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Continuity and discontinuity in the scope of social rights in the recent case law of the Court of Justice

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1. *The field of application of the Nice Charter: does the 2021 KO judgment reopens the question?*

Two relatively recent judgements of the Court of Justice allow dealing with the evergreen topic of social rights and especially their effectiveness, which depends first and foremost on the applicability of the sources that contain them. This is why, at the supranational level and not only, as will become evident shortly, the question of the scope of application of the Charter of Fundamental Rights is decisive.

In this regard, a judgment of the Court of Justice of 17 March 2021, *KO*, C-652/19, seems to undermine the certainties reached up to that point since, after recalling that "the provisions of the Charter apply, under Article 51(1) thereof, to the Member States only when they are implementing Union law. Article 6(1) TEU and Article 51(2) of the Charter make it clear that the Charter does not extend the field of application of Union law beyond the powers of the European Union and does not establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties. The Court is, therefore, called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the pow-

ers conferred on it"[1]; it emphasises that for "it to be found that Directive 98/59 and, consequently, the Charter, are applicable to the main proceedings, that directive must impose a specific obligation in respect of the situation at issue in those proceedings, which has been implemented by the provisions of Italian law concerned"[2].

However, "such an obligation is not apparent from the provisions of Directive 98/59. The main objective of that directive is to make collective redundancies subject to prior consultation with the workers' representatives, and prior notification to the competent public authority"[3] and "Directive 98/59 provides for only a partial harmonisation of the rules for the protection of workers in the event of collective redundancies, that is to say, harmonisation of the procedure to be followed when such redundancies are to be made"[4] is ensured.

In particular, "the means of protection to be afforded to a worker who has been unlawfully dismissed as part of a collective redundancy, following a failure to comply with the criteria on the basis of which the employer is required to determine the workers to be dismissed, are manifestly unrelated to the notification and consultation obligations arising from Directive 98/59. Neither those means nor those selection criteria fall within the scope of that directive. Consequently, they remain within the Member States' competence"[5].

These affirmations of the Court of Justice contrast previous case law (from *Akeberg* to *Florescu* via *Poclava*) that had yet to go into detail and thus had left it to be understood that once an institution is regulated at the European level through a directive. This source has been transposed into national law, and the implementation of Union law allows the Charter of Fundamental Rights rules to enter the Member States' legal systems.

Apart from the change of orientation that is always possible, there is, however, an inconsistency in the reasoning of the most recent judgment of the Court of Luxembourg since the discourse should be differentiated according to whether one refers to Article 20 or Article 30 CFREU. While

[1] CJEU, C-652/19, par. 34.
[2] *KO*, par. 37.
[3] CJEU, C-652/19, par. 40.
[4] CJEU, *KO*, par. 41.
[5] CJEU, *KO*, par. 42.

the first rule states that 'all persons are equal before the law' and therefore effectively does not concern dismissals, Article 30, as is well known, refers precisely to this institution, stating that "every worker has the right to protection against unjustified dismissal, following Union law and national laws and practices". Therefore, implementing the directive on collective redundancies cannot permit the entry of Article 20 into domestic law. In contrast, the same cannot be said of Article 30, even if the effects of applying that provision to the present case would have been substantially irrelevant. Nevertheless, such an interpretation by the Court of Justice risks further weakening the Charter of Fundamental Rights and, thus, the application of social rights in domestic law.

2. Continued. *The possible interferences with the relevant Italian constitutional case law*

With the partial repealing of the Court of Justice will also have to reckon with the Italian Constitutional Court, which, as is known, regarding labour law, in Judgment 194 of 2018, had settled on the positions of the Court of Justice expressed up to that point.

The Constitution Court argued as follows about EU law profiles.

1) Under Article 51 CFREU, the Court of Justice of the European Union has consistently held that the provisions of the CFREU apply to the Member States when they act within the scope of Union law. And this is clear to the Constitutional Court, according to which 'for the Charter of Fundamental Rights of the European Union to be invoked in a case of constitutional legitimacy, the case subject to domestic legislation must be governed by European law – in so far as it is inherent in acts of the Union, in national acts and conduct which give effect to European Union law – and not by national rules alone which have no connection with that law' (judgment no. 80 of 2011). And in the present case, concerning the regulation of sanctions in the event of individual unlawful dismissals, there is no evidence to suggest that the censured regulation of Article 3(1) of Legislative Decree No 23 of 2015 was adopted in the implementation of the European Union law.

2) For the applicability of the CFREU, Article 3(1) of Legislative Decree No 23 of 2015 should fall within the scope of a rule of Union law other

than those of the Charter itself. However, the mere fact that Article 3(1) of Legislative Decree No 23 of 2015 falls within an area in which the Union has competence within the meaning of Article 153(2)(d) of the Treaty on the Functioning of the European Union cannot entail the applicability of the Charter given that, as regards the regulation of individual dismissals, the Union has not in practice exercised that competence. Moreover, it cannot be considered that the legislation censured was adopted in the implementation of Directive 98/59/EC (on collective redundancies) since, as is evident, Article 3(1) of Legislative Decree No 23 of 2015 regulates individual redundancies.

3) To argue the existence of a European case, the respondent argued that they would fall within the scope of the Union's employment policy and the measures adopted in response to the Council's recommendations. Those recommendations, provided for in Article 148(4) TFEU fall within the Council's discretion and have no binding force, so this is the implicit reasoning conducted by the Constitutional Court; they cannot be regarded as Union law.

This is also valid beyond labour law. The Constitutional Court, in its judgment 149 of 2022, stated that there is no doubt that the European Union's secondary law governs the matter of copyright protection, in particular by Directive 2001/29/EC, and this implies that the domestic regulation falls within the scope of implementation of European Union law within the meaning of Article 51 CFREU, with the consequent obligation, on the part of the competent Italian administrative and judicial authorities, to respect the rights recognised by the Charter, including Article 50 CFREU, which sanctions at the EU level the right to *ne bis in idem*. As can be seen, also in this case, the Constitutional Court generically refers to the secondary source of the Union, from which derives the applicability of the principle contained in the Charter to the whole matter of copyright, even if the directive only protects certain aspects.

3. *The notion of the worker in anti-discrimination law: the "told" and "untold" of the 2023 JK judgment*

What has just been stated is countered by another ruling of the Court of Justice that does not concern the Charter of Fundamental Rights but re-

lates to a prominent social right, the right not to be discriminated against at work, stemming from Directive 2000/78. The reference is to the ruling of 12 January 2023, Case C 356/21, *J.K.*, according to which the scope of application of the Directive is rather broad since that source "Directive 2000/78 is not an act of EU secondary legislation such as those based, in particular, on Article 153(2) TFEU, which seek to protect only workers as the weaker party in an employment relationship, but seeks to eliminate, on grounds relating to social and public interest, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided"[6]. For these reasons, "although Directive 2000/78 is thus intended to cover a wide range of occupational activities, including those carried out by self-employed workers in order to earn their livelihood, it is nevertheless necessary to distinguish activities falling within the scope of that directive from those consisting of the mere provision of goods or services to one or more recipients and which do not fall within that scope"[7]. In the present case, the Court finds that it is not a supply of services but "the activity pursued by the applicant constitutes a genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient, enabling the applicant to earn his livelihood, in whole or in part. Thus, "the question whether the conditions for access to such an activity fall within Article 3(1)(a) of Directive 2000/78 does not depend on the classification of that activity as 'employment' or 'self-employment', given that the scope of that provision and, accordingly, the scope of that directive must be construed broadly"[8]. In particular, "article 3(1)(c) of Directive 2000/78 refers to 'dismissal' only by way of example of 'employment and working conditions', and covers, among other things, the unilateral termination of any activity referred to in Article 3(1)(a) of that directive"[9] and, therefore, also of a self-employed activity. And this can be safely verified. "It should be noted, ..., that just as an employed worker may involuntarily lose his or her job following, for example, a 'dismissal', a person who has been self-employed may also find himself or herself obliged to stop working due to his or her contractual counterparty and thus be in a vulner-

[6] CJEU, C-356/21, par. 43.
[7] CJEU, *J.K.*, par. 44.
[8] CJEU, *J.K.*, par. 47.
[9] *J.K.*, par. 62.

able position comparable to that of an employed worker who has been dismissed"[10].

In short, the scope of the anti-discrimination protection guaranteed by Directive 2000/78, at least concerning conditions of employment and occupation, is extended by the Court of Justice also to forms of self-employment that are not merely the provision of services, and this is an undoubted advance in social rights.

However, even this ruling presents some obscure points that would have deserved a more in-depth study precisely concerning the Charter of Fundamental Rights rules, of which no mention is made. The reference is again to Article 30 and, above all, Article 21. The Court's choice not to refer to any of these provisions does not appear accidental.

Starting from the first, the Luxembourg judges, also in the light of the *KO* judgment, confirm that the scope of application of the rules of the Charter in domestic law is strictly linked to the institution to which the rule refers so that Article 30 can be applied only in the context of the implementation of directives concerning dismissals (moreover with all the limitations highlighted above).

It should not be forgotten, however, that Article 21 CFREU – according to which "any form of discrimination based, in particular, on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation" is prohibited – was the subject of a judgment of the Court of Justice almost ten years ago, *Association de médiation sociale* of 2014. To be precise, the Court of Justice stated at the time that "the principle of non-discrimination ... enshrined in Article 21(1) of the Charter, is in itself sufficient to confer on individuals a right that can be invoked as such" provided, however, that the case to which this rule refers "falls within the field of application of the Charter".

So, one wonders why there is no reference to what has just been said in the 2023 judgment. The absence of even a mention of Article 21 conceals an attitude of caution on the Court of Justice concerned with addressing the personal scope of application of the Charter's rules in the field of labour law. In short, a connection between Article 21 and Directive 2000/78 in the present case would have risked opening a debate on applying the Charter

[10] *J.K.*, par. 63.

rule beyond employment. In contrast, in this way, the Court confines the question to the profile of working and employment conditions referred to in Directive 2000/78. In other words, the Luxembourg judges make it clear that the interpretation of the directive's scope concerning employment and work conditions is linked to the wording used in the 2000 directive while avoiding addressing whether that interpretation can be exported to Article 21 CFREU. It is clear, however, that the question of the personal scope of application of all Charter provisions, or at least of those for which it is not clear whether they apply only to employment, remains in the background and sooner or later will also have to be addressed by the Court of Justice.

Keywords

Social rights, Nice Charter, Scope, Court of Justice, Case law.

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Are self-employed "zombies" more important than classic workers? A few comments on the Polish approach to supporting labour market during the COVID-19 pandemic*

Contents: **1.** Introductory remarks. **2.** Where do zombies come from, about the specific position of the self-employed on the Polish labour market. **3.** COVID-19 pandemic and (strange) directions of public support for labour market participants. **4.** Self-employed zombies as proof of the hidden paradigm of the Polish labour market? **5.** Concluding remarks.

1. *Introductory remarks*

We would like to begin this paper with a brief note about what this paper is not about. First, we do not intend to present the entirety of the social, legal and economic debate on the entitlements that the self-employed should enjoy, especially the self-employed who are economically dependent on a single contractor. These issues are analyzed in both Polish and European labour law doctrine[1]. This discussion has undoubtedly been further reinvigorated as a result of the experience of the COVID-19 pandemic. Again, it is not our goal to present or summarize the full picture of tools that EU member states have used to support the self-employed during the pandemic. We do not attempt to draw lessons from the diverse situations in individual

* The thoughts contained in this paper are solely the authors' conclusions and comments, and can no, under no circumstances, be equated as the views of any institution.

[1] As an example: NATO, *The Self-employed and the EU Court of Justice: towards new social protection of vulnerable EU citizens?* in *ELLJ*, 2021, vol. 12, n. 1, pp. 17-36. In Polish doctrine: SKUPIE, *Praca na własny rachunek w ramach Unii Europejskiej w wietle prawa i orzecznictwa*, in *SPPracPol*, 2022, vol. 29, n. 3, pp. 279-290; MORAS-OLA , *Mo liwe kierunki regulacji ochrony pracy samozatrudnionych ekonomicznie zale nych*, in *Acta Univ. Lodz*, 2022, n. 101.

countries. In this area, too, the pandemic was a "driver" of many new discussions[2]. The purpose of the paper is decidedly more modest. We want to show an example from Poland where, support for the self-employed was disproportionately huge compared to support for classic employees.

So the aim of the paper is to describe Polish case in which public authority, in a situation of destabilization of labour market due to the COVID-19 pandemic, makes a choice regarding the distribution of support primarily to self-employed rather than people working under an employment contract. In the our opinion, it is closely related to the paradigm of economic development that Polish ruling elites adhere to (regardless of political provenance) in which individual entrepreneurship as such has a higher rank than classic employment.

The COVID-19 outbreak has surprised labour market participants as well as the public authorities. In Poland, the effects of the pandemic were much less severe than in many EU Member States. Poland came through the COVID-19 pandemic with fewer "losses" in the labour market than other member states. Referring to a single indicator such as unemployment, it should be noted that in 2019 the average for the EU 27 was 6.8% (Eurozone – 7.6%), Poland – 3.3%. In 2020 – EU27 average unemployment was 7.2% (Eurozone – 8.0%), Poland – 3.2%. And in 2021 – EU27 average unemployment was 7.0% (Eurozone 7.7%), Poland 3.4%. And in 2022 – EU27 average unemployment was 6,1% (Eurozone 6,7%), Poland 2,9%.

However, it was necessary to adopt a wide range of employment support programs financed from the state budget. Characteristically, this support was focused primarily on self-employed people. It consisted mainly of two forms: exemption from paying social insurance contributions and payment of the standstill benefits (*wiadczenie postojowe*). This benefit also concerned the people under civil law contracts, i.e. people who are not formally entrepreneurs (because they have not registered a business) and are party to contracts for the provision of services, i.e. they perform work in an economic sense but are not subject to protection under the labour code.

On the other hand, the support for classic employees was much lower and consisted mainly in co-financing shortened working time schemes (under Polish regulations, the funds were received by the employer who, if

[2] As an example: Gruber-Risak, Hatzopoulos, Mulcahy, *Policies to support the self-employed in the labour markets of the future*, in *BPB*, 2022, n. 8.

met certain criteria, could apply for them and use them to co-finance employees' salaries and social security contributions). The government has in no way responded to the trade unions' demands to significant increase the amount of unemployment benefits, which is still abnormally low compared to most EU Member States.

We decided to find an answer to the question of what causes such a noticeable disproportion in the distribution of aid funds that focused on directing them mainly to the self-employed, most of whom function as "zombies". It is worth clarifying right away what we mean by this word. The practice of self-employment on the Polish labour market has been developed widely for people who, in fact, are not able to function independently in the market reality, which means that in any potentially crisis situation they are at risk of "economic death". We call them "zombies" self-employed, because they come to life only after administering a "drip" from public funds[3]. The sudden economic collapse caused by the COVID-19 pandemic has become a brutal opportunity to test in practice the ability of this type of entrepreneurs to survive.

A hypothesis will be presented that such a distribution of accents in the activities of the government's actions in relation to the broadly understood labour market during a pandemic is part of the overall narrative regarding the vision of the future of socio-economic development, in which the key assumption is to distinguish self-employment (understood rhetorically as entrepreneurship) as by definition better than subordinated work – allegedly providing about greater independence and responsibility of the individual. Symptomatic confirmation of the idea that this belief is rooted in Polish reality is the fact that there is a lecture subject in secondary school: entrepreneurship, while secondary schools' students are not familiarized themselves with the basic principles of labour law, which makes them noticeably helpless when they appear on the labour market for the first time.

We will try to answer the question of what has led to the fact that in the Polish labour market there are so many self-employed people who do not have any capital at their disposal to survive the period of economic downturn. We will pay attention to such issues as:

- lack of compliance with the existing regulations on the obligation to

[3] We would like to expressly emphasize that the form of such a "drip" has been also available before the COVID-19 pandemic as well as now – exemptions from the obligation to pay social security contributions or radical reduction in its amount.

conclude employment contracts including drawing attention to the jurisprudence of the Polish Supreme Court, which increasingly draws attention to the key importance of the factor of the will of the parties and not the objective features of the relationship between them, including the existence of subordination;

- the importance of the preferences of the labour market participants themselves. Generally, low wages result in a greater "temptation" to use any legal form that leads to higher net income;

- economic and social rhetoric, presented both in the mainstream media and social media. It is a legacy of the neoliberal assumptions underlying the transformation carried out after the collapse of the authoritarian system in Poland and describes self-employment (understood rhetorically as entrepreneurship) as a life attitude by definition more creative, appropriate or responsible than being an employee.

Then, we will show what kind of support was received by the self-employed (and those who were party to so-called civil law contracts) during the COVID-19 pandemic. And finally, we will consider the reasons that make public authorities, but also social partners fail to notice the disproportions in the structure of providing support to various groups of labour market actors during the pandemic.

Why does this issue seem important? Primarily because it sheds additional light on the common (but false in case of Poland) narrative that can be summarized as follows: during the pandemic, full-time employees used job retention programs directed to them by employers (such as a short-term work scheme). On the other hand, the self-employed, or atypical workers were provided with not sufficient support that allowed them to survive the pandemic[4].

The Polish example seems to us to be interesting as an *ad-hoc* standstill benefit was created, which could be collected by a self-employed person (regardless of whether he/she would have access to unemployment benefit) in a situation when the amount of this benefit was higher than the unemployment benefit, what showed a clear preference of the public authority for a specific form of activity in the labour market.

[4] Spasova, Ghailani, Sabato, Vanhercke, *Social protection for atypical workers during the pandemic. Measures, policy debates and trade union involvement in eight member states*, in *ETUI-REHS WP*, 2020.

2. *Where do zombies come from, about the specific position of the self-employed on the Polish labour market?*

The percentage of the self-employed in the Polish labour market among people aged 20-64 is one of the highest in the EU (18.4% in 2021). The solo self-employed dominate among them (14.3%). In this regard, Poland is in second place after Greece[5]. The explanation for this phenomenon should be sought in historical conditions of relatively recent date. Until 1989, Poland was in the orbit of a centrally planned economy, where the concept of the labour market as such did not really exist due to the omnipotence of the state in all socio-economic matters. The political changes brought about by the collapse of the Soviet empire triggered a transition towards a market economy model, with the consequences of accelerating privatisation and restructuring of large state-owned enterprises. A real labour market, governed by the laws of supply and demand, emerged in Poland. Labour shortages, which had been artificial during the period of a centrally controlled economy, disappeared, while there was an excess of labour supply, which was the cause of the rapidly rising unemployment rate – a phenomenon officially absent during the socialist economy. The unemployment rate rose from zero in 1989 to 16.4% in 1993[6].

Although foreign direct investments directed to Poland by multinational corporations were growing rapidly, they were not able to absorb the surplus labour force. An additional risk factor was the policy of the state successively tightening the criteria of access to unemployment benefits, shortening the period of their receipt and reducing their amount. While in 1990 80% of the unemployed were entitled to the benefit, in 1995 it was 52% and in 2000 – only 20.3%[7]. The above factors, combined with liberal business regulations, resulted in a rapid increase in the number of microenterprises, largely one-person enterprises. To date, this type of entrepreneurship dominates in Poland. In 2017, among 2.3 million microenterprises, almost 2/3 were self-employed[8].

[5] Eurostat, *Self-employed people without employees (own-account workers) by country in Q3 2009, 2019 and 2021*, EC, 2022.

[6] Steinerowska-Streb, *Rynek pracy w gospodarce transformuj cej si : przykład Polski*, in Pangsy-Kania, Szczodrowski (eds.), *Gospodarka polska po 20 latach transformacji: osi gni cia, problemy, wyzwania*, Instytut Wiedzy i Innowacji, 2010.

[7] Szyłko-Skoczny, *Polityka rynku pracy w III RP - do wiadczenia i wyzwania*, in *ProbPolSpol*, 2014, vol. 26, n. 3, pp. 25-42.

[8] PIE, *Mikrofirmy pod lupą*, Polski Instytut Ekonomiczny, 2019.

But why do self-employed zombies still exist on the Polish labour market in a situation where, for several years now, the economic situation has been excellent, the unemployment rate is getting lower and lower, and large companies are desperately seeking qualified workers? There may be several reasons for this. First, the importance of the preferences of labour market participants themselves, which are further stimulated by incentives from the state. Despite the acceleration of wage growth in Poland over the past few years, it is still not sufficient, as evidenced by the fact that almost 10% of Poles are "working poor"[9]. Although this percentage is below the EU average and is gradually declining, almost 1.6 million people may be willing to look for additional income at any cost. In general, low wages result in a greater "temptation" to use any legal form that leads to higher net wages. And here, the self-employed receive clear bonuses in terms of paying social security contributions compared to a person employed based on a contract of employment. There are numerous discounts for starting a business, the health contributions are not dependent on the size of the business. Another issue is sickness insurance for such persons only at their will.

Since May 2018, the "relief for start-up" is in force, i.e. the possibility of not paying social security contributions for the first 6 months of running a business. After using this relief, entrepreneurs can benefit from preferential contributions for 2 years – the lowest basis from which they can calculate contributions is 30%. of the minimum salary (compared to a basis of at least 60% of the average salary with standard contributions). There is also a possibility to pay lower social insurance contributions. It can be simply stated that it is addressed to potential zombies. If you are a sole proprietor and have been in business for at least 60 days in the year preceding the submission of your return you may apply for lower Social Insurance contributions. In addition, their annual income in the previous year must not have exceeded PLN 120,000 (approx. €27,000)[10]. In addition, there are very flexible rules regarding the possibility to suspend business activity or favourable tax rules (above all, a flat tax of 19%). All this results in a noticeable difference in the net income of a self-employed person in comparison with a contractual employee.

[9] Muster, *Employees' poverty: Poland in comparison to other EU countries*, in *ProbPolSpol*, 2021, vol. 52, n. 2, pp. 26–53.

[10] Here and hereafter, conversion according to the average exchange rate in 2020.

Of course, employment based on an employment contract is the most stable basis for activity in the labour market, it is connected with paid holiday leave, specific rules on maternity protection etc. but in common practice, it is not connected, for example, with the employer's investment in the qualifications and competences of the average employee. In Poland, for example, there are no sectoral training funds. In general, employer involvement in employee development is relatively limited. Looking at this, one can choose self-employment with the knowledge that being an employee would not give the expected possibility of professional development anyway.

Secondly, there are no effective legal mechanisms to counteract the shift from employment contracts to self-employment in situations of obvious economic dependence. This may explain the strange regularity that the number of self-employed increases during periods of economic crises, which, after all, are not conducive to the establishment of new businesses and, on the contrary, may cause businesses to fail. For example, before the COVID-19 pandemic, in Q4 2019, about 1 million 595 thousand people were self-employed; in Q4 2020, it was already approx. 1 million 630 thousand people. This means that the number of self-employed increased by around 35,000 in 2020. It is hard not to suspect that this may be related to "pushing out workers into fictitious self-employment"[11].

The situation is complicated by the inconsistency in the case-law by the courts in relation to types of employment. On the one hand, the Supreme Court has repeatedly ruled that in a situation where the risk of conducting business activity is not borne by the self-employed person, but only by his/her exclusive client, and in addition, the remuneration for this activity is determined in a lump sum, it means that the person conducting business activity is, in fact, an employee[12]. However, other decisions of the Supreme Court increasingly often suggest the superiority of the freedom of contract contained in the Civil Code (i.e. the possibility of arranging a legal relationship at the discretion of the parties, as long as its content or purpose does not contradict the nature of the relationship, the law or the principles of social co-existence) over the provisions of the Labour Code indicating that the performance of work in conditions of subordination is employment

[11] PIE, *W koronakryzysie fikcyjne samozatrudnienie coraz bardziej powszechn form zatrudniania pracowników*, in *TG PIE*, 2021, n. 14.

[12] E.g. ruling of the Supreme Court I PK 142/18 and II PK 189/14.

under an employment relationship, regardless of the name of the contract concluded by the parties[13]. As it seems, the case law practice of courts is more and more often leaning towards the latter interpretation. This is important because in Poland all issues of assigning work providers to the appropriate regime have been left primarily to judicial decisions, which, in addition, must be based on general provisions of the Labour Code unchanged for several decades[14].

And finally, an image issue that cannot be ignored here. The positive vision of entrepreneurship as an activity which is generally more creative than "ordinary" paid work has been promoted practically from the very beginning of the socio-economic transformation. This rhetoric presented both in mainstream media and in social media is a legacy of neoliberal assumptions of the initial period of transformation in Poland, based mainly on the theses of the Washington Consensus. In this view, self-employment itself is seen as a life attitude that is by definition more appropriate or responsible than being a formally dependent worker. The (undisclosed) existence of such a paradigm accepted by the ruling elites, regardless of their political provenance, may be confirmed by the fact that for years secondary schools have been teaching the following lecture: fundamentals of entrepreneurship (now to be called: business and management!), but not equipping students with the necessary knowledge on their future functioning on the labour market.

In Poland, there is a broad consensus on the adequacy of the description of existing employer-employee relations as very strongly hierarchical and characterised by a high degree of subordination. The term "landowner" (*folwarczny model pracy*) model of work is often used to describe the Polish work model. The widespread use of "management" of human resources with the use of such pressure mechanisms as anger, giving orders in a very explicit manner, shouting, and expecting results regardless of the objective capabilities of the employee would be, among others, a consequence of the long-lasting institution of serfdom in Poland. Additionally, a very low level of confidence of Poles in the state and in any emanation of public authority is indicated, which is supposed to be the aftermath not only of the communist period but also of the earlier partitions (when the country's territory remained

[13] E.g. ruling of the Supreme Court II UK 201/12.

[14] Grzebyk, *Analiza orzecznictwa s dowego w sprawach o ustalenie istnienia stosunku pracy. Zatrudnienie pracownicze a zatrudnienie cywilnoprawne*, Instytut Wymiaru Sprawiedliwości, 2015.

under foreign occupation). In such conditions, it may be assumed that a certain group of people "escapes" into self-employment as a form of escape from employer-employee relations characterised by luck of comfort in mutual relations.

The low internal geographical mobility of Poles (resulting from the post-transformation collapse of local public transport and the lack of a developed housing market) may be another factor. Thus, in specific areas of the country, the choice of self-employment rather than seeking subordinated work became a necessity.

The last element is the low popularity of part-time work. This is due to a strong belief among employees that they will be paid in proportion to their working hours while their responsibilities will reflect full-time work. We are talking here more about prevailing beliefs – such as that a part-time worker is by definition not promotable. In such circumstances, when someone wants to work *de facto* less than 40 hours a week, they often choose self-employment and then economic dependence on one contractor.

3. *COVID-19 pandemic and (strange) directions of public support for labour market participants*

In response to the crisis caused by the COVID-19 pandemic, the Polish government quite efficiently prepared successive legislative packages to protect the economy and workers. These were called Anti-Crisis Shields. The first of the Shields, adopted in March 2020, was followed by others. The financial instruments adopted in relation to employees were directed at their employers and made it possible to subsidise salaries in the event of economic downtime or reduced working hours. The initial amount was PLN 1,533.09 (approx. € 365) per full-time employee together with social security contributions. Companies could claim a wage subsidy if turnover decreases by a minimum of 15% (any two months of 2020 compared with the same period of 2019) or by a minimum of 25% (from January 2020 compared with the previous month). It is estimated that in 2020 the sum of these benefits amounted to PLN 6.802 billion so € 1.479 billion[15]. This represented 0.3%

[15] Surdykowska, *Job retention schemes in Europe – Poland*, in J. Drahokoupil, T. Müller (eds.), *Job retention schemes in Europe. A lifeline during the Covid-19 pandemic*, ETUI, 2021.

of GDP and was therefore one of the lowest values across the EU, although of course this must be regarded as preliminary data as there are no studies covering the entire pandemic period. At the same time, the public authority decided to provide extensive support to self-employed persons. Provision was made for them to receive a standstill benefit of PLN 2080 (€667). Initially, this was a universal solution – regardless of the sector.

Self-employed persons had to prove that in the month preceding the application their income was at least 15% lower. Initially, the standstill benefit was only paid to self-employed people whose income in the previous month did not exceed PLN 15,595.74 (approx. €3,463). Later, this income limit was abolished. Under the second regulation from autumn 2020, support for the self-employed was linked to activities in specific sectors. The provision of support was linked to the following conditions: the income from the activity in October or November 2020 had to be at least 40% lower than in the same period of the previous year; the self-employed person had to suspend the business as a result of COVID-19; the self-employed person had previously received standstill benefit.

The third regulation of 2021 made the grant of support conditional on a documented fall in turnover. In the event of a decrease in turnover of: at least 30%, support could be granted in the amount of 50% of the monthly minimum wage (PLN 1,300; approx. €289); at least 50%, support could be granted in the amount of 70% of the monthly minimum wage (PLN 1,820; approx. €405); at least 80%, support could be granted in the amount of 90% of the monthly minimum wage (PLN 2,340; approx. €520). In each case, support was available for a maximum period of 3 months. The standstill benefit was also due to those self-employed who suspended their business after 31 January 2020. In this situation, the entrepreneur does not have to meet the condition of a decrease in income.

Successive waves of COVID-19 were associated with successive "waves" of standstill benefits for the self-employed, which were combined with non-refundable loans. However, this already applied only to specific industries that were likely to be affected by the anti-covid restrictions imposed. For example – the restrictions that came into effect from 15 December 2021 consisted of the closure of discos, dance clubs or other forms of recreation in an enclosed space. Those whose business activities related to these areas received a renewed standstill benefit of PLN 2080 (approx. €462) – with a fall in income in one of the two months preceding the month of application

following a COVID-19 of at least 40% compared to the comparative period. Additionally, they were entitled to: a one-time grant to cover current costs of running business activity in the amount of maximum PLN 5,000 (approx. € 1111) – in the event that the income obtained in December 2021 was lower as a result of the occurrence of COVID-19 by at least 40 percent in relation to the income obtained in the relevant comparative period and exemptions from social security contributions for December 2021 – with a decrease in income in one of the two months preceding the month of application following the occurrence of COVID-19 of at least 40% in relation to the comparative period. The standstill benefit for the self-employed totalled about PLN 5 billion (approx. € 1.11 billion) in 2020-21.

Additional support for the self-employed should also be mentioned, namely the exemption from paying social security contributions. This meant a *de facto* declaration of financing of accounting entries on individual accounts of these people in the Social Insurance Fund, which results – in addition to the right to health experience – also in support from the state budget for their future pensions. In 2020-21, the total amount of this type of support for entrepreneurs employing fewer than 50 people was approximately PLN 15.5 billion (approx. € 3.44 billion), including PLN 2.288 billion (approx. € 0.64 billion) for solo self-employed.

If we compare the support directed to self-employed workers and to employees during the COVID-19 pandemic, it seems that it was definitely more beneficial for the former. While the funds allocated to support employees during the economic downtime also included a social security contribution, the amount paid depended on the economic situation of the individual enterprise. In the case of self-employed people, they could choose not to pay their contribution in full, and it was still credited to their pension accounts.

What caused a very nervous negative reaction from the trade unions was the amount of standstill benefit for self-employed people, which was significantly higher than the amount of unemployment benefit. This meant that a self-employed person who stopped working was in a better situation than an employee who lost his job. Admittedly, as of September 2020, the unemployment benefit was raised to PLN 1,200 (approx. € 267), but the trade unions still regarded this as insufficient. During the presidential election campaign, incumbent president Andrzej Duda, running for re-election, agreed and pushed through the introduction of the so-called solidarity al-

lowance in the amount of PLN 1,400 (approx. € 311) which was to be paid for a period of 3 months to people losing their jobs between June and September 2020, as part of an agreement with the NSZZ Solidarno trade union. However, it was a temporary solution that could not satisfy trade unionists. The other leading trade union centre, OPZZ, regularly demanded that the unemployment benefit be increased to the level provided for in Convention 168 of the International Labour Organisation, i.e. at least 50% of the last received salary.

When one traces the history of support provided to labour market actors during the pandemic, one cannot help but notice a certain dichotomy. In the case of employees, this support was not only limited and channeled through employers, but was also accompanied by measures allowing for (temporary) lowering of standards in the workplace (e.g. the possibility of suspending the social fund in companies, or limiting the inspection powers of labour inspectorates). Economically dependent self-employed workers were treated on an equal footing with the rest of entrepreneurs, benefiting from a whole range of allowances and subsidies which made their income situation less threatening than that of employees of companies in trouble.

4. *Self-employed zombies as proof of the hidden paradigm of the Polish labour market?*

In the point on the response of public authorities to the effects of the COVID-10 pandemic in the labour market area, we highlight emblematic features of this response. The benefits received by the self-employed were more favorable than those received by those working under a contract of employment or losing their job. In fact, it could be argued that during the COVID-19 pandemic, the self-employed, who had previously failed to generate their own means of subsistence despite existing financial incentives from the state, received an additional "drip" of aid during the crisis.

This means that the state has *de facto* supported the self-employed zombie who, due to their inability to function independently as entrepreneurs, should seek their future on the labour market as employees. Moreover, the pandemic period has not caused the public authorities to reflect on the need for radical changes to the unemployment benefit system. With this in mind, we would like to take a look at the dominant view of the

labour market and labour law in Poland to seek an explanation why public authorities took the decisions they did during COVID-19. In other words, what is behind the dominant discourse on the greater role of entrepreneurship (self-employment) in economic and social development over subordinated work.

The first issue is the attitude to unemployment benefits. One can get the impression that the approach of most political elites ruling Poland since the beginning of the transformation is similar, treating the state of unemployment as an alien phenomenon to be avoided in every way (including by encouraging own entrepreneurship) rather than as a normal challenge for active labour market policies. It is a truism to state that during the period of the centrally controlled economy, unemployment did not theoretically exist. Of course, there was a great deal of hidden unemployment, if by this we mean economically irrational over-employment in particular positions in particular workplaces. It is also a truism to state that unemployment has become the basic social problem during the period of political and economic transformation. The very strong and dynamic remodeling of the economy was expressed in the privatisation of state enterprises or the liquidation of big agriculture state farms, with obvious consequences for the situation of the labour force. Labour was becoming a precious good. Poland faced an exceptionally high scale of unemployment in the pre-accession period to the EU, which resulted in massive emigration of Polish citizens to the EU member states that opened their labour markets first. Emigration processes after 2004 are treated in Poland as an unhealed wound – the source and cause of growing demographic problems. It is not important that empirically this thesis does not make sense (the cause of the currently growing demographic problems is a collapse at the beginning of the 1990s and the phenomenon of a fundamental decline in fertility rates also occurring in other countries) – what is important is that the fear of unemployment as a social phenomenon that may cause a "nightmare" effect is socially or politically very strong. In such a paradigm, everything is better than unemployment (even the low labour force participation rate), understood as the presence of people on the labour market looking for work and expecting active support from the state (benefits, costly labour market services). Since the beginning of the political transformation, no political party has seriously tried to push through the concept of unemployment insurance – understood in such a

way that the amount of benefit is in any way related to lost wages. The unquestioned assumption was that the Polish economy could not afford it; the contribution would constitute an excessive non-wage labour cost. The criteria for accessing the unemployment benefit was gradually tightened and in return, a simple message was being offered to those at risk of losing their jobs – "take matters into your own hands and register as self-employed". More and more social security reductions were introduced to make it as cost-effective as possible for solo self-employed people to enter the market.

It is a picture in which the period of unemployment is not treated as a certain transfer period between one employment and another, but as an individual and social disaster. For example, it should be stressed that the special fund – Labour Fund (which comes from employers' contributions, the amount of which is determined annually in the Budget Act), which is supposed to serve the purpose of activating the unemployed, has in most years not been used for passive (unemployment benefits) and active forms of combating unemployment (for example, training, vocational guidance, improving the quality of job placement, etc.), but have been allocated by the public authorities for other purposes not related to the labour market. The bitter truth is that the current system of supporting the unemployed in Poland is characterized by: overrepresentation of unemployed people without the right to unemployment benefit, who are not unemployed in economic terms (who are not looking for a job) and register with employment offices only in order to obtain the right to health benefits; a significant proportion of the "real" unemployed (jobseekers) who are not entitled to unemployment benefits; a very low amount of the allowance, which in practice does not allow you to function above the subsistence level; a limited number of funds allocated to the active fight against unemployment and improvement of the qualifications of the unemployed; spending funds from the Labour Fund for purposes that are not within the scope of its tasks (such as, for example, co-financing the system of additional savings for the retirement under Employee Capital Plans). The Labour Fund became a "piggy bank" from which the government could draw for de facto any purpose. This has been a permanent subject for protest from both trade unions and employers' organisations. It is hard to resist the impression that the vision of the system of support for the unemployed assumes that such persons will almost immediately and independently find another job or will deactivate themselves on the labour market or

start a business. This helps us to explain the phenomenon of self-employed zombies.

There is also the other side of the coin, related to existing labour law regulations. The Polish Labour Code dates back to 1974 (of course, it has been partially amended hundreds of times), so it contains regulations being a legacy of the communist times, to a large extent not adjusted to the needs of the contemporary labour market. As a result it limits the freedom of employers in shaping the workforce in their companies, which makes them more willing to use the wicket allowing for large-scale solo self-employment (economically dependent on one contractor) or civil law contracts (in practice – contracts of mandate). On the other hand, the general weakness of social dialogue mechanisms in Poland causes that trade unions are very reluctant to attempt to modernize the labour law limiting legislative protection of an employee and unions' own rights. One may get the impression that in order to defend the existing *status quo*, they are de facto ready to accept the existence of self-employed zombies.

In light of the above considerations, it is possible to put forward a thesis that the functioning of the self-employed zombie is a reflection of a much more serious problem of the Polish labour market. This is confirmed by the experience of the COVID-19 pandemic. It shows that the increase in the number of people receiving unemployment benefits is still treated as the greatest disaster, rather than as an objective phenomenon that requires an appropriate response. In contrast, the fact that the number of self-employed people has not decreased during the crisis is treated as a major success, even though this statistic is largely due to the zombie drip of self-employment.

Directing serious support from public funds to this group during the COVID-19 pandemic, while failing to modernise the system of unemployment benefits, reveals the hidden paradigm of betting on the development of individual entrepreneurship as the main engine of the Polish economy. This is additionally supported by the phenomenon of what we call post-traumatic stress disorder of Polish politicians associated with the experience of mass unemployment in the 1990s. In such an approach, any type of unemployment, even if resulting from objective reasons (e.g. technological unemployment), does not become a challenge for active labour market policies, but a threat that can be prevented by an (illusory) incentive for independent economic activity.

5. *Concluding remarks*

In our opinion the deep attachment of both the public authorities (irrespective of the political orientation of particular governments) and society to the idea that a high scale of self-employment is beneficial as it indicates the development of entrepreneurship constitutes a visible problem for the Polish labour market.

This is manifested in the widely accepted perception that an increase in self-employment means that Poland is moving in the right direction economically and socially. Within this paradigm, it is often emphasized that self-employment as such is more beneficial to society, the economy and the individual than an employer-employee relationship (employment contract). Such a discourse has dominated the Polish labour market debate since the beginning of the transformation, i.e. since 1989. Occasionally there are voices (more numerous than in the past, but still isolated) that such a high scale of self-employment as is currently the case is not beneficial to economic development, as the self-employed persons are less effective than other categories of people present on the labour market. More often than in the past, there are also claims about excessive tax and contribution preferences for the self-employed. However, it is difficult to speak of any breakthrough in the perception of this phenomenon.

In this paper, we did not address the issue of EU regulations on self-employment. It would be interesting to ask the question whether and to what extent they have influenced/are influencing Polish regulations in this area? We will not attempt to answer this question. It seems to us that one could defend the thesis that to a small extent. As you know, freedom of doing business is guaranteed by Article 16 of the Charter of Fundamental Rights. In the Charter we also have guarantees for the exercise of the right of establishment and the provision of services in all Member States (Article 15). The Union's goal of encouraging this form of activity is expressed in Principle No. 5 of the European Pillar of Social Rights. The key point is that the concept of self-employed is not defined autonomously in European Union law. Acts of EU law refer in this regard to the definitions contained in the legal orders of the member states. It is, of course, the case law of the Court of Justice can be pointed to, first of all, the judgment of November 20, 2001 in the case of Aldona Malgorzata Jana and others v. Staatssecretaries van Justice (C-268/99). Of course, the context of this ruling was specific (distinguishing

the provision of sexual services from prostitution in subordination to the person organizing this practice). Nonetheless, the criteria indicated in that judgment: carrying out an economic activity outside of any relationship of subordination , in terms of the choice of this activity, the conditions of work and the conditions of remuneration, on one's own responsibility and in exchange for remuneration paid to this person directly and in full, are crucial for defining self-employment (compare the judgment of the CJ of December 15, 2005 in the joined cases against Claude Nadin Nadin- Lux Sa (C-151/04) and Jean-Pascal Durre (C-152/04). As we pointed out in earlier discussions, the Polish legislator allows de facto self-employment under conditions of perceived subordination.

The differentiated support situation of both groups of individual labour market actors during the COVID-19 pandemic seems to confirm the thesis about the permanent character of dichotomy between self-employed and employees. Let us emphasise again that the amount of the standstill benefit for the self-employed was higher than the amount of unemployment benefit and was addressed to all the self-employed whose turnover had dropped as indicated, taking the benefit was not connected with the necessity to terminate business activity (the necessity to deregister it) and the benefit was addressed to all the self-employed, both to those who could potentially cease their activity and acquire the right to unemployment benefit and to such self-employed persons who, due to the radically low contribution they paid, could not acquire the right to unemployment benefit even potentially.

In our opinion, such dichotomous solutions applied in the framework of support for the participants of the labour market in relation to COVID-19 have discriminatory features and should be assessed in the light of the Constitution of the Republic of Poland and the principle of "social justice" contained therein. Article 2 of the Constitution indicates that the Republic of Poland is a democratic state under the rule of law, implementing the principles of social justice. With this in mind, the question arises whether the scale of support addressed to the self-employed – even if it was of a virtual nature (an accounting entry in an individual insurance account) is fair in the context of comparability of measures addressed to different categories of persons present on the labour market.

As brutal as it may sound, the COVID-19 pandemic was a missed "opportunity" to purge the Polish labour market of people running businesses but having neither capital nor specific marketable skills or a concept of how

to run a business. It is obvious that the extraordinary situation related to COVID-19 would necessitate reconstruction of various elements of support for all labour market participants (including a radical increase in unemployment benefits). Of course during the pandemic crisis, it seemed necessary to create an ad hoc support for self-employed people who were not entitled to unemployment benefit. However, for axiological reasons it should be lower than the latter one financed after all by the person previously paid contribution and not by the government's helicopter money. All this submits us to uphold the thesis of the blind faith of the ruling politicians in the vision of entrepreneurship that will revive even zombies.

Abstract

The paper discusses the nature of the support received by self-employed persons (and those who are parties to so-called civil law contracts) during the COVID-19 pandemic in Poland. The authors point out that the benefit received by such people, the so-called "standstill benefit" (*świadczenie postojowe*) was higher than unemployment benefits. This may raise serious doubts both ethically and from the point of view of the rationality of the functioning of the socio-economic system. In the authors' opinion, this is due to the blind adherence of successive governments in Poland to the idea of entrepreneurship as a solution to all possible problems and challenges in the labour market..

Keywords

Labour market, COVID-19, self-employed, unemployment, entrepreneurship.

Tania Bazzani

The European Pillar of Social Rights Before and After the Pandemic: How the Covid has impacted on its Achievements and Focus on the European Employment Policies

1. *Introduction*

In addressing the pandemic, the EU's and Member States' political strategy marked a clear change in comparison with the austerity policies adopted during the first stage of the 2008 financial crisis, which led to a cut in social spending and in a downsizing of social protection for people. Some authors speak about a process of "socialisation"[1] (see paragraph n. 2.1) that has progressively led European and Member States' policies to embody a more social perspective from 2015. This coincided with the European Commission

[1] ZEITLIN, VANHERCKE, *Socializing the European Semester: EU Social and Economic Policy Co-ordination in Crisis and Beyond*, in *JEPP*, 2018, vol. 25, n. 2, pp. 149-174. The process of socialization touches also the post-pandemic period: VESAN, CORTI, SABATO, *The European Commission's entrepreneurship and the social dimension of the European Semester: from the European Pillar of Social Rights to the Covid-19 pandemic*, in *CEuPs*, 2021, n. 19, pp. 277-295.

(henceforth "Commission") headed by Junker, that has emphasised since its inauguration the need to strengthen the social dimension of the European Union. This resulted in a document sketching out future directions for developing social rights within the EU, while reinforcing the existing EU social acquis: the European Pillar of Social Rights.

In November 2017, the European Pillar of Social Rights (henceforth "EPSR") was solemnly proclaimed by the European institutions, confirming the will in progressing on social rights. It consists of 20 principles contained in three interconnected chapters: equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. From a legal perspective, the EPSR is soft law; however, it can be used to generate hard law and interact with it.

Just over two years after the EPSR's proclamation, the World Health Organization declared the outbreak of a dramatic international public health emergency (30 January 2020) and a pandemic on 11 March 2020, with tremendous and complex social and economic impact at a global level, including but not limited to pandemic-related deaths, social distancing requirements, corresponding social exclusion for vulnerable persons, stagnation in education, etc[2]. When Member States (henceforth "MSs") had scarcely emerged from the most dramatic moments of the pandemic, an international armed conflict broke out in Ukraine due to the Russian attack, with different repercussions on MSs[3].

Within this complex context, it is worth asking what kind of progresses the EPSR has managed to achieve from its proclamation to the present day, particularly because the pandemic – and the effects of the ongoing war –

[2] For example: Blustein, Guarino, *Work and Unemployment in the Time of COVID-19: The Existential Experience of Loss and Fear*, in *JHumPsych*, 2020, vol. 60, Is. 5, pp. 702-709; Kong, Prinz, *The impact of shutdown policies on unemployment during a pandemic*, in *Covid Economics 17*, 13 May 2020, pp. 24-72, https://air.unimi.it/retrieve/dfa8b9a7-958f-748b-e053-3a05fe0a3a96/CovidEconomics17%281%29.pdf#page=29; Tamesberger, Bacher, *COVID-19 Crisis: How to Avoid a "Lost Generation"*, in *InterEcon*, 2020, vol. 55, pp. 232–238; Sumner, Hoy, Ortiz-Juarez, *Estimates of the Impact of COVID-19 on Global Poverty*, in *WIDER WP*, 2020, n. 43; Eurofound, *Living, working and COVID-19*, COVID-19 series, Publications Office of the European Union, Luxembourg, 2020.

[3] In addressing different situations of crisis, from the pandemic to the Ukraine's invasion, the EU shows to be "a *sui generis* multi-level, multi-faceted actor that can change shape in response to events", Anghel, Jones, *Is Europe really forged through crisis? Pandemic EU and the Russia - Ukraine war*, in *JEPP*, 2023, vol. 30, n. 4, pp. 766-786, DOI: 10.1080/13501763.2022.2140820.

have inevitably channelled the use of available national and European resources and the attention of the regulatory interventions to deal with the emergency situation. In these respects, and others, it is interesting to consider how present circumstances have influenced the implementation of the EPSR; that is, whether its development has changed substantially from the way it was initially conceived, or instead whether it has progressed or developed differently than expected.

In fact, the proclamation of the EPSR was accompanied by the political declaration of the European institutions to make the current acquis in the social field more effective and to strengthen it by setting new goals for the future[4]. This has triggered many initiatives (proposals for directives, directives, communications, etc.; see Commission summary) in less than a year and a half. The hypothesis put forward is that the pandemic has played a role in slowing down the implementation of the EPSR, having channelled the use of resources previously earmarked for the implementation of the EPSR to respond to the emergency, and, in a broader sense, to have channelled the intervention activities of the EU and the MSs.

Obviously, other elements may have had an impact, such as the difficulty of reaching consensus on many issues in an enlarged EU context. However, it seems necessary at least to take a snapshot of interventions during the pre- and post-COVID periods, and to suggest some of the particular elements that could have influenced the development of the social dimension in a different way.

In considering these issues, this article will attempt to analyse whether the results achieved so far have maintained consistency with the original design of the EPSR, or whether the emergency interventions to cope with these multiple crises have caused a slowdown or a departure from the initial impetus of its conceptualisation. Within this context, in the second part of this article, particular attention will be devoted to the employment policies implemented by the EU in the last few years.

This article also focuses on the aspect of employment policies instead of the entire content of the EPSR, for two key reasons. Firstly, employment policies aptly demonstrate the interplay between two dynamics that run through the EPSR – a protective and proactive dynamic. By employment

[4] EC, *Establishing a European Pillar of Social Rights*, Commission Staff Working Document, SWD(2017) 201 final, Brussels, 26.4.2017.

policies, we mean both active policies intended to economically support the unemployed and inactive policies (also known as passive policies) which create the conditions for a return to the labour market through courses, guidance, or other initiatives. Secondly, employment policies are particularly significant during a crisis because they not only aim to preserve the income of those who have involuntarily lost their jobs, but also to encourage their return to the labour market through activation policies; these activation policies are often overshadowed in times of crisis when short-term interventions take precedence. Focusing on employment policies during the COVID-19 pandemic helps to untangle these shifting policy priorities.

Following an explanation of the methodology adopted for assessing the EPSR's results, the first part of this article focuses on the implementation of the EPSR before the pandemic (section 2). Next, this article will assess the EPSR's achievements during the pandemic until today (section 3), as well as the Action Plan for implementing the EPSR and its follow-up thus far (section 4). The article concludes by offering remarks on whether the EPSR implementation has changed considerably in light of the COVID-19 pandemic, and discussing whether these changes have slowed or impeded its implementation in the post-pandemic period. Solutions for possible improvement will also be suggested.

1.1. Methodology

This section describes the methodological approach to assessing the outcomes of the EPSR. In the view of the previous Commission[5], the initiatives (Recommendations, Communications, Directive, proposals of Directives, etc.) that initiated at the start of the Juncker presidency and which might be seen as consistent with the EPSR's principles should be considered as resultant impacts of the EPSR's implementation (regardless of whether these initiatives were developed previously or not). This way of reporting the EPSR's outcomes has raised doubts as to whether its results essentially consisted of a repackaging of previous initiatives (without actually offering material or novel contributions toward the strengthening of the social rights

[5] EC, *Social Priorities Under the Juncker Commission*, November 2019, https://ec.europa.eu/commission/presscorner/detail/en/FS_19_6552.

within the EU), or whether they actually constituted added value brought forth by the implementation of the EPSR[6]. It is therefore important to establish with which particular criteria an assessment of the outcomes of the EPSR might be made, from its inception until present day.

In order to address this issue and evaluate the ways in which the EPSR has been put into practice, this contribution will focus on three conceptual areas that have produced actual effects[7]. These areas may be instructive for further developments. One important aspect is how the EPSR has influenced the European institutions' practice to make decisions and orient policy (the "process"). In other words, this aspect enables one to assess whether the implementation of the EPSR has been supported by a genuine commitment of the European institutions in a way that permeates their decision making on a more fundamental level. This is relevant because economic policy plays a greater role in the EU than employment policy, and is also due to broader legislative competences in the first field. Another important field of analysis touches on how the EPSR has impacted the management of EU resources (the "resources"). This is crucial in order to verify whether the European Institutions create the actual conditions for implementing the EPSR. An investment of European resources not only helps to support those MSs with fewer resources available to realise the EPSR, but also to convince more reluctant MSs by providing a convincing source of support. Finally, another area of concern is whether the political and legal framework (the "framework") offers adequate conditions to implement the EPSR: the existing EU legal *acquis* could reinforce – and be reinforced by – the implementation of the EPSR; whether the EU legal competence in the social sphere is enough[8]; or whether the policy responses to structural problems are stable or only *una tantum*[9]; etc. This is relevant in order to possibly support the implementation

[6] Garben, *The European Pillar of Social Rights: An Assessment of its Meaning and Significance*, in *CYELS*, 2019, n. 21, pp. 101-127.

[7] Other analysis of the EPSR's outcomes pre- and post-pandemic have chosen to take into consideration other aspects, *e.g.* Urquijo, *The Implementation of the European Pillar of Social Rights (EPSR) in the Post-Pandemic Era*, in *RJEA*, 2021, n. 21, pp. 85-84, which focuses, instead, on the economic situations and economic coordination.

[8] As we will discuss on the basis of Scharpf, *The asymmetry of European integration, or why the EU cannot be a "social market economy"*, in *SER*, 2010, n. 8, pp. 211-250.

[9] As these authors try to investigate: Block, Kritikos, Priem, Stiel, *Emergency Aid for Self-Employed in the COVID-19 Pandemic: A Flash in the Pan?*, in *DP DIWBerlin*, 2020, n. 1924.

of the EPSR with a more suitable legal framework than the one that is currently in place, especially if the framework does not adequately support the realisation of the rights described in the EPSR.

After sketching out the EPSR's outcomes along these conceptual lines both before and after the pandemic, this contribution will look at European employment policies as conceived by the Action Plan for implementing the EPSR. Although for the sake of completeness the analysis should cover the entire content of the EPSR, this article focuses on the aspect of employment policies for the reasons already explained in the introductory part of this article. In order to do this, the main proposals regarding active and passive policies will be considered in light of the framework described so far. This provides a particularly interesting perspective of policies that are able to capture the dual dynamics of social rights (i.e. that are both protective and proactive), and, at the same time, explore the impacts of the pandemic on a policy area that is particularly affected in times of crisis.

2. *The pre-pandemic results of the EPSR*

In November 2019, in the immediate period before the outbreak of the COVID-19 pandemic, the Commission published a report with the progress that has been achieved thus far in implementing the EPSR[10]. The report highlighted several initiatives that had been promoted by the Commission: some of these efforts had resulted in directives, such as in the case of the Work-life Balance Directive[11] and the directive on Transparent and Predictable Working Conditions[12], while others were still under discussion[13].

Further, although some directives do not necessarily refer to the com-

[10] Https://ec.europa.eu/info/sites/default/files/social_priorities_juncker_commission_-en.pdf.

[11] Dir. 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

[12] Dir. 2019/1152 of 20 June 2019 on transparent and predictable working conditions in the European Union.

[13] The Pay Transparency directive's proposal: COM(2021) 93 final. However, on 15 December 2022 a political agreement reached between the European Parliament and the Council on the Directive on pay transparency measures: https://ec.europa.eu/commission/presscorner/-detail/en/IP_22_7739, the Platform work directive's proposal: COM(2021) 762 final.

mon understanding of social rights, they were adopted with the aim of achieving coherence with the EPSR, and consequently could be considered as its outcomes. Indeed, the Electricity directive (Directive (EU) 2019/944) can be linked, according to Garben[14], to the implementation of the EPSR – in particular, to principle 20 of the EPSR, "Access to essential services", according to which everyone has the right to access essential services of good quality. Additionally, in line with the idea of creating an EU where people and services can move freely without prejudice to social rights, the Posting of Workers Directive was revised[15] in order to better facilitate the circulation of workers throughout EU while also ensuring workers' rights. The Commission also elaborated a proposal for a Council Recommendation (COM(2018) 132 final), in order to provide non-standard workers and the self-employed with social security schemes and to take measures allowing them to build up adequate social benefits.

2.1. The process to implement the EPSR

Between its introduction until the outbreak of the pandemic, the EPSR demonstrated a capacity to catalyse the attention of policy makers, to impact the guidelines addressed to MSs in planning economic, social and employment reforms, and to confer within its mechanisms a relevant role to social partners.

The implementation of the EPSR must be seen in light of the European Semester, which is the most relevant process for delivering EU policies, and which consists of interconnected actions or steps taken at the EU level[16]; this is a complex procedure focused on economic matters, but also contains employment guidelines which impact the social sphere. After the first period of its introduction – as a tool used to implement austerity policy for addressing the financial crisis started at the end of 2008 – the European Semester embarked on a process of "socialisation"[17], meaning that it started to recognise a special attention to the social dimension.

[14] Garben, cit.

[15] Dir. 2018/957 of 28 June 2018 amending dir. 96/71/EC concerning the posting of workers in the framework of the provision of services.

[16] Hacker, Björn, *A European Social Semester? The European Pillar of Social Rights in practice*, in *ETUI-REHS WP*, 2019.

[17] Zeitlin, Vanhercke, cit., pp. 149-174.

Since 2017, the priorities of the EPSR have been integrated into the European Semester and within the new Employment Guidelines, including a set of new goals, such as the need to ensure adequate minimum wage levels and the need to tackle unemployment and inactivity, together with tailor-made assistance supporting job seekers, training and requalification schemes, and similar initiatives. Such goals are based in particular on the need to eliminate barriers to participation to society, including mechanisms supporting career progression, equality between men and women, fighting undeclared work, fostering the transition towards open-ended forms of employment, and preventing precarious working conditions. Such elements showed an awareness of the interventions needed to guarantee an adequate minimum level of decent living and working conditions, and were not limited to considering social measures not only as a functional component of a fair market (although they were indispensable to it), but as measures valuable in and of themselves, independent from their economic significance.

Further priorities of the EPSR were embraced both by the European Semester and the new Employment Guidelines[18], such as guaranteeing access to essential services (including water, sanitation, energy, transport, financial services, digital communications, etc.), together with adequate social housing assistance and the right to affordable health care (including establishing access to long-term care of good quality). The European Semester did not just embed the EPSR's goals, but it also highlighted the need that MSs should ensure timely and meaningful involvement of social partners in the design and implementation of economic, employment and social reforms and policies[19]. This aspect was considered to be particularly important, since social partners should play a crucial role in implementing the EPSR, together with MS and European institutions. In this way, according to the Commission, the European Semester of policy coordination put "social considerations on par with economic ones in all its core activities"[20].

Also notable was the European Semester's adoption of social scoreboard indicators to measure the EPSR's achievements, which would have provided

[18] COM(2017) 677 final.

[19] Sabato et al., *Implementing the European Pillar of Social Rights: What is Needed to Guarantee a Positive Social Impact*, European Economic and Social Committee, Brussels, 2018.

[20] EC, *Future of Europe*, Factsheets on the Commission's 10 priorities 07 May 2019 #EURoad2Sibiu, https://ec.europa.eu/info/sites/default/files/euco-sibiu-factsheets-commission-10-priorities_en_0.pdf, p. 21.

EU and the MSs' institutions and social partners with a valuable tool to measure the results of associated policies. However, the EPSR social scoreboard coexisted with previous indicators[21] running the risk of creating confusion. Further, the adoption of the new indicators created some concerns in the European Trade Union Institute (ETUI): they were not discussed with social partners and other civil society representatives, denying their role in this matter; in this case, moreover, such indicators were considered insufficient because of the lack of monitoring activity for four EPSR's principles. Hence, they did not monitor principle 7 ("right to information about employment conditions and protection in case of dismissals"), principle 8 ("right to social dialogue and involvement of workers"), principle 10 ("right to healthy, safe and well adapted work environment and data protection") and principle 12 ("right to social protection and lack of agreement")[22].

With respect to specific country recommendations, difficulties were encountered in translating those goals within the specific domestic context, in part due to their general descriptive character. According to some authors[23], such inefficiencies were also due to a lack of available resources at the domestic level because of the restrictions imposed by the European Semester, which limited the MSs' capacity to deliver the EPSR. Thus, a dissonance can be observed between the declarations of principle of the European Semester, which recognised the crucial role of the EPSR, and the actual measures it put in place, which place tight economic constraints on the realisation of the EPSR.

Nevertheless, the EPSR has provided some interesting outcomes, especially from the perspective of a key-bond to avoid the further weakening of social rights. In this sense, Garben[24] points out the crucial role the EPSR played in relation to the EU Better Regulation Agenda[25], which aims to sim-

[21] Sebastiano, Corti, *The Times They are A-changing'? The European Pillar of Social Rights from Debates to Reality Check*, in Vanhercke, Ghailani, Sabato (eds.), *Social Policy in the European Union: State of Play*, European Trade Union Institute (ETUI) and European Social Observatory (OSE), Brussels, 2018, pp. 51-70.

[22] Galgòczi *et al.*, *The Social Scoreboard Revisited, Background Analysis*, in *ETUI*, 2017, n. 3.

[23] Sebastiano, Corti, *cit.*

[24] Garben, *cit.*

[25] Communication EC, *Better Regulation for Better Results: An EU Agenda*, COM (2015) 215 final, SDW (2015) 111 final; Communication EC, *EU Regulatory Fitness*, COM (2012) 746 final.

plify EU legislation. Hence, the EPSR sought to avoid that the Better Regulation Agenda could be used for unintended purposes, such as "deregulation in the interests of business"[26], by compiling the various disagreements expressed by different stakeholders. In particular, on the basis of the EPSR's goals, several civil society groups expressed their concern against an orientation toward deregulation, stressing that simplification doesn't necessarily entail deregulation and that the social *acquis* must be guaranteed.

The EPSR also brought to fruition the work of the European Labour Authority (ELA)[27], which was formed in 2019 and will become fully operational by 2023. This agency is considered a key institution for implementing the EPSR, especially from a cross-border[28] perspective, in the sense that it aims to facilitate access to information on rights and obligations regarding labour mobility across the Union, as well as with regard to relevant services. Further, it is particularly relevant in terms of "processes" able to be developed at the EU-level because it should facilitate and enhance cooperation between MSs in the enforcement of relevant EU law across the Union, including facilitating concerted and joint inspections, which are extremely relevant in guaranteeing social rights effectiveness, as well as in tackling undeclared work.

In November 2019, the Commission assessed around 42 initiatives made at the EU level, the majority of which were still in progress at that time[29]. Such initiatives focused on four main domains, which the Commission defined as the following: (1) "asserting shared values: establishing a European Pillar of Social Right", including for example the Presentation of the Social Scoreboard to monitor Member States' progress[30]; (2) "Mainstreaming social priorities: acknowledging the social dimension in all policies": aiming at

[26] Garben, *cit.*, p. 17.

[27] Regulation of the European Parliament and of the Council 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, Brussels, 24 May 2019.

[28] Within a cross-border perspective, however, the meaning of "fair mobility" has been differently interpreted by trade unions and employers organisations, together with an ambiguous position of the ELA at this regard: Michel, Michon, *The European Labour Authority and the shaping of "fair mobility". The ambiguities of a regulatory agency in achieving the European labour market*, in Michel, Michon (eds.), *The EU's Government of Worker Mobility*, Routledge, 2022.

[29] Https://ec.europa.eu/info/sites/default/files/social_priorities_juncker_commission_-en.pdf.

[30] Https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/maintenance.

making social priorities cutting all the EU policies, which concerned for example the Investment Plan for Europe, the European Fund for Strategic Investments[31]; (3) "Renewing and modernizing social legislation," aimed at adapting the 'social acquis' to the needs of today's world of work, including for example the on transparent and predictable working conditions in the EU[32]; (4) "Fair and enforceable rules on labour mobility", to strengthen labour mobility by establishing clear and fair rules, including for example the posting of workers in the framework of the provision of services[33]; (5)"Investing in Youth and Skills", with the aim of investing in human capital and in youth's future, for example by maximising the European Social Fund[34], with a focus on social inclusion, education and skills and employment; and (6) "Relaunching social dialogue", including for example the Quadripartite agreement to strengthen the European social dialogue in the EU's policy making process[35].

However, even if the pandemic would have broken out only a few months later, it was clear that the EPSR was a long way from being achieved in full. Therefore, although limited economic resources were initially devoted to the EPSR (and, as I discuss, have since been increased), in its first phase of adoption it may be said to have had a demonstrably positive impact on the EU Semesters and EU guidelines discourse, while also achieving the creation of important institutions such as the ELA.

2.2. The resources to implement the EPSR

Alongside regulatory schemes, both national level and EU-level resources are necessary for the implementation of the EPSR. In pre-pandemic times, a new version of the European Social Fund (ESF) was created. This new fund, the ESF Plus, was the result of a merging of existing funds: the ESF, the Youth Employment Initiative (YEI), the Fund for Aid to the Most Deprived (FEAD), the EU Programme for Employment and Social Innova-

[31] Https://ec.europa.eu/commission/presscorner/detail/en/IP_14_2128.

[32] Https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1152.

[33] Https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0957.

[34] Https://ec.europa.eu/european-social-fund-plus/en.

[35] Https://op.europa.eu/en/publication-detail/-/publication/2d1df4a6-66ae-11e7-b2f2-01aa75ed71a1.

tion (EaSI) and the EU Health programme. The creation of ESF Plus aimed at providing a strong tool for the achievement of the EPSR's goals, with a budget of € 99.3 billion for the period 2021-2027.

A budget of 50 million Euro was also set to be devoted for the ELA's creation and development.

In a first phase of the EPSR's introduction, few economic resources seemed to be available for its effective implementation. However, after approximately one year from its proclamation, the situation started to change and the EU budget and funds began to be oriented for achieving the EPSR's goals.

2.3. The framework within which the EPSR is implemented

The EPSR defines the EU social goals for the future. In this sense, the EPSR can be considered as a tool capable of channelling both the efforts of MSs and European institutions, as well as trade unions and organisations representing civil society. The EPSR also contributed to the circulation of different kinds of narratives within labour and social law; that is, moving from a market-centred perspective to a human rights-centred view. This is exemplified by the Green Paper "Modernising labour law to meet the challenges of the 21st century", which viewed labour problems primarily from a labour market perspective. In contrast, the Pillar is presented as a declaration of rights that focuses on the individual as a whole, rather than just as a participant in the market. The EPSR not only highlights the social rights prioritised by the EU, but also represents a possible cultural development in the EU approach to addressing contemporary social issues. This article contributes to the understanding of the outcomes of the EPSR (i.e. directives, recommendations, etc.), and the extent to which broader societal issues influence these outcomes.

The Commission of Ursula von den Leyen, appointed from 1 December 2021, has not only kept the EPSR as a relevant aspect of its political discourse, but it has closely connected it – and apparently subordinated – to the sustainable development policy (discussed further in the next section)[36].

[36] Communication EC, *The European Green Deal*, COM(2019) 640 final.

3. *The EPSR from the start of the pandemic till nowadays*

On 11 March 2020, the World Health Organization declared the outbreak of a global pandemic. Several MSs found themselves inadequately prepared to respond to the COVID-19 emergency[37]: while they adopted measures to contain and reduce the spread of the virus, the health and safety conditions for workers were problematic to guarantee from the outset. Employers implemented flexible mechanisms, including home office modalities, in order to reduce workers' exposure to the virus and to keep on working despite the slowed economic forecast. Nevertheless, numerous companies have not been able to survive the economic downturn and have had to shut down their operations or furlough workers due to suspended contracts and projects. Many companies drastically reduced employees' working time, and national systems granted unemployment benefits to those who were qualified to access them[38]. However, not all workers could receive these protections, especially precarious workers and self-employed persons such as artists and entertainers; moreover, self-employed persons carrying out activities in more heavily affected economic areas were also disproportionately affected because of the double negative consequence of having no job and no possibilities to access unemployment benefits[39]. The pandemic demonstrated the structural problems of the MSs' welfare systems, which needed to be adapted to the new world of work, change already envisaged by the EPSR (principle 12)[40].

[37] Casquilho-Martins, Belchior-Rocha, *Responses to COVID-19 Social and Economic Impacts: A Comparative Analysis in Southern European Countries*, in *SocSciJ*, 2022, vol. 11, n. 36, https://doi.org/10.3390/socsci11020036; Cantillon, Seeleib-Kaiser, Van Der Veen, *The COVID-19 crisis and policy responses by continental European welfare states*, in *SocPolAdm*, 2021, n. 55, pp. 326-338.

[38] In the EU, the number of hours worked decreased by 3.7% in the Euro Area and by 2.8% in the EU in the first quarter of 2020, compared to the previous quarter. The decrease of working hours has affected more women than men. Eurofound, *Living, working and COVID-19*, in *COVID-19 series*, Publications Office of the European Union, Luxembourg, 2020.

[39] This happened in several EU Member States: Fana et al., *The COVID Confinement Measures and EU Labour Markets*, Publications Office of the European Union, Luxembourg, 2020.

[40] Principle n. 12, European Pillar of Social Rights: "Social protection. Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection".

3.1. The process of implementing the EPSR

The EU institutions took prompt action in developing a strategy to cope with the impacts of the pandemic[41]. First, the time designated for negotiations, which would normally have taken several months before arriving to a decision, drastically decreased. Additionally, the EU interventions consisted not only of mitigating the EU budget rules and making European structural and investment funds more flexible, but also in setting new tools and launching a European recovery plan[42].

Some directives that were relevant to the EPSR were adopted following the pandemic (e.g. for minimum wage[43]) and reached important stages (e.g. for pay transparency[44]); however, other initiatives remain in the form of directive proposals (e.g. platform work[45]) or recommendations proposals (e.g. minimum income[46]).

However, Vanhercke, Spasova and Fronteddu highlight that the "Re-

[41] Tholoniat, *Next Generation EU: un plan de relance européen ambitieux*, in *Confrontations Europe,* 2020, n. 129, pp. 16-17. Http://confrontations.org/wp-content/uploads/2020/09/Confrontations-Revue-129Impression_16-17-Tholoniat.pdf; Grasso et al., *The impact of the coronavirus crisis on European societies. What have we learnt and where do we go from here?* Introduction to the COVID volume, in *EurSoc*, 2021, n. 23.

[42] Vanhercke, Spasova, Fronteddu, *Conclusions. Facing the Economic and Social Consequences of the Pandemic: Domestic and EU Responses*, in Vanhercke, Spasova, Fronteddu (eds.), *Social policy in the European Union: state of play*, ETUI, 2020, p. 166: https://www.etui.org/sites/default/files/2021-01/10-Conclusions-Facing%20the%20economic%20and%20social%20consequences%20of.pdf See also: Vanhercke *et al.*, *From the European Semester to the Recovery and Resilience Facility. Some social actors are (not) resurfacing*, ETUI, Brussels, 2021, 48 p, https://www.etui.org/publications/european-semester-recovery-and-resilience-facility.

[43] The Council adopted the directive on adequate minimum wages on 4 October 2022: https://www.consilium.europa.eu/en/press/press-releases/2022/10/04/council-adopts-eu-law-on-adequate-minimum-wages/.

[44] However, on December 2022 a political agreement was reached between the European Parliament and the Council on the Directive on pay transparency measures: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_7739. On 30 March 2023, the European Parliament approved the new EU Pay Transparency Directive: https://www.consilium.europa.eu/en/press/press-releases/2023/04/24/gender-pay-gap-council-adopts-new-rules-on-pay-transparency/.

[45] Proposal for the directive of the European parliament and of the council in improving working conditions in platform work, COM(2021) 762 final, Brussels, 9.12.2021.

[46] Proposal for a Council Recommendation On adequate minimum income ensuring active inclusion, COM(2022) 490 final, Brussels, 28.9.2022.

covery and Resilience Facility" (RRF) – a new European tool which entered into force in February 2021 to mitigate the economic and social impact of the Covid-19 pandemic and to implement the Next Generation EU recovery instrument – is impacting the European Semester and changing the way European policy has developed in the last decade. In general, "it would seem that with the creation of the RRF, much of the 'territory' gained by social affairs players over the past decade is now being contested"[47].

This is not only because the RRF is based on bilateral dialogue between the Commission and MSs (rather than on multilateral surveillance between MSs) – but also because it will be managed by the so-called Recovery Task Force (RECOVER), a new body introduced with this goal, together with the Directorate General for Economic and Financial Affairs (DG ECFIN). Instead, the Directorate General of Employment, Social Affairs, and Inclusion (DG EMPL), which in the past could achieve a prominent role in the European Semester process[48], has lost such a role within the RRF.

Further, although the EU Commission encourages MSs to favour dialogue with social partners, no specifications are made in the RRF as to how to clarify how these stakeholders should play a role in the implementation of recovery and resilience plans[49]. In this regard, the ETUI highlighted the lack of a robust reference to the EPSR and to the social goals as a whole, both in the Recovery Plan and in the EU's Multiannual Financial Framework (MFF) for 2021-2027[50]. Additionally, it was also noted that there was a lack of guarantees for the proper involvement of social partners in the "design and implementation of the investment priorities or in the monitoring of results"[51].

It seems, therefore, that the demonstrated responsiveness of EU deci-

[47] Vanhercke, Spasova, Fronteddu, *cit.*, p. 168.

[48] Zeitlin, Vanhercke, *cit.*

[49] However, the Commission evaluates positively the efficacy of social dialogue and the social partners' impact in adapting to the crisis situation, not highlighting the need to clarify their role. Employment and Social Developments in Europe Towards a strong social Europe in the aftermath of the COVID-19 crisis. EC, *Reducing disparities and addressing distributional impacts*, DG Employment, 2021.

[50] ETUC, MFF and recovery plan: the ETUC demands reinforcement of social partners involvement, Press release, 5 August 2020, European Trade Union Confederation. https://www.etuc.org/en/pressrelease/mff-and-recovery-plan-etuc-demands-reinforcement-social-partnersinvolvement .

[51] Vanhercke, Spasova, Fronteddu, *cit.*, p. 165.

sion-making has silently relegated the role of the social dimension to the background over the last several years. Additionally, other important goals – not only those directly concerning social rights – have been placed at the top of the European political agenda, undermining the catalytic role which the EPSR played in its inception phase. In particular, measures directed at curbing climate change and managing the digital transition with the aim of achieving sustainable development are now playing a central role both in the RRF, and in the European Semester. These measures may provide conditional access to available resources which are devoted not only to implement the EPSR, but also for initiatives related to sustainability.

The RRF makes available € 723.8 billion (in current prices) in loans (€ 385.8 billion) and grants (€ 338 billion) to MSs in order to both mitigate the economic and social impact of the coronavirus pandemic and to support the digital and green transition[52]. In order to access such resources, MSs will have to present Recovery and Resilience Plans, in the directions of orienting their policies towards specific sustainable development flagships. It is therefore a very impactful instrument because MSs can access RRF resources only insofar as their policies have a proven orientation to the flagship policies set at EU level. However, its range of actions seems to be broader than the achievement of the EPSR, because it is based on the concept of sustainable development. How these two domains (i.e. the social and the environmental) will interact (or not), and how these dimensions will be balanced by the EU institutions and by the MS in their respective national development plans, will only become evident over the next years.

Within such a context, on 4 March 2021 the Commission launched an Action Plan with the aim of implementing the EPSR in response to the new complexities generated by the pandemic. With the Action Plan, the Commission aimed to support MSs, social partners and other relevant stakeholders as key actors with the capacity to implement the EPSR and to achieve "a strong social Europe for just transitions and recovery"[53]. With the Porto declaration on May 2021, the Council of the EU proclaimed their determination "to continue deepening the implementation of the EPSR at EU and national level," and referred to the Action Plan for "useful guidance

[52] Https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en.

[53] EC, *The European Social Rights Action Plan*, 2021, p. 5.

for the implementation of the EPSR, including in the areas of employment, skills, health, and social protection"[54].

However, in spite of the Porto declaration, the Action Plan needs effective and direct access to economic resources in order to improve social rights and make progress in the implementation of the EPSR. In this sense, according to the ETUI, the coordination of the EU funds, the RRF and the EU Semester should be improved[55].

3.2. Resources for implementing the EPSR

The EU mobilized considerable economic resources to tackle the pandemic's effects. However, according to some scholars, the generally limited capacity of MSs to manage structural investment funds, together with the exceptional considerable amounts of EU resources devoted to public investments could raise doubts as to the effective management of the available funds[56]. In a couple of years, we will be able to assess whether such funds have been effectively and entirely used; however, some data are already available concerning their allocation[57].

In terms of passive labour market policies, the temporary Support to mitigate Unemployment Risks in an Emergency (SURE) was one of the first interventions adopted to cope with the crisis. The measure was only one part of a broader package which immediately provided more than half a trillion euro to support workers, small businesses and MSs' economies, and through May 2021 provided nearly €90 billion in back-to-back loans to support short-time work schemes and similar measures within SURE[58]. Additionally, the Cohesion Policy funding and the EU Solidarity Fund have

[54] CoEU, *The Porto Declaration*, 08/05/2021, p. 1: https://www.consilium.europa.eu/en/press/press-releases/2021/05/08/the-porto-declaration/pdf.

[55] ETUC Resolution adopted: European Pillar of Social Rights Action Plan, the Future of Social Protection, adopted on 23.06.2022: https://www.etuc.org/en/document/etuc-resolution-adopted-european-pillar-social-rights-action-plan-future-social-protection.

[56] Alcidi, Gros, Francesco, *Who Will Really Benefit From the Next Generation EU Funds?,* CEPS, Brussels, 2020.

[57] Https://commission.europa.eu/strategy-and-policy/recovery-plan-europe_en#-the-beneficiaries and https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en.

[58] Https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure_en.

been mobilized in the Coronavirus Response Investment Initiative to provide financial support to MSs for their immediate response to the Coronavirus crisis and its long-term impact[59]. The Next Generation EU[60]– the new recovery package – brought relevant modifications to the long-term EU budget. In total, € 1.85 trillion have been devoted to support the EU's economy. In total, the EU's recovery package amounts to € 2 364.3 billion[61]. Also, with its € 99.3 billion for the 2021-2027, the ESF Plus remains one of the main instruments for investing in people in the fields of employment, social, education and skills policies, including structural reforms in these areas.

However, as already mentioned in the previous subsection (3.1.), according to the ETUI[62], an effort to coordinate EU funds, the RRF and the EU Semester is necessary for guaranteeing effective results of the Action Plan. Indeed, to ensure the success of the Action Plan the ETUI Resolution "European Pillar of Social Rights Action Plan, the Future of Social Protection 2022" calls for "a more coordinated and consistent alignment among the different EU policies, legislative and financial frameworks – Cohesion funds, the RRF, the EU Semester – with the social objectives of the EPSR and interventions to meet them"[63].

Moreover, the ETUI believe that national resources should also be used to this end, and not only when this would prevent economic growth.

The RRF regulation states that the implementation of the European Pillar of Social Rights should be achieved through national reforms and investments as indicated by the Country Specific Recommendations of the European Semester[64]. However, the RRF only provides guarantees in in-

[59] Https://ec.europa.eu/regional_policy/en/newsroom/news/2020/03/16-03-2020-cohesion-policy-and-eu-solidarity-fund-contribute-to-the-coronavirus-response-investment-initiative.

[60] Communication EC, *Europe's moment: Repair and Prepare for the Next Generation*, COM (2020) 456 final. € 750 billion recovery effort are devoted in July 2020 to the Next Generation EU.

[61] Https://www.consilium.europa.eu/en/infographics/recovery-fund-eu-delivers/.

[62] European Pillar of Social Rights Action Plan, the Future of Social Protection, ETUC Resolution adopted on 23.06.2022. Https://www.etuc.org/en/document/etuc-resolution-adopted-european-pillar-social-rights-action-plan-future-social-protection.

[63] Https://www.etuc.org/en/document/etuc-resolution-adopted-european-pillar-social-rights-action-plan-future-social-protection.

[64] Grossi, Brady, Rayner, Pedjasaar, *The European Pillar of Social Rights: Five years on*, European Policy Center, Discussion Paper, 20 December 2022, p. 9.

stances where national recovery and resilience plans are effectively consistent with the EPSR's goals. No social conditionality clauses apply to the RRF, and there is no minimum investment for achieving social goals. Instead, Member States have to devote specific percentages of resources for other policies (37% of their expenditure in the climate and 20% of their expenditure in the digital transitions)[65].

3.3. The framework within which the EPSR is implemented

In looking at how the implementation of EPSR has developed in the period from the pandemic until today, there are a few issues of note addressed in this section. The first concerns the way the EU and the MSs supported the self-employed and precarious workers throughout the pandemic with temporary interventions. A further aspect regards the context of contradictions and tensions in setting and assigning EU funds. Last but not least, a crucial issue that can no longer be postponed and which seems to be decisive in determining the fate of the EPSR: the legal competences of the European Union in the social field.

During the pandemic, several MSs adopted social protection measures and benefits for the first time to combat unemployment for autonomous, freelance or self-employed workers. From a human rights perspective, this situation could have been ideal for introducing stronger protections against unemployment in a structural manner at the EU level[66]; as Next Generation EU highlighted, "the crisis is a test for our social protection systems and necessary investments need to fill the gaps in coverage that have become apparent in the crisis, for instance for those self-employed"[67]. Such a scenario would have been consistent with principle 12 of the EPSR, according to which "regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection". However, a possible stabilisation of the meas-

[65] Grossi, Brady, Rayner, Pedjasaar, *cit.*, p. 9.

[66] At the same time, it must be acknowledged that this may not have been ideal for Member States from an economic perspective, especially given the recent challenges that MS faced in recovering from the 2008 financial crisis.

[67] Communication EC, *Europe's moment: Repair and Prepare for the Next Generation*, COM (2020)456 final. € 750 billion recovery effort are devoted in July 2020 to the Next Generation EU, p. 11.

ures taken to combat unemployment for autonomous, freelance or self-employed workers is certainly an aspect to be carefully assessed from the point of view of economic sustainability in each Member State. Thus, in order to face the pandemic, MSs and the EU preferred to adopt *ad hoc* measures, which intervened in different sectors to address economic and social difficulties, including reserving and allocating resources devoted to protecting the economy and supporting the unemployed[68].

Therefore, while the EU and MSs' political strategies to tackle the pandemic's effects marked a change in comparison with the austerity policies adopted during the first stage of the 2008 financial crisis, it is nevertheless questionable whether *una tantum* measures could be sufficient to ensure that MSs might be "resilient" in the long term[69]. Being resilient is indeed a EU political goal, also linked to the concept of sustainability, where "resilience is the ability not only to withstand and cope with challenges but also to undergo transitions in a sustainable, fair, and democratic manner"[70]. Being more resilient would need for intervention to support precarious workers and the self-employed in case of lack of work. This would also imply to support weakener MSs in difficulties.

However, in assigning the available resources to address the crisis, the recovery plan "Next Generation EU" ended up supporting countries such as France and Germany[71] instead of the low-income countries, since criteria focused on the country's size and the relative reduction in GDP[72]. The first tranche of the "Next Generation EU" (70% of grants) was exclusively based

[68] Seemann *et al.*, *Protecting livelihoods in the COVID-19 crisis: A comparative analysis of European labour market and social policies*, in *GlobSocP*, 2012, vol. 1, n. 19; Devetzi, Stergiou (eds.), *Social security in times of corona a legal comparison of selected European countries*, Sakkoulas Publications, 2021; Eurofound, *COVID-19: Policy responses across Europe*, Publications Office of the European Union, Luxembourg, 2020.

[69] Vandenbroucke *et al.*, *The European Commission's SURE Initiative and Euro Area Unemployment Re-Insurance*, VoxEU: Research-based Policy Analysis and Commentary from Leading Economists, CEPR, 2020.

[70] Communication EC, *2020 Strategic Foresight Report, Strategic Foresight - Charting the Course Towards a More Resilient Europe*, Brussels, 9.9.2020 COM(2020) 493 final.

[71] Darvas, *Having the Cake, but Slicing it Differently: How is the Grand EU Recovery Fund Allocated?*, Blogpost, 23 July 2020. https://www.bruegel.org/2020/07/having-the-cake-howeu-recovery-fund/.

[72] Armingeon, De la Porte, Heins, Sacchi, *Voices from the past: economic and political vulnerabilities in the making of next generation EU*, in *CEuPs*, 2022, n. 20, p. 146.

on pre-crisis economic conditions; however, the second tranche (30% of grants) focused on GDP, in addition to population size and GDP per capita. While the GDP criterion used for the "Next Generation EU" does not respond to an insurance criterion because these resources benefit all the Member States[73] – not only the Member States which are most contributing to the EU budget – a greater effort towards solidarity could also have been made for the second tranche towards those countries most affected by the pandemic[74].

4. *The EPSR Action Plan and the European Employment Policies*

The Commission adopted the EPSR Action Plan on 4 March 2021, with the aim of turning the EPSR's principle into actions. Within this framework, we focus in this section on recent European employment policy initiatives to implement the EPSR in the post-pandemic period, and on the outcomes these initiatives are currently producing.

In particular, we look at the goals set by the Action Plan, on the Commission's commitments to meet those goals, and on the corresponding follow up. With the Action Plan, the Commission encouraged MSs to take several national policies and actions, with the aim of guaranteeing effective employment policies for all, supporting involvement of social partners to ensure the information and consultation of workers during restructuring processes, encouraging entrepreneurship, and enhancing a strategic collaboration with industry, social partners and researchers; these initiatives were aimed at contributing to the Commission's work on industrial ecosystems.

The Action Plan sets three priority challenges, translated into three targets to be achieved by 2030. Setting such targets also means to provide an updated (post pandemic) tool to measure the results of the EPSR and implies the need to revise the Social Scoreboard. These challenges are discussed further in the sections below.

[73] Fuest, *The NGEU Economic Recovery Fund*, in *CESifo Forum*, 2021, n. 1, p. 6, https://www.cesifo.org/DocDL/CESifo-Forum-2021-1-fuest-NGEU-january.pdf.

[74] Darvas, *cit.*

4.1. The first target: improving the number of people in employment

The first target focuses on improving the number of people in employment: in particular, it sets that at least 78% of the population aged 20 to 64 should be employed by 2030. This target should be achieved through policies aimed both at reducing the gender employment gap and supporting the participation of young people in the labour market, with a specific aim to decrease the rate of young people aged 15-29 who are neither employed nor undergoing education or training (NEETs) from 12.6% (2019) to 9%. Furthermore, other under-represented groups – e.g. older people, low-skilled people, persons with disabilities, those living in rural and remote areas, LGBTIQ people, Roma people and other ethnic or racial minorities particularly at risk of exclusion or discrimination as well as those with a migrant background – should be enabled to participate in the labour market. Broadly, active employment policies aim to encourage people to re-enter the labour market, and therefore play a relevant role in the Action Plan for ensuring equality.

The Action Plan also devotes particular attention to youth employment policies, establishing that young people should be supported in finding stable job of high quality. Considerable resources have been dedicated to this goal, especially through the ESF Plus. In its New Industrial Strategy for Europe[75], the Commission invites MSs to devote at least EUR 22 billion to youth employment policies. The Youth Guarantee – introduced for the first time in 2013 to provide chances for training or working to young people[76] – is still presented as a relevant tool[77], having been reinforced in the last years (for example, its target group was extended to all young people under the age of 30). Further EU initiatives, although not envisaged by the Action Plan, have been adopted in the last years to boost youth employment, such as the EU Youth Strategy (2019-2027)[78], which highlighted the need for a European

[75] COM (2020) 102 final of 10 March 2020. See also: Alcidi, Baiocco, Corti, *A Social Dimension for a New Industrial Strategy for Europe*, in *InterEcon*, 2021, n. 3.

[76] Council Recommendation of 22 April 2013 on establishing a Youth Guarantee.

[77] Council Recommendation of 30 October 2020 on reinforcing the Youth Guarantee and replacing the Council Recommendation of 22 April 2013.

[78] Resolution of the Council of the European Union and the Representatives of the Governments of the Member States meeting within the Council on a framework for European cooperation in the youth field: The European Union Youth Strategy 2019-2027.

Youth Work Agenda, specifically addressing the problems introduced by the pandemic (gaps in education, inability to find work). Thus, the Council and the Representatives of the Governments adopted a Resolution on the Framework for establishing a European Youth Work Agenda 2020[79], encouraging further synergies within national and EU institutions.

Activation policies are presented by the Action Plan as necessary to create the conditions for the green and digital transition, and therefore represent a bridge between the EPSR and the Agenda for Sustainable Development. With the Action Plan, the Commission presents a Recommendation for Effective Active Support to Employment ("EASE")[80], setting the main guidelines to combine policy measures with available funding for job creation and job-to-job transitions in the digital and green sectors. Further, in the EASE Recommendation, the MSs are encouraged to foster a relationship between training initiatives and the labour market, which in turn should be guaranteed by the coordination and collaboration between different stakeholders.

From this perspective, the Action Plan highlights the activation policies' role in guaranteeing quality job creation, which in turn is necessary for sustainable development: specifically, the Action Plan mentions for the need for policies aimed at skill building, improvement of employment services and transition incentives.

The Action Plan emphasises apprenticeships and entrepreneurship as an example of measures that can support activation policies towards "new" policy solutions[81]. However, these measures have been common in activation policies for decades, with success depending more on the particularities of the labour market system (understood as interactions of the relevant stakeholders) than on the presence of the measure itself. According some authors, the EPSR "merely constitutes the latest stage in the development of the European Employment Strategy", although it has "…potential to be the platform for a proper Social Union"[82]. From a perspective of employment

[79] European Youth Work Agenda 2020, OJ C 415, 1.12.2020, pp. 1-8: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42020Y1201%2801%29.

[80] EC Recommendation of 4.3.2021 on an effective active support to employment following the COVID-19 crisis (EASE), C(2021) 1372 final.

[81] EC, *The European Pillar of Social Rights Action Plan*, 2021, p. 16: https://ec.europa.eu/social/main.jsp?catId=1607&langId=en.

[82] Rogowski, *The European Employment Strategy, the European Social Pillar and their Impact*

policies, several contents of the European Employment coordination – now part of the European semester – are still embedded in the EPSR (e.g. the importance of education, training and life-long learning; the need to support people to find a job both with social protection and training entitlements, employment services cooperation, etc). However, the EPSR is not only about employment policies and embedded a holistic rights-centre approach.

Two tools of the Action Plan seem to be particularly interesting, namely: the re-employment plans designed to support workers at risk of unemployment; and the prioritisation of investment in job skills, adopting a long-term perspective, necessary to ensure sustainable development. Regarding the activation of unemployed persons, the Action Plan highlights the importance of cooperating with employment services – which can be modernized through funds available from the EU – and of supporting dialogue between social partners in order to foster policies for economic transition and workplace innovation.

Further, the Action Plan points out the need to reinforce both companies and entrepreneurs as a way of encouraging employment and workers. As a part of the strategy to achieve such a goal, the Action Plan mentions the New Industrial Strategy and the Circular Economy Action Plan, both launched by the Commission in 2020[83] to support the twin transition to a green and digital economy, may also have the capacity to create new jobs and economic improvement. In this regard, the Commission committed itself to revise the Industrial Strategy, which was updated in May 2021[84]. However, although the revised version of the Strategy affirms

on Labour Law Reform in the European Union, in *IJCL*, 2019, vol. 35, n. 3, pp. 1-2. See also: VANHERCKE, *From the Lisbon strategy to the European Pillar of Social Rights: the many lives of the Social Open Method of Coordination*, in VANHERCKE, GHAILANI, SPASOVA, POCHET (eds.), *Social policy in the European Union 1999-2019: the long and winding road, Brussels*, European Trade Union Institute (ETUI) and European Social Observatory (OSE), 2020.

[83] EC Communication, *A New Industrial Strategy for Europe*, COM(2020) 102 final, 10 March 2020: https://ec.europa.eu/info/sites/info/files/communication-eu-industrial-strategy-march-2020_en.pdf.

EC Communication, *A new Circular Economy Action Plan For a Cleaner and More Competitive Europe*, COM(2020) 98 final, 11 March 2020: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:98:FIN.

[84] EC Communication, *Updating the 2020 New Industrial Strategy: Building a Stronger Single Market for Europe's Recovery*, COM(2021) 350 final, 5.5.2021: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52021DC0350.

that "the EPSR has continued to be the EU and its Member States' compass in cushioning the social impacts", no further attention is devoted to the EPSR in this document.

4.2. The second target: increasing opportunities for training

The second target of the Action Plan is that by 2030, at least 60% of all adults should participate in training every year. As with the first goal, it is crucial that activation policies (including also training) be used in combination with passive labour market policies. In order to reach this second target, the Commission committed itself to adopt a very wide range of different recommendations and action plans. Within this picture, the Action Plan highlights that workers' employability needs to be improved, innovation boosted, social fairness ensured, and the digital skills gap closed, with particular attention to issues and barriers faced by disadvantaged groups and young people: training is a key element to achieve the just mentioned goals.

Training is particularly relevant in the context of activation policies: at this regard, the Action Plan, in referring to the training target, highlights that "skills are essential to equip people for the new green and digital jobs and help shield workers from unemployment"[85]. At this regard, the Action Plan refers to the European Skills Agenda, according to which "Access to up- and reskilling opportunities is vital for the tens of millions of workers propelled into short-time work or unemployment"[86]. However, adequate resources should be made available as well. In this regard, the Action Plan highlights the possibility to access the ESF Plus, which was reinforced with a EUR 88 billion budget[87], the Erasmus+[88]and the European Regional Development Fund. Furthermore, the Recovery and Resilience Facility (see par. 4.4) can also support investment and reform in education and training policies.

[85] EC, *The European Pillar of Social Rights Action Plan*, 2021, p. 9: https://ec.europa.eu/social/main.jsp?catId=1607&langId=en.

[86] EC Communication, "*European Skills Agenda for sustainable competitiveness, social fairness and resilience*", COM(2020) 274 final, Brussels, 1.7.2020, p. 2: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0274.

[87] EC, *The European Social Rights Action Plan*, 2021, p. 23.

[88] Https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2317.

The Action Plan sets the additional goal of guaranteeing basic digital skills to at least 80% of those aged 16-74. Investing in skills is viewed by the Action Plan as a way to enable the digital transformation and ensure equality by providing opportunities for employment in a wider range of sectors. This strategy requires the implementation of adequate education and training systems, which are key for lifelong learning, employability and participation in society, and can reduce early school leaving and increase participation in upper secondary education. The Action Plan refers to the Digital Education Action Plan 2021-2027[89] as a way to develop a high-performing digital education ecosystem in the EU, ensuring access to digital skills which are especially needed. Adequate education and training systems are particularly important for guaranteeing the green transition: specifically, the Action Plan announces the Commission's intention to integrate biodiversity and ecosystems into education and training programs. In this sense, in January 2022, a Council Recommendation on learning for environmental sustainability was proposed by the Commission[90].

The Commission encouraged MSs to foster initiatives to promote additional training by cooperating with stakeholders, developing comprehensive policies capable of ensuring access to quality education and by implementing the Recommendation on vocational education and training (VET) for sustainable competitiveness, social fairness and resilience[91]. This aspect is further developed by the Recommendation EASE, which notes that social partners' participation should be put at the core of developing the economic system and be linked to actual education and training needs. Hence, action on behalf of the MS and collaboration among different labour market stakeholders – including social partners – seem to be crucial to reaching the second target.

To improve rates of job skills acquisition, the Commission committed itself to three priorities.

[89] Digital Education Action Plan 2021-2027: https://education.ec.europa.eu/focus-topics/digital-education/action-plan.

[90] EC, *Proposal for a Council Recommendation on learning for environmental sustainability*, 14.1.2022, COM(2022) 11 final, 2022/0004(NLE): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0011&qid=1647944342099.

[91] Council Recommendation of 24 November 2020 on vocational education and training (VET) for sustainable competitiveness, social fairness and resilience 2020/C 417/01:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020H1202%2801%29.

First, it proposed a Transformation Agenda for Higher Education[92]. After the Action Plan's adoption, the Commission took action on multiple fronts[93], proposing a European strategy for universities and a Council Recommendation on building bridges for effective European higher education cooperation[94], together with further initiatives in the same direction[95]. Second, an initiative was proposed to introduce Individual Learning Accounts, with a recommendation adopted at the Council Meeting on 16 June 2022[96]. Third, the Commission proposed a European approach to micro-credentials for fostering lifelong learning and employability, issuing a recommendation which was adopted on 16 June 2022 by the Council of the European Union[97]. Finally, it proposed a Skills and Talent package, launching the Talent Partnerships in June 2021.

With the Action Plan, the Commission also committed itself to review Council Recommendation on the Quality Framework for Traineeships, which concerns working conditions for the trainees, in 2022. This aspect seems particularly important to ensure that trainings are qualitatively good, *i.e.* labour market orientated and carried out according to adequate conditions in terms of adequate knowledge.

In the EPSR Action Plan, the Commission also announced its goal to adopt an Action Plan on Social Economy. Consequently, a document was presented on 9 December 2021[98], expressly anchored to the EPSR Action Plan's goals and programs.

The most important instrument to support target 2 is the ESF Plus. The ESF, before the merging with further funds, was already used to cope with the coronavirus pandemic and its economic fallout with a number of initiatives, including initiatives to favour access to employment for jobseekers and

[92] EC Communication on achieving the European Education Area by 2025, COM/2020/625 final: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0625.

[93] Https://eurydice.eacea.ec.europa.eu/publications.

[94] Https://ec.europa.eu/commission/presscorner/detail/en/ip_22_365.

[95] Https://education.ec.europa.eu/education-levels/higher-education/about-higher-education.

[96] Https://www.consilium.europa.eu/en/press/press-releases/2022/06/16/council-recommendation-on-individual-learning-accounts-to-boost-training-of-working-age-adults/.

[97] Https://education.ec.europa.eu/education-levels/higher-education/micro-credentials.

[98] Https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10117&furtherNews=yes#navItem-1.

inactive people (activation and training)[99]. Then, as already mentioned, the ESF Plus was reinforced and can be accessed for supporting task 2, together with the Erasmus+, the European Regional Development Fund and the Recovery and Resilience Facility, as suggested by the Action Plan.

4.3. The third target: reducing the number of people at risk of poverty or social exclusion

The third target focuses on reducing the number of people at risk of poverty or social exclusion: such a reduction should reach at least a minimum of 15 million by 2030, at least 5 million of which should be children. To achieve this target and implement the EPSR, the Action Plan suggests fostering social inclusion and combating poverty, breaking the intergenerational cycles of disadvantage, guaranteeing minimum income schemes, access to affordable housing and to essential services of sufficient quality, promoting health and ensuring care, and making social protection fit for the new world. In doing this, the Action Plan seems to sign a change in respect to the previous policies: it includes, indeed, housing and services next to the typical social rights (e.g. right to work, right to training, right to unemployment benefits), and it deserves a particular attention to elderly and persons with disabilities. Further, the importance to minimum income schemes is equal to that one for other social rights.

Within the goal of making social protection fit for the new world, it is crucial to adapt social protections to a social context that has been considerably transformed over the last decades. In this regard, successful implementation of the EPSR needs an intervention on behalf of non-standard workers and the self-employed, consistent to the 2019 Council Recommendation on access to social protection[100]. In order to address the challenge of adapting social protection systems to the changed world of work, the Commission launched a High-Level Group working on the future of social protection and of the welfare state in the EU[101], as announced in the Action Plan. The

[99] European Social Fund synthesis report 2020: https://ec.europa.eu/european-social-fund-plus/en/publications/european-social-fund-synthesis-report-2020.

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

[101] Https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10101&furtherNews=yes.

Group will present recommendations on how to make social protection and welfare systems fit for the future by the end of 2022.

The Commission also launched, in cooperation with the Italian social security institution *Istituto Nazionale della Previdenza Sociale* (INPS), a pilot project to explore the feasibility of introducing a European Social Security Pass to improve the portability of social security rights across borders by 2023[102].

4.4. The EPSR from now on

With the Action Plan, the Commission invited the European Council to adopt the targets discussed above, with the aim of achieving them by 2030, and called MSs to define their own national ones to prove their commitment to achieving the Action Plan's objectives.

In June 2022[103], MSs' proposals on their own national targets were presented at the Employment, Social Policy, Health and Consumer Affairs Council *(*EPSCO*)*; these resulted in targets which were overall considerably higher than those set by the Action Plan for the employment, fight against poverty and social exclusion. However, they resulted in lower targets concerning the improvement of adults share in training participation, revealing the most problematic area for Member States. Now, the achievements of the three targets will be measured in occasion of the 2023 European Semester, creating new opportunities for the EPSR within this crucial process of decision making at EU level.

In order to reach the Action Plan's targets, and more in general, the EPSR's goals, resources can be activated within both the already available funds and new resources created on the occasion of the pandemic. In this sense, the Action Plan should be viewed in connection with the Multi-Annual Financial Framework (MFF) 2021-2027[104], NextGenera-

[102] Https://ec.europa.eu/social/main.jsp?catId=1545&langId=en.

[103] Https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=10299&furtherNews=yes#navItem-1.

[104] Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027: "The economic impact of the COVID-19 crisis requires the Union to provide a long-term financial framework paving the way to a fair and inclusive transition to a green and digital future, supporting the Union's longer-term strategic autonomy and making it resilient to shocks in the future." https://eur-

tionEU[105], and the Recovery and Resilience Facility (RRF), among other frameworks. The MFF 2021-2027 provides resources which MSs are able to activate for the purpose of implementing the EPSR. However, the EPSR is not even mentioned in this document, which only discusses the need to guarantee a fair and inclusive transition to a green and digital future.

NextGenerationEU also provides economic resources and crucial tools for achieving the EPSR's goals, supporting people to remain in their jobs and to create new ones, by using different EU funds. These include the Just Transition Fund (to which the NextGenerationEU stated an additional € 32.5 billion) to alleviate the socio-economic impacts of the transition, to support re-skilling, to help SMEs create new economic opportunities, and to invest in the clean energy transition (for example, the SURE initiative which, in the short term, can mitigate unemployment risks in an emergency). Additionally, NextGenerationEU has announced that in the future, it will be provided with 100 billion EUR to help workers keep their income and ensure businesses can stay afloat and retain staff.

NextGenerationEU clearly refers to the need to guarantee fair and inclusive recovery by referring to EU values and fundamental rights, which can be achieved by using the EPSR as a guide for the transition. In addition, the EPSR may help to address inequality by fostering solidarity between people, generations, regions and countries, and by guaranteeing decent living conditions for all workers; achieving these aims can be possible only through the cooperation with social partners, civil society and other stakeholders.

The 2021-2027 Cohesion policy funds also play a crucial role for implementing the EPSR.

From this perspective, the Action Plan envisages the use of such resources to guide future regional and national policies, through both the country-specific recommendations and the national recovery and resilience plans. In this regard, the Action Plan creates a strong anchor, (although of a political rather than legal nature), between EU resources and targets it sets within the areas of employment, skills, and social protection.

lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.433.01.0011.01.ENG&toc=OJ%3AL%3A2020%3A433I%3ATOC.

[105] EC Communication "*Europe's moment: Repair and Prepare for the Next Generation*". COM/2020/456 final: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590732521013&uri=COM%3A2020%3A456%3AFIN.

The Action Plan for implementing the EPSR is setting crucial targets, potentially able to bring about relevant results in the next years. The Commission has already started to intervene in this field through a consistent number of recommendations. The targets and the guidelines suggested to achieve them are relevant within a European employment policy perspective. Two particular concepts highlighted by the Action Plan and Recommendation EASE concern the need for job market activation initiatives that are more tailor-made to stakeholder needs, and for a stronger connection with effective possibilities to find a job. Quality of jobs is also a relevant element under the idea of "more and better jobs," a flagship concept of the Lisbon Agenda, introduced more than 20 years ago.

A key element that will hopefully become more developed in the next months is the enhancement of coordination between social partners and public administrations in the MSs for the purposes of planning development projects and supporting job creation. Here the ELA, together with the public employment services coordination at all levels and social dialogue, could provide main "places" to organize such coordination. In this way, sustainable development could be addressed in such a way as to create a virtuous integration with the EPSR.

5. *Conclusions and proposals for improvement*

So far, the EPSR has been implemented in two distinct phases, characterized by considerably different contexts (pre- and post-pandemic). This article aims to show whether the original design of the EPSR has been maintained in the post-pandemic period, or whether the emergency interventions to cope with the pandemic have caused a slowdown or a departure from the initial conceptualisation of the EPSR.

In order to carry out this assessment, three main aspects have been taken into account: (1) the impact of the EPSR on the decision-making process of the European institutions; (2) the resources made available for the implementation of the EPSR; and (3) the regulatory framework, with an eye towards its suitability in ensuring the implementation of the EPSR.

With respect to the process of the implementation of the EPSR, despite the difficulties encountered during the pandemic, the EPSR has demon-

strated a continued presence in EU policy and regulatory discourse. However, its role has become diluted, presumably because of the pandemic's impact.

The social partners' weakened role within the EU Semester should also be highlighted, since presumably they should contribute in the EPSR's implementation. Additionally, the catalysing role of the EPSR as a tool able to converge the action of different agencies has been weakened in recent years, making its role less meaningful.

Further, the EU policy has gradually been reframed in the context of the Sustainable Development Agenda, posing questions as to whether the EPSR will play an ancillary role with respect to the green and digital transition, or whether the EPSR will play a more central role in mutually reinforcing these respective goals.

With regard to the resources reserved for the implementation of the EPSR, considerable amounts were made available before and after the pandemic. However, the management of the pandemic absorbed many of the resources made available to cope with the emergency lockdown measures. In addition, resources to implement the EPSR have largely become conditional on the fulfilment of other policy objectives – namely, sustainability policies and those related to the digital transition – as can be seen from the Action Plan. This added conditionality for resources available for implementing the EPSR can in some cases result in a conflict of priorities.

Concerning the regulatory framework, progress has been made in the context of both hard and soft law (e.g. adoption of new directives and several proposals).

Despite this, a pending issue remains unresolved both before and after the pandemic: the so-called constitutional asymmetry at the EU level, which implies a greater scope for action in the economic sphere in comparison to the social one.

In terms of legal competences, the EU is better able to address economic matters, while having a limited role in addressing social issues. Scharpf defines such an imbalance of legal competences as "constitutional asymmetry"[106], or rather a structural problem to intervene effectively within the

[106] SCHARPF, *The asymmetry of European integration*, cit., p. 211–250; SCHARPF, *The European Social Model: Coping with the Challenges of Diversity*, in *MPIfG WP*, 2002, n. 8.

social sphere. Scharpf[107] and Weiss[108] suggest providing a solution to deal with this dated issue by changing the Treaties and enlarging the EU legislative competence within the social area. Similarly, Parker and Pye[109] adopt a complementary perspective, arguing for the introduction of an assessment of the implications of economic policy for social rights into the structures through which EU and Eurozone governance currently takes place, i.e., the European Semester. They believe such an intermediate step would also create the consensus necessary to intervene through amendments to both Treaties to recognize more room for the social dimension. Sabato with Vanhercke and Guio, provide a clear and convincing picture of the possibility of adopting a "Social Imbalances Procedure"[110] for the EU as a way of addressing the asymmetry between EU economic and social policies. "In envisioning parity between the social and the economic and providing a social pillar to the EU"[111], Aranguiz supports instead an extensive and effective use of Art. 9 TFEU. According to this article, the so-called social clause, Union's policies "shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health" (Art. 9 TFEU).

The constitutional asymmetry of European competences in the economic and social fields increasingly presents challenges for intervening appropriately in the social sphere and for effectively guaranteeing social rights within the sphere of action of the market. Therefore, such imbalance has been an obstacle for the implementation of the pillar since its inception, both before the pandemic, and in the post-pandemic.

Such imbalance between EU competences within the economic and

[107] Scharpf, *After the Crash: A Perspective on Multilevel European Democracy*, in *MPIfG DP*, 2014, vol. 14, n. 21.

[108] Weiss, *The Need for More Comprehensive EU Social Minimum Standards*, in Singer, Bazzani, *European Employment Policies: Current Challenges*, Berliner Juristische Universitätsschriften: Zivilrecht, Band, 2018, 76.

[109] Parker, Pye, *Mobilising Social Rights in EU Economic Governance: A Pragmatic Challenge to Neoliberal Europe*, in *CEuPs*, 07/07/2017: https://link.springer.com/content/pdf/10.1057%2Fs41295-017-0102-1.pdf.

[110] Sabato, Vanhercke, Guio, *A "Social Imbalances Procedure" for the EU: Towards Operationalisation*, in *ETUI-REHS WP*, n. 2022/09, Brussels, ETUI.

[111] Aranguiz, *Social mainstreaming through the European pillar of social rights: Shielding the social from "the economic" in EU policymaking*, in *EJSS*, 2018, vol. 4, n. 20, pp. 341-363.

social spheres could be dealt with through amendments to both Treaties in order to enhance the EU competence in the realm of social policy. Such a change would allow for the kinds of prompt action required in light of the continuously changing world of work and to address social needs that cannot be postponed; for example, in the case of adapting social security systems for guaranteeing adequate protection to self-employed and precarious workers.

Progress on these fronts is potentially achievable in a short timeframe, since a number of existing proposals of Directives can already be adopted to implement the EPSR (e.g. proposal on improving working conditions in platform work, minimum income, etc.).

These could be adopted without any change of the Treaties, but with a political will which is not (yet) clear enough in the individual MSs. This lack of clarity was evident in the Porto declaration on May 2021, when the Council of the EU highlighted its determination to implement the EPSR at the EU and at the national level, "with due regard for respective competences and the principles of subsidiarity and proportionality"[112]. However, no mention was made about the problem of the limitation of EU competences in the social field, and both "legislative and non-legislative work" from the EU and MSs are mentioned as equally valuable[113].

A prompt intervention of a decisive action would be therefore recommendable. Likewise, MSs may already follow existing EU recommendations, and can access considerable resources to implement actions coherent with the EPSR's view. However, difficulties in managing EU funds can be a barrier to their full use and might require lighter, although monitored, procedures for their accessibility.

In conclusion, the observation of the three elements taken at hand – process, resources and legal context – shows a multifaceted picture in which the implementation of the EPSR is affected by the pandemic, but which nevertheless endures and continues to progress. However, the risk is that the EPSR will lose momentum without decisive action on several fronts. These include an extension of the EU's legal competences in the area of social policy, a prioritisation and independence of the EPSR over other policies, enhancing access to resources for the implementation of the EPSR, a more prominent role for the social partners within the European Semester, and

[112] CoEU, cit., p. 1.
[113] CoEU, cit., p. 1.

last but not least, the adoption of directives which are currently only proposed.

Failure to intervene by adjusting the implementation of the EPSR in light of the circumstances presented by the COVID-19 pandemic could create future issues for EU Member States in the event of future crises, and could prevent the adequate realization of a social market economy within the internal market.

Abstract

This article examines the results achieved by the European Pillar of Social Rights ("EPSR") thus far, with particular attention devoted to its impacts on employment policies. More specifically, this article is aimed at understanding the pre-COVID successes of the EPSR (as well as outcomes from the onset of the COVID-19 pandemic until present) by addressing whether European interventions over the course of the pandemic have maintained consistency with the design of the EPSR, or whether emergent circumstances have led to a departure from its initial intent. The ability of the EPSR to capture the attention of different stakeholders demonstrated in the pre-pandemic phase of its implementation seems to have been diluted in the subsequent phases for different reasons, including a strengthening of the political discourse on sustainable development. Overall, however, more resources have been made available for post-pandemic social interventions to support the green and digital transition.

Keywords

European Pillar of Social Rights, Action Plan, European Employment Policies, Pillar Targets, COVID-19 Pandemic.

Andrea Conzutti, Costanza Ziani

Next Generation Labour: what the EU is asking to Italy and Spain

Contents: **1.** Foreword: the EU approach to conditionality. **2.** The Recovery and Resilience Facility. **3.** *Ex ante* conditionality. **4.** *In itinere* conditionality. **5.** The Next Generation EU: towards a (new?) social Europe. **6.** The more you get, the more is asked. What's expected from Italy and Spain from a social point of view. **7.** Concluding remarks: the crucial role of financially assisted States.

1. *Foreword: the EU approach to conditionality*

There is no doubt that the European Union is in the habit of linking the disbursement of its structural and investment funds to "strict conditionalities"[1], consisting of systemic reforms in line with "sound economic governance", i.e. with what has been undertaken at the European level within the common procedures for the coordination of national fiscal policies[2], and monitoring this through a system of sanctions allowing for the suspension of payments to the Member States that fail to take effective measures within the framework of the overall supranational macroeconomic priorities[3].

[1] The expression was introduced in 2011, in Article 136.3 TFEU, about the granting of "any required financial assistance" by the forthcoming European Stability Mechanism (ESM). On this point, see PINELLI, "*Conditionality*", in *MPEnc PubInt*, 2013, p. 1 ff.

[2] In this regard, see Article 23 of Regulation (EU) n. 1303/2013 of the European Parliament and of the Council of 17 December 2013 on the European Structural and Investment Funds designed as an instrument to promote cohesion in the European Union area, expressly headed "Measures linking effectiveness of ESI Funds to sound economic governance".

[3] For an analysis of the origins of macroeconomic conditionality, first established in the context of International Monetary Fund and World Bank interventions, see PINELLI, *Conditionality and Economic Constitutionalism in the Eurozone*, in *IJPL*, 2019, n. 1, p. 22 ff.

Indeed, such a *modus procedendi*, evocatively referred to as the "reform market"[4], is now a constant practice in the development path of European integration, which has been fuelled, in recent years, especially during the restructuring of sovereign debts, which grew exponentially as a result of the 2008 financial crisis[5].

It is therefore not surprising if this same paradigm applies today, once again, to the Next Generation EU (NGEU). That is to say, an exceptional temporary stimulus instrument that, with a total budget of no less than EUR 750 billion allocated under the Multiannual Financial Framework (MFF) for 2021-2027, aims at stemming the severe macroeconomic impact triggered by the Covid-19 pandemic, by providing European countries with the necessary resources to enable the stimulation of the real economy[6].

As was to be expected, the modalities and criteria for the allocation of the resources contemplated by this programme of epoch-making proportions have, from the outset, attracted the interest of the constitutionalist doctrine, which, however, has mainly focused on one aspect, albeit of particular interest: Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. This is an unprecedented act, through which the European institutions, following a lively controversy between Poland and Hungary on the one hand and the rest of the Member States on the other, definitively agreed to make the disbursement of funds under the NGEU conditional on the respect of the rule of law in the various EU Countries[7].

[4] In this perspective Somma, *Il mercato delle riforme. Appunti per una storia critica dell'Unione europea*, in *MSCG*, 2018, n. 1, p. 167 ff., explicitly reasons about structural reforms imposed as a quid pro quo for financial assistance and directed towards a decisive alignment with neoliberal economic orthodoxy.

[5] The literature on the Eurozone financial and economic crisis is endless. Studies that offer a comprehensive view of the effects induced by macroeconomic conditionality during this phase include: Craig, *Member States Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, in Adams, Fabbrini, Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Hart Publishing, 2014, p. 19 ff.; Tuori, Tuori, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge University Press, 2014.

[6] For further details see Chessa, *La governance economica europea dalla moneta unica all'emergenza pandemica*, in *LD*, 2020, n. 3, p. 409 ff.

[7] The breadth of the scholarship on the so-called rule of law conditionality, which today constitutes the most controversial but at the same time most defined application of conditionality, provides a measure of the relevance of the issue for public-sector doctrine. On this topic

Focusing predominantly on the so-called "rule of law conditionality" introduced by the aforementioned Regulation, however, another central aspect of European recovery has been neglected, essentially leaving it in the background: the conditional mechanism established by the Recovery and Resilience Facility, i.e. the key instrument of the NGEU.

Nevertheless, the concept and the mechanism of conditionality also arouses the interest of labor-law doctrine when it is related to the social policies of each Member State.

In fact, cohesion and social progress are two of the objectives of the European Union[8]. As such, and even though social policies are essentially national competences, the EU has, over the course of European integration, developed a set of instruments in the social field (financial support, European legislation, and mechanisms to coordinate national policies), which makes it possible to refer to a "Social Europe". The latter involves a "social *acquis*"[9] which has, over several decades, supported a process of convergence between Member States and been fundamental to the simultaneous pursuit both of economic progress on the one hand and of social progress and cohesion on the other[10].

In this context, one of the most significant tools arranged by the EU is the so-called horizontal social clause[11] contained in Article 9[12] of the Treaty

in the most recent Italian debate see, at least: BUZZACCHI, *Le condizionalità finanziarie a salvaguardia dello Stato di diritto, o il rule of law a protezione del bilancio?*, in *D&C*, 4 aprile 2022. As for the two judgments of 16 February 2022, the first in Case C-156/21, rendered on the action brought on 11 March 2021 by Hungary against the European Parliament and the Council, and the second in Case C-157/21, rendered on the action brought on 11 March 2021 by the Republic of Poland against the European Parliament and the Council, through which the Court of Justice of the European Union (CJEU), sitting in plenary session, dismissed both actions seeking the annulment of Regulation (EU) 2020/2092 on the rule of law, we refer, among the very first comments, to BARTOLE, FARAGUNA, *La condizionalità nell'Unione, i carrarmati fuori dell'Unione*, in *RDCompar*, 17 March 2022.

[8] See Article 3 of the Treaty on the European Union.

[9] For a first account of the development of the social *acquis* in Europe, see EC, *The EU Social Acquis*, SWD(2016) 50 final, March 2016.

[10] On this topic see FERNANDES, RINALDI, *Is there such a thing as "Social Europe"?*, in *RevPP*, Special Issue "*L'Europe dans la tourmente*", April-June 2016, n. 1079.

[11] For the analysis of the Art. 9 TFEU and the possible applications of the horizontal social clause introduced by the Lisbon Treaty, with particular references to social and economic mainstreaming and the European Impact Assessment see FERRARA, *L'integrazione europea attraverso il "social test": la clausola sociale orizzontale e le sue possibili applicazioni*, in *RGL*, 2013, n. 2, p. 295 ff.

[12] "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of

on the Functioning of the EU, which obliges EU, already since December 2009, to ensure that in all its activities certain social principles are reflected. Although in the 2009 a significant potential was attributed to this new Treaty provision, looking back at the post-Lisbon EU developments, Commission's documents and decisions of the EU Court of Justice, it's clear that the horizontal social clause has not changed the EU as hoped.

No one can argue that from the beginning, and especially right after, the pandemic, the EU is, indeed, still suffering from the same "social deficit" for which the European left and the unions has been criticizing it in the pre-Lisbon period and which is depriving it of the support of EU citizens[13].

It should also be pointed out that the so-called horizontal social clause of Article 9 TFEU, along with other provisions of primary Euro-Unitarian law, constitute a development, and not an alteration, of the premises on which European construction was conceived and proposed, and that the biunivocal overlap between economically sustainable development and the strengthening of the social dimension constitutes an indefectible postulate[14] especially in a period of economic crisis such as the one currently ongoing, caused by the pandemic of Covid-19.

This paper will therefore attempt to highlight two profiles of significant importance: *in primis*, it will try to trace the content of the specific constraints to which the granting of financial aid is subject. In this way, it will be possible to identify the overall reference framework of European economic support action and verify the concrete attitude of the relations between national and supranational attributions in the current post-emergency juncture: to question the thesis of the Union's meddling in national political, institutional and social structures[15], with the consequent *de facto* "receivership" of the

adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".

[13] See Šmejkal, *The horizontal social clause of art 9 TFUE and its potential to push the EU towards social Europe*, in *PragueWP*, 2016, vol. III, n. 1, p. 1 ff.

[14] Balduzzi, *Unione europea e diritti sociali: per una nuova sinergia tra Europa del diritto ed Europa della politica*, in *FederIT*, 2018, Special Issue 4, p. 245.

[15] This is argued, for example, by Salmoni, *Piano Marshall, Recovery Fund e il containment americano verso la Cina. Condizionalità, debito e potere*, in *CostIT*, 2021, n. 2, p. 80, according to whom the impressive number and wide scope of conditionalities to which European financial assistance is subject could "lead to a sort of structural homologation of the Member States, possibly even to a significant change in their form of state and government".

Countries receiving financial assistance, which, although it has appeared in the limited scholarly debate that has developed on the subject, appears mostly distant from the real dynamics of Euro-national recovery[16].

Secondly, starting from the agenda of the European Pillar of Social Rights, the paper will focus on the content of the NGEU with specific reference to the social policies: the goal is, in fact, to identify and cross-cuttingly analyze the constraints, targets and milestones that characterize the new EU's social policies arranged in response to the Covid-19 pandemic.

In order to do so, a comparative analysis will be made between Italy and Spain, two of the Member States that were found to be among the biggest beneficiaries of the funds prepared by the European Union to cope with the crisis, identifying the differences and the identities that characterize the two countries in terms of social policies.

2. *The Recovery and Resilience Facility*

The largest part of the financial contributions allocated under the NGEU will be distributed by the aforementioned Recovery and Resilience Facility (RRF), whose total endowment, fed through the issuance of special European bonds[17], amounts to EUR 672.5 billion, broken down as follows: EUR 312.5 billion in grants and EUR 360 billion in loans at subsidised rates to be repaid.

To understand the functioning of this exceptionally far-reaching instrument, it is crucial to start from its legal basis, namely Regulation (EU) 2021/241. This is an act of the European Parliament and the Council, approved on 12 February 2021, based on which the various EU Countries that

[16] See the analyses by Dani, Menéndez, *Recovery Fund: dietro i sussidi il commissariamento?*, in *CostINFO*, 25 July 2020; Somma, *Commissariare il parlamento. Il piano nazionale di ripresa e resilienza e le sue condizionalità (parte I)*, in *La fionda*, 11 October 2021.

[17] In this context, the new Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, having authorised the European Commission to borrow exceptionally on the capital markets up to EUR 750 billion, has been the key pivot for the financing of the strategy adopted by the European Union to overcome the pandemic crisis. On this subject, see the contribution by Bonini, *Il Bundesverfassungsgericht tedesco e la legge federale di ratifica della "Decisione sulle Risorse Proprie" dell'Unione europea: ancora una volta, una pronuncia problematica nel nome del sindacato sugli atti ultra vires?*, in *DPCE online*, 2021, n. 1, p. 2759 ff.

have requested supranational assistance have been called upon to prepare and implement – over six years, from 2021 to 2026 – ambitious packages of structural investments as well as of legal reforms: the National Recovery and Resilience Plans (NRRPs or Recovery Plans)[18].

The Regulation in question represents, in essence, a "framework law containing the fundamental principles and coordinates" that the beneficiary States must follow to obtain the disbursement of considerable sums of European money[19]. It is, therefore, appropriate to dwell on the main prescriptions contained in the Recovery and Resilience Facility which, as we shall see more analytically below, impose strict conditionalities on the countries of the Union, which can essentially be subdivided according to two different timeframes:

i) *ex ante* conditionality, concerning the stage of elaboration of national Recovery Plans*;*

ii) *in itinere* conditionality, about the implementation of what was previously planned[20].

3. Ex ante *conditionality*

Starting from the analysis of the *ex ante* conditionality, i.e. the European context that formed the backdrop to the process *of* writing the NRRPs, it should first be noted that the conception phase of these National Plans, whose structural reforms are conceived as a counterpart for financial assistance, undoubtedly intersected with the functioning of EU governance, and was inevitably influenced by the guidelines emanating from the latter[21].

In fact, on 17 September 2020, the European Commission released the

[18] A lively doctrinal debate is developing on National Recovery and Resilience Plans. Among the many contributions already published, limiting ourselves to the literature in Italian, we would like to mention: CLARICH, *Il PNRR tra diritto europeo e nazionale: un tentativo di inquadramento giuridico*, in *Astrid*, 2021, n. 12, p. 1 ff.; STAIANO, *Il Piano Nazionale di Ripresa e Resilienza guardato da Sud*, in *FederIT*, 2021, n. 14, p. iv ff.

[19] SCIORTINO, *PNNR e riflessi sulla forma di governo italiana. Un ritorno all'indirizzo politico "normativo"?*, in *FederIT*, 2021, n. 18, p. 236.

[20] BARAGGIA, BONELLI, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, in *GermLJ*, 2022, n. 23, pp. 154-155.

[21] See SOMMA, *L'Europa tra momento hamiltoniano e momento Polanyi*, in *Nomos*, 2021, n. 1, p. 3.

first guidelines for the preparation of Recovery Plans, which were followed, on 21 December 2020, by the publication of some sectoral guidance models to assist the various countries in the drafting of their Recovery Plans, in compliance with the European provisions on State aid[22]. Subsequently, on 12 February 2021, the aforementioned Regulation establishing the Recovery and Resilience Facility was approved. Precisely for this reason, in January 2021, the European Commission intervened again by updating the previous version of the guidelines to align it with the text of the agreement on the proposed Regulation[23].

In particular, Art. 18 RRF provided that the National Plans had to be duly justified through a meticulous series of explanations from which the coherence of "milestones" (goals, qualitative), "targets" (objectives, quantitative), and "timetable" (indicative calendar) both with the European priorities contemplated in the six pillars of the Recovery and Resilience Facility itself – among which the green economy and digitalisation stand out – and with the Country Specific Recommendations (CSRs) expressed, within the framework of the European Semester, by the Council on a proposal by the European Commission in 2019 and 2020[24]. These are therefore a sort of *ad hoc* constraints addressed to the individual States of the Union[25] which, to Italy, impose, among other measures, to:

- "pursue fiscal policies aimed at achieving prudent medium-term fiscal positions and ensuring debt sustainability"[26];
- "enhance coordination between national and regional authorities"[27];
- "improve the efficiency of the judicial system and the effectiveness of public administration"[28];
- "address restrictions to competition, particularly in the retail sector and in business services, also through a new annual competition law"[29].

[22] EC, *Staff Working Document*, SWD (2020) 205 final, 17 September 2020.

[23] EC, *Staff Working Document*, SWD (2021) 12 final, 22 January 2021.

[24] Rivosecchi, *Il bilancio nel diritto pubblico italiano*, in *Nomos*, 2020, n. 3, p. 32.

[25] Also called "Country Specific Conditionalities". In this sense, see Salmoni, *Recovery fund, condizionalità e debito pubblico. La grande illusione*, Cedam, Padova, 2021, p. 46.

[26] CoEU, *Recommendation of 20 July 2020 on the 2020 National Reform Programme of Italy and delivering a Council opinion on the 2020 Stability Programme of Italy*, 2020/C 282/12, 26 August 2020, point 1.

[27] CoEU, *cit.*, point 1.

[28] CoEU, *cit.*, point 4.

[29] CoEU, *cit.*, point 3.

In a nutshell, in the light of all these "set rhymes" dictated by the supranational level, with which the financially assisted countries would, in any case, have had to comply to access European economic resources, it can be seen that the national margin for manoeuvre in the writing of Recovery Plans was, from the outset, considerably circumscribed[30].

4. *In itinere conditionality*

Having briefly described the conditionalities conceived as "prodromal" for the elaboration of the various Recovery Plans, it is now necessary to analyze the specific *in itinere* conditionalities, i.e. those related to the subsequent implementation phase of the National Recovery Plans.

In this regard, while the economically assisted States undoubtedly did not enjoy complete freedom in drawing up their NRRPs, insofar as the basic outlines of their recovery policies were already substantially pre-determined by the supranational level, it can be preliminarily noted that substantially similar considerations also apply to the implementation of what was planned, which is mostly governed at the European level[31].

The "key player" in the entire NRRPs enforcement process is the European Commission, which plays a crucial role in the disbursement of EU resources[32]. In particular, the European Commission, with the help of the Economic and Financial Committee, is responsible for thoroughly verifying the "satisfactory fulfilment" of the commitments made by the various ben-

[30] See Lupo, *La delega legislativa come strumento di coordinamento dell'attività normativa di Governo e Parlamento: le lezioni che si possono trarre dalla legge n. 421 del 1992 (anche ai fini dell'attuazione del PNRR)*, in *AmmCamm*, 5 January 2022, p. 11, who reflects on the European guidelines, conceived as an obligatory point of reference for the conception of national Recovery Plans, pointing out that these and, above all, the Country Specific Recommendations "certainly do not represent blinkered indications coming from the "Brussels bureaucrats", but rather express political guidelines that any government with common sense and not the victim of crossed vetoes should pursue with conviction, in the name of the national interest and the very competitiveness of the European common market".

[31] Bilancia, *Indirizzo politico e nuove forme di intervento pubblico nell'economia in attuazione del Recovery and Resilience Facility, tra concorrenza e nuove politiche pubbliche*, in *CostIT*, 2022, n. 1, p. 1 ff.

[32] See also De Minico, *Il Piano nazionale di ripresa e resilienza. Una terra promessa*, in *CostIT*, 2021, n. 2, p. 115.

eficiary States, to which the disbursement of financial aid is linked on a six-monthly basis (Art. 24(3) RRF).

In this context of constant monitoring, the European Commission also has the possibility of activating, independently or together with the Council, a sort of "sanctioning mechanism"[33] resulting in the partial or total suspension of commitments and payments, not only in the hypothesis that the country has failed to meet the aforementioned milestones and targets (Art. 24, par. 6, RRF), but also in the hypothesis that it has violated the requirements of the European rules on "sound economic governance" (Art. 10 RRF)[34]. In fact, the Recovery and Resilience Facility operates a close link between the RRF and the fiscal rules introduced since the Maastricht Treaty and the subsequent Stability and Growth Pact (SGP), making European disbursements conditional upon the adoption of appropriate corrective actions for any excessive deficits or imbalances[35].

In short, concerning the *in itinere* conditionalities to which financial assistance is subject, there is no doubt that they are numerous and penetrating, a clear sign of the growing presence of the European Union within the constitutional architecture of the Member States[36]. In this sense, the vastness of the action covered by the Recovery and Resilience Facility, although it does not exhaust the entire decision-making activity that the public authorities will be able to put in place from now until 2026, is undoubtedly such as to

[33] On the articulated sanctioning procedure introduced by the Recovery and Resilience Facility, such as to confer a high coefficient of compulsoriness to the European conditionalities, see De Sena, D'Acunto, *Il doppio mito: sulla (pretesa) neutralità della politica monetaria della BCE e la (pretesa) nonvincolatività degli indirizzi di politica economica dell'Unione*, in *CostIT*, 2020, n. 3, p. 148.

[34] In this respect, Art. 24 RRF, dedicated to "Rules on payments, suspension and termination of agreements regarding financial contributions and loans", stipulates that failure to meet the mentioned milestones and targets may even lead to the termination of the agreements concluded between the European Commission and the beneficiary State, as well as to the full recovery of the funding granted by the European Union.

[35] See, in particular, Art. 10 RRF, under the heading "Measures linking the Facility to sound economic governance". On European fiscal rules the literature is endless. See at least: Rivosecchi, *L'indirizzo politico finanziario tra Costituzione italiana e vincoli europei*, Cedam, 2007; Chessa, *La costituzione della moneta. Concorrenza, indipendenza della banca centrale, pareggio di bilancio*, Jovene, 2016.

[36] Salmoni, *Piano Marshall, Recovery*, cit., p. 69. In a similar perspective, see also: Somma, *Il mercato delle riforme. Come l'Europa è divenuta un dispositivo neoliberale irriformabile*, in Mostacci, Somma (eds.), *Dopo le crisi. Dialoghi sul futuro dell'Europa*, Rogas, 2021, p. 236 ff.

influence a very broad spectrum of domestic policies, occupying a very dense timetable, where almost everything is already significantly conditioned[37].

5. *The Next Generation EU: towards a (new?) social Europe*

Having explained, albeit briefly, the articulated conditionality mechanism used by the European Union, it now seems appropriate to focus on the path taken by the Union regarding social policies.

A preliminary remark is necessary: the creation of a "Social Europe" was not a priority at the outset of the European project. The founding fathers considered that social progress would result from the economic progress brought about by the creation of the common market. The European Economic Community (EEC) was therefore created to focus on economic openness, whilst Member States would remain responsible for the development of their welfare states[38].

However, this assumption does not deny that from Maastricht onwards, via Amsterdam, Nice, the second and less successful Treaty of Rome and, finally, Lisbon, the evolution of primary European Union law has shown a rise in the "rank" of the recognition of the Union's social objectives and, thanks to the inclusion of the Charter of Nice in the body of the Treaties, of the correlative "solidarity rights"[39], nor that the progressive construction of a more political Union has certainly also brought with it the ambition for a more social Europe[40].

On the other hand, this means that in the founding spirit of European integration, the economic and social dimensions are understood to be inextricably intertwined, and therefore the Lisbon formula of the "highly com-

[37] Lupo, *Il Piano Nazionale di Ripresa e Resilienza (PNRR) e alcune prospettive di ricerca per i costituzionalisti*, in *FederIT*, 2022, n. 1, p. v.

[38] See Fernandes, Rinaldi, *Is there such*, cit. p. 1.

[39] Ciancio, *All'origine dell'interesse dell'Unione europea per i diritti sociali*, in *FederIT*, n. 13, 2016, p. 1 ff.; de Schutter, *La Carta sociale europea nel contesto dell'attuazione della Carte dei diritti fondamentali dell'Unione europea. Studio per la Commissione Afco*, Parlamento europeo, Direzione generale politiche interne, 2016 (available on *http://www.europarl.europa.eu/committees/it/-studies.html*).

[40] Patroni, Griffi, *Ragioni e radici dell'Europa sociale: frammenti di un discorso sui rischi del futuro dell'Unione*, in *FederIT*, 2018, n. 4, p. 33 ff.

petitive social market economy" (Art. 3 TEU) is to be welcomed as an acknowledgement and an explanatory clarification of an *acquis* already acquired[41].

Nevertheless, in recent years, some more concrete actions for strengthening the social foundations of the Union have been taken by the "European Pillar of Social Rights" (EPSR)[42]. In fact, the opportunity to implement its principles has also been recalled in recent times, identifying its action guidelines as an essential component for deepening the European social dimension[43]. It is true that the Social Pillar does not have binding force for the Member States, and therefore it runs the risk of failing to guarantee the legal effectiveness of those rights that it emphatically proclaims[44]; however, it constitutes a valid programmatic basis to initiate a process of recomposition of rights between national experiences characterized by strong social differences, moving along the axis of fundamental labour and welfare protections. It is no coincidence that, in the experience following its approval, the vitality of the Social Pillar has been far more intense than expected: the integration of its objectives within the procedures of the European Semester, for instance, has made possible to launch numerous activities aimed at measuring the performance of individual States also based on indicators of a social nature[45].

[41] Balduzzi, *cit.*, p. 246.

[42] The EPSR was endorsed in Göteborg, on 17th November 2017, following the joint proclamation by the European Parliament, the Council and the Commission. It was preceded by a number of documents in which the EU institutions emphasized the importance of transparency in decision-making processes, both from the point of view of recovering political consensus in the face of the abuse of the intergovernmental method outside the law of the Treaties, and as an axiological indication for their own work, in order to not allow themselves to be carried away by the ideological contrapositions that emerge in the European Council, where the different economic weight of the Member States is highlighted. On this topic see Kilpatrick, *Social Europe via EMU: sovereign debt, the European semester and the European pillar of social rights*, in *DLRI*, 2018, p. 737 ff.; Sikel, *Dove porta il Pilastro europeo dei diritti sociali*, in *WP FES Italia*, 2018, p. 1 ff.

[43] Pitrone, *La crisi sociale dopo quella sanitaria da Covid-19. È possibile ripartire dal pilastro europeo dei diritti sociali?*, in *IusII*, 28.4.2020; Sciarra, *European Social Policy in the Covid-19 Crisis*, in *IACL-IADC Blog*, 14.5.2020.

[44] Ratti, *Il pilastro europeo per i diritti sociali nel processo di rifondazione dell'Europa sociale*, in Ferrara, Chiaromonte (ed.), *Bisogni sociali e tecniche di tutela giuslavoristiche*, Milano, 2018, p. 7 ff..; Giubboni, *Oltre il Pilastro europeo dei diritti sociali. Per un nuovo riformismo sociale in Europa*, in Bronzini (ed.), *Verso un Pilastro Sociale europeo*, Roma, 2018, p. 15 ff.

[45] Maccabiani, *Il duplice "stress test" del Pilastro europeo dei diritti sociali nell'UEM in via di completamento: nuove iniziative, vecchie questioni*, in *FederIT*, n. 24, 2018, p. 1 ff.

And it is precisely from the EPSR that the NGEU and thus the Recovery and Resilience Facility (RRF) take their cue for the relaunch of Europe from a social perspective[46].

As previously mentioned, the instrument of RRF is structured in six pillars, deemed as key to achieving recovery from the Covid-19 crisis and to enhancing the long-term resilience of the EU and of its Member States: a) green transition; b) digital transformation; c) smart, sustainable and inclusive growth; d) social and territorial cohesion; e) health, and economic, social and institutional resilience; and f) policies for the next generation, children and youth.

At least three pillars are particularly relevant to social policy goals. Regarding the social and territorial cohesion pillar, reforms and investments should contribute – among others – to fighting poverty and tackling unemployment, leading to the creation of high-quality and stable jobs, the inclusion and integration of disadvantaged groups, and should enable the enforcement of social dialogue, infrastructure, and services, as well as of social protection and welfare systems[47]. Reforms and investments in health, and economic, social, and institutional resilience, should aim – among others – to increase crisis preparedness and crisis response capacity, by improving the accessibility and capacity of health and care systems[48]. Finally, reforms and investments related to the pillar next generation, children and youth are considered as essential to promote education and skills, including digital skills, up-skilling, reskilling and requalification of the active labour force, integration programmes for the unemployed; investment in access and opportunity for children and young people related to education, health, nutrition, jobs,

[46] In fact, in the Commission's view the recovery and transition process should be "fair for all Europeans [...] to prevent growing inequalities, ensure support from all parts of the society and contribute to social, economic and territorial cohesion". Thus, in defining their responses to the crisis, the Member States were invited "to factor in" the need to ensure a just and socially fair transition and to adopt measures ensuring equal opportunities, inclusive education, fair working conditions and adequate social protection "in the light of the European Pillar of Social Rights"; see Communication EC (2020) *Annual Sustainable Growth Strategy 2021*, COM(2020) 575 final, 17 September 2020.

[47] Reg. 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility, recital 14. See also Centurelli, *Verso un futuro migliore: azioni nazionali ed europee sulla politica di coesione per riparare il tessuto sociale, disattivare gli squilibri causati dalla crisi Covid-19 e rilanciare l'economia*, in *RGM*, 2020, n. 3-4, p. 732 ff.

[48] Reg. 2021/241, recital 15.

and housing; and policies that bridge the generational gap[49]. These actions should ensure that the youngest segments of the population are not permanently affected by the impact of the Covid-19 crisis and that the generational gap is not further deepened[50].

It emerges that the social issues are addressed in the documents related to the RRF in two ways: first of all, there is an explicit focus on specific target groups and social policy areas; secondly, there is a more generic (even if reiterated) request for full implementation of the principles and rights of the European Pillar of Social Rights[51].

Indeed, *in primis*, emphasis is placed on target groups such as children, young people, women and vulnerable groups, and frequent mention is made of several social policy areas – such as education and skills development, active labour market policies, the promotion of quality employment, healthcare, housing, and the promotion of gender equality and equal opportunities. In particular, the objectives of the promotion of gender equality and equal opportunities for all are to be mainstreamed in the NRRPs, and the Member States should provide an explanation of how the measures included in their plans will contribute to those objectives[52].

Second of all, the overall requirement is that the national Recovery and Resilience Plans should contribute to the implementation of the EPSR, i.e. also taking into account principles and policy areas not explicitly mentioned in the RRF Regulation. In this respect, the Member States are asked to explain how their NRRPs (and specific components of those plans) would contribute to the implementation of the Pillar and, while reporting on the expected impact of the NRRPs, they are requested to use the indicators of the EPSR's Social Scoreboard. The contribution of the NRRPs to the implementation of the EPSR is indeed one of the criteria to be used by the Com- mission for the assessment of the plans[53].

[49] See Delfino, *Social Europe in times of crises: what lessons can be gleaned from the past?*, in *ILLJ*, 2022, vol. 15, n. 1, p. 136.

[50] Reg. 2021/241, recital 16.

[51] Sabato, Mandelli, Vanhercke, *The socio-ecological dimension of EU Recovery. From the European Green Deal to the Recovery and Resilience Facility*, in *EuroSoc*, 2021, n. 24, p. 40 ff.

[52] Reg. 2021/241, article 18.4 (o); EC, *Guidance to Member States Recovery and Resilience Plans, Commission Staff Working Document*, PART 1/2, SWD(2021) 12 final, 22 January 2021, points 10-11.

[53] Reg. 2021/241, recital 42 and art. 19c.

In conclusion, the EPSR and its Social Scoreboard constitute a very important element, because they are expected to act as a sort of benchmark to assess the social consequences of reforms and investments planned by the RRF and implemented by the NRRPs[54].

6. *The more you get, the more is asked. What's expected from Italy and Spain from a social point of view*

In order to better understand the concrete enforcement of the provisions of the RRF on social policies, it seems useful to focus in comparative terms on Italy and Spain for two reasons: first of all, both countries were among the States most severely affected by the pandemic and its disastrous social and economic consequences[55] (a factor that, as already mentioned, led them to be among the Member States receiving the most funds)[56]; secondly, even during the pre-pandemic period, both countries were in a situation of weak economic recovery after the strong economic crises of the previous years[57].

In this context, the NGEU, and each NRRPs, are a milestone on the way to a more integrated EU. Indeed, the financial assistance provided by the European institutions represents a golden opportunity, not only to invest in the areas most affected by the pandemic[58], but perhaps more importantly,

[54] See Guarriello, *Da una crisi all'altra, il risveglio dell'Europa sociale*, in *DLM*, 2022, n. 1, p. 16.

[55] Baylos Grau, *Emergencia sanitaria, legislación laboral de crisis y diálogo social*, in *RMTEC*, 2021, n. 149, pp. 15-36.

[56] Vanhercke, Spasova (ed.), *Social policy in the European Union: state of play 2021. Dealing with the pandemic: re-emerging social ambitions as the EU recovers. Twenty second annual report*, European Trade Union Institute (ETUI) and European Social Observatory (OSE), 2022, p. 149 ff.

[57] In these terms, Braun, Rürup, Schildberg, *Europe's South on the path to recovery?*, in *IntPS*, 14th June 2021, p. 1 ff.

[58] In terms of policy areas, the two countries show different priorities. The Italian plan focuses (35 per cent of total social spending) largely on general education policies. Particularly significant is the investment in health-care infrastructure (30 per cent) and in urban regeneration and social housing (20 per cent). Spain, instead, prioritizes investments in social infrastructure and housing (33 per cent of the entire social envelope), followed by adult learning (19 per cent) and general education policies (14 per cent). In these terms, see Corti, Liscai, Ruiz, *The Recovery and Resilience Facility: boosting investment in social infrastructure in Europe?*, in *ILLJ*, 2022, vol. 15, n. 1, p. 25.

to target prevailing deficiencies in the countries' economy and make it more resilient to future threats[59].

The Italian plan is divided into six missions and 16 components and includes a total of 190 measures, of which 132 are investments and 58 are reforms. It is, therefore, a very ambitious plan that intends to address, in line with the CSRs, the structural weaknesses of the Italian economy, accompanying, at the same time, the country along the path of ecological transition and helping to foster social inclusion and reduce territorial disparities, with the indication of three transversal priorities: women, youth and the South[60].

As for Spain, instead, the recovery plan is all about the bottom line[61]. It has set itself the task of transforming the economic model – a project that has been discussed in Spain for a long time – as well as the ecological transformation to combat climate change, the digitalization of government services, making the economy and society fit for the 21st century, the advancement of women to achieve gender equality and the social cohesion of society[62]. In addition to the four guiding objectives (ecological transformation, digital transition, social/regional cohesion, and gender equality), the plan defines 10 policy areas and 30 projects to boost economic growth, which include 211 measures, of which 102 are reforms and 109 are investments[63]. The emphasis on social equality and social cohesion as one of the four guiding objectives is a unique feature of the Spanish plan.

Specifically, from the social policies point of view, the Italian plan has been appreciated for the emphasis it places on social and territorial cohesion, which is pursued by introducing measures and tools to support the most

[59] See Aranguiz, *National Recovery and Resilience Plan: Spain*, in *ILLJ*, 2022, vol. 15, n. 1, p. 1 ff.

[60] The Italian Government and the European Commission have agreed on 525 milestones and targets: the targets are concentrated in the first two years and concern the introduction of new legislation and measures to initiate the various investments (tenders, activation of recruitment platforms, etc.). Targets, on the other hand, prevail from the end of 2023 and can be: intermediate/final indicators of the progress of a work or result indicators of an intervention.

[61] Braun, Rürup, Schildberg, *cit.*, p. 3.

[62] Baylos Grau, *Un primo approccio alla riforma del lavoro spagnola*, in *DLRI*, 2022, vol. 174, n. 2, pp. 225-246. See also Baylos Grau, *La reforma laboral en España: primeras impresiones*, in *DLab*, 2021, 282, p. 295 ff.

[63] Di Domenico, Cataldi, De Crescenzo, *Un confronto tra i piani nazionali di ripresa e resilienza (PNRR) di sei paesi europei, con focus sulle politiche di genere*, in *NT-MEF*, 2021, n. 1, p. 23 ff.

vulnerable groups, especially women, young people, and the population of southern Italy, by strengthening the education sector and by acting to reduce territorial gaps also through investments in physical capital[64].

The Spanish plan also received a positive assessment, particularly developing the green and digital, the social and territorial cohesion and the equal opportunities pillars. Indeed, more than half of the plan's components contribute to social and territorial cohesion with measures in education, social housing, social services, active labour market policies, also with a view to closing regional gaps[65]. The economic growth is driven by actions to support the country's productivity and competitiveness, such as removing barriers to investment and incentivizing innovation, labour market efficiency and reforming the education system[66]. Specific measures are geared towards improving the social protection system by intervening in the unemployment assistance scheme and the family benefit system, in order to reduce child poverty and through the full implementation of the national minimum income scheme adopted in 2020. Furthermore, active labour market policies, reinforcement of training and reviewing hiring incentives are geared towards improving the functioning of the labour market[67].

A theme common to Spain and Italy is the reference in the Recommendations to the sustainability of the pension system. On this aspect, however, the approaches differ: Italy confirmed in the NRRP the 2021 deadline for the "Quota 100" measure[68] and does not include further measures in the Plan, although there is an ongoing discussion between the government and social partners on a pension reform; Spain, on the other hand, announced a

[64] The Italian plan aims at reducing the North-South territorial gaps, also through investments in infrastructures (broadband, high-speed, waste, water resources, ports, last-mile connections) in the southern areas and, in order to do so, the 40% of the Italian plan's resources are earmarked for the South. On this topic see Garofalo, *Gli interventi sul mercato del lavoro nel prisma del PNRR*, in *DRI*, 2022, n. 1, p. 114 ff.

[65] See Baylos Grau, *Presentación: Acuerdo social y reforma laboral*, in *RMTEC*, 2022, n. 152, pp. 9-17.

[66] Heilmann, Patuleia, Reitzenstein, *Green Recovey Tracker Report: Spain,* Wuppertal Institute, E3G, Berlin, 29th April 2021, p. 3 ff.

[67] EsadeEcPol – Centre for Economic Policy, *Next Generation EU: For a True Country Plan*, in *Esade*, 28th June 2021.

[68] CSR1 2019 called for "fully implementing past pension reforms in order to reduce the burden of old age pensions on public expenditure". EC, *Staff Working Document*, SWD(2019), 1011 final, 27th 2019.

comprehensive reform of the pension system, the impact of which on public finances and system sustainability is still uncertain[69].

On the labour market, the Recommendations for Italy and Spain highlight the need to reduce the unemployment rate and increase labour market participation. In response, both countries invest significant resources in this regard (around RRF 6 billion for both) and plan to strengthen active and passive labour policies[70]. More specifically, the Italian plan includes measures introducing a comprehensive and integrated reform of active labour market and vocational training policies, defining, in close coordination with the Regions, the essential levels of training for the most vulnerable groups. The reinforcement of active labour market policies and the improvement of capacity building of public employment services, including their integration with education and training providers and private operators, aims at increasing the effectiveness of the services offered[71]. Furthermore, the measures under this component aim to reduce social vulnerabilities to shocks, by focusing on undeclared work in all its forms and in all sectors, by outlining initiatives for more effective controls and sanctions together with stronger incentives to work legally. This component also promotes gender equality (e.g. equal pay) and female entrepreneurship.

Spain aims to reduce the unemployment rate, especially youth unemployment[72]. To this end, the reforms contained in the plan aim to simplify contractual arrangements by reducing exceptions to open-ended contracts. Building on the experience of short-time work programmes, the reforms will also seek to preserve employment through the introduction of a flexibility and stabilization mechanism that will provide firms with the tools to cope with adjustments without job destruction and should retrain and up-

[69] On this topic see Natali, Terlizzi, *The Impact of COVID-19 on the future of pensions in the EU*, Expert study for the project SociAll, CES, 2021.

[70] Corti, Núñez Ferrer, Ruiz de la Ossa, Regazzoni, *Comparing and assessing recovery and resilience plans. Italy, Germany, Spain, France, Portugal and Slovakia*, in *CEPS RRRP*, 2021, n. 5, p. 3 ff.

[71] For a thorough analysis of how the adoption of the Italian plan has impacted on the still troubled political landscape, but also how the Italian institutions have managed to allocate funding efficiently by providing, among other things, unprecedented financial and structural support for social and labour market policies, see Ales, *National Recovery and Resilience Plan: Italy*, in *ILLJ*, 2022, vol. 15, n. 1, p. 1 ff.

[72] Aranguiz, *cit.*, p. 7.

grade workers and thus facilitate job transitions[73]. Moreover, the active labour market policies will be strengthened, including through a reform of recruitment incentives.

It is very clear that the NRRPs put a strong emphasis on efforts towards advancing in the labour and social dimension, with significant investments and reforms in various areas[74]. Some of the main concerns posed by previous CSRs are addressed by some of these reforms, particularly regarding temporary employment and (youth) unemployment (especially in Spain)[75]. At the same time, virtually all the principles of the EPSR have been translated into implementing actions in the Italian and Spanish RRPs. More transversal changes, including the efficiency of the public administration, the tax system and employment services are also an important part of the plans. No less importantly, the two main axes of the plans, the green and digital transitions, are also expected to boost the economy in a sustainable and inclusive manner (for example by improving the (social) housing market and the population's digital skills), which should also bring a positive outcome to the social and labour dimensions[76].

Moreover, the positive involvement of the social partners[77] in the plan-

[73] In this regard, an interesting analysis focusing on the Italian RRP is provided in TASSINARI, *Labour market policy in Italy's recovery and resilience plan. Same old or a new departure?*, in *CompItPol*, 2022, vol. 14, n. 4, p. 441 ff.

[74] NATALI, TERLIZZI, *Access to Social Protection for All at the time of Covid-19: The role of the EPSR and the NGEU*, Expert study for the project SociAll, ETUC, 2021 (available on https://spa.etuc.org/images/2020/ThematicFocuses/ETUC_PaperII_DN_AT_13072021_latest.pdf).

[75] On this topic CLAUWAERT, *The country-specific recommendations (CSRs) in the social field: An overview and initial comparison. Update including the CSRs 2019-2020*, ETUI Background Analysis 2019.3, ETUI, 2019.

[76] The importance of active labour market policies, education, training, and skills development policies is strongly highlighted and explicitly linked to the green transition. In particular, in the "methodology for climate tracking" annex to the RRF Regulation (European Union 2021: Annex VI), the highest coefficient for the calculation of support to climate change objectives (100%) has been attributed to measures in the NRRPs "contributing to green skills and jobs and the green economy"; see Reg. 2021/2041, *cit.* See also BAPTISTA *et al.*, *Social protection and inclusion policy responses to the COVID-19 crisis. An analysis of policies in 35 countries, Luxembourg, European Social Policy Network (ESPN)*, Publications Office of the European Union, 7th September 2021, p. 34 ff.

[77] For further details about the future possible role of the social partners in the European social dialogue see ALES, DELFINO, *The European social dialogue under siege?*, in this journal, 2022, p. 21 ff.

ning and monitoring of the RRPs also brings some hope regarding future implementation of the two RRPs[78].

7. *Concluding remarks: the crucial role of financially assisted States*

Given the foregoing, one could potentially be tempted to conclude that the European recovery and resilience conditionalities are, on the whole, entirely consistent with that alleged *de facto* "receivership" of the States receiving financial assistance, mentioned at the beginning of this paper[79]. To be more explicit, the recurrence, as much in the phase of drafting as in that of the subsequent enforcement of national Recovery Plans, of pervasive constraints to which the disbursement of supranational contributions is subordinated – which European countries could not afford to renounce, on pain of a further worsening of their debt exposure – could be considered in line with the conviction of an unacceptable interference of the European Union in the domestic politics of the assisted States. An interference that, moreover, "would not end in a single act, but would be prolonged in the future, with the consequence of binding by its definitiveness and recurrence, not only the majority forces of today – a legitimate cogency having promoted the Recovery Plans' ascendant phase – but also those of tomorrow, who would themselves be bound to respect these commitments"[80].

Such a reconstruction is not persuasive for one basic, peaceful but unavoidable reason: the crucial role played by the Member States within the institutional architecture of the European Union[81].

Certainly, at the current post-emergency juncture, strategic economic recovery policies are also a product, to a significant extent, of the action of

[78] Corti, Núñez Ferrer, *Steering and Monitoring the Recovery and Resilience Plans. Reading between the lines*, in *CEPS RRRP*, 2021, n. 2, p. 12 ff.; Tkalec, Umbach, *NextGenerationEU under a Social Equity Lens*, Robert Schuman Centre, Policy Brief, 2022, n. 36, p. 4.

[79] Somma, *Quando l'Europa tradì se stessa. E come continua a tradirsi nonostante la pandemia*, Laterza, 2021, p. 140 ff.

[80] De Minico, *Il Piano nazionale*, cit., p. 117. In very sharp terms, see also Sciortino, *PNNR e riflessi*, cit., p. 260.

[81] In this regard, Bilancia, *Indirizzo politico*, cit. p. 32, emphasises the fundamental role assumed by national governments in the European dimension and, in particular, in the EU's institutional bodies, where the need to promote public policies expressly aimed at combating the pandemic crisis has emerged.

European institutions[82]. If the latter were not included in the analysis, it would be difficult to have a correct picture of how these policies will be articulated in the pending implementation of the Recovery Plans. However, this entirely acceptable observation should not lead one to think that the contribution of national constitutional bodies to the determination of these policies has failed: in other words, one should not be misled into believing that supranational choices are something distinct and separate from the internal legal systems[83].

On closer inspection, indeed, the decision-making process that, on the one hand, led to the adoption of the Recovery and Resilience Facility and that, on the other hand, will govern the disbursement of financial resources follows the usual government-centric approach that characterizes European economic governance, dominated by the two-tier executive, the Council and the European Commission[84]. These are institutions in which the national governments exercise a decisive weight (as in the case of the Council) or at least a very significant influence (as in the working groups of the European Commission), on behalf of and representing their countries, in the planning, negotiation and determination of all the various European policies. Thus, the States receiving financial assistance, far from being bypassed by the Union, participate fully in the European recovery process and the related decision-making circuits that develop in the supranational sphere[85].

[82] TORCHIA, *Il sistema amministrativo italiano e il Fondo di ripresa e resilienza*, in *Astrid*, 2020, n. 17, p. 4 ff.

[83] See SCIORTINO, *PNNR e riflessi*, cit., p. 260, who points out how this misunderstanding has "often served governments well at various junctures to offload responsibility at the European level for unpopular choices".

[84] In this regard, it should also be noted that this decision-making process, dominated by the Council and the European Commission, has by no means exhausted the entire *spatium deliberandi*, having left considerable room for manoeuvre to the European Parliament, which, far from being marginalised in the political dialogue, has shown itself to be "an active participant in the discussion, amendment and final approval of the operative content of Regulation (EU) 2021/241, occupying the spaces that the co-decision procedure with the Council allowed": DE MINICO, *Il Piano nazionale*, cit., pp. 114-115.

[85] See LUPO, *Il Governo italiano*, in *GCost*, 2018, n. 2, pp. 944-948, who, in observing that the governments of the Member States operate in two fora, one national and one supranational, quotes a sentence by Federica Mogherini: "Italy has two capitals, Rome and Brussels", to remark how "The recognition of a single government, which is based and acts simultaneously in two capitals, in two institutional contexts, and therefore of closely intertwined European and national forms of government, which give rise to a Euro-national parliamentary system, allows us to

Therefore, the Recovery and Resilience Facility, in outlining what has rightly been defined as a "maxi euro-national procedure"[86] of elaboration and implementation of the various NRRPs, gives us a subjectively complex setting of the function of political direction (so-called *indirizzo politico*), distributed among several centers of authority: an osmotic circuit that, in line with art. 10 TEU, is fed by the multiple relations and procedures that link national actors to those of the Union.

If we want to draw the thread of the argument, there seems to be little doubt that the European conditionalities for recovery and resilience configure a stringent "external constraint"[87] on the policy decisions of the assisted States, which inevitably implies for them some degree of coercion to implement supranational dictates in exchange for financial aid, which is difficult to give up in the face of the serious economic emergency caused by the Covid-19 epidemic. Nonetheless, the general impression is that such a constraint, far from determining a veiled form of substitution of the Union for its Member States, must still be framed as the result of choices that are not exclusively European, i.e. of options that are concerted and shared also with the States receiving assistance[88]: the result, in the final instance, of a certain unity of purpose, of a certain *idem sentire* of objectives and aims between national and supranational levels, in the light of what – rightly or wrongly – has been extolled as the "Hamiltonian moment" in the history of European integration[89].

frame and understand much better the dynamics that have developed in recent years, both at national and at European level".

[86] Lupo, *La delega legislativa*, cit., p. 15.

[87] On macroeconomic conditionality as an expression of an external constraint, see Guazzarotti, *Sovranità statale e vincolo finanziario. Potere pubblico e potere privato nel governo degli Stati europei*, in *DCost*, 2018, n. 2, p. 85 ff. More generally, on the theory of the external constraint, understood as an instrument to impose on Italy the necessary investments and reforms, otherwise unfeasible due to the inadequacy of the Italian political class, one cannot but refer to the reconstruction carried out by one of its most fervent supporters, Guido Carli: see, Carli, *Cinquant'anni di vita italiana*, Laterza, 1993, p. 3 ff.

[88] See Bilancia, *Sistema delle fonti ed andamento del ciclo economico: per una sintesi problematica*, in *OSF*, 2020, n. 3, p. 1428, who, in relation to macroeconomic policies, refers to a shared European sovereignty.

[89] The quotation is taken from a statement by the then German Vice-Chancellor Olaf Scholz, who, in an interview with Die Zeit on 19 May 2020, imagined that through the issuance of common bonds by the European Commission, i.e. by sharing the debt needed to finance the NGEU, albeit based on stringent expenditure conditionalities, a real "Hamiltonian

In the end, a final remark must be made regarding the social dimension of the actions taken by the EU because of the crisis and the disbursement of funding.

It is necessary to think about where Europe is going and what institutional trajectories need to be followed to create a truly social Europe, whose physiognomy, however, is even more difficult to define in the scenario opened by a health and social crisis affecting all its Member States at the same time. In this context, hopes for greater economic and political integration at supranational level are described by the ideological divide that has pitted the countries in favor of public debt mutualization programmes against the Nordic bloc of the so-called "frugal four"[90]: beyond the compromise reached, it is clear that, as previously argued, there is a crucial role of the Member States whose sovereignty allows them to paralyze the development of the Union by exercising a power of veto[91].

Today more than ever, the Union must resolve the basic contradiction in which it has always been entangled, namely that of aspiring to a state-like constitutional legitimacy without having the characteristics of the welfare state: the common monetary policy is in fact matched neither by a common fiscal policy, nor by a common economic policy, nor by mutual financial assistance instruments[92].

Therefore, what is needed is a profound revision of the current system of economic and financial governance, coupled with measures to recompose

moment" was taking place, laying the foundations for a finally centralised fiscal and budgetary policy. The allusion is, in particular, to the proposal by Alexander Hamilton, then US Treasury Secretary, to mutualise the debt accumulated by the 13 former British colonies during the struggle for independence from the United Kingdom. That proposal, approved in 1790, laid the foundation for the fiscal unity of the nascent Federation of the United States of America. On this point, however, the doctrine tends to be divided. Among the authors who seem, to some extent, to liken the current phase of European recovery and resilience to a sort of "Hamiltonian moment", one may recall SANDULLI, *Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power*, in *DP*, n. 2, 2020, p. 409, who defines the *Next Generation EU* "the first concrete step towards fiscal union". In contrast, see CHESSA, *Critica del neo-costituzionalismo finanziario. Sul nesso tra scienza economica e diritto pubblico*, in *D&C*, 2021, n. 1, p. 96 ff.

[90] BRUNSDEN, FLEMING, *EU divisions laid bare by "frugal four" recovery proposal*, in *Financial Times*, 24th May 2020.

[91] See BASCETTA, *La democrazia azzoppata dal veto di una minoranza*, in *Il Manifesto*, 21st July 2020.

[92] DE WITTE, *A new phase in the trajectory of social Europe*, in *DLRI*, 2018, n. 4, p. 72 ff.

the asymmetries produced by years of clash between liberalism and the protection of social rights[93].

Thus, the social soul of the EU needs mechanisms to absorb the setbacks suffered by national welfare systems that are more exposed to economic downturns, whether symmetrical or asymmetrical[94].

In the absence of a common equalisation scheme, the guarantee of essential levels of social rights will continue to be shattered by the impact of the different health conditions of households, depriving European solidarity of the capacity it needs to ensure the emancipation from need of those European citizens who struggles more. To achieve this, it is necessary to restore mutual trust between the Member States, laying the foundations as of now to enable countries whose gross domestic product is highly differentiated to accept a risk-sharing system that offers guarantees of stability and discourages the so-called "moral hazard"[95].

Finally, it could be also pointed out that an effective socialization of EU governance could be achieved through the introduction of more tangible forms of social conditionality that are based not only on the European Pillar of Social Rights, but more broadly on the EU social *acquis*[96].

[93] On this topic see Guazzarotti, *Crisi dell'Euro e conflitto sociale. L'illusione della giustizia attraverso il mercato*, Milano, 2016, p. 82 ff.; Clementi, Fabbrini, *Sdoppiamento: perché serve un nuovo patto politico e istituzionale*, in *Rivoluzione Europa. Istituzioni, economia, diritti, quali proposte per un big bang europeo*, Milano, 2019, p. 19 ff.

[94] Regarding this matter, there are several proposals suggesting the institutionalization of forms of fiscal transfer between Member States, in a logic of risk-sharing. In addition to the introduction of a European unemployment insurance scheme, the introduction of a European wage standard, a European fund against social exclusion and, above all, the creation of a single Eurozone budget headed by an EU finance minister are being discussed. See Ferrera, Leonardi, in *Rivoluzione Europa. Istituzioni*, cit., p. 52 ff.

[95] In these terms see Riccobono, *Un "salto di specie" per l'UE? La solidarietà europea alla prova della crisi pandemica*, in *WP C.S.D.L.E. "Massimo D'Antona"*, INT - 154/2020, p. 51.

[96] See Rainone, *From deregulatory pressure to laissez faire: the (moderate) social implications of the EU recovery strategy*, in *ILLJ*, 2022, vol. 15, n. 1, p. 51. In this paper the Author analyzes from a critical point of you the instrument of RRF focusing on the social policies, pointing out that he European Pillar of Social Rights is too weak to effectively steer the EU and national social and labour policies towards the upward convergence demanded by the Treaties.

Abstract

The paper aims at analyzing the articulated conditionality regime contemplated by the Recovery and Resilience Facility (RRF) which, especially in the field of social and labour policies, significantly affects the use of the financial resources allocated by the European Union, within the framework of the Next Generation EU (NGEU), in order to stem the severe macroeconomic impact triggered by the Covid-19 pandemic.

For this purpose, the constraints, targets, and milestones affecting Italy and Spain, two of the largest recipients of supranational financial assistance, will be examined in comparative terms. Moving from this analysis, an attempt will therefore be made to question the idea of the alleged *de facto* receivership of these countries, pointing out how they, while respecting certain identities and other physiological differences, are called upon to play a crucial role in the field of labour and social policies.

Keywords

Next Generation EU, Recovery and Resilience Facility, conditionality, social policies, Italy and Spain.

Massimiliano Delfino

Legal orders in dialogue and the "resources" of the Italian Workers' Statute

Contents: **1.** Reasons for comparison. **2.** The "ascending" and "descending" comparison. **3.** The Workers' Statute and comparison: the discipline of changes of duties and the Spanish forerunner. Overview. **4.** The personal scope of application of the Statute and the workers of the *gig economy*: the differences with *Common law* systems. **5.** *Continued*. *Gig workers* in the Italian legal system. **6.** Article 18 and the influences of the "filtered" comparison. **7.** Short conclusions.

"*The main purpose of comparative law is a better understanding of one's labour law system*".

(Manfred Weiss, *The Future of Comparative Labour Law as an Academic Discipline and as a Practical Tool*, 25 Comparative Labour Law & Policy Journal, 2003, 169-182).

1. *Reasons for comparison*

The idea of comparison in this paper is well explained by the expression "legal orders in dialogue", demonstrating the enduring relevance of what Otto Kahn-Freund emphasised more than fifty years ago. He highlighted that comparative law is not a separate subject matter but rather a tool of analysis, the best way to understand one's legal system: one of the merits of legal comparison is that it allows a scholar to place himself outside the labyrinth of details in which legal thought easily gets lost and to see the broad outlines of law and its main features[1]. Moreover, again according to

[1] Kahn-Freund, *Comparative Law as an Academic Subject*, in *LQR*, 1966, 82, p. 40. See also

the same author, the comparative method is intricate, requiring knowledge of the legal system and the social and primarily political context of the countries under consideration[2]. In short, understanding the framework in which law operates is essential to prevent the use of comparative law for practical purposes from becoming abused.

2. *The "ascending" and "descending" comparison*

The time is ripe today, more than ever, for some considerations on comparison for the reasons familiar to all the disciplines of the legal area and others typical of labour law.

It is appropriate to start with the general reasons.

The globalisation of society and the economy make it increasingly necessary to compare the legal systems of different countries.

The dimension of the European Union, which now appears to be definitively settled, already from the stage of designing actions, presents the "germ" of comparison because it is not possible to intervene with supranational legislation (of harmonisation or not) without being acquainted with the legal systems of the 27 Member States. The case of the EU Directive 2022/2041 on adequate minimum wages is particularly eloquent in that, from its structure, it reveals the underlying comparative work. The circumstance that the directive is divided into two parts, one aimed at countries where there is a statutory minimum wage and the other at those where the fixing of minimum wages is left to collective bargaining, gives a demonstration of the work of analysis of domestic legislation carried out by the Union's institutions. This is somewhat less valid for international law because, for example, the ILO compares the significant adhering countries before issuing Conventions with less "diligence" than the Union does since the adhering states are not obliged to ratify these Conventions. In contrast, the Member States of the European Union must apply the primary (Treaties and the

the remarks of Hepple, *The Influence of Otto Kahn-Freund on Comparative Labor Law*, in Aa.Vv., Liber amicorum. *Spunti di dialogo con Bruno Veneziani*, Cacucci, 2012, p. 153 ff.

[2] Kahn-Freund, *On Uses and Misuses of Comparative Law*, in *MLR*, 1974, p. 27. On this point see also Blanpain, *Comparativism in Labor Law and Industrial Relations*, in Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Economies*, Kluwer Law International, 2010, p. 3 ff.

Charter of Fundamental Rights of the European Union) or secondary sources with direct effect or implement those with indirect effect (directives, decisions).

It is now the case to list the typical reasons for comparative analysis in labour law.

The development of multinational companies requires that they operate in different countries and intersect with a plurality of legal systems, from which functioning problems arise, which can be solved only by understanding each national context[3].

The European Union means many things for labour law, but since its origins, it has, first and foremost, meant freedom of movement for workers, who must be granted certain rights in the various Member States.

Globalization in recent years for labour law (and beyond) has been intertwined with the outset and development of the platform economy and digitalisation, which has brought with it the exponential increase of the number of companies that, through their "*Apps*", make use of the services of delivery workers, for whom a similar problem arises in all the legal systems in which those companies operate, namely their classification.

3. *The Workers' Statute and comparison: the discipline of changes of duties and the Spanish forerunner. Overview*

The Italian Workers' Statute is a clear example of what can be defined as both an "ascending" and "descending" comparison. Ascending because the Statute is "indebted" to the comparative method since some topics come from an appraisal of other legal systems[4]. However, it also represents a descending comparison because the Statute anticipated significant developments ten years before they happened in France[5] and Spain. In the latter country, reference was often made to the Italian experience in drafting the 1980 *Estatuto de los Trabajadores.* However, the Workers Statute's overall

[3] Magnani, *Diritto sindacale Europeo e comparato*, Giappichelli, 2017, p. 2.

[4] See, for example, discrimination protection and trade union rights: the French *Loi Auroux* of 1968 already granted the trade union in the company the right of posting and assembly.

[5] Dorssemont, *Lo Statuto all'avanguardia: uno strumento pioneristico per l'Europa e oltre*, in Rusciano, Gaeta, L. Zoppoli (eds.), *Mezzo secolo dallo Statuto dei lavoratori. Politiche del diritto e cultura giuridica*, I, *Diritti Lavori Mercati*, *Quaderno*, 2020, p. 73.

structure was much more considered than any of its single provisions. Both bodies of law, while presenting significant differences[6], guarantee respect for the rights arising from the subordinate employment relationship through imperative standards of a "quasi-constitutional" character.

Assuming this, however, it is appropriate to go into the details of some issues that, from the perspective of comparison, appear more interesting than others. The first is the regulation of workers' duties contained in Article 13. The second is the personal scope of Law 300 of 1970, which, as is well known, is that of employees, which has undergone tensions in recent years in various legal systems. The third is Article 18, particularly the protection against unlawful dismissals, one of the hot spots of the Statute. All three profiles are highly topical, so it is appropriate to refer to the current version of the Statute and not the original one.

It is better to start with the discussion on workers' duties because it is the one to which less time needs to be devoted from the comparative point of view. Article 13, and consequently Article 2103 of the Italian Civil Code, was amended in 1970 by statutory provisions and significantly revised in 2015. Less known is that in Spain, through the use of emergency decrees between 2010 and 2012, the legislature intervened on the notion of professionalism, replacing the "individual" categories with the more extensive concept of "professional group" to allow greater and "easier" flexibility in the functional mobility of workers. It is necessary, however, to give an account of how collective bargaining, entrusted with the task of solidifying and implementing this reforming line, refrained from conducting this process, continuing instead to refer to the previous taxonomic system of the classification of professionalism[7]. The essence of the reform intervention carried out in Spain a decade ago lies in giving the employer

[6] On this point see, Pérez de los Cobos Oriuel, *El Estatuto de los Trabajadores español en el cincuenta aniversario del italiano*, in *FRCJS*, vol. 22, no. 2, 2019, pp. 51-69, according to whom "el contraste entre los contenidos de la norma española y la de su homónima italiana no puede ser más elocuente. ... [A]mbas respondieron a momentos, necesidades políticas y sociales y proyectos políticos muy diferentes, y por ello, sus contenidos fueron y son muy dispares. En un seminario europeo celebrado en octubre de 1979 en el Instituto de Estudios Sociales para hacer un balance del proyecto presentado, precisamente Gino Giugni, padre del Statuto dei lavoratori, consideró el texto español muy diferente del italiano, señalando que era más un pequeño código de trabajo que una ley sobre la protección de la libertad y la dignidad del trabajador en el lugar de trabajo" (p. 59).

[7] Bini, *Contributo allo studio del demansionamento in Italia*, in *DRI*, 2016, p. 211.

more comprehensive ranges in exercising its power to modify the conditions under which work is performed, with an actual increase in the relative flexibility, "internal" to the same employment relationship. And this approach is not very different from the one given in Italy to the discipline of duties with the *Jobs Act*, at least in terms of its effects on the increased ease of demoting the worker[8].

4. *The personal scope of application of the Statute and the workers of the* gig economy*: the differences with* Common law *systems*

Regarding the notion of subordinate work, there would be many profiles to address. Starting with an important one, the autonomy/subordination dichotomy has changed and is undergoing tensions but remains at the very core of labour law both in the European Union legal system[9] – as emphasised, for example, in the Court of Justice's 2017 *Uber* ruling and the 2021 proposal for a directive on digital platform work – and in many national legal systems, including those outside the Union, albeit with significant differences between *Civil law* and *Common law* systems. Many of those profiles will be analysed below.

In the time of the platform economy, the above-mentioned dichotomy remains an ever-green topic, as well as the idea that the work of delivery men and women is not necessarily performed outside the area of subordination simply because of the existence of a digital platform. On the contrary, the classification problem, while taking different forms, also remains valid for the types of work used in the gig economy[10].

[8] On this point, see *ex multis* GARGIULO, *La determinazione della prestazione di lavoro tra libertà e dignità: potere direttivo e jus variandi a cinquant'anni dallo Statuto*, in RUSCIANO, GAETA, L. ZOPPOLI (eds.), *Mezzo secolo dallo Statuto dei lavoratori. Politiche del diritto e cultura giurudica*, I, *Quaderno of this journal*, 2020, p. 379; VOZA, *Autonomia privata e norma inderogabile nella nuova disciplina del mutamento di mansioni* in GHERA, M.G. GAROFALO (ed.), *Contratti di lavoro, mansioni e misure di conciliazione vita-lavoro nel Jobs Act*, Cacucci, 2015, 2, p. 199; BROLLO, *La disciplina delle mansioni dopo il Jobs Act*, in *ADL*, 2015, p. 1156.

[9] See most recently MONDA, *The Notion of the Worker in EU Labour Law: "Expansive Tendencies" and Harmonisation Techniques*, in this journal, 2022, p. 2.

[10] On this point, see PERULLI, SPEZIALE, *Dieci tesi sul diritto del lavoro*, il Mulino, 2022, while pointing out that "this typically twentieth-century construction of labour law hinged on subordination is outdated today" (p. 57) and that we need to adopt the "perspective of a labour law 'beyond' subordination" (p. 61), believe that this is a trend in the subject that has not yet been brought to fruition at least in our legal system.

Similar "respect for tradition" in the just indicated sense is found in the approach used by the British courts, which have dealt with Uber through rulings by the Employment *Tribunal* in 2016[11], the *Employment Appeal Tribunal* in 2017[12], the *Court of Appeal (Civil division)* in 2018[13] and the *UK Supreme Court* in 2021[14].

The 2017 judgement confirms the classification given in the first instance, ruling out that drivers are "employees" (workers with the broadest protection) as well as "self-employed" and opting for the intermediate category of "workers", who are entitled to some of the employees' rights, from minimum wage to the protection provided by working time regulations.

It has just been mentioned that the British courts have classically conducted the classification activity, as attested by the same judges, according to whom the Uber model is familiar. At the same time, the concrete attitude of the contractual agreement because of the use of new technologies has been changing[15]. Indeed, the *Employment Appeal Tribunal* points out that new

[11] *Uber B.V. and Others* v *Mr Y Aslam and Others*, October 26, 2016, [2017] IRLR 4.

[12] The judgment of the *Employment Appeal Tribunal*, *Uber B.V. and Others* v *Mr Y Aslam and Others*, UKEAT 0056 17 DA, is dated November 10, 2017. On the British rulings, see Pacella; *"Drivers" di Uber: confermato che si tratta di "workers" e non di "self-employed"*, in *LLI*, 2016, 2, p. 15 ff.; Cabrelli, *Uber e il concetto giuridico di "worker": la prospettiva britannica*, in *DRI*, 2017, p. 575 ff.; Prassl, *Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who is a Worker?*, in *LQR*, 2017, p. 33 and *Oxford Legal Studies Research Paper*, No. 25/2017; Perulli, *Lavoro e tecnica al tempo di* Uber; De Stefano, *Lavoro "su piattaforma" e lavoro non standard in prospettiva internazionale e comparata*, and Auriemma, *Impresa, lavoro e subordinazione digitale al vaglio della giurisprudenza*, all in *RGL*, 2017, respectively, p. 195 ff. (p. 205 ff.), p. 241 ff. (pp. 249-252) and p. 281 ff.; Voza, *Il lavoro reso mediante piattaforme digitali tra qualificazione e regolazione* and Loffredo, *Il lavoro su piattaforma digitale: il curioso caso del settore dei trasporti*, both in *QRGL*, 2017, 2, p. 71 ff. and p. 117 ff. respectively. On the *Employment Appeal Tribunal*'s ruling, see De Luca, *Uber: ormai è un assedio. Prospettive future sul diritto del lavoro nella* gig economy *alla luce della sentenza della Corte d'Appello di Londra*, in *DRI*, 2018, p. 977 ff. On the British rulings and, more generally, on labour in the platform economy, see Kenner, *Uber drivers are "workers" - The expanding scope of the "worker" concept in the UK's gig economy*, in Kenner, Florczak, M. Otto (eds.), *Precarious Work. The Challenge for Labour Law in Europe*, Edward Elgar Publishing, 2019.

[13] *Uber B.V. and Others* v *Mr Y Aslam and Others*, December 19, 2018, [2018] EWCA Civ 2748.

[14] Judgement of February 19, 2021.

[15] See *Employment Appeal Tribunal* judgment, para. 82: "Uber's agency model was nothing new: it was simply the scale of the arrangement that was different, but that reflected the new technology".

technologies swap how the existence of an employment relationship is ascertained without questioning whether this ascertainment should be the main activity to be performed. Indeed, technology has relevance primarily to the application of (EU-derived) working time legislation, according to which the worker (*worker* or, perhaps, *employee* but not *self-employed*, except for what the 2018 ruling decided) is required to be: at work, in the performance of his or her duties, and available to the employer. Well, of these three requirements, the one that is most affected by technological innovation is the last one, since drivers, according to the British courts, assume a work obligation when they are in the urban area where London-based Uber operates and when they connect to the company's "*App*". The lack of a Web connection depends solely on the worker. On the other hand, the physical presence on the territory, because of the rules provided by Uber, is equivalent to not responding to the customer's call and "triggering" the qualification as a *worker*.

As partially anticipated, a contrary view is in the 2018 ruling, which reverses the approach of previous decisions by denying the existence of an employment relationship between drivers and Uber and assimilating their situation to that of drivers operating in the traditional cab service. For this purpose, the presence of the *App* and the circumstance that the company handles bookings and payments for the service is irrelevant, in the judges' opinion. In other words, according to the 2018 ruling, there is no employment contract between the driver and Uber. Still, there is a *service contract* (and thus self-employment) between driver and passenger, while the company only plays the role of a mere intermediary[16].

The final word on the matter, at least so far, has been written by the *UK Supreme Court* in its 2021 judgment rejecting the Appeals ruling classifying Uber drivers as *workers* and holding that the purpose of labour legislation is to protect workers merely because they are in a position of dependence to a person or organisation that exercises control over their work. Moreover, again the 2021 ruling recalls that the same labour legislation prevents employers from waiving the protection provided by law.

[16] This follows from the 2018 ruling, where it is stated that the *Employment Tribunal*'s assertion that if there were a contract between the driver and the passenger, the latter would be burdened with the employer's obligations, first and foremost, the responsibility to recognise the minimum wage, is incorrect. Instead, for the *Appeal Court*, the passenger is simply a customer of the driver ("the passenger is the customer of the driver's business": para. 140), while the company acts as an intermediary ("a booking agent for a group of self-employed drivers": para. 133).

What has been said so far makes realising that the classification of employment relationships with Uber remains within the framework of the classic British tripartition between *self-employed*, *worker* and *employee*, with fluctuations between the former and the latter "category" depending on case law under consideration.

A "traditionalist" approach was also used by the French *Cour de Cassation*, in 2020, starting from the assumption that the performance of work within a *service organisé*, when the employer unilaterally determines the conditions of implementation of the service and follows the typical paths of that system that does not provide for a different alternative between autonomy and subordination, qualified Uber France's cycle drivers as dependent workers[17].

Returning to the United Kingdom, the courts turn out to be aware of the problems generated by the *gig economy* in an employment relationship and the fact that workers must be afforded protections of *workers* as it is possible for them to be economically dependent on the platform[18]. However, case law, even in *Common law* systems, cannot extend protection beyond legal definitions. In short, it has reached a point, highlighted by the 2018 and 2021 judgements, in which courts cannot be asked to protect the contractual imbalance between the driver and the transport company because it is necessary for an express legislative intervention in the case[19].

The role of the legislature is growing in another *Common law* system, namely that of the United States of America. Indeed, some State laws (enacted by 18 States) have yet to intervene in the classification of drivers of transportation companies, thus making the traditional test applicable, while other States, including Utah, classify drivers as self-employed. Another model

[17] Cour de Cassation Chambre sociale 4 March 2020 no. 374, with a comment by I. Zoppoli, *I* Travalleurs Uberises*: meglio qualificati o meglio tutelati in Francia?*, in *RIDL*, 2020, 2, p. 782.

[18] The 2018 ruling is clear: "the question whether those who provide personal services through internet platforms similar to that operated by Uber should enjoy some or all of the rights and protections that come with worker status is a very live one at present. There is a widespread view that they should, because of the degree to which they are economically dependent on the platform provider" (*Appeal Court* judgment, para. 164).

[19] The court again states that "in cases of the present kind, the problem is not that the written terms misstate the true relationship but that the relationship created by them is one that the law does not protect. Abuse of superior bargaining power by imposing unreasonable contractual terms is a classic area for legislative intervention, not only in the employment field" (*Appeal Court* judgment, para. 164).

gives the individual contract much more weight in organising drivers of transportation companies operating through "*Apps*". The North Dakota example is eloquent because it presumes that transportation companies only exercise control over drivers if agreed to in a written contract[20].

In this regard, it should be remembered that in the United States, the role of the employment contract is decisive because it can qualify the worker as an employee. At the same time, the contractual qualification as a self-employed person has no relevance.

The various legal and *Common law* tests may consider the contract as an element in determining whether the person is self-employed. Still, they usually go further by analysing the concrete case and its effectiveness.

This being the case, in *Common law* systems, one is far from the unavailability of the type of contract typical of the Italian legal system – according to which not even the legislator can authorise the signatory parties to the individual contract to apply the protections of self-employment to employment relationships that have contents and modes of execution typical of subordination[21] – and also from the positions of French doctrine and case law, according to which the existence of an employment relationship depends neither on the intentions expressed by the signatory parties nor on the *nomen iuris* contained in the contract but on the factual conditions in which the activity of the workers in question is carried out[22]. Moreover, it should be noted that in 2019, the French *Conseil Constitutionel* intervened in this area by declaring unconstitutional the presumption of *non-salariat* contained in Article 44 of *Loi* 2019-1428 on the relationship between the platform and the worker, as it considered the determination of the scope of labour law to be among the fundamental principles of the matter and as such not available to the parties.

That said, attention will need to be paid to how to implement, if passed, in *civil law* jurisdictions a provision of the proposed directive on work through a digital platform of 2021, according to which "the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship"[23].

[20] Rachabi, *Despite the Binary: Looking for Power Outside the Employee Status*, in *TLR*, 2021, 95, p. 11 and A. Zoppoli, *Prospettiva rimediale, fattispecie, sistema*, Editoriale Scientifica, 2023, p. 51 ff.

[21] C. Const. 31 March 1994 no. 115.

[22] Freedland, Countouris, *The Legal Construction of Personal Work Relations*, Oxford University Press, 2011, 53.

[23] Art. 4 (1) of the proposed directive.

The issue is sensitive because, although the presumption favours subordination and not autonomy in this case, contrary to the French example, this provision cannot be understood and implemented in the sense that the European Union can establish without any limitation the scope of labour law. This is not so much – and it should be emphasised – because there would be a breach of the principle of the unavailability of the type of contract that characterises the Italian system and, in fact, other *civil law* systems as well, but because the Union requires the application of domestic protections for employment in the presence of at least two of the criteria indicated in Article 4(3)[24]. The provision's wording, however, gives Member States some discretion by allowing them to provide for the presence of even more than two of the presumption criteria indicated. By doing so, on the one hand, the Union's interference would grow proportionally to the increase in the number of criteria chosen and, on the other hand, there would seem to be a risk of nullifying the albeit minimal harmonisation effect typical of the legal basis of the directive, i.e., Article 153 TFEU, because discretion in the choice of the number of criteria brings with it the possible differentiation between jurisdictions.

5. Continued. *Gig workers in the Italian legal system*

The decisions of the foreign courts mentioned earlier are also very relevant from the Italian perspective concerning another delivery platform, namely *Foodora*. It is generally known that the Court of Turin, in a judgment of May 7, 2018[25], classified the bikers of that company as self-employed workers, while the Court of Appeals of the same city, in its ruling of January 11, 2019, No. 468, came to a different conclusion, considering the same workers hetero-organized collaborators to whom the discipline of subordinate employment applies, under Article 2, Legislative Decree 81/2015.

[24] Level of pay; obligation to abide by rules on outward appearance, behaviour, and work performance; supervision of work performance; restriction of freedom to organise one's work; limitation of the ability to have clients.

[25] V. Tullini, *First reflections on the Turin ruling on the Foodora case*, in *LDE*, 2018, p. 1; Spinelli, *La qualificazione giuridica del rapporto di lavoro dei fattorini Foodora tra autonomia e subordinazione*, in *RGL*, 2018, 2, p. 371 ff.

And this was also the position taken by the Supreme Court in its January 24, 2020, ruling No. 1663.

It is worth noting here that the Italian Appeal and Supreme Court rulings recognise the application of employee protections based on the 2015 legal provision. In fact, in the absence of this provision, it would have been complicated, with one sporadic exception[26], to extend the protection of subordinate labour to the case of hetero-organized work. In other words, the Italian legislation of 2015 made available to the interpreter (in this case, to case law) a tool, Article 2 of Legislative Decree 81, moreover using "assimilation" techniques typical of French law[27], which made it possible, without modifying Article 2094 of the Civil Code, to extend to *Foodora* delivery workers protections that they would not otherwise have obtained. And all this is in tune with what the British judges decided in their 2018 ruling, which calls for legislative intervention, subject to the particularities of the legal system across the Channel.

The centrality of the legislature's role in qualifying the relationship and the relevance of the autonomy/subordination dichotomy in the Italian legal system is demonstrated by another legislation block, namely law 81/2017, the so-called *Jobs Act* for the self-employed, thanks to which the distance between the protections guaranteed to subordinate work and the measures to protect self-employment remains considerable[28].

Returning to the *gig economy*, the problem of the autonomy/subordination dichotomy is accentuated by another of the elements that drive comparison and dialogue between legal systems, namely globalisation. Uber drivers or Foodora cycle drivers will be classified differentially, depending on the legal

[26] See Palermo Tribunal, November 4, 2020, which qualifies delivery workers as employees regardless of Article 2, Legislative Decree no. 81/2015.

[27] Perulli, *Oltre la subordinazione. La nuova tendenza espansiva del diritto del lavoro*, Giappichelli, 2021, p. 38.

[28] Ballestrero, *La dicotomia autonomia/subordinazione. Uno sguardo in prospettiva*, in *LLI*, 2020, 6, p. 14 ff. recalls how the autonomy/subordination dichotomy is not in *rerum natura*: it is the fruit of a systemic arrangement that has distant origins and has been consolidated over time, which appears to be confirmed by Law no. 81/2017. Not of the same opinion are Perulli, Speziale, cit., according to whom this regulatory block, law no. 128/2019 and Article 2, Legislative Decree no. 81/2015, shows how by now, the "great dichotomy" between subordinate and self-employment is much more relative (pages 61-62), while admitting that this is still only a trend since "the Italian system has not yet achieved this goal of extensive modulation of protections" (p. 64).

system of the EU Member State (or, why not, even in non-EU countries)[29], even though Uber's business rules are similar worldwide. This will make it convenient for the company to await the outcome of the domestic "classification activity", which is the courts' responsibility in applying the legal case and investing more in those domestic contexts, in which case law will place drivers outside the area of subordination. This is a familiar phenomenon for labour law, as multinational companies have constantly been subjected to different rules in different domestic legal systems, including the classification of employment relationships. However, the difference from the past is the presence of a digital platform, which is a-territorial.

In addition, referring the classification issues to domestic judges causes the risk of having different treatments not only among other countries but also within each of them, as judges may not necessarily decide similar cases uniformly throughout the country unless there is an intervention of a High Court, as, for example, happened in the United Kingdom and partly in Italy, which, moreover, may not necessarily be decisive because there may be a change of orientation.

6. *Article 18 and the influences of the "filtered" comparison*

It is appropriate to deal now with Article 18 of the Workers' Statute, which, as it is well known, was profoundly amended between 2012 and 2015 through Law 92/2012 and Legislative Decree 23/2015. Currently, only null and void dismissals and dismissals taken for discriminatory or unlawful reasons are hit with the maximum sanction of full reinstatement. Evidence of the place at the top of the fundamental needs protected by the legal system is provided by their unconditional punishment, i.e., the most severe sanction on dismissals is applied regardless of the size of the enterprise, the professional qualification held and the date of the worker's employment.

Comparison played a significant role in this matter because a reform of that magnitude required a comparison with the leading Member States of the European Union, from which it appeared that Italy was the only country to have in large companies a practically generalised application of

[29] As self-employed, subordinate, hetero-organized in Italy; or as an employee, worker, self-employed in the UK, and so on in other countries.

reinstatement. In almost all other countries, there was (and is) a system under which monetary, not reinstatement, sanctions are applied, except for Germany, where the choice between compensatory and reinstatement remedies is left to the judges who can take into account many elements before choosing between one and the other[30].

Once the reform was enacted, Italy searched for the constraints arising from the European Union and international law in the direction of the need for reinstatement. This search has much to do with the comparative method since, as mentioned at the beginning, EU law and international law have in them, albeit differently, the "germ" of comparison.

This attempt, shaky from its outset, finally waned with the Italian Constitutional Court's ruling no. 194 of 2018, which, after recalling that reintegration protection is not the only paradigm implementing Articles 4 and 35 of the Constitution[31], highlighted the absence of any constraint stemming from the Union's system because of the applicability of Article 30 of the Charter of Fundamental Rights of the European Union – according to which, moreover, every worker has the right to protection against any unjustified dismissal while it does not refer to reinstatement protection – "Article 3, paragraph 1, of Legislative Decree No. 23 of 2015 should fall within the scope of application of Union law other than the Charter itself".

In contrast to what happened with Article 30 CFREU, the Constitutional Court has shown much more room for international law, recalling Article 24 of the European Social Charter[32], which "must qualify

[30] L. Zoppoli, *Flex/insecurity. La riforma Fornero (l. June 28, 2021, no. 92) prima, durante e dopo*, Editoriale Scientifica, 2012, p. 128.

[31] Constitutional Court ruling no. 303 of 2011 is cited on this point.

[32] Since "the plaintiff has stated that her health condition has severely deteriorated and that she would be physically unable to resume an activity within" the Union body at which she worked, "the parties are invited, in the first place, to seek an agreement to determine fair monetary compensation for the plaintiff's dismissal". Fontana, *La Corte costituzionale e il decreto n. 23/2015:* one step forward, two steps back, WP CSDLE "Massimo D'Antona".IT - 382/2018 emphasises the innovativeness of this principle since "the Constitutional Court has never shown towards the Social Charter great openings and indeed in the past has considered its provisions as norms 'without a specific preceptive content' (see, for example, judgment no. 325/2010), documents of 'mere direction', that is, not binding (Constitutional Court no. 50/2015)." (p. 29). Of the same opinion is M.T. Carinci, *La Corte costituzionale n. 194/2018 ridisegna le tutele economiche per il licenziamento individuale ingiustificato nel "Jobs Act", e oltre*, WP CSDLE "Massimo D'Antona".IT - 378/2018, according to whom "the CSE thus definitively comes out of the limbo of legal irrelevance in which the Judge of Laws for a long time confined it, to finally rise

as an international source, according to Article 117, paragraph 1 of the Constitution"[33], moreover, applicable to Italy, which has ratified the European Social Charter.

However, Article 24 does not directly mention reinstatement but refers to "the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief". Thus, the 2018 ruling specifies for unjustified dismissal, the obligation to ensure the adequacy of payment, in line with what the Court affirmed based on the internal constitutional parameter of Article 3 of the Constitution. Thus, an integration between sources and – what is most relevant – between the protections they guarantee is realised[34].

The reference in the 2018 judgement to the decision of January 31, 2017, rendered because of collective complaint No. 106/2014 brought by the *Finnish Society of Social Rights* against Finland, is another example of the application of the comparative method because the examination of complaints provides insight into solutions adopted in other legal systems, does not appear incongruous.

Reference to this decision clarifies what "reasonable compensation" means in Article 24 ESC, *i.e.*, *adequate* and *deterrent* compensation.

From what has been said, it is clear that the comparative method, "filtered" through the provisions of Union law and international law, cannot be used to argue the constitutional illegitimacy of Article 18 of the Statute and Article 3, Legislative Decree 23/2015 in the part in which they replaced reinstatement with monetary sanctions, but only to require that these sanctions be adequate and dissuasive, to be brought somewhat closer to restorative protection.

to the status of an interposed parameter of the constitutionality of the law" (p. 22). More generally on the content of Article 24 CSE see Orlandini, *La tutela contro il licenziamento ingiustificato nell'ordinamento dell'Unione europea*, in *DLRI*, 2012, p. 624; Cester, *I licenziamenti nel Jobs Act*, in *W.P. CSDLE "Massimo D'Antona".IT*, no. 273, 2015, pp. 8-10; Perulli, *La disciplina del licenziamento individuale nel contratto a tutele crescenti. Profili critici*, in *RIDL*, 2015 1, p. 418.

[33] Thus C. Const. no. 120/2018 on the union's freedom of the military.

[34] C. Const. no. 194/2018.

7. *Short conclusions*

The time has come for some brief concluding remarks.

Around the Workers' Statute, the world has changed profoundly in fifty years. Much water has flowed under the bridge, but the original approach of law 300/1970 has held up regarding the profiles considered here. Indeed, this has happened for the personal scope because, as seen, the autonomy/subordination dichotomy has been characterised by tensions and twists. Still, it has by no means waned, not even in the wake of the digital revolution, and the classification as a dependent worker is still the gateway to the protections of the Statute.

With regard, on the other hand, to Article 18 and the consequences following an unlawful dismissal, on closer inspection, the current framework is not substantially different from the original one because from 1970 to 1990, most companies were covered by compensatory remedies, reinstatement being confined to companies with more than 35 employees. Of course, the approach at that time was different from the contemporary one because the *rationale* behind that version of Article 18 was that large companies could economically afford the reinstatement of workers unlawfully dismissed, while the idea behind the 2012/2015 reform was that reinstatement should be confined only to the particularly detestable cases of discriminatory dismissals or dismissals that are void on other grounds. The implication, however, is that the number of workers protected by reinstatement in 1970 is like the current one since, as noted above, the space reserved for reinstatement protection is similar.

What has been said so far makes realising that comparing the statutory profiles under consideration was crucial.

It showed that the amendment of the workers' duties provision in 2015 had its antecedent in the Spanish reform a few years earlier.

It was instrumental in adapting the notion of subordination to the changing dynamics of the platform economy because examining the choices made in other supranational and national *civil* and *common-law* legal systems made it possible to realise that the problems to be addressed and the answers provided were all in all analogous.

The affair concerning Article 18 (and related provisions) made the Italian legal system, which has not always been characterised by linear regulatory interventions, assimilate the crucial changes deriving from the marginalisation of the reinstatement protection.

Abstract

The idea of comparison in this paper is well explained by the expression "legal orders in dialogue", demonstrating the enduring relevance of what Otto Kahn-Freund emphasised many years ago. According to him, comparative law is not a separate subject matter but a tool of analysis, the best way to understand one's legal system. The time is ripe today for some considerations on comparison for the reasons familiar to all the disciplines of the legal area and others typical of labour law. This paper concentrates on the logic specific to labour law and particularly on the Italian Workers' Statute, which is a clear example of what can be defined as both an "ascending" and "descending" comparison. Ascending because the Statute is "indebted" to the comparative method since some topics come from an appraisal of other legal systems. However, it also represents a descending comparison because the Statute anticipated significant developments ten years before they happened in France and Spain.

Keywords

Comparison, Italian Workers' Statute, workers' duties, classification issue, individual dismissals.

Melanie Hack

Working-life out-of-balance? Legal responses in the EU and Norway to parenthood and caregiving in times of crisis

1. *Setting the frame: Digitization and demographic change*

Digitization, coined as the fourth industrial revolution and described as "a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres"[1], also blurs the boundaries between work and home life, imposing increasing challenges on the individual employee to rec-

[1] See KLAUS SCHWAB, *The Fourth Industrial Revolution: what it means, how to respond*, in *World Economic Forum*, January 14, 2016, available at https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/ (last accessed: 16.09.2022).

oncile conflicting demands[2]. The Covid-19 pandemic has made this abundantly clear as existing inequalities were exacerbated, particularly for female employees[3]. This was also the case for Norway – despite the country's status as a frontrunner in gender equality in the workplace[4] and in digitalization in the working sphere[5].

In addition, the Covid-19 pandemic hit European societies at a time when Europe was already faced with a massive challenge of demographic transformation[6]. Many countries – including Norway – are confronted with an aging workforce, which also raises the issue of how employees may be able to address the needs not only of their immediate families but also of their extended families[7]. Norway is aging at an increasing pace and "a historic shift" will take place soon; by the year 2030, elderly people will, for the first time, outnumber children, placing the financial sustainability of the Norwegian social security system at risk[8].

[2] ILO, *Work-life balance*, available at https://www.ilo.org/global/topics/working-time/wlbalance/lang—en/index.htm (last accessed: 16.09.2022).

[3] Among others European Commission, *International Women's Day 2021: COVID-19 pandemic is a major challenge for gender equality*, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1011; Reichelt, Makovi, Sargsyana, *The impact of COVID-19 on gender inequality in the labor market and gender-role attitudes*, in *ES*, 2021, 23, sup1, S228-S245; Adams-Prassl, Boneya, Golin, Rauh, *Inequality in the impact of the coronavirus shock: evidence from real time surveys*, in *IZA Discussion Paper*, 2020, 13183, pp. 1–49. In Norway, see Bing, *Koronapandemien har endra arbeidslivet vårt: – Fleksibilitet blir en ny valuta, tror arbeidslivsforsker,* 2021, available at: https://frifagbevegelse.no/podkast/koronapandemien-har-endra-arbeidslivet-vart—fleksibilitet-blir-en-ny-valuta-tror-arbeidslivsforsker-6.158.757043.10a55fd8cf (last accessed: 16.09.22).

[4] *Human Development Index*, available at: http://hdr.undp.org/en/countries/profiles/NOR (last accessed: 16.09.22).

[5] OECD, *Digital Government Review of Norway*, 2017, p. 4 with further references, available at: https://www.oecd.org/gov/digital-government/digital-government-review-norway-recommendations.pdf (last accessed: 16.09.22).

[6] In general, European Commission, *Report on the Impact of Demographic Change*, 2020, p. 7 ff.

[7] See *e.g.* ILO, *cit*.

[8] Folkman Gleditsch, *Nasjonale Befolkningsfremskrivinger*, 2020-2100, *Et historisk skifte: Snart flere eldre enn barn og unge,* 2020, available at: https://www.ssb.no/befolkning/artikler-og-publikasjoner/et-historisk-skifte-flere-eldre-enn (last accessed: 25.05.2023); Norwegian Ministry of Finance, *Long-term Perspectives on the Norwegian Economy 2021*, in *Meld. St. 14 (2020–2021) Report to the Storting* (white paper), available at: https://www.regjeringen.no/contentassets/91bdfca9231d45408e8107a703fee790/en-gb/pdfs/stm202020210014000engpdfs.pdf (last accessed: 16.09.2022).

1.1. Key factors in achieving work-life balance

Two factors play a decisive role in the ability to achieve work-life balance[9]: 1. working time and 2. the availability of various forms of paid leave[10]. This article focuses on the second key factor and analyses the right to paternity★[11] and carer's leave in the recently enacted European Union's (EU) Work-life Balance Directive[12] (WLB-Directive) and Norwegian law.

2. *The Work-life Balance Directive*

2.1. From soft to hard law

The WLB-Directive is the most recent piece of EU gender equality legislation, and the first legal instrument to emerge from the European Pillar of Social Rights (EPSR)[13]. Both the principle of gender equality and the principle of work-life balance are clearly reaffirmed in the EPSR's principles 2 and 9[14]. The WLB-Directive builds on the parental leave regulations in Dir. 2010/18/EU and complements it both by strengthening existing rights and by introducing new rights[15]. It lays down minimum requirements related to

[9] For definition and overview of scientific literature, including meta-analyses and systematic reviews: WÖHRMANN, DILCHERT, MICHEL, *Working time flexibility and work-life balance*, in *ZA*, 2021, 75, pp. 74-85 and p. 77 with further references.

[10] ILO, *cit*.

[11] ★ is used to illustrate the variety and diversity of family life and clearly mark that not only fathers but also co-mothers are encompassed.

[12] 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.

[13] Official Journal of the European Union, Interinstitutional Proclamation on the European Pillar of Social Rights, (2017/C 428/09), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2017:428:FULL&from=DE (last accessed 16.09.2022); see also ARABADJIEVA, *Reshaping the Work–Life Balance Directive with Covid 19 lessons in mind*, in *etui Working Paper*, 2022.01, available at: https://www.etui.org/sites/default/files/2021-12/Reshaping%20the%20Work%E2%80%93Life%20Balance%20Directive%20with%20Covid-19%20lessons%20in%20mind-2022.pdf (last accessed: 16.09.2022); in detail to the EPSR: LÖRCHER, SCHÖMANN, *The European pillar of social rights: critical legal analysis and proposal*, report 139, ETUI, The European Trade Union Institute, 2016, available at: https://www.etui.org/publications/reports/the-european-pillar-of-social-rights-critical-legal-analysis-and-proposals (last accessed: 16.09.2022).

[14] WLB-Directive, preamble, para. 9.

[15] *Ibid.*, para. 15.

parental, paternity★, and carer's leave and to flexible work arrangements[16]. All of these entitlements are designed to "achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life for workers who are parents, or carers"[17].

Although the Directive has been criticized for being a somewhat diluted version of the original Commission's proposal and may thus lose its legal clout, the preamble at least acknowledges that work-life balance remains a significant challenge for many parents and workers with care responsibilities[18]. This challenge has a particularly negative impact on women, who often end up spending more time on unpaid caring responsibilities and less time on paid work[19]. In contrast to the gender equality directives[20] already in force, the WLB Directive therefore pursues a new approach as it specifically aims to not only enhance the conditions for women but also establish incentives for men to engage in family and care work[21]. The establishment of paternity★ leave on the occasion of birth constitutes an essential instrument. While "paternity★ leave" has become a reality in many EU states, men still often refrain from taking parental leave in the period immediately after birth, which, as critics have argued, defeats the purpose of involving fathers★ in childcare and caring responsibilities right from the beginning[22].

[16] Art. 1 WLB-Directive, see also Art. 16 No. 1 and preamble, para. 16 and ARABADJIEVA, *cit.*, p. 5.

[17] *Ibid.*

[18] *Ibid.*, para. 10.

[19] *Ibid.*

[20] In particular: Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC and finally Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; particularly the latter is somewhat outdated as stressed by FLOCKERMANN, WIENFORT, *Die neue Work-Life-Balance-Richtlinie - Fortschritt und Stillstand zugleich*, in *djbZ*, 2020, 3, pp. 107-108 and p. 107 who rightly note that a reform of this Directive has been blocked for years by some EU member states.

[21] WLB-Directive, preamble para. 11; FLOCKERMANN, WIENFORT, *cit.*, p. 107.

[22] *Ibid.*, p. 107.

2.2. The Directive's five central instruments

The WLB-Directive introduces five central instruments to achieve work-life balance: first, the autonomous non-transferable right to father's★ leave is strengthened as the four months of parental leave for each parent introduced by Dir. 2010/18/EU are to be continued, but the non-transferable, *i.e.*, autonomous, part is to be increased from one to two months for each parent[23]. These two months must be paid, and the level of pay should stimulate both parents to take parental leave[24]. Second, on the occasion of birth, the right to ten days of paid leave is introduced and the payment of this leave must at least be at the level of the national sick leave benefit[25]. Third, the right to five days of carer's leave per employee is introduced every year. As opposed to the European Commission's original proposal, there is no requirement that the leave must be paid[26]. Fourth, the right to flexible work arrangements is strengthened as employees may for example request flexible work schedules or reduced working hours[27]. Finally, the Directive requires protection against discrimination for employees who claim or apply for such rights[28].

2.3. "Implementation" in Norway?!

As manifested in Art. 20 No. 1, EU-member states had to implement the Directive by August 2, 2022, but it opens for an extended timeframe up to August 2, 2024 when it comes to the payment or allowance corresponding to the last two weeks of the non-transferable parental leave[29].

Norway is not a member of the EU, and as a result, would only be legally obliged to transpose such a directive if it were incorporated into the EEA agreement[30]. The WLB-Directive has been marked as EEA relevant by

[23] See clause 2 Dir. 2010/18/EU; Art. 5 no. 1, 2 WLB-Directive; Art. 3 no. 1 a) WLB-Directive.

[24] WLB-Directive, preamble, para. 31f, Art. 8 no. 3.

[25] WLB-Directive Art. 4 no. 1.

[26] See to the critics among others: ARABADJIEVA, *cit.*

[27] Art. 3 (1) f. and Art. 9 WLB-Directive.

[28] Art. 11 WLB-Directive.

[29] Art. 20 no. 2, Art. 8(3) in conjunction with Art. 5 (2) WLB-Directive.

[30] For an overview of the impact of EU and EEA law on Norwegian non-discrimination law: HELLUM, STRAND, *Likestillings- og diskrimineringsrett*, Gyldendal Forlag, 2022, p. 73 ff. and in

the EU and is now under consideration by the Joint Committee with a decision pending[31]. *De lege lata*, Norway is thus not obliged to implement the WLB-Directive. The Norwegian Government has, however, emphasized that "There is nothing to prevent Norway from introducing the changes in question before we are committed to it"[32]. Not surprisingly, the Norwegian legislator recently amended the existing parental leave provisions in the National Insurance Act (*folketrygdlov* - ftrl)[33] by strengthening *inter alia* fathers'* individual right to parental benefits[34].

3. *Legal framework on the right to paternity* leave in Norway*

3.1. Norway a role model for decades

Norway has long been considered a role model when it comes to paternity* leave, being the first country to introduce an earmarked father's* quota of four weeks as early as 1993[35]. However, it took more than two

general for implementation of EU and EEA law into Norwegian law: FINSTAD, *Norway and the EEA*, p. 66 ff. and p. 70 ff. and to the current challenges concerning the diverging development in the EU and the EEA ARNESEN ET AL., *Introduction*, p. 11, both contributions in ARNESEN ET AL. (*eds.), Agreement on the European Economic Area, A Commentary*, C.H.Beck, Hart, Nomos publishers, 2018.

[31] The incorporation would be in EEA Agreement, Annex XVIII Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women. See https://www.regjeringen.no/-no/sub/eos-notatbasen/notatene/2017/juni/europakommisjonens-work-life-balance-directive/id2556738/; for actual *status quo* on incorporation: https:/-/-www.efta.int/-eea-lex/32019L1158.

[32] Author's translation, available at: https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2017/juni/europakommisjonens-work-life-balance-directive/id2556738/ (last accessed: 16.09.2022).

[33] Lov om folketrygd (folketrygdloven), LOV-1997-02-28-19. No official translation available.

[34] Prop. 15 L (2021-2022) Proposisjon til Stortinget, Endringer i folketrygdloven mv. (styrking av fedres rett til foreldrepenger mv.) and Innst. 149 L (2021-2022), Innstilling fra familie- og kulturkomiteen om Endringer i folketrygdloven mv. (styrking av fedres rett til foreldrepenger mv.); Lovvedtak 40 (2021-2022).

[35] ELLINSÆTER, *Conflicting Policy Feedback: Enduring Tensions over Father Quotas in Norway*, in *SP*, 2021, 28, 4, pp. 999-1024 and p. 1000; see to the role-model function CHEMIN, *Norway the fatherland*, in *The Guardian*, July 19, 2011, available at: https://www.theguardian.com/-money/2011/jul/19/norway-dads-peternity-leave-chemin (last accessed: 16.09.2022); for a legal

decades to increase the quota to about three months[36]. The new parental leave scheme emphasised three key considerations: first, the child's need for contact with one of the parents throughout the first year of life; second, the health of both mother and child; and third, gender equality[37]. By anchoring the latter in the leave scheme, the key aim was to ensure that female employees would not have to resign from their jobs when they had children, and to contribute to a more equal care responsibility between parents[38].

After the father's* quota had first been introduced, its duration was amended six times, with a steady increase[39]. If the father* does not use the leave, it is withdrawn. In 2013, the duration reached a peak of 14 weeks and was considerably reduced in 2014 to 10 weeks[40]. The rationale behind the reduction was *inter alia* to increase the parents' freedom of choice when allocating the parental leave weeks, and correspondingly, the available common part increased by four weeks[41]. In 2018, it was finally extended again to 15 weeks[42].

historical overview: SYSE, *Verdens beste foreldrepengeordning?*, in BUGGE, INDREBERG, SYSE, *Lov, liv og lære - Festskrift til Inge Lorange Backer*, Universitetsforlaget, 2016, pp. 513-532 and p. 522 ff.

[36] ELLINSÆTER, *cit.*, p. 1.

[37] See preparatory work: NOU 1996: 13, Offentlige Overføringer til barnefamilier p. 215; In Norway fathers* have in principle had the opportunity to take parental leave since the late 1970s, however, utilisation was still low in the early 1990s. This increased considerably after the father's quota was introduced, see KITTERØ, HALRYNJO, *Mer likestilling med fedrekvote?*, in *K.no*, 2019, 2, pp. 71-89 and p. 74 with further references.

[38] NOU 1996: 13, p. 215 ff.; for an overview: HAMRE, *Fedrekvotens historiske utvikling, Fedrekvoten – mer populær enn noen gang*, in *Samfunnspeilet*, 2017, 1, available at: https://www.ssb.no/befolkning/artikler-og-publikasjoner/fedrekvoten-mer-populaer-enn-noen-gang—298200 (last accessed: 16.09.2022).

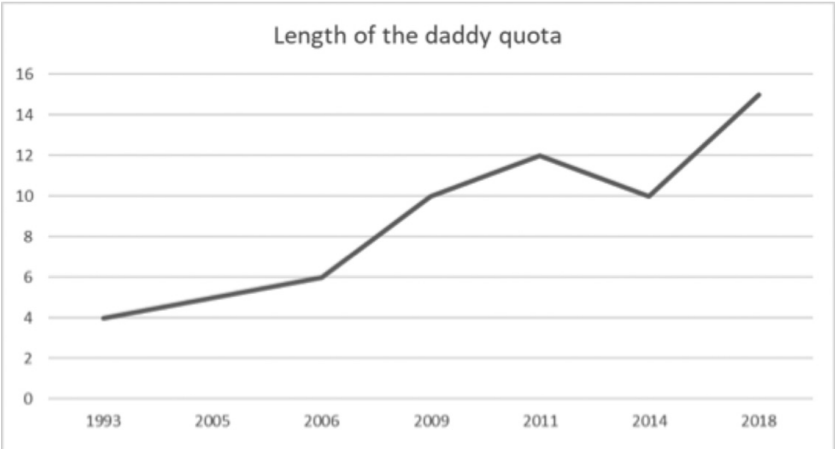
[39] In detail HAMRE, *cit.*; SYSE, *cit.*

[40] See table 1 on the development on the duration of the father's* quota in Norway.

[41] In-depth: SYSE, *cit.*, p. 529 ff.

[42] To the development of the father's* quota: KITTERØ, HALRYNJO, *cit.*

Table 1 on the development of the duration of the father's★ quota in Norway



3.1.1. Tripartition of parental leave

De lege lata, the parental benefit scheme consists of three parts: Provided that the parents choose the full rate – 100 % payment for a total of 49 weeks[43] – one part of 15 weeks is reserved for the father★ (father's★ quota). The second part of 15 weeks is reserved for the mother (mother's quota). Three of the total leave weeks must be taken at the latest before the maternity leave, *i.e.,* prior to birth[44]. The leave period may be claimed as early as 12 weeks before birth[45]. The third part of 16 weeks can be freely distributed between the parents[46]. Exempted from the division are the quota weeks[47]. Moreover, both parents are also entitled to one year of unpaid leave in the extension of the parental benefit period[48].

[43] Similarly, 19 weeks are reserved for each of the parents choosing a reduced rate, corresponding to 80 % of the sickness benefit allowance for 59 weeks.

[44] Ftrl. § 14-12 and § 14-10.

[45] Ftrl. § 14-10.

[46] Ftrl. § 14-9 (5) and ftrl. § 14-6.

[47] Ftrl. § 14-12.

[48] For an overview: Haider, Kjønstad, *Innføring i trygderett*, Universitetsforlaget, 2018, chap. 4.3, p. 102 ff.

Excluded from the division are, moreover, the last 15 benefit days (three weeks) before and the first 30 benefit days (six weeks) after the birth, which are reserved for the mother. These six weeks are included in the maternity quota. The maternal quota cannot be utilised before birth.

Provisions on parental leave that are applicable to fathers* apply correspondingly to co-mothers as manifested in the Children Act (*barneloven)* in § 4a (3)[49].

Both the mother and the father* need to have been professionally active prior to claiming the leave[50]. The mother must have been in income-generating work for six out of the last 10 months prior to birth[51]. The income may be generated via employment, work as a freelancer, or self-employment. The amount of parental benefit will be 100 % of their calculation basis, which follows the sickness benefit rules[52].

Receiving parental benefit presupposes that the member is not working during the leave, with an exception for so-called graduated solutions, which can be used to combine parental benefits with part-time work[53].

3.1.2. Rights to leave for the timeframe close to birth/on the occasion of birth

The father* cannot receive parental benefit for the first 30 benefit days (six weeks) after the birth but may apply for up to two weeks of unpaid care leave as manifested in the Working Environment Act (*arbeidsmiljøloven – aml.)*[54]. To capture the lack of pay, both collective agreements and individual employment contracts often have special paid leave rights for fathers* to be taken on the occasion of birth. The payment is thus made by the employer and not by the National Social security scheme[55].

[49] Lov om barn og foreldre (LOV-1981-04-08-7); See Prop. 15 L, p. 17 and commentary to bl § 4 a by KVALØ, available at Juridika.no stressing the applicability of the ftrl.

[50] Ftrl. § 14-6 (1); in-depth overview: HAIDER, KJØNSTAD, *cit.*, chap. 4.3.5.

[51] See for the special regulations for adoption ftrl. §§ 14-5 (1), 14-10; for a critical evaluation: HAIDER, KJØNSTAD, *cit.*, chap. 4.3.3.

[52] Ftrl. § 14-7.

[53] In detail HAIDER, KJØNSTAD, *cit.*, chap. 4.3.4, p. 106.

[54] Ftrl § 14-10 (1) s. 3, aml § 12-3. Official EN translation available at https://lovdata.no/dokument/NLE/lov/2005-06-17-62 (last accessed: 16.09.2022).

[55] Prop. 15 L (2021-2022), Endringer i folketrygdloven mv. (styrking av fedres rett til foreldrepenger mv.), chap. 5.1.

3.1.3. Paternal★ leave beyond the father's★ quota: the activity requirement

The father's★ quota can be utilised even if the mother is at home with the child (ftrl. § 14-12 (2)). The father's★ right to parental leave beyond the father's★ quota, however, requires the mother to be in certain forms of activity (ftrl. § 14-13), such as: going back to work (lit. a), and studying on a full-time basis (lit. b) or in combination with work that in total amounts to full-time (lit. c)[56]. The father's★ quota may also be taken if the mother due to illness or injury is completely dependent on help to take care of the child (lit. d) or where she is admitted to a health institution (lit. e).

The father's★ leave's dependence on the mother's activity has been subject to vigorous legal debate, and critics have argued that it constitutes gender discrimination[57]. The question was thoroughly considered in the National Insurance Court's appeal case TRR-2015-1542[58], which assessed the role and impact of EU law, specifically the European Court of Justice's (ECJ) decision C-222/14 (*Maïstrellis*[59]), the Gender Equality Directive on Norwegian law, that is, the Gender Equality Act of 2013 (*likestillingslov*) and the prohibition against discrimination as manifested in § 98 of the Norwegian Constitution (*grunnlov - Grl*). The Court clarified that it did not fall under its jurisdictional scope of competence to rule whether a breach of the Norwegian Equality Act could be established in the first instance. However, the court emphasized that it appeared doubtful whether the activity requirement ftrl § 14-13 was compatible with the Gender Equality Act and the Gender Equality Directive and, interestingly, noted that "there is reason to believe that the EFTA Court will be able to reach the same result as the EU Court in case C-222/14 if it is presented with the question of whether section 14-13 of the National Insurance Act is in conflict with the Equality Directive". The National Insur-

[56] Further examples: full-time participation in an introductory program (ftl. § 14-13 lit. f) and full-time participation in qualification programs (ftl. § 14-13 lit. g).

[57] Criticism of the compatibility with EU/EEA law Syse, *cit.*, p. 527 stressing that "It is probably only a matter of time before this gender difference must be abolished in Norwegian law" (author's translation).

[58] The National Insurance Court constitutes an independent national appellate body dealing with social security and pension disputes, see Lov om anke til Trygderetten (trygderettsloven), LOV-2021-06-18-127.

[59] Judgment of the Court of 16 July 2015, ECLI identifier: ECLI:EU:C:2015:473.

ance Court finally concluded that although the view of the father's★ caring role and gender equality protection have subsequently been strengthened, the latter not the least through the adoption of § 98 in the Constitution, it was a conscious choice by the legislature to establish and maintain the activity requirement in ftl. § 14-13, "although this appears unfortunate from a gender perspective"[60]. Finally, the Court's judgement concluded that in view of these considerations, Article § 98 of the Constitution does not provide a basis for overriding or interpreting the activity requirement in ftrl. § 14-13 away[61]. Two years later, the EFTA's Surveillance Authority (ESA), brought an infringement case against Norway, claiming that the controversial activity requirement violated Dir. 2006/54/EC as the father's right to parental benefits is dependent on the mother's situation, but not *vice versa*. The EFTA Court ruled in case E-1/18 that the rules on parental benefits in ftrl. §§ 14-13 and 14-14 could not be subsumed under "employment and working conditions" of Art. 14 (1) c of the Gender Equality Directive, thus dismissing ESA's application for a declaration that Norway had failed to fulfil its obligations pursuant to the Equal Treatment Directive by keeping the controversial provisions in the ftrl[62]. By declaring the material scope of Dir. 2006/54/EC not fulfilled – as opposed to C-222/14 (*Maïstrellis*) – the chance was lost to assess a potential violation of the Directive's prohibition against discrimination on grounds of gender and thus a potential breach of the EEA Agreement (where the Directive is incorporated in Annex XVIII)[63]. Or to put it simply: the litmus test for the compatibility with EU law here was a matter of defining the very legal nature of parental benefits, which were classified as mere income support, not necessarily linked to employment[64].

3.1.4. "Implementation" of the WLB-Directive in Norway

While the rights under the Directive apply to workers, it is important to note that the Norwegian parental benefit scheme has a wider scope of

[60] Author's translation.

[61] The same legal opinion is repeated in other rulings, see e.g. TRR-2016-809.

[62] EFTA Court Judgement E-1/18 of 13.12.2019, 62018EJ0001, para. 65 ff., 71, 72.

[63] EEA Agreement - Annex XVIII Health and Safety at Work, Labour Law and Equal Treatment for Men and Women.

[64] See to the lacking link E-1/18, *cit.*, para. 66, 67; Critical to the judgement also HANSEN, *Fedre kan få styrkede rettigheter*, Aftenposten 25.12.2019.

application as both employees and others who meet the requirements of generating a pension-relevant income are eligible for parental benefits[65]. The new law regime applies to all fathers★ who have earned the right to parental benefits[66].

According to the recent law reform, eligible fathers★ are entitled to eight weeks of parental benefits. With effect from August 22, 2024, the total period will be 10 weeks, including two additional weeks on the occasion of birth[67]. Prior to the reform, the activity requirement in ftrl. §§ 14-13 and 14-14 set a legal limitation here[68]. With the new law, no such conditions will be set for the father's★ eight weeks, and the controversial activity requirement will be suspended for this period, establishing an autonomous opportunity to utilise parental benefits[69].

3.2. Carer's leave

3.2.1. Rights for caregivers in the WLB-directive

Art. 6 is the Directive's instrument to address demographic change as it secures employees five days of leave per year to care for "relatives". "Carer's leave" means leave from work for employees who as "carers" need to provide personal care or support to a relative or a household member in need of significant care or support due to a serious medical reason[70]. The term "relative" encompasses a "worker's son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in civil partnership"[71].

The underlying aim is to promote participation in the workforce while taking on an additional burden of caring[72]. The impact of demographic change on society at large and working-life in particular, is explicitly referred to in the preamble, emphasizing a predicted "continued rise in care needs"[73],

[65] Ftrl § 14-6, 14-7.
[66] Prop. 15 L (2021-2022), p. 18; Lovvedtak 40 (2021-2022).
[67] *Ibid*., p. 8.
[68] *Ibid*., p. 12, 18.
[69] *Ibid*., p. 18.
[70] Art. 3 lit. c, d WLB-Directive. In addition to carer's leave, the Directive lays down in its Art. 7 so-called Time off from work on grounds of *force majeure*.
[71] Art. 3 no. 1 lit. e WLB-Directive.
[72] Preamble, para 27, WLB-Directive.
[73] *Ibid*.

which calls for new care policies, including expanding the right to carer's leave for "additional relatives, such as grandparents and siblings" [74].

While the European Commission suggested a carer's leave of 5 days per year to be paid at least at the level of sick pay, the WLB-Directive finally refrained from requiring paid leave, leaving the question of payment to the discretion of member states[75]. As rightly stressed by critics, implementing compulsory payment would have been more effective than mere recommendations[76]. What has remained from the Commission's promising intention is that the Directive at least, in its preamble, stresses the importance that the leave is paid, and that it explicitly encourages member states to introduce paid carer's leave "in order to guarantee the effective take-up of the right by carers, in particular by men"[77]. This is of particular importance as men are often first earners[78].

3.2.2. Carer's leave rights in Norway

The central provision when it comes to carer's leave is aml. § 12-10 on "care and nursing of related parties"[79]. As for carer's leave, Norwegian law basically distinguishes between six scenarios – in addition to situations of general leave related to a sick child[80]: 1) End-of-life care for a close relative where the employee is entitled to leave for 60 days[81]. 2) Leave for up to 10 days per calendar year to provide necessary care to parents, spouse, cohabitant, or a registered partner[82]. 3) Necessary care for a disabled or chronically ill child from and including the calendar year after the child turned 18[83]. 4) Necessary care for a child that has a chronic illness, long-term illness, or dis-

[74] *Ibid.*

[75] See for critical comparison ARABADJIEVA, *cit.*, p. 10.

[76] FLOCKERMANN, WIENFORT, *cit.*, p. 108.

[77] Preamble, WLB-Directive, para. 32.

[78] FLOCKERMANN, WIENFORT, *cit.*, p. 108.

[79] Author's translation. See to term Prop. 118 L (2011-2012), pp. 2-3; commentary by LØKKEN SUNDET to aml § 12-10, online commentary Karnov, available via lovdata.no.

[80] Aml. § 12-9 (1), (2).

[81] Aml. § 12-10 (1); see also overview by SKJØNBERG, HOGNESTAD, HOTVEDT, *Arbeidsrett*, Gyldendal Forlag, 2022, 3. Edition, p. 507; see also commentary by FOUGNER, HOLO, SUNDET, THORKILDSEN to aml. § 12-10, online commentary Juridika, available via lovdata.no.

[82] Aml. § 12-10 (2) s. 1.

[83] Aml. §§ 12-10 (1) s. 2, 12-9 (3).

ability and where there is a considerably increased risk of absence from work[84]. The employee is entitled to leave for up to 20 days per calendar year. In addition, the employee has the right to leave to participate in training at an approved health institution or public competence centre in order to be able to take care of and treat the child[85]. 5) Care for a child with life-threatening or other very serious illness or injury[86]. 6) Special leave in cases where the employee's child is in a hospital or have been recently discharged[87].

Special care allowances for care related to "end-of-life care for close relatives"[88], "children with a chronic illness, long-term illness or disability"[89], "hospital stay for child"[90] and in cases of "child with serious illness or injury"[91] are further regulated in chapter 9 ftrl. As for the "essential care for parent, spouse, cohabiting partner or registered partner"[92] and as for "essential care for disabled child over 18 years of age"[93], there is no such statutory requirement for pay. When it comes to these two scenarios, Norwegian law does thus not go beyond the Directive's requirements. Carer's leave was not subject to the recent amendments of the Norwegian law.

4. *Protection against discrimination when exercising the right to paternity★ and carer's leave*

4.1. WLB-Directive

Workers who exercise their right to leave, which includes paternity★ or carer's leave "should be protected against discrimination or any less favourable treatment on that ground"[94]. According to Art. 11, EU member states "shall take the necessary measures to prohibit less favourable treatment

[84] Aml. § 12-10 (2) s. 2.
[85] Aml. § 12-9 (3).
[86] Aml. § 12-9 (4) lit. c.
[87] Aml. § 12-9 (4) lit. a, b.
[88] Aml. § 12-10, ftrl. § 9-13.
[89] Aml. § 12-09, ftrl. §§ 9-5, 9-9.
[90] Aml. § 12-09, ftrl. § 9-10.
[91] Aml. § 12-09, ftrl. § 9-10.
[92] Aml. § 12-10.
[93] Aml. § 12-09.
[94] WLB-Directive, preamble, para. 40, Art. 11.

of workers" *inter alia* provided that they have applied for, or already have taken paternity★, parental or carer's leave.

4.2. Legal situation in Norway

4.2.1. Prohibition against discrimination due to care-related tasks

In 2018, the Norwegian anti-discrimination law regime, which was rather fragmented at that time, was harmonized and consolidated with the enactment of the Equality and Anti-Discrimination Act (*likestillings- og diskrimineringsloven* - ldl)[95]. The scope of application was widened to encompass discrimination both in and beyond the employment sphere. Care-related discrimination is explicitly mentioned in the catalogue of protected grounds of discrimination in the Act's § 6. In contrast, the Constitution's prohibition against discrimination in § 98 is not limited to specific grounds[96]. In the employment context, the provisions in chapter 13 of the Working Environment Act are *lex specialis*. Prior to the latest reform, care-related tasks were considered indirect gender discrimination[97]. The underlying rationale was that responsibility for care was a "typical situation for women"[98], and it was argued that men who perform care tasks were correspondingly in a woman-typical situation[99]. With the enactment of the new law, the legislator wanted to separate care-related tasks from the prohibition against gender discrimination to make it clear that it also applies to men[100]. As specified in the preparatory work: "Today, it is an expectation and a goal that men and women are equal caregivers"[101] .

[95] Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven, LOV-2017-06-16-51. Official EN translation: https://lovdata.no/dokument/NLE/lov/2017-06-16-51 (last accessed: 16.09.2022).

[96] For further details: Prop. 19 L, (2016-2017), Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven), chap. 4.3.

[97] Sverre, § 6, in *Karnov-online-kommentar*, available via lovdata.no.

[98] Ballangrud, Søbstad, *§ 6. Forbud mot å diskriminere*, in Ballangrud, Søbstad (eds.) *Likestillings- og diskrimineringsloven. Lovkommentar*, Universitetforlaget, 2023, in particular chap. 6.2.2 and chap. 6.2.5, available via juridika.no.

[99] *Ibid*.

[100] *Ibid*.; Sverre, *cit*.

[101] Author's translation, see Prop. 81 L (2016-2017), Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven), chap. 11.9.2.2 p. 92; quoted also by Ballangrud, Søbstad, *cit*.

The prohibition against discrimination includes care for close relatives, *i.e.* the closest family members[102]. "Care tasks" primarily refers to care for young children[103]. Care for older children, elderly parents, and spouse, partner, and cohabitant may also be regarded as care tasks[104]. The decisive criteria are, again, whether the person who is exposed to the differential treatment is actually responsible for or provides care to a person in need of care, typically due to illness or disability[105]. The prohibition also encompasses the assumption that a person has care-related tasks. Remarkably, the example of differential treatment in the preparatory work assumes a person having elderly parents in need of care[106]. For situations concerning care of small children, the assumption is typically an overlap between gender and age discrimination[107]. Also, future care tasks are encompassed[108]. With the creation of a separate ground of discrimination related to caregiving, cases that have previously been assessed as discrimination based on association with a person with disabilities may now constitute discrimination related to care tasks[109]. A further debated issue is whether the prohibition against discrimination related to care tasks also implies a duty on behalf of the employer to facilitate for such tasks and, if so, how far this duty extends[110].

4.2.2. Prohibition against discrimination related to leave at birth and adoption

Among the prohibited grounds of discrimination in ldl. § 6 is discrimination related to leave due to birth and adoption. Again, the Norwegian legislator included a specific ground of discrimination. Previously, such discrimination was considered as gender discrimination. Employees' rights in

[102] Sverre, *cit.* referring to Prop. 81 L (2016-2017), chap. 30, p. 312.

[103] Where exactly to draw the line between small and older children has neither in the preparatory work, nor in the case-law been further specified, for further references, see e.g. case 14/1013 of the Anti-discrimination Tribunal Ballangrud, Søbstad, cit., chap. 6.2.5; Prop. 81 L (2016-2017), chap. 11.9.2.3, p. 92.

[104] Prop. 81 L (2016-2017), chap. 11.9.2.3, p. 92; Ballangrud, Søbstad, *cit.*; Sverre, *cit.*

[105] *Ibid.*

[106] *Ibid.*, p. 93; Ballangrud, Søbstad, *cit.*; Sverre, *cit.*

[107] Ballangrud, Søbstad, *cit.*

[108] *Ibid.*

[109] *Ibid.*

[110] Prop. 81 L (2016–2017) chap. 11.9.2.4, p. 93; in-depth: Ballangrud, Søbstad, *cit.*

case of parental leave are further specified in ldl. § 33[111]. "Leave at birth and adoption" includes leave (six weeks) for mothers close to birth (aml. § 12-4, ftrl. § 14-12), care leave for fathers★ after birth (WEA section 12-3), and the father's★ quota (aml. § 12-5, ftrl. § 14-12). Both men and women are protected, which has also been stressed in a recent case decided by the Anti-Discrimination Tribunal where a male jobseeker had been rejected during an interview with a staffing agency due to impending parental leave[112]. The tribunal concluded that the complainant was exposed to a breach of the discrimination regulations[113].

Section 10 specifies that the scope of protection is graduated according to which leave rights are exercised. The highest level of protection concerns – with very limited options for justification – leave for prenatal medical visits, pregnancy leave, carer's leave on the occasion of birth, leave for the mother for the first six weeks after birth, time to breastfeed aml. §§ 12-1, 12-2, 12-3 (1), 12-4, and 12-8 and when claiming the mother and father's★ quota ftrl. § 14-12 (1)[114]. As for differential treatment based on other parental leave rights, such as the common part that can be shared between the parents (aml. § 12-5), the justification requirements are less restrictive[115]. As clarified in the Act's § 10 (3), differential treatment based on these reasons will never be allowed in case of hiring or termination of employment.

5. *Focal points of critique*

Recent critics have argued that the WLB-Directive is already outdated and needs to be critically revisited and various aspects of the framework strengthened, particularly to meet the new demands that arose during the Covid-19 pandemic and to specifically address unpaid care work[116].

Also, the comparative analysis indicates that the Directive falls short of

[111] Ballangrud, Søbstad, *cit.*, chap. 6.2.4.

[112] Case 21/39, decided on 22.03.2022, available at: https://www.diskrimineringsnemnda.no/showcase/2021000039 (last accessed: 16.09.2022).

[113] See press release: *Diskriminering av foreldre i arbeidslivet – et vedvarende problem*, https://www.diskrimineringsnemnda.no/artikkel/3332 (last accessed 16.09.22).

[114] Ldl. § 10 (1) and commentary to § 10 by Ballangrud, Søbstad, *cit.*

[115] Ldl. § 10 (1), § 9 (1).

[116] Arabadjieva, *cit.*

expectations, particularly on four areas: first the duration of the non-transferable paternity★ leave period, second, that carer's leave is unpaid and rather short, and third, the limited personal scope of the Directive, *e.g.* not encompassing the situation of freelancers, and, finally, fourth, the protection against discrimination when claiming and exercising the right to paternity★ and carer's leave.

5.1. Increasing the length of non-transferable parental leave

The rather ambitious aim of the European Commission's proposal could only be partly realized. Among those ambitions was the proposal of four months of non-transferable leave, which in the end was diluted to two months. Considering that fathers★ still take fewer parental leave weeks than mothers and often no more than the compulsory part, extending the paternal★ leave would be a clear signal and move towards a more sustainable and equal sharing of parental leave and care work between parents[117]. A recent survey by Statistics Norway clearly revealed that in the years 2009-2017, the willingness of fathers★ to use of their quota largely corresponded to the quota manifested in law[118]. In a nutshell: "As long as the mother takes out far more weeks than the mother quota, the rules on mother quota only seem to have cosmetic significance"[119]. Also, even after the upcoming amendments, father's★ leave beyond the non-transferable week of eight weeks will still be subject to the controversial activity requirement, which also deserves critical scrutiny. Keeping this requirement is more than questionable considering EU and EEA law – particularly in view of the CJEUs *Maïstrellis* Judgment[120]. It should be kept in mind that parental leave constitutes a fundamental right in the EU, explicitly enshrined in Art. 33 (2) of the Charter of Fundamental Rights[121].

[117] Similar and in view of the German situation: Flockermann, Wienfort, *cit.*, p. 108 with further references.

[118] Engvik, Pettersen, *Lengst pappaperm blant lærere, men langt fra en likedeling*, in *SSB analyser*, 2021, 14, available at: https://www.ssb.no/befolkning/likestilling/artikler/lengst-pappaperm-blant-laerere-men-langt-fra-en-likedeling (last accessed: 16.09.22).

[119] Author's translation, see Syse, *cit.*, p. 532.

[120] See to the judgement e.g.: Borelli, *Article 33 CFREU Family and professional life,* in Bell, Ales, Deinert, *International and European Labour Law, Article-by-Article Commentary*, Nomos Verlag, 2018, para. 30.

[121] See also Riesenhuber, *European Employment Law*, Intersentia, 2022, p. 676, para. 3.

One additional decisive parameter towards a more equal share of available parental leave is the payment of such leave.

5.2. Payment and duration of carer's leave

The WLB-Directive's preamble refers to studies that indicate that EU member states providing a significant portion of parental leave to fathers★, with a relatively high replacement rate, experienced a higher take-up rate by fathers★ and in consequence an increase in the employment rate of mothers[122]. The adequacy of the allowance to increase incentives particularly for men is explicitly emphasized[123]. As for the determination of the level of the payment or allowance provided for the minimum non-transferable period of parental leave, member states shall take into consideration that the ability to take parental leave relies heavily on remuneration, particularly on behalf of the first earner[124]. As women are often secondary earners, it is important to create incentives for men and to avoid leaving care work to women for economic reasons. In line with the European Commission's proposal, some have argued for introducing paid carer's leave, where wages are replaced based on the rates of sick leave and maternity leave[125]. Then, the decision of who would perform care work would hopefully no longer be immediately tied to economic factors[126]. If one in addition worked progressively on reducing the pay gap between men and women, the question of who takes the leave might in the future finally become a gender-neutral one.

Moreover, extending the period of paid carer's leave is necessary to meet the demands of an ageing population and to tackle the dissolution of the intergenerational contract[127]. A decrease in the working force also leads to a shortage of people working in the caring sector, which in turn affects the generation in need of care. The gap in caring may then need to be covered by relatives. Achieving a balance here is not only beneficial for the working individual but also, from a utilitarian perspective, for society at large. An increase in workforce participation – be it by extending the working life or

[122] WLB-Directive, preamble, para. 26.
[123] *Ibid.*, para. 29 ff.
[124] *Ibid.*, para. 31.
[125] Flockermann, Wienfort, *cit.*, p. 108 with further references.
[126] *Ibid.*
[127] See also WLB-Directive, preamble, para. 27.

by increasing participation of employees with family and care responsibilities through more flexible work arrangements – is essential for the sustainability of social security systems.

5.3. Enhancing protection for self-employed persons and freelancers

Self-employed persons and freelancers are exempt from the WLB-Directive's personal scope, which is limited to employees, so this group is not protected by the highlighted work-life balance instruments[128]. To close this gap, *Flockermann* and *Wienfort* suggest reviewing Dir. 2010/41/EU on the application of the principle of equal treatment in order to protect self-employed men and women[129]. This is particularly opportune considering the emergence of atypical work forms in a digitized world and the rise of self-employment in the platform economy. Norway, which explicitly does not limit paternity* and carer's leave to employees only, might function as a role model here.

5.4. Extending the protection against discrimination

Drawing special attention to the vulnerable situation of parents and caregivers in working life, *de lege ferenda*, the catalogue of grounds of discrimination in working life on the national level should be amended by a specific category addressing parenthood and caring responsibilities. Extending protection against discrimination to cases of carer's leave for employees with caring responsibilities for elderly parents, responds to the changing demographic reality of life and work. Norway, having established two specific discrimination grounds, might function as a role model here. Additionally, not only direct and indirect discrimination should be addressed. As emphasized in the Norwegian preparatory work: legislation should encompass discrimination based on the assumption that the individual, currently or in the future, might claim parental and carer's leave. *De lege ferenda*, both on EU and national level, the legislator will need to specifically address different forms of discrimination, including multiple discrimination scenarios – for example cases where age, disability, and discrimination due to parental and

[128] Art. 2 WLB-Directive, and preamble, para. 17.

[129] Flockermann, Wienfort, *cit.*, p. 108 with further references.

carer's leave interact – and harassment related to claiming leave rights, and harmonize the different applicable non-discrimination law regimes[130].

6. *Concluding remarks: Need for a human-centred and a life-cycle-approach*

To balance working and private life in a post-pandemic world which is furthermore confronted with digitization and demographic change, a "human-centred" approach is needed. Additionally, employing a lifecycle perspective is quintessential[131]. If one focuses on employees' needs, work-life balance in all phases of working life takes centre stage.

From a gender perspective, it should be acknowledged that women still shoulder the main caring responsibilities throughout the life course[132]. The pandemic considerably deteriorated the progress that had been made thus far. This is also the case for an equalized country like Norway. A stronger focus on men and their *de facto* engagement in balancing work and private life is also fundamental. This entails legally enabling both genders to actually use the different available work-life balance instruments. If one in addition takes the bonding between a new-born and parent more seriously, it is to be hoped that the legal frameworks will facilitate for fathers* becoming more involved in child-care and to actively demanding their leave rights. For legal scholarship, it might be worth thinking outside of the box and acknowledge findings in psychology on the interrelation between paternity* leave and father*-infant bonding and subsequent family engagement of fathers*.

Finally, the time will hopefully come when both the EU and national legislators acknowledge the diverse and multifaceted family life in the 21st century also in their legal wording[133].

[130] See *e.g.* possible scenarios of discrimination by association and harassment Bell, Waddington, *Similar, Yet different: The Work-Life Balance Directive and the expanding frontiers of EU Non-Discrimination Law*, in *CMLR*, 2021, 58, p. 1413 ff. and 1419 ff.

[131] Similar European Trade Union Confederation, Rebalance, Trade unions' strategies and good practices to promote work-life balance, 2019, p. 13, available at: https://www.etuc.org/-en/publication/rebalance-trade-unions-strategies-and-good-practices-promote-work-life-balance (last accessed: 16.09.2022).

[132] *Ibid.*, p. 13 with further references.

[133] The particular needs of diverse family situations are *inter alia* emphasized in WLB-Directive, preamble, para. 37.

Abstract

In view of the current societal challenges related to digitization and demographic change, this article analyses, the European Union's Work-life Balance Directive 2019/1158. The key focus rests on parental and carer's leave and what legal protection this essential factor is granted. As Norway is not an EU member and was a global forerunner in introducing the right to paternity* leave and includes extensive protection against discrimination, the article discusses the WLB-Directive against Norwegian legislation.

Keywords

Work-life balance, digitization, demographic change, paternity leave, carer's leave, non-discrimination.

Claire Marzo

Renewing social protection in a post-pandemic digital world: the example of Platform Workers in France and the UK

Contents: **1.** Introduction. **2.** French Bismarckian model versus UK Beveridgian model. **3.** Existing public universal protections of platform workers in France and the UK and their slight increase to face the pandemic. **4.** Public actions from France and the UK to face the pandemic: the French "*Etat d'urgence*" and the British "coronavirus acts". **5.** Private help and insurances from some platforms. **6.** The moving balance between public and private protections. **7.** EU law impact. **8.** Towards the bases of a theory of modern social protection in a post-pandemic digital world: discussing social solidarity.

1. *Introduction*

Platform Workers' Social Protection in France and the UK might seem too small a subject. According to Eurostat, platform workers are a small category[1]. Platform work is defined by the European Commission as "any work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service"[2]. For Eurofound, it is "an employment form in which organisations or individuals use an online platform to access other organisations or individuals

[1] According to the European Commission, more than 28 million persons work via a digital platform in the EU. They could be 43 million by 2025. European Commission, Proposal for a directive on improving working conditions in platform work, COM (2021), 762 final, 9.12.2021.

[2] Proposal for a directive of the European Parliament and of the council on improving working conditions in platform work, COM/2021/762 final.

to solve specific problems or to provide specific services in exchange for payment"[3]. Even if it is growing, it is not many people.

What makes it interesting is that platform work appears in all States worldwide and in a wide number of situations. It includes for instance deliveries (Amazon…), collaborative consumption systems (Deliveroo, UberEATS…), systems of products or house rental services (Airbnb…), redistribution markets (eBay…) collaborative lifestyles (Facebook…). It thus puts together diverse profiles, diverse activities, and diverse legal statuses.

It thus becomes a test to social protection systems. Platform work questions the rationale behind the whole social security system and its equality purposes. Concretely, because many of these workers are independent workers even if they do not necessarily have a very independent job, it raises the question of the access to social protection of new independent workers by comparison to employees. If these workers are to multiply and endanger the predominant status of employees, it requires a rethinking of the whole system.

This question must be studied in light of the two main social security models: the Bismarckian and the Beveridgian. This study focuses on two examples coming from these two systems: France and the UK. It compares platform workers' access to social protection in these two countries during and beyond the COVID-19 pandemic.

This study compares the evolutions in delivery platform workers' social protection that emerged in response to the COVID-19 crisis in France and in the UK. This subject raises descriptive and prescriptive questions around the interaction and balance between public authorities, platforms, trade unions and private insurers both in the state of emergency and in the longer term. In particular it questions social protection universalism.

This study will outline the consequences of these legal changes and their limits to inform some theoretical directions of modern social protection in light of a pandemic. It will start by describing the welfare state models in France and in the UK (I). It then focuses on the existing public protections of platform workers in France and the UK. They consist in the universal basic benefits which are given to most people in need by the French and

[3] Https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work; (15/4/20); Communication de la Commission européenne, COM 2016/184.

British welfare states. We cannot examine all branches of social security, but we will focus on social assistance and healthcare benefits. These support mechanisms were slightly improved to face the pandemic (III). This description is a necessary background to understand the main or major public actions taken by France and the UK: the French "state of emergency" or "*Etat d'urgence*" and the British "coronavirus acts". These laws aimed at helping most workers but often forgot nonstandard ones and specifically platform workers even if there were evolutions for the second and third waves of the pandemic (III). The fourth part will be devoted to two platforms' policies to provide their workers with supplementary help and insurance. These actions, which are often neglected in studies because of their private nature, are part of the reality of the platform worker's support (IV). This link between public and private support is worth a specific analysis: the moving balance between public and private protection (V). This is to be seen in light of EU law recent developments (VI). Shows a growing awareness of the need to protect vulnerable populations and specifically platform workers, a new balance between public and private actors in enacting this protection and maybe the bases of a rudimentary theory of modern social protection in France and UK in light of international law (VII).

2. *French Bismarckian model versus UK Beveridgian model*

France has built a system inspired by the Bismarckian model, while the British system was remodelled by Beveridge, the other father of the welfare state. These two systems differ in that the former is a system of social protection centred on the insurance of salaried income, whereas under the latter the entire population benefits from a basic welfare system organised by the State and funded by taxation[4]. Against the background of the opposition between these two philosophies, both countries have been the scene of power struggles and compromises between the State and enterprises. In France and in the United Kingdom, companies' initiatives on behalf of their workers during the 19th century were not only charitable: they were intended to fix

[4] It is necessary to add the "doctrine of the three Us": unity, uniformity, universality. See KERSCHEN, *Universalité et citoyenneté sociale*, in DAUGAREILH, BADEL, *La sécurité sociale, Universalité et modernité, Approche de droit comparé*, Pedone, 2019, chap. 29, p. 451.

and stabilise the workforce and avoid lawmakers creating a system over which the employers would not have had full control[5].

We might expect that these two systems would deal differently with platform workers' access to healthcare since a Beveridgian system should theoretically give access to social protection and healthcare to all workers and non-workers. This might imply that employment statuses do not impact the access to healthcare. On the opposite, Bismarckian systems like France would reserve social security, protection, and access to healthcare to workers and might also distinguish between different employment status such as employees and independents.

The reality is far from these theories. It turns out that there has been a convergence between the two models. Both in the UK and in France, we find different accesses and different statuses. We must even say that the UK has an extra/third employment status for "workers" who are not employees or independent[6]. Beyond the existence of employment status, both Beveridgian and Bismarckian systems have felt that they should protect the most vulnerable part of the population, thus creating universal protections.

3. *Existing public universal protections of platform workers in France and the UK and their slight increase to face the pandemic*

This part aims at reminding the reader what universal protections are available for British and French platform workers in need. It is difficult to get a clear picture of the situation of platform workers, as a whole, in France and in England. But it is known that temporary workers have been hit hardest by the pandemic and that many of them have lost their jobs[7]. This analysis is not exhaustive. It focuses on three universal protections: access to minimum wage by proposing a short analysis of the fluctuations of the British Universal credit and the French RSA; platform workers' access to healthcare in France

[5] Pellet, Skzryerbak, *Droit de la protection sociale*, PUF, Thémis Droit, 2017, p. 54.

[6] An intermediate category between employees and self-employed workers, see Uber BV and others (Appellants) v Aslam and others (Respondents), UKSC 5 19 February 2021.

[7] Insee, *Une photographie du marché du travail en 2019*, in *Insee Première*, n. 1793, February 2020; EC, *Proposal for a Joint Employment Report*, 9 March 2021; Matsaganis *et al.*, *Non-standard employment and access to social security benefits*, Note 8/2015, Brussels, European Commission.

and UK; and help in case of professional disease and analysis of platform workers' access to it.

On the one hand, access to replacement incomes have been increased and extended both in France and the United Kingdom. In France, the "active solidarity income" benefit (*Revenu de solidarité active*, RSA), which provides a minimum income to those with no resources and is available to French people over the age 25[8] and legally resident foreigners[9], was extended during the crisis[10]. It was also increased in 2020 and slightly in 2021[11]. An exceptional solidarity grant (*aide exceptionnelle de solidarité*[12]) was also introduced. In the United Kingdom, access to Universal Credit, which is already relatively wide[13], was facilitated by the addition of a month's payment without the need to go to a job centre[14]. Access to this benefit was opened to the self-employed, but the level of the allowance remains low[15]. The "Independent Workers Union of Great Britain" (IWGB), which generally defends the rights of platform workers and precarious workers[16], brought an action

[8] On the additional condition of not being a student or unpaid trainee in a company.

[9] See Law n. 2008-1249 of 1 December 2008 "extending the scope of the *Revenu de Solidarité Active* and reforming integration policies".

[10] Order n. 2020-312 of 25 March 2020 had automatically prolonged entitlement to the RSA. It allows beneficiaries of the RSA to continue receiving the benefit until 12 September 2020, without reassessing their entitlement. This mechanism was reiterated in Order n. 2020-1553 of 9 December 2020 extending the benefit until 30 April 2021. Entitlements to the RSA will be reassessed after this period, including for the past period.

[11] It was € 564.78 for a single person with no children after the re-evaluation on 1 April 2020. The re-evaluation on 1 April 2021 led to a slight reduction (from € 565.34). See Decree n. 2021-530 of 29 April 2021 re-evaluating the flat-rate amount of the RSA.

[12] Decree n. 2020-519 of 5 May 2020 allocating an exceptional health-emergency solidarity grant to the most disadvantaged households, concerning households receiving certain benefits specifically listed in the texts, namely: RSA and RSO in the overseas collectivities, APL and ALF, ASS; and finally the flat-rate return-to-work benefit. The amount of this exceptional grant is € 150 per beneficiary, plus € 100 per dependent child under the age of 20; those receiving housing benefits only get the grant for children. The allocation of this grant was repeated in October and December 2020 (Decree n. 2020-1746 of 29 December 2020). See also the conclusion of Badel, *L'indemnisation du chômage total à l'heure du COVID-19*, in *DS*, n. 9, 2020, p. 687.

[13] A person aged over 18 years and below the retirement age living in the United Kingdom must have a very low or non-existent income and savings of less than £16,000: https://www.gov.uk/universal-credit/eligibility.

[14] Https://www.understandinguniversalcredit.gov.uk/coronavirus/.

[15] £409.89 per month, equivalent to € 481.

[16] See, for example a recent judgment of the Court of Appeal on the right of Deliveroo

in March 2020 against the social security law[17] on the grounds that the conditions for granting benefits discriminated against minorities[18], women and collaborative economy workers, particularly during a public health crisis[19]. Furthermore, the United Kingdom allowed income tax to be paid monthly and modernised an employment allowance ("New Style" Employment & Support Allowance – ESA) which was initially reserved for the disabled and then extended to those unable to work because of COVID-19)[20]. Finally, some local authorities were sometimes able to pay special allowances to platform workers[21].

On the other hand, sickness coverage, as well as the access to healthcare have not changed – or only slightly. The pandemic did not lead to any major changes. Sickness benefits are limited to certain workers (most often employees – *salariés*) in France and in England. Although overall, in France, it is to be welcomed that there is "system of sickness insurance […] accessible to all residents, regardless of their professional activity and their resources"[22], platform workers nevertheless frequently found themselves unable to access it. It could have been assumed that lawmakers would extend access to atypical workers, but this did not happen. In England, sick pay[23] is only available to employees, and only those paid more than £118 per week[24]. Precarious workers or platform workers are excluded from this scheme. This differen-

delivery workers to collective bargaining: Court of Appeal (UK), The Independent Workers Union Of Great Britain V The Central Arbitration committee e- And Roofoods Ltd T/A Deliveroo, 24 June 2021, EWCA Civ 952.

[17] Statutory Sick Pay Act 1994: https://www.legislation.gov.uk/ukpga/1994/2/contents.

[18] Minorities known as "BAME"\ (Black, Asian and Minority Ethnic workers).

[19] Https://iwgb.org.uk/page/support-our-campaign.

[20] Https://www.gov.uk/employment-support-allowance.

[21] For example, in Belfast, it is specified that only those who could not benefit from the self-employed fund could apply for a grant: https://consultations.nidirect.gov.uk/dfi-driving-policy-branch/taxi-drivers-financial-assistance-scheme/.

[22] Marié, *Variations autour du régime juridique des indemnités journalières de sécurité sociale en période épidémique*, in *DS*, 2020, n. 9, p. 683.

[23] £95.85 per week since 6 April 2020, i.e. less than 30% of the minimum wage; Hendy, *The Gaps in the Government's Coronavirus Income Protection Plans*, Institute of Employment Rights, 2020.

[24] See UK Employment Rights Act 1996, s. 230. https://www.gov.uk/statutory-sick-pay/eligibility. This entitlement is granted as of the first day and not, as normal, the fourth day for those isolating due to suspected coronavirus. It does not cover those who have to isolate for twelve weeks because they are particularly vulnerable.

tiation led the IWGB to add to its action the fact that these benefits discriminate against collaborative economy workers[25].

As far as access to healthcare is concerned, once again the pandemic has not led to any changes. Healthcare is free and open to all in England under the National Health Service (NHS). But not all services are covered. In France, self-employed people benefit from less generous coverage than employees[26]. According to the Council of the European Union, evidence shows that some non-standard workers and some self-employed persons have insufficient access to the branches of social protection which are more closely related to participation in the labour market[27].

Finally, in both countries, although formal coverage of platform workers is guaranteed by the social protection systems, coverage seems not to be entirely effective[28]. In particular, access to voluntary protection schemes shows how workers can be theoretically covered but do not actually make the choice to be effectively covered (often for reasons of cost). In view of the difficulties faced by workers, both the UK and France adopted special pandemic schemes.

4. *Public actions from France and the UK to face the pandemic: the French "Etat d'urgence" and the British "coronavirus acts"*

This part aims at presenting the main measures adopted by France and the UK to face the work disruption caused by the pandemic. The social protection of platform workers has seen some adaptations to cope with the emergency, and in different ways in France and in the United Kingdom. Several universal benefits have been increased and new benefits have been created, in the context of a state of emergency, by means of solidarity funds.

[25] Https://iwgb.org.uk/en/post/iwgb-to-sue-uk-government-over-its-failure-to-protect-precarious-workers.

[26] Pellet, Skzryerbak, *cit.*, p. 50. Concerning how complementary insurance works: *ibid.*, p. 380.

[27] Pédrot, *L'accès aux soins des personnes les plus démunies à l'épreuve de la COVID*, in *RevDSS*, n. 2, 2021, p. 255. See also §13 of the preamble to the Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed, 2019/C 387/01, ST/12753/2019/INIT, OJ C 387 of 15 November 2019, p. 1.

[28] See the distinction proposed by Spasova, *cit.*, p. 22. Furthermore, the question of gender and the fact that women are more often excluded protection schemes must be raised.

But these funds have often ignored, in both countries, the specific needs of platform workers. Regarding France, we will present the French law of 24 March 2020 and implementing decrees as well as the changes subsequently brought in 2021 to learn from previous mistakes (particularly of exclusion of some independent workers including platform workers) and to adapt to a slow return to a more normal situation. Regarding the UK, we will look at the "coronavirus acts" in light of platform workers needs and the IWGB claim to complain about the situation of platform workers among others as well as the follow up measures.

Faced with the pandemic, the French government was relatively quick to take emergency measures. When it declared the state of health emergency on 24 March 2020[29], the government brought in various measures by way of government orders[30], in particular in the area of labour and social security law[31], making a distinction between employees and the self-employed. Employees had access to a partial furlough-type job-saving scheme[32]; self-employed workers, who had only recently been granted – restrictive – access to an unemployment-type benefit[33], were entitled to an indemnity thanks to the creation of a solidarity fund which paid a grant directly to very small enterprises (TPEs), micro-enterprises and self-employed workers, who were the victims of temporary lay-offs.

[29] Emergency Law n. 2020-290 of 23 March 2020 aimed at dealing with the COVID-19 epidemic, JORF n. 0072 of 24 March 2020, text 2.

[30] See the list of social texts in France: https://www.leclubdesjuristes.com/blog-du-coronavirus/textes-autres-sources/droit-social/.

[31] Https://www.vie-publique.fr/dossier/273985-les-ordonnances- COVID-19-mars-and-avril-2020-dossier. For a brief summary of the French situation in English, see: Moizard, *COVID-19 and Labour Law: France*, in *ILLEJ*, 2020 vol. 13, n. 1: https://illej.unibo.it/article/-view/10782/10690.

[32] Article R. 5122-1 of the French Labour Code. See Dalmasso, *Les trois âges de l'activité partielle*, in *DS*, 2020, n. 7, p. 612; Tournaux, *Activité partielle en période de crise sanitaire: rupture ou continuité?*, in *RevDSS*, 2020, p. 954.

[33] Dossier *Assurance chômage, un nouveau modèle?*, in *DS*, 2018, p. 580. See also Badel, *L'indemnisation du chômage*, cit., p. 687. The 2018 Law for the "Freedom to choose one's professional future" grants the self-employed an indemnity in the event of the loss of activity. But it excludes entrepreneurs who cannot prove that they have at least two years' non-salaried activity on behalf of a single company (which is the case of most ride-hailing drivers), as well as "micro-entrepreneurs" with an income of less than € 10,000 over the last two years. JORF n. 0205 of 6 September 2018: https://travail-emploi.gouv.fr/le-ministere-en-action/loi-pour-la-liberte-de-choisir-son-avenir-professionnel/.

A comparison with employees, on the one hand, and companies[34], on the other, showed that platform workers, who are most often self-employed with a specific status called the "*auto-entrepreneur*" status[35], were at a disadvantage. Employees actually had access to extra forms of protection: on top of the advantages linked to their status (better sick pay and access to unemployment payments)[36], they also had better protection in terms of working from home[37], distance measures or "*gestes barriers*" and access to training under a government scheme known as "FNE-Formations"[38]. Finally, the status of *auto-entrepreneur* does not entitle platform workers to withdraw from their workplace if they consider that the situation is too dangerous.

Above all, platform workers barely benefited from this "public coverage of the income of employees and the self-employed"[39] because it was difficult for them to meet the conditions of eligibility[40], since these did not take into account the fluctuations in their turnover, the lack of any substantial length of service in activity or the insufficient income generated[41].

These difficulties were heard by the government during the second lockdown. Whereas a Decree in August 2020 had restricted the list of beneficiaries of the solidarity fund[42], another Decree in November 2020 allowed

[34] Https://www.gouvernement.fr/info-coronavirus.

[35] Except exceptional cases of changes of status, *infra* §IIB.

[36] In addition there are provisions intended to improve the situation of jobseekers following the end of lockdown: non-taking into account of the period of lockdown in the calculation of future entitlements; postponement of the new method of calculating the reference salary (from 1 April to 1 September). Art. D. 2020- 425 14 April 2020, and D. 2020-361 27 March 2020. See also LAFORE, *Le système de protection sociale à l'épreuve du COVID-19: des constats et quelques enseignements*, in *RevDSS*, p. 981.

[37] Art. L. 1222-11 of the Labour Code.

[38] For example on training, see Art. L. 6314-1 and L. 6313-11 of the Labour Code, as well as the conditions of implementation of Art. L. 6313-11.

[39] LAFORE, *cit.*

[40] Several conditions: to have started their activity before 1/2/2020, have fewer than 11 employees, post a turnover of less than € 1 million in the last completed financial year, have a taxable profit of under € 60,000 for the last completed financial year, be up to date with the payment of their taxes or social contributions at 31 December 2019. It is also necessary to have been obliged to close due to the public health measures (bars, restaurants, etc.) or to have posted a turnover in March 2020 at least 50% lower than in March 2019 (and so on for the following months). The aid is equal to the difference in the turnover between March 2020 and March 2019, up to a limit of € 1,500.

[41] BADEL, *L'indemnisation du chômage*, cit, p. 687.

[42] Decree n. 2020-1048 of 14 August 2020 amending Decree n. 2020-371 of 30 March

a company or auto-entrepreneur to obtain assistance if they had lost at least 50% of their turnover over the period from 1 October 2020 to 30 November 2020[43]. And the start of the activity was moved forward in order to encompass all companies, including the most recent ones[44]. Later, auto-entrepreneurs were able to receive a compensatory grant (*subvention compensatoire*), regardless of the size of the loss of turnover[45]. In addition to this there were contributions waivers and assistance with their payment[46], as well as an exceptional financial grant (*aide financière exceptionnelle*, AFE COVID) proposed by the self-employed workers' social protection council (*Conseil de la protection sociale des indépendants*)[47].

The restrictions imposed to combat the spread of the COVID-19 epidemic were then progressively lifted. The government has begun to reduce its coverage of furlough schemes to finally end it. The benefit *auto-entreprise* started being reduced in June 2021[48] and the end of all forms of aid was set at 31 December 2021[49]. The government has, however, once again extended

2020 on the solidarity fund for companies particularly affected by the economic, financial and social consequences of the COVID-19 epidemic and the measures taken to limit its spread.

[43] Decree n. 2020-1328 of 2 November on the solidarity fund for companies particularly affected by the economic, financial and social consequences of the COVID-19 epidemic and the measures taken to limit its spread.

[44] Before 31 August 2020 or before 30 September 2020.

[45] Decree n. 2021-553 of 5 May 2021 on the adaptation for April 2021 of the solidarity fund for companies particularly affected by the economic, financial and social consequences of the COVID-19 epidemic and the measures taken to limit its spread.

[46] Decree n. 2020-1103 of 1 September 2020 on the social contributions and dues of companies, self-employed workers and artist-authors affected by the public health crisis.

[47] Aid scheme known as "AFE COVID" specifically for self-employed people whose activity has been interrupted since 2 November 2020 due to administrative closures decided by the public authorities. Depending on the economic situation of the independent business, and if the arrangements introduced by the URSSAFs are not sufficient, it is still possible to apply for the Aid for Contributors in Difficulty (ACED) or the classic Exceptional Financial Aid (AFE). See: https://www.secu-independants.fr/action-sociale/aide-coronavirus/.

[48] Https://www.auto-entrepreneur.fr/actualite/mise-a-jour-de-l-aide-pour-les-auto-entrepreneurs-suite-au-covid-19.

[49] Order n. 2021-135. A Decree dated 3 June 2021 extended the application of the exemption and aid schemes for the payment of social contributions due for 2020 and 2021 for self-employed workers. See Decree n. 2021-709 of 3 June 2021 on the extension of the measures concerning the social contributions of businesses and self-employed workers provided for by Article 9 of Law n. 2020-1576 of 14 December 2020 on the funding of the Social Security for 2021 and the adaptation of the furlough job-saving scheme for domestic workers and childminders.

the application of the furlough scheme that provides indemnities and a partial furlough allowance[50].

In England, two types of measures were rushed through in emergency for workers in difficulties[51]. First of all, a Job Retention Scheme enabled a company to suspend the activities of its workers: they did not work[52] and were paid 80% of their salary up to £2,500 per month. This scheme only applied to employees, and more generally to workers specifically registered on the PAYE tax scheme[53]. It was supposed, according to the government, to include platform workers and precarious workers[54]. But several reports have shown that the latter were frequently overlooked: for example, an Uber driver working for a platform without an employment contract[55], and whose customer is not the employer (typical platform economy model) was excluded from this scheme[56], More generally, the scheme was criticised because it gave the employer the choice of letting a worker go rather than putting them on the job retention scheme[57].

Platform workers were nevertheless able to try and benefit from the self-employed workers' scheme[58]. The Self-employed Income Support Scheme (SEISS) is similar to the model above, but applies to the self-employed, who can obtain 80% of their profits up to a maximum of £2,500 per month. Platform workers were supposed to be able to access this scheme more easily. However, there were many conditions: to obtain the income

[50] See Decrees n. 2021-671 and n. 2021-674 of 28 May 2021 adapting the rate of benefit in the event of long-term partial furloughing.

[51] Social Security Contributions and Benefits Act 1992 (amended by the Coronavirus Act 2020); Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020; S.230(3)(b) Employment Rights Act 1996.

[52] The interruption in working cannot be partial.

[53] PAYE (*Pay As You Earn*) is the income tax withholding scheme of HMRC (*Her Majesty's Revenue and Customs*). HENDY, *cit.*, p. 7.

[54] Platform workers may have the following statuses: agency workers, those on zero-hours contracts, independent workers, employees, etc. See FORD, *The Fissured Worker: Personal Service Companies and Employment Rights*, in *ILJ*, 2020, vol. 49, n. 1, p. 35.

[55] Analysis proposed just before the Uber judgment in February 2021 which would create an exception.

[56] HENDY, *cit.*

[57] In English "furlough"; HENDY, *cit.*

[58] BOGG, FORD, *Furloughing and fundamental rights*, UK labour law blog: https://uklabourlawblog.com/2020/04/06/ furloughing-and-fundamental-rights-the-case-of-paid-annualleave-by-alan-bogg-and-michael-ford/.

support, it was necessary to have been self-employed for the last three years. Those who received £50,000 profit less than in the previous year, or the average of the three previous years, obtained a one-off payment from the *Inland Revenue* in June 2020. This scheme would only cover 62% of the self-employed and exclude the new workers on the market[59]. Finally, only employees could refuse to work in their working place for health and safety reasons[60]. Legal actions were brought by the IWGB: it claimed that that there was a failure – a refusal even – to extend this right to precarious and self-employed workers as well as that the measures proposed by the government for the self-employed were inadequate[61]. The SEISS was quadrupled and improved[62] during the second lockdown, and has been offered twice since then[63]. It was accessible again at the end of July 2021[64]. However, it remains difficult to obtain for platform workers.

In spite of the improvements, it seems that overall neither France nor England altered their general inclusion rules or their classic employment categories in dealing with the pandemic. In other words, in spite of the extensions, atypical workers were not brought into the schemes or into categories to which they normally did not have access. The workers who did not benefit from the forms of aid described above (employees/self-employed workers) had to turn to the welfare system. To compensate the lack of these benefits, some platforms provided private help and insurances to their workers.

[59] Hirst *et al.*, *Coronavirus: support for businesses*, House of Commons Briefing Paper, 3 April 2020, p. 13.

[60] Bales, *COVID 19 and the Future of Work*, 2 April, 2020: https://legalresearch.blogs.bris.ac.uk/2020/04/covid19-and-the-future-of-work/comment-page-1/.

[61] Https://iwgb.org.uk/page/support-our-campaign; https://iwgb.org.uk/en/post/iwgb-to-sue-uk-government-over-its-failure-to-protect-precarious-workers.

[62] The improvement consists of faster payment of the aid, but the persons eligible remain the same as before.

[63] Amount available increased to 40% of the income on 24 September 2020, then 80% of that on 31 October 2020.

[64] Https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme.

5. *Private help and insurances from some platforms*

This part aims at searching outside the box. When many authors stopped at regretting the lack of public support, this paper aims at going further by looking at other solutions. Faced with the lack of effectiveness of the formal cover, several platforms have chosen to complement the state insurance systems with supplementary financial assistance, granted subject to certain conditions to some of their workers if they test positive for COVID-19, on top of a protection offer negotiated with private insurance companies. In this study, we focus on Deliveroo and Uber in France and UK to examine two extra types of support: platforms' policy to help some categories of workers: Analysis of Uber and Deliveroo's actions and evolution towards the end of the crisis as well as platforms' private supplementary insurances: Presentation of Uber and Deliveroo's insurance policies and assessment (Axa or Bikmo).

Several service or delivery platforms, and in particular those whose workload increased due to the pandemic, took measures to help out their workers. In the same way as certain platforms introduced "contactless" deliveries, with the aim of protecting both the delivery worker and the consumer, they also endeavoured to promote deliveries under safer health conditions. Uber thus reimbursed the costs of buying sanitisers up to a value of € 25 on presentation of receipts[65]. Deliveroo gave out free hygiene kits (mask and hand sanitiser) to all its riders[66]. Furthermore, Deliveroo and Uber paid indemnities to riders and drivers forced to quarantine or contaminated by the coronavirus, and offered teleconsultations at no charge. Both platforms have undertaken, in France as in the United Kingdom, to pay compensation for a maximum period of 14 days to any driver with COVID-19 – or obliged to isolate. Uber offers a maximum of £100 (equivalent to € 115)[67] or € 100 per week. This policy of support has been difficult to implement due to the difficulty of obtaining medical certificates[68]. Deliveroo later ended this spe-

[65] Https://www.uber.com/fr/blog/update-covid-19-financial/.

[66] Since 4 January 2021: https://riders.deliveroo.co.uk/en/news/latest-covid-19-updates.

[67] Uber United Kingdom: https://www.uber.com/en-GB/blog/covid-financial-assistance/; Uber France: https://www.uber.com/fr/ blog/update-covid-19-financial/.

[68] Https://www.bbc.co.uk/news/business-52092722?intlink_from_url=&link_location=live-reporting-story; https://www.The guardian.com/world/2020/apr/17/uber-driver-dies-from-covid-19-after-hiding-it-over-fear-of-eviction.

cific scheme in the United Kingdom[69]. Uber restricted it by means of an extension of the personal scope and a concomitant reduction in the allowances paid before it also ended it[70]. Initially this amount was calculated only on the basis of the history of average weekly incomes over the last 3 months before the driver or rider's application for the allowance. In April 2020, Uber added a ceiling corresponding to the average income of all drivers, or all the delivery riders working in the city where the driver or rider works[71]. It should also be added that the allowance is not guaranteed, the drawback being that the application for the allowance automatically leads to the temporary suspension of the account[72], at least until the application is processed (at most 7 days).

Independently of their allowance schemes, Uber and Deliveroo also contacted insurance companies to offer their workers extra insurance coverage. For example, Deliveroo France has joined forces with Wakam and Qover to offer its workers sickness insurance applicable if they are contaminated with COVID-19. In France, Deliveroo's partner riders are protected as long as they have completed at least 30 deliveries with Deliveroo in the last 8 weeks[73]. In the event of a total inability to work due to an illness certified by a doctor and lasting more than 7 consecutive days, the riders are entitled to an allowance of € 30 a day up the fifteenth day off work inclusive[74]. It should be noted that subcontractors cannot take advantage of this cover. This cover has not been provided in the United Kingdom. Although Deliveroo has called upon insurance company Bikmo to offer two types of insurance (civil liability and accident insurance), but not sickness insurance as the UK's universal social security system is deemed sufficient[75]. Uber

[69] Https://riders.deliveroo.co.uk/en/food-safety. The last of these provisions no longer exists. The platform now explains in detail on its site the public measures taken and how to benefit from them.

[70] See https://www.uber.com/fr/blog/update-covid-19-financial/, and compare to https://www.uber.com/fr/blog/faq-sur-le-covid-19-pour-les-chauffeurs-and-livreurs/.

[71] This amount will be different from one city to another. The total amount could not be less than € 50 in France. The minimum amount varies according to the country.

[72] Https://www.uber.com/fr/blog/update-covid-19-financial/.

[73] Several conditions must be added: the insured person can claim cover if: a) there are aged under 70; b) they are affiliated with the relevant social security scheme; c) they are legally resident and permitted to work in France; and d) they have a valid courier's contract with the Group Policy Holder to carry out deliveries.

[74] Https://riders.deliveroo.fr/fr/indemnite-maladie.

[75] For Deliveroo, see: https://riders.deliveroo.co.uk/en/support/new-riders/what-does-deliveroos-free-rider-insurance-cover.

France, for its part, has called upon insurance company Axa to propose a social protection offer known as "health and personal risk" cover for its self-employed drivers and riders. This partnership was extended to the whole of Europe in 2018[76]. This extra insurance allowed residents who had tested positive for COVID-19, subject to eligibility, to claim an extra allowance under the "Partner Protection" cover.

In the United Kingdom, the situation is more or less the same. If a driver catches COVID-19 and is unfit to work for at least 7 days, after that the scheme pays a fixed amount of £65 (approximately €75) per day for a maximum of 15 days while they are unfit to work[77]. Only "Active Uber Partners" can claim these payments, during the insurance period. They must prove that the serious illness started during this insurance period and that a doctor has ascertained that the driver's inability to work was a direct consequence of this illness. It was cancelled on 30 August 2021[78]. These policies also cover several other risks. For instance, Deliveroo has offered its delivery riders four insurance policies: civil liability, accident, professional training and sick pay[79].

This mechanism is not the first of its kind, and there is a history of links between public and private insurance. This is reminiscent for example, of the subtle interplay of the "complementary insurance" with public insurance and the welfare system[80]. But this association is nevertheless rather extraordinary in the context of platform work where everything is still to be tested and regulated. It raises questions in terms of the balance to be found, and also the possible theoretical changes that could be made to social protection in light of the crisis.

6. *The moving balance between public and private protections*

This part aims at contextualising the equilibrium to be found between public and private protections. It goes back in time to the history of the

[76] Https://www.argusdelassurance.com/produits-services/sante-prevoyance/protection-sociale-axa-renforce-son-partenariat-avec-uber.129760.

[77] Https://www.uber.com/en-GB/blog/covid-financial-assistance/.

[78] Https://uber.app.box.com/s/40il45dto630z39145ksykw8lalna526?uclick_id=f479f8bc-936c-409d-8 bac-b6e61d756915.

[79] Https://riders.deliveroo.fr/fr/support/toutes-vos-assurances-deliveroo/maladie.

[80] Pagnerre, *L'impact de la crise sur la protection sociale complémentaire*, in *DS*, 2020, n. 9, p. 672.

game of cat and mouse between public and private powers for workers' social protection since the XIXth century, history which is rather similar in France and UK despite the opposition of philosophies between the French Bismarckian model and the British Beveridgian model. It then comes back to today's game by assessing public incentives and legal obligations or constraints. It takes the example of the "LOM" law in France and the lack of actual legislative change in UK despite the Taylor report.

The use of the insurance technique first appeared at the end of the 19th century[81] as a way of setting up solidarity policies on an objective basis[82]. Insurance could then be public or private (private insurance, mutual societies, social security, public authorities, etc.) and already public and private schemes were complementing each other[83].

Not only can it be said that the Bismarckian and Beveridgian models are moving closer together[84], but it must also be added that in both countries, private insurance has come to complete the public system. The boundary between public social protection and the private operators is shifting, over time and according to sectors, without the change turning into an overall privatisation[85] or leading to the disappearance of private insurance[86]. The question arises as to whether private insurance complements the public system or whether the minimal public system fills in the gaps in the private insurance cover. The two propositions are not incompatible. The complementarity of public and private actors appears to be in what is still today a shifting balance.

It cannot be said that the platforms are less involved in social protection than their predecessors, in other words companies when they had to provide their employees with social protection. However, at this stage, they are not forced by law to provide assistance to workers, but only encouraged to do

[81] Pellet, *L'Europe et la privatisation des Etats providences*, in *DS*, 2011, n. 2, p. 48.

[82] Bourgeois, *Solidarité*, Paris, Armand Colin, 1896.

[83] For example, the occupational accident/illness risks and retirement cover have been completed by private complementary insurance schemes which play a more important role than the public system even though they are not obligatory.

[84] Daugareilh, Badel, *cit.*

[85] See the response of Pellet, *cit.*, p. 199, to Supiot, *L'Esprit de Philadelphie, la justice sociale face au marché total*, Seuil, 2010, chap. II.

[86] The disappearance of the mutual societies in the United Kingdom when the welfare state laws were passed whereas they had played an important role before that has not prevented other types of private insurance from being introduced. Pellet, *cit.*, p. 54.

so by the threat of legislative action. History has shown how public and private actors were still playing "cat-and-mouse" as the latter sought to avoid legislation that would be too costly by unilaterally taking generous measures. This game appears, if we examine the behaviour of certain platforms, to be going on again, both in France and in England. In France, we saw it when insurance was introduced in 2017. Uber's partnership with Axa dates from the passage of the El Khomri Law[87] against a background or legal tensions and accusations of "disguised employment"[88]. Likewise, in the United Kingdom, as already mentioned, the partnership with Axa is changing because the above-mentioned *Uber* judgment has transformed the platform's obligations. The passenger users of Uber UK were sent a message the day after the judgment saying that Uber drivers would now automatically be entitled to paid holidays, a pensions scheme and would be guaranteed the national minimum wage, pointing out that "Uber was proud to be making these changes for drivers, who are an essential part of our everyday lives", and that "making these changes is the right thing to do, and we hope other operators will join us in taking this important step"[89]. The trend is for the platforms and private insurance companies to become more involved in the collaborative economy sector, which is still under construction. This trend is being encouraged and regulated by the public authorities.

An original development is the greater responsibility given by the State to private entities. It could correspond to the State disengaging from its role as framework and creator and guarantor of hard law. This appears, for example in the Orientation of Mobilities Law known as the "LOM"[90] which only applies to a certain, small number of platforms[91], but which introduces the

[87] As far as occupational accidents are concerned, Law n. 2016-1088 of 8 August 2016 on work, the modernisation of social dialogue and the securing of career paths, known as the "El Khomri Law", requires that intermediation platforms that determine both the characteristics of the service provided (delivery, transport) and the price of the service provided (price scale) take care of occupational accident cover.

[88] FREEDLAND, *Le contrat de travail et les paradoxes de la précarité*, lecture given at the Collège de France, in *RDT*, 2016, p. 289.

[89] Letter sent by Uber to consumers: *At least the National Living Wage. This is a floor, not a ceiling and drivers will still be able to earn more, as 99% already do.*

[90] Law n. 2019-1428 of 24 December 2019 on the orientation of mobilities ("LOM").

[91] Special provisions of the LOM concerning car transport or meal delivery platforms of the "above-ground" part of platform working. See VAN DEN BERGH, *La charte sociale des opérateurs de plateformes: Couvrez cette subordination que je ne saurais voir*, in *DS*, 2020, p. 439.

concept of the social responsibility of enterprises into French law; it gives the platforms the possibility of establishing a charter setting out the conditions of exercise of the professional activity and any complementary social protection guarantees negotiated by the platform from which the workers may benefit. We find it again in a draft bill[92] and in the Decree on platforms that attempts to introduce social dialogue within the platforms[93] in 2021. Once again lawmakers are not imposing anything binding on the platforms. They are urging them to negotiate with the workers. The rule becomes one of incentivising and not obligation imposed by French law. This is not the case in the United Kingdom, where lawmakers have yet to take any action[94]. Though one might note the role of the UK Supreme Court's decision in the Uber case which has led Uber to recognise a British union, the GMB, to conduct negotiations with its drivers[95].

7. *EU law impact*

This part aims at assessing the evolutions in European Union (EU) law by examining the recent and ongoing developments such as EU social rights pillar, the minimum wage directive proposal and more recently the platform workers working conditions directive proposal.

After the EU social rights pillar and the minimum wage directive – which was adopted in September 2022 – the European Commission proposal regarding platform workers' working conditions is probably the most interesting for platform workers as it goes towards a general framework. It goes

[92] Bill n. 187 on the protection of self-employed workers by creating a duty of vigilance, the defence of employee status and the fight against pseudo-self-employment, presented by Jacquin and al., recorded with the Office of the President of the Senate on 4 December 2020.

[93] See new Order n. 2021-484 of 21 April 2021 on the methods of representation of self-employed workers using platforms and the conditions of exercise of that representation, as well as the dossier entitled *Quel avenir pour les plateformes après le rapport Frouin?* in *DS*, 2021 n. 3.

[94] Government's refusal to act after the Taylor Report, see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019__background_briefing_notes.pdf.

[95] Https://www.theguardian.com/business/2021/may/26/uber-agrees-historic-deal-allowing-drivers-to-join-gmb-union.

beyond mere social protection matters to focus on digital and labour rights of platform workers (whether these are online or *in situ* workers). It raises the question of social protection when assessing the needs of platform workers. The presumption of employment (which leads to the requalification of a contract when several clues are found) shows the will of the European institution to protect the existing distinction between employees and independent workers. This choice does not go against the recognition of universal rights but it maintains a distinction between different categories of workers. It is difficult to reconcile with the principle of neutrality which was established by the recommendation of November 2019 on access to social protection for workers and the self-employed: it specifically refers to platform workers and aims at lowering the differences between independent workers and employees in line with the European Pillar of Social Rights. A recent study from the European trade Union institute also shows that this presumption might lead to the requalification of 60% of the contracts, thus maintaining a good proportion of workers without the same rights as employees. If this proposal does not bring much in terms of social protection, it is interesting to emphasize the contradiction between the broadening of the status of employment on the one hand and the announced equality between statuses on the other hand. This hesitation appears again in the solo self-employed workers guidelines, which aims at strengthening independent workers collective bargaining rights without imposing any hard law. It is also in line with Directive 2019/1152 on transparent and predictable working conditions. It shows the paradoxes the EU and the States are in when it comes to choosing a path for a better social protection. This European framework is completed by numerous calls for change.

8. *Towards the bases of a theory of modern social protection in a post-pandemic digital world: discussing social solidarity*

This part aims at assessing the evolutions proposed and discussing social solidarity in light of international law and specifically the ILO calls regarding the national margin of manoeuvre for a changing social protection.

The pandemic and the platforms' reactions have put a spotlight on the gaps in the public social protection systems. The Confederal Secretary of the European Trade Union Confederation (ETUC), Liina Carr, has stated that

"Europe's welfare systems have fallen behind the pace of change in the economy over decades and the COVID crisis badly exposed the huge gaps that were created"[96]. This general remark applies more particularly to non-standard workers[97] and platform workers, who have often been overlooked by the authorities and have not been the subject of particular relief measures in the face of the pandemic[98]. The coronavirus crisis has at least had the merit of drawing attention to the need for the Welfare State to assist all citizens or humans[99], given that the measures taken by certain countries to contain the spread of the virus and provide a certain safety net to workers struggle to protect the most vulnerable of them[100]. On this point, progress is being seen in the overall reflection.

For a long time, fundamental rights texts have emphasized social human rights[101]. The pandemic has heightened calls to provide atypical workers with guaranteed access to prevention measures in terms of health and safety, social protection and respect for their fundamental rights and employment rights. According to Alain Supiot, "only the shock of reality can awaken from a dogmatic sleep"; in other words, the pandemic can be an opportunity to rebuild on new foundations[102]. The International Labour Organisation asserts that "policies to broaden and develop social protection coverage are needed

[96] Https://www.etuc.org/fr/pressrelease/les-systemes-de-protection-sociale-ont-echoue-au-test-covid-dans-tous-les-pays-de-lue; For more information: https://www.etui.org/publications/non-standard-workers-and-self-employed-eu.

[97] Eurofound, *cit.*; OECD, *cit.*

[98] Okamura, *cit.*, p. 12.

[99] Https://www.gov.uk/government/publications/queens-speech-december-2019-background-briefing-notes.

[100] ETUC, *Red card for platform abuses in the COVID-19 crisis*, ETUC documents: https://www.etuc.org/en/document/red-card-platform-abuses-covid-19-crisis.

[101] Such as the International Labour Organisation (ILO Declaration on Decent Work, Servais, *L'OIT et le travail décent. La difficile médiation entre croissance, création d'emploi et protection des travailleurs*, in *RDCTS*, 2011, n. 1, p. 71. At European level, see the European Commission proposal for the European Pillar of Social Rights of 26 April 2017. See also the minutes of the Council of Ministers of 15 February 2017, which mentions that "the third objective aims to protect citizens against the hazards of life at a time when the global economy is undergoing major changes": https://www.gouvernement.fr/conseil-des-ministres/2017-02-15/le-socle-europeen-des-droits-sociaux.

[102] Supiot, Seul le choc avec le réel peut réveiller d'un sommeil dogmatique, in *Alter Eco,* 21 March 2020: https://www.alternatives-economiques.fr/alain-supiot-seul-choc-reel-reveiller-dun-sommeil-do/00092216.

[103] ILO, *World Employment and Social Outlook: The Changing Nature of Jobs*, 2015.

in light of the changing nature of work"[103], and reiterates this postulate in a period of crisis as its "Work in the time of COVID" report shows[104]. This can still be seen in France and in the United Kingdom.

If a theory of modern social protection is to be identified in a post-pandemic digital world, it would have to reflect the calls for a more uniform social protection independently of the worker's status. But these international and European calls are difficult to implement at national level.

The pandemic has led to identifying another trend of this social protection theory: the lack of willingness of the States to oblige the platforms to provide a strong social protection to their workers. In other words, in France and in the UK, platform workers are at the interplay between public social protection and private insurances and measures. The game of cat and mouse shows two paradoxical tendencies: on the one hand platforms are in front of strong and protective States which are able to nationalise social protection to help the population face COVID-19. On the other hand these same States hesitate as to incentivise or oblige the platforms to participate to their workers' social protection in a world transformed by digitalisation and flexible work. France and the UK do not radically transform unemployment benefits affiliation or access to universal credit, but they gradually draw a new social contract.

Is this an extension of neoliberalism? Does it signal a more general movement by governments of downloading or delegating responsibilities to platforms? This remark slightly transforms the argument of the absence of social protections for platform workers, it goes on to reflect on governments' role. It is not to say that the French and the British states are abdicating their responsibilities, but there is a change of nature. The balance between private and public actors is transformed in light of a new concept of social solidarity.

In this evolving framework, it is necessary to rethink the rights (waiting periods, calculation rules, benefits duration) and the rules regulating contributions (minimum work period condition…) so that they do not prevent platform workers from accessing or aggregating benefits because of their statuses[105]. Public powers will need to find a compromise between incentives and obligations in order to provide the necessary benefits to protect platform workers' dignity.

[104] ILO, *Work in the time of COVID*, May 2021.

[105] According to the expression in the Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01).

Abstract

This contribution aims to assess the logic behind social protection systems by focusing on digital platform work. It tests its scope, rationale and equality purposes. More specifically this study compares the answers brought by a Bismarckian and a Beveridgian social security model, i.e. France and the UK, to platform workers' issues in terms of access to social protection during and beyond the COVID-19 pandemic. This subject raises descriptive and prescriptive questions around universalism and the interaction between public authorities, platforms, trade unions and private insurers.

Keywords

Digital platform work, comparative labour law, EU labour law, Covid-19 platform worker.

Camilla Spadavecchia, Mihaela Chelaru

The impact of covid-19 on highly skilled migrants' well-being and intention to stay in Brainport Eindhoven

1. *Introduction*

Demographic changes such as aging and the decline of the population have contributed to the shortage of skilled labour in European countries. In this framework, the Netherlands, as other EU countries have, has started to develop policies and strategies to attract and retain Highly Skilled Migrants (HSMs)[1].

[1] Tarique, Schuler, *Global talent management: Literature review, integrative framework, and suggestions for further research,* in *JWB*, 2010, 45, pp. 122-133; Suutari, Wurtz, Tornikoski, *How to Attract and Retain Global Careerists: Evidence from Finland*, in Al Ariss (eds.), *Global Talent Management Akram Challenges, Strategies, and Opportunities,* Springer, New York, 2014, pp. 237-248; SEO, *Attracting and Retaining Highly Skilled Migrants in The Netherlands*, SEO-Report, 2015, 2015-88, available online at: https://www.seo.nl/en/publications/attracting-and-retaining-highly-skilled-migrants-in-the-netherlands; Cerna, Czaika, *European Policies to Attract Talent: The Crisis and Highly Skilled Migration Policy Changes. In High-Skill Migration and recession,* in *Gendered Perspectives*, 2016, pp. 22-43 Basingstoke: Palgrave McMillan; Shirmohammadi, Beigi, Stewart,

With working sectors and technologies ranging from Energy, Integrated Photonics, Automotive Industry, Printing, and Additive manufacturing to Foodtech and Medtech, the Eindhoven Region – known as Brainport Region – represents the high-tech industrial hub of the Netherlands. Fifteen years ago, the region started attracting highly qualified employees worldwide[2]. Over the last five years, the number of HSMs has risen quickly in the region[3]. As a result, big corporations and Small and Medium Enterprises (SMEs) are now focusing on attracting and retaining more HSMs.

Due to the recent Covid-19 pandemic, most countries have introduced measures such as social distancing, travel restrictions, and remote work that affected individuals and society in several ways. After the healthcare systems, the labor market is one of the most harmed sectors by the pandemic[4].

Further, HSMs have started to work from home due to pandemic-related measures. Several studies have identified loneliness, ineffective communication, and work-home interference factors that have impacted the well-being of those who work from home[5].

During the covid-19 pandemic, EU member states adopted and agreed on a joint and coordinated approach to restricting the free movement of people to limit infection cases[6].

The Netherlands started the first (of several) lockdowns on March 15, 2020. The relatively mild measures allowed freedom of movement of people

Understanding skilled migrants' employment in the host country: A multidisciplinary review and a conceptual model, in *IJHRM,* 2019, 30, 1, pp. 96-121; Spadavecchia, Yu, *Highly-Skilled Migrants, Gender, and Well-Being in the Eindhoven Region. An Intersectional Analysis*, in *AdS*, 2021, 11, 3, p. 72.

[2] OECD, *Innovation-Driven Growth in Regions: The Role of Smart Specialisation*, Paris, OECD Publishing, 2013.

[3] Spadavecchia, *Global Talent Management in Brainport Region. Improving the retention of Talent and the attractiveness of the Region for Highly Skilled Migrants*, Research Report, Sept. 2021.

[4] ILO, *Global Estimates on International Migrant Workers. Results and Methodology*, Third Edition, 2021.

[5] Deutrom, Katos, Ali, *Loneliness, life satisfaction, problematic internet use and security behaviours: re-examining the relationships when working from home during COVID-19,* in *BIT*, 2021, pp. 1-15; Wang, Tian, Qin, *The impact of epidemic infectious diseases on the wellbeing of migrant workers: A systematic review*, in *IJW*, 2020, 10, 3, pp. 7-25; Taser, Aydin, Torgaloz, Rofcanin, *An examination of remote e-working and flow experience: The role of technostress and loneliness*, in *CHB,* 2022, 127.

[6] European Council, *The EU's response to COVID-19*, available at *https://www.consilium.europa.eu/en/policies/coronavirus/covid-19-travel-measures/*.

as long as they kept a distance of 1.5 m from each other[7]. In addition, the Government introduced restrictions on all non-essential travel from and to non-EU countries[8], which in some cases lasted until 2022. Furthermore, until March 23, 2022, a ban on entry into the EU has been in place for people from countries outside the Schengen area.

A growing body of literature has investigated the well-being of migrants[9] and highly skilled migrants[10]. For example, a study by Gerber & Ravazzini[11] (2022) investigated the life satisfaction (LS) of HSMs in Switzerland during the pandemic. In addition, Maekawa *et al.* (2022)[12] investigated the impacts of sudden departures due to Covid-19 on HSMs workers in three countries in Micronesia. Nevertheless, no research has been found investigating the well-being of HSMs during the pandemic and its impact on their intention to stay or leave the region of residence.

Against this background, this study investigated how the (changed) well-being of HSMs in Brainport Eindhoven during the pandemic has influenced their intention to leave the region.

To answer this question, we explored several aspects of HSMs' well-being (e.g., career, economic, social, health, and community well-being), and in general, we looked at their LS.

This research is connected to a previous study on HSMs' well-being in the Eindhoven region and how their well-being influences their intention to stay[13].

[7] KUIPER *ET AL.*, *The intelligent lockdown: Compliance with COVID-19 mitigation measures in the Netherlands*, in *ALSRP*, 2020, 20.

[8] GROENIGER, VAN DER WAAL, DE KOSTER, *Dutch COVID-19 lockdown measures increased trust in government and trust in science: A difference-in-differences analysis*, in *SSM*, 275, p. 113819.

[9] NGUYEN, YEOH, TOYOTA, *Migration and the well-being of the 'left behind' in Asia: Key themes and trends*, in *APS*, 2006, 2, 1, pp. 37-44. WISEMAN, BRASHER, *Community wellbeing in an unwell world: Trends, challenges, and possibilities* in *JPHP,* 2008, 29, 3, pp. 353-366; SAFI, *Immigrants' life satisfaction in Europe: Between assimilation and discrimination*, in *ESR*, 2010, 26, 2, pp. 159-76; GRAHAM, MARKOWITZ, *Aspirations and happiness of potential Latin American immigrants*, in *JSRP*, 1, 2, 2, p. 9.

[10] SPADAVECCHIA, YU, *cit.*

[11] GERBER, RAVAZZINI, *Life satisfaction among skilled transnational families before and during the COVID-19 outbreak*, in *PSP,* 2022, p. e2557.

[12] MAEKAWA *ET AL.*, *Highly Skilled Migrant Workers as a Vulnerability of Small Island Developing States During the COVID-19 Pandemic: Cases of Three Countries in Micronesia*, in *JDR*, 2022, 17, 3, pp. 380-387.

[13] SPADAVECCHIA, *cit.*

2. *Some literature at the core of this study*

2.1. Well-being models and indexes

This study is based on the well-being model by IOM (2013)[14] and is strongly informed by the previous research conducted by Spadavecchia and Yu (2021)[15] on HSMs' well-being in Eindhoven. Spadavecchia and Yu (2021)[16] looked at an intersection of previous well-being models and looked at well-being with a deductive approach by exploring respondents' perceptions of well-being.

This study looked at those previously encountered dimensions and the respondents' emotional health, as studies found that people's emotional health has been impacted by the covid-19 (see 2.2.). The analyzed dimensions include economic well-being (financial satisfaction, occurred changes over the pandemic), job and career well-being (job satisfaction, organizational support before and during the pandemic, remote work experience during the pandemic, career track, and how, if so, that has changed over the pandemic), community well-being (including safety perception, volunteering experiences, trust in the government, sense of belonging), social well-being (including the social connections both in the region and in other relevant countries, the changes in terms of social relationships during the Covid-19 measures) and, finally, health-related well-being. For this last dimension, we added two significant parts to the model proposed by IOM (2013)[17], namely emotional health and trust in the health system (and how those factors changed during the pandemic)[18].

2.2. Covid-19 and well-being

The recent pandemic of Covid-19 has been associated with trauma and with the development or reinforcement of feelings such as anger, depression, psychological disorders, and anxiety in the workplace[19]. Specifically, unpre-

[14] IOM, *World Migration Report: Migrant Wellbeing and development*, Geneve, 2013.
[15] Spadavecchia, Yu, *cit.*
[16] Spadavecchia, Yu, *cit.*
[17] IOM, *World Migration Report*, *cit.*
[18] Spadavecchia, Yu, *cit.*
[19] Di Giuseppe, Gemignani, Conversano, *Psychological Resources Against the Traumatic*

dictability, uncertainty, the severity of illness, misinformation, and social isolation, were associated with mental and emotional disorders during the pandemic[20].

Several studies have pointed out that due to Covid-19, the employee's perceptions of workload imbalance their family roles and further increase their job stress and dissatisfaction[21].

In an extensive study of nearly 1,500 people from 46 countries, Cambell & Gavett (2021)[22] found that most respondents experienced a decline in general and workplace well-being. Most reported a decrease in mental health, difficulties in meeting basic needs, and feelings of loneliness and isolation. Due to the pandemic, many people were forced to work from home. Vyas and Butakhieo (2021)[23] found that working at home includes the blurred boundary between work and family, distractions, and social isolation. For example, employees might be distracted by the presence of young children or family members while working at home. Furthermore, working from home blurred the boundaries between work and family life, leading to overwork[24].

Experience of Covid-19, in *CN,* 2020, April, 17, 2, pp. 85-87. Molino *et al.*, *Wellbeing costs of technology use during Covid-19 remote working: An investigation using the Italian translation of the technostress creators scale*, in *Sustainability*, 2020, 12, 15, p. 5911; Guadagno, *Migrants and the COVID-19 pandemic: An initial analysis*, 2020; Kumar *et al., The psychological impact of COVID-19 pandemic and lockdown on the migrant workers: A cross-sectional survey*, in *Asian journal of psychiatry*, 2020, 53, p. 102252; Blundell, Costa Dias, Joyce, Xu, *COVID 19 and Inequalities*, in *FS,* 2020, 41, 2, pp. 291-319; IOM, *Research. Migration Factsheet No. 6 - The impact of COVID-19 on migrants*, Geneve, 2020; Barron *et al.*, *Safeguarding people living in vulnerable conditions in the COVID-19 era through universal health coverage and social protection,* in *LPH,* 2021; Bell *et al.*, *Challenges facing essential workers: A cross-sectional survey of the subjective mental health and well-being of New Zealand healthcare and "other" essential workers during the COVID-19 lockdown*, in *BMJ open*. 2021, 1, 11(7), p. e048107; Montani, Staglianò, *Innovation in times of pandemic: The moderating effect of knowledge sharing on the relationship between COVID-19-induced job stress and employee innovation*, in *R&D Management*, 2022, 52, 2, pp. 193-205.

[20] Rajkumar, *COVID-19 and mental health: A review of the existing literature,* in *AJP,* 2020, 52, p. 102066.

[21] Montani, Staglianò, *cit.*; Sadiq, *Policing in pandemic: Is perception of workload causing work-family conflict, job dissatisfaction and job stress?*, in *JPA*, 2022, 222, p. e2486; Rafique *et al.*, *Investigating the impact of pandemic job stress and transformational leadership on innovative work behavior: The mediating and moderating role of knowledge sharing*, in *JIK*, 2022,7,3, p. 100214.

[22] Campbell, Gavett, *What covid-19 has done to our well-being*, in *12 charts*, in *HBR*, 2021, 10.

[23] Vyas, Butakhieo, *The impact of working from home during COVID-19 on work and life domains: an exploratory study on Hong Kong*, in *PDP*, 2021, 4(1), pp. 59-76.

[24] Grant *et al.*, *Construction and initial validation of the E-Work Life Scale to measure remote e-working*, in *ER*, 2018.

Several studies have indicated that international migrants represent one of the least protected and most affected groups by the pandemic[25]. Furthermore, factors such as job insecurity, contagion risks, discrimination, and psychological distress, have severe impacts on the well-being of migrant workers[26]. Additionally, due to the border closures, several migrants have been "trapped" in their host countries[27]. Finally, a recent study conducted in Switzerland by Gerber & Ravazzini (2022)[28], on the life satisfaction (LS) of transnational skilled migrant families, before and during Covid-19 found that the pandemic remarkably harmed highly skilled migrants' LS[29].

2.3. Intention to stay

Several studies have examined the factors influencing the intention to stay of migrants in the host community[30]. Literature has shown that most HSMs intend to stay in the destination country for about five-six years[31]. Batista & Cestari (2016)[32], in their studies on transnational migrants, found that the social connections with people in the home country strongly correlated to return within five and ten years, which ties in the destination country did not influence. According to Barbiano di Belgiojoso (2016)[33], attachment to the host country, in terms of economic, migratory status, social connections, and sense of belonging, positively influence the length of stay of migrants. Bijwaard *et al.* (2011)[34] argue that some people migrate to accu-

[25] ILO, *COVID-19 and the world of work: Impact and policy responses*, ILO Monitor 1st Edition, 2020; Guadagno, *cit.*; IOM, *Research. Migration Factsheet*, *cit.*

[26] Wang, Tian, Qin, *cit.*

[27] ILO, *COVID-19 and the world*, *cit.*

[28] Gerber, Ravazzini, *cit.*

[29] Gerber, Ravazzini, *cit.*

[30] SEO, *cit.*

[31] ICP, *Global Talent. Regional Growth. Working towards an Integrated Attraction and Retention Plan for the Metropolitan Region The Hague/Rotterdam*, Research Report, 2016, http://www.ic-platform.nl; CBS, *Statistics Netherlands*, 2020, https://www.cbs.nl/en-gb/dossier/migration-and-integration/how-many-people-immigrate-to-the-netherlands-.

[32] Batista, Cestari, *Migrant Intentions to Return: The Role of Migrant Social Networks*, Working Paper Series, Working Paper No 1602, in *Nova Africa Center for Business and Economic Development*, 2016.

[33] Barbiano di Belgiojoso, *Intentions on desired length of stay among immigrants in Italy*, in *Genus*, 2016, 72, p. 1.

[34] Bijwaard *et al.*, *The impact of labor market dynamics on the return migration of immigrants*, in *RES*, 2014, 96, 3, pp. 483-94.

mulate savings before returning home, while others may migrate to improve their skills that are highly rewarded in the source country.

3. *Methodology*

Considering the study's exploratory nature, we used a qualitative method to examine what factors influenced the well-being of HSMs in Brainport Eindhoven during the Covid pandemic. A qualitative research design is required to explore the differences in the experienced well-being during the pandemic of the HSMs[35]. Our study involves in-depth interviews with HSMs who left the region and HSMs still living in the area.

3.1. Research design

The research is deductive as semi-structured interviews were prepared for the two groups of participants around crucial dimensions of well-being, referring to findings from existing literature on HSMs and well-being and from the literature on covid-19 pandemic (*see* 2.1).

3.2. Sample strategy and composition

The selection criteria used for this study are holding at least a Bachelor's degree obtained in a Third Country and having lived in Brainport Eindhoven for at least six months before the pandemic started (2019). Further, for HSMs who left, "having left the region during the pandemic (2020-2022)" was used as an additional criterion. As control variables, we looked at gender (male or female), origin (EU/non-EU), and parenthood (yes/no). Those variables are selected as they proved to be highly relevant to the well-being experience of HSMs[36]. Based on the selected variables (Gender) 2x (Parenthood) 2 x (Origin) 2, we reached the need for eight respondents for each group.

[35] Ramos, Martín-Palomino, *Addressing women's agency on international mobility*, in *WSIF*, Pergamon, 2015, 49, pp. 1-11.

[36] Spadavecchia, Yu, *cit*. Riaño, *Drawing new boundaries of participation: Experiences and strategies of economic citizenship among skilled migrant women in Switzerland*, in *Environment and Planning*, A, 2011, 43, 7, pp. 1530-1546; Aure, *Highly skilled dependent migrants entering the labour market: Gender and place in skill transfer*, in *Geoforum*, 2013, 45, pp. 275-284.

Therefore, we interviewed 16 HSMs who, at the time of the interview, were living (group 1) or had left the region (group 2). Respondents were retrieved through purposive and snowball sampling. Interviews took place between February 15 and April 18, 2022.

Table 1. Respondents characteristics

	Age	Gender	Kids (yes / no)	Origin (EU / non EU)	Currently living in Eindhoven (Yes/ No)	Working status
INT 1	35	Female	No	Non EU	Yes	Entrepreneur
INT 2	45	Female	Yes	Non EU	Yes	Entrepreneur
INT 3	37	Female	Yes	EU	No	Employed
INT 4	42	Female	Yes	EU	Yes	Entrepreneur
INT 5	36	Female	No	EU and Non EU	No	Employed
INT 6	39	Male	Yes	EU	Yes	Self employed
INT 7	31	Female	No	EU	No	Employed
INT 8	40	Female	Yes	Non EU	Yes	Entrepreneur
INT 9	32	Male	No	Non EU	No	Employed
INT 10	34	Male	No	Non EU	No	Not working
INT 11	32	Male	No	EU	Yes	Employed
INT 12	33	Male	Yes	Non EU	Yes	Employed
INT 13	35	Female	No	Non EU	No	Employed
INT 14	31	Female	No	Non EU	No	Employed
INT 15	29	Female	No	EU	No	Employed
INT 16	67	Male	Yes	Non EU	Yes	Retired

3.3. Research quality indicators

To enhance the trustworthiness of the research[37], the researchers recorded, transcribed, and carefully analyzed (via elective, open, and axial coding) all the interviews. Furthermore, data collection triangulation and researchers' triangulation have been used to address credibility. In addition, the principal author prepared a migration grid that was then used during the interview.

To ensure confirmability, the study is based on substantial literature and models of well-being found in research and uses a script and migration grid[38]. Finally, the questions had an open character to avoid performativity and desirable answers by interviewees. Moreover, to further mitigate desirable answers, the anonymity of the interviews was guaranteed.

4. *Findings*

The covid-19 pandemic strongly impacted all (except physical health) the explored dimensions of the well-being of almost all respondents. Moreover, for almost half of the studied population, these impacts resulted in their emigration decision.

The following subsections present findings related to the well-being dimensions explored and other emerging factors.

4.1. Job and career well-being

The main changes in terms of job and career are due to the overall uncertainty of the situation and the work-from-home measures.

INT. 6, for instance, mentioned that uncertainty about when things would end and he could start working was the most challenging part.

> "We were constantly wondering when this is going to end when it's going to be possible to work again. The uncertainty surrounding that, I think, was the most difficult part." (INT. 6)

[37] Nowell *et al.*, *Thematic analysis: Striving to meet the trustworthiness criteria*, in *IJQS*, 2017, 16, 1, p. 1609406917733847.

[38] Nowell *et al.*, *cit.*

Further, a remarkable difference in the experience of entrepreneurs and employed respondents is also found.

Entrepreneurs' work had been significantly impacted by the covid-19 measures, mainly because they were all small entrepreneurs with businesses based on the social interaction of people, which was banned for several months between 2020-2021. Finally, three of the five entrepreneurs started their businesses in 2019. On the other hand, none of the employed participants lost their job due to the pandemic. Some of them had changed jobs over the last three years, but for a personal choice. Nevertheless, the work-from-home policy had strongly impacted both negatively and positively the well-being of several respondents and their partners.

4.2. Work-from-home policy and impact on respondents' well-being

The work-from-home policy strongly impacted most respondents' way of working. Respondents with kids mentioned their difficulty in balancing their parenthood and work-related duties. Some mentioned feeling overwhelmed by unclear boundaries between work and family life.

> "Nowadays, with Covid and everything online, there is no limit between your job and your life; everything goes on continuously, and people text you at night. So I felt like I was working 24/7." (INT. 2).

Several respondents mentioned being tired of being on screen all day, and some mentioned experiencing so-called "zoom fatigue".

Furthermore, respondents living alone mentioned missing interactions with colleagues, mainly because there was no social interaction in other aspects of their lives.

Nevertheless, overall, working from home was positively experienced by most respondents. Most people mentioned that besides the initial struggle, working from home benefited their family, as being together brought them closer.

> "On the positive side, my husband started working from home so I was like, happy... yeah, and when he started going to work at least once or twice a week, that was challenging for both of us." (INT. 1)

Moreover, several respondents mentioned that they or their partners initially did not believe they could work from home. However, in the end, they did, and they were happy with it. Also, some realized they could continue working from home while living in another country (see 4.10.3). Consequently, when asked to return to the office, many interviewees and their partners started negotiating with the company about continuing to work remotely. When companies were not supportive in that respect, they started looking for other jobs in companies allowing remote work.

4.3. Financial well-being

We found a difference between respondents employed in a company and entrepreneurs.

For instance, the pandemic had not negatively impacted the financial security of employed interviewees, but it impacted the security of entrepreneurs.

Moreover, most employed respondents could increase their savings as they have not spent money on leisure activities, clothes, or traveling.

> "[Covid]made me richer because I did not spend any money on coffee outside or dinners outside or drinking outside; it was all at home. So you save a lot of money. I saved more money during Covid than at any time in my life, which is crazy." (INT. 13)

Nevertheless, all the respondents who had businesses had been impacted by the pandemic-related measures to a certain extent.

> "Very greatly [impacted]. It was devastating. The business, which was focused on connecting, networking events, cultural activities, it was yeah, we were really struggling." (INT. 2)

Furthermore, the respondents who left the country, but kept their Dutch contract and salary, were highly satisfied with their financial situation. They receive a higher salary than the average salary in their destination countries and could benefit from a lower cost of living.

Moreover, one of the respondents could also benefit from the tax reduction for HSMs returning to their country. On the other hand, respon-

dents who left the Netherlands and found a job in the new destination country mentioned having a worse economic situation.

4.4. Trust in the government

The Dutch Government's pandemic management strongly impacted HSMs' trust in the Government. Twelve out of 16 respondents mentioned that their trust in the government had substantially decreased during the pandemic.

The main complaints regard the long-lasting non-mandatory use of face masks, the continuous lockdowns, and the fast elimination of all measures in June 2021, which led to a new lockdown right after summer 2021.

> "I mean at the beginning of the pandemic they were not encouraging the use of masks. And I found that unreasonable." (INT. 3)

Complaints also refer to the lack of economic support provided by the government to small businesses. This, for instance, is the main reason influencing INT.2's decision to leave the Country.

> "We were really struggling with how the pandemic was handled in this Country. And the lack of support, the rules there were for, for business for entrepreneurs. Big companies were supported, but the common ordinary entrepreneurs, for us it was impossible. So for sure, we will leave. Not tomorrow, but in a couple of years when my kid finishes school." (INT. 2)

Nevertheless, respondents were generally satisfied that they could still get out of the house and walk-in nature during the lockdowns.

Most respondents' perception of how the Dutch Government managed the situation was impacted by the information they read about how their or other countries were dealing with the pandemic.

In addition, the travel ban constitutes another highly relevant element that impacted the trust in the government. This had been very tough for people from non-EU countries that had a much longer travel ban regarding EU citizens.

4.5. Volunteering

More than half of the respondents did some volunteering jobs or activities in Eindhoven. For most of them, volunteering had good outcomes in terms of well-being. It increased their sense of meaning, accomplishment, and community, strengthening their social relationships.

Nevertheless, during Covid, all their volunteering jobs closed, so they felt isolated.

4.6. Sense of belonging

Experiencing a sense of belonging positively influences the well-being of respondents.

Nevertheless, only two out of 16 respondents feel a sense of belonging to Eindhoven and the Dutch culture, and another mentioned feeling "adjusted". This means that 13 out of 16 people do not feel they belong to Eindhoven. Furthermore, the language and the different lifestyles and cultures negatively impact belonging.

The lack of belonging and the need to belong had been crucial in the HSMs' decision to emigrate.

Furthermore, all respondents who left experienced a sense of belonging to their new destination, which positively influenced their well-being.

For instance, INT 5, who moved to Spain, says:

> "The cultural aspect, like, here in Spain, I do feel that, culturally, I'm more like home. And all, like, the culture here makes me feel more at home than the Dutch culture, for instance, there (NL), you know, the relationships are a little bit different". (INT. 5)

4.7. Sense of safety

Fourteen out of 16 respondents mention that Eindhoven is a very safe city, and for most people living in the town, this safety influences their intention to stay.

> "I mean, I feel very safe. Very safe country and Eindhoven is a safe city,

> even if people sometimes try to paint it as a dangerous place [...]. Of course, that helps in our decision to stay." (INT. 6)

4.8. Social well-being

The Covid-19 and the related measures have substantially impacted the respondents' social relationships with people living in the region.

Most respondents, especially those living alone, had been strongly impacted by the lack of social contacts, especially at the beginning of the pandemic, when they felt that they had to be more strict in not meeting people.

Further, given the restrictions, during the pandemic, most respondents selected friends to meet. Finally, several respondents mentioned that the lack of deep relationships influences their intention to leave.

4.9. Health

4.9.1. Opinions about the Health System

Thirteen out of 16 respondents are not satisfied with the Dutch health system. Most complaints concern health insurance costs, the lack of a proper prevention system, the general practitioner (GP) bottleneck to see a specialist, and the long waiting lists.

> "This is my main complaint in this country [...] Because I had bad personal experiences. The doctors not treating you is a huge problem, and in terms of prevention, they do not do any kind of prevention in the health system." (INT. 11)

> "I didn't really like the health system in the Netherlands, but luckily, we had the opportunity to go either to Belgium or to Germany for extra appointments or something we needed. We should be able to see a specialist whenever we want, but it is not possible here." (INT. 3)

4.9.2. Physical health

The respondents' physical health had not significantly changed over the last three years, and neither the Covid nor the related measures impacted their health.

4.9.3. Emotional health during covid-19

The pandemic, and especially the uncertainty related to it, strongly impacted the emotional health of almost all respondents.

> "Okay, so I think, in general, what affected this number was the level of anxiety that I had during that year, right, because it was so unexpected, it was a lot of uncertainty." (INT. 5)

Almost all respondents with teenage kids affirmed that the pandemic had strongly affected them.

Nevertheless, most respondents also mentioned several positive impacts of the pandemic on their well-being.

Most people with kids mentioned that having the family constantly living together was challenging but also increased the bonding between family members (see 4.10.3).

Further, more than half of the respondents mentioned that they liked to slow down a bit and enjoy the small things in life:

> "I've realized things that you didn't realize before.You get to understand that small thing in life are the most important … we've lost so many relatives because of Covid…so many things have happened, and you just start appreciating small things in life." (INT. 8)

A significant number of respondents mentioned that they became more resilient and self-conscious.

> "I learned a lot. So, for example, how to be satisfied only by myself." (INT. 11)

Further, six out of sixteen respondents mentioned that they went more often out in nature during the pandemic and realized how important it was for their well-being.

4.10. Main factors that impacted the respondents' intention to leave

The pandemic had strongly impacted respondents' well-being and,

therefore, their intention to leave. The main reasons people left or intend to leave are the covid-19 measures, the lack of sense of belonging, and the need to stay close to the family of origin.

4.10.1. Travel ban policy and the intention to leave

The travel ban had a significant impact on the well-being of the respondents. In several cases, this has also directly influenced their intention to leave:

> "I always had the impression that they [family] were not as far away, right, because I could take a plane and come to [city] and stay with them, which was still the same. But after Covid, we experienced that the distance was,… perceived as a long distance. So I think after experiencing covid, I appreciate being in the same city as my family." (INT. 5)

4.10.2. Having a supportive network

Having a supportive network has been identified as a crucial factor for people who moved, not only for those having kids but also for those planning to have a family in the future.

> "To have a bigger support network, like grandparents and family, godparents, uncles, everything in case we needed something." (INT. 3)

4.10.3. Work-from-home policy as a trigger to leave

The remote work policy had been a trigger for people to leave Eindhoven.

> "They [the company] have a completely remote work lifestyle. So I can work from anywhere. I don't need to be in Eindhoven. I don't need to be anywhere specific. And then, luckily, [the partner] also found a remote job. So we realized that neither of us works in Eindhoven anymore, and we don't have very deep connections. So we decided to leave". (INT 13)

When companies started asking people to return to the office, those who enjoyed working from home and envisioned the possibility of working from home in another country started negotiating the option to work from home permanently. When that was not possible, they left their job.

> "When his company said that it wouldn't be possible for him to work remotely…he found a new job." (INT. 3)

For three out of seven respondents, the possibility of continuing to work for a Dutch company and enjoying the Dutch working culture and labour conditions was crucial. They explicitly mentioned that they did not want to work for a company in their destination country.

> "The factor that really pushed us to move was that our companies agreed with us working remotely in a permanent manner because none of us wanted to work for a Spanish company." (INT. 5)

Other respondents expected to have the worst working conditions back in their country, but they decided to take the risk and move back.

Further, five out of seven people who left affirmed that the weather played a role in their decision to leave. They all expressed a higher sense of well-being by being in countries with better weather conditions.

> "The weather, having long days, even in winter; that we have lighter days until six o'clock in the afternoon. That really impacts my happiness in the level of energy that I have as well." (INT. 5)

Finally, rather than Covid-19 being the main element impacting their intention to emigrate, for many, the pandemic functioned as a final trigger for their decision to leave.

4.11. Expectations

All respondents' expectations regarding their life in the new country or region were met.

> "So far, yes [expectations are met]. I don't know. I don't know if it's

> because I've also started traveling more. And you know, I have the perfect balance of living in Amsterdam, which is beautiful, and traveling, which is also really exciting. So, I think so far, it has been great." (INT. 13)

> "I know that I would have found a harder environment workwise… I was prepared, and I was fine with it". (INT. 15)

One respondent mentioned that her expectations were not completely met because their house was still being prepared, so they had to move with the in-laws, which led to family interference in their child's upbringing.

5. *Conclusion and discussion*

This study looked at how Covid-19 influenced the well-being HSMs in Brainport Eindhoven and how their (changed) well-being impacted their intention to stay. Our findings show that besides physical health, all the other well-being dimensions have been affected by the covid related measures. Further, those measures, and especially the work-from-home and travel ban policies, strongly influenced the intention to leave of almost half of the respondents.

The findings show that the pandemic had not negatively impacted the financial well-being of those employed; most could save more money than usual. This finding contrasts with findings on the negative economic impacts of covid-19 on labour migrants[39].

This is because our respondents are professional migrants with stable high-end jobs. Nevertheless, those running their own business had a substantial financial setback. This, for one of them, resulted in the intention to leave in the next couple of years. Further, the career possibilities of those employed have not been significantly impacted by the pandemic.

Nevertheless, the work-from-home policy affected the well-being of many, both in positive and negative terms. In general, adverse outcomes are related to the invasion of the work on private time and space and the so-

[39] IFRC, Report 2020, https://www.ifrc.org/sites/default/files/IFRC-report-COVID19-migrants-least-protected-most-affected.pdf; ILO, *COVID-19 and the world*, *cit.*; GUADAGNO, *cit.*; WILSON *ET AL.*, *Job insecurity and financial concern during the COVID-19 pandemic are associated with worse mental health*, in *JOEM*, 2020, 62, 9, pp. 686-691.

called "zoom fatigue". Other scholars found an increase in symptoms related to technostress (e.g., feelings of exhaustion) and eye-related symptoms during the pandemic[40].

For those living alone, working remotely, and not being able to meet people triggered a sense of loneliness[41].

In addition, uncertainty on how long the pandemic would last impacted the work of the entrepreneurs.

Further, working from home had both positive and adverse outcomes for those living with their partners or families, as also found by[42]. On the one hand, respondents struggled to combine work and family life; on the other hand, they could strengthen their bonds with the other family members. Similar results have been found by Arntz *et al.* (2020) and Bouziri *et al.*(2020)[43].

Nevertheless, several respondents found that they like to work from home. When asked to go back to the office, they started negotiating the possibility of working remotely on a permanent base. When the employers did not grant this possibility, they started looking for other jobs.

Several people decided to leave only when they knew they could continue working from home for their Dutch employer. This is because they prefer the Dutch conditions regarding salary, benefits, and work-life culture. For them, the Covid-19 pandemic functioned as a pushing factor to fulfil all their job and personal life needs. This is a new finding worth to be explored in other studies, for instance, quantitative studies, that can test those findings.

Further, "trust in the government" has been significantly impacted by the pandemic. In this respect, most respondents, who initially trusted the Dutch government, have lost their trust after seeing the government's pan-

[40] Molino *et al.*, *cit.*; Bell *et al.*, *cit.*; Majumdar, Biswas, Sahu, *COVID-19 pandemic and lockdown: cause of sleep disruption, depression, somatic pain, and increased screen exposure of office workers and students of India*, in *CI*, 2020, 37, 8, pp. 1191-1200; Rump, Brandt, *Zoom-fatigue. Institute for Employment and Employability IBE Study*, 2021, available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ibeludwigshafen.de/wp-content/uploads/2020/09/EN_IBE-Studie-Zoom-Fatigue.pdf.

[41] Wang, Tian, Qin, *cit.*

[42] Deutrom *et al.*, *cit.*; Taser *et al.*, *cit.*; De Filippis *et al.*, *Collaborating during coronavirus: The impact of COVID-19 on the nature of work (No. w27612)*, *National Bureau of Economic Research*, 2020; Xiao *et al.*, *Impacts of working from home during COVID-19 pandemic on physical and mental well-being of office workstation users*, in *JOEM*, 2021, 63,3, p. 181.

[43] Arntz *et al.*, *Working from home and COVID-19: The chances and risks for gender gaps*, in *Intereconomics*, 2020 55(6), pp. 381-386; Bouziri *et al.*, *Working from home in the time of COVID-19: how to best preserve occupational health?*, in *OEM*, 2020, 77(7), pp. 509-510.

demic management. Groeniger *et al.* (2021)[44] registered a sharp decrease in trust in the government between December 2019 and early March 2020.

Specifically, several are complaints about the government's management of the pandemic. Respondents' complaints relate mainly to not making mandatory the use of face masks for several months and to the lack of consistent communication. In this respect, Sibley *et al.* (2020)[45] found that a solid and cohesive national response to exceptional circumstances increases people's trust in politicians and scientists.

Further, another highly shared complaint is about the extended travel bans towards and from non-EU countries. The prolonged ban substantially impacted the respondents' well-being, especially non-EU citizens. Several could not see their family for a long time, even when their relatives or parents fell sick or passed away.

A critical issue emerged from the lack of financial support for the small entrepreneurs, which led to the intention to leave one respondent. Even if the Dutch government adopted a package of financial measures designed to support entrepreneurs and companies during the pandemic[46], they did not seem adequate for small entrepreneurs.

Finally, people complained about the continuous lockdowns given to the weak measures taken. Nevertheless, some people from countries with a high infection rate felt safer in the Netherlands.

"The sense of belonging" has been highly significant for the respondents' well-being. However, even if many have strong connections to some specific communities or friends, most respondents do not feel a proper sense of belonging in the Netherlands. This influenced their respondents' intention to leave. Barbiano di Belgiojoso (2016)[47] found that the sense of belonging is strictly related to the intention to leave.

On the positive side, almost all respondents feel *safe* in the region, and their safety perception has not changed during the pandemic. In addition, their sense of safety strongly influences their intention to stay[48].

[44] Groeniger, *cit.*

[45] Sibley *et al.*, *Effects of the COVID-19 pandemic and nationwide lockdown on trust, attitudes toward government, and well-being*, in *AP*, 2020, 75,5, p. 618.

[46] Government of the Netherlands, March 17, 2020, available at https://www.government.nl/latest/news/2020/03/19/coronavirus-dutch-government-adopts-package-of-new-measures-designed-to-save-jobs-and-the-economy.

[47] Barbiano di Belgiojoso, *cit.*

[48] Spadavecchia, Yu, *cit.*

Further, most people do not trust the health system, and three will leave because of that[49]. Nevertheless, the pandemic did not negatively impact HSMs' opinions about the health system.

Finally, the pandemic strongly impacted emotional and social well-being, and both elements influenced some people's intention to leave. Many have seen uncertainty as a trigger for their anxiety, stress, and in some cases, depressive symptoms[50].

Further, worrying about one's own and far away family members' health has a considerable impact on the well-being of people. It has been established that concerns about other people's health increase the risk of anxiety[51].

The impossibility of going back home and seeing the family frequently also changed the idea of distance "from home", which influenced two respondents' intention to move "back home".

Nevertheless, Covid-19 also had a positive impact on the lives of many respondents. For instance, several reported increased resilience and self-consciousness. Furthermore, during the lockdowns, people could enjoy a renewed connection with nature. For example, Killgore *et al.* (2020)[52] found that people's resilience was higher among those who tended to go outdoors more often and engage with nature. In addition, Williams and Hall (2014)[53] found a strong relationship between the natural environment and well-being.

Moreover, the pandemic also changed the way of meeting friends. Due to the restriction, most people start selecting friends to meet. Some people felt relieved not to have to participate in social activities constantly. Finally, several people who left or planned to leave mentioned the weather as a relevant reason impacting their intention to leave. The relationship between weather and well-being has also been discussed by Feddersen *et al.* (2016)[54].

[49] Spadavecchia, Yu, *cit.*

[50] Guadagno, *cit.*; Molino *et al.*, *cit.*; Bell *et al.*, *cit.*; Kumar *et al.*, *cit.*

[51] Bell *et al.*, *cit.*

[52] Killgore, Taylor, Cloonan, Dailey, *Psychological resilience during the COVID-19 lockdown*, in *PR*, 2020, 291, p. 113216.

[53] Williams, Hall, *Women, migration and well-being: Building epistemological resilience through ontologies of wholeness and relationship*, in *GCPS*, 2014, 26, 2, pp. 211-221.

[54] Feddersen, Metcalfe, Wooden, *Subjective wellbeing: Why weather matters*, in *JRSSSA*, 2016, 179, 1, pp. 203-228.

Abstract

Human capital often referred to as talent, is a pillar of knowledge-based economies. The population aging and decline pushed countries and companies worldwide to engage in the "battle for the best and the brightest". They do so by looking at international talent, also known as Highly skilled migrants (HSMs). Traditionally, global talent management studies have focused only on HSMs' career and financial satisfaction. Nevertheless, those studies failed to understand how to retain HSMs, as they did not look at them as whole individuals whose overall well-being would affect their intention to stay.

This paper discusses how the well-being of HSMs workers in Brainport Eindhoven, a critical Dutch technical hub, has changed during the Covid-19 pandemic and how that has affected their intention to stay or to leave the region. Given the exploratory nature of this work, we use a qualitative method. Our findings show that the Covid-19 measures strongly impacted HSMs' intention to leave the region.

Keywords

Highly skilled migrant workers, well-being, Netherlands, Brainport Eindhoven, intention to stay, intention to leave, Covid-19 measures.

Juan Carlos Álvarez Cortés

The so-called "social shield" in Spain during pandemics: special attention to the prevention of occupational risks

Contents: **1.** Introduction. **2.** Modifications of social security benefits in times of pandemic. **2.1.** Temporary incapacity. **2.2.** Unemployment benefits. **3.** Occupational Health and Safety during the pandemic. **3.1.** Legislative framework for the employer's obligations to ensure OHS with a reference to working time. **3.2.** Isolation of workers during Easter 2020. **3.3.** Promoting teleworking. **3.4.** Vaccination requirements.

1. *Introduction*

The aim of this contribution is simply to describe in a synthetic way several regulations that were adopted in Spain during the pandemic to protect workers and their families.

The number of deaths due to COVID-19 in Spain (103,721 people as of April 17, 2022), or the number of COVID-19 cases in Spain (11,736,893 people as of April 17, 2022), remind us that our lives will no longer be the same.

The rules in prevention of labour risks during pandemic, maybe by influence of ILO, WHO or EU standards or recommendations are similar in all of countries of European Union. In fact, is something that we could confirm examining the legal regulations adopted during the pandemic in the different EU Member States.

For that reason, in this brief contribution the point of view will be changed. First of all, we are going to focus on how in Spain Social Protection System has helped to prevent the massive spread of the COVID-19 through the labour market. Subsequently, we will review the specific rules on occupational risk prevention during the pandemic (or how those already in place in Spain have been adapted).

This is because the combination of the two measures has succeeded in

protecting the population not only from the risk of illness and death, but also in providing an income for families during a period when industrial, professional or occupational activity had been limited in order to prevent the spread of COVID-19 viruses.

2. *Modifications of social security benefits in times of pandemic*

This came about with the special regulation in pandemic period of two Social Security benefits:

Temporary incapacity and

Unemployment benefit (also, for independent workers).

2.1. Temporary incapacity

As in other European countries, when the workers become ill or suffer an accident they can obtain, if meet requirements, a social security benefit during sick leave.

In Spain, it means that workers must have to pay at least 180 days of contributions in the event of common illness (never in case of accident or illness due to work).

Obviously, if it is proven that the disease (COVID-19) was contracted exclusively through work, it will be classified as an accident at work. But, unfortunately, because the difficulty or impossibility of proving that the contagion occurred at work, all such requests were rejected or were denied by the public General Practitioner.

The novelty in the regulation of this protection during the pandemic was the consideration of Sick leave due to COVID-19 contagion as an accident at work.

a) For staff working in health or social-health centres, the law classifies as an accident at work, (without proof) for all purposes, the infection of the SARS-CoV2 virus during the pandemic period.

In Spain, when an employer doesn't offer Personal Protection Equipment for their workers, if they get a disease or suffer an accident at work, they have to pay then a special surcharge of the temporary incapacity benefit, between 30 and 50% plus.

As everybody knows during the first months of pandemic, there weren't

enough face masks, gloves, Personal Protection Equipment's for workers in essential services (who never stopped their activities, even in pandemic). However, Labour Inspectorate never sanctioned employers for that breach, because the inspectors knew that it was impossible to obtain PPE in the first moment of pandemic time.

b) Exceptional situation of assimilation to an accident at work for temporary incapacity.

In the beginning of pandemic, a special law established an exceptional situation of temporary incapacity in the case of a worker or self-employed person contracting COVID-19, this disease would be considered as an accident at work.

Periods of preventive isolation or true contagion of workers caused by the COVID-19 virus.

In the first of cases, it referred to a symptomatic isolation, established by public General Practitiones. A PCR test was not necessary.

- When the competent authority would have prohibited freedom of movement of workers to certain locations to prevent transmission of the virus. And those workers couldn't telework from their homes.

In both cases, temporary incapacity was considered as an occupational contingency:

- Special benefit payment (75% of wages)
- No need for a previous contribution period.

This improved, on the one hand, the amount of the financial benefit for temporary incapacity and, on the other hand, facilitated access to this benefit by "relaxing" the requirements that had to be met in order to obtain this benefit.

2.2. Unemployment benefits.

Like most other countries, to avoid spreading the contagion, the Spanish Government banned commercial or trading activity, in non-essential activities.

Employers could suspend or reduce working hours of contracts by *force majeure* (massive contagion) or by economic, organization or production-related causes (also linked with pandemic).

In those cases:

- employers didn't have to pay contributions and

- workers could get unemployment benefits with no requirements (only the had to be hire before 14 of March 2020).

The idea was to protect all the employees in Spain, despite they didn't pay enough social security contributions.

In Spain, the government adopted 9 types of specials unemployment benefits to avoid spread the virus and preserve the life of workers:

a) For workers in companies affected by procedures of suspension of reduction working hours caused, directly or not, by COVID-19 (including part-time workers and permanent seasonal employees).

b) Extraordinary unemployment benefits for domestic employees – only during the pandemic. This group highly feminised was the first time in its history obtaining these benefits. A recent ruling by the European Court of Justice condemns Spain for discrimination for not providing unemployment protection for this group. Recently, Spain has adopted Royal Decree-Law, September 6th, for the improvement of working conditions and Social Security for domestic workers, protecting this group with unemployment benefits.

c) Exceptional unemployment benefit at the end of a temporary contract (in special conditions).

d) Unemployment protection for finishing contracts during the trial period.

e) Unemployment benefits for artists in public performances.

f) Exceptional unemployment benefit for technical and auxiliary personnel in the culture sector.

g) Extraordinary unemployment benefits for bullfighting professionals.

h) Special unemployment benefit for persons not entitled to other benefits.

i) Protection of the self-employed due to cessation of activity during pandemic.

The common feature of all of them was to relax eligibility requirements for unemployment benefits and to improve the amount and duration of unemployment benefits to prevent extreme poverty among families during the pandemic.

3. *Occupational Health and Safety during the pandemic*

Our Constitution, in Article 40.2, entrusts the public authorities with ensuring occupational health and safety (in reality it refers to "hygiene" at work, the prevailing terminology at the time of its adoption). This right is related to another fundamental right "the right to life and physical integrity", established in article 15 of the Spanish Constitution and the right to health protection in article 43 of the Spanish Constitution.

3.1. Legislative framework for the employer's obligations to ensure OHS with a reference to working time.

Royal Decree No. 463/2020 entailed the declaration of a state of alarm in Spain on March 14, 2020, due to the management of the health crisis caused by COVID-19. Three days later, Royal Decree-Law No. 8/2020 was enacted, which implied the establishment of measures to alleviate the economic and social impact of COVID-19, while establishing various measures to prevent contagion in the workplace.

a) "*Plan me cuida*" (plan for the reconciliation of work and family life during the pandemic)

It supposed the rights of adaptation and reduction of legal working hours, extending them to cover exceptional circumstances originated by the COVID-19. This plan was aimed at workers who accredited care duties with respect to the spouse or common-law partner, as well as relatives by blood up to the second degree (parents, children, siblings, grandparents, grandchildren) of the worker, provided that any of these situations concurred:

- Reasons of age, illness or disability requiring personal and direct care as a consequence of COVID-19.
- Due to the closing of schools or educational centres that provide care or attention to the person who needs it.
- When the person responsible for the direct care or assistance could not continue to do so for justified causes related to COVID-19.

This plan provided for the adaptation of the working day, through an agreement between the company and the worker, in which the working

time could be modified, altering or adjusting it to allow the worker to provide care and attention for the aforementioned cases. The reduction of the working day implies the proportional reduction of the salary with the maintenance of the guarantees included in the contract, Workers' Statute or other regulations.

b) Temporary suspension of contracts and reduction of working hours (provisional employment restructuring procedure).

Similarly, Royal Decree-Law No. 8/2020 imposed exceptional measures related to the suspension of contracts and reduction of working hours, both for *force majeure* and for economic, technical, organizational and production reasons.

The temporary suspension of the contract or reduction of working hours was not only provided for employees but also for self-employed workers (who were protected because they had to give up their activity due to the Decree regulating confinement or because of the reduction of income due to limitations in the mobility of persons and clients in the State of Alarm).

As we said, for both groups, the government established both special unemployment protection.

c) Special measures in workplaces

Law No. 2/2021, of 29 March, on urgent prevention, containment, and coordination measures to deal with the health crisis caused by COVID-19, which regulates measures in workplaces. However, it must be said that since the beginning of the pandemic, preventive measures have been adopted in the workplace in accordance with the Law on Occupational Risk Prevention and the guidelines given by the epidemiological specialists of the World Health Organisation. Actually, numerous standards have been enacted since the declaration of the State of Alarm, succeeding one another or complementing each other, so that we can find an amalgam of legal texts in relation to the measures that sought to mitigate the effects of the pandemic.

Thus, in addition to complying with the occupational risk prevention regulations and the rest of the applicable labour regulations, the owner of

the economic activity or, where appropriate, the manager of the centres and entities, should take a number of different measures[1].

Also, persons who presented symptoms compatible with COVID-19 or who were in home isolation due to a diagnosis of COVID-19 or who were in a home quarantine period due to having had close contact with a person with COVID-19 should not go to their workplace.

3.2. Isolation of workers during Easter 2020

Established in Law No. 4/2021, of April 12, regulating a recoverable paid leave for employees who do not provide essential services in order to reduce the mobility of the population in the context of the fight against COVID-19. It was intended for employed persons providing services in public or private companies or entities and whose activity was not paralyzed as a result of COVID-19.

This leave was mandatory between March 30 and April 9, 2020. The right of retirement that would have corresponded to them if they had been providing services on a regular basis was retained.

The companies that had to apply this leave could establish the minimum number of staff or work shifts required to maintain the activity.

3.3. Promoting teleworking

Royal Decree-Law No. 8/2020 (Article 5) established the preference for teleworking as an alternative to the temporary suspension of the contract or reduction of working hours. In this remote work, the legislator was also concerned with the prevention of occupational hazards, for that reason it also referred to risk assessment, understood as carried out when the worker himself carries out a voluntary self-assessment.

[1] - Ventilation, cleaning and disinfection measures appropriate to the characteristics and intensity of use of the work centres.

- Provide workers hydroalcoholic gels or disinfectants with virucidal activity.

- Safety distance of 1.5 meters between workers, adapting working conditions, including the arrangement of workstations and the organization of shifts. If not possible, workers should be provided with protective equipment appropriate to the level of risk.

- Adopt measures to avoid the massive coincidence of people, both workers and clients or users, in the work centres.

- Promotion of the use of teleworking when this is possible due to the nature of the work activity.

This rule is anchored in four premises:

a) As a form of remote activity, outside the work centre, tried to eliminate the risk of contagion in the contacts with the work mates, clients and users or in the journeys especially if workers had to use public transport.

b) Telework is imposed on a mandatory basis for both parties to the employment relationship (workers and employers), provided that two very lax requirements are met:

- It had to be "technically and reasonably possible" and
- The effort of adaptation had to be "proportionate".

c) Preference is given to the teleworking system against the secondary resource to the provisional employment restructuring procedure.

d) In those companies in which teleworking was not foreseen prior to the State of Alarm, it was understood that the business obligation to carry out the evaluation of occupational risks through a simple self-assessment carried out voluntarily by the worker himself by answering a standard form had been fulfilled.

Several months later, the most important regulation on this was established by Royal Decree-Law No. 28/2020, of September 22, on teleworking, (currently replaced by the Act No. 10/2021 of 9 July).

This Royal Decree-Law, and the Act No. 10/2021 now in force, are applicable to workers or employees.

The entry into force of those laws meant the return to the voluntary nature of teleworking, since until that time (September 22, 2020), teleworking was mandatory in all cases in which it could be applied, as a way to prevent transmission of the virus. The signing of the so-called teleworking agreement was required, and it established the impossibility of the termination of the employment contract or the substantial modification thereof in case the worker refused to work remotely.

This Royal Decree-Law was an urgent regulation, which intends, with the endorsement of the social dialogue, to correct the mistakes of the previous hasty regime and to establish some basic principles. Then and now, with Act No. 10/2021 on teleworking the fundamental principles are:

Teleworking returns to be voluntary demanding the conformity of both parts of the contract.

It can be developed in the domicile of the worker or in any other place chosen by this one as it can be a telecentre.

It requires compliance with the "regularity" parameter, so that the non-

face-to-face work "in a reference period of three months", reaches "a minimum of thirty percent of the working day".

Attributes to remote workers the right to adequate health and safety protection, with the provisions of the Law on Occupational Risk Prevention and its implementing regulations being fully applicable. Especially psychosocial, ergonomic and organizational factors.

It recognizes the right to time registration (to note down the start and end time of the work activity) and the right to digital disconnection. Must correctly reflect the time that the teleworker devotes to the work activity, indicating the time of commencement and termination of the working day.

It establishes an exhaustive protection of the worker's right to privacy and data protection.

It insists on the idea of avoiding, involving the equality plans, that teleworking is used as a refuge or, better, as a trap for women with family responsibilities.

It respects the previous conventional regulation.

It establishes a guarantee of remuneration, since the expenses derived from the "performance of remote work" will be "borne or compensated by the company", both for the equipment and for the tools and means used for the development of their work activity.

3.4. Vaccination requirements

In Spain, vaccination is not mandatory.

Besides, companies cannot impose an obligation on their employees to declare whether they have been vaccinated.

Vaccination is personal health information that is not obligatory to disclose. That is, there is no obligation to answer if they have been vaccinated against the coronavirus, as this could affect their right to privacy, as stated in Article 18 of the Spanish Constitution.

Although the powers of management and control of the company and the workers' right to privacy may conflict, preference must be given to the latter.

In addition, as established in art. 9.1 EU, regulation No. 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and the free movement of such data, the processing of data relating to health is prohibited,

except for the exceptions provided for in the regulation itself. In our country there is also no obligation to state whether one has been vaccinated as a condition for being hired, in selection processes, because vaccination against COVID-19 is part of the candidate's privacy and should never be included in a job interview. This would also be a very serious infringement.

Abstract

This paper provides a brief overview of the labour regulations adopted during the pandemic in Spain, with special reference to all those that made it possible to safeguard workers' health and prevent the spread of the virus.

Keywords

COVID-19, temporary incapacity, Occupational Health and Safety, Pandemic, Teleworking, unemployment benefits.

Benjamin Dabosville

COVID-19: a stress test for French employee representation

Contents: **1.** Introduction. **2.** Is it mandatory to consult the CSE for a risk assessment? **3.** How should the CSE be consulted? **4.** When should the CSE be consulted?

1. *Introduction*

An unusual event, such as COVID-19, not only acts as a mirror, reflecting gaps in a legal framework, but also represents a stress test which challenges confidence in the system itself.

In France, this issue was all the more important in terms of workplace representation, given that the legal framework in question had been broadly amended in 2017. The main source of this legal framework, the French Labour Code, was modified by Order No. 2017-1386[1], which aimed to unify the workers' elected representatives within companies[2]. Although the roles of trades unions remained the same, this legislation got rid of the former employees' representative bodies[3]. What were previously known as the "*délégués du personnel*", the role of which was to resolve day-to-day problems;

[1] Order no. 1386 of 22 September 2017. This Order was confirmed by a parliamentary Act (Act no. 217 of 29 March 2018). *See* LOISEAU, *Le comité social et économique*, in *DS*, 2017, pp. 1044-1049; BORENFREUND, *La fusion des institutions représentatives du personnel, Appauvrissement et confusion dans la représentation*, in *RDT*, 2017, pp. 608-624; ODOUL, ASOREY, *Comité social et économique : nouvelles dispositions*, in *RDT*, 2018, pp. 142-144.

[2] France has a dual system for representing workers' interests. This communication will focus on the elected aspect of the system and will not present the role of trade unions.

[3] The words "employee" and "worker" are used as synonymous in this communication.

the "*comité d'hygiène, de sécurité et des conditions de travail*", which focused on health and safety issues; and the "*comité d'entreprise*", which worked on economic issues, no longer existed. Instead, a new institution was created, known as the *Comité Social et Économique* (CSE), bringing together all the roles previously covered by employees' representatives[4].

Initiated in companies between 1 January 2018 and 31 December 2019, these new CSEs are an institution within which employers' and workers' representatives are supposed to discuss topics affecting the company. In particular, the employer must consult the employee representatives before taking any major decisions.

Was this system relevant in light of the COVID-19 crisis? What were the problems that led the legislator, the administration and judges to clarify or modify the framework that had just been created?

Three main problems were revealed by the pandemic. They relate to the scope of the duty to consult the CSE (2), the way in which it should be consulted (3), and the appropriate time to do so (4).

2. *Is it mandatory to consult the CSE for a risk assessment?*

The French Labour Code specifies the tasks of the CSE. These vary according to the number of employees in the company[5]. If there are fewer than fifty employees[6], the CSE has certain prerogatives[7], but does not have the right to be consulted. If there are fifty or more employees, then consultation is mandatory[8]. However, there is a difficulty with the scope of this obligation. The Labour Code states that the CSE must be informed and consulted on issues relating to the organisation, management and general running of the undertaking. To clarify the meaning of this vague formulation, the same ar-

[4] The "*comite social et économique*" (CSE) is the staff representation body in the company. It is composed of the employer and a staff delegation elected for a 4-years mandate.

[5] Art. L2312-1 LC (Labour Code).

[6] The creation of a CSE is not mandatory if the undertaking has fewer than eleven employees.

[7] Art. L. 2312-5 to L. 2312-7. In particular, workers' representatives may submit claims to the employer and have a right of alert. They also have roles to play in the field of health and safety and are allowed to conduct investigations relating to workplace accidents (Art. L2312-5 LC).

[8] Art. L2312-8 to 2312-84 LC.

ticle adds that this consultation is mandatory on several topics "in particular", notably in the event of a significant change in health and safety conditions or working conditions[9]. During the pandemic, the meaning of this sentence was at the centre of a key legal debate. There was no doubt that the spread of COVID-19 was to be considered as "changing circumstances" which, according to European Directive No. 89/391[10] and its implementation into French law[11], requires the employer to adjust the measures taken for the safety and health protection of workers[12]. In order to achieve this, French employers were helped by several governmental guidelines[13]. These guidelines were not legally binding but they summarised the state of knowledge at a given point in time and, therefore, had to be taken into account by employers. Employers had first to assess the risks in the company and then, with the help of the governmental guidance, decide on the protective measures to be taken. At the core of the dispute was the role of workers' representatives at the key stage of risk assessment: should the CSE only be informed of the risks and consulted on protective measures or should it be consulted at both stages?

Because the Labour Code provided no clear answer, the problem was resolved by the courts, mainly in proceedings for interim relief[14]. Many courts of first instance[15], in several rulings issued between April and June 2020, in other words at the beginning of the pandemic, did not adopt a strict interpretation of the Labour Code. Based on recommendations from the Labour Minister and the National Institute for Research and Safety[16], the judges pointed out that the more the employees' representatives were in-

[9] Art. L2312-8 LC.

[10] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

[11] Act no. 1414 of 31 December 1991 amending the Labour Code and the Public Health Code to promote the prevention of occupational risks and transposing European directives on health and safety at work.

[12] Art. 6.1 Council Directive 89/391/EEC and Art. L4121-1 LC.

[13] Some information may be found on the government website (https://www.gouvernement.fr/info-coronavirus). The Ministry of Labour also provided a benchmark guide that was often updated (https://travail-emploi.gouv.fr/le-ministere-en-action/coronavirus-covid-19/article/guide-repere-des-mesures-de-prevention-des-risques-de-contamination-au-covid-19).

[14] Zernikow, *Les représentants du personnel en France et en Allemagne et la protection de la santé des salariés quelles leçons de la crise sanitaire?*, in *RDCTSS*, 2022/1, p. 30.

[15] In France, the "*Tribunal de justice*" (TJ) is the first level of jurisdiction for issues relating to the CSEs.

[16] Institut National de Recherche et de Sécurité (INRS).

volved, the better the risk assessment. They thus stated that the CSE must be "included" in this assessment[17]. Although the exact meaning of this term "included" remains unclear, it underlines the need for active participation by the CSE. In a key ruling, one court of appeal also used the term "consultation" to describe the prerogatives of the CSE[18]. Dating from April 2020 and concerning the multinational company Amazon, this decision received widespread coverage[19] and had a significant impact on practice. However, the highest jurisdiction, the *Cour de Cassation*[20], did not reach the same conclusion and subsequently denied the CSE the right to be "consulted"[21]. This latest decision, in May 2021, was, however, too late to have any effect on practice. Moreover, the legislator confirmed the direction of the earlier rulings by amending the Labour Code. According to Act No. 2021-1018, which was adopted in August 2021, employers must consult the CSE regarding risk assessments in the company[22].

Court rulings and legislative changes concerning consultation of the CSE on risk assessment drew attention to the role of employees' represen-

[17] TJ Le Havre, ord. 7.05. 2020, No. 20/0043; TJ Lille, ord. 5.05.2020, No. 20/00399; TJ Lille, 24.04.2020, No. 20/00395. See also TJ Paris, ord. 9.04.2020, No. 20/52223 TJ Lyon, ord. 22.06. 2020, No. 20/00701. Guiomard, *Les référés, juges de la prévention*, in *RDT*, 2020, 5, pp. 351-355; Montpellier, *Prévention sur ordonnances: intérêt et limites de l'intervention a priori du juge de référés*, in *BJT*, 2020, 5, pp. 20-26; Gallon, *De Lille à Nanterre en passant par Versailles: les points cardinaux du droit à la sécurité en temps d'épidémie*, in *DO*, 2020, 5, pp. 305-348.

[18] *Cour d'Appel* Versailles 14 April 2020 no. 20/01993, in *RDT*, 2020, 7-8, pp. 482-485 (obs. Berthier); in *RJS,* 2020, 8-9, pp. 587-590 (obs. Adam); in *Dalloz actualité*, 29 April 2020 (obs. Malfettes).

[19] Even the newspaper *Le Monde* devoted several articles to relevant case law (Picard, *Coronavirus: la justice confirme le rappel à l'ordre d'Amazon*, in *Le Monde*, 24.04.2020; *L'affaire Amazon appelle à s'interroger sur les conséquences de décisions rendues en urgence*, in *Le Monde*, 2.02.2020; Picard, *Coronavirus: le ministère du travail refuse la demande de chômage partiel d'Amazon*, in *Le Monde*, 04.05.2020; *Amazon entame la réouverture de ses six entrepôts en France*, *Le Monde*, 20.05.2020).

[20] The *Cour de cassation* is the highest court in the French judiciary. Its role is to control the correct application of law by the courts of first instance and courts of appeal, thus ensuring a uniform interpretation of law.

[21] Cass. soc. 12 May 2021, no. 20-17.288, Chastagnol, Godefroy, Djedaini, *La DUERP, le cœur du réacteur de la prévention en entreprise?*, in *SJ-S*, no. 11, from 22.03.2022, 1081. This case law did not concern the CSE but the former "*Comité d'Entreprise*". Nevertheless, this is of little no importance, since both bodies have the same prerogatives in terms of health and safety.

[22] Article L4121-3 LC. The situation changes if the company has fewer than fifty employees, in which case, the CSE does not have the right to be consulted. Nevertheless, the Labour Code was also amended to strengthen the involvement of the CSE (Art. L2312-5, al. 3 LC).

tatives on health and safety issues. As a result of the dispute that arose during the pandemic, the prerogatives of the CSE were clarified and strengthened. However, strengthening the legal framework only makes sense if the representative body is able to exercise its prerogatives in practice. As we will see, during the first months of the health crisis quite the opposite occurred.

3. *How should the CSE be consulted?*

The way in which the consultation is conducted is highly important for the satisfactory implementation of the CSE's prerogatives. Before the pandemic, according to the Labour Code[23], the principle was face-to-face consultation. Nevertheless, online consultation was also possible. The use of video conferencing could be decided by the employer alone, up to a limit of three meetings per year. In order to use videoconferencing more than three times a year, an agreement between the employer and the employee delegation was required[24]. This framework was temporarily modified during the health emergency caused by COVID-19. Several Orders introduced two significant time-limited changes[25]. The first related to the use of videoconferencing[26]. The limits set out in the law were removed. As a result, the employer was able to use videoconferencing for all consultations with the CSE, without having to obtain prior agreement from the employee delegation[27]. The second change concerned the technical devices that were allowed for online meetings. Videoconferencing was no longer the only authorised device and employers were entitled to organise phone conferences under the same conditions as video conferences. In addition, the Order permitted instant messaging. Nonetheless, the conditions for using this third mechanism

[23] On this topic, the Labour Code was amended by Act no. 994 of 17 August 2015. This Act enshrined in the law the possibility of using videoconference.

[24] Art. L. 2315-4 LC.

[25] Order no. 389 of 1 April 2020 (Art. 6) and Order no. 2020-1441 of 25 November 2020 (Art. 1).

[26] Decree no. 508 of 2 May 2020, KERBOUC'H, *Les délais d'information et de consultation du CSE pendant la crise sanitaire*, in *SJ-S*, n° 19 from 19.05.2020, pp. 3-6.

[27] Order no. 1441 of 25 November 2020 made an exception for important consultations, such as those on collective redundancies. In this situation, a majority of the employees' representatives can, under certain conditions, object to the employer's decision on how they are consulted.

were stricter. The employer had to either obtain the agreement of the CSE or be unable to organise a video or phone conference[28].

Even if these rules were only in force for a brief time[29], they made major change in the way the CSE operated during the pandemic. However, the results of this experimentation remain mixed[30]. Although the health, ecological and financial advantages of online meeting are recognised, it is also pointed out that it was accompanied by a loss of mutual understanding. It is also noted that it created an imbalance of power in favour of the one, generally the employer, who had control over the technological tool. As a result, although few companies are considering continuing to use digitalization after the health crisis, it is generally accepted that certain issues (redundancy, working hours) cannot be effectively discussed in this way. Studies also underline that the digitization of social dialogue can only be done in a satisfactory way if collective agreements are concluded in the company to specify the arrangements for remote meetings[31].

In many respects, these legal provisions applicable during the pandemic rather weaken the role of the CSE, making it dependent on the goodwill of the employer. In fact, this temporary rule does not seem to have been primarily intended to help the representatives in their tasks. Rather, they were intended to allow employers to manage their affairs easy and quickly, without being slowed down by consultation with the CSE. The same problem also arose with regards to the timing of the consultation.

4. *When should the CSE be consulted?*

According to European Directive No. 89/391, workers' representatives shall be consulted "in advance and in good time" by the employer[32]. The

[28] Order no. 1441/2020 also gave the majority of employees' representatives the ability to object to the employer's decision, under certain conditions.

[29] Art. 6 of Order no. 389/2020 was applicable until 31 September 2021 (Art. 8, Act no. 689 of 31 May 2021).

[30] GÉA, *La digitalisation du dialogue social*, in *RDT*, 2021, pp. 625-633.

[31] *Ibid.*; ANACT, *Les organisations du travail à l'épreuve de la crise. Les pratiques du dialogue social*, in *Expo. QVT*, May 2021, 5/3, p. 12.

[32] Art. 11.2.

French Labour Code adds that they shall have "sufficient time" to review[33]. In order to implement these guidelines, priority is given to collective bargaining. Agreements between trades unions and employers[34] set the timeframe for the CSE to submit its opinion to the employer. If no agreement is reached, the deadline is set by the Labour Code.

As COVID-19 spread around the world, companies needed to take emergency measures. However, emergency situations had not been anticipated by the legislator. To remedy this problem, a governmental decree temporarily modified the legal time limits for consultation and thus impeded the representatives in their tasks. Of course, these rules were only in force for a few months, from May to August 2020, and were limited in scope to decisions that aimed to deal with "the economic, financial and social consequences of the spread of the COVID-19 epidemic"[35]. Nevertheless, it marked a major change at a crucial moment in time. The basic consultation period[36] was reduced from one month to eight days. If the CSE needed to be helped by an expert, the expert only had either 24 or 48 hours to carry out certain tasks[37]. This forced him to often perform a summary analysis and reduced his interactions with staff representatives. In addition to this Decree, information provided by the Ministry of Labour also contributed to undermining the role of the CSE. In an FAQ available on its website, the Ministry asserted that, if a prior consultation was not possible due to the health crisis, an "*a posteriori*" consultation was required. Such a formula makes no-sense. The purpose of a consultation is to generate a discussion before a measure comes into force. There can be no ex-post consultation. The vocabulary of the FAQ was equally revealing, using in the same sentence the formula "*a posteriori* consultation" and the word "information", as if the two were synonymous.

[33] Art. L2312-15 LC.

[34] The Labour Code also states how to conclude a collective agreement if there are no trade unions in the company (Art. L2232-21 to L2232-29-2 LC).

[35] The decree was then struck down by the highest French administrative court, the *Conseil d'État* (19.05.2021, no. 441031, in *D.A.*, 27 May 2021 (obs. DOMERGUE)). The *Conseil d'État* recalled that the legal basis for Decree no. 508 of 2 May 2020 was Order no. 460 of 22 April 2020 and that the legal basis for this Order was Act no. 290 of 23 March 2020. Since the issue of time limits for consultation was not addressed by this law, the Order had no legal grounds to deal with this issue.

[36] The Labour Code provides different time limits depending on the subject of the consultation and whether or not an external expert is used.

[37] Art. 1. Decree no. 508 of 2 May 2020.

In conclusion, how did the French representative framework fare with regard to the pandemic? Did the French system pass this stress-test? Analysis and practitioners' testimonies reveal mixed results[38]. On the one hand, the prerogatives of employees' representatives in occupational health and safety were strengthened. On the other, representatives found it more difficult to exercise these prerogatives in practice. These difficulties were not only related to COVID-19 itself or to the unpreparedness of the parties, but also to the way the authorities handled it. The forced digitalisation of social dialogue and the consultation short deadlines reduced the possibilities for genuine exchanges between employers and employee representatives. This echoes a longstanding trend in French law: praised for its merits, social dialogue is in practice slow to materialise.

[38] Bernard, Roulet, *Controverse: Le CSE et le droit à la participation des travailleurs: des victimes collatérales de la covid-19?*, in *RDT*, 2020 p. 440.

Abstract

The crisis caused by covid-19 was a baptism of fire for workplace representation in France. The legal framework for work councils, which is established by the legislator, had been amended shortly before the spread of covid-19. However, there were no provisions to deal with emergencies. This framework also suffered from inaccuracies which the crisis brought to light. Clarifications and adjustments were therefore necessary. As a result, the role of employee representatives is somewhat ambiguous. On one hand, their prerogatives in occupational health and safety have been strengthened. On other hand, the rules laid down regarding the methods and timing of employee representatives' involvement make this more difficult in practice.

Keywords

Employee Representatives, Work Council Consultation, Risk Assessment, Occupational Risks, Covid-19.

Emilia D'Avino, Eufrasia Sena

The OHS in Italy during and after the pandemic: lights and shadows for the future*

Contents: **1.** Introduction. **2.** The role of trade unions during the pandemic emergency. **3.** The pandemic legacy and its potential impact on employees & employers' obligations. **4.** The issue of compulsory vaccination legitimacy. **5.** A final reflection.

1. *Introduction*

The fight against Covid-19 pandemic can probably be considered a sort of pressure test for Italian OHS system. It could be an occasion to wonder if this system worked, and whether there is any experience gained during the pandemic that can be applied in the management of OHS, even outside the specific scope of virus control. On the other side, this experience could help to show if there is something that did not work or did not work well and if it could be improved, both at collective and individual level.

Consequently, this paper aims at focusing that the emergency – with a certain "heterogenesis of ends" – brought out on one side the fundamental role of social participation and, in the perspective of employment relationship, the importance of worker's duty of cooperation. Indeed, although these aspects already existed before Covid, they were even more evident after the pandemic.

At present, therefore, it is even more evident that OHS system must rely on the integration between legislator and social partners at institutional

* This article is the result of a joint reflection. Dr. Emilia D'Avino authored p. 3; 4. Dr. Eufrasia Sena authored p. 2.

level. On the other hand, at individual level it is very important the cooperation between employee and employer; thus, fully implementing European legislation in this field. However, a significant role is played by case law, which is entrusted both the legislator's actions legitimacy at a constitutional level and the assessment of employer's liability or employee's negligence boundary.

2. *The role of trade unions during the pandemic emergency*

As it is known, Italy was the first European country to have been strongly affected by the Covid-19 infection. The lack of adequate scientific knowledge on the characteristics of the coronavirus and its methods of transmission made the first months of the pandemic very difficult to manage, but, beyond the inevitable initial difficulties that led to a wide lockdown, the subsequent management of the fight against the pandemic in the workplaces allowed the continuation of production activities without offices and companies turning into hubs for the coronavirus.

In Italy the state of emergency was declared on 31 January 2020[1], but the first restrictive measures were adopted at the end of February for some areas of the country (i.e. "red zone")[2], and subsequently extended to a wider area, including a large part of the northern Italy[3]. Since 11 March 2020 all the measures have been concerning the whole national territory[4]: all retail commercial and catering services activities were suspended, with few exceptions strictly identified by decree, and all activities in favour of persons, as hairdressers, barber shops, beauty centres, were closed. Companies started to use smart work as much as possible and leaves were recommended for employees for whom this was not possible, in order to close not essential business departments. In each company, anti-contagion protocols had to be adopted, as periodic sanitization and limits to the movement of people within the plant.

Already in this first phase the Italian Government underlined the utility

[1] Resolution of the Council of Ministers of 31 January 2020, published in the Italian Law Journal on 1 February 2020.

[2] Decree of the President of the Council of Ministers 23 February 2020.

[3] Law Decree 2 March 2020, no. 9.

[4] Decree of the President of the Council of Ministers 11 March 2020.

of agreements between companies and unions to better counteract the spread of the virus in the workplace and for the practical implementation of the anti-contagion measures[5]. In this way a participatory management of the safety at work has been put into effect, involving trade unions at all levels, from the national protocols up to the represents for the safety in the companies[6].

Later, on 22 March 2020, another Decree provided for the closure of all industrial and commercial activities in the whole national territory, with the exception of those indicated in the Decree (essential activities, as production, transportation, marketing and delivery of medicines, healthcare technology and medical-surgical devices as well as agricultural and food products; continuous cycle plants; defence industry; other activities of strategic importance for the national economy and any other activity useful to cope with the epidemiological emergency)[7].

On 24 April 2020 a Shared Protocol, regulating measures for the contrast and containment of the spread of the Covid-19 virus in the workplaces, was signed by the Government, trade unions and employers' organizations[8]. According to this Protocol, the continuation of production activities could only take place in presence of conditions that ensure adequate levels of protection for working people.

The Law Decree 16 May 2020 No. 33 ruled that all economic activities, that in the meantime had been going to reopen, had to comply with the Shared Protocol (and its subsequent updates) and the other ones possibly adopted at regional level. Failure to comply with the content of these Protocols would cause the suspension of the activity.

[5] See De Sario, Di Nunzio, Leonardi, *Azione sindacale e contrattazione collettiva per la tutela della salute e sicurezza sul lavoro nella fase 1 dell'emergenza da pandemia di Covid-19*, in *RGL*, 2021, pp. 91-110.

[6] See Marazza, *L'art. 2087 c.c. nella pandemia covid-19 (e oltre)*, in *RIDL*, 2020, I, pp. 267-286. According to Pascucci, *Sistema di prevenzione aziendale, emergenza coronavirus ed effettività*, *Giustiziacivile.com*, 2020, p. 73, spec. p. 79, the Italian Government underlined, "due the exceptional nature of the moment, the need for the extraordinary measures to deal with the coronavirus emergency to be shared as much as possible by all the actors, perhaps also to indicate the "common good" here at stake, namely the health of workers, but also, for its through, of the whole population".

[7] Decree of the President of the Council of Ministers 22 March 2020.

[8] See Bologna, Faioli, *Covid-19 e salute e sicurezza nei luoghi di lavoro: la prospettiva intersindacale*, in *RDSS*, 2020, 2, pp. 376-391.

Furthermore, according to art. 29 *bis* of the Law Decree No. 23 of 2020 (converted into Law No. 40/2020), compliance with the requirements contained in the protocol constituted the fulfilment of the safety obligation to which public and private employers were required pursuant to art. 2087 of the Italian Civil Code and in this way the Italian legislator resolved the question of the normative effectiveness of the Protocols[9]. Subsequently, the law converting the Decree introduces a shield for the responsibility of public and private employers too. They actually fulfil their obligation referred to in Art. 2087 Civ. Cod. through the exact application of prescriptions included in the Shared Protocol, in order that the respect for protocols represents the realization of the general duty of care[10].

An update of the Protocol was signed one year later, in April 2021, provided for less stringer rules, having regard to the evolution of the pandemic. So the measures provided for by the Protocols, remained in force until the end of the emergency and they were parameter to be followed in the continuation of economic-productive activities[11].

In the light of the above, the Government's decision to actively involve trade unions in defining and implementing the procedures to counteract the spread of the virus in the workplace, was very useful to the achievement of the goal, because, while there was the need to regulate health and safety in the workplace, to enact a specific regulation for any production sector and for any type of company was impossible, for both technical and temporal reasons. So a participatory mechanism was activated and the obligations falling on employers were identified and negotiated with the social partners, to find a meeting point between health protection and recovery (or continuation) of productive activities. Indeed, "the continuation of production activities could (...) take place only in the presence of conditions that ensure adequate levels of protection for people who work", under penalty of sus-

[9] See MATTEI, *La salute dei lavoratori nella pandemia e l'impronta dello Statuto*, in *LD*, 2020, pp. 633-654.

[10] See BOCCAFURNI, *L'art. 2087 c.c. e il valore del protocollo sindacato-azienda nella definizione del perimetro della responsabilità datoriale*, in *DSL*, 2020, 2, pp. 62-70.

[11] According to NATULLO, *La gestione della pandemia nei luoghi di lavoro*, in *LD*, 2022, 1, pp. 77-96, especially p. 83, it was a "legislative escamotage". See BOCCAFURNI, *L'art. 2087 c.c. e il valore del protocollo sindacato-azienda nella definizione del perimetro della responsabilità datoriale*, in *DSL*, 2020, 2, pp. 62-70; MARESCA, *Il rischio di contagio da COVID-19 nei luoghi di lavoro: obblighi di sicurezza e art. 2087 c.c. (prime osservazioni sull'art. 29-bis della l. n.40/2020)*, in *DSL*, 2020, 2.

pension of production "until safety conditions are restored". The obligations concerned not only the adoption of the most suitable individual protective devices based on the specific type of activity carried out, but also an overall rethinking of the common spaces, both those where the production activity takes place and those of support (changing rooms, canteens, etc.) in order to reduce the presence of employees, also through a massive use of agile work, where possible. Furthermore, these obligations do not only concern employees, but anyone, for whatever reason, who has to access company premises (suppliers, employees of contractors, collaborators), in order to minimize contact between people as much as possible and therefore the potential opportunities for contagion.

The decision to involve trade unions in counteracting coronavirus in the workplace and the importance of the role they played in that situation could be useful for the whole Italian trade union system[12].

In Italy, in the last decades, trade unions have been facing a crisis of representativeness and they often failed to be real interlocutors of workers' interests and requests, because workers no longer felt represented by the unions and did not hesitate to disavow what they had agreed, not trusting their ability to correctly interpret needs and demands of workers' community. We can consider, for example, the *referendums* proposed in 2010 by FCA (now Stellantis) to the employees of two plants and concluded with only a measurement approval of company's proposals; or the *referendum* on the Alitalia agreement in 2017, rejected by employees, even if not only trade unions but also the Italian Government had strongly supported it. It is surely a crisis whose scope goes beyond trade union boundaries, because it's part of a more general difficulty of the so-called intermediate corps (political parties too, for example[13]), whose weakness can translate into a direct relationship between citizen and the State just in appearance, but, in reality, it turns into an increase of the stronger party's power (companies, in industrial relations), whose needs end up prevailing[14].

On the other way around, during the pandemic the role of the unions

[12] About the new challenges for Italian industrial relations, see TIRABOSCHI, SEGHEZZI (Eds.), *Welfare e lavoro nella emergenza epidemiologica*, V, *Le sfide per le relazioni industriali*, ADAPT University Press, 2020.

[13] See SANTONI, *Contrattazione collettiva e principio di maggioranza*, in *RIDL*, 2013, I, p. 75.

[14] See MARIUCCI, *Giuslavorismo e sindacati nell'epoca del tramonto del neoliberismo*, *WP CSDLE "M. D'Antona".IT*, *407/2020*, pp. 6-7.

was decisive, maybe because in situations of emergency the importance of intermediate structures to manage some critical issues is particularly apparent and, therefore, trade union consultation carried out during the pandemic could usefully be applied to other issues relating to safety at work[15].

Occupational accidents, sometimes fatal, require a cultural change, rather than a regulatory one: safety should not be perceived as a cost by either employers or employees themselves, but as an opportunity. There are many rules on occupational safety as well as on inspections and there is a system of sanctions, recently also strengthened. But it is clear that labour inspectors cannot be present every day in every plant and a stronger involvement of trade unions, at national, local and company level, could be the right way to promote the safety culture[16]. Even in a widely regulated system such as the OHS, trade unions can play a role in translating provisions into concrete practice, demonstrating the importance of the social partners for the functioning of prevention systems[17].

3. *The pandemic legacy and its potential impact on employees & employers' obligations*

There is also another crucial issue arising from emergency OHS legislative framework, linked to the area of employer and employee obligations. Indeed, pandemic demonstrated that OHS system is adequate to deal with any kind of risk, even the most unpredictable: especially thanks to the general clause in Art. 2087 Civil Code[18]. This Art. delimits employer's liability and it

[15] See Ales, *Quale welfare ai tempi della pandemia?*, in *RDSS*, 2020, 2, pp. 429-438.

[16] About the issue of employees' involvement in the definition and implementation of measures to protect their health and safety, see Menghini, *Le rappresentanze dei lavoratori per la sicurezza dall'art. 9 dello Statuto alla prevenzione del Covid-19: riaffiora una nuova "soggettività operaia"?*, in *DSL*, 2021, 1, pp. 1-55, spec. p. 48 ff.

[17] Natullo, *La gestione della pandemia nei luoghi di lavoro*, in *LD*, 2022, 1, pp. 89-90. See Directive 89/391/EEC and Ales, *Directive 89/391/EEC*, in Ales, Bell, Deinert, Robin-Olivier (Eds.), *International and European Labour Law*, Baden-Baden: Nomos – Hart – Beck, 2018, p. 1210. About the link between shared protocols and Italian social security system, *see* Giubboni, *Contro la pandemia: obblighi datoriali di sicurezza, tutele sociali, questioni risarcitorie*, in *PD*, 2020, 4, pp. 617-642.

[18] Albi, *Sub art. 2087 c.c.*, in De Luca Tamajo, Mazzotta (ed.), *Commentario breve alle leggi sul lavoro*, Cedam, 2013, p. 444; Dell'Olio, *L'art. 2087 cod. civ.: un'antica, importante e moderna*

is adequate to include every possible measure to be taken to prevent occupational risks, including biological risks (such as the Covid-19)[19]. Obviously, as seen previously, an integration with legislative sources and collective bargaining is essential[20]. Indeed, Art. 2087 Civ. Cod. is very broad, including all measures which, although not expressly provided for, are deemed "necessary" to protect worker "according to the particular nature of the work, experience and technique". This broadness risks excessively extending liability, even beyond fault or wilful misconduct. Covid-19 put this principle under stress, so that the legislator had to intervene with a disclaimer in case of compliance with protocols[21]. The legislator's interference in this area is important because

norma, in Dell'Olio, *Inediti*, Giappichelli, 2007; Delogu, *La funzione dell'obbligo generale di sicurezza sul lavoro. Prima, durante e dopo la pandemia: principi e limiti*, Aras, 2021; Giubboni, *Covid-19: obblighi di sicurezza, tutele previdenziali, profili riparatori*, in *WP CSDLE "Massimo D'Antona".IT - 417/2020*; Natullo, *Covid-19 e sicurezza sul lavoro: nuovi rischi, vecchie regole?*, in *WP CSDLE "Massimo D'Antona".IT - 413/2020*; Russo, *L'art. 2087 c.c. al tempo del Covid-19*, in *LLI*, 2020, 1.

[19] On the use of a risks approach in Italy Ales, *The 'Risk Approach' in Occupational Health and Safety (with an Eye to Italy): Alternative or Complement to the "Core/Contingent Approach"?*, in Ales, Deinert, Kenner, *Core and Contingent Work in the European Union*, Bloomsbury Publishing, 2017, p. 255.

[20] See Lgs. D. 81/2008. Albi, *Adempimento dell'obbligo di sicurezza e tutela della persona. Art. 2087 c.c.*, Giuffré, 2008; Ales, *Occupational Health and Safety: a European and Comparative Legal Perspective*, in *WP CSDLE "M. D'Antona".INT*, 120/2015; Lazzari, *L'obbligo di sicurezza nel lavoro temporaneo, tra ordinamento interno e diritto comunitario*, in *DLRI*, 2009, p. 633; Natullo (ed.), *Salute e sicurezza sul lavoro*, Utet, 2015; Pascucci (ed.), *Salute e sicurezza sul lavoro a dieci anni dal d.lgs. n. 81/2008. Tutele universali e nuovi strumenti regolativi*, Franco Angeli, 2019; Persiani (ed.), *Il nuovo diritto della sicurezza sul lavoro*, Utet, 2012; Rusciano, Natullo (eds.), *Ambiente e sicurezza del lavoro*, Utet, 2007; Tiraboschi (ed.), *Il testo unico della salute e sicurezza nei luoghi di lavoro. Commentario al decreto legislativo 9 aprile 2008, n. 81*, Giuffrè, 2008; Zoppoli, Pascucci, Natullo (eds), *Le nuove regole per la salute e la sicurezza dei lavoratori, Commentario al Dlgs 9 Aprile 2008, n. 81*, Ipsoa-Wolter Kluwer, 2008; Montuschi (ed.), *La nuova sicurezza sul lavoro. D.lgs. 9 Aprile 2008, n. 81 e successive modifiche*, Zanichelli, 2011. In a comparative perspective Ales (ed.), *Health and Safety at Work. European and Comparative Perspective*, Alphen aan den Rijn, Kluwer Law International, 2013.

[21] See Art. 29-*bis* l. no. 40/2020. Aa.Vv., *Responsabilità ed obblighi di lavoratori e datori di lavoro dopo i nuovi protocolli sicurezza e vaccini*, La Tribuna, 2021; Balletti, *Obblighi dei lavoratori*, in Zoli (ed.), *I Principi comuni*, in Montuschi (Dir.), *La nuova sicurezza sul lavoro. D.lgs. 9 aprile 2008, n. 81 e successive modifiche. Commentario*, Zanichelli, 2011, p. 196 ff.; Del Punta, *Diritti e obblighi del lavoratore: informazione e formazione*, in Montuschi (Dir.), *Ambiente, salute e sicurezza*, Giappichelli, 1997, p. 158; Picco, *Lavorare durante l'emergenza in violazione delle prescrizioni: le responsabilità datoriali*, in Filì (ed.), *Covid-19 e rapporto di lavoro*, in Garofalo, Tiraboschi, Filì, Seghezzi (Dir.), *Welfare e lavoro nella emergenza epidemiologica. Contributo sulla nuova questione so-*

it removes liability assessment from the discretion of judges. Normally, on the contrary, the ex-post assessment aimed at excluding employer's liability is a prerogative of courts. Consequently, case law above all played a decisive role in this field, especially in case of worker's co-responsibility for negligence.

The issue of worker negligence allows to reflect on another aspect that strongly arose during the pandemic. Indeed, emergency helped to make it clearer that worker is not only the beneficiary of occupational safety protection measures, but he is also co-responsible for compliance with the relevant regulations[22]. In this respect, European perspective based on the worker's duty to cooperate emerged loud and clear during pandemic[23]. Without any doubt, worker's negligent conduct may reduce or exclude employer's liability[24].

Therefore, on the one hand employee has the right and the power to demand that the employer fulfil his safety obligation and he/she could legitimately refuse to work if he fails to do so. On the other hand, employer must rely to employee's cooperation duty, and he may demand the fulfilment of worker's obligations to ensure healthy and safety. The dutifulness of employee's cooperation is based on the duty of safety, which is introduced both in the employee's and employer's interests. Articles 1175 and 2104 Civil Code and Articles 20 and 21 lgs. D. No. 81/2008 favour this interpretation.

In the context of employment relationship, employee is obliged to fulfil his obligation properly (pursuant to Art. 1175 Civil Code), with diligence and complying with employer's directives (pursuant to Art. 2104 Civil Code). Employer can expect and demand the employee cooperation in his obligation to protect health and safety of all workers. This duty is even clearly in Art. 20 lgs. D. No. 81/2008, that expressly states that "every worker must take care of his or her own health and safety and that of others in the workplace on which the effects of his actions or omissions fall, in accor-

ciale, Adapt University Press, e-Book series, 2020, 89, vol. I, p. 52 ff.; SOPRANI, *Il ruolo del lavoratore nel sistema di sicurezza aziendale*, in *ISL*, 2021, p. 397 ff.

[22] BARASSI, *Il contratto di lavoro nel diritto positivo italiano*, II ed. Vol. II, S.E.L., 1917 as quoted by PASCUCCI, *Sicurezza sul lavoro e cooperazione del lavoratore*, in *DLRI*, 2021, p. 421.

[23] Art. 13 European Directive 89/391/CEE.

[24] This would be a case of elective risk. See also Art. 18, p. 3-*bis*, Lgs. D. 81/2008. Among others, TULLINI, *Sicurezza sul lavoro: posizione di garanzia del datore e concorso di colpa del lavoratore*, in *Labor*, 2017, p. 125 ff.

dance with his training, instructions and the means provided by the employer". Therefore, depending on the skills and professional activities, the intensity of this obligation may differ, but it can never be waived. This explains also the reason of the introduction of a compulsory Covid-19 vaccination for certain categories, such as healthcare or educational sectors, among others, with the provision of suspension of employment relationship in case of no vaccination[25].

In this perspective, mandatory vaccination is not surprising, because it is fully consistent with the purposes described so far. On the other hand, the aim to reinvigorate its content through the express provision of the suspension from employment and salary is to be appreciated.

Indeed, without doubt employers could activate disciplinary proceedings in the event of a refusal to take the only suitable measure to prevent contagion. The sanction of suspension in case of no-compliance with mandatory vaccination is characterised by one particularity: it is aimed at balancing the right to self-determination of medical treatment (Art. 32 Italian Const.) and the community health protection. In this balancing act, worker's right to keep his job is maintained, protecting in this way him from dismissal due to the breach. Despite this, the introduction of suspension from employment as a "para-sanction" has been much discussed, to the extent that it has been brought to the attention of courts. Compulsory vaccination and its suspension of employment for non-fulfilment have been considered as a veiled threat, or an indirect coercion. Indeed, appeals have been filed before the administrative courts and orders of referral to Constitutional Court on the legitimacy of this framework, relating to the violation of Articles 3, 4, 32, 33, 34, 97 Italian Constitution, having regard to the right to work and to the compression of the freedom of health self-determination, especially in relation to pharmacological treatments liable to give rise to adverse effects that are neither slight nor transitory. Anyway, the Constitutional Court in the ruling of 15 February 2023, No. 15 clarified that worker suspension represents,

[25] See Decree Law No. 44/2021, Artt. 4, 4 *bis*, 4 *ter*, 4 *quater*, 4 *quinquies* signed into Law no. 76/2021 as amended and supplemented. Mandatory vaccination it was introduced also for people aged over 50 who are in jobs, either in the public or private sector (Art. 4 *quater*). Erikson, *Mandatory Vaccination against COVID-19 in the Employment Relationship*, and Maraga, *Covid-19 vaccination and employment relationships in Italy. The vaccination obligation pursuant to Law Decree April 1st, 2021, no. 44 and the general employer's duty to ensure safety at work*, in *ILLEJ*, 2022, 2.

for the employer, the fulfilment of a nominal safety obligation, included in contractual synallagma. Furthermore, since during the suspension there is not the respect of mutual consideration principle, the denial of remuneration is not a sanction and it is justified: indeed, remuneration is linked to the performance of work, except in cases where, in the absence of work as a result of an unlawful refusal by the employer, the obligation to pay remuneration is in any event owed by the latter.

4. *The issue of compulsory vaccination legitimacy*

The debate on mandatory vaccination for Covid-19[26] makes it possible to move from reflections on workers' obligations arising from employment relationship to a broader perspective, linked to the need protecting collective interests[27]. Indeed, vaccination imposed on health care workers is not only a provision responding to an obligation of safety and protection in the workplace, in contact with the public, but also to the equally fundamental principle of safety of care, linked to an interest of the community. Actually, this debate is not new at all, even if it is a topical issue in the light of the Covid-19 compulsory vaccination.

Indeed, it is part of a wider discussion on the relationship between the compulsory nature of health treatments, the protection of community and the individual freedom.

Without a doubt, the introduction of mandatory vaccination aims at protecting a "higher" interest. In this way, the right to individual choice is sacrificed because workers are obliged to protect the community, especially when they have a social contact responsibility (e.g. health workers). In this perspective legislator acts within the framework of the "unavailability" of

[26] Pascucci, Delogu, *L'ennesima sfida della pandemia Covid-19: esiste un obbligo vaccinale nei contesti lavorativi?*, in *DSL*, 2021, p. 81; Lazzari, *Gli obblighi di sicurezza del lavoratore, nel prisma del principio di autoresponsabilità*, and Tiraboschi, *Nuovi modelli della organizzazione del lavoro e nuovi rischi*, both in *DSL*, 2022, 1, pp. 1 and 136; Pascucci, Lazzari, *Prime considerazioni di tipo sistematico sul d.l. 1 aprile 2021, n. 44*, in *DSL*, 2021, p. 152; Vinceti, *COVID-19 Compulsory Vaccination of Healthcare Workers and the Italian Constitution*, in *Annali di Igiene: Medicina Preventiva e di Comunità*, 2022, p. 208.

[27] See, among others, Cons. Stato 3 October 2022 No. 8434; 20 June 2022 No. 5014; 20 October 2022 No, 7054.

collective right to health, provided for in Art. 32 Const[28]. In other terms, the latter is an interest certainly prevailing over the right to work and over the right to self-determination.

In this debate the Constitutional Court already made an important contribution in the past, ruling on the constitutionality of laws on compulsory vaccination in particular situations or for certain categories.

Legislative provision constitutionality lies in Art. 32 Const. According to this Article, health treatment may be provided for by provision of law. Considering the duty to protect health as an interest of the community, legislator must provide for compulsory vaccination if it is necessary. In other words, Italian Republic has the duty to protect those in greater danger if an individual and unmotivated worker's choice results in a risk of collective health.

Art. 32 textually establishes that "a determined" health treatment can be imposed only by legal provision. "Determination" of the treatment implies the need to specify the purpose and the disease it wants to fight. The lack of this specification can make "indeterminate" a health treatment imposed and – therefore – nullified the aim of Art. 32[29].

This is the first, essential step, that allows legislator to take responsibility for the balance between free individual determination and protection of collective health and that ensures the necessary awareness of the treatment imposed. Therefore, this indication is essential to allow the review of legislative choice non-unreasonableness, in a judgment of constitutional legitimacy of laws.

Indeed, mandatory vaccination and introduction of sanctions in case of breach are legal only if they are proportional and reasonable, considering the concrete situation and the real need for workers and workplace safety.

In the ruling of 1 December 2022 No. 14, and in the ruling of 9 February 2023 No. 15, the Constitutional Court confirmed this position and also the choices on Covid-19 compulsory vaccination were considered neither unreasonable nor disproportionate.

Once again, the Court already specified that a law on health treatment is not incompatible with Art. 32 Const. under the following conditions: if

[28] See Ales, Miranda, Giurini, *Italy: From Occupational Health and Safety to Well-being at Work*, in Ales, *Health and Safety at work*, cit., p. 232.

[29] Constitutional Court 20 February 2023 No. 25.

the treatment is aimed to preserve the state of community health; if it does not affect the state of health of the person subjected to it, except for those consequences which appear normal and, therefore, "tolerable"[30]. Therefore, it is excluded mandatory vaccination legitimacy only if vaccinated health status exceeds normal tolerability: serious and fatal adverse events are tolerable if they are few in relation to the vaccinated population. Since it is never possible to exclude in general adverse reactions possibility to any type of drug, the discrimen should be found in the hypotheses of accidental and unpredictability of individual reaction, even if this criterion would involve delicate ethical profiles (for example, who is responsible for identifying the percentage of citizens "expendable")[31].

Consequently, this matter had to be resolved only by the individual risks assessment.

5. *A final reflection*

If we would consider the Covid-19 pandemic as a pressure test for Italian OHS system, we could say that Italy has stood this test also thanks trade unions and their involvement in counteracting the spread of the virus in the workplaces, but this "Covid-test" has highlighted some issues too.

For instance, the link between occupational safety system and local health service didn't work well, for the truth more for problems related to the management of the latter, and to the political choices about it, than for issues related to the OHS. This is not the place to analyse the functioning of the Italian health system, but probably the pandemic has shown that health is also guaranteed through a capillary and effective local medical service, that should have closer link with safety at work.

On the other hand, however, about the individual employment relationship, the issue on mandatory vaccination revived two aspects.

The first is linked to worker's obligation to cooperate, through a balance

[30] Furthermore, the other requirement is that in the event of further damage, the provision is in any case made for the payment of an equitable indemnity in favour of the injured party, irrespective of the parallel compensatory protection. Constitutional Court Judgments No. 258 of 1994 and No. 307 of 1990.

[31] Constitutional Court No. 14/2023.

between individual and collective health rights. As also reiterated by the Constitutional Court, "in this balancing between the two declinations of the right to health, individual and collective, imposition of compulsory health treatment finds justification in that 'principle of solidarity' which represents the basis of social coexistence normatively prefigured by the Constituent"[32]. Also in the case of Covid vaccination, legislator respected this principle of solidarity, trying to squeeze the rights of individuals as little as possible and complying with principle of proportionality. For example, the temporary consequence of suspension in case of mandatory vaccination breach for healthcare workers – which is not of a sanctioning nature – falls within legislator's responsibility to identify a "calibrated consequence"[33], in terms of sacrificing healthcare worker rights.

The second aspect is related to the role of jurisprudence both in the full implementation of Article 2087 Civil Code and in ascertaining the legislative legitimacy of rules that sacrifice individuals' right to self-determination of health treatment. Indeed, the legislator during pandemic intervened in areas normally left to case law: exoneration of employer liability, disciplinary or para-disciplinary proceedings in the event of employee obligations breach. This was in response to the urgency of providing legal certainty at an exceptional historical moment. Without this action the uncertainty of liability framework in case of no vaccination and the length of judgments would have created additional risks. So, in other terms, the discretional power was taken away from the judge to ensure legal certainty in the pandemic emergency. However, for the future, the role of jurisprudence must undoubtedly be re-established, because general clauses require a concrete evaluation. In this future context, there is no doubt that latest Constitutional Court clarifications will help to increasingly affirm employee's duty of cooperation.

The final feeling, therefore, is that the OHS system is adequate, but its flexibility would risk leaving areas of protection uncovered, or ineffective, without the active role of all those involved in this system, at every level.

[32] Constitutional Court No. 15/2023, referring to the Constitutional Court No. 75/1992.
[33] Constitutional Court No. 14/2023.

Abstract

This paper aims at focusing that the emergency, with an "heterogenesis of ends", brought out the fundamental role of trade unions in managing the OHS system. On the other hand, in the perspective of employment relationship, emerged the importance of the worker's duty of cooperation and the role played by jurisprudence in the ordinary legal framework, both in the full implementation of Article 2087 Civ. Cod. and in the assessment of legislative legitimacy of rules that sacrifice individuals' right to self-determination of health treatment.

Keywords

Health and safety at work, trade unions, workers' duty to cooperate, right to health.

Nicolas Moizard

The refusal of compulsory vaccination at workplace in French law

Contents: **1.** Introduction. **2.** The absence of mass resistance. **3.** A compulsory procedure for reluctant employees. **4.** The French legislator has remained in the middle of the road.

1. *Introduction*

The Covid-19 health crisis gave rise to emergency regulations in France, as in many countries. In the context of labour relations, the public authorities favoured the soft-law approach to regulate the resumption and the continuance of work. A protocol was very regularly updated on the website of the Ministry of Labour. Since 16 May 2022, it has been replaced by a guide, following the gradual uplifting of the measures and the end of the obligation to wear a mask inside. This protocol provided for preventive measures and "rules" of work organization, such as distancing people from each other, wearing a mask, hand hygiene and a number of days per week of teleworking. These measures did not seem sufficient to the public authorities, who gave priority to vaccination. Following an announcement by the President of the Republic, several pieces of legislation dealt with labour relations. The health crisis introduced exceptional regimes that disrupted the ordinary mechanisms. Numerous obligations have been created for certain categories of employees: a health pass which subsequently became a vaccination pass or a vaccination obligation. An Act of 5 August 2021 introduced an obligation of vaccination mainly for nursing staff[1]. The same Act introduced a

[1] Loi n° 2021-1040 du 5 août 2021 relative à la gestion de la crise sanitaire.

health pass for employees working in leisure facilities, some public transport and some department stores. This pass concerned staff in contact with customers. Employees had to present their employer with either proof of vaccination, a negative virological test result or a medical contraindication to vaccination. An Act of 22 January 2022 transformed this health pass into a vaccination pass[2]. The vaccination pass is either a proof of vaccination status attesting to a complete vaccination schedule, or a certificate of recovery from Covid-19, or a medical contraindication. During the parliamentary debates, the trade unions and employers' organisations expressed their refusal to generalise passes to all workplaces. These different passes raised fears that medical secrecy and the protection of personal data would be violated, even if the employer did not have access to information on the employee's state of health[3].

Following the relative improvement in the health situation and, above all, progress in vaccination, an Act of 30 July 2022 puts an end to these exceptional regimes[4]. However, there is still an obligation to vaccinate certain health workers or those in contact with vulnerable people. The Conseil Constitutionnel (Constitutional Council), which is the highest constitutional authority in France, validated this obligation, considering that the legislator had achieved a balanced conciliation between the protection of health on the one hand and the freedom of enterprise and the right to employment on the other hand[5]. For its part, the Conseil d'Etat (Council of State), the supreme administrative jurisdiction in France, considered that it did not have jurisdiction to verify whether the objective of protecting health could have been achieved by other means, since the methods adopted by the law were not manifestly inappropriate to the objective sought[6]. In several cases involv-

[2] Loi n° 2022-46 du 22 janvier 2022 renforçant les outils de la gestion de la crise sanitaire et modifiant le code de la santé publique.

[3] See European Data Protection Board (EDPB), *Statement on the processing of personal data in the context of the covid-19 outbreack*, statement, 19 March 2020; v. Guérin-François, *Coronavirus et protection des données personnelles: un enjeu mondial*, in *Dalloz actualité*, 1st April 2020; Keim-Bagot, Moizard, *Santé au travail et pandémie: les droits du salarié en recul?*, in *RDT*, 2021, pp. 25-36; Lanna, *Les données personnelles de santé, nouvelle composante de la prévention sanitaire*, in *DA*, 2020, 6, Étude 7.

[4] Loi n° 2022-1089 du 30 juillet 2022 mettant fin aux régimes d'exception créés pour lutter contre l'épidémie liée à la covid-19.

[5] Conseil Constitutionnel, décision 2022-835 DC du 21 janvier 2022 (loi renforçant les outils de gestion de la crise sanitaire et modifiant le Code de la santé publique).

[6] Conseil d'Etat, 28 janvier 2022, no. 457879.

ing hospital staff, the Conseil d'Etat found that the vaccination requirement did not seriously and manifestly infringe the right to life[7], freedom of association[8], freedom of work[9], respect for the principle of equality[10], respect for physical integrity, human dignity, the right of patients to give their free and informed consent to medical care and individual freedom[11]. This priority given to the protection of health was reflected in all aspects of social life, with a few rare exceptions concerning the exercise of religion[12] and the right to demonstrate[13].

In response to the pandemic, each State has defined its vaccination policy[14]. States that have imposed a generalized vaccination obligation are in the minority. Several States, including France, preferred to impose obligations on non-vaccinated persons and to limit the vaccination obligation to certain persons, taking into account their professions and sectors of activity. There is no question here of minimizing the importance of the pandemic, nor of discussing the effectiveness of the vaccine against the virus or its effects on the human body. Vaccination requirements already exist for health care workers, but this one has the particularity of being part of a pandemic. It is indicative of a shift in the execution of public policies towards companies and an increased responsibility of employees. It is useful to focus on the consequences of an employee's refusal to comply with this obligation.

First, this article notes the lack of mass resistance to the legal requirement to vaccinate. Secondly, it examines the compulsory procedure for employees who refuse to comply. Finally, since the French legislator remained in the middle of the road, some comments will be given regarding the ways out of this impasse.

[7] Conseil d'Etat, ord., 27 sept. 2021, no. 456571.

[8] Conseil d'Etat, ord., 20 oct. 2021, no. 457101.

[9] Conseil d'Etat, ord., 8 oct. 2021, no. 456947.

[10] Conseil d'Etat, ord., 18 oct. 2021, no. 457213.

[11] Conseil d'Etat, ord., 18 oct. 2021, no. 457216.

[12] Conseil d'Etat, réf., 18 mai 2020, no. 440366.

[13] Conseil d'Etat, réf., 13 juin 2020, no. 440846, 440856, 441015.

[14] See MTIMKULU-EYDE *ET AL.*, *Mandatory COVID-19 Vaccination: Lessons from Tuberculosis and HIV*, in *HHR*, 2022 1, pp. 85-91. In a European perspective, EUROPEAN PARLIAMENT, *Legal issues surrounding compulsory Covid-19 vaccination*, EPRS, March 2022.

2. *The absence of mass resistance*

The obligation of vaccination has not raised widespread resistance. The refusal to be vaccinated is not massive. Caregivers very often ended up complying. They have either sought a professional reorientation, or made early requests for retirement, or resigned. However, some have not regularised their situation yet. According to government estimates, there are around 12,000 of them. Even if the number of people concerned is small, their absence weighs on the organisation of the services, which are short of staff. With each new Act on the health situation, some advocate the "reintegration" of these staff. Following a parliamentary amendment, the Act of 30 July 2022 provides that health personnel suspended because they have not been vaccinated, may be reinstated when the vaccination obligation is no longer medically justified. This will require the favourable opinion of the National Health Agency (*Haute Autorité de Santé*), an independent public authority, which is tasked with the evaluation of health products from a medical and economic perspective. In July 2022, this authority ruled against lifting the vaccination obligation for health and medico-social workers. The vaccination obligation is thus prolonged, as the pandemic has not disappeared. Collective associations of healthcare workers and firefighters have been created and continue to demonstrate to alert public opinion to their social situation. The employees' unions, for their part, did not make this a priority. Most of them were reserved in the face of the constraint, preferring a consultation aimed at convincing reluctant or hostile employees.

3. *A compulsory procedure for reluctant employees*

Unless there is a medical contraindication, the legislation imposes an obligation to vaccinate healthcare personnel, i.e. people working in health and medico-social establishments and services and professionals in contact with vulnerable people (at home or during medical transport). Firefighters are also subject to this obligation. The obligation concerns those who are in contact with vulnerable people and is based on a very broad professional criterion. This includes all health professionals, but also psychologists, psychotherapists, osteopaths and their secretaries. This obligation applies to both

the public and private sectors, but in this study we will limit ourselves to private law employees who are subject to the Labour Code.

The employee must present his documents to his employer, who must draw certain consequences. The employees concerned must either present a complete vaccination schedule or a medical contraindication to vaccination. The employer participates in the public policy of generalising vaccination against Covid-19[15]. It participates in a "decompartmentalization" between public health and occupational health. Some companies have even organised vaccination within their medical services. The employer is becoming a link in a broader movement to decentralise public policies in the company[16]. This trend can be found in other areas[17]. For example, companies are asked to end gender inequalities in the workplace through collective bargaining, although the phenomenon is due to factors that go beyond the framework of labour relations.

If he refuses to present proof of the vaccination requirement, the employee is no longer authorised to work. The legislative innovation consists in a suspension of the employment contract which is binding on the parties. The employer has no discretionary power. According to the legislation, he "notes" that the employee can no longer carry out his activity. At no point is this presented as a disciplinary suspension or a prohibition of employment. The underlying idea is that the employee will comply with his obligations. The risk of suspension is intended to act as a deterrent[18]. The social effects are radical. During this period, the employee is not paid and the period cannot be considered as a period of actual work counting for paid holidays, nor for rights acquired under seniority.

The Defender of Rights reported numerous complaints from public servants who were suspended while on sick leave[19]. The Defender concluded that this practice constituted discrimination on the grounds of health. The

[15] See Meiffret-Delsanto, *Obligation vaccinale contre la Covid 19: une protection de la population nocive pour l'entreprise?*, in *DS*, 2022, 2, pp. 104-112; Gamet, Jubert-Tomasso, *Controverse: En quelle mesure, l'employeur peut-il prendre en compte le statut vaccinal du salarié?*, in *RDT*, 2021, 9, pp. 484-492.

[16] See Supiot, *La gouvernance par les nombres*, Fayard, 2015, 520 p., p. 279.

[17] This is the situation in the fight against irregular employment.

[18] See Fabre, *Les obligations de vaccination et de présentation d'un passe sanitaire*, in *RDT*, 2021, 9, pp. 512-518; Kahn dit Cohen, *La suspension du contrat de travail: pari (politique) et difficultés (juridiques)*, in *DS*, 2022, 2, pp. 113-118.

[19] Défenseur des Droits, *Rapport annuel d'activité 2021*.

Conseil d'Etat considered that the suspension could only take effect from the date on which the employee's sick leave ended[20]. As soon as the employee has complied with his or her vaccination obligation, he or she can return to work.

The legislation provided for a consultation procedure in the event of non-compliance with the health and vaccination pass. In this case, the employer was obliged to summon the employee after three days "in order to examine with him the means of regularising his situation, in particular the possibilities of assignment, if necessary temporary, within the company to another post not subject to this obligation". Nothing of the sort is provided for employees subject to the vaccination obligation. The labour administration only considers that when the employee refuses the vaccination, the employer is "invited" to encourage dialogue with the employee and to organise a meeting with him or her to discuss ways of regularising the situation. The scope of this obligation, which is linked to contact with vulnerable persons, no doubt implicitly justifies this greater severity. Suspension is a protective measure justified by a public health imperative. Moreover, one may wonder about the usefulness of such an interview if no possibility of adapting the position is authorised in the company. For health structures, either you are vaccinated or you are suspended.

The suspended employee can, in agreement with the employer, take days off work or paid leave, but we are then in a situation of waiting for regularisation, which is totally inappropriate in the event of a definitive refusal to be vaccinated. It is also impossible to wait for the lifting of the vaccination obligation, which will persist as long as the pandemic continues. Otherwise, the employer will be obliged to suspend the employee's employment contract until the situation is regularised. There is no time limit. Ways out of this impasse need to be considered.

4. *The French legislator has remained in the middle of the road*

An employee who refuses to work will not be entitled to unemployment benefits. Several departmental councils that deliver the Active Solidarity Income (RSA) have explicitly stated their refusal to pay the income to suspended employees. They have either referred these carers to their individual

[20] Conseil d'Etat 2 mars 2022 no. 458353.

responsibilities in the public interest or argued that these people do not fall within the scope of the scheme. However, whatever their opinion, departmental council are not entitled to create new exemptions to the payment of this income.

In the mind of the legislator, an employee who refuses to be vaccinated is making a personal choice that is contrary to the general interest and especially to the protection of the weakest people. Access to the workplace is conditional on vaccination. There is no end to this situation, which may therefore continue as long as the parties have not broken the employment contract.

The employer could attempt a change of job, compatible with the vaccination requirement, provided that this change does not modify the employment contract. This would otherwise require the employee's agreement. In the case of a protected employee, such as a trade union delegate or an elected employee, the employee's agreement would have to be obtained, even if the employment contract is not modified. However, this solution is difficult to envisage, as no distinction between functions is made by the legislation. It applies to everyone working in the structures concerned, with the exception of certain people responsible for carrying out a specific task.

In situations other than a health crisis, the legislator has sometimes given precedence to the interests of the company over the individual refusal of the employee. It has thus been provided that when an employee refuses changes to his or her employment contract resulting from a collective performance agreement, which is a collective agreement on employment with specific effects on the individual employment relationship, a *sui generis* dismissal procedure applies. The employee makes a choice contrary to the collective interest, for reasons of his own, and he will be dismissed, without being able to effectively challenge the lawfulness of his dismissal. No such provision is made for refusal of vaccination. It was discussed during the parliamentary debates. The initial draft of the Act of 5 August 2021 provided that the fact that an employee was unable to carry out his activity for lack of vaccination for a period of more than two months justified his dismissal. The legislator thought that it would provide a secure way for the parties to terminate the contract. It had to back down in the face of hostile reactions from trade unions and the risk of conflict with ILO Convention No. 158, which imposes the possibility of a review of the grounds for dismissal.

Even if the legislation is silent, the employee's job is at stake. If the employee does not get vaccinated and does not resign, the employer who wishes

to terminate the employment contract must implement the common law procedures for terminating the employment contract. No litigation has developed on this issue so far. We have seen above that employees who have left their jobs have done so in other ways.

The parties may wish to break the contract by mutual agreement. Provided that the employee agrees, the contract can be terminated by a homologated conventional rupture[21]. Of course, there must be no fraud or lack of consent. The employee will thus be entitled to unemployment benefits but the employer will have to pay a sum corresponding to the legal redundancy allowance, which he will not always be inclined to do, as the termination is for reasons beyond his control.

The employee may resign. However, this decision must be clear and unequivocal. The employee must not have been pressured and his voluntary departure from work due to lack of vaccination does not constitute a clear intention to resign.

If no agreement is reached and the employee has not resigned, then the employer must take the initiative to terminate the contract by dismissal. This is not prohibited in any way. As the Constitutional Council has noted, by renouncing a *sui generis* dismissal procedure, the legislator excludes the refusal to vaccinate from constituting in itself a reason for dismissal. Some scholars envisage the possibility of disciplinary dismissal for failure to fulfil the safety obligation[22]. A decision of the social chamber of the *Cour de cassation* (Court of Cassation), which is the highest court in the French judiciary[23], in 2012 goes in this direction with regard to the repeated refusal of an employee of a funeral home to be vaccinated against hepatitis B[24]. However, this hypothesis gives rise to some unease. The link with disciplinary law should have been established by the legislator itself. Suspension is more a means of putting pressure on the employee than a step towards sanctioning an employee who is at fault in terms of his or her professional obligations. As one author points out, "the legislator wanted to preserve the legal situation arising from a contract whose execution is momentarily rendered impossible by the employee's

[21] See Dalmasso, *Traîtres ou refuzniks? Le délicat renvoi des salariés réfractaires au vaccin*, in *DS*, 2022, 2, pp. 119-123.

[22] See Radé, *Et maintenant, que vais-je faire?*, in *DS*, 2021, 11, p. 865.

[23] The Court of Cassation has jurisdiction over all civil and criminal matters triable in the judicial system.

[24] Cass. soc. 11 juillet 2012, no. 10-27.888; Bull. civ. V, no. 221.

health condition"[25]. Moreover, the employer's decision could be directly or indirectly discriminatory because of "philosophical or religious convictions"[26]. The refusal to be vaccinated finally affects the employee's personal convictions, his consent to medical care and his private life. The disciplinary ground here borders on personal privacy.

Another procedure generally applied to an employee in log-term absence. The Social Chamber of the Court of Cassation allows an employee to be dismissed for "objective disorder"[27]. This is a non-disciplinary personal reason justified by the objective disorganisation of the company. This disorganisation must concern the entire company and not just the department or establishment. The employer must also demonstrate the need to replace the employee permanently. This obligation will be easy to demonstrate in the highly stressed health sector. Another possibility of dismissal is sometimes put forward. An employee who is no longer able to meet the new conditions of practice of the profession might be dismissed.

All these methods of terminating the employment contract are only hypotheses, which will probably not be applied. The situation created by the legislator shows that it has remained in the middle of the road. It did not impose a general obligation to vaccinate. Several measures, such as passes, were intended to put pressure on people to be vaccinated. The President of the Republic had even stated that he wanted to "piss off" the anti-vaccine campaigners[28]. France finds itself in a peculiar situation, in which unvaccinated health workers are recruited by neighboring countries while it itself lacks a workforce in this sector. In labour relations, the legislator has put the employer in the position of a controller of compliance with a public policy obligation. This control is limited to compliance with a procedure. It should not go any further by allowing an employer to have access to the employee's medical file. By not having carefully created a specific cause for dismissal, the legislator did not go to the end of his logic. The suspension of the employment contract is, as we have seen, a strong incentive to be vaccinated in order to return to work. But the system is not complete. Implicitly, it means that the reluctant employee must leave his workplace if he does not want to give in.

[25] FABRE, *cit*.

[26] PEYRONNET, *Covid 19 et égalité*, in *DS*, 2020, 07-08, pp. 588-592; MOIZARD, *Crise sanitaire et discriminations au travail*, in *RDT*, 2020, 4, pp. 257-259.

[27] See for example, Cass, ch. Mixte, 18 mai 2007, no. 05-40.803.

[28] See *Le Monde*, 4 January 2022.

Abstract

During the Covid-19 health crisis, French public authorities introduced an obligation to vaccinate health workers. Many of them refused to comply with this obligation. Their employment contract has been automatically suspended. This is not a disciplinary measure but, during this period, the employee is not paid and he will be not entitled to unemployment benefits. There is no term limit. The legislator did not expect any specific provisions to terminate the employment contract and established therefore a legal insecurity.

Keywords

Covid-19, obligation to vaccinate, health workers, suspension of employment contract, termination of employment contract.

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El "Proceso de Escucha" de Sumar y la Propuesta sobre la Regulación del Trabajo*

Sumario: **1.** Las recientes reformas del derecho del trabajo español. **2.** La iniciativa SUMAR en el contexto político español del año 2023. **3.** El significado del "proceso de escucha" a través de la experiencia de trabajo colectivo realizado. **4.** Las propuestas del Grupo de Trabajo de SUMAR sobre la regulación de las relaciones laborales. **5.** Qué enseñanzas tiene para el iuslaboralismo italiano este proceso de escucha y la propuesta de regulación del trabajo de SUMAR.

1. *Las recientes reformas del derecho del trabajo español*

El gobierno de coalición en España entre PSOE y Unidas Podemos no solo ha supuesto la primera experiencia de coalición entre fuerzas políticas de la izquierda desde la promulgación de la Constitución democrática de 1978, sino que ha afrontado innumerables escollos y turbulencias – la pandemia, desastres naturales, la inflación y el desabastecimiento por la guerra de Ucrania – frente a los que ha reaccionado con la producción de una importante mejora de la protección social y con el lanzamiento de una reforma laboral de extrema importancia, con efectos muy significativos de mejora de la estabilidad en el empleo, crecimiento del empleo de calidad y correlativa reducción del desempleo como efectos más llamativos. La iniciativa de este proceso de reformas la ha conducido el Ministerio de Trabajo y Economía Social, cuya titular, Yolanda Díaz, compatibiliza este cargo con el de Vicepresidenta Segunda del Gobierno tras la dimisión de Pablo Iglesias y su retirada

* El presente artículo es fruto de la reflexión común de los dos autores. Sin embargo, los párrafos 1 y 5 son atribuibles a Antonio Loffredo mientras los párrafos 2, 3 y 4 a Antonio Baylos.

de la política activa, y pertenece al grupo de ministros correspondiente a Unidas Podemos (UP).

La reforma laboral de 2021 se enmarca, entonces, en un cuadro de políticas sociales que ha supuesto un profundo cambio de rumbo respecto aquel en el que siempre se ha movido el derecho laboral español posfranquista. El activismo del Ministerio de Trabajo y Economía Social en la protección de los trabajadores y en la modernización del mercado de trabajo ha sido especialmente intenso desde su toma de posesión, cuando tuvo que hacer frente a la emergencia de la pandemia haciendo un uso abundante de los Ertes (instrumento similar a la Cassa di integrazione guadagni in deroga), como forma de mantenimiento de una situación de producción normal.

Además, a pesar de haber tenido que hacer frente a un periodo de grave crisis económica, mediante el método de concertación se aumentó el Salario Mínimo Interprofesional en 344 € en 5 años, lo que lo llevó a 1.050 € en 2023, con un incremento de 47% en el quinquenio.

Finalmente, no se puede dejar de mencionar la llamada "ley riders" que, mediante una reforma del Estatuto de los trabajadores, introdujo una importante presunción de subordinación a favor de los repartidores, siendo uno de los primeros países de Europa que optó por abordar con decisión el problema de su cualificación jurídica, introduciendo el derecho de información de los representantes de los trabajadores a la gestión algorítmica de la organización de empresa.

En todo caso, como se ha dicho, con diferencia la reforma más significativa dentro de la actividad normativa del gobierno fue sin duda la del mercado de trabajo aprobada por el Consejo de ministros en diciembre de 2021, que tenía como objetivo empezar a reparar los daños de más de veinte años de políticas neoliberales de empleo llevadas a cabo tanto por gobiernos de centroizquierda como de derecha. En particular, se querían abordar las consecuencias de la reforma del Partido Popular de 2012, que pretendía debilitar las organizaciones sindicales, afectando negativamente la capacidad y fortaleza de la negociación colectiva.

Sin embargo, si hay un elemento real de extraordinaria novedad en la reforma, tal vez lo constituya la elección de afrontar una crisis en sentido contrario al normalmente elegido. Es bien conocido como la crisis sea una compañera de viaje del derecho del trabajo, como escribe Carlos Palomeque, y las crisis se han, a menudo, utilizado como excusas para una constante re-

forma neoliberal del mercado de trabajo, con transformaciones tan profundas que han afectado al derecho del trabajo hasta en sus pilares.

Los costes de las crisis de estos años los han pagado exclusivamente y de forma realmente brutal la clase trabajadora, a través de una fuerte rebaja de sus garantías en la relación laboral. Por estas razones, uno de los "deportes" más practicados por parte de los gobiernos occidentales ha sido el "lanzamiento de la reforma laboral que solucionará la crisis ocupacional". Sin embargo, las respuestas que el derecho del trabajo español ha ofrecido delante de esta última crisis han sido diferentes; en un periodo histórico en el que se habla constantemente de la necesidad de un derecho del trabajo que sea más sostenible, el Ministerio de Trabajo español ha demostrado como este mismo derecho además que sostenible tiene que ser sostenido por los pilares de los derechos de las trabajadoras y trabajadores.

Es bien conocido que el derecho del trabajo español tiene unas anomalías, que lo diferencian de otros, especialmente a causa del porcentaje excepcional de contratos de duración determinada en relación con los trabajadores fijos y la ultraactividad del convenio colectivo limitada por la reforma del PP. Sin embargo, esta reforma contiene muchos elementos de reflexión también para el derecho italiano, en particular, recuperar el valor de la estabilidad y luchar contra los contratos de bajo coste.

El rasgo principal de la reforma se encuentra ciertamente en la lucha contra la precariedad y, de manera especial, contra el abuso de los contratos temporales, tipología contractual predominante en la historia democrática de la España posfranquista. La reforma devuelve el papel de contrato tipo al contrato indefinido (como también exige la directiva UE) y deroga los contratos que, de hecho, la jurisprudencia española había transformado en acausales (obra o servicio, eventual o interino); de esta manera es posible contratar un contrato de duración determinada sólo en presencia de razones "productivas o sustitutivas" que se caracterizan por la temporalidad, demostrando haber aprendido de la lección italiana respecto a la interpretación de la causa de duración determinada del contrato contenido en el Decreto Legislativo 368/2001.

Además, la reforma quiere restituir el valor de la formación en los contratos formativos, para los que al menos se debe garantizar el Salario Mínimo Interprofesional, con el fin de evitar que se utilicen únicamente para reducir costes laborales. La nueva regulación de los contratos formativos prevé la supresión del contrato en prácticas, del contrato para la formación y aprendizaje

y del contrato para la formación dual universitaria, sustituido por el nuevo contrato formativo en sus dos modalidades: la formación en alternancia con el trabajo retribuido por cuenta ajena o el desempeño de una actividad laboral destinada a adquirir una práctica profesional adecuada. Este cambio quiere preservar el elemento formativo y garantizar los derechos de las personas en la realización del trabajo.

Finalmente, la reforma opta por reforzar el papel de la negociación colectiva mediante la afirmación de la función prioritaria del convenio colectivo nacional del sector y la elección del convenio colectivo del sector de actividad del contratante en caso de contratas y subcontratas, lo que puede significar el fin de la aplicación del convenio colectivo "multiservicios".

Esa reforma está obteniendo buenos resultados concretos ya poco tiempo después de su aprobación también gracias a que se obtuvo tras un largo proceso de concertación con los agentes sociales más representativos, así como con la Comisión Europea. La concertación constituye, de hecho, un rasgo característico de la actividad del Ministerio de Trabajo y de la Economía Social español de este gobierno, dado que encuentra correspondencia en la apuesta por constituir un movimiento político al modo precisamente concertado de Sumar, guiado por la ministra Yolanda Diaz.

2. *La iniciativa SUMAR en el contexto político español del año 2023*

El asedio continuo de la oposición de los partidos de la derecha y de la derecha extrema a esta obra reformista coloca las elecciones generales, inicialmente previstas para finales de noviembre del 2023 y luego adelantadas al 23 de julio después de los resultados de las elecciones autonómicas del 28 de mayo, como un momento fundamental en el logro de las mayorías que posibiliten la continuidad y profundización de esta experiencia de gobierno. Para ello, el espacio a la izquierda del PSOE tiene que reorganizarse superando las divisiones y tensiones que se han ido desarrollando en su interior. En esa dirección, Yolanda Diaz se ha erigido en un referente fundamental para liderar políticamente este espacio de cara a las elecciones.

Para ello, ha impulsado la creación de una *plataforma ciudadana*, de carácter transversal, independiente de (pero no confrontada con) los partidos políticos, que debe abrirse a un *proyecto de escucha* a la ciudadanía, para conformar un amplio programa de reformas que abarque "una década progre-

sista" en adelante. Este proyecto se denomina SUMAR, y se va desarrollando tanto en torno a actos territoriales "con la sociedad civil", como con la creación de un amplio proceso de discusión y de debate sobre propuestas de análisis y de proyecto en torno a los temas más importantes que estructuran la sociedad y que requieren soluciones a medio y largo plazo sobre los retos más urgentes que los definen.

De esta manera, en septiembre de 2022, se crearon hasta 35 grupos de trabajo sobre diferentes aspectos, dirigidos cada uno de ellos por personas sin relevancia pública en el ámbito político, pero si en el cultural, económico o académico, organizados en cinco ejes – conocimiento, social, económico-laboral, sostenibilidad, calidad democrática – que se abrieron a un amplio número de personas que participaron en lo que debía ser el análisis de la realidad y las propuestas de reforma. Se trató de un proceso de participación plural y numerosa, más de 1.200 personas han trabajado en el seno de estos grupos que finalmente presentaron el resultado de sus trabajos el 12 de enero del 2023 en un acto conjunto en Madrid en el que se expusieron las conclusiones de nueve de los 35 grupos de estudio y que cerró la intervención de Yolanda Diaz. A partir de ahí, se está elaborando un documento sintético de las propuestas, pero cada uno de estos informes se utilizan para que, en cada ámbito sectorial, prosiga el debate esta vez con instituciones y organizaciones sociales, así como otro tipo de colectivos, en la idea de seguir cumulativamente logrando tanto el conocimiento de este tipo de análisis y propuestas como la incorporación de apreciaciones, matices o nuevas aportaciones a dichos informes. A mitad de marzo se ha producido el lanzamiento formal de SUMAR como plataforma ciudadana de cara a las elecciones generales liderada por Yolanda Diaz.

3. *El significado del "proceso de escucha" a través de la experiencia de trabajo colectivo realizado*

La desatención, cuando no el manifiesto incumplimiento de la constitución social, ha caracterizado la experiencia vivida en las últimas cuatro décadas y es la causa del desapego ciudadano ante la política como fórmula de cambiar las cosas. Vaciando progresivamente de contenido las promesas de un trabajo estable como base de la seguridad de la existencia de la mayoría de la población, imposibilitando la realización de un derecho a la vivienda

cada vez más ilusorio, demostrándose incapaces de garantizar un ambiente saludable, la precariedad laboral y vital de amplias capas populares ha ofrecido una imagen de una sociedad escindida y profundamente desigual, lo que se acentuó de manera terrible con ocasión de la crisis financiera y de endeudamiento público en el ciclo 2010-2013, que puso fin a un proceso largo de la modernización y privatización a gran escala a partir de la mitad de la década de los ochenta y toda la de los noventa del pasado siglo hasta el inicio de los años dos mil en España.

Los juristas saben – sabemos – que la realidad no puede separarse de sus representaciones, y en el largo trayecto que lleva hasta el inicio de un período de excepción marcado por la irrupción de la pandemia a comienzos del 2020, se ha ido conformando un modelo de sociedad, regida políticamente por el turno bipartidista en el gobierno y comprometida por su representación económica, social y cultural fuertemente neoliberal, que ha generado inseguridad, desigualdad creciente y sufrimiento de innumerables personas, condenadas a su irrelevancia en términos de decisión política. La captura de este espacio por agentes que mantenían en lo esencial la impotencia de las pulsiones sociales, inmunizando la dimensión de la política frente a cualquier cambio sustancial, impuso una gobernanza alejada de las propuestas de profundización democrática del país. Esa es la crónica del fracaso democrático del sistema de turno de partidos que ha caracterizado la experiencia española a partir de 1982 hasta su crisis a partir de las elecciones del 2015 y las turbulencias electorales e institucionales posteriores que desembocaron en el gobierno de coalición tras laselecciones de noviembre del 2019[1].

[1] A partir de la movilización espontánea del 15-M y la ocupación de las plazas en el 2011, que, tras la continua movilización social de ese trienio 2011-2013 condujo a la irrupción de nuevos actores políticos como Podemos, que obtuvo un resultado espectacular en las elecciones del 2015, con más de cinco millones de votos y 69 escaños. A partir de ahí, las maniobras para que no pudiera intervenir en el espacio público de toma de decisiones relevantes fueron extremadamente potentes, lo que condujo a repetición de elecciones ante la imposibilidad de formar mayorías suficientes sin el concurso de este grupo, y movimientos que desestructuraron al PSOE como partido democrático para que aceptara el gobierno del PP en minoría en el 2016, con la "defenestración" de Pedro Sánchez y su retorno a la dirección del partido con posterioridad. En junio de 2018 la moción de censura al gobierno Rajoy supuso el inicio de un ciclo nuevo que permitiría, de nuevo tras una repetición electoral, la formación de un gobierno de coalición entre el PSOE y UP, pero ya con una fuerte disminución del voto de este sector, en torno a tres millones de sufragios, y 33 diputados. El gobierno no tenía mayoría en la cámara pero conseguiría una amplia mayoría parlamentaria para la investidura con el apoyo de partidos nacionalistas y soberanistas además de otros partidos pequeños.

A partir de la situación de excepcionalidad social que causó la pandemia, la sociedad ha descubierto la necesidad de políticas públicas que combatieran las consecuencias más lesivas de una crisis económica y productiva de incalculable alcance, la posibilidad de articular un escudo social frente a las adversidades personales, de construir estructuras sólidas de preservación del empleo en el contexto de un proceso de institucionalización de sindicatos y asociaciones empresariales en torno al diálogo social como método de gobierno, a la vez que se visibilizaba a tantas y tantas personas protagonistas de cuidados y atenciones imprescindibles en una sociedad avanzada como la nuestra cuyo trabajo paradójicamente apenas veía reconocido su valor en términos de mercado. Desde ahí se ha planteado la oportunidad y la necesidad de un cambio profundo de modelo que consolide el compromiso público por nivelar la desigualdad, fortalecer el empleo estable y profundizar de este modo el diseño de la constitución social que durante tanto tiempo ha quedado sin desarrollar.

A este marco de pensamiento corresponde la iniciativa de SUMAR de impulsar un amplio proceso de escucha entre la sociedad española y constituir nada menos que 35 grupos de discusión y trabajo sobre los temas más importantes que definen un modelo social y político en nuestro país, una mirada colectiva crítica del presente y un diseño de cambio real de futuro. Un proceso de debate que ha culminado sus trabajos en una serie de materiales muy valiosos que contienen análisis y propuestas muy completas que denotan una capacidad de proyecto, un diseño poliédrico de una serie de enfoques de la realidad social más justa, más igualitaria, en la que el trabajo esté en el centro de la construcción democrática y en donde se prescribe una ciudadanía materialmente sostenida en sus necesidades y en sus anhelos de prosperidad y de felicidad por políticas públicas activas que garanticen sanidad, educación, inclusión social e igualdad efectiva, a partir de un esquema de redistribución equitativa de recursos y de asignación plena de derechos.

Hay un proyecto de país muy detallado y articulado como resultado de estos debates que han involucrado a más de mil doscientas personas de distintos ámbitos y organizaciones en una discusión colectiva. Un proyecto de país que se aleja de – y se confronta con – las visiones que hasta el momento se han ido desplegando ante la ciudadanía como únicas propuestas viables, un proyecto que busca salir adelante mediante un cambio social, político, económico y cultural que deje atrás el fracaso evidente de la lógica neoliberal

que ha animado las políticas públicas y la acción de los poderes privados en el inmediato pasado, y que se ha encarnado en la impotencia democrática en la que se movía el bipartidismo. La lectura de estos textos surgidos de la discusión colectiva permite comprender la riqueza de los debates habidos que se manifiesta en la corrección de los análisis y la inteligencia de las propuestas efectuadas. Más allá de las coordenadas discursivas e históricas que encuadran este esfuerzo colectivo, lo cierto es que las palabras allí recogidas importan, son en sí mismas una herramienta interpretativa y expresiva de la realidad que se quiere transformar, extremadamente valiosa y sugerente.

Ahora bien, ese proyecto requiere de agentes colectivos que lo dinamicen, lo protagonicen y lo encarnen. Un sujeto que, apoyándose en la articulación de subjetividades complejas y polifónicas, declinadas también en femenino, poblado por identidades diversas, que sepan confluir entre lo social y lo político, capaz de representar esa realidad anotada en los análisis y las propuestas de estos grupos de estudio. Un sujeto que actúe en el espacio público y en la política de partidos, bien anclado en los movimientos y en las dinámicas sociales, capaz de articular una cultura ciudadana en torno a los ejes que se han discutido en el proyecto de país que emerge de estos debates de enorme riqueza, que sepa representar esa realidad apenas anotada en las densas páginas que han recogido los análisis críticos y las propuestas de actuación que prefiguran reformas institucionales bien meditadas y escogidas. En todas ellas destaca la necesidad de políticas públicas que reconstruyan derechos e intereses, que impongan límites a los poderes privados, que recuperen el sentido profundo del derecho de la ciudadanía a tener derechos y a que éstos estén garantizados suficientemente. Políticas públicas que se remiten a un Estado social comprometido con los objetivos de igualdad sustancial y de remoción de las dificultades para su logro efectivo que declara nuestra Constitución

Este es el reto actual, la decisión consecuente ante un proyecto completo de cambio institucional, político y social como el representado por el conjunto de estos grupos de estudio, un mundo posible que representa una realidad que tiene grandes probabilidades de alcanzarse y lograrse impulsada por una amplia mayoría social. Lo que en última instancia implica el horizonte de sentido en el que se mueve SUMAR.

4. *Las propuestas del Grupo de Trabajo de SUMAR sobre la regulación de las relaciones laborales*

Los dos autores de esta nota hemos participado en el grupo de trabajo que se denominaba "Trabajo Decente" y que dirigía y coordinaba Amparo Merino, catedrática de Derecho del trabajo de la Facultad de Ciencias Sociales de Cuenca, de la Universidad Castilla La Mancha (UCLM). Formaron parte del grupo 43 personas, mayoritariamente del ámbito académico universitario, pero en donde también intervinieron abogados y sindicalistas. La gran mayoría de quienes fueron convocados y aceptaron participar éramos iuslaboralistas, aunque también participaron sociólogos y economistas. La presencia académica universitaria fue abrumadora, aunque contamos con magistrados e inspectores de trabajo. Las y los profesores participantes provenían de 18 universidades españolas y dos italianas – los profesores Lassandari y Loffredo – alguna de las cuales cubrían un cupo mayor, como las de la UCLM, Granada, Pablo de Olavide (Sevilla), La Laguna, Valencia, la Pública de Navarra o la Autónoma de Barcelona[2]. El grupo lo componían 24 mujeres y 19 hombres.

El objeto del documento del grupo sectorial sobre "Trabajo Decente" quería centrarse fundamentalmente sobre la materia estrictamente laboral de la regulación legal y colectiva del trabajo, aunque eran evidentes las concomitancias con otros grupos de estudio, señaladamente los que se dedicaban al análisis de la dimensión europea, migraciones, el relativo a bienestar y derechos sociales y el correspondiente a la justicia. Con algunos de estos se mantuvieron contactos indirectos pero la regla general fue la de una suerte de *self restraint* con algunas indicaciones muy generales.

Como forma de trabajar, se preparó un texto que debía ser debatido y discutido por todos los participantes. En la redacción de este texto trabajó una comisión compuesta por la coordinadora del grupo sectorial, Amparo Merino, a la que se añadieron Joaquin Aparicio y Antonio Baylos. La organización de las reuniones de discusión se hizo a través de un primer encuentro virtual, en el que se acordaron modificaciones y añadidos al texto original,

[2] Las universidades de referencia de las personas participantes eran la de León, Castilla La Mancha, La Laguna, Pablo de Olavide, Córdoba Autónoma de Madrid, Autónoma de Barcelona, Alcalá de Henares, Salamanca, Granada, Las Palmas de Gran Canaria, Valencia, Jaén, Complutense de Madrid, Pública de Navarra, Sevilla, Alicante, Bolonia y Siena.

seguido de un plazo de dos semanas para que aquellas personas que no habían podido intervenir (o no lo habían hecho, pero tenían interés en aportar algunas observaciones al texto) enviaran sus comentarios o propuestas que a su vez resultaban seleccionadas y agrupadas para una nueva sesión colectiva en la que se presentaba el texto por así decir "enmendado" para su aprobación. Finalmente, en una última sesión, el documento resultaría adoptado como "documento final"[3].

Éste, como se verá a continuación tiene dos partes muy diferenciadas. En un primer término, el documento se estructura sobre los principios fundamentales que explican la posición de partida: la centralidad del trabajo en las sociedades actuales, el carácter político y democrático del reconocimiento constitucional del trabajo y el derecho del trabajo, la relación entre el trabajo y la Seguridad Social, la democratización de la empresa y el refuerzo de los derechos laborales en un Estatuto del Trabajo, y, finalmente, el gobierno de las grandes transiciones, ecológica, digital y la derivada de los grandes flujos de circulación de las personas. La segunda parte es menos asertiva que propositiva y se dedica a lo que se consideran "los elementos centrales del cambio", que se desgranan en once apartados – huyendo de la idea canónica del decálogo – construidos en torno a la enunciación de derechos: el primero, el derecho al trabajo, seguido del derecho a la vida, a la salud y seguridad de las personas que trabajan y al ambiente seguro y saludable, los derechos de ejercicio colectivo, sindicación, huelga y negociación colectiva, el derecho a un trato digno y a no ser discriminado, a un salario digno, suficiente y adecuado, al tiempo de trabajo y a la adaptación del trabajo a la persona, al estudio y la formación, a la intimidad, a la propia imagen y la protección de datos personales, a la libertad ideológica y de pensamiento y a la libertad de expresión e información, a la tutela de la Seguridad Social ante estados de necesidad de las personas que trabajan y el derecho a una eficaz protección delos derechos reconocidos a las personas trabajadoras. Cada uno de estos apartados contienen a su vez toda una serie de medidas o de líneas de desarrollo que los especifican y concretan.

El documento final formalmente sirve ahora como un texto que se difundirá entre sindicatos y organizaciones sociales no sólo a efectos de que estas entidades conozcan el trabajo realizado, sino también para que puedan

[3] Está disponible en el siguiente enlace: https://drive.google.com/file/d/1Pv68-Jn_-UOTgz4BsV2exz361IPQ9Gud7/view?usp=sharing.

aportar o intervenir sobre su contenido. En alguna medida, no obstante, la presencia en el grupo de estudio de importantes exponentes tanto de la consulta jurídica de las dos confederaciones – CCOO y UGT – como de personalidades clave en los círculos culturales del sindicalismo español – como el director de la Escuela de Trabajo de CCOO – garantiza una evidente cercanía del documento final a las posiciones sindicales.

A este documento final la coordinadora del grupo sectorial de estudio, Amparo Merino, tuvo que presentar un resumen de dos páginas en el que se intentara condensar el sentido y el alcance del texto aprobado, y además intervino en el acto público de presentación de las "ideas para una década progresista" que se celebró el 12 de enero, entre los nueve sectores seleccionados para dar una idea general del proyecto llevado a cabo.

5. *Qué enseñanzas tiene para el iuslaboralismo italiano este proceso de escucha y la propuesta de regulación del trabajo de SUMAR*

El movimiento que dio lugar a la redacción de los documentos compartidos en los distintos grupos de escucha de Sumar constituye, incluso con independencia del contenido de los mismos, un fenómeno de sumo interés no sólo dentro de la política española sino también fuera de las fronteras ibéricas. La opción política de empezar de abajo hacia arriba la construcción de una plataforma, primero social y política y luego electoral, que escuche las necesidades de los ciudadanos y ciudadanas debe hacer reflexionar mucho, sobre todo en un país donde las últimas elecciones (tanto políticas como administrativas) registraron una abstención y una desafección preocupante para cualquier país que quiera llamarse democrático. Abandonar el enfoque político "top/down" puede constituir una forma de reafirmar el deseo de participar libremente en la toma de decisiones sobre el destino de un país y puede conducir, si va seguido de una participación real de la gente, a un acercamiento de la ciudadanía a la política institucional, cada vez más lejana.

Más allá del método, en todo caso debe subrayarse con fuerza que el elemento de mayor valor para el debate italiano está constituido precisamente por el hecho de que, en todos los documentos, pero en particular en el de "Trabajo decente", por supuesto, se reitera la absoluta centralidad del trabajo y del Estado de bienestar en el mundo contemporáneo y que la protección

del trabajo, en todas sus formas y aplicaciones, no es un legado del siglo XX, sino una absoluta necesidad moderna.

En efecto, el documento sobre el Trabajo decente se mueve entre el presente, el pasado y un futuro posible y deseable.

El presente lo constituye la crítica a la mercantilización del trabajo (y de su derecho) que se dio a nivel internacional y que parece imparable con las únicas fuerzas de los derechos laborales de los países. Por ello, el grupo de trabajo siempre ha reflexionado teniendo en cuenta un enfoque multinivel, en el que se considere tanto el nivel europeo (en el que España está jugando un papel fundamental como motor de los derechos sociales y que puede ser especialmente significativo ahora que comienza su semestre de presidencia del Consejo de la UE) y el internacional, y en particular de la OIT. Además, la misma noción de trabajo decente se inspira, sin ser exactamente la misma, en aquella elaborada justo por la OIT.

El pasado del que no se desprende el documento de Trabajo decente es, en cambio, la Constitución, que se sitúa en el centro de la reflexión del grupo no sólo como pilar de la materia, sino también en su función de bisagra entre la ley nacional y la norma internacional.

Finalmente, por supuesto, el documento del grupo mira hacia el futuro del trabajo, consciente de que no se parecerá en nada a lo que hemos conocido hasta ahora. Por lo tanto, la necesidad compartida fue la necesidad de desarrollar un estatuto del trabajo que tenga en cuenta las transiciones ecológica, digital y migratoria pero que se preocupe sobre todo de proteger a la persona que trabaja, en cualquier forma en que se realice el servicio.

Palabras clave

SUMAR, proyecto de escucha, políticas públicas, agentes colectivos, trabajo decente.

Maria Giovanna Elmo

Una mirada a los países de América Latina con respecto a las nuevas realidades del derecho del trabajo

Sumario: **1.** Las nuevas realidades del derecho del trabajo. **2.** Relación laboral y nuevas tecnologías. **3.** Difusión y desarrollo del teletrabajo. **4.** Regulación del trabajo por plataformas digitales. **5.** Realidades todavía actuales: el recrudecimiento del trabajo forzoso. **6.** Conclusiones.

"*Donde hay revolución, hay confusión y, donde hay confusión, alguien que sabe lo que quiere tiene mucho que ganar. Se trata de una frase que expresa bien la idea del derecho del trabajo, ahora que los gobernantes de los países europeos en los que nació hacen más de cien años están destruyendo su estatuto epistemológico. Solamente una situación de emergencia como la actual puede explicar la creciente frecuencia de las preguntas que muchos me presentan: ¿dónde va el derecho del trabajo? ¿a qué fin atenderá? ¿tiene todavía un futuro?*"[1]

1. *Las nuevas realidades del derecho del trabajo*

El XIII Seminario Internacional de derecho comparado del trabajo "Isla de Margarita"[2] – que tuvo lugar en noviembre de 2022 en República Do-

[1] Romagnoli, *Introducción: el futuro del derecho del trabajo no será el que una vez fue*, en *RAP*, 2016, 47, p. 157.

[2] El seminario ha tenido lugar en Santo Domingo, República Dominicana, desde el 7 hasta el 12 de noviembre 2022; auspiciado por la Sociedad Internacional de Derecho del Trabajo y de la Seguridad Social (SIDTSS), la Academia de Ciencias de República Dominicana, la Asociación Dominicana de Derecho del Trabajo y de la Seguridad Social (ADDTSS), la Asociación de Profesores Universitarios de Derecho del Trabajo de Venezuela (APUDTV). Organizado por *Universitas* Fundación, cuyo director es Mirabal Rendón I. (también presidente de la Asociación de Profesores Universitarios de Derecho del Trabajo de Venezuela). Las actividades se or-

minicana – ha sido una oportunidad para dialogar sobre las nuevas realidades del derecho del trabajo a través de una aproximación comparativa.

Actualmente, hay cambios de alcance mundial que afectan el sistema de las relaciones laborales y se presentan como verdaderos desafíos; nos referimos a la crisis climática, la crisis demográfica, la globalización y el impacto de la digitalización[3].

Estos cambios aportan oportunidades a través de la creación de riqueza y bienestar, sin embargo, constituyen un reto para la sostenibilidad social del sistema económico. Estos procesos, de hecho, afectan las economías ofreciendo enormes oportunidades en términos de productividad, aumento del bienestar y una participación consciente y activa que, al mismo tiempo, podrían conducir a un mayor crecimiento del desempleo, acentuar las desigualdades y provocar el empobrecimiento de la clase media, también en los países desarrollados.

Por lo tanto, cabe subrayar la necesidad de reflexionar sobre las implicaciones incluso en el ámbito laboral; piénsense a la sostenibilidad, la brecha digital, las discriminaciones y la pérdida de protagonismo del sujeto colectivo.

2. *Relación laboral y nuevas tecnologías*

El tema en el que más se centró el debate durante el Seminario ha sido la transformación del trabajo bajo la incidencia de las nuevas tecnologías.

Hoy más que nunca, las tecnologías digitales son indispensables en el mundo del trabajo, del aprendizaje, del entretenimiento, para socializar, para hacer compras y acceder a cualquier servicio, desde la sanidad a la cultura. La llamada revolución tecnológica ha inducido cambios nunca vistos hasta ahora, tanto por su intensidad como por sus repercusiones sociales y – en el escenario descrito – también evoluciona el mercado del trabajo, su dinámica, su organización y todo esto afecta a la vida social de los trabajadores[4].

ganizaron en sesiones por la mañana, durante las cuales los expertos presentaron sus informes, y por la tarde, en las que los participantes compararon experiencias nacionales sobre temas específicos. Al final de cada jornada se presentaron los resultados de los grupos de trabajo.

[3] Como subrayado durante el Seminario por el Prof. Herrera Vergara J. R. en su intervención "El derecho del trabajo de la nueva normalidad".

[4] Se v. la Declaración del Centenario OIT para el futuro del trabajo, 21 junio 2019. En

No cabe duda de que el advenimiento de la digitalización impone reflexiones sobre varios asuntos: asistimos a la destrucción y a la creación simultánea de puestos de trabajo; a la introducción de nuevos procesos; cambios cualitativos y cuantitativos en el rendimiento laboral; las unidades industriales son más reducidas, los procesos ya no son repetitivos, sino dinámicos y flexibles.

En el pasado, el trabajo por cuenta ajena se caracterizaba por ejecutivo (típico del modelo fordista-taylorista), de lo contrario, hoy asistimos a una ejecución de la prestación caracterizada por una mayor participación del trabajador en el logro de los objetivos de la empresa y su mayor participación crítica, razonada y consciente. El antiguo modelo fordista, pues, cede el paso a un modelo inteligente caracterizado por una flexibilidad inteligente – hecha también y sobre todo de auto organización – con tareas cada vez menos rígidas orientadas a la cooperación y a la colaboración, con estructuras hechas de procesos y conocimientos compartidos[5].

También por estas razones los fenómenos que hoy afectan al mundo del trabajo cuestionan el significado tradicional de la subordinación, entendida

esta ocasión, se subrayan los cambios que se están produciendo en el mundo y sus influencias en el mercado laboral. Se refiere en particular a las innovaciones tecnológicas, a los cambios demográficos, a los cambios medioambientales y climáticos y a la globalización; acontecimientos que tienen profundas repercusiones sobre la naturaleza y el futuro del trabajo, así como sobre el papel y la dignidad de los trabajadores. En esta ocasión, la Conferencia Internacional del Trabajo hace un llamamiento a todos sus miembros para que "trabajen sobre la base del enfoque tripartito y del diálogo social, para desarrollar aún más su enfoque del futuro del trabajo centrado en la persona". Entre las modalidades identificadas se encuentran las siguientes: a) reforzar las capacidades de todos para beneficiarse de las oportunidades de un mundo laboral cambiante mediante la consecución efectiva de la igualdad de género en términos de oportunidades y trato; b) invertir en el aprendizaje permanente de las personas y en una educación de calidad accesible a todos; c) garantizar el acceso universal tanto a los sistemas de protección social generales y sostenibles como a medidas eficaces de apoyo a las personas en transición durante su vida laboral; d) de conformidad con la Agenda del Trabajo Decente, es necesario promover un crecimiento económico integrador y sostenible; e) promover políticas y medidas que garanticen un respeto adecuado de la intimidad y la protección de los datos personales y que respondan a los desafíos y aprovechen las oportunidades que se presentan en el mundo laboral en relación con la transformación digital del trabajo, incluido el trabajo en plataformas.

[5] Como destacado en el Seminario por el Prof. Hernández Álvarez O. en su intervención "Industria contemporánea y nuevas tecnologías". Sobre el mismo asunto se v.: Id., *Crítica de la subordinación: veinte años después,* en *Revista de doctrina, jurisprudencia e informaciones sociales*, 2022, p. 7.

como hetero dirección de la prestación y sujeción del trabajador al poder directivo y organizativo del empleado[6].

Estos procesos, por una parte, pueden socavar, como se ha mencionado, la concepción de los tipos contractuales a los que estamos acostumbrados y, por consiguiente, de las técnicas tradicionales de protección; por otra parte, influyen significativamente en la autonomía individual y en las relaciones interpersonales en el contexto laboral.

Todo ello representa un cambio que exige una redefinición del papel del capital humano en los modelos de gestión de la empresa, sin olvidar los derechos fundamentales de los trabajadores dado que los cambios ocurridos en la sociedad contemporánea – incluida las innovaciones tecnológicas – en nada cambian las condiciones que justificaron la construcción del derecho del trabajo como una disciplina especial, ni comportan la ineficacia de sus instituciones esenciales.

Por estas razones, ante el contexto descrito, uno de los principales retos parece ser la nueva forma en que los procesos de trabajo podrán regularse para garantizar la continuidad de los objetivos históricamente inherentes al derecho laboral: la protección de los trabajadores y el respeto de su dignidad.

3. *Difusión y desarrollo del teletrabajo*

En los últimos años hemos sido testigos de un amplio recurso a nuevas modalidades de organización del trabajo también a causa de la pandemia, la cual ha cambiado radicalmente el papel y la percepción del trabajo a distancia, así como el uso de herramientas digitales[7].

Asistimos a la larga difusión del trabajo a distancia, sobre todo en su forma de teletrabajo; de hecho, es innegable que precisamente la pandemia de Covid-19 ha puesto de relieve esta realidad y los correspondientes temas de derecho laboral[8]. En particular, los ámbitos de mayor criticidad se refieren a los tiempos de trabajo, a la esfera trabajo-familia y al bienestar de los trabajadores y al entorno de trabajo[9].

[6] En este sentido Perulli, *Oltre la subordinazione. La nuova tendenza espansiva del diritto del lavoro*, Giappichelli, 2021.

[7] Eurofound, *New forms of Employment*, 2015, p. 72.

[8] Esposito M., *Quel che resta del Covid*, en *DLM*, 2020, p. 237.

[9] Una perspectiva de género: Franconi, Naumowicz, *Remote work during COVID-19*

Pues bien, al igual que en el resto del mundo, esta modalidad de trabajo se incrementó significativamente en los países de América Latina.

Cabe destacar – tal como se ha señalado por la OIT – que en esta región la difusión del teletrabajo no ha sido homogénea entre los diferentes grupos de trabajadores, dado que hay estructuras laborales con baja intensidad global en el uso de TICs y con elevadas brechas tecnológicas. Las posibilidades efectivas de realizar trabajo desde el domicilio han dependido – entre otros factores – del tipo y naturaleza de la ocupación y de las tareas, y del acceso efectivo a las tecnologías necesarias para realizar el trabajo de manera remota.

El estudio mostró los varios factores que condicionan la incidencia de esta modalidad de empleo entre los trabajadores: el nivel educativo, el tipo de ocupación, el género, la edad, ingresos laborales, etc. De hecho, sobre la base de estas características se desprende que "los asalariados formales, de mayor nivel educativo, adultos, y realizando tareas profesionales, técnicas, gerenciales y administrativas, han podido hacer un uso más intensivo de esta modalidad de trabajo. Asociado a ello, los ocupados que pudieron continuar con sus actividades desde sus hogares exhibían con anterioridad a la pandemia ingresos laborales promedios más elevados que el resto de los trabajadores. La situación inversa se observa entre los trabajadores informales, cuentapropistas, jóvenes, de menores calificaciones y de bajos ingresos laborales, quienes experimentaron las mayores pérdidas de empleo y de horas trabajadas, especialmente en la primera mitad de 2020"[10].

Más allá de la diferente propagación de esta modalidad de trabajo, lo que le interesa a esta crónica es informar de la evolución normativa que tuvo (y sigue teniendo) esta región en materia de teletrabajo.

En efecto, en los últimos años las disciplinas en materia de teletrabajo subieron modificaciones.

Algunos países de la región contaban ya en una regulación antes de la pandemia; en estos casos se hicieron modificaciones para considerar las circunstancias específicas en las cuales esta modalidad estaba siendo implementada, o se establecieron disposiciones especiales[11].

pandemic and the right to disconnect-implications for women's incorporation in the Digital World of Work, en *Problematyki Prawa Pracy i Polityki Socjalnej*, 2021.

[10] OIT, *Desafíos y oportunidades del teletrabajo en América Latina y el Caribe,* Nota técnica, julio 2021.

[11] Ejemplo de ello es Perú donde el teletrabajo se encontraba ya regulado por la Ley de teletrabajo, n. 30036 y su Reglamento, aprobado por Decreto Supremo n. 009-2015-TR; sin

Los ordenamientos, en general, han sentido la necesidad de establecer los presupuestos legales mínimos para la regulación del teletrabajo en aquellas actividades, que, por su naturaleza y particulares características, lo permitan[12].

A continuación, se dan algunos ejemplos brevemente, sin que la lista sea exhaustiva.

Uruguay mediante el Decreto n. 86/022 (7 marzo 2022) reglamentó la Ley n. 19.978 del 2021 que reguló la modalidad de teletrabajo, concretando el contenido de mínima del contrato de teletrabajo y aclarando varios temas de la ley que generaban dudas. Colombia adoptó la Ley n. 2088 del 2021 sobre el trabajo en casa, la cual no aplica únicamente a las actividades que se pueden desarrollar mediante herramientas tecnológicas, sino a cualquier actividad que pueda ser desarrollada fuera de las instalaciones del empleador[13]. Además, el Ministerio del Trabajo expidió el Decreto 1227 de 2022, mediante el cual se modificó y adicionó la regulación del teletrabajo en Colombia, con el fin de flexibilizar y facilitar su implementación. Paraguay aprobó la Ley n. 6738 del 2021 que establece modalidades del teletrabajo en relación de dependencia. Argentina modificó la Ley de Contrato de Trabajo para regular los derechos y obligaciones de las partes en la relación laboral que se desarrolla a distancia mediante la Ley n. 27.555 del 2020.

En Perú el teletrabajo se encontraba ya regulado por la Ley de teletrabajo, n. 30036 y su Reglamento, aprobado por Decreto Supremo n. 009-2015-TR. Sin embargo, Perú para hacer frente a la pandemia creó una modalidad especial de trabajo a distancia, llamada 'trabajo remoto'. Precisamente, "el Decreto de Urgencia n. 026-2020 incorporó la modalidad de trabajo remoto como una forma de prestación de servicios en el ámbito laboral que permita la continuidad de las actividades de los trabajadores que deban acatar el aislamiento social obligatorio y no estén vinculados al desarrollo de actividades esenciales. Esta modalidad fue creada especialmente para afrontar

embargo, para hacer frente a la pandemia creó una modalidad especial de trabajo a distancia, llamada 'trabajo remoto'. La modalidad de teletrabajo requiere que exista acuerdo expreso entre el trabajador y el empleador para que pueda implementarse; en cambio, el trabajo remoto puede ser asignado por el empleador de forma unilateral. Otros ejemplos son Honduras, Bolivia y Ecuador, donde se habilitó el teletrabajo en el sector público y, con excepción de Ecuador, también en el sector privado.

[12] En ocasiones, se remite que los aspectos específicos se establecerán en el marco de las negociaciones colectivas, se vea Argentina.

[13] Se señala que Colombia en 2008 estableció garantías sindicales y de seguridad social para los trabajadores bajo esta modalidad.

el período de aislamiento social obligatorio y durante el período que se extienda la emergencia sanitaria por el brote de Covid-19, con el objetivo de flexibilizar las exigencias formales correspondientes a la modalidad de teletrabajo, la cual se encuentra regulada en la Ley de Teletrabajo n. 30036 y su Reglamento, aprobado por Decreto Supremo No 009-2015-TR"[14]. La modalidad de teletrabajo requiere que exista acuerdo expreso entre el trabajador y el empleador para que pueda implementarse; en cambio, el trabajo remoto puede ser asignado por el empleador de forma unilateral. Brasil en 2017 modificó la Consolidación de la Legislación del Trabajo (CLT) incorporando un capítulo sobre teletrabajo. Costa Rica cuenta con Ley de teletrabajo desde septiembre 2019, Ley n. 9738, que tiene como objeto promover, regular e implementar el trabajo virtual para la generación de empleo y modernización, tanto en el sector privado como en el público. Pues bien, aunque no sea posible realizar un análisis de todas las normativas, podría ser interesante destacar algunos aspectos y contenidos que resultan comunes entre estos países; para que podamos observar las tendencias que caracterizan esta modalidad de trabajo en la región.

En todos los casos la legislación proporciona una definición legal del teletrabajo/teletrabajador; lo que parece caracterizar esta modalidad de trabajo es que se desempeñe en lugares distintos al establecimiento del empleador mediante la utilización de tecnologías de la información y comunicación[15].

Según las normativas el teletrabajo no afecta ni altera las condiciones esenciales de la relación laboral. La aplicación de esta modalidad no puede

[14] Cossio Peraltra, *La (in)seguridad jurídica laboral en el Perú en tiempos de pandemia,* en *Derecho de los Desastres: Covid-19,* Facultad de Derecho de la Pontificia Universidad Católica del Perú, 2020, p. 514.

[15] A modo de ejemplo: Costa Rica Ley n. 9738 (art. 3): "[…] modalidad de trabajo que se realiza fuera de instalaciones de la persona empleadora, utilizando las tecnologías información y comunicación sin afectar el normal desempeño de puestos, de los procesos y de los servicios que se brindan". Paraguay Ley n. 6738 (art. 4): "El teletrabajo es una modalidad voluntaria, flexible y reversible tanto para la persona teletrabajadora como para la empleadora que podrá ser acordada desde el inicio de la relación laboral o con posterioridad; se regirá por el acuerdo entre las partes y las demás disposiciones vigentes que rigen la materia". Argentina, Ley n. 27555 (art. 102 *bis*): "Habrá contrato de teletrabajo cuando la realización de actos, ejecución de obras o prestación de servicios, en los términos de los artículos 21 y 22 de esta ley, sea efectuada total o parcialmente en el domicilio de la persona que trabaja, o en lugares distintos al establecimiento o los establecimientos del empleador, mediante la utilización de tecnologías de la información y comunicación".

vulnerar derechos de las partes de la relación laboral y no constituye por sí misma causal de terminación de la relación de trabajo.

Los principios enunciados pertenecen, en general, a las condiciones de trabajo y tienen bastantes características en común.

En primer lugar, cabe señalar el principio de voluntariedad entre las partes[16]. Este principio reviste particular importancia en las leyes analizadas; de hecho, el teletrabajo se caracteriza por ser de carácter voluntario con acuerdo entre las partes y el consentimiento prestado por la persona que trabaja en una posición presencial para pasar a la modalidad de teletrabajo podrá ser revocado por la misma en cualquier momento de la relación (entonces se prevé la reversibilidad).

Con relación a la protección de la salud y seguridad de los teletrabajadores, se prevén varias medidas, como: el deber del empleador de informar a la persona teletrabajadora sobre el cumplimiento de las normas y directrices relacionadas con la salud ocupacional y prevención de los riesgos de trabajo, según lo establecido en el ordenamiento jurídico vigente para esta materia (Paraguay). En algunos casos el control del cumplimiento deberá contar con participación sindical (Argentina), en otros casos mayor importancia se da a la evaluación de los riesgos para implementar las medidas correctivas a los que se encuentra expuesto el teletrabajador, también con autoevaluaciones por parte del teletrabajador (Perú).

Los equipos de los teletrabajadores deberán ser proporcionados por el empleador, igualmente, los costos de operación, funcionamiento, mantenimiento y reparación de equipos serán siempre de cargo del empleador[17].

[16] Se vea Argentina Ley n. 27555 (art. 7): "El traslado de quien trabaja en una posición presencial a la modalidad de teletrabajo, salvo casos de fuerza mayor debidamente acreditada, debe ser voluntario y prestado por escrito". Costa Rica Ley n. 9738 (art. 2): "El teletrabajo es voluntario tanto para la persona teletrabajadora como para persona empleadora y se regirá en sus detalles por el acuerdo entre las partes […]". Paraguay Ley n. 6738 (art. 8) entre los principios que rigen el teletrabajo se encuentra también la voluntariedad. En Perú según la Ley n. 31572 (art. 3.2) el teletrabajo se caracteriza también por "ser de carácter voluntario y reversible".

[17] La Ley n. 21220 de Chile (Art. 152 *quáter* L.) estipula que "Los equipos, las herramientas y los materiales para el trabajo a distancia o para el teletrabajo, incluidos los elementos de protección personal, deberán ser proporcionados por el empleador al trabajador, y este último no podrá ser obligado a utilizar elementos de su propiedad. Igualmente, los costos de operación, funcionamiento, mantenimiento y reparación de equipos serán siempre de cargo del empleador". Por su parte, la Ley n. 6738 de Paraguay (Art. 14) establece que "Son obligaciones del empleador a los efectos de la presente ley sin perjuicio de las previstas en las demás disposiciones vigentes: […] c) Proveer y garantizar el mantenimiento de los equipos, programas, la que podrá

En relación con la duración de la jornada y organización del trabajo no hay una tendencia única. En casos el horario de trabajo y la jornada laboral debe ser pactada previamente por escrito en el contrato de trabajo de conformidad con los límites legales vigentes (Costa Rica, Paraguay, Perú), o se respecta a lo convenido por hora como por objetivos (Argentina), o distribuyen libremente su horario (Chile).

Sorprende positivamente que se prevea en la mayoría de los casos el derecho a la desconexión digital. De hecho, la persona que trabaja bajo la modalidad de teletrabajo tendrá derecho a no ser contactada y a desconectarse de los dispositivos digitales y/o tecnologías de la información y comunicación, fuera de su jornada laboral y durante los períodos de licencias; además no podrá ser sancionada por hacer uso de este derecho[18].

ser variada en aquellos casos en que el empleado, por voluntad propia, solicite la posibilidad de realizar teletrabajo con su equipo personal y la persona empleadora acepte, lo cual debe quedar claro en el contrato o adenda y exime de responsabilidad a la persona empleadora sobre el uso del equipo propiedad de la persona teletrabajadora". En la Ley n. 27555 de Argentina (Art. 9) se estipula que "El empleador debe proporcionar el equipamiento –hardware y software, las herramientas de trabajo y el soporte necesario para el desempeño de las tareas, y asumir los costos de instalación, mantenimiento y reparación de las mismas, o la compensación por la utilización de herramientas propias de la persona que trabaja. La compensación operará conforme las pautas que se establezcan en la negociación colectiva". La Ley n. 2088 del año 2021 de Colombia (Art. 8) estipula que "Para el desarrollo del trabajo en casa y el cumplimiento de sus funciones, el servidor público o el trabajador del sector privado, podrá disponer de sus propios equipos y demás herramientas, siempre que medie acuerdo con el respectivo empleador y/o entidad pública. Si no se llega al mencionado acuerdo, el empleador suministrará los equipos, sistemas de información, software o materiales necesarios para el desarrollo de la función o labor contratada, de acuerdo con los recursos disponibles para tal efecto. El empleador definirá los criterios y responsabilidades en cuanto al acceso y cuidado de los equipos, así como respecto a la custodia y reserva de la información de conformidad con la normativa vigente sobre la materia. En todo caso el empleador es el primer responsable de suministrar los equipos necesarios para el desarrollo de las actividades, cumplimiento de funciones y prestación del servicio bajo la habilitación de trabajo en casa".

[18] Se v. Argentina Ley n. 27555 art. 5; Chile Ley n. 21220 de (Art. 152 *quáter* J.) se establece que "Tratándose de trabajadores a distancia que distribuyan libremente su horario o de teletrabajadores excluidos de la limitación de jornada de trabajo, el empleador deberá respetar su derecho a desconexión, garantizando el tiempo en el cual ellos no estarán obligados a responder sus comunicaciones, órdenes u otros requerimientos. El tiempo de desconexión deberá ser de, al menos, doce horas continuas en un periodo de veinticuatro horas. Igualmente, en ningún caso el empleador podrá establecer comunicaciones ni formular órdenes u otros requerimientos en días de descanso, permisos o feriado anual de los trabajadores". Paraguay conecta el derecho a la desconexión con la privacidad, art. 8, let. E, Ley n. 6738: El empleador debe respetar la vida

Colombia – que como hemos dicho sancionó una ley sobre el trabajo en casa, la cual no aplica únicamente a las actividades que se pueden desarrollar mediante herramientas tecnológicas, sino a cualquier actividad que pueda ser desarrollada fuera de las instalaciones del empleador – prevé una "desconexión laboral" (no únicamente digital), ósea la garantía y el derecho que tiene todo trabajador y servidor público a disfrutar de su tiempo de descanso, permisos, vacaciones, feriados, licencias con el fin de conciliar su vida personal, familiar y laboral. Por su parte el empleador se abstendrá de formular órdenes u otros requerimientos al trabajador por fuera de la jornada laboral.

Hay que destacar, sin embargo, que otros aspectos sobre el teletrabajo son menos frecuentes en estas legislaciones, por ejemplo, las condiciones en relación con la privacidad y protección de datos solo están detalladas en unos pocos países de la región. En tema de privacidad algunas veces la legislación hace referencia a otra fuente sin regular adecuadamente: en Argentina los sistemas de control destinados a la protección de los bienes e informaciones de propiedad del empleador deberán contar con participación sindical a fin de salvaguardar la intimidad de la persona que trabaja bajo la modalidad de teletrabajo y la privacidad de su domicilio (art. 15). Paraguay hace referencia al Ministerio de Trabajo, Empleo y Seguridad Social el cual tendrá que establecer las regulaciones necesarias para el cumplimiento de los mecanismos de control, privacidad, responsabilidad de las partes, confidencialidad y manejo de la información, relativas a la modalidad de teletrabajo (art. 27).

A pesar de los aspectos mejorables que hemos resaltado, hay que destacar el esfuerzo para crear un marco de principios comunes a los teletrabajadores y fijar condiciones fundamentales de trabajo para esta categoría cada vez más presente.

privada del teletrabajador y los tiempos de descanso y reposo de la familia de éste. A tal efecto, se garantiza el derecho a la desconexión digital de los trabajadores, que consiste en el derecho de los empleados a no contestar comunicaciones, llamadas, *emails*, mensajes, *WhatsApp*, etc., de trabajo, fuera de su horario laboral".

4. *Regulación del trabajo por plataformas digitales*

Otra novedad en el mundo del trabajo digital – abordada durante el Seminario – consiste en la difusión del trabajo por plataformas digitales.

En todo el mundo asistimos al aumento de la heterogeneidad y de la inestabilidad del trabajo, a la difusión de prestaciones ambiguas, de empleos temporales, precarios, de "tareas" que a menudo no permiten alcanzar condiciones de vida aceptables, una inserción social satisfactoria, el pleno acceso al bienestar y a la seguridad social. Las plataformas han puesto en relación directa proveedores de servicios y clientes, han acentuado la sincronización, pero también la fragmentación de las relaciones económicas.

Esta innovación implica nuevos riesgos y, a la vez, transforma el concepto de relación de trabajo[19].

América Latina también ha tenido que afrontar estos desafíos, sin embargo, por el momento, debemos señalar que solo unos países avanzaron en materia de regulación del trabajo por plataforma digital.

Entre ellos podrían mencionarse Uruguay y Argentina "donde desde 2015 se han comenzado a incorporar disposiciones específicas en sus legislaciones sobre esta nueva modalidad de trabajo. Además, varios países de América Latina han introducido mecanismos de tributación simplificada y acceso a la seguridad social (como el 'monotributo') para extender la cobertura del seguro a autónomos y micro y pequeñas empresas, promoviendo su transición a la economía formal. Por ejemplo, en Argentina y Uruguay, los 'monotributistas' pagan un costo fijo que cubre impuestos y cotizaciones a la seguridad social"[20].

En Chile, el 11 de marzo del año 2022, se dictó la Ley n. 21.431 al fin de regular el trabajo prestado a través de las plataformas digitales de prestación de servicios, estableciendo un sistema dual, hibrido y reversible, que entra

[19] Como destacado durante el Seminario por la Prof.a Fernandez Docampo B. en su intervención "El derecho colectivo del trabajo en las plataformas digitales".

[20] OIT, *Panorama laboral 2021. América latina y el Caribe*, 2021, p. 164. El estudio precisa que "en el caso de Uruguay, el Gobierno también ha introducido medidas específicas para ampliar la cobertura a los trabajadores de taxi por plataformas. Para obtener su licencia para operar, los conductores que usan aplicaciones de taxi deben estar registrados en la seguridad social. Las aplicaciones permiten que los conductores se registren y automáticamente agreguen una contribución a la seguridad social al precio de cada viaje y es transferido a la institución de seguridad social uruguaya".

en vigor a partir de 1 de septiembre del año 2022. Por esta ley se distingue entre trabajadores dependientes e independientes; de esta manera, los primeros prestan los servicios bajo un régimen de subordinación y dependencia (con sus respectivas garantías), en cambio, los segundos no están sujetos a las normas de la subordinación, por eso hablan de un "sistema dual". Por consiguiente, "a los trabajadores dependientes de las plataformas digitales de prestación de servicios se le reconocen todos los derechos que le confiere la legislación laboral, pero a los trabajadores independientes solo se le reconocen parcialmente algunos derechos en materia de capacitación, seguridad, derechos fundamentales, previsionales, protección de datos, tutela judicial y negociación colectiva, no siendo titulares de aquellos que no se le han sido conferido expresamente, por ese califica el sistema de hibrido. La elección entre ser trabajador dependiente o independiente queda entregada a la voluntad de las partes contratantes, sin embargo, se le reconoce el derecho del trabajador independiente de una plataforma digital de prestación de servicios a pedir con posterioridad que sea calificado su relación como de naturaleza laboral y como trabajador dependiente, si logra probar judicialmente que en la práctica prestó servicios personales remunerados bajo subordinación y dependencia, conforme a los principios de primacía de la realidad y de la irrenunciabilidad de los derechos laborales, por eso se califica el sistema como reversible"[21].

Algunos países de la región están intentando desarrollar una legislación espacial, de hecho, por el momento hay proyectos de ley que aún no han sido aprobados (v. Colombia, Perú).

5. *Realidades todavía actuales:* el *recrudecimiento del trabajo forzoso*

Como se dijo al principio, además de los temas específicos relacionados con el trabajo digital, también se ha prestado mucha atención a los derechos fundamentales. A este respecto la intervención del Prof. Cabeza Pereiro se centró en el trabajo forzoso; el cual constituye una realidad que, aunque no se pueda definir nueva, desafortunadamente sigue siendo actual.

[21] Como expuesto durante el Seminario por FRANCHI A. (Abogado de la Universidad Católica de la Santísima Concepción) en su intervención "Los trabajadores de plataformas digitales de prestación de servicios en Chile. Su regulación a través de la Ley n. 21.431".

Las estimaciones de la OIT de 2021 muestran un deterioro con respecto a la encuesta anterior de 2017, pasando de aproximadamente 40 millones de personas víctimas de la esclavitud a 49,6 millones, incluidos los menores, tanto en la forma de trabajo forzoso (aumentado de 25 a 27,6 millones) que en la de matrimonio forzado (de 15 a 22 millones), esta última condena por la vida a un estado de explotación, violencia y abuso[22].

Entonces una dirección contraria a la de los objetivos globales de desarrollo sostenible (ODS) asumidos por las Naciones Unidas. La referencia es al Objetivo 8, en particular el 8.7, el cual prevé acabar con la esclavitud infantil para el año 2025 y poner fin a la esclavitud universalmente (en todas sus formas) para el año 2030.

Desafortunadamente, como dijimos, el trabajo forzoso ha crecido en los últimos años y ninguna región del mundo está exenta. Parece ser un problema mundial no relacionado con la riqueza de las naciones (al menos directamente) dado que se trata de una cuestión que persiste en todos los puntos geográficos y en todas las economías.

El componente principal y más crítico en términos de retroceso frente al Objetivo – basado en la investigación OIT – está en el trabajo doméstico y la explotación sexual con fines comerciales (este último cuenta con 6,3 millones de víctimas) que tiene una dimensión de género relevante y que, en la economía privada, calcula unos 150.000 millones de dólares de beneficios ilícitos cada año.

También es grave el problema del trabajo infantil para niños, con alrededor de 3,3 millones de niños, lo que representa el 12 por ciento del total de víctimas, empleados en muchos sectores económicos – principalmente en el trabajo doméstico, en la agricultura y en la industria manufacturera – y sujetas a la explotación sexual, así como a formas graves de coacción, incluido secuestro, administración de drogas, engaño y manipulación de la deuda.

Los desencadenantes han sido (y siguen siendo) en primer lugar, los acontecimientos mundiales como: la crisis pandémica; los conflictos armados; el cambio climático; la pobreza extrema; la inmigración forzosa e insegura; el incremento de la violencia de género. También hay que considerar las disrupciones en el derecho del trabajo que afectan a los principios y de-

[22] OIT, *Estimaciones mundiales sobre la esclavitud moderna. Trabajo forzoso y matrimonio forzoso*, 2022.

rechos fundamentales La preocupación de la OIT por la eliminación del trabajo forzoso a nivel global ha sido constante, y las principales expresiones de esta son los Convenios Internacionales n. 29 (1930)[23], el Convenio n. 105 (1957) complementa el anterior enfrentando nuevos problemas derivados de la Segunda Guerra Mundial[24] y el Protocolo complementario de 2014. El Protocolo 2014 oficia como un agregado al Convenio, por lo cual deberá ser ratificado también por aquellos Estados que ya ratificaron este último. En la misma conferencia (n. 103) se aprobó la Recomendación n. 203, por lo cual los Estados miembros, mientras no ratifiquen el Protocolo, deberán seguir las directivas de la recomendación. De hecho, el protocolo y la Recomendación n. 203 expresan que los Estados miembros deben promover políticas de prevención de situaciones posibles de trabajo forzoso. Entre estas medidas se señalan la promoción de la libertad sindical, programas de lucha contra la discriminación, iniciativas para luchar contra el trabajo infantil y promover las oportunidades educativas para los niños y las niñas. En esta línea los Estados deberán promover campañas de sensibilización específicas, programas de capacitación para grupos de población en situación de riesgo a fin de aumentar su empleabilidad, así como su capacidad y oportunidades de generar ingresos, la extensión efectiva de las tutelas laborales y de la seguridad social a todos los sectores de la economía, y que se cumpla de manera efectiva, políticas de empleo y migración que eviten situaciones de trabajo forzoso.

A este respecto, cabe señalar que han ratificado el Protocolo 2014 solo algunos países de América latina: Argentina, Chile, Costa Rica, Panamá, Perú (entre los países europeos solo Portugal y España).

La preocupación de la OIT por la erradicación del trabajo forzoso se expresa también en otros convenios: el CIT 95 (1949) sobre protección del salario, prohíbe en su art. 4 el pago total del salario en especie […]; el CIT 182 (1999), sobre las peores formas de trabajo infantil, indica entre estas "todas las formas de esclavitud o las prácticas análogas a la esclavitud, como la venta

[23] El art. 2 del Convenio n. 29 "la expresión trabajo forzoso u obligatorio designa todo trabajo o servicio exigido a un individuo bajo la amenaza de una pena cualquiera y para el cual dicho individuo no se ofrece voluntariamente" (definición que ha sido reafirmada en el Protocolo 2014).

[24] Se aprobó con la intención de ampliar el alcance del CIT 29. El primer Convenio refería básicamente a situaciones análogas a la esclavitud; el CIT 105 extiende el concepto a otras situaciones emparentadas con la esclavitud.

y la trata de niños, la servidumbre por deudas y la condición de siervo, y el trabajo forzoso u obligatorio, incluido el reclutamiento forzoso u obligatorio de niños para utilizarlos en conflictos armados" (art. 3). Además, el CIT 189 sobre trabajo doméstico (2011) reconoce en su art. 3 que los Estados miembros deberá asegurarse a los trabajadores domésticos la efectiva promoción y respeto de los principios y derechos fundamentales en el trabajo, entre los que se indica "la eliminación de todas las formas de trabajo forzoso u obligatorio"[25].

Cabe destacar también el Protocolo de Palermo (2000) para prevenir, suprimir y penalizar el tráfico de personas, especialmente mujeres y niñas que complementa la convención de las naciones unidas contra la delincuencia organizada transnacional.

Se trata de una realidad no nueva sino persistente sobre la que vale la pena preguntarse ya que, como demuestran las cifras, todavía queda mucho por hacer (también por los países occidentales).

6. *Conclusiones*

Debatir sobre las nuevas realidades del derecho del trabajo y sus implicaciones no es ciertamente sencillo.

Esta crónica ha elegido algunos de los temas principales abordados en el Seminario "Isla de Margarita" 2022 y, en primer lugar, los aspectos relativos a la difusión de los trabajadores a distancia, digitales o, de toda forma, empleados en contextos empresariales "desmaterializados".

Ha sido interesante verificar la adecuación de los marcos normativos en los países de América Latina sobre todo en relación con el teletrabajo. De hecho, esta región puede constituir un buen ejemplo y un interesante campo de investigación, dado que – debido a las exigencias impuestas por la pandemia – se han promulgado varias leyes. Estas normativas – aunque mejorables – trazan una línea de orientación de los derechos fundamentales para los teletrabajadores y constituyen un importante marco legal.

Al contrario, en tema de trabajo por plataformas digitales todavía queda un largo camino por recorrer. En esto caso, como vimos, faltan leyes espe-

[25] Tal como destacado por Raso Delgue, Rosenbaum Rimolo, *El Centenario de la OIT y la legislación laboral uruguaya*, 2019, p. 135.

ciales en casi todos los países y persiste el debate sobre el estatus jurídico de estos trabajadores (subordinado u autónomo).

Además, algunos asuntos surgidos en Europa todavía no se han abordado – y despiertan mucho interés – como por ejemplo el riesgo de discriminación por el algoritmo[26]. La mayor preocupación que ha surgido del estudio es lo de un escenario de rebajas de derechos para los trabajadores por plataformas precisamente por una importante desregulación que se traduce en la consiguiente merma de derechos. No tanto por una posible situación de abuso sino por la falta de un marco legal adecuado para estas figuras y por la relajación de los elementos que han caracterizado tradicionalmente el concepto laboral de la 'dependencia'[27]. De hecho, la ausencia de un esquema jurídico-normativo adecuado podría traducirse en una consiguiente contracción de los derechos, incluso fundamentales, de estos trabajadores.

[26] En tema de discriminación del algoritmo, del cual Italia ha sido pionera, *ex multis*, se vean: Perulli, *La discriminazione algoritmica: brevi note introduttive a margine dell'ordinanza del Tribunale di Bologna*, en *LDE*, 2021; Peruzzi, *Il diritto antidiscriminatorio al test di intelligenza artificiale*, en *LLI*, 2021, p. 48; Faioli M., *Discriminazioni digitali e tutela giudiziaria su iniziativa delle organizzazioni sindacali*, en *DRI*, 2021, p. 204; Aloisi, Gramano, *Artificial Intelligence Is Watching You at Work: Digital Surveillance, Employee Monitoring, and Regulatory Issues in the EU Context*, en *CLLPJ*, 2019, p. 95. Para una visión general véase Ales, Esposito M., Elmo, *Implicación de los cambios tecnológicos en el ejercicio de los derechos laborales fundamentales en Italia*, en Monereo Pérez, Vila Tierno, Esposito M., Perán Quesada (dir.), *Innovación tecnológica, cambio social y sistema de relaciones laborales. Nuevos paradigmas para comprender el derecho del trabajo del siglo XXI*, Ed. Comares, 2021, p. 959.

[27] Un tema muy debatido en el Seminario. En especial véase: Carballo Mena, *Indicios de la relación de trabajo y empresas digitales*, en *Trabajo y Derecho*, 2020.

Palabras claves

Teletrabajo, trabajo por plataformas, trabajo a distancia, nuevas tecnologías, Isla de Margarita.

Lorenzo Zoppoli

Derecho laboral y medioambiente: stepping stones para un camino difícil[*] [**]

Indice: **1.** Terminología y cuestiones por abordar. **2.** Cómo localizar el o los problemas que el medioambiente le presenta en la actualidad al derecho laboral: las dos mercantilizaciones. **3.** ¿Cuáles son las respuestas que el sistema del derecho laboral ha propuesto y propone respecto al problema fundamental de tener que encauzar al mismo tiempo a las dos mercantilizaciones? **4.** ¿Cuáles son las zonas de luz que ya pueden encontrarse en el sistema? **5.** ¿Cuáles son, en cambio, las sombras más oscuras (simétricas a las zonas de luz)? **6.** ¿Cuál puede ser el camino para iluminar más zonas, reducir las sombras y hacen emerger las *stepping stones*?

1. *Terminología y cuestiones por abordar*

El tema abordado por los dos números gemelos de *Lavoro e diritto* 2022 sobre "Trabajo y medioambiente en el Antropoceno" [*Lavoro e ambiente nell'Antropocene*], es tan importante como eminentemente actual.

Más allá de que se emplee el término Antropoceno – que es el más gastado, tanto por parte del sentido común como por el debate científico, tras la estela del Nobel de química atmosférica (1955) Paul Crutzen y del biólogo Eugene Filmore Stoermer (quien lo acuñó en los años 80) – u otros términos, menos conocidos y más sofisticados y recientes (Capitaloceno, *Manthropocene*/Machoceno; *Plasticene*/*Wasteocene*[1]), el asunto que se propone es el de la relación entre "trabajo y medioambiente", como lo subraya, desde el

[*] Informe del seminario de presentación de los dos fascículos de *Lavoro e diritto*, 2022, n. 1 y 2, Università di Ferrara, 8 de julio de 2022.

[**] La traducción es de Carlos Caranci.

[1] IOVINO, *Il codice antropocene*, en *la Repubblica*, 1 de julio de 2022.

mismo título de su ensayo, Antonio Baylos. Y, para citar el título completo, de la "necesidad del límite".

También nosotros, juristas del trabajo italianos, llevamos tiempo hablando de ello, apelando a la "sostenibilidad" (hay alguna monografía pionera en 2018[2], un conocido "Manifiesto" de 2020[3], o el XX congreso Aidlass 2021[4]) y oponiéndonos al medioambientalismo amanerado que, como dice Michele Serra, favorece "el *greenwashing* hasta para las peores fábricas del planeta… como por ejemplo los gigantes de la ropa de usar y tirar (sector tan destructivo como la guerra)"[5]. Por lo demás, y con toda seguridad, nosotros no somos los únicos juristas que nos interesamos por los desastres medioambientales: en la prensa hace furor la "justicia climática" a propósito del reciente drama de la Marmolada[6]; y los filósofos del derecho escriben monografías sobre el "derecho al clima"[7].

El mérito de los dos números de *Lavoro e diritto* es el de haber abordado esta temática con ambición y claridad, planteando una reflexión especializada y completa, apoyada en una sólida base conceptual de análisis que, sin duda, parece ir más allá del necesario trabajo preliminar de descubrir y reconocer nuevas áreas de investigación, además, destaca el enfoque interdisciplinario.

El primer número está dedicado, mengonianamente, al "problema y el sistema", con la atención puesta tanto en los casos más conocidos de conflicto entre protección del trabajo y protección del medioambiente, como en los principios jurídicos; el segundo número, en cambio, aborda el asunto bajo el enfoque de las reglas y las perspectivas, buscando vínculos, obligaciones y remedios para poderlos ubicar en los escenarios pertinentes.

En mi opinión, las muchas y complejas cuestiones de interés para el derecho laboral – pero no exclusivamente – que se tratan en las casi 500 páginas de los dos números de *Lavoro e diritto*, se pueden afrontar si nos centramos en cinco preguntas:

[2] Tomassetti, *Diritto del lavoro e ambiente*, Adapt University, 2018; Cagnin, *Diritto del lavoro e sviluppo sostenibile*, Cedam, 2018.

[3] Caruso, Del Punta, Treu, *Manifesto sul diritto del lavoro sostenibile*, en www.csdle.lex.unict.it.

[4] *Il diritto del lavoro per una ripresa sostenibile*, Taranto, 28-30 de octubre de 2021, La Tribuna, 2022, con informes de Marinelli, Fiorillo, Marazza y Renga.

[5] Serra, *La polvere sotto il tappeto*, en *la Repubblica*, 6 de julio de 2022.

[6] Luna, *Il diritto a essere protetti dal cambiamento climatico*, siempre en *la Repubblica*, 6 de julio de 2022.

[7] Pisanò, *Il diritto al clima. Il ruolo dei diritti nei contenziosi climatici europei*, ESI, 2022.

a) Cómo localizar el problema o los problemas que el medioambiente le enfrenta en la actualidad al derecho laboral.

b) Cuáles son las respuestas que ofrece hoy el sistema del derecho laboral.

c) Cuáles son las zonas de luz que ya pueden encontrarse en el sistema.

d) Cuáles son, en cambio, las sombras más densas.

e) Cuál es el camino para iluminar más y reducir las sombras.

2. *¿Cómo localizar el o los problemas que el medioambiente le presenta en la actualidad al derecho laboral?*

Aquí encontramos, especialmente en el primer número, un interesante análisis de algunos casos recientes y graves que han atraído la atención de los juristas del trabajo hacia las múltiples fricciones entre protección del trabajo, protección de la salud pública y protección del medioambiente. Sobre todo, los ensayos de Stella Laforgia sobre Taranto (que "es Italia" según Goffredo Fofi, pero que es, sobre todo, según Stella, emblemática de las *bad practices* medioambientales), de William Chiaromonte sobre las migraciones, y de Gaetano Natullo sobre el reciente drama de la pandemia. Pero abundan las alusiones a otros sucesos conocidos, como el drama ferroviario de Viareggio (sobre el que se detiene Stefania Buoso en el segundo fascículo), a las más antiguas tragedias de Seveso, de Chernobyl, de la suiza Sandoz y de otros casos ocurridos en Japón, Bhopal y otros lugares.

Los análisis casuísticos confirman tanto las alarmas que vienen alertando sobre lo inadecuado del actual sistema de protección, como las dificultades a la hora de resolverlo, y ofrecen tantas y valiosas sugerencias para encontrar posibles soluciones que quiero sintetizar en algunos aspectos fundamentales.

Sin embargo, el problema fundamental que presenta este asunto – en clave jurídica, pero yo diría más bien conceptual – me parece que ha sido identificado, sobre todo, en el ensayo introductorio de Andrea Lassandari (luego retomado por muchos otros, y también por Antonio Baylos, citado más arriba, que habla de "bulimia del capital"). Andrea plantea la cuestión "teórica" de la relación entre la regulación destinada a controlar la "mercantilización del trabajo" (es decir, nuestro derecho laboral) y la necesidad creciente – pero a la que se conoce desde los primeros estudios marxianos sobre el capitalismo – de controlar el fenómeno de la "mercantilización de la tierra", de la naturaleza o del medioambiente, o como se lo quiera llamar.

Ante estos términos, casi dan ganas de decir que no estamos en el Antropoceno, sino en el "Capitaloceno", a pesar de las destrucciones ambientales perpetradas por países que no se definen como capitalistas pero que desde hace décadas forman parte plenamente del orden mundial capitalista. Más bien, habría que distinguir, aún, entre verdugos y víctimas, pero de un modo transversal, es decir, atendiendo a los pueblos, a las clases, a las personas en carne y hueso, antes que a los regímenes políticos que han emergido en medio de los cambiantes y no siempre descifrables órdenes geopolíticos contemporáneos.

Sin embargo, en el fondo, no es este el aspecto más importante. Lo que merece una discusión concienzuda es, más bien, el enunciado según el cual el problema fundamental para los juristas del trabajo es que debe poder frenarse la mercantilización del medioambiente sin renunciar a ningún principio, regla, o técnica de las que han permitido, de algún modo, controlar la mercantilización del trabajo en la economía de mercado mundial. Además, que se pueden concluir las líneas y los instrumentos para la protección del trabajo que se han visto suspendidos, interrumpidos o, incluso, debilitados por el afirmarse, en los últimos años, de la "empresa irresponsable"[8].

Andrea Lassandari – y muchos otros autores reunidos en estos dos números de *LD* – están convencidos de ello, y postulan, por consiguiente, la necesidad de elaborar una nueva teoría de la justicia que, por lo que se refiere a la relación triangular empresa/trabajo/medioambiente, tendría que conllevar:

a) nuevos límites constitucionales a la libertad de iniciativa económica (por ejemplo, en lo que se refiere a la producción de armas);

b) una nueva configuración de las obligaciones que emergen del contrato de trabajo subordinado (y no exclusivamente);

c) políticas sociales no necesariamente consumistas (por ejemplo, basadas en la renta básica universal).

Más adelante, este asunto es retomado explícitamente por otros autores, en especial Giulio Centamore, el cual subraya que esta nueva teoría de la justicia debería tener una doble implicación:

a) ser una verdadera alternativa a la reedición de las políticas de la flexiguridad y de los mercados transicionales de trabajo;

b) ir más allá de la justicia distributiva, procedimental, hiper-personalís-

[8] Título icástico de un magnífico libro de Luciano Gallino, Einaudi, 2005.

tica (es decir, centrada en el individuo, interpreto), para centrarse en cambio en una noción de "persona" que incluya también el medioambiente, en el que la persona no solo trabaja, sino que también vive y cultiva relaciones colectivas, privadas y públicas.

Dilucidado de este modo, el problema de una nueva idea de justicia en el derecho laboral se convierte, no obstante, en un asunto conflictivo, sobre el cual no existe una fácil convergencia ni de intereses, ni de enfoques para investigar. Y el propio término "sostenibilidad", que parece sinónimo de una simple ampliación de las protecciones también hacia el medioambiente, asume aspectos dilemáticos: si la sostenibilidad ambiental de las actividades de empresa no tiene que sacrificar ni el derecho al trabajo ni los derechos de los trabajadores, ¿a quién se le deberá imputar el inevitable aumento del coste económico de las actividades de empresa?

3. *¿Cuáles son las respuestas que el sistema del derecho laboral ha propuesto y propone respecto al problema fundamental de tener que encauzar al mismo tiempo a las dos mercantilizaciones?*

Esta es, en mi opinión, la pregunta más difícil de todas. Y no solo porque la fecha de nacimiento del Antropoceno es aún dudosa, suspendida entre un par de centenares de años (¿revolución industrial o primer uso de la bomba atómica?). De hecho, en mi opinión, en primer lugar habría que ponerse de acuerdo sobre la conciencia de la época planetaria en la que se gesta un sistema jurídico como el nuestro, por añadidura con una fuerte caracterización nacional, más o menos completo y capaz de evolucionar autónomamente. En efecto, es ligeramente arduo sostener que nuestro derecho laboral se ha desarrollado siguiendo las coordenadas que han sido dictadas por lo que hoy se empieza a llamar "el código del antropoceno". Nuestros maestros nos enseñaron que el derecho laboral moderno es, en sí mismo, fruto de alguna casualidad genética, que se formó por estratos[9] y con la acusada tendencia a una microdiscontinuidad conservadora[10]. Y a menudo bajo el signo de una

[9] Giugni, *Il diritto del lavoro negli anni '80*, in *Lavoro legge contratti*, il Mulino, 1989, pp. 295-296, con una alusión especial al derecho laboral italiano "producto de una estratificación por aluvión" (que con el tiempo se ha ido acentuando).

[10] Romagnoli, *Il lavoro in Italia. Un giurista racconta*, il Mulino, 1995, p. 19 ss.

laboriosísima defensa de los pocos cauces sólidos y efectivos que se oponen a la más salvaje mercantilización del trabajo[11].

No obstante, en los dos fascículos de *Lavoro e diritto*, varios ensayos resaltan que, desde hace unos veinte años, el sistema del derecho laboral nacional y supranacional está ofreciento respuestas a la cuestión de pensar una estrategia reguladora más coherente y completa, y así oponerse a la mercantilización del trabajo y de la naturaleza.

Desde hace por lo menos 15/20 años se está llamando la atención sobre la emergencia, fundamentalmente, de principios –supranacionales, de rango constitucional, de matriz social – que han empezado a ser formalizados y, de alguna manera, también normativizados. Son emblemáticos el art. 37 de la Carta europea, que entró en vigor en 2009, y el art. 191 ss. del TFUE, en donde se resaltan tanto el horizonte de la sostenibilidad medioambiental, como los principios de la precaución, de la acción preventiva y del "quien contamina, paga"; pero también la Agenda 2030, aprobada en 2015 por la Asamblea general de la ONU, con los "objetivos de desarrollo sostenible" (ODS[12]).

Según muchas opiniones (de nuevo Baylos, Brino, Centamore, Martelloni), los dos últimos años han sido decisivos, también por el peso añadido por la grave, todavía actual, epidemia causada por la Covid[13].

Las iniciativas, los protocolos, los compromisos y los recursos se siguen unos a otros en un vórtice de lugares, fechas y obligaciones que es difícil de seguir. *Green Deal Europe* 2020, Glasgow 2021, PNRR 2021, reforma constitucional italiana de 2022: todas ellas son etapas que deben ser recordadas y valoradas. Siendo generosos, también la acción y la producción de matriz sindical debe ser considerada congruente y tempestiva, con la idea, que ha emergido a nivel supranacional, de la *Just Transition*, con la última generación de los protocolos antipandemia en Italia (si bien la más reciente actualización, del 30 de junio de 2022, habla aún de la Covid-19 como de un riesgo genérico) y con el aumento de la estipulación de los contratos colectivos con conciencia "medioambientalista".

A pesar de que valoro el esfuerzo por ver el vaso medio lleno – si se

[11] V., para todo, Mariucci, *Cultura e dottrine del giuslavorismo*, número monográfico de *LD*, 2016, sobre *Autonomia e dipendenza DEL diritto del lavoro*.

[12] Baylos, *Trabajo y ambiente: la necesidad del límite*, en *LD*, 2022, 2, p. 249.

[13] Sobre este asunto, ver también el cuaderno monográfico que he dirigido, *Tutela della salute pubblica e rapporti di lavoro*, en *DLM*, 2021, cuad. n. 11, p. 67 ss.

puede decir así –, me parece, sin embargo, que desde el sistema del derecho laboral estamos aún lejos de poder configurar una respuesta para el problema que hemos señalado antes. En el sentido de que seguimos sin vislumbrar un sistema que se pueda decir acabado en términos de principios, sujetos, reglas, sanciones, efectividades y resultados.

Ni parece que se pueda decir que un sistema "acabado" es capaz de nacer en poco tiempo sin encontrar problemas. Los dos fascículos de los que estoy hablando llaman la atención, con acierto, tanto en lo poco que hay actualmente como en lo mucho que aún hace falta; y no deben leerse atendiendo a uno solo de estos dos factores.

No obstante, si indicamos cuáles son las sombras se pueden también avistar ciertas *stepping stones*: una especie de camino de piedras, puede que accidentado pero visible, a lo largo del cual un nuevo sistema podría tomar forma y adquirir vigor. Veamos ahora cuáles son las piedras que han surgido, sin olvidar el deber de atender, justo después, a las sombras, con la esperanza de poder disipar alguna de ellas.

4. *¿Cuáles son las zonas de luz que ya pueden encontrarse en el sistema?*

a) Como ya se ha dicho, muchas zonas de luz son el producto de proclamas y principios de derecho internacional y europeo, cuidadosamente analizados y valorados, sobre todo en el ensayo de Vania Brino[14];

b) Para Italia en concreto, los nuevos artt. 9 y 41 de la Constitución[15] tienen importancia fundamental, habiendo sido modificados de manera significativa con una reforma que se llegó a cabo en febrero de 2022 (l. n. 1 del 11 de febrero), justo entre los dos números de *Lavoro e diritto*. Ya Roberto Bin habla de ellos en el primer fascículo[16], y el tema es retomado

[14] Brino, *Il raccordo tra lavoro e ambiente nello scenario internazionale*, en *LD*, 2022, 1, pp. 97-115.

[15] La primera norma le impone ahora a la República proteger "el medioambiente, la biodiversidad y los ecosistemas, también por el interés de las futuras generaciones"; mientras que el renovado art. 41 precisa, por un lado, que la iniciativa económica privada "no puede desarrollarse de manera tal que cree daño a la salud y al medioambiente" y, por otro, que la ley determina programas y controles para que la actividad económica se dirija y se coordine "con fines sociales y medioambientales".

[16] Bin, *Il disegno costituzionale*, en *LD*, 2022, 1, pp. 115-128, en donde se habla de un "diseño recuperado".

en el fascículo siguiente, sobre todo por Stefania Buoso[17] y Paolo Pascucci[18].

c) Observando los perfiles institucionales de mayor intervención, es muy importante que Italia haya conseguido dotarse, desde hace ya muchos años, de un aparato administrativo dedicado a la tutela del patrimonio medioambiental. El Ministerio nace en 1986, y desde el 2016 está operativo el Instituto superior de protección e investigación ambiental (ISPRA, en italiano), flanqueados por las Agencias regionales para el ambiente (ARPA) y, en las provincias con estatus especial, por las Agencias provinciales para el ambiente (APPA), tal y como se puede leer en el ensayo de Vito Pinto[19].

d) Volviendo al plano estrictamente normativo, para los laboralistas es crucial el viejo art. 2087 del código civil acerca de las obligaciones de seguridad que debe respetar un empleador, integradas, sobre todo, por muchos instrumentos previstos por el texto único sobre la seguridad en el trabajo (es decir, el d.lgs. n. 81/08): a partir de los compromisos sobre la valoración de los riesgos – que en cierta medida pueden extenderse también a los riesgos medioambientales –, y al rol que se les debe reconocer a los representantes de los trabajadores, capaces (por lo menos en teoría) de dirigir, además de los puestos de trabajo, también el territorio[20].

e) También suscita esperanzas el art. 2086 cod. civ., renovado en 2019, que parece ampliar las responsabilidades de la empresa, precisamente, en lo que se refiere al deber de prevenir los riesgos de la actividad desempeñada, evocando el tipo ideal de la "empresa integral… que promueve un nexo de reciprocidad y de interacción con el tejido social con el fin de afrontar la complejidad (ecológica, social, tecnológica) y de producir valores compartidos de relevancia pública"[21].

f) En este marco pueden entrar también las nuevas reglas para sustentar la paridad de género, la contratación de jóvenes o de discapacitados, que, en

[17] Buoso, *Sicurezza sul lavoro, ambiente e prevenzione: disciplina positiva e dilemmi regolativi*, in *LD*, 2022, 2, pp. 271-292.

[18] Pascucci, *Modelli organizzativi e tutela dell'ambiente interno ed esterno all'ambiente*, en *LD*, 2022, 2, pp. 335-356.

[19] Pinto, *L'effettività della protezione ambientale e la dirigenza delle Agenzie specializzate*, en *LD*, 2022, 2, pp. 395-410.

[20] Ver los ensayos de Natullo, Pacucci y Buoso que ya se han citado, a los que se añade el de Tullini, *La responsabilità dell'impresa*, en *LD*, 2022, 2, pp. 357-374.

[21] De esto habla, sobre todo, Tullini, *cit.*, pp. 364-365.

cualquier caso, están dirigidas a favorecer a aquellas empresas que promocionan la mejor instrumentalización para el equilibrio trabajo-vida personal, el cual debe tomarse como un instrumento de equilibrio también en la perspectiva de los ritmos de la vida cotidiana, que se reflejan en la explotación medioambiental[22].

g) Conectadas a lo que se acaba de exponer, aparecen también las reglas y las medidas orientadas a promover el *smart working* y el trabajo a distancia, que explotó durante la pandemia, pero que es capaz, potencialmente, de asentarse por cantidad y calidad, asumiendo el valor de un instrumento de valorización de los territorios que han sido marginalizados por el desarrollo económico híper-urbanizado (el llamado *South working*). Por esto es interesante el nexo que aparece entre el desarrollo del trabajo a distancia y la Estrategia nacional de las áreas internas (SNAI, en italiano), perseguida en Italia desde hace algunos años y que recientemente ha recibido un incentivo[23].

h) A pesar de las conocidas dificultades para la acción sindical en las pasadas décadas, en especial en relación a las conexiones entre las crisis empresariales y las crisis medioambientales, se señalan desarrollos importantes, tanto al nivel de los análisis y de las propuestas de desarrollo de los sistemas socioeconómicos (como la elaboración de la conocida como *Just Transition*, que fue obra, sobre todo, del sindicalismo internacional y que ha inspirado políticas y documentos importantes de la OIT[24]), como, más concretamente, en la contratación colectiva (con la introducción de voces retributivas y medidas de *welfare* empresarial, ligadas a comportamientos virtuosos conforme al perfil ecológico[25]).

i) Finalmente, al nivel más estrictamente operativo, indicamos tres oportunidades importantes – que se traducen en recursos o instrumentos que existen y son utilizables en gran medida – en clave de protecciones paralelas del trabajo y del medioambiente, coherentes con las conveniencias empresariales: los recursos del Plan nacional de resistencia y resiliencia (PNRR)[26];

[22] Siempre Tullini, *cit.*, pp. 366-367.

[23] V. Corazza, *Il lavoro senza mobilità: smart working e geografia sociale nel post-pandemia*, en *LD*, 2022, 2, p. 431-448.

[24] Centamore, *Una just transition per il diritto del lavoro*, en *LD*, 2022, 1, pp. 129-146.

[25] Además de Centamore, recién citado, v. Carta, *La transizione ecologica nelle relazioni sindacali*, en *LD*, 2022, 2, p. 311-334.

[26] Sobre todo, v. Martelloni, *I benefici condizionali come tecniche promozionali del Green New Deal*, en *LD*, 2022, 2, pp. 293-310.

las llamadas sociedades *benefit* (SB) – introducidas en Italia ya en 2016 y valorizadas recientemente también en la dimensión europea –, que se caracterizan porque persiguen no solo el beneficio sino también "una o más finalidades de beneficio común", y que van más allá tanto de la mera responsabilidad social de la empresa, como del régimen especial del "tercer sector"[27]; y los modelos organizativos certificados, susceptibles de ser integrados a la vista de la prevención tanto de los daños al trabajo como de los daños medioambientales[28].

5. *¿Cuáles son, en cambio, las sombras más oscuras (simétricas a las zonas de luz)?*

Como ya he dicho, casi de forma simétrica a las zonas de luz se encuentran varias criticidades. Puede resultar útil reseñarlas, por seguir componiendo, así, una suerte de guía de lectura, integrada y crítica, de los distintos ensayos contenidos en los dos fascículos de *Lavoro e diritto*.

a) Principios y normas internacionales aparecen sin embargo caracterizadas por excesivas vaguedades e inefectividades, sobre todo si se las enfrenta con la creciente gravedad medioambiental de la globalización económica, y que hace poco se han puesto en evidencia por las deslocalizaciones desertificantes[29] y por la recarbonización inducida por la economía de guerra[30].

b) La interpretación y aplicación de las nuevas normas de la Constitución italiana no es una tarea ágil y lineal. Mientras que el nuevo art. 9 parece cada vez más sencillo y directo a la hora de ampliar el objeto de las tutelas constitucionales, el art. 41 es muy ambiguo, ya que no aclara demasiado si de la nueva formulación se deriva "solo" una prohibición reforzada de no provocar daños medioambientales, o también un deber que esté equipado jurídicamente de alguna concreción a la hora de tutelar a las generaciones futuras para la mejora del ecosistema[31]. Yo, si bien sea consciente de la complejidad de esta problemática, y de la sugestión que produce, procuraría ser prudente a la hora de evocar derechos para subjetividades no imputables inmediata-

[27] V. siempre Tullini, *cit.*, p. 367 ss.
[28] V. sobre todo Pascucci, *cit.*, p. 343 ss., y Buoso, *cit.*, p. 280 ss.
[29] V. el ensayo de Bin, *cit.*
[30] V. sobre todo Baylos, *cit.*, pp. 250-251.
[31] El asunto es afrontado, sintéticamente pero de manera eficaz, por Bin, *cit.*

mente – como las nuevas generaciones –, y daría preferencia a los deberes de las comunidades presentes y a las consecuentes responsabilidades institucionales. Además, un exceso de entusiasmo hacia la importancia jurídica del ecosistema a nivel constitucional puede producir nuevas "asimetrías reguladoras", llevando a imaginar leyes orgánicas para el medioambiente, pero no para el trabajo, cuya protección quedaría adjudicada a una tradicional (pero no por ello garantizada) "función política del trabajo… eje alrededor del cual gira el modelo constitucional"[32].

c) Las zonas de luz del aparato administrativo, ya señaladas, se ven oscurecidas por innumerables sombras. Para empezar, las sombras que tienen que ver con la propia disciplina del personal y de las profesionalidades más elevadas del sector, en donde se cruzan elecciones discutibles de la contratación colectiva a las que ciertas interpretaciones muy rígidas de la jurisprudencia administrativa (sobre la integración y los tratamientos económico-normativos de profesionalidades técnicas que son cruciales para hacer funcionar los órganos competentes) vuelven totalmente absurdas[33]. En segundo lugar, casos dramáticos, como el ILVA de Taranto, han puesto en evidencia la debilidad de un cuadro normativo de protección del medioambiente en abstracto, del cual, no obstante, emergen conflictos paralizantes. Es emblemático aquel entre la fundamental Autorización integral ambiental (AIA), de competencia gubernamental, y las ordenanzas del alcalde para proteger la salud pública: un conflicto que ha provocado confusión e irresolución también respecto a las recientes largas controversias ante jueces de todo orden y rango[34]. Por el contrario, habría merecido alguna consideración específica la gran inversión que en Italia se está diseñando para las llamadas *smart cities*[35], hacia las cuales el PNRR también parece apuntar con el fin de aumentar el atractivo de los territorios y la organización de las comunidades. Al nivel de los reajustes jurídico-institucionales se perfila una gran sombra: el desarrollo del llamado regionalismo diferenciado, que prevé proyectos de reforma en estado avan-

[32] V. de nuevo, específicamente, Bin, *cit.*, pp. 125-126.

[33] Todo está magistralmente analizado en el ensayo de Pinto, *cit.*

[34] Todo está bien descrito en el ensayo de Laforgia, «*Se Taranto è l'Italia»: il caso Ilva*, en *LD*, 2022, 1, pp. 29-52.

[35] Tomando una de las muchas definiciones que se manejan, la *smart city* es una ciudad en la que las inversiones en capital humano y social, y en infraestructuras para las nuevas comunicaciones, alimentan un desarrollo económico sostenible, garantizan una calidad de vida elevada, con una sabia gestión de los recursos naturales, recurriendo a una *governance* participativa.

zado que corren el riesgo de debilitar, precisamente, las regiones del Sur, en las que el trabajo y el medioambiente deberían ser tutelados por instituciones más fuertes[36]. Surge, así, la gran responsabilidad de la clase política, que parece verse afectada, por lo menos en Italia, por una grave falta de preparación y una inadecuación para afrontar con equilibrio y una prospectiva más amplia el conjunto de los problemas prospectados.

d) Respecto al cuadro normativo, ya el art. 2087 cod. civ. – que aparece como uno de los mayores puntos de fuerza – muestra sin duda una significativa e interesante evolución, pero con conceptos y lógicas en su desarrollo que constriñen su plena operatividad. Por ejemplo, si salud y medioambiente son colocados, de manera compacta e indiferenciada, entre los derechos fundamentales, el rol de la contratación colectiva corre el riesgo de ser reajustado y de verse sobrepasado por la ley, a pesar de que ofrece grandes capacidades para modernizar y mantener unidas las tutelas contra los "riesgos ubicuitarios"[37]. La alternativa al binomio protector ley/contrato colectivo – previsto incluso en la normativa sobre la seguridad del trabajo – está constituido por un refuerzo de los circuitos participativos de sindicatos y trabajadores en las decisiones empresariales, sin embargo este refuerzo anda bien lejos de verse concretado de una forma y en cantidad suficientes como para originar un auténtico cambio de sistema. Por fin, a pesar de las potencialidades que he indicado, la instrumentalización del d.lgs. n. 81/08 evoluciona con mucha dificultad en la práctica aplicativa, a la hora de englobar de nuevo la prevención de los riesgos medioambientales[38].

e) También el renovado art. 2086 cod. civ., bien mirado, no amplía con claridad y holgura las obligaciones programatorias y prevencionistas que tienen las empresas, sino que solo configura "el deber de instituir un ajuste organizativo, administrativo y contable adecuado a las dimensiones de la empresa… así como de impulsar sin demora la adopción y la actuación de uno de los instrumentos previstos por el ordenamiento para la superación de la crisis y la recuperación de la continuidad de empresa". Estos deberes están previstos de forma limitada para el emprendedor "que opere de forma societaria o colectiva", además de que el ajuste debe ser adecuado *per tabulas* "en función de la detección tempestiva de la crisis de empresa y de la pérdida

[36] Aquí parece un poco optimista la valoración de Corazza, *cit.*

[37] El término es de Pascucci, *cit.*, p. 341. Esta temática es abordada sobre todo por Natullo, *La gestione della pandemia nei luoghi di lavoro*, en *LD*, 2022, 1, p. 88 ss.

[38] Aquí resulta emblemático el caso Viareggio, tratado en el ensayo de Buoso, *cit.*

de la continuidad empresarial". Si se considera que la renovación es consecuente con la aprobación de la reforma del código de la crisis de empresa y de la insolvencia (d.lgs. n. 14/19, que no entró plenamente en vigor hasta julio de 2022), parece difícil recabar un dato normativo que pueda sustentar lo que anteriormente se denominó "tipo ideal de la empresa integral". Sombras similares se condensan también sobre otros perfiles de la disciplina de empresa, como es el caso de las sociedades *benefit*, a cuyo respecto no se prevé ningún rol específico para los sindicatos[39]; o el del enriquecimiento de la sensibilidad social que se encomienda a reglas (*debidas diligencias*) y a organismos (comités de empresa europeos) presentes sobre todo en las grandes multinacionales, y a los que aún les queda lejos asumir cierta importancia general en la vida y en las decisiones de las empresas[40].

f) También el papel del sindicato y de las relaciones sindicales respecto a la protección del medioambiente está evolucionando, a pesar de miles de dificultades. Resultan optimistas las perspectivas que pretenderían asignar a los sujetos colectivos una función impulsora de la protección del medioambiente[41]. El instrumento analítico que, sobre la base de las reflexiones en materia de *just transition*, propone Cinzia Carta en el ensayo ya citado, está más articulado, y se basa en tres modelos de relaciones industriales (neoliberal, ecológico-liberal, estructuralmente transformador[42]): se puede estar de acuerdo con ella a la hora de considerar que el tercer modelo, que es el que resulta más incisivo a la hora de encauzar la mercantilización doble, está bien lejos de hacerse realidad. En especial, el papel que la contratación colectiva puede llegar a desempeñar en Italia parece ser bastante limitado, sobre todo si se ve obligado a basarse en recursos autónomos estando en un escenario sistemático en el que, para las empresas, siempre es posible escoger la vía de escape de la contratación "pirata".Y tampoco se puede pensar en una fiscalización fisiológica de cada uno de los tratamientos contractuales más onerosos para las empresas. Será mejor, por lo tanto, imaginar una suerte de

[39] V. siempre TULLINI, *cit.*, p. 368.

[40] BAYLOS, *cit.*Y, antes, LOFFREDO, *Democrazia industriale e sustainable corporate governance: i soliti sospetti*, en *RGL*, 2021, I, p. 601 ss.

[41] V., para ulteriores consdieraciones, ZOPPOLI L., *Rappresentanza collettiva e mercati transizionali del lavoro: le prospettive di cambiamento*, en *Flexicurity e mercati transizionali del lavoro*, edición de CIUCCIOVINO, GAROFALO D., SARTORI, TIRABOSCHI, TROJSI, ZOPPOLI L., Adapt University press, 2021.

[42] CARTA, *cit.*, p. 313.

"control público", de alta competencia técnica, de la sostenibilidad medioambiental de la contratación colectiva, que sea ejercido por alguna agencia en defensa del interés general para la salvaguardia del ecosistema. Desde luego, a corto plazo, podría parecer que reduciría las libertades sindicales, pero debería ser estructurado de tal manera que impulsase la práctica de una cultura sindical medioambientalista para las dos partes sociales.

g) También el PNRR – que, como ya se ha dicho, vehicula grandes recursos y otras tantas esperanzas – se presta a valoraciones divergentes. Hay quien señala su "frigidez social"[43], mientras que otros subrayan las potencialidades de las conocidas como condicionalidades en términos de calidad del empleo, garantizada por las empresas que participan en concursos públicos financiados con los recursos del PNRR[44]. En estos análisis no se presta mucha atención a la instrumentalización que controla el riesgo de degeneraciones criminales, siempre al acecho en cuanto se manejan recursos públicos considerables, y que es un factor ulterior de contaminación también ecológica.

6. *¿Cuál puede ser el camino para iluminar más zonas, reducir las sombras y hacen emerger las* stepping stones?

Al hacer esta pregunta habría que preparase para realizar un enorme esfuerzo propositivo. Por supuesto, para el objetivo de este texto, no se puede pretender aportar mucho más que alguna indicación general y metodológica, debiendo siempre espigar entre los ensayos de los fascículos consultados.

Parece fundamental aquí considerar la "sostenibilidad medioambiental", tomando distancias respecto al viejo paradigma de la centralidad de la empresa capitalista "tradicional", si no se quiere caer en una contradicción lógica radicalmente incapacitante. El sistema económico de mercado y la protección medioambiental pueden coexistir solo si se afirma concretamente la idea de la "empresa integral", a la que se refiere sobre todo Patrizia Tullini (si bien con algún exceso de optimismo en relación a su configuración normativa actual).

Ponerse las gafas de la sostenibilidad ambiental significa, entonces, salir

[43] Martelloni, *cit.*, p. 301, quien, sin embargo, valora de manera moderadamente positiva la novedad de los llamados contratos de desarrollo, ya existentes, pero valorados en 2022 (v. p. 303 ss.).

[44] Tullini, *cit.*, pp. 366 and 367.

de la lógica económica de la *short-time performance* que ha caracterizado hasta ahora a la empresa financiarizada y globalizada, pero que no consiente rebaja alguna de la presión "temporal". De hecho, el Antropoceno avanza a un ritmo inexorable, prefigurando catástrofes ecológicas inminentes. Es como si hubiese que sustituir la "época del turbo-capitalismo" por una nueva presión, en donde el sistema en su totalidad, no solo el económico, tiene que rendir cuentas ante la perspectiva evidente del "fin del tiempo" para la salvación ecológica del planeta. En resumen, nos hallamos totalmente inmersos en el "tiempo infernal" del que hablaba Walter Benjamin, recuperado oportunamente por Antonio Baylos.

Asumir estos dos factores tiene consecuencias significativas en términos de políticas del derecho en general y laborales en particular:

a) es necesario ampliar en todos los sentidos la capacidad del sistema para formular análisis preventivos del impacto socio-ambiental de las actividades económicas;

b) es necesario reforzar las reglas y los procedimientos para equilibrar rápidamente y dinámicamente los intereses y los derechos, y hacer que los balances concretos sean, en primer lugar, jurídicamente sólidos.

Por desgracia, ciertas experiencias recientes (véase el caso ILVA en Italia) han puesto duramente a prueba incluso palabras y conceptos que son cruciales para el jurista, como "balance". Técnicas reguladoras e interpretaciones sofisticadas y valiosas corren, así, el riesgo de quedar sepultadas bajo casos empresariales y judiciales, que incluso puede que sean importantes, y sobrepasadas por la urgencia intelectual y política de tener que afirmar la prioridad de valores, principios y tutelas en el tema medioambiental. Yo creo, sin embargo, junto a muchos de los autores de los dos fascículos de *Lavoro e diritto*, que *adaptation* y *mitigation* son las directrices para el avance de la regulación, siempre y cuando sean compartidas y practicadas de manera tenaz y duradera, previniendo con rigor la manifestación de elecciones productivas, organizativas y de gestión que sean claramente dañinas tanto para el medioambiente como para el trabajo digno.

A lo largo de estas directrices se va prefigurando la creciente importancia de administraciones públicas, sindicatos y jueces. Las empresas – l as tradicionales, sobre todo si son medio-pequeñas – son esencialmente, por desgracia, el terreno por abonar, sin desde luego dejar que se extingan y, es más, impulsando una evolución rápida hacia otros modelos. Es necesario un regulador intransigente pero sofisticado, dúctil y ejemplar a la hora de promo-

ver ciertos comportamientos. Y, sobre todo, con la capacidad de gestionar con rapidez una transformación profunda de sistemas complejos a través de una auténtica participación coral.

Un enfoque sistemático sobre la perspectiva reguladora es más que nunca necesario, si no queremos pretender "salvarnos sin ton ni son"[45]. Pero es un método que, antes que para salvaguardar el sistema preexistente frente a los nuevos problemas, sirve para edificar un sistema que (desafortunadamente) aún no existe.

El nuevo sistema debería basarse en:

- la integración orgánica de valores e instrumentos que están presentes, o que se encuentren en una fase de experimentación avanzada, en los sistemas de protección del medioambiente y del trabajo;

- el recurso a toda la instrumentación clásica del derecho laboral (empezando por la norma inderogable, por la contratación, por los modelos organizativos aseverados y verificados), que debe ser reforzada en tanto que capacidad reguladora;

- el incremento de los sujetos, la capacidad y la profesionalidad de los análisis preventivos de los impactos ambientales, con la implicación indispensable de ciudadanos, consumidores y usuarios;

- el mantenimiento y la selección de competencias integradas y específicas en los tres ambientes institucionales sobre los que se apoya el deber de construir un sistema de tutelas integradas: administradores, sindicatos, jueces.

La política, por lo menos en Italia, parece sufrir un dramático atraso, en especial en lo que se refiere a ordenar las prioridades concretas y cotidianas. La "tierra", por lo demás, no es un sujeto político fuerte, ni social ni electoralmente. Se vuelve un sujeto político fuerte en los momentos de emergencia, y, por mucho que se vean próximos, los *shocks* ecológicos no son todavía suficientes como para decidir la agenda política. Por otro lado, también el trabajo es un sujeto políticamente debilitado[46]. Por lo tanto, no hay motivos para tener demasiada confianza en la capacidad operativa de la política a la hora de encauzar la doble mercantilización, que pone en peligro tanto al hombre como a su ambiente natural.

[45] Retomando el título de la última novela (editada por Einaudi) de Paolo Colagrande.

[46] Por último, v. el buen análisis de MAURO, *L'Italia tradita che ogni giorno muore sul lavoro*, en *la Repubblica*, 8 de julio de 2022.

Por eso, estudiosos, intelectuales y formadores deberán desempeñar un papel de primer orden. No tanto para alimentar las desconfianzas e iniciar nuevas y ardorosas batallas en las que el espíritu "de facción" prevalezca sobre el interés común por resolver problemas epocales. Más bien, para alimentar una inteligencia colectiva cuya ausencia, actualmente, se hace notar de una manera dramática, aunque se vea por suerte interrumpida por valiosas iniciativas editoriales, como esta de los dos magníficos fascículos de *Lavoro e diritto*.

Palabras clave

Medioambiente, sostenibilidad, protección del trabajo, respuestas reguladoras en el derecho laboral, *adaptation* y *mitigation*.

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abbreviations

The list of abbreviations used in this journal can be consulted on the website www.ddllmm.eu/dlm-int/.

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