table of contents

Focus edited by Alessandra Sartori and Elena Gramano

Due Diligence in Global Value Chains: a Comparative Overview in the Light of the EU Directive

Bernd Waas

AI in the Workplace and Digital Platforms: Opportunities, Risks and Legal Challenges

Contents: **1.** Introduction. **2.** The need for comprehensive international regulation is growing by the day, but progress is slow and the prospects are bleak. **3.** "Overregulation" should always be avoided, but the necessary protection of employees is not up for discussion. **4.** AI Act: The law must now be brought to life. **5.** AI is a factor in the qualification of contracts as an employment relationship. **6.** Algorithmic management must be legally contained; there is also a blueprint for this. **7.** Discrimination law may need to be reconstructed. **8.** Data protection and AI: There is still a lot to do. **9.** Workers' participation must be strengthened (also in the interest of employers). **10.** Never underestimate the value of social dialogue and collective bargaining. **11.** In the end, it's about people.

1. *Introduction*

AI is becoming more and more widespread in the workplace. Legislators, especially the European legislator, have reacted. Now it is time to apply these rules.

In the following, I would like to provide some food for thought in the form of 10 theses, first discussing some more general issues before focussing on some specific questions of workers protection.

2. *The need for comprehensive international regulation is growing by the day, but progress is slow and the prospects are bleak*

The proliferation of AI, including AI in the workplace, is a fact. And is here to stay. The importance of AI will even grow in the future. International regulation of this issue would therefore be highly desirable. Effective pro-

tection of workers from this technology seems no less necessary than many other things that we consider to be core principles of worker protection.

There are some reasons for hope in this respect: First of all, there is indeed already international regulation in the European context, namely in the form of the Council of Europe Framework Convention on artificial intelligence and human rights, democracy, and the rule of law. This first-ever international legally binding treaty was opened for signature in September 2024 and has so far been signed by 14 states[1] and also by the European Commission on behalf of the EU[2]. The signatories also include countries outside Europe, which were remarkably involved in the negotiation process. At United Nations level, a Pact for the Future was adopted last lear that includes a Global Digital Compact[3]. Currently, consultations are under way on the establishment of an Independent International Scientific Panel on AI and a Global Dialogue on AI Governance within the United Nations[4]. Even more importantly from our perspective is the fact that the International Labour Office recently concluded, based on responses received by Member States as well as employers' and workers' organisations, that the International Labour Conference should adopt standards in the form of a Convention on decent work in the platform economy supplemented by a Recommendation[5]. Apart from this, there are still voices that continue to rely on a "Brussels effect" of the European AI Act. This would mean that companies outside the EU would also be forced to comply with the requirements of the law, either because it is convincing in terms of content or simply because the size of the European single market ultimately requires compliance[6].

Even so, there is little reason for exuberant optimism: the Council of Europe's framework convention shows above all how difficult international

[1] Council of Europe, *Framework Convention on Artificial Intelligence and human rights*, https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence.

[2] *Ibid*.

[3] Https://www.un.org/digital-emerging-technologies/global-digital-compact.

[4] Https://www.un.org/global-digital-compact/en/ai.

[5] Ilo, *Realizing decent work in the platform economy*, ILC.113/Report V(2), 2025, https://www.ilo.org/sites/default/files/2025-02/ILC113-V%282%29-%5BWORKQ-241129-001%5D-Web-EN.pdf

[6] Cf. Eustace, *The European Union's Forced Labour Regulation: Putting the "Brussels Effect" to work for international labour standards*, in *ELLJ*, 2023, *15*,1, pp. 144-165, https://doi.org/10.1177/20319525231221097.

regulation is. The original draft was thinned out considerably in order to reach an agreement. In particular, though the private sector is not completely exempt, signatory states will be able to decide for themselves how strict they want to be with their companies[7]. This does not bode well for other regulatory efforts. A look across the Atlantic is particularly sobering. Until recently, there seemed to be some convergence on the issue of regulating AI. But this is no longer the case: within hours of taking the oath of office for the second time, the current US-President issued an executive order that revoked an executive order from the prior administration that was committed to a certain degree of employee protection at least. Now, regulation of AI seems to be largely equated, at least at the federal level, with the paralysis of AI[8]. This seems to me to be too short-sighted. For example, Anu Bradword from Columbia University recently argued powerfully that digital regulation and innovation are by no means opposites[9]. However, this does not change the fact that a different wind is currently blowing in the USA. And this wind will blow in the face of international regulatory efforts too.

3. *"Overregulation" should always be avoided, but the necessary protection of employees is not up for discussion*

Not so long ago, representatives of large tech companies made the point that the regulation of AI could safely be left to the companies themselves. These voices did not prevail in Europe. In the US, the picture is completely different. It is therefore not surprising that warning voices are ringing out from there to Europe. For example, two US senators recently warned Europe

[7] CHANG, *The first global AI treaty. Analyzing the Framework Convention on Artificial Intelligence and the EU AI Act*, in *U. Ill. L. Rev Online*, December 20, 2024, https://illinoislawreview.org/online/the-first-global-ai-treaty/.

[8] Cf. only RAJKUMAR, *The head of US AI safety has stepped down. What now?*, in *ZDNET*, February 19, 2025, https://www.zdnet.com/article/the-head-of-us-ai-safety-has-stepped-down-what-now/?utm_source=substack&utm_medium=email#google_vignette; MEYER, *OpenAI points to China as reason why it should escape copyright rules and state-level AI bills in the U.S.*, in *Fortune*, March 13, 2025, https://fortune.com/2025/03/13/openai-altman-trump-ai-rules-consultation-copyright-state-bills/?utm_source=email&utm_medium=newsletter&utm_campaign=eye-on-ai&utm_content=2025031318pm&tpcc=NL_Marketing.

[9] BRADFORD, *The false choice between digital regulation and innovation, in NULR*, 2024, 118, 2, *Journal*, https://doi.org/10.2139/ssrn.4753107.

against over-regulating AI[10]. Such warnings should not be dismissed lightly. It is always important to avoid over-regulation. Lawyers should, who often suffer from the occupational disease of only seeing problems, take this particularly to heart. How often do we call for the legislator, complain afterwards about the poor quality of the laws, then rely on the courts and are often disappointed again. Instead, the following should apply: it is better not to make a law than to make a bad law. So the presumption rule in the Platform Work Directive, for instance, would have been better left out. How often has this rule been tinkered with in the legislative process! The result of all this in any event is difficult to digest to put it mildly. Inevitably, the German observer is reminded of a quote attributed to Reich Chancellor Bismarck: "Laws are like sausages", he once said, "it is better not to be there when they are made". I am afraid that this observation also applies to laws at Union level.

How the draft directive on liability for AI, which the Commission recently scrapped, should be assessed in this light is a matter for discussion[11]. After all, liability rules are not only about compensating for damage that has occurred, but also about encouraging potential tortfeasors to avoid causing damage and thus liability for damages[12]. In other words, liability rules are a powerful tool to steer people in the right direction. It is true, though that there always were doubts in some quarters about an AI liability directive, which would be added a product liability directive also encompassing AI programmes. Some people thought that this would be killing one bird with two stones[13]. Be that as it may, the Commission's sudden change of course is concerning. And hopefully not to be understood as a swing towards a

[10] Conrad, Chambliss, *Overregulation is undermining Europe in the global tech race and empowering China. U.S. and Chinese investment in AI outpace that of eurozone*, in *Roll Call*, March 13, 2025, https://rollcall.com/2025/03/13/overregulation-is-undermining-europe-in-the-global-tech-tace-and-empowering-china/.

[11] Zenner, *An AI Liability Regulation would complete the EU's AI strategy*, in *CEPS*, February 25, 2025, https://www.ceps.eu/an-ai-liability-regulation-would-complete-the-eus-ai-strategy/.

[12] Cf. in general, for example, Wagner, *Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?*, in *Archiv für die Civilistische Praxis*, 2006, 206, 2-3, p. 352, https://doi.org/10.1628/000389906782068031; Wagner, *Digitale Ordnungspolitik – Haftung und Verantwortung*, in *List Forum für Wirtschafts- und Finanzpolitik*, 2022, 50, 1-2, pp. 77-105, https://doi.org/10.1007/s41025-022-00237-8.

[13] *Zwei Klappen für eine Fliege*. (o. D.). Aktuell, https://rsw.beck.de/aktuell/daily/-magazin/detail/zwei-klappen-fuer-eine-fliege.

course that is only business-friendly at first glance, because it continues to expose companies to 27 different liability systems.

In any event, it remains the task of the labour lawyer to identify gaps in the protection of workers including loopholes in existing law[14] and to formulate recommendations as to how these can be closed. The purpose of labour law is to protect the weaker party. Regulations that serve this purpose can never be over-regulation. The fact that the legally protected interests of employers must also be taken into account – in the formulation of rules by the legislator and in the application of these rules by the courts – is another matter.

4. *AI Act: The law must now be brought to life*

Looking at the AI Act, there is light and shade. This is especially true from a labour law perspective, where it can be argued that, despite the imposition of certain employer obligations, that the law is still too closely tied to the product liability methodology and therefore cannot take sufficient account of the special features of the employment relationship and its inherent imbalance of power[15].

The task now is to bring this law to life[16]. Breathing life into a law, is never easy. This applies in particular to a law such as the AI Act, which not only breaks completely new ground, but also leaves many things open in order to be flexible and therefore future-proof. It is true that the law was a difficult birth, accompanied to the end by doubts as to whether it would ever see the light of day. However, it is now clear that the real work is just beginning. Of particular importance in this context are the Guidelines

[14] See also Opinion of the European Economic and Social Committee, *Pro-worker AI: levers for harnessing the potential and mitigating the risks of AI in connection with employment and labour market policies* (own-initiative opinion) (C/2025/1185) (sub 5.4.2). See also, for instance, Yusifli, *Labour Rights and the EU Artificial Intelligence Act: How to Get Away with High-Risk AI*, in U. Lux. LRP, No. 2025-01, https://ssrn.com/abstract=5098359.

[15] See also EESC, *cit.*, (sub 5.2.1); also quoting Ponce Del Castillo, *The EU's AI Act: governing through uncertainties and complexity, identifying opportunities for action*, in Global Workplace Law & Policy, June 20, 2024, https://global-workplace-law-and-policy.kluwerlawonline.com/2024/06/20/the-eus-ai-act-governing-through-uncertainty-and-complexity-identifying-opportunities-for-action/.

[16] Skeptical, for instance, Jarovsky, *The AI Governance tornado*, in *Luiza's Newsletter*, February 12, 2025, https://www.luizasnewsletter.com/p/the-ai-governance-tornado.

with which the Commission concretises the content of important provisions of the Regulation and the so-called Codes of Practice, which are currently being developed by the AI Office and a wide range of stakeholders. In February, the Commission published Guidelines on AI system definition as well as Guidelines on prohibited artificial intelligence (AI) practices, as defined by the AI Act[17]. A third draft of a General-Purpose AI (GPAI) Code of Practice has been published just a few days ago (and is already highly controversial)[18].

All these efforts take time. Irrespective of this, three problems await solutions. One of the most important issues to be clarified is the relationship between the AI Act and other laws, in particular the General Data Protection Regulation (GDPR)[19]. As we all know, the EU's digital legislation forms a spider web, with the AI Act and the GDPR as particularly thick knots. At first glance, everything seems quite simple: Art. 2 (7) of the AI Act does not affect the General Data Protection Regulation. However, this does not mean that there are not countless interfaces. To name just one example: According to Art. 6 (1) lit. f GDPR, a comprehensive balancing of interests must be carried when determining the lawfulness of the processing of personal data. The question then is whether and to what extent a violation of the AI influences that balancing of interests[20]. Opinions are divided on this matter. In addition to these overlaps between the two laws, there are also potential frictions between them. For example, under the AI Act, the provider of an AI system bears the main obligations under the AI Act, whereas under the GDPR, the operator of the AI application is generally responsible. This difference in addressing the obligations can lead to uncertainties in the question of liability, for example if an error occurs in a high-risk AI system and the provider is held liable under the AI Act, whereas the GDPR sees the operator as the controller[21].

[17] https://digital-strategy.ec.europa.eu/en/library/commission-publishes-guidelines-ai-system-definition-facilitate-first-ai-acts-rules-application.

[18] https://digital-strategy.ec.europa.eu/en/library/third-draft-general-purpose-ai-code-practice-published-written-independent-experts.

[19] See in this regard also De Luca, Federico, *Algorithmic discrimination under the AI Act and the GDPR*, in *EPRS*, February 2025, https://www.europarl.europa.eu/RegData/etudes/-ATAG/2025/769509/EPRS_ATA(2025)769509_EN.pdf; Hüger, *Die Rechtmäßigkeit von Datenverarbeitungen im Lebenszyklus von KI-Systemen*, in *ZfDR*, 2024, p. 263.

[20] Hacker, Stiftung, Soyda, *Der AI Act im Spannungsfeld von digitaler und sektoraler Regulierung*, Bertelsmann Stiftung, 2024, p. 23.

[21] Hacker, Stiftung, Soyda, *Der AI Act im Spannungsfeld*, cit., p. 24.

But there is not only the task of clarifying the relationship between the AI Act and other laws. A second problem arises from the AI Act itself. As is well known, the legislator has left many questions unanswered in the law, but has instead delegated the task of answering them to the European standardisation organisations as part of the so-called New Approach and the so-called New Legal Framework[22]. This raises fundamental questions, such as the legitimacy of the standardisation system, especially in an area such as working life, but also the ability of harmonised standards to guarantee the protection of fundamental rights whose protection the legislator is concerned about[23]. Irrespective of this, it remains to be seen what the standards will ultimately look like. It seems sensible to take a very close look. In any case, a recently published study by the non-governmental organisation Corporate Europe Observatory entitled "Bias baked in – How Big Tech sets its own AI standards", denounces an excessive influence of tech companies on standardisation[24].

The third problem is the practical implementation of the law and the enforcement of the legal positions it grants. This poses a double challenge: on the one hand, ensuring that players at EU level do not get in each other's way, *e.g.* the AI Office on the one hand and the European Data Protection Board (EDPB) on the other[25] but also, and this seems to be the bigger problem, ensuring that the law is applied uniformly by the national authorities and avoiding divergent interpretations and ultimately "compliance shopping"[26]. There is also the problem that the AI Act requires the national authorities to have permanently available staff with expertise in AI, data protection, cybersecu-

[22] See https://single-market-economy.ec.europa.eu/single-market/goods/new-legislative-framework_en?prefLang=de.

[23] Critical, for instance, VEALE, BORGESIUS. *Demystifying the Draft EU Artificial Intelligence Act*, in *CLRI*, 2021, 22, 4, pp. 97-112. https://doi.org/10.9785/cri-2021-220402; KUSCHE, *Possible harms of artificial intelligence and the EU AI act: fundamental rights and risk*, in *JRR*, 2024, pp. 1-14.

[24] *Bias baked in. How Big Tech sets its own AI standards*, in *Corporate Europe Observatory*, https://corporateeurope.org/en/2025/01/bias-baked. However, the Commission's involvement in the standardisation process, for example, is not uncontroversial either; cf. BITKOM, *Status and challenges in the standardization of high-risk requirements of the AI Act*, *Position Paper*, 2024, p. 4, https://www.bitkom.org/sites/main/files/2025-01/status-and-challenges-in-the-standardization-of-high-risk-requirements-of-the-ai-act-december-2024.pdf.

[25] NOVELLI et al., *A Robust Governance for the AI Act: AI Office, AI Board, Scientific Panel, and National Authorities*, in *EJRR*, 2024, pp. 1-25, p. 12.

[26] NOVELLI et al., *cit.*, p. 18.

rity, fundamental rights, health and safety, and relevant standards and laws[27]. Given the fact that AI experts are rare, this might be easier said than done. However, the decisive factor is ultimately the political will to implement the law. In this respect, it remains to be seen how it is to be understood that the EU's digital chief recently promised a "business-friendly" implementation of the AI Act[28]. As already mentioned above, the term must be well thought out and should in any event not be used lightly against workers' interests.

5. *AI is a factor in the qualification of contracts as an employment relationship*

Countless papers have been written in recent years about whether platform workers are employees or can at least be put in a middle category between employees and the self-employed. The question is of course rightly asked, even though it is also true that the circle of persons who qualify as employees can change over time – especially in the course of technological change. Those who were once employees do not always have to remain employees. It is also true, however, that the requirements for employee status are not set in stone.

The question is therefore: does the use of AI potentially influence the qualification issue? I would like to answer this in the affirmative. The so-called crowdworker decision of the German Federal Labour Court from December 2020 seems illustrative to me here[29]. There, the court affirmed the employee status of a platform worker. The Court acknowledged that the worker was not bound by instructions. However, there was sufficient external control, for which the court found that the incentive system developed by the platform, which relied not least on workers' gambling instincts, was sufficient[30]. There

[27] Novelli et al., *cit.*, p. 17.

[28] Dastin, Howcroft, Loeve, *France and EU promise to cut red tape on artificial intelligence technology*, in *thejapantimes*, February 11, 2025, https://www.japantimes.co.jp/business/2025/02/11/tech/ai-france-eu-red-tape-tech/.

[29] Federal Labour Court of 1 December 2020-9 AZR 102/20.

[30] Federal Labour Court of 1 December 2020-9 AZR 102/20, para 50: "The defendant used the incentive function of this evaluation system to induce the user to continuously carry out control activities in the district of his usual place of residence. (...) The defendant thus stimulated the 'gambling instinct' of the users by offering the prospect of experience points and the associated the 'play instinct' of the users with the aim of encouraging them to work regularly. thereby encourage them to engage in regular activities".

are studies that show that algorithmic nudging is not necessarily less powerful than issuing instructions[31]. It is therefore time to look beyond the employer's right to issue instructions and also consider other ways in which a sufficient degree of control can ultimately be exerted.

Recently, AI has also been linked to the qualification issue in other respects. Guy Davidov, in particular, has spoken out in favour of establishing a state system so as to require any business engaging with someone to do work to treat that worker as an employee, unless pre-authorisation is granted to consider this worker an independent contractor. Pre-authorisation would be applied for from a government agency via a dedicated website and granted (or denied) immediately by an automated system. The system would rely on AI technology to predict whether the worker would be considered an employee by a court[32]. The proposal promises legal certainty and has the additional charm of utilising AI for law enforcement. Personally, however, I am not convinced, not least because of doubts about the ability of AI to take a holistic view of legal relationships, but also with regard to the underlying assumption that every contract for the provision of services must first be regarded as an employment contract.

6. *Algorithmic management must be legally contained; there is also a blueprint for this*

The OECD recently presented a comprehensive study on "Algorithmic management in the workplace"[33]. What does it say? Let me just quote from the summary: "The findings show that algorithmic management tools are already commonly used in most countries studied. While managers perceive that algorithmic management often improves the quality of their decisions as well as their own job satisfaction, they also perceive certain trustworthiness

[31] Cf. on this in particular Kellogg, Valentine, Christin, *Algorithms at Work: The New Contested Terrain of Control*, in *AMA*, 2019, 14,1, pp. 366-410.

[32] Davidov, *Using AI to Mitigate the Employee Misclassification Problem*, in *MLR*, 2024, https://doi.org/10.1111/1468-2230.12919. See also Cohen et al., *The use of AI in legal systems: determining independent contractor vs. employee status*, in *Artif Intell Law*, *2023*.

[33] Milanez, Lemmens, Ruggiu, *Algorithmic management in the workplace*. OECD Artificial Intelligence Papers, 2025, n. 31, https://www.oecd.org/en/publications/algorithmic-management-in-the-workplace_287c13c4-en.html.

concerns with the use of such tools. They cite concerns of unclear accountability, inability to easily follow the tools' logic, and inadequate protection of workers' health. It is urgent to examine policy gaps to ensure the trustworthy use of algorithmic management tools".

The Directive on platform work contains an unconvincing presumption. At the same time, however, with its provisions on algorithmic management, it represents a pioneering achievement that cannot be overestimated. There are provisions on limitations on the processing of personal data (Art. 7), a data-protection impact assessment (Art. 8), transparency (Art. 9), human oversight (Art. 10), human review (Art. 11), safety and health (Art. 12), information & consultation (Art. 13) and the provision of information to workers (Art. 14). That is quite something.

In light of the OECD study, however, the question arises as to why these regulations are limited to platform work. Algorithmic management certainly plays a particularly prominent role in platform work. But does this justify – also in view of the principle of equality under EU law – leaving algorithmic management outside of platform work unregulated?[34-35].

7. *Discrimination law may need to be reconstructed*

Discrimination law is a particularly hot topic when it comes to AI. There are two reasons for this, one of which lies in the area of substantive law and the other in the area of law enforcement.

As far as the first point is concerned, the main problem is probably that "algorithmic discrimination" threatens to blow up the existing system, which is essentially based on a distinction between direct and indirect discrimination[36]. This has led to proposals to completely redesign discrimination law. Let me just remind you of Sandra Wachter's Theory of Artificial Immutability, according to which so-called "algorithmic groups" should be protected

[34] See also EESC, *cit.*, (sub 5.4.2).

[35] See also Open Letter, *Algorithmic Management and the Future of Work in Europe,* in *Social Europe*, November 4, 2024, https://www.socialeurope.eu/open-letter-algorithmic-management-and-the-future-of-work-in-europe.

[36] Cf. in this regard only Adams Prassl, Binns, Kelly Lyth, *Directly discriminatory algorithms*, in *MLR*, 2022, 86, 1, pp. 144-175; Cf. also Mooij, *Adjudicating a discriminatory algorithm*, in *European Law Blog*, 2025, https://doi.org/10.21428/9885764c.459fc812.

under anti-discrimination law[37]. As far as I can see, however, this is extremely controversial[38]. Ultimately, there is no evidence that the algorithmic group as such is worthy of protection or even stable enough to consider its protection. We should not forget that in that case the law would not protect people because of their sexual orientation or their age or their religion, but because they belong to a group that is defined on the basis of a certain click behaviour or individual pixels in a picture. Overall, it seems to me that there are currently more questions than answers in substantive discrimination law with regard to AI.

A bit more clarity exists in the area of law enforcement (if only we knew a little better what exactly we want to enforce). There are those who want to help persons affected by discriminatory AI, for example by reversing the burden of proof to a large extent[39]. At the same time, there are voices advocating for strengthening the rights of associations (including trade unions)[40] and, if necessary, extend the powers of the authorities[41]. The latter proposals are obviously based on the assessment that the judicial protection of individual rights alone is not sufficient to prevent discriminatory AI.

8. *Data protection and AI: There is still a lot to do*

If the AI Act must be brought to life, then the GDPR must be specifically geared towards protection against AI. And this substantiation is taking place. On 27 February, for example, the CJEU issued an important ruling, in which it the Court not only specified the content of the right to infor-

[37] Wachter, *The Theory of Artificial Immutability: Protecting Algorithmic Groups under Anti-Discrimination Law*, in *Tulane* LR, 2022, 97.

[38] Cf. Thomsen, *Three Lessons for and from Algorithmic Discrimination*, in *Res Publica*, 2023, 29, 2, pp. 213-235; Zeiser, *Emergent discrimination: Should we protect algorithmic groups?*, in *J App. Phil*, 2025.

[39] Grünberger, *Reformbedarf im AGG: Beweislastverteilung beim Einsatz von KI*, in *ZRP*, 2021, p. 234.

[40] Cf. Herberger, *Verbandsklageverfahren für diskriminierungsrechtliche Ansprüche*, in *RdA*, 2022, p. 228.

[41] Spiecker Gen. Döhmann, Towfigh, *Coded bias. The General Equal Treatment Act and protection against discrimination by algorithmic decision-making systems*, Federal Anti-Discrimination Agency, 2023, pp. 4-5, https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/EN/publikationen/ki_study.pdf?__blob=publicationFile&v=2.

mation of a person affected by automated decision-making, but also decided how to proceed if the controller is of the opinion that the information to be transmitted includes protected data of third parties or business secrets[42]. The concretization of the provisions of the GDPR is not limited to the CJEU, though. The role of the European Data Protection Board, which late last year issued an Opinion on certain data protection aspects related to the processing of personal data in the context of AI models[43], deserves particular mention. However, there is still a lot to be done, particularly in terms of employee protection. The European Economic and Social Committee recently presented a list of demands, not least to enable the enforcement of Article 88 of the General Data Protection Regulation (GDPR) and give explicit guidance on consent and legitimate interest[44].

There are also proposals that go well beyond the concretisation of existing regulations. This applies in particular to claims aimed at granting collective rights to the data generated by the employees themselves. Such ideas come in all shapes and colours. One proposal, recently put forward by Ifeoma Ajunwa, is particularly far-reaching. In her view, data gathered from workers should be treated as capital in the automation of their workplaces such that a portion of the gains from automation should be returned to the worker[45]. These and other proposals deserve serious consideration, although perhaps two comments are in order. Firstly, that data protection is closely interwoven with the protection of privacy, which sets certain limits to its "collectivisation" (even if these do not appear insurmountable). And secondly, and perhaps more importantly, that the collective protection of employees – for example in the form of information and consultation – does not presuppose the recognition of property-like rights (and the associated argumentative effort to justify them).

[42] CJEU of 27 February 2025, C-638/23, Amt der Tiroler Landesregierung.

[43] Https://www.edpb.europa.eu/system/files/2024-12/edpb_opinion_202428_ai-models_en.pdf. Cf. also Stalla-Bourdillon, *EDPB Opinion 28/2024 on Personal Data Processing in the Context of AI Models A Step Toward Long-Awaited Guidelines on Anonymisation?*, in *ELB*, January 2025, https://doi.org/10.21428/9885764c.3518cb2b.

[44] EESC, *cit.* (sub 1.8).

[45] Ajunwa, *AI and Captured Capital*, in *YLJF*, January 31, 2025, https://www.law.columbia.edu/sites/default/files/2025-03/AI%20and%20Captured%20Capital%20-%20Ifeoma%20Ajunwa.pdf.

9. *Workers' participation must be strengthened (also in the interest of employers)*

As is well known, the AI Act contains a provision on employee participation, which was slipped into the law at the very end as a treat for employees. Pursuant to Art. 26 (7), "before putting into service or using a high-risk AI system at the workplace, deployers who are employers shall inform workers' representatives and the affected workers that they will be subject to the use of the high-risk AI system". According to recital (92), this provision is without prejudice to obligations for employers to inform or to inform and consult workers or their representatives under Union or national law and practice, including Directive 2002/14/EC.

In fact, German law, for instance, goes much further. For example, under Section 87 (1) No. 6 of the Works Constitution Act (*Betriebsverfassungsgesetz*), the works council has a right of co-determination when it comes to the introduction and use of technical equipment intended to monitor the behaviour or performance of employees". What is more, the Courts interpret this provision extensively. According to the Federal Labour Court, technical equipment is intended to monitor the conduct or performance of employees within the meaning of the law if the device is objectively and directly suitable for monitoring, regardless of whether the employer pursues this objective and also evaluates the data obtained through the monitoring". An individual monitoring intention is therefore not required[46]. Accordingly, the introduction of a headset system, for example, which enables employees in the retail sector to communicate wirelessly by means of a so-called conference mode, is subject to co-determination even if the conversations can neither be recorded nor saved[47]. German law therefore has a lot to offer in terms of co-determination and could be expanded even further under a new government. However, the reference to German law must contain a double caveat: according to a recently published study, in 2023 only 7 per cent of companies still have employee representation based on the Works Constitution Act[48].

[46] This has been the established case law of the court since the decision of the Federal Labour Court of 9 September 1975-1 ABR 20/74. However, a recent decision by the Federal Administrative Court (of 4 May 2023-5 P 16/21), which set sthe emphasis slightly differently, has raised certain doubts about the Federal Labour Court s case law.

[47] Federal Labour Court of 16 July 2024-1 ABR 16/23.

[48] Stettes, *Eine Analyse auf Basis der IW-Beschäftigtenbefragung 2024*, in *IW-Report*, 2025, 1, https://www.iwkoeln.de/fileadmin/user_upload/Studien/Report/PDF/2025/IW-Report_2025-Betriebsraete-und-Interessenvertretung.pdf.

And co-determination in the introduction of AI does not always work out in practice as the legislator had envisioned[49].

But this is not at all about preaching the virtues of German law[50]. The aim is rather to focus on something else, namely to shed light on the advantages of employee participation in general. It is important to realise that AI systems are socio-technical systems whose real effects are not only dependent on the underlying technology[51]. At least as important are the specific objectives pursued with the application and the embedding of the system within an organisation, i.e. the context in which the application is used. For example, ensuring sufficient transparency requires not only technical explainability, but also "active communication and explanation of the algorithmic decision-making processes in organisations that use the AI system"[52]. And the people who work with a system and are affected by it are the ones who can "provide context". There is something else to add: it is now generally agreed that trust is an important success factor in the use of AI. But what better way to strengthen employees' trust in AI than to involve their representatives in a timely and comprehensive manner?

10. *Never underestimate the value of social dialogue and collective bargaining*

The fact that we could learn something about the power of collective bargaining on AI from the US of all places may have surprised many of us. Nevertheless, an important lesson on collective bargaining and AI came from there. I'm talking about the dispute over AI in Hollywood. Collective bargaining between the film studios and the unions representing screenwriters,

[49] Krzywdzinski, *Zwei Welten der KI in der Arbeitswelt*, Weizenbaum discussion paper, 2024, 39, https://www.weizenbaum-institut.de/media/Publikationen/Weizenbaum_Discussion_Paper/Weizenbaum_Series_39.pdf

[50] See also: OECD, *OECD-Bericht zu Künstlicher Intelligenz in Deutschland*, OECD Publishing, 2024, https://www.oecd.org/de/publications/oecd-bericht-zu-kunstlicher-intelligenz-in-deutschland_8fd1bd9d-de.html.

[51] Cf. only Selbst et al., *Fairness and Abstraction in Sociotechnical Systems*, August 23, 2018.

[52] AI Ethics Group led by VDE, *From Principles to Practice. An inter-disciplinary framework to operationalise AI ethics*, Bertelsmann Stiftung, https://www.bertelsmann-stiftung.de/-fileadmin/files/BSt/Publikationen/GrauePublikationen/WKIO_2020_final.pdf, S. 10. Cf. also Sloane et al., *Participation is not a design fix for machine learning*, in *EAAMO*, 2022, https://arxiv.org/abs/2007.02423.

actors and radio producers was tough. The collective agreement was preceded by a lengthy strike. And the Californian legislature had to provide a little help in the final stages. In the end, however, a collective agreement was reached that addressed the specific problems in the industry and prevented studios, for example, from simply cloning actors digitally and thus depriving them of their livelihood. So you could say that the negotiations between the actors ended the way a Hollywood movie should: With a happy ending. Is it a coincidence that a collective agreement on the use of AI was recently concluded in Germany in the very same sector, namely the film industry?[53]

It takes little thought to recognise the value of collective bargaining on AI. It is quite simply the value that collective bargaining has in general: The social partners are much closer to the subject matter than the distant legislator. And they can react to changes much more quickly than the mills of legislation would allow. The German collective labour agreement illustrates both points: It stipulates, for example, that digital replicas of actors may only be used with their consent. Do we seriously need the legislator for such a regulation? And the agreement provides that its content will be reviewed every six months. That's what I call speed. Legislative procedures take longer.

Does that mean everything is fine? Is "negotiating the algorithm"[54] the magic formula? Unfortunately, no. Because as plausible as it is to rely on the strengths of collective bargaining when regulating AI, it is also true that collective bargaining systems in many countries are no longer as well-functioning as they were just a few decades ago. Collective bargaining on AI thus inevitably becomes part of a general problem, namely that autonomy is a wonderful thing, but that it only really works if enough people join in.

11. *In the end, it's about people*

When looking at AI from a legal perspective, it is worth occasionally venturing a look beyond the boundaries of your own profession. There are important questions in connection with AI that should also interest lawyers.

[53] Eckstein, *Erster KI-Tarifvertrag für die Film- und Fernsehbranche in Kraft*, in *Mebucom*, February 10,2025, https://mebucom.de/business/erster-ki-tarifvertrag-fuer-die-film-und-fernsehbranche-in-kraft/.

[54] Cf. De Stefano, *Negotiating the Algorithmm: Automation, Artificial Intelligence and Labour Protection*, in *CLL&PJ*, 2019, 41,1.

For instance: What impact does the use of AI have on our relationships with others (in a labour law context: the employer and colleagues)? Can we "trust" machines? Should we and can we really quantify everything? How great is the risk that we will lose cognitive skills and the ability to think critically in the long term if we rely too much on AI? What significance does it have that we as humans are inclined to ascribe human characteristics to machines? Only if we ask ourselves such questions can we as lawyers meaningfully contribute to human-centred AI.

Let me come to the end: AI presents us with numerous questions that must be addressed. And we won't be running out of problems any time soon. Quite the opposite. The increasing use of AI agents alone is associated with numerous new legal issue[55]. We need to embrace the challenge of AI, recognise the opportunities of AI and help minimise the risks that come with AI. And we should realise that we will only be able to master AI if we look beyond the boundaries of our profession and cooperate with other sciences. To do this, we must first listen and then contribute our specific knowledge in a way that others can understand and benefit from. Let's try.

[55] Cf. only Kolt, *Governing AI Agents*, in *Notre Dame L. Rev.*, 2025, https://arxiv.org/abs/2501.07913.

Matilde Biagiotti

Recent Developments in the Regulation of Equality Bodies in the European Union*

Contents: **1.** Introduction. **2.** Equality bodies as originally established by EU anti-discrimination directives. **3.** Establishment, mandate and characteristics of renewed equality bodies. **4.** Functions and tools of renewed equality bodies. **4.1.** Promotion and prevention function. **4.2.** Decision-making function. **4.3.** Support and litigation function. **5.** Equality bodies' cooperation and consultation with other actors. **6.** Equality bodies and the fight against algorithmic discrimination: the potentiality of equality data. **7.** Final remarks.

1. *Introduction*

In the last two decades, the European anti-discrimination legislation has represented a successful vehicle for the enforcement of non-discrimination and equality principles and for achieving social justice in the world of work among European countries. Nevertheless, some weaknesses are still apparent, especially due to the excessive fragmentation of the legislation and its heterogeneous implementation across Member States.

Equality bodies were originally designed to extend the protection against discrimination with competence to analyse the problems involved, study possible solutions and provide concrete assistance for the victims. However, they have experienced limitations in their actions because of external and internal factors characterising their mandates, structures and resources.

* The article is part of the PRIN 2020 INSPIRE Research Project - *Inclusion Strategies through Participation in Workplace for Organizational Well-Being* (2020CJL288). This essay is the re-elaboration of the research presented by the Author at the XXIV ISLSSL World Congress "*Work in a changing world. The quest for labour rights and social justice*" (Rome, 17-20 September 2024). A shorter version of this paper will be forthcoming into the Congress Proceedings e-book (FrancoAngeli publisher, Milan).

Eventually, the European Union institutions have proceeded, through the draft of two directive proposals recently adopted in May 2024, to strengthen national bodies' powers and mandate to fight discrimination on grounds of sex, race, religion or belief, disability, age and sexual orientation.

Given the circumstances, it appears crucial to conduct an in-depth investigation of the role played by equality bodies until today, at the same time considering hypothetical developments which may derive from the newly increased standards provided at the EU level. In order to do so, a comparative analysis is conducted on two levels: the first relates to the weighting of the changes made at the EU regulatory level; while the second concerns the assessment of legal frameworks, policies and initiatives that support equality bodies' actions across different European countries which, taking into account the impact of socio-economic factors, legal and institutional structures, can represent valid examples to be followed for the effective implementation of the new directives by Member States which are still running below these standards.

The analysis is organised as follows. After a brief introduction to the creation and initial developments of equality bodies, the first part focuses on the establishment, mandate and characteristics of renewed equality bodies following the new legislation; afterwards, the second part is dedicated to the identification of equality bodies' functions, commonly divided into promotion and prevention, decision-making, and support and litigation, and the instruments at their disposal, considering both those following an *ex-ante approach* while pursuing the prevention of discrimination and those designed for an *ex-post* reaction to discrimination; in the third part, the focus shifts to the analysis of cooperative relationships established between equality bodies and other actors, including social partners and stakeholders, in the broader perspective of ensuring the highest possible social and work inclusion of people from vulnerable groups; finally, the last section focuses on the role that renewed equality bodies could play in contemporary societies, characterised by the use of new technologies and artificial intelligence systems, especially through the collection and use of *equality data*.

2. *Equality bodies as originally established by EU anti-discrimination directives*

Equality bodies were originally established within the broader renewed anti-discrimination legislation of the first years of the 2000s (the "Equality

Directives"). In particular, article 13 of the *Racial Equality Directive* (dir. 2000/43/EC) stated that: "Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin"[1]. This first provision was soon followed by article 20 of dir. 2006/54/EC and article 11 of dir. 2010/41/EU, concerning the protection against discrimination based on gender[2].

Truth was that some Member States had already established such organisms, since the '60s and the '70s, especially in some countries with common law traditions, and in general in the Northwestern part of the continent[3]. Nevertheless, it was mainly due to the adoption of the *Racial Equality Directive* that equality bodies spread all over Europe. The phenomenon constituted, and still constitutes, a *unicum* in comparison with other organisms established with similar mandates in extra-EU countries, especially because of their mandatory nature. However, in the European context, mandatory is only the creation of equality bodies, while their inner structure, mandate and functions depend primarily on how each Member State has decided to assemble and manage them.

Overall, it seems that the variety of legal traditions, administrative structures and political frameworks which constantly characterise countries in the European Union context is also identifiable in the general architecture of equality bodies[4]. Given the circumstances, *Equinet* – the *European Network*

[1] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[2] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

[3] On the topic, *see*, among others: European Commission, Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("the Racial Equality Directive") and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ("the Employment Equality Directive"), Brussels, 19.3.2021 COM(2021) 139 final, pp. 13-16; Benedi Lahuerta, *Equality Bodies: advancing towards more responsive designs?*, in *IJLC*, 2021, 17, pp. 390-392.

[4] On the topic, *see*, among others: Kádár, *Equality Bodies: a European Phenomenon*, in *IJDL*, 2018, 18, 2-3, pp. 145-146.

of Equality Bodies – was established in 2007 with the aim of guaranteeing, at least, minimum standards of harmonisation and effective cooperation between these bodies[5].

The context where equality bodies act is worrying, considering that discrimination is still too spread among European countries and several doubts and weaknesses continue to characterise the implementation of acceptable standards: for instance, a high degree of uncertainty surrounds the concept of "discrimination" in the first place, especially due to the emergence of new forms of discrimination (such as algorithmic or statistical discriminations); besides, the number of cases denounced and brought before judges is modest, indicating both fear in victims' behaviour and low awareness of the existence of support services; lastly, follow-up measures to decisions in matters of discrimination are currently ineffective, where present[6]. More particularly, different levels of protection against discrimination have been registered among European countries for years: a situation hardly conceivable for the progressively social European Union which is currently becoming more and more solid[7].

Equality bodies appear to be, at least on paper, actors capable of contributing to the enforcement of the anti-discrimination legislation[8], for several reasons: in the first place, they have shown resilience, surviving challenges like the 2008 financial crisis or the limited harmonisation in their regulation across Europe; not only that, some of them have been deeply developed due to the over-transposition of legislation by some innovative Member States, thus representing examples to be followed[9]; as for their functioning, they can carry out different tasks in single structures, through the adoption of a complementary approach on multiple levels; and lastly, the use of a "cross-domain approach" and the establishment of a strong interconnection between discrimination and the protection of human rights enable the introduction of

[5] *See* https://equineteurope.org.

[6] European Commission, COM(2021) 139 final, cit., pp. 25 and 26.

[7] European Commission, COM(2021) 139 final, cit., pp. 13-16.

[8] Elizondo-Urrestarazu, *Introduction*, in Equinet, *Equality Bodies working on cases without an identifiable victim: Actio popularis*, 2022, pp. 6-9, defines Equality Bodies as "equality watchdogs".

[9] Farkas, *Learnings from the piloting of indicators for the mandate and independence of equality bodies*, Equinet Report, European Network of Equality Bodies, 2022, pp. 5 and 6; Calafà, *Equality Bodies in attesa di riordino*, in Borzaga, Calafà, Guarriello, Vallauri, *Sesso, genere, discriminazioni: riflessioni a più voci (Parte terza)*, in *LD*, 2023, 1, pp. 26-29, indicates Sweden, Great Britain and Belgium as inspiring Countries.

functions providing victims with tailored assistance[10]. As a whole, these characteristics can lead to favourable impacts in, at least, three areas[11]: in the first place, equality bodies can contribute to a radical change at the societal level, spreading the values of diversity and equality in the national culture ("macro-perspective"); secondly, they can lead to organisational changes, both in the public and in the private sectors, by influencing policy-making and procedures ("meso-perspective"); and lastly, their actions impact on the personal situation of the victims who entrust equality bodies for some form of support ("micro-perspective").

Eventually, the potential positive impact deriving from equality bodies' intervention came to the attention of the European institutions, which decided to act, firstly through the publication of a Recommendation[12] about the necessity to improve the minimum standards for their functioning in 2018; and afterwards, given that no effective changes were registered, as showed by an investigation[13] which followed the Recommendation, they intervened by proposing two draft directives on the subjects. The two directives[14] have been adopted in May 2024.

[10] Solanes Corella, *Equality bodies in the European Union: The Spanish independent authority for equal treatment*, in *DJHR*, 2023, 11, pp. 107-113.

[11] On the topic, *see*, among others: Kádár, *Equality Bodies*, cit., pp. 147-150; Van de Graaf, *Procedural justice perceptions in the mediation of discrimination reports by a national equality body*, in *IJDL*, 2020, 20, 1, pp. 46-47.

[12] Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, published in L 167/28, 4 July 2018.

[13] European Commission, Commission Staff Working Document, Equality bodies and the implementation of the Commission Recommendation on standards for equality bodies, 19 March 2021, Brussels, SWD(2021) 63 final, accompanying the document Report from the Commission to the European Parliament and Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM(2021) 139 final.

[14] Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC. Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU.

Dir. 2024/1499/EU and dir. 2024/1500/EU regulate "standards for equality bodies" in the field of equal treatment and equal opportunities, respectively: the first, about racial or ethnic origin, religion or belief, disability, age or sexual orientation, and gender (in matters of social security and the access to and supply of goods and services); while the second, concerning gender in matters of employment and occupation. The necessity to adopt two directives depended on the different legal basis on which the *Equality Directives* are based: on the one hand, Directive 2024/1499/EU amends previous Directives 2000/43/EC and 2004/113/EC, with art. 19 TFEU as a legal basis; on the other hand, Directive 2024/1500/EU amends the 2006/54/EC and 2010/41/EC Directives, with art. 157(3) TFEU as legal basis.

The following paragraphs provide an analysis of the two Directives and the major changes made compared to previous legislation.

3. *Establishment, mandate and characteristics of renewed equality bodies*

Article 1 of the new directives introduces a first improvement, given that it assigns equality bodies the competence to act against discrimination based on all the grounds covered by the *Equality Directives*: as a matter of fact, one of the limits highlighted until now about the functioning of these bodies was the absence of a mandate to act in the field of discriminations due to religion or belief, disability, age or sexual orientation of the victims, as covered by dir. 2000/78/EC. However, over the years, Member States have proved to be quite flexible and proactive, almost all recognising their equality bodies the competence to contrast discrimination deriving from the excepted grounds, thus showing a general over-transposition of the EU anti-discrimination requirements in this area. Lastly, as for the number of grounds that a single body can treat, no strict requirements are provided for in the directives but, from the analysis of national practices, it emerges that both single-ground bodies and multi-ground bodies exist[15].

Since article 2 of the Directives foresees that one or more bodies can be established in the same country, a widespread usance consists of the co-existence of two national bodies, one focused on a single ground and a multi-ground body. As far as the latter is concerned, both positive and negative

[15] *See* European Commission, SWD(2021) 63 final, cit., pp. 3-6.

aspects can be highlighted. In relation to the advantages, reference is made to the provision of easier access for victims, to the greater coherence in the planning of activities and cost-effectiveness, as well as to the capacity to efficiently deal with multiple and intersectional discrimination, which is a characteristic of high valuable importance. In relation to the negative aspects of multi-ground bodies, sometimes, they experience difficulties in granting the same visibility to all the protected grounds, together with the complexity of equally investing and employing human and financial resources in each field[16]. However, good practices exist and consist mainly in the organization of joint activities to achieve progress in more than one area at the same time, or in the application of a "cross-ground approach" to solve needs placed at the intersection of more grounds. In general, extensive expertise in dealing with different victims is fundamental for the effectiveness of equality bodies' actions[17].

The new directives also deal with the regulation of a number of aspects that define both the internal functioning of equality bodies and their external appearance[18], as can be observed in article 3 about the "independence" of equality bodies, article 4 about their "resources", and articles 12 and 13 regarding "equal access for all, along with accessibility and reasonable accommodations for persons with disabilities"[19]. Overall, these provisions represent an important improvement in comparison with the limited existing framework.

Concerning the independence of equality bodies[20], previous legislation

[16] *Ibidem*, pp. 3-6. *See* also IORDACHE, IONESCU, *Effectively enforcing the right to non-discrimination. Promising practices implementing and going beyond the requirements of the Racial Equality and Employment Equality Directives 2021*, European network of legal experts in gender equality and non-discrimination, European Commission - Directorate-General for Justice and Consumers, 2022, pp. 63-67.

[17] IORDACHE, IONESCU, *cit.*

[18] ECRI General Policy Recommendation No. 2 of the Council of Europe on Equality Bodies to combat racism and intolerance at national level, adopted on 13 June 1997 and revised on 7 December 2017, recommends for *independence*, *accessibility* and *quality* as essential characteristics of efficient Equality Bodies. On the topic, *see* also, SOLANES CORELLA, *cit.*, pp. 107-113.

[19] Articles 3, 4, 12, 13 of Council Directive (EU) 2024/1499 of 7 May 2024 and of Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024. For a general analysis of the regulatory developments concerning renewed equality bodies, *see* EQUINET, *Understanding the New EU Directives on Standards for Equality Bodies. Key principles derived from the Legal Digest on Standards for Equality Bodies*, 2024.

[20] CROWLEY, *Equality Bodies making a difference*, European Commission - Directorate-

didn't provide for them to be formally independent or to have their own legal personality, causing several critical consequences[21]: in the first place, equality bodies have been experiencing limited autonomy in the organisation of their work due to the role played by national Governments; related to this, they haven't been able to manage properly human and financial resources, thus causing their inability to effectively exercise all their functions, and making it difficult for victims to receive assistance. In this last regard, other aspects must be considered[22]: first and foremost, among all their competencies, equality bodies across Europe have most commonly minimised the recourse to strategic litigation due to the high costs involved; secondly, they have limited the recruitment of specialised staff; and they have also avoided the opening of scattered local offices, thus affecting accessibility for victims of discrimination. As a whole, the reduced financial resources appear today as a substantial obstacle to the correct functioning of equality bodies[23]. Besides, their independence must be considered also when thinking about the context surrounding them: for example, the national political framework

General for Justice and Consumers, Publications Office of the European Union, 2018, p. 7. The situation in relation to legal status was largely positive with 31 out of 43 equality bodies having their own legal personality. However, 10 equality bodies formed part of Government ministries and independence is curtailed in such situations (Austria (2 EBs), Finland (2 EBs), Germany, Iceland, Italy (2 EBs), Portugal (CIG) and Spain). Two equality bodies were part of NGO associations (Liechtenstein).

[21] *See*, among others, Filì, *Le direttive gemelle (UE) 2024/1499 e (UE) 2024/1500 sugli organismi di parità*, in *DRI*, 2024, 4, pp. 1246 and 1247; Borzaga, *Il destino di Consigliere e Consiglieri di Parità in Italia dopo le più recenti riforme*, in *ERDDA*, 2024, 3-4, pp. 348-349; Benedi Lahuerta, *cit.*, pp. 397-400; Crowley, *Taking Stock. A perspective from the work of equality bodies on: European equality policy strategies, equal treatment directives, and standards for equality bodies*, Equinet, 2020, pp. 23-26; Borzaga, *Va ripensato il ruolo delle consigliere e dei consiglieri di parità?*, in Borzaga, Calafà, Guarriello, Vallauri (eds.), *Sesso, genere, discriminazioni: riflessioni a più voci (Parte terza)*, in *LD*, 2023, 1, p. 17 ff.

[22] Crowley, *Equality Bodies making a difference*, cit., pp. 11 and 12; Crowley, *Taking Stock*, cit., pp. 23-26.

[23] Crowley, *Equality Bodies making a difference*, cit., pp. 11-12. The author describes the following situation: a slow improvement in resources (staff and/or budget) has been recently registered for 16 EBs (Austria (Ombud for Equal Treatment), Belgium (UNIA), Bulgaria, Croatia (People's Ombudsman), the Czech Republic, Finland (Non-Discrimination Ombudsman), Greece, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Portugal (CEARD), Romania and Slovenia). Conversely, 11 EBs have experienced a decrease in staffing and/or budget in recent years (Belgium (IEWM), Cyprus, Estonia (Commissioner for Gender Equality and Equal Treatment), Italy (gender bodies), Netherlands, Norway (2 EBs), Poland, Spain and the UK).

plays a significant role, that can range from hostility to support, including an overall disinterest, towards their activities[24].

The new directives provide for some improvements in the regulation of equality bodies' independence, especially through the adoption of article 3, titled precisely "independence", which aims at guaranteeing "neutrality"[25] to these organs. Here, explicit reference is made in the first paragraph to grant that equality bodies can work without being subjected to any external influence, which may derive from Governments, other public bodies as well as private ones. Moreover, an independent management of all types of resources is requested. The second paragraph focuses on the recruitment process of their staff, in order to guarantee transparent procedures, as asked and in the 2018 Recommendation[26]. Finally, the fourth paragraph addresses the theme of multi-mandate bodies, indicating the necessity to build a solid internal structure within them to efficaciously exercise the equality mandate at the same level as the other ones.

In this context, multi-mandate bodies deserve special attention because of the convergence of the equality mandate and other different functions in the hands of the same organ[27], thus causing positive and negative consequences[28]. On the one hand, the potential of multi-mandate bodies is mainly related to the opportunity to establish synergies among different mandates through the recourse to cooperation and integrated approaches, while indirectly improving staff expertise and flexibility in the fight against discrimination and ensuring an intersectional perspective. Moreover, having more

[24] On the topic, Crowley, *Equality Bodies making a difference*, cit., p. 7. The context is the following: in 8 countries, there is political hostility toward EBs (Bulgaria, Croatia, Cyprus, Italy, Poland, Romania, Sweden and the UK); political disinterest is instead registered in 12 countries (Austria, Belgium, Estonia, Finland, Greece, Hungary, Liechtenstein, Luxembourg, Lithuania, Slovakia, Slovenia and Spain); finally, a supportive political context is evident in 7 countries (France, Germany, Iceland, Ireland, Latvia, Netherlands and Portugal).

[25] Farkas, *cit.*, p. 6, uses the term "neutrality".

[26] Crowley, *Equality Bodies making a difference*, cit., pp. 10-11.

[27] Farkas, *cit.*, pp. 15-18, provides us with a practical definition of a "multi-mandate body": "The classic example of a multi-mandate body is a National Human Rights Institution with competences to deal with a wide range of human rights issues. Clearly, the extent of a National Equality Body's mandate outside equal treatment is much more limited and focused than that of a classic National Human Rights Institution".

[28] On the topic, *see* among others, Farkas, *cit.,* pp. 15-18; Crowley, *Equality Bodies making a difference*, cit., pp. 8-9; European Commission, SWD(2021) 63 final, cit., pp. 3-6; Iordache, Ionescu, *cit.*, pp. 65-67.

than one mandate could provide these bodies with more popularity and visibility, even across victims. Lastly, the potential cost-saving effect of the convergence of different mandates is interesting. On the other hand, costs might represent also a risk for the correct functioning of multi-mandate bodies, especially because of the possible competition that could take place between different mandates to secure a part of the already low budget. Finally, the lack of planning could create problems linked to the effective organisation of the work, both in terms of activities' prioritisation and the mere control of them. In this context, some good practices can be highlighted, ranging from the establishment of a dedicated leadership and separate staff for each mandate, along with a balanced apportioning of resources, followed by the draft and publication of annual reports monitoring the activities of each department.

As a whole, from the analysis of the new directives, mixed sensations are evocated in this area. Undoubtedly, the general requests moved by the European institutions have been answered positively, especially taking into account the introduction of transparent procedures, as well as the specifications concerning independence for all equality bodies and also for multi-mandate ones. Conversely, failures or – more appropriately – potential "missed opportunities" are related to: first and foremost, the lack of explicit safeguards to guarantee independence or the absence of legal avenues to be used to "counterattack" when the independence of equality bodies is violated; secondly, while providing for transparent procedures in staff's recruitment, ideally, a reference to the possibility to include exponents of vulnerable groups directly in the staff would have been appreciated, thus further representing a whole diverse society[29]; and lastly, no explicit reference is made to the need to overcome the incidence of national political contexts on equality bodies' activities nor any means are provided for to address the issue.

As far as resources allocated to equality bodies are concerned, article 4 of the new directives explicitly refers only to the need to grant these organs, including multi-mandate bodies, with "sufficient resources". Once again, a missed opportunity can be pointed out, given that no procedures are foreseen to create, firstly, a multi-annual budget and, secondly, a monitoring programme of the budget[30]. In so doing, the legislator has missed the chance to

[29] Benedi Lahuerta, *cit.*, pp. 392-397.

[30] On the topic, European Commission, SWD(2021) 63 final, cit., pp. 16-18; Benedi Lahuerta, *cit.*, pp. 392-397.

spread a good practice that could have been applied to all equality bodies, flexibly, by adequately considering the specific functions, activities and needs of each of them.

Lastly, with regard to accessibility to equality bodies, two perspectives must be taken into account and analysed, namely: awareness of the existence of these organs and more generally of anti-discrimination support procedures, along with proper access of victims to equality bodies and their services. As far as the first dimension is concerned, low awareness of anti-discrimination rights and procedures to combat it have been already denounced[31]: in this context, the conduction of a good awareness-raising project by equality bodies may be an efficient instrument to reach higher standards in terms of knowledge of both victims and duty-bearers (employers or service providers)[32]. Good practices for the increase of awareness levels highlighted among equality bodies around Europe are, for instance: the draft of guidelines and codes of conduct, as well as the organisation of training and educational courses seem to be efficient for the preparation of duty bearers; while hosting awareness campaigns in the media, along with events and the delivery of annual awards contribute to the dissemination of information among citizens[33]. In this regard, the new Directives seem to have welcomed the suggestions about the need to introduce standards for the promotion of equality bodies and their actions within the anti-discrimination framework: article 5 entails the use of all appropriate means to spread awareness on the existence of equality bodies, also enumerating a series of activities suitable for the further dissemination of anti-discrimination procedures. Furthermore, the first paragraph contains an explicit reference to the necessity to spread information "with particular attention to individuals and groups at risk of discrimination".

In relation to the second dimension of accessibility to equality bodies, the *Racial Equality Directive* didn't provide for any clear standards and only limited its interference to the need to spread information among victims

[31] On the topic, *see* European Commission, COM(2021) 139 final, cit., pp. 11-12. Data show that at least 71% of the members of ethnic and immigrant minorities are unaware of the existence of organs providing support against discrimination.

[32] European Commission - Directorate-General for Justice and Consumers, *A comparative analysis of non-discrimination law in Europe 2019*, publications Office of the European Union, 2020, pp. 147-150.

[33] On the topic, *see* European Commission, SWD(2021) 63 final, cit., pp. 11-15.

"by all appropriate means"[34]. Data show that only few equality bodies have worked on and accomplished to allow access to their services to a broad diversity of victims. Besides, in situations where they have acted on the matter, they haven't been able to apply systematic approaches towards diverse complainants[35].

Generally speaking, access for victims to equality bodies and their services must be granted through flexible, clear and simple procedures. Several different and effective approaches emerge from the analysis conducted at the EU level[36]: first and foremost, support shall be offered free of charge; secondly, accessibility must be granted by providing different channels of contact and communication (oral, online, by e-mail or face-to-face meeting), and by making it possible for victims to use the language they prefer to denounce their situation; moreover, confidentiality during the procedures must be ensured, together with the application of faster deadlines to facilitate the outcome; and lastly, both regional and local offices are open and located all over the country in order to grant visibility to equality bodies and easier access for victims, by also implementing accommodations to ensure physical access for all. In this latter direction, the new directives reiterate multiple times the point: firstly, article 5(3) states that these organs must implement all appropriate instruments and formats to reach the audience, taking into account multiple vulnerable groups of people; secondly, article 12 explicitly refers to the absence of barriers to be ensured in the submission of complaints and to the importance of cost-free procedures; and lastly, article 13 specifically relates to issues concerning access to equality bodies for people with disabilities. Overall, the directives seem to have followed a clear and linear strategy in the matter.

4. *Functions and tools of renewed equality bodies*

The original functions of equality bodies following article 13 of the *Racial Equality Directive* were the provision of independent assistance to victims, the conduction of independent surveys, the publication of independent

[34] Benedi Lahuerta, *cit.*, pp. 397-400.

[35] Crowley, *Equality Bodies making a difference*, cit., p. 13.

[36] On the topic, Benedi Lahuerta, *cit.*, pp. 392-397; Iordache, Ionescu, *cit.*, pp. 83-86; European Commission, SWD(2021) 63 final, cit., pp. 19-24.

reports and the issuing of recommendations. Among them, assistance to victims has been recognised as being used in the most varied ways among Member States.

All the old functions have been preserved within the new directives, sometimes broadly specified, others expanded or simply complemented with new ones[37]. In this way, new legislation has responded affirmatively to the requests advanced by the 2018 Recommendation, which asked for the further deepening of equality bodies' competencies.

Following the renewed legal framework, equality bodies' functions can be now divided into three main categories: promotion and prevention, decision-making, and support and litigation[38]. In this way, these organisms are solidly equipped to confront discrimination from two opposite perspectives[39]: in the first place, *ex-ante* instruments enable them to prevent discrimination and play a proactive role in creating the ideal conditions for uprooting any form of discrimination in several areas; secondly, equality bodies have at their disposal instruments suitable also to react to discrimination, thus ensuring *ex-post* interventions aimed at minimising the impact of unequal treatment. Overall, the improvements registered represent a significant change, especially because these organisms may be able to renovate most European anti-discrimination systems founded primarily on reaction to discrimination and individual enforcement[40]: a proactive spirit, together with collective and structural actions, may characterise the equality bodies of the future.

The following paragraphs will focus on the analysis of each of the mentioned functions.

4.1. *Promotion and prevention function*

Article 5 of the new Directives deals with the first function recognised to equality bodies, that is the prevention of discrimination and the promotion

[37] *See*, among others, Filì, *cit.*, pp. 1248-1249; European Commission, COM(2021) 139 final, cit., pp. 13-16; Iordache, Ionescu, *cit.*, pp. 67-83; Kádár, *Equality Bodies*, cit., pp. 145 and 146; Solanes Corella, *cit.*, pp. 113-117; Farkas, *cit.*, pp. 26-27.

[38] European Commission, SWD(2021) 63 final, cit., pp. 6-10; Crowley, *Equality Bodies making a difference*, cit.; Crowley, *Taking Stock*, cit.

[39] On the topic, *see* Benedi Lahuerta, *cit.*, pp. 390-392; Solanes Corella, *cit.*, pp. 113-117.

[40] Benedi Lahuerta, *cit.*, pp. 390-392.

of equal treatment. In this regard, many are the improvements that can be highlighted, among which, the promotion of positive actions and equality mainstreaming both in public and private entities; secondly, the provision of training, advice and support to organisations; and lastly, solid cooperation with stakeholders and social partners represent fruitful activities, also in relation to the promotion and exchange of good practices.

The *Equality Directives* of the 2000s originally indicated "independent assistance" as one of the main functions of equality bodies. However, this provision was quite vague in the definition of the characteristics of such assistance, especially because no specific activities were indicated, nor reference was made to the limits of the provided service[41]. The vagueness was generated by the general fear of encouraging an extremely litigious legal culture in European societies[42], thus no criteria were established requiring Member States to guarantee legal collective standing to victims of discrimination or to institute agencies to conduct investigations or have decision-making powers. Actually, the direct consequence of this behaviour was rather a negative effect on the enforcement of *Equality Directives*, and besides, the extreme freedom left to Member States in the organisation of assistance for victims has given birth to the complex and varied framework already mentioned, thus increasing the need for new legislation better defining this "assistance to victims".

Analysing the new directives, it emerges that these requests have been heard and welcomed by the legislator. As a matter of fact, article 6 now enumerates a series of activities that equality bodies shall conduct while providing victims with assistance: it ranges from receiving complaints from victims to different steps to be taken while assisting vulnerable people. Among them, significant attribution is given to the dissemination of information about the legal framework, the services provided by the body, available remedies and technical provisions concerning confidentiality and protection of personal data. Besides, equality bodies hold now the competence to make suggestions and orient victims to complementary forms of support (such as psychological help). Lastly, equality bodies shall guarantee the respect of a reasonable time to respond to the assistance requests lodged by victims.

Overall, the two directives have provided specific standards for the or-

[41] Farkas, *cit.*, pp. 15-18; Benedi Lahuerta, *cit.*, pp. 397-400.

[42] Farkas, *cit.*, pp. 8-14.

ganisation of assistance within equality bodies, covering all phases of the victim support request procedure[43].

4.2. *Decision-making function*

Originally, article 13(2) of the *Racial Equality Directive* recognised the power of equality bodies to conduct independent surveys, publish independent reports and make recommendations. Critics from the doctrine have highlighted a "typical", by now, vagueness in such a provision, which didn't give any specifications about the nature of the mentioned recommendations or the topics to be addressed within surveys and reports[44]. As a consequence, only a limited number of Member States have organised their equality bodies in a way that allows them to issue legally binding decisions, and likewise, the opportunity to effectively ensure the enforcement of such decisions has been taken by even fewer organs[45]. Therefore, the European framework shows low numbers when it comes to equality bodies with decision-making competence and high degrees of unresponsiveness to decisions. Limits have been highlighted starting from the investigation phase, with problems registered both in general cooperation and in the exchange of information with respondents; besides, variety represents another problem, since not all equality bodies with a decision-making function can issue legally binding decisions; lastly, no effective mandatory mechanisms enable equality bodies to avoid general unresponsiveness, due to the low use of sanctions or the inadequacy of existing ones.

With the adoption of new legislation on equality bodies, extended specifications have been made about the nature of and the processes involved in their decision-making function. As a matter of fact, article 8 (titled "Inquiries")[46] and article 9 (titled "Opinions and Decisions") of the new directives regulate, respectively, the sphere of investigations conducted by equality bodies, and their ability to make assessments about cases and issue decisions about them. On the one hand, more clarity about definitions of roles and activities has been guaranteed, welcoming the suggestions made by the Eu-

[43] Benedi Lahuerta, *cit.*, pp. 392-397; Solanes Corella, *cit.*, pp. 117-123.

[44] Benedi Lahuerta, *cit.*, pp. 397-400.

[45] On the topic, Crowley, *Equality Bodies making a difference*, cit., pp. 11 and 12; Crowley, *Taking Stock*, cit., pp. 23-26.

[46] For an analysis of art. 8 of the new directives, *see* Filì, *cit.*, p. 1249.

ropean institutions. On the other hand, concerning the enforcement of the decisions issued by equality bodies, it seems that both steps forward and steps back have been taken. Article 9, in its second paragraph, refers explicitly to "specific measures to remedy any breach of the principles of equal treatment found and to prevent further occurrences" and to the establishment of "appropriate mechanisms for the follow-up to non-binding decisions, such as feedback obligations, and for the enforcement of binding decisions". In so doing, the legislator has appropriately satisfied the demands concerning the supply of mechanisms to actively follow equality bodies' decisions, but the achievement of effective results appears unrealistic due to the lack of explicit reference to any sanctions[47]. In this sense, the legislator has missed the opportunity to follow entirely the 2018 Recommendation, which counted on the necessity to issue suitable, effective and proportional sanctions to achieve a high standard in the enforcement of equality bodies' decisions. Of course, the mention of "feedback obligations" is welcomed, but it appears too weak in comparison, for example, to the provision of activities' periodical monitoring. For instance, monitoring processes could have been mentioned and extensively treated in article 9, entailing both cyclic follow-ups in relation to further complaints received about the same issue of discrimination, or focused on the steps taken, subsequently to decisions, both by perpetrators and the legislator[48]. But surely, an improvement is generated by article 10(4), which entails the opportunity for equality bodies to initiate legal proceedings aiming at defending their legally binding decisions[49].

4.3. *Support and litigation function*

The support and litigation function granted to equality bodies mainly consists of, firstly, the possibility to act in court proceedings (on behalf or in support of one or more victims, or to defend the public interest), and secondly, the opportunity of recurring to forms of alternative dispute resolutions.

[47] On the topic, *see*, European Commission - Directorate-General for Justice and Consumers, *cit.*, pp. 111-117; Solanes Corella, *cit.*, pp. 107-113; European Commission, SWD(2021) 63 final, cit., pp. 3-6.

[48] Iordache, Ionescu, *cit.*, pp. 72-73. Only the Equality Bodies of Bulgaria, Cyprus, Denmark, France and Norway use monitoring processes to assess the follow-up to their decisions.

[49] Article 9 of directives 2024/1499/EU and 2024/1500/EU enables equality bodies to make legally binding decisions.

As far as the latter are concerned, new legislation constitutes an important improvement in the field, by introducing the use of alternative dispute resolutions for equality bodies across all Member States. In particular, article 7 of the new directives regulates the issue, suggesting mediation or conciliation as possible forms of alternative dispute resolutions, to be chosen by each State following their legal framework and traditions. Overall, this kind of support can prove to be effective in order to achieve structural responses, at the same time offering assistance to individual victims and adapting legislation to more appropriate standards[50].

Additionally, "Member States shall ensure that equality bodies have the right to act in court proceedings in civil and administrative law matters relating to the implementation of the principle of equal treatment […]"[51]. By doing so, article 10 of the new directives provides for the recognition of legal standing to all equality bodies, trying to put a remedy to the variegated framework in the field.

Legal standing, intended as the "right or ability to bring a legal action to a court of law, or to appear in a court"[52], when recognized to equality bodies, allows for a series of improvements in the fight against discrimination, for several reasons[53]: first of all, it is considered the most effective instrument for acting against collective discrimination which harms entire groups of the society; secondly, it appears as a valuable mean to overcome the systematic issue of low access to justice by victims of discrimination, as well as underreporting of such cases, giving that providing equality bodies with the possibility to represent these victims relieve the latter from the fear to be exposed and consequently to be victims of retaliation.

Besides, the legal casework of equality bodies has succeeded in impacting equality law at different levels[54]: first and foremost, national non-discrimination legislation among all Member States has been deeply investigated and further interpreted thanks to legal actions taken also by equality bodies;

[50] *See*, on the topic, Iordache, Ionescu, *cit.*, pp. 67-83; Kádár, *The legal standing of Equality Bodies*, in European Commission - Directorate-General for Justice and Consumers, *EELR*, 1/2019, Publications Office of the European Union, pp. 7-9.

[51] Art. 10(1) of Directive n. 2024/1499/EU and of Directive n. 2024/1500/EU.

[52] Kádár, *The legal standing*, cit., p. 1.

[53] On the topic, *see*, among others, Van de Graaf, *cit.*, pp. 58-59; Elizondo-Urrestarazu, *cit.*, pp. 6-9; Farkas, *cit.*, pp. 5-6.

[54] Kádár, *Equality Bodies*, cit., pp. 147-150.

additionally, these legal actions have reached several times the European Courts, namely through the encouragement directed to national courts to refer for preliminary ruling in front of the Court of Justice (CJEU), or by bringing cases in front of the European Court of Human Rights (ECtHR).

When it comes to the study of the legal standing of equality bodies, it is interesting to note that some specific legal provisions provide them with this competence, namely article 7(2) of dir. 2000/43/EC and article 9(2) of dir. 2000/78/EC, which allows them, as public institutions set up to fight against discrimination and to promote equality, to exercise this function in courts as well. The remarkable fact is that this concession doesn't derive from their *status* as victims of discrimination, as normality requests.

Equality bodies in Europe have developed and implemented different legal actions, depending on many internal and external factors characterizing their functioning. Therefore, several are the legal procedures that these bodies can advance in courts, thus constituting a wide set of legal instruments which best characterize their fight against both individual and structural disparities which weaken our societies[55]. More precisely, equality bodies shall appear in court in different circumstances, as indicated directly by article 10 of the new directives: firstly, as explicated in the second paragraph, they can issue *amicus curiae* observations to courts as experts in equality law, in this case not taking the side of any party[56]; secondly, as written in the fourth paragraph and observed above, they can act in court proceedings to defend and guarantee the correct enforcement of their legally binding decisions[57]. And lastly, the third paragraph enumerates a series of other circumstances in which these organs can appear in court: first of all, they can initiate court proceedings on behalf of one or several victims, by employing their own staff or lawyers paid for the job[58]; secondly, they can participate in support of one or several victims, taking the side of a party with the aim

[55] Pirker, *Legal standing of Equality Bodies*, in Equinet, *Equality Bodies working*, cit., pp. 11–17. For the analysis of different legal avenues at equality bodies' disposal, *see*, Kádár, *The legal standing*, cit., pp. 1 and 2; European Commission, SWD(2021) 63 final, cit., pp. 6–10.

[56] The *amicus curiae* function is commonly used by Equality Bodies who doesn't recur often to legal proceedings. Lantschner, *Strategic litigation: equality bodies' strategic use of powers to enforce discrimination law*, in Directorate-General for Justice and Consumers, *European equality law review*, Publications Office of the European Union, 1/2020, pp. 16–18, indicates how the *amicus curiae* function is useful to obtain strategic results without straining resources.

[57] This is quite fundamental for those organs which act as quasi-judicial bodies.

[58] Art. 10(3), letter (a) of dir. 2024/1499/EU and of dir. 2024/1500/EU.

to obtain particular outcomes[59]; and lastly, they can initiate court proceedings in their own name to defend the public interest, both with identifiable or no identifiable victims (depending on national criteria) and by opting for class actions or *actio popularis*[60], thus playing a proactive role in the fight against discrimination which harm the rights and interests of entire groups of persons.

As a matter of fact, further specifications concerning the legal standing of equality bodies were absolutely necessary to be developed and included in the new legislation and the fact that the two directives both provide for specific regulation in the field is of pivotal importance. This is also due to a series of challenges and risks which strongly affect the enforcement of legal actions lodged by equality bodies, and which derive from the already mentioned vague guidance provided by legislation until now. In particular[61], limitations of economic resources influence the choice of equality bodies to recur to litigation, given the high costs; similarly, high costs may induce equality bodies to recur only to strategic litigation, thus impacting negatively on the "quantity" of proceedings, while preferring "quality" of them; besides, the general lack of internal planning of litigation can be also highlighted in the work of the bodies, thus requesting strategies to build a balance in the forms of support granted to victims; and lastly, given the scarce awareness of these bodies and their competencies, building trust among victims is even more complicated.

Among the legal actions mentioned, strategic litigation merits special attention. Even if not extensively regulated by the new directives, stricter re-

[59] Art. 10(3), letter (b) of dir. 2024/1499/EU and of dir. 2024/1500/EU.

[60] Art. 10(3), letter (c) of dir. 2024/1499/EU and of dir. 2024/1500/EU. *Actio popularis* can be defined as those proceedings initiated by an organization acting in the public interest on its own behalf without a specific victim to support or represent. Pirker, *cit.*, pp. 17-19, reports that OSCE defines *actio popularis* as a "mechanism for the protection of a particular group of people against systematic violations of rights which represents a public interest in a society that is defined as democratic". On the topic, *see* also, Micov Inová, *How have Equality Bodies used* actio popularis*?*, in Equinet, *Equality Bodies working,* cit., p. 21; El Morabe, *Why should* actio popularis *be enabled for equality bodies?*, in Equinet, *Equality Bodies worikng,* cit., pp. 35-39.

[61] On the topic, *see*, Crowley, *Taking Stock*, cit., pp. 23-26; Kádár, *The legal standing*, cit., pp. 7-15; European Commission, SWD(2021) 63 final, cit., pp. 6-10; Lantschner, *cit.*, pp. 16-18. Different sources of strategic litigation can be highlighted: NGOs, the Media, Human Rights lawyers or individual complaints brought to Equality Bodies are the most common ways in which these cases come to the attention of Equality Bodies.

quirements for the mandatory legal competencies of equality bodies will probably support and encourage the spread of strategic proceedings as well. This legal avenue allows to obtain significant collective outcomes, having an impact well beyond the individual case and, for this reason, strategic litigation is often considered a tool suitable for advocacy of rights, as a trigger for social change, as well as a form of political participation, not forgetting the increased standards granted in access to justice[62]. The factors impacting equality bodies' use of strategic litigation are multiple: starting with the specific and independent transposition of the requirements in the field by the Member States; followed by the competencies and functions granted to equality bodies which must be also taken into account; and finally, special attention is to be turned to available economic resources, considering that strategic litigation implies elevated costs.

As far as *actio popularis* are concerned, enablers of this type of action are the existence of a legal provision allowing for its use by equality bodies, as well as specific knowledge of *actio popularis* procedures in courts. Conversely, potential barriers are the lack of a clear mandate enabling equality bodies to act, followed by the difficulties in being aware of structural discriminations; and finally, the potential (negative) media attention on the proceedings[63].

The selection of cases to be brought in court is an essential part of the strategic litigation process, consisting of an overall evaluation of potential positive and negative outcomes of the case. More precisely, equality bodies generally consider: the contribution of a case in the clarification of equality legislation; the existence of previous jurisprudence in the field or its absence; the interest showed by the social debate on the topic and the potential public interest for its outcome; and the interest of the equality body itself on the issue, or the expectations by its partners[64].

Follow-up measures to strategic litigation by equality bodies can for sure contribute to spreading the potentiality of this instrument, through activities ranging from the publication of the case outcomes also through the media and social media, to the organization of academic discussions or sem-

[62] On the topic, Lantschner, *cit.*, pp. 1-4. The author defines strategic litigation means "selecting suitable cases and bringing them to court, the outcome of which should have broader impact and go beyond the individual case", p. 1; European Commission, COM(2021) 139 final, cit., pp. 6-7.

[63] Micov inová, *cit.*, p. 28-31.

[64] Lantschner, *cit.*, pp. 7-16; El Morabe, *cit.*, pp. 35-39.

inars on the topic. Probably, a structure of coordination is needed for the better use of this legal avenue, concerning the choice of selection criteria for cases, the dissemination of information about the procedure among both stakeholders and the victims, and finally, the establishment of partnerships to cooperate with other organizations interested in the topic (NGOs for example)[65].

5. *Equality bodies' cooperation and consultation with other actors*

The fight against discrimination, in order to be coherent and effective, must be conducted at different levels, by several actors and in multiple areas that mark the lives of people involved. Equality bodies, where well organised and supported, are playing a significant role in this field, especially thanks to their capacity to build connections and start collaborations with several other actors engaged in the same fight against discrimination. For this reason, they have been sometimes renamed "equality hubs", thus capable of connecting different actors and allowing mutual learning and coherent action, bringing the fight against discrimination to a systemic level[66].

The original legislation, through article 11 of the *Racial Equality Directive*, only provided for the encouragement of social dialogue and cooperation between social partners and NGOs, without mentioning the involvement of equality bodies in these partnerships. Conversely, it appears that the new directives have bridged this gap, especially due to the introduction of article 14 (titled "Cooperation") and article 15 (titled "Consultation")[67]. In this scenario, collaboration is explicitly allowed and suggested at all levels (locally, regionally, nationally, and even at the EU and international levels), alongside the involvement of both public and private actors, thus including all those playing a role in the fight against discrimination in the society.

In general, collaborations with several actors are established in different areas, following varied aims and employing numerous instruments. In this regard, the first subject matter concerns the actors involved in such collaborations. Equality bodies tend to cooperate with other equality bodies at

[65] Lantschner, *cit.*, pp. 7-16; Iordache, Ionescu, *cit.*, pp. 72-73.

[66] Benedi Lahuerta, *cit.*, pp. 392-397; Crowley, *Equality Bodies making a difference*, cit., pp. 8 and 9.

[67] For an analysis of artt. 13 and 14 of the new directives, *see* Filì, *cit.*, p. 1249.

two levels[68]: in the national sphere, aiming at promoting the consistent application of equal principles and coherence of actions; more broadly, at the European level, these bodies are represented by Equinet, which plays a significant role in granting the exchange of good practices, regular meetings and discussion about specific issues by bringing together representatives of all national bodies. Besides, equality bodies establish collaborations with national public actors as well. The analysis of the good practices collected at the European level shows that different forms of dialogue are put into action[69]: invitations to review new legislation or the performing of advisory functions on the laws are very common, as well as the inclusion of equality bodies' representatives in policy working groups and the dialogue with civil servants, along with the establishment of direct relationships with Parliaments. Furthermore, cooperation with other stakeholders[70] is very common. In the first place, equality bodies tend to establish collaborations with social partners in order to help them in the prevention of discrimination at work and by suggesting good practices; not only that, equality bodies engage in the organisation of training activities for multiple duty bearers, including its staff members, labour inspectorates or judges; partnerships are built also with other public bodies engaged in the protection of fundamental rights in various sectors, such as education, healthcare and employment[71]. Lastly, fruitful collaborations are commonly established with NGOs: many activities are conducted to better represent the necessities of vulnerable groups, starting from their education, empowerment and autonomy; besides, equality bodies always refer to NGOs in order to select cases of potential interest for strategic litigation, sometimes initiating proceedings together and working side by side for the dissemination of case results to the public. Good practices for

[68] European Commission, SWD(2021) 63 final, cit., pp. 24-29.

[69] European Commission, *ibidem*, pp. 24-29.

[70] On the topic, *see*, Kádár, *Equality Bodies*, cit., 2018, 147-152; Benedi Lahuerta, *cit.*, pp. 392-397; Lantschner, *cit.*, pp. 16-18.

[71] Iordache, Ionescu, *cit.*, pp. 87-90. Different practices can be highlighted: organisation of educational courses, the draft of *memoranda* of understanding, joint policy groups and boards, referral mechanisms and advisory opinions. The impact of these actions in employment can be seen both in the long-term (incremental increase of awareness about discrimination) and in the short-term (non-discrimination standards applied consistently). For a general overview of the activities conducted by social partners for the prevention and fight against discrimination, also in collaboration with equality bodies, *see* Eurofound, *Role of social partners in tackling discrimination at work*, Publications Office of the European Union, 2020.

the establishment of fruitful collaborations are, for instance, the construction of specific structures offering support to victims, the entertainment of regular contacts and exchange of experiences, the implementation of clear and transparent procedures in the development of action plans, and the bargaining of formal rules to regulate collaboration[72].

6. *Equality bodies and the fight against algorithmic discrimination: the potentiality of equality data*

Equality bodies are called to play an increasingly important role these days, especially due to the dissemination of new forms of discrimination, such as algorithmic ones. As a matter of fact, equality bodies own a series of instruments and play several functions which can prove to be very fruitful in this field[73]: in the first place, as quasi-judicial bodies, they can request and have access to technical information about the functioning of AI systems, thus using their investigation powers as provided by article 8 of new legislation; in the second place, employing their decision-making function, they have the opportunity to impose effective follow-up measures to their binding decisions, or they can opt for public dissemination of their resolutions' outcomes, thus performing a still relevant awareness-raising function; moreover, these bodies can initiate collaboration with other actors in order to create proper architecture aiming at understanding the functioning and the impacts of algorithmic AI systems on vulnerable groups of people. The partnerships can be established with actors involved in data protection, consumer protection, health care, financial services and, employment rights (such as trade unions and employers' organisations in the latter case)[74].

Additionally, as bodies endowed with litigation powers, they can initiate proceedings in courts, opting for collective redress, which appears to be a fundamental tool to effectively combat algorithmic discriminations, given that these systems usually harm entire groups of individuals. In this scenario,

[72] Iordache, Ionescu, *cit.*, pp. 97-100.

[73] Capellà Ricart, *The role of European equality bodies to address algorithmic discrimination*, in *IJDL*, 2024, 24, 3, pp. 2-20; Allen, Masters (eds.), *Regulating for an equal AI: a new role for equality bodies. Meeting the new challenged to equality and non-discrimination from increased digitisation and the use of Artificial Intelligence*, Equinet Publication, 2020, pp. 67 ff.

[74] Allen, Masters, *cit.*, pp. 67 ff.

the intervention of equality bodies can range from: the request of access information about the functioning and the structure of AI systems; to the building and management of telematic public platforms used to centralise all the complaints about AI systems; and lastly, to using statistics and equality data to demonstrate the unequal treatment of certain groups in Court[75].

As far as equality data are concerned, article 16 of the new Directives regulates their collection and access conditions for equality bodies. First and foremost, equality data can be defined as "any piece of information that is useful for the purposes of describing, analysing, reasoning about, and decision-making on the state of equality"[76]. In order to be effective, these data must present several characteristics, such as: robustness and objectiveness; they must be systematically collected, reliable and valid; clarity and transparency must characterise their collection, and they must be comprehensive and representative of the sample, in a way to enable comparisons[77]. In order to be effectively employed, equality data shall be treated only by specialised staff, able to manage their safe and correct collection and their other additional uses. Dedicated resources are needed and should be invested in the field[78]. Equality bodies must be granted the right to collect data directly, for instance by means of research and surveys, or indirectly, by obtaining equality data from public and private actors.

From the analysis of good practices collected at the European level, different ways of using this type of data by equality bodies emerge[79]. In the first place, they are commonly deployed to verify and evaluate the enforcement of the anti-discrimination legislation at the national and supranational levels; secondly, equality data are used as a catalyst for the establishment of collaborations with several different actors, such as statistic offices, public departments and agencies, labour inspectorates, civil society organisations, research

[75] As a consequence, the detection of similar issues is easier, people victims of the same discrimination are interrelated and the potential for strategic litigation increase, and lastly, evidence of structural discrimination can be found.

[76] Ilieva, *Handbook on Identifying and Using Equality Data in Legal Casework*, Equinet - European Network of Equality Bodies, 2024, p. 12. Moreover, "the information may be quantitative or qualitative in nature. It could include aggregate data that reflect inequalities or their causes or effects in societies. Sometimes data that are collected primarily for reasons other than equality-related purposes can be used for producing equality data".

[77] Ilieva, *cit.*, pp. 14-17.

[78] European Commission, SWD(2021) 63 final, cit., pp. 11-15.

[79] European Commission, COM(2021) 139 final, cit., pp. 15-16.

centres and universities; and lastly, data can be useful in order to make effective recommendations about specific cases or situations where a risk of discrimination is detected.

Nevertheless, equality data are primarily used by equality bodies in their legal casework, as mentioned above. As a matter of fact, these data are essential to enable the correct and global evaluation of discrimination cases, providing contextual facts which are pivotal for the detection of discrimination. Besides, the use of equality data can be also beneficial to make comparisons between different treatments received by victims, thus serving as proof of discrimination, especially in cases concerning structural discriminations which affect several individuals. In these cases, the degree of complexity in identifying and proving discrimination is very high[80].

As a whole, it appears that equality bodies are suitable actors to address collective discrimination deriving also from the use of AI systems, but their success is likely to depend on the results of the new directives' implementation by European Member States, paying particular attention to the availability and management of staff and financial resources. In this sense, the ability of equality bodies to intervene in support of both individual victims and the broader public interest in cases of algorithmic discrimination depends primarily on their own understanding of the phenomenon. In this circumstance, the resources allocated to equality bodies in each Member State acquire a fundamental relevance, directly impacting on the ability of the body to firstly know about, and then effectively counteract, such forms of discrimination[81]. With respect to the use of equality data, the current critical issues relate to the scarcity of resources itself, as well as to the lack of a coordinated approach to data collection and study, considering that there is still a great imbalance between data collected on some factors of discrimination compared to others, and in a still limited number of areas of victims' daily lives.

[80] Ilieva, *cit.*, pp. 6–10.
[81] Allen, Masters (eds), *cit.*, pp. 67 ff.

7. *Final remarks*

The study of the two new directives adopted by the European Union on the organization and functioning of equality bodies, namely dir. 1499/2024/EU and dir. 1500/2024/EU, has helped to decipher the role that these bodies should play in the fight against discrimination following profound renewals.

As a matter of fact, the directives represent a significant step forward compared with the still too varied and generally dissatisfied conditions, which characterise contemporary equality bodies. Clearly, the effectiveness of the change can only be assessed at a later stage, once national implementation has taken place and is effective. On the one hand, it is possible to expect that for some Member States the required adjustments to the new standards will be almost insignificant, given the already widely positive results achieved in this area. For other States, the adaptation process will be more complex and will involve, in the first place, the revision of political priorities at government level, so as to ensure the recognition of an appropriate amount of economic resources to the cause. Moreover, where the new European legislation has failed to arrive, progressive States will arrive first, thus continuing to provide an example to follow for those who experience difficulties and for the European institutions themselves.

As a whole, the new legislation enables equality bodies to fight discrimination on a systemic and multi-level basis, thanks to the provision of functions and tools aimed both at preventing discrimination and remedying it. Furthermore, the opportunity to choose between several instruments constitutes, at the same time, an attempt to mediate the same variety of political, legal and social cultures that characterise the European Member States. While the emphasis on the need to build partnerships aims to underline the importance of being able to adopt a multilevel and interdisciplinary approach in the fight against discrimination, which has deep roots in all areas of society and requires structural action. This need is further amplified if we consider that we are facing a period of profound change due to the implementation of artificial intelligence in the management of our daily lives, making it equally necessary to increase and improve the tools available in the fight against new forms of discrimination.

Abstract

The essay examines recent legislative developments at the European level in the field of anti-discrimination law with the adoption of EU directives 2024/1499 and 2024/1500 concerning equality bodies. Specifically, the analysis provides an overview of the establishment, mandate, and characteristics of the renewed equality bodies, with particular attention to the functions assigned to them: promotion and prevention; decision-making; support and litigation. The analysis concludes by identifying a hypothetical role for the renewed equality bodies in combating new forms of discrimination deriving from the use of artificial intelligence systems.

Keywords

Equality bodies, Anti-discrimination, EU law, Labour law, Artificial Intelligence.

Claudia Carchio

Workplace Inclusion and Social Sustainability: the Case of Workers with Chronic Illness and Transplant Recipients

1. *Chronic illnesses and transplants: employment challenges and occupational impact*

The transition toward social sustainability – one of the core pillars of the tripartite sustainability paradigm – presents both significant challenges and opportunities for enterprises and modern production systems. A key aspect of this transition is the full integration of workers affected by chronic illnesses or those who have undergone transplants, as their participation in the labour market is essential for fostering social inclusion and economic resilience.

The number of individuals facing such health conditions is steadily increasing and is expected to rise further due to demographic aging, which will inevitably affect the active workforce. According to the World Health Organization (WHO), chronic diseases – including cardiovascular conditions (such as heart disease and stroke), cancer, diabetes, chronic respiratory diseases, musculoskeletal disorders, depression, and other mental health issues – represent

the leading cause of mortality worldwide, accounting for 41 million deaths annually, of which 17 million occur among individuals under the age of 70[1].

In a resolution adopted in December 2023, the European Parliament acknowledged chronic diseases as one of the most pressing challenges for public health in the EU, given their substantial share of healthcare expenditures across member states. These conditions also impose a significant burden on the quality of life of affected individuals, their families, and caregivers. For this reason, the Parliament urged member states to invest in innovation in disease management to reduce morbidity and mortality[2].

Although these diseases are more prevalent among individuals aged 50 and over (who are more than twice as likely to develop them compared to those under 35[3]) they affect a substantial portion of the EU's active workforce, accounting for a quarter of the total. This share has been steadily increasing, rising by 8 percentage points between 2010 and 2017[4].

This upward trend is expected to persist, driven by the progressive aging of the population and the simultaneous rise in labour market participation among older workers. The latter is influenced by increasing life expectancy, which has led to a gradual elevation of retirement age thresholds[5], as well as by the decline in workforce entry rates among younger generations[6].

[1] According to the WHO, *Noncommunicable diseases*, Key facts, 16 September 2023, *https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases*, chronic diseases account for 74% of all deaths globally. See also WHO, *World health statistics 2023: monitoring health for the SDGs*, Sustainable Development Goals, 2023, Licence: CC BY-NC-SA 3.0 IGO; WHO, *Invisible numbers: the true extent of noncommunicable diseases and what to do about them*, 2022, *https://www.who.int/publications/i/item/9789240057661*.

[2] Resolution of the European Parliament of 13 December 2023 on noncommunicable diseases (2023/2075(INI)).

[3] Vargas Llave, Vanderleyden, Weber, *How to respond to chronic health problems in the workplace?*, Eurofound Policy Brief, 2019, pp. 4-5, which also reports that even among younger workers (aged 16 to 29), the percentage of those reporting chronic illnesses is high and increasing, having risen from 11% in 2010 to 18% in 2017.

[4] According to Vargas Llave, Vanderleyden, Weber, *cit.*, the proportion of the active population affected by chronic diseases increased by 8 percentage points between 2010 and 2017.

[5] For a global overview of pension reforms addressing these issues, the OECD's annual studies provide valuable insights, with the latest being OECD, *Pensions at a Glance 2023: OECD and G20 Indicators*, OECD Publishing, 2023, *https://doi.org/10.1787/678055dd-en*. In Italy, the increase in the retirement age was introduced by Article 24 of Decree-Law No. 201/2011, converted into Law No. 214/2011 and subsequent amendments.

[6] See European Commission, *2024 Ageing Report. Underlying Assumptions & Projection Methodologies*, Institutional Paper 257, Publications Office of the European Union, 2023, p. 32

A similar trend can be observed among transplant recipients. In Italy alone, approximately 31,000 individuals underwent transplants in 2024, including 4,700 organ transplants and 25,900 tissue transplants[7]. This number has been steadily increasing, with a significant proportion of recipients being of working age – more than half falling within the 41-to-60-year range[8].

These demographic shifts, coupled with the naturally more fragile health conditions of an aging workforce, are reshaping the employment composition and professional skills[9]. They affect business organization in terms of both productivity and competitiveness while also influencing employment opportunities and job quality for affected workers[10].

Consequently, worker health has become a crucial factor, not only for

ff., which projects an increase in the labour market participation of older workers (aged 55-64) across all EU member states, with an average rise of 10 percentage points by 2070-from 65.4% in 2022 to 75.5% in 2070. The increase is expected to be more pronounced for women (+13 percentage points) than for older male workers (+6 percentage points). Likewise, for individuals aged 65-74, labour market participation is forecasted to grow from 9.8% in 2022 to 18.4% by 2070.

[7] Data from the National Transplant Center, available on its official website: *https://www.trapianti.salute.gov.it*.

[8] According to the 2022 Annual Report on the National Transplant Network's Activities, *https://www.trapianti.salute.gov.it*, in 2022, kidney transplant recipients aged 41-60 accounted for 55.7%, liver transplant recipients for 48%, heart transplant recipients for 54.5%, lung transplant recipients for 45.3%, and pancreas transplant recipients for 57.9%.

[9] Among the many studies on older workers, active ageing, and health conditions, see Eiffe, Muller, Weber (eds), *Keeping older workers engaged: Policies, practices and mechanisms*, European Foundation for the Improvement of Living and Working Conditions (Eurofound), 2024; AGE Platform Europe, *Barometer 2023 - Empowering older people in the labour market for sustainable and quality working lives*, AGE Platform Europe, 2023; Eiffe, *Eurofound's Reference Framework: Sustainable work over the life course in the EU*, in *EJWI*, 2021, 6, 1, pp. 67-83; the joint report by EU-OSHA, Cedefop, Eurofound, EIGE, *Towards age-friendly work in Europe: a life-course perspective on work and ageing from EU Agencies*, Publications Office of the European Union, 2017; EU-OSHA, *The ageing workforce: implications for occupational safety and health. A research review*, Publications Office of the European Union, 2016; Dupré, Karjalainen, *One in six of the EU working-age population report disability*, Eurostat, 2003. In Italian legal literature, see in particular Filì (ed.), *Quale sostenibilità per la longevità? Ragionando degli effetti dell'invecchiamento della popolazione sulla società, sul mercato del lavoro e sul welfare*, ADAPT University Press, No. 95, 2022; Cappellari, Lucifora, Rosina (eds.), *Invecchiamento attivo, mercato del lavoro e benessere*, Il Mulino, 2018; Bozzao, *Anzianità, lavori e diritti*, Editoriale scientifica, 2017.

[10] For an in-depth and evolutionary analysis of the relationship between health protection and the management of employment relationships, see Tiraboschi, *Salute e lavoro: un binomio da ripensare. Questioni giuridiche e profili di relazioni industriali*, in *DRI*, 2023, no. 2, p. 229 ff., and the references therein.

ensuring full social inclusion, but also for maintaining corporate sustainability in an evolving economic landscape.

Workers affected by chronic illnesses or who have undergone transplants face specific challenges in the labour market due to their fragile and unique health conditions. Although these illnesses lack a universally accepted legal definition, they can be identified through the classifications provided by the World Health Organization (WHO)[11] and, at the European level, by the European Health Interview Survey (EHIS)[12]. These frameworks emphasize the long-term nature of such diseases, which often persist throughout a person's life, result from irreversible pathological alterations, and require specialized rehabilitation as well as extended periods of treatment and monitoring[13].

The absence of a definitive cure and the prolonged duration of chronic illnesses mean that their course is inherently dynamic, evolving over time through phases of improvement and, frequently, progressive deterioration, following a fluid and oscillatory trajectory.

Given the wide range of conditions classified as chronic and the variability in their progression and treatment, as well as the differing characteristics of diseases requiring transplants and their outcomes, it is clear that the health conditions of affected individuals cannot be generalized.

However, despite these case-by-case differences, chronically ill and transplant patients share the necessity of undergoing periodic, or in some cases lifelong, treatment, including life-saving therapies, while dealing with compromised health. As a result, they may experience a decline in work capacity, face disability or incapacity, and encounter significant employment and labour market integration challenges.

[11] The WHO defines such conditions as "health problems that require ongoing treatment for a period of years or decades". It should also be noted that the WHO uses non-communicable disease as a synonym for chronic illness, describing it as a condition that cannot be transmitted from person to person, has a long duration, and is generally characterized by a prolonged clinical course. See WHO, *Preventing chronic diseases: a vital investment*, WHO global report, 2005, particularly Part 2: The Urgent Need for Action, Chapter One: Chronic Diseases - Causes and Health Impacts, p. 35 ff.

[12] See EUROSTAT, *Quality report of the third wave of the European Health Interview Survey. 2022 Edition*, Publications Office of the European Union, 2022, *https://ec.europa.eu/eurostat/-en/web/products-statistical-reports/-/ks-ft-22-002*.

[13] It should be noted that, in international literature, a chronic disease is defined by one or more specified characteristics, while irreversibility of the condition or its progressive worsening are not necessarily required for classification as a chronic illness. On this point, see the WHO definition referenced in note 9.

2. *The Italian legal framework on employment for chronically ill and transplanted individuals: gaps and emerging perspectives*

The traditional approach, both scientific and regulatory, has largely framed incapacity and employment as mutually exclusive conditions, failing to adequately explore and promote measures that facilitate workplace retention for individuals with limited ability to perform specific tasks[14].

Italian legislation has not systematically addressed the issue of employability and working conditions for such individuals[15]. Instead, protective measures have been predominantly concentrated within the social security system, providing benefits ranging from disability allowances to incapacity pensions for those who permanently lose their ability to work. Additionally, protections extend to illness-related benefits, leave entitlements, temporary suspensions, and workplace accommodations for employees who are temporarily unable to fulfil their assigned duties.

While this approach provides essential social protection by ensuring income security for workers experiencing work incapacity, it lacks a broader

[14] See, in this regard, the Eurofound report, prepared on behalf of the European Foundation for the Improvement of Living and Working Conditions within the framework of the European Observatory of Working Life - Eur-WORK, 2014, Corral, Durán, Isusi, *Employment Opportunities for People with Chronic Diseases*, 2014, *https://www.eurofound.europa.eu/en/publications/2014/employment-opportunities-people-chronic-diseases*. See also OECD, *Sickness, Disability and Work: Keeping On Track in the Economic Downturn*, cit., pp. 17-18; EU-OSHA, *Rehabilitation and Return-to-Work Policies and Systems in European Countries*, cit. For similar observations in the Italian context, see Tiraboschi, *Sistemi di welfare: occupabilità, lavoro e tutele delle persone con malattie croniche*, in Tiraboschi (a cura di), *Occupabilità, lavoro e tutele delle persone con malattie croniche*, cit., p. 15; Varva, *Malattie croniche e lavoro tra normativa e prassi*, in RIDL, 2018, no. 1, p. 109 ff.

[15] Among the earliest studies addressing the employment of individuals with chronic illnesses, see Tiraboschi, *Le nuove frontiere dei sistemi di welfare: occupabilità, lavoro e tutele delle persone con malattie croniche*, in *DRI*, 2015, 3, p. 681 ff. More recently, reference may be made to: Carchio, *Rischi e tutele nel reinserimento lavorativo delle persone con malattie croniche e trapiantate: prime riflessioni alla luce del d.lgs. n. 62/2024*, in *DLS*, 2024, 2, I, p. 162 ff.; see also Verzulli, *Disabilità, malattia cronica, fragilità: il lavoro agile come accomodamento ragionevole*, in *DLS*, 2024, 1, I, p. 1 ff.; Levi, *Sostenibilità del lavoro e tutela della salute in senso dinamico: la prospettiva privilegiata delle malattie croniche*, in *DRI*, 2023, 2, p. 277 ff.; Militello, *La tutela del lavoratore affetto da patologia oncologica in Italia*, in *DRI*, 2018, 2, p. 457 ff.; Caracciolo, *Patologie croniche e lavoratori fragili*, in Brollo et al. (eds.), *Lavoro agile e smart working nella società post-pandemica. Profili giuslavoristici e di relazioni industriali*, ADAPT University Press, 2022, p. 127 ff.; Fernández Martínez, Tiraboschi (eds.), *Lavoro e malattie cro*niche, ADAPT University Press, 2017.

perspective that includes professional retraining and labour market reintegration[16]. As a result, it often leads to premature workforce exits, even in cases where such departures could be avoided through a more nuanced assessment and enhancement of residual work capacities and the specific needs of these workers within their professional environments[17]. This dynamic not only limits employment opportunities for affected individuals but also results in a loss of valuable skills and resources for enterprises and, more broadly, for the entire welfare system.

The employment trajectory of individuals affected by chronic illnesses or those who have undergone transplants should not necessarily equate to their definitive exclusion from the labour market. Instead, it should prompt the adoption of multi-tiered interventions – at national, corporate, and individual levels – aimed at reducing inactivity among chronically ill workers, enabling them to remain in employment despite diminished work capacity while optimizing their residual abilities.

Thus, ensuring the inclusion of such individuals in the workforce, in alignment with their health conditions, is crucial. Their participation in labour markets and integration into organizational structures can serve as a driver for sustainable economic and social development, yielding positive outcomes at both collective and individual levels.

On a broader scale, this issue is particularly relevant for welfare systems facing increasing economic strain. The growing number of economically active individuals – either employed or employable – who exit the labour market or experience temporary or long-term work incapacity due to health

[16] See Tiraboschi, *Le nuove frontiere dei sistemi di welfare: occupabilità, lavoro e tutele delle persone con malattie croniche*, in Fernández Martínez, Tiraboschi (eds.), *cit.*, p. 25-26; Amici di Marco Biagi, *La salute della persona nelle relazioni di lavoro*, ADAPT University Press 2019, p. 47 ff.; Dagnino, *La tutela del lavoratore malato cronico tra diritto vivente e (mancate) risposte del sistema*, in *DRI*, 2023, 2, p. 336 ff, spec. pp. 336-339; Eichenhofer, *The Euoropean social model and reforms of incapacity benefits*, in Devetzi, Stendahl (eds), *Too sick to work? Social security reforms in Europe for persons with reduced earnings capacity*, Wolters Kluwer, Milano, 2011, p. 19.

[17] According to OECD estimates, persons with disabilities – including chronically ill workers – have an employment rate of just over half that of the total active population and a double unemployment rate. See OECD, *Sickness, Disability and Work: Breaking the Barriers - A Synthesis of Findings across OECD Countries*, OECD Publishing, 2010. These findings align with more recent research, which indicates that individuals with disabilities are 42% less likely to be employed compared to those without disabilities. Moreover, their unemployment rate stands at 15%. See OECD, *Disability, Work and Inclusion: Mainstreaming in All Policies and Practices*, OECD Publishing, 2022.

conditions challenges the financial sustainability of social security systems, intensifying pressure on welfare mechanisms that provide pension and disability benefits[18].

The repercussions of this phenomenon are particularly evident at the intermediate level, where individual companies must adapt their managerial and organizational structures to create workplace environments conducive to the inclusion of affected workers. In this context, collective bargaining plays a crucial role in fostering inclusion by ensuring equitable working conditions for individuals with chronic illnesses or transplant recipients.

At the micro level, that is, the individual level, workers suffering from chronic illnesses or those who have undergone transplants often face reduced employment prospects[19], diminished income levels, and limited career advancement opportunities due to employment discontinuity or the risk of job loss[20].

[18] OECD, *Sickness, Disability and Work: Keeping on Track in the Economic Downturn*, OECD Background Paper, 2009, p. 13, states that in OECD member countries, disability benefits account for 1.2% of GDP, rising to 2% when sickness benefits are included. In the Netherlands and Norway, expenditures on disability and sickness benefits reach higher levels, approximately 5% of GDP. See also VANDENBERGHE, ALBRECHT, *The Financial Burden of Non-Communicable Diseases in the European Union: A Systematic Review*, in *Eur J Public Health*, 2020, 30, 4, p. 833 ff. Regarding healthcare expenditures, the European Commission estimated at the 2014 EU Summit on Chronic Diseases – Conference Conclusions, Brussels, 3-4 April 2014, that € 700 billion was spent annually on chronic disease treatment, representing 70-80% of the total healthcare budget – a figure already projected ten years ago.

[19] According to Eurofound, *How to Respond to Chronic Health Problems in the Workplace?*, cit., p. 1, based on data from the Survey of Health, Aging and Retirement in Europe (SHARE), 74% of healthy individuals aged 50-59 are employed, while this percentage drops to 70% among those with a chronic illness and falls further to 52% for individuals with two chronic conditions (https://share-eric.eu). Similarly, according to the European Parliament, *Employment and Disability in Europe. Briefing Document*, May 2020, (*https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651932/EPRS_BRI(2020)651932_EN.pdf*), the employment rate of individuals with disabilities (aged 20-64) stood at 50.6% in 2017, compared to 74.8% for individuals without disabilities. Additionally, in most EU member states, only a small percentage of working-age individuals with severe disabilities are employed. See also EU-OSHA, *Rehabilitation and Return-to-Work Policies and Systems in European Countries*, 2016, updated in 2022, *https://oshwiki.osha.europa.eu/en/themes/rehabilitation-and-return-work-polices-and-systems-european-countries*.

[20] Among the numerous studies highlighting the positive impact of employment on individuals with illness – also from a therapeutic perspective – see VERBEEK, *Workers with occupational pain*, in WAINWRIGHT, ECCLESTON (eds.), *Work and Pain. A Lifespan Development Approach*, Oxford University Press, 2020; KNOCHE, SOCHERT, HOUSTON, *Promoting Healthy Work for Workers with Chronic Illness: A Guide to Good Practice*, European Network for Workplace Health Promo-

Thus, strategies aimed at promoting the employment of individuals with long-term health conditions carry significant implications across multiple domains: they influence social security systems (as well as healthcare policies more specifically), affect the collective interests of workers, and shape the dynamics of individual employment relationships.

3. *Employment inclusion of chronically ill workers: the role of disability-related protections*

As previously observed, the labour reintegration of individuals affected by chronic illnesses is not only essential for ensuring the sustainability of the welfare state but also represents a win-win strategy for both workers and businesses. However, an effective reintegration approach should go beyond merely implementing measures that allow individuals to retain their jobs or return to work post-illness. Instead, it should also aim to facilitate continued employment throughout the different phases of the illness – whenever compatible with the worker's condition.

To date, national legislation has only marginally addressed the employment relationship of workers with chronic illnesses through fragmented and sector-specific provisions[21]. One notable example is Article 8, Paragraph 3 of Legislative Decree No. 81/2015[22], which grants workers suffering from oncological diseases and severe progressive chronic-degenerative conditions the right to convert their employment contract from full-time to part-time and *vice versa*, provided that a dedicated medical commission verifies their

tion (ENWHP), 2012; STEINER, CAVENDER, MAIN, BRADLEY, *Assessing the Impact of Cancer on Work Outcomes: What Are the Research Needs?*, in *Cancer*, 2004, esp. p. 1710; and ZAMAGNI, *People Care: dalle malattie critiche alle prassi relazionali aziendali*, in *Atti del convegno della Fondazione Giancarlo Quarta*, Milan, 26 October 2011.

[21] By contrast, more recent collective bargaining has shown greater attention to the protection of workers affected by chronic and disabling illnesses. See, in this regard, AIMO, IZZI, *Disability and Employee Well-being in Collective Agreements: Practice and Potential*, in *Adapt Labour Studies*, 2019, Vol. 7, p. 3 ff.; MILITELLO, *cit.*, p. 457 ff.; and STEFANOVICHJ, *Disabilità e non autosufficienza nella contrattazione collettiva. Il caso italiano nella prospettiva della Strategia europea sulla disabilità 2010-2020*, *Adapt Labour Studies*, e-Book series, No. 33/2013.

[22] See, among others, BRUZZONE, ROMANO, *Patologie oncologiche, patologie cronico-degenerative e diritto al part-time*, in TIRABOSCHI (ed.), *Le nuove regole del lavoro dopo il Jobs Act*, Giuffrè, Milan, 2016, p. 613 ff.

reduced work capacity, including impairments caused by life-saving treatments[23].

Additionally, during the COVID-19 pandemic, chronically ill workers were classified among "vulnerable workers"[24] and granted special protections beyond standard measures. These included leave allowances, enabling them to abstain from work with absences considered equivalent to hospitalization[25] or illness not counted toward absence limits[26]. They were also permitted remote work arrangements[27] and enhanced medical surveillance measures[28].

However, despite chronic illnesses being incorporated into the broader legislative concept of vulnerability – both in its open-ended formulation,

[23] Another specific provision was introduced by Article 8, Paragraph 10 of Law No. 81/2017, aimed at self-employed workers covered by this legislation. However, this provision primarily concerns job retention and social security protection. Specifically, during periods of certified illness resulting from therapeutic treatments for oncological diseases or severe progressive chronic-degenerative conditions, or any illness causing temporary total work incapacity, the same economic and regulatory treatment applicable to hospitalization is granted. On this provision, see in particular Lanzalonga, *La tutela della genitorialità e della malattia per i lavoratori iscritti alla Gestione separata Inps*, in D. Garofalo (ed.), *La nuova frontiera del lavoro: autonomo – agile – occasionale*, ADAPT University Press, Labour Studies, 2018, p. 239 ff.

[24] On this topic, see among the most recent contributions: Tamburro, *La nozione di fragilità nel prisma del rischio alla salute*, in *MGL*, 2024, 1, pp. 124 ff.; Pascucci, *L'emersione della fragilità nei meandri della normativa pandemica: nuove sfide per il sistema di prevenzione?*, in *RDSS*, 2023, 4, p. 691 ff.; Brollo, *Fragilità del lavoro nell'era pandemica*, in Bassanelli (ed.), *Abitare oltre la casa. Metamorfosi del domestico*, DeriveApprodi, 2022, p. 103 ff.; Ead., *Fragilità e lavoro agile*, in *LDE*, 2022, 1, p. 1 ff.; Mazzanti, *Le fragilità tra poliedricità e multifattorialità*, in Filì (ed.), *Quale sostenibilità per la longevità*, cit., p. 17 ff.

[25] Article 26, Paragraph 2 of Decree-Law No. 18/2020.

[26] Article 1, Paragraph 481 of Law No. 178/2020.

[27] See Article 26, Paragraph 2-bis of Decree-Law No. 18/2020, as subsequently amended and integrated. For a broader discussion of this measure, see, among others, Caracciolo, *cit.*.; Brollo, *Smart o emergency work? Il lavoro agile al tempo della pandemia*, in *LG*, 2020, 6, p. 553 ff.; Bini, *Lo smart working al tempo del coronavirus. Brevi osservazioni in stato di emergenza*, in *Giustiziacivile.com*, 2020, no. 3; Albi, *Il lavoro agile fra emergenza e transizione*, in *WP C.S.D.L.E. "Massimo D'Antona".IT*, no. 430/2020; Maio, *Il lavoro da remoto tra diritti di connessione e disconnessione*, in Martone (ed.), *Il lavoro da remoto. Per una riforma dello smart working oltre l'emergenza*, *Quaderni di Argomenti di Diritto del Lavoro*, 2020, no. 18, p. 86 ff.; Caruso, *Tra lasciti e rovine della pandemia: più o meno smart working?*, in *RIDL*, 2020, I, p. 215 ff.; and Alessi, Vallauri, *Il lavoro agile alla prova del Covid-19*, in Bonardi, Carabelli, D'Onghia, Zoppoli (eds.), *Covid-19 e diritti dei lavoratori*, Instant Book Consulta giuridica della CGIL, 2020, no. 1, p. 131 ff

[28] Article 26, Paragraph 2 of Decree-Law No. 18/2020; Article 83 of Decree-Law No. 34/2020; see also the circular issued by the Ministry of Health on April 29, 2020.

which considered individual factors such as disease, comorbidities, and age[29], and in the formalistic classification outlined by the Ministerial Decree of February 4, 2022[30] – these special protections ceased following the expiration of emergency regulations.

The limited scope of existing legislative provisions highlights the absence of a clear legal definition of chronic illnesses and, more importantly, the lack of a dedicated protective framework for workers affected by such conditions. This necessitates broadening the scope of analysis to assess the applicability of regulatory frameworks that, while not explicitly designed for these individuals, could nonetheless encompass their needs.

National case law has also followed this approach, building upon the jurisprudence of the Court of Justice of the European Union (CJEU), which, in the context of anti-discrimination law, has in certain circumstances extended disability-related employment protections to chronically ill workers[31].

As is well known, the CJEU's interpretation of disability is broad, rooted in the biopsychosocial model adopted by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) of 2006[32], to which

[29] In this regard, Article 83 of Decree-Law No. 34/2020 required public and private employers to provide exceptional health surveillance due to COVID-19, extending the measure to workers at risk due to immunosuppression, post-oncological conditions, life-saving therapies, or comorbidities. More broadly, the provisions covered workers most exposed to infection risk, particularly due to age.

[30] This refers to the Ministerial Decree of the Ministry of Health, issued under Article 17, Paragraph 2 of Decree-Law No. 221/2021, which specifically identified chronic illnesses with poor clinical compensation and severe health implications, classifying them under the fragility condition.

[31] On this point, see DAGNINO, *cit.*, p. 338; EUROFOUND, *How to respond to chronic health problems in the workplace?*, cit., p. 2; VARVA, *Malattie croniche e lavoro tra normativa e prassi*, in *RIDL*, 2018, 1, p. 122 ff. Notably, this observation had already been made some time earlier by OORTMIJN, et al. in *Health of People of Working Age - Full Report*, European Commission Directorate General for Health and Consumers, 2011.

[32] United Nations Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, approved by the European Union through Council Decision No. 2010/48 of 26 November 2009 and subsequently ratified in Italy with Law No. 18/2009. See, in Italian legal scholarship, VALLAURI, *Disabilità e lavoro. Il multiforme contemperamento di libertà di iniziativa economica, diritto al lavoro e dignità (professionale) della persona disabile*, in BOFFO, FALCONI, ZAPPATERRA (eds.), *Per una formazione al lavoro. Le sfide della disabilità adulta*, Florence, 2012, p. 60, who emphasizes that the notion of disability as framed by the UN Convention affirms the right of every individual to achieve the highest possible degree of autonomy and independence within any relational or work environment.

the EU is a signatory[33]. According to the Court's jurisprudence, disability, in the context of employment protection, refers to a "limitation resulting in particular from physical, mental, or psychological impairments, which, in interaction with various barriers, may hinder full and effective participation in professional life on an equal basis with other workers"[34].

The acceptance of this definition implies that, in determining disability status, an individual's impairments or personal characteristics are not, in themselves, sufficient grounds for classification. Instead, disability arises from the interaction between the individual's impairments and the specific environmental, behavioural, or physical barriers[35] present in their workplace, which hinder their ability to fully engage in employment and other dimensions of daily life[36].

See also D. GAROFALO, *La tutela del lavoratore disabile nel prisma degli accomodamenti ragionevoli*, cit., p. 1225 ff., who argues that the concept of disability enshrined in the Convention has shifted the notion of equality from a formal to a substantive level; see also NUNIN, *Disabilità, lavoro e principi di tutela nell'ordinamento internazionale*, in *Variazioni sui Temi di Diritto del Lavoro*, 2020, 4, p. 886 ff.

[33] The UN Convention, although classified as a "mixed agreement" – namely, an agreement negotiated by the EU with third parties that falls within the scope of shared competence with Member States under Article 4 of the TFEU – is considered an integral part of the European Union's legal system. Consequently, EU law must be interpreted in accordance with its provisions, in compliance with Article 216(2) of the TFEU, which states that "agreements concluded by the Union shall be binding upon the institutions of the Union and upon Member States". See also CJEU 11 April 2013, Cases C-335/11 and C-337/11, *HK Danmark*, paragraph 29, where it is clarified that "the primacy of international agreements concluded by the Union over secondary law requires that the latter be interpreted, as far as possible, in conformity with those agreements".

[34] CJEU 11 April 2013, cit., paragraph 38; similarly, CJEU, 18 December 2014, Case C-354/13, *Kaltoft*; 18 December 2014, Case C-354/13, *Fag og Arbejde*; 1 December 2016, Case C-395/15, *Daoudi*; 18 January 2018, Case C-270/16, *Ruiz Conejero*. On this point, see among many commentators CHIAROMONTE, *L'inclusione sociale dei lavoratori disabili fra diritto dell'Unione europea e orientamenti della Corte di giustizia*, in *VTDL*, 2019, 4, p. 907 ff.; FERNANDEZ MARTINEZ, *L'evoluzione del concetto giuridico di disabilità: verso un'inclusione delle malattie croniche?*, in *DRI*, 2017, 1, p. 74 ff.; ID., *Malattie croniche e licenziamento del lavoratore: una prospettiva comparata*, in *DRI*, 2015, 3, p. 750 ff.; VASINI, *Discriminazione per disabilità: la normativa italiana è in linea con la normativa europea?*, in *LG*, 2017, p. 226 ff.; PASTORE, *Disabilità e lavoro: prospettive recenti della Corte di giustizia dell'Unione europea*, in *RDSS*, 2016, 1, p. 199 ff.; FAVALLI, FERRI, *Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?*, in *EJHL*, 2016, 5, p. 9 ff.; Venchiarutti, *La disabilità secondo la Corte di Giustizia: il modello bio-psico-sociale diventa "europeo"?*, in *www.dirittocomparati.it*, 15 May 2014; CARRIZOSA PREITO, *La discriminazione fondata sulla malattia del lavoratore*, in *LD*, 2013, 2, p. 283 ff.

[35] See also letter (e) of the UN Convention on the Rights of Persons with Disabilities.

[36] In Italian case law, a consolidated judicial approach has emerged, affirming that "the subjective element of disability cannot be derived from national law but exclusively from EU

The concept of disability has evolved into a relational and social construct, no longer confined to a purely biomedical assessment of physical or mental impairments. Instead, it is shaped by the reciprocal interaction between the individual and their environment, fundamentally arising from the failure of societal structures to accommodate the needs of disadvantaged persons[37].

Given this expanded and dynamic interpretation of disability, jurisprudence has recognized that limitations may also result from a curable or chronic illness, provided the resulting impairments are long-term[38]. As a consequence, a worker may be legally classified as disabled if affected by a disease – whether curable or not – so long as it persistently affects their social and occupational integration[39].

Nevertheless, this does not imply an automatic equivalence between the categories of chronically ill individuals and disabled persons. The rights and protections afforded to disabled workers are extended to chronically ill workers only upon case-by-case verification, ensuring that the individual faces structural barriers to labour market inclusion on an equal basis with other workers. In other words, what is legally relevant is not the mere presence of a chronic illness but the degree to which it obstructs full participation in professional life.

law, which must be understood in a broad sense as a limitation resulting from long-term physical, mental, or psychological impairments that, in interaction with various barriers, may hinder the full and effective participation of the affected individual in professional life on an equal basis with other workers". See Cass. 9 March 2021 No. 6497; in similar terms, Cass. 26 October 2021 No. 30138; 13 February 2020 No. 3691; 22 October 2018 No. 26675; 19 March 2018 No. 6798; 23 April 2018 No. 9953; 5 October 2016 No. 19928.

[37] See in this regard Sagone, *La tutela della disabilità secondo il modello bio-psico-sociale*, in *Federalismi.it*, 2023, no. 1, p. 251; C. Garofalo, *Illegittimità del licenziamento del lavoratore disabile. I diversi regimi sanzionatori*, in *VTDL*, 2022, 2, p. 251; Sanchini, *I diritti delle persone con disabilità tra dimensione costituzionale, tutela multilivello e prospettive di riforma*, in *Federalismi.it*, 2021, 24, pp. 170-179 Riccardi, *La "ridefinizione" del concetto di persona disabile nell'ordinamento sovranazionale*, in Pagano (ed.), *La persona tra tutela, valorizzazione e promozione. Linee tematiche per una soggettività globalizzata*, *Quaderni del Dipartimento Jonico*, Edizioni DJSGE, Taranto, 2019, p. 298.

[38] See also CJEU 11 April 2013, cit., paragraphs 39 and 41.

[39] Italian case law contains numerous rulings on the legitimacy of dismissals due to exceeding absence limits, equating chronically ill workers classified as disabled with other categories of disabled individuals. Examples include cases concerning mental illnesses (Tribunal of Milan 24 September 2018), craniopharyngioma (Tribunal of Mantua 16 July 2018, No. 1060), diabetes (Tribunal of Santa Maria Capua Vetere 11 August 2019), arterial hypertension (Court of Appeal of Genoa 21 July 2020), prostate adenoma (Court of Appeal of Turin 26 October 2021), double lymphoproliferative neoplasia (Court of Appeal of Florence 26 October 2021), and phlebolymphedema of the right lower limb (Tribunal of Milan 2 May 2022).

It is worth noting that, while the biopsychosocial model of disability – adopted by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and embraced by the Court of Justice of the European Union (CJEU) in anti-discrimination rulings – should ideally serve as a unifying reference for all EU disability-related legislation[40], its binding effect within national legal systems remained limited prior to the adoption of Legislative Decree No. 62/2024 (discussed below).

Before the formal codification of the biopsychosocial concept of disability, national regulations relied exclusively on domestic legal definitions, which were far more restrictive than the UNCRPD framework. Disability status was typically tied to quantifiable degrees of incapacity, expressed as percentage-based thresholds[41], and was conceptually distinct from related classifications such as handicap[42], invalidity[43], and incapacity[44] – each carrying specific legal meanings and protections tailored to different regulatory contexts.

Thus, when EU-derived provisions were applied – such as Directive 2000/78/EC on equal opportunities and anti-discrimination protections for disabled persons[45] or Directive 89/391/EEC on occupational health and

[40] See the appendix to Council Decision of 26 November 2009, No. 2010/48, which lists EU legislative acts establishing common rules affected by the provisions of the Convention.

[41] Article 1, Paragraph 1 of Law No. 68/1999.

[42] Article 3, Paragraph 1 of Law No. 104/1992.

[43] Article 12 of Law No. 118/1971 and Article 1 of Law No. 222/1984.

[44] Article 12 of Law No. 118/1971 and Article 2 of Law No. 222/1984.

[45] On this matter, reference can be made to the now extensive case law recognising that the ordinary sick leave period (*comporto*) may constitute indirect discrimination when applied to workers with disabilities. The apparently neutral criterion governing the calculation of job retention periods fails to account for the higher morbidity risks typically associated with disability. As a result, termination based solely on exceeding that threshold may itself be qualified as discriminatory. See in particular Cass. 21 December 2023 No. 35747 in *DeJure*; 31 March 2023 No. 9095, in *GI*, 2023, no. 10, p. 2145 ff., with a note by Filì, *Superamento del comporto di malattia e rischio di discriminazione indiretta per disabilità*. At the appellate and first-instance level, in addition to the rulings cited in note 53, see Court of Appeal of Naples 17 January 2023 in *RIDL*, 2023, no. 2, p. 254 ff., with commentary by Donini; Tribunal of Rovereto 30 November 2023 in *Boll. Adapt*; Tribunal of Parma, 9 January 2023, in *Labor*, 2023, no. 3, p. 312 ff., with note by Ravelli; Tribunal of Milan 18 May 2022; Tribunal of Milan 18 and 2 May 2022; Tribunal of Mantua 22 September 2021; Tribunal of Pavia 16 March 2021 all in *DRI*, 2023, 2, p. 445 ff.; Tribunal of Milan 12 June 2019 , in *www.italianequalitynetwork.it*; Tribunal of Milan 28 October 2016 in *RIDL*, 2017, 3, p. 475. In Italian scholarship, see among others: Maresca, *Disabilità e licenziamento per superamento del periodo di comporto*, in *LDE*, 2024, 2, p. 1 ff.; Greco, *Il licenziamento per supera-*

safety regulations for disabled workers – the applicable reference point was the biopsychosocial disability model, which could, in some cases, encompass chronic illnesses where they led to substantial limitations in professional life. However, in domestic legal contexts, where multiple distinct definitions of disability existed – each governed by specific statutory frameworks and measurable incapacity criteria – chronic illnesses could not automatically be classified as disabilities under national law.

Such a legal framework has resulted in significant application uncertainties, primarily due to the unequal levels of protection granted to chronically ill workers. In certain contexts – particularly those regulated by EU-based legislation – their protections align with those of disabled individuals, whereas under national law, which remains rooted in a biomedical model of disability, chronic illness did not always qualify for the same safeguards.

Additionally, even where chronically ill workers were recognized as disabled, protections often operated *ex post*, meaning they were applied remedially or stationarily, rather than *ex ante*, in the management phase of the employment relationship[46]. This is because the scope of disability protections depends on the existence of a professional limitation, arising from the interaction between an individual's impairments and environmental barriers. However, such an assessment was not easily conducted in advance, as it relied on discretionary interpretations rather than a standardized and binding disability certification process[47].

mento del periodo di comporto del lavoratore disabile, in *VTDL*, 2024, special issue, p. 69 ff.; Zampieri, *La tutela antidiscriminatoria: dal lavoratore come contraente debole al lavoratore come persona umana*, in *VTDL*, 2024, special issue, p. 45 ff.; D. Garofalo, *La risoluzione del rapporto di lavoro per malattia*, in *DRI*, 2023, no. 2, p. 41 ff.; Dagnino, *Comporto, disabilità, disclosure: note a margine di una querelle giurisprudenziale*, in *AGL*, 2023, 1, p. 241 ff.; Salvagni, *Il "prisma" delle soluzioni giurisprudenziali in tema di licenziamento del disabile per superamento del comporto*, in *LPO*, 2023, nos. 3-4, p. 215 ff.; Bono, *Disabilità e licenziamento discriminatorio per superamento del periodo di comporto*, in *LG*, 2023, no. 1, p. 25 ff.; Franza, *Quando l'effettività genera paradossi*, in *LG*, 2022, no. 1, p. 62 ff.; Cristofolini, *Licenziamento per superamento del periodo di comporto e divieto di discriminazione per disabilità*, 2022, no. 12, p. 1125 ff.; Avanzi, *Il recesso per superamento del "comporto" alla prova del diritto antidiscriminatorio*, in *Conversazioni sul lavoro dedicate a Giuseppe Pera dai suoi allievi*, 10 June 2022; Izzi, *Il licenziamento discriminatorio secondo la più virtuosa giurisprudenza*, in *LG*, 2019, nos. 8-9, p. 748 ff.

[46] See Dagnino, *La tutela del lavoratore malato cronico tra diritto vivente e (mancate) risposte del sistema*, cit., pp. 348-349.

[47] Cf. Delogu, *"Adeguare il lavoro all'uomo": l'adattamento dell'ambiente di lavoro alle esigenze della persona disabile attraverso l'adozione di ragionevoli accomodamenti*, in *RGL*, 2024, no. 1, pp. 8-9.

For example, reasonable accommodation decisions – such as adjusting work duties or extending employment absence limits before termination[48] – were dependent on the employer's ability to correctly assess whether an employee met disability criteria.

A key legislative development addressing these shortcomings is Legislative Decree No. 62/2024, issued in implementation of Law No. 227/2021 (the "Disability Framework Act")[49]. This decree introduces a unified definition of disability, aligning with Article 1(2) of the UN Convention on the Rights of Persons with Disabilities (UNCRPD)[50]. It also establishes a centralized disability certification process, overseen by INPS[51], followed by a multidimensional assessment aimed at developing an individualized and participatory life project, based on the biopsychosocial approach[52].

Once effectively implemented, it indeed appears capable of helping define a clearer and broader framework of protection for individuals with chronic illnesses, facilitating their inclusion among persons with disabilities. This, in turn, would contribute to overcoming the most evident shortcomings of the previous regulatory framework under Italian law[53].

[48] On this point, see the observations of Filì, *Superamento del comporto di malattia*, cit., p. 2145. According to the Author, the prevailing case law – which deems the dismissal for exceeding the sick leave period to be null and void, on the grounds of indirect discrimination, when no distinction is made between absences etiologically linked to a disability and those that are not – raises serious concerns. In particular, it risks fostering an excessive form of protection for the disabled worker, especially where the individual fails to cooperate with the employer by informing them of their condition and the connection between the illness-related absences and the disability. This, in turn, may result in a disproportionate burden and cost being placed on the employer.

[49] Article 2, Paragraph 2, Letter a), No. 1 of Law No. 227/2021. On this point, see also Bonardi, *Luci e ombre della nuova legge delega sulla disabilità*, 8 February 2022, *italianequalitynetwork.it*; and Cingolani, Fedeli, Cembrani, *Disabilità: quel silenzio assordante sulla legge delega che cela diversi aspetti da rivedere*, in *Quot. Sanità*, 12 January 2022.

[50] Article 2, Paragraph 1, Letter a of Legislative Decree No. 62/2024, which defines disability as "a lasting physical, mental, intellectual, neurodevelopmental, or sensory impairment that, in interaction with various barriers, may hinder full and effective participation in different life contexts on an equal basis with others".

[51] Article 9 of Legislative Decree No. 62/2024, which assigns exclusive management of the basic evaluation process to INPS, effective from 1 January 2026.

[52] Articles 18-32 of Legislative Decree No. 62/2024.

[53] See Levi, *Sostenibilità del lavoro e tutela della salute in senso dinamico: la prospettiva privilegiata delle malattie croniche*, in *DRI*, 2023, 2, p. 290, who, prior to the adoption of Legislative Decree No. 62/2024, observed that "chronic illness has not yet received adequate regulatory recognition within labour law, despite the now widespread awareness of the need for a dedicated system of rules".

4. *Key innovations introduced by legislative decree no. 62/2024*

Legislative Decree No. 62/2024 introduces a significant shift in the approach to disability, formally moving beyond the biomedical model – which was based solely on the severity of impairment – and adopting the biopsychosocial model[54]. This new framework recognizes disability as the result of the interaction between an individual's health condition and environmental and personal factors, extending its application across all sectors of the legal system.

This transformation is realized through the introduction of a unified assessment process, replacing all previous procedures for the determination of civil disability[55]. This process is based on medico-legal evaluation criteria that not only determine the residual capacities of individuals with impairments but also assess how their health condition interacts with the contextual factors of their environment[56].

The difference from the past is significant. Previously, disability – defined in national law as "handicap" – was characterized as "a physical, psychological, or sensory impairment, stabilized or progressive, causing difficulties in learning, relationships, or workplace integration, leading to social disadvantage or exclusion". The new definition views disability as "a lasting physical, mental, intellectual, neurodevelopmental, or sensory impairment that, in interaction with various barriers, may hinder full and effective participation in different life contexts on an equal basis with others"[57].

[54] Among the earliest scholarly commentaries on Legislative Decree No. 62/2024, see Elmo, *Condizione di disabilità e stato di salute del lavoratore alla luce del d.lgs. n. 62 del 2024*, in *DSL*, 2025, 1, I, p. 58 ff.; Monaco, *Il decreto legislativo 3 maggio 2024, n. 62: una lettura giuslavoristica*, in *Professionalità Studi*, 2024, 3, p. 3 ff.; Leonardi, *Reasonable Accommodation for Workers with Disabilities: Analysis of the New Italian Definitions within the Multi-level Legal System*, in this journal, 2024, 1, p. 93 ff.; and Battisti, *Il legislatore accoglie (con qualche riserva) la nozione euro-unitaria di disabilità*, in *AmbienteDiritto.it*, 2024, 3, p. 1475 ff.

[55] See Article 5, Paragraph 1 of Legislative Decree No. 62/2024.

[56] See Article 5, Paragraph 3 of Legislative Decree No. 62/2024, which clarifies that the basic medico-legal assessment procedure must be based on the ICD classification system and ICF descriptive tools, particularly regarding activity and participation in terms of capacity. As an additional assessment and participation tool, except for minors, the WHODAS questionnaire and its updates must be used, along with other scientifically validated evaluation instruments identified by the WHO to describe and analyse functionality, disability, and health.

[57] Article 3 of Law No. 104/1992, as amended by Article 3 of Legislative Decree No. 62/2024.

With the adoption of the biopsychosocial model in Law No. 104/1992, the previous medical model is effectively overcome. This eliminates the necessity of extending EU law protections through interpretation and results in a broader range of applicable safeguards.

The new Article 3, Paragraph 1 of Law No. 104/1992 states that disability under the biopsychosocial model is recognized "following the basic assessment"[58], which includes "all civil disability determinations provided for by current legislation"[59]. This is followed, if requested by the individual, by a multidimensional evaluation, explicitly grounded in the biopsychosocial approach.

The basic assessment process is initiated by the individual via electronic submission to INPS, which will exclusively manage the evaluation process starting from 1 January 2027[60]. The submitted medical certificate must include personal details, diagnostic documentation, and the coded diagnosis according to the ICD system, along with information on the progression and prognosis of any identified conditions[61].

Once an individual's health condition is established through the introductory medical certificate, the basic evaluation identifies the functional and structural deficits that hinder their ability to perform activities. It then assesses how these limitations affect the person's capacity qualifier[62] in relation to the "Activity and Participation" component of the ICF classification, in-

[58] See Articles 5 ff. of Legislative Decree No. 62/2024.

[59] Article 12 of Legislative Decree No. 62/2024 establishes that the Minister of Health, through regulations jointly adopted with the Minister of Economy and Finance, the Political Authority for Disability, and the Minister of Labor and Social Policies, in consultation with the Minister of Education and Merit, following an agreement within the Permanent Conference between the State, the Regions, and the Autonomous Provinces of Trento and Bolzano, and after consulting INPS, must "update the definitions, criteria, and procedures for the assessment of civil disability, civil blindness, civil deafness, and deaf blindness, based on the ICD and ICF classifications and in accordance with the definition of disability set forth in Article 2, Paragraph 1, Letter a. These updates will modify the standards established by the Ministerial Decree of 5 February 1992, published in the Official Gazette No. 47 of 26 February 1992".

[60] The deadline was extended by Article 19-quater of Decree-Law No. 202 of 27 December 2024, converted with modifications into Law No. 15 of 21 February 2025. Originally, Article 9 of Legislative Decree No. 62/2024 had set this deadline for 1 January 2026.

[61] Article 8 of Legislative Decree No. 62/2024.

[62] In the ICF classification, the "capacity" qualifier describes "(...) an individual's ability to perform a task or action". See WHO, *International Classification of Functioning, Disability and Health*, World Health Organization, 2001, p. 122.

cluding domains related to employment and higher education[63], using a standardized and uniform environmental reference[64].

Furthermore, Article 6, Paragraph 2 of Legislative Decree No. 62/2024 stipulates that during the basic evaluation, the individual must complete the WHODAS questionnaire to assess their "level of functioning" across six domains: cognitive activities, mobility, self-care, interpersonal relationships, daily life activities, and participation. Given the complexity of WHODAS, ensuring that the individual receives proper assistance from the evaluation unit is essential to avoid the risk of completing it without adequate support[65]. WHODAS provides a comprehensive description of both an individual's ability to perform daily activities, including work-related tasks, and the difficulties experienced, taking into account interactions with their physical, social, and personal environment.

Once disability status is certified, Article 23, Paragraph 1 of Legislative Decree No. 62/2024 grants the individual the option to activate a further multidimensional evaluation, leading to the development of a life project aimed at "improving personal and health conditions across various life domains"[66].

The multidimensional evaluation is also based on the ICF and ICD classifications and explicitly follows the biopsychosocial approach. Beyond assessing capacity, the procedure incorporates the ICF "performance" qualifier, which enables the evaluation of an individual's functional abilities within their specific environment[67]. This is a critical component, as the mul-

[63] Article 10 of Legislative Decree No. 62/2024. The following Article 11, Paragraph 1 of Legislative Decree No. 62/2024 establishes that the application of the ICF classification system will begin on 1 January 2025.

[64] See also 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, *https://www.mim.gov.it/documents/7673905/8077831/LINEE+GUIDA+PF_C_17_pubblicazioni_3276_allegato.pdf/0750a6da-b88b-c511-09dd-2c9c637a26a2?t=1707910450547* .

[65] Cf. Frattura, Tonel, Zavaroni (eds.), *Misurare la Salute e la Disabilità. Manuale dello Strumento OMS per la Valutazione della Disabilità WHODAS 2.0*, OMS, 2010, p. 4 ff.

[66] Article 18, Paragraph 1 of Legislative Decree No. 62/2024.

[67] See Article 25 of Legislative Decree No. 62/2024, whose Paragraph 2 establishes that the procedure is structured into four phases: "a) In line with the basic assessment results, it identifies the individual's objectives based on their desires and expectations, defining their functional profile, including ICF capacity and performance across self-selected life domains;

tidimensional assessment is specifically designed to shape the individual's life project, requiring an in-depth analysis of the environmental factors influencing their daily and professional life.

The adoption of the biopsychosocial model – explicitly referenced in Article 25, Paragraph 1 of Legislative Decree No. 62/2024 in relation to the multidimensional evaluation – is justified by the objective of this procedure, which is to identify the goals and tools necessary for developing a life project. This initiative aims to remove or prevent barriers, enabling individuals to access support systems that facilitate inclusion and participation across various life domains, including education, higher learning, housing, employment, and social engagement, while also addressing poverty, marginalization, and social exclusion[68].

Thus, while the basic evaluation determines disability *status* and assesses support needs, assigning different levels of protection, the multidimensional evaluation functions as a complementary process. It contextualizes the outcomes based on the individual's needs and objectives, ensuring that the life project formally incorporates measures that enhance social and professional inclusion, including reasonable accommodations.

Although the implementation of certain provisions in Legislative Decree No. 62/2024 is contingent upon a ministerial decree and the completion of an experimental phase (expected by the end of 2025), the legal framework already holds significant relevance for chronically ill individuals and, more broadly, for all persons with disabilities. Once fully enacted, this legislation is expected to provide a clearer and broader protective *status* for chronically ill workers, facilitating their integration into disability classifications and addressing existing regulatory shortcomings.

In this context, it is also noteworthy that collective bargaining, despite its recent attention to protections for workers with chronic and debilitating conditions, has primarily extended benefits to those formally classified as disabled, underscoring the importance of precisely defining disability within the legal framework.

b) It determines the barriers and facilitators in the domains mentioned in letter (a) and adaptive competencies; c) It formulates assessments regarding the physical, mental, intellectual, and sensory health profile, personal needs, and quality-of-life domains, aligned with the individual's priorities: d) It establishes objectives to be pursued within the life project, incorporating any previously activated support plans and their goals".

[68] Article 18, Paragraph 2 of Legislative Decree No. 62/2024.

Collective agreements have introduced several key measures[69], including:

- extending job retention periods by excluding absences due to severe illnesses from absence calculations and granting specific leave and permits;
- facilitating the reintegration of disabled workers or those deemed unfit for their original roles, promoting reasonable accommodation policies;
- assigning employer-sponsored organizations, bilateral entities, joint commissions, and working groups the role of developing initiatives and strategies aimed at improving workplace conditions and supporting targeted inclusion for disabled workers.

Thus, greater clarity in the legal definition of disability has direct implications for the application of contractual provisions, ensuring stronger protections for individuals with chronic illnesses.

5. *Sustainable employment for chronically ill workers: ensuring health protection and equal opportunities*

Even before the adoption of Legislative Decree No. 62/2024, the recognition of the biopsychosocial concept of disability led to a broader interpretation of labour law protections. This extension allowed chronically ill workers, who did not formally meet the national definition of disability under the biomedical model, to access certain safeguards originally designed for disabled individuals, particularly those derived from EU law aimed at facilitating job retention and workplace reintegration.

These protections include: occupational health and safety regulations, ensuring workplaces implement preventive and protective measures that minimize health risks by adapting job roles, equipment, and work methodologies to individual needs[70]; anti-discrimination laws, requiring reasonable

[69] For further details, see the comprehensive analysis conducted within the PRIN PNRR SUNRISE Project (Sustainable Solutions for Social and Work Inclusion in Case of Chronic Illness and Transplantation), Prot. P20229FEWC, carried out by the research units of the University of Udine and the University of Modena and Reggio Emilia, under the coordination of Professor Valeria Filì. The project database is available at *https://prinsunrise.uniud.it/database/mapping-italian-case-law-regarding-assessment-of-the-workers-suitability-for-the-specific-jobs*.

[70] Article 6, Letter d) of Directive No. 89/391/EEC, see also Article 18, Paragraph 1, Letter c) of Legislative Decree No. 81/2008, which includes among the employer's obligations the duty to assign tasks to workers while taking into account their abilities and conditions in relation to their health and safety.

accommodations to guarantee equal treatment for disabled workers, a principle increasingly applied to those with chronic illnesses[71].

Such measures grant chronically ill workers specific rights while also reshaping employer responsibilities. This becomes especially relevant in return-to-work policies, where the core concept is sustainable employment[72], intended as an approach ensuring that individuals with physical or psychological impairments can continue working through adaptations that align with their needs and abilities. Sustainable employment supports high-quality jobs, a reasonable balance between work and personal life, and job security.

There exists a reciprocal relationship between the health and psychological changes caused by chronic illness – which affect an individual's work capacity and career trajectory – and the impact of the workplace environment on their health and professional engagement.

Based on these premises, sustainable employment for chronically ill workers can be structured around two main pillars:

- ensuring work does not harm health, by integrating universal workplace protections with targeted safeguards for individuals at higher health risk, in line with occupational health and safety regulations;

- implementing additional measures, beyond risk prevention, to provide specialized protections for vulnerable groups, through workplace, role, and organizational adaptations tailored to individual needs.

These frameworks enable chronically ill individuals to remain in employment, reinforcing their rights while enhancing workplace inclusivity.

5.1. *Safeguarding workplace health and safety*

The first fundamental pillar of sustainable employment for chronically ill workers lies in implementing health and safety measures that ensure working conditions do not negatively affect their well-being or work capacity. In other words, employment must actively contribute to maintaining their physical and mental health.

In this context, a specific obligation is placed on employers, who must

[71] Article 5 of Directive No. 2000/78/EC and Article 3, Paragraph 3-bis of Legislative Decree No. 216/2003.

[72] This concept was initially introduced in reference to work sustainability throughout life, particularly in response to demographic shifts and the need to extend working life, as analysed in EUROFOUND, *Sustainable Work and the Ageing Workforce*, 2012, pp. 7-8.

guarantee both workplace safety and, more broadly, workers' health in all aspects related to work[73]. This duty is established in Italian law through the transposition of Directive No. 89/391/EEC into Legislative Decree No. 81/2008, known as the Consolidated Law on Health and Safety at Work, which also implements the preventive obligation under Article 2087 of the Civil Code[74].

For chronically ill workers, fulfilling this obligation requires considering the unique characteristics of their conditions, particularly the physical and psychological changes associated with their illnesses. Employers must also account for the effectiveness and invasiveness of medical treatments and the progression of the disease, which, unlike acute illnesses, is irreversible, has an unpredictable trajectory, and alternates between critical phases and periods of improvement.

Beyond medical factors, social and occupational aspects also play a crucial role. These include the worker's socioeconomic status, education level, type of employment contract, nature of their duties (especially if physically demanding), work schedule flexibility, as well as company-specific policies – whether mandatory or voluntary – aimed at supporting employees with chronic conditions. Additionally, gender differences must be considered, as chronic illnesses affect men and women differently, both in terms of prevalence and workplace impact[75].

[73] Art. 5 of the Directive 89/391/CEE.

[74] On the obligation laid down by Article 2087 of the Italian Civil Code and its implementation under Legislative Decree No. 81/2008, the literature is vast. Accordingly, reference is limited here to a selection of key contributions, including: DELOGU, *La funzione dell'obbligo generale di sicurezza sul lavoro. Prima, durante e dopo la pandemia: principi e limiti*, Aras Edizioni, 2022; NATULLO, *Ambiente di lavoro e tutela della salute*, Giappichelli, 2021; Buoso, *Principio di prevenzione e sicurezza sul lavoro*, Giappichelli, 2020; PASCUCCI, *La tutela della salute e della sicurezza sul lavoro: il Titolo I del d.lgs. n. 81/2008*, Aras, 2014; FANTINI, GIULIANI, *Salute e sicurezza nei luoghi di lavoro, le norme, l'interpretazione, la prassi*, Giuffrè, 2015; PERSIANI, LEPORE (eds.), *Il nuovo diritto della sicurezza sul lavoro*, Utet Giuridica, 2012; and ALBI, *Adempimento dell'obbligo di sicurezza e tutela della persona. Art. 2087*, in BUSNELLI (dir.), *Il Codice Civile. Commentario*, Giuffrè, 2008.

[75] To illustrate the significance of biological differences – defined by sex – and socioeconomic and cultural factors – defined by gender – on health and disease, one need only look at the growing focus on gender medicine. This field examines variations in the onset, progression, and clinical manifestations of diseases common to both men and women, as well as differences in responses to treatment and adverse effects associated with therapies.

At the international level, this is reflected in initiatives such as the WHO Programme for Gender Equality, Human Rights & Health Equity, while in Italy, significant steps have been taken with the adoption of Law No. 3/2018, which delegates authority to the govern-

These specific considerations must be taken into account by the employer, primarily in fulfilling one of the most essential preventive duties prescribed by the Legislative Decree No. 81/2008 – namely, risk assessment[76]. Article 28 stipulates that this assessment must identify all potential risks to workers' safety and health, including those affecting specific groups of workers exposed to particular risks. The employer must then implement preventive measures in the workplace, including appropriate selection of work equipment and workplace adjustments.

Among the groups considered particularly at risk, individuals with reduced work capacity, such as disabled and chronically ill workers, must be included. For these workers, the employer is required to assess their specific vulnerabilities in the Risk Assessment Document, recognizing that they often face more unfavourable conditions compared to other employees. Based on this assessment, additional or tailored safety measures must be adopted to protect them. However, it is crucial to acknowledge that chronically ill workers, like those with disabilities, form a highly diverse group, each affected by distinct impairments that expose them to varying degrees of vulnerability and heightened risks compared to healthy workers[77].

ment on clinical drug trials and includes provisions for reorganizing healthcare professions and the leadership of the Ministry of Health. Further developments include the Decree of the Ministry of Health of 13 June 2019, which establishes the Plan for the Application and Dissemination of Gender Medicine, in implementation of Article 3, Paragraph 1 of Law No. 3 of 11 January 2018. Also relevant is the MINISTERO DELLA SALUTE, *Il genere come determinante di salute. Lo sviluppo della medicina di genere per garantire equità e appropriatezza della cura*, in *QMS*, April 2016, 26.

[76] Article 17, Paragraph 1, Letter a) of Legislative Decree No. 81/2008 explicitly states that the evaluation of all workplace risks, leading to the drafting of the risk assessment document under Article 28, is among the non-delegable responsibilities of employers. On the topic of risk assessment, see among many others: TORRE, *La valutazione del rischio e il ruolo delle fonti private*, in CASTRONUOVO et al. (eds.), *Sicurezza sul lavoro. Profili penali*, Giappichelli, 2021; ANGELINI, *La valutazione di tutti i rischi*, in PASCUCCI (ed.), *Salute e sicurezza sul lavoro a dieci anni dal d.lgs. n. 81/2008. Tutele universali e nuovi strumenti regolativi*, Franco Angeli, 2019, p. 81 ff.; STOLFA, *La valutazione dei rischi*, in *Working Paper Olympus*, 2014, No. 36, p. 1 ff.; NATULLO, *Sicurezza sul lavoro modello procedurale organizzativo*, in NATULLO, SARACINI (eds.), *Sicurezza sul lavoro. Regole organizzazione partecipazione*, Editoriale scientifica, 2017, p. 17 ff.

[77] On the specific features of risk assessment with particular regard to workers with disabilities or illnesses, see among many: BORDIN, *Sicurezza sul lavoro e invecchiamento*, in *I&S Lav*, 2024, 1, p. 44 ff.; PASCUCCI, *L'emersione della fragilità nei meandri della normativa pandemica: nuove sfide per il sistema di prevenzione?*, cit., esp. p. 713 ff.; SCLIP, *Sicurezza sul lavoro dei disabili: VdR e accomodamento ragionevole*, in *I&S Lav*, 2018, 12, p. 633 ff.; EU OSHA, *Priorities for Occupational*

Beyond the severity of the impairment itself, the nature and level of risks to which these workers are exposed depend significantly on the conditions and environment in which they work. A proper risk assessment should therefore be customized, taking into account individual differences and workplace contexts, adapting its scope and content to specific worker needs to protect those particularly exposed to certain hazards. However, this process should be guided by reasonableness, avoiding the assumption that simply being ill or disabled automatically warrants a distinct risk assessment, as such an approach could itself lead to discriminatory outcomes.

Adopting a dynamic approach tailored to the specific needs of each individual and workplace is essential, moving away from standardized models and adapting both to the worker's unique risks and the conditions of their employment. In other words, as defined by the European Agency for Safety and Health at Work (EU-OSHA), what is needed is a "disability-sensitive risk assessment"[78].

Risk assessment is thus a complex and ongoing process, requiring regular adjustments and updates. For this reason, the legislator has mandated that, both in drafting the Risk Assessment Document and more broadly in structuring the work environment, customized solutions for ensuring health and safety must be identified with the support of key figures, such as the occupational physician, the head of the protection and prevention service, and the workers' safety representative. This reflects a participatory model of workplace safety, involving all individuals with the capacity to influence working conditions. The consultation of workers themselves is particularly valuable, especially when they suffer from a medical condition, as their involvement allows for a more precise identification – and therefore prevention – of specific risks associated with their health *status*.

Among these figures, the occupational physician[79] plays a central role

Safety and Health Research in Europe: 2013-2020, 2013; and BERLIN ET AL., *Occupational Health and Safety Risks for the Most Vulnerable Workers*, Milieu Ltd, 2011.

[78] EU-OSHA, *Workforce Diversity and Risk Assessment: Ensuring Everyone is Covered*, 2009.

[79] The role of the occupational physician is described in Article 2, Paragraph 1, Letter h) of Legislative Decree No. 81/2008, as amended, as the "physician possessing one of the qualifications and professional training requirements set forth in Article 38, who collaborates, pursuant to Article 29, Paragraph 1, with the employer for risk assessment and is appointed by the latter to conduct health surveillance and fulfil all other duties prescribed by this decree"; on this figure in the Italian legal order see, among many, PASCUCCI, *Dopo il d.lgs. 81/2008: salute e sicurezza in un decennio di riforme del diritto del lavoro*, in ID. (ed.), *Salute e sicurezza sul lavoro*, cit., p. 20 ff.;

in protecting the health of disabled and chronically ill workers. This professional is not only responsible for identifying workplace risks, but also for preventing and managing them through health surveillance programs[80]. This activity consists of a set of medical actions designed to protect the health and safety of workers in relation to their work environment, occupational risk factors, and job execution methods[81]. It is carried out through specific health protocols, including medical check-ups, specialist examinations, and instrumental or laboratory assessments, whenever the risk evaluation process indicates the necessity of preventing occupational hazards via health surveillance measures[82].

Although workplace health monitoring has traditionally focused on occupational and environmental risk prevention, the National Prevention Plan 2020-2025 suggests a broader approach that aligns health surveillance with

LAZZARI, *I «consulenti» del datore di lavoro*, in PASCUCCI (ed.), *Salute e sicurezza sul lavoro*, cit., p. 124 ff.; BORTONE, *Commento agli artt. 38-41* and NOGLER, *Commento all'art. 42*, both in ZOLI (ed.), *I principi comuni*, in MONTUSCHI (dir.), *La nuova sicurezza sul lavoro*, Zanichelli, 2011, vol. I, respectively p. 470 ff. and p. 478 ff.; GRAGNOLI, *La sopravvenuta inidoneità del lavoratore subordinato allo svolgimento delle sue mansioni*, in F. CARINCI, GRAGNOLI (eds.), *Codice commentato della sicurezza sul lavoro*, Giappichelli, 2010, p. 380 ff.; MONDA, *La sorveglianza sanitaria*, in L. ZOPPOLI, PASCUCCI, NATULLO (eds.), *Le nuove regole per la salute e la sicurezza dei lavoratori*, IPSOA, Milan, 2010, p. 339 ff.; and ALBI, *Sub artt. 38-42 D.leg. n. 81/2008*, in GRANDI, PERA (eds.), *Commentario breve alle leggi sul lavoro*, Cedam, 2009, p. 2820 ff.

[80] Article 25, Letter b of Legislative Decree No. 81/2008.

[81] According to Article 2, Paragraph 1, Letter m of Legislative Decree No. 81/2008, as amended, while Article 41 of the same decree establishes the different types of medical examinations included in the health surveillance activities assigned to the occupational physician, detailing their objectives and timelines.

[82] A relevant development was introduced by Article 14 of Decree-Law No. 48/2023, converted into Law No. 85/2023, which amended Article 18 of Legislative Decree No. 81/2008, adding that among the employer's and managerial duties is the appointment of an occupational physician not only in cases explicitly mandated by the Legislative Decree No. 81/2008, but also when required by the risk assessment under Article 28. This extends health surveillance to all instances where the risk evaluation suggests its necessity, rather than only in cases where the law expressly mandates it. On this point, see PASCUCCI, *Le novità del d.l. n. 48/2023 in tema di salute e sicurezza sul lavoro*, in *DLRI*, 2023, no. 3, p. 413 ff.; RAUSEI, *I ritocchi al Testo Unico: tra medico competente, formazione, attrezzature di lavoro e nuovi obblighi per lavoratori autonomi e imprese familiari (art. 14, d.l. n. 48/2023, conv. in l. n. 85/2023)*, in DAGNINO, C. GAROFALO, PICCO, RAUSEI (eds.), *Commentario al d.l. 4 maggio 2023, n. 48 c.d. "decreto lavoro", convertito con modificazioni in l. 3 luglio 2023, n. 85*, ADAPT University Press, no. 100, pp. 125 ff.; and SCUDIER, *D.L. 48/2023 - Modifiche al d.lgs. 81/08. Prime note sulle principali novità per il MC e per la sorveglianza sanitaria*, 11 May 2023, http://www.anma.it.

the prevention of individual risks[83]. This ensures that workplace safety contributes to overall well-being and serves as a comprehensive health protection system, known as Total Worker Health[84].

Thus, the occupational physician's role should not be limited to eliminating and controlling risks within the workplace (primary prevention) or identifying symptoms related to occupational hazards (secondary and tertiary prevention). Instead, it should also consider risk behaviours in daily life, including those related to non-occupational chronic illnesses that could eventually impact work capacity.

However, it is important to note that the occupational physician cannot infringe on workers' personal lives, but should instead recommend preventive measures to mitigate risk factors that originate within the workplace and, when combined with external influences, increase the likelihood of illness[85]. In this way, workplace health surveillance programs can significantly enhance workers' well-being, without unwarranted intrusion into their private lives.

5.2. *Implementing reasonable accommodations*

Turning to the second aspect that ensures sustainable employment for individuals with chronic illnesses, it is necessary to analyse the concept of reasonable accommodations – those structural or organizational adjustments that are necessary and appropriate to guarantee the right to work not only for disabled persons but also for those affected by chronic or severely debilitating illnesses, ensuring equal treatment with other workers.

The obligation to provide such accommodations primarily originates from EU legislation, which requires Member States not only to adopt rules ensuring workplace health and safety, mandating that workplaces be

[83] The National Prevention Plan 2020-2025, available at *www.salute.gov.it*, was adopted on 6 August 2020 through an agreement within the State-Regions Conference. It serves as a strategic framework for planning health prevention and promotion interventions nationwide, ensuring both individual and collective health protection as well as the sustainability of the National Health Service.

[84] For further analysis, see Pelusi, *New Competencies for Risk Prevention in the Fourth Industrial Revolution. From New Risks, New Professional Roles*, in *WP SALUS*, 2020, 1, p. 15 ff.

[85] The prevention of chronic diseases has long been recognized as a fundamental medium- and long-term objective by the European Commission. See European Commission, *The 2014 EU Summit on Chronic Diseases - Conference Conclusions*, Brussels, 3-4 April 2014, pp. 2 and 4.

adapted to meet the needs of individuals particularly exposed to specific risks or disabilities, but also to guarantee equal treatment for such individuals.

The first set of provisions ensures that employers modify workplaces following risk assessments to eliminate hazards and make necessary workplace adjustments – or, as Directive No. 89/391/EEC puts it, adapt the nature of work itself to meet the requirements of disabled or ill employees, ensuring safe working conditions. The second establishes a general prohibition of direct or indirect discrimination based on disability in employment, as outlined in Directive No. 2000/78/EC, which obliges employers to provide appropriate solutions that ensure access to and retention of employment for individuals with disabilities on an equal footing with other workers.

Both cited regulations, though implemented through different mechanisms, ultimately aim to apply the principle of equality, establishing the obligation to adapt the work environment to the varied abilities and life conditions of disabled workers[86]. This ensures their effective workplace participation, regardless of their health status, while also protecting their well-being.

Reasonable accommodations serve as the intersection between anti-discrimination protections and workplace health safeguards. They are both an essential part of the equality paradigm and a means of fulfilling the employer's preventive duty under Article 2087 of the Civil Code[87]. By requiring workplace adjustments, reasonable accommodations affect the employer's organizational authority and simultaneously pursue two complementary objectives: eliminating disadvantages faced by disabled and chronically ill workers while preserving their physical health and moral integrity. Their shared goal is to ensure workforce inclusion and prevent health-related risks.

Workplace solutions for disabled employees thus act as tools for removing barriers, addressing the challenges that arise from their interaction with the work environment, and ensuring equal access to employment.

[86] BARBERA, *Discriminazioni e pari opportunità (diritto del lavoro)*, in *Enciclopedia del Diritto*, Annali VII, 2014, p. 385.

[87] See, on the reference to Article 2087 of the Italian Civil Code, among others, CINELLI, *Insufficiente per la Corte di giustizia la tutela che l'Italia assicura ai lavoratori disabili: una condanna realmente meritata?*, in *RDSS*, 2013, p. 623 ff.; and PASCUCCI, *L'emersione della fragilità nei meandri della normativa pandemica: nuove sfide per il sistema di prevenzione?*, cit., p. 704.

Additionally, they represent a practical application of the employer's duty to assign tasks to workers while considering their abilities and health-related conditions[88], allowing them to perform their duties safely and effectively.

Regarding the scope of the obligation to provide reasonable accommodations, it is established both at the supranational level[89] and in national legislation, which references the former. Article 3, Paragraph 3-bis of Legislative Decree No. 216/2003[90], along with the new Article 5-bis of Law No. 104/1992 – introduced by Legislative Decree No. 62/2024[91] – incorporates the definition of reasonable accommodations from the UN Convention on the Rights of Persons with Disabilities, which forms an integral part of the EU legal framework.

According to Article 5 of Directive No. 2000/78/EC, reasonable accommodations are "appropriate measures, tailored to the needs of specific situations, to enable persons with disabilities to access employment, perform their jobs, be promoted, or receive training". Further clarification is provided in Recital 20 of the directive, which describes "effective and practical measures aimed at adapting the workplace to the disability, such as modifying premises, adjusting equipment, work schedules, task distribution, or providing training and mentoring". This list is not exhaustive but rather

[88] Article 18, Letter c) of Legislative Decree No. 81/2008.

[89] See Article 5 of Directive No. 2000/78/EC and Article 2 of the UN Convention on the Rights of Persons with Disabilities (2006), which defines reasonable accommodations as "necessary and appropriate modifications and adjustments that do not impose a disproportionate or excessive burden, adopted when required in specific cases to ensure that persons with disabilities can enjoy and exercise, on an equal basis with others, all human rights and fundamental freedoms". This definition embraces a broader concept, extending beyond the professional sphere, which, according to the CJEU, must also be considered when interpreting Directive No. 2000/78/EC. See CJEU 18 January 2024, C-631/22, point 41; 21 October 2021, C-824/19, point 59; 15 July 2021, C-795/19, point 49; 11 September 2019, C-397/18, point 40.

[90] Article 3, Paragraph 3-bis of Legislative Decree No. 216/2003 was introduced by Article 9, Paragraph 4-ter of Decree-Law No. 76/2013, converted into Law No. 99/2013, to align national legislation with EU legal requirements, following a CJEU ruling against Italy for failing to mandate all employers to implement reasonable solutions adapted to specific situations for all disabled individuals, thereby violating the obligation to properly and fully transpose Article 5 of Directive No. 2000/78/EC. See CJEU 4 July 2013, C-312/11.

[91] See Article 17, Paragraph 1 of Legislative Decree No. 62/2024, which introduced Article 5-bis of Law No. 104/1992.

illustrative, and both CJEU case law[92] and national jurisprudence[93] have expanded its interpretation to include additional types of workplace modifications.

Reasonable accommodations consist of various types of adjustments, including both material changes to the workplace – such as modifications to physical environments – and organizational adaptations, such as task reassignments, flexible schedules, and shift modifications[94]. These measures must be applied throughout all phases of employment, including recruitment, active work engagement, and employment termination[95].

[92] Additionally, various CJEU rulings have clarified the scope of reasonable accommodations, including reduced working hours as a valid adaptation under Article 5 of Directive No. 2000/78/EC. See CJEU 11 April 2013, cit., points 49 and 56; 4 July 2013, C-312/11, point 60; 11 September 2019, C-397/18, point 64, which established that the concept of reasonable solutions must be understood as encompassing the removal of various barriers that hinder full and effective participation of disabled individuals in professional life on an equal footing with other workers. See, in legal scholarship, Delogu, *"Adeguare il lavoro all'uomo": l'adattamento dell'ambiente di lavoro alle esigenze della persona disabile attraverso l'adozione di ragionevoli accomodamenti*, cit., p. 12; Verzulli, *cit.*, p. 19 ff.; and Spinelli, *La sfida degli "accomodamenti ragionevoli" per i lavoratori disabili dopo il Jobs Act*, in *DLM*, 2017, I, p. 42 ff.

[93] See *Cass.* 23 February 2021, No. 4896 and *Cass.* 9 March 2021, No. 6497, in *RIDL*, 2021, 4, p. 597 ff., with commentary by Alessi, *Disabilità, accomodamenti ragionevoli e oneri probatori*, in *RIDL*, 2021, 4, p. 613 ff.; 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.; De Falco, *L'accomodamento per i lavoratori disabili: una proposta per misurare ragionevolezza e proporzionalità attraverso l'INAIL*, in *LDE*, 2021, 3, p. 2 ff.; *Trib. Lecco*, 9 February 2023, in *DRI*, 2023, 4, p. 1057 ff., with note by Ambrosio, *Le soluzioni ragionevoli quali argomenti a favore della tutela antidiscriminatoria*.

[94] Regarding case law, see Rome Court ruling of 18 December 2023, which recognized the right to obtain remote work (agile work) as a reasonable accommodation for a disabled worker; see Cucchisi, *Il diritto al lavoro agile fra accomodamenti ragionevoli e normativa emergenziale. Spunti dalla recente giurisprudenza di merito*, in *Boll. ADAPT*, 2024, 7. See, in legal scholarship, on the use of remote work (lavoro agile) as a form of reasonable accommodation for vulnerable and disabled workers: Caracciolo, *Patologie croniche e lavoratori fragili*, in Brollo et al. (eds.), *cit.*, p. 130 ff.; Zilli, *Il lavoro agile per Covid-19 come "accomodamento ragionevole" tra tutela della salute, diritto al lavoro e libertà di organizzazione dell'impresa*, in *Labor*, 2020, p. 533 ff.; Tufo, *Il lavoro agile (dell'emergenza) esordisce in giurisprudenza: come bilanciare gli interessi in gioco nell'era della pandemia?*, in *LDE*, 2020, 2.

[95] Given the vague formulation of existing legislation and the atypical nature of the solutions that can be adopted, a useful tool for identifying appropriate accommodations has emerged through the catalogue of reasonable accommodations outlined in the Guidelines on Targeted Employment Placement for Persons with Disabilities, adopted – albeit six years later than the original deadline of 22 March 2016 – by Decree No. 43 of the Minister of Labour on

It is essential to note that the specific solutions adopted should be based on the individual needs of persons with disabilities and the unique characteristics of their work environment. Their primary function is to eliminate barriers to exercising rights, which arise from the interaction between the individual and their surroundings.

For this reason, reasonable accommodations implemented by employers are not fixed but rather subject to evolution over time. As the Committee on the Rights of Persons with Disabilities defines it, they constitute an "*ex nunc* duty"[96], meaning that they must be continuously reassessed and adjusted in response to changing circumstances and workers' evolving needs.

The obligation to provide reasonable accommodations, despite its dynamic nature, is expressly limited by economic sustainability. This condition is outlined in the UN Convention on the Rights of Persons with Disabilities (2006), which states that accommodations must not impose a "disproportionate or excessive burden". Similarly, Article 5 of Directive No. 2000/78/EC establishes that the requirement to take appropriate measures applies "unless such measures impose a disproportionate financial burden on the employer". The directive further clarifies that a solution is not considered disproportionate if the cost is sufficiently offset by existing policies within the Member State supporting individuals with disabilities.

Thus, the employer's obligation and the disabled worker's right to appropriate measures that enable them to perform their job under equal conditions are inherently subject to financial feasibility. This means conducting an assessment of the measure's viability within the specific organizational framework in which the worker is employed and evaluating its proportionality in relation to the company's structure and financial situation – including factors such as business size, number of employees, available resources (such

11 March 2022. These guidelines were established based on the directive criteria set forth in Article 1 of Legislative Decree No. 151/2015, particularly concerning the analysis of workplace characteristics assigned to persons with disabilities. See BARBIERI, *Accomodamenti ragionevoli e politiche d'inclusione organizzativa*, in *DPL*, 2022, 19, p. 1192 ff.

[96] See Committee on the Rights of Persons with Disabilities, General Comment No. 6 on Equality and Non- Discrimination, 2018, UN Doc CRPD/C/GC/6, Paragraph 24. In legal scholarship, attention has been drawn to the need for reasonable accommodations to be specifically tailored to the individual needs of disabled workers. See, among others, FERRI, *L'accomodamento ragionevole per le persone con disabilità in Europa: da Transatlantic Borrowing alla Cross-Fertilization*, in *DPCE*, 2017, 2, p. 390; and NUNIN, *cit.*, p. 890.

as revenue or profit), and any financial distress the company may be experiencing[97].

An additional factor to consider, as explicitly outlined in legislation, when determining whether reasonable accommodations impose excessive costs, is the existence of compensatory measures within national policies, such as public funds or subsidies that provide financial support for employing disabled individuals[98].

In this legal framework, which establishes a shared responsibility between the employer and the State in implementing reasonable accommodations, public incentives contribute to defining the criterion of economic sustainability for workplace adaptations. At the same time, they mark the boundary between what is not legally enforceable and what is considered a mandatory obligation.

From this perspective, a fundamental distinction emerges between the obligation to provide reasonable accommodations and the duty of workplace safety under Article 2087 of the Civil Code. Unlike the former, the latter is not subject to economic or organizational feasibility constraints. Instead, safety measures must be adopted solely based on the nature of the work, experience, and available technical knowledge[99] and are not contingent on proportionality or reasonableness assessments[100].

[97] As highlighted in Recital 21 of Directive No. 2000/78/EC, determining whether specific measures impose a disproportionate financial burden requires evaluating financial and other costs, the size and financial resources of the organization or company, and the possibility of accessing public funds or other subsidies.

Regarding Italian case law, see Cass. 28 April 2017 No. 10576, which recognized different thresholds for financial feasibility depending on whether a company is in financial distress, and Cass. 2 May 2018 No. 10435.

[98] In the Italian context, Article 14, Paragraph 4, Letter b) of Law No. 68/1999, introduced by Article 11, Paragraph 1, Letter b) of Legislative Decree No. 151/2015, establishes the Regional Fund for the Employment of Disabled Persons, which provides financial contributions for the partial reimbursement of expenses related to the adoption of reasonable accommodations for workers with a reduction in work capacity exceeding 50%. Covered expenses include telework technologies, removal of architectural barriers that hinder workplace integration, and the establishment of a workplace inclusion officer.

[98] As established in Article 2087 of the Civil Code and Article 2, Paragraph 1, Letter n) of Legislative Decree No. 81/2008, workplace health and safety protections are non-negotiable obligations.

[100] According to Recital 14 of Directive No. 89/391/EEC, "the improvement of workers' safety, hygiene, and health at work is an objective that cannot be dependent solely on economic considerations".

In fact, the need to protect workers' health can limit entrepreneurial freedom, as stipulated in Article 41, Paragraph 2 of the Constitution, which establishes that economic activity must not harm health, the environment, safety, freedom, or human dignity[101]. Consequently, if a reasonable accommodation is deemed necessary not only to guarantee equal opportunities for disabled workers but also to prevent harm to their health, its economic unsustainability cannot serve as a justification for failing to implement it[102].

Beyond proportionality, the existence and scope of the obligation to adapt workplace structures to meet disabled workers' needs are also subject to the criterion of reasonableness. This principle defines and qualifies the measures employers must implement, ensuring they are practical, effective, and suited to both individual circumstances and organizational contexts.

This criterion has been defined in its scope by case law, which – though not entirely consistent[103] – has recognized its autonomous value distinct from proportionality in financial burden. The judiciary has anchored it to broader obligations of fairness and good faith, requiring employers to implement only those organizational modifications that are reasonable, meaning they

[101] See, on the constitutional amendment to Article 41 of the Italian Constitution introduced by Constitutional Law No. 1/2022 – which included the protection of health and the environment among the limits to private economic initiative – *ex multis*: Cassetti, *Riformare l'art. 41 della Costituzione: alla ricerca di "nuovi" equilibri tra iniziativa economica privata e ambiente?*, in *federalismi.it*, 2022, 4, p. 188 ff.; Bartolucci, *Le generazioni future (con la tutela dell'ambiente) entrano "espressamente" in Costituzione*, in *Forum QC*, 2022, 2; Bin, *Il disegno costituzionale*, in *LD*, 2022, 1, p. 115 ff.; Pascucci, *Modelli organizzativi e tutela dell'ambiente interno ed esterno all'impres*a, in *LD*, 2022, 2, p. 335 ff.

[102] See Palladini, *Licenziamento, inidoneità sopravvenuta e ragionevole accomodamento*, in *VTDL*, 2024, p. 93 ff.; Delogu, *"Adeguare il lavoro all'uomo"*, cit., p. 26; D'Ascola, *Il ragionevole adattamento nell'ordinamento comunitario*, in *VTDL*, 2022, 2, pp. 205-206; Torsello, *I ragionevoli accomodamenti per il lavoratore disabile nella valutazione del Centro per l'impiego*, in *VTDL*, 2022, 2, pp. 229-230.

[103] Regarding case law, see Cass. 23 February 2021 No. 4896, and 9 March 2021 No. 6497, contra Cass. 19 December 2019 No. 34132 in *Labor*, 2020, no. 5, pp. 636 ff., with note by Margiotta, *Tutela dei disabili, "accomodamenti ragionevoli" e obbligo di "repêchage"*; 26 October 2018 No. 27243 and 19 March 2018 No. 6798, both in *RIDL*, 2019, 2, p. 145 ff., with note by Aimo, *Inidoneità sopravvenuta alla mansione e licenziamento: l'obbligo di accomodamenti ragionevoli preso sul serio dalla Cassazione*, and in *RGL*, 2019, 2, p. 244 ff., with note by Salvagni, *Licenziamento per sopravvenuta inidoneità psicofisica: reintegrazione per mancata adozione di accomodamenti ragionevoli e per violazioni del "repêchage"*.

do not impose a sacrifice exceeding the level of tolerance deemed acceptable by "common social evaluation"[104].

This assessment must be carried out considering the subjective positions of all parties involved, taking into account the worker's interest in maintaining a job suited to their health condition, the employer's legitimate interest (under Article 1464 of the Civil Code) in securing productive labour, and the interests of other employees who may be affected. However, just as colleagues' concerns cannot be regarded as absolute barriers, but must be balanced with the disabled worker's rights – as long as accommodations do not impose an excessive burden on other employees or infringe upon their legal entitlements – the same principle applies to business operations. Employers must reasonably adjust their organizational structure to ensure equal treatment for disabled workers, striking a balance between workplace efficiency and inclusivity[105].

According to the most recent case law, the right of workers with disabilities to retain their jobs can justify limitations on managerial freedom, granting judges the power to review not only whether reasonable accommodations have been adopted (*an*) but also the adequacy of the measures taken (*quantum*).

This results in an expansion of employers' obligations, requiring them to actively engage in adaptive measures. Their duty is not limited by their freedom to organize the workplace, but rather by the reasonableness and proportionality of the adopted solution[106].

[104] See also Cass. 9 March 2021 No. 6497, point 5.4.

[105] Similarly, in recent CJEU rulings, see Judgment of 18 January 2024, C-631/22, which affirmed that Article 5 of Directive No. 2000/78/EC, interpreted in light of the EU Charter of Fundamental Rights (Articles 21 and 26) and the UN Convention on the Rights of Persons with Disabilities (Articles 2 and 27), precludes national legislation that would allow an employer to terminate an employment contract solely due to permanent incapacity arising from disability during the employment relationship, without first considering or maintaining reasonable accommodations to allow the worker to retain their position, nor demonstrating that such accommodations would impose a disproportionate burden.

[106] See Voza, *Eguaglianza e discriminazioni nel diritto del lavoro. Un profilo teorico*, paper presented at the XXI AIDLaSS Congress, Diritto antidiscriminatorio e trasformazioni del lavoro, Messina, 22-25 May 2024, typescript, p. 52. The Author observes that today, the obligation to provide reasonable accommodations is assuming a systematic significance in assessing the legitimacy of the exercise of managerial powers, in their broader organizational dimension rather than solely in the context of an individual employment relationship. This tends to neutralize the effects of Article 30 of Law No. 183/2010, which traditionally shields the employer's "tech-

Additionally, within the reforms introduced by Legislative Decree No. 62/2024, there is a strengthened emphasis on reasonable accommodations, particularly to ensure the full workplace inclusion of individuals affected by chronic illness or transplants, where they are explicitly recognized as disabled.

This legislation introduces the concept of a "life project", to be developed based on a multidimensional assessment, aimed at promoting social inclusion and participation on an equal footing with others, while also improving personal well-being and health conditions[107].

The life project[108] identifies the individual's objectives, including healthcare and assistance services, reasonable accommodations to enhance quality of life and participation across different areas of life, as well as tailored supports and interventions that ensure full inclusion and equal access to civil and social rights and fundamental freedoms[109].

Since it is specifically tailored to the needs of the disabled individual across different contexts, the measures within the life project inevitably influence one another, working to coordinate emerging needs and objectives from the multidimensional assessment[110]. In this way, the concept of reasonable accommodation acquires a renewed significance.

nical, organizational, and production-related decisions" from scrutiny. The resulting restriction of entrepreneurial prerogatives, brought about by the duty to provide reasonable accommodations, can be read in light of Article 41(2) of the Constitution—particularly following its reformulation, which added "health and the environment" to the foundational values of "safety, freedom, and human dignity".

[107] Art. 18, comma 1, d.lgs. n. 62/2024.

[108] Article 26, Paragraph 3, Legislative Decree No. 62/2024.

[109] Alongside these elements, Article 26, Paragraph 3 establishes that the life project also identifies: "b) The interventions defined in the following areas: 1) Learning, social interaction, and emotional well-being; 2) Training and employment; 3) Housing and social habitat; 4) Health; (…); d) Operational and individualized action plans for the measures and support linked to the project's objectives, including the indication of possible priorities, or, in the case of existing plans, their realignment – also in terms of objectives, services, and interventions; e) The professionals and other figures involved in providing the designated support, specifying roles and responsibilities; f) The individual responsible for its implementation; g) The scheduling of periodic reviews and updates, including to verify the continuity and adequacy of the provided services concerning the objective; h) The details and full set of human, professional, technological, instrumental, and economic resources – both public and private – as well as those from the third sector, already available or activatable within territorial communities, family networks, and informal support systems, forming the budget plan under Article 28".

[110] Article 19, Paragraph 1 of Legislative Decree No. 62/2024, which states that the life

The formalization of reasonable accommodations within the life project represents a process of harmonization with the other integrated interventions, such as care and assistance measures. Although these may not initially seem connected to employment, they can still affect the identification of appropriate workplace accommodations in each specific case. This is further reinforced by the required periodic reviews of the life project[111], which allow for adjustments to services based on the progression of chronic illness or post-transplant health changes – thus ensuring that accommodations remain aligned with the evolving needs of the individual.

6. *Final considerations*

The workplace inclusion of individuals with chronic illnesses and transplant recipients plays a crucial role in fostering social and economic progress, especially in light of significant demographic shifts and technological advancements in production systems. With an aging population, a rising prevalence of chronic conditions, and continuous improvements in medical treatments, the workforce has expanded to include individuals with specific health needs. As a result, employment policies must be redefined to ensure equitable labour market access. Beyond being a matter of fundamental rights, integrating these workers strengthens social cohesion and enhances economic sustainability.

An inclusive approach to employment promotes corporate policies that optimize human resources and create accessible, efficient work environments. On a broader social scale, guaranteeing employment for individuals with chronic illnesses or transplants helps prevent exclusion and isolation, improving both individual and collective well-being. Work is not only a source of income but also a foundation of dignity, personal fulfilment, and active community participation. Economic systems that value diversity and ensure equal opportunities foster social cohesion, prevent discrimination, and contribute to a more inclusive society.

project ensures coordination between intervention plans for each life context and their respective objectives.

[111] Article 26, Paragraph 3, Letter g) of Legislative Decree No. 62/2024 reinforces the necessity of periodic monitoring, while Article 26, Paragraph 5 establishes that the life project is subject to updates upon request by the disabled person or their legal representative, ensuring ongoing alignment with evolving needs.

Ensuring the full participation of chronically ill workers is therefore not merely an ethical and legal obligation but a strategic necessity that reinforces economic resilience, drives innovation, and aligns workplace accessibility with broader environmental and technological progress, ultimately building a society that embraces diversity and sustainable growth.

Despite the evident benefits of inclusive employment policies, legislative gaps have created significant uncertainty in the protection of chronically ill individuals and transplant recipients. Until now, no specific regulatory framework has fully addressed their needs, with only the recent Legislative Decree No. 62/2024 offering a potential solution. The increasing number of workers affected by chronic illnesses presents challenges for employment management, particularly regarding job stability and continuity. In the absence of targeted legislation, protections for chronically ill workers have often been drawn from disability regulations, initially through interpretative means, based on the biopsychosocial concept of disability established at the supranational level with the 2006 UN Convention on the Rights of Persons with Disabilities.

The adoption of this definition has allowed for an expansion of EU-derived protections to individuals who, despite lacking formal disability certification under national regulations, suffer from long-term conditions that hinder full and effective professional participation. However, apart from anti-discrimination protections and workplace health and safety rights, the broader aspects of employment management have relied on various legal frameworks whose applicability was contingent on meeting specific disability criteria. This fragmentation created considerable uncertainty, making it difficult to establish a coherent regulatory framework, as protections were determined on a case-by-case basis rather than through clear, universally applicable rules.

This uncertainty has been problematic not only for employers but also for vulnerable workers, as the unpredictability of legal protections has led to increased litigation with uncertain outcomes and costs. Legislative Decree No. 62/2024 is therefore a welcome development, introducing a unified disability assessment process based on a social and dynamic model. This innovation yields several benefits: first, the broad definition of disability permeates all protective measures for disabled individuals, serving as a consistent reference across multiple regulatory disciplines. Second, access to protections for chronically ill workers becomes more straightforward, as eligibility is no

longer determined solely by the severity or permanence of impairments but by the extent to which these limitations affect relational and professional participation.

Moreover, legal certainty improves as the decree removes the need for interpretative assessments regarding whether an individual qualifies as disabled and is entitled to associated protections. Once fully implemented, this framework will provide clarity on the applicability of disability-related protections, limiting the need for judicial interpretations that have previously expanded protections but often placed excessive burdens on employers. By establishing clear criteria, the new legislation ensures that employment protections are appropriately applied, balancing the rights of chronically ill workers with the responsibilities of employers, and contributing to a more stable and inclusive labour market.

Abstract

The essay examines the employment inclusion of individuals with chronic illnesses and transplant recipients, focusing on the legal uncertainties arising from the absence of a coherent regulatory framework within the Italian legal system. Building on the supranational recognition of the biopsychosocial model of disability, it illustrates how existing protections have traditionally been drawn from disability law through interpretative means. The recent adoption of Legislative Decree No. 62/2024 introduces a unified and dynamic definition of disability, broadening the scope of applicable safeguards and enhancing legal certainty. This reform constitutes a pivotal development, paving the way for a more systematic and inclusive approach to the protection of workers with long-term health conditions, consistent with constitutional and EU principles of equality and non-discrimination.

Keywords

Chronic illness, Transplant recipients, Labour inclusion, Disability law, Biopsychosocial model.

Maria Giovannone

AI, Working Machinery and OSH Implications: Human Rights Approach and Liability Regimes in the Multilevel Regulation

Contents: **1.** Introduction. **2.** Positioning the AI Act in the OSH discipline. **3.** The AI Act in the EU frame on digital economy. **4.** The twist with the Machinery Regulation. **5.** The use of machines equipped with AI: employers' and external actors' liability in the Italian OSH system. **6.** Concluding remarks.

1. *Introduction*

The evaluation of workers' rights as human rights is the subject of a wide-ranging and controversial debate[1], which starts from the possible advantages of this key to the full realisation of social protections in the path of

[1] The debate is broad and controversial and straddles labour law and international law. For an international labour framework, ALSTON, (ed.), *Labour Rights as Human Rights*, Oxford University Press, 2005; LEARY, *The Paradox of Workers' Rights as Human Rights*, in COMPA, DIAMOND (eds.), *Human Rights, Labor Rights and International Trade*, University of Pennsylvania Press, 1996; COLLINS, *The Role of Human Rights in Labour Law*, in COLLINS (ed.), *Putting Human Rights to Work*, Oxford University Press, 2022; BELLACE, TER HAAR, *Perspectives on labour and human rights*, in BELLACE, TER HAAR (eds.), *Research Handbook on Labour, Business and Human Rights Law*, Edwar Elgar Publishing, 2019; FINKIN, *Worker rights as human rights: regenerative reconception or rhetorical refuge?*, in BELLACE, TER HAAR (eds.), *Research Handbook on Labour, Business*, cit., pp. 102-129; COLLINS, MANTOVALOU, *Human Rights and the Contract of Employment*, in COLLINS, MANTOVALOU (eds.), *The Contract of Employment*, Oxford University Press, 2016. For a general overview of the debate in the Italian literature, please refer to the reflections carried out by PERULLI in the introductory paper of the *10th Seminar on International and comparative labour law, Labour Rights as Human Rights*, held at the Cà Foscari University of Venice from 3 to 6 June 2024; as well as PERULLI, BRINO (eds), *A Global Labour Law: Towards a New International Framework for Rights and Justice*, Giappichelli, 2024.

sustainability[2]. Equally debated is the identification of the regulatory techniques – hard or soft, private or public, unilateral or negotiated – that operatively must accompany this transition; even more so is the evaluation of the consequences on the remedial level of this binomial in the global workplace[3].

The need for this approach to labour protection, driven by national, international and European doctrine, can be observed from two distinct perspectives. That of the Global North[4], where the need emerges for regulatory techniques capable of satisfying new demands for protection beyond typological qualification[5]. That of the Global South where the full affirmation of

[2] Fasciglione, *Impresa e diritti umani nel diritto internazionale. Teoria e prassi*, Giappichelli, 2024; Ales, *Tracing the Social Sustainability Discourse within EU Law: the Success of the "Labour-Rights-as-Human-Rights" Approach*, in this journal, 2024, 1, p. 30; Sanguineti Raymond, *La Diligencia Debida en Materia de Derechos Humanos Laborales*, in this journal, 2024, I, pp. 165-217; Guarriello, *Take Due Diligence Seriously: comment alla direttiva 2024/1760*, in *DLRI*, 2024, 3, pp. 245-298; Valenti, *Riflessioni in tema di sostenibilità sociale nel diritto del lavoro tra tecniche di tutela e prove di* regulatory compliance, in this journal, 2024, 3, p. 469 ff.; Ponte, *Catene di valore, diritti dei lavoratori e diritti umani: riflessioni intorno alla proposta di direttiva relativa al dovere di diligenza delle imprese ai fini della sostenibilità*, in *AD.it*, 2024, 1, p. 1 ff.; Borzaga, Mussi, *Luci e ombre della recente proposta di direttiva relativa al dovere di due diligence delle imprese in materia di sostenibilità*, in *LD*, 2023, 3, pp. 495-514; Giovannone, *Dovere di diligenza e responsabilità civile nella proposta di direttiva europea*, in this journal, 2023, 3, pp. 469-500; Giovannone, *The European directive on "corporate sustainability due diligence": the potential for social dialogue, workers' information and participation rights*, in *ILLEJ*, 2024, 1, pp. 227-244; Mocella, C*atene globali del valore e tutela dei diritti umani*, in *DRI*, 2025, 1, pp. 26-44; Sanguineti, *Il nuovo diritto transnazinoale del lavoro nelle catene globali del valore: caratteristiche e modello regolatorio*, in *DRI*, 2025, 1, pp. 2-25.

[3] Brino, *Hard and Soft Law Instruments for regulating Multinational Enterprises: an Unphill Struggle towards Global Responsibility?*, in Ales, Basenghi, Bromwich, Senatori (eds), *Employment Relations and Transformation of the Enterprise in the Global Economy*, Giappichelli, 2016, pp. 85-108; Brino, *Corporate sustainability due diligence: quali implicazioni per i diritti dei lavoratori?*, in *Dir. um. dir. int*, 2023, 17, 3, pp. 707-729; Ferrante, *Diritti dei lavoratori e sviluppo sostenibile*, in *JUS*, 2022, 3, pp. 349-369. On the weakness of soft law sources, Pertile, *La crisi del sistema di supervisione dell'Oil nel suo contesto: il timore è fondato, ma agitarsi non serve a nulla*, in *LD*, 2019, 3, pp. 407-428; Corazza, *Verso un nuovo diritto internazionale del lavoro?*, in *DLRI*, 163, 3, pp. 487-498.

[4] The distinction between Global North and Global South is widely used within national and international legal literature. For a general framing of its implications from the perspective of labour law and international law, Buchanan et al. (edited by), *The Oxford book of International Law and Development*, Oxford University Press, 2023; Tyc, *Global trade, labour rights and international law - a multilevel approach*, Routledge, 2021.

[5] On the subject in the national legal system see Perulli, *Oltre la subordinazione. La nuova tendenza espansiva del diritto del lavoro*, Giappichelli, 2021; Perulli, Treu, *"In tutte le sue forme e applicazioni": per un nuovo Statuto del lavoro*, Giappichelli, 2022; Zoppoli, *Prospettiva rimediale, fat-*

social rights, in the sphere of human rights, is still in progress, aggravated moreover by dumping phenomena in global supply chains[6].

These evolutionary dynamics are also reflected in the European institutions in promoting the unstoppable rise of human rights as a countervalue of the global market and, above all, of the global digital market[7] and artificial intelligence. Notoriously, the AI market is less governed by European countries in terms of production (also due to a greater shortage of raw materials in which the Global South is rich) and know-how (which other areas of the Global North such as the USA and China are more equipped with). Precisely for this area, it is increasingly being overseen by the European institutions in terms of legal regulation. This is by virtue of a more deep-rooted protective attitude, not only of its social legislation obviously aimed at protecting the person, but of the "product discipline" itself whose primary focus remains the protection of competition in the single market today, however, in a more ethical and anthropocentric sense.

In this regard, emblematic is EU Regulation No. 2024/1689 (AI Act)[8] on the use of artificial intelligence systems which, among the most important profiles, addresses that of the implications that the use of AI can have on the health and safety of workers – as well as users in general – also for the purpose of identifying the responsibilities of deployers (including employers, manufacturers, designers, installers) and the users themselves. There is no

tispecie e sistema nel diritto del lavoro, Editoriale Scientifica, 2022; TREU, *Rimedi, tutele e fattispecie: riflessioni a partire dai lavori della Gig economy*, in *LD*, 3-4, 2017; CIUCCIOVINO, *La crisi della fattispecie e l'approccio rimediale nella discussione giuslavoristica*, in this journal, 1, 2024, pp. 5-22; PERULLI, *Cittadinanza, subordinazione e lavoro nel diritto del lavoro che cambia*, in *LD*, 1, 2024, pp. 44-63; TULLINI, *Cittadinanza sociale, nuovi diritti, universalismo delle tutele*, in *LD*, 1, 2024, pp. 65-76; RAZZOLINI, *Effettività e diritto del lavoro nel dialogo fra ordinamento dell'Unione e ordinamento interno*, in *LD*, 1, 2024, pp. 447-467; TYC, *Global trade, labour rights and international law – a multilevel approach*, cit.

[6] BORELLI, ORLANDINI, *Lo sfruttamento dei lavoratori nelle catene di appalto*, in *DLRI*, 173, 2022, 1, pp. 109-133; GUARRIELLO, NOGLER, *Violazioni extraterritoriali dei diritti umani sul lavoro: un itinerario di ricerca tra rimedi nazionali e contrattazione collettiva transnazionale*, in *DLRI*, 166, 2020, 2, pp. 173-185.

[7] TREU, *CSRD, direttiva sui lavoratori delle piattaforme e valutazione dei rischi*, in *Federalismi*, paper 18 December 2024; TER HAAR, *Industry 4.0 + Industry 5.0 = Happy Marriage Between Humans and Technology*, in *ILLEJ*, 2024, 17, 2, pp. 189-213.

[8] Reg. 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending reg. No 300/2008, No 167/2013, No 168/2013, 2018/858, 2018/1139 and 2019/2144 and dir. 2014/90/EU, 2016/797 and 2020/1828 (OJEU 12.7.2024).

doubt, in fact, that the protection of safety at work can be ascribed to the area of workers' fundamental and human rights at national, European and international level, also due to its status of core-labour standard. Thus, through prevention protection, the historical link between the social regulation of working conditions and that of the conditions of use of products – to which both EU Regulation No. 2024/1689 and EU Regulation No. 2023/1230 (Machinery Regulation)[9] on the requirements of work equipment also for the purposes of health and safety at work belong – is increasingly strengthened, while respecting the different legal basis of reference.

Starting from these premises, the essay focuses first of all on the anthropocentric evolution that European regulatory techniques are having in the context of product discipline, both that of the AI Act and the Machines Regulation, through a specific declination of the conceptual dichotomy labour rights as human rights.

The first aim is to illustrate how the two acts fit into the European project of shaping a cultural model of digital economy based on the protection of European social values and fundamental (and human) rights in the competitive global scenario. The AI Act raises questions about the adequacy of national rules governing many areas of employment, including health and safety. Also, the European act interacts with technical harmonisation legislation on requirements for machinery and work equipment, now regulated by the Machinery Regulation (§2).

Furthermore, reading the two acts together provides new insights into the alignment between workers' rights and human rights, responding to the weakening of traditional labour law. This last point is particularly clear with reference to the AI Act which, together with other legislative developments on due diligence, pushes companies to take into account the risks of human rights violations without undermining the centrality of shareholder value (§3).

The Machinery Regulation is fully relevant to this discussion, because it will apply to systems that use artificial intelligence technologies. In this regard, it should be noted that the commercial regulations governing work equipment, which currently straddle the two regulations, aim to establish a very strict guarantee for manufacturers without neglecting the responsibil-

[9] Reg. 2023/1230 of the European Parliament and of the Council of 14 June 2023 on machinery and repealing Dir. 2006/42/EC of the European Parliament and of the Council and Council dir. 73/361/EEC (OJEU L 165/1 29.6.2023).

ities of other external actors downstream of the product's placing on the market (§4).

Therefore, the essay shows how, rather than rolling back existing protections, this new legislative framework introduces a product regulation technique in which the relative risks are assessed taking into account the vulnerability of individuals (and workers) and their degree of exposure to human rights violations, including the right to health and safety at work. At national level, this new conceptual basis and the resulting regulatory technique that incorporates risk management (and directs it towards the protection of human rights of workers) prompts an investigation into the compatibility of the aforementioned regulatory framework with the parameters developed by case law in implementation of Italian legislation on occupational health and safety for assessing the liability of employers and workers themselves, if AI and automatized machines are used in the direction or execution of the work performance. In addition, the responsibility of those involved throughout the "supply chain" (designers, manufacturers and suppliers) will be assessed (§5). Possible evolutionary interpretations are proposed in the conclusions (§6).

2. *Positioning the AI Act in the OSH discipline*

Regulation (EU) 2024/1689 (AI Act) subjects the entire discipline of the employment relationship to a stress-test, requiring interpreters to question the adequacy of national rules governing multiple regulatory areas[10].

[10] Ciucciovino, *Risorse umane, intelligenza artificiale e Regolamento (UE) 2024/1689*, in *DRI*, 3, 2024, pp. 573-614; Ciucciovino, *La disciplina nazionale sulla utilizzazione della intelligenza artificiale nel rapporto di lavoro*, in *LDE*, 2024, 1, pp. 18-19; Viscomi, *Professionalità e diligenza ai tempi della transizione digitale*, in *LLI*, 2024, 10, 1, pp. 53-70; Zoppoli, *Il Diritto del lavoro dopo l'avvento dell'IA: aggiornamento o stravolgimento? Qualche utile appunto*, in this journal, 3, 2024, pp. 409-430; Brino, *La tutela della persona che lavora nell'era dell'IA tra sfide etiche e giuridiche*, in this journal, 2024, 3, p. 431; Carinci, Ingrao, *L'impatto dell'AI Act sul diritto del lavoro*, in *DLRI*, 2024, 184, 4, pp. 451-494; Mantelero, Peruzzi, *L'AI e la gestione del rischio nel sistema integrato delle fonti*, in *RGL*, 2024, 4, pp. 517-537; Faioli, *Assessing Risks and Liabilities of AI-Powered Robots in the Workplace. An EU-US Comparison*, in *DSL*, 2025, 1, pp. 79-113; Zappalà, *Dalla digitalizzazione della pubblica amministrazione all'amministrazione per algoritmi: luci e ombre dell'effetto disruptive sui rapporti di lavoro*, in *Federalismi.it*, 2024, 27, pp. 232-265; Zappalà, *Informatizzazione dei processi decisionali e diritto del lavoro: algoritmi, poteri datoriali e responsabilità del prestatore nell'era dell'intelligenza artificiale*, in *WP C.S.D.L.E. "Massimo D'Antona"*, 2021, 446; Novella, *Poteri del datore di*

Naturally, there is no shortage of reflections on the impact of the new European regulations on health and safety at work, due to the adaptation of the domestic legal system to the traditional framework of protections, obligations and related responsibilities of the actors of the prevention system[11].

In the field of occupational health and safety, in fact, it should be noted that IA systems can represent a tool for exercising employer powers and prerogatives, a tool for performing work and, even more specifically, an individual or collective (so-called smart) protective device[12]. In each of these

lavoro nell'impresa digitale: fenomenologia e limiti, in *LD*, 2021, 3-4, pp. 451-470; Voza, *Lavoro autonomo e capitalismo delle piattaforme*, Cedam, 2018; Peruzzi, *Intelligenza artificiale e lavoro. Uno studio su poteri datoriali e tecniche di tutela*, Giappichelli, 2023; Gargiulo, *Intelligenza Artificiale e poteri datoriali: limiti normativi e ruolo dell'autonomia collettiva*, in *Federalismi.it*, 2023, 29, pp. 171-191; Faioli, *Unità produttiva digitale. Perché riformare lo Statuto dei lavoratori*, in *EL*, 2021, 1, p. 48; Biasi (a cura di), *Intelligenza artificiale e diritto del lavoro*, Giuffrè, 2024; Tebano, *Lavoro, potere direttivo e trasformazioni organizzative*, Editoriale Scientifica, 2020; Zampini, *Intelligenza artificiale e decisione datoriale algoritmica. Problemi e prospettive*, in *ADL*, 2022, 3, p. 481 ff.; Faleri, *Management algoritmico e asimmetrie informative di ultima generazione*, in Federalismi.it, 2024, 3, p. 217; J. Prassl, *What If Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work*, in *CLLPJ*, 2019, 41, 1, p. 146.

[11] For an overview of the main issues *Revolutionizing health and safety: the role of AI and digitalization at work*, ILO, Geneva, 2025. In literature, Tullini, *Prevenzione e tutela della sicurezza sul lavoro nell'economia digitale*, in *RDSS*, 2021, 4 p. 671 ff.; Pascucci, *Sicurezza sul lavoro e cooperazione del lavoratore*, in *DLRI*, 2021, 3, p. 421; Pascucci, *Note sul futuro del lavoro salubre e sicuro… e sulle norme sulla sicurezza di rider & co.*, in *DSL*, 2019, 1, p. 37; Pascucci, *Le nuove coordinate del sistema prevenzionistico*, in *DSL*, 2023, 2, p. 37 ff.; Tebano, *Intelligenza Artificiale e datore di lavoro: scenari e regole*, in this journal, 2024, 3, p. 449 ff.; Barbera, *"La nave deve navigare". Rischio e responsabilità al tempo dell'impresa digitale*, in *LLI*, 2023, 2, p. 3 ff.; Peruzzi, *Sistemi automatizzati e tutela della salute e sicurezza sul lavoro*, in *DSL*, 2024, 2, p. 86 ff.; Squeglia, *Obiettivi, strumenti e metodi dell'intelligenza artificiale nella tutela della salute e della sicurezza dei lavoratori*, in *DSL*, 2025, 1, pp. 114-133; Lai, *Brevi note in tema di Intelligenza Artificiale e salute e sicurezza del lavoro*, in *LDE*, 1, 2025. Let us also refer to Giovannone, *Responsabilità datoriale e prospettive regolative della sicurezza sul lavoro. Una proposta di ricomposizione*, Giappichelli, 2024, p. 161 ff.

[12] Regarding the impact of the AI Act on OSH regulations, also from the perspective of fundamental rights, Cefaliello, Kullmann, *Offering false security: How the draft artificial intelligence act undermines fundamental workers rights*, in *ELLJ*, 2022, 13(4), pp. 542-562; Almada, Petit, *The EU AI Act: A Medley of Product Safety and Fundamental Rights?*, in *RSC WP*, 2023, 59, European University Institute Robert Schuman Centre for Advanced Studies; Jarota, *Artificial intelligence in the work process. A reflection on the proposed European Union regulations on artificial intelligence from an occupational health and safety perspective*, in *CLSR*, 2023, 49, pp. 1-14; Botero Arcila, *AI liability in Europe: How does it complement risk regulation and deal with the problem of human oversight?*, in *CLSR*, 2024, 54, pp. 1-17; Gredka-Ligarska, *Employer as an AI System Operator and Tortious Liability for Damage Caused by AI Systems: European and US Perspectives*, in *CJCL*, 2024, 12, pp. 1-23. Multidisciplinary research has examined the impact of AI on health and safety protection

applications, AI can constitute a hypothesis for the evolution of "experience and technique" (art. 2087 of the Civil Code)[13] and for the predisposition of an adequate organisational structure of the enterprise (art. 2086 of the Civil Code)[14], for a better governance of risk, provided that the role of the *human factor* is not excessively minimised or completely eliminated[15].

In turn, the experimentation of these safety management models opens the door to new scenarios for assessing the position of the employer, for the purposes of attributing responsibility for the accident and risk event[16], as well as of the worker himself in relation to his possible culpable complicity. In par-

in the workplace. Cfr. AKYILDIZ, *Integration of digitalization into occupational health and safety and its applicability: a literature review*, in *EuRJ*, 2023, 9, 6, pp. 1509-1519; A. SHAH, MISHRA, *Artificial intelligence in advancing occupational health and safety: an encapsulation of developments*, in *J. Occup. Health*, 2024, 66, 1, pp. 1-12; BUDI MAHENDRA et al., *Restructuring the occupational health and safety management system in the era of artificial intelligence*, in *JPH*, 2025, 47, 1, pp. e168-e169. On the contribution of occupational medicine, EL-HELALY, *Artificial Intelligence and Occupational Health and Safety, Benefits and Drawbacks*, in *Med Lav*, 2024, 115, 2, p. 1 ff. On the contribution of engineering, GIALLANZA et al., *Occupational health and safety issues in human-robot collaboration: State of the art and open challenges*, in *Saf. Sci*., 2024, 169, p. 1 ff.; NGUYEN et al., *Human-Centered Edge AI and Wearable Technology for Workplace Health and Safety in Industry 5.0*, in TRAN (eds), *Artificial Intelligence for Safety and Reliability Engineering. Springer Series in Reliability Engineering*, Springer, 2024, pp. 171-183. In the management area, MELHEM et al., *Integrating Occupational Health and Safety with Human Resource Management: A Comprehensive Approach*, in AWWAD (eds) *The AI Revolution: Driving Business Innovation and Research*, Springer, 2024, pp. 311-317; MOORE, *OSH and the Future of Work: Benefits and Risks of Artificial Intelligence Tools in Workplaces*, in DUFFY (eds) *Digital Human Modeling and Applications in Health, Safety, Ergonomics and Risk Management*, Springer, 2019, pp. 292-315.

[13] Regarding Article 2087 of the Italian Civil Code as an accessory obligation, similar to a collateral provision with respect to the duty of diligence, fairness and good faith, MESITI, *L'ambito di applicazione della tutela prevenzionistica ed antinfortunistica e, segnatamente, dell'art. 2087 c.c.*, in *LG*, 2017, 4, p. 322.

[14] On the subject see FAIOLI, *Adeguatezza ex art. 2086 c.c. e obbligo di introdurre tecnologia avanzata per mitigare i rischi da lavoro*, in *Federalismi.it*, 6, 2025, pp. 143-157.

[15] *Ex multis*, MARASSI, *Intelligenza artificiale e sicurezza sul lavoro*, in BIASI (a cura di), *Diritto del lavoro e intelligenza artificiale*, *op. cit*., p. 207 ff.; DELFINO, *Lavoro e realtà aumentata: i limiti del potenziamento umano*, in BIASI (a cura di), *op. cit*., p. 601 ff.; MAIO, *Diritto del lavoro e potenziamento umano: i dilemmi del lavoratore aumentato*, in *DRI*, 2020, 3, p. 167 ff.; ALOISI, DE STEFANO, *Il tuo capo è un algoritmo*, Laterza, 2020; DAGNINO, *Dalla fisica all'algoritmo: una prospettiva di analisi giuslavoristica*, in *ADAPT University Press*, Modena, 2019.

[16] On the new frontiers of "risk", LOI, *Lavoro, transizione ambientale e digitale nella regolazione procedurale del rischio*, in ALBI (a cura di), *Il diritto del lavoro nell'era delle transizioni*, Pacini Giuridica, 2024, pp. 67-93; LOI, *Il rischio proporzionato nella proposta di regolamento sull'IA e i suoi effetti nel rapporto di lavoro*, in *Federalismi.it*, 2023, 4, pp. 239-259.

ticular, these critical issues arise when the AI system acts as an autonomous manager or executor of the work process, while the residual organisational, managerial, control and spending powers vested in the OSH system's guarantors are not clearly defined. Furthermore, there are cases in which workers suffer physical or psychological harm as a result of using equipment that employs AI systems. In such cases, it is natural to wonder how the liability of the various parties in the supply chain is determined for damage caused by defective products, equipment or machinery, or by incorrect risk assessment, failure to maintain equipment or improper tampering with equipment. However, in these cases, it is necessary to address the need to prevent forms of objective personal liability and, at the same time, clarify the level of autonomy of AI systems and the residual margin of decision-making and execution remaining with natural persons. Thus, on the insurance front (through the National Institute for Insurance against Accidents at Work - INAIL), it may be useful to consider the potential implications of these accident trends on the rule exempting employers from the obligation to pay compensation[17].

It should be made clear that the AI Act cannot answer all these questions because its purpose is to create a single market for AI by ensuring that its devices are safe and respect the fundamental values of the European Union, through a balanced reconciliation of social rights and market protection. For this reason, its legal basis is the protection of competition (Articles 114 and 16 TFEU)[18].

Therefore, the AI Act is part of the complex puzzle of technical harmonisation regulations on the requirements for machinery and equipment (including work equipment), flanking Directive 2006/42/EC[19] (henceforth

[17] It is also true that the re-emergence of the exemption rule under Article 10 of d.P.R. No. 1124/1965 encounters, more generally, insurmountable constitutional limits, which will be discussed below. On the subject, Faioli, *Data Analytics, robot intelligenti e regolazione del lavoro*, in *Federalismi.it*, 2022, 23, pp. 149-165.

[18] Resta, *Governare l'innovazione tecnologica: decisioni algoritmiche, diritti di gitali e principio di uguaglianza*, in *PD*, 2019, 2, pp. 199-236; Alaimo, *Il Regolamento sull'Intelligenza Artificiale: dalla proposta della Commissione al testo approvato dal Parlamento. Ha ancora senso il pensiero pessimistico?*, in *Federalismi.it*, 2023, 25, p. 133 ff.; Peruzzi, *Intelligenza artificiale e lavoro: l'impatto dell'ai act nella ricostruzione del sistema regolativo UE di tutela*, in Biasi (a cura di), *Intelligenza artificiale e diritto del lavoro*, cit., p. 113 ff.; Sartor, *L'intelligenza artificiale e il diritto*, Giappichelli, 2022, p. 45 ff.; Ingrao, *"Glasnost'" versus "Trade Secrets". Sui limiti ai diritti di informazione e di accesso al codice sorgente dell'intelligenza artificiale derivanti dal segreto commerciale*, in *RGL*, 2024, 4, p. 571 ff.

[19] See Annex I, Section A of dir. 2006/42/EC of the European Parliament and of the

Machinery Directive), soon to be repealed by Regulation (EU) No. 2023/1230[20] (henceforth Machinery Regulation) for workers' health and safety profiles. The relationship between these two acts is then destined to interact with the provisions set out to protect the healthiness of the working environment. At national level, these include those of Title I[21] and Title III[22] of Legislative Decree No. 81/2008[23].

The link with the product discipline is not surprising, since the OSH discipline is pervaded by a high technical component that supports the content specification of the safety obligation and, consequently, the perimeter of civil and criminal liability. This emerges from the overall structure of Legislative Decree No. 81/2008, which requires a combined reading of the general provisions of Title I, on the one hand, and those of the special Titles and the numerous technical Annexes, on the other. With reference to work equipment, this technique transpires from the necessary cross-references between the general obligations under Title I and the specific characteristics of work equipment under Title III[24], which are in turn supplemented by the technical standards under Annexes V, VI and VII and the specific sector regulations[25].

With respect to the interaction between the Italian regulations and the AI Act, there is a fear that the AI Act may generate, in practice, antinomies between the two regulatory frameworks and in fact lower the protective

Council of 17 May 2006 on machinery, and amending dir. 95/16/EC (recast) (OJ L 157, 9.6.2006, p. 24).

[20] Reg. 2023/1230 of the European Parliament and of the Council of 14 June 2023 on machinery and repealing Dir. 2006/42/EC of the European Parliament and of the Council and Council Dir. 73/361/EEC.

[21] Titled *Principi comuni (*Common Principles*)*.

[22] Titled *Uso delle attrezzature e dei dispositivi di protezione individuale* (Use of equipment and personal protective equipment*)*.

[23] As supplemented by subsequent sector regulations.

[24] Titled *Uso delle attrezzature e dei dispositivi di protezione individuale* (Use of equipment and personal protective equipment).

[25] Similarly, in legal proceedings relating to accidents caused by the use of defective equipment, technical advice known as "percipiente" (percipient) is particularly important. Cfr. Cass. 27 June 2024. In literature, Proto Pisani, *Lezioni di diritto processuale civile*, Jovene, 1996, p. 477; Luiso, *Diritto processuale civile*, II, *Il processo di cognizione*, Giuffrè, 2000, p. 90; Auletta, *Il procedimento di istruzione probatoria mediante consulente tecnico*, Cedam, 2002; Ricci, *Le prove atipiche tra ricerca della verità e diritto di difesa*, *Atti del XXV Convegno Nazionale dell'Associazione italiana fra gli studiosi del processo civile*, *Cagliari, 7/8 ottobre 2005*, Giuffrè, 2007.

standards on the use of work equipment and the assessment of the related risks. This is especially so in light of the regulatory system of the European act, which focuses on the risk management of so-called "high-risk" systems and on the construction of a system of obligations aimed at making manufacturers or producers (providers) and, at most, suppliers or first-level users (first-level deployers) responsible. Instead, the role of second-level users (second-level deployers or rather users), which undoubtedly include employers, is relegated to the background[26]. In detail, the regulation devotes particular attention to the regulation of risk management, focusing on 'high-risk' systems used in "employment, workers' management and access to self-employment", and in particular for the recruitment or selection of natural persons, for taking decisions on the promotion and termination of employment, as well as for the assignment of tasks, monitoring or assessment of persons in employment-related contractual relationships (Annex I). While such systems are permitted, they impose particularly stringent regulatory burdens in the form of the adoption of "appropriate data governance and management practices". The assessment of compliance with these requirements is entrusted to internal procedures to be carried out by the provider itself (Art. 19)[27]. As for employers using such systems, they must more simply follow instructions and report any serious incidents or malfunctions to the supplier/distributor. Conversely, where the risk to the rights and freedoms of individuals is limited, the regulation essentially imposes transparency obligations. Finally, where the risk is minimal, the use of self-regulation through the adoption of "codes of conduct" is encouraged.

Consequently, the framework for allocating civil liability, particularly that relating to the use of "high-risk" systems (Article 27), referring to producers and suppliers, would be too lenient for the entrepreneur/employer (user) as the primary guarantor of worker's health and safety[28]. In fact, if we pay attention to the obligations dictated by Articles 14, 15, 16 and 17[29], they

[26] On this point, CIUCCIOVINO, *Risorse umane, intelligenza artificiale e Regolamento (UE) 2024/1689*, cit.

[27] Only high-risk AI systems used for biometric identification are covered by conformity assessment by a notified body.

[28] CAIROLI, *Intelligenza artificiale e sicurezza sul lavoro: uno sguardo oltre la siepe*, in *DSL*, 2024, 2, p. 26 ff.

[29] In general, with regard to algorithms whose operation is considered high-risk, art. 14 requires that their operation must always be supervised by the user, including through a com-

mainly concern the supplier who must: ensure that the system complies with all requirements and has adequate quality management measures in place; draw up the technical documentation of the system; keep automatically generated logs; ensure that the system is subject to the relevant conformity assessment procedure. In essence, these burdens describe an upstream-oriented responsibility for the use of such technologies, towards the supplier. On the contrary, a residual civil liability for the employer is outlined, relegated to the only hypothesis in which the latter makes "significant changes" to the normal operation of the AI software[30]. However, the same hypotheses of producer and user liability would be linked only to risks that determine a significantly harmful impact on the health and safety of the worker (Art. 27). Therefore, from the point of view of the health and safety of workers, this arrangement would lead to a system that is not very harmonious with respect to that intended by Directive 89/391/EEC and its derived norms[31].

However, it must be pointed out that the AI Act expressly refers to the remaining technical harmonisation legislation and, precisely, the Machinery Directive[32], which will be definitively repealed by the aforementioned Machinery Regulation as of 20 January 2027. Likewise, more generally, it is clear that the AI Act cannot exhaustively fill the vagueness of the OSH obligation arising from the use of such systems. In fact, the regulation has a declaredly circumscribed scope of action[33], mainly focused on risk management in the

puter interface. Furthermore, art. 15 prescribes that such tools, net of human control, must be designed in such a way as to achieve a reasonable level of accuracy and cyber-security. As a closing rule, then, art. 17 prescribes that algorithms must be equipped with their own self-assessment mechanism, regarding the quality of their functioning.

[30] In all other hypotheses, the only party liable under the strict liability regime is precisely the provider, even in the case of the processing of sensitive employee data (art. 15). The employer (user), in fact, is only obliged to comply with the directives and instructions for use drawn up by the provider, to observe compliance with them throughout the application process, to monitor the system and, in the event that he perceives risks to health or fundamental rights, to take corrective measures or discontinue use (art. 29). Art. 29, paragraph 1-bis, then provides for the obligation for the user to implement human supervision of the system, ensuring that the persons responsible for ensuring such supervision are competent, adequately qualified and trained and have the necessary resources to ensure effective supervision of the system.

[31] More specifically, on the impact of the directive at EU and comparative level, see Ales (edited by), *Health and Safety At Work. European and Comparative Perspective*, *Kluwer Law International*, 2013; Ales, *Occupational Health and Safety: a European and Comparative Legal Perspective*, in *WP C.D.S.L.E. "Massimo D'Antona"*, 2015, 12.

[32] Recital 26 and Annex V, Part A.

[33] Mantelero, Peruzzi, *cit.*, p. 518.

commercial sphere and aimed at providing a minimum and complementary level of protection that does not preclude the introduction of more favourable rules for workers, also through collective agreements[34]. Therefore, these obligations must be supplemented with those arising from other European and internal sources already in force.

3. *The AI Act in the EU frame on digital economy*

The AI Act is part of a broader reformist project that attempts to shape a "cultural" model[35] of the digital economy, the backbone of which is the safeguarding of European social values and fundamental rights – even human rights[36] – in the new competitive scenarios of global markets[37], even before the labour market[38].

Within this "anthropocentric" view[39], the complementarity of the data protection regulation (EU) 2016/679 (GDPR)[40], of the Directive (EU)

[34] Art. 2, co. 11.

[35] Finocchiaro, *La regolazione dell'Intelligenza Artificiale*, in *RTDPub*, 2022, 4, p. 1091. See also the reflections of Brino, *La tutela della persona che lavora nell'era dell'IA tra sfide etiche e giuridiche*, in this journal, 2024, 3, p. 431 ff.

[36] De Stefano, Aloisi, *Fundamental labour rights, platform work and human rights protection of non-standard workers*, in Bellace, Blank, ter Haar (edited by), *Research Handbook on Labour, Business and Human Rights Law*, cit., pp. 359-379; De Stefano, *"Negotiating the Algorithm": Automation, Artificial Intelligence, and Labor Protection*, in *CLLPJ*, 2019, 41, 1, pp. 15-46; De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"*, in *CLLPJ*, 2016, 37, pp. 471-504; De Stefano, Aloisi, *European Legal framework for digital labour platforms*, European Commission, Luxembourg, 2018, p. 11.

[37] Bellavista, Santucci, *Tecnologie digitali, poteri datoriali e diritti dei lavoratori*, Giappichelli, 2022; Bassan, *Corso di diritto internazionale dell'economia e dei mercati*, Giappichelli, 2024; Biasi (a cura di), *Diritto del lavoro e intelligenza artificiale*, cit.

[38] On the concept of transnational labour law, Corazza, *Verso un nuovo diritto internazionale del Lavoro?*, in *DLRI*, 2019, 163, 3, pp. 487-498; Sanguineti Raymond, *Le catene globali di produzione e la costruzione di un diritto del lavoro senza frontiere*, in *DLRI*, 2020, 166, 2, pp. 187-226. On the concept of digital labour, Rudolf-Cibien, Pencolé, *What Should a Good Concept of Labour Do? The Case of Digital Labour*, in *ILLEJ*, 2024, 17, 2, pp. 45-65.

[39] EU Comm., 2018, 795 final; EU Comm., 2021, 205 final, 2.

[40] Ciucciovino, *Trattamento dei dati nell'ambito dei rapporti di lavoro*, in Aa.Vv., *Codice della privacy e data protection*, Giuffrè, 2021, pp. 947-956; Le Bonniec, *Another Path for AI Regulation: Worker Unions and Data Protection Rights*, in *ILLEJ*, 2024, 17, 2, pp. 115-131; Trojsi, *The confirmed, indeed reinforced, Centrality of the GDPR for the Protection of Workers' Personal Rights in the light of subsequent EU Legislative Acts*, in *ILLEJ*, 2024, 17, 2, pp. 355-370; De Lombaert, Rijal, Cos-

2024/2831 on platform workers[41], as well as that of the further ongoing regulatory hypotheses of liability regimes related to the use of artificial intelligence[42] is above all evident. Above all, in the specific field of product regulation, the Machinery Directive is closely linked to the AI Act and is intended to ensure that existing levels of worker protection when using work equipment are maintained, even when AI systems are used[43].

More specifically, the AI Act seems to add a further piece to the controversial path of identification between *workers' rights and human rights*[44]. In fact, it shares with other regulatory acts – the CSRD Directive and the CS3D Directive[45] – a vision of business activity that takes into account *shareholder value* together with its social externalities and, above all, the degree of exposure to risks of human rights violations.

In fact, the AI Act has provided for a specific and additional obligation of Fundamental Rights Impact Assessment (Fria), among which also those of workers, for some first-level deployers of the various AI systems[46]. The

TRASAL, MOLÈ, *Mass Collection of Workers' Data in Warehouse Facilities: Reflections on Privacy and Workforce Well-being*, in *ILLEJ*, 2024, 17, 2, pp. 145-168. On access to data by workers' representatives, GOULD, *Differential Privacy and Collective Bargaining over Workplace Data*, in *ILLEJ*, 2024, 17, 2, pp. 133-144.

[41] GIOVANNONE, *La direttiva sui "platform workers": regole multilivello e prospettive di attuazione*, in *LD*, 2025, 1, pp. 65-90.

[42] On the topic FAIOLI, *Assessing Risks and Liabilities of AI-Powered Robots in the Workplace*, cit.

[43] SENATORI, *EU Law and Digitalization of Employment Relations*, in GYULAVÀRI, MENEGATTI (eds.), *Decent Work in the Digital Age. European and Comparative Perspectives*, Hart-Bloomsbury, 2022, pp. 57-81; SENATORI, *Introduzione. L'AI Act: un nuovo tassello nella costruzione dell'ordinamento del lavoro digitale*, in SCAGLIARINI, SENATORI (a cura di), *Lavoro, Impresa e Nuove Tecnologie dopo l'AI Act*, in *QFondMB*, 2024, pp. 6-15.

[44] *Ex multis*, ALSTON, (ed.), *Labour Rights as Human Rights*, Oxford University Press, 2005; LEARY, *The Paradox of Workers' Rights as Human Rights*, in COMPA, DIAMOND (eds.), *Human Rights, Labor Rights and International Trade*, cit.; COLLINS, *The Role of Human Rights in Labour Law*, in COLLINS (ed.), *Putting Human Rights to Work*, Oxford University Press, 2022; BELLACE, TER HAAR, *Perspectives on labour and human rights*, cit.; FINKIN, *Worker rights as human rights: regenerative reconception or rhetorical refuge?*, cit.; COLLINS, MANTOVALOU, *Human Rights and the Contract of Employment*, cit.; PERULLI, BRINO (eds), *A Global Labour Law*, cit.; ALES, *Tracing the Social Sustainability Discourse within EU Law: the Success of the "Labour-Rights-as-Human-Rights" Approach*, cit., p. 30.

[45] Corporate Sustainability Reporting Directive - CSrD (Dir. 2022/2464/EU) and in the Corporate and Sustainability Due Diligence Directive (Dir. 2024/1760/EU). Both are currently being revised at the initiative of the European Commission (so-called Omnibus I package, cf. https://commission.europa.eu/publications/omnibus-i_en).

[46] Art. 27. In detail, this concerns deployers that are public law bodies or private entities

Fria regulatory technique represents one of the most innovative and disruptive profiles of the AI Act in the social sphere, in contrast to the traditional approach of the technical product regulation so far. First of all, it is potentially highly relevant for the protection of OSH and privacy, as well as anti-discrimination protection[47]. Secondly, Fria is in addition to conformity assessment, shifting part of the burden of dealing with potential negative consequences of AI to the primary users (first-level deployers) in relation to the specific and real operating context of such systems. Therefore, unlike conformity assessments and not having to comply with pre-established models and checklists, when adapting to the European discipline this obligation could be developed in closer connection with the already existing national provisions on the safety of work equipment, possibly also envisaging the involvement of workers' representatives[48].

At national level, Fria could thus be combined with the obligations of third parties[49] and those of the employer[50], and in particular with the risk assessment in respect of which Fria's technical assessment would be placed on

providing public services. On the subject of fundamental rights, Bassini, *Intelligenza artificiale e diritti fondamentali: considerazioni preliminari*, in M. Biasi (a cura di), *Diritto del lavoro e intelligenza artificiale*, Giuffrè, 2024, p. 23 ff.

[47] Regarding AI and anti-discrimination law, Barbera, *Discriminazioni algoritmiche e forme di discriminazione*, in *L&LI*, 2021, 7, 1, pp. I.1-I.17.; Barbera, *Principio di eguaglianza e divieti di discriminazione*, in Barbera, Guariso (a cura di), *La tutela antidiscriminatoria. Fonti, strumenti, interpreti*, Giappichelli, 2019, p. 59 ff.; Ballestrero, *Ancora sui rider. La cecità discriminatoria della piattaforma*, in *Labor*, 2021, 1, p. 104 ff.; Alessi, *Lavoro tramite piattaforma e divieti di discriminazione nell'UE*, in Alessi, Barbera, Guaglianone (a cura di), *Impresa, lavoro e non lavoro nell'economia digitale*, Cacucci, 2019; Perulli, *La discriminazione algoritmica: brevi note introduttive a margine dell'ordinanza del Tribunale di Bologna*, in *LDE*, 2020, 1, p. 1 ff.; Lo Faro, *Algorithmic Decision Making e gestione dei rapporti di lavoro: cosa abbiamo imparato dalle piattaforme*, in *Federalismi.it*, 2022, 25, p. 189 ff.; Gaudio, *Algorithmic management, poteri datoriali e oneri della prova: alla ricerca della verità materiale che si cela dietro l'algoritmo*, in *L&LI*, 2020, 2, pp. 19-71; De Petris, *La discriminazione algoritmica. Presupposti e rimedi*, in M. Biasi (a cura di), *Diritto del lavoro e intelligenza artificiale*, *op. cit.*, p. 225; Dumanĉ iĉ , Obadić , *Un'analisi di genere delle condizioni di lavoro e del diritto della protezione sociale nel lavoro su piattaforma digitale*, in *LLI*, 2024, 2, pp. 28-51; Kambouri, *Una critica intersezionale di genere alla Direttiva europea sulle piattaforme digitali*, in *LLI*, 2024, 2, pp. 52-76.

[48] On the role of representations in general and the new frontiers of participation see Maraga, *L'informazione sindacale nell'era dell'IA: verso nuovi spazi di partecipazione dei lavoratori nell'impresa?*, in *AD.it*, 1, 2025, pp. 1-18.

[49] Arts. 22, 23, 24 and 72 of d.lgs. No. 81/2008.

[50] Arts. 17, 28, 29 and 71 of d.lgs. No. 81/2008.

the first level deployer after the machine has been placed on the market, but before its introduction into the company.

4. *The twist with the Machinery Regulation*

In the same context of the EU competition law framework, the Machinery Regulation will apply to systems using AI technologies, once the previous Machinery Directive[51] is repealed.

Like the AI Act, it places a particular burden on the manufacturer. This figure, possessing detailed knowledge of the design and production process, holds a position of guarantee that obliges him to assess the conformity of the machine[52] and define the essential health and safety requirements of the same[53], while making available "precise and comprehensible information"[54] and specific accompanying documentation.

The Machinery Regulation also burdens the figures of the importer[55] and the distributor[56]: the former, as a person who places a product from a third country on the EU market; the latter, as a figure other than the manufacturer or importer, who makes a product available on the market. The importer has to make sure that the manufacturer has completed the appropriate procedures for conformity assessment of the product, taking personal responsibility for it. The distributor is responsible for verifying that the product is correctly identified and accompanied by the necessary documentation, taking due care in transport and storage so as not to compromise its conformity with the safety requirements.

With regard to safety components of equipment, as in the previous Directive, the Machinery Regulation requires that they are subject to CE marking. However, in the definition of safety components, it also includes digital components including software, extending for the first time the specific discipline to intangible equipment[57]. Furthermore, with regard to machines that

[51] On this subject also Elmo, *Sistemi IA e rischi per la salute e la sicurezza dei lavoratori: riflessioni a margine della regolamentazione europea*, in *AD.it*, 2024, 4, pp. 1-16.

[52] Recital 31, Arts. 10 and 25.

[53] Recital 32.

[54] Recital 39.

[55] Arts. 13-14.

[56] Art. 15 ff.

[57] Art. 3.

use AI systems, the regulation places the obligation of a risk assessment on the manufacturer, taking into account the evolution of their behaviour if they have certain levels of autonomy. In addition, new requirements are imposed to protect the health of workers against risks arising from the dynamics of human-machine interaction[58]. This assessment will have to take into account the evolution of the behaviour of machines operating with certain levels of autonomy, in accordance with the AI Act[59]. In perspective, such predictions appear to be particularly onerous for manufacturers. One only has to think of the technical measures to be taken in the face of autonomous machine behaviour, or of the cybersecurity solutions required for the safety of machinery employing AI software and systems connected to data networks. Moreover, with respect to human-machine integration, the safety requirements of mobile elements will have to be updated taking into account the most innovative solutions on collaborative applications, as imposed by the Regulation[60].

Well, given that the commercial regulation of work equipment today straddles the two Regulations, it is useful to understand how this regulatory interweaving will interact with the national prevention regulation. In particular, the set-up does not seem destined to change since the AI Act expressly refers to the harmonisation legislation and the Machinery Directive which, as of 20 January 2027, will be repealed by the new Machinery Regulation. Therefore, machines and products that fall within the scope of these measures must be declared compliant with them and their use must be integrated into the company's prevention system according to the national regulations already in force.

However, the Machinery Regulation also applies to old products that have undergone "substantial modification" by various users. These are those machines that, having been modified after being placed on the market or put into service, affect safety by increasing or creating a risk[61]. As in the case of AI systems, such hypotheses incorporate clear and direct responsibilities on the part of the various users, possibly including employers. Therefore, in

[58] On the challenge of finding assessment methods for risks generated by combined human-machine action, Treu, *Intelligenza Artificiale (IA): integrazione o sostituzione del lavoro umano?*, in *WP CSDLE "Massimo D'Antona"*, 2024, 487, p. 15.

[59] Annex II, Part B, para. 1.

[60] Annex III, Part B.

[61] Art. 3, co. 16.

the gradual implementation of the two regulations – AI Act and Machinery Regulation – it will be crucial to understand whether one is dealing with a newly manufactured machine, or a machine that, having been placed on the market under the previous regulation, has undergone such substantial changes over time. With respect to the latter, there is inevitably an obligation to assess the risks to the health and safety of persons (or animals)[62], together with the various obligations incumbent on the economic operators in the supply and use chain, of which the employer himself is a part.

Furthermore, it is possible to assume that the DVR (the Italian OSH risk assessment document) will be supplemented with specific technical annotations that will enable the guarantors of the prevention system to take into account the evolution of the behaviour of machines designed to operate with different levels of autonomy, on the basis of the manufacturer's technical indications. This is because of the importance that the self-learning process has acquired upstream, during the design and production of the AI system. In addition, when selecting work equipment, the employer must take into account the specific conditions and characteristics of the work to be performed, the risks present in the work environment and those arising from the use of the machinery, as well as those arising from interference with other equipment already in use (in a combined reading of Articles 28 and 71 of Legislative Decree No. 81/2008)[63]. Moreover, this employer's guarantee position derives directly from Directive 391/89/EEC, which imposes a general obligation on employers to ensure the health and safety of workers "in every aspect related to the work"[64]. To reinforce this interpretation, this general obligation has been further clarified by the EU Court of Justice, according to which the employer is required to assess all risks existing in the workplace that are "continually changing in relation, particularly, to the progressive development of working conditions and scientific research concerning such risks"[65].

Then, in order to minimise the risks, the employer must take appropriate technical and organisational measures (including those of Annex VI) and

[62] Recital 26.

[63] On the coordination between d.lgs. n. 81/2008 and the Machinery Regulation see D'Arcangelo, *Robotica e lavoro. Prime osservazioni in tema di sicurezza (delle macchine e dei lavoratori)*, in *Federalismi.it, focus LPT*, n. 6/2025, pp. 83-104.

[64] Art. 5, co. 1.

[65] CJCE 15 november 2001 aff. C-49/00, *Commission vs Italy*, § 13.

the necessary measures so that the equipment: is installed and used in accordance with the instructions for use; is subject to control and appropriate maintenance; and is subject to the measures for updating the minimum safety requirements. In addition, the use of equipment must be restricted to workers who have received adequate information, training and instruction.

From this brief reconstruction it emerges that the employer's position of guarantee is highly articulated and can be invoked with reference to distinct time segments of the work organisation process, following the introduction of the equipment into the company.

This guarantee position is clearly distinct with respect to that of third parties to the company (designers, manufacturers, suppliers, installers and assemblers), respectively in the preliminary and subsequent phases following the placing on the market, or the introduction into the company of the equipment itself.

The same safety requirements imposed by EU Regulation No. 2023/1230 and EU Regulation No. 2024/1689 keep this distinction clear. Furthermore, with regard to the obligation to provide training, information and instruction to workers[66], the general literacy requirement introduced by Article 4 of the AI Act may require training courses to be supplemented with information on how AI systems work. The introduction of the new obligation of education and training for the employer who makes use of equipment requiring special knowledge (Art. 71, para. 7, Legislative Decree No. 81/2008), in order to ensure its use in a suitable and safe manner (Art. 73, para. *4-bis*) seems to point in this direction[67]. Among other things, the same legislative intervention provided that the hirers and lenders in use must acquire and keep on file a self-certifying declaration by the party hiring, leasing or using, or by the employer, attesting to the specific training and instruction of the persons identified for use (Art. 72, para. 2, second sentence). This provision reinforces the logic of empowerment of the supply chain.

Ultimately, the new duties of a technical-procedural nature introduced by the regulations flank the more traditional prevention duties, without absorbing them. Consequently, in the wake of product and social discipline, the guarantee positions of the actors involved must be kept quite distinct.

[66] Art. 73, d.lgs. No. 81/2008. Consider also the managerial training obligation set out in Art. 37, para. 7, d.lgs. No. 81/2008 (currently awaiting implementation through the special State-Regions Agreement).

[67] D.l. No. 48/2023 converted with amendments by L. No. 85 of 3 July 2023.

5. *The use of machines equipped with AI: employers' and external actors' liability in the Italian OSH system*

At this point, the question arises as to whether this "regulatory mosaic" can guarantee a certain delimitation of the OSH obligation and an adequate level of protection of workers' health and safety[68].

Firstly, it cannot be ruled out that the traditional criteria for attributing liability in OSH matter will be taken into account in an evolutionary way by case law[69]. At the same time, collective bargaining could develop modal rules that circumscribe the tasks of the various health and safety actors[70].

[68] On this topic also the insights of Faioli, *Assessing Risks and Liabilities of AI-Powered Robots in the Workplace*, cit., p. 79 ff.; Faioli, *Robot Labor Law. Linee di ricerca per una nuova branca del diritto del lavoro e in vista della sessione sull'intelligenza artificiale del G7 del 2024*, in *Federalismi.it*, 2024, 8, p. 182 ff.; Malzani, *Tassonomia UE e vincoli per l'impresa sostenibile nella prospettiva prevenzionistica*, in *DLRI*, 2023, pp. 177-178, p. 75 ff.; Marinelli, *Verso una Fabbrica Intelligente: come l'AI invita a ripensare la tutela della salute e della sicurezza dei lavoratori*, in *VTDL*, 2023, 4, p. 828 ff.

[69] On case law practice, Adams-Prassl, Laulom, Maneiro Vàsquez, *Il ruolo dei tribunali nazionali nella protezione dei lavoratori delle piattaforme: un'analisi comparata*, in Miranda Boto, Bramseshuber, Loi, Ratti (a cura di), *Contrattazione Collettiva e gig economy. Uno strumento tradizionale per nuovi modelli di organizzazione*, Giappichelli, 2022, p. 83 ff. Also, Esposito, *Ciclo produttivo digitalmente integrato e responsabilità datoriali: appunti sull'effettività delle tutele*, in *Federalismi*, 2022, 25, pp. 95-103 who comments on the contribution of some merit judgments such as Trib. Padova 16 July 2019 differently from Cass. 2 November 2021 No. 31127 and No. 31128. On the notion of "employer" in the face of the fragmentation/disarticulation of the productive organisation, Carinci, *Processi di ricomposizione e di scomposizione dell'organizzazione: verso un datore di lavoro "à la carte"?*, in *DLRI*, 2016, 152, pp. 733-747; Alvino, *Il lavoro nelle reti di imprese: profili giuridici*, Giuffrè, 2014; Auriemma, *Il datore di lavoro nell'evoluzione dell'impresa complessa*, Edizioni Scientifiche Italiane, 2022; Basenghi, *Assetti societari e individuazione del datore di lavoro per la sicurezza*, in Campanella, Pascucci (a cura di), *La sicurezza sul lavoro nella galassia delle società di capitali*, in *I WP di Olympus*, 2015, 44, pp. 27-33.

[70] On the new regulatory spaces for collective bargaining and partecipation, Faleri, *Prove di democrazia partecipativa per le rappresentanze dei lavoratori nella transizione digitale*, in *RGL*, 2024, 4, p. 608 ff.; Aa.Vv. (a cura di), *Sistemi di prevenzione, partecipazione e rappresentanza dei lavoratori nel tempo della trasformazione digitale*, Franco Angeli, 2024; Delfino, *Lavoro mediante piattaforme digitali, dialogo sociale europeo e partecipazione sindacale*, in *Federalismi.it*, 2023, 25, p. 171 ff.; Timellini, *Verso una Fabbrica Intelligente: come l'AI invita a ripensare la tutela della salute e della sicurezza dei lavoratori*, in *VTDL*, 2023, 4, p. 841; Corti, *Intelligenza artificiale e partecipazione dei lavoratori. Per un nuovo umanesimo del lavoro*, in *DRI*, 2024, 3, p. 615 ff.; Biasi, *Il lavoro nel disegno di legge governativo in materia di intelligenza artificiale: principi, regole, parole, silenzi*, in *DRI*, 2024, 3, p. 662; Rota, *Sull'Accordo quadro europeo in tema di digitalizzazione del lavoro*, in *L&LI*, 2020, 6, 2, p. C.25 ff.; Spinelli, *Industrial Relations Practices in the Digital Transition: What Role for the Social Partners?*, in this journal, 2024, 2, pp. 461-476; Cristofolini, *Digital Trade Unionism in the Making?*

It is therefore necessary to analyse the legal validity of the traditional OSH regulations on "external parties" to the company (Articles 22, 23, 24 and 72 of Legislative Decree No. 81/2008)[71], as well as the criteria for apportioning liability between the latter and the employer, developed over time by case law. As a matter of fact, it is well known that, at the impetus of European legislation, Legislative Decree No. 81/2008 extended the duty of safety to the design, construction and supply phases of machinery to be used in the working environment with a specific liability, criminally sanctioned, of designers, manufacturers, suppliers and installers.

For its part, the inter-subjective allocation of responsibility between these parties and the employer has been addressed by establishing that, if the latter uses (or causes to be used) machinery that does not comply with current legislation, it shall be jointly liable with the manufacturer (or with the other parties indicated), unless the defect is unknown and cannot be recognised with normal diligence, even in relation to the certification obligations[72].

Insights from the Italian Experience, in this journal, 2024, 2, pp. 395-420. On the first contractual experiments in the field of AI, Imberti, *La contrattazione collettiva aziendale di fronte alle sfide della rivoluzione digitale e ai processi di cambiamento organizzativo*, in *Federalismi.it*, 2022, 25, p. 161 ff.; Faioli, *Perché regolare le relazioni industriali e le tutele giuslavoristiche in relazione all'intelligenza artificiale. Le sfide più complesse nel settore del credito tra rinnovo contrattuale del 2023 e dichiarazione congiunta europea del 2024*, in *Federalismi.it*, 2024, 30, p. 207 ff.; Lamannis, *La contrattazione collettiva aziendale alla prova del management algoritmico*, in Gargiulo, Saracini (a cura di), *Parti sociali e innovazione tecnologica*, in *Quaderni* in this journal, 2023, 15, p. 163 ff. In a comparative perspective, Corti, *Innovazione tecnologica e partecipazione dei lavoratori: un confronto tra Italia e Germania*, in *Federalismi.it*, 2022, 17, pp. 113-123. On the defence of collective interests, in remedial proceedings, Zappalà, *Intelligenza artificiale, sindacato e diritti collettivi*, in Biasi (a cura di) *Diritto del lavoro e intelligenza artificiale*, cit., p. 200; Protopapa, *Sindacato e nuove azioni di "classe"*, in *LD*, 2024, 2, p. 257; Razzolini, *Class action: l'azione in giudizio del sindacato verso un cambio di paradigma*, in *RIDL*, 2023, 1, p. 111; Imberti, *Intelligenza artificiale e sindacato. Chi controlla i controllori artificiali?*, in *Federalismi.it*, 2023, 29, p. 200; Recchia, *Condizioni di lavoro trasparenti, prevedibili e giustiziabili: quando il diritto di informazione sui sistemi automatizzati diventa uno strumento di tutela collettiva*, in *LLI*, 2023, 9, 1, p. R. 32; Zoppoli, *Prospettiva rimediale, fattispecie e sistema nel diritto del lavoro*, Editoriale Scientifica, 2022; Comandè, *"Grande è la confusione sotto il cielo" dei rider: strategie sindacali e chiavi di accesso alle tutele giudiziali*, in *RIDL*, 2023, 4, p. 559; Gaudio, *Algorithmic management, sindacato e tutela giurisdizionale*, in *DRI*, 2022, 1, p. 30; Tullini, *L'economia digitale alla prova dell'interesse collettivo*, in *LLI*, 2018, 4, 1, p. 1.

[71] On the topic, Volpe, *Sicurezza organizzata e soggetti esterni all'azienda*, in *DSL*, 2016, 2, pp. 11-17; Vallebona, *Responsabilità civile dell'imprenditore. Appalti. Responsabilità dei progettisti, fabbricanti, fornitori e installatori*, in Montuschi (a cura di), *Ambiente, salute e sicurezza. Per una gestione integrata dei rischi di lavoro*, 1997, p. 204 ff.

[72] Cf. Cass. Pen. 27 September 2001 No. 35067.

It follows that the manufacturer's liability does not exclude the liability of the employer who is the user of the machinery, since the latter is obliged to eliminate sources of danger for the workers called upon to use it[73]. Therefore, when assessing joint liability in this matter, the existence of obligations incumbent on "external" parties does not exclude the employer's duty to verify the safety of the machinery it makes available[74]. On the other hand, in the event of non-compliance of the machinery with the relevant safety standards, an external party cannot invoke the imprudent behaviour of the user/purchaser of the machinery to their own advantage[75].

That being said, the determination of the degree of liability of the employer and of the other holders of positions of guarantee, in the event of injuries to physical and psychological integrity attributable to defective machines using IA systems, should not disregard these hermeneutical canons. Rather, in court proceedings, the judge may find himself in the particular position of having to assess, among the elements of his own conviction, the technical classification of the levels of autonomy of the AI system, as developed during its design, construction and placing on the market. This is to figure out if the algorithmic intermediation of the machine used by the worker can be considered the only cause of the harmful event, how much production, design, or modification defects played a role, either alone or together, and, lastly, if it was due to the employer not following their specific obligations during risk assessment, use, maintenance, and training. Finally, it is possible to find contributory negligence on the part of the worker, which may relieve the employer of his responsibilities[76]. Therefore, in the event of breach of one or more of these obligations, it is difficult to hypothesise that the employer could be relieved of responsibility, since the employer will be legally liable for the malfunctioning of the machine mediated by the AI system[77]. However, this guarantee position could be progressively weakened if the other causal factors mentioned above prevail.

[73] Cf. Cass. Pen 13 January 2006 No. 1216; Cass. Pen. 9 July 2008 No. 27959.

[74] Cf. Cass. Pen. 21 June 2004, No. 27808.

[75] Cf. Cass. Pen. 5 March 2003 No. 41985; Cass. Pen. 23 July 2008 No. 30818.

[76] On worker cooperation in OSH for the use of AI, PASCUCCI, *Sicurezza sul lavoro e cooperazione del lavoratore*, in *DLRI*, 2021, 3, p. 421.

[77] In favour of "upstream" liability in the hands of designers, manufacturers, suppliers and installers, CAIROLI, *cit.*, p. 35 ff. However, SQUEGLIA, *Obiettivi, strumenti e metodi dell'intelligenza artificiale nella tutela della salute e della sicurezza dei lavoratori*, in *DSL*, 2025, 1, p. 127 ff. reiterates the immovable (criminal) responsibility of the employer.

On the other hand, precisely with regard to the damage caused by AI systems used as components of machines with an increasing degree of autonomy, the controversial hypothesis of attributing legal personality to AI has arisen, as a remedy to the risk of excessive liability on the part of employers, manufacturers and suppliers[78]. This was the direction taken by the 2017 European Parliament Resolution in relation to robots deemed to be agent systems[79]. The founding hypothesis of a legal personality of the machine would not imply its personification, assuming rather a functional (and evidential) value. It would be a suitable mechanism to allow the imputation of effects directly to the machine, with an easing of criminal law profiles and of the burden of compensation on physical persons[80], also in a logic of greater economic sustainability. In Italy, a similar *fictio* is represented by the liability of entities under Legislative Decree No. 231/2001 and Article 30 of Legislative Decree No. 81/2008[81].

The prospect, not free from perplexity[82], tends towards a compromise regulatory solution, in any case without relieving the employer, designers, manufacturers and suppliers of their respective prevention obligations. This would involve hypothesising, on the basis of a case-by-case risk assessment, the degree of effective residual human control over AI, up to and including

[78] For an analysis on the prospects of attributing legal personality to Faini, *Intelligenza artificiale e regolazione giuridica: il ruolo del diritto nel rapporto tra uomo e macchina*, in *Federalismi.it*, 2023, 2, pp. 1-29; Faioli, *Data analytics, robot intelligenti e regolazione del lavoro*, cit., p. 153 ff. *Contra*, Tenore, *Riflessioni sulle diverse questioni giuridiche ed esistenziali derivanti dal crescente utilizzo di intelligenze artificiali*, in *DRI*, 2024, 3, p. 666 ff.

[79] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. In the same vein, European Parliament resolution of 20 January 2021 on artificial intelligence: questions of interpretation and application of international law in so far as the EU is affected in the areas of civil and military uses and of state authority outside the scope of criminal justice. *Contra*, the European Economic and Social Committee in its position of 31 May 2017, published on 31 August 2017.

[80] Thus the perspective of Alpa, *Quale modello normativo europeo per l'intelligenza artificiale?*, in *CI*, 2021, 4, pp. 1003-1026.

[81] On the appropriateness of enhancing the Organisation and Management Models (MOG) referred to in d.lgs. No. 231/2001 in the face of the challenges posed by IA, Lazzari, Pascucci, *Sistemi di IA, salute e sicurezza sul lavoro: una sfida al modello di prevenzione aziendale, fra responsabilità e opportunità*, in *RGL*, 2024, 4, p. 596 ff.; Ciucciovino, *La disciplina nazionale sulla utilizzazione della intelligenza artificiale nel rapporto di lavoro*, in *LDE*, 2024, 1, pp. 18-19.

[82] On the peculiarity of techniques for assessing the risk of committing predicate offences and the difficulties of transferring this model to assess "new" risks, Treu, *Il controllo umano delle tecnologie: regole e procedure*, in *WP CSDLE "Massimo D'Antona"*, 2025, 492, p. 16.

more extreme scenarios in which such control no longer exists or only intervenes at such a late stage in the decision-making and management process that it compromises the strong causal link between the employer's conduct and the harmful event.

While waiting for more solid interpretative constructs[83], the fact remains that employers, when preparing their DVR and planning prevention and protection measures, must at least take into account the different degrees of autonomy and pervasiveness of AI, as certified by the manufacturer. In this way, when assessing risks, the employer will be able to make probabilistic predictions on the "conduct" of the digitised system, enabling him to draw up appropriate prevention and organisational protocols. In this way, his liability could be graduated for facts that are causally attributable to technically unforeseeable risks or for those attributable to the "fact of the third party"[84]. In any case, the prerequisite should be that the employer, workers and their representatives have received adequate preliminary training on the specific technical aspects of AI, with a view to participatory management of technological risk[85].

6. *Concluding remarks*

Looking at the two Regulations' contents and objectives, it's clear that the need to create a single market for AI prevails, ensuring that the related devices are safe and respectful of the fundamental rights and values of the European Union. These objectives must be achieved in a clear logic of reconciliation between social rights and market protection; this explains the

[83] On the limits of the regulatory solutions proposed by the new Directive (EU) 2024/2853 on liability for defective products, CRUDELI, *Sistemi di intelligenza artificiale autonomi e responsabilità datoriale*, in *DSL*, 2024, 2, p. 408 ff.

[84] In more detail, see GIOVANNONE, *Responsabilità datoriale e prospettive regolative della sicurezza sul lavoro. Una proposta di ricomposizione*, cit., p. 177 ff.

[85] In this sense also LAZZARI, PASCUCCI, *cit.*, p. 590; ROTA, *cit.*, p. C. 30 ff. In general, on the difficulties of disseminating the participatory method in the company prevention dimension, among others, ALES, *La tutela della salute sul lavoro nel prisma del metodo partecipativo, in Tutela della salute pubblica e rapporti di lavoro*, in ZOPPOLI (a cura di), in *Quaderni* in this journal, 2021, 11, pp. 231-250; ANGELINI, *Rappresentanza e partecipazione nel diritto della salute e sicurezza dei lavoratori in Italia*, in *DSL*, 2020, 1, p. 96 ff. On the general role of representation and the new frontiers of participation, MARAGA, *L'informazione sindacale nell'era dell'IA: verso nuovi spazi di partecipazione dei lavoratori nell'impresa?*, in *AD.it*, 1, 2025.

joint reference to the EU Charter of Fundamental Rights and the EU's international trade commitments. Consequently, given that the use of AI systems may entail risks to fundamental rights, it is necessary to adopt a system of rules relating to the characteristics that they must possess before they are placed on the European market. On this basis, the AI Act introduces a risk-based procedural regulatory model and a series of obligations, mainly for providers of AI systems, to be fulfilled before being placed on the European market.

Similarly, the Machinery Regulation seems to be moving which, unlike the old directive, also applies to products that have undergone substantial changes and not only those of new production. These are those products that, modified after being placed on the market or in service, impact safety, increasing or creating a risk. The reference therefore goes to those equipment that require the adoption of repairs or additional protective devices. The Regulation thus also refers to machines that use artificial intelligence, introducing an obligation to assess risks that takes into account the evolution of their behaviour if they are equipped with certain levels of autonomy and the imposition of new safety and health protection requirements for workers against risks originating from the dynamics of human-machine interaction. In addition, specific protective devices and specific tools for safe unlocking and the corresponding instructions for use must be provided. Moreover, the prevention of contact risks that determine dangerous situations and of the psychic tensions that can be caused by interaction with the machine must be adequate in relation to the coexistence of man and machine in a shared space in the absence of direct collaboration and to the interaction between man and machine. On this basis, an obligation to assess the risks to the health and safety of humans or animals is envisaged, which obliges all economic operators involved in the supply and distribution chain. However, the function of manufacturers remains particular who, possessing detailed knowledge of the design and production process, hold a position of guarantee that obliges them to assess the conformity of the machine: a requirement that should remain the exclusive responsibility of the manufacturer. Following that assessment, the manufacturer should also establish the applicable essential health and safety requirements, in relation to which measures must be taken to address the risks.

Consequently, where the machine integrates an AI system, the assessment should include the risks that may arise during its life cycle due to an

expected evolution of its behaviour to operate with different levels of autonomy; it will therefore have to be carried out in accordance with the AI Regulation. At this point, it is not lost on us that the two acts integrate in order to more clearly identify the subjects responsible for the obligations of assessment, management and minimization of risks. It is also true that the directive on platform work is integrated with both for the identification of rights and protection needs deriving from the use of digital technologies and AI systems.

On the other hand, coming to the Italian system, it seems to be clear that Legislative Decree No. 81/2008 has extended the OSH debt to the design, construction and supply phases of machinery to be used in the workplace with a specific liability, criminally sanctioned, of designers, manufacturers, suppliers and installers.

For its part, case law has long addressed the inter-subjective division of responsibility between these subjects and the employer, establishing that if the latter uses (or causes to be used) an unsuitable machine, because it does not comply with the regulations in force, he participates in liability with the manufacturer (or with the other parties indicated), unless the defect is unknown and not recognizable with normal diligence, also in relation to the required certification obligations. It follows that the manufacturer's liability, in the event that the harmful event was caused by failure to observe accident prevention precautions in the design and manufacture of the machinery, does not exclude the liability of the employer using the same, since he is obliged to eliminate the sources of danger for the workers called upon to use it. Therefore, in assessing the concurrence of liability in the matter, on the one hand, the existence of the obligations incumbent on the "external" parties does not exclude the employer's duty to ascertain the regularity of the machinery he uses or causes to be used; on the other hand, in the event of non-compliance of the machinery with the reference safety standards, the external party cannot invoke the imprudent behaviour of the user/purchaser of the same to its advantage.

Also in the light of these hermeneutical canons it is clear that the determination of the degree of responsibility of the employer and other holders of guarantee positions, in the event of injuries to physical and mental integrity resulting from the use of AI, cannot disregard a classification of the levels of autonomy of this and its heterogeneous applications, in order to provide suitable operating rules and identify prevention standards useful for

parameterizing employer obligation and liability. In fact, even in the face of algorithmic intermediation in the exercise of decision-making powers, a de-responsibility of the employer is unthinkable since every management act, even if mediated by AI systems, is always legally attributable to the same.

On the other hand, the Artificial Intelligence Bill No. 1146, approved by the Senate of the Italian Republic last March 2025[86], seems to be moving in this direction, also on the basis of the indications coming from the Survey on the relationship between Artificial Intelligence and the world of work[87], with particular reference to the impacts that generative artificial intelligence may have on the labour market.

[86] See in particular Arts. 10 and 11.

[87] *Indagine conoscitiva sul rapporto tra Intelligenza Artificiale e mondo del Lavoro*, published by the Italian Parliament in June 2024 followed by the final report *Linee guida per l'implementazione dell'intelligenza artificiale nel mondo del lavoro*, released by the Italian Ministry of Labour in June 2025.

Abstract

The essay analyses the AI Act in the frame of EU machinery requirements regulation starting from the labour rights as human rights international debate and then exploring its possible impact on the Italian OSH legislation with particular reference to the employer's obligation to assess risks and the safety requirements of work equipment, referred to in Title III of Legislative Decree No. 81/2008. In envisaging the adaptation of the prevention discipline to the AI Act, account is taken of the essential link between it and the entire European technical harmonization legislation and, in particular, with Regulation (EU) No. 2023/1230 (Machinery Regulation). On this conceptual basis, the contribution also explores the compatibility of the aforementioned regulatory interweaving with the parameters for assessing the liability of the employer, designers, manufacturers and suppliers developed by the case law in implementation of the aforementioned provisions of Legislative Decree No. 81/2008.

Keywords

EU frame on digital economy, Labour rights as human rights, AI Act, Working machinery's OSH requirements, OSH risk assessment, Employers', Manufacturers' and supply chain actors' liability.

Alessandra Ingrao

AI at Work: Reframing Data Protection through the Lens of Labor Law

Contents: **1.** Introduction. **2.** Against AI exceptionalism: a methodological warning for data protection and labor law. **3.** Two structural flaws in the approach of privacy law in the age of AI. **4.** Between continuity and disruption: the AI act and the risk of normative exceptionalism. **5.** The erosion of purpose limitation in the age of adaptive AI: from determinism to opacity. **6.** Challenging the principle of data minimization in ai-driven workplaces. **7.** Automated decision-making in the workplace: limits of individual rights and the need for collective oversight.

1. *Introduction*

Artificial Intelligence (AI) has become an integral component of contemporary productive and organizational dynamics, profoundly reshaping the modalities of work performance, the exercise of managerial authority, and workplace control techniques[1]. In this evolving context, the protection of workers' personal data and, more broadly, the safeguarding of their private sphere – emerges with renewed centrality, raising complex normative and systemic questions. This essay seeks to elucidate the key tensions between data protection law and the deployment of AI in the employment context, with the aim of critically assessing the adequacy of existing legal instruments and identifying potential regulatory trajectories.

[1] Alaimo, *Il Regolamento sull'Intelligenza Artificiale. Un treno al traguardo con alcuni vagoni rimasti fermi*, in *Federalismi*, 2024, p. 231 ff.; L. Zoppoli, *Il diritto del lavoro dopo l'avvento dell'intelligenza artificiale: aggiornamento o stravolgimento? Qualche (utile) appunto*, in *DLM*, 2024, 3, p. 1 ff.; Ciucciovino, *Intelligenza artificiale e diritto del lavoro: problemi e prospettive*, in *DRI*, 2024, 3, p. 586 ff.; Nuzzo, *Vecchi e nuovi limiti al monitoraggio dei lavoratori al tempo dell'IA*, in *RGL*, 2024, 4, p. 555 ff.

To engage meaningfully with the intersection of AI and the protection of workers' rights, it is first necessary to clarify what is meant by "artificial intelligence" today. In its current usage, the term refers to a heterogeneous set of computational tools primarily grounded in machine learning techniques, including deterministic, non-deterministic, and generative models. Far from the science fiction image of sentient robots, contemporary AI systems are algorithmic constructs designed to process vast quantities of data and generate inferences, predictions, or new forms of content. They do not represent a paradigmatic break with the past, but rather a successful recombination of existing technologies, whose operational effectiveness has been enhanced by exponential advances in computational power and data availability.

Nevertheless, the label "artificial intelligence" has acquired a powerful symbolic role in public and regulatory discourse, functioning as an organizing metaphor that attracts attention, resources, and normative legitimacy. As a result, a technology that is neither truly "intelligent" nor wholly "artificial" has acquired disproportionate symbolic prominence. These systems do not "learn" in any human sense; rather, they detect patterns and correlations in data selected, annotated, and structured by human agents[2]. Behind the façade of automation lies an extensive network of human labor – often – invisible that sustains AI's operational viability. In the world of work, acknowledging this reality is essential: the adoption of AI in personnel selection, performance evaluation, shift allocation, or predictive surveillance continues a longstanding trajectory of technological rationalization of employer power – one already familiar to labor law and requiring renewed critical engagement.

[2] The legal definition of an artificial intelligence system, set out in Article 3, par. 1(1) of the AI Act, confirms this premise. It describes an AI system as an automated system designed to operate with varying levels of autonomy and capable of producing outputs such as predictions, content, recommendations, or decisions that may influence physical or virtual environments. Crucially, Recital 12 emphasizes the system's inferential capacity – that is, its ability to derive models or algorithms from data inputs and generate outputs that exceed basic data processing, enabling learning, reasoning, or modelling (see Recital 12). This is precisely what distinguishes AI from traditional rule-based software, which follows predefined instructions without the capacity for autonomous decision-making or adaptation over time. Regarding the complexity of defining an AI system, see also the European Commission's report summarising the responses of stakeholders to the public consultation. Commission Guidelines on the definition of an artificial intelligence system, 6 February 2025, C (2025) 924 final.

Secondly, it is crucial to understand the specific privacy challenges posed by AI[3]. These concern both the input phase (data collection and selection) and the output phase (generation of inferences, analysis, classifications, and decisions). Practices such as non-consensual data scraping or the large-scale harvesting of nominally legitimate data often evade the protections established by current legal frameworks. On the output side, the use of algorithms to derive information not explicitly provided by workers, to evaluate performance, or to predict future behaviors introduces unprecedented scenarios of profiling and control. These processes risk undermining the dignity of the worker, circumventing privacy safeguards, and exacerbating manipulation and surveillance risks.

AI also tends to replicate and reinforce preexisting systemic biases, contributing to the depersonalization of decision-making and eroding worker autonomy. The technical opacity of AI complicates transparency and accountability[4], making it difficult for affected individuals to understand or contest the decisions that affect them. Finally, the strategic economic value of AI technologies encourages deregulatory development paths in which the protection of fundamental rights may be subordinated to the imperatives of innovation and competitiveness.

In sum, AI does not represent a radical rupture but rather an acceleration of longstanding dynamics. Yet, precisely because of its capacity to intensify preexisting issues, it starkly exposes the structural gaps and ambiguities of current privacy regimes. This essay thus offers a critical examination of the principal legal challenges, and – drawing also on the normative legacy of labor law – proposes regulatory strategies capable of safeguarding human dignity and autonomy in an increasingly "datafied" workplace.

[3] On these aspects, see EDPB Opinion 28/2024, adopted on 17 December 2024 pursuant to Article 64(2) GDPR, which addresses critical issues such as the anonymisation of AI models, the use of legitimate interest as a legal basis for the development and deployment of such models, and the consequences of processing unlawfully obtained data during training on the model's subsequent lawfulness. The EDPB emphasises the need for a case-by-case assessment of whether an AI model can be considered anonymous, reiterates the requirement to apply the three-part legitimate interest test (necessity, proportionality, balancing of interests), and affirms that the illegality of training data may compromise the lawfulness of the model itself, unless proper anonymisation has been achieved.

[4] Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information*, Harvard University Press, 2015.

2. *Against AI exceptionalism: a methodological warning for data protection and labor law*

When addressing issues related to privacy and artificial intelligence, it is essential to resist what has aptly been described as "AI exceptionalism"[5] – the growing tendency in legal and policy discourse to frame AI as a radically novel, pervasive, and unpredictable technology that requires a separate and autonomous regulatory framework. Such a perspective risks distorting both the interpretive and normative landscape.

In reality, the concerns raised by AI – privacy violations, surveillance, lack of transparency, and discrimination – are not unprecedented. Rather, they are more extreme, complex, and opaque manifestations of longstanding issues that have already been addressed, albeit imperfectly, by existing regulatory instruments, particularly in labor law. AI has not created these problems; it has merely intensified them, made them more urgent, and harder to ignore.

Rising societal and institutional anxiety about AI has led European policymakers to propose new legislation, such as the AI Act, which establishes dedicated regulatory agencies and outlines governance frameworks that are structurally distinct from existing data protection regimes. Yet the core question is not whether a new law is needed, but whether lawmakers possess a sufficiently comprehensive and accurate understanding of the problems AI poses, and whether they are capable of identifying their true nature. A general or overly procedural – regulation such as the current European approach – risks overlooking the very substantive dimensions that privacy and labor law already seek to govern, despite their limitations.

Artificial intelligence must be understood as part of the broader historical trajectory of the digital transformation of labor relations – an evolution marked by the exponential growth in data collection, processing, and profiling. This trajectory has already prompted regulatory responses through instruments such as the GDPR, national labor statutes, anti-discrimination laws, occupational health and safety regulations, and the recent introduction of algorithmic transparency obligations under EU and domestic law.

It would thus be misguided to assume that privacy and labor law are already fully equipped to handle the challenges of AI, or that all that is needed

[5] Solove, *Artificial Intelligence and Privacy*, in *FLR*, 2025, vol. 77, p. 1 ff.

is an additional layer of protections. That would be akin to building a new floor on an already unstable foundation. At the same time, we must not start from scratch. What is required is a structural reconsideration of existing regulatory paradigms – a critical re-evaluation that acknowledges real discontinuities without neglecting deep continuities.

AI is not a parallel universe, but rather the continuation and intensification of processes that the law has long engaged with and, in part, already regulates.

In the field of labor, this means that the challenges posed by artificial intelligence must be addressed in light of the protections already in place. These protections are not necessarily obsolete, but they require updating, integration, and realignment. In this context, the principle of complementarity set forth by the AI Act plays a crucial role, outlining a regulatory framework that is minimal and non-exhaustive: "minimal" because it does not preclude the adoption of more favorable measures for workers at the national level, including through collective bargaining (Art. 2, §11); and "complementary" because it is not intended to undermine existing EU or national legal frameworks, but rather to operate functionally, facilitating and supporting existing rights and remedies (Recital 9)[6]. The very structure of the AI Act thus rejects an exceptionalist approach and reinforces the need for clear, coherent, and harmonized regulation. The real risk does not lie in the absence of new norms, but in losing direction – chasing the illusion of normative exceptionalism rather than strengthening, evolving, and rendering fully effective the legal framework of labor law in the digital age.

In light of these reflections, the following section identifies and analyses the most pressing challenges currently emerging at the intersection of AI, data protection, and labor law.

3. *Two structural flaws in the approach of privacy law in the age of AI*

The first major flaw in contemporary data protection architecture lies in its continued reliance on a model of individual informational control.

[6] This is expressly confirmed in the provisions concerning the deployer. In particular, it is clarified that the obligation to use the system in accordance with the provider's instructions must not compromise compliance with obligations established by other legal sources (Art. 26, §3, AI Act).

Since its inception, privacy law has largely been built upon the notion that empowering individuals through access to information, consent mechanisms, and post hoc rights – such as access, rectification, and objection – would suffice to safeguard personal autonomy in the digital age.

This logic has increasingly informed labor regulation as well. In recent decades, traditional labor law protections – such as the prohibitions under Article 4 of the Italian Workers' Statute against employer surveillance – have given way to more transparency-based frameworks. Notably, Article 1-bis decree n. 152/1997 embodies a shift from categorical prohibitions to a system premised on prior individual information. Under this model, it is assumed that if a worker is adequately informed about the source of the data collected and the logic of the algorithmic systems used for monitoring or decision-making, they will be better equipped not only to align their conduct with the employer's expectations, but also to exercise their rights more effectively, act autonomously, and contribute responsibly to organizational life.

Yet surprisingly little critical attention has been paid to this model, which continues to rest on the increasingly tenuous assumption that fully informed individuals can meaningfully navigate the complexities of data processing[7]. In practice, workers rarely read privacy notices, and when they do, they are often left with a sense of opacity and powerlessness. Even when privacy statements are read and understood, such awareness proves largely ineffective, as it does not translate into any actual capacity to influence the power structure overseeing data use. Thus, regulatory provisions grounded in the ideal of the "empowered data subject" often reveal their conceptual fragility, exposing a normative framework that remains markedly individualistic in orientation.

This is precisely where labor law – rooted in solidaristic and collective logics – can offer a corrective[8]. It reminds us that power asymmetries in the workplace are not resolved through information alone, but require mechanisms of participation and representation capable of articulating collective interests. Privacy governance in the workplace, therefore, cannot rely exclusively on individual empowerment; it must also incorporate institutionalized forms of worker voice and negotiation.

[7] See Hartzog, Richards, *Privacy's Constitutional Moment and the Limits of Data Protection*, in *Bost. Coll. LR*, 2020, 61, p. 1687 ff.

[8] Corti, *La partecipazione dei lavoratori: avanti piano, quasi indietro*, in Id (a cura di), *Il pilastro europeo dei diritti sociali e il rilancio della politica sociale dell'UE*, Vita e pensiero, 2021, p. 163 ff.

A second, and perhaps deeper, structural flaw in the current regulatory framework lies in its accountability model[9] – an architecture that appears increasingly misaligned with the operational logic of artificial intelligence. Similar to what has occurred in the field of occupational health and safety – where physical or psychological risks arise from work organization – the GDPR views "informational-technological risk" as a direct consequence of adopting digital tools capable of collecting, processing, and utilizing personal data. The GDPR marks a significant evolution beyond the consent-based paradigm, shifting the focus toward the proactive duties of data controllers. These duties – ranging from conducting data protection impact assessments and maintaining records of processing activities to ensuring data minimization and embedding data protection by design and by default – aim to bind organizational conduct to the effective protection of fundamental rights, including those of workers.

However, what is often overlooked in both academic and policy discussions is whether this accountability-based framework remains viable in the face of AI's expansive data demands. Unlike traditional monitoring systems (such as CCTV), AI requires access to substantially larger datasets to function effectively. More importantly, algorithmic decisions are no longer based solely on the data of individual subjects, but on inferential patterns drawn from the aggregation of data across millions of individuals[10]. In this context, the principle of data minimization is not merely difficult to apply – it risks becoming conceptually irrelevant. The issue is not one of non-compliance, but rather of a structural incompatibility between the principle's intent and the technological requirements of AI systems.

Moreover, it is important to highlight that risk analysis and mitigation strategies in the architecture of GDPR remain a unilateral obligation of the

[9] This principle requires the employer, as the data controller, to assess risks in advance and adopt appropriate measures to prevent or mitigate negative consequences. Regardless of the operational autonomy of processing systems, deployers are required to demonstrate the adoption, effective implementation, and continuous monitoring of the risk prevention model. These measures must be documented in the data protection impact assessment (Article 35 GDPR), describing the prevention strategies adopted in accordance with the processing principles set out in Article 5 GDPR. This article represents the only mandatory requirement for the employer to examine technological risks and the measures undertaken to mitigate them.

[10] S. Brown, *Machine Learning, Explained*, in *MIT Sloan School of Management*, 21 april 2021, https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained (last access: 3 may 2025).

data controller, carried out without mandatory participation from trade union representatives of workers. Article 35(9) of the GDPR considers obtaining the opinion of representatives of the affected categories as merely optional.

The AI Act fails to correct the unilateral and individualistic approach that characterises the regulation of artificial intelligence. The Fundamental Rights Impact Assessment (FRIA), as set out in Article 27, is mandatory only for public bodies and private entities providing services of general interest, such as schools, hospitals, or banks. However, it does not apply to deployers who use AI systems in the fields of "employment, worker management, and access to self-employment". During the final approval phase of the Regulation, the provision that would have imposed such an obligation – alongside essential safeguards such as human oversight and consultation – was removed. These elements had formed the protective core of the original legislative proposal (see former Article 29 bis).

Conversely, Article 8 of the Digital Platforms Directive recognizes trade union participation as an added value, imposing an obligation to consult workers and their representatives during risk assessments[11]. While employers are not bound to follow these opinions, the principle of accountability requires them to justify any deviations from the received feedback, ensuring such opinions are documented in the data protection impact assessment.

Another relevant aspect concerns the confidentiality of documents held by employers, an issue frequently encountered both in the privacy impact assessment and in delivering the Risk Assessment Document (DVR) to worker safety representatives. In this regard, Article 8(2) of the Digital Platforms Directive explicitly mandates the delivery of the impact assessment to worker representatives – a requirement absent in both the GDPR and the AI Act.

In this light, AI exposes a latent tension already present in privacy law – between the *ex ante* logic of restraint and a digital infrastructure that is, by design, driven by the continuous expansion of data collection and processing. This contradiction must be squarely confronted if data protection is to remain meaningful in the algorithmic workplace.

[11] Delfino, *Lavoro mediante piattaforme digitali, dialogo sociale europeo e partecipazione sindacale*, in *Federalismi.it*, 2023, 25, p. 171 ff.

4. *Between continuity and disruption: the AI Act and the risk of normative exceptionalism*

Despite the explicit acknowledgment of the AI Act's complementary and minimal character, which affirms the continued validity of pre-existing national and European legislation and encourages their integration (Recital 9 and Article 2(11)), the Regulation still risks, in certain respects, reinforcing the very form of regulatory exceptionalism that ought to be avoided. The Act often treats artificial intelligence as a technology requiring an autonomous and distinct legal framework, rather than as a phenomenon to be governed within existing legal paradigms – chief among them, data protection law. Such an approach may lead to excessive fragmentation, regulatory duplication, and conceptual misalignment, particularly in the domain of labor, where strong safeguards are already in place[12].

This tendency is especially problematic when viewed through the lens of two foundational data protection principles: *purpose limitation* and *data minimization*. The proper functioning of AI systems – especially those relying on machine learning techniques – often presupposes the ingestion and processing of large, heterogeneous datasets. In many cases, the utility and accuracy of such systems increase with the volume and diversity of data they can access. Yet this requirement stands in tension with legal obligations to collect only data that is necessary and relevant for specific, clearly defined purposes. The expansionist logic of AI thus places strain on these core principles, calling into question whether the current legal architecture is structurally equipped to manage such a conflict.

High-risk AI systems, as defined under the AI Act, are subject to a range of ex ante compliance obligations imposed primarily on producers[13]. These include conformity assessments, CE markings, technical documentation, and

[12] *Funditus* M.T. Carinci, Ingrao, *L'impatto dell'AI Act sul diritto del lavoro*, in *DLRI*, 2024, 184, p. 451 ff.

[13] Article 5 AI Act sets out a list of prohibited practices, including emotion recognition in the workplace, untargeted scraping of biometric data, and subliminal manipulation (AI Act, Art. 5, par. 1, a-g), see M.T. Carinci, Ingrao, *cit.*, p. 463. The European Commission's Guidelines on Prohibited AI Practices, published on 4 February 2025, provide detailed interpretations of each prohibited practice and clarify their scope of application. They confirm, among other things, that "deployers" (i.e., employers) are also subject to the prohibitions set out in Article 5. Although non-binding, these guidelines offer valuable interpretative guidance and serve as best practices supporting regulatory enforcement.

risk management protocols. These obligations, modelled on product safety and liability regimes, are intended to ensure that AI systems entering the European market meet defined technical and ethical standards[14]. However, in practice, many of these safeguards rely on internal compliance mechanisms – especially self-assessment by providers[15] – rather than oversight by independent third-party bodies. Notably, Annex III of the AI Act subjects AI systems used in employment, education, and access to essential services to internal control-based conformity assessments that do not involve external certification bodies. As a result, high-risk workplace AI systems may be introduced and operated without meaningful external scrutiny.

While the regulation does introduce certain obligations for *deployers* – such as employers – these remain limited in scope. Employers must ensure that systems are used in accordance with the provider's specifications, and they are tasked with implementing human oversight and suspending use where risks to health, safety, or fundamental rights are identified. However, they are no longer generally required to conduct fundamental rights impact assessments, except in narrowly defined ipotesys. Furthermore, employers bear responsibility for communicating with trade unions and workers prior to the introduction of AI tools, providing information about the system's functions and objectives. This procedural transparency, while welcome, is insufficient on its own to guarantee substantive accountability – particularly when the underlying datasets and algorithms remain inaccessible and opaque.

Despite the AI Act's stated commitment to fundamental rights[16], the regulation does little to integrate the safeguards already present in data protection law. It does not, for instance, ensure that AI systems will be deployed in ways consistent with the GDPR's principles of necessity, proportionality, or fairness. Instead, by positioning AI systems within a distinct regulatory orbit, the AI Act may unintentionally marginalize the GDPR's protective logic – particularly its emphasis on limiting both the quantity and the scope of data collected.

The interdependence between the AI Act and the GDPR is undeniable,

[14] Peruzzi, *Intelligenza artificiale e diritto. Uno studio su poteri datoriali e tecniche di tutela*, Giappichelli, 2023.

[15] With specific reference to "high-risk" systems, the Regulation itself provides that the classification it establishes may be waived under certain conditions and based on a self-assessment conducted by the provider (Art. 6, par. 3 and 4).

[16] Tebano, *Intelligenza artificiale e datore di lavoro: scenari e regole*, in *DLM*, 2024, 3, p. 1 ff.

especially in contexts like employment, where personal data are continuously generated, processed, and evaluated. However, the AI Act fails to provide a coherent framework for reconciling its own risk-based regulatory model with the rights-based logic of data protection. The two systems risk operating in parallel rather than in synergy.

Against this backdrop, the next section turns to a detailed examination of the core tensions between AI deployment in the workplace and the application of data protection principles – focusing in particular on "purpose limitation" (§ 5) and "data minimization" (§ 6).

5. *The erosion of purpose limitation in the age of adaptive AI: from determinism to opacity*

The principle of "purpose limitation" is one of the foundational tenets of the GDPR. It mandates that personal data must be collected for specific, explicit, and legitimate purposes and must not be further processed in ways incompatible with those initial aims, unless a new legal basis is identified. Within the employment context, such a basis is typically found in the employer's "legitimate interest" (Article 6, par. 1(f), GDPR), but never in the consent of the employee – given the inherently unbalanced nature of the employment relationship.

The application of this principle is relatively straightforward in relation to deterministic AI systems – those whose outputs are predictable because they operate based on fixed, pre-programmed rules. In such cases, the employer, acting as "data controller", is required to clearly predefine the purposes of the data processing and ensure these purposes are transparent to the worker.

For example, consider a digital forensics tool (or "e-discovery" system) implemented to protect corporate assets pursuant to Article 4(1) of the Workers' Statute. If such a tool is deployed to automatically scan emails for keywords suggestive of illicit activity with a view to initiating disciplinary proceedings, it cannot subsequently be repurposed for a fundamentally different goal – such as quantitatively tracking employee email traffic to assess performance. Such a shift would constitute a violation of the principle of purpose limitation, unless grounded in a compatible legal basis and properly disclosed to the worker in advance.

This relatively clear framework begins to break down, however, when one considers "non-deterministic" or "adaptive" AI systems – those capable of learning from historical data and modifying their behavior over time without direct human intervention. These systems refine their outputs based on the patterns they detect, evolving continuously in both how they classify behavior and how they prioritize risk. As such, they may eventually requalify a worker's conduct based on new patterns, reclassify legitimate anomalies as suspicious, or even shift their internal thresholds for intervention in response to emerging correlations in data. What was once considered normal may later be flagged as deviant – not because of any actual change in conduct, but due to the model's evolving internal logic.

To illustrate, consider again an AI system deployed under the justification of protecting corporate assets. If this system is designed for cybersecurity purposes – such as an AI-driven threat detection platform – it may initially be calibrated to detect specific risk indicators, like keywords in emails. Over time, however, it may begin to flag actions such as transferring files from a different device, accessing records outside business hours, or logging in from a new location. While each of these behaviors may be entirely legitimate (e.g., due to remote work or workstation changes), the system's adaptive functioning may nevertheless classify them as suspicious.

The result is a form of surveillance that no longer targets specific, predefined conduct but instead operates through probabilistic profiling and open-ended anomaly detection. Workers, in turn, may be compelled to justify legitimate actions simply because they deviate from the system's expectations, thus experiencing a form of control that is both diffuse and opaque. This transforms the monitoring process from one of targeted oversight to one of continuous behavioral evaluation based on shifting and unpredictable criteria.

Moreover, the reliance on such systems places additional burdens on corporate IT personnel, who are now expected to continuously audit and recalibrate algorithmic outputs as part of their human oversight responsibilities. More fundamentally, however, adaptive AI challenges the very possibility of complying with the principle of purpose limitation: if the system's logic evolves, and if its operational focus shifts over time, how can the purposes of data processing be clearly defined and communicated in advance?

In this context, the legal obligation to provide clear and intelligible information to workers about how their data will be used becomes increasingly

difficult to fulfil. The dynamic nature of adaptive AI undermines the principle of foreseeability in data processing, revealing a structural incompatibility between the regulatory expectations of purpose specificity and the technical architecture of machine learning-based monitoring systems. This incompatibility demands urgent regulatory attention, particularly in the field of labor law, where the stakes for fundamental rights are especially high.

6. *Challenging the principle of data minimization in ai-driven workplaces*

Article 5(1)(c) of the GDPR enshrines the principle of "data minimization", requiring that personal data be "adequate, relevant, and limited to what is necessary in relation to the purposes for which they are processed." This obligation is reinforced by the technical principles of "privacy by design" and "by default", which demand that any technology employed by a data controller be configured to restrict data collection to the strict minimum required for achieving a predetermined, legitimate objective.

Beyond technical configuration, this principle also extends to the organizational dimension of data governance. Data controllers are encouraged to implement policies that favor targeted or randomized monitoring strategies over indiscriminate or continuous surveillance practices. In the employment context, this would entail preventive interventions oriented toward discouraging misconduct, rather than sustained, high-intensity tracking of individual behavior.

However, in contrast to the principle of purpose limitation – whose applicability depends to some extent on whether the AI system in question is deterministic or non-deterministic – the principle of data minimization is consistently undermined by AI systems across the board. Indeed, AI technologies, even those of moderate complexity, function optimally only when fed with large and diverse datasets. Their efficacy, and in some cases their very operation, presupposes a volume and granularity of data that is structurally at odds with the minimization imperative.

Illustrative examples abound. In the gig economy, platforms systematically collect and process workers' geolocation data, attendance records, acceptance or refusal of shifts, and delivery times in order to generate behavioral profiles and performance scores. In more traditional employment sectors, the widespread adoption of "fall detection" systems – typically based

on accelerometers embedded in wearable devices – entails the continuous monitoring of bodily movement patterns to trigger automatic alerts in the event of presumed physical distress. Similarly, the integration of "smart personal protective equipment" (PPE) for health monitoring – where the occupational physician acts as data controller – exemplifies a legal use of remote tracking that nonetheless challenges the boundaries of proportional data collection.

From a regulatory standpoint, the AI Act stipulates that any AI system, deterministic or otherwise, used for behavioral profiling in the workplace will automatically be classified as "high-risk" under Article 6(3)(d). While this classification reaffirms the requirement for compliance with the GDPR, it stops short of imposing a fully integrated normative framework on producers and deployers – one that would substantively guarantee compliance with the principles of purpose limitation and minimization. As such, the regulation remains largely procedural, leaving core normative tensions unresolved.

Responsibility for resolving these tensions, therefore, rests with the deployer, who acts as the data controller and is bound by the GDPR's accountability framework. This implies a proactive duty to identify, implement, and document technical and organizational measures aimed at reducing the risks associated with AI-driven data processing. These safeguards must be explicitly included in the "data protection impact assessment" (DPIA), and where compliance with the minimization principle cannot be reasonably assured – even through mitigation –profiling activities should not proceed. The mere operational value or perceived necessity of an AI system does not absolve employers from their legal obligation to protect the fundamental rights of workers.

Beyond the legal duty, the principle of data minimization should inform broader organizational decisions about the appropriateness of introducing AI tools in place of existing human supervision or simpler, non-adaptive technologies. Minimization must not be treated as a mere technical constraint but as a substantive ethical and legal consideration embedded within the corporate decision-making process itself.

Finally, it bears repeating that the enforceability of this principle would be significantly strengthened by embedding collective oversight mechanisms in workplace governance structures. Had the European regulatory framework mandated structured forms of worker consultation or codetermined

decision-making regarding the deployment of AI-based monitoring systems, the proportionality standard embodied in the data minimization principle would have been afforded a more effective and enforceable status.

7. *Automated decision-making in the workplace: limits of individual rights and the need for collective oversight*

The use of Artificial Intelligence (AI) in the workplace introduces significant challenges in terms of data protection and the regulation of decision-making processes. In particular, automated decision-making (ADM) systems – whether deterministic, non-deterministic, or generative – are increasingly used to manage tasks ranging from hiring to performance evaluation, scheduling, and even disciplinary measures. These systems process large amounts of data and generate outputs that can substantially affect the rights and freedoms of workers. While the General Data Protection Regulation (GDPR) and national labor law have introduced specific protections, a deeper analysis reveals the structural fragility of current safeguards, particularly when ADM systems are hybrid and when collective rights are neglected in favor of individual ones.

Under Article 22(1) of the GDPR, data subjects have "the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her". Paragraph 3 of the same article requires that individuals subject to such decisions must be able to obtain human intervention, express their point of view, and contest the decision. Complementary obligations under Articles 13(2)(f), 14(2)(g), and 15 ensure ex-ante and ex-post transparency[17].

However, these safeguards are limited to decisions made solely by automated means, thereby excluding a broad spectrum of hybrid systems, where human oversight is nominal or merely formal. As scholarly literature highlights, the presence of a human "in the loop" does not necessarily mitigate the opacity or potential bias of algorithmic systems, especially when human operators lack the technical expertise to evaluate algorithmic outputs

[17] Wachter, Mittelstadt, Floridi, *Why a Right to Explanation of Automated decision-making Does not Exist in the General Data Protection Regulation*, in *IDPL*, 2017, 7, 2, p. 76 ff.

critically. Automation bias, where human decision-makers defer to algorithmic recommendations, often renders the human check ineffective[18].

Moreover, the exercise of individual rights under Article 22, such as access and contestation, proves largely inadequate in practice. Workers rarely possess the necessary information, time, or resources to interpret complex algorithmic logics or source code. Even when access is granted, trade secrets and intellectual property protections – recognized under Directive (EU) 2016/943 and reinforced by Recital 63 and Article 15(4) GDPR – often limit the disclosure of meaningful insights into algorithmic functioning[19].

Given these limitations, it is necessary to reconceptualize oversight not as an individual endeavor but as a collective right. Article 1-bis of Legislative Decree 152/1997, as amended by Legislative Decree 104/2022 and then by Legislative Decree 48/2023, partially addresses this issue by requiring employers to inform both individual workers and trade unions about the use of fully automated decision-making systems. However, by limiting the obligation to "fully" automated systems, the law enables circumvention where minimal human involvement is maintained.

A more effective solution would be to strengthen the role of trade unions by allowing them, with the aid of technical experts, to conduct independent audits of ADM systems. This should include access to technical documentation, training datasets, and, where appropriate, to portions of the source code – not to replicate or exploit the software, but to verify compliance with labor and data protection rights. Such oversight could be carried out under conditions that protect intellectual property and trade secrets, following the model of controlled access found in Article 22(3) GDPR and the GDPR-Recital 63 limitations.

In conclusion, hybrid ADM systems challenge the foundational assumptions of both data protection law and labor law. Individual rights are insufficient to counterbalance the algorithmic opacity and the systemic nature of decisions affecting workers. Therefore, the regulatory architecture must

[18] Kaminkski, Urban, *The Right to Contest AI*, in *CLR*, 2021, 121, p. 1957 ff.

[19] See Court of Justice of the European Union, 27 February 2025, CK, Case C-203/22, regarding the right of access under Article 15(1)(h) GDPR, clarified that the data subject is entitled to receive meaningful and comprehensible information about the actual logic applied in automated processing. This applies even when the information involves elements protected as trade secrets, the disclosure of which must be assessed by the competent supervisory authority or court through a balancing of the rights and interests at stake.

evolve to include stronger collective guarantees, more robust technical transparency mechanisms, and a structural rethinking of the human–machine relationship in employment contexts. Only by moving beyond individualistic paradigms can the law meaningfully respond to the challenges posed by artificial intelligence in the workplace.

Abstract

Artificial Intelligence is reshaping the workplace, but the legal framework designed to protect workers' privacy is struggling to keep pace. This article challenges the notion that AI requires exceptional legal treatment, arguing instead that it magnifies long-standing tensions within data protection and labor law. It highlights two core structural flaws: the illusion of individual control over personal data and the limits of accountability in algorithmic environments. As the AI Act introduces new rules, it risks sidelining key GDPR principles – such as purpose limitation and data minimization – by failing to confront the complexity of adaptive and non-deterministic systems. The paper focuses on the critical issue of automated decision-making, where existing safeguards, like Article 22 GDPR, often fall short. It calls for a shift from individual empowerment to collective oversight, empowering trade unions to scrutinize algorithmic systems – including their source code – while navigating the sensitive balance with trade secret protections.

Keywords

Artificial Intelligence, GDPR, Automated decision-making, Trade Union, Collective oversight.

Olga Rubagotti

Deconstructing the Labour-Productivism Nexus: A Capability Approach to Labour Law and Industrial Relations Institutions*

Contents: **1.** Introduction. **2.** Reinterpreting Labour Law Institutions Through the Capability Approach in view to Delegitimise Productivism. **3.** The Role of Bilateral Bodies in Enhancing Workers' Freedom of Choice within the Labour Market. **4.** The Role of Occupational Welfare in Enhancing Workers' Freedom of Choice at the Employment Relationship Level. **5.** Challenges and Limitations. **5.** Discussion and Conclusion.

1. *Introduction*

The transition to climate neutrality is not only an environmental necessity but also a fundamental human rights issue. Achieving a sustainable future requires upholding the right to live in a healthy environment and reducing pollution-related mortality rates, which disproportionately impact disadvantaged social groups[1].

* This paper has been written as part of the *Riccardo Del Punta Scholarship*, and an earlier version of the paper has been presented at the ULB seminar on 17 April 2025, held at the *Centre de Droit Public et Social* of the *Université libre de Bruxelles*.

[1] ARABADJIEVA, BARRIO, *Rethinking social protection in the green transition Implementing the Council Recommendation on fair transition*, ETUI Policy Brief, 2024, 10; HEKMATPOUR, LESLIE, *Ecologically Unequal Exchange and Disparate Death Rates Attributable to Air Pollution: A Comparative Study of 169 Countries from 1991 to 2017*, in *ER*, 2022, 212; AKGÜÇ, ARABADJIEVA, GALGÓCZI, *Why the EU's patchy 'just transition' framework is not up to meeting its climate ambitions*, ETUI Policy Brief, 2022, 06; BARBERA, *Giusta transizione ecologica e diseguaglianze: il ruolo del diritto*, in *DLRI*, 2022, n. 175, p. 339 ff.; ROSSIGNOLI, *Giustizia Ambientale. Come sono nate e cosa sono le disegnaglianze ambientali*, Castelvecchi, 2020.

Labour law scholars have long debated how labour law can ensure that this major shift in industrial capitalism aligns with principles of social justice[2]. More recently, some have argued that labour and social law should integrate environmental protection as a core objective rather than treating it as an external factor[3]. This perspective expands the role of labour law beyond merely mitigating the negative effects of decarbonisation policies on workers and businesses. Instead, it advocates actively shaping new forms of production and employment that support environmental sustainability[4]. Labour law should not only promote a fair distribution of the benefits and costs of the transition[5], but also have a direct ecological impact[6].

A key argument in this debate is that if workers had the freedom to choose between an environmentally sustainable job and a carbon-intensive job, they would likely opt for the former[7]. In other words, if we were in a hypothetical state of nature – meaning in a condition of absolute freedom of individual choice and equality among rational people that disregards their real-life-status – the moral and rational criterion guiding individual decisions would be oriented toward environmental sustainability.

[2] Aa.Vv., *Introduction: The Labour-Environment Nexus - Exploring New Frontiers in Labour Law'*, in *IJCL,* 2023, n. 3&4, p. 271 ff.; See also the special issue ed. by Zbyszewska in 2018, for *CLLPJ*, with contributions by Zbyszewska, Routh, Chacartegui, Tomassetti, Kullmann, 2018, 40, p. 1 ff.; Doorey, *A transnational law of just transitions for climate change and labour*, in Blackett, Trebilcock (eds.), *Research Handbook on Transnational Labour Law*, Edward Elgar, 2015, p. 6; Sen, *Sustainable Development and Our Responsibilities*, in *PO*, 2010, XXVI, 98, p. 134.

[3] Caruso, Del Punta, Treu, *Il Diritto del Lavoro nella giusta transizione. Un contributo "oltre" il manifesto*, in *WP C.S.D.L.E. "Massimo D'Antona"*, 2023; Caruso, Del Punta, Treu, *Manifesto for a sustainable labour law*, in *WP C.S.D.L.E. "Massimo D'Antona"*, 2020.

[4] Caruso, Del Punta, Treu, *Il Diritto del Lavoro del*, cit., pp. 15, 17 and 45; Dermine, Dumont, *Conclusion: Utopias for an Ecological Social Law and How to Get There*, in Bueno, Haar, Zeki (eds.), *Labour Law Utopias: Post-Growth and Post-Productive Work Approaches,* Oxford University Press, 2024; L. Zoppoli, *Derecho laboral y medioambiente: stepping stones para un camino dificil*, in this journal, 2023, I, p. 265; Dermine, *Towards a sustainable social law: what role for legal scholars?*, in *IJCL*, 2023, vol. 39, n° 3, pp. 321 and 322.

[5] Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-century Economist*, Random House, 2017; Moore, *The Rise of Cheap Nature*, in Moore (ed.), *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism*, Kairos, 2016.

[6] Supiot, *Labour is not a commodity: The content and meaning of work in the twenty-first century*, in *ILR*, 2021, 160, 1, p. 10.

[7] Tomassetti, *Diritto del lavoro e limiti ecologici alla crescita*, in Zilio Grandi (ed.) *Organizzazione dell'impresa e qualità del lavoro Atti del convegno Organizzazione dell'impresa e qualità del lavoro, Venezia 8 maggio 2023*, Adapt, 2024, p. 25.

The idea that rational, equal and free individuals, in exercising their freedom of choice, would ethically opt for environmental sustainability is grounded in the theories of Dewey[8], as partially expanded by Sen[9]. Dewey argued that freedom of choice is neither an abstract nor a purely individualistic concept. Instead, it is intrinsically linked to the capacity to make informed and responsible decisions within a framework that fosters social progress and collective well-being[10].

This theory is premised on the idea that human beings are driven not solely by the satisfaction of self-centred desires or the maximisation of personal gain, but also by the pursuit of objectives shaped by beliefs, emotions, and sentiments. These human attributes can inspire altruism and compassion[11]. Furthermore, human beings are conceived as capable of articulating their own vision of the good within a moral framework that does not rely exclusively on abstract principles, but it is equally attentive to the realities of specific circumstances[12].

Moreover, environmental sustainability is not only an ethical concern. Environmental sustainability is a condition for human flourishing and well-being, ensuring the possibility for human development and the reproduction of the social sphere of current and future generations[13]. It is therefore reasonable to assume that – in a condition of full freedom of choice, and ceteris paribus – workers would certainly choose for a sustainable job, corresponding to the ILO definition of green jobs[14].

A progressive interpretation of the just transition principle should therefore be deeply rooted in the value of freedom[15], emphasising that workers, their families, and local communities should be empowered to freely choose for environmental sustainability. At minimum, they should not be forced to

[8] Dewey, *Theory of Valuation*, Chicago University Press, 1939.

[9] Sen, *cit.*, p. 130.

[10] Dewey, *cit.*; Bonvin, Laruffa, *Transforming Social Policies and Institutions in a Capability Perspective: Agency, Voice and the Capability to Aspire*, in *JHDC,* 2024, *25*, 4, p. 575 ff.

[11] Dewey, *The Study of Ethics*, in *The Early Works*, 1882-1898, Carbondale & Edwardsville, Southern Illinois University Press, 2023, vol. 4.

[12] Zimmerman, *Capabilities et development de l'individualitè, De Dewey a Sen, la voie d'un pragmatism critique*, in *PR*, 2020, 3, p. 134 ff.

[13] Sen, *cit.*, p. 130.

[14] Ilo, *Green jobs, green economy, just transition and related concepts: A review of definitions developed through intergovernmental processes and international organizations*, Geneva, June 2023, p. 4 ff.

[15] Supiot, *cit.*, p. 10.

choose between decent work and environmental sustainability[16]. This further implies that governments should make any effort to ensure that the right to a decent work and the right to health and environmental sustainability are not in conflict and their free exercise is guaranteed simultaneously at the highest level.

If freedom of choice is critical to a just transition, then a capability approach to labour law might help unveil the potential of this discipline to promote environmental sustainability[17].

Reconceptualising labour law through the lens of the capability approach can support workers' freedom to pursue eco-socially valuable jobs (public work, non-profit work, care work)[18] and increasing also workers' non-productivist time spaces already protected by labour and social law[19]. This perspective can challenge the traditional link between labour and productivism and simultaneously deconstructs the labour law-productivism nexus.

Productivism follows an economic logic that prioritises maximising production over social and ecological well-being[20], considering as valuable only those jobs that increase the GDP[21]. Labour law is ambivalent towards productivism. It has historically built a legal framework around wage labour that, while protecting workers from commodification and exploitation, also reinforces market-driven productivity[22]. Critical scholars have observed that labour law tends, on one side to tie wage labour to workers' participation in production without recognising the social value of non-productive work[23],

[16] Tomassetti, *Diritto del lavoro e limiti ecologici*, cit., pp. 25 and 26.; Barbera, *Giusta transizione*, cit., p. 339 ff.

[17] Sen, *cit.* p. 134; Bonvin, Laruffa, *Towards a Capability-Oriented Eco-Social Policy: Elements of a Normative Framework*, in *SPS*, 2021, 21(3), p. 484 ff.

[18] Bueno, *From Productive Work to Capability-Enhancing Work: Implications for Labour Law and Policy*, in *JHDC*, 2022, 23, 3, pp. 354-372.

[19] Dermine, *Towards a Sustainable Social Law*, cit., p. 335.

[20] Bueno, *The Value of Work in Labour Law*, in Bueno, Haar, Zekic (eds.), *cit.*, p. 116 ff.

[21] Audier, *L'âge productiviste. Hégémonie prométhéenne, brèches et alternatives écologiques*, La Découverte, 2019.

[22] Dermine, *Towards a Sustainable Social Law*, cit., pp. 315 ff; Dermine, Dumont, *A Renewed Critical Perspective on Social Law: Disentangling Its Ambivalent Relationship with Productivism*, in *IJCL*, 2022, 38, 3, p. 237 ff.

[23] Zbyszewska, Routh, *Challenging Labour Law's 'Productivity' Bias Through a Feminist Lens: A Conversation*, in Blackham, Kullmann, Zbyszewska (eds.), *Theorizing Labour Law in a Changing World: Towards Inclusive Labour Law*, Hart, 2019, p. 245 ff.

and on the other side it fails to distinguish between work that generates socio-ecological benefits and work that contributes to environmental degradation[24]. This lack of differentiation strengthens productivist logic without questioning its long-term social and environmental impact[25].

Such a paradox reveals an inherent contradiction: economic growth can enhance capabilities, but productivism and the concurrent irrational idea of unlimited economic growth in a finite planet constrains them by limiting workers' freedom choices and environmental sustainability[26].

This article seeks to address and unravel this contradiction by showing how reconceptualising labour law in the light of the capability approach can help de-legitimise productivism rationales by ensuring that workers' freedom of choice supports economic models that balance ecological preservation with social justice[27]. Whilst recognising that a capability approach to labour law has the potential to deconstruct the nexus between labour law and productivism, this article also underscores a range of critical issues that presently pose significant barriers to such normative goal.

The main argument behind this article is that the emphasis on freedom of choice should be integrated with the normative goal to rethink our social and welfare model[28], and our understanding of the meaning of work[29], in a way to satisfy human needs within the ecological boundaries.

By analysing certain labour law and industrial relations institutions, this article will show that applying the capability approach to labour law offers a potential way to shift beyond productivism[30]; its emphasis on promoting of freedom of choice[31] for work with a socio-ecological positive value can

[24] Zbyszewska, *Regulating Work with People and 'Nature' in Mind: Feminist Reflections*, in *CLLPJ*, 40,9, 2018, p. 9 ff.; Bueno, *The Value of Work*, cit.

[25] L. Zoppoli , *Derecho laboral*, cit., p. 254.

[26] Del Punta, *Labour law and the capability approach*, in *IJCL*, 2016, 4, p. 383 ff.; Del Punta, *Leggendo "The idea of justice", di Amartya Sen*, in *DLRI*, 2013, 2, p. 197 ff.

[27] Caruso, *Capability e diritto del Lavoro: non solo Teoria. Dialogando con Riccardo del Punta*, in *WP C.S.D.L.E "Massimo D'Antona"*, 2024, 479, p. 9.

[28] Galgóczi, Pochet, *Just Transition and Welfare States: a Largely Unexplored Relation*, in *SL*, 2023, 3, 165, p. 46 ff.; Arabadjieva, Bugada, Chacartegui, Tomassetti, Zbyszewska, *cit.*, p. 271 ff.

[29] Langille, *Labour Law beyond the Growth and productivism: an introduction*, in Bueno, Haar, Zekic (eds.), *cit.*, p. 1 ff.

[30] Sen, *cit.*, p. 130; Dermine, Dumont, *A Renewed Critical Perspective*, cit., p. 237 ff.

[31] Bueno, *From Productive Work to Capability*, cit.

also restore centrality to workers as human beings, emancipating labour law from the logic of productivism[32].

The analysis is structured as follows: Section 2, premised on the notion that all labour law institutions can be re-evaluated through the lens of the capability approach, examines the contribution of industrial relations institutions, specifically bilateral bodies and occupational welfare, to enhancing workers' freedom of choice and dismantling the labour law-productivism nexus at both the labour market and employment relationship levels. Section 3 explores the role of bilateral bodies in safeguarding freedom of choice within the labour market through vocational training programs and partnerships with employment services. Section 4 focuses on the specific contribution of occupational welfare to enhancing this freedom at the employment relationship level by leveraging wage, organisational, and financial tools. Section 5 provides critical reflections on the limitations of these two industrial relations institutions, particularly concerning its scope and effectiveness in empowering workers' freedom of choice and consequently in re-building a labour which integrate environmental protection as one of its core objectives. Section 6 discusses the findings and concludes.

2. *Reinterpreting Labour Law Institutions Through the Capability Approach in view to Delegitimise Productivism*

Scholars have argued that all labour law institutions can be reinterpreted through the lens of the capability approach[33].

In his essay "Labour Law and the capability approach", Del Punta proposed a taxonomy of the capabilities from a labour law perspective – one that serves the purpose to build a new foundational basis of labour law[34]. Considering the systems of labour law in Western democracies, he identifies five groups of capability[35].

[32] Dermine, Dumont, *A Renewed Critical Perspective*, cit., p. 237 ff.

[33] Del Punta, *Labour law and*, cit., p. 383 ff.; Del Punta, *Is the Capability Theory an Adequate Normative Theory for Labour Law?*, in Langille (ed.), *The Capability Approach to Labour Law*, Oxford Academic, 2019; Caruso, *Capability e diritto del Lavoro*, cit.; Langille, *Introduction: The Capability Approach to Labour Law - Why are We Here?*, in Langille (ed.), *The Capability Approach*, cit.

[34] Del Punta, *Labour law and*, cit., p. 391.

[35] Del Punta, *Labour law and*, cit., p. 392.

a) *capability for work*: the capability of having a fairly paid job, in proportion to the quantity and quality of work sufficient for the necessities of life; b) *capability for human respect and dignity*: the capability of having working conditions which are compatible with the worker's health and safety and respectful of their personal dignity as a human being; c) *capability for professional skills*: the capability of having adequate occupational training and being included in organizational production systems which respect and enhance the value of the worker's knowledge and skill; d) *capability for work-life balance*: the capability of enjoying a sufficient amount of work-free time, a fortiori in the event of needs related to illness/accident and maternity/paternity or other relevant personal requirements; e) *capability for voice*: the capability of joining trade unions and performing collective actions in order to defend their interests.

Among Del Punta's taxonomy, there are three groups of capabilities with a clear and direct environmental implication: 1) the capability for professional skills; 2) the capability for human respect and dignity; 3) and the capability for work-life balance.

1) Capabilities for *professional skills* are enhanced by all those labour law institutions and rules that increase workers' access to employment opportunities, thereby broadening them[36]. Promoting *capabilities for professional skills* within the labour market entails enhancing employability and freedom of choice for workers, primarily through vocational training, active labour market policies, and passive labour market measures[37].

2) Capabilities related to *human respect and dignity*, as well as 3) *work-life balance*, are supported by labour law institutions and regulations specifically designed to improve working conditions while fostering both professional growth and human development[38]. These include social security and occupational welfare, flexible working arrangements, and work–life balance policies – all of which promote spaces of freedom from work, restoring time to

[36] Caruso, *Occupabilità, formazione e capability nei modelli giuridici di regolazione dei mercati del lavoro*, in *DRLI*, 2007, 113, pp. 20 ff. and 34 ff.

[37] Rustico, Tiraboschi, *Employment Prospects in the Green Economy: Myth and Reality*, in *IJCL*, 2010, 26, 4, p. 369 ff.; Scott, *Future skills needs for the green economy: some starting points*, *Third Generation Environmentalism*, 2008, 3G, p. 5; Tyros, Andrews, De Serres, *Doing green things: skills, reallocation, and the green transition*, in *Oecd Ec. Dep.WP*, n. 1763, OECD Publishing, Paris, 2023; Oecd, *Greener Skills and Jobs*, in *Oecd GGS*, OECD Publishing, Paris, 2014.

[38] Caruso, *Capability e diritto del Lavoro*, cit., pp.14 and 15.

the individual and enabling autonomous choice within the employment relationship.

How can these groups of capabilities contribute to environmental sustainability?

A) From a labour market perspective, vocational training is widely recognised as a key pillar of a just transition[39]. For example, EU Regulation 2021/1056, which established the Just Transition Fund (JTF), provides funding aimed at developing skills for green jobs through training, re-skilling and up-skilling programmes. This is intended to address the social, occupational, economic, and environmental impacts of the transition towards the European Union's environmental sustainability objectives[40]. Similarly, the role of vocational training is emphasised in the European Council Recommendation on Ensuring a Fair Transition Towards Climate Neutrality[41].

Training programmes enhance workers' employability in the green economy by reskilling or upskilling those displaced by decarbonisation policies, such as employees in the fossil fuel sector or other polluting industries. Where jobs are lost due to due to environmental transition, training programmes can support their transition into new, sustainable roles aligned with climate neutrality goals. Without adequate training, workers in declining industries risk long-term unemployment or precarious work, which undermines the social fairness of climate policies. Conversely, a well-designed skills development strategy is essential for a just transition, balancing environmental objectives with workers' rights and the promotion of decent work.

Active labour market policies support both workers and firms in adapting to changes brought about by the greening of the economy. These policies provide crucial services such as information, guidance, and job-matching support[42]. In this context, the OECD has recently emphasised the importance of an efficient and effective labour market activation strategy. A key

[39] ILO, *Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies For All*, 2015, pp. 9, 10 and 12 to 17.; COM (2021) 801, *Ensuring a Fair Transition Towards Climate Neutrality*, p. 4 ff.

[40] 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*, 2024, p. 15 ff., particularly, p. 19.

[41] COM (2021) 801, p. 27, pt. (5), lett. C) and 2022/C 243/04, pt. (5), lett. C) - pt. (19).

[42] OECD, *Good Jobs for All in a Changing World of Work: The OECD Jobs Strategy*, OECD Publishing, Paris, 2018.

component involves policies that encourage individuals to actively seek and accept suitable employment, consistent with just transition principles. This is achieved through incentive structures embedded in tax and welfare systems, alongside benefit-linked job-search obligations.

At the same time, actions aimed at increasing job opportunities, such as job-search assistance and subsidised employment, are also vital[43]. For example, employment services can offer targeted support to help individuals transition smoothly into new roles, particularly within emerging sustainable industries.

Passive labour market policies play the same role. Strong safety nets (e.g., unemployment benefits, short-time work arrangements and pensions), for example, protect workers displaced by decarbonisation, giving them financial stability while they reskill or transition into new jobs. The same goes for universal basic income: it can reduce the level of workers' dependency from fossil fuel jobs.

Beyond supporting the shift from fossil-fuel jobs to green jobs, these institutions support the transition towards social reproductive labour, including caregiving work, non-profit activities and so-forth. Critical scholars have recently argued that – far beyond the flawed category of green jobs[44] – social reproductive work is the main horizon to deconstruct the labour law-productivism nexus, building a more sustainable labour law.

B) At the level of the employment relationship, creating dedicated time-spaces that allow workers freedom from work is essential to the process of de-commodifying labour[45]. Reducing working time, introducing flexible work arrangements, and enhancing workers' autonomy[46] – enabling them to tailor their schedules to individual needs – encourages a shift in focus from purely productivity-driven goals to the prioritisation of well-being, family life, and personal development.

For example, policies that introduce shorter working weeks and reduce standard working hours provide workers with greater opportunities to participate in caregiving, engage with their communities, and adopt more sustainable lifestyles. By limiting the time spent in wage labour, such measures

[43] Keese, Marcolin, *Labour and social policies for the green transition: A conceptual framework*, in *OECD Soc. Emp. and Migr. WP*, OECD Publishing, Paris, 2023, n. 295, p. 36.

[44] Tomassetti, *Diritto del Lavoro e limiti*, cit., p. 27; Semenza, *La retorica dei green jobs*, in *DLRI*, 2022, 175, p. 359 ff.

[45] Dermine, *Toward a sustainable social law*, cit., p. 315 ff.

[46] Caruso, *Capability e diritto del Lavoro*, cit., pp.14 and 15.

increase the availability of time for activities that exist outside market structures and productivity imperatives[47].

While existing labour and social law instruments – when reinterpreted through the lens of the capability approach – hold significant theoretical potential to support the development of a socio-ecological labour law and to challenge the productivist model, their practical implementation relies on the active involvement of public authorities and the industrial relations system, each within their respective spheres of influence[48]. Both actors play a critical role in strengthening mechanisms that support socio-ecological activity, improving workers' ability to exercise choice over both the quality and quantity of their work. This includes adapting roles and responsibilities to align with sustainable practices and fostering employment opportunities that prioritise environmental and social sustainability, while simultaneously enhancing workers' well-being and strengthening community resilience.

In this connection, our analysis will concentrate on the role of Italian industrial relations institutions, with a particular focus on *bilateral bodies* and *occupational welfare* in advancing workers' autonomy, contributing to the establishment of a labour law framework independent of productivism. Both institutions have been chosen due their function to address workers social needs and their power to implement global social protection standards as well as meeting sustainability goals[49].

The sections below analyse how these two industrial relation institutions allowing for tailored, worker-centric protections may contribute in building a labour law which integrate the environmental protection as one of its core objective.

[47] Frayne, *Stepping outside the circle: the ecological promise of shorter working hours*, in *GL*, 2016, 20, 2, p. 197.

[48] L. Zoppoli, *Derecho laboral y*, cit., pp. 265-266.

[49] Santoni, *Tra impresa e territorio: welfare aziendale e sostenibilità in Italia*, in Maino (ed.), *Agire insieme. Coprogettazione per cambiare il welfare*, *Sesto Rapporto sul Secondo Welfare in Italia*, Percorsi di secondo welfare, 2024.

3. *The Role of Bilateral Bodies in Enhancing Workers' Freedom of Choice Within the Labour Market*

Based on the theoretical discussion developed in Sections 1 and 2, bilateral bodies can contribute to workers' freedom of choice within the labour market, both through re-professionalisation programmes and through their collaboration with job-seeking services. We have seen that, in principle, workers who benefit from reskilling and upskilling programmes are less dependent on the fossil-fuel economy and other polluting industries and jobs. In line with the underlying assumption of this article, they are potentially more free to choose employment in climate-neutral sectors and occupations.

Bilateral bodies, established through agreements between trade unions and employers' associations, play a key role in improving working conditions by providing shared services and interventions in the labour market[50]. Scholars define bilateral bodies as organisational structures within the industrial relations system, created to address workers' specific needs, echoing the founding mission of the labour movement[51]. A core function of bilateral bodies is their involvement in vocational training and active labour market policies, acting as intermediaries between labour supply and demand. Italian legislation offers a clear example in this regard. Article 2, letter b), of Legislative Decree 276/2003 formally recognises the role of bilateral bodies in employment services. This includes facilitating access to initial and continuing training – often co-funded by state or regional entities – managing inter-professional training funds (Article 118 of Law 388/2000)[52], which are the primary mechanism for continuous training in Italy[53], and administering bilateral funds (Article 12, paragraph 4 of Legislative Decree 276/2003) to support job transitions and upskilling.

[50] See the special issue *Gli enti bilaterali: Mercato del lavoro e rappresentanza sindacale*, in *LD*, 2003, n. 2.

[51] M. Napoli, *Gli enti bilaterali nella prospettiva di riforma del mercato del lavoro*, in *Jus*, 2003; M. Napoli, *Riflessioni sul ruolo degli enti bilaterali nel decreto legislativo 10 settembre 2003*, *in Jus*, 2005, n. 276; see also Del Punta, *Enti bilaterali e modelli di regolazione sindacale*, in *LD*, 2, 2003, pp. 219-222; M. Napoli, *Diritto del lavoro e riformismo sociale*, in *LD*, 2008, 2, pp. 337-340;

[52] D'ascenzio, *La formazione nel settore della somministrazione di lavoro in Italia*, in *Professionalità Studi*, ADAPT University Press, 2017, 2/I, p. 89 ff.

[53] Di Corrado, *I Fondi Paritetici Interprofessionali*, in *DPL*, 2016, 12, p. 785 ff.; Franzosi, Premutico, *Analisi del sistema dei fondi interprofessionali e possibili prospettive*, in *Professionalità Studi*, ADAPT University Press, 2017, 2/I, p. 26 ff.

By offering industry-specific training – covering areas such as digital skills, health and safety, and green skills for sustainable development – bilateral bodies play a vital role in helping workers reskill and adapt to both technological and environmental transformations. Over the past twenty years, bilateral bodies have become a key pillar of labour market governance and policy in Italy[54]. By promoting labour market policies in cooperation with employment services, bilateral bodies contribute to the development of training and guidance programmes tailored to the evolving demands of the labour market. These policies enable a joint approach: bilateral bodies provide the training component, while employment services support active job search efforts.

As Rustico and Tiraboschi highlight in their work on green jobs, the transition to a greener economy requires not only the creation of new employment opportunities, but also substantial investment in equipping workers with the specific skills needed for environmental sustainability and green technologies[55]. Without access to such training opportunities, workers remain more dependent on the fossil-fuel economy or other unsustainable forms of employment.

In this context, bilateral bodies can serve as a bridge between labour market needs and workers' human development, promoting targeted training pathways that encompass technical, digital, and environmental skills. In this respect, the activities of bilateral bodies may contribute to deconstructing the labour–productivism nexus by facilitating access to green employment and, crucially, to reproductive and sustainable professions. These roles challenge the productivity-centred conception of work, helping to ensure that economic growth remains within environmental boundaries.

Practical examples of such programs include courses on renewable energy system installation, sustainable waste management, or the adoption of eco-friendly agricultural practices. Additionally, reskilling and training programs might include training initiatives that equip workers for roles in community support, such as social workers or coordinators of local projects. These positions focus on aiding individuals rather than enhancing economic productivity. Other examples include programmes aimed at promoting sustainable entrepreneurship which empower workers to create small-scale social enterprises

[54] Alaimo, *Servizi per l'impiego e disoccupazione nel welfare attivo e nei mercati del lavoro transizionali. Note sulla riforma dei servizi all'occupazione e delle politiche attive nella legge 28 giugno 2012*, in *RDSS*, 2012, 92, 3, p. 555 ff.

[55] Rustico, Tiraboschi, *cit.*, p. 369 ff.

or local initiatives founded on fair and sustainable models, such as organic farming cooperatives or artisan workshops employing recycled materials.

Furthermore, bilateral bodies can collaborate with companies to identify necessary skills and ensure workers are prepared for future challenges. The collaborative action of workers' representatives and employers is indeed crucial in the collection of information, given their privileged vantage point, as well as in initiatives aimed at promoting the conscious and voluntary use of the facilities provided by employment services in the light of the personalisation[56] and promptness[57]. The latter has been recently encouraged by the European Commission, which urged employment services to act as "*transition agencies*" in anticipating and supporting individuals "*status transitions*" in the labour market[58], such as employment, unemployment, study, and vocational training[59].

Scholars highlight the role of bilateral bodies in employment services as key instruments for enhancing job opportunities and promoting environmental and social sustainability. Del Punta, applying the capabilities approach, argued that ensuring effective job-matching services is more impactful than merely proclaiming the right to work[60].

A comprehensive analysis of all bilateral bodies remains challenging due to their diversity; however, noteworthy examples of good practice can be identified and deserve closer examination. Some of these bodies are at the forefront of vocational training for the green transition, employing inter-professional funds and digital learning platforms to advance their efforts.

Considering EBINTER[61] and EBINPROF[62], which provide continuous training for employees of companies affiliated via the inter-professional fund *For.Te*[63], both offer specialised courses on the ecological transition as

[56] Reg. 2020/1215/UE, n. 2094 December 2020, p. 7.

[57] Sartori, *Modelli organizzativi e servizi per l'impiego nell'ordinamento multilivello*, in *LD*, 2023, 2, p. 238.

[58] These two quotations belong to Sartori, *Modelli organizzativi*, cit., p. 238.

[59] Sartori, *L'organizzazione dei centri per l'impiego: struttura, utenti, servizi*, in Bresciani, Sartori, (eds.) *Innovare I servizi per il Lavoro: tra il dire e il mare… Apprendere dalle migliori pratiche internazionali*, FrancoAngeli, 2015, p. 64.

[60] Del Punta, *Labour law and*, cit. , p. 399; Del Punta, *Leggendo "The idea of justice"*, cit., pp. 210 and 214.

[61] Ente Bilaterale Nazionale Terziario, www.ebinter.it.

[62] Ente Bilaterale Nazionale Per I Dipendenti Da Proprietari Di Fabbricati, *www.ebinprof.it*.

[63] Www.fondoforte.it.

part of two training programmes aimed at developing green skills. On the one hand, the *Ecological Transition Training Path* focuses on environmental sustainability and green economy themes, equipping workers with the skills needed to promote sustainability in the workplace. On the other hand, the *Futuro Sostenibile ed Inclusivo* initiative supports SMEs in developing sustainable and inclusive workplace policies.

In a similar vein, EBIT[64] delivers training services through the interprofessional fund *Fondimpresa*[65], which has allocated € 20 million towards green transformation and circular economy initiatives, including new strategies and workforce training. An individual training account has been created for member companies, enabling them to manage training funds autonomously via an online platform.

Similarly, EBM[66] has allocated € 800,000 since 2023 for training in sustainability and green skills, while EBG[67] has launched an e-learning platform in collaboration with *Interattiva*. The platform offers courses in digital skills, language training, health and safety, and green skills, delivered in multiple formats including video lessons, live streams, webinars, and virtual reality experiences.

Bilateral bodies also play a key role in facilitating access to the New Skills Fund[68], established under the National Recovery and Resilience Plan (NRRP), which finances training in digital and green skills[69]. By reducing labour costs for companies investing in employee training, these mechanisms help to address skill mismatches, fill hard-to-recruit positions, and support the re-professionalisation of workers affected by economic transitions[70].

In the context of collaboration with employment services[71] at the territorial level[72], and in line with the European Employment Strategy[73], bilateral

[64] Ente Bilaterale Turismo, www.ebit.it.

[65] Www.fondimpresa.it.

[66] Ente Bilaterale Metalmeccanici, www.ebm.it.

[67] Ente Bilaterale Generale, www.ebg.it.

[68] Impellizzieri, Massagli, *Fondo Nuove Competenze: istruzioni per l'uso e nodi operativi*, in *Bollettino ADAPT*, 2020, n. 40, 2.

[69] Faioli, *Matchmaking: la tecnologia avanzata per il mercato del Lavoro*, in *LD*, 2023, 2, p. 333 ff.

[70] Caruso, *Occupabilità, formazione*, cit., p. 23; Garofalo, *Le politiche per l'occupazione tra aiuti di Stato e incentivi in una prospettiva multilivello*, Cacucci, 2022, p. 356.

[71] Sartori, *Modelli organizzativi e servizi*, cit., p. 240.

[72] Ebinter, *I centri per l'impiego dei servizi alle imprese in Italia e In Europa*, in *Rapporto, novembre*, 2019.

[73] Sartori, *Modelli organizzativi e servizi*, cit., p. 249.

bodies play a crucial role in developing training and guidance programmes that respond to labour market needs. These programmes may be administered jointly, with bilateral institutions responsible for the delivery of training components, while employment services facilitate active job search support. Moreover, such collaboration holds the potential to foster initiatives aimed at the reintegration of more vulnerable groups into the labour market – particularly those disproportionately impacted by the green transition, including the unemployed and individuals with low skill levels. The interplay between the public and private sectors, particularly in the coordination and management of resources, contributes to the development of more effective strategies to enhance employability. This approach is consistent with the principle of personalisation, ensuring that support measures are appropriately tailored to the specific needs and circumstances of individuals.

4. *The Role of Occupational Welfare in Enhancing Workers' Freedom of Choice at the Employment Relationship Level*

Sections 3 has discussed how bilateral bodies can enhance workers' freedom of choice in the labour market through re-professionalisation programmes and collaboration with job-seeking services, thereby reducing dependence on fossil-fuel industries and other polluting sectors. We now shift the analytical focus at the level of the employment relationship, exploring the transformative potential of occupational welfare in ensuring workers access to non-productivist time-spaces and expanding their freedom of choice.

Occupational welfare[74], from an industrial relations perspective[75], represents a spontaneous although fragmented response by industrial relations

[74] *Ex multis*: Titmuss, *Essays on the welfare state*, 1958; Sinfield, *Analyses in the Social Division of Welfare*, in *JSP*, 1978, 7, 2, p.129 ff.; Greve, *Occupational Welfare: Winners and Losers*, Edward Elgar, 2007; Farnsworth, *Social versus Corporate Welfare. Competing Needs and Interests within the Welfare State*, Palgrave MacMillan, 2012; Caruso, *Recenti sviluppi normativi e contrattuali del welfare aziendale, nuove strategie di gestione del lavoro o neo consumismo?*, in *RIDL*, 2018, 1, p. 369 ff.; Caruso, *"The bright side of the moon" politiche del lavoro personalizzate e promozione del welfare occupazionale*, in *RIDL*, 2016, 2, p. 177 ff.; Alvino, Ciucciovino, Romei (eds.) *Il welfare aziendale. Una prospettiva giuridica*, il Mulino, 2019; Chiaromonte, Vallauri (eds.), *Modelli ed esperienze di welfare aziendale*, Giappichelli, 2018.

[75] Tiraboschi, *Il welfare aziendale ed occupazionale in Italia: una prospettiva di relazioni industriali*, in *DRI*, 2020, n. 1/XXX, p. 95.

actors to the transformations of the post-Fordist labour market. In Italy, it evolved from paternalistic and mutualist traditions[76] into company-level initiatives[77], eventually becoming institutionalised through Article 208 of the 2015 Financial Law. This law defines a set of benefits – educational, training, recreational, welfare, or health-related – which, due to their social purpose, receive fiscal incentives and are excluded from taxable income for both employees and employers. In this way, bargained welfare extends the role of the industrial relations system beyond traditional labour protections to encompass elements of the welfare state, thereby reinforcing the safeguarding of workers' fundamental rights[78].

Scholars have recently positioned occupational welfare as a tool for both expanding workers' autonomy and integrating ESG (Environmental, Social, and Governance) principles into industrial relations[79]. From a capabilities perspective, it alleviates the constraints of classical subordination[80], granting workers greater freedom both *from* and *within* work. Key mechanisms of occupational welfare that enhance workers' well-being include individually tailored working hours, work–life balance policies, and wage structures that promote gender equality and holistic well-being.

These mechanisms primarily operate through organisational and retributive levers. With regard to the organisational lever, the decoupling of labour law from productivist imperatives unfolds along two key dimensions. First, the negotiation of reduced working hours and increased flexibility can contribute to lower emissions and reduced energy consumption in the workplace[81]. Research in organisational economics highlights a direct correlation

[76] Gallino, *L'impresa responsabile, un'intervista ad Adriano Olivetti*, Einaudi, 2001.

[77] Barbera, "*Noi siamo quello che facciamo". Prassi ed etica dell'impresa post-fordista*, in *DRI*, 2014, n. 144, p. 639 ff.

[78] Caruso, *Recenti sviluppi normativi*, cit., p. 370; Caruso, *La rappresentanza delle organizzazioni di interessi tra disintermediazione e re-intermediazione*, in *WP C.S.D.L.E "Massimo D'Antona"*, 2017, 326; on the topic and more recently, I may refer to Rubagotti, *Welfare occupazionale e tendenze evolutive*, in *LLI*, 2021, 7, 1, pp. 67-70, and 82-83; Rubagotti, *Collective bargaining and public health protection. Which role for the implementation of Agenda 2030 Goal 3 and EU social policies?*, in *PDE*, 2022, 1, pp. 145-146,

[79] Caruso, *Capability e diritto del lavoro*, cit., p. 11.

[80] Del Punta, *Is the Capability Theory*, cit. p. 94 ff.

[81] Etuc, *Adaption to climate change and the world of work-a guide for trade unions*, 2020; Corso, *Sfide e prospettive nella rivoluzione digitale: lo smart working*, in *DRI*, 2017, n. 4, p. 981; Testa, *La funzione sostenibile del contratto collettivo: spunti teorici ed empirici*, in Aa.Vv. (eds.), *La funzione del contratto collettivo. Salari, produttività, mercato del lavoro*, ADAPT University press, 2023, pp. 327 and 328.

between the quantitative aspects of working time – such as its length, intensity, and scheduling – and the environmental sustainability of production processes[82]. Similarly, the qualitative dimensions of work-time organisation significantly influence environmental outcomes, particularly through the promotion of safer and more resource-efficient practices[83]. Crucially, negotiated flexibility also enables the alignment of work with personal life and individual needs[84]. The implementation of work–life balance measures allows employees to choose working arrangements that respect and promote their holistic well-being, moving beyond a narrow focus on productivity[85].

The redistributive function of wages[86], when combined with their role in supporting consumption, can be aligned with the principle of sustainability through collective bargaining on welfare. This is particularly relevant given that current legislation on occupational welfare allows employees to convert a portion of their salary into benefits, services, and welfare provisions that are eligible for tax relief[87]. In this context, wages can be understood not only as a means of income distribution but also as a mechanism for promoting energy efficiency, encouraging energy-saving behaviours. Moreover, they can serve as a lever to guide consumption towards environmentally sustainable goods and services[88]. By offering sustainability-oriented benefits, companies can play an active role in supporting policies that foster collective well-being and enhance quality of life – not only for their employees but also for the wider community[89]. In doing so, they contribute to a broader and more holistic understanding of corporate success, one that moves beyond profit maximisation to embrace environmental responsibility and social impact.

[82] Nasser, Larsson, *World shorter work time reduce greenhouse gas emissions? Analysis of time use and consumption in Swedish House Holmes*, in *Environ. Plann. C: Politics Space*, 2015, vol. 33, n. 4, p. 726 ff.; Devetter, Rosseau, *Working Hours and Sustainable Development*, in *RSE*, 2011, p. 333 ff.; Despiegelaere, Piansa, *The why and how of working time reduction*, ETUI, 2017, revision in January 2021, pp. 35-37.

[83] Allamprese, *Riduzione e flessibilità del tempo di lavoro*, Ipsoa, 2003.

[84] Dermine, Dumont, *A Renewed Critical Perspective*, cit., p. 237 ff.

[85] Dermine, *Towards a Sustainable*, cit., p. 315 ff.

[86] Unep, *Labour and the environment: A natural Synergy*, 2007.

[87] Tomassetti, *Diritto del Lavoro e Ambiente*, cit., p. 229, see notes no. 52-57; Adapt, *La contrattazione collettiva in Italia*, *VI Rapporto Adapt*, ADAPT University Press, 2019, p. 197 ff.

[88] Tomassetti, *Labour Law and Environmental Sustainability*, in *CLLPJ*, 2018, 40, 1, p.72.

[89] Adapt, *La contrattazione collettiva*, cit., p. 197, ff.; Aa.Vv, *Labour and Environmental Sustainability (A green mentality for collective bargaining), Commission Européenne*, Adapt, 2020, pp. 44-45.

5. *Challenges and Limitations*

The preceding sections highlighted the role of bilateral bodies and occupational welfare in fostering workers' freedom of choice, both within the labour market and in the context of the employment relationship. We now focus on structural challenges that hinder their transformative potential to effectively enhance workers' freedom of choice and therefore to align social justice with environmental sustainability. Although the issues affecting these institutions are broadly similar, both face a distinct set of challenges related to their structure and content.

A) The first issue concerns their limited coverage, which results in an unequal distribution of services provided by bilateral bodies and access to occupational welfare. Regarding bilateral bodies, their restricted scope curtails transformative potential. This is partly due to their funding model, which depends on contributions from affiliated companies. As a result, workers employed in non-affiliated firms are excluded from access to training and upskilling services[90]. Moreover, disparities in the availability of training across sectors and regions give rise to inequities in access to lifelong learning opportunities[91]. The scope of occupational welfare is similarly constrained by the industrial relations framework and the structure of collective bargaining and its unequal distribution reveals several challenges[92]. Firstly, marked regional disparities persist, particularly between the North and South of Italy. Secondly, its uneven adoption reflects sectoral imbalances and evolving workforce dynamics. Thirdly, a structural gap exists between large enterprises and small to medium-sized enterprises (SMEs), largely due to the limited prevalence of company-level bargaining. Many SMEs lack the capacity or bargaining power to establish tailored welfare agreements. These limitations undermine the universal accessibility of occupational welfare and, consequently, its potential to enhance workers' freedom of choice within the employment relationship.

[90] Martinengo, *Gli enti bilaterali dopo il d.lgs. 276/2003*, in *LD*, 2006, 2, 3, p. 245 ff.

[91] Casano, *La riforma del mercato del lavoro nel contesto della "nuova geografia del lavoro*, in *Biblioteca "20 Maggio"*, 2017, 2, p. 186 ff.

[92] L. Zoppoli, *Un nuovo diritto del lavoro sostenibile nei confini di un "Manifesto": tra politica e diritto*, in *LDE*, 2020, 3, p. 11; L. Zoppoli, *Solidarietà e diritto del lavoro: dissolvenza o polimorfismo?*, in *WP C.S.D.L.E. "Massimo D'Antona"*, 2018, 356, p. 11 ff.; Bavaro, *Sulla prassi e le tendenze delle relazioni industriali in Italia (a proposito di un'indagine territoriale)*, in *DRI*, 2017, 1, p. 13 ff.

B) The second issue – one that particularly impacts bilateral bodies – concerns the misalignment between vocational training and the formal education system. This disconnect leads to the duplication of training initiatives and an inefficient allocation of resources. More significantly, it undermines the transferability of acquired skills, thereby constraining workers' capacity to navigate transitions across sectors or occupational roles, particularly in the context of rapidly evolving economic landscapes.

C) The third issue concerns the mismatch between training provision – offered through inter-professional funds and private e-learning providers – and the evolving demands of the labour market, particularly in the areas of digitalisation and the green transition[93]. This misalignment limits the effectiveness of labour market integration, creates skills gaps, and curtails opportunities for lifelong learning and career progression. Simultaneously, occupational welfare often fails to address workers' broader social needs, revealing a critical gap in contemporary labour strategies. While there are notable best practices[94], many welfare schemes neglect the increasing demand for environmentally conscious approaches and for initiatives that restore the centrality of the worker – aligned with the de-commodification of labour. These include work-life balance policies, flexible working arrangements, and access to healthcare services.

Conversely, occupational welfare schemes are frequently designed with limited attention to either social or environmental sustainability. They frequently centre on benefits that are outdated or narrowly defined, primarily aimed at consumer support – provisions which, although offering short-term convenience, contribute little to long-term sustainability or the empowerment of workers[95]. This is exemplified by the widespread use of vouchers, such as those for meals, fuel, air travel, and gym memberships[96]. While these may offer immediate economic relief, they fall short in con-

[93] Ferri, Tesauro, *I Fondi interprofessionali nella Strategia d'Impresa*, in *Sinapsi*, 2018, n. 1, VIII, pp. 49-59; Valsega, *Perché è (sempre più) importante parlare di formazione continua: ruolo, strategie ed evoluzione dei fondi interprofessionali*, in *Professionalità Studi*, 2017, n. 2, vol. I, p. 19 ff.

[94] Tomassetti, *Diritto del Lavoro*, cit., p. 229, notes n. 52-57; Santoni, *Tra impresa e territorio: welfare aziendale e sostenibilità in Italia*, in Maino (eds.), *Agire insieme. Coprogettazione e coprogrammazione per cambiare il welfare*, in *Sesto Rapporto sul secondo welfare*, Percorsi di secondo welfare, 2023, p. 131 ff.

[95] Caruso, *Recenti sviluppi normativi*, cit.

[96] Osmer Data Base, that refers to the Brescia District, the second industrial hub in Italy. See https://www.osmer.org/ricerca.php.

tributing to systemic change, particularly in promoting sustainable consumption or social-reproductive activities. For instance, fuel and airline travel vouchers reinforce high-impact consumption patterns, undermining the urgent shift towards greener alternatives. Such schemes reflect an ongoing prioritisation of consumption and productivity, which perpetuates resource depletion, waste, and pollution – ultimately reinforcing the logic of productivism rather than challenging it.

6. *Discussion and Conclusion*

This article has explored both the transformative potential and the limitations of industrial relations institutions in enhancing workers' freedom of choice and shaping labour law to contribute positively to environmental sustainability, while also highlighting examples of best practice.

As outlined in Sections 3 and 4, institutions such as bilateral bodies and occupational welfare can, in principle, enhance workers' autonomy, enabling them to disengage from employment in sectors that contribute to global warming and climate change. To some extent, these institutions help rebalance the relationship between productive and social reproductive labour, thereby contributing to the deconstruction of the labour law – productivism nexus.

However, as Section 5 shows, these mechanisms often fall short in enabling real freedom of occupational choice in alignment with socio-ecological goals, or in securing non-productivist time – spaces for workers. In practice, they prove to be somewhat ineffective – what might be described as a «blunt instrument» in the pursuit of transformative change. Given these constraints, it is crucial to identify and address the structural and operational barriers that hinder bilateral bodies and occupational welfare schemes from fully realising their transformative potential within the labour law framework.

Firstly, the operational scope of both mechanisms requires substantial expansion. For bilateral bodies, this necessitates a diversification of funding streams beyond the conventional reliance on contributions from affiliated enterprises. Such a shift would improve accessibility – particularly for small and medium-sized enterprises (SMEs) – while also facilitating the simplification of administrative procedures. Furthermore, the standardisation of

training provision across regions and economic sectors is imperative to ensure equitable access to lifelong learning and vocational development opportunities.

With regard to occupational welfare, it is essential to address its limited coverage by reducing the accessibility gap between small and medium-sized enterprises (SMEs) and larger corporations, while also addressing significant regional disparities – most notably the divide between the industrialised North and the less economically developed South. One viable solution involves the establishment of territorially based joint funds, financed through collectively bargained contributions[97]. These funds could be designed to provide context-specific services and benefits tailored to the distinct challenges faced by SMEs[98] – such as limited financial capacity and weaker bargaining power – within local production districts or sectoral supply chains[99].

Secondly, to address the persistent disconnect between vocational and educational training systems and the evolving demands of the labour market, training initiatives must be rendered more responsive to local socio-economic contexts. This includes identifying skills shortages, supporting marginalised or vulnerable groups, and ensuring broad-based access to training across different labour market segments. Strengthening the coordination between vocational training programmes and job placement services is critical. Bilateral bodies could, for instance, partner with public employment agencies to establish dedicated platforms that align training outcomes with real employment opportunities, particularly in emergent and strategic sectors such as the green economy and care work. Furthermore, the implementation of rigorous monitoring and evaluation mechanisms is necessary to assess the efficacy of such programmes. Metrics such as placement rates, skill relevance, and labour market alignment should be systematically tracked and analysed.

Thirdly, a strategic reorientation of occupational welfare is required to overcome its current consumerist orientation, which tends to prioritise short-term material convenience over longer-term sustainability objectives and substantive worker empowerment. A forward-looking welfare strategy

[97] Maino, Mallone, *Welfare aziendale, contrattuale e territoriale: trasformazione in atto e prospettive di sviluppo*, in Treu (ed.), *Welfare aziendale 2.0*, Ipsoa, 2016, p. 104 ff.

[98] Viscomi, *Between company and territory: negotiation practices and welfare construction*, in *LD*, 2024, n. 3, p. 483 ff; Alachevich, *Welfare territoriale nel distretto pratese, un gioco a somma positive?* in *DLRI*, 2015, 1, p. 143 ff.

[99] May I refer to Rubagotti, *Welfare occupazionale*, cit., p. 76.

should aim to reconcile immediate needs with emerging societal and environmental imperatives. This may involve, for example, the provision of subsidised public transport to reduce carbon emissions, incentives for sustainable consumption practices[100], and comprehensive health and well-being programmes designed to support both physical and psychological well-being[101]. Such measures would reposition occupational welfare as a vehicle for promoting environmental sustainability and social reproduction, thereby enhancing its transformative capacity and bridging the gap between individualised consumption and collective well-being.

In conclusion, reconceptualising labour law through the lens of the Capability Approach offers a promising theoretical foundation for reorienting our economic systems towards environmental sustainability. Embedding the principles of freedom of choice within labour law – both at the macro level of the labour market and within individual employment relationships – challenges the productivism. It facilitates the development of an economic model that respects planetary boundaries while upholding workers' rights and well-being.

Nevertheless, this conceptual innovation must be operationalised through practical reforms. Within this framework, industrial relations are instrumental in reconfiguring the character of work and its entrenchment within wider market logics and economic reasoning. By delivering training and welfare services, industrial relations actors can actively support workers through just transition processes and contribute to the construction of a more ecologically sustainable and socially inclusive model of development.

While this analysis affirms the theoretical potential of industrial relations mechanisms to contribute to an environmentally attuned labour law – and highlights illustrative best practices – it also underscores the persistent structural limitations that constrain their transformative capacity. To this end, the article proposes concrete policy and institutional interventions aimed at overcoming these barriers and enhancing the efficacy of these mechanisms.

Ultimately, realising the full potential of the Capability Approach in labour law requires a fundamental reassessment of entrenched institutional norms, policy frameworks, and industrial relations practices. Nonetheless, much of the current academic discourse remains abstract and insufficiently

[100] TOMASSETTI, *Labour Law and*, cit., p.72.

[101] May I refer to RUBAGOTTI, *Collective bargaining and public*, cit., pp. 137 and 150.

grounded in the complexities of socio-economic implementation, frequently advocating idealised models that lack practical applicability[102]. The Capability Approach, with its commitment to contextual pluralism, normative flexibility, and empirical relevance, demands that both scholars and policymakers engage with the material implications of theoretical models – ensuring that their proposed reforms translate meaningfully into practice[103].

[102] AA.VV., *Introduction: The Labour-Environment*, cit., p. 271 ff.; DERMINE, DUMONT, *A Renewed Critical Perspective*, cit., p. 237 ff.

[103] DEL PUNTA, *Diritto del lavoro e valori*, in DEL PUNTA (ed.), *Valori e tecniche nel diritto del lavoro*, Firenze University Press, 2022, p. 15 ff.

Abstract

This article examines how reconceptualising labour law through the lens of the Capability Approach can contribute to the de-legitimisation of productivist rationales, by safeguarding workers' freedom of choice both within the labour market and at the level of the employment relationship. Adopting this normative framework, the analysis focuses on the role of industrial relations institutions – particularly occupational welfare mechanisms – in supporting this objective. Special attention is given to bargained welfare and the bilateral bodies established through sectoral collective bargaining between trade unions and employers' associations, assessing their capacity to enhance workers' autonomy and agency. While the Capability Approach offers a promising theoretical basis for challenging the productivist underpinnings of labour law, the article also identifies significant structural and operational challenges that limit the transformative potential of these institutions in practice.

Keywords

Capability approach, Environmental sustainability, Socio-ecological labour law, Productivism deconstruction, Industrial relations.

Alexander Stöhr

Decline in Collective Bargaining Coverage: Insights and Experiences from Germany

Contents: **1.** Introduction. **2.** Statistical and economic background. **2.1.** Development of collective bargaining coverage. **2.2.** Causes. **2.3.** Economic and social impacts. **3.** Possible countermeasures. **3.1.** Measures to strengthen collective agreements. **3.1.1.** Statutory minimum wage. **3.1.2.** Facilitated general application of collective agreements. **3.1.3.** Collective bargaining coverage in the awarding of public contracts. **3.1.4.** Assessment. **3.2.** Measures to increase the attractiveness of trade union membership. **3.2.1.** Differentiation clauses in collective agreements. **3.2.2.** Tax privileges. **3.2.3.** Financial participation of outsiders (solidarity contribution). **3.2.3.1.** General background. **3.2.3.2.** Swiss law as a potential model. **3.2.3.3.** Lessons from the Swiss model. **3.2.3.4.** Constitutional issues. **4.** Summary and conclusions.

1. *Introduction*

Collective bargaining is a traditional institution for wage setting. It describes a system in which trade unions and employers' associations or individual employers bargain over wages for the employees at the respective firms[1]. This system is regarded as the key instrument for improving employees' incomes and working conditions: collective agreements negotiated by trade unions and employers or employers' associations respectively ensure social peace and social cohesion to a considerable extent. They are the benchmark for transparency and fair competition in the world of business and labour and enable fairer redistribution and fair participation of employees and their families in the social market economy[2]. In addition, collective

[1] Bellmann *et al.*, *Collective bargaining coverage, works councils and the new German minimum wage*, in *EID*, 2021, p. 269.

[2] Löw, Oldehaver, *Stärkung der Tarifautonomie, der Tarifpartner und der Tarifbindung*, in *NZA*, 2024, p. 88.

agreements reduce the burden on the state by allowing the social partners to regulate labour relations independently and resolve conflicts together[3]. According to the German legislator, it is "the task of the parties to collective agreements to equalise the structural inferiority of individual employees when concluding employment contracts at a collective level and thus to enable an approximately equal negotiation of wages and working conditions"[4]. Collective bargaining coverage is defined as the share of employees covered by collective agreements. Higher rates of collective bargaining coverage are therefore essential for pushing down the share of workers on below-decent pay[5]. Competitiveness based on low wages is not sufficient to restart growth in the European Union. This is reflected in recent European Commission programmes, such as the Recovery Plan and Next Generation EU. A new European growth strategy focuses on wages and living standards, alongside digitalisation and decarbonisation as two fundamental priorities. Given tight labour markets, labour shortages and the need to upskill workers a sound wage structure that does not rely on an exploitative low-wage sector is complementary to an investment strategy in infrastructure, digitalisation and education[6]. Hence, supporting collective bargaining may serve as a reference point for policy to make sure that within Member States good and well-paid jobs are part of a growth strategy towards the knowledge economy[7]. However, collective bargaining coverage is declining in many Member States, which has undesirable impacts overall. One important reason for this development is the cost-free participation of outsider employees ("free riders"), which reduces the incentives to be a member of a union and to pay dues. Here, the interest in a high level of collective bargaining coverage collides with individual contractual freedom, which sets limits to the legal discrimination of outsider employees. This paper discusses possible legal countermeasures with a focus on Germany. With regard to solidarity contributions, a possible regulatory model from Switzerland is examined.

[3] German Federation of Trade Unions, *Positionen zur Stärkung der Tarifbindung*, April 2019, p. 1.

[4] Printed Matter 18/1558 of Deutscher Bundestag, p. 26.

[5] Haapanala, Marx, Parolin, *Decent Wage Floors in Europe: Does the Minimum Wage Directive Get It Right?*, in *IZA DP*, October 2022, No. 15660, p. 29.

[6] Hassel, *Round Table. Mission impossible? How to increase collective bargaining coverage in Germany and the EU*, in *Transfer*, 2022, p. 491.

[7] Cazes, Garnero, Martin, *Negotiating our Way Up: Collective Bargaining in a Changing World of Work*, in *OECD Publishing*, 2019; Hassel, *cit.*, p. 491.

2. *Statistical and economic background*

2.1. *Development of collective bargaining coverage*

Strong collective bargaining developed during the era of industrialisation. It peaked during the 1960s when trade unions forcefully pushed up living standards, while economies were growing strongly. The labour share of GDP was at a historic high and inequality low. The late 1960s and early 1970s were a turning point for trade union strength and collective bargaining. Tight labour markets, industrial unrest, and rising inflation shifted the macroeconomic paradigm of Western governments. Instead of approving strong unions and collective bargaining, governments started to either fight them (in the United Kingdom and United States) or neglect them (Germany)[8]. Collective bargaining and strong trade unions were seen by economists as obstructing economic restructuring, innovation, and flexible adjustment to a new economic regime[9]. In western Europe, the decline of unions and collective bargaining was gradual and also not universal, as some countries maintained high levels of bargaining coverage and strong trade unions[10]. In 2021, for example, only 30 percent of companies in Germany were still bound by collective agreements, and the degree of employee organization has halved since 1980[11]. For several decades, the organizational power of German unions has been characterized by an eroding membership base, a patchy membership structure and an enforcement crisis in collective bargaining policy. The European average is at least over 30 percent union density. But even in Member States with traditionally high levels of organization, such as Belgium, Italy and the Scandinavian countries, membership figures are declining[12].

In Germany, the membership in employers' associations is in decline, too[13]. Many employers left their association in order to quit their collective agreements: according to Section 3 German Collective Agreements Act (*Tar-*

[8] Hassel, *cit.*, p. 491.

[9] Aidt, Tzannatos, *Trade unions, collective bargaining and macroeconomic performance: A review*, in *IRJ*, 2008, p. 258.

[10] Hassel, *cit.*, p. 491.

[11] Höpfner, *Partizipation und Kostenausgleich: Nutzungsentgelt für Tarifverträge*, in *ZA*, 2020, p. 178.

[12] Henssler, *Stärkung der Tarifbindung durch den Gesetzgeber?*, in *RArbeit*, 2021, p. 1.

[13] Löw, Oldehaver, *cit.*, p. 88.

ifvertragsgesetz, TVG), the binding by a collective agreement requires that the employee and the employer are members of the parties to the collective agreement, unless the employer has concluded the collective agreement by himself with the trade union. In response to this, some associations have developed the so-called membership "without collective bargaining coverage" (OT), in which the employers concerned are not affected by the collective bargaining agreement, but should nevertheless participate in the services of an employers' association (e.g. training, advice and labour court representation). Such membership is considered permissible by case law[14].

2.2. *Causes*

There are many reasons for this development[15]. One central cause is to be found in the social structure. Social milieus are eroding, and employees are emancipating themselves from large social organizations[16]. In Germany, most trade unions are mass organisations for employees in terms of their tradition and legal understanding. However, the era of trade unions, with whose ideas and objectives the majority of employees in an industry could identify, has long since come to an end in almost all sectors. The change in the world of work towards more and more qualified professions and jobs and equally qualified employees has led to the alienation of trade unions as mass organisations[17]. In general, it can be observed that the binding forces of large social organisations such as churches, political parties and trade unions have dwindled over the last 20 to 30 years. This is probably generally due to the increasing trend towards individualisation of all living conditions and can therefore only be controlled politically to a very limited extent with legal activities[18].

[14] German Federal Labour Court of 18.7.2006 - 3 AZR 374/05.

[15] In depth Günther, Höpner, *Why does Germany abstain from statutory bargaining extensions? Explaining the exceptional German erosion of collective wage bargaining, Economic and Industrial Democracy*, in *EID*, 2022, p. 88; Paster, Oude Nijhuis, Kiecker, *To extend or not to extend: Explaining the divergent use of statutory bargaining extensions in the Netherlands and Germany*, in *BJIR*, 2020, p. 532.

[16] Hassel, Schröder, *Gewerkschaftliche Mitgliederpolitik: Schlüssel für eine starke Sozialpartnerschaft*, in *WSI-Report*, 2018, p. 13.

[17] Loritz, *Rechtliche und tatsächliche Ursachen der gesunkenen Tarifbindung*, in *Festschrift für Ulrich Preis*, Verlag C.H.BECK, 2021, p. 795.

[18] Franzen, *Stärkung der Tarifautonomie durch Anreize zum Verbandsbeitritt*, Bund-Verlag, 2018, p. 14.

The changed work structure offers a less favorable environment for trade union activity than the industrial work of earlier decades, with communal standing in the production hall or collective driving into the pit in large factories. The world of work has become increasingly fragmented in a modern industrial and service society[19]. The service sector has grown larger, with an increasing share of companies with small local units and flat hierarchies. The disappearance of entire sectors such as coal mining and the massive reduction in capacity in the iron and steel industry, together with the increased use of robots and machines, particularly in the metal industry, have considerably reduced the size of the "traditional" physical labour force. As a result, large trade unions have simply lost a considerable proportion of their traditional membership potential. The digitalised areas of companies largely employ highly qualified workers whose remuneration often significantly exceeds the maximum collectively agreed salaries. Such employees often do not consider joining a trade union. The ongoing digitalisation of the world of work will continue to make many traditional jobs and workers and entire professions that are currently still within the scope of collectively agreed salaries redundant[20].

This is supported by empirical data: in the manufacturing industry, the proportion of union members among all employees in 2014 was 19.7 percent compared to 13.9 percent in the service sector. In the company size category of 10–24 employees, 9.9 percent of employees belonged to a union in 2014, between 25 and 99 employees 15.8 percent, in companies with between 100 and 499 employees 21.2 percent and in larger companies 26.5 percent. The breakdown of categories by age, gender and the form of work is also revealing, since the unionisation rate of part-time employees, women and younger employees is significantly lower than the average unionisation rate. In 2014, 12.1 percent of employed women in Germany were members of a trade union, compared to 19.1 percent of employed men[21]. These figures show that the trade unions are more strongly represented in larger companies, in the manufacturing industry and among older male employees in full-time employment. However, these areas are likely to decline due to economic

[19] Printed Matter 18/1558 of Deutscher Bundestag, p. 26.

[20] Loritz, *cit.*, p. 795.

[21] Dieke, Lesch, *Gewerkschaftliche Mitgliederstrukturen im europäischen Vergleich*, in *IW-Trends,* 2017, 3, p. 25.

and demographic developments; services and the associated smaller companies, part-time employment and female employment are likely to increase in the coming years. These developments pose major challenges for the trade unions in terms of their membership structure, which they will initially have to overcome in organisational terms themselves[22].

Furthermore, the benefits of collective bargaining are challenged by growing international competition and technological change. These developments lead to a rising demand for more flexible and tailor-made compensation systems, and hence the respective firms opt out of traditional collective bargaining[23]. Finally, probably the biggest problem is the cost-free participation of outsider employees ("free riders") by including the collective agreement in the employment contract, which is common practice in Germany: when employees receive the benefits of a collective bargaining agreement for free, the incentives to be a member of a union and to pay dues are reduced[24].

2.3. *Economic and social impacts*

From an economic point of view, collective bargaining is ascribed some desirable characteristics: it reduces transaction costs of wage negotiation and reduces the potential for conflicts between single employers and employees as it regulates the wage setting in a transparent manner[25]. Collective agreements lay down standardised working conditions for a large number of employees with different training and activities. A company that uses such a collective agreement would otherwise have to organise these matters itself. In addition, the company saves itself additional internal distribution debates with a collective labour agreement[26]. The disadvantages of collective agreements for employers are repeatedly cited: low flexibility, greater external control of individual companies and, as a result, personnel costs that may no

[22] Franzen, *cit.*, p. 15 ff.; Seiwerth, *Stärkung der Tarifautonomie - Anregungen aus Europa?*, in *ELLJ*, 2014, p. 450.

[23] Oberfichtner, *Works council introductions in Germany: Do they reflect workers' voice?*, in *EID*, 2019, p. 301; Bellmann *et al.*, *cit.*, p. 269.

[24] Höpfner, *cit.*, p. 178; Seiwerth, *Rechtliche Möglichkeiten zur Stärkung der Tarifbindung*, in *NZA*, 2025, p. 137 ff. On this in depth below 3.2.1.

[25] Oberfichtner, *cit.*, p. 301; Bellmann *et al.*, *cit.*, p. 269.

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

longer be commensurate with company circumstances. The parties to collective agreements have responded to this criticism in particular by introducing so-called opening clauses. This allows individual companies to deviate from the provisions of the collective agreement under certain conditions[27].

The decline in collective bargaining coverage has clear consequences for wages and working conditions. Employees who are not paid according to collective agreements earn significantly less than employees in companies with collectively agreed wages. For trade unions, this development is existential. As membership organizations, they depend on a broad membership base, which not only forms the financial basis for the strength of their offerings and services, but is also the basis for legitimacy, representation, mobilization and thus ultimately for their ability to assert themselves in collective bargaining and social policy. The organizational power of the trade unions is a key to the future of the social partnership[28]. It is equally important that all companies, including small and medium-sized ones, perceive the collective agreement as a sufficiently flexible and appropriate instrument for shaping company working conditions[29]. A larger problem that is increasingly being seen more clearly is the low-wage sector that has emerged. The weakness of collective bargaining autonomy in the low-wage sector and the existence of the low-wage sector perpetuate each other[30].

3. *Possible countermeasures*

As shown above, collective bargaining coverage is a result of a number of factors, which derive from the wider industrial relations system. Against this background, the role of the legislator is limited, since collective bargaining coverage depends on the wider industrial relations system[31]. Two basic approaches can be considered: measures to strengthen collective agreements (sub 3.1) and measures to increase the attractiveness of trade union membership (sub 3.2).

[27] Franzen, *cit.*, p. 18.
[28] Hassel, Schröder, *cit.*, p. 6.
[29] Henssler, *cit.*, p. 1.
[30] Seiwerth, *cit.*, p. 450.
[31] Hassel, *cit.*, pp. 491 and 494.

3.1. *Measures to strengthen collective agreements*

The German legislator took this path in 2014 with the so-called Collective Bargaining Autonomy Strengthening Act (*Tarifautonomiestärkungsgesetz*). This law introduced a general minimum wage and lowered the requirements for collective agreements to be declared generally applicable. This is intended to strengthen the actual application of collective agreements where they still exist. Where there are only a few collective agreements or, in the opinion of the legislator, insufficient collective agreements, state law must close the gap. This approach is concerned with strengthening the collective agreement, as this is the typical instrument with which appropriate working conditions can be established. The legislator thus equates collective bargaining autonomy with its products, the collective agreements. The idea is: if you strengthen the collective agreement through various legal measures, you simultaneously strengthen collective bargaining autonomy[32].

3.1.1. *Statutory minimum wage*

The statutory minimum wage is a wage set by law that may not be undercut. Agreements on lower wages than the statutory minimum wage or the waiver of the minimum wage by employees are invalid, i.e. the employee can still assert their claim to it. Apart from Germany, there is also a statutory minimum wage in France, the Netherlands, Portugal, Spain and the United Kingdom, for example. There is no statutory minimum wage in Italy, Austria, Switzerland and the Scandinavian countries, as these countries place more emphasis on collective bargaining autonomy[33].

At European level, the new Directive 2022/2041 on fair and adequate minimum wages[34] was introduced in order to improve working conditions by increasing minimum wages and significantly increasing collective bargaining coverage. The Directive requires Member States to have a process for setting their minimum wage at a sufficiently high level to provide a "decent standard of living" and also encourages collective bargaining by requiring countries to create action plans if bargaining coverage is below 80

[32] FRANZEN, *cit.*, p. 13.

[33] Overview at Eurostat, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Minimum_wage_statistics, accessed 30.3.2025.

[34] Directive 2022/2041 - Adequate minimum wages in the EU, L 275/33.

percent[35]. Although the European Union does not have the legal authority to directly change member country laws on minimum wages or collective bargaining and the Directive is restricted to encourage Member States to comply and helps define a process for making plans through consultations with businesses and unions, it is sometimes regarded as a "big deal", since it represents a paradigm shift away from neoliberal policies that previously sought to weaken trade unions and towards the recognition that trade unions and collective bargaining help make economies work properly[36].

Theoretically, the minimum wage could indeed influence the bargaining over wages and strengthen the position of unions. This is because both parties bargain over a surplus and the minimum wage sets a lower limit for the bargaining result. If this lower limit is a reference point and potentially a fallback position for unions, it could influence the bargained wage in the employees' favour[37]. However, it is theoretically ambivalent whether the minimum wage leads to a rise or a further deterioration of employers' collective bargaining participation. On the one hand, the number of companies participating in collective bargaining may rise as the minimum wage lowers the marginal costs of participation. The minimum wage sets a new minimum that is paid by all employers. Hence, additional wage costs of firms that consider an adoption of collective agreements are limited to the difference between collectively bargained wages and the minimum wage. Before the introduction of the minimum wage, these marginal wage costs of joining a collective agreement may have exceeded this difference[38]. On the other hand, the marginal returns of collective bargaining may also fall in the course of the introduction of the minimum wage, which induces the incentive to leave collective agreements. The reduction of marginal returns is mostly because minimum wages impose an alternative minimum standard and thereby reduce the need to bargain over wages of minimum wage jobs. Therefore, the minimum wage

[35] Hassel, *cit.*, p. 491.

[36] Madland, *Historic New EU Law Part of Growing Push for Sectoral Bargaining*, in *onlabour* of 19.1.2023, https://onlabor.org/historic-new-eu-law-part-of-growing-push-for-sectoral-bargaining/, accessed 30.3.2025.

[37] Apel, Bachmann, Bender, *Arbeitsmarktwirkungen der Mindestlohneinführung im Bauhauptgewerbe*, in *JLMR*, 2012, p. 257; Avouyi-Dovi, Fourgere, Gautier, *Wage rigidity, collective bargaining, and the minimum wage: Evidence from French agreement data*, in *RES*, 2013, p. 1337; Dittrich, Knabe, Leipold, *Spillover effects of minimum wages in experimental wage negotiations*, in *CESifo ES*, 2014, p. 780; Bellmann *et al.*, *cit.*, p. 269.

[38] Bellmann *et al.*, *cit.*, p. 269.

limits the potential of collective agreements to serve as a tool to reduce the transactional costs of wage bargaining[39]. Furthermore, a statutory minimum wage may reduce the incentive for employees in low-wage sectors to seek protection from the trade unions because the state is already taking care of wage protection[40]. Other authors confirm that minimum wages crowd out industrial relations[41]. Since marginal costs and marginal returns are reduced by the introduction of a minimum wage, the resulting effect on employer participation is ultimately an empirical question that can be analysed in a reduced form analysis.

A study provides an empirical investigation by estimating the effect of the introduction of the German minimum wage on employer participation in collective bargaining, which also contributes to a highly relevant policy question, mostly because the parliamentary justification of the new law was substitutive by design, i.e. the minimum wage was introduced to compensate for the employers' decreasing bargaining participation[42]. This study assessed the role of the recent introduction of the minimum wage for collective bargaining coverage. It shows that a statistically significant probability that an affected companies opts out of collective bargaining contracts. However, the authors also observed a small positive probability for affected companies to join bargaining contracts in the course of the introduction of the minimum wage. Since the latter effect falls short of significance and is dominated by companies leaving collective bargaining, their net effect is a slight reduction in bargaining participation. The result that a significant fraction of affected companies leave collective bargaining suggests that the minimum wage has a small substitutive mechanism when it comes to collective bargaining as a central institution of industrial relations. This substitutive mechanism can be explained by lowered marginal returns from collective bargaining, but the minimum wage may also constitute a substitutive norm replacing the traditional norm of collectively bargained wages. This result implies that the minimum wage should not be interpreted as an institution that strengthens the

[39] *Ibid.*

[40] Löwisch, Rieble, *Tarifvertragsgesetz*, Verlag C.H.BECK, 4th edition, 2017, § 5 point 9; Lobinger, *Stärkung oder Verstaatlichung der Tarifautonomie?*, in *JZ*, 2014, p. 810; Henssler, *cit.*, p. 1; Löw, Oldehaver, *cit.*, p. 88.

[41] Aghion, Algan, Cahuc, *Civil society and the state: The interplay between cooperation and minimum wage regulation*, in *JEEA*, 2011, p. 3.

[42] Bellmann *et al.*, *cit.*, p. 269.

bargaining autonomy as proposed by the German government in its official justification of the minimum wage legislation[43].

However, the data situation is, as always, inconsistent. Other economic findings are more encouraging, since countries working towards the European objective of 80 percent collective bargaining coverage can directly benefit from lower wage inequality and the absolute purchasing power at the effective wage floor appears predominantly driven by the system of minimum-wage setting: higher levels of collective bargaining coverage directly influence the wage floor in countries without statutory minimum wages, whereas this is not the case in countries with statutory minimum wages where the lowest rate of pay is fixed in legislation[44].

In order to strengthen the autonomy of collective bargaining, the collective bargaining partners and collective bargaining commitment, some authors support a partial return to the determination of minimum wages by the collective bargaining partners. The proximity and dialogue between the collective bargaining partners could lead to solutions that are better tailored to the respective region and sector, in contrast to the "one size fits all solution" provided by the minimum wage. It would also create an incentive for both trade unions and employers to organise themselves and take matters into their own hands – at present, the collective bargaining partners are relieved of this work by government measures[45].

3.1.2. *Facilitated general application of collective agreements*

Another element of the German approach to strengthening collective bargaining autonomy is the facilitation of the general application of collective agreements. The general application of a collective agreement means that this agreement also covers employment relationships that are not covered by a collective agreement if and to the extent that they fall within its scope. This serves several purposes. Firstly, general applicability has a social protection function: employees who are not covered by a collective agreement should be guaranteed appropriate working conditions[46]. According to sec-

[43] *Ibid*.

[44] Haapanala, Marx, Parolin, *cit.*, p. 30 ff.

[45] Löw, Oldehaver, *cit.*, p. 88.

[46] Franzen, in *Erfurter Kommentar zum Arbeitsrecht*, Verlag C.H.BECK, 25th edition 2025, § 5 TVG point 1.

tion 5 TVG, the Federal Ministry of Labour and Social Affairs may in agreement with a committee composed of three representatives each from the umbrella organisations of employers and of employees declare a collective agreement to be generally applicable where the declaration of general application appears necessary in the public interest. As part of the German reform, the declaration of the general applicability of collective agreements was made easier by abolishing the previous 50 percent quorum. This is now replaced by a "specified public interest", which is generally deemed to exist if the collective agreement has become "predominantly important" for the organisation of working conditions in its area of application, or if a declaration of general applicability is required to safeguard the effectiveness of the collective agreement against the "consequences of undesirable economic developments".

The autonomous behaviour of the parties to collective agreements declared to be generally applicable is also burdened because it is shaped by the foreseeable extension of collective agreements and the regulatory power invites tie-in deals to the detriment of third parties. There is also a risk that those collective bargaining parties will be dependent on the state's extension of collective agreements because they are no longer able to conclude such agreements autonomously. This creates a structural dependency on the ministry that is incompatible with the model of state-independent coalitions. Just imagine if the ministry refused to extend all collective agreements in the construction industry. It is unclear whether the collective bargaining parties there would then still be able to exercise any regulatory power at all, or whether they become minimum wage organisations that are unable to conclude autonomous collective agreements and lose their collective bargaining capacity due to their dependence on the state[47].

3.1.3. *Collective bargaining coverage in the awarding of public contracts*

In Germany, the Green Party and the Left Party demand that public contracts may only be awarded to companies bound by collective agreements[48]. This demand is also shared by the German Federation of Trade

[47] Löwisch, Rieble, *cit.*, § 5 point 11.
[48] Printed Matter 20/14345 of Deutscher Bundestag.

Unions (DGB) and some legal experts[49] and was taken up in a draft law by the German government of 20 December 2024, with is due to come into force on 1 July 2025 if it is passed by parliament. According to this draft law, federal contracts shall only be awarded to companies that pay according to a representative collective agreement for the respective sector. With this law, the federal government wants to limit predatory competition based on wage and personnel costs and thus ensure fairer competition, greater wage justice and more collective bargaining agreements. The law is to apply to the awarding of federal supply and service contracts with a contract value of 30,000 euros or more and to the awarding of federal construction contracts with a contract value of 50,000 euros or more.

In the absence of reliable data on collective bargaining coverage in Germany, it is currently impossible to predict what benefits such a law could offer. In particular, the existing data does not currently indicate the extent to which the sectors commissioned by the federal government would even fall within the scope of a collective agreement and how many of the commissioned companies are already bound by collective agreements. It is also to be expected that the planned regulations will entail a high level of bureaucracy for companies due to the obligation to provide evidence. This is likely to increase the risk that small and medium-sized companies in particular will be excluded from public procurement procedures at federal level for purely practical reasons[50]. The Council for the Review of Standardisation therefore demands that the law only be applied from significantly higher contract values[51]. From a legal perspective, concerns have been raised against the preliminary working version, particularly with regard to European and constitutional law: in particular, a collective bargaining law would create a de facto collective bargaining obligation, which would constitute a violation of the negative freedom of association[52]. After the change of government in Germany, the fate of the draft law remains to be seen anyway.

[49] German Federation of Trade Unions, *Positionen zur Stärkung der Tarifbindung*, April 2019, p. 1; see also Pelke, *Im Blickpunkt*, in *BB*, 2021, p. 1523.

[50] Löw, Oldehaver, *cit.*, p. 88.

[51] Https://vergabeblog.de/2025-01-14/gesetzesentwurf-fuer-ein-tariftreuegesetz/, accessed 30.3.2025.

[52] Hartmann, *Unionsrechtliche und verfassungsrechtliche Grenzen für ein Bundestariftreuegesetz*, in *ZA*, 2023, p. 510.

3.1.4. *Assessment*

According to its original idea, collective bargaining autonomy is based on an individual and collective, membership-based right of freedom for employees and employers and their associations, which is independent of the state. Instead, the German approach, with its introduction of minimum wages and the lowering of the requirements for a declaration of general applicability of collective agreements, seeks to impose collective bargaining instead of strengthening collective bargaining autonomy[53]. This assigns the social partners a new function, namely to implement certain public welfare interests specified by the state under sovereign control. Collective bargaining autonomy is understood as the autonomous, non-state regulation of working conditions by the collective bargaining partners, whose decisions are in turn legitimised by the autonomous decision of their members to join. It is based on collective self-organisation and acts on the basis of free, not externally controlled organisation, i.e. on its own initiative. The state merely provides a legal framework for autonomous organisation. In contrast, the models for extending collective bargaining coverage, which have recently been massively expanded by the legislator, create working conditions by an act of the state that are only based more or less loosely on collective agreements. At best, one can still speak of "collectively agreed" state labour conditions[54].

With regard to the original idea of collective bargaining autonomy, a broad membership base in both the trade unions and the employers' organisations is desirable, since the legal effects of the collective agreement are primarily legitimised by the membership of the parties to the employment contract in the parties to the collective agreement[55]. Unfortunately, membership-based legitimisation plays no discernible role in the concept of the German approach. According to the legislator's concept, collective agreements can also be concluded, for example, if the relevant regulations are drawn up jointly by chambers of labour and chambers of commerce organised under public law. This can be called the "nationalisation of collective bargaining autonomy" and is a misguided path that weakens the associations

[53] Löw, Oldehaver, *cit.*, p. 88.

[54] Henssler, *cit.*, p. 1 ff.

[55] Franzen, *cit.*, § 1 TVG point 6; Thüsing, in Wiedemann (ed.), *Tarifvertragsgesetz*, Verlag C.H.BECK, 9th edition 2023, § 1 point 42 ff.

and discredits the collective bargaining system[56]. Ironically, 10 years after the Collective Bargaining Autonomy Strengthening Act came into force, the strengthening of collective bargaining is still being discussed[57].

State replacement of collective bargaining reduces the attractiveness of the prevailing trade unions in particular: Why should employees join and pay union dues when they already receive adequate protection from the state? The collective bargaining system also loses legitimacy: anyone who is dissatisfied with the collective bargaining conditions will not benefit from leaving the union, and at the same time the rights to have a say within the union are devalued[58]. The law is appropriately dubbed as "law to weaken the bargaining autonomy"[59]. Instead of tackling the causes, it merely combats the symptoms, and does so one-sidedly and with unsuitable means. It moves away from a free market economy labour constitution, provokes a progressive turning away of the labour contract parties from the associations and will foreseeably lead to compulsory state regulation of working and economic conditions. The collective bargaining system will only survive in the long term if companies are convinced by its intrinsic advantages to voluntarily submit to collective bargaining[60]. The German approach fails to recognise the difference between collective bargaining autonomy and collective bargaining. In the worst case, it leaves only losers, in particular weakened trade unions and inadequate employee representation. Measures to strengthen collective bargaining autonomy must therefore address the causes rather than the symptoms, namely collective bargaining coverage by virtue of membership[61].

3.2. *Measures to increase the attractiveness of trade union membership*

Another way to strengthen collective bargaining autonomy is to focus on precisely this functional condition of collective bargaining autonomy, namely the strengthening of the membership base. For the evaluation, one

[56] Lobinger, *cit.*, p. 810; Franzen, *cit.*, p. 14.

[57] Seiwerth, *cit.*, p. 137.

[58] Löwisch, Rieble, *cit.*, § 5 point 10.

[59] Forst, *Die Allgemeinverbindlicherklärung von Tarifverträgen nach dem sogenannten Tarifautonomiestärkungsgesetz*, in *RArbeit*, 2015, p. 25.

[60] Henssler, *cit.*, p. 1.

[61] Seiwerth, *cit.*, p. 450; Löw, Oldehaver, *cit.*, p. 88.

must ask to what extent the legal system itself provides incentives to join employee or employer associations. The product of collective bargaining autonomy, the collective agreement, must first be placed at the centre and the question must be asked to what extent it can provide incentives for trade union membership. The legal system cannot stop the demographically and economically induced decline in trade union membership. However, it can create favourable conditions under which membership of a trade union appears attractive to employees – and this against the background that the task of shaping collective bargaining autonomy cannot be achieved without a sufficient membership base of the coalitions, especially the trade unions[62].

3.2.1. *Differentiation clauses in collective agreements*

Since the cost-free participation of outsider employees reduces incentives to be a member of a union and to pay dues, trade unions frequently demand that differentiation clauses be permitted in collective agreements. For the most part, employees who are employed by an employer who is bound by a collective agreement are in any case covered by the collective agreement by virtue of a reference clause. Employers bound by collective agreements have a considerable interest in treating their employees uniformly as if they were all bound by the collective agreement, and not just the members of the union concluding the collective agreement, as the system of German collective agreement law itself provides for under Sections 3 (1) and 4 (1) TVG. Only the uniform treatment of all employees in accordance with the collective agreement to which the employer is bound ensures the essential standardisation function of the collective agreement. Employees of companies bound by collective agreements therefore do not need to join the trade union in order to benefit from the blessings of the collective agreement. And for employees of non-unionised companies, participation in the collective agreement is primarily the result of a decision by the employer to apply the collective agreement in the employment contract. The result is therefore a curious picture: the collective agreement as the trade union achievement per se is not at all suitable as an argument in favour of joining a trade union due to the legal and factual circumstances. Employees receive the benefits of a collective agreement anyway if they

[62] FRANZEN, *cit.*, p. 15 ff.

work for an employer who is bound by a collective agreement; and in the case of an employer who is not bound by a collective agreement, the fact of union membership has no effect at all on the employer's decision to apply the collective agreement[63].

Differentiation clauses in collective agreements could offer a way out. This means that only members of the trade union party to the collective agreement can claim certain benefits from the employer. Such provisions are intended to incentivise employees to join the union. Differentiation clauses are intended – as the German Federal Labour Court put it in a famous ruling – "to compensate for the advantage that outsiders have in that they enjoy the successes of trade union work to a large extent without contributing financially to the union's work. At the same time, the differentiations are intended to financially compensate the organised employees for having borne the burden of their membership of the organisation[64]."

Those in favour of qualified differentiation clauses argue that creating financial incentives for trade union membership is a legitimate and lawful objective[65]. A working group has drawn up a draft law to regulate such differentiation clauses[66]. In the opinion of the Federal Labour Court, simple differentiation clauses are permissible insofar as such clauses are not linked to the core of the exchange relationship between performance and consideration and do not exert unreasonable pressure on outsider employees to join the union[67]. However, qualified differentiation clauses are deemed invalid: The German Federal Labour Court has ruled that qualified differentiation clauses that directly or de facto prohibit employers from granting collectively agreed working conditions to outsiders violate the negative freedom of association and are also outside the norm-setting competence of the collective bargaining partners, because the collective bargaining partners have access to employment relationships of those who are not organized or are organized differently[68]. Thus, there is only room for additional benefits within

[63] Franzen, *cit.*, p. 21.

[64] German Federal Labour Court of 29.11.1967 - GS 1/67.

[65] Deinert, *Negative Koalitionsfreiheit - Überlegungen am Beispiel der Differenzierungsklausel*, in *RArbeit* 2014, p. 129; Däubler, Heuschmid, *Tarifverträge nur für Gewerkschaftsmitglieder?*, in *RArbeit* 2013, p. 1; Waltermann, *Differenzierungsklauseln im Tarifvertrag*, Bund-Verlag, 2016, p. 72 ff.

[66] Benecke *et al.*, *Entwurf eines Gesetzes über Differenzierungsklauseln in Tarifverträgen*, in *AR*, 2021, p. 310.

[67] German Federal Labour Court of 18.3.2009 - 4 AZR 64/08.

[68] German Federal Labour Court of 23.3.2011 - 4 AZR 366/09.

the framework of agreements under the law of obligations between trade unions and companies.

3.2.2. *Tax privileges*

Numerous proposals have been made as to how tax incentives could be used to increase the degree of unionization. The most far-reaching idea here is to create genuine tax-exempt status for parts of wages in order to promote this through the membership of the persons concerned in the associations[69]. A less extensive solution would be the privileged treatment of union dues. It is a matter of debate whether the proposal to privilege union dues under tax law is constitutional. Critics argue that, in order to have a tangible incentivising effect, the tax advantage would have to result in a clear improvement in the position of union members and thus an equally clear disadvantage for outsiders, which would not be justified by objective reasons and would therefore be unconstitutional[70]. Other authors do not see any constitutional problems. For all those employees who have low income-related expenses, the result is that any tax advantage is lost. If one wants to provide an appropriate financial incentive, a corresponding tax concession would be justifiable[71]. However, most likely it will not in itself provide a sufficient incentive to join. With an average annual gross income of around 46,500 euros, the typical union dues amount to 465 euros per year. Since the average tax rate on this taxable income is just under 24 percent, the employee would have to pay more than three quarters of the membership dues out of his or her own pocket, even if they were deducted in full as income-related expenses[72].

3.2.3. *Financial participation of outsiders (solidarity contribution)*

3.2.3.1. General background

In view of the limited effect of tax benefits and their dependence on the individual tax rate, a financial participation of outsiders in collective bar-

[69] In depth Franzen, *cit.*, p. 46 ff.
[70] Loritz, *cit.*, p. 795.
[71] Franzen, *cit.*, p. 70.
[72] Höpfner, *cit.*, pp. 178 and 190.

gaining autonomy has been proposed in recent discussions. According to this proposal, employees who participate in the collective bargaining agreement on the basis of a contractual agreement with the employer without being a member of the union concluding the agreement should pay a solidarity contribution[73]. In addition to being independent of the individual tax rate, this has the following advantage: whereas in the case of tax privileges the state subsidizes membership with public funds and thus ultimately becomes involved in financing the associations themselves, it maintains its neutrality when solidarity contributions are introduced and merely ensures that outsiders share in the costs of collective bargaining autonomy insofar as they participate in it. It thus avoids making coalitions financially dependent on the state[74]. In Germany, for instance, solidarity contributions could not be levied through collective agreements under current law because this would exceed the collective bargaining power of the associations and burden outsider employees. Hence, the legislator would have to create an authorisation for the parties to the collective agreement to regulate a contribution obligation for outsiders with normative effect by means of a collective agreement[75]. Models can be found in Switzerland, but also in Turkey and the USA, for example.

3.2.3.2. Swiss law as a potential model

The following examines the regulation from Switzerland, where experience with solidarity contributions has been gathered for over 70 years[76]. In Switzerland, solidarity contributions are permitted under strict conditions. The first prerequisite is that the collective labour agreement, the Swiss equivalent of a collective agreement, provides for an obligation to pay solidarity contributions. However, since the collective labour agreement has no effect on outsiders under Art. 357 of the Swiss Code of Obligations (CO), an additional act is required to establish an obligation for outsiders to pay. There are two ways to do this:

[73] HÖPFNER, *cit.*, pp. 178 and 190.

[74] HÖPFNER, *cit.*, pp. 178 and 191.

[75] HÖPFNER, *cit.*, p. 178 and 198.

[76] For the historical development see MELZER, *Außenseiter und Solidaritätsbeiträge im Schweizerischen Recht*, University of Munich, dissertation, 1962, p. 4 ff.

Firstly, it is possible to declare the collective labour agreement generally applicable, including the obligation to pay contributions. The legal basis for this is Art. 3 para. 2 lit. b of the Federal Law on the Declaration of General Applicability of Collective Agreements (AVEG). The prerequisite for the declaration of general applicability of the provisions on the obligation to pay contributions is that the contributions of the employers and employees not party to the collective labour agreement do not exceed the shares that would result from an equal distribution of the actual costs among all employers on the one hand and all employees on the other. In practice, it is indeed the case that provisions on the obligation of outsiders to pay contributions are declared generally applicable. However, the declaration of general applicability is rather uncommon. The second option, which is much more significant in practice, is to stipulate the obligation to pay contributions pursuant to Art. 356b para. 2 CO as a condition for the outsider's contractual affiliation. Contractual affiliation is not to be equated with the usual reference to collective agreements in Germany. It is a tripartite contract between the two parties to the collective labour agreement and the outsider, who thereby becomes a party to the collective labour agreement. The contractual affiliation establishes the direct and binding effect of the collective labour agreement. As a result, it is the contractual agreement between the parties to the collective labour agreement and the outsider that constitutes the legal basis for the obligation to pay contributions[77].

For the declaration of general applicability, Art. 3 para. 2 lit. b AVEG expressly stipulates that the regulations on the obligation to contribute can only be declared generally applicable if the contributions are limited to the actual costs of concluding and monitoring the collective labour agreement and if they are distributed equally among all employees and employers. This means that only the costs of negotiating the agreement, including attendance fees, for monitoring bodies and monitoring visits as well as for conciliation and arbitration negotiations may be allocated. On the other hand, outsiders may not share in the costs of other trade union activities that are not directly related to the specific collective labour agreement.

The limitation of the obligation to contribute to the inspection costs in the narrow sense does not apply to the contractual connection[78]. Art.

[77] Höpfner, *cit.*, pp. 178 and 191 ff.

[78] Geiser, Müller, Pärli, *Arbeitsrecht in der Schweiz*, Stämpfli-Verlag, 5th edition 2024, point 841.

356b para. 2 sentence 2 CO, following the case law of the Swiss Federal Supreme Court, only prohibits "unreasonably" high contributions as a condition of affiliation[79]. This is intended to prevent solidarity contributions from de facto creating an obligation to join[80]. This limitation is only understandable in light of the fact that in Switzerland the obligation to form a coalition is prohibited, but the obligation to enter into a contract is permitted, as a reverse conclusion from Art. 356b para. 3 CO shows[81]. Accordingly, an "agency shop" is permissible, i.e. an obligation of the employer towards the trade union in the collective labour agreement to employ only trade union members and employees covered by the agreement. The legislator has deliberately not regulated the level at which a contribution is unreasonably high in the Code of Obligations. The predominant view is that the upper limit should be two thirds of the membership fee[82]. According to the opposing view, contributions up to a full membership fee should be permissible, as is the case in Turkey in the public sector[83].

In practice, however, the problem of the maximum permissible limit for solidarity contributions does not arise when joining a contract in Switzerland, as the outsider contributions there are extremely low. Even today, they often amount to only five Swiss francs per month. The background to this low outsider burden is the extremely restrictive legal requirements for the use of contributions. According to Art. 356b para. 2 subpara. 2 CO, these may not be administered by one party to the collective labour agreement alone, but only by a joint fund and may only be spent for purposes that arise during the negotiation, implementation and further development of the collective labour agreement for the benefit of all employees. Expenses of the associations that are not covered by the collective labour agreement may not be financed. Solidarity contributions are expressly not an advertising tool or a means of pressurising employees to join an association. They do

[79] Swiss Federal Supreme Court of 13.9.1959, BGE 75 II, 305, 321 ff.

[80] Swiss Federal Supreme Court of 13.9.1959, BGE 75 II, 305, 312 ff.

[81] Geiser, Müller, Pärli, *cit.*, point 844.

[82] Swiss Federal Supreme Court of 13.9.1959, BGE 75 II, 305, 322, Kreis, *Der Anschluss eines Aussenseiters an den Gesamtarbeitsvertrag*, University of Bern, dissertation, 1973, p. 26; Biet-mann, *Differenzierungsklauseln im System des deutschen Tarifrechts*, Nomos-Verlag, 2010, p. 91.

[83] Meier, *Privatrechtlicher Schutz gegen Koalitionszwang*, 1979, pp. 87 and 97, https://-/ampark.law/wp-content/uploads/2022/01/meier_koalitionszwang_1979_87.pdf, accessed 30.3.2025.

not serve to promote the associations, but solely to strengthen the collective labour agreement as such. In view of the low level of solidarity contributions, there was, as expected, no pull effect and their advertising effect in Switzerland is zero[84].

3.2.3.3. Lessons from the Swiss model

In view of the experience with solidarity contributions in Swiss labour law, the aim should be to reduce negative incentives to join as far as possible. It is not primarily a question of allocating transaction costs, but rather of equalising the advantages that outsiders currently have over union members due to the lack of an obligation to pay contributions. Anyone who participates in the collective agreement without belonging to a trade union should not be in a better economic position than if they had to pay a contribution as a member. The aim must be to counteract the market failure of the collective agreement system by eliminating as far as possible the financial favouring of outsiders with reference to the employment contract. It is therefore necessary to look at the solidarity contributions from the perspective of the associations and their members rather than the outsider, as is the case in Switzerland[85].

This fundamental decision has several implications: Firstly, the "user fee" for outsiders should be set as high as possible in order to achieve the intended steering effect. Ideally, the amount should be equal to the membership fee of the trade union concluding the collective agreement. This would completely eliminate the financial disincentive that arises from a labour contract reference to outsiders. Secondly, this avoids the hardly practicable distinction between the costs incurred for the conclusion, implementation and monitoring of the collective agreement and the costs incurred for general association activities without reference to a specific collective agreement. If this distinction were to be maintained, the trade union would also have to be held accountable and monitored by an independent supervisory authority. This would be the first step towards a "nationalisation of the coalitions", which must be avoided as a matter of urgency, as this would put the free market economy labour market consti-

[84] Höpfner, *cit.*, p. 178, 191, 192 ff.
[85] Höpfner, *cit.*, pp. 178, 191 and 194 ff.

tution as a whole at risk. Thirdly, it is not necessary to impose restrictions on the use of contributions on the expenditure side. The aim is not to strengthen a specific collective agreement, as is the case in Switzerland, but to promote the associations and collective bargaining autonomy as a whole. Accordingly, equal administration by a fund or a joint organisation is not necessary. There is no reason why the contributions should not go to the respective association, which may use them for any purpose, including for political activities or to finance legal expenses insurance or other services in which the outsiders do not participate[86].

3.2.3.4. Constitutional issues

The constitutionality of solidarity contributions is controversial and cannot be fully assessed in this context. In legal systems where only one trade union has the power to represent all the employees in the workplace, including collective bargaining on their behalf, it is widely considered justified to allow the union to take agency fees from employees who are represented by it: those who are members pay union dues; those who prefer not to become members have to pay agency fees[87]. However, in the United States, twenty-four states enacted "right to work" laws that prohibit this "agency shop" arrangement. It is argued that such "right to work" laws infringe freedom of association by preventing the collective parties from agreeing on agency fees even though the union must represent all the workers. If employees can enjoy the same benefits whether they pay union dues or not, many have incentives to save money and enjoy the benefits as "free riders"[88]. In Germany, however, some authors object that strengthening collective bargaining autonomy is not a task that the state should impose on non-unionised employees. They lack the proximity and group-specific, special responsibility that could justify a special levy. The funds would also flow into an organisation that is administered by the parties to the collective agreement. Special levies without state collection, administration and utilisation would be a novelty not covered by the constitution[89]. Ultimately, it depends

[86] *Ibid.*

[87] Davidov, *A Purposive Approach to Labour Law*, Oxford University Press, 2016, p. 221.

[88] Davidov, *cit.*, p. 222.

[89] Loritz, *cit.*, pp. 795 and 800.

on the constitution of each individual state and its interpretation by the courts.

4. *Summary and conclusions*

Collective bargaining describes a system in which trade unions and employer associations or individual employers bargain over wages for the employees at the respective firms. It is regarded as the key instrument for improving employees' incomes and working conditions, a guarantor of social peace and a mean to reduce the burden on the state. In many countries, collective bargaining worked well for a long time. However, membership in trade unions and employers' associations and, thus collective bargaining coverage is declining in many Member States. One central cause is the disintegration of traditional social milieus and the emancipation of employees from large social organizations. Furthermore, the world of work has become increasingly fragmented in a modern industrial and service society. Probably the biggest problem is the cost-free participation of outsider employees by including the collective agreement in the employment contract, since it reduces incentives to be a member of a trade union and pay the union dues. The decline in collective bargaining coverage has clear consequences for wages and working conditions and raises the question of legal solutions, since, according to the prevailing view, collective bargaining autonomy and collective bargaining coverage should be maintained and promoted[90]. Two different approaches can be identified in the various adopted and proposed solutions: The mandatory application of collective agreements including a statutory minimum wage ("more state"), as adopted in Germany, and the creation of incentives for voluntary union membership ("more legitimisation").

First of all, one has to bear in mind that legal considerations are of no help against the economic and social developments described above[91]. Hence, some of these problems cannot be solved by legal means at all. With regard to the "more state-approach", policy measures, such as extension mechanisms, can help to support coverage but even those require the acceptance

[90] SEIWERTH, *cit.*, p. 137.

[91] LORITZ, *cit.*, pp. 795 and 806.

of such measures by other actors and might encounter legal constraints[92]. Excessive state legislation can have negative effects. Instead of giving the collective bargaining partners room for collectively agreed solutions, more and more detailed questions of working and economic conditions are also being solved by legislation. From the perspective of collective bargaining law, it is particularly detrimental if solutions found through collective bargaining are devalued by statutory regulations, as was recently observed in the case of bridging part-time work. If the legislator makes collective bargaining achievements accessible to everyone by law, it deprives the trade union of its negotiating success and, from the perspective of the members, also devalues the activities of the collective bargaining partners that they finance. Increasingly imposed collective bargaining discredits the collective bargaining system as an unintentionally coercive system and makes it a foreign body in a constitutional order characterized by rights of freedom and equality. After all, freedom of associations is about freedom, not about compulsion. It further reduces the attractiveness of collective bargaining for companies and leads to increasing disassociation. The foreseeable long-term consequence of such a coercive system will be increasing pressure on employers' associations to avoid collective bargaining agreements in general[93]. The idealistic attachment of employees to a union lies outside the sphere of influence of the state. It is up to the trade unions alone to ensure that it is once again fashionable for the younger generation in particular to be a member of a trade union by means of a clever policy of promoting young talent and recruitment, especially in the social media. Legislators can, however, start at the economic level and take measures to reduce the economic disincentives to join. However, this can only ever be a matter of reducing the existing disincentives. The aim of a legal solution must not be to create genuine positive incentives, i.e. to put association members in a noticeably better financial position than outsiders. That would certainly not be in line with the constitution.

Strengthening collective bargaining autonomy would rather mean creating incentives for employers and employees to join the coalitions in order to create a broader basis for legitimisation and at the same time extend the normative collective bargaining coverage again. Possible means are tax privileges and solidarity contributions of outsiders. However, both means should

[92] Hassel, *cit.*, pp. 491 and 495.
[93] Höpfner, *cit.*, pp. 178 and 189.

not be intended as isolated measures, but as building blocks of an overall concept that can be coupled in particular with an attractive and forward-looking collective bargaining policy for the employer side. Furthermore, the constitutional limits of the respective jurisdiction must be observed in the law making.

Finally, if action is to be taken, time is of the essence, since there might be a "tipping point". From this point, the undesirable development accelerates rapidly und perhaps even uncontrollably. In some areas of labour and economic life, collective bargaining without state coercion is unlikely to develop in the foreseeable future. If nothing is done soon, it is feared that labour law will have the perspective of "more state"[94].

[94] SEIWERTH, *cit.*, pp. 137 and 144.

Abstract

Concern for the common good is directing the focus of labour law policy towards strengthening collective bargaining coverage. In many countries, the collective bargaining coverage is in decline, mainly because of the cost-free participation of outsider employees ("free riders"). The article discusses possible solutions for countermeasures with a special focus on Germany.

Keywords

Collective bargaining, Trade unions, Minimum wage directive, Public contracts, Solidarity contribution.

Stefania Torre

The Women's lawyer: Éliane Vogel Polsky and the Defrenne cases*

Contents: **1.** Introduction. **2.**The years of training: between legal profession and scientific research. **3.** Alongside working women: the Herstal strike. **4.** The beginning of the Defrenne saga. **5.** *Defrenne vs Sabena*: a success for female workers. **5.1.** Written procedure. **5.2.** Oral proceedings. **5.3.** The judgment.

1. *Introduction*

The history of women who have made the EU lives, years later, the same delays that in the Italian historiography marked the story of the "mothers of the Republic"[1]. Except for the book by Maria Pia Di Nonno, the merit and commitment of women who were active in foundation of the Union and the pillars of Community law are still hidden in the shadows and to be discovered[2]. Also in the international bibliography, only recently have been published studies, biographies and catalogues of exhibitions dedicated to the pioneers of the UE. It is also remarkable that the "Council of

* The paper presents the results of a research undertaken at the PRIN 2022 project "Rediscovering European Integration Through Legal Storytelling", coordinated by Prof. Amedeo Arena of the University of Naples Federico II, in collaboration with the University of Rome La Sapienza and the University of Turin. The work published here in English is part of a larger essay in Italian for the proceedings of the project, currently being published.

[1] Rossi Doria, *Diventare cittadine. Il voto delle donne in Italia*, Giunti, 1996; Fondazione Nilde Iotti, *L'Italia delle donne. Settant'anni di lotte e di conquiste*, Donzelli, 2018; Pezzini, Lorenzetti (eds.), *70 anni dopo tra uguaglianza e differenza. Una riflessione sull'impatto del genere nella Costituzione e nel costituzionalismo*, Giappichelli, 2019; D'Amico, *Una parità ambigua*, Raffaello Cortina Editore, 2020.

[2] Di Nonno (ed.), *Le Madri Fondatrici dell'Europa*, Edizioni Nuova Cultura, 2017.

Europe in brief" site devotes a page only to the founding fathers of the Union[3]!

Despite the remarkable progress made in scientific research thanks to the feminist revolution and the impact of *Gender Studies*[4], female ignorance remains in the historical field legal, conditioning knowledge of the institutions and regulatory systems that govern our time[5]. Yet, it is enough to recall a few names to realize that the history of contemporary Europe, its political-administrative organization, Community law cannot do without the contribution of some female figures who have struggled, in often adverse times, for the continent's pro-European and pacifist project. Louise Weiss, Ada Rossi, Maria De Unterrichter, Ursula Hirshmann, Éliane Vogel-Polsky, Jacqueline Nonon, Fausta Deshorme La Valle, Simone Veil Jacob, Sophie Scholl, Sofia Corradi are some women who, in a different way, believed and worked for a united Europe that was, mainly, a common space of sharing and memory of a cultural and intellectual heritage that has oriented the world, raising a barrier against the ever-latent threat of nationalism.

The essay I am presenting was born with the intention of giving voice and visibility back to a protagonist of Community policies on gender equality and social security, that in the European design and in the nascent law of the European Union identified the possible scope for the redemption of women's rights.

2. *The years of training: between legal profession and scientific research*

The name of Éliane Vogel Polsky, in the few available texts[6], is associated with a judicial affair, brought to the attention of the European Court of Justice between 1971 and 1978, with three different legal processes. In the lit-

[3] Https://www.coe.int/it/web/about-us/founding-fathers.

[4] Ago *et al.*, *Sguardi femministi sulla storiografia*, in *Genesis*, XXIII/1, 2024.

[5] Burke, *Ignoranza. Una storia globale*, Raffaello Cortina Editore, 2023.

[6] Gubin, *Éliane Vogel-Polsky. Une femme de conviction*, Institut pour l'égalité des femmes et des hommes, 2007; Irigoien Domínguez, *Éliane Vogel-Polsky: advocate for a social Europe: from antidiscrimination law to Europea politics for gender equality*, Research Papers in Law, 1/2022, Department of European Legal Studies, College of Europe. Tas, *The Court of Justice in the Archives Project. Analysis of the Defrenne II case (43/75)*, Europea University Institute, 2021.

erature we talk about the "Defrenne saga", just to highlight the particularity and uniqueness of the court case.

It all began on 16 February 1968, when a hostess of the Belgian airline Sabena, Gabrielle Defrenne, terminated her employment for having reached the age limit. At the time, the hostess was just 40 years old, but for the art. 5 of the national employment contract for flight crew, which came into force in 1956, women were obliged to retire at the age of 40.

Discrimination between women and men in cabin crew was evident, both regarding retirement age and pension benefits.

The men in the company could continue to work until they reached 55 years of age and enjoy different pension and survivors' benefits, as laid down by the Royal Decree of 3 November 1969 on the right to pension for aircraft crew and special arrangements for the application of the previous Royal Decree of 24 October 1967 on retirement pensions and workers' survivors' pensions[7]. In this respect, art. 1 of the Decree of November 1969 expressly excluded hostesses from the category of addressees. Therefore, female flight crew – for example – were not entitled to an additional pension allowance for those who had reached 23 years of service.

Faced with unequal treatment, Gabrielle Defrenne decided to take legal action to claim her rights. She will meet Éliane Vogel-Polsky and Marie-Thérèse Cuvelliez on his way.

Both were two well-known female lawyers, with already some years of militancy in the Belgian feminist and socialist associations. Éliane and Marie-Thérèse knew each other from the time of the University. They had attended the law course at the Free University of Brussels (ULB) between 1947 and 1950 and were among the very few female students to complete legal studies, which still constituted in the mid-twentieth century a predominantly male prerogative.

With Marie-Thérèse and Odette De Wynter (who will be the first woman to become a notary in Belgium), Éliane builds an extraordinary relationship of friendship and sharing of political, civil and legal passion that will last for years.

With Marie-Thérèse, Éliane takes her first steps into the world of legal

[7] *Arrêté royale determinant pour le prsonnel navigant de l'aviation civile les règles spéciales pour l'ouverture du droit à la pension et les modalités spéciales d'application de l'arrêté royale n. 50 du 24 octobre 1967 relatif à la pension de retraite et de survie des travaileurs salariéa*, in *Moniteur Belge*, no. 238, pp. 11903-11911.

profession. During the three-year traineeship to become a lawyer, the two friends will collaborate with the *Journal des Tribunaux*, for which they will write with a certain regularity, even choosing provocatively a language that declined feminine some "heavy" nouns: for the first time a legal journal will talk about female magistrate and judge.

As a keen reader of Simone de Beauvoir, Éliane spreads her ideas in the forums she takes part in, frequently organized by youth groups.

In 1952, with the inseparable Marie-Thérèse, she decided to challenge the sexism of the Belgian lawyer by presenting herself for the Janson prize, reserved for young lawyers who distinguished themselves for their legal eloquence. Against all odds, Éliane wins the challenge and is acclaimed by the *Journal des Tribunaux* for her oratory skills, talent and elegance.

Éliane will always accompany the exercise of the profession to scientific commitment.

In 1958 he obtained a licence in Labour Law and Sociology at the Brussels Institute of Labour, created to deepen his knowledge of the social and legal problems of post-industrial society. This will be a decisive experience for the future of Vogel-Polsky, who will meet Léon Troclet, a socialist deputy, expert in labour law and workers' conditions, in the classrooms of the Institute. Troclet, who had been appointed to the European Parliament in 1961, transferred two great passions to Éliane: attention to social issues and confidence in a united Europe.

With Troclet, Éliane spent many years studying and researching at the National Centre for the Sociology of Social Law, an independent scientific institution which she herself chaired from 1972. The main aim of the Centre was to draw up proposals for legislation which would focus on the weaker categories of workers, such as women, disabled people, young people and immigrants. Between 1978 and 1983, Cuvelliez will also work at the Centre and study new subjects.

Éliane's scientific career will then be completed by her enrolment at the Institute for European Studies, which was officially opened in February 1964 and from which she obtained a special licence in European studies in 1965.

Within a few years, the fields of interest of Vogel-Polsky are defined, ranging from international social law to comparative and community social law. With this wealth of experience and technical and legal knowledge, Éliane began her academic career at the ULB's Faculty of Law in 1969, taking on

the teaching of international and european social law, and then comparative social law and comparative social history.

The very high competence in labour and social law issues will be at the origin of numerous professional assignments, by the International Labour Organization, the Commission of the European Community and the Council of Europe.

3. *Alongside working women: the Herstal strike*

At the end of the 1960s, two important events marked the professional and intellectual future of Vogel-Polsky. In 1966 she sided with the workers on the great strike at the National Arms Factory in Herstal. In 1968, at the height of student protest, she began to take part in women's liberation movements and to direct her interests towards feminist demands and gender-based social relations.

From now on, Éliane's attention will increasingly be drawn to the issues of women's working conditions and wages, with a comparative and European approach. The theme of gender discrimination will be introduced in her university courses, where she will explore the legal and social aspects of economic equal treatment.

The interdependence of international conventions and the ratification of agreements by different international organisations will also be a priority in her scientific studies. It is precisely the study of these issues that will guide her work on fundamental social and economic rights and inspire the commitment to advocacy.

The great event that marked a turning point in Vogel-Polsky's career was the strike of *women-machines* employed in the National Arms Factory of Herstal[8]. The company had about 13,000 workers, including 3,500 women. Some 2000 women were employed on machines and performed alienating work in precarious, dangerous and unhealthy conditions. The women-machines were underpaid and had no career or training opportunities.

Despite the demands of the trade union assemblies for a new collective agreement for 1966-68, the National Factory did not intend to give in to the change in the conditions of its workers before a new national agreement.

[8] COENEN, *La grève des femmes de la F.N. en 1966. une première en Europe*, POL-HIS, 1991.

On 16 February 1966 a long strike began, involving more than 5,000 male workers. The biggest blow to the factory was the interruption of work by the women-machines, which paralysed the whole company. The initiative provoked heated reactions but did not change the determination of the workers. On the contrary, the unrest soon spread to other Belgian industrial complexes and lasted until 10 May 1966. The strike received the support of feminist associations, which call for the application of art. 119 of the Treaty of Rome establishing the European Community.

The text – as is known – provided that the signatory states of the Treaty would undertake to implement in the first phase (which was to end on 31 December 1961) the principle of equal pay for workers of both sexes who had performed the same type of work and that in future national legislation would maintain equal pay. Although the rule was inspired by economic interests linked to industrial production, a social project of the future European Community could be seen in between. Éliane was immediately aware of this, and when she heard the news of the strike on television and radio, she immediately went to Herstal to support the protest.

The events provoked a new awareness among European intellectuals[9]. In Brussels, the socialist left set up a committee to support agitated workers – of which Vogel-Polsky and Cuvelliez were also members – which launched a petition to the Belgian labour minister for the application of art. 119 of the Treaty of Rome.

Belgium, in fact, had ratified the European Charter in 1958 but had not acted on the provision of art. 119, since it was considered merely a programmatic rule which did not confer any subjective right. Under national legislation, only the social partners involved in joint committees and collective agreements were allowed to intervene on the question of wages.

The principle of equal pay continued to be ignored in Belgium, regardless of the pressures of feminist movements and the protests of socialist parliamentarians.

At the end of 1961, even though the European Commission had set July 1960 as the deadline for the Member States to comply with the provisions of the Treaty, the implementation of equal pay was still to be achieved in many countries on the continent. It became necessary to convene urgently a con-

[9] Minesso, *Welfare donne e giovani in Italia e in Europa nei secoli XIX-XX*, Franco Angeli, 2015.

ference of the member states to extend the adaptation to the principles of the Treaty until 31 December 1964, with a procedure that violated the content of art. 236 of the Charter itself and which provoked conflicting reactions in doctrine. Among the most severe critics of the political operation was Vogel-Polsky who, from that time on, never ceased to insist on the direct applicability of the rule of art. 119 in the signatory States. However, her voice was almost isolated in the national context. Éliane was aware of this and was looking for a more effective strategy to draw attention to the legal issue. An exemplary legal case could be the right solution to mark a significant turning point.

This is an idea that is particularly strengthened by the day after the end of the Herstal strike, which marked a partial victory for the workers: They obtained only half of the required wage increase and the establishment of a commission to study equal pay and the valorisation of women's work.

In the meantime, the Herstal Women's Support Committee, called "Equal Pay for Equal Work", will continue to fight for effective equal pay, bringing cases of violation of workers' equality to the attention of the courts. Pressed by events, the Belgian government had launched on 24 October 1967 the Royal Decree n. 40 on women's work, which art. 14 recognized the right of women workers to equal pay and the possibility of taking legal action in case of violation of the principle. It is interesting the reference that the Decree makes to the provision of art. 119 of the Treaty of Rome. It is in fact clarified that the equal pay fixed by the Decree is not a consequence of the direct applicability of the rules of the European Charter, nor did it suggest an interpretation of the provision. On the contrary, it emphasizes the need for a uniform reading, valid for all the signatory States of the Treaty and that in rigor of art. 164 only the European Court of Justice could render. The Court was in fact the supreme legal authority of the Community, whose function was to ensure respect for the law in the interpretation and application of the Treaties[10].

An important part of the Court's work concerned the subject of references for preliminary rulings by national courts, whenever there was a controversial question on the interpretation of Community provisions which might affect the decision in the case. In such circumstances, the proceedings had to be suspended pending the decision of the Court of Justice, whose judgments were binding on all Member States and their national courts.

[10] *Arrêté royale n. 40 sur le travail des femmes*, in *Moniteur Belge*, no. 238, pp. 11189-11199.

The centrality of the Court of Justice in the demand for equal pay is a fact that does not escape Vogel-Polsky, for which it is more than ever necessary to seek cases to be dealt with in the courts in order to refer the matter to the Community jurisdiction. It is an appropriate but not easy transition, because it clashes with a certain reluctance on the part of the victims of wage inequality, intimidated by the possible consequences and the general climate of mistrust and suspicion towards women's claims. In fact, despite attending the trade union meetings of workers and women's associations, Vogel-Polsky is unable to find any significant case to bring to trial.

4. *The beginning of the Defrenne saga*

The great opportunity comes with the story of Gabrielle Defrenne.

The defensive line of the first legal action taken by the hostess was to obtain the annulment by the Council of State of the Royal Decree of 3 November 1969, because it was discriminatory in that it laid down special rules on the right to pension from which female airline cabin crew were excluded[11].

Marie-Thérèse Cuvelliez, who signs the defence for Gabrielle Defrenne, invokes the violation of art. 119 of the Treaty of Rome and requests that the national court first refer the matter to the Court of Justice, because of differences in interpretation on the above-mentioned provision. The point at issue concerned the nature of the pension, whether it could be regarded as equal to salary and therefore subject to the obligation laid down in art. 119 of the European Treaty. The defence argued for equality, arguing that the pension allowance was a contribution paid directly to the worker for the work performed. On the contrary, the Belgian government insisted on the political nature of the right to pension, and therefore on the difference in function with respect to remuneration and consequently on the exclusion from the scope of art. 119.

If we read the Cuvelliez's brief carefully, the most interesting passage in the defence is that concerning the interpretation to be given to the expression equal pay, to which the Community provision refers. The Court is asked

[11] Historical Archives of the Europea Union - Court of Justice of European Union (henceforth HAEU-CJEU)-1215, *Dossier de procédure original: affaire 80/70, Gabrielle Defrenne/Belgique.*

to clarify whether that wording refers in general terms to equal treatment of workers of both sexes. In support of this reading, the lawyer Cuvelliez attached a memoir by Éliane Vogel-Polsky which demonstrated how art. 119 should be read in the sense of equal working conditions between women and men engaged in the same type of activity[12].

Vogel-Polsky's opinion focuses on the ambivalence of rights and obligations arising from the principle referred to above[13]. Art. 119 set out a social right but with an obvious economic aim. The author pointed out that its inclusion had been strongly desired by France, to prevent industrial competition from the Member States and a situation of unequal treatment of workers, which would have hindered their free movement.

Many of the comments were based on a letter sent to the Member States by the President of the European Commission on 28 July 1960, which not only clarified the dual social and economic nature of the principle of equality, but also asked for information on the way in which the Member States or the social partners responsible for wages had given effect to the Community provision[14]. For Éliane this document is valuable, because it clarifies the reading provided by the Commission to art. 119, expressly recognizing that equal pay is first and foremost the expression of a right of a social nature which guarantees all women workers in the Community and imposes obligations necessary for the common social policy. The Treaty of Rome imposed itself on the signatories not only in the economic, fiscal and customs fields but also in four other areas of social importance: the free movement of workers, the European Social Fund, vocational training policy and Articles 119 and 120 of the Treaty.

Another important topic of the paper is the content and limits of equal pay. Drawing on its international and comparative law expertise, Vogel-Polsky used excerpts from the UN Covenant and the Declaration on the Elimination of Discrimination against Women to argue for a reading of the concept of pay that was not limited to wages alone, but more broadly all conditions of treatment of workers (such as occupational safety and health, maternity,

[12] HAEU-CJUE-1215, *Dossier de procédure original: affaire 80/70, Gabrielle Defrenne/Belgique*, paper 15, *Memoires pour Melle Gabrielle Defrenne*, p. 4.

[13] HAEU-CJUE-1215, *Dossier de procédure original: affaire 80/70, Gabrielle Defrenne/Belgique*, annex to n. 15, *Consultation*.

[14] The letter is attached to the memorandum signed by the legal adviser of the European Commission, paper 17.

vocational training, the dignity of the worker). It is significant that she states, with a provocative note, that wage equality, taken in isolation, does not exist, it is a myth! There can be no reading other than that which alludes to equal treatment in employment[15].

The move to extend the stipulation of art. 119 to the right to a pension is the consequence of the overall reasoning. The old-age pension is a part of the salary paid to an employee, which includes all sums paid because of the employment contract. More precisely, the right to a pension constitutes that social wage which is not dependent on economic, cultural, sociological and technical factors linked to the way in which direct wages are fixed, and for this reason must be subject to the principle of equal pay.

The argumentative efforts of Vogel-Polsky and Cuvelliez will not be enough to convince the European Commission, which will clarify its position in the brief filed by legal adviser Italo Telchini, by which it will reject the argument of retirement pension as an indirect benefit for the worker and the extension of the principle of equal pay to the regulations on the pensionable age of civil aviation personnel.

The final decision of the Court of Justice will declare the legal defence of Gabrielle Defrenne unsuccessful[16]. The judges will accept the arguments of the Commission and the Belgian government, excluding the equating of social security benefits with pay. The literal formulation of art. 119 of the Treaty of Rome did not permit the rule to be extended to social security schemes and benefits directly governed by law, outside any concertation. These schemes grant rights to workers not so much based on the employment relationship as based on social policy considerations. The employers' contribution to the financing of these schemes could therefore not be considered as a direct or indirect payment of a benefit. The old-age pension, in conclusion, as a social benefit could not be understood as an advantage paid to the worker and remained foreign to the provision of art. 119.

[15] HAEU-CJUE-1215, *Dossier de procédure original: affaire 80/70, Gabrielle Defrenne/Belgique*, annex to n. 15, Consultation, p. 9 ff.

[16] The judgment of the Court of 25 may 1971, https://e-justice.europa.eu/ecli/-ECLI:EU:C:1971:55.

5. Defrenne vs Sabena*: a success for female workers*

The disappointment and bitterness over the outcome of the first proceeding will not discourage neither Gabrielle Defrenne nor her lawyers, Vogel-Polsky and Cuveillez, who will continue the legal action taken also against the Sabena Flight Company, for wage discrimination and compensation for loss resulting from the termination of employment.

Almost five years have passed since the Court's ruling, but the climate in Europe is changing profoundly. Strikes for equal pay have resumed and the feminist movement has regained momentum[17]. The Conference of Heads of State and Government of the European Community was held in Paris on 19-20 September 1972, setting out new guidelines for Community policy and integration. In 1974, almost confirming the changed outlook in the Community, the European Council adopted the resolution of 21 January on the social action programme which, in several passages, stresses the need to improve the free movement of workers, social security and measures to equalise the treatment of workers in general, including migrants[18].

In the wake of the new commitments made by Europe, important directives are introduced by the Commission which concern women's work: Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women[19]; the subsequent Directive 76/207 on the implementation of the principle of equal treatment for men and women and concerning access to employment, training and promotion as well as working conditions[20]; finally, Directive 79/7 on the implementation of the principle of equal treatment for men and women in matters of social security[21].

In a politically and ideologically more favourable context for change, the second chapter of the Defrenne saga is inserted, which will become one of the most important cases in the history of the formation of Community law.

The judicial affair, which enabled the Court of Justice to play an active

[17] Facchi, Giolo, *Una storia dei diritti delle donne*, Il Mulino, 2023.
[18] Https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31974Y0212(01).
[19] Http://data.europa.eu/eli/dir/1975/117/oj.
[20] Http://data.europa.eu/eli/dir/1976/207/oj.
[21] Http://data.europa.eu/eli/dir/1979/7/oj.

role in launching the Community's social project, crystallised the principle of equal pay for men and women, and established the criterion of direct horizontal effect of certain provisions of Union law.

The court case arrived at the Court of Justice after a preliminary passage before the courts of Belgium. Defrenne's legal strategy had changed completely since the previous experience, which ended in 1971. On this occasion, Gabrielle Defrenne sued her employer, the Sabena Company, for wage discrimination and for the losses she had suffered because of compulsory retirement, which had affected her career.

Access to the voluminous *dossier de procédure* offers the scholar a very rich archive, useful for the history of legal thought, the language of European law, for the theory of Community law and for a better understanding of the comparative approach to legal experiences, which is the common trait of all actors in Defrenne II.

The *dossier* is divided into two "bundles", for the written procedure[22] and for the oral procedure[23], and consists in both cases of a very large number of documents (in total there are about 1100 cards), as proof of the interest and relevance of the questions on which the Court was called upon to rule.

But we follow the narrative of the dossier.

Assisted by Marie-Thérès Cuvelliez, Gabrielle Defrenne, after the dismissal of the claim for compensation for wage discrimination and violation of the Treaty of Rome by the Labour Court of Brussels, she appealed to the Labour Court, which acknowledged the merits of the application in that it raised the question of "self-executing" of Art. 119 of the European Charter, that is to say if the principle had become directly applicable in the signatory states of the agreement. On 23 April 1975, the national court ordered a stay of judgment and a reference to the European Court for a preliminary ruling so that it could rule on the two critical points: whether article 119 directly introduces the principle of equal pay for male and female workers performing the same work, as well as the same right to bring legal proceedings before national courts in order to obtain compliance with the principle, and, where appropriate, from what date; secondly, whether art. 119 had become applicable in the Member States on the basis of acts adopted by the European Community (in which case, from what

[22] HAEU-CJUE-1696, *Dossier de procédure original 1: affaire 43/75.*
[23] HAEU-CJUE-1697, *Dossier de procédure original 2: affaire 43/75.*

date) or if there was exclusive competence of the national legislator in this respect.

On 2 May 1975, the application was entered in the Court's register under reference number 43/75. In the following days followed communications pursuant to art. 20 of the Statute of the Court, which provides for information to be given to interested parties, the European Commission, the Council and the Member States for the purpose of sending written observations on the preliminary ruling.

On 6 May, the President of the Court, Robert Lecourt, appointed Pierre Pescatore as Judge-Rapporteur and Henri Mayras as Advocate General. On 12 May, the Registry of the Court then informs the lawyer Cuvelliez of the entry in the register of the judgment Defrenne vs Sabena.

Here the first curiosity is born.

In the literature, the case Defrenne vs Sabena is presented as the masterpiece of Éliane Vogel-Polsky! Yet, in no document of the whole procedure does her name appear. One can only speculate on the reason for this "apparent" absence, which could be justified by the intense collaboration with the Commission, the Council of Europe and the Belgian government on major labour issues. There is no doubt, however, that the ideas of Vogel-Polsky constitute the technical basis of Cuvelliez's arguments in the defense of Defrenne.

The other surprise in the judicial affair is the replacement during the trial, and before the oral hearing, of the Advocate-General, an appointment that is assigned to Alberto Trabucchi.

5.1. *Written procedure*

During the written procedure, four parties submitted remarks: the defence of Defrenne, the European Commission and the governments of England and Ireland. On the fact that only these two States have addressed observations, the literature puts forward a hypothesis[24]. The Defrenne II case came to the attention of the Court three years after the two states joined the European Community. A possible pronouncement of retroactivity of the principle of equality referred to in art. 119 would have had serious economic consequences, especially in countries where the employment and exploita-

[24] Tas, *cit.*, pp. 6-7.

tion of female labour was important. Both the British and Irish governments considered that art. 119 was not directly effective for the Member States, albeit with partially different arguments.

The British government invoked the *criteria* developed by the Court itself, according to which the directly applicable provision must impose a clear and precise obligation, without limitations that would make it necessary for the implementation of the principle by the Member States. Art. 119 of the Treaty gave rise to many uncertainties about the use of expressions such as *salary* or *equal work*, to the point that it had been necessary to include in art. 1 of Directive 75/117 the expression *the principle of equal pay between men and women outlined in art. 119*, for clarity. Also to highlight the generic formulation of the rule of the Treaty, the British government recalled the previous case Defrenne, which was born from the request of the Belgian Council of State to have a unique interpretation of art. 119 and its extension to pensions and social security benefits. The attribution of direct effect to art. 119 could have created many problems of confusion and uncertainty in national law and between it and the Community law. But since it was the task of the Member States to achieve the EU's objectives, governments had an obligation to do so through national legislation. Whether a provision whose wording is doubtful and uncertain were to be made effective immediately, conflicts with the rules of national law would inevitably arise.

Even more frightening are the practical and economic consequences of the direct effect of the Treaty provision on the status of workers in the Member States. In England the principle of equal pay was enshrined in the 1970 Equal Pay Act (annexed to the observations), which became fully effective on 29 December 1975. The law provided that employers, both public and private, would receive funding until the end of 1975 to eliminate wage discrimination, in accordance with a timetable consistent with the deadlines of Directive 75/117. If the provision of art. 119 had been retroactive for the United Kingdom, this would have led to confusion and the adjustments could have resulted in an increase in labour costs. Many employers would be at risk, the creditworthiness of many companies would fail and rising labour costs would drive inflation. However, in the event that the Court would have wanted to recognise the direct effect of art. 119, the British Government's wish was that this should be limited to relations between individuals and Member States, based on the reasoning

that States are directly obliged to implement the principle of equal pay. If they failed, they would have been responsible to the citizens for their inaction.

The Irish Government also took a similar position, stating that art. 119 of the Treaty imposed an obligation solely on the States, which were responsible for removing obstacles and restrictions to the free movement of workers. The implementation of obligations could justify measures under national law which also affected legal relations between private individuals, but the binding nature of the Community provision did not affect citizens. Art. 119, in contrast to other provisions of the Treaty of Rome which were deemed directly applicable, formulated a social objective that the Member States had to implement in the interest of only one category of citizens, namely women workers. Based on these arguments, the conclusion was the exclusion of the direct effect of art. 119 and the recall of Directive 75/117, which required Member States to take appropriate measures to eliminate discrimination between workers within one year of notification thereof.

The position of the European Commission was placed in the middle of the interpretations provided by the defence of Defrenne and the British and Irish governments.

On the one hand, the Commission excluded the direct effect of art. 119 stating that the actual text of the provision referred to a precise date by which the obligations assumed would be implemented, namely 31 December 1961 (the first expiry of the transitional period). Moreover, the resolution adopted by the conference of the Member States on 30 December 1961 extended the initial deadline to 31 December 1964.

For the Commission as well, art. 119 fell into the category of prescriptions not equipped with "self-executing", because it needed clarification by internal rules. However, the Treaty made it incumbent on the signatory States to ensure that equal pay was implemented by the end of 1964 and then to prevent forms of pay discrimination. In summary, for the Commission it was necessary to distinguish between the vertical and horizontal effectiveness of the provision of art. 119: in fact, if the immediate applicability to relations between private individuals, with reference to relations between States and citizens, was to be ruled out, after the expiry of the time allowed for ensuring the principle of equal pay the provision became directly applicable.

Finally, a few comments on Defrenne's defensive memory.

Contrary to what was claimed by the other parties, Cuvelliez acknowledged the clarity and completeness of the provision in art. 119: "*Elle precise une obligation de faire dont la signification est non equivoque*"[25].

The principle of equal pay did not give rise to any doubts or uncertainties, especially in the case of Belgium, whose Constitution under art. 6 guaranteed the principle of equality before the law. The meaning of the concept of equality was clear to the Belgian jurists. The terms of art. 119 were obvious and, therefore, from the beginning of the first phase of implementation of the Treaty there was an obligation for States to apply the principle of equality. In the case of Belgium, the obligation was imposed by the law ratifying the Treaty, from 4 January 1958, and from that date it had to be guaranteed also by the national courts. Nor was the resolution of the Conference of the Member States of 30 December 1961 to be invoked, because that was a political and diplomatic decision taken by an assembly not provided for in the Treaty and therefore not empowered to amend its provisions.

The defence of Defrenne also took a critical position on the reference to Directive 75/177. Excluding the emphasis on making more understandable the principle established by art. 119, should be seen as a further Community initiative to follow up the provision of the Treaty.

Finally, Cuvelliez stated that it was only by recognising the direct effect of art. 119, it would have had a meaning, a social utility, a raison d'être, a positive effect on the working women. Without direct effect, the rule would have remained a dead letter.

The variety of readings and proposals for interpretation provided by the parties in the written procedure led the Court to address several questions to the British and Irish governments and to the European Commission. The judges asked Ireland and the United Kingdom to investigate the economic consequences of the direct effect of art. 119, in particular by indicating which firms would be most penalised; which category of workers and with what numbers; the extent of wage differentials; which category of workers and with what numbers; the extent of wage differentials. In addition, it was also asked to clarify whether the decision taken by the representatives of the governments of the Member States at their meeting on 30 December 1961 fell

[25] HAEU-CJUE-1696, *Dossier de procédure original 1: affaire 43/75*, c. 581.

within the scope of the agreements provided for in art. 3 of the Act of Accession to the Community and, if so, because the decision had not been applied in 1973.

More detailed requests addressed to the Commission, from which the Court requested five clarifications on the concept of remuneration and equal work; on the legal nature of Sabena (whether it was a private or public company); the decision taken on 30 December 1961 and the legal grounds for amending the Treaty without recourse to the ordinary procedure; on the implementation of the principle of equal pay in the Member States and the legal grounds for Directive 75/117.

It is clear from the wording of the questions that the Court's uncertainties were precisely related to the difficulty of reconciling economic interests and the common market with the social and solidarity objectives of the Community project.

The difficulty also seems to emerge from the answer to the questions given by the European Commission, which introduced the issue of the separation between workers in the public and private sectors. The Commission's view was that it would be easier for public servants to ascertain what the salary and the same work were, since classifications according to type and degree of activity were available. For the private sector, there was a lack of references. An important argument which would have prompted the Court to give serious thought.

In addition to the expected replies, the in-depth discussions produced a substantial number of annexes to the arguments put forward by the parties.

The UK government has presented studies showing that labour costs increase by at least 3.5% in the case of equal pay. In support of its claims, it attached the results of a survey conducted in 1969 by the Department of Employment and Productivity on a sample of firms. The documents were completed by tables on the number of men and women employed in different industrial sectors, as well as on wages and salaries paid to men and women. All in all, a material which was to demonstrate the negative repercussions for the English economy if the principle of equality of wages had been recognised retroactively.

The core of documents which are more substantial is that accompanying the Commission's reply. It includes the text of the resolution of 30 December 1961, as well as several reports from the Commission to the

Council on the implementation of the principle of equal pay in different years and a statistical report on the structure and distribution of wages in 1966.

Among these annexes, the most interesting is the *V Rapport de la Commission au Conseil sur l'état d'application au 31 décembre 1973 du principe d'égalité entre rémunération masculines et féminines au Danemark, en Irlande et au Royame-Uni*, which offered arguments for the thesis about the diversity between public and private sector workers. The report was divided into three parts: the first, devoted to the analysis and problems posed by art. 119. The second described the situation in the participating States in the public and private sectors, in collective bargaining, in administrative wage-setting decisions and in the social security system; The third part described both the more general condition of women workers and the measures, both legislative and contractual, taken to implement equal pay.

The *Report* on the implementation of equality in Denmark, the United Kingdom and Ireland was also cited in the reply by the Defrenne defence, after the parties' written submissions were communicated. Mrs Cuvelliez criticised the proposal to separate the public and private sectors from work as an argument that was not justified from a legal point of view, which would lead to further discrimination between workers. Only women employed in the public sector would benefit from the direct effect of art. 119 of the Treaty, whereas those working in private companies would be affected by the legislative initiative of the States. Furthermore, the defence of Defrenne wondered why the Commission, which had given itself so much work to draw up studies and reports on the subject, decidedly useful but not very incisive, had not resorted to the infringement procedure as provided for by art. 155 and 169 of the Treaty. Finally, Cuvelliez invited the Court to examine carefully the findings of the Report, particularly in Denmark, whose experience showed that the implementation of equal pay, while creating difficulties, was possible and that the goal could also be achieved in England and Ireland. In essence, a firm stance, especially towards those economic arguments which were the real obstacle to the elimination of pay discrimination.

5.2. *Oral proceedings*

During the oral proceedings, the conclusions of Advocate General Aberto Trabucchi, presented at the hearing on 10 March 1976, were of some

interest. After summarising the facts from which the preliminary ruling had arisen, Trabucchi focused on the ultimate aim of art. 119. Included in the title of the Treaty on the social policy of the Community, it aimed to contribute to the improvement of the working and living conditions of the European workforce. Citing the Advocate General of the Defrenne I trial, Trabucchi adopted the conclusion that art. 119 was inspired by the intention to prevent distorted competition between European states through recourse to female labour, which is less expensive than male labour[26].

Entering the substance of the question of the effectiveness of the Treaty provision, the Advocate General set out several decisive points.

First, he cleared the field of all objections to the wording, calling into question the objective of the provision: to prohibit any discrimination against women in terms of pay; imposing a precise obligation on the recipients, without reservation. The obligation imposed on the Member States, to whom the rule was addressed, consisted of a duty to act within a precise deadline, namely the end of the first phase of transition. The resolution adopted on 30 December 1961 to extend the deadline for implementing the principle of equal pay until 31 December 1964 had not amended the Treaty, replacing art. 119 in relation to the question of the time-limit. The resolution was to be seen simply as a political act, expressing the concerns of States to overcome the difficulties arising from the application of the rule.

The second question that Trabucchi clarified concerned the completeness of the standard, a necessary requirement to recognize its direct effectiveness. The Advocate General referred to the case-law of the Court which had given direct effect to articles of the Treaty which imposed an obligation to do, when the obligation was clearly stated, determined in content and not subject to reservations (Lütticke case 57/65).

But the most important passage of the observations was that concerning the application of art. 119 to private individuals. Says about it Trabucchi: *"la discriminazione che la norma vuole vietare sarà, nella maggior parte dei casi, l'opera di un privato imprenditore a danno della lavoratrice"*[27].

States can only intervene directly in the setting of wages in the public sector, whereas in the private sector wage-setting is largely left to the parties'

[26] HAEU-CJUE-1215, *Dossier de procédure original: affaire 80/70, Gabrielle Defrenne/Belgique, Conclusions de M. l'Avocat général Alain Dutheillet De Lamothe*, p. 6.

[27] HAEU-CJUE-1697, *Dossier de procédure original 2: affaire 43/75, Conclusione dell'Avocato Generale Alberto Trabucchi*, pp. 11-12.

bargaining. It was necessary to adopt appropriate internal rules. On these observations, the States had concluded that art. 119 directly bound only the national governments and that obligations on private citizens were to be excluded. The European Commission itself had insisted on a reading of 119 which legitimized a legal initiative by private individuals, but this could only be considered as being founded in the presence of discrimination carried out by the State itself as an employer, or in the case of remuneration systems set by the legislative or executive branch.

All the reconstruction was criticized by Trabucchi, for whom limiting the rule only to civil servants would have meant creating a new condition of discrimination. The argument of the legal nature, public or private, of the Sabena airline also lost interest. Whether it was a private company or a public one, it had little to do with the issue.

Trabucchi stressed the criteria for determining the effects of a Community rule on national law and pointed out that, in this case, it was not the designation of the addressee but the purpose, spirit and objective of the provision. The purpose of article 119 was to eliminate all forms of wage discrimination, not only because of the laws or regulations of the Member States, but mainly because of collective agreements or individual contracts. The obligation to implement equality fell mainly on trade union associations and private individuals, independently of other provisions of domestic law. The principle of equal pay by its very nature concerned individuals and could have effects on them, allowing recourse to national courts in the event of infringement, even in the absence of specific provisions adopted by the States. Certainly, Mr Trabucchi reiterated, it was desirable to adopt administrative and criminal measures that would strengthen the Community rules; but this did not preclude the possibility for the national court to disregard domestic law and any public or private act which was contrary to the principle of equal pay, declaring the absolute nullity of the contractual clause contrary to the rule or of the provision of law conflicting with the principle.

In conclusion, for the Advocate General the rule of art. 119, while mentioning the Member States of the Community, laid down a principle and an obligation for all public authorities competent to implement the provisions of the Treaty, first among all national courts. Its direct effect also applied to private citizens, irrespective of national law. Certainly, the Member States and the European Community would have been called upon, in time, to in-

tervene with legislative and regulatory proposals to broaden the scope of applicability of art. 119. If it had really been limited to equal pay in the strict sense and the same type of work, the ultimate goal of the standard would have been betrayed. Discrimination against women was often hidden behind the pay structure, job classification or description, type of work required in certain sectors, vocational training and general working conditions. The studies and inquiries submitted by the parties to the case provided a wealth of material on this subject.

Referring to the preliminary ruling of the Brussels Labour Court, Trabucchi pointed out that the Belgian Royal Decree of 24 October 1967 had not affected the scope of art. 119 of the Treaty. The right of women workers to apply to national courts in cases of wage discrimination did not come into being until 1 January 1968 but was retroactive to the first date indicated by Community legislation. As the collective agreement between Sabena and its employees fell within the scope of the contractual autonomy of the social partners, situations of unequal treatment contained in the contract could be eliminated only through recourse to jurisdiction and pursuant to art. 119 of the Treaty.

Trabucchi's conclusion was very clear: "*Il principio contenuto nell'art. 119 del trattato è stato introdotto nell'ordinamento giuridico belga non già dal regio decreto di cui si discute, bensì dalla legge di ratifica del trattato CEE approvata il 2 dicembre 1957*"[28].

The last reflections were reserved for the observations of the United Kingdom and Ireland against the direct effect of art. 119 for probable economic consequences. Trabucchi replied that this type of argument, although useful for the purpose of calculating opportunities, could not have legal relevance. The direct effect of art. 119 for questions relating to remuneration in the strict sense did not justify fears on the part of States, also in view of the fact that many of them had already taken initiatives consistent with the Community principle, that the financial impact would not have worsened the national economy.

[28] HAEU-CJUE-1697, *Dossier de procédure original 2: affaire 43/75, Conclusione dell'Avvocato Generale Alberto Trabucchi*, cit., p. 20.

5.3. *The judgment*

The Court's judgment came on 8 April 1976.

The judges accepted most of the arguments put forward by the Advocate General and Mrs. Cuvelliez.

Art. 119 of the Treaty of Rome was recognised as being directly effective, not only in relations between Member States and citizens, but also in relations between private individuals. In the event of discrimination, the injured party could bring an action before a national court on the basis that the Community principle also applied to private law contractual clauses. As regards the date from which application was to be considered as guaranteed, the Court indicated 1 January 1962 for the original signatory States and 1 January 1973 for those subsequently acceded to the Community. The resolution of the Member States adopted on 30 December 1961 did not alter the first deadline set by the provision of the Treaty of Rome for the implementation of anti-discrimination measures between workers.

The judges ruled that, even in cases where the rule of art. 119 had no direct effect, the provision should not be interpreted as conferring exclusive competence on the national legislator to implement equal pay, since such implementation could result from the concomitance of internal and Community rules.

Finally, the Court, giving in partly to the requests of the English and Irish governments, established that the direct effect of art. 119 could not be invoked for pay periods prior to the date of the judgment, except only for workers who had already brought a legal action or an equivalent claim.

Overall, the Court's decision marked an important stage in the process of recognising and protecting gender equality and gave a social direction to the European project and Community law. It was a further confirmation of the central role played by the case law of the Court in building the Europe of the peoples. Alberto Trabucchi recalled it a few months after the judgment of Defrenne II. In October 1976, as he was leaving the post of Advocate General and member of the Court, Mr Trabucchi gave a brief speech summing up the passion and dedication with which the first judges had accepted the challenge of building a new legal system, Independent of national and international law, which was accepted by the citizens of the Community as a set of rules and principles shared: "*tutti e sempre noi alla Corte abbiamo lavorato con la coscienza che il nostro compito non si esaurisse*

nella pure essenziale funzione del "suum cuique tribuere", avendo invece la mira di far sentire concretamente anche la forza traente del diritto nel nuovo sistema del rapporto comunitario, secondo quelle che sono le funzioni tradizionali del momento giuridico nella vita dei popoli"[29].

As for Éliane, although the ruling was a success for the workers, she knew well that effective equal pay and working conditions were a distant goal. After all, the Court had yielded to economic pressures by limiting the retroactive effects of art. 119. But above all, equal pay was only one of many aspects relevant in the comparison of male and female work. The chapter on indirect discrimination, to which Trabucchi had also referred in his requisition, was still to be written.

It is not surprising, therefore, that the Defrenne affair should again come to the attention of the Court in December 1977[30].

Gabrielle Defrenne, while defending her rights before the European courts, had appealed against the judgment of the Labour Court which rejected the claim for compensation for early retirement and for economic loss in the calculation of the pension. Reached in Cassation, the matter was referred to the Court, still called to decide on the interpretation of art. 119 of the Treaty, in order to clarify whether the principle of equality was limited to pay or included working conditions and limitations on working capacity for reasons of gender. In other words, the judges had to clarify once and for all whether article 119 had laid down a fundamental principle of Community law which could guarantee workers against any form of discrimination.

The judgment confirmed Vogel-Polsky's concerns and doubts.

The Court rejected Gabrielle Defrenne's defence argument that she insisted on the general principle of non-discrimination in art. 119 of the Treaty and therefore for its extensive application[31]. On the contrary, the courts held that, in the context of the social provisions of the Treaty, 119 was to be interpreted as a special rule limited only to wage discrimination and not extendable to other elements of the employment relationship. When asked whether there was a general principle of Community law prohibiting

[29] HAEU-CJUE-2778, *Audiences solennelles de la Cour (10/1976), Discorso dell'Avvocato Generale Alberto Trabucchi*, 7 ottobre 1976, p. 3.

[30] HAEU-CJUE-2112, *Dossier de procédure original: affaire 149/77.*

[31] *Il Foro Italiano*, 1978, 101, parte quarta: giurisprudenza comunitaria e straniera, pp. 491-492, pp. 503-504.

discrimination on grounds of sex in the field of employment, the Court replied with an argument which left no doubt. Respect for the fundamental rights of the individual was certainly an integral part of Community law; the elimination of sexual discrimination was undoubtedly one of the fundamental rights; the European Social Charter of 18 November 1961 and the International Labour Organisation Convention n. 111 of 25 June 1958 laid down the prohibition of discrimination in employment and occupation, however the facts referred to by the applicant Defrenne dated back to a time when the Community had not yet assumed, with regard to national law, a function of monitoring and ensuring equal treatment of workers, and therefore the issue had to be brought under domestic and international law.

For Éliane Vogel-Polsky, the battle for women's rights continued to be an open game.

Abstract

The essay rebuilds the role of Eliane Vogel Polski, a Belgian lawyer, feminist and equal opportunities advocate, in the complicated judicial affair that opposed the hostess Gabrielle Defrenne and the Airline Sabena and that provoked three historic judgments of the European Court of Justice, which sanctioned the principle of equal pay treatment for workers of both sexes.

Keywords

Employment contract, social welfare, equal treatment, EU law, Court of Justice of European Union.

Focus
edited by Alessandra Sartori and Elena Gramano

Due Diligence in Global Value Chains: a Comparative Overview in the Light of the EU Directive

Wilfredo Sanguineti Raymond

La nueva directiva sobre la diligencia debida de las empresas declinada con ojos de laboralista*

Contenido: **1.** La necesidad de contemplar la directiva con ojos de laboralista. **2.** El modelo de regulación del trabajo global subyacente al tratamiento de la diligencia debida introducido por la directiva y sus componentes principales. **2.1.** Los derechos humanos laborales como bien protegido. **2.2.** Las "cadenas de actividades" como espacio de protección. **2.3.** Las grandes empresas europeas y de terceros países como sujetos obligados. **2.4.** La diligencia debida como estándar regulador. **3.** La responsabilidad administrativa y civil de las empresas como elemento de cierre del sistema. **4.** El impacto del Paquete Ómnibus sobre la Directiva de Diligencia Debida: ¿simplificación o debilitamiento?

1. *La necesidad de contemplar la directiva con ojos de laboralista*

Luego de un largo proceso de gestación, marcado por múltiples y muy complejas negociaciones, marchas y contramarchas, así como abundantes concesiones recíprocas, el pasado 25 de julio de 2024 entró en vigor la Directiva (UE) 2024/1760, de 13 de junio de 2024, sobre diligencia debida de las empresas en materia de sostenibilidad. Una norma que no oculta, ya desde su inicio, lo delicado y ambicioso de su propósito: establecer normas sobre "las obligaciones que incumben a las empresas en relación con los efectos adversos, reales y potenciales, para los derechos humanos y el medio ambiente de sus propias operaciones, de las opera-

* La publicación de este artículo forma parte de las actividades del Proyecto de Investigación "La diligencia debida de las empresas en materia de derechos humanos laborales. Impacto de la regulación europea y relevancia para España", financiado por la Agencia Estatal de Investigación del Ministerio de Ciencia, Innovación y Universidades y la Unión Europea (PID2023-146443NB-I00), del que son investigadores principales por los profesores Wilfredo Sanguineti Raymond y Juan Bautista Vivero Serrano.

ciones de sus filiales y de las operaciones efectuadas por sus socios comerciales en las cadenas de actividades de dichas empresas", así como sobre "la responsabilidad que se deriva del incumplimiento" de estas, de acuerdo con lo indicado en su artículo 1, apartados a) y b).

La sola lectura de esta delimitación inicial es suficiente para advertir que nos encontramos ante un instrumento regulador muy singular, de factura inédita hasta el momento en la Unión Europea, en tanto que portador de una auténtica revolución desde varias perspectivas. Entre ellas, la de la manera de hacer negocios y construir empresa al interior de la Unión Europea, que ha de encaminarse preceptivamente ahora igualmente hacia la consecución de objetivos sociales y medioambientales, y no solo de resultados económicos. Pero también desde la óptica de la delimitación del ámbito hacia el que han de proyectarse esas preocupaciones, que se prolonga más allá del perímetro de las operaciones desarrolladas por la propia empresa, hacia el espacio ocupado por todas las entidades con las que esta mantiene relaciones corporativas o comerciales para el logro de sus objetivos. Lo más importante, con todo, es la transformación que introduce en las que hasta entonces venían constituyendo simples prácticas voluntarias de responsabilidad social de las grandes empresas, que pasan a convertirse en objeto de auténticas obligaciones jurídicas, cuyo no acatamiento está en condiciones de precipitar la asunción de responsabilidades por parte de las mismas, como se apresura a indicar la norma.

Todas estas son transformaciones en cuya gestación, lentamente alumbrada a lo largo de las últimas décadas, han desempeñado un rol capital los derechos laborales. De hecho, la aprobación de un instrumento de este tipo no se explica si no es a partir de los muy numerosos escándalos y catástrofes industriales asociados al desconocimiento de los más elementales derechos de los trabajadores situados en destinos remotos, hacia los que las grandes empresas, incluidas las europeas, suelen desviar la fabricación de los bienes que llevan sus marcas. Y, por supuesto, sin la demanda social de asunción por esas empresas de la responsabilidad de asegurar el respeto de estos derechos en todas las actividades de las que se nutren, independientemente del lugar donde se encuentren situadas.

A la vez, resulta meridianamente claro que, a despecho de su ámbito general de aplicación, la protección de los derechos asociados a la prestación de trabajo asalariado constituye uno de los cometidos nucleares, si no el más

importante, de la directiva[1]. No en vano 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 de los de dimensión global, donde la fragmentación productiva, la disociación de responsabilidades y la competencia feroz entre las empresas crean un caldo de cultivo propicio para la materialización de todo tipo de atentados contra los derechos de los trabajadores que intervienen en ellos, convirtiéndolos así en las principales víctimas potenciales de las violaciones de los derechos humanos que pueden producirse con ocasión del desarrollo de las actividades de las grandes corporaciones. Al extremo de poderse afirmar que el objetivo de la directiva de prevenir la materialización de efectos adversos sobre los derechos humanos en el ámbito de esas actividades quedaría vaciado de contenido si no se contemplasen en su núcleo protector de manera singular y privilegiada, como de hecho ocurre, los derechos humanos de contenido específicamente laboral.

Lo anterior permite sostener que, aunque es evidente que la Directiva sobre diligencia debida de las empresas no es una norma laboral en sentido estricto, se trata de un instrumento diseñado pensando en gran medida en la protección de los derechos de esta naturaleza, cuyas consecuencias para la garantía de estos en su dilatado espacio de aplicación son del mayor relieve. De ahí que sea importante prestar especial atención a sus repercusiones laborales, pasando revista a su contenido "con ojos de laboralista", como se propone hacer el presente estudio introductorio de este número monográfico de *Diritti Lavori Mercati*, dedicado a la "Diligencia debida en las cadenas globales de valor: una visión comparativa a la luz de la Directiva de la Unión Europea".

2. *El modelo de regulación del trabajo global subyacente al tratamiento de la diligencia debida introducido por la directiva y sus componentes principales*

En contra de lo que sus acusadas dosis de novedad pudieran inducir a pensar, la aprobación de la directiva que centra nuestra atención no constituye un hecho normativo aislado. Muy por el contrario, esta representa en realidad

[1] Del mismo modo, GUARRIELLO, *Take Due Diligence seriously*: *commento alla direttiva 2024/1760*, en *DLRI*, 2024, 183, pp. 255-256.

el punto más álgido de un proceso, en muchos aspectos silencioso pero en todo caso real y efectivo, de construcción de herramientas dirigidas a regular el trabajo desarrollado al interior de las cadenas globales de valor de las grandes empresas.

Este es un proceso que se inició a mediados de los años noventa, de forma coincidente con el despliegue de la globalización económica y la puesta en evidencia de las negativas consecuencias que podía acarrear sobre el respeto de los derechos de los trabajadores en todo el mundo, por decisión de las propias empresas, que se inclinarían por impulsar, al calor de las denuncias de la sociedad civil, una serie de fórmulas y mecanismos de naturaleza privada, como las declaraciones unilaterales, los códigos de conducta y en cierta medida incluso los acuerdos marco internacionales suscritos con federaciones sindicales mundiales de rama de actividad, dirigidos a exigir a sus contratistas y proveedores situados en terceros países el respeto de una base mínima de derechos laborales, coincidente en líneas generales con los estándares considerados fundamentales por la OIT. Esta dinámica continuará, ante la insuficiencia de esta clase de iniciativas, con el lanzamiento de un conjunto de instrumentos internacionales que buscaron promover la puesta en marcha por las empresas de procesos de diligencia debida dirigidos a la consecución de ese objetivo, como los Principios Rectores de las Naciones Unidas, las Líneas Directrices de la OCDE, ambos de 2011, o la Declaración Tripartita de Principios sobre las Empresas Multinacionales y la Política Social de la OIT, de 2017. Hasta llegar, luego de la tragedia de Rana Plaza de 2013, en la que murieron 1.134 trabajadores que en su mayor parte prestaban servicios para contratistas de grandes marcas mundiales de la moda, a la aprobación de una serie de normas nacionales de carácter vinculante, a través de las cuales se busca convertir esa recomendación en obligaciones jurídicamente exigibles, como la Ley francesa del deber de vigilancia de 2017 y la Ley alemana de diligencia debida de las empresas en las cadenas de suministro de 2021, que constituyen los antecedentes inmediatos y a la vez la causa eficiente del lanzamiento del proceso que terminaría con la aprobación de una norma comunitaria inspirada en la misma idea.

El efecto de esta evolución ha sido, de manera patente luego de la aprobación de la directiva, la conformación de un sistema de regulación multinivel del trabajo prestado al interior de las cadenas globales de valor de las grandes sociedades, basado en el juego combinado de una amplia galaxia

de instrumentos reguladores[2] de muy diverso origen y variada morfología – privados y públicos, nacionales e internacionales, unilaterales y pactados, de *soft* y de *hard law* – todos ellos orientados hacia el mismo objetivo: corregir los desequilibrios sociales generados por la globalización[3], utilizando como herramienta para ello el encauzamiento del poder de las propias empresas sobre sus redes de colaboradores y socios comerciales extendidos por todo el mundo[4]. Este es, por lo demás, un sistema que, pese a su falta de planificación y a la ausencia de un catálogo definido de fuentes, está en condiciones de conseguir, a partir de las interacciones entre sus componentes, un resultado imposible de ser alcanzado separadamente por cada uno de ellos: convertir en irrelevantes las fronteras nacionales y las diferencias de personificación, haciendo posible la aplicación de un núcleo básico de derechos a lo largo y ancho de esas cadenas, sin importar el territorio en el que se sitúen los trabajadores o quien ocupe frente a ellos la posición de empleador o empresario.

El anterior es un sistema al cual subyace un singular modelo de regulación, caracterizado por su adaptación a las características especiales del fenómeno que por su intermedio se busca ordenar. Las piezas de este modelo, presentes en todos sus instrumentos, incluida la directiva, se articulan en torno a cuatro elementos básicos: a) la consideración de los derechos humanos, incluyendo dentro de estos de manera especialmente relevante los laborales, como el bien objeto de protección, b) la identificación de las cadenas globales de producción, suministro o valor como espacio de regulación, c) la atribución a las grandes empresas, y en particular a las casas matrices de los grupos multinacionales, de la condición de sujetos obligados a desarrollar esa protección, haciéndose cargo del control de fábricas y negocios de los que no son necesariamente propietarias y d) la individualización de la diligencia debida como principio regulador dirigido a impulsar y ordenar el ejercicio de ese rol por parte de esas empresas[5]. De hecho, todo

[2] Diggs, Reagan y Parance, *Business and Human Rights as a Galaxy of Norms*, en *GJIL*, 2019, 2, pp. 309-362.

[3] Blackett, *Futuros transnacionales del derecho internacional del trabajo. Introducción*, en *RIT*, 2020, 4, p. 499.

[4] Véase, con más amplitud, Sanguineti Raymond, *Le catene globali di produzione e la costruzione di un diritto del lavoro senza frontiere*, en *DLRI*, 2020, 166, p. 187 ss.

[5] El desarrollo de esta tesis en Sanguineti Raymond, *Teoría del Derecho Transnacional del Trabajo*, Aranzadi, Navarra, 2022, pp. 117-172.

el sistema de regulación diseñado por la directiva se articula a partir de estos cuatro elementos. Es decir, tomando como punto de partida la preocupación por garantizar el respeto de los derechos humanos, con mención destacada de los que conciernen al trabajo, no solo en las actividades de las propias empresas sino en las de sus filiales, socios comerciales y proveedores, mediante la imposición a estas del deber de prevenir, mitigar o eliminar la materialización de impactos negativos sobre esos derechos, a través de la puesta en marcha de procesos de diligencia debida cuyo contenido regula de manera escrupulosa.

Esto determina que la mejor forma de realizar una primera aproximación al contenido de esta norma sea analizando la manera como aparecen configurados dentro de ella estos cuatro elementos capitales. Esta es la tarea a la que están dedicados los siguientes cuatro apartados.

2.1. *Los derechos humanos laborales como bien protegido*

A diferencia de lo que ocurre en el caso de los Principios Rectores, que recurren a una cláusula general con el fin de identificar los derechos objeto de protección, la directiva opta por una compleja técnica de doble entrada, basada en la identificación de un listado de vulneraciones asociadas a una relación de convenios y tratados internacionales en materia de derechos humanos, a la que se adiciona una cláusula de apertura de efectos limitados. Así, de acuerdo con el artículo 3.1.c) la noción de "efecto adverso sobre los derechos humanos", a cuya prevención y eliminación apunta todo el sistema diseñado por la norma europea, abarca "la vulneración de alguno de los derechos humanos enumerados en el anexo, parte 1, sección 1", siempre que estos se encuentren "amparados por los instrumentos internacionales que figuran en el anexo, parte 1, sección 2". Y también "la vulneración de un derecho humano no enumerado" en esa relación, pero solamente si se encuentra "amparado por los instrumentos de derechos humanos" mencionados en la segunda y se cumplen tres condiciones adicionales: que ese derecho "pueda ser objeto de vulneración por parte de una empresa o una entidad jurídica", que esa vulneración "menoscabe directamente un interés jurídico protegido" por esos instrumentos y que "la empresa pudiera haber previsto el riesgo de vulneración", teniendo en cuenta las circunstancias del caso y en particular la naturaleza y alcance de sus operaciones comerciales y su cadena de acti-

vidades, así como las características del sector económico y el contexto geográfico y operativo.

Así definido, este elenco no solo de resulta de compleja aplicación, sino "inevitablemente parcial, incompleto y estático" frente a la evolución de las fuentes internacionales sobre la materia[6]. A pesar de ello, tampoco puede dejar de observarse que a través de él se introduce una relación más completa de los derechos amparados por la directiva que la contenida en la Ley alemana de diligencia debida, en la que se inspira, que combina una mayor atención hacia los derechos civiles y políticos con una muy amplia presencia de los derechos humanos laborales. En efecto, de los dieciséis derechos o conductas vulneradoras de estos expresamente incluidos solo tres no parecen tener ningún contenido o proyección laboral, siendo un total de nueve los de esta naturaleza, en tanto que otros cuatro mantienen un vínculo al menos indirecto con estos últimos. Esta es una observación que permite apreciar, ya desde el inicio, hasta qué punto la directiva es, desde la perspectiva material, una norma de tutela de los derechos humanos laborales.

También es importante hacer notar que las fuentes de reconocimiento de estos derechos no solo vienen identificadas en el anexo a través de referencias a los convenios reconocidos como fundamentales por la Declaración de la OIT sobre Principios y Derechos Fundamentales en el Trabajo, sino a los principales tratados internacionales de derechos humanos de aplicación universal. Y en particular a los Pactos Internacionales de Derechos Civiles y Políticos, y de Derechos Económicos Sociales y Culturales. Esta dualidad, que sirve para sellar el encuentro entre dos sistemas normativos que hasta hace no mucho tiempo atrás habían venido recorriendo sus caminos por separado[7], resulta de capital importancia, puesto que permite extender el espacio de aplicación de la diligencia debida más allá de la relación de cinco derechos habilitantes y formas intolerables de explotación presentes en la referida declaración, hacia otros derechos humanos laborales que están en condiciones de cumplir una clara función preventiva del *dumping social*, tan extendido en el seno de las cadenas de valor de las grandes empresas de numerosos sectores de la economía global.

[6] Guarriello, *cit.*, p. 13.

[7] Bellace, Ter Haar, *Perspectives on labour and human rights*, en Bellace, Ter Haar (eds.), *Research Handbook on Labour, Business and Human Rights*, Elgar Publishing, Londres, 2019, p. 2, con referencia al sistema de normas internacionales del trabajo y el sistema de derechos humanos.

Este es el caso del derecho "a disfrutar de condiciones de trabajo equitativas y satisfactorias" incluido en el número 6 de la parte I del anexo con la expresa indicación de que dentro de él se incluyen, a su vez, los derechos a "un salario justo y un salario digno y adecuado", a "unas condiciones de trabajo seguras y saludables y una limitación razonable de las horas de trabajo", interpretados de conformidad con lo previsto por el artículo 7 del segundo de dichos pactos. Se recogen de este modo los componentes principales de este "derecho marco", fuente de reconocimiento de otros derechos de contenido singular[8].Y específicamente aquellos que, por estar directamente relacionados con las condiciones con arreglo a las cuales debe prestarse el trabajo en las empresas integradas en las cadenas mundiales de producción, pueden servir de límite frente a la reducción abusiva de los costes laborales como herramienta competitiva. El potencial redistributivo de este derecho es de tal modo patente, máxime si es aplicado como estándar para la determinación del correcto cumplimiento de la obligación de las empresas de modificar sus prácticas de compra para prevenir, mitigar o eliminar los efectos adversos sobre los derechos protegidos, prevista por los artículos 10.2.d) y 11.2.e) de la directiva[9].

El listado de derechos y vulneraciones destaca también por el recurso a formulaciones novedosas que buscan adaptarse a la particular morfología que pueden asumir las conductas corporativas que no reflejan los estándares internacionales en materia de derechos humanos[10]. Igualmente remarcable es el cuidado puesto a la hora de definir el contenido de los derechos colectivos de los trabajadores, que no solo recoge lo reflejado en los convenios internacionales del trabajo, sino en los pactos internacionales antes referidos, incluyendo una mención expresa del derecho de huelga que aleja cualquier discusión sobre su inserción en el espacio de protección marcado por la directiva. Hay, con todo, omisiones dignas de ser destacadas. Entre ellas, particularmente la del derecho al trabajo reconocido por el artículo 6 del Pacto Internacional de Derechos Económicos Sociales y Culturales, que sitúa ex-

[8] Monereo Pérez, López Insua, *La garantía internacional del derecho a un "trabajo decente"*, en *REDT*, 2015, 177, p. 28 ss.

[9] Meyer, Patz, *Dividing the Indivisible. Human Rights under the EU Corporate Sustainability Due Diligence Directive*, in *Verfassungsblog*, 1-6-2024, https://verfassungsblog.de/dividing-the-indivisible-human-rights-under-the-eu-corporate-sustainability-due-diligence-directive/.

[10] Bueno, Bernaz, Holly, Martín-Ortega, *The EU Directive on Corporate Sustainability Due Diligence: The Final Political Compromise*, en *B&HRJ*, 2024, p. 2.

tramuros del sistema de tutela una garantía de tanta importancia como es la relativa al derecho "a no ser privado injustamente del empleo"[11].

Otro tanto puede decirse respecto de la relación de instrumentos internacionales contenida en la segunda parte del anexo, dentro de la cual ostentan un protagonismo casi absoluto los convenios fundamentales de la OIT, pero sin que esto suponga que no existan carencias dignas de ser destacadas. En concreto, por lo que a los derechos humanos laborales se refiere, salta inmediatamente a la vista la no inclusión en el listado de dichos convenios del Convenio 155 sobre la seguridad y salud de los trabajadores de 1981 y del Convenio 187 sobre el marco promocional para la seguridad y salud en el trabajo de 2006, pese a que ambos han pasado a ostentar la condición de fundamentales luego de la inclusión en 2022 del derecho a un ambiente de trabajo seguro y saludable en el espacio de la declaración de 1998. Antes bien, como se indica en el considerando 33, la inclusión de estos convenios ha quedado pospuesta para una posterior ampliación del referido listado una vez que hayan sido ratificados por todos los Estados miembros de la Unión, cosa que de momento no ha ocurrido. No está de más recordar, de todas formas, que el derecho a "condiciones de trabajo seguras y saludables" aparece mencionado en la primera parte del anexo como uno de los componentes del derecho a condiciones de trabajo equitativas y satisfactorias. Y que para la determinación de sus alcances son de necesaria referencia los estándares establecidos por los convenios antes mencionados. Con todo, la inclusión de estos convenios, posible en el futuro a propuesta de la Comisión en aplicación de las previsiones contenidas en los artículos 3.2 y 36.d) de la directiva, se torna altamente recomendable a los efectos de ofrecer una sólida base de sustento a este derecho, visto el elevado riesgo de accidentes de trabajo y enfermedades profesionales de muy graves consecuencias que existe al interior de las redes de contratistas y proveedores situados en destinos remotos con niveles muy escasos de protección de la seguridad y salud en el trabajo[12].

[11] Observación General núm. 18 (200%) del Comité de Derechos Económicos, Sociales y Culturales (Documento E/C.12/GC/18, párrafo 6. Más ampliamente, Vivero Serrano, *La erradicación del despido libre y la diligencia debida de las empresas en materia de sostenibilidad*, en Sanguineti Raymond, Vivero Serrano (Dirs.), *La dimensión laboral de la diligencia debida en materia de derechos humanos*, Aranzadi, Navarra, 2023, p. 449 ss.

[12] Vogt, Subasinghe, *Protecting Workers' Rights in Global Supply Chains: Will the EU's Corporate Sustainability Due Diligence Directive. Make a Meaningful Difference?*, in CILJ, 2024, 57, p. 6.

El espacio de tutela marcado por la directiva resulta, de este modo, de no fácil delimitación y de alcances no del todo coincidentes con el óptimo de protección marcado por los estándares internacionales, al menos en su estado actual. Aun así, no puede dejar de reconocerse el decisivo espacio que dentro de él ocupan los derechos humanos laborales. Así como su aptitud para abarcar la inmensa mayoría de las vulneraciones de estos derechos que están en condiciones de producirse al interior de los procesos de producción global.

2.2. *Las "cadenas de actividades" como espacio de protección*

La delimitación de las actividades y empresas a las que deberán ser aplicados los procesos de diligencia debida es realizada por la directiva a través de su artículo 1.a), de acuerdo con el cual la misma alcanza a cubrir no solo las "propias operaciones" de las empresas obligadas, sino también "las operaciones de sus filiales" y "las operaciones efectuadas por sus socios comerciales en las cadenas de actividades" de aquellas, sin que en ninguno de los casos importe el espacio en el que se sitúen esas operaciones, ni el hecho de que sean realizadas por la primera o por otras entidades con las que esta mantiene lazos de naturaleza corporativa o comercial.

La ausencia de toda alusión geográfica permite colocar dentro del radio de acción de la norma actividades desarrolladas en cualquier lugar del globo y no solo en la Unión Europea o en alguno de sus Estados miembros. La directiva se convierte, de este modo, en una norma de claras repercusiones extraterritoriales[13]. A la vez, su proyección más allá del espacio de la propia empresa, hacia las operaciones de otras entidades jurídicamente diferenciadas, se trate de sus filiales o de sus socios comerciales, sirve para imponer un límite claro a la utilización de la personalidad jurídica como escudo para la elusión por las empresas líderes de cualquier tipo de responsabilidad por las condiciones con arreglo a las cuales se elaboran los bienes que llevan sus marcas. La doble fragmentación, tanto de los ordenamientos jurídicos nacionales como de las fórmulas de personificación de los sujetos económicos, de la que se han servido las grandes corporaciones para sacar el mayor provecho posible del proceso de globalización, encuentra de tal modo un llamativo contrapunto en la aplicación de las obligaciones introducidas por la

[13] Guarriello, *cit.*, p. 21.

directiva, que contribuye así a restaurar el nexo entre poder económico y organizativo y responsabilidad, no solo en el plano ético sino también en el terreno jurídico[14].

Sentado lo anterior, tampoco puede dejar de señalarse que se registran diferencias importantes entre la fórmula empleada por la directiva para la determinación de su "ámbito de aplicación vertical"[15] y la propuesta presentada inicialmente por la Comisión, que optó por recurrir a una noción de carácter omnicomprensivo, como es la de "cadena de valor", siguiendo en esto las recomendaciones de los Principios Rectores de las Naciones Unidas y las Líneas Directrices de la OCDE, bien que limitando su aplicación exclusivamente a los socios comerciales que mantengan una "relación comercial establecida" con la empresa obligada, asumiendo en este caso la fórmula introducida por la Ley francesa del deber de vigilancia. Frente a ello, el texto definitivo recurre a un concepto carente de antecedentes, no solo normativos sino incluso conceptuales, y de ámbito más restringido, como es el de "cadena de actividades", aunque prescindiendo a la vez de cualquier mención al tipo de relación comercial mantenida con la misma.

¿Cuáles son las consecuencias de esta doble opción?

Partiendo de la definición de "cadena de actividades" aportada por el artículo 3.1.g) de la Directiva, no es difícil establecer que la diferencia entre esta noción y la de "cadena de valor" radica en la exclusión que a través de la primera se hace de algunas de las actividades de los socios comerciales que intervienen en los denominados "eslabones posteriores" de la misma. Es decir, en los eslabones que van desde la empresa obligada hacia el consumidor. Entre ellas, singularmente las actividades relacionadas con la venta, el uso por los consumidores y la gestión de los residuos de los productos, así como con su desmontaje, eliminación y reciclado. Y también las actividades de distribución, transporte y almacenamiento de los productos de la empresa, cuando no son desarrolladas por un socio comercial directo sino por colaboradores situados en los niveles inferiores. Y también, por indicación expresa del precepto, el desarrollo de estas actividades por un socio comercial directo, siempre que se relacionen con productos sujetos a controles de exportaciones sujetos al Reglamento UE 2021/821 o a exportaciones relacionadas con

[14] Nuevamente, GUARRIELLO, *cit*.

[15] Como lo denomina BUENO, *Mutlinational enterprises an labour rights: concepts and implementation*, en BELLACE, TER HAAR (eds), *Research Handbook on Labour, Business and Human Rights*, Elgar Publishing, 2019, p. 436.

armas, municiones o materiales de guerra. E incluso las asociadas a las inversiones, préstamos, seguros y otros servicios financieros desarrollados por entidades de esta naturaleza[16], que quedan comprendidas en el espacio de la directiva solo respecto de sus propias actividades, las de sus filiales y las de sus socios comerciales que se ubican en las fases iniciales de sus cadenas de actividades. Y no, en cambio, hacia los destinatarios finales de las mismas[17].

Incluidas dentro del espacio de la directiva quedan, en cambio, las actividades asociadas a los "eslabones anteriores", es decir hacia el productor, de la "cadena de actividades" de las empresas obligadas. Un espacio que viene definido a partir de una amplia referencia a todo lo relacionado con "la producción de bienes o la prestación de servicios por parte de la empresa", pudiendo abarcar, por tanto, como la propia norma indica, "el diseño, la extracción, el abastecimiento, la fabricación, el transporte, el almacenamiento y el suministro de materias primas, productos o partes de productos y el desarrollo del producto o del servicio". Asimismo, por lo que a los "eslabones posteriores" se refiere, la noción de "cadena de actividades" abarca, por decisión expresa del legislador comunitario, las actividades "relacionadas con la distribución, el transporte y el almacenamiento de un producto", pero solo "cuando los socios comerciales lleven a cabo esas actividades para la empresa o en su nombre", vale decir exclusivamente si son realizadas por socios comerciales directos. Y siempre que no afecten a las actividades expresamente excluidas a las que se ha hecho alusión.

Es indudable que del modo descrito se dejan al margen de los procesos de diligencia debida algunas actividades susceptibles de generar riegos importantes para los derechos humanos laborales. Este es el caso, por ejemplo, del desguace de buques, tratándose de la eliminación de los productos[18]. A pesar de ello, tampoco es posible negar que el ámbito de aplicación asignado a la directiva, aun apartándose del óptimo internacionalmente recomendado, está en condiciones de abarcar el grueso del trabajo y las vulneraciones de esos derechos que pueden producirse al interior de la economía global, que tienen como escenario principal las actividades relacionadas con la extracción

[16] Guamán Hernández, *La Directiva sobre due diligence en sostenibilidad: la inconsistencia del nuevo marco normativo sobre responsabilidad empresarial de la Unión Europea*, en *RTSS*, 2024, 482, p. 22.

[17] Morato García, *El proceso de diligencia debida en la nueva directiva europea*, en *TyD*, 2024, 119, p. 6.

[18] Vogt, Subasinghe, *cit.*, p. 7.

y el suministro de las materias primas y la producción de los bienes que llevan las marcas de las grandes corporaciones o sus componentes. De ahí que, pese a sus carencias, susceptibles en todo caso de ser superadas más adelante en aplicación del mecanismo de revisión previsto por el artículo 36.c), esta delimitación inicial del espacio de proyección de la diligencia debida obligatoria deba ser considerada portadora de un avance sustancial para la protección de los derechos de los trabajadores en todo el mundo.

En cualquier caso, tanto o más importante que la identificación de las actividades afectadas por la directiva, es la determinación de los sujetos integrados dentro de las "cadenas de actividades" sobre los que habrán de ser aplicados los procedimientos de diligencia debida. Desatendiendo la propuesta de la Comisión, y probablemente como contrapunto de las limitaciones que acaban de ser presentadas, la norma comunitaria opta en este caso por introducir a través de su artículo 3.1.f) un concepto particularmente amplio de "socio comercial", que está en condiciones de comprender tanto a los "socios comerciales directos", entendiendo por tales a aquellos con los que "la empresa tenga un acuerdo comercial directo" relacionado con sus "operaciones, productos o servicios", como a los "socios comerciales indirectos", que son los que, no siendo socios comerciales directos, realicen "operaciones comerciales" vinculadas "con las operaciones, productos o servicios" de la empresa obligada. Se opta así por ajustarse con rigor a las recomendaciones contenidas en los instrumentos internacionales, que propugnan la aplicación de los procesos de diligencia debida a todas las entidades que, manteniendo o no una relación comercial directa con la empresa titular del proceso productivo global, se encuentren vinculadas a sus operaciones, productos o servicios o formen parte de su cadena de valor.

La importancia de esta opción, por lo que a la tutela de los derechos humanos de naturaleza laboral se refiere, no puede ser puesta en duda, toda vez que la experiencia demuestra que las vulneraciones de estos derechos no suelen tener en las actividades de la empresa líder ni en la de sus filiales, sino en las de sus socios comerciales, su espacio principal de materialización. Multiplicándose este riesgo conforme se desciende a lo largo de los sucesivos eslabones de las cadenas de actividades, hasta poder llegar, en situaciones extremas, incluso a las labores clandestinas, la explotación laboral infantil o el trabajo forzado de los inmigrantes, sin que necesariamente las empresas líderes permitan, alienten o tengan incluso conocimiento de ello. En contraste con lo que se verá a continuación en relación con la identificación de las

empresas obligadas, esta decisión permite extender la aplicación de los procesos de diligencia debida a decenas o incluso centenares de miles, sino millones, de empresas ubicadas en todo el planeta[19], las cuales operan en colaboración o participan en las actividades de las más importantes empresas europeas o con una actividad relevante dentro de la Unión.

Esta es una observación que nos permite apreciar en toda su intensidad la importancia de la apuesta realizada por las instituciones comunitarias, así como las grandes dificultades que conlleva para las empresas su aplicación.

2.3. *Las grandes empresas europeas y de terceros países como sujetos obligados*

La identificación de las empresas obligadas es realizada por el artículo 2 de la directiva siguiendo un exigente doble patrón selectivo, basado en el número de trabajadores empleados y su volumen neto de negocios, que se aparta nuevamente de los estándares internacionales, para los cuales la diligencia debida debe ser aplicada por todo tipo de empresas, independientemente de su tamaño e importancia.

Aun siendo así, no puede dejar de observarse que, al menos en materia laboral, son las grandes corporaciones, y especialmente las de dimensión global, las que están en condiciones de generar riesgos de mayor magnitud para los derechos internacionalmente reconocidos en favor de los trabajadores, debido a su peculiar forma de organización de la producción y el modelo de negocio que las caracteriza, por lo que es a estas empresas a las que debe serles exigido un nivel de compromiso singularmente relevante con el respeto de esos derechos, como es el previsto por una norma de las características de la que se viene examinando. A la vez, es en relación con este tipo de empresas, y no respecto de todas, que adquiere sentido la proyección de las políticas y las medidas de diligencia debida más allá de las actividades de la propia sociedad, hacia todos los socios comerciales y proveedores integrados en su cadena de actividades.

Es más, desde la perspectiva de la garantía del respeto de los derechos humanos laborales, el criterio de selección de las empresas obligadas no debería ser, ni la cantidad de trabajadores directos con los que cuentan, ni el montante de sus negocios, sino la extensión y complejidad de sus cadenas

[19] Goudappel, *Mandatory Due Diligence - Threat or Opportunity?*, en *Database of Business Ethics*, 1-6-2024, https://db-business-ethics.org/blog-dbbe/item/mandatory-due-diligence-threat-or-opportunity-6

de valor y los riesgos asociados a las actividades que realizan. Los demás son todos criterios indirectos, no basados en el riesgo[20], aunque más operativos y fáciles de controlar, siendo una cuestión de política de Derecho dónde situar el listón para la aplicación de las obligaciones contenidas en la norma. Un asunto que terminaría por quedar zanjado en la fase final de las negociaciones, debido a las exigencias de algunos Estados, por medio de una muy importante ampliación de los umbrales exigidos, que terminaron por quedar situados en los 1.000 trabajadores y 450 millones de euros de volumen mundial neto de negocios. Lo cual supone que se ha pasado, de una afectación potencial de 16.000 empresas europeas, de acuerdo con la propuesta inicial lanzada por la Comisión, a alrededor de 5.000, es decir una tercera parte[21], debido a la decisión de duplicar el número de trabajadores y triplicar el volumen de negocios inicialmente exigidos con el fin de conseguir la aprobación del texto. Lo cual tiene, por cierto, la virtualidad añadida de facilitar que escapen a la aplicación de la directiva las empresas de grandes dimensiones que no desarrollen actividades intensivas en mano de obra, aunque estas sean potencialmente lesivas para los derechos de los trabajadores[22].

Por supuesto, cuantas más empresas estén incluidas en el espacio de la directiva, seguramente mejor. Pero siempre que las seleccionadas tengan la entidad y la capacidad de "tracción" necesaria para poner en marcha procesos de diligencia debida con aptitud para "tirar" de las empresas de menores dimensiones integradas en sus redes de contratistas y proveedores. La cuestión es, así pues, si el volumen y las características de las empresas seleccionadas están en condiciones de permitir la consecución de los objetivos de la directiva o es preciso modificar los umbrales inicialmente establecidos o incluso introducir un enfoque específico para los sectores de alto riego, en aplicación del mecanismo previsto por el artículo 36.c), que encomienda a la Comisión la realización de una evaluación de las reglas que fijan actualmente su ámbito de aplicación.

También importantes para valorar el tratamiento de la materia por la directiva son tres previsiones adicionales. La primera se relaciona con la acla-

[20] GUARRIELLO, *cit.*, p. 18.

[21] HOLLY, *The EU Corporate Sustainability Due Diligence Directive: Maximising impact through transposition and implementation*, The Danish Institute for Human Rights, 2024, p. 9, 1-6-2024, https://www.humanrights.dk/files/media/document/DIHR_The%20EU%20Corporate%20Sustainability%20Due%20Diligence%20Directive_0.pdf

[22] MORATO GARCÍA, *El proceso de diligencia debida en la nueva directiva europea*, cit., p. 5.

ración, realizada por el artículo 2.1.b), de que la misma es de aplicación a las empresas que, aunque no alcancen individualmente los umbrales exigidos, operen como matriz última de un grupo de sociedades que sí los haya alcanzado. Lo cual supone que dichos umbrales juegan en última instancia a nivel de grupo y no de empresa individual, con la consiguiente ampliación de su espacio potencial de aplicación. Esta precisión viene acompañada de la inclusión de los acuerdos de franquicia y de licencia, mediante la introducción de una regla especial. Se trata del artículo 2.1c), de acuerdo con el cual estos se encuentran sometidos a las obligaciones reguladas por la directiva cuando mantengan una identidad y un concepto empresarial comunes, apliquen métodos empresariales uniformes, ingresen en concepto de cánones más de 22,5 millones de euros y tengan un volumen mundial de negocios neto superior a los 80 millones de euros. Esta es una inclusión especialmente significativa desde la perspectiva de la garantía de los derechos humanos laborales, a la vista de la existencia de numerosos sectores altamente franquiciados, como el de la hostelería, en los que existe un riesgo patente de afectación de los mismos debido al elevado grado de fragmentación y la intensa competencia que los caracteriza[23].

De todavía mayor trascendencia la decisión del legislador comunitario de no vincular solo a las empresas europeas, entendidas como aquellas "que se hayan constituido de conformidad con la legislación de uno de los Estados miembros", sino también a las empresas no europeas, definidas por el artículo 2.2 como las "que se hayan constituido de conformidad con la legislación de un tercer país", siempre que cuenten con un volumen neto de negocios superior a los 450 millones de euros exclusivamente "en la Unión", al margen del número de trabajadores que empleen. Este es un mandato que determina que la mayor parte de las empresas de grandes dimensiones, y no solo las europeas, deban supervisar las actividades de sus socios comerciales y proveedores en todo el mundo siguiendo los requisitos impuestos por la norma comunitaria si desean mantener su posición en el mercado europeo o asumir una presencia relevante dentro de él.

Esta era una inclusión necesaria para no colocar a las empresas europeas en una posición de desventaja competitiva frente a las demás, tanto a nivel interno como global. Lo más relevante es, no obstante, que de este modo la directiva está en condiciones de desplegar un sorprendente "doble efecto

[23] VOGT, SUBASINGHE, *cit.*, p. 9.

extraterritorial", de acuerdo con el cual los procesos de diligencia debida por ella regulados no solo deberán ser aplicados a las actividades de las empresas europeas en todo el mundo, sino también a las actividades desarrolladas a nivel global por las multinacionales no europeas[24]. Sin distinguir en este último caso entre las dirigidas al mercado europeo y las que tengan otros destinos, dada la dificultad y los superiores costes que supone aplicar simultáneamente una diversidad de estándares de diferente intensidad reguladora a sus procesos productivos globales dependiendo de a dónde estén dirigidos sus productos.

La directiva crea, de tal modo, un importantísimo incentivo para que todas las empresas de dimensión global apliquen voluntariamente a todas sus actividades aquel tratamiento de la diligencia debida que les permite acceder al mercado europeo, que es el más grande y de mayor capacidad adquisitiva de todos los existentes, incluso si este estándar es más estricto que el exigido en otros mercados. Lo cual la sitúa en condiciones de ser aplicada por las empresas como si de una norma global se tratase. A la vez, la presencia de la norma europea actúa como un claro aliciente para que esas empresas exijan a sus Estados la aprobación de una legislación semejante con el fin de no ver reducida su posición competitiva respecto de las demás empresas de su misma nacionalidad.

Nos encontramos ante el denominado "efecto Bruselas"[25], cuya consecuencia más relevante es la proyección de las normas europeas, por lo general más exigentes, hacia las empresas de dimensión global, así como sobre la actividad legislativa de otros países, dando lugar a una "carrera hacia la cima" (*race to the top*) en vez de una "carrera hacia el abismo" (*race to the bottom*), como la propiciada por la globalización. De ahí que la aprobación de la directiva tenga, a despecho de su dimensión europea, un inmenso potencial para fomentar el respeto de los derechos humanos laborales en todo el mundo y deba ser considerada, aún con sus límites y contradicciones, como un paso de gigante en el camino hacia una globalización más justa.

[24] Véase, con más amplitud, SANGUINETI RAYMOND, *Teoría del Derecho Transnacional del Trabajo*, cit., pp. 200-201.

[25] Teorizado por BRADFORD, *The Brussels Effect. How the European Union Rules the World*, Oxford University Press, 2020.

2.4. *La diligencia debida como estándar regulador*

Establecido lo anterior, la directiva se aboca a regular el conjunto de obligaciones en las que se concreta la diligencia debida como estándar de conducta empresarial. A estos efectos, desarrolla a través de sus artículos 5 a 16 un detallado esquema de obligaciones, compromisos y recomendaciones, que recuerda por su exhaustividad a la Ley alemana de diligencia debida, aunque superándola.

Este esquema se descompone hasta en seis fases distintas, enunciadas por el artículo 5. Estas fases y los preceptos que las regulan son los siguientes: a) integración de la diligencia debida en las políticas y sistemas de gestión de riesgos de la empresa (artículo 7), b) detección evaluación y priorización de los efectos adversos potenciales y reales sobre los derechos protegidos (artículos 8 y 9), c) prevención y mitigación de impactos adversos del primer tipo y eliminación o minimización de los del segundo tipo (artículos 10 y 11), d) reparación de los efectos adversos reales (artículo 12), e) supervisión de la eficacia de la política y las medidas de diligencia debida adoptadas (artículo 15) y f) comunicación pública de sus actuaciones y resultados (artículo 16). A estas cinco fases se añaden dos elementos de carácter transversal, que son traídos a colación por el propio artículo 5 con reenvío a su regulación específica: a) la colaboración con las partes interesadas (artículo 13) y b) el establecimiento de un mecanismo de notificación y un procedimiento de reclamación (artículo 15). El planteamiento de conjunto se cierra con la previsión del artículo 4, que impide a los Estados miembros introducir obligaciones de diligencia debida que difieran de las establecidas en materia de detección y evaluación de riesgos y adopción de medidas adecuadas para la prevención de los impactos negativos potenciales y la eliminación o minoración de los impactos negativos reales previstas por los artículos 8.1 y 2, 10.1 y 11.1. Lo dispuesto por estos preceptos representa, así, el núcleo del diseño de las obligaciones de diligencia debida realizado por la directiva. Teniendo, como tales, carácter inderogable, tanto *in peius* como in *melius*[26].

La directiva esboza de tal forma un completo recorrido por el que deberán transitar los procesos de diligencia debida puestos en marcha por las empresas, cuyo diseño constituye un detallado desarrollo de los pasos y requisitos de aplicación de la misma postulados por los Principios Rectores de

[26] Guarriello, *cit.*, p. 25.

las Naciones Unidas y las Líneas Directrices de la OCDE, con los que se encuentra en plena sintonía. Dicho recorrido deberá empezar, así, por el establecimiento de una política de diligencia debida dentro de la cual se incluya la descripción del enfoque adoptado, el código de conducta a seguir en el conjunto de sus actividades y los procesos previstos para comprobar su cumplimiento y extender su aplicación; para pasar luego a la identificación y evaluación de los efectos adversos potenciales o reales que se deriven de sus actividades, las de sus filiales y sus socios comerciales, con posibilidad de priorizar los más graves o más probables; y de ahí a la adopción de medidas adecuadas para prevenir o mitigar los efectos adversos potenciales detectados o que podrían haberse detectado o para eliminar o minimizar los efectos adversos reales ocasionados; hasta llegar a la reparación de estos últimos, siempre que hayan sido causados por la propia empresa, en solitario o conjuntamente con otro sujeto, y a la evaluación de la eficacia de sus actividades de detección, prevención, mitigación, eliminación y minimización, seguida de la comunicación pública de las actuaciones realizadas y sus resultados. Todo ello manteniendo una colaboración significativa con las partes interesadas a lo largo de sus principales etapas y con creación de un mecanismo accesible para la presentación de notificaciones sobre la existencia de efectos adversos y de un procedimiento públicamente disponible para la interposición de reclamaciones, en estos tres casos con intervención de los trabajadores y sus representantes en sus distintos niveles.

Esta secuencia configura la regulación más completa y detallada de la diligencia debida incluida hasta el momento en un instrumento vinculante. Esto nos induce a interrogarnos por su aptitud de conjunto, no simplemente para promover el logro de sus objetivos, como sucede en el caso de los instrumentos de *soft law*, sino para alcanzarlos de manera real y efectiva. No debemos perder de vista que, como ha sido denunciado, la impresionante asimilación de la que ha sido objeto la diligencia debida en los últimos años, tanto a nivel de las empresas como de los organismos internacionales e incluso de los Estados, no se ha visto acompañada de un nivel similar de aplicación práctica de esta[27], siendo muchos y muy relevantes los déficits de respeto de los derechos humanos, y en particular de los laborales, que se registran actualmente en la escena económica global. De hecho, la propia aprobación de la directiva constituye una buena prueba de ello.

[27] Quijano, López Hurtado, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edge Sword?*, en *B&HRJ*, 2021, p. 13.

Para realizar esta evaluación es preciso partir de tener en cuenta que, traducir las recomendaciones, propuestas y expectativas contenidas en esa clase de instrumentos, en obligaciones jurídicamente exigibles constituye un auténtico desafío, máxime cuando nos encontramos delante de una noción de un evidente carácter abierto, dinámico y evolutivo, como ocurre en el caso de la diligencia debida. En este caso, como se ha observado, las obligaciones que se introduzcan han de ser lo suficientemente ciertas como para permitir a las empresas obligadas comprender y aplicar su contenido, así como a las partes interesadas supervisar su cumplimiento. Pero, a la vez, deberán huir de la previsión de una lista cerrada de medidas a adoptar, que pueda limitar la adaptabilidad y sofocar la innovación, promoviendo un simple ejercicio de "marcar casillas", alejado por completo de sus propósitos[28].

¿Cómo afronta este desafío la directiva?

Si bien los elementos para la articulación de una respuesta a esta pregunta se encuentran desperdigados a lo largo de todos los preceptos que han sido citados, existen al menos cuatro a los que conviene hacer mención aquí de manera singular.

El primero se relaciona con la fijación de un estándar o criterio general de valoración de las actuaciones desarrolladas en cumplimiento de la directiva, que sirva de guía a las empresas y, a la vez, permita establecer con dosis razonables objetividad su correspondencia con los objetivos perseguidos por la misma. Este estándar viene establecido por los artículos 10.1 y 11.1 a través de la indicación de que las empresas obligadas deberán adoptar "medidas adecuadas" para prevenir, mitigar, eliminar o minimizar cualquier impacto adverso sobre los derechos protegidos. Esta es una indicación que conecta con la definición de esta clase de medidas aportada por el artículo 3.1.l, que las caracteriza como aquellas "que sean capaces de alcanzar los objetivos de la diligencia debida", "abordando de forma efectiva los efectos adversos de un modo proporcionado en relación con el nivel de gravedad y la probabilidad del efecto adverso" y "razonablemente a disposición de la empresa" de acuerdo con las circunstancias del caso, incluyendo dentro de estas "la naturaleza y el alcance del efecto adverso y los factores de riesgo pertinentes". Esta no es una definición fácil de interpretar y aplicar. No obstante, tiene una indudable virtud: pone el acento en la eficacia de dichas medidas, alentando con ello la implementación de actuaciones específicas dirigidas al abor-

[28] Bueno, Bernaz, Holly, Martín-Ortega, *cit.*, p. 4.

daje de impactos adversos concretos y desautorizando una visión puramente formal de su contenido[29].

El segundo de esos elementos se vincula con la posibilidad, prevista por los artículos 10.2.b) y 11.3.c), de introducir, entre las medidas dirigidas a prevenir los efectos adversos potenciales y eliminar los reales, un sistema de garantías contractuales "en cascada", exigibles por las empresas obligadas a sus socios comerciales directos, y por estos últimos a sus propios socios, como herramienta para asegurar el cumplimiento del código de conducta y el plan de prevención que hayan sido adoptados por la primera. Este es el mecanismo utilizado, y además desde antiguo, por muchas empresas multinacionales, especialmente de sectores de alto riesgo, para exigir a las entidades que colaboran con ellas el respeto de una base mínima de derechos laborales[30]. Su eficacia potencial es amplia, al basarse en la utilización de la fuerza contractual de las empresas y la imposición de sanciones comerciales como "palanca" para hacer efectivo el respeto de los derechos protegidos en sus cadenas de valor[31]. Un elemento sin el cual sería imposible implicar a todas las empresas, decenas, centenares o incluso miles, que mantienen relaciones comerciales directas o indirectas con las sociedades obligadas. Sin embargo, la extensión de este mecanismo más allá de los sectores que suelen recurrir a él puede plantear dificultades si no viene acompañada de un tratamiento más preciso del contenido de esas garantías y las condiciones necesarias para su suficiencia, que evite que puedan convertirse en un mero instrumento de traslación de riesgos a los proveedores[32]. Una tarea que viene encomendada por el ar-

[29] Loc. cit.

[30] Véase Sanguineti Raymond, *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, 2014, pp. 201-234; y Morato García, *Los códigos de conducta para socios comerciales y su contribución a la mejora global de las condiciones laborales*, en Sanguineti Raymond, Vivero Serrano (Dirs.), *Diligencia debida y trabajo decente en las cadenas globales de valor*, cit., pp. 349-406.

[31] Brino, Bonfanti, *Verso una Direttiva europea sulla due diligence in materia di diritti umani lungo la catena globale del valore. Riflessioni di Diritto del Lavoro e Diritto Internazionale Privato*, en Sanguineti Raymond, Vivero Serrano (Dirs.), *Diligencia debida y trabajo decente en las cadenas globales de valor*, Aranzadi, Pamplona, 2022, versión digital, comunicación núm. 7, p. 5.

[32] Bright, da Graça Pires, Streibelt, Schönfelder, *A Comparative Analysis between the Corporate Sustainability Due Diligence Directive and the French and German Legislation*, en *Verfassungsblog*, 30-5-2024, https://verfassungsblog.de/a-comparative-analysis-between-the-corporate-sustainability-due-diligence-directive-and-the-french-and-german-legislation/.

tículo 18 de la directiva a la Comisión, que deberá adoptar "orientaciones sobre las cláusulas contractuales tipo voluntarias" previstas por los referidos preceptos a más tardar el 26 de enero de 2027.

Tan relevante como lo anterior resulta, en tercer lugar, la decisión de incluir dentro del referido catálogo de medidas la realización de "modificaciones" y "mejoras" en el "plan de negocio de la empresa", en sus "estrategias generales y en sus operaciones", incluyendo dentro de estas últimas sus "prácticas de compra", como apuntan los artículos 10.2.d) y 11.3.e). De este modo el legislador comunitario reconoce expresamente que buena parte, si no la mayoría, de las vulneraciones de los derechos humanos laborales que se producen al interior de las cadenas globales de valor tienen su origen en el modelo de negocio de las grandes corporaciones, cuyas agresivas estrategias comerciales presionan a la baja las condiciones que sus socios comerciales pueden ofrecer, a su vez, a sus trabajadores[33]. Para satisfacer los estándares de diligencia debida exigidos por la directiva, las grandes empresas deberán, en consecuencia, adaptar sus condiciones comerciales y prácticas de abastecimiento, de forma que no induzcan o impulsen a sus proveedores a desconocer los derechos de sus trabajadores. O, mejor aún, como apunta el considerando 46 de la directiva, habrán de "desarrollar y utilizar prácticas de compra que contribuyan a unos salarios dignos para sus proveedores" y "no fomenten impactos adversos potenciales en los derechos humanos". Y en particular en los que corresponden a los trabajadores, que son los más expuestos en estos casos, claro está.

Una mención especial requiere, finalmente, el tratamiento dado por los artículos 3.1.n) y 13 de la directiva a la participación de los trabajadores y sus representantes en los procesos de diligencia debida. Esta es una cuestión cuya importancia está fuera de cualquier duda. La posición como *stakeholders* de los trabajadores y sus representantes no es equiparable a la de otros sujetos situados fuera del espacio de desarrollo de las actividades de las empresas[34], dado que se trata de los principales titulares de los derechos protegidos y quienes de manera más inmediata pueden verlos afectados con ocasión de mismas[35].

[33] 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, 4, p. 761 y ss.

[34] Trebilcock, *Due diligence on labour issues. Opportunities and Limits of the UN Guiding Principles on Business and Human Rights*, en Blacket ,Trebilcock (eds.), *Research Handbook on Transnational Labour Law*, Edward Elgar, 2015, p. 103.

[35] Wils, Swan, *Engament, remedy & justice. Priorities for the Corporate Sustainability Due*

Además, como participantes directos en los procesos sobre los que debe ejercerse la diligencia debida, se encuentran en la mejor posición para identificar los riesgos para los derechos protegidos, detectar las vulneraciones que puedan padecer y proponer medidas adecuadas para abordarlos[36], superando las limitaciones de los tradicionales sistemas de auditoría, basados en un enfoque superficial "de instantánea" centrado en los síntomas antes que en las causas de los problemas[37].

De ahí que deba ser considerada un acierto la inclusión, dentro del elenco de "partes interesadas" realizado por el primero de dichos preceptos, de referencias que permiten considerar comprendidos en esta categoría a los trabajadores y sus representantes en todos los eslabones de las cadenas de actividades de las empresas. Es decir, no solo a "los empleados de la empresa, los empleados de sus filiales", así como a "los sindicatos y representantes de los trabajadores" de ambas, sino también a "los empleados, sindicatos y representantes de los trabajadores de los socios comerciales de la empresa", sin distinguir entre los directos y los indirectos.

Implicar a grupo tan amplio y disperso de sujetos no es, por supuesto, una tarea sencilla. Por esta razón, la implementación de cualquier proceso de diligencia debida ha de empezar por la realización de una exhaustiva cartografía de las partes interesadas[38], que permita identificar a los sujetos que en cada espacio cuentan con el respaldo de los trabajadores. Así como por la adopción de medidas dirigidas a proteger la libertad de sindicación e incluso a promover la creación de sindicatos en las fábricas de los contratistas donde no los haya. No hace falta insistir en que esta previsión está en condiciones de potenciar las sinergias entre sindicatos de diversos países, así como la asunción de un rol vertebrador de estos por las federaciones sindicales de rama de actividad[39].

Menos plausible resulta, no obstante, el diseño de las formas de colaboración con las partes interesadas, que es realizado por el artículo 13 sin incluir

Diligence Directive from workers in the Global South, Business & Human Rights Resource Centre, 2023, p. 3.

[36] Landau, *Human Rights Due Diligence and Labour Governance*, Oxford University Press, 2023.

[37] 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, 26, p. 12.

[38] Wils, Swan, *cit.*, p. 6.

[39] Guamán, *cit.*, p. 30.

ninguna alusión al papel que debe corresponder a la representación de las personas que trabajan en los procesos de producción global. Una carencia a la que hay que añadir la limitación de esa colaboración a la consulta en algunas de las fases del proceso de diligencia debida, como son las de recopilación de la información necesaria sobre los efectos adversos reales o potenciales, de desarrollo de los planes de acción preventiva y correctiva, de adopción de las decisiones de suspensión o terminación de una relación comercial, de puesta en marcha de las medidas adecuadas para reparar los efectos adversos y de desarrollo de los indicadores necesarios para la realización de las actividades de supervisión[40]. Mediante esta extensa pero a fin de cuentas taxativa formulación se descarta la posibilidad de proyectar los derechos de consulta sobre todas las etapas y los componentes de los procesos de diligencia debida, como sería necesario para promover la plena adaptación de las políticas y medidas a adoptar a la realidad y los riesgos que pueden experimentar los derechos humanos laborales, especialmente en destinos remotos y escasamente protectores. Una información que suele escapar al conocimiento de las grandes corporaciones, así como de las entidades privadas de supervisión a las que estas recurren en muchos casos. Esta es una necesidad que no termina de ser cubierta por la norma, pese a la importancia de los espacios en los que el derecho de consulta se encuentra reconocido, con el riesgo de que pueda volverse en contra de los propósitos que la inspiran.

También importantes son, en fin, el derecho de las partes interesadas a recibir "información pertinente y exhaustiva" con el fin de hacer posibles unas consultas "eficaces y transparentes", reconocido por el artículo 13.1; la preceptiva elaboración de la política de diligencia debida "previa consulta a los empleados de la empresa y sus representantes", de acuerdo con lo dispuesto por el artículo 7.2; las especiales fórmulas de participación de los sindicatos y los demás representantes de los trabajadores en los procedimientos de reclamación, a las que hace alusión el artículo 14 en sus apartados 2 y 3; y la posibilidad de que los sindicatos interpongan demandas de responsabilidad civil en nombre de las presuntas víctimas de vulneraciones de los derechos protegidos, abierta por el artículo 29.3.d).

[40] Así, críticamente, GUAMÁN, *cit.*, p. 28, y MORATO, *El proceso de diligencia debida en la nueva directiva europea*, cit., p. 17.

3. *La responsabilidad administrativa y civil de las empresas como elemento de cierre del sistema*

La aplicación de la compleja arquitectura de medidas que ha sido presentada hasta aquí precisa de mecanismos que atribuyan consecuencias jurídicas a su no aplicación o su aplicación defectuosa. Solamente así será posible traspasar la línea marcada por la tutela de los intereses reputacionales de las empresas, dentro de la que este tipo de actuaciones se han movido hasta el momento, promoviendo la implementación de procesos de diligencia debida eficaces y con capacidad para proyectarse sobre todos los sujetos integrados en las cadenas de actividades de dichas organizaciones. La introducción de fórmulas de exigencia administrativa y judicial del cumplimiento de las obligaciones marcadas por la directiva, así como de medios de reparación de los daños causados a los derechos protegidos, constituye, de este modo, una consecuencia inevitable del carácter vinculante de la nueva regulación, cuyo objetivo no es otro que el de dotar a las obligaciones de diligencia debida de los necesarios "dientes para morder", como se ha dicho gráficamente[41].

El legislador comunitario ha sido plenamente consciente de ello. Para advertirlo basta con tener en cuenta la especial atención que ha dedicado a la construcción de un sistema público de vigilancia del cumplimiento de los mandatos contenidos en la directiva. Esta preocupación se expresa a través de los artículos 24 a 28, que siguiendo la estela marcada por la Ley alemana de diligencia debida imponen a los Estados miembros la creación de una o varias autoridades administrativas de control dotadas de las facultades necesarias para investigar las presuntas contravenciones, ordenar la adopción de medidas correctoras, imponer sanciones pecuniarias y de otro tipo, incluidas las dirigidas a "avergonzar" a los infractores, e incluso exigir medidas de reparación, siempre que estas sean posibles. Esta es, sin duda, una pieza capital para conseguir que las empresas obligadas terminen de dar el salto desde la voluntariedad al respeto de un orden de deberes detalladamente prescrito como es el establecido por la directiva. La presencia de una autoridad supervisora dotada de los recursos y las competencias necesarias puede ofrecer además a los afectados una vía para exigir el respeto de sus derechos más rápida y menos onerosa que la de los litigios civiles[42].

[41] GUARRIELLO, *cit.*, p. 46.

[42] VOGT, SUBASINGHE, *cit.*, p. 16.

Siendo lo anterior correcto, tampoco pueden perderse de vista los límites de la aplicación del control administrativo a un estándar de conducta de contornos tan abiertos y dinámicos como el de diligencia debida, que requiere una valoración cualitativa de la adecuación de las medidas adoptadas a las características del riesgo y la posición ocupada por la empresa en relación con él, que difícilmente puede ser realizada de forma por completo satisfactoria en sede administrativa. La sola previsión de un sistema de este tipo conlleva, por ello, el riesgo de que la vigilancia pueda terminar por centrarse en el cumplimiento puramente formal de las exigencias impuestas a las empresas, sin ningún control de fondo sobre su adecuación a los objetivos perseguidos por la directiva. Además, por supuesto, de no estar en condiciones, por su propia naturaleza, de ofrecer una reparación a las víctimas de las vulneraciones de los derechos humanos que puedan haberse producido.

En realidad, la única forma de evitar este doble riesgo y conseguir que las empresas asuman de forma decidida el compromiso de prevenir y hacer frente a las vulneraciones de los derechos humanos que puedan producirse al interior de sus cadenas de actividades, es estableciendo una relación directa entre su no actuación o su actuación negligente y los perjuicios padecidos por los titulares de los derechos protegidos[43], mediante la creación de un criterio *ad hoc* de atribución de la responsabilidad civil, basado en la consideración de la diligencia debida, en sí misma, como portadora de un deber de prevención o cuidado cuyo incumplimiento o cumplimiento deficiente es capaz de desencadenar la responsabilidad de las empresas por los daños que como consecuencia del mismo puedan haberse producido[44].

Esta es una necesidad de la que ha sido consciente también el legislador europeo, que ha optado por introducir una regulación de la responsabilidad civil de las empresas basada en este principio. Así se deduce del texto del artículo 29.1 de la directiva, de acuerdo con el cual "la empresa podrá ser considerada responsable de los daños causados a una persona física o jurídica" siempre que "haya incumplido, de forma deliberada o por negligencia, las obligaciones" relacionadas con la prevención de efectos adversos potenciales y de eliminación de los efectos adversos reales sobre los derechos protegidos

[43] Quijano, López Hurtado, *cit.*, p. 3, y Trebilcock, *El desastre de Rana Plaza siete años después: iniciativas transnacionales y proyecto de tratado*, en *RIT*, 2020, 4, p. 621.

[44] Véase, con más amplitud, Sanguineti Raymond, *La diligencia debida en materia de derechos humanos laborales*, en Sanguineti Raymond, Vivero Serrano (Dirs.), *La dimensión laboral de la diligencia debida en materia de derechos humanos*, Aranzadi, 2023, pp. 77-81.

previstas por sus artículos 10 y 11, que como sabemos conforman el núcleo de los procesos de diligencia debida, aunque añadiendo que esto ocurrirá solo cuando el derecho, la prohibición o la obligación incumplidos, que deberán formar parte del anexo, "tengan por objeto proteger a una persona física o jurídica", lo que equivale a decir que quedan excluidos los daños exclusivamente ambientales[45].

Lo expuesto significa que la falta de acatamiento de esas obligaciones está en condiciones de convertirse en el fundamento de una obligación de resarcimiento en cabeza de la empresa incumplidora. Para ello es necesario, no obstante, como apunta a continuación el precepto, que "como consecuencia del incumplimiento" antes indicado "se haya causado un daño a los intereses jurídicos de la persona física o jurídica protegidos por el Derecho nacional". Más allá de lo enigmático de esta última frase, a través de la cual la directiva parece remitir a las condiciones de materialización de la responsabilidad civil vigentes en cada ordenamiento, con las dificultades consiguientes[46], lo cierto es que de este modo se descarta cualquier pretensión de objetivación de la responsabilidad, al supeditarse su existencia a la prueba, se entiende que por el demandante, de la existencia de un nexo de causalidad entre el incumplimiento doloso o negligente de las obligaciones de diligencia debida y el daño causado.

Este sistema se distingue del introducido por la Ley francesa, que obliga a las empresas a reparar los daños que el cumplimiento del deber de vigilancia podría haber evitado, puesto que en el caso del artículo 29.1 lo que se exige es que la deficiente aplicación de las obligaciones apuntadas sea, por sí misma, la causa del daño. Esto es, que el daño se derive de la no introducción de medidas adecuadas para prevenir o mitigar los efectos adversos potenciales o a eliminar los efectos adversos reales sobre los derechos protegidos. Lo cual es tanto como exigir que el mismo tenga su origen en la circunstancia de n haber ejercido sobre las filiales y los socios comerciales la influencia necesaria para evitarlo[47]. Esta es una situación difícil de imaginar, máxime cuando la

[45] Bueno, Oehm, *Conditions of Corporate Civil Liability in the Corporate Sustainability Due Diligence Directive: Restrictive, but clear?*, en *Verfassungsblog*, 28-5-2024, https://verfassungsblog.de/conditions-of-corporate-civil-liability-in-the-corporate-sustainability-due-diligence-directive/

[46] *Ibid*.

[47] Gorelli Hernández, *Bases para la armonización de la diligencia debida en materia de derechos humanos: la Directiva sobre diligencia debida de las empresas en materia de sostenibilidad*, original inédito, p. 29.

directiva señala a continuación que una empresa no podrá ser considerada responsable "cuando el daño haya sido causado únicamente por sus socios comerciales en su cadena de actividades". No obstante, está en condiciones de producirse cada vez que pueda establecerse que el mismo no habría tenido lugar sin la acción o la omisión de la empresa obligada, que se hizo más fácil gracias a ella o que lo alentó o motivó.

El mantenimiento de prácticas comerciales predatorias, que suponen un incumplimiento de la ya destacada obligación de la empresa de realizar las modificaciones necesarias en sus prácticas de compra con el fin de eliminar potenciales efectos adversos sobre los derechos de los trabajadores de sus socios comerciales, y que conduce a estos a desconocerlos para atender sus pedidos, podría constituir un ejemplo, por lo demás no infrecuente, de este tipo de situaciones, siempre que sea posible distinguirlo con suficiente claridad de los supuestos de concurso previstos por el segundo párrafo del artículo 29.4, en los que los daños han sido causados conjuntamente por la empresa y su filial o socio comercial directo o indirecto. Aunque la casuística puede ser más amplia, toda vez que la valoración del cumplimiento de las referidas obligaciones ha de realizarse a la luz de la eficacia de las medidas que adoptadas para prevenir, evitar o minimizar los impactos negativos en los que se concreta el daño[48].

En cualquier caso, más allá de la complejidad del supuesto de hecho y su no fácil aplicación, lo verdaderamente relevante es que, a pesar de las concesiones y compromisos que han sido necesarios para conseguir su aprobación, el principio base de la directiva de que las empresas respondan de los daños causados ha podido ser salvado[49] a través de una operación jurídica que introduce un gran cambio luego de décadas de una jurisprudencia transnacional contradictoria y de más de un siglo de teorías basadas en la responsabilidad limitada, el velo corporativo y la separación de personalidades jurídicas, de las que se han beneficiado las grandes corporaciones[50].

Esta previsión debe ser contemplada, por lo demás, en contacto con el conjunto de facilidades introducidas por el artículo 29.4 con el fin de favorecer el acceso a la justicia de las víctimas, las cuales se relacionan con los plazos de prescripción, las costas procesales, la posibilidad de solicitar medidas

[48] Guarriello, *cit.*, p. 48.
[49] Nuevamente, Guarriello, *cit.*, p. 46.
[50] Bueno, Oehm, *cit.*

inhibitorias, la representación en juicio a través de sindicatos u organizaciones no gubernamentales y la posibilidad de ordenar a la empresa la exhibición de pruebas en determinados supuestos.

Dicho lo cual solo queda por afirmar que, del modo hasta aquí descrito, la Directiva 2024/1760 sobre la diligencia debida de las empresas en materia de sostenibilidad introduce avances decisivos en la lucha contra la lacra de la explotación laboral, todavía persistente en muchos espacios y sectores de la economía global. Por más que esta constatación no sirva para disimular los numerosos escollos e incluso trampas que aparecen diseminados, y a veces ocultos, a lo largo de su texto debido a su tortuoso proceso de aprobación. Aun así, se trata de una norma difícil siquiera de imaginar no hace mucho tiempo atrás, cuya aplicación extraterritorial y potencial proyección como una norma universal suponen un paso de gigante en el proceso de construcción de herramientas de garantía del respeto de los derechos humanos laborales en las actividades económicas desarrolladas a lo largo y ancho del planeta, que luego de su aprobación parece imposible de detener.

4. *El impacto del Paquete Ómnibus sobre la Directiva de Diligencia Debida: ¿simplificación o debilitamiento?*

Casi desde el momento de su aprobación, el marco regulador de la diligencia debida introducido por la directiva se ha visto sometido a importantes tensiones. A ello han contribuido las críticas a las que se está viendo sometido el orden internacional y la deriva arancelaria iniciada por la principal potencia global. Lo fundamental ha sido, no obstante, un viraje en la orientación del ejecutivo comunitario luego de las elecciones europeas, que está conduciendo a poner en entredicho algunos de sus elementos.

Este cambio tiene su fuente en el "Informe Draghi sobre la competitividad de la Unión Europea". Un documento que considera como un lastre para la competitividad de las empresas europeas las regulaciones rígidas, burocráticas y prescriptivas y propone una transformación del marco regulatorio de la Unión Europea, dirigido a hacerlo más sencillo, ágil y eficiente. A partir de aquí, era cuestión de tiempo que este relanzamiento de la competitividad como valor orientador de la acción comunitaria afectase a las normas inspiradas en el fomento de la sostenibilidad. El desenlace se produjo nueve meses después, de la mano del "Paquete Ómnibus de simplificación",

lanzado por la Comisión Europea el 26 de febrero de 2025. Un documento en el que se incluye una "Propuesta de Directiva por la que se modifican las Directivas 2006/43, 2013/2464 y 2024/1760 en lo que atañe a determinados requisitos de información y diligencia debida en materia de sostenibilidad empresarial".

Más allá de lo llamativa que resulta la presentación de esta propuesta en pleno período de transposición, poniendo así en cuestión la credibilidad del legislador comunitario, es necesario realizar un balance de su impacto sobre el modelo de regulación de la diligencia debida introducido por esta.

Este es un balance que no tiene que ser por fuerza negativo. Del modo como viene presentada, la reforma parece dirigida a afectar a aspectos meramente procedimentales del tratamiento de la diligencia debida. Cabe preguntarse, sin embargo, en qué medida es verdaderamente así. Es decir, en qué medida estamos ante una propuesta que busca un aligeramiento de las cargas innecesarias o excesivas y no delante de una modificación de aspectos nucleares de la tutela de esos derechos, adoptada bajo el pretexto de la simplificación administrativa. Esto hace necesario realizar un "control de daños" del impacto del Paquete Ómnibus, a los efectos de valorar si, más allá de las palabras, este encubre el viejo axioma de las propuestas desreguladoras de acuerdo con el cual toda regulación es, por sí misma, un obstáculo para la competitividad empresarial.

Algo que debe ser puesto inmediatamente de manifiesto en este análisis es que ninguno de los elementos estructurales del modelo de regulación introducido por la directiva es afectado por el Paquete Ómnibus.

Tanto antes como después, los derechos protegidos siguen siendo los mismos y vienen identificados a través de una lista de 16 vulneraciones, de las que al menos nueve se vinculan con derechos humanos de naturaleza laboral, en su mayor parte de clara vocación antidumping; en tanto que la protección continúa proyectándose hacia las cadenas de actividades de las empresas, con la consiguiente capacidad de esta para abarcar tanto los socios comerciales directos como los indirectos y los procesos de extracción y elaboración de las materias primas y de fabricación de los bienes en los que suelen producirse el grueso de la vulneraciones de esos derechos; a la vez que los criterios de identificación de las empresas obligadas, todas de grandes dimensiones y con una importante capacidad de "tracción", tampoco se ven modificados, manteniéndose también la vinculación de las empresas no europeas; mientras que, en fin, el carácter obligatorio de los procesos de dili-

gencia debida no se ve alterado, preservándose igualmente su diseño y las etapas que lo integran.

Por el contrario, la propuesta busca incidir principalmente sobre aspectos de detalle de algunos de los componentes de dicho modelo. La dimensión más afectada es la relativa a los procesos de diligencia debida, que es materia de varios cambios de importancia.

Lo primero persigue aquí la propuesta es ampliar las materias relacionadas con dicho procedimiento respecto de las cuales los Estados no podrán establecer obligaciones distintas de las previstas por la directiva. El listado de las cuestiones sujetas a un máximo de armonización pasa a comprender también, según el nuevo artículo 4, las relacionadas con la identificación, prevención y mitigación de impactos negativos sobre los derechos humanos, la colaboración con las partes interesadas y la creación de un mecanismo de reclamación y notificación. Todas ellas no podrán ser objeto de una regulación distinta y, por tanto, más garantista, si bien se hace una salvedad en relación con la posibilidad de incluir disposiciones más estrictas o más específicas dirigidas a ofrecer un nivel diferente de protección de los derechos humanos, laborales y sociales.

La propuesta introduce a continuación una previsión que relativiza el enfoque basado en el riego que informa el diseño global de la directiva, al limitar la realización de las evaluaciones en profundidad a los socios comerciales directos de los ámbitos en que se haya detectado una mayor probabilidad de que se produzcan efectos adversos y que estos sean más graves, con la consiguiente exclusión inicial de los socios comerciales indirectos, pese a que los mayores riesgos de vulneraciones de los derechos humanos, y en particular de los laborales, se producen en los eslabones inferiores de las cadenas de actividades de las grandes compañías. Esta limitación, introducida mediante la adición de un nuevo apartado 2.b) al artículo 8, convive con la obligación de las empresas, prevista por la letra a), de realizar un inventario de las actividades de los socios comerciales, sin distinguir entre los directos y los indirectos, para determinar, igualmente, los ámbitos en que es más probable que se produzcan impactos adversos y que estos sean más graves. La obligación de cartografiado de toda la cadena de actividades, sin distinguir entre sus distintos niveles, se mantiene como fuente de información sobre los riesgos que las empresas deberán prevenir, mitigar o eliminar. Lo mismo que la obligación de las empresas de hacer frente a estos riesgos.

De allí que la propuesta incluya inmediatamente después un nuevo apartado 2 bis, por medio del cual se extiende el deber de llevar a cabo evaluaciones pormenorizadas cada vez que las empresas dispongan de "información plausible" que sugiera que se han producido o pueden producirse efectos adversos en las operaciones de un socio comercial indirecto. Esta es una información de la que deberían tener conocimiento las mismas a partir del referido cartografiado, aunque es posible también que accedan a ella por fuentes externas, como las denuncias. No parece, en consecuencia, que la realización de evaluaciones en profundidad pueda entenderse limitada solo los socios comerciales directos, con total exclusión de los demás. Y menos aún en los sectores y actividades donde el riesgo de vulneración de los derechos laborales constituya una posibilidad a la luz de la información que la propia empresa deberá reunir o que le sea suministrada.

Por lo que se refiere a las fases de prevención de los efectos adversos potenciales y de eliminación de los reales sobre los derechos protegidos, reguladas por los artículos 10 y 11, interesa destacar el mantenimiento de la mayor parte de las medidas previstas, incluyendo no solo la elaboración y aplicación de un plan de acción preventiva o correctiva, sino la exigencia de garantías contractuales que avalen el cumplimiento del código de conducta a los socios comerciales directos, así como de estos a sus socios integrados en la cadena de actividades de la empresa, y la introducción de las modificaciones o mejoras en el plan de negocio, las estrategias o las prácticas de compra de las empresas que sean necesarias para evitar o eliminar esa clase de efectos. Ambos son mecanismos de gran importancia para la proyección de la exigencia de respeto de los derechos laborales hacia los socios comerciales indirectos. En el primer caso, por basarse en la imposición de sanciones comerciales a través de un sistema de garantías contractuales "en cascada", ya utilizado con éxito por muchas empresas de sectores de alto riesgo. Y, en el segundo, porque, como se ha dicho, son muchas veces las malas condiciones contractuales las que impulsan a los socios comerciales directos a externalizar los pedidos hacia otros empresarios con esa misma finalidad degradatoria, pudiéndose llegar, a través de sucesivos encargos, a fórmulas extremas de explotación.

Con todo, la propuesta suprime del catálogo de medidas a ser puestas en marcha como "último recurso" ante el fracaso de las mencionadas, la terminación de la relación contractual con el socio comercial reticente o incumplidor. Esas medidas quedan limitadas a la imposición de un plan de

prevención reforzada, la abstención del establecimiento de nuevas relaciones o la ampliación de las existentes y la suspensión del vínculo comercial con el fin de aumentar la influencia que se tiene sobre el mismo. La existencia de supuestos en que las grandes corporaciones dependen de los insumos o las prestaciones de unos pocos proveedores ha conducido aquí al ejecutivo comunitario a admitir la posibilidad de seguirse abasteciendo de estos, pese al riesgo o la evidencia de vulneración de los derechos humanos. De todas formas, no puede dejar de observarse que esa medida puede – y debería – ser adoptada por las empresas cada vez que se encuentren ante proveedores que generan riesgos o daños graves a los derechos protegidos.

En su afán de aligerar las cargas burocráticas, la propuesta introduce a continuación un cambio que contradice el carácter dinámico y continuo de los procesos de diligencia debida. Se trata de la variación del plazo de realización de las evaluaciones periódicas de la adecuación y eficacia de las medidas adoptadas, que pasa, de acuerdo con el nuevo texto del artículo 15, de ser de al menos doce meses a extenderse hasta cinco años. Un plazo tan prolongado conspira contra la eficacia de los procesos de diligencia debida, perjudicando incluso a las propias empresas, que son las primeras interesadas en que estos cumplan su cometido. No obstante, la nueva redacción añade que las evaluaciones deben realizarse también cuando haya motivos razonables para considerar que las medidas adoptadas no son ya adecuadas o eficaces o pueden surgir nuevos riesgos, con lo que devuelve la cuestión al espacio de responsabilidad de la propia empresa.

Un último extremo de la regulación de los procesos de diligencia debida afectado por la Propuesta Ómnibus es el relativo a la colaboración de las partes interesadas, regulada por los artículos 3.1.n) y 13. La intención en este caso ha sido restringir tanto los sujetos a los que se atribuye esa condición como las fases de los procesos de diligencia debida en las que resulta preceptiva su participación.

La primera es una limitación que no afecta a los trabajadores de la matriz, sus filiales y sus socios comerciales de la cadena de actividades, así como a los sindicatos y demás representantes de todos ellos, que son expresamente mencionados por el primero de esos preceptos. En los demás casos, la idea ha sido convocar solo a las personas o comunidades cuyos derechos o intereses puedan verse "directamente" afectados por las actividades de la empresa, así como a sus representantes, con la consiguiente exclusión de quienes solo ostentan un interés difuso o indirecto, como las asociaciones

de consumidores o las organizaciones de defensa de los derechos humanos. Esta es una exclusión que deja fuera a sujetos que, como los mencionados, pueden ser los únicos capaces de tener un conocimiento de la realidad de las relaciones laborales en los territorios donde la implantación sindical brilla por su ausencia. Su exclusión puede, por ello, perjudicar a la eficacia de las medidas a adoptar o transmitir una falsa imagen de inexistencia de riesgos de vulneración.

De forma paralela, la modificación del segundo de los preceptos aludidos restringe aún más las fases en que deberá consultarse a las partes interesadas, al excluir las relacionadas con la toma de las decisiones sobre la terminación o suspensión de la relación comercial y con el desarrollo de los indicadores requeridos para las evaluaciones periódicas. Los espacios de participación que quedan son, aun así, relevantes, ya que se vinculan con la recopilación de información necesaria para la realización de la detección, evaluación y priorización de los riesgos, el desarrollo de los planes de acción preventiva y correctiva ordinarios y mejorados y la adopción de las medidas necesarias para la reparación de los efectos adversos. No está demás insistir, de todas formas, en que la participación de los trabajadores y sus representantes debería extenderse a todas las etapas de los procesos de diligencia debida y ser objeto de un tratamiento especial y privilegiado. Cosa que no ocurre ni en la versión inicial de la directiva ni en la modificada, con un claro perjuicio de la eficacia potencial de los procesos de diligencia debida.

Por lo que se refiere a la supervisión del cumplimiento de las obligaciones establecidas por las disposiciones nacionales de transposición, la iniciativa reformadora mantiene las competencias de la autoridad administrativa que deben crear los Estados, incluyendo su capacidad para desarrollar investigaciones, realizar inspecciones, ordenar el cese de las infracciones e imponer sanciones a las empresas, además de concederles un plazo para adoptar medidas de reparación. La única modificación afecta a la consideración del volumen de negocios mundial neto como base para la imposición de sanciones pecuniarias a las empresas, así como a la exigencia de que el límite máximo de estas sanciones no sea inferior al 5% de aquél. Ambas previsiones, contenidas en el apartado 4 del artículo 27, son sustituidas por un genérico encargo a la Comisión de elaborar y publicar, en colaboración con los Estados, orientaciones que ayuden a las autoridades nacionales de supervisión a determinar el nivel de las sanciones a aplicar.

La razón esgrimida para adoptar esta decisión radica en el hecho de que el apartado 1 incluye ya un listado de criterios a tener en cuenta con esa finalidad. Aun así, no está demás indicar que el eliminado es un criterio empleado por otras normas comunitarias, como los reglamentos de protección de datos o de inteligencia artificial, y que este hecho deja abierto el camino para una carrera a la baja entre los Estados en lo que a la regulación de la responsabilidad administrativa de las empresas se refiere.

Todo lo anterior se ve complementado por una última y radical decisión "de cierre" de la propuesta, de gran impacto sobre el sistema de garantías de la directiva, así como sobre las fórmulas diseñadas por esta para el acceso a la justicia de las víctimas de vulneraciones de los derechos humanos. Se trata de la eliminación del régimen común de responsabilidad civil a nivel de la Unión Europea establecido inicialmente por el apartado 1 del artículo 29. Esta previsión se ve sustituida por una genérica alusión, incluida en el apartado 2, al derecho de las víctimas a obtener una reparación íntegra de los daños que puedan haberles causado las empresas por incumplimiento de sus obligaciones relacionadas con la prevención y eliminación de efectos adversos sobre los derechos protegidos, cuando puedan ser consideradas responsables de esos daños conforme al Derecho nacional, al que no se exige, sin embargo, ninguna adaptación, ni que pase a considerar que esa conducta constituye fuente de responsabilidad civil.

Esta decisión va acompañada de otra de gran relieve: la eliminación de la posibilidad, prevista por el apartado 3.d), de que las personas perjudicadas puedan autorizar a un sindicato, una organización no gubernamental o una institución de derechos humanos para que interponga demandas dirigidas a hacer valer sus derechos

La intención de "limar los dientes" a la directiva es aquí evidente y va más allá de una mera simplificación procedimental, al mutilar un aspecto sustancial de su contenido particularmente importante, no solo para asegurar el compromiso de las grandes empresas con los derechos humanos, sino para ofrecer a las víctimas de vulneraciones de los derechos humanos la reparación que merecen.

¿Significa esto que la directiva y su sistema de garantías han quedado privados de eficacia, de manera a luego de la aprobación de la propuesta que comentamos pueda campar la irresponsabilidad?

No parece que sea así, al menos por dos razones. La primera se apoya en la constatación de que el sistema de control administrativo de la directiva no

ha sido alterado.Y este prevé la creación de una autoridad autónoma con capacidad para tramitar procedimientos de naturaleza cuasi jurisdiccional, dentro de los cuales puede exigirse a las empresas el cumplimiento de sus obligaciones de diligencia debida e incluso la adopción de medidas de reparación. Esto supone que existe una vía capaz de permitir a los afectados defender sus derechos y obtener una reparación, más rápida y menos onerosa que los litigios civiles. Adicionalmente, es preciso tener en cuenta que cualquier incumplimiento de dichas obligaciones que ocasione un daño a los titulares de los derechos protegidos debe generar la consiguiente responsabilidad de la empresa causante, en aplicación de las normas generales vigentes en cada país. Esto es así en la medida en que la existencia de una norma *ad hoc* de responsabilidad civil ha dejado de ser indispensable una vez que la diligencia debida ha pasado a ser fuente de obligaciones jurídicas directas en cabeza de las empresas. Lo único que hay que hacer es aplicar esas normas, y en particular la exigencia de un nexo de causalidad entre el incumplimiento empresarial y el daño, con criterios que se adapten a la particular naturaleza de la diligencia debida y a las singularidades del trabajo desarrollado en las cadenas de valor.

De lo expuesto hasta aquí se desprende que los elementos nucleares del modelo de garantía global de los derechos humanos laborales plasmado en la Directiva de diligencia debida se mantienen pese a los cambios proyectados por la Comisión Europea, con sola la excepción del último de los examinados. No podemos hablar, en consecuencia, de un primer paso adelante del legislador comunitario, seguido luego de dos pasos atrás, aunque sí de dos pasos adelante, amenazados por un muy llamativo paso atrás, frente al cual lo que corresponde a quienes consideran que la directiva representa una valiosa herramienta para la corrección de los desequilibrios ocasionados por la globalización es poner en valor y llenar de contenido los muchos elementos valiosos que esta conserva, haciéndolos fuertes y haciéndose fuertes en torno a ellos.

Resumen

Aunque la Directiva sobre la diligencia debida no es una norma laboral, se trata de un instrumento diseñado pensando en gran medida en la protección de los derechos de esa naturaleza, cuyas consecuencias para la garantía transnacional de estos son de la mayor importancia. De ahí que sea importante pasar revista a su contenido "con ojos de laboralista", como se propone hacer el editorial que se presenta a continuación. En él se destaca cómo esta norma europea consolida un modelo de regulación global surgido en las últimas décadas como respuesta a los abusos cometidos en los procesos de subcontratación desplazados hacia países con una débil protección laboral. Este es un modelo que se estructura en torno a cuatro pilares: a) reconocimiento de los derechos humanos laborales como bien protegido; b) extensión de las obligaciones empresariales a toda la cadena de actividades; c) atribución de responsabilidad a las grandes empresas, incluidas las no europeas; y d) recurso a la diligencia debida como estándar regulador, cuyo tratamiento general se analiza desde esa perspectiva. El texto examina en su última parte el impacto del Paquete Ómnibus lanzado por la Comisión Europea, destacando cómo este no altera el diseño global de la directiva, aunque introduce retrocesos en algunos de sus elementos relevantes, como el régimen de responsabilidad civil creado por ella.

Palabras clave

Diligencia debida, Derechos humanos laborales, Cadenas globales de valor, Derechos fundamentales en el trabajo, Trabajo decente.

Helene Langbein

The German LkSG and the New Corporate Sustainability Due Diligence Directive (CSDDD) - an Evaluation of Existing Regulations in Light of European Changes

1. *Introduction*

After the tragic collapse of the Rana Plaza textile factory in Bangladesh in 2013 that caused the death of more than 1100 people the whole world discussed about Western responsibility to this and similar incidents[1]. Globalisation and responsibility in supply chains came into public focus[2].

[1] For further information on the Rana Plaza factory collapse see: https://www.amnesty.de/informieren/aktuell/bangladesch-zehn-jahre-rana-plaza-ungluecktextilindustrie-arbeitsbedingungen (last accessed November 30, 2024).

[2] See also Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung:

Ten years later, in January 2023 the German law about due diligence in supply chains, the *Lieferkettensorgfaltspflichtengesetz, LkSG*, became effective. Beforehand, many discussions about the need and importance of a law regarding supply chain due diligence occurred[3]. The German approach was originally built on the voluntary implementation of measurements to protect human rights along supply chains according to a "National Action Plan" which implements Nr. 17 of the UN Guiding Principles on Business and Human Rights into German Law[4]. This approach failed since only 13-17 % of the affected companies, in contrast to the 50% the National Action Plan aimed at, actually implemented adequate measurements meeting the requirements of due diligence[5]. After a monitoring by the Ministry of Federal Affairs (*Auswärtiges Amt*) that revealed this alarmingly low adaption rate, the discussion about the introduction of mandatory rules regarding supply chain due diligence arose again. Finally, in 2021 German legislature passed the *LkSG*.

With the new European Corporate Sustainability Due Diligence Directive (CSDDD)[6] entering into force, the *LkSG* needs to get partly changed to meet the requirements of the European provisions. Which effects has CSDDD on the *LkSG*? What are the significant changes for companies, stakeholders and those affected of human rights violations? Is the implementation of the CSDDD the right step towards fairer supply chains? The following article is dedicated to these questions.

2. *Provisions of the Current LkSG*

The *LkSG* in its current form (November 2024) applies to all companies, regardless of their legal form, based in Germany that employ more than 1000 employees, § 1 *LkSG*.

https://www.bmz.de/de/aktuelles/aktuelle-meldungen/10-jahre-rana-plaza-152970 (last accessed November 30, 2024).

[3] For the legislative procedure see: https://www.bundestag.de/dokumente/textarchiv/-2021/kw23-de-lieferkettengesetz-845608 (last accessed November 30, 2024).

[4] See Auswärtiges Amt, *National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020*.

[5] Auswärtiges Amt, *Monitoring of the status of implementation of the human rights due diligence obligations of enterprises set out in the National Action Plan for Business and Human Rights 2016-2020*, p. 4.

[6] Dir. EU 2024/1760 of 13 June 2024.

2.1. *Definition of the Supply Chain*

The foundation for the law is the *Lieferkette* - the "supply chain". The definition of *Lieferkette* can be found in § 2 Section 5 *LkSG*. This regulation roughly translates to:

"The supply chain within the meaning of this Act refers to all products and services of a company. It comprises all steps in Germany and abroad that are necessary to manufacture the products and provide the services, from the extraction of the raw materials to the delivery to the end customer and includes

1. the actions of a company in its own business area,
2. the actions of a direct supplier and
3. the actions of an indirect supplier."

Even though the wording of the definition is suited mainly for companies in the production sector, the *LkSG* actually applies to every company within the above-given scope, including service industries[7].

It is not easy to determine which step in a complex supply chain is covered by the *LkSG*. For example: since the supply chain covers everything until the delivery to the end customer, one may think that the producer of a small part of a big and complex product, like a car, is responsible for the whole supply chain until the consumer buys the car, but this apparently is not the intention of the law[8]. The understanding of the supply chain is way more limited than the wording of § 2 Section 5 *LkSG* may imply at first sight. The supply chain of the manufacturer of the small part would in this example end when the small part arrives at the car manufacturer, since that is the end customer of the producer of the small part manufacturer[9]. The car

[7] Zimmer, *Das Lieferkettensorgfaltspflichtengesetz, Handlungsoptionen für Mitbe-stimmungsakteure und Gewerkschaften*, Bund-Verlag, 2023, p. 17.

[8] BMWK (Bundesministerium für Wirtschaft und Klimaschutz), BMAS (Bundesministerium für Arbeit und Soziales), BAFA (Bundesministerium für Wirtschaft und Ausfuhrkontrolle), *Fragen und Antworten zum Lieferkettengesetz*, 6.8 and 6.10, https://www.bafa.de/DE/Lieferketten/FAQ/haeufig_gestellte_fragen_node.html (last accessed December 1, 2024).

[9] Mittwoch, Bremenkamp, *Comment on § 2 LkSG,* in Kaltenborn, Krajewski, Rühl, Saage-Maass (eds.), *Lieferkettensorgfaltspflichtenrecht,* C. H. Beck, 2023, marginal no. 812; Kolb, *Comment on § 2*, in Mankowski, Kalb (eds.), *LkSG*, C. H. Beck, 2023, marginal No. 217; Schall, *(Berechtigte) Lücken in der Lieferkettensorgfaltspflicht des LkSG?*, in *NZG,* 2022, p. 789.

manufacturer on the other hand would be responsible for the whole supply chain regarding the car[10].

2.2. *Human Rights and Environmental Conditions Protected by the LkSG*

Companies under the scope of the LkSG are obliged to avoid environmental risks and risks regarding human rights. The prospective companies need to monitor their supply chains in respect to these risks and take measures to prevent violations (for details see Sections 2.3.1, 2.3.2 and 2.3.3). Situations causing or aggravating the violation of the protected matters listed below require certain actions of the obliged companies according to § 7 *LkSG* (for details see Section 2.3.4).

§ 2 Section 1 *LkSG* states that international conventions listed in the appendix of the law also define protected legal positions by the *LkSG*. Since these agreements are only binding between states, section 2 and 3 order the direct horizontal effect of the international conventions through the introduction of prohibitions[11].

2.2.1. *Environmental Conditions*

§ 2 Section 2 No. 9 and No. 10 *LkSG* define the environmental conditions protected by the *LkSG* connected with human rights. No. 9 prohibits negative repercussions of the environment caused by the economic activity of a company. This includes soil changes, water and air pollution, harmful noise emissions, and excessive water consumption. § 2 Section 2 No. 9 a)-d) *LkSG* clarifies that these environmental conditions are only protected by the *LkSG* when humans are affected negatively by violations, e. g. when "the natural basis for the preservation and production of food [is] significantly impaired" (§ 2 No. 9 a) *LkSG*). Therefore, negative repercussions of the environment without the affection of humans are only a matter of the *LkSG* in its current form, when they are listed in the prohibitions of § 2 Section 3 *LkSG*.

[10] Mittwoch, Bremenkamp, *cit.*; Kolb, *cit.*; Schall, *cit.*

[11] Leyens, *Comment on § 2 LkSG,* in Hopt, *Handelsgesetzbuch*, C. H. Beck, 2024, marginal no. 2; in detail Wiater, *Unternehmerische Menschenrechtsbindung nach Maßgabe des Lieferkettengesetzes*, in *JZ*, 2022, p. 863 ff.

The environmental regulations in § 2 Section 3 *LkSG* mainly regulate the use and handling of quicksilver, dangerous chemicals hazardous waste. A violation of the prohibitions listed in § 2 Section 3 *LkSG* is a violation of the *LkSG* regardless of a violation of protected human rights.

2.2.2. *Risks Regarding Human Rights*

Apart from the above-mentioned environmental risks with an aspect to human rights in § 2 Section 2 No. 9 and 10 *LkSG,* the law prohibits the violation of the following human rights:

2.2.2.1. Child Labour (No. 1 and 2)

§ 2 Section 2 No. 1 and 2 *LkSG* both have child labour as their subject matter. In No. 1 a minimum age for taking up employment is required, which is linked to the end of compulsory schooling in the respective state but cannot be lower than 15 years. Exceptions apply according to Art. 2 Section 4 and Art. 4-8 of ILO Convention No. 138. These include, for example, taking up light activities in line with compulsory schooling by the age of 13 years[12].

No. 2 prohibits the worst forms of child labour according to ILO Convention No. 182, which includes for example forced labour, slavery, prostitution and drug trafficking[13]. Labour which can be dangerous for "life, health or morality of adolescents" is also prohibited under the age of 18, according to § 2 Section 2 No. 2 d) *LkSG*.

2.2.2.2. Forced Labour and Slavery (No. 3 and 4)

§ 2 Section 2 No. 3 and 4 *LkSG* prohibit any form of forced labour and slavery. The definition of forced labour is oriented on Art. 2 ILO Convention No. 29[14] and translates to: "any labour or service which is required of a person under threat of punishment and for which he or she has not volunteered". It does not matter if labour is forced by public or private actors

[12] See ILO Convention No. 138, art. 7 section 1.

[13] See ILO Convention No. 182, art. 3.

[14] The explanatory memorandum refers to Art. 8 ICCPR, ILO Convention No. 29 and ILO Convention No. 105: BT-Drs. 19/28649, p. 35.

or if the specific form of forced labour may even be legal in the respective state[15]. Voluntary labour can also turn into forced labour if workers are not able to finish working in a self-determined way, e.g. by the creation of physical obstacles or psychological pressure[16].

2.2.2.3. Industrial Safety (No. 5)

Violations of regulations regarding industrial safety in the supply chain, in particular obviously inadequate safety standards of the workplace, the lack of protection against hazardous materials, the lack of measurements to avoid exhaustion and unsatisfactory safety instructions of the workers, are prohibited by § 2 Section 2 No. 5 *LkSG*. The safety standards of the respective state the labour is done in apply, not German standards.

2.2.2.4. Freedom of Association (No. 6)

Companies bound by the *LkSG* have to make sure that individual and collective freedom of association and the right to strike and collective bargaining according to ILO Convention No. 87 and 98, Art. 22 ICCPR and Art. 8 ICESCR[17] are guaranteed along their supply chains in and outside of Germany. The national laws are decisive only regarding the freedom of action of unions[18]. Therefore, by the wording of § 2 Section 2 No. 6 *LkSG*, the right to form and join an association is not determined by the respective national law[19].

This becomes problematic, when trade unions are forbidden by the national laws of a state in the supply chain[20]. On the one hand one could assume that the collaboration with such states in a supply chain is automatically a violation of the *LkSG*. On the other hand, § 3 *LkSG* clarifies that the obligations of the bound companies are based on "appropriateness" (see Section

[15] ILO, *Global Estimates of Forced Labour*, 2012, p. 19; Zimmer, *cit.*, p. 21.

[16] Zimmer, *cit.*, p. 21.

[17] These are not mentioned in the wording of § 2 Section 2 No. 6 LkSG, but in the explanatory memorandum: BT-Drs. 19/28649, p. 37.

[18] Schönfelder, *§ 4 Menschenrechtliche und umweltbezogene Risiken*, in Grabosch, *Das neue Lieferkettensorgfaltspflichtengesetz*, Nomos, 2021, p. 90; critical Zimmer, *cit.*, p. 23.

[19] Schönfelder, *cit.*, p. 91.

[20] *Ibid.*

2.3) Part of that is the own causal contribution of the company to the violation (see Section 2.3). Therefore, one could also assume that business activities in countries where trade unions are forbidden are unproblematic since the company has no causal contribution to this situation[21]. The explanatory memorandum to § 2 Section 2 No. 6 *LkSG* limits both interpretations as it states: "If the domestic context makes it impossible to fulfil this responsibility in full, companies can be expected to respect the principles of internationally recognised human rights to the extent possible in the circumstances"[22].

Protected by the law according to the judgement practice of the ILO supervisory body are trade union plurality and the right to access the company[23]. It is disputable if works councils and comparable bodies are also protected by § 2 Section 2 No. 6 *LkSG*[24]. It is partly argued that this is not the case since the regulation aims at trade unions by its wording[25]. The explanatory memorandum however mentions "trade unions and other employee representatives"[26] which can lead to the assumption that representatives elected by the employees, such as works councils are also protected by § 2 Section 2 No. 6 *LkSG*[27].

2.2.2.5. Equality (No. 7)

§ 2 Section 2 No. 7 *LkSG* prohibits unequal treatment in employment. The regulation defines national and ethnic origin, social origin, health status, disability, sexual orientation, age, gender, political opinion, religion and world

[21] Sagan, Schmidt, Alexander, *Das Lieferkettensorgfaltspflichtengesetz, Ein Überblick aus der Perspektive des Arbeitsrechts*, in *NZA-RR*, 2022, p. 285; Ehmann, *Der Regierungsentwurf für das Lieferkettengesetz: Erläuterung und erste Hinweise zur Anwendung*, in *ZVertriebsR,* 2021, p. 144.

[22] BT-Drs. 19/28649, p. 1.

[23] Zimmer, *cit.*, p. 24; 67th Report of the CFA, case No. 303 (Ghana), marginal no., 264; 95th Report, case No. 448 (Uganda), marginal no. 124; 127th Report, case No. 878 (Nigeria), marginal no. 109; 197th Report, case No. 905 (UdSSR), marginal no. 633; 265th Report, case No. 1431 (Indonesia), marginal no. 127; 270th Report, case No. 1500 (China), marginal no. 324; 338th Report, case No. 2348 (Iraq), marginal no. 995.

[24] Endorsened: Zimmer, *cit.*, p. 24; Ehmann, *cit.*, p. 144; Nietsch, Wiedmann, *Der Regierungsentwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in der Lieferkette*, in *CCZ,* 2021, p. 105; Rejecting: Sagan, Schmidt, Alexander, *cit.*, p. 285.

[25] Zimmer, *cit.*, p. 24.

[26] BT-Drs. 19/28649, p. 37.

[27] Zimmer, *cit.*, p. 24; Ehmann, *cit.*, p. 144; Nietsch, Wiedmann, *cit.*, p. 105.

view as forbidden grounds for discrimination. The standard example in this regulation is unequal pay for equal work[28]. It is questionable whether the latter only applies to unequal pay because of gender, since in the explanatory memorandum the German legislator only cites international laws concerning inequality regarding gender[29]. Since this would mean a big loophole in the protection of the employees, and this view would also contradict international adjudication practice, it is to be assumed, that unequal pay is forbidden no matter which of the grounds for discrimination is the reason[30]. The regulation allows exceptions because of employment requirements.

2.2.2.6. Appropriate Wage (No. 8)

Receiving an appropriate wage is a human right in itself, but it also prevents other human rights violations[31]. Forced labour or child labour lose their attractiveness when independent, adult workers get paid enough to support their families[32]. The appropriate wage according to § 2 Section 2 No. 8 *LkSG* is at least the minimum wage of the respective state. If this is considered too low, the appropriate wage has to be higher than minimum wage[33]. The appropriate wage is based on the local cost of living of the employees and their families and the local social security benefits[34]. To determine the correct values, the internationally accepted "Anker method" is suggested to be used[35]. Relevant risk factors are the withholding of relevant wage components, for example to cover the costs of work clothing and materials[36].

[28] Sagan, Schmidt, Alexander, *cit.*, p. 286; Schönfelder, *cit.*, p. 92.

[29] Schönfelder, *cit.*, p. 92; BT-Drs. 19/28649, p. 37 ff.

[30] Schönfelder, *cit.*, p. 93; Harings, Jürgens, *Die Auswirkungen des Lieferkettensorgfaltspflichtengesetzes auf die Transportwirtschaft,* in *RdTW,* 2021, p. 298.

[31] Schönfelder, *cit.*, p. 93 ff.; LeBaron, *Wages: An Overlooked Dimension of Business and Human Rights in Global Supply Chains,* in *BHRJ,* 2021, p. 17.

[32] Schönfelder, *cit.*, p. 94; LeBaron, *cit.*, p. 14 ff.; ILO, *Child Labour Business Guidance Tool*, p. 11.

[33] Schönfelder *cit.*, p. 94; Sagan, Schmidt, Alexander, *cit.*, p. 286.

[34] BT-Drs. 19/28649, S. 38.

[35] Schönfelder, *cit.*, p. 94; other suggestions: Zimmer, *cit.*, p. 26 ff.; Sagan, Schmidt, Alexander, *cit.*, p. 286.

[36] Schönfelder, *cit.*, p. 95; LeBaron, *cit.*, p. 11 ff.

2.2.2.7. Security forces with excessive use of force (No. 11)

To protect employees from violence in connection with a violation of their right to life, health, and freedom of association and to further prevent torture, § 2 Section 2 No. 11 *LkSG* places special demands on the use of private and public security forces[37]. This regulation is aimed at the typical situation in countries of the global south, especially in zones of conflict with paramilitary forces[38].

2.2.2.8. Catch-all Offence (No. 12)

§ 2 Section 2 No. 12 *LkSG* builds the basis for further protection from human rights violations according to the conventions and pacts listed in the appendix, such as the right to maternity leave, freedom of speech or right to education[39]. According to the clause, the entrepreneurial behaviour has to be "directly suitable" to cause an impairment of these rights. Therefore, the probability and temporal connection for the occurrence of the impairment must be very high[40]. Also, the unlawfulness of the behaviour has to be "obvious, when weighing up all the relevant circumstances".

Thus the "catch-all offence" is indeed very limited to some rare and severe cases that would otherwise create a great lack of protection of human rights. Some voices in German jurisprudence have been risen, in favour of the regulation being too vague[41]. However, since the respective agreements applicable in Germany are referenced by the law[42], there is indeed a static canon of legal interests to be protected, which is why the sufficient determinability of the standard is possible by interpretation[43].

[37] Schönfelder, *cit.*, p. 102.

[38] BT-Drs. 19/28649, p. 38 ff.; Sagan, Schmidt, Alexander, *cit.*, p. 287; Schönfelder, *cit.*, p. 102.

[39] Schönfelder, *cit.*, p. 103 ff.

[40] Schönfelder, *cit.*, p. 104.

[41] Sagan, Schmidt, Alexander, *cit.*, p. 287; Spindler, *Verantwortlichkeit und Haftung in Lieferantenketten - das Lieferkettensorgfaltspflichtengesetz aus nationaler und europäischer Perspektive*, in *ZHR*, 2022 p. 78; Keilmann, Schmidt, Falko, *Der Entwurf des Sorgfaltspflichtengesetzes, Warum es richtig ist auf eine zivilrechtliche Haftung zu verzichten*, in *WM*, 2021, p. 720; Wagner, Rutloff, *Das Lieferkettensorgfaltspflichtengesetz - eine erste Einordnung*, in *NJW*, 2021, p. 2146 ff.

[42] Schönfelder, *cit.*, p. 106.

[43] Zimmer, *cit.*, p. 28; Krause, *Das Lieferkettensorgfaltspflichtengesetz als Baustein eines transnationalen Arbeitsrechts Teil II*, in *RArbeit*, 2022, p. 335; Schönfelder, *cit.*, p. 106.

2.3. *Due Diligence Obligations*

The *LkSG* imposes various obligations on companies to monitor their supply chains for possible above-mentioned violations and limit or eliminate them. It is important to note that the duties are "obligations of means" and therefore fulfilled by attempt – the attempts do not have to be successful[44]. Also, the obligations are limited due to appropriateness[45]. Which measurements are appropriate is based on the following criteria according to § 3 *LkSG*:

- type of the company's business activities;
- the company's ability to influence the protected risks;
- the typically expected severity, the likelihood and reversibility of a violation;
- the type of the company's causal contribution to the violation.

Additionally, the accountability of the bound company varies along the supply chain. The *LkSG* differentiates between "activities of the own business area" (§ 2 Section 4 No. 1), "direct suppliers" (§ 2 Section 4 No. 2) and "indirect suppliers" (§ 2 Section 4 No. 3).

2.3.1. *Risk Management System*

The centrepiece of the companies' duties obligatory by the *LkSG* surely is the establishment of a risk management system. These are generally nothing new for big companies[46]. The big difference between the already existing risk management systems and the one the *LkSG* obligates are the risks the system is monitoring: traditional compliance risk management systems are used to prevent corruption, money laundering and cartel[47]. The risk management system of the LkSG in contrast is used to protect human rights and the environment[48].

[44] BT-Drs. 19/28649, p. 2, 41; Sagan, Schmidt, Alexander, *cit.*, p. 282; Spindler, *cit.*, p. 80; Wagner, *Haftung für Menschenrechtsverletzungen in der Lieferkette*, in *ZIP*, 2021, p. 1099.

[45] Zimmer, *cit.*, p. 29; Sagan, Schmidt, Alexander, *cit.*, p. 282; Grabosch, *§ 5 Die Sorgfaltspflichten*, in Grabosch, *Das neue Lieferketten-sorgfaltspflichtengesetz*, cit., p. 143.

[46] Grabosch, *§ 5 Die Sorgfaltspflichten*, cit., p. 125 ff.

[47] Zimmer, *cit.*, p. 36.

[48] Zimmer, *cit.*, p. 36; Gehling, Ott, Lüneborg, *Das neue Lieferketten-sorgfaltspflichtengesetz - Umsetzung in der Unternehmenspraxis*, in *CCZ*, 2021, p. 234.

Since the risk management system has to be appropriate, the financial and other resources used to maintain this system are limited to this appropriateness, e. g. by company size[49]. On the other hand, this principle also means that the risk management system has to be effective[50]. A system is effective when it leads to the identification of risks and prevents, stops or limits violations caused or contributed to by the company, § 4 Section 2 *LkSG*[51]. According to § 4 Section 3 *LkSG,* the companies have to name a designated person for monitoring the risk management system, like a "human rights officer".

For the establishment and implementation of the risk management system, the companies have to consider the interests of workers and other people affected in a protected legal position by the economic activity of the company, § 4 Section 4 *LkSG*. The German legislator did not, however, state how the companies need to consider the interests of these groups[52].

2.3.2. *Risk Analysis*

Part of the risk management system is the risk analysis to identify possible risks along the supply chain. With the identification of a risk, the company has to prioritise these risks according to the factors in § 3 Section 2 *LkSG*, mentioned above (see section 2.3).

To identify risks of possible violations, the German legislator suggests doing "risk mapping" in regard to business fields, locations, products, or countries of origin[53]. How exactly the risk analysis is to be implemented is under the assessment of the company[54].

The risk analysis must be carried out at least once a year for the own business area and for direct suppliers, § 5 Section 4 *LkSG*. If there is a specific reason, such as an expansion of business activities, it also needs to be carried out on an ad hoc basis. This "*ad hoc* analysis" also applies to indirect suppliers. If the supply chain is organised in an abusive way, the company also has to carry out the

[49] Zimmer, *cit.*, p. 31.

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*; Sagan, Schmidt, Alexander, *cit.*, p. 287.

[53] Zimmer, *cit.*, p. 35; Steinhaus, Guttzeit, *Management unternehmensstrate-gischer Risiken: Früherkennung von Indikatoren für Beschäftigungsrisiken,* in *Mitbestimmungspraxis*, 2021, p. 34.

[54] BT-Drs. 19/28649, 45.

yearly risk analysis regarding indirect suppliers according to § 5 Section 1 *LkSG*. The outcome of the analysis has to be communicated to the companies' decision-makers, who have to take the results as a basis for their decisions[55].

2.3.3. *Preventive Measures*

When the risk analysis results in the identification of risks, the company has to take appropriate measures to prevent the risks from materialising according to § 6 *LkSG*.

§ 6 Section 1 *LkSG* stipulates that the preventive measures must be taken *unverzüglich*. Following the system of the German Civil Code (BGB) this means "without culpable hesitation" (see § 121 Section 1 *BGB*). In contrast to *sofort,* meaning without any hesitation, a short appropriate delay is unproblematic[56].

Subsequently, an overview of the different preventive measures shall be given.

2.3.3.1. Policy Commitment

If at least one risk is identified, company management has to make a policy commitment about the human rights strategy of the company[57]. It expresses the company's commitment and dedication to respect human rights[58]. It includes the company's risk management concept, the prioritised risks according to the risk analysis and the expectations the company has of its employees, contract partners and indirect suppliers, § 6 Section 2 *LkSG*. The policy commitment has to be presented to the works council, the *Wirtschaftsausschuss* ("economic committee", which is a particular part of the works council) and publicly to the direct suppliers[59]. Since the commitment has to address the specific risks and measurements, it is a tool that forces continuous transparency[60].

[55] Zimmer, *cit.*, p. 39; Sagan, Schmidt, Alexander, *cit.*, p. 287; Nietsch, Wiedmann, *cit.*, p. 107.

[56] Grabosch, *§ 5 Die Sorgfaltspflichten*, cit., p. 147.

[57] Grabosch, *§ 5 Die Sorgfaltspflichten*, cit., p. 148.

[58] BT-Drs. 19/26639, p. 46.

[59] BT-Drs. 19/26639, p. 46.

[60] Grabosch, *§ 5 Die Sorgfaltspflichten*, cit., p. 149.

2.3.3.2. Preventive measures in the own business area

§ 6 Section 3 *LkSG* stipulates that companies have to enable appropriate preventive measures in their own business area. Four measures are given by the regulation as standard examples[61]:

"1. the implementation of the human rights strategy set out in the policy commitment in the relevant business processes,

2. the development and implementation of appropriate procurement strategies and purchasing practices that prevent or minimise identified risks,

3. training in the relevant business areas,

4. the implementation of risk-based control measures to verify compliance with the human rights strategy contained in the policy commitment in its own business area."

Since these four points are standard examples, companies regularly have to follow them, but exceptions are possible[62]. This means also that the company's duties are not automatically fulfilled when all these measures have been taken[63]. Depending on the particular case there may be other measures a company has to take to fulfil their duties.

2.3.3.3. Preventive Measures Regarding Direct Suppliers

According to § 6 Section 4 *LkSG,* companies have to implement preventive measures vis à vis their direct suppliers. The regulation lists four measures as standard examples[64]:

"1. consideration of human rights and environmental expectations when selecting a direct supplier,

2. the contractual assurance of a direct supplier that it fulfils the human rights and environmental expectations demanded by the company's management and addresses them appropriately along the supply chain,

3. the implementation of training and education to enforce the contractual assurances of the direct supplier in accordance with number 2,

4. the agreement of appropriate contractual control mechanisms and

[61] BT-Drs. 19/26639, p. 46.

[62] Grabosch, *§ 5 Die Sorgfaltspflichten*, cit., p. 121.

[63] *Ibid.*

[64] *Ibid.*

their risk-based implementation in order to verify the direct supplier's compliance with the human rights strategy."

2.3.4. *Remedial Measures*

If a violation of protected rights occurs or is imminent, the bound company has to take remedial measures to prevent or stop the violation or minimise its extent according to § 7 *LkSG*. The measures have to be appropriate (see section 2.3) and need to be taken *unverzüglich* (see section 2.3.3).

In its own business area, the bound company has to stop the human rights violation successfully. The principle of "obligations of means" of the *LkSG* does not apply in this situation[65]. This is in line with the principle of appropriateness since the companies have enough influence in their own business area to be required to stop any violation[66]. Exceptions from this rule can be made for violations occurring abroad and particular corporate structures that limit the influence of the company[67].

Violations caused by direct suppliers often cannot be stopped by the bound company. In these cases, the measures are structured in a step model, oriented on the different criteria of appropriateness. As a first step, a concept for the minimisation of human rights' violations has to be made, including a timetable for the implementation of the here defined measures. According to § 7 Section 2 No. 3 *LkSG* a temporary suspension of the business relations can be necessary.

If the violation of the protected rights is especially grave, if the attempts of the minimisation concept don't work or if it is obvious that a minimisation concept is doomed to fail and if there is no effective milder remedy the cancellation of the business relationship serves as the ultima ratio, according to § 7 Section 3 *LkSG*[68].

With reference to § 5 Section 1 *LkSG,* the same measures have to be taken in the case of violations caused by indirect suppliers if the supply chain is structured in an abusive way (see section 2.3.2).

[65] Grabosch, *§ 5 Die Sorgfaltspflichten*, cit., p. 157 ff.

[66] Zimmer, *cit.*, p. 43; Grabosch, *§ 5 Die Sorgfaltspflichten*, cit., p. 157 ff.; BT-Drs. 19/28649, p. 48.

[67] The wording in § 7 Section 1 Sentence 4 *LkSG* differs from "has to stop the violation" to "has to usually stop the violation": Grabosch, *§ 5 Die Sorgfaltspflichten*, cit., p. 158.

[68] Zimmer, *cit.*, p. 43; Grabosch, *§ 5 Die Sorgfaltspflichten*, cit., p. 158 ff.

2.3.5. *Complaints procedure*

The companies have to establish an appropriate complaints procedure according to § 8 *LkSG*. People who are impaired in their human rights by the activities of the company or their suppliers have to be given the opportunity to file their complaints to the company. The system has to allow the file of complaints via NGOs or other trusted people or organisations; personal involvement cannot be a requirement to file a complaint[69]. The complainants have to be protected from disadvantages or punishments in connection with their complaints and their identities must remain confidential according to § 8 Section 4 *LkSG*.

2.4. *Enforcement*

The *Bundesamt für Wirtschaft- und Ausfuhrkontrolle (BAFA)* – the Federal Office of Economics and Export Control – is responsible for the enforcement of the *LkSG*. The *BAFA* may penalise violations by imposing fines. The amount of the fines varies, according to different factors including the particular offence and its severity from up to a hundred thousand euros to up to 2% of the company's annual turnover, cf. § 24 *LkSG*.

Civil liability is not provided for by the *LkSG*, § 3 Section 3 *LkSG*. Therefore, the enforcement of the law works exclusively by public enforcement[70]. People affected from violations can on the one hand use the designated complaint procedure (described above) and on the other hand try to enforce their possible civil claims via tortious liability. The latter are measured, however, based on international private law, since the LkSG itself does not provide a civil law basis for claims[71]. This is however the crux of the matter: a violation of the protected rights will regularly not result in a tortious claim according to international private law, since the law of the place of origin applies[72]. Therefore, affected parties outside of Germany are regularly not able to assert any claims for damages[73].

[69] Zimmer, *cit.*, p. 46; Sagan, *Das Beschwerdeverfahren nach § 8 LkSG*, in *ZIP,* 2022, p. 1424.

[70] Sagan, Schmidt, Alexander, *cit.*, p. 282.

[71] Rühl, Knauer, *Zivilrechtlicher Menschenrechtsschutz? Das deutsche Lieferketten-gesetz und die Hoffnung auf den europäischen Gesetzgeber*, in *JZ,* 2022, p. 109.

[72] Rühl, Knauer, *cit.*, p. 109; Mansel, *Internationales Privatrecht de lege lata wie de lege ferenda und Menschenrechtsverantwortlichkeit deutscher Unternehmen*, in *ZGR*, 2018, p. 454 ff.

[73] Rühl, Knauer, *cit.*, p. 111; Wagner, *Das Lieferkettengesetz: Viele Pflichten, keine Haftung,*

Contradictory to this regulation is §11 *LkSG*, which does not really fit into the public enforcement system the *LkSG* imposes[74]. This provision allows people affected by a violation of a paramount legal position to authorise a trade union or an NGO to take legal action to assert its rights in court. First of all, the law does not make clear which protected rights are of a "paramount legal position"[75]. Since the *LkSG* protects fundamental human rights, every right in § 2 Section 2 *LkSG* seems of utmost importance[76]. More astonishing is, however, that there is absolutely no possibility to take legal action in court, as was explained above. Therefore, this procedural standing imposed by § 11 *LkSG* comes to nothing[77].

3. *Points Contradicting CSDDD – Necessary Adjustments to the LkSG*

With CSDDD entering into force, Germany has to adjust the *LkSG*. The following section will give an overview of the important points currently contradicting the current version of the directive and prospects for future changes. After that, these findings will be re-examined in light of the omnibus package.

3.1. *Scope*

CSDDD is known to have a step-by-step model regarding its scope according to Art. 37 Section 1 CSDDD. In its final stage, it binds companies with at least 1000 employees, like the *LkSG,* but with the further condition that a net annual turnover of at least 450 million euros is reached. Also, in contrast to § 1 *LkSG*, employees are calculated on a full-time equivalent basis, according to Art. 2 Section 4 CSDDD. Therefore, the scope of CSDDD is limited compared to the one of the *LkSG*.

in TÖLLE (eds.), *Selbstbestimmung: Freiheit und Grenzen, Festschrift für Reinhard Singer zum 70. Geburtstag,* Berliner Wissenschafts-Verlag, 2021, p. 710 ff.

[74] SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 290.

[75] *Ibid.*

[76] *Ibid.*

[77] *Ibid.*; RÜHL, KNAUER, *cit.*, p. 110.

3.2. *Chain of Activities*

As explained in Section 2.1, the *LkSG* covers the "supply chain" of the bound companies. In contrast, the basis of CSDDD is the "chain of activities", Art. 3 Section 1 g). It contains nearly every activity of downstream and upstream business partners related to the product or service the company provides. The activity of the downstream business partner does not need to be directly related to the product, indirect activities that support the production or service, like cleaning works, are also part of the chain of activities[78]. Concerning upstream business partners, activities for the company or in the name of the company are included. Much alike § 2 *LkSG* the end customer is not part of the chain of activities.

3.3. *Protected Legal Positions*

CSDDD follows a similar systematic as the *LkSG* regarding the integration of international agreements for the definition of protected legal positions. The standards however far exceed those of the *LkSG*[79].

3.3.1. *Human Rights*

CSDDD refers in its annex predominantly to the same international agreements as the *LkSG* but it integrates more human rights that are to be protected, like personality rights or freedom of conscience and religion according to Art. 17 and Art. 18 UN social pact[80]. Also, CSDDD solely refers to international agreements, whereas in some parts the *LkSG* refers to conditions of the respective area, for example in § 2 Section 2 No. 5 *LkSG* (see section 2.2.2.3) where the industrial safety conditions of the state the labour is done in are significant.

[78] Grabosch, *Die EU-Lieferkettenrichtlinie, Weltweiter Schutz für Mensch und Umwelt,* Friedrich-Ebert-Stiftung, 2024, p. 6 ff.; different opinion: Hübner, Lieberknecht, *Mehr Pflichten für weniger Unternehmen? - Kerninhalte der EU-Lieferketten-RL und ihre Umsetzung im deutschen Recht*, in *NJW*, 2024, p. 1843.

[79] For an overview see Hagel, Wiedmann, *Wie muss das LkSG aufgrund der CS3D angepasst werden?*, in *CCZ,* 2024, p. 191.

[80] Schmidt, *Die EU-Lieferketten-Richtlinie (CSDDD) - Meilenstein oder bürokratische Hydra?*, in *NZG*, 2024, p. 861; Schäfer, Schütze, *Die CSDDD - eine erste Vorstellung der Richtlinie und ihrer Folgen für die deutsche Wirtschaft*, in *BB*, 2024, p. 1095.

Therefore, German legislature needs to include every legal position CSDDD refers to into the *LkSG* and has to adapt the regulations that are based on national regulations and conditions.

3.3.2. *Environmental Conditions*

The environmental conditions protected by CSDDD greatly exceed those of the *LkSG*. While *LkSG* mainly protects resources as far as humans are concerned and regulates the use of quicksilver and hazardous substances, CSDDD protects biodiversity, animals and plants of the sea, the sea itself, the ozone layer, natural heritage and wetlands on top of the conditions already protected by the *LkSG*[81]. Also, companies have to establish a plan regarding climate protection and to meet the 1.5-degree target of the Paris climate agreement according to Art. 22 Section 1 CSDDD.

Consequently, the provisions of the *LkSG* concerning environmental conditions need to be widely expanded to meet the criteria of CSDDD.

3.4. *Due Diligence Obligations*

Basically, CSDDD imposes the same obligations on companies as the *LkSG:* implementation of a risk management system, risk analysis, preventive and remedial measures and the implementation of a complaints procedure. Referring to risk analysis, risk management system and preventive measures, the obligations differ to an extent in some smaller details[82]. The biggest differences can be found in the risk analysis (Art. 8 and 9 CSDDD), since it is not limited to the own business area and direct suppliers, but indirect suppliers in the chain of activities need to be included[83].

Regarding the remedial measures, one can find one of the biggest differences between CSDDD and *LkSG*. First, violations of the protected rights basically have to be stopped, regardless if the violation was caused in the own business area or by a supplier[84]. The measures that need to be taken however still need to be appropriate[85]. The final remedy when these attempts fail is,

[81] Hagel, Wiedmann, *cit.*, p. 191.

[82] See Hagel, Wiedmann, *cit.*, p. 192 ff.

[83] Hübner, Lieberknecht, *cit.*, p. 1844 ff.

[84] Grabosch, *Die EU-Lieferkettenrichtlinie,* cit., p. 8.

[85] For a differentiation between the definitions of "appropriateness" see Grabosch, *Die EU-Lieferkettenrichtlinie*, cit., p. 8.

comparable to § 7 Section 3 *LkSG,* the cancellation of the business relations. Completely new in comparison to the *LkSG* is the obligation of "remediation of actual adverse impacts" stipulated by Art. 12 CSDDD[86]. If a company has caused or jointly caused an actual adverse impact, it needs to provide remediation. According to Art. 3 Section 1 t) CSDDD remediation is the restoration to a situation equivalent to or as close as possible to the situation without the impact. This includes financial and non-financial compensation.

3.5. *Engagement with stakeholders*

According to Art. 13 CSDDD, companies shall effectively engage with stakeholders regarding the whole process of fulfilling their obligations. § 4 Section 4 *LkSG* in contrast stipulates that the bound companies have to consider the interests of trade unions, works councils and other stakeholders, but the regulation does not impose to actually engage with them and consult them. Therefore, Art. 13 CSDDD far exceeds the comparable regulation in § 4 *LkSG.*

3.6. *Enforcement*

The biggest difference between the *LkSG* and CSDDD can be found when law enforcement is considered. CSDDD does not rely solely on public enforcement but also introduces a tort law claim in Art. 29 Section 1. Hereby every person who suffered damages caused by failed compliance to Art. 10 and 11 CSDDD can claim compensation for their damages in court. Excluded from this are the obligations for climate protection of Art. 22 CSDDD. The national legislators must determine the details of the calculation of damages, causality, burden of proof and place of jurisdiction following their national law[87]. Art. 29 CSDDD further specifies the provisions for the limitation period of the claim. It states that the limitation period must not unreasonably hinder the bringing of claims for damages and must be at least 5 years. This is considerably longer than the regular German limitation period of 3 years[88].

[86] In § 24 LkSG "remediation of actual adverse impacts" is only a part of the calculation of fines: HAGEL, WIEDMANN, *cit.*, p. 197.

[87] HÜBNER, LIEBERKNECHT, *cit.*, p. 1845.

[88] § 195 German Civil Code (*BGB*).

Art. 29 Section c) CSDDD alike § 11 *LkSG* allows trade unions and NGOs to file lawsuits for people who suffered from damages. Contrary to § 11 *LkSG* the organisations are not meant to enforce the rights in their own capacity[89]. Therefore Art. 29 does not describe a litigation standing as in § 11 *LkSG*[90].

Apart from the differences regarding civil enforcement, CSDDD also emphasises public enforcement, as part of a "smart mix"[91]. The possible fines the authorities can impose however are notably higher. The maximum amount has to be at least 5 % of annual turnover, Art. 27 Section 4 CSDDD, in contrast to the maximum of 2 % of annual turnover according to § 24 *LkSG*.

3.7. *Possible Changes Resulting from the Omnibus Package*

In February 2025, the European Commission had proposed an "omnibus package" with the aim of reducing bureaucracy for companies[92]. The consolidation of reporting commitments across multiple acts is a rational approach, given the overlap in responsibilities stemming from CSDDD, CSRD, and the taxonomy directive.

Moreover, should the omnibus package successfully negotiate the legislative process, it will result in a significant weakening of the duties stipulated by CSDDD for companies: the monitoring of the chain of activities will only comprise the direct suppliers[93]. Consequently, companies will no longer be obligated to put an action plan that aligns with the 1.5°C goal into effect[94]. Human rights violations will not be required to cease immediately, an enhanced prevention plan may also be sufficient[95]. The tort law claim and the obligation to remediate of adverse impacts are to be completely withdrawn[96].

[89] This addition was deleted during the legislative process: SCHMIDT, *cit.*, p. 868 ff.

[90] SCHMIDT, *cit.*, p. 868 ff.

[91] HÜBNER, LIEBERKNECHT, *cit.*, p. 1844.

[92] Omnibus I, COM (2025) 80; COM (2025) 81; COM (2025) 87; Omnibus II, COM (2025) 84, 26 February 2025.

[93] Art. 4 par. 4 Omnibus I, COM (2025) 81, p. 38 ff.

[94] Art. 4 par. 10 Omnibus I, COM (2025) 81, p. 41.

[95] Art. 4 par. 6 Omnibus I, COM (2025) 81, p. 40.

[96] Art. 4 par. 12 Omnibus I, COM (2025) 81, p. 41 ff.

Therefore, the forthcoming of the omnibus package would mean, that the German legislator would actually only need to implement some minor changes to the existing LkSG. The package would therefore negate any improvement on current rules.

4. *Prospects and Conclusion*

As the above analysis showed, the German legislator needs to adjust the *LkSG* in big parts to meet the criteria of the directive in its current form. In the event of the European Commission achieving success with the proposal of the omnibus package, the majority of the aforementioned adjustments would not be required.

Following the German elections in February 2025, the Christ Democratic Union Party (CDU) and the Social Democratic Party (SPD) entered into negotiations to establish a coalition treaty, which was officially ratified in April 2025[97]. According to the stipulations set out in the coalition treaty, the future government of the Federal Republic of Germany has declared its intention to effect significant reductions in the size of the bureaucracy burdening commercial enterprises[98]. The LkSG is to be abolished in its entirety[99]. The duties regarding reporting commitments are to be fully suspended[100]. Subsequent to this, sanctions will be imposed for only the most egregious violations of human rights[101]. The future German government has announced its intention to implement the regulations of the CSDDD to the minimum extent legally feasible through the introduction of a new law[102]. This procedure is both unnecessary and ineffective for two main reasons. Firstly, it would be more logical to simply amend the current LkSG. Secondly, and more pertinently, the few clauses of the LkSG that exceed the regulations of the CSDDD (e.g. sections 1 and 11 LkSG) would also have to be eliminated.

[97] *Verantwortung für Deutschland, Koalitionsvertrag zwischen CDU, CSU und SPD, (*Coalition Treaty) https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag2025_bf.pdf (last access: 30 April 2025).

[98] Coalition Treaty, p. 56.

[99] Coalition Treaty, p. 60.

[100] *Ibid.*

[101] *Ibid.*

[102] *Ibid.*

It is not inconceivable that this could be considered to be in violation of the law.

According to Art. 1 Section 2 CSDDD, the directive is not to be employed as a basis for the diminution of the prevailing national standards of protection for human, employment and social rights, the environment and climate. The "sacrifice" of better regulations as a compromise for the implementation of CSDDD is assumed to be a violation of that clause. The dissolution of the LkSG, as outlined in the coalition treaty, may also be regarded as a contravention of Art. 1 Section 2 CSDDD[103].

In light of these considerations, it is currently challenging to anticipate the future of the LkSG. However, the current political situation in Europe and Germany gives only little hope that human rights monitoring and protection will greatly improve in the future.

[103] HAGEL, WIEDMANN, *cit.*, p. 187.

Abstract

Since 2023 the German *LkSG* about due diligence in supply chains is effective. With the new European Directive adjustments to the existing law will be necessary. The article analyses the existing German regulations and evaluates them in light of CSDDD. The European Directive almost exclusively exceeds the regulations of the *LkSG* regarding the protection of human rights and the environment in supply chains. Especially the introduction of civil liability in case of violations against protected legal positions is a big improvement compared to the current provisions of German law. How exactly the adjustments to the existing law will be made is a matter of speculation in light of the upcoming elections in Germany.

Keywords

Due diligence, Supply chain, CSDDD, Human rights, National implementation.

Łukasz Pisarczyk, Urszula Torbus

A Chance for Sustainable Development or an Unwanted Burden? Implementing the Due Diligence Directive in Poland*

Contents: **1.** Opening remarks. **2.** Polish companies in European production and supply chains. **3.** The law, collective bargaining, and policies. Implementing CSR standards in Poland. **4.** Transposing the CS3D into the Polish legal system. Expectations, obstacles, potential impact. **5.** Conclusions.

1. *Opening remarks*

Adopting Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence (CS3D) has boosted a discussion about due diligence standards[1] and their implementation by companies operating in the European Union[2]. The Member States (MSs) face the problem of transposing CS3D standards into their domestic legal systems. However, the transposition must be seen in a broader perspective. On the one hand, it is a step forward in creating a framework for sustainable development and fair dual transition, with corporate social responsibility (CSR) being part of it[3]. On the other

* This article is co-financed by Narodowe Centrum Nauki (the National Science Centre in Poland), project No. 2019/33/B/HS5/02067.

[1] See e.g. RUGGIE, *Multinationals as global institution: Power, authority and relative autonomy*, in *R&G*, 2018,Vol. 12, 3, pp. 317-333.

[2] SCHILLING-VACAFLOR, LENSCHOW, *Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges*, in *R&G*, 2023,Vol. 17, 3, pp. 677-693.

[3] Due diligence standards have been adopted by various international institutions. See e.g. United Nations Human Rights Council, *The Guiding Principles on Business and Human Right*, https://www.undp.org/sites/g/files/zskgke326/files/migration/in/UNGP-Brochure.pdf; United

hand, national circumstances deserve appropriate consideration. Some MSs have already adopted certain due diligence standards[4]; in some, there are autonomous solutions negotiated by the national social partners, while in others, setting up a legal framework has already begun[5]. Differences reflect a diversity of European economies and a variety of collective bargaining systems[6]. Despite increasing convergence, there are still significant dissimilarities between the West and the East, including the Central and Eastern European countries that joined the European Union in 2004. The headquarters of multinational companies (MNCs) are situated mainly in Western and Northern Europe. Central and Eastern European countries are dominated by small and medium-sized enterprises (SMEs). In many cases, they are either subsidiaries or contractors of the multinationals. There are also significant differences as regards the position of social partners and the role of social dialogue, including collective bargaining (sectoral v. company-level negotiations, coverage level)[7], as well as the participation of workers' representatives in business matters. These phenomena will affect both the importance of the directive and the way it is implemented in various MSs.

Poland, the largest economy in Central and Eastern Europe, can serve as an instructive example of the directive being transposed in a country that hosts subsidiaries rather than central management[8], and where industrial re-

Nations, *The Corporate Responsibility to Protect Human Rights, An Interpretive Guide*, New York-Geneva, 2012, https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf; OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018, https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.; OECD, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Paris: OECD Publishing, 2023, https://doi.org/10.1787/81f92357-en.

[4] Gustafsson, Schilling-Vacaflor, Lenschow, *Foreign corporate accountability: The contested institutionalization of mandatory due diligence in France and Germany*, in *R&G*, 2023, Vol. 17, 4, pp. 891-908.

[5] Ministry of Development Funds and Regional Policy Republic of Poland, *Corporate Sustainability Due Diligence Directive*, https://www.gov.pl/web/fundusze-regiony/dyrektywa-w-sprawie-nalezytej-starannosci.

[6] See e.g. Liukkunen, *The Role of Collective Bargaining in Labour Law Regimes: A Global Approach*, in Liukkunen (ed.), *The Role of Collective Bargaining in Labour Law Regimes. A Global Perspective*, Springer, 2019, pp. 1-64.

[7] T. Müller, *Collective bargaining systems in Europe. Some stylised facts*, 2021, https://www.uni-europa.org/old-uploads/2021/04/CB-Systems-in-Europe-EN.pdf.

[8] Eurostat, *Structure of multinational enterprise groups in the EU*, 2024, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Structure_of_multina-

lations are in a deep crisis[9]. A question arises about how these factors may influence the establishment of common CSR standards. The article begins by outlining the structural conditions for the functioning of Polish companies, including their potential and position in the activity chains, which can be crucial for implementing the CS3D. Next, the paper discusses statutory and autonomous measures adopted to implement the existing due diligence standards. Finally, the article considers what amendments, if any, will be required to comply with the obligations set out in the CS3D. Minimal source material is an issue. The discussion on implementing the CS3D in Poland has not begun yet. There are very few references to the topic. The government has not submitted any comprehensive drafts for future legislation. The author takes into account the position of the Polish government proposed while adopting the CS3D, other governments' statements, and documents adopted by the Corporate Social Responsibility Team that has been in operation since 2009. Regarding autonomous CSR standards, the results of two research projects, including interviews with social partners, have been considered[10]. A reference point is also the way of implementing other directives transposed into the Polish legal system in recent years, particularly those which set up standards of corporate responsibility, like Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (Whistleblower Directive, WD).

2. *Polish companies in European production and supply chains*

Three phenomena profoundly influenced the Polish economy and its structure: 1) their peripheral nature; 2) the legacy of communism, and 3) the neo-liberal agenda adopted during the first phase of the political and economic transformation (after 1989). Like some other Central and Eastern Eu-

tional_enterprise_groups_in_the_EU; Eurostat, *Multinational enterprise groups in EU-EFTA countries by controlling country – experimental statistics*, 2024, https://ec.europa.eu/eurostat/databrowser/product/page/EGR_MNE.

[9] See e.g. Kahancová, Mrozowicki, Šćepanović, *20 years after: perspectives on industrial relations in Central and Eastern Europe since EU enlargement*, in *Transfer Eur. Rev. Labour Res.*, 2024, Vol. 30, 1, pp. 3-14; Pisarczyk, *The Crisis of the Collective Bargaining System in Poland*, in *IJCLLIR,* 2019,Vol. 35, 1, pp. 57-77.

[10] Mądrzycki, Pisarczyk, *Ekspertyza układy zbiorowe (Expert opinion on collective agreements)*, 2022, https://www.gov.pl/web/dialog/krajowy-plan-odbudowy.

ropean systems, the Polish economy was peripheral, far from economic and innovation centers[11]. For centuries, the main branch of the Polish economy was agriculture[12]. The adoption of modern technologies (from the steam engine to computer tools) has been delayed. Poland was a relatively poor and underdeveloped country where production was an ancillary branch of the economy. It was often an element of the economic structure with its center outside Poland. As a consequence of World War II, the communist regime was established. The communists took over full political power. The so-called socialist democracy was only a façade, while in reality, there was no room (especially in the first, Stalinist, period before 1956) for any independent activity. The communist government initiated the process of industrialization[13]. A centrally planned economy was established. Not only politically, but also economically, the system was dependent on the Soviet Union, which absorbed a large part of the Polish production. Specifically located investments (heavy industry) failed to develop the Polish economy sufficiently. In the 1970s, the government, perceived as more liberal, obtained large loans and licenses for producing various goods from the West. However, the investments were unsuccessful (obsolete or useless technologies). The Polish economy plunged into a deep crisis. Social discontent led to the suppression of the workers' movement ("Solidarno" [Polish Trade Union "Solidarity"]) through the introduction of martial law (1981)[14]. Throughout the 1980s, the Polish economy struggled with severe difficulties. The industry was inefficient, while the standard of living decreased. In 1989, when the systemic changes began, the Polish economy was on the verge of bankruptcy.

The new democratic government faced the need for deep economic and social reforms. A large number of unprofitable enterprises were privatized and subsequently taken over by Western capital[15]. Poland did not see a financial oligarchy form, as some countries in the region did. In principle, only the state retained control over some large enterprises. The Polish in-

[11] See e.g. Leszczyński, *Ludowa historia Polski (People's history of Poland)*, W.A.B., 2020; Kuligowski, *A history of Polish serfdom*, in *Czas Kultury*, 2016, https://www.eurozine.com/a-history-of-polish-serfdom.

[12] Relatively many people still live and work in rural areas.

[13] The main focus of investment was heavy industry.

[14] Seweryński, *Polish labour law from communism to democracy*, Dom Wydawniczy ABC, 1999.

[15] Berend, *Social shock in transforming Central and Eastern Europe*, in *Communist Post-Communist Stud.*, 2007, Vol. 40, 3, pp. 269-280.

dustry became part of the global production with its centers in the West. Car assembly plants and component production became Poland's hallmark. These activities depend on the capital center and are associated with a low margin. Polish companies are mainly dependent entities. They do not influence the actual decision-making processes, or this influence is negligible. For many years, Poland was also a country of cheap labour to encourage Western capital to invest in the country[16] (an escape can currently be observed to "cheaper" locations, such as Bulgaria, Romania, or outside Europe). Large companies controlled by the Polish capital are mainly state-owned companies[17]. The state has retained control over some sectors. The process of renationalization has also occurred in recent years[18]. Large state-owned companies are active in gas and oil production as well as in banking. Polish private companies are mainly SMEs. Their economic and technological potential does not allow them to compete with MNCs effectively. They naturally remain, or become, dependent entities. Polish companies are not major players on the global market. They do not build their position on the benefits of operating in countries with undeveloped employment standards. Therefore, the directive does not fundamentally affect their market situation[19].

Despite significant economic growth and improvement in the financial landscape, it has not been possible to accumulate the capital that would permit a fundamental change in the position of Polish enterprises and an escape from the middle-income trap. For political reasons, the state has chosen an agenda of social transfers addressed to broad social groups[20]. The

[16] Eurostat, *Multinational enterprise groups in EU-EFTA countries by controlling country – experimental statistics*, 2024, https://ec.europa.eu/eurostat/databrowser/product/page/EGR_MNE.

[17] Krawiec, *1000 najwi kszych firm w Polsce. Powstał nowy ranking "Wprost" (1000 the largest companies in Poland. New rating by Wprost)*, in *Wprost*, https://eff.wprost.pl/11837982/1000-najwiekszych-polskich-firm-wyprzedza-jeden-walmart-dwie-trzecie-pkb.html.

[18] Åslund, *The Biggest Problem in Post-Communist Transition: The Privatization of Large Enterprises*, CASE Working Papers 2021, 16 (140), https://www.case-research.eu/files/?id_plik=6857.

[19] Eurostat, *Multinational enterprise groups in EU-EFTA countries by controlling country – experimental statistics*, 2024, https://ec.europa.eu/eurostat/databrowser/product/page/EGR_MNE.

[20] Becker, *Governing neo-nationalism, trade unions and industrial relations: the cases of Hungary and Poland*, in *Transfer Eur. Rev. Labour Res.*, 2024, Vol. 39, 1, pp. 51–65; Gyulavári, Pisarczyk, *Populist Reforms in Hungary and Poland: Same Song, Different Melodies*, in *IJCLLIR*, 2023, Vol. 39, 1, pp. 49–70.

debate about investments and development strategies continues; yet, it is stifled by the need to implement populist promises. Nonetheless, the government has assumed that around 700 Polish companies may be covered by the obligations arising from the CS3D. The estimates do not cover the construction industry, which was not part of the original version of the project[21]. Still, the structure of the Polish market means that the directive will have the most significant indirect impact on SMEs that are part of the supply and/or production chains. The government has not yet presented any comprehensive data on the potential impact of the directive on the SME sector.

At the same time, the implementation process will be affected by the position of the social partners and the quality of industrial relations. The quality of industrial relations is crucial for establishing and efficiently operating CSR procedures. Unfortunately, industrial relations in Poland, i.e., collective bargaining and information and consultation procedures, are facing a deep crisis. The prerequisite for the existence of cheap labour was a low level of wages and the lack of a collective bargaining system[22]. As a result, in Poland, like in most other CEECs, no comprehensive collective bargaining system covers large groups of workers. Sectoral collective agreements are almost non-existent. Collective bargaining focuses on the company level and covers a relatively small group of workers (up to 20 per cent)[23]. Workers' councils, although set up to implement Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, are also niche, with minimal competencies. Information exchange and social dialogue take place only in certain areas and to a limited extent. Moreover, industrial relations have not been supported by the state. Even at the time when a shift from neo-liberal to social policy occurred, the state often chose a direct intervention in economic and social matters (leg-

[21] Ministry of Development Funds and Regional Policy of the Republic of Poland, *Opinion of the Polish Government to the draft directive on corporate sustainability due diligence*, https://www.gov.pl/web/fundusze-regiony/dyrektywa-w-sprawie-nalezytej-starannosci. The first opinion was submitted in 2022 and then modified (2024) after the draft directive had been amended.

[22] See e.g. Eurofound, *Collective bargaining coverage*, 2022, https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/collective-bargaining-coverage; Kahancová, Mrozowicki, Šćepanović, *cit.*, pp. 3-14.

[23] Mądrzycki, Pisarczyk, *cit.*

islative changes, social transfers)[24]. As a result, no widespread or efficient mechanisms can be used to implement the CS3D.

3. *The law, collective bargaining, and policies. Implementing CSR standards in Poland*

The Polish government has declared that it will be involved in implementing CSR standards. On the one hand, companies, including MNCs, benefit from globalization and technological development. On the other hand, their activities may affect human rights and the natural environment[25]. This is particularly true for regions like CEECs, where MNCs dominate local markets and transfer profits abroad[26]. Although local communities contribute to generated profits, they receive insufficient benefits in return. Therefore, the Polish government expects MNSs to conduct their activities and adopt business models that consider sustainable development issues and the recommendations of international organizations in this area. The government stresses that CSR is not an issue of promoting philanthropy or sponsorship, but economic and social justice[27]. In particular, workers' interests and needs should be considered. Workers should participate in the benefits they help create. CSR means respecting and implementing decent working conditions. It means increasing wages, improving other working conditions, and, particularly in Poland, not abusing atypical forms of employment, including non-employee status.

It should be assumed that the position of MNCs in various countries will determine the method of implementing CSR standards. In Poland, MNCs play an essential role as investors and employers. They import new technologies and introduce new methods of organizing work. Moreover,

[24] Becker, *cit.*, pp. 51-65; Gyulavári, Pisarczyk, *Populist Reforms in Hungary and Poland: Same Song, Different Melodies*, in *IJCLLIR*, 2023, Vol. 39, 1, pp. 49-70.

[25] Ministry of Development Funds and Regional Policy of the Republic of Poland, *cit.*

[26] Eurostat, *Multinational enterprise groups in EU-EFTA countries by controlling country – experimental statistics*, 2024, https://ec.europa.eu/eurostat/databrowser/product/page/-EGR_MNE.

[27] Ministry of Development Funds and Regional Policy of the Republic of Poland, *cit.*

these entities are supported not only by capital but also by the political environment. In the past, specific legislative initiatives were challenged by the US administration[28]. The state cares about capital, technology, jobs, and good relations with the countries where the central management of MNCs is located. On the one hand, MNCs' import standards and corporate values that can improve employment conditions, bring them closer to the Western level, and revive relations with organized labour. On the other hand, investing in Poland was to reduce production costs. An increase in these costs will encourage the search for different locations. Due to financial and political influence and fear of negative social consequences (closing down plants, collective redundancies), the state will be very cautious in implementing CSR standards. It should be expected that they will be enforced to the minimum extent necessary, considering investors' interests. Therefore, it has become increasingly clear that some CEECs refrain from adopting radical measures (e.g., tax measures) towards MNCs due to political, economic, and legal reasons. Despite the political declarations, the solutions adopted so far do not align with the strategy of a just transformation that considers the interests of not only companies but also their stakeholders. Sustainable development is difficult to reconcile with current economic and financial interests, particularly in markets where MNCs hold a significant dominance over other participants.

So far, the government's efforts to promote CSR have included the dissemination of international standards for responsible business conduct developed by the OECD, the UN, the ILO, the EU, and the Council of Europe, as well as the dissemination of knowledge and information on non-financial reporting and responsible supply chains[29]. The government has also established a special platform for dialogue with stakeholders in due diligence: the Team for Sustainable Development and Corporate Social Responsibility (the Team), which has been operating since 2009[30]. It comprises representatives of the government administration, employers' organizations, trade unions,

[28] https://www.politico.eu/article/polands-government-takes-aim-at-us-owned-broadcaster/, accessed 1 June 2025.

[29] Ministry of Development Funds and Regional Policy of the Republic of Poland, *cit*.

[30] The operation of the Team is based on the regulation of the Minister of Investment and Development of 10 May 2018. The Team is an auxiliary body of the Minister of Development Funds and Regional Policy.

industry and sector associations, NGOs, and academics. Nearly 70 institutions and organizations participate in the Team's work. The Team's primary objective is to create a space for dialogue and exchange of experiences between public administration and various stakeholders in developing CSR practices in the Polish market[31]. The Team's role is to promote solidarity and find a balance between the competitiveness of the economy, care for the natural environment, and quality of life. The Team recommends implementing the Strategy for Responsible Development to achieve these goals. The Team's tasks are carried out within specialized working groups[32]. The Team offers open membership in the working groups for institutions and organizations (like NGOs). Working groups are expected to develop proposals for specific market instruments and tools to support enterprises and other organizations in implementing social responsibility practices and due diligence policies, making it possible to conduct daily business operations[33]. The public administration effectively supports the implementation of tools and instruments developed by working groups. On the one hand, the importance of the Team should not be underestimated. On the other hand, its influence on the promotion and implementation of due diligence standards is limited. Its recommendations are not binding. There is no data on the impact of the Team's recommendations on companies' operations, strategies, or adopted policies.

The Polish law, unlike some other legal systems[34], does not establish a system of guarantees and obligations in the field of CSR. Despite a number of specific standards or requirements that could be classified as implementing CSR standards, there is no comprehensive statutory model that could be confronted with the requirements under the CS3D.

The role of collective bargaining in developing CSR has also remained limited. The first reason is the approach of Polish trade unions. Some union members have regarded the idea as pure propaganda imported from the West

[31] Ministry of Development Funds and Regional Policy of the Republic of Poland, *cit*.

[32] Working group for consumer issues; Working group for innovation for sustainable development and CSR; Working group for social responsibility of universities; Working group for social responsibility of administration; Working group for relations with persons providing employment.

[33] Ministry of Development Funds and Regional Policy of the Republic of Poland, *cit*.

[34] Gustafsson, Schilling-Vacaflor, Lenschow, *cit*., pp. 891-908.

and used instrumentally by companies. They have not believed in the positive impact of such strategies. Due to the state of social and economic development, CSR issues are sometimes perceived as incidental. Consequently, trade unions have not treated CSR matters as a strategic priority[35]. Secondly, negotiating CSR cannot develop due to the weakness of industrial relations. In Poland, collective agreements that could establish common standards across industries or sectors hardly exist. As revealed by the research, CSR matters are rarely addressed in company-level agreements. Workers' representatives concentrate on a traditional bargaining agenda covering wages, other work-related benefits, OHS, and working time. Employers are reluctant to develop CSR standards so as not to impede their market position (due to the lack of multi-company agreements, companies compete on labour costs). As a result, social responsibility matters are not addressed at all or are regulated only partially. The adopted solutions usually do not meet the conditions stipulated for enterprises in the directive.

Moreover, company-level collective agreements cover only around 15-20 per cent[36]. Collective agreements have been concluded in specific sectors and companies (e.g., state-owned companies). It fundamentally limits the role of collective bargaining as a tool to establish CSR strategies. CSR standards, if adopted, are usually issued unilaterally by companies as codes of conduct or policies. In the case of Polish subsidiaries, the documents are typically issued by central management outside Poland. Although sometimes adjusted to local conditions, they predominantly respect the interests of MNCs.

This fundamentally differs from the situation in Poland and countries where organized labour can take the initiative in actions for sustainable development. Given the weakness and passivity of trade unions in Poland, the state will dominate the implementation process. As a result, the implementation model will depend on the current political configuration. In recent years, the state has taken initiatives to promote collective bargaining. This results from the implementation of milestones within the National Recovery Plan and the implementation of the directive (regardless of its future until the Court rules on the complaint and the Advocate General issues an opin-

[35] Rees, Preuss, Gold, *European trade unions and CSR: common dilemmas, different responses*, Routledge, 2015, p. 9.

[36] Mądrzycki, Pisarczyk, *cit.*

ion). The government has presented a reform proposal. However, they are conservative and will not lead to a fundamental change in socio-economic relations. We should not expect a significant intensification of collective bargaining either. The participation of social partners in sustainable transformation will therefore depend on their adoption of appropriate strategies and determination to implement them. The experience of social dialogue practice in recent years does not provide grounds to expect a significant influence of trade unions in implementing CSR standards. The level of influence may be political relations and attempts to influence the government. The situation may change if the government adopts new legislation promoting collective bargaining. Trade unions may also be involved in other actions and campaigns supporting sustainable development, e.g., in collaboration with NGOs[37].

Theoretically, transnational collective agreements (TCAs) concluded between the central management of MNCs and workers' representatives[38] could also play a role in implementing CSR standards about subsidiaries (including Polish subsidiaries)[39]. In the past, TCAs were perceived as an opportunity to promote employment conditions and, as a result, more sustainable development in the social area. Their practical importance remained, however, limited. Moreover, the idea of cross-border collective bargaining has significantly slowed down. In particular, the European Commission and social partners have temporarily abandoned adopting a voluntary legal framework for TCAs. The idea was challenged by companies, which maintained that cross-border collective bargaining should remain an element of autonomous relations between social partners. However, the lack of a legal framework that facilitates negotiations and supports resolving potential disputes is perceived as an obstacle to strengthening transnational social dialogue. An analysis of the agreements covering Polish companies reveals rather limited participation in due diligence matters. Environmental issues are not addressed at all. Social matters constitute the core of the agreements. Nev-

[37] Rees, Preuss, Gold, *cit.*, p. 14.

[38] See e.g. Schömann, *Transnational Company Agreements: towards an internationalisation of industrial relations*, in *Transnat. Coll. Barg. Co. Level*, European Trade Union Confederation, 2012, pp. 197-217; Sciarra et al., *Towards a legal framework for Transnational Company Agreements*, European Trade Union Confederation, 2014; Ter Haar, *The EU and transnational company agreements*, in ter Haar, Kun (eds.), *EU collective labour law*, Edward Elgar Publishing, pp. 275-291.

[39] Ter Haar, *Transnational Company Agreements: Past, present and future. A play in three acts*, https://global-workplace-law-and-policy.kluwerlawonline.com/author/berylterhaar1/.

ertheless, the practical importance is limited. First, it is because of developed statutory standards. Second, the involvement of Polish social partners in adopting TCAs is usually marginal. Third, communication problems between central management and subsidiaries have been reported. Fourth, Polish law does not recognize TCAs as normative agreements (sources). In order to be binding for the companies, they must be implemented by national laws[40]. However, Polish employers, searching for greater flexibility, are usually reluctant to implement standards that increase their obligations[41]. As a result, implementing TCA standards, including those which could be qualified as CSR standards and extending the already existing statutory standards, is relatively rare. Fifth (and maybe the most important), TCAs usually do not deal with pay issues, while differences in remuneration are among the key factors differentiating the position of workers in various regions. Sixth, the number of Polish companies covered by cross-border standards remained relatively low. To summarize, the role of TCAs as an emanation of CSR and an instrument of sustainable development in the social area has remained relatively limited.

In Poland, there are neither statutory nor autonomous standards that would meet the directive's requirements. The system is coordinated mainly by soft law instruments. As a result, CSR standards are diversified and fragmented.

4. *Transposing the CS3D into the Polish legal system. Expectations, obstacles, potential impact*

Due to the lack of a sufficient legal framework, the transposition of the CS3D into national law will require the development of new regulations in the national legal system. However, there is currently no work underway on the implementation. The government has not presented any proposals or even an outline of the future implementation. Due to the directive's content, the government must prepare the draft law. The social partners will participate in the legislative work. Representative trade unions and representative

[40] Boguska, *Europejskie układy ramowe* (European framework agreements), PhD thesis, Warszawa 2022.

[41] Mądrzycki, Pisarczyk, *cit.*

employer organizations will be able to present their position. The topic will also be discussed within the Social Dialogue Council[42]. Taking into account the experience with implementing other recently adopted directives[43], it should be expected that implementation will occur no earlier than the end of the period provided for the Member States.

The government has expressed specific predictions and expectations regarding the effects of the implementation. They may imply the main directions of the future draft. First, the government expects the implementation to entail a change in the attitudes of entrepreneurs and other stakeholders. Due diligence procedures will require companies to adopt detailed documentation covering human rights and environmental policies. The ultimate aim is a modern business model heading towards a sustainable economy and assuming proper relations between economic growth, environmental care, and quality of life. Companies will be expected to adopt procedures to prevent violations of human rights in the activities of enterprises, promote a responsible approach to the business, and emphasize their role as leaders not only in the pursuit of profits, but also in the proper approach towards employees, customers, subcontractors, and natural resources alike[44]. This opinion is interesting since Poland has been skeptical about European climate policy and the Green Deal[45]. Much greater emphasis has been placed on the need to protect, for example, workers' rights (as an element of a new social policy). The government does not recognize the potential impact of implementing the directive on the competitiveness of Polish companies. However, this may decrease with the unification of protection standards within supply chains (production). The government expresses disappointment due to the lack of guarantees concerning freedom of association and the right to strike. Moreover, the government expects companies to be more aware of and familiar with other documents of so-

[42] See e.g. Hajn, Mitrus, *Poland*, in Blanpain R. (ed.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, Kluwer Law International, 2016; Baran, *Outline of the Polish Labour Law System*, Wolters Kluwer, 2016.

[43] For instance, the WD was implemented in 2024 – two years after the implementation deadline expired.

[44] Ministry of Development Funds and Regional Policy of the Republic of Poland, *cit*.

[45] See e.g. Arak, *Why Poland can't and won't hit 2050 EU Green Deal target*, Polish Economic Institute, https://pie.net.pl/en/why-poland-cant-and-wont-hit-2050-eu-green-deal-target/.

called soft international law, such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. As a result, the implemented standards are expected to reduce the risk of discrimination or other human rights violations resulting from the enterprise's activities and reduce the risk of adverse impact of business on the natural environment. At the same time, the government declares its support for solutions that do not increase expenditure or reduce the revenues of public finance sector entities, including the state budget[46]. It can be interpreted as a declaration to avoid solutions expanding the obligations and costs borne by Polish companies. CSR standards may be perceived mainly as improving the position of Polish stakeholders whose participation in the development is insufficient. The experience with transposing other recently adopted EU directives also allows us to make certain assumptions regarding the implementation technique. So far, Polish legislators have usually chosen the literal transposition of EU standards. This happened even in areas where legislation existed and EU standards could be incorporated into the existing solutions. Literal transposition took place all the more when national law did not regulate a given area. This is also the case with the WD, where no statutory standards of whistleblower protection have existed so far. Therefore, a literal transposition technique should be expected. The personal scope of the future regulation will be affected by rules indicating the State that is competent to regulate matters covered by the CS3D[47]. The law will apply directly to a relatively small group of companies covered by the CS3D, with their registered offices in Poland. It is unlikely that Poland will extend the application scope to smaller companies. It would mean expanding the obligations of Polish entrepreneurs, who seek more flexibility in order to remain competitive with MNCs. As a result, one can expect that the application standards arising from the CS3D will be copied.

[46] Ministry of Development Funds and Regional Policy of the Republic of Poland, *cit*.

[47] As regards the companies referred to in paragraph 1, the Member State competent to regulate matters covered by this Directive shall be the Member State in which the company has its registered office (Art. 2.6 CS3D). As regards a company as referred to in par. 2, the Member State competent to regulate matters covered by this Directive shall be the Member State in which that company has a branch. If a company does not have a branch in any Member State, or has branches located in different Member States, the Member State competent to regulate matters covered by this Directive shall be that in which that company generated the highest net turnover in the Union in the financial year preceding the last financial year (Art. 2.7 CS3D).

Paradoxically, for numerous Polish companies, implementing the CS3D may turn out to be crucial. It will affect their market position, including their ability to compete. Although the CS3D does not apply to SMEs directly, implementing standards may have a significant impact on SMEs in large enterprises' supply/production chains[48]. Most SMEs currently do not have the appropriate systems and procedures to meet the draft directive's requirements. There is no way that large enterprises will transfer their due diligence obligations to SMEs as suppliers. Hence, it will be necessary to consider solutions to mitigate potential negative consequences for SMEs when implementing the provisions of the directive, among others, in the scope of accompanying measures that MSs will have to implement[49]. At the same time, other MS, where the headquarters of TNCs are situated, may adopt solutions affecting Polish subsidiaries in a way that would be positive or negative for them. For instance, MSs may allow parent companies to fulfil the obligations set out in Articles 7 to 11 and Article 22 on behalf of companies which are subsidiaries of those parent companies and fall under the scope of the CS3D (Article 6 CS3D). Companies may be required to take appropriate measures to identify and assess actual and potential adverse impacts arising not only from their operations but also those of their subsidiaries and, where related to their chains of activities, those of their business partners (Article 8.1). Moreover, Polish entities and workers may benefit from meaningful stakeholder engagement (Article 13). At the same time, Polish subsidiaries may be affected by complaints (Article 14) and monitoring (Article 15) procedures established in other MSs for parent companies and dependent units. Although Polish enterprises will not be directly subject to the application of foreign regulations, they may be affected by the results of policies adopted by central management and implemented using corporate instruments. Polish companies may be obliged to adapt their policies within supply/production chains[50]. At the same time, it

[48] *Fundacja Instytut Przedsi biorczo ci Społecznej* (Foundation Institute of Social Entrpreneurship), *Dyrektywa w sprawie nale ytej staranno ci przedsi biorstw w zakresie zrównowa onego rozwoju (CSDDD) – Nowe wyzwania i obowi zki* (Corporate Sustainability Due Diligence Directive (CSDDD) – New challenges and obligations), https://fips.pl/dyrektywa-w-sprawie-nalezytej-starannosci-przedsiebiorstw-w-zakresie-zrownowazonego-rozwoju-csddd-nowe-wyzwania-i-obowiazki/.

[49] Ministry of Development Funds and Regional Policy of the Republic of Poland, *cit*.

[50] Modzelewska, *Niedługo nowe obowi zki dla firm. Wa na dyrektywa nadchodzi* (New obligations for companies soon. An important directive is coming), in *Money.pl*,

is expected that the implementation of the directive will standardize the relations of Polish companies with German or French companies, which have so far been subject to different due diligence standards[51].

The future Polish draft will probably start by defining the main concepts using the definitions laid down in Article 3 CS3D. As confirmed by previous implementations, a literal transposition should be expected. It is also reasonable to expect that the draft will oblige companies that conduct risk-based human rights and environmental due diligence by, among others, integrating due diligence into their policies and risk management systems (Article 7); identifying and assessing actual or potential adverse impacts (Article 8); (where necessary) prioritizing actual and potential adverse impacts (Article 9); preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimizing their extent (Articles 10 and 11); providing remediation for actual adverse impacts (Article 12); carrying out meaningful engagement with stakeholders (Article 13); establishing and maintaining a notification mechanism and a complaints procedure (Article 14); monitoring the effectiveness of their due diligence policy and measures (Article 15); publicly communicating on due diligence (Article 16). There are, however, some matters where the transposition will require considering national conditions. An important example is the workers' representation model. Due diligence policies will be established after consultations with the company's employees and representatives. Poland has no comprehensive representation system by works councils or other elected bodies. The legislator usually prioritizes trade unions. This has been evidenced by the implementation of other recently adopted EU directives. While implementing the WD, the Polish legislator provided that a legal entity should establish an internal reporting procedure after consultation with: 1) the company trade union or company trade unions if more than one company trade union operates in the legal entity, or 2) representatives of persons performing work for the legal entity, elected in the manner adopted in the legal entity, if no company trade union operates in it (no involvement of works councils has been provided for). Considering the existing model of workers' representation, such a way of implementation also seems likely in the case of due diligence procedures.

https://www.money.pl/gospodarka/wazna-dyrektywa-ktora-wplywa-na-biznesy-co-trzeba-oniej-wiedziec-7074933063928576a.html.

[51] *Fundacja Instytut Przedsi biorczo ci Społecznej*, cit.

The policies' required content will probably be a copy of Article 7.3 CS3D. Another problem is a narrow definition of an employee and the lack of an efficient mechanism to requalify civil law contracts into employment contracts. As a result, many workers working in an employee-like model do not enjoy the employee status[52]. Consequently, they can be deprived of protection under the CS3D. Although the directive does not define the employee concept, Polish standards may be considered insufficient in the light of CJ EU judgments defining workers (employees). The problem could be solved by adopting a presumption of the employment relationship, which is considered to implement Directive (EU) 2024/2831 on improving working conditions in platform work (Platform Work Directive, PWD). No proposals on publishing annual company statements (Article 16) have yet been submitted. The government has not launched any website or portal to provide information and support to companies, their business partners, and stakeholders (Article 20). Another issue concerns the supervisory authorities to supervise compliance with the obligations laid down in the provisions of the implementation of Articles 7 to 16 and Article 22 of the CS3D (Article 24), which will be adopted in Poland. A possible choice will be between the Ombudsman and one of the central administration governmental bodies (ministers). Since the supervisory authorities are obliged, among others, to deal with substantial concerns submitted by natural and legal persons, it would be reasonable to recommend the Ombudsman, who is independent in public administration and whose main task is to protect fundamental rights. According to regulations implementing the WD, the Ombudsman was recognized as a competent authority for external reporting. Regarding penalties for non-compliance with due diligence duties, one can expect the imposition of financial fines that should be effective, proportionate, and dissuasive (Article 27). The draft may provide for administrative penalties by the CS3D. Polish law also provides for offences and criminal liability to strengthen the protection. At the same time, non-compliance with due diligence standards could be treated as a tort, which makes it possible to claim compensation for damage (Article 29). A person or entity that has inflicted damage to another person or entity by their fault shall be obliged to redress it (Article 415

[52] Compare EUROSTAT, *Self-employment: outline and latest developments*, Archive: Employment in detail - quarterly statistics - Statistics Explained - Eurostat. See also MITRUS, *Poland,* in WAAS, HIESSL, (eds), *Collective bargaining for self-employed workers in Europe*, Wolters Kluwer, pp. 199-216.

of the Civil Code)[53]. The concept of fault covers both willful misconduct and negligence. Negligence is understood as the lack of due diligence. In contractual relationships, due diligence means diligence which is generally required in the relations of a given kind (Article 355 § 1 of the Civil Code). Without a different statutory provision, the damage redress shall involve losses the injured party has suffered and profits it could have obtained, if no damage were inflicted (Article 361 § 2 of the Civil Code). It is, as a rule, consistent with CS3D standards.

Due to the crisis of collective relations, no serious hopes should be associated with autonomous implementation. This also applies to transnational collective bargaining, as previous experience prevents them from being seen as a real mechanism for implementing EU standards.

5. *Conclusions*

The current state of due diligence regulations in Poland means that the transposition of the CS3D will require the creation of a new, comprehensive legal framework. Due to the subject of the regulation, a separate act regulating this issue should be expected. By reason of the structure of Polish enterprises, the new regulation has not aroused much interest for now. As a result, it should be expected that the government will propose a kind of 'literal' implementation by directly transposing the standards resulting from the directive into national law. The opposition of the social partners, in particular employers, may focus on the new obligations. The strong position of MNCs and, as a result, the government's fear of adopting solutions that could provoke their protests or even withdrawal from the Polish market may be necessary for the implementation method. At the same time, economic interests should not prevail over workers' rights. Probable models of solutions can be sought in the existing implementing regulations. There should not be much hope for autonomous implementation by the social partners. At the same time, solutions adopted in the countries where the headquarters are located may interest Polish companies.

[53] English translation of the Civil Code: LEX, Wolters Kluwer, https://sip.lex.pl/#/act-translation/1459620615.

Abstract

The article presents the challenges of implementing Directive (EU) 2024/1760 on corporate sustainability due diligence (CS3D) in Poland. It highlights structural constraints of the Polish economy, including Poland's peripheral economic position, the predominance of SMEs, and the structural weakness of collective bargaining institutions that hinder the effective adoption of CSR standards. The authors argue that the Polish transposition of the CS3D is likely to be "literal", replicating the EU provisions with minimal obligations and narrow applicability, partly due to the strong position of multinational corporations (MNCs) and the government's fear of adopting solutions that would provoke their protest. Nevertheless, the directive may indirectly affect SMEs involved in the supply chains of larger companies. The article critically assesses the absence of binding CSR obligations and the limited role of autonomous implementation mechanisms, such as collective agreements or transnational company agreements (TCAs). Poland's current state of due diligence regulations will require a new comprehensive legal framework. The analysis contributes to the broader debate on sustainable development and the CS3D implementation in Central and Eastern Europe.

Keywords

Corporate Sustainability Due Diligence, CS3D, Corporate Social Responsibility.

Bas Rombouts

A Dutch "Smart-mix"? International Responsible Business Conduct, (Fundamental) Labour Standards and the Sectoral Agreements in the Netherlands

Contents: **1.** Introduction. **2.** The international architecture of IRBC: the UN, OECD and ILO instruments. **3.** The minimum of labour standards protected under the IRBC Frameworks. **4.** The Dutch approach: Legislative initiatives and the IRBC Covenants. **4.1.** Legislative developments in the Netherlands. **4.2.** The Dutch IRBC Sector Agreements. **5.** Closing reflections.

1. *Introduction*

The international (non-binding) normative frameworks developed in the context of the UN, OECD and ILO form the basis for a diverse set of – voluntary, mandatory, public and private – instruments related to international responsible business conduct (IRBC). One of the key features of the UN Guiding Principles on Business and Human Rights (UNGPs) is the expectation that states take on an active role to enact policies and laws that promote corporate respect for human and labour rights throughout their global value chains (GVCs). Accordingly, states should "consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights"[1]. The Netherlands has been facilitating and promoting sectoral multi-stakeholder agreements on IRBC since 2014,

[1] UN. Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, p. 5. Also see: Shift, *Fulfilling the State Duty to Protect: A Statement on the Role of Mandatory Measures in a "Smart Mix"*, February 2019, at: https://shiftproject.org/fulfilling-the-state-duty-to-protect-a-statement-on-the-role-of-mandatory-measures-in-a-smart-mix/.

in which labour rights – especially the fundamental labour standards of the International Labour Organization (ILO) – feature prominently[2]. Additionally, several – legislative and other – initiatives were developed to promote corporate accountability for sustainability issues. Labour standards are an important aspect of the social – or human rights – dimension of sustainable development, especially in relation to corporate activities, since multinational enterprises often affect workers' rights at the lower end of GVCs, frequently in Global South countries.

This article evaluates this Dutch "smart-mix approach", with an emphasis on the sectoral agreements in order to assess their value as a tool to promote IRBC in GVCs. It reflects on them by situating them in the international framework of corporate responsibilities and fundamental labour standards. Therefore, this article first examines the international normative architecture of IRBC; the instruments developed in the framework of the OECD and UN, and, to a lesser extent, the ILO. It is essential to explore these voluntary international instruments, since their system, procedures and underlying principles are the basis for all other, national (or regional) IRBC initiatives. Additionally, it is important to take the international framework as a point of departure considering that mandatory legislation, such as the EU Corporate Sustainability Due Diligence Directive, is currently under revision and it is by no means certain what the outcome of those processes will be. This first section examines the central IRBC/UNGPs concepts of a "smart-mix" and of Human Rights Due Diligence (HRDD) in some detail.

Secondly, with this regulatory and to a large extent procedural or functional baseline in place, the article reviews the most central internationally recognized workers' rights, that are to be protected – as a minimum – under these international and national initiatives, with an emphasis on the fundamental labour standards of the ILO. With a clear understanding of both these procedural and substantive foundations of IRBC, the focus will shift to the regulatory instruments that the Netherlands has developed. Considering that the objective of this article is to explore the specific Dutch attempts to regulate IRBC, a detailed examination of due diligence legislation outside the Netherlands, including the CSDDD – and its uncertain future – falls outside the scope of this project.

[2] International RBC Agreements, https://www.imvoconvenanten.nl/en.

2. *The international architecture of IRBC: the UN, OECD and ILO instruments*

Virtually all IRBC instruments refer to the UNGPs and the OECD Guidelines for Multinational Enterprises (OECD Guidelines) as their international normative foundations[3]. A third instrument, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) is less frequently mentioned, but can be considered as the most comprehensive instruments with regard to labor law protection[4]. These three non-binding instruments aim to regulate responsibilities for business with respect to respecting human rights related to their business activities and GVCs and are – according to the organizations themselves – aligned and complementary[5]. The UN, OECD and ILO consider these voluntary codes the "three main instruments that have become the key reference points for responsible business, and which outline how companies can act responsibly"[6].

The UNGPs are generally regarded as the groundbreaking instrument on assigning specific responsibilities to businesses in relation to their human rights impacts. Adopted by the UN Human Rights Council in 2011, these principles incorporate the "protect, respect, and remedy" framework developed by John Ruggie and his team[7]. According to this policy framework, while states have a *duty* to protect human rights (pillar I), an important *re-*

[3] UN. Office of the High Commissioner for Human Rights, *cit.* OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD Publishing, 2023, https://doi.org/10.1787/81f92357-en.

[4] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions, 5th Edition, March 2017, International Labour Office, Geneva (ILO MNE Declaration).

[5] ILO, OHCHR, OECD, EU, *Responsible Business, Key Messages from International Instruments*, 18 October 2019, p. 2, https://www.ilo.org/resource/brief/responsible-business-key-messages-international-instruments.

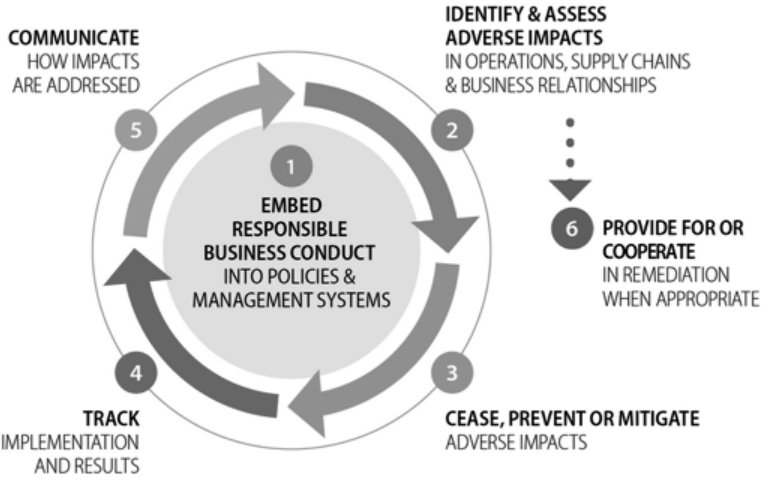
[6] ILO, OHCHR, OECD, EU, *Responsible Business, Key Messages from International Instruments*, 18 October 2019, p. 3, https://www.ilo.org/resource/brief/responsible-business-key-messages-international-instruments.

[7] Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/8/5, Human Rights Council, 7 April 2008.

sponsibility for the private sector is to respect human rights (pillar II). Finally, victims of human rights violations must have access to a fair and effective *remedy* (pillar III). The strength of the UNGPs lies in their simplicity: they comprise 31 principles, divided into foundational and operational principles, followed by a clear commentary. Under pillar II of the UNGPs, "the corporate responsibility to respect" companies must refrain from violating human rights and have to address human rights violations in which they are involved[8]. This means they must avoid causing or contributing to violations and address them when such violations do occur. In addition, companies also have a responsibility to prevent or mitigate violations when they are directly linked to their business activities, even when they have not directly contributed to these negative impacts[9].

This responsibility implies that companies should apply HRDD, a procedure that entails a risk assessment to map – or identify – actual and potential human rights impacts. Those impacts have to be addressed as a next step[10]. A company does not have to address all possible risks; prioritization may take place based on the severity and likelihood of the occurrence of the risks[11]. In addition to identifying, preventing and mitigating human rights risks, (public) accountability for the steps taken is also an important element of the HRDD process. HRDD forms the operational core of the responsibilities assigned to companies within the UNGPs. This system of HRDD has been integrated into the OECD Guidelines and the ILO MNE Declaration. The six steps of HRDD – which should be seen as an iterative process – are visualized as follows.

[8] UNGPs, principle 11.
[9] UNGPs, principle 13.
[10] UNGPs, principle 13.
[11] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct,* 2018, p. 17.



OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018, p. 21.

Respect for human rights by businesses, according to the UNGPs, should be promoted by means of a "smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights"[12]. The public and private sector should therefore work together to create a regulatory environment in which IRBC can be genuinely effective. The idea behind the smart-mix is therefore that different types of regulation have different strengths and weaknesses and that "interactions among these instruments can compensate for these, and lead to better regulatory performance overall"[13]. This means that voluntary measures alone will not suffice, and that mandatory legislation is an essential ingredient of the smart-mix[14].

The smart-mix, the process of human rights due diligence and the responsibility for corporations to use their leverage to address negative human rights impacts can be seen as the basis for contemporary IRBC regulation.

[12] UNGPs, principle 3, commentary.

[13] Schleifer, Fransen, *Towards a Smart Mix 2.0, Harnessing Regulatory Heterogeneity for Sustainable Global Supply Chains*, in *SWP Working Paper*, 2022, p. 14.

[14] John Ruggie affirms "smart mix" includes mandatory measures at Finnish EU Presidency conference, 2 December 2019, https://www.business-humanrights.org/en/latest-news/john-ruggie-affirms-smart-mix-includes-mandatory-measures-at-finnish-eu-presidency-conference/.

While the UNGPs should be seen as an instrument that is essentially procedural in nature and that covers all human rights[15], the OECD-Guidelines can be seen as the broadest substantive instrument concerning IRBC. The OECD-Guidelines were adopted in 1976 and contain recommendations from governments to business to conduct their operations in a sustainable manner, as well as to conduct due diligence to avoid negative impacts on people and the environment[16]. The OECD-guidelines cover the entire spectrum of IRBC and contain voluntary standards and principles related to the environment, corporate disclosure, human rights, employment and industrial relations, science, technology and innovation, corruption, competition, taxation and consumer protection[17]. The guidelines find their basis in internationally recognized standards and also include provisions on all the fundamental labour standards of the on the overarching ILO objective to pursue decent work for all[18]. The OECD Investment Committee is charged with overseeing the guidelines and, at the national level, National Contact Points (NCPs) are installed to promote awareness of the guidelines among the business community and to handle disputes on the application and interpretation of the guidelines. The NCPs' complaint mechanism has resulted in nearly 700 "cases" (so-called "specific instances" which are non-binding recommendations) on the application of the guidelines since 2000[19]. The guidelines are endorsed by 51 countries (the 38 OECD member-States and an additional 13 others), all of which have established a National Contact Point. They have been revised regularly, including in 2011 to fully incorporate HRDD into the operational framework of the guidelines. Since then, much practical further documentation has been developed on implementing HRDD, thereby providing detailed interpretations of the requirements under Pillar II of the UNGPs, the "corporate duty to respect human rights[20].

Within the framework of ILO, the MNE Declaration was adopted in 1977, in response to growing concerns about the activities of multinationals (just as the OECD-Guidelines), particularly in low-income countries. The

[15] UNGPs, principle 12, commentary.

[16] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD Publishing, 2023, https://doi.org/10.1787/81f92357-en, p. 3.

[17] OECD, *OECD Guidelines for Multinational Enterprises*, cit.

[18] OECD, *OECD Guidelines for Multinational Enterprises*, cit., pp. 28-32.

[19] OECD Database of specific instances https://mneguidelines.oecd.org/database/.

[20] An often cited document that contains additional guidance is: OECD, *OECD Due Diligence Guidance*, cit.

MNE Declaration is addressed primarily to governments and business but also includes provisions for workers' and employers' organizations. The main objective of the Declaration, which – in proper ILO fashion – was created by means of a tripartite process, is to provide recommendations to the private sector on how to implement inclusive, responsible, and sustainable work policies and how business can contribute to the global promotion of decent work[21]. Whereas the OECD guidelines focus on responsible business conduct in the broadest way, the MNE Declaration focuses on work-related business activities. This way, the MNE Declaration is the most detailed of the three frameworks discussed when it comes to labour law and social policy. In addition to references to the fundamental labour standards[22], the MNE Declaration contains various provisions on *e.g.* labour market policy, remuneration, working conditions, social security, training, consultation and access remedy and dispute settlement[23].

The MNE Declaration has been revised several times (in 2000, 2006, 2017 and in 2022). The 2017 revision is particularly noteworthy, as it resulted in improved harmonization with the UNGPs, OECD-Guidelines, the UN 2030 Agenda for Sustainable Development and the Paris Climate Agreement[24]. It was most recently amended in 2022 to enshrine the recognition of the right to a safe and healthy working environment as Fundamental Principle and Right at Work (FPRW). Currently, the MNE Declaration contains provisions in line with the UNGPs regarding HRDD, dispute resolution mechanisms and access to remedy[25]. The MNE Declaration is embedded in the ILO's recent comprehensive strategy on decent work in supply chains, which was adopted by the ILO Governing Body in 2023[26]. The international instruments within the framework of the OECD and ILO both refer to the UNGPs (and to each other) and incorporate the system of Pillar II from the UNGPs, as a result of which, at an international level, these three instruments together can be and are regarded as the normative framework regarding responsibilities of the private sector in relation to IRBC.

[21] ILO MNE Declaration, p. 7. Also see: https://www.ilo.org/resource/other/what-ilo-mne-declaration.

[22] ILO MNE Declaration, par. 9.

[23] ILO MNE Declaration, par. 13-86.

[24] ILO MNE Declaration, p. 7.

[25] ILO MNE Declaration, par. 10.

[26] GB.347/INS/8, Governing Body, 347th Session, Geneva, 13–23 March 2023, 27 February 2023, ILO strategy on decent work in supply chains.

It is important to stress that in all three instruments the fundamental labour standards of the ILO have a central place in the framework of rights that ought to be protected within GVCs. The UNGPs even explicitly mention the fundamental principles and rights as part of the absolute minimum that should be respected by corporations in relation to their own activities and within their supply chains[27].

This section reviewed the international normative structure that forms the basis for the Dutch IRBC framework. It focused mainly on the *functioning* and *structure* of the UN, OECD, and ILO instruments and the *procedures* that lie at the heart of IRBC. However, for a clear analysis of the value of the Dutch regulatory tools, it is additionally imperative to survey which *specific rights* are to be protected in this framework at a minimum.

3. *The minimum of labour standards protected under the IRBC Frameworks*

Under all three IRBC instruments discussed above, the minimum floor of – and the starting point for – labour rights protection is formed by the fundamental labour standards of the ILO and other work-related rights that are enshrined in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Universal Declaration of Human Rights incorporates the right to work, the right to equal pay for work of equal value, the right to just and favourable remuneration and the right form and join trade unions in its article 23[28]. A substantial number of work-related rights can be found in the two binding international human rights treaties that flowed from the Universal Declaration; in the ICCPR (which contains mainly "first generation" freedom rights) and particularly in the ICESCR (which includes "second generation" human rights). Many of these rights align and overlap with the fundamental labour standards of the ILO. The ICCPR contains provisions on equal treatment (arts. 2, 3 and 26), on the prohibition of slavery and forced

[27] Together with the "International Bill of Human Rights" which consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. See: UNGPs, principle 12.

[28] United Nations, Universal Declaration of Human Rights, 1948, art. 23.

labour (art. 8) and on freedom of association (art. 22). Within the ICESCR there is even an entire chapter on work-related human rights, which is based largely on the earlier work of the ILO[29]. The right to work is codified in article 6, on which the Committee on Economic, Social and Cultural Rights published an insightful General Comment in 2006, which clearly linked this provision to the ILO strategic goal to achieve "decent work for all"[30]. Article 7 contains the principle of equal pay for work of equal value, article 8 includes provisions on trade union rights including the right to strike, article 9 deals with social security, and protection of children from exploitation is enshrined in article 10. In addition to the norms of these three human rights instruments, work-related rights can also be found within a host of other (core and other) UN Human Rights Treaties and instruments[31].

However, the focus in this essay is on the fundamental labour standards of the ILO, since these are widely regarded as the baseline for international workers' rights protection and explicitly referenced in most – if not all – IRBC instruments that deal with human rights protection in GVCs.

In 1998, the ILO Declaration on Fundamental Principles and Rights at Work (FPRW) was adopted by the International Labour Conference, the ILO's legislative body[32]. This declaration initially identified 4 key issues as fundamental: the prohibitions on (1) child labour and (2) forced labour, (3) non-discrimination and equal treatment in employment, and (4) freedom of association and the right to collective bargaining. In 2022, the Declaration was amended to include the right to a safe and healthy working environment as the fifth fundamental principle and right at work. Each of these FPRW is linked to two Fundamental Conventions, which have been ratified by the

[29] RIEDEL, *Monitoring the 1966 International Covenant on Economic, Social and Cultural Rights*, in POLITAKIS (eds.), *Protecting labour rights as human rights: present and future of international supervision: proceedings of the international colloquium on the 80th anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations*, International Labour Office, 2007, p. 4.

[30] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18.

[31] For a more detailed overview, see: ROMBOUTS, *The international diffusion of fundamental labour standards: Contemporary content, scope, supervision and proliferation of core workers' rights under public, private, binding, and voluntary regulatory regimes*, in *CHRLR*, 2019, 50, 3, pp. 136-139.

[32] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted at the 86th Session of the International Labour Conference (1998) and amended at the 110th Session (2022).

vast majority of ILO member states[33]. An important feature of the Declaration is that is provides that non-ratifying member states, still have an obligation to respect, promote and realize the principles contained in these fundamental conventions by virtue of their membership in the ILO[34]. Additionally, non-ratifying member states have to report to the ILO on a yearly basis on their efforts and potential progress made with respect to these five fundamental areas[35].

The continued relevance of addressing violations of these five "human rights at work" could hardly be overestimated. An estimated 160 million children are engaged in child labour – nearly one in ten children worldwide – and about half of them perform hazardous work[36]. This may include work in mining, agriculture or fisheries, with dangerous equipment, chemicals, or other types of work that could damage children's physical or mental health and/or jeopardize their right to education. Convention 138 is a general convention that aims to gradually raise the minimum age of access to employment and includes a system with different categories of minimum ages and several exceptions[37]. Convention 182 covers the very worst forms of child labour, such as slavery, prostitution, child soldiers and the use of children in criminal activities and has only one fixed minimum age of 18[38].

An estimated 28 million people worldwide are in trapped in a situation of forced labor, a concept closely related to (modern) slavery, labour exploita-

[33] C138 Minimum Age Convention, 1973 (No. 138); C182 Worst Forms of Child Labour Convention, 1999 (No. 182); C29 - Forced Labour Convention, 1930 (No. 29); C105 - Abolition of Forced Labour Convention, 1957 (No. 105); C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111); C100 - Equal Remuneration Convention, 1951 (No. 100); C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98); C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); C155 - Occupational Safety and Health Convention, 1981 (No. 155); C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187). For the ratification rates, see: NORMLEX, *Information system on International Labour Standards*, normlex.ilo.org.

[34] See: ILO Declaration on Fundamental Principles and Rights at Work, par. 2: "[...] all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions [...]".

[35] ILO Declaration on Fundamental Principles and Rights at Work, II Annual follow-up concerning non-ratified Fundamental Conventions, par. A, B.

[36] ILO, UNICEF, *Child Labour: Global estimates 2020, trends and the road forward, 2021*, p. 8.

[37] ILO Minimum Age Convention, 1973 (No. 138).

[38] ILO Worst Forms of Child Labour Convention, 1999 (No. 182).

tion and human trafficking[39]. Forced labour may involve situations in which individuals are actually physically forced to work, but also often involves situations in which people have to loan substantial sums in order gain access to employment. Those debts may be impossible to pay off resulting in "debt bondage". These latter cases often involve vulnerable groups of migrant workers who are posted – under false pretenses – to jobs in a host country[40]. The ILOs old but still relevant fundamental conventions were supplemented in 2014 by a specific protocol which focusses on modern forms of forced labour and contains provisions on prevention, protection of the victim, compensation, remedies, and dispute settlement mechanisms[41].

According to the ILO, work-related illnesses and accidents lead to nearly 3 million fatalities amongst workers each year. Additionally, some 395 million people a confronted with a non-fatal occupational accident or illness each year[42]. A large proportion of these cases are preventable. In addition to the two fundamental conventions, which aim to provide a framework for implementing a functional national system to ensure safe and healthy working conditions[43], the ILO has adopted a large number of specific technical conventions on the subject. There are sector-specific conventions (*e.g.* about mining, fishing, or agriculture) or risk-specific conventions (*e.g.* about work with radiation, with asbestos, or with chemicals)[44].

Discrimination – in its many different forms – in the workplace remains a persistent and systemic problem present in all types of countries and sectors. The ILO's fundamental conventions on the subject cover (non-exhaustively listed) grounds for prohibited discrimination, as well as as the principle of equal pay for men and women for work of equal value[45]. Estimates are that

[39] ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, 2022, p. 2.

[40] For a well-known example and ILO action in that case, see: Swepston, Wallenberg, *Concentrated ILO Supervision of Migrant Rights in Qatar - Part 2*, in *IRLCL*, 2016, 3, pp. 405-408.

[41] Protocol of 2014 to the Forced Labour Convention, 1930 No. 29, 2014. Also see: Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203).

[42] ILO, *A call for safer and healthier working environments*, 2023, p 2.

[43] C155 - Occupational Safety and Health Convention, 1981 (No. 155). C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

[44] Safety and Health at Work, https://www.ilo.org/topics-and-sectors/safety-and-health-work.

[45] C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111); C100 - Equal Remuneration Convention, 1951 (No. 100).

the gender wage gap worldwide is still about 17%[46]. In the Netherlands, the gap is estimated to be around 13%[47].

Freedom of Association and the related right to collective bargaining are generally regarded as the most important of the fundamental – and probably of all – labour standards. This should not come as a surprise, because without a well-functioning system of worker participation – effective industrial democracy – guaranteeing and establishing other types of workers' rights becomes extremely difficult. Ratification of the two best-known ILO conventions – Convention 87 and Convention 98 – is therefore a major priority for the ILO[48]. Convention 87 protects the independence of trade unions – and employers' organizations – *vis-à-vis* the government, and Convention 98 focuses more on protecting trade unions and their members from discrimination and unjustified interference by management. Violations of these rights, such as banning independent trade unions, violence against trade union leaders or members, and interference through bribery or threats are common, and in many jurisdictions around the world we currently see trade union rights coming under increased pressure[49].

Having dealt with both the form and procedures *and* the content of labour rights protection under international IRBC instruments in GVCs, the next section will examine the Dutch approaches and will assess their (un)successfulness.

4. *The Dutch approach: Legislative initiatives and the IRBC Covenants*

Both the voluntary and the mandatory tracks for promoting IRBC have been pursued in the Netherlands in recent years. This section will start with the different – and arguably failed – attempts at creating binding legislation. The Child Labour Duty of Care Act is explored, the broader (initiative) proposal for a Responsible and Sustainable International Business Conduct Law

[46] Holder, *Gender Pay Gap Statistics 2025: A Comprehensive Analysis, Equal Pay Today*, in *Equal Pay Today*, https://www.equalpaytoday.org/gender-pay-gap-statistics/.

[47] Said, *Vrouw van de Toekomst (Woman of the Future)*, in *TRA*, 2025, 21.

[48] C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98). C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

[49] Cahill, Newman, Ó Conaill, *Global Perspectives on Freedom of Association*, in *EJCLG*, 2024, p. 14.

is examined subsequently, and the latest legislative move, the creation of the Act on International Responsible Business Conduct, which is meant to implement the EU Corporate Sustainability Due Diligence Directive (CSDDD), is dealt with afterwards. It seems in place to already note that none of these legislative initiatives have been properly implemented to date. After exploring the legislative initiatives, the focus will shift to the sectoral IRBC agreements and some additional reflections on the current state of the Dutch IRBC approach.

4.1. *Legislative developments in the Netherlands*

We will start out by examining the Dutch attempts to create binding legislation in the field of IRBC, since even though these laws have not been implemented in fact, they have served as an example of (innovative) IRBC legislation and may have had some positive effects (also on the development of EU legislation). The first initiative to mention is the Child Labour Duty of Care Act (Wzk) published in the official state gazette on November 13, 2019[50].

The Wzk requires companies to declare that they are doing enough to prevent child labour in their supply chain and includes a due diligence obligation[51]. When a company is a party to an IRBC Sector Agreement, it is assumed that the company complies with the law[52]. Child labour is defined in the Wzk by using the ILO standards outlined above and as we have seen, this fundamental labour standard is to be protected under the UNGPs, OECD-Guidelines and ILO MNE Declaration. The law also offers possibilities for sanctioning. Should there be a reasonable suspicion that child labor is occurring in the supply chain, the company must adopt and implement a plan of action based on the guidance provided in the OECD Guidelines. If a company has not adequately fulfilled its responsibilities, an administrative fine can be imposed and directors can be criminally prose-

[50] Child Labour Duty of Care Act, 2019. Staatsblad 2019, 401, *Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid, Wzk).*

[51] Wzk, art. 5.

[52] Rietveld, Baks, Bier, *De Wet zorgplicht kinderarbeid en de opkomst van human rights due diligence; van vrijwilligheid naar verplichting (Child Labour Duty of Care Act and the rise of HRDD)*, in *Ondernemingsrecht*, 2021/25, afl. 4 - March 2021, p. 152.

cuted in exceptional cases[53]. The Wzk is the first – and so far, the only officially adopted – national law that incorporates mandatory HRDD, although the law itself does specify how due diligence should be conducted[54]. The Wzk has a broad scope and applies to all companies based in the Netherlands, and those selling goods and/or services physically or online in the Netherlands[55].

Although the Wzk was formally adopted, it was never implemented. The reasons for this were that other, more comprehensive laws were expected and under construction, both at the national and EU level, that would have included the protection of minors from child labour. There may be good reasons to prefer broader instruments that cover all human rights. "Single-issue" pieces of legislation may have the effect that companies only focus on these specific issues, while there may be many other human rights or sustainability issues that require attention. Nevertheless, the Wzk was often referred to as an early example of how mandatory HRDD laws could be shaped.

The second legislative initiative, which according to the drafters would have the additional effect of "absorbing" the Child Labour Duty of Care Act[56], is the initiative proposal (private members bill) Responsible and Sustainable International Business Conduct, which was submitted in March 2021[57]. Instead of a single issue law, this initiative proposal focuses – in line with the UNGPs and OECD Guidelines – on a broad mandatory due diligence obligation, that covers all human rights[58]. Interestingly, the proposed Act offers a non-exhaustive list of when negative human rights impacts occur and every right on this list is directly related to the ILO's fundamental labour standards (freedom of association, discrimination, child labour, forced labour, unsafe working conditions, exploitation and slavery)[59]. The explanatory

[53] Wzk, art. 5, *Kamerstukken II* 2016/17, 34506, nr. 8, p. 7-8.

[54] Rose, *De opmars van human rights due diligence, De invulling van de norm "gepaste zorgvuldigheid" uit de Wet zorgplichtkinderarbeid* (*The rise of HRDD and the interpretation of the duty of care in the Child Labour Duty of Care Act*), in *NTM/NJCM-bull.*, 2020, 15, p. 1.

[55] Wzk, art. 4.

[56] Proposal for a Responsible and Sustainable International Business Conduct Act, art. 4.3.

[57] Second Chamber of Parliament, Proposal for a Responsible and Sustainable International Business Conduct Act, Tweede Kamer, vergaderjaar 2020-2021, 35 761, nr. 2.

[58] Proposal for a Responsible and Sustainable International Business Conduct Act, art. 1.2(1).

[59] Proposal for a Responsible and Sustainable International Business Conduct Act, art. 1.2(2) under a, b, c, d, g, i, j.

memorandum of the proposal expressly states that it was created since the creation of a EU wide law would take too much time and the drafters indicated that this proposal might help to speed up the European process[60]. EU wide legislation was always preferable compared to different national instruments, since such a mushrooming of domestic laws might jeopardize a level playing field for IRBC in Europe. Eventually, the EU did adopt the Corporate Sustainability Due Diligence Directive (CSDDD) in June 2024[61], which had the effect that the legislative process of the Responsible and Sustainable International Business Conduct Act was ended.

The Dutch government immediately started drafting an implementation act for the CSDDD, the IRBC Act, which was published for public consultation[62]. However, considering the new developments in the EU, with the adoption of the "Stop the Clock" directive and pending changes to EU sustainability legislation, this national legislative process has also stalled[63]. While much more is to be said about the EU wide developments, and the geopolitical and economic arguments for or against simplification and substantive alteration of the CSDDD, this, as mentioned in the introduction, lies beyond the scope of this contribution.

Instead of seeing the national legislative developments portrayed above as a dead end, it seems to make more sense to view them as small steps in a process that recognizes that voluntary measures alone are insufficient to genuinely promote IRBC and respect for human and labour rights in GVCs. This aligns with the position of the Dutch government and the Social Economic Council – an important advisory body on social policy. The voluntary track nevertheless remains important, and it is through a combination of measures that IRBC ought to be implemented in the Netherlands[64]. One of

[60] Explanatory Memorandum Responsible and Sustainable International Business Conduct Act, 35 761, nr. 2, par. 2.2.1.

[61] Directive of the European Parliament and of the Council, n. 2024/1760, 13 June 2024, on corporate sustainability due diligence and amending Directive (EU), n. 2019/1937 and Regulation (EU), n. 2023/2859 (Text with EEA relevance).

[62] International Responsible Business Conduct Act, public consultation, https://www.internetconsultatie.nl/wivo/reacties.

[63] See generally: https://www.consilium.europa.eu/en/press/press-releases/2025/04/14/simplification-council-gives-final-green-light-on-the-stop-the-clock-mechanism-to-boost-eu-competitiveness-and-provide-legal-certainty-to-businesses/.

[64] Government of the Netherlands, Improving Responsible Business Conduct (RBC), https://www.government.nl/topics/responsible-business-conduct-rbc/government-promotion-of-responsible-business-conduct-rbc.

the most progressive and innovative elements of such a smart mix are the IRBC Sector Agreements, to which our attention is directed presently.

4.2. *The Dutch IRBC Sector Agreements*

An important and innovative aspect of the Dutch approach to IRBC was taken with the adoption of sectoral IRBC Agreements[65]. These are multi-stakeholder agreements within designated high-risk sectors that have the objective of addressing environmental and human rights issues. These agreements could be seen as a hybrid ingredient in the smart-mix. They are certainly not binding legislation, but parties to the Agreements do commit themselves to IRBC standards and procedures and therefore participation in an agreement does lead to obligations[66]. The Agreements are based on an advisory report of the Social Economic Council and are collaborative efforts in which businesses, trade unions, and other civil society organizations are parties and in which the government has a facilitating role[67]. The IRBC Agreements were adopted for a five year period and 11 Agreements were negotiated in total. Presently, there are only two of them left in force, while several others are being re-negotiated, albeit in an adjusted format.

One of the main innovative features of the IRBC Agreements is that they are collaborative efforts between businesses, governments, trade unions and other civil society organizations. The Agreements are also created through an intensive dialogue between all these stakeholders[68]. In this sense, they can be seen as multi-stakeholder initiatives that have a mixed public-private character. All the IRBC Agreements adhere to the ILO's fundamental labour standards and include HRDD requirements based on the OECD-Guidelines and the UNGPs[69]. By concluding these agreements per sector, a

[65] Social Economic Council (SER), International RBC Agreements, https://www.imvo-convenanten.nl/en.

[66] Erkens, *Innovation in Corporate Social Responsibility: sustainable business agreements in The Netherlands*, in *JSR*, 2021, 3, 1, p. 17.

[67] Social Economic Council (SER), Advies 14/04, "IMVO-Convenanten," (IRBC Agreements) April 2014. Also see: KPMG Sustainability, MVO Sector Risico Analyse, Aandachtspunten voor Dialoog (RBC Sectoral Risk Assessment), September 2014, https://-/www.rijksoverheid.nl/documenten/rapporten/2014/09/01/mvo-sector-risico-analyse.

[68] International RBC Agreements, https://www.imvoconvenanten.nl/?sc_lang=en.

[69] International RBC, *Why care about international responsible business conduct?*, https://www.imvoconvenanten.nl/en/why.

tailor-made approach to the specific risks in that sector is possible. All in all, there have been IRBC Agreements concluded in the garments and textile sector[70], the banking sector[71], the gold sector[72], sustainable forestry[73], insurance[74], floriculture[75], pension funds[76], and food products[77]. These IRBC Agreements ended after their five-year term passed. However, the agreement on natural stone (TruStone Initiative) has been extended and adjusted and is in its second term now.[78] The Renewable Energy Agreement[79] is still in force and negotiations on subsequent agreements in the metal sector have been concluded and are ongoing for the garment sector[80]. It is important to point out that these next generation of IRBC Agreements do differ from their predecessors. Not only has their name changed (in Dutch, from "Convenanten" to "Overeenkomsten")[81], but there is also much more limited involvement of the government, which is no longer a party to the Agreements. The reason for this is that the role of the government will shift to monitoring due diligence legislation[82]. While the government does recognize that it remains committed to promoting sectoral initiatives, this sectoral approach will change, depending on the other elements of the policy-mix, especially (EU) legislation[83]. It is likely that a new, more holistic sectoral instrument will be

[70] Dutch agreement on sustainable garment and textile, https://www.imvoconvenanten.nl/en/garments-textile.

[71] Dutch Banking Sector Agreement, https://www.imvoconvenanten.nl/en/banking.

[72] Responsible Gold Agreement, https://www.imvoconvenanten.nl/en/gold.

[73] Agreement to Promote Sustainable Forestry, https://www.imvoconvenanten.nl/en/forestry.

[74] Agreement for international responsible investment in the insurance sector, https://www.imvoconvenanten.nl/en/insurance.

[75] Floricultural sector joins forces to press for more responsible production, https://www.imvoconvenanten.nl/en/floricultural.

[76] Agreement for the Pension Funds, https://www.imvoconvenanten.nl/en/pension-funds.

[77] Agreement for the Food Products Sector, https://www.imvoconvenanten.nl/en/food-products.

[78] International RBC TruStone Initiative, https://www.imvoconvenanten.nl/en/trustone.

[79] International RBC Agreement for the Renewable Energy Sector, https://www.imvoconvenanten.nl/en/renewable-energy.

[80] International RBC Agreement for the Metals Sector, https://www.imvoconvenanten.nl/en/metals-sector.

[81] Which could be translated as from covenants to contracts. The terminology itself does not reflect any substantive difference however.

[82] Second Chamber of Parliament, 26 485, Nr. 395, Responsible Business Conduct.

[83] Second Chamber of Parliament, 26 485, Nr. 376, Responsible Business Conduct.

developed in the near future. However, as mentioned, this is also dependent on the timeline and (future) content of the EU initiatives.

While all agreements commit to respecting fundamental labour standards, the sectoral model allows the different agreements to emphasize the importance of certain rights for a specific industry. A sectoral approach has the benefit of offering tailor-made models for promoting corporate sustainability[84]. The Banking Agreement for example refers to freedom of association and the right to collective bargaining[85], while the Gold Agreement places more emphasis on the prohibitions of forced and child labour[86].

Even though it is indeed voluntary for a company to become a party to an IRBC Agreement, this does involve a strong commitment from the parties involved. The scope of the agreements covers a corporation's own activities and its business relationships throughout their GVCs. The overall objectives of the agreements are firstly, "to improve circumstances in a number of risk areas for example child labour, low wages, human rights violations and environmental pollution" and secondly to offer a collective solution to problems that businesses are unable to solve on their own[87].

The main way by which the IRBC Agreements have a positive impact is by monitoring the compliance of the companies that are a party to the agreement. Additionally, there are specific projects connected to the IRBC agreements. A few examples may be useful to understand the nature of these projects. In the framework of the Renewable Energy Agreement, a number of parties are implementing a project that integrates artisanal and small-scale copper mining production in Peru into responsible supply chains. The project is meant to build productive relations within the sector, promote respect for human rights, and encourage the adoption of better mining practices. The overall aim is to help to improve the living standards of miners and the local

[84] Laagland, *Decent Work in the Cross-Border Supply Chain: A Smart Mix of Legislation and Self-Regulation*, European Council on Foreign Relations, 2023, 2, p. 354.

[85] Dutch Banking Sector Agreement on international responsible business conduct regarding human rights, October 2016, p. 27.

[86] Dutch Gold Sector IRBC Agreement on international responsible business conduct of companies in the Netherlands with gold or gold bearing materials in their value chains, June 2017, Annex I, p 45.

[87] International RBC, *Why care about international responsible business conduct?*, cit.

communities by developing a multi-stakeholder roadmap for a responsible supply chain and to strengthen due diligence mechanisms[88].

A second example is the implementation of a stakeholder dialogue in Rajasthan in India to address specific risks in the sandstone extraction and processing sector. This project – under the TruStone Initiative – aims to formalize labour in sandstone quarries and reduce the incidence of child and forced labour in the sector[89]. The stakeholder dialogue is building trust between suppliers and importers, leads to increased awareness of the specific risks and aligns efforts with local organizations and initiatives[90]. There are similar initiatives in the South of India and in Zimbabwe[91].

Although there are clear differences between the agreements, they all include the risk-based due diligence system based on the OECD guidelines and the UNGPs. Therefore, companies have to identify and address environmental and human rights risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing decisions. Parties to the IRBC Agreements commit to achieving tangible outcomes and several agreements include dispute settlement or complaints mechanisms. This way, one could argue that the IRBC Agreements do not entirely belong to the voluntary category of IRBC, at least not for the parties involved.

The IRBC Agreements, in this perspective, should be seen as an important first step in the Netherlands towards less voluntary and more binding rules on IRBC. The 5 year evaluation of the IRBC Agreements stated that the agreements are seen as highly important instruments, firstly to build capacity and create awareness about IRBC; secondly, to increase the influence of buyers and suppliers in GVCs and thirdly they are seen as invaluable in promoting the continuous learning and knowledge sharing process about how to successfully conduct HRDD[92]. However, the evaluation also made it crystal clear that the sector agreements approach in itself is by no means

[88] https://www.imvoconvenanten.nl/en/renewable-energy/participants/projects/peru-copper.

[89] International RBC, *Projects*, https://www.imvoconvenanten.nl/en/trustone/initiatief/projects#rajasthan.

[90] *Ibid*.

[91] Also see: Tsabora, Chidarara, *From Mountains of Hope to Anthills of Despair, Assessment of human rights risks in the extraction and production of natural stone in Zimbabwe*, TruStone Initiative Anthills of Despair, September 2021.

[92] Ministry of Foreign Affairs, *From giving information to imposing obligations, a new impulse for responsible business conduct*, 2020, p. 12-13.

sufficient considering that the IRBC agreements only reached 1,6% of the corporations in the designated high risk sectors[93]. Therefore, according to the Dutch government and the Social Economic Council, broad mandatory due diligence regulation is absolutely necessary for a functioning IRBC mix[94]. Moving forward, the Dutch government is considering adjusting the sectoral model to a more comprehensive approach which could include a general IRBC framework agreement[95].

The current Dutch policy for a smart-mix is categorized under five key headings:[96] imposing obligations; setting conditions; incentivizing; facilitating; and informing. The Dutch government finds that "without obligatory instruments, voluntary agreements have only limited impact" and that a "legal obligation to exercise due diligence is expected to be effective in defining a minimum standard for RBC"[97]. Setting conditions refers to the good example that the government should set with respect to responsible public procurement and incentivizing refers to a financial system that includes "carrots and sticks" to make sure that laggards with respect to IRBC mend their ways[98]. The Dutch Government has made different grant incentives available, e.g. the "social sustainability fund" for companies that want to address problems related to labour rights in their GVCs[99]. Informing and facilitating refer to the task the government has to make sure that the actors involved have the capacity and know-how to conduct IRBC properly. To this effect, the

[93] Bitzer et al., *Evaluation of the Dutch RBC Agreements 2014-2020: Are voluntary multi-stakeholder approaches to responsible business conduct effective?*, KIT Royal Tropical Institute, Amsterdam, 8 July 2020, p. 8.

[94] SER Advies (Social Economic Council recommendations) 20/08, (Social Economic Council recommendations) september 2020, Samen naar duurzame ketenimpact, Toekomstbestendig beleid voor internationaal MVO. SER Advies 21/11 (Social Economic Council recommendation), oktober 2021, Effectieve Europese gepaste zorgvuldigheidswetgeving voor duurzame ketens (Effective HRDD for sustainable GVCs).

[95] However, not much information on this IRBC "vision for the future" is available at the time of writing. With the exception of Second Chamber of Parliament, 26 485, Nr. 395, Responsible Business Conduct and Second Chamber of Parliament, 26 485, Nr. 376, Responsible Business Conduct.

[96] Referred to as the 5V model, since these headings translate into Dutch as: Verplichten, Voorwaarden stellen, Verleiden, Vergemakkelijken en Voorlichten. See: Ministry of Foreign Affairs, *cit.*, p. 19.

[97] Ministry of Foreign Affairs, *cit.*, p. 13.

[98] Ministry of Foreign Affairs, *cit.*, p. 15.

[99] Https://www.government.nl/topics/responsible-business-conduct-rbc/government-promotion-of-responsible-business-conduct-rbc.

Netherlands has created an RBC Support Center, which provides tailor-made advice, training and coordinates subsidy programs related to IRBC[100]. The IRBC Agreements touch on several of these five main "smart-mix topics" and according to the Dutch government, a policy mix, in which sectoral agreements have an important part to play – next to mandatory legislation – is the preferred course of action[101].

5. *Closing reflections*

None of the legislative efforts with respect to mandatory HRDD in the Netherlands have been effectively implemented to this date. Moreover, the evaluation of the IRBC Sector Agreements showed that they have not been very effective at moving those companies that could be considered as "laggards" towards more sustainable business practices. But it would be wrong to conclude from this that the Dutch attempts at creating a smart-mix have failed. As regards legislation, the preferred outcome was always an instrument at the level of the EU and the Dutch (draft) laws may have influenced the process at the level of the European Union in a positive way.

A distinguishing feature of the IRBC Sector Agreements is that they are modelled to promote collaboration between business actors, civil society organizations and the government[102]. They were and are an innovative tool and an important ingredient in the "smart-mix" that combines both voluntary and binding features. Moreover, it is expected that when mandatory legislation – most likely the CSDDD – will enter into force, this will be beneficial for the further development of sectoral initiatives such as the IRBC Agreements. Moreover, it is expected that mandatory legislation will also lead to more companies joining an IRBC Agreement, since the built-up expertise of the parties to IRBC agreements, governmental support, and their collaborative nature could make them very attractive for companies that want or have to get their HRDD procedures in order. However, col-

[100] IRBC Support Center (MVO Steunpunt), https://www.rvo.nl/onderwerpen/mvo-steunpunt.

[101] Ministry of Foreign Affairs, *cit.*, p. 16.

[102] Erkens, *cit.*, p. 2.

laborating in IRBC Agreements should not be seen as waiving obligations under (future) mandatory legislation[103].

The character of the IRBC agreements has changed a bit and there is now a much more limited role for the government. Nevertheless, they still qualify as multi-stakeholder instruments that incorporates an important holistic approach that brings together different public and private actors, with a view to tackle sustainability issues together, making use of each other's expertise via a model of shared responsibility. Mandatory legislation that focuses on duties for (mainly) lead firms is indeed necessary, but complementing this with collaborative approaches such as the IRBC Agreements is an important venue to promote corporate sustainability as well. Both the private, sectoral and the public mandatory approaches may be "considered as mutually capable of shaping each other"[104].

The OECD Guidelines and the UNGPs (and to some extent, the ILO MNE Declaration) remain indispensable cornerstones of all IRBC instruments in the Netherlands and worldwide, and they ensure that the different IRBC tools are aligned and based on the same normative framework. (Fundamental) labour standards and other work-related human rights are at the heart of IRBC efforts, and they play a crucial role in promoting and realizing more socially responsible GVCs. Given that the most severe labour and human rights violations often occur at the lowest tiers of these chains, it is imperative that IRBC efforts are (also) directed there, if we really want responsible business conduct to make a difference in the lives of those who might need it most. In this light, it is concerning that/if mandatory IRBC legislation is only applicable to higher tiers and this would mean these legislative initiatives are not fully in line with the international normative frameworks of the UN, OECD and ILO. Additionally, mandatory legislation – for it to keep in sync with the spirit of the UNGPs – should not be restrictive when it comes to the specific rights that fall under its scope. The UNGPs emphasize that all human rights (could) deserve attention.

The Netherlands – like other countries – has not gathered all necessary ingredients for the perfect mix of IRBC measures. The rapidly shifting

[103] LAAGLAND, *cit.*, p. 355: "It is important to make sure that due diligence obligations agreed on in private agreements are equivalent to the public norm laid down in law. It must be prevented that participation in RBC-agreements becomes a safe harbour for companies".

[104] LAAGLAND, *cit.*, p. 357.

geopolitical landscape is causing delays and will probably lead to less progressive or diluted regulation, in particular when it comes to EU wide sustainability legislation. Nevertheless, mandatory legislation is a vital element of the combination of measures that is needed. Additionally, sectoral and collaborative approaches such as the IRBC Sector Agreements in the Netherlands are likely to fulfill an important role in any future smart-mix.

Abstract

A key strategy for effectively implementing and promoting International Responsible Business Conduct (IRBC) is securing a "smart-mix" of different – binding, voluntary, public, and private – regulatory mechanisms. The international normative basis for all these instruments is found in the voluntary frameworks developed by the UN, OECD, and ILO. The Fundamental Labour Standards of the International Labour Organization play a central role within IRBC as some of the most basic rights that are to be respected by corporations throughout their global value chains. Taking the international IRBC framework and the Fundamental Labour Standards as a starting point, this article assesses and evaluates some of the Dutch attempts to create and facilitate a smart-mix of IRBC instruments. The article focusses in particular on the Dutch sectoral agreements; multi-stakeholder IRBC instruments that emphasize a collaborative approach between business actors, civil society organizations and the government.

Keywords

International Responsible Business Conduct, Fundamental Labour Standards, Smart-mix, Sectoral Agreements, UN Guiding Principles, OECD Guidelines, International Labour Organization.

authors' information

Matilde Biagiotti
Ph.D. Candidate, University of Bologna Alma Mater Studiorum
(matilde.biagiotti2@unibo.it)

Claudia Carchio
Research Fellow in Labour Law, University of Udine
(claudia.carchio@uniud.it)

Maria Giovannone
Associate Professor in Labour Law, University of Roma Tre
(maria.giovannone@uniroma3.it)

Alessandra Ingrao
Associate Professor in Labour Law, University of Milano La Statale
(alessandra.ingrao@unimi.it)

Helene Langbein
Research Assistant and PhD Student, Friedrich-Schiller-University Jena
(helene.langbein@uni-jena.de)

Łukasz Pisarczyk
Full Professor, University of Silesia in Katowice
(l.pisarczyk@wpa.uz.zgora.pl)

Bas Rombouts
Associate Professor in International Labour Law and Human Rights, Tilburg University
(s.j.rombouts@tilburguniversity.edu)

Olga Rubagotti
Ph.D., University of Verona
(olga.rubagotti@univr.it)

Wilfredo Sanguineti Raymond
Full Professor in Labour Law, University of Salamanca
(wsr@usal.es)

Alexander Stöhr
Probationary Judge at the Berlin Labour Court and Lecturer, Philipps University of Marburg
(papinian82@gmail.com)

Urszula Torbus
Assistant Professor, University of Silesia in Katowice
(urszula.torbus@us.edu.pl)

Stefania Torre
Associate Professor in Medieval and Modern Law History, University of Naples Federico II
(stefania.torre@unina.it)

Bernd Waas
Full Professor in Labour Law, Goethe Universität Frankfurt
(waas@jur.uni-frankfurt.de)

abbreviations

The list of abbreviations used in this journal can be consulted on the website www.ddllmm.eu/dlm-int/.

Finito di stampare nel mese di settembre 2025
dalla Grafica Elettronica (Na)