of informality. This will allow for short periods of work, e.g., from the employee's home, even if the employer has no a formal framework for teleworking. This change has long been expected by both employers and employees.

The Bill has adapted to remote work those legal mechanisms of telework which did not raise any doubts and ensured compliance with the Framework Agreement. The authors of the draft law intend to improve the legal framework in some areas. The Bill clarifies the situation of the parties as regards and costs. The employee should not incur costs related to the performance of work, including electricity and the Internet. At the same time, the law offers a mechanism simplifying the reimbursement of the costs by the employer. The new legislation develops special standards (adapted to dis-

[26] *Commission staff working paper - Report on the implementation of the European social partners' - Framework Agreement on Telework* {COM(2008) 412 final}.

tant work) as regards the organization of work, OHS and employee privacy. There is some concern that the employee is required to confirm that the workplace is organized in a way that ensures safe performance of work. A great deal depends on the practical application of the new law.

There are some areas where further improvements are still expected and recommended. Although Polish law provides for the participation of employee representatives in introducing remote work, the involvement is quite limited. In most cases, the conditions of teleworking will be determined by unilateral acts of the employer (issued after consultations with elected representatives) and individual agreements with employees. The state does not use the development of remote work to promote collective bargaining. There new law does not resolve the problem of working time in distant work and the employee's right to be offline.

Despite raised doubts and concern the Polish legislature is going to make a step towards a better legal framework for distant work. Taking into account ongoing changes, the future law creates a broader and more flexible formula of work outside employer's premises instead of teleworking in a strict sense. The changes provided by the new law aim at eliminating problems and restoring an appropriate balance between parties. There are still some solutions that raise doubts and should be monitored in practice (the organization of a workplace, working time and the right to be offline). Some other problems cannot be eliminated without system changes (the deficit of democracy, abuse of civil law contracts).

Abstract

The existing Polish law provides for two legal forms of distant work: telework and pandemic remote work. The telework is, however, limited to work with the use of information technologies only while the anti-Covid law, which allows remote work irrespective of the use of information technology, is of extraordinary and temporary character. As a result, the legal framework is not adapted to the growing demand for work outside employer's premises. To resolve this problem the government has recently submitted the bill aimed at creating a new comprehensive legal framework for the distant work. The Polish case may be helpful in identifying legal solutions which constitute an obstacle in the development of the distant work. It also provides examples of how to improve the situation. The article confronts the existing and future regulations and evaluates them from the perspective of international and European standards.

Keywords

Distant work, remote work, telework, employer and employee, collective bargaining.

Irene Zoppoli

The ILO's supervisory bodies help to read EU law: the case of posting of workers

Summary: **1.** The ILO's supervisory bodies: times of crisis or success? **2.** Posting of workers in the multilevel system of regulation: the CEACR's "jurisprudence". **3.** Possible fields of cooperation between the ILO and the EU.

1. *The ILO's supervisory bodies: times of crisis or success?*

Over the years, the role of standards setting played by the International Labour Organisation has been essential for the worldwide juridical culture. Nevertheless, the normative function is partially useful for implementing labour rights without an effective system of monitoring, which is indeed one of the cornerstones of the current functioning of the International Labour Organisation.

The lack of punitive mechanisms able to enforce ILO's Conventions, even if they have been ratified, makes the existence of efficient supervisory bodies an essential aspect for the survival of the incomparable supranational organisation.

As well known, the ILO's supervisory structure is composed of the regular system and the special one[1]. An important pillar of this structure is the Committee of Experts on the Application of Conventions and Recommendations (CEACR), which takes part of the regular system.

[1] See PERTILE, *La crisi del sistema di supervisione dell'Oil nel suo contesto: il timore è fondato, ma agitarsi non serve a nulla*, in *LD*, 2019, p. 407 ff.; MAUPAIN, *The ILO Regular Supervisory System: A Model in Crisis?*, in *IOLR*, 2014, p. 117 ff.

Briefly, the ILO's regular supervisory process is articulated in these steps. Governments periodically submit to the CEACR reports on the application of ratified conventions and social parties representing employers and workers may comment them. Based on the received documentation, the Committee of Experts publishes observations in its annual report to discuss selected cases within the Tripartite Committee on the Application of Standards (CAS), which is a permanent supervisory body deputised to formulate recommendations to the States. The Committee of Experts can also send direct requests to Governments and employers' and workers' organizations asking for clarifications about some aspects or when some difficulties in the application of conventions are found.

The CEACR's activity is not limited to the monitoring of the correct application of the conventions, but it also includes the solution of interpretative issues.

This overlapping of functions is due to the non-implementation of Article 37 of the ILO Constitution, which states that the International Court of Justice is the only existing body with the explicit authority to interpret the Constitution or ILO conventions and furthermore provides for the possibility of appointing a tribunal to expedite the determination of a dispute or question relating to the interpretation of a convention[2].

In this perspective, exercising an extra duties' role the CEACR has produced a "quasi-jurisprudence"[3] able to have a great impact on fixing higher labour standards by developing a common meaning of the international norms.

Therefore, the CEACR has gained a central place to encourage a uniform implementation of labour standards. One has to investigate if the fear of this success has been the main factor leading to the 2012 crisis[4], when the Employers' delegates criticized, from a procedural point of view, the interpretative function of the CEACR and, from a substantive point of view, its

[2] See La Hovary, *Article 37 of the ILO Constitution: an unattainable solution to the issue of interpretation?*, in *CLLPJ*, 2017, p. 337 ff.

[3] Borelli, Cappuccio, *Chi monitora e come? Appunti sui meccanismi di supervisione dell'OIL*, in *LD*, 2019, p. 514.

[4] See Supiot, *Qui garde les gardiens? La guerre du dernier mot en droit social européen,* in Supiot (ed.), *Les Gardiens des droits sociaux en Europe. Les recours nationaux et internationaux en cas de remise en cause des droits sociaux par l'Union européenne. Actes du séminaire du 6 février 2015*, Semaine Sociale Lamy, 2016, p. 7; Borzaga, Salomone, *L'offensiva contro il diritto di sciopero e il sistema di monitoraggio dell'Oil*, in *LD*, 2015, p. 450.

"jurisprudence" recognizing the right to strike within Convention No. 87 (Freedom of Association and Protection of the Right to Organise). This opposition represents a watershed for the activity of the supervisory body, which from that moment on tried to be more cautious.

There is also another reason why the CEACR is considerable victim of its success[5]: it is so much overload of work that it cannot manage to analyse all reports received[6].

A restyling of the monitoring system is hard to be realized because of the presence of political, technical and structural problems; notwithstanding the difficulties, it should be a priority in the ILO agenda[7]. It is questionable the comment on the ineffectiveness of the International Labour Organization based on the lack of real enforcement measures at its disposal. Instead of complaining about the absence of sanction mechanisms, enhancing and reinforcing the existing systems as the monitoring one of the CEACR would be a more fruitful choice.

2. *Posting of workers in the multilevel system of regulation: the CEACR's "jurisprudence"*

The exercise of workers' mobility through transnational posting of workers is a subject that makes emergent challenges coming from the globalization, the competition between legal orders and the universality of some fundamental labour rights. All of these "big issues" are closely connected with the mission of the International Labour Organisation.

Markets' globalization including workers has produced one of the most dangerous risks: social dumping. The right of undertakings to provide services in the territory of another State and to post their workers temporarily jeopardises the principle of *lex loci laboris* by allowing the interplay of competition on labour cost.

[5] GRAVEL, *Les mécanismes de contrôle de l'OIT: bilan de leur efficacité et perspectives d'avenir*, in JAVILLIER, GERNIGON, POLITAKIS (eds.), *Les normes internationales du travail: un patrimoine pour l'avenir- Mélanges en l'honneur de Nicolas Valticos*, 2004, p. 8.

[6] See CEACR, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 110th Session of the International Labour Conference, 2022.

[7] See RYDER, *Opening remarks by Guy Ryder*, ILO Director-General, 108th Session of the International Labour Conference, 2019.

Social dumping is a manifest enemy of social justice, which is a target so important for the ILO as it appears in its Constitution[8]. The universal calling of the values founding the ILO is in ontological conflict with the possibility to exploit the gap between domestic labour disciplines to gain a competitive advantage on the market.

The effect of posting of workers, seen as a juridical and not only an economic phenomenon, is the producing of a competition between legal orders[9], taking into account the national level and the supranational one.

It must be highlighted that the domestic labour legislation is only one part of a more articulated puzzle of the applicable regulatory framework. The fragmentation of rules has reshaped international law[10]: the existence of a plurality of supranational organizations with autonomous disciplines places the States within a complex system which is difficult to be harmonized.

Transnational posting of workers matches the issue of the coherence of the multilevel system of regulation. One has to remind a case involving the role of the CEACR that is paradigmatic of the difficulty to find the right balance between the different applicable rules.

The reference is to the 2010 Report of the Committee of Experts that monitored the application in the United Kingdom of Convention No. 87. The Committee observed "with serious concern" that "the omnipresent threat of an action for damages that could bankrupt the Union, possible now in the light of the Viking and Laval judgements, creates a situation where the rights under the Convention cannot be exercised". Furthermore, on that occasion the CEACR made clear that "its task is not to judge the correctness of the ECJ's holdings in Viking and Laval as they set out an interpretation of the European Union law, based on varying and distinct rights in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to deny workers' freedom of association rights under Convention No. 87".

The different approaches with regard to the purpose of the regulatory discipline are the first aspect deserving to be underlined. On the one side, Convention No. 87 is directed to protect workers' rights; on the other side,

[8] See Treu, *OIL: un secolo per la giustizia sociale*, in *DLRI*, 2019, p. 463 ff.

[9] Giubboni, *Norme imperative applicabili al rapporto di lavoro, disciplina del distacco ed esercizio di libertà comunitarie*, in *DLM*, 2008, p. 543.

[10] Ferrarese, *Il diritto internazionale come scenario di ridefinizione della sovranità degli Stati*, in *SM*, 2017, p. 85.

the European discipline concerning posting of workers since 1996 is based on economic priorities[11].

The ILO Conventions through the interpretation of the competent bodies, namely the Committee on Freedom of Association and the Committee of Experts[12], has given birth to the so-called "international code of freedom of association"[13], despite a trouble genesis[14] and the persistence of the uncertainty concerning the meaning of freedom of association caused by the abovementioned Employers' assertions[15]. Since the beginning, the ILO has proved to ensure great attention to freedom of association, both in individual dimension and in the collective dimension, by considering it essential to sustained progress.

In a few words, in the European framework posting of workers faces this kind of problem: extending national labour law could be a restriction of freedom to provide services, considered only justifiable by overriding reasons of public policy and whether it is proportional (that is, the measure is suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it)[16].

The asymmetry between the international system and the European

[11] Zilio Grandi, *Il dumping sociale intracomunitario alla luce della più recente giurisprudenza CGE. Quando la libertà economica prevale sui diritti sociali*, in Atti del Convegno Nazionale Nuovi assetti delle fonti del diritto del lavoro, 2011, p. 53

[12] For the distinction between the two bodies see Brino, *L'azione normativa dell'Organizzazione internazionale del lavoro nella promozione dei diritti sociali fondamentali*, in Brino, Perulli, *Manuale di diritto internazionale del lavoro*, Giappichelli, 2015, p. 32 ff.

[13] Barreto Ghione, Baylos Grau, *Il ruolo dei principi internazionali e del Comitato OIL sulla libertà di associazione*, in Baylos Grau, Zoppoli L. (eds.), *La libertà sindacale nel mondo: nuovi profili e vecchi problemi. In memoria di Giulio Regeni*, in *QDLM*, 2019, n. 6, p. 49. The authors mention all relevant ILO Conventions in this field. See also Ferrara, *Libertà sindacale e tutela internazionale: il ruolo dell'Oil nel centenario della sua fondazione*, in *VTDL*, 2019, p. 743 ff.

[14] Borzaga, Mazzetti, *Core labour standards e decent work: un bilancio delle più recenti strategie dell'OIL*, in *LD*, 2019, p. 450.

[15] See Bellace, *ILO Convention no. 87 and the right to strike in an era of global trade*, in *CLLPJ*, 2018, p. 495. The author demonstrates how the ILO constituents have consistently recognized that there is a positive right to strike, which is inextricably linked to – and an inevitable corollary of – the right to freedom of association.

[16] For details about the evolution of the EU law on transnational posting of workers see Delfino, *Ultima direttiva sul distacco transnazionale dei lavoratori e trasposizione in Italia nel prisma del bilanciamento di interessi*, in *DLM*, 2021, p. 271 ff.; Cordella, *Distacco transnazionale, ordine pubblico e tutela del lavoro*, Giappichelli, 2020; Giubboni, Orlandini, *Mobilità del lavoro e dumping sociale in Europa, oggi*, in *DLRI*, 2018, p. 907 ff.

concerning the permissible restrictions to the right to strike and the right to take collective action concerns the lack of a test of proportionality of interests in the ILO Convention.

On 14 September 2011, the CEACR in the Communication to the European Parliament exhorted to invert the evaluation parameter: economic freedoms have to contend with the non-renounceable respect for social rights.

The impact of the abovementioned ECJ's judgments on the conception of the conflict between fundamental social rights and so-called fundamental economic freedoms is well known[17]: in this perspective, the freedom to conduct a business produces horizontal effects in so far as collectively organized workers have to take responsibility for the employer's interest in exploiting the opportunities coming from the internal market[18].

Although, there are some signals in a different direction recently: the European legislator is more social-oriented about the discipline concerning the posting of workers.

The legal framework has been modified by the Directive 2018/957/EU of 28 June 2018 amending Directive 96/71/EC with the general purpose to grant a more equal treatment to posted workers and local one by providing, first of all, a more consistent list of mandatory rules concerning the minimum protection in the hosting country.

The relevant reference for this survey is the protective clause of Article 1, paragraph 1, Directive 2018/957/EU, when states that "this Directive shall not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, to conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practice".

This provision reinforced by the new legal framework could entail a turnaround to overcome the clash between domestic order and the legal

[17] Among a wide literature see SCIARRA, *Solidarity and Conflict European Social Law in Crisis*, Cambridge University Press, 2018; FREEDLAND, PRASSL, *Viking, Laval and Beyond*, Hart Publishing, 2014; DEAKIN, *Il Trattato di Lisbona, le sentenze Viking e Laval e la crisi finanziaria: in cerca di nuove basi per "l'economia sociale di mercato" europea*, in *RGL*, 2013, p. 683 ff.

[18] GIUBBONI, *Libertà d'impresa e diritto del lavoro nell'Unione Europea*, in *Cost.*, 2016, p. 112.

order of the European Union produced by the so-called Laval-quartet. It could be a chance to reshape the European balance in the social field, but the question remains whether the ECJ will try to limit the impact of this legislative intervention.

It is worth investigating how the ILO's supervisory bodies could intervene in this debate.

3. *Possible fields of cooperation between the ILO and the EU*

There might be chances to find fields of beneficial cooperation between the International Labour Organisation and the European Union, able to produce positive consequences for both the supranational organisations.

They are affected by different shortcomings, which could be solved in a complementary manner. On the one hand, the ILO, despite its ancient history, is strongly criticized for being ineffective, considering that it has no real enforcement measures at its disposal[19]. On the other hand, the European Union has been accused for decades of balancing workers' rights and economic freedoms in a way that is destructive of the Member States' social *acquis*.

The recent amendment of the posting of workers Directive is a good occasion to empower the link between the supranational organizations.

The ILO's supervisory bodies could play a fundamental role to guide the interpretation of the abovementioned provision, in a way that approximates arrangements on union rights among the Member States which have ratified Convention No. 87.

The competition between international standards and European provisions is a problem of hierarchy of sources shaped differently in each constitutional order[20] and this difficulty must not be underestimated. In any case, whatever the place occupied at the national level by international and European sources, the CEACR's role must not be ignored: its "quasi-jurisprudence" could have an interpretative force to avoid the development of conditionality mechanisms which establish a superiority of economic free-

[19] See ONIDA, *Labour standards and ILO's effectiveness in the governance of globalization*, KITes Working papers, Internationalization and Technology Studies, Università Bocconi Milano, 2008.

[20] See THOMAS, OELZ, BEAUDONNET, *The use of international labour law in domestic courts: Theory, recent jurisprudence, and practical implication*, in JAVILLIER, GERNIGON, POLITAKIS (eds.), *cit.*, p. 257 ff.

doms on the recognizing of some fundamental rights, such as freedom of association.

The strongest objection to a similar solution relies on the fact that the ILO' s supervisory bodies use soft law's tools, whose capacity to influence national systems is weak.

Although abandoning the traditional way to judge the effectiveness of a legal system, it is possible to appreciate the virtues of the ILO's supervisory mechanisms through the CEACR, which consist in its technical and impartial structure, in the periodic nature of the monitoring's activity and the simplicity of access[21]. On a formal occasion, the CEACR, by describing its mandate, has explicitly recognized that "its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. […] The Committee's technical role and moral authority are well recognized [...] This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions"[22].

As stated about other monitoring bodies whose acts are deprived of binding effects[23], the principle of loyal cooperation should impose to take into account the opinions of the CEACR, because of its inherent belonging to the ILO and because of its function. The effect of a similar consideration is the subjection of domestic courts to the principle of aggravation of the motivational burden when they want to decide differently.

In this perspective, involving the jurisprudence of the CEACR within the so-called *judicial comity*[24] – namely the dialogue between courts by using

[21] Kilpatrick, *L'Europa della crisi si rivolge all'Oil: come è cambiata la mobilitazione sui diritti sociali e del lavoro*, in *RGL*, 2019, p. 181; Beaudonnet, *L'utilisation des sources universelles du droit international du travail par les jurisdictiones internes*, in *Bull. DCTSS*, 2005, p. 62.

[22] International Labour Conference (2015), 104th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Geneva: ILO, 11.

[23] Amoroso, *Sull'obbligo della Corte Costituzionale Italiana di "prendere in considerazione" le decisioni del Comitato europeo dei diritti sociali*, in *La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea? Atti del seminario in previsione dell'udienza pubblica della Corte Costituzionale del 25 settembre 2018 sulla questione di costituzionalità sul d. lgs n. 23/2015*, in *FQC*, 2018, p. 81 ff.

[24] See for details Remida, *Il ruolo della soft-law nella protezione multilivello dell'autonomia collettiva*, in *RGL*, 2013, p. 791.

legal or jurisprudential sources of different legal orders – should be a good way of beneficial cooperation. It is a different conception of the positioning of sources and constitutional bodies: not in the vertical language of the hierarchy, but the horizontal language of the "network"[25].

The CEACR's "jurisprudence" on freedom of association could be considered as a precious material concerning the possible relationship between the international and the European legal orders in the field of posting of workers. The final target is the "convergence of the parallel commitments"[26]: it is a paradoxical situation that the European Union through the voice of the Court of Justice, moreover in a field which is outside of the European competences, can require the Member States to violate the obligations derived from ratified international conventions.

In this scenario, primarily the CEACR could accomplish a harmonizing function to interpret the posting of workers Directive in a compatible way with the domestic and international protections.

The pressure coming from the international supervisory body could avoid that the abovementioned protective clause will be neutralised by the interpretation of the European Court of Justice[27], worried by safeguarding the priority of freedom to provide services. It is a realistic risk because the market-oriented approach of European law keeps connecting the posting of workers' Directive to freedom to provide services rather than to free movement of workers; this is a legal element that the European case law could enhance, as in the past.

Furthermore, a common ground of the protection of social rights facilitated by the intervention of international bodies could be an interest of the European Union too. More clearly, there is an opposite risk coming from the increase of mandatory rules of minimum protection realized by the 2018 Directive: it may be an inhibitor of freedom to provide services, dissuading Member States' companies from posting workers with inevitable consequences for the economic development of the internal market[28].

[25] Dorssemont, *A judicial pathway to overcome Laval and Viking*, in *Observatoire social européen. Research Paper*, 2011, p. 3.

[26] Maupain, *La mise en œuvre des conventions de l'OIT à l'épreuve de la supranationalité européenne*, in Supiot (ed.), *Les Gardiens des droits sociaux en Europe*, cit., p. 76.

[27] Allamprese, Borelli, Orlandini, *La nuova direttiva sul distacco transnazionale dei lavoratori*, in *RGL*, 2019, p. 135.

[28] De Carvalho, *The revision of the Posting of Workers Directive and the freedom to provide services in EU: towards a dead end?*, in *JT*, 2018, p. 731 ff.

In other terms, the lack of harmonisation in this matter could encourage a protectionism use of domestic labour rights. The stigma for this kind of distortive use of labour standards was expressed in the 1998 ILO Declaration on Fundamental Principles and Rights at work.

This must be avoided and it is a shared interest of both international organisations, especially when ideas of sovereignism are re-emerging, showing the existence of a strong tension between supranational legal frameworks and national prerogatives.

The CEACR's "jurisprudence", in this case, could cooperate to develop a uniform legal ground through a more clear interpretation of Convention No. 87.

From a wider perspective, it could be also possible that the CEACR expresses observations relating to the exercise of EU competences crossing principles and values protected by ILO Conventions. It would be necessary a creation of *ad hoc* subcommittee to avoid aggravating the already mentioned structural problem of the CEACR, that is to say, the overwork.

From EU point of view, there are other options to amplify the effect of harmonisation coming from the international regulatory level.

First of all, there is room to consider more thoroughly the CEACR's "jurisprudence" in the freedom of association's field. According to Article 156 TFEU, often neglected, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in matters relating to the right of association and collective bargaining between employers and workers; to this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation[29]. This provision could allow to enhance the international standards without threatening the distribution of competences.

Secondly, the chance of ratification of ILO Conventions by the European Union, as an autonomous entity, has been hypothesised[30]. Beyond the

[29] For details about this provision see DELFINO, *Il fenomeno sindacale e le "altre" fonti del diritto dell'Unione Europea*, in BAYLOS GRAU, ZOPPOLI L. (eds.), *cit.*, p. 221.

[30] See GALLARDO MOYA, *Convenzioni Oil*, in BAYLOS GRAU, CARUSO, D'ANTONA, SCIARRA (eds.), *Dizionario di diritto del lavoro comunitario*, Monduzzi editore, 1996, p. 295 ff.

presence of technical and constitutional problems of a similar solution, particularly evident in the case of freedom of association which is a field reserved to the domestic prerogatives, there is a prominent political obstacle: in the current period of crisis of EU democratic legitimacy, it is really difficult to imagine a similar homogeneous action.

Therefore, there is a lowest common denominator behind all the abovementioned proposals, namely the awareness that one of the most consistent weaknesses of the ILO is its "loneliness"[31]. The International Labour Organisation is unique in its originality, as a constant project characterized in terms of identity by the target of the social justice. It is urgent to remedy to it to produce a greater positive echo, despite the presence of numerous hurdles.

The ILO's approach to labour rights as fundamental rights has had increased resonance within the EU[32] and it is worth enforcing the communication channels to face in a combined way the globalization's challenges, which are crucial in the case of posting of workers.

[31] Perulli, *L'OIL e lo spirito di Filadelfia oggi: cent'anni di solitudine*, in *DLM*, 2019, p. 5 ff.

[32] See European Commission, *Analysis – in the light of the European Union acquis – of the ILO Conventions that have been classified by the International Labour Organisation as up to date*, Luxembourg: Publications Office of the European Union, 2014.

Abstract

The author explores whether it is possible to fix higher standards and methods of protection by joining forces of the International Labour Organisation and the European Union. The protective clause of Article 1, paragraph 1, Directive 2018/957/EU is considered a chance for the ILO's supervisory bodies to play a role in the interpretation of the provision in a way that approximates arrangements on union rights among the Member States which have ratified the ILO Convention No. 87.

Keywords

ILO, EU, CEACR, quasi-jurisprudence, posting of workers.

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abbreviations

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