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El Consejo Andaluz de Relaciones Laborales (CARL): un modelo original para mejorar las relaciones industriales

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1. *Marco normativo y funcional*

En España existe una larga tradición que se remonta a principios de los años 80 del siglo XX en la creación de organismos autónomos para el fomento de las relaciones laborales en su vertiente colectiva, impulso de la negociación colectiva y resolución extrajudicial de conflictos laborales. En la actualidad existen 17 de estos organismos, uno por cada Comunidad Autónoma, siendo el segundo más antiguo, después del Consejo de Relaciones Laborales Vasco, el Consejo Andaluz de Relaciones Laborales (CARL) que celebró en septiembre de 2023 su 40º aniversario fundacional mediante la Ley de 27 de junio de 1983 de la Junta de Andalucía, octava de las Leyes aprobadas por el Parlamento de Andalucía desde sus inicios en la I Legislatura. Sin duda alguna su creación obedeció a la necesidad de democratizar las relaciones laborales en un momento especialmente sensible de nuestra historia, cuando apenas llevaba tres años aprobado el Estatuto de los Trabajadores de marzo de 1980 y cuando faltaban aún dos años para la aparición de la Ley Orgánica de Libertad Sindical.

Probablemente, estos más de cuarenta años transcurridos puedan estar suponiendo, en estos momentos, un tránsito por una crisis de identidad, en

la medida en que el marco regulador del CARL respondía a unas necesidades y contextos muy diferentes de los actuales. La necesidad de gestionar lo que se llamó la concertación social, con presencia de las organizaciones sociales y económicas junto con el gobierno y la Administración, el dotar de carácter consultivo a un órgano que indicaba al gobierno el camino a transitar en el complejo mundo de la composición de intereses dentro del sistema de relaciones laborales, la propia necesidad de desarrollar las instituciones laborales, novedosas, recogidas en el ET de 1980, tanto de carácter individual como colectivo, todo ello dotaban al CARL de unas grandes expectativas de partida y de la responsabilidad de afrontar enormes retos.

Evidentemente, las cosas son muy diferentes en 2026. Cuarenta años no pasan en balde y resulta evidente que hay que poner la Ley al día si queremos que el CARL siga sirviendo a los fines para los que creó y pueda hacer frente a los nuevos retos del sistema de relaciones laborales. En toda la trayectoria vital del CARL hay momentos cumbre que han ido moldeando su configuración actual y le han imprimido carácter. Es evidente, que el nacimiento del Consejo Económico y Social de Andalucía (CES) en 1997, absorbió sus funciones consultivas, si bien es cierto que en este órgano estatutario, órgano de autogobierno de Andalucía, no sólo están representados los intereses de las organizaciones sindicales y empresariales más representativas sino también de los consumidores y organizaciones del tercer sector. La negociación colectiva y el conflicto colectivo siguen formando parte de las competencias del CARL, son su ecosistema natural, de forma que el SERCLA, Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía, en funcionamiento desde 1999, es gestionado administrativamente por el CARL, siendo un acuerdo entre organizaciones sindicales y empresariales, que ejecuta sus resoluciones de mediación y arbitraje a través del CARL, y mantiene con éste una relación de soporte administrativo que también está siendo impulsado y reformado en estos momentos.

Nos encontramos en un momento idóneo para relanzar la relación entre las organizaciones sindicales y empresariales y el CARL, reconociendo, sin duda, su carácter tripartito y colegiado, al mismo tiempo que su impronta indiscutible de Administración Pública prestadora de servicios. Se trata, como dice el propio Decreto 155/2022, de 9 de agosto, por el que se regula la estructura orgánica de la Consejería de Empleo, Empresa y Trabajo Autónomo, de una entidad adscrita de la Administración Pública de la Junta de Andalucía, que no es organismo autónomo, no es órgano de autogobier-

no – y por tanto no se encuentra recogido en el Estatuto de Autonomía de Andalucía – y tampoco es una agencia administrativa o empresarial. No es Administración instrumental, porque forma parte de la Consejería, a cuya Viceconsejería se adscribe administrativamente. Tampoco sería un centro directivo, de conformidad con el artículo 16.2 de la Ley 9/2007, de 22 de octubre, de la Administración de la Junta de Andalucía, ni una unidad administrativa especial según su artículo 88.1. Tiene, claramente, carácter público, es Administración Pública, aunque no Autoridad laboral. Técnicamente, tiene la calificación de órgano colegiado de participación social, según los artículos 20 y 88.2.d) de dicha Ley. Incluso podríamos decir que es una Administración que no ejerce como tal, o que no parece que lo haga, pero lo hace; el CARL es una Administración "líquida", que está y no está al mismo tiempo, porque es una Administración que hace suya la voluntad de las organizaciones sindicales y empresariales que la integran en su Pleno. En el resto de España, estos organismos también plantean esta difusa estructura en su naturaleza jurídica, pudiendo existir en forma de organismo público o de organismos privado gestionado a través de fundaciones. Donde todos coincidimos es en el ejercicio de nuestras competencias en materia de negociación colectiva y resolución del conflicto laboral.

Pero además de Administración, somos un centro de imputación convencional, vinculados como estamos a los acuerdos entre los interlocutores sociales, y un ámbito de confrontación democrática de intereses sindicales y empresariales; y de ambos mundos, el de las normas legales y el de la voluntad y autonomía colectiva de sus organizaciones sindicales y empresariales habrá de surgir la reforma de su Ley de 1983 que está prevista para este año 2026.

El paso de estos cuarenta años deja ver que hoy el CARL une, indiscutiblemente, a su carácter tripartito, el de una Administración prestadora de servicios en materia de negociación colectiva y de conflicto colectivo. En términos económicos y de utilidad social, la posición del CARL es, simplemente, insuperable. Con un coste inferior a los 50 millones de euros en estos cuarenta años, ha conseguido aglutinar e impulsar la firma de casi 30.000 convenios colectivos, que han dado cobertura a 130 millones de contratos de trabajo, lo que da una idea de su importancia estructural en el sistema económico andaluz, un ecosistema con más de 540.000 empresas y 3,5 millones de trabajadores. Por lo que se refiere al SERCLA, que gestiona el CARL, su coste aproximado ha sido de unos 20 millones de euros duran-

te estos 25 años, habiendo evitado la pérdida de más de 50 millones de horas de trabajo por motivo de huelga, lo que equivale a casi 1.000 millones de euros. No se puede hacer más con menos.

Como Consejo tripartito – sindicatos, patronal y Administración – que es el ADN de su naturaleza, y en su funcionamiento en modo de Comisión Permanente y de Pleno, desarrolla sus funciones sobre la base del acuerdo unánime entre las tres organizaciones que lo componen, CCOO, UGT, CEA y Junta de Andalucía. Nunca se ha votado una decisión o una acción, o proyecto, en el seno del CARL, y esto lo identifica claramente como un órgano de impulso y protección del diálogo social tripartito. A nivel nacional estimamos que el CARL tiene la mejor estructura funcional, competencial e institucional de las posibles, la fórmula más completa con fundamento en la Ley, composición tripartita, con medios propios para la negociación y la mediación, programa presupuestario, personal funcionario en su relación de puestos de trabajo, 10 sedes administrativas repartidas en las 8 provincias (Jerez y Algeciras, junto a Cádiz capital) y gestión económica en el marco de la Ley de Contratos del Sector Público.

Con todos estos aditamentos, está en la cúspide de sus fortalezas ser un órgano con perfiles híbridos pues presenta características singulares, debido a su propia evolución de competencias. Formalmente, en su Ley de creación de 1983 se configuró como un órgano colegiado de naturaleza consultiva. Sin embargo, sus funciones con el paso del tiempo se han alejado de esa naturaleza consultiva y la han aproximado a las propias de un centro directivo prestador de servicios dentro de la Consejería de Empleo, lo que dificulta su propia consideración sobrevenida como simple órgano colegiado de participación social. Así la inicial función consultiva prevista en su art. 3.2 a) b) y c) fue asumida por el CES a partir de 1997, quedando sin efecto de forma práctica. Igualmente, las previstas en las letras f) – centralizar la documentación de las elecciones sindicales – y h) – depósito de convenios colectivos de ámbito supraprovincial – fueron asumidas por la Dirección General de Trabajo y por el CMAC en las Delegaciones Territoriales. Al mismo tiempo, seguimos manteniendo las competencias de Registro Público para organizaciones sindicales que no rebasen el ámbito de Andalucía, para asociaciones de trabajadores autónomos, con casi 600.000 trabajadores autónomos en la Comunidad Autónoma, y para los acuerdos de interés profesional, que son suscritos por los trabajadores autónomos con sus clientes mayoritarios. Como nos gusta decir dentro del

propio Consejo, somos una gran caja de herramientas para resolver los problemas de la negociación colectiva y resolver los conflictos laborales, singularmente los de carácter colectivo.

El Consejo tiene también una posición institucional, administrativa y presupuestaria propia y diferenciada frente a las organizaciones sindicales y empresariales que lo componen. El CARL tiene un espacio propio de autonomía funcional, al servicio, por supuesto, de las organizaciones sindicales y empresariales, y con pleno respeto a la autonomía colectiva, pero un espacio legal autónomo para la realización de sus fines y competencias legales y reglamentarias. Esta es, posiblemente, la mayor de las fortalezas que exhibe el CARL en comparación con los distintos organismos autonómicos, diecisiete en total, con competencias en las relaciones laborales que existen en España, ya sean fundaciones del sector público o privado, o Consejos bipartitos.

Hay, por tanto, una relación de reciprocidad entre el respeto a la autonomía colectiva de las organizaciones y el respeto a la autonomía funcional e institucional del CARL, que supone un equilibrio indispensable para que se puedan ejecutar con autonomía, independencia y neutralidad las competencias del Consejo y pueda desarrollarse el ejercicio de la libertad sindical y libertad de asociación y empresa por parte de sindicatos y patronal.

Reconozcamos que somos una *rara avis* dentro de la organización administrativa de la Junta de Andalucía, porque funcionamos en Comisión Permanente y en Pleno junto a las organizaciones sindicales y empresariales, los expertos, y la propia Administración de la Junta. El CARL actúa siempre de la mano de las organizaciones empresariales y sindicales bajo la aplicación de un principio de subsidiariedad por el que complementamos la acción de las organizaciones allí donde éstas no puedan llegar, un principio de proporcionalidad, por el que se proponen iniciativas adecuadas en su forma y su alcance, y un principio de atribución, por el que solo ejercemos aquellas competencias que las leyes y los acuerdos convencionales adoptados por los interlocutores sociales establezcan. Y es aquí donde el CARL encuentra la mayor de sus fortalezas, que no es otra que trabajar desde el diálogo y el consenso, desde el respeto a la autonomía funcional y competencial y la capacidad de iniciativa del Consejo como Administración pública y desde el respeto a la autonomía colectiva de las organizaciones miembros de un Consejo como órgano de participación institucional.

2. *El II Plan de Apoyo a la Negociación Colectiva de Andalucía (2023-2025)*

El 3 de julio de 2023 el Pleno del Consejo Andaluz de Relaciones Laborales, aprobó el II Plan de Apoyo a la Negociación Colectiva de Andalucía (2023-2025), dando así cumplimiento al punto 2.3.11 del Pacto Social y Económico para el Impulso de Andalucía firmado en marzo pasado por las organizaciones sindicales y empresariales con el gobierno de la Junta. Este Plan supone, igualmente, la aplicación del V Acuerdo para el Empleo y la Negociación Colectiva (AENC) en el sistema de relaciones laborales de Andalucía, siendo la nuestra la primera Comunidad Autónoma de España en implementar este acuerdo interconfederal firmado en mayo de 2024 por UGT, CCOO, CEPYME y CEOE. El II PANC se estructura en siete objetivos estratégicos, catorce objetivos operativos y setenta y siete medidas de apoyo, constituyendo un entramado de propuestas para la mejora de la negociación colectiva en Andalucía sobre la base del respeto a la autonomía colectiva de las partes y de la coordinación y asistencia técnica del CARL.

Los objetivos estratégicos 1, 2 y 4 están centrados en los procesos de negociación colectiva *stricto sensu*, y se dirigen a contribuir y facilitar, objetivo estratégico 1, los procesos de negociación colectiva en los distintos ámbitos sectoriales y otras unidades de negociación. Los objetivos operativos están enfocados a dinamizar el ritmo de las negociaciones y en reactivar y actualizar la negociación colectiva pendiente o desfasada, que es aquella en la que los convenios llevan años sin negociarse o están en situación de prórroga durante más de tres años. La formación específica de las personas negociadoras de los convenios, objetivo estratégico 2, es una de las claves del II PANC, pues el CARL es perfectamente consciente de que la calidad técnica de un convenio es esencial en la evitación del conflicto colectivo y en la mejora de la productividad en la empresa. Los esfuerzos emprendidos por el Consejo en este campo se han visto notablemente reforzados con medidas como la creación de la Cátedra de Negociación Colectiva y Relaciones Laborales y la Cátedra de Mediación, Arbitraje y Canal interno de denuncias, mediante convenios de colaboración con la Universidad Internacional de Andalucía (UNIA). La Cátedra de Negociación Colectiva y Relaciones Laborales actúa como un *think tank* de la negociación colectiva en Andalucía, habiendo editado ya cinco guías para negociadores sobre distintas temáticas que abarcan desde la propia administración del convenio, a la conciliación de la vida laboral y familiar, la regulación en convenio de los

derechos digitales y los retos de la inteligencia artificial en la empresa, o la regulación convencional de los salarios.

El objetivo estratégico 4 es de vital importancia pues pretende facilitar a las unidades de negociación propuestas de contenidos que permitan una agilización del proceso negociador. Dentro del respeto a la autonomía colectiva de las partes, el CARL realizará recomendaciones generales a las mesas negociadoras que contribuyan a extender la negociación colectiva a las nuevas realidades empresariales, las nuevas formas de organización del trabajo y a adaptarse a las necesidades de las personas trabajadoras y empresas de esos ámbitos sectoriales (economía colaborativa, empresas multiservicios, teletrabajo, desconexión digital, etc.). De hecho durante 2024 y 2025 se aprobaron las primeras recomendaciones y cláusulas tipo en materia de administración y gestión del convenio colectivo, composición equilibrada entre hombres y mujeres en las mesas de negociación, impulso del SERCLA como vía preferente de resolución de conflictos laborales, y de implementación en los convenios colectivos de la cultura de la prevención de la seguridad y salud laboral.

El objetivo estratégico 3 es el que se refiere expresamente a la necesidad de reforzar al propio CARL como órgano de participación institucional y pilar básico de las relaciones laborales en Andalucía. Para ello se prevén tres objetivos operativos que parten de la necesidad de reformar la Ley del Consejo Andaluz de Relaciones Laborales, que data de 1983, y de reforzar sus medios técnicos y personales a la luz de la creciente actividad. Recientemente hemos puesto en marcha una política de comunicación social en redes de la que carecíamos. De otro lado está previsto trabajar en la racionalización de la estructura de la negociación colectiva sectorial de ámbito provincial y autonómico de acuerdo con los intereses de las partes negociadoras y favoreciendo la adecuación de los ámbitos de negociación a cada sector funcional y territorial. De igual modo se contribuirá desde el CARL a facilitar un mayor conocimiento y seguridad jurídica con relación a la determinación de vacíos de cobertura, convenios aplicables a las distintas actividades, ámbitos funcionales, legitimación para negociar y situaciones que afecten a la aplicabilidad de los convenios, determinando, además, la realidad de los ámbitos personales de cobertura.

El objetivo estratégico 6 está relacionado con el fortalecimiento y dinamización del Sistema Extrajudicial de Resolución de Conflictos Laborales de Andalucía (SERCLA), pieza clave dentro de la estructura del CARL,

y para el que se prevé potenciar su utilización como cauce principal para la gestión de la conflictividad laboral a través de la negociación colectiva. De igual manera, se está trabajando ya en la adaptación del marco funcional del SERCLA a las necesidades y circunstancias que exijan el devenir de las relaciones laborales que permita la mejora de la eficacia y la gestión de la calidad en el Sistema. Uno de los frutos tempranos de este objetivo se ha obtenido con la firma del convenio de colaboración entre el CARL y el Consejo Andaluz de Colegios de Graduados Sociales, y la firma del Acta de Adhesión de este Consejo al Código Ético de actuación ante el SERCLA.

Finalmente, el II PANC, haciéndose eco de las directrices del V AENC, ha planteado en sus objetivos estratégicos 5 y 7 la promoción de la igualdad de género, de trato y de oportunidades, y el impulso a la prevención de la violencia sexual y de género en la negociación colectiva, así como la promoción de la sensibilización y generación de cultura preventiva de la seguridad y salud en el trabajo. Ambas cuestiones pasarán por el desarrollo de acciones formativas que podrán concertarse con el Instituto Andaluz de la Mujer y con el Instituto Andaluz de Prevención de Riesgos Laborales, con quienes se han establecido ya protocolos de actuación. Estos dos objetivos estratégicos pretenden fomentar la incorporación de la mujer a la negociación colectiva, tanto en las mesas negociadoras como en las comisiones paritarias e impulsar la prevención de la violencia sexual y de género en la negociación colectiva. Del mismo modo, se prevé la promoción de la sensibilización y generación de cultura preventiva de la seguridad y salud en el trabajo con la incorporación de cláusulas de colaboración con el IAPRL y con la priorización de la acción preventiva sobre factores que generan determinados riesgos frente al mero establecimiento de pluses de toxicidad, penosidad, peligrosidad o insalubridad. Se busca impulsar desde el CARL el compromiso de las empresas y de las personas trabajadoras con el cumplimiento de las normas de prevención.

El II PANC (2023-2025) es un instrumento digno de emulación en materia de colaboración entre los agentes sociales y la Administración Pública andaluza, fruto ello de un proceso de negociación en el seno del Consejo que ha tomado siete meses de trabajo intenso y minucioso. UGT Andalucía, CCOO Andalucía y CEA han mostrado su generosidad y su capacidad de entendimiento de la mano y en el seno del CARL, lo que constituye un enorme motivo de satisfacción para esta presidencia y certifica el excelente estado de salud del Consejo.

3. *Algunos datos y problemas de la negociación colectiva en Andalucía*

En relación con el impulso de la negociación colectiva, el CARL sistematiza sus actuaciones y servicios a través de sus análisis en las 12 Comisiones Permanentes, 4 Plenos y 32 reuniones de las Comisiones Técnicas Provinciales (4 reuniones al año en cada una de las 8 provincias) celebradas anualmente y a través especialmente de la aprobación consensuada y puesta en marcha del II Plan de Apoyo del CARL a la Negociación Colectiva. La gestión que el CARL realiza de la negociación colectiva en Andalucía permite el apoyo en las negociaciones y desbloqueo de los convenios colectivos de los principales sectores de actividad de nuestra comunidad autónoma. Entre las actuaciones realizadas en los últimos tres años se pueden señalar las llevadas a cabo en los convenios colectivos de sectores y empresas estratégicas en las ocho provincias andaluzas, singularmente en el sector de las empresas metalúrgicas, especialmente en la provincia de Cádiz, con fuerte implantación de las empresas navales, o Huelva, con una presencia importante de industria petrolera y química, o en Sevilla, con gran impacto sobre la industria aeronáutica. También ha habido actuaciones relevantes en los convenios del campo y agricultura, singularmente importantes para la economía de Andalucía, como es el caso del campo de Granada o Almería, en el comercio, donde se ha desbloqueado el convenio de Sevilla que afecta a 5.000 empresas y 60.000 trabajadores. Los convenios de limpieza, transporte de mercancías y pasajeros, clínicas privadas, ayuda a domicilio se han atendido directamente desde el CARL mediante asistencias técnicas a las mesas de negociación por técnicos del propio Consejo, o a través de presidencias y mediaciones en el SERCLA y que finalizaron con la firma del convenio.

Con datos cerrados a diciembre de 2025, el número de convenios colectivos vigentes en Andalucía es de 730, que afectan a 379.199 empresas y 1.822.939 trabajadores, lo que supone un incremento del 4,14% respecto del número de convenios de 2024, y incremento de cobertura para empresas del 19,33% y del 14,55 % para trabajadores. De estos convenios, 142 son convenios de sector con cobertura para 378.000 empresas y 1,7 millones de trabajadores, y 588 son convenios de empresa, con cobertura para 591 empresas y 73.000 trabajadores.

Podemos decir que la negociación colectiva en Andalucía goza de un excelente estado de salud, del que se ocupa con dedicación permanente el propio CARL, lo que redunda en un incremento de la confianza pública

que este organismo despierta entre los negociadores de convenios colectivos tanto de sector como de empresa, e implica la prestación de un servicio administrativo directo y gratuito por parte de la Administración laboral andaluza que cada vez está teniendo una mayor demanda. Posiblemente, el mayor y más frecuente problema con el que nos enfrentamos los Consejos de Relaciones Laborales sea el del bloqueo del proceso de negociación colectiva.

La insuficiencia del marco normativo es notoria en este sentido. Existen muchos sectores sin asociaciones empresariales suficientemente fuertes – por ejemplo, ciertos subsectores de servicios, economía doméstica, actividades informales o microempresas aisladas – que no cumplen los criterios cuantitativos de representatividad del ET. Esto impide que puedan ser legitimadas para negociar convenios sectoriales, lo que deja al sector sin regulación colectiva específica. Un ejemplo reciente es el caso del personal al servicio del hogar familiar. Como destaca la reciente sentencia del Tribunal Supremo 386/2025, de 7 de mayo, que confirmó a su vez la del Tribunal Superior de Justicia del País Vasco 2190/2022, de 27 de octubre, no existe vulneración del derecho fundamental a la negociación colectiva porque la patronal vasca CONFEBASK se niegue a constituir la mesa de negociación del convenio colectivo del sector de las personas trabajadoras del hogar familiar para el ámbito del País Vasco.

En sectores con muchos pequeños empresarios o autónomos, la afiliación empresarial a asociaciones suele ser baja, dispersa o incluso inexistente, lo que dificulta que una asociación obtenga un 10-15 % (según ámbito estatal o autonómico) de empresas, o que agrupe a un porcentaje suficiente de los trabajadores afectados. En paralelo, los sindicatos más representativos pueden no tener presencia real en todos los subsectores o todas las provincias del ámbito sectorial. Esta dispersión genera problemas para acreditar el porcentaje mínimo tanto para la representación sindical como para la empresarial. Dado que el artículo 88 exige mayorías cualificadas, si las asociaciones empresariales disponibles no representan los umbrales legales, los interlocutores sindicales pueden negarse a constituir la comisión negociadora, o la patronal puede alegar falta de legitimación, produciéndose estancamientos largos. En algunos casos, la vía excepcional (recurrir a asociaciones de mayor ámbito o incluso la extensión de convenios) no es viable porque no existen o porque su representatividad tampoco está acreditada o reconocida en ese ámbito concreto.

La falta de convenio sectorial supone que los trabajadores de esos sectores quedan bajo convenios empresariales más frágiles o bajo el Estatuto sin regulación sectorial específica, lo que puede implicar condiciones de trabajo peores, menor protección frente a abusos, desigualdad entre empresas del mismo sector, etc. Por otro lado, la acreditación de la representatividad puede implicar exigencias administrativas, pruebas de afiliación, informes, datos estadísticos, etc., muchas veces costosas o complejas para asociaciones pequeñas. Además, no todos los empresarios tienen conocimiento de los requisitos legales o de las implicaciones de no estar asociados.

Para superar estos problemas y lograr que todos los sectores dispongan de un convenio colectivo sectorial cuando sea necesario, se pueden contemplar varias vías. Desde el Consejo Andaluz de Relaciones Laborales entendemos que la vía prioritaria es el diálogo social, es decir, la propia negociación colectiva a nivel andaluz, bien a través de un acuerdo interprofesional que aborde las soluciones necesarias para la resolución de este recurrente problema, bien a través de Recomendaciones o Cláusulas Tipo aprobadas en su Pleno. Pero pueden contemplarse otras vías, algunas podrían requerir cambios normativos en los artículos 87 y 88 del Estatuto de los Trabajadores; otras son de política administrativa, o de apoyo institucional, de incentivos al asociacionismo empresarial, etc.

Los Consejos de Relaciones Laborales autonómicos pueden jugar un papel clave como mediadores, promotores y garantes del cumplimiento del marco normativo. Algunas de sus funciones ya se aplican en este sentido: Diagnóstico sectorial participativo, mediación institucional, registros oficiales de representatividad, o capacidad de propuestas normativas con informes consultivos propios. El Consejo Andaluz de Relaciones Laborales, mediante la medida 5.2 del II Plan de Apoyo a la Negociación Colectiva, está en una posición estratégica para intervenir, consensuando un protocolo de actuación de conformidad con la legislación vigente, o apoyando la creación, acreditación y fortalecimiento de asociaciones empresariales, o promoviendo criterios flexibles cuando la estructura sectorial lo exige, y asegurando que no haya sectores desregulados como consecuencia de ausencias estructurales de actor empresarial legitimado. Una política bien diseñada que combine diagnósticos precisos, incentivos, registro y respaldo normativo puede reducir de forma significativa ese bloqueo, e incluso lograr que todos los sectores cuenten con convenios colectivos sectoriales, favoreciendo una negociación colectiva más inclusiva, equitativa y funcional.

Maria Giovannone

Labour Rights as Human Rights: the Prospects for Substantive and Remedial Protection Offered by Directive (EU) 2024/1760

Contents: 1. Introduction. 2. Due diligence on the human rights track: from CSR practices to hard law. 3. The human rights identification technique. 4 The civil liability regime. 5. Workers as protected subjects. 6. Prospects for the participation of employees and their representatives. 7. Some concluding remarks.

1. *Introduction*

The valuation of workers' rights as human rights is the subject of a wide-ranging and controversial debate[1] which starts from the possible ad-

[1] 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 Harr, *Perspectives on labour and human rights*, in Bellace, Ter Harr (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 Harr (eds.), *Research Handbook on Labour, Business and Human Rights Law*, Edwar Elgar Publishing, 2019, 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 labour doctrine, 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*

vantages that this interpretation offers for the full implementation of social protections, in the face of various forms of vulnerability and new protection needs in the path towards sustainability[2]. In this problematic context, the possibility of equating the fundamental rights of workers with human rights at work has been particularly discussed, both in doctrine and in jurisprudence[3].

Equally debated is the identification of the regulatory techniques – hard or soft, private or public, unilateral or agreed – that must accompany this path, as well as the possibility of identifying a set of *labour human rights* or globally shared *human rights at work*.

Even more complex is the assessment of the remedial effects[4] of the conceptual binomial *labour rights as human rights*: not only because of the difficulties in accessing direct and immediate protection measures for victims of injury, but also because of the identification of the parties against whom such claims should be brought. In fact, while in classic international law the obligations arising from human rights are imposed only on States or, at most, on subjects acting on their behalf, in the more recent perspective of *business and human rights*[5] these obligations also extend to private individuals

Rights and Justice, Giappichelli, Torino, 2024; Ales, Bell, Deinert, Robin-Olivier, *International and European Labour Law*, Nomos, Munchen, Oxford, 2018; Ales, *Diritti sociali e discrezionalità del legislatore nell'ordinamento multilivello: una prospettiva giuslavoristica*, in *DLRI*, 2015, 3, pp. 455-495; Fornasier, Stanzione (eds.), *The European Convention on human rights and its Impact National Private Law*, Intersentia, 2023.

[2] On the topic of sustainability Caruso, Del Punta, Treu, *Il diritto del lavoro nella giusta transizione. Un contributo "oltre" il manifesto*, in *CSDLE "Massimo D'Antona"*, 2023; Perulli (ed.), *La responsabilità sociale delle imprese: idee e prassi*, Il Mulino, 2013; On the topic see Treu, Perulli, *Sustainable Development, Global Trade and Social Rights*, Wolters Kluwer, 2018; Montuschi, Tullini, *Lavoro e responsabilità sociale dell'impresa*, Zanichelli, 2006; Novitz, *Trade, Labour and Sustainable Development*, Elgar Studies in Labour Law, 2024.

[3] On this subject in international doctrine and practice, see Guarriello (ed.), *Impresa e diritti umani sul lavoro tra normativa e prassi*, Franco Angeli, 2025.

[4] For a review of the main critical issues Brino, *Governance societaria sostenibile e due diligence: nuovi orizzonti regolativi*, in *LDE*, 2022, 2, pp. 6-19. On jurisdictional conflicts limiting access to justice, Brino, *Diritti dei lavoratori e catene globali del valore: un formante giurisprudenziale in via di definizione?*, in *DLRI*, 2020, 167, 3, pp. 451-70; Bonfanti, *Accesso alla giustizia per violazioni dei diritti umani sul lavoro lungo la catena globale del valore: recenti sviluppi nella prospettiva del diritto internazionale privato*, in *DLRI*, 2021, 171, 3, pp. 369-390; Mongillo, *Imprese multinazionali, criminalità transfrontaliera ed estensione della giurisdizione penale nazionale: efficienza e garanzie "prese sul serio"*, in *DLRI*, 2021, 170, 2, pp. 179-213.

[5] For a framing of the issues Caretti, Tarli Barbieri, *I diritti fondamentali*, Giappichelli, 2022; Pisillo Mazzeschi, *Diritto internazionale dei diritti umani*, Giappichelli, 2023; Marchesi, *La*

and, in particular, to companies in the specific form of due diligence: an obligation of means consisting of preventing, mitigating and avoiding the violation of human rights[6].

However, the need for this approach to labour protection, promoted by national, international and European doctrine, can be observed from two distinct perspectives. That of the *Global North*[7], where there is a need for regulatory techniques capable of satisfying new protection needs that go beyond typological qualification[8]. That of the *Global South*, where the full affirmation of social rights within the scope of human rights is still ongoing and slowed down by dumping phenomena in global supply chains[9].

protezione internazionale dei diritti umani, Giappichelli, 2023. In particular, on business and human rights, from an internationalist perspective Fasciglione, *Impresa e diritti umani nel diritto internazionale. Teoria e prassi*, Giappichelli, 2024; from the labour perspective see Sanguineti Raymond, *Il nuovo diritto transnazionale del lavoro nelle catene globali del valore: caratteristiche e modello regolatorio*, in *DRI*, 2025, 1, pp. 1-25; Frosecchi, *Percorso di lettura sul concetto di "diritto transnazionale del lavoro"*, in *DLRI*, 2017, 153, 1, pp. 219-226, as well as most recently Carta, *Lavoro e responsabilità dell'impresa nello spazio giuridico globa*le, Giappichelli, 2025.

[6] Ales, *Tracing the Social Sustainability Discourse within EU Law: the Success of the "Labour-Rights-as-Human-Rights" Approach*, in *DLM*, 2024, p. 30; Guarriello, *Take Due Diligence Seriously: comment alla direttiva 2024/1760*, in *DLRI*, 2024, 3, pp. 245-298; Mocella, *Catene globali del valore e tutela dei diritti umani*, in *DRI*, 2025, 1, pp. 26-44; Valenti, *Riflessioni in tema di sostenibilità sociale nel diritto del lavoro tra tecniche di tutela e prove di* regulatory compliance, in *DLM*, 2024, 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 *AmbienteDiritto.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 *DLM*, 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 ; Murgo, *Il ruolo dei lavoratori nella due diligence sociale e ambientale*, in *DRI*, 2025, 1, pp. 45-74.

[7] See Buchanan et al. (eds.), *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.

[8] On the subject, in the national legal system see Perulli, Treu, *"In tutte le sue forme e applicazioni": per un nuovo Statuto del lavoro*, Giappichelli, 2022; Zoppoli, *Prospettiva rimediale, fattispecie e sistema nel diritto del lavoro,* Editoriale Scientifica, 2022; Ciucciovino, *La crisi della fattispecie e l'approccio rimediale nella discussione giuslavoristica*, in *DLM*, 2024, pp. 5-22; Perulli, *Cittadinanza, subordinazione e lavoro nel diritto del lavoro che cambia*, in *LD*, 2024, 1, pp. 44-63; Tullini, *Cittadinanza sociale, nuovi diritti, universalismo delle tutele*, in *LD*, 2024, 1, pp. 65-76; Razzolini, *Effettivita e diritto del lavoro nel dialogo fra ordinamento dell'Unione e ordinamento interno*, in *LD*, 2024, 1, pp. 447-467.

[9] Borelli, Orlandini, *Lo sfruttamento dei lavoratori nelle catene di appalto*, in *DLRI*, 2022,

In this context, this essay analyses the possible impact that the valorisation of the binomial *labour rights as human rights* may have on the techniques of substantive and remedial protection of individual and collective labour rights in the context of global supply chains, starting from the recent provisions of Directive (EU) No. 2024/1760 on corporate sustainability due diligence[10].

In fact, the Directive is part of a broader and more complex path of regulatory hardening of due diligence, prompted by international market dynamics and already experienced in recent years in some EU and non-EU countries. To this end, first of all, it identifies for the first time – with an act endowed with primacy over domestic laws[11] – the individual and collective rights of workers catalogued as human rights that generate direct obligations for companies. Secondly, it regulates new participation and information rights for workers and their representatives in order to prevent possible violations of these rights by the companies themselves[12].

The potential of the Directive is thus analysed with particular reference to the prospects for participatory governance of business risk, which seems to shift the focus of human rights protection from remedial action in response to a violation that has already occurred to the prevention of the violation itself. Furthermore, the achievement of this objective is entrusted to the proceduralisation of the obligation of means – namely due diligence – whereby, through a risk-based approach, the company also contributes to determining the scope of exact fulfilment and the technical parameters for assessing its potential civil liability.

173, 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*, 2020, 166, 2, pp. 173-185.

[10] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (OJEU, 5.7.2024).

[11] See on the topic Borelli, Orlandini, Tufo, *Le norme internazionali del lavoro nella giurisprudenza italiana*, in *DLRI*, 2024, 1-2, pp. 33-59.

[12] On the new voice instances Esposito, *La conformazione dello spazio e del tempo nelle relazioni di lavoro: itinerari dell'autonomia collettiva*, presentation given at the AIDLaSS Study Days in Campobasso, 25-26 May 2023.

2. *Due diligence on the human rights track: from CSR practices to hard law*

It is well known that Directive (EU) 2024/1760 represents the culmination of a broader process of regulating (unilateral and negotiated[13]) Corporate Social Responsibility practices[14], which have guided multinational companies in adopting human rights standards of conduct.

Indeed, due diligence was first defined by the 2011 UN Guiding Principles on Business and Human Rights[15] as an obligation for companies to identify, prevent and mitigate human rights risks and impacts arising from their activities and business relationships along the value chain, and to account for actions taken to address them[16]. Its implementation therefore consists of the adoption of a trans-company and trans-national risk management system anchored to respect for internationally recognised human rights.

In recent years, there have been a number of national experiments that, with varying degrees of intensity, have attempted to transfer due diligence into hard regulation pending the adoption of an international treaty (now in its third draft[17]) that recognises the direct liability of companies for violating fundamental rights along the supply chain. This has occurred in

[13] For a framing of CSR practices in the international scenario, Brino, Perulli, *Diritto Internazionale del Lavoro*, Giappichelli, 2023, pp. 197-243. For an analysis of the value and different aspects of CSR, Gottardi, *CSR da scelta unilaterale datoriale a oggetto di negoziazione collettiva: la responsabilità sociale contrattualizzata*, in Guarriello, Stanzani (eds.), *Sindacato e contrattazione nelle multinazionali. Dalla normativa internazionale all'analisi empirica*, Franco Angeli, 2018, pp. 58-75. See also the important examples of negotiated practices contained in the framework agreements respectively of Eni s.p.a., *Global Framework Agreement on International Relations and Coroporate Social Responsibility*, 2019 under renewal and Enel Group, *Global Framework Agreement on Fundamental Rights and Social Dialogue in the Enel Group*, 2013 renewed in 2023.

[14] For an analysis of the value and different aspects of CSR, Gottardi, *CSR da scelta unilaterale,* cit., pp. 58-75.

[15] On the 2011 UNPG, see Brino, *Diritto del lavoro e catene globali del valore*, Giappichelli, 2020, p. 43 ff.; Partiti, *Polycentricity and polyphony in international law: interpreting the corporate responsibility to respect human rights*, in *ICLQ*, 2021, 70, 1, pp. 133-164. Ruggie, Sherman, *The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, in *EJIL*, 2017, 28, 3, pp. 921-928.

[16] Principle 15, Guiding Principles.

[17] See OHCHR, OHCHR, Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, Third Revised Draft, OEIGWG Chairmanship, 17 August 2021, available at: https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf.

particular in California[18], in the United Kingdom[19], in the Netherlands[20], in Norway[21] and, even more, in France[22] and in Germany[23]. Conversely, in Italy, due diligence remains an obligation to be to be established following the transposition of the Directive, albeit starting from certain devices already existing in the current legal framework, for example in the area of occupational health and safety protection and corporate compliance.

The duty of due diligence requires companies to internalise, among other things, numerous social risks that lie outside their legal jurisdiction, leveraging the economic and contractual power of multinationals; this is due to the control they exercise over satellite companies and suppliers along the supply chain.

Thus, firstly, it pushes national legal systems to incorporate sustainability, with binding legal requirements and specific sanctions. Secondly, it completes the apparatus of those duties of transparency, communication and information set out in the recent EU legislation on social matters as well as on competition[24] , addressing them to a very wide audience of stakeholders to whom new rights of participation are recognised.

The Directive has several interesting aspects and some critical issues. However, here we are interested in understanding how the introduction of the duty of due diligence and the related liability regime favour, on the one hand, the emergence of new rights of information and participation of workers and their representatives, and, on the other hand, the direct extension to companies of obligations arising from human rights. All of this, moreover, with reference to a defined – but potentially expandable – set of first, second, third and fourth generation human rights mentioned in the Annex.

In fact, the Directive obliges big companies to structure a risk management system against (actual or potential) social and environmental externalities linked to their activities along the global supply chain, requiring States

[18] California Transparency in Supply Chains Act of 2010.

[19] Modern Slavery Act of 2015.

[20] Child Labour Duty of Care Act of 2019.

[21] Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act) of 18 June 2021.

[22] Loi n° 2017-399.

[23] Lieferkettensorgtfaltgesetz of 2021. For a comparison of the German and Norwegian models, Krajewski, Tonstad, Wohltmann, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, in *BHRJ*, 2021, 6, pp. 550-558.

[24] Reference is made, for instance, to Directive (EU) No. 2024/2831 and Regulation (EU) No. 2024/1689.

to adopt monitoring and control mechanisms and a system of sanctions to protect this obligation. The objective is to prevent and stop negative impacts that the activities of the company and its direct and indirect partners may have on a natural or legal person, causing damage to human rights, including workers' rights, and the environment. The *trait d'union* between these mechanisms, as will be seen, is the provision of specific information obligations and the involvement of a wide range of stakeholders among which workers and their representatives stand out.

3. *The human rights identification technique*

The human rights listed in the first part of the Annex are: the right to life; the prohibition of torture and cruel, inhuman, or degrading treatment; the right to liberty and security, privacy and respect for family life, freedom of thought, conscience and religion, but also the prohibition of causing any degradation of soil, water and air with harmful emissions, excessive use of water and devastating land or other natural resources such as deforestation; the right of individuals, groupings and communities to lands and resources necessary for subsistence.

In addition to these rights recognised to every human being, there are the human rights of the working person, such as the right to just working conditions, to a fair wage for employees and an adequate living income for the self-employed or smallholders, to healthy and safe working conditions and reasonable limitation of working hours; the prohibition of restrictions on access to adequate housing if provided by the employer, as well as food, clothing, water and sanitation and hygiene in the workplace; the right of children to the highest standards of health, education, an adequate standard of living, to be protected from economic exploitation and from work that is hazardous to their education or harmful to their physical, mental, spiritual, moral or social development; the prohibition of child labour before the completion of compulsory schooling and in any case under the age of 15; the prohibition of the worst forms of child labour; the prohibition of forced or compulsory labour; the prohibition of all forms of slavery, the slave trade and human trafficking; freedom of association, assembly, the right to organise, to strike and to bargain collectively; the right to equal pay and the prohibition of discrimination in employment.

The listing of human rights and fundamental freedoms is followed by a second part in which the relevant sources are indicated: the 1966 UN International Covenant on Civil and Political Rights; the 1966 UN International Covenant on Economic, Social and Cultural Rights; the 1989 UN Convention on the Rights of the Child; the fundamental ILO Conventions on Freedom of Association no. 87/1948, on the Right to Organise and Collective Bargaining No. 98/1949, on the Prohibition of Forced Labour No. 29/1930 and the 2014 Protocol, on the Abolition of Forced Labour No. 105/1957, on the Minimum Age for Employment No. 138/1973, on the Worst Forms of Child Labour No. 182/1999, on Equal Remuneration No. 100/1951 and on the Prohibition of Discrimination in Employment and Occupation No. 111/1958. As mentioned, these are the eight core ILO conventions recognised by the 1998 Declaration on Fundamental Principles and Rights at Work, to which two conventions on the protection of a safe and healthy working environment were added in 2022, not yet included in the list of the Annex, awaiting ratification by all Member States. There is no reference to the ILO conventions on health and safety at work and Convention No. 190/2019 on Violence and Harassment as they have not yet been ratified by all Member States. The second part of the Annex then contains the list and the relevant international or European Union environmental protection instruments.

The solution of listing human rights and environmental protection provisions in an annex to the Directive, instead of in the body of the Directive itself, seems to respond to the need not only to facilitate their identification in the most shared way possible, but also to facilitate their possible modification and integration over time, in relation to the emergence of new risk factors.

In this regard, in fact, Art. 3.2 provides for a specific delegation to the Commission, while Art. 36(d) provides that in the Commission's report to the European Parliament and the Council on the state of application of the Directive six years after its entry into force, and every three years thereafter, it is to be assessed, inter alia, whether it is appropriate to proceed, in the light of international developments, to update the coverage of risks of negative impact on human rights, with particular regard to good governance. Furthermore, Recital 32 states that the Directive: "aims to comprehensively cover human rights […]. In order to achieve a meaningful contribution to the sustainability transition, due diligence under this Directive should be

carried out with respect to adverse human rights impacts on persons resulting from the abuse of one of the rights as enshrined in the international instruments listed in Part I, Section 1, of the Annex to this Directive. The term 'abuse' should be interpreted in line with international human rights law. In order to ensure comprehensive coverage of human rights, an abuse of a human right not specifically listed […] should also form part of the adverse human rights impacts […]". Finally, the possibility of adoption of additional standards by companies is foreseen (see recital 33).

The technique for identifying human rights adopted by the Directive therefore appears convincing because, although it formally excludes certain ILO conventions on core labour standards for the reasons mentioned above, it aims to achieve a dynamic and progressive process of regulatory hardening of due diligence by entrusting not only national institutions and governments, but also companies themselves, with the development of additional and possibly more specific standards of protection.

4. *The civil liability regime*

Article 29(1) provides that civil liability exists when (i) the company has intentionally or negligently failed to comply with its obligations to prevent and stop adverse impacts in accordance with the rights, prohibitions and obligations contained in the Annex to the Directive; and (ii) as a result of such failure, damage has been caused to the legal interests of the natural or legal person that are protected under national law. The four conditions and due diligence obligations that satisfy the fulfilment are thus clarified[25].

The debate on the liability regime has been a very long one in the European institutions. In fact, in the text of the proposal approved by the Commission on 23 February 2022[26], Article 22 established the civil liability of the company in the event that it had not adopted a risk management system against negative social and environmental externalities (Articles 7-8), or in the event that, due to this omission, there had been a harmful nega-

[25] On this point, 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. 511-512.

[26] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937 (Brussels, 23.2.2022, COM(2022) 71 final, 2022/0051 (COD)).

tive impact consisting of conduct detrimental to human rights (including workers' rights) or the environment "which should have been identified, prevented, cushioned, stopped or minimized in the entity" through specific preventive measures (par. 1). In the event that the negative impact was caused by an indirect partner (i.e. by an entity in the supply chain with which the company does not have direct contractual relationships), the liability of the company that had fulfilled these obligations was excluded "unless, in the specific case, it was unreasonable to expect that the concrete intervention, including with regard to the verification of compliance, was capable of preventing, cushioning or stopping the negative impact or minimizing its magnitude". In this circumstance, those preventive and remedial initiatives, initiated by the company, directly related to the damage in question should have been evaluated (par. 2).

The Council's amendments, dated 30 November 2022[27], made substantial changes. In particular, the company would have been held liable for damage caused to a natural or legal person in the event that it had "intentionally or negligently failed to comply with the obligations" of *due diligence* (Article 22(1)(a)) and, as a result of such non-compliance, "damage had been caused to the legal interest of the natural or legal person protected by national law" (Article 22, par. 1, letter b)). In any case, a company could not have been held liable if the damage had been caused only by its business partners. The conditions under which liability is triggered have thus been clarified – the damage, the breach of the duty of care, the causal link between the damage and the breach, the specification of fault (intent or negligence) – and the relevant law, precisely the domestic law of the Member States, has been specified in order to avoid undue interference by other jurisdictions in the field of compensation for tort[28].

The European Parliament's position of 1 June 2023, for its part, proposed a similar approach[29] by providing that civil liability is triggered when, as a result of a breach of due diligence obligations, "the company has caused or contributed to an actual adverse impact that should have been identified,

[27] EU Council, General approach to the Proposal, Brussels, 30 November 2022, 15024/1/22 REV 1.

[28] *Ibid*. Section III(E)(27).

[29] European Parliament amendments adopted on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, P9_TA(2023)0209.

prioritised, prevented, mitigated, stopped, repaired or minimised in extent by the appropriate measures provided for in this Directive, and which has caused damage". The four conditions defined by the EU Council have thus been re-proposed, with the clarification of the *due diligence* obligations that meet the fulfilment[30] and deleting the reference to national law.

The liability of directors, provided for in the original proposal, has instead been completely eliminated because it risks "compromising the duty of directors to act in the best interest of the company"[31] and, therefore, the maximization of corporate profits[32]. Thus, the system of corporate liability has definitively maintained the approach desired by the Council. Article 29(1) provides that civil liability exists when (i) the company has failed to comply with its obligations to prevent and stop adverse impacts intentionally or negligently, in compliance with the rights, prohibitions and obligations contained in the Annex to the Directive; and (ii) as a result of that non-compliance, damage has been caused to the legal interests of the natural or legal person which are protected by national law.

Anyway, the proposal to establish a liability regime for companies, as is well known, has met with much resistance. First of all, because it evokes the unresolved debate on the corporate purpose of the company and the need to balance the interests of shareholders with those of stakeholders[33], given that sustainable development should by definition take into account the

[30] In both negotiating positions, little attention is paid to the obstacles related to victims' access to justice. On this point, Borzaga, Mussi, *Lights and shadows of the recent proposal for a directive on the duty of due diligence of companies in the field of sustainability*, in *LD*, 2023, 3, p. 511-512.

[31] *Ibid.*, sec. III(F), par. 30-32.

[32] Indeed, in its resolution of 10 March 2021 that launched the legislative debate, the European Parliament called for the members of the company's administrative, management and supervisory bodies to be responsible for the adoption and implementation of its sustainability and *due diligence strategies* (recital 45 of the proposal for a directive contained therein).

[33] Libertini, *Economia sociale di mercato e responsabilità sociale dell'impresa*, in *Rivista ODC*, 2013, 3, pp. 1-27; Libertini, *Dalla responsabilità sociale all'impresa sostenibile*, in the context of the seminar *L'impresa sostenibile* held at the Department of Law of the University of Catania on 16 December 2022; Amatucci, *Responsabilità sociale dell'impresa e nuovi obblighi degli amministratori. La giusta via di alcuni legislatori*, in *GCom*, 2022, 4, p. 617/I; Keay, *The corporate objective*, Edward Elgar, 2011, p. 70 ff.; Barcellona, *La* sustainable corporate governance *nelle proposte di riforma del diritto europeo: a proposito dei limiti strutturali del c.d.* stakeholderism, in *RSoc*, 2022, 1, pp. 1-52; Kun, *How to Operationalize Open Norms in Hard and Soft Laws: Reflections Based on Two Distinct Regulatory Examples*, in *IJCL*, 2018, 34, 1, p. 39; Richter, *Long-Termism*, in *RSoc*, 2021, 1, pp. 30-31. On the hegemony *of shareholderism*, also Vitols, *What is the Sustainable Company?*, in Vitols, Kluge (eds.), *The Sustainable Company: a new approach to corporate governance*, I, Etui, 2011.

interests of those who may be harmed by the production activity – workers, trade unions, local communities – by involving them in a transparent manner in certain stages of the decision-making and production process.

Above all, however, and this is the most interesting aspect of the operational application of due diligence, there is concern that civil liability for failure to comply with social and environmental protections is too vague because it is based on principles and rights that lack sufficient prescriptive content, enshrined in international instruments addressed to the States called upon to implement them. In fact, the Annex to the Directive contains a list of principles and rights enshrined in specific international acts that should guide the exercise of due diligence, including the International Covenant on Economic, Social and Cultural Rights and the ILO Conventions[34]: the exemption resulting from compliance with the duty of due diligence would then become ambiguous, with the consequence of determining a possible objectification of civil liability on the part of entities (and directors)[35]. In other words[36], there is a risk of uncertainty in the mechanisms for determining civil liability considering the particularly afflictive repercussions that this could have on case law, which has the delicate function of safeguarding legal certainty together with the other fundamental values underlying the discipline in question.

On the other hand, however, it is important to stress how the Directive invites companies to supplement the minimum standards of protection enshrined in national and international sources with organisational and management procedures. In fact, due diligence does not translate into an obligation to "do more" than what is required by law, but rather into a

[34] On this point see O'Brien, Martin-Ortega, *Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective*, In-depth analysis, European Paliament (EP/EXPO/DROI/FWC/2019-01/Lot6/1/C/16), p. 18. See also the criticism by Murgo, *La proposta di direttiva sulla* corporale sustainability due diligence *tra ambizioni e rinunce*, in *DRI*, 2022, 3, p. 946.

[35] On the risk of incurring (quasi) strict liability, Ventoruzzo, *Note minime sulla responsabilità civile nel progetto di direttiva Due Diligence*, in *RSoc*, 2021, 2-3, p. 381 ff.

[36] See Calvosa, *La governance delle società quotate italiane nella transizione verso la sostenibilità e la digitalizzazione*, in *RSoc*, 2022, 2-3, p. 314. Similarly, Presti, *La sostenibilità nel diritto dell'impresa e delle società: l'auspicabile ritorno della regolazione pubblica*, in *JUS*, 2022, 3, p. 394; Carella, *La responsabilità civile dell'impresa transnazionale per violazioni ambientali e di diritti umani: il contributo della proposta di direttiva sulla* due diligence *societaria a fini di sostenibilità*, in *FSJELS*, 2022, 2, p. 27; Mark, *Corporate sustainability due diligence: More than ticking the boxes?*, in *MJECL*, 2022, 29, 3, pp. 302-303.

duty to manage risk through a preventive system designed to mitigate the negative effects caused by the company along the chains of activities. In this logic, therefore, civil liability reinforces the organisational virtuosity of the company in terms of primary prevention. Essentially, this is civil liability for one's own actions, which derives from an obligation of means rather than results; an obligation that translates into a duty to set up a suitable organisation to prevent the negative externalities of production activities upstream. For this reason, the list of international acts contained in the Annex represents a support in identifying the social and environmental risks to be prevented, certainly not an exhaustive evaluation parameter of the fulfilment of the duty of diligence[37]. And it could not be otherwise, since the global duty of diligence cannot be based on mere compliance with disparate national laws that impose different standards of protection[38].

This interpretation is supported by the wording of Article 29 itself, which excludes liability in cases where, in the event of damage caused exclusively by a business partner, the company has fulfilled its due diligence obligations[39]. Liability is therefore based on organisational fault, if not for wilful misconduct, then for negligence (i.e., for failing to comply with the duty of diligence), and not for the direct violation of human rights and environmental protection, thereby removing the risk of incurring strict liability.

In this way, due diligence should not expand the already questionable hypotheses of strict liability, in which the obligation to compensate damages is independent of fault and, therefore, of the assessment of the diligence of conduct[40]. It is in these terms that companies seem to be called upon to

[37] Nogler, Lieferkettensorgfaltspflichtengesetz: *perché è nata e quali sono i suoi principali contenuti*, in *DLRI*, 2022, 173, 1, p. 17, interprets the list contained in the German law in the same way.

[38] See on the topic Scheltema, *An assessment of the effectiveness of international private regulation in the corporate social responsibility arena: legal perspective*, in *MJECL*, 2014, 21, 3, pp. 383-405.

[39] For this opinion also Bonfanti, *Catene globali del valore, diritti umani e ambiente, nella prospettiva del diritto internazionale privato: verso una direttiva europea sull'obbligo di diligenza delle imprese in materia di sostenibilità*, in *JUS*, 2022, 3, p. 298.

[40] Borelli, Izzi, *L'impresa tra strategie di* due diligence *e responsabilità*, in *RGL*, 2021, 4, p. 554 ff. who instead propose the use of joint and several liability of an objective nature, which disregards culpable conduct, as a remedial technique, alongside due diligence which instead is at the preventive level.

adhere more strictly to the standards of professional diligence and fairness with a view to strengthening good corporate governance through appropriate enterprise risk management policies[41], which do not alter the corporate purpose of the company but impose the conditions for achieving it[42].

Read in this sense, therefore, the liability regime appears persuasive because it promotes, in favour of the company and the people who hold primary management positions within it, an organisational culture of sustainability rather than a culture of blame, through the introduction of preventive obligations assigned, as will be seen shortly, to participatory protocols[43].

The civil liability regime, at present, is one of the profiles affected by the Omnibus Package. Firstly, restricting the subjective scope of mandatory due diligence as a preventive obligation. In fact, the proposal envisages limiting the due diligence obligation on parent companies no longer with reference to the entire chain of activities envisaged by the Directive, but only on subsidiaries and direct partners (no longer on indirect partners), unless "plausible" information, or complaints or information conveyed through credible media emerge, or NGO reports and files are published, or, again, incidents or risks already identified occur that concern indirect partners.

Secondly, the Commission's proposal has direct implications for the remedial mechanisms arising from breaches of due diligence obligations.

In fact, while preserving the regime of civil liability and the related compensation obligations, it proposes to eliminate certain aspects aimed at ensuring the harmonisation of the remedial instrument among the various countries, such as: the possibility of promoting collective action; the easing of the burden of proof on the claimant; the conferral on the relevant provisions of the status of mandatory rules, with a view to granting them extraterritorial effect, which is useful in the context of private international law.

[41] Cerrato, *Appunti per una via italiana all'ESG. L'impresa costituzionalmente solidale (anche alla luce dei nuovi artt. 9 e 41, comma 3, Cost.)*, in *An. giur. ec.*, 2022, 1, p. 93.

[42] In fact, Tombari, *Riflessioni sullo statuto organizzativo dell'impresa sostenibile tra diritto italiano e diritto europeo*, in *An. giur. ec.*, 2022,1, p. 143, concludes that, if we were waiting for an answer at the European level on the subject of the "purpose of the company" and the directors' duties, we are destined to be disappointed.

[43] Brino, *La governance societaria sostenibile: un cantiere da esplorare per il diritto del lavoro?*, in *LD*, 2023, 3, p. 445.

5. *Workers as protected subjects*

Another important aspect is the fact that the operational implementation of due diligence requires the necessary contribution of stakeholders.

Indeed, the binomial of "diligence and responsibility" is in fact conditioned by the extensive participation, *ratione materiae*, of the various stakeholders. The scope of beneficiaries of these information and participation rights is broad and includes "company's employees, the employees of its subsidiaries, trade unions and workers' representatives, consumers and other individuals, groupings, communities or entities whose rights or interests are or could be affected by the products, services and operations of the company, its subsidiaries and its business partners, including the employees of the company's business partners and their trade unions and workers' representatives, national human rights and environmental institutions, civil society organisations whose purposes include the protection of the environment, and the legitimate representatives of those individuals, groupings, communities or entities" (Article 3(n)).

For its part, Recital 65 emphasises that companies must pay particular attention to vulnerable stakeholders when taking appropriate measures to achieve effective stakeholder involvement, by expanding the list of those to be involved and informed on a case-by-case basis. On the other hand, such a broad list of stakeholders could entail the need to mediate between potentially conflicting instances[44], in relation to which companies will have to selectively recognise, for some rather than others, rights of voice and action, as well as the related representation procedures[45].

With particular regard to employees, however, a more specific reflection must be made on the definition accepted by the Directive since, in the context of "stakeholders", it mentions only "company's employees" and "employees of its subsidiaries", without any specification of the type of contract considered for this purpose. Consequently, if the reference to

[44] As has often been the case between labour and environmental protection. The reference to the Italian "Ilva case" is obvious. See, among others, Tullini, *I dilemmi del caso Ilva e i tormenti del giuslavorista*, in *Ius17*, 2012, 5, 3, pp. 163-169. For a historical reconstruction of the case, Laforgia, *Se Taranto è l'Italia: il caso Ilva*, in *LD*, 2022, 1, pp. 29-52.

[45] Cian, *Clausole statutarie per la sostenibilità dell'impresa: spazi, limiti e implicazioni*, in *RSoc*, 2021, 2-3, p. 497, which offers interesting reflections on the ability of statutory autonomy to impose "sustainable" management conduct on directors.

subordinate employment in its various forms seems to be almost taken for granted, the same cannot be said for coordinated and continuous work and self-employment. In this respect, of little prescriptive value and limited scope is Recital 34, according to which enterprises should exert their influence to ensure "a living income for self-employed workers" along the chain of activities.

On the other hand, it is also true that the subsequent reference in the definition to "trade unions and workers' representatives" suggests a potential enlargement of the subjective scope of the rights in question to include not only trade union but also direct representation, expressed by broadly understood groups and categories of workers (not already employees).

Such an extensive reading, more generally, seems consistent with the most recent European provisions on transparency in labour relationships (Directive No. 2019/1152/UE), whistleblowing (Directive No. 2019/1937/EU) and, even more, with the definition of stakeholders accepted by Directive (EU) No. 2022/2464[46] on corporate sustainability reporting. On the other hand, if the integration of sustainability in business activities is to be translated into rules of conduct and organisation, one must be prepared to broaden the range of stakeholders in the production system in order to find joint and realistically feasible organisational solutions, in a socially transactional logic.

This framework includes the provision for the direct involvement of stakeholders in management decisions and the importance given to this participatory aspect by Dir. (EU) No. 2024/1760, which supplements and strengthens the provisions of Dir. (EU) No. 2022/2464. In fact, while in the latter the obligation of disclosure on sustainability policies is limited to the communication phase, placed downstream of the risk management system[47], in Dir. (EU) No. 2024/1760 this obligation also includes the preventive phase of designing internal sustainability policies and due diligence procedures, as will be seen shortly.

[46] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

[47] See Rescigno, *Note sulle regole dell'impresa sostenibile. Dall'informazione non finanziaria all'informativa sulla sostenibilità*, in *An. giur. ec.*, 2022, 1, pp. 165-184; Faleri, *Diritti di informazione e principio di trasparenza per una governance societaria sostenibile*, in *LD*, 2023, 3, p. 545 ff.

6. *Prospects for the participation of employees and their representatives*

The entire due diligence policy must be developed in prior consultation with the company's employees and their representatives (Article 7.2). The policy must include: a description of the company's approach; a code of conduct containing the rules and principles to be followed; the procedures put in place to integrate due diligence into the company's relevant policies and to implement due diligence.

In addition, there is an obligation to consult interested parties at several stages of the due diligence process and, among these, preventive moments are also included (Art. 13). Above all, consultation is provided for when gathering information useful for identifying, assessing and prioritising adverse impacts, as well as for developing preventive (and corrective) action plans.

However, there is a possible "loophole". In particular, when it is not "reasonably possible to carry out effective engagement with stakeholders", companies must seek the advice of experts "who can provide credible insights into actual or potential adverse impacts" (para. 4). The use of external experts therefore seems rather discretionary and risks supplanting social dialogue.

However, it is to be welcomed that the involvement of stakeholders in the development of due diligence includes the drafting of codes of conduct. Indeed, it is desirable that the procedures for the prevention of negative impacts – a fundamental parameter for the assessment of liability and a strong point for the actual success of corporate procedures in this regard – be entrusted with operational instruments that are not unilateral but negotiated.

Therefore, the impression is that, especially in the regulation of the preventive apparatus of the due diligence system, hand can be put on a corporate governance inclined to adopt sustainable strategic choices that are as negotiated and participated in as possible[48] . This presupposes that the definition of a broad group of stakeholders corresponds to the attribution of a more structured and preventive right of participation in top-level decision-making processes, in direct relationship with shareholders and institutional investors, in order to remedy the information asymmetries

[48] See 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.

regarding the negative social and environmental impacts of business activities, which affect not only stakeholders but also company representatives themselves[49].

This is precisely where workers' representatives come in, as they are able to guide the company's strategies and management decisions thanks to their long-standing expertise in steering the behaviour of (multinationals) companies and workers towards general, higher and global interests[50] that are not covered by the protective structures of national legal systems[51]. In fact, although the Directive treats workers and their representatives almost on a par with other stakeholders, and despite the fact that in terms of due diligence the values at stake (human rights, including workers' rights, and environmental protection) are considered to be equally important[52], in most national legal systems, workers' representatives are already privileged stakeholders because they are more institutionalised than others within the company[53]. On the other hand, it is precisely from collective bargaining that is expected to urge companies to comply with statutory rules, contractual obligations and codes of conduct that act as external limits to the exercise of private economic initiative. This is not only to protect workers, but also to safeguard the (eco)sustainable conversion[54] of enterprises in a broad sense, through atypical social bargaining[55].

[49] Strampelli, *La strategia dell'Unione europea per il capitalismo sostenibile: l'oscillazione del pendolo tra amministratori, soci e* stakeholders, in *RSoc*, 2021, 2-3, p. 371 ff.

[50] Tombari, *Corporate purpose e diritto societario: dalla "supremazia degli interessi dei soci" alla libertà di scelta dello "scopo sociale"?*, in *RSoc*, 2021, 1, p. 3. On the topic of worker participation, Ales, *Libertà sindacale vs partecipazione? Assenze, presenze e possibilità nello Statuto dei lavoratori*, in *RGL*, 2020, 1, pp. 129-147; Perulli, *Workers' Participation in the Firrn: Berween Social Freedom and Non-Domination*, in *Working Papers CSDLE "Massimo D'Antona" - INT*, 2019, p. 149. Critical on this point is Calvosa, *La governance delle società quotate italiane*, cit., p. 317 ff., according to whom the need to select the stakeholders to which to attribute some form of corporate power extends the director's managerial discretion too much.

[51] Marchetti, *Il bicchiere mezzo pieno*, in *RSoc*, 2021, 2-3, p. 344.

[52] As Ferrante, *Diritti dei lavoratori e sviluppo sostenibile*, in *Jus*, 2022, 3, p. 359, points out, workers' organisations are equated with other intermediate bodies.

[53] For a review, Malberti, *L'*environmental, social, and corporate governance *nel diritto societario italiano: svolta epocale o colpo di coda?*, in *DLRI*, 2020, 168, 4, pp. 661-680.

[54] On this topic see Barca, *On working-class environmentalism: a historical and transnational overview*, in *Interface*, 2012, 4, 2, p. 75. Doorey, *Just Transitions Law: Putting Labour Law to Work on Climate Change*, in *JELP*, 2017, 30, 2, pp. 201-239.

[55] Piglialarmi, *La contrattazione sociale territoriale: inquadramento giuridico del fenomeno attraverso l'analisi contrattuale*, in *DRI*, 2019, 2, pp. 713 ff.

Therefore, it seems that the debate on the implementation of the Directive should focus on the search for legal and negotiating devices that make due diligence effective within the company organisation, in the complex procedures of risk mapping and prevention. These are instruments that must bring together the skills and knowledge of the company and stakeholders to draw up a credible action plan that is agreed upon by all parties, remedying the lack of legitimacy and effectiveness of unilateral tools[56]. It is in these terms that the – both upstream and downstream – information and participation of workers and their representatives can contribute to preventing the social externalities of production activity and to delimiting the company's civil liability.

This scenario does not seem to be called into question by the Omnibus package, despite the downsizing of the list of stakeholders proposed by it, in which however workers and their representatives continue to feature.

7. *Some concluding remarks*

In light of what has been said so far, there is no doubt that Dir. (EU) No. 2024/1760 is part of the broader regulatory framework of transparency and information obligations placed on companies for the operational introduction of sustainability[57]. Equally evident is the fact that these new-generation duties correspond, in perspective, to new rights of (direct and indirect) participation, action and negotiation of workers and their representatives.

Then, what is particularly innovative is that the enforcement of this due diligence system is entrusted to a stringent civil liability regime, which is unprecedented compared to the milder regulatory mechanisms of Corporate Social Responsibility.

From a transdisciplinary perspective, moreover, the Directive seems to mark a turning point in the context of international human rights law for two reasons. Firstly, because it adds an important piece in the controversial process of enucleating a (globally) shared set of labour human rights, placing them on an equal footing with classic civil and political rights on the one

[56] As pointed out by Patz, *The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment*, in *BHRJ*, 2022, 7, pp. 291-297.

[57] On the prospects for the involvement of social partners in the current transition processes, Caruso, Del Punta, Treu, *Il diritto del lavoro nella giusta transizione*, cit.

hand and new-generation environmental rights on the other. More specifically, in this regard, it should be clarified that the Directive does not equate labour rights with human rights at work, but rather between fundamental workers' rights and human rights at work. The very important consequence, from the point of view of regulatory techniques, is given by the fact that a shared set of fundamental rights of workers that have the same status as human rights, legally applicable to Member States, but also intended to operate beyond the border of the European region with extraterritorial effectiveness and, therefore, universal[58].

Moreover, because it contributes to strengthening the horizontal effect – between private parties – of human rights obligations, which in turn is functional to the greater effectiveness and immediacy of protection.

Furthermore, on the remedial level, there is the possibility that victims of human rights violations may seek compensation directly from companies, even in the absence of a legal relationship that qualifies as an employment relationship with them. In addition, the imposition of the due diligence obligation clearly encourages the prevention of injuries and, ultimately, the *ex-ante* protection of entitled parties, through a risk-based approach based on the ability of each company to proceduralise and detail its contents.

In fact, it seems no coincidence that the Directive (Articles 18 to 21) provides for the Commission's obligation to prepare support and accompanying tools for companies, stakeholders, and third parties in the chain of activities, aimed at facilitating the exercise of due diligence on the basis of models, guidelines, and best practices that can also be derived from the international soft law framework and application experiences. For their part, the Member States are called upon to provide information and support to companies, their business partners and stakeholders through accompanying measures (Article 20) consisting in the creation of dedicated websites, platforms or portals, to be managed separately or jointly with other countries. In addition, they may provide forms of financial support to SMEs and stakeholders in order to facilitate the exercise of their rights.

[58] For a return to the universal dimension of the debate on fundamental workers' rights in the context of human rights, see Loercher, Brunn, A. T. Ribeiro (eds.), *The International Covenant on Economic, Social and Cultural Rights and the Employment Relation*, Bloomsbury Publishing, 2025.

However, none of these prospects have been called into question by the Omnibus package[59] and, at the same time, they seem to be the main regulatory trajectories along which the adoption of the international treaty on business and human rights in supply chains is moving.

[59] Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements, Brussels, 26.2.2025 COM(2025) 80 final.

Abstract

The essay analyses the possible impact that the valorisation of the binomial labour rights as human rights may have on the techniques of substantive and remedial protection of individual and collective labour rights in the context of global supply chains, starting from the recent provisions of Directive (EU) No. 2024/1760 on corporate sustainability due diligence.

The potential of the Directive is analysed with particular reference to the prospects for participatory governance of business risk, which seems to shift the focus of human rights protection from remedial action in response to a violation that has already occurred to the prevention of the violation itself. Furthermore, the achievement of this objective is entrusted to the proceduralisation of the obligation of means – namely due diligence – whereby, through a risk-based approach, the company also contributes to determining the scope of exact fulfilment and the technical parameters for assessing its potential civil liability.

Keywords

Labour rights as human rights, CSR practices, Due diligence, Sustainability reporting, Employees' participation.

Anette P. Hemmingby

The Classification of Workers – a Regulatory Gap?

Contents: 1. Introduction. 2. The Norwegian system of labour relations. 3. A shift in the labour market. 4. The current legal framework: employees, contractors and collective rights. 4.1 Analytical and legal framework. 4.2 Gray-zone workers. 4.3 EU and EEA Law. 4.4 International and human rights dimensions. 4.5 Implications for Norway under the EEA Agreement. 5. Classification and legal protection in Norway. 6. Platform workers and collective bargaining. 7. Is there a regulatory gap? 7.1 A response to the tension. 7.2 Interpretation of the employee concept after the presumption. 7.3 What, then, is the "gap"? 8. Recent developments in law and policy. 8.1 The presumption of employment in Norwegian law. 8.2 Comparing the presumption of employment in Norwegian law and the Platform Work Directive. 8.3 Coherence, implementation and institutional challenges. 9. Concluding reflections.

1. *Introduction*

Norwegian labour law rests on a mature institutional settlement that couples statutory protection with collective self-regulation. The Working Environment Act (WEA) supplies the protective baseline in the employment relationship, while the Labour Disputes Act (LDA) structures conflict and bargaining between organized parties[1]. Co-determination is embedded in statute and practice – social dialogue and tripartite cooperation underpin wage formation and workplace participation across sectors[2]. Historically high un-

[1] Arbeidsmiljøloven (Working Environment Act) (WEA) 17 June 2005 no. 62; Arbeidstvistloven (Labour Disputes Act) (LDA) 27 January 2012 no. 9. For state employees, the following statutes apply, respectively: Statsansatteloven (Civil Service Act) 16. June 2017 no. 67 and Tjenestetvistloven (Public Service Disputes Act) 18. July 1958 no. 2.

[2] Ot.prp. nr. 49 (2004–2005) p. 60, Prop. 14 L (2022-2023) p. 13.

ion density and broad collective agreement coverage have ensured that most workers are enveloped by this dual system of rights and negotiated standards[3].

Over the last decade, however, the labour market has changed in ways that strain this settlement. Platform-mediated work, alongside other non-standard arrangements, has grown rapidly – particularly in urban areas – offering flexibility but also exposing workers to thinner protection and greater vulnerability[4]. Norway's comprehensive welfare and labour legislation still provides a strong backdrop, yet workers who fall outside the traditional category of "employee" risk standing outside the protective perimeter of the WEA and, in practice, outside the main channels of representation and voice.

The classification boundary therefore becomes decisive. Under Norwegian law, the WEA applies to "employees", not to independent contractors or solo self-employed[5]. In a series of cases, the Supreme Court has insisted that status turns on the reality of the relationship, not the label chosen in a written contract – emphasizing instruction/subordination, responsibility for results, opportunities to take on other work, and the day-to-day performance of the arrangement[6]. Platform work complicates these criteria because control and supervision may be exercised through technological and algorithmic means rather than direct personal oversight; in effect, "new wrapping" around familiar questions of dependency and subordination.

Collective bargaining presents a parallel challenge. Platform workers have traditionally been outside the scope of sectoral and company agreements, and the position of solo self-employed under competition law has been uncertain. Recent EU developments form part of the legal backdrop to this analysis and are addressed below[7].

[3] Departementenes sikkerhets- og serviceorganisasjon. Teknisk redaksjon, *Lavlønn i Norge*, NOU, 2024, 11, p. 43 ff. and Nergaard, *Organisasjonsgrader, tariffavtaledekning og arbeidskonflikter 2022*, Fafo-notat 2024:05.

[4] OECD, *The Future of Work*, OECD Publishing, 2019.

[5] WEA § 1-8.

[6] Rt. 2013 s. 354 (Avlaster 1) paras. 39-42, Rt. 2013 s. 342 (Beredskapshjem) paras. 33, HR-2016-1366-A (Avlaster 2) paras. 41-43.

[7] E.g. *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96), Case *FNV Kunsten Informatie en Media v Staat der Nederlanden* (Case C-413/13), the European Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02), and Directive (EU) 2024/2831 on improving working conditions in platform work.

This article asks whether there is a regulatory gap at the edges of regulated working life in Norway. The concern is not merely theoretical, but relates to the possible misalignment between the personal scope of statutory labour-law protection and the reach of collective labour-law institutions. Reports and disputes in recent years reveal workers performing long hours for comparatively low income and hesitating to raise concerns for fear of losing shifts or contractual hours – symptoms of weak voice and thin protection where the system's coordinating devices do not reach[8]. The core hypothesis is that classification practices which place platform workers outside the employee category risk excluding them from both statutory safeguards and collective bargaining coverage, producing a structural shortfall of protection and voice. In this sense, the potential regulatory gap concerns the interaction between individual and collective labour law rather than the absence of regulation as such.

A central part of today's policy response is the presumption rule: in cases of doubt, the relationship is presumed to be *employment*[9]. This is intended to close loopholes, reinforce the priority of open-ended employment over fixed-term arrangements, and strengthen rights of employees, hired personnel and (to a degree) self-employed in areas such as representation, information/consultation and dismissal. Yet the presumption rule also raises new challenges that must be confronted. I will explore this in the following.

Methodologically, the article proceeds from Norwegian sources of law – statutes, collective agreements and case law – situated within the institutional context of social dialogue and the evolving labour market. The discussion follows the following structure: an overview of the Norwegian system; the shift in the labour market; classification and legal protection; collective bargaining and platform work; the regulatory-gap question; and recent developments in social dialogue and legislation, culminating in a set of concluding reflections. Throughout, the focus remains on Norwegian law and institutions, with European developments treated as the legal context against which national solutions must operate[10].

[8] E.g. TOSL-2024-140889 (Wolt), Fellesforbundet, Streiken avsluttet: Foodora signerer tariffavtale, 27.09.2019, www.fellesforbundet.no; see also Aftenposten/NTB 27.09.2019.

[9] WEA § 1-8. See also Prop. 14 L (2022-2023) p. 24-32.

[10] Act No. 109 of Nov. 27, 1992, relating to the implementation in Norwegian law of the main part of the Agreement on the European Economic Area (EEA Act), § 1.

2. *The Norwegian system of labour relations*

The Norwegian system of labour law and industrial relations can be described as a hybrid structure in which statutory law and collective agreements interact closely. Unlike systems that rely primarily on legislative regulation, Norway maintains a model in which collective bargaining and social dialogue are indispensable complements to statutory rights. The WEA functions as the backbone of individual labour rights, establishing rules for health and safety, information and consultation, as well as dismissal protection[11]. It does not, however, operate in isolation. Collective agreements fill normative gaps by regulating pay, working time, pensions, and dispute resolution at both the sectoral and enterprise level. Access to these collective frameworks is, however, contingent on legal status: the institutional rights attached to collective bargaining presuppose that workers fall within the scope of labour law as employees[12]. This linkage between classification and collective voice is a defining feature of the Norwegian model and becomes particularly salient in the context of non-standard and platform-mediated work.

A defining feature of the system is the institutionalized role of the social partners. Employers' organizations and trade unions not only negotiate agreements but also shape national labour market policy in tripartite cooperation with the state. This tripartism is visible in the annual wage settlements, in which macroeconomic considerations, competitiveness, and fairness are balanced[13]. The Norwegian model thus depends heavily on high union density and broad collective agreement coverage. When coverage decreases or when groups of workers are excluded from unions, the system's integrative function could be weakened.

From a legal perspective, the Norwegian system is characterized by an intricate balance between mandatory statutory provisions and the freedom of contract exercised collectively. The WEA contains provisions that are mandatory and protective, reflecting the principle that labour law exists to protect the weaker party in an inherently asymmetrical relationship. Yet the system also allows for adaptation through collective bargaining, which

[11] WEA §§ 1-1, 14-9, 15-7.

[12] LDA §§ 3 and 4.

[13] More about this in e.g. Hemmingby, *L'implication de l'État et la négociation collective dans le droit du travail norvégien: Une analyse critique*, in *SSLam*, 2025.

has historically produced detailed frameworks tailored to specific industries. This combination is often presented as the essence of the Nordic labour market model[14]. However, it also presupposes a stable and predominantly standard employment relationship. As the number of non-standard workers increases, including those in platform-mediated work, the tension between statutory coverage and collective adaptation becomes more apparent[15].

3. *A shift in the labour market*

The Norwegian labour market has undergone a series of structural shifts driven by digitalization, globalization, and the growing prevalence of non-standard and precarious work. Traditional employment relations, once the dominant and assumed model, are increasingly supplemented – and in some sectors, displaced – by more fragmented and flexible arrangements. Among these, platform work has attracted particular attention. Food delivery companies, ride-hailing apps, and online labour platforms mediate the supply of work through digital interfaces, algorithmic matching, and ratings systems. This form of organization disrupts established categories: it promises autonomy to workers, but often subjects them to unprecedented forms of algorithmic surveillance and dependency[16].

From a legal perspective, these developments expose the limitations of a binary classification system designed for an analogue economy. Contracts typically define platform workers as independent contractors, stressing their freedom to choose when to work and for whom. In practice, however, the platforms may exercise extensive control through technological means. Algorithms can determine access to shifts, monitor performance via GPS, and rank workers based on ratings that condition their ability to secure future work. The relationship is thus marked by dependency and asymmetry, features traditionally associated with the employment contract. Yet, by presenting the relationship as self-employment, platforms displace the risks

[14] Ibid. See also Stokke, Nergaard, Evju, *Det kollektive arbeidslivet*, Universitetsforlaget, 2013, 2nd ed., pp. 231-236.

[15] Prop. 14 L (2022-2023) noting the challenges of extending protections to non-standard workers and the presumption of employment, see especially pp. 19-20.

[16] European Commission, *Report on Digital Labour Platforms*, 2021, which analyses the growth of platform work and its reliance on algorithmic management systems.

of fluctuating demand onto workers, excluding them from various statutory and collective protections[17].

The vulnerabilities of platform workers are both economic and institutional. Economically, these workers often face irregular and unpredictable income, no entitlement to sick pay, and no protection against dismissal. Institutionally, their exclusion from collective agreements undermines the integrative capacity of the Norwegian model. The Foodora strike of 2019 demonstrated the stakes: riders designated as employees successfully organized, undertook industrial action, and secured a collective agreement. Their victory underscored the difference legal status makes. Had they been classified as self-employed, their right to strike and bargain collectively would have been questionable under EU competition law[18]. This illustrates that classification in platform work has implications not only for access to statutory labour-law protection, but also for the permissibility and institutional framing of collective bargaining, thereby situating national labour law within the broader framework of EU and EEA competition and labour law.

These shifts raise pressing regulatory questions. Should Norwegian law adapt by stretching the concept of "employee" to encompass platform workers, or should it follow the route of introducing intermediate categories? Alternatively, should collective bargaining rights be extended irrespective of formal status, thereby decoupling protection from classification? Each option carries doctrinal and political risks but doing nothing would leave an expanding segment of the labour force unprotected. The inclusiveness of the Norwegian model, and its political legitimacy, ultimately depend on preventing large-scale exclusion at the margins of working life[19].

[17] Directive (EU) 2024/2831 introduces obligations on algorithmic transparency and human oversight, reflecting concern over digital control substituting for managerial authority (chapter 3).

[18] Coverage of the Foodora strike, Norway 2019, including union communications and media reports documenting riders' successful collective action and resulting collective agreement. See above, note 8.

[19] Prop. 14 L (2022–2023), which frames the presumption of employment as necessary to address systemic exclusion of non-standard workers.

4. *The current legal framework: employees, contractors and collective rights*

4.1. *Analytical and legal framework*

This section sets out the European and international legal framework relevant to the analysis of classification and collective rights in Norwegian labour law. The purpose is not to replace the national assessment, but to identify the external legal constraints and reference points that inform the interpretation of collective bargaining rights for workers who fall outside, or at the margins of, the traditional employee concept.

In particular, European competition law, EU labour-law developments and international human-rights instruments define the legal space within which collective agreements for dependent or borderline workers may be concluded. This framework is therefore relevant for understanding the conditions under which collective representation and bargaining may be extended beyond standard employment relationships in Norway.

4.2. *Gray-zone workers*

Understanding the existing legal framework is essential for analyzing the position of those who risk falling into a *regulatory gap* – workers whose economic dependency or contractual form leaves them at the margins of labour-law protection. Before assessing the extent of that gap, it is necessary to clarify how Norwegian and European law define the status and collective rights of employees, independent contractors and those often described as *grey-zone workers*.

The term *grey-zone workers* refers to individuals who are formally self-employed but economically dependent on, or subordinated to, a single client or intermediary. The expression, used in European and international policy literature, denotes the "grey area between genuine self-employment and employment"[20]. It encompasses both those who are formally self-employed but in fact working under another's direction and control – the category identified in EU case law as *false self-employed* – and

[20] *FNV Kunsten Informatie en Media v Staat der* Nederlanden (Case C-413/13). See also Hotvedt, *Kollektive forhandlinger for oppdragstakere? Rekkevidden av adgangen til å forhandle tarifavtaler i lys av internasjonal rettsutvikling*, in *Arbeidsrett*, 2020, 1, pp. 1-44.

those who are economically dependent self-employed, whose independence is largely nominal. In practical and legal terms, these workers occupy the space in which questions of classification, protection and collective rights converge.

Norwegian labour law is built on a binary distinction between *employees* and *independent contractors*. The WEA applies only to employees, as defined functionally[21]. Independent contractors fall outside its personal scope and are primarily governed by general contract law, though sectoral statutes may provide specific protection. The distinction depends on the factual reality of control and subordination rather than on contractual form.

Independent contractors are not prohibited from organizing or joining trade unions. They may also negotiate and enter into collective agreements regulating aspects of their work. However, they are not covered by *tariff agreements* (*tariffavtaler*) within the meaning of the Labour Disputes Act (LDA)[22]. According to the LDA, a tariff agreement presupposes that at least one party represents employees[23]. Collective arrangements covering contractors are therefore valid as ordinary civil contracts but do not have the normative or institutional effects of tariff agreements – such as binding dispute-resolution procedures, peace obligations, or extended applicability through the General Application Act[24].

In practice, several Norwegian unions represent contractors and *solo self-employed* workers – those who operate without employees and rely economically on one or few clients. Organizations such as the Norwegian Union of Journalists and Creo[25] have concluded framework agreements that set minimum standards for freelancers[26]. These are legitimate and enforceable under contract law but remain outside the statutory regime of collective labour law.

[21] WEA § 1-8.

[22] See note 1.

[23] LDA § 1 e.

[24] Act of 4 June 1993 No. 58 relating to general application of collective agreements, etc. (The General Application Act).

[25] Creo is a trade union representing workers in the art sector in Norway.

[26] Arbeidslivet, *Selvstendig næringsdrivende og oppdragstakere*, 2024, www.arbeidslivet.no.

4.3. *EU and EEA Law*

Under EU law, collective bargaining by self-employed persons has traditionally raised questions under Article 101 TFEU, which prohibits agreements that restrict competition. In *Albany* (C-67/96), the Court of Justice held that collective agreements between employers and employees fall outside Article 101 because they pursue social, not economic, objectives[27]. In *FNV Kunsten* (C-413/13), the Court extended this principle to *false self-employed* persons whose situation is comparable to that of employees – effectively describing part of the *grey zone* between employment and self-employment[28].

Building on this jurisprudence, the European Commission adopted Guidelines on collective agreements for solo self-employed persons in 2022[29]. The Guidelines clarify that collective bargaining is compatible with competition law where self-employed persons are economically dependent, work side by side with employees, or are in comparable positions of subordination. The Commission further stated that such agreements will not be an enforcement priority even where the boundaries of the *Albany* exemption remain open.

The Platform Work Directive (Directive (EU) 2024/2831) continues this evolution[30]. It introduces a rebuttable presumption of employment and rules on algorithmic management, emphasizing that digital control and economic dependency may reveal an employment relationship irrespective of contractual form. Read together with the 2022 Guidelines, the Directive reflects a broader European recognition that *grey-zone workers* require functional rather than formal inclusion in systems of protection and representation.

4.4. *International and human rights dimensions*

International labour standards frame collective rights beyond a strict employee/contractor divide. Freedom of association and the right to bargain

[27] *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96), paras. 59-64.

[28] *FNV Kunsten Informatie en Media v Staat der Nederlanden* (Case C-413/13), paras. 32-36.

[29] The European Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02).

[30] Directive (EU) 2024/2831 of the European Parliament and of the Council on improving working conditions in platform work.

collectively are recognized as general worker rights under ILO Conventions Nos. 87 and 98 and under Articles 5 and 6 of the European Social Charter[31]. These instruments have been central to discussions concerning workers in the *grey zone* between employees and independent entrepreneurs.

The ICTU v. Ireland case illustrates this development. Following a complaint by the Irish Congress of Trade Unions to the ILO Committee on Freedom of Association concerning restrictions on collective bargaining for self-employed workers such as freelance journalists, the Committee found that excluding such workers from bargaining rights was incompatible with Convention No. 98[32]. The Committee recommended legal reform, and Ireland subsequently amended its competition legislation through the *Competition (Amendment) Act 2017*, allowing collective bargaining for defined categories of dependent self-employed workers[33]. The case established in international labour practice that certain self-employed persons occupy a *grey zone* in which collective rights must be recognized.

This position corresponds with European law following *FNV Kunsten* and the Commission's 2022 Guidelines, which similarly identify "solo self-employed" in dependent positions as entitled to collective negotiation on working conditions[34]. The same reasoning has been reflected in decisions of the European Committee of Social Rights, which has emphasized that the right to bargain collectively cannot depend solely on formal employment status[35].

From a policy perspective, international organizations have reached comparable conclusions. The OECD has highlighted the need for more inclusive forms of social dialogue to ensure that non-standard and platform-based workers are not left institutionally unrepresented[36]. Together, these instruments and experiences form part of the legal and policy background against which Norwegian labour law must now be interpreted.

[31] ILO Convention No. 87 (1948); Convention No. 98 (1949); Council of Europe, European Social Charter (Revised) (1996), arts. 5-6.

[32] The European Committee of Social Rights (ECSR) case *ICTU v. Ireland* No. 123/2016.

[33] Ireland, Competition (Amendment) Act 2017 (No. 12 of 2017).

[34] The European Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02) pts. 27-33.

[35] European Committee of Social Rights, Conclusions XXI-3 (2018)

[36] OECD, *Employment Outlook 2019*, 2019, pp. 189-190.

4.5. *Implications for Norway under the EEA Agreement*

As an EEA state, Norway is obliged to ensure that national rules are consistent with the EEA's competition-law and labour-market framework. The 2022 Guidelines are considered *EEA-relevant soft law* and guide both the EFTA Surveillance Authority (ESA) and national enforcement bodies. This means that collective agreements for economically dependent contractors are unlikely to be treated as anti-competitive, provided that they concern working conditions and not market prices.

Nevertheless, Norwegian statutory law still reflects a strict binary division. The WEA protects employees; the LDA governs collective relations for employees; and no specific legal category covers dependent contractors. The structure leaves limited space for the collective regulation of dependent self-employment within the existing system, even as European and international developments increasingly legitimize such arrangements[37]. Enforcement and practical implementation in Norway also depend less on formal legal barriers than on the institutional willingness of trade unions and employer organizations to include these groups[38].

Recent European debate further supports this interpretation. The European Commission's pragmatic enforcement approach has effectively opened a space for collective bargaining by *solo self-employed* persons[39]. This approach enables national systems to accommodate dependent self-employed within collective structures without formal amendment of competition law.

In summary, Norwegian law allows organization and collective negotiation for independent contractors, but only employees enjoy the institutional rights attached to tariff agreements. EU, EEA and international developments have expanded the permissible scope for collective bargaining by dependent self-employed persons, signaling a gradual convergence between individual and collective protection. The interaction between these frameworks – national, European and international – defines the legal context within which Norwegian labour law must now evolve. Against this backdrop, the legal status of platform workers becomes a critical test case: it

[37] Hotvedt, *cit.*, pp. 1-44.

[38] Jessnes, *Kollektiv organisering av selvstendige og oppdragstakere*, Fafo-rapport, 2022, 07.

[39] Hiessl, *"Enforcement Priorities" as an Escape Route from EU Competition Law?*, in Jorens (ed.), *The Lighthouse Function of Social Law*, Springer, 2023, pp. 123-141.

is here that questions of classification, collective bargaining rights and the interface between labour law and competition law intersect may arise most visibly in practice.

5. *Classification and legal protection in Norway*

At the heart of Norwegian labour law lies the distinction between employee and independent contractor. This binary determines access to the Working Environment Act (WEA) and its protections. Employees are entitled to rights such as dismissal protection (§ 15-7) and restrictions on temporary employment (§ 14-9). Independent contractors are excluded becuase they are not *employees*. The stakes of classification are therefore immense: the boundary line between employee and contractor functions as the gateway to the entire protective regime[40]. While the employee concept is not defined by an explicit reference to the protective purpose in statutory language, Norwegian case law has consistently interpreted the concept in light of the Working Environment Act's social and protective function[41].

Norwegian case law applies a functional test, not a formalistic one. The Supreme Court has repeatedly stressed that the actual performance of the relationship matters more than the contractual label. In Rt. 2013 s. 354 *Avlaster 1* and Rt. 2013 s. 342 *Beredskapshjem*, the Court underscored that the decisive criteria are subordination, employer control, integration into the organization, responsibility for results, and the worker's ability to perform services for others. In HR-2016-1366-A *Avlaster 2*, the Court highlighted the continuous flow of instructions and the worker's integration into daily operations as indicators of employment. This jurisprudence reflects an insistence on substance over form[42].

Nevertheless, the functional approach is not without limits. It was developed in the context of analogue work relations characterized by visible

[40] WEA e.g. setting out purpose, rules on temporary employment, and dismissal protection.

[41] See, inter alia, Rt. 2013 s. 354 (Avlaster I), Rt. 2013 s. 342 (Beredskapshjem), and HR-2016-1366-A (Avlaster 2). See further Hotvedt, *Kollektive forhandlinger,* cit., when it comes to the purposive interpretation of the employee concept in Norwegian labour law.

[42] Rt. 2013 s. 354 (Avlaster 1), Rt. 2013 s. 342 (Beredskapshjem) and HR-2016-1366-A (Avlaster 2), emphasizing substance over form in classification disputes.

managerial hierarchies. Platform work challenges these criteria. Control is exercised less through direct human supervision and more through algorithmic management. Workers may appear autonomous – choosing when to log on and accept tasks – yet their autonomy is structured and constrained by digital systems that allocate shifts, track performance, and determine access to future work. The law must therefore grapple with whether algorithmic management should count as "control" for classification purposes[43].

The problem is compounded by the economic logic of platforms. Platforms often insist that workers are entrepreneurs running their own business, bearing the risks of fluctuating demand. Yet in practice, many platform workers depend overwhelmingly on a single platform for income, lack bargaining power, and cannot meaningfully set prices or conditions. This economic dependency undermines the entrepreneurial narrative and has prompted debates about "economically dependent self-employment" as a descriptive category[44]. Although Norwegian law has not yet recognized this intermediate category, debates around its possible introduction highlight the inadequacy of a rigid binary.

In sum, the Norwegian classification system illustrates the law's difficulty in mapping traditional categories onto new realities. On one hand, the Supreme Court's functional approach allows flexibility, ensuring that labels cannot easily disguise subordination. On the other, it lacks a framework for addressing technologically mediated control and economic dependency.

The introduction of a presumption of employment in § 1-8 of the WEA represents a legislative response to concerns about under-inclusion in borderline cases. The provision does not redefine the employee concept, nor does it explicitly codify the Act's protective purpose in statutory language. Rather, it establishes a procedural presumption that places the burden of proof on the party asserting that an employment relationship does not exist.

According to the preparatory works, the presumption is intended to reinforce a functional and purposive assessment of the relationship, in which established criteria such as control, subordination, integration and allocation of economic risk remain decisive[45]. Where these indicators point in different directions, the presumption clarifies the point of departure for the

[43] Directive (EU) 2024/2831, chapter 3, addresses algorithmic management, reflecting recognition that digital control mechanisms may replicate subordination.

[44] Hotvedt, *Kollektive forhandlinger*, cit.

[45] See Prop. 14 L (2022-2023).

assessment without displacing the holistic evaluation developed in Supreme Court case law[46].

6. *Platform workers and collective bargaining*

This section applies the legal framework outlined above to the specific context of platform-mediated work. The focus is not on re-assessing the general scope of collective labour law, but on examining how questions of classification and collective bargaining arise in practice where workers are formally self-employed but perform work under conditions of economic dependency.

Collective bargaining has long been a cornerstone of the Norwegian labour market model, ensuring that wages, working conditions, and conflict resolution are not left solely to managerial discretion or statutory minimums. However, the arrival of platform work has destabilized the assumption that bargaining is reserved for employees in the traditional sense. Workers who are formally self-employed but functionally dependent on a single platform occupy a legal grey zone. The key issue is whether these workers should be entitled to join trade unions and bargain collectively without running afoul of competition law[47].

While EU competition law treats self-employed persons as undertakings for the purposes of Article 101 TFEU, subsequent case law and Commission guidance clarify that collective agreements aimed at improving working conditions for solo self-employed persons in positions of economic dependency fall outside the scope of the prohibition[48]. This doctrinal fram-

[46] See also Rt. 2013 p. 354 (Avlaster I), Rt. 2013 p. 342 (Beredskapshjem), and HR-2016-1366-A (Avlaster 2), confirming a holistic and functional assessment based on the reality of the relationship.

[47] See generally the LDA, which define the legal basis of collective bargaining in Norway, cf. note 1 above.

[48] See *FNV Kunsten Informatie en Media* (Case C-413/13), paras. 31-42, where the Court held that collective agreements covering so-called "false self-employed" persons fall outside Article 101 TFEU. See further European Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02), clarifying that collective agreements aimed at improving working conditions for economically dependent solo self-employed persons do not constitute an enforcement priority and, in defined situations, fall outside Article 101 TFEU.

ing risks excluding solo self-employed workers from collective bargaining. Yet – as mentioned above – the Court of Justice of the European Union (CJEU) in FNV Kunsten (Case C-413/13) recognized that so-called "false self-employed" – those in a position comparable to employees – should be allowed to bargain collectively. The Court emphasized that where a contractual designation of self-employment conceals a relationship of dependency and subordination, the logic of competition law must yield to the imperatives of social protection[49].

Building on this jurisprudence, the European Commission in 2022 adopted the Guidelines clarifying that collective agreements covering solo self-employed persons who lack real bargaining power are compatible with Article 101. The Guidelines make clear that such agreements are presumed lawful when they aim to improve working conditions rather than restrict competition. This development significantly widens the space for unions to represent platform workers, even when platforms insist on their self-employed status[50].

The *Foodora dispute* in Norway illustrated these tensions in practice. Riders engaged in strike action in 2019, demanding not only higher wages but also predictability of schedules and access to insurance. Their campaign attracted public attention and culminated in Foodora signing a collective agreement with the Norwegian Transport Workers' Union. The agreement was acknowledged as the first of its kind for platform workers in Norway. Crucially, the case underscored how collective action can succeed even in fragmented workforces and demonstrated the role of legal classification: had the riders been designated as self-employed, their bargaining rights would have been far less clear[51].

These developments point towards a recalibration of the relationship between labour law and competition law. Where once competition law operated as a barrier to collective bargaining for the self-employed, EU jurisprudence and Commission guidance now carve out spaces where bargaining is not only permissible but clearly compatible with competition

[49] *FNV Kunsten Informatie en Media v Staat der Nederlanden*, (Case C 413/13) where the CJEU recognized that "false self-employed" may bargain collectively.

[50] The European Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02).

[51] Coverage of the Foodora strike, Norway, 2019; see media reports and union documents describing the negotiation and eventual agreement.

law when confined to working conditions. For Norway, an EEA member, these changes are legally and politically significant. They suggest that the boundary of collective bargaining rights can be redrawn to include platform workers without undermining the competitive order of the internal market. The developments illustrate that the significance of classification extends beyond access to statutory protection and into the collective domain, reinforcing the question of whether existing legal categories adequately capture the realities of platform-mediated work.

7. *Is there a regulatory gap?*

7.1. *A response to the tension*

When I raise the question of whether Norwegian labour law leaves a "regulatory gap" at the margins of working life – i.e., a space in which workers who in practice exhibit dependency and subordination are not fully captured by the protective regime of the WEA or by collective agreements, my point is not that independent contractors lack all legal protection. The term "regulatory gap" is used here in a structural rather than a literal sense, referring to the reach and coherence of existing legal frameworks rather than to the absence of regulation as such. It is that they may stand outside the particular labour-law structures that have historically secured protection and voice: the statutory standards of the WEA and the collectively negotiated frameworks that organize terms and participation in Norwegian working life.

The WEA applies – by design – only to "employees" within a functional definition. Independent contractors fall outside that personal scope and therefore do not benefit from, inter alia, limits on temporary employment and protection against unfair dismissal[52]. Norwegian case law has long insisted that status is determined by substance rather than contractual labels. The Supreme Court's *Avlaster 1*, *Beredskapshjem* and *Avlaster 2* decisions are standard points of reference for a holistic, fact-sensitive test[53]. What chal-

[52] WEA § 1-8; §§ 14-9, 15-7.

[53] Rt. 2013 s. 354 (Avlaster 1), paras. 39-42, Rt. 2013 s. 342 (Beredskapshjem), para. 33 and HR-2016-1366-A (Avlaster 2), paras. 41-43.

lenges the application of that test today is less its logic than its context: in platform-type arrangements, control and direction are exercised through digital infrastructures – task allocation, data-driven monitoring, ranking – rather than through visible hierarchical supervision.

Recent reforms respond to that tension. The Platform Directive introduces a rebuttable presumption of employment where indicators of control and direction are present and imposes transparency and human-oversight duties for algorithmic management[54]. Domestically, in 2023 § 1-8 WEA was amended to introduce a presumption of employment in doubtful cases, placing the burden of proof on the putative employer[55]. The reform's declared purpose was to prevent borderline arrangements from slipping outside the Act's personal scope and to reaffirm open-ended employment as the normative form.

7.2. *Interpretation of the employee concept after the presumption*

The 2023 amendment does not rewrite the employee concept. It clarifies *how* the concept is to be applied. The preparatory works state that the well-known holistic assessment remains decisive, but that it must now be carried out expressly in light of the protective purpose of the WEA. Where indicators pull in different directions, that purpose shall weigh heavily[56]. In other words, the presumption codifies a purposive approach that was already implicit in doctrine and case law: classification is a normative exercise directed by the Act's social function of safeguarding those who, in reality, work under another's control[57].

Hotvedt emphasizes this point. She argues that the presumption primarily strengthens the interpretative point of departure: dependency, subordination and integration are still the core indicators, but they are to be read through the lens of the WEA's protective and social aim[58]. She further

[54] Directive (EU) 2024/2831 of the European Parliament and of the Council on improving working conditions in platform work, art. 4 (presumption), arts. 6-8 (algorithmic management).

[55] WEA § 1-8. See also Prop. 14 L (2022-2023) pp. 24-32.

[56] Rt. 2015 s. 475 paras. 65, Rt. 2013 s. 354 (Avlaster 1) paras. 39. See also Hotvedt, *Kollektive forhandlinger*, cit.

[57] Rt. 2013 s. 354 (Avlaster 1), paras. 39-42.

[58] Hotvedt, *Arbeidstakerpresumsjonen under lupen,* in *Arbeidsrett* 2025, pp. 1-35. See also Sønderland Skjønberg, *Legal presumptions in Labour Law*, in *NJLL*, 2025, pp. 1-18.

contends that the amendment requires courts to articulate more clearly how that aim affects the weighting of the indicators in borderline cases – thus positioning the presumption as an interpretative tool rather than a freestanding rule of proof[59].

A systemic challenge follows from the amendment's limited reach. The presumption was added to the WEA only; no corresponding provision exists in the Labour Disputes Act (LDA). That asymmetry raises the risk – at least in theory – of divergent applications of "employee" across individual and collective domains: a worker might be presumed an employee when claiming WEA rights, yet face a more open-textured, case-based approach in disputes about the reach of a collective agreement. Norwegian scholars caution against such fragmentation and argue for a consistent, purposive understanding across the two pillars of Norwegian labour law[60]. This asymmetry does not create a contradiction in law, but it does raise questions about the practical alignment of individual and collective labour law in borderline cases.

Addressing the gap ultimately raises a strategic question about the direction of reform. One possibility is to revisit the scope of the employee concept itself – either by broadening the functional test or by introducing an intermediate category of "worker." One solution is to include as employees *economically dependent self-employed persons*, individuals who formally operate independent businesses but in reality depend on a single client for income. Extending the employee concept to such relationships could reduce under-inclusion but might also blur the boundary between genuine entrepreneurship and dependent work, creating uncertainty in the law.

An alternative strategy is to maintain the existing definition of "employee" while extending certain collective rights irrespective of status. The Court of Justice in *FNV Kunsten* recognized that "false self-employed" may lawfully engage in collective bargaining, and the European Commission's 2022 Guidelines confirm that agreements improving the conditions of solo self-employed workers in positions of dependency fall outside the prohibition in Article 101 TFEU[61]. Such an approach would preserve the autonomy

[59] Hotvedt, *Kollektive forhandlinger*, cit.

[60] See e.g Hotvedt, *Kollektive forhandlinger*, cit.

[61] *FNV Kunsten Informatie en Media v Staat der Nederlanden* (Case C-413/13) paras 32-36 and the European Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02).

of genuinely independent contractors while enabling those in borderline positions to participate in collective regulation.

Neither path is without risk. Redefining "employee" could stretch the concept to the point where its analytical clarity and institutional function are weakened. Extending collective bargaining rights beyond employees requires careful calibration with competition law and with the structure of Norwegian collective institutions. Still, the present situation – in which a segment of the workforce remains outside both statutory protection and collective coverage – appears increasingly difficult to sustain. The regulatory gap, in this sense, is not merely technical but systemic: it touches both individual fairness and the coherence of the Norwegian model itself.

7.3. *What, then, is the "gap"?*

On this reading, the "gap" is not a doctrinal void but one of reach and coherence. When workers in platform-type settings are treated as independent contractors, they may be partially integrated into the protective system: the presumption narrows under-inclusion on the individual side of the WEA, but the collective side – coverage by collective agreements and the practical channels of voice – remains less certain so long as the LDA lacks a parallel interpretative directive. That uncertainty matters in a model built on interaction between statutory protection and collective regulation.

From an analytical perspective, two principal pathways can be identified. One is to adjust the *application* of the employee concept – via purposive interpretation under § 1-8 – so that dependent contractors are captured where the substance of the relationship warrants it. A second is to strengthen collective voice regardless of formal status, in line with EU developments: *FNV Kunsten* recognizes collective bargaining for "false self-employed", and the Commission's 2022 Guidelines demarcate when agreements for solo self-employed in positions of dependency fall outside Article 101 TFEU[62]. Neither approach demands categorical re-definition; both are compatible with a purposive method that preserves real self-employment while securing protection where dependency is demonstrated.

[62] *FNV Kunsten Informatie en Media v Staat der Nederlanden*, (Case C-413/13), paras. 32-36; the European Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02) pts. 27-33.

The practical implication is straightforward. If the presumption's purposive logic guides *both* WEA status questions and the interpretation of collective coverage, the "regulatory gap" narrows without redesigning the system. If interpretations diverge across the two statutes, the gap may persist as a structural fissure – less about the presence of rules than about their alignment. Chapter 8 considers how recent legislation and EU measures position Norwegian law with respect to that alignment.

8 *Recent developments in law and policy*

8.1. *The presumption of employment in Norwegian law*

The legislative and policy developments of recent years demonstrate that the question of classification and protection is now a central concern both in Norway and at the European level. The presumption of employment introduced into § 1-8 of the WEA marks a significant step in clarifying the point of departure for assessing employment status. The amendment establishes a rebuttable presumption of employment in cases of doubt and reallocates the burden of proof. According to the preparatory works, the purpose of the provision is to reduce the risk of under-inclusion, while the substantive criteria for employee status remain those developed in Norwegian Supreme Court case law[63]. This confirms a purposive reading that has been developing in Norwegian law for decades[64].

8.2. *Comparing the presumption of employment in Norwegian law and the Platform Work Directive*

The presumption of employment introduced in WEA § 1-8 and the rebuttable presumption established in the Platform Work Directive pursue related objectives, but they differ in scope and regulatory technique. Both respond to concerns about under-inclusion in borderline cases and seek to

[63] See Prop. 14 L (2022-2023) (Amendments to the Working Environment Act: clarification of the employee concept and presumption of employment), emphasizing that the presumption reallocates the burden of proof in cases of doubt without altering the substantive assessment of employee status; cf. Working Environment Act § 1-8.

[64] See e.g. Sønderland Skjønberg, *cit.*

ensure that contractual form does not obscure the substantive reality of the working relationship[65].

Under Norwegian law, the presumption in § 1-8 operates as a general evidentiary rule across sectors. It reallocates the burden of proof in cases of doubt, while leaving the substantive employee concept to be determined through the holistic, fact-sensitive assessment developed in Supreme Court case law. The relevant indicators therefore remain those traditionally associated with control, subordination, integration and the allocation of economic risk, evaluated in light of the protective function of labour law as expressed in legal doctrine and preparatory works[66].

The presumption in the Platform Work Directive is more targeted in material scope, as it is designed specifically for platform-mediated work. The Directive combines a rebuttable presumption of employment with a more detailed regulatory response to digital forms of control, including rules on algorithmic management, transparency and human oversight of significant decisions affecting working conditions. In this sense, the Directive articulates a denser framework for assessing direction and control within a confined field, whereas the Norwegian presumption may be said to go further in terms of general applicability[67].

The relationship between the two presumptions is therefore probably best described as functional alignment rather than identity. Both reflect a purposive approach in which the assessment of employee status is anchored in the realities of dependency and control, including technologically mediated forms. At the same time, the Directive's sector-specific design and its procedural obligations relating to algorithmic management add layers of regulation that Norwegian law addresses primarily through general principles and institutions.

[65] Working Environment Act § 1-8; Prop. 14 L (2022-2023). Directive (EU) 2024/2831 on improving working conditions in platform work (Platform Work Directive), introducing a rebuttable presumption of employment for platform work.

[66] Rt. 2013 p. 354 (Avlaster I); Rt. 2013 p. 342 (Beredskapshjem); HR-2016-1366-A (Avlaster 2); see also Prop. 14 L (2022-2023).

[67] Directive (EU) 2024/2831 (Platform Work Directive), including its provisions on algorithmic management, transparency and human oversight of automated decision-making affecting working conditions.

8.3. *Coherence, implementation and institutional challenges*

While the reform strengthens individual protection, it also raises new questions about coherence and implementation. The absence of a corresponding presumption in the LDA means that the relationship between the two statutes is not fully synchronized. Courts and practitioners must therefore determine whether the purposive interpretation codified in § 1-8 of the WEA should also inform the interpretation of the LDA. From a systemic point of view, this is crucial: as Skjønberg observes, the legitimacy of the Norwegian model depends on the functional unity of individual and collective labour law[68]. A dual system in which "employee" is read differently in the two domains would risk eroding that coherence.

Another challenge concerns enforcement. The presumption shifts the burden of proof, but it presupposes institutional capacity to make the presumption effective. The Labour Inspection Authority, the courts and the social partners will need both resources and interpretative guidance to apply the new rule consistently. Hotvedt argues that the 2023 amendment, by clarifying the evidentiary presumption, inevitably requires courts to make explicit how protective considerations inform their legal assessment of employment status[69]. Without such doctrinal transparency, the presumption risks operating merely as a rhetorical signal rather than as a substantive interpretative directive.

The European context adds further layers to this development. The Platform Directive introduces a parallel presumption of employment and procedural rules on algorithmic management[70]. Platforms are required to provide information about automated decision-making and to ensure human oversight of significant managerial functions. The Directive's recitals clarify that digitally mediated and algorithmic management techniques are relevant to the assessment of direction and control in the classification of employment relationships[71].

[68] Skjønberg, *Tariffavtalen og dens sentrale rettsvirkninger*, in *JV*, 2019, 54, pp. 277-334, see especially pp. 278-279. See also NOU 2021: 9, Den norske modellen og fremtidens arbeidsliv.

[69] Hotvedt, *Arbeidstakerpresumsjonen under lupen*, cit., on p. 35.

[70] Directive (EU) 2024/2831 of the European Parliament and of the Council on improving working conditions in platform work.

[71] *Ibid*., recitals concerning algorithmic management, control and the assessment of employment status.

In addition to the rebuttable presumption of employment, the Platform Work Directive introduces procedural obligations aimed at increasing transparency and accountability in algorithmic management. Platforms are required to provide information about automated decision-making and to ensure human oversight of decisions that significantly affect working conditions. In this context, the Directive's recitals clarify that digitally mediated management techniques may be relevant when assessing "direction and control" for the purposes of employment classification[72].

For Norway, incorporation of the Directive through the EEA Agreement would require careful coordination with national law. At the level of legal method, the two presumptions are functionally aligned, albeit embedded in different regulatory structures and with different material scope[73]. Both rely on functional indicators of control and dependency. The practical question is how the EU standard will interact with Norwegian jurisprudence, which has long applied a broad, purposive test. On can argue that the presumption complements, rather than replaces, the holistic approach developed by the Supreme Court[74]. The same logic should allow for alignment with the Directive's framework: both seek to ensure that technological or contractual form does not obscure the existence of an employment relationship.

A related issue concerns collective bargaining. Together with the Court's approach in FNV Kunsten, the Guidelines clarify the competition-law space for collective bargaining by economically dependent solo self-employed persons, which is of direct relevance for EEA states when assessing the permissibility of such agreements[75]. The Commission's Guidelines clarify that such agreements fall outside the prohibition in Article 101 TFEU where the workers are in positions of dependency comparable to employees[76]. This confirms that expanding collective coverage for platform workers is compatible with

[72] *Ibid*.

[73] Directive (EU) 2024/2831, Prop. 14 L (2022-2023) and WEA § 1-8.

[74] Rt. 2013 s. 354 (Avlaster 1), paras. 39-42, Rt. 2013 s. 342 (Beredskapshjem), para. 33 and HR-2016-1366-A (Avlaster 2), paras. 41-43.

[75] *FNV Kunsten Informatie en Media v Staat der Nederlanden*, (Case C-413/13); the European Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02).

[76] The European Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02), pts. 27-33.

EU law. For Norway, where the LDA has not been amended, the challenge will be to ensure that the interpretation of "employee" and the reach of collective agreements develop consistently with this European understanding.

In sum, both the Norwegian and the European reforms narrow the gap at the individual level by clarifying how dependency and control should be evaluated. However, they do so through different regulatory techniques: Norwegian law primarily through a general evidentiary presumption within a holistic test, and EU law through a sector-specific framework combining a rebuttable presumption with procedural safeguards relating to algorithmic management[77]. Yet they also create new uncertainties at the institutional level: how to maintain coherence between individual and collective labour law, and how to operationalize enforcement in a digital and transnational economy. These questions do not undermine the reforms' significance, but they illustrate that the "regulatory gap" cannot be closed by legislative amendments alone. It requires an interpretative and institutional alignment across the full breadth of labour law – a task that will shape the next stage of Norwegian and European labour law development.

9. *Concluding reflections*

The analysis in this article has examined whether Norwegian labour law leaves what may be described as a regulatory gap at the margins of working life. The question is ultimately one of reach and coherence: do the protective structures that have defined the Norwegian model extend to new forms of work, and are the individual and collective dimensions of protection sufficiently aligned to maintain the integrity of the system?

The introduction of a presumption of employment in § 1-8 of the WEA represents a significant reaffirmation of the Act's social and protective function[78]. The amendment codifies a purposive interpretative method, ensuring that borderline cases are resolved in light of the Act's underlying aims. By doing so, the legislature has clarified the point of departure for assessing employment status and strengthened the normative foundation of the employee concept.

[77] Directive (EU) 2024/2831, Prop. 14 L (2022-2023) and WEA § 1-8.
[78] Prop. 14 L (2022-2023), pp. 24-32.

At the same time, the presumption rule exposes the limits of reform through legislation alone. The WEA and the LDA have always formed the two interdependent pillars of Norwegian labour law. Yet only the former has been amended. Without a corresponding interpretative clarification in the collective sphere, there is a risk that the employee concept will be applied differently in individual and collective contexts. As shown above, both doctrine and preparatory works stress that the two statutes are intended to operate coherently, but maintaining that coherence will require attention in practice as courts and institutions apply the new rule.

The European developments discussed here – most notably the Platform Work Directive and the Commission's 2022 Guidelines – reinforce a converging methodological trajectory, while relying on different regulatory techniques and material scope. Both reflect a broader European movement toward purposive and functional interpretation of employment relations, recognizing that dependency and control may take new forms in a digital economy. The Directive's procedural provisions on algorithmic management also underline that substantive protection must be matched by institutional capacity and procedural safeguards.

From a systemic perspective, the regulatory gap identified here is not a void but a measure of imbalance between different components of the legal order. The challenge is to maintain the coherence of a model that combines strong statutory protection with extensive collective regulation. Whether the Norwegian presumption rule and the EU reforms can close this gap will depend on how consistently they are interpreted and enforced, and on whether the purposive orientation of § 1-8 is allowed to guide not only individual but also collective labour law.

In this sense, the reforms now under way are best understood as part of a continuing process of adaptation. The Norwegian model has historically demonstrated resilience by translating social and economic change into legal innovation without abandoning its normative foundations. Preserving that balance – between flexibility and protection, individual rights and collective voice – remains the central task. The presumption rule and the evolving European framework provide important tools for that purpose. Their effectiveness will ultimately depend on sustained institutional engagement and a shared commitment to purposive, coherent interpretation across the individual and collective domains.

Abstract

This article examines whether Norwegian labour law contains a regulatory gap at the margins of regulated working life, focusing on the classification of workers in platform-mediated and other non-standard forms of work. The Norwegian labour-law model rests on a dual structure: statutory protection under the Working Environment Act (WEA) and collective regulation under the Labour Disputes Act (LDA). Access to both pillars depends on classification as an "employee", making the boundary between employee and independent contractor decisive for both legal protection and collective voice.

The growth of platform work challenges this binary framework. Platform-mediated work complicates the assessment, as control is often exercised through algorithmic management, digital monitoring and task allocation systems. Workers formally designated as self-employed may in practice be economically dependent on a single platform and lack genuine entrepreneurial autonomy, yet risk exclusion from statutory safeguards and collective agreements.

Despite developments, the article identifies a potential structural misalignment.

The presumption rule has been introduced only in the WEA, not in the LDA. As a result, the interpretation of "employee" in individual labour law may not automatically align with its application in the collective sphere. Given that the Norwegian model depends on the interaction between statutory protection and collective bargaining, divergence between these two domains risks undermining systemic coherence.

The article concludes that closing this gap does not necessarily require the creation of new legal categories. Rather, it depends on consistent, purposive interpretation across individual and collective labour law and on institutional willingness to extend protection and voice to workers in evolving forms of dependency.

Keywords

Employment classification, Platform work, Presumption of employment, Collective bargaining, Regulatory gap.

Daniela Izzi

Intersectional Discrimination under EU Directive 2023/970 and Beyond: Challenges and New Perspectives for European Equality Law

Contents: 1. The Directive on strengthening the principle of equal pay between men and women and the first explicit prohibition of intersectional discrimination in EU law. 2. The definition of intersectional discrimination and its remediable ambiguities. 3. In search of a legal framework to address intersectionality: the Directive's limited guidance and the challenges ahead. 4. A promising starting point for advancing anti-discrimination protection through the case law of the Court of Justice.

1. *The Directive on strengthening the principle of equal pay between men and women and the first explicit prohibition of intersectional discrimination in EU law*

Directive (EU) 2023/970, which aims to strengthen "the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms" (the so-called Pay Transparency Directive), introduces new regulatory instruments designed to address more effectively an inequality already taken into account in the original EEC Treaty (Article 119, now Article 157 TFEU). Despite this long-standing and progressively refined legal framework, gender-based pay discrimination continues to play a decisive role in perpetuating a significant gender pay gap within the European Union, which ultimately reflects a range of structural distortions in women's labour-market participation[1].

[1] For an analysis of the highly complex content of Directive 2023/970, see, among the earliest contributions, Moizard, *Les logiques de la directive (UE) no. 2023/970 visant à renforcer*

Among the significant innovations set out in this Directive, the prohibition of intersectional discrimination is by no means secondary in importance.

The recognition of intersectional discrimination as a distinct legal concept can be regarded as a milestone in EU law. It represents the culmination of a critical trajectory commonly traced back to the work of the U.S. legal scholar who, several decades ago, first coined the term "intersectionality" to highlight the interaction between systems of sexist and racist oppression and expose the blindness of anti-discrimination laws and policies to the specific forms of disadvantage experienced by individuals, such as black women, who simultaneously belong to multiple marginalized groups[2]. The powerful metaphor of the road intersection, and of the multiple collisions that may concurrently affect those located at that point, has been employed to illustrate the limitations inherent in one-dimensional representations of inequalities[3], and to open up a new analytical perspective – the intersectional lens – which has been adopted across several disciplines, primarily in the social and human sciences, worldwide[4].

l'application du principe de l'égalité des rémunérations entres les sexes, in *DS*, 2023, p. 877 ff.; Fuentes Rodríguez, *La directive 2023/970, por la que se refuerza el principio de igualdad de retribucíon a través de medidas de transparencia en materia retributiva y de mecanismos para su complimento*, in *TL*, 2023, p. 223 ff.; Izzi, *Alla ricerca dell'effettiva parità di retribuzione tra uomini e donne: la Direttiva Ue n. 2023/970 come punto di svolta*?, in *RGL*, 2024, I, p. 301 ff. More in general, on the topic of gender pay inequalities see Benedí Lahuerta, Miller, Carlson (Eds.), *Bridging the Gender Pay Gap through Transparency*, Edward Elgar, 2024; Eurofound, *Equal value, equal pay: Concepts, mechanisms and implementation towards gender pay equity*, Publications Office of the European Union, 2025.

[2] The reference is to the seminal article by Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in *UCLF*, 1989, p. 139 ff., followed shortly thereafter by Crenshaw, *Mapping the margins: Intersectionality, identity politics, and violence against women of color*, in *SLR*, 1991, p. 1241 ff. Intersectional thinking, however, is largely indebted to the rich intellectual elaboration developed within black and postcolonial feminisms. For further discussion on this point, see Yuval-Davis, *The Politics of Belonging: Intersectional Contestations*, Sage, 2011, pp. 4-5; Hill Collins, Bilge, *Intersectionality*, Wiley, 2020, 2nd ed.; Mercat-Bruns, Vuattoux, Duffuler-Vialle, Renucci, Meyrat, et al., *L'intersectionnalité: quelle utilité pour le droit de la non-discrimination?*, in *RDH*, 2025, pp. 8-9.

[3] See Crenshaw, *Demarginalizing the Intersection*, cit., pp. 149-150.

[4] For examples of the application of the intersectional method to various disciplines, mostly outside the legal field, see the contributions collected in the special issue entitled *Doing Intersectionality in Explored and Unexplored Places*, in *AG*, 2022, vol. 11 (https://riviste.unige.it/index.php/aboutgender/issue/view/91). For an application within the body of legislation and

Notwithstanding the remarkable journey undertaken by intersectionality, not only in geographical but also in thematic terms[5], and the attention it has received in United States and Canadian case law, as well as in international law, it has paradoxically struggled to gain full acceptance within the field of anti-discrimination law in which it first emerged[6]. The paradox may nevertheless be explained by the difficulty of reconciling the focus on multidimensional inequalities demanded by the intersectional approach with anti-discrimination law, which has traditionally been structured around specific identity categories and operates according to a single-dimension logic that permeates every aspect of its application.

Moreover, the vertical architecture of anti-discrimination law gives rise to coordination problems among heterogeneous rules applicable to different protected grounds. These difficulties are particularly evident in the EU legal order, where the various equality directives have differing scopes and contain exceptions or impose obligations that apply only to specific grounds[7]. Awareness of such difficulties, however, should not diminish the significance of the explicit recognition of intersectionality provided for by Directive 2023/970, marking the point of arrival of a long-standing process.

At the European level, the overlap between multiple identity characteristics at risk of disadvantage and the need to consider their combined effects received its first regulatory response a quarter of a century ago with the introduction of prohibitions of discrimination on grounds other than gen-

public policies aimed at overcoming the gender gap in the Italian labour market, see Corazza, *Il lavoro delle donne? Una questione redistributiva*, Franco Angeli, 2025.

[5] The plurality of interpretations that intersectionality has received makes it even more difficult to provide a unitary definition. Such a task is in any case inherently complex, given that – as observed by Nash, *Intersectionality and Its Discontents*, in *AQ*, 2017, pp. 117-118 – "nearly everything about intersectionality is disputed". It is nonetheless well established that intersectionality exposes the composite and systemic nature of inequalities.

[6] In this regard, see, *inter alia*, Atrey, *Intersectional Discrimination*, Oxford University Press, 2019, p. 31, and, earlier, Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law*, Hart, 2017, p. 159, both nevertheless offering explanations for the persistent resistance of anti-discrimination law to intersectionality.

[7] See Fredman, *Intersectional Discrimination in EU Gender Equality and Non-discrimination Law*, European Commission, Publications Office of the European Union, 2016, p. 62 ff.; Schieck, Waddington, Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart, 2007, p. 172 ff.; and, for a more general discussion, see the literature cited below at n 13.

der[8] in supranational law through Directive 2000/43, concerning race and ethnicity (the so-called Race Equality Directive), and Directive 2000/78, concerning religion or belief, disability, age or sexual orientation (the so-called Framework Equality Directive). In the preamble to these Directives[9], attention was drawn to the gender dimension of the inequalities addressed, noting that "women are often the victims of multiple discrimination" and that the interaction between the different grounds protected by equality law must therefore be taken into account.

The course inaugurated with this expansion of European anti-discrimination law continued into the new century. An important attempt to define the concept of "multiple discrimination" was made in a proposal for a so-called Horizontal Directive, presented in 2008 to extend the protection guaranteed by the Framework Equality Directive beyond the sphere of employment (and more precisely in social protection, education and access to goods and services)[10]. However, this proposed directive, which was amended in 2017 (with interesting changes involving the point under consideration here)[11], faced a complicated legislative process and was formally withdrawn in early 2025[12]. The opportunity was thus lost to address the persistent misalignment in the scope of application of the European equality directives and the resulting difficulties in bringing judicial claims based on discrimination involving two or more protected personal characteristics falling within heterogeneous areas[13].

[8] Until then, gender had been the only ground of discrimination addressed by European Community law, apart from the prohibition of discrimination on grounds of nationality, which – as is well known – underpins the rules on the free movement of workers in the single market.

[9] See in particular Recital 14 of the Race Equality Directive and Recital 3 of the Framework Equality Directive.

[10] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: COM (2008) 426 final, 2.7.2008.

[11] In this regard, see Xenidis, *Multiple discrimination in EU anti-discrimination law: towards redressing complex inequality?*, in Belavusau, Henrad (Eds.), *EU Anti-Discrimination Law Beyond Gender*, Hart, 2018, pp. 51-54; Bello, *Intersezionalità. Teorie e pratiche tra diritto e società*, Franco Angeli, 2020, p. 316 ff.

[12] Annex IV to the EU Commission's Communication on the Work Program for 2025, p. 25, states that this proposal is being withdrawn, explaining that it "is blocked and further progress is unlikely."

[13] On the uneven pattern of antidiscrimination protection and the complexities arising from the existence of separate and not fully consistent equality directives see Fredman, *Dis-*

Codifying the concept of "intersectional discrimination" in a normative source such as Directive 2023/970 on reinforcing pay equality between men and women, which concerns the most established subject matter of EU equality law and an area already covered by the existing body of that law, was arguably a more natural choice. After all, gender difference has from the outset been the primary catalyst for Europe's political and scholarly engagement with the issue of multi-ground discrimination[14]. An important impetus for developing this approach also came from the EU Gender Equality Strategy 2020-2025, which emphasizes that "women are a heterogeneous group and may face intersectional discrimination based on several personal characteristics". Moreover, the strategy presents "intersectionality – the combination of gender with other personal characteristics or identities, and how these intersections contribute to unique experiences of discrimination – as a cross-cutting principle" to be followed in its implementation[15].

The terms "multiple discrimination" and "intersectional discrimination" are sometimes used interchangeably in the European Union, while in certain periods one has been preferred to the other[16]. The prevailing scholarly view in the old continent, however, is that the two terms refer to

crimination Law, Oxford University Press, 2012, pp. 143-145; Bell, *EU Anti-Discrimination Law: Navigating Sameness and Difference*, in Craig, de Búrca (Eds.), *The Evolution of EU Law*, Oxford University Press, 2021, p. 675.

[14] For insights and explanations in this connection see Xenidis *Multiple discrimination*, cit., pp. 48-51. For an earlier discussion, see also Gottardi, *Dalle discriminazioni di genere alle discriminazioni doppie o sovrapposte: le transizioni*, in *DLRI*, 2003, p. 456. For a critique of the dilution of intersectional debate following its arrival in Europe, through processes of depoliticization and "whitening", see – most recently and in line with a substantial body of scholarship – Solanke, *Intersectional discrimination as an epistemic injustice*, in O'Cinneide, Ringelheim, Solanke (Eds.), *Research Handbook on European Anti-Discrimination Law*, Edward Elgar, 2025, p. 237 ff.

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Union of Equality: Gender Equality Strategy 2020-2025*, COM (2020) 152 final, 5.3.2020; for quotations p. 16 and p. 2 respectively.

[16] The gradual shift from the former (which emerged in the international context and has sometimes been regarded as the most "neutral" term) to the latter, noted by Xenidis, *Multiple discrimination*, cit., pp. 55-56, now appears to be further confirmed by the development outlined above. Indeed, an examination of the preparatory works of the proposed Horizontal Directive and of the Pay Transparency Directive reveals no substantial differences between the concept of "multiple discrimination" employed in the former and that of "intersectional discrimination" adopted in the latter.

non-coincidental phenomena. Specifically, though there is no single settled terminology, "multiple discrimination" is widely used – in line with the approach adopted by international institutions – as the broad, overarching concept covering all forms of multidimensional discrimination. This includes, on the one hand, forms of discrimination in which two or more grounds either operate independently at different times – as in what is commonly referred to as "sequential (multiple) discrimination" – or operate simultaneously within the same instance, yet remain analytically separable – as in what is commonly referred to as "additive (multiple) discrimination"; and, on the other hand, "intersectional discrimination", in which, conversely, such separation is impossible, since the different grounds interact synergistically, producing a qualitatively distinct outcome[17].

The synergy among grounds that cannot be disentangled in their co-constitutive dynamics of inequality production, together with the qualitative – rather than merely quantitative – difference of the inequality produced, constitutes a core feature of intersectional discrimination. These elements have been clearly identified from the outset[18] and have more recently been conveyed through eloquent metaphors[19].

[17] For the framing of intersectional discrimination as a *species* of the *genus* of multiple discrimination see Burri, Schiek, *Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?*, European Commission, 2009, pp. 3-4; Fredman, *Intersectional Discrimination*, cit., p. 27; Xenidis, *Multiple discrimination*, cit., pp. 46-47; Militello, Strazzari, *I fattori di discriminazione*, in Barbera, Guariso (Eds.), *La tutela antidiscriminatoria*, Giappichelli, 2020, p. 157 ff. *Contra* Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore*, Institute For Human Rights, Åbo Akademi University, 2002, pp. 10-12; and more recently Atrey, *Intersectional Discrimination*, p. 213, who instead argues that intersectional discrimination, when broadly understood, is capable of operating as a *genus* encompassing the various manifestations of multi-ground discrimination (she indeed concludes her study by affirming that "there are good reasons to see all multi-ground discrimination as basically intersectional" and therefore that "when multiple grounds are implicated in a claim, it may best be understood in terms of intersectionality and characterized as intersectional discrimination").

[18] See Crenshaw, *Demarginalizing the Intersection*, cit., p. 149: "Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination-the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination *as Black women-not the sum of race and sex discrimination, but as Black women*" (emphasis added).

[19] See Solanke, *Intersectional discrimination*, cit., p. 232: "Just as oxygen and hydrogen pro-

Of the three forms of multi-ground discrimination, this is the least immediately recognizable. In sequential discrimination, several instances of discrimination based on different grounds occur on separate occasions and can be addressed judicially without raising particular difficulties. An example is that of a woman who is first excluded from company bonus schemes reserved for employees engaged in activities not traditionally performed by women, and who is subsequently denied access to overtime work on grounds of nationality. The resulting loss of income may ultimately induce her to resign, given the inadequacy of the remuneration she receives. Additive discrimination arises where two or more single-ground forms of discrimination overlap on the same occasion, each of which – as in the previous situation – can be identified and proven independently, even though their combined effect results in a cumulative disadvantage for the victim. This may occur, for instance, in the case of a female worker who, in the job she has obtained, is penalised in terms of pay both on account of her gender and because she is a migrant worker. Intersectional discrimination, by contrast, arises when the protected grounds are so deeply intertwined that their indivisible combination must be recognized in order to identify discrimination, or at least to fully grasp its distinctive and complex nature. It was precisely the failure to recognize that combination that determined the outcome of the US legal case which prompted the pioneering development of intersectional theory[20].

The *DeGraffenreid* case concerned a collective redundancy scheme implemented by General Motors, with layoffs that did not affect women in general, nor people of color as a whole, but specifically black women. These women had been among the last to be hired by the company and thus had less seniority. Since neither white women nor black men were made redundant, the court found that there had been neither sex discrimination nor race discrimination and, ultimately, no discrimination at all. This outcome starkly highlighted the serious limitations of the traditional single-axis approach adopted in anti-discrimination law, which failed to protect precisely those individuals most disadvantaged in the different protected groups.

duce water, not 'oxydrogen', or tin and copper together make bronze, not 'timper', the synergy in intersectional discrimination produce a new subject – Black women".

[20] The reference is to the well-known case *DeGraffenreid v General Motors Assembly Division, St Louis*, 558 F.2d 480, C.A. Mo., 8th Cir. (1977), which is central to the analysis of Crenshaw, *Demarginalizing the Intersection*, cit.

The same approach, as is well known, also underpins EU equality law, often preventing it from capturing the specific harm experienced by certain minority groups situated at the crossroads of multiple axes of inequality. This limitation became evident in the first case of intersectional discrimination brought before the Court of Justice, namely the *Parris* case (see § 2 below), which involved the interplay between sexual orientation and age. Arguably, however, the most striking example of unacknowledged intersectional discrimination in the European Union concerns corporate neutrality policies prohibiting the wearing of religious or ideological symbols in the workplace. These rules disproportionately affect Muslim women, while leaving unaffected non-religious or non-Muslim women, as well as male adherents of Islam (see further § 4 below).

Clearly, it is intersectional discrimination in this strict sense that most urgently requires a regulatory response, as it remains invisible when assessed through the traditional single-axis lens. The intersectional legal framework, however, may also contribute to a more accurate understanding of additive discrimination insofar as a synergistic interaction exists among the protected grounds involved. Consider, for example, the case of wage penalisation affecting an immigrant woman who has succeeded to a position previously held by a native male worker, in circumstances where it is extremely difficult to disentangle the respective roles played by gender and by ethnic origin or migrant status in producing the outcome of lower pay. In such a case, even where the situation can be disaggregated into two instances of single-ground discrimination – each of which may be separately identified and established before a court – the use of a single-axis approach to interpreting the disadvantage inevitably obscures certain dimensions of the disadvantage and fails to account for the synergistic effects generated by the interaction of multiple axes of inequality.

The permeability of the boundaries between additive or compound discrimination and intersectional discrimination becomes most evident when the analysis shifts from theory to judicial practice, as illustrated for example by Canadian case law applying the intersectional approach[21]. Without

[21] In *Baylis-Flannery* (*Ontario Human Rights Commission and Rachael Baylis-Flannery v Walter deWilde*, 2003 HRTO 28), a case concerning employer harassment of a young Black woman, the Ontario Human Rights Tribunal explained its decision to adopt an intersectional approach to discrimination, stating that while the employee could succeed in her claim for discrimination "on either enumerated ground of race and sex, or on both grounds, one set

purporting to resolve the much-debated question of the extent to which additive discrimination and intersectional discrimination are distinct or overlapping, this contribution instead aims to emphasise the necessity of fully embracing an intersectional perspective in order to properly capture the nature of complex forms of discrimination as they are experienced through lived identities in their entirety[22]. The most critical challenge posed by intersectional discrimination, however, remains its legal invisibility.

This article examines whether, and to what extent, Directive 2023/970, through the definition of intersectional discrimination set out in Article 3.2(e), delivers the long-awaited legal adjustment, and analyses the terms under which this occurs (§ 2). The formalisation of a legal notion of intersectional discrimination, while undoubtedly significant, is not in itself sufficient to ensure the effective application of the prohibition. In light of the rather vague provisions of the Pay Transparency Directive referring to intersectional discrimination, this article then seeks to sketch the basic contours of a regulatory model that could be applied in such situations, without purporting to provide exhaustive answers to the many open questions that remain (§ 3). It concludes by explaining why the prohibition of intersectional discrimination introduced by the European legislator in the context of gender pay equality should influence the case law of the Court of Justice well beyond that specific area (§ 4).

2. *The definition of intersectional discrimination and its remediable ambiguities*

Directive (EU) 2023/970 starts by acknowledging that "gender-based pay discrimination… may involve an intersection of various axes of discrimination," thereby affirming the need to consider, in this context, the combination of "sex, on the one hand, and racial or ethnic origin, religion or belief, disability, age, or sexual orientation, as protected under Council Directive 2000/43/EC or 2000/78/EC, on the other" (Recital 25, echoing

following the other, the law must acknowledge that she is not a woman who happens to be Black, or a Black person who happens to be female, but a Black woman".

[22] The added value of subsuming within the notion of intersectional discrimination situations in which protection might already be afforded on the basis of a single ground is emphasised by Bello, *Discriminazioni e diritto alla prova della complessità delle esperienze nello spazio giuridico europeo*, in *DeS*, 2024, p. 42.

the explanatory memorandum to the Commission's proposal of 4 March 2021). On this basis, Article 3.2(e) of the Pay Transparency Directive establishes that the prohibition of gender-based pay discrimination includes "intersectional discrimination, which is discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or 2000/78/EC".

However, this concise definition does not fully clarify the nature of that combination. This contrasts with the earlier version proposed by the European Parliament[23] and with the definition adopted by the European Institute for Gender Equality (EIGE)[24], which explicitly state that different grounds or personal characteristics can "interact with each other at the same time in such a way as to be inseparable," giving rise to unique and specific forms of discrimination. This lack of clarification has been considered problematic, as it leaves room for legislators tasked with transposing the Pay Transparency Directive into national law and for the courts to interpret the combination "as one that is synergistic or additive," thereby legitimizing an additive approach which has been described as "antithetical to the synergy underpinning intersectionality"[25].

Concerns about the margin of ambiguity inherent in the new definition are not unfounded, as shown by the conceptual divergences found even in the various language versions of the Pay Transparency Directive. In the Italian version, in particular, intersectional discrimination is not defined by referring to the combination of sex and one or more other protected grounds that lies at the root of the discrimination, as is the case in the French

[23] European Parliament Report A9-0056/2022, 22.3.2022, on the proposal for a directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM (2021) 93 final, 4.3.2021.

[24] European Institute for Gender Equality, *Intersectionality*, European Union, http://eige.europa.eu/rdc/thesaurus/terms, accessed 3 June 2025.

[25] Dube, *Taking Stock of the EU Pay Transparency Directive's Intersectional Approach*, in *EELR*, 2024, pp. 46-47. The observation is persuasive, notwithstanding what has been noted above (§ 1) concerning the fluidity of the boundary between additive discrimination and intersectional discrimination, as well as the synergy among protected grounds that may also be identified in situations judicially addressed as the sum of instances of single-ground discrimination. The additive approach referred to here is, in fact, the one that led to the fragmentation of the complex discrimination at issue in *DeGraffenreid*, with the consequent denial of its unlawfulness, as will be discussed shortly.

and Spanish versions[26], which reflect the English text. Rather, it is defined by referring to the "combination of discrimination based on sex and any other ground referred to in Directive 2000/43/EC or Directive 2000/78/EC" and thus to the co-presence of different single-axis discriminations.

Confusing a single multi-ground discrimination with multiple separate single-ground discriminations is an issue far from negligible, as the additive logic underlying the recognition of different single-axis discriminations is precisely what, by requiring each to be proven separately, led the judges in the *DeGraffenreid* case to deny the existence of any discrimination whatsoever.

The same approach was followed by the Court of Justice in the *Parris*[27] case, which arose from the refusal to grant a survivor's pension to the same-sex partner of a worker who had entered into a civil union with him as soon as it became legally possible under Irish law, but after reaching the age of 60, whereas the occupational pension scheme provided for payment of a survivor's pension only if the member married or entered into a civil partnership before that age. In that instance, Advocate General Kokott invited the Court to consider the disadvantage arising from the interplay between the worker's sexual orientation and age as a single form of discrimination, albeit only as an alternative line of reasoning[28]. However, the Court ulti-

[26] In Article 3.2(e) of these two language versions, intersectional discrimination is, respectively, "*une discrimination fondée simultanément sur le sexe et sur un ou plusieurs autres motifs de discrimination* prohibés au titre de la directive 2000/43/CE ou 2000/78/CE" and "la *discriminación por razón de sexo combinada con cualquier otro motivo o motivos de discriminación* contra los que protegen las Directivas 2000/43/CE o 2000/78/CE" (emphasis added).

[27] Case C-443/15, *David L. Parris v. Trinity College Dublin and Others*, 24 November 2016, which has been the subject of numerous criticisms: see, for example, Atrey, *Illuminating the CJEU's blind spot of intersectional discrimination in Parris v Trinity College Dublin*, in *ILJ*, 2018, p. 278 ff.; Schieck, *On uses, mis-uses and non-uses of inter-sectionality before the Court of Justice (EU)*, in *IJDL*, 2018, p. 82 ff.

[28] Opinion of Advocate General Kokott, C-443/15 *David L. Parris v Trinity College Dublin and Others*, 30 June 2016, at point 153: "The *combination of two or more different grounds* for a difference of treatment is a feature which lends a new dimension to a case such as this and must be taken duly into account in its assessment under EU law. After all, *it would be inconsistent with the meaning of the prohibition on discrimination* enshrined in Article 1 in conjunction with Article 2 of Directive 2000/78 *for a situation such as that at issue here to be split and assessed exclusively from the point of view of one or other of the grounds* for a difference of treatment *in isolation*" (emphasis added).

The choice made by the Advocate General to rely on the recognition of intersectional discrimination only as a last resort, rather than advancing it as the sole basis – as the referring Irish court had done – has been convincingly criticised as logically inconsistent by Xenidis,

mately rejected this view[29]. Having found no discrimination on the ground of sexual orientation on the one hand, nor on the ground of age on the other, the Court of Justice concluded that no other form of discrimination could be established[30].

In this light, it is quite clear that interpreting the new notion of intersectional discrimination in such a way as to reach conclusions of this kind would amount to a betrayal of the underlying rationale for its introduction, which appears to be primarily to ensure the recognition of forms of discrimination that would otherwise remain undetected. This may be inferred from Recital 25 of the Preamble to the Pay Transparency Directive; however, the preparatory works of the never-adopted Horizontal Directive are also relevant in this respect, as it was within that legislative framework – as noted above – that the first steps were taken towards the objective ultimately achieved by Article 3(2)(e) of the Pay Transparency Directive[31].

Any ambiguity in the wording of this definition may be resolved by invoking the principle of *effet utile*, which requires EU provisions to be interpreted and applied so as to ensure their full effectiveness[32]. With regard

Multiple discrimination, cit. This choice undoubtedly reflects a cautious litigation strategy, which cannot, however, be regarded as preferable as a general approach, contrary to the view expressed by Lousada Arochena, *Mujeres y discriminación interseccional. Un ensayo sobre las mujeres en los márgenes*, Dykinson, 2024, p. 137.

[29] More precisely, the Court stated that "*while discrimination may indeed be based on several of the grounds* set out in Article 1 of Directive 2000/78, *there is, however, no new category of discrimination resulting from the combination of more than one of those grounds*, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established" (Case C-443/15, *David L. Parris*, para 80, emphasis added).

[30] In defence of the Court of Justice's decision not to engage with an intersectionality perspective, Prechal, *Challenges in EU non-discrimination law: past, present, future*, in Kornezov, Picod, Brohée, Stapper (Eds), *Justice in Transition: Towards a United and Sustainable European Union*, Bruylant, 2025, p. 300, has observed that "none of the (interested) parties was able to explain what taking on board intersectionality would imply in the case at hand."

[31] See Council of the European Union, *Progress report on Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, 10740/19, 26 June 2019, p. 8: "Discrimination on multiple grounds is understood as discrimination, in any of its forms, occurring on the basis of any combination of two or more of the following grounds, *including where taken separately the situation would not give rise to discrimination against the person concerned*: religion or belief, disability, age or sexual orientation. Discrimination on multiple grounds should be recognised in order to reflect the complex reality of discrimination cases, as well as to increase the protection of the victims thereof" (emphasis added).

[32] On this point, see further Tridimas, *The General Principles of EU Law*, Oxford University

to the intersectional discrimination prohibited by Directive 2023/970, this therefore militates in favour of recognising the unlawfulness, above all, of situations in which the failure to take a unitary account of the synergistic interaction between multiple protected grounds would leave the resulting disadvantage without visibility and without redress. Another Recital of the Directive, moreover, in referring to "discrimination on multiple grounds which can be difficult to disentangle" [33], implicitly signals the need to move beyond the limitations of applying an additive logic to complex forms of discrimination.

In the meantime, it should be noted that the interpretative ambiguity found in the Italian translation of the Pay Transparency Directive's definition of intersectional discrimination has not been carried over into the three subsequent Directives that reaffirm this concept – namely, Directive 2024/1385 on combating violence against women and domestic violence, and Directives 2024/1500 and 2024/1499, which establish standards for equality bodies operating, respectively, in the field of gender equality and with regard to other protected grounds. In the Italian versions of these Directives, intersectional discrimination is consistently defined as discrimination arising from the combination of sex and one or more other protected personal characteristics, rather than as a combination of distinct instances of discrimination, each based on a separately considered ground[34]. A syner-

Press, 2013, 3rd edition, p. 418 ff.; Méndez-Pinedo, *The Principle of Effectiveness of EU Law: A Difficult Concept in Legal Scholarship*", in *JT*, 2021, p. 5 ff.

[33] It is Recital 48 which, with regard to the bringing of collective claims, states that this is facilitative precisely "when workers are facing discrimination on multiple grounds which can be difficult to disentangle".

[34] More specifically, the Italian versions define intersectional discrimination as "discriminazione fondata sul sesso in combinazione con altri motivi di discriminazione di cui all'articolo 21 della Carta" ("discrimination based on sex in combination with other grounds of discrimination under Article 21 of the Charter") in Directive 2024/1385 (Recital 6 and Article 16.4), and as "discriminazione fondata sul sesso in combinazione con uno o più motivi di discriminazione protetti a norma della direttiva 79/7/CEE, 2000/43/CE, 2000/78/CE o 2004/113/CE" ("discrimination based on sex in combination with one or more grounds of discrimination protected under Directive 79/7/EEC, 2000/43/EC, 2000/78/EC or 2004/113/EC") in Directive 2024/1500 (Recital 15 and Article 5, similarly to Recital 16 and Article 5 of Directive 2024/1499, with the exception that, in the latter legislative instrument, sex is not accorded separate consideration in relation to the other protected grounds). A noteworthy feature of the Directive on gender-based violence – despite its only marginal relevance to the field of employment – is that the notion of intersectional discrimination it articulates differs from all others by expressly referring to the grounds protected under Article 21 of the EU

gistic interpretation of the new legal definition thus appears to be gaining traction even in contexts where it had previously been more uncertain.

3. *In search of a legal framework to address intersectionality: the Directive's limited guidance and the challenges ahead*

The imperfect definition of intersectional discrimination provided in Article 3.2(e) of the Pay Transparency Directive does not detract from the advances made in conferring visibility and legal substance to a concept that had previously existed in EU antidiscrimination law only in very fuzzy terms, and had been handled by courts and equality bodies with limited awareness, if not entirely overlooked.

Although many Member States have begun to engage with the issue of multiple and intersectional discrimination, and references to it can be found in national legislation and case law, the legal implications of intersectionality are still rarely fully grasped and given due recognition[35]. For its part, the Court of Justice has often been able to identify and skilfully address instances of overlapping discrimination, but has not done so consistently. In particular, in key cases such as *Parris* and those concerning the Islamic headscarf in the workplace (see below, § 4), which could not be adequately addressed through a purely additive

Charter of Fundamental Rights. As is well known – and as recalled by Bell, Numhauser-Henning, *Equal Treatment*, in Jaspers, Pennings, Peters (Eds.), *European Labour Law*, Intersentia, 2024, p. 263 – this provision sets out a list of grounds that is not only broader than those found in the anti-discrimination Directives, but also open-ended. It is therefore often relied upon as the basis for claims advocating the overcoming of the closed list of protected grounds, which are widespread – albeit controversial – within the legal scholarship on intersectionality: see, for example, Atrey, *Intersectional Discrimination*, cit., p. 146 ff.; *contra*, Schiek, *Revisiting intersectionality for EU Anti-Discrimination Law in an economic crisis – a critical legal studies perspective*, in *SD*, 2016, p. 23 ff. In the case of Directive (EU) 2024/1385, however, the reference to Article 21 CFREU does not appear to be capable of being read in this sense, since the notion of intersectional discrimination is employed there solely to ensure due consideration for the most vulnerable potential victims of gender-based violence.

[35] See Fredman, *Intersectional Discrimination*, cit., p. 9; Böök, Burri, Timmer, Xenidis, *A comparative analysis of gender equality law in Europe*, European Commission, Publications Office of the European Union, 2024, pp. 18-19; Bello, *Intersezionalità. Teorie e pratiche*, cit., p. 347 ff. As regards Italy, references to multi-ground and intersectional discrimination have begun to appear in labour case law in recent years, albeit still in rather generic and indistinct terms. See, for instance, Trib. Palermo, 17 November 2023, in *RGL*, 2024, II, p. 170 ff.; Trib. Busto Arsizio, 3 February 2025, in *ADL*, 2025, II, p. 707 ff.

approach, the Court has demonstrated a lack of sensitivity to the specific protection needs of individuals situated at the intersection of different protected grounds[36]. There is thus a clear utility in opening up EU equality law to intersectionality in a way that is both structural and coherent, especially in view of the significant guiding role performed by this supranational legal order.

The terms in which the Pay Transparency Directive achieves this openness may be seen as a development of the earlier scholarly proposal to "incorporate intersectional insights through a capacious view of existing grounds," by construing those grounds as "sufficiently capacious to address the confluence of power relationships which compounds disadvantage," and by suggesting that "all aspects of an individual's identity should be taken into account even within one identity ground"[37]. The technique for addressing multi-grounds discrimination based on the "capacious view of existing grounds," traces of which can be found in international human rights law[38], presupposes the identification of a "lead" ground within which to operate in order to shed light on other dimensions of the disadvantage suffered. This would not require dismantling the single axis approach underpinning the entire EU equality law apparatus, which would entail enormous theoretical and practical difficulties[39], but would instead entail

[36] For a thorough analysis of the case law in which the CJEU has, in substance, dealt with multi-dimensional discrimination – though without making any reference to multiple or intersectional discrimination – see Xenidis, *Multiple discrimination*, cit., p. 59 ff., Xenidis, *From critical theory to litigation strategy: Can intersectionality transform EU equality law?*, in *ELJ*, 2025, p. 22 ff., and, earlier, Fredman, *Intersectional Discrimination*, cit., p. 71 ff.

[37] See Fredman, *Intersectional Discrimination*, cit., pp. 86-87 for the quotation, and more extensively p. 66 ff., in the commendable attempt to prompt a response to intersectional discrimination irrespective of legislative reform.

[38] In particular, the references are to the application of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and of the Convention on the Rights of Persons with Disabilities (CRPD).

[39] An alternative approach to addressing intersectional discrimination has been proposed to avoid the excessive fragmentation that may result from creating too many subjective categories – and the consequent risk of diluting anti-discrimination law – without leveling down differing individual experiences into the predominant protected ground. This approach entails reorganizing the grounds of discrimination around three core nodes, viz., race, gender, and disability: see Schiek, *Organizing EU Equality Law Around the Nodes of "Race", Gender and Disability*, in Schiek, Lawson (Eds.), *European Union Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination*, Routledge, 2016, p. 11 ff.

By contrast, see Atrey, *Intersectional Discrimination*, cit., for a radical rethinking of the entire framework designed for single-axis discrimination, and Solanke, *Discrimination as*

the introduction of the adjustments necessary to respond to the challenges posed by intersectionality.

The impression that the legislature has adhered to this framework may stem from the fact that, while recognizing intersectional discrimination as an autonomous legal notion, the Pay Transparency Directive links it specifically to gender-based pay discrimination, which it expressly prohibits. In doing so, it effectively anchors this new category of discrimination to the particular protected ground covered by the Directive. Accordingly, this Directive adopts a sex-centered definition of intersectional discrimination, which is addressed via the framework of sex discrimination. Here too, a "lead" ground therefore appears to be envisaged, even if this framing is intended to distance itself from any idea of competition between protected grounds, that is, from an approach that considers "a focus on one as eclipsing another"[40]. This framing of intersectional discrimination, however, fails to take account of the fact that its sex-centred definition is the immediate consequence of the legal basis (Article 157.3 TFEU) and of the subject matter of Directive 2023/970, and thus does not necessarily point to a specific position on how to reconcile the consideration of multiple axes of inequality with the structure of anti-discrimination law. The subsequent reiteration of the prohibition of intersectional discrimination in Directive 2024/1499 on equality bodies, which does not focus on gender, further undermines the idea that intersectional discrimination is necessarily channelled towards a predetermined "lead" ground[41].

However, if the aim was to lay the groundwork for a regulatory model of intersectional discrimination, it is hardly surprising that the legislature chose to begin with gender, the ground that has received the most long-standing and robust protection under EU equality law and that, as has

Stigma, cit., for the proposal of an alternative method to legally operationalise intersectionality based on the anti-stigma principle.

[40] Competition between different protected grounds – which, in this context, would result in grounds other than gender being treated as of secondary importance – is criticized by Fredman, *Intersectional Discrimination*, cit., p. 70 (also for the quotation above).

[41] Indeed, Directive 2024/1499, which concerns equality bodies in relation to all grounds protected under EU anti-discrimination law, no longer adopts a sex-centred definition of intersectional discrimination, describing it (in Recital 16 and Article 5) as "discrimination based on a combination of grounds of discrimination protected under Directives 79/7/EEC, 2000/43/EC, 2000/78/EC or 2004/113/EC'.

already been noted, has dominated the debate on intersectionality in the European context.

The features of this model and the concrete implications of its normative adoption are outlined only in a very preliminary manner in the Pay Transparency Directive, raising more questions than it answers, starting with its preamble. Here (in Recital 25), the Directive emphasizes the need to enable national courts, equality bodies and other competent authorities to take due account of any disadvantage arising from the intersection of various axes of inequality both "for substantive and procedural purposes". It therefore clarifies that this is particularly relevant in facilitating the recognition of an intersectional discrimination – including through the selection of an appropriate comparator and the proper application of the proportionality test – and in ensuring an adequate remedial response.

Among the various factors identified as requiring adjustment in light of the intersectional nature of discrimination, the approach to comparison is undoubtedly central; however, no guidance is provided in the Directive. The sensitivity of the comparative exercise is hardly surprising, given that, as is well known, comparison generally plays a decisive role in determining whether discrimination exists and, in certain specific situations, whether it is direct or indirect[42].

The issue first concerns the scope of comparison, which must be defined broadly enough to apply it effectively[43]. In the context of widespread horizontal gender segregation, for instance, extending the principle of equal pay from equal work to work of equal value constituted a crucial step in addressing gender pay discrimination, although it remains to a large extent underutilised[44]. Given that the equivalence in the value of work is frequently obscured by gender-based bias and the systematic undervaluation of typically feminised skills, the Directive (Article 4) lays down a set of criteria designed to facilitate the objective assessment of such value. Considering

[42] In the case law of the Court of Justice, see, in this regard, Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, 16 July 2015.

[43] On the scope of comparison, the Pay Transparency Directive (Article 19.1) reiterates that it is not limited to those who work for the same employer but includes all wages from a single source establishing the pay conditions, in the sense now specified by Recital 29.

[44] For a recent illustration of its effective application by the Court of Justice, see Case C-624/19, *K and Others v Tesco Stores Ltd*, 3 June 2021. On the continuing difficulties in determining equal value, see Eurofound, *cit.*

the explicit opening towards an intersectional perspective, those same criteria should operate as a safeguard against the aggravation of remuneration penalties resulting from the cumulative interaction between gender and other protected grounds. In assessing work activities for the purposes of determining their potential equal value, due account should in any event be taken of additional personal dimensions which, in certain contexts, may reinforce the adverse effects of horizontal gender segregation, as exemplified by ethnic origin and/or nationality in sectors such as domestic work, personal care or cleaning services.

Selecting the comparator is even more delicate, however, as the exercise is sometimes far from straightforward and becomes particularly complex in cases of intersectional discrimination. Here, revealing the alleged disadvantage suffered by individuals situated at the intersection of multiple protected grounds (e.g., black women) requires forms of comparison that take that overlap into account, such as "diagonal" comparisons with persons embodying the opposite sets of characteristics, which may, however, in practice prove unfeasible or inadequate. Ignoring the intersection between different factors, moreover, makes it possible to focus attention on the privileged subjects within the female group (white women) and within the group of Black persons (Black men), thereby excluding, respectively, a finding of gender discrimination and of racial discrimination. A range of solutions concerning the comparative framework have been proposed in the scholarly literature and applied in legal systems that have addressed intersectional discrimination, including the approach of engaging with all relevant comparators in the specific claim (that is, the full breadth of comparator groups which do not share one, some, or all of the claimant's personal characteristics)[45].

The complexity of the emerging scenario may prove discouraging. Given these difficulties, some reassurance may be found in the thoughtful analyses of the case law of the Court of Justice of the European Union, which show that, over time – and even without formally adopting an intersectional approach – the Court has addressed situations involving the coexistence of various axes of inequality, demonstrating, in substance, "some awareness of the existing synergies between the social systems that create

[45] For this latter proposal, see Atrey, *Comparison in Intersectional Discrimination*, in *LegS*, 2018, p. 379 ff., illustrating the approach through a case from the South African legal system, and arguing for its preference over the comparative methods employed by US and UK courts.

and sustain disadvantage"[46]. Indeed, through a contextual and situated analysis attentive to the specific nature of the alleged disadvantage, the Court of Justice has repeatedly succeeded in identifying differences not only between groups defined by opposite characteristics (e.g., women and men), but also within groups sharing the same protected characteristic (e.g., women). It has done so by shaping comparison with the necessary flexibility to account for such distinctions: as seen, for instance, many years ago in the case law concerning above all pregnant women but also older female workers[47].

Openness to intra-group comparisons has become increasingly evident in recent years in EU anti-discrimination case law[48]. This development may facilitate an appropriate judicial response to intersectional discrimination, particularly if coupled with the Court of Justice's readiness to take into account all relevant protected personal characteristics in the circumstances of the individual case, thereby allowing for multiple terms of comparison[49]. The path is by no means smooth; nevertheless, shaping the comparative analysis in a way that, on a case-by-case basis, best brings out a holistic understanding of the legally relevant dimensions of personal identity as situated within the relevant social context appears, at present, to be the only reliable compass available to those charged with addressing intersectional discrimination.

Although it makes no explicit reference to intersectional discrimination, the Pay Transparency Directive appears to contribute to this approach. In particular, it expressly allows – alongside non-simultaneous compari-

[46] The quotation is from Xenidis, *Multiple discrimination*, cit., p. 74. However, similar conclusions are supported by a wide range of scholarly analyses, such as – again – Fredman, *Intersectional Discrimination*, cit., p. 71 ff.

[47] See Case C-177/88, *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 8 November 1990, and Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*, 26 February 1986. In these cases concerning direct discrimination, the Court of Justice has in substance followed a *sex-plus* model, identifying unfavourable treatment, respectively, of pregnant women as compared not only with men but also with non-pregnant women, and of women approaching retirement age as compared not only with men but also with younger women.

[48] See Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, 22 January 2019, and Case C-16/19, *VL v Szpital Kliniczny*, 26 January 2021, concerning discrimination on grounds of religion and of disability, respectively.

[49] For a more detailed discussion, including an example drawn from EU case law on the Islamic headscarf, see Dube, *cit.*, pp. 50-51. Along the same lines, Howard, *Intersectional discrimination and EU law: Time to revisit Parris*, in *IJDL*, 2024, pp. 304-305.

son – for purely hypothetical comparison, that is, one not requiring the identification of an actual comparator (Article 19.3). In doing so, it renders indisputable an understanding that could previously be derived by way of interpretation from EU anti-discrimination legislation and clearly signals an openness towards comparative operations that are less readily amenable to control. The same provision further lays down that statistics and "any other evidence may be used to prove alleged pay discrimination", thereby legitimising the use of evidentiary tools such as reliance on facts of common knowledge or situation testing[50], which may facilitate the judicial uncovering of intersectional discrimination.

As regards statistics, which are often successfully relied upon by claimants in gender discrimination cases, Directive 2023/970 is, however, disappointing. It clarifies that the legal recognition of intersectional discrimination does not entail "additional obligations on employers to gather data … with regard to protected grounds of discrimination other than sex" (Article 3.3). This limited obligation of data disaggregation imposed on employers – a controversial issue during the drafting process of the Directive – stands in stark contrast to the need to facilitate the proof of intersectional discrimination. The criticisms levelled against this choice are therefore well founded, notwithstanding understandable concerns regarding the financial burden of broader data collection and, at least in part, the need to safeguard privacy[51]. However, albeit not decisively, a broader statistical reporting duty (which includes age-related data: see Article 31) is imposed on Member States. Moreover, the monitoring bodies to be established at the national level to support the application of the principle of equal pay (Article 29) must give particular attention to intra-group disparities. Importantly, monitoring bodies' role in raising awareness of the principle of equal pay and

[50] In several decisions, the Court of Justice has grounded its reasoning on general circumstances which were not established through specific evidence in the proceedings but were treated as matters of common knowledge. This is exemplified by the leading Case C-409/95, *Hellmut Marschall* v *Land Nordrhein-Westfalen*, 11 November 1997, in which the Court attached weight to "prejudices and stereotypes concerning the role and capacities of women in working life" in order to support the finding that "even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates", thereby justifying a rule giving priority in promotion to female candidates. As regards situation testing, by contrast, see Dube, *cit.*, pp. 53-54.

[51] See Dube, *cit.*, pp. 52-53; Bonardi, *Il valore del lavoro e la questione salariale al femminile*, in *LD*, 2025, p. 656.

in effectively addressing its violations expressly encompasses intersectional discrimination. This requires them not to overlook pay disadvantages experienced by sub-groups of women, such as those belonging to ethnic minorities or women with disabilities.

EU Directives 2024/1499 and 2024/1500 explicitly require equality bodies to pay specific attention to intersectional discrimination, appropriately highlighting the importance of adopting preventive measures, promoting positive action, as well as providing assistance to victims[52]. However, these Directives do not explicitly call into question the existing division of competences among the bodies responsible for implementing the principles of equal treatment and equal opportunities with regard to the different protected grounds. Against the background of a European context in which single-ground and multi-ground equality bodies coexist – often even within the same Member State – EU legislation therefore leaves Member States with the discretion to opt for either a pluralistic or a monistic institutional model, even though the integrated competences of the latter may facilitate the combating of intersectional discrimination[53]. To that end, the legislative encouragement of regular coordination and cooperation between equality bodies operating at different levels remains in any event beneficial[54].

Another aspect that is bound to be affected by the recognition of the intersectional dimension of presumed pay discrimination is the assessment of compliance with the principle of proportionality, which must be carried out in relation to the justifications or legal exceptions invoked to

[52] For a comprehensive analysis of these directives, which aim to enhance the independence, efficiency, and resource allocation of equality bodies, see Biagiotti, *Recent Developments in the Regulation of Equality Bodies in the European Union*, in this journal, 2025, p. 19 ff.; Borzaga, *Equality bodies e contrasto alle discriminazioni nei luoghi di lavoro: il nuovo quadro normativo eurounitario e le possibili implicazioni per l'ordinamento italiano*, in *LP*, 2025, p. 727 ff.; D'Haeninck, Hondeghem, *New directives for equality bodies: A unified future*, in *EV*, 2025, p. 131 ff.; Mazzetti, *Verso l'uguaglianza? Le nuove direttive sugli organismi di parità*, in *LD*, 2025, p. 91 ff.

[53] Some Member States have begun to move in this direction, with the specific aim of facilitating the tackling of multiple and intersectional discrimination, as noted by Xenidis, *Multiple discrimination*, cit., p. 56. For the Italian debate on this topic – prompted many years ago by Izzi, *Eguaglianza e differenze nei rapporti di lavoro*, Jovene, 2005, pp. 443-444 – see, Calafà, Protopapa, *Dalle origini alle direttive di "terza generazione": gli attori delle politiche per la parità*, in *RGL*, 2024, I, p. 419 ff.; on advantages and limits of multi-grounds equality bodies see Biagiotti, *cit.*, p. 24 ff.

[54] Along the same lines in the Italian context, see Gabriele, *Le discriminazioni multiple nell'intreccio delle fonti*, in *DML*, 2021, pp. 376-377.

rule out the unlawfulness of the contested treatment. This issue is mentioned in recital 25 but is not further developed in Directive 2023/970. However, it was addressed by Advocate General Kokott in her Opinion in *Parris*, where she argued for a stricter standard of judicial review as regards possible justifications. She observed that "the combination of two or more grounds for a difference of treatment … may also mean that, in the context of the reconciliation of the conflicting interests for the purposes of the proportionality test, the interests of the disadvantaged employees carry greater weight, which increases the likelihood of undue prejudice to the persons concerned, thus infringing the requirements of proportionality *sensu stricto*"[55].

As noted earlier, this line of reasoning did not influence the Court of Justice's decision. In the case in question, the Court halted at an earlier stage, refusing to recognize that a situation of disadvantage arising from the combination of two protected grounds ought to have been assessed in a different light. However, there have been instances in which the Court, even without explicitly reasoning in intersectional terms, has nonetheless given concrete weight to the co-existence of protected grounds, particularly through a rigorous application of the proportionality test[56]. More generally, this enhanced level of scrutiny would seem to be appropriate in all cases of multi-ground discrimination, thus encompassing not only intersectional discrimination in the strict sense, but also additive discrimination[57].

[55] Stated in the Opinion of Advocate General Kokott in Case C-443/15, *Parris v Trinity College Dublin*, para 157. The idea that judicial review standards must be heightened subsequently resurfaced, albeit without any explicit reference to proportionality, in "*Shadow Opinion of former Advocate General Sharpston: headscarves at work (Cases C-804/18 and C-341/19)*" – available at: https://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html – which was drafted in relation to the *Wabe* and *MH Müller* cases before the file was officially assigned to Advocate General Rantos, and later made public in order to contribute informally to the legal debate. On the notion of an "enhanced level of scrutiny to the sequential aspects of the justification being advanced by the employer," see in particular para 270.

[56] See in particular Case C-152/11, *Johann Odar v Baxter Deutschland GmbH*, 6 December 2012, paras 63-70, as highlighted by Bribosia, Medard Inghilterra, Rorive, *La discrimination intersectionnelle en droit: mode d'emploi*, in *RTDH*, 2021, p. 266; see also Case C-312/17, *Surjit Singh Bedi v Bundesrepublik Deutschland*, 19 September 2018, paras 63-78, as noted by Xenidis, *Intersectionality from critique to practice: Towards an intersectional discrimination test in the context of 'neutral dress codes*, in *EELR*, 2022, n. 2, p. 34.

[57] For a suggestion along these lines, see Bribosia, Medard Inghilterra, Rorive, *cit.*, pp. 266-267.

Scrutiny of justifications for treatments that produce disadvantages on more than one ground is complicated by the fragmentation of EU antidiscrimination law and the heterogeneity of the rules established in this connection for certain protected characteristics. The heightened judicial review required in cases of intersectional discrimination may call for a cumulative application of the justification criteria associated with each individual ground of discrimination, in line with an approach that has begun to emerge in certain Member States[58]. Nonetheless, assessing compliance with the principle of proportionality is a particularly sensitive issue, and the Pay Transparency Directive's complete silence on this point does little to encourage the judicial application of the newly introduced prohibition of intersectional discrimination.

The final potential impact of the intersectional nature of discrimination contemplated by the Pay Transparency Directive concerns remedies, that is the consequences of a proven breach of the principle of equal pay for equal work or work of equal value between men and women, both for the claimant as the victim and for the employer held liable. Given that EU equality law states that remedies must always be effective, proportionate, and dissuasive, the Pay Transparency Directive explicitly requires that the intersectional discrimination be taken into account: first, as one of the relevant factors to be considered when awarding full compensation or reparation to the worker (Article 16.3); and second, as one of the aggravating or mitigating factors that may be assessed in determining the penalty to be imposed on the employer (Article 23.3).

It should be noted that compensation or reparation must also cover non-material damage, and that the simultaneous harm to multiple dimensions of personal identity may arguably affect how such damage is quantified. Scholars have nevertheless pointed to various other reasons justifying heavier sanctions in cases of intersectional discrimination, including its insidious nature which makes it more difficult to recognize[59]. According to

[58] Specifically, as regards the German regime and the guidance that may be drawn from it, see Schiek, *On uses, mis-uses and non-uses*, cit., pp. 92-93, who explains how this principle could have been applied in *Parris* by subjecting discrimination on grounds of sexual orientation and age to a more stringent proportionality review. The example is particularly instructive, given that in that case intersectional discrimination results from the combination of direct and indirect discrimination.

[59] See, among others, Dube, *cit.*, p. 55, and Bribosia, Medard Inghilterra, Rorive, *cit.*, p. 267 ff.

a different view, however, it would be misguided to replace the need for a case-by-case determination of compensation for intersectional discrimination with a rigid presumption in favour of a higher quantification of damages, detached from the severity of the concrete disadvantage suffered by the claimant[60]. Far more persuasive, by contrast, is the same author's recommendation to recall the importance of designing remedies that are structurally and proactively capable of addressing the multidimensional disadvantage they are intended to redress[61]. Given the European Union's lack of competence with regard to sanctions, this issue ultimately falls to the individual Member States, where, in the context of single-ground discrimination, judicial remedies already exist that are open-ended in nature (and therefore capable of being tailored to the needs of the case at hand), have a collective scope, and serve a preventive function[62].

More generally, the adoption of preventive measures remains the primary and most appropriate course of action in relation to all forms of discrimination. This need is, however, particularly acute in the context of intersectional discrimination, where ensuring substantive equality requires uncovering the co-constituted structures of disadvantage and systems of power, and where litigation often proves especially challenging.

4. *A promising starting point for advancing anti-discrimination protection through the case law of the Court of Justice*

As noted above, the guidance on the handling of intersectional discrimination offered by Directive 2023/970 is very limited and undoubtedly re-

[60] See Atrey, *Intersectional Discrimination*, cit., pp. 198-201, who criticises, on these grounds, the decision of the Ontario Human Rights Tribunal in *Baylis-Flannery* (above, n 20) concerning the calculation of damages for mental anguish awarded to the Black woman who was harassed, arguing that it cannot be taken for granted that such anguish is greater simply because the claimant was targeted on both grounds of race and sex.

[61] See again Atrey, *Intersectional Discrimination*, cit., p. 201 ff., who thereby draws attention to the more general need not to overlook, at the remedial stage, the situation of the disadvantaged group to which the claimant belongs, providing examples drawn from various legal systems.

[62] In Italy, these characteristics are reflected, for example, by the judicial order provided for under Article 38 of Legislative Decree No 198/2006, which may be issued at the conclusion of proceedings concerning collective gender discrimination and has, precisely because of those characteristics, been regarded as a form of compulsory positive action.

quires further elaboration. Nonetheless, the explicit prohibition introduced by Article 3.2(e) of this Directive, and reaffirmed in identical wording by the Equality Bodies Directives 2024/1499 and 2024/1500, maps out a pathway that not only Member States, but also the Court of Justice of the European Union, are expected to follow. In this respect, the role of the Court of Justice appears particularly significant, given the widespread tendency to defer to it on the most conceptually demanding issues and the decisive influence that its rulings exert across all national legal systems[63].

In reality, none of the well-known precedents in which the Court was confronted with situations involving an objective overlap between protected grounds is a particularly good fit for the field of gender pay equality, where the prohibition of intersectional discrimination is expressly established. In *Parris*, the dispute concerned remuneration, as it related to access to an occupational pension scheme. However, alongside age, the relevant protected ground was not gender but sexual orientation.

By contrast, in the six cases concerning workplace penalties levied on women for wearing the Islamic headscarf in violation of corporate neutrality policies[64], there was a clear connection to the employee's gender (and ethnic background), even though the cases were framed as instances of religious discrimination. Nevertheless, these disputes did not directly involve the sphere of remuneration.

In the *Wabe* case, upon closer examination, the disciplinary suspension imposed on a kindergarten teacher for wearing a headscarf in breach of a

[63] For a more detailed discussion on this point see Xenidis, *From critical theory*, cit., pp. 39-41, which sets out the reasons underlying the pronounced "transformative potential of doing intersectionality in supranational anti-discrimination litigation", with particular reference to proceedings before the Court of Justice (see p. 24 for the quoted expression).

[64] Case C-157/15, *Achbita v G4S Secure Solutions*, 14 March 2017; Case C-188/15, *Bougnaoui*, 14 March 2017; Joined Cases C-804/18 *IX v Wabe* and C-341/19, *MH Müller Handels GmbH v MJ*, 15 July 2021; Case C-344/20 *LF v SCRL*, 13 October 2022; Case C-148/22, *OP v Commune d'Ans*, 28 November 2023. There is an extensive body of literature on this line of case law, much of it critical: among the countless commentaries on the first twin rulings, see Dorssemont, *Freedom of religion in the workplace and the Court of Justice of the European Union: A return to the principle of* Cuius regio, eius religio?, in *RDCTSS*, 2017, p. 200 ff., https://journals.openedition.org/rdctss/2354; whereas, turning to the most recent judgment, see Ringelheim, *Headscarf bans in the public workplace before the Court of Justice:* OP v Commune d'Ans *or the Art of Ambiguity*," in *ELLJ*, 2024, p. 912 ff. With particular attention to the intersectional perspective see Gutierrez-Solana, *Unveiling Complex Discrimination at the Court of Justice of the European Union: the Islamic Headscarf at Work*, in *FemLS*, 2021, p. 205 ff., and Xenidis, *Intersectionality from critique to practice*, cit., p. 55.

ban on religious symbols had an immediate impact on her remuneration. A similar situation, if brought before the courts again, could thus potentially fall within the scope of Article 3.2(e) of the Pay Transparency Directive. Irrespective of this potentially extensive application of the Directive, the prohibition of intersectional discrimination enshrined therein undoubtedly represents a clearer articulation of the objective of ensuring that those situated at the intersection of multiple axes of disadvantage are not excluded from the protection afforded by European equality law, precisely because they may be in greater need of it. That objective, already articulated in broad terms in numerous non-binding sources and further reinforced by the Commission's decision to frame intersectionality "as a cross-cutting principle" of its action (as noted above, § 1), has marked an objective leap forward with the first legal recognition of intersectional discrimination. Beyond constituting a point of arrival, such recognition nonetheless inevitably represents a starting point as well, including with regard to the scope of its operative reach.

An interpretation extending the prohibition of intersectional discrimination beyond the formal scope of the Pay Transparency Directive now appears to be viable and supported by compelling arguments.[65] The evolution of EU anti-discrimination law as a whole has shown a clear trend towards harmonisation, a trend that can already be observed with regard to intersectionality in the Equality Bodies Directives. Moreover, the Court of Justice has consistently demonstrated a strong commitment to ensuring the effectiveness of EU anti-discrimination law, often by overcoming legal barriers whose underlying rationale remained uncertain[66].

[65] In a similar vein, see Howard, *cit.*, p. 308; see also Dube, *cit.*, p. 56.

[66] See, for instance, the application of the prohibition of indirect discrimination under Directive 79/7/EEC on the principle of equal treatment for men and women in matters of social security, where indirect discrimination has never been explicitly defined: Case C-389/20, *CJ v Tesorería General de la Seguridad Social (TGSS)*, 24 February 2022. See also, and more significantly, the extension to workers who are carers of persons with disabilities of the duty of reasonable accommodation provided for persons with disabilities under Directive 2000/78, as recognised in the recent judgment in Case C-38/24, *Bervidi*, 11 September 2025. More generally, on the Court of Justice's engagement with addressing the "protective gaps associated with the enforcement of EU labour law", see Koukiadaki, *Enforcement of EU Labour Law: Legal foundations and the role of the CJEU*, in *ELLJ*, 2024, p. 639. Within the specific field of non-discrimination, see instead Kollonay-Lehoczky, *Enforcing non-discrimination,* in Rasnača, Koukiadaki, Bruun, Lörcher (Eds.), *The Effective Enforcement of EU Labour Law*, Bloomsbury, 2022, p. 213 ff.

The need to take into account the synergistic combination of multiple protected personal characteristics – stemming from the new prohibition of intersectional discrimination – now effectively prevents European judges from replicating certain lines of reasoning that had been adopted in the past. This applies, first and as already noted, to the reasoning in the *Parris* judgment, which held that claims of alleged multi-ground discrimination must necessarily be disaggregated into separate claims of single-ground discrimination. Also requiring reconsideration is the conviction – first explicitly expressed in *Wabe* and *Müller* and later reaffirmed in *OP*, the only two rulings on wearing the Islamic headscarf at work in which the referring courts openly raised the gender dimension of the alleged religious discrimination – that, in assessing a violation of the prohibition of religious discrimination under Directive 2000/78, no account may be taken of a ground (such as gender) that falls outside the Directive's scope and is protected by another legal instrument not invoked in the proceedings[67]. It is true that, in such cases, it would have been appropriate to refer to all the relevant legal sources already at the stage of formulating the preliminary questions[68]; however, the formal obstacle to an intersectional approach could have been overcome by the Court through a reformulation of those questions, as is not uncommon when it becomes necessary to correct the approach adopted by the referring courts. In any event, a siloed approach to the various sources of anti-discrimination law undermines the rationale of their potential interconnection, now endorsed by the definition of intersectional discrimination and, in particular, by the combination of different protected grounds, as laid down in Article 3.2(e) of the Pay Transparency Directive.

The issue of unfavorable treatment experienced by Muslim women workers who refuse to comply with employer-imposed rules on religious and ideological neutrality in workplace dress codes – an issue at the core of a line of EU case law whose outcomes have often been regarded as unsatis-

[67] Joined Cases C-804/18, *IX v Wabe,* and C-341/19, *MH Müller Handels GmbH v MJ*, paras 57-58, where the Court fully aligns with the Opinion of Advocate General Rantos, 25 February 2021, para 59; Case C-148/22, *OP v Commune d'Ans*, paras 42, 48-49, where the Court once again follows the Opinion of Advocate General Collins, 4 May 2023, paras 35-38. Notably, none of these rulings take into account the explicit references to gender contained in Recital 3 and Article 19.2 of Directive 2000/78.

[68] Similarly, see Bello, *Discriminazioni e diritto*, cit., p. 41.

factory[69] – offers the Court of Justice a particularly important, albeit highly sensitive, opportunity to engage with the recognition of intersectional discrimination.

The risk of "double discrimination" – or even "triple discrimination" on the basis of religion, gender and ethnic origin – has already been brought to the Court's attention in precisely these terms by two Advocates General[70]. Furthermore, as previously noted, some encouragement to broaden the perspective beyond the religious ground has come from certain referring judges. The most thought-provoking reflections, although still preliminary and ultimately disregarded by the Court, were offered by Advocate General Medina in the *LF* case. There, she underscored the importance of intra-group comparison to extend equality protection "to the less privileged individuals within a particular group"[71] and called for a realistic acknowledgment of the serious social exclusion that may result for women belonging to ethno-religious minorities when the issue is underestimated[72].

[69] In addition to the critical scholarship cited at n. 64, confirmation of their inadequacy can be found in the broader proposals to amend the current regulatory framework by extending to religion, the duty of reasonable accommodation established under EU anti-discrimination law for persons with disabilities. See Alidadi, *Religion, Equality and Employment in Europe. The Case for Reasonable Accommodation*, Hart, 2019; Donegan, *Thinly Veiled Discrimination: Muslim Women, Intersectionality and the Hybrid Solution of Reasonable Accommodation and Proactive Measures*, in *EJLS*, 2020, p. 143 ff.; and, highlighting recent developments in the case law of the Italian Court of Cassation, Marinelli, Dolazza, *Accomodamenti ragionevoli e discriminazioni per motivi religiosi sul luogo di lavoro*, in *DLRI*, 2022, p. 377 ff.

[70] See, respectively, the Opinion of Advocate General Medina in Case C-344/20, *LF v SCRL*, 28 April 2022, para 66, which emphasizes that "double discrimination is a real possibility," and the aforementioned Shadow Opinion of former Advocate General Sharpston in Cases C-804/18 and C-341/19, *Wabe and MH Müller*, 23 March 2021, paras 270-276, which diverges significantly from the official Opinion of Advocate General Rantos on the same proceedings, 25 February 2021.

[71] Thus, the Opinion of Advocate General Medina in Case C-344/20, *LF v SCRL*, para 39. It should be noted, however, that her reasoning on infra-group comparison (paras 35-42) is primarily aimed at urging the Court to frame the case as one of direct religious discrimination, rather than indirect discrimination, more than as guidance on intersectionality.

[72] The words of Advocate General Medina in her Opinion in Case C-344/20, *LF v SCRL*, para 66, are worth quoting: "if employers impose internal neutrality rules as a generalalised policy, Muslim women may in reality not only experience 'particular inconveniences', but a deep disadvantage to becoming employees. That may lead in turn to setting them apart from the labour market – a source of personal development and social integration – resulting then in discrimination going beyond religion and extending also to gender."

In the face of these developments, further reinforced by the approach adopted in the case law of major international institutions which have read employment-related disputes concerning the Islamic veil through an intersectional lens, the avoidance strategies repeatedly deployed by the Court of Justice have been regarded as surprising[73]. Indeed, in cases falling within other areas of anti-discrimination law, the Court has displayed both interpretative courage and rigour. By contrast, when particularly sensitive issues – such as those relating to religion – come to the fore, it appears instead to systematically favour a compromise-oriented approach, reflecting their political salience and their potential impact on public opinion[74]. This thus seems to constitute a more contested terrain.

New light, however, could be shed on cases concerning the Islamic headscarf in the workplace by taking seriously the commitment to combating intersectional discrimination, a responsibility now explicitly embraced by the European legislator. This calls for a more deliberate and informed development and application of the legal model articulated only in embryonic terms in the Pay Transparency Directive, together with closer attention to the obligations it entails. In particular, as illustrated above, this includes conducting contextual and situated analyses; making intra-group comparisons that reflect the multiple identities of alleged victims of discrimination; and applying more rigorous scrutiny to justifications under the proportionality test.

As is well known, giving practical effect to intersectionality in anti-discrimination law is not a task that can be approached through improvisation. Yet the die has been cast, and the Court of Justice can no longer overlook this evolving legal landscape in its future case law.

[73] See Xenidis, *Intersectionality from critique*, cit., pp. 34 and 36, which also refers to specific cases in the evolving jurisprudence of international institutions.

[74] In this sense, see Barbera, Borelli, *Principio di eguaglianza e divieti di discriminazione*, *WP CSDLE "Massimo D'Antona".IT*, 2022, n. 451, pp. 75-76.

Abstract

This article examines a pivotal development in EU equality law: the first explicit prohibition of intersectional discrimination introduced by Directive (EU) 2023/970 on strengthening the principle of equal pay between women and men. After clarifying the relevant terminology used in the context of multi-ground discrimination, it analyses the conceptual ambiguities surrounding the definition of intersectional discrimination and considers how they may be addressed. In light of the Directive's rather vague provisions referring to intersectional discrimination, the article then seeks to sketch the basic contours of a regulatory model applicable in such situations, without purporting to provide exhaustive answers to the many open questions that remain. It concludes by explaining why the prohibition of intersectional discrimination introduced in the specific context of gender pay equality should influence the case law of the Court of Justice of the European Union well beyond that field. It therefore advocates a purposive and expansive interpretation of the new prohibition, capable of ensuring effective legal protection for workers situated at the intersection of multiple axes of disadvantage.

Keywords

EU law, prohibition of intersectional discrimination, equal pay, purposive and expansive interpretation, religious symbols in the workplace.

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Are Union Co-op Labor Negotiations a Win-Win and for Whom?

Contents: 1. Introduction. 2. Background. 3. Union Co-op Negotiations. 4. Theoretical Framework. 5. Analysis. 5.1. Union Co-op Labor Negotiations are Likely to be More Interest-Based. 5.2. Encouraging Participation in Civic Society and Political Democracy. 5.3. Recognizing Community and External Interests. 5.4. Technological Change. 5.5. Addressing Racism and Other Systemic Discrimination. 5.6. Climate Change and Environmental Sustainability. 6. Conclusion.

1. *Introduction*

Are union co-op labor negotiations in the United States more similar to the interest-based win-win negotiation framework popularized by *Getting to Yes*[1] than traditional labor negotiations? If they are, do co-op labor negotiations and resultant collective bargaining agreements (CBAs) address some of the grand challenges of this historical time? Do they grapple with challenges, such as climate change, technological advancements like genera-

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[1] Fischer, Ury, Patton, *Getting to yes: Negotiating agreement without giving in*, Penguin, 2011.

tive AI, and combatting racism and anti-democratic leadership, in similar or different ways than traditional negotiations? This article explores how union negotiations in worker-owned co-ops compare to more traditional labor negotiations. The theoretical analysis addresses possible synergies between practices traditionally considered as alternative, employee ownership and collective bargaining, and the development of collective bargaining in new business models.

In the United States the development from master-servant doctrine to a more contract-based employment framework occurred during industrialization in the 19th century and overlapped with the time period when the U.S. abolished chattel slavery[2]. The law diverged from that of Britain which presumed an annual contract with termination during the term only for cause[3]. Employment at will is the default employment relationship in the United States[4]. The relationship is terminable by either party, without any notice, at any time and for any or no reason[5]. Unlike Western Europe where the default employment relationship generally requires notice and a reason[6], any contract in the U.S. that requires just cause for termination is an exception to the default relationship[7]. Collective bargaining takes place in this context, and a minority of the workforce, less than 7% of the private sector, are unionized[8].

The law governing unionization and collective bargaining in the private sector is the National Labor Relations Act. Bargaining in the U.S. is

[2] Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, in *EREPJ*, 2001, 5, p. 453; Tippett, *The Master-Servant Doctrine: How Old Legal Rules Haunt the Modern Workplace*, 2025, p. 36.

[3] Lin, *Race, Solidarity, and Commerce: Work Law as Privatized Public Law*, in *ASLJ*, 2023, 55, p. 834; Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, in *BJE&LL*, 1996, 17, pp. 92-93 (While scholars debate when and why the U.S. default diverged, they agree it did diverge).

[4] Ray et al., *Understanding Labor Law*, Carolina Academic Press 6th ed., 2025, p.46.

[5] Tippett, *cit.*, p. 36.

[6] Jacobs, *A Key to Comparative Labour Law in Europe*, 2021, p. 78 ("open-ended contracts of employment may only end if there is a valid reason for termination connected with the capacity or conduct of the worker or based on the operational requirements of the enterprise"); Smyth, *European Employment Law: A Brief Guide to the Essential Elements*, Business Expert Press, 2017, pp. 15, 17.

[7] Ray et al., *cit.*, p.47.

[8] https://www.bls.gov/news.release/pdf/union2.pdf (private sector membership in 2024 5.9%); https://cepr.net/publications/union-membership-stagnated-in-2025/ (private sector coverage density in 2025 6.8%).

shop by shop, or in other words enterprise by enterprise or firm by firm[9]. It is not sectoral like in Germany and other European countries;[10] no default rule, such as in some European countries, requires employees of non-signatory companies be governed by the standards set in collective bargaining[11]. When multiple employers in an industry bargain and sign on to a contract, it is only by employer choice[12].

The framework for bargaining under the NLRA is also known as "business unionism" or "bread and butter unionism" because it focuses on bargaining for better economic conditions and job security[13]. Unions do not normally bargain over having board-level control, firm ownership, or input into management decisions[14]. The reasons for unionism taking this trajectory include the legal framework of the NLRA and the jurisprudence interpreting it[15].

Because of the focus on job security, collective bargaining agreements in the U.S. generally contain a provision that mandates that employees may be disciplined, including discharged, only for cause[16]. Scholars in the field of U.S. law and economics have long asserted that substituting just cause protections for an employer's ability to terminate at will is less efficient[17]. Many

[9] Nahmias, *Innovations in Collective Action in the Labor Movement: Organizing Workers Beyond the NLRA and the Business Union*, in *MIT Work of the Future*, Working Paper No. 13-2021, 2021, p. 5.

[10] Estlund, *The Case for Sectorial Co-Regulation*, in *ABAJL&EL*, 2025, 38(3), pp. 391-93; Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 in *YLJ,* 2019, 128(3), p. 622.

[11] Jacobs, *cit.*, p. 40 ("The procedure of extension erga omnes now exists in the majority of European countries (e.g., BE, CZ, DE, ES, FR, FI, GR, LU, NL, PO, SI, LV, SL)").

[12] *Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404/1982, p. 412.

[13] Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, in *YLJ,* 2023, 132, p. 1392; Paul M. Secunda, *Promoting Employee Voice in the New American Economy*, in *MLR*, 2011, 94, p. 757.

[14] Palladino, *Economic Democracy at Work: Why (and How) Workers Should be Represented on US Corporate Boards*, in J. *JL&PL.*, 2021, 1, p. 373; Matthew T. Bodie, *Income Inequality and Corporate Structure*, in *SLR*, 2016, 45(1), p. 70.

[15] Reddy, *cit.*, pp. 1396-1397, 1405 and 1414; Logan, *The Union Avoidance Industry in the United States*, in *BJIR*, 2006, 44, pp. 651-52.

[16] *Elkouri & Elkouri, How Arbitration Works*, BNA, Dec. 2020 §15.2A.ii; Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, in *EREPJ*, 2001, 5, p. 478; *Basic Patterns in Union Contracts*, BNA 14th ed., 1995, p. 7.

[17] Epstein, *In Defense of the Contract at Will*, in *UCLR.*, 1984, 51, p. 951; Reddy, *cit.*, pp. 1426-1427.

U.S. employers tend to be anti-union and fight organizing voraciously[18]. Similarly, the traditional collective bargaining process is adversarial – "part and parcel" of the process is putting economic pressure on the other party to submit to demands[19]. The negotiation involves brisk and contentious conversations at the bargaining table, and behind closed doors each party tries to ascertain the true position, rather than interests, of the other party[20]. As described by one scholar, attributes of traditional collective bargaining shield "bargainers from opponents' distributive power tactics" and include:

- Developing positions in advance of negotiations
- Overstating opening positions
- Committing to the positions early and publicly
- Using coercive forms of power
- Keeping the other side off balance[21]

Interviews with participants in union co-op collective bargaining and a review of several union co-op collective bargaining agreements suggest that many union co-op labor negotiations are more similar to interest-based negotiations than traditional labor negotiations. Those involved described these negotiations as more transparent, involving greater exchange of information, and oriented more toward cooperative problem-solving than traditional negotiations. Some agreements reference interest-based negotiations and others cooperative principles. The structure of the union cooperative may facilitate interest-based negotiations because of the greater sharing of information, including financial information, than in traditional negotiations and the orientation toward cooperative principles[22]. Resultant advantages may include: 1) higher satisfaction from participants with the

[18] Racabi, *Balancing Is for Suckers*, in *CLR*, 2023, 109, p. 67-68.

[19] *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477/1960, p. 489; Brommer et al., *Cooperative Bargaining Styles at FMCS: A Movement toward Choices*, in *PeppDRLJ*, 2002, 2(3), pp. 465-466.

[20] Friedman, *Front Stage Backstage: The Dramatic Structure of Labor Negotiations*, MIT Press, 1994, pp. 4-5.

[21] Cutcher-Gershenfeld, *How Process Matters A Five-Phase Model for Examining Interest-Based Bargaining*, in Kochan, Lipsky (Eds.), *Negotiations and Change: From the Workplace to Society*, 2019, ILR Press, p. 143; Brommer et al., *cit.*, pp. 466 and 479 (describing FMCS providing assistance in around 5,275 traditional negotiations annually and around 300 interest-based negotiations annually).

[22] See Levinson, *Union co-op negotiations: True integrative bargaining* (working paper on file with author) (finding more sharing of information and suggesting union co-ops offer "an opportunity to make the necessary types of entity-wide change for interest-based bargaining to succeed.").

process and outcomes, and 2) workers gaining financial literacy and practicing problem-solving skills transferable to other settings[23].

Perhaps more interest-based negotiations and resultant CBAs also address grand challenges of this historical time differently than negotiations with a traditional non-cooperative business. Traditional union negotiations foster leadership and independent thinking and, along with other aspects of unionization, such as information sharing and voting, may lead to more active participation in political democracy[24]. Co-op labor negotiations have the potential to address the larger societal issues in a more direct and cohesive manner by drawing on cooperative principles and utilizing the integrative bargaining approach. In particular, the use of open book negotiations and a problem-solving approach suggest that workers involved in these negotiations will have models and tools to use in democratic leadership. A possible spill-over effect is more workers participating in civic society and political democracy.

Traditional negotiations tend to focus on workplace issues rather than issues of concern to the community in which they operate, or other external interests. Union co-op negotiations may have the potential for greater attention to community concern. A couple of the interviewed participants in negotiations reported addressing community concerns. Three of the resultant CBAs appear to integrate more concern for the community than more traditional CBAs[25]. While a different and relatively new approach to traditional bargaining, Bargaining for the Common Good, more directly addresses community concerns, union co-op negotiations also appear to sometimes address community concerns. Perhaps integrating Bargaining for

[23] Democracy at Work Inst., *Becoming employee owned: Options for business owners interested in engaging employees through ownership*, 17 Dec. 2014, https://institute.coop/sites/default/files/COT_BecomingEmployeeOwned_FINALweb.pdf; *Cooperative Education Fund grants include financial literacy for Spanish speaking worker-owners*, 20 Dec. 2021, https://www.cdf.coop/post/cooperative-education-fund-grants-include-financial-literacy-for-spanish-speaking-worker-owners.

[24] Becher, Stegmueller, *Cognitive ability, union membership, and voter turnout*, 2019, p. 2 (IAST working paper available at https://sites.duke.edu/stegmueller/files/2019/04/Becher_Stegmueller_UnionTurnout.pdf) ("there is nonetheless robust evidence that unions increase the propensity of their members to participate in elections"). See also Booth, Lup, Williams, *Union membership and charitable giving in the United States*, in *ILRR*, 2017, 70(4), p. 848 (finding union members 3% more likely than non-union members to donate to charitable organizations).

[25] See text accompanying notes 136-140.

the Common Good into union co-op negotiations would provide synergy to focus on community concerns.

Traditional negotiations tend to address technological change by focusing on job security and retraining[26]. None of the union co-op CBAs contain provisions that proactively address how to redistribute wealth as work becomes more automated, although some union co-ops may work with the larger labor and cooperative movements on addressing this challenge. Two of the CBAs reflect a cooperative approach to technological change while one reserves the right to management[27]. The union cooperatives may be innovating around technological change in spheres other than negotiations, such as their ownership structure, as reflected in the interview of one participant[28].

Environmental concerns are often encompassed in traditional negotiations to the extent they affect the health and safety of the workers. Traditional CBAs often contain health and safety provisions to protect workers from dangers such as chemicals and other environmental pollutants or conditions, such as extreme heat. Two of the union co-op CBAs express a focus on environmental sustainability, and the participants in these negotiations confirmed that while, in the round of negotiations explored, sustainability was not a topic of discussion, it is a primary focus of the businesses[29]. On the other hand, most of the CBAs do not address environmental sustainability or focus on the pending large-scale changes to work that climate change may portend, although sustainability is a core principle for at least one of the other union co-ops.

Finally, most traditional CBAs contain non-discrimination clauses. Often these are analogous to the protections provided by anti-discrimination laws in the United States, such as Title VII. Sometimes however, they provide more protections, such as for those disabled by work[30]. The interviews and

[26] Cha, *A Just Transition: Why transitioning workers into a new clean energy economy should be at the center of climate change policies*, in *FordELR*, 2017, 29(2), pp. 203-204 ("The opposition some labor unions have to climate change mitigation efforts is rooted in the need to protect their members.").

[27] See text accompanying notes 142-149.

[28] See text accompanying note 150.

[29] See text accompanying notes 178-181.

[30] See Levinson, *What the awards tell us about labor arbitration of employment discrimination claims*, in *UMiJLR*, 2012, 46(3), p. 834 ("Other cases indicate that arbitrators sometimes apply the law even less restrictively than the courts in favoring discriminatees").

resultant union co-op CBAs suggest that in limited circumstances the cooperative principle of non-discrimination results in inclusion of even stronger contract terms to combat racism and other systemic discrimination.

This paper next provides background about the operations of more traditional labor negotiations in the United States and about the limited instances and business frameworks where collective bargaining and employee ownership intersect. The third part of the paper briefly describes union co-op labor negotiations to familiarize the reader with negotiations in this sector. In the fourth part, the paper expounds the theoretical framework from which the union co-op labor negotiations will be explored – the dispute resolution theories of distributive versus interest-based bargaining. In the final part, the paper analyzes several union co-op negotiations and resultant CBAs and addresses the questions posed at the outset of the research and this paper.

2. *Background*

In the United States, collective bargaining is normally an adversarial process where each party uses economic power to pressure the other to reach agreement[31]. In the private sector, employers may lawfully lock out and replace their employees, and union workers have the right to strike[32]. An example of this process is the most recent negotiations between the United Auto Workers and three automobile manufacturing companies in the United States: Stellantis, General Motors, and Ford. During these negotiations, the union adopted a new method of economic pressure, termed the "Stand Up Strike". In a stand-up strike, rather than all workers of one target company striking in unison, the workers incrementally pressure the employers by striking at certain facilities of all three companies based on how far from meeting the unions' demands each employer remains. In addition, the union and its president, Sean Fain, used a variety of media, from traditional media

[31] See generally *NLRB v. Ins. Agents' Int'l Union,* 361 U.S. 477/1960; Brommer et al., *cit.*, pp. 466, 479 (describing FMCS providing assistance in around 5,275 traditional negotiations annually and around 300 interest-based negotiations annually).

[32] NLRA section nos. 7, 8(a)(1), 8(a)(3) (29 U.S.C. section nos. 7, 8(a)(1), 8(a)(3)); See generally *NLRB v. Erie Resistor Corp.*, 373 U.S. 221/1963; See generally *NLRB v. Brown,* 380 U.S. 278/1965.

to announcements in virtual media and videos posted on social media to reach a wide audience. This media likely contributed to the majority of residents of the United States supporting the UAW's demands rather than the automakers' positions[33]. At issue in the bargaining were pay, benefits, and profit-sharing[34]. Another contested topic of negotiation was how to maintain job security as the world transitions to green energy, in the face of climate change, and as the auto industry opens new, possibly non-union, plants to produce electric batteries[35]. The parties ultimately reached an agreement that eliminated the existing tiered wage scheme, granted significant raises, and contained a means through which employees at newly opened battery plants could unionize[36].

Another example of a traditional bargaining process is the Writers Guilds' (both the Guild of America West and the Guild of America East) most recent negotiations with the media production studios, such as Walt Disney Co. and Netflix, Inc.[37] The parties exerted economic pressure with the workers striking for over four months. Again, beyond wages, one of the key issues was job security. For the writers, job security is threatened by the significant advances in artificial intelligence in recent years. The Guilds were able to negotiate not only for increased revenue from streaming shows, but also for guarantees that scripts for movies and television/streaming shows will be written by humans rather than generative AI[38].

[33] Sullivan, *Americans broadly support auto, Hollywood strikes, Reuters/Ipsos poll shows*, 21 Sept. 2023, https://www.reuters.com/world/us/americans-broadly-support-auto-hollywood-strikes-reutersipsos-poll-2023-09-21/.

[34] Sullivan, *cit.*

[35] Combs, *Analysis: The big 3-UAW pay raise of (TBD)% will make history*, in *BLNews*, 22 Sept. 2023, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-big-3-uaw-pay-raise-of-tbd-will-make-history; Chiem, *UAW steps up GM and Stellantis strike, notes Ford progress*, in *Law360*, 22 Sept. 2023, https://www.law360.com/articles/1724757/uaw-steps-up-gm-and-stellantis-strike-notes-ford-progress; MacLeod, Yusuf, *Ford CEO: UAW demands regarding EV battery plants holding deal "hostage"*, in *MemBJ*, 29 Sept. 2023, https://www.bizjournals.com/memphis/news/2023/09/29/ford-ceo-uaw-demands-ev-battery-plants.html; Sullivan, *cit.*

[36] Woods, *UAW wins big contract after bold strike approach*, in *ABALELN*, 08 Aug. 2025, https://www.americanbar.org/groups/labor_law/resources/magazine/2023-fall/uaw-wins-big-contract-after-bold-strike-approach/.

[37] Golum, *Screenwriters approve deal, end strike after months of talks (2)*, in *DailyLR*, 27 Sept. 2023, https://news.bloomberglaw.com/daily-labor-report/hollywood-union-boards-ok-new-deal-send-contract-to-member-vote.

https://www.bargainingforthecommongood.org/ (consulted 03 Nov. 2025).

[38] Golum, *cit.*

One more recent development in collective bargaining in the United States is a growing number of unions that explicitly consider community and external interests in preparing for negotiations. In the Bargaining for the Common Good framework, the union involves community members and finds intersections between their interests and those of workers and formulates bargaining proposals to address these mutual interests[39].

While in traditional negotiations the issue of job security is addressed by bargaining, unions less commonly bargain for ownership rights in a company. Managerial decisions, ownership rights, and union participation on company boards are permissive subjects of bargaining to the extent they do not relate to terms and conditions of employment. Employers are not bound to bargain over permissive subjects, and unions may not insist on an employer agreeing to a permissive subject[40]. Nevertheless, some U.S. companies and unions have experimented with union representatives holding positions on company boards and with worker ownership. For example, in the 1980s, the UAW and General Motors partnered to launch the manufacture of Saturn automobiles with the union having representatives on Saturn's board[41]. The Saturn partnership involved "over 400 union members, jointly selected by the local and the company" performing operations tasks that would traditionally be considered management positions[42]. Workers completed 92 hours of training annually in "production methods, team dynamics, leadership, and problem solving, or related topics"[43]. Unlike a cooperative, the Saturn employees did not have an ownership stake in the company, but the workers received compensation contingent on company performance[44].

[39] https://www.bargainingforthecommongood.org/ (consulted 03 Nov. 2025).

[40] See generally *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666/1981; *Pieper Elec., Inc.*, 339 NLRB 1232/2003 1235; *Harrah's Lake Tahoe Resort Casino*, 307 NLRB 182/1992 182; NLRB Gen Cous., Advice Memo: *Pac. Lumber Co.*, No. 20-CA-22433, 1989 WL 241589, p. 1.

[41] Cutcher-Gershenfeld, *How process matters: A five-phase model for examining interest-based bargaining*, in Kochan, Lipsky (eds.), *Negotiations and change: From the workplace to society*, Cornell Univ. Press, 2003, p. 158 (UAW-Saturn agreement was 28 pages that established joint governance structure rather than 700 plus pages of master agreement that served as starting point).

[42] Rubinstein, Heckscher, *Partnerships and flexible networks: Alternatives or complementary models of labor-management relations*, in Kochan, Lipsky (eds.), *Negotiations and change: From the workplace to society*, Cornell Univ. Press, 2003, p. 19.

[43] Rubinstein, Heckscher, *cit.*, p. 193.

[44] *Ibid*.

Also, during the late 1970s and early 1980s, unions experimented with purchasing and managing large companies to avoid shutdowns, such as in the instance of Rath Packing Company[45]. Rath was a meatpacking company in Iowa[46]. The United Food and Commercial Workers Local 46 orchestrated a buy-out of the company by an ESOP (employee stock ownership plan)[47]. A majority of the members of the ESOP's board of trustees were workers, and the company's board of directors consisted of workers and union-named representatives[48]. Although initially successful, the company ultimately declared bankruptcy and liquidated its assets in 1985[49].

Many unions and employers, however, maintain traditional roles during negotiation. Management retains rights of ownership, board participation, and decisions about the direction of the company. Unions bargain for better terms and conditions of employment, such as wages, benefits, health and safety, schedules, and job security.

On the other hand, in many U.S. companies, employees are beneficial owners through an ESOP[50]. Some ESOPs are set up to provide employees with input at the board level and about managerial decision-making, but most are not. Over the last decade, workers in the United States have increasingly turned to worker-owned cooperatives to provide a living wage, job security, company ownership, and a voice in decision-making. One of the earlier projects created worker-owned cooperatives in Cleveland[51]. In that project, a large foundation led initiative recruited anchor institutions, such as hospitals and universities, to purchase from worker-owned co-ops[52].

[45] Gunn, *Workers' self-management in the United States*, Cornell Univ. Press, 1984, p. 136; Ellerman, Pitegoff, *The democratic corporation: The new worker cooperative statute in Massachusetts*, in *NYURLSC*, 1983, 11(3), p. 448 n. 33; Olson, *Union experiences with worker ownership: Legal and practical issues raised by ESOPs, TRASOPs, stock purchases and co-operatives*, in *WiLR*, 1982, 5, pp. 753-760; Rosen, Wilson, *Employee ownership: A new strategy for economic development*, in *NYURLSC*, 1986-1987, 15(1), p. 219.

[46] Gunn, *cit.*, pp. 133 and 134.

[47] Gunn, *cit.*, p. 135.

[48] Hammer, Stern, *A yo-yo model of cooperation: Union participation in management at the Rath Packing Company*, in *ILRR*, 1986, 39(3), p. 341, DOI: 10.2307/2524094; Gunn, *cit.*, pp. 139-140.

[49] Hammer, Stern, *cit.*, pp. 345 and 346.

[50] Blasi, Freeman, Kruse, *The citizen's share: Reducing inequality in the 21st Century*, Yale Univ. Press, 2014, p. 119.

[51] Https://www.evgoh.com/ (consulted 06 Feb. 2024).

[52] *Ibid*.

In 2018, the state of Colorado enacted statutes to incentivize incorporation of worker-owned cooperatives[53]. During the COVID pandemic, New York City established a hotline to assist owners convert their businesses to worker-owned cooperatives[54]. At most of these cooperatives, the workers are not represented by a union.

Some worker-owners, and other employees of worker-owned cooperatives, are unionized and negotiate collective bargaining agreements with the cooperative employer. The oldest union cooperative currently operating in the United States is Cooperative Home Care Associates, where the workers are represented by SEIU (Service Employees International Union) 1199[55]. A prominent example of an organization incubating union cooperatives is Co-op Cincy. Mondragon Corporation was an inspiration and model for Co-op Cincy[56]. Most of the companies in the Mondragon cooperative are not unionized, but the grocery, Eroski, is. Mondragon uses a system of social councils to provide worker voice and decision-making power.[57] Co-op Cincy substitutes the social council with a union[58]. United States labor law prohibits company unions, including many employee committees in non-unionized companies[59]. When, however, workers unionize, companies can lawfully implement work-councils negotiated in partnership with the union. For examples of unionized coops in the United States, see A Bookkeeping Cooperative (ABC) (location not identified on their website)[60], Anytime Union Taxi (Rockville, MD)[61], Community Printers

[53] Wiener, Phillips, *Colorado - "The Delaware of cooperative law:" Benefits to incorporating a worker cooperative in Colorado*, in *Fifty by Fifty*, 29 May 2018, https://medium.com/fifty-by-fifty/colorado-the-delaware-of-cooperative-law-babedc9e88eb.

[54] Kahn, *Employee ownership key to NYC recovery strategy,* in *Fifty by Fifty*, 25 Jan. 2021, https://www.fiftybyfifty.org/2021/01/employee-ownership-key-to-nyc-recovery-strategy/.

[55] Pinto, *Building community, forging respect: Home care co-ops show a better way*, in *CoopBJ.,* 2022/2023, p. 20, https://ncbaclusa.coop/content/uploads/2023/02/Fall-2022_Winter-2023-Cooperative-Business-Journal_FINAL-v2.pdf.

[56] Barker, Vera, *"Co-op Cincy": A Living Lab for the 1worker1vote Movement*, in Clamp, Peck, *Humanity@Work & Life: Global Diffusion of the Mondragon Cooperative Ecosystem Experience* Oak Tree Press, 2023, p. 224.

[57] Barker, Vera, *cit.*, p. 227.

[58] See generally Levinson, *Breaking new ground: Social movement theory and the Cincinnati union co-ops*, in *ERSJ*, 2022, 34, p. 213.

[59] NLRA section nos. 2(5), 8(a)(2) (29 U.S.C. section nos. 152(5), 158(a)(2)).

[60] Https://bookkeeping.coop/home/ (consulted 03 Nov. 2025).

[61] Https://anytimeuniontaxi.coop/ (consulted 03 Nov. 2025).

(Santa Cruz, CA)[62], Democracy Brewing (Boston)[63], Design Action Collective (San Francisco Bay Area)[64], Gimme Coffee (Ithaca, NY)[65], New Era Windows Cooperative (Chicago)[66], Time of Day Media (New York City)[67], White Electric Coffee Co-Op (Providence, R.I.)[68], and Working Systems (Olympia, WA)[69].

Practitioners debate whether unionization of a worker-owned co-op is necessary or a good idea. Prior articles address the ways that a union worker-owned co-op benefits the workers as owners and the workers as workers and is beneficial for both the union movement and the cooperative movement[70]. This paper turns to exploring the process of collective bargaining in unionized worker-owned co-ops.

3. *Union Co-op Negotiations*

Participants in union co-op negotiations have generally described bargaining that is more interest-based than traditional distributive collective bargaining. The parties have shared goals and are interested in financial viability of the business and welfare of the workers. The process is often collaborative. Sometimes the union and employer negotiate for a more continuous bargaining process rather than set terms governing health and safety or scope of work, for instance[71]. One participant, Ra Criscitiello, described the negotiations: The negotiations resembled a very good mediation where a talented mediator engages in sincere listening, recognizes and furthers the overall goal, uses the energy of conflict to drive momentum, and ultimately

[62] Https://comprinters.com/ (consulted 03 Nov. 2025).

[63] Https://www.democracybrewing.com/ (consulted 03 Nov. 2025).

[64] Https://designaction.org/ (consulted 03 Nov. 2025).

[65] Https://gimmecoffee.com/ (consulted 03 Nov. 2025).

[66] Https://newerawindows.com/Content/newerawindows.com.html (consulted 03 Nov. 2025).

[67] Https://www.timeofdaymedia.com/ (consulted 03 Nov. 2025).

[68] Https://www.whiteelectriccoffee.com/ (consulted 03 Nov. 2025).

[69] Https://workingsystems.com/ (consulted 03 Nov. 2025).

[70] Levinson, *Breaking new ground*, cit., pp. 217-219.

[71] See, e.g., United Healthcare Workers - West (UHW) Collective Bargaining Agreement with Nursing and Caregivers Cooperative, Inc. (NCC), Dec. 1, 2016 - Dec. 1, 2017 (on file with author).

the parties resolve their issues.[72] In contrast, in traditional negotiations generally the employer focuses on keeping down costs, and the union focuses on winning a greater share of the economic pie for the workers.

Union co-op negotiations are often quicker than traditional adversarial negotiations, and parties, particularly union representatives, appear more satisfied with the process and outcomes. One union attorney, Casey Whitten-Amadon, described the negotiations as the quickest and easiest of the hundreds of negotiations in which he has participated[73]. Lewis Connell, another union negotiator, concluded that if he ever had to negotiate a manufacturing CBA, he would be "so spoiled" he would be "wondering why there is such a problem and what is the big deal – why don't they just listen"[74].

The workers involved in co-op negotiations tend to participate more actively than in traditional negotiations and gain problem-solving and leadership skills[75]. The co-ops generally provide full financial information to the union representatives, unlike in most traditional negotiations where the law does not require an employer to provide financial information unless the employer insists it has no ability to pay its employees more than it has offered[76].

Of course, not all union co-ops are the same and not all engage in interest-based negotiations. Some participate in coordinated or multi-employer bargaining, and others do not engage in collective bargaining. These cooperatives likely reap different benefits from their relationship with the union, other than those resulting from interest-based negotiations and the resultant CBAs. One example of a union co-op that signs onto a multi-employer master agreement is Time of Day Media, a party to the 2023 Writers Guild of America Theatrical and Television Minimum Basic Agreement[77].

[72] Interview with Ra Criscitiello, Deputy Director of Research, SEIU United Healthcare Workers West, 29 Apr. 2024.

[73] Interview with Casey Whitten-Amadon, Attorney for IUE-CWA, 24 Apr. 2024.

[74] Interview with Lewis Connell, Unit Chair & VP, USW Local Union 14734-16, 10 May 2024.

[75] Levinson, *Union co-op negotiations,* cit.

[76] Lurie, Fitzsimmons, *A union toolkit for cooperative solutions*, Cmty & Worker Ownership Project at the CUNY Sch. of Lab. & Urb. Stud., 2021, https://slu.cuny.edu/wp-content/uploads/2021/11/28283961_Union_Toolkit_final_11-2021.pdf.

[77] For example, Time of Day Media is a party to the 2023 Writers Guild of America Theatrical and Television Minimum Basic Agreement, available at https://www.wgaeast.org/

CHCA has recently decided, at the union's request, to participate in coordinated bargaining and will start multi-employer bargaining. Many reasons indicate that multi-employer bargaining will be preferable for certain union co-ops, even though it likely results in the loss of interest-based bargaining. For instance, in a worldwide economy, surviving as a small co-op can be challenging and joining a large group of employers with a union contract can provide the advantages of large horizontal scale that multi-nationals have without giving up the ability to function as a democratically-run enterprise. Likewise, when a large worker-owned co-op operating in the mixed public/private sector must obtain resources through the legislature, legislatures are more likely to listen to a larger group of employers and workers than one employer and its worker-owners. And multi-employer bargaining can still sometimes allow for a side-letter agreement that institutes democratic governance and care for community in the relationship between the co-op and the union representing its workers.

Some union co-ops do not have collective bargaining agreements at all. Snow Bloom Coffee, for instance, stated that: "Our collective bargaining agreement would be our by-laws (we don't have an employer to bargain against) and you can find all of those documents on our website under the transparency tab"[78]. A review of their by-laws indicates that the union who represents them, UE 1011, is not mentioned[79]. Snow Bloom's *Transparency Report* for 2023 has a page devoted to the role of the union[80]. It explains that the co-op workers are able "to participate in the union's national elections" and to support other food-service workers who unionize and collectively bargain through the contribution of dues[81].

Similarly, Collective Copies relies solely on their bylaws, which were approved by the union, to resolve "shop floor" disputes. Their by-laws in-

guild-contracts/mba/download/; E-mail from Angad Bhalla, Worker/Owner, Time of Day Media, to Kelsey Hammon, research assistant to Ariana Levinson, Professor of Law., Louis D. Brandeis Sch. of L., Univ. of Louisville, 12 Feb. 2024 (on file with author).

[78] Email response to online inquiry form submission, 24 Mar. 2024 (on file with author).

[79] See Amended and Restated Bylaws of Slow Bloom Coffee Cooperative Corporation: Adopted December 3rd, 2023, https://static1.squarespace.com/static/650bc396043d117e215bf99b/t/6573958e3a1e3c0365a0f390/1702073743120/Amended+and+Restated+Bylaws+of+Slow+Bloom+Coffee+Cooperative+-+Draft+20230607.docx+%285%29.pdf.

[80] Slow Boom Coffee Co., *Transparency report 2023*, p. 22, https://drive.google.com/file/d/1bgJgLRXd8k9gS5Ju97RYw0E89IoSIUnL/view.

[81] *Ibid*.

corporate provisions that address topics more commonly seen in CBAs than bylaws, such as pay differentials, maintenance of a healthful workplace, holiday and vacation pay, health benefits, non-discrimination, a just cause guarantee, and the right to due process, including notice and an opportunity to be heard, before termination of a worker/owner[82]. The relationship with the union would enable them, in rare instances where they cannot internally resolve a dispute, to call on the expertise of the union and to mediate the dispute with the help of an outside neutral party[83]. For all of these union cooperatives, even those that do not have a traditional CBA, a potential advantage is being embedded within the larger labor movement with the ability to pool resources for material benefits, such as retirement plans or mutual aid during emergencies, such as a pandemic, and also to push for social and legal change benefiting more democratic workplaces.

Even when the agreements do not manifest significant differences, interviews about the process reveal significant differences between worker-owned co-op labor negotiations and traditional negotiations. While change may be gradual when starting with an already-existing CBA, the potential to adopt more interest-based solutions over the years remains.

4. *Theoretical Framework*

The dispute resolution literature describes two distinct types of negotiation to better enable understanding of the bargaining process. In traditional bargaining, each party begins negotiation with an offer seeking more than they realistically anticipate obtaining. Each party then makes gradual concessions until reaching agreement. In this type of negotiation, the parties envision an inelastic amount of resources, for which they each bargain for the greatest amount. This bargaining is sometimes termed "competitive," "rights based," "positional," "zero-sum," or "distributive"[84]. I will use the term "distributive" to describe this type of bargaining. Advantages of distributive negotiations are they can result in one party obtaining a great share

[82] By-laws of Collective Copies, Inc. (on file with author).

[83] Interview with Randy Zucco, owner Collective Copies, 29 July 2024.

[84] Folberg, Golann, Stipanowich, Reynolds, Schmitz, *Resolving disputes: Theory, practice, and law*, Aspen, 2022, pp. 47 and 49-50.

of resources and that they can counterbalance differentials in bargaining power[85].

In *Getting to Yes*[86], the authors popularized an alternative type of negotiations, termed variously in the literature as "cooperative," "win-win," "integrative," or "interest-based" negotiations[87]. I will use the latter term. In this type of negotiation, the parties envision an elastic amount of available resources, share differences in which resources are most valuable to them and why, and create solutions that will satisfy all the parties' interests[88]. Rather than focusing on the parties' positions – the bottom-line outcome each party wishes for – the bargaining focuses on the parties' interests – the underlying reasons for their positions. Parties work together to generate and evaluate options that might address their interests[89]. Parties commit themselves to settling conflicts based on objective criteria rather than raw economic power.

In distributive negotiations, the parties risk overlooking certain resources or solutions because they are narrowly focused on dividing money and other assets[90]. Additionally, after concluding, distributive negotiations can leave parties feeling as though they were "forced" to compromise and therefore dissatisfied[91]. Interest-based negotiations are designed to address these disadvantages. Focusing on the parties' interests will more easily address emotional needs in addition to economic needs. For these reasons, interest-based negotiations are well-suited to situations in which the parties have an ongoing relationship.

[85] Goodpaster, *Primer on competitive bargaining*, in *JDR*, 1996, 2, pp. 375-376.

[86] Fischer, Ury, Patton, *cit.*

[87] While there may be differentiation among integrative or cooperative approaches, the level of detail necessary to analyze between a distributive and an interest-based approach does not require delving into those particular nuances. See, e.g., Gifford, *A context-based theory of strategy selection in legal negotiation*, in *OhStLJ*, 1985, 46(1), p. 43 (differentiating between cooperative and integrative approaches).

[88] Folberg, Golann, Stipanowich, Reynolds, Schmitz, *cit.*, pp. 53-56; Cf. Cutcher-Gershenfeld, *cit.*, p. 146, Table 8.4 (listing behaviors involved in one form of interest-based collective bargaining).

[89] See Leventhal, *Implementing interest-based negotiation: Conditions for success with evidence from Kaiser Permanente*, in *DRJ*, 2006, 61(3), p. 55.

[90] See generally Chapter 2 of Lax, Sebenius, *The manager as negotiator: Bargaining for cooperation and competitive gain*, Free Press, 1986.

[91] Menkel-Meadow, *Toward another view of legal negotiations: The structure of problem solving*, in *UCLALR*, 1984, 31(4), pp. 813-814.

As a descriptive matter, much negotiation conducted by attorneys, whether in litigation settlement or closing a transaction, opens with interest-based negotiation. At some point, the negotiation then transitions to distributive negotiation and dividing the available money and other resources[92]. Litigation settlement might start off with a brief interest-based approach focused on the form and timing of payment and then rapidly shift to distributive negotiation over the settlement amount. On the other hand, a transactional negotiation, such as negotiating between partners opening a business, might start with a long interest-based phase. The parties discuss non-economic terms such as what they desire from the partnership and how they will work well together. Then, toward the end of the negotiation, the parties transition to discussion of amounts of assets each party will contribute to establishing the business.

Within this theoretical framework, traditional private-sector collective bargaining in the United States integrates more distributive than interest-based negotiation[93]. The bargaining often starts with non-economic terms such as health and safety or scheduling, where each side might offer a creative idea to address the other side's interests. The bargaining then turns to the crux of the negotiations, which focuses on economic terms, such as wages and benefits. Each party focuses on obtaining the largest share of the available resources, and uses economic power, such as strikes and lockouts, to obtain their desired outcome.

[92] White, *The pros and cons of "Getting to Yes"*, in *JLE*, 1984, 34(1), p. 116; Craver, *Negotiation ethics for real world interactions*, in *OhStJDR*, 2010, 25(2), p. 316; Gifford, *cit.*, p. 57; See also Sanchez, *Back to the future of ADR: Negotiating justice and human needs*, in *OhStJDR*, 2003, 18(3), pp. 684-693 (explaining how historically Mary Parker Follett, Richard Walton, and Robert McKersie advocated for more integration, or interest-based bargaining, in labor negotiation).

[93] See Leventhal, *cit.*, p. 56 (describing difficulties with using interest-based negotiation in traditional collective bargaining); Cutcher-Gershenfeld, *cit.*, p. 143 Table 8.1 (listing characteristics of traditional labor negotiations); But see Gifford, *cit.*, p. 89 (describing collective bargaining as more suitable for integrative bargaining than some other types of negotiation in which lawyers are involved, yet recommending management attorneys take competitive approach initially); Cf. Westergard, *Federal union bargaining power explained*, in *ULVLR.*, 2022, 43(2), p. 91 (noting that federal unions, which cannot bargain over wages or strike, use interest-based negotiation and political lobbying to influence collective bargaining); Clark, *Labor relations: Past and future trends affecting K-12 employment relations: A management perspective*, in *JLE*, 2001, 30(2), p. 232 (describing wide spread adoption of interest based bargaining in public sector education labor negotiations).

Scholars have recognized that implementing interest-based collective bargaining with a traditional company is not possible, even if the parties so desire, unless interest-based negotiation is implemented throughout the company and workplace[94]. Additionally, successful integrative bargaining requires disclosure of information, so companies must be willing to share financial information[95]. However, the law in the United States does not require companies to share financial information in collective bargaining.

In fact, as a theoretical matter, confirmed by at least one empirical study, implementing interest-based collective bargaining with a traditional U.S. business may disadvantage the union and workers. The legally backed bargaining power of employers may disadvantage workers without legally backed ownership or decision-making power.[96] The union co-op offers an opportunity to make the necessary types of structural business and workplace change for interest-based bargaining to succeed[97]. The strategies suggested for successful bargaining in situations between unequal parties, such as "establishing default rules and disclosure requirements," are more likely to be found in union co-op negotiations than traditional collective bargaining[98]. Participant's descriptions of collective bargaining in unionized worker-owned co-ops sounds more similar to interest-based bargaining.

[94] See Leventhal, *cit.*, p. 57; Susskind, Landry, *Implementing a mutual gains approach to collective bargaining*, in *Negot.*, 1991, 7(1), p. 8 (describing mixed results of implementing interest-based negotiations in five labor negotiations and recommending institutionalizing approach to deal with all employment issues); Cf. Cutcher-Gershenfeld, *cit.*, p. 160 (concluding that without preparation interest-based labor negotiation is likely to fail). But see Duvall, *Making friends of foes: Bringing labor and management together through integrative bargaining*, in *JDR*, 2009, 1, p. 197 (arguing that collective bargaining is "an ideal setting for integrative bargaining").

[95] Duvall, *cit.,* p. 198; Gifford, *cit.*, p. 61.

[96] Hafiz, *Structural labor rights*, in *MiLR*, 2021, 119(4), p. 656, DOI: 10.36644/mlr.119.4 ("workers' collective rights have eroded to the point where they lack any substantive ability to function as counterstructure – as effective countervailing power against employers.").

[97] Cf. Barenberg, *The political economy of the Wagner Act: Power, symbol, and workplace cooperation*, in *HLR*, 1993, 106(7), p. 1392 (concluding that "the relation between power and trust should be a central focus in the current debate over collaborationist labor relations"). But see Rubinstein, Hecksher, *cit.*, at 196 (arguing that in economy where horizontal flexibility to diminish number of workers is required render co-management with a union infeasible).

[98] Hafiz, *cit.*, p. 697.

5. *Analysis*

The dispute resolution theoretical framework indicates that interest-based negotiations for collective bargaining will result in both the cooperative owners' interests and the interests of the cooperative workers being met[99]. The transparency of the process will enable understanding that when interests were not met, the outcome resulted from necessary compromise given the market, clients, community, and other external constraints. The worker-owners and the workers represented by the union (even when they are the same workers) should feel more satisfied with the outcome of the bargaining.

The dispute resolution literature also indicates that using interest-based collective bargaining will result in the parties utilizing beneficial options they might otherwise have overlooked[100]. For example, worker owners' interest in generating increased revenue and job security, rather than a plant closure, might be addressed differently than in traditional effects collective bargaining which typically results in laying workers off in reverse seniority order. The parties might instead discuss an option to transfer production to a different product with a growing market and work together to find a way to implement changes to the production line and work schedule to accomplish this goal.

For this analysis, nine union co-op collective bargaining agreements, including those of eight worker-owned cooperatives were reviewed:

- Cooperative Home Care Associates and 1199 SEIU NewYork's Health

[99] Cf. Cutcher-Gershenfeld, *cit.*, p. 143 (issues such as "quality, job security, continuous improvement, work and family issues, new pay systems, work redesign, benefit restructuring, training, new technology and strategic investment choice" benefit from "joint problem-solving dialogues").

[100] While no study directly addresses whether resulting terms of a contract negotiated through interest-based rather than distributive based negotiation are different or better, the theory suggests that more creative terms that are more satisfactory to both parties likely will result. See, e.g., Booth, McCredie, *Taking steps toward "Getting to Yes" at Blue Cross and Blue Shield of Florida*, in *AME*, 2004, 18(3), p. 110, ("The change in mindset to be collaborative vs. competitive in the development of this solution was critical to the formation and ongoing success of the joint venture"); Shonk, *5 win-win negotiation strategies*, in *Harvard Program on Negotiation Daily Blog*, 02 Oct. 2025, https://www.pon.harvard.edu/daily/win-win-daily/5-win-win-negotiation-strategies/ (providing examples of creative proposals for contract clauses that further interest-based negotiation); See Bazerman, Neale, *Negotiating rationally*, Free Press, 1992, p. 22 (discussing generating alternate proposals rather than assuming a fixed pie).

and Human Service Union, AFL-CIO Collective Bargaining Agreement for the period Dec. 11, 2022 through Dec. 31, 2002 (hereinafter CHCA CBA).

- Our Harvest & UFCW Local 75 2020-2023 Collective Bargaining Agreement (hereinafter Our Harvest CBA).

- Retail, Wholesale and Department Store Union (RWDSU) UFCW and A Bookkeeping Cooperative, Inc. Collective Bargaining Agreement effective Jan. 1, 2020 (hereinafter Bookkeeping CBA).

- SEIU-UHW (United Healthcare Workers – West), CTW, CLC with AlliedUp Cooperative, Inc. 2021-2023 Collective Bargaining Agreement (hereinafter AlliedUp CBA).

- Snow River Cooperative and Local #800 IUE-CWA, AFL-CIO 2021-2024 Collective Bargaining Agreement (hereinafter Snow River CBA)

- Sustainergy Cooperative and USW, AFL-CIO, on behalf of Local.

- Union 14734-16, Collective Bargaining Agreement for the period July 1, 2022 through June 30, 2025 (hereinafter Sustainergy CBA).

- United Healthcare Workers – West (UHW) Collective Bargaining Agreement with Nursing and Caregivers Cooperative, Inc. (NCC) for the term Dec. 1, 2016 – Dec. 1, 2017.

- Worx Printing LLC & United Steel Workers 2022-2026 Collective Bargaining Agreement (hereinafter Worx CBA).

The review also included one multi-stakeholder union cooperative's, a grocery owned by both the consumers and workers, collective bargaining agreement[101].

CHCA's agreement is included in the analysis because until the most recent session this CBA was bargained between the cooperative and union. Collective Copies' bylaws were included because they treat the bylaws as their collective bargaining agreement. Time of Day Media's CBA, where the cooperative is simply a signatory to the multi-employer minimum standard CBA, was not included in the review. Information from interviews with participants in union co-op negotiations, which are reported in the article *Union Co-op Labor Negotiations: True Integrative Bargaining*[102], supplement the analysis based on the review of the CBAs.

[101] UFCW 3000 and Central Co-op Grocery Unit Collective Bargaining agreement effective 3/1/2022-12/31/2024 (on file with author) (hereinafter Central Co-op).

[102] Levinson, *Union Co-op Labor*, cit. (draft on file with author).

The article first briefly summarizes how the interviews and resultant CBAs suggest that many union co-op labor negotiations are more similar to interest-based negotiations than traditional labor negotiations. The paper then suggests that interest-based negotiations and the resultant CBAs may have a spillover effect and encourage the worker-owners to engage in civic society and political democracy. The CBAs contain various types of provisions promoting democratic decision-making and political participation, and union co-op negotiations appear to hold significant promise toward enabling workers to more fully participate in political and community democracy.

The paper then turns to considering whether union co-op labor negotiations have the potential to address some of the other grand challenges of our times differently than traditional negotiations. First examined are the ways in which the CBAs address community concerns. Next, the ways in which the CBAs address advancing technology are summarized, concluding that while some adopt more interest-based approaches – others do not – and none address head on the issue of how to redistribute wealth as work becomes more automated. Then the paper examines the ways in which the CBAs address race and other invidious discrimination. The union co-op CBAs do not generally suggest more active measures to combat systemic race discrimination but rather reflect a similar commitment to nondiscrimination in the workplace that results from traditional negotiations. Finally, examples of CBAs that promote environmental sustainability are discussed. While a few of the union co-op CBAs reflect a commitment to environmental sustainability, none explicitly address the dramatic social and economic shifts likely occurring because of climate change.

5.1. *Union Co-op Labor Negotiations are Likely to be More Interest-Based*

The interviews with those involved in union co-op negotiations suggest negotiations are more interest based than traditional collective bargaining. The interest-based negotiations result in direct reflection of that approach in some of the CBAs as well as commitments to continue to use interest-based negotiation to resolve problems arising during the term of the CBAs. For some, although the commitment to interest-based negotiations is not explicitly reflected in the CBAs, the CBAs include cooperative principles suggesting that an interest-based approach is commonly used during the parties' relationship, as well as in negotiations.

Several of the contracts explicitly acknowledge using a different more interest-based approach to negotiation of the contract. For example, the Worx CBA states that it "is the result of a collaborative effort among the worker-owners […] with the guidance of Union staff and leadership"[103]. The AlliedUp CBA states: "Enshrined in this collective bargaining agreement is an alternative employment model for the healthcare staffing industry: the worker-owned union cooperative. While the foundation of this model is not new, the partnership and details of this model are unprecedented. This agreement represents an innovative partnership, designed to forge a new frontier of unionized labor in the healthcare staffing industry. SEIU/UHW and AlliedUP are proud to create this collective bargaining solution for Allied Healthcare professionals"[104].

In fact, the Our Harvest CBA explicitly referencing interest-based negotiations. Article 1: Intent and Purpose states: "A special role of the collective bargaining process should be focused on continuous resolution of problems rather than adjudicating claims. This attitude of collective bargaining is remarkably different than what exists in private industries in most cases in North America where adversarial collective bargaining and adjudicating claims and grievances where there are winners and losers is the norm. The goal of continuous problem solving and win-win bargaining should be the style and substance of collective bargaining in the union co-op agreement"[105].

The Our Harvest CBA also commits the parties to a non-traditional interest-based form of dispute resolution known as binding mediation[106]. Most traditionally negotiated CBAs use arbitration as the final method of dispute resolution. Binding mediation is different than a stepped process including mediation before arbitration and different than the process known as med-arb. In binding mediation, the neutral simply makes a decision about how to resolve the grievance if the mediation fails. There is no process of

[103] Worx Printing LLC & United Steel Workers 2022-2026 Collective Bargaining Agreement, Article 1 - Intent and Purpose, at *1 (on file with author) (hereinafter Worx CBA).

[104] SEIU-UHW (United Healthcare Workers - West), CTW, CLC with AlliedUp Cooperative, Inc. 2021-2023 Collective Bargaining Agreement, Article I: Purpose and Philosophy, at *1 (on file with author) (hereinafter AlliedUp CBA).

[105] Our Harvest & UFCW Local 75 2020-2023 Collective Bargaining Agreement, Article I: Purpose and Philosophy, at *2 (on file with author) (hereinafter Our Harvest CBA).

[106] Our Harvest CBA, *cit.*, Article 6 Problem Solving, Grievance, & Binding Mediation Procedure, Sub-Part 6.3, at *8.

adjudication as in arbitration, and the neutral has access to information the parties provide during mediation that might not be permitted or presented during arbitration[107].

Other contracts also mention the use of interest-based negotiations throughout the term of the CBA. The Central Co-op CBA implements bargaining during the term of the agreement. It states: "Based on their mutual desire to increase collaborative engagement, Central Co-op and the Union agree to establish a Labor-Management Council ("LMC") […]. The LMC shall meet at least twice annually for the purpose of resolving matters in the workplace that may not be covered by the terms of the parties' collective bargaining agreements"[108].

The Central Co-op CBA explicitly recognizes that workers will need to spend time in Co-op meetings and will be paid for that work[109]. It further provides that workers can attend voluntary meetings without pay[110].

The Snow River CBA has at least five provisions explicitly requiring continuous collective bargaining during the term of the CBA. Continuous bargaining is required for the following topics: all temporary positions are reviewed after 60 days to determine whether a full-time position should be created; positions can be determined to involve "broad-based responsibility" so that seniority is only one factor in selection; four-day flex hours work week will be implemented; holiday work will be voluntary if possible and discussed prior to scheduling; and a safe and healthful workplace will be maintained[111].

The Snow River CBA repeats the commitment to cooperative principles in its preface and in one of the governing Articles. It states, for example: "Snow River Cooperative, its employees and the Union will work

[107] *Lindsay v. Lewandowski*, 139 Cal. App. 4th 1618/ 2006 1622, 43 Cal. Rptr. 3d 846/2006 848; Sher, Witkin, Hilberman, Marcus, Steele, *Other Forms of Dispute Resolution*, in *GPSolo*, 2015, 32(1), p. 61.

[108] Central Co-op, Letter of Understanding #1, at *24 (on file with author).

[109] Central Co-op CBA, *cit.*, Article 5, Hours of Work and Overtime, 5.6 Mandatory Meetings and 5.8.3 Voluntary Meetings, at *11.

[110] Central Co-op CBA, *cit.*, Article 5, Hours of Work and Overtime, 5.6 Mandatory Meetings and 5.8.3 Voluntary Meetings, at *11.

[111] Snow River Cooperative and Local #800 IUE-CWA, AFL-CIO 2021-2024 Collective Bargaining Agreement, Article IV Seniority, at *6 & *8-9, Article VIII General, 8.10 Flex Hours, at *24, Article IX Holidays at *25, Article XIII Health and Safety, at *31 (on file with author) (hereinafter Snow River CBA).

continuously and cooperatively toward our long-term common goals of being a low-cost, high-quality manufacturer, with quality customer service. In addition, Snow River Cooperative, its employees and the Union will work toward secure employment through a cooperative partnership based on mutual respect. Snow River Cooperative will ask employees to share in the direction of the Company and participate in decision making through the use of term positions, teams and other means of employee empowerment"[112].

Additionally, even when a contract does not explicitly mention interest-based collective bargaining or continued interest-based negotiation during the term of the agreement, the terms indicate that structurally the cooperative business principles (as distinguished from the interest-based negotiation framework) are used throughout the entity, which should reinforce the use of interest-based labor negotiations. The Bookkeeping CBA explicitly incorporates the International Cooperative Principles. It states: "The Union and the Coop agree to work together in partnership to serve the interests of the membership as both workers and owners. This partnership is guided by the principles of solidarity, accountability, and community in alignment with the International Cooperative Principles, which are:

1. Voluntary and Open Membership
2. Democratic Member Control
3. Member Economic Participation
4. Autonomy and Independence
5. Education, Training and Information
6. Co-operation among Co-operatives
7. Concern for Community and the Cooperative Values of *self-help, self-responsibility, democracy, equality, equity,* and *solidarity"*[113].

The CHCA CBA states that: "The Union recognizes the unique nature of the Employer as a worker-owned cooperative corporation and agrees to continue to cooperate with the Employer and the Employees to

[112] Snow River CBA, *cit.*, at *1 and Article VIII General, 8.8 Common Goals, at *24.

[113] Retail, Wholesale and Department Store Union (RWDSU) UFCW and A Bookkeeping Cooperative, Inc. Collective Bargaining Agreement effective 2020, Article 3 – Union Cooperative Partnership, at *4 (on file with author) (hereinafter Bookkeeping CBA). For more on the International Cooperative Principles, see The International Co-Operative Alliance: Statement on the Co-Operative Identity, 23 Sept. 1995, https://www.gdrc.org/icm/coop-principles.html.

perpetuate and enhance the Employer's unique culture reflecting worker ownership"[114]. The CBA specifies: "All Employees shall continue to have the opportunity to purchase and own Class A or other classes of stock in the Employer as designated by the Employer's Board of Directors and to become and remain worker-owners of the Employer in accordance with the Employer's by-laws and practices as now in effect or as they may be modified by the Employer's Board of Directors in its sole discretion"[115].

The CBA establishes "a Committee on Worker-Ownership to discuss and explore issues surrounding the development and maintenance of positive Employer-Union relations at a worker-owned enterprise [...] "[116]. The parties entered a Sideletter Regarding Worker-Ownership because the "worker-owned cooperative corporation is in many respects a unique entity," with a "special nature [...] recognized as a valuable characteristic which the parties wish to nurture and preserve [...]"[117]. The Sideletter Agreement includes a provision that "Employees who are or who become worker-owners of the Employer may continue without limitation to participate in (a) worker-owner activities and decisions, including voting on major company decisions (including by way of example but not limitation, significant policy changes, wage and benefit levels, and the distribution of the Employer's year end profits, if any), (b) the election of the majority of the membership of the Employer's Board of Directors and (c) all other worker-owner activities and decision making in accordance with the provisions of the Employer's By-laws and practices ("By-Laws"), as they are now in effect or as they may be modified in the future. Employees who are worker-owners shall participate in such activities in their capacities as worker-owners and not as officers, stewards, representatives or other agents of the Union"[118].

[114] Cooperative Home Care Associates and 1199 SEIU New York's Health and Human Service Union, AFL-CIO Collective Bargaining Agreement for the period December 11, 2002 through December 31, 2003 Article I Recognition, at *3 (on file with author) (hereinafter CHCA CBA).

[115] CHCA CBA, *cit.*, Article V Employer Procedures, at *9.

[116] CHCA CBA, *cit.*, Article XXIX Committee on Worker-Ownership, at *50.

[117] CHCA CBA, *cit.*, Article XXIX Committee on Worker-Ownership, at *50.

[118] CHCA CBA, *cit.*, Sideletter Regarding Worker-Ownership, at *52.

5.2. *Encouraging Participation in Civic Society and Political Democracy*

In the United States, union membership is associated with higher rates of voting[119]. This may be because union members are more familiar with engaging in democratic processes, like collective bargaining, at work or because unions educate their members and encourage solidarity[120]. Engagement in democratic processes and ongoing education should be even greater in a union cooperative than in a non-cooperative business, suggesting that union co-op collective bargaining has potential to encourage participation in political democracy. Unions and co-ops traditionally promote democratic processes[121], and the spill-over effect likely increases political activism and democratic processes. One study sets out three ways that workplace democracy may have a spillover effect to civic society and political democracy[122]. First, when workers participate in democracy at work it may increase "personal efficacy"[123]. Second, participating in group decision-making may increase workers "social orientation" and "sense of commonality"[124]. Third, workers may gain democratic skills at the workplace that can be transferred to other settings[125].

One item included in several of the union co-op CBAs – and also included in many traditionally-negotiated CBAs – is paid time off for jury

[119] Becher, Stegmueller, *Cognitive ability, union membership, and voter turnout*, 2019, p. 2 (IAST working paper available at https://sites.duke.edu/stegmueller/files/2019/04/Becher_Stegmueller_UnionTurnout.pdf) ("there is nonetheless robust evidence that unions increase the propensity of their members to participate in elections"). See also Booth, Lup, Williams, *Union membership and charitable giving in the United States*, in *ILRR*, 2017, 70(4), p. 848, DOI: 10.1177/0019793916677595 (finding union members 3% more likely than non-union members to donate to charitable organizations).

[120] See Booth, Lup, Williams, *cit.*, p. 839-840 (explaining that being part of civil organization leads to more awareness of civic opportunities, more group participation in civic activities through organization, and self-identity that includes civic mindedness).

[121] But see Rybnikova, *Spillover effect of workplace democracy: A conceptual revision*, in *FIP*, 2022, 13, p. 10, DOI 10.3389/fpsyg.2022.933263 ("research on cooperatives demonstrates a huge diversity of cooperatives and shows that cooperatives are not necessarily democratic organizations since their aims, values, and ways of organizational decision-making are highly varying and oligarchic tendencies are one of the essential struggles in cooperatives").

[122] Rybnikova, *cit.*, pp. 10 and 11.

[123] Rybnikova, *cit.*, pp. 10 and 11.

[124] Rybnikova, *cit.*, pp. 10 and 11.

[125] Rybnikova, *cit.*, pp. 10 and 11.

duty[126]. In the United States, courts pay a very low fee to those serving on jury duty, and many individuals do not participate in jury duty, even when directed to do so, due to the fact that this jury pay is in lieu of their regular wages. Unions negotiate provisions for pay during jury duty, which permits the workers to engage in the democratic process and experience decision-making as a group of citizens, a jury.

The AlliedUp CBA also demonstrates commitment to enabling workers to participate in political democracy more explicitly by enabling workers to voluntarily contribute a portion of their wages to the union's Committee on Political Education fund[127]. Likewise, the Sustainergy CBA enables workers to voluntarily contribute to the United Steelworkers Political Action Committee, which "supports various candidates for federal and other elective office"[128]. The Central Co-op CBA enables contribution to the "UFCW Active Ballot Club political action committee"[129], and the CHCA CBA enables contribution to "the 1199 Political Action Fund"[130].

The bargaining process where financial information is shared with all workers and assessed by the union and workers from the perspective of their impact on workers as workers, rather than owners, also encourages democratic decision-making. It requires that those workers involved in negotiations be financially literate and hone their analytical skills. It also helps those workers involved view financial information and the workplace from different angles – both as owners and as workers.

Our Harvest CBA provides an example of open-book labor negotiations. The CBA states: "Therefore, the main goal of union co-op man-

[126] See, e.g., Worx CBA, *cit.*, Article 11 - Paid Time Off, at *4 (providing pay of "normal wage rate for the first three days of jury duty"); Our Harvest CBA, *cit.*, 10.7 Jury Duty, at *12 (providing pay of "up to one week's worth of hours […] in addition to jury fee remuneration."); Snow River CBA, *cit.*, Article VI Hours of Work, 6.8 Jury Pay, at *14 (providing compensation less jury pay received); Sustainergy Cooperative and USW, AFL-CIO, on behalf of Local Union 14734-16, Collective Bargaining Agreement for the period July 1, 2022 through June 30, 2025, Article 8 Miscellaneous Provisions, Section 7 Jury Duty, at *12 (on file with author) (hereinafter Sustainergy CBA); Central Co-op CBA, *cit.*, Article 10 Leaves of Absence, 10.4 Jury Duty Leave; Cf. CHCA CBA, *cit.*, Article XVII Jury Duty, at *19 (providing pay for only three days of jury duty).

[127] AlliedUp CBA, *cit.*, Article 14: Union Membership, at *7.

[128] Sustainergy CBA, *cit.*, Article 3 Check Off, Section 4 PAC, at *5-6.

[129] Central Co-op CBA, *cit.*, Article 2 - Union Security and Activities, 2.1 Active Ballot Club, at *4.

[130] CHCA CBA, *cit.*, Article III, Check-Off, at *5.

agement relations in the union co-op model should be the continuous ongoing resolution of grievances, complete honesty by both sides and open financial books (virtually nonexistent in so called normal industrial relations in the United States), and a constant effort to improve the lives of the worker owners in the context of increasing the value of the co-op"[131].

These open-book negotiations are an aspect of running the cooperative with the finances available to all workers to enhance decision-making. The process is reflected in the Salary and Wage provision of the CBA.

"Hourly and salaried yearly increases are based on productivity and profitability. Financial information is available for review to all employees. Between January 1st and January 15th annually, the end of year finances will be evaluated in order to determine appropriate wage increases. Such raises will take effect on February 1st annually"[132].

The training established by the Our Harvest CBA also promotes democratic decision making. The CBA states: "Our Harvest believes in training on being part of a cooperative. Key topics will include communications, team building, problem solving, decision making, and leadership. As Mondragon practice demonstrates, this type of organizational training cannot and must not be a one-time event, but rather constitutes a continuous ongoing learning and reinforcement process"[133].

Similarly, the AlliedUp CBA establishes training for "professional development" and "employee advancement"[134]. The Co-op makes a regular contribution of one percent of the "annual gross payroll" to the SEU United Healthcare Workers West and Joint Employer Education Fund[135]. The CBA states that: "as a worker-owner company, members are able to position themselves in leadership roles to ensure fellow workers have a voice representing themselves and one another"[136].

The processes outlined in the Our Harvest CBA for addressing workplace issues also involve teamwork to a greater extent than traditional union grievance arbitration. Rather than a shop steward, an elected union committee negotiates with union representatives on the workers' behalf

[131] Our Harvest CBA, *cit.*, BACKGROUND, at ⋆1.
[132] Our Harvest CBA, *cit.*, Article 14.3 Salaries and Wages, at ⋆18.
[133] Our Harvest CBA, *cit.*, Article 11.7 Training/Apprenticeship, at ⋆16.
[134] AlliedUp CBA, *cit.*, Article 10: Joint Training and Education Trust Fund, at ⋆5.
[135] AlliedUp CBA, *cit.*, Article 10: Joint Training and Education Trust Fund, at ⋆5.
[136] AlliedUp CBA, *cit.*, Article I: Purpose and Philosophy, at ⋆1.

and advocates for the individual workers when they have discipline issues or other grievances[137]. The Union Committee meets regularly with the other workers so that others can "provide their input into the Cooperative's decision-making process and an opportunity to express their concerns […]"[138]. Similarly, the Snow River CBA emphasizes teamwork. It states: "We will achieve this goal through a strategic alliance of the employees, the Union and Snow River Cooperative working together for continuous improvement using team management, employee empowerment, and mutual respect"[139]. The Snow River Cooperative also establishes an elected three-person grievance and bargaining committee to work with Snow River and includes the Union Business Agent and President as participants in the meetings[140].

Social science research indicates that to counter the rise of authoritarian leaders, including in the United States[141], individuals must learn to engage in deliberative dialogue and practice empathy as well as engage in the politics of cooperation[142]. Other research hypothesizes a spillover effect where participating in workplace democracy leads to greater participation in political democracy[143], as supported by the literature regarding union membership discussed above. To the extent social science suggests that peo-

[137] Our Harvest CBA, *cit.*, Article 3, Union Shop Conditions & Checkoff, 3.8 Union Committee, at ⋆5.

[138] *Id.* at ⋆5-6.

[139] Snow River CBA, *cit.*, Preface, at ⋆1.

[140] Snow River CBA, *cit.*, Article VII Grievance Procedure, at ⋆14-15.

[141] See generally, MacWilliams, *Donald Trump is attracting authoritarian primary voters, and it may help him to gain the nomination*, in *LSE Blog*, 27 Jan. 2016, https://blogs.lse.ac.uk/usappblog/2016/01/27/donald-trump-is-attracting-authoritarian-primary-voters-and-it-may-help-him-to-gain-the-nomination/.

[142] Galamba, Matthews, *Science education against the rise of fascist and authoritarian movements: towards the development of a pedagogy for democracy*, in *CSSE*, 2021, 16, p. 584, DOI: 10.1007/s11422-020-10002-y. Cf. Cohen, Smith, *Do authoritarians vote for authoritarians? Evidence from Latin America*, in *RAP*, 2016, 3(4), p. 7, DOI: 10.1177/2053168016684066 (finding authoritarians support right, but not left, wing authoritarians, and education is best predictor to reduce authoritarianism).

[143] Budd, Lamare, Timming, *Learning about democracy at work: Cross-national evidence on individual employee voice influencing political participation in civil society*, in *ILRR*, 2018, 71(4), p. 979 (2018), DOI: 10.1177/0019793917746619. ("we find that employees with greater levels of individual autonomy and voice at work are indeed significantly more likely to engage in a broad array of pro- democratic behaviors"); But see Rybnikova, *cit.*, p. 02 (whether workplace democracy has spillover effect to political democracy is understudied and contested).

ple are more susceptible to authoritarian leadership when they are used to taking direction rather than problem solving and developing leadership skills, union co-op negotiations hold promise toward enabling workers to more fully participate in political and civic democracy.

5.3. *Recognizing Community and External Interests*

Beyond the interests of the owners and the co-op and the workers and the union, the dispute resolution literature suggests that an interest-based approach may be more responsive to the interests of those external to the negotiations. While an underexplored area of study, distributive approaches to negotiation may be less likely to consider negotiating parties' internal conflicts and the external factors, like relationships with family or friends, reputation in the community, or impact on the neighborhood than interest-based approaches[144]. In terms of collective bargaining, the interest-based approach of a union co-op might create terms and conditions of work that are more responsive to community concerns and other externalities such as climate change[145].

One participant in negotiations described community concerns about healthy food in schools as an integral part of negotiations. Paige Stephens explained how a plan to increase the potential markets for Our Harvest produce aligned with the union's political agenda to increase the healthiness of food for children in the Cincinnati school district[146]. The union worked with the School Board to pass a good food purchasing policy, which encourages schools to procure local food from unionized workforces, among other criteria[147]. The policy improves the quality and healthiness of the food eaten by 70,000 school children[148]. Similarly, Kevin O'Brien, who participated in Worx negotiations, relayed that the parties had many discussions to

[144] See, e.g., Folberg, Golann, Stipanowich, Reynolds, Schmitz, *cit.*, p. 5 (describing how triangle of negotiation interests involves environmental social considerations such as party to divorce negotiations having concern with how children, grandparents, and neighbor will think about new parenting arrangement).

[145] Cummings, *Catalytic localism: What is new about the Green New Deal*, in *CKLR*, 2022, 97(2), p. 293.

[146] Interview with Paige Stephens, Business Agent, UFCW Local 75, 09 July 2024.

[147] Interview with Paige Stephens, Business Agent, UFCW Local 75, 09 July 2024.

[148] Interview with Paige Stephens, Business Agent, UFCW Local 75, 09 July 2024.

educate the outside union representative and themselves about how their cooperative business operates and what their larger societal goals are[149].

Other participants did not explicitly address community concerns in the rounds of negotiation in which they were involved. The interviews suggest that a different approach, such as Bargaining for the Common Good[150], might more often address community concerns. Perhaps providing even more promise, the Bargaining for the Common Good approach might be integrated with the interest-based approach already in use by union co-ops. In fact, several of the union co-op CBAs recognize the obligation to give back to the larger community, which is one of the seven cooperative principles. The Worx CBA and the Bookkeeping CBA explicitly recognize "community" as a core principle that guides the partnership between the Union and the Co-op[151]. The Bookkeeping CBA also commits the Union and Co-op "to work cooperatively together with other unions, community groups, cooperatives, and businesses to encourage the growth of the cooperative sector and the solidarity economy"[152]. The Our Harvest CBA requires prioritizing solidarity with "individual ownership" as "a close second"[153]. The CBA states: "The union-co-op model, in order to be successful, cannot divorce itself in any way from the broader worker rights movement and therefore it is absolutely essential that the worker owners be good union members in the broadest sense of the term, participating in the union to uplift the conditions of workers around the world. If workers in some corner of the globe are building your product for a $1/hour then it undermines your ability to make the same product, sell it in the marketplace, and maintain your same standard of living"[154].

It establishes a union committee to "keep members informed and connected to the workers movement in the city, the country, and the world, and also to develop competitive best practices in each relevant market sector"[155].

[149] Interview with Kevin O'Brien, General Manager, Worx Printing, 14 May 2024.

[150] See generally Velazquez, *Bargaining for the common good in bankruptcy*, in *LSJ*, 2025, 50(4), DOI: 10.1177/0160449X251324433.

[151] Worx CBA, *cit.*, Article 4 - Partnership, at *1; Bookkeeping CBA, Article 3 – Union Cooperative Partnership, at *4.

[152] Bookkeeping CBA, *cit.*, Article 21 – Cooperative and Solidarity Economy Growth, at *14.

[153] Our Harvest CBA, *cit.*, Background, at *2.

[154] Our Harvest CBA, *cit.*, at *2.

[155] Our Harvest CBA, *cit.*, Article 3 – Union Shop Conditions & Checkoff, 3.8 Union Committee, at *5.

5.4. *Technological Change*

Addressing some of the grand challenges of this historical time, such as technological advancement of AI and the growth of the gig economy[156], might be better addressed with the big-picture thinking of interest-based negotiation. As to technological change, some union co-op CBAs provide a more creative approach than the traditional focus on job security. None of the CBAs contain provisions proactively addressing how to redistribute wealth as work becomes more automated, although some union co-ops may work with the larger labor movement on addressing this challenge. One of the ways that Mondragon addresses technological change is by consisting of a network of cooperatives that constantly innovate and provide retraining and different jobs to workers, and this could be a possible future means for union co-ops to address these challenges.

The Our Harvest CBA takes a more cooperative and proactive approach to addressing technological change than the focus on maintaining jobs that results from some more traditional negotiations. It specifies: "12.3 The Union recognizes the need for improved methods and output in the interest of the employees and the business and agrees to cooperate with the Cooperative in the installation of such methods, in suggesting improved methods and in the education of its members in the necessity for such changes and improvements"[157].

Paige Stephens explained that while in the round of negotiations that she described technology was not specifically discussed, everyone involved is aware they are negotiating against the backdrop of being a small urban farm that must compete with major food producers who have technology Our Harvest does not[158].

The Nursing and Caregivers Cooperative, Inc. (NCC) CBA provides another example of an interest-based approach to addressing technological change. Traditionally in the United States, homecare work is quite precarious. SEIU United Healthcare Workers -- West has pioneered the use of the union co-op and ongoing interest-based collective bargaining to improve

[156] See Estlund, *What should we do after work? Automation and employment law*, in *YLJ*, 2018, 128(2), p. 254.

[157] Our Harvest CBA, *cit.*, Article 12. Union Cooperation, at *16.

[158] Interview with Paige Stephens, Business Agent, UFCW Local 75, 09 July 2024.

the workers' working conditions and provide job security[159]. The collective bargaining agreement with the Nursing and Caregivers Cooperative, Inc. (NCC) provided: "This Agreement recognizes NCC's right to revise, rescind, or supplement the employee policies contained in the Employee Handbook from time to time as well as policies regarding eligibility for worker-owner status (as opposed to worker non-owner status).

However, NCC will meet and confer with UHW before implementing changes to:

1. Clinical protocols and scope of work performed by LVNs

2. Supervisory relationship between LVNs and MDs (or other providers)

3. Operational protocols that substantially affect LVNs' day to-to-day work (e.g., app vendor, transportation to client visits, particularities of clinical partners)

4. Substantial changes to hiring criteria for LVNs[160].

Ra Criscitiello, Assistant Director of the Research Department, reports that the listed issues were "broad enough to encompass all the issues that did – in real life – arise that required the creation of committees"[161]. While the other CBAs do not explicitly mention technological change or AI[162], the committees established, such as the Worx Partnership Committee or the AlliedUp Joint Labor Management Committee, operate to address issues that arise during the term of the CBAs, so should offer a way to address technological change[163].

On the other hand, the Snow River CBA reserves to the Board of Directors, as traditional negotiations often do, the management right to

[159] Cf. Rubinstein, Hecksher, *cit.,* p. 200 (suggesting that viable unions in horizontal economy need to "provide information, help with job movement, support access to improved skills" and pressure employers for worker participation in decision-making).

[160] United Healthcare Workers – West (UHW) Collective Bargaining Agreement with Nursing and Caregivers Cooperative, Inc. (NCC) for the term Dec. 1, 2016 – Dec.1, 2017 (on file with author).

[161] E-mail from Ra Criscitiello, Deputy Dir. Rsch., SEIU-United Healthcare Workers-West to Ariana Levinson, Professor of Law, Louis D. Brandeis Sch. of L., Univ. of Louisville, 12 July 2021 (on file with author).

[162] The Bookkeeping CBA recognizes remote workers as part of the bargaining unit. Bookkeeping CBA, *cit.*, Article 1 - Recognition, at *3.

[163] See Worx CBA, *cit.*, Article 4 - Partnership, at *1. AlliedUp CBA, *cit.*, Article 12: Labor Management Partnership, at *6.

"introduce new or improved methods or facilities"[164]. While labor negotiations may not reflect a more cooperative approach to technological change, the Board of Directors being made up of employee owners will nevertheless provide worker control over this type of technological change. When a CBA exists prior to the conversion to a worker-owned co-op, as with Snow River, it may take multiple iterations of bargaining to reflect the full impact that the CBA can have to address technological change and other issues.

Overall, several CBAs reflect the possibility that the union co-op negotiations will result in provisions that address technological change in a more cooperative way than the traditional focus on job preservation. Unions and cooperatives may also be addressing such challenges in ways other than through collective bargaining. One interview participant, Kevin O'Brien, described how the parties discussed technology at the broadest level, "realizing that robotic automation is here – a dribble of water that is about to become a tidal wave"[165]. They understand their work will train and be replaced by robots and to benefit, they must own the company, including the robots.

5.5. *Addressing Racism and Other Systemic Discrimination*

In the United States, a correlation between race and income inequality and other social determinants of health exists, as well as a history of chattel slavery and economic exclusion of racial minorities[166]. To the degree that

[164] Snow River CBA, *cit.*, Article III Rights of Management, at *4.

[165] Interview with Kevin O'Brien, General Manager, Worx Printing, 14 May 2024.

[166] See generally Bowdler, Harris, *Racial Inequality in the United States*, U.S. Dept. of the Treasury, 21 July 2022, https://home.treasury.gov/news/featured-stories/racial-inequality-in-the-united-states (correlation between race and wealth inequality); Aladangady, Forde, *Wealth inequality and the racial wealth gap*, in *FEDS Notes*, 22 Oct. 2021, https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.html (correlation between race and wealth inequality); Cogburn, *Culture, race, and health: Implications for racial inequalities and population health*, in *MilbQ*, 2019, 97(3), pp.736-761, DOI: 10.1111/1468-0009.12411 (correlation between race and social determinants of health); Ndugga, Hill, Artiga, *Key data on health and health care by race and ethnicity*, 11 June 2024, https://www.kff.org/racial-equity-and-health-policy/key-data-on-health-and-health-care-by-race-and-ethnicity/?entry=executive-summary-introduction (correlation between race and social determinants of health); Brace, *The politics of property: Labour, freedom and belonging,* Edinburgh Univ. Press, 2004 (chattel slavery); Santucci, *Documenting racially restrictive covenants in 20th Century Philadelphia*, in *Cityscape*, 2020, 22(3), pp. 241-268 (racially restrictive covenants in

interest-based negotiations enable consideration of community interests, union co-op negotiations might conceivably address these systemic inequities more directly than traditional labor negotiations. Anti-discrimination was mentioned by two participants in negotiations as a topic of negotiation[167]. With one exception, the union co-op CBAs do not suggest anything other than a similar commitment to nondiscrimination in the workplace that results from traditional negotiations[168]. One participant explicitly confirmed that the union proposed the union's standard non-discrimination clause for other traditional CBAs for their language in the CBA with the co-op[169]. The Bookkeepers CBA provides an example of how, even within the strictures of the inadequate legal framework in the United States, union co-op negotiations can result in proactive measures to promote anti-discrimination[170]. And, of course, in their business practices and participation in community and political affairs, union co-op workers may be more likely to work toward systemic change than other union workers, but it is not yet reflected in the CBAs.

Each of the CBAs has a non-discrimination clause, as do most CBAs resulting from traditional labor negotiations[171]. The clauses prohibit discrimination against a worker because of race or gender, which in the United States generally includes gender identity and sexual orientation[172], and disability, among other standard non-job-related characteristics[173]. Some of

Philadelphia); Arnold, Powell, Fosl, Rothstein, *Racial justice in American land use*, Cambridge Univ. Press, 2025, p. 1 (land use policies in U.S. marginalize non-whites).

[167] Interview with Kevin O' Brien, General Manager, Worx Printing, 14 May 2024; Interview with Paige Stephens, Business Agent, UFCW Local 75, 09 July 2024.

[168] The exception is discussed immediately below. Bookkeepers CBA, *cit.*, Article 5 – Equal Employment Opportunity – No Retaliation, at *10.

[169] Interview with Ra Criscitiello, Deputy Director of Research, SEIU United Healthcare Workers West, 29 Apr. 2024.

[170] Bookkeepers CBA, *cit.*, Article 5 – Equal Employment Opportunity – No Retaliation, at *10.

[171] *Ninth Circuit finds discrimination claims may be arbitrated*, in *AzEmpLL*, 1998, 5(5), p. 4.

[172] Sperino, *The early days of the Ending Forced Arbitration Act*, in Bales, Gross (eds.), *The Federal Arbitration Act: Successes, failures, and a roadmap for reform* Cambridge Univ. Press, 2024, pp. 175, 184.

[173] Worx CBA, *cit.*, Article 12 – Non-Discrimination, at *6; Snow River CBA, *cit.*, 8.4 Equal Opportunity, at *23; Sustainergy CBA, *cit.*, Article 8 Miscellaneous Provisions, Section 5 Discrimination, at *11-12; Central Co-op CBA, Article 3 – Employment Practices, 3.1 Equal Opportunity Policy, at *4-5; By-Laws of Collective Copies, Inc., *cit.*, Article II, Worker-Members' and Workers' Rights, section 10, at *3.

the CBAs have no further provisions addressing systemic discrimination than the baseline requirements of their state or federal law[174]. Others include broader categories than generally required by U.S. law such as marital status[175], parental status[176], Appalachian origin[177], political beliefs or affiliation[178], immigration status[179], citizenship status[180], personal appearance[181], or family responsibilities[182].

The Bookkeepers CBA takes a more proactive approach to foster anti-discrimination[183]. It prohibits asking a candidate about salary history[184] – a practice which has been recognized by studies as contributing to the continuing gender pay gap in the United States[185]. The Bookkeepers CBA also requires: "The Coop shall provide all vendors, workshop leaders, and professional development contractors who may be required to interact extensively with Employees a written primer on how to appropriately and respectfully interact with the Employees, including anti-discrimination and sensitivity language regarding race, creed, color, sex, nationality, (dis)ability, sexual orientation, age, gender expression, identity, and pronouns"[186].

[174] See, e.g., Worx CBA, *cit.*, Article 11 – Paid Time Off, at ⋆4 (providing paid sick leave and time off to the extent required by state law); Snow River CBA, *cit.*, Article X – Insurance Coverage, at ⋆27 (requiring compliance with family medical leave laws).

[175] Sustainergy CBA, *cit.*, Article 8 Miscellaneous Provisions, Section 5 Discrimination, at ⋆11-12.

[176] Central Co-op CBA, *cit.*, Article 3 – Employment Practices, 3.1 Equal Opportunity Policy, at ⋆4-5.

[177] Sustainergy CBA, *cit.*, Article 8 Miscellaneous Provisions, Section 5 Discrimination, at ⋆11-12.

[178] Our Harvest CBA, *cit.*, Article 4. Conformity to Law, 4.1, at ⋆6; Bookkeepers CBA, *cit.*, Article 5 – Equal Employment Opportunity, at ⋆10.

[179] Our Harvest CBA, *cit.*, Article 4. Conformity to Law, 4.1, at ⋆6.

[180] CHCA CBA, *cit.*, Article IV No Discrimination, at ⋆7.

[181] Bookkeepers CBA, *cit.*, Article 5 – Equal Employment Opportunity, at ⋆10.

[182] *Ibid.*

[183] Bookkeepers CBA, *cit.*, Article 3 – Union Cooperative Partnership, at ⋆4 (establishing values of equality and equity).

[184] Bookkeepers CBA, *cit.*, Article 5 – Equal Employment Opportunity – Ban on Salary History, at ⋆10.

[185] See generally National Women's Law Center, *Asking for salary history perpetuates pay discrimination from job to job*, Dec. 2018, https://nwlc.org/wp-content/uploads/2018/12/Asking-for-Salary-History-Perpetuates-Discrimination-1.pdf; *Greater Phila. Chamber of Com. v. City of Phila.*, 949 F.3d 116/ 2020 (3d Cir.).

[186] Bookkeepers CBA, *cit.*, Article 5 – Equal Employment Opportunity – No Retaliation, at ⋆10.

Finally, the CBA affirmatively requires that the Co-op, union, and workers "will endeavor to treat all people with dignity and respect"[187].

The Collective Copies Bylaws, while not a periodically negotiated CBA, contains provisions that other union co-ops might adopt in their CBAs. In addition to a traditional CBA-like nondiscrimination provision, the bylaws contain two provisions which might address structural inequities in pay and working conditions. One provides for an hourly pay differential no greater than a ratio of 2:1[188]. The other states "In its formal structures for sharing work, the Collective shall in principle stive toward equalization of work, participation, and status"[189].

5.6. *Climate Change and Environmental Sustainability*

In the United States, some unions are involved in working toward sustainability by addressing climate change through a "just transition" while others are concerned that a just transition will eliminate well-paying union jobs[190]. The just transition is "a political theory of how economic and racial equity principles are built into policy shifts from fossil fuels to clean energy"[191]. Addressing the vulnerabilities of fossil fuel workers and communities is a priority in a just transition to sustainable energy production[192]. Interest-based union co-op bargaining with consideration of community interests has the potential to directly incorporate a commitment to environmental sustainability. A few of the union co-op CBAs reflect a commitment to environmental sustainability. None explicitly address the massive changes in types of work, work methods, and redistribution of wealth required to address climate change in a way that prioritizes working people, especially workers of color and low-income workers.

The Worx CBAs explicitly mentions "sustainability". That CBA commits the Union and Co-op to work together "guided by core principles of

[187] Bookkeepers CBA, *cit.*, Article 10 – Dignity and Respect, at *9.

[188] By-Laws of Collective Copies, Inc., *cit.*, Article II, Worker-Members' and Workers' Rights, section 4, at *2.

[189] *Ibid.*

[190] Cha, *cit.*, p. 204; Cummings, *cit.*, p. 301.

[191] Cummings, *cit.*, p. 293.

[192] Cha, *cit.*, p. 198.

sustainability, solidarity, accountability, and community"[193]. Kevin O'Brien explained that while environmental issues were not explicitly discussed during negotiations, they choose to be a print-on-demand business because it is an ecologically friendly printing process, and they store and have a service dispose of the liquid discharge in an environmentally safe manner[194].

The Our Harvest CBA directly addresses environmental concerns stating: "The Union recognizes the need for conservation and the elimination of waste and agrees to cooperate with the Cooperative in suggesting and practicing methods in the interest of conservation and waste elimination"[195]. Paige Stephens mentioned that while in the round of negotiations she described environmental issues were not discussed, as an urban farm, the worker-owners are very conscious of environmental issues and use sustainable agricultural practices[196]. The Collective Copies bylaws may incentivize the use of environmentally safe products through a provision that states: "The Collective will within financial means maintain a healthful workplace in accordance with standards determined by worker-members. Workers will have access to current information regarding supplies and product safety"[197].

While the other CBAs do not explicitly mention sustainability or climate change, some of the union co-ops such as Sustainergy, an insulation and solar panel installation company, are very committed to sustainability and addressing environmental concerns. Lewis Connell pointed out in his interview that while environmental concerns were not explicitly raised during negotiations, sustainability is a core principle on which Sustainergy operates[198]. As with addressing technological change, the various committees established by the CBAs may provide a way to raise and implement sustainable practices in the business.

[193] Worx CBA, *cit.*, Article 4 - Partnership, at ⋆1.

[194] Interview with Kevin O'Brien, General Manager, Worx Printing, 14 May 2024.

[195] Our Harvest CBA, *cit.*, Article 12 - Union Cooperation, at ⋆16.

[196] Interview with Paige Stephens, Business Agent, UFCW Local 75, 09 July 2024.

[197] By-Laws of Collective Copies, Inc., cit., Article II, Worker-Members' and Workers' Rights, section 7, at ⋆3.

[198] Interview with Lewis Connell, Unit Chair & VP, USW Local Union 14734-16, 10 May 2024.

6. *Conclusion*

The review of several union co-op CBAs, and interviews with participants in the negotiations resulting in those agreements, reveals that the collective bargaining process is more interest-based than traditional more distributive labor negotiations and that commitment to cooperative principles enhances a problem-solving approach in the union and co-op relationship. The negotiations and resultant CBA terms may enhance participants' likelihood of engaging in civic society and in democratic political processes, and ultimately countering the rise of authoritarian leaders. Some of the CBAs resulting from these union co-op negotiations also reflect a commitment to concern for the community. The likelihood of the union co-op negotiations addressing other interrelated primary challenges of this historical time, such as advances in technology, systemic racism, and climate change, is varied and not yet as developed as ideal, but holds promise.

Traditional labor negotiations may be equally if not more limited in addressing these challenges, and interest-based negotiation in that context is unlikely to alleviate those limitations. The dispute resolution literature recognizes that when parties have uneven bargaining power, interest-based negotiation may not be fruitful. Indeed, at least some labor negotiators believe, given the labor laws and the capitalist economy in the United States (and most of the world), interest-based negotiations will not lead to positive results for workers at traditional firms[199]. Only through adversarial bargaining with demonstrations of strong solidarity and readiness to strike will material and other gains be made. For example, some in the labor movement believe that the UAW-represented workers' wages stagnated, different tiers of workers were created, and their pension was lost because the prior union leadership was not militant enough and compromised too often with the automotive employers[200]. But compromises are different than interest-based

[199] Paquet, Gaétan, Bergeron, *Does Interest-Based Bargaining (IBB) really make a difference in collective bargaining outcomes?*, in *Negot.*, 2000, 16(3), p. 292, https://doi.org/10.1111/j.1571-9979.2000.tb00219.x; Fonstead, McKersie, Eaton, *Interest-based negotiations in a transformed labor-management setting*, in *Negot.*, 2004, 20(1), pp. 9-10 (2004) https://direct.mit.edu/ngtn/article/20/1/5/122179.

[200] Brooks, *How the UAW went from a militant, trailblazing union to a corrupt, dealmaking one*, in, *In These Times*, 05 Mar. 2020, https://inthesetimes.com/article/uaw-history-militant-corruption-concessions-gary-jones-indictment; Fain, *The UAW's Shawn Fain on union*

negotiations, and a poor compromise can happen in traditional negotiations as well.

By prohibiting company unions and requiring unions to single-mindedly represent the workers they represent in collective bargaining[201], U.S. labor law protects somewhat against the use of interest-based negotiations that would sell short the represented workers. Moreover, in the context of a union worker-owned cooperative, workers make financial and operational decisions and have access to full financial information. Their unions advocate for their interests as workers and provide a link to the larger union movement and community. The combination of ownership and unionization, as reflected in the reviewed CBAs, can result in provisions addressing technological change, participation in democratic political processes, prohibiting racial and other discrimination, and promoting environmental sustainability. As this sector of the U.S. economy continues to grow, further research on its impact, through labor negotiations and other work mechanisms, on the grand challenges of our historical times is warranted.

growth and union power, in *Jacobin*, 25 Sept. 2025, https://jacobin.com/2025/09/fain-uaw-union-power-billionaires.

[201] *Centerville Clinics, Inc.* 181 NLRB 135/1970 139; *Teamsters, Loc. 249*, 139 NLRB 605/1962, 607.

Abstract

This paper explores how union negotiations in worker-owned co-ops compare to more traditional labor negotiations. The theoretical analysis addresses possible synergies between practices traditionally considered as alternative, employee ownership and collective bargaining, and the development of collective bargaining in new business models. Initially, the theoretical framework that provides the basis for the comparison – the dispute resolution theories of distributive versus interest-based bargaining – is described. Interviews with several participants in union co-op collective bargaining suggest that many negotiations are more similar to interest-based negotiations than traditional labor negotiations. Additionally, some collective bargaining agreements (CBAs) reference interest-based negotiations.

The paper then addresses whether union co-op labor negotiations, implementation of the resultant CBAs, or both, have the potential to address some of the grand challenges of our times differently than traditional negotiations. Many of the CBAs explicitly recognize the interests of community as important. Many of the negotiations involve high levels of worker-participation, and the CBAs contain various types of provisions promoting democratic decision-making and political participation. Union co-op negotiations, thus, appear to hold significant promise toward enabling workers to more fully participate in political democracy and civil society. Some union co-op CBAs address advancing technology with an interest-based approach. None explicitly address how to redistribute wealth as work becomes more automated. On the other hand, the CBAs do not generally suggest more active measures to combat systemic race discrimination but rather reflect a similar commitment to nondiscrimination in the workplace that results from traditional negotiations. A few of the CBAs reflect a commitment to environmental sustainability; none explicitly address the dramatic social and economic shifts occurring because of climate change.

Keywords

Worker-owned cooperative, Collective bargaining, Interest-based negotiation, U.S. labor law, Dispute resolution.

Tommaso Maserati, Sara Roccisano

Remuneration of "Grey Times": at the intersection between the Working Time Directive and the Minimum Wage Directive*

Contents: 1. Introduction. 2. The EU ascendent of Working Time Regulation. 2.1. The first phase: the SIMAP and Jaeger cases and the relevance of spatial constraint. 2.2. The second phase: the Matzak case and the spatio-temporal constriction. 2.3. The third phase: the Grand Chamber ruling and the constriction on free time. 3. Qualification and remuneration of "grey time" in the Italian legal system: case law and collective agreements. 4. Adequate minimum wage directive and the role of working time. 5. Wage adequacy, proportionality and sufficiency in the rulings of Court of Cassation of October 2023. 6. Final remarks: what remuneration for grey times?

1. *Introduction*

This essay aims to analyse the relationship between working time and wages within both the EU and Italian legal frameworks. Traditionally, it has been assumed that there is a direct, proportional relationship between the number of hours worked and the remuneration received[1]. However, this correlation has weakened - though not entirely disappeared, and certainly not for all categories of workers[2] – with the emergence of post-Taylorist production models, which treat hourly flexibility and labour cost reduction

* Although the work is the result of joint reflection, sections 1, 2 and 3 should be attributed to Tommaso Maserati, while sections 4, 5 and 6 to Sara Roccisano.

[1] For an historical reconstruction, see De Luca Tamajo, *Il tempo nel rapporto di lavoro*, in *DLRI*, 1986, 31, p. 464.

[2] Supiot, *On-the-job time: time for agreement*, in *IJCL*, 1996, 12, p. 203.

as essential business requirements[3]. At the same time, the segmentation and differentiated value of time to employers has grown, particularly with the advent of new technologies[4] that blur the boundaries between work and leisure[5] through their "anywhere, anytime" functionality[6].

Against this backdrop, it is worth considering whether a legal relationship still exists between the aforementioned concepts of *working time* and *wages*. In particular, it is necessary to assess whether the value of working time has been effectively disregarded for the purposes of remuneration, or whether a connection persists in which compensation is still granted in exchange for the worker's time (and, if so, what form that remuneration takes).

The analysis will be conducted using a case study of one of the legal instruments involved in the flexibilization of time and remuneration, namely the "*on-call availability*" and/or "*stand-by duty*". These segments are an example of 'grey time', i.e. time spent not actively working, but still at the employer's disposal. The issue of remuneration arises here: will the employer be obliged to pay for this time? Does their classification as working time or rest period impact the answer to this question? The structure of the paper is as follows.

Section 2 analyses the EU legal notion and case law regarding "working time" and "rest periods", in order to contextualise the so-called "grey times" (i.e. time segments lacking certain elements characterizing the notion of working time but presenting others, whose qualification is debated) in the light of the approaches (and overruling) that the Court of Justice of the European Union (C. Just.) adopted over time. Given the limited scope of the Working Time Directive (WTD), Section 3 will scrutinise whether its notions of "working time" and "rest period" are relevant to determine the *an* and *quantum* of compensation. This scrutiny will be carried out through the analysis of the most recent Italian case law on the matter, in which the Court seems to embrace the interpretation of CJUE on working time, while addressing the question of compensation.

[3] Vardaro, *Tecnica, tecnologia e ideologia della tecnica nel diritto del lavoro*, in *PD*, 1986, 1, p. 90.

[4] Barbieri, *Dell'inidoneità del tempo nella qualificazione dei rapporti di lavoro*, in *LLI*, 2022, 1, p. 30.

[5] Genin, *Proposal for a Theoretical Framework for the Analysis of Time Porosity*, in *IJCL*, 2016, 3, p. 289

[6] Eurofound, ILO, *Working anytime, anywhere: The effects on the world of work*, Publications Office of the European Union, 2017.

The following sections will focus on the function of working time as a parameter for commensurate wage within the European Directive on Adequate Minimum Wages and in the Italian legal system. This analysis will focus particularly on the concept of adequacy (Section 4). The most recent approaches of the Supreme Court of Cassation about proportionality and sufficiency of wage levels will be analysed in Section 5, in order to test the question underlying this study about the remuneration of grey times, when liable to be qualified as falling within the notion of working time in the light of the case law of the Court of Justice. The aim of the study is trying to understand whether this remuneration should be considered susceptible to the application of the principles of sufficiency and proportionality set by Article 36 of the Italian Constitution, according to which the worker has the right to a wage which must be proportionate to quality and quantity of work performed and, in any case, sufficient to guarantee a free and dignified existence. Section 6 concludes by providing a tentative answer this question.

2. *The EU ascendent of Working Time Regulation*

For the purposes of this analysis, it is essential to examine the definition of working time as established within the EU legal and jurisprudential framework. The national legislations in this area – including the Italian legal system – have been harmonised through the adoption of Directive 2003/88/EC, which governs certain aspects of the organisation of working time and provides a legal definition of working time.

This regulatory intervention is grounded in the competences conferred upon the EU in the field of occupational health and safety, initially under Article 118a of the Treaty of Rome and currently under Article 153 TFEU[7]. It also seeks to give effect to the rights enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union (CFREU)[8]. This is significant not only in legitimising EU intervention

[7] Barnard, *Recent legislation. The Working Time Regulations 1998*, in *ILJ*, 1999, 1, p. 61; Alessi, *Orario di lavoro e tutela della salute innanzi alla Corte di Giustizia*, in *DRI*, 1997, 2, p. 125.

[8] Gramano, *Stand-by time through the Court of Justice's lens*, in *ELLJ*, 2022, 4, p. 578; Ferrante, *Le nozioni di orario di lavoro e di riposo alla luce della più recente giurisprudenza della Corte di giustizia*, in Aimo, Fenoglio, Izzi (eds.), *Studi in memoria di Massimo Roccella*, Esi, 2021, p. 765.

in this domain[9], but also from an interpretative standpoint.[10] The directive's teleological orientation – as articulated and reinforced by Article 31(2) of the Charter of Nice[11] – establishes an interpretive framework that supports the classification of so-called grey time as working time. This hermeneutic approach is a consistent feature of EU case law and will be explored further in subsequent sections, particularly in light of recent jurisprudential developments.

However, this foundational principle also appears to limit the directive's scope, excluding its application to areas beyond occupational health and safety – most notably, wage regulation. As the Court of Justice of the European Union (C. Just.) has repeatedly affirmed (see Section 2.3), the legal concepts defined in the Working Time Directive (WTD) bind Member States solely within the scope of the directive's legal basis under the Treaties.

The directive introduces (art. 2) a compendium of definitions (in fact meticulously reported within the Italian discipline in art. 1 d.lgs. 66/2003); in particular, the definition of "working time", meaning "*any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice*", and of "rest period", meaning "*any period which is not working time*", is relevant. The interpretation of these definitions has been significantly influenced by the C. Just. case law. The existence of times with unclear classification, the absence of a *tertium genus* between working time and rest, and the Court's continually reiterated binary structure of definitions have imposed on the C. Just. a work of "delimiting the boundaries" of working time[12], developed through at least three "phases", briefly described below.

[9] C. Just., United Kingdom v. Council, C-84/94, cfr. Von Prondzynski, *Council Directive 93/104/EC concerning certain aspects of the organization of working time*, in *ILJ*, 1994, 1, p. 92.

[10] Leccese, *Le tendenze attuali e l'evoluzione del diritto comunitario in materia di tempi di lavoro: progetti di riforma della direttiva europea e giurisprudenza della Corte di giustizia*, in Veneziani, Bavaro (eds.), *Le dimensioni giuridiche dei tempi del lavoro*, Cacucci, 2009, p. 331; Ricci, *Tempi di lavoro e tempi sociali. Profili di regolazione giuridica nel diritto interno e dell'UE*, Giuffrè, 2005, p. 148.

[11] Ricci, *La "scomposizione" della nozione di orario di lavoro nella recente giurisprudenza della Corte di giustizia*, in *RGL*, 2021, 1, p. 324.

[12] Bellomo, Rocchi, *Orario di lavoro, reperibilità, fruizione del tempo libero. La Corte di giustizia e il parziale superamento della sentenza Matzak del 2018*, in *RIDL*, 2021, 2, p. 336.

2.1. *The first phase: the SIMAP and Jaeger cases and the relevance of spatial constraint*

The initial rulings of the Court of Justice concerning the definition of working time were established in the landmark *SIMAP*[13] and *Jaeger*[14] cases. These decisions addressed the working conditions of hospital staff required to remain on standby within the hospital premises. The key legal question posed to the Court was whether such periods of physical presence – characterised by inactivity or even the possibility of sleeping – should be classified as working time.

These early cases provided the Court with the opportunity to lay down foundational principles for interpreting the concept of working time, which have been consistently reaffirmed in later jurisprudence. The Court established several core precedents: (a) the binary structure of the Directive's system, which excludes the possibility of a third, intermediate category - requiring each time period to be classified either as working time or as a rest period; (b) the cumulative interpretation of the three definitional elements of working time (working, at the employer's disposal, and performing one's duties), with the third element afforded less interpretative weight; (c) the decisive role of physical presence at the workplace in qualifying a time period as working time. According to the Court, being required to remain at the workplace restricts a worker's ability to dispose freely of their time, even if no actual work is performed. The mere fact of physical presence is thus sufficient to satisfy the directive's definition, as it compresses the worker's personal autonomy and leisure time.

Under this teleological interpretation, the intensity or frequency of actual work performed during such availability periods is irrelevant to their legal classification[15].

These two judgments established a critical dichotomy between two forms of "grey" time: on-call availability (classified as a rest period) and

[13] C. Just., October 3th 2000, *Sindicato de Médicos de Asistencia Pública (SIMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, C-303/98; see Guariso, *Definizione di "tempo di lavoro" e consenso del dipendente alla prestazione di lavoro straordinario: due importanti precisazioni della Corte CE*, in *D&L*, 2001, 2, p. 355.

[14] C. Just., September 9th 2003, *Landeshauptstadt Kiel v. Norbert Jaeger*, C-151/02.

[15] Van Drongelen, *The concept of "working time" in the Working Time Directive and the Dutch Working Time Act*, in *ELLJ*, 2012, 1, pp. 99-100; Marinelli, *Orario di lavoro e periodo di riposo: un (potenziale) ripensamento della Corte di giustizia*, in *ADL*, 2018, 4-5, p. 1174

standby duty (classified as working time). This distinction has been consistently upheld in subsequent case law and is determined by the presence or absence of a spatial constraint within the traditional workplace[16]. It is precisely this constraint – namely, the requirement of physical presence – that becomes the focus of further developments in subsequent jurisprudence.

2.2. *The second phase: the Matzak case and the spatio-temporal constriction*

This interpretation has been partially expanded in light of the Matzak ruling. While the judgment formally reiterates prior EU case law, it introduces elements of discontinuity that are particularly relevant to the issue at hand. In Matzak, the Court appears to move away from the requirement of physical presence at a specific location as *the* decisive factor in determining the qualification of working time. In fact, it draws a parallel between the obligation to be present at the workplace and the imposition of spatial-temporal constraints, such as the requirement to be reachable and available within a very short timeframe, on the basis that both significantly limit a worker's ability to pursue personal activities (par. 63)[17]. As a result, while reaffirming both the binary structure of the Directive and the cumulative interpretation of the definitional criteria, the Court effectively elevates the importance of spatial and temporal constraints in assessing whether a period qualifies as rest[18].

This interpretive shift – foreshadowed in earlier case law – is extended in Matzak beyond the confines of physical presence at the workplace, thereby abandoning the strict equivalence between the compression of rest and physical presence.

Some scholars who endorse this broader interpretive approach have noted a gradual attenuation in the significance of the three definitional elements (working, at the employer's disposal, and performing duties) for the purposes of legal classification, even though they continue to be formally

[16] C. Just., 5th October 2004, from C-197/01 to C-403/01; C. Just., 1st December 2005, *Abdelkader Dellas et al. v. Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité*, C-14/04.

[17] Mitrus, *Potential implications of the Matzak judgment (quality of rest time, right to disconnect)*, in *ELLJ*, 2019, 4, p. 388.

[18] Ricci, *La "scomposizione" della nozione di orario di lavoro nella recente giurisprudenza della Corte di giustizia*, in *RGL*, 2021, 1, p. 326.

referenced by the Court. In light of the case law discussed above, it can be argued that – though not explicitly reformulated – the third criterion has been indirectly reconstructed[19]. Consequently, while the tripartite definition remains in force, its practical application has narrowed, leading to a broader conception of working time. This evolution, in turn, limits the scope of organisational flexibility available to employers[20].

2.3. *The third phase: the Grand Chamber ruling and the constriction on free time*

In the wake of the landmark Matzak judgment, the Court of Justice took a further step in March 2021 through two Grand Chamber rulings[21]. On these occasions, the Court initially reaffirmed that physical presence at a designated location is sufficient for a period to be automatically classified as working time. However, in the absence of such a constraint, the possibility of classification as working time is not excluded. Instead, it falls to the national court to assess whether the constraints imposed during the relevant period significantly affect the worker's ability to manage their time freely – while not actively performing professional duties – and to pursue personal interests (par. 45).

To assist in this evaluation, the Court identified specific indicators for assessing the degree of constraint or duress, such as: the amount of time available to the worker, during the standby period, to return to professional duties; and the average frequency and unpredictability of call-outs[22].

By introducing these elements, the Court has brought significant flexibility to the legal concept of working time, signalling a clear evolution from previous case law. Notably, working time is now construed as the residual

[19] Ferrante, *Between health and salary: the incomplete regulation of working time in European law*, in *ELLJ*, 2019, 4, p. 379.

[20] Glowacka, *A little less autonomy? The future of working time flexibility and its limits*, in *ELLJ*, 2021, 2, p. 114.

[21] C. Just., Grand Chamber, 9th March 2021, *DJ v. Radiotelevizija Slovenija, C-344/19, and RJ v Stadt Offenbach am Main*, C-580/19, both in *RIDL*, 2021, 2, commented by Bellomo, Rocchi, *Orario di lavoro, reperibilità, fruizione del tempo libero. La Corte di giustizia e il parziale superamento della sentenza* Matzak *del 2018*, in *RIDL*, 2021, 2, p. 309 ff.

[22] C. Just. 9th September 2021, *XR v. Dopravní podnik hl. m. Prahy, akciová společnost*, C-107/19.

category – that is, time that cannot be considered rest[23]. In this framework, it is the compression of rest that serves as the decisive indicator for identifying working time, rather than the other way around.

However, this more functional and context-sensitive approach also introduces a risk of divergent interpretations among national courts. This potential for legal fragmentation has drawn criticism from several legal scholars, who argue that the absence of clear thresholds could undermine legal certainty and the harmonising intent of the Directive[24].

In light of the broader jurisprudential development and the milestones reached through the Grand Chamber's rulings[25], three general hypotheses can now be identified: (a) Standby duty with an obligation to be physically present at the workplace (excluding homeworking): in this scenario, the time period is automatically presumed to constitute working time, without the need for further assessment. (b) On-call periods involving significant constraints (e.g., very short response times or frequent and unpredictable call-outs): if the worker is not required to remain at the workplace, it falls to the national court to assess, on a case-by-case basis, the intensity of the constraints imposed. If these are sufficiently burdensome as to impair the worker's ability to enjoy genuine rest, the time must be classified as working time. (c) On-call periods without intense constraints: in the absence of both a requirement to be physically present and any substantial limitations on the worker's freedom, the period must be classified as a rest period. However, it is important to note that even under hypothesis (c), the presence of certain obligations during rest periods does not render them irrelevant for the WTD. While these obligations do not justify the creation of a *tertium genus*[26], the Court of Justice has recognised that classifying such periods as rest does not absolve employers of their broader responsibilities – particularly those

[23] On the circularity of the interpretation of these notions, Leccese, *Questioni in materia di tempi di lavoro nel SSN. Nuove prospettive dalla giurisprudenza della Corte di giustizia*, in *RGL*, 2023, 2, p. 236.

[24] Mitrus, *Defining working time versus rest time: An analysis of the recent C. Just. case law on stand-by time*, in *ELLJ*, 2023, 1, p. 42.

[25] Gramano, *La normativa europea alla prova della frammentazione del tempo di lavoro*, in *ADL*, 2022, 5, p. 939. See also Zahn, *Does Stand-by Time Count as Working Time? The Court of Justice Gives Guidance in DJ v Radiotelevizija Slovenija and RJ v Stadt Offenbach am Main*, in *EP*, 2021, 1, p. 124.

[26] Critically, Ferraresi, *Problemi irrisolti dei tempi di disponibilità e reperibilità dei lavoratori*, in *DRI*, 2022, 2, p. 425.

stemming from Directive 89/391 on occupational health and safety. Notably, the Court acknowledges that standby periods, even when qualified as rest, may nevertheless generate psychological strain (par. par. 61-65)[27]. While agreeing with this conclusion, it could be considered almost paradoxical that the ECJ, while formally designating certain periods as rest, simultaneously recognises that such time may impose a burden on the psycho-physical health of workers. So much so that one might argue that rest time, as currently defined, is not necessarily restful in substance.

The practical consequences of the Court of Justice's approach become particularly evident in cases involving risks to, or actual harm suffered by, workers' health. Where on-call shifts – formally classified as rest periods – are subsequently reclassified as working time, and this reclassification leads to a breach of the maximum limits on working time established by the Directive and national legislation, employers may incur various forms of liability. In such instances, employees may bring actions for damages, which under Italian law are presumed to be *in re ipsa* – that is, damage is presumed to exist where the unlawful conduct is established.

By contrast, where reclassification is invoked with the aim of obtaining remuneration for time segments redefined as working time, a different legal framework applies. As previously discussed, the definitional principles set out in Article 2 of Directive 2003/88/EC, as interpreted by the C. Just., do not extend to wage entitlements. The Directive was adopted under the legal basis of occupational health and safety, not wage regulation, and the Court has confirmed that its provisions do not create a direct entitlement to remuneration for time classified as working time, since the WTD does not govern remuneration, with the sole exception of provisions concerning paid annual leave[28]. As a result, the directive does not prevent the application of national law, collective agreements, or employer decisions that distinguish

[27] C. Just., *DJ v. Radiotelevizija Slovenija*, C-344/19. See also Ferrante, *L'orario di lavoro tra presente e futuro*, in *LLI*, 2022, 1, p. 124.

[28] C. Just., 9th March 2021, *DJ v. Radiotelevizija Slovenija*, C-344/19, par. 58; similarly: C. Just., Grand Chamber, 15th September 2021, *BK v. Republika Slovenija (Ministrstvo za obrambo)*, C-742/19, par. 98; C. Just., 9th September 2021, *XR v. Dopravní podnik hl. m. Prahy, akciová společnost*, C-107/19; C. Just., 10th September 2015, *CC.OO. v. Tyco Integrated Security SL and Tyco Integrated Fire Security Corporation Servicios SA*, C-266/14, par. 47-49; C. Just., 1st December 2005, *Abdelkader Dellas et al. v. Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité*, C-14/04, par. 38-39; C. Just., 25th June 2011, *Nicușor Grigore v. Regia Națională a Pădurilor Romsilva - Direcția Silvică București*, C-258/10, par. 80-84.

between periods of actual work and periods of inactivity, even when both are classified as working time for the purposes of the directive. Accordingly, under EU law, it is permissible for two time segments, both qualifying as working time, to be compensated differently. Furthermore, the Court asserts that the designation as a rest period neither preclude nor impose the remuneration of those segments of availability, if national legislation so provides[29]. In summary, while Member States remain free to determine the remuneration of workers covered by the directive in accordance with their own legal and contractual frameworks, they are not obliged to do so merely because a time segment falls within the definition of working time or rest period under Article 2 of the directive[30]. The only substantive limitation appears to derive from the doctrine of *effet utile*. Under this principle, any differential remuneration scheme must not undermine the effectiveness of the directive's objectives-namely, the protection of workers' health and safety[31]. In this light, it could be argued that minimal or symbolic remuneration may compromise the directive's enforcement. Such payments may fail to deter employers from overburdening workers and may inadvertently encourage employees to extend their working hours in order to increase their income, thus conflicting with the directive's protective aims.

3. *Qualification and remuneration of "grey time" in the Italian legal system: case law and collective agreements*

In light of the C. Just. case law, a preliminary conclusion may be drawn: the reclassification of a given time segment as "working time" does not, in itself, entail an obligation for Member States to provide full remuneration for that period, nor necessarily to compensate it as overtime. It is nonetheless clear from the case law in question that some form of remuneration is always presumed – albeit potentially at a level inferior to that applicable

[29] C. Just., 9th March 2021, *DJ v. Radiotelevizija Slovenija*, C-344/19, par. 59; C. Just., 21st February 2018, *Ville de Nivelles v. Rudy Matzak*, C-518/15, par. 51.

[30] C. Just., 21st February 2018, *Ville de Nivelles v. Rudy Matzak*, C-518/15, par. 50.

[31] C. Just., 11th January 2007, *Jan Vorel v. Nemocnice Český Krumlov*, C-437/05, par. 32. Cfr. Leccese, *Monitoring working time and Working Time Directive 2003/88/EC: A purposive approach*, in *ELLJ*, 2023, 1, p. 28; Ferraresi, *Disponibilità e reperibilità del lavoratore: il tertium genus dell'orario di lavoro*, in *RIDL*, 2008, 1, pp. 109-110.

to ordinary working time. Against this backdrop, it remains uncertain how national case law addresses situations involving the reclassification of time segments as "working time", particularly given that the relevant EU Directive neither mandates nor prohibits the granting of equal pay in such cases.

The issue does not appear to arise where grey time is entirely unregulated by collective bargaining; it is sufficient, in this sense, to recall the consolidated Italian case law on the subject of "dressing times". In such cases, the activity of dressing and undressing is regarded as qualitatively distinct from other work activities; however, its qualification as working time entails the application of "ordinary" remuneration, which may be increased to reflect overtime work if applicable[32].

Rather, the interpreter's primary concern lies in instances where collective bargaining agreements, while wrongly qualifying a period of availability as rest period, provide allowances lower than the ordinary wage. It is an established principle that collective bargaining cannot restrict the concept of working time as set out in the WTD and in Legislative Decree 66/2003. As a result, the qualification of those times as rest period, when in contrast with the WTD, could be declared null and void *in parte qua*.

Still, what about the allowances set by the collective agreement? While a substantial corpus of case law has hitherto aligned with prior ECJ rulings – emphasising that the classification of working time does not affect entitlement to full remuneration – two recent rulings by the Court of Cassation appear to chart a novel course.

In the first case, the Court acknowledged that a period of on-call time performed at the employer's premises should be classified as 'working time', thereby overturning the previously contested ruling of the Court of Appeal. However, this partial reform did not result in the wage claims being upheld: the time segments in question were already compensated under a collective agreement by way of an indemnity (albeit lower than regular pay), and their reclassification, the Court argued, did not entail an obligation to pay them "in full"[33].

[32] A considerable body of case law has developed on the subject; cfr. Cass., 22nd March 2022, n. 9306, in *De Jure*; see Ferrante, *I tempi preparatori della prestazione lavorativa: una nozione "di confine"*, in *DRI*, 2022, 2, p. 461.

[33] Cass. no. 32418/2023; see Abbasciano, *Periodi di guardia, orario di lavoro e remunerazione: se il "sillogismo" è "monco", quali tutele per i lavoratori?*, in *RIDL*, 2024, 1, p. 8; Scelsi, *Sulla remunerazione dei turni di guardia in una recente pronuncia di legittimità*, in *DLF*, 2023, 8, p. 6.

At first glance, the Court appears to reject the notion that reclassifying a period as working time has any bearing on remuneration, whenever collective bargaining agreements had already provided for compensation during that period. Its significance, however, should not be overstated. On the one hand, the requalification of hourly segments is arguably not neutral from the point of view of the health and safety of workers. The Court's silence on the subject is evidently attributable to the absence of a claim for damages, which would appear to be configurable precisely in such a requalification hypothesis[34]. On the other hand, it appears that the appellant challenged the judgment on the basis that the reclassification of time as working time necessarily entailed full remuneration. In rejecting this claim, the Court of Cassation merely reaffirmed its prior rulings, in line with the aforementioned ECJ case law. What is more significant, however, is that the legitimacy of the allowance established by the collective agreement – specifically in light of Article 36(1) of the Constitution – does not appear to have been contested in terms of its adequacy and proportionality. However, it would appear that such an assessment may be the only viable avenue through which the remuneration of 'grey times' can be challenged, given its capacity not only to override collective bargaining provisions but also to transcend the classification of the hours concerned as working time or rest periods.

This conclusion aligns with the second decision of the Court of Cassation, previously referenced. In that case – concerning overnight stays in accommodation classified as rest periods and compensated with a nominal allowance under the collective agreement – the Court affirmed the possibility of departing from the agreement where, upon judicial review, it is found to be incompatible with the principles enshrined in Article 36(1) of the Constitution[35]. And, as stated and as further explained in the next paragraph, this principle applies even when the collective agreement has been signed by the most representative trade unions. The relevancy of the possibilities and limitations of an assessment of the adequacy of grey times compensation set out in collective bargaining agreements is evident when one considers that national collective agreements on this matter (which are

[34] Cass., 14th July 2015, n. 14710; in on-call case not qualified as working time, the damage is not presumed and needs to be proved in its *an*: Cass. No. 18310/2011, in *LG*, 2011, 11, p. 1159

[35] Cass., 23rd April 2025, no. 10648.

more accessible and generalisable) tend to share two key features: (i) they intervene only in relation to time segments that are (self-)classified as rest periods; and (ii) they provide relatively low compensation, often calculated as a flat rate rather than being proportionate to the actual hours of service rendered[36].

The Court's position – which is formally established but left to the court of second instance for application – appears consistent with the approach seen before and with C. Just. case law, since it seems that the reclassification of working time is not directly relevant, but rather indirectly so, functioning as an indicator of the degree of commitment required from the worker during those time segments. This, in turn, is significant for assessing the qualitative and quantitative proportionality of the compensation[37].

Therefore, it seems possible to offer a preliminary partial answer to the research question posed in this paper. Specifically, there appears to be a persistent link between working hours and remuneration within Italian legal system, to the extent that classifying a time segment as working hours triggers the application of Article 36, paragraph 1, of the Constitution. As a result, the increased hardship associated with such a classification is taken into account when applying the criteria set out in the aforementioned article, regardless of any potential differences in remuneration compared to periods of "actual" work. However, it is precisely this potential for differentiation – consistent with C. Just. case law and the proportionality requirement embedded in Article 36(1) of the Constitution – that gives rise to the

[36] In this regard, reference can be made to the CCNL Logistics (special part, section II), which provides for a minimum allowance of €25.82 gross for 12 monthly payments (art. 76); the CCNL Cooperative Sociali (Social Cooperatives), which provides for on-call availability 'with a restriction on staying at the facility', monthlyised at € 77.47 (art. 57) and on-call availability regulated at company/territory level with a gross indemnity of € 1.55 per hour (art. 58); and the CCNL Industria Metalmeccanica (Metalworking Industry), which in art. 6 (section four, title III) provides for a detailed regulation of on-call availability, also delegating to lower levels, committing companies to avoid any possible risk of being on-call. 58); the CCNL for the Mechanical Engineering Industry, which in Article 6 (section four, title III) provides for a detailed regulation of on-call availability, also delegating it to lower levels, committing companies to avoid staying at the workplace and providing for a response time of 30 minutes, recognising a compensation of an explicitly retributive nature on the basis of the level of classification, and excluding it from working hours.

[37] On the relevance of requalification on the compensation, Leccese, *Questioni in materia di tempi di lavoro nel SSN. Nuove prospettive dalla giurisprudenza della Corte di giustizia*, in *RGL*, 2023, 2, p. 240.

question of what constitutes an adequate wage for "grey periods", and what tools may be used to assess it.

4. *Adequate minimum wage directive and the role of working time*

To answer this question, an in-depth analysis of 2022/2041 European directive on adequate minimum wages may assist. The claim for adequacy of remuneration of working time is strongly stated not only in art. 36 of the Italian Constitution, but also in this act, definitively adopted on 19 October 2022, after the covid-19 emergency which has significantly worsened the economic distress already present within the Union[38]. The act is part of a broader series of social policy initiatives, making a decisive shift from the original foundations of the European integration process. It pursues multiple objectives: alongside the specific goal of improving working conditions through increased access to minimum wages – whether established by law or by collective agreements – and their progressive increase, it also aims to address the phenomenon of wage dumping.

The Act is presently under review before the Court of Justice due to the appeal of annulment[39] brought by the Kingdom of Denmark[40] (with the support of Advocate General Emiliou[41]), claiming that EU exceeded

[38] European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, 28th October 2020*, p. 21. In its October 2020 document, the Commission took care to stress that ensuring a dignified life is essential to supporting a sustainable and inclusive recovery from the pandemic.

[39] Denmark applied to the Court primarily – the annulment of the entire Directive, and alternatively, the annulment of Article 4(2) alone, which concerns the promotion of collective bargaining.

[40] C. Just., 14th January 2025, *Kingdom of Denmark v. European Parliament and Council of the European Union*, C-19/23.

[41] Opinion delivered on 14th January 2025. For a critical assessment of the Opinion, see Countouris, *Avoiding another "Viking and Laval" moment - a critical analysis of the AG opinion on the Adequate Minimum Wage Directive, Case C-19/23*, in *ELLJ*, 2025, 16, 2, p. 315; Ratti, *What is Minimum Wage Directive*, cit., p. 344 ff. *Contra,* especially on art. 5, see Delfino, *Proposta di direttiva, tutela giuridica dei salari e nodi della contrattazione collettiva in Italia*, in *DRI*, 2021, 1, p. 440. On the legal basis of the directive, see Garben, *Choosing a Tightrope Instead of a Rope Bridge - The Choice of Legal Basis for the AMW Directive*, in Ratti, Brameshuber, Pietrogiovanni (eds.), *The Eu Directive on Adequate Minimum Wages*, Hart, 2024, p. 25 ff. See also Sjödin, *European minimum*

its competence: the legal basis of the Directive is found in Article 153(1)(b) TFEU, which establishes that the Union holds shared competence in the field of working conditions[42], while Article 153(5) TFEU explicitly excludes Union competence in matters relating to pay[43]. It should be noted, however, that the Court of Justice, in its settled case law (which was narrowly interpreted by the Advocate General in his Opinion), has made it clear that this exclusion constitutes an exception[44]. As such, its scope must be interpreted restrictively, so as not to undermine the overall objectives of the Union and, more specifically, those set out in Article 153(1) and Article 151 TFEU[45].

wage: A Swedish perspective on EU's competence in social policy in the wake of the proposed directive on adequate minimum wages in the EU, in *ELLJ*, 2022, 2, p. 273 ff.

[42] The identification of such a legal basis was strongly advocated by the ETUC (European Trade Union Confederation), see Clauwaert, *Legal arguments in favour of the ETUC proposal for a directive on Fair Minimum Wage and Collective Bargaining*, www.etuc.org. It describes it as a "very limiting basis", suggesting the possibility of an interpretation of Article 153(5) TFEU whereby only that component of remuneration strictly linked to its compensatory function would fall outside the Union's competences, while excluding from such limitation the social dimension of the wage obligation, thereby «expanding the scope of European solidarity». Zoppoli L., *Base giuridica e rilevanza della proposta di direttiva del Parlamento europeo e del Consiglio relativa a salari minimi adeguati nell'Unione europea*, in Aimo, Fenoglio, Izzi (eds.), *Studi in memoria di Massimo Roccella*, Esi, 2023, pp. 357, 360 and 361. It is a "rather fragile" legal basis according to Calvellini, Loffredo, *Salari e copertura della contrattazione collettiva: dietro le apparenze molti dubbi*, in *RGL*, 2023, 4, p. 577.

[43] As well as the right to association, the right to strike, and the right to lockout, «in order not to crystallise the positions of *winners* e *loosers*», Treu, *L'Europa sociale: problemi e prospettive*, in *DRI*, 2001, 3, p. 320. It denounces the striking «anomaly of European social law, which excludes the issue of wages from its competences, Loi, *La retribuzione: competenza esclusiva degli Stati membri?*, in Loy (ed.), *Lavoro, Europa, Diritti. In ricordo di Massimo Roccella*, Ediesse, 2012, p. 223.

[44] Beyond the rulings referenced in the next footnote, see also C. Just., 19th June 2014, da C-501/12 a C-506/12, C-540/12 and C-541/12, *Specht et. al.*, par. 33.

[45] It is precisely this need to safeguard the attainment of the objectives enshrined in the Union's founding Treaties (since ensuring adequate wage within the Union also serves as a vehicle for the effective implementation of various principles developed at the EU level) that has led the Court of Justice to interpret the derogation in such a way that not every issue related to "remuneration" falls within the scope of the exclusion of shared competence with the aim of gradually expanding the scope of powers conferred upon the Union, see C. Just., 13th September 2007, C- 307/2005, *Del Cerro Alonso, ibidem*, in *www.eur-lex.europa.eu*, par. 39-41, in which the Court of Justice upheld the worker's claim to benefit – on the basis of the prohibition of discrimination against fixed-term employees – from the same conditions granted to a permanent employee, even where this entailed the right to receive certain back payments of wages. See also C. Just., 15th April 2008, C-268/2006, *Impact,* in *www.eur-lex.europa.eu*, par. 121-126, still on the subject of the prohibition of discrimination against fixed-term employees and C. Just., 12th

There is no doubt that the adequacy of wages constitutes a component of the broader category of working conditions[46], on the assumption that remuneration is a key factor directly shaping employment conditions and indirectly contributing to the realisation of the Union's foundational principles. The objective of the Directive is therefore to ensure the adequacy of wages – not their uniformity across Member States – through the adoption of minimum requirements aimed at establishing a common ideal-typical model of minimum wage, while respecting national practices and supporting and strengthening collective bargaining[47].

What merits attention, first and foremost, is the delineation of the directive subjective scope, as the increasing use of non-standard contractual arrangements – characterized by the inclusion of only specific temporal segments within the contract's subject matter – is also shaped and driven by the broader dynamics outlined in the introductory section (par. 1). The Directive applies not only to workers who have an employment contract or employment relationship in accordance with national law, collective agreements, and the practices in force in each Member State, also taking into account the interpretation provided by the Court of Justice (Article 2) [48]. In line with Regulation (EC) No. 593/2008 of the European Parliament and of the Council, the Directive is intended to be applied to both private and public sector workers. But, in addition to this, it is established that the act should also be covering domestic workers, on-call and intermittent workers, voucher-based workers, platform workers, interns and apprentices, and

November 1996, *United Kingdom v. Council*, C-84/94, cit.; see also the conclusion of the Advocate General Sanchez – Bordona of 28th May 2020 given in C. Just., 8th December 2020, C-620/18, *Hungary v. Parliament*. Treu, *La proposta sul salario minimo*, cit., p. 9.

[46] It has nevertheless been noted in the scholarly literature that, by considering the institution of the minimum wage as falling within the scope of working conditions "[t]he meaning of the subject of remuneration – and of the provision excluding it from the Union's competences – is substantially affected and limited, because the 'condition' represented by the 'minimum wage' is the first and most important element in determining remuneration, both in and of itself and because it indirectly, yet necessarily, influences the setting of wages above the minimum as well […]", Proia, *La proposta di direttiva sull'adeguatezza dei salari minimi*, in *DRI*, 2021, 1, p. 27.

[47] Cfr. recital n. 12. Thus, fulfilling the Commission's "commendable" intention to create synergy between the directive and collective bargaining, v. Barbieri, *Il salario minimo legale in Italia, dagli studi di Massimo Roccella alla proposta di direttiva e ai disegni di legge di questa legislatura*, in Aimo, Fenoglio, Izzi (eds.), *Studi in memoria di Massimo Roccella*, Esi, 2021, p. 84.

[48] Menegatti, *Scope (Article 2)*, in Ratti, Brameshuber, Pietrogiovanni, *cit.*, p. 156 ff.

other atypical workers, as well as cases of false self-employment. Genuinely self-employed workers are excluded from the scope of the Directive (Recital 21), although the issue of vulnerable self-employed workers was specifically discussed during consultations with social partners[49].

As for the notion of "minimum wage" set out in the Directive, it is worth noting, first of all, that the act refrains from specifying which elements of remuneration should be taken into account for the purposes of this definition. This is likely due, at least in part, to the need not to exceed the competences conferred upon the Union[50]. Art. 3[51], par. 1, n. 1, defines it as «the minimum remuneration set by law or collective agreements that an employer, including in the public sector, is required to pay to workers for the *work performed during a given period*»[52].

The definition thus reaffirms the role of working time as a parameter for the calculation of remuneration. It therefore appears that the Directive intends to exclude from the notion of minimum remuneration – which must meet the requirement of adequacy – any payments that are not strictly and directly linked to the performance of work within a defined period of time («the minimum remuneration […] that an employer […] is required to pay […] for the work performed during a given period»). This interpretation is further supported by Recital 28 of the Directive, which states that minimum wages are considered adequate if they enable the recipient to enjoy «a decent standard of living based on *full-time employment*».

[49] See Etuc, *Reply of the European Trade Union Confederation*, cit., p. 12; Bellavista, *La proposta di direttiva sui salari minimi adeguati. L'Europa sociale ad una svolta*, in *DRI*, 2021, 2, p. 429. See on that Proia, *La proposta di direttiva*, cit., p. 40, who states that the highest percentage of working poor is found precisely among self-employes workers, to be understood, in all likelihood, as "false self-employed", according to Barbieri, *cit.*, p. 87, note 54. See Lassandari, *Oltre la "grande dicotomia"? La povertà tra subordinazione e autonomia*, in *LD*, 2019, 1, pp. 92-95.

[50] As noted by Pascucci, *Il salario minimo tra la proposta di direttiva e i disegni di legge italiani*, in Aimo, Fenoglio, Izzi (eds.), *cit.*, p. 259.

[51] See Houwerzijl, *Definitions (Article 3)*, in Ratti, Brameshuber, Pietrogiovanni, *cit.*, p. 169 ff.

[52] The definition necessarily differs from that of remuneration provided in Directive (EU) 2023/970 on gender pay gap, which reiterates the notion of remuneration adopted in Directive 2006/54/EC. Article 2(1)(e) of the latter requires Member States to consider remuneration as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer", adding that such consideration may be "complementary or variable".

It is therefore reasonable to assume that, on the one hand, the Directive reinforces the principle of reciprocity between the core obligations in the employment contract (work performed versus remuneration), and, on the other, requires that adequacy pertains specifically to the minimum wage mandatorily paid to a worker for the work performed within a given time segment – more precisely, during working hours[53].

This claim raises several questions. For the purposes of this discussion, we will focus on the one that is most relevant in light of the notion of working time as developed by the Court of Justice of the European Union[54] and, in particular, we will seek to understand whether the minimum wage (as defined in Article 3(1)(1) of the Directive) also applies to so-called grey time – for which, as we saw before, collective agreements sometimes provide only minimal forms of compensation), and whether it must meet the requirement of adequacy and be subject to the application of the principles of proportionality and sufficiency. Before doing that, it is necessary to question the concept of adequacy as an essential characteristic of remuneration. In order to do this, we still need to address the directive on adequate minimum wages and its effect on the Italian legal system.

5. *Wage adequacy, proportionality and sufficiency in the rulings of Court of Cassation of October 2023*

Let us first of all examine whether the directive embraces a specific notion of adequacy and, if so, what criteria are to be used in assessing it. This very concept, according to some scholars, represents a "critical point" within the European legislative framework[55].

The preparatory works of the directive reveal that the notion of minimum wage adequacy, as conceived by the Commission, is grounded in two main assumptions: on the one hand, a wage is considered adequate if it is "fair" in relation to the overall wage distribution; on the other hand, if it enables its recipient to enjoy a decent standard of living, taking into account

[53] Cassì, *La retribuzione nel contratto di lavoro*, Giuffrè, 1954, p. 7 ff.; Guidotti, *La retribuzione nel rapporto di lavoro*, Giuffrè, 1956, p. 100 ff.; Treu, *Onerosità e corrispettività nel rapporto di lavoro*, Giuffrè, 1968, p. 44 ff.

[54] See *supra*, par. 1

[55] Treu, *cit.*, p. 12.

the broader economic conditions[56]. While the assessment of fairness – based on the practices observed in different Member States – relies on comparative evaluation with additional elements, the second criterion is framed in more "absolute" terms. Nonetheless, these aspects are closely interrelated, as the very notion of a "decent standard of living" is itself defined through comparative processes[57]. The Commission adopted two distinct indicators – later also incorporated into Article 5, which concerns the procedure for determining adequate statutory minimum wages – both of which are well-established at the international level, for the purpose of this assessment[58]. The fairness of wage distribution is assessed by comparing the minimum wage with 60% of the gross median wage (the Kaitz index, used by the OECD) and/or with 50% of the gross average wage (an indicator employed by the European Committee of Social Rights in its interpretation of the European Social Charter)[59]. These two variables are not considered to be alternative, but rather to constitute a «double threshold of decency»[60]. The adequacy of the minimum wage in ensuring a decent standard of living is, by contrast, assessed by comparing the net minimum wage with the at-risk-of-poverty threshold (AROP) and with net average wages[61].

This articulation of the concept of adequacy is also reflected in the final version of the directive. Indeed, minimum wages are considered adequate (again) when they are "fair in relation to the wage distribution in the

[56] Lo Faro, *L'iniziativa della Commissione per il salario minimo europeo tra coraggio e temerarietà*, in *LD*, 2020, p. 549, refers to it as "substantive notion".

[57] See European Commission, *Impact assessment*, cit., p. 2 e COM(2020) 682 final, 28th October 2020, p. 2.

[58] Particularly noteworthy is the interpretation proposed by Ratti, *La riduzione della povertà lavorativa nella direttiva sui salari minimi adeguati*, in *VTDL*, October 2022, Extraordinary number, p. 44 ff., which analyses the notion of adequacy precisely in light of the criteria set out in this article, concluding that wages are adequate when they are regularly updated and indexed, as well as when they are fair in relation to the wage distribution of the country in question (cf. recital No. 29). See also Delfino, *Lecture,* 7th December 2023, Seminar "*Salario minimo e Costituzione*", Bologna, 2023.

[59] See Bavaro, *The Legal Institutions of Industrial Relations on Wage-setting,* in Ratti, Brameshuber, Pietrogiovanni, *cit.*, p. 67, who observes that the concept of adequacy in the directive suffers from an underlying ambiguity – should it refer to the market value of labour, or to the monetary value necessary to ensure a decent standard of living? – which, however, makes it impossible, for the purposes of its determination, to disregard collective bargaining outcomes (as opposed to statutory minimum wage levels).

[60] Contouris, *L'Europa sociale al bivio*, in *RGL*, 2024, 1, p. 128.

[61] European Commission, *Impact assessment*, cit., p. 3.

relevant Member State" and when they enable workers "to have a decent standard of living based on full-time employment". Such adequacy must be assessed and determined by each Member State, taking into account national socioeconomic conditions. For this purpose, consideration should be given to purchasing power, national long-term productivity levels and developments, wage levels, and their distribution and growth (see Recital 28). It is worth noting, first of all, that Recital 28 sets out a twofold condition: not only must wage adequacy be assessed on the basis of macroeconomic data, but it must also fulfil the requirement of ensuring a decent standard of living. This highlights a conceptual parallel between Recital 28 of the directive and Article 36 of the Italian Constitution.

Among the tools that a Member State may use to assess wage adequacy is, *inter alia*, a basket of goods and services priced in real terms, from which the cost of living can be derived "with a view to achieving a decent standard of living". Within this basket, however, consideration should be given not only to goods and services that meet the most basic needs – such as food, housing, and clothing – but also to those related to education, social inclusion, and cultural participation (Recital 28, second paragraph). In addition, certain nationally developed indicators may be employed, as well as comparisons between net minimum wages and the poverty threshold, or with the purchasing power of minimum wages. It must be noted, however, that these are merely indicative and illustrative guidelines[62], and not binding – contrary to what had been advocated in some quarters[63]. Nonetheless, they underscore the necessity of grounding wage determination in clear and appropriate benchmarks, capable of standing up to scrutiny in terms of adequacy.

What is certain is that even some of the parameters set out in the European directive were referred to by the Italian Supreme Court of Cassation in a series of rulings issued in October 2023 for assessing adequacy of remuneration[64]. These references were made to guide judges in objectifying the

[62] Menegatti, *Il salario minimo nel quadro europeo e comparato. A proposito della proposta di direttiva relativa a salari minimi adeguati nell'Unione europea*, in *DRI*, 2021, 1, p. 57, observes that making certain parameters – such as the poverty threshold – binding would likely have resulted in encroaching upon the notion of remuneration, with respect to which the Union does not have competence.

[63] Bellavista, *cit.*, p. 427.

[64] The Court of Cassation overturned decisions of the Courts of Appeal that had reject-

equitable power granted to them by law to determine the worker's remuneration following a finding of invalidity of the relevant contractual clause – even when such a clause originates from "qualified" collective bargaining[65].

According to the prevailing interpretation of the combined provisions of Articles 1419(2) and 2099 of the Italian Civil Code, it is a well-established principle in case law that, when the wage treatment provided to the worker is found to be unlawful, the judge may supplement (or "hetero-integrate") the individual employment contract by imposing on the employer the obligation to pay a wage deemed consistent with the principles of proportionality and adequacy.

This mechanism of judicial determination of remuneration traces back to a jurisprudential interpretation originating in the 1950s, when actions by workers alleging remuneration lower than that provided for in the collective agreements were brought before Courts. Upon acknowledging the immediate horizontal effect of Article 36 of the Constitution, waiting for statutory minimum wage or for legally binding collective agreements[66] Courts began to employ the wage levels set in collective agreements as standard of reference.

This case law has been challenged as we witnessed the emergence within industrial relations practice of collective agreements signed by representative trade unions that foresee remuneration which are *manifestly* inadequate.

This scenario – albeit rare – is exactly the one from which the rulings of the Court of Cassation, which for the first time embodied the concepts

ed workers' claims in judgments nos. 27769, 27711, and 27713 of 2nd October 2023, and upheld appellate decisions that had granted the claims in judgments nos. 28320, 28321, and 28323 of 10th October 2023. See also Lassandari, *La suprema Corte e il contratto collettivo: alla ricerca dell'equa retribuzione*, in *RGL*, 2023, 4, p. 531 ff.; Delfino, *La recente giurisprudenza della Cassazione in materia di salario minimo, ovvero alla ricerca della soglia perduta*, in this journal, 2023, p. 548 ff. See also Tomassetti, *Contrasting Ideas of Justice in the Law-Collective Bargaining Nexus: The Case of Wage Settlement and Litigation*, in Tomassetti, Bugada, Forsyth (eds.), *The Law and Collective Bargaining. Sources and Patterns of Regulation in the Modern World of Work*, Hart, 2025, p. 53 ff.

[65] The leading judgment that paved the way for this line of case law, although not the first on the subject, is represented by Trib. Torino, 9 agosto 2019, n. 1128, in *DRI*, 2020, p. 848, with a commentary by Centamore, *I minimi retributivi del CCNL confederale Vigilanza privata, sezione Servizi fiduciari, violano l'art. 36 Cost.: un caso singolare di dumping contrattuale e una sentenza controversa del Tribunale di Torino.*

[66] Nowadays, Italy is one of the few countries in Europe which has not statutory minimum wage nor legally binding collective agreements.

of adequacy of remuneration autonomously from the provisions of collective bargaining. These rulings concerned the remuneration established in a collective agreement (expired on 31 December 2015 but remained in force for almost eight years) signed by two of the most representative Italian trade unions, amounting to €930.00 gross per month[67]. The provision regarding remuneration was hence declared null and void for being in contrast with Article 36 of the Italian Constitution.

In reaching such a declaration, the Court of Cassation deemed it appropriate to employ certain parameters capable of serving as statistical evidence for assessing whether the remuneration was inconsistent with constitutional requirements. In particular, the wage treatment was compared, on the one hand, with the absolute poverty threshold developed by ISTAT, which represents the monetary value, at current prices, of a basket of goods and services considered essential, in the Italian context and for a household with specific characteristics, to achieve a minimally acceptable standard of living. This basket is composed of three macro-categories (food, housing, and residual expenditures), whose monetary value is not calculated at the absolute minimum price, but rather at the minimum price accessible to all households, taking into account the characteristics of supply in different territorial contexts. In ISTAT's surveys, absolute poverty is distinguished from relative poverty: households are classified as absolutely poor if their monthly expenditure is equal to or lower than the value of the absolute poverty threshold; they are considered "relatively poor", instead, if their consumption expenditure falls below a conventional relative poverty threshold (the so-called poverty line). While absolute poverty classifies households based on their ability to acquire a basket of essential goods, relative poverty is instead linked to inequality in the distribution of consumption expenditure[68].

In addition to this threshold, further statistical evidence used to assess the inadequacy of the wage treatment provided includes the amounts disbursed under the ordinary wage guarantee fund (Cassa Integrazione Guadagni Ordinaria), the Citizenship Income (Reddito di Cittadinanza), the unemployment benefit (NASpI), and the income threshold for access to

[67] The monthly amount corresponds to a gross hourly wage of €5.37, based on a standard 40-hour workweek.

[68] Istat, *Le statistiche dell'Istat sulla povertà. Anno 2021. I maggiori consumi non compensano l'inflazione. Stabile la povertà assoluta*, Istat Statistiche Report, 15th June 2022, *Glossario*; Istat, *Le statistiche dell'ISTAT sulla povertà. Anno 2021*, istat.it, pp. 9-11.

disability pensions. The key point to highlight here is that, with regard to these parameters, the Court clarified that these are «forms of income support which refer, however, to the availability of minimum amounts merely sufficient to ensure the recipient's survival, but not suitable to support an assessment of the adequacy and proportionality of wage»[69]. This is significant, as it confirms that the remuneration under scrutiny was found unlawful primarily because it failed to meet even the threshold of adequacy as required by the constitutional principle of sufficiency – which, even in the literal wording of the provision («[…] in any case sufficient […]»), stands at a quantitatively lower level than that of proportionality.

Finally, equally decisive was the comparison between the wage under review and the minimum remuneration levels established by other national collective labour agreements for tasks similar to those covered by the section of the collective agreement under scrutiny[70]. The discrepancy that emerged – reaching up to 30% – was sufficient to cast doubt on the proportionality of the remuneration in relation to the quantity and quality of the work performed[71].

The true element of novelty contained in the rulings under comment lies, on the one hand, in the fact that the clause struck down by the Judges

[69] Cass., no. 27769/2023, cit., par 23.2, and Cass., no. 28320/2023, par. 1.13; Tarquini, *La giurisprudenza di fronte alla crisi del contratto collettivo come parametro della retribuzione proporzionata e sufficiente: nuovi percorsi di applicazione diretta dell'art. 36 Cost.*, in Albi (eds.), *Salario minimo e salario Giusto*, Giappichelli, 2023, p. 56.

[70] This refers to the National Collective Labour Agreement (c.c.n.l.) for the Multiservice sector, which, under Article 10, includes in Level II "workers who carry out supervision of premises," exemplifying roles such as "doorman, custodian, guard, unarmed surveillance," as well as "general workers assigned to reception duties"; the National Collective Labour Agreement for employees of building owners, which, under Article 15, assigns Category D1 to "workers engaged in surveillance activities carried out on a non-intermittent basis within buildings primarily used for commercial purposes or in residential properties and/or complexes"; and the National Collective Labour Agreement for employees of companies in the Tertiary, Distribution and Services sectors, which, under Article 100, classifies custodians, ushers, and doormen at Level VI.

[71] In case law, the comparison is mostly carried out by examining the contractual items that make up the so-called constitutional minimum wage: basic pay, thirteenth-month salary, and cost-of-living allowance (indennità di contingenza). This approach aligns with the jurisprudential orientation according to which fair remuneration – used as a benchmark for adjustment pursuant to Article 36, paragraph 1, of the Constitution – does not comprise all the elements that contribute to the overall remuneration package. See Cass., 27th January 2021, No. 1756; 20th January 2021, No. 944; 25th June 2020, No. 12624, available in *DeJure*.

was included in an agreement signed by parties possessing a characteristic that the legal system itself sometimes identifies as a guarantee of the quality of the employee's economic and regulatory treatment: namely, the higher level of comparative representativeness[72]. However, it is submitted that what is commendable is not so much the outcome of the decisions, but rather the interpretative process that led to the formulation of the principle of law or to the confirmation of the judgments issued by the Courts of Appeal[73]. Scholars have argued that such landmark jurisprudence marked a significant shift from a *procedural* to a *substantive* idea of justice in wage settlement and litigation, whereby substantive justice refers to judicial scrutiny of compliance with the constitutional principle of just remuneration, while procedural justice relies on collective bargaining provisions as fair parameters, provided that such provisions are set in collective agreements concluded by representative trade unions and employers' federations[74].

The Court of Cassation has, in fact, clarified that the judge enjoys «broad discretion in determining fair remuneration» within an assessment that is «entrusted to the trial judge»[75]. In implementation of Article 36 of the Constitution, the judge may, in fact, «refer for comparative purposes to the wage treatment established in other collective agreements from related sectors or for similar tasks». The Court of Cassation further adds that «the concepts of sufficiency and proportionality are aimed at ensuring for the worker a life that is not merely free from poverty, but one that is dignified»[76] and that «in the assessment of adequate minimum remuneration pursuant to Article 36 of the Constitution, within the scope of the powers granted under Article 2099, paragraph two, of the Civil Code, the judge may also refer to economic and statistical indicators, including those suggested by

[72] But see Ichino, *Se è il giudice a stabilire il salario minimo,* in *Lavoce.info*, 6th October 2023; Bronzini, *Il contributo della Corte di cassazione per risolvere il tema dei "salari indecenti"*, in *LDE*, 2023, 2, p. 2; Pascucci, *La recente giurisprudenza di legittimità sul salario proporzionato e sufficiente e i parametri per la sua determinazione*, in *QRGL*, 2024, 10, *passim*. On the topic, see also Delfino, *Salario legale, contrattazione collettiva e concorrenza*, Esi, 2019.

[73] Cfr. Pascucci, *La recente giurisprudenza,* cit., p. 28. Forse inevitabile al fine di adeguamento dell'orientamento, v. Lassandari, *Salario minimo e Costituzione. Intervento al seminario di studi organizzato dall'Università di Bologna*, 7th December 2023.

[74] Tomassetti, *Contrasting Ideas*, cit., *passim*.

[75] Cass., nn. 27769 e 27711/2023, cit., points 20-21.

[76] Cass., no. 27769/2023, cit., par. 23.2; Cass., no. 27769/2023, cit., point 11.

Directive (EU) 2022/2041»[77], «by virtue of the integration of the Italian legal system within the European and international framework»[78].

The principles of proportionality and sufficiency of remuneration, as enshrined in Article 36 of the Italian Constitution, are, as clarified by the Court of Cassation[79], inseparably connected; they complement and reinforce each other, both constituting essential elements of the contractual cause and mutually correcting one another. Thus, there may be cases in which remuneration, though apparently sufficient, is not proportionate to the work performed, and cases in which remuneration, though seemingly proportionate, is not sufficient. In either of these scenarios, the clause (being null and void) [80], must be corrected, as it renders the contract incapable of fulfilling its purpose[81]. Furthermore, the Court of Cassation specifies that, due to the binding force of the right to fair remuneration stemming directly from Article 36 of the Constitution, the only burden placed on the worker is to prove «the amount of the remuneration» and «the object of the assessment, namely the work actually performed»[82].

Having established that any contractual clause relating to remuneration may be subject to judicial review to assess its conformity with the legal order, we can now address our main question, redefining it: to what extent the principles concerning adequacy of remuneration may be applied to the wage provided for in collective agreements applicable to "grey times"? As the C. Just. taught while defining the concept of working time, the answer to this question depends on the object of the obligation and on the nature of the remunerative counter-performance, as we will see in the following paragraph.

[77] Cass., no. 27769/2023, par. 24 ff.

[78] Cass., no. 28320/2023, par. 1.14; Cass., no. 27769/2023, par. 11 ff.

[79] Cass., 2nd October 2023, no. 27769.

[80] See Cass., 4th May 1961, no. 1004. Bellomo, *Retribuzione sufficiente e autonomia collettiva*, Giappichelli, 2002, p. 79; it defines them as two «symbiotic principles» Colapietro, *Commento all'art. 36*, in Bifulco, Celotto, Olivetti (eds.), *Commentario alla Costituzione*, 1, Utet, 2006, p. 745.

[81] From this perspective, Zoppoli L., *La corrispettività nel contratto di lavoro*, Esi, 1991, *passim*.

[82] All quotations are taken from Cass., no. 27713/2023, par. 17.

6. *Final remarks: what remuneration for grey times?*

Legal scholarship has debated the legal nature of all those payments made to workers as compensation for their availability during waiting periods, as provided for in certain non-standard forms of employment[83]. The debate has arisen due to the absence of an actual work performance during such periods – as in the case of on-call work and employment under temporary work agencies.

The decisive factor in determining whether such payments qualify as remuneration – thus triggering the applicability of the principles set out in Article 36 of the Constitution – lies, according to some scholars, in the employer's ability to exercise, during these time segments, the powers granted to them by law, thereby becoming a creditor of a work performance involving a *facere*. In other words, «the mere absence of a tangible performance does not seem sufficient to justify excluding workers in a state of 'availability' from the application of Article 36 of the Constitution»[84].

According to other scholars, however, this conclusion is not acceptable, as Article 36 of the Constitution presupposes the existence of "work" understood as a specific *facere*. Therefore, for the purpose of determining the amount of such payments, Article 36 would either not be applicable at all, or – alternatively – only the criterion of sufficiency would apply. In this latter interpretation, the service in question would still possess a remunerative nature, but with special characteristics that would justify a balancing of the constitutional principles set out in Article 36[85].

[83] Palladini, *I principi costituzionali in materia di retribuzione e la loro applicazione giurisprudenziale*, in Gragnoli, Palladini (eds.), *La retribuzione*, Wolters Kluwer, 2012, esp. p. 56 ff.

[84] Palladini, *cit.*, p. 64; Garofalo, *La legge delega sul mercato del lavoro: prime osservazioni*, in *RGL*, 2003, 2, p. 371; Pascucci, *Giusta retribuzione e contratti di lavoro: Verso un salario minimo legale?*, Franco Angeli, 2018, p. 77. See also M.T. Carinci, *La fornitura di lavoro altrui. Interposizione. Comando. Lavoro temporaneo. Lavoro negli appalti*, in Schlesinger (eds.), *Il Codice civile. Commentario*, Giuffrè, 2000, p. 341; Bano, *Art. 22*, in Gragnoli, Perulli (eds.), *La riforma del mercato del lavoro e i nuovi modelli contrattuali*, Cedam, 2004, p. 347. *Contra*, Miscione, *Retribuzione e rapporti di lavoro flessibile*, in Gragnoli, Palladini (eds.), *cit.*, p. 676. Doubting it, Bellomo, *Art. 36*, in Amoroso, Di Cerbo, Maresca (eds.), *Diritto del lavoro. La Costituzione, il Codice civile e le leggi speciali*, 2017, Giuffrè, p. 221.

[85] Ciucciovino, *La disciplina dei rapporti di lavoro*, in M.T. Carinci, Cester, *Somministrazione, comando, appalto, trasferimento d'azienda*, 2004, Ipsoa, p. 83; Gottardi, *Lavoro intermittente*, in Gragnoli, Perulli (eds.), *La riforma del mercato del lavoro e i nuovi modelli contrattuali*, Cedam, 2004, p. 489; if we're not mistaken, Speziale, *La prestazione di lavoro temporaneo e il trattamento*

In cases involving so-called grey time that may be classified as working time in light of the interpretation provided by the Court of Justice, there should remain no doubt as to the remunerative nature of the payments made to compensate for such periods.

From this, it follows that both constitutional principles governing remuneration should apply – if for no other reason than the fact that the rigidity of the contractual type reasonably excludes the possibility of envisaging remunerative counter-performances detached from both constitutional parameters.

Therefore, remuneration paid for services performed during time segments that qualify as working time – pursuant to the principles enshrined in Article 36 of the Constitution, which, as previously discussed, are mutually corrective – must be both proportionate and sufficient.

The fact that proportionality, in terms of the quality of the work performed, may be subject – within the framework of collective bargaining – to adjustments based on the content-related differences of the tasks carried out (especially with regard to highly specialised roles), is a further element confirming the remunerative nature of the payment. This entails all the corresponding consequences, including judicial review of the provisions negotiated by collective agents, and the judge's power to determine remuneration equitably in the event of a declaration of nullity. And this is the consequence of the enforcement of both the European directive and art. 36 of Italian Constitution: in the event that collective agreements provide for "grey times" a remuneration lower than the standard one, an adequacy assessment is required, performed through objective criteria.

Some doubts remain, finally, regarding the applicability of these principles to those payments made for time segments that cannot be classified as working time. As it has been noted, even in cases where the worker is not required to be physically present at the workplace but must remain on-call, there is nonetheless a restriction of free time – albeit less significant than in other scenarios, yet still present[86], to the point that some scholars have interpreted it as «an extension of working time regulation»[87]. In this case, we

retributivo, in Liso, Carabelli (eds.), *Il lavoro temporaneo. Commento alla legge n. 196/1997*, Franco Angeli, 2004, p. 302. On a different basis, see Ferraro, *Diritto dei contratti di lavoro*, il Mulino, 2011, p. 349.

[86] Alessi, *Disponibilità, attesa e contratto di lavoro*, in Biblioteca '20 Maggio', 2011, 1, p. 232

[87] Occhino, *Il tempo libero nel diritto del lavoro*, Giappichelli, 2010, p. 207.

believe that, as a preliminary matter, the issue concerning the legal nature of the payment made must be resolved, as it necessarily depends on the actual constraints imposed on the worker. Even in situations where these activities may not, strictly speaking, have a remunerative nature, we concur with those scholars who maintain that the allowances granted must nonetheless comply with the principle of sufficiency[88], which must also be given due weight in light of the interpretation offered by the Constitutional Court regarding non-working time[89].

[88] Levi, *Contratto di lavoro intermittente e disponibilità del lavoratore*, in *DL*, 2006, p. 386 ff.; Gottardi, *cit.*, p. 489; Alessi, *cit.*, 241.

[89] C. Cost., 11th May 1992, no. 210.

Abstract

This paper explores the evolving legal landscape surrounding the remuneration of "grey time" – periods of on-call or stand-by duty – within both EU and Italian frameworks. It critically examines the jurisprudence of the European Court of Justice, which progressively redefined "working time" through spatial and temporal constraints, affecting how such periods are legally classified. The paper also connects these developments to the EU Directive on Adequate Minimum Wages, arguing that wage adequacy concerns working time. It further discusses the role that recent Italian Court of Cassation rulings invoking constitutional principles of proportionality and sufficiency in wage, on one hand, and a ruling by the same Court regarding the qualification of grey. The study concludes that compensation for legally classified working time must meet both sufficiency and proportionality requirements, potentially opening space for judicial review of collective agreements.

Keywords

Working time, Grey times, Wage, Proportionality, Sufficiency.

Focus on Employment in the Era of AI and Digital Platforms: Understanding and Regulating Transitions

Ilaria Purificato

Rebalancing the Power: from the Involvement of Social Partners in AI Governance to AI Systems as a Tool for Strengthening Unions

Contents: 1. Introduction. 2. Scope and Methodology. 3. Spaces for Collective Actors Action According to Art. 26 of Regulation (EU) 2024/1689. 3.1. "Information" in the AI Act. 3.1.1. The "Minimum Right" to Information for Workers and Their Representatives. 3.1.2. Rights to Information and Consultation. 3.2. Data Protection Impact Assessment. 4. Fundamental Rights Impact Assessment for High-Risk AI Systems: a missed opportunity for the involvement of collective actors?. 5. Surveillance and Human Oversight. 6. A few preliminary remarks on the case of Italy. 7. The Digitalization of Trade Union Action in the Workplace. 8. From Digital Tools to AI-Powered Advocacy: Exploring Trade Unions' Evolving Technological Landscape. 9. Final remarks.

1. *Introduction*

The implementation of Artificial Intelligence (AI) systems in workplace technologies and in the processes that regulate the functioning of digital platforms has driven the rise of algorithmic management systems. These systems have progressively absorbed employers' prerogatives and the management of worker selection and recruitment stages[1]. As a result, they

[1] Regarding the employers' powers, see Tebano, *Lavoro, potere direttivo e trasformazioni organizzative*, Editoriale Scientifica, 2020; Ciucciovino, *La disciplina nazionale sulla utilizzazione dell'intelligenza artificiale nel rapporto di lavoro*, in *LDE*, 2024, 1, p. 1 ff.; Sartori, *L'impatto dell'intelligenza artificiale sul controllo e la valutazione della prestazione, e sull'esercizio del potere disciplinare*, in *LDE*, 2024, 3 and also Id., *Intelligenza artificiale e gestione del rapporto di lavoro. Appunti da un cantiere ancora aperto*, in *VTDL*, 2024, 3, p. 806 ff.; Tebano, *Intelligenza Artificiale e datore di lavoro:*

have intensified the pre-existing information asymmetry and amplified the inherent power imbalance between the parties in the employment relationship[2].

By increasing the need for collective protections, this situation should lay the groundwork for a potential strengthening of collective actors in terms of representativeness, involvement, and bargaining power. In other words, it should promote the revitalization and enhancement of protective measures – including those already established by law or collective bargaining – capable of monitoring and influencing the exercise of employers' powers, preventing abuses through mechanisms that range from information and consultation procedures to stronger participation rights, alongside transparency and disclosure obligations[3].

However, despite the existence of policy documents outlining principles and guidelines in this regard, collective agreements frequently conflict with these frameworks. Moreover, a number of structural impediments hinder the full implementation of these principles, including but not limited to: declining unionization rates; the fragmentation of work performance[4]; competitive dynamics; the creation of individual reputational profiles; and the lack of physical or virtual spaces for worker aggregation.

Nevertheless, a significant number of European documents and acts emphasize the importance of involving workers and their representatives in workplaces where AI systems are used, at various levels. As articulated in the White Paper on Artificial Intelligence - A European Approach to Ex-

scenari e regole, in *DLM*, 2024, 3; Gargiulo, *Intelligenza Artificiale e poteri datoriali: limiti normativi e ruolo dell'autonomia collettiva*, in *federalismi.it*., 2023; Zappalà, *Informatizzazione dei processi decisionali e diritto del lavoro: algoritmi, poteri datoriali e responsabilità del prestatore nell'era dell'intelligenza artificiale*, in *Biblioteca 20 maggio*, 2021, 2, p. 98 ff.

[2] Peruzzi, *Intelligenza artificiale, poteri datoriali e tutela del lavoro: ragionando di tecniche di trasparenza e poli regolativi*, in *Ianus*, 2021, n. 24; Tullini, *La questione del potere nell'impresa. Una retrospettiva lunga mezzo secolo*, in *LD*, 2021, 3-4, p. 429 ff.

[3] With regard to the revival of the active role played by collective bargaining, which does not hinder but accompanies, guides and limits change, when necessary, see Ingrao, *Dagli algoritmi alla IA agentica. Le operazioni ermeneutiche dei CCNL sulla qualificazione del rischio*, in *LLI*, 2025, 2, r.39 ff.; For a study on company and regional collective bargaining and artificial intelligence, see Peruzzi, *Governare l'IA nei luoghi di lavoro: traiettorie della contrattazione collettiva aziendale e territoriale*, in *LLI*, 2025, 2, r 55 ff.

[4] Forlivesi, *La rappresentanza e la sfida del contropotere nei luoghi di lavoro*, in *LD*, 2020, 4, p. 673 ff.

cellence and Trust[5], which outlines the EU's strategy for "trustworthy" and "safe" AI development, "the design and implementation of AI systems in the workplace directly impacts workers and employers". Consequently, the involvement of social partners is regarded as "a crucial factor in ensuring a human-centered approach to AI in the workplace".

This is also reflected in the European Social Partners Framework Agreement where social partners acknowledge that the most effective approach to harnessing the benefits of digitization while mitigating its risks is to implement a joint, circular, and dynamic process, striving for a continuous balance between workers' and employers' interests[6].

Recent European studies further corroborate the assertion that the involvement of collective actors is imperative to ensure better working conditions in innovative and digitalized environments. The findings of these studies indicate a positive correlation between the presence of worker representation within companies that use AI technologies and the existence of enhanced working conditions[7].

However, it is also crucial to consider the well-documented developments that have shaped trade union relations in the food delivery sector across various national levels. In this context, grassroots movements emerged in response to the initial absence or difficulties of traditional trade unions in reaching platform workers and addressing their needs. These movements have frequently functioned as either a substitute for or in collaboration with established union organizations, thereby addressing a significant deficit in worker representation[8].

[5] European Commission, Bruxelles, 19.2.2020, COM(2020) 65 final.

[6] European Social Partners Framework Agreement on Digitalisation. See, among others, Senatori, *The European Framework Agreement on Digitalisation: a Whiter Shade of Pale?*, in *ILLeJ*, 2020, 2, 13, pp. 160-175; Battista, *The European Framework Agreement on Digitalisation: a tough coexistence within the EU mosaic of actions*, in *ILLeJ*, 2021, 1, 14, pp. 105-121; Rota, *Sull'Accordo quadro europeo in tema di digitalizzazione del lavoro*, in *LLI*, 2020, n. 2, p. 25 ff.

[7] Cazes, *Social dialogue and collective bargaining in the age of artificial intelligence*, in *OECD Employment Outlook 2023 artificial intelligence and the labour market*, p. 221 ff.

[8] See, among others, Marrone, *Rights against the machines! Food delivery, piattaforme digitali e sindacalismo informale*, in *LLI*, 2019, 5, 1, p. I.3 ff.; Pacella, *Le piattaforme di food delivery in Italia: un'indagine sulla nascita delle relazioni industriali nel settore*, in *LLI*, 2019, 5, 2, p. 181 ff.; Martelloni, *Individuale e collettivo: quando i diritti dei lavoratori digitali corrono su due ruote*, in *LLI*, 2018, 4, 1, p. 18 ff.; Tassinari, Maccarone, *Riders on the storm. Workplace solidarity among gig economy couriers in Italy and the UK*, in *Work, Employment and Society*, 2019; Purificato, Scelsi with the supervision of Senatori, Spinelli, *Representing and Regulating Platform Work: Emerging Problems*

2. *Scope and Methodology*

Based on these premises, this paper aims to deepen the analysis of the relationship between AI and collective actors from two perspectives, both of which have the potential to increase the power of the employer's counterpart.

The first perspective considers AI as a technology capable of influencing every dimension of human life, including work. AI affects the way work is managed, organized and performed, and thus shapes working conditions. This reality underlines the need for action to ensure the development and diffusion of AI systems that are "trustworthy", as defined by the European legislator, *i.e.* that respect the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union and are inherently "non-deterministic".

From this perspective, collective actors, as key stakeholders, can play an active role in protecting workers and promoting the responsible use of AI. In order to explore this issue, the paper examines the AI Regulation and relevant European legislation to assess the level of protection offered.

The second perspective considers AI as a potential tool for trade union renewal. In response to changes in the world of work – such as the disruption of traditional space-time coordinates and the evolving nature of industrial relations, particularly in terms of the prerogatives of the various actors involved – these changes inevitably affect the ability of trade unions to connect with workers, defend their interests and maintain the effectiveness of traditional organizing and action strategies. In this context, AI can serve as a catalyst for the revitalization of trade unions. By leveraging advanced analytics, digital communication platforms, and predictive systems, collective actors could better identify emerging worker needs, enhance mobilization capacity, and strengthen representation, thereby redefining the role of unions in a constantly evolving labour landscape.

To investigate this potential, the paper analyzes existing practices – including those that have been the subject of case law – as well as experimental initiatives implemented by trade unions, exploring whether there is room for further development and expansion of these practices.

and Possible Solutions. National report on Italy, 41-52, available at the following link: https://irel.fmb.unimore.it/archive/research-output/national-reports/.

The following paragraphs will focus on analyzing the two perspectives in detail.

Specifically, the first part (paragraphs 3 to 5) aims to examine the role and forms of intervention granted to collective actors by the European legislator, starting with an analysis of the provisions set out in the AI Act[9]. Despite its legal basis – Articles 16 and 114 TFEU – framing it as an instrument for harmonizing the internal market with respect to the protection of individuals with regard to the processing of personal data, the regulation also pursues the objective of monitoring, assessing, and mitigating the risks associated with the use of AI systems in sectors such as "employment, management of workers, and access to self-employment". In this context, collective actors are recognized as potential stakeholders, with avenues for intervention aimed at ensuring transparency in specific segments of the AI value chain.

The analysis, therefore, starts with the relevant provisions of the AI Act and expands to include European and Italian legal sources that form part of the same regulatory framework. These references include Regulation (EU) 2016/679 on the protection of individuals with regard to the processing of personal data and the free movement of such data (GDPR), the Directive (EU) 2024/2831 on improving working conditions in platform work (henceforth "Platform Work Directive"), as well as provisions within domestic law that govern processes and technologies potentially integrating AI systems, such as Article 1-bis of Legislative Decree No. 152/1997 and Article 4 of the Workers' Statute.

The second part of the paper (paragraphs 6 to 8) explores whether collective actors are adopting AI as a tool to enhance their connection with workers, better understand their needs, and ultimately increase union membership and unionization rates.

In order to achieve this objective, the analysis considers firstly practices where collective actors use digital tools to carry out trade union activities,

[9] See, *inter alia*, Biasi, *Intelligenza Artificiale e diritto del lavoro: rischi (lavoristici), opportunità (occupazionali), sfide (regolative)*, in Basile et al. (eds.), *Intelligenza Artificiale. Diritto, giustizia, economia ed etica*, Giappichelli Editore, p. 179 ff.; Alaimo., *Il Regolamento sull'Intelligenza Artificiale. Un treno al traguardo con alcuni vagoni rimasti fermi,* in *federalismi.it,* 2024, 25, p. 231 ff.; Scagliarini, Senatori (eds.), *Lavoro, Impresa e Nuove Tecnologie dopo l'AI Act*, Quaderni Fondazione Marco Biagi, 2024; Biasi (eds.), *Diritto del lavoro e intelligenza artificiale*, Giuffrè, 2024; Peruzzi, *Intelligenza artificiale e lavoro. Uno studio su poteri datoriali e tecniche di tutela*, Giappichelli. See also the essays pubblished in *RGL*, 2024, 4, pp. 511-618 and the section *Intelligenza Artificiale e regolamentazione legale e negoziale dei rapporti di lavoro*, in *LDE*, 2025, 3.

alongside national court rulings on their legitimacy. The focus then shifts to practices in other countries, where collective actors are not merely using digital tools, but are actively leveraging AI to enhance their strategies and outreach.

3. *Spaces for Collective Actors Action According to Art. 26 of Regulation (EU) 2024/1689*

3.1. *"Information" in the AI Act*

One of the few provisions of the AI Act relevant to this analysis is Article 26, titled "Obligations of deployers of high-risk AI systems". According to this provision, continuous monitoring of AI systems by individuals, along with transparency and the adoption of accountability measures by the deployer, are identified as key strategies for mitigating the risks these systems may pose to individuals' security and fundamental rights[10].

Within the field of investigation, these purposes can be considered essentially referred to two instruments by Article 26, which also provide for the intervention of collective actors: the information and the data protection impact assessment.

Article 26(7) specifically addresses the obligations of employers acting as deployers when using or intending to use high-risk AI systems in the workplace, as defined in Annex III, No. 4 of the analyzed regulation. This provision mandates that employers inform both workers and their representatives about the use of such systems. It further specifies that this information should be provided, where appropriate, in accordance with Union and national laws and practices governing the information and consultation of workers and their representatives.

This formulation contrasts with the approach taken in the European Parliament's amended version of the same regulation[11]. In paragraph 5a of the former Article 29, the text explicitly required the deployer to start worker information and consultation procedures, as set out in Directive 2002/14/EC, before using the AI system. Additionally, once the system was

[10] Concerning Article 26 of AI Act, see among others Zoppoli L., *Tecnologia, socializzazione, partecipazione e poteri collettivi dopo l'AI Act*, in *federalism.it*, 2025, 14, p. 283 ff.

[11] 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.

operational, the provision stipulated that all affected workers should receive adequate and ongoing information.

Firstly, the comparison highlights that the approved text deletes any specific reference to existing legislation, replacing it with a more general reference to "the rules and procedures laid down by Union and national law and practice". This shift broadens the potential scope of the information obligation, extending it beyond generalist directives to include those with a more specific focus, such as directives on workplace health and safety[12] or collective redundancies.

Secondly, the distinction between the right to information and consultation and the right to information itself is blurred, evolving into an indefinite duty of information for the deployer. Depending on the circumstances, this duty may be fulfilled either alternatively or cumulatively towards workers and their representatives.

As outlined in recital 92, this informational obligation not only encompasses the two distinct rights mentioned above but also appears to introduce an employer's duty to inform both workers and their representatives about the "planned deployment of high-risk AI systems [in] the workplace". This measure aims to safeguard the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union.

However, this obligation should be understood as residual nature, as the deployer is only required to fulfill it "where the conditions for [the] information or information or information and consultation obligations in other legal instruments are not fulfilled".

This would amount to affirming the establishment of a "minimum right" for workers and their representatives, including those in undertakings and establishments that do not meet the minimum dimensional requirements set by Directive 2002/14/EC for its enforceability. Similarly, this right could extend to self-employed workers – at least during the access-to-employment phase – considering that Annex III, no. 4 of the AI Regulation identifies high-risk AI systems as those used in "employment, [the] management of workers and [the] access to self-employment," including the stages of selection and recruitment.

The approach taken in Article 26(7) of the AI Regulation, which appears to "smooth over" the differences between various informational in-

[12] Peruzzi, *Sistemi automatizzati e tutela della salute e sicurezza sul lavoro*, in *DSL*, 2024, 2, pp. 91-92.

struments, seems to account only for their similarities while overlooking their functional distinctions.

Applying a "difference filter" would require distinguishing between two categories of information: the first serving the sole purpose (at least ostensibly) of enabling workers to understand the employer's decision-making processes, and the second involving the active participation of workers' representatives[13].

In the first scenario, the employer would be bound by a "mere" duty of information, aimed at ensuring oversight of managerial power – in this case, exercised through algorithmic management. This type of information obligation aligns with that established in Directive (EU) 2019/1152, as well as the "minimum" information to be provided to workers and their representatives in residual cases. However, a critical divergence emerges regarding the timing of the information: in the first case, the information would be provided ex post (*i.e.,* after the system is deployed), whereas in the latter case, the rule appears to require information to be shared prior to the commissioning and use of the high-risk AI system.

The second category of information, by contrast, encompasses the rights to information and consultation as genuine instruments of worker participation in company processes. These mechanisms can effectively "interfere" with the otherwise unilateral exercise of employers' powers, counterbalancing the potential "monopsonic" control inherent in algorithmic management.

Despite the evident functional differences between these instruments, it cannot be ruled out that even the "mere" information the employer is required to provide to collective bodies may, in certain circumstances – particularly when combined with other instruments – serve as a powerful tool, not only within the judicial arena but also in shaping workplace dynamics and reinforcing worker protections.

[13] The definition of employee representatives' involvement could coincide with that provided in Directive 2001/86/EC, which encompasses "any mechanism, including information, consultation, and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company".

3.1.1. The "Minimum Right" to Information for Workers and Their Representatives

Regulation bears certain similarities with the right to information in terms of its function, but differs in terms of its subjective scope. In contrast to the Transparency Directive, which is limited to employee representatives, the AI Regulation extends its scope to employee representatives as well as to individual employees.

By opting for this approach, the European legislator ensures the logical continuity between the AI Regulation and Article 9 of the Platform Work Directive[14] which requires Member States to mandate that digital platforms inform both individuals performing platform work and employees' representatives about the use of automated decision-making and monitoring systems.

This "double entitlement to the right to information"[15] is also reflected in Article 1-bis of Legislative Decree No. 152/1997, as reworded by the so-called Transparency Decree[16], which transposed Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union, later amended by Legislative Decree No. 48/2023 and converted into Law No. 85/2023.

Article 1-bis imposes on employers a duty to provide information on the use of fully automated decision-making or monitoring systems, addressing both workers and "company trade union representatives or [of] the unitary trade union representation and, in the absence of such representatives, [of] the territorial offices of the trade union associations that are comparatively more representative at national level"[17]. The provision also recognizes the right of workers, or their company or territorial trade union representatives, to request additional information[18].

[14] Art. 9 is entitled "Transparency with regard to automated monitoring systems and automated decision-making systems".

[15] See 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, 1, C. 44. See also Tebano, *I diritti di informazione nel D.Lgs. n. 104/2022. Un ponte oltre la trasparenza*, in *LDE*, 2024, 1, p. 1 ff.; Donini, *Informazione sui sistemi decisionali e di monitoraggio automatizzati: poteri datoriali e assetti organizzativi*, in *DLM*, 2023, 1, 85 ff.; Zilli, *La via italiana per condizioni di lavoro trasparenti e prevedibili*, in *DRI*, 2023, I, p. 30 ff.

[16] Legislative Decree 27 June 2022, no. 104.

[17] Art. 1-bis, par. 6, of the Legislative Decree no. 157/1970.

[18] Art. 1-bis, par. 3, of the Legislative Decree no. 157/1970. This tool has been widely

As noted in the literature[19], this obligation to inform collective actors carries significant potential for empowering worker representatives in the context of AI and automated systems. This potential becomes even more evident when read jointly with Article 4 of the Workers' Statute, to which Article 1-bis explicitly refers in the final part of paragraph 1.

Specifically, while AI systems and digital platforms might ostensibly be classified as mere "work instruments", access to information about their operation could enable collective actors to challenge this classification. Where these systems also serve as tools for monitoring workers, such access could pave the way for negotiations with company representatives to authorize their use, in line with the requirements of the Workers' Statute.

Regarding the content of the information to be provided by the deployer, Article 26(7) of the AI Regulation offers no explicit guidance. Even if one were to assume that the requirements for employer-deployers should also apply to non-employer deployers – as outlined in Article 26(11) – this would only partially address the gap. Paragraph 11 limits its scope to high-risk AI systems that "make decisions or [that] assist in making decisions affecting natural persons". However, AI systems deployed in the workplace may impact employees in other ways, including through monitoring and surveillance functions[20].

As a result, the information obligation toward workers and their representatives would only align with the AI system's purpose, the types of decisions made, and the right to receive explanations in certain cases. Furthermore, the right to information would be limited in scope, as paragraph 11 specifies that information must be provided only to the natural person subject to decisions made or assisted by high-risk AI systems – excluding broader categories of workers who may nonetheless be affected by the system's operation.

used by the union to launch a series of actions aimed at obtaining the judgment of digital platforms for not providing adequate information to collective subjects on automated systems. See, Trib. Palermo 31 March 2023; Trib. Palermo 20 June 2023; Trib. Turin 5 August 2023.

[19] Recchia, *cit.*

[20] Although one would choose a broad interpretation of the term "decisions" to include recruitment, assignment of tasks, termination of employment, monitoring would still remain outside the scope of Art. 26(11).

3.1.2. Rights to Information and Consultation

Moving on to the level of information and consultation rights, as mentioned above, the current wording of Article 26(7) replaces the explicit reference to Directive 2002/14/EC with a more generic reference to "where applicable" referring to "rules and procedures laid down in Union and national law and practice on information of workers and their representatives". This change may have implications for interpretation.

Within the scope of the general information and consultation procedure, the "case" that would trigger the application of Directive 2002/14/EC is defined in Article 4(2)(c), which states that information and consultation must be carried out on "decisions likely to lead to substantial changes in work organisation …" – provided the dimension requirements of undertakings outlined in Article 3 are met. Indeed, the introduction or modification of an AI system within company technologies or automated systems of digital platforms can impact work organization, leading to the need to activate information and consultation procedures[21].

Substantially, though not formally[22], the approach adopted by the AI Act aligns with that of the Platform Work Directive18, which, in Article 13, refers the regulation of information and consultation rights entirely to Directive 2002/14/EC. It also introduces the right for workers' representatives to be assisted by an expert to examine the subject of the information and consultation process and draft an opinion.

Both documents confirm the original choice of the European legislator to limit the scope of information and consultation rights to employee

[21] Regarding the link between AI Act, GDPR and Directive 2002/14/EC, see Corti, *Intelligenza Artificiale e partecipazione dei lavoratori. Per un nuovo umanesimo del lavoro*, in *DRI*, 2024, 3, p. 628 ff.

[22] The Platform Work Directive uses a completely opposite approach from the approach taken by the AI Act in referring to existing legislation on the matter. Indeed, Article 13 provides that "This Directive is without prejudice to Directive 89/391/EEC as regards information and consultation and to Directives 2002/14/EC or 2009/38/EC of the European Parliament and of the Council (18).

Member States shall ensure that information and consultation, as defined in Article 2, points (f) and (g), of Directive 2002/14/EC, of workers' representatives by digital labour platforms also covers decisions likely to lead to the introduction of or to substantial changes in the use of automated monitoring systems or automated decision-making systems.

For the purposes of this paragraph, information and consultation of workers' representatives shall be carried out under the same arrangements concerning the exercise of information and consultation rights as those laid down in Directive 2002/14/EC …".

representatives. Specifically, Article 26(7) does not include any provisions addressing the situation of self-employed workers, who are also entitled to fundamental rights and should, as such, be protected against the misuse of high-risk AI systems. As a result, such workers should be considered entitled to the more general "minimum right" to receive information.

Having clarified the applicable procedure and its scope, it is important to define the content of the information that must be provided to employees' representatives to ensure that information and consultation rights are effectively exercised. It is essential to establish what information the deployer possesses and, consequently, what can be shared during the consultation process. Since this information can often be highly technical, consideration must be given to the extent to which employees' representatives can understand it well enough to carry out a meaningful consultation.

Regarding the first aspect – identifying the information in the deployer's possession – it can reasonably be assumed that this primarily includes the instructions for use, which the supplier is obliged to provide. These instructions must be concise, complete, accurate, clear, relevant, accessible, and easy to understand. Additionally, if the deployer assumes the role of a supplier, as outlined in Article 25, further information may be generated.

Among the instructions referred to in Article 13(2) are:

"(b)the characteristics, capabilities and limitations of performance of the high-risk AI system, including:

(i) its intended purpose;

(ii) the level of accuracy, including its metrics, robustness and cybersecurity referred to in Article 15 against which the high-risk AI system has been tested and validated and which can be expected, and any known and foreseeable circumstances that may have an impact on that expected level of accuracy, robustness and cybersecurity;

(iii) any known or foreseeable circumstance, related to the use of the high-risk AI system in accordance with its intended purpose or under conditions of reasonably foreseeable misuse, which may lead to risks to the health and safety or fundamental rights referred to in Article 9(2);

(iv) where applicable, the technical capabilities and characteristics of the high-risk AI system to provide information that is relevant to explain its output;

…

(d) the human oversight measures referred to in Article 14, including

the technical measures put in place to facilitate the interpretation of the outputs of the high-risk AI systems by the deployers;

…

(f) where relevant, a description of the mechanisms included within the high-risk AI system that allows deployers to properly collect, store and interpret the logs in accordance with Article 12".

It is evident that such information is indicative of a high degree of complexity and technicality. In the event of its identification by law or, as might be the case in Italy, by collective bargaining as information to be provided to workers' representatives, the effectiveness of the information itself could be compromised. Consequently, the involvement of experts, in conjunction with targeted training for both representatives and workers, appears essential.

Article 4 of the AI Act[23] addresses this issue, albeit only in relation to workers, by requiring deployers to ensure an adequate level of AI literacy for personnel using AI systems. However, the regulation does not explicitly reference workers' representatives, seemingly delegating the acquisition of technical skills to external training initiatives.

3.2. *Data Protection Impact Assessment*

In the context of procedures to be initiated ex ante regarding the use of high-risk AI systems in the workplace – particularly those involving workers' representatives – Article 26(9) of the AI Act explicitly requires a data protection impact assessment. Specifically, this provision states that when the use of high-risk AI systems involves the processing of personal data, the deployer – and, therefore, the employer – is obligated to conduct a prior data protection impact assessment, as governed by Article 35 of Regulation (EU) 2016/679. This obligation arises due to the fact that the "nature, object, context, and purposes" of the data processing present a high risk to the rights and freedoms of natural persons[24].

[23] Art. 4 of AI Act: "Providers and deployers of AI systems shall take measures to ensure, to their best extent, a sufficient level of AI literacy of their staff and other persons dealing with the operation and use of AI systems on their behalf, taking into account their technical knowledge, experience, education and training and the context the AI systems are to be used in, and considering the persons or groups of persons on whom the AI systems are to be used".

[24] See Article 29 Working Party, Guidelines on data protection impact assessment and

For the purpose of these analysis, this accountability mechanism opens up potential avenues for the involvement of workers and their representatives. Article 35(9) requires the data controller to collect the views of the data subjects (workers) or their representatives (trade unions) regarding the intended processing.

At first glance, Article 35 of the GDPR does not appear to grant binding force to the opinions of data subjects or their representatives. However, as clarified by the Article 29 Working Party (WP29), the data controller is always required to seek the opinion of data subjects, unless doing so would be inappropriate – for example, if it were disproportionate, impracticable, or would compromise the confidentiality of business plans. In such cases, the WP29 explains that the data controller must provide a justification for not seeking those views. Therefore, in the absence of such "exceptional" circumstances, the data controller must seek the views of data subjects and justify any deviation from those views in the final decision[25].

The concrete modalities of the impact assessment under analysis, in particular as regards the involvement of data subjects' representatives, show clear parallels with the consultation procedure for workers' representatives. These similarities are evident at key stages, such as the collection of opinions and the justification for any deviation from the decision taken in relation to the opinion expressed by the collective actors.

This similarity is even more pronounced in the Platform Work Directive, where Article 8 requires digital work platforms, as data controllers, to carry out a personal data impact assessment in accordance with Article 35 of the GDPR. In particular, Article 8 and Recital 43 of the Directive explicitly use the term "consultation" to describe the forms of involvement of workers and their representatives in this process[26].

determination of whether processing 'is likely to present a high risk' for the purposes of Regulation (EU) 2016/679, 4 April 2017 (as last amended and adopted 4 October).

[25] Ivi, 17.

[26] Recital 43 of the Platform Work Directive: "Taking into account the effects that decisions taken by automated decision-making systems have on persons engaged in work through digital platforms and, in particular, on digital platform workers, this Directive lays down more specific rules concerning the consultation of persons engaged in work through digital platforms and their representatives in the context of data protection impact assessments".

4. *Fundamental Rights Impact Assessment for high-risk AI systems: a missed opportunity for the involvement of collective actors?*

To ensure the protection of fundamental rights, Article 27 of the AI Act introduces a procedure to be applied when a high-risk AI system is first deployed and updated whenever the assessed factors change. This procedure is defined as a "Fundamental rights impact assessment for high-risk AI systems". The main objective of this tool is to identify specific risks to fundamental rights arising from the use of such AI systems, the individuals or groups that may be affected, and the measures to be taken if such risks materialize.

As in the case of the data protection impact assessment, this procedure also includes a stakeholder involvement phase. Recital 96 specifies that stakeholders may include "representatives of groups of persons ... affected by the AI system". This involvement could take place during both the impact assessment process and the design of risk mitigation measures.

It can be observed that this impact assessment could have served as a valuable tool to enhance the involvement of workers' representatives. However, its applicability is limited to public law organizations, private law entities providing public services and deployers of high-risk AI systems in the context of "access to and enjoyment of essential private services and essential public services and benefits". Consequently, it excludes deployers of AI systems in the workplace[27].

This interpretive result remains unchanged even in the light of paragraph 4, which states that the fundamental rights impact assessment complements the data protection impact assessment if "one of the obligations [required for the former] is already met through the data protection impact assessment". Contrary to some academic interpretations, this provision does not appear to "merge" the fundamental rights impact assessment with the Article 35 impact assessment of the GDPR beyond the explicitly defined scope.

[27] According to the Art. 27, "Prior to deploying a high-risk AI system referred to in Article 6(2), with the exception of high-risk AI systems intended to be used in the area listed in point 2 of Annex III, deployers that are bodies governed by public law, or are private entities providing public services, and deployers of high-risk AI systems referred to in points 5 (b) and (c) of Annex III, shall perform an assessment of the impact on fundamental rights that the use of such system may produce" as a consequence AI systems in matter of "Employment, workers' management and access to self-employment" do not fall within its scope.

The recitals themselves, such as recital 48, explicitly refer to the impact that AI systems could have on fundamental rights in the employment context. This suggests that the lawmakers deliberately chose to exclude the applicability of the fundamental rights impact assessment when AI systems are used for the purposes listed in Annex III, point 4 – unless the fulfilment of the DPIA obligations incidentally addresses aspects relevant to the fundamental rights impact assessment, even if guided by a different purpose[28].

5. *Surveillance and Human Oversight*

The final issue to consider in this first part of the analysis is the interplay between surveillance and human oversight of AI systems and the decisions they make or support. While human oversight is essential for preserving anthropocentrism, the involvement of collective actors in implementing these mechanisms is almost absent in the AI Act, whereas it is continuous and pervasive in the automated systems covered by the Platform Work Directive, extending to every phase of their use.

With regard to human oversight, both the regulation[29] and the directive ensure that high-risk AI systems and automated procedures are supervised by natural persons. Both instruments require that supervision be entrusted to individuals with the necessary authority, skills and training, and that they be empowered to detect and address anomalies, malfunctions and unexpected performance[30] and "not use the high-risk AI system or otherwise disregard, override or reverse the output"[31]. In a similar way, the directive permits the discontinuation of the use of automated monitoring system or the automated decision-making system[32].

However, while the AI Act does not appear to provide for the involvement of representatives of the affected persons in this context, the Platform Work Directive introduces an "assessment of the impact of in-

[28] See contra Zappalà, *Sistemi di IA ad alto rischio e ruolo del sindacato alla prova del risk-based approach,* in *LLI*, 2024, 1,10, I.66.

[29] Art. 14.

[30] Art. 14, point 4, lett. A) of the AI Act.

[31] Art. 14, point 4, lett. D) of the AI Act.

[32] Art. 10 of the Platform Work Directive.

dividual decisions taken or supported by automated decision-making or monitoring systems". This assessment is to be conducted at least every two years, thereby ensuring regular and ongoing oversight. It explicitly involves workers' representatives, who also receive the information gathered during the assessment process.

A divergence between the AI Act and the cited directive is evident in the configuration of the human review phase. It is important to note that it does not include a provision that would allow the affected person to request and obtain a full review of the decision made by the deployer based on the output produced by an AI system.

6. *A few preliminary remarks on the case of Italy*

Just over a year after the AI Act came into force, Law No. 132/2025, entitled "Provisions and delegated powers to the Government on Artificial Intelligence," came into force in Italy, expressly dedicating Articles 11 and 12 to the subject of work.

In particular, Article 11, paragraph 2, resolves the reference to information by referring to the cited Article 1-bis of Legislative Decree No. 152 of May 26, 1997, without any reference to collective actors since it refers only to workers.

The Law on AI cannot be considered apart from the previous intervention of the European Delegation Law 2024, which delegates powers to the Government for the transposition of European directives, including Directive (EU) 2024/2831 on improving working conditions in work through digital platforms. In this case, Article 11 provides a list of certain guiding principles and criteria that the Government must follow when transposing the aforementioned Directive.

According to th letter f), these include a reference to "establishing the manner in which digital labour platforms inform persons who perform work through digital platforms, representatives of workers on digital platforms …".

In this sense, the law lends itself to a broad interpretation, as the request can be absorbed by the existing Article 1-bis mentioned above in the case of fully automated systems, as well as by the rights to information and consultation already regulated in Legislative Decree No. 25/2007. In the latter case,

there are two critical issues that could arise when the directive is actually transposed into our legal system.

The first concerns the scope of application, since, as noted, the directive confirms that its beneficiaries are limited to employees and their representatives; on the other hand, it does not refer to the minimum number of employees for companies, which is set at 50 employees by Legislative Decree No. 25/2007.

The second one concerns the actors entitled to these rights, namely workers' representatives. In fact, the organizational and structural characteristics of platform work hinder the establishment of "Rappresentanze sindacali aziendali" (RSA) and "rappresentanze sindacali unitarie" (RSU), thereby weakening the effectiveness of the legislative provisions, as they would lack a collective interlocutor through which dialogue could take place[33].

Finally, a critical issue could arise from the difficulty in this sector in concluding collective bargaining, which play a central role in defining information and consultation procedures[34].

This regulatory framework should then be integrated with the recently enacted law on rights of participation of workers[35]. As noted in the literature, this version of the law represents a weakened version of the proposed law, and this may also have an impact on (consultative) participation and the use of automated decision-making and monitoring systems. The reference to the latter as content of consultative participation was included in the proposal, while all references have been removed from the law[36].

7. *The Digitalization of the Trade Union in the Workplace*

Turning to the second perspective outlined in paragraph 2, the hypothesis under consideration derives from the issue that the use of AI sys-

[33] See also Ales, Palmirotta, Purificato, Senatori, *Country Report Italy*, in Sutterer-Kipping (ed.), *The EU Directive on platform work. Context, Commentary and Trajectories*, Nomos, forthcoming.

[34] Delfino, *Lavoro mediante piattaforme digitali, dialogo sociale europeo e partecipazione sindacale*, in *Federalismi.it,* 2023, p. 174.

[35] Law 15 May 2025, no. 76.

[36] See, Ales, Purificato, Senatori, *Che ne è della partecipazione? Un primo commento (critico) alla l. n. 76 del 2025*, in *DLM*, 2025, 2.

tems generally amplifies the power imbalance in favour of employers. These sections explores whether – and how – the adoption of such technologies by collective actors could represent an opportunity to enhance their action in an explorative way. The potential outcomes of such empowerment could include a rebalancing of labour relations, a reduction in existing asymmetries, and a strengthening of the protection of workers' rights.

As highlighted in the literature, the rise of platform work initially exposed the limitations of traditional trade unions in reaching out to workers and addressing their needs with the rise of grassroots movements and the piloting of negotiating arrangements, including political solutions. This was primarily due to the unions' inability to communicate in innovative ways, to provide services and support in non-traditional formats, and to grasp the hybrid nature of platform work. However, this initial phase of crisis has been gradually overcome, partly through experimentation with innovative solutions, including the use of digital platforms and social networks[37].

The observations concerning platform work can also be seen in more traditional work contexts. The advent of information and communication technologies has precipitated a fundamental shift in the manner in which work is organized and performed, making workplaces increasingly "virtual" rather than strictly physical. This transformation extends the concept of the "productive unit" as the boundary for exercising trade union rights, with evident impacts on collective labor relations.

At the national level, the main trade unions have explored and implemented various solutions that use digital technologies – such as dedicated websites, applications and social networks – to maintain constant communication with members, provide support, define strategic priorities through

[37] See, among others, Cristofolini, *Digital Trade Unionism in the Making? Insights from the Italian Experience*, in this journal, 2024, 2, p. 395 ff.; Massagli, *Intelligenza artificiale, relazioni di lavoro e contrattazione collettiva. Primi spunti per il dibattito*, in *LDE*, 2024, 3, p. 1 ff.; Monterossi L., *Tecnologie digitali, nuovi modelli di organizzazione del lavoro e sfide per il sindacato*, in *federalismi.it*, Focus, Lavoro, Persona, Tecnologia, 9 agosto 2023, p. 237 ff.; Ales, *The impact of Automation and Robotics on Collective Labour Relations: Meeting an Unprecedented Challenge*, in Gyulavari, Menegatti, *Decent Work in the Digital Age. European and Comparative Perspective*, 2022, Bloomsbury Publishing, p. 39 ff.; Gargiulo, Saracini, *Riflettendo su parti sociali e innovazione tecnologica: contenuti, ratio e metodo*, in Gargiulo, Saracini (eds.), *Parti sociali e innovazione tecnologica*, QDLM, 2023, p. 9 ff.; Carneiro, Costa, *Digital unionism as a renewal strategy? Social media use by trade union confederations*, in *JIR*, 2020, 64, 1, p. 26 ff.; Magnani, *Nuove tecnologie e diritti sindacali*, in *LLI*, 2019, 5; Marazza, *Social, relazioni industriali e (nuovi percorsi di) formazione della volontà collettiva*, in *RIDL*, 2019, 1, p. 57 ff.

participatory processes and provide information on working conditions and the content of collective agreements[38].

This evolution of trade union action, in their "2.0 version", raises the question of whether such activities fall within the scope of existing legislation, in particular the provisions of the Workers' Statute. On this point, both lower and higher courts have repeatedly ruled, essentially affirming that the exercise of trade union activity through digital technologies is compatible with the framework established by Law No. 300/1970.

The Italian Supreme Court (judgment no. 35643 of 22 December 2002[39]) ruled on a case of "electronic leafleting" by company representatives using company e-mail. The Court determined that "the evolution of communication methods that has progressively established itself in recent decades, even within company communities, leads to the conclusion that email is included in the notion of spaces designated for trade union communications".

The Court further stated that "the evolution of telematic communication methods and the greater effectiveness achieved through reaching individual workers via their personal email inboxes should be considered a necessary update of the mode of communication, aimed at ensuring the real effectiveness of trade union activity", while still respecting Article 26 of the Workers' Statute – namely, "without prejudice to the normal conduct of company business" and provided that the employer is required, pursuant to Article 25 of the same law, to provide appropriate spaces in places accessible to all workers within the production unit.

This judicial approach provides an evolutionary interpretation of existing legislation, which extends the concept of trade union "space". References to innovative ways of exercising certain trade union prerogatives are also beginning to emerge in the collective bargaining process. A notable example is the recent Lamborghini integrative and participation agreement for the years 2023-2026, which introduces the "digitalization of the union

[38] Regarding proselytism and the use of company email, and online collective bargaining, see Aniballi, *Diritti e libertà sindacali nell'ecosistema digitale*, Edizioni Scientifiche Italiane, 2022.

[39] See Tampieri, *È antisindacale il divieto assoluto di volantinaggio "elettronico" tramite la e-mail aziendale*, in *Il lavoro nella giurisprudenza*, 2023, p. 824 ff.; Aniballi, *Digitalizzazione dell'attività di proselitismo e delle comunicazioni sindacali: opportunità e limiti nella cornice statutaria*, in *Giustizia Civile*, 2022, 1, p. 235 ff.; Other rulings on the topic: Cass. civ. sez. lav., 13/09/2024, no. 24595; Cass. civ. sez. lav., 17/03/2023, no. 7799; Cass. civ. sez. lav., 05/12/2022, no. 35644.

notice board" (Article 2.6). This agreement entails the migration of the trade union notice board to the company intranet, accompanied by the establishment of a digital communication channel accessible via a dedicated application installed on workers' mobile devices. This configuration ensures that not only trade union communications, but also internal company information and human resources systems, are accessible to workers in a timely manner.

8. *From Digital Tools to AI-Powered Advocacy: Exploring Trade Unions' Evolving Technological Landscape*

In the cases previously described, the technologies used by trade unions can be defined as 2.0, as they are based on basic information technologies that do not include AI. According to the definition provided by the AI Act, AI is characterized by its ability to infer patterns and learn from data.

From this perspective, it is possible to see how AI can be used by collective actors for different purposes, which can broadly be referred to as negotiation in the strict sense, preparatory activities for the negotiation phase, which may include "access to big data and company statistical series to better refine bargaining strategies and calibrate them to the actual state of companies"[40], as well as, finally, administrative, support, and consulting services[41].

Regarding the first possible development of the use of AI by collective actors, i.e., as an agent of agency, no practices have been identified at the time of writing[42]. However, concerns have been raised about the compatibility of the nature and function of collective bargaining with the use of AI as a negotiating agent, in terms of voice, legitimacy of consent and relational aspects, as well as the conflict and/or consultation that surround negotiations[43]. Moreover, an anthropocentric approach to the use of Artificial Intel-

[40] Caruso, *Il sindacato tra funzioni e valori nella "grande trasformazione". L'innovazione sociale in sei tappe*, in *WP C.S.D.L.E. "Massimo D'Antona"*, 394/2019 p. 89.

[41] Zoppoli L., *Il diritto del lavoro dopo l'avvento dell'intelligenza artificiale,* in *DLM*, 2024, 3, p. 417.

[42] OECD, *Shaping Transitions to Decent Work: Social Dialogue for a Better Future*, OECD Publishing, 2024.

[43] Adamczyk, Surdykowska, *Delegating the Undelegable? Agent-Based AI and the Limits of Artificial Collective Bargainers*, in Palmirotta, Purificato, Senatori (eds.), *AI and Employment:*

ligence, such as that adopted at European level, would conflict with the total delegation of the negotiating process to the technology itself.

On the second aspect, there are, however, examples from some large American companies where AI has been used as a tool to prepare for the negotiations that are ultimately conducted by humans. In this sense, it has been observed that the empirical results that AI provides to the parties can potentially limit freedom and democracy, since the data itself can be understood as objective and as the best solution and, consequently, influence the final choices. In a similar way, the capacity of automated systems to process available information quickly, providing an automatic interpretation of preferences, with a consequent reduction in the contradictory nature of the process, can be accepted by the parties in exchange for the efficiency with which possible solutions are processed[44].

Furthermore, regarding the adoption of AI-powered technologies to enhance communication with their members and carry out specific activities, it is interesting to note that the experimental use of AI systems, in particular chatbots, has been observed in other countries by both traditional trade unions and informal worker coalitions[45]. In these contexts, the deployment of chatbots was not limited to the provision of services[46], but rather involved a reconfiguration to embody an organizational ethos. This strategic use of AI has been demonstrated to contribute to increasing the resources and capabilities of unions, thereby providing a compelling case study on the strategic leveraging of AI to support collective action.

One pertinent example is chatbots, which use natural language processing (NLP) or machine learning (ML) technologies to process data and provide different types of responses. A distinction can be made between "declarative" chatbots, which are designed to perform a single function (e.g. providing assistance or services), and "predictive" chatbots, which act as virtual assistants capable of learning and adapting to users' needs.

Governance, Rights, and Organisational Change, in *Bulletin of Comparative Labour Relations*, forthcoming.

[44] *Ibid*.

[45] Flanagan, Walker, *How can unions use Artificial Intelligence to build power? The use of AI chatbots for labour organising in the US and Australia*, in *New Technology, Work and Employment*, 2021, 36, pp. 159-176.

[46] Some chatbots developed in Italy by trade unions provide more basic assistance services to their members. Examples include Uilli, a technology developed by Uil, and DigitaCGIL, a digital platform created by CGIL.

In the cases analyzed, the chatbots used by collective actors were not merely declarative tools. Unions were actively involved in the back-end design phase, collaborating with IT engineers to shape the information provided and define the approach to workers' queries. This collaborative process ensured that the chatbot's responses were aligned with the union's objectives and workers' expectations.

The distinguishing characteristic of these experimental chatbots is that they function as more than mere repositories of pre-set answers. Instead, they are designed to initiate conversations with workers, allowing unions to gather insights into workers' needs and offer tailored assistance. In this way, the chatbots effectively become an infrastructural resource for collective actors.

This experimentation has highlighted both the benefits and challenges of using such technologies. On the one hand, chatbots have strengthened the participation of marginalized members, fostered more interactive engagement across the membership base, enhanced the unions' ability to map workplaces, and facilitated the early detection of sensitive situations (e.g., workplace harassment). Furthermore, the use of chatbots contributed to fostering collective cohesion and reinforcing the democratic nature of union processes. On the other hand, technological malfunctions or limitations could cause frustration and a sense of "abandonment" among workers, producing the opposite effect of what unions aim to achieve. Similarly, the transformation of interactions – with human-to-human exchanges being replaced or filtered through a digital tool – could potentially alienate workers if not carefully managed.

However, chatbots would not be the only way AI could be integrated into trade union activities.

Workers' organizations could leverage AI to analyze and process the vast amounts of data they collect, using these insights to foster internal reflection on their strategies – identifying which initiatives to launch, which issues to prioritize, and which groups of workers to engage with more effectively. Example could be the use of constantly updated databases to catalog good practices and suggest possible solutions during negotiations, or the collection of workers' needs through dedicated forums, could be enhanced by AI. The AI could process this information to draft proposals, which workers' representatives could then assess and refine for negotiation purposes.

Even the European Trade Union Confederation (ETUC), in its toolbox for navigating the digital revolution, acknowledges the potential of digital tools to strengthen union action. In point 5, addressing the challenge of "attracting and retaining members", ETUC highlights the use of digital solutions. Point 2 emphasizes the importance of data-driven decision-making, enabled by innovative database management. Finally, point 3 more broadly stresses the need for trade unions to find ways to "keep pace with technological progress".

The use of AI systems by trade unions raises important questions regarding their regulation, particularly in relation to the application of the AI Act.

At the European level, AI systems like chatbots or tools for collecting and processing workers' data for predictive purposes do not appear to qualify as "high-risk" systems under the AI Act. These technologies would not seem to fall within the list of systems outlined in Annex III, nor would they meet the criteria set out in Article 6(1).

Depending on their specific functionalities, such systems could instead be classified as general-purpose AI. In any case, Article 50 of the regulation would likely apply, as it requires that providers of "AI systems intended to interact directly with natural persons" must ensure those individuals are informed that they are engaging with an AI system. Furthermore, the provisions of the General Data Protection Regulation (Regulation (EU) 2016/679) would remain applicable, particularly regarding the handling of personal data.

9. *Final remarks*

The implementation of AI systems in the workplace could amplify the existing power imbalance between the parties in the employment relationship, intensifying the employer's control, decision-making, and disciplinary powers. To safeguard workers' fundamental rights in these evolving contexts, the European lawmaker has introduced provisions that involve workers' representatives as stakeholders. This participation occurs through "weak" forms of information and consultation (I&C) and the broader right to receive information, aiming to promote greater transparency.

However, this fragile balance could be partially restored by strengthening trade unions – a process that may be supported by the strategic adoption

of AI systems, both in their interactions with workers and within the union's internal organization, as well as through the strengthening of collective bargaining. The synergistic use of such technology could positively influence union representativeness, reducing the emergence and consolidation of alternative forms of self-organization and, in turn, potentially increasing union density.

For these theoretical considerations to translate into practical outcomes, it is crucial to overcome cultural resistance within trade unions. Embracing this evolution of the representative paradigm would require unions to proactively adopt AI tools and promote training campaigns, fostering genuine engagement and equipping their members to navigate this technological shift.

Abstract

The paper analyzes the relationship between artificial intelligence systems and collective actors from two perspectives: on the one hand, the impact of AI on relations between different actors; on the other, the potential of technology as a tool for strengthening trade union action. The first part examines the forms of intervention recognized for workers' representatives under the new AI Act, with a particular focus on information obligations, impact assessments, and human oversight and supervision mechanisms. The second part explores how trade unions are getting their activities digital, including trying out AI-based tools like advanced chatbots and predictive systems to help with organizing and bargaining. A trustworthy and safe use of AI systems by collective actors could serve to rebalance information and power imbalances, strengthening their ability to represent workers in new forms of digital work.

Keywords

Artificial Intelligence, AI Act, Information and consultation, Collective actions, Workers' representatives.

Matteo Rinaldini

Navigating the Digital Age: Insights, Contributions and Challenges from a Sociology of Work Perspective

1. *The pervasiveness of digital technologies in the world of work*

One of the main concerns of contemporary sociology of work is the pervasiveness of digital technologies across occupations, industries, and institutional contexts. Digitalization transforms not only high-skilled or high-tech sectors; it spreads across the labor market, affecting professionals, technicians, office staff, but also low-skilled and manual workers. Empirical evidence shows that a considerable share of workers with primary education use portable digital devices in their daily activities, challenging the view that digitalization only concerns a restricted elite of knowledge workers and revealing, instead, its systemic diffusion. Recent European surveys confirm that more than four out of five workers regularly use some form of digital device in their work and that this is true not only for office-based occupations but also for sectors such as logistics, cleaning, and personal services.

The widespread adoption of digital technologies has brought with it both opportunities and risks. On the one hand, it enables new forms of flexibility, coordination, and improves productivity. The possibility to engage in remote work or hybrid arrangements, supported by digital infra-

structures, has extended autonomy for many professionals, particularly in high-skilled service sectors. On the other hand, digitalization exacerbates the fragmentation of tasks, space, and time, enhances surveillance, and increases work intensity.

Before examining the empirical evidence on the diffusion of digital technologies in work processes, it is useful to situate these developments within the broader sociological debates on how the concept of work itself is reconfigured in the digital age. A growing literature has questioned the boundaries traditionally established between production and consumption, paid and unpaid work, formal and informal activities, through notions such as digital labour, prosumption, and produsage. These perspectives highlight how value creation increasingly relies on activities that remain partially invisible or excluded from standard employment relations, blurring the distinction between work and non-work. Particularly, as Casilli and other scholars have shown, a significant share of digital value creation relies on forms of invisible, fragmented (often outsourced) and weakly recognized labour[1]. Digitalization thus entails not only technological innovation, but also processes of job reclassification and social invisibilization of work.

From this standpoint, digitalization does not simply introduce new tools into existing jobs, but contributes to a redefinition of what counts as work, who is recognized as a worker, and which forms of labour remain socially and institutionally acknowledged. Framing digitalization within these debates allows the analysis to move beyond a purely descriptive of how technology is spread and to reconnect empirical trends to core sociological questions concerning recognition, invisibility, and the social boundaries of labour.

As Eurofound's most recent survey illustrates, only a minority of European workers telework full-time (around 3%), but hybrid and occasional telework arrangements are steadily expanding and now involve almost one

[1] Casilli, *En attendant les robots-Enquête sur le travail du clic*, Editions du Seuile, 2019; Ter Hoeven, Van Zoonen, *Flexible work designs and employee well-being: Examining the effects of resources and demands*, in *NTWE*, 2015, 30(3), pp. 237-255; Surie, Huws, *Platformization and informality: Pathways of change, alteration, and transformation*, in Surie, Huws (eds.), *Platformization and Informality: Pathways of Change, Alteration, and Transformation*, Springer International Publishing, 2023, pp. 1-12; Borghi, Peterlongo, *Hybridisation of work and the platform informal revolution*, in *RIS*, 2023, 64(2), pp. 317-344.

quarter of the workforce[2]. While such arrangements may improve work–life balance for some, they are also contributing to blur the boundaries between work and private life, due to a higher availability outside normal working hours and a greater exposure to unpaid overtime, especially for women, who bear disproportionate responsibilities for care.

The emergence of generative artificial intelligence tools has added further complexity. Despite a still uneven diffusion, around 12% of workers in Europe report using AI-based systems such as ChatGPT or image generators in their daily tasks: usage peaks above 20% in some Northern and Western Europe countries, while remaining below 5% in Southern and Eastern regions[3]. These technologies promise gains in efficiency and creativity, but also threatens of substitution of cognitive tasks and of new forms of dependency on opaque algorithmic systems. The diffusion of algorithmic management is already quite visible across sectors: about 17% of workers report that their performance is monitored by algorithmic systems, 16% that their task allocation is managed digitally, and 10% that their working hours are set automatically by a software[4]. These figures highlight how the employ of algorithmic management is no longer restricted to platform work, but has penetrated financial services, transport, logistics, manufacturing and other sectors. The most recent ILO estimates reinforce this picture by examining the exposure to generative AI across the global workforce[5]. According to the 2025 World Employment and Social Outlook report, nearly one in four workers worldwide is employed in occupations that display some degree of exposure to GenAI. Around 16.3% of workers are in roles with medium exposure, while 7.5% are in occupations where most tasks could in principle be automated by GenAI, especially in high-skilled professions such as accountants, software developers, and clerical support roles. In contrast, low and medium skill occupations remain largely shielded, with over 99% of workers facing minimal or no exposure at all[6]. These findings suggest that

[2] Eurofound, *Living, working and COVID-19*, Publications Office of the European Union, 2024.

[3] Eurofound, *cit.*

[4] Eurofound, *cit.*

[5] ILO, *World Employment and Social Outlook: Trends 2025*, ILO Flagship Report, 16 of January 2025, website: https://www.ilo.org/publications/flagship-reports/world-employment-and-social-outlook-trends-2025.

[6] ILO, *cit.*

generative AI will not only transform cognitive work but also contribute to a restructuring of employment by skill level. While medium-skill occupations appear to be the most exposed segment (38.1% of total show some degree of exposure), the concentration of high-exposure roles is greater in high-skill employment, which foster the debate on the future of professional and knowledge work[7].

The growing pervasiveness of digital technologies across occupations, sectors, and national contexts not only demonstrates the breadth of the current technological transformation but also raises fundamental questions about its consequences for workers and employment structures. The fact that digital tools now shape the daily activities of both high-skilled professionals and low-skilled manual workers indicates that the impact is neither confined to specific segments of the labour market nor limited to narrow forms of task automation. Rather, the diffusion of digitalization penetrates deeply into the organization of work, reconfiguring rhythms, expectations, and modes of coordination. This expanding technological presence inevitably shifts the attention of scholars toward two closely intertwined issues: the first is how digital systems reshape the *quality* of work and the second refers to how they transform the *quantity* and composition of employment. In other words, once the systemic character of digitalization is recognized, the analysis must move beyond the descriptive dimension of a fast diffusion to explore its substantive effects on labour. It is precisely at this analytical juncture, where widespread adoption intersects with concerns about work intensification, autonomy, surveillance, and potential job displacement, that contemporary debates on job quality and the substitution of labour by technology reaffirm their relevance and urgency.

While a growing body of sociological literature has addressed the implications of digitalization for work and employment, this article argues that existing contributions often remain fragmented across distinct analytical traditions, focusing on either job quality, employment effects, or governance and regulation. The contribution of this article lies in proposing an integrated analytical framework that connects these strands and allows for a more systematic interpretation of digital transformation in the world of work.

Specifically, the article advances a three-dimensional analytical perspective. First, it conceptualizes digitalization as a process that simultane-

[7] ILO, *cit.*

ously reshapes job quality and employment structures, linking debates on work intensity, autonomy, and psychosocial risks with those on task substitution and occupational change. Second, it emphasizes the institutional, sectoral, and organizational mediation of technological change, rejecting universalistic accounts and highlighting how similar technologies generate divergent outcomes across contexts. Third, it foregrounds the role of power, knowledge, and opacity in digitally mediated workplaces, showing how algorithmic systems reorganize authority, visibility, and control.

By articulating these dimensions within a unified sociological framework, the article seeks to move beyond descriptive overviews and to offer an analytical tool for interpreting current transformations of work under digitalization.

At the same time, the article adopts a thematic rather than approach-driven structure. This choice is deliberate and reflects the increasing overlap between analytical traditions that address digitalization and work. Rather than mapping contributions according to discrete theoretical schools, the article organizes the discussion around key analytical dimensions through which different approaches, including labor process theory, institutionalist perspectives, and socio-technical traditions, intersect and contribute to the understanding of the digital transformation. This thematic organization intends to facilitate the dialogue across approaches while preserving analytical coherence.

2. *Work under digitalization: reconfiguring job quality and employment structures*

The diffusion of new technologies has re-awakened attention to the social sciences, focusing simultaneously on the transformation of work (how it is carried out, the conditions under which it unfolds, and its overall quality), and on the risks of job substitution generated by technological innovation. These two strands of inquiry are deeply connected: understanding the future of employment requires analyzing not only whether jobs will be created or destroyed, but also how technological change reshapes the quality of work itself.

For low-skilled and manual workers, digitalization is often less about autonomy and more about control. Studies on warehouse employees and delivery drivers show how wearable devices, scanners, and GPS trackers

dictate the pace and reduce the discretion in organizing tasks[8]. Algorithmic allocation of shifts and performance metrics further standardize and intensify work. Recent analyses link these practices to psychosocial risks, showing that algorithmic monitoring contributes to the loss of autonomy, increased monotony, and higher levels of work-related stress, anxiety, and burnout. Moreover, the intensification associated with digital tools often coincides with reduced clarity of roles, weak support, and heightened feelings of isolation, especially in telework and hybrid arrangements. It is not a coincidence, therefore, that the debate on job quality has been significantly revitalized in the digital era. Earlier literature concentrated on wages, contractual security, and working hours, whereas the pervasive impact of digital technologies has made job quality inseparable from technological transformations. Digitalization simultaneously promises empowerment and generates new vulnerabilities: it introduces new forms of control, subjectification, and psychosocial risks that reshape how workers experience their jobs[9]. At the same time, it compels scholars to integrate into the concept of job quality new dimensions such as algorithmic transparency, data protection, skill obsolescence, and the psychosocial consequences of technologically mediated work[10]. The literature increasingly emphasizes risks such as "technostress", social isolation, and permanent availability, illustrating how digital technologies affect not only the organization of work but also the

[8] Delfanti, *The warehouse. Workers and robots at Amazon*, Pluto Press, 2021; Cirillo, Rinaldini, Virgillito (eds.), *Technology and work in services: Vulnerable workers under automation and digitalisation*, Cham, Springer Nature, 2025, pp. 1-33.

[9] Carreri, Gosetti, Poggio, Zanoni, *Lavoro e digitalizzazione: soggettività, controllo e qualità del lavoro nella quarta rivoluzione industriale*, in *SL*, 2020, 158, pp. 51-73.

[10] Poutanen, Kovalainen, *Skills, creativity and innovation in the digital platform era: Analyzing the new reality of professions and entrepreneurship*, Routledge, 2023; Kovalainen, Vallas, Poutanen, *Theorizing work in the contemporary platform economy*, in Poutanen, Kovalainen, Rouvinen (eds.), *Digital work and the platform economy*, Routledge, 2019, pp. 31-55; Arcidiacono, Piccitto, *Assessing inclusivity through job quality in digital plat-firms*, in *SIn.*, 2023, 11(4), pp. 239-250; Arcidiacono, Pais, Piccitto, *La qualità del lavoro nella platform economy: da diritto a servizio*, in *SPol.*, 2021, 8(1), pp. 75-98; Pulignano, Grimshaw, Domecka, Vermeerbergen, *Why does unpaid labour vary among digital labour platforms? Exploring socio-technical platform regimes of worker autonomy*, in *HR*, 2024, 77(9), pp. 1243-1271; Wood, Graham, Lehdonvirta, Hjorth, *Good gig, bad gig: autonomy and algorithmic control in the global gig economy*, in *WESoc.*, 2019, 33(1), pp. 56-75; Berg, Green, Nurski, Spencer, *Risks to job quality from digital technologies: Are industrial relations in Europe ready for the challenge?*, in *EJIR*, 2023, 29(4), pp. 347-365.

rhythms of everyday life[11]. However, as Gallie argues, trajectories of job quality remain highly contingent on institutional mediation, which explains the coexistence of optimistic, pessimistic, and institutionally grounded perspectives[12]. In this perspective AI applications may reduce monotony, enhance engagement, and improve physical safety, but they also generate intensification of effort, heightened stress, and skills mismatches if not coupled with proactive strategies of worker involvement and reskilling.

At the same time, growing attention is being directed to the risks of job substitution. The WEF Future of Jobs Report 2023 emphasizes the dual nature of technology adoption as both a source of job creation and of job destruction. More than 85% of firms surveyed across 45 economies identified new technologies as the most important driver of organizational transformation over the 2023-2027 time frame[13]. The most pervasive seem to be Digital platforms and apps (expected to be adopted by 86% of companies), followed by education and workforce technologies (81% of companies), big data and AI (around 75%)[14]. The report highlights that all technologies are expected to generate net job growth, (along with substantial disruption), with the exception of humanoid and non-humanoid robots. For instance, big data analytics, climate change mitigation technologies, and cybersecurity are seen as the strongest drivers of job creation, whereas agriculture technologies, digital platforms, and generative AI appear to be associated with significant labour-market upheaval: simultaneous job losses and gains across sectors[15]. The report foresees that 23% of jobs globally, equivalent to 152 million positions, will undergo structural transformation in the next five years, with 83 million roles displaced and 69 million new ones created[16]. This churn reflects deep transformations: clerical roles such as data entry clerks, accountants, postal service clerks, and bank tellers are expected to decline rapidly, while demand for AI and machine learning specialists, digital transformation experts, sustainability specialists, and data analysts is

[11] Carreri, Gosetti, Poggio, Zanoni, *cit.*

[12] Gallie, *The Quality of Work in a Changing Labour Market*, in *SPA*, 2017, 51, 12, pp. 226-243.

[13] World Economic Forum, *Future of Jobs Report*, 2023, website: https://www.weforum.org/publications/the-future-of-jobs-report-2023/.

[14] World Economic Forum, *cit.*

[15] World Economic Forum, *cit.*

[16] World Economic Forum, *cit.*

expected to grow strongly. The "human-machine frontier" is shifting gradually: as of 2023, about 34% of business tasks were automated, compared to 66% still performed by humans, with further rebalancing expected in the coming years[17].

Within this framework, an intense debate has emerged on the substitution effects of new technologies, epitomized by the so-called routinization debate[18]. Mainstream labor economics, particularly in the neoclassical tradition, has long emphasized Skill-Biased Technical Change (SBTC), arguing that technological progress increases demand for high-skilled workers and entails a progressive upgrading. The subsequent Task-Biased Technical Change (RBTC) approach, while remaining firmly within the neoclassical mainstream, has argued that digital technologies primarily substitute routine tasks, both manual and cognitive, leading to the polarization of the employment structures, as mid-skill clerical and production roles shrink while both high-skill and low-skill jobs expand.

The debates on whether digital technologies create or destroy jobs continue to represent a central and unresolved issue in the literature. While RBTC approach has provided powerful insights into patterns of polarization and job displacement, subsequent research has shown that technological adoption cannot be reduced to task characteristics alone. A growing body of sociological research demonstrates that substitution and complementarity effects are deeply mediated by social, organizational, and institutional contexts. Factors such as industrial relations systems, workers' bargaining power, managerial strategies, and skill availability shape both the pace and the direction of technological adoption. As a result, the create-or-destroy dichotomy appears increasingly insufficient to capture the complex processes of job reconfiguration, recomposition, and reclassification that accompany digitalization. The contrast between these two perspectives, the neoclassical labour economics on the one side and the economic sociology

[17] World Economic Forum, *cit.*

[18] On this topic: Autor, *The "task approach" to labor markets*, in *JLMRS*, 2013, 46, 3, pp. 185-199; Biagi, Sebastian, *Technologies and "routinization"*, in Zimmermann (eds.), *Handbook of Labor, Human Resources and Population Economics*, Springer, 2020, pp. 1-17; Autor, Dorn, *The growth of low-skill service jobs and the polarization of the US labor market*, in *AER*, 2013, 103(5), pp. 1553-1597; Goos, Manning, Salomons, *Job polarization in Europe*, in *AER*, 2009, 99(2), pp. 58-63; Acemoglu, Restrepo, *Automation and new tasks: The implications of the task content of production for labor demand*, in *JEP*, 2018, 33(2), pp. 3-30.

on the other, illustrates that conclusions about displacement or resilience are contingent upon the theoretical lens adopted: where economists often stress substitution and efficiency, sociological perspectives highlight power, inequality, and how institutions shape technological change.

These debates on job quality and labor substitution make clear that the effects of digitalization cannot be understood by examining technologies and/or tasks isolated from the broader context of work. The heterogeneous outcomes observed across occupations (ranging from intensified surveillance to expanded autonomy, from task displacement to new forms of professional specialization) underline that technological change does not unfold uniformly across the labour market. Instead, its impacts are filtered through specific organizational practices, industrial relations arrangements, and broader institutional structures. The same digital tool may enable skill upgrading in one setting while reinforcing fragmentation or precarity in another, depending on how work is organized and governed. This variability underscores a central insight of the sociology of work: technological transformations are always embedded in particular socio-economic contexts. Consequently, any effort to assess digitalization's implications must consider not only the technologies themselves, but also the institutional configurations, sectoral dynamics, and national political economies within which they are deployed.

3. *Contextualizing digitalization: organizational, sectoral and institutional variations*

Against the backdrop of an intensifying geopolitical and geo-economic conflict over technological innovation, the United States has consolidated a position of hegemonic leadership, challenged only by the rapid ascent of China. This global contest is so fraught with consequences that several scholars within the Varieties of Capitalism tradition have argued that the analytical framework itself may require rethinking or even supersession in order to account for the systemic centrality of U.S.-driven innovation dynamics[19].

[19] Soskice, *Rethinking Varieties of Capitalism and growth theory in the ICT era*, in *RKE*, 2022, 10, n. 2, pp. 222-241.

However, while American predominance at the technological frontier appears indisputable, the ways in which technological hegemony is institutionalized, mediated, and translated into patterns of work and production vary considerably across national contexts[20]. It is precisely this divergence that underscores the importance of contextualizing the diffusion and implications of new technologies within specific institutional configurations. Parallel to this critique, other scholars have developed the so called "variegated economies" approach, which conceives capitalism not as a collection of discrete and internally coherent national models but as a dynamic and polymorphic process whose development is inherently uneven and multiscalar[21]. In contrast to the Varieties of Capitalism framework, often criticized for its narrow, firm-centric, and rationalist assumptions, in addition to its tendency to treat geographical variability as homogeneous national archetypes, the variegated economies perspective emphasizes a more differentiated and dynamic understanding of institutions. This involves recognizing how capitalist development unfolds simultaneously across different scales: at the national and regional level, through distinctive regulatory and institutional patterns; along global value chains, which structure flows of capital, labor, and knowledge; and at the firm level, where strategies and organizational forms mediate technological change. By adopting this lens, scholars seek to account for the temporal and spatial heterogeneity of capitalist trajectories, including the uneven diffusion and institutional embedding of digital technologies[22].

In other terms, the impact of digitalization cannot be understood in abstraction: platforms and AI systems operate within specific legal, economic, and social environments and comparative studies show that identical technologies can produce divergent outcomes depending on the industrial relations regime, educational systems, and societal structures in which they are embedded. The contextual variability of digitalization is particularly evident when comparing advanced economies with emerging ones. In Europe, strong labor institutions often mediate technological change, while in other regions digital platforms proliferate with minimal regulation, leading

[20] Soskice, *cit*.

[21] Peck, Theodore, *Variegated capitalism*, in *PHG*, 2007, 31, 6, pp. 731-772; Peck, *Variegated economies*, Oxford University Press, 2023.

[22] Alvarez León, *The digital economy and variegated capitalism*, in *CJC*, 2015, 40, 4, pp. 637-654.

to increased precariousness. Even within Europe, Northern countries display different trajectories from Southern or Eastern European contexts due to differences in welfare regimes, industrial relations, and skill formation systems[23].

Sectoral analysis enriches this picture. In logistics, for example, digitalization supports real-time tracking and just-in-time delivery, but also imposes strict surveillance on drivers and warehouse staff[24]. In education, digital technologies facilitate remote learning and blended teaching, yet they also exacerbate inequalities between institutions with different resources[25]. In agriculture, precision farming illustrates how digital tools reshape traditional labor practices while raising questions about data ownership and environmental sustainability[26]. In banking and telecommunications, digitalization has been associated with substantial labor substitution: the spread of ATMs in the late twentieth century and the rise of home banking services led to significant downsizing in banking, while the adoption of chatbots in call centers displaced human operators[27]. By contrast, in healthcare, digital technologies tend to reconfigure professional roles without necessarily reducing employment[28]. Similarly, in manufacturing, the evidence of job destruction linked to Industry 4.0 is mixed and declining employment is often driven by broader structural transformations and multiple contributing factors[29].

So, it is to be recognized that sectoral differences and institutional contexts shape the outcomes of technological change. Even within firms, organizational practices mediate how digitalization affects workers. This institutional, sectoral and organizational diversity demonstrates that sociological analysis cannot rely on universal models of technological impact: a

[23] Berg, Green, Nurski, Spencer, *Risks to job quality from digital technologies: Are industrial relations in Europe ready for the challenge?*, in *EJIR*, 2023, 29, 4, pp. 347-365.

[24] Cirillo, Rinaldini, Virgillito (eds.), *cit.*

[25] Williamson, Eynon, Potter, *Pandemic politics, pedagogies and practices: digital technologies and distance education during the coronavirus emergency*, in *LMT*, 2020, 45, 2, pp. 107-114.

[26] Klerkx, Jakku, Labarthe, *A review of social science on digital agriculture, smart farming and agriculture 4.0: New contributions and a future research agenda*, in *NJAS-WJLS*, 2019, 90, p. 100315.

[27] Kornelakis, Kirov, Thill, *The digitalisation of service work: A comparative study of restructuring of the banking sector in the United Kingdom and Luxembourg*, in *EJIR*, 2022, 28, 3, pp. 253-272; Doellgast, *Strengthening social regulation in the digital economy: comparative findings from the ICT industry*, in *LInd*, 2023, 33, 1, pp. 22-38.

[28] Cirillo, Rinaldini, Virgillito (eds.), *cit.*

[29] Garibaldo, Rinaldini, *L'operaio digitalizzato*, il Mulino, 2019.

contextual approach continues to be important and it is necessary to adopt a comparative and multi-level framework that considers how global technologies are filtered through local structures.

Taken together, these organizational, sectoral, and institutional variations reveal that digitalization is neither a uniform nor a linear process. The same technologies travel across borders and industries but are refracted through distinct regulatory landscapes, collective bargaining arrangements, managerial traditions, and societal expectations. This heterogeneity strengthens a central insight of sociological research: technological change cannot be understood outside the social structures that mediate, enable, or constrain it. What appears, at first glance, as a purely technical transformation is in fact shaped by distributive conflicts, institutional legacies, and organizational choices. It is precisely this empirical variability that exposes the limits of universal models of technological impact and invites a more critical engagement with the assumptions that often underpin public and academic narratives about digitalization.

A further limit in contemporary debates on digitalization is the tendency toward technological presentism, whereby phenomena such as artificial intelligence or platform work are portrayed as radically novel disruptions. However, many of the dynamics associated with digital technologies (including flexibilization, spatial fragmentation of labour, regulatory arbitrage, and the reallocation of tasks along global value chains) largely predate recent advances in AI. Digital technologies often operate as accelerators and coordinators of pre-existing processes. Research on global value chains and digital productions/infrastructures shows how technologies contribute to the reclassification and redistribution of work across organizational and geographical boundaries, reinforcing path-dependent trajectories of deregulation and labour segmentation[30]. From this perspective, digitalization should be understood as embedded within historically sedimented patterns of capitalist organization, rather than as a sudden break with the past.

All this ultimately brings us back to one of the foundational concerns of the sociological perspective: the rejection of technological determinism. To insist on contextualization, therefore, is to underline that the trajecto-

[30] Tubaro, *The dual footprint of artificial intelligence: environmental and social impacts across the globe*, in *Glob.*, 2025, pp. 1-18, Tubaro, Casilli, Cornet, Le Ludec, Torres Cierpe, *Where does AI come from? A global case study across Europe, Africa, and Latin America*, in *NEP*, 2025, 30(3), pp. 359-372.

ries of digitalization are not predetermined by the inherent properties of technologies, but are contingent on the ways in which they are embedded, regulated, and contested within specific socio-economic contexts.

4. *Challenging technological determinism*

As mentioned above, a key theoretical task for sociology of work is to resist technological determinism, that is, the tendency to attribute homogeneous and inevitable social outcomes to technological innovations. The recurring discourse of a "digital age" or "AI era" illustrates how technologies are often reified as autonomous drivers of epochal change. Such perspectives obscure the role of institutions, collective actors, and power relations in shaping work and employment. Technological determinism remains a persistent temptation, both in public discourse and within parts of the scientific community. These discourses have political implications: by portraying technological change as inevitable, they dismiss demands for regulation, redistribution, and democratic participation, ultimately delegitimizing social conflicts.

The sociology of work must instead uncover the social and political embeddedness of technologies. The design, the adoption, and the use of digital artifacts are not linear, smooth processes, but are shaped by struggles, negotiations, and institutional arrangements. Concepts such as "algorithmic control" risk mystifying managerial decisions by attributing agency to algorithms rather than to human actors who design, implement, and regulate them. Organizational and labour studies have also shown that the integration of digital technologies into work processes reconfigures managerial control rather than eliminating it. Research highlights how digital tools are embedded in existing organizational routines and power relations, producing hybrid forms of control that combine discretion and surveillance[31]. This insight is reinforced by recent scholarship that warns against the reification of digital technologies through deterministic narratives. As Joyce et al. argue, conceptual labels such as "algorithmic control" or "algorithmic surveil-

[31] Bruni, Tirabeni, Pittino, Miele, *On the dualistic nature of power and (digital) technology in organizing processes*, in *SO,* 2020, XXII, special issue, pp. 207-219; Crouch, *Will the gig economy prevail?*, John Wiley & Sons, 2019.

lance" risk obscuring the continuity between digital and pre-digital forms of managerial authority, attributing agency to algorithms rather than to the actors and institutions that design, deploy, and regulate them[32]. Similarly, periodizations that announce a "platform capitalism" era tend to portray technological change as rupture, overlooking the incremental, contested, and uneven character of digitalization. By focusing narrowly on spectacular technologies or on selected empirical cases, deterministic accounts miss the broader infrastructures and sociomaterial processes through which digital tools reshape labour. In this sense, resisting technological determinism means not only underlining the role of institutions and collective action, but also cultivating a more processual and contextual understanding of technological change that acknowledges its multiscalar and contested trajectories. As Social Shaping of Technology (SST) approaches have shown, innovation and diffusion always involve social mediation, reinterpretation, and resistance[33]. Orlikowski and Scott's notion of the duality of technology and the subsequent debates on sociomateriality further underscore that technological artifacts and social relations are inseparably entangled[34]. By highlighting this co-construction, sociology of work avoids both naïve optimism and dystopian fatalism.

A closely related line of critique has been developed within Labour Process Theory (LPT)[35]. Building on its longstanding focus on managerial control, consent, and the organization of labour, labour process scholars have extensively examined the implications of digital technologies for work. Recent contributions show that algorithmic management, data-driven monitoring, and digitally mediated performance evaluation often represent an intensification and reconfiguration of control, rather than a radical rupture with previous forms of work organization. Concepts such as digital Taylorism explicitly draw on the labour process tradition to emphasize continuity in managerial strategies of work intensification, standardization, and

[32] Joyce *et al., New social relations of digital technology and the future of work: beyond technological determinism*, in *NTWE*, 2023, 28, 2, pp. 145-161.

[33] Mackenzie, Wajcman, *The social shaping of technology*, Open University, Buckingham, 1999.

[34] Orlikowski, Scott, *Sociomateriality: Challenging the separation of technology, work and organization*, in *AMA*, 2008, 2, 1, pp. 433-474.

[35] Braverman, *Labor and monopoly capital: The degradation of work in the twentieth century*, Monthly Review Press, 1974.

surveillance, while also acknowledging that digital technologies open new arenas of contestation within the labour process. From this perspective, digitalization does not impose predetermined outcomes, but interacts with existing power relations, organizational choices, and institutional constraints[36].

In terms of organizational theory and design, the framework of Socio-Technical systems (STS), one of the most dialogic approaches with the sociology of work, proves particularly useful: technologies are never adopted in isolation, but as part of broader ensembles that combine technical, organizational, and institutional elements[37]. The STS tradition, from the pioneering studies of Trist and Bamforth in the British coal mines to Calvin Pava's reconceptualization of knowledge work systems, emphasizes the principle of joint optimization, that is, the search for a balanced design that enables both technical efficiency and social well-being[38]. This perspective is especially relevant for contemporary debates on digitalization, since it explicitly resists the "technological imperative" that views workers and organizations as passive recipients of technological change.

Pava's work is particularly illuminating in this regard[39]. He recognized that the advent of information technologies and microprocessors required a profound rethinking of sociotechnical design. Instead of focusing solely on routine work processes, he proposed that the basic unit of analysis should be deliberations, the reflective and communicative practices through which actors confront complex, uncertain, and non-routine tasks. This reconceptualization underscores that technologies do not dictate outcomes by themselves, but interact with human agency, organizational choice, and institutional context. In this way, the sociotechnical approach highlights the possibility of disobeying the technological imperative: technologies can be designed and implemented either to reinforce forms of digital Taylorism and surveillance, or to support collaboration, learning, and participatory decision-making. Recent debates on algorithmic management and digital

[36] Gandini, *Labour process theory and the gig economy*, in *HRel.*, 2019, 72(6), pp. 1039-1056; Briken, Chillas, Krzywdzinski, Marks, *The new digital workplace: How new technologies revolutionise work*, Bloomsbury Publishing, 2017.

[37] Butera, *Lavoro e organizzazione nella quarta rivoluzione industriale: la nuova progettazione socio-tecnica*, in *L'ind.*, 2017, 38(3), pp. 291-316.

[38] Trist, Bamforth, *Some social and psychological consequences of the longwall method of coal-getting*, in *HRel.*, 1951, 4, 1, pp. 3-38; Pava, *Managing new office technology. An organizational strategy*, Simon and Shuster, 1983.

[39] Pava, *cit.*

control make the relevance of this insight particularly evident. The diffusion of wearable devices, data analytics, and AI-driven monitoring systems carries with it the risk of reviving the logic of Taylorism in digital form, a phenomenon that some scholars call digital Taylorism, by fragmenting tasks, intensifying monitoring, and reducing workers' discretion. STS offers a critical counterpoint by showing that such trajectories are not technologically predetermined but are organizationally chosen. Coding practices, data architectures, and algorithmic systems are not neutral infrastructures: they embody assumptions, values, and power relations that reflect managerial priorities and institutional environments. To treat algorithms as autonomous "agents" of control obscures the social decisions and design choices that underpin them.

Seen from this angle, the relevance of STS for the sociology of work lies in its capacity to illuminate how the introduction of new technologies is always mediated by organizational design choices. Whether digital tools generate intensification and alienation or, conversely, enhance autonomy and collective intelligence depends on how they are embedded in work systems. The design of digital workplaces thus involves normative choices: it can promote discretionary coalitions, collaborative deliberations, and distributed governance, or consolidate hierarchical command and control. In turbulent and uncertain environments, STS further invites us to see change not as an episodic event, but as an ongoing, dynamic process of redesign, in which technologies and organizations co-evolve.

All these perspectives provide a critical counterpoint to narratives of inevitability, opening analytical space to consider alternative paths, institutional mediation, and the role of agency in shaping the world of work. Indeed, from a theoretical perspective, challenging determinism involves recognizing the agency of social actors. Employers, managers, trade unions, policy-makers, and workers all participate in shaping how technologies are implemented and contribute to define what consequences will be. Countering the deterministic narratives about technologies is thus not only an analytical task but also a normative one, aimed at reopening political space for dialogue and negotiation. As the SST and LPT perspectives remind us, the evolution of digital capitalism is an unfinished and contested process, shaped by institutional mediation, labor-capital conflict, and the ongoing reconfiguration of social relations.

These reflections on the social dimension of technology and the critique of deterministic narratives point directly to another defining chal-

lenge of contemporary digitalization: the reconfiguration of power and knowledge within technologically mediated workplaces. If technologies are co-constructed through institutional arrangements, organizational choices, and social relations, then understanding how they reshape labor requires attention not only to their design, but also to the forms of visibility and invisibility they produce. The growing reliance on data-driven systems, AI models, and algorithmic decision-making introduces new regimes of mediated surveillance, classification, and control in which access to information becomes a central driver of inequality. In this sense, the rejection of technological determinism does not merely highlight the agency of human actors, it also compels us to examine how digital systems reorganize the distribution of and access to knowledge, authority, and accountability. It is precisely at this intersection of technology, power, and epistemic asymmetry that the issue of opacity emerges as a critical terrain for sociological analysis.

5. *Opacity, power and knowledge in digital technologies*

The opacity of digital technologies, particularly AI and algorithmic systems, represents a critical challenge that differentiates the current wave of innovation from previous technological transformations. While earlier forms of automation were largely visible, material, and decipherable (even when complex), digital systems increasingly operate through layers of abstraction that obscure their functioning. The literature distinguishes at least three forms of opacity[40]. The first is *intrinsic complexity*: machine learning and deep learning systems often operate through models whose internal logic is difficult to interpret, even by the engineers who design them. The second is *technical illiteracy*: the absence of widespread digital and algorithmic competence among workers and citizens limits their ability to understand, monitor, or challenge automated processes. The third is *intentional opacity*: deliberate restrictions on access to data, models, and decision-making criteria imposed by corporations, which reproduce and deepen hierarchies of knowledge and power.

This last form of opacity has particularly profound implications for labor relations. In call centers, workers often remain unaware of the criteria

[40] Burrell, *How the machine "thinks": Understanding opacity in machine learning algorithms*, Big Data Soc., 2016, 3, 1, pp. 1-12.

by which AI systems allocate calls or assess performance, despite legal requirements for transparency[41]. In manufacturing, operators frequently perceive Manufacturing Execution Systems as "black boxes", where decisions about pacing, sequencing, or quality control appear as inscrutable outputs rather than negotiated parameters[42]. Yet empirical studies also demonstrate that opacity is not immutable: when firms provide structured training to workers and when unions gain access to algorithmic systems, opportunities emerge for co-determination in design and implementation[43]. Research on algorithmic management in logistics and platform work shows that workers' situated knowledge often contributes to improving algorithmic accuracy or correcting managerial misinterpretation[44]. These examples reveal that opacity is not technologically determined, but a socially constructed phenomenon, resulting from choices about system design, access policies, institutional constraints, and power asymmetries.

Opacity must also be understood as a *stratified* phenomenon. The distinction between intrinsic, cognitive, and intentional opacity highlights how different groups possess unequal forms of access and interpretive power. Managers, data scientists, and IT specialists may understand, or at least partially reconstruct, the functioning of algorithmic systems, while frontline workers remain in the dark[45]. At another level, multinational corporations often maintain exclusive control over proprietary algorithms and training data, whereas regulators, unions, and civil society actors face significant barriers in obtaining meaningful information[46]. This asymmetry reflects and at the same time actively reinforces existing power imbalances in workplaces and labor markets, defining who can question, negotiate, or contest algorithmic decisions.

Case studies across sectors underscore both the risks of growing opacity and the possibilities for resisting it. In some European countries, collective

[41] Doelgast, *cit*.

[42] Godino, Junte, Molina, *Artificial intelligence and algorithmic management at work: A case study approach on the role of industrial relations in Spain*, INCODING Case Studies Reports, 2023, on line: https://ddd.uab.cat/record/290685.

[43] Garibaldo, Rinaldini, *cit*.

[44] Marrone, *Rights against the machines!: il lavoro digitale e le lotte dei rider*, Mimesis, Milano, 2021.

[45] Rinaldini, *Accesso alla tecnologia e autonomia*, in Masino (a cura di), *Autonomie nel lavoro negli anni Duemila*, TAO Digital Library, 2022, pp. 76-87.

[46] Zuboff, *The age of surveillance capitalism*, edn. Pubblic Affairs, 2019.

agreements now include clauses granting workers information rights concerning algorithmic decision-making[47]. In others, unions have negotiated participatory auditing procedures or training programs that enable workers to interpret algorithmic outputs and challenge managerial decisions when necessary. In platform work, experiments with algorithmic transparency have shown that opening access to data can empower workers to identify unfair rating practices or discriminatory allocation mechanisms. These initiatives suggest that opacity, far from being an inherent feature of digital technologies, can be politically contested, negotiated, and partially dismantled through institutional interventions.

Insights from the sociology of social movements further expand this analysis by highlighting how opacity and algorithmic control can also become focal points for collective mobilization. The literature on movement unionism and digital labour activism shows that workers and unions increasingly mobilize around issues of transparency, data access, and algorithmic governance. In digitally mediated workplaces, opacity does not only constrain workers' agency but may also trigger new forms of collective action, including coalition-building across occupational and national boundaries, hybrid forms of unionism, and transnational campaigns targeting platform governance[48]. Recent contributions emphasize that the invisibilization of labour is not only an economic issue, but also a political one, closely linked to struggles for recognition and rights. From this perspective, digitalization reshapes labour processes, along with the conditions under which work becomes visible, recognized, and collectively contested. All this suggests that algorithmic opacity can be considered a source of domination and a terrain of conflict and negotiation through which power relations can be contested[49].

[47] Holtgrewe, Dworsky, *European social partners' approaches to artificial intelligence and algorithmic management*, INCODING Case Studies Reports, 2024, online: https://ddd.uab.cat/record/290690.

[48] Tassinari, Maccarrone, *Riders on the storm: Workplace solidarity among gig economy couriers in Italy and the UK*, in *WESoc.*, 2020, 34(1), pp. 35-54; Marrone, *cit.*

[49] Della Porta, Chesta, Cini, *Labour conflicts in the digital age: A comparative perspective*, Policy Press, 2022; Piasna, *Digital labour platforms and social dialogue at EU level: How new players redefine actors and their roles and what this means for collective bargaining*, in *SPA*, 2024, 58(4), pp. 568-582; Haidar, Keune, *Introduction: Work and labour relations in global platform capitalism*, in Haidar, Keune (eds.), *Work and labour relations in global platform capitalism*, Edward Elgar Publishing, 2021, pp. 1-27.

At the same time, at theoretical level, the problem of opacity invites a reconsideration of classical concepts of power and control in the sociology of work. Foucault's analyses of surveillance resonate strongly with contemporary discussions of algorithmic monitoring, yet the shift from visual to data-driven oversight introduces new dynamics that exceed traditional panoptic paradigms. The sociology of work can make a distinctive contribution by linking micro-level analyses of workplace practices with macro-level studies of regulatory frameworks, industrial relations systems, and platform governance regimes. Such a multi-scalar approach reveals that opacity is not merely a technical limitation, but a political and institutional field in which conflicts over knowledge, authority, and decision-making unfold.

6. *Conclusion*

Digital technologies do not operate as autonomous, linear, or inevitable forces shaping the future of work. Rather, their diffusion and effects are deeply embedded within social, institutional, and organizational contexts. Despite their pervasive presence across occupations and skill and through their differentiated consequences on job quality and employment structures, digital technologies reveal themselves to be far from universal agents of transformation. Their impacts are filtered through sectoral dynamics, managerial strategies, industrial relations systems, welfare regimes, and national political economies[50]. Identical technologies can yield divergent outcomes depending on how they are designed, implemented, governed, and contested.

Within this perspective, the article has not aimed to provide a comprehensive or systematic review of an already extensive literature. Rather, it has advanced an analytical framework intended to organize and interpret the heterogeneous effects of digitalization on work and employment. By integrating three interrelated dimensions (the reconfiguration of job quality and employment structures, the institutional and organizational mediation of technological change, and the reorganization of power, knowledge, and

[50] Lloyd, Payne, *Digitalisation, unions and 'country-effect': Does union strength at the workplace matter?,* in *JIR*, 2025, https://doi.org/10.1177/00221856251326682; Haapanala, Marx, Parolin, *Robots and unions: The moderating effect of organized labour on technological unemployment*, in *EID*, 2023, 44(3), pp. 827-852; Snell, Gekara, *Re-examining technology's destruction of blue-collar work*, in *NTWE*, 2023, 38(3), pp. 415-433.

opacity in digitally mediated workplaces), the article proposes a sociological lens through which current transformations of work can be more systematically captured.

Sociology of work emerges as an indispensable field for interpreting contemporary transformations. It provides conceptual tools to move beyond deterministic discourses that frame digitalization as an unstoppable, self-propelled revolution. Understanding the future of employment requires addressing both the qualitative reorganization of work and the quantitative restructuring of labor demand. The polarization of tasks, the risks of substitution associated with generative AI, and the intensification of psychosocial pressures all point to the need for an analytical framework that treats technology as a processual and contextual phenomenon. Similarly, trajectories of digitalization are far from homogeneous; instead, they are shaped by institutions, power configurations, and multi-scalar processes that produce variegated (sometimes contradictory) patterns of change.

Approaches such as the SST, LPT and STS traditions are useful to understand technologies as co-constructed through human agency, organizational design, and institutional mediation. The possibility of amplifying autonomy or reinforcing digital Taylorism is not inherent to the technology itself, but arises from socio-organizational choices and negotiations. Recognizing this co-construction allows sociology to maintain a critical stance, refusing both naïve celebrations of innovation and dystopian projections of inevitable decline.

At the same time, intrinsic, cognitive, and intentional forms of opacity characterizing AI-driven systems redistribute knowledge and authority across the labor process, creating new asymmetries between workers, managers, corporations, and regulators. These phenomena challenge the traditional understanding of power and surveillance, demanding a renewed theoretical and empirical inquiry. The sociology of work is crucial in revealing how opacity is produced or justified, how it can be resisted, and how its consequences may vary depending on the institutional setting within which digital systems are embedded.

We need of a sociology of work that is empirically grounded, theoretically ambitious, and politically attuned to workers. Technological change cannot be meaningfully analyzed without paying attention to the social conflicts, institutional arrangements, and organizational practices that shape its outcomes. Nor can it be understood without the scrutiny of the ine-

qualities it produces, intensifies, or transforms. Digitalization raises profound questions about control, autonomy, skill, surveillance, and democratic participation in the workplace; addressing them requires a discipline capable of integrating micro-level observations with macro-level structural analysis.

At the same time, all this raises crucial methodological challenges for the sociology of work. The increasing heterogeneity, fragmentation, and partial invisibility of digital labour complicate traditional empirical strategies based on standard occupational classifications, surveys, and firm-level data. One of the key challenges for the sociology of work lies in measuring digital labour, whose fragmented, informal, and platform-mediated forms often escape standard statistical tools and occupational classifications[51]. The risk is that this methodological gap perpetuates the invisibility of digital work within empirical research itself. Addressing these challenges calls for the combination of quantitative approaches with qualitative, ethnographic, and comparative methods capable of uncovering hidden forms of labour, informal practices, and workers' lived experiences. In this sense, the digital transformation of work reshapes labour processes, but also challenges the epistemological and methodological tools of sociological inquiry itself.

Also for these reasons, the sociology of work must cultivate deeper and more sustained dialogue with other disciplines. Legal scholarship contributes insights into emerging regulatory regimes and the governance of AI; political economy situates technological change within global value chains and geopolitical competition; philosophy clarifies ethical dilemmas surrounding autonomy, responsibility, and human dignity; and the arts, as illustrated by Crawford in the book *Atlas of AI*, expose the material, ecological, and symbolic infrastructures that sustain contemporary digital systems[52]. Only through this multidisciplinary collaboration can we understand the full spectrum of social relations that constitute digitalization.

Ultimately, anchoring technological change to society allows sociology not merely to interpret contemporary transformations but to intervene in shaping them. As digitalization reconfigures labor markets, reorganizes the labor process, and redistributes power and control, the sociology of work has a critical responsibility: to find and reveal the conditions under

[51] Pais, *La platform economy: aspetti metodologici e prospettive di ricerca,* in *Polis*, 33(1), 2019, pp. 143-162.

[52] Crawford, *The atlas of AI: Power, politics, and the planetary costs of artificial intelligence*, Yale Univ. Press, 2021.

which technological innovation can support human capabilities, collective well-being, and democratic participation; And how to enhance and create such conditions. The challenge is formidable, but the stakes are equally high. In reaffirming its analytical and normative mission, sociology of work can help build pathways toward forms of digitalization that enhance, rather than erode, the conditions for a just and sustainable future of work.

Abstract

The article reflects on the diffusion of digital technologies in the world of work from the perspective of the sociology of work, questioning deterministic interpretations of technological innovation. Through an analysis of digitalization processes, artificial intelligence, and algorithmic management, the article shows how the effects of new technologies on employment and job quality are deeply mediated by institutional, sectoral, and organizational contexts. Drawing on approaches such as Social Shaping of Technology and Socio-Technical Systems, it highlights the role of collective action and governance in shaping alternative trajectories of digitalization. In conclusion, the article argues for the need for a sociological analysis capable of anchoring technological change to social relations, conflicts, and institutions, in order to orient innovation toward socially sustainable outcomes.

Keywords

Digitalization, Sociology of Work, Job Quality, Technological Determinism, Algorithmic Management.

Matthijs van Schadewijk

Workers' Organisations as Enforcement Actors against Algorithmic Discrimination: What Role for the AI Act and Platform Work Directive?

Contents: 1. Introduction. 2. When does algorithmic discrimination occur? 3. Proving algorithmic discrimination. 4. Legal standing. 5. The AI Act and PWD. 6. Conclusion.

1. *Introduction*

In 2024, the European legislator adopted both the AI Act[1] and the Platform Work Directive (PWD)[2]. The two instruments are a milestone for regulating the digitalisation of, *inter alia*, labour relations in the EU. Interestingly, both the AI Act and the PWD give workers' organisations a role in managing the digital transition at work[3]. Amongst other things, this development raises the question of what the AI Act and PWD offer to workers' organisations striving to tackle one of the core issues of digitalisation: algorithmic discrimination[4]. Like humans, algorithms can develop biases against certain groups. A well-known example is Amazon's selection algorithm, which favoured men based on characteristics of previous employees[5]. As a result, employers who use algorithms may violate equal

[1] Reg. 2024/1689 of 13 June 2024.

[2] Dir. 2024/2831 of 23 October 2024.

[3] See, *e.g.*, AI Act, art. 26(7); PWD, art. 13. These provisions are discussed in section 5.

[4] On these core issues, see, *e.g.*, OECD, *Using AI in the workplace. Opportunities, risks and policy responses*, in *OECD AIP*, March 2024.

[5] College voor de rechten van de mens, *Als computers je CV beoordelen, wie beoordeelt*

treatment legislation. However, enforcing the right to equal treatment traditionally rests with the individual employee, for whom it is difficult to prove discrimination. This is all the more true when the discrimination is hidden behind algorithms the employee cannot see, making them less likely to realise discrimination occurs. For this reason, litigation by workers' organisations, such as trade unions, may be a promising route to counter algorithmic discrimination. Workers' organisations represent a larger group of workers and generally have more capacity and oversight than individual workers. As a result, they are usually in a better position to become informed and gather evidence of, and take legal action against, discrimination. In addition, it may be particularly interesting to act against algorithmic decision-making for trade unions, as it allows them to highlight and reinforce the value of the union and its membership[6].

It is unclear, however, what options workers' organisations have to take legal action against algorithmic discrimination. How can they prove algorithmic discrimination, and under what circumstances do they have legal standing to bring a discrimination claim? And – most importantly – what additions do to the AI Act and Platform Work Directive provide in this context? Taking EU law as the starting point, this contribution addresses these questions. First, it briefly discusses when algorithmic discrimination occurs (section 2)[7]. Next, it analyses how a collective approach can help prove algorithmic discrimination (section 3) and addresses the legal standing of

dan de computers? Algoritmes en discriminatie bij werving en selectie, College voor de Rechten van de Mens, 2020, p. 4.

[6] van Schadewijk, *Collectief procederen tegen algoritmische discriminatie*, in *ArbA*, 2024, 3, pp. 3-24; Gaudio, *Litigating the Algorithmic Boss in the EU: A (Legally) Feasible and (Strategically) Attractive Option for Trade Unions?*, in *IJCL,* 2024, 1, pp. 91-130; Spiecker, Towfigh, *Automatisch Benachteiligt. Das Allgemeine Gleichbehandlungsgesetz und der Schutz vor Diskriminierung durch algorithmische Entscheidungssysteme*, Rechtsgutachten im Auftrag der Antidiskriminierungsstelle des Bundes, April 2023, available at https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Rechtsgutachten/schutz_vor_diskriminierung_durch_KI.html, pp. 79-87; Hakkarainen, *Naming something collective does not make it so: algorithmic discrimination and access to justice*, in *IPR,* 2021, 4, pp. 1-24.

[7] On this much-researched topic, see, more extensively, *e.g.* Gerards, Xenidis, *Algorithmic Discrimination in Europe. Challenges and Opportunities for Gender Equality and Non-discrimination Law*, European Commission, 2020; Hacker, *Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination Under EU Law*, in *CMLR*, 2018, 55, pp. 1143-1186; Zuiderveen Borgesius, *Discrimination, Artificial Intelligence and Algorithmic Discrimination*, Council of Europe, 2018.

workers' organisations in discrimination cases (section 4). Finally, it analyses what the AI Act and PWD add to the discussed legal framework (section 5). The contribution ends with a conclusion (section 6).

The analysis of the EU legal framework is complemented by a comparative legal study of three Member States: the Netherlands, Germany and Italy. The comparative analysis is particularly relevant for sections 4 and 5, since, as will become clear, the legal standing of workers' organisations and the impact of the AI Act and the PWD largely depend on national implementation. The selection of jurisdictions, which does not aim to be comprehensive but is intended to illustrate the meaning and potential impact of the EU legal framework, is informed by a combination of doctrinal and practical considerations. The Netherlands was included due to its relatively expansive mechanisms for collective enforcement and the author's in-depth familiarity with its legal system. Germany presents a useful contrast, given its more limited avenues for collective enforcement[8]. Italy was selected based on empirical developments, since it is, to the author's best knowledge, the only Member State where workers' organisations (specifically trade unions) have already been actively involved in addressing algorithmic discrimination through litigation[9].

1. *When does algorithmic discrimination occur?*

Algorithmic discrimination falls within the scope of the EU equal treatment directives, which prohibit direct and indirect discrimination in employment and occupation on several grounds: gender,[10] racial or ethnic origin[11], religion or belief, disability, age and sexual orientation[12]. For

[8] De jong et al., *Rechtsvergelijking toegang tot de rechter van belangenorganisaties in algemeenbelangacties*, Eindrapport voor het Wetenschappelijk Onderzoek- en Datacentrum (WODC), May 2025, available at https://repository.wodc.nl/handle/20.500.12832/3455; Herberger, Bielefeld, *Verbandsklageverfahren für diskriminierungsrechtlichte Ansprüche*, in *RdA*, 2022, pp. 220–228.

[9] Trib. Bologna 31 December 2020 no. 2949, in *RIDL*, 2021, 2, pp. 175-195; Trib. Palermo 17 November 2023 no. 9590. Also *cf.* Trib. Palermo 12 April 2021, in *ADL*, 2021, 4, p. 1081 ff.

[10] Dir. 2006/54/EC of 5 July 2006.

[11] Dir. 2000/43/EC of 29 June 2000.

[12] Dir. 2000/78/EC of 27 November 2000. See, regarding the question of whether the classic list of protected grounds in EU law requires expansion, Ganty, Benito Sanchez, *Expanding the List of Protected Grounds within Anti-Discrimination Law in the EU*, in *Equinet*, 2021.

the applicability of EU equal treatment law to employers[13], it is irrelevant whether the algorithm itself makes the discriminatory decision, or whether the employer engages in discriminatory behaviour based on the discriminatory output of the algorithm[14]. Also of note is that EU equal treatment law in the field of employment and occupation not only protects workers, but extends to most self-employed persons[15]. As for algorithmic discrimination, this is particularly relevant for workers who perform work through digital platforms, since – as is well known – it is not always clear whether this type of worker falls under the legal classification of a "worker" and in the platform economy, many work-related decisions are made by algorithms (who does what job, in what place, at what time and for what remuneration, etc.)[16].

In the context of algorithms, indirect discrimination is the most relevant form of discrimination. *Direct* discrimination occurs when one person is treated less favourable than another because of one of the aforementioned protected grounds. This would occur when an algorithm disadvantages workers by taking into account a variable that coincides (or nearly completely overlaps)[17] with a protected ground. However, most algorithms have

[13] The application of equal treatment legislation to *AI providers*, although interesting, falls outside the scope of this contribution.

[14] *Cf.* CJEU 8 November 1990, C-177/88, ECLI:EU:C:1990:383 (*Dekker*) (employer not hiring a pregnant employee because insurer does not pay sick pay violates the prohibition of discrimination); 25 April 2013, C-81/12, ECLI:EU:C:2013:275 (*Accept*) (homophobic statements made by an employee lead to the presumption that an employer's rejection of a homosexual job applicant is discriminatory). See also *e.g.* Dzida, Groh, *Diskriminierung nach dem AGG beim Einsatz von Algoritmen in Bewerbungsverfahren*, in *NJW*, 2018, p. 1920.

[15] This applies at least to the grounds of racial or ethnic origin and sex, as Dir. 2000/43/EC contains an explicit reference to the provision of goods and services and another directive, Dir. 2004/113/EC, regulates the principle of equal treatment on grounds of gender in the provision of goods and services. For the remaining grounds, the CJEU requires that the self-employed person engages in a "genuine activity" in the context of a legal relationship with "a degree of stability"; CJEU 12 January 2023, C-356/21, ECLI:EU:C:2023:9 (*JK/TP*).

[16] See, in more detail, *e.g.* Kloostra, *De positie van de werker bij platformwerk*, Wolters Kluwer, 2024, pp. 34-40; Jovović, *Ter Visie - Algoritmische discriminatie*, in *TAO*, 2018, 4, pp. 141-145.

[17] Such as being an immigrant, which was equated with race or ethnic origin in the *Feryn* case (CJEU 10 July 2008, C-54/07, ECLI:EU:C:2008:397); Gerards, Xenidis, *cit.*, p. 64. These are, however, exceptions. For direct discrimination the CJEU usually requires that the variable is explicitly linked to the protected ground. An apt example is CJEU 7 December 2000, C-79/99, ECLI:EU:C:2000:676 (*Schnorbus*) (preference for candidates who have completed men's military service is not direct discrimination on grounds of sex); Barnard, *EU Employment Law*, OUP, 2012, p. 354.

reached the point where they do not use variables that directly coincide with a protected ground[18]. *Indirect* discrimination occurs when an apparently neutral provision, criterion or practice puts individuals from a protected group at a particular disadvantage, unless the difference can be objectively justified. This may be the case when the algorithm disadvantages employed persons by taking into account a variable that statistically, but not exclusively, correlates with a protected ground. For example, in the aforementioned example of Amazon, the selection algorithm developed a preference for masculine language such as 'executed' and 'captured' to account for the disparity between men and women in the training data (which had arisen because Amazon had hired fewer women than men in the past), with the result that the algorithm later rejected women's applications based on these preferences.

The existence of indirect discrimination does not require the outcome of the algorithm *as such* (i.e. all variables taken together) to be particularly disadvantageous to the protected group[19]. Even taking into account a single variable, which statistically correlates with a protected ground, can be regarded as a 'provision, measure or practice' that particularly disadvantages persons with the protected ground[20]. However, when a variable exhibits such a statistical correlation with persons of a protected group – causing it to 'particularly' disadvantage those persons – is unclear. So far, the Court of Justice of the EU (CJEU) has provided limited specificity, requiring a 'much greater' or 'significant' difference[21]. In literature, it has been argued that a significant difference exists if the probability of persons in the protected

[18] Hacker, *Teaching Fairness to Artificial Intelligence*, cit., p. 1153.

[19] Of course, this is possible, for instance if a probability value resulting from an algorithm is statistically higher for men than for women. See, on such "bias in the algorithm" (as opposed to "bias in the data"), *e.g.* Hacker, *Teaching Fairness to Artificial Intelligence*, cit., pp. 1146-1150; Vetzo, Gerards, Nehmelman, *Algoritmes en grondrechten*, Boom juridisch, 2018, pp. 142-145. Nevertheless, just like in case of bias in the algorithm, one would consecutively – in the context of objective justification – have to look at the underlying variables to find out the "real2 reason for the distinction.

[20] See also Hacker, *Teaching Fairness to Artificial Intelligence*, cit., p. 1153; Gaudio, *Litigating the Algorithmic Boss*, cit., pp 109-110; College voor de rechten van de mens, *Advies aan Dazure B.V. over premiedifferentiatie op basis van postcode bij de Finvita overlijdensrisicoverzekering*, 28 January 2014, available at https://publicaties.mensenrechten.nl/publicatie/29c613ac-efab-4d2a-a26c-fe1cb2556407. For an argument to move away from this approach and look exclusively at the algorithm as a whole, see Jovović, *cit.*, p. 143.

[21] *E.g.* CJEU 18 October 2017, C-409/16, ECLI:EU:C:2017:767 (*Kalliri*). The question of which groups should be compared is often equally difficult to answer. On this aspect, see

group being positively assessed is at most 75 per cent of the probability of persons outside the group being positively assessed. As a result, providing statistics is of major importance[22].

2. *Proving algorithmic discrimination*

As is well known, producing statistics indicating indirect discrimination presents significant challenges, especially when the variables are diverse and hidden behind an algorithm[23]. As such, to enable the effective enforcement of EU equal treatment law, litigants are not expected to prove these statistics. Instead, EU equal treatment law provides for an alleviation of the burden of proof, entailing that if a person who believes he or she has been discriminated against (presents and if necessary) proves facts that may suggest direct or indirect discrimination, it is up to the opposing party to prove that no discrimination has occurred (or that it is justified)[24]. In the view of the author, there are two routes that litigants can follow to prove a presumption of algorithmic discrimination. In both routes, the collective aspect comes into play.

Route 1: insight in the algorithm

The first route relates to identifying the variables used by the algorithm, which may enable the establishment of a link between the algorithm and a protected ground. EU equal treatment law does not give litigants the right to access the decision models and data used by the employer, as became clear in the cases *Kelly* (2011) and *Meister* (2012)[25]. Since 2018, however, litigants do have the toolbox of the General Data Protection Regulation

e.g. Bell, Numhauser-henning, *Equal treatment*, in Jaspers, Pennings, Peters (eds.), *European Labour Law*, Intersentia, 2024, pp. 279-284.

[22] Hacker, *Teaching Fairness to Artificial Intelligence*, cit., p. 1153; Thüsing, *Comment on § 3 AGG*, in Säcker et al. (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, C.H. Beck 2021, c. 31.

[23] See also *e.g.* Jovović, *cit.*, p. 144; Dzida, Groh, *cit.*, p. 1922.

[24] Dir. 2000/43/EC, art. 8(1); Dir. 2000/78/EC, art. 10(1); Dir. 2006/54/EC, art. 19(1).

[25] CJEU 19 April 2012, C-415/10, ECLI:EU:C:2012:217 (*Meister*); CJEU 21 July 2011, C-104/10, ECLI:EU:C:2011:506 (*Kelly*).

(GDPR) at their disposal[26]. In addition to the EU equal treatment directives, the GDPR places restrictions on the discriminatory processing of personal data, including in the area of personnel decisions[27]. Of particular relevance to this contribution is that, under Article 15 GDPR, individuals have a right to access the processing of their personal data, including data relating to protected characteristics such as religion or gender[28]. The right of access under the GDPR is granted to the individual data subject (the person whose data is being processed). By extension, the right of access is, in principle, limited to the (processing of) personal data of the individual concerned and does not extend to the operation of the algorithm as such. Nevertheless, in certain circumstances an individual may invoke his or her right of access to gain insight into the functioning of algorithms and verify whether variables related to a protected ground are used by the algorithm[29]. More specifically, this route is open if *automated decision-making* is involved, in which case Article 15(1)(h) GDPR requires the data subject to be informed of the existence of automated decision-making, as well as the underlying logic and the significance and expected consequences of the processing for the data subject. This means that the user of the algorithm must provide insight into the key variables and their weight in the decision-making, so that data subjects can verify the accuracy and lawfulness of the processing[30].

[26] Reg. 2016/679 of 27 April 2016.

[27] See, *inter alia*, art. 5(1)(a) (processing of personal data must be lawful and proper), art. 9 (the processing of special personal data, including data on ethnicity, religion and sexual preference, is prohibited in principle) and art. 22 (the use of fully automated decision-making is, in principle, prohibited). On these provisions and their significance for algorithmic discrimination, see, *e.g.*, Hacker, *Teaching Fairness to Artificial Intelligence*, cit., pp. 1170-1183; Aloisi, *Regulating Algorithmic Management at Work in the European Union: Data Protection, Non-discrimination and Collective Rights*, in *IJCL*, 2025, 1, pp. 48-55.

[28] Under art. 13-14 GDPR, they are also entitled to this information in advance. For equal pay of men and women, a similar obligation arises from the Pay Transparency Dir. (Dir. (EU) 2023/970 of 10 May 2023), which requires employers to provide employees with easy access to the criteria (which must be objective) used to determine pay (art. 6), and grants worker(s' organisations) a passive information right (art. 7). In view of the specificity of equal pay of men and women and the different burden of proof (pointing out a single man or woman who earns more is sufficient to prove a presumption of discrimination; *e.g.* Kullmann, *Discriminating job applicants through algorithmic decision- making*, in *AA,* 2019, 1, pp. 45-53), this Directive will not be discussed further in this contribution.

[29] *Idem* Hacker, *Teaching Fairness to Artificial Intelligence*, cit., pp. 1173-1174; Aloisi, *cit.*, p. 60.

[30] Article 29 data protection working party (wp29), *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, Adopted on 3 October 2017,*

Automated decision-making within the meaning of the GDPR occurs when a decision is based solely (i.e. without meaningful human intervention) on automated processing of personal data and produces legal effects or otherwise significantly affects the data subject[31]. As regards (potentially) discriminatory algorithms in the workplace, this is often the case. In the *SCHUFA* case of 2023, the CJEU interpreted the term "decision" broadly and held that it can also include preparatory acts[32]. Similarly, in a Dutch case concerning taxi platform Ola the Amsterdam Court of Appeal ruled that the risk profile ("suspicious" or "not suspicious") drawn up by the platform's algorithm – on the basis of which Ola decided whether or not to take measures against the driver – involved automated decision-making. In line with the *SCHUFA* case, according to the Court of Appeal of Amsterdam, the issue was not whether automated decision-making took place *on the basis of* the score ("suspicious" or "not suspicious"), but whether the score *itself* came about through exclusively automated processing (which was the case)[33]. Put differently, it seems sufficient that the algorithm independently attaches something of a judgement (such as a score or a probability value) to the collected data[34]. In addition, in an employment law context, a decision that 'significantly affects' the data subject is present quickly. This is the case, for example, if it involves a rejection of a job application or if the decision has financial consequences for the person concerned[35].

As last Revised and Adopted on 6 February 2018, available at https://ec.europa.eu/newsroom/article29/items/612053, pp. 30 and 32-33; Amsterdam Court of Appeal 4 April 2023, ECLI:NL:GHAMS:2023:804 (*Ola*); ECLI:NL:GHAMS:2023:793 and ECLI:NL:GHAMS:2023:796 (*Uber*).

[31] GDPR, art. 22(1).

[32] CJEU 7 December 2023, C-634/21, ECLI:EU:C:2023:957 (*SCHUFA*), c. 44-46 and 60-62. The fact that the follow-up action is performed by a human being does not preclude the second condition ("based solely on automated processing"), as the preparatory action is qualified as the "decision".

[33] Amsterdam Court of Appeal 4 April 2023, ECLI:NL:GHAMS:2023:804 (*Ola*), c. 3.43. The same applied to the earning profile and the allocation of rides by Ola's algorithm, as well as the deactivation decisions, the batched matching system, the upfront pricing system and the determination of average ratings by Uber's algorithm; Amsterdam Court of Appeal 4 April 2023, ECLI:NL:GHAMS:2023:793 and ECLI:NL:GHAMS:2023:796 (*Uber*).

[34] Also called an "outcome" or a "target variable"; *e.g.* Vetzo, Gerards, Nehmelman, *cit.*, p. 144.

[35] Preamble 71 GDPR; WP29, *cit.*, p. 26; Amsterdam Court of Appeal 4 April 2023, ECLI:NL:GHAMS:2023:793 and ECLI:NL:GHAMS:2023:796 (*Uber*).

The right of access in case of automated decision-making can make it possible (though not always: see *infra*) to find out the variables used by the algorithm. This may open the door to establishing a link between the algorithm and a protected ground. More specifically, the right of access under the GDPR facilitates the demonstration of a presumption of discrimination without an identifiable or identified victim. This possibility is of great importance for workers' organisations that wish to combat discrimination independently, for example in the public interest. Indeed, for various reasons, such as the unwillingness to come forward or a lack of transparency of the decisions made by the employer or the algorithm, it is not always possible to identify one or multiple victims[36]. The cases *Feryn* (2008) and *Associazone* (2020) show that EU equal treatment law prohibits discrimination in employment and occupation, even when there is no identifiable victim[37]. EU equal treatment law aims to promote conditions for a socially inclusive labour market. According to the CJEU, this aim would be jeopardised if the prohibition of discrimination applied only to cases where an alleged victim of discrimination initiates legal proceedings against the employer. As a result, in *Feryn* and *Associazone*, the CJEU qualified public statements made by (an employee of) an employer as a form of discrimination, despite there being no identifiable victim. Consequently, it can be assumed that for there to be a presumption of discrimination, it suffices that a workers' organisation can point to a variable in the algorithm used by the employer that correlates with a protected ground, even if no victim had been identified.

The follow-up question is how strong the correlation between the variable and the protected ground must be to trigger the presumption. Since it concerns a presumption, it is not necessary to demonstrate the aforementioned statistical percentage of, say, 75%[38]. Instead, a possible correlation (a possible link) between the variable and the protected ground may suffice. For example, the Tribunal of Bologna considered that Deliv-

[36] See also *e.g.* Gaudio, *Litigating the Algorithmic Boss*, cit.; Lahuerta, *Enforcing EU equality law through collective redress: Lagging behind?*', in *CMLR*, 2018, 55, pp. 783-818.

[37] CJEU 23 April 2020, C-507/18, ECLI:EU:C:2020:289 (*Associazone*); CJEU 10 July 2008, C-54/07, ECLI:EU:C:2008:397 (*Feryn*).

[38] If the statistical difference is established, the employer can (only) redeem himself by proving an objective justification; e.g. CJEU 10 March 2005, C-196/02, ECLI:EU:C:2005:141 (*Nikoloudi*).

eroo used an algorithm that discriminated against workers on the basis of union membership,[39] because it penalised workers who, after accepting an order, decided to go on strike instead of to work[40]. The Tribunal considered that by not distinguishing between the reasons why an assignment was cancelled, the algorithm worked in practice to disadvantage striking workers. In other words, after the union had shown that the algorithm attached consequences to cancelling assignments (the variable), the existence of a possible link between that variable and union membership seemed sufficient to establish a presumption of discrimination[41]. Similarly, the Tribunal of Palermo held the work organisation system adopted by food delivery platform Foodinho, which awarded a series of benefits to the most productive riders and who were most available to work on weekends, indirectly discriminated against workers on various protected grounds (including age, disability and religious beliefs that prevented them from working on weekends)[42].

If a presumption of discrimination is established, the onus is on the employer to rebut the presumption. The employer can rebut the presumption by showing no actual correlation exists or that there is another, objective explanation underlying the use of the variable. It is clear that, if the litigant succeeds in establishing a link between a variable used and a protected ground, it will be difficult for the employer to rebut the presumption[43]. In the aforementioned Italian cases, both Deliveroo and Foodinho also failed to rebut the presumption of discrimination.

[39] Under Italian law, the protected ground '(religion or) belief' includes trade union membership.

[40] Trib. Bologna 31 December 2020 no. 2949, in *RIDL*, 2021, 2, pp. 175-195.

[41] See also Purificato, *Behind the scenes of Deliveroo's algorithm: the discriminatory effect of Frank's blindness*, in *ILLEJ*, 2021, 1, p. 184; Pietrogiovanni, *Deliveroo and Riders' Strikes: Discriminations in the Age of Algorithms*, in *ILECL*, 2021, 7, p. 320; Gaudio, *Litigating the Algorithmic Boss*, cit., p. 114.

[42] Trib. Palermo 17 November 2023 no. 9590; Gaudio, *Trade Unions, Strategic Litigation and Digital Labour Platforms: A Case-Study of the CGIL*, in *AmbDir*, 2024, 2, available at https://ssrn.com/abstract=4872370, p. 14.

[43] See also, and in more detail, *e.g.* Jovović, *cit.*, pp. 144-145; Hacker, *Teaching Fairness to Artificial Intelligence*, cit., pp. 1160-1170.

Route 2: identifying victims

Route 1 does not always offer a solution. For example, some employers use 'AI-based compensation support', which means that algorithms recommend the variables of the pay or bonus to be determined. It can be doubted whether the algorithm's recommendation is always a decision that affects the worker 'significantly', for instance if the recommendation is not decisive for the employer's judgement or further circumstances (variables) come into play[44]. If the algorithmic decision does not have significant consequences, then, under the GDPR, the employer does not have to provide insight into the operation of the algorithm[45]. In addition, even for experts it may not be possible to identify the variables used by some algorithms. This is particularly true for self-learning algorithms that are trained on the basis of previous human decisions, where any human biases may translate into the system and be difficult to identify and correct (the well-known 'black box')[46]. In such cases, the question arises whether, and, if so, how, litigants can prove a presumption of discrimination without an understanding of the algorithm and the variables used. One approach that may offer a solution is identifying victims[47]. The fact that one person from a protected group has been disadvantaged (for example, if a woman is denied a promotion) is usually insufficient to establish a presumption. There have to be additional circumstances[48]. Identifying multiple victims is one such circumstance, and this is where worker' organisations can play an important role. For example, in the *Danfoss* case of 1989 a trade union managed to prove by sampling

[44] For instance, in the Schufa case, the fact that the bank's conduct was 'primarily' determined by the probability value was a relevant factor (c. 48).

[45] In that case, however, it can be argued that it is not (the decision of) the algorithm but (only) the possible follow-up action of the employer that is discriminatory, making the evidentiary issue logically a different one. In this sense, there is some harmony between the GDPR and EU equal treatment law. *Cf.* Hacker, *A legal framework for AI training data - from first principles to the Artificial Intelligence Act*, in *LIT*, 2021, 2, pp. 271-274.

[46] *E.g.* Grozdanovski, *In search of effectiveness and fairness in proving algorithmic discrimination in EU law*, in *CMLR*, 2021, 58, pp. 99-136; Jovović, *cit.*, p. 144; Hacker, *Teaching Fairness to Artificial Intelligence*, cit., p. 1153.

[47] *Cf.* Aloisi, *cit.*, p. 61.

[48] In exceptional cases, this may be different; *e.g.* College voor de Rechten van de Mens 24 August 2023 no. 2023-92 (automated rejection while the applicant had only provided their name and age leads to a presumption of discrimination, although an additional relevant factor was that the vacancy had not been filled).

that the remuneration of female employees in the company was on average lower than that of men, shifting the burden of proof to the employer[49]. In addition, a lack of transparency is also indicative of discrimination, according to the aforementioned *Kelly* and *Meister* cases. The CJEU considered that, although EU equal treatment law does not provide a right of access, a refusal by the employer to give access to the details of the selected candidate is one of the circumstances the national court must take into account when assessing a presumption of discrimination. By extension, it can be argued that if a worker(s' organisation) can point to more than one victim from a protected group[50], supplemented by a refusal or inability of the employer to provide insight into the algorithm, a presumption of discrimination can be established[51].

Since the presumption in route 2 relies on identifying victims, the employer can rebut this presumption by pointing to other employees in the protected group who have not been disadvantaged by the decision-making at issue. In route 1, this option does not exist: in that case, the suspect variable has been identified and the employer has to prove, based on more comprehensive, statistical data, that this variable does not actually correlate with the protected ground. For this purpose, pointing to non-disadvantaged persons from the protected group is insufficient. If the employer succeeds in pointing to non-disadvantaged workers from the protected group in route 2, the burden of proof returns to the litigant who can then try to prove the alleged discrimination on the basis of the normal, national rules on evidence. In that case, due to the opacity of the algorithm, the possibility of proving discrimination seems to be out of the question. However, if the employer cannot point to other persons in the protected group, then the claim has a good chance of succeeding. It is difficult for an employer to prove that he did not discriminate if he cannot indicate on the basis of which

[49] CJEU 17 October 1989, C-109/88, ECLI:EU:C:1989:383 (*Danfoss*).

[50] Or a victim and someone outside the protected group who was not disadvantaged, such as a woman who was rejected for a job application and a man who was hired.

[51] *Cf.* Amsterdam Court of Appeal 7 October 2014, ECLI:NL:GHAMS:2014:4132 (unclear selection criteria combined with an existing disadvantage in the sector give rise to a presumption of discrimination). When taking this route, it seems irrelevant whether the litigant takes the position that there is *direct* or *indirect* discrimination. Establishing a presumption of discrimination involves the litigant proving facts that may suggest direct *or* indirect discrimination. In this context, the CJEU has so far not distinguished between direct and indirect discrimination.

considerations he came to a certain decision and cannot substantiate it with documentation. Logically, the same applies when not he, but an algorithm he uses makes the decision[52].

3. *Legal standing*

Section 3 outlined two routes to prove a presumption of algorithmic discrimination, showing that in both routes the collective aspect plays an important role. With this, however, it is not yet clear what possibilities workers' organisations have to bring an algorithmic discrimination case to court. In general, several roles for workers' organisations in (algorithmic) discrimination cases can be identified[53]. First, workers' organisations can act in support of individual claimants in court proceeding[54]. This is the dominant model in Germany[55], where the principle is that claimants can only advocate for the protection of their own individual rights and interests[56]. Second, workers' organisations can engage on behalf and with the consent of one or more specific workers, for example by means of power of attorney[57]. Third, in several Member States, including the Netherlands[58] and Italy[59], workers' organisations can act as independent litigants on behalf of a

[52] *Idem* Jovović, *cit.*, pp. 144-145.

[53] For a general framework regarding legal standing of representative entities, see De Jong et al., *cit.*; Amaro et al., *Collective Redress in the Member States of the European Union*, Study requested by the JURI committee of the European Parliament, 2018, pp. 27-31. Specifically with regard to discrimination: Chopin, Germaine, *A comparative analysis of non-discrimination law in Europe 2022*, European Commission, 2023, pp. 87-97.

[54] *E.g.* Amsterdam Court of Appeal 4 April 2023, ECLI:NL:GHAMS:2023:804 (*Ola*); ECLI:NL:GHAMS:2023:793 and ECLI:NL:GHAMS:2023:796 (*Uber*).

[55] *Allgemeines Gleichbehandlungsgesetz* ("AGG") of 18 August 2006, 23; Spiecker, Towfigh, *cit.*, p. 61; Herberger, Bielefeld, *cit.*; Chopin, Germaine, *cit.*, p. 88; Berghahn et al., *Evaluation des Allgemeinen Gleichbehandlungsgesetzes*, erstellt im Auftrag der Antidiskriminierungsstelle des Bundes, October 2016, available at https://www.antidiskriminierungsstelle.de/SharedDocs/forschungsprojekte/DE/AGG_Evaluation.html, pp. 142-144.

[56] *Grundgesetz* of 23 May 1949, 19(4); Heidbrink, *Comparative legal research on access to justice in public interest litigation. Germany*, attachment to De jong et al., *cit.*, pp. 86-99.

[57] For the Netherlands, see *Burgerlijk Wetboek* of 1 January 1992, art. 3:60. For Italy, see l. no. 215 of 9 July 2003, art. 5, c. 1; l. no. 216 of 9 July 2003, art. 5, c. 1; l. no. 67 of 1 March 2006, art. 4, c. 1.

[58] *Burgerlijk Wetboek*, art. 3:305a.

[59] L. no. 215/2003, art. 5, c. 3; l. no. 216/2003, art. 5, c. 3; l. no. 67/2006, art. 4, c. 3.

larger group. Such action, which has been described as "genuine collective redress"[60], can be divided into class action or group action (claims on behalf of an identified or undefined group of victims) and *actio popularis* (claims by organisations acting in the public interest, without a specific (group of) victim(s) to support or represent)[61]. As for Germany, equal treatment law also provides for an *actio popularis*, but – in line with the aforementioned principle – the thresholds are high, requiring, *inter alia*, a severe violation of equal treatment law[62]. As a result, this *actio popularis* is rarely used in practice[63].

However, as has been noted elsewhere, workers' organisations may have a clear interest in acting as independent litigants on behalf of a larger group, especially in algorithmic discrimination cases.[64] In discrimination cases, the added value of collective redress clearly exists if no victim has been identified (route 1), but can also be present if there are one or more victims (route 2). By not limiting the legal playing field to the representation of specific victims, positive effects can be achieved for a wider group of workers, and – in the words of the CJEU in the *Feryn* and *Associazone* cases – a socially inclusive labour market can be promoted on a larger scale[65]. This is particularly true for algorithmic discrimination, since algorithms by their very nature cover multiple groups of workers yet make it difficult, because of their opacity, to identify specific victims. By extension, the German model has been deemed unfit to offer effective protection against (algorithmic) discrimination[66].

[60] Gaudio, *Litigating the Algorithmic Boss*, cit., p. 100; Rasnača, *Special Issue Introduction: Collective Redress for the Enforcement of Labour Law*, in *ELLJ*, 2021, 4, p. 407; also *cf.* Ter haar, *The role of collective interest representatives in enforcing EU labour rights*, in *ELLJ*, 2024, 4, p. 658.

[61] Chopin, Germaine, *cit.*, p. 95.

[62] AGG, § 17(2). For the protected ground of disability, the thresholds are lower; AGG, § 23(4); Herberger, Bielefeld, *cit.*, p. 224.

[63] Spiecker, Towfigh, *cit.*, p. 61; Herberger, Bielefeld, *cit.*; Berghahn et al., *cit.*, pp. 142-144.

[64] Gaudio, *Litigating the Algorithmic Boss*, cit., pp. 100-103; Spiecker, Towfigh, *cit.*, pp. 61 and 79-87; Hakkarainen, *cit.*, p. 3 ff.

[65] See also Gaudio, *Litigating the Algorithmic Boss*, cit., p. 102; Nagy, *The European Collective Redress Debate After the European Commission's Recommendation. One Step Forward, Two Steps Back?*, in *MJECL*, 2015, 4, pp. 534-535; European Parliament Resolution of 18 May 2000, A5-0136/2000, pp. 21-22.

[66] For general criticism, see Herberger, Bielefeld, *cit.*; Berghahn et al., *cit.*, pp. 142-144. Specifically with regard to algorithmic discrimination: Spiecker, Towfigh, *cit.*, pp. 61 and 79-87.

Furthermore, a closer examination of the Dutch and Italian models suggests that genuine collective redress is indeed a viable path in addressing algorithmic discrimination[67]. In case of algorithmic decision-making, workers are usually affected homogenously by the same or analogous decision-making processes. Therefore, when this is in breach of their rights, there will be a similar harm resulting from the same illicit behaviour, which is a precondition for obtaining collective redress in both legal systems (and for collective redress in general)[68]. Furthermore, both legal systems allow litigation by organisations on behalf of an undefined group of claimants or in the public interest, provided that certain criteria are met. Like in other systems providing for collective redress[69], the most substantive criterion is that organisations must possess a certain degree of representativeness. In Italy, organisations may engage in proceedings in support or on behalf of victims if they are included in a list approved by decree of the Minister of Labour and Social Policies and the Minister for Equal Opportunities[70]. However, as is illustrated by the abovementioned *Deliveroo* and *Foodinho* cases (where this was not an issue), this limitation does not apply to trade unions: they have legal standing to engage on behalf or in support of victims of discrimination on all grounds[71]. Similarly, in the Netherlands the requirement of representativeness is primarily intended to prevent claims organisations with commercial motives from initiating proceedings. As a result, workers' organisations generally meet this standard. This goes for established trade unions that defend various employee interests, and the same can be said for associations who have as their specific goal to combat discrimination, such as the *Bureau Clara Wichmann*[72].

Thus, while the potential for genuine collective redress in cases of algorithmic discrimination is limited in Germany, it appears to be a viable option in both the Netherlands and Italy. It is important to recognise that this divergence is enabled by the underlying EU legal framework. EU equal

[67] For a similar conclusion, not linked to a specific national legal system, see Gaudio, *Litigating the Algorithmic Boss*, cit., p. 101.

[68] Van Schadewijk, *cit.*, pp. 16-17; Gaudio, *Litigating the Algorithmic Boss*, cit., p. 101.

[69] De Jong et al., *cit.*, pp. 52-56.

[70] L. no. 215/2003, art. 5, c. 2; l. no. 216/2003, art. 5, c. 2; l. no. 67/2006, art. 4, c. 1.

[71] Chopin, Germaine, *cit.*, p. 88.

[72] *Burgerlijk Wetboek*, art. 3:305a(2); van Schadewijk, *cit.*, pp. 15-16; Bij De Vaate, Özkul, *Collectieve handhaving door de vakbonden: mogelijkheden en uitdagingen*, in *TRA*, 2024, 5, pp. 19-20.

treatment law allows, but does not force Member States to give organisations legal standing to act as independent litigants on behalf of a larger group. Despite attempts of the European Commission and the European Parliament to include such an obligation in the EU equal treatment directives in the late 1990s, a number of Member States did not consider it desirable to allow workers' organisations to bring discrimination cases independently and without a victim's consent[73]. As a result, although the Member States are obliged to grant legal standing to organisations, this obligation only exists if and to the extent that organisations (1) have a legitimate interest in complying with equal treatment law based on criteria in national law (*e.g.* because they represent such interests according to their articles of association), and (2) are acting on behalf or in support of, and with the consent of, a victim[74]. The wording 'on behalf or in support of' makes clear that Member States are not required to grant workers' organisations independent legal standing and, therefore, enable genuine collective redress. Furthermore, the requirement of a victim's consent implies that a victim must have been identified. This means that, although discrimination without an identifiable or identified victim – the aforementioned route 1 – is prohibited under EU equal treatment law, that same legislation does not require enforcement if such discrimination occurs[75]. Ultimately, this helps explain why some Member States – such as the Netherlands and Italy – have used the discretionary space offered, thus making genuine collective redress in algorithmic discrimination cases possible, whereas others – such as Germany – have opted for a more restrictive approach that is grounded in national legal traditions.

A final comment pertaining to the legal standing of workers' organisations in algorithmic discrimination cases can be made in relation to the GDPR. In section 3, it was discussed that the right of access under the GDPR is an important means to gain insight into the algorithm and the variables used[76]. Although the GDPR, like the EU equal treatment direc-

[73] Lahuerta, *cit.*, p. 802.

[74] Dir. 2000/43/EC, art. 7(2); Dir. 2000/78/EC, art. 9(2); Dir. 2006/54/EC, art. 17(2).

[75] CJEU 23 April 2020, C-507/18, ECLI:EU:C:2020:289 (*Associazone*); CJEU 10 July 2008, C-54/07, ECLI:EU:C:2008:397 (*Feryn*). For critical comments, see: Dorssemont, *Collective Actors Enforcing EU Labour Law*, in Rasnača et al. (eds.), *Effective Enforcement of EU Labour Law*, Bloomsbury Publishing, 2022, p. 375; Lahuerta, *cit.*

[76] The right of access can also be used to demonstrate the opacity of the algorithm,

tives, allows Member States to enable the rights laid down therein to be exercised by organisations by means of collective redress and this is dealt with in different manners in the Member States[77], this is not an obvious route for exercising the right of access in algorithmic discrimination cases. Exercising the right of access in algorithmic discrimination cases by means of collective redress would mean that the workers' organisation first initiates legal proceedings to gain insight into the algorithm, and then initiates a second legal proceeding to demonstrate a presumption of discrimination. After all, the workers' organisation needs the former to do the latter and, depending on the results in the first legal proceeding, chooses to follow route 1 or 2. This process strategy does not seem feasible for various reasons. Instead, and although this does entail more risk for the workers (who must identify themselves by name to the employer), it seems more logical for the workers' organisation to consult with the workers of the employer and for them to submit a request for access to the data to the employer, if necessary via the court, on the basis of the GDPR. Put differently, consultation and cooperation with the workers concerned, and not collective redress, currently seems to be the most effective way to gain insight into the algorithm.

4. *The AI Act and PWD*

What do the AI Act and PWD add to the legal framework discussed above? The AI Act is the EU's digitalisation flagship and is designed to counter the risks associated with the deployment of AI systems, including bias and discrimination. Like the GDPR, the AI Act complements equal treatment legislation by imposing various obligations on providers and users of AI systems that should, *inter alia*, prevent bias and discrimination[78].

which was previously mentioned to play a role in route 2, but even without the right of access the workers' organisation can achieve this result by invoking the *Kelly* and *Meister* cases. However, the presence of a statutory right to information may lead to a presumption of discrimination being assumed more readily when following route 2; see section 5 *infra*.

[77] GDPR, art. 80(2). In the Netherlands, collective redress for data protection breaches is governed by the abovementioned *Burgerlijk Wetboek*, art. 3:305a. In Italy, qualified consumer bodies and public enforcement bodies are empowered to bring representative actions for data protection breaches following law no. 28 of 25 June 2023, art. 140-ter ff. In Germany, there is no mechanism for collective redress in case of data protection violations.

[78] AI Act, art. 9 (mandatory risk management system), 10 (quality requirements for data-

Similarly, in addition to the well-known qualification issue, the PWD addresses specific problems that the use of algorithmic management poses for platform workers[79]. In doing so, the AI Act and PWD are an important addition to the GDPR, particularly since – unlike the GDPR – they do not focus on the processing of individual personal data but on the operation of the algorithm as a whole[80].

Importantly, both legislative instruments contain different information rights that complement the right of access under the GDPR[81]. Article 26(7) AI Act requires employers, before implementing a high-risk AI system in the workplace, to inform the workers concerned and their representatives of the use of the AI system[82]. AI systems used for personnel decisions, such as algorithms that see to recruitment or compensation, in principle qualify as high risk[83]. In addition, workers are entitled to clear and substantive explanations of the role of these AI systems on personnel decisions affecting them[84]. The PWD, in turn, contains several information obligations that address the use of algorithmic management by work platforms. A platform must: assess the impact of the processing of personal data by automated monitoring and automated decision-making and submit the assessment to

sets), 11 (documentation requirement bias tests), 15 (transparency requirement) and 27 (fundamental rights test).

[79] PWD, artt. 7 (further restrictions on automated decision-making in the workplace, including an unqualified ban on processing personal data relating to a protected ground), 8 (mandatory impact assessment), 9 (transparency obligation) and 10 (mandatory human monitoring).

[80] See also, in relation to the PWD, Otto, *A step towards digital self- & co-determination in the context of algorithmic management systems*, in *ILLEJ*, 2022, 1, p. 60.

[81] On this, see also Spinelli, *Industrial Relations Practices in the Digital Transition: What Role for the Social Partners?*, in this journal, 2024, 2, pp. 470-472.

[82] This provision came about in response to an amendment by the European Parliament (P9 TA(2023)0236, Amendment 408). The original lack of a role for worker representation was widely criticised; *e.g.* ETUC, *Commission's proposal for a regulation on Artificial Intelligence fails to address the workplace dimension*, 17 April 2025, available at https://etuclex.etuc.org/european-commission-proposal-regulation-artificial-intelligence; Doellgast, *Strengthening Social Regulation in the Digital Economy: Comparative Findings from the ICT Industry*, in *LInd*, 2023, 1, pp. 9-10; De Stefano, Taes, *Algorithmic management and collective bargaining*, in *FB*, 2021, 10, pp. 10-11.

[83] AI Act, preamble 57, art. 6(2) and Annex III under 4; Hacker, *A legal framework*, *cit.*, p. 189. This may be different, for example, if the system is only intended to perform a limited procedural task or only performs a preparatory act; AI Act, preamble 53 and art. 6(3). It can be argued that the latter is not the case if the algorithm makes a 'decision' within the meaning of the GDPR (see section 3).

[84] AI Act, art. 86.

the workers' representatives[85]; provide platform workers and their representatives with detailed information on the use of automated monitoring and automated decision-making[86]; evaluate together with workers' representatives the impact of individual decisions resulting from automated surveillance and automated decision-making and submit this evaluation to them[87], and; inform and consult workers' representatives on the introduction or substantial modification of the use of automated surveillance and automated decision-making, for which purpose workers' representatives may be assisted by an expert[88].

Although the AI Act and PWD do not explicitly link the new information rights to discrimination, the aforementioned rights put workers(s' organisations) in a better position to verify whether the algorithm uses variables related to a protected ground. After all, the right to information is extended to other subjects than just automated decision-making, and in case of automated decision-making the employer will have to provide more detailed information. As a result, it is likely that route 1, which depends on getting insight in the algorithm, can be followed more frequently. In addition, it is of great importance that the AI Act and PWD grant information rights to workers' representatives *directly*. This is unlike the GDPR which, as discussed in section 3, grants the right of access to individual data subjects only. This is an important step forward for workers' organisations seeking to independently stand up against algorithmic discrimination via route 1. This becomes particularly evident when examining Italian law, which since 2022 has established detailed information requirements to be provided not only to individual workers but also to trade unions[89]. This has swiftly resulted in several cases where trade unions have directly enforced their rights[90] to access data and information about the algorithm[91].

[85] PWD, art. 8; GDPR, art. 35.

[86] PWD, art. 9. This includes, for example, information about decisions supported or made by the algorithm, the possible consequences for the worker (such as dismissal) and the underlying reasons.

[87] PWD, art. 10.

[88] PWD, art. 13.

[89] L. no. 104 of 27 June 2022.

[90] On the basis of law no. 300 of 20 May 1970, art. 28.

[91] Trib. Torino 5 August 2023, in *ADL* 2024, 1, p. 111 ff.; Trib. Palermo 20 June 2023, in *DeJure (IUS Lavoro)*, 26 July 2023; Trib. Palermo 3 April 2023 no. 14491, in *ADL*, 2023, 5, pp. 1004-1019; Gaudio, *Trade Unions, Strategic Litigation*, cit., pp. 15-19.

However, the bestowment of information rights on workers' representatives in the AI Act and PWD does raise the important question of who are meant by "workers' representatives" in the AI Act and PWD. The AI Act does not contain a definition. The PWD defines workers' representatives as representatives of platform workers, such as trade unions and representatives who are freely elected by the platform workers, in accordance with national law and practice[92]. For both legal instruments, the approach mirrors that of other EU directives regulating information and consultation, where the European legislator, because of different national traditions, has left the designation of the competent workers' representatives to the discretion of the Member States[93]. This means that it is up to the Member States to determine which workers' representatives are entitled to the information rights under the AI Act and PWD. There is, however, an important caveat. Both the AI Act and PWD contain a reference to Directive 2002/14/EC (establishing a general framework for informing and consulting employees). It concerns the right to information in Article 26(7) AI Act (concerning the introduction of a high risk AI system in the workplace) and Article 13 PWD (concerning the introduction or substantial change in the use of automated surveillance and automated decision-making)[94]. With regard to the AI Act, the reference aims to clarify that the obligation to inform (which entails an obligation to disclose) is without prejudice to any more far-reaching information and consultation obligations arising under Directive 2002/14/EC. With regard to the PWD, the reference has a more far-reaching meaning and makes clear that, per definition, an information and consultation obligation exists within the meaning of Directive 2002/14/EC[95]. In both cases, the reference to Directive 2002/14/EC does not require Member States to align with the competent workers' representatives within the meaning of Directive 2002/14/EC, but such an alignment does seem logical[96]. At the

[92] PWD, preamble 22 and art. 2(1)(f).

[93] See, *inter alia*, Dir. 2002/14/EC of 11 March 2002, art. 2(e); Dir. 98/59/EC of 20 July 1998, art. 1(1)(b); Barnard, *cit.*, pp. 686-687; Jaspers, Lorber, *Workers' Participation in Business Matters*, in Jaspers, Pennings, Peters (eds.), *cit.*, pp. 534-537.

[94] AI Act, preamble 92 and art. 26(7); PWD, art. 13.

[95] Originally, the same applied to the AI Act, but the reference to Directive 2002/14/EC was later moved to the Preamble. As a result, the introduction of a high-risk AI system in the workplace does not necessarily entail an obligation to inform and consult within the meaning Directive 2002/14/EC, but this must be assessed on a case-by-case basis.

[96] van Schadewijk, *cit.*, p. 21; De Jager, *De Europese Artificiële Intelligentie-Verordening*

same time, however, it can be doubted whether this is the best course of action. In several Member States, including Italy, Germany and the Netherlands, the information and consultation rights of Directive 2002/14/EC are exercised by works councils (*rappresentanze sindacali aziendali* and *rappresentanze sindacali unitarie*; *Betriebsrat*; *ondernemingsraad*). The link is not binding: Directive 2002/14/EC, too, leaves the designation of the workers' representatives to the Member States and other Member States refer not (only) to works councils but (also) to other bodies such as trade unions[97]. By extension, for the subjects regulated by the AI Act and PWD it is not self-evident to grant the information rights to works councils (only)[98]. It can be argued this is particularly true for the ability of workers' organisations to litigate algorithmic discrimination. Although decisions regarding the use of algorithmic management will often be subject to information and consultation rights of works councils – meaning they can play an important role in preventing algorithmic discrimination – works councils may lack legal standing to initiate legal proceedings if and when algorithmic discrimination occurs. This is the case in Italy and the Netherlands[99]. Interestingly, the situation is different in Germany, where works councils have legal standing to start the *actio popularis* laid down in German equal treatment law[100]. However, as was discussed in section 3, this particular *actio popularis* is limited in scope and usage. More generally speaking, putting forward works

en algoritmen op het werk: voldoende future-proof?, in *TRA*, 2024, 5, p. 7. To the author's best knowledge, no official information on this is currently available in the Netherlands, Germany or Italy.

[97] For an overview, see SEC(2008) 334 final, par. 3.2(e).

[98] Given the complex relationship between works councils and platform work, this is particularly true for the PWD; Aloisi, Rainone, Countouris, *An unfinished task? Matching the Platform Work Directive with the EU and international "social acquis"*, ILO, 2023, pp. 20-24; Veale, Silverman, Binns, *Fortifying the algorithmic management provisions in the proposed Platform Work Directive*, in *ELLJ*, 2023, 2, pp. 321-326. According to Aloisi, Potocka, Sionek, *De-gigging the labor market? An analysis of the "algorithmic management" provisions in the proposed Platform Work Directive*, in *ILLEJ*, 2022, 1, p. 41, "workers' representatives" refers primarily to trade unions and the lack of an explicit definition is primarily intended to not unduly limit the scope of the PWD.

[99] For Italy, the lack of legal standing stems from l. no. 300/1970, art. 28. For the Netherlands, see Dutch Supreme Court 3 December 1993, ECLI:NL:HR:1993:ZC1163; Van Schadewijk, *cit.*, p. 22. Dutch works councils can, however, lodge a non-judicial complaint before the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*); *Wet College voor de rechten van de mens* of 17 December 2011, art. 10(2)(d).

[100] AGG, § 17(2).

councils as enforcement actors can be said to be problematic for different reasons, such as their dual purpose (representing workers' interests while also contributing to the effective functioning and decision-making of the organisation as a whole) and associated issues related to independence and equality, as well as limited (legal) knowledge of works councils members[101]. By extension, if national legislators implementing the AI Act and PWD wish to strengthen the synergy with equal treatment law, more specifically the possibilities for workers' organisations to litigate algorithmic discrimination, it may not be the best course of action to grant the information rights of the AI Act and PWD to works councils (only).

The follow-up question is, then, what or what kind(s) of workers' organisation(s) should (also) be granted the information rights under the AI Act and PWD. It goes without saying that employers should not be required to share information about algorithms – which are usually company secrets[102] – with all sorts of interest groups. It seems logical to attach certain national criteria which are related, for example, to the independence and representativeness of the organisation. As a potential example, the aforementioned list of approved organisations in Italy comes to mind. Through such an approach, national legislators can ensure that certain workers' organisations with legal standing are granted the information rights, without requiring to circulate sensitive company information unnecessarily. Organisations that do not meet the criteria retain their current options for gaining insight into the algorithm, such as involving the workers concerned or, if national law provides for this possibility[103], filing a complaint with a public body protecting fundamental rights. The issue also provides an impetus for further cooperation between works councils, trade unions and other organisations that stand up against discrimination.

With regard to trade unions, their position can also be strengthened through collective agreements. Like the GDPR, both the AI Act and PWD acknowledge the importance of collective agreements in regulating algorithms at work, allowing further rules to be laid down therein[104]. Throughout the EU

[101] Van Schadewijk, *cit.*, p. 22; Berghahn et al., *cit.*, p. 143.

[102] On this aspect, see *e.g.* Kullmann, *cit.*, pp. 52-53; PWD, art. 21(2).

[103] Of the three researched Member States, only the Netherlands provides for this possibility with the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*); see also Chopin, Germaine, *cit.*, pp. 84-85.

[104] GDPR, art. 88; AI Act, art. 2(11); PWD, art. 26(2). See also European Social Partners'

(perhaps even the world), arrangements in collective agreements regarding the use of algorithms at work, including specific information rights, are slowly beginning to emerge[105]. By extension, such arrangements can also improve trade unions' possibilities to take legal action against algorithmic discrimination.

Finally, it is important to note that Article 77 AI Act grants bodies charged with supervising or enforcing fundamental rights, which can be assumed to include courts, the power to order information concerning the algorithm from the employer. The PWD provides for something similar[106]. In most legal systems, courts and other public bodies charged with protecting fundamental rights will already have the possibility to order information from the employer. At the same time, the fact that they can order the employer to provide information does not alter the fact that, as is clear from the *Kelly* and *Meister* cases, a lack of transparency in itself is insufficient to establish a presumption of discrimination. However, it cannot be ruled out that, now that we are dealing with the enforcement of a statutory EU right to request information, an employer's refusal or failure to provide the required information may more readily give rise to a presumption of discrimination. This could be helpful, for example, if the workers' organisation follows route 2 but can only identify one alleged victim. In this case, it could be argued that even though there is only one victim, the circumstance that the employer is not complying with his legal duty to provide information is sufficient to establish a presumption of discrimination. If this is correct, then the AI Act and PWD are relevant not only for route 1, but also for route 2.

5. *Conclusion*

Algorithmic discrimination is one of the core challenges of digitalisation. Enforcement by workers' organisations is a promising means to take

Autonomous Framework Agreement on Digitalisation (22 June 2020), available at https://www.etuc.org/en/document/eu-social-partners-agreementdigitalisation.

[105] See, *e.g.*, TUC, *Dignity at work and the AI revolution: a TUC manifesto*, 2021, available at https://www.tuc.org.uk/sites/default/files/2021-03/The_AI_Revolution_20121_Manifesto_AW.pdf; Aranguiz, *Spain's platform workers win algorithm transparency*, 18 March 2021, https://www.socialeurope.eu/spains-platform-workers-win-algorithm-transparency; Dagnino, Armaroli, *A Seat at the Table: Negotiating Data Processing in the Workplace: A National Case Study and Comparative Insights*, in *CLLPJ*, 2019, 1, pp. 173-196.

[106] PWD, art. 21(1).

up the challenge. While proving algorithmic discrimination is – and will remain to be – a difficult exercise, EU and national law offer workers' organisations several tools to increase the chances of success. To this end, the right to information about the functioning of algorithms is essential. This right does not follow from EU equal treatment law, but is enshrined in the GDPR and, to a more far-reaching extent, the AI Act and PWD. This legislation is partly, but not primarily, aimed at countering and providing remedies against algorithmic discrimination. As a result, as highlighted by the diffuse notion of "workers' representatives", a lack of alignment with the effective enforcement of equal treatment law lies in wait[107]. The same applies to the legal standing of workers' organisations to act as independent litigants, which is not governed by EU law but is left to the discretion of the Member States. Consequently, by having to define the notion of "workers' representatives" in the AI Act and PWD, and by regulating the legal standing of workers' organisations, Member States currently play an essential role in either enabling or hindering collective redress against algorithmic discrimination. Collective agreements can also play an important role in this process. After all, why make things more difficult when they can be addressed collaboratively?

[107] For similar criticism regarding the lack of synergy between equal treatment law and the AI Act, see Adams-Prassl, *Regulating algorithms at work: Lessons for a "European approach to artificial intelligence"*, in *ELLJ*, 2022, 1, pp. 30-50.

Abstract

This contribution aims to analyse what the recent AI Act and Platform Work Directive offer to workers' organisations striving to tackle algorithmic discrimination through litigation. How can workers' organisations prove algorithmic discrimination, under what circumstances do they have legal standing to bring a discrimination claim, and what additions do to the AI Act and Platform Work Directive provide in this context? Focusing on EU, Dutch, German and Italian law, this contribution addresses these questions.

Keywords

Digitalisation, Collective enforcement, Algorithmic discrimination, AI Act, Platform Work Directive.

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abbreviations

The list of abbreviations used in this journal can be consulted on the website www.ddllmm.eu/dlm-int/.

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