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Focus on Social dialogue

Tiziano Treu

Social Dialogue in a Time of Societal Transformation*

1. This year conference "Social dialogue in a time of a societal transformation" deals with a topic very close to the interests of Marco Biagi. Marco not only dedicated to it important studies which are still worth reading. He contributed to organise and to promote social dialogue during the years in which he was consultant to the European Commission, and then in Italy when he gave his precious advice to the ministry of employment.

The decision of the Fondazione Biagi to select this topic is very timely for quite good reasons.

One: social dialogue is a fundamental institution of collective labour relations as they are practiced in many developed countries. It is an essential part of the social model since it aims at promoting and improving by consensus the decision-making process in socio-economic affairs at different levels, international national and local.

As such it has been endorsed by many documents of the governing bodies of the ILO (beginning with the Decent Work Agenda) and of the European Union (lately by the Council recommendation on strengthening social dialogue of August 2023).

Two: the actual practice of social dialogue, after decades of expansion, is meeting with growing obstacles which may anticipate a decline.

* The editorial is based on the presentation of Professor Tiziano Treu at the XXI International Conference in Commemoration of Professor Marco Biagi "Social Dialogue in a Time of Societal Transformation", held at the Marco Biagi Foundation (Modena, Italy), on 18-19 March 2024.

The indicators of its critical conditions are analysed in many of the papers presented in this conference: general reduction of its frequency and diffusion, declining coverage of collective bargaining, both national and decentralised, which leaves without protection groups and types of workers mostly in need (atypical and precarious , self-employed, people working in the informal economy and in very small enterprises), reduced impact of these consensual practices on the actual conditions of employment, as shown by the diffusion of low salaries and by the reduction of the labour share relative to the share of profits and rents.

The declining effectiveness of these form of collective action has reduced the capacity, which was documented in the past, to promote the cause of labour *vis a vis* the powers of the companies and also to have voice and participate in the public arena.

The signs of difficulty are of different intensity in the various countries and sectors of the economy; but the great transformations of the last years have contributed to increase the obstacles to collective action and social dialogue, in general and in particular in the new environment of the digital economy.

2. The papers submitted to this conference analyse the reasons of the difficulties of social dialogue in the various countries; but, as it is common in our conferences, they also try to give answers to the problems and to submit proposals on how to reverse the present negative trends.

I will give my contribution, by underlying some issues which seems to be particularly relevant for our discussion.

My first assumption is that minor adjustments of past practices are not sufficient to relaunch social dialogue, because the reasons of its crisis go back to structural trends present in the transformation of our society. These trends are often analysed but not always fully understood in their implications nor taken into account.

The two transitions, digital and ecological, have accelerated previous structural economic and social changes, and altered the very material basis on which labor relations, individual and collective, have been built in the past century.

The processes of disintermediation and individualisation promoted by convergent factors, technological, ideological and cultural, have weakened the traditional basis of social cohesion and in parallel.

The established systems of collective representation of the workers.

A second assumption: as in the past the growth and strength of the social representation systems have been promoted by the combined influence of the social actors, trade unions in the first place, and of the normative and political support of democratic governments, now a similar convergent action of social parties and of public institutions, national and international, is necessary to renovate collective action and social dialogue.

Indeed, both public and private actors are now required to prove a commitment and capacity of innovation greater than in the past in order to meet the radical challenges of the present epochal transitions and to face the obstacles of a hostile environment.

The very relationship between public and private action and between their modes of intervention will have to be reconsidered. Both forms of regulations are called to intervene in structures and relations different from those prevailing in the "solid world" of Fordism, that are more fluid, if not virtual, more volatile and uncertain.

Public interventions will have to rely less on rigid and static regulations and more on principles, flexible frameworks and procedures.

The social parties will have to show their capacity to adapt their consensual regulation not only to the changing and diversified characters of the present work but also to the growing expectation of individuals to receive more personalised treatments and recognition.

3. The importance of such a convergent commitment of private actors and public institutions is stressed by our papers and generally acknowledged by official documents, international and European.

But the necessity of reframing their relations as hinted above is less perceived, and so are the implications of these assumptions on the actual policy making.

The communication of the European Commission mentioned at the beginning, is no exception, because it does not contain binding provisions and also because the proposed support to social dialogue is rather weak.

The social parties are not less challenged to innovate their practices and strategies, resisting to the inertia of the business as usual. The labour unions are in a most difficult stance, because they are still conditioned by a constituency composed mostly by middle aged and old workers, who come from

past experience, while attracting workers of the new generation is as much an obvious necessity as an arduous target.

Equally difficult is for the unions to enlarge the scope of their constituency to the multiform and unknown world of the autonomous workers, and even more to the people working in the informal, national and immigrants.

Innovating their strategies in line with the new challenges also implies entering unknown territories.

The digital economy demands not only different skills but also categories and languages distant from those received from the industrial tradition.

The ecological transition is even more alien from the economy of the past century which was based on carbon and managed without any concern for the consumption of natural resources.

Integrating the imperatives of climate change in the employment practices is not less difficult than greening the enterprises, as the ILO demands.

The difficulty is well documented by the strong reactions of the social parties to the European targets and the timing of ecological sustainability, in sectors ranging from automotive and steel to agriculture.

4. In order to exert effectively their influence through dialogue and bargaining the union leaders and members will have to renew not only their basic professional skills, but also in depth their culture and attitudes.

This is true particularly if they want to tackle through bargaining the issues and areas most impacted by the transitions and more exposed to international competition. The urgency of these issues is daily reminded to both unions and employers by thousands of workers who demand concrete answers.

The employers and managers are not less affected, due to social pressure and also because they are required by the legislations national and European to show concrete signs of social responsibility. The Corporate sustainability reporting directive (CSRD) has imposed to the enterprises wide ranging obligations to report on the impact of their activities and of that of their supply chain on environmental and social sustainability.

The proposed directive "Due diligence" will extend the obligations of the same enterprises to monitor the risks of their activities for both human

and environmental rights and to adopt measures necessary to prevent and mitigate these risks.

Here too a radical change of strategies and attitudes is demanded to meet these new obligations, whether the employers and managers intend to perform these tasks through unilateral initiative or by seeking consensus and support of the workers and their representatives.

In all these issues the public institutions, national and international, have a major role to play, whose importance is widely recognised after the disillusionment consequent to the past practices of deregulation and disintermediation.

Here too the challenge is to implement adequate public policies and measures consistent with the declarations in favour of social dialogue and collective bargaining.

The papers presented in the seminar mentioned quite a few examples of measures aimed at promoting collective actions and dialogue in various forms.

A series of measures consists in providing legal safeguards for the joint initiatives of the social parties and in some cases obligations to bargain on various issues (like the French law of 17 August 2017).

This is particularly true in the areas most affected by the two transitions, namely the integration of digital technology in the workplace and the control on the use of artificial intelligence, the prevention of new risks for the health and safety of the workers, the mitigation of damages to the environment.

Similar attempts are envisaged and promoted by the unions, in agreement with employer's associations, aimed at reinforcing the traditional rights to codetermination and to adapt them to operate in the new context of fluid enterprises and of international supply chains.

Regulations and guidelines have been introduced by the European Union which extend the right to information and consultation of workers representatives with the view of protecting the workers privacy in the world of big data, through the rules of the General data protection regulation (GDPR), of improving the conditions of platform workers in the proposed directive to be approved, and of reinforcing the instruments of workers representatives necessary to deal with the "algorithmic management".

These measures contribute to support the functioning of social dialogue and the influence of labour unions in the digital workplace.

But their approval has met with strong opposition by the employers' associations and by the government of some member states, which have contributed to water down the most effective regulations so to reduce their impact.

The rights of workers representatives has been often restricted to simple information with step backwards and renounce to promote effective consultation and participation.

5. More needs to be done to support effective social dialogue particularly in the most critical areas for the protection and welfare of workers: the new realities of digital workplaces dominated by the artificial intelligence , the sectors and enterprises directly affected by the ecological transition and by the consequent displacement of workers, at the other extreme the workers still excluded from collective action ,and often from normative protection, like many self-employed, atypical and irregular workers, persons working in the informal economy.

An effective support to social dialogue in the context of the new economy requires more than isolated measures on specific issues. Those approved so far need not only to be strengthened but also consolidated and integrated in a systematic framework, legal and contractual.

In conclusion I want to recall the attention to a further condition for the effectiveness of social dialogue, which has been recalled by the important report of the ILO Global commission on the future of work.

I refer to the need to invest more in all the institutions of work: on one side the collective social organisations, on the other the public administrations dedicated to the employment services and to the workers education and training, the various instruments and measures which form the universal welfare, and finally the defence and promotion of fundamental rights, which are essential not only for personal dignity but also for allowing to the individuals to participate to collective action and to civic life.

Edoardo Ales

Tracing the Social Sustainability Discourse within EU Law: the Success of the "Labour-Rights-as-Human-Rights" Approach*

Contents: **1**. Introduction. **2**. Financial and Non-financial Statements: point of Origin. **3.** From Non-financial Reporting to the Sustainability Discourse: the Environmental (E) and Social (S) Factors. **4.** The Sustainability Discourse and the Financial Sector: taking Human Rights (HR) on Board. **5**. Facilitating Sustainable Investment by Qualifying Economic Activities as Sustainable. **6**. The (E)SHR Sustainability Discourse and Consumers Protection against Greenwashing. **7.** The Sustainability Discourse and Corporate Sustainability Due Diligence: a Misleading Title? **8.** The very Notion of SHR Sustainability: a Conclusive Reflection on the SHR Sustainable Undertaking.

1. *Introduction*

This essay aims at tracing the tortuous path of the social sustainability discourse[1] within EU Law[2] against the background of the integrated social-green transition[3], originating from a different awareness of their inextricable entanglement, fed by a renewed interest for human rights, which seem to prevail as interpretational code of the employment/social issues, above all in a globalized economy. Actually, undertakings and financial operators are confronted with a growing engagement of the EU in favor of individuals as

* This essay will be part of the *Liber Amicorum* offerend to Valerio Speziale.

[1] Ly, Cope, *New Conceptual Model of Social Sustainability: Review from Past Concepts and Ideas*, in *IJERPH*, 2023, 20, p. 5350.

[2] McGuinn, Fries-Tersch, Jones, Crepaldi, Masso, Kadarik, Samek Lodovici, Drufuca, Gancheva, Geny, *Social Sustainability. Concepts and Benchmarks*, 2020, http://www.europarl.europa.eu/supporting-analyses.

[3] Ales, *Never too Late? The Integrated EU Social-Green Commitment towards a Just Transition*, in Ales, Addabbo, Curzi, Fabbri, Senatori (eds.), *Green Transition and the Quality of Work. Implications Linkages Perspectives*, Palgrave, forthcoming.

members of the society, workers, investors and costumers, whose social, employment & human rights shall be protected and guaranteed. At the same time, it is apparent that undertakings and financial operators play a key role in pursuing environmental and social objectives when they conduct sustainable economic activities and investments. An interdependence that, if properly regulated, may activate a virtuous circle to the advantage of the whole humankind.

2. *Financial and Non-financial Statements: point of Origin*

Adopted on the juridical basis of Article 50 TFEU[4], Directive 2013/34[5] introduced coordination measures of national provisions regarding the *annual financial statement*, the *management report* and the *corporate governance statement* of public and private companies, limited by shares or by guarantee, as well as for partnerships, limited partnerships and unlimited companies. Such intervention was triggered by the Commission's communication *Single Market Act*[6], of 2011 and referred to the presentation, the contents, the measurement bases and the publication of those documents, with the view of protecting shareholders, members of the undertaking and third parties, due to the limited liability of such public and private entities.

In particular, according to the Dir. 2013/34, the *annual financial statement* shall provide information to the investors, give account of past transactions and enhance corporate governance, through balance sheets, profits and losses accounts and notes, which shall provide a true and fair view of assets, liabilities, financial position, profit and losses of the undertaking. The *management report*, at turn, shall provide a fair review of developments and performance of undertaking's business, describing its principal risks and uncertainties, including information on environmental and social aspects but also employees matters (Recital 26 and Article 19(1)). This was the first, feeble attempt towards the accounting of non-financial key performance indicators (KPI).

[4] Freedom of establishment.

[5] Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (Accounting Directive).

[6] COM(2011) 206 final 13.4.2011, *Single Market Act. Twelve levers to boost growth and strengthen confidence.*

On the other hand, inspired by the idea of disclosure, Directive 2014/95[7], also adopted on the juridical basis of Article 50 TFEU and triggered by the *Single Market Act*, focused on the provision of non-financial and diversity information in order to rise to a similar level the transparency of social and environmental commitments of undertakings in all sectors, within the framework of a new definition of Corporate Social Responsibility (CSR) in terms of "responsibility of enterprises for their impact on society", as stated by the Commission's communication *A renewed EU strategy 2011-14 for Corporate Social Responsibility*[8]. Against that trend, in 2013, the European Parliament adopted two resolutions emphasizing the importance of business disclosing non-financial information, i.e., on sustainability such as social and environmental factors, relegating CSR in the background.

Consistently, according to Directive 2014/95, which amends Directive 2013/34, *non-financial statements* shall refer at least to environmental, social and employee related, respect for human rights, anticorruption and antibribery matters (Recital 6). Such a statement is due by public-interest entities, meaning undertakings falling within the scope of Directive 2013/34 which are (a) governed by the law of a Member State and whose transferable securities are admitted to trading on a regulated market of any Member States; (b) credit institutions or (c) insurance undertakings, both in the meaning of EU Law; (d) designated as such by Member States, for instance because of the nature of their business, their size or the number of their employees (Article 19a).

Those public-interest entities, which exceeds the average number of 500 employees during the financial year, shall include in the *management report* a *non-financial statement*, which shall contain information necessary to understand undertaking's development, performance, position and impact of its activity at least on the just mentioned matters. The *non-financial statement* shall include: (a) a brief description of the undertaking's business model; (b) a description of the policies pursued by the undertaking in relation to those matters, including *due diligence processes* implemented; (c) the outcome of those policies; (d) the *principal risks* related to those matters linked to the under-

[7] Directive 2014/95/EU of 22 October 2014, as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Non-financial Reporting Directive).

[8] COM(2011) 681 final 25.10.2011. Se, in a broad perspective, LAZZERONI, *Responsabilità sociale d'impresa 2.0 e sostenibilità digitale. Una lettura giuslavoristica*, Firenze-Siena, 2024.

taking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause *adverse impacts in those areas*, and how the undertaking manages those risks; (e) other non-financial key performance indicators relevant to the particular business.

To be emphasized, as it is in the text, a first reference, within EU secondary Law, to *due diligence processes*, *principal risks* and *adverse impacts* on environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, taking the center stage of *non-financial disclosure*, echoing the OECD *Guidelines for Multinational Enterprises* (1976), the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (1977) and the *UN Guiding Principles on Business and Human Rights* (2011). We will come back on this at the end of the essay.

If the undertaking does not pursue policies in relation to one or more of those matters, the *non-financial statement* shall provide a clear and reasoned explanation for not doing so. Member States may allow information relating to impending developments or matters in the course of negotiation to be omitted in exceptional cases where, in the duly justified opinion of undertakings' governing bodies, the disclosure of such information would be seriously prejudicial to its commercial position, provided that such omission does not prevent a fair and balanced understanding of the undertaking's condition concerning those matters.

Public-interest entities, which exceeds 500 employees are obliged, already under Directive 2013/34 to include a *corporate governance statement* in their management report, as a specific section. According to Dir. 2014/95, the *corporate governance statement* shall contain a description of the *diversity policy* applied in relation to the undertaking's governance bodies with regard to aspects such as, for instance, age, gender, or educational and professional backgrounds, the objectives of that diversity policy, how it has been implemented and the results in the reporting period. If no such policy is applied, the statement shall contain an explanation as to why this is the case (Article 20 (1)(g)).

Article 2 Dir. 2014/95 commits the Commission to prepare *non-binding guidelines* on methodology for reporting non-financial information, including non-financial KPI, general and sectoral, with a view to facilitating relevant, useful and comparable disclosure of non-financial information by undertakings. In doing so, the Commission shall consult relevant stakeholders.

Consistently, in 2017, the Commission adopted the *Guidelines on non-fi-*

nancial reporting (methodology for reporting non-financial information)[9]. In 2019, the *Supplement on reporting climate-related information*[10], which testifies an enhanced interest for the environmental matters. More in general, the 2017 Guidelines are deeply influenced by the 2030 Agenda adopted by the General Assembly of the United Nations in September 2015 and by the Paris Agreement of the same year, to which the Commission corresponded in 2016 publishing its Communication *The next steps for a sustainable European future*[11].

3. *From Non-financial Reporting to the Sustainability Discourse: the Environmental (E) and Social (S) Factors*

Thus, the non-financial reporting discourse started to be superseded by the sustainability one, as confirmed, some years later, by Directive 2022/2464[12], adopted on the combined juridical base of Article 50 and 114 TFEU, the latter adding the approximation of laws perspective to freedom of establishment.

Before that, however the Commission issued the *Action plan on financing sustainable growth*[13] setting measures to reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth, manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues, as well as foster transparency and long-termism in financial and economic activity. According to the Commission, the disclosure of relevant, comparable and reliable sustainability information is a prerequisite for meeting those objectives. Implementing the *Action Plan*, the Parliament and the Council have adopted, among the others, Regulation (EU) 2019/2088[14], governing disclosure of sustainability information to end

[9] Communication from the Commission 2017/C 215/01.

[10] Communication from the Commission 2019/C 209/01.

[11] COM(2016) 739 final 22.11.2016, *Next steps for a sustainable European future. European action for sustainability*. See, in a broad perspective, Mucciarelli, *Perseguire un diritto societario «sostenibile»: un obiettivo sincero?*, in *RGL*, 2021, I, p. 520.

[12] Directive (EU) 2022/2464 of 14 December 2022, as regards corporate sustainability reporting (Corporate Sustainability Reporting Directive (CSRD)).

[13] COM(2018) 97 final 8.03.2018.

[14] Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector (Sustainable Finance Disclosure Regulation (SFDR)).

investors and asset owners by financial market participants and financial advisers. We will come back on it in a while.

Furthermore, in the *Green Deal*[15], the Commission committed to review the provisions concerning *non-financial reporting* of Dir. 2013/34, in order to develop, as solicited by the Council and the Parliament, within what has been qualified as a *sustainable corporate governance perspective*, a mandatory Union non-financial reporting standard, preferably referred to as *sustainable reporting* on sustainable information.

In the same vein, Dir. 2022/2464 amends Dir. 2013/34, spotlighting the ultimate beneficiaries of its provisions, i.e., individual citizens as savers and costumers, investors but also civil society actors as NGOs and social partners, specifically differentiated from trade unions and workers representatives. The latter shall be adequately informed so to be able to better engage in social dialogue (Recital 9).

On the background of the amendments, one can find the growing investors awareness of the financial implications of climate related risks as well as risks resulting from health and social issues, such as child and/or forced labour. Therefore, points 17 and 18 are added to the definitions list provided by Article 2 Dir. 2013/34, clarifying a very broad notion of "sustainability matters", which includes "sustainability factors" as defined in Article 2 point (24) of Regulation (EU) 2019/2088, meaning, also in this case, environmental, social and human rights, employee, anti-corruption and anti-bribery matters. Where social and human rights, employee matters should have been provided with a clearer meaning.

More significantly, as already mentioned, Dir. 2022/2464 substitutes the Sustainability to the Non-financial reporting as regulated by Article 19a Dir. 2013/34, in the sense of obliging public-interest entities to include in their *management report* information necessary to understand the undertaking's impacts on *sustainability matters*, and, at turn, how sustainability matters affect the undertaking's development, performance and position. This is a virtuous circle that should protect the interests of all the ultimate beneficiaries.

In the same sense, Dir. 2022/2464 details the information to be disclosed in relation to *sustainability matters*: (a) the undertaking's business model and strategy; (b) the time-bound targets; (c) the role, expertise and

[15] COM(2019) 640 final 11.12.2019, *The European Green Deal*.

skills of the governance bodies, as well as the existence of incentive schemes which are offered to them; (d) the undertaking's policies; (f) the *due diligence process* implemented by the undertaking; the principal actual or potential *adverse impacts* connected with the undertaking's own operations and within its value chain, together with actions taken to identify and monitor those impacts; any actions taken by the undertaking to prevent, mitigate, remediate or bring an end to actual or potential *adverse impacts*, and the result of such actions; (g) the *principal risks* to the undertaking, including a description of the undertaking's principal dependencies on those matters, and how the undertaking manages those risks; (h) indicators relevant to the disclosures.

Rather hastily, a par. 5 added to Article 19a by Dir. 2022/2464 provides that the management of the undertaking shall inform the workers' representatives at the appropriate level and discuss with them the relevant information and the means of obtaining and verifying *sustainability information*. The workers' representatives' opinion, apparently stemming from a consultation, shall be communicated, where applicable, to the relevant governance bodies. Sanctions for the violation of that obligation shall imposed by the Member States.

The contents of *corporate governance statement* too are modified by Dir. 2022/2464, in the sense that the description of the diversity policy applied to the undertaking's governance bodies shall refer to gender first and then to other aspects such as, age, disabilities or educational and professional background.

Most significantly, Dir. 2022/2464 adds Chapter 6a to Dir. 2013/34. In particular, Article 29b and 29c commit the Commission to adopt delegated acts supplementing Dir. 2013/34 in order to provide for European Sustainability Reporting Standards (hereinafter ESRS), respectively for public-interest entities and small and medium-sized undertakings. ESRS shall specify the forward-looking, retrospective, qualitative and quantitative information, as appropriate, to be reported by undertakings. They shall, at least, include the information that financial market participants subject to the disclosure obligations of Regulation 2019/2088 need in order to comply with those obligations.

The ESRS shall ensure that information is understandable, relevant, verifiable, comparable and represented in a faithful manner. They shall avoid imposing a disproportionate administrative burden on undertakings, including

by considering, to the greatest extent possible, of the work of global standard-setting initiatives for sustainability reporting.

For the first time in a binding Eu Law instruments, Environmental (E), Social(S) and Governance(G) factors (ESG) are recalled as such, understanding S as including also the Human Rights factors (SHR), which, at turn, encompasses the employment matters.

In fact, as for SHR, ESRS specify the information that undertakings have to disclose on: (i) equal treatment and opportunities, including gender equality and equal pay for work of equal value; training and skills development; the employment and inclusion of people with disabilities; measures against violence and harassment in the workplace; diversity; (ii) working conditions, encompassing secure employment, working time, adequate wages; social dialogue, freedom of association, existence of works councils, collective bargaining, including the proportion of workers covered by collective agreements; workers information, consultation and participation rights; work-life balance; health and safety; (iii) respect for the HR, fundamental freedoms, democratic principles and standards established in the *International Bill of Human Rights*[16] and other core conventions, such as the UN *Convention on the Rights of Persons with Disabilities*, the UN *Declaration on the Rights of Indigenous Peoples*, the ILO *Declaration on Fundamental Principles and Rights at Work* and the ILO fundamental conventions, the *European Convention for the protection of Human Rights*, the *European Social Charter*, and the *Charter of Fundamental Rights of the European Union*.

Quite a lot to be effectively and realistically reported on.

Relevant too for the S(HR) are the information that undertakings have to disclose about G, i.e., (i) the role of the undertaking's governing bodies with regard to *sustainability matters*, and their composition, as well as their expertise and skills in relation to fulfilling their role or the access such bodies have to such expertise and skills; (ii) the main features of the undertaking's internal control and risk management systems, in relation to the sustainability reporting and decision-making process; (iii) business ethics and corporate culture, including anti-corruption and anti-bribery, the protection of whistle-

[16] The Universal Declaration of Human Rights (UDHR), the International Covenant on Economic Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR).

blowers and animal welfare; (iv) activities and commitments of the undertaking related to exerting its political influence, including its lobbying activities; (v) the management and quality of relationships with customers, suppliers and communities affected by the activities of the undertaking, including payment practices, especially with regard to late payment to small and medium-sized undertakings.

A lot more on top of the already quite a lot.

Generously, ESRS shall consider the difficulties that undertakings may encounter in gathering information from actors throughout their value chain, especially from those which are not subject to the *sustainability reporting*, and from suppliers in emerging markets and economies. ESRS shall specify disclosures on value chains that are proportionate and relevant to the capacities and the characteristics of undertakings in value chains, and to the scale and complexity of their activities. ESRS shall not impose disclosures that would require undertakings to obtain information from small and medium-sized undertakings in their value chain that exceeds the information to be disclosed pursuant to the sustainability reporting standards for small and medium-sized undertakings.

When adopting delegated acts on ESRS, the Commission shall, to the greatest extent possible, take account of, among the others: (a) the work of global standard-setting initiatives for sustainability reporting, and existing standards and frameworks for responsible business conduct, corporate social responsibility, and sustainable development; (b) the information that financial market participants need in order to comply with their disclosure obligations laid down in Reg. 2019/2088 and the delegated acts adopted pursuant to that Regulation; (c) the criteria, indicators and methodologies set out in the delegated acts adopted pursuant to Regulation (EU) 2020/852[17], including the Technical Screening Criteria (TSC) and the reporting requirements set out in the delegated act adopted pursuant to that Regulation; (d) the disclosure requirements applicable to benchmark administrators in the benchmark statement and in the benchmark methodology and the minimum standards for the construction of EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks in accordance with Commission Delegated Regulations (EU) 2020/1816, (EU)

[17] Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation).

2020/1817 and (EU) 2020/1818[18]; (g) Directive 2003/87/EC[19]; (h) Regulation (EU) 2021/1119[20].

ESRS have been adopted by Commission Delegated Regulation 2023/2772[21], a 284 pages document supplementing Dir. 2013/34, to be applied from 1 January 2024 for financial years beginning on or after 1 January 2024. The deadline for the adoption of further ESRS specifying the information that undertakings have to report with regard to sustainability matters and the reporting areas specific to the sector in which an undertaking operates has been wisely postponed to 30 June 2026[22].

4. *The Sustainability Discourse and the Financial Sector: taking Human Rights (HR) on Board*

Recalled more than once in the above, Reg. 2019/2088 anticipates Dir. 2022/2464 in opening the sustainability discourse in relation to disclosures in the financial sector. Adopted on the juridical basis of Article 114 TFEU, it is strictly related to the *2030 UN Agenda* and the *Sustainable Development Goals* as well as to the implementation of the *Paris Agreement* as explicated by the Commission in its Communication *European action for sustainability*[23].

Disclosures to end investors in the investment decisions making process

[18] Commission Delegated Regulation (EU) 2020/1816 of 17 July 2020 as regards the explanation in the benchmark statement of how environmental, social and governance factors are reflected in each benchmark provided and published; Commission Delegated Regulation (EU) 2020/1817 of 17 July 2020 as regards the minimum content of the explanation on how environmental, social and governance factors are reflected in the benchmark methodology; Commission Delegated Regulation (EU) 2020/1818 of 17 July 2020 as regards minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks.

[19] Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community.

[20] Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality ('European Climate Law').

[21] Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards.

[22] Directive (EU) 2024/1306 of 29 April 2024 amending Directive 2013/34/EU as regards the time limits for the adoption of sustainability reporting standards for certain sectors and for certain third-country undertakings.

[23] COM(2016) 739 final 22.11.2016.

shall refer to: (i) the integration of *sustainability risks*; (ii) the consideration of *adverse sustainable impact*; (iii) *sustainable investment* objectives; (iv) the promotion of E or SHR characteristics. Such disclosures need the definition of harmonized requirements in order to make the principal-agent relationship between end investors and *financial market participants* or *financial advisors* transparent during the precontractual and ongoing phases.

Against that background, definitions provided by Reg. 2019/2088 are crucial to understand the very purpose of such a legislative instrument.

Sustainability risk means an ES(HR)G event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment (Article 2 point 22).

Sustainable investment means an investment in: (i) an economic activity that contributes to an E objective, as measured, for example, by key resource efficiency indicators; (ii) an economic activity that contributes to a S objective, in particular by tackling inequality or fostering social cohesion, social integration and labour relations; (iii) human capital or economically or socially disadvantaged communities. Such investments can be deemed to be sustainable as long as do not significantly harm any E&SHR objectives and provided that the investee companies follow good G practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance (Article 2 point 17).

Financial market participant (FMP) means: (a) an insurance undertaking which makes available an insurance-based investment product (IBIP); (b) an investment firm which provides portfolio management; (c) an institution for occupational retirement provision (IORP); (d) a manufacturer of a pension product; (e) an alternative investment fund manager (AIFM); (f) a pan-European personal pension product (PEPP) provider; (g) a manager of a qualifying venture capital fund registered under EU Law; (h) a manager of a qualifying social entrepreneurship fund registered under EU Law; (i) a management company of an undertaking for collective investment in transferable securities (UCITS); (j) a credit institution which provides portfolio management (Article 2 point 1).

Financial adviser (FA) means: (a) an insurance intermediary which provides insurance advice with regard to IBIPs; (b) an insurance undertaking which provides insurance advice with regard to IBIPs; (c) a credit institution which provides investment advice; (d) an investment firm which provides investment advice; (e) an AIFM who provides investment advice in accor-

dance with EU Law; or (f) an UCITS which provides investment advice in accordance with EU Law (Article 2 point 11).

Even if Reg. 2019/2088 does not contain a definition of *adverse sustainable impact*, it requires FMPs to publish and maintain on their website a *statement on due diligence policies* with respect to the Principal Adverse Sustainable Impact (PASI) of investments decision on *sustainability factors*, considering their size, the nature and scale of their activities and the types of financial products they make available (Article 4). That statement shall provide information on policies on identification and prioritization of PASIs, actions taken or planned towards them, but also on FMP adherence to responsible business codes of conduct and internationally recognized due diligence and reporting standards as well as on the degree of alignment to the Paris Agreement objectives. This is the so called transparency of PASI at entity level.

Transparency is also required, as for the precontractual disclosure phase, on the integration of *sustainability risks* into FMPs investment decisions and into FA investments or insurance advice as well as on the results of the assessment of the likely impacts of *sustainability risks* on the returns of the financial products FMPs make available (Article 6). Biunivocally, transparency is required in terms of clear and reasoned explanation of whether and how a financial product considers PASIs on *sustainability factors*, to be understood in the meaning already mentioned in the above (Article 7). This is the so called transparency of PASI at financial product level.

The transparency principle in the precontractual disclosure phase applies also to the prominent kinds of financial products considered by Reg. 2019/2088, i.e.: (i) a financial product that promotes, among the others, E or/and SHR characteristics, provided that the investee follows good G practices; (ii) a financial product that has *sustainable investment* objective, provided that an *index* has been designated as a *reference benchmark*. As for the former, information have to be disclosed on how E or/and SHR characteristics are met and if an *index* consistent with those characteristics has been designated as a *reference benchmark*. As for the latter, on how the *designated index* is aligned with that objective and why and how the designated index aligned with that objective differs from a *broad market index*. Where no *index* has been designated as a *reference benchmark*, the information to be disclosed shall include an explanation on how that objective is to be attained (Article 8 and 9).

The transparency principle applies to FMPs and FAs that make available those financial products in terms of a description of the E or/and S characteristics or of the sustainable investment objective and of information on the methodologies used to assess, measure and monitor those characteristics or the impact of the sustainable investments selected for the financial product, including its data sources, screening criteria for the underlying assets and the relevant sustainability indicators used to measure those characteristics or the overall sustainable impact of the financial product (Article 10).

As required by Article 10(2), the Commission, elaborating on a draft provided by the Joint Committee of the European Supervisory Authorities (ESAs), has adopted Regulatory Technical Standards (RTS) in order to detail the content of that information and its presentation requirements[24].

In their periodic reports, FMPs & FAs that make available those financial products shall include, for each one promoting E or/and SHR characteristics, a description of the extent to which those characteristics are met; for each one having *sustainable investment* objective, its overall *sustainability-related impact* by means of relevant *sustainability indicators* or, where an *index* has been designated as a reference benchmark, a comparison between the overall *sustainability-related impact* of the financial product with the impacts of the *designated index* and of a *broad market index* through *sustainability indicators*.

For those purposes, where appropriate, FMPs may use the information in management reports in accordance with Article 19 Dir. 2013/34 or the information in Sustainability reporting in accordance with Article 19a of that Directive.

Member States shall designate competent authorities monitoring the compliance of FMPs and FAs with the requirements mentioned in the above. Those authorities shall have all the supervisory and investigatory powers necessary for the exercise of their functions. No reference is made to sanctioning powers of those authorities (Article 14).

[24] Commission delegated regulation (EU) 2022/1288 of 6 April 2022 on regulatory technical standards, as amended and corrected by Commission Delegated Regulation (EU) 2023/363 of 31 October 2022.

5. *Facilitating Sustainable Investment by Qualifying Economic Activities as Sustainable*

In order to furtherly enhance the sustainability discourse, shortly after Reg. 2019/2088 and before Dir. 2022/2464, the EU Institutions adopted Regulation (EU) 2020/852, establishing a framework to facilitate sustainable investment (so called Taxonomy Regulation), by introducing a unified classification system of sustainable economic activities. The intention was and still is to shift capital flows towards them, underpinned by an understanding of the E sustainability of those activities and investments. Therefore, guidance has to be provided towards activities that qualify as contributing to E objectives (E Sustainable Activities) as well as towards investments that fund these activities (E Sustainable Investments). The same guidance should be provided, at a later stage, for activities that qualify as contributing to S objectives (S Sustainable Activities). That stage is still to come. However, as we will see, the same definitions of E Sustainable Activities and E Sustainable Investments provide some promising elements.

The focus on E Sustainable Activities & Investments is motivated by the desire to fight *greenwashing*, defined as "the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met" (Recital 11). Therefore, the Taxonomy Regulation aims to establish criteria for determining whether an economic activity qualifies as E Sustainable for the purposes of establishing the degree to which an investment is E Sustainable, defined, at turn, as an investment in one or several economic activities that qualify as E sustainable. Against this background, the disclosure obligations attached to the Taxonomy Regulation supplement those laid down by Reg. 2019/2088, in order to enhance transparency and to provide an objective point of comparison by financial market participants to end investors on the proportion of investments that fund E Sustainable Activities.

In the same vein, Reg. 2019/2088 has been amended in order to mandate the ESAs to jointly develop RTS to further specify the details of the content and presentation of the information in relation to the principle of "do no significant harm". RTS should be consistent with the *adverse impacts sustainability indicators* as referred to in Reg. 2019/2088 as well as with the so called *minimum safeguards*, which we will get back later to.

For the purposes of establishing the degree to which an investment is

E Sustainable (E Sustainable Investment), an underlaying economic activity that shall qualify as E Sustainable (E Sustainable Activity) is needed. This happens if: (a) it contributes substantially to one or more of the E objectives defined by the Taxonomy Regulation; (b) does not significantly harm any of those objectives, in accordance with the criteria laid down by the Taxonomy Regulation; (c) is carried out in compliance with the *minimum safeguards* referred to by the Taxonomy Regulation; (d) complies with Technical Screening Criteria (TSC) the Commission is mandated to establish in accordance with the Taxonomy Regulation.

All those criteria shall be used by Member States to qualify an economic activity as E Sustainable when adopting measures providing requirements for FMPs or issuers in respect of financial products or corporate bonds that are made available as E sustainable, in order to guarantee a E Sustainable Investment (Article 4).

Undertakings obliged to non-financial reporting (now, as already illustrated, Sustainability reporting) under Dir. 2013/34 shall include in their relevant statements information on how and to what extent their activities are associated to E Sustainable Activities.

Recalling that the E objectives are climate change mitigation and adaptation, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control, the protection and restoration of biodiversity and ecosystems, our major point of interest is the definition of the very notion of *minimum safeguards*, as a criteria to qualify an activity as E Sustainable.

According to Article 18 Taxonomy Regulation, *minimum safeguards* have to be understood as *procedures* implemented by an undertaking to ensure the alignment of an economic activity, again, with the OECD *Guidelines for Multinational Enterprises*, the UN *Guiding Principles on Business and Human Rights*, the eight (now ten) fundamental conventions identified in the ILO *Declaration on Fundamental Principles and Rights at Work* and the International Bill of Human Rights.

All instruments already referred to in the above.

When implementing the *minimum safeguards*, undertakings shall adhere to the already illustrated principle of 'do no significant harm' referred to in Article 2 point 17 Reg. 2019/2088. In relation to that, the Taxonomy Regulation introduces an Article 2a into Reg. 2019/2088, according to which the ESAs shall, through their Joint Committee, draft RTS detailing content

and presentation of the information in relation to that principle, consistent with those, already mentioned, of the *sustainability indicators* in relation to the PASIs as referred to in Reg. 2019/2088. Drafts have been submitted to the Commission who has adopted RTS by Delegated Regulation 2021/2139[25] and 2023/2486[26].

6. *The (E)SHR Sustainability Discourse and Consumers Protection against Greenwashing*

The E and SHR dimensions lastly come across in the context of the sustainability discourse within Directive (EU) 2024/825[27], which empowers consumers for the green transition through better protection against unfair practices and through better information. Indeed, Dir. 2024/825, to be transposed by Member States by March 2026, amends Directives 2005/29/EC[28] and 2011/83/EU[29], concerning, respectively, unfair business-to-consumer commercial practices in the internal market and, more in general, consumer rights.

Dir. 2024/825 aims to enable better-informed transactional decisions by consumers to promote sustainable consumption, eliminating practices that cause damage to the sustainable economy and prevent consumers from making sustainable consumption choices, and ensuring a better and consistent application of the Union consumer legal framework.

In particular, as far as the E and SHR sustainability discourse is con-

[25] Establishing the TSC for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives.

[26] Establishing the TSC for determining the conditions under which an economic activity qualifies as contributing substantially to the sustainable use and protection of water and marine resources, to the transition to a circular economy, to pollution prevention and control, or to the protection and restoration of biodiversity and ecosystems and for determining whether that economic activity causes no significant harm to any of the other environmental objectives.

[27] Directive (EU) 2024/825 of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information.

[28] Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive').

[29] Directive 2011/83/EU of 25 October 2011 on consumer rights.

cerned, Dir. 2024/825 aims to avoid greenwashing, first, in the sense that consumers shall not be misled about E or SHR characteristics through the overall presentation of a product. Consequently, Dir. 2005/29 has been amended by adding, among the others, to the list of the main characteristics of a product in respect of which a trader's practices can be considered misleading, E and S characteristics (Article 6(1)).

Information provided by traders on the S characteristics of a product throughout its value chain can relate, for example, to the quality and fairness of working conditions of the workforce involved, such as adequate wages, social protection, the safety of the work environment and social dialogue. Such information can also relate to respect for HR, to equal treatment and opportunities for all, including gender equality, inclusion and diversity, to contributions to social initiatives or to ethical commitments, such as animal welfare. The E and S(HR) characteristics of a product can be understood in a broad sense, encompassing the E and S(HR) aspects, impact and performance of that product.

Greenwashing may also take the appearance of traders advertising benefits to consumers that are irrelevant and not directly related to any feature of that specific product or business and which could mislead consumers into believing that they are more beneficial to E and SHR than other products or traders' businesses of the same type. Therefore, such a misleading commercial practice has been added to those prohibited by Annex I Dir. 2005/29 as substituted by Dir. 2024/825 (Article 6(2)).

A further form of *greenwashing* is comparing products on their E or SHR characteristics, an increasingly common marketing technique that could mislead consumers, if they are not able to assess the reliability of information. Consequently, traders shall be obliged to provide consumers with information about the method of comparison, the products which are the object of comparison and the suppliers of those products, as well as the measures to keep information up to date (Article 7(7) Dir. 2005/29).

Last but not least, *greenwashing* may hide behind *sustainability labels*, to be understood as any voluntary trust mark, quality mark or equivalent, either public or private, that aims to set apart and promote a product, a process or a business by reference to its E or/and S characteristics, excluding any mandatory label required under Union or national law (Article 2(r) Dir. 2005/29). Therefore, before displaying a *sustainability label*, any trader shall ensure that it meets minimum conditions of transparency and credibility, including the existence of objective monitoring of compliance according to

the publicly available terms of a certification scheme. Such monitoring should be carried out by a third party whose competence and independence from both the scheme owner and the trader are ensured by international, Union or national standards and procedures. Thus, displaying uncertified sustainability labels has been prohibited as misleading commercial practice listed in Annex I to Dir. 2005/29 as substituted by Dir. 2024/825.

7. *The Sustainability Discourse and Corporate Sustainability Due Diligence: a Misleading Title?*

By the adoption of Dir. 2024/825, EU Law seems to have come full circle about the E&SHR sustainability discourse, which, although to different extents, touches undertakings of various kind and size. In fact, the reference to sustainability that can be found within the title of the Corporate Sustainability Due Diligence Directive[30] looks more like a formal tribute to it than a substantive enhancement of that discourse. Not by chance, the Preamble of the Directive refers to Article 2 TUE, which emphasizes, among the others, the respect for HR, rather than to Article 3 TUE, advocating for a Union that shall work for the sustainable development of Europe, even if, according to the same Preamble, Union's action on the international scene shall include fostering the sustainable economic, S&E growth of developing countries.

HR&E themselves take the center stage of the Directive, which, not surprisingly, recalls Commission Communication *A strong social Europe for just transitions*[31] rather than the *Sustainable Europe Investment Plan*[32] one. The openness to the global dimension of Union companies, relying on global value chains, is confirmed by the reference to the *Decent work worldwide for a global just transition and a sustainable recovery* Communication[33], which stresses

[30] Directive of 13 June 2024 … on corporate sustainability due diligence. See Borelli, Izzi, *L'impresa tra strategie di* due diligence *e responsabilità*, in *RGL*, 2021, I, p. 553; Gualandi, *Addressing MNEs' Violations of Workers' Rights through Human Rights Due Diligence. The Proposal for an EU Directive on Sustainable Corporate Governance*, in this journal, 2022, 1, p. 83; Cordella, *The Slow Approval Process of the Due Diligence Directive and the Different Paths for the Involvement of Trade Unions*, in *ILLEJ*, 2023, II, p. 17.

[31] COM(2020) 14 final 14.01.2020, *A strong social Europe for just transitions.*

[32] COM(2020) 21 final 14.1.2020, *Sustainable Europe Investment Plan.*

[33] COM(2022) 66 final 23.02.2022, *Decent work worldwide for a global just transition and a sustainable recovery.*

the rising concern of consumers and investors regarding HR&E at global level. Therefore, after having recalled, almost casually, the European Pillar of Social Rights, the Preamble focuses on the *UN Guiding Principles on Business and HR*[34] and its Foundational Principles. Among them the Exercise of HR Due Diligence stands out (point 15 and 17) in terms of undertaking's obligation to identify, prevent, mitigate and account for how they address their impact on HR. The same value is recognized to the OECD *Guidelines for Multinational Enterprises* as specified by the *Due Diligence Guidance for Responsible Business Conduct*, duly accompanied by the ILO Tripartite Declaration of Principles on Multinational Enterprises and Social Policy and the UN *Sustainable Development Goals*[35].

An outward-looking approach by the EU Institutions, which may mitigate the disappointment for an apparently narrow scope of application covering only companies with more than 1000 employees and a net worldwide turnover of more than 450 million in the last financial year. Apparently, since it includes also ultimate parent company of a group that reaches those thresholds as well as, under certain conditions, companies entered into or ultimate parent company of a group that entered into franchising or licensing agreements in the Union in return for royalties with independent third-party companies (Article 4).

The Directive provides for those companies obligations, and liability for their violation, to be mandatorily coped with due diligence processes, in relation to actual and potential *HR adverse impacts* and *E adverse impacts*, with respect to their own operations, those of their subsidiaries, and those carried out by their business partners in companies' chains of activities; but also, the obligation to adopt and put into effect a transition plan for climate change mitigation (Article 1).

As usual, definitions offer the insight needed to understand the essence of the Directive, starting from "*adverse impact*", eventually defined within an EU Law instrument. It means an *adverse E impact* and *adverse HR impact*, which, at turn, refers to an impact on persons resulting from an *abuse* of one or more of the HR listed in the Annex to the Directive, by a company or legal entity, that directly impairs a legal interest protected by the HR instru-

[34] Resolution 17/4 of 16.06.2011.

[35] SPINELLI, *Regulating Corporate Due Diligence: from Transnational Social Dialogue to EU Binding Rules (and Back?)*, in this journal, 1, 103.

ments listed in the Annex to the Directive. However, an abuse is at stake only if a company could have reasonably foreseen the risk that such HR may be affected, considering the circumstances of the specific case, including the nature and extent of the company's business operations and its chain of activities, characteristics of the economic sector and geographical and operational context. A highly complicated definition that betrays a difficult compromise between HR supporter and the global business.

It falls outside the scope of this essay to investigate the challenging mechanisms of the Directive and their effectiveness. However, among them, it shall purposively be emphasized the obligation for undertakings to establish notification and complaint procedures in favor of people who deem to be victim of an (S)HR abuse, also by participating in collaborative procedures, including those established jointly by companies through industry associations, multi-stakeholder initiatives or global framework agreements. Worth mentioning is also the presence of supervisory authorities, at Member State level, which can impose sanctions on abuse perpetrators.

Although occasionally the same Directive seems to have come full circle about the E&SHR sustainability discourse by providing that the obligation to adopt an annual statement on matters covered by the Directive does not apply to undertakings already subject to sustainability reporting requirements under Dir. 2013/34/EU[36].

8. *The very Notion of SHR Sustainability: a Conclusive Reflection on the SHR Sustainable Undertaking*

It could be useful to conclusively reflect upon the very notion of SHR sustainability as understood by the EU Legislator all along its restless effort made through the years.

The point of origin is represented by the obligation, provided by Dir. 2013/34, for undertaking to include in the *management report* information on S aspects and employees matters, in the view of accounting for the non-financial KPI. A generic reference that only allowed speculating on the distinction between employment related issues and an unspecified S dimension.

[36] Loffredo, *Democrazia industriale e* sustainable corporate governance*: i soliti sospetti*, in *RGL*, 2021, I, p. 601.

In Directive 2014/95 the EU Legislator moved up a gear by including within the *management report* a *non-financial statement*, which should contain information necessary to understand undertaking's activity development, performance, position and impact at least, once again on S and employee matters, but also as the E dimension and the respect for HR, anti-corruption and bribery matters. A much wider range of factors towards which the undertaking shall provide a self-assessment. Worth to be mentioned, the first appearance of HR among them.

Such a wide range of factors has been confirmed, without any specifications, by Dir. 2022/2464 under the umbrella of "sustainability matters" or "sustainability factors" as qualified by Reg. 2019/2088. However, Dir. 2022/2464 adds Chapter 6a to Dir. 2013/34, mandating the Commission to adopt delegated acts supplementing the latter in order to provide for ESRS.

ESRS specify that undertakings have to disclose information on two areas of *employment matters*.

First, equal treatment and opportunities, including gender equality and equal pay for work of equal value; training and skills development; the employment and inclusion of people with disabilities; measures against violence and harassment in the workplace; diversity. Second, working conditions, including secure employment, working time, adequate wages; but also, the instruments to realize them, such as social dialogue, freedom of association, existence of works councils, collective bargaining, including the proportion of workers covered by collective agreements; the information, consultation and participation rights of workers; work-life balance; health and safety.

Information has to be disclosed by undertakings also on the respect for HR, fundamental freedoms, democratic principles and standards.

Here a generic reference is made to a wide range of international global instruments: the UDHR, the ICESCR, the ICCPR, the UN *Convention on the Rights of Persons with Disabilities*, the UN *Declaration on the Rights of Indigenous Peoples*, the ILO *Declaration on Fundamental Principles and Rights at Work* and the ILO fundamental conventions; but also to regional instruments like the *European Convention for the protection of Human Rights*, the *European Social Charter*; and supranational one, like the *Charter of Fundamental Rights of the European Union*.

Defining *Sustainable investment* Reg. 2019/2088 refers them, among the other, to *economic activities that contributes to a S objective*, i.e., by tackling inequality or fostering social cohesion, social integration and labour relations;

or to human capital or economically or socially disadvantaged communities, as long as those investments do not significantly harm any E&SHR objectives and the investee companies follow good G practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance (Article 2 point 17).

On the other hand, Reg. 2020/852 defines an *economic activity as sustainable* if, among the other, provides for *minimum safeguards* that have to be understood as *procedures* implemented by undertakings to ensure the alignment of an economic activity with the OECD *Guidelines for Multinational Enterprises*, the UN *Guiding Principles on Business and Human Rights*, the ILO fundamental conventions identified in the *Declaration on Fundamental Principles and Rights at Work* and the International Bill of Human Rights (the UDHR, the ICESCR, the ICCPR) (Article 18). By referring to the Declaration as such, Reg. 2020/852, opens to the amendments introduced in 2022 recognizing Safety & Health and Conventions 155 and 185 as fundamental.

Dir. 2024/825 understands *sustainability labels* as any voluntary trust mark, quality mark or equivalent, either public or private that aims to set apart and promote a product, a process or a business by reference to its E or/and S characteristics, adding that information provided by traders on the S characteristics of a product can relate, for example, to the quality and fairness of working conditions, such as adequate wages, social protection, the safety of the work environment and social dialogue. Such information can also relate to respect for HR, to equal treatment and opportunities for all, including gender equality, inclusion and diversity, to contributions to social initiatives or to ethical commitments, such as animal welfare.

Directive 2024/1760/EU[37], abandons, except for the title, any substantive references to the sustainability discourse, emphasizing, in the Annex the SHR dimension as such, with a situational use of the abuse of HR as workers' rights. This happens, for instance, with the prohibition of all forms of slavery and slave-trade, including practices akin to slavery, serfdom or other forms of domination or oppression in the workplace, such as extreme economic or sexual exploitation and humiliation, or human trafficking, interpreted in line with Article 8 ICCPR. Or with the prohibition to restrict workers' access to adequate housing, if the workforce is housed in accommodation pro-

[37] See on it, GIOVANNONE, *The European directive on "corporate sustainability due diligence": the potential for social dialogue, workers' information and participation rights*, in *IlleJ*, 2024, p. 227.

vided by the company, and to restrict workers' access to adequate food, clothing, and water and sanitation in the workplace, interpreted in line with Article 11 ICESCR.

Thus, at the end of the day, a (*SHR*) *sustainable undertaking*[38] is an undertaking that integrates a due diligence process into its policies and risk management systems in order to assess, identify, prevent, prioritize, mitigate, end and, in case, remediate actual and potential adverse impacts, to be understood as abuses occurring within the SHR dimension[39].

[38] Speziale, *L'impresa sostenibile*, in *RGL*, 2012, I, p. 494.

[39] Baylos, *Empresas Transnacionales y Debida Diligencia*, in this journal, 2/2022, p. 3; Sanguineti Raymond, *La Diligencia Debida en Materia de Derechos Humanos Laborales*, in this journal, in this issue.

Abstract

This essay aims at tracing the tortuous path of the social sustainability discourse within EU Law against the background of the integrated social-green transition, originating from a different awareness of their inextricable entanglement, fed by a renewed interest for human rights, which seem to prevail as interpretational code of the employment/social issues, above all in a globalized economy. Actually, undertakings and financial operators are confronted with a growing engagement of the EU in favor of individuals as members of the society, workers, investors and costumers, whose social, employment & human rights shall be protected and guaranteed. At the same time, it is apparent that undertakings and financial operators play a key role in pursuing environmental and social objectives when they conduct sustainable economic activities and investments. An interdependence that, if properly regulated, may activate a virtuous circle to the advantage of the whole humankind.

Keywords

Social sustainability, labour rights, human rights, corporate social responsibility, due diligence.

Costantino Cordella

The Concept of Occasional Work in the Italian Labour Law

Contents: **1.** Introduction. **2.** The continuity/occasionality dichotomy. **3.** The technical meaning of continuous work. **4.** The relation between continuous and occasional work. **5.** Occasionality as frequency *within* the relationship... **6.** ...and as frequency *of the* relationships. **7.** Occasionality within and outside the so-called vouchers.

1. *Introduction*

The concept of occasionality in Italian labour law is present in several institutes[1]. One of those in which it has particular significance are the "prestazioni accessorie" under artt. 70 ff. of d.lgs. 276/2003, in which the occasionality is associated with the condition that the worker is at risk of social exclusion, to encourage the regular employment especially for the vulnerable persons[2].

[1] On labour law, see art. 14, par. 1, d.lgs. n. 81/2008 (as amended by d.lgs. n. 146/2021, converted by l. n. 215/2021), on the communication to the National Labour Inspectorate of the occasional self-employment; art. 1, par. 3, l. 3 April 2001 n. 142, on the worker member of cooperative companies with a non-occasional coordinated and continuous collaboration; art. 34, d.P.R. n. 818/1957, on the requirements to recognise unemployment benefits; or, again, art. 25, d.lgs. n. 36/2021, on sports work carried out through vouchers (later repealed by d.lgs. n. 163/2022).

[2] Cfr. PEDRAZZOLI, *Prestazioni occasionali di tipo accessorio rese da particolari soggetti*, in PEDRAZZOLI (eds.), *Il nuovo mercato del lavoro. Commentario al d.lgs. 10 settembre 2003, n. 276,* Zanichelli, 2004, p. 860 ff.; see *etiam* LO FARO, *Prestazioni occasionali di tipo accessorio rese da particolari soggetti*, in GRAGNOLI, PERULLI (eds.), *La riforma del mercato del lavoro e i nuovi modelli contrattuali. Commentario al decreto legislativo 10 settembre 2003, n. 276*, Cedam, 2004, p. 810 ff.; GHERA, *Diritto del lavoro. Appendice di aggiornamento al 31 dicembre 2003*, Cacucci, 2004; BORZAGA, *Le prestazioni occasionali all'indomani della l. n. 30 e del d.lgs. n. 276/2003*, in *RIDL*, 2004, 2, p. 291 ff.

Several changes were made to this institute: first, the annual limit of the remuneration that the worker may receive from all his clients was increased (from 3 to 5,000 euros, *ex* artt. 16 and 17, d.lgs. n. 251/2004); then, the following year, the limit of remuneration was set at 5,000 euros for each of the worker's clients (*ex* art. 1-*bis,* paragraph 1, lett. e, d.lgs. n. 35/2005, converted by l. n. 80/2005). After a short time, its use was expanded in all sectors for certain classes of workers (retained persons, part-time workers, etc.)[3]; finally, with the reforms of 2012-2013 (art. 1, par. 32, l. n. 92/2012 and art. 7, d.l. n. 76/2013) and the Jobs Act (artt. 48-50, d.lgs. n. 81/2015), the occasionality requirement was eliminated, and these rules were applied to all sectors and to any type of worker[4].

If, at first, the vouchers were little used, these reforms caused them to become particularly widespread, to the point of pointing out the risk of an excessive precarisation for the workers[5]. To prevent the institute from being cancelled through the referendum proposed by the CGIL, the 2017 reform once again changed its characteristics: a discipline based on the concept of occasionality was reintroduced, with a new (and very special) regulatory structure[6].

As anticipated, the concept of occasionality is also present in other institutes of Italian labour law. It is, for example, associated with the obligation

[3] See art. 22, d.l. n. 112/2008, converted by l. n. 133/2008, and the use for specific categories (students, retired persons, part-time workers., etc.) envisaged by art. 7-*ter*, par. 12, d.l. n. 5/2009.

[4] On this topic see Bellomo, *Le prestazioni di tipo accessorio tra occasionalità, atipicità e "rilevanza fattuale"*, in Aa.Vv., *Studi in onore di Tiziano Treu. Lavoro, istituzioni, cambiamento sociale,* Jovene, 2011; Lamberti, *Il lavoro occasionale accessorio*, in Cinelli, G. Ferraro, Mazzotta (eds.), *Il nuovo mercato del lavoro dalla riforma Fornero alla legge di stabilità 2013*, Giappichelli, 2013, p. 174 ff.; Pinto, *Il lavoro accessorio tra vecchi e nuovi problemi*, in *LD*, 2015, n. 4, p. 679 ff. and Cordella, *Libretto famiglia e contratto di prestazione occasionale: individuazione della fattispecie*, in *DRI*, 2018, p. 1163.

[5] As is well known, the discipline was repealed (art. 1 d.l. n. 25/2017, converted by l. n. 49/2017) due to the CGIL's referendum request, deemed admissible by the C. Cost. in the judgment C. cost. 27 January 2017, n. 28, in *FI,* 2017, n. 3, I, p. 790 ff.; on the subject see A. Zoppoli, *L'eloquente (ancorché circoscritta) vicenda referendaria su responsabilità negli appalti e lavoro accessorio*, in Staiano, A. Zoppoli, L. Zoppoli (eds.), *Il diritto del lavoro alla prova dei referendum*, ESI, 2018, p. 135 ff.; see *etiam* Zilli, *Prestazioni di lavoro accessorio e organizzazione*, in *ADL*, 2017, 1, p. 86.

[6] See F. Marinelli, *Il lavoro occasionale in Italia: Evoluzione, disciplina e potenzialità della fattispecie lavoristica*, Giappichelli, 2019; Garofalo, *La nuova frontiera del lavoro: autonomo-agile-occasionale*, ADAPT University Press, 2018, p. 596 ff., p. 632 ff. and p. 637 ff.; Massi, *Disciplina delle prestazioni occasionali*, in *DPL*, 2017, 29, p. 1813.

to give prior notice of the start of self-employment (d.lgs. 146/2021): since the occasional works are often performed in the black economy, to avoid risks to the health and safety of self-employed workers, the legislator has envisaged that the start of their work must be declared in advance to the public authority (INL).

The concept of occasional work is also used in tax and social security law. According to art. 67, par. 1, n. l of the Presidential Decree 917/1986 in tax law, the occasional work is used when the work is *not* habitual[7]. In social security law, on the other hand, work is occasional if the remuneration does not exceed 5,000 euros: in such cases the worker is not obliged to register with the so-called "Gestione separata INPS"[8]. However, according to the interpretation of the case law's majority, the current social security rules[9] oblige any person who performs professional activity on a habitual basis to register with the "Gestione separata INPS" even if his annual remuneration is less than € 5,000. To ascertain the occasional nature of the activity, several parameters have therefore been taken into account: the choice of enrolment in a register, tax declarations, the opening of a VAT number, the existence of a material organisation supporting the activity[10].

Apart from cases where it was provided for by law, the concept of occasionality was also examined as a means of qualifying employment relationships as subordinate or autonomous by scholars and case law[11]. Since our interest here is to understand its meaning to verify what protections can be recognised against the risk of the precariousness for the workers, before considering the main institutes in which occasionality determines problems of precariousness (art. 54 *bis* d.l. n. 50/2017 and art. 2222 cod. civ.), it is helpful

[7] The rule provides that the wages from occasional self-employment services are included in the tax category known as "redditi diversi" and are subject to taxation according to the ordinary rules.

[8] Casillo, *Profili previdenziali del lavoro autonomo occasionale*, in Cordella, *Occasionalità e rapporti di lavoro: politiche del diritto e modelli comparati*, Editoriale Scientifica, 2023, forthcoming.

[9] Art. 2, par. 26, l. n. 335/1995, as interpreted by art. 18, par. 12, d.l. 98/2011 conv. with l. n. 111/2011.

[10] See, most recently, Corte Cass., sez. lav., 6 September 2023, n. 26018; sez. VI, 22 March 2022, n. 9344; 25 May 2021, n. 14390, point 12; 10 May 2021, n. 12358; in the same sense, in tax jurisprudence, see Cass. civ., sez. trib., 2 July 2014, n. 15031.

[11] On that debate see F. Ferraro, *Studio sulla collaborazione coordinata*, Giappichelli, 2023, p. 383 ff.; see, in the same sense, Bavaro, *Sul concetto giuridico di "tempo del lavoro" (a proposito di ciclo-fattorini)*, in *Labor*, 2020, n. 6, p. 676.

to also examine these orientations by scholars and case law. First, it is necessary to check whether the thesis that occasionality is the opposite of continuous work can be considered valid[12].

2. *The continuity/occasionality dichotomy*

In the past, the concept of occasionality was contrasted with that of continuity for purposes of qualifying the relationship. Since it was believed that the occasional work could only be self-employment, the dichotomy occasionality/continuity confirmed that the subordinate work was only continuous work[13].

After the amendments to the art. 409 cod. proc. civ., the self-employment was also considered to be continuous, but Italian labour law scholars continued to uphold the dichotomy between continuity and occasionality[14]. Even when, thanks to the art. 409 cod. proc. civ., it was given greater depth to the continuity, and there was no longer any need to explain its characteristics based on the occasionality, the lack of specific studies on the latter concept meant that it continued to be understood as the opposite of continuity[15].

[12] A legal definition of the continuity work's concept is, for example, proposed in the well-known judgment on riders App. Torino, 4 February 2019, in *RIDL*, 2019, 2, 340, on which, among many comments, see Carabelli, Spinelli, *La Corte d'Appello di Torino ribalta il verdetto di primo grado: i riders sono collaboratori etero-organizzati*, in *RGL*, 2019, 1, 95 ff., or Recchia, *Contrordine! I riders sono collaboratori eterorganizzati*, in *LG*, 2019, 403 ff.; see also the case law examined in Vullo, *"Parasubordinazione" e rito del lavoro: l'art. 409, comma 1, n. 3, c.p.c. nella dottrina e nella giurisprudenza*, in *Studium iuris*, 2021, 3, p. 317 ff.

[13] See Bavaro, *Tesi sullo statuto giuridico del tempo nel rapporto di lavoro subordinato*, in Veneziani, Bavaro, *Le dimensioni giuridiche dei tempi del lavoro*, Cacucci, 2009, p. 15 ff, where it is pointed out that before the introduction of co.co.co. the jurisprudence used the concept of "continuity" to qualify subordinate employment in art. 2094 cod. civ.; on this topic, in a critical sense, see Spagnuolo Vigorita, *Riflessioni in tema di continuità, impresa, rapporti di lavoro,* in *RDC,* 1969, 1, p. 545 ff. See also Gaeta*, Tempo e subordinazione: guida alla lettura dei classici*, in *LD*, 1998, p. 35; Gaeta, Loffredo, *Tempi e subordinazioni*, in Veneziani e Bavaro (eds.), *Le dimensioni giuridiche dei tempi del lavoro*, Cacucci, 2009, p. 29 ff.; Gragnoli, *Tempo e contratto di lavoro subordinato*, in *RGL*, 2007, 1, p. 439 ff.

[14] Ballestrero, *L'ambigua nozione di lavoro parasubordinato*, in *LD*, 1987, p. 60 ff.; Santoro Passarelli, *Il lavoro parasubordinato*, Giuffré, 1979, p. 59 ff.; Ichino, *Il contratto di lavoro*, Giuffré, 2000, p. 297 ff.

[15] See, for example, Borzaga, *Le prestazioni occasionali* all'*indomani della l. n. 30 e del d.lgs. n. 276/2003*, in *RIDL*, 2004, 1, p. 285 ff. In the same sense also A. Avio, *Omogeneità di trattamento*

3. *The technical meaning of continuous work*

The continuity undoubtedly exists in the subordinate employment[16]. In this case, there is the interest of the creditor in getting from the debtor the availability to perform the service continuously in the form required by him[17]. In other words, the continuous work is considered to enable the worker to perform his obligation even if his work does not achieve a specific result, since the continuous work in the subordinate employment – as the Italian scholars pointed out – can be broken down into an unlimited manner over time without the creditor's interest in receiving it being lost[18].

If, therefore, the technical continuity is a characteristic of the subordinate employment, it is more difficult to say whether it is also an element that must always be excluded in self-employment.

In this regard, it has been said that the self-employment envisaged by art. 2222 cod. civ. is incompatible with the continuity as a creditor's interest

e incoerenze previdenziali, in *LD*, 2005, p. 131; LUNARDON, *Lavoro a progetto e lavoro occasionale*, in AA.VV., *Commentario al D. Lgs. 10 settembre 2003, n. 276*, 4, Ipsoa, 2004, p. 28 ff. and MISCIONE, *Il collaboratore a progetto*, in *Lav. Giur.*, 2003, 9, p. 16.

[16] The continuity in question is the technical one, on which see *ex plurimis* ICHINO, *Il lavoro subordinato: definizione e inquadramento. Artt. 2094-2095*, Giuffré, 1992, p. 28 ff. Since to perform a job, the debtor must always perform several actions, each activity is executable through *material* continuity, understood as a plurality of actions functionally connected to achieve the desired result. This is a *natural* feature of the category of obligations to do, which allows them to be distinguished from obligations to give (in this sense, already, ICHINO, *Il lavoro subordinato*, cit., p. 27.

[17] In the perspective of understanding continuing performance as an index of the worker's availability, see ICHINO, *Il tempo della prestazione nei rapporti di lavoro*, cit., p. 28 ff.; in the same sense, previously, see OPPO, *I contratti di durata*, in *RDCom*, 1943, 1, p. 143 ff. (now in *Obbligazioni e negozio giuridico, Scritti giuridici*, Cedam, 1992, p. 248 ff.), and DEVOTO, *L'obbligazione ad esecuzione continuata*, Cedam, 1943. It is a matter, in these cases, of a "temporal" availability, distinct from the availability - which we could define as "contents" availability –, which concerns the worker's adherence to receiving directives on the modalities of performance; in the sense of valorising the character of direction as the only possibility of concrete expression of subordination see SPAGNUOLO VIGORITA, *Riflessioni in tema di continuità, impresa*, cit., p. 574. In a partially different sense, concerning art. 409 cod. proc. civ. and its capacity to include continuity as an expression of the creditor's interest and not, as is the case in subordinate employment, as an "intrinsic feature of the service", see recently MARTELLONI, *Lavoro coordinato e subordinazione*, Bup, 2012, p. 88.

[18] Recently, on the subject, see PROIA, *Tempo e qualificazione del rapporto di lavoro*, in *L&LI*, 2022, 8, 1, p. 56.

in getting the worker's energies for an extended period of time[19]. The continuity in self-employment acquires a value only if it is understood as the time necessary to perform the work, i.e. only if it has a "preparatory" purpose, which does not affect the creditor's interest in getting the result; in practice, the preparatory continuity is an element external to the cause of the contract and is a time that the creditor is forced to "suffer": the latter wants to get the result and conclude the relationship, but must wait for the period agreed upon in the contract, which the debtor uses to perform the work[20].

With the amendment of art. 409 cod. proc. civ. and the introduction of the coordinated and continuous collaborations (henceforth "co.co.co."), the continuous work became, *de jure,* autonomous. This called into question the certainty with which, until then, the continuity had been excluded from the autonomous work[21]. Without being able to deal in depth with the scope of application of the rule, it suffices to say that the art. 409 cod. proc. civ., by also admitting in the self-employment continuous relationships, has blurred the boundary with the subordinate employment[22].

In fact, it was possible to consider that the continuous activities may also be self-employment[23] when the other two characteristics required by art. 409 cod. proc. civ. are present, i.e. that the worker makes use of his collaborators and/or that the creditor "only" exercises the power to "coordinate" and not also that of "directing" the worker's activity. It has thus

[19] In fact, it has been said that the legislator, when regulating art. 2222 cod. civ., was only thinking of "occasional" self-employment (Pessi, *Contributo allo studio della fattispecie lavoro subordinato*, Giuffrè, 1989, p. 61); see also Bavaro, *Tesi sullo statuto giuridico del tempo*, cit., p. 15 ff. and the bibliography cited *supra*, in note 25.

[20] Oppo, *I contratti di durata*, p. 155 ff.; other typical contracts belong to this category, in addition to the work contract, such as the contract of tender or transport, in which instantaneous performance is envisaged, although performance requires a specific duration.

[21] In this sense see Borzaga, *Le prestazioni occasionali all'indomani della l. n. 30 e del d.lgs. n. 276/2003*, in *RIDL*, 2004, p. 279.

[22] It was pointed out that co.co.s caused a decrease in the use of subordinate labour: see Proia, *Metodo tipologico, contratto di lavoro subordinato e categorie definitorie*, in *ADL*, 1, 2002, p. 103; a different point of view, based on the problem of the "escape" from subordinate employment, was by Ichino, *La fuga dal diritto del lavoro*, in *DD*, 1990, p. 69 ff.; Martelloni, *Lavoro coordinato e subordinazione*, cit., p. 88.

[23] Among the many, in the sense indicated in the text, see Pessi, *Contributo allo studio*, cit., pp. 200-202; in the opposite sense, see Ichino, *Il lavoro subordinato*, cit., p. 83, who considers technical continuity to be present only in subordinate employment.

followed that continuity, as the creditor's lasting interest in acquiring the worker's working energies, cannot be the distinguishing element between self-employment and subordinative work and, consequently, that the dichotomy continuity/occasionality has been increasingly less represented for the purpose of discerning the correct qualification to be given to employment relationships[24].

4. *The relation between continuous and occasional work*

The little capacity of the aforementioned dichotomy in ascertaining whether a relationship is subordinate or self-employed is confirmed by the case law and the legislative choices that indicate the occasionality as a concept compatible with the subordinate employment.

Although with very different meanings, such that the terms "temporariness", "exceptionality", etc. overlap[25], the occasionality has been associated with the work of "short duration"[26]. The performance by the worker of

[24] In the same sense, F. Ferraro, *Studio sulla collaborazione coordinata*, Giappichelli, 2023, p. 385; see also Cordella, *Spunti operativi (e non solo)*, cit., p. 344. With reference to project work, the notion of "occasional services" and that of "continuous services", see Ghera, *Sul lavoro a progetto*, in Aa.Vv., *Diritto del lavoro. The New Problems. L'omaggio dell'accademia a Mattia Persiani*, Cedam, 2005, p. 1319 ff.; Papaleoni, *Il lavoro a progetto o occasionale*, in Aa.Vv., *Diritto del lavoro. The New Problems,* cit., p. 1370 ff.; Santoro Passarelli, *La nuova figura del lavoro a progetto*, in Aa.Vv., *Diritto del lavoro. The New Problems*, cit., p. 1427; Pinto, *Le "collaborazioni coordinate e continuative" e il lavoro a progetto*, in Aa.Vv., *Lavoro e diritti dopo il decreto legislativo 276/2003*, Cacucci, 2003, p. 323; Biagi, *Le proposte legislative in materia di lavoro parasubordinato: tipizzazione di un tertium genus o codificazione di uno Statuto dei lavori?*, in *LD*, 1999, 4, p. 11.

[25] The occasional nature of the activity has been used as an index in the investigation of the right qualification of labour relationships. Nevertheless, this use of occasionality has never led to a clear definition of its content, with a series of terms overlapping one another and making the concept increasingly close to a general clause. Recently, references to occasionality stand out (see C. Cost., 20 June 2022, n. 155), exceptionality (see Trib. Milano, sez. lav., 26 October 2022, n. 2207; App. Roma, sez. lav, 30 June 2022, n. 2643), to sporadic nature (see App. Sassari sez. lav., 25 January 2023, n. 22), or to the non-accustomed nature of the services (C. Cost., 24 November 2022, n. 234, point 7.2). See C. Cost. 30 November 2022 n. 234; Cass. 9 July 2021, n. 19586; App. Turin, 4 February 2019, in *RIDL*, 2019, 2, 340; Cass. 11 October 2018, n. 25304; 17 March 2016, n. 5303; 19 April 2002, n. 5698; 6 May 1985, n. 2842.

[26] Cfr. Cass. 28 July 1995, n. 8260, in *Giust. Civ.*, 1996, I, p. 2356 ff.; 15 June 1999, n. 5960; 6 July 2001, n. 9152, in *RDL*, 2002, n. 2, II, p. 272 ff.; 4 September 2003, n. 12926; 8 August 2008, nos. 21482 and 21483; 12 February 2012, n. 1987; in doctrine *ex plurimis* Bavaro, *Sul*

minor activities for the same creditor has been considered by case law to be compatible with the concept of continuity. In the same sense the legislator, as early as the first regulation of fixed-term work in l. n. 230/62, established a simplified regime – with regard to the exemption from the obligation of the written form[27] – for the fixed-term contracts of short duration (less than twelve days): it thus confirmed both that the occasional work relationships can be subordinate employment, and the occasionality can have the meaning of work of a modest entity[28].

If one considers the term 'occasional' carefully, however, one discovers that its assimilation to the concept of modest work activity is a simplification that clashes with the lexical meaning of the word 'occasional' and thus complicates its legal application. For this reason, it is not possible to share that position which, recently, to distinguish the relationships carried out through digital platforms pursuant to Article 47 *bis*, d.lgs. no. 81/2015, from the "continuous" ones referred to in Article 2(1), d.lgs. no. 81/2015, pointed out that the former are occasional relationships, and the latter are not. This thesis would reintroduce the dichotomy already pointed out, between occasionality and continuity, to which, however, it seems sufficiently clear that no qualifying meaning can be attributed.

5. *Occasionality as frequency* within the *relationship*…

To understand the legal space of the occasionality in the labour relationships, it may then be useful to refer to the doctrinal and jurisprudential elaboration on the "time" of work; in particular it would be helpful to consider the "frequency" with which the same parties perform a plurality of relationships[29], since, even from a lexical point of view, the occasional nature

concetto giuridico di "tempo del lavoro" (a proposito di ciclo-fattorini), in *Labor*, 2020, n. 6, p. 676; CATAUDELLA, *Prestazioni occasionali*, in *ADL*, 2006, p. 786.

[27] Art. 19(4), d.lgs. 81/15. In the same sense, with respect to the previous regime of d.lgs. 368/01, see CATAUDELLA, *Prestazioni occasionali*, cit., p. 786.

[28] See art. 1(4) of l. n. 230 of 18 April 1962, according to which "The writing is not, however, necessary when the duration of the *purely occasional* employment relationship does not exceed twelve working days" (italics mine), according to a formulation also reproduced by the subsequent regulation of d.lgs. n. 368/2001 and abandoned, concerning the occasionality, only with the recent regulation provided by d.lgs. n. 81/2015.

[29] Recently BAVARO, *Sul concetto giuridico di «tempo del lavoro»*, cit., p. 673, recalled Lotmar's

of services seems to position itself well within the functional area of the "frequency" of performance of a work activity.

Reasoning along these lines, it must first be considered that, by understanding the frequency as an "internal" characteristic of "the relationship", one enters the merits of the labour protections relating to "the employment relationship" and not also those relating to the labour market. The frequency within the relationship concerns, for example, the legal and/or collective rules by which, to preserve the psycho-physical integrity of the workers, the limits are set to the worker's work commitment (e.g. regulations on working hours, breaks, rest periods, etc.); or it is the way to determine the performance quantitatively[30]: in fact, with the conclusion of the employment contract, the times of performance of activities are defined, and the parties choose how often the work is to be performed[31].

These examples considering the frequency with which work is performed 'within' the same employment relationship show that this type of frequency does not help to define the concept of the occasional nature of work that interests us. For our purposes it is of interest to consider occasionality as a tool for combating job insecurity, while the occasional frequency with which, depending on the type of service[32] or the type of contract provided for by law[33], the parties consensually decide how often the work is performed, has a mere 'descriptive' meaning, devoid of relevance for the attribution of greater protection against the risk of job insecurity to occasional workers.

6. *... and as frequency* of the *relationships*

Having said that on the frequency *within* the relationship, a different matter concerns the cases in which the occasional works are performed

distinction between the temporality of the performance (Arbeitszeit) and the temporality of the relationship (Vertragszeit), where the former concerns the duration of the performance and the latter the duration of the relationship.

[30] BAVARO, *Sul concetto giuridico di «tempo del lavoro»*, cit., p. 672.

[31] It may be the case that the power to determine the frequency lies with the creditor (as in intermittent work) or also with the debtor, subject to the productive interest (as in the self-employment contract *ex* art. 2222 cod. civ.)

[32] E.g. the activities indicated in r.d.l. n. 2657 of 6 December 1923.

[33] E.g. intermittent work.

"outside" a contract regulating their frequency; that is when the creditor decides to regulate several relationships with the same worker using individual "contratti d'opera" *ex* art. 2222 cod. civ. or "contratti di prestazioni occasionali" under art. 54 *bis* d.l. 50/17.

In such cases, although there is a formal compliance with the labour law, the occasionality can acquire the significance of a parameter of legality when judging the degree of frequency *of* the relationships and thus a functional significance in the fight against the precariousness, thanks to its capacity to combat the phenomenon of substituting the precarious relationships with the stable ones.

In these terms, the lawful use of the occasional work includes cases in which the creditor requires the performance of an activity for an "interest that has arisen over and above that which" can be planned, or in which, because there are sudden peaks of labour (e.g. in the catering or tourism sectors), there is a difficulty in planning the work requirement resulting from the "type of activity".

The two conditions mentioned are not easy to identify in practice and the boundaries with the cases in which permanent labour needs are satisfied through occasional contracts often overlap; the complexity of the analysis requires one to consider that the need for work, although connected to an unforeseen need, is repeated over time with a particular frequency and that, in such cases, in addition to being complex to understand whether or not they are permanent needs, it is necessary to assess the right balance between the opposing interests: on the one hand, the creditor's interest in using simplified and cheaper contractual schemes, such as occasional self-employment or the "contratto di prestazioni occasionali" under art. 54 *bis*, and, on the other hand, the employee's interest in job stability. In this regard, it is certainly no coincidence that the instances of simplification that took root during the season of flexibility, starting in the late 1990s, caused legislative attention to be paid to work carried out on an occasional basis and also caused the need to introduce, firstly, occasional work, with d.lgs. n. 276/2003, and then – arriving at the present day – the arrangement with the twofold guise of art. 54 *bis* d.lgs. n. 50/2017, through the "contratto di prestazioni occasionali" and the "Libretto famiglia"[34].

[34] On which see CORDELLA, *Libretto famiglia e contratto di prestazione occasionale: individuazione della fattispecie*, cit., p. 1158 ff. The rule was subsequently revised in relation to its scope of application by art. 1, paras. 342 and 343, of l. n. 197 of 29 December 2022 – by which, among

There is no need now to describe the regulatory framework that the legislator has decided to give to the institute over the course of twenty years of application[35]; instead, it is interesting to point out that this discipline is the one that, by establishing rules for monitoring the regularity of occasional work, best represents the balance mention. Compared to self-employment under art. 2222 cod. civ., in fact, the vouchers – especially considering the current art. 54 *bis* cited above – make it possible to combat the risk of a frequency of use contrary to the parameter of occasionality, thanks to the more precise definition of the concept permitted by the constraints of its regulation (see *infra* in the text)[36] . In the case of self-employment, although the recent introduction of the obligation to communicate the start of activity has accentuated the control on the frequency of relationships maintained between the same subjects, the absence of definitive measures on the application limits of the case has ended up opening the "vase of evils"; in other words, in self-employment, even if creditors are obliged to pay more attention to the occasional nature of their relationships with their workers, they cannot refer to a concept of occasionality that is well defined in its application boundaries.

7. *Occasionality within and outside the so-called vouchers*

At this point, it is necessary to clarify how to define the concept of occasionality used by the above-mentioned Art. 54 *bis*.

other changes, the economic limit in the case of occasional services of several workers in favour of the same client was raised to € 10,000, the ban on the use of occasional services only for companies with more than ten employees was relaxed, and a specific and more detailed procedure for the acquisition of work vouchers for the agricultural sector was introduced; on these changes see Bellomo, *Il lavoro occasionale tra mercato, tutele e nuove tecnologie. Brevi note sulle attuali criticità e sulle prospettive di (ulteriore) riforma della disciplina*, in *Federalismi.it*, 2023, 4 – and, most recently, with art. 37 d.l. n. 48 of 4 May 2023, converted with amendments into l. n. 85 of 2 July 2023, which, in the wake of the previous year's amendments, further extended the scope of vouchers, allowing their purchase up to € 15,000 in the spa and tourism sectors.

[35] On which, apart from what was said at the beginning, see the bibliography cited in footnote 4.

[36] Even if it is clear that today there is a problem of excessive bureaucratisation due to the administrative procedures to which principals who use the institute are forced, which also ends up impeding its diffusion: see, in this sense, D'Avino, *La tenuta della "burocratizzazione" digitale di Presto e libretti famiglia*, in Cordella, *Occasionalità e rapporti di lavoro: politiche del diritto e modelli comparati*, Editoriale Scientifica, 2023, p. 89 ff.

The two institutes introduced with this regulation – but this was also the case for the previous disciplines – serve to simplify the management of relationships intended to satisfy unforeseeable interests of creditors. Their use has been envisaged with "qualitative" limits – think of the prohibitions for workers employed in the previous six months[37] or for companies with more than ten employees[38] –, but above all "quantitative and economic ones", designed to limit the spread of the case and prevent it from generating precariousness.

The link between occasionality, as a measure of the frequency of labour relationships between the same parties, and the economic limits is provided specifically in subparagraph 1 lett. c) of art. 54*bis*, which lays down for the maximum remuneration payable to the same worker in the annual amount of EUR 2,500; being an economic parameter applicable to relations established between the same parties, it is useful to delimit the hypotheses falling within the concept of occasionality.

Although this limit may be considered the measure by which occasionality is manifested in quantitative terms in the voucher regulation, it is less certain that this meaning of occasionality extends to occasional self-employment and, therefore, that also for relationships are performed by means of contracts of labour under art. 2222 cod. civ. occasionality is measurable by means of the aforementioned limit. Admitting this hypothesis is indeed unjustified (as well as unreasonable[39]) especially in cases where there is no connection with the performance of works under art. 54 *bis*. In fact, this would mean that, in the absence of any rules allowing it, only work contracts under art. 2222 cod. civ. that do not generate the exceeding of the remuneration of art. 54 *bis,* paragraph 1, lett. c), would be occasional, on the basis of an interpretation of the limit so broad as to infringe the legislative power to establish the interests to be pursued and the regime of the individual labour cases.

More congenial is instead that the economic limit could be applied for activities performed with one or more contracts both, established under art. 54 *bis* cited above and self-employment. Since occasionality finds a certain

[37] Art. 54 a (5) cited above.

[38] As recently established by art. 1, par. 342, lett. d.) of l. n. 197 of 29 December 2022, which amended the original prohibition laid down in art. 54 *bis* cited above only for companies with more than five permanent employees.

[39] *Ibid*, pp. 347-348.

parameter in the limit of art. 54 *bis* (c), it could be prohibited that, in the same year, the creditor could employ the worker under a self-employment contract, if the economic limit was exceeded for activities performed under art. 54 *bis*[40]. The verification of the limit of the remuneration paid/received should include remuneration deriving from one or more self-employment contracts for which the previous/successive performance of the activities referred to in article 54 *bis* gives rise to the presumption of an intention to use occasional employment contracts, even when this is not possible.

From a practical point of view, this interpretation would have an important implication too. By understanding the maximum remuneration as an "economic measure" of the occasional employment even when different cases are used, the sanction regime of art. 54 *bis* cited would be extended outside the scope of the provision. This limit would have the function to preserve, in an anti-fraud key, the occasional work and to consent, therefore, the application of the sanction of the transformation of the relationship in a permanent contract provided for by paragraph 20 of art. 54 *bis* cit. (also) when the parties try to escape its overcoming by means of the "contratto d'opera".

[40] CORDELLA, *Spunti operativi*, cit., p. 343 ff.

Abstract

The article reconstructs the meaning that the occasionality's concept acquires in Italian labour law, on the assumption that its better definition can contribute to combating precarious employment. In this sense, it first criticises the thesis that considers occasional work as work other than continuous work. Then the meaning of occasional work is reconstructed within the category of the frequency with which different work relationships take place between the same parties. Finally, its applicability is assessed within the framework of the discipline of the relationships provided for by Art. 54 *bis* d.l. n. 50/2017 and occasional self-employment under art. 2222 of the Civil Code.

Keywords

Occasional work, Precarity, Continuity of work, Self-employment.

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Dock Work Regulation in Italy and Spain: a Difficult Balance of Competition and Workers' Protection

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1. *Background*

Globalisation has made it increasingly crucial for a region to have efficient ports. As regards Europe, ports play an important role both in the exchange of goods within the internal market and in providing a link between peripheral areas and the continent. But most of all, ports represent key gateways, connecting Europe to the rest of the world[1]. For these reasons, the EU market needs efficient and competitive ports. Port bottlenecks due to work-related issues can cause congestion, extra emissions and additional costs for shippers, transport operators, consumers and society as a whole. The efficiency and competitiveness of a port depends not only on its geographic location, but also and above all on its logistical performance, which may depend on the adequacy of infrastructure, the quality of services, the degree

[1] 74% of goods entering or leaving Europe travel by sea, and Europe boasts some of the best port facilities in the world (Cf. the data from the EU Commission on: https://transport.ec.europa.eu/index). About the evolution of maritime trade and port logistics, see, among many: VANELSLANDER, SYS, *Port Business, market challenges and management actions*, University Press Antwerp, 2015; MUSSO, FERRARI, BENACCHIO, BACCI, *Porti, lavoro, economia. Le regioni portuali di fronte alla rivoluzione logistica*, Cedam, 2004.

of interconnection with land networks, and, to a large extent, the organisation of labour[2]. As a consequence, the efficient regulation of dock work, which allows for a good and safe organisation of tasks and a sufficient protection of workers, is of strategic importance for a socially sustainable growth of the EU maritime sector.

Dock work regulation has always been tricky. In fact, dock work has very peculiar characteristics, starting with the extreme variety of activities and operations that dock workers are expected to carry out[3]. In addition, dock work is *per se* intermittent, due to unpredictable work peaks. This is why the port sector has always been characterised by the need for companies to rely on temporary labour[4]. For many years, this necessity has been satisfied by the presence in the ports of pools of specialised workers, to whom companies would turn in times of need[5]. Also, a port is traditionally a place with a dichotomous nature. On the one hand, it represents a transit point open to free competition, on which various commercial interests spill over. On the other hand, it is a public asset and a national frontier[6]. This is the main reason why dock work regulation historically has private and public elements. Finally, the need to ensure high standards of safety requires various precautions. In fact, technological change has resulted in significant improvements for the safety of dock workers, but it has also introduced new hazards, and port work is still "an occupation with very high accident rates"[7].

For all these reasons, many European countries have always had a special organisation of dock work, characterised by market barriers, restrictive practices and State-controlled systems with monopolistic features. With the advent of the EU, these systems had to come to terms with neoliberal policies

[2] On this topic, see: Bottalico, *Il lavoro portuale ai tempi delle meganavi*, Egea, 2021, p. 49 ff.; Bologna, *Le multinazionali del mare. Letture sul sistema marittimo-portuale*, Egea, 2010, pp. 45-108.

[3] Ales, Passalacqua, *La fornitura di lavoro portuale temporaneo*, in Xerri (ed.), *Impresa e lavoro nei servizi portuali*, Giuffré, 2012, p. 295.

[4] See, among many: Lefebvre, D'Ovidio, Pescatore, Tullio, *Manuale di diritto della navigazione*, Giuffré, 2022; Ales, Passalacqua, *cit.*; D'Aste, *Il lavoro portuale temporaneo ai sensi dell'art. 17 della legge 84/94. Analisi e temi di riflessione*, in *QP*, 2011, pp. 4-7.

[5] Van Hooydonk, *The Spanish dock labour ruling (C-576/13): mortal blow for the dockers' pools*, in *TR*, 2016, 7-8, p. 276.

[6] Capuano, Gagliardi, *Il caso del porto di Piombino: attualità, problemi, prospettive*, in Xerri (ed.), *Impresa e lavoro nei servizi portuali*, Giuffré, 2012, p. 401.

[7] ILO, *Code of practice: Safety and health in ports (Revised 2016)*, 2018, p. 2.

and the EU Treaties principles on free competition[8]. Recently, the most important challenge of dock work regulation has become that of finding concrete solutions to balance economic freedom and efficient competition with workers' protection and safety[9].

Thus far, each EU Member State continues to maintain its own dock work discipline, risking to lead to an uneven playing field for port companies within the internal market. These distortions of competition may undermine the EU maritime and transport policy. Indeed, the EU Commission has tried several times to regulate market access to port services, but has met with the opposition from some stakeholders, in particular trade unions. In fact, trade unions saw these attempts as a way to liberalise the sector without taking into account social and labour protection. Two Directive proposals were therefore rejected by the EU Parliament[10]. In 2017, EU Regulation 2017/352 was issued, establishing a regulatory framework for the provision of port services, but the cargo-handling sector does not fall within its scope[11].

[8] For an overview of port labour regulations in the EU, see: Van Hooydonk, *Port labour in the EU*, Portius, 2013.

[9] Xerri, *Ordinamento portuale e settore trasporto*, in Xerri (ed.), *cit.*, p. 19; Bottalico, *Towards a common trajectory of port labour systems in Europe? The case of the port of Antwerp*, in *CSTP*, 2019, p. 9. Undoubtedly, this is not an issue that exclusively concerns the port sector. On the contrary, it is part of a broader problem involving workers' protection in general, which is seen by the ECJ as a limitation on the economic freedoms guaranteed by the EU Treaties. On this topic, see, among others: Countouris, De Stefano, Lianos, *The EU, Competition Law and Workers' Rights*, in *UCLRP*, 2021, 2; Lianos, Countouris, De Stefano, *Re-thinking the competition law/labour law interaction: Promoting a fairer labour market*, in *ELLJ*, 2019, 3, p. 291 ff.; Carril Vázquez, *El debate actual sobre la protección social de los trabajadores como límite a la libre prestación de servicios en el mercado interior de la Unión Europea*, in *AFDUC*, 2007, 11, pp. 107-116; Schömann, *Collective bargaining and the limits of competition law*, ETUI Policy Brief, 2022. Online: https://www.etui.org/sites/default/files/2022-02/Collective%20bargaining%20and%20the%20limits%20of%20competition%20law_2022.pdf.

[10] The reference is to the proposed Directives submitted in the early 2000s. For a reconstruction of the proposals and an explanation of their outcome, see: Fernández Prol, *Relacion laboral de estiba portuaria y Libertad de establecimiento*, in Carballo Piñeiro (ed.), *Retos presentes y futuros de la política marítima integrada de la Unión europea*, Bosch, 2017, pp. 225-248; Verhoeven, *Dock Labor Schemes in the Context of EU Law and Policy*, in *ERS*, 2011, 2, pp. 150-166.

[11] Regulation 2017/352 of the EU Parliament and of the Council of 15 February 2017.

2. *Research questions and methodology*

Against the described background, the present research analyses the dock work regulatory system of two EU Member States with a strong maritime tradition: Italy and Spain. The first aim of this analysis is to identify strengths and weaknesses of the two systems and understand their approach in balancing the market dynamics with workers' protection. In addition, the research is carried out with a view to the harmonisation of the subject at the EU level, in order to understand whether it would be useful and what could be the preferable approach of a possible EU legislation.

These two legal systems were chosen for several reasons. On the one hand, they have a similar historical context and comparable dock work legislations. Indeed, the systems are very similar to one another: in both States there are pools of specialised and properly trained dock workers to cope with work peaks, who detain a priority in supplying temporary labour. Also, both legal systems have a troubled history of convictions by the European Court of Justice (ECJ) because of their dock work regimes. On the other hand, the two systems are different from the point of view of collective bargaining and collective agreements' effects. As known, the Spanish legal system, unlike the Italian one, is characterized by sectoral collective agreements with statutory status, statewide scope and *erga omnes* effect[12]. For these reasons, it is worth analysing and comparing two systems that are at once so similar and so different.

The research will be developed as follows.

In the first part (paragraph 3), the Italian system will be analysed, from its historical evolution to the current regulation. Conversely, the second part (paragraph 4) will be devoted to the Spanish system. The Italian system will be analysed first because of the chronological succession of the rulings that led to dock work reforms in both Italy and Spain: the Italian regulation was considered to be incompatible with EU law already in 1991, while the Spanish one only had the same fate in 2014. For both systems, a historical overview will be outlined. This outline responds to the need to understand the deep reasons that led to the existing regulations, which are the result of a concatenation of events and evolutions. Thereafter, the current legislations

[12] Cf. Royal Decree No. 2 of 23 October 2015 (*Texto Refundido de la Ley del Estatuto de los Trabajadores*), Title III.

and collective agreements will be analysed. Lastly, the most relevant considerations will be taken up and developed in the conclusion (paragraph 5).

3. *Dock work regulation in Italy*

3.1. *Historical remarks*

The creation of dock workers' guilds in Italy dates back to the Middle Ages. Dock workers, just as other workers did in the same era, gathered to defend their common interests and for mutualistic purposes. For example, the so-called *Compagnia dei Caravana* was founded in the port of Genoa in the 14th century[13].

These guilds continued to operate until the mid-19th century, reaching large numbers of associates and very complex structures, regulated by internal statutes[14]. They were abolished in 1864[15], causing huge problems of labour exploitation that resulted in a dock work crisis. In fact, dock workers were limited in their power to bargain fair wage conditions, as they had to bargain individually and no longer as a group. In addition, they lost control over the labour market: following the abolition of the guilds, they were no longer guaranteed enough shifts for a sufficient income. Also, many new workers joined the market, working mostly on a casual basis. These workers were day labourers selected through a lottery. The new system was called "free choice system", referring to the contractor's discretion to hire as many workers as he deemed necessary from time to time. In these years dock workers were *de facto* divided into occasional and permanent workers[16]. This *de facto* division characterised the entire period between the end of the 19th century and the first part of the 20th.

In the first half of the 20th century, the fascist government sought to determine a balance between supply and demand for dock labour by restor-

[13] Passaniti, *Eguaglianza, diritto di associazione e laicità. Il significato costituzionale dell'abolizione delle corporazioni nel 1864*, in Maffei, Varanini (eds.), *L'età moderna e contemporanea. Giuristi e istituzioni tra Europa e America*, Firenze University Press, 2014, p. 112.

[14] Maiullari, *Corporazioni di mestiere e quartieri urbani. Coabitazione e coesione in una città portuale del Mediterraneo settentrionale: Genova tra Otto e Novecento*, in *MEFR*, 1993, 2, p. 482.

[15] L. No. 1797 of 29 May 1864.

[16] Bettini, *I vantaggi illusori del lavoro precario. I portuali sotto il fascismo*, in *SS*, 2003, 2, p. 450.

ing the labour supply blockade. This measure aimed at creating a political consensus among masses of workers traditionally close to socialism, as well as at avoiding social tensions in ports, which represented the country's main commercial gateways[17]. Royal Decree No. 166 of 24 January 1929 put an end to the free-choice system and restored the port labour reserve in favour of the newly established *Compagnie*, which resembled the previous guilds. Nevertheless, the new *Compagnie* had less self-government power than the old guilds, as wages were set by the administrative port authority[18].

The *Compagnie* established during the fascist-era were pools of dock workers who supplied port companies with the labour they needed to carry out cargo-handling activities. With the end of the corporate-fascist system, the *Compagnie* remained as cooperative societies[19]. Truth to be told, the legal nature of the *Compagnie* is still debated, but the prevailing doctrinal opinion recognises in the legal status and structure of these pools a privatistic character, tending to qualify them as cooperative societies or labour cooperatives with a mutualistic purpose[20].

In 1942, the Italian Navigation Code was enacted[21]. Its Art. 110 stipulated that the conduct of port operations was completely reserved for the *Compagnie*. In other words, port operators could not use their own employees to carry out cargo-handling activities: they had to turn to the *Compagnie*. In addition, the *Compagnie* predetermined the number of dock workers to be put to work, according to parameters established *ex ante* at their own discretion. Needless to say, this monopolistic dock work system greatly influenced the organisation of port operators[22].

The *Compagnie*'s activity fell under the scheme of labour interposition. As is well known, the disapproval of the Italian legal system toward interposition has been gradually fading, also due to the influence of EU law[23]. Law

[17] Bettini, *cit.*, p. 488.

[18] Cfr. Fragola, *L'ordinamento corporativo del lavoro portuale e le compagnie delle Maestranze*, in *DM*, 1938, 2, p. 2.

[19] The structure of the *Compagnie* has remained similar to that of the fascist era, although their status has changed, and their organisation has been democratised. Bettini, *cit.*, p. 489.

[20] Minale Costa, *Il diritto del lavoro nei porti. Il lavoro portuale tra regolamentazione legale e contrattuale*, Giappichelli, 2000, p. 55; Carbone, *Le compagnie portuali: natura, funzioni, responsabilità*, in *LD*, 1987, p. 525.

[21] Royal Decree No. 327 of 30 March 1942.

[22] Carbone, Celle, Lopez De Gonzalo, *Il diritto marittimo*, Giappichelli, 2011, p. 145.

[23] Ales, Passalacqua, *cit.*, p. 298.

No. 1369 of 23 October 1960 on the prohibition of labour interposition was finally repealed by Decree No. 276 of 10 September 2003. However, in the port sector a form of interposition was allowed far before the repeal of Law No. 1369/1960: the activity of the *Compagnie* was considered an exception to the general principle of the ban on interposition[24].

The presence of the *Compagnie* prevented the spread of occasional labour. Dock labour interposition did not result in workers' rights being threatened: the flexibility of the system did not lead to deregulation and precariousness but to a secure environment, characterised by a strict professional regulation. Dock workers were registered in special lists and provided with a booklet certifying their status and membership. Their registration was subject to age limits, possession of Italian citizenship, residence in the port municipality, absence of criminal convictions, good moral and civil conduct and proof of a healthy body[25].

The *Compagnie* solely supplied personnel to port companies until 1994[26]. The system was clearly contrary to EU principles and, in 1991, a ruling of the ECJ deemed the Italian dock work regulation contrary to EU competition law[27]. In particular, the dock labour reserve in favour of the *Compagnie* (Art. 110 of the Italian Navigation Code) was considered to be incompatible with EU law, since the *Compagnie* held a dominant position, which they used for abusive purposes. The ECJ's interpretation of abusive conduct in this context is quite broad: it includes the imposition of purchase or selling prices or unnecessary performances, the limitation of production or technical development and the application of different contractual terms to equivalent performances[28]. In this sense the *Compagnie* were engaged in abusive conducts[29].

[24] See above all Biagi, *Cooperative e rapporti di lavoro*, Franco Angeli, 1983, p. 250 ff.

[25] Royal Decree No. 2476 of 1923, Artt. 155, 152, 194. See: Raffaelli, *La somministrazione di lavoro portuale*, Ca' Foscari University, 2009, p. 21.

[26] Ales, Passalacqua, *cit.*, p. 300.

[27] ECJ, C-179/90, *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, 1991, Para. 19-20. See: Munari, *Compagnie portuali, imprese concessionarie e operazioni di imbarco e sbarco: il diritto comunitario e la corte di giustizia*, in *DM*, 1991, 4, p. 1128 ff.

[28] Minale Costa, *cit.*, p. 88.

[29] Ales, Passalacqua, *cit.*, pp. 306-308.

3.2. *The current regulation*

Law No. 84 of 28 January 1994 abolished the dock labour reserve in favour of the *Compagnie* and required for the transformation of all the *Compagnie* into cooperatives or common companies. These are still involved in the provision of temporary dock labour, but their legal status is regulated by Art. 17 of Law No. 84/1994. Therefore, they are often called "Art. 17 companies".

As mentioned, the temporary dock labour supply was open to competition, as any company or cooperative can now carry out this activity, as long as it obtains an authorization from the Port Authority. Although they do not enjoy a monopoly on dock work, Art. 17 companies still play a key role in Italian ports[30]. Their sole purpose is to temporarily lend to port companies the workforce they need as a special type of labour interposition. Also, Law No. 84/1994 states that they must have their own resources and their personnel must be properly trained for carrying out port operations. The results of the training are verified by the Port Authority, which administers the list of temporary workers who have completed the training.

To summarise, there are two types of companies in the current framework: port companies engaged in port operations (regulated by Art. 16 and Art 18 of Law No. 84/1994) and Art. 17 companies, which supply temporary workers to port companies. Artt. 16 and 18 companies perform port operations through their own staff and, during intense work peaks, they turn to Art. 17 personnel.

It could be stated that Law No. 84/1994 liberalised dock work[31]. More precisely, it created a "controlled liberalisation"[32]: both Artt. 16 and 18 companies and Art. 17 companies need a special authorisation from the Port Authority, and the dock workers' register is also administered at a public level. This major role of the Port Authority certainly has the consequence of restricting full competition, but it is necessary because of the limited port space

[30] On the strategic importance of Art. 17 companies, see: BENVENUTI, *Ruolo e funzioni dell'art. 17 nell'organizzazione del lavoro portuale del porto di Genova*, in *QP*, 2011, pp. 45-47.

[31] L. No. 84 of January 28, 1994, Art. 18. See: CARBONE, *Dalla riserva di lavoro portuale all'impresa terminalista tra diritto interno, diritto comunitario e diritto internazionale*, in *DM*, 1992, 2, p. 599 ff.

[32] BRIGNARDELLO, *I servizi portuali alle merci: le imprese autorizzate per l'espletamento di operazioni portuali e "servizi portuali"*, in XERRI (ed.), *cit.*, p. 189; XERRI, *cit.*, p. 20.

and the public interests involved. In other words, controlled liberalisation consists of a system that combines competition with security optimization within a regulated market.

Ultimately, dock workers can be hired either by the port companies themselves, or by Art. 17 companies that then send them temporarily to work for port companies. If a port company needs temporary labour, it can only turn to Art. 17 companies. Conventional labour supply agencies come into play only if Art. 17 companies are short of personnel[33]. The current regulation, which sets a prerogative in favour of Art. 17 workers over those of conventional agencies, ensures safety and protects dock workers' employment.

Prior to 2020, a third category of workers could – in some cases – carry out port operations. In fact, shipowners could perform cargo-handling through their own seafarers. This practice is called self-handling. In 2020, an amendment to Law No. 84/1994[34] was enacted, stating that self-handling is only admissible if the labour demand cannot be met through the personnel of Art. 17 companies and if the ship is equipped with adequate means and suitable personnel, who must be dedicated exclusively to port operations. This amendment was necessary for safety reasons, that is, to prevent inadequately trained workers from carrying out complex and dangerous operations[35]. According to a doctrine[36], the discipline thus amended would have the effect of restoring the system prior to the 1994 reform, which had been censured by the ECJ[37]. As a matter of fact, the incompatibility with EU law of the pre-1994 Italian framework was due to the fact that the execution of port operations was completely reserved to the *Compagnie*, while the current regulatory framework allows port companies under Artt. 16 and 18 to use their own personnel. In addition, the European regulatory framework must be applied as interpreted by the ECJ. In the *Commission v. Spain* ruling, the Court, while censuring the Spanish dock system, considered among the various admissible solutions the possibility of "creating a reserve of workers

[33] L. No. 84, 1994, Artt. 16-17.

[34] Decree No. 34 of 19 May 2020, Art. 199 *bis*.

[35] On self-handling and the 2020 amendment, cf.: Faggioni, *Lavoro portuale: una svolta inattesa nella giurisprudenza europea. Spunti di riflessione a partire dalla pronuncia Katoen della Corte di giustizia dell'UE (cause riunite C-407/19 e C-471/19)*, in *DLRI*, 2023, 3, p. 491 ff.

[36] Zunarelli, *La (contro)riforma del regime dell'autoproduzione del regime delle operazioni portuali: il nuovo art. 16 comma 4 bis della l. n. 84/1994*, in *RDN*, 2020, 2, p. 1247.

[37] ECJ, C-179/90, *Merci Convenzionali*, *cit.*

managed by private companies, which operate as temporary employment agencies and make workers available to port companies"[38]. The recent *Katoen* ruling goes even further: the Court shows an openness toward legal systems that completely reserve port operations to recognised dock workers[39]. The solution of the *Katoen* case is based on the relevance of security and safety matters, but it represents a first step towards a greater consideration of social rights in the single market: it is not to exclude that in the near future the need for employment stabilisation of dock workers will be considered by the ECJ as a valid reason for a partial restriction on freedom of establishment.

3.3. *The single collective agreement for dock workers*

After the entry into force of Law No. 84/1994, dock workers were exposed to the risk of fragmentation of working conditions and social dumping. To avoid this outcome, Law No. 186 of 30 June 2000 modified paragraph 13 of Art. 17, Law No. 84/1994, stating that social partners had to negotiate a single national collective agreement for dock workers[40]. This prevented companies from applying particularly unfavourable collective agreements and using labour costs as a competitive advantage.

Following a ruling by the Council of State[41], the text of paragraph 13 was then rewritten again by Law No. 247 of 24 December 2007[42]. Law No. 247/2007 establishes that Port Authorities must include in the authorisations that they release an obligation to ensure workers a treatment that cannot be lower than the standards described in the national collective agreement stipulated by trade unions and employers associations that are comparatively more representative at a national level and by the Italian Ports Association (*Assoporti*)[43]. Therefore, the law does not directly impose the application of

[38] ECJ, C-576/13, *EU Commission v. Kingdom of Spain*, 2014, Para. 55.

[39] ECJ, C-407/19 & C-471/19, *Katoen Natie Bulk Terminals NV v. General Services Antwerp NV, Middlegate Europe NV v. Ministerraad*, 2021. See: FAGGIONI, *cit.*, pp. 485-489.

[40] L. No. 186 of June 30, 2000, Art. 3.

[41] Cons. St., Judgement No. 3821 of 22 June 2006, *Assoporti v. Confitarma et al.* The case cannot be detailed here for reasons of space: please refer to the pages of TINCANI, *Lavoro portuale e contratto collettivo unico di riferimento. Il commento*, in *LG*, 2007, pp. 1009-1016 and COSTANTINI, *Il lavoro portuale: problemi del passato e sfide del futuro*, in *DM*, 2019, p. 51 ff.

[42] L. No. 247 of December 24, 2007, Art. 1, Para. 89.

[43] See Vezzoso's comment on the single port collective agreement. The Author is very

the single agreement, but it does indirectly oblige companies to comply with it. For all the illustrated reasons, the single national collective agreement for dock workers has an extraordinary relevance compared to common national collective agreements. In fact, as is well known, due to the non-implementation of the second part of Article 39 of the Constitution, national collective agreements in Italy have neither *erga omnes* effect nor statutory status[44]. Nevertheless, paragraph 13 of Art. 17 contains a "social clause" through a mechanism of referral *per relationem* to the single collective agreement, so that every company (*ex* Artt. 16, 17 or 18) must guarantee its employees or temporary workers a fair treatment[45].

4. *Dock work regulation in Spain*

4.1. *Historical remarks*

In Spain, precariousness and remuneration irregularity have been historical features of dock work because of the varying pace of maritime traffic and poor regulation of the profession. In the late 19th century, the growth of maritime traffic significantly increased the demand for dock labour. Nevertheless, only certain groups of dock workers could count on job stability,

critical of the role given by the law to this agreement and believes that it undermines the collective bargaining freedom of companies: VEZZOSO, *Sul contratto unico per i lavoratori dei porti*, in *DM*, 2008, pp. 487-488.

[44] To further explore the matter, see in particular the following texts: GHERA, *L'articolo 39 della Costituzione e il contratto collettivo*, in ZOPPOLI A., ZOPPOLI L., DELFINO (eds.), *Una nuova Costituzione per il sistema di relazioni sindacali?*, Editoriale Scientifica, 2014; RUSCIANO, *Lettura e rilettura dell'art. 39 della Costituzione*, in *DLM*, 2013, p. 263 ff.; LECCESE, *Il diritto sindacale al tempo della crisi. Intervento eteronomo e legittimità costituzionale*, in *DLRI*, 2012, p. 479 ff.; DEL PUNTA, *Eppur non si muove: lo stallo del diritto sindacale*, in ICHINO (ed.), *Il diritto del lavoro nell'Italia repubblicana, Teorie e vicende dei giuslavoristi dalla Liberazione al nuovo secolo*, Giuffré, 2008, pp. 381-395; GIUGNI, *sub Art. 39*, in *Commentario della Costituzione*, Zanichelli-Il Foro Italiano, 1979, p. 268 ff.; PERA, *Problemi costituzionali del diritto sindacale italiano*, Feltrinelli, 1960, p. 108 ff.

[45] COSTANTINI, *cit.*, p. 179; VEZZOSO, *cit.*, p. 488; CUNATI, *ll lavoro portuale dopo l'attuazione del c.d. Protocollo Welfare*, in *DRI*, 2008, pp. 213-218. On social clauses, see, among many: COSTANTINI, *La finalizzazione sociale degli appalti pubblici. Le "clausole sociali" fra tutela del lavoro e tutela della concorrenza*, in *Biblioteca "20 Maggio"*, 2014, 1, online: https://csdle.lex.unict.it/sites/-default/files/Documenti/Articoli/2014-1_Costantini.pdf; GHERA, *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, in *DRI*, 2001, p. 133 ff.

while the majority of dock workers worked on call and experienced a highly precarious situation[46].

In 1939, a legislation on cargo-handling activities in ports was enacted for the first time[47]. As in the Italian case, the fascist regime wanted to regulate the issue to avoid disorders in a strategic sector and to gain the consensus of the masses. This law stipulated that the cargo-handling activities were to be carried out by members of the *Servicio de Trabajos Portuarios* (STP), then renamed *Organización de Trabajadores Portuarios* (OTP) by Decree No. 88 of 23 May 1968.

In the 1960s and 1970s, a series of orders regulated port labour, increasing the specificity of the discipline. The fascist-era system was based on State-controlled dock labour management[48] and until the Mid-1980s the sector was strongly controlled by the Ministry of Labour. At this time, the OTP was not the direct employer or contractor of dock workers. These were paid by the port companies, but depended on the OTP, and they were only remunerated when they actually carried out cargo-handling activities remaining unemployed for the rest of the time[49].

The paradigm shift from precariousness to stability only took place after the dock work relationship was considered to be special[50]. The special status of dock workers was established by Law No. 32 of 2 August 1984, that modified some articles of the Workers' Statute by regulating the dock labour relationship in a different way than the common one. Entities similar to temporary employment agencies provided skilled dock workers to port companies. The permanent employers of dock workers were the agencies themselves, which applied the special dock work regime. These agencies were first named *Sociedades Estatales de Estiba y Desestiba*, then *Agrupaciones Portuarias de Interes Economico*, and lastly *Sociedades Anónimas de Gestión de Estibadores Portuarios* (SAGEPs).

[46] To further deepen the history of dock work in Spain, see: Ibarz Gelabert, *Oficios y cualificaciones en el trabajo portuario. El caso de Barcelona en la primera mitad del siglo XX*, in *HS*, 2003, 1, pp. 119-137.

[47] Order of the Ministry of Labour of September 6, 1939.

[48] González Laxe, López Arranz, Novo Corti, *La complejidad del sector de la estiba: un análisis económico-jurídico para el caso español*, in *TL*, 2021, 3, p. 256 ff.

[49] Fernández Prol, *cit.*, pp. 235-236. To deepen these aspects, see also: Ballester Pastor, *La relación laboral especial de los estibadores portuarios*, Tirant lo Blanch, 2014.

[50] Fernández Prol, *cit.*, p. 235.

The SAGEPs system was then confirmed by the *Texto Refundido de la Ley de Puertos y de la Marina Mercante* (TRLP) approved by Decree No. 2 of 5 September 2011. According to this legislation, all the port companies who wished to perform cargo-handling services had to be integrated as participants in the port's SAGEP and obliged to cover its operating costs[51].

Theoretically, dock workers could be hired in two ways: either with a special employment relationship with the SAGEP or directly by the port company. In the first scenario, a triangular labour relationship was to be created among the SAGEP, the dock worker and the user company (labour interposition). In the second scenario, the relationship between the dockworker and the port company fell under the common regime. Nevertheless, job offers from the port company were to be directed primarily at workers of the SAGEP[52]. Following the offer, the special employment relationship with the SAGEP was suspended, and the selected worker was then hired directly by the port company through a common employment relationship[53]. At the end of the contract with the port company, the dock worker had the option to resume the original special relationship with the SAGEP. This technical-legal solution guaranteed the stability of dock workers within the SAGEPs.

In addition, Decree No. 2/2011 established the minimum number of workers that port companies had to hire under the common employment regime, corresponding at least at 25% on a year-on-year basis[54].

In 2014, the ECJ condemned Spain for its dock work system, finding it contrary to the principle of freedom of establishment and criticising the fact that port companies could not independently select their employees[55]. In fact, according to a consistent case law of the ECJ[56], Art. 49 TFEU prevents

[51] Royal Decree No. 2/2011, Artt. 142-143. See: Fernandez Prol, *cit.*, p. 237.

[52] Fernandez Prol, *cit.*, p. 237; Bravo Ortega, *La reforma portuaria en España*, in Fotinopoulou Basurko (ed.), *Gobernanza portuaria*, Eusko Jaurlaritzaren Argitalpen Zerbitzu Nagusia, 2011, pp. 75-90; Cabeza Pereiro, *Aspectos jurídico-laborales del trabajo portuario en España*, in Fotinopoulou Basurko (ed.), *Gobernanza portuaria*, Eusko Jaurlaritzaren Argitalpen Zerbitzu Nagusia, 2011, pp. 91-110.

[53] Ballester Pastor, *El nuevo régimen jurídico (legal y convencional) de relaciones laborales en la estiba portuaria ¿cumple ya las exigencias de la liberalización del sector que impone el TJUE?*, in *REJLSS*, 2022, 5, pp. 121-152.

[54] Royal Decree No. 2/2011, Art. 150.

[55] ECJ, C-576/13, *EU Commission v. Kingdom of Spain*, *cit*. See: Van Hooydonk, *cit.*; Bouveresse, *Activités portuaires*, in *RevE*, 2015, 2, p. 32.

[56] ECJ, C-299/02, *Commission v. Netherlands*, 2004, Para. 15; C-19/92, *Kraus v. Land Baden-Württemberg*, 1993, Para. 32.

any measure, even if it is applied without discrimination on the basis of nationality, that may make the exercise of freedom of establishment more complicated. In the case of the Spanish dock legislation, the Court decided that, even if Decree No. 2/2011 equally applied to Spanish and foreign companies, the performance of cargo-handling activities was made less attractive for foreign companies by the fact that they had to compulsorily participate in the SAGEPs' capital and primarily hire SAGEPs' workers.

Of course, freedom of establishment can be restricted if the legislation pursues legitimate objectives – such as those of workers' protection and port safety claimed by Spain[57]. Nevertheless, the Court found that the alleged objectives could have been achieved by less detrimental measures.

Following the ruling of 2014, Spain was obliged to modify its legal framework. This was done through Decrees No. 8 of 12 May 2017 and No. 9 of 29 March 2019 (then partially modified by Law No. 12/2021), which enunciated the principle of freedom of employment of dock work and transformed all the SAGEPs into *Empresas de Trabajo Temporal* (ETTs) or *Centros Portuarios de Empleo* (CPEs)[58]. ETTs are common temporary labour supply companies, while CPEs have as exclusive purpose the recruitment of dock workers and their supply to authorised companies.

Decree No. 8/2017 carried out a real deconstruction of the previous Spanish regime. According to many authors, it implemented a step backward in the protection of dock workers and even went beyond what the ECJ required[59]. Indeed, immediately after the 2017 reform there was a lot of concern among dock workers and their unions[60]. The 2017 Decree was also

[57] See the extensive EU case law on the characteristics of the measures that pursue these objectives, for example: ECJ, C-518/09, *Commission v. Portugal*, 2011, Para. 65; C-288/89, *Collectieve Antenne Voorziening Gouda v. Commissariaat voor de Media*, 1991, Para. 15.

[58] Ojeda Avilés, *La reconversión del sector portuario. Los Reales Decretos Leyes 8/2017 y 9/2019*, La Ley, 2019; Bravo Ortega, *cit.*, pp. 75-90.

[59] Fernández Prol, *cit.*, p. 246; Pazos Pérez, *cit.*, p. 269; Fernández Prieto, *La relación laboral de la estiba tras la STJUE de 11 de diciembre de 2014*, in Cabeza Pereiro, Rodríguez Rodríguez (eds.), *El trabajo en el mar. Los nuevos escenarios jurídico-marítimos*, Bomarzo, 2015, pp. 560-561; Cabeza Pereiro, *Algunos interrogantes acerca de los Centros Portuarios de Empleo*, in Carballo Piñeiro (ed.), *Retos presentes y futuros de la política marítima integrada de la Unión europea*, Bosch, 2017, pp. 206-209.

[60] Pazos Pérez, *La estiba portuaria tras la aprobación del real decreto 8/2017 de 12 de mayo*, in Carballo Piñeiro (ed.), *Retos presentes y futuros de la política marítima integrada de la Unión europea*, Bosch, 2017, 2017, p. 259 ff.

deeply criticised by the doctrine, as it was accused of "replacing the supply of permanent workers with the supply of temporary workers" with the consequence of "replacing decent work with precarious work"[61].

In practice, Decree No. 8/2017 left a key role to collective bargaining, which alone bore the responsibility of ensuring stability for dock workers[62].

4.2. *The current regulation*

In 2019, Decree No. 9/2019 was enacted, which meant a certain progress in terms of dock workers' safety and employment stability[63]. Indeed, this Decree was issued with the aim of combining economic freedoms with workers' rights[64]. It added Chapter V to Law No. 14 of 1 June1994 that regulates temporary labour supply. This Chapter deals exclusively with CPEs, establishing a framework that is different from the one of other labour supply agencies, especially from the point of view of organisational structure and financial security. In any case, many relevant issues are still deferred to collective bargaining. These issues are currently regulated by the 5th Framework Agreement regulating labour relations in the dock sector, signed in 2022[65].

Moreover, Law No. 4 of 25 February 2022 was recently enacted. The main topic of this Law is the protection of consumers and users in situations of vulnerability, but its "Transitional and Final Provisions" give a sort of endorsement to the 5th Framework Agreement[66]. Law No. 4/2022 also clarifies that CPEs carry out a mutualistic activity among their members, which share common interests and expenses. This confirms that CPEs are completely different from common ETTs regulated by Law No. 14/1994[67]. In addition, a key obligation on port companies now appears in Art. 18 of Law No. 14/1994. These companies have to request the temporary assignment of CPEs dock workers every time that they do not use their own personnel. As outlined in the next paragraph, the 5th Framework Agreement reproduces

[61] Cabeza Pereiro, *cit.*, p. 223.

[62] Pazos Pérez, *cit.*, p. 253.

[63] Ballester Pastor, *cit.*, p. 126.

[64] Royal Decree No. 9/2019, Preamble.

[65] 5th Agreement regulating labour relations in the dock sector, in Nation Official Bulletin (BOE) No. 118 of 18 May 2022, pp. 68980-69042.

[66] Ballester Pastor, *cit.*, p. 126.

[67] *Ibid*.

this priority in favour of CPEs personnel. Before this change, port companies could turn to CPEs or ETTs with no order of preference.

4.3. *The framework agreements regulating labour relations in the dock sector*

Collective agreements regulating labour relations in the dock sector have been negotiated since 1998. These agreements, stipulated in accordance with Title III of the *Texto Refundido de la Ley del Estatuto de los Trabajadores*, have general scope and *erga omnes* effect. Particularly interesting for our purposes is the affair regarding the 4th Framework Agreement, signed in 2008. It was declared incompatible with the principles of free competition by a famous decision of the National Competition Commission – which sanctioned the signatory associations – and by the National Court and the Supreme Court[68]. These decisions raise an extremely relevant issue regarding the complex interactions among the single market, free competition and the protection of social and labour rights. The thesis supported by the Spanish courts and the Competition Commission is based on the idea that the collective agreement illegitimately restricts free competition among companies. Of course, collective bargaining does take certain aspects away from the dynamic of competition[69]; this has led to certain frictions in the EU concerning

[68] *Comisión Nacional de la Competencia*, September 24, 2009; *Audiencia Nacional, Sala de lo Social*, June 1st, 2008; *Tribunal Supremo, Sala de lo Social*, November 11, 2010. For the specific arguments that led to the "conviction" of the 4th Agreement – related to the previous legal framework and partially comparable to those that led the ECJ to condemn the Spanish system in 2014 – please refer to: Ojeda Avilés, *La impugnación del IV Acuerdo Marco de la Estiba: un problema laboral con solución mercantil*, in *RTSS*, 2021, pp. 27-52; Odriozola Landeras, *Situación del Sector de la Estiba Cinco Años Después de la Aprobación de la Ley 48/2003, de 26 de Noviembre, de Régimen Económico y de Prestación de Servicios de los Puertos de Interés General*, in *RT CEF*, 2008, 304, online: https://doi.org/10.51302/rtss.2008.5561.

[69] Cf., *ex multis*: Miracolini, *La funzione anticoncorrenziale della contrattazione collettiva*, in *VTDL*, 2021, 2, pp. 355-383; Forlivesi, *Sulla funzione anticoncorrenziale del CCNL*, in *DRI*, 2019, p. 839; Del Punta, *Valori del diritto del lavoro e economia di mercato*, in *Biblioteca "20 Maggio"*, 2019, 2, online: https://csdle.lex.unict.it/sites/default/files/Documenti/Articoli/2019-2_DelPunta.pdf; Orlandini, *Autonomia collettiva e libertà economiche: alla ricerca dell'equilibrio perduto in un mercato aperto e in libera concorrenza*, in *Biblioteca "20 Maggio"*, 2008, 2, online: https://csdle.lex.unict.it/-sites/default/files/Documenti/Articoli/2008-2_Orlandini.pdf; Brino, *Diritto del lavoro e diritto della concorrenza: conflitto o complementarietà?*, in *RGL*, 2005, 1, p. 351; Ichino, *Contrattazione collettiva e antitrust: un problema aperto*, in *MCR*, 2000, p. 639; Pallini, *Il rapporto problematico tra diritto della concorrenza e autonomia collettiva nell'ordinamento comunitario e nazionale*, in *RIDL*, 2000, 2, p. 209 ff.

collective instruments and their impact on competition, freedom to provide services and freedom of establishment[70]. Indeed, the ECJ adopts an inverted perspective compared to that of the constitutional tradition of most Member States: according to the ECJ, economic freedoms can only be compressed if imperative reasons of general interest justify a limitation[71]. The decisions concerning the 4th Agreement demonstrate the influence that this European case law has had on national courts, leading them to a restrictive interpretation of labour rights as limits to economic freedoms[72].

However, as outlined above, the *Katoen* ruling appears to represent a – albeit slight – change of course on the part of the ECJ. By virtue of this new course, the current Spanish framework can be considered in line with EU law. As regards the collective framework, it is worth describing more in detail the agreement in force today: the 5th Framework Agreement, signed in 2022. It represents the minimum standard, allowing other agreements or contracts of lesser scope to regulate certain matters, albeit within the terms and limits set by the Framework Agreement itself. This ensures uniformity in compliance with the legal framework while respecting the tradition whereby each port has its own collective agreement.

The 5th Framework Agreement guarantees job stability and quality of employment revolving its entire regulation around the right to an effective employment, whether the workers are employed directly by companies or belong to CPEs[73]. The importance placed by the Agreement on effective employment is such that the main measures to achieve greater flexibility ex-

[70] See, for example, the Albany case (ECJ, C-67/96, September 21, 1999, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*) and the Viking case (ECJ, C-438/05, December 11, 2007, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line*). See: Ichino, *cit.*; Ballestrero, *Le sentenze Viking e Laval: la Corte di Giustizia "bilancia" il diritto di sciopero*, in *LD*, 2008, 2, pp. 372-391; Raison, Chaumette, *L'arrêt Viking Line sur les entraves syndicales à la liberté d'établissement*, in *DMF*, 2009, pp. 794-808.

[71] Ballestrero, *cit.*, p. 381; On the same topic, see also: Carril Vazquez, *Cuando as libertades do mercado da Unión Europea limitan os dereitos de proteccion social de persoas que traballan*, in *AFCTUC*, 2010, 1, pp. 53-70.

[72] See: Carril Vázquez, who finds this increasing power of the *lex mercatoria* over workers' rights very worrying: *El impacto de las normas de competencia sobre el IV acuerdo para la regulación de las relaciones laborales en el sector de la estiba portuaria y el papel de la comisión nacional de competencia en el control de legalidad de los convenios colectivos*, in Quintáns-Eiras, Díaz De La Rosa, García-Pita y Lastres (eds.), *Estudios de derecho marítimo*, Thomas Reuters Aranzadi, 2012, p. 520.

[73] 5th Agreement for the regulation of labour relations in the dock sector, *cit.*, Art. 13.

clusively apply to companies that respect certain employment quality indicators[74]. This has an impact on the relationship between CPEs and their member companies. Indeed, the mutualistic nature of CPEs means that the member companies have some obligations in terms of employment stability, vocational training, etc., *vis à vis* the personnel of the CPEs of which they are members[75]. In addition, the Agreement enhances the priority given to the personnel of CPEs: port companies must turn to CPEs workers both when they decide to make new hires and when they occasionally do not assign activities to their own employees. Of course, the role of ETTs is really marginal[76], but this does not surprise since the recent legal framework also gives a leading role to CPEs over other models. The previous system, which left to companies a totally free choice, put the safety of workers (and of the entire port area) at risk and jeopardised workers' job stability.

The compatibility of the priority mechanism appearing in the 5th Framework Agreement (and "authorised" by Law No. 4/2022) represents the most controversial issue when it comes to considering the compatibility of the Spanish system with EU principles. However, once again the system should be analysed in light of the recent *Katoen* ruling[77]. In that occasion, the ECJ stated that safety protection requirements may justify a restriction on freedom of establishment, declaring compatible with EU competition principles a regulation that reserves port operations to recognised dock workers[78]. Therefore, the priority mechanism does not conflict with EU law[79]. In addition, it should be considered that the previous Spanish legislation

[74] For the quality indicators, see: 5th Agreement for the regulation of labour relations in the dock sector, *cit.*, Art. 28.

[75] 5th Agreement for the regulation of labour relations in the dock sector, *cit.*, Chapter XI. Arrieta Idiakez, *Análisis de los aspectos más destacables del V Acuerdo para la regulación de las relaciones laborales en el sector de la estiba portuaria*, in *RGDTSS*, 2022, 63, Para. IV, online: https://www.iustel.com/v2/revistas/buscador.asp?id=2&meta=%22Labour%20%20relations%22.

[76] In any case, according to the data of the Ministry of Transport, in 2020 almost 90% of dock workers were members of a CPE. See: Ministry of Transport – National Ports, *Movilidad y agenda urbana, Análisis de la evolución de la liberalización del sector de la estiba en España*, November 2021.

[77] ECJ, C-407/19 & C-471/19, Katoen, *cit.*

[78] The only requirement for such a regulation to be legitimate is that the conditions for being a recognised dock worker are based on objective, non-discriminatory criteria known in advance, that allow workers from other Member States to demonstrate that they meet equivalent requirements. Also, the reserve must not establish a *a priori* limited quota of workers eligible for the recognition.

[79] Thus also: Ballester Pastor, *cit.*, pp. 150–151.

(the one enacted in 2017) did not comply with ILO Convention No. 137[80]: by going beyond what the ECJ required, Spain had created a system that did not guarantee dock workers any stability of employment. Therefore, the current framework is preferable because it allows Spain to comply with both its obligations under international and EU law. Besides, the priority mechanism in favour of CPEs is similar to the Italian one. In fact, the Italian system is also characterised by conventional work outsourcing and dock work outsourcing, which differs from the former for certain peculiarities and a specific regulation. Therefore, it is coherent to compare Spanish CPEs to Italian Art. 17 companies. Both the CPEs and Art. 17 companies cope with the unpredictable and irregular work peaks typical of the sector. Moreover, they function in a very similar way: they hire workers and then send them on temporary assignments to companies authorised to carry out port operations.

5. *Conclusive remarks*

Both the Italian and the Spanish current regulations have tackled the quest for balancing freedom of competition with workers' interests. As regards freedom of competition, in both systems it is guaranteed by the existence of different models for the provision of dock services, and particularly by the fact that port companies can hire their own personnel. Of course, the systems are not fully liberalised. They give rise to a "controlled liberalisation" based on authorisations and the obligation to turn – in case of need for temporary labour – to recognised dock workers who are part of specialised pools. The described restrictions are first justified by the public interests at stake. In addition, these rules allow a control on the adequate qualifications of those hired, in order to ensure safety in the provision of the service[81]. Last but not least, the two systems manage to combine the need to cope with work peaks with the need to ensure employment stability. In the port sector, which is characterised by a marked intermittency of labour demand, the stability of temporary dock workers is crucial to obtain a smooth functioning of cargo-handling. In fact, if the most skilled workers leave the profession, frightened

[80] Cabeza Pereiro, *cit.*, p. 208; Rodríguez Ramos, *El régimen jurídico de la relación laboral de los estibadores: pasado, presente y futuro*, in *TL*, 2018, 2, p. 103.

[81] Fernández Avilés, *La estiba sigue en conflicto: liberalización de mercados vs. garantías sociales*, in *RTSS*, 2017, 4, p. 10.

by its precariousness, port companies will have to hurriedly fill a large demand for labour without a stable pool from which to source, risking having to turn to agencies to supply poorly trained workers. Such a situation could greatly diminish the quality of services, with risks for the entire industry. Conversely, the Italian and Spanish regulations set up instruments to counteract downward competition, both among workers in the access to the labour market and among companies based on working conditions[82].

The analysis definitely shows that the evolution of the two systems is not dissimilar. In particular, it is indicative that the two collective bargaining systems, despite coming from different starting points, at a closer look appear very similar. In fact, the Italian single collective agreement for dock workers resembles a Spanish statutory agreement: the law does not go so far as to give it *erga omnes* effect, but the social clause of referral *per relationem* has a comparable result.

The evolution undergone by the two regulatory systems fits into one larger trend: while the 1990s and early 2000s witnessed a common tendency in European port systems toward an increasing flexibility and market liberalisation[83], in the most recent years there has been a return to regulation to the benefit of safety and dock workers' employment stability. The Spanish Law No. 4/2022 and the Italian amendment of 2020 are two examples of this new trend, and the *Katoen* ruling is also part of the process, as it has in some ways endorsed this regulatory resurgence. These new developments give hope for a future in which economic and market values recognise the imperatives of equity and social sustainability. In this way, and when labour law also takes due account of the challenges of market efficiency, the traditional juxtaposition of competition and labour law can be overcome[84].

[82] On the competition-regulating role of labour law, see: Tullini, *Concorrenza ed equità nel mercato europeo: una scommessa difficile (ma necessaria) per il diritto del lavoro*, in *RIDL*, 2018, 2, pp. 199-232.

[83] On this common tendency, see the contribution of Bottalico, *cit.*

[84] See Treu, *Compiti e strumenti delle relazioni industriali nel mercato globale*, in *LD*, 1999, p. 193, who already called for a narrowing of the distance between market dynamics and labour law approaches when facing the complexity of sustainable development. On the complementarity and interdependence of competition law and labour law, cf. Brino, *cit.*, pp. 319-360 and Id., *Diritto del lavoro, concorrenza e mercato. Le prospettive dell'Unione europea*, CEDAM, 2012. On the relationship between competition law and labour law see also, among many others: De Luca Tamajo, *Concorrenza e diritto del lavoro*, in Perulli (ed), *L'idea di diritto del lavoro, oggi. In ricordo di Giorgio Ghezzi*, Giuffrè, 2016, 13 ff.

Another asset of pursuing this direction is that solutions like the ones adopted by Italy and Spain fit into that slight area of overlap between EU law and the ILO Convention No. 137. Indeed, EU law and international law have different – though not totally irreconcilable – lines on this matter. In fact, systems based on dock labour pools, where port operations are reserved for specialised and properly trained workers, are supported and encouraged by the ILO, whose Convention No. 137 expresses the need to: (a) ensure that dock workers have a stable or regular employment, (b) guarantee that dock workers are registered on special lists, (c) make sure that dock workers enjoy a right of priority of engagement for cargo-handling activities[85].

If a weakness is to be found in the analysed systems – which, to be fair, is not a small one –, there is a risk of loss of competitiveness of Italian and Spanish ports, and of all ports governed by similar legislations. That is because in some neighbouring Member States temporary labour can be used more freely and shipping companies can use their own personnel for cargo-handling activities. These countries have not ratified ILO Convention No. 137 or just do not comply with it. However, a solution to this issue is the harmonisation of dock work organisation at the EU level, which would lead to the creation of a level playing field within EU ports.

It is true that previous attempts at harmonisation failed. Nonetheless, the failure was due to the fact that the proposals neglected dock workers' protection and employment stability, which is why they faced opposition from trade unions. In view of the latest developments, it can be assumed that a common legislation that is more respectful of the needs of dock workers is now possible. For example, this common legislation could include an obligation to reserve port operations to recognised dock workers who have been adequately trained, as well as a requirement to prioritise pool-affiliated dock workers with respect to temporary labour. The common EU framework should probably not be contained in a Regulation, as it was done in 2017 for the other port services, but preferably in a Directive[86]. In fact, some differences between Member States in terms of competences and management rely on long-lasting traditions, and local specificities have ancient roots. Such a Directive could indicate the pivots on which the States, with some level of discretion, should outline their dock work organisation without upsetting their *status quo.*

[85] ILO, Convention No. 137, 1973, Artt. 2-3.

[86] Thus also: PAZOS PEREZ, *cit.*, p. 267.

Abstract

The paper analyses the dock work regulatory systems of Italy and Spain in order to identify their approach in balancing freedom of competition with workers' protection, with a view to the harmonisation of the subject at the European level.

Keywords

Dock work, Ports, EU law, Spain, Italy, Competition.

Giulia Giaimis

Anyone Can Be an Individual. Even a Woman

Contents: **1.** Introduction. **2.** Changing the structure of the narrative: a starting point. **3.** The labour market in the environmental transition: challenges and opportunities. **3.1.** The importance of the GPNs to achieve decent work conditions. **4.** Women as a workforce. **4.1.** The COVID-19 pandemic: an inequality's amplifier. **5.** European Union's approach to the firms' environmental transition: sustainability. **5.1.** Sustainability and the gender gap issue. **6.** Black Feminist Legal Theory. **6.1.** Intersectionality: a metaphysic approach. **7.** Intersectionality in the transitioning labour market. **8.** Intersectionality in the green jobs sector: a step towards a green society. **9.** Conclusion.

1. *Introduction*

"There is no such thing as conversation. It is an illusion. There are intersecting monologues, that is all"[1].

This sentence, written by Rebecca West in 1935, embodies at the same time the quicksand we are in and the opportunity to come out from it.

The present paperwork aims at describing the critical aspects of the firms' environmental transition from the standpoint of women. Then, it will try to identify a solution as a means to foster green growth while achieving gender equality.

In order to fulfil the mentioned intentions, the paper will firstly analyse the current situation (*par. 2*) and the needed changes of attitude towards the issue. Then, the challenges and the opportunities represented by the firms' transition in the labour market will be critically described (*par. 3*), introducing

[1] West, *The Harsh Voice: four short novels*, Penguin Books, Harmondsworth, 1956 (Reprint of 1935 edition), p. 63.

a focus on the Global Production Networks' relevance to the topic. After that, the focal point expressed by the woman figure will be added to the equation, considered as a workforce (*par. 4*), indulging in a brief comment on the COVID-19 pandemic's effects on women's condition. Further, the European Union's approach to the firms' environmental transition will be analysed (*par. 5*), in order to better understand the implications to the represented issue. Moving on to the solutions aimed at inserting women as an active part of the firms' environmental transition, an investigation of the historical roots of the intersectionality theory will be made (*par. 6*), to introduce a more recent perspective. Then, the method theorised by the present paperwork will be portrayed (*par. 7*), including a close examination of the green jobs sector's specific challenges (*par. 8*). Finally, a concise observation will close the present paper (*par. 9*).

2. *Changing the structure of the narrative: a starting point*

As a matter of fact, environmental transition is the centrepiece of any discussion about the future. Politicians, economists, jurists and, above all, scientists are aware of the challenges we, as human beings, will have to fight if they want to survive on this planet. Nevertheless, all this talking often appears to happen on narrative levels, and as Rebecca West said, there is no conversation, thus communication is useless and superficial.

In order to make the communication among the involved characters work, a scheme of concentric circles around the topic would be useful to be drawn. In fact, environmental transition is already affecting different sectors, some of which will benefit from it because of their nature while others could benefit from it only if they will be able to adjust to the transition. When a sector is touched by a revolution, and the environmental transition can be considered as a revolution, every aspect of its functioning changes, including the labour market at its base, which is indeed the most affected part of it.

Talking about the labour market includes the so-called direct market, which is composed of all the jobs figures of the sector, and the so-called expanded labour market, that consists of the jobs figures located along the sector's value chain[2]. According to this explanation, the green transition to be

[2] A value chain "describes the full range of activities that are required to bring a product

completed should encompass every step of the value chain, that should realise its own environmental transition while the sector it is part of, changes itself. For this reason, communication between players, such as jobs figures and entrepreneurs, workers and trade unions, politicians and businessmen, is required and communication between sectors, such as institutions and private sector's representatives, retailers and supply chain companies is needed.

Existing monologues, though, are the necessary starting point for a conversation. Where there is a monologue, there is self-awareness that can be spoken out loud to be listened to. Intersecting monologues become a resource when the speakers start to listen to each other. Listening is where the interaction begins[3]. It's not by chance that many private companies and even public administrations are introducing courses to learn how to put in place the so-called active listening[4]. This technique, usually, successfully applied to groups of few people, should be used also at a larger scale, such as the global debate on environmental transition.

In this respect, the 2030 Agenda[5] drafted by the United Nations needs to be recalled. In fact, it has been drawn like a circular system, in which every goal of the circle can be expanded into many smaller goals. These goals show the requirements that should be fulfilled in order to achieve the single objective they contribute to perform.

3. *The labour market in the environmental transition: challenges and opportunities*

The 2030 United Nations' Agenda for Sustainable Development identifies at least three sustainable development goals that are directly connected to the labour market. They are number 8, 9 and 12, respectively *decent work and economic growth*; *industry, innovation and infrastructure*; and *responsible consumption and production*. Nevertheless, as mentioned above, all the goals are

or service from conception, through the intermediary phases of production and delivery to final consumers, and final disposal after use". KAPLINSKY, *Spreading the gains from globalization: what can be learnt from value-chain analysis*, in *PET*, vol. 47, no. 2, 2004, pp. 74–115.

[3] See PLUTARCO, *De recta ratione audiendi*, in *Moralia*.

[4] To deepen the topic, see the Thomas Gordon's method.

[5] UN Resolution A/RES/70/1, *Transforming our world: the 2030 Agenda for Sustainable Development*, 25 September 2015.

connected, and each of them interferes with the current labour market's dynamics since they imply a change, often positive, of the *status quo*.

Goal number 8 (*decent work and economic growth*) deserves to be deepened, since the concept covered by it will be useful also farther in the paperwork, when the gender gap problem will be addressed. Delineating the boundaries of the definition of decent work is challenging, because it cannot be linked only to one aspect of the work sector. Undoubtedly, a building up decent work conditions' process begins with the creation of a fair labour market. As a matter of fact, nowadays the labour market is not fair. A disequilibrium exists, which finds its roots in geopolitical assets compounded by the multitude of crises that have been occurring in the last decade. Against this unhealthy scenario the individual will of States to commit to change for the better becomes essential. In fact, environmental transition still sees some of the richest and industrialised countries opposing elementary measures that would help preserving, thus restoring, Nature. Exploring new business models and industrial methods is probably the only path to be paved in order to make those countries aware of the opportunities that the environmental transition represents.

In the current labour market, workers are often put before a choice, working at any condition to survive daily life, but endanger long-term existence or even quitting any chance to stay alive in the long run. That's the reason why the definition of decent work must encompass the concept of a fair labour market. Environmental transition will represent at the same time a massive opportunity for the creation of new jobs positions and a scary challenge for those jobs figures that will be replaced by greener profiles. In fact, the structural changes triggered by the transition will not affect all workers at the same time and in the same way, since jobs are different "in terms of skill requirements and types of tasks to be performed"[6]. To correctly address these required shifts occurring in the majority of the production sectors, efforts should be made because imagining a simple switch towards the greener job profile within the same job sector would be unrealistic. It can happen only where the skill requirements are exactly the same and no additional training is necessary. As it is easily to be conceivable, this coincidence rarely happens.

The Organization for Economic Co-operation and Development

[6] OECD, *Impacts of green growth policies on labour markets and wage income distribution: a general equilibrium application to climate and energy policies*, ENV/EPOC/WPIEEP(2016)18/FINAL of 22 February 2018.

(OECD) has been testifying the modifications happening in the labour market subsequent to the green transition. The OECD's reports aim at understanding how workers shift within the labour market adapting to the countries' green policies. These data, correctly analysed, give the scholars the opportunity to identify functional strategies to adapt the labour market's structure to the environmental transition revolution. Even more important, the OECD's reports allow institutions and academic centres to recognise negative impacts of the green transition policies on specific categories of workers, such as women, so that making suggestions in order to overcome the unfairness created by the transition itself as unwanted bias.

In this respect, the ways through which green policies affect the labour market, as identified by the OECD must be briefly reported below, in the interest of understanding which category of workers is most affected by each channel. They have been divided in "four main categories:

- changes in production modes and technologies.
- changes in demand patterns.
- changes in aggregate income and other macroeconomic conditions.
- changes in international trade and competitiveness"[7].

As it is recognisable looking at the list above, changes in production models and those in demand patterns will especially affect workers of the energy sector, which is one of the most touched by the environmental transition. As the present paper will explain in the following paragraphs, in this case the change does not affect women directly, but it can influence their private lives as wives, daughters and sisters. In fact, in the energy sector a lot of job profiles, occupied by male workers, risk not to be converted into their greener *alias*, leading to the dismissal of that workforce. Dismissal, considered as a social event, produces its effects within the social group the dismissed worker lives in. The most common one is family. For this reason, when male workers are dismissed, women become involved. Scholars are expressing their concerns about the future situation of southern America, since in those territories, the lack of job opportunities often leads men to abuse substances or alcohol, which makes them dangerous to their own families' members.

In 2015 already, the International Labour Organisation (ILO)[8] suggested

[7] OECD, *cit*.

[8] ILO, *Guidelines for a just transition towards environmentally sustainable economies and societies for all*, 2016.

social dialogue over these important themes and the IEA[9]'s Global Commission on People-Centred Clean Energy Transitions is taking up the baton in the energy sector[10]. Several initiatives have been thought in order to include women in the transition[11]. If considered as main characters in the energy transition, women are included in programs and initiatives that have multiple purposes. According to their geopolitical existing conditions, countries are activating different plans. Therefore, European countries are creating fundings and scholarships to foster female participation in colleges and universities' programs which include the STEM[12] subjects, since the presence of women in these courses, at a global level, has been accounted for around 35% of the total number of students. On the other hand, developing countries try to make women, and young girls, aware of their potential by investing in their job training to make out of them micro-entrepreneurs of the renewable energy sector. In rural areas, then, the main goal consists of making it possible for women achieving energy independence. Hence, for instance, "the Indian social service centre, SevaKendra, has a project for 'gender mainstreaming through solar technology' *to* provide rural women training in assembling and selling solar lamps"[13].

Regarding the *changes in international trade and competitiveness* (point 4 of the OECD's list), the balance existing between western and eastern countries has been changing in the last twenty years. In point of fact, some countries that were considered as the main factories of the western economies, such as China, have developed their own consumption markets which are competitive also at a global level. The described shift is relevant to the labour market for mainly two reasons. The first one is represented by the need for skilled workers in the expanding markets. Resuming the previous example, China has become a big market itself, serving Chinese people and foreign people, considering the amount of population who lives in those territories, thus skilled workers are needed, since new job profiles are opened to Chinese people. The second reason is relevant to the present paper because emerging

[9] International Energy Agency.

[10] IEA, *The Global Commission on People-Centred Clean Energy Transitions' report*, October 2021.

[11] ILO, *Greening with Jobs and a Just Transition*, 2022.

[12] Science, technology, engineering and mathematics.

[13] IEA, *The Global Commission on People-Centred Clean Energy Transitions' report*, October 2021, recommendation 7.

countries or industrialised countries, which are defending their power in the world scenario, are often fostering policies that hamper transition. They tend to maximise the profits with no concerns towards the environment, they are not working to realise the environmental transition, because they see it as an obstacle and a limit to the extent at which they could express their fullest potential.

The evidence that not every industrialised country is committed to the environmental transition underlines how difficult it has become protecting some workers categories, such as women, who are located along the product value chains all around the world. This is why a control of the GPNs[14] is required.

3.1. *The importance of the GPNs to achieve decent work conditions*

Global production networks (GPNs) can be defined as organisational chains through which international players can realise and upgrade their business models. GPNs are one of the products of globalisation, but they could also represent a risk for workers' conditions if they are misused[15]. Against this backdrop, it is necessary to add to the historical issues that GPNs have been facing, the battles that the world have been fighting against in the last decade, one for all the pandemic of COVID-19. Pandemic hit the labour sector not only because many industries shut down for a prolonged amount of time, but mostly because workers deployed along the GPNs have been forgotten, since for the first time after the second world war the excessive and omnipresent consumerism was silent.

An ongoing international policy research programme entitled "Capturing the gains: Economic and social upgrading in global production networks"[16] which is updated to 2022, identifies six key areas of intervention in its 2022 Program. Those areas have many similarities with the Italian PNRR[17], and in a broader context, with the European Green Deal[18]. The more relevant areas to the present work are mainly two, dedicated to the

[14] Global Production Networks.

[15] As an overview see ILO, *ILO Decent Work interventions in global supply chains: a synthesis review on lessons learned; what works and why, 2010-2019*, 2019.

[16] See website capturingthegains.org.

[17] Piano Nazionale di Ripresa e Resilienza.

[18] See more at https://www.consilium.europa.eu/en/policies/green-deal/.

new social challenges and opportunities, and to the socio-economic drivers of global economic development. In fact, the Program aims at locking workers' safety (in terms of social security and wages) even through the application of information technology.

As the ILO often reports in its publications, defining social upgrading cannot take into account only an increase in wages. Therefore, investigating social upgrading (or downgrading) requires inserting the term *decent work* in the utilised vocabulary[19]. In this respect, a change occurred during the years that need to be recalled. To the global buyers known since the first globalisation, lots of smaller buyers should be added. Many SMEs[20], especially in the fashion manufacturing sector, spoil micro GPNs, in order to be able to put on their clothes the label "handcrafted". Of course, numbers concerning these realities compared with those regarding the global buyers are very small but still the concept of decent work should be the leading character in the global discussion.

Regarding this, recalling the sentence pronounced by Amartya Sen can be useful to understand the reason why building a fair market is, nowadays more than ever, important. He said, "A society can be Pareto optimal (functioning) and still perfectly disgusting"[21]. The very same concern has been raised by the United Nations, which have intervened over the years to make the global community aware of what is happening and to underline that every aspect of what is happening in the world is connected. Therefore, decent work conditions and social upgrading are encompassed, as mentioned before, in the broader definition of sustainability, reported also in the UN 2030 Agenda[22].

However, participation in GPNs represents an important source of employment and a great opportunity, especially for developing countries and workers' minorities[23]. In this respect, voluntary based instruments might affect workers' conditions in a positive way. In particular, collective bargaining agreements appear to be useful in those countries where trade unions have

[19] On social upgrading, see also HENRY, CHATO, *Economic and social upgrading in the Philippines' pineapple supply chain*, ILO, 2019.

[20] Small and medium enterprises.

[21] ATKINSON, *Economics as a Moral Science*, in *Econ*, 2009, vol. 76, pp. 791-804.

[22] ILO, *Decent work is not just a goal - it is a driver of sustainable development*, 2020.

[23] See among others ILO, *Moving the Needle: Gender Equality and Decent Work in Asia's Garment Sector*, 2021, Bangkok.

got power and the capability of influencing governments. Even in developed countries though, the bargaining dumping phenomenon has been implemented, since the number of people seeking a job at any condition is increasing lately. For this reason, for example, in Italy in 2018 the employers and employees' representatives signed the so-called *Patto di Fabbrica*, in order to guarantee a level playing field and ensure the respect of workers' human dignity.

The ILO Declaration on Fundamental Principles and Rights at Work already in 1998, stated that four fundamental principles and rights at work are universal, and apply to all people in all States, regardless of the level of economic development[24]. These are: the freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced or compulsory labour; the abolition of child labour; the elimination of discrimination in respect of employment and occupation. ILO's approach to value chain's development has been considered as pivotal for the purpose of contributing to decent work "by:

- creating more and more equal opportunities for productive work for women and men.
- increasing incomes.
- providing greater income security.
- enhancing social integration.
- providing better prospects for professional development"[25].

As the GPNs move their tentacular schemes around the world, multi-actor global binding agreements could be an effective solution. Those types of agreements have been experimented in other aspects of industrialisation to foster sustainability, such as the fight against the use of plastic.

Concerning this aspect, luxury brands, mostly in France, are investing in their value chains, because their customers are starting to refuse to pay a lot for a product that walks over human beings' dignity[26]. Thanks to the attention they pay to the GPNs, luxury brands appear to be justified to ask

[24] See note no. 8.

[25] See note no. 19.

[26] In fact, one of the priority actions identified by the ILO in order to harness trade consists in ensuring "open, fair and contestable markets through competition and consumer policies, and collaborate at the multilateral level to address vulnerabilities in supply, transport and distribution chain infrastructure to increase resilience to conflict, future pandemics and climate change"; See United Nations, 2023, *The Sustainable Development Goals Report 2023 - Special edition*, p. 56.

for a high price, which means that in this situation social pressure has worked out. LVMH group is making transparency and traceability its distinctive feature, since the group provides customers with a QR-code which allows them to trace back the product they bought and all its components. These private initiatives need to be analysed and considered, when possible, since those brands have a privileged position in the market. They are at the opposite corner of the ring to the fast fashion brands; thus, the adopted solutions wouldn't be the same. In fact, in those other cases, workers are too often put before the option of choosing their dignity or being able to survive.

The usage of voluntary based agreements[27] added to governments intervention, appears to be the most effective path to follow. In the law field, we are familiar with concepts like the right interpretation or the right aim of the law, therefore it might be useful to match the concept of decent work with the thought of the right way to make business. Labour national and international regulation's role will become broader. In fact, it not only has to fuel economic growth, but also it must shape the market according to sustainable development principles. As a possible result, labour regulation could endeavour sustainable work conditions throughout the GPNs controlled by default.

4. *Women as a workforce*

Women are often labelled according to one manifestation of their personality, they are alternatively considered as a citizen, as a mother, as a worker, as a housewife. But the only thing that these terms have in common is that they change as the observer changes. The woman itself stays the same, no matter the field of life she is walking through.

The partial view described above might influence the approach to the problem represented by the arising of the green jobs sector. To avoid the risk of a partial comprehension of the problem, analysing the effects that the green transition is having, and will have, on women, has been crucial to the present research. Before moving to solutions hypotheses, the different sets and patterns of women's life must be identified. These distinctions are pivotal

[27] On this topic, see LAAGLAND, *Decent Work in the Cross-Border Supply Chain: A Smart Mix of Legislation and Self-Regulation*, in *ECFLR*, 2023, vol. 20, n. 2, pp. 336-357.

to create a sort of bucket of contents, from which different features of a woman's life and lifestyle can be pulled out. Depending on the country where she lives, the culture she belongs, the choices she has made, or the choices she had to make, a woman occupies a different role in the labour market. Certainly, considering all the possibilities would become a statistics' matter and falls outside the goal of the present work. However, dividing the factors can be helpful to understand how much a precise women's condition is perceived and also can lead to the comprehension of the division between casual circumstances and potential discriminating situations existing in the labour market.

As mentioned above, dividing the types of risks that environmental transition comes in with into direct risks and indirect risks can be appropriate, due to the different aspects of a woman's life those risks would affect. Direct risks are those consisting in the loss of jobs occupied by women because of the company's environmental transition. These risks lie in the countries where the production happens, and as seen in the paragraph dedicated do the GPNs, those countries are often insensible to the environmental matters, thus they will be hit by the transition and many people will lose their jobs, as soon as the production mechanisms will be forced to change. In the manufacturing sector, countries like India and China, where dyeing fabric is still making workers use cancerous materials[28] and personal protection devices are not utilised, we will assist to a massive loss of jobs when committing countries will start to apply more restrictive regulatory measures. Besides, indirect risks are represented by all those situations in which women find themselves forced into, because somehow the transition would affect an aspect, or more, or their lives.

In this respect, theoretically, the firms' environmental transition represents a massive opportunity to women, since greener jobs profiles which will replace their non-green correspondents, are going to be created and will need to be fulfilled. But, as a matter of fact, replaced jobs would result in a high number of unemployed people, the majority of which (according to the surveys[29]) are men, whose frustration and sadness would affect the social micro-system they live in, such as their families. Furthermore, several studies

[28] See SINGH, CHADHA, *Textile industry and occupational cancer*, in *JOMT*, 2016, no. 11, article no. 39.

[29] ILO, *Green Jobs: Towards decent work in a sustainable, low-carbon world*, 2008.

have already evidenced that women who share home with those unemployed men, are often victims of physical or psychological violence coming from their frustrated partner, or they are forced to choose a job only to provide for their family without concerns about their future careers[30]. These women, who would eventually become mothers, would not be the example they wanted to be for their daughters, and the race to equality would be stopped for another generation of women. Therefore, the chain of consequently connected effects, started from that single firm's decision of being more sustainable, would continue, since its consequences will be passed on to the children of that family fostering a culture which does not respect gender equality. In practice, the initial firm's choice of being more environmentally sustainable would translate into a less socially sustainable choice.

As reported by the ILO, requested profiles for the green jobs sector often correspond to a low educated profiles and require physical strength, thus they seem to be dedicated to young men[31]. Another factor that should not be underestimated consists in the low rate of female students who pursue a college curriculum, and then a career, in scientific subjects (STEM), as mentioned above. The lower number of women approach the labour market as scientific profile job candidates, the higher number of men will occupy powerful and prestigious positions in scientific fields, such as board members in a company. Hence, covering the gender gap in the labour market slips further away.

4.1. *The COVID-19 pandemic: an inequality's amplifier*

The OECD has reported how COVID-19 pandemic affected young women who live in developing countries[32]. In fact, usually girls who live in those countries have to move far from home in order to attend school. Thus, they live at schools' residences for a few months, and then they come back

[30] SWANBERG, *Domestic Violence and Employment: A Qualitative Study*, in *JOHP,* 2005, no. 1, pp. 3-17; TOLMAN, *A Review of Research on Welfare and Domestic Violence*, in *JSI,* 2000, n. 56, pp. 655-682.

[31] UNEP, ILO, IOE, ITUC, *Green Jobs: Towards decent work in a sustainable, low-carbon world Policy messages and main findings for decision makers*, United Nations Environment Programme, 2008.

[32] See LAVADO *ET AL.*, *COVID-19 disparities by gender and income: evidence from the Philippines*, in *ILR*, 2022 vol. 161, n. 1; ILO, *Socioeconomic impact of the COVID-19 pandemic in Indonesia: labour market analysis and policy recommendation* (1st. ed.), 2022.

home for the following ones. They also are too poor to pay fees, as so private scholarships cover for their payments. During the pandemic though, these female students have been forced to stay home, taking care of family and household. Because of the lack of Internet connection infrastructures and because of the cultural belief according to which if they are at home, they cannot be spared by home working, they couldn't follow lectures and tasks. As a result, the majority of them drop out of school, losing the opportunity of being a working citizen, who could have had a relevant role in the society. In this specific case, firms are not the cause of the change of the labour market, but they are subjected to the lack of workers' offer. Considering that firms are adaptive to the market, their transition has the secondary effect that consists in definitely cutting out those women from qualified jobs positions. Moreover, firms for several reasons, including saving money and energy resources, are implementing smart-working. As long as many countries still are not connected properly to the Internet, the firms will be the unconscious authors of gender discrimination.

5. *European Union's approach to the firms' environmental transition: sustainability*

The labour market represents a complex playing field, where gender equality could exist, but it does not because of diverse reasons. In fact, it is crucial to take into account that gender equality is one of the aspects of sustainability, thus recalling how the European Union is addressing the problem can be useful.

Regarding the measures implementing corporate sustainability's put in place in the EU borders, taxonomy should be remembered. The EU taxonomy would provide companies, investors, and policymakers with appropriate definitions of economic activities that can be considered environmentally sustainable. Moreover, EU taxonomy has been recently implemented by the *Climate Delegated Act*[33], which sets out, among other relevant cataloguing, the criteria functional to identify when an activity is a help for climate change mitigation[34]. These criteria are useful, before all, to overcome information asymmetry and then, to guarantee market integrity.

[33] Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council.

[34] Reg. (EU) 2021/2139, Annex I.

Furthermore, *April Package* indicates as one of its initiatives the *New Corporate Sustainability Reporting Directive*[35], which amends the requirements identified by the Non-Financial Reporting Directive (NFRD). With the aim of helping SMEs throughout the difficulties they have to face these days, like COVID-19 pandemic effects, the CSRD applies only to a small group of them and only three years after being applied by big companies. Investors ask for sustainability information from companies, especially big companies listed on regulated markets. Therefore, the draft standards developed by the *European Financial Reporting Advisory Group*[36] in February 2021 are tailored to the EU policies.

Linked to the CSRD's goals, the proposal for the *Directive on Corporate Sustainability Due Diligence*[37] upheld by the EU Commission in February 2022, responds to the fact that voluntary actions have not been enough to reduce significantly negative externalities inside and outside European boundaries. Hence, this Directive will complement the current NFRD "by adding a substantive corporate duty for some companies to perform due diligence to identify, prevent, mitigate and account for external harm resulting from adverse human rights and environmental impacts in the company's own operations, its subsidiaries and in the value chain"[38]. Article number 15 of the draft contains a reference to long-term interests and sustainability, useful to stress the importance of a long period approach. Structured like this, as an objective to be fostered using tools such as business strategy, the directive offers a huge opportunity to insert the gender gap as an issue to be reported by companies.

5.1. *Sustainability and the gender gap issue*

As briefly mentioned before, the United Nations have identified, among others, gender equality as one of the objectives of the 2030 Agenda and the

[35] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU. Entered into force on 3 January 2023.

[36] EFRAG, *Final report proposals for a relevant and dynamic EU sustainability reporting standard-setting*, 2021.

[37] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM (2022) 71 final of 23 February 2022.

[38] Directive (EU) 2019/1937, p. 4.

UNITAR have organised several round tables on the topic. During one of them[39], the speakers explained that the gender gap problem's roots are difficult to eradicate, since they are the outcome of a persistent stereotypical reasoning which is indeed outdated. In fact, firms in which women have powerful positions, the speakers said, are keener to environmental transition and, thus, adjust their policies faster in response to governments' requests.

All the analysed circumstances make clear the need for the creation of a labour market that can make the firms' environmental transition truly sustainable. Furthermore, since many firms are compliant with sustainable certifications, because of reputational effect or because they believe in it, the labour market demand and offer system should help neutrality.

The gender inequality problem affects the society as a whole, therefore a discussion table between all the Labour Relations parties involved is required. However, imposing rules to firms is an option but it could raise doubts since it could be in contrast to constitutional principles, such as entrepreneurship freedom. Besides, several constitutions, including the Italian Constitution[40], have already added the environment as a good to be taken care of. In addition to that, article 41 of the Italian Constitution seems to open a way to a broader concept of sustainability, since it comprehends human dignity as a value to be respected even in the work sector, as suggested by the SDGs.

The first step to overcome the difficulties coming from the green jobs sector and from the prejudices connected to the green jobs is represented by achieving gender neutrality. The theory of intersectionality comes in to help to avoid prefixed differences between men and women. An intersectional system might allow firms, which are planning an environmental transition, to identify potential candidates through their jobs profiles considering the female factor only as a factor.

Before analysing intersectionality as currently considered, a description of its roots and history is required to pay tribute to those scholars who firstly raised the problem and to understand how to properly use this powerful tool.

[39] UNITAR, Navarre University, *Virtual roundtable on sustainable development goal 5 (SDG5) into environmental policies and practices*, 2022.

[40] Articles 9 and 41 of the Italian Constitution.

6. *Black Feminist Legal Theory*

In order to respect the framework in which intersectionality belongs, the Black Feminist Legal Theory[41] must be recalled and explained. The Black Feminist Legal Theory takes the move from the critics to the Critical Legal Studies (CLS), which state "that the creation and application of law propagates an intrinsic 'political dimension' that serves to structure mass consciousness and contributes to the reproduction of the social and political structures of liberal society"[42].

The main problem of this theory, according to the Black Feminist Legal Theory's scholars, lies in the lack of universality. In fact, the CLS consider women as a whole, dismissing the racial component. Therefore, the Black Feminist Legal Theory was born to encompass diverse discriminating factors, which black women must face in the labour sector. Here they are "*multiply-burdened*"[43]. The prominent author Crenshaw has defined intersectionality through the metaphor of the intersecting traffic, where discrimination follows different paths simultaneously, as traffic does.

Application of the intersectionality theory in court disputes is particularly challenging because the concept is often misused. In fact, since intersectionality has been taken from the black community and borrowed by the LGTBQ+ community, scholars complain that it has lost its power of representing marginalised people. The reason why it happens is represented by the so-called "but for" approach, according to which people who are both part of the LGTBQ+ community and found themselves in a privileged position are protected, while the true minority groups stay in their corners, even more marginalised. Described like this, the intersectionality theory appears to have been misused and it seems to have lost its connection with the Black Feminist Legal Theory.

The present paper wants to use the intersectionality theory's main concept in order to suggest a labour market system that could overcome the gender gap and protect *multiply-burdened* women, who find themselves hit

[41] Combahee River Collective, *The Combahee River Collective Statemen,* 1977; Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in *UCLF*, 1989, Vol. 19890, Iss. 1, Article 8.

[42] Kupupika, *Shaping Our Freedom Dreams: Reclaiming Intersectionality through Black Feminist Legal Theory*, in *VLRO*, 2021, 107, pp. 27-47.

[43] Kupupika, *cit.*

by all the challenges that the environmental transition has implied for them. But it aims at staying true to the path paved by the Black Feminist Legal Theory, as well, and being respectful in the application of the concept to a broader group of female individuals.

Therefore, the last sentence of the author Kupupika's article (cited before) deserves to be reported untouched, because it embodies the spirit of the theory, which is needed to be amplified: "Only fierce commitment to Black feminist practice can transform modern feminist movements into vehicles for achieving our freedom dreams"[44].

6.1. *Intersectionality: a metaphysic approach*

Relevant to the present paper is also a study, which considers intersectionality through metaphysics[45]. The author of the mentioned study explains the inseparability of intersectoral identities in terms of explanatory unity.

Intersectionality is described as the representation of various dimensions of discrimination that intersect each other building up a new form of oppression, while the original forms still are in act. This model is functional to understand today's women's dimension as workers in the environmental transition. Hence, social categories are assumed as determinables and determinates, where determinables are inseparable, while determinates are not, but one woman can belong to different determinables and determinates at the same time. To solve the problem of the inseparability two processes can be used, that are the destruction conception and the intact category conception of inseparability.

To the extent of the present work, the latter is the most performative, since it leaves the conceptualisation of the woman category intact. In fact, it allows the components to survive the process, creating, though, a multiplication of entities which belong to the main category. As a result, the category woman becomes divisible into many categories which describe her. This aspect is the most relevant to the present work because the intersectionality theory thus becomes lowered into the reality, where categories are often faded and adjoining.

[44] KUPUPIKA, *cit.*

[45] BERNSTEIN, *The metaphysics of intersectionality*, in *PhilS*, 2020, no. 177, pp. 321-335.

7. *Intersectionality in the transitioning labour market*

The present work wants to underline the importance of the intersectionality theory in order to overcome the effects that the environmental transition of the firms have on women, rematching intersectionality with its roots in the labour field.

Before considering the translation of the intersectionality theory in the firms' environmental transition and its effects on the labour market, it is important to stress that the present paper does not take into consideration the practise consisting in covering the gender indication on jobs requests' profiles or not reporting it in the *curriculum vitae*, as already happens in some employees' seeker companies. This method has been used until now to help transgender people to avoid discrimination when they approach the labour market. The idea fostered by the present paper, as further deepened in the text, considers a broader approach, which includes the gender indication, as a factor, of the human being who is seeking for a job.

Even though some scholars are reluctant to the application of the intersectionality theory to situations which differ from the ones hypothesised by the Black Feminist Legal Theory's scholars, the present work wants to explore a way to use the theory that is respectful of its roots and that is also in line with its application in a more complex historical framework. Since the conceptualisation of the intersectionality theory, in this case, is immersed into the labour field reality, it does not appear to put in danger the main aspect of the mentioned theory. Avoiding the risk of the *but for* approach, mentioned before, is necessary in order to endeavour the protection of female workers who are *multiply-burdened*.

In sociology, categories of social differentiation are key to mark the differences existing between individuals, but also to enlighten the common aspects. In fact, in this way a multitude of minority groups can be created. Once the groups have been defined, observing how they interact with each other and their internal dynamics helps to understand which individuals are the most marginalised, thus the categories implicated. This sociological method is used, especially in the USA, in the health sector, to understand which people are cut out from medical treatments. Another field where the method has been experimented is the social care services field, where people with disabilities, and especially if they are immigrants, would face more obstacles being listened to and assisted by the social service system.

The same approach has been barely used, in the labour sector only to portray the labour market dynamics, since statistics are often used to describe reality not to change it. Therefore, the first step to overcome the difficulties coming from the labour market and from the firms' environmental transition is represented by achieving gender neutrality. The theory of intersectionality comes in to help to create a system of intersection. Intersectionality is based on mathematical set-theoretic, where circles with different contents can intersect each other in accordance with the characteristics of that precise pattern of contents. As such a method is used, people will be seen as individuals more than as men and women.

In this respect, recalling that the mathematical set-theoretic includes algebraical addition, not simple addition, is key not to contrast the Black Feminist Legal Theory, which represents the roots of the intersectional theory, as already said. In fact, a simplistic addition of a person's characteristic would be not only unproductive but also dangerous in terms of creating a privileged situation in a marginalised group of people. As explained before, somebody can be at the same time a privileged person and be part of a marginalised group. For these reasons, utilising algebraical addition allows one to analyse the labour field from a woman perspective through a set-based mathematical lens. It also contributes to creating a multi-axes Cartesian plane where different social markers intersect each other.

In Europe, companies in the labour market tend to hide data referred to personal conditions to avoid discrimination in the jobs selecting process. Also, when a person is hired, his/her/their data are treated in a careful manner and some of them are inaccessible to the employer, according to the General Data Protection Regulation (GDPR) - Reg. EU n. 679/2016. The need for privacy required to be balanced with the need for considering all the distinguishing factors. In fact, treated as prescribed by law, those data become essential to be considered in order to achieve gender neutrality and gender equality.

Native gender, chosen gender, culture, family status, age, academic studies level, race, ethnicity, disabilities' affection, are all social markers that can be applied to women as well as to men. But, if only some of them are considered in the labour market, transitioning enterprises would have a partial view of the person who could be their next employee. If gender could really be only one of those factors, its power would be reduced exponentially. Such a system would be also more adhering to those cases where the native gender is different from the chosen one.

As a matter of fact, a woman can fulfil more than one of the social markers listed above, since they mirror the boxes where a woman is often put, when a simplistic description of her (being) is given. Seen just as a social category, despoiled of the conceptual burden, different in each culture, being a woman becomes an attribute of a human being, considered in his/her corporal form.

8. *Intersectionality in the green jobs sector: a step towards a green society*

Gender neutrality represents a step before gender equality, but it goes, at the same time, beyond it. Inasmuch as the green jobs sector is a new-born, it represents the optimal opportunity to achieve all those goals that are still far from be accomplished in the traditional sectors.

As explained in the previous paragraphs, women in the labour market are considered as one of the expressions of their lives' aspects, thus they are a minority even if as a gender they represent the predominant one numerically. Moreover, a prejudice exists in the green jobs sector, according to which the majority of the available jobs are thought as more suitable for men than for women, without evidence of it.

The ILO has explained the existing relationship between green jobs and decent work conditions, and the need for an employment shifting due to the environmental transition[46]. More recently, the ILO has reported on how green jobs contribute to the SDGs. Thanks to the environmental transition massive "opportunities will arise for job creation and skills development, improvements in job quality and incomes, as well as advances in equity and social inclusion"[47]. The mentioned positive effects are not automatic, though, since policies which foster gender equality and social inclusion are needed to make the environmental transition a just transition.

Reaching gender equality in the transitioning labour market, according also to the ILO, is important not only in terms of fairness, but it seems the better way to make the transition profitable for the countries involved and a positive effect for the population of those countries. In 2013, the Global Gender Gap Report reported "a strong correlation between a country's gen-

[46] See note no. 25.

[47] ILO, *Green Jobs*, The ILO DW for SDGs Notes Series, 2015, p. 2.

der gap and its national competitiveness, income and development. The studies conclude that a nation's competitiveness in the long term depends significantly on whether and how it enables women to access the same rights, responsibilities and opportunities as men"[48]. Nonetheless, in 2022 the Global Gender Gap Report still underlines the difficulties faced by women to get into the labour market. Difficulties that have been exacerbated by the pandemic.

Women play a key role in every society system also on the consumption side, because they indeed lead the family expenses even in those countries where they have no rights to work or to have their own money, simply because they provide for the family basic needs, using their money or using their husbands' money. Therefore, women are fundamental in the environmental transition even as customers, thus investing in their education will produce a benefit for the economic system of the country where they live.

Against this background, according to the ILO "the transition to environmentally sustainable economies and societies offers the potential to address existing gender inequalities in the labour market and access women's untapped potential to further sustainable and economic development"[49]. The intersectionality theory method, as described above, can represent the suitable tool to pursue a fair environmental transition.

Furthermore, since many countries' constitutions have recognised Nature as a value to protect and they have also committed to international initiative such as the UN 2030 Agenda, a half-mandatory system can be envisioned. In fact, including women in the environmental transition is a matter of sustainability, therefore binding rules could push firms to become not only possible but also legit. The new green jobs profiles require some skills that are new compared with the ones of their non-green *alias* and some which are the same.

In this context introducing a list of attributes in which the woman factor is only a social marker would allow a woman to be considered as an individual, with specific characteristics rather than a woman who is also a worker. Such a calculation could be imposed by binding agreements or even by the law, in those countries whose constitutions consider Nature as a good to be protected, to the extent it would never become discriminatory for any

[48] ILO, *Green Jobs*, cit., p. 13.

[49] See note no. 41.

of the individuals involved. The choice of the most suitable legal tool would depend also on the legal system of the country which applies the method. In a not so broad context, like the European Union's one, it is possible to imagine the utilisation of regulatory obligations, which could fix a minimum level of requirements, in order to let member States free to implement the system, as pre-built. Besides, at a global level in those realities that encompass very different legal systems, binding agreements could be the preferred instruments to achieve women's inclusion. In fact, for instance when multinational enterprises are involved the issues do not reply to themselves in different scenarios, instead they are shaped variously, according to the reality from which they are born. The larger the territorial context is, the more commitment is needed from all the stakeholders in furtherance of reaching the wanted purpose.

9. *Conclusion*

The shift needed in the conception of the woman would require a profound cultural revolution, to be mirrored in the transitioning labour market. Nevertheless, the inverse process could be possible, and it wouldn't be the first time that the practical needs would precede the cultural change. It already happened during unfortunate global circumstances, such as the world wars, when women found themselves in charge of households, companies, shops and even plantations.

Therefore, covering the gender gap through the practicalities of the labour market field does not appear so inconceivable. Moreover, even talking about an environmental transition, which should lead to a green economy, without addressing the gender gap problem would be inconsistent with the United Nations' 2030 Agenda. But even more importantly, it would be inconsistent with the movement that is emerging underneath the dusty vision of national institutions.

Freeing women from the labels they are conceptualised in by men, and unfortunately sometimes by themselves yet, would be the only way to achieve a more sustainable global society. In this respect, recalling the words of Kofi Annan's statement, delivered at the Conference on African Women and Economic Development, in Addis Ababa, in 1998, seems to be indispensable: "Gender equality is more than a goal in itself. It is a precondition for

meeting the challenge of reducing poverty, promoting sustainable development and building good governance"[50].

[50] Press Release SG/SM/6544 REC/27, 30 April 1998.

Abstract

The gender inequality problem affects the society as a whole, and the environmental transition risks to exacerbate the gender gap. If gender could really be only one of the many features of a human being, its power would be reduced exponentially. The present paper aims at using the intersectionality theory, properly declined, as one of the tools useful to solve the gender inequality issue happening in the firms' environmental transition while fostering green growth.

Keywords

Intersectionality, Women, Multiply-burdened, Environmental transition.

Marco Aurelio Leonardi

Reasonable Accommodation for Workers with Disabilities: Analysis of the New Italian Definitions within the Multi-level Legal System

1. *Disability as a "relational" concept: issues of domestic compliance and new perspectives*

The landscape of disability rights has changed significantly over time. Recent international developments show that the definition of disability itself has been interpreted in recent years as a "relational" concept rather than a mere medical condition[1].

The international trend has certainly influenced both the law of European Union and several countries[2]. However, Italy has struggled to comply

[1] MALZANI, *Dal collocamento mirato al diversity management. Il lavoro dei disabili tra obbligo e inclusione nella prospettiva di genere*, in *RDSS*, 2019, 4, p. 720 ff.; Cf. also BARBERA, *Le discriminazioni basate sulla disabilità*, in BARBERA (eds.), *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Giuffrè, 2007, p. 77 ff.

[2] LAWSON, *United Nations Convention on the Rights of Persons with Disabilities (CRPD)*, in

properly and there have been some differences between international and national law, which is still in the process of being adapted. Recently, within the framework of the "National Recovery and Resilience Plan" (PNRR)[3], Legislators enacted Framework Law. no. 227 of 22 December 2021, which, through several implementing Legislative Decrees, seeks to streamline and update the provisions related to disability in accordance with supranational standards[4]. Among the latter Decrees, d.lgs. no. 62 of 3 May 2024 amends the national legal definition of disability and the procedure for determining this condition. In addition, it introduces into the Italian legal system the concept of "Reasonable Accommodation", which has never been previously addressed by the law[5].

This paper aims to examine how the concepts of "Disability" and "Reasonable Accommodation" are – and have been – interpreted in international, European, and Italian labour law by comparing the definitions, and highlighting the crucial role of both Italian case law and recent domestic developments in mitigating the differences. The comparison between the medical and social models in addressing disability is analysed as a prerequisite for the further analysis of the regulatory framework, which is carried out using a vertical approach, starting from the international context, and moving towards national provisions.

Ales, Bell, Deinert, Robin-Oliver (eds.), *International and European Labour Law*, Nomos, 2018, p. 455 ff.

[3] My translation of "Piano Nazionale di Ripresa e Resilienza", *www.governo.it* (last accessed 17 June 2024). In this regard, cf., *inter alia*, Garofalo, *Gli interventi sul mercato del lavoro nel prisma del PNRR*, in *DRI*, 2022, 1, p. 114 ff.; Calafà, *Le politiche del mercato del lavoro nel PNRR: una lettura giuslavoristica*, in *LD*, 2023, 2, p. 163 ff.

[4] For a comprehensive analysis of l. no. 227/2021, cf., *inter alia*, De Falco, *Ragionando attorno alla legge delega in materia di disabilità: una prospettiva giuslavoristica*, in *RCP*, 2022, 5, p. 1738 ff.; Dagnino, *La tutela del lavoratore malato cronico tra diritto vivente e (mancate) risposte di sistema*, in *DRI*, 2023, 2, p. 336 ff. All the implementing decrees were published in the Italian Official Journal: d.lgs. no. 222 of 13 December 2023 focuses on the improvement of public services for inclusion and accessibility, whereas d.lgs. no. 20 of February 5, 2024, establishes the National Guarantor Authority for the Rights of Persons with Disabilities. As mentioned above, d.lgs. no. 62 of 3 May 2024 is the latest to be published.

[5] Monaco, Falabella, *Prima analisi del decreto legislativo 3 maggio 2024, n. 62 in materia di disabilità: una "rivoluzione copernicana"*, in *BollettinoAdapt.it*, 20 maggio 2024, 20, p. 1 ff. (Last Accessed 17 June 2024), in particular, p. 5. D.lgs. no. 62/2024 enters into force on 30 June 2024. The enforcement of the provisions will be phased in over time, with some rules going through a first phase of experimental application on a sample of territories, starting on 1 January 2025, while the full implementation on all national territories will have to wait until 1 January 2026.

2. *Preconditions for the analysis: from the medical to the social perspective through the classifications of the World Health Organisation*

The evolution of the legal concept of disability lies in the fact that, in addition to a clinical component, a "relational" dimension has emerged over time, changing the understanding of the phenomenon. Before being reflected in legal norms, this shift in perspective begins within medical-legal science. Therefore, as a premise for this research, it is necessary to understand how the social approach to defining disability differs from the medical one.

The medical model is reflected in two World Health Organisation (WHO) classifications: the International Classification of Diseases (ICD) and the International Classification of Impairments, Disabilities and Handicaps (ICIDH)[6].

The ICD determines the cause of diseases and their clinical manifestations but does not address their consequences on the individual's existence. Complementarily, the ICIDH focuses on the consequences of diseases and their correlation, distinguishing the concepts of "Impairment", "Disability," and "Handicap". "Impairment" is the loss or malfunction of an anatomical structure or function; "Disability" is the limitation or loss of the ability to perform a basic activity compared to a "normal" human being; "Handicap" is the condition of disadvantage resulting from an impairment or disability that prevents one from playing a "normal" role in society[7]. These three concepts are placed in a linear and constant causal sequence: from a "disease" or a "disorder" derives an "impairment" that leads to a "disability," which im-

[6] World Health Organization (WHO), *International Statistical Classification of Diseases and Related Health Problems* (ICD), 1970; *International Classification of Impairments, Disabilities, and Handicaps* (ICIDH), 1980, both on *www.who.int* (last accessed 17 June 2024). In this regards, *funditus*, Sagone, *La tutela della disabilità secondo il modello bio-psico-sociale*, in *Federalismi.it*, 2023, 1, p. 244 ff.; Manchikanti, Falco, Hirsch, *Necessity and implications of ICD-10: facts and fallacies*, in *PP*, 2011, 14, p. 405 ff.; Altman, *Disability Definitions, Models, Classification Schemes and Applications*, in Albredht, Seelman, Bury (eds.), *Handbook of Disability Studies*, Thousand Oaks, 2001, p. 97 ff.; Masci, *La tutela costituzionale della persona disabile*, in *Federalismi.it*, 2020, 1, p. 146; Badley, *An introduction to the concepts and classifications of the International Classification of Impairments, Disabilities and Handicaps*, in *DisRe*, v. 15, 1993, 4, p. 161 ff.; Ministero della Salute, *Linee guida per la redazione della Certificazione di disabilità in età evolutiva ai fini dell'inclusione scolastica e del profilo di funzionamento tenuto conto della Classificazione Internazionale delle Malattie (ICD) e della Classificazione Internazionale del Funzionamento, della Disabilità e della Salute (ICF) dell'OMS*, 10 November 2022, in *www.salute.gov*, p. 1 ff. (last accessed 17 June 2024).

[7] Who, *ICIDH*, cit., pp. 27-29.

plies a "handicap"[8]. As clarified, this sequence does not consider the relationship between disability and social factors, making the former static and immutable[9]. In other words, the medical perspective is so defined because it focuses on the pathological condition whose consequent impairments determine *per se* the disability, which lead to a handicap.

This aspect emphasises the difference with the social model, which examines, not only the pathology and its related impairments, but also how the latter interact with environmental factors that, acting as barriers or facilitators, can reduce or increase difficulties in performing daily activities: disability becomes a "social concept" because it does not depend only on the impairment, but also on how the difficulties arising from it manifest in the relationship between the individual and society[10].

The latter perspective emerged after the WHO replaced the ICIDH with the International Classification of Functioning, Disability, and Health (ICF), which is now used to complement the ICD[11].

Unlike the ICIDH, the ICF allows an assessment that does not follow a sequential causal line but examines how the determinants of disability – *i.e.* impairments of functions and body structures, limitations in daily activities, and environmental factors – interrelate. The assessment outcome is never predetermined, even with the same disease, as the individual's final condition depends on the interplay of such determinants[12].

The above-mentioned determinants are integrated by the ICF into the four components: "Body Functions", "Structures", "Activities and Participation," and "Environmental Factors." The "Activities and Participation" component is divided into six domains covering all life areas, analysed through two qualifiers: "performance" and "capacity".

When assessing the individual's capacity, the focus is on his or her ability

[8] WHO, *ICIDH*, cit., p. 30. SAGONE, *cit.*, p. 247; MARTELLONI *ET AL.*, *Law 227 of 22 December 2021 and its implementation according to the United Nations Convention on the Rights of Persons with Disabilities (CRPD): the proposal of the Italian Scientific Societies accredited on the basic assessment of Disability*, in *RIMEDL*, 2023, 3, p. 553. MINISTERO DELLA SALUTE, *Linee guida*, *cit.*, p. 34.

[9] SAGONE, *cit.*, p. 245. M. LEONARDI, *Salute, disabilità, ICF e politiche sociosanitarie*, in *SPS*, 2005, 8, 3, p. 80.

[10] TAMBORRINO, *Tutela giuridica delle persone con disabilità. Diritti e libertà fondamentali delle persone diversabili*, in *Key*, 2019, p. 22.

[11] WHO, *International Classification of Functioning, Disability and Health* (ICF), 2001, endorsed with Resolution no. WHA54.21 of 22 May 2001.

[12] MARTELLONI *ET AL.*, *cit.*, p., 548; SAGONE, *cit.*, p. 247.

to complete an action or task at the highest possible level within a given domain at a given time, taking into account a standard environment, which is not tailored to the individual's needs. In this context, environmental factors are used to describe the environment in which capacity is tested.

On the other hand, performance relates to how a person with a disability interacts in his or her actual environment, with the related facilitators and barriers. In such an evaluation, the environmental factors affecting the individual's living environment are effectively considered[13].

However, both capacity limitations without a lack of performance and, conversely, performance limitations without a reduction in capacity are crucial in determining the disability *status*[14].

3. *The international development of the concepts of "Disability" and "Reasonable Accommodation"*

From a legal perspective, the highlighted paradigm shift led to several results. On the one hand, it modified the terminology used: "Disability" is not a loss of "normality", but a variation of human functioning caused by the interaction between individual characteristics and the social environment. Similarly, the concept of "Handicap" has become obsolete, though it should now express "a different way of participating in society" rather than a "social disadvantage".

On the other hand, the social approach has facilitated the connection between disability and anti-discrimination law, with greater consideration of the enforcement of reasonable accommodation as a crucial factor in promoting inclusivity, particularly in employment.

As regards the international level, disability is directly addressed by two Conventions: the International Labour Organization Convention no. 159 of 1 June 1983, supplemented by Recommendation no. 168/1983, and the United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006 (CRPD), as interpreted by the Committee on the Rights of Persons with Disabilities (hereafter the Committee). The first focuses specifically on disability in employment. The second has a broader scope, in-

[13] WHO, *ICF*, cit., p. 123. See also, MINISTERO DELLA SALUTE, *Linee guida*, cit., p. 36.

[14] M. MARTELLONI *ET AL.*, *cit.*, p. 554.

volving employment as well. In the areas of overlap, the CRPD develops the content of the previous Convention through several innovations, the most important of which is the approach to the concept of disability[15].

The ILO Convention adopts the medical perspective since it does not consider environmental aspects: it defines the "Disabled Person" as one whose prospects of suitable employment are reduced because of a "duly recognised physical or mental impairment"[16].

The CRPD, on the other hand, does not focus on the identification of a clinical condition *per se* as the only determinant of disability, but on the dynamic interplay of biological, psychological, and social factors. As a result, it specifies that persons with disabilities are those facing a "long-term physical, mental, intellectual, or sensory impairments" interacting "with various barriers" which hinders their full participation in society on an equal basis with others[17].

The same shift can be seen in the interpreting the concept of "Reasonable Accommodation". The ILO Convention and the Recommendation no. 168 of 1983 include "Reasonable Adaptations" among the measures to be taken, "whenever appropriate and possible", to promote the participation of persons with disabilities in both employment and the work environment[18]. However, they do not specify when the "adaptation" is "reasonable", and only hint at the issue of the balance between workers' interests and employers' needs. On the contrary, the CRPD mandates the States Parties to "promote the realization of the right to work" to persons with disabilities, ensuring that "reasonable accommodation is provided [...] in the workplace"[19]. The concept of "Reasonable Accommodation" is specifically defined as involving "necessary and appropriate modification and adjustments, not imposing a disproportionate or undue burden", to ensure that persons with disabilities enjoy their fundamental rights "on an equal basis with others"[20].

[15] For a comprehensive analysis of the contents of the Conventions, cf. NUNIN, *Disability work and protection principles in International law*, in *VTDL*, 2020, 4, p. 879 ff.; DESSÌ, *Riflessioni sulla Convenzione OIL in tema di reinserimento professionale e di occupazione delle persone disabili*, in FERRANTE (eds.), *A tutela della prosperità di tutti. L'Italia e l'Organizzazione Internazionale del Lavoro a un secolo dalla sua Istituzione*, Giuffrè, 2020, p. 201 ff.

[16] ILO Convention no. 159/1983, art. 1.

[17] CRPD, art. 1. See also Preamble (e). Cf. MALZANI, *cit.*, p. 720 ff.; NUNIN, *cit.*, p. 888.

[18] ILO Convention no. 159/1983, art. 7 and Recommendation no. 168/1983, art. 11(a).

[19] CRPD, art. 27(i).

[20] CRPD, art. 2.

The latter definition focuses on the two main concepts of "Reasonableness" and "Proportionality", which have been interpreted by the Committee as involving two separate evaluations. An accommodation is "reasonable" if it achieves the purpose for which it is made and is appropriate and effective for the worker. This assessment does not consider the cost to the employer, as it is part of the "Proportionality test". The latter balances the aim of granting equal rights to the interested person concerned with the cost of the means required, to ensure that the accommodation, although practically possible, does not impose an excessive burden. The "Proportionality test" is based on several factors, including financial costs, available resources, the impact on the accommodating party and on other workers, and reasonable health and safety requirements[21].

Furthermore, since reasonable accommodation allows individuals to enjoy rights "on an equal basis", refusal to provide it constitutes a "discrimination on the basis of disability"[22].

4. *Dir. no. 2000/78/EC of the European Union and the role of the CJEU*

The comparison between the CRPD and EU law shows that the two regulations provide a very similar protection to persons with disabilities when it comes to their professional sphere[23].

[21] Committee on the Rights of Persons with Disabilities, General Comment no. 6(2018), Sec. V(D), paragraph 25(a)(d)(e), p. 7.

[22] CRPD, art. 2. Cf. also BARBERA, *cit.*, p. 77 ff.

[23] For a comprehensive analysis of the EU regulation on disability and reasonable accommodation cf., *inter alia*, CHIAROMONTE, *L'inclusione sociale dei lavoratori disabili fra diritto dell'Unione europea e orientamenti della Corte di giustizia*, in *VTDL*, 2020, 4, p. 897 ff.; As regards the influence of the CRPD on the EU anti-discrimination law, cf., *inter alia*, WADDINGTON, *The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Non-Discrimination Law*, in BELAVUSAU, HENRARD (eds.), *EU Anti-Discrimination Law Beyond Gender*, Hart, 2018. According to the latter Author, the EU does not seem to fully meet the requirements of the Convention, as dir. no. 2000/78/EC only covers discriminatory acts in the area of employment and occupation, which means that people with disabilities do not enjoy the same protection in all other areas covered by the broader scope of the CRPD. In this regard, in 2008, the European Commission proposed a new non-discrimination Directive, which would have extended protection from discrimination beyond employment, complementing dir. no. 2000/78/EC, although it was never enacted. In examining the CJEU cases on the relations between obesity and disability, the Author also affirms that, although the Court formally

Even before the CRPD was adopted, the obligation to provide reasonable accommodation for individuals with disabilities was – and still is – established in dir. no. 2000/78/EC, which provides for a general framework for equal treatment in employment and occupation, and protects against discrimination based on several grounds, including disability[24].

Given its scope, art. 5, dir. no. 2000/78/EC grants the right to reasonable accommodation only in the field of employment. The definition is similar to that of the CRPD: "Reasonable Accommodation" means the appropriate measures, determined on a case-by-case basis, to facilitate the participation of persons with disabilities, unless it constitutes a "Disproportionate Burden" for the company. The definition is developed in recitals no. 20 and no. 21: the former provides for some examples of reasonable accommodation, the latter lists the factors on which the "Proportionality test" is based, with no significant differences compared to the CRPD. Furthermore, art. 2(2)(b)(ii), dir. no. 2000/78/EC implicitly qualifies the denial of reasonable accommodation under art. 5, cit., as indirect discrimination.

On the other hand, the Directive does not provide a definition of persons with disabilities, which is established by the Court of Justice of the European Union (CJEU). In defining the latter, the CJEU upheld the traditional medical approach until the EU ratified the CRPD in 2009, which represented a turning point for the EU law[25]. As a result, the Court reinterpreted dir. no. 2000/78/EC in line with the Convention and moved towards the social model, focusing not only on the individual's medical condition – as it used to do – but also on the barriers resulting from the interaction of their long-term impairments with social or environmental factors. The CRPD had also an impact on the concept of reasonable accommodation, which was interpreted by the CJEU in line with the earlier statements of the Committee on its negotiability, the "Proportionality test" and in considering its denial as indirect discrimination[26].

expresses principles in line with the Convention, it does not effectively apply them when addressing concrete cases, resulting in a violation of international standars. Cf. p. 9-10.

[24] Council Directive 2000/78/EC of 27 November 2000. See ROCCELLA, TREU, AIMO, IZZI, *Diritto del lavoro dell'Unione europea*, Cedam, 2023, p. 336 ff.

[25] The CRPD was ratified by Council Decision 2000/43/EC of 26 November 2009, and it became binding under art. 216, par. 2, TFEU. Cf. CHIAROMONTE, *cit.*, p. 901.

[26] The medical model was stated for the first time in CJEU, C-13/05 of 11 July 2006, *Chacón Navas*, whereas the first case where the Court supported the social approach was CJEU, Joined Cases C-335/11 and C-337/11 of 11 April 2013, *HK Danmark*. See CHIAROMONTE, *cit.*,

5. *Disability and Reasonable Accommodation in national law: critical aspects and related case-law trends*

Although the CRPD was ratified by l. no. 18 of 3 March 2009, it was only after the CJUE condemned Italy for not having a specific provision that the Italian Parliament introduced Article 3(3-*bis*) in d.lgs. no. 216 of 9 July 2003, which transposed dir. no. 2000/78/EC[27]. Although the introduction of a specific article was a necessary step towards a more protective regime, it posed – and still poses – some critical aspects, which can be highlighted as follows.

First, art. 3(3-*bis*), cit., does not define the concept of reasonable accommodation, as it refers to art. 2 of the CRPD for its elements. Specifically, the provision requires public and private employers to provide such accommodation "as defined in the United Nations Convention on the Rights of Persons with Disabilities [...]"[28].

Secondly, neither art. 3(3-*bis*), cit., nor d.lgs. no. 216/2003 define the concept of disability. Thus, the provision grants the right without identifying its recipients.

Thirdly, art. 3(3-*bis*), cit., supplements, without a proper harmonisation, a fragmented legal framework, where other laws already address disability with a medical perspective. Specifically, art. 3, l. no. 104 of 5 February 1992, which considers a "Handicapped Person" as who has a "physical, psychic or sensory impairment, whether stabilised or progressive, which causes difficulties in learning, relationships or work integration and which leads to a process of social disadvantage or marginalisation"[29]. The norm clearly expresses the medical approach seen in the ICIDH: the individual's clinical condition determines an "impairment", which causes "difficulties" (*i.e.*, "disability"), which leads to an "handicap" as a "social disadvantage or marginalisation"[30].

p. 915 ff. and Ales, *Il benessere del lavoratore: nuovo paradigma di regolazione del rapporto*, in this journal, 2021, 1, p. 48. Cf. also CJEU 10 February 2022, C-485/20, *HR Rail SA* which recently summarized the European case-law trend on the topic.

[27] CJEU, Case C-312/11, 4 July 2013, *Commission v. Italy*, commented by Agliata, *La Corte di Giustizia torna a pronunciarsi sulle nozioni di "handicap" e "soluzioni ragionevoli" ai sensi della direttiva 2000/78/CE*, in *DRI*, 2014, 1, p. 263 ff.

[28] As well as, dir. no. 2000/78/EC, d.lgs. no. 216/2003 only recognises the right to a reasonable accommodation in employment, neglecting other areas of the CRPD which should now be adressed by Framework Law no. 227/2021.

[29] My translation of art. 3, l. no. 104/1992.

[30] Sagone, *cit.*, p. 248; Rossi, *Forme della vulnerabilità e attuazione del programma costituzionale*, in *RA*, 2017, 2, p. 28.

Complementarily, there are several other regulations related to the concept of "Civil Disability"[31] – such as l. no. 68/1999, on targeted employment for people with disabilities – which lists several protected persons focusing on the percentage of incapacity, assessed by different bodies depending on the category of impairment[32].

All these shortcomings led to several issues in the national framework. The first one concerned the beneficiaries of the right to reasonable accommodation, since the d.lgs. no. 216/2003 does not define the concept of disability and does not match with other national laws, which, by using a medical approach, clearly do not meet either the Supranational and European standards or the scope of art. 3(3-*bis*), cit.

Furthermore, the lack of a legal definition of "reasonable accommodation" itself raises some questions concerning what adjustments are required of the employers and how they may conduct the "Proportionality test"[33].

The issues highlighted, which have never been addressed by Legislators before Framework Law no. 227/2021, have been solved by the Supreme Court over time[34].

On the one hand, regarding the beneficiaries of reasonable accommodation, the Supreme Court affirms that the scope of the obligation stated under art. 3(3-*bis*), d.lgs. no. 216/2003, should be interpreted in accordance

[31] My translation of the legal concept of "Invalidità Civile".

[32] Without claiming to be exhaustive, about l. no. 68/1999, Riccardi, *Disabili e lavoro*, Cacucci, 2018; On both, D'Ascola, *Reasonable accommodation in the EU and national legal system. The duty to adopt adequate organizational measures as a limit to the employer's power of dismissal*, in *VTDL*, 2022, 2, p. 192 ff., Garofalo, *La tutela del lavoratore disabile nel prisma degli accomodamenti ragionevoli*, in *ADL*, 2019, 6, p. 1211 ff.; Garofalo, *Illegitimacy of the dismissal of the disabled worker. The different sanctions regimes*, in *VTDL*, 2022, 2, p. 252 ff.; Torsello, *I ragionevoli accomodamenti per il lavoratore disabile nella valutazione del centro per l'impiego*, in *VTDL*, 2022, 2, p. 209 ff.

[33] The latter question not only refers to what aspects the employers must take into account for an accommodation to be "reasonable", but it also concerns the potential overlap of this employer's obbligation with other similar duties, such the obligation of *repêchage* in case of dismissal. On this topic, *inter alia*, Garofalo, *Illegitimacy of the dismissal,* cit., p. 256 ff.; Voza, *Sopravvenuta inidoneità psicofisica e licenziamento del lavoratore nel puzzle normativo delle ultime riforme*, in *ADL*, 2015, 4-5, p. 778 ff.

[34] Cf., *inter alia*, Cass., Civ, sec. lav., no. 6497 of 9 March 2021, commented by Alessi, *Disabilità, accomodamenti ragionevoli e oneri probatori*, in *RIDL*, 2021, 4, p. 613 ff. and De Petris, *L'obbligo di adottare accomodamenti ragionevoli nei luoghi di lavoro: approdi definitivi della Suprema Corte e questioni ancora aperte*, in *ADL*, 2021, 4, p. 1061 ff.; Cass., civ., sec. lav., no. 27243 of 26 October 2018, commented by Aimo, *Inidoneità sopravvenuta alla mansione e licenziamento: l'obbligo di accomodamenti ragionevoli preso sul serio dalla cassazione*, in *RIDL*, 2019, 2, p. 145 ff.

with dir. no. 2000/78/EC, since the former transposes the latter. Consequently, to determine who deserves a reasonable accommodation, the Court uses the social approach suggested by the CJEU, despite the definitions provided by other laws.

On the other hand, the Supreme Court offers a thorough explanation of the concept of "Reasonable Accommodation", following the coordinate of the CRPD. The Court defines it as the organizational modification that enables work to be performed under equal conditions and must be decided on a case-by-case basis, following the worker's request[35]. As in the CRPD, the selected measure needs to be "reasonable" and must not impose an "undue burden" on the employer, although the Court marks a notable difference compared to the international interpretation of the two concepts.

According to the international trend, "Reasonableness" relates only to the ability of the measure to achieve its aim, and "Proportionality" concerns the cost to the employer. On the contrary, the Supreme Court believes that both concepts involve a balancing of the interests of all parties concerned. In this regard, the "Proportionality test" takes into account the economic cost of the required adjustment, which must be assessed by focusing on subjective and objective factors[36], whereas the evaluation on the reasonability of the accommodation examines the effects on the organisation of the enterprise. The Court considers the reasonability test as a concrete application of the principle of good faith in legal relations. Thus, the employer must make all the organisational changes allowing people with disabilities to work in an environment appropriate to their condition, but it must also balance the concerned individual's interest with the productivity of the company and other employees' needs. The measure adopted is "reasonable" when the employer sets all the interests involved within objectively acceptable parameters[37].

[35] Cass. Civ, sec. lav., no. 6497/2021, cit.

[36] The subjective parameters involve the employer's circumstances and include the size of the company, the discrepancy between expenditure and income, or a possible internal crisis. The objective criteria pertain exclusively to the cost of the resources required and the employer's eligibility for public support to mitigate the associated costs. Cf., *inter alia*, Garofalo, *La tutela del lavoratore disabile*, cit., p. 1218 ff.

[37] Cass. Civ., sec. lav., no. 6497/2021, cit., 5.4. Cf. Garofalo, *La tutela del lavoratore disabile*, cit., p. 1229 and D'Ascola, *cit.*, p. 202-208, for the analysis of the interactions among the principle of good faith, the obligation to provide reasonable accommodation and the possibility of a judicial control on the employer's organisational choices.

6. *Framework Law no. 227/2021, Reasonable Accommodation and the two assessments of Disability*

The research shows that national law has not been properly aligned with international and European standards in defining the concepts of disability and reasonable accommodation: as mentioned above, the former has only been addressed from a medical perspective, while the latter has not even been provided for in legislation. This is one of the reasons why Framework Law no. 227/2021 was enacted, as it mandates, among other things, its implementing Legislative Decrees to revise the current legislation to redefine both concepts in line with supranational developments.

L. no. 227/2021 aims to amend art. 3, l. no. 104/1992 – which, as mentioned above, currently defines the concept of "Handicapped Person" – to align it "with the UN Convention on the Rights of Persons with Disabilities"[38]. On the other hand, the new Law entrusts the Implementing Decrees to introduce the definition of "Reasonable Accommodation" in l. no. 104/1992[39].

An interesting aspect of l. no. 227/2021 is that the condition of disability is determined by two different assessments. The first involves a basic evaluation to determine the individual's impairment and support needs[40]. The second consists of a "multidimensional" assessment, explicitly based on the social approach, which begins at the request of the applicant, and is necessary to develop an "Individualised, Personalized and Participatory Life Plan" (IPPLP)[41]. The IPPLP aims to identify the resources, methods, and expertise needed to realize the person's life goals and aspirations and to determine the reasonable accommodation needed to support individuals with disabilities' involvement in all aspects of life, including employment[42]. Whereas the basic

[38] Art. 2(2)(a)(1), l. no. 227/2021.

[39] Art. 2(2)(c)(5), l. no. 227/2021. Cf. Consiglio dei Ministri, press release no. 57 of 3 November 2023, in *www.governo.it* (last accessed 17 June 2024).

[40] L. no. 227/2021 entrusts the basic evaluation to a single body, the INPS – "National Institute for Social Services" (my translation of "Istituto Nazionale della Previdenza Sociale") – which follows a single procedure, replacing the previous fragmented system of different bodies and processes depending on the type of disability and on the purpose of the application. Cf. art. 2(2)(b)(2), l. no. 227/2021.

[41] My translation. Cf. art. 2(2)(a)(1), l. no. 227/2021.

[42] Art. 2(2)(c)(8), l. no. 227/2021.

evaluation is linked to the primary legal protection and measures, the second one is voluntary and serves only to draft the IPPLP.

The multidimensional nature of the second assessment, which is the only one explicitly based on a social approach, could lead one to believe that the basic assessment would continue to follow a medical perspective. In this case, one might wonder how Framework Law no. 227/2021 would affect the national system, bringing it into line with the CRPD, if only the second assessment appears to be multidimensional.

The answer to this question seems to lie in the parameters used in the basic assessment to determine the condition of disability, since l. no. 227/2021 states that the ICD and ICF classifications must be considered when conducting the basic evaluation[43]. This circumstance may have a huge impact when compared to the previous system: the use of the ICF classification has never been addressed by the national law as a general basis to ascertain individual's disability, although it interprets such condition as a social concept rather than a purely medical one[44].

However, if the basic evaluation also adopts a social approach, one might wonder about the difference with the multidimensional evaluation, which is highlighted below.

7. *Innovations of d.lgs. no. 62/2024 on the definition and assessment of Disability*

To answer the latter question, one must analyse the recent d.lgs. no. 62/2024, enacted to implement l. no. 227/2021 and to develop its content with several innovations[45].

Firstly, as required by l. no. 227/2021, art. 3, d.lgs. no. 62/2024 amends art. 3, l. no. 104/1992, replicating exactly the definition of "Persons with Dis-

[43] Art. 2(2)(b)(1), l. no. 227/2021.

[44] Before l. no. 227/2021, the ICF was legally adopted only in small and very specific contexts. Recently, art. 4, d.lgs. of 7 August 2019, no. 96, amended art. 5(2), d.lgs. no. 66 of 13 April 2017 ("*Norme per la promozione dell'inclusione scolastica degli studenti con disabilità, a norma dell'articolo 1, commi 180 e 181, lettera c), della legge 13 luglio 2015, n. 107*") to adopt the criteria of the ICF for assessing the disability *status* of school students. Complementarily, the Italian Ministry of Health issued some guidelines to enforce the latter regulation. Cf. MINISTERO DELLA SALUTE, *Linee guida*, cit., p. 1 ff. Cf. SAGONE, *cit.*, p. 250; MARTELLONI ET AL., *cit.*, pp. 554-555.

[45] MONACO, FALABELLA, *cit.*, p. 1 ff.

abilities" found in the CRPD. As a result, the new article abandons the concept of "handicap"[46] and refers to the persons with disabilities as those who have "a long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others"[47].

However, the article specifies that this condition will be ascertained by the basic evaluation: the latter is indeed crucial, as it will be the general procedure for determining the condition of disability, which also includes any type of assessment of "Civil Disability"[48].

At this point, one might wonder why the Legislators have resorted to two evaluations and why the basic one plays a decisive role in determining the condition. The answer lies in the fact that the assessments have different objectives. The basic focuses on determining the individual's support needs. Thus, it evaluates the latter's degree of autonomy.

It is no coincidence that d.lgs. no. 62/2024 states that such an evaluation uses the ICD and the ICF mainly to assess how the functional and structural impairments resulting from the person's pathology influence their daily activities. Among other aspects, the basic assessment specifically focuses on ascertain the individual's "capacity" in the domains related to ICF "Activities and Participation" component[49].

[46] L. no. 104/1992, art. 4.

[47] L. no. 104/1992, art. 3(1) (my translation). Furthermore, for granting access to the different legal benefit, the article now classify disability by the "amount of support needed" rather than the "gravity" of the condition. According to art. 3(2), the need for support is assessed by the basic evaluation, using the ICF classification. Cf. l. no. 104/1992, art. 4. Cf. Monaco, Falabella, *cit.*, p. 2;

[48] Cf. the list in art. 5, d.lgs. no. 62/2024. In addition, art. 12, d.lgs. no. 62/2024 requires the Minister of Health to adopt, by 30 November 2024, a regulation updating the definitions, criteria and procedures for the assessment of "Civil Disability", "Civil Blindness", "Civil Deafness" and "Civil Deafblindness" in order to bring them into line with the new definition of disability and the parameters of the ICD and ICF classifications.

[49] Cf. d.lgs. no. 62/2024, art. 5(3). However, cf. also art. 10(1), which specifies that the basic evaluation must particularly ascertain the following aspects: "a) the assessment and verification of the individual's health condition, indicated in the introductory certificate with ICD codes; b) the evaluation of long-term and significant impairments of health *status*, functional, mental, intellectual, or sensory, in accordance with ICF indications and taking into account the ICD; c) the identification of functional and structural *deficits* that hinder the individual's activities in terms of health, relevant in terms of capacity according to the ICF; d) the identification of the individual's functioning profile, limited to the domains of mobility and autonomy in basic and instrumental activities of daily living, requiring continuous support; e) the evaluation of the

However, if the analysis focuses on capacity, the context taken as a reference point should be standard and independent of the specific factors belonging to the individual's living environment[50].

The difference with the multidimensional assessment seems to be in the latter aspect. In this sense, d.lgs. no. 62/2024 explicitly states that the multidimensional assessment is based on the social approach, as it focuses on the performance of the individual, which consists in the ability to carry out certain daily activities in the specific context in which he or she lives, with all the environmental factors that are part of it. In this perspective, since the multidimensional appraisal aims exclusively at drafting the IPPLP, it must necessarily take into account the environmental factors that the person will encounter in the life course that he or she wishes to follow[51].

As a result, the two evaluations seem to complement each other: the basic assessment identifies the individual's disability, focusing on his or her support needs, while the second one contextualizes the outcome of the first, assessing how the individual's specific condition relates to the barriers in his or her environment, to determine what measures are needed to ensure equal participation in society.

In this context, given that the multidimensional evaluation considers the specific environmental factors emerging in the chosen context, the IPPLP provides for the reasonable accommodations needed to achieve the goals that have been set.

impact of functional and structural impairments in terms of capacity according to the ICF classification, in the domains related to activities and participation, also considering the domains related to work and learning in higher education; f) the evaluation of the level of support needs, mild or moderate, or intensive, high, or very high support, related to the ICF domains of activities and participation" (my translation).

[50] WHO, ICF, cit., 123. See also, MINISTERO DELLA SALUTE, *Linee guida*, cit., p. 36.

[51] D.lgs. no. 62/2024, art. 25(2). The evaluation is specifically divided into four phases. The first step is to identify the objectives that the person wishes to pursue, in line with the basic assessment, and in relation to these to determine the functioning profile, both in terms of "capacity" and "performance". Secondly, the assessment identifies the "environmental factors" – i.e. the barriers and facilitators – which may be found in the contexts chosen by the person through the indication of objectives. Thirdly, it evaluates the physical, mental, intellectual, and sensory health profile, along with the person's needs in the domains of quality of life, taking into account the individual's priorities. Finally, it determines the specific objectives that can be achieved with the IPPLP, according to the person's aspirations.

8. *Innovations of d.lgs. no. 62/2024 on the concept and enforcement of Reasonable Accommodation*

The definition of "Reasonable Accommodation" is now contained in the new art. 5-*bis*, l. no. 104/1992, introduced by art. 17, d.lgs. no. 62/2024.

Reasonable accommodation is granted to individuals who have been recognized as having a disability through the basic evaluation process[52], where "the application of legal provisions" does not ensure that they can effectively and promptly exercise their "human rights and fundamental freedoms on an equal basis with others". In this sense, reasonable accommodation "identifies the necessary, relevant, appropriate, and adequate measures and adjustments that do not impose a disproportionate or undue burden on the obligated party"[53].

The concept is further detailed in art. 5-*bis* (5), l. no. 104/1992, which specifies that reasonable accommodation must be "necessary, adequate, relevant, and appropriate to the level of protection to be provided and to the contextual conditions in the specific case, as well as compatible with the resources actually available for this purpose"[54].

The article seems to implicitly recall the concepts of "Reasonableness" and "Proportionality", in line with international and European standards: as clarified by the Committee, an accommodation is "reasonable" if it is necessary and appropriate to the needs of the individual and "proportional" if it is compatible with the resources available[55]. In this regard, it appears that art. 5-*bis*(5) may contrasts with the latest decisions of the Italian Supreme Court, which holds that, in employment relationships, the "Reasonableness test" – as an application of the principle of good faith – implies a balancing of interests of all parties involved[56]. Conversely, according to the latter article, if a measure is "necessary" and "appropriate" to the needs of the individual, it is reasonable *per se*, thus eliminating any other evaluation concerning the interests of third parties, since the only limit seems to concern the cost of the measure required.

[52] D.lgs. no. 62/2024, art. 5(4).

[53] L. no. 104/1992, art. 5-*bis*(1). Cf. also art. 5-*bis*(2), which assigns a subsidiary function to reasonable accommodation when the normal benefits and supports of existing legislation are not sufficient.

[54] L. no. 104/1992, art. 5-*bis*(5).

[55] Cf. Committee on the Rights of Persons with Disabilities, General Comment no. 6(2018), Sec.V(D), paragraph 25(a)(d)(e), p. 7 and *supra* § 3.

[56] *Supra*, § 5.

Regarding the implementation of reasonable accommodations, art. 5-*bis*, l. no. 104/1992 now provides a specific procedure applicable to Public Administrations, public service concessionaires, and private entities. The person with a disability – or the subjects referred to in art. 5-*bis*(3) – must submit a written request for Reasonable accommodation, possibly including a concrete proposal, which will be evaluated by the recipient. In case of rejection, the applicant – or the associations protecting the same interests – may either start a claim based on disability-discrimination[57] or submit a request to the new National Guarantor Authority for the Rights of Persons with Disabilities, to verify whether there the refusal of reasonable accommodation consisted in an indirect discrimination and, in such cases, to propose possible solutions[58].

9. *The impact of the recent reform on the multi-level legal framework*

The analysis of the impact of the reform on the previous regulatory framework rises several points for consideration.

The first question is whether d.lgs. no. 62/2024 has achieved the long-awaited shift from the medical to the social model: the answer seems to be affirmative.

From a purely legal perspective, the definitions of "Disability" and "Reasonable Accommodation" finally reflect those of the CRPD. Moreover, the Decree implicitly incorporates the concepts of "Reasonableness" and "Proportionality" in line with the General comments of the Committee.

The shift towards a social model also seems evident in the way disability is assessed. Clearly, the multidimensional evaluation has more social aspects than the medical one, since it ascertains the individual's performance in his or her concrete environment, taking into account all the factors of his or her life context.

[57] L. no. 104/1992, art. 5-*bis*(8-11), which refer to arts. 3-4, L. no. 67 of 1 March 2006, which relate to the anti-discrimination procedure under art. 28, d.lgs. no. 150 of 1 September 2011.

[58] L. no. 104/1992, art. 5-*bis*(8-11), according to which the Guarantor does not seem to have direct sanctioning powers, in accordance with the provisions of L. no. 227/2021. On this point, see Abril, Choubey, M.A. Leonardi, Zampieri, *Reasonable Accommodation and Disability: a Comparative Analysis*, in *DSL*, 2024, 1, p. 32, where it has been highlighted that L. no. 227/2021 does not grant neither sanctioning powers to the new Authority nor does it confer on the latter advisory powers towards private entities.

However, there seems to be a shift towards the social approach even in the basic assessment. In this regard, the use of the ICF is crucial, since even in ascertaining the individual's capacity in a standard environment there are environmental factors to consider. It can be noticed that even the latter factors, although uniform and unspecific, relates to the individuals' impairment, determining different degrees of disability. This is confirmed by the ICF itself, which states that environmental factors are taken into account in describing the context in which the individual's capacity is assessed. Not surprisingly, it has been pointed out that both capacity limitations in the absence of performance limitations and, conversely, performance limitations in the absence of capacity limitations, have value[59].

On the other hand, one might wonder whether the new concept of disability can lead to the uniformity that was lacking in the previous legal framework. The answer seems positive as well.

The legislators adopted a single definition of disability under art. 3, l. no. 104/1992, which is determined through a single procedure that is valid for nearly all legal purposes[60]. Moreover, the new "social" dimension of the legal definition of disability is in line with art. 3(3-*bis*), d.lgs. no. 216/2003 and, more generally, with the anti-discrimination legislation, which is now expressly referred to by art. 5-*bis*, l. no. 104/1992, in cases of refusal to provide reasonable accommodation.

The only aspect that needs to be clarified is the possible difference between the new legal concept of "Reasonable Accommodation" and the one described by the Supreme Court, when applicating art. 3(3-*bis*), d.lgs. no. 62/2024. In particular, it may be questioned whether the "Reasonableness test" can still be considered as a specification of the principle of good faith in contracts, since, according to d.lgs. no. 62/2024, a measure is reasonable if it satisfies the applicant's needs, which should not be balanced with interests of third parties, as instead provided for by the parameter under arts. 1175 and 1375 c.c.

On a more practical level, there are other issues that can only be touched upon in this essay.

[59] M. Martelloni *et al.*, *cit.*, p. 554.

[60] In this regard, it is important to recall that the different definitions of "civil disability" – which, under art. 5, d.lgs. no. 62/2024, are included in the condition of disability under art. 3, cit. – should be revised according to the ICD and ICF parameters, through a regulation of the Italian Ministry of Health.

On the one hand, it is necessary to assess how the new procedure for requesting reasonable accommodation relates to the procedure provided for in art. 10(3), l. no. 68/1999, which was not updated by d.lgs. no. 62/2024. The latter norm states that, in the event of a deterioration in the worker's state of health, he or she may be dismissed if the commission referred to in art. 4, l. no. 104/1992 finds that it is impossible for him or her to be reinstated, even after the possible adjustments to the organisation of work have been made.

On the other hand, the relationship between the IPPLP and the employer's discretion in organisational management should be examined, as reasonable accommodation under the IPPLP may be designed for the person with a disability without the involvement of the potential employer, who may not have been identified in the specific case[61].

In conclusion, the reform seems to achieve the long-awaited "Copernican revolution"[62] that will certainly reduce the difference between supranational and national law. Of course, how it will be implemented needs to be further examined, with more certain answers after the trial period.

[61] See also Abril, Braj Choubey, M. A. Leonardi, Zampieri, *cit.*, p. 31.
[62] Monaco, Falabella, *cit.*, p. 1.

Abstract

The essay examines the concepts of "Disability" and "Reasonable Accommodation" in labour law, providing critical insights into the differences between international, European and national legal interpretations. The analysis takes into consideration the impact of the recent legislative developments in Italy, including Framework Law no. 227 of 22 December 2021 and Legislative Decree no. 62 of 3 May 2024.

Keywords

Disability, Reasonable Accommodation, Definitions, Multi-Level, Comparison.

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Comparative Legal Analysis in the EU Labour Law: the Approach of the Council of the EU*

Contents: **1.** Introduction. **2.** Methodology. **3.** Methods of Legal Interpretation in the EU Institutions. **3.1.** Methods of legal interpretation at the Council. **4.** Comparative Law as a Research Method. **4.1.** Comparative Labour Law as a Research Method. **5.** The Comparative Method Applied: the Case of the Council. **6.** Conclusions.

1. *Introduction*

Comparative legal research, akin to embarking on a journey, enables exploration and the discovery of new places and different, often surprising, points of view[1]. It serves as a fundamental tool in legal scholarship, facilitating the examination of multiple legal systems to unveil both similarities and differences. Moreover, this method is not only pertinent within academic discourse but is also firmly entrenched in the practices of judges and legal practitioners, particularly in the field of international and European law.

The Court of Justice of the European Union (C. Just.) has historically embraced the comparative law method[2]. Lenaerts and Gutman emphasise

* This paper develops the report presented at the conference "*Best practices in comparative labour law*" promoted by International Association of Labour Law Journals, 5 May 2023.

[1] Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, in *HILJ*, 1985, 26, 2, p. 412.

[2] Lenaerts, Gutman, *The Comparative Law Method and the European Court of Justice: Echoes across the Atlantic*, in *AJCL*, 2016, 64, 4, p. 842; Graziadei, *The European Court of Justice at Work: Comparative Law on Stage and Behind the Scenes*, in *JCLS*, 2020, 13, 1, p. 9. In the case law it is noteworthy C. Just., Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, where the C. Just. established that "in pursuance of the task conferred on it by Article [19 TEU] of ensuring

the pivotal role of comparative law within Union courts, highlighting its significance in interpreting and shaping EU law[3]. As a result, comparative method is well-established in the C. Just. case law, which employs it to address the lacunae in EU law, as intended by the authors of Article 340 of the Treaty on the Functioning of the European Union (TFEU)[4]. This situation is understandable given that the C. Just. is tasked with ensuring that EU law is interpreted and applied uniformly across all European countries, ensuring that countries and institutions of the Union comply with EU norms[5]. Moreover, the interpretative methodology of EU law, mostly developed by the C. Just. in the absence of specific treaty provisions[6], has been significantly influenced by legal doctrine with EU legal scholars analysing and systematising these methods[7]. There is a strong interplay between the judiciary and academia, as many Court judges were previously law professors, contributing to a scholarly environment[8]. These methods, being judge-made and unwritten,

that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the [EU] legal system and, where necessary, general principles common to the legal systems of the Member States".

[3] Lenaerts, Gutman, *cit.*, p. 842.

[4] Lenaerts, Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, in *EUI WP AEL*, 2013, 9, p. 37.

[5] See Article 19 Treaty on European Union (TEU), Articles 251 to 281 Treaty on the Functioning of the European Union (TFEU), Article 136 Treaty on the European Atomic Energy Community (Euratom Treaty), and Protocol No. 3 annexed to the Treaties on the Statute of the Court of Justice of the European Union.

[6] In fact, there are no specific provisions in the TEU and the TFEU concerning the interpretation of primary and secondary law apart from Article 6 TEU and Article 340 TFEU, both of which refer to comparative law.

[7] Petrić, *A Reflection on the Methods of Interpretation of EU Law*, in *ICLJ*, 2023, 17, 1, p. 92; Itzcovich, *The Interpretation of Community Law by the European Court of Justice*, in *GLJ*, 2009, 10, 5, p. 540. As for the literature on the C. Just.'s interpretation, see also: Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, Clarendon Press, 1993; Fennelly, *Legal Interpretation at the European Court of Justice*, in *FILJ*, 1996, 20, p. 656; Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart, 2012; Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press, 2012; Lenaerts, Gutiérrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne*, Bruylant, 2020.

[8] Bobek, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts*, in Adams *et al.* (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart, 2013, pp. 197, 227-228; Vauchez, *Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, in *EPSR*, 2012, 4, 1, p. 51.

essentially form customary norms, requiring legal officials' adherence and belief in their obligation to follow them[9]. National judges, being crucial legal officials in the decentralised EU judicial system, must accept and apply the C. Just.'s interpretation methods to ensure the EU legal system's autonomy, coherence, and functionality[10]. Despite conceptual autonomy, EU law interpretation methods closely resemble those of national laws due to shared legal traditions. These methods include textual, contextual, and purposive approaches. Since the judges of the Court come from the Member States and are trained in national legal traditions, they tend to apply these methods in an analogous way to EU law. This convergence suggests a universalistic perspective on interpretation methods in Europe[11].

Alongside the interpretation of EU law after its entry into force, the comparative method is applied in specific areas of law, with a particular focus in this essay on labour law, where it serves to inform legislative efforts[12]. Comparative method is not the most frequently adopted; however, it remains highly significant for creating law within the Union's competencies[13]. Alongside this methodology the Legal Advisers of the EU institutions employs in their activity the interpretive rules established by the C. Just.

A gap persists in the literature regarding a comprehensive understanding of the methodologies used by the main institutions of the European Union (EU), in particular the Council of the EU (Council), in their legislative processes, especially around labour law[14]. Addressing this gap is important

[9] Petrić, *cit.*, p. 92; Itzcovich, *cit.*, p. 540.

[10] Petrić, *cit.*, p. 92; Itzcovich, *cit.*, p. 540; Rosas, *The National Judge as EU Judge: Opinion 1/09*, in Cardonnel, Rosas, Wahl (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Hart, 2012, p. 105.

[11] Petrić, *cit.*, pp. 95-96.

[12] Leino-Sandberg, *What Do EU Legal Advisers Do?*, in Leino-Sandberg (eds.), *The Politics of Legal Expertise in EU Policy-Making*, Cambridge University Press, 2021, p. 75.

[13] Lyal, *The Community Dimension in Legal Education: A Personal Perspective*, in *EJLE*, 2007, 4, 1, p. 61.

[14] The literature on the role of the legal advisors of the EU institutions (Parliament, Council and Commission) is extremely scarce, among others: Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making*, Cambridge University Press, 2021; Jacqué, *The Role of Legal Services in the Elaboration of European Legislation*, in Vauchez, De Witte (eds.), *Lawyering Europe: European Law as a Transnational Social Field*, Hart, 2013, pp. 43-54. Conversely, there is a large literature on the C. Just. and its way of interpreting the law, among others: Petrić, *cit.*; Graziadei, *cit.*; Sankari, *Constitutional Pluralism and Judicial Adjudication: On Legal Reasoning, Minimalism and Silence by the Court of Justice*, in Davies, Avbelj (eds.), *Research Handbook on Legal Pluralism*

not only for academic clarity, but also to improve the effectiveness and transparency of legal decision-making within the EU.

This paper studies the interpretative method of the Legal Advisers at the Council, especially in labour legal field. In delineating the methods used by the Council in its legislative policies, it is crucial to recognise the multifaceted nature of EU decision-making processes. These processes vary depending on the policy area under consideration, embodying distinct methodologies tailored to specific contexts. The Community method, prevalent in most EU legislative acts, operates under the ordinary legislative procedure as outlined in Article 294 TFEU[15]. This method embodies the collaborative efforts of EU institutions, including the European Commission, the European Parliament, and the Council of the EU, with decisions made through qualified majority voting. Conversely, the intergovernmental method, primarily employed in domains such as the common foreign and security policy, entails shared initiative between the Commission and EU Member States, with generally unanimous decision-making in the Council[16].

and EU Law, Edward Elgar, 2018; Slaughter, Stone Sweet, Weiler, *The European Court and National Courts*, Hart, 2018; Lenaerts, Gutman, *cit.*; Lenaerts, Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*; Jakab, *Special Issue: Constitutional Reasoning*, in *GLJ*, 2013, 14, 8, pp. 1215-1278; Bobek, *cit.*; Vauchez, *cit.*; Itzcovich, *cit.*; De Búrca, Weiler, *The European Court of Justice*, in Weiler (eds.), *The Collected Courses of the Academy of European Law*, Oxford University Press, 2001; Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, in *Oxford European Community Law Series*, Clarendon Press, 1993; MacCormick, Summers, *Interpreting Statutes: A Comparative Study*, Dartmouth, 1991.

[15] Among others, European Union, *The Community and Intergovernmental Methods*, in *EUR-Lex*, 2024, https://eur-lex.europa.eu/EN/legal-content/glossary/the-community-and-intergovernmental-methods.html; Aa.Vv., *EU Constitutional Law*, in *Oxford European Union Law Library*, Oxford University Press, 2022; Devuyst, *The European Union's Community Method: Foundations and Evolution*, in *Oxford Research Encyclopaedia of Politics*, Oxford University Press, 2018; Dero-Bugny, *The Dilution of the Community Method and the Diversification of Intergovernmental Practices*, in *ROFCE/DP*, 2014 134, p. 61; De Baere, *The Community Method*, in *Constitutional Principles of EU External Relations*, Oxford University Press, 2008, pp. 73-98.

[16] Among others, European Union, *The Community and Intergovernmental Methods*, *cit.*; Aa.Vv., *EU Constitutional Law*, *cit.*; Bickerton, Hodson, Puetter, *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, Oxford University Press, 2015; Dero-Bugny, *cit.*; Puetter, *Europe's Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance*, in *JEPP*, 2010, 19, 2, pp. 161-178; Tsebelis, Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, in *IO*, 2001, 55, 2, pp. 357-390.

Furthermore, it is crucial to recognise the peculiarity of the work of the Council Legal Advisers whose role is to assist "the Council and its preparatory bodies, the Presidency and the GSC in order to ensure that Council acts are lawful and well drafted. It has the right and the duty to intervene when it considers it necessary, orally or in writing, both at the level of working parties and committees and at the level of Coreper or the Council, by giving fully independent opinions on any legal question, whether at the request of the Council or on its own initiative. […] It is also responsible for checking the drafting quality of proposals and draft acts and for formulating drafting suggestions for the Council and its bodies, […]"[17]. Therefore, the work entails "a creative approach where appropriate, to identifying legally correct and politically acceptable solutions […]"[18].

Given the peculiarities of the work within the Council and the objective of understanding its approach to the construction of law, this study aims to investigate the use of comparative law in this institution, particularly in the field of labour law, and to contribute to filling the existing gap in the literature. The research question guiding this study is twofold: how does the Council employ the method of comparative law, and what significance does it hold within the spectrum of legal methodologies used in the field of labour law? This study is motivated by the need to not only elucidate the Council's approach to legal analysis but also to comprehend the broader implications of employing comparative methods in EU legislative processes.

To effectively address the research question, this article initially delves into the legal research methods employed by EU institutions, highlighting the jurisprudential framework of the interpretation forms applied by the various Legal Services of the Commission, Parliament, and Council (Section 3). Then, the essay focuses on the methods of legal interpretation applied by the Legal Service of the Council (CLS), dwelling on the legal reasons (Lisbon treaty) that lead to preferring an EU law-based or comparative method (Section 3.1). Section 4 explores legal comparison as a research method to establish the connection between doctrinal perspectives on legal research methodology and its practical application. Section 5 analyses how the Council uses comparative law in practice, thus highlighting the similarities and differences between academic theory and practical implementation focussing

[17] Council of the EU, *Comments on the Council's Rules of Procedure*, 2022, p. 37.
[18] Council of the EU, *Mission Statement of the Council Legal Service*, 2019, para. 4.

on labour law. Finally, the essay concludes by synthesising these reflections to provide a comprehensive answer to the research question.

2. *Methodology*

A fundamental premise underlying this research is the importance of the comparative method in both the academic and practical spheres. Understanding the methodological underpinnings of legal analysis is not only essential for scholarly pursuits but also crucial for informing decision-making processes within non-academic institutions and organizations, such as the Council of the EU. By elucidating the methodological frameworks employed by the Council, particularly in the context of comparative law, this study seeks to bridge the gap between academic scholarship and practical legal application.

The methodological approach adopted in this study integrates both doctrinal and empirical dimensions. Indeed, three methods have been combined in this research: critical or semi-systematic literature review[19], participant observation in the participant-as-observer approach[20], and *élites* semi-structured interviews[21].

[19] Snyder, *Literature Review as a Research Methodology: An Overview and Guidelines*, in *JBR*, 2019, 104, pp. 333-339; Bandara *et al.*, *Achieving Rigor in Literature Reviews: Insights from Qualitative Data Analysis and Tool-Support*, in *Communications of the Association for Information Systems*, 2015, 37, pp. 154-204; Wong *et al.*, *RAMESES Publication Standards: Meta-Narrative Reviews*, in *BMC Med.*, 2013, 11, 1, pp. 20; Booth, Papaioannou, Sutton, *Systematic Approaches to a Successful Literature Review*, Sage, 2012; Fink, *Conducting Research Literature Reviews: From the Internet to Paper*, Sage, 2005.

[20] K. M. Dewalt, B. R. Dewalt, Wayland, *Participant Observation*, in Bernard H. Russell (eds.), *Handbook of Methods in Cultural Anthropology*, AltaMira Press, 1998, pp. 259-299; P. Jackson, *Principles and Problems of Participant Observation*, in *HG*, 1983, 65, 1, pp. 39-46; Spradley, *Participant Observation*, Holt, Rinehart and Winston, 1980; J. Ross, M.H. Ross, *Participant Observation in Political Research*, in *PM*, 1974, 1, 1, pp. 63-88; Bogdan, *Participant Observation*, in *PJE*, 1973, 50, 4, pp. 302-308; Gold, *Roles in Sociological Field Observations*, in *SF*, 1958, 36, 3, pp. 217-223; Becker, Geer, *Participant Observation and Interviewing: A Comparison*, in *HO*, 1957, 16, 3, pp. 28-32.

[21] Lancaster, *Confidentiality, Anonymity and Power Relations in Elite Interviewing: Conducting Qualitative Policy Research in a Politicised Domain*, in *IJSRM*, 2017, 20, 1, pp. 93-103; Mikecz, *Interviewing Elites: Addressing Methodological Issues*, in *QIn*, 2012, 18, 6, pp. 482-493; Harvey, *Strategies for Conducting Elite Interviews*, in *QRes*, 2011, 11, 4, pp. 431-441; Aberbach, Rockman, *Conducting and Coding Elite Interviews*, in *APSA*, 2002, 35, 4, pp. 673-676.

The literature review conducted in this study followed a critical or semi-systematic approach[22], aligning with the complexities inherent in comparative law research. From an academic perspective, comparative law has been conceptualised and studied across diverse disciplines, leading to varied methodological approaches and fragmented research traditions. Consequently, a comprehensive systematic review of every relevant article is impractical due to the diverse conceptualisations and interdisciplinary nature of comparative law studies[23].

Instead, this study adopted a critical semi-systematic literature review approach, which emphasises the synthesis of potentially relevant research traditions using meta-narratives[24]. This approach acknowledges the broad spectrum of comparative law studies and aims to identify and understand the evolution of research in comparative social and labour law over time. By synthesising different research traditions, this methodological approach provides an understanding of complex areas while ensuring the transparency of the research process[25].

The review process involved examining key articles and works related to comparative law and labour law, focusing on identifying themes, theoretical perspectives, and common issues. References to comparative methodology literature were made when necessary to contextualise the findings and address the research questions effectively[26]. Furthermore, the literature review

[22] SNYDER, *cit.*, p. 335.

[23] For a better understanding of the motivation behind a semi-systematic literature review, see the description of meta-narrative reviews in WONG *ET AL*, *RAMESES Publication Standards,* cit.

[24] "In general, the review seeks to identify and understand all potentially relevant research traditions that have implications for the studied topic and to synthesize these using meta-narratives instead of by measuring effect size" in SNYDER, *cit.*, p. 335.

[25] "This type of analysis can be useful for detecting themes, theoretical perspectives, or common issues within a specific research discipline or methodology or for identifying components of a theoretical concept" in SNYDER, *cit.*, p. 335. See also, WARD, HOUSE, HAMER, *Developing a Framework for Transferring Knowledge Into Action: A Thematic Analysis of the Literature*, in *JHSR&P*, 2009, 14, 3, pp. 156-164.

[26] Regarding Comparative Law, among others, see: SIEMS, *Comparative Law*, Cambridge University Press, 2022; BHAT, *cit.*; KISCHEL, *Comparative Law*, Oxford University Press, 2019; REIMANN, ZIMMERMANN, *The Oxford Handbook of Comparative Law*, Oxford University Press, 2019; GOANTA, SIEMS, *What Determines National Convergence of EU Law? Measuring the Implementation of Consumer Sales Law*, in *LS*, 2019, 39, 4, pp. 714-734; SACCO, GAMBARO, *Trattato Di Diritto Comparato. Sistemi Giuridici Comparati*, UTET, 2018; SAMUEL, *cit.*; LÖHNIG, *Comparative Law and Legal History: A Few Words about Comparative Legal History*, in ADAMS, HEIRBAUT (eds.),

served as a tool to assess and understand the methodologies applied by Legal Advisers in the CLS. By analysing scholarly works alongside practical insights, this study aimed to bridge the gap between academic scholarship and practical application in the context of the Council's legal work.

To conceptualise comparative law in general and comparative labour law in particular, theoretical frameworks from Sacco, Weiss, Kestemont, Waas, Trebilcock and Finkin were used in this study[27]. The use of these models served to synthesise key debates and issues in academic research and then assess their practical implications, especially in the case of the Council.

Overall, the literature review provided a comprehensive understanding of the theoretical foundations and practical implications of comparative law research, enriching the methodological approach adopted in this study. By integrating theoretical insights with practical observations, this study aimed

The Method and Culture of Comparative Law. Essays in Honour of Mark Van Hoecke, Hart, 2015; Valcke, Grellette, *Three Functions of Function in Comparative Legal Studies*, in Adams, Heirbaut (eds.), *cit.*, pp. 99-112; Valcke, *Reflections on Comparative Law Methodology - Getting inside Contract Law*, in Adams, Bomhoff (eds.), *Practice and Theory in Comparative Law*, Cambridge University Press, 2012, pp. 22-48; Bussani, Mattei, *The Cambridge Companion to Comparative Law*, Cambridge University Press, 2012; De Coninck, *The Functional Method of Comparative Law: "Quo Vàdis"?*, in *RJCIPL*, 2010, 74, 2, pp. 318-350; Mattei, *The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence*, in Riles (eds.), *Rethinking the Masters of Comparative Law*, Hart, 2001, p. 238; Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, in *AJCL*, 1991, 39, 1, p. 1-34; Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, in *AJCL*, 1991, 39, 2, pp. 343-401. Regarding Comprative Labour Law, among others, see: Finkin, *Comparative Labour Law*, in Reimann, Zimmermann (eds.), *cit.*, pp. 1109-1136; Trebilcock, *Comparative Labour Law*, Edward Elgar, 2018; Finkin, Mundlak, *Comparative Labor Law,* Edward Elgar, 2015; Zahn, *The "Europeanisation" of Labour Law: Can Comparative Labour Law Solve the Problem?*, in *NILQ*, 2010, 61, 1, pp. 79-92; Weiss, *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945-2004*, in *ILJ*, 2010, 39, 1, pp. 92-94; Bronstein, *International and Comparative Labour Law. Current Challenges*, Palgrave Macmillan and International Labour Organization, 2009; Blanpain, *Comparative Labour Law and Industrial Relations*, Kluver Law Taxation, 1987; Finkin, *cit.*, pp. 1130-1160; Weiss, *The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool*, in *CLLPJ*, 2005, 25, 1, pp. 169-182; Fahlbeck, *Comparative Labor Law - Quo Vadis?*, in *CLLPJ*, 2005, 25, 1, pp. 7-20; Blanpain, *cit.*; Aa.Vv., *Comparative Labour Law and Industrial Relations*, Springer, 1982.

[27] Finkin, *cit.*; Sacco, Gambaro, *cit.*; Trebilcock, *cit.*; Kestemont, *Handbook on Legal Methodology. From Objective to Method*, Intersentia, 2018; Kestemont, *A Typology of Research Objectives in Legal Scholarship*, *RJJ*, 2015, 5, pp. 5-21; Finkin, Mundlak, *cit.*; Weiss, *The Transformation of Labour Law in Europe*, cit.; Waas, *A Restatement of the Law with Respect to Labour Law*, in *IJCL*, 2008, 24, 4, pp. 451-467; Weiss, *The Future of Comparative Labor Law*, *cit.*; Sacco, *Legal Formants (Installment I of II)*, cit.; Sacco, *Legal Formants (Installment II of II)*, *cit.*

to contribute to the ongoing dialogue between academia and legal practice within the European Union institutions.

From a practical perspective, the participant-as-observer approach was adopted to provide an in-depth understanding of the Council's legal service dynamics[28]. This methodological choice was influenced by the temporary nature of the author's position and the acknowledgment among colleagues of the author's dual role as both participant and observer[29]. By actively engaging in the daily activities of the legal service, the author gained firsthand experience and insights into the decision-making processes and operational mechanisms within the Council.

The participant-as-observer approach enabled the author to strike a balance between insider and outsider perspectives, minimising the potential for bias and subjective interpretation[30]. This methodological decision aimed to enhance the credibility and validity of the observations made, ensuring a nuanced understanding of the Council's legal work.

Through moderated participation in the working group, the author immersed himself in the professional environment of the Legal Advisers, gaining valuable insights into their thought processes, approaches to legal analysis and interactions with other stakeholders[31]. Being embedded within the working group, the author was able to grasp the complexities of the Council's legal decision-making processes, thus facilitating a comprehensive description and analysis of the observed phenomena.

The participant-as-observer approach not only allowed for a thorough exploration of the CLS dynamics but also facilitated a deeper understanding

[28] To carry out the participant observation, reference was made, among others, to: K.M. Dewalt, B.R. Dewalt, Wayland, *cit.*; Jackson, *cit.*; Spradley, *cit.*; J. Ross, M.H. Ross, *cit.*; Bogdan, *cit.*; Gold, *cit.*; Becker, Geer, *cit.*

[29] "Although basically similar to the complete observer role, the participant-as-observer role differs significantly in that both field worker and informant are aware that theirs is a field relationship. This mutual awareness tends to minimize problems of role-pretending; yet, the role carries with it numerous opportunities for compartmentalizing mistakes and dilemmas which typically bedevil the complete participant." in Gold, *cit.*, p. 220.

[30] Jackson, *cit.*; Gold, *cit.*; Schwartz, Green Schwartz, *Problems in Participant Observation*, *AJS*, 1955, 60, 4, pp. 343-353.

[31] "Participant observation offers the possibility of collecting information to which other methods do not give access or which is prerequisite to the use of other methods. Participant observation can be used rigorously, and can produce reliable data […]." in J. Ross, M.H. Ross, *cit.*, p. 78.

of the institutional culture, norms, and practices. By actively participating in meetings, discussions, and everyday activities, the author gained unique insights into the Council's internal dynamics and operational challenges, which significantly informed the research findings and analysis.

Overall, the participant-as-observer approach proved instrumental in providing rich, contextualised data on the CLS operations, thereby enriching the methodological rigor and depth of the study.

The semi-structured interviews conducted complemented the participant observation by providing additional perspectives and insights from key stakeholders within the CLS[32]. These interviews were conducted with the aim of minimising potential distortions caused by limited observation duration and gaining further understanding of critical aspects not fully captured through observation alone.

The interviews, conducted via video calls in the spring of 2023, were structured around specific topics related to research methods, comparative law, and decision-making processes within the Council. The topics included understanding the rationale behind choosing different research methodologies, determining the scope of legal systems for comparison, and preferences for micro- or macro-comparative approaches.

Each interview lasted approximately 45 minutes, during which the author facilitated the discussion based on a predefined framework. The interviewees were given space to discuss freely and organise their answers within the limits of disclosable information. The author took detailed notes during the interviews to capture key insights and observations.

To ensure confidentiality, the interviewees were categorised as: (a) CLS Legal Officer 1, "Interview A" and (b) CLS Legal Officer 2, "Interview B". This classification aimed to protect the anonymity of the respondents while allowing for meaningful categorisation and analysis of the interview data.

It is essential to note that the interviews were conducted with the Legal Advisers of the Council, who represent a subset of the CLS staff. In spring 2023, the CLS comprised approximately sixty legal advisers, most of whom are employed on a permanent basis. In the Directorate responsible for Employment and Social Affairs there were eight legal advisers. Approximately

[32] To carry out the interviews, reference was made, among others, to: LANCASTER, *cit.*; ALSHENQEETI, *Interviewing as a Data Collection Method: A Critical Review*, in *ELR*, 2014, 3, 1, pp. 39-45; HARVEY, *cit.*; MIKECZ, *cit.*; HARVEY, *cit.*; BERRY, *Validity and Reliability Issues in Elite Interviewing*, in *PSP*, 2002, 35, 4, pp. 679-682; ABERBACH, ROCKMAN, *cit.*; BECKER, GEER, *cit.*

between 3 and 4 persons dealt specifically with employment and social law, at least 2 full-time. The sample of interviewees was representative of 50% of the personnel, ensuring a diverse and comprehensive perspective on the issues discussed.

The information gleaned from the interviews complemented the findings from participant observation, providing valuable insights into the CLS operations, decision-making processes, and the interplay between academic and practical methodologies. Overall, the combination of participant observation and semi-structured interviews enriched the methodological approach, enhancing the comprehensiveness and validity of the study's findings.

Finally, it is important to specify that the considerations on the roles and activities of the Legal Services other than the Council are based on the analysis of the literature[33], not on interviews or participatory observations. Due to confidentiality provisions, it was not possible to discuss specific cases, making generalisations in the methodological description necessary. Overall, this comprehensive approach provides valuable insights into comparative law methodologies within the Council, contributing to both academic research and the practical application of law.

3. *Methods of Legal Interpretation in the EU Institutions*

The legal system of the European Union, like all systems, presupposes interpretation by legal operators (judges, legal advisers, and legal professionals) as a way for evolution, adaptation, and creation of EU Law[34].

Contrary to some national legal systems, such as Italy[35], the methods of

[33] Leino-Sandberg, *The Politics of Legal*, *cit.*; Lewis, T*he European Council and the Council of the European Union*, in Cini, Pérez-Solorzano, Borragan (eds.), *European Union Politics*, Oxford University Press, 2019, pp. 157-175; Jacqué, T*he Role of Legal Services in the Elaboration of European Legislation*, in Vauchez, De Witte (eds.), *Lawyering Europe: European Law as a Transnational Social Field*, Hart, 2013, pp. 43-54.

[34] In CLS Legal Officer 1, "Interview A", it emerges that the leading role of the C. Just. is crucial for the CLS. The prevailing interpretation criteria applied by the CLS are those of the C. Just.: linguistic or textual, systemic, or contextual, and teleological or purposive methods. Therefore, it is necessary to briefly reconstruct the case law on interpretation.

[35] See Article 12 of the Civil Code of Italy on legal interpretation stating: "In applying the law, no other meaning may be attributed to it than that made manifest by the grammatical meaning of the words according to their connection and the intention of the legislature.

interpretation of EU law are mainly of jurisprudential origin. The C. Just. had to intervene by introducing these methods and filling the gap in the treaties where there are no specific provisions on the interpretation of primary and secondary EU law. Petri emphasises that in the construction of the interpretative system, the C. Just. was significantly influenced by legal doctrine. Indeed, "EU legal scholars have described and systematised these methods and argued for their adaptation and modification. This was supported by a specific relationship between the 'bench' and the 'academia': on the one hand, many judges at the Court were previously law professors, which is why the Court has sometimes been referred to as 'academic' court; on the other, many (if not all) judges of the Court have regularly contributed with their extra-judicial writings to the advancement of the EU legal literature, especially in the formative years of the EU integration"[36].

Although these interpretative methods have never been crystallised in a legislative act, they inform the entire EU legal system and have become customary norms[37]. National courts have actively contributed to the solidification of the interpretative system through a fruitful dialogue with the C. Just. This is because, as Lenaerts and Gutiérrez-Fons explain, "the philosophical foundations of EU law are not those of a hierarchical legal order where interpretation is the result of a 'top-down' and dogmatic approach. On the contrary, 'to say what the law of the EU is' involves a complex balancing exercise which must be struck in a pluralist environment where the mutual exchange of ideas is of the essence"[38].

The methods of interpretation of EU law are first laid down in the *van Gend en Loos* case and are then constantly reaffirmed up to the case *Presidenza del Consiglio dei Ministri v. BV*[39]. In the former case, the C. Just. stated that "it is necessary to consider the *spirit*, the *general scheme* and the *wording* of those provisions", while in the latter, it stated that "it is necessary to consider not only the *wording* of that provision, but also its *context* and the *objectives* of the

If a dispute cannot be decided by a specific provision, reference shall be made to the provisions governing similar cases or analogous matters; if the case still remains doubtful, it shall be decided according to the general principles of the legal system of the State".

[36] Petrić, *cit.*, p. 92; Itzcovich, *cit.*, p. 540.

[37] *Ibid.*

[38] Lenaerts, Gutiérrez-Fons, *cit.*, p. 61.

[39] Cfr. C. Just., Judgment of 05 February 1963, *van Gend en Loos*, Case C-26/62, ECLI:EU:C:1963:1, para. 12-13 and C. Just., Judgment of 16 July 2020, *Presidenza del Consiglio dei Ministri v. BV*, Case C-129/19, ECLI:EU:C:2020:566, para. 38.

legislation of which it forms part"[40]. Alongside these general interpretative methods, the C. Just. consistently applies legal comparison. This method is not only additional but even legitimizes the others because they are based on the common constitutional traditions of the Member States, as also indicated by Article 6(3) TEU and Article 340(2) TFEU[41]. It is no coincidence that Lenaerts and Gutman affirm that the C. Just. is the institution that has employed the comparative legal methodology to interpret law and resolve legal antinomies since its inception[42]. Indeed, "the comparative law method constitutes an important, indeed crucial, tool for the Union courts as part of deciding all the various types of cases that are brought before them in all areas of EU law whether involving judicial interpretation or judicial lawmaking"[43].

The relevance of comparative legal analysis for EU Law is already evident in the treaties, which in fact expressly provide that in certain cases EU Law shall be interpreted "[...] in accordance with the general principles common to the laws of the Member States [...]"[44]. The call for legal comparison is even stronger in Article 6(3) of the TEU, which refers to the "constitutional traditions common to the Member States". These phrases commit the C. Just. to interpret EU Law through a bought-in methodology that considers all the legal traditions of the Member States[45].

The C. Just. is not the only institution applying the comparative methodology. Indeed, all major EU institutions – the European Commission, the Council, and the European Parliament – employ comparative legal analysis in their legislative work through their Legal Services.

[40] Emphasis added.

[41] Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020, ECB decisions on the Public Sector Purchase Programme exceed EU competences, 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 112: "The methodological standards recognised by the C. Just. for the judicial development of the law are based on the (constitutional) legal traditions common to the Member States (cf also Art 6(3) TEU, Art 340(2) TFEU), which are notably reflected in the case-law of the Member States' constitutional and apex courts and of the European Court of Human Rights. […] As long as the C. Just. applies recognized methodological principles and the decision it renders is not objectively arbitrary from an objective perspective, the Federal Constitutional Court must respect the decision of the C. Just. even when it adopts a view against which weighty arguments could be made".

[42] Lenaerts, Gutman, *cit.*, p. 842; Graziadei, *cit.*, p. 9.

[43] Lenaerts. Gutman, *cit.*, p. 176.

[44] Article 340, TFEU.

[45] Graziadei, *cit.*, p. 27.

The Legal Services of the three institutions are the bodies responsible for conducting technical assessments of EU legislation by applying interpretative methodologies. Advisory and advocacy are the two functions that these three Legal Services specifically fulfil. This article focuses exclusively on the Advisory function.

Legal Advisers accomplish the advisory function by providing objective and neutral technical assistance in the form of legal interpretations. While the Commission Legal Service is more involved in the preliminary stages of proposal drafting and in the contentious phase, that of the co-legislators has a more active Advisory role, having to provide a sound analysis of the legal implications of legislative proposals and to identify legitimate solutions, avoiding political considerations[46].

According to Siems, the European Commission conducts comparative legal analysis to assess its impact on Member States legislation, to evaluate how directives are transposed and how effective regulations are[47]. Legal science has dealt with understanding how the European Commission conducts comparative legal analysis through both qualitative and quantitative studies[48]. Furthermore, the European Commission often conducts preliminary comparative studies aimed at understanding common Member States principles that can serve as a model for harmonising legislation[49]. Examples of these studies are contained in the preliminary reports or impact studies that accompany legislative proposals[50].

The Legal Services of the two co-legislators use comparative analysis on an occasionally, particularly in new topics, where competencies are uncertain, or when there are significantly dissimilar legislations to be harmonised. Opinions or oral interventions based on a comparative analysis may be issued in an advisory capacity as a preliminary assessment of the conformity of the proposal with the legal basis or as a remedy with a view of addressing or preventing a legal issue or potential conflict of competence[51].

[46] Leino-Sandberg, *What Do EU Legal Advisers Do?*, *cit.*, 58.

[47] Siems, *Comparative Law*, *cit.*, p. 217.

[48] Goanta, *Convergence in European Consumer Sales Law: A Comparative and Numerical Approach*, Intersentia, 2016; Goanta, Siems, *Comparative Law*, cit.; Börzel, *Why Noncompliance: The Politics of Law in the European Union*, Cornell University Press, 2021.

[49] CLS Legal Officer 1, "Interview A", 2023.

[50] *Ibid*.

[51] CLS Legal Officer 1, "Interview A", 2023; CLS Legal Officer 2, "Interview B', 2023.

3.1. *Methods of legal interpretation at the Council*

Having provided a general overview of the interpretation methods within EU institutions and the role of the Legal Services of the Commission and co-legislators, we now turn our attention to the interpretation methods employed within the Council.

To grasp the methodologies employed by the Council in its legislative processes, it is necessary to recognise the diverse nature of the EU's decision-making process. These processes vary across policy sectors, each characterised by specific methodologies tailored to its unique context. The Community method, extensively used in EU legislative acts, operates within the framework of the ordinary legislative procedure outlined in Article 294 TFEU[52]. It entails collaboration among EU institutions – the Commission, the Parliament, and the Council – with decisions made by qualified majority voting. Conversely, the Intergovernmental method, primarily employed in sectors such as the common foreign and security policy, involves joint initiative between the Commission and EU Member States, with decision-making typically requiring unanimity within the Council[53].

Furthermore, understanding the distinct role of Council Legal Advisers is essential. They are tasked with supporting the Council, its preparatory bodies, the Presidency, and the GSC to ensure the legitimacy and precision of legislative acts. Council Legal Advisers have the autonomy to intervene orally or in writing, providing independent legal opinions on any pertinent matter[54]. Additionally, they are responsible for evaluating the editorial quality of proposals and suggesting improvements, often necessitating a creative approach to identify legally sound and politically viable solutions[55].

According to Leino-Sandberg, the EU legislative procedure can be considered a laboratory for practical comparative law[56]. The same concept also appears in Jacqué, who emphasises how Legal Advisers working in the EU

[52] Among others, European Union, *cit.*; Aa.Vv., *EU Constitutional Law,* cit.; Devuyst, *cit.*; Dero-Bugny, *cit.*; De Baere, *cit.*

[53] Among others, European Union, *cit.*; Aa.Vv., *EU Constitutional Law*, cit.; Bickerton, Hodson, Puetter, *cit.*; Dero-Bugny, *cit.*; Puetter, *cit.*; Tsebelis, Garrett, *cit.*

[54] Council of the EU, *Comments on the Council's Rules of Procedure*, *cit.*, p. 37.

[55] Council of the EU, *Mission Statement of the Council Legal Service*, *cit.*, para. 4.

[56] Leino-Sandberg, *What Do EU Legal Advisers Do?*, *cit.*, p. 75.

legislative procedure have to be able to evaluate and examine the existing legislation of Member States[57].

The analysis of the law is accompanied by the ability to preserve the coherence of the legal system, allowing it to evolve without disruption[58]. This aspect is especially important in the EU context, where regulatory evolution is particularly rapid, and in the field of social and labour legislation, which has only been partially devolved to the EU and with very strict limits.

To analyse legislative proposals and preserve the coherence of the EU legal system, the CLS apply various methods that can be grouped into two types: (a) the *EU law-based method* and (b) the *comparative method*.

The *EU law-based method* is the one most frequently employed within the Council. It is based on a legal evaluation of norms according to the interpretative criteria established by the C. Just.[59], namely linguistic or textual, systemic, or contextual, and teleological or purposive criteria[60].

In everyday work, to understand the legal soundness of a legislative proposal, an analysis template is followed that aims to decode any legal ambiguities, antinomies, and inconsistencies. The analysis presupposes a quasi-academic study of case law related to legal basis, the regulatory framework, in which the proposal fits, and the EU law.

At this stage, it is necessary to identify all the problems that a text may have, both in terms of coherence with primary law and in terms of application. Since Article 291(1) TFEU assigns to the Member States the responsibility for implementing all binding acts, it is crucial to identify any issues that may invalidate the act or make it unenforceable and propose solutions. During the analysis and amendment phase of the legislative proposal by the Member States' representatives, the Legal Advisers are called upon by the Presidency to conduct an evaluation of the various proposals, providing an oral or written opinion on their legal soundness[61].

Legal Advisers employ EU sources (legislation, case law and doctrine) to analyse a legislative proposal. Treaty law and C. Just. case law play a leading

[57] JACQUÉ, *cit.,* p. 49.

[58] JENKS, *Craftsmanship in International Law*, in *AJIL*, 1956, 50, 1, pp. 51-52.

[59] CLS Legal Officer 1, "Interview A".

[60] C. Just., Judgment of 05 February 1963, *van Gend en Loos*, Case C-26/62, ECLI:EU:C:1963:1, para. 12-13.

[61] This reconstruction is based on the author's observation and interviewees' responses: CLS Legal Officer 1, "Interview A"; CLS Legal Officer 2, "Interview B".

role. Indeed, the initial phase of the analysis involves a preliminary assessment of the proposal's legitimacy vis-à-vis the legal basis indicated by the Commission. The purpose of this assessment is to detect antinomies and to evaluate whether the proposed legal basis is the most suitable to achieve the purpose of the legislative proposal. At this stage, the main interpretative criteria applied are teleological and systematic, as the assessment is made with respect to the Treaty and the preliminary legitimacy of the act[62].

In the second phase, the entire legislative text is studied article by article, applying a textual and systematic analysis to the meaning of the text and its relationship with all its parts and with EU law. Then, a teleological evaluation is applied regarding the conformity of the text to the purpose pursued and that indicated by the legal basis. The purpose of this evaluation is the same as the first phase: to understand how norms are formed, bring out any antinomies and inconsistencies, and preliminarily assess the conformity of the text to the treaties and EU law more generally. This phase is very delicate because it presupposes attention to detail without losing sight of the overall framework and is carried out by resorting to both legal and case law sources of the EU[63].

This biphasic evaluation is typically conducted preliminarily by a Legal Adviser who then follows the entire legislative process of that proposal. The aim is to ensure a high level of knowledge, continuity, and efficiency at the various stages of the procedure, especially considering the six-monthly rotation of Presidencies. Indeed, it is practically impossible that a proposal starts and ends its process under a single Presidency, so it is essential to ensure the continuity and independence of the administration[64].

The biphasic evaluation is repeated for each amendment of the text, to ensure high regulatory quality and legal soundness. It may also happen that on particularly complex issues, the CLS is called upon to take a position by delivering a written or oral opinion. In these opinions, the normative analysis follows the biphasic model, and the interpretation is anchored in both the general principles of law and the case law of the C. Just.[65].

The *comparative method* is less common and has a fundamentally residual

[62] *Ibid.*

[63] This reconstruction is based on the author's observations and responses from the interviews: CLS Legal Officer 1, "Interview A"; CLS Legal Officer 2, "Interview B".

[64] *Ibid.*

[65] *Ibid.*

character. This method is employed after conducting an initial evaluation through the EU law-based method, thus in a subsequent phase and with an integrative purpose.

Within the Council, resorting to the comparative method occurs in particularly sensitive legal areas, such as EU labour law, because the legal basis imposes stringent limits, the regulatory context in which the proposal is inserted is particularly complex, or there are issues of compatibility of a provision or an amendment with the EU legal order. Thus, the comparative method has a complementary and instrumental character and is used to reformulate provisions that are not legally sound to align them with primary law and/or the case law of the C. Just.. In its practical application, the comparative method employed at Council slightly differs from the model applied by legal science[66]. Therefore, Section 4 considers comparative law as a research method. Through a semi-systematic literature review, the comparative method, its features, and procedure are described. Finally, Section 5 will return to the comparative method applied at the Council.

4. *Comparative Law as a Research Method*

The study of law is one of the oldest academic disciplines whose methodology has been developed over time as implicit know-how inherent in the type of education offered in universities[67], especially civil law universities[68]. The academic education offered to law students has at its core the learning of methods aimed at identifying, analysing, applying, and improving the law[69]. For a long time, this approach made legal research impermeable to the need to formalise a precise methodology, in contrast to other social sciences[70]. However, this traditional understanding is no longer consistent

[66] *Ibid*.

[67] Hutchinson, Duncan, *Defining and Describing What We Do: Doctrinal Legal Research*, in *DLR*, 2012, 17, 1, p. 100; Kestemont, *A Meta-Methodological Study of Dutch and Belgian PHDs in Social Security Law: Devising a Typology of Research Objectives as a Supporting Tool*, in *EJSS*, 2015, 17, 3, p. 362; De Theux, Kovalovszky, Bernard, *Précis de Méthodologie Juridique: Les Sources Documentaires Du Droit*, Presses de l'Université Saint-Louis, 1995, p. 87.

[68] Sébastien Pimont, *A Propos de l'activité Doctrinale Civiliste (Quelques Questions Dans l'air Du Temps)*, in *RTDC*, 2006, 4, p. 707.

[69] Kestemont, *Handbook*, *cit*., p. 1.

[70] "In the past, the under-description of the doctrinal method has not been problematic

with the needs of current scientific research[71]. Legal studies evolved rapidly and complexly in recent decades, alongside internationalisation and legal globalisation[72]. Over the past three decades, the legal disciplines have transnationally flourished, also favoured by the spread of comparative method[73].

The transnational development of law has made it necessary to reflect carefully on the methodology of legal research so that it can be understood outside the purely legal and national context[74]. Therefore, legal scholarship has clarified and organised its methodology[75].

In comparative legal research, "two or more phenomena or legal arrangements are compared with each other in order to detect similarities and/or differences"[76]. Traditionally, there are three types of comparison: internal, historical, and external[77].

Internal comparison refers to the comparative study of legal concepts or institutes that belong to the same legal system. The internal comparison may take place within the same discipline (e.g., dismissal in the private and public sector) or different disciplines (e.g., the concept of enterprise for commercial law and bankruptcy law)[78].

because the research has been directed 'inwards' to the legal community. The targeted audience has been within the legal paradigm and culture and therefore cognisant of legal norms […]" in HUTCHINSON, DUNCAN, *cit.*, p. 118.

[71] STOLKER, *Rethinking the Law School: Education, Research, Outreach and Governance*, Cambridge University Press, 2014, p. 224.

[72] LANGBROEK *ET AL.*, *Methodology of Legal Research: Challenges and Opportunities*, in *ULR*, 2017, 13, 3, p. 1.

[73] LANGBROEK *ET AL.*, *Methodology of Legal Research*, *cit.*, p. 1.

[74] VAN GESTEL, VRANKEN, *Assessing Legal Research: Sense and Nonsense of Peer Review versus Bibliometrics and the Need for a European Approach*, in *GLJ*, 2011, 12, 3, p. 906; LANGBROEK *ET AL.*, *Methodology of Legal Research*, *cit.*, p. 1.

[75] Among others, see: HUTCHINSON, DUNCAN, *cit.*, p. 118-119; VAN HOECKE, *Legal Doctrine: Which Method(s) for What Kind of Discipline?*, in VAN HOECKE (eds.), *Methodologies of Legal Research : What Kind of Method for What Kind of Discipline?*, Hart, 2011, pp. 1-18; BREMS, *Methods In Legal Human Rights Research*, in COOMANS, GRÜNFELD, KAMMINGA (eds.), *Methods of Human Rights Research*, Intersentia, 2009, pp. 77-90; MCCONVILLE, WING HONG CHUI, *Research Methods for Law*, in MCCONVILLE, HONG CHUI (eds.), *Research Methods for Law*, Edinburgh University Press, 2007.

[76] KESTEMONT, *A Meta-Methodological*, *cit.*, p. 368.

[77] KESTEMONT, *Handbook*, *cit.*, p.12.

[78] KISCHEL, *Introduction: What Is Comparative Law?*, Oxford University Press, 2019, pp. 3-44; KISCHEL, *Aims of Comparative Law*, Oxford University Press, 2019, pp. 45-86; EBERLE, *The Method and Role of Comparative Law*, in *WUGSLR*, 2009, 8, 3, pp. 451-486; REITZ, *How to Do Comparative Law*, in *AJCL*, 1998, 46, 4, pp. 617-36.

Historical comparison aims at comparing legal constructs or legal systems of different periods (e.g., contract law in Roman law and contract law in contemporary private law); it is a synchronic analysis of the past that aims at a static understanding of a legal phenomenon[79]. Historical comparison must be carried out bearing in mind the historical evolution and the different problems faced by the various epochs[80].

External comparison is the most widespread and involves the comparative study of legal constructs from different legal systems or the comparative study of different legal systems. Furthermore, the purpose of external comparison can be to identify legal families, different solutions to the same problem, and to promote harmonisation of legal systems[81]. Precisely with this last purpose, the external comparison is frequently used in EU institutions.

The popularity of external comparison has encouraged the legal doctrine to formalise it in a more detailed manner. This comparison revolves around six methodological features: (a) reasons to compare; (b) nature of the comparison; (c) *tertium comparationis*; (d) choice of legal systems; (e) access to sources; and (f) comparative approach. Procedurally, external comparison follows a four-step path: (1) description of legal systems; (2) comparison between legal systems; (3) identification and explanation of similarities and differences; and (4) evaluation of the compared systems by specifying their strengths and weaknesses[82].

The first methodological feature is the "reasons for comparing", which significantly impacts subsequent methodological choices. The reasons for comparing are the pre-legal reasons for the scholar to compare.

According to Glenn, the reasons for comparing are: (i) learning and knowledge (information about the law of other countries and a better un-

[79] Löhnig, *Comparative Law and Legal History: A Few Words about Comparative Legal History*, p. 115; Husa, *Research-Designs of Comparative Law: Methodology or Heuristics?*, in Adams, Heirbaut (eds.), *The Method and Culture*, *cit.*, p. 58.

[80] Michaels, *The Functional Method of Comparative Law*, in Reimann, Zimmermann (eds.), *cit.*, pp. 339-382.

[81] Husa, *Research-Designs*, *cit.*, p. 59; Monateri, *Methods of Comparative Law*, Edwar Elgar, 2012; Tsogas, *International Labour Regulation: What Have We Really Learnt So Far?*, *RI/IR*, 2009, 64, 1, pp. 75-94; Jansen, *Comparative Law and Comparative Knowledge*, in Reimann, Zimmermann (eds.), *cit.*; Van Hoecke, *Deep Level Comparative Law*, in Van Hoecke (eds.), *Epistemology and Methodology of Comparative Law*, Hart, 2004, pp. 165-195; Hill, *Comparative Law, Law Reform and Legal Theory*, in *OJLS*, 1989, 9, 1, pp. 100-115.

[82] Kestemont, *Handbook*, *cit.*, p. 36.

derstanding of it), (ii) the development of evolutionary and taxonomic science (typical evolutions, diachronic changes, legal families), (iii) the improvement to one's legal system (better understanding it, including the endurance of its traditions, improving it, using it as a tool for interpreting the constitution) and (iv) the harmonisation of law[83].

The second methodological feature concerns the "nature of the comparison". According to Husa[84], there are two main types of comparison: macro- and micro-comparison[85]. Macro-comparison is the study of legal systems in comparison, with the aim of examining their principles, structure, spirit, and style, as well as their voting and procedural practices[86]. Micro-comparison focuses on the comparative analysis of legal constructs by bringing out the solutions adopted by different legal systems to common problems[87].

The "*tertium* (or *tertia*) *comparationis*", or the element(s) shared by the systems under comparison, is the third methodological feature. Reitz recalls that to compare two systems, they must either share the same legal principle, address the same problem, or pursue the same aim[88]. These common elements are presupposed by a study of the systems to be compared and are defined by Jansen: "tertia comparationis […] result from a choice about 'what matters', that is, which aspects of the law are relevant for the comparative lawyer, and which aspects of the law might benefit from the additional knowledge which comparison provides"[89].

The fourth methodological feature is the "choice of legal systems". This characteristic strongly depends on the purpose of the research and the reasons for the comparison. When, for instance, the research aims to study the har-

[83] Glenn, *Aims of Comparative Law*, in *Elgar Encyclopedia of Comparative Law*, Edward Elgar, 2006; Van Hoecke, *Methodology of Comparative Legal Research,* in *LM,* 2015, p. 2; Kestemont, *Handbook*, *cit.*, p. 37; Kischel, *Aims of Comparative Law*, *cit.*, pp. 45-86.

[84] Husa, *Research-Designs*, *cit.*, p. 57.

[85] Romano presents a critical theory in which Husa's dichotomy is overcome by establishing a tripartition between micro-, meso- and macro-comparison. See: Romano, *Micro-Meso-Macro Comparative Law: An Essay on the Methodology of Comparative Law*, in *CKJICL*, 2017, 17, 1, pp. 1-17.

[86] Husa, *Research-Designs*, *cit.*; Dannemann, *Comparative Law: Study of Similarities or Differences?*, in Reimann, Zimmermann (eds.), *cit.*, pp. 382-420; Zweigert, Kötz, *An Introduction to Comparative Law*, Clarendon Press, 1998, p. 4.

[87] Kestemont, *Handbook*, *cit.*, p. 37.

[88] Reitz, *cit.*, p. 622.

[89] Jansen, *cit.*, p. 314.

monisation of legislation in the EU, a comparison between the legal systems of Member States is likely to be preferred. On the other hand, when the purpose of the research is to increase scientific knowledge of legal phenomena, a legal system is likely to be studied because it deviates from others with which it is being compared[90]. Moreover, the choice of legal systems to be compared is also influenced by preparatory studies, the relevance of the tertia comparationis and the researcher's knowledge of the language of the systems studied[91].

The fifth methodological feature concerns "access to sources". Sources are divided into primary (legislative acts, judicial pronouncements) and secondary (legal doctrine)[92]. Typically, the study proceeds from primary sources; secondary sources assume a particularly significant role in the interpreting and understanding (if the language is unknown to the researcher) of primary sources[93].

The sixth and final methodological feature concerns the "comparative approach". The dogmatic and the functional comparative approaches are the two basic types of approaches.[94] The dogmatic approach projects an identified legal notion or principle onto a non-national legal system in order to identify structurally and conceptually analogous legal constructs[95]. This approach is mainly used in macro comparisons between structurally similar legal systems (e.g., two or more common law systems or two or more civil law systems). However, when adopting the dogmatic approach, one must be aware of its three main risks: (a) the risk that different meanings correspond to homonymous concepts, e.g., the word *jurisprudence* in English means "philosophy and theory of law or legal doctrine"[96] and in French means "case law"[97]; (b)

[90] Dannemann, *cit.,* p. 409; Zweigert, Kötz, *cit.*, p. 41.

[91] Kestemont, *Handbook*, *cit.*, pp. 39-40.

[92] Sacco, *Legal Formants (Installment II of II)*, *cit.*

[93] Kestemont, *Handbook*, cit., p. 41; Sacco, Gambaro, *cit.*, pp. 8-10.

[94] Siems, *Comparative Law*, cit., pp. 37-39; Valcke, Grellette, *cit.*, pp. 100-101; Husa, *Research Design*, *cit.*, p. 61; Husa, *Farewell to Functionalism or Methodological Tolerance?*, in *RJCIPL*, 2003, 37, 3, p. 422; Michaels, *cit.*, p. 341.

[95] Kestemont, *Handbook*, *cit.*

[96] Garner, Campbell, Black, *Jurisprudence*, in *Black's Law Dictionary*, St. Paul: West Academic Publishing, 2009.

[97] Pintens, *Inleiding Tot de Rechtsvergelijking*, Leuven University Press, 2003, p. 52; Watson, *Legal Transplants an Approach to Comparative Law*, University of Virginia, 1974, p. 11; Van Hoecke, *Deep Level*, cit., p. 175; Zweigert and Kötz, *cit.*, p. 35.

the risk of searching for a national legal concept in the same formant[98] of the foreign system and not finding it because in that system the concept has been established in another formant[99]; and (c) the risk that different legal concepts pursue similar objectives, e.g., *trusts* in Common law, *fiducie* in French law, *amministrazione fiduciaria* in Italian law[100].

In the functional approach, the methodological premise is a *praesumptio similitudinis* according to which "the legal system of every society faces essentially the same problems, and solves these problems by quite different means through often with similar results"[101]. This approach – adopted mainly in macro comparisons – is primarily empirical because it does not project a fixed dogmatic concept belonging to one system onto another system, but analyses how different systems solve a common problem or factual, legal, social or economic situation[102]. Functionalism fits well with comparative labour law because the latter has a clear predilection for seeking solutions to legal problems: "[…] comparative work is most often undertaken less for enlightenment per se than in search of a better solution to a pressing problem than domestic law currently affords[…]"[103].

By opting for a functional description rather than projecting national concepts, definitions and principles onto foreign legal systems, functionalist researchers reject the assumptions that originate from their domestic legal culture. As a result, the functional approach rejects ethnocentrism in favour of a neutral and objective approach akin to the natural sciences in their descriptive nature[104].

On a practical level, the rejection of ethnocentrism clashes with the impossibility of comparing systems in a completely neutral manner, due to the

[98] The formant is a concept developed by Rodolfo Sacco in comparative law. A formant is the legal basis on which the legal system of a society evolves. According to Sacco, it is possible to identify three main types of legal formants: a) case-law (common law countries), b) legislative (civil law countries); c) doctrinal. Sacco, *Legal Formants (Installment I of II)*, *cit.*; Sacco, *Legal Formants (Installment II of II)*, *cit.*; Sacco and Gambaro, *cit.*, p. 3-7.

[99] Zweigert, Kötz, *cit.*, p. 35; Pintens, *cit.*, pp. 89-90.

[100] Kestemont, *Handbook*, *cit.*, p. 44; Cerri, *Trust Affidamento Fiduciario e Fiducie. Tre Modi Di Declinare La Fiducia Nel Quadro Del Diritto Europeo*, Giuffrè, 2015.

[101] Zweigert, Kötz, *cit.*, p. 34.

[102] Van Hoecke, *Methodology*, *cit.*; Husa, *Research-Designs*, *cit.*; De Coninck, *cit.*; Michaels, *cit.*

[103] Finkin, *cit.*, p. 1140.

[104] Michaels, *cit.*

ineliminable *forma mentis* produced by legal training[105]. Consequently, the functional approach makes researchers more self-aware, enabling them to identify and reduce their own biases through objective analysis[106].

Since the functional approach originates from a problem and assumes the existence of various legal means to solve it, it is characterised by a thorough analysis of all legal sources and formants[107]. However, a number of factors, including time and resources, language skills, social, legal, political and economic context and access to legal sources, affect the accuracy of research[108].

Kestemont presents the *sui generis* approach, a heterogeneous category, in addition to the dogmatic and functional methods[109]. This approach encompasses all the variations that researchers have developed to adapt traditional ones to their research needs. A first example is the typological approach, which is based on the functional approach and aims to collect and classify all viable solutions to the same problem[110]. Another example is Schlesinger's structural comparative research. Structural comparative research is a variation of the functional approach and requires scholars to identify similar structures in different legal systems to explain their function and describe their development[111].

The *sui generis* approaches tend to combine a number of comparisons, often adopting a dual comparison involving first a diachronic and then a synchronic study or a wide-ranging comparison of many legal systems to select the most similar or dissimilar ones that are subsequently compared more specifically[112].

Procedurally, external comparison follows a four-step path: (1) description of legal systems; (2) comparison between legal systems; (3) identification

[105] Frankenberg, *cit.*, p. 443; De Coninck, *cit.*, p. 328.

[106] Frankenberg, *cit.*, p. 443.

[107] Zweigert, Kötz, *cit.*, pp. 103-104; Van Hoecke, *Deep Level*, *cit.*, p. 168; Dannemann, *cit.*, p. 408; Reitz, *cit.,* pp. 628-630; Michaels, *cit.*, p. 364; Husa, *Farewell*, *cit.*, p. 423; Kestemont, *Handbook*, cit., p. 47.

[108] Van Hoecke, *Deep Level*, *cit.*, p. 167.

[109] Kestemont, *Handbook*, *cit.*, p. 47.

[110] *Ibid.*

[111] Scarciglia, *Strutturalismo, Formanti Legali e Diritto Pubblico Comparato*, in *DPCE*, 2017, 3, pp. 649-670; Mattei, *cit.*, p. 238.

[112] Kestemont, *Handbook*, *cit.*, p. 48.

and explanation of similarities and differences; and (4) evaluation of the compared systems by specifying their strengths and weaknesses[113].

The starting point for comparison is selecting and describing two or more legal systems. Whether it is a micro or macro comparison, describing the general characteristics of the legal systems or constructs being compared is necessary. In the case of macro comparison, the scholar identifies and analyses the main formats, the hierarchy of norms, the fundamental principles of the legal systems, the methods of interpretation, and the system's internal structure to adequately reflect that system's representation of itself. In the case of micro-comparisons, the scholar describes the systems in general terms and then goes on to a rigorous comparative analysis of the legal constructs[114]. This phase can be conducted either from a diachronic or synchronic perspective, depending on the points to be made by the researcher.

The second stage is the actual comparison bringing out the similarities and differences[115]. In this stage, the objectives pursued by the study play a decisive role[116]. The scholar whose aim is legal harmonisation will tend to give greater weight to similarities and identify common principles that bind the systems[117]. Conversely, the scholar whose objective is, for instance, to analyse which social system is more generous with unemployment benefits will focus on the differences between the legal systems. However, the importance of the objectives should not be overestimated because the researcher delineates similarities and differences to be able to effectively describe and evaluate the two legal systems[118].

The third stage is the explanation of the findings[119]. This stage can be operationally placed either at the close of the comparison stage (second stage)

[113] Kestemont, *Handbook*, *cit.*, p. 36.

[114] Kestemont, *Handbook*, *cit.*, pp. 48-51; Vogenauer, *Sources of Law and Legal Method in Comparative Law*, in Reimann, Zimmermann (eds.), *cit.*, p. 872.

[115] Lemmens, *Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship*, in in Adams, Bomhoff (eds.), *cit.*, pp. 302-326; Reitz, *cit.*, pp. 619-620.

[116] Kestemont, *Handbook*, cit., p. 51; Dannemann, *cit.*, p. 415.

[117] Hill, *cit.*, p. 110; Dannemann, *cit.*, p. 415.

[118] Bell, *Legal Research and the Distinctiveness of Comparative Law*, in Van Hoecke (eds.), *Methodologies of Legal Research*, *cit.*, p. 174; Örücü, *Developing Comparative Law*, in Örücü, Nelken (eds.), *Comparative Law: A Handbook*, Hart, 2007, p. 50; Dannemann, *cit.*, pp. 399, 419; Valcke, *cit.*, p. 44.

[119] Dannemann, *cit.*, p. 416; Reitz, *cit.*, p. 626; Husa, *Research-Designs*, *cit.*, p. 54.

or at the opening of the terminal evaluation stage (fourth stage). Nevertheless, it remains a conceptually autonomous stage because it has a different purpose from the other two, namely, to explain why the similarities and differences exist. Instead, stage two aims to describe the similarities and differences, and stage four evaluates the comparison results[120]. To explain why there are similarities and differences, the researcher identifies the endogenous (legal principles, interpretation, and political choices of law) and exogenous (historical, political, social, ideological, economic) factors that have produced these results[121].

The final stage concerns the evaluation of the results. At the end of the research, the researcher evaluates the results and answers the research question[122]. Here, it is essential to highlight the limitations and choices made in the comparison and the problems with the sources so that the reader understands the foundation on which the judgement is based[123].

4.1. *Comparative Labour Law as a Research Method*

Comparative labour law serves as a vital tool in understanding the evolving dynamics of labour markets and legal frameworks,[124] particularly amidst technological advancements and global economic shifts[125].

As Trebilcock and Blanpain pointed out, comparative labour law has evolved beyond traditional national boundaries, encompassing a diverse range of governance spheres and substantive issues[126]. From international labour

[120] Kestemont, *Handbook*, *cit.*, pp. 53-54; Lemmens, *cit.*, p. 322; Van Gestel, Micklitz, *Revitalising Doctrinal Legal Research in Europe: What about Methodology?*, in Neergaard, Nielsen, Roseberry (eds.), *European Legal Method - Paradoxes and Revitalisation*, Djøf Forlag, 2011, p. 58.

[121] Lemmens, *cit.*, p. 323; Reitz, *cit.*, p. 627.

[122] Zweigert, Kötz, *cit.*, p. 46.

[123] Kestemont, *Handbook*, *cit.*, p. 54.

[124] Hepple, *Labour Laws and Global Trade*, Hart, 2005, p. 270.

[125] On the relevance of comparative labour law, one should recall the studies of Otto Kahn-Freund. See, among others, Kahn-Freund, Davies, Freedland, *Kahn-Freund's Labour and the Law*, Stevens, 1983; Kahn-Freund, *Comparative Law as an Academic Subject*, in *LQR*, 1996, 82, 40, p. 41; Otto Kahn-Freund, *Labour Relations and the Law: A Comparative Study*, Stevens, 1965. On the relevance of comparative labour law, one should recall the studies of Otto Kahn-Freund.

[126] Trebilcock, *Comparative Labour Law*; Blanpain, Baker, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Kluwer Law International, 2014.

standards to private ordering mechanisms like corporate codes of conduct, the field now incorporates multiple layers of regulation and addresses a wide array of topics within individual and collective employment law[127].

According to Rittich and Mundlak[128], comparative labour law entails more than just comparing legislative texts and court decisions; it involves examining theories, legal constructs, and reform processes across different legal systems[129]. According to Araki, "A comparative labour law study, especially a functional analysis of respective labour law systems viewed from a broad perspective remains important and clarifies the features of one's own system"[130].

In terms of methodological approaches, comparative labour law is closely linked to the research objectives and ideological perspectives of scholars[131]. Drawing on a wide range of sources, including international treaties, regional agreements, court decisions, and scholarly publications, comparative labour law research seeks to inform policy debates and promote global harmonisation while acknowledging the diversity of legal systems and social contexts. Particularly in labour matters that fall within the competence of the EU, labour legislation builds on the information of the Member States and in turn creates a new source of law[132].

Comparative labour law has often neglected an explicit discussion of

[127] SCIARRA, *The "Autonomy" of Private Governance Building on Italian Labour Law Scholarship in a Transnational Perspective*, in NUMHAUSER-HENNING, RÖNNMAR (eds.), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, Hart, 2013, pp. 65-75; ESTLUND, *Regoverning the Workplace: From Self-Regulation to Co-Regulation*, Yale University Press, 2010; MCCANN, *Law and Social Movements*, Routledge, 2006.

[128] RITTICH, MUNDLAK, *The Challenge to Comparative Labor Law in a Globalized Era*, in FINKIN, MUNDLAK (eds.), *cit.*, pp. 80-111.

[129] Among others, COLLINS, *Theories of Rights as Justifications for Labour Law*, in DAVIDOV, LANGILLE (eds.), *The Idea of Labour Law*, Oxford University Press, 2011, pp. 137-155; TREBILCOCK, *Using Development Approaches to Address the Informal Economy in Labour Law*, in DAVIDOV, LANGILLE (eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Hart, 2006, pp. 63-96; FUDGE, MCCRYSTAL, SANKARAN, *Challenging the Legal Boundaries of Work Regulation*, Hart, 2012.

[130] ARAKI, *A Comparative Analysis of Security, Flexibility, and Decentralized Industrial Relations in Japan*, in *CLLPJ*, 2007, 28, 3, p. 454.

[131] ARTHURS, *Compared to What? The UCLA Comparative Labor Law Project and the Future of Comparative Labor Law*, in *CLLPJ*, 2007, 28, 3, p. 595.

[132] TREBILCOCK, *Comparative Labour Law*; in BOGG, COSTELLO, DAVIES (eds.), *Research Handbook on EU Labour Law*, Edward Elgar, 2016; SCIARRA, *cit.*; ZAHN, *cit.*

methods or methodology like other branches of legal research[133]. However, the importance of method stems from the fact that this discipline implicitly incorporates non-legal variables related to economic systems and labour relations. An important contribution in this field came from Marshall and from Arthurs who asks the question "Compared to what?"[134]. Arthurs calls for a reflection on the comparability of systems and norms.

Despite a certain lack of methodological reflection, Trebilcock states that comparative labour law follows a "formula" of presenting country-specific descriptions or analyses of a defined issue[135]. These analyses may be structured around predetermined questions or points and may incorporate interdisciplinary approaches, drawing from fields like industrial relations, law and economics, gender studies, and migration studies.

Trebilcock's formula needs to be understood in combination with the studies on comparative labour law by Finkin and Weiss. While the first proposes a taxonomy of comparative labour law, highlighting its historical development and various approaches, the second values comparative labour law as a method in scholarship and practice for its impact on the development of national and international labour law[136].

As Finkin pointed out, comparative labour law emerged alongside labour law itself in the late 19th and early 20th centuries[137]. In the taxonomy proposed by Finkin, comparative labour law is classified into four overlapping genres: descriptive; predicative; purposive; and, multidimensional. The descriptive genre involves the compilation and presentation of what one state is doing in legal matters compared to others. The predictive genre deals with how labour law reacts to social and economic changes. Comparative analysis can serve as an early warning system for emerging issues. In the purposive genre, the comparative method can offer insights into alternative approaches to legal issues, with the aim of finding better solutions than those offered by

[133] This debate appears, among others, in Adams, Husa, *Comparative Law Methodology*, in Oderkerk (eds.), *The International Library of Comparative Law*, Edward Elgar, 2017; Smits, *Elgar Encyclopedia of Comparative Law*, Elgar, 2012; Hutchinson, Duncan, *cit.*

[134] Marshall, *Revitalising Labour Market Regulation for the Economic South: New Forms and Tools*, in Marshall, Fenwick (eds.), *Labour Regulation and Development*, Edward Elgar, 2016, pp. 318-320; Arthurs, *cit.*

[135] Trebilcock, *cit.*

[136] Finkin, *cit.*; Weiss, *The Future of Comparative Labor Law*, cit.

[137] Finkin, *cit.*, pp. 1109-1120.

national laws. This genre also explores the transplantation of legal concepts between countries, considering social, political, and legal contexts. Finally, the multidimensional genre assumes that labour law is a complex field that intersects with various disciplines such as history, economics, sociology, and political theory. Multidimensional comparative labour law involves deep academic analysis that transcends mere description or prescription, enriching understanding through contextualisation[138].

Weiss's reflection is significant because it strengthens the existing link in labour law between scholarship and practitioners. In a functionalist logic, Weiss emphasises how the comparative method in the field of labour law is an appropriate tool for understanding one's own legal system and for identifying solutions to problems[139]. This approach not only enriches methodological reflection but also demonstrates how comparison in labour law is a flexible and effective tool that presupposes a deep knowledge of multiple legal systems and interdisciplinary perspectives.

The reading of Kestemont, extensively discussed in the previous section, also contributes to a better understanding of the procedures and characteristics of comparison in the field of labour law[140]. These studies have been conducted based on empirical research in comparative labour law and have allowed for the identification of underlying trends. Specifically, the comparative method in labour law can be categorized into three types: internal, historical, or external[141].

The first type involves studies concerning norms or legal concepts within the same legal system, the second type pertains to the historical evolution of a specific legal norm, and the third involves the study of legal constructs from different legal systems or the comparative study of different legal systems. External comparison is the most used approach in labour law and follows a process divided into four stages: (1) description of legal systems; (2) comparison between legal systems; (3) identification and explanation of similarities and differences; and (4) evaluation of the compared systems by specifying their strengths and weaknesses[142].

[138] Finkin, *cit.*, pp. 1120–1129.

[139] Weiss, *The Future of Comparative Labor Law*, *cit.*, pp. 172–173, 178–179.

[140] Kestemont, *Handbook*, *cit.*; Kestemont, *A Typology*, *cit.*; Kestemont, *A Meta-Methodological*, *cit.*

[141] Kestemont, *Handbook*, *cit.*, p. 12.

[142] Kestemont, *Handbook*, *cit.*, p. 36.

Kestemont systematises in this methodological framework the preceding reflection and clarifies how Trebilcock's "formula", Finikin's taxonomy, and Weiss's approaches give a specific form to comparative labour law, which, however, is rooted in and nourished by the general theories describing legal comparison discussed in the previous section.

5. *The Comparative Method Applied: the Case of the Council*

Transitioning to the examination of the comparative method in practical application, the focus will be on the CLS. The CLS plays a key role in the legislative arena, safeguarding the EU's broader interests, avoiding conflicts and supporting legally sound and politically viable solutions in the Council. As a result, the CLS facilitates the smooth functioning of EU and intergovernmental processes[143].

To examine legislative proposals and maintain the consistency of the EU legal framework, the CLS employs a range of approaches, which can be classified into two main categories: (a) the *EU law-based method* and (b) the *comparative method*. Based on observation and interview, the predominant approach employed by the CLS is the EU law-based method, which aligns with the criteria adopted by the C. Just. These criteria include linguistic or textual analysis, systemic evaluation, and teleological or purposive interpretation. While section 3.1 elaborates on approach (a), it is imperative to now delve into approach (b), both in a general sense and specifically concerning matters related to labour law.

Comparative legal analysis plays a role in cases of unclear situations regarding the legitimacy of a proposal in relation to the selected legal basis especially in EU labour law. In this area, legal bases allow the EU to act on shared or supporting competencies (Title IX, X and XIV). Consequently, conflicts can occur between the legal basis and the legislative proposal. In these situations, the comparative method has the function of preventing legal antinomies and finding legally sound solutions[144].

[143] Council of the EU, *Comments*, *cit.*, p. 37; Council of the EU, *Mission*, *cit.*, para. 4.

[144] The legal officer of CLS 1 emphasised the residual nature of the comparative method, underlining its value precisely in those fields where harmonisation is more complex due to the limitations of the legal basis. On this point, direct observation and the opinion of the legal officer of CLS 2 point to a more nuanced reality. Indeed, the use of comparative method may

According to direct observation and interviews, the CLS employs the comparative method to prevent or solve legal antinomies between the legal basis and the legislative proposal. Furthermore, this methodology is applied both in a preliminary (before interpreting the proposal to understand its principles) and in a remedial (after the proposal has been studied and an antinomy between the legal basis and the legislative act has been identified) manner.

On a more practical level, direct observation supplemented by interviews reveals that the CLS employs a micro-comparison of specific national legal structures or institutions relevant to the approval of an EU legislative act. Yet this does not mean that there may not be situations in which the focus is broadened, but it is punctual comparative research.

Regarding the *tertia comparationis*, the CLS bases its comparison on the axiomatic premise that the Member States systems are similar in general and have a similar degree of legal consistency. The understanding that the legal systems of the Member States are heavily intertwined through the EU *acquis* and are a part of the Western legal tradition serves as support for this concept[145].

Regarding the choice of legal systems to be compared, the general principle laid down by the Court of Justice of the European Union and the Treaties is that all Member States should be compared. However, legislative timeframes, the rotation of Presidencies and their political priorities, the presence of a few systems that present peculiarities, and the need to find an effective solution to a problem may impede a systematic and comprehensive study of all Member States. When forced to limit the number of systems to be examined, the CLS rationally chooses to focus on the most problematic legal systems. This decision is based on an in-depth assessment of the legislative proposal, considering the legal concerns, and on the Presidency's inputs during the working parties. The legislative procedure and the necessity of finding solutions that are both legally sound and compliant with EU law mitigate the risk of non-exhaustiveness[146]. Regarding the comparative ap-

also occur to understand the legal impact of a single article of a proposal that is otherwise analysed according to the EU law-based method. However, in generalising, it remains correct to say that the comparative method has a complementary nature.

[145] This reconstruction is based on the author's observation.

[146] This reconstruction is based on the author's observation and interviewees' responses: CLS Legal Officer 1, "Interview A"; CLS Legal Officer 2, "Interview B".

proach, the CLS demonstrates pragmatism. The CLS comparative approach is *sui generis* in that it seeks to discover parallels between national legislations and provide sound legal solutions for the EU Law. In their analyses, Legal Advisers attempt to remain impartial with respect to their domestic legal system and those being examined. Given the context of the analysis and the objectives sought, neutrality is necessary[147].

Operationally, Comparative Legal Research in the CLS follows a tripartite scheme: (a) description of the EU legislative proposal and identification of the legal systems to be compared; (b) comparison of the legal systems; (c) explanation of differences and similarities and evaluation of the results. In the balance of the analysis, the first step is crucial because the legislative proposal and the selection of systems to be micro-comparison have an impact on the other steps[148].

The description of the EU legislative proposal and the identification of the legal systems to be compared constitute the starting point. This phase is divided into three parts and begins with an examination of the EU legislative framework and legal basis. The content of the legislative proposal and the problematic issue to be managed through the comparison are then evaluated. Finally, the chosen legal systems are evaluated, with an emphasis on formants, fundamental principles, and transposition procedures of EU legislation (e.g., laws, collective agreements, administrative acts). This phase can be conducted from a diachronic or synchronic perspective, depending on the points the Legal Adviser needs to highlight[149].

The second phase is the actual comparison bringing out the similarities and differences. At this point, the analysis is shaped by the goal of harmonisation and emphasises finding common ground between legal systems. The aim of the comparative analysis is to avoid legal antinomies and find feasible alternatives so that EU legislation can effectively harmonise Member States laws[150].

The third and final phase brings together the explanation of similarities and the evaluation of results. The reason for this unification is linked to the

[147] *Ibid*.

[148] This reconstruction is based on the author's participant observation.

[149] This reconstruction is based on the author's observation and interviewees' responses: CLS Legal Officer 1, "Interview A"; CLS Legal Officer 2, "Interview B".

[150] This reconstruction is based on the author's observation and interviewees' responses: CLS Legal Officer 1, " Interview A"; CLS Legal Officer 2, "Interview B".

ultimate purpose of the CLS, which is to advise Member States. For this reason, the interest in why the differences and similarities exist is relative and greater weight is given to evaluating the results of the research and proposing adjustments. However, the internal articulation in the explanation of similarities and differences and the evaluation remains. Specifically, exposing similarities and differences contributes to the formulation of legality assessments and the presentation of sound legal solutions[151].

The observation shows that the use of the comparative method in the areas of labour law and social law has two significant differences.

Concerning the approach, it is predominantly functionalist. In other words, the methodological premise is that essentially the same issues are addressed in the law of the Member States but are solved in similar or different ways according to national traditions[152]. Since the issues are common, the aim must be to find the minimum common denominator for legally sound solutions and to harmonise legislation[153]. This essentially empirical approach is crucial because labour law integrates and hybridises by bringing together economic, social and cultural considerations. Therefore, to understand an entire legislative proposal or a single provision or to solve an antinomy, it is essential to start from the common problem. A rigid doctrinal approach would not be appropriate because it does not serve the purpose and contradicts the legal basis and limited competence of the EU in this area.

The second difference concerns the comparative procedure. Comparative analysis starts with the identification of the legal problem, which is conducted using an EU law-based assessment. The procedure leads to the identification of the problematic rules and the identification of the legal systems to be analysed, which are rarely all 27. These legal systems are identified based on certain criteria, for instance, the problematic nature of a certain legal system (because it differs from others), or the presence of effective solutions to the problem on a national basis. The third stage concerns the emergence of similarities and differences and the evaluation of these in relation to the legal basis and objective of the proposed European legislation. Based on this evaluative study, the most suitable solutions at EU level are identified

[151] *Ibid.*

[152] ZWEIGERT, KÖTZ, *cit.*, p. 34.

[153] The CLS 2 legal officer expressed this very concept by stating that the key to the whole comparison is the "problem" to be solved and the objective is to find a legally sound and politically acceptable solution.

to advise decision-makers on the best and legally most appropriate course of action[154].

Finally, the role of C. Just. jurisprudence plays an even more significant role in the framework of labour law and social law. This complex area, in which the Member States have only conferred limited competencies to the EU, is dependent on interpretations of both treaties and derived legislation by the C. Just. Therefore, it is always necessary to investigate the limits of a solution resulting from comparison, as it may not be legitimate. This is why in the fields of labour law and social law, the final evaluation of the solutions identified must undergo further scrutiny regarding their consistency with C. Just. interpretation.

6. *Conclusions*

The comparative method, especially in labour law, is a key tool for dealing with legal complexities both in academia and in professional practice. Scholars have outlined the essential methodological prerequisites for effective comparison, including the reasons for comparison, the nature of comparison, the *tertium comparationis*, the choice of legal systems, access to sources and the comparative approach. Moreover, at the operational level, this process has four stages: description of the legal systems, comparison of the legal systems, identification and explanation of similarities and differences, and evaluation of the systems under examination.

Given its complexity and the need for innovative solutions to concrete problems, labour law naturally lends itself to comparative analysis. It is no coincidence that a predominantly functional approach is observed in comparative labour law, based on the premise that different legal systems address common issues, while maintaining a neutral perspective free of ethnocentrism.

Within the EU context, the C. Just. consistently employs the comparative method to interpret EU law. This interpretative approach is deeply rooted and developed through a dialogue between the C. Just. and legal scholarship. Thus, one can speak of a bridge between academia and practice.

[154] This reconstruction stems from firsthand experience. I have been tasked with conducting structured comparisons in this way within the field of social legislation and anti-discrimination law.

Concerning the other EU institutions, co-legislators adopt the comparative method in two ways: initially, as a preliminary measure to interpret a proposal, and subsequently, in a corrective capacity to rectify any conflicts identified between the proposal and existing legal frameworks.

Focusing on the Council, this institution employs two distinct models of regulatory analysis aimed at preserving the coherence of the legal system, allowing it to evolve without interruption. These two methods are the *EU law-based method* and the *comparative method*. The EU law-based method is the one most frequently employed within the Council, based on a legal evaluation of norms according to the interpretative criteria established by the C. Just., namely linguistic or textual, systemic, or contextual, and teleological or purposive criteria.

The Council employs the comparative method as a supplementary approach, especially areas such as labour law where shared EU competence may lead to legal conflicts. Using micro-comparisons, CLS assumes Member States' legal systems share general principles and some uniformity. Legal systems are chosen based on legal, political factors, and input from the Presidency. The CLS aims to find viable legal solutions through a three-step process: describing the EU legislative proposal, comparing legal systems, and evaluating the results.

Moreover, the comparative law method serves as a vital tool for the Council in reconciling divergent legal traditions and approaches among Member States. Given the decentralised nature of the EU's legal system and the diverse socio-economic contexts across its member countries, harmonising legislation in areas such as labour law presents unique challenges. Here, the comparative method facilitates the identification of common principles and the development of legal frameworks that strike a balance between uniformity and flexibility. By drawing on insights from comparative analysis, the Council can craft legislation that reflects shared values and objectives while respecting the autonomy and diversity of national legal systems.

The results of the study illustrate the fundamental importance of comparative legal analysis in labour law, particularly in areas of limited EU competence where significant harmonisation challenges arise. This methodological approach ensures that legislative decisions are well-informed, consistent, and capable of achieving the EU's overall labour and social policy objectives.

Finally, it emerges that doctrinal input is vital and informs the interpretation methods applied by Legal Advisers, creating a bridge between theory and practice.

Abstract

This research investigates the use of comparative law within the Council of the EU, particularly in the field of labour law, with the aim of filling gaps in the literature and improving the understanding of EU legislative processes. The study examines the theoretical and practical frameworks of comparative legal analysis, focusing on its application within the Council Legal Service (CLS).

Using a multidimensional methodology encompassing both doctrinal and empirical approaches, the research integrates a critical literature review, participant observation and interviews.

Through a comprehensive synthesis of academic studies and practical insights, the study sheds light on the Council's interpretive methods, decision-making processes, and the role of comparative law within it. It delves into the CLS's methods of normative analysis, highlighting the importance of comparative legal analysis in resolving legal antinomies, particularly in labour law.

By bridging the gap between academic discourse and institutional practice, this research contributes to an understanding of comparative law analysis methods within EU legislative bodies, fostering the transparency, effectiveness, and coherence of legal decision-making processes.

Keywords

Comparative Method, Legal Analysis, EU Law, EU Labour and Social Law, Council of the EU.

Pierluigi Ruffo

"Sports work" and Regulatory Techniques: the Different Approaches of France and Italy

Contents: **1.** Methodological introduction. **2.** The regulatory approach of the French legislator: the (almost complete) reference to the general discipline. **3.** The "sports worker" type in the Italian model. **4.** The role of hetero-direction for classification purposes. **5.** *Following.* Is it only an apparent gap?

1. *Methodological introduction*

The reform of employment relationships in the sports sector implemented by the Italian legislature has aroused interest in labour law doctrine in this issue[1].

The matter is now governed by Legislative Decree No. 36 of 28 February 2021 – as amended first by Legislative Decree No. 163 of 5 October 2022 and then by Legislative Decree No. 206 of 4 September 2023[2] – which

[1] Several Authors have recently engaged with the topic: see LAMBERTUCCI, *Il lavoro sportivo subordinato tra disciplina speciale e normativa generale di tutela: prime considerazioni sulla riforma del 2021*, in *ADL*, 2024, I, p. 1 ff.; FRAIOLI, *La riforma del lavoro sportivo di cui al d.lgs. n. 36/2021*, in *MGL*, 2023, p. 55 ff.; GRAGNOLI, *Le ultime novità sul contratto di lavoro degli sportivi*, in *RDES*, 2023, p. 85 ff.; GRAGNOLI, *I nuovi profili di specialità del rapporto di lavoro degli sportivi professionisti*, in *RDES*, 2021, p. 263 ff.; VETTOR, *La nuova riforma del lavoro sportivo: prime analisi alle disposizioni integrative e correttive al d.lgs. n. 36/2021 (d.lgs. n. 163/2022)*, in *MGL*, 2023, p. 129 ff.; ZOLI, *La riforma dei rapporti di lavoro sportivo tra continuità e discontinuità*, in *RGL*, 2022, I, p. 41 ff.; BIASI, *Causa e tipo nella riforma del lavoro sportivo. Brevi osservazioni sulle figure del lavoratore sportivo e dello sportivo amatore nel d.lgs. n. 36/2021*, in *LDE*, 2021, no. 3; ZOLI, ZOPPOLI L., *Lavoratori, volontari e amatori tra sport e terzo settore*, in *WP C.S.D.L.E. "Massimo D'Antona"* - 443/2021.

[2] The decree-law No. 71 of 31 May 2024, containing urgent provisions on sport, has again amended the matter concerning public administration workers and the sports volunteer. Moreover, at the time of writing, the conversion law has not yet been enacted.

introduced several notable innovations, first and foremost the declination of a type of "sports worker" (Article 25), indifferent to the historically relevant distinction between the professional and amateur sectors.

The primary purpose of this paper is to analyse and assess the regulatory solutions adopted from a comparative perspective. First, this is done to better understand the Italian model, which will be seen to be characterised by marked peculiarities of discipline and an unusual legislative technique. The analysis of this special regulation through the lens of comparison allows to address fundamental issues of Italian labour law, starting with the longstanding problem of legal classification[3] and the related issues in terms of worker protection. Then, it is to reflect on the most significant emerging differences, especially with regard to the regulatory approach.

To this end, a premise of a methodological nature is required, starting with some necessary considerations on the most authentic meaning of "comparison"[4].

Paraphrasing a recent essay on the topic[5], the reason for comparing different legal systems is not in the comparison of foreign models of law. The aim is to measure the influence of a different legal culture on the development of a discipline by considering the various political, socio-economic, and cultural differences typical of each national context.

Those differences – which, according to Montesquieu, represented an insurmountable obstacle to the so-called "transplantation" of legal institutions, causing the inevitable "rejection" of the implanted external body[6] – seem to have progressively faded away. Moreover, as Kahn-Freund argues, such differences are eroded by the relentless advancement of globalisation[7]. The only exception is represented by the political factor, which, in Khan-

[3] For an overview of the different positions concerning sports work, see SPADAFORA, *Diritto del lavoro sportivo*, Giappichelli, 2012, p. 69 ff.

[4] On the role of comparison in general, see SOMMA, *Dialogo tra esperienze giuridiche e comparazione: verso nuovi paradigmi?*, in GRAZIADEI, SOMMA (eds.), *Esperienze giuridiche in dialogo. Il ruolo della comparazione*, Sapienza Università Editrice, 2024, p. 11 ff.; from the labour law perspective see, in the same volume, MENEGATTI, *Diritti collettivi e* gig economy*: il ruolo dello Statuto dei lavoratori italiano in chiave comparata*, p. 171 ff.; DELFINO, *Legal orders in dialogue and the "resources" of the Italian Workers' Statute*, in this journal, 2023, p. 91 ff.

[5] See GAETA, *La comparazione nel diritto del lavoro italiano*, in SOMMA, ZENO-ZENCOVICH (eds.), *Comparazione e diritto positivo*, Roma TrE-Press, 2021, p. 183 ff.

[6] *De l'esprit des lois*, 1748, vol. I.

[7] KAHN-FREUND, *On the Use and Abuse of Comparative Law*, in *RTDPC*, 1975, p. 785 ff.

Freund's view, is abstracted from the others and is considered the only one capable of "preventing or frustrating" the rigid grafting of norms or institutions in different countries[8].

More recently some emphasis has been placed on the relevance of the economic element, which, as said[9], in the context of a "multilevel system" such as the Italian one, gets "close to the legal systems and often directly influences them".

The comparison deals with all these aspects. However, regarding this paper, the "political" component seems to have a particular incidence, which will be better highlighted later (see paragraph 4).

The comparison will be made with France since, on the one hand, it is a country with similar roots and legal traditions in which sport is substantially interpreted similarly as a relevant phenomenon from a cultural and socio-economic side of view[10]. On the other hand, in the French legal system, an opposite regulatory technique for sports labour relationships is used.

As previously mentioned, comparison is particularly useful to address the issue of legal classification. This issue remains highly relevant, especially in this era where the "stability" of traditional categories of subordinate work and self-employment is strongly challenged by deep socio-economic transformations. As a matter of fact, these changes inevitably impact labour law and the rigidly binary framework on which it was constructed during the twentieth century[11]. Therefore, the analysis aims to assess its stability and coherence in the sports sector.

[8] Kahn-Freund, *cit.*, p. 791 ff.

[9] Treu, *Metodo comparato e diritto del lavoro*, in Corti (ed.), *Il lavoro nelle Carte internazionali*, Vita e Pensiero, 2016, p. 350; also, Treu, *Comparazione e circolazione dei modelli nel diritto del lavoro*, in *DLRI*, 1979, p. 167 ff.

[10] On the Constitutional value of sport in Italy, see Vettor, *Sport and Constitution in the framework of recent legal reforms in Italy*, in *ILLEJ*, 2024, p. 279 ff.

[11] See Perulli, *Beyond Subordination: Four Arguments*, in Vv.Aa., *Defining and Protecting Autonomous Work. A Multidisciplinary Approach*, Palgrave Macmillan, 2022, p. 51 ff.

2. *The regulatory approach of the French legislator: the (almost complete) reference to the general discipline*

French legal system provides for a structured discipline of sport, contained in a special code, the *Code du Sport*[12], aimed at regulating every aspect of the sporting phenomenon[13].

From the labour law's point of view[14], thanks also to the well-known dichotomous vision of labour relations, which are brought back to the rigid alternative of subordination-autonomy[15], the regulatory procedure undertaken by the transalpine legislator is nevertheless relatively simple and linear. The general discipline of subordinate employment applies almost integrally, with the only exception of the provisions on fixed-term employment contracts[16]. These specific provisions apply only to two exact figures, outlined in Article L. 222-2 of the code: the *sportif professionnel salarié* and the *entraîneur professionnel salarié*[17] (i.e. subordinate professional athletes and coaches).

[12] The *Code du Sport* – adopted in 2004 on the initiative of the then Ministry of Youth, Sport, and Associative Life (now the Ministry of Sport) – arises from a broader process of codification aimed at improving the accessibility and intelligibility of French law.

[13] On French sports law see, most recently, Buy, Marmayou, Poracchia, Rizzo, *Droit du sport*, LGDJ, 2023.

[14] See recently Karaquillo, *La modification contractuelle dans le secteur des activités sportives salariées: una pratique usuelle aux multiples facettes*, in *RDT*, 2022, p. 365 ff.

[15] Moreover, as well-known, French doctrine has long debated the necessity of categories different from those of subordination and autonomy: see, for all, Supiot, *Au-delà de l'emploi*, Flammarion, 1999; Lyon-Caen, *Le droit du travail non salarié*, Sirey, 1990, p. 302 ff. For a useful and accurate survey of the various positions see, also for the necessary bibliographical references, Zoppoli I., *I* travailleurs ubérisés*: meglio qualificati o meglio tutelati in Francia?*, in *RIDL*, 2020, p. 778 ff.

[16] Article L. 222-2-1. For a critique of this derogatory discipline see Rabu, *Le nouveau contrat de travail des sportifs et entraîneurs professionnels*, in *RDT*, 2016, p. 32 ff, which highlights a problem of incompatibility with the development of the jurisprudence of the *Court de cassation*, *Chambre sociale*. According to the latter, the succession of fixed-term contracts must be justified by the existence of "concrete" and "precise" elements establishing the temporary nature of these employment relationships, and which cannot result from the reference to the "sporting risk" and the result of competitions (*Soc. 17 décembre* 2014 No. 13-23.176). Furthermore, the Author emphasises doubts of compatibility with the framework agreement on fixed-term work of 18 March 1999, implemented by Directive 1999/70/CE. The jurisprudence of the Court of Justice of the European Union (CJEU 4 July 2006 C-212/04) moves in the same direction. See also Karaquillo, *L'applications des dispositions du Code du travail au contrat de travail du sportif professionnel*, in *RDT*, 2011, p. 14 ff.

[17] On the notions of subordinate professional athlete and coach see again Rabu, *cit.*, p. 32-33; recently see also Buy, Marmayou, Poracchia, Rizzo, *cit.*, p. 321 ff.

The first figure is defined as any individual whose remunerated activity consists of exercising a sporting activity in the context of a relationship of legal subordination with a sports association or company referred to in Articles L. 122-2 and L. 122-12.

As regards this aspect, it is worth highlighting how the law, while making textual reference to the *status* of "professional", attributes to it an exclusively formal relevance. The distinctive features of the figure are, instead, the "onerous" nature of the sports performance and the presence of a *lien de subordination juridique*. As will be more evident later (paragraph 3), such *status* offers a first stimulating key to a comparative interpretation of the different characteristics of professional sports in Italy and France, with direct and immediate consequences on the classification issue.

Moving on to the second figure, the subordinate professional coach is described as any individual whose main paid activity consists in preparing and supervising the sporting activity of one or more subordinate professional athletes in a relationship of legal subordination with a sports association or club referred to in Articles L. 122-2 and L. 122-12, and who holds a professional qualification or certificate of qualification provided for in Article L. 212-1.

The provision is structurally more articulate and detailed than the previous one, even though it is strictly connected since it links the identification of the figure of *sportif professionnel salarié*. As seen before, a sufficient regulatory prerequisite for the classification of *entraîneur professionnel salarié* is not the presence of a *lien de subordination juridique,* which is in any case required, but rather the preparation or supervision of the activity of one or more subordinate professional athletes. Therefore, the inapplicability to the operational perimeter of the rule of those who prepare or supervise the sporting activity of one or more autonomous athletes is derived. Besides the doubts that such settlement inevitably generates[18], it is necessary to underline the reference to the main character of the remunerated activity, a reference that instead does not assume any classifying relevance regarding the athletes' performance. Moreover, it is worth emphasising that the definition of the criteria based on which the activity is to be considered as "main" is referred by the law to national collective agreements, which have (or, instead, are entitled to have) a role that is crucial in the

[18] See RABU's critique, *cit.*, p. 33.

definition of at least one of the two figures of the sports worker provided by the law[19].

These are all aspects that will be deeply analysed later since, in terms of classification, they highlight an apparent "contradiction" between athletes and coaches, which is similar to the Italian legal system.

3. *The "sports worker" type in the Italian model*

Moving on the Italian model, it is characterised by certain marked peculiarities, both in terms of the legal classification of the so-called "fattispecie" or type and in terms of the consequent discipline[20]. The regulatory framework outlined by the national legislator is much more complex and articulated than the French one just examined. With specific regard to the "sports worker" type, some Authors speak of a "trans-typical" type[21] and of so-called "concentric circles" discipline[22] or "variable geometry"[23].

Indeed, as mentioned before, Article 25, Legislative Decree No. 36/2021 seems to configure a specific type of sports worker, finally indifferent to gender and sectoral differences[24], and identifiable through the use of different regulatory techniques: on the one hand, the punctual indication of "typical"

[19] See, regarding the aspect of remuneration, the table in Article 12.6 of the *Convention collective nationale du sport du 7 juillet* 2005, which distinguishes between four "classes" of coaches. For each class, in addition to the minimum remuneration amount, "tasks", "autonomy", "responsibility" and "technicality" are detailed.

[20] See the doctrine already cited in footnote 1.

[21] BIASI, *cit.*, p. 4.

[22] V. GRAGNOLI, *I nuovi profili*, cit., p. 263 ff.

[23] BIASI, *cit.*, p. 4.

[24] Consistently with the provisions of Article 5, Law No. 86 of 8 August 2019, and in line with the extensive jurisprudence of the CJEU: see, for all, the well-known *Bosman* ruling (CJEU 15 December 1995 C-415/1993), according to which – as reported by BIASI, *cit*, p. 10 – the European notion of worker (whether in sports or not) cannot allow an external element to condition access to the guarantees falling within the shadow of European law: what matters is only that there is an exchange between a service capable of economic evaluation and compensation". Moreover, on the European notion of the worker see MONDA, *The notion of the worker in EU Labour Law: "expansive tendencies" and harmonisation techniques*, in *DLM*, 2022, p. 93 ff.; MENEGATTI, *The Evolving Concept of "worker" in EU law*, in *ILLEJ*, 2019, p. 71 ff.; COUNTOURIS, *The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope*, in *ILJ*, 2017, p. 192 ff.

figures of sportsmen and sportswomen (athletes, coaches, instructors, technical directors, sports directors, athletic trainers, referees)[25]. On the other hand, an open formulation includes anyone who is paid to perform tasks defined as "necessary for the performance of sporting activities", excluding those of an administrative-managerial nature. In terms of classification, it is also specified that the sporting activity may represent the subject of an employment relationship (including in the form of apprenticeship pursuant to Article 30, Legislative Decree No. 36/2021), of a self-employment relationship (including in the form of continuative and coordinated collaborations under Article 409, Civil Code), as well as occasional work, following current legislation (Article 25, paragraphs 2 and 3-*bis*).

In any way, the configuration of the "sports worker" type (for which the so-called "act of membership" remains essential[26]) implies the application of a largely derogatory regulation compared to the general one[27], especially regarding dismissals[28] and fixed-term contracts[29] (Article 26, paragraphs 1 and 2, Legislative Decree No. 36/2021).

However, it is worth emphasising here that, in addition to the classification rules[30] – which, as will be seen shortly, certainly facilitate access to the derogatory discipline of Article 26 only for professional athletes – there are still significant differences between the professional and amateur sectors[31]. This is the first and (perhaps) most relevant discrepancy between the Italian and French models considered, prompting inevitable reflection on the different *ratios* underlying these two *prima facie* dissimilar regulatory approaches.

[25] According to a formulation that follows the same regulatory technique already used in Law No. 91 of 23 March 1981 on professional sports.

[26] See Article 15(1) of Legislative Decree No. 36/2021: it represents the formal act by which the individual becomes a subject of the sport organisation and is authorised to carry out sports activities.

[27] See, most recently, LAMBERTUCCI, *cit.*, p. 1 ff.

[28] In general, on the discipline of dismissals in the Italian legal system see, most recently, LUCIANI, *I licenziamenti individuali nel privato e nel pubblico*, Giappichelli, 2024.

[29] On fixed-term contracts in Italy see SARACINI, ZOPPOLI L. (eds.), *Riforma del lavoro e contratti a termine*, Editoriale Scientifica, 2017.

[30] See Articles 27(2) and (3) and 28(2) of Legislative Decree No 36/2021.

[31] About the differences between professional and amateur sectors before the reform see FERRARO, *Il calciatore tra lavoro sportivo professionistico e dilettantismo*, in LDE, 2019, no. 3; TOSI, *Sport e diritto del lavoro*, in *ADL*, 2006, I, p. 717 ff.; BELLAVISTA, *Il lavoro sportivo professionistico e l'attività dilettantistica*, in *RGL*, 1997, I, p. 521 ff. More recently see also DE MARTINO, *Sulla distinzione tra professionismo e dilettantismo nel lavoro sportivo*, in *RIDL*, 2022, II, p. 42 ff.

As seen before, the French legislator is entirely indifferent to the need for a specific regulation for the so-called *amateurs*, who are equated in all respects to professionals in the presence of a demanding and subordinate relationship. The notion of professional loses any relevance, as for the correct classification of the employment relationship, the emphasis is placed on verifying the existence of the subordination constraint and the actual exercise of directive power by the employer[32].

Conversely, the Italian legislator (re)assigns to CONI and the individual federations – based on criteria they establish, and not based on the concrete modalities in which the relationship is articulated – a peculiar classification power to define the boundary between professionalism and amateurism, with direct regulatory impacts[33], primarily resulting in the application of a *different* and *particular* presumptive classification regime[34]. "Different" because, while in amateurism there is a presumption of self-employment for all sports workers in the form of coordinated and continuous collaboration, in professionalism, although only for athletes, there is instead a presumption of subordination. "Particular" because, in both cases, criteria based on "temporal" elements take central relevance, which, at least *prima facie*, seem entirely unrelated from verifying the concrete modalities of the relationship and from the existence of hetero-direction.

This is reflected in Articles 27(2) (3) and 28(2) of Legislative Decree No. 36/2021, referring, in this order, to professionals and amateurs. On the one hand, Article 27 outlines only for professional athletes a "peculiar" presumption of subordination not based on the profile of hetero-direction but rather on the "principal" or "prevalent" and "continuous" nature of the sporting performance, i.e. on the "occasionality"[35], to which the three different cri-

[32] See Rebu, *cit.*, p. 33.

[33] See Article 27 for professionals and Article 28 for amateurs.

[34] For an in-depth analysis of the "mechanism of presumptions" outlined by the Legislative Decree No. 36/2021 it is allowed to make a reference to Ruffo, *Il lavoro sportivo tra teoria della subordinazione e ambigue novità legislative*, in *RGL*, 2023, I, p. 141 ff., where the purely "relative" nature of presumptions is emphasized.

[35] Regarding the relevance of "occasionality" for the legal classification of the sports worker fattispecie or type another reference is allowed to Ruffo, *L'occasionalità nei rapporti di lavoro sportivo*, in Cordella (ed.), *Occasionalità e rapporti di lavoro. Politiche del diritto e modelli comparati*, Editoriale Scientifica, 2023, p. 184 ff. But already, even if in different terms, Ichino, *Il lavoro subordinato: definizione e inquadramento*, in *Comm. Schlesinger*, Giuffrè, 1992, p. 97 ff.

teria of Article 27(3)[36] can briefly be referred. On the other hand, Article 28 establishes that the amateurs' sports performances are presumed to be the subject of a continuative and coordinated collaboration when, besides being "coordinated under the technical-sports profile"[37], they have a duration that, although continuous, does not exceed twenty-four hours per week.

Therefore, the absolute relevance of the "occasional" nature of the sports performance – to be understood essentially as the logical-legal opposite of the labour notion of "habitual"[38] and whose "presumptive-classifying value" is quite evident[39] – emerges very clearly, mainly where the legislator develops precise criteria that derive the presumption from whether certain temporal thresholds are exceeded (although in the amateur sector, the predetermined threshold is relatively high).

The situation is different for other professional sports workers besides athletes, for whom the inclusion of the relationship within the framework of subordination or autonomy follows, as in France, the traditional codified classification criteria (Articles 2094 and 2222, Civil Code).

Here, severe doubts of constitutional legitimacy arise, which will be examined later (paragraph 4). However, it is now worth focusing on the aspect of most significant interest arising from the comparison with the French system concerning the role "played" by the element of hetero-direction as a distinctive feature of subordination in sports labour relationships.

[36] That imply, conversely, a presumption of self-employment: a) the activity is practiced in the context of one or more events related within a short period of time; b) the athlete is not contractually bound regarding the attendance at preparation or training sessions; c) the performance which is the subject of the contract, despite having a continuous nature, does not exceed eight hours per week, five days per month or thirty days per year.

[37] It should be noted that the "coordination" in question, although its systematic placement requires at least some alignment with that of Article 409 of the Code of Civil Procedure, does not seem to coincide with it, as it may well express itself in the modalities of subordination. Of a similar opinion is Ferraro, *Studio sulla collaborazione coordinata*, Giappichelli, 2023, p. 133, according to which, if understood *latu sensu*, the technical-sports coordination should be considered inherent to every sports relationship and even to volunteer work, rendering the regulation unconstitutional due to the violation of the principle of the non-negotiability of the type.

[38] On which see Casillo, *Riflessioni sull'occasionalità del lavoro*, in *DLM*, 2023, p. 454 ff.; Cordella, *Spunti operativi (e non solo) sulla comunicazione di avvio del lavoro autonomo occasionale*, in *DLM*, 2022, p. 348 ff.

[39] Ruffo, *L'occasionalità nei rapporti*, cit., p. 192.

4. *The role of hetero-direction for classification purposes*

Concerning the issue of hetero-direction, it is now necessary to ask why the Italian legislator, about both professional athletes and the entire category of amateurs, "seems" to continue to consider this element as a non-determinative factor for subordination.

This choice contrasts with the French example, which, as seen, through the normative reference to the *lien de subordination juridique* – clearly defined in the historic *Cass. Soc.* 13 *November* 1996 No. 94[40] – emphasises the absolute relevance of the employer's directive power as an inescapable feature of the type, even in the context of sports work.

However, as anticipated, this assumption appears to waver concerning the figure of the *entraîneur professionnel salarié*, who, similarly to the provisions made by the Italian legislator for professional athletes, is defined based on the "principal" nature of the remunerated activity. In this regard, while it seems almost paradoxical that the coach, along with "other" figures different from athletes, falls within the sports workers category for whom the Italian legislation refers to traditional codified criteria of classification, the French approach could be more pertinent, as the coach plays a crucial managerial role in the "organisation" of sports practice, almost like a manager[41]. Moreover, it has also been said that is difficult to understand the need to anchor the identification of such a "sportsman" to that – deemed structurally antecedent – of the subordinate athlete, as this establishes a prerequisite inexplicably disconnected from the methods of performance and, *de relato*, from the verification of the existence of hetero-direction. Conversely, referring to national collective agreement for a clear definition of the "principal" nature of the activity can undoubtedly be useful, primarily to specify the inevitably open meaning of such a phrase, which is challenging to control interpretatively[42].

This last aspect highlights another marked difference in regulatory ap-

[40] According to which the *lien de subordination* is characterised by working under the authority of an employer who has the power to issue orders and instructions, to supervise their execution and to punish failures.

[41] On the issues related to the legal classification of managers, see Galardi, *Il dirigente d'azienda. Figure sociali, fattispecie, disciplina*, Giappichelli, 2020; Zoppoli A., *Dirigenza, contratto di lavoro e organizzazione*, ESI, 2000; Tosi, *Il dirigente d'azienda*, Franco Angeli, 1974.

[42] See footnote 19.

proach compared to the Italian model, which, e.g., refers first and foremost to federal regulations for clarifying the semantic content of the so-called "necessary" tasks referred to in the aforementioned Article 25, asserting (here as elsewhere) its autonomy.

In light of this intriguing "mirror game", it is worth noting how very different regulatory techniques are used for the exact figure of the sports worker, whose performance modalities are nearly identical in the countries examined, at least on a phenomenal level[43].

The question is as to the possible reason for these differences.

One answer might lie in the different relationship between the sports system and the state system within the two legal systems[44].

In the analysis of the French case, the prevailing doctrine highlights the weak autonomy of the sports system concerning the state system and, in any case, the very high degree of "integration" between the two systems[45]. This would explain a more straightforward and more linear approach by the legislator who, despite some apparent peculiarities, essentially refers to the general regulation of labour relationships, "entrusting" the definition of some more specific aspects to the competence of national collective agreements[46] and only subordinately to the regulation of the individual sports federation.

In the Italian case, however, the sports system has always claimed a broad, if not total, sphere of autonomy[47], which still manifests itself in numerous provisions (see Articles 15[48], 25[49] and 27, paragraph 5[50]). Despite the (today

[43] On the interpretation of a legal concept of sport see MARMAYOU, *Le sport: notion juridique*, in *Encyclopédie Droitdusport.com*, étude no. 106. See also, by the same A., *Définir le sport*, in *Gazette du Palais*, 19-21 octobre 2008.

[44] See CARBONI, *L'ordinamento sportivo italiano nel diritto comparato*, in *feralismi.it*, 2021, p. 49 ff.

[45] FISCHER, *France*, in HALLMANN, PETRY, *Comparative Sport Development - Systems, Participation and Public Policy*, Springer, 2016, p. 62.

[46] Called upon to establish, e.g., the conditions under which a fixed-term contract of less than 12 months can be concluded (Article L. 222-2-4).

[47] On the relations between the state system and the sports system in Italy, see DI NELLA, *Il fenomeno sportivo nell'ordinamento giuridico*, ESI, 1991; see also BELLOMO, *Introduzione*, in VV.AA., *Lineamenti di diritto sportivo*, Giappichelli, 2024; INDRACCOLO, *Rapporti e tutele nel dilettantismo sportivo*, ESI, 2008.

[48] In the part where it requires the act of membership for the subject to access the protections and regulations of the sports system.

[49] When the definition of "necessary" tasks for sports practice is left to technical regulations of each individual sports discipline.

[50] Which makes the effectiveness of the sports employment contract subject to approval

more successful than ever) attempts of the state system to breach the "wall" dividing the two "worlds", sports work continues to maintain its marked "specificity"[51] – explicitly reaffirmed in paragraph 1-*bis* of Article 25 of Legislative Decree No. 36/2021 – which is reflected in a more pronounced "speciality" of its regulation[52].

Here the relevance of the political factor aforementioned in paragraph 1 becomes evident. Since sports work has a well-defined phenomenal connotation, which does not change between the contexts examined, one would expect an identical classification in general terms, in the theory of general law. Instead, the difference operates on an eminently political level, understood in its multifaceted connotation that embraces and includes "economy", an unmistakably "conditioning" element[53] of political decisions.

In Italy, as seen, a political evaluation is made that favours national sports federations, to which, through the attribution of a peculiar classification power between professionals and amateurs, the "selection" of subjects who can benefit from facilitated access to subordination or autonomy is entirely entrusted. There are indeed "privileged" intersections between professionalism and subordination on one side and between amateurism and independence on the other, the latter especially being the result of (economic) policy evaluations aimed at safeguarding the economically less "relevant" sector[54].

Such a setup inevitably raises some constitutional legitimacy doubts regarding violating the principle of equality under Article 3 of the Constitution. One cannot help but observe that the distinction between professionals and amateurs, which the law does not define and leaves to individual federations, becomes decisive without any evident reasonableness[55]. This issue in-

(within seven days of signing) by the National Sports Federation or the Associated Sports Discipline.

[51] Regarding the "specificity" of sport, especially at the European level, see Colucci, *L'autonomia e la specificità dello sport nell'Unione europea*, in *RDES*, 2006, p. 15 ff.

[52] On the "speciality" of sports work see the thesis of Gragnoli, *I nuovi profili*, cit., p. 263 ff.

[53] See the statement by Treu, *Metodo comparato e diritto*, cit., p. 350.

[54] Mezzacapo, *Il rapporto di lavoro degli atleti c.d. professionisti di fatto: questioni aperte e prospettive di riforma*, in *LPO*, 2019, p. 604, recalls how Coni has indicated the significant economic relevance of the phenomenon as a decisive condition for the establishment of the professional sector.

[55] Of the same opinion is Gragnoli, *Le ultime novità*, cit., p. 91 ff.

tersects with the problem of the non-negotiability of the type[56], albeit with the peculiar reduction of protections accompanying sports work.

It is a marked anomaly, highlighting all the limits of using a temporal criterion based on occasionality as a decisive element – even if it must be reiterated subsequently to the "federal filter" – from which to deduce the legal nature of work performance. This leads to questioning the revision of the typical criteria of the type, substantially reaffirmed in the "nearby" French model.

5. Following. *Is it only an apparent gap?*

However, the disparity between the two frameworks is less stark if one adopts a more in-depth reading of the temporal-criteria and the notion of "occasionality" aforementioned. This reveals, as hinted at several points, the only "apparent" irrelevance of hetero-direction for classifying purposes even in the Italian system.

The "time factor" assumes a peculiar classifying value when understood as an indicator of the "stability" of sports worker's insertion in the organisation of the sports company or association. "Stability" measures, on the one hand, the degree of "organic integration" of the sports worker into the organisational structure and, on the other hand, the degree of the employer's power to intervene and impact the execution of the sports activity.

The marked "specificities" of sports work (particularly of the athlete) mentioned earlier emerge briefly. A different measurement of the employer's power to guide the athlete's performance would undoubtedly lend itself to incontrovertible complexities. The content of the sports activity, and especially the sports gesture, enhances the personal and individual component of the athlete, which is resistant to submission within the group or to being confined within the employer's rigid directives[57]. Therefore, the lack of "stability" in the performance is taken as a presumptive element of the absence of submission and, thus, of subordination[58]. In other words, in the reconstruction outlined, the limit between the categories of autonomy and sub-

[56] D'Antona, *Limiti costituzionali alla disponibilità del tipo contrattuale nel diritto del lavoro*, in *ADL*, 1995, I, p. 63 ff.

[57] Zoppoli A., *cit.*, p. 135.

[58] Ruffo, *L'occasionalità nei rapporti*, cit., p. 187 ff.

ordination remains indicated, as in France, by the verification of hetero-direction, which is "presumed" to exist in the case of sports work performed with "habituality" – that is, as a principal or prevalent and continuous activity (Article 27, paragraph 2) – or, conversely, its absence in the case of sports work performed with "occasionality" – that is, as a marginal/non-habitual activity identified by the presence of at least one of the criteria of Articles 27(3) and 28(2).

In these terms, the normative use of the temporal criterion for presumptive-classifying purposes finds its complete legitimacy in Article 2094, Civil Code, which, seemingly in the background, returns to centre stage[59], preserving its role as a cornerstone norm in the classification of employment relations.

Thus, the seemingly vast disparity with the French model is, if not eliminated, at least diminished. In both models, despite the relevant specificities of the sport, the legal classification of the sports worker type is still anchored to the central categories of subordinate work and self-employment[60], although in the Italian model with some adjustments, especially in terms of regulation. However, these adjustments on regulation result in a lower level of protection offered to Italian sports workers compared to the standard employee prototype, unlike in France, where an almost undifferentiated protection is provided (except for the rules on fixed-term contracts).

Finally, there remains one last crucial difference between the two legal systems, which lies in the defining methods and the related legal consequences of the perimeter of professionalism. In France, the *status* of a professional (or amateur) takes on, as seen, a purely descriptive value entirely irrelevant to the nature of the relationship. In Italy, the determination of the two areas (professionalism-amateurism), despite the relatively presumptive nature analysed, guides the legal classification of the work performance (and the applicable regulation), unreasonably subordinating the outcome to an external and abstract factor (the decision of the Federation)[61], lacking a connection with the concrete methods of work performance.

[59] On the continuing centrality of Art. 2094 of the Civil Code, see Caruso, Del Punta, Treu, *Manifesto per un diritto del lavoro sostenibile*, in *WP C.S.D.L.E. "Massimo D'Antona"*, 2020, p. 21.

[60] Moreover, in Italy, art. 2(2) of Legislative Decree No. 81 of 15 June 2015 has (re)introduced the non-applicability of the regulation of hetero-organized collaborations to amateur sports collaborations.

[61] Biasi, *cit.*, p. 9.

Therefore, apart from the only seemingly different "weight" exerted by hetero-direction on the classifying level, there remains a certain distance between the regulatory approaches of the two observed countries. This distance traces its "matrix" in the "political" factor, whose ability to "frustrate or prevent" the "legal homogenisation" of institutions and/or regulatory techniques[62], even between phenomenologically very similar systems, finds here clear and unequivocal confirmation.

[62] Well highlighted in the aforementioned Kahn-Freund thought.

Abstract

The essay aims to analyse the different regulatory techniques of France and Italy concerning employment relations in the sports sector and the consequences of these differences in classification. Central importance in this sense is assumed by the incidence of the status of a professional sportsman, which, while in France assumes a purely formal meaning with no influence on the nature of the relationship, in Italy, it represents, even if limited to athletes, a sort of passe-partout for the access to the "fattispecie" or type of subordinate sports employment and the relative particular regulation. The author identifies a decisive weight in this difference in the political factor.

Keywords

Sports work, Italy, France, Classification, Professionalism.

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La Diligencia Debida en Materia de Derechos Humanos Laborales*

Contents: **1.** El carácter político y no exclusivamente técnico de los procesos de elaboración de las normas y prácticas de diligencia debida de las empresas como premisa. **2.** La diligencia debida en materia de derechos humanos laborales: una noción por construir. **3.** Rasgos y requisitos esenciales de la dimensión laboral de la diligencia debida. **3.1.** Aplicación al conjunto de derechos humanos laborales reconocidos internacionalmente. **3.2.** Proyección hacia las cadenas de valor de las empresas de dimensión global y trazabilidad y transparencia de estas. **3.3.** Especial atención a la prevención de los impactos indirectos sobre los derechos protegidos y sus causas profundas. **3.4.** Participación significativa de los representantes de los trabajadores en el diseño, la aplicación y el control de las políticas y medidas de diligencia debida. **3.5.** Consideración de la no aplicación o la aplicación deficiente de los procesos de diligencia debida como fuente de responsabilidad administrativa y civil de las empresas.

1. *El carácter político y no exclusivamente técnico de los procesos de elaboración de las normas y prácticas de diligencia debida de las empresas como premisa*

En los últimos años hemos asistido a un sorprendente ascenso, puede decirse incluso que a una "marcha triunfal", de la noción de diligencia debida en materia de derechos humanos, que contrasta con el limitado valor normativo de los instrumentos internacionales a través de los cuales se produjo

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su lanzamiento en 2011[1]. Al extremo de haberse llegado a afirmar que la diligencia debida se ha convertido en la "nueva *lingua franca*" del discurso en torno a la responsabilidad de respetar los derechos humanos en el mundo de los negocios[2], a la vez que en un parámetro imprescindible de valoración de cualquier iniciativa empresarial dirigida a este objetivo.

La pregunta que sugiere este inusitado avance no es otra que la siguiente: ¿cómo es posible que un concepto acuñado tan poco tiempo atrás, cuyo origen hay que rastrearlo en el ámbito de la gestión de los riesgos empresariales, haya terminado por convertirse en un marco tan influyente, o incluso dominante, a los efectos de conceptualizar y hacer operativa esa responsabilidad por parte de las empresas?[3]

Como he tenido la ocasión de explicar con más detalle en otro lugar[4], son varias las razones que explican el éxito fulgurante de la diligencia debida. Buena parte de ellas se vinculan con su aptitud para actuar como soporte regulador de los comportamientos susceptibles de ser puestos en marcha por las empresas para prevenir impactos negativos sobre los derechos protegidos, en especial debido a su singular enfoque proactivo *ex ante* en vez de *ex post*, que permite poner la entera organización de las mismas al servicio de su protección[5], y a su notoria "plasticidad"[6], que hace posible que su contenido

[1] Me refiero, como es de sobra conocido, a los Principios Rectores de las Naciones Unidas sobre las Empresas y los Derechos Humanos y las Líneas Directrices de la OCDE para Empresas Multinacionales. Estas últimas denominadas, luego de su revisión del año 2023, Directrices de la OCDE para Empresas Multinacionales sobre la Conducta Empresarial Responsable.

[2] Deva, *Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?*, en *LJIL*, 2023, n. 36, pp. 389-390.

[3] Reproduzco aquí la pregunta formulada por Landau, en su estudio *Human Rights Due Diligence and Labour Governance*, pp. 3-4 del original inédito de próxima publicación por Oxford University Press puesto amablemente a mi disposición por la autora para la preparación de este trabajo. Un gesto por el que deseo dejar expresa constancia aquí de mi gratitud.

[4] Permítaseme esta referencia inicial a mi *Teoría del Derecho Transnacional del Trabajo. La génesis de un estatuto para el trabajo global*, Thomson Reuters-Aranzadi, Pamplona, 2022, especialmente pp. 155-156. Muchas de las ideas de base que se expondrán en las páginas siguientes tienen su punto de arranque en esta obra, a la que remito para un desarrollo más profundo y documentado de lo que aquí se dirá de manera sintética.

[5] Como apuntan, Daugareilh, D'ambrosio, Sachs, *La ley francesa sobre el deber de vigilancia: presente y futuro de una innovación jurídica*, en Sanguineti Raymond (Dir.), *Comercio internacional, trabajo y derechos humanos*, Universidad de Salamanca, Salamanca, 2021, pp. 115-116.

[6] D'ambrosio, *Le devoir de vigilance: une innovation juridique entre continuités et ruptures*, en DrSoc, 2020, n. 106, p. 633 ss.; D'ambrosio, Barraud De Lagerie, *La responsabilitè des entreprises reformuleè par la loi: un regard pluridisciplinarire*, en *DrSoc*, 2020, n. 106, p. 637.

se adapte a los riesgos y situaciones particulares de cada sector de actividad y de cada empresa, modulando además el grado de intervención de los sujetos empresariales en función de su nivel de influencia sobre la situación en cada caso considerada. No obstante, tampoco puede dejar de indicarse que detrás del amplio apoyo concitado por el concepto, que se extiende no solo al espacio de las organizaciones internacionales que lo lanzaron sino a los agentes empresariales y sindicales globales, las organizaciones de defensa de los derechos humanos y los gobiernos de la mayor parte de los Estados sede de las grandes corporaciones, se encuentra también su evidente, y muy posiblemente deliberada, ambigüedad, que permite que cada uno de estos sujetos pueda prestarle su apoyo a partir de una comprensión de su contenido y sus implicaciones no necesariamente coincidente con la de los demás.

La diligencia debida constituye, como se ha afirmado, un concepto capaz de ser interpretado y operacionalizado, es decir definido a través de variables medibles, de formas muy diversas[7], dependiendo del sujeto que se aproxime a él y los intereses que sostengan su intervención. Esto implica que no nos encontramos ante una regla de conducta fija, que pueda ser aplicada de forma clara y definida, sino frente a un amplio estándar normativo, que requiere de una posterior elaboración, desarrollo e interpretación. Siendo, precisamente, estos procesos posteriores de elaboración, o más bien de reelaboración, desarrollo e interpretación, los que determinarán finalmente su utilidad para la tutela de los intereses de los titulares de los derechos protegidos[8].

De ahí que el consenso alcanzado en torno a la noción de diligencia debida deba ser considerado más un *punto de partida* para la construcción de un sistema de garantía transnacional de los derechos humanos, que un punto de llegada en sentido estricto, puesto que su posterior aplicación es capaz de cobijar interpretaciones muy distintas y hasta antagónicas de su contenido, basculantes por lo general entre dos extremos: una interpretación de carácter tecnocrático, que la concibe como una herramienta de gestión de los riesgos empresariales que debe estar sujeta al control de las empresas que la ponen en marcha y sus directivos, y otra de fondo humanista, que pone el acento

[7] Según destaca LANDAU, *Human Rights Due Diligence*, cit., p. 7.

[8] Como apuntan MARSHALL *et al.*, *Mandatory Human Rights Due Diligence. Risks and Opportunities for Workers and Unions*, RMIT University Business and Human Rights Centre, TraffLab ERC, Labour, Equality and Human Rights research group y Monash Business School, 2023, p. 11. Texto disponible en: https://media.business-humanrights.org/media/documents/TraffLabReport_March23.pdf.

en la protección de los derechos humanos y la participación de sus titulares en su puesta en marcha y aplicación[9].

Si lo que se acaba de apuntar es correcto, no es posible considerar la elaboración de las normas y las prácticas en las que se concreta la diligencia debida como una operación exclusivamente técnica. Antes bien, ambas poseen una inocultable *dimensión política*, que se relaciona con la determinación de los espacios o escenarios en los que se lleva a cabo su elaboración, los actores que son incluidos y excluidos de los correspondientes procesos reguladores y los componentes, enfoques y posibilidades de regulación que se introducen o no en ellos[10]. Pudiendo ser el resultado final, medido tanto en términos formales como de efectividad para la consecución de los objetivos que han conducido a la construcción del concepto, muy distinto en función de las respuestas que se haya terminado por dar a cada una de las antes referidas variables.

La comprensión de esta realidad resulta indispensable para el adecuado encuadramiento de la materia que será objeto de análisis en las páginas siguientes.

2. *La diligencia debida en materia de derechos humanos laborales: una noción por construir*

Partiendo de esta premisa, el presente estudio se propone llevar a cabo una reconstrucción de lo que puede denominarse la *dimensión laboral de la diligencia debida en materia de derechos humanos*, entendida como el estándar de conducta que ha de guiar el cumplimiento por las empresas, y en particular por las de dimensión global, de su obligación internacional de respetar los derechos humanos atribuidos de forma singular por las normas internacionales a los trabajadores que intervienen en sus propias actividades o prestan servicios para los socios comerciales y las empresas que se integran sus cadenas de valor localizadas en todo el planeta.

Lo anterior equivale a proponerse determinar cuáles han de ser los alcances de la diligencia debida que han de desarrollar las empresas para pre-

[9] De acuerdo con la descripción que hace LANDAU, *Human Rights Due Diligence*, cit., p. 5, de las dos "lógicas irreconciliables" con arreglo a las cuales puede concebirse e instrumentalizarse la diligencia debida.

[10] Nuevamente, LANDAU, *Human Rights Due Diligence*, cit., p. 14.

venir la materialización de impactos negativos sobre los derechos humanos de contenido laboral en el conjunto de sus actividades a nivel global. Es decir, en tanto herramienta o componente necesario de un nuevo sistema de gobernanza global del mundo del trabajo, o de un nuevo *Derecho Transnacional del Trabajo*, actualmente en fase de formación, cuyo cometido es hacer posible la aplicación de esos derechos en los procesos productivos desarrollados por las empresas, directamente o contando con la participación de terceros, en cualquier espacio del globo[11]. Teniendo en cuenta para ello el carácter político y no exclusivamente técnico de este proceso de rellenado de contenidos del que se ha dado cuenta, y los objetivos que, de acuerdo con los instrumentos internacionales creadores de la obligación de las empresas de respetar los derechos humanos, han de guiar la actuación de las empresas, con la consiguiente colocación de los intereses de los titulares de estos derechos, en nuestro caso los trabajadores, y no de las empresas, en el centro de los correspondientes procesos de diligencia debida[12]. Y sin perder de vista la ineludible exigencia de efectividad que, a la vista de estos objetivos, han satisfacer los mecanismos que se construyan para su aplicación[13].

Esta es una tarea que debería estar realizada, o al menos bastante avanzada, desde hace mucho tiempo. A fin y al cabo, la protección de los derechos laborales se encuentra en el origen de la demanda social de responsabilización de las empresas por las consecuencias de sus operaciones en todo el orbe, así como de la introducción del concepto de diligencia debida como herramienta para hacerla efectiva. De hecho, fueron las denuncias de graves vulneraciones de los derechos laborales cometidas a lo largo de las cadenas de

[11] Daugareilh, D'Ambrosio, Sachs, *cit.*, pp. 115-116.

[12] Sobre la diligencia debida en materia de derechos humanos como un proceso dirigido a la protección de los intereses de los titulares de los derechos y no, al menos de forma directa y principal, a la prevención de riesgos para las empresas, véase Salmón Gárate y Lovón, *Un punto de partida esencial: la debida diligencia en el marco de los Principios Rectores*, en *TyD*, 2021, número monográfico 14 sobre *La diligencia debida en materia de derechos humanos laborales*, en especial p. 5, recogiendo una observación ampliamente compartida por los estudiosos del concepto.

[13] Dado su propósito, la diligencia debida es un mecanismo en el que no solo tienen relevancia los procesos diseñados para su puesta en práctica sino sus resultados. En realidad, la diligencia debida constituye, como apuntan Macchi, Bright, *Hardening Soft Law: the Implementation of Human Rights Due Diligence Requiements in Domestic Legislation,* en Buscemi, *et al.*, *Legal sources in business and human rights. Envolving dymanics in International an European Law*, Brill, Leiden, 2020, p. 4, una "norma de conducta" que debe "estar claramente orientada a la consecución de los resultados previstos". Para una amplia recopilación bibliográfica sobre esta cuestión, véase la obra citada en *supra* nota 5, pp. 155-156, nota 524.

producción de las empresas multinacionales las que precipitaron las primeras iniciativas de estas últimas, inspiradas aún en la noción de responsabilidad social corporativa[14], y dieron lugar más tarde al lanzamiento de los instrumentos internacionales sobre la materia[15]. Asimismo, han sido las catástrofes industriales producidas en la última etapa, y señaladamente la del edificio Rana Plaza, ocurrida en Daca en 2013, en la que murieron 1.129 trabajadores, principalmente mujeres, las que precipitaron los avances posteriores, tanto en la construcción de instrumentos de control de sus redes de colaboradores más eficaces y sostenibles por parte de las empresas, como en la aprobación de normas estatales reguladoras de las obligaciones empresariales sobre la materia[16].

Nada de lo anterior tendría por qué extrañar, puesto que el espacio más relevante en el que pueden producirse vulneraciones de los derechos humanos con ocasión del desarrollo de las actividades empresariales es el de los procesos de producción. Y en especial el de los de dimensión global, donde la fragmentación productiva, la disociación de responsabilidades y la competencia feroz entre las empresas crean el caldo de cultivo para la materialización de todo tipo de atentados contra los derechos de los trabajadores que intervienen en ellos. La organización de la producción a través de cadenas globales de producción territorialmente fragmentadas multiplica, de tal modo, el riesgo de afectación de los derechos humanos de contenido laboral, convirtiendo a los trabajadores en las principales víctimas potenciales de las

[14] Sobre este proceso y la consiguiente asunción del rol de "guardianes de la globalización" por las casas matrices de las empresas multinacionales como respuesta a la demanda ciudadana, véase Frydman, *Comment penser le droit global?*, en *Série des Workings Papers du Centre Perelman de Philosophie du Droit*, 2012, n. 1, especialmente p. 19.

[15] Comenzando por el Pacto Mundial de las Naciones Unidas del año 2000 y continuando con los Principios Rectores sobre las Empresas y los Derecho Humanos, lanzados por esta organización en 2011, y las Líneas Directrices de la OCDE para Empresas Multinacionales, del mismo año, entre otros instrumentos, como la Declaración Tripartita de Principios sobre las Empresas Multinacionales y la Política Social de la OIT luego de su reforma de 2017.

[16] El punto de arranque vendrá dado en este caso por la aprobación de la Ley francesa sobre el deber de vigilancia, aprobada en 2017, a la que sucederán otras iniciativas de propósitos equivalentes adoptadas en los Países Bajos en 2019, Suiza en 2020, y Noruega y Alemania en 2021. Es posible que ninguna de estas normas hubiera sido aprobada sin la conmoción que supuso para la opinión pública mundial esa tragedia y otras similares ocurridas en los últimos años en empresas situadas en destinos remotos que producían para grandes sociedades y marcas europeas.

violaciones de los derechos humanos que pueden tener lugar con ocasión del desarrollo de las actividades de las grandes corporaciones.

A partir de esta constatación no es difícil concluir que su dimensión laboral constituye la faceta más relevante de la diligencia debida en materia de derechos humanos. Y, por tanto, el espacio donde en última instancia se juega su eficacia – o la falta de ella – a nivel global.

A pesar de ello, hasta el momento no existe un desarrollo suficiente de este aspecto de la diligencia debida específicamente ligado a los derechos humanos de contenido laboral y la singular problemática planteada por su tutela, ni a nivel de la reflexión académica, ni tampoco a nivel normativo[17]. De hecho, el propio concepto de *diligencia debida en materia de derechos humanos laborales* no existido en la literatura jurídica hasta hace no demasiado tiempo[18], no siendo abundantes los estudios monográficamente dedicados a la materia[19]. Sin que este déficit sea remediado por los instrumentos internacionales y las normas nacionales que desarrollan los alcances de la diligencia debida, que tienen en los derechos laborales uno de sus puntos de referencia, pero no suelen incluir previsión alguna sobre la manera como esta debe ser aplicada para su tutela. Si acaso, es a nivel de los instrumentos desarrollados por las empresas para el control de sus procesos productivos globales, por su propia naturaleza más próximos al terreno, donde la atención al

[17] Por más que existan muy meritorios y abundantes estudios, especialmente elaborados desde la perspectiva del Derecho Internacional, sobre el rol de la diligencia debida en la tutela de los derechos humanos en general. Entre ellos, por citar uno de los primeros en lengua castellana, véase Martín-Ortega, *La diligencia debida de las empresas en materia de derechos humanos. Un nuevo estándar para una nueva responsabilidad*, en Zamora Cabot, García Cívico, Sales Pallarés (Coordinadores), *La responsabilidad de las multinacionales por violaciones de derechos humanos*, Universidad de Alcalá, 2013, pp. 167-192. Un meritorio texto construido "con ojos de laboralista" pero adoptando una perspectiva igualmente general es el de Guamán Hernández, *Diligencia debida en derechos humanos. Posibilidades y límites de un concepto en expansión*, Tirant lo Blanch, Valencia, 2022.

[18] Como apuntaría en su momento Bueno, *Multinational enterprises and labour rights: concepts and implementation*, en Bellace, Ter Haar, *Research Handbook on Labour, Business and Human Rights*, Elgar Publishing, Londres, 2019, pp. 421-438, quien propone su adopción.

[19] Véase Trebilcock, *Due diligence on labour issues. Opportunities and Limits of the UN Guiding Principles on Business and Human Rights*, en Blackett, Trebilcock (Eds.), *Research Handbook on Transnational Labour Law*, Edward Elgar, Cheltenham, 2015, pp. 93-107. Con posterioridad puede mencionarse el estudio de Bueno, *cit.*, que abre una línea autónoma de reflexión sobre el problema, y los trabajos de Marshall *et al.* e Landau, *Human Rights Due Diligence*, cit., referidos en *supra* notas 9 y 4, respectivamente, dedicados a profundizar sobre la cuestión.

respeto de los derechos laborales por sus filiales y socios comerciales es objeto de especial atención. Muestra de ello son, en particular, un bloque de códigos de conducta para proveedores y contratistas y acuerdos marco con proyección a las cadenas de valor de las empresas que se ocupan de llevar a cabo un desarrollo del contenido de los derechos laborales cuyo respeto se comprometen a exigir en sus relaciones comerciales y diseñan herramientas para hacerlo efectivo[20].

A la vista de lo anterior, no puede sino concluirse que la reconstrucción de la dimensión laboral de la diligencia debida constituye en la actualidad una tarea en buena medida pendiente de realización. Pero, a la vez, de particular importancia para la delimitación de los contornos de la diligencia debida exigible a las empresas en relación con estos derechos.

Esta es, por lo demás, una tarea impostergable. No debemos perder de vista que, conforme se ha puesto de manifiesto con sentido crítico, la importantísima asimilación de la que ha sido objeto la diligencia debida, tanto a nivel internacional como interno, en especial en los países sede de las grandes corporaciones, no ha venido necesariamente acompañada de un nivel equivalente de aplicación práctica de sus contenidos por las empresas[21], ni ha permitido advertir un progreso especialmente significativo en el nivel de respeto de los derechos protegidos. O, en nuestro caso, una mejora particularmente relevante en las condiciones laborales de los trabajadores de las cadenas de valor situados en el sur global[22]. De hecho, la capacidad de la diligencia debida para actuar como un instrumento eficaz de tutela de los derechos humanos en general, y de los de naturaleza laboral en particular, se encuentra hoy en buena medida pendiente de ser demostrada. Existiendo quienes tienen fundadas razones para dudar de ella, al menos en la fase actual de su desarrollo[23].

En estas condiciones, antes que poner en cuestión la aptitud o la pertinencia de la diligencia debida como herramienta para promover el respeto

[20] Para una presentación y análisis de los instrumentos de este tipo, se remite nuevamente a la obra citada en *supra* nota 5, pp. 45-52 y 62-68.

[21] Según observan críticamente Quijano, López Hurtado, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edge Sword?*, en *BHRJ*, 2021, p. 13.

[22] Recientemente, aportado datos que ilustran esta afirmación, Marshall *et al.*, *cit.*, p. 6.

[23] Así, Landau, *Human Rights Due Diligence*, cit., especialmente pp. 148-150, pp. 3-4, específicamente respecto de los derechos laborales. Con carácter general, en la misma dirección, Deva, *cit.*, pp. 398-404.

de los derechos humanos en las actividades empresariales, dado el importantísimo nivel de consenso alcanzado en torno a ella y su indudable maleabilidad, de lo que se trata es de desarrollar una reflexión autónoma sobre las condiciones que deberá reunir su puesta en práctica para alcanzar los objetivos que impulsaron su lanzamiento y justifican su existencia, evitando que esta termine por convertirse, de la mano de desarrollos insuficientes o puestas en práctica deliberadamente vacías, en un mero ejercicio formal de "marcar casillas", sin efectos reales sobre la situación de los derechos humanos[24].

Este es el cometido al que pretenden contribuir las páginas que siguen en relación con los derechos humanos de contenido laboral. Su objetivo es detectar, a la vez, tanto los rasgos diferenciales que asume la diligencia debida cuando debe ser aplicada a la prevención y mitigación de impactos negativos sobre los derechos laborales como las condiciones que debe reunir su regulación o su puesta en práctica por las empresas para estar en condiciones de promover una mejora efectiva del respeto de esos derechos en los procesos productivos de dimensión global, adoptando como punto de partida para este análisis el tratamiento general de la diligencia debida en materia de derechos humanos llevado a cabo por los instrumentos internacionales y en particular por los Principios Rectores de las Naciones Unidas[25].

Esta línea de reflexión guarda coherencia con estudios recientes que se han propuesto ofrecer orientaciones sobre la manera de regular la diligencia debida para impulsar un cambio significativo para los trabajadores de las cadenas de suministro transnacionales[26] o realizar propuestas normativas capaces de dar lugar a una trayectoria alternativa para la misma, que sirva para promover la protección de los trabajadores y ayude a contrarrestar las asimetrías de poder existentes al interior de esas cadenas[27]. El matiz del enfoque adop-

[24] LANDAU, esta vez en *Human Rights due diligence and the risk of cosmetic compliance*, en *MJIL*, 2019, pp. 234-238.Véase también MAK, *Corporate sustainability due diligence: More than ticking the boxes?*, en *MJECL*, 2022, vol. 29, pp. 301-303.

[25] El texto prescinde, en cambio, de cualquier referencia a las normas estatales y comunitarias reguladoras de la materia, incluida la muy reciente Directiva sobre la diligencia debida de las empresas en materia de sostenibilidad, cuyo texto no ha sido aún publicado oficialmente a la fecha de cierre de este estudio, en la medida en que su propósito es situarse en un momento previo al examen de estos instrumentos, como es el de la construcción de herramientas analíticas que sirvan para valorar su aptitud para ofrecer una tutela adecuada de los derechos humanos de contenido laboral, partiendo en todos los casos de la ya apuntada inexistencia dentro de estas normas de un tratamiento específico a esta dimensión.

[26] MARSHALL *et al.*, *cit.*

[27] LANDAU, *Human Rights Due Diligence*, cit.

tado aquí se encuentra en el énfasis que se pondrá en el desarrollo de la noción misma de diligencia debida en materia de derechos humanos laborales y en la amplitud de las propuestas formuladas para su adecuada aplicación, que tratarán de informar tanto su regulación como la praxis de las empresas. Teniendo en cuenta, además, los problemas y necesidades de regulación que conlleva su puesta en práctica en ambos espacios.

3. *Rasgos y requisitos esenciales de la dimensión laboral de la diligencia debida*

La diligencia debida es la herramienta técnica a través de la cual las empresas deben hacer efectivo el cumplimiento de su obligación internacional de respetar los derechos humanos. Partiendo de las fuentes internacionales que la proclaman, y en particular de los Principios Rectores de las Naciones Unidas, esta puede ser caracterizada como un "proceso" que ha de ser puesto en marcha por las empresas con el cuádruple objetivo de "identificar, prevenir, mitigar y responder de las consecuencias negativas de sus actividades sobre los derechos humanos"[28], teniendo en cuenta el "impacto real y potencial" que sobre los mismos haya "provocado o contribuido a provocar a través de sus propias actividades" o el hecho de que ese impacto guarde "relación directa con sus operaciones, productos o servicios prestados por sus relaciones comerciales"[29].

Así entendida, la diligencia debida se distingue de otros procesos de características similares principalmente por su finalidad, que como se ha dejado apuntado no radica en identificar y prevenir riesgos para la propia empresa sino para los titulares de los derechos humanos. De esta identificación de su particular objeto derivan, a su vez, otros dos rasgos singulares de la noción, como son los relacionados con el *carácter continuo* en vez de estático de su puesta en práctica, dirigido a favorecer su adaptación a la naturaleza dinámica

[28] Principio 17.

[29] Nuevamente, Principio 17, reiterando la fórmula contenida en el Principio 13, letra b). Por su parte, de acuerdo con las Directrices de la OCDE para Empresas Multinacionales sobre la Conducta Empresarial Responsable, en su nueva versión lanzada en 2023, "la diligencia debida se define como el proceso mediante el cual las empresas, como parte integrante de sus sistemas de toma de decisiones y de gestión de riesgos, identifican, previenen, mitigan e informan sobre los impactos adversos reales o potenciales de sus actividades", de acuerdo con el Comentario 15 a su Sección II.

de los riesgos que aquí se trata de prevenir[30], y con su *naturaleza participativa*, en tanto que esta requiere, para una adecuada contemplación de los intereses a cuya tutela se encamina, que sean tenidas en cuenta en todas sus fases las opiniones de las personas potencialmente afectadas por las actividades empresariales[31]. No puede dejar de indicarse, en fin, que a partir de estos rasgos no es posible considerar a la diligencia debida como un puro ejercicio de *compliance*, sino como un *estándar de conducta* al que vienen asociados una serie de deberes de cuidado que se espera que las empresas cumplan en relación con sus actividades y relaciones comerciales, para el cual no solo son relevantes los pasos que se sigan sino la aptitud de estos, y del proceso en su conjunto, para prevenir la materialización de impactos negativos sobre los derechos protegidos, que es el resultado que se espera conseguir con su aplicación[32].

Con estos perfiles, es evidente que la noción de diligencia debida no puede ser sino una para todos los derechos humanos cuya protección persigue. Aun así, tampoco parece que pueda ponerse en duda que su aplicación está en condiciones de revestir matices particulares y requerir especiales medidas de garantía en relación con algunos de ellos. Y que estas necesidades pueden dar lugar a modalidades específicas o fórmulas singulares de plasmación de la diligencia debida, cuya individualidad ha de ser desentrañada si se quiere avanzar en la reconstrucción de los alcances del concepto y promover una aplicación adecuada de este.

Este es el caso de los derechos humanos de contenido laboral, cuya peculiar naturaleza y su singular ámbito de aplicación, coincidente con el espacio de los procesos globales de producción, así como su importante grado de vulnerabilidad dentro del espacio de estos, precisan con mayor urgencia que cualesquiera otros de la realización de esta operación reconstructiva, mediante la delimitación de los contornos que deben asignarse a la noción de diligencia debida específicamente referida a ellos y los requerimientos y garantías que esta precisa para desempeñar su misión institucional.

Esta labor se aborda a continuación, distinguiendo al efecto cinco elementos que representan, simultáneamente, elementos o rasgos indispensables de la dimensión laboral de la diligencia debida y presupuestos para su eficacia.

[30] Principio 17, letra c).

[31] Principio 18, letra c) y Principio 20, letra b).

[32] Sobre el particular se remite a *supra* nota 14 y la bibliografía allí referida.

3.1. *Aplicación al conjunto de derechos humanos laborales reconocidos internacionalmente*

El primer elemento definitorio de la identidad de la dimensión laboral de la diligencia debida en materia de derechos humanos se relaciona con su particular alcance o espacio material de aplicación, que afecta de manera particular a aquellos derechos que, ostentando esa condición general, tienen como titulares a los trabajadores asalariados o deben ser ejercidos en el marco o en conexión con una relación de trabajo.

La identificación de la nómina de estos derechos requiere de una labor de acotación normativa a partir de la delimitación general del espacio de aplicación de "la responsabilidad de las empresas de respetar los derechos humanos" llevada a cabo por los Principios Rectores de las Naciones Unidas, de acuerdo con la cual esta responsabilidad "se refiere a los derechos humanos internacionalmente reconocidos, que abarcan, como mínimo, los derechos enunciados en la Carta Internacional de Derechos Humanos y los principios relativos a derechos fundamentales establecidos en la Declaración de la Organización Internacional del Trabajo relativa a los principios y derechos fundamentales en el trabajo"[33]. Esto supone que la aplicación de la diligencia debida se extiende a los derechos reconocidos tanto por la Declaración Universal de Derechos Humanos de 1948 y los Pactos Internacionales de Derechos Civiles y Políticos y de Derechos Económicos y Sociales de 1966, que integran la aludida Carta Internacional, como por los convenios fundamentales de la OIT, que desarrollan el contenido de los derechos a los que su declaración de 1998 asigna esa condición[34], cuyo listado se alarga hasta diez luego de la reforma operada en esta última en 2022[35].

[33] Principio 12. Adicionalmente, el comentario a este principio indica que en algunas circunstancias es posible que las empresas deban tener en cuenta otros instrumentos internacionales, en particular en relación con la protección de las personas pertenecientes a grupos específicos o colectivos especialmente vulnerables. Esta referencia remite a un bloque de tratados que reconocen también derechos humanos laborales. Así ocurre con la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer, la Convención sobre los Derechos del Niño, la Convención Internacional sobre la Protección de los Derechos de Todos los Trabajadores Migratorios y de sus Familiares o la Convención sobre los Derechos de las Personas con Discapacidad.

[34] Como indica expresamente el comentario al Principio 12.

[35] Cuando la Conferencia Internacional del Trabajo aprobó su *Resolución sobre la inclusión*

De la simple lectura de esta declaración puede extraerse un primer bloque de derechos de naturaleza laboral, compuesto por aquellos cinco a los que se confiere la condición de principios o derechos fundamentales en el trabajo, por representar el marco esencial para el desarrollo de los demás derechos presentes en las normas internacionales del trabajo. Estos son los derechos: a) a la libertad sindical y el reconocimiento efectivo del derecho de negociación colectiva, b) a la eliminación de todas las formas de trabajo forzoso u obligatorio, c) a la abolición efectiva del trabajo infantil, d) a la eliminación de la discriminación en materia de empleo y ocupación y e) a un entorno de trabajo seguro y saludable. No está demás indicar, con todo, que estos derechos o principios se encuentran recogidos igualmente en los principales instrumentos internacionales de derechos humanos, por lo que ostentan de forma simultánea la condición de derechos humanos laborales[36].

Este listado inicial expresamente citado por los Principios Rectores no agota, sin embargo, el universo de los derechos laborales sobre los que ha de proyectarse la diligencia debida de las empresas. Antes bien, al mismo debe ser añadido un segundo bloque de derechos que, pese a no estar incluidos en la Declaración de la OIT de 1998, son objeto de reconocimiento por los instrumentos internacionales de derechos humanos.

Los derechos de este segundo bloque no aparecen recogidos de manera dispersa sino agrupados en torno a dos *derechos marco* o de estructura compleja, en tanto que aglutinadores, a su vez, de un conjunto de derechos funcionalmente anudados entre sí[37]. Estos derechos, cuya función es ofrecer una visión articulada del conjunto de prerrogativas, libertades y garantías jurídicas necesarias para asegurar a las personas que trabajan un trato conforme a la dignidad humana, son el "derecho al trabajo" y el derecho "a condiciones equitativas y satisfactorias de trabajo", que aparecen consagrados de manera coincidente por el artículo 23 de la Declaración Universal de los Derechos Humanos y los artículos 6 y 7 del Pacto Internacional de Derechos Económicos, Sociales y Culturales[38].

de un entorno de trabajo seguro y saludable en el marco de la Declaración de la OIT relativa a los principios y derechos fundamentales en el trabajo.

[36] Véase, dentro de los instrumentos universales, los artículos 2, 4, 7, 23 y 24 de la Declaración Universal de Derechos Humanos, 2, 8, 22 y 24 del Pacto Internacional de Derechos Civiles y Políticos y 7, 8 y 10 del Pacto Internacional de Derechos Económicos Sociales y Culturales.

[37] Monereo Pérez, López Insua, *La garantía internacional del derecho a un "trabajo decente"*, en *NREDT*, 2015, n. 177, p. 28 ff.

[38] La importancia de estos dos derechos para la conformación del espacio de aplicación

¿Cuál es el contenido de estos derechos, tan ampliamente formulados?

La técnica utilizada por los instrumentos internacionales para definir su contenido combina una cláusula general con una serie de referencias de carácter singular dirigidas a dar cuenta de sus más importantes manifestaciones[39].

En el caso del derecho al trabajo[40], su reconocimiento viene acompañado de indicaciones que permiten entender incluidos en su contenido los derechos "a la libre elección" del mismo, de acuerdo con la Declaración de 1948, y "a tener la oportunidad de ganarse la vida mediante un trabajo libremente escogido o aceptado", conforme al Pacto de 1966. Más amplio es el desarrollo del derecho "a condiciones equitativas y satisfactorias de trabajo"[41], que comprende, de acuerdo con su versión más avanzada, contenida en el segundo de los referidos instrumentos, los siguientes cuatro derechos, cada uno con un contenido singular: a) "a una remuneración que proporcione como mínimo" un "salario equitativo e igual por trabajo de igual valor" y unas "condiciones de existencia dignas" para los trabajadores "y para sus familias", b) a "la seguridad y la higiene en el trabajo", c) a la igualdad de oportunidades para la promoción profesional y d) "al descanso", "la limitación razonable de las horas de trabajo", las "vacaciones periódicas pagadas" y "la remuneración de los días festivos"[42].

El alcance sustantivo de los derechos humanos de contenido laboral resulta, de este modo, no solo deliberadamente amplio sino tendencialmente omnicomprensivo por lo que a los espacios de protección se refiere[43]. En efecto, dentro de él no solo se incluyen aquellos derechos que, como se ha dicho, constituyen presupuestos para el ejercicio de los demás, sino también

de la diligencia debida es destacada especialmente por Bueno, *Multinational enterprises and labour*, cit., pp. 423-424.

[39] Monereo Pérez, López Insua, *cit.*, p. 36.

[40] O del "derecho a trabajar", en el caso del Pacto de 1966.

[41] O "al goce de condiciones de trabajo equitativas y satisfactorias", según se trate de uno u otro instrumento.

[42] Conforme al texto del artículo 7 del Pacto Internacional de Derechos Económicos, Sociales y Culturales, que desarrolla y amplia los contenidos inicialmente postulados para este derecho por la Declaración Universal. Para un análisis de la configuración jurídica y el contenido de este derecho, véase Bueno, *Corporate liability for violations of the human right to just conditions of work in extraterritorial operations*, en *IJHR,* 2017, n. 21, especialmente pp. 5-8. Texto disponible en: http://eprints.lse.ac.uk/75781/1/Bueno_Corporate%20liability_2017.pdf.

[43] Así, tempranamente, Trebilcock, *Due diligence on labour issues*, cit., p. 100.

los que ofrecen una cobertura protectora a los principales elementos del desarrollo de la relación laboral, en particular a través del derecho a condiciones equitativas y satisfactorias de trabajo. Un derecho dentro del cual se incluyen las principales dimensiones del tratamiento de las condiciones de trabajo, como el salario, el tiempo de trabajo o las condiciones de seguridad y salud, que con más facilitad son susceptibles de ser utilizados como fuente de ventajas competitivas, tanto por los Estados como por las empresas[44]. Esto permite atribuir a este derecho, y por su intermedio a los derechos humanos laborales en general, una función limitadora de las prácticas de *dumping social*, de gran relevancia dentro del actual escenario de exacerbada competencia global que constituye el caldo de cultivo para la materialización de toda clase de vulneraciones de los derechos de los trabajadores[45].

Visto el amplio espectro de derechos cubiertos y su capacidad para abarcar de forma holística los más relevantes espacios y elementos de desarrollo de las relaciones laborales, tanto a nivel individual como colectivo, así como los presupuestos para su existencia en condiciones de libertad e igualdad, no puede sino coincidirse con la opinión de quienes entienden que el marco aportado por los Principios Rectores demanda de las empresas un ejercicio de la diligencia debida extenso y profundo[46], que está en condiciones de poner en cuestión muchas de las prácticas sobre las que se asienta el modelo de negocio imperante en numerosos sectores de la economía global, basado en una fuerte presión a la baja sobre las condiciones laborales de los trabajadores situados en destinos remotos.

Las normas reguladoras de la diligencia debida y las políticas y prácticas de ejecución de la misma desarrolladas por las empresas deberán, pues, partir de este enfoque inclusivo y global en cuanto a la cobertura de los derechos humanos de los trabajadores[47]. Sin que estas puedan ya, como ocurría en el pasado, llevar a cabo una elección "a la carta" de los derechos protegidos[48].

[44] Esta idea ha sido formulada originalmente por CORREA CARRASCO, *Acuerdos marco internacionales. De la responsabilidad social empresarial a la autonomía colectiva transnacional*, Tirant lo Blanch, Valencia, 2016. p. 65, en relación a la necesidad de que estas materias sean abordadas por los acuerdos marco internacionales.

[45] Nuevamente, CORREA CARRASCO, *cit.*, con referencia al papel que podrían cumplir los acuerdos referidos en la nota anterior de incluir esa clase de contenidos.

[46] TREBILCOCK, *Due diligence on labour issues*, cit., p. 100.

[47] Conforme remarcan MARSHALL *et al.*, *cit.*, p. 16.

[48] Como denunciaría en su día DAUGAREILH, *Responsabilidad social de las empresas transnacionales: análisis crítico y prospectiva jurídica*, en *CRL*, 2009, n. 27, p. 91.

La necesidad de delimitación del espacio material de aplicación de la diligencia debida no se agota, con todo, con la identificación del elenco de derechos cubiertos. Una vez realizada esta es preciso llevar a cabo un ejercicio paralelo de delimitación del contenido internacionalmente garantizado por cada uno de ellos. Es decir, proceder a una reconstrucción del *estándar internacional de protección* respecto del cual la misma deberá ser ejercida. Este es un ejercicio de delimitación bastante más delicado y complejo, que tampoco puede ser dejado exclusivamente en manos de las empresas[49].

La realización de esta ulterior operación plantea obstáculos notables, en especial debido al carácter genérico, y por tanto impreciso, de las normas sobre derechos humanos, que suelen dejar numerosos cabos sueltos y cuestiones sin resolver, y a su diseño centrado en el Estado antes que directamente en los actores no estatales[50], con todos los problemas de trasposición de un espacio a otro de sus mandatos que esta diferente orientación plantea.

De todas formas, estas dificultades están en condiciones de ser afrontadas con mayor solvencia y menor grado de incertidumbre que en otros ámbitos en el terreno de los derechos humanos laborales. Esto se debe a que todos estos derechos son objeto de una regulación más detenida, que marca un estándar mínimo de protección, por los convenios internacionales del trabajo emanados del sistema normativo de la OIT.

Esto significa que los cinco derechos fundamentales en el trabajo proclamados por esta organización tienen en los convenios fundamentales que los desarrollan una herramienta principalísima para la determinación de su contenido protegido. Pero también que para la delimitación de los contornos de los derechos al trabajo y a condiciones equitativas y satisfactorias de trabajo, así como de los derechos que dentro de estos se enmarcan, habrá que tener necesariamente en cuenta la regulación contenida en los correspondientes convenios internacionales sobre, entre otras materias, salarios mínimos e igualdad salarial, tiempo de trabajo y descansos e incluso protección frente al despido, como se verá inmediatamente, pese a ser todos ellos convenios técnicos y no convenios fundamentales[51]. Es más, tampoco parece que pueda

[49] Este es un riesgo sobre el que advierte especialmente DEVA, *cit.*, p. 398.

[50] Otra vez DEVA, *cit.*, respecto de esta última característica.

[51] De hecho, la Observación General núm. 23 del Comité de Derechos Económicos, Sociales y Culturales, de la que se hablará inmediatamente, luego de indicar en su apartado 1 que "muchos convenios de la OIT se refieren directa e indirectamente a las condiciones de trabajo equitativas y satisfactorias", identifica como "importantes" a los efectos de la determi-

prescindirse del empleo, cuando sea necesario, de las decisiones de los órganos de control de la aplicación de estos instrumentos existentes dentro del sistema de la OIT. Las decisiones de la Comisión de Expertos en la Aplicación de Convenios y Recomendaciones, con carácter general, y las del Comité de Libertad Sindical, en relación con los derechos colectivos. Por más que ambas vengan referidas al contenido de las obligaciones de los Estados antes que de los particulares.

Asimismo, en relación con los derechos al trabajo y a condiciones de trabajo equitativas y satisfactorias, resulta de particular importancia tener en cuenta la Observación General núm. 18[52] y la Observación General núm. 23[53] del Comité de Derechos Económicos, Sociales y Culturales del Consejo Económico y Social de las Naciones Unidas, dedicadas a cada uno de ellos, ya que contienen precisiones de la mayor importancia para la adecuada interpretación de sus alcances. Así, por citar la que seguramente constituya la de mayor relieve, es importante destacar que, de acuerdo con la primera, deben entenderse comprendidos dentro del derecho al trabajo, dada su finalidad, también los derechos "a decidir libremente aceptar o elegir trabajo", "a no ser obligado de alguna manera a ejercer o efectuar un trabajo", al "acceso a un sistema de protección que garantice al trabajador su acceso al em-

nación de su contenido los siguientes veintidós: "Convenio sobre las Horas de Trabajo (Industria), 1919 (núm. 1); Convenio sobre el Descanso Semanal (Industria), 1921 (núm. 14); Convenio sobre los Métodos para la Fijación de Salarios Mínimos, 1928 (núm. 26); Convenio sobre las Horas de Trabajo (Comercio y Oficinas), 1930 (núm. 30); Convenio sobre las Cuarenta Horas, 1935 (núm. 47); Convenio sobre la Protección del Salario, 1949 (núm. 95); Convenio sobre los Métodos para la Fijación de Salarios Mínimos (Agricultura), 1951 (núm. 99); Convenio sobre Igualdad de Remuneración, 1951 (núm. 100); Convenio sobre el Descanso Semanal (Comercio y Oficinas), 1957 (núm. 106); Convenio sobre la Discriminación (Empleo y Ocupación), 1958 (núm. 111); Convenio sobre la Fijación de Salarios Mínimos, 1970 (núm. 131); Convenio sobre las Vacaciones Pagadas (Revisado), 1970 (núm. 132); Convenio sobre la Edad Mínima, 1973 (núm. 138); Convenio sobre Duración del Trabajo y Períodos de Descanso (Transportes por Carretera), 1979 (núm. 153); Convenio sobre Seguridad y Salud de los Trabajadores, 1981 (núm. 155); Protocolo de 2002 del Convenio sobre Seguridad y Salud de los Trabajadores, 1981 (núm. 155); Convenio sobre los Trabajadores con Responsabilidades Familiares, 1981 (núm. 156); Convenio sobre el Trabajo Nocturno, 1990 (núm. 171); Convenio sobre el Trabajo a Tiempo Parcial, 1994 (núm. 175); Convenio sobre la Protección de la Maternidad, 2000 (núm. 183); Convenio sobre el Marco Promocional para la Seguridad y Salud en el Trabajo, 2006 (núm. 187); y Convenio sobre las Trabajadoras y los Trabajadores Domésticos, 2011 (núm. 189)".

[52] Documento E/C.12/GC/18.

[53] Documento E/C.12/GC/23.

pleo" y "a no ser privado injustamente de empleo"[54]. Una indicación, esta última, que conecta con el Convenio núm. 158 de la OIT sobre la terminación de la relación de trabajo, que impone "la necesidad de ofrecer motivos válidos para el despido, así como el derecho a recursos jurídicos y de otro tipo en caso de despido improcedente", según se indica en el propio instrumento[55].

La traducción de los mandatos contenidos en las normas internacionales que han sido citadas en obligaciones para las empresas susceptibles de ser integradas dentro de sus instrumentos y políticas de diligencia debida puede plantear especiales dificultades tratándose de Estados que no han ratificado los convenios de la OIT que regulan los correspondientes derechos, los recogen en su legislación de forma incompleta o deficiente o no prevén mecanismos adecuados para su aplicación. Este puede ser el caso, por ejemplo, de los Estados Unidos, China, India o Brasil, que no han ratificado el Convenio núm. 87 sobre la libertad sindical y el derecho de sindicación y plantean problemas de diversa intensidad en cuanto a la garantía de este derecho. O de un número más amplio de países que, no habiendo hecho lo propio con el Convenio núm. 158, carecen de normas que protejan a los trabajadores frente a los despidos arbitrarios[56].

En casos como estos debe tenerse presente que, como indican los Principios Rectores, "la responsabilidad de respetar los derechos humanos constituye una norma de conducta mundial" que "existe con independencia de la capacidad y/o voluntad de los Estados de cumplir sus propias obligaciones"[57]. En consecuencia, conforme apostillan las Directrices de la OCDE,

[54] Párrafo 6.

[55] Párrafo 11.

[56] Véase, destacando el problema en relación con estos dos derechos, BUENO, *Informe individual*, en SANGUINETI RAYMOND (Coord.), *Documentos de Trabajo del Grupo de investigación sobre Comercio Internacional y Trabajo*, Salamanca, 2021. Texto disponible en: https://proyectotranslab.usal.es/wp-content/uploads/sites/83/2021/02/2020-Informe-consolidado-del-Grupo-de-Investigaci%C3%B3n-sobre-Comercio-internacional-y-trabajo.pdf.

[57] Comentario al Principio 11. En la misma dirección, la Observación General núm. 24 del Comité de Derechos Económicos, Sociales y Culturales del Consejo Económico y Social de las Naciones Unidas sobre las obligaciones asumidas por los Estados en virtud del Pacto Internacional de Derechos Económicos, Sociales y Culturales en el contexto de las actividades empresariales, señala en su apartado 5 que "de conformidad con las normas internacionales", las empresas deben respetar los derechos enunciados en ese instrumento "independientemente de si existe legislación interna y si esta se aplica plenamente en la práctica".

"el hecho de que un Estado no aplique su legislación nacional pertinente o no cumpla sus obligaciones internacionales en materia de derechos humanos", "no afecta a la responsabilidad de las empresas de respetar" estos derechos. Debiendo estas, "en los Estados en que las leyes y normas nacionales sean contrarias a los derechos humanos reconocidos internacionalmente" buscar la manera "de cumplirlos en la mayor medida posible"[58]. La dificultad radica en determinar cuáles han de ser las medidas que las empresas deberán adoptar para llevar a cabo esta clase de cumplimiento. Correspondiendo en principio la decisión a estas últimas, al no aportar estos instrumentos, ni ningún otro, precisión adicional alguna sobre el particular, como sería deseable. De hecho, la construcción de herramientas que sirvan de orientación para el afrontamiento de esta clase de dificultades, mejor si adaptadas a la singular realidad de cada derecho, constituye uno de los grandes desafíos de futuro de la diligencia debida en materia de derechos humanos laborales.

Es importante indicar también que, al lado de las declaraciones y tratados internacionales, existen otros instrumentos, como las propias Directrices de la OCDE o la Declaración Tripartita de la OIT sobre las Empresas Multinacionales y la Política Social, que contienen recomendaciones dirigidas a este tipo de empresas sobre el contenido de sus obligaciones internacionales en materia laboral, bien que en lo fundamental aplicables a sus propias actividades y no a las de sus socios y colaboradores externos[59]. Orientaciones de interés se encuentran, asimismo, en otras herramientas, construidas con el fin de servir de guía para la aplicación de la diligencia debida en relación con determinados derechos laborales particularmente conflictivos o para sectores de especial riesgo. Este es el caso de la Herramienta de Orientación de la OIT y la OIE sobre el Trabajo Infantil Destinada a las Empresas y la Guía de la OCDE de Debida Diligencia para Cadenas de Suministro Responsables en el Sector Textil y del Calzado, aunque en ambos casos su atención se centra más en las políticas y medidas de diligencia debida a aplicar que en la determinación del estándar internacional de protección, que en buena medida se da por supuesto. Con lo cual la cuestión continúa en gran parte abierta y pendiente de posteriores desarrollos y clarificaciones.

[58] Capítulo IV, comentario 43, del que se extrae la cita, y Capítulo I, comentario 2.

[59] La importancia de estos dos instrumentos es destacada espacialmente por BUENO, *Multinational enterprises and labour*, cit., pp. 435-427, quien lleva a cabo una presentación de sus principales contenidos, a la que se remite.

3.2. *Proyección hacia las cadenas de valor de las empresas de dimensión global y trazabilidad y transparencia de estas*

El segundo rasgo distintivo de la diligencia debida en materia de derechos humanos laborales guarda relación con la delimitación del particular bloque de empresas respecto de las cuales, pese al alcance tendencialmente universal de la noción, adquiere especial relevancia su aplicación debido a la naturaleza de los derechos protegidos y los espacios dentro de los que estos pueden verse afectados. Esta es una delimitación que afecta tanto a las empresas a las que corresponde la puesta en marcha de los procesos de diligencia debida como a aquellas sobre las cuales estos han de ser proyectados, como se verá a continuación.

Por lo que respecta a las primeras, los Principios Rectores de las Naciones Unidas adoptan el más amplio punto de partida posible al indicar que "la responsabilidad de las empresas de respetar los derechos humanos se aplica a todas las empresas, independientemente de su tamaño, sector, contexto operacional, propietario y estructura"[60]. Esta visión extensiva se apoya en una constatación elemental: también "algunas empresas medianas y pequeñas", y no solo las grandes o muy grandes, "pueden provocar graves consecuencias negativas sobre los derechos humanos, que requerirán la adopción de las correspondientes medidas"[61]. Lo determinante para la existencia de esta responsabilidad no es, en consecuencia, la dimensión de la empresa o la escala de sus actividades, sino el riesgo que estas últimas pueden suponer para los derechos humanos[62]. De ahí la importancia, puesta de relieve por numerosos autores, de que los instrumentos reguladores de la diligencia debida incluyan dentro de su ámbito de aplicación a todas las empresas, incluidas las medianas y las pequeñas[63]. Por más que, como matizan inmediatamente después los propios Principios Rectores, "la magnitud y la complejidad de los medios

[60] Principio 14.

[61] Comentario al Principio 14.

[62] Como indicant Boyd, Keene, *Essential elements of effective and equitable human rights and environmental due diligence legislation*, United Nations Human Rights Special Procedures, Policy Brief n. 3, 2022, p. 21.

[63] Además de la opinión de los autores citados en la nota anterior, véase Landau, *Human Rights Due Diligence and Labour Governance*, cit., pp. 150-151; Marshall *et al.*, *cit.*, p. 16; Wilde-Ramisng, Vanpeperstraete, Hachfeld, *Legislating Human Rights Due Diligence. Respecting Rights or Ticking Boxes?*, Clean Clothes Campaign-ECCHR-Public Eye-SOMO, 2022, p. 22.

dispuestos" por las mismas "para asumir esa responsabilidad" puedan variar en función de "su tamaño, sector, contexto operacional, propietario y estructura", así como de "la gravedad de las consecuencias negativas de las actividades de las empresa sobre los derechos humanos"[64].

Ahora bien, sentado el alcance omnicomprensivo del estándar de diligencia debida, tampoco parece que pueda ponerse duda que, al menos por lo que a los derechos humanos laborales se refiere, su auténtico valor e importancia radican en su aptitud para encauzar la actuación de las grandes corporaciones, y muy en especial de las de dimensión transnacional o global, hacia la puesta en práctica de políticas y medidas dirigidas a evitar la materialización de impactos negativos sobre los mismos.

Esta especial orientación de la dimensión laboral de la diligencia debida hacia ese tipo de empresas responde a un doble orden de razones. Estas se vinculan, antes de nada, con la constatación de que son estas empresas las que están en condiciones de generar riesgos de mayor magnitud sobre los derechos de los trabajadores o verse envueltas en vulneraciones graves de los mismos con ocasión de sus actividades, debido a la singular fórmula de organización de sus procesos productivos, fragmentada aunque a la vez funcionalmente sometida a su autoridad, que multiplica la probabilidad de que esas situaciones puedan tener lugar. A la vez, tampoco debe perderse de vista que es en relación con esta clase de procesos productivos, sometidos al liderazgo de ese singular tipo de empresas, y respecto de los derechos de las personas que prestan sus servicios a su interior, que adquiere sentido la proyección de las políticas y medidas de diligencia debida más allá de las actividades realizadas por la propia empresa, hacia sus socios comerciales y las entidades integradas en sus cadenas de valor, de la que se tratará a continuación. De hecho, el objetivo de hacer posible el control de los potenciales impactos negativos sobre los derechos humanos de las actividades de las corporaciones de dimensión global constituyó en su día el motivo que inspiró el lanzamiento de los Principios Rectores, siendo el diseño del proceso de diligencia debida presente en estos uno concebido de manera particular

[64] Nuevamente, Principio 14, cuyo comentario remarca la idea de que "los medios a los que recurra una empresa para asumir la responsabilidad de respetar los derechos humanos serán proporcionales, entre otros factores, a su tamaño" e indica a continuación que "las pequeñas y medianas empresas pueden disponer de menor capacidad, así como de procedimientos y estructuras de gestión más informales que las grandes empresas, de modo que sus respectivos procesos y políticas adoptarán formas diferentes".

para ser aplicado a las actividades de empresas multinacionales en todo el mundo[65], como una nueva manera de abordar la cuestión luego de varios intentos fallidos de hacerle frente recurriendo a herramientas de mayor voltaje regulador.

En consecuencia, sin perjuicio de prever su proyección hacia toda clase de empresas, los instrumentos reguladores de la diligencia debida deberán llevar a cabo un tratamiento de los procesos en los que esta ha de concretarse que subraye la especial vinculación de las grandes corporaciones y las empresas titulares de actividades de proyección transnacional y sancione su obligación de construir procesos de desarrollo de la misma que contribuyan de manera eficaz a la prevención y mitigación de cualquier impacto negativo sobre los derechos humanos, con énfasis especial en los de contenido laboral, introduciendo reglas claras y operativas sobre los requisitos que estos procesos habrán de cumplir para estar en condiciones de alcanzar ese objetivo[66]. Debiendo, a su vez, este tipo de empresas prestar una especial atención al respeto de los derechos de esta última clase en el diseño y la aplicación de sus políticas y procesos de diligencia debida.

Una vez puesta de relieve las singularidades del ámbito subjetivo de aplicación *horizontal* de la diligencia debida en materia de derechos humanos laborales, es importante prestar atención a la identificación de su proyección *vertical*[67]. Es decir, a la determinación de los sujetos, normalmente empresas pero potencialmente también otras personas, como pueden ser por ejemplo los trabajadores autónomos, sobre los cuales la misma ha de ser aplicada.

Nuevamente aquí el estándar internacional introducido por los Principios Rectores resulta particularmente amplio. De acuerdo con estos, la responsabilidad de las empresas de respetar los derechos humanos no solo exige que estas "eviten que sus propias actividades provoquen o contribuyan a pro-

[65] Como apunta DEVA, *cit.*, pp. 400-401, citando en apoyo de este punto de vista el criterio de autoridad del diseñador de los Principios Rectores, John Ruggie y destacando que el Pilar II de estos 'se basa principalmente en las experiencias de las empresas multinacionales y sus expectativas de gestión de las cadenas de valor' a ellas vinculadas.

[66] A lo que se opone la doctrina es a la pretensión de limitar la aplicación de la diligencia debida exclusivamente a este tipo de empresas, excluyendo a las de menor dimensión o alcance, pese a la posibilidad de que puedan materializar atentados, incluso de gran envergadura, sobre los derechos protegidos. Pueden verse en este sentido las opiniones de los autores citados en *supra* notas 63 y 64. Esta observación no se encuentra reñida, sin embargo, con la puesta del acento en la responsabilidad de las grandes empresas.

[67] Como la denomina BUENO, *Multinational enterprises and labour*, cit., p. 436.

vocar consecuencias negativas" sobre estos derechos, sino también que "traten de prevenir o mitigar" aquellas "directamente relacionadas con operaciones, productos o servicios prestados por sus *relaciones comerciales*, incluso cuando no hayan contribuido a generarlos"[68]. Debiéndose entender que estas últimas "abarcan las relaciones con socios comerciales, entidades de su *cadena de valor* y cualquier otra entidad no estatal o estatal directamente relacionada con sus operaciones comerciales, productos o servicios"[69].

La proyección de la diligencia debida no se detiene, así pues, en las actividades desarrolladas por la propia empresa, ni aun en las actividades de las empresas que integran el grupo de sociedades que pueda estar sometido a su control, sino que se proyecta hacia todas las entidades que, manteniendo o no una relación comercial directa con ella, se encuentren vinculadas a sus operaciones, productos o servicios o formen parte de su cadena de valor. Particularmente significativa resulta aquí la alusión a las operaciones, productos y servicios de las empresas como marco de referencia para la identificación del espacio de las relaciones comerciales incluidas. Y, sobre todo, el uso de la noción de "cadena de valor", en lugar de las de "cadena de producción" y "cadena de suministro", como marco de referencia de los procesos y actividades cubiertos, ya que esta permite entender comprendidos no solo los necesarios para la producción de los bienes o la prestación de los servicios de los que se trate, sino también el suministro de los insumos requeridos por estos, así como las tareas necesarias para que lleguen al consumidor, incluidas las relacionadas con su comercialización y distribución[70]. Aunque, inmediatamente después, los propios Principios Rectores se encargarán nuevamente de aclarar que las medidas a adoptar por las empresas "variarán" dependiendo de si se trata de consecuencias negativas sobre los derechos humanos que la empresa "provoque o contribuya a provocar" o "su implicación se reduzca" a la sola existencia de "una relación directa de esas consecuencias con las operaciones, productos o servicios prestados por una relación comercial"[71].

La importancia de este amplio diseño del espacio de proyección de la diligencia debida, bien que con adecuación de su contenido a la singularidad

[68] Principio 13. La cursiva es mía.

[69] Comentario al Principio 13, ídem.

[70] Se remite nuevamente aquí a lo apuntado en la obra citada en *supra* nota 5, especialmente pp. 122-123.

[71] Principio 19, apartado b).

de la relación existente en cada caso, no puede ser puesta en duda por lo que a la aplicación de su dimensión laboral se refiere. Como es de sobra conocido, aunque pueda haber excepciones, especialmente en lo relativo al respeto de los derechos colectivos, las vulneraciones de los derechos laborales no suelen tener en las actividades de la empresa líder, ni tampoco en las de aquellas controladas corporativamente por esta, su espacio principal de materialización. Antes bien, el ámbito en el que se multiplica el riesgo de que estas vulneraciones se produzcan es el de los socios comerciales y las entidades que forman parte de las cadenas de valor de las primeras. Es aquí donde la organización transnacional de la producción en red, los modelos de negocios basados en la competencia descarnada entre las empresas, el aprovechamiento de las diferencias de tutela entre las distintas localizaciones y el ajuste a la baja de los costes laborales crean un caldo de cultivo especialmente propicio para la materialización de toda clase de vulneraciones de los derechos laborales. De ahí la importancia de que los Principios Rectores proyecten la aplicación de la diligencia debida hacia todos los socios comerciales y la entera cadena de valor de las empresas, con el fin de transformar estas últimas, simultáneamente, en *cadenas de control* o *cadenas de garantía* del respeto de los derechos humanos[72]. Y muy en especial de los derechos de los trabajadores, que son los que en más riesgo se encuentran en estos casos.

La cadena de valor y las relaciones comerciales de las grandes corporaciones y las empresas de dimensión global representan, de tal forma, el espacio más relevante e incluso nuclear de proyección de la dimensión laboral de la diligencia debida. Aquel en el que esta revela toda su utilidad y justifica de manera plena su razón de ser.

La puesta en práctica de la diligencia debida en este espacio constituye, sin embargo, una tarea extremadamente compleja. A diferencia de lo que ocurre con los grupos de empresas, las cadenas de valor no son entidades estáticas de contornos definidos, sino estructuras variables, dinámicas y evolutivas[73], que se generan a través de acuerdos comerciales de diversa naturaleza, entidad y duración entre sus componentes, los cuales pueden articularse a

[72] El desarrollo de esta tesis en mi estudio *Las cadenas mundiales de producción y la construcción de un Derecho del Trabajo sin fronteras*, en AEDTSS, *El futuro del trabajo: cien años de la OIT. XXIX Congreso Anual de la Asociación Española de Derecho del Trabajo y de la Seguridad Social*, Ministerio de Trabajo, Madrid, 2019, especialmente p. 43.

[73] Como indica la OIT, en su informe *El trabajo decente en las cadenas mundiales de suministro*, Ginebra, 2016, p. 1.

diferentes niveles, sin que estos sean necesariamente conocidos por quienes se sitúan en los superiores o la entidad ubicada en el vértice, pudendo llegar a implicar a decenas, centenares o miles de sujetos empresariales, los cuales pueden, a su vez, tener a su servicio un número de trabajadores que puede llegar en algunos casos a sumar varios millones[74].

La consideración de este carácter fluido, o incluso "líquido", de las cadenas de valor[75] puede conducir con gran facilidad, tanto a las instancias reguladoras como a las empresas, a tratar de limitar la aplicación de los procesos de diligencia debida a los espacios más "visibles" o "controlables" de las mismas, representados por las empresas situadas en su primer eslabón o, en todo caso, por aquellas que mantienen una relación comercial establecida con la empresa principal, bien de forma directa o bien con un intermediario de por medio[76]. Esta no es, por supuesto, una opción desdeñable. No obstante, pasa por alto que muchas vulneraciones, y especialmente las de particular gravedad, pueden producirse en los sucesivos eslabones de esas cadenas. Y además teniendo como protagonistas a entidades que no mantienen vínculos de una cierta permanencia o duración con la empresa principal o sus contratistas o proveedores directos. De hecho, la experiencia demuestra que, aunque pueden producirse violaciones en el primer nivel y por parte de socios permanentes, en particular en lo que se refiere a los derechos a un salario adecuado, a la limitación del tiempo de trabajo, a la protección de la seguridad y la salud o a la libertad sindical, las mismas están en condiciones de agravarse conforme se desciende hacia los niveles inferiores, hasta llegar, en casos extremos, a situaciones de trabajo informal o clandestino o de explo-

[74] Sirvan como ejemplo las dimensiones de la cadena de producción (en la que no se incluyen las actividades relacionadas con la provisión de insumos y la comercialización) de Inditex, que según los datos ofrecidos por su memoria anual correspondiente al año 2021, está integrada por 1.790 proveedores, los cuales cuentan con 8.756 fábricas situadas en diversas localizaciones, en la que se da empleo a 3.098.854 de trabajadores. Muchísimo más grande aún es, por ejemplo, la cadena de suministro de Nestlé, en la que se integran nada menos que 165.000 proveedores y 695.000 agricultores, de acuerdo con la información recopilada por DEVA, *cit.*, p. 402.

[75] Dicho con palabras de BRINO, *Diritto del lavoro e catene globali del valore. La regolazione dei rapporti di lavoro tra globalizzazione e localismo*, Giappichelli, Torino, 2020, p. 1.

[76] Una presentación de estas opciones, que aparecen recogidas con diversas variantes en los primeros instrumentos reguladores de la diligencia debida, como la Ley francesa sobre el deber de vigilancia, la Ley alemana sobre la diligencia debida de las empresas en las cadenas de suministro o la Propuesta de Directiva de la Unión Europea sobre diligencia debida de las empresas en materia de sostenibilidad, en la obra citada en *supra* nota 5, pp. 124-129.

tación laboral infantil y trabajo forzoso, especialmente de los inmigrantes. Sin que estas situaciones tengan por qué ser conocidas o permitidas por la empresa que se sitúa al frente de la cadena, que puede incluso tenerlas expresamente prohibidas[77].

A la vista de esta situación, resulta de particular importancia que los procesos de diligencia debida se extiendan más allá del primer nivel de contratación[78] y las relaciones comerciales establecidas, hacia los demás niveles, sin ningún límite, así como a todas las relaciones comerciales, incluyendo las intermitentes y las esporádicas[79]. Es decir, abarcando igualmente, como se ha propuesto, a los proveedores informales y a la subcontratación fluctuante, de corto plazo y a domicilio, muy frecuentes en los niveles inferiores, donde los derechos humanos, como acabamos de ver, pueden verse más severamente afectados[80].

La extrema dificultad de esta tarea no es óbice para su exigencia. Nos encontramos ante un riesgo derivado de la estructuración de las actividades de las grandes empresas, del que no parece que puedan desentenderse alegando la imposibilidad de cumplir con el estándar internacional debido a la conformación que ellas mismas han decidido dar a su modelo de negocio. Antes bien, el planteamiento debe ser el inverso. Es decir, a la hora de emprender o estructurar cualquier actividad que requiera la participación de empresas colaboradoras, socios comerciales y proveedores, las grandes corporaciones deberán asegurarse de que esta posee una escala adecuada para llevar a cabo procesos de diligencia debida proporcionales a los riesgos que pueda generar para los derechos humanos. Y, por supuesto, de que poseen los recursos necesarios para llevarla a cabo[81]. El hecho de que con anterioridad las cosas funcionasen de otro modo, no existiendo límite alguno a la

[77] Véase, con más amplitud, mi estudio *Las cadenas mundiales de producción y la construcción de un Derecho del Trabajo sin fronteras*, en AEDTSS, *cit.*, pp. 34-35.

[78] Conforme señalan expresamente las Directrices de la OCDE para Empresas Multinacionales sobre la Conducta Empresarial Responsable en el comentario n. 17 a su parte II.

[79] Como indica LANDAU, *Human Rights Due Diligence*, cit., pp. 150-151, 'limitar la obligación de realizar la diligencia debida en materia de derechos humanos a las relaciones comerciales establecidas elimina la necesidad de que las empresas consideren cómo sus actos u omisiones y sus prácticas de compra pueden afectar a los trabajadores a lo largo de sus cadenas de suministro', pese a que 'estos niveles más distantes encarnan los riesgos e impactos más graves'.

[80] Así, de forma coincidente, MARSHALL *et al.*, *cit.*, p. 28; WILS, SWAN, *Engament, remedy & justice. Priorities for the Corporate Sustainability Due Diligence Directive from workers in the Global South*, en *Business & Human Rights Resource Centre*, 2023, pp. 4 y 7.

[81] WILDE-RAMISNG, VANPEPERSTRAETE, HACHFELD, *cit.*, p. 22.

fragmentación productiva y la elusión de responsabilidades no constituye, de este modo, un motivo de exceptuación de la obligación internacional de las empresas de respetar los derechos humanos mediante procesos adecuados de diligencia debida. Antes bien, el cumplimiento de estas obligaciones debería conducir incluso, cuando ello resulte necesario, a un replanteamiento de la configuración de sus cadenas de valor, con el fin de reconducirlas a parámetros compatibles con la puesta en marcha de los mismos.

Lo que ocurre es que, como se ha apuntado, muchas empresas tienen una visibilidad limitada de sus cadenas de suministro globales[82]. O incluso, dicho de manera más directa, no conocen cuál es su configuración más allá del primer nivel[83]. El primer paso para la puesta en marcha de cualquier proceso de diligencia debida capaz de ofrecer un mínimo de garantía frente a potenciales impactos negativos sobre los derechos humanos laborales es, por ello, la realización por las grandes empresas de un *mapeo o inventario* de sus cadenas de valor[84]. Sin este conocimiento de las entidades que las integran, cualquier ejercicio de la diligencia debida será, por hipótesis, insuficiente e ineficaz. Las empresas deberán, pues, asegurarse de la *trazabilidad* de sus actividades y los procesos productivos de los bienes y servicios que constituyen su objeto o llevan sus marcas[85], como paso previo para la puesta en práctica de la diligencia debida en materia de derechos humanos laborales.

Es más, no parece que esta sea una información que deba permanecer solo en manos de la empresa, completamente al abrigo del escrutinio de terceros y en especial de las partes interesadas. En nuestro caso, los trabajadores titulares de los derechos protegidos y sus representantes. Por el contrario, resulta indispensable garantizar la *transparencia* de la información relativa al conjunto de socios comerciales, entidades y sujetos integrados dentro de las cadenas de valor, a los efectos de que esos representantes estén en condiciones de conocer cuál o cuáles son las empresas o marcas para las que producen las empresas a las que prestan servicios sus representados y cuáles son los restantes actores de las cadenas de valor de esas empresas y marcas, tanto hacia arriba como hacia abajo[86].

[82] SHERMAN, *Integrating Human Rights Due Diligence Into Model Supply Chain Contracts*, Working Paper of Corporate Responsibility Iniciative, n. 80, p. 21.

[83] Como indicaría GARRIDO SOTOMAYOR, Coordinador General del Acuerdo Marco Global de Inditex, en una entrevista mantenida con ocasión de la preparación de este estudio.

[84] WILS Y SWAN, *cit.*, p. 4.

[85] MARSHALL *et al.*, *cit.*, pp. 17-18.

[86] Coinciden en destacar esta necesidad, MARSHALL *et al.*, *cit.*; WILS, SWAN, *cit.*, p. 8; OUTH-

La transmisión de esta información sobre la composición de las cadenas de valor, que debería constituir un derecho de los representantes de los trabajadores de todos los niveles de las mismas, como se indicará más adelante[87], resulta de crucial importancia para que estos puedan llevar a cabo una supervisión adecuada de la efectividad de los procedimientos de diligencia debida y sean capaces de poner en conocimiento de las empresas que los realizan las vulneraciones de los derechos laborales producidas en sus distintos nodos y niveles, así como, en su caso, presentar reclamaciones frente a ellas. Lo mismo que para poner en marcha procesos de control sistemático de los centros de trabajo y llevar a cabo campañas contra las violaciones recurrentes o especialmente graves[88]. Nada de esto resulta posible si los representantes de los trabajadores no saben para quién producen las empresas para las que estos trabajan. De ahí que se haya afirmado que la organización de los trabajadores a lo largo de las cadenas de valor y el control por estos del respeto de los derechos humanos de contenido laboral requiere de una visión sistémica de cómo y dónde funcionan estas cadenas[89].

De lo apuntado hasta aquí es posible concluir que, para estar en condiciones de favorecer una protección efectiva de los derechos humanos de contenido laboral, cualquier regulación de la diligencia debida deberá extender su radio de acción al conjunto de relaciones comerciales y entidades integradas dentro de las cadenas de valor de las empresas, sin hacer distinciones en función del nivel en el que se ubiquen o a la naturaleza permanente o temporal de su vinculación a ellas. Asimismo, dicha regulación habrá de exigir a las mismas la realización de un inventario exhaustivo de la composición de esas cadenas, así como su puesta en común con los representantes de los trabajadores en los respectivos niveles de las mismas. Naturalmente, las empresas deberán desarrollar sus procesos de diligencia debida teniendo en cuenta estas necesidades, haya o no norma que las obligue a ello, y estructurar

WAITE, MARTIN ORTEGA, *Monitoring Human Rights in Global Supply Chains: insights and policy recommendations for civil society*, Business, Human Rights and the Environment Research Group, University of Greenwich, 2017, Policy Paper n. 3, pp. 3, 11. Texto disponible en: https://research.stmarys.ac.uk/id/eprint/4319/1/19108%20OUTHWAITE_Monitoring_Human_Rights_in_Global_Supply_Chains_2017.pdf.

[87] En *infra* 3.4.

[88] Destacan especialmente la importancia de ese control sistemático y las campañas puestas en marcha por los sindicatos de trabajadores, aportando ejemplos de experiencias exitosas, MARSHALL *et al.*, *cit.*, p. 17.

[89] Una vez más, MARSHALL *et al.*, *cit.*

sus actividades en términos que lo hagan posible, además de llevar a cabo ese inventario y compartirlo con las instancias de representación de los trabajadores[90].

3.3. *Especial atención a la prevención de los impactos indirectos sobre los derechos protegidos y sus causas profundas*

La diligencia debida en materia de derechos humanos tiene como tercera característica diferencial la especial orientación de su ejercicio hacia la prevención de un peculiar tipo de impactos adversos sobre los derechos humanos laborales, susceptibles de producirse como consecuencia o con ocasión del desarrollo de las actividades comerciales de las empresas de grandes dimensiones a las que corresponde de manera principal su puesta en práctica. Esta es, a su vez, una orientación que incide de forma decisiva sobre la configuración de las medidas que deberán ser adoptadas por las mismas para conseguir ese resultado.

Los Principios Rectores de las Naciones Unidas definen la diligencia debida como el "proceso" por el cual las empresas, a los efectos de cumplir con su obligación internacional de respetar los derechos humanos, deben "identificar, prevenir, mitigar y responder de las consecuencias negativas de sus actividades" sobre estos derechos[91]. Este es un proceso que, como apuntan los mismos a continuación, "debe abarcar" tanto las "consecuencias negativas" que la empresa "haya provocado o contribuido a provocar a través de sus propias actividades" como aquellas que "guarden relación directa con sus operaciones, productos o servicios prestados por sus relaciones comerciales"[92]. Y que se inicia con la puesta en marcha de una operación de evaluación o "calibración" de los "riesgos en materia de derechos humanos", con arreglo a la cual las empresas "deberán identificar y evaluar las conse-

[90] Un destacado ejemplo de esta práctica es posible encontrarlo en el Acuerdo Marco Global de Inditex, que sanciona este derecho de información sobre la composición de la cadena de suministro de la multinacional en favor de la federación sindical firmante y las organizaciones afiliadas a esta desde su versión inicial del año 2007. Sobre este acuerdo y su importancia para el ejercicio de la acción sindical global, véase Boix Lluch, *L'accordo quadro globale di Inditex: un modello di azione sindacale globale. Un bilancio dopo la firma del rinnovo e dell'ampliamento del 2019*, en *DLRI*, vol. 42, n. 2, pp. 227-250.

[91] Principio 17.

[92] Nuevamente, Principio 17.

cuencias negativas reales o potenciales" sobre estos derechos "en las que puedan verse implicadas ya sea a través de sus propias actividades o como resultado de sus relaciones comerciales". Pudiendo, finalmente, las "medidas que deberán adoptarse" con el fin de evitar o mitigar los riesgos detectados variar "en función" de que la empresa "provoque o contribuya a provocar las consecuencias negativas" o que "su implicación se reduzca a una relación directa de esas consecuencias con las operaciones, productos o servicios prestados por sus relaciones comerciales"[93].

De este modo los Principios Rectores distinguen entre tres *formas de implicación* de las empresas en los impactos negativos potenciales o reales sobre los derechos humanos relacionados o asociados a sus actividades[94]. Ordenadas de mayor a menor esas formas de implicación son, de acuerdo con su formulación más desarrollada contenida en los mismos: a) que la empresa "provoque o pueda provocar" esos impactos; b) que la misma "contribuya o pueda contribuir" a su generación; y c) que, aunque la misma "no ha contribuido" con su conducta a los impactos de los que se trate, estos "guardan relación directa con las operaciones, productos o servicios prestados por otra entidad con la que mantiene relaciones comerciales"[95]. Dicho en pocas palabras: *causar*, *contribuir a causar* o *tener una relación directa* con la afectación. Cada una de estas situaciones requiere, a su vez, diferentes *cursos de acción esperados*[96], como explican los mismos a continuación: a) en la primera, la empresa deberá "tomar las medidas necesarias" para prevenir o poner fin a las consecuencias negativas sobre los derechos humanos provocadas o susceptibles de ser provocadas por su actuación; b) en la segunda, la misma habrá de "tomar las medidas necesarias para poner fin o prevenir" su contribución; y c) en la tercera la selección de las medidas adecuadas dependerá de una variedad de factores contextuales, entre los cuales cobra una importancia especial "la influencia de la empresa sobre la entidad" que "provoque en sí misma consecuencias negativas sobre los derechos humanos"[97].

[93] Principio 19, apartado b.1).

[94] De acuerdo con la terminología utilizada por Wilde-Ramisng, Vanpeperstraete, Hachfeld, *cit.*, p. 11.

[95] Comentario al Principio 19.

[96] Dicho con palabras de Wilde-Ramisng, Vanpeperstraete, Hachfeld, *cit.*

[97] Nuevamente, de acuerdo con el comentario al Principio 19. La literatura sobre la materia coincide en destacar la "influencia" o el "apalancamiento" de la empresa respecto del agente causante directo del impacto negativo como el criterio decisivo para la elección de las medidas a adoptar en estos casos, pese a que los Principios Rectores incluyen otros factores a

Este planteamiento resulta aplicable en su integridad a la prevención y mitigación de los impactos negativos sobre los derechos humanos laborales. El énfasis de los procesos de diligencia debida relacionados con estos derechos no parece, sin embargo, que pueda entenderse centrado en los impactos negativos ocasionados de manera directa por las grandes corporaciones. Es decir, concentrarse en la prevención de los comportamientos contrarios a los derechos humanos laborales que guarden una relación causalidad inmediata con la conducta de estas empresas y tengan como afectados a sus propios trabajadores. Por más que, como es evidente, puedan existir atentados de esta naturaleza, en particular en relación los derechos de libertad sindical y negociación colectiva.Y de que en estos casos las empresas causantes de la vulneración deberán detener su conducta y cambiarla por otra respetuosa de los derechos vulnerados, además de remediar sus consecuencias[98].

En realidad, los procesos de diligencia debida cobran su real sentido y utilidad no tanto en relación con ese tipo de *impactos directos* sobre los derechos humanos laborales, que por su propia naturaleza son escasos y fácilmente remediables por la propia entidad que los provoca, sino respecto de los que podemos denominar *impactos indirectos* sobre esos derechos[99], en tanto que asociados a la conducta de un tercero, sea este una filial de la casa matriz y, sobre todo, un socio comercial, una empresa proveedora o cualquier otro sujeto integrado en su cadena de valor. Se comprenden aquí dos tipos de impactos negativos: a) los que la empresa haya *contribuido* a generar, aunque hayan sido puestos en práctica por cualquiera de los sujetos antes mencionados, y b) aquellos que, pese a no poderse entender que la misma ha contribuido a su realización, están directamente *vinculados* a sus actividades a través de sus relaciones comerciales. La razón por la que es necesario prestar atención a estos impactos con preferencia sobre los directos no es difícil de discernir: las situaciones de verdadero riesgo para los derechos humanos laborales se producen en el ámbito de dichas cadenas, donde la fragmentación de los procesos productivos y la exacerbada competencia entre las empresas

tener en cuenta, como "la importancia de la relación comercial para la empresa, la gravedad de la infracción y la posibilidad de que la ruptura de la relación con la entidad en cuestión provoque en sí misma consecuencias negativas sobre los derechos humanos". Véase, por todos, BUENO, *Multinational enterprises and labour*, cit., p. 425.

[98] Conforme apuntan, desarrollando la idea de los Principios Rectores, TREBILCOCK, *Due diligence on labour issues*, cit., p. 101; SHERMAN, *cit*., p. 7.

[99] Esta distinción es hecha por TREBILCOCK, *Due diligence on labour issues*, cit.

crean un caldo de cultivo propicio para la materialización de una diversidad de atentados contra los mismos. El espacio nuclear de aplicación de la diligencia debida en materia de derechos humanos laborales es, así pues, el de los impactos de naturaleza indirecta sobre los derechos protegidos, asociados a los supuestos de *contribución* y *vinculación* antes referidos.

Una vez establecido lo anterior, emerge inmediatamente la siguiente pregunta: ¿cuándo es posible entender que una empresa contribuye a un impacto adverso sobre los derechos humanos laborales y cuándo, en cambio, ha de considerarse que tiene únicamente una vinculación directa con este?

En línea de principio, es posible entender que una empresa *contribuye* a un impacto adverso cuando sus acciones o actividad causan, facilitan, inducen o incentivan a otra entidad, normalmente un proveedor, contratista o socio comercial de su cadena de valor, a causar ese impacto[100]. Esto supone que debe existir un elemento o factor de "causalidad" entre la conducta de la empresa y la actuación del autor de la vulneración[101] de entidad suficiente como para considerar que la vulneración no se habría producido sin el concurso de la primera, se hizo posible o fue más fácil gracias a ella o que la alentó o motivó[102]. Dicha contribución debe ser, en consecuencia, "sustancial" y "no menor o insignificante", como apostillan las Directrices de la OCDE[103]. La situación es por completo distinta en los supuestos de *vinculación directa*. Aquí estamos delante de impactos adversos que no son causados ni provocados por la empresa que debe ejercer la diligencia debida, sino que son realizados de forma autónoma por entidades cuyas actividades están relacionadas con las operaciones, productos o servicios de la primera. Estos impactos son, así pues, imputables exclusivamente al colaborador o socio comercial que los ejecuta. Debiéndose tener presente, en cualquier caso, que para poder establecer la presencia de esta clase de vinculación no resulta necesaria la existencia de una relación comercial directa con la entidad causante del daño, toda vez que el nexo exigido en estos casos por los Principios Rectores es uno entre el impacto adverso y las actividades de la empresa líder de

[100] Los tres primeros términos son utilizados por las Directrices de la OCDE en el comentario núm. 16 a su parte II. El cuarto aparece al lado de los dos primeros en la Guía de la OCDE de debida diligencia para cadenas de suministro responsables en el sector textil y del calzado, p. 60.

[101] Wilde-Ramisng, Vanpeperstraete, Hachfeld, *cit.*, p. 12.

[102] De acuerdo con las indicaciones de la guía citada en *supra* nota 101.

[103] Otra vez en el comentario n. 16 a su parte II.

la cadena. Y no, por tanto, entre esta y la primera[104]. Dadas sus características, este tipo de implicación está en condiciones de proyectar los procesos de diligencia debida hacia todos los espacios y niveles de las cadenas de valor de las empresas. Sin que la falta de proximidad con el agente debido a la existencia de numerosos intermediarios e incluso el desconocimiento de su existencia sean motivos para excluirla.

Esta es, con todo, una distinción que resulta más fácil de comprender desde el punto de vista conceptual que de ser trasladada de manera adecuada a la compleja realidad del trabajo prestado al interior de las cadenas globales de valor. Al menos si se parte de una visión superficial de sus alcances. No debemos perder de vista que actualmente resulta poco menos que imposible encontrar una sola empresa de cierta dimensión o importancia que ponga en marcha políticas o medidas que, de forma clara y directa, impulsen, motiven o induzcan a sus colaboradores a recurrir al trabajo forzoso, a la explotación laboral infantil, a las prácticas antisindicales o a incumplir los estándares internacionales en materia de salarios, tiempo de trabajo o seguridad y salud. En realidad, la única forma de aplicarla es tratando de ir más allá de las apariencias, mediante la realización de una valoración profunda de las *causas estructurales* que pueden encontrarse detrás de los impactos negativos sobre los derechos humanos laborales causados por las entidades integradas en los distintos eslabones de esas cadenas[105]. Esto conduce a prestar atención a las características del modelo de negocio y las prácticas de abastecimiento de las empresas y a valorar la incidencia que ambos pueden tener sobre la materialización de vulneraciones de los derechos de los trabajadores de las empresas colaboradoras.

La realización de este análisis permite entender, por ejemplo, que si bien una empresa que recurre a prácticas comerciales predatorias, abonando precios abusivamente bajos, imponiendo plazos excesivamente cortos o modificándolos constantemente, por citar solo algunos ejemplos[106], no está vulnerando con ello de forma directa los referidos derechos, está induciendo

[104] Wilde-Ramisng, Vanpeperstraete, Hachfeld, *cit.*, p. 14.

[105] Nuevamente, Wilde-Ramisng, Vanpeperstraete, Hachfeld, *cit.*, p. 20. En el mismo sentido, Mares, *Securing human rights through risk-management methods: Breakthrough or misalignment?*, en *LJIL*, 2019, n. 32.

[106] Véase, con referencia a un estudio de caso especialmente relevante, Anner, *Prácticas de compra predatorias en las cadenas mundiales de suministro de la industria de la confección: tensión en las relaciones laborales en la India*, en *RIT*, 2019, n. 4, pp. 761-787.

o empujando a sus socios comerciales a hacerlo para estar en condiciones de atender sus requerimientos[107]. O está incrementando sustancialmente el riesgo de que esta clase de actuaciones puedan producirse. No siendo en última instancia, por tanto, la precariedad laboral, los salarios insuficientes, las jornadas excesivas, las deficientes condiciones de seguridad y salud, la hostilidad hacia los sindicatos y la negociación colectiva e incluso el trabajo infantil y el recurso a fórmulas de trabajo clandestino más que el resultado previsible de este tipo de prácticas[108].

Como consecuencia de esta aproximación estructural, el espacio de los supuestos de contribución a la vulneración de los derechos laborales por parte de las grandes compañías está en condiciones de ampliarse a costa de los de mera vinculación, que deben entenderse circunscritos a las situaciones en que no sea posible detectar ningún tipo de incidencia, ni directa ni a través de un efecto "en cascada" entre proveedores, de sus políticas comerciales sobre la conducta como empleador del sujeto causante de la vulneración.

Es más, tampoco es posible fijar una frontera clara y permanente entre ambos tipos de implicación. En realidad, se trata de dos extremos de un *continuum*, dentro del cual la naturaleza de la implicación de la empresa líder de la cadena puede variar a lo largo del tiempo, dependiendo de los alcances de su respuesta o de la falta de ella, en particular en relación con un impacto adverso con el que inicialmente solo se encontraba vinculada[109]. Así, la ausencia de medidas para prevenir o mitigar una vulneración de los derechos laborales previamente detectada está en condiciones de ser considerada como una omisión que contribuye o facilita su perpetuación, especialmente cuando se combina con compras repetidas y significativas de productos que se sabe que están asociados a esa vulneración. De igual modo, una empresa que inicialmente estuvo solo vinculada a un comportamiento contrario a esos derechos puede luego ser considerada contribuyente al mismo si mantiene esa relación pese a que las medidas que adoptó para hacerle frente no consiguie-

[107] Sobre esta constatación, comúnmente aceptada dentro de la literatura especializada, véase, por todos, BUENO, *Multinational enterprises and labour,* cit., pp. 424-425.

[108] Como apuntarían hace ya bastante tiempo ANNER, BAIR, BLASIT, *Toward Joint Liability in global Supply Chains: address-sing the root causes of Labour Violations in International Subcontracting Networks*, en *CLPJ*, 2013, n. 1, especialmente p. 3.

[109] Coincidentemente, SHERMAN, *cit.*, p. 8; WILDE-RAMISNG, VANPEPERSTRAETE, HACHFELD, *cit.*, p. 12-13.

ron acabar con él o reducirlo. Incluso, la previsibilidad de la presencia de situaciones de déficit en el respeto de los derechos laborales, es decir la medida en la que la empresa podría o debería haber sabido razonablemente de su posible existencia, puede ser considerada como un factor capaz de determinar el tránsito de una clase de implicación a la otra[110].

La consideración de esta distinción entre contribución y vinculación representa un factor clave a los efectos de la correcta realización de la *evaluación de riesgos* que debe representar el punto de partida de cualquier proceso de diligencia debida dirigido a la prevención de impactos adversos sobre los derechos humanos laborales en las cadenas de valor de las empresas. Aunque esta evaluación ha de partir de la consideración de una serie de factores contextuales de incidencia general, como son los relacionados con las características del sector de actividad en el que opera la empresa, la configuración de sus cadenas de valor, la naturaleza de los productos que fabrica o los servicios que presta y las condiciones socioeconómicas, culturales, legales y de gobernanza del país en el que se ubican sus colaboradores[111], este análisis deberá verse complementado por la ponderación de la incidencia del modelo de abastecimiento y las prácticas de compra de la misma sobre las posibilidades de cumplimiento de los estándares internacionales de protección laboral por parte de los proveedores del primer nivel, así como del impacto "reflejo" que estos factores pueden tener sobre los situados en los restantes eslabones de la cadena de valor[112].

Este último es, además, un análisis que deberá adaptarse al contenido de cada derecho humano laboral, así como a la influencia que sobre su respeto están en condiciones de desplegar los factores antes indicados. Y muy en particular los aludidos en último término, que pueden determinar el paso de la mera vinculación a la contribución cada vez que sea posible establecer que son las condiciones impuestas por la empresa líder las que dificultan o hacen inviable el cumplimiento de los estándares exigidos a sus colaboradores[113].

[110] Estos ejemplos han sido tomados de los textos de los autores citados en la nota anterior, loc. cit.

[111] Un listado ordenado de todos estos factores puede apreciarse, por ejemplo, en la Guía de la OCDE de debida diligencia para cadenas de suministro responsables en el sector textil y del calzado, pp. 44-46.

[112] Véase, destacando especialmente esta idea, WILS, SWAN, *cit.*, p. 10.

[113] Una muestra de este análisis, en relación con la limitación del tiempo de trabajo y las horas extraordinarias excesivas, está representado por la *Fair Working Hours Guide*, elaborada en

Es importante indicar, en fin, que también el contenido de las medidas que deberán ser adoptadas por las empresas a los efectos de prevenir o mitigar los riesgos e impactos negativos para los derechos humanos laborales detectados guarda una relación de estrecha correspondencia con la naturaleza de su implicación en ellos.

Así, a la luz de lo expuesto resulta completamente claro que, para prevenir o poner fin a su posible contribución a la generación de los mismos, las empresas deberán empezar por concebir los procesos de diligencia debida como algo más que un puro ejercicio de vigilancia[114] y adoptar un enfoque profundo, centrado en la prevención de las causas estructurales que pueden encontrarse en la base de las deficientes condiciones laborales y los abusos dentro de sus cadenas de valor. El control sobre los proveedores y los socios de estos deberá, de este modo, verse acompañado de prácticas de compra responsables, que aseguren o al menos no pongan en cuestión la viabilidad económica de los derechos de los trabajadores de la cadena de valor[115]. Entre ellas, de manera especial la garantía de una cierta estabilidad en los pedidos, la fijación de precios que sirvan de soporte para las condiciones laborales exigidas y en particular para el pago de salarios dignos, el establecimiento de tiempos de entrega razonables y no alterables unilateralmente, el cumplimiento de los plazos previstos para los pagos y la creación de vínculos razonablemente duraderos con los proveedores, poniendo límites a la elevada intercambiabilidad entre ellos que impera en algunos sectores[116].

2023 por Jansen y Hohennegger para la Fundación Fair Wear. En esta se evalúan las causas profundas que pueden provocar un exceso de tiempo de trabajo en el sector de la confección, distinguiendo entre las que se relacionan con la empresa solicitante de los encargos y las que están dentro de la esfera de control del proveedor, llegándose a la conclusión de que más de la mitad de las razones de ese exceso se vinculan con las prácticas de compra de las primeras. No está de más advertir, con todo, que de momento no se dispone de instrumentos suficientemente desarrollados que puedan servir de guía a las empresas para identificar y medir los riesgos a los que se encuentran expuestos los distintos derechos humanos laborales a lo largo de sus cadenas de valor. Esta es una carencia destacada especialmente por Bueno, *Multinational enterprises and labour*, cit., p. 435. Un buen ejemplo de instrumento de este tipo está representado por la Herramienta de orientación de la OIT y la OIE sobre el trabajo infantil destinada a las empresas, lanzada en 2016.

[114] Wils, Swan, *cit.*, p. 9.

[115] Sobre esta consideración, ampliamente compartida por los estudiosos de la materia, puede verse, por todos, Sherman, *cit.*, pp. 8-9.

[116] Permítaseme la remisión a mi estudio *Comercio internacional y trabajo: resultados de una investigación global*, en Sanguineti Raymond (Dir.), *Comercio internacional, trabajo y derechos hu-*

La situación no es la misma cuando la empresa solo está vinculada por razón de sus operaciones, productos o servicios a un impacto negativo que no ha causado ni contribuido a causar a través de su conducta o sus políticas y prácticas comerciales. Aquí, como ha quedado dicho, aquella debe exclusivamente *utilizar su influencia* sobre la entidad de su cadena de valor generadora del riesgo o causante del daño, con el fin de persuadirla de que prevenga, mitigue o ponga fin a los mismos. Esto significa que la naturaleza y los alcances de las medidas a adoptar dependen del nivel de influencia que la empresa posea sobre dicha entidad, valorado en función de las circunstancias prácticas de la relación que tenga con ella[117]. Para determinar el contenido de su intervención la empresa deberá empezar, en consecuencia, por llevar a cabo una estimación, de índole eminentemente casuística, de su "capacidad de cambiar las prácticas perjudiciales de la entidad responsable del daño", de acuerdo con la definición que de la noción de influencia ofrecen las Directrices de la OCDE[118], teniendo en cuenta para ello una diversidad de factores, entre los cuales estas últimas mencionan los siguientes: la naturaleza de la relación comercial, la estructura y complejidad de la cadena de suministro y el número de proveedores y otras relaciones comerciales, las características de los productos o servicios de los que se trate y la naturaleza del impacto negativo al que se preste atención[119].

Aunque todos estos factores han de ser tenidos en cuenta, no cabe duda que los más relevantes para medir el nivel de influencia de la sociedad líder sobre sus colaboradores son los que prestan atención a la naturaleza de la relación comercial que mantiene con ellos y la posición que ocupan en la cadena de valor. En aplicación de este doble parámetro, es posible considerar que la influencia de la empresa líder sobre un socio comercial o proveedor es *alta* cuando posee el control sobre él, normalmente a través de medios corporativos, como ocurre en el caso de una filial, o mantiene un vínculo contractual directo y una relación comercial de larga duración con este, representando los pedidos que realiza una porción significativa de su volumen total de negocios; mientras que esa influencia puede ser *media* o *baja* si no

manos, Universidad de Salamanca, Salamanca, 2021, especialmente p. 35, con referencia a las propuestas realizadas en marco del Grupo Internacional de Investigación sobre Comercio Internacional y Trabajo, de cuyas labores da cuenta la obra.

[117] Véase Bueno, *Corporate Liability for Violations*, cit., especialmente el apartado 1.2.1.

[118] En el comentario n. 23 a su Parte II.

[119] Véase el comentario n. 24 a la Parte II.

posee un nexo contractual directo con el proveedor, sus interacciones comerciales son esporádicas o de corto plazo y los encargos relacionados con sus actividades representan una fracción poco relevante de las operaciones del primero; e incluso *baja* o *muy baja* en el caso de que el mismo se sitúe en una posición alejada de la empresa líder dentro de la cadena de valor[120].

Naturalmente, las medidas que han de ser puestas en marcha en cada una de estas situaciones pueden y deben ser distintas. En la primera, la mejor opción será seguramente la utilización de la relación comercial privilegiada que se mantiene con la entidad colaboradora como la herramienta principal para exigirle el acatamiento de los estándares laborales vigentes a nivel internacional, recurriendo a medidas como la inclusión de cláusulas *ad hoc* en los contratos de aprovisionamiento o las órdenes de compra, que atribuyan a esos estándares el estatus de condiciones de asociación o requisitos para el mantenimiento del nexo mercantil, unidas seguramente a programas de formación y sistemas de desarrollo de capacidades[121]. Con aplicación de las consecuencias previstas por estas cláusulas cuando corresponda. Algo que puede dar lugar, dependiendo de los casos, bien por la continuación de la relación comercial mientras duren los esfuerzos de mitigación, bien a su suspensión a lo largo de este proceso cuando sea necesario, especialmente en atención a la gravedad de los riesgos, incluso a la terminación del vínculo, si han fracasado los esfuerzos de mitigación o esta no se considere factible y el riesgo resulta particularmente grave[122].

Cuando el nivel de influencia pueda ser considerado medio y, sobre todo, bajo o muy bajo, en cambio, asume un rol fundamental la labor preventiva de la empresa líder de la cadena. Para ponerla en marcha esta deberá, antes que nada, utilizar la influencia cierta que posee sobre sus socios comerciales de los primeros niveles con el fin de exigirles, en especial a través de fórmulas contractuales como las que acaban de ser mencionadas, que apli-

[120] Esta clasificación parte de la propuesta formulada por la Guía de la OCDE de debida diligencia para cadenas de suministro responsables en el sector textil y del calzado, p. 42.

[121] Apuntando en esta dirección, SHERMAN, *cit.*, pp. 8-9. Esta es una técnica tradicionalmente utilizada por las empresas multinacionales de diversos sectores. Puede verse, en este sentido, mi estudio *Códigos de conducta para proveedores y contratistas de empresas multinacionales españolas*, en SANGUINETI RAYMOND (Dir.), *La dimensión laboral de la internacionalización de la empresa española. Una visión de conjunto de los instrumentos de gestión laboral transnacional de las multinacionales españolas*, Cinca, Madrid, 2014, pp. 210-213.

[122] De acuerdo con el comentario núm. 25 a la Parte II de las Directrices de la OCDE.

quen y exijan, a su vez, la diligencia debida en materia de derechos humanos laborales a sus colaboradores de los niveles inferiores o se abstengan de encargar la producción a terceros que no ofrezcan garantías suficientes[123]. Además, dicha empresa deberá llevar a cabo, por todos los medios a su alcance, una cuidadosa actividad de control sobre las fuentes de las que se nutren sus proveedores, con el fin de imponerles, de ser necesario a través de ese efecto contractual "en cascada", la adopción de las medidas necesarias para prevenir o poner fin a los impactos detectados o la finalización de todo vínculo con ellos.

En cualquier caso, debe descartarse de plano que una empresa pueda escudarse en su falta de influencia para no adoptar ninguna medida y continuar abasteciéndose de productos o servicios asociados a impactos negativos sobre los derechos de los trabajadores. Por el contrario, las empresas deben llevar a cabo la diligencia debida con independencia del grado de influencia que posean sobre sus colaboradores, ya que este es un factor condicionante de los alcances de las medidas a adoptar y no de la necesidad de ponerlas en marcha. De no contar con influencia sobre un proveedor o un nivel de su cadena de valor, la empresa deberá, por tanto, realizar los esfuerzos necesarios para crearla o incrementarla[124], recurriendo por ejemplo a alianzas con otras empresas dedicadas a la misma actividad para sumar fuerzas, o prescindir de esa fuente de abastecimiento.

3.4. *Participación significativa de los representantes de los trabajadores en el diseño, la aplicación y el control de las políticas y medidas de diligencia debida*

La enunciación de los rasgos característicos y requisitos esenciales de la diligencia debida en materia de derechos humanos laborales que se viene realizando resultaría incompleta si se dejase de hacer referencia al protagonismo que dentro de su concepción y puesta en práctica ha de reconocerse a la participación de los trabajadores de las cadenas de valor, canalizada a través de sus representantes en sus distintos niveles. De hecho, como habrá ocasión de indicar a continuación, esta participación constituye, a la vez, un componente ineludible de todo proceso de diligencia debida y una condición para su eficacia.

[123] La presencia de este tipo de cláusulas es frecuente también en los instrumentos a los que alude el estudio citado *supra* nota 122.

[124] Como apunta SHERMAN, *cit.*, p. 9.

La anterior no es una conclusión que pueda extraerse de la sola lectura de los Principios Rectores de las Naciones Unidas, que se conforman con incluir referencias genéricas a la necesidad de realizar "consultas sustantivas" con "los grupos potencialmente afectados y otras partes interesadas" o a "tener en cuenta" los "comentarios de las partes afectadas" en las etapas de identificación y evaluación de los riesgos y de seguimiento de la eficacia de la respuesta frente a ellos[125], obviando cualquier alusión a los trabajadores o sus representantes como grupo potencialmente afectado por el desarrollo de las actividades empresariales o parte interesada en la ejecución de los procesos de diligencia debida. Es únicamente en la Guía de la OCDE de debida diligencia para una conducta empresarial responsable, publicada en 2018, donde es posible encontrar referencias más precisas a la posibilidad de recabar "informes" y de "consultar e involucrar", como parte de los "titulares de los derechos afectados o potencialmente afectados", a "los trabajadores, los representantes de los trabajadores y los sindicatos" durante las etapas antes referidas[126].

No cabe duda, sin embargo, que la posición como *stakeholders* de los trabajadores de las cadenas de valor y sus representantes no resulta equiparable a la que ocupan otras personas y grupos de interés que se sitúan en el exterior del espacio de desarrollo de las actividades productivas y comerciales de las empresas[127]. Antes que por ninguna otra razón, porque los trabajadores son los principales titulares de los derechos protegidos y los sujetos que de manera más clara, inmediata y directa pueden ver afectados esos derechos con ocasión o como consecuencia de la ejecución de esas actividades[128], como viene demostrado por el amplísimo historial de graves vulneraciones de los mismos experimentadas en las últimas décadas, que ha estado en la base del surgimiento del estándar de diligencia debida. Podrá discutirse, en consecuencia, la conveniencia de incluir o no el punto de vista de otros colectivos o grupos, pero la intervención de los representantes de los trabajadores no solo no podrá estar ausente de los procesos de diligencia debida, sino que deberá ocupar una posición privilegiada dentro de estos.

Quienes trabajan en las cadenas de valor están, además, dada su condi-

[125] Principio 18, letra b) y Principio 20, letra b).

[126] Véase las páginas 29, 31 y 52 de la guía recién indicada.

[127] Trebilcock, *Due diligence on labour issues*, cit., p. 103, destacando de manera especial esta diferencia.

[128] Como observan Wils, Swan, *cit*., p. 3.

ción de participantes directos en los procesos sobre los que debe ejercerse la diligencia debida, en la mejor posición para identificar los riesgos a los que pueden verse expuestos los derechos de los que son titulares, detectar las vulneraciones que estos puedan padecer y proponer medidas adecuadas para abordarlos[129]. De ahí que se haya dicho que los trabajadores son "los mejores auditores"[130] e incluso "expertos con profundos conocimientos sobre los riesgos potenciales y reales a lo largo de la cadena de valor"[131], toda vez que "están en el lugar todo el día, todos los días", "conocen el proceso y los problemas de las operaciones normales", "tienen ideas para resolver los problemas" y "pueden verificar si las correcciones se aplican y funcionan realmente"[132]. Contar con su participación supone, en virtud de ello, disponer de una herramienta clave para superar las limitaciones de los tradicionales sistemas de supervisión de proveedores y contratistas, basados en un enfoque superficial "de instantánea" llevado a cabo a través de auditorías realizadas en momentos específicos y centradas en los síntomas antes que en las causas de los problemas[133], optando por un método capaz de permitir una aplicación eficaz de los procesos de diligencia debida.

No se debe olvidar, finalmente, que la participación de los trabajadores resulta indispensable para solventar el conflicto de intereses que subyace al diseño de las políticas y las medidas de diligencia debida cuando este recae exclusivamente en las propias empresas[134]. Un conflicto que puede conducir a que esas políticas y medidas sean diseñadas teniendo en cuenta exclusivamente los intereses de estas y no los de los titulares de los derechos protegidos, dando lugar a procedimientos puramente cosméticos, de mero *compliance*, sin capacidad real para cumplir su función, o a una selección interesada de las vulneraciones a prevenir, enfocada exclusivamente en aquellas de mayor impacto negativo sobre su reputación e imagen de marca, con el consiguiente

[129] En la misma dirección, LANDAU, *Human Rights Due Diligence*, cit., p. 154.

[130] Dicho con palabras de FORD, NOLAN, *Regulating transparency on human rights and modern slavery in corporate supply chains: the discrepancy between human rights due diligence and the social audit*, en *AJHR*, 2020, n. 26, p. 12.

[131] Según afirman WILS, SWAN, *cit.*, p. 6.

[132] OUTHWAITE, MARTIN ORTEGA, *Worker-driven monitoring. Redefining supply chain monitoring to improve labour rights in global supply chains*, en *C&C,* 2019, vol. 23, n. 4, p. 389.

[133] NOLAN, *Chasing the Next Shiny Thing: Can Human Rights Due Diligence Effectively Address Labour Exploitation in Global Fashion Supply Chains?*, en *IJCJSD*, 2022, n. 11, p. 7.

[134] Sobre el cual llaman la atención especialmente OUTHWAITE, MARTIN ORTEGA, *Worker-driven monitoring*, cit., p. 383.

abandono de las demás[135]. La mejor manera, si no la única, de prevenir estas desviaciones es incorporando la voz de los trabajadores a los procesos de diligencia debida, con el fin de hacer posible que la tutela de sus derechos se sitúe en el centro de estos.

La adopción de este enfoque supone dejar de ver a las personas que trabajan al interior de las cadenas de valor exclusivamente como víctimas pasivas que requieren la asistencia de las empresas, para pasar a concebirlas como agentes del cambio, capaces de asumir un rol proactivo en la promoción del respeto de sus derechos en todo el espacio de las mismas[136]. Naturalmente, para que la participación de la que venimos hablando pueda cumplir esta función es preciso que sea *significativa* y no meramente superficial. Esto requiere que se cumplan al menos tres condiciones elementales.

La primera y más evidente es que comprenda todas las etapas de las que se componen los procesos de diligencia debida, desde la de identificación y evaluación de los riesgos, pasando por la de selección y adopción de las medidas oportunas para prevenir o mitigar los que hayan sido detectados, hasta llegar a la evaluación de los resultados de estas últimas[137]. Esta es una condición cuya plena satisfacción requiere del reconocimiento de cuatro bloques de derechos o prerrogativas de carácter instrumental[138]:

a) *Derechos de información*, dirigidos a hacer posible el acceso a toda la información necesaria para una participación adecuada y eficaz en los procesos de diligencia debida, lo cual requiere la transmisión de datos razonablemente precisos sobre la estructura y la composición de la cadena de valor, incluidos los proveedores que participan en ella, la metodología empleada en las evaluaciones de riesgos, las auditorías realizadas y las medidas preventivas y de mitigación adoptadas, así como sus resultados;

b) *Derechos de consulta*, encaminados a permitir que los titulares de los derechos laborales puedan desempeñar un papel activo y relevante en el diseño de los procesos de diligencia debida, para lo que deberán crearse espacios que permitan que sus puntos de vista sean oídos y tenidos en cuenta en

[135] Para un mayor desarrollo de este argumento puede verse mi estudio *Teoría del Derecho Transnacional del Trabajo. La génesis de un estatuto para el trabajo global*, cit., pp. 174-176.

[136] MARSHALL *et al*., *cit*., p. 8; DEVA, *cit*., p. 405.

[137] Véase, por todos, MARSHALL *et al*., *cit*., p. 18.

[138] De modo parecido, LANDAU, *Human Rights Due Diligence*, cit., pp. 152-157, haciendo referencia a la necesidad de reconocer a los representantes de los trabajadores tres bloques de derechos: derechos de información, derechos de consulta y derechos de aplicación.

particular en las fases de la identificación de los riesgos y elaboración de las medidas necesarias para su prevención y mitigación;

c) *Derechos de supervisión y control*, cuyo propósito es situar a los mismos en el centro de los esfuerzos de vigilancia, de forma que estos ofrezcan resultados fiables y reflejen adecuadamente sus necesidades, requiriéndose para esto que los representantes participen activamente en el diseño de los sistemas de control de los socios comerciales y proveedores, así como en la fijación de sus objetivos y prioridades, y que su puesta en práctica los implique de forma relevante; y

d) *Derechos de participación en la solución y la remediación*, que les reconozcan ese papel en el diseño y la aplicación de los mecanismos y las fórmulas de solución de los problemas detectados, a través de su inclusión en los procesos de identificación y denuncia de posibles vulneraciones, la investigación de su existencia y la determinación de las respuestas frente a ellas[139].

La segunda condición para que la participación de los trabajadores pueda ser considerada significativa es que se lleve a cabo colectivamente y no de forma individual. El acceso personalizado a los sistemas de denuncias que puedan ser implementados por las empresas y las reuniones con grupos de trabajadores convocadas por las empresas constituyen vías de actuación distintas, de eficacia más bien dudosa, sobre todo en el segundo caso[140], que por su propia naturaleza no están en condiciones de satisfacer los requisitos de una verdadera participación de los trabajadores como grupo de interés, que requiere del concurso de las organizaciones que los representan. Y muy en particular de los sindicatos libremente constituidos por ellos.

No puede dejar de indicarse, en tercer lugar, que solo será posible hablar de una participación significativa de los trabajadores en el caso de que esta se encuentre en condiciones de implicar a representantes de los trabajadores de todos los espacios y eslabones posibles de las cadenas de valor. Y no solo de la casa matriz y de sus filiales, por más importantes que estas sean. La identificación de estos representantes es, no obstante, una tarea extremadamente compleja. De ahí que se haya indicado que la puesta en práctica de cualquier proceso de diligencia debida deberá empezar por la realización de una *carto-*

[139] La formulación de los derechos mencionados en las letras c) y d) se inspira en la propuesta de un nuevo marco para la vigilancia de las cadenas de valor formulada por Outhwaite, Martin Ortega, *Worker-driven monitoring*, cit., pp. 384-390.

[140] Alertan sobre esta clase de reuniones, especialmente cuando se realizan con trabajadores seleccionados por las empresas, Marshall *et al.*, *cit.*, p. 19.

grafía exhaustiva de las partes interesadas[141], que sirva para identificar a los sujetos que cuentan con el respaldo de los trabajadores en los distintos niveles del proceso global de producción. Debiendo tenerse en cuenta aquí que estos trabajadores no constituyen un grupo homogéneo sino que difieren notablemente entre sí en cuanto a su grado de visibilidad y vulnerabilidad, por lo que resulta especialmente necesario identificar a quienes están en condiciones de llevar la voz de los menos visibles y más vulnerables[142], ya que es en relación con ellos que los riegos para los derechos humanos laborales resultan especialmente patentes.

El cumplimiento de estas tres condiciones conlleva el tránsito de una visión unilateral, elitista y tecnocrática de la diligencia debida a otra de carácter *pluralista*[143], que empodera a los trabajadores y sus organizaciones y los coloca en el núcleo de los procesos de diligencia debida, convirtiéndolos en los "ojos y oídos" necesarios para su aplicación eficaz[144].

Con todo, la puesta en marcha de estas fórmulas de participación puede verse gravemente obstaculizada, incluso existiendo voluntad de ponerla en marcha por parte de la empresa líder, por la inexistencia de representantes de los trabajadores, y en particular de sindicatos libremente constituidos, en muchos de los espacios de las cadenas de valor. Para superar esta carencia, es recomendable que las empresas pongan en marcha, incluso por propia conveniencia ya que la presencia de representantes de los trabajadores constituye, según hemos visto, un elemento especialmente valioso para la prevención de prácticas abusivas, medidas dirigidas a proteger la libertad de sindicación e incluso promover la creación de sindicatos en las fábricas y centros de trabajo de sus redes de contratistas y proveedores[145]. Unas medidas que podrán tomar la forma de acuerdos marco con las federaciones sindicales mundiales de rama de actividad, en los que se incluya el compromiso de favorecer la implementación de la libertad sindical en las cadenas de valor, introduciendo

[141] Como recomiendan Wils, Swan, *cit.*, p. 6.

[142] Wilde-Ramisng, Vanpeperstraete, Hachfeld, *cit.*, p. 25.

[143] Landau, *Human Rights Due Diligence*, cit., p. 154, destacando que esta visión parte de reconocer la realidad de intereses divergentes y promueve oportunidades de diálogo y enfoque negociados capaces de reforzar los sistemas empresariales de gobernanza laboral.

[144] Outhwaite y Martin Ortega, *Worker-driven monitoring,* cit., p. 385.

[145] De acuerdo con la recomendación contenida en el informe *Unpicked. Fashion & Freedom of Association*, publicado en octubre de 2022 por el Business & Human Rights Centre, p. 17. Texto disponible en: https://media.business-humanrights.org/media/documents/2022_Unpicked_Fashion_and_FOA.pdf.

un conjunto de derechos y garantías instrumentales encaminados a ese objetivo[146]. La firma de estos acuerdos puede representar, de hecho, un importante punto de apoyo para la construcción de *redes sindicales transnacionales* que contribuyan al despliegue del poder sindical más allá de las fronteras nacionales y las múltiples identidades corporativas implicadas en las cadenas de valor[147]. La inexistencia de sindicatos o incluso el hecho de que estos se encuentren prohibidos o estén controlados por el Gobierno en un país determinado no exime a la empresa, de cualquier modo, de su compromiso de promover una participación significativa de los trabajadores de sus cadenas de valor. De ser este el caso, las empresas deberán realizar acciones específicas para promover la consulta y la participación autónoma de los trabajadores[148].

Por lo que se refiere a la fuente del reconocimiento de los derechos de participación de los que se viene tratando, debe indicarse que, aunque es deseable su reconocimiento con la mayor amplitud y claridad posible en las normas reguladoras de la diligencia debida obligatoria, su espacio natural de plasmación está representado por la suscripción de protocolos y acuerdos con las organizaciones sindicales de ámbito transnacional o representativas de los trabajadores de las cadenas de valor, a través de los cuales se regule su participación en el diseño y la implementación de los procesos de diligencia debida[149], incluyendo el control de su aplicación y la solución de los conflictos que puedan presentarse[150], creando en la medida de lo posible estructuras de cogobernanza de estos procesos[151].

[146] La experiencia pionera y a la vez de absoluta referencia está representada por el Acuerdo Marco Global de Inditex, respecto de cuyos contenidos ligados a la promoción del despliegue de la libertad sindical a lo largo de la cadena de valor de esta empresa se remite al estudio de Boix Lluch, *cit.*, *supra* nota 91.

[147] Fichter, *Organising In and Along Value Chains What Does It Mean for Trade Unions?*, Friedrich Ebert Stiftung, 2015, p. 10. Texto disponible en: https://library.fes.de/pdf-files/iez/11560.pdf.

[148] Conforme apunta la *Guía de Debida Diligencia para la Participación Significativa de las Partes Interesadas Involucradas en el Sector de Extracción*, publicada en 2015 por la OCDE, p. 86.

[149] Expresamente en este sentido, véase la *Guía de la OCDE de debida diligencia para cadenas de suministro responsables en el sector textil y del calzado*, pp. 28-29.

[150] Como indica también el informe citado en *supra* nota 146.

[151] Uno de los ejemplos más notables de este tipo de pactos viene dado por el Protocolo para la aplicación del Acuerdo marco Global entre IndustriALL Global Union e Inditex, suscrito el 3 de octubre de 2022, a través del cual se crea una estructura específica de interlocución en cuyo vértice se sitúa un Comité Sindical Global compuesto por representantes de los sindicatos tanto de la sociedad matriz como de su cadena de suministro global. Asimismo, constituye un

3.5. Consideración de la no aplicación o la aplicación deficiente de los procesos de diligencia debida como fuente de responsabilidad administrativa y civil de las empresas

Al listado de cuatro rasgos o elementos necesarios de la dimensión laboral de la diligencia debida presentados hasta aquí debe serle añadido un quinto componente, asociado a su regulación legal. Este se encuentra representado por la creación de mecanismos que permitan asignar consecuencias jurídicas a la no aplicación o la aplicación defectuosa de los procesos de diligencia debida, incluyendo dentro de estas últimas la atribución a las empresas de responsabilidades por los daños que puedan haberse ocasionado a los trabajadores titulares de los derechos protegidos[152]. La presencia de este ingrediente resulta de fundamental importancia para que los procesos de diligencia puedan proyectar sus efectos más allá de la línea marcada por la tutela de los intereses reputacionales de las grandes corporaciones, hacia el conjunto de los derechos humanos laborales y la totalidad de las entidades integradas en sus cadenas de valor, contribuyendo a prevenir no solo las vulneraciones directas de esos derechos sino también las indirectas, incluyendo dentro de estas las que las empresas no han causado ni contribuido a causar, pero que guarden una relación directa con sus productos, operaciones o servicios.

La que se acaba de formular no es una conclusión que se desprenda del contenido de los Principios Rectores de las Naciones Unidas. Por el contrario, estos parten de contemplar la diligencia debida como un estándar de conducta, pero no como una fórmula de atribución de responsabilidades[153]. Una cuestión, esta última, que consideran supeditada a lo que disponga la legislación de los Estados. "La responsabilidad de las empresas de respetar los derechos humanos" se afirmará en ellos de manera rotunda con el fin de no dejar espacios para la duda, "se diferencia de las cuestiones de responsabilidad legal y de cumplimiento de las leyes, que siguen dependiendo en gran medida de las disposiciones legislativas nacionales en las jurisdicciones pertinentes"[154].

referente absoluto la estructura de cogobernanza creada a través del Acuerdo sobre la prevención de incendios y seguridad en la construcción en Bangladesh, sobre la que llama la atención SALORANTA, *Collective and Collaborative Worker-driven Mechanisms? A Mission (im)possible to Enhance Access Remedy in Relation to Human Rights Due Diligence?*, en *EBLR*, 2023, vol. 34, n. 2, p. 292.

[152] LANDAU, *Human Rights Due Diligence and the risk of cosmetic compliance*, cit., p. 244.

[153] D'AMBROSIO, *cit.*, p. 626.

[154] Comentario al Principio 12.

Para los Principios Rectores, en consecuencia, la diligencia debida – o más bien la falta de ella – no constituye una fuente autónoma de asignación de responsabilidad alguna a las empresas, de forma que su adecuada aplicación queda sujeta en última instancia a su propio criterio, condicionado si acaso por la necesidad de proteger su buen nombre e imagen de marca. No es de extrañar que, a partir de esta constatación, se hable dentro de la literatura especializada de la "brecha de responsabilidad" que caracteriza el diseño de los Principios Rectores[155].

Es evidente que este modesto punto de partida no está en condiciones de garantizar la aplicación del estándar de diligencia debida más allá de los sectores y empresas especialmente expuestos al escrutinio público o caracterizados por un muy elevado y notorio nivel de riesgos. En realidad, como se ha apuntado críticamente, solo una aprehensión jurídica fuerte desde instancias jurídico-públicas de los procesos que puedan poner en marcha las empresas para hacer efectiva su responsabilidad de respetar los derechos humanos puede estar en condiciones de promover su aplicación hacia todos los eslabones de las cadenas de valor de las empresas de los diferentes sectores de actividad de la economía global[156] y favorecer un enfoque profundo y orientado a los resultados de la diligencia debida, conjurando el riesgo de actuaciones puramente cosméticas, sin capacidad real de impacto. La cuestión es, por supuesto, cómo llevar a cabo esta intervención desde fuentes heterónomas sobre los procesos de aplicación de la diligencia debida susceptibles de ser puestos en marcha por las empresas.

No cabe duda que la creación de una autoridad administrativa con capacidades efectivas para supervisar y promover la correcta aplicación de las medidas de diligencia debida constituye un factor crítico a los efectos de promover ese resultado[157]. Sobre todo si la misma se encuentra dotada de las

[155] La expresión es utilizada, entre otros autores, por DAUGAREILH, D'AMBROSIO, SACHS, *cit.*, p. 117; BUENO, BRIGHT, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, en *ICLQ*, 2020, vol. 69, n. 4, p. 763; y SALES PALLARÉS, MARULLO, *El 'ángulo muerto' del Derecho Internacional: las empresas transnacionales y sus cadenas de suministro*, en *Persona y Derecho*, 2018, vol. 78, n. 1, pp. 261-291.

[156] BAZ TEJEDOR, *Acerca de la certidumbre jurídica del trabajo decente en las cadenas globales de valor*, en SANGUINETI RAYMOND, VIVERO SERRANO (Dirs.), *Diligencia debida y trabajo decente en las cadenas globales de valor*, Thomson Reuters-Aranzadi, Pamplona, 2022, p. 123. Este es un punto de vista ampliamente compartido a nivel doctrinal.

[157] Como postula de manera particularmente enérgica LANDAU, *Human Rights Due Diligence*, cit., p. 157.

facultades necesarias para investigar las presuntas contravenciones, ordenar la adopción de medidas correctoras e imponer sanciones a los infractores. Esta ha sido, de hecho, una de las carencias más notables de las primeras intervenciones normativas sobre la materia y uno de los elementos de novedad más relevantes introducidos por las más recientes[158]. La presencia de una instancia de este tipo, particularmente si reviste carácter especializado, permite además despejar las incertidumbres a las que puede conducir el hecho de que la responsabilidad de interpretar lo que la diligencia debida requiere recaiga exclusivamente en los tribunales[159].

Lo anterior no debe hacer perder de vista los límites de la aplicación del control público y la responsabilidad administrativa a un estándar de conducta de contornos tan fluidos como el de diligencia debida, en el que la determinación de las medidas a adoptar en cada caso depende de manera decisiva de la naturaleza y las características del riesgo y la posición que ocupa la empresa en relación con él. Esta es una valoración de carácter cualitativo que difícilmente puede ser llevada a cabo de manera por completo satisfactoria en sede administrativa, ya que requiere la realización de un análisis de fondo sobre la aptitud de las medidas de aplicación de la diligencia debida puestas en marcha para cumplir adecuadamente la función preventiva que se les asigna. Con lo que la presencia aislada de esta clase de sistemas conlleva el riesgo de que la vigilancia termine centrándose en el cumplimiento puramente formal de las exigencias impuestas a las empresas por las normas cuya aplicación se trata de controlar.

A esta limitación de partida de los sistemas de supervisión administrativa hay que sumarle su incapacidad para proporcionar una reparación a las víctimas de las vulneraciones de los derechos humanos por los daños que las medidas de diligencia debida no hayan sido capaces de prevenir o mitigar[160]. Esta es, por lo demás, una condición que no solo resulta indispensable para

[158] El primero es el caso de la Ley francesa sobre el deber de vigilancia del año 2017 y el segundo el de la Ley alemana de diligencia debida de las empresas en la cadena de suministro aprobada en 2021. Para una sucinta presentación de los contenidos básicos de ambas leyes puede verse mi estudio citado en *supra* nota 5, pp. 73-74 y 76-78, respectivamente.

[159] LANDAU, *Human Rights Due Diligence*, cit., p. 258, destacando especialmente el riesgo de que los tribunales se remitan a las practicas, los procesos y las políticas empresariales existentes y a las interpretaciones que los directivos lleven a cabo sobre lo que deben constituir las medidas de diligencia debida.

[160] Sobre la que llaman la atención especialmente QUIJANO, LÓPEZ HURTADO, *cit.*, p. 4.

ofrecer un adecuado amparo a los titulares de los derechos protegidos. Tanto o más relevante es la función disuasoria de cualquier comportamiento negligente o inadecuado que está en condiciones de desplegar sobre las empresas la posibilidad de tener que asumir esa carga[161]. De hecho, la única forma de conseguir que estas últimas asuman de manera firme y decidida el compromiso de prevenir y hacer frente a las vulneraciones de los derechos humanos laborales al interior de sus cadenas de valor es estableciendo una relación directa entre su no actuación o su actuación negligente y los perjuicios que esas vulneraciones puedan haber ocasionado a los trabajadores afectados, mediante la introducción de reglas específicas en materia de responsabilidad civil que las obliguen a su reparación en esas situaciones[162].

No debemos pasar por alto que este es un resultado que no está en condiciones de verse satisfecho de forma plena mediante la sola aplicación de las reglas generales en materia de responsabilidad civil vigentes en la mayor parte de ordenamientos nacionales, que en el mejor de los casos alcanzan a cubrir el resarcimiento de los daños que las empresas hayan *causado* con su conducta y los daños que las mismas hayan *contribuido* a causar en concurso con la actuación de sus socios comerciales, en este caso a salvo de las incertidumbres que sobre la aplicación de la noción de "contribución" en el sentido que aquí se le viene dando pueden existir[163]. Fuera del ámbito de la

[161] LANDAU, *Human Rights Due Diligence*, cit., p. 161, para quien la creación de un marco específico de responsabilidad es un componente adicional necesario de la regulación de la diligencia debida en materia de derechos humanos, tanto para la disuasión como para garantizar que las víctimas tengan acceso a la reparación.

[162] Nuevamente, QUIJANO, LÓPEZ HURTADO, *cit.*, p. 3. En el mismo sentido, TREBILCOCK, *El desastre del Rana Plaza siete años después: iniciativas transnacionales y proyecto de tratado*, en *RIT*, 2020, n. 4, p. 621.

[163] Téngase presente aquí los resultados del caso seguido en los Estados Unidos contra la multinacional *Wal-Mart* por la imposición a sus contratistas de plazos de entrega y precios que los obligaban, según los demandantes, a violar las condiciones que esta les imponía mediante su código de conducta. Este es un supuesto de manual de contribución de una empresa multinacional a la generación de impactos negativos sobre los derechos humanos de contenido laboral. A pesar de ello, la demanda de responsabilidad fue desestimada en 2009 por entender el órgano juzgador que la exigencia de esas condiciones y su control no determinaban el surgimiento de un deber de cuidado (*duty of care*) que obligue a la sociedad demandada a garantizar su cumplimiento por sus contratistas, ya que la misma no ejercía ningún control sobre el trabajo diario del personal de estos últimos, que permita atribuirle la condición de empleador de manera conjunta con ellos. Sobre este caso, así como otros iniciados infructuosamente con el mismo propósito ante las jurisdicciones de varios países, véase BRINO, *Diritti dei lavoratori e catene globali del valore: un formante giurisprudenziale in via di definizione?*, en *DLRI*, 2020, n. 167, pp. 460-463.

responsabilidad civil por los daños ocasionados quedan, de esta forma, las hipótesis de falta de diligencia de las empresas en la prevención de los impactos negativos sobre los derechos humanos laborales acaecidos en sus cadenas de valor que, aunque las empresas no hayan causado o contribuido a causar, hubieran podido ser evitados gracias a su intervención, toda vez que la negligencia en la aplicación de los estándares impuestos por la diligencia debida no constituye una causa susceptible de ser considerada suficiente por sí sola para comprometer su responsabilidad de acuerdo con las antes referidas reglas generales[164].

El corolario de lo anterior no resulta difícil de discernir: la negación de responsabilidad por las vulneraciones no causadas ni alentadas por las empresas, pero cuya prevención se encontraba a su alcance de haber aplicado correctamente los procedimientos propios de la diligencia debida. E incluso, más en general, la completa ausencia de la misma respecto de todos los atentados contra los derechos humanos laborales que pudieran producirse al interior de sus cadenas de valor por acción de sujetos sobre los que deberían haber llevado a cabo un control adecuado. Piénsese, por citar solo dos ejemplos, en los daños causados a los trabajadores como consecuencia de la falta de condiciones de seguridad en un establecimiento industrial al que una marca líder encarga una parte importante de su producción sin haber realizado previamente un control suficiente sobre la idoneidad de las mismas[165] o en la utilización de trabajo infantil por un contratista de una gran empresa en contra de la prohibición expresa de esta y sin que pueda considerarse que

[164] Estas requerirían, como apuntan Bueno, Bright, *cit.*, p. 794, la demostración de que las empresas han contribuido a la realización de las conductas causantes del daño. Lo cual es tanto como decir que han colaborado a sabiendas con ellas o las han alentado.

[165] Este fue el caso de la demanda de responsabilidad civil interpuesta contra la multinacional alemana KIK por un grupo de víctimas y familiares de víctimas de un incendio ocurrido en una fábrica de un contratista de esta empresa ubicada en Paquistán, que se cobró la vida de 262 trabajadores. La pretensión se fundaba en el hecho de que KIK, que era el comprador del 75 % de la producción del contratista, contaba con un código de conducta que exigía el respeto de una serie de reglas dirigidas a garantizar unas condiciones de trabajo seguras, pese a lo cual el control realizado por la empresa auditora italiana *RINA Services* por encargo de la multinacional no fue el adecuado, ya que le otorgó una certificación internacional de cumplimiento de la norma SA 8000, que incluye la garantía de la seguridad en el trabajo, tres semanas antes que se produjese el fatal incendio que condujo a la muerte de los trabajadores debido a que la fábrica solo contaba con un única salida y tenía las ventanas enrejadas y las salidas de emergencia bloqueadas. El caso no sería resuelto por los tribunales germanos debido a la que las partes llegaron antes a un acuerdo. Para más información, véase Guamán Hernández, *cit.*, p. 85.

las condiciones que le son ofrecidas lo fuercen a ello, pero sin ejercer sobre él la vigilancia que sería necesaria[166].

La existencia de fórmulas que extiendan la responsabilidad de las empresas líderes en situaciones como las apuntadas resulta de fundamental importancia a los efectos de asegurar una real implicación de estas en la prevención de los *impactos indirectos* sobre los derechos humanos laborales, en tanto que asociados a la conducta de un tercero, y en especial de un socio comercial o una entidad integrada dentro de la cadena de valor, respecto de los cuales cobra su auténtico sentido y utilidad la diligencia debida, como ha habido ocasión de explicar antes[167]. Con especial atención a aquellos que, no habiendo sido provocados por esas empresas, guardan una relación directa con sus operaciones, productos o servicios.

Para avanzar en la creación de esta clase de fórmulas es preciso ir más allá de los factores clásicos de imputación de la responsabilidad previstos por la mayor parte de ordenamientos jurídicos, mediante la creación de un criterio *ad hoc* de atribución de la misma que se adecúe a la singular problemática planteada por la garantía de los derechos humanos, y en particular los laborales, en las cadenas de valor. La clave para ello se encuentra, según he podido exponer más detalladamente con anterioridad[168], en considerar a la diligencia debida *en sí misma* como portadora de un deber de prevención o cuidado cuyo incumplimiento o cumplimiento defectuoso es capaz de desencadenar la responsabilidad de las empresas por los daños que su adecuada aplicación podría haber evitado. Esto supone atribuir consecuencias reparadoras a la no aplicación o la aplicación negligente de las medidas necesarias para prevención y mitigación de los impactos negativos sobre los derechos protegidos que se produzcan en su cadena de suministro[169] con independencia de la conducta y la responsabilidad que pueda corresponder al sujeto directamente causante del daño. Es decir, concibiendo la misma como una responsabilidad por hecho propio, como es el incumplimiento de las obligaciones asociadas a la diligencia debida, y no por hecho ajeno, como pueden ser las vulneraciones realizadas por los colaboradores[170].

[166] El ejemplo es proporcionado por BUENO, BRIGHT, *cit.*, p. 792.

[167] Véase *supra* 3.3.

[168] Me remito al planteamiento desarrollado en mi trabajo citado en *supra* nota 5, especialmente pp. 191-193, en cuya base se encuentra el supuesto de responsabilidad civil introducido por la Ley francesa del deber de vigilancia.

[169] D'AMBROSIO, *cit.*, p. 643.

[170] Conforme destaca SACHS, *La loi sur le devoir de vigilance des sociétés mères et sociétés donn-*

No es este, por supuesto, un sistema de responsabilidad fácil de aplicar. Antes que nada, porque la valoración de la existencia del incumplimiento o el cumplimiento defectuoso de la diligencia debida exige la realización de un examen de fondo sobre la idoneidad y eficacia de las medidas preventivas adoptadas que no resulta fácil de realizar[171], en especial debido a que deberá adaptarse a la naturaleza del riesgo, el tipo de implicación de la empresa con el impacto negativo y su nivel de influencia sobre el sujeto causante del daño. Pero, sobre todo porque la acreditación del nexo causal entre la conducta negligente y el daño sufrido por los trabajadores titulares de los derechos hace necesario la demostración por parte de estos de que este último no se habría producido de haberse llevado a cabo un control adecuado sobre el sujeto que lo causó o que el mismo tuvo lugar como consecuencia de la falta de medidas preventivas adecuadas[172]. De aquí la necesidad de que su introducción venga acompañada de una presunción que sirva para aliviar a los demandantes de la carga de probar tanto la existencia del incumplimiento de las obligaciones asociadas a la diligencia debida como la relación de causalidad, de manera que ante la sola acreditación del daño a los derechos protegidos deba ser la empresa obligada quien demuestre que cumplió razonablemente con las mismas[173].

A despecho de estas dificultades, la presencia de una fórmula de este tipo, que proyecte la responsabilidad de las grandes corporaciones más allá de los impactos causados o provocados por ellas, hacia todos los que pueden y deben ser objeto de prevención al interior de sus cadenas de valor, constituye un indispensable elemento "de cierre" con el que se completan los rasgos esenciales de una diligencia debida adaptada a la singular naturaleza de los derechos humanos laborales y potencialmente eficaz.

neuses d'orde: les ingrédients d'une corégulation, en *RDT*, jun. 2017, pp. 389-390, con referencia al sistema introducido por la Ley francesa.

[171] D'AMBROSIO, *cit.*, p. 645.

[172] Véase, nuevamente, D'AMBROSIO, *cit.*, p. 646, indicando que esto supone exigir al demandante la realización de un 'razonamiento contrafáctico'.

[173] DAUGAREILH, *La ley francesa sobre el deber de vigilancia de las sociedades matrices y contratistas: entre renuncias y promesas*, en SANGUINETI, VIVERO SERRANO (Dirs.), *Impacto laboral de las redes empresariales*, Comares, Granada, 2018, pp. 369-387.

Resumen

La demanda de respeto de los derechos humanos y los derechos fundamentales en el trabajo ha cumplido un papel de la mayor importancia dentro del proceso de construcción de mecanismos dirigidos a comprometer a las grandes empresas en la vigilancia de las actividades de sus socios comerciales en todo el mundo.

A pesar de ello, no existe un desarrollo especifico de los requisitos que deberá cumplir la regulación o la puesta en marcha de procesos de diligencia debida dirigidos a impedir o limitar impactos adversos sobre esos derechos en las cadenas de valor de estas empresas. El presente artículo se propone llevar a cabo una reconstrucción de esa indispensable dimensión laboral de la diligencia debida.

Palabras clave

Due diligence, Derechos humanos laborales, Derechos fundamentales en el trabajo, Trabajo decente, Cadenas globales de valor.

Stefano Bini

The *Consejo Andaluz de Relaciones Laborales*: since 1983, a Successful Institutional Model for Social Dialogue*

Contents: **1.** Introduction. **2.** Digitalization and disintermediation: challenges and opportunities for social partners. **3.** The *Consejo Andaluz de Relaciones Laborales*: purpose and functions of a key institution for social dialogue and collective bargaining. **3.1.** Introduction. **3.2.** Legal nature and normative framework of a "hybrid" Public Administration. **3.3.** Functions and peculiarities. **4.** The *Consejo Andaluz de Relaciones Laborales* as a virtuous model of institutionalized social dialogue, looking to the digitalized future. **5.** Conclusions.

1. *Introduction*

The paper intends to propose to the reader a reasoning around a virtuous model of tripartite experience of social dialogue, which represents an emblematic case study worthy of consideration for the crucial involvement of a public authority.

This last one is the Andalusian Council of Industrial Relations (*"Consejo Andaluz de Relaciones Laborales" - CARL*): a collegiate body of a tripartite

* The present study is part of the scientific production developed within the framework of the following research projects: *Proyecto Nacional de investigación I+D+i, sobre "La huida del mercado de trabajo y la legislación social en España" (PID2022-141201OB-I00); Proyecto Nacional de investigación I+D+i, sobre "Plan de Recuperación, Transformación y Resiliencia de España: proyección e impacto de sus políticas palancas y componentes sociales en el marco sociolaboral" (PID2022-1394880B-100); Proyecto Nacional de investigación I+D+i, sobre "La negociación colectiva como instrumento de gestión anticipada del cambio social, tecnológico, ecológico y empresarial" (PDI2021-122537NB-I00); Proyecto financiado por la Conselleria de Innovación, Universidades, Ciencia y Sociedad Digital de la Comunitat Valenciana, sobre "La regulación de la formación para el empleo ante el reto de la transición Digital, Ecológica, Territorial y hacia la Igualdad en la diversidad" (CIGE/2022/171).*

nature, constituted by the employers' and trade union organizations that hold the most representative status in the Andalusian Autonomous Community, as well as by the *Junta de Andalucía*, integrated within the organizational structure of the regional Ministry of Employment.

Well, the objective of this study is to propose a critical and reasoned analysis of this peculiar institution, on the occasion of its fortieth anniversary, trying to better understand its functioning peculiarities and projecting the gaze to its future horizons, thus offering avenues for reflection and interpretative proposals, with a view to ascertaining whether it can represent a successful model of institutionalized social dialogue, functional to concretize the vision of a digitalization of work conceived as a "shared social process" or a "continuous partnership process". The thesis that is argued in the study considers, of course, that it is.

Starting from a general and brief overview of the tendency to disintermediation that characterizes the contemporary phenomenon of the digitalization of work, the paper will thus provide a critical analysis of some of the main pillars of the Andalusian Law 4/1983 of 27 June – which established the Andalusian Council of Industrial Relations, as mentioned above – thus assessing the regulatory dimension of the CARL, with particular reference to its creation, its legal nature and its functions.

In this way, through a critical analysis of the normative data, it is intended to test the relevance of the reference discipline (Law 4/1983 of 27 June), considering possible paths of its reform. Special attention will be focused on the II Plan of Support to the Andalusian Collective Bargaining 2023-2025, elaborated by the CARL, within a mature social consensus that has identified strategic and operational objectives, as well as concrete measures and actions, in order to – among other things – strengthening the role of the *Consejo* as a collegiate organ of institutional participation and a fundamental pillar of the Andalusian industrial relations system.

From a methodological point of view, the paper is based on a theoretical analysis of the normative data and (*rectius*, in the light of) doctrinal contributions elaborated on the theme.

2. *Digitalization and disintermediation: challenges and opportunities for social partners*

As widely evidenced in international and national doctrine, the contemporary labour horizon seems to be disruptively starred by algorithms, increasingly integrated in production processes, in a growing interpenetration with human being at work. Just think, by way of example, of the eight combinations identified in the theoretical model of the "operator 4.0", through which it is possible to study the coordinates of a new human-machine integration, through an innovative taxonomy: "the Super-strength Operator (operator + exoskeleton), the Augmented Operator (operator + augmented reality), the Virtual Operator (operator + virtual reality), the Healthy Operator (operator + wearable tracker), the Smarter Operator (operator + intelligent personal assistant), the Collaborative Operator (operator + collaborative robot), the Social Operator (operator + social networks), and the Analytical Operator (operator + Big Data analytics)"[1].

Algorithms, autonomous organizations, smart contracts, blockchain[2]: dematerialized and "humanless" digital technologies give shape to "a sort of technology-enabled leaderless collective", co-protagonist of society and work[3].

With specific reference to the latter, the digital transformation that affects the world of contemporary work has been opportunely defined (among other things) in terms of a true "globotic revolution"[4], result of an

[1] Breque, De Nul, Petridis (European Commission - Directorate General for Research and Innovation), *Industry 5.0. Towards a sustainable, human-centric and resilient European industry*, European Union, 2021, p. 15, https://op.europa.eu/en/publication-detail/-/publication/468a892a-5097-11eb-b59f-01aa75ed71a1 (date of last consultation: March 8, 2024); Romero, Stahre, Wuest, Noran, Bernus, Fast-berglund, Gorecky, *Towards an operator 4.0, typology: a human-centric perspective on the fourth industrial revolution technologies*, in Vv.Aa., *Proceedings of the International Conference on Computers and Industrial Engineering*, 2016, pp. 1-11.

[2] Bini, *Algorithms, blockchain, smart contracts. Some introductory considerations for a labour law approach*, in Lo Faro (Ed.), *New Technology and Labour Law. Selected Topics*, Giappichelli, 2023, pp. 35-45.

[3] Popper, *A Venture Fund with Plenty of Virtual Capital, but No Capitalist*, in *The New York* Times, May 21, 2016, https://www.nytimes.com/2016/05/22/business/dealbook/crypto-ether-bitcoin-currency.html (date of last consultation: January 22, 2022).

[4] Baldwin, *Rivoluzione globotica*, il Mulino, 2019, p. 11.

unprecedented and extremely quick mixture between digitization and globalization.

Precisely the confluence of different phenomena linked together, along with the unpredictability that characterizes the evolution of digital technology, determines the emergence of particularly emblematic and significant trends: among which, that of disintermediation seems to play a special role. Indeed, as highlighted with particular reference to blockchain, algorithmic technologies "can diminish the role of intermediaries, who can command market power, collect significant fees, slow economic activity, and are not necessarily trustworthy or altruistic keepers of personal information"[5].

Although it represents only one example, blockchain represent the epiphenomenon of a wider global trend, well described in terms of "digital disintermediation", launched towards "metalaboral" horizons and the projection of a work entirely developed in the metaverse[6]: "*blockchain è disintermediazione perché, essendo essa una tecnologia crittografica, rende giuridicamente possibile il trasferimento digitale di dati, valori, diritti e informazioni senza la presenza di terzi certificatori*"[7].

By the way, as recently argued, "*firme es la convicción sobre la necesidad de considerar y abordar la digitalización del trabajo con un planteamiento que la conciba como proceso social compartido, con respecto al cual explorar y poner en práctica todas las metodologías y las herramientas participativas que faciliten la proyección del fenómeno en su dimensión indispensablemente colectiva*"[8].

In other terms, the challenge of disintermediation can offer, in reality, the opportunity for a relaunch of the participatory dynamics of the social partners and, therefore, for a new period of intermediation that, in the context of social dialogue, brings social agents back to the center of the scene, facing the transformative processes in progress. Effectively, as has been opportunely brought to light by authoritative Spanish doctrine, "*los procesos de automatización no pueden desarrollarse sobre la base de un impulso empresarial ex-*

[5] OECD, *OECD Blockchain Primer*, 2018, p. 3, https://cdn.gihub.org/umbraco/-media/2431/oecd-blockchain-primer.pdf (date of last consultation: March 10, 2024).

[6] On the point, see Bini, *El trabajo hacia el metaverso: horizontes de participación*, in Cairós Barreto, Estévez González (Coords.), *Estudios sobre negociación colectiva y diálogo social*, Bomarzo, 2024, pp. 75-100.

[7] Faioli, *Con la blockchain migliorano politiche del lavoro e previdenza*, in *Il Sole 24 Ore*, August 17, 2018, p. 14.

[8] Bini, *Digitalización, información, democratización*, in *RMTES*, 2022, 154, p. 209.

clusivo y excluyente", being "*necesario garantizar la presencia del sindicato en la gestión de los procesos de innovación tecnológica*"[9].

And this need for participation can be satisfied only starting from a full enhancement of the fundamental role of information on the dark side of the digital revolution, animated by algorithms of last generation, wrapped in a halo of mystery that affects its dynamics, its codes, its operating logics[10]. In fact, only by shedding light – in a collective dimension – precisely on these critical profiles, through an effective, timely and exhaustive information, the asymmetry that connotes ontologically the employment relationship, and that by effect of digitization suffers a pathological accentuation, can be reduced and controlled[11].

In this sense, the Spanish legal system represents a sort of laboratory of virtuous innovation of extraordinary interest, having adopted a specific rule by means of the Royal Decree-Law 9/2021 of 11 May, "amending the recast text of the Workers' Statute Act, approved by Royal Legislative Decree 2/2015 of 23 October, to guarantee the labour rights of persons engaged in distribution in the field of digital platforms" (the so-called "Rider Law" o "*Ley Rider*")[12], in which we can find the provision of an innovative and specific right of information for workers' representatives (the new article 64.4, letter d) of the Workers' Statute)[13].

[9] Goerlich Peset, *Innovación, digitalización y relaciones colectivas de trabajo*, in *RTES*, 2019, 92, p. 6.

[10] Bini, *La dimensión colectiva de la digitalización del trabajo*, Bomarzo, 2021.

[11] Crouch, *Se il lavoro si fa gig*, il Mulino, 2019, 161. As a result of the digital revolution affecting work organisation, we can observe an "*expansión del poder de control de los empresarios sobre los trabajadores, acentuando la asimetría del contrato de trabajo*". See also Gómez Gordillo, *Algoritmos y derecho de información de la representación de las personas trabajadoras*, in *TL*, 2021, 157, p. 163: "*las nuevas herramientas de gestión empresarial pueden, con mayor intensidad que las tradicionales, vulnerar los derechos fundamentales de las personas trabajadoras y sortear los controles desarrollados en los espacios de participación de sus representantes en la empresa*".

[12] Ginès i Fabrellas, *El derecho a conocer el algoritmo: una oportunidad perdida de la "Ley Rider"*, in *IUSLab*, 2021, 2, p. 3: "*el derecho de información que se reconoce a la representación legal de la plantilla en la 'Ley Rider' resulta una regulación pionera en Europa, que permite conocer y controlar la legalidad de las decisiones laborales adoptadas por la empresa. El acceso a información sobre las métricas o variables utilizadas por el algoritmo permite a la representación legal evaluar su adecuación para adoptar decisiones automatizadas en materia de condiciones laborales, acceso o mantenimiento del empleo*".

[13] Article 64.4, letter d), of the Spanish Workers' Statute: "*El comité de empresa, con la periodicidad que proceda en cada caso, tendrá derecho a: (…) d) Ser informado por la empresa de los parámetros, reglas e instrucciones en los que se basan los algoritmos o sistemas de inteligencia artificial que afectan a la*

A particularly significant normative contribution of the will – fully shared – to give back prominence to the social partners, within the framework of a general systematic vision, which conceives the digitization of work as a "*proceso de colaboración*"[14], a true "*proceso social en construcción*"[15], "*cuyos límites y efectos están aún por explorar en toda su profundidad*"[16].

Consistent with this vision, another interesting hermeneutic-systematic contribution is provided, always in the Spanish framework, by the Fifth Agreement for Employment and Collective Bargaining (CNEA), signed on 10 May 2023, between the trade unions' organizations CCOO and UGT and the employers' organizations CEOE and CEPYME. In this Agreement, the signatory parties identify – *inter alia* – the general coordinates describing the impact of the introduction of digital technologies on work organization, defined in terms of "*inversión estratégica básica para el futuro de las empresas y para el incremento de su productividad y competitividad*"[17].

And, "*con el objetivo de favorecer una transición justa, inclusiva y beneficiosa para todas las partes, es fundamental que los convenios colectivos sectoriales y de empresa incorporen medidas para hacer frente a estos retos, en línea con lo recogido en el Acuerdo Marco Europeo sobre Digitalización y en este AENC, adaptándose estas medidas a las realidades de cada sector, actividad y empresa y anticipándose a sus impactos en los centros de trabajo*"[18]. In other words, in order to promote an inclusive and sustainable digital transition, it recognized as essential the inclusion, in both sectorial and company collective agreements, of measures specifically addressed to these challenges, in line with the European Social Partners Framework Agreement on Digitalisation (June 2020).

As is well known and as has been said at length in a previous mono-

toma de decisiones que pueden incidir en las condiciones de trabajo, el acceso y mantenimiento del empleo, incluida la elaboración de perfiles". In this regard, see Bini, *Digitalización, información, democratización*, cit., pp. 210-211: "*a través de la ampliación del alcance del derecho de información de la representación de las personas que trabajan, pretende favorecer la elaboración de respuestas precisamente a estas cuestiones y, en otras palabras, contribuir a una especie de 'levantamiento del velo', es decir a la disolución del halo de misterio que envuelve, en general, el fenómeno "inteligencia artificial" en la empresa*".

[14] Acuerdo Marco Europeo de los Interlocutores Sociales sobre Digitalización, 2020, 5.

[15] Rodríguez Ramos (Ed.), *Transición digital en Andalucía: realidades y desafíos. Informe*, Consejo Económico y Social de Andalucía, 2020, p. 30.

[16] Prieto, Boto Gil, *Introducción*, in *Guía Negociación Colectiva y Digitalización 2020 – Cuadernos de acción sindical*, CC.OO., 2020, 9, p. 7.

[17] V Acuerdo para el Empleo y la Negociación Colectiva (V AENC), May 2023.

[18] *Ibid*.

graphic study on the subject[19], the latter specifically promotes and "encourages social partners at the appropriate levels and enterprises to introduce digital transformation strategies in a partnership approach"[20], highlighting that a "shared analysis and joint commitment to action needs to be supported by social dialogue structures, comprising employer and workers representatives"[21].

So, faced with a reality so set on the path towards a tendency to disintermediation, there is a strong need to reverse course and turn the tide, the trend itself, promoting paths of reintermediation – and so, first of all, paths of social dialogue – that transform the digitalization of work in a "shared social process". Well, precisely starting from this conceptual premise, we must ask ourselves about what possible structures of social dialogue could represent fruitful and virtuous framework models, functional to the realization of an anthropocentric, collective and plural vision of the digitalization of work. In this sense, the *Consejo Andaluz de Relaciones Laborales* presents features and characteristics worthy of note.

3. *The Consejo Andaluz de Relaciones Laborales: purpose and functions of a key institution for social dialogue and collective bargaining*

3.1. Introduction

Established by one of the first laws of the Andalusian Parliament – the Andalusian Law 4/1983, of 27 June – the institution has celebrated this year its fortieth year of activity, playing (*rectius*, continuing to play) an absolutely central role in the industrial relations system of the Community.

As the most authoritative Spanish doctrine has highlighted, the *Consejo Andaluz de Relaciones Laborales* represents an "*instrumento utilísimo de diálogo*

[19] Bini, *La dimensión colectiva*, cit.

[20] European Social Partners Framework Agreement on Digitalization, June 2020, 8-9: highlights two "objectives: foster employment transitions of workers in enterprises, and more broadly between enterprises and sectors, through investment in skills that ensure skills updating and the continuous employability of the workforce and the resilience of enterprises; provide the conditions for digital transformation of enterprises that leads to employment creation, including employers' commitment to introduce technology in a way that benefits at the same time employment, productivity and the work content and improved working conditions".

[21] European Social Partners Framework Agreement on Digitalisation, June 2020, 9.

social y de consulta entre los interlocutores sociales y la Administración autonómica", expressing the best idea of "*promoción de diálogo y de consenso social con vistas a promocionar e incitar el desarrollo, la mejora y la modernización de las relaciones laborales en Andalucía*"[22].

A useful instrument of social dialogue and consultation among social partners and regional Administration: indeed, the *Consejo* is conceived as a permanent consultative and social dialogue body in the field of industrial relations, which is responsible, according to its founding law "to facilitate consultation and cooperation between the Autonomous Administration, employers' organizations and trade unions, as well as between them and to facilitate their access to the services administered by the Autonomous Community"[23].

Coherently with the international Guidelines on Labour Administration and, in particular, with article 5, ILO C150 – Labour Administration Convention, 1978 (No. 150)[24], the Andalusian Council of Industrial Relations is created in order to ensure "consultation, cooperation and negotiation between public authorities and the most representative organizations of employers and workers"[25].

[22] Rodríguez-Piñero, Bravo Ferrer, *El Consejo Andaluz y el Desarrollo de las Relaciones Laborales en Andalucía*, in Cruz Villalón, Rodríguez-Piñero, Bravo Ferrer (Coords.), *Veinte años de relaciones laborales en Andalucía*, Consejo Andaluz de Relaciones Laborales, 2003, p. 117.

[23] Translation of article 3.1, Andalusian Law 4/1983.

[24] Article 5, ILO C150 - Labour Administration Convention, 1978 (No. 150) : "1. Each Member which ratifies this Convention shall make arrangements appropriate to national conditions to secure, within the system of labour administration, consultation, co-operation and negotiation between the public authorities and the most representative organisations of employers and workers, or -where appropriate- employers' and workers' representatives. 2. To the extent compatible with national laws and regulations, and national practice, such arrangements shall be made at the national, regional and local levels as well as at the level of the different sectors of economic activity".

[25] Article 5, ILO C150 - Labour Administration Convention, 1978 (No. 150). See Explanatory Memorandum 2, Andalusian Law 4/1983 of 27 June: "*La creación de un Consejo de relaciones laborales en Andalucía responde a las directrices internacionales más recientes sobre el sistema general de la Administración del Trabajo, de forma que, dentro del respeto más estricto a la autonomía de las organizaciones empresariales y de los sindicatos, se establezcan procedimientos para garantizar 'la consulta, la cooperación y la negociación entre las autoridades públicas y las organizaciones más representativas de empleadores y de trabajadores' que son necesarios no sólo a nivel nacional, sino también 'a nivel regional y local' (art. 5, Convenio 150 OIT, 1978). Mediante la creación del Consejo andaluz de relaciones laborales se pretende, así, facilitar 'consultas y cooperación efectivas entre los trabajadores y organismos públicos y las*

More concretely, the current competence framework of the CARL – as a result of a set of regulatory interventions, that have occurred over time, which will be mentioned later – consists of some fundamental functions among the others[26]:

- to facilitate collective bargaining between employers' organizations and trade unions, through material and personal supports, that enable the highest levels of dialogue and understanding, always in accordance with the principle of collective autonomy, enshrined in article 37 of the Spanish Constitution[27]. In particular, the Council plays a crucial role, encouraging and supporting collective bargaining in sectors characterized by difficulties and criticalities for collective bargaining;

- to facilitate and promote mediation and arbitration in collective labour disputes[28]: since 1999, collective labour disputes has been successfully managed by the CARL through the so called "Extrajudicial System for the Resolution of Labour Disputes in Andalusia" *(Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía – SERCLA)*, established within the Council.

With reference to the first of the two functional profiles just introduced, it is worth pointing out that a fundamental strategic "map", in which the objectives and measures for the impulse to collective bargaining are stated, is represented by the so called "*Plan de Apoyo a la Negociación Colectiva Andaluza*", which has been recently approved, in its second version, for the 2023-2025-time horizon (see *infra*).

Precisely this last source makes a significant hermeneutical contribution, of great interest to understand and study the dynamics of the functioning of social dialogue in the context of reference, highlighting how "collective bargaining is inherent in social dialogue (…): social dialogue and collective bargaining are the most appropriate working methods for the proper functioning of the labour relations system at all levels and for addressing reforms, changes and adaptations in productive sectors and enterprises"[29].

organizaciones de empleadores y de trabajadores, así como entre éstas últimas' (art. 6.2.c., Convenio 150 OIT,1978)".

[26] See Consejo Andaluz de Relaciones Laborales, *Memoria de actuaciones 2022*, CARL, 2023, pp. 9-10.

[27] Article 3.1.d), Andalusian Law 4/1983.

[28] Article 3.1.e), Andalusian Law 4/1983.

[29] Consejo Andaluz de Relaciones Laborales, *II Plan de apoyo del CARL a la negociación colectiva laboral andaluza (2023-2025)*, CARL, 2023, pp. 10-11: "*la negociación colectiva es inherente al diálogo*

And precisely this "consecration" of social dialogue as crucial method for the governance of the industrial relations system – intrinsically linked to collective bargaining, of course – is fully appreciated in its institutionalization, through the creation in Andalusia (as indeed in other Spanish Autonomous Communities) of regional Economic and Social Councils (*Consejos Económicos y Sociales Autonómicos*) and Labour Relations Councils (*Consejos Autonómicos de Relaciones Laborales*, like the *CARL*)[30].

With reference to the Andalusian context, precisely the concrete dynamics of the model of institutionalization of the social dialogue deserve to be studied carefully in its specific operational development, throughout the decades of cumulated experience, in order to properly understand what such an institution model can "tell" other legal systems, with specific regard to the industrial relations and the social dialogue processes management.

Indeed, the fortieth birthday of the Andalusian Council of Industrial Relations – which represents in Spain a real reference[31], taken as an efficient model for the implantation of similar organs in other autonomous communities: "*Ninguna otra Comunidad Autónoma ha abordado la concertación social de una forma tan extensa y detenida*"[32] – offers, in a certain way (and, of course,

social. El art 10.2º Ley Orgánica 2/2007, de 19 de marzo, de reforma del Estatuto de Autonomía para Andalucía (EAA) establece entre los objetivos básicos de la Comunidad Autónoma, el diálogo y la concertación social, reconociendo la función relevante que para ello cumplen las organizaciones sindicales y empresariales más representativas de Andalucía. Los protagonistas de la negociación colectiva son las personas trabajadoras y las empresas, a través de sus representantes: las organizaciones sindicales y empresariales. En esta materia, y como consecuencia del necesario respeto al principio de autonomía de las partes, el papel de los agentes sociales y económicos como interlocutores necesarios e imprescindibles resulta incuestionable. El diálogo social y la negociación colectiva son los métodos de trabajo más apropiados para el buen funcionamiento del sistema de relaciones laborales en todos los niveles y para abordar reformas, cambios y adaptaciones en los sectores productivos y empresas".

[30] In Andalusia, the Andalusian Economic and Social Council (*Consejo Económico y Social de Andalucía* - CES) was established in 1997, taking on consultative functions (previously attributed to the CARL) of the Autonomous Community's Government in economic and social matters. It is a statutory, collegiate and self-government body, attached to the Regional Ministry of Employment, Enterprise and Self-employment, in which the interests of not only the most representative trade union and employers' organizations are represented; consumers and users, the social economy sector, local authorities and universities are also represented (Andalusian Law 5/1997, of 26 November).

[31] On the historical-evolutionary trajectory of the Spanish model of social dialogue and trade union protagonism, see, among others: Casula, *Espagne: le "modèle ibérique" face à la crise et aux indigné*, in Andolfatto, Contrepoid (Eds.), *Syndicats et dialogue social. Les modèles occidentaux à l'épreuve*, PIE Peter Lang, 2016, pp. 107-122.

[32] Rodríguez-Piñero, Bravo Ferrer, *cit.*, 127; González Biedma, *Aspectos de la concertación social en Andalucía*, in Ojeda Avilés, *La concertación social tras la crisis*, Ariel, 1990, p. 272.

beyond the limited perimeter of the present study), the precious opportunity to carry out a reasoned study, a sort of "check-up" that looks to the future, through a critical analysis of the past, considering the main aspects of its regulatory framework of reference, in the light of the main challenges facing the social partners, such as the digitalization of work.

In so doing, the aspects of greater interest of the institution model in question will be highlighted, placing it adequately in the context of a reflection on the centrality of the role of social partners and social dialogue in the European context, being aware of a fundamental data: "*diálogo y concertación social constituyen una seña de identidad de la Unión Europea y de los países europeos*"[33].

3.2. Legal nature and normative framework of a "hybrid" Public Administration

Looking in depth at the essential profile of CARL, we can say that collective bargaining and conflict constitute, in a certain sense, the DNA that defines its identity, whose "hybrid" character – with respect both to its composition, as to its functions – derives from the tripartite structure that it has, despite being, at the same time, a Public Administration.

According to article 4.8 of the Andalusian Decree 155/2022, of 9 August, "which regulates the organizational structure of the Andalusian Ministry of Employment, Enterprise and Self-employment" ("*Consejería de Empleo, Empresa y Trabajo Autónomo*"), the CARL is configured as an entity attached to the same Public Administration and, in particular, to the Office of the Deputy Councillor ("*Viceconsejería*"), thus excluding the possibility to consider the CARL as an autonomous and/or a self-governing body (as it is not provided for and regulated by the Statute of Autonomy of Andalusia), and/or an administrative agency or an instrumental Administration, being rooted within the administrative apparatus proper to the Andalusian Ministry of Employment, Enterprise and Self-employment.

With respect to its composition, the Title II of the Andalusian Law 4/1983 provides for an organisational structure composed of a President (rep-

[33] Durán López, *Diálogo y Concertación Social desde la Perspectiva y Experiencias Europeas*, in Cruz Villalón, Rodríguez-Piñero, Bravo Ferrer (Coords.), *cit.*, p. 141. See also Hecquet, *Essai sur le dialogue social européen*, LGDJ, 2007; Welz, *The European Social Dialogue under Articles 138 and 139 of the EC Treaty. Actors, Process, Outcomes*, Wolters Kluwer, 2008.

resenting and directing the Council), a Secretary General (coordinating the technical and administrative services), a Plenum of twenty-eight representatives (four of the *Consejería de Empleo, Empresa y Trabajo Autónomo*, ten of the most representative trade unions, ten of the most representative employers' organizations, plus four members appointed by the President of the *Junta de Andalucía*).

The composition, to which reference has just been made, clearly demonstrates the peculiarity and the hybrid nature that characterize this Public Administration, animated by the representatives of trade unions and employers' organizations.

In addition, extremely interesting seems to be the peculiar functional autonomy the *Consejo Andaluz de Relaciones Laborales* has, considering that precisely this functional autonomy is conceived in a purposeful perspective, at the service of trade union and employers' organizations, with full respect for both collective autonomy and institutional autonomy that characterizes the CARL[34]. It is precisely in the constant search for balance between these aspects of the complex concept of "autonomy", that the founding mission of the Council expresses itself to some extent.

In this sense, the definition of an Andalusian Council of Industrial Relations conceived as a "liquid Administration", seems very appropriate, highlighting the peculiar character of a Public Administration animated and starred by trade unions and employers' organizations: an Administration "*que está y no está al mismo tiempo, porque es una Administración que hace suya la voluntad de las organizaciones sindicales y empresariales que la integran en su Pleno*" and, precisely in this sense, it is also a "*centro de imputación convencional, vinculados como estamos a los acuerdos entre los interlocutores sociales, y un ámbito de confrontación democrática de intereses sindicales y empresariales, y de ambos mundos, el de las normas y el de la voluntad y autonomía colectiva de sus organizaciones sindicales y empresariales habrá de surgir ese proyecto de Ley*"[35].

Concretely, the availability of both human and economic resources to

[34] Gómez Muñoz, *Una visión general del Consejo Andaluz de Relaciones Laborales a propósito de su cuarenta aniversario fundacional*, in *TL*, 2023, 170, p. 15: "*El Consejo tiene también una posición institucional, administrativa y presupuestaria propia y diferenciada frente a las organizaciones sindicales y empresariales que lo componen. El CARL tiene un espacio propio de autonomía funcional, al servicio, por supuesto, de las organizaciones sindicales y empresariales, y con pleno respeto a la autonomía colectiva, pero un espacio legal autónomo para la realización de sus fines y competencias legales y reglamentarias*".

[35] Gómez Muñoz, *cit.*, pp. 10-11.

be devoted to collective negotiation and mediation of collective labour disputes, as well as the physical presence on the territory of the Andalusian Community, with ten administrative offices: all these factors contribute to the concrete and effective promotion of social dialogue according to a tripartite structure, converting the CARL model into a case study of great interest in the Spanish horizon (and not only).

However, a factor of significant criticality, in the context of the dynamics of operation of the *Consejo Andaluz de Relaciones Laborales*, can be identified in the excessive fragmentation that characterizes the CARL regulatory framework of reference, based on three fundamental pillars, that are represented by the Andalusian Statute of Autonomy ("*Estatuto de Autonomía*"), the above mentioned CARL Law ("*Ley de creación del CARL*") and the Decree of structure of the Andalusian Ministry of Employment, Enterprise and Labor Autonomous ("*Decreto de estructura de la Consejería de Empleo, Empresa y Trabajo Autónomo*").

The combination of these normative pillars outlines the regulatory profile of a *Consejo* intrinsically characterized by a tripartite matrix (trade unions, employers' organizations and Public Administration), functioning on the basis of unanimous agreements, that express an emblematical orientation to the promotion of social dialogue and to the protection of a tripartism approach. But, as has pointed out in doctrine, the time seems ripe for a reform: in fact, the proposal of approval of a new Law of the CARL sinks its roots (also) in the soil of the need to cope and overcome the "regulatory dispersion" that characterizes the current scenario, forty years after the entry into force of the Law establishing the *Consejo*[36].

3.3. Functions and peculiarities

Here, we consider preferable to propose a general and comprehensive

[36] Gómez Muñoz, *cit.*, p. 13: "*creemos que este puede ser el momento idóneo para una nueva Ley del CARL con motivo de su 40º aniversario fundacional que reajuste su naturaleza híbrida (órgano consultivo/centro directivo) conforme a sus competencias actuales, y que, además, evite la enorme dispersión normativa en la que se encuentran reguladas sus funciones y competencias*". Indeed, limiting here the look to the rules of greater importance, it is necessary to point out, as reference sources: articles 1.b), 1.d), 2.4 y 4.8, Decree 155/2022, 9 August, regulating the organizational structure of the Andalusian Ministry of Employment, Enterprise and Self-employment; articles 10.20, 26.2, 44, 63, 166, Organic Law 2/2007, 19 March, reforming the Statute of Autonomy for Andalusia (EAA).

overview, without going deep into the analysis of specific norms: it seems so interesting to consider critically the framework of functions entrusted to the CARL, looking inevitably at the CARL Law (Andalusian Law 4/1983, of 27 June), whose article 3 clarifies that "the role of the Council will be to facilitate consultation and cooperation between the Regional Administration and employers' and trade union organizations, as well as to promote their access to the services administered by the Autonomous Community"[37].

More specifically, among the principal functions of the *Consejo Andaluz de Relaciones Laborales*, we can highlight the elaboration of proposals regarding labour or social policy, the promotion and preparation of advices, studies and statistics on labour relations, either on its own initiative or on a proposal from the President of the *Junta de Andalucía* or the *Consejo de Gobierno*.

But, as mentioned above, the two main, structural functions the CARL exercises are:

- to "*facilitar, dentro del respeto al principio de autonomía colectiva consagrado en el artículo 37 de la Constitución, la negociación colectiva entre organizaciones empresariales y sindicales, mediante apoyos materiales y personales que posibiliten los más altos niveles de diálogo y entendimiento. El Consejo fomentará, en especial, la negociación colectiva en aquellos sectores donde existan particulares dificultades para la misma*"[38];

- to "*facilitar y promover la mediación y el arbitraje en los conflictos colectivos de trabajo. A tal fin, el Consejo podrá adoptar medidas encaminadas a su solución mediante el ofrecimiento de mediadores y árbitros y la adopción de propuestas o recomendaciones, en especial respecto de contiendas prolongadas o de amplia repercusión en la Comunidad Autónoma o sobre autorregulación de huelgas y paros en servicios públicos esencia*"[39].

In other words, the main functions of the CARL can be identified as follows.

On the one hand, it is protagonist in the facilitation and impulse of collective bargaining, through material and personal supports, that concretely and significantly enable the most high-quality levels of social dialogue and mutual understanding, of course always within the constitutional perimeter and, in particular, respecting the principle of collective autonomy enshrined

[37] Translation of article 3.1, Andalusian Law 4/1983, of 27 June.
[38] Article 3.2, letter d), Andalusian Law 4/1983, of 27 June.
[39] Article 3.2, letter e), Andalusian Law 4/1983, of 27 June.

in article 37 of the Spanish Constitution[40]. It deserves to be highlighted that the Council encourages and supports collective bargaining, especially, in sectors characterized by particular difficulties or complexity.

On the other hand, the CARL plays a crucial role also in the collective labour disputes field, contributing to facilitate mediation and arbitration, by offering mediators and arbitrators and adopting proposals or recommendations, especially in those cases characterized – among other things – by a high-level of criticalities: prolonged, wide-ranging disputes with a broad impact in the Community, such as is the case of the strikes in essential public services.

This specific and fundamental collective conflict management function (and contribution to the management) is fulfilled by the *Consejo Andaluz de Relaciones Laborales* through a specific tool, represented by the so called "*Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía*" (SERCLA), functionally "anchored" at the CARL and regulated by an Interprofessional Agreement, demonstrating the crucial role played by social agents in forecasting, regulating and driving a vital instrument in the Andalusian industrial relations system[41].

Administratively linked to the CARL (the relationship between CARL and SERCLA is oriented by the administrative support that the first guarantees the second), the *Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía (SERCLA)* was created in 1996, by means of an inter-confederal agreement and it has experimented an evolution in its system of competences that we could define, in its historical development, somehow characterized by "variable geometries". Effectively, while initially the competence

[40] Article 37, Spanish Constitution: "*1. La ley garantizará el derecho a la negociación colectiva laboral entre los representantes de los trabajadores y empresarios, así como la fuerza vinculante de los convenios. 2. Se reconoce el derecho de los trabajadores y empresarios a adoptar medidas de conflicto colectivo. La ley que regule el ejercicio de este derecho, sin perjuicio de las limitaciones que pueda establecer, incluirá las garantías precisas para asegurar el funcionamiento de los servicios esenciales de la comunidad*".

[41] MARTÍN MUÑOZ, *La autocomposición de los conflictos laborales. Valoración teórico-práctica de la mediación y el arbitraje en el ámbito de aplicación del ASAC y del acuerdo SERCLA*, in *REDT*, 2020, 231, pp. 163-196. On the extrajudicial labour-dispute resolution, see also: SÁEZ LARA, *Presente y future de la mediación en el sistema español de relaciones laborales*, in VALDÉS DAL-RÉ (Coord.), *Los sistemas de solución extrajudicial de conflictos laborales*, SIMA, 2006, pp. 68-102; VALDÉS DAL-RÉ, *Los procedimientos extrajudiciales de solución de conflictos laborales en la Unión Europea: una aproximación de derecho comparado*, in VALDÉS DAL-RÉ (Coord.), *Los sistemas de solución*, cit., pp. 182-209.

of the System embraced only collective labour conflicts, over the years (and, with greater precision, from 2005), it has been extended to embrace also individual labour conflicts, and subsequently (in 2022) reduced, excluding conflicts in the Public Administration (because of the impossibility of having a budget to be allocated to transactional effects). The strategic importance of the Extrajudicial System of Labour-Dispute Resolution System of Andalusia is, moreover, confirmed by the quantitative data submitted by the CARL, which validate the centrality of this crucial instrument, with a view to successfully managing and resolving conflicts and disputes[42].

4. *The* Consejo Andaluz de Relaciones Laborales *as a virtuous model of institutionalized social dialogue, looking to the digitalized future*

Definitely, to an overall assessment, it emerges a full coherence between the general functions institutionally characterizing the mission of the CARL and those that we could define as the strategic lines of intervention, that compose the holistic concept of social dialogue, in an inclusive and comprehensive vision, clearly highlighted by the International Labour Organisation, in the following terms: "Social dialogue includes: negotiation, consultation and information exchange between and among governments, employers' and workers' organizations; collective bargaining between employers/employers' organizations and workers' organizations; dispute prevention and resolution; and other approaches such as workplace cooperation, international framework agreements and social dialogue in the context of regional economic communities"[43].

The constant synergy with trade unions and employers' organizations, which characterizes the core action of the Andalusian Council of Industrial Relations, is somehow one of the most emblematic aspects of this so peculiar institution, whose activity is guided and oriented by the principles of subsidiarity, proportionality and attribution. In fact, the CARL conceives its

[42] On this point, interesting data are presented in Gómez Muñoz, *cit.*, pp. 26-29. *Inter alia*: *"La gestión del SERCLA implica la tramitación de expedientes de mediación y arbitraje en toda la comunidad autónoma, con un volumen anual de 3.000 expedientes en sus 10 sedes provinciales"* (page 26).

[43] International Labour Organisation, *Social dialogue and tripartism*, https://shorturl.at/moPQ6, 1 (date of last consultation: March 4, 2024).

own action as complementary and integrative with respect to the action of trade unions and employers' organizations (subsidiarity); in a perspective of adaptation to specific needs (proportionality); and respecting the powers legally conferred on the CARL (attribution). As highlighted by the Council's President, "*el CARL encuentra la mayor de sus fortalezas, que no es otra que trabajar desde el diálogo y el consenso, desde el respeto a la autonomía funcional y competencial y la capacidad de iniciativa del Consejo como Administración pública y desde el respeto a la autonomía colectiva de las organizaciones miembros de un Consejo como órgano de participación institucional*"[44].

Coherently with its fundamental function related with the impulse to collective bargaining, the CARL adopted, in July 2023, the *II Plan de Apoyo a la Negociación Colectiva Andaluza* 2023-2025 (Plan of Support to the Andalusian Collective Bargaining), which identifies a set of objectives and actions, to promote collective bargaining in the Andalusian socio-economic context, in the biennium 2023-2025.

Result of a mature and extended negotiation process between social agents and Andalusian Public Administration, the II PANC (2023-2025) represents an important contribution with a view to tracing the future path that the Andalusian industrial relations system is called to follow.

Concretely, seven are the strategic objectives which, together with the fourteen operational objectives and the seventy-seven support measures, form the core of this key document, which constitutes a fundamental contribution, looking to the future, with a view to improving the quality of collective bargaining, while respecting the spirit and essential values of social dialogue and "*sobre la base del respeto a la autonomía colectiva de las partes y de la coordinación y asistencia técnica del CARL*"[45].

Among them, it seems interesting to consider, from the point of view of this study, in particular, the strategic objective number 3, dedicated to "strengthen the Andalusian Council of Industrial Relations as a collegiate body of institutional participation and basic pillar of labor relations in Andalusia", identifying three well-defined operational objectives: the reform of the Andalusian Council of Industrial Relations Law, the rationalization of the structure of sectoral collective bargaining at the provincial and regional levels and the contribution to facilitating greater knowledge and legal cer-

[44] Gómez Muñoz, *cit.*, p. 15.
[45] *Ibid.*

tainty in relation to certain critical profiles of contemporary complexity in collective bargaining[46].

With regard to the first operational objective of the three to which reference has just been made, among the relative support measures, all teleologically oriented to the achievement of the objective itself, some of them in particular deserve to be highlighted: the impulse to a "*reformulación y modernización por parte de la Consejería de la relación de puestos de trabajo del CARL para adecuar su estructura a la realidad funcional actual*"; the allocation of "*los medios necesarios al CARL para llevar a cabo una política de comunicación social propia en redes sociales coordinada con la de las organizaciones empresariales y sindicales*"; the allocation "*de los medios técnicos y personales suficientes para el desarrollo de las funciones administrativas del Consejo y para el desempeño de la labor del Consejo como observatorio estadístico de la negociación colectiva*"[47].

In other words, the II Plan of Support to the Andalusian Collective Bargaining highlights the ability of CARL to understand that times change and that, therefore, to continue to perform effectively and successfully its fundamental functions, it is necessary to adopt some changes, some reformulations, some modernizations.

Times change and CARL adapts to them.

This specific point just mentioned seems of interest, demonstrating perfectly the ability of the CARL of adaptation to the changing needs of the socio-economic reality in which it is called to operate: it is probably in the predisposition to embrace, manage and lead the change that we can find one of the success-key elements that have guaranteed the *Consejo* its protagonism, despite the passage of the years.

In fact, as highlighted by José Manuel Gómez Muñoz, current President of the *Consejo Andaluz de Relaciones Laborales* and Full Professor of Labour and Social Security Law, the creation of the CARL in 1983 responds to a specific need for democratization of labour relations, in a precise and very particular historical moment, characterized by the recent implementation and entry into force of a rule of extraordinary importance in the trade union Spanish landscape: the *Estatuto de los Trabajadores* (1980; Spanish Workers' Statute)[48].

[46] Consejo Andaluz de Relaciones Laborales, *II Plan de Apoyo del CARL*, cit., pp. 19-21.

[47] *Ibid.*

[48] Gómez Muñoz, *cit.*, p. 9: "*Sin duda alguna su creación obedeció a la necesidad de democratizar*

Precisely the development of the classical institutions, both individual and collective, on which the architecture of Labour Law is based – in a participatory and inclusive dynamic, proper to social dialogue, and in a critical period – is, in a certain sense, the fundamental challenge of an innovative organ, like the CARL of the origins was.

Well, the contemporary context is deeply different from that which accompanied the birth of the CARL, resulting, today, characterized by new major social issues, that challenge the Labour Law paradigms, questioning its own conceptual foundations. Among all, particularly emblematic are the unprecedented challenges posed by the disruptive process of digitization of society and, therefore, in particular, of employment, in the general terms briefly described above (see *supra*).

Indeed, "in the light of the empirical evidence emerging from the contemporary productive reality, the digitalisation of socio-economic paradigms emerges as disruptive enough to determine – among other things – the apparent eclipse of the collective dimension of work, as a result of an important push towards the individualization of and in the work itself. The same identity and class consciousness of the workers seem to 'discolour', broken down into a molecular society model, driven by intelligent technologies, structured according to disintermediation logics (in this sense, blockchain and distributed ledger systems are emblematic archetypes)"[49].

Precisely in the face of such trends, as has been pointed out above, "the digitalisation of work should be considered as a transition to build inclusively, according to an anthropocentric vision – consistent with the development model of 'industry 5.0' – and with the indispensable participation of workers' representative organisations. Digitalisation cannot be considered as a phenomenon fulfilled, inexorable, implacable, which the worker and the social partners can only interpret and 'suffer' passively, but as a 'partnership process between employers and workers and representatives' (European Social Partners Framework Agreement on Digitalisation)"[50].

las relaciones laborales en un momento especialmente sensible de nuestra historia, cuando apenas llevaba tres años aprobado el Estatuto de los Trabajadores de marzo de 1980 y cuando faltaban aún dos años para la aparición de la Ley Orgánica de Libertad Sindical".

[49] Bini, *Participation in the anticipation in the digitalisation of work: models and experiences for a shared sustainable process*, in Vv.Aa., *ILERA European Congress 2022 on "Industrial relations and the Green Transition; Towards inclusive and sustainable growth" (Barcelona, 8-10 September 2022) - Abstract Book*, ILERA, 2022, p. 85.

[50] *Ibid*.

So, as highlighted in doctrine, its fortieth anniversary could represent for the CARL the occasion for a new impulse for the achievement of its fundamental objectives: Public Administration together with social partners should continue playing a central role in the promotion of collective bargaining and labour disputes' resolution, providing technical and professional support, experimenting forms of innovation and modernization[51]. The peculiarities and dynamics of functioning of the model of social dialogue that the CARL embodies and institutionalizes, seem fully consistent with the complex and unprecedented challenges posed by the process of digitalization of work in place.

5. *Conclusions*

In conclusion, it is clear that the *Consejo Andaluz de Relaciones Laborales* (Andalusian Council of Industrial Relations) has represented, represents and will continue to represent a key-institution in the Autonomous Community of Andalusia industrial relations system and a reference model in the social dialogue general horizon.

As is well said in the II Plan of Support to the Andalusian Collective Bargaining, "*En estos cuarenta años de funcionamiento, el CARL se ha consolidado como un referente fundamental en el marco general de las relaciones laborales en Andalucía. Como adalid del diálogo y del consenso ha sido, y es, especialmente decisiva su aportación al mejor desarrollo de las relaciones laborales en nuestra Comunidad Autónoma y para la configuración de la negociación colectiva como instrumento principal para la regulación de las relaciones colectivas de trabajo en donde el convenio colectivo se convierte en espacio idóneo para favorecer la competitividad empresarial y para el mantenimiento y la creación de empleo*"[52].

[51] Gómez Muñoz, *cit.*, p. 15: "*estamos ante un Consejo Andaluz de Relaciones Laborales en el que la Administración de la Junta de Andalucía, de la mano de los interlocutores sociales, debe recuperar en este 40º aniversario una posición relevante de iniciativa, fomento y promoción de la negociación colectiva, de ofrecimiento del apoyo técnico y profesional a la negociación colectiva y a la resolución de los conflictos, con una voluntad irrenunciable de modernización y actualización de nuestro sistema andaluz de relaciones laborales, con capacidad de propuesta y de creación de nuevas herramientas técnicas para favorecer los procesos de negociación y de impulso a las empresas y a los derechos de los trabajadores*".

[52] Consejo Andaluz de Relaciones Laborales, *II Plan de Apoyo del CARL*, cit., p. 7: "In these forty years of operation, the CARL has established itself as a fundamental reference in the general framework of industrial relations in Andalusia. As the champion of dialogue and

The recipe of this success is, of course, composed of many ingredients, among which we cannot fail to mention its intrinsically hybrid character, with reference both to its composition, as to its functions; in fact, one of its greatest strengths lies in the interpenetration of different complex functions that, with their intrinsically hybrid character, trace variable geometries, as in a continuous kaleidoscopic evolution, which guarantees full capacity to respond to the changing volatility of the issues on which it intervenes.

And it is precisely this capacity of response on several fronts – together with the predisposition to adaptation and readiness for change and modernisation, as well as with the "*clima de entendimiento y mutua confianza entre los interlocutores sociales y la Administración Autonómica dentro del Consejo* [that] *ha contribuido al diálogo y a la concertación social en Andalucía*"[53] – which can make the difference, seeming extraordinarily important in addressing the challenges of the digitalization of work.

In fact, faced with the above-mentioned reality, characterized by a digitalization of work oriented to disintermediation, and assumed as a shared premise the strong need to reverse course and turn the trend, promoting paths of reintermediation, returning centrality to social dialogue, with a view to transform the digitalization of work in a "shared social process", the *Con-*

consensus, and it is especially decisive its contribution to the better development of industrial relations in our Autonomous Community and to the configuration of collective bargaining as the main instrument for the regulation of collective labour relations where the collective agreement becomes an ideal space for promoting business competitiveness and maintaining and creating jobs". See also pages 7-8: "*Es también este Consejo expresión máxima de la participación institucional y representativa de los interlocutores sociales y económicos en los órganos colegiados de la administración autonómica, cumpliéndose el mandato Constitucional y Estatutario en cuanto al papel que desempeñan las organizaciones sindicales y empresariales más representativas en la Comunidad Autónoma de Andalucía en el ejercicio de la defensa de los intereses que les son propios. El CARL se proyecta como un modelo que ha servido de referencia para la composición de los demás órganos de participación institucional consagrando el carácter tripartito y paritario que rigen en estos ámbitos participativos y representativos*" ("It is also the highest expression of the institutional and representative participation of the social and economic partners in the collegiate bodies of the autonomous administration, fulfilling the constitutional and statutory mandate as regards the role played by the most representative trade union and employers' organizations in the Autonomous Community of Andalusia in the exercise of the defense of their own interests. The CARL is projected as a model that has served as a reference for the composition of the other bodies of institutional participation by enshrining the tripartite and parity character that govern in these participatory and representative").

[53] Rodríguez-Piñero, Bravo Ferrer, *cit.*, p. 127.

sejo Andaluz de Relaciones Laborales could represent a virtuous model of institutionalized social dialogue, a fruitful reference, functional to the concrete realization of an anthropocentric, collective and plural vision of the algorithmic work.

In this sense, the *Consejo Andaluz de Relaciones Laborales*, with its glorious and long history, crosses now its own evolutionary trajectory with a bright future ahead, feeding on the vital sap brought by collective bargaining and industrial conflict.

Abstract

The paper proposes a study around a virtuous model of tripartite experience of social dialogue, emblematical for the crucial involvement of a public authority: the *Consejo Andaluz de Relaciones Laborales*. Starting from a general and brief overview of the tendency to disintermediation that characterizes the contemporary phenomenon of the digitalization of work, the paper will thus provide a critical analysis of the Andalusian Council of Industrial Relations, thus assessing its regulatory dimension, with particular reference to its creation, its legal nature and its functions. Special attention will be focused on the II Plan of Support to the Andalusian Collective Bargaining 2023-2025, elaborated by the same CARL, that has identified strategic and operational objectives, as well as concrete measures and actions, in order to strengthening the role of the *Consejo* as a collegiate organ of institutional participation and a fundamental pillar of the Andalusian industrial relations system.

Keywords

Social dialogue, Digital transformation, Disintermediation, *Consejo Andaluz de Relaciones Laborales*, Case study.

Gianluca Giampà

Collective Bargaining for Solo Self-Employed Persons in the European Union. Assessing the Efficacy of the European Commission's Guidelines

Contents: **1.** The Complex Relationship between Competition Law and Collective Workers' Rights in the European Union Framework. **2.** Collective Agreements and Competition Law in the European Court of Justice Case Law. **3.** The scope of the "labour law exemption" according to the European Commission Guidelines. **4.** Efficacy of the Guidelines in guaranteeing social rights to solo self-employed persons.

1. *The Complex Relationship between Competition Law and Collective Workers' Rights in the European Union Framework*

The legitimacy of collective agreements applicable to self-employed persons is a prominent issue that arose in the context of the interaction between European competition law and labour law principles.

The relationship between the principle of free competition in the European internal market and trade union freedoms has always been contentious. This conflict has been influenced by the significant expansion of social rights in the last century, which has challenged the rigidity of older competition law regulations[1]. Social and political changes, which have transformed the European Union from an organisation primarily focused on creating a common market to evolving into a complex political entity with diverse competences, have also influenced this process.

[1] For a historical reconstruction, cfr. MINDA, *The Common Law, Labor and Antitrust*, in *IRLJ*, 1989, 11, p. 466 ff.; see also ICHINO, *Collective Bargaining and Antitrust Laws: an Open Issue*, in *IJCL*, 2001, 17, pp. 185-188.

In the last decades, the tension between ensuring fair competition in the internal market and meeting social needs has become more evident. It is important to note that collective bargaining was not the sole battleground where the social principles of the Union clashed with competition rules[2]. There was notable dispute also regarding matters like Sunday rest[3], job placement[4], and strikes[5], to give just some examples.

As for European Union law, the conflict arises from the provision of Art. 101 of the Treaty on the Functioning of the European Union, which prohibits agreements that have the potential to restrict or distort competition[6]. While collective agreements concerning individual rights of employees are generally considered compatible with free competition[7], issues can arise when provisions in collective agreements result in restrictions on competition in the service market.

However, in EU law, there are norms, including primary legislation, that establish trade union freedom without explicit constraints regarding the subjective qualification of those exercising it, whether they are employees or self-employed[8]. It has been argued that Art. 152 of the TFEU, which recog-

[2] On this issue, CORTI, *Concorrenza e lavoro: incroci pericolosi in attesa di una svolta*, in *DLRI*, 2016, 3, pp. 505-509.

[3] CJEU C-145/88 *Torfaen Borough Council v B & Q plc* of 23 November 1989.

[4] CJEU C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* of 23 April 1991 (*Macroton*); CJEU C-55/96 *Job Centre coop. arl.* of 11 December 1997.

[5] CJEU C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*. of 11 December 2007 (*Viking*); CJEU C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* of 18 December 2007.

[6] Art. 102 could also be relevant if a union achieves a dominant position. See LIANOS, COUNTOURIS, DE STEFANO, *Re-thinking the competition law/labour law interaction: Promoting a fairer labour market*, in *ELLJ*, 2019, 10, 3, p. 303 and LIANOS, *Reconciling Antitrust Standard and Collective Bargaining Rights: Towards a New Analytical Framework in EU Competition Law*, in WAAS, HIESSL (eds.), *Collective Bargaining for Self-Employed Workers in Europe*, Wolters Kluwer, 2021, p. 302, also about Art. 106, pp. 302-304.

[7] In this sense ICHINO, *Collective Bargaining and Antitrust Laws: an Open Issue*, in *IJCL*, 2001, 17, 2, p. 189. According to BIASI, *"We will all laugh at gilded butterflies". The shadow of antitrust law on the collective negotiation of fair fees for self-employed workers*, in *ELLJ*, 2018, 9, 4, p. 361 "European competition law is specifically directed at undertakings (and their dealings) and it does not – apparently – cover individuals".

[8] This approach is also followed by the most prominent international sources on labour law and human rights. See, about the importance of taking a human right based approach in considering collective labour rights, STYLOGIANNIS, *Collective Labour Rights for Self-Employed*

nizes and promotes the role of the social partners, introduced in the Treaty of Lisbon, has severed the functionalization constraint of social dialogue to the interests of the Union, recognizing it as an autonomous function[9]. The subsequent Art. 155, with reference to social dialogue "at Union level" provides that this dialogue "may lead to contractual relations, including agreements".

Furthermore, Art. 28 of the Charter of the Fundamental Rights of the European Union, which holds equal status with the EU Treaties, recognise to workers and employers and their respective organisations "the right to negotiate and conclude collective agreements at the appropriate levels"[10]. It was affirmed that Art. 28 constitutes a fundamental vehicle for the principle of solidarity in the European Union[11].

It is important to note that Art. 28 mentions collective agreements for the first time in the context of primary European sources. In other provisions, including Art. 152 of the TFEU, more generic expressions such as "social dialogue" are preferred[12]. However, it is believed that the recognition of social dialogue itself translates into the recognition of collective bargaining since the latter is the natural outcome of the former. Furthermore, the reference to the negotiation phase extends the scope of Art. 28 to all the necessary steps leading to the conclusion of an agreement[13], even if it is not ultimately reached[14]. No definition of "collective agreement" is provided.

Workers. A Human Rights-Based Approach of Platform Work, Wolters Kluwer, 2023, p. 167 ff. Cfr. also GIOVANNONE, *Guidelines on collective agreements regarding the solo self-employed persons: another (controversial) immunity to EU competition rules*, in this journal, 2023, 2, p. 3.

[9] CARUSO, ALAIMO, *Il contratto collettivo nell'ordinamento dell'Unione europea*, in *B20M*, 2011, 2, pp. 281-282.

[10] See LAZZARI, *La Carta dei diritti fondamentali dell'Unione e le relazioni industriali: il diritto di contrattazione collettiva*, in *DLRI*, 2001, p. 641 ff.

[11] On the issue of solidarity in European labour law, see ZIMMER, *Solidarity as a Central Aim of Collective Labour Law?*, in LÓPEZ LÓPEZ (ed.), *Inscribing Solidarity. Debates in Labor Law and Beyond*, Cambridge University Press, 2022, p. 47.

[12] SCHNORR, I *contratti collettivi in un' Europa integrata*, in *RIDL*, 1993, 1, p. 328; CARUSO, ALAIMO, *cit.*, p. 274. SCIARRA, *How Social Will Social Europe Be in the 2020s?*, in *GLJ*, Special Issue 1, p. 86 affirms that it might be required, "in the long run", a reform of art. 152.

[13] VENEZIANI, *Right of collective bargaining and action (Article 28)*, in BERCUSSON (ed.), *European labour law and the EU Charter of Fundamental Rights*, ETUI, 2002, p. 54.

[14] ALES, *The Regulatory Function of Collective Agreements in the Light of Its Relationship with Statutory Instruments and Individual Rights: A Multilevel Approach*, in GYULAVÁRI, MENEGATTI (eds.), *The Sources of Labour Law*, Wolter Kluwers, 2019, p. 43.

Since, according to Art. 28, collective agreements should be negotiated and concluded "in accordance with Community law and national laws and practice", the norm appears to defer the definition to the legislation of the Member States. Additionally, the reference to "appropriate levels" seems to encompass the various forms and articulations of bargaining in individual national experiences, ranging from company-level agreements to those concluded within the framework of European social dialogue.

Another peculiarity of Art. 28 is that it codifies the right to collective bargaining alongside the right to trade union action, in what has been called a "cumulative view"[15]. The right to bargaining, in fact, lacks effectiveness when trade union action is not adequately supported by norms that legitimise and facilitate it within a framework characterised by democratic principles. Therefore, it is significant that the connection between these two rights has been recognized and codified at the European level in Art. 28, based on the constitutional traditions of the Member States[16].

2. *Collective Agreements and Competition Law in the European Court of Justice Case Law*

The first significant judgement concerning the compatibility of collective bargaining with EU competition law is the one on the Becu case (CJEU C-22/98 of 16 September 1999). In this decision the Court of Justice of the European Union established that, for the purposes of competition law, workers are not considered undertakings[17].

A few days later, in the well-known Albany case (CJEU C-67/97 of 21

[15] Ales, *cit.*, pp. 42-43.

[16] According to the ILO, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, 2008, p. 4 available at https://www.ilo.org/resource/conference-paper/report-iii1b-giving-globalization-human-face-general-survey-fundamental, "specific provisions in relation to collective bargaining are present in 66 constitutions".

[17] Point 26: workers (in the specific case, dockers) "do not therefore in themselves constitute 'undertakings' within the meaning of Community competition law". According to CJEU C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* of 10 December 1991 (*Merci*) a person's status as a worker is not affected by the fact that "the worker, whilst being linked to the undertaking by a relationship of employment, is linked to other workers by a relationship of association".

September 1999), the Court stated that collective agreements that pursue social policy objectives by implementing measures to improve conditions of work and employment can be considered exempt from the application of Art. 101. In the Court's reasoning, since objectives of social relevance have a recognized space in the Treaties[18], they must therefore be considered in a proper balance with competition rules.

The exemption from competition law established by the Court is subject to a "double filter"[19]. The first filter concerns the nature of the agreement, that must be that of a "collective agreement". The second filter concerns the object of the collective agreement[20], that must consist in certain objectives of social relevance[21]. For this reason, the exemption has been defined as "arguably narrow"[22] and based on "at least too generic" argumentations[23], and the Albany ruling has been considered partially consistent with the Court's previous orientations[24].

[18] According to De Vries, *Protecting Fundamental (Social) Rights through the Lens of the EU Single Market: The Quest for a More "Holistic Approac"*, in *IJCLLIR*, 2016, 2, p. 221, the Court raises collective bargaining "to a legitimate European social value".

[19] Di Via, *Sindacati, contratti collettivi e antitrust*, in *MCR*, 2000, 2, p. 283.

[20] According to Pallini, *Il rapporto problematico tra diritto della concorrenza e autonomia collettiva nell'ordinamento comunitario e nazionale*, in *RIDL*, 2000, 2, p. 242 the control over the object makes the freedom of bargaining "supervised".

[21] Schiek, *Collective bargaining and unpaid care as social security risk – an EU perspective*, in *IJCLLIR*, 2020, 36, 3, p. 402. The notion of social objectives has been further specified. Cfr. CJEU C-222/98 *Hendrik van der Woude v Stichting Beatrixoord* of 21 September 2000 (*van der Woude*), point 21; CJEU C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL* of 3 March 2011 (*AGR2*), point 29. Cfr. Evju, *Collective Agreements and Competition Law: The Albany Puzzle, and van der Woude*, in *IJCLLIR*, 2001, 2, p. 165 ff.

[22] Freedland, Countouris, *Some Reflections on the "Personal Scope" of Collective Labour Law*, in *ILJ*, 2017, 1, p. 59; cfr. Biasi, *Ripensando il rapporto tra il diritto della concorrenza e la contrattazione collettiva relativa al lavoro autonomo all'indomani della l. n. 81 del 2017*, in *ADL*, 2, 2018, p. 450. It's worth noting that AG Wahl, in the opinion given in *FNV Kunsten* (CJEU C-143/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* of 4 December 2014) affirmed that "the notion of direct improvement of the employment and working conditions of employees must not be too narrowly construed". Cfr. also, Giubboni, *Libertà d'impresa e diritto del lavoro nell'Unione europea*, in *Cost.it*, 2016, 3, p. 106, according to whom the scope of application of the Albany extempion is indeed wide.

[23] Ichino, *Collective Bargaining and Antitrust Laws: An Open Issue*, in *IJCL*, 2001, 17, 2, p. 193.

[24] Allamprese, *Diritto comunitario della concorrenza e contratti collettivi*, in *LG*, 2000, 8, 1, p. 35. The previous orientation of the judges emerges from the opinion of the Advocate General Lenz (20 September 1995) in the Bosman case (CJEU C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others*

These decisions pertain to cases where the agreements were applicable only to employees. The Court of Justice, while referring to the workers in the Albany judgement, "does not go on to specify who does and who does not qualify as a worker for the purpose of this exception"[25].

In many member states of the EU, collective agreements that regulate the working conditions of self-employed persons are common[26], although not as widespread and effective as it is for employees. The interests at stake and the established protections are indeed still of great relevance[27]. In some countries, this phenomenon has also developed with the collective regulation of the work relationship of platform workers, whose legal classification is still subject to extensive debates[28].

The first judgement that addressed the issue was on the Pavlov case (CJEU C-180/98 to C-184/98 of 12 September 2000). According to the

and Union des associations européennes de football (UEFA) v Jean-Marc Bosman of 15 December 1995): "there is in my opinion no rule to the effect that agreements which concern employment relationships are in general and completely outside the scope of the provisions on competition in the EC Treaty" (point 273 and 274); see also CJEU C-241/94 *French Republic v. Commission of the European Communities* of 26 September 1996.

[25] Risak, Dullinger, *The concept of "worker" in EU law. Status quo and potential for change*, ETUI, 2018, p. 21.

[26] See Hiessl, *National Approaches to Collective Bargaining for the Self-Employed: Common Trends, Innovative Potential and Unresolved Problems*, in Waas, Hiessl (eds.), *Collective Bargaining for Self-Employed Workers in Europe*, Wolters Kluwer, 2021, p. 279 ff. The practice it's also very common in Italy: cfr., recently, Piglialarmi, *La contrattazione collettiva, il lavoro parasubordinato e i rapporti di collaborazione ex art. 2, comma 2, d.lgs. n. 81/2015*, in *DRI*, 2019, 1, p. 388 ff.; Centamore, *Sindacato, contrattazione e lavoro non standard,* in *RGL,* 2022, 2, p. 216. It's important to underline that Art. 2113 of the Italian Civil Code seems to indirectly recognize the non-derogability by individual parties of the regulations set by collective agreements, even for para-subordinate self-employed workers. This implies an implicit confirmation of the favorability of Italian legislation towards the possibility of concluding collective agreements for self-employed persons. Other norms implicitly admit this possibility as well, such as art. 47-*quater* of Legislative Decree no. 81/2015, which refers to collective agreements for the integration of the regulation applicable to self-employed platform workers. Some Authors have included within these norms Art. 2, par. 2 of the same Legislative Decree, which allows collective agreements to derogate from the regulations on "hetero-organised collaborations". However, it is likely that this norm does not apply to self-employed persons within the EU definition (Delfino, *Salario legale, contrattazione collettiva e concorrenza*, ESI, 2019, p. 169).

[27] This is true for those who perform personal work and are subject to a power imbalance with their counterpart. Cfr. Countouris, De Stefano, *The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively*, in Waas, Hiessl (eds.), *Collective Bargaining for Self-Employed Workers in Europe*, Wolters Kluwer, 2021, p. 10.

[28] An effective summary of the debate is provided by Bellomo, *Platform work, protection needs and the labour market in the Labour law debate of recent years*, in this journal, 2022, 2, p. 155 ff.

Court, the Albany exemption "cannot be applied to an agreement which [...] is not concluded in the context of collective bargaining", such as an agreement that applies only to self-employed persons.

A partially different assessment was made subsequently in the well-known FNV Kunsten case (CJEU C-143/13 of 4 December 2014). According to some scholars, a factor that influenced the Court of Justice's different approach was the entry into force of the Lisbon Treaty, which has equated the provisions of the Charter of Fundamental Rights of the European Union, including Art. 28, with those of the Treaties themselves[29].

The Court stated that the concept of an undertaking includes those who "perform their activities as independent economic operators in relation to their principal"[30]. Consequently, a service provider can't be considered as an undertaking, "if he does not determine independently his own conduct on the market, but is entirely dependent on his principal"[31]. If the self-employed persons to whom the agreement is applied can be said to be "entirely dependent", they are considered "false self-employed". In particular, the state of dependency arises from the fact that the worker does not bear any economic or financial risk with the counterparty and operates as an auxiliary within the principal's undertaking. The Court also specified that the classification of a self-employed person under national law does not prevent that person from being classified as an employee according to the EU definition[32].

As a result of the Court's ruling, only service providers in a situation comparable to that of workers are exempted from competition law. Therefore, only collective agreements that apply to "false" self-employed persons can be considered compliant with EU law.

[29] Lianos, Countouris, De Stefano, *cit.*, p. 308.

[30] Cfr. CJEU C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio (CEEES) and Asociación de Gestores de Estaciones de Servicio v European Commission* of 14 December 2006, point 38.

[31] Since the term "undertaking" is not defined in either primary or secondary European law, scholars have suggested a "functional approach" in interpreting this notion. This is because provisions that contain the term could serve very different functions in relation to the different fields of regulation. See Arnold, Cerny, *Entrepreneur*, in Bartolini, Cippitani, Colcelli (eds.), *Dictionary of Statuses within EU Law*, Springer, 2019, p. 188. See also Carinci M.T., *Attività professionali, rappresentanza collettiva, strumenti di autotutela*, in *B20M*, 1, 2008, p. 176.

[32] As previously stated in CJEU C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* of 13 January 2003 (*Allonby)*, point 71.

The characteristics that the Court outlines to describe false self-employment seem to refer, partially, to the notion of economic dependence[33], which has been occasionally used in some national legal systems as a basis for providing protections to workers[34]. FNV Kunsten has identified criteria that can be used to interpret the EU notion of worker for the purpose of applying the Albany exemptions, using an approach that has been defined "functional"[35].

While this solution is reasonable in ensuring that even those who are only formally self-employed receive the protections guaranteed by collective agreements, on the other hand, it appears to be excessively cautious as it continues to strongly link the applicability of collective agreements to the qualification of "worker", albeit in the form of "false self-employed"[36]. There are indeed several categories of self-employed persons who, although not falling within the Court's definition of false self-employment, deserve the protections provided by collective agreements[37].

[33] Grosheide, ter Haar, *Employee-like worker: competitive entrepreneur or submissive employee? Reflections on CJEU, C-413/13, FNV Kunsten Informatie*, in Łaga, Bellomo, Gundt, Miranda Boto (eds.), *Labour Law and Social Rights in Europe*, Gda sk University Press, 2017, p. 37; Menegatti, *The Evolving Concept of "worker" in EU law*, in *ILLeJ*, 2019, 1, pp. 80-81, according to whom the EU notion of worker is "much broader to that of 'employee' commonly endorsed by national judiciaries, to the point of including intermediate categories workers - variously referred by some legislations to as dependent contractors, economically dependent, 'parasubordinate' workers, employee-like persons".

[34] Consider, for example, the figure of the TRADE (*Trabajador Autónomo Económicamente Dependiente*) in the Spanish legal system. TRADEs, as outlined in the *Estatuto del Trabajo Autónomo* established in Spain in 2007, are the sole category of self-employed individuals granted the right to enter into collective agreements, known as "Professional Interest Agreements" (see Art. 13 of the *Estatuto*). Cfr., on this point, García-Muñoz Alhambra, *Spain*, in Waas, Hiessl (eds.), *Collective Bargaining*, cit., p. 237. Cfr. also, in relation to the Italian context, Delfino, *Statutory minimum wage and subordination. FNV Kunsten judgment and beyond (CJEU, C-413/13)*, in Łaga, Bellomo, Gundt, Miranda Boto (eds.), *Labour Law and Social Rights*, cit., p. 46, where he affirms that almost all the requirements described by *FNV Kunsten* are formally present in "hetero-organised" employment relationships as regulated in Italy by art. 2, d.lgs. 81/2015.

[35] Lianos, Countouris, De Stefano, *cit.*, p. 313.

[36] Cfr. Perulli, *A new category within European Union Law: Personal work*, in *ELLJ*, 2024, 1, p. 199, "basically, in FNV, the Court did nothing but reaffirm an absolutely undisputed principle in all legal systems regarding the classification of the employment relationship, that is the 'primacy of facts'". "False self-employed" cannot therefore constitute a third intermediate category between workers and entrepreneurs. Cfr. Risak, Dullinger, *cit.*, p. 21 and Loi, *Il lavoro autonomo tra diritto del lavoro e diritto della concorrenza*, in *DLRI*, 2018, 4, pp. 864-865.

[37] Lianos, Countouris, De Stefano, *cit.*, p. 314 mention, for example, creative workers,

3. *The scope of the "labour law exemption" according to the European Commision Guidelines*

From 2013 to the present, the discourse surrounding the insufficient protection of self-employment and the increasing inadequacy of labour law categories, both at the European and national levels, has steadily intensified. The emergence of platform work has underscored the necessity for concrete interventions to enhance protections for self-employed persons.

With the aim of addressing these new protection needs, the European Commission adopted Guidelines[38] on the application of the Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02) on September 30, 2022. The Guidelines were initially proposed on December 9, 2021, coinciding with the proposal for a Directive on working conditions in digital platforms.

The Guidelines clarify some of the criteria established by the case law of the Court of Justice, as highlighted in the introduction of the act. This introduction provided an overview of the current state of the conflict between labour law and competition law, while also outlining the objectives of the Guidelines. Points 3 and 4 highlight the different principles involved. The case law of the Court of Justice is then mentioned in detail (points 5, 6 and 7). Lastly, attention is given to the changes in work organisation that have occurred in the last decades (point 8).

As for the general scope of application, point 13 affirms that the Guidelines apply to collective agreements as previously defined in point 2(c), which are agreements "negotiated and concluded between solo self-employed persons or their representatives and their counterparty" that "concerns the working conditions of such solo self-employed persons". This definition is

who can easily be excluded by the Court definition of false self-employed because they "have autonomy regarding the 'time, place, and content' of the task". Cfr. also, on platform workers, Doherty, Franca, *Solving the "Gig-saw"? Collective Rights and Platform Work*, in *ILJ*, 2019, 3, p. 352 ff.; Cordella, *Il lavoro dei rider: fenomenologia, inquadramento giuridico e diritti sindacali*, in *VTDL*, 2021, 4, p. 941 ff.; Guarriello, *L'accesso alla contrattazione collettiva per i lavoratori delle piattaforme: una corsa a ostacoli*, in Aimo, Fenoglio, Izzi (eds.), *Studi in memoria di Massimo Roccella*, ESI, 2021, p. 550 ff.

[38] A similar action was taken in the Netherlands, where the Authority for Consumers & Markets adopted Guidelines on price arrangements between self-employed workers in 2021, which also "codified" European Court of Justice jurisprudence (see Monti, *Collective labour agreements and EU competition law: five reconfigurations*, in *ECJ*, 2021, 17, 3, p. 721).

derived from the case law of the Court of Justice, that generally states that a collective agreement, to be considered exempt from competition law, must have the specific objective of improving the working conditions of workers[39]. Point 15 provides an exemplary – and perhaps redundant – list of the subjects that fall within the scope of working conditions regulated by collective agreements.

As for the subjective scope of application, the Guidelines apply to solo self-employed persons, defined as individuals who do not "have an employment contract or who is not in an employment relationship, and who relies primarily on his or her own personal labour for the provision of the services concerned" (point 2(a)). Solo self-employed persons are thus distinguished, on the one hand, from employees, and on the other hand, from undertakings, as solo self-employed persons are expected to predominantly perform personal work. Therefore, the contribution of other means, such as the use of machinery or the help of substitutes or assistants, cannot prevail on personal work but should be ancillary. It's worth noting that the CJEU, in its judgement on the Yodel case, considered the use of "subcontractors or substitutes to perform the service"[40] as a factor that could exclude the qualification of "worker". It's important to underline that the definition provided in the Guidelines should be interpreted more flexibly, to include workers who use substitutes or have a basic organisation of their own means but perform the activity primarily in a "personal" way.

It's important to note that the definition of "solo self-employed person" coincides with the notion of "false self-employed person" as defined by the FNV Kunsten judgement. This is not surprising, as the Guidelines do not aim to alter the definitions of "worker" and "undertaking" within EU law. As noted by scholars, the initiative behind the Guidelines was taken by the Directorate-General on Competition of the European Commission[41]. Therefore, it's understandable why the Guidelines appear to have a limited effect on reshaping the fundamental notions and principles in European labour law. The aim of the Guidelines seems to be more about identifying the limits of action of competition law in a more accurate manner, rather than extend-

[39] See par. 2.

[40] CJEU C-692/19 *B v Yodel Delivery Network Ltd* of 22 April 2020, point 45.

[41] Senatori, *EU law and digitalization of employment relations*, in Gyulavàri, Menegatti (eds.), *Decent Work in the Digital Age. European and Comparative Perspectives*, Hart-Bloomsbury, 2021, p. 68.

ing or reshaping those limits[42] to promote broader application of labour law protections[43].

After outlining the definitions, general principles, and scope of application, the Guidelines detail specific cases that fall outside the scope of Art. 101 in Section 3, as well as cases in which the Commission chooses not to intervene in Section 4. The distinction between these two scenarios could potentially lead to ambiguity, as in the cases outlined in Section 4, the legitimacy of collective agreements is not explicitly established. Therefore, if the Commission cannot definitively intervene in these cases, it remains possible for other entities to intervene. For example, the Court of Justice may intervene through a judgement following a question for a preliminary ruling in a dispute between private parties.

Following the reference to the content of the FNV Kunsten judgement, the Guidelines delineate three distinct categories of self-employed persons presumed to be exempt from the application of Art. 101 to collective agreements that apply to them. These categories represent a further development of the criteria already identified by the Court of Justice. The criteria are specified through the identification of factual indicators, an approach commonly used in recent EU legislation.

A similar approach was also followed in the first draft of the proposal for a Directive on improving working conditions in platform work, where five different criteria were established to facilitate the qualification of a relationship as a working relationship: if at least two criteria were concretely verified, the relationship would be legally presumed to be a working relationship. The use of this technique aimed to guarantee more homogeneity in the qualification of platform workers across different member States, identifying the determination of worker status as crucial for recognising labour protections. The most recent text of the proposal (March 8, 2024), likely the

[42] Pallini, *L'approccio "rimediale" della Commissione UE alla tutela del diritto di contrattazione collettiva dei lavoratori autonomi*, in *LDE*, 2023, 3, p. 8.

[43] The Commission has therefore disregarded the hopes of some scholars, who had imagined the possibility that the labour exception could also be extended to some genuine self-employed workers, proposing a case-by-case evaluation of the agreements by the antitrust authorities of the Member States. See on this point Razzolini, *Organizzazione e azione collettiva nei lavori autonomi*, in *PS*, 2021, 1, p. 60. A similar case-by-case evaluation of the compatibility of the collective agreements with antitrust law is adopted in Australia (Giovannone, *Guidelines on collective agreements*, cit., p. 13-14).

final one, narrowed the application of the legal presumption by eliminating the factual criteria.

The first indicator considered in the Guidelines is economic dependency towards the counterparty. According to the European Commission, economic dependency is likely to be a common characteristic of workers who provide services in a predominantly personal way (point 23). The Guidelines refer to certain national legislations, such as those in Germany and Spain[44], which recognise the right of self-employed persons to engage in collective bargaining, subject to certain conditions.

The issue of economic dependence as a valid criterion for distributing labour law protections has long been a topic of discussion in many European legal systems[45]. The notion of economic dependence is particularly considered when making internal distinctions in the field of genuine self-employment[46]. However, as mentioned, the Guidelines do not aim to identify a group of self-employed persons deserving of protections. Rather, the goal is to specify the notion of false self-employed persons within European Union law.

In this case, the Guidelines seem to use a criterion useful for making distinctions within genuine self-employment to differentiate, instead, between workers (in the form of "false self-employed persons") and self-employed persons[47]. The use of this his criterion highlights the contradictions

[44] For Germany: Section 12a of the Collective Agreements Act; for Spain: Art. 11 of L. 20/2007, of 11 July 2007.

[45] See the comprehensive research by PERULLI, *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects*, Report for the European Commission, 2003. More recently, scholars used the criterion of economic dependency to analyse the regulations applicable to gig economy workers: see CHERRY, ALOISI, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, in *AULR,* 2017, 66, 3, pp. 635 ff.; RAZZOLINI, *Self-employed workers and collective action: a necessary response to increasing income inequality*, in *CLLPJ*, 2021, 42, 2, p. 18. See also PERULLI, *The legal and jurisprudential evolution of the notion of employee*, in *ELLJ*, 2020, 2, p. 10 ff.; PALLINI, *Il lavoro economicamente dipendente*, Cedam, 2013, pp. 39 ff.; CORAZZA, *Dipendenza economica e potere negoziale del datore di lavoro*, in *DLRI*, 2014, 4, pp. 654-655.

[46] Cfr. FERRARO, *Studio sulla collaborazione coordinata*, Giappichelli, 2023, p. 599.

[47] See, regarding the border between genuine self-employment and false self-employment, with reference to the Italian legal framework and in particular to a law that employs factual criteria to identify "economic dependence", SANTORO-PASSARELLI, *Falso lavoro autonomo e lavoro autonomo economicamente dipendente ma genuino: due nozioni a confronto*, in *RIDL*, 2013, 1, p. 108 ff. The Author argues that the category of "economic dependence" could be more useful for

of the Commission's approach, which on the one hand does not want to depart from the state of the art of Court of Justice case law, and on the other hand, attempts to introduce criteria that goes "beyond subordination"[48] to include in the notion of worker individuals who have the characteristics of genuine self-employed[49].

In point 24, the Guidelines define the factual indicators for presuming economic dependency of solo self-employed persons. Economic dependency is presumed if the work-related earnings of the solo self-employed person from a single counterparty exceed 50 percent over a period of either one or two years. The incorporation of two distinct and individually assessable timeframes, a feature absent in the 2021 draft, is designed to enhance the efficacy of protection, and deter abusive practices by clients. Specifically, this measure prevents clients from potentially dividing the payment of fees to diminish their impact within a single year, thereby evading the application of the collective agreement to the solo self-employed person. The established threshold is objective and easily measurable[50]. Once the threshold is exceeded, the self-employed person is presumed to be economically dependent, without the need for further investigations into specific circumstances.

The second indicator is defined as the "similarity of tasks". If a solo self-employed person works side-by-side with an employee for the same counterparty, is placed under the direction of him, does not bear the commercial risk of the counterparty activities or does not enjoy sufficient independence as regards the performance of the economic activity concerned, then that person can benefit from collective bargaining. This criterion was probably introduced in relation to a collective bargaining praxis adopted in

identifying self-employed workers deserving of protection rather than false self-employed persons.

[48] DAVIDOV, *Setting Labour Law's Coverage: Between Universalism and Selectivity*, in *OJLG*, 2014, 34, 3, pp. 564-566; PERULLI, *Oltre la subordinazione. La nuova tendenza espansiva del diritto del lavoro*, Giappichelli, 2021.

[49] SCHIEK, GIDEON, *Outsmarting the gig-economy through collective bargaining - EU competition law as a barrier to smart cities?*, in *IRLCT*, 2018, 32, 3, p. 290, noted that using the category of "economic dependency" to determine who can access collective bargaining "would go well beyond the *FNV Kunsten* case law".

[50] The threshold has been considered too high in relation to its function of determining a presumption of economic dependency. Cfr. GEORGIOU, *An Assessment of the EU's Draft Guidelines on the Application of EU Competition Law to Collective Agreements of the Solo Self-Employed*, in *competitionpolicyinternational.com*, 2022.

some countries, such as Netherlands and Slovenia, to conclude agreements applicable both to employees and self-employed[51].

The Guidelines clearly specify that these indicators should not be considered for determining the reclassification of the worker under national laws but only regarding the applicability of collective agreements under EU law. The EU definition of "false self-employed persons" can in fact also include workers who, under individual national legislation, are considered genuinely self-employed. Furthermore, it is clarified, albeit redundantly, that collective agreements that apply to both employees and self-employed persons can also be exempted from competition law. There is no reason to assume the exclusion of such collective agreements, as they are very common in the practice of collective bargaining in certain Member States[52].

However, it is a fact that, according to the legislation of many Member States, the conditions mentioned in the Guidelines, which clearly reference those of the FNV Kunsten judgement[53], can easily lead to the recognition of employee status. Consequently, it is believed that the concrete application of this indicator would be very limited and reserved for rare cases where such strong indicators of subordination do not result in the reclassification of the self-employed person as an employee[54]. This belief could be reinforced, especially concerning platform workers, by the most recent version of the text of the Proposal for the Directive on Improving Working Conditions in Platform Work dated March 8, 2024, which establishes a legal presumption of an employment relationship when "facts indicating control and direction" are identified (Art. 5).

The indicator of task similarity is indeed more indeterminate than the indicator of economic dependency and, as a result, more challenging to apply in concrete terms. It can be envisioned that applying a collective agreement to a self-employed person based on this indicator would not be "automatic" and likely require, instead, a judicial decision explicitly confirming its presence.

[51] Perulli, *A new category within European Union Law*, cit., p. 202.

[52] Fulton, *Trade Unions Protecting Self-Employed Workers*, ETUC, 2018.

[53] Romei, *Contratto di lavoro e diritto della concorrenza*, in Del Punta, Romei, Scarpelli (eds.), *Il contratto di lavoro*, in *Enciclopedia del Diritto - I tematici*, VI, Giuffrè, 2023, p. 299.

[54] Cfr. Rainone S., *Labour Rights Beyond Employment Status: Insights from the Competition Law Guidelines on Collective Bargaining*, in Addabbo *et al.* (eds.), *Defining and Protecting Autonomous Work*, Palgrave, 2022, p. 189.

The third indicator pertains to the specific case of workers operating through digital platforms. The sector-specific nature of this category is closely tied to the platform work debate in recent years, which has revealed the poor working conditions faced by individuals working through digital platforms, often classified as self-employed. The Guidelines underline that platform workers often must accept the conditions imposed by platforms without the opportunity for individual negotiation ("take it or leave it"). The Commission highlights that many national authorities or courts are increasingly recognising the dependence of service providers on certain types of platforms, or even acknowledging the existence of an employment relationship. According to the Commission itself, this recognition supports the comparability of solo self-employed persons working through platforms with workers.

This argument holds true only concerning the recognition of "dependence", which is a prerequisite for comparability to workers according to the FNV Kunsten judgement. However, the same argument does not hold the same weight regarding the recognition of platform workers as employees. If platform workers are deemed employees in national legal systems, they would unquestionably be regarded as workers under EU law, and thus, the Albany exemption would apply regardless. Therefore, the recognition of some platform workers as employees does not significantly affect the assessment of comparability with workers.

What truly matters in assessing comparability with workers is the level of dependence, even for platform workers classified as self-employed under national laws. Determining this level, in the case of platform workers, does not necessitate a specific inquiry from an economic perspective (as outlined in the first indicator) or in terms of working conditions (as examined in the second indicator). According to the Guidelines, the mere fact that a worker operates through a digital platform is sufficient to consider them as false self-employed under European law and, therefore, exempt from the application of Art. 101 regarding the collective agreements applicable to them[55].

It is also highlighted that some Member States have implemented specific legislation to protect platform workers. The regulations of Spain[56] and

[55] The application of collective agreements probably serves as residual protection for those platform workers who cannot be presumed to be employees under the proposed directive. Cfr. GIOVANNONE, *La contrattazione collettiva dei lavoratori autonomi nell'orizzonte UE: tra tutela della concorrenza e autotutela collettiva*, in *fdl.it*, 2022, p. 222.

[56] Royal D.l. 9/2021, of 11 May 2021.

Greece[57], are explicitly mentioned, but it is important to note that France[58] and then Italy[59] have also enacted laws specifically aimed at platform workers or certain subcategories of them. The Italian law, which provides certain protections for self-employed riders, explicitly defers the regulation of some matters, such as compensation, to collective bargaining[60].

To fully understand the scope of this latest index identified by the Guidelines, it is important to carefully examine the definition of "digital platform" provided by them. A restrictive definition of digital platform is given. According to point 2(d), a digital platform is "any natural or legal person providing a commercial service which meets all of the following requirements: (i) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application; (ii) it is provided at the request of a recipient of the service; and (iii) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location".

This definition was identical to the one given in the first draft of the Proposal for a Directive on improving working conditions in platform work of 2021. It's noteworthy that the latest version of the Directive added another condition that must be met to define a platform as a "digital labour platform" for the purposes of the Directive. The platform should involve "the use of automated monitoring or decision-making systems". The introduction of this additional condition reduces the scope of application of the Directive, but obviously does not directly apply to the Guidelines that were approved before. Nonetheless, since the proposed Directive and the Guidelines are closely linked, it cannot be ruled out that an interpretation of the definition of digital platform consistent with that of the Directive could be favoured by the Commission. This observation is further supported by the language of the Guidelines, which stipulates that if the definition were to evolve during the process of approving the Directive, the Commission could contemplate revising the definition contained in the Guidelines accordingly.

[57] L. 4808/2021.

[58] L. 2016-1088 of 9 August 2016.

[59] D.l. 101/2019 of 3 September, that has modified d.lgs. 81/2015 introducing a specific regulation for self-employed riders. See SANTORO-PASSARELLI, *Ancora su eterodirezione, etero-organizzazione, su coloro che operano mediante piattaforme digitali, i riders e il ragionevole equilibrio della Cassazione n. 1663/2020*, in *MGL*, 2020, numero straordinario, p. 214 ff.

[60] See art. 47-*quater*, d.lgs. 81/2015.

Requirement (iii), regarding the necessary organisation of work by the platform, is better defined in point 30, where it is stated that the organisation of work "should imply, at a minimum, a significant role in matching the demand for the service with the supply of labour" and "can include other activities such as processing payments". The organisation, as defined by the Guidelines, may therefore not concern the performance of work itself but only the initial phase of the relationship[61]. However, it is necessary for the platform to have a "significant role", not just in providing a mere service of matching demand and supply, but in the context of the matching phase. It is in this phase that the platform's organisational intervention must be concretely evident.

Finally, with an overly general provision that recalls the notion of personal work, it is stated that digital platforms, according to the Guidelines, are those for which "the organisation of work performed by the individual [...] constitutes a necessary and essential, and not merely a minor and purely ancillary, component".

Section four of the Guidelines addresses cases where solo self-employed persons, although not in comparable conditions to that of workers[62], still find themselves in a position of contractual weakness compared to the counterparty. In these cases, the Commission intends not to intervene regarding the legitimacy of collective agreements applicable to them if these aim to improve working conditions.

The Guidelines specifically identify two different conditions under which the Commission foresees non-intervention.

In the first case, collective agreements concluded by solo self-employed persons with counterparties of a certain economic strength are involved. This is because solo self-employed persons may have insufficient bargaining power in these situations to influence the determination of their working conditions[63]. Then, from the Commission's perspective, collective agreements would serve to address this disparity.

[61] On the distinction between an "initial phase" and a "working performance phase" in platform work see FALSONE, *Lavorare tramite piattaforme digitali: durata senza continuità*, in *DLRI*, 2022, 2, pp. 250-251

[62] For this reason, it was stated that in this case the Guidelines "fade the exact equivalence between undertakings and self-employment" (DELEONARDIS, *La disciplina del rapporto di lavoro autonomo e il ruolo dell'autonomia collettiva*, in *VTDL*, 2023, 3, p. 756).

[63] According to RAINONE S., *cit.*, p. 189 the use of bargaining power as an index represents a "paradigm shift" in European Union law.

The disparity is envisaged under two alternative conditions: a) if the agreement is negotiated with one or more counterparties which represent the whole sector or industry; b) if the counterparty/ies have an annual turnover and/or annual balance sheet of more than 2 million euros or the counterparty/ies has a staff headcount equal to or more than 10 persons[64]. If several counterparties negotiate the agreement, they are considered jointly for the calculation of the threshold. The indices in this case are associated with factual data. It is challenging to imagine the occurrence of the first index, as it refers to an entire sector or industry. The second index can more easily occur, as it sets a low threshold for the number of employees and a high turnover or balance sheet limit. This index appears to be adopted to include digital companies that in many cases have few or no employees but generate significant income. One possible side effect of the application of this index could be that it could make the counterparties reluctant to negotiate working conditions jointly, as this could become a condition for the legitimacy of the agreements themselves[65].

The second category of collective agreements in which the Commission establishes non-intervention is those "concluded by self-employed persons pursuant to national or Union legislation". Such legislation must pursue social objectives. An example of such legislation is given in the Guidelines itself, referring to Directive (EU) 2019/790, regarding the right of authors and performers to appropriate and proportionate remuneration. This provision suggests a scrutiny of the reasons for intervention by the EU institutions, which is difficult to accomplish.

The Commission thus leaves it to the Member States to identify in abstract the cases in which the social objectives, already mentioned in the Albany case[66], are effectively pursued. In other words, the existence of the social object of the agreement, as required by EU case law, is presumed through an internal provision that legitimises collective bargaining to pursue it. This

[64] The requirements are the same as those identified for defining a "microenterprise" in Art. 2 of Annex I to the Commission recommendation of 6 May 2003 concerning the definition of micro, small, and medium-sized enterprises.

[65] In general, regarding the potential abusive behaviour of companies related to numerical thresholds, see DASKALOVA, *The Competition Law Framework and Collective Bargaining Agreements for Self-Employed: Analysing Restrictions and Mapping Exemption Opportunities*, in WAAS, HIESSL (eds.), *Collective Bargaining*, cit., p. 49.

[66] GIOVANNONE, *Guidelines on collective agreements*, cit., p. 10.

provision allows room for States to identify and, in some cases, protect certain common practices in collective bargaining for solo self-employed persons that are viewed favourably. Until now, the legislative solutions provided by States in this direction were "framed with EU Law in mind"[67]. The provision in the Guidelines regarding non-intervention could potentially encourage States to make less cautious and more autonomous evaluations.

4. *Efficacy of the Guidelines in guaranteeing social rights to solo self-employed persons*

The nature of the act adopted, specifically a Commission communication, raises concerns regarding the effectiveness of the Guidelines, as it lacks the capacity to introduce substantial changes to the state of the art established by EU legislation.

On one hand, the Guidelines simply clarify who is considered a false self-employed within the specific subject matter, specifying the orientations of the FNV Kunsten judgement by providing indicators that presume certain self-employed persons to be comparable to employees for the purpose of the applicability of competition law. Essentially, they reaffirm the exclusion of genuine self-employed persons under EU law from the application of collective agreements. In other words, the Guidelines do not "create new rights or new regulatory categories" and leave "completely unprejudiced the legislative and jurisprudential dynamics at national and supranational level"[68].

On the other hand, they introduce a partially innovative provision by acknowledging for the first time that some self-employed persons, even if not comparable to workers, may fall within the scope of the Albany exemption, based on specific indicators demonstrating the vulnerability of them. However, in the latter scenario, the Commission can only act within the scope of its own proceedings and cannot interfere with the judgments and orientations of the Court of Justice. Therefore, the Guidelines cannot guarantee total exemption in all circumstances where the legitimacy of a collective agreement may be called into question.

[67] Monti, *cit.*, p. 726. The Author mentions, in particular, the Irish legislation adopted through the Competition (Amendment) Act 2017, Section 2.

[68] Perulli, *A new category within European Union Law*, cit., p. 200.

Moreover, as highlighted in the previous paragraph, some of the criteria identified by the Guidelines have clear defects, sometimes due to their excessive indeterminacy, and other times due to possible difficulties in concrete verification. However, the most evident problem of the Commission's approach is that it leaves the evaluation of the legitimacy of collective agreements applied to solo self-employed persons to individual judgement[69]. In some cases, the distinction is based on indicators closely related to the personal situation of the person (a paradigmatic example being economic dependency)[70]. In other cases, decisive factors concern the counterpart, such as belonging to a particular sector or meeting economic or employee number thresholds. The potentially contradictory consequence of this approach is that a collective agreement may be legitimately applied only to certain self-employed persons in a specific sector or company, while excluding others based on subjective elements that are not easily verifiable *ab initio*.

Therefore, although the Guidelines represent an important interpretative advancement in relation to the established case law of the Court of Justice, they may not be the best tool for resolving the issue of the legitimacy of collective agreements applicable to economically vulnerable self-employed persons. Nor is it believed that the economic weakness of an individual self-employed person, based on objective and precise data, can be a suitable criterion for evaluating the legitimacy of the application of a collective agreement.

A collective approach to the issue is necessary. A legislative solution, through a specific regulation, which could be based on the full implementation of Art. 28 of the Charter of Fundamental Rights[71], may be needed[72].

[69] Cfr. Pallini, *L'approccio "rimediale"*, cit., p. 13.

[70] Giovannone, *La contrattazione collettiva dei lavoratori autonomi*, cit., p. 221 argues the difficulty for social partners to ensure the application only to persons with certain requirements. See also Villa, *Lavoro autonomo, accordi collettivi e diritto della concorrenza dell'Unione europea: prove di dialogo*, in *RGL*, 2022, 2, p. 306. On the inadequacy of a system based on numerical thresholds, cfr. Treu, *Uno Statuto per un lavoro autonomo*, in *DRI*, 2010, 3, p. 615 and Treu, *Lavoro autonomo e diritti collettivi nell'Unione europea*, in *LDE*, 2023, 3, pp. 9-10.

[71] Cfr. Lianos, *Reconciling Antitrust Standard and Collective Bargaining Rights: Towards a New Analytical Framework in EU Competition Law*, in Waas, Hiessl (eds.), *Collective Bargaining*, cit., p. 318; cfr. Piglialarmi, *Lavoro autonomo, pattuizioni collettive e normativa antitrust: dopo il caso FNV Kunsten, quale futuro?*, in *LDE*, 2021, 4, p. 23.

[72] According to some scholars, this article alone could make it possible to consider the

This solution could involve redefining the concept of a worker in the European law[73], at least for the purpose of evaluating the legitimacy of collective agreements, to include not only employees and false self-employed persons[74] but also, in general, self-employed persons who provide their services in a personal way[75]. This type of action could align with some scholars' suggestions to overcome the rigid dichotomy between workers and the self-employed as the sole means to assign labour protections[76].

The relevance of the notion of "personal work" as a tool to redefine the scope of application of European labour law is indeed gaining attention. A proper understanding of this notion would generally encompass individuals "who make a living from their own work", excluding only entrepreneurs that "make a living by organising the work of others, by organising capital"[77]. If this is true, all genuinely self-employed persons would be included in the definition, making it quite broad.

Therefore, it's important to emphasise that the concept of "personal work" may only be useful in cases where there's a need to expand the scope of a protection to cover all workers, whether they are employees or self-employed. There may indeed be instances where the notion of "personal work" is too broad to ensure a fair distribution of protections[78]. Indeed, it has been

interests of the self-employed in bargaining superior to the rules of competition law. Cfr. LIANOS, COUNTOURIS, DE STEFANO, *cit.*, p. 323.

[73] LIANOS, *Reconciling Antitrust Standard*, cit., pp. 314-316. According to FERRARO, *The Challenge of Self-employment protection in the European Union*, in BELLOMO, PRETEROTI (eds.), *Recent Labour Law Issues. A multilevel Perspective*, Giappichelli, 2019, p. 77, "the absolute equivalence self-employed = undertaking [...] configure an obstacle to the realization of objectives of inclusion and social protection".

[74] LA TEGOLA, *Le fonti di determinazione del compenso nel lavoro non subordinato*, Cacucci, 2022, p. 181, after analysing the Guidelines, argues that the protection of economically dependent self-employed persons cannot solely rely on their classification as "false self-employed".

[75] As suggested by LIANOS, COUNTOURIS, DE STEFANO, *cit.*, p. 323; cfr. BIASI, "*We will all laugh at gilded butterflies*", cit., pp. 371-372. Partially *contra* DASKALOVA, *The Competition Law Framework*, cit., p. 48, who argues that "limiting the collective bargaining exemption to vulnerable self-employed seems necessary to avoid undesirable consequences", but acknowledges that "a uniform vulnerability criterion may be difficult to spell out".

[76] See the works mentioned in footnote 48 and also TREU, PERULLI, *"In tutte le sue forme e applicazioni". Per un nuovo Statuto del lavoro*, Giappichelli, 2022, particularly pp. 33-34.

[77] See PERULLI, *A new category within European Union Law*, cit., p. 188.

[78] According to PERULLI, *A new category within European Union Law*, cit., p. 190, the notion of personal work "has no selectivity". See also p. 209. Cfr. ROMEI, *cit.*, p. 298.

observed that the concepts of "employee" and "self-employed" within the EU context should be regarded as "plural", as they serve different functional purposes depending on the type of protection being discussed[79]. In the context of recognizing the right to collectively bargain, considering its significance as a fundamental human right in many legal systems[80], the notion of "personal work" appears suitable for fairly determining who should have access to this right. Excluding genuinely self-employed individuals from collective bargaining would not be coherent with the principles emerging from the EU Treaties, given the reasons outlined above.

In conclusion, the valorisation of the notion of "personal work", if applied in this case, could help overcome the restrictive orientation of the FNV Kunsten ruling and allow the Albany exemption to be applied to a broader category of individuals without the need for complex case-by-case assessments. This action, by eliminating uncertainty, would also promote collective bargaining for self-employed persons in negotiation and pre-negotiation phases, enabling the full implementation of Art. 28 CFREU.

[79] Pallini, *Libertà di contrattazione collettiva dei lavoratori autonomi e tutela della concorrenza: apologia della giurisprudenza della Corte di giustizia dell'UE*, in Aimo, Fenoglio, Izzi (eds.), *Studi in memoria di Massimo Roccella*, ESI, 2021, p. 864.

[80] De Stefano, *Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach*, in *ILJ*, 2016, 46, 2, p. 11. See also Stylogiannis, *Collective Labour Rights for Self-Employed Workers. A Human Rights-Based Approach of Platform Work*, Wolters Kluwer, 2023, p. 163 ff.

Abstract

The purpose of this paper is to examine the compatibility of collective agreements for self-employed persons with the principles of European competition law. According to European law, self-employed persons are considered to be on equal footing with companies, and as a result, they may violate competition rules by entering into agreements on working conditions. The judgments of the European Court of Justice in the Albany and FNV Kunsten cases have established that collective agreements for self-employed persons are not generally exempted from the rules prohibiting restrictions on competition. However, considering the protection needs of many self-employed persons, a change in approach seems necessary. In 2022, the European Commission adopted Guidelines aiming to clarify the scope of EU competition law regarding collective agreements for self-employed persons. The objective is to exclude self-employed individuals who are most in need of trade union protection. However, there are some critical points in the Guidelines that warrant attention, such as the assessment of the compatibility of collective agreements for self-employed persons with competition law being conducted on an individual basis. A collective approach to the issue appears necessary instead of an individual one. Therefore, it seems appropriate to reflect on the dialectic between market freedom and social rights in European law concerning this specific issue, particularly in light of the recent proposal.

Keywords

Self-employment, European labour law, Collective agreements, European competition law, Labour protection.

Joana Nunes Vicente

Neglecting the Involvement of Trade Unions in Due Diligence processes? A Critical Appraisal of the EU's Corporate Due Diligence Directive

Contents: **1.** Introduction. **2.** The background: the negative impact of global value chains on human labour rights; the failure of traditional remedies; new approaches based on corporate due diligence process. **3.** The Proposal and the Directive on Corporate Sustainability Due Diligence: a general approach. **4.** The concept of workers' participation and the advantages of workers' participation in the adoption of corporate due diligence processes for human rights. **5.** The participation granted to employees' representatives under the Proposal and the Directive: positive steps and gaps.

1. *Introduction*

In recent decades, global value chains – whereby goods that used to be produced within one country are now fragmented and distributed across global networks of production – have become an integral part of the global economy, changing the patterns of trade, investment and production in global industries. They operate as a result of the liberalisation of trade, the substantial reduction of trade costs and the evolution of technologies that allow the organisation and remote control of production processes[1]. With this strategy, multinational companies exercise control and coordination power over the entire global process. By contrast, they often take advantage of a regulatory void in developing countries, when it comes to provide remedies for victims

[1] SANGUINETI, *La Construcción de un Nuevo Derecho Trasnacional del Trabajo para Las Cadenas Globales de Valor*, in *MREL*, 2021, p. 298; LEE, *Global supply chain dynamics and labour governance: Implications for social upgrading*, in *ILO Research Paper*, International Labour Office, 2016, p. 6.

of human (labour) rights violations. The rise of global value chains poses, thus, a challenge for national governments and international organisations to enforce labour standards in such cross-national activities.

On this matter, due diligence has become a central element in the current debate on how to prevent and respond to the issue of human rights violations committed by companies along global supply chains, which explains the emergence of soft and hard law instruments based on this preventive mechanism. Several studies and international institutions point out the advantages of an effective participation by employees and their representatives in the adoption of human rights due diligence processes. This paper is aimed at verifying whether, and to what extent, this objective can be said to be achieved in the EU's Directive on Corporate Sustainability Due Diligence, which aims to enhance the protection of the environment and human rights in the EU and globally.

The paper consists of four sections. The first section explains the background of the EU's Directive on Corporate Sustainability Due Diligence, recalling the negative impact of global value chains on human labour rights, the failure of traditional remedies and new approaches based on corporate due diligence process (soft law and regulatory options). Section two focus on the Directive and its draft. It provides a brief overview, giving a few examples of controversial issues, mainly, the specific matter we will address, the involvement of trade unions and workers' representatives in corporate due diligence processes. The third section looks into the concept of "employee participation" in the decision-making of an organisation and its importance, notably the advantages of an effective participation by employees and their representatives in the adoption of due diligence processes for human rights, according to the most relevant international documents/instruments. Section four returns to the Directive and examines the participation of the employees' representatives at all stages of the due diligence process under the proposed Directive and the EU legal instrument adopted, providing some conclusions.

2. *The background: the negative impact of global value chains on human labour rights; the failure of traditional remedies; new approaches based on corporate due diligence process*

In global value chains, companies – many of them multinational companies – restructure their operations internationally through outsourcing and offshoring of activities, by locating the various stages of their production processes across different countries, usually in developing and emerging countries where labour-intensive production stages are more likely to be offshored.

The adverse economic and social impacts of global value chains in those economies are widely pointed out in literature[2]: developing countries may be trapped in a "race to the bottom" to attract multinational companies and induce foreign investment, deregulating labour regulations[3], exacerbating the risk of violation of labour human rights, in particular, insufficient occupational safety and health, lack of fair wages, irregular or excessive working time, discrimination, including repugnant forms of violation such as forced labour or child labour.

The growing awareness that supply chains could have a negative impact on environment and labour rights of local populations of those countries has led to search remedies for a sustainable social upgrading in GSCs. However, it must be mentioned that the answer seems quite complex. Indeed, regarding abuses committed abroad, the corollary obligation that States assume under the right to remedy is often deemed to be confined to violations committed by state actors, not abuses committed by on-state actors such as companies[4]. Furthermore, EU Private International Law does not contain general

[2] For more developments, see MARCATO, TRONCOSO BALTAR, *Economic and social upgrading in global value chains: concepts and metrics*, Instituto de Economia - UNICAMP (2017), available at: https://www.eco.unicamp.br/images/arquivos/artigos/3557/TD318.pdf; HOLLWEG, *Global value chains and employment in developing economies, Technological Innovation, Supply Chain Trade, and Workers in a Globalized World*, 2019, available at: https://www.wto.org/english/res_e/booksp_e/gvc_dev_report_2019_e_ch3.pdf. In most of the literature, this type of analysis has been conducted mainly for developing economies, and the problems considered have been those typical of low-income countries. See, however, GUNNELLA, HASCHIMI, BENKOVSKIS, CHIACCHIO, SOYRES, LUPIDIO, FIDORA, FRANCO-BEDOYA, FROHM, *The impact of global value chains on the euro area economy*, in *Occasional Paper Series,* European Central Bank, 2019.

[3] SANGUINETI, *cit.*, p. 300.

[4] TIRUNEH, *Providing remedy for Corporate Human Rights Abuses committed abroad: the extra-territorial dimension of home states' obligation under ICESCR*, in *UJIEL*, 2023, p. 15.

procedures for suing non-EU companies in Member States' courts and it does not allow victims to call for the application Member States' substantive legislation as, in tort claims, the applicable law is the law of the place where the damage occurs[5].

In this context, corporate due diligence process has become a central element on the current debate: a range of processes[6] that business should have in place to identify, avoid and monitor human rights impacts over certain third parties along the value chains with which they are involved. That means that independently of states' abilities and/or willingness to fulfil their own human rights obligations, business enterprises have a responsibility not to infringe human rights by their own actions but also a duty to act with reasonable diligence to prevent, mitigate and address any potential adverse impacts that their operations may have on human rights – even when those activities are carried out by other actors in the value chains.

On this last matter, it is indeed clear that that the implementation of such mechanism has suffered a significant evolution in recent years.

If, at a first level, corporate due diligence process emerged as a voluntary compliance model adopted by companies (responding to the concerns of external stakeholders such as consumers, environmental associations and NGOs, rather than employees)[7], gradually there have been various efforts from inter-governmental organisations to provide guidelines for social responsibility that encourage companies to improve their human rights due diligence process. In 2011, the United Nations Human Rights Council unanimously endorsed the "Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework". In the same year, the OECD published the OECD Guidelines for Multinational

[5] Gualandi, *Addressing MNEs' violations of workers' rights through Human Rights Due Diligence. The proposal for an EU Directive on Sustainable Corporate Governance*, in this journal, 2022, I, p. 84.

[6] According to Bonnitcha, McCorquodale (*The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, in *TIJIL*, 2017, p. 899), the concept of due diligence is normally understood to mean different things by human rights lawyers and by business people. Whereas business people normally understand "due diligence" as a process to manage business risks, human rights lawyers understand "due diligence" as a standard of conduct required to discharge an obligation, an external, "objective" standard of conduct to take reasonable precaution to prevent, or to respond to, certain types of harm.

[7] Guarriello, *Il ruolo del sindicato e delle rappresentanze del lavoro nei processi di due diligence*, in *RGL*, 2021, p. 581.

Enterprises, and since then it has published several guidelines for companies to fulfil their due diligence recommendations – the most general being the Due Diligence Guidance for Responsible Business Conduct (2018). In 2017, the ILO adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration).

More recently, the growing awareness that private voluntary standards alone and soft law instruments are insufficient to advance labour standards in global value chains[8] has led to search hard law solutions on coherence with the existing international standards and their broad achievements. Consequently, the corporate responsibility to respect human rights is gradually moving from a "soft" law standard set in international law to "hard" legal obligations developed in either national statutes or case law applying across borders[9]. In some countries, courts have embraced the concept of due diligence in cases related to underlying human rights violations. Case law developments have been particularly significant in England. In others, there have been legislative developments serving the same purpose. Examples of such legislation are: the French[10] Duty of Vigilance Law in 2017; the "Child Labour Due Diligence Law" from Netherlands, in 2019; or the German Supply Chain Act, in 2021[11].

3. *The Proposal and the Directive on Corporate Sustainability Due Diligence: a general approach*

Against this evolving global regulatory environment and in order to avoid fragmentation, the European Union has started in 2021 a long process

[8] On this topic, explaining the reasons for this lack of progress, SPINELLI, *Regulating Corporate Due Diligence: from Transnational Social Dialogue to EU Binding Rules (and Back?)*, in this journal, 2022, I, p. 104.

[9] For a more general perspective of this case law, see COSLIN, NAIDOO, RENARD, *Duty of Care and Vigilance in Human Rights Matters: From an International Impulse to European Implementations*, in *RED*, 2020, p. 73.

[10] For a general approach of the French statute, see COSLIN, NAIDOO, RENARD, *cit.*, p. 79; LYON-CAEN, *Verso un obbligo legale di vigilanza in capo alle imprese multinazionali?*, in *RGL*, 2018, pp. 240-241.

[11] For a critical examination of the german legislation, see NOGLER, *Ley alemana de obligaciones de cuidado en la cadena de suministro: por qué nació y cuales son sus principales contenidos*, in SANGUINETI (coord.), VIVERO SERRANO (coord.), *Diligencia debida y trabajo decente en las cadenas globales de valor*, Aranzadi, 2022, pp. 141-182.

for the adoption of a new directive[12] on corporate sustainability due diligence obliging companies to integrate their human rights and environmental impact into their management systems. The process, which started with the European Parliament Resolution of 10 March 2021, a proposal for a directive issued by the European Commission on February 2022, followed by multiple rounds of negotiations and material amendments submitted by all EU institutions[13], has recently been concluded when the European Council formally adopted the Corporate Sustainability Due Diligence Directive (CSDDD) on 24 May 2024[14].

If we look at the proposal and at the final text of the Directive, one can observe that there are several issues certainly deserving careful consideration and that could raise some shortcomings or future difficulties. For instance, the final compromise has a much narrower personal scope than what was initially proposed, applying to EU companies and parent companies with over 1000 employees and a worldwide turnover higher than 450 million euro and Non-EU companies, reaching the same turnover thresholds in the EU. The Directive can also be questioned from the point of view of the list of human rights included in international human rights whose violation form

[12] It must be recalled that the Directive is just one element of a much more comprehensive EU agenda to promote environmental sustainability, decent work and human rights worldwide (see the Corporate Sustainability Reporting Directive (CSRD), the new Regulation (EU) 2023/1115 on deforestation-free products, the new EU Batteries Regulation 2023/1543), as noted by BRINO, *Governance societaria sostenibile e due diligence: nuovi orizzonti regolativi*, in *LDE*, 2022, p. 5; and MARQÚEZ CARRASCO, *Todos los ojos puestos en Bruselas: las claves de la futura directiva sobre diligencia debida en materia de sostenibilidad empresarial*, in *REEDH*, 2023, pp. 13-14. In any case, the new proposal stands out from the other initiatives because it is a more general approach and not so much a sectoral one, as observed by LANTARÓN BARQUÍN, *Derechos humanos y cadenas de suministro: conclusiones a partir de una lectura comparada de legislaciones estatales anglosajonas y continentales*, in SANGUINETI, VIVERO SERRANO (coord.), *cit.*, p. 202.

[13] The Council reached a political agreement on a general approach in December 2022 and the Parliament adopted its report on the Commission proposal in April 2023 and voted on it on June 2023. On December 2023, the Council and the European Parliament have reached a provisional agreement, but until the very end it was unclear how the Members States would position themselves in the decisive vote in the Council's Corepor on March 2024.

[14] On 24 May 2024, the European Council formally adopted the Corporate Sustainability Due Diligence Directive (CSDDD). This was the last step in the decision-making procedure: following the approval of the European Parliament which voted in favour of the CSDDD on 24 April 2024 and the agreement that was reached on 15 March 2024 between the EU member states on the final text of the directive.

part of the adverse human rights impact covered by the Directive, since it surprisingly omits certain particularly important international instruments and European and regional texts (EU Charter of Fundamental Rights, the Council of Europe European Convention on Human Rights, the European Social Charter and the International Convention on the Protection of Migrant Workers)[15].

Among these many issues, the specific matter we will address concerns precisely the involvement and participation of trade unions and workers' representatives in corporate due diligence processes. According to the EU legal instrument, what role do workers and their representatives organisations shall have as stakeholders throughout due diligence process? Are they considered as mere passive subjects of the implementation of the process? Or, in contrast, are they involved in all stages of this relevant process? And if so, what kind of involvement or participation?

4. *The concept of workers' participation and the advantages of workers' participation in the adoption of corporate due diligence processes for human rights*

Before looking at the advantages of corporate due diligence processes for human rights supported by adequate workers' involvement, some preliminary comments need to be made concerning the use of the concept of workers' participation, in general terms.

It should be stressed that employee participation in companies, in decision process (not participation in income, profits or assets)[16] can be analysed from different perspectives. One can distinguish between situations in which workers are directly involved, that is forms of direct participation, and those in which they are involved through their representatives, that is forms of indirect participation[17]. On the other hand, one can use the term "participation" in a broader or strict sense. In a broader sense, it[18] tends to refer to any

[15] See Brino, *cit.*, p. 12; Marqúez Carrasco, *cit.*, p. 17.

[16] About this distinction, see Pedrazzoli, *Partecipazione, costituzione economica e art. 46 della costituzione: chiose e distinzioni sul decline di un'idea*, in *RIDL*, 2005, p. 431.

[17] See Reis, *Envolvimento e participação dos trabalhadores na empresa*, *Vinte Anos de Questões Laborais*, Coimbra Editora, 2013, pp. 146-147.

[18] Pedrazzoli, *cit.*, p. 439, explores de difference between participation on decision making, on one side, and information-consultation, on the other side. The Author argues that the later plays a preparatory role regarding participation *hoc sensu*.

mechanism through which employees, directly or indirectly, can influence the organisation and decision-making of the company, covering modalities, with different intensities, such as: (i) the right of workers or their representatives to request information; (ii) the right of workers or their representatives to be consulted, establishing dialogue and exchanging opinions with company bodies; (iii) the right to participate in and exert influence on the company's activities. In this sense the term "participation" is considered equivalent to "involvement", used in EU social law[19]. In a strict sense, it refers to the right to participate in and exert influence on the company's activities. For the purposes of this article, we will used the expression "participation" to refer to employees' involvement through their representatives – especially trade unions – and in its broader sense, even in a much broader and less technical sense, including, meetings, discussions, hearings or consultation proceedings, information, and participation.

That said, one could ask what the importance of an active involvement of workers' representatives is, particularly trade unions, in the due diligence process, understood as an ongoing process that companies should implement to prevent, mitigate and address any potential adverse impacts that their operations may have on human rights even when those activities are carried out by other actors in the value chain.

In international literature, Wilfredo Sanguineti[20] point out the advantages of an effective participation by employees and their representatives in the adoption of due diligence processes for human rights. Firstly, while the processes is exclusively designed by companies, that increases the risk that it will only take into account the interests of companies, addressing only the violations with the greatest negative impact on their image, instead of prioritising workers' interests[21]. Secondly, it is recognized how difficult it is for

[19] See, for instance, the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees and the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Co-operative Society with regard to the involvement of employees. For a more general and critical perspective of the EU law concept of employees' involvement, see GOMES, *Direito à informação e à consulta dos trabalhadores na empresa*, in *Carta dos Direitos Fundamentais da União Europeia Comentada*, Almedina, 2013, p. 331, and also ALAIMO, *Il coinvolgimento dei lavoratori nell'impresa: informazione, consultazione e partecipazione*, in ALAIMO *et al.*, *Diritto del Lavoro e Diritto Sociale Europeo, Temi Scelti*, Giappichelli, 2009, pp. 130-131 and WEISS, *La partecipazione dei lavoratori nella comunita` europea*, in *DRI*, 2004, pp. 153-171.

[20] SANGUINETI, *cit.*, p. 345.

[21] GUARRIELLO, *cit.*, p. 588.

companies to reach the different links in the value chains, with their different locations, either to identify risks or to detect possible violations, or to adopt corrective measures and carry out their monitoring work effectively. The consultation and involvement of trade unions can help undertakings to identify potential and actual adverse impacts more precisely and to set up a more effective due diligence strategy. Actually, local trade unions can play a pivotal role in monitoring the working conditions at suppliers. This is because workers and their representatives are well aware of where possible misconduct may occur, they have direct knowledge of the reality of working conditions and are therefore in a position to act as the "eyes and ears" of supervisory systems. Furthermore, the very coordination that exists between trade union organisations in different parts of the world can allow violations committed in any area to be brought to the attention of the main company for the purposes of taking corrective action.

On this basis, several recommendations provided by inter-governmental organisations, and consultative bodies also highlight corporate due diligence process as an ongoing process which requires the discussion with and involvement of stakeholders at all stages of the process, particularly trade unions and other workers' representatives.

The UN Guiding Principles[22] provide for "meaningful consultation with potentially affected groups and other relevant stakeholders" in the context of due diligence, considering that such consultation is an integral part of the due diligence function as an aid for companies to understand impacts on specific people, in a specific context of operations. To this end, companies should consult stakeholders "directly in a manner that takes into account language and other potential barriers to effective participation".

Under the OECD Due Diligence Guidance for Responsible Business Conduct[23], meaningful stakeholder engagement is a key component of the due diligence process. In line with the OECD Guidance that "meaningful stakeholder engagement" should: 1) involve two-way communication and consultation, 2) be conducted in "good faith" on both sides, 3) be responsive and timely, and 4) be on-going, which means that stakeholder engagement

[22] P. 18, available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[23] Pp. 27, 28, 29, 30, 32, 34, 48 and 49, available at: https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

activities continue throughout the lifecycle of an activity, 5) be inclusive and adapted to the needs and rights of marginalised and vulnerable groups; 6) take into account the potential barriers to participation faced by affected stakeholders and 6) be context-sensitive and safe with adequate safeguards in place to protect participants from intimidation, retaliation or retribution, "including by maintaining confidentiality or anonymity". Therefore, engaging with impacted and potentially impacted stakeholders and rightsholders may be especially relevant when an enterprise is identifying adverse impacts in the context of its owns activities, devising prevention and mitigation responses to risks, identifying forms of remedy for adverse impacts, tracking and communicating on how human rights impacts are being addressed. In all those stages, the guidance recommendation is to consult and engage impacted or potentially impacted stakeholders, including "workers, workers' representatives and trade unions".

According to ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[24], enterprises – including multinational enterprises – should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should involve meaningful consultation with potentially affected groups and other relevant stakeholders including workers' organisations, as appropriate to the size of the enterprise and the nature and context of the operation.

Hence, the European Economic and Social Committee[25] underlines the importance of involving workers' representatives and trade unions in the process of setting up (risk mapping) due diligence processes, as well as in monitoring it (implementation) and reporting breaches (alert mechanisms). Only with a fruitful social partnership can the transformation towards a more social and ecological sustainable economy be managed.

Against this, the last section will analyse whether, and to what extent, this objective of engagement with trade unions in due diligence processes can be said to be achieved in the EU's Directive on Corporate Sustainability

[24] P. 10, available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[25] Opinion of the European Economic and Social Committee about the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability, Due Diligence, 2022, available at: https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/sustainable-corporate-governance.

Due Diligence. In this way, it will start with a brief account of the concept of stakeholders adopted by the proposed directive. Then it will examine in detail the participation granted to employees' representatives in the various steps that companies have to take to comply with the due diligence duty under the Proposal and the Directive.

5. *The participation granted to employees' representatives under the Proposal and the Directive: positive steps and gaps*

As a preliminary point, it is important to make some comments about the concept of stakeholders. According to the Proposal, stakeholder (Article 3 (n)) means the company's employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships. This broad definition gave cause for criticisms for two reasons[26]. Firstly, it did not differentiate between "rights-holders", whose human rights may be directly impacted, and "relevant stakeholders". As outlined in the OECD Due Diligence Guidance for Responsible Business Conduct, "not all individuals and groups considered as stakeholders will have interests that can be affected by a specific activity carried out by an enterprise". The UNGPs and the UN Guiding Principles clearly make a distinction between "affected groups" (rights-holders) and "other relevant stakeholders", that means, the legitimate representatives of rights-holder interests. The Proposal didn't account this crucial distinction. Secondly, the Proposal does not refer to workers' representatives (trade unions) as stakeholders, in contrast with the position adopted by the OECD Guidance[27] and the formula used by the European Parliament's 2021 Resolution[28]. Certainly one can say that the broad formula used in the proposal – groups, communities or entities – already covers the trade unions themselves[29]. How-

[26] In addition, it must be noted that as for the legal basis for the proposal, no reference was made to Article 153(1)(e) TFEU (information and consultation of workers) and Article 154 TFEU (structured consultation of management and labour), as noted by GUALANDI, *cit.*, p. 95.

[27] See the OECD *Guidance for Responsible Business Conduct* (Q.8).

[28] See the Resolution (article 3 (1)) – available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021IP0073.

[29] MARTÍN HERNÁNDEZ, *La perspectiva de la Unión Europea sobre la diligencia debida empre-*

ever, since the importance of this particular group of representatives, it would be a contribution to the right direction an explicitly reference to worker representatives. One could see for instance the European Parliament's report of June 2023[30], which proposed a concept of interested parties including workers and their representatives: "affected stakeholders' means those individuals, groups or communities that have rights or legitimate interests that are affected or could be affected by the adverse impacts stemming from a company's activities or actions or the activities or actions of entities in its value chain, and the legitimate representatives of such individuals or groups, including the workers and their representatives and the trade unions of the company, of its subsidiaries and throughout its value chain, or in cases where there are no individuals, groups or communities affected by an adverse impact on the environment, credible and experienced organisations whose purpose includes the protection of the environment". Following this last recommendation, the final text of the Directive explicitly mention trade unions and other workers' representatives. "Stakeholders" means the company's employees, the employees of its subsidiaries, trade unions and workers' representatives, consumers; and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business partners, including the employees of the company's business partners, trade unions and workers' representatives, national human rights and environmental institutions, civil society organisations whose purpose includes the protection of the environment, and the legitimate representatives of those individuals, groups, communities or entities". However, to better align with the rights-holder centred approach provided in the international documents, it should clearly distinguish stakeholders in general from rights-holders in particular.

Concerning trade unions' involvement throughout all phases of the due diligence process and analysing the shortcomings of the Proposal in comparison to the final text of the Directive, one can anticipate that several improvements have been made. While the Commission draft didn't mention stakeholder consultations as a general obligation to be fulfilled at all stages

sarial en materia de sostenibilidad tras la aprobación de la propuesta de directiva, in SANGUINETI (coord.), VIVERO SERRANO (coord.), *cit.*, p. 292.

[30] Https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html.

of the due diligence process, the final version creates a new article 8d, including a clear reference to "Meaningful Stakeholder Engagement".

Regarding the step of identifying potential or actual negative effects on human rights, article 6 of the Proposal merely mentioned that companies should also, where relevant, carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or potential adverse impacts. With this option, the proposal rejected the mandatory nature of stakeholder consultation (only "where relevant", which could be read as providing "a degree of discretion to companies to elect when to engage in such consultation"), and it was not aligned with the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD recommendations. According to the new Directive, in contrast, consultation should be undertaken by companies with all stakeholders, including trade unions, to gather the necessary information on actual or potential adverse impacts, in order to identify, assess and prioritise adverse impacts (article 8d (2a) (a)).

Concerning prevention and mitigation of potential negative effects on human rights, the proposal suggested that Member States should ensure that companies take appropriate measures to prevent, or where prevention was not possible or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts that have been, or should have been, identified (article 7 (1) and 8 (1)). Such measures include the adoption of prevention action plans and corrective action plans; contractual assurances from a business partner with whom the company has a direct business relationship with a view to achieving compliance with the company's code of conduct and with preventive or corrective action plans; suspension of commercial relations with the partner in the value chain of which the negative impact has arisen; termination of the business relationship with the partner in question if the potential adverse impact is severe; payment of damages to the affected persons and of financial compensation to the affected communities. Nevertheless, the consultation with affected stakeholders was only explicitly mentioned in case of the adoption of prevention action plans and corrective action plans (art. 7 (2) (a); 8 (3) (b)), not concerning the other preventive and corrective measures[31]. The final version of the Directive has improved this point, by extending consultation of stakeholders to the

[31] See Martín Hernández, *cit.*, p. 293.

decision to terminate or suspend a business relationship (article 8d (2a) (b) (c)), which is certainly a good starting point, but it should have been strengthened to include the other measures.

Under article 10 of the proposal, Member States should ensure that companies carry out periodic assessments to verify if that risk mitigation measures were being pursued or to validate that adverse impacts have actually been prevented or mitigated. Surprisingly, at this relevant stage of monitoring and tracking the effectiveness of the companies' due diligence activities, workers' participation was completely absent, once again not consistent with the OECD guidelines, as explained in the previous section. A welcomed improvement has been reached in the final version adopted making stakeholder consultation compulsory at this stage (article 8a (2a) (e)).

Finally, a special consideration should be made concerning grievance or complaints mechanisms[32]. According to the Proposal, companies should provide the possibility for trade unions and other workers' representatives to submit complaints where they have legitimate concerns regarding actual or potential adverse human rights impacts (article 9). Despite this good starting point, the Proposal presented three significant shortcomings.

Firstly, according to the Proposal, companies should inform the relevant workers and trade unions of the procedures for dealing with complaints. In contrast, as outlined in the UN Guiding Principles, trade union participation should not be limited to the right to be informed. A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. Thus, engagement with stakeholder groups, namely, trade unions, about the design and performance of the mechanism can help to ensure that trade union will use it in practice and create a common interest in its success[33]. No measure is included in the Proposal with this purpose. By contrast, the European Parliament's report of June 2023 suggested that Member States should ensure that "when companies establish or participate in notification and grievance mechanisms, those mechanisms are legitimate, accessible, predictable, equitable, transparent, rights-compatible, gender- and culturally responsive, and based on engagement and dialogue". In addition, notification and grievance mechanisms should "be designed and

[32] Martín Hernández, *cit.*, p. 294.

[33] P. 31, available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

operated in a manner that is informed by the perspectives of stakeholders and adapted to the needs of people who may be most vulnerable to adverse impacts"[34].

Secondly, the Proposal also fails to include a reference to grievance mechanisms set forth in global framework agreements concluded between groups of companies (or multinational companies) and global union federations or European union federations. According to Guarriello[35] , one of the most innovative aspects of the recent global framework agreements is to include specific provisions regarding workers' rights at suppliers and subcontractors. Most global framework agreements applicable in the global value chain make reference to the ILO instruments – mainly those concerning fundamental principles and rights at work, such as freedom of association/collective bargaining, non-discrimination, child labour, and forced labour. Some global framework agreements include procedural mechanisms for monitoring and verifying the obligation to respect fundamental labour rights through global chains such as training for workers' representatives and local management, site visits to subsidiaries of the company in different countries, definition of complaints procedures, etc.[36].

Lastly, the Proposal didn't recognise two important key instruments to enable workers' representatives to carry out their monitoring work effectively. On the one hand, the trade unions' right to request information on the composition of the networks of suppliers and contractors[37] and other additional information. As described above, stakeholder engagement is characterised by two-way communication. It involves the timely sharing of the relevant information for stakeholders to make informed decisions[38]. To enable trade unions to monitor the working conditions at the suppliers and the adherence to the labour standards, it is of crucial importance that information

[34] Https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html.

[35] Guarriello, *cit.*, p. 511.

[36] Less frequently they go beyond the core labour standard, dealing with wages and working time; health and safety; training, and restructuring, as pointed out by Spinelli, *cit.* , p. 106. Furthermore, regarding some specific issues, such as environmental issues, these agreements still have serious limitations, as noted by Giovannone, *Le nuove dinamiche della contrattazione collettiva per la Just Transition: prospettive regolative per la convergenza tra interessi economici, sociali e ambientali*, in *RGL*, 2021, p. 646.

[37] Sanguineti, *cit.*, p. 347.

[38] By contrast, see the European Parliament's proposed amendment, art. 8 d (4), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html.

is provided by the lead company in the first instance about the companies in its global supply chain. On the other hand, an effective protection against possible retaliatory measures for the often whistleblowing role that workers' representatives play. For that reason, in its report of June 2023, the European Parliament proposed an amendment establishing that "In informing and consulting affected stakeholders, companies shall identify and address barriers to engagement and shall ensure that participants are not the subject of retaliation or retribution, including by maintaining confidentiality or anonymity. Companies shall pay particular attention to the needs of vulnerable stakeholders, and overlapping vulnerabilities and intersecting factors, ensure a gender-responsive approach, and fully respect the United Nations Declaration on the Rights of Indigenous Peoples".

The majority of these limitations have been successfully overcome in the new Directive. In fact, concerning trade union's right to request information, this key instrument is now explicitly recognised on article 8d (2): "consulted stakeholders shall be allowed to make a reasoned request for relevant additional information, which shall be provided by the company within a reasonable period of time and in an appropriate and comprehensible format". Regarding complaints' procedures, article 9 (6) include a specific reference to the complaint mechanisms provided for in global framework agreements describing that "companies are allowed to fulfil the obligations by participation in collaborative complaints' procedures and notification mechanisms, including those established jointly by companies, through industry associations, multi-stakeholder initiatives or global framework agreement". Moreover, it also states that "companies shall take reasonably available measures to prevent any form of retaliation by ensuring the confidentiality of the identity of the person or organisation submitting the complaint, in accordance with national law" (article 9 (3)). Finally, the new directive calls for companies to establish a fair, publicly available, accessible, predictable and transparent procedure for dealing with complaints. Despite this positive reference, it would be useful an explicitly reference to the role of stakeholders in conceptualising the complaints mechanisms themselves, as described above.

In conclusion, it seems fair recognized that the Commission Proposal clearly fell short of international standards, in what concerns trade unions' participation throughout corporate due diligence process. According to those recommendations, while stakeholders' involvement, in particular trade

unions' involvement, is a key component of the due diligence process, this involvement should be interactive, covering information, consultation, and comprehensive/structural, it means an ongoing process. To the contrary, in the proposed directive, trade unions were not explicitly mentioned as stakeholders. A clear obligation to consult stakeholders was only referred when enacting preventive or corrective action plans. In some stages, it was clearly non-existent. In others, it was limited to a passive role, far away from a constructive cooperation between companies and workers' representatives. Thanks to specifically recommended changes (particularly from the European Parliament), the final version of the directive adopts wide-ranging amendments that introduce a systematic approach to stakeholder participation in order to cover all stages of human rights due diligence, in line with international standards. Despite some minor shortcomings – regarding the subsets of stakeholders or the involvement of workers' representatives in the design of grievance mechanisms – the new piece of legislation entails almost all the principles that should be followed for stakeholder engagement to be characterised as meaningful.

Abstract

After a brief reconstruction of the various steps that have emphasised the role of human rights due diligence, the article examines the role of trade unions and other forms of employee representation in the implementation of due diligence processes. More specifically, it aims to verify whether, and to what extent, this objective can be said to be achieved in the Directive on Corporate Sustainability Due Diligence. With this purpose, the article looks into the concept of "employee participation" in the decision-making of an organisation and the advantages of an effective participation by employees and their representatives in the adoption of human rights due diligence processes pointed out by several studies and international institutions. Then, it analyses the participation granted to employees' representatives in the various actions that companies have to take to comply with the due diligence duty under the proposed directive and the legal instrument adopted. The limits and shortcomings found in the proposal have been significantly overcome in the final version, which leads to an overall positive judgement despite some minor gaps.

Keywords

Global value chains, Labour protection regulations, Due diligence, trade unions, EU Directive.

Ilaria Purificato, Iacopo Senatori

Implementing the European Social Partners Framework Agreement on Digitalization at the Crossroads of Collective Bargaining and Participation: the Italian Case of the Right to Disconnect*

Contents: **1.** Context. The implementation of the European Framework Agreement on Digitalization in Italy and the future of the European Social Dialogue. **2.** The multifaceted character of disconnection. **3.** The disconnection in the Italian collective agreements. **3.1.** Scope of the analysis and methodological approach. **3.2.** The outputs. **4.** Evaluating the influence of the EFAD on the Italian collective agreements. **5.** Concluding remarks.

1. *Context. The implementation of the European Framework Agreement on Digitalization in Italy and the future of the European Social Dialogue*

This essay addresses two intertwined regulatory issues linked to the digitalization of employment relations. On the side of the subject matter of regulation, it is focused on the highly problematic topic of working time. To be more specific, the attention will be placed on the legal characterization of the worker's power to disconnect from work devices, intended as a means to control and manage the balance between the different dimensions of human life in an era dominated by the risk of "time porosity"[1].

* This paper is the result of the joint reflection of the Authors. However, sections 1 and 2 can be attributed to Iacopo Senatori, sections 3,4, and 5 to Ilaria Purificato.

[1] The phenomenon of "time porosity" has been extensively addressed in the literature (see GENIN, *Proposal for a Theoretical Framework for the Analysis of Time Porosity*, in *IJCLLIR*, 2016, vol. 32, no. 3, pp. 280-300; KRAUSE, *"Always-on": The Collapse of the Work-Life Separation in Recent Developments, Deficits and Counter-Strategies*, in ALES, CURZI, FABBRI, RYMKEVICH, SENATORI, SOLINAS (eds.), *Working in Digital and Smart Organizations. Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave Macmillan, Cham, 2018, pp. 223-248) and will be taken for granted in this essay.

On the side of regulatory methods, the essay addresses European Social Dialogue as a method of regulation of the problems arising from the technological transformation. Therefore, it will specifically deal with the normative sources and contents generated in the context of the European Social Dialogue (hereinafter ESD) and its domestic implementing acts.

As a result, this contribution, besides discussing a very specific topic of labour law, will also attempt to provide an insight on the health of European social dialogue, from the perspective of its coordination with the national regulatory levels.

In its Communication *Strengthening social dialogue in the European Union: harnessing its full potential for managing fair transitions* of 25 January 2023 (COM(2023) 40 final), the European Commission, while on the one hand emphasised the importance of a social dialogue that "adapts to the digital age"[2] and that "promotes collective bargaining in the new world of work", on the other hand lamented a progressive decline of the instruments and the culture of social dialogue. The former, demonstrated by the lack of new agreements to be implemented through EU law in the last decade, and the latter by the limited information about the impact of ESD on national systems, which obscures any possible monitoring, analysis or follow-up on the implementation of the initiatives of European social partners.

The European Social Partners Framework Agreement on Digitalisation, signed on 22 June 2020, is arguably one of the most remarkable and well-known outcomes of the European Social Dialogue on the subject "work and technology"[3]. A specific initiative on telework and the right to disconnect, in the form of an update of the 2002 Telework Agreement, to be implemented via a Directive, has been announced in the European social partners' work programme 2022-2024 but has not materialised[4].

[2] An adaptation that necessarily embraces the functioning of social dialogue practices (machinery and organization), but also its regulatory contents.

[3] Another example, limited to a single sector, is the European Framework Agreement of the European social dialogue Committee for central government administrations on digitalization signed on 17 June 2022 (https://www.epsu.org/article/eu-social-partners-adopt-agreement-digitalisation-central-and-federal-government). Its scope covers workers and civil servants who have an employment contract or a statutory relationship in central government administrations.

[4] The European social partners tried to renegotiate the 2002 Framework Agreement on Telework, but in November 2022 the process came to an end due to the rejection of the compromised text by the employers' organisations. Consequently, the European workers' organisa-

The EFAD implementation plan devises a yearly report by the Social Dialogue Committee during the first three years after the signature, and a full report during the fourth year. It is eloquent to observe that the first report, and to the best of the authors' knowledge the only available one, released by the European social partners in 2021[5], under the heading "Italy" displays only a blank space, thus confirming the concerns expressed by the Commission in the abovementioned Communication. Therefore, while awaiting the full implementation report, due within the next twelve months, this analysis of the outcome of the rulemaking action of Italian social partners on one of the topics addressed in the EFAD can provide some general indications, at least, on the degree of alignment between the two levels of social dialogue, supranational and domestic.

The choice of the topic addressed in the analysis, the right to disconnect (or, to use the vaguer terminology of the EFAD, "modalities of connecting and disconnecting"), was suggested by the remarkable entity of the debates – at the policy and scholarly levels – as well as the production – at the normative level – that stemmed on the subject at hand from the peculiar experience of remote work in Italy[6].

One should not avoid the possible objection, that very existence of this peculiar experience, whose origins pre-date the signature of the EFAD (as the first organic legislation on "agile work" was enacted in 2017), would make questionable, as well as methodologically incorrect, any direct inference drawn between the domestic provisions and the European social partners' initiative, especially in the absence of a specific reference to the EFAD made in the domestic sources that allegedly implemented the former.

It must also be pointed out that, while disconnection and the problems of "time porosity" have come to the spotlight in the context of remote

tions have requested the intervention of the European Commission. In April 2024, in accordance with Article 154(2) TFEU, the Commission has launched consultations with the social partners on possible action by the European institutions on telework and workers' right to disconnection. By the time of writing this contribution, the European social partners have submitted their responses to the European Commission's first phase of consultation.

[5] Http://erc-online.eu/wp-content/uploads/2021/09/Implementation-of-the-Digitalisation-agreement_1st-Joint-report.pdf (consulted on 17 June 2023).

[6] The experience can not be addressed into detail in this paper. For a detailed analysis of the statutory and collective agreement provisions see Senatori, Spinelli, *(Re-)Regulating Remote Work in the Post-pandemic scenario: Lessons from the Italian experience*, in *ILLeJ*, 2021, vol. 14. no. 1, pp. 209-260.

working, their scope largely exceeds that context, given the pervasive impact of the "digital organization" of work, that can affect also traditional office work.

Nevertheless, comparing the results of the Italian social partners' regulatory action with the contents of the EFAD, or at least jointly reading the two, can be instructive in two ways.

First, even the worst-case scenario, one that shows a state of misalignment, or indifference, or in any case the plain irrelevance of the European agreement on the domestic developments, would represent a significant finding about the "health" of the ESD in the field of digitalization of work.

Second, the domestic elaboration, in both its positive and negative features, may inspire an "upgrade" of the ESD in preparation of the following steps that have been announced (the evaluation and possible review of the EFAD in 2025 and the updated telework agreement).

The comparison between the EFAD and the national regulatory framework is made even more complicated by the open and programmatic content of the former, which is at odds with the more traditionally normative nature of the national sources, particularly collective agreements. The scarcity of provisions with a directly normative content is a characteristic of the EFAD that has been openly criticised in the literature[7].

Indeed, the EFAD does not promote the coordination of national jurisdictions through a set of common normative standards. Instead, through a typically procedural regulatory technique, it proposes a "methodological toolkit" consisting in guidelines for national social partners on how to meet the challenges of digitalization. The next section will show how this characteristic is shaped in the case of disconnection.

On the other hand, the methodological imprint of the EFAD, icastically depicted in the document by a chart that draws the circular "partnership process" that the parties of the employment relationship, and their representatives, are invited follow while dealing with the problems of digitalization, may itself represent a parameter for national social partners, potentially even more influential than an "ordinary" prescription.

Such partnership process basically consists in the establishment of a continuous dialogue throughout all the stages of the implementation of a new

[7] MANGAN, *Agreement to Discuss: The Social Partners Address the Digitalisation of Work*, in *ILJ*, 2021, vol. 50, no. 4, pp. 689-705.

technology in the workplace, based on a mutual commitment to problem-solving and balancing of opposed interests. In terms of social dialogue instruments, as it has been maintained elsewhere[8], although the EFAD, respectful of all the domestic traditions, does not take a clear stance on the issue, it implicitly suggests the adoption of a "continuous bargaining" approach, resulting from a sort of "hybridization" of collective bargaining and employee participation (as for the latter, specifically in the form of information and consultation).

The analysis, aimed at assessing whether and to what extent the measures envisaged by the Italian social partners to regulate the disconnection from digital work devices can be coordinated with the provisions of the EFAD, or can even be considered as directly implementing the European agreement, will proceed as follows. The next section reconstructs the different theoretical approaches revolving around the concept of disconnection and the corresponding implications for the regulatory contents and techniques, highlighting the specific position taken by the EFAD. The focus will then shift to the interpretations and regulatory solutions envisioned by Italian social partners, mainly in collective agreements. They compose a heterogeneous system of rules and practices, that express different understandings of the nature and the function of disconnection. As a result, their consistency with the EFAD will not emerge clearly.

2. *The multifaceted character of disconnection*

Disconnection is systematically invoked as an essential safeguard against the disruptive effects exerted by digital technologies on the traditional organizational patterns of working time. However, the legal and practical meanings attached to the concept in the scholarly and policy debate are not univocal.

Disconnection is generally referred to as a right, but such definition is more often implicit than expressed. Furthermore, it is not clear whether it should be constructed as a "new" right with a peculiar content or just as a "restyling" of established legal instruments.

[8] Senatori, *The European Framework Agreement on Digitalisation: a Whiter Shade of Pale?*, in *ILLeJ*, 2020, vol. 13, no. 2, pp. 159-175.

For instance, the EFAD carefully avoids to qualify disconnection as a right, and the measures envisaged to regulate it do not go beyond the simple reiteration of the obligations attached to the rules on working time, extra time and telework.

At the EU level, a different position has been taken by the European social partners in their work programme for the years 2022-2024, that include the "right to disconnect" among the matters to be addressed in the update of the 2022 Framework Agreement on telework. Since this document is more recent than the EFAD, the wording could suggest a shift of perspective, or perhaps an increased consideration, by the European social partners about the systemic role of disconnection for the protection of workers' interests in the context of digitalisation. Furthermore, this new perspective aligns the European social partners with the European lawmakers. The reference is to the initiative of the European Parliament of 4 December 2020 for a recommendation to the Commission on a legislative proposal on the right to disconnect, which will be sidelined, awaiting for the announced autonomous initiative by the social partners[9].

Differently from EFAD, the mentioned legislative proposal adopts a broad notion of the right to disconnect. As these Authors have argued elsewhere, while the EFAD focuses solely on safeguarding the worker from undue external interferences with her private time (like off-hour calls or emails), the Proposal aims to prevent the worker from any kind of organisational or motivational coercion, even if implicit or self-produced, to exceed the work schedule. Furthermore, its scope potentially extends beyond the realm of traditional employment relationships and by the provision of prescriptive and promotional measures it could be considered as a promising instrument for the improvement of the time-related working conditions in the digital context[10].

[9] For a more detailed examination of the relationship, including any potential issues, between EFAD and the European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect, see BATTISTA, *The European Framework Agreement on Digitalisation: a tough coexistence within the EU mosaic of actions*, in *ILLeJ*, 2021, no. 1, pp. 116-118. Further issues may arise from the relation between EFAD and the more recent Commission initiative on telework and workers' right to disconnect, urged by the European social partners (mentioned in footnote no. 5) because of the topic at stake. In any case, the very case related to the Framework Agreement on telework shows how the European Commission could intervene on matters that are already regulated by the European social partners, albeit by restricting their role.

[10] See SENATORI, *EU Law and Digitalisation of Employment Relations*, in GYULAVÀRI,

Also in Italy, with the exception of a minor piece of legislation enacted with temporary effects during the pandemic emergency, disconnection has never been expressly qualified as a right in normative sources. The main provisions (Law n° 81/17 and the Protocol on agile work in the private sector signed on 7 December 2021) ambiguously refer to it as an unlabelled prerogative that should be granted via specific technical and organizational measures.

Nevertheless, considering disconnection as a right, vested with a content that exceeds the mere organizational etiquette, seems to be the necessary precondition for equipping this workers' prerogative with a minimum degree of effectiveness and enforceability. In the same perspective, it has been observed that, insofar as disconnection serves the purpose of protecting workers' health, by preventing them from working long hours, it should be considered also as a duty, resulting from the workers' general obligation to cooperate to the implementation of adequate measures of prevention and protection of the work environment.

This said, there is no general consensus about the boundaries of the right and the specific prerogatives that can be claimed by the worker in that respect, except for the minimum denominator consisting in the worker being immune from sanctions in case she is unavailable to contacts from the employer or the colleagues outside normal working hours. This minimum content is acknowledged also by the EFAD, which states that "With full respect for working time legislation and working time provisions in collective agreements and contractual arrangements, for any additional out of hours contacting of workers by employers, the worker is not obliged to be contactable".

This common ground is the point of origin from which at least two different constructions of the right to disconnection are developed, with different views about the identification of the protected interests and, consequently, of the implementing instruments.

Starting from the protected interests, the "minimalist" approach links disconnection to the protection of workers' health in a strict sense, and therefore is focused on ensuring that the worker effectively enjoys her rest time and is not compelled by external agents to exceed her work schedule. This

MENEGATTI (eds), *Decent Work in the Digital Age. European and Comparative Perspectives*, Hart-Bloomsbury, pp. 75-76.

is the idea advocated by the EFAD, which elects as legal benchmarks "working time legislation and working time provisions in collective agreements and contractual arrangements", as well as "teleworking and mobile work rules". According to this approach, disconnection is construed as an updated and reinforced implementation of the "old-fashioned" right to rest.

Instead, the "extensive" approach is focused on the protection of the workers' sovereignty over working time. This construction of the right to disconnect has a scope that transcends the binary structure of working time regulations. In fact, it not only protects the worker from external interferences on the exercise of the statutorily granted right to rest, but it also covers the legitimate interest of the worker to manage autonomously her working schedule, deciding freely whether a given time span during the working day should be dedicated to work or to other private activities. This approach is strictly linked to the working-by-objective paradigm and to an evolving interpretation of work-life balance, which is centered on the idea of working time sovereignty intended as the possibility for the worker to plan in advance her flexible working schedule. In this perspective, disconnection can be construed as a new right, functional to a modern conception of wellbeing in a broad sense.

This "evolutionary" approach, however, does not have sound roots in the existing sources of regulation in Italy and at the EU level.

It is true that the legislative initiative proposed by the European Parliament adopts a more extensive definition of disconnection than the one contained in the EFAD, as it protects the worker not only from external contacts outside working hours, but, more generally, the right "not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time". And, indeed, the scope of this definition encompasses any kind of organizational or motivational pressure, even implicit or self-produced, to exceed the work schedule. However, also under this broader definition, the binary construction of "working time" (*i.e.* the work hours contractually established and legally enforced) remains the factor that sets the boundary of the protection granted by the law.

Confirming this ambiguity, also in Italy, the 2021 Protocol on agile work in the private sector defines the disconnection period as the time span in which the worker "does not perform work", and not, as it could have been, in which the worker "can freely decide whether to work or not, without prejudice for her obligation to respect a minimum work schedule and/or to achieve the targets set in the employment contract".

Coming to the instruments that should sustain the enforcement of the right to disconnect, the minimalist definition (protection of the right to rest) would clearly require a "technological update" of the measures and arrangements requested to ensure compliance with working time legislation. A guidance in this respect may come from the CJEU, whose "purposive" interpretation of the Working Time Directive led he European judges to affirm the employer's duty to set in place a system for monitoring the hours worked[11].

This set of "hard" instruments may be complemented by the "soft" organizational measures and practices promoted by the EFAD, which, as it has been noted above, adheres to a minimalist definition of disconnection.

Such measures address basically two dimensions of work organization: planning and workplace culture. For instance, they propose the "commitment from management to create a culture that avoids out of hours contact" and the establishment of a "no-blame culture to find solutions and to guard against detriment for workers for not being contactable".

Given their "soft" character, the direct enforceability of these organizational measures by the individual workers is questionable. However, if one wants to look at the glass half-full, this flaw leaves room for an effective intervention by collective representatives, with a function of mediation and control on the organizational design by means of employee involvement and collective bargaining practices, which would be consistent with the "partnership approach" that stands at the core of the EFAD.

With regard, instead, to the extensive approach, that construes the right to disconnect as time sovereignty, the solutions should take into account the fact that, under this construction, working time tends to become no longer the only parameter for the organization and the assessment of the work performance. As result, working time rules cannot be the only safeguard of workers' rights.

Against such background, a crucial field of intervention, besides the protection of the worker from direct external interferences on the self-organization of work schedules, is the determination of targets and parameters for the assessment of the work performance. These targets and parameters

[11] CJEU, C-55/18, *CC.OO*, ECLI:EU:C:2019:402 See KARTYÀS, *Working Time Flexibility: Merits to Preserve and Potentials to Adjust to Change*, in GYULAVÀRI, MENEGATTI (eds.), *Decent Work in the Digital Age. European and Comparative Perspectives*, Hart-Bloomsbury, 2022, pp. 147-164.

should be reasonable, in the sense that it should be possible for the worker to discharge her obligations without affecting her capacity to govern the balance between work and other personal occupations. The most efficient way to achieve this result is to determine targets and parameters jointly between employer and worker. However, given the typical asymmetries between the two parties, in terms of organizational skills, information, and bargaining power, this is an area where innovative forms of collective mediation could be tested, again in line with the "partnership process" proposed by the EFAD.

3. *The disconnection in the Italian collective agreements*

3.1. *Scope of the analysis and methodological approach*

In order to ascertain whether and how national social partners are putting into practice the "methodological toolkit" as well as, more generally, the provisions contained in the EFAD within collective agreements, more than fifty collective agreements were collected[12] and analysed.

These are national and company collective agreements as well as agreements on smart working in the private sector signed after the publication of the EFAD, and more specifically between 2022 and 2023.

For each agreement, several aspects were examined, such as:

- finding contractual terms that make explicit reference to "disconnection" or the "right to disconnect" either as an individually regulated aspect or as part of the more general regulation of working time;

- determining the type of approach, minimalist or extensive, based on which the right to disconnect is constructed, by analysing the definition provided in the text of the collective agreements for the right to disconnect and the function attributed to it;

- identifying any spaces reserved for the participation of workers and their representatives and, more generally, for means of expressing social dia-

[12] In Italy, there is no official register that collects all collective agreements. As a consequence, the collective agreements analysed were retrieved both from the national archive of collective agreements available on the website of the National Economic and Labour Council (CNEL) and from other databases open to consultation on the Internet, such as the Olympus Observatory database (https://olympus.uniurb.it).

logue as a possible method of regulating issues related to technological innovation.

3.2. *The outputs*

The first significant finding that emerges from the empirical analysis of the selected collective agreements concerns the applicative scope of the right to disconnection.

Almost all of the analysed collective agreements, both at national and company level, do not recognize disconnection as a right or, in any case, as a prerogative of all workers who, in increasingly innovative and digitalised working contexts, can perform their activities through or by means of technological devices. On the contrary, they bring the regulation of disconnection within the regulation framework of remote work, applying them to smart workers and teleworkers.

In these cases, the reference to disconnection is included in a more complex context aimed at indicating the elements of the work performance outside company premises and in which, in the cases of agile work, the identification of the "technical and/or organizational measures necessary to ensure disconnection"[13] is referred to the written agreement between worker and employer, just as also provided for in Article 19 of Law No. 81/2017.

Only a very small percentage of the analysed collective agreements, on the other hand, does not establish an exclusive link between disconnection and remote work, stating that the former should be "recognised for all workers, even outside periods of performance in agile work mode"[14].

Given this necessary premise, the cases appear more heterogeneous when moving to the collection and analysis of disconnection definitions, which can reveal even if it is elevated by collective autonomy to a genuine right recognised to the worker, in the absence of an explicit qualification of disconnection as a right by law.

There is an observed trend according to which it is the smart working agreements[15] in the most majority of cases include in their text the explicit

[13] See, for example, art. 90 of Third Sector NCA signed on March 30, 2023.

[14] Chemicals- Gas-Water Sector: NCA Draft renewal agreement, Sept. 30, 2022, but see also Chemicals-Electrical Sector: NCA renewal agreement, July 18, 2022.

[15] Other contracts refer to "periods of disconnection" and do not qualify the disconnec-

reference to disconnection as a right which is granted to the worker who performs his or her work in agile mode, without, however, concretely defining the organizational measures necessary to ensure the enjoyment of this right.

On the other hand, the number of sectoral collective agreements that refer to disconnection as a right is not negligible, but, at the same time, it cannot be considered to coincide with the totality of the contracts analysed[16].

Whether it is expressly qualified as a right, or whether it is referred to in terms of mere "disconnection", it is identified either by referring to the activity to be interrupted (e.g. it is tendentially described as abstention from performing tasks, activities and electronic work communications or abstention from performing work) or alternatively, albeit with different shades, to the digital equipment to be disconnected (for example, it is defined as interruption of telematic connections and deactivation of electronic devices, interruption of access and/or connection to company computer systems and deactivation of company communication devices).

In any case, the time delimitation of the disconnection period is also laid down according to different patterns. In some cases, the period of disconnection coincides with the non-working time, which is to be understood as the period of time beyond working hours; in other cases, specific time slots are identified during which the employee is guaranteed the right to refrain from work performed by means of electronic and IT tools.

Only one of the analysed smart working agreements seems to safeguard the main characteristics of this working modality, *i.e.* organizational flexibility with respect to working time and organization by phases, cycles, objectives, as it clarifies that "taking into account also the flexibility of the working modality defined in 'smart working', with reference to the possibility of arranging with one's manager a different time placement of the work performance based on the assigned activities, agree that at the end of the performance the worker has the right to disconnect"[17].

tion as a right. One example is Smart Working Agreement of Leonardo (Metalworking sector) signed on March 8, 2022.

[16] Examples are The NCA of Metalwoking - Craft Sector (Confimitalia) signed on June 7, 2022 and the NCA of Agroindustrial, Fishing and Fishing Enterprise sector signed on March 23, 2023.

[17] Smart Working Agreement of Chemicals - Glass, O-I Italy Origgio signed on June 7, 2022.

Such a clause suggests that, unlike other cases analysed in smart working agreements and sectoral collective agreements, the arrangement of the disconnection period within the day depends on the parties and not on the contractual provisions concerning the definition of daily working time.

Lastly, from the definition of disconnection provided by the social partners in collective agreements, it is also possible to deduce the function attributed to it and, consequently, to understand the type of approach that the national social partners opt for in shaping disconnection, *i.e.* the "minimalist" and the "extensive" approaches.

The analysed national and company-level agreements seem to follow predefined models as regards the identification of functions, since all of them provide, alternatively or complementarily, that disconnection is envisaged to protect the psycho-physical health and quality of life of workers as well as being a functional tool to ensure the work-life balance. In some cases, they also specify that disconnection can positively influence the bridging of the inclusion, starting with the sharing of family duties, as a tool "useful to promote the adoption and reinforcement of rules of conduct consistent with the new working methods"[18]. In the same vein, in order to ensure that smart working can promote gender equality and contribute to eliminating discriminations, it identifies disconnection as a useful tool to pursue these aims by recognizing a higher number of hours in which the worker can disconnect from working devices[19].

Therefore, comparing the outcomes of the observation of the selected collective agreements with the constructions of the right to disconnection proposed in the section 2 of this article, it can be observed that the "minimalist" approach is predominantly adopted. Only in one case (at least among the agreements analysed) disconnection is used not only as a means for protecting the right to rest from external influences, but also as a tool that the worker can manage autonomously in order to organize his/her working time, intrinsically linked to one of the essential features of remote work, namely the organization of work by goals.

Turning to the analysis of the third point, which concerns the spaces for participation and involvement of workers and their representatives in the

[18] See "Charter of values of the person in the enterprises of the electricity sector" attached to NCA of Chemicals - Electrical Sector signed on July 18, 2022.

[19] See the mentioned SWA of Leonardo.

regulation of disconnection, no contractual provisions were found that explicitly include disconnection among the topics covered by a regulation that is the outcome of the collective involvement of workers and their representatives.

Conversely, if disconnection is considered as a figure of the more general agile modality of work performance, then both national and company collective agreements contain references aimed at guaranteeing periodic information to workers' representatives, at monitoring the progress of this modality of work, and at setting up for the same purposes, as well as with the purpose of making proposals, observatories specifically dedicated to agile working or, alternatively, to issues related to work-life balance and technological innovations.

Furthermore, there is no shortage of examples of collective agreements[20] in which there is a commitment by the parties to jointly plan and implement training initiatives on various topics, including the use of agile working, in the part reserved to "participation and industrial relations".

4. *Evaluating the influence of the EFAD on the Italian collective agreements*

In relation to the collected outcomes, it is possible to assess the state of implementation of the measures promoted by the EFAD on "modalities of connecting and disconnecting" within the collective agreements signed in our country subsequent to its publication.

Indeed, the European social partners stipulated that within three years from the date of its conclusion, the EFAD should have been implemented by national organizations, a deadline that expire on June 22, 2023.

As a result, one could imagine that the influence of the agreement could, to date, be at least in an advanced stage.

Putting any reflection on the use or not of the circular approach proposed in the EFAD on hold for the moment, this section focuses exclusively on the measures listed in the text of the agreement to be taken into consideration in order to ensure the proper management of connection and disconnection, in order to evaluate their reception at national level.

As an introduction, it should be pointed out that the EFAD in this part

[20] Chemicals-Gas-Water Sector: NCA Draft, mentioned above.

recognizes an important role for collective bargaining in managing the effects of "technologies in the workplace, in particular on the expectations that may be placed on workers". This role becomes even more importance in a national context like Italy, where, as previously mentioned, there is no legislation regulating disconnection. Consequently, what is established in collective agreements constitutes the only form of regulation of this right or power of worker.

Turning to the evaluation in the strict sense of the implementation of the measures provided by the EFAD, the heterogeneity of the approaches adopted within the analysed collective agreements does not allow a univocal but overall finding to be made.

In the analysed collective agreements, one finds, first and foremost, a focus on compliance with the rules on working time. This leads to the identification of disconnection with non-working time, corresponding to time slots in which the employment contract provides that no work should be performed, even in the traditional way of performance.

In accordance with the provisions of the EFAD, collective bargaining also provides for spaces dedicated to information and training on the use of digital tools and the ways in which remote work can be performed, as well as their impact on workers' health and safety.

In addition, statements with a more value-based rather than programmatic nature aimed at developing awareness among workers about the absence of an obligation to respond when they are contacted out of working hours, without incurring repercussions as a result, are present in the collective contracts analysed.

Moreover, some agreements have shown that they can propose practical solutions to ensure that workers' disconnection is respected. These include a number of practices that introduce "disconnection-friendly" behaviours, such as pre-scheduling meetings in work slots for the alignment of teamwork and activities that require the involvement of multiple workers, as well as the setting of technological tools in "delayed delivery" or offline modes. These measures can otherwise fall within the guidelines outlined in the EFAD about the periodic exchanges between managers and workers on workload and work processes, as well as meeting with colleagues can be an anti-isolation practice.

Therefore, steps toward the implementation of the disconnection measures in the EFAD seem to have been taken by the social partners within collective agreements, albeit to be considered as a whole.

If what has been said is true, however, it is important to raise three observations, concerning the limitations found in the analysed collective agreements with respect to the provisions contained in the EFAD concerning disconnection.

The first limitation is to be found in the choice of the parties to consider disconnection only in relation to the performance of work in agile mode, not considering that the rapid evolution of work organization models and production processes due to technological innovations may require that disconnection should also be guaranteed to workers who perform their performance in the more traditional ways and on company premises.

The second limitation concerns the attention that the measures envisaged by the European social partners reserve for the need to create a "culture of disconnection" aimed at raising awareness and respect for the need to disconnect electronic devices beyond working hours, especially to safeguard health of workers, as well as not stigmatizing the behaviour of the worker who makes himself uncontactable outside the working time.

In this regard, it does not seem to emerge from company-level collective agreements, maybe the most appropriate level for addressing such issues, provide for the presence of principle or explanatory rules concerning the importance of the culture of disconnection for the company (as has happened in recent times with the culture of participation). Nor do they envisage practices that involve workers, their representatives and management in the joint creation of an environment in which the importance of disconnection is recognised for the implications it can have on the well-being of workers and, consequently, also on company productivity levels.

The third observation relates precisely to the involvement profiles of workers and their representatives in defining aspects related to the issue of disconnection. The observed collective agreements showed the absence of a specific interest of the parties in adopting a participatory approach (to be understood in a broad sense, including the information and consultation rights) in the definition of aspects related to disconnection. Conversely, when considered in the context of agile work or as an evolution of the organizational process or working hours arrangement then some generic provisions extend to it, leaving room for shared definition of aspects that could concern it.

One might imagine that one of the limits to the shared regulation of detailed aspects of disconnection, where it is considered in the context of

agile work (which at present seems to be the prevailing application hypothesis), which could concern, for example, the technical and organizational measures necessary to ensure disconnection, can be found in the fact that the law (l. no. 81/2017, art. 19[21]) provides that these elements are to be defined by the worker and the employer in the agile work agreement . However, this would not explain the approach adopted by the social partners in collective agreements where disconnection is considered as an autonomous matter, although, as mentioned within the present contribution, this possibility seems not to be taken into account in collective agreements.

5. *Concluding remarks*

The empirical analysis of the selected collective bargaining referring to the years 2022-2023, which, according to the timeline could already incorporate the impacts exerted by the EFAD, has shown that in our country the autonomous agreement of the European social partners has potentially influenced the choices of the national social partners regarding the issue of disconnection only to a minimal degree.

The greatest gap is the almost total disinterest in the common circular dynamic process that, in fact, constitutes the essence of the autonomous agreement itself.

The wide range of intervention spaces for collective representation, which are configured both under the assumption of a minimalist approach and in the case of an extensive approach, are currently left empty. Neither collective bargaining nor the involvement of workers and their representations seem to be committed to the development of a regulatory framework and joint organizational practices that can foster disconnection in the workplace, including virtual ones, since they leave the definition of these aspects to the individual parties.

Looking ahead and reflecting on the potential of digitization and technological innovations to suddenly change organizational and production

[21] The article states that "the agreement shall also identify the worker's rest time as well as the technical and organizational measures necessary to ensure the worker's disconnection from technological work equipment".

models of the companies, the power of disconnection is evident when considered in its "extensive" configuration.

As clarified above, in this case there would be ample room for the intervention of collective representatives and collective bargaining in the shared definition with the employer of multiple aspects that can be referred to the common definition of goals and parameters for the evaluation of work performance, which can no longer be anchored to the sole criterion of working hours.

The European Union also seems to be moving in the direction of giving social dialogue and, in particular, collective bargaining a main role in defining the regulation of disconnection. Indeed, in the Proposal for a Council Recommendation on strengthening social dialogue in the European Union, in addition to the recognition of disconnection as a right, it is stated that collective bargaining, as the place where working and employment conditions are regulated, could be the instrument that the social partners could use to intervene promptly to intercept changes in the world of work allowing the introduction of new labour protection instruments, among which it explicitly includes (and without putting it alongside others) the right to disconnection.

Abstract

The paper considers the right to disconnect as a testing field for the implementation of the European Social Partners Framework Agreement on Digitization (EFAD) in the Italian regulatory system. The right to disconnect has been expressly addressed in the EFAD as one of the tools that can accompany the implementation of new technologies in organizations and the development of new and more flexible ways of organizing work, by ensuring a balance between benefits (like a better work-life balance) and risks (like the evanescence of boundaries between work and private life). In Italy, the right to disconnect emerged in the legal debate about the regulation of remote work. The topic is not addressed into detail in statutory law. This gave social partners the opportunity to intervene extensively on the matter. The paper analyses the influence of the EFAD on Italian collective bargaining with regard to disconnection by means of a systematic and critical review of the different solutions envisaged by collective agreements signed in 2022-2023.

Keywords

Right to disconnection, European Social Partner Framework Agreement on Digitalization, Collective bargaining, Workers' participation.

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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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