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Modern Forms of Work

A European Comparative Study

edited by

Stefano Bellomo and Fabrizio Ferraro

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In copertina: Yulia Ryzhenko, *Dettaglio di un fregio antico romano in rilievo*.

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Foreword

This collective work provides the opportunity to develop a choral reflection on how the metamorphosis of the productive system, and in particular the digital revolution that is spreading, are profoundly transforming the world of work.

The idea of giving shape to a collective volume stems from the fruitful and constructive dialogue established during the Meeting of the European sub-section ELLYS, European Labour Law Young Scholars, now in its 4th edition, held in Rome, July 3rd-5th. The essays are in fact re-workings of the reports held by researchers who decided to present a paper, previously accepted by the scientific committee of the Meeting.

The title of the book *"Modern forms of work. A European comparative study"* evokes the intent to encourage a comparative reflection focused on modern work, through an observation capable of giving account of the different European and non-European points of view.

The prospects for reflection concern the main areas of labour law, namely the employment relationships law, trade union law and social security law. For reasons of consistency, it was decided to divide the writings into three subgroups.

The first set of essays contains national reports on modern forms of work, intended to merge into a broader and more extensive research that will involve many other European countries. The national legal systems of Poland, Slovenia, Spain and Portugal are hereby analysed. The authors of the reports give account of the different regulatory frameworks provided in each Country and of the legal condition of platform workers. The analysis highlights interesting parallels and common perspectives.

The second group contains some reflections regarding Critical Issues on Digitalization, Platforms and Algorithms. It deals with the different facets of the galaxy of digital work. The contributions are mostly focused on work through a digital platform, a crucial topic in the debate on the qualification of the fundamental work types and on the current breadth of the "weak or economically dependent work" area. Its increasingly widespread diffusion has gone hand in hand with the surfacing of new abusive practices, that are characterized by the intermediation of discontinuous and precarious work services, as well as by the creation of alternative systems of meeting supply and demand where there are not workers and employers, but relations without formal schemes and regulatory frames are established (P. Tullini, *C'è lavoro sul web?*, *Labour&LawIssues*, 2015; M. Weiss, *La platform economy e le principali sfide per il diritto del lavoro*, *Diritto delle relazioni industriali*, 2018, n. 3, 715 ss.; A. Perulli (ed.), *Lavoro autonomo e capitalismo delle piattaforme*, CEDAM-WKI, 2018). Specifically, within the latter, the workers operate in a highly competitive context and in fact assume an evident economic risk, resulting in a more marked wage dumping.

Also other issues are examined, strictly related to digital work, such as the role of blockchain systems in the employment relationship and the (subordinate) smart working, which in many countries represented an opportunity for job continuity to the benefit not only of companies, but also of the employees themselves. Smart working is already changing the characteristics of the employment relationship. In short, it involves the transition from a strict submission of work energies to the employer, to a series of performances aimed at specific goals and to the consequent recognition of a wider autonomy for the worker. More generally, it is a way of carrying out work that is functional to achieving a better work-life balance, with reference to both the workplace and working time. Sometimes it can also enhance productivity. During the Covid-19 pandemic emergency, smart working turned out as an effective tool in order to contain the spread of the coronavirus. Scholars and legislators emphasize the value of smart working as a true organizational measure to be used in order to strengthen the workplace safety.

The third group of essays is inserted into the section entitled "*New Balances and Workers' Rights in the Digital Era*". These writings deal with various issues related to the wider matter of digital work. For example,

the concept of worker in EU Law is examined, in order to understand if it can represent a "chance or hindrance" in the finding of a regulation for modern forms of work. There are also reflections on issues relating to social security, jurisprudential qualification, the role of the social partners and trade unions, as well as smart working as a new frontier of well-being. An interesting parallel is also proposed with the Japanese system, with reference to the equal pay in telework.

About industrial relations, the spread of platforms and smart working can represent a barrier (C. Crouch, *The decline of collective industrial relations in contemporary capitalism, Stato e mercato*, 2012) or an opportunity. It is a barrier when it causes the individualisation of digital workers, in contrast with the synthesis of collective interests to which unions' representation aims. On the other hand, it is an opportunity if we consider the spread, at European and trans-national level, of innovative trade union actions. Anyway, collective actions and legal interventions in some EU countries for the protection of workers on demand via app are significant.

Through the reflections of the authors, it is understood that digital work represents an unprecedented challenge for interpreters as for legislators, in search of solutions capable of accounting for specific protection needs of people who work through remote connection tools, even beyond the traditional categories, but without sacrificing too complex market balances that bring, on the one hand, a new set of problems and, on the other hand, additional opportunities for development, growth, wealth and employment.

The writings, despite the differences of approaches and methods, reveal the existence of a dense and inexhaustible dialogue between young scholars, at European and extra-European level. The analysis of new forms of work – the offspring of transnational processes of globalization and technologization – forms a fertile ground for experimenting a transnational dialogue on which young researchers can practice with excellent results, as this small volume confirms.

We would like to thank all the participants to the Meeting and those who decided to send the reworking of their papers. Special thanks also go to Dario Calderara for his help in the revision and composition of the volume.

Stefano Bellomo
Fabrizio Ferraro

SECTION I

National Reports on Modern Forms of Work

1. Report on the State of Polish Legislation of Modern Forms of Work

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Summary: 1. Labour market in Poland – an overview. – 2. Undeclared work. – 3. Social partners and collective labour law. – 4. Temporary agency workers (TAW). – 5. New Labour Codes. – 6. Lex Uber. – 7. Civil law contracts misuse and social insurance differentiation.– 8. Conclusion.

Labour market in Poland – an overview

Poland in the recent years has been facing a period of economic growth, which brought a reduced percentage of unemployment in the labour market. The current unemployment rate in Poland (data from April 2019) is 3,7% compared to EU (28) 6,4%[1].

According to Polish legislation the main three forms of conducting work are:

- establishing an employment relationship (regulated by Labour Code)
- civil law contracts (regulated by Civil Code)
- self-employment (regulated by a set of acts referred to as "Constitution for Business"[2]).

The standard employment relationship in Poland is regulated by labour law. According to the article 22 of the Polish Labour Code[3] "§ 1. By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under

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1 https://ec.europa.eu/eurostat/web/lfs/visualisations, (accessed 20.06.2019).

2 https://www.gov.pl/web/przedsiebiorczosc-technologia/konstytucja-biznesu, (accessed 20.06.2019).

3 Act from 26th June of 1974 –Labour Code (Journal of Laws from 2019 item 1040 with amendments).

his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration". In the article 2 of the Labour Code an employee is defined as a person employed on the basis of an employment contract, appointment, election, nomination or cooperative contract of employment.

Employment in the form of telework is also regulated by the Labour Code in its chapter IIb. According to the art.67[5] of the Labour Code a telework is defined as "§ 1. Work may be performed away from the premises of an employer, on a regular basis, by means of informationand communications technologies (ICTs) in the meaning of the provisions on rendering services by electronicmeans (telework)" while "a teleworker is any person carrying out telework under the conditions specified in § 1 and presenting the effects of work to an employer, in particular by means of information and communications technologies (ICTs)".

The main types of non-standard employment in Poland are considered: temporary employment contracts, civil law contracts and employment through temporary work agencies (regulated by a separate act[4] to whom though apply certain rules of the Labour Code)[5].

The main difficulties that occur in Polish labour market, as indicated in the PRECARIR report, contain of a strong dualisation with different forms of precarious work, that manifest themselves with a high percentage of temporary employment contracts and civil law contracts being main source of income, and a high share of employees earning less than a minimum wage[6].

Reforms of the labour market in Poland that have been implemented in the last years have caused a significant growth of non-standard employment (such as temporary and civil law contracts). In fact, according to EUROSTAT in 2015, Poland had the highest share of temporary workers among EU Member States (28%), which improved

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[4] Act from 9th July of 2003 on the Employment of Temporary Workers (Journal of Laws from2018 item 594 with amendments).

[5] P. Lewandowski, I. Magda, *Temporary employment, unemployment and employment protection legislation in Poland,* in: *Myths of employment deregulation: how it neither creates jobs nor reduces labour market segmentation*, ed. A. Piasna, M. Myant, Brussels 2017, p. 144, https://www.etui.org/Publications2/Books/Myths-of-employment-deregulation-how-it-neither-creates-jobs-nor-reduces-labour-market-segmentation/Piotr-Lewandowski-and-Iga-Magda-Chapter-7-Temporary-employment-unemployment-and-employment-protection-legislation-in-Poland, (accessed 21.06.2019).

[6] M. Maciejewska, A. Mrozowicki, *Poland: country report*, https://www.socjologia.uni.wroc.pl/attachments/Poland_national-report_PRECARIR_2016_2017-03-02_21-16-46.pdf, (accessed 20.06.2019).

slightly since then – in 2018 Poland with 19,5% of temporary workers was being 3rd after Spain (22,7%) and Montenegro (26,1%) compared to EU(28) 12,1%.[7] The reasons for having a temporary contract indicated by the temporary workers in Poland in the survey shows that only 5,4% of temporary workers did not want a permanent job, while 52,8 % responded they could not find a permanent job[8].

Another problem is the high number of people working on the basis of civil law contracts which are not regulated by the labour law (called "junk contracts" because of the weak protection of the worker and their abusive use on the labour market)[9]. According to GUS (General Statistical Office) in 2014 there was about 1 million of workers that performed their work based on different civil law contracts[10].For the majority of them it was the only paid work in that time with no other form of employment based on labour law contracts and the type of contract was not of their own choice[11].

Moreover, Poland belongs to those EU countries that have the highest number of low-wage earners in proportion to total number of employees – the latest available data from 2014 shows that the percentage is 23,56% for Poland (after Montenegro, Latvia, Macedonia, Romania and Lithuania) compared to 17,19% in EU (28)[12].

Last but not least, work in the Polish labour market can be performed by self-employed, often referred to as freelancers. Their professional activity is not regulated by the Labour Code but a set of separate acts. They are individual entrepreneurs and gain no protection

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7 https://ec.europa.eu/eurostat/tgm/graph.do?tab=graph&plugin=1&pcode=tps00073 &language=en&toolbox=d ata, (accessed20.06.2019).

8 http://appsso.eurostat.ec.europa.eu/nui/submitView TableAction.do, (accessed20. 06.2019).

9 https://www.etui.org/News/The-struggle-against-junk-contracts-in-Poland, (accessed20.06.2019).

10 A. Mrozowicki, M. Maciejewska, *Bricolageunionism. Unions' innovative responses to the problems of precarious work in Poland*, in: M. Bernaciak and M. Kahancová, Innovative union practices in Central-Eastern Europe, ETUI, 2017, p. 139, https://www.etui.org/Publications2/Books/Innovative-union-practices-in-Central-Eastern-Europe, (accessed20.06.2019).

11 *Pracujący w nietypowych formach zatrudnienia. Notatka informacyjna z 27.01.2016*, Główny Urząd Statystyczny, Warszawa 2016, https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-bezrobotni-bierni-zawodowo-wg-bael/pracujacy-w-nietypowych-formach-zatrudnienia,21,1.html, (accessed20.06.2019).

12 http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do, (accessed 20.06.2019).

from labour law regulations. According to Freelancer Report[13]over 25% of them work in the "grey zone" with unclear legal status or no legal contract whatsoever. Their working time is often longer than 40h/week and they gain lower income than the minimum wage regulated by law for employees and some of the civil law contractors.

The 4.0 industrial revolution has strengthen already existing problems of precarious working conditions in the Polish labour market as indicated above. The problems have increased owing to the high global competition and tendency to reduce risks and responsibility of the companies in the gig economy. In the last years non-standard employment has become more popular, often used as a substitute of a traditional employment contract. Labor costs, dynamic changes in the labour market and labour regulations led to a situation in which workers in order to conduct work activity are being forced by companies to conclude a civil law contract instead of an employment relationship or even to register as self-employed which lets the employer reduce personnel employment costs[14]. An overuse of B2B model of work performance is becoming an increasing problem. On the contrary of civil law contracts that have recently been under interest and growing protection of labour and social security law, self-employed individuals especially in case of economic dependence from the company, gain no type of protection.

Furthermore, platform work has shown that the traditional concept of subordination having time and place of work as its defining elements can no longer suit the reality of 4.0 labour market, when the provision of work has become time and space independent.

New technologies have significantly changed the forms of control over employees, putting at risk their right to privacy and work-life balance. Although, coming into force of the GDPR and its data protection principles have brought significant amendments to the Polish regulation of monitoring of workers by the employer, still there are uncertainties on the critical aspects considering its range, technologies and consequences both for privacy, health and protection of workers' dignity and other basic rights.

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[13] The "Freelancers in Poland 2018" survey was conducted by the platform useme.eu on a group of 1002 respondents using the questionnaire method available on the website, https://useme.eu/pl/blog/raport-freelancing-w-polsce-edycja-2018,98/, (accessed 21.06.2019).

[14] M. Wojciuk, *Labor taxation versus employment models in Poland*, "OPTIMUM. ECONOMIC STUDIES" No 2 (92) 2018, p. 139.

Undeclared work

According to the Polish Labour Code (art. 29) an employment contract should be established in writing. But in a contrary case when it has not been stipulated in a written form, there is an obligation of the employer to provide the employee with a written statement of the settlements of the employment relationship at the latest on the date when the employee commences work. In practice, as indicated by the State Labour Inspectorate, during a control procedure an employer could easily avoid penalty in case of failure to fulfill the obligation, by simply claiming that it was the first day of the employee who has just commenced the work and that the employer according to legal regulation had time to prepare the written contract till the end of the "first" day[15].

In order to fight against undeclared employment an amendment to Polish Labour Code has been approved obliging employers to deliver to the employee a written form of employment contract before the actual start of the work (and not at the first day of work as it was regulated before)[16].

Social partners and collective labour law

Poland's collective labour agreements cover only a small part of employees and the main characteristic of collective labour relations in Poland is a low level of unionization of enterprises and a low level of participation of employees especially in private sector. A deep crisis of the social dialogue has been observed in recent years and Polish legal system's reaction was a high level of regulation[17].

Although, the crisis of the social dialogue is a fact, trade unions are undertaking different social projects as a reaction to the problems indicated above.

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[15] S. Clauwaert, I. Schömann, N. Buetten, Z. Rasnača, *The crisis and national labour law reforms: a mapping exercise. Country report: Poland*,2016, p. 6, https://www.etui.org/ReformsWatch/Poland#The%20state%20of%20labour%20market%20reforms (accessed 22.06.2019).

[16] Act of 13th May 2016 amending the Act – LabourCode(Journal of Laws from 2016 item 910).

[17] D. Skupień, M. Łaga, Ł. Pisarczyk, *Polish Labour and Social Security Law: The Impact of the Economic Crisis and Demographic Problems*, "Hungarian Labour Law E-Journal" 2016/1, p. 1-2.

An example of a successful campaign conducted by a trade union NSZZ Solidarność led to changes in temporary employment in the Labour Code in 2016. Owing to union's complaint to the European Commission about the incorrect application in Poland of Council's Directive 99/70/EC related to fixed-term contract, in 2014 the European Court of Justice (ECJ) ruled that Polish provisions violated the antidiscrimination principle of not treating fixed-term contractors in comparison to permanent employees in a less favorable way. As a result in 2016 an important amendment of Polish Labour Code entered into force, limiting duration of the temporary employment contracts (up to 33 months in total) and improved the protection of fixed-term employees against dismissal (adopting same notice periods as those of permanent contracts)[18]. With some exceptions provided by the Labour Code, the general rule states that after 33 months of duration a temporary contract transforms itself into permanent contract. As a result on the 22nd November 2018 last temporary contracts concluded before the amendment has been transformed into permanent contract[19].

Workers engaged in non-standard forms of work (mainly self-employment or so-called "junk contracts") were excluded from the protection of both Labour Code and collective labour law. It has been declared as discriminatory by the Constitutional Court in 2015 (after a complaint of trade union NSZZ Solidarność to International Labour Organisation from 2011 about a possible violation of the ILO Convention no 87 and ILO's recommendation for Polish government to guarantee right of association to all types of workers)[20].

To overcome this crisis an important amendment to the Act on Trade Unions[21] has been approved and entered into force on the 1st January 2019. Before the amendment the right to establish and join trade unions has been granted to employees, members of agricultural cooperatives, temporary agencies workers and persons employed in non-combatant military service. Homeworkers, pensioners and unemployed had the right to join existing trade unions but there were different categories of workers that had neither right to establish nor to join

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18 A. Mrozowicki and M. Maciejewska, *Bricolage…*, op. cit., p. 150-151.

19 J. Czarzasty, *Industrial Relations Poland: Developments in working life 2018*, p. 13, https://www.eurofound.europa.eu/sites/default/files/wpef19046.pdf, (accessed 21.06.2019).

20 A. Mrozowicki, M. Maciejewska, *Bricolage…*, op. cit., p. 152.

21 Act of 5th July 2018 amending the Act on trade unions and certain other acts (Journal of Laws from 2018 item 1608).

trade unions, which included workers conducting work on the basis of civil law contracts and self-employed. The amendment extended the right to association to a new category of subject which are "persons performing paid work" independently from the type of contract (as defined by the new art. 1^1 of amended Trade Unions' Act). It gives the right of association to non-employees under the condition that they remain in a legal relationship with the company for at least six months before gaining the right to join the trade union[22].

Temporary agency workers (TAW)

In order to improve legal status of temporary agency workers and fight against abuses in the TA sector an important amendment of the Law on the employment of temporary agency workers has been approved in 2017[23]. One of the major changes brought by the Law was the prohibition to give to a temporary agency worker the same type of work that he conducted for the company on the basis of a permanent employment contract less than 3 months from his dismissal. It also stipulated a total 18-month limit (calculated within following 36 months) of the period in which a temporary worker can be introduced in the same user company, regardless of the temporary work agency that employs him[24].Before, in order to avoid the 18-month limit temporary agencies transferred temporary employees to other agencies (most often daughter companies), which then could direct the employee to the same user company (for the next 18 months).

New Labour Codes

In 2018 The Labour Law Codification Commission finished working on the drafts of two separate labour codes: Individual Labour Code and Collective Labour Code, which had innovative proposals but have been abandoned by the government due to disagreements between social partners involved in their preparation. Consequently, the government declared to

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22 J. Czarzasty, op. cit., p.2-3.

23 Act from 7th April 2017 amending the Act on the employment of temporary agency workers and certain other acts,(Journal of Laws from 2017 item 962).

24 S. Clauwaert, I. Schömann, N. Buetten, Z. Rasnača, op. cit.,p. 10-12.

transport some of their provisions to the existing Labour Code that stays in force, but no sooner than after the elections in the end of 2019[25].

Some mostly discussed provisions proposed by the Commission were as follows:

- excluding possibility of hiring under civil law contracts and making an employment contract the main basis of conducting work with self-employment reserved only for certain specialist
- limiting a possibility to conclude a fixed-term employment contract only to exceptional situations and periods of time
- a significant change in the definition of employment relationship :

"Art. 45. § 1. By establishing an employment relationship, the employee undertakes to perform a specific type of work under the supervision of the employer, and the employer – to hire an employee in return of remuneration. (…)

Art. 47. § 1. Performing work in the conditions specified in art. 45 § 1 is employment on the basis of an employment relationship, regardless of the name of the contract concluded by the parties. In particular, work performed in the structures of the employers' organizational unit is work performed on the basis of a contract of employment. § 2. The structure of an organizational unit is understood as any organizational and personal connections that serve to perform the activity of a given unit. (…)

Art. 50. Significant doubts as to whether work is performed in the form of employment or self-employment, the court decides in favour of employment. An employer denying the existence of an employment relationship is required to prove that the work is not carried out under his supervision"[26].

Lex Uber

As a consequence of the growth of the gig economy and protests of Polish taxi drivers against Uber, the government has adopted first regulation of the platform work – so-called „lex Uber".

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[25] J. Czarzasty, op. cit., p. 2.

[26] Translated by the author, based on the text of the proposal published by the Ministry of Family, Labour and Social Policy: https://www.gov.pl/web/rodzina/bip-teksty-projektu-kodeksu-pracy-i-projektu-kodeksu-zbiorowego-prawa-pracy-opracowane-przez-komisje-kodyfikacyjna-prawa-pracy, (accessed 21.06.2019).

The amendment to the Road Transport Act[27], the so-called "lex Uber", was adopted in order to organize the taxi services market and eliminate the grey zone in passenger transport. The act comes into force on 1st January 2020.

The amendment stipulates that an entrepreneur acting as an intermediary in the transport of persons will be obliged to commission orders only to entrepreneurs having the appropriate license. He will be obliged to verify that the driver to whom he is commissioning transport has a license for the carriage of passengers and, on the other hand, also the driver will be obliged to receive the transport orders only from the licensed trader.

As for the license in the field of passenger transport by taxi, the obligation to have a certificate of completing road transport training confirmed by a passed exam in knowledge of the topography of the town and local law was abolished. In addition, a taxi transport license will only be granted for a specific area and not for a specific vehicle, as before.

One of the mayor innovations is the possibility to use the mobile application as an alternative device for charging, instead of the taximeter and the cash register. These regulations will apply to taxi drivers and drivers occasionally transporting people with a motor vehicle (designed for transportation of 7 and not more than 9 people including the driver).

Civil law contracts misuse and social insurance differentation

The Labour Code stipulates that whether the employment meets the conditions specified in § 1 of the article 22 (employment relationship) it is considered an employment relationship, regardless of the name of the contract concluded between the parties and that in these working conditions employment contracts cannot be replaced with a civil law contract. If so, a civil law contract should be converted to an employment contract by court or labour inspectors. Chief Labour Inspectorate's annual reports on the number of control of civil law contracts and their conversions into employment contracts show that from the total number of civil law contracts investigated by the inspectors in 2013 38% ended in conversions and in 2015 – 27%. If we compare this

[27] Act of 16th May 2019 amending the Road Transport Act and certain other acts, (Journal of Laws of 2019 item 1180).

data to number of persons receiving only income from civil law contracts the level of control seems insufficient and there are not enough labour inspectors to conduct these procedures in order to enforce the real protection of workers[28].

The choice of selected employment models by the company is motivated by the possibility to lower the non-wage costs of employment offered by the legislator within different types of contracts. The differences in social insurance and tax obligations are significant. This leads to misuse of the most favorable contracts from the company's point of view that oblige employees to accept them[29].

Moreover, as they are not regulated by the Labour Code, they do not guarantee such rights to workers as holiday paid leave, parental leaves, notice periods, social insurance etc.

The social obligations differ in case of two civil law contracts indicated in the table 1: the most favorable for the employer is the contract to perform specified work that not require any social security or health insurance contributions on behalf of the worker, who is obliged to pay his pay personal income tax. This type of contract as for the costs of the employment are considered is then followed by contracts of mandate and by employment contracts.

Furthermore, there was no minimum income or wage guaranteed for civil law based employment. This has changed since 2017 when an amendment of the act on minimum wage[30] came into force, introducing minimum hourly wage for civil law contracts of mandate (still living room for abuse in case of misuse of contracts for specific work that has no minimum wage protection). It changes every year and for 2019 the minimum wage is set at 2250 PLN, and the hourly minimum wage is 14,70 PLN[31].

The table 18 presents the differences in the quality of working conditions according to legal basis of the work performance on the example of retail sector:

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28 P. Lewandowski, I. Magda, op. cit., p. 150.

29 82% of the persons in 2014 working on the basis of civil-law contracts as a sole source of income in declared that they had not chosen this form voluntarily – *Pracujący w nietypowychformachzatrudnienia…*,op. cit., GUS 2016, p. 4.

30 Act of 22nd of July 2016 on the amendment to the Act on the minimum remuneration for work and some other acts (Journal of Laws of 2016 item 1265).

31 1 PLN=4,2 EURO.

Tab. 1. Features of various emplyment contacts in Poland.

Benefits and rights of workers	Labour Code contracts		Civil-law contracts	
	Permanent	Fixed-term (FTC)	Contract of mandate (umowa zlecenie)	Contract to perform specified work (umowa o dzieło)
Social security benefits	Yes	Yes	Yes, but can be relatively low	No
Health insurance	Yes	Yes	Yes	No
Paid leave	Yes	Yes	No (upon agreement)	No (upon agreement)
Minimum wage requirement	Yes	Yes	Yes	No
Period of notice	Yes*	Yes, but was shorter than in PLC until 2016	Upon agreement	Upon agreement
Justification for terminating contract	Yes	No	No	No

Source: P. Lewandowski, I. Magda, op. cit., p. 145

As indicated above, in Polish legal system different forms off employment result in different tax and social insurance obligations.Civil law contractors and self-employed pay a minimum level of social contributions, which often leads to a minimum retirement pension[32].

Conclusion

The Polish Labour Code from 1974 despite significant changes in the last years, has no suitable response for new types of work observed in the labour market in the digitalization era. Undoubtedly, the major problems that Poland has to address, are the abusive use of civil law contracts and false self-employed used by the companies as an attractive business model and often abusive alternative to employment contracts.

In this light, the clear distinction between subordination and autonomy in work provision is crucial. On the other hand, the relation between the definition of worker as defined by the EU legislation and Polish definition of an employee within the meaning of Article 2 of the Labor Code remains unclear.

The dynamic technological development within the gig economy make it urgent and necessary to redefine the classic terms of the employee and employer and their legal relationship in Polish labour law, especially such elements of this relationship as time and place of work, the boundaries of the power of control regarding to the overuse of technologies in the workplace and their influence on worker's private life, dignity or physical and mental health.

The 4.0 industrial revolution brings constant and dynamic changes into the labour market, with new types of work emerging in different national legislations. The complexity of these relationships is currently not adequately reflected in Polish legal system that requires major changes and incorporation of the latest case law of the European Court of Justice in this regard.

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[32] *Recent changes in self-employment and entrepreneurship across the EU* Research note no. 6/2015, p. 38,https://ec.europa.eu/social/BlobServlet?docId=15535&langId=en, (accessed 21.06.2019).

Tab. 18. Dimensions of precariousness in the retail sector.

		Quality of working conditions dimension before January 2019					
	Regulated by:		Wages	Working time	Job security	Social security	Representation (voice)
The formal employment status dimension	Labour Code	FT open-ended contract	No regulation at the sectoral level, minimum wage set by law Generally low wages (23% employees had wages lower than minimum wage, which refers mostly to part-time contracts, but also to temporary employed)	Tendency to extend working-time reference periods in case of non-unionised companies	Dismissal periods guaranteed by Labour Code	Regulated by Labour Code setting a standard	Limited worker organisation (mostly limited to large hypermarkets)
		Fixed-term contract			Dismissal periods guaranteed by Labour Code - until February 2016 much shorter than in FT OE contracts		Limited - unions unwilling to organise because union membership considered important reasons for non-extension of the contract)
		Part-time contract		Regulated by Labour Code, but common practice of extending working time (extra hours on demand)	Dismissal periods guaranteed by Labour Code; growing share of part-time jobs in large shops	Lower contributions due to the nature of contracts	Limited worker organisation (mostly limited to large hypermarkets)
		TAW	No information on wages per sector, but wages considered generally lower	High flexibility, seasonality	Depending on the type of contracts - moderate (Labour Code) or no (non-Labour Code)	Dependent on a type of contract; lower contributions due to short-term nature of contracts	No union organisation, advisory work of unions in case individual TAWs' problems
	Non Labour Code	Self-employment, bogus self-employment	No regulation by Labour Code or other regulations	Not regulated, averagely longer working hours of self-employed as compared to other types	No job security	Usually minimum statutory contributions	No union organisation except for short-lived experiments (e.g. bazaar traders)
		Civil law contracts	No regulation by Labour Code or other regulations;	Not regulated	No job security, high rotation	No social security contributions in case of specific task contracts; obligatory contributions (with exceptions) in case of freelance contracts	No union organisation experiments (radical unions)

Source: M. Maciejewska, A. Mrozowicki, *Poland: country report*, **op**.cit.,p. 58.

The starting point should therefore be the critical analysis of the basic institutions of labor law. Considering the pace of evolution of the labour market and the growth of people employed in non-standard forms, there is an urgent need to guarantee protection to all types of workers and basic rights in the field of social and health protection in the working environment for every form of work provision.

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2. Modern Forms of Work: The Slovenian Perspective

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Introduction

The topic of modern forms of work has been the subject of scrutiny over the last decade(s). As matter of fact, a multitude of scholars have undertaken the quest to identify the modern (or perhaps even new) forms of work and contextually assess them from various perspectives, among them from the perspective of labour and social security law. While it could be argued that the work itself is not so different than in the past – and 'modern' forms of work merely reflect a new approach in organising the work carried out – the phenomenon has nevertheless stuck around. Much of it has to do with the expansion of the notion of 'digitalisation', more precisely by the use of technology with all its developments in the performance of work. One of these new forms of work, which has gained a lot of attention, is platform work. More specifically, the emergence of platforms as an intermediary that connects a worker with the recipient of an executed service (i.e. 'consumer') has brought a divide in assessing one of the most delicate legal questions in labour law, namely the difference between an employee or a self-employed person in the context of platform work. Considering that the intermediary platforms operate differently, no absolute solution has yet been adopted. Furthermore, even differing judgments have been adopted when assessing the business model of a single platform, most

widely known in the case(s) of Uber (drivers).[1] Countries around the world try to grapple with this phenomenon in various ways, either by financing research projects to assess the situation on the labour market and make recommendations, by undertaking initiatives to change the legal regulatory framework with statutory amendments, etc. The phenomenon could also be tackled by social partners, more precisely, for instance, by taking steps towards modifying collective agreements.

This contribution aims to focus on platform work in Slovenia. The idea is to assess the developments on the labour market by identifying the practical examples of companies where platform work is emerging and illustrating the regulatory context in which it is placed. This cannot be done without a short overview of the relevant statutory rules. Moreover, policy responses are outlined and in the last part, platform work is assessed through the lens of the Slovenian social security system.

Regulatory framework of legal grounds for the performance of work

Employees

In Slovenian labour law, according to the Employment Relationships Act (ZDR-1),[2] an employee is any natural person that is in an employment relationship based on a concluded employment contract.[3] Moreover, an employment relation(ship) is defined (in Article 4 ZDR-1) as a relationship between a worker and an employer whereby the worker integrates voluntarily in the employer's organized working process and in which s/he, in return for remuneration, continuously carries out work in person according to the instructions and under the supervision of the employer.

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1 This can, to some extent, be explained by judgments being adopted in various countries with their own labour law peculiarities, and by taking into account that the facts in concrete cases vary in details, which may play a crucial role in adopting a final decision. Regarding different judgements see Barbara Kresal, *Delo preko spletnih platform (Platform work)*, in: Multidisciplinarna analiza prekarnosti na trgu dela, 2020 (not yet published).

2 *Zakon o delovnih razmerjih* (ZDR-1), Official Gazette of RS, no. 21/2013 with amendments up to 15/2017 – odl. US.

3 Besides the standard employment contract (full-time work for indefinite period of time for the employer working at employer's premises), several non-standard forms of employment contract are regulated in ZDR-1. These are: fix-term employment contract; temporary agency employment; part-time employment; employment for work at home; employment of a business manager or a procurator; and public work employment (a fix-term measure of active labour market policy).

If elements of an employment relationship exist, work shall not be performed on the basis of civil law contracts, except in cases determined by a statutory Act (Art. 13 ZDR-1). The contracting parties cannot freely choose whether the relationship between them will be defined as an employment relationship or not. The qualification depends on the way in which the contract is put into practice. Performing work on the basis of a civil or commercial law contract, contrary to Article 13 of the ZDR-1, means a disguised employment relationship and is treated as a misdemeanour.

There is also a presumption of existence of an employment relationship (Article 18 ZDR-1). In the event of a dispute on the existence of an employment relationship between the worker and the employer, it shall be presumed that the employment relationship exists if elements of an employment relationship exist. As a rule, it is established by the labour court of law. Hence, as the notion indicates, 'bogus' self-employed persons are not self-employed persons. Such a person would be treated as an employee and the entire labour law protection would apply.[4] In this respect, income or hours of work per week are merely of minor relevance, elements of subordination and continuous performance of work are more important in case-law.

Self-Employed Persons

After employees, the second largest group are self-employed persons, for whom labour law technically does not apply, since those persons ought to be independent contractors in relationships with no subordination, where statutory safeguards of the same extent are not required. A self-employed person is, therefore, not defined in the ZDR-1. Nevertheless, the ZDR-1 applies to a special intermediary group of the self-employed, i.e. economically dependent persons.[5]

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[4] It needs to be highlighted that this is only the case, if a worker claims the existence of an employment relationship before a labour court of law, or if an inspector notices it and then issues an order that the employer should offer an employment contract proposal within the next 3 days.

[5] See Art. 213 of ZDR-1 that is in force since 2013. An economically dependent person is a self-employed person, who on the basis of a civil law contract (not employment contract) performs work in person, independently (there is no personal subordination) and for remuneration for a longer period of time in circumstances of economic dependency and does not employ workers. Economic dependency means that a person obtains at least 80 % of his/her annual income from the same contracting partner. In order to be entitled to such limited labour law protection, an economically dependent person is obliged to notify his/her contracting party (on whom s/he is economically dependent) at the end of each calendar or business year.

The status of a self-employed person is therefore regulated elsewhere. A self-employed person in general is a person who is registered as an entrepreneur in the Business Registry of Slovenia and does not employ employees (as then he is in essence an employer). The statutory grounds for performing the activity of a self-employed person can be various – it can be a company owner as a natural person who independently carries out gainful activity on the market within a regulated company (i.e. individual entrepreneur – *samostojni podjetnik*). Furthermore, they can perform an independent profession, which applies to attorneys or reporters. The status of private researchers, individuals in the fields of health and social care, and of the self-employed in culture is also regulated.

As a general remark, it can be highlighted that the distinction between an employee or a self-employed person (almost as a rule) hinges on the element of subordination (i.e. the level of direction and control of the employer).

Other Legal Grounds

There are also other legal grounds for performing work. For instance, temporary or occasional/intermittent work is regulated for pensioners (*začasno in občasno delo upokojencev*) and for students *(študentsko delo)*. The latter remains one of the cheapest and most flexible forms of work on the labour market. Another legal ground next to temporary or occasional/intermittent work is personal supplementary work (*osebno dopolnilno delo*) that covers domestic or voucher-based work.[6]

Notifications should entail the conditions under which s/he operates, accompanied by all evidence and information required for the assessment whether economic dependency exists or not. Nevertheless, no official evidence exists for these persons and we are not aware of any significant number of such people who have claimed that they are in a status of economic dependency and have therefore invoked limited labour law protection. The scope of protection is regulated in Art. 214 of ZDR-1. Its elements are: prohibition of discrimination; ensuring minimum dismissal (notice) periods; prohibition of dismissal in the case of unfounded reasons (for instance, due to sickness or injury as the most common one); ensuring a comparable payment for the performed work as arises out of collective agreements and general employer's acts for the type, scope and the quality of undertaken work, whereas the obligation of payment of taxes and social security contributions has to be accounted for; and limited liability for damages. For an overview of problems with the current statutory regulation of economically dependent persons in Slovenia, see Luka Tičar, Ekonomsko odvisne osebe (Economically dependent persons), in: Multidisciplinarna analiza prekarnosti na trgu dela, 2020 (not yet published).

[6] It is regulated since 2015 in Arts. 12-16 of Prevention of Undeclared Work and Employment Act (ZPDZC-1) *Zakon o preprečevanju dela in zaposlovanja na* črno (ZPDZC-1), Official Gazette of RS, no. 32/14 and 47/15-ZZSDT and in Rules on personal

Moreover, a civil contract of service (*podjemna pogodba*) could be concluded, for instance by making or repairing an item in exchange for remuneration or some other physical or intellectual work in line with Article 619 of the Slovenian civil Obligations Code (OZ).[7] It is also possible to conclude other unregulated (innominate) contracts, for instance a contract of business cooperation (*pogodba o poslovnem sodelovanju*).[8]

Furthermore, the Slovenian Prevention of Undeclared Work and Employment Act (ZPDZC-1) regulates some other types of permissible work, such as urgent work, humanitarian work, neighbour work and work as assistance by family members. The latter is the most widespread of the other types of permissible work mentioned.

Lastly, for the creation of an individual intellectual work from the field of literature, science or art in exchange for remuneration, an additional ground exists – an authorship contract (*avtorska pogodba*) can be concluded on the grounds of the Copyright and Related Rights Act (ZASP).[9]

A multitude of legal grounds exist, each covering a specific segment of work. Regarding platform work, the ground chosen is very dependent on the work itself, as it could be done through self-employment, employment or in a more casual temporary or intermittent way based on one of the other (civil) legal grounds. Typically, the judgment would take account of the employment relationship elements, such as subordination, continuity and length of the relationship, organization of the working process, etc.

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supplementary work (Official Gazette RS, No. 94/2014). According to ZPDZC-1, personal supplementary work is not considered as undeclared work. It concerns work when a person (an artisan) him/herself produces certain small art work, or other products made at home predominately by manual work or in traditional way and sells them, or picks and sells forest fruits (like mushrooms) or herbs. Personal supplementary work may also be in the form of household assistance or similar work or other small work, like teaching assistance, child-care, dog-walking etc. Income threshold is set and the reporting to the tax office is also due semi-annually. There is a special registry of persons performing personal supplementary work.

7 *Obligacijski zakonik* (OZ), Official Gazette of RS, no. 97/07 with amendments up to 20/18-OROZ631.

8 Statistics show that civil contract of service is predominantly concluded by persons already in a full-time employment relationship and very rarely as the sole ground of one's income (although 'rarely' may in absolute terms still present several thousand persons). Self-employed persons sometimes also conclude a civil contract of service, but more often conclude unregulated civil contracts, such as a contract of business cooperation.

9 *Zakon o avtorski in sorodnih pravicah* (ZASP), Official Gazette of RS, no. 16/07 with amendments up to 63/16-ZKUASP.

Platform work in practice

The main challenge imposed by new or modern forms of work is to prevent avoidance of the applicability of labour law protections. If employment is characterized by subordination, the main challenge is that technology or organization of work in a special manner might disguise the elements of an employment relationship, which as a consequence deprive work-active persons of protections they are due. These can be numerous, such as individual working rights (working time and hours, work-life balance, rest periods, annual leave, health and safety, protection against unfair dismissal, minimum rates of pay, wage setting, periodicity of payment, etc.), collective rights (information and consultation, collective bargaining, protection against collective redundancies, protection against insolvency, right to strike, etc.) and social security rights (lack of social insurance coverage, etc.). If a person contracts as a self-employed person, no labour law protections (apart from limited protection for economically dependent self-employed persons) exist and this has been an ongoing problem in Slovenia for several years now. People who should enjoy labour law protection, from an individual or collective labour law perspective, do not have it. The main challenge, therefore, is to prevent this from happening.

In the last few years, newer forms of work or modern organization of work in Slovenia is resulting in the use of websites for promotion of services, which often leads to 'platform work' in its widest sense.[10] Considering that digitalization has brought up many labour law issues, one of these also relates to platform work or work on the basis of a technological platform. We wish to focus on this type of work and present as many examples as we are aware of that take place in Slovenia.[11]

As mentioned, the use of platforms has gained traction on the Slovenian labour market lately. It has to be stressed from the outset that these platforms operate under different conditions. While they are generally

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[10] One definition of platform work could be all labour/work provided through, on or intermediated by online platforms in a wide range of sectors. Work can be of very varied forms (manual/digital, on-site/off-site, on-line/local service, large/small scale, etc.). A triangular relationship between platform, platform worker, and client, as well as online intermediation (virtual relationship, strong role of technology or algorithms in organising work), are key features of platform work. Platform work must be provided in exchange for a payment, thus not covering genuine sharing activities.

[11] Due to the lack of any statistical data on platform work in Slovenia, it is impossible to estimate the number or the share of platform workers in Slovenia.

established for matchmaking purposes between offer and demand, a key difference can be that some function with the purpose of gaining income, while others (non-profit, commons-based platforms)[12] do not. The question of whether working natural persons might be employees of a platform could be invoked more often in cases, at least in Slovenia, where payment would be made to the platform and the latter would pay a natural person for the service provided. Where this is not the case, for instance, where a platform does not pursue profit, but is merely a tool in linking offer and demand, the question of whether the platform could be an employer is difficult to imagine.[13]

There are, of course, and these may be interesting, several platforms that are established with the purpose of being profitable, namely in the transport, cleaning and delivery sectors.

With respect to the Slovenian transport sector, several companies function through a platform, more specifically companies like GoOpti,[14] Flixbus and the Cammeo taxi service. Each of them holds a specific market share. Cammeo[15] is a provider of taxi services, often for 1 specific person,

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12 Florian A. Schmidt, *Digital Labour Markets in the Platform Economy – Mapping the Political Challenges of Crowd Work and Gig Work*, Friedrich-Ebert-Stiftung, 2017, p. 9, available at *https://library.fes.de/pdf-files/wiso/13164.pdf*. See also Martin Risak, *Fair Working Conditions for Platform Workers – Possible Regulatory Approaches at the EU level*, Friedrich-Ebert-Stiftung, 2018 (https://library.fes.de/pdf-files/id/ipa/14055.pdf).

13 One of such non-profit free of use platforms in Slovenia is ''Mojmojster'' (*www.mojmojster.net*), created by a company Eforma d. o. o. It is advertised as a ''matchmaking'' website between consumers and businesses that offer construction services. It was designed by architects, who themselves had struggles in finding quality construction service providers. Moreover, website operates also in Croatia (*www.emajstor.hr*) and Austria (*www.daibau.at*). What the platform allows the users and construction providers, is that orders of consumers can be left on the website, where then usually self-employed construction service providers or construction companies in general can contact the consumer and then make arrangements between themselves. Construction service providers are also registered on the website and this allows consumers to search for them on the basis of their required service (for instance, parquet change, carpentry, installations, etc.). The construction service providers are also ranked by consumers, which allows for a quality control, and moreover, providers with a poor rating are erased after a while. This allows the consumers and construction providers an excellent tool for contacting each other. Even though the website platform is free of use and merely an intermediary, this is a modern form developed in the Slovenian labour market.

14 The service is ordered through a website, paid by a credit card directly before the transport, where then a driver may call you at the time of expected pick-up and execute the service.

15 Cammeo taxi service is carried out by CFLEET d. o. o. (limited liability company seated in Slovenia), but operates also in other countries, such as Croatia and Serbia. The main company is Cammeo franšiza d. o. o. (the franchisor), seated in Croatia (see

GoOpti predominantly carries out transfers with vans for several people, very often towards an airport,[16] and Flixbus allows for transfers with buses from the pick-up point to the destination point.[17] Unfortunately, the information advertised does not allow for conclusions as to what kind of relationships exist between the natural person carrying out a service and the platform to which payment is made. Usually, merely the terms and conditions vis-à-vis the platform-consumer relationship are available online, which are of not much help.

There are two possible pathways towards determining whether active persons are employees of the platform or not. The first is inspection and the second the case-law of the courts. Platform work as such is not mentioned anywhere in the yearly reports of Slovenian Labour Inspectorate, while the issue of disguised employment relationships is addressed in a general manner, stating that the use of it in practice is much broader than what the inspectorate has found out (on a yearly basis). Moreover, the issues in determining all the elements of an employment relationship by an inspector are explained.[18] The courts' case-law could prove beneficial, although it has to be stated that the judgments of the first instance labour courts in Slovenia are not publicly accessible. Moreover, those judgments that are available are anonymized, making the link to a specific company troublesome. One specific judgment[19] can be highlighted, as the facts of the case allow for speculation that it concerned the Cammeo taxi service, although this cannot be vehemently confirmed. In that case, the inspectors had

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https://cammeo.si/hr/uvjeti-i-pravila-koristenja (May 2019)). It is a company providing regular taxi service, where you can call the taxi, pay with cash or by card, but the company has also developed a mobile application (app) Cammeo. The consumer of the service may also pay the ride through the app and rate the driver. After ordering a ride through the app, a text message with the details of the vehicle and time of its arrival in real time is sent. It therefore functions, at least in part, very similar to the Uber design, however, we cannot truly compare the two until more is known about the contractual relationship between the drivers and the company.

16 These orders consist of transports on Slovenian territory, but also to Budapest, München, Vienna, Zagreb, Genova, Milano, Rimini, Venice, etc. More information is available at *https://www.goopti.com/sl/* (May 2019).

17 More information is available at: *https://www.flixbus.si/* (May 2019).

18 See the yearly report of Slovenian Labour Inspectorate for the year 2018 (pp. 70-71), available at *https://www.gov.si/assets/organi-v-sestavi/IRSD/73bcef96d4/Porocilo-o-delu-IRSD-za-leto-2018.pdf* (February 2020).

19 See the decision of the Slovenian Administrative Court, UPRS I U 923/2015, decided on 30. 3. 2016, available at: *http://www.sodisce.si/usrs/odlocitve/2015081111396616/* (May 2019).

determined that a transport taxi company had operated unlawfully, since it had not concluded employment contracts, but civil contracts titled ''Service order contracts'' (slov. *pogodbe o naročilu storitev*). The link could be made on the facts of the case, since the company invoked that they have been operating in Slovenia and Croatia for 3 years on the basis of a new and unique business model in the world. In the relevant case, the drivers were all self-employed at the beginning, but the inspector had determined that they were, in fact, in a disguised employment relationship. This had occurred notwithstanding the fact that the drivers were owners or had taken up lease of the vehicles, that they were allowed to work for other transport companies, that they could decline the work offered at any time, and that they could choose their days of leave or days off as they wished.

What seems to also be important and interesting in Slovenia is that the issue of disguised employment relationships might prove to be obsolete to the platform.[20] This could occur when the platform company contracts with other companies, who then contract with drivers, be it on an employee or self-employed basis. In other words, when there is another company functioning as another link in the chain, there is no contractual relation between the natural person driving and the company managing the platform.[21]

Two other platforms can be mentioned. The first is the *E-hrana* (or E-food in English) platform,[22] where a delivery order for various dishes can be placed. A multitude of restaurants are connected on this platform and the user/consumer can order a dish from a restaurant directly through E-hrana's website. If it has a delivery service, the restaurant then makes sure that the delivery is executed. In such cases, E-hrana is merely a website joining many food businesses with the intent to include all of them. However, this is not the only purpose

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[20] This does not apply, if the question of who the 'real' employer is, would come up. There might be a fine line between a company lawfully providing services with its contractors to another company, or having somewhat fictive employment with a company on paper and working for another company in reality. No clear-cut solution has yet been adopted in Slovenian case-law – especially not in relation to platform work – although cases with such legal questions have recently made it all the way up to the Slovenian Supreme Court and are subject to being decided.

[21] Reportedly, Flixbus contracts with 2 Slovenian transport companies Nomago and Arriva, whose drivers drive Flixbus buses (with colour and logo). Again, we are not certain what the employment status of drivers is.

[22] See *https://www.ehrana.si/seznam* (May 2019).

of this platform. In the capital city of Ljubljana, a special *E-hrana live service* is carried out. This service essentially allows people to place an order to deliver the ordered food to their household, even from those restaurants/food businesses that do not provide deliveries themselves. This is possible through the E-hrana contractors, who deliver food by bicycle from selected places to your household. The bikers deliver food in the range of around 2.5 km of the restaurant and the food order can be tracked on the map. This E-hrana live service is a true case of platform work. It is not clear whether the bikers are in an employment relationship with the company behind the platform.[23]

The other, second platform that is interesting is in the cleaning sector, operating under the name Beeping.[24] It is a cleaning service for households controlled by a limited liability company with various terms and conditions of use.[25] These regulate the relationship between the platform and the end user/consumer. Unfortunately, the relationship between the cleaning 'beepers' and the platform cannot be vehemently confirmed, although the platform advertises itself on the website with the notion that 'all beepers' have a regulated legal status, where they are professionally self-employed cleaners.

This platform is interesting as it is the only one in Slovenia, to our knowledge, where several indices as to how the contractual arrangements between the platform and the cleaner take place are identifiable through the website. For instance, it is advertised as desired that the consumer fills out a short questionnaire they are sent after the service has been performed, concerning its quality based on four parameters. Moreover, checks are sometimes made of the cleaners' work, not only through the user rating, but also through a "mystery shopper", i.e. a person who deliberately orders the cleaning service with the intention of assessing the quality. In this sense, the level of control is not insignificant. Furthermore, before the conclusion of every contract, platform representatives carry out a formal conversation with the candidate,

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[23] From our experience as users of the service, they are usually students or self-employed persons.

[24] See *www.beeping.si* (February 2020). Essentially, the cleaning order is placed and paid by a credit card, PayPal or a bank deposit on the beeping website (payment in cash is not possible), where then a cleaner contacts you and performs the service. The "beeper" then issues a bill to the platform for performing the service. However, the platform keeps 20 percent of the total amount paid by the costumer.

[25] Rather lengthy terms are available in Slovene at: *https://www.beeping.si/stran/splosni-pogoji-poslovanja* (February 2020).

who then must pass a training course. Training of the cleaners can very well represent the provision of instructions by the hiring company, and the supervision or control is rather high. It could be argued that these persons do not work independently, but in a subordinated position.

How to delineate between employees or self-employed persons

In Slovenia, the judgment of whether a person is in an employment relationship (and enjoys labour law protection) consists of several elements, the most important being that the work is carried out according to the instructions and under the supervision of the employer. This judgment hinges on various factors that could indicate a confirmation or rejection of an employment relationship. Some of these are already contained in ILO Recommendation No. 198, and include the determination of working hours, determination of workplace by the party requesting work, worker's availability, the provision of tools, materials and machinery, absence of financial risk of the worker, etc. In national case-law, all of these are taken into account for determining the element of subordination. The general idea is that subordination is confirmed if several indices are confirmed, or rejected if there are none or there are very few of them.

The issue of this multi-factor test of subordination is that the employers may organize their work process and conclude such agreements with workers, where many of these criteria would not exist, for instance, by working from home from the worker's computer (if the work is of such a nature), by not having a strict schedule of working hours, by allowing work for other companies, etc. The issue is that a multi-factor test can be manipulated, even more so when a company concludes different agreements with different workers, where factors do not allow for or make it substantially more difficult to generalize or compare workers between themselves.

One of the more effective ways of ensuring labour law protection to a broad range of work-active people that has been established so far is the 'ABC test' that originates in United States of America. A clear outline of the historical development and comparative analysis of the delineation between employees and self-employed persons among the federal states of the United States of America can be seen from the case Dynamex Operations West, Inc., v The Superior Court of Los Angeles

County.[26] The case concerned the claims of delivery drivers regarding some basic labour rights found in state wage orders, such as minimum wages, maximum working hours and the obligation to pay over-time work. The claimants did not claim the existence of an employment relationship with its full labour law protection, but merely the confirmation that they are employees for the purposes of their wage order entitlements (i.e. for a limited number of very basic working conditions). Nevertheless, it is not impossible to project the opinion of the California's Supreme Court on the delineation between employees and the self-employed for the purposes of the determination of the employment relationship with its full protective position.

What the court did in this case and why the case is so important is that it compared the different tests in USA federal states, such as the ''economic reality test'', multi-factor test and ABC test. It explained that the multi-factor test takes account of all the circumstances of the case, but can be manipulated and legal certainty and predictability are questionable since no two cases are the same. The court said that, based on the comparison of pros and cons, the ABC test is the most effective way to provide protection. In accordance with the test, the employer should carry the burden to prove all three elements of the ABC test, that is:

a) that the worker is free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact;
b) that the worker performs work that is outside the usual course of the hiring entity's business; and
c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

For instance, a plumber or an electrician, who is normally a self-employed person, is normally performing work that is outside the usual course of the hiring business (and free from the control and direction of the hiring entity). Moreover, they normally advertise their service as independent and perform work for various numbers of clients or potential customers. There are normally steps to establish and promote the business of the self-employed (now more broadly), perhaps

[26] S222732, Ct.App. 2/7 B249546, Los Angeles County Super Ct. No. BC332016, filed 4/30/18.

through incorporation, licensure, etc. On the other hand, persons who are in disguised employment relationships usually do not and are not free from the control of the party requesting work and do not perform work outside the usual course of the hiring entity's business.

Since the employer carries the burden of proof, the protective scope is very high. If only one (but also if more) of the elements exist, the person working is considered an employee. The element of subordination is only one part of the test (part a), whereas it is often easier to see that parts (b) or (c) are not fulfilled. For instance, all Uber drivers perform work that is within the usual course of the hiring entity's business, i.e. transport services.[27] Therefore, they are automatically employees in this sense. Most often, this will also coincide with the (c) part, since often they will drive merely for Uber and be economically dependent from the company. Many cases that are considered borderline now would be easily solved by this test for the benefit of the worker and this could be a very effective way towards granting protective labour law scope to those who need it. This may apply to platform work, but can perhaps even be applied in a broader manner.

Policy responses

It can be interesting to observe, from a national or comparative perspective, what the policy responses to the notion of platform work are. In Slovenia, so far at least, no statute has been adopted that would relate directly to platform work and place it in the context of various legal grounds as options for the performance of work. However, platform work was a part of the more policy-oriented theme of 'precarious work'.[28]

Platform work might be seen as one of such types, where the risk of precariousness might be greater for various reasons, for instance due to: income insecurity, limited access to training and additional benefits for workers, information asymmetry (access to relevant data on working and pay conditions, assessments, etc. is fully controlled by the platform), lack of dispute resolution systems, the risk of privacy breaches and lack of mutual communication and solidarity between and among platform

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[27] Therefore, in the case of UBER, the employer could not prove the (b) element of the test.

[28] Lack of labour law protection and the relative widespread of grounds for work outside of employment relationship has contributed to the evermore important debate on precarious work in Slovenia.

workers and management,[29] lack of social insurance coverage and consequently the inability to claiming benefits, etc. For this reason, an ongoing project ''Multidisciplinary analysis of precarious work'' is being financed by the Slovenian Ministry of Labour, Family, Social Affairs and Equal Opportunities and by the Slovenian Research Agency. It aims to analyse this phenomenon from the viewpoint of various sciences, such as law, economics, sociology, social work and medicine. Theoretical and empirical research is carried out, taking account of the Slovenian system and its shortcomings and comparative analysis of selected EU Member States and their measures to tackle this phenomenon. The project concludes in spring 2020 and the ministry is awaiting the results, before possibly proceeding with any statutory proposal. Unless a new concept is developed, platform work will still fall into the sphere of employment or self-employment or other legal grounds, depending on the relationship with the platform and other factors, such as length/continuity, scope, etc.

Next to the policy responses, social partners are likewise of the utmost importance in the field of labour law, especially with respect to collective agreements in industrial relations. The existing collective agreements predominantly only regulate the position of employees, as trade unions have been (and still are) focusing on bargaining for and assisting their members only. One of the few exceptions is the Collective Agreement for Professional Journalists that is (according to Article 2 of the Collective Agreement) also valid for freelance journalists. It is worth mentioning that in October 2016 the Trade Union of the Precarious workers (TUPW) (*Sindikat prekarcev*) was established within the Association of Free Trade Unions of Slovenia (*ZSSS*), the country's largest trade union confederation. However, except for a few independent campaigns that were carried out by the TUPW, no bigger steps were taken. Platform work is also not explicitly regulated in any of the sectoral collective agreements that are publicly accessible.

Platform work and social security

The last part of this contribution illuminates the notion of platform work in the Slovenian social security system. The system is labelled as 'Bismarckian' and is still dominated by social insurance schemes

[29] See Barbara Kresal, *Delo preko spletnih platform (Platform work)*, in: Multidisciplinarna analiza prekarnosti na trgu dela, 2020 (not yet published).

that generally provide income replacement benefits or benefits in kind when a social security risk materializes. Even though social insurance schemes have traditionally been modelled around one's activity and the corresponding income, platform work is still not subject to specific rules of these schemes. That does not mean, however, that such workers are excluded. Platform workers could be included in one of the existing schemes depending on their legal classification. They could be classified as an employee, a self-employed person or as an individual working in other legal relationships. Platform workers classified as employees or self-employed persons are formally covered by all social security schemes, which could be viewed as a strength in a solidarity society. Nevertheless, there are still issues regarding effective coverage. When platform work would take place on one of the various other civil contractual grounds, meaning it would be classified as other legal relationships in the field of social security, these persons would lose the possibility of being covered against some of the traditional social risks,[30] for which social insurances were established. In essence, there could be gaps in the formal coverage of persons working through a platform. One of the possible solutions could, be that work in other legal relationships would represent an insurable ground, which would be in line with the principle that each type of work is valued equally. If this were to be done, the next question that would then likely arise is: if and/or how to modify rights and the conditions for claiming them to best suit the specifics of the covered group.

There are two other possible social security perspectives on top of a lack of coverage or modification of rights. Even though self-employed persons are insured and their rights more or less the same in all social insurance schemes in Slovenia in comparison with employees,[31] their obligations are not. Essentially, this means that the self-employed are treated differently from employees from a financial

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[30] More specifically, for the risk of unemployment and parental care, and in some cases perhaps even to the risk of sickness or injury that is not work-related.

[31] This is partially also due to the decision of the Slovenian Constitutional Court – see decision U-I-358/04, adopted on 19. 10. 2006. The case concerned the claim for a partial pension of a self-employed attorney. The court said that self-employed persons are to be regarded equally as employees when claiming rights, unless a reasonable reason dictates otherwise. In the case concerned the court did not find such a valid reason and eloquently said that the fact, that they pay contributions for all insurable contingencies, means that they should be treated equally, irrespective of their ground for insurance (i.e. employees or self-employed).

perspective, where contribution basis and taxation are based on their profit and not income.[32] The profit so determined is usually low or non-existent, hence why, in practice, over two thirds of self-employed persons are paying social insurance contributions from a minimum basis. In practice this means that self-employment as status can lead to a higher income than through employment, the difference being progressively noticeable as one's income increases.

This difference likewise impacts the labour market, where individuals might agree to contract as independent service providers due to financial gains, since they earn more money, while simultaneously the other contractual party remains flexible and evades labour law protections, unless they are caught by inspectors or the working individual files a court claim claiming the existence of an employment relationship.[33] Moreover, such agreements have consequences for the financing of the social security system, since less contributions (and taxes) are collected. Furthermore, such disguised employment relationships may also present an unfair competition advantage, etc. In other words, one challenge for the social security system is to achieve a financial balance concerning the obligation to pay contributions from various insurable types of activity.

The second issue vis-à-vis the obligation to contribute for platform workers is that technological advancements enable persons to receive income value through means that are extremely difficult, if not impossible to detect. It can be imagined that it would be possible to work through a computer for payment that is earmarked on one's user account on the platform. If this income is then spent by purchasing something else directly, meaning that it is never noted in one's bank account, this income is not subjected to tax and no contributions are paid. Payment in crypto coins could also be untraceable. In other words, technological advancements, globalization and connectivity make it harder to monitor one's income and pose an additional (albeit likely

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[32] See Arts. 144 and 145 of Slovenian Pension and Disability Insurance Act (*Zakon o pokojninskem in invalidskem zavarovanju*; ZPIZ-2), Official Gazette of RS, no. 96/12 with amendments up to 65/17.

[33] One practical shortcoming is, that reportedly, the Health Insurance Institute of Slovenia, which is responsible for registration in all social insurances, does not verify the factual conditions, whether a person is really employed or performs work for an employer on other legal basis, such as a self-employed person in a disguised employment relationship. Contracts and other proofs are supervised by the Labour inspectorate or Tax administration. Interestingly, taxi drivers in Ljubljana might be insured for 5 to 10 hours weekly, although it is suspected that they work 5 to 10 hours daily.

rather small) threat to the financial stability of social security system by not collecting contributions. The issue is not new per se, since some people work and receive payment/wages in cash (either partially in the part above the minimum wage, or even in total). In other words, it is not always possible to detect illegal behaviour.

Conclusion

Although it seems that its scope and share is still rather low, we can conclude that the presence of the gig economy in Slovenia is increasing. By taking account of the concrete cases outlined above that relate to platform work, as an example of a new modern form of work, the conclusion could be made that platform work and its challenges in Slovenia relate mostly to transport services, delivery services and the services of domestic workers. There is nothing modern about the work itself that is undertaken here, merely the organization of this work and the use of an intermediary – a platform, is newer.

That is why there is not really a need to dismantle the traditional concepts and adopt new legislation, not only in relation to platform work but to work overall. What needs to be the focus of labour lawyers and courts of law is to grant employment protection where this is due, and to see through the technology equipment and in this way sort of 'pierce the veil' (of platforms, when platform work is concerned). One option to do this would be to adopt legislation and adjudge cases in a way very much similar to the ABC test developed in the USA. One part of that test is the criteria of subordination, which in Slovenia, for instance, is already the most important element. Another element is the performance of work that is within the usual course of the hiring entity's business. This can be related to the voluntary inclusion in an organized working process, which is also already an element of the Slovenian employment relationship definition. So, in a large part, several elements already exist in legislation today that would only need to be understood slightly differently to allow the courts to adjudge cases in this different, protective manner. In this sense, a shift of perspective would need to occur, but the rules and the definition of the employment relationship would not need to (drastically) change.

What they found useful in the USA is that the employer should carry the burden of proving that the ABC elements of the test do not exist, and by doing so, the workers are better protected and the courts have the

possibility to look at the relationship in a broader context. From a legal point of view, one procedural adjustment that would have to be made in this regard is to shift the burden of proof in cases of claiming the existence of an employment relationship on the hirer (hiring employer). The idea of this line of thinking is that when new methods of organizing work and work distribution appear, steps need to be taken to ensure that persons who require protection receive it. This is mostly the task of courts and inspectors, and looking at the work relationship from a different angle and by shifting a certain perspective, this can be achieved.

On top of the accessible judicial protection, effective supervision by the Labour Inspectorate (with adequate staffing, which is currently lacking) is the necessary precondition for achieving better compliance with the labour law rules in practice in Slovenia.

Besides labour protection, ensuring social security for platform workers is of the utmost importance. In general this can be achieved in one of two ways. The first concerns setting up special schemes for (special groups of) platform workers,[34] while the second option would be to incorporate the platform workers into the existing schemes. However, in the latter option, existing schemes need to be adapted to the growing variety of different types of platforms.[35] Overall, we call for an inclusive approach, which we believe is more closely aligned with the EU level recommendations.[36]

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[34] This has been done in Belgium for income earned from recognised platform work (see Paul Schoukens, Alberto Barrio, Saskia Montebovi, *The EU social pillar: An answer to the challenge of the social protection of platform workers?*, European Journal of Social Security, 20(3), 2018, pp. 219 – 241).

[35] In this respect see, for example, Chris Forde et al., *The Social Protection of Workers in the Platform Economy,* European Union, 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/614184/IPOL_STU(2017)614184_EN.pdf (February 2020).

[36] See European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)) and Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01).

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3. Modern Forms of Work in the Spanish labour market

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Summary: 1. General assessment of modern forms work in the Member State: 1.1. Are there modern forms in the Spanish labour market? – 1.2. Is the legal notion of subordination in crisis 1.3 Should the criterion based on the incorporation of the "worker" in the company prevail over the power to give orders? 1.4 Are there new forms of disciplinary powers? 1.5 How platform economy, algorithms and Artificial Intelligence can influence the traditional paradigms of labour law? 1.6 Considering the role of self-employment in the Gig-economy, how does Spain protect weak/economically dependent self-employment? 2. Legal and/or industrial relations answer: 2.1. Is there any specific regulation, either legal or in collective labour agreements 2.2. Is there any bill being discussed? 2.3. What is the role of social partner? 2.4. Is it possible to include service providers or "modern workers" within the scope of collective labour agreements? 3. Social Security approach 3.1 The role of the social security system in the field of new forms of work 4. Conclusion

General assessment of modern forms work in the Member State.

Are there modern forms in the Spanish labour market?

Apart from the emergence of some collaborative employment experiences in which independent professionals join forces to overcome the limitations of their size and lack of power in the market, and some isolated crowdsourcing experiences (Amazon Mechanical Turk), the main new forms of employment have arisen due to the irruption of online platforms: a firm owns a software which is used to

manage the demand and supply of services. Through an application (app) the firm establishes an immediate link between a customer and a service provider.

These platforms have been especially successful in activities in which the customers do not seek a high level of professionality or qualification. They are sector where the activity is principally based upon workforce. This is the case of food delivery companies (Glovo, Deliveroo, Uber Eats, Stuarts), electric scooter "hunters" (Lime and Voi) and people transport (Uber and Cabify).

The profile of the workers employed by these platforms is, therefore, essentially of young people who combine work with studies, do not demand full-time, permanent employment and can provide the flexibility that the firm requires.

Is the legal notion of subordination in crisis?

The debate is as to whether the present legal framework is still adequate to cover these new forms of employment and whether it is necessary to adapt the traditional concepts of labour law such as the concept of employee and employer. The new characteristics of the supply of services seem to distort the identifying elements of conventional employment ant it is increasingly becoming more difficult to tie down or clarify the activities and establish their nature.

The online platforms operating at the moment in Spain maintain their positions as mere businesses which put users and professionals in touch and they underline their activity as intermediaries with no power of control or direction over the activity of the service providers. They justify that the relationship that unites them with the service providers (riders) is based on a commercial contract and not a contract of employment as the self-employed workers decide their own provision of services.

The foregoing has brought into question the validity of the legal test of evidences which is used to uncover false commercial relationships and reveal intentional avoidance of labour and of Social Security law. At the same time the new situation transferred the entrepreneurial risk to the employee and take on the employment cost.

The element of subordination and dependency which is key to detect self-employed status seems to have already encountered some problems because these platforms present new ways of controlling and directing their work force.

Nevertheless, the reality demonstrates that the new ways of employment are capable of being encapsulated perfectly within the present legal framework. The issue is about the means which appear to be hidden by the new forms of control and management.

In that sense it seems that, in the main, the decisions are not taken in a direct way by the employer but through the automated decisions of the algorithms. Nevertheless, the guiding hand behind the automatic decision making has been previously introduced by the firm. It is been a "transformation of the classic patterns of dependence"[1], but the subordination remains trough a digital platform, new instruments to subordinate the dependent but still the same company dependency.

There is a voluntariness and freedom to accept the tasks, but once is done, "the service provider cannot" abandon the "service schedule"", otherwise, as it happens if they start to reject services, there would be a high risk of being "disconnected"[2].

The control of the place and time o work is exercised in a different way because a fixed place of work, factory, office etc. has been substituted by "open spaces" where the activity takes place and the worker seems the be "owner" of his working hours. However, it is through an app which can geographically locate the "worker" that the new places of work are delimitated and the requests for deliveries which mark the time and length of work; without it, there is no way to provide the services[3].

In these cases the means of production without which one would not be able to work is the digital platform and the ownership of it by the employer. The bicycle or the mobile of the workers' property would not be the essential means of production.

The following "determinative elements" or "evidence elements" which is being adopted by case law to determine the nature of employment is the provision of the work on another's behalf. Together with the subordination and dependency the differentiating element between a salaried employee and self-employed worker is who assumes

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1 Mercader Uguina, J. R. *El futuro del trabajo en la era digitalización y la robótica*. Tirant lo Blanch, Valencia, 2017

2 Beltran de Heredia Ruiz, I. *Work in the platform economy: arguments for an employment relationship*. Huygens, Barcelona, 2019.

3 Goerlich Peset, J., García Rubio, M. *Indicios de autonomía y de laboralidad en los servicios de los trabajadores en plataformas* in Pérez de Los Cobos, F. *El trabajo en plataformas digitales: análisis sobre su situación jurídica y regulación futura*. Marcial Pons, Las Rozas, 2018, pp. 17-36.

the risk and who gets the final outcomes of the activity. In this sense, the service provider they earn a fix amount per each commitment and if they cannot change de prices.

Nevertheless, as Case Law stresses, a new form of dependency appears as in the information and in the brand. The "riders" work under a commercial brand not their own but that of the company. It is latter with which the customers contracts and in which they entrust the provision of services. In that sense, they must at all times publicize the brand, the corporative image, follow the directives and orders which they are compelled to obey by the "employer" company and to wear the uniforms and the material with the logos of the company. In short, they are the personified image of the digital platform and they have to maintain inside in a high "digital reputation" if they want to keep working on it[4]. Their good reputation, gain with the restaurants and clients reviews, keeps them as providers in these daily hiring model.

Alongside this new elements of dependency with the brand, another indications which Case Law has identified from the new forms of employment platforms it comes with the ownership of the information, the know-how. It is the digital platform which controls all the necessary data in order to carry out the activity and through which it ensures that the providers are fully subordinated to a productive system based on the information controlled and managed by the platform.

Should the criterion based on the incorporation of the "worker" in the company prevail over the power to give orders?

In reality in this new form of employment through digital platforms, the worker is not included within a cooperative network: the outside worker has little power of decision over his own services, less even within the company which he works. It is the company which determines when, how and what the workers must do.

In contrast, a true economic collaboration ought to create ideas of common interest of professionals giving them power to organize their own method of work. Also in the field of the food delivery, examples of these horizontal models of integration of a net of pro-

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[4] Todolí Signes, A. *El futuro del trabajo: los nuevos indicios de laboralidad aplicables a empresas digitales* in *Revista de Treball, Economia i Societat* I. n. 92, 2019, pp. 1-8.

fessionals and the use of platforms for work, deepening in shared interests are isolated experiences such as "La Pajara", "Mensatas" or "Mensos y Cleta".

Are there new forms of disciplinary powers?

Within employment through digital platforms disciplinary power is exercised in a different way, in a false dissociation from the employer. Because the decisions are automated through algorithms there is an intentional depersonalization of decision making attempting to feign an objective decision making process. Workers are no longer dismissed but the platform itself descends with their service requests, making a stop on the "calls". This is a subterfuge to make the worker responsible for the consequences of algorithms, as he has been previously advice about his capacity to improve the necessary data to guide the algorithms results.

For example, the better the rating by the customers, the better the marks; the greater the responses or reviews for the delivery and the better time, the better marks; the faster of the delivery, the better score; the less delivery rejected, the better score; and in this way, the worker knows that this ability to choose his shifts of work depends on his assessments in the internal ranking, weekly assessment in the firm which creates better marks which at the end translates into working hours more balanced with the workers' private life, as well as the prospect of remaining within the firm.

On the other hand, he is aware that to have worse results would bring about worse working hours and in the final resort the impossibility to provide services. In this way, if in any given moment he is unable to provide services through the impossibility of achieving better working hours, it would not be the firm who dismisses with his services but the worker himself who has created the situation.

How platform economy, algorithms and Artificial Intelligence can influence the traditional paradigms of labour law?

The use of algorithms in the production process creates many benefits but also dangers. Therefore it requires special supervision of the automated decisions and there must always be "human hand" in the ultimate stage of decision making[5]. The algorithm does not understand

[5] ILO, Global Commision on the Future of Work. *Work for a brighter future*. ILO,

about human rights nor is it capable of discernment of real situations through deliberative judgement which takes into account the rights of the workers.

The hardware is neutral but not the software which is programmed to operate within the hardware. In other words, the software functions according to the preordained guidelines. If the decision through an algorithm ends up generating for example a discriminatory decision it will be as a consequence of a preordained or programmed discriminatory bias. It is in the predesign where the problem is found and this is where the "human hand" manifest itself.

The introduction of discriminatory bias in the process of decision making can cause very serious danger because the operative of these systems initially takes a discriminatory step which can in turn create exponentially a multitude of discriminatory acts as the algorithms then carry out automated decisions "on mass".

The algorithm cannot differentiate between personal and working life, compulsory rest periods, the maximum working day, equality rights etc. But it is the person who introduces the parameters. Therefore the workers should have a key role in the creation of algorithm.

Equally, it must not be forgotten that algorithms function by means of the use of the workers´ personal data by processing the personal data and even generating new information. Though and in spite it may seem it is outside the regulation's scope of application, the specific framework of personal data protection is fully applicable and all principles included in the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), should be respected.

Considering the role of self-employment in the Gig-economy, how does Spain protect weak/economically dependent self-employment?

One of the consequences in the Gig economy has been the prolification of self-employment through the commercial exploitation of what until now evolved through stable and salaried employment. In this dis-

Geneve, 2019.

junction of precariousness the need to control the flight towards an irregular employment by means of false self-employment should be stressed albeit this new service does not always presents illegal situations.

In Spain within the definition of a self-employed worker there is a differentiation between the traditional self-employed worker and the Economically Dependent Self-Employed Worker (in Spanish, TRADE). The latter is characterized when 75 percent of the work income and economic or professional activities stem from only one client and the self-employed worker doesn't have any workers in his/her charge (art. 11 Estatuto del Trabajo Autónomo; Real Decreto 197/2009, de 23 de febrero).

Precisely, in pursuit of combating fraud the legal construction of TRADE was shaped and it is in this legal construction where the new forms of employment have been framed. The TRADE was born, with modest acceptance, to avoid fraud, however now it has turned into a legal construction used to hide true wage-based relations.

Certain it is that whilst the common self-employer worker is outside the scope of labor law, bar the social security and health and safety regulation, the TRADE has series of rights due to the special vulnerability it shares with wage-based workers. A written contract has been stablished, in the regulation, which must be registered and in which the severance payment, the total duration of the working day, weekly rest and national holidays (the right to have 18 days per year off), and Agreements for Professional Interests (API) must be included.

The legal dispute which could arise would be channel trough the social courts.

Legal and/or industrial relations answer

Is there any specific regulation, either legal or in collective labour agreements

In spite of the absence of a specific regulation on the matter, a reform of the Worker Statute is currently being worked on and a discussion about the need to adapt the legal framework to the new forms of employment has started. The only expressed reference is found in the collective bargaining, more specifically y the V National Labor Agreement for the Catering Industry (BOE n. 76, 29 march 2019), which has been amended to widen its scope to incorporate "the delivery of food and drinks, included those carried out through digital platforms", the

concern is that this collective bargaining will only be applicable to wage-based relations, and self-employment will fall outside its scope albeit it being the predominant work form.

This has led to the courts giving the institutional response and therefore the courts are undertaking the task of acting against situations of suspected fraud.

Is there any bill being discussed?

In spite of the absence of regulation, both the jurisprudence and the labour Inspectorate are carrying out a profitable job in dismantling the fraudulent employment model of Glovo and Deliveroo.

In this sense, as a result of the lack of contributions to the Social Security, the Labour Inspectorate has issued, during 2018-2019 a warrant of infringement in Barcelona for 1.31 million of euros owing to contracts of year and a half; 1.2 millions in Madrid and more than a 160.000 euros for unpaid social contributions in Valencia; and 380.000 euros in Zaragoza.

Meanwhile, the court has initiated a dual channel in which, on one hand, they have mainly acknowledged self-employment as fraudulent, identifying a true-wage based relationships. Nevertheless, on another hand, other Courts have acknowledge, with practically identical factors situations the legal nature of the employment model based on TRADEs.

- Judgments acknowledging wage based relation:
- Judgment of Labour Court of Valencia dated 26 June 2019.
- Judgment of Labour Court n. 31 of Barcelona dated 11 June 2019 (n. 662/2017).
- Judgment of Labour Court n. 33 of Madrid dated 11 February 2018.
- Judgment of Labour Court n. 11 of Barcelona dated 29 May 2018 (n. 213/2018).
- Judgment of Labour Court n. 6 of Valencia dated 1 June 2018 (n. 244/2018).
- Judgments acknowledging self-employment:
- Judgment of Labour Court n. 17 of Madrid dated 11 January 2019 (n. 418/2018).
- Judgment of Labour Court n. 39 of Madrid dated 3 September 2018 (n. 284/2018).

What is the role of social partner?

Initially, the Trade unions could not reach these type of employee. Among the causes for this are the difficulties to construct a representation of the workers in the companies which operate through digital platforms, because the workers do not offer the services in a specific workplace, with the individualization which entails geographic dispersion, and our representative system is based precisely in the number of employees in a specific workplace.

Another hindrance is the profile of the workers. The fact that this employees are, in their vast majority, youngsters balancing work and studies means that they do not succeed in creating a real awareness which would take them to claim better work conditions; the high rate in temporality generates high rotation which makes it difficult to articulate a common defence.

Equally, the particular job insecurity of these employees and the total instability to remain in the job due to a lack of stable work contracts, even providing services in an irregular manner (mainly attributable to the lack of residence permits) means that the dread of losing the little they have discourages them from finding any help from the trade unions.

Nevertheless, through these digital groups some experiential forms of association where created (example "Riders X Derechos"), and since last year the trade unions have started to lead the litigation of these employees' conflicts.

Is it possible to include service providers or "modern workers" within the scope of collective labour agreements?

Within the different barriers, from a functional approach, it is not always easy to delimitate the exact sector in which they operate while they may fit in different sectors. More ever, a problem arises when we need to identify the agents with enough capacity to represent the concrete sector.

But mainly, there is an insurmountable boundary while they are termed as self-employed workers[6]. Since the collective labour agreement cannot include within its scope third parties outside of its functional

[6] Rodríguez-Piñero Royo, M. *El papel de la negociación colectiva. Contenidos a afrontar, aparición de nuevas actividades y nuevas formas de trabajo* in C. C. Colectivos, EL FUTURO DEL TRABAJO: RETOS PARALA NEGOCIACIÓN COLECTIVA XXX Jornada de

and geographic scope and those which have not been represented in the collective bargain. However, the judgement of the European Court of Justice, with the judgment FNV 2014/12/4 (C-413/13) ushered the possibility for collective bargaining to include protective clauses for these third parties when a fraudulent nature can be observe in the work of these employees.

Note that is Spain the "economically dependent self-employed workers" have been acknowledge the ability to sign Agreements for Professional Interest in defence of their common interests. Clauses which subsequently can be introduced in their individual contracts would be null and void if they contradict that included in the applicable API.

All the same, these agreements are not protected by the Albany test (CJEU 1999/09/21, C-67/96, Albany International BV Case) and they must respect the competition law.

Accordingly, the only formula for the employees of digital platform to benefit from the rights and working conditions acknowledged in the collective bargaining is the recognition as employees.

Social Security approach

3.1 The role of the social security system in the field of new forms of work

The luck of recognition as employees implies that within the Social Security these employees are included within the special regime for self-employees. In these sense, the cost derived from the social security must be paid by the self-employed workers, as well as the rest of tax costs originated from said condition.

If to these factors we add the economic deprivation of these "workers" it comes as no surprise that the coverage that these workers take on is the legal minimum rate. Since their work would not be otherwise profitable.

Regarding the protection of contingencies the coverage of the risk of temporary incapacity as well as occupation risk are compulsory.

According to a recent report drafted by UGT, the companies which act by means of digital platform for "take away" or food delivery, save

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Estudio sobre Negociación Colectiva. Ministerio de Trabajo, Migraciones y Seguridad Social, Madrid, 2018, pp. 91-144.

up to an average of 10.000 euros per worker not acknowledged as an employee but as a self-employed worker, and it is estimated that according to the number of riders which provide services at a national level, currently the social security is being deprived of 93 million per year owing to these situation.

To compensate for the low coverage that these workers have, as long as they are legally admitted, which not always happens, Deliveroo has procured a private insurance for its workers through the insurance company Qover. Thereby, the intention is to cover all accidents and injuries which could occur during the working hours.

Recently a Glovoo rider died and at a later time it was proven that he was not an official rider but an irregular worker who had been subcontracted by an official company rider. Consequently, the problem regarding the irregular work of immigrants in this type of job has resurfaced. Immigrants are especially prone to this practice due to the extensive waiting list to be part of the work force and the scarce inspections which are stablished on behalf of the company.

Conclusion

Currently, a specific legal frame aimed at employment through digital platforms in nonexistent, and this legal vacuum is leading to companies to use the facilities of said digital platforms to create an employment model based on "labour law flight", moving towards forms of commercial contracts by means of self-employment.

However, the pursue of this malpractice is being carried out by courts and by the Labour Inspectorate in a hope of avoiding the loss of labour rights that real employees could suffer. The malpractice of hiring employees as self-employed workers signifies that the statutory minimum wage is not applicable, neither is the maximum legal working day, nor the statutory minimum daily rest, and more over these workers lack the permits and basic right such as reconciling private and professional life.

With this outsourcing the workers are now who take on the cost of the social protection and Health and Safety along with the rest of the tax expenditures as individual business people.

From here spring the tendencies towards labour flexibilitation as the company for which the riders work (Glovo, Deliveroo…) do not have to resort to the labour dismissal but terminate the commercial

relationship with the self-employed worker escaping the compensational amount stipulated in the labour legislation.

Yet, reality shows that despite this fraudulent self-employment these workers still work as if they were real employees in view of the management and leadership of the company instrumented through the medium of digital platforms and its algorithms. It is the company which establishes the times slots, determines the way the service should be carried out, manages the activity and the service and finally, exercises disciplinary authority.

The judicial disparity engenders the call for the judicial doctrine to be unified. Regardless of the need for a statutory regulation in order to bring clarity to this matter. Despite the debate about if a reformulation of the classic legal constructions of employee and employer is necessary, I believe that these legal constructions are compatible with the current framework. Therefore, the law making process should concentrate on regulating the evidence to detect mal practices and expose false self-employees.

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4. New forms of work and Social Security in Portugal

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Summary: 1. Introduction. – 2. Social protection in the digital economy – 3. New challenges for Social Security in Europe – 4. Social Security in Portugal – 4.1. General Framework – 4.2. The Portuguese Social Security's schemes – 4.2.1. Social Scheme for Dependent Workers – 4.2.2. Social scheme for self-employed workers – 4.2.3. Economically-dependent workers or the "Grey zone workers" – 4.2.3.1. The Contracting Entities – 5. Conclusions: Can platform workers benefit from social protection in Portugal?

Introduction

The economic and financial crisis in 2008, the need for increased flexibility in the labour market, the fight against high rates of unemployment across Europe and the greater use of advanced information and communications technology («ICT»), have resulted in the emergence of new forms of work across Europe.

The global economic crisis has severely affected the Portuguese economy and the rapid rise in unemployment started to weigh on the social security budget, making Portugal the third European country[3]

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2 All references to national law are available at www.dre.pt (in portuguese only).

3 After Greece in May 2010 and Ireland in November 2010.

to ask for external help, which resulted in the implementation of an Austerity Program – the Portugal Memorandum of Understanding on Specific Economic Policy Conditionality (*MoU*[4]).

The austerity program forced Portugal to adapt its labour laws, promoting more flexible working regimes, namely in what regards working time and dismissals. It also obliged for significant social reforms, namely by cutting in wages in the public sector, reducing social protection and pension schemes and also by increasing the legal age to acquire retirement pensions[5].

In result of these difficult times, the Portuguese labour market, as the European market, needed to adapt, which gave grounds for the emergence of new forms of work, more flexible and, usually, performed by former unemployed people with the need to make ends meet[6].

Hence, for the last decade, we have been witnessing the emerging and increase in forms of employment that provide more flexibility to employers, such as mini-jobs in Germany[7], the «*zero-hour*» contracts in the UK[8], rising of self-employed people and of platform work around Member-States[9]. This has been associated with a growth of part-time or self-employed work, which abled people to face the results of the economic crisis, but also increased job insecurity due to the lack of proper legal regulation of said new forms of work.

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4 Portugal Memorandum of Understanding on Specific Economic Policy Conditionality (MoU), from 17 May 2011, with the ECB and the IMF, available in https://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf.

5 For a in-depth analysis of the Portuguese situation during the economic crisis and respective labour reforms, see David Carvalho Martins, "Labour law in Portugal between 2011-2014", *in Labour Law and Social Security Law at the crossroads focused on international labour law standards and social reforms*, Coord. Martin Štefko (ed.) et al., Charles University in Prague, Faculty of Law, Prague 2016, pp. 217-241 and Maria do Rosário Palma Ramalho, "Portuguese labour law and industrial relations during the crisis", Working Paper n.º 54, ILO (2013), pp. 1-6, available at https://www.ilo.org/ifpdial/information-resources/publications/WCMS_232798/lang--en/index.htm.

6 Regarding the emergence of new forms of work in Portugal, in particular, see our article "New forms of work in Portugal", *in Recent Labour Law Issues – A Multilevel Perspective,* Coord. Stefano Bellomo, Antonio Pretori, G. Giappichelli Editore, 2019

7 Jobs with short hours and low rates of pay.

8 Contracts where employees get paid for the hours they work but where there is no obligation on employers to offer work, while employees have the option of not taking on the work that is offered.

9 European Comission, *Non-standard employment and access to social security benefits*, Research note 8/2015, coord. Manos Matsaganis, Erhan Özdemir, Terry Ward and Alkistis Zavakou, Directorate-General for Employment, Social Affairs and Inclusion, 2016.

Besides the lack of legal regulation of these new forms of work, and especially with the absence of a legal working status, there is also a lack of regulation regarding the entitlement to social benefits in the same way as more standard forms of typical work.

Therefore, the "new" developments in the world of work have exposed a new set of questions that States have yet to respond: (i) how will the digital economy shape social security schemes?; (ii) what type of work will be regulated?; (iii) what social needs will there be?; and (iv) how will Member-States guarantee Social Security's sustainability on the long run?

In our article we will, firstly, present the current social security challenges around Europe in regards to new forms of work (in particular, platform workers) to, afterwards, explain how the Portuguese social security system has been adapting to the changes on the labour market, trying to maintain sustainable, despite all the economic and financial restraints that has been facing over the last decade.

Social protection in the digital economy

Social protection systems play a key stabilizing role, especially in the current context of heightened uncertainties about the pace and extent of labour market changes. The digital transformation has with no doubt created many new opportunities, but also rendered a growing number of current workers' tasks redundant and will require substantial restructuring in the future.

Hence, effective social protection plays a crucial role by providing a buffer against the individual and social costs of these adjustments and can ensure that those losing their jobs have the time to find adequate job matches or undertake training if needed, in order to re-enter the job market. At the same time, the future world of work presents distinct and sizeable challenges that may undermine the prevention, protection or promotion capacities that have guided the development of present-day social protection systems.

Also, the rising of new forms of work – in particular, platform work – has bring to the discussion the reforms of concepts such as "subordination", "subordinate work", "independent work", "typical" and "atypical" work.

In general terms, the concept of "typical" has been usually associated to the "classic" subordinate full-time employment relationship, whereas the "atypical" forms of work have been classified as different

types of subordinate work or as self-employed work[10]. These classifications have a direct impact in the organization and sustainability of social security schemes, as we will see.

More recently, new forms of work – such as platform work – have been classified as "new atypical" self-employed work in the form of individual or "solo" self-employment, even though platforms may use direct and indirect control mechanisms indicating a personal or, at least, an economic dependency of the digital workers on the platforms[11].

This means that what before was classified as atypical work is now known as "more typical" when compared with platform work. Therefore, platform workers have also been called the "grey area workers", since they don´t necessarily adapt to neither of the two more common distinctions amongst legal frameworks of Member-States, neither exists a specific status regulation that put to rest the divergences of concepts around the countries.

Despite the absence of a legal status for platform workers, the truth is that they are part of modern labour markets and they do not have social protection under law.

Thus, social protection schemes around Europe do not regulate platform work, which is one of the current (new) challenges that countries are now facing, in hands with the already known problems of ageing population, negative growth rates, shrinking of working-age population, migration, as well as higher life expectancy and low birth rates.

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[10] According to the European Commission, non-standard or atypical work is defined '*as fixed-term contracts, temporary agency work, part-time work and independent contract work*'. (Employment and Social Developments in Europe Report, 2014 p.30). According to the ILO, non-standard or atypical work refers to: '*jobs that fall outside of the realm of standard work arrangements, including temporary or fixed-term contracts, temporary agency or dispatched work, dependent self-employment, as well as part-time work, including marginal part-time work, which is characterized by short, variable, and often unpredictable, hours*.' According to the OECD, non-standard or atypical work may be broadly defined as '*all employment relationships that do not conform to the 'norm' of full-time, regular, open-ended employment with a single employer (as opposed to multiple employers) over a long time span. Such a broad definition of non-standard employment includes three partly overlapping types: a) self-employment (own account workers); b) temporary or fixed-term contracts; and c) part-time work*.' (OECD 2015 p.138)

[11] Olga Chesalina, "Access to social security for digital platform workers in Germany and in Russia: a comparative study", *in Spanish Labour Law and Employment Relations Journal*, n.º 1-2, Vol. 7, November 2018, pp. 17-28, p. 17.

This means that platform work must be considered as relevant work for social security's purposes, especially given the exponential growth of these new forms of work across the globe and the continuous need for social security sustainability, especially in Europe.

New challenges for Social Security in Europe

Therefore, while the challenges of the digital economy and on-demand work for labour law are taking interest amongst scholars and legislators across the world, there are few incursions and studies dedicated to the challenges that the platform economy bring to social security schemes and what should be the approaches and appropriate solutions for these new challenges.

The main challenges arising of the digital – *on-demand* – economy are, first and foremost, the lack of proper social security protection for digital workers, as well as the sustainability of the social security systems.

Many workers in these non-standard forms of employment have lower job and income security, poorer working conditions and lower social protection coverage, as compared to workers in standard employment forms, namely with full-time and indefinite employment relationships[12].

Besides, we should bear in mind that worker's classification, in each country, determines access to social protection. Furthermore, it is generally common for countries to differentiate the access criteria and grant of social protection regarding the type of employment relationship established with each individual.

Hence, it can be said that social systems have been designed – at least in early times – with full-time, permanent, dependent workers in mind, leaving other workers at a potential disadvantage.

Since the economic crisis of 2008 is – apparently – a problem of the past, the EU has been increasing its attention regarding social policies that, in the economic crisis period, were sacrificed in order to promote economic growth within the EU and Member-States. For that motive, the EU has been working on promoting policies for an overall social

[12] ILO (2016a), non-standard forms of employment include part-time and on-call work, temporary employment, multiparty employment relationship and disguised employment and dependent self-employment – cf. ILO Report Non-Standard Employment Around The World: Understanding challenges, shaping prospects, Geneva, 2016.

protection amongst Member-States that, however, is not without its many challenges, especially when facing the particular challenges of regulation for non-typical employment relationships as the self-employed or the economic dependent self-employed.

A visible result of EU's efforts is the Pillar of Social Rights[13] which is about delivering new and more effective rights for citizens. It builds upon 20 key principles, structured around three categories:

1. Equal opportunities and access to the labour market
2. Fair working conditions
3. Social protection and inclusion:

Within the third category, the EU identifies, amongst other, the following objectives:

a) *Social protection*: Regardless of the type and duration of their employment relationship workers, and, under comparable conditions, the self-employed, have the right to adequate social protection.
b) *Grant of unemployment benefits*: The unemployed have the right to adequate activation support from public employment services to (re)integrate in the labour market and adequate unemployment benefits of reasonable duration, in line with their contributions and national eligibility rules. Such benefits shall not constitute, however, a desincentive for a quick return to employment.
c) *Minimum income*: Everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services. For those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market.
d) *Old age income and pensions*: Workers and the self-employed in retirement have the right to a pension commensurate to their contributions and ensuring an adequate income. Women and men shall have equal opportunities to acquire pension rights. Everyone in old age has the right to resources that ensure living in dignity.

[13] Regarding the European Pillar of Social Rights, please see the European Commission booklet: https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european -pillar-social-rights-booklet_en.pdf

Even though the Pillar of Social Rights is a soft law instrument, *i.e*, is not binding for Member-States, the fact is that has sent a message that social policies are crucial and national legislations must adapt in order to comply with the EU's desires.

This message is particularly important when the world is facing a work revolution – the called work 4.0 – where new forms of work and new types of "workers" are appearing in the labour market, obliging Member-States to provide, in their national legal schemes, social protection for those individuals.

However, the different labour law frameworks and social protection schemes around Europe make the task difficult, especially when the aim is to guarantee social protection for all workers, independently of their legal status.

In Portugal, as in many other countries, the social protection regime for self-employed workers is not the same as for dependent ones. In particular, self-employed face different access criteria to social protection and even when such access is provided, self-employed workers may face difficulties in meeting eligibility criteria or contribution thresholds of the schemes that they can access.

They will typically also face a higher administrative burden than dependent workers to report their income, pay social protection contributions and access benefits. Additionally, given the continuous emerging of new forms of work around the globe, in cases where employees may be misclassified as independent workers, this might have the effect of reducing their access to social protection.

Furthermore, workers who sit in the "grey zone", between dependent employment and self-employment, are at risk of being similarly disadvantaged, even though their working arrangements may have some of the characteristics of a typical employment relationship.

Portugal, in response to EU concerns, has been facing many social reforms, namely in 2012 where it was extended unemployment protection to economically dependent self-employed, in cases whether there is termination of professional activity; in 2018, when the eligibility criteria for economic dependency were relaxed with the effect of extending unemployment protection to more self-employed workers; and in 2019, the requirements regarding qualifying periods for access to benefits in case of termination of activity were reduced, as well as changes to the calculation of contributions for self-employed workers came into force.

Therefore, we will now further discuss the different social protection schemes in force in Portugal and analyse their correspondence to EU guidelines regarding social protection and also their adequacy given the new labour market challenges.

Social Security in Portugal

General framework

Social security, as described by the ILO «*is a human right which responds to the universal need for protection against certain life risks and social needs. Effective social security systems guarantee income security and health protection, thereby contributing to the prevention and reduction of poverty and inequality, and the promotion of social inclusion and human dignity*».

Social Security systems can be described as an integrated set of state planning measures for the prevention and remedying of personal risks through individualised and economically assessable benefits. Also, Social security is the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner.

Simply, social security systems are the citizen's insurance policies in case of social events that prevent/enable them from working: *e.g.*, sickness, invalidity, parenthood, old-age, which is accurate since social security systems were born from previous insurance policies's schemes across the globe.

In Portugal, the Social Security system, as we know it now, is originated from the legislation of the 60's, where the State established social policies plans[14].

Portuguese social security system has been developing across the years to a more structured and egalitarian system, with respect for the international[15], European[16] and national[17] laws.

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[14] Law n.º 2115, of the 18th of june 1962 that regulated the integration of welfare objectives and achievements in the social policy plan.

[15] For example, the ILO Convention n.º 102 (1952); The European Social Charter from the Council of Europe (1961) and the European Social Security Code and Protocol (1964).

[16] For example, the European Commission's recommendations.

[17] The Portuguese Constitution (1976) and all the social security legal scheme, namely Law n.º 110/2009 of 16th of September that approved the code of contributory

The Code of Contributory Regimes of the Social Security Welfare System[18] (hereinafter the Contributory Code) constituted an important milestone in the evolution of the Portuguese legal system of social security. This is because it translates a systematizing and coding effort to gather and organize, in a single diploma, matters that were scattered over different legal diplomas and assumed a reformist vocation, since it established new and innovative solutions.

This was the first systematization in the history of Portuguese social security of the normative acts that regulated the entire contributory legal relationship between taxpayers and beneficiaries and the social security system[19].

With the contributory code, the principles that determined the rights and obligations of taxpayers and beneficiaries of the social security system were compiled, systematized, clarified and harmonized, and the rules were adapted to contemporary factuality and the administrative simplification and modernization was greatly improved.

For the first time, the obligation to share the burden of social protection for self-employed workers – whose activity is the provision of services – has been introduced between workers and companies. Workers are assured that benefits that replace income from work are calculated on the basis of what is actually their income from work, and they are guaranteed more social protection, and, as agreed with the social partners, the contribution base is gradually broadened to include new remuneration components.

More recently, the scheme for self-employed workers was restructured in the Contributory Code, having regulated, with an innovative character, several matters, namely widening and redefining the contributory basis of the general scheme and creating the figure of the contracting entities, which we will further explain.

But before, in order to grasp the full picture of the Portuguese social security system, we will begin by explaining the major schemes currently in force.

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schemes to the social security system. All national laws are available for consultation in *Diário da República Eletrónico*, *i.e*, www.dre.pt.

18 Law n.º 110/2009 of 16th of September that approved the code of contributory schemes to the social security system

19 Joana Tavares de Oliveira / Rui Valente, *Código contributivo anotado*, Coimbra, Coimbra Editora, novembro 2011.

The Portuguese Social Security's schemes

Nowadays, we can distinguish social security schemes, for working individuals, in three major groups: (i) Dependent Workers; (ii) Self-employed workers (the so-called "Green Receipts"), and (ii) Economically-dependent workers (or the "Grey Area workers").

However, we should not forget that, traditionally, labour-related social security schemes have been designed around the default case of the typical standard dependent worker. The Portuguese labour law is no exception. Therefore, in this context, standard work is understood as subordinated, full-time work of an indefinite duration, *i.e*, dependent work, even though has been adapting to "atypical" forms of work, such as part-time and fixed-term work.

Hence, social security's sustainability was created and is based in the typical dependent form of work.

Social Scheme for Dependent Workers

As said, the dependent worker scheme is the classic social security scheme, which imposes social security contributions for employers and employees that concluded an employment contract, with subordination. For social security purposes, it does not matter if the employment contract was concluded for undetermined period, fixed-period, part-time or full-time, since all employees are considered salaried and dependent workers ("*trabalhadores por conta de outrem*").

So, under social security law, who is covered by the "standard" dependent work social protection scheme?

a) People who carry their professional activity being subject to an employment agreement or a legally equivalent agreement;
b) Undertake to provide their activity;
c) Are covered under that activity by the general social security scheme for workers;

On the other hand, are excluded from this scheme: (i) self-employed workers; (ii) lawyers and paralegals included in the relevant Insurance Fund, (iii) workers working in Portugal on a temporary basis who prove that they are covered by a different country's compulsory welfare scheme[20].

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[20] Apelles J. B. Conceição, Segurança Social, 9ª edition (reimpression), Almedina, 2014, pp.189-195.

Regarding the costs associated to this scheme, it is important to refer that social contributions are not equally divided between employer and employee. The major part of social security contributions is supported by the employer – 23,75% of the relevant employee's monthly income –, whereas the employee only supports 11% of the contributions. These contributions are deducted directly from the employee's paycheck, since all the legal obligations before the Social Security are of the employer. In total, each dependent work relation requires the payment of 34,75% of the employee's relevant income to Social Security[21].

Thus, the employer has the obligation of: (i) give notice of admission of workers 24h prior to the effective date of the employment agreement or 24h after when duly justified; (ii) payment of contributions (the employer's and the employee's) from the 10th to the 20th of the month subsequent the relevant month[22]; (iii) give notice of termination, suspension and amendment of the employment contract by the 10th of the subsequent month (after the employment's termination); and (iv) file the Statement of Compensation Format, via electronic form, which enables Social Security to cross-check the employee's deductions and the employer contribution's payments.

Regarding social protections, dependent workers can access the full list of protections available by Social Security: unemployment, sickness, parenthood, retirement, disability, old age and death, other protections (professional diseases, child support, etc.).

This social scheme is the one that provides a full range of social protection. However, is the scheme which is more burdensome with administrative obligations and costlier to the employer, rather than to the employee.

Social scheme for self-employed workers

One of the manifestations of the "atypical" work, in contrast with typical dependent work, was the absence of legal subordination (*e.g.* self-employment) and/or due to the absence of a stable employment relationship (*e.g.* fixed-term work) or income security (*e.g.* part-time work).

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[21] For example, if the employee earns 1000,00€ as base salary per month, the employer must pay 34,75% of the 1.000,00€ to Social Security (1000* 0,3475 = 347,50€, which equivalents to 110,00€ from the employee (11%) and 237,5/€ from the employer (23,75%). Therefore, the cost with such employee would be, in reality, of 1237,50€ for the employer and the employee will only receive 890,00€.

[22] Otherwise the employer may face criminal charges and pay fines.

The latter were already included in the dependent worker social scheme, as mentioned, but the former have a specific social security scheme.

So, social security considers self-employed those workers who:

I. Carry their professional activity without being subject to an employment agreement or a legally equivalent agreement;
II. Undertake to provide the result of their activity to others;
III. Are not covered under that activity by the general social security scheme for dependent workers;

Are excluded from this scheme lawyers and paralegals included in the relevant Insurance Fund and workers working in Portugal on a temporary basis who prove that they are covered by a different country's compulsory welfare scheme.

Self-employed are the commonly known "green receipts", since they have to file a green receipt to Tax Authorities that are after communicated to Social Security for payment of contributions.

For social security purposes, self-employed are considered their own employers, therefore all contributory obligations – administrative and financial ones – are entirely theirs.

The contributory obligation of self-employed workers includes: (i) the payment of contributions; (ii) the issue of the Quarterly Statement of the amounts corresponding to the activity exercised; (iii) the issue of the Annual Statement of Activity (Annex SS to Model 3 of the IRS).

The self-employed workers are required to declare: (i) The total value of income associated with the production and sale of goods; (ii) The total value of the income associated with the provision of services; (iii) Other income necessary to establish the relevant income.

Based on the relevant income, self-employed pay, in general, a contribution rate of 21.4%[23], which is, in total, lower than the contributory rate for dependant workers but correspond to a higher sacrifice for self-employed compared with dependant workers (who only pay 11%).

This social scheme offers, however, some exclusions, namely if the self-employed worker cumulatively has an employment agreement.

In such cases, the self-employed may be exempt from contributing as long as they meet all of the following cumulative criteria: (i) issues a "Green receipt" and has an employment agreement with

[23] But, in case of the individual is considered an "*empresário em nome individual*" (sole entrepreneur) it can be of 25,2%.

separate entities with no control or group relationship; (II) Employment agreement requires mandatory inclusion in another welfare scheme covering all eventualities covered by the self-employed worker's regime; (III) the average monthly compensation in the employment contract is superior to a specific threshold that is evaluated on a periodic basis[24].

The exemption also applies for those cases where: (i) the self-employed worker is an invalidity or old-age pensioner of national or foreign welfare schemes; (ii) the self-employed worker is a pensioner resulting from an occupational risk suffering from occupational disability superior to 70 %; (iii) is a self-employed worker who has no income or reduced income, in the previous year, and is in the same situation; and/or (iv) is a self-employed worker who is under the self-employed worker regime, in the 12 months period following the commencement of activity;

Besides the different social security scheme, in a labour point of view, there is a risk associated to this regime, since it is normally considered as false independent work and has more probability to be subject to scrutiny of the Labour Inspection.

For example, if there is a suspicion of labour fraud, Social Security will notify the inspection services of the Authority for Working Conditions ("ACT") or the inspection services of the Social Security Institute to verify the legality of the situation. Further to such notification, special legal procedure can be used so as to ascertain whether there is an employment agreement/dependent work relationship, which implies to file a special lawsuit to labour courts.

Regarding social protections, self-employed workers can access the following protections: sickness, parenthood, retirement, disability, old age and death.

This means that self-employed, despite their contributory rate is almost as high as the joint contributory rate for dependent workers, they are not entitled to all social protections, being excluded protection in case of unemployment.

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[24] In 2020, it is equivalent to 438,81€. This means that if a self-employed also has and employment agreement under a dependent working scheme and receives more than 438,81€, he would be exempt of contributions for social security as a self-employed (but pay as a dependent worker).

Economically-dependent workers or the "Grey zone workers"

Within the social security concept of self-employed, there is a sub-category of the economically dependent workers. This concept derives from the Labour Code concept[25], which may be relevant when assessing if platform workers may be considered as economically dependent and therefore have access to social protection.

As said[26], under Portuguese law, the determining factor[27] in qualifying an agreement as an *employment employment* is the existence of *legal subordination*, in which the employee is subject to the employer's authority and management powers[28], and that involves not only obeying legitimate orders and instructions related to work performance and discipline (Article 128 Portuguese Labour Code – PLC), but also being subject to the employer's disciplinary powers (Articles 98 and 328 PLC).

Apart from the established concepts of independent self-employment and subordinate employment, there is the concept of *economically dependent work*, provided by Article 10 PLC, which covers situation of workers who "remain economically dependent on a single principle or client/employer for their source of income"[29], despite being formally self-employed, since they do not have a *contract of employment*. These workers are considered as *employee-like workers*, which corresponds to the civil law notion of *"parasubordination"* in Italy[30].

This concept of *economic dependency* is not to be understood as meaning the need for labour income in order to guarantee the workers and their families' subsistence, but as referring to the situation in which the

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25 Cf. Article 10 of the Portuguese Labour Code

26 Mariana Pinto Ramos, "New forms of work in Portugal", ob. cit., pp. 122-127.

27 Maria do Rosário Palma Ramalho, Tratado de Direito do Trabalho, Parte II, Almedina, Coimbra, 2019 p. 32.

28 Nuno de Salter Cid, «Contrato de trabalho, contrato de prestação de serviço e utilização indevida deste: problemas e soluções», in Revista de Direito e de Estudos Sociais, 2017, p. 180.

29 Comission of the European Communities, «Green Paper: Modernising labour law to meet the challenges of the 21st century», Brussels, 2006, p. 11.

30 M. Pedrazzoli, «Prestazione d'opera e parasubordinazione», in Rivista Italiana di Diritto del Lavoro, 1985, pp. 506-556; M. Vittoria Ballestreto, «L'ambigua nozione di lavoro parasubordinato», in Lavoro e Diritto, Bologna, 1987, 1, pp. 41-67.

worker is integrated and exclusively engaged in an otherwise unrelated productive process[31], despite being formally independent.

Taking all the above in the account, platform workers in Portugal may be considered, in a labour point of view, *economic dependent*[32]. However, since this is a case-by-case analysis, the absence of a legal status to platform workers difficults the adaptation of Social Security schemes to these new forms of work.

Therefore, for social security purposes, can a platform worker be considered an economically dependent worker? To assess such possibility, we need first to understand the legal regime.

So, the economically-dependent workers or "Grey zone workers" are considered the self-employed workers who are more dependent on a single entity, – the so-called contracting entities – for income.

Therefore, according to the Portuguese social security law, economically-dependent workers are those that meet all of the following criteria: (i) are self-employed workers; (ii) are under the obligation to contribute (not exempt); (iii) comply with an annual income threshold of 2.614,56 €.

Along with the economically dependent workers, we need to analyze the contracting entities regime, as follows.

The Contracting Entities

The Contracting Entities were first regulated in the Contributory Code but the self-employed social protection regime changed significantly in 2018 with Decree-Law n.º 2/2018 of 9th of January. This law entered into force on January 1st, 2019.

The rationale behind this legal amendment was, in fact, to preserve the dignity of work and to increase the social protection of the self-employed workers, therefore, a revision of the contribution regime of the self-employed workers was carried out by this normative, with the purpose of establishing a better balance between the contributory duties and rights of those workers and an effective social protection that improves the perception of benefits, contributing to a greater link to the social security welfare system.

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31 Maria do Rosário Palma Ramalho, Direito do Trabalho…, ob cit., p. 83.

32 Given the Uber example, the driver, while formally independent, is engaged in a productive process that is organised and determined by the electronic platform operator.

The revision of the rules for determining the amount of contributions to be paid by self-employed workers so that these contributions have as a reference the most recent months of income, or the reevaluation of the contracting entities' regime in order to reinforce justice in the distribution of the contribution effort between contractors and independent workers, with strong or total dependence on the income of a single entity, embodies some of the changes foreseen in the Government's Program, materialized through this decree-law.

The new law had a significant impact in the contracting entities. They are the natural or corporate persons with business activity that can be qualified as "contracting entities".

So, as mentioned, for a self-employed to be considered economically dependent, it must verify the following criteria:

a) That they benefit, in the same calendar year, from at least 50% of the self-employed worker's total business (value ascertained by the amount earned by providing services to the same corporate group);
b) Self-employed worker must be under the obligation to contribute to social security (not exempt);
c) Self-employed worker earns an income as consideration for services provided superior to 6 times the Index for Social Support ("IAS"), which in 2020 is 438,81€. Therefore, the threshold should be superior to 2.632,86€.

If a self-employed is considered economically dependent this entails social security obligations to the contracting entity, namely the obligation to pay contributions.

Nowadays, the contribution rate for these cases is of 10% or 7%[33]. The contribution is ascertained on the basis of the global amount of services provided by the self-employed worker to the Contracting Entity.

Therefore, if more than 50% and up to 80% of the services are provided yearly by the self-employed is to the same entity (or to corporations of the same corporate group), said contracting entity must pay a contributory rate of 7%.

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[33] But before the legal reform in 2018, contracting entities were only responsible for a 5% contributory rate, whereas the self-employed had higher contributory rates as now.

Whereas, if more than 80% of services are provided to the same entity or corporate group, then the contributory rate increases to 10%[34].

One of the major critics around this specific social security scheme is that, normally, contracting entities are totally unaware that are considered one by social security. Therefore, they are only notified to pay contributions more than a year later of the rendering of services by the self-employed.

So, how is the payment made by the contracting entity?

a) Issue of the Tax return by the self-employed worker until May 31st of the year subsequent to the relevant year (Tax Return for Personal Income Tax);
b) Social Security will determine the amount of services provided to the contracting entities;
c) Social Security will issue a collection document and give notice to the contracting entity;
d) Contracting Entity will pay until the 20th of the month subsequent to that of the issuance of the collection document.

With reference to the previous calendar year, the self-employed worker will declare the global amount of services provided by (each) contracting entity.

Regarding social protections, economically dependent workers can access the full list of protections available by Social Security: unemployment, sickness, parenthood, retirement, disability, old age and death, other protections (professional diseases, child support, etc.).

This means that, for social security purposes, economically dependent workers are similar to dependent workers, given that the contracting entities assume an "employer-like" role, whereas the economically dependent worker is considered a dependent-like worker. Hence, only economically dependent self-employed workers are able to access unemployment protection, given this special regime where the burden of the payment of contributions is split (unequally) between workers and contracting entity, *i.e*, the beneficiary of the services.

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[34] For example, imagine the case where an entity, in 2020, engages a service in the amount of 1.400,00€ with a self-employed earning an annual income of 2.700,00€ euros (greater than 6 times the "IAS") for service provision. Since more than 50% (2700/2=1350) of the services were provided to the same entity, such entity will be considered as a contracting entity, with a contributory obligation in the amount of 98,00€ (1.400,00€ x 7%) for 2021.

Conclusions: Can platform workers benefit from social protection in Portugal?

Given all the above, platform work, or any kind of 'new forms of work' in Portugal, in which an individual provides a service to consumers through an electronic platform whose operator acts as the intermediary, rehashed the debate related to the definition of employment contract and its difference compared to the service agreement, since they occupy a "grey area" between those two concepts. However, the parse legislative examples we have today in Portugal (*i.e.*, the "Uber Law"[35]) do not provide the answer regarding the working status of these workers under the law. Therefore, we need to analyse the working status on a case-by-case analysis.

In our opinion, Portugal incorporates platform workers in its existing social security system, but omits to fine-tune the existing schemes around the specific working conditions of platform work, which are, by nature, flexible.

Therefore, a platform worker can be, potentially, viable to any of the different social schemes or even to cumulate two of them (dependent work and independent work).

There is no specific legal framework to new forms of work, therefore one must adapt to the general rules accordingly. One must adapt accordingly to the nature and amount of its annual income, which can also vary on an annual basis.

Hence, is not possible to say if these workers are able to access social protection under current social security law.

However, despite the diversity of social protection schemes, we might say that platform workers are able to access social protection if:

I. They are considered dependent workers, under a labour relationship where they provide services to the platform through a company that is formally their employer, in tripartide relationship;
II. They are self-employed *stricto sensu* and pay social security contributions (even though they are not able to access unemployment grants);
III. They are considered economically-dependent workers and their annual income is 50% or more dependent on the same entity (*e.g.* Uber), in which case the company must also pay contributions to

[35] Law 45/2018, of 10 of August, available in *Diário da República* n.º 154/2018, Série I of 2018-08-10, in https://data.dre.pt/eli/lei/45/2018/08/10/p/dre/pt/html

social security, which will provide more protection for these workers, since enables them to access all available social protections, including unemployment protection.

This means that, in the Portuguese legal framework, there are several possibilities for platform workers to access social benefits, even though the levels of protection are not the same in every different scheme which can also entails that workers in the same circumstances (e.g. being an Uber Driver) may have completely different social protections, according to their working status. Therefore, not only the Portuguese social security, but all social security's worldwide, will need to adapt to these new forms of work, in order to maintain social security sustainability. The "typical" labour relationship is no longer the standard scenario in labour markets and social security systems need to adapt in order to survive.

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SECTION II

Critical Issues on Digitalization, Platforms and Algorithms

5. Strengths and Weaknesses of Platform Work. Platform work as a chance for a more inclusive Labour Market

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Summary: 1. Introduction. – 2. The multifaceted phenomenon of platform work. – 3. Introductory remarks on the problematic implications of platform work. – 4. The negative impact of platform work on worker's well-being. – 5. The difficult adaptability of traditional remedies to the problems arising from platform-work. – 6. Reconciling digital technologies and well-being at work. – 7. Platform jobs and active ageing workforce – 8. "Accommodate" digital work for disabled people. – 9. Platform work and work-life balance solutions – 10. Final remarks.

Introduction

Technological innovation is one of the key elements that affects our society and labour market, along with demographic changes and globalization.

The main issue that scholars are called to tackle concerns the effective implications of such technology on real life. Nevertheless, it has to be highlighted that technology represents a neutral tool: whether consequences are positive or negative, it depends on how people make a use of it and manage the social transformation deriving from it.

The same consideration could be made with specific regard to platform work, which represents a new way of organising paid work. It consists in an employment form in which organisations or individuals use an online platform to access other organisations or individual in

[1] Claudia Carchio is the sole author of paragraphs 6, 7, 8 and 9 Caterina Mazzanti is the sole author of paragraphs 2, 3, 4 and 5. The introduction (paragraph 1) and the final remarks (paragraph 9) have been written together by the two authors.

order to perform specific activities or duties in exchange for payment[2]. It could also be defined as a tool that facilitates the match between supply and demand of activities, since it shortens the distances between people and it breaks down geographical barriers. From this perspective, it is one of the most revolutionary changes that affects our society and labour market. In fact, platform work redraws the production processes and, with them, the relationships between employer and worker, workers, work and leisure time.

So, platform work might be considered as a neutral tool as well. It might provoke disadvantages, when it is misused or abused but it might also become an opportunity, when people are able to make a proper use of it, to eliminate social barriers and to include disadvantaged categories.

The research, that has been carried out together by the two authors, aims to describe both sides of the medal.

Firstly, it starts from some considerations concerning the misuse of technology, by specifically focusing on the negative impact of platform work on wellbeing. Therefore, the study will delve into the topic of health and social risks arising from an abuse of such tools.

Secondly, it analyses the topic by adopting a completely different approach, in the light of which such tool might be considered as a chance for disadvantaged workers, since it opens the way to a more inclusive labour market.

The multifaceted phenomenon of platform work

Platform work might be metaphorically described in terms of a multicoloured mosaic, since it encompasses many different situations. The phenomenon, in fact, includes different scale of workers' tasks, service provisions and skills, which might vary from case to case, from basic to highly specialised ones. Consequently, even the range of workers is very wide. Finding a *fil rouge* between all the different types of platform work becomes necessary to deeply analyse such phenomenon. At this regard, as clearly highlighted by the Eurofound, the expression "platform work" refers to «an employment form that uses a

[2] R. Florisson, I. Mandl, *Platform work: types and implications for work and employment*, Eurofound Working Papers, 1, https://www.eurofound.europa.eu/sites/default/files/wpef18004.pdf .

platform to enable organisations or individuals to access other organisations or individuals to solve specific problems or to provide specific services in exchange for payment». In addition, it is generally based on a three-parties structure or 'triangular relationship[3]', since it involves a 'client', a 'worker' and a 'platform'.

As clearly pointed out[4], such form of organising work might be identified in both on-location work (as on-demand work via App or, more appropriately, gig work[5]) and crowdsourcing. In other words, such jobs are either digital or physical.

In the first case, activity is performed according to the traditional scheme, since it is closely connected to the traditional dimension of space and time. At this regard, technology plays an innovative role in assenting a job opportunity and controlling the worker's performance.

In the second case, activities are carried out exclusively online, by the use of digital tools. it might potentially include all social categories, also the disadvantaged ones, since it enables people to work potentially everywhere and make it possible to perform work to those, who normally are excluded from the labour market because of their social position or personal needs and difficulties (as in the case of working-parents, especially mothers, or people with disabilities). The variety of workers should be inevitably considered as a crucial aspect of the analysis: in fact, thanks to this perspective, the overview on the phenomenon might be broader.

Introductory remarks on the problematic implications of platform work

As highlighted by scholars, platform work raises significant issues. The topic, in fact, prompts a very wide debate, concerning

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[3] E. Ales, *Protecting Work in the Digital Transformation: Rethinking the Typological Approach in the Intrinsically Triangular Relationship Perspective*, in E. Ales, Y. Curzi, T. Fabbri, O. Rymkevich, I. Senatori, G. Solinas, *Working in Digital and Smart Organizations*. Palgrave Macmillan, Cham, 2018, 11-28.

[4] See https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/ platform-work.

[5] G.A. Recchia, *Working for an internet Platform: new challenges for courts,* Legal Issues in the Digital Economy: the Impact of Disruptive Technologies in the Labour Market, (edited by V. Filì, F. Costantini), Adapt University Press, Cambridge Scholars Publishing, 2019, 23; M.A. Cherry, *Beyond Misclassification: The Digital Transformation of Work,* Comparative Labour Law & Policy Journal, 2016, 37 (3), 544-577; V. De Stefano, *The Rise of the «Just-in-Time Workforce»: On-Demand Work, Crowdwork and Labour Protection in the «Gig economy»*, Comparative Labour Law & Policy Journal, 37(3), 471-504.

problems of different fields of interest, as those on personal data processing and privacy, or the correct classification of such work within traditional schemes[6]. In order to trace the boundaries of the present analysis, one aspect, however, seems to be of fundamental importance, and regards the risks on health and social conditions to which are exposed platform workers. This aspect is closely connected to the classification of platform work within the scheme of the employment relationship, autonomous work one or as a 'third *genus*'. In fact, the protection standards, even those concerning worker's heath and safe, might vary from work category to work category. Therefore, the higher the protection ensured, the more important the distinction becomes.

From the perspective of the Italian legal framework, it has to be pointed out that the Legislator has recently established a specific regulation on so-called 'riders' into the Law n. 128/2019. As it is well known, the activity performed by riders consists in good (especially food) delivery and it is organised through a digital platform, that enables the match between supply and demand. According to art. 1, of the overmentioned Law, those workers have to be qualified within the scheme of 'hetero-organization' that is, more specifically, a collaboration based on a strong link between worker and client, similar to the one that characterised the employment relationship but still definable in terms of a para-subordination. The most significant aspect is, that for such category, the protection standards are close to the ones provided for the traditional employment relationship.

One of the main issues arising from the new discipline of Law n. 128/2019 concerns the possibility to extend such regulation to the entire category of platform workers. In fact, as highlighted before, the phenomenon is multifaceted and includes a wide variety of workers,

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[6] Garofalo D, *La prima disciplina del lavoro su piattaforma digitale (D.L. n. 101/2019 conv. In L. 128/2019),* Il Lavoro nella giurisprudenza, being published (the article has read thanks to the kind courtesy of the author); Dagnino, E. (2015), *Uber law: prospettive giuslavoristiche sulla sharing/on-demand economy*, Adapt Labour Studies, e-Book series, Bergamo, Adapt, available at http://www.bollettinoadapt.it/uber-law-prospettive-giuslavoristiche-sulla-sharingondemand-economy/; V. De Stefano (2016), I*ntroduction: crowdsourcing, the gig-economy and the law*, CLLPJ, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2767383; G.A. Recchia, *Contrordine! I "riders" sono collaboratori eterorganizzati*, Il Lavoro nella giurisprudenza, 2019, 4, 403-411; G.A. Recchia, *"Gig economy" e dilemmi qualificatori: la prima sentenza italiana*, Il Lavoro nella giurisprudenza, 2018, 7, 726-734

activities and working modalities. In case the regulation might be considered as exclusively directed to so-called 'riders', there should be a violation of art. 3 Italian Constitution[7].

Moreover, the notion of risk on health need be specified, since it significantly varies whether we consider the two main forms of platform work, the work via App and the crowdsourcing.

In the first case, in fact, risks on health are not considerably different to the ones normally arising from the traditional form of work. At this regard, workers perform their activity within a conventional scheme and the internet platform has the main scope to facilitate the match between offers and demand of services (as it happens for *Uber* or *Foodora*, both representing two instances of internet platform through which the worker provides traditional services but the way the activity has to be performed is subject to the rules of the digital platform).

Otherwise, as highlighted before, crowdsourcing consists of an online provision of services or activities. Therefore, the risks on workers heath condition might be significant connected to the new working modality based on the use of technology. From this perspective, online work might expose workers to significant risks with negative implications on both health and social conditions.

In particular, the epochal change in performing work may have a strong impact on workers social attitudes and provoke the arise of psycho-social pathologies such isolation, stress, technostress, technology addiction.

The negative impact of platform work on worker's wellbeing

The risks arising from platform work and affecting workers' health and social conditions are different, whether we consider the two main forms of platform work, on-demand work and outsourcing. As mentioned before, within the first case – which include also transportation services – risks might not be different to those arising from the traditional form of work, since working modalities are similar[8]. Nevertheless, it

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[7] Garofalo D., *La prima disciplina del lavoro su piattaforma digitale (D.L. n. 101/2019 conv. In L. 128/2019)*, Il Lavoro nella giurisprudenza, being published

[8] S. Caffio, *Working with an internet platform: facing old and new risks*, Legal Issues in the Digital Economy: the Impact of Disruptive Technologies in the Labour Market,

has been highlighted that for transportation services these risks may be more significant for platform workers, who may have less experience or knowledge of how to manage risks, in particular because platform workers are generally younger[9]. Furthermore, those workers reported having experienced physical as well as sexual assaults by their clients[10].

Risks on health and social conditions might be even exacerbated in outsourcing. In fact, in this case worker performs work online and might be significantly exposed to issues arising from the abuse of technologies.

The first problem is the worker's isolation, which is caused by the absence of a shared place while the worker performs his activity. Those works mostly include individual activities, generally without any contact or time for exchanges, debate or discussions with others. It is evident that the typical characteristics of platform work can trigger the emergence of psycho-social issues. At this regard, social integration and a sense of belonging through an identified profession or form of employment are of fundamental importance and if they lack, there might be negative implications on worker's wellbeing.

The misuse of technology might increasingly provoke issues such are technostress, which refers to the pathologic consequence of an abuse of technology. As pointed out, technostress, in fact, can emerge due to hard work schedules, constant connectivity, multi-tasking, lower income, inconsistent productivity and blurred work-life distinction, with the arise of work-home conflict[11].

Moreover, work often takes place at home or in environments that are not proper work environments. So, ergonomic requirements might be violated, as it happens when the laptop or other tools do not meet legislative standards[12].

(edited by V. Filì, F. Costantini), Adapt University Press, Cambridge Scholars Publishing, 2019, 55.

9 Eurofound, *Platform work: types and implications for work and employment*, 68, available at https://www.eurofound.europa.eu/sites/default/files/wpef18004.pdf; M. Tran, R.K. Sokas, *The gig economy and contingent work: An occupational health assessment*, Journal of Occupational and Environmental Medicine, 2017, 59, 63-66;

10 Eurofound, *Platform work: types and implications for work and employment*, 68, available at https://www.eurofound.europa.eu/sites/default/files/wpef18004.pdf.

11 A. Umayr, K. Conboy, E. Whelan, *Understanding the influence of technostress on workers-job satisfaction in Gig – Economy: an exploratory investigation*, available at https://aisel.aisnet.org/cgi/viewcontent.cgi?article=1033&context=ecis2019.

12 M. Tran, R.K. Sokas, *The gig economy and contingent work: An occupational health assessment*, Journal of Occupational and Environmental Medicine, 2017, 59, 64.

In both cases of work via App and outsourcing, even the rating system might negatively affect workers' wellbeing, since they feel pressured to perform activities in order to get a positive feedback by clients, and they are consequently exceptionally affable, tolerating inappropriate behaviour from users, which can be mentally stressful.

The difficult adaptability of traditional remedies to the problems arising from platform-work

As highlighted before, some risks are linked to particular activities, such the location-based activities. In this regard, it was noted that the legal framework is not adequate, because it is based on the traditional model of the employment relationship. In fact, the legal protection is primarily directed to employees, by imposing obligations on the employer, and not to self-employed workers. On the other side, self-employed workers have to manage risks on their own account, even from an economic point of view. In other words, there is a transfer of risk from companies to workers and this seems to be the general rule in the platform economy[13].

The situation is even more complicated whether we consider the issue of workers' protection in the event of an injury. Due to the classification of platform workers in terms of self-employed, they should provide some form of occupational accident insurance at their own expense, as it happens in the case of the sign of 'terms and condition' included into the contractual agreement with Amazon Mechanical Turk, according to which they are "not eligible to recover workers' compensation benefits in the event of injury"[14]. Consequently, the ILO has encouraged the introduction of fees in line with the minimum wages set by collective bargaining or by law.

In conclusion, referring to what was highlighted before (see paragraph 3), the problem of classifying platform work according to the traditional scheme has a significant impact on workers' protection,

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[13] S. Caffio, *Working with an internet platform: facing old and new risks,* Legal Issues in the Digital Economy: the Impact of Disruptive Technologies in the Labour Market, (edited by V. Filì, F. Costantini), Adapt University Press, Cambridge Scholars Publishing, 2019, 66-67.

[14] ILO (2018), *Digital labour and the future of the work. Towards decent work in the online world,* International Labour Office – Geneva, ILO, 2018, available at https://www.ilo.org/global/publications/books/WCMS_645337/lang--en/index.htm

since standards to be given to platform-workers varies from case to case. A clear regulation in which all different types of platform work are included, appears to be necessary, in order to provide platform workers an adequate protection.

Reconciling digital technologies and well-being at work

As already pointed out, the digital economy, specifically in its component of sharing or platform economy, is redrawing the production processes and, with them, the relationships between employer and worker, workers, work and leisure time.

Thus far, the paper has been focused on the critical issues and risks associated with digital platforms jobs. However, the transformation of labour markets brought about by the emergence of the digital economy may potentially produce a variety of effects, both positive and negative, on all aspects of working conditions – including employment security, wages and remuneration, working time, occupational safety and health conditions, access to social security, work organisation, work-life balance, and opportunities for training[15].

In this regard, it can equally lead to increasing inequalities or to general improvements in living and working conditions, but this will depend on how it is managed and regulated.

Hence, the importance of examining which categories are the most at risk of marginalization and how digital jobs can be oriented as a positive factor for their integration, instead of a negative vector of disadvantages.

Technological advances will create new jobs (the ILO estimates that between 2014 and 2019 there will be 213 million new labour market entrants[16]), but will also be the cause of other losses. Therefore, although there are important and noticeable benefits to a range of workers, there are also many risks and costs that affect the livelihoods of digital workers.

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15 ILO (2018), *Digital labour and the future of the work. Towards decent work in the online world, International Labour Office – Geneva, ILO*, cit.

16 ILO (2014), *World of Work Report 2014*, International Labour Office – Geneva, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_243961.pdf.

For this reason, it is crucial to address emerging forms of on-demand work performances in promoting labour market inclusiveness and high-quality jobs[17], in their multiple dimensions of earnings quality, labour market security, quality of working environments, and this is especially true for the weakest socio-economic groups of workers, such as aged workers, people with disabilities, working mothers and caregivers.

Ensuring them wide participation in innovation activities is paramount because these under-represented groups of the population may frequently be the least equipped to seize new opportunities because of discrimination within the labour markets, the persistence of stereotypes, or the higher barriers they face[18].

These workers can be defined as disadvantaged in the labour market because they comparatively earn lower employment rates than prime-age men (aged 25-54) with a gap, on average, around 22% for mothers with young children, 45% for people with disabilities and 32% for workers aged 55-64[19].

In addition, considering that low employment rates are often linked with social exclusion, insufficient levels of well-being, poor working conditions and limited career prospects, it emerges the importance of exploring how this "new jobs" could affect labour market inequalities in helping to reduce the persistent difficulties.

Platform jobs and active ageing workforce

The transformation process induced by digital jobs imposes workers to face the constant technological and IT evolution to support the rapid changes of the organization and new needs in terms of work-health-life-balance[20].

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17 For references about "job quality" see the influential J.E. Stiglitz, A. Sen, J. Fitoussi (2009), *Commission on the Measurement of Economic Performance and Social Progress*, Paris, which identified eight dimensions of well-being; for a development of the notion see S. Cazes, A. Hijzen, A. Saint-Martin (2015), *Measuring and Assessing Job Quality: The OECD Job Quality Framework*, OECD Social, Employment and Migration Working Papers, 174, OECD Publishing.

18 OECD (2018), *Opportunities for All: A Framework for Policy Action on Inclusive Growth*, OECD Publishing, Paris, 108.

19 *Ibidem*, 230.

20 This has become one of the most significant tasks for Human Resources, see S. Young Lee, J. Brand (2005), *Effects of control over office workspace on perceptions of the work environment and work outcomes*, in *Journal of Environmental Psychology*, 25, 323-333.

If, on one hand, most of the platform workforce belongs to the so-called Generation Y or Millennials (those who were born between 1980 and 2000[21]), we cannot forget, on the other hand, that the ongoing demographic changes are increasing life expectancy, allowing people to live, and work, longer.

The increase in average life expectancy in addition to low birth rates and a marked demographic aging process[22] contribute to alter the dynamics of the labour market and also jeopardize the long-term sustainability of welfare systems because of the increased imbalance between active and inactive population.

This is confirmed by the EU Commission report, "The 2015 Ageing Report", according to which in the EU an increase in the old age dependency ratio (percentage of people aged 65 or over compared to those aged 15-64) is expected to be between 27.8% and 50.1% in the 2013-2060 period. This would imply a transition from four to two working age people for each person over the age of 65[23].

In this context, active ageing measures, developed according to the indications of the World Health Organization to strengthen the link between the psycho-physical well-being of the elderly and their activities, aims at enhance the potential of the most advanced phase of human existence[24].

The relevance of that kind of measures emerges just considering all the efforts made by the EU authorities in order to achieve higher employment rate of older workers (see the Lisbon Strategy[25], the 2012 European Year for Active Ageing and Solidarity between Generations[26]

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21 W. Strauss, N. Howe (2000), *Millennials Ri-sing: The Next Greatest Generation,* Vintage Books, New York.

22 Eurostat (2011), *The greying of the baby boomers. A century-long view of ageing in European populations*, Luxemburg; Eurofound (2013), *Role of Governments and Social Partners in Keeping Older Workers in the Labour Market*, Dublin.

23 EU Commission (2015), *The 2015 Ageing Report, Economic and budgetary projections for the 28 EU Member States (2013-2060)*, Publications Office of the European Union, Luxembourg.

24 G. Reday-Mulvey (2005), *Working beyond 60. Key policies and Practises in Europe*, Palgrave Macmillan, Basingstoke, 33.

25 Available at https://www.europarl.europa.eu/summits/lis1_it.htm.

26 See Decision No. 940/2011/EU of the European Parliament and of the Council, September 14, 2011, on the European Year for Active Ageing and Solidarity between Generations (2012); EU Commission, *The EU Contribution to Active Ageing and Solidarity between Generations*, EU Publication Office, Luxemburg, 2012.

and more recently, the Europe 2020 Strategy[27]), as well as the interventions adopted by many EU Countries aimed at postpone the pension age[28]. Even the Eurofound highlighted that greater participation in the labour market cannot be achieved without the necessary adaptation of the work itself to the changing needs of long-term workers[29].

Therefore, the concept of sustainable work has been identified as a multidimensional approach to interpreting and responding to changes in terms of work and society in general. Sustainable work can be considered the key to making the labour market a good match for aging people as well and, moreover, to encourage an increase in employment rates by making jobs more adaptable to different ages[30].

According to Eurofound, the main dimensions related to sustainable work throughout the working life are quality of work and individual circumstances (needs and abilities). These two dimensions should both flow into an integrated model. The quality of work, in fact, can have a strong impact on health and well-being of workers, on the development of skills and on the work-life balance; individual circumstances (including health and care needs) may also change throughout the working life and impair the ability to work.

Having a look at the specific situation of platform workers, we can consider their distribution among age groups. In the European area, young people are overrepresented among platform workers compared to the general population. On average older workers aged 55 and over, account for 11%-17% of platform workers[31].

Despite crowdwork is more widespread among young workers, technological developments associated with the digitalisation of work may offer opportunities for older workers as well.

The changes occurring in the working world, along with the aging of society in Europe, might produce innovative implications not only

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27 Available at https://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf.

28 G. Reday-Mulvey (2005), *cit.*.

29 Eurofound (2014), *Foundation Focus, Sustainable work: towards better and longer working lives*, issue 16, Dublin, Ireland.

30 *Ibidem*, 4.

31 See U. Huws, N. Spencer, D. Syrdal, K. Holts (2017), *Work in the European gig economy: Research results rrom the UK, Sweden, Germany, Austria, the Netherlands, Switzerland and Italy*, FEPS, UniGlobal and University of Hertfordshire; R. Florisson, I. Mandl (2018), *Digital age. Platform work: Types and implications for work and employment– Literature review*, cit., 20 ff.

on working conditions across all ages but even in relation to sustainable work in the future when younger cohorts of workers will reach older ages[32]. For example, the use of nonstandard and temporary contracts – at the moment mostly limited to younger employees – may spread to other age groups with potential consequences on labour protection, as well as on social security.

At the same time, rapid population aging also infers job reallocation issues as it will significantly increase the number of elderlies who will need support in remaining within the labour market or finding new jobs. Moreover, the extension of life expectancy may lead to a reallocation of labour across sectors and occupations as the overall consumption patterns change with a shift from durable goods toward services, such as health care[33].

Despite the emerging problems brought about by digitalization and technological diffusion may nonetheless offer many opportunities such as working remotely with the potential reduction of physically demanding work. It could facilitate greater access to employment for older workers, too[34].

The platform economy could be a way to encourage older workers to expand choices that enable them to remain economically active for a longer period and create a lifelong active society.

Of course, those who want or have to remain economically active should be able to access assistance to do so, for example through flexible working arrangements that include reduced working hours and telework. This way, the platform work should fit well, as it provides new and innovative means of adapting jobs and workplaces to facilitate the continued employment of aging workers and those who have or develop disabilities over the course of their working life.

However, not all adults have enough skills to face these challenges. For example, the Survey of Adults Skills – PIAAC (conducted between 2012 and 2015) shows that around 15% of adults had no prior computer

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[32] Eurofound (2017), *Working conditions of workers of different ages: European Working Conditions Survey 2015*, Publications Office of the European Union, Luxembourg, 4.

[33] OECD (2018), *Opportunities for All: A Framework for Policy Action on Inclusive Growth*, OECD Publishing, Paris, 93.

[34] Eurofound (2017), *Working conditions of workers of different ages: European Working Conditions Survey 2015*, cit., 69.

experiences or did not have basic ICT skills, while around 14% had low levels of problem-solving skills in technological environments[35].

For these reasons, strengthening the existing measures for life-long learning to reskilled or upskilling over life will be of the utmost importance in order to be ready for the significant changes that lie ahead[36].

"Accommodate" digital work for disabled people

Starting from the acknowledgement of population aging, we can foresee a consequent rise in the number of workers with health disease. Hence, the importance to underline that attaining employment is a crucial matter for the inclusion and participation in society for people with health problems and/or disabilities too.

More in general, across Europe, a large portion of the population suffers from a disability and consequently risks being excluded from the labour market[37].

A recent study[38], for the first time, investigated and revealed the features and habits of people with disabilities who carry out crowd work and shows as health conditions influence the decision to carry out gig work: for 10% of these workers crowd work provides a way to continue working and earning an income despite their disability.

In this way, platform work allows labour to be organized in new ways, through the exploitation of economic and technological efficiencies. As such, crowd work may offer a valid opportunity even for people with disabilities to enter into or remain within the labour market.

Indeed, it certainly provides advantages such as: work from home; avoid the use of transportations; autonomously manage with what pace one wants; carry out each task thus setting a flexible work schedule; use personal adaptive technologies and even choose not to reveal one's disability status.

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35 OECD (2016), *New markets and new jobs, Background report for the 2016 Ministerial Meeting on the Digital Economy*, OECD Publishing, Paris.

36 OECD (2018), *Opportunities for All: A Framework for Policy Action on Inclusive Growth*, cit., 102.

37 A. Scharle, M. Csillag (2016), *Disability and labour market integration*, Analytical Paper, EU Commission, Publications Office of the European Union, Luxembourg.

38 Cfr. K. Zyskowski, M. Ringel Morris, J.P. Bigham, M.L. Gray, S.K. Kane (2015), *Accessible Crowdwork? Understanding the Value in and Challenge of Microtask Employment for People with Disabilities*, in *Proceedings of the 18th ACM Conference on Computer Supported Cooperative Work & Social Computing*, 1682 ff.

However, some features of platform jobs, such as the lack of health insurance benefits or social security protections, may limit the potential of crowd work as a career.

Consequently, it is important to strengthen initiatives supporting the integration of people with a disability in the labour market, focusing on appropriate measures.

In this respect, one of the fundamental pieces of protection against the discrimination in employment and working conditions of disabled people is the legal provision of reasonable accommodations, that are specific solutions that the employers are obliged to put in place to "accommodate" the needs of workers with disabilities, offering them a substantial equality[39].

In the search for effective tools that promote work integration of people with disabilities – as imposed by the rules that require employers to guarantee reasonable accommodations – the path of work through the platform could prove successful.

In fact, it allows to: a) avoid work placement with architectural barriers and without environmental facilitators; b) adapt the characteristics of the jobs to be assigned to people with disabilities, also with reference to reasonable accommodation; c) find good practices of job inclusion of people with disabilities (these are for example some of the principles provided by the guidelines on the targeted placement of people with disabilities in the Italian legislation)[40].

Platform work and work-life balance solutions

In order to guarantee job sustainability, active policies that include employment strategies for the so-called working caregivers are paramount too[41].

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[39] See for example EU Directive 2000/78/EC, UN Convention on the Rights of Persons with Disabilities, the Charter of Fundamental Rights of the European Union (2000), the Social Pillar, the Digital Agenda for Europe; in the Italian legislation, d.lgs. no. 151/2015 and d.lgs. no. 216/2003.

[40] C. Spinelli (2016), *La nuova disciplina dell'inserimento al lavoro delle persone disabili (d.lgs. n. 151/2015) nel quadro della normativa internazionale e dell'Unione europea*, in E. Ghera, D. Garofalo (Eds.), *Semplificazioni-Sanzioni-Ispezioni nel Jobs Act 2*, Cacucci, Bari, 11 ff.

[41] The crucial importance of work-life balance already emerges from the European Social Pillar, where principle n. 9 states that «*parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way*».

In terms of work-life balance initiatives, in addition to those aimed at parents by the political action of many governments[42], active policies that include employment strategies for the so-called working carers are also fundamental to guarantee job sustainability. In fact, to increase the participation within the working life (even up to a more advanced age) while still being able to fulfil family responsibilities, it is necessary to rethink ways to reconcile work and private life, according to a broader perspective that takes the needs of workers into account[43].

However, we should not forget that the most recent studies on gender differences in the labour market indicate parenting as one of the most influential factors in this field[44]. Having a child significantly reduces the chances of women of continuing to work and improve their career prospects while a similar impact does not exist for men. This increases the gap between work paths and income trends along the working life.

Even across platforms, research has found significant differences in gender participation rates[45]. The results highlight that in Countries where platform jobs more often constitute the main source of income, the majority of workers are male. In other countries where platform jobs are mainly a supplementary form of income, the rate of female workers is higher, which "*may reflect cultural attitudes and preconceptions about the societal role of women*"[46].

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[42] E. Kossek, M. Valcour, P. Lirio (2014), *The Sustainable Workforce: Organizational Strategies for Promoting Work-Life Balance and Wellbeing*, in Cooper C., Chen P. (Eds.), *Wellbeing: A Complete reference Guide*, Oxford: Wiley-Blackwell, 295 ff.; E. Galinsky, K. Aumann, J.T. Bond (2011), *Times Are Changing: Gender and Generation at Work and at Home*, available at www.familiesandwork.org.

[43] F. Romano (2017), *Sustainable work: appunti di ricerca per un'analisi giuridica*, in E. Dagnino, F. Nespoli, F. Seghezzi (Eds.), *La nuova grande trasformazione del lavoro*, ADAPT Labour Stedies, e-Book series n. 62, 263 ff.

[44] Eurostat (2018), *The life of women and men in Europe – A statistical portrait – 2018 edition*, available at https://ec.europa.eu/eurostat/web/products-digital-publications/-/KS-01-18-904?inheritRedirect=true&redirect=%2Feurostat%2Fpublications%2Fdigital-publications.

[45] See among others for Sweden N. Angelov, P. Johansson, E. Lindahl (2016), *Parenthood and the Gender Gap in Pay*, in *Journal of Labor Economics*, vol. 34, issue 3, 545 ff.; for the U.S., C. Goldin, S.P. Kerr, C. Olivetti, E. Barth (2017), *The Expanding Gender Earnings Gap: Evidence from the LEHD-2000 Census*, in *The American Economic Review*, 107(5), 110-114; for Denmark H.J Kleven, C. Landais, J.E. Søgaard (2018), *Children and Gender Inequality: Evidence from Denmark*, NBER Working Paper 24219; for Italy, Inps (2017), *XVI Rapporto annuale*, available at https://www.inps.it/docallegatiNP/Mig/Dati_analisi_bilanci/Rapporti_annuali/INPS_XVI_Rapporto_annuale_intero_030717%20.pdf.

[46] S. Kuek, C. Paradi, C. Guilford C., T. Fayomi, S. Imaizumi, P. Ipeirotis (2015), *The global opportunity in online outsourcing*, World Bank Group, Washington DC, U.S.

Nonetheless, gender roles and the stereotype that women, despite their level of education, should take care of children, housework and elderly relatives, play an important role when women make the decision to do crowdwork as it allows them to stay at home. Thus, platform work enables women to engage in some form of work, earn an income, while still managing other responsibilities and performing housework. In addition, the high cost of child and elderly care often prevents parents (especially women) from taking up a job outside the household[47].

However, crowdwork often represents a trap, adding a double burden to the workload of women. Women with young children on average spend just 5 hours less than the average sample as a whole, working on platforms. Many of these women work at night (36% from 10 p.m. to 5 a.m.) and during the evening (6 p.m. to 10 p.m.; 65%), and 14% of them work for more than two hours during the night for more than 15 days a month[48].

The outsourcing of work through platforms has led to the development of a 24-hour economy. The consequence is a stretching of consecutive hours of work (paid and unpaid) which contribute to putting an additional burden on workers, especially female, given their disproportionate workload of care responsibilities and household work[49].

The sense that workers have of having to be available at all times when working on platforms blurs the lines between their private and professional life. Moreover, workers may find they cannot enjoy their spare time, since there is a constant pressure to be on call to accept potential upcoming projects. They typically have no control of their time or work schedule and, instead, have to be available constantly, with consequences not only for their work-life balance, but also in terms of income security and management of other jobs[50].

In most cases, on-demand work, despite the benefit of giving workers the option of taking up jobs when they fit well with career paths

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47 D Anxo, C. Franz, A. Kummerling (2013), *Working Time Distribution and Preferences Across the Life Course: A European Perspective*, in *Economia & lavoro*, 2, 77 ff.

48 ILO (2018), *Digital labour platforms and the future of work: Towards decent work in the online world*, International Labour Office – Geneva.

49 ILO (2017), *World Social Protection Report 2017–19: Universal social protection to achieve the Sustainable Development Goals*, International Labour Office – Geneva.

50 D. Martin, J. O'Neill, N. Gupta, B. Hanrahan (2016), '*Turking in a global labour market', Computer Supported Cooperative Work: CSCW: An International Journal*, 25(1), 39–77; R. Smith, S. Leberstein (2015), *Rights on Demand: Ensuring Workplace Standards and Worker Security In the On-Demand Economy*, National Employment Law Project, New York.

and personal commitment plans, is not "voluntary" and the reason why individuals embark on this type of work is solely brought about by a lack of alternatives[51].

Indeed, a regular working schedule and regular salaries are paramount for individuals with family responsibilities, especially for women[52]. This multiplication of duties, however, reduces the time that female workers can devote to work. Therefore, their lower availability to perform work compared to men has repercussions on their overall salary. In other words, just like in the case of standard work performances, women end up having less time to spend on the job and therefore have fewer earning possibilities. The flexible management of working time can be of help but this aspect alone cannot be the solution that solves the problem of low female participation in the labour market.

For this reason ILO recommends expanding time sovereignty of platform workers by strengthening a greater autonomy of their working schedule. Exploiting technology to achieve a balance between work and personal life can help them address the pressures that come with the blurring of boundaries between working and private schedules[53].

On the other hand, ILO underlines that the economic and social imperative of gender equality can no longer be questioned and, at the same time, that gender equality begins within the household. For this reason, it recommends the adoption of policies that promote the sharing of care and domestic responsibilities between men and women, by establishing and expanding leave benefits for both parents and investing in public care services to ensure a balanced division of care work, not only between men and women but also between the State and the family[54].

Final remarks

In conclusion, in order to ensure that platform work might offer workers a chance and become an instrument of inclusion within the labour market, from the one hand, it seems to be necessary to ensure a minimum protective standard to all, regardless of the belonging to

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[51] Eurofound (2018), *Work on demand: Recurrence, effects and challenges*, Publications Office of the European Union, Luxembourg.

[52] *Ibidem*.

[53] ILO (2019), *Work for a brighter future – Global Commission on the Future of Work*, International Labour Office – Geneva, 12.

[54] *Ibidem*.

the legal category. From the other hand, specific interventions by the legislator are needed, aimed at preventing and contrasting the risks on workers' well-being[55].

In addition, the spreading of digital jobs in general, and platform jobs in particular, brings a diversification of employment arrangements and a transformation of working conditions.

A whole uniformity is neither necessary nor possible, but diversification may nonetheless endanger the attainment of decent work.

Following the ILO teaching, ensuring decent work on digital labour platforms could be possible, even for weaker workers, keeping in mind that none of the negative outcomes is inherent to the concept of crowd work itself. On the contrary, reconfiguring the terms of microwork in order to improve conditions for workers could be possible.

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6. Can digital platforms challenge French Labour Law?

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Summary: 1. Introduction. – 2. The 2016 "El Khomri" Act: the first attempt of the French legislator to regulate platform work. – 3. The 2018 "Take Eat Easy" case: an (almost) classic solution. – 4. The 2019 "Mobilités" Act: a (still) confusing situation. – 5. Conclusion. – 6. Selected bibliography

Introduction

Like in many other countries, in France the issue of labour via digital platforms has recently been the subject of much debate. Almost every French labour law scholar has written a paper or participated in a conference on this very delicate topic. Regardless of the point of view taken on this issue, nearly everyone raises an important question: can digital platforms challenge French labour law and, more specifically, its traditional approach on subordination and the employment contract?

As everyone knows, digital platforms can come in every possible shape or form. Nevertheless, from a labour law standpoint, the most interesting platforms are the so-called "crowdworking" platforms, which essentially allow the provision of work services[1]. These platforms put a "crowd" of workers in contact with potential clients, thus creating a triangular relation between the platform, the worker and the client. On the one hand, workers have access to a platform that allows them to obtain customers and gain visibility in the market; on the other hand, customers have access to a platform which gives

[1] See: B. Gomes, *Le crowdworking: essai sur la qualification du travail par intermédiation numérique*, Revue de droit du travail, 2016, p. 464.

them the possibility of obtaining goods and services from a large variety of providers. In France, the most known platform of this kind is undoubtedly the UBER platform.

The main difficulty raised by this type of platforms relates to the working conditions of the workers concerned. Indeed, quite often, platforms do not exercise direct power over workers and the latter have a certain freedom in the exercise of their professional activity[2]. Nevertheless, these workers are in reality very much controlled by the platform and they often find themselves in a situation of economic dependence towards the platform. In short, these workers are in a "grey area" between subordinate employment and self-employment.

However, unlike in some other national labour law systems, in French labour law there is no intermediate status between subordinate employment and self-employment. Indeed, the French law makes a clear distinction between employees and self-employed workers. Employees exercise their activity in a situation of "legal subordination", namely under the authority of an employer who has the power to give them orders and directives, to control their work and to punish them in case of malpractice[3]. When a worker does not exercise his/her activity in such a situation, he/she is qualified as self-employed and does not benefit from labour law legislation. Of course, in certain cases, this distinction is far from easy. In these particular cases, the French legislator decided to create a series of legal presumptions. Thus, some workers – such as professional journalists or performing artists – are presumed to be bound by an employment contract[4]. Conversely, other workers – in particular those who are registered in the trade and companies register – are presumed not to be bound by an employment contract[5]. It should be noted that, in the latter case, the workers in question are perfectly free to take legal action and request the conversion of their contract into an employment contract, provided that they are placed in a relationship of permanent legal subordination with their principal[6].

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2 T. Pasquier, *Le droit social confronté aux défis de l'uberisation*, Dalloz IP/IT, 2017, p. 371.

3 See the classic "Société Générale" decision, in which the French Supreme Court ("Cour de cassation") defined the elements of "legal subordination": Cour de cassation, chambre sociale, 13.11.1996, n° 94-13.187.

4 Articles L. 7112-1 and L. 7121-3 of the French Labour Code.

5 Article L. 8221-6 I of the Labour Code.

6 Article L. 8221-6 II of the Labour Code.

In this context, the legal qualification of the relationship between the platform and its workers can be particularly difficult. Even worse, the French legislator and the French judges seem to be taking quite different paths. On the one hand, the legislator clearly seems to prefer the self-employed worker status and is continuously pushing towards this direction; on the other hand, the judges are trying to resist this legislative tendency, by fully preserving their competence to qualify the contract of platform workers as an employment contract. To better understand this current tension, it is useful to examine, in a chronological order, all the recent French developments in the field of platform work[7].

The 2016 "El Khomri" Act: the first attempt of the French legislator to regulate platform work

The first Act to specifically address the issue of platform workers was the famous "El Khomri" Act of August 8, 2016[8]. Indeed, according to this Act, when a platform "determines the characteristics of the service provided or the good sold and sets its price, it has a social responsibility towards the workers concerned"[9]. The "workers concerned" are the self-employed workers using such platforms[10]. As for the content of the "social responsibility" of platforms, it consists in the allocation of some minimum rights in the fields of labour law and social security law.

More specifically, the French legislator makes a distinction between the rights attributed to all self-employed platform workers regardless of their income and the rights which are granted to those who have an annual income above a certain threshold[11]. On the one hand, all self-employed platform workers are granted two important collective labour rights. The first one is the right to organise: these workers have the right to form, join and assert their collective interests through trade unions[12]. The second one is the right to strike, but it is interesting to

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7 For a more detailed presentation of these developments, see A. Jeammaud, *Le régime des travailleurs des plateformes, une œuvre tripartite*, Droit ouvrier, 2020, p. 181.

8 *Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels,* Journal officiel de la République française, 9.8.2016, n° 0184.

9 Article L. 7342-1 of the Labour Code.

10 Article L. 7341-1 of the Labour Code.

11 Namely 5.347,68 euros for the year 2020.

12 Article 7342-6 of the Labour Code.

note that the French legislator avoids using the term "strike" and simply describes the legal consequences of exercising the right to strike: indeed, according to the new Article L. 7342-5 of the Labour Code, "a concerted refusal to provide the service" by self-employed platform workers "can neither engage their contractual responsibility, nor constitute a reason for breaking the relationship with the platform, nor justify measures penalising them in the exercise of their activity". On the other hand, self-employed platform workers who have an annual income above a certain threshold are granted, in addition to the rights mentioned above, three other main advantages. Firstly – and perhaps most importantly – the platform is responsible for paying the contributions for "accidents at work and occupational diseases", when the self-employed worker decides to subscribe to a voluntary insurance (Article L. 7342-2 §1)[13]; secondly, the platform must also pay a specific contribution for "professional training", which is normally paid by the self-employed person him/herself (Article L. 7342-3 §1); thirdly, the platform must cover the costs and pay compensation when the self-employed worker wishes to obtain a professional qualification certificate (Article L. 7342-3 §2).

The provisions of the "El Khomri" Act mark a significant development in the legal apprehension of platform workers. Regarding the right to organise and the right to strike, the idea is that the allocation of collective labour rights to these workers will allow them to break out of isolation and gradually improve their working conditions. In this regard, it should be noted that this is the first time that the French legislator has granted to self-employed workers the right to strike, a right which is normally recognised only to employees. As for the other advantages attributed to platform workers, the main idea is that it is not possible to encourage workers to use the platforms without offering them a minimum social protection. In this respect, the payment by the platforms of the contributions for "accidents at work and occupational diseases" might result in more workers deciding to subscribe to an insurance program protecting them against this particular professional risk.

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[13] It should be noted that, in principle, the self-employed are not covered against the risk of "accidents at work and occupational diseases". However, they have the option to subscribe to a voluntary insurance against this risk.

However, this legislative development should in no way be overestimated. Compared to the rights granted to employees, the rights attributed to self-employed platform workers are indeed particularly limited[14]. Regarding, on the one hand, labour law rights, it should be noted that – apart from the right to strike and the right to organise[15] – self-employed platform workers do not benefit from any other concrete guarantee in terms of working time, safety at work, remuneration, or even the termination of the employment relationship. On the other hand, the benefits attributed to platform workers in the field of social security law have nothing comparable to those of employees, and the legislator clearly seems to favour voluntary private insurance over compulsory social security protection against accidents at work and professional diseases[16].

Most importantly, the "El Khomri" Act gives no precise answer to the very delicate question of the legal status of platform workers. Indeed, this Act merely states that its provisions are applicable to "self-employed workers using, for the exercise of their professional activity, one or more platforms […] defined in article 242 bis of the General Tax Code"[17]. Despite the ambiguous wording of this article, most authors agree that the "El Khomri" Act does not qualify all workers using such platforms as self-employed, but simply indicates the personal scope of its provisions[18].This opinion seems to be confirmed by the parliamentary proceedings of the "El Khomri" Act. Indeed, in the first draft of this Act, it was expressly provided that the respect by platforms of their "social responsibility" was not such as to "establish the existence of a link of subordination between the

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14 M. Julien, E. Mazuyer, *Le droit du travail à l'épreuve des plateformes numériques*, Revue de droit du travail, 2018, p. 194.

15 However, the right to organise does not constitute a real "new" right granted to plateform workers. In French law, the right to organise is already granted to membres of all professions, with a few extremely rare exceptions.

16 B. Gomes, *Les plateformes en droit social. L'apport de l'arrêt Elite Taxi contre UBER*, Revue de droit du travail, 2018, p. 155.

17 See Article L. 7341-1 of the Labour Code.

18 In this sense, see amongst others: A. Jeammaud, *Uber, Deliveroo : requalification des contrats ou dénonciation d'une fraude à la loi ?*, Semaine sociale Lamy, 2017, n° 1780, p. 5; T. Pasquier, *Le droit social confronté aux défis de l'ubérisation*, cit., p. 371; A. Fabre, *Les travailleurs des plateformes sont-ils des salariés? Premières réponses frileuses des juges français*, Droit social, 2018, p. 548; M. Julien, E. Mazuyer, *Le droit du travail à l'épreuve des plateformes numériques*, cit., p. 193.

platform and the worker using its services"[19]. In other words, this draft attempted to introduce a legal presumption that platform workers were not employees but self-employed. However, this provision was eventually withdrawn. Consequently, the "El Khomri" Act only grants some (very limited) rights to self-employed platform workers, without making a clear statement on the legal status of platform workers in general.

The 2018 "Take Eat Easy" judgment: an (almost) classic solution[20]

In practice, most platform workers sign an independent contractor agreement as self-employed workers[21]. As such, according to Article L. 8221-6 I of the Labour Code, they do not benefit from labour law legislation. Nevertheless, as every other self-employed worker, self-employed platform workers are perfectly free to take legal action and demand the conversion of their contract into a "classic" employment contract (Article L. 8221-6 II). To do so, they must prove that the platform has the power to give them orders and directions, to control their work and punish them in case of malpractice. In other words, they must prove the existence of a relation of "legal subordination" between them and the platform[22]. This is precisely what a platform worker tried to demonstrate in the famous "Take Eat Easy" case[23].

This case concerned a bike delivery man who was using the "Take Eat Easy" platform as a self-employed worker. After 4 months of de-

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19 See the Article 27 bis of the *Projet de loi visant à instituer de nouvelles libertés et de nouvelles protections pour les entreprises et les actif-ve-s*, Assemblée nationale, Session ordinaire de 2015-2016, texte adopté n° 728, 12.5.2016.

20 For a more recent example, see also the "UBER" judgment : Cour de cassation, chambre sociale, 4 mars 2020, n° 19-13.316.

21 More precisely as "micro-self-employed" workers, which is a specific category of self-employed workers of low income.

22 See the "Société Générale" judgment mentioned above (Cour de cassation, chambre sociale, 13.11.1996, n° 94-13.187).

23 Cour de cassation, chambre sociale, 28.11.2018, n° 17-20.079. For a commentary on this judgment, see amongst many others: M.-C. Escande-Varniol, *Un ancrage stable dans un droit du travail en mutation*, Recueil Dalloz, 2019, p. 177; M. Peyronnet, *Take Eat Easy contrôle et sanctionne des salariés*, Revue de droit du travail, 2019, p. 36; E. Dockès, *Le salariat des plateformes – à propos de l'arrêt Take Eat Easy*, Droit ouvrier, 2019, p. 1; J. Sénéchal, *Le critère français de la subordination juridique confronté au « contrôle » et à « l'influence déterminante » d'un opérateur de plateforme en ligne sur l'activité de ses usagers*, Dalloz IP/IT, p. 186.

livering food and 2 traffic accidents, he decided to take legal action against the platform. The 1st degree Court ("Conseil de prud'hommes") decided that it was not competent to judge this case, because the worker in question was a self-employed worker and not an employee. As for the Court of Appeal of Paris, it decided that the worker was not an employee, mainly because he was free to choose his workdays as well as the amount of his working hours. However, the Supreme Court ("Cour de cassation") took a different decision. First of all, the Court reminds that the existence of an employment contract does not depend on the will expressed by the parties or the name they have given to their agreement, but on the factual conditions in which the workers' activity is carried out. Then, the judges remind the classic definition of legal subordination: "the link of subordination is characterised by the performance of work under the authority of an employer, who has the power to give orders and directives, to control the execution of the work and to sanction the breaches of his subordinate". Bearing all these in mind, the Supreme Court decided that the Court of Appeal of Paris should have accepted the existence of an employment contract, as it had made two important findings: firstly, that the platform was equipped with a geolocation system allowing real-time monitoring of the position of the worker and the calculation of the total number of kilometres travelled; secondly, that the platform had the power to sanction its workers. As a result, the Supreme Court considered that the three elements of legal subordination (the power of direction, the power of control and the power of sanction) were present in the "Take Eat Easy" case and that the worker and the platform were therefore bound by an employment contract.

At first glance, the "Take Eat Easy" judgment seems rather banal. In order to qualify the contract binding the worker to the platform as an employment contract, the Supreme Court uses the classic definition of legal subordination, without needing to resort to more innovative reasoning. Nevertheless, a closer look at this judgment reveals a subtle development. Indeed, although the Court affirms the existence of a power of direction exercised by the platform over its workers, it does not explain the factual elements establishing such a power. As one author stated, this "omission" of the Court is entirely justified: more and more often, the power of direction is in fact lacking "because the worker exercises a profession of such specialisation that [the platform] is unable to give him orders and directions or because he works from a distance,

in an independent manner"[24]. Does this however mean that, with the "Take Eat Easy" judgment, the power of direction is slowly relegated to the background? For the moment, the judges of the Supreme Court answer this question in the negative, by reaffirming that the powers of direction, control and sanction are still the three cumulative elements required to affirm the existence of legal subordination[25]. Nevertheless, some authors advocate going beyond the idea of legal subordination and moving to a concept of "controlled autonomy", more appropriate to describe platform work and other modern kinds of work in general[26].

In any case, most labour law scholars openly welcomed the "Take Eat Easy" judgment. In their view, this judgment is an official confirmation that French labour law already has all the necessary "tools" to effectively protect platform workers. However, most scholars agree that this judgment has also some important limits. Firstly, the decision only concerns the "Take Eat Easy" platform, which used to operate in a quite intrusive manner (impossibility to change working hours, geolocation system, constant "strikes" on workers, etc.). Secondly, the decision only concerns a single worker of the "Take Eat Easy" platform and does not have any effect on other platform workers. Finally, as these workers are generally bound by independent contractor agreements, it is entirely up to them to take legal action against the platforms and prove that they are in fact employees. As a result, there was still an urgent need for the French legislator to take some concrete steps to clarify the legal situation of these workers.

The 2019 "Mobilités" Act: a (still) confusing situation

Barely two years after the adoption of the 2016 "El Khomri" Act, the French legislator wished to intervene again in the field of platform work. Indeed, on the occasion of the review of a 2018 Act known as "Avenir Professionnel"[27], an amendment was tabled authorising platforms to establish

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[24] P. Lokiec, *De la subordination au contrôle*, Semaine sociale Lamy, 2019, suppl. n° 1847, p. 12-13.

[25] See: *Entretien avec Jean-Guy Huglo, Doyen de la chambre sociale de la Cour de cassation. Take Eat Easy: une application classique du lien de subordination juridique*, Semaine sociale Lamy, 2019, suppl. n° 1847, p. 6

[26] See: E. Heyer, P. Lokiec, D. Méda, *Une autre voie est possible*, Flammarion, 2018.

[27] *Loi n° 2018-771 pour la liberté de choisir son avenir professionnel*, Journal officiel de la République française, 6.9.2018, n° 0205.

"a [social] charter, determining the conditions and the methods of exercise of [their] social responsibility, defining [their] rights and obligations, as well as those of workers with whom [they are] in contact"[28]. Furthermore, this amendment contained a specific provision, according to which the existence of such a charter and the respect of its content by a platform could not "characterise the existence of a link of legal subordination between the platform and the workers". In other words, this amendment proposed the establishment of a legal presumption that platform workers were not employees. However, the proposed provisions were eventually censored by the Constitutional Council ("Conseil Constitutionnel") for a mainly formal reason: it was held that they had no connection with the subject matter of the "Avenir Professionnel" Act[29].

A few months later, the French legislator tried yet again to introduce these provisions in a new legislative text. This time around, his efforts were crowned with success. Indeed, the so-called "Mobilités" Act adopted on December 24, 2019[30] introduced into the Labour Code a series of new articles relating to platform workers. First of all, according to Article L. 7342-8, the new provisions apply to self-employed workers using platforms carrying out two types of activities: driving a transport car or delivering goods by means of a two or three wheeled vehicle, motorised or not. These particular platforms have from now on the possibility to establish a social "charter", specifying inter alia the conditions for exercising the professional activity of the workers, the measures allowing these workers to obtain a decent price for their activities, the procedures for monitoring their activity, the quality of service expected, the circumstances which may lead to the termination of trade relations, as well as other measures aimed at improving the working conditions or preventing the professional risks to which these workers are exposed[31]. Finally, the platform transmits the charter in question to the competent administrative authorities, which decide whether to approve it or not[32]. If the charter is approved, it must be appended to the contracts binding the platform to the workers and published on the platform's website.

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28 See: Assemblée nationale, *Amendement n° 2072 présenté par M. Taché*, 7.6.2018.

29 Conseil constitutionnel, 4.9.2018, n° 2018-769 DC.

30 *Loi n° 2019-1428 d'orientation des mobilités*, Journal officiel de la République française, 26.12.2019, n° 0299.

31 Article L. 7342-9 of the Labour Code.

32 To do so, the administrative authorities have a 4 month deadline. In the absence of a response within this period, the charter is deemed to be approved.

As in 2018, the legislator also attempted to introduce a legal presumption that the workers covered by the provisions mentioned above were not employees. Indeed, according to the last version of the "Mobilités" Act, the existence of a social charter and the respect by the platform of the commitments made in this charter could not characterise the existence of a link of legal subordination between the platform and the workers. Once again, this provision was censored by the Constitutional Council, this time for a substantial reason[33]. In summary, the reasoning adopted by the Council was as follows: under Article 34 of the French Constitution, the legislator determines the fundamental principles of Labour Law, among which are the essential characteristics of the employment contract. Therefore, the legislator must fully exercise his competence without transferring the task of determining these characteristics to administrative or jurisdictional authorities or private bodies[34]. However, the last version of the "Mobilités" Act allowed private platform operators to determine in a social charter the basic elements of their relationship with their workers, elements which could not be used by the judges in order to establish the existence of an employment contract[35]. Consequently, this provision was found to be unconstitutional and was ultimately withdrawn from the text of the 2019 "Mobilités" Act[36]. There is therefore no legal presumption that platform workers are not employees and judges are still perfectly free to use the content of the charters established by the platforms in order to characterise, if necessary, the existence of an employment contract.

The provisions contained in the 2019 "Mobilités" Act constitute an important step towards a more "collective" protection of platform workers. Added to the provisions of the 2016 "El Khomri" Act, they create a minimum "safety net" for workers who are otherwise deprived

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33 Conseil Constitutionnel, 20.12.2019, n° 2019-794 DC. For a commentary on this decision, see: B. Gomes, *Constitutionnalité de la « charte sociale » des plateformes de « mise en relation » : censure subtile, effets majeurs*, Revue de droit du travail, 2020, p. 42.

34 Conseil Constitutionnel, 20.12.2019, n° 2019-794 DC, paragraph 23.

35 Ibid., paragraph 28.

36 However, it should be noted that the Article L. 7342-9 of the Labour Code still states that "when approved, the establishment of the charter cannot characterise the existence of a link of legal subordination between the platform and the workers". According to the Constitutional Council, this provision is not unconstitutional, as the legislator does not cede his competence to private actors but simply indicates that the link of legal subordination cannot result from a purely formal criterion, such as the mere existence of a social charter.

from any protection given by labour and social security law. However, these new provisions also present three important disadvantages. Firstly, the 2019 "Mobilités" Act does not introduce any real legal obligation for digital platforms. Indeed, it is entirely up to them to decide whether they wish to establish a "social charter" or not, as well as to determine the amount of protection given to the workers. Secondly, the new provisions leave the very crucial matter of platform workers' working conditions entirely in the hands of platforms themselves. In this respect, it should be noted that trade unions are completely excluded from the process of establishing such a "social charter". Finally – and perhaps most importantly – the 2019 "Mobilités" Act still does not solve the very important issue of the legal status of platform workers. As the 2016 "El Khomri" Act, this new Act merely states that its provisions are applicable to self-employed platform workers, without making any clear statement regarding the legal status of platform workers in general. Therefore, it is still entirely up to each and every worker to decide (if he/she has the necessary resources) to take legal action against the platform and request the conversion of his/her contract into a "classic" employment contract…

Conclusion

After two legislative Acts passed within three years, the legal situation of workers using digital platforms remains greatly uncertain. What could be the possible solutions?

A first solution – which seems to be very much desired by the French legislator – would be to create a clear legal presumption according to which platform workers are self-employed workers. Of course, in this case, platform workers should be able to take legal action to overturn this presumption, by proving that they are in fact bound by an employment contract. Although this solution would have the advantage of clarity, it still has a major drawback: the status of self-employed worker does not correspond to the actual situation of a large number of platform workers, who could potentially not have the resources needed in order to exercise a legal action against the platform.

A second solution would be to introduce another legal presumption, according to which platform workers are employees. In this case, it would be platforms that should be able to overturn this presumption, by proving that the contracts which bind them with their workers are not

in fact employment contracts. This solution would have the advantage of taking into consideration the inherent inequality between platforms and workers and would offer the latter a more suitable social protection. Nevertheless, given the current political context, it is extremely unlikely that the French legislator would adopt such a solution.

A third – and probably more realistic – solution would be to create an intermediate status for platform workers, between subordinate employment and self-employment. In this case, platform workers should still be able to take legal action to request the conversion of their contract into an employment contract. Most importantly, the legislator should take specific measures to create this intermediate status and not leave this very delicate question in the hands of platforms alone by means of soft-law mechanisms such as non-binding social charters. In our view, the legislator should make sure that all parties (included trade unions) are actively involved in the creation of this intermediate status and that platforms themselves are bound by substantial legal obligations towards their workers.

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7. Blockchain and the algorithm in the employment relationship

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Summary: 1. Premise – 2. Digital innovation and labour market – 3. Inside blockchain: distributed ledger technology and miners – 4. Towards a legislative definition of blockchain in the Italian legal system – 5. Smart contracts – 6. The impact of distributed ledger technology on the world of work – 7. The future of work

Premise

Technological evolution has been dramatically transforming labour law in recent years. The digitalization of production and the introduction of smart devices within traditional production models have had a considerable impact not only on the organization of work but also on the enhancement of the technological skills of employees[1].

Recent years' progress of scientific and technological research has indeed created increasingly refined forms of production and work organization, the aim of which is the implementation of efficiency and business results through the enhancement of workers' technological skills[2]. An objective pursued through the rational organization of work

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1 As is well known, there are many factors that affect labour productivity, such as the "capital equipment" made available to the worker and the "total factor productivity", in addition, of course, to the service provider's activity. In this regard, please refer to L. Costabile, *Glossario dell'economista per il giuslavorista*, in *Rivista giuridica del lavoro*, 2009, I, 183.Recently, see M. Piva – M. Vivarelli, *Innovation, jobs, skills and tasks: a multifaceted relationship*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2018, 3, 159, 599.

2 On the evolution of technologies, methods of production and methodologies of work organization and their effects on work, with particular reference to the reduction of working hours, see S. Bellomo, *Trasformazione del lavoro e tendenze attuali della contrattazione collettiva: l'esempio dei nuovi accordi sull'orario di lavoro*, in *Il diritto del mercato del lavoro*, 2018, 3, 697.

within the company, but also and above all through the integration and, in several cases, the replacement of individual work with the work of the machines[3].

Nowadays, in digital production systems, the organization of work is often entrusted to an algorithm[4], which supports the entire digital infrastructure, as in the blockchain system, and promotes disintermediation in the meeting between job demand and supply, identifying the worker most suited to carrying out the tasks required according to a digital recruitment mechanism, based on transparent and immutable data. And through smart contracts, moreover, it is possible to streamline the legal relationships on which the company is based to improve efficiency and simplify relations with workers, customers and suppliers.

Aware of such changes, national governments are recently starting to introduce reforms to support the digitalisation of the production system, in order to prevent the apparatus of protection of the worker and industrial relations from being overwhelmed by the speed with which scientific innovation is shaping the work relationship[5].

A change of perspective is therefore necessary as it moves from the urgency of bringing the worker's traditional protectionist vocation closer to the changes that digital technology today brings to working reality[6].

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[3] The issue of integrating the worker with the machine would deserve a separate discussion in order to be appreciated in its complexity. We merely recall here the illuminating contribution by V. Maio, *Il diritto del lavoro e le nuove sfide della rivoluzione robotica*, in *Argomenti di diritto del lavoro*, 2018, 6, 1414.

[4] On the meaning of the term algorithm, see P. Domingos, *The Master Algorithm. How the Quest for the Ultimate Learning Machine Will Remake Our World*, Allen Lane, 2015.

[5] For example in Germany, with Arbeiten 4.0, launched on the basis of the indications of the Green Book of the Ministry of Labor and concluded, after about a year, with the adoption of a White Paper, there has been a social dialogue on the issues of worker participation and their involvement in quality of employment issues following recent technological innovations. In France, the unions have drawn up, both jointly and independently, a large series of reports and recommendations on the subject of digitization, IT transformation of production systems and quality of life and work. The aim is to analyze and prevent, in order to offer a prompt solution, the effects on the employment contract of digitalization, which are detected with reference to the workplace, working times and the characteristics of subordination. For further information on the subject, see the CISL report, *Una via italiana a Industria 4.0 che guardi ai modelli europei più virtuosi*, Rome, 13 March 2017.

[6] For wide-ranging considerations on the interactions between contract and company organization, please refer to M. Persiani, *Contratto di lavoro e organizzazione*, Padova, 1966. Recently, see M. Franceschetti – D. Guarascio, *Il lavoro ai tempi del management algoritmico*, in *Rivista giuridica del lavoro*, 2018, 4, 705.

Digital innovation and labour market

It is undeniable that technological evolution plays a prominent role in the adaptation of traditional labour law categories to the historical context as well as in the awakening of industrial relations, often overwhelmed by the speed with which scientific innovation shapes the employment relationship[7].

The evolution of technology has created increasingly refined forms of production and work organization, whose aim is the implementation of efficiency and business results through the enhancement of workers' technological skills. An objective to be pursued through the rational organization of work within the company, but also through integration and, in some cases, the replacement of individual work with the work of machines[8].

Just a few months ago the European Commission declared that the European Union intends to create new professional skills and update existing ones. In other words, renewing the labour market to enable it to keep pace with technological evolution.

According to EU data, the demand for digital workers is on a solid growth track. Over the last years investments in ICT to improve efficiency or business volume increased but 43% of Europeans do not have basic digital skills, as "they cannot search for information on the web, send emails, make video calls, shop or pay their bills online". And 90% of jobs, in all sectors of business, require digital skills, but 35% of the labour force doesn't have basic digital skills.

Nonetheless, 53% of companies looking for ICT specialists report difficulties in recruiting them and, still today, there are 1 million open vacancies for ICT experts in the European Union.

Most of all, most of workplaces have not taken any action to tackle the lack of digital skills of their employees, likely in consideration of the high costs that would be encountered when undertaking actions to deal with digital skills gaps.

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[7] With reference to the genetic mutation of labour law see V. Speziale, *The genetic mutation of labour law*, in WP CSDLE "Massimo D'Antona" .it – 322/2017, 2.

[8] See J. Rifkin, *The End of Work – The Decline of the Global Labor Force and the Dawn of the Post-Market Era*, 1995, ed. Putnam Publishing; R. Donkin, *The Future of Work*, 2010; J. Kaplan, *Humans Need Not Apply: A Guide to Wealth and Work in the Age of Artificial Intelligence*, Yale Un. Press, 2015.

Data returns a picture of the labour market that is highly deficient with respect to the themes that already influence the working reality[9].

The fourth industrial revolution[10], that of the use of intelligent machines, interconnected and connected to the internet, and now also of blockchain and smart contracts technology, inevitably imposes on national economies a solid commitment in plans for re-industrialization and investments in 4.0 technologies.

The aim is to allow companies to resist to the competition of foreign economies at the forefront of scientific and technological research.

When we talk about technological evolution of course we refer to artificial intelligence, automation and robotics. These technological advances are able to create new jobs as countless opportunities lie ahead, but they can also create huge job losses.

Technological changes are dynamic processes and simultaneously involve the creation and destruction of jobs as well as the transformation of existing jobs. Both these elements have critical implications for workers and employers and, in the long time, tend to have effect also on their families.

This revolution, though, is having a transformative impact on the world of work.

Some observers are concerned that these changes may lead to a «race against the machine»[11] or in a «jobless future»[12], as almost surely today's skills won't match the jobs of tomorrow and probably new acquired skills will quickly become obsolete. So huge investments are needed in order to enable workers to thrive in the technological age.

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[9] European Union Report, *Digital skills for all Europeans*, 2019, available at https://ec.europa.eu.

[10] The first to talk about a c.d. fourth industrial revolution was the World Economic Forum, *The future of Jobs. Employment, Skills and Workforce*, 2016. The expression is commonly used to refer to the production and organizational system based on the connection between physical and digital systems, based on the use of big data in a global competitive horizon. Otherwise, the third industrial revolution descended from the creation of industrial robots and computers, while the second and first were born, respectively, with mass production and the assembly line and with the use of machines powered by mechanical energy. On the link between the fourth industrial revolution and changes in the labor market, see S. Caravella, M. Menghini, *Race against the Machine. Gli effetti della quarta rivoluzione industriale sulle professioni e sul mercato del lavoro*, in *L'industria*, 2018, 1, 43.

[11] E. Brynjolfsson, A. McAfee, *Will humans go the way of horses*, in *Foreign affairs*, 2015, 8 ss.; Id., *The second machine age. Work, progress and prosperity in a time of brilliant technologies*, W. W. Norton & Co Inc., 2014.

[12] R. Ford, *Rise of the Robots: Technology and the Threat of a Jobless Future*, New York, 2015.

The peculiarity of the current technological change is that the growth in automation is combined with the competition that characterizes the context of globalization[13].

As a result, enterprises are under strong pressure to reduce costs while intensifying productivity. The new manufacturing technologies leading to Industry 4.0 are expected to introduce new production models that can create opportunities for workers as well as for enterprises, enhancing productivity and competitiveness.

As it has been highlighted, repercussions of many of these technological developments are already being felt today, but many of them are still to be felt in current production models and labour systems. How quickly and broadly these developments are adopted and how quickly they can impact business models, will undoubtedly shape the stability or volatility of future labour markets[14].

Inside blockchain: distributed ledger technology and miners

The anglo-saxon term "blockchain" is intended to refer to a new organizational paradigm of exchanges and data between subjects belonging to the same network, whose ductility was not slow in highlighting the multiple uses that such a technology is suitable for covering in different sectors of the legal system[15].

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[13] On the complex relationships between market globalization, international competition and wages see M. Martone, *A che prezzo*, Rome, 2019. For a general analysis of the effects of economic globalization see D. Acemoglu , J. A. Robinson, *Why Nations Fail, The origins of Power, Prosperity, and poverty*, New York, 2012; D. Rodrick, *La globalizzazione intelligente*, Roma – Bari, 2011, 151 but also Id., *Dirla tutta sul mercato globale*, Torino, 2019; S. Sassen, *Globalization and its discontens. Essays on the new mobility of people and money*, NY, 1998. On the effects of globalization on labour law see M. Revelli, *Globalizzazione e trasformazioni del lavoro*, in A. Sasso, S. Toselli (a cura di), *Cultura e identità nella scuola che cambia. Tecnologie. Sapere. Lavoro. Cittadinanza*, Bologna, 1999; V. Speziale, *La mutazione genetica del diritto del lavoro*, cit., 2.

[14] See World Economic Forum White Paper, *Eight Futures of Work Scenarios and their Implications*, January 2018, 2.

[15] As is known, the critical issues related to the spread of scientific and digital innovation are not exclusively labour law, but affect almost every sector of knowledge. *Ex plurimis*, see A. Stemler, *Betwix and between: regulating the sharing economy*, in *Fordham Urb. Law Journal*, 2016, 3143; A. De Franceschi, *The adequacy of Italian Law for the Platform Economy*, in *EuCML*, 2016, 1, 56.

When we talk about blockchain we talk about an innovative and safe technology that, through the paradigms of the cryptography, creates a chain of blocks, each of which represents an exchange, a transaction, shared and validated by the entire network. So it is a distributed and public ledger that is immutable, except with the consent of all the participants, and that carries out transactions in a transparent and secure manner because every member of the network can control every exchange in every moment.

The chain of transactions that makes up the blockchain is not static, but changes rapidly, following the pace of transactions made by the participants.

For a new block to be added to the blockchain, the transaction must be validated by solving a complex mathematical problem against payment of a price. This activity is called mining and is carried out by particular types of subjects, the miners, whose performance is remunerated and is, indeed, strongly encouraged through the free determination of the amount paid for the resolution of the mathematical problem[16].

It is immediately intuitive that the work of the miners is essential to the survival of the system, given that, thanks to their commitment, the transactions carried out by the participants are validated and the chain of blocks in which they are enclosed is continued.

Obviously, each blockchain system calibrates the difficulty of the algorithm increasingly, in relation also to the number of participants in solving the mathematical problem.

If the transaction verification process detects an error, it ends unsuccessfully. In this case, not only the new block cannot be created, but every person in the network is aware of the failure to authorize the transaction.

Otherwise, if the validation of the transactions is successful, a new block is created, which is added to the already existing chain. In other words, a transaction recording is created that is public, as it is visible to everyone, permanent and immutable, provided that no participant in the blockchain will be able to modify or even delete it from the chain.

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[16] In other words, mining is the process of solving the mathematical algorithm called proof of work, given that the first miner who manages to solve this algorithm, proving that he has employed resources to achieve this goal, communicates the solution to the other players in the chain. The price for mining depends on multiple factors, and is in particular determined by the amount of commitment, the processing capacity and the economic availability of the subjects who invest their time in solving the problem.

Of course, the great absentee, in such a well-conceived system, is the central authority, that is the subject delegated to the control of the correctness of the transactions, now replaced by the generalized and distributed control of all the participants of the network.

Towards a legislative definition of blockchain in the Italian legal system

Aware of these changes, the European Union on the one hand, with the resolution of the European Parliament of 3 October 2018 "Distributed and blockchain registry technologies: creating trust through disintermediation", and the national governments on the other hand are introducing the first interventions in support of the digitalization of the production system, in order to avoid that the worker's protection apparatus and industrial relations are overwhelmed by the speed with which scientific innovation is shaping the employment relationship more and more rapidly.

At European level, the creations of the EU Observatory and Forum on the Blockchain should be remembered, inaugurated by the European Commission and with the support of the European Parliament, as well as the European Blockchain Partnership, an organization to which all European countries belong.

In Italy, we started to talk about blockchain when, with reference to cryptocurrencies, the Bank of Italy attempted to provide a first definition of cryptoactivity within the "Financial Stability Report no. 1/2018", in order to avoid inconsistencies with respect to the definition of currency with legal tender status. Thus, he elaborated a definition of cryptoassets, namely "digital activities whose transfer is based on the use of cryptography and Distributed Ledger Technology". Some of these cryptoactivities, including Bitcoin, continues the Bank of Italy in accordance with the orientation adopted by the European Central Bank, are commonly identified as "virtual currencies", given that they do not perform the economic functions of the currency nor integrate the currency from a legal and legal point of view[17].

[17] And indeed, the Bank of Italy specifies in the same Report that "Currently technological limits contribute to making the use of cryptoactivity as payment instruments inefficient. Use in wholesale payments is hampered by uncertainty about the costs associated with the individual transaction and execution times". Furthermore, "Cryptoactivities do not confer rights of an economic nature (such as the payment of coupons or dividends) and do not represent liabilities of an issuing

The norm, if on the one hand represents a first timid attempt to define the phenomenon of cryptoactivity, on the other it does not provide a solid technical and legal structure to which to refer in the interpretation of the blockchain phenomenon.

Nor does help seem to come from the latest European anti-money laundering directive, which, while attempting to regulate virtual currencies, at least from a criminal law point of view, limits itself to laying down obligations on the Member States which, however, do not provide no precise legal indication regarding distributed ledger technology[18].

Thus, the italian legislator has eventually noticed the economic potential and the legal relevance of the blockchain phenomenon which, in order to realign the Italian legislation to that of the competing economies that have already begun to explore the uses of this technology, has provided for the first time, a definition of distributed ledger.

In particular, pursuant to the first paragraph of art. 8 ter of the legislative decree n. 135 of 2018, converted with amendments into Law no. 12 of 2019, for "technologies based on distributed registers", we mean "computer technologies and protocols that use a shared, distributed, replicable, simultaneously accessible, architecturally decentralized register on cryptographic bases, such as to allow registration, validation, updating and storage of data both in clear text and further protected by cryptography verifiable by each participant, which cannot be altered and cannot be modified"

This is a first nuclear intervention that recognizes legal dignity to the phenomenon of registers distributed in the exchange of data within a virtual network. A legal framework of distributed ledger technology, albeit still primordial, which represents a leap forward towards the definition and recognition of technological phenomena attributable to blockchain technology from which, in the near future, a real regulation could arise, under the profile not only civil law, but also and above all labor law, corporate and tax law of the distributed ledger phenomenon.

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institution" and their purchase is therefore motivated "mainly by expectations of price increases, a typical mechanism of speculative bubbles".

[18] The reference is to the directive of the European Parliament and of the Council 2018/843 of 30 May 2018, which amends the European Union directive 2015/849 concerning the prevention of the use of the financial system for money laundering or terrorist financing purposes and which amends the directives of the European Union 2009/138 / CE and 2013/36 / UE.

Smart contracts

The use of blockchain technology could have even more disruptive effects if accompanied by a wise use of smart contracts, that use digital technology innovations to simplify and accelerate the traditional path of contract stipulation.

It is not by chance that the italian legislator, with the aforementioned art. 8 ter of the d. L. n. 135 of 2018, immediately after naming the distributed registers and therefore recognizing them as legally relevant, he took care to provide a definition also of the so-called smart contracts.

Pursuant to the aforementioned legislative provision, in fact, "a smart contract is defined as a computer program that operates on technologies based on distributed registers and whose execution automatically binds two or more parts on the basis of effects predefined by the same".

The peculiarity of smart contracts is that, although they refer to the concept of contract in the name, they differ from the juridical conformation of the latter under different profiles. In them the concept of agreement extends and takes the form of a pact between several parts written in a programming language.

Aware of the complexities and systematic criticalities that the adoption of such a tool to circulate the will of the parties is capable of introducing into our legal system, the legislator is concerned with specifying that "smart contracts meet the requirement of the written form after computer identification of the interested parties, through a process having the requirements set by the Digital Italy Agency with guidelines to be adopted within ninety days from the date of entry into force of the law of conversion of this decree".

Inside production models, smart contracts may have considerable potential.

The most striking effect of the use of smart contracts, which at the occurrence of predetermined conditions put in place the pre-established effects, is in fact the radical streamlining of some segments of the productive and organizational activity of the company. Hence the remarkable speeding up of production and, therefore, of the exchange of goods and services.

In fact, the transparency that characterizes blockchain technology would represent a very useful tool for assessing the reliability of the worker and, at the same time, his experience and competence in a given professional field, comparing previous work experiences with that of new potential stipulation.

Furthermore, the publicity of the blockchain register would allow to prevent or in any case limit the hypotheses of irregular work, as such they cannot be registered in the blockchain on which the professional career of the worker would be recorded.

These are some first considerations on the potential interactions between two phenomena, blockchain and Industry 4.0, which are already conditioning the working reality through their potential as tools for organizing companies and markets.

Moreover, smart contracts are able to manage data, including lists of people who will participate in a given vote or the criteria for building the voting system in a certain organization. In the smart contract it is therefore possible to define the rules to which the participants must adhere in the vote, given that the smart contract is a program that carries out operations unalterably with respect to that established at the time of programming.

The direct effect of this voting system is the immediate controllability of the election and its result, which will be automatically implemented in its entirety to the achievement of 50% + 1 of the participants. Voting systems based on blockchain technology could therefore be used to reinvigorate union voting systems and, due to their effect, industrial relations. The future of union democracy could in fact pass through digital voting systems and rules, such as to guarantee maximum transparency and the full participation of the workers involved[19].

Anyway, it must be considered that the applications of the smart contract in the employment relationship may currently be limited: the assumption on which the smart contract is based is the condition of equality of the subjects, which is not present in the employment contract.

Moreover, in labour law what matters is not the contract but the employment relationship, that is, not what the parties say to each other but how the relationship is actually posed. In the employment contract, moreover, there is still a duration relationship, in which what is agreed at the initial moment then changes, also for reasons other than

[19] Such a system is already being developed by the Italian Union trade FIM, which intends to become the promoter of a digital voting mechanism for union trade representatives inside the company (RSU). The aim of the project is to respect the certainty and secrecy requirements of the vote together with those of immediacy of the result, avoiding the spread of phenomena of little transparency in the election results. On this regard see S. Tagliavini, *Blockchain: un nuovo paradigma di democrazia (sindacale)*, in *Bollettino Adapt*, 2018, 30.

the will of the parties. So from a contractual point of view, on the one hand there is the obstacle of equality of the parties and on the other that of the mandatory nature of the law.

The impact of distributed ledger technology on the world of work

The complexity of the blockchain phenomenon imposes some considerations about the potential effects on the work of the processes of digitization of production systems and working relationships, given that technological innovation represents a challenge for the economic and labour law system in terms of the future sustainability of the change introduced[20].

The fear is, on the one hand, that of the potential elimination of numerous jobs, given that every technological change has a strong impact on employment levels. On the other hand, that of the qualitative transformation that work performance can undergo. Which testifies to the significant destabilization that the technological and scientific evolution of recent years has been able to bring to our legal system[21].

For these reasons, it is not surprising that, from the progressive awareness of the radical change that is transforming the economic and working reality, to those who foresee a significant progress in the labour market, in terms of greater efficiency of companies and greater competence and professionalism of individuals[22], contrast those who, on the other hand, show concern about the considerable changes that digital innovation in the economy and labour is destined to bring to the workforce[23].

Truth is that it is likely that the diffusion of blockchain technology must be perceived as a chance for the creation of new job opportunities, able to contribute to taking care of the emergence of work that

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[20] Con riferimento alla durata ed alla intensità del lavoro *online* si veda W. Daubler, *Challenges to Labour Law*, in A. Perulli (a cura di), *L'idea del diritto del lavoro, oggi. In ricordo di Giorgio Ghezzi*, Cedam, 2016, 497.

[21] For a wide-ranging vision on the topics of automation, artificial intelligence and safeguarding "human" employment levels, V. De Stefano, *Negotiating the algorithm: automation, artificial intelligence and labor protection*, in International Labor Office, 2018.

[22] R. Ciccarelli, *La rivoluzione dei lavori*, in G. Allegri – G. Bronzini, *Libertà e lavoro dopo il Jobs Act. Per un garantismo sociale oltre la subordinazione*, Derive Approdi, Rome, 2015, 142.

[23] C. Degryse, *Impacts sociaux de la digitalisation de l'économie*, in *WP ETUI*, 2016, 2, 9; J. Drahokoupil – B. Fabo, *The platform economy and the disruption of the employment relationship*, in *ETUI Policy Brief*, 2016, 5, 2.

plagues the current condition of the labour market, above all national, through the creation of figures specific professionals[24].

As carefully observed, one of the most evident effects of the digitalization of socio-economic and working relationships is constituted by the considerable reduction of transaction costs[25], made possible by the construction of a communication system that favors the meeting between the worker and the user of the service[26].

Due to the worldwide distribution of the blocks that make up the chain, blockchain technology creates a system of encounter between labour supply and demand "peer to peer", with relationships of a horizontal nature, which arises as an alternative to the traditional mediation system in the meeting between those who perform their work and those who request it.

So, it seems that there may be great potential for development as regards the administrative management of labour law, as the blockchain allows to have information on the employment relationship that is shared, certain, between subjects that dialogue. Therefore, large space can have the blockchain technology in the management of labour market institutions, especially in the perspective of the elimination of intermediation of any third party.

The future of work

The technological and scientific development of the last few years has laid the foundations for a real digital technological revolution, whose repercussions are not slow to show up on the production systems and on the occupational profiles of the companies. Which are forced between conflicting forces, such as, on the one hand, the vital

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[24] Thus, among the technical works it is possible to include the blockchain information security analyst, the blockchain data scientist, the blockchain developer. Likewise, among the jobs not strictly related to the technical use of the blockchain there are the marketing blockchain specialist, the blockchain project manager, the technical recruiter. It is therefore a market still in the process of being formed and defined, in which the possession of the required digital and technological skills will be the determining condition for the possibility of accessing or not accessing the job opportunities linked to the development of the blockchain.

[25] P. Ichino, *Le conseguenze dell'innovazione tecnologica sul diritto del lavoro*, in *Rivista italiana di diritto del lavoro*, 2017, 4, 1, 525.

[26] In terms of consolidation of an alternative circuit of the encounter between supply and demand for work see P. Tullini, *Economia digitale e lavoro non standard*, in *Labour Law Issues*, 2016, 2, 2, 5.

modernization of technological structures and the necessary updating of the professional skills of the workers employed and, on the other, the need to support the greater level of competitiveness introduced by technologies increasingly sophisticated digital media.

Recent digital innovations pose several problems not only in terms of managing the employment dynamics linked to the transformation of the production process, but also and above all in terms of continuous training of the worker[27]. On closer inspection, even today there is not a full awareness of the evolution of digital technology and its effects on work and employment, especially in terms of skills and professional skills necessary to support and contribute to the change in production processes.

The market therefore may begin to turn to blockchain technology as a tool for the "humanization"[28] of work, which evolves and integrates with the Industry 4.0 digital manufacturing program, given that the blockchain lends itself to becoming the reference paradigm for production models and the business models of the various sectors, especially where innovative solutions are needed that can reduce inefficiencies and protect the environmental sustainability of production.

In conclusion, due to its complexity, the theme allows to glimpse the new potential that blockchain technology allows businesses to develop. The real challenge, in the current historical, economic and cultural context, however, is to understand how it will change the role of intermediate bodies and the employment relationship and where, and with what character, its applications will find full manifestation.

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[27] On the interactions between contract and company organization see M. Persiani, *Contratto di lavoro e organizzazione*, cit..

[28] M. Bentivogli, M. Chiriatti, *Così la blockchain aumenta l'umanità del lavoro*, in *Il Sole 24 Ore*, 12 August 2018. For an original analysis of the transition from the right to work to freedom from work in the context of a "human" economy, please refer to N. BUENO, *Introduction to human economy. From the Right to work to the Freedom from work*, available at http://kluwerlawonline.com/toc.php?pubcode=IJCL.

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8. Working via the Internet versus lex loci laboris – fair competition?

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The current post-industrial social order is different from the agricultural order and industrial, which is reflected in the focus on services – especially professional ones and technical. Services are more and more often provided via the Internet and this trend seems to be covered by modern form of work. Due to the existing single internal market in the European Union, the use of employees employed in one country to provide services in the other country via the Internet has become popular on a larger scale. Liberalization of the movement promotes the growth of competition; greater possibilities resource allocation results in more efficient use and specialization and a the scale of the market allows the development of its participants and reducing costs[1]. As it is stated in art. 1 of the Treaty on EU, which marks a new stage in the process of creating an ever closer union among the peoples of Europe. The free movement of labour and services are basics freedoms of the European Union and its single market. On the other hand fair competition is cornerstone of EU, facilitating the reduction of territorial and labour conditions imbalances and skills mismatches. It could help battle with poor economic and labour market conditions, low income, and establishing the area of freedom, security and social justice. Posted worker is also the solution for the difficulty of finding workers with appropriate skills and increased market competition. The freedom to provide or receive services in an EU country other than the one where the company or consumer is established (Article 56 TFEU). At the same time competition should be understood as the struggle of entrepre-

[1] N. Lillie, I. Greer, *Industrial Relations, Migration, and Neoliberal Politics: The Case of the European Construction Sector, Policy & Society* 2007/35, p. 551–581

neurs for benefits economic achieved through the sale of goods and services and the contest for markets supply and sales, as well as manpower. Competition includes so various activities aimed at eliminating rivals and acquiring clients at the expense of rivals operating in the same industry[2].

Intra-EU mobility is still increasing but with a slower speed. In 2017, there were 17 million EU-28 movers in the EU, according to Eurostat population statistics among which 12.4 million of working age (20-64 years) compared to 11,8 million in 2016[3]. In 2014 there were 1.92 million posted workers in the EU, and the number has increased by 44.4% between 2010 and 2014. In 2015, the overall number of PDs A1 increased by roughly 7% reaching a total of 2.05 million[4]. These numbers are small as a share of total employment, but in some sectors exist specially high concentration of posted workers, for example construction sector is about 43.7% of the total posted workers. Poland sends the highest number of posted workers to other Member States (513,972 in 2016)[5].

Variations in the location of work, create various questions and issues about payments, social protection of workers and which national regulations apply. The use of letter – companies, temporary agencies, long supply chain with subcontractors, self-employment soar to further challenges. We would like to highlight some of the crucial troubles in monitoring the implications of principle *lex loci laboris*. Currently there is no obstacle to open a company or a branch in a country with lower lever of social protection and hire the employees in this country. These employees provide services for via the Internet for recipients all over Europe (service recipients). For instance (and this is rather popular practice, not theoretical considerations), a company with foreign capital, citing freedom of establishment, creates a branch in Poland. This branch (service provider) employs employees, paid at Polish rates

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[2] C. Kosikowski, T. Ławicki, *Ochrona prawna konkurencji i zwalczanie praktyk monopolistycznych*, Warsaw 1994, p. 9

[3] 2018 Annual Report on intra EU Labour Mobility Final Report December 2018, European Commission Directorate-General for Employment Social Affairs and Inclusion Directorate D – Labour mobility file:///C:/Users/marta/Downloads/2018%20Labour%20Mobility%20Report.pdf, 07.11.2019 r.

[4] Posting of workers Report on A1 portable documents issued in 2015 file:///C:/Users/marta/Downloads/KE-04-17-164-EN-N%20(1).pdf

[5] TOWARDS FAIR LABOUR MOBILITY: REVISION OF EU POSTING OF WORKERS RULES, POLAND, 2016 file:///C:/Users/marta/Downloads/POSTED_country%20sheet_v_empl_PL_EN_04.pdf

of pay. These employees provide services (e.g. as call-center consultants, IT specialists and even medical services, so-called telemedicine) for recipients throughout Europe (recipients).

Development of modern forms of communication often eliminates a necessity to leave (temporarily) the country by employee. Service does leave the country albeit not the employee. As a result, the working conditions are in this case determined by the place (country) of work. This leads us to the legal dilemma connected with the possibility of sending effects of work via the Internet and traditional principle *lex loci laboris.* It seems *de lega lata* that *lex loci laboris* still prevails, however new perspectives appear on the horizon. Transfer of services via the Internet is an unquestionable example of unfair competition, based on gaining market advantage due to lower labour costs. It should be stressed that online workers from lower-income countries dominate. The presented above issues lead us to the questions: is this how fair competition should look like? How is the principle of equal pay for work applied in this case? Thus, shouldn't we restore European competitiveness by reconciling the balance between *lex loci laboris* and fundamental freedoms? There are many factors which determine competitive advantage or disadvantage of companies for example: knowledge, skills, flexibility, innovations but also taxes and social security contributions. It means also different labour condition, wages and social security level. Some sectors are particularly sensitive for the intense competition between subcontractors. Then there is space for playing with social costs and social dumping due to abuse of legal regulations of social workers. According to A. Sapir Social social dumping' can result from:

- imports of goods from low wage countries,
- imports of services involving posted workers from low wage countries,
- offshoring of production to low wage countries[6].

What is common for these three points, is low wage countries. It leads us to the question whether working via Internet from low wage country could be qualified as a new (sub)type of social dumping. Then, if yes – does it require any legal action? Before that, let us elaborate

[6] A. Sapir, *Single Market and Social Protection: Friends or Foes?*, Presentation prepared for an Informal Meeting of Labor Ministers (revised) Hosted by Sweden's Minister for Employment, Stockholm, 11 September 2015, http://bruegel.org/wp-content/uploads/2016/03/Sapir-2015-Stockholm.pdf

about current regulations laying down the rules in employment relationship with crossborder element. When determining which law applies in employment relationships with a crossborder element, the Rome I Regulation (hereinafter 'Rome I')[7] should be applied. Article 8 of the Rome I Regulation harmonizes the conflict rules in Europe on the law applicable to individual contracts of employment. In principle, parties are free to choose the law applicable to their employment contract. But Article 8(1) Rome I limits the effect of a choice of law since such a choice by the parties cannot deprive the employee of the protection afforded to him by mandatory provisions of the law applicable in absence of this choice (the 'objectively applicable law')[8]. As a consequence, an employee might take advantage of better protection enshrined in the labour law of the host country. Obviously a physical presence in the host country is a crucial prerequisite of application art. 8 Rome I. Subsequently the foregoing provision shall not be invoked in case of working via Internet from other country.

Whenever social dumping is considered, posted workers are usually recalled. The position of workers who are posted to another Member State in the framework of the provision of services has thus been a European concern for a considerable time. The PWD[9] is a tangible results of this concern. The PWD aims to reconcile the exercise of companies' fundamental freedom to provide cross-border services under Article 56 TFEU (old Article 49 EC), on the one hand, with the need to ensure a climate of fair competition and respect for the rights of workers (Recital 5)[10]. Unfortunately, the legal framework in relation to posting is considered by many as conducive to "social dumping", illegal

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7 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations OJ 2008 L 177/6 (hereafter referred to as 'Rome I').

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9 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997, L 18, 1 (hereafter 'PWD').

10 M. Houwerzijl, The Analysis of the Posting of Workers Directive(s) with A Specific Focus on EU Cross-Border Road Transport, in A. Zwanenburg, B. Bednarowicz (eds.) Cross-Border Employment and Social Rights in the EU Road Transport Sector, Haag 2019, p. 76.

work etc and results in displacement effects[11]. In order to refrain from myths, it should be emphasised that if posting of workers is applied in a fair manner, it does not involve any social dumping. Social dumping would occur if a posted worker did not receive the minimum rate of pay which they were eligible for[12]. As a remedy to social dumping, according to Prof. D. Pieters, a single EU market requires one of the below solutions:

1. a separate insurance fund for posted workers from across the European Union
2. social security ties with tax law and not labour law
3. possibility of a free choice for the workers themselves[13].

Although each of the above proposals seems too politically ambitious, Danny Pieters stressed the need for bold steps in responding to the changing labour market. Could we take into account consideration solutions suggested by prof. D. Pieters in case of working via Internet? Would these solutions work without physical movement to another country?

In this context it has to be stressed that both PWD and Regulation Rome I require physical presence of employee in the host country. EU law does not notice the movement of service as such. Rhetorically, what is the difference between crossborder movement of employee (even just temporal) and crossborder movement of services? The relevant question is whether the service itself, without the actual mobility of employees, should be considered as the cross-border provision of services? *De lege lata* no, PWD and other law is not applicable in this situation because it lacks physical employee's move to the territory of another country despite the provision of services to a recipient in another country.

Although current law applicable in employment relationships with a crossborder element does not notice the problem of working via Internet, a slightly different approach is noticeable in case law. For instance, carrying out the services relating to the performance of the contract in

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[11] J. Cremers, J. E. Dølvik, G.bosch, *Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU*, in Industrial Relations Journal, 38:6, pp. 524-541; M. Bernaciak, *Social dumping: political catchphrase or threat to labour standards?*, in ETUI Working Paper, 2012, 06.

[12] M. Szypniewski, *Implications of Collective Bargaining for Posting of Workers – a Pandora's Box*, in A. Perulli & S. Bellomo (eds.) *Industrial Relations in the Era of Gobalization: a Multilevel Analysis,* Venice 2019, p. 174-175

[13] D. Pieters, Posting of workers: disease or symptom? V European Labour Mobility Congress Krakow, 20 November 2017

another Member State was the background of the Case C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund*[14]. In this case the crucial question was whether payment of a minimum wage to the employees of subcontractors of tenderers shall be guaranteed even in the case where the subcontractor concerned is established in another Member State and all of the services relating to the performance of the contract concerned are to be carried out in that other Member State. According to ETC a minimum wage on subcontractors which are established in a Member State other than that to which the contracting authority belongs and in which minimum rates of pay are lower constitutes an additional economic burden. It may prohibit or render less attractive the provision of their services in the host Member State, and it can constitute a restriction within the meaning of Article 56 TFEU. As we can see, the Court has just touched very sophisticated issue of remuneration to employees working in other Member State. It other words, service does leave the country albeit not the employee. In *Bundesdruckerei* Court ruled that article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs which requires that subcontractor to pay those workers a minimum wage fixed by that legislation.

Conversely in *Rüffert*[15] case CJEU states that such restriction cannot be justified by the objective of ensuring the protection of workers since it applies only to workers employed in the context of public works contracts. The level of protection of workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3, of PWD. According to Directive, Member State is not entitled to impose to companies established in other Member States a rate of pay such as that provided for by collective agreement. In the situation of cross-border services provision of minimum wages cannot be placed through the collective agreement with the meaning of the Directive. A company is entitled to pay the minimum wages valid in the receiving Member State subject to the Directive. Also protection of working life does not constitute an admissible justification. Court reminded that PWD should be interpreted in the light of Article 49 EC and the freedom to provide services, which is one of the fundamental freedoms pledged by the Treaty. Contrary to *Ruffert* case where there was a non-universal

[14] ECLI:EU:C:2014:2235

[15] ECLI:EU:C-346/06

collective agreement, in *RegioPost*[16] case the minimum wage is a consequence of regional law. The social protection was also a subject for the CJEU prospective justification (similar to *Bundesdruckerei*).

The abovementioned attitude could generate double standards for cross-border and inter-regional conditions. It could also lead to situation that in fact workers in the same company fulfilling the same duties might be paid differently. Additional problems will arrive in the case of fulfilling job via Internet as a self-employed. Lack of social protection and working conditions, especially concerning working hours can build economic benefits but as a result of weak working conditions. Therefore the freedom to provide the services seems to be an obstacle to guarantee higher wage to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belongs. Once again, it seems that economy prevails over social aspects. It is a question of balance between economic freedom and protection of workers. Economic advantage cannot be built on poor employees` rights protection.

The issue of residence and carrying out the work in another Member State was also partly analysed in case C-570/15 – *X v. Staatssecretaris van Finaciën*[17]. Although it hardly needs to be stressed that the recalled dispute concerned application of social security schemes and determination of the applicable legislation, some of the findings deserve attention and might be useful for labour law. Firstly, the social security coordination rules laid down in Regulation (EC) No 883/2004[18] anticipates pursuit of activities in two or more Member States (article 13). In general, it can be said that "normally pursuing activities in two or more Member States" refers to coinciding activities which are a normal aspect of the working pattern and the fact that there is no gap between the activities in one Member State or the other. Article 13 Regulation No 883/2004 also applies in case of activities that are performed in alternation, consisting in successive work assignments carried out in different Member States, one after another[19]. Secondly,

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16 C-115/14

17 ECLI:EU:C:2017:674

18 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ 2004, L 200/1 (corrigendum OJ 2004, L 200/1), (hereafter 'Regulation No 883/2004)

19 H. Verschueren, B. Bednarowicz, *The EU Coordination of the Social Security Systems of the Member States and Its Applicability in Cross-Border Road Transport*, in A.

as stated by Advocate General[20], the particularity of such a working arrangement (working from home etc) lies in the fact that it potentially undermines the concept of a particular place of employment, as a relevant factor for determining the Member State which has the closest link to the employment relationship. A person can do telework on her computer or telephone at home or while travelling and such mode of working can amount to a significant part of employment activity. The Court will have in the future to decide how this circumstance should be taken into account for the purposes of determining the applicable social security legislation.

From our point of view in case of working via Internet requires promoting fair competition between Member States, in particular fighting illegal practices such as undeclared work or bogus self-employment. The abuse of self-employment could be particularly challenging for public authorities to discover. The assumption of the employment status indicated on the A1 certificate defines the worker's status. The definition of the employment relationship depends on the Member State in whose territory the worker perform its duties. Many abusive cases could be linked with multiple supply chain of contractors and subcontractors and then posted by foreign enterprises. The self – employed in Poland represents more than 17.5% of all employees, the self-employed person is about 2 million 800 thousand. There could be observed a phenomenon of substitution of self-employment contracts, which is in some cases apparent and in fact, violations of labour rights. The draft of the Labour Code presents the notion of economically dependent self-employed, which is a person who provide services to the individual trader or company on average at least half of the time. It could be solution to problem of bogus self – employment. The term 'employee' for the purpose of EU law should be defined according to impartial conditions that describe the employment relationship[21]. It must be taken into account the rights and responsibilities and performing services for and under the direction of another person[22]. The classification of a 'self-employed person'

Zwanenburg, B. Bednarowicz (eds.) *Cross-Border Employment and Social Rights in the EU Road Transport Sector*, Haag 2019, p. 138.

20 OPINION OF ADVOCATE GENERAL SZPUNAR delivered on 8 March 2017 (1) Case C-570/15 X v Staatssecretaris van Financiën

21 FNV Kunsten Informatie en Media, Case C-413/13,

22 Haralambidis, C-270/13, EU:C:2014:2185, paragraph 28

under state law does not prevent that person being classified as an employee within the meaning of EU law[23]. Some crucial aspects need to be checked: scope of management, and direction, independence; selection procedure and nature of the obligations; freedom to choose the methods, time, place, content of the obligations.

What should be stressed here and seems to be interesting, Polish law noticed the problem connected with working via Internet, unfortunately exclusively in the aspect of working time. In this context, let me clarify that whereas generally work on Sundays and holidays is prohibited, one of the exception relates to teleservices received outside the territory of the Poland. Thus, carrying out the work via electronic means of communication to recipients outside of Poland convalidities general ban on working on Sundays and public holidays. Naturally, this work is still remunerated according to wage settled in Poland. It should be at least puzzling that through such a regulation labour law limits the protection of employees, let alone it creates an incentive to open a branch and hire employees in Poland in order to work via Internet to other Member States. The admissibility of work on Sundays and public holidays concerns , work to ensure the functioning of work stations . Therefore, work on the above days can only be completed by persons performing services directly, and persons necessary for the proper performance of these services (necessary supervisors and necessary technical support). Thus, the rule does not introduce the principle that all employees in companies focused on the provision of such services can be hired on Sundays and public holidays.

Additionally online employees face many difficulties of earning from foreign sources. In many cases work is performed without existence of any type of contracts, as a undeclared work. Workers via Internet are not formed into unions, and in many countries they cannot legally be formed, because they are self-employed. There exists a space for European or even broader multinational levels system supporting online workers. The system could monitor and control payment flows and working conditions (working and non – working time)[24].

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[23] Allonby, C-256/01, EU:C:2004:18, paragraph 71

[24] More information about internet workes in ILO report: Working anytime, anywhere: The effects on the world of work, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_544138.pdf

The proposal of new Directive on transparent and predictable working conditions in the European Union[25] points out loops between the EU social acquis and last developments on the labour market. This initiative is one of Commission's key actions to follow up on the European Pillar of Social Rights and it is important and needed step. In the proposal the Parliament highlight the need to „extend existing minimum standards to new kinds of employment relationships, improve enforcement of EU law, increase legal certainty across the single market, and and prevent discrimination by complementing existing EU law ensure for every worker a core set of enforceable rights". It should be noted that is important stone but not sufficient. According to data in 2016 a quarter of all employment contracts were for "non-standard" forms of employment[26]. It has resulted in a greater variety of the working population and has create real possibility of work for people who previously would have been excluded. It directed to instability for some type of contracts unclear or unfair practices, particularly for those in the most precarious situations. In many cases it is difficult to enforce their rights. The new Directive's aim is to improve the working conditions by promoting more transparent and predictable employment. It covers all workers in all forms of work, including those in the most flexible non-standard and new forms of work such as zero-hour contracts, casual work, domestic work, voucher-based work or even platform work. The proposed Directive complements existing acts of EU, among them Directive PWD. What is more, online workers are covered as long as they work in any EU country. However, self-employed workers would not be touched by the new regulation.

Non-standards jobs are becoming more frequent due to alterations in the world of work, such as growing digitalisation and the creation of new business needs. The flexibility of new forms of work is a very important incentive for job creation. The labour market necessitates flexible work agreements, but flexibility must be shared with minimum protection. In many cases the weak position of the employees is

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[25] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on transparent and predictable working conditions in the European Union, COM/2017/0797 final – 2017/0355 (COD), No longer in force, Date of end of validity: 20/06/2019

[26] Document 52017PC0797, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on transparent and predictable working conditions in the European Union https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0797

based of fear and poor awareness of their rights. Many abusive cases are underreporting by posted workers, because of concern about losing their jobs and being sent back to home country. Therefore there is a need of cooperation between governments, trade unions and companies in these area to keep the balance in free European market. It must to be underlined that any kind of new solution should not be allowed without passing rigorous proportionality test. It is necessary to find the proper balance between favouring freedom of services within EU and the protection of employees' rights.

The above observations lead to the conclusion that currently it is more important that an employee work in a different country than who is the recipient of the service. Having taken into account progressive development of services provided via the internet and assuming that most services in the future will be provided electronically this traditional approach might change in the nearest future. The differences in labour costs attached to sending the services via Internet seem to have been used more and more strategically by firms in order to gain competitive advantage. Therefore, it seems that there is also need to launch programmes for monitoring on implications of principle of *lex loci laboris*. At the same time, involvement of three parties is crucial to combat fraud practice in employment relations and to promote good labour practice and fair competition.

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9. Labour protection in the transition to the digital economy: the Italian perspective

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Summary: 1. Platform capitalism and sharing economy. – 2. The problem of qualifying the relationship. – 3. The collaborations organized by the client and the case of the Foodora postmen. – 4. Towards a selective approach.

Platform capitalism and sharing economy

The term Industry 4.0 indicates the tendency to digital innovation of industrial processes to modernize the production system and to relaunch the competitiveness of the manufacturing sector of the future[2].

Smart Manufacturing policies, carefully pursued by national governments, have had a strong impact on the economic and social context, generating a series of changes on the production organization, which are remembered in history as the fourth industrial revolution, from which the affirmation of an economic model based on the idea of sharing not only goods and services, but also knowledge

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1 * The article elaborates, with the addition of notes, as well as further references and insights, the issues addressed in the paper presented by the author on the occasion of the ELLYS MEETING, *Modern Forms of Work a European Comparative Study* (Rome, July 3rd-5th 2019), as part of the thematic session *Digitalization, platforms and algorithms from the Labor Law perspective*.

2 M. Weiss, *Digitalizzazione: sfide e prospettive per il diritto del lavoro*, in *Diritto delle relazioni industriali*, 2016, 659 ff.; E. Signorini, *Il diritto del lavoro nell'economia digitale*, Turin, 2018; A. Donini, *Il lavoro digitale su piattaforma*, in *Labour&Law Issues*, 2015, 51 ff.; M. Tiraboschi, F. Seghezzi, *Il Piano nazionale Industria 4.0: una lettura lavoristica*,in *Labour&Law Issues*, 2016, 13 ff.; P. Ichino, *Le conseguenze dell'innovazione tecnologica sul diritto del lavoro*, in *Rivista italiana di diritto del lavoro*, 2017, 1, 525 ff.; R. Del Punta, *Un diritto per il lavoro 4.0*, in A. Cipriani, A. Gramolati, G. Mari (eds), *Il lavoro 4.0. La IV rivoluzione industriale e le trasformazioni delle attività lavorative*, Florence, 2017, 225.

and professionalism, through a digital platform, which "intermediates" and "interconnects" consumers-users with working suppliers[3].

Subsequent developments in the sharing economy and in particular the relational capacity of technologies have had unprecedented consequences on the labour market, ranging from the modification of the characteristics of work performance, up to the birth of a completely new form of employment, which replaces itself in part to the previous one.

The result was a destabilization of the work protection system, which disrupted the traditional dichotomy between autonomy and subordination and disrupted the spatial and temporal coordinates of work performance, on which the architrave of labour protection rested[4].

It should also be considered that the job opportunities that arise from the web, precisely because of their short duration, for the small remuneration, for the few hours of work, tend to feed the "poor job", placing the worker in a weak position contractual, to the prerogative of the economic power of the large clients and of the platform itself[5].

The vulnerability of workers 2.0, loyal to the platform, lies precisely in the occasional nature of the performance performed with the intermediation of the platform, which often ends up removing them from the protective arms of subordinate work.

The work intermediated by the platform for these reasons ends up being mainly a "second best", a response to the lack of employment, the economic crisis and the difficulty of entering the labour market, a concrete alternative to the inability to access a type of contract subject to greater protection.

Sometimes, however, it may not be a simple makeshift or a mere survival to the digital age, but a choice for a flexible and autonomous way of performing the service[6].

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[3] S. Bellomo, *Transformation of work and Collective bargaining current trends: the paradigmatic example of the new worktime arrangements*, in *Diritto del mercato del lavoro*, 2018, I, 3, 697 ff.; T. Addabbo, E. Ales, Y. Curzi, T. Fabbri, O. Rymkevich, I. Senatori (eds), *Performance Appraisal in Modern Employment Relations: An Interdisciplinary Approach*, London, 2019; C. Crouch, *Se il lavoro si fa gig*, Bologna, 2019.

[4] O. Razzolini, *Lavoro autonomo organizzato*, in M. Pedrazzoli (ed. by), *Lessico Giuslavoristico*, 2, Bologna, 2010, 79 ff.; A. Perulli, *Il Jobs Act del lavoro autonomo e agile: come cambiano i concetti di subordinazione e autonomia nel diritto del lavoro*, in *WP C.S.D.L.E.* "Massimo D'Antona".IT – 341/2017, 180.

[5] M. Forlivesi, *La sfida della rappresentanza sindacale dei lavoratori 2.0*, in *Diritto delle relazioni industriali*, 3, 2016, 664 ff.

[6] M. Lai, *Evoluzione tecnologica e tutela del lavoro: a proposito di smart working e di crowd working*, in *Diritto delle relazioni industriali*, 2017, 985.

The work that hides behind the intermediation of the platform hides in fact completely heterogeneous forms, ranging from work on demand, at the request of certain products or services, with low technological density work performance, to crowdsourcing which consists of outsourcing not of a single service, but of a part or an entire economic activity to a crowd of people, which may include highly professional positions.

In both perspectives, the digitalization of the production process, so exalted by the national governments and the institutions of the Union, if on the one hand offers new job opportunities, while slowly leading to the disappearance of more manual and repetitive jobs, on the other hand leads to proliferation of hybrid legal categories that move between the typical legal categories of autonomy and subordination, without finding a precise location, in an archipelago removed from any regulatory framework.

In this perspective, it is necessary to focus on an "agenda of possible solutions" which, starting from the enhancement of the principles of solidarity and social justice, reach the point of guaranteeing dignity and safety to anyone who works behind remuneration[7].

The problem of qualifying the relationship

The doctrine has been investigating for some time on the attitude of traditional qualifying categories to manage the profound changes of the economic-productive reality, mostly endorsing the expansive tendencies that tend to widen the boundaries of subordination, to include a wide range of relationships that aren't fully connoted by its identity traits[8].

Moreover, labour law as an autonomous regulatory system arises precisely from the need to protect the worker by reason of the subjection in which he finds himself opposed to his employer and therefore, the qualification of the relationship as subordinate has always represented the prerequisite for the application of a protective statute recognized to the worker in compensation for his position of economic and contractual weakness[9].

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[7] R. Voza, *Nuove sfide per il welfare: la tutela del lavoro nella gig economy*, in *Rivista di diritto della sicurezza sociale*, 4, 2018, 658 ff.

[8] F. Santoni, *Autonomia e subordinazione nel riordino delle tipologie contrattuali del lavoro non dipendente*, in *Diritto del mercato del lavoro*, 2016, 505 ff..

[9] P. Ichino, *Subordinazione e autonomia nel diritto del lavoro*, Milan, 1989.

The implication of the person who works and his dignity, which feeds the original drive of labour law, to operate unequally, to recover the substantial equality of a relationship that is born "unbalanced" as originally, pushed the legislator, with a series of legislative interventions, to expand the guarantees of subordination, with a possible reduction of rigidity[10].

This approach, however, if on one hand provides the access key to labour protection, albeit with possible mitigations of the protective statute, on the other hand doesn't appear to be able to summarize the varied and multiple relationships that are hidden in the complex labyrinth of digital work and in particular it doesn't take into account the heterogeneity of individual work contributions.

The overcoming of the Taylorist-Fordist model, the downsizing of standardized work, the proliferation of new relationships carried out with the help of technology, the rise of new forms of micro-entrepreneurship with accentuated dependency profiles, have produced a "metamorphosis" of the labour law, a genetic mutation, which requires a redefinition of the protections of the person who works against the risk of being reduced to a commodity[11].

In particular, for workers of the gig economy the "option of subordination at all costs" and, therefore, the extension of the discipline of subordinate work, could be precluded in those organizational models in which the platform is limited to a mere activity brokerage without costs for users, without affecting the remuneration and the methods of performance of the service.

On the contrary if the intermediation activity is accompanied by that of service organization, with the setting of specific contractual conditions and the compensation, with a precise indication of the requirements of the offer, it is possible to identify in the platform something that goes beyond a simple "telematic place" in which job supply and demand meet and, consequently, verify the concrete existence of the elements for the qualification of the relationship in the context of subordinate work, going to examine how the performance fits into that "organization"[12].

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[10] R. Santucci, *Regole sostanziali e procedurali su interpretazione e applicazione del diritto del lavoro per consentire la 'migliore certezza possibile' del diritto*, in *Writings in honor of Francesco Santoni*, in *Quaderni de «Il Diritto del mercato del lavoro»*, 2020, in course of publication.

[11] L. Zappalà, *Metamorfosi del diritto del lavoro e crisi della rappresentanza*, in *Osservatorio sulle fonti*, 3, 2017, 2 ff.; F. Santoni, *Le metamorfosi del diritto del lavoro*, in *Diritto del mercato del lavoro*, 1, 2015, 3 ff.

[12] G. Quadri, *Il lavoro tramite piattaforme digitali: problemi di qualificazione e tecniche di*

This qualifying operation, in fact, assumes that the platform manager exercises the power of a traditional employer, albeit with legal traits partially altered by the use of technological means, from geolocation tools for control, to sophisticated "apps" smartphone to issue orders, to user feedback for the possible imposition of sanctions.

The delocalization of the service performed with the aid of technology therefore requires an adaptation of the traditional tools for qualifying the relationship and, with it, a re-reading of the labour institutes that takes into account the asymmetries of the various work contributions.

This need indeed involves a wider phenomenon than digital work, covering all forms of work that arise from the spatial and temporal disarticulation of performance and, in particular, from the loss of centrality of work in the company, primarily the smart-working referred to in Law 22 May 2017 no. 81, with which the Italian legislator attempted precisely to modulate the structural elements of subordination to the successful dematerialisation of work within the company[13].

The execution of the remote work performance entailed a strengthening of the employer control at a distance and, with it, a physiological expansion of the employer powers in managing the relationship, precisely because of their intrinsic unity.

The inadequacy of the regulatory system is even more evident for workers of the gig economy, both because the extension of the guarantees provided by the article 4 of Law 300/1970 presupposes the subordinate nature of the relationship, both because their concrete application is affected by the obsolescence of the norm in the context of the digital factory[14].

The pervasive control of the algorithm and in some cases of the geolocation mechanisms, is then accompanied by the reputational feedback, which combines information on the lender with the end user reviews of the service, a sort of bonus-malus, which can be not only harmful the dignity and confidentiality of the worker, but may have immediate repercussions in terms of sanctions, affecting his economic treatment or his future job opportunities, with the suspension or deactivation of his profile[15].

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tutela, in *Diritto del mercato del lavoro*, 3, 2019, in course of publication.

13 S. Bini, *Il potere di controllo nella prestazione di lavoro agile. Brevi osservazioni*, in M. Verzaro (ed. by), *Il lavoro agile nella disciplina legale collettiva ed individuale*, Napoli, 2018, 93; M. Marazza, *Dei poteri (del datore di lavoro), dei controlli (a distanza) e del trattamento dei dati (del lavoratore)*, in *Argomenti di diritto del lavoro*, 2016, 3, 490.

14 P. Tullini, *Le collaborazioni etero-organizzate dei riders*: *quali tutele applicabili?*, in *Lavoro Diritti Europa*, 1, 2019.

15 A. Iacopini, *Via libera all'installazione di app su smartphone per i "drivers"*, in *Guida al*

Moving from this perspective we understand the opportunity to introduce new techniques that protect the worker not so much in the relationship, but rather in the labour market, also through the experimentation of new technological tools, able to govern the effects of digitalization and put a brake to the intrinsic economic and contractual weakness of the platform workers towards the power held by the platform.

Following this approach, technology would buy a space in the regulation of a new phenomenon, constituting not only the object, but an integral part of a regulatory production process aimed at basing a canvas of measures that prevent opportunistic behaviours.

Hence the need for the legislator to turn his gaze to scientific research, to those projects that propose the adoption of innovative technological devices for the protection of platform workers, from the use of sophisticated hardware and software to prevent the loss of personal data or reputational mechanisms focused for the first time on the evaluation of the behaviours of the platform[16].

Other studies already conducted in some European countries, however, endorse the idea of using algorithmic proliferation for the management of some aspects of the employment relationship, as happened recently in Austria, where public employment services have used a system known as the "AMS algorithm" to increase the efficiency of active programs for reintegration into the world of work[17].

The collaborations organized by the client and the case of the Foodora postmen.

The actions of the national legislator, variously aimed at creating a regulatory framework for the new forms of work that arise from technological innovation, have so far moved in two different but complementary directions, both aimed at extending the protections of subordination.

On the one hand, the article 18 of Law 81/2017 introduced a new method of performing subordinate work (smart-working), performed

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lavoro, 2019, 48.

16 N. Lettieri, A. Guarino, D. Malandrino, R. Zaccagnino, *Platform Economy and Techno-Regulation—Experimenting with Reputation and Nudge*, in *Future Internet*, 2019, 11, 163.

17 D. Allhutter, F. Cech, F. Fischer, G. Grill, A. Mager, *Algorithmic profiling of job seekers in Austria: how austerity politics are made effective*, available at the web address www.frontiersin.org.

only in part on company premises and with the possible use of technological tools, on the other hand, the article 2 of Legislative Decree 81/2015 has reworked within the collaboration relationships a space to be subjected to the discipline of subordinate work, without giving you a specific qualification.

Moving in an anti-avoidance perspective, the article 2 Legislative Decree no. 81/2015, in fact, provided for the application of the discipline of the subordinate employment relationship "also to the collaborative relationships which result in mainly personal, continuous and whose execution methods are organized by the client", thus identifying in the hetero-organization the constraint that conforms to the performance of the service, acting as an aggregative element of a type of collaboration subtracted from the article 409, no. 3, of the code of civil procedure[18].

The hetero-determination, as a watershed, between the two categories of collaborations in the original version of the article 2 of Legislative Decree 81/2015 had to be referred "also to times and places of work", just as the performance of work had to consist of an "exclusively" and not „predominantly" personal contribution.

The law Decree 3 September 2019, n. 101, converted with Law 128/2019, in force since last November 4, with the aim of extending the aim of hetero-organized collaborations, has instead provided that the exclusive personal contribution will prevail over the organization of vehicles and capitals and has suppressed the reference to "times and places", which thus becomes only one of the possible manifestations of the power of hetero-organization.

Finally, with an almost superfluous clarification, the article 1, first paragraph, lett. a), of Legislative Decree 101/2019 specified that the regulation on hetero-organized collaborations also applies when "the methods of execution of the service are organized through platforms, including digital".

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[18] G. PROIA, *Il lavoro autonomo continuativo e le collaborazioni "organizzate" tra esigenze di tutela e contrasto agli abusi*, in *Liber Amicorum Giuseppe Santoro-Passarelli. Giurista della contemporaneità*, I, 2018, 501; M. Persiani, *Autonomia, subordinazione e coordinamento nei recenti modelli di collaborazione lavorativa*, in *Il diritto del lavoro*, 1998, 203 ff.; R. De Luca Tamajo, *Per una revisione delle categorie qualificatorie del diritto del lavoro: l'emersione del "lavoro coordinato"*, in *Argomenti di diritto del lavoro,* 1997, 41.

The article 2, paragraph 1, Legislative Decree no. 81/2015, therefore, despite its still controversial nature, it provided another way of accessing the protective status of subordinate work, now expressly applicable to "digital platforms" that exercise an interference in the lender's organizational autonomy, determining its execution methods beyond simple coordination[19].

The extension of the discipline provided for collaborations organized by the client to digital platforms, however, requires an adaptation work that modulates the requirements foreseen by the legal case to the complex forms of work that arise from the web, which is then intertwined with interpretative problems, which invested the norm.

As is well known, the interpretations of the norm oscillate between its reconstruction in terms of subordination[20], do you want it to be an even more restricted form or an absolute presumption[21], or a typing of its jurisprudential indices[22] and the reconstruction in terms of autonomy[23], in

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[19] E. Ghera, *Intervento*, in A. Vallebona (ed. by), *Colloqui giuridici sul lavoro – Il lavoro parasubordinato organizzato dal committente*, in *Massimario di giurisprudenza del lavoro*, 2015, 50; G. Santoro-Passarelli, *I rapporti di collaborazione organizzati dal committente e le collaborazioni continuative e coordinate ex art. 409, n. 3, c.p.c.*, in *WP C.S.D.L.E. "*Massimo D'Antona".IT, 2015, 278; G. Santoro-Passarelli, *Sulle categorie del diritto del lavoro riformate*, in *Diritto delle relazioni industriali*, 2016, 7; P. TOSI, *L'art. 2, comma 1, d.lgs. n. 81/2015: una norma apparente?*, in *Argomenti di diritto del lavoro*, 2015, 6, I, 765.

[20] L. Nogler, *Tecnica e subordinazione nel tempo della vita*, in *Diritto delle relazioni industriali,* 2015, 337.

[21] G. Santoro-Passarelli, *I rapporti di collaborazione organizzati dal committente e le collaborazioni continuative ecoordinate* ex *art. 409,* cit., 278.

[22] A. Zoppoli, *La collaborazione eterorganizzata: fattispecie e disciplina*, in *WP C.S.D.L.E.* "Massimo D'Antona".IT, 2016, 296; A. Perulli, *Il lavoro autonomo, coordinato e le prestazioni organizzate dal committente: il nuovo quadro normativo alla luce del Jobs Act*, in *WP C.S.D.L.E.* "Massimo D'Antona".IT – 272/2015, 2 ss.; M. Persiani, *Note sulla disciplina di alcune collaborazioni coordinate*, in *Argomenti di diritto del lavoro*, 2015, 6, 1256 ff.; Id., *Ancora note sulla disciplina di alcune collaborazioni coordinate*, in *Argomenti di diritto del lavoro*, 2016, 2, 313 ff.; R. Pessi, *Il tipo contrattuale: autonomia e subordinazione dopo il Jobs Act*, in *W.P. CSDLE "Massimo D'Antona"*.IT – 282/2015; S. Ciucciovino, *Le «collaborazioni organizzate dal committente» nel confine tra autonomia e subordinazione*, in *Rivista italiana di diritto del lavoro*, 2016, 3, I, 321 ff.

[23] Turin court judgment of 7 May 2018, in *Rivista italiana di diritto del lavoro*, 2018, II, 283 ff., with note of P. Ichino. In a compliant sense, see the judgment of the Court of Milan of 10 September 2018, no. 1853, in *Rivista giuridica del lavoro e della previdenza sociale,* 2019, II, 82 ff. Similarly, in a judgment of 29 January 2018, the Paris Court rejected the requalification of the Uber driver's relationship in terms of subordination (Cons. prud'h. Paris 29 January 2018, no. 16/11460), after having already expressed itself in this regard with reference to home delivery cyclists (Cour d'Appel de Paris 20 April 2017, no. 17/0051; Cour d'Appel de Paris 14 December 2017, no. 17/04607; Cour d 'Appel de Paris, 9 November 2017, no. 16/12875).

which according to some it would constitute a *tertium genus* that stands between the subordinate work referred to in article 2094 of the civil code and the collaboration referred to in article 409, no. 3, of the code of civil procedure.

In this sense, the Turin Court of Appeal expressed itself in the well-known sentence concerning the qualification of the services of the bell-boys of the Foodora platform which, in an attempt to recover from the norm the "usefulness to regulate the concrete cases", despite the ambiguities of the regulatory dictation, has identified "a third gender, which is placed between the employment relationship referred to in article 2094 of the civil code and collaboration as required by article 409 no. 3 of the code of civil procedure"[24].

The reconstruction of the Turin Court of Appeal, which although expressed in terms of the "third gender" remains within the broad genus of self-employment, without invoking the entry of new contractual typologies, thus places itself in a line of overcoming the rigor of the first jurisprudential applications, including that of the Court of Turin, pronounced on the affair in the first instance[25].

The latter, recognizing in the hetero-organized collaboration an even more restricted form of subordination, ended up excluding the independent collaborator from the protective discipline even when he was included in the organization unilaterally prepared by the client.

The digital platform, in fact, provided the entire infrastructure in which the service was located and established its execution methods also with reference to the "times" and "places", through the predetermination of the place of departure and precise delivery times, all always under constant monitoring of the GPS and smartphone application.

According to the Court of Appeal, however, the straight-organized worker isn't a subordinate, but remains technically "autonomous", without prejudice to the extension of the discipline of subordination for "every other aspect" of the relationship, in order to "guarantee greater protection for new types of work "which arise from the" increasingly accelerated diffusion of recent technologies".

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[24] Turin Court of Appeal judgment of 4 February 2019, no. 26, in *Rivista itliana di diritto del lavoro,* 2019, II, 340 ff., with note of M.T. Carinci and R. Del Punta.

[25] Turin court judgment of 7 May 2018, cit., 294.

Moving from this perspective, we understand the collocation within the regulatory framework of hetero-organized collaboration even in the presence of the contractual freedom of the riders to decide, "if" and "when" to give their availability and subsequently to accept or not the established shifts, that would fail the obligation to provide the service, a typical structural element of the subordination.

The same solution was received by the Corte di Cassazione which, called upon to pronounce on the basis of the appeal filed by the company against the Turin Court of Appeal ruling, clarified how the hetero-organization involved the execution phase of the service strictly conveyed in its modality by the platform, while in the genetic phase it remains the decision-making autonomy of the worker to freely choose "if" to oblige to execute it[26].

However different is the argumentative procedure followed by the Supreme Court, which comes to apply "in full" and not selectively the protection of subordinate work, including those on the dismissals, on the contrary disapproved by the appeal judges because they are judged ontologically incompatible with the autonomous nature of the relationship.

In order to operate the protective discipline of subordinate work, however, an effective integration of the collaborator into the production organization unilaterally prepared by the client is required, which goes beyond the simple coordination that also connotes the collaborations attracted in the discipline referred to in article 409 no. 3 code of civil procedure[27].

To draw the boundary line between the two cases, the article 15 of the Law n. 81/2017, in fact, with a provision of authentic interpretation, clarified that the collaboration is considered coordinated pursuant to article 409, no. 3, code of civil procedure when «in compliance with the coordination methods established by mutual agreement by the parties, the collaborator independently organizes the work activity».

The legislator thus identified the "discretive element" of the coordinated collaboration with respect to that heteroorganized by the client in autonomy in the organization of the activity, accompanied by the "common agreement" on the modalities.

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[26] Corte di Cassazione judgment of 24 January 2020, no. 1663, in *Diritto & Giustizia*,18, 2020, 13 ff.

[27] G. Santoro Passarelli, *Interventi lavoro etero-organizzato, coordinato, agile e telelavoro: un puzzle non facile da comporre nell'impresa in trasformazione*, in *Diritto delle relazioni industriali*, 3, 2017, 771 ff.

Collaboration is coordinated when coordination is limited to a mere "functional connection" with the client's activity, in an internalization vehicle, which leaves full autonomy in the organization of the service while respecting the agreed methods, while hetero-organized collaboration requires a "functional integration" in the organization unilaterally prepared by the client, to whom the provision of services remains structurally linked.

Towards a selective approach

The technique of extending the discipline of subordination, beyond the questions concerning the qualification of the relationship, eludes the problem of the protections specifically applicable to the employment relationship when it is not possible to apply article 2 Legislative Decree 81/2015, for lack of its assumptions.

In this new scenery, in which labour law seems to be dominated by the proliferation of intermediate categories, following the path already taken in some European countries, the typing of a *tertium genus* or rather a regulation of economically dependent self-employed work is also proposed in our country [28].

The Spanish Statute provides precisely the case of economically dependent self-employed work (TRADE), carried out under a single commission regime, which stands between subordinate and self-employed work, which enjoys some protections placed on the client[29].

Similarly in the United Kingdom there is the category of workers, halfway between self-employed and employee, similar to our notion of "parasubordinate" worker, to which the Employment Rights Act of 1996 recognizes a part of the legislation on subordination, especially that on minimum wages, anti-discrimination protection, timetables and vacation.

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[28] A. Perulli, *Economically dependent/ quasi –subordinate (parasubordinate)employment: legal, socil, and economic aspects*, European Commission, Brussels, 2002. On past proposals see M. Biagi, M. Tiraboschi, *Le proposte legislative in materia di lavoro parasubordinato: tipizzazione di un* tertium genus *codificazione di uno "Statuto dei lavori"?*, in *Lavoro e diritto*, 1999, 571 ff.; G. Ghezzi (ed. by), *La disciplina del mercato del lavoro, proposte per un testo unico*, Rome, 1996; M. Pedrazzoli, *Lavoro sans pharse e ordinamento dei lavori*, in *Rivista italiana di diritto del lavoro*, 1998, I, 49 ff.

[29] A. Soru, *Statuto del lavoro autonomo*, in A. Perulli (ed. by), *Capitalismo delle piattaforme e diritto del lavoro*, Milan, 2018, 159 ff.

However, the regulation of economically dependent work fits only to those coordinated and continuous collaboration relationships characterized by economic dependence on the platform, but doesn't take into account the "extreme fragmentation of online working relationships", which arise from its disintermediation[30].

The "digital corporal", in fact, transforms the service provider, hitherto employed by the supplier company, into a self-employed worker who works for a plurality of clients, for which his weakness in some cases doesn't reside in the "economic dependence", as rather in the split up of its activity, characterized by a series of short or very short-term employment relationships.

For these reasons has made its way the idea of moving "from a regulatory logic based on the border between cases and a regulation for thresholds that cross the cases", which, *quoad effectum*, however, reaches the recognition of a core of essential protection, of inalienable rights individual and collective, without excluding the protection of subordinate work for those activities with reference to which the digital platform does not operate as a mere intermediary, but as an actual employer[31].

The French experience shows us the practicability of a regulation by thresholds, with measures tailored to the changing needs of the production context, capable of grasping its potential, to restore equity and social justice to all forms of work without necessarily having to follow the path of subordination.

France, not surprisingly, was one of the first countries to accept Uber's services outside the United States, which generated a dispute of this size, due to the contrasting profiles with the antitrust legislation, to determine a reform of the entire discipline on public non-scheduled road transport and, always in the French system, the first collaborative start-ups were born, such as SnapCar, Voitures jaunes, Chauffeur privé and LeCab.

Then slowly the questions concerning the violation of the rules on the correct functioning of the competition were accompanied by those raised by the collaborators of the digital platforms, who com-

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30 P. Tullini, *Il lavoro nell'economia digitale*, in A. Perulli (ed. by), *Capitalismo delle piattaforme e diritto del lavoro*, cit., 171 ff.

31 A. Perulli, *Capitalismo delle piattaforme e diritto del lavoro: verso un nuovo sistema di tutele?*, in A. Perulli (ed. by), *Capitalismo delle piattaforme e diritto del lavoro*, cit., 116 ff.

plained about the total absence of a minimum protection regulation, as well as in some cases the existence of a relationship of disguised employee work.

In this context, the French legislator with the Law 6 August 2015, n. 90 (so-called Loi Macron), first of all imposed on collaborative platforms the obligation to provide clear, precise and transparent information on the conditions of use of the services.

Then with the Law 8 August 2016, n. 2088 (so-called Loi Travail) the "social responsibility of the platform" was introduced, which given the characteristics of the goods sold and the provision of services provided and, fixing the price, cannot exempt itself from recognizing a series of social rights for self-employed workers that in the exercise of their professional activity they resort to the same, from social insurance for accidents and occupational diseases, to unemployment benefits, to the right to professional training, even to collective rights, first of all that of union organization.

In the Italian legal system there are several legislative proposals that have followed over time, some of which re-proposed the mechanism of attraction to the protection of subordination, also through an extension of the scope of article 2, paragraph 1, Legislative Decree 81/2015, others on the contrary provided for the typing of new contractual figures.

In recent years, then, the attention of the legislator has focused on the activities of the home delivery bellboys in the restaurant sector, precisely because of the high judicial litigation that has affected this category.

The regulation of the discipline of riders had already been announced within the Decree-dignity (Decree Law 87/2018), but the legislation was then expunged from the final text and postponed to a decree that should have been a little later.

However, this decree has never been approved, just as the attempt to negotiate a collective agreement has failed, since the negotiating table around the question of qualifying the relationship has been blocked.

Subsequently, the Legislative Decree 101/2019, converted with the Law 128/2019, entitled *Urgent provisions for the protection of work and for the resolution of corporate crises*, has dedicated seven new articles, included in the text of Legislative Decree 81/2015, to self-employed workers employed in the delivery of goods for account of others who perform work done by digital platforms[32].

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[32] For a first comment on the legislative provision, see S. Giubboni, *I riders e la legge*, in *Rivista del diritto della sicurezza sociale*, 2019, 847 ff.; E. Ales, *Oggetto, modalità di*

This is a series of forecasts ranging from the contractual requirement, to the minimum hourly remuneration parameterized to the minimum tables, to the supplementary allowance for the work done at night, during holidays or in adverse weather conditions, to the anti-discrimination protection, which adds the prohibition for the platform to provide for the exclusion or reduction of job opportunities in case of non-acceptance of the service, to the compulsory insurance coverage against accidents and professional diseases.

In defining the scope of these protections, the article 47-*bis*, second paragraph, of Legislative Decree 81/2015, however, defines digital platforms as "the IT programs and procedures of companies which, regardless of the place of establishment, organize the delivery of goods, fixing the price and determining the methods of performance of the service".

In this respect, the solution outlined by the article 47-*bis* converges with previous legislative interventions, once again enhancing the hetero-organization of the execution methods as an element that ends up determining the applicable discipline.

This could devalue the scope of the legislative intervention, clearly aimed at providing a minimum and residual regulatory contribution, for all the services of riders who cannot benefit from the "flooding" of the protection of subordination, lacking that functional integration to the organization of the platform.

The result is a highly unstable regulatory framework, characterized by a succession of laws, none of which has managed to provide a legal framework for the regulation of new forms of socio-economic dependence, capable of going beyond the problem of qualifying the relationship and ensuring broader protection of work including services that are not typified[33].

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esecuzione e tutele del "nuovo" lavoro autonomo. Un primo commento, in *Massimario di giurisprudenza del lavoro*, 2019, 719 ff.

[33] P. Ichino, *Sulla questione del lavoro non subordinato ma sostanzialmente dipendente*, in *Rivista italiana di diritto del lavoro*, 2, 2015, 573 ff., in a note to the judgment of the Court of Justice of 4 December 2014, case C – 413/13, *Kunsten*.

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10. Smart working as a modern form of work?

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Summary: 1. Introduction. – 2. The definition of smart working. – 3. The correct interpretation of the performance of smart working. – 4. The form, content and discipline of the termination. – 5. Relationship between law, collective bargaining and individual agreement. – 6. The discipline of smart working in the P.A. – 7. Brief conclusions.

Introduction

Today's society pursues and at the same time chases a constant transformation of the production system and, hand in hand, changes in the world of work follow from it, accompanied by technological changes and a transition towards the digital age. The current industrial revolution changes the traditional forms of work and their organization. In fact the essential element of this process lies in the digitalization of industry[1].

The use of information technologies, as it has been properly pointed out, that allow to obtain integration of work activities in a certain organizational arrangement reduces the chance of keeping the monitoring devices separate from the technologies that allow to perform the tasks entrusted by the employer[2].

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1 https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A52016AE1017#ntr21-C_2016389IT.01005001-E0021.

2 E. Raimondi, *Potere di controllo, tutela della riservatezza e <<lavoro agile>>,* in *RGL*, n. 1, 2019, p. 72.

In these cases the doctrine assumed that the protection of confidentiality is represented by the privacy[3] protection techniques, laid down in the General Data Protection Regulation (GDPR)[4].

Another factor to consider is concerned with the rapid development of new technologies and the fact that the law can hardly keep up with them.

One of the expressions of such situations is represented by the smart working introduced by Article 18 of Law no. 81 of 22 May 2017, which is a new way of performing private and public employment relationships.

The definition of smart working

Smart working is introduced in Chapter II of law no. 81/2017 and in art. 18, paragraph 1, which defines it as a mode of performance of employed work[5] while excluding the creation of a new and autonomous contractual typology. It is possible to deduce from the written law that smart working falls within the sphere of subordinate work[6] and that it does not represent a sub-form of subordination[7], so as not to impact on the characteristic features of the latter[8].

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[3] G. Proia, *Trattamento dei dati personali, rapporto di lavoro e l'<<impatto> della nuova disciplina dei controlli*, in *RIDL*, n. 4, 2016, p. 552; G. Santoro – Passarelli, *Sulle categorie del diritto del lavoro riformate*, in *DRI*, n. 1, 2016, pp. 26-27.

[4] Regolamento Ue n. 2016/679 del 27 aprile 2016.

[5] G. Santoro-Passarelli, *Lavoro eterorganizzato, coordinato, smart e il telelavoro: un puzzle non facile da comporre in un'impresa in trasformazione*, in *WP C.S.D.L.E. "Massimo D'Antona".IT*, 2017, no. 327, p. 8; A. Maresca, *Smart working, subordinazione soft*, in *www.ilsole24ore.com*, 26 luglio 2017, p. 1; M. Peruzzi, *Sicurezza e agilità: quale tutela per lo smart worker?*, in *DSL*, 2017, no. 1, p. 2.

[6] As stated by G. Santoro-Passarelli, *Lavoro subordinato (voce)*, in *Enc. Giur. Treccani on line*, 2015, "However it must be stressed that the identification of the typical content of subordination does not always eliminate the difficulties that the jurisprudence has encountered and meets while assessing the subordinate nature of the relationship when the specific case is placed in the boundary area of subordinate employment".

[7] See G. Santoro-Passarelli, *op. cit.*, p. 12; A. Donini, *Nuova flessibilità spazio-temporale e tecnologie: l'idea del lavoro smart*, P. Tullini (curated by), *Web e lavoro. Profili evolutivi e di tutela*, Torino, 2017, p. 88; oppure M. Perulli, *Il Jobs Act del lavoro autonomo e smart: come cambiano i concetti di subordinazione e autonomia nel diritto del lavoro*, in G. Zilio Grandi, M. Biasi (curated by), *Commentario breve allo statuto del lavoro autonomo e del lavoro smart*, 2018, Cedam, p. 58.

[8] A scenario is possible, in which the smart worker is less subordinated, based on the classic meaning of the term, compared to a normal lender. This is because when we speak of subordination it is normally meant straight-direct and hetero-organized

Law no. 81/2017 qualifies smart working as a procedure for the performance of the service of salaried employment with particular connotations, and that smart working can be identified with the aims of preserving competitiveness of companies and maintaining work-life balance.

Such discipline finds its application within all subordinate employment contracts and the fulfillment of work in a smart form cannot, therefore, be imposed on the employee, but it must be instead arranged through a deal between both parties.

This first characteristic excludes the possibility that the employer can unilaterally impose such form of employment on its employees and that a group agreement must be reached in order to impose it at the level of the whole organisation[9].

While the first part of art. 18 paragraph 1 affirms the absence of "precise time or place restrictions for work", the second part states that the job performance must be carried out partly within the company's offices and partly outside without the need for a fixed location; however, it must be executed within the maximum daily and weekly working time limits only, in compliance with any limit set both by law and collective bargaining[10].

These two conditions, if understood as essential requirements of the performance of smart working, could be contradictory, since the deal could only concern the absence of exact time and not place constraints, in the face of a performance that is in any case subject to certain time limits.

Consequently, this definition implies that the work has to be performed in alternation between the company's premises and external premises. This implies that work that is performed entirely either outside or within the company's premises[11] cannot be classified as smart working.

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work. In particular, hetero-direction indicates the power that the employer exerts for the specification of the object of the service and the afore-mentioned modalities of performance, while hetero-organization falls within the sphere of power of directive. Nonetheless, this is not something that pertains to the punctual qualification of what and how to execute the performance, but it regards to how the performance develops in terms of time and space (and therefore also addresses the profile of the integration of work performance within the company's activity).

[9] G. Santoro-Passarelli, *op. cit*., p. 10.

[10] See S. Bellomo, *Orario di lavoro, riposi, ferie: i principi costituzionali, la normativa europea ed il quadro regolativo definito dal d.lgs. 8.4.2003, n. 66*, in G. Santoro-Passarelli (curated by), *Diritto e processo del lavoro e della previdenza sociale*, 2017, Utet, p. 1034 ss.

[11] V. Pinto, *La flessibilità funzionale e i poteri del datore di lavoro. Prime considerazioni sui decreti attuativi del Jobs Act e sul lavoro smart*, in *RGL*, 2016, no. 2, p. 366.

One of the central objectives of the law discussed here is to have an effect on working hours, so as to make the performance more flexible and guarantee the possibility for the worker to manage it autonomously, as far as the temporal location and temporal length are concerned[12].

The correct interpretation of the performance of smart working

It is fundamental to analyse in depth the text of art. 18 paragraph 1, which defines "…smart working as a modality of execution of the salaried employment relationship established through an agreement between the parties… without any specific ties in terms of time or of place…".

Therefore, as stated above, it is important to evaluate which of the possible interpretations is the most correct and consequently which one does justice to the will of the legislator in order to be an interpreter who is as fair as possible[13].

The interpretation that appears to be the most correct is that Article 18, paragraph 1 has a structure divided into two parts: the first part of paragraph 1 does not describe the job performance in a "smart" way, but rather the requirements, contents and limits of the amending deal and in particular the way in which the deal of smart work will be able to influence the job performance; on the other hand, the second part of paragraph 1 focuses on the job performance under the smart working modality, while foreseeing that part of the work must performed in company premises and that another part must be carried out outside of them, without a fixed location, while respecting the maximum duration of the employment relationship pursuant to art. 4, Legislative Decree no. 66/2003[14].

The execution of work in alternation between company premises and outside of them, and the discretionary choice of the places where the work is carried out outside the company make the concept peculiar

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[12] D. Calderara, *Il c.d. "lavoro agile" nella l. n. 81/2017: prospettive d'indagine, n. 6, Call for contributions*, in *Giustiziacivile.com*, "Il lavoro agile (il perimetro giuslavoristico di un nuovo modo di lavorare)", 2018, p. 5 ss.

[13] D. Calderara, *op. cit*., p. 7 ss.

[14] D. Mezzacapo, *Il lavoro agile* ex *legge n. 81/2017: note minime e problemi aperti*, AA.VV., *Il lavoro agile nella disciplina legale, collettiva ed individuale. Stato dell'arte e proposte interpretative di un gruppo di giovani studiosi*, in *WP C.S.D.L.E. "Massimo D'Antona" Collective Volumes*, 2017, n. 6, p. 130.

because, in salaried employment, even before the provisions of Law no. 81/2017, neither a contractual obligation to development the performance inside the company premises, nor an obligation of labelling a precise location or place of work is envisioned, which is now contradicted by this legislation[15].

Surely the elements of flexibility are introduced with the agreement, and in order to clarify the dynamics of the matter it is sufficient to verify the fact that the law permits private[16], collective or individual autonomy to remove the worker from the power of the employer with respect to the location and time of work[17].

By declaring that the worker is freed from the powers of the employer, the obligation through which a normal employee[18] is linked to an employer is no longer specified according to a smart working agreement since it is not explicitly defined.

Probably, since the employer's powers are not exercised within the smart working agreement, the area of private autonomy, which is concerned with the definition of time and space of work, is expanded.

The form, content and discipline of the termination

As mentioned, the first essential requirement for smart working is the individual agreement, and the article. 19 of the l. n. 81/2017 defines the form of the smart employment agreement, the duration, withdrawal modalities and in part its contents.

The agreement must be stated clearly in writing as *probationem* "for the purposes of administrative regularity and evidence" and may be determined for a fixed-term employment or an open-ended employment.

It is imperative to point out how, in the relationship between the smart employment agreement and the employment contract, even according to some collective agreements[19], the smart agreement does not replace the employment contract, but only establishes a mode of execution of

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15 V. Pinto, *op. cit*., p. 367 e art. 1, D.Lgs. n. 152/1997.

16 G. Santoro-Passarelli, *Autonomia privata individuale e collettiva e norma inderogabile,* in *RIDL*, 2015, no. 1, pp. 61-62.

17 *contra* V. Pinto, *op. cit*., pp. 367-368.

18 Relating to the place and time related to work performance.

19 Accordo Bnl, Benetton Group, Enel, Ferrovie dello Stato, Ferrero, Intesa San Paolo, Comune di Milano e di Torino.

the relationship that coexists with those already previously provided[20], placing itself as an ancillary contract to the main contract of salaried employment[21].

In order to start the smart agreement, it is not necessary to enter into a collective agreement, but it would be reductive to regulate this modality of execution only on the basis of individual agreements[22], and for this reason it seems appropriate to use collective agreements in order to resort smart working, as before of the promulgation of Law No. 81/2017[23].

As far as the contents are concerned, they relate to the fulfilment of the work performance outside the company premises. They also make references to the forms of exercise of the managerial power of the employer, to the tools used by the worker, to rest times, to technical and organizational measures necessary to ensure the worker's disconnection from the technological tools of the work.

In fact, in the situation in which the performance is carried out outside the company premises it is useful to regulate the application of the employer's powers, their limits and the protection guarantees to be granted to the employee in a different way, or this reason, it is worthwhile asking ourselves whether these powers may be discontinued or if they will weaken with respect to the standard salaried employment pursuant to art. 2094 of the Italian Civil Code.

Probably with the smart work agreement it is possible to intervene to decline only the "forms of exercise" of the managerial power and its corollaries[24], while not yet excluding the unilateral exercise, replacing it with the agreement[25].

On the one hand, this provision does not specify what may be the contents envisaged by the agreement. On the other hand, it gives the individual operator the task of identifying the most relevant contents to be inserted according to the performance carried out outside of the premises.

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[20] M. Lai, L. Ricciardi, *La nuova disciplina del lavoro agile*, in *DPL*, 2016, n. 11, p. 708.

[21] F. Carinci, *Prefazione*, in G. Zilio Grandi, M. Biasi (curated by), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, 2018, Cedam, p. VI.

[22] G. Santoro-Passarelli, *op. cit*., pp. 10-11.

[23] Accordi Nestlè del 12.10.2012, Barilla del 02.03.2015, Snam del 26.11.2015, Euler Hermes 15.01.2016.

[24] G. Proia, *L'accordo individuale e le modalità di esecuzione e di cessazione della prestazione di lavoro agile*, in G. Zilio Grandi, M. Biasi (curated by), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, 2018, Cedam, p. 192.

[25] G. Santoro-Passarelli, *op. cit*., pp. 10-11.

In relation to the workplaces, as stated, the law does not provide for a fixed place to perform the service outside the company premises, nonetheless this does not imply a total negligence on the part of the employer in relation to the places where the service will take place. It is imperative to establish in this case, at the time of the agreement, the methods for identifying external places, or a list of suitable workplaces that could be suitable[26].

According to art. 18 the workstation – of the smart working – cannot be fixed, or in any case must always be changeable – at least at a potential level.

On the other hand, the contents necessary for the agreement[27] must be identified by collective or individual private autonomy along with periods of rest.

The technical and organisational measures necessary to ensure the disconnection of the employee from technological instruments[28], which represent the boundaries on the availability of the employee, shall also be indicated[29].

Paragraph 2 of art. 19 indicates that each of the parties may withdraw, in the case of an open-ended employment agreement, with notice of no less than thirty days, extended to ninety days if the employee is a disabled worker pursuant to art. 1, l. n. 68/1999, or without notice in the presence of a justified reason[30]. Furthermore, it is possible to withdraw before the expiry of the deadline, in the presence of a justified reason, if the smart agreement is for a fixed term.

In any case, due to the accessory nature of the smart deal compared to the employment contract, the withdrawal does not extinguish the employment relationship, which will continue according to the traditional methods and no longer in the smart working mode[31].

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[26] M. Peruzzi, *op. cit.*, p. 18.

[27] A. Maresca, *op. cit.*, p. 2.

[28] A. Fenoglio, *Il diritto alla disconnessione del lavoratore agile*, in G. Zilio Grandi, M. Biasi (curated by), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, 2018, Cedam, pp. 547 ss.

[29] If the necessary contents of the smart deal are not explicitly identified by the private autonomy, it could be null and void, due to the lack of a fundamental part of it.

[30] F. Malzani, *Il lavoro agile tra opportunità e nuovi rischi per il lavoratore*, in *DLM*, 2018, n. 1, pp. 32-33.

[31] As suggested by influential doctrine G. Santoro-Passarelli, *op. cit.*, p. 11.

The justified reason for withdrawal can be implemented by both parties and may concern both business and personal needs of the worker. Thus, the justified reason for withdrawal from the individual agreement can be as objective as much as subjective. Consequently, the suitable reasons that can constitute a justified reason for withdrawal can be predefined in the individual smart labor agreement, without necessarily defining a *numerus clausus*[32].

Even if the law does not suppose anything in this regard, there is no reason to exclude that the smart working agreement, like any other agreement, can also be settled by mutual agreement.

To complete the analysis on art. 18, with the introduction of the new paragraph 3-bis[33] , employers are in any case expected to give priority to requests for work in smart working mode made by women employees in the three years following the end of the period of maternity leave or by employees with children in serious disability as pursuant to Law no. 104/1992.

Relationship between law, collective bargaining and individual agreement

The collective private autonomy anticipated the legal action[34], by regulating in appropriate agreements different forms of smart working, mostly at company or group level[35], and in some sectors. Some characteristics that recur in several agreements follow the legal requirements.

Of course, the collective source may not replace the consensus expressed by the employee in the individual agreement for the activation of work in smart working.

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[32] G. Proia, *L'accordo individuale e le modalità di esecuzione e di cessazione della prestazione di lavoro agile*, in G. Zilio Grandi, M. Biasi (curated by), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, 2018, Cedam, p. 194.

[33] As stated in l. n. 145/2018, art. 1, c. 486.

[34] Collective bargaining has regulated a mode of carrying out the employment relationships in the absence of delegation. This provides a solution to the classical topic of the relationship between law and collective bargaining. With regards to the relationship between law and collective bargaining we refer to. F. Carinci, *Una svolta fra ideologia e tecnica: continuità* e *discontinuità* nel diritto del lavoro di inizio secolo, in Aa. Vv., *Studi in onore di Giorgio Ghezzi,* Padova, 2005, pp. 439 ss.

[35] Such as Eni 6.2.2017; gruppo ENGIE 20.1.2017; gruppo Zurich dell'1.6.2016; CCNL Agrindustria 23.3.16. CCNL Alimentaristi 5.2.2016; CCNL Federculture 12.5.2016.

In reality, the referral to collective bargaining carried out by the above law, under article 20, could be interpreted in a restrictive way, by attributing to the latter a function that is exclusively concerned with equality of economic and normative treatment of smart workers, as the regulative attention[36] should be focused on the content of the individual contract.

It is not argued that collective autonomy could at any level of bargaining include the use of the smart working modality, therefore establishing the content and the modes for provision of services and administering regulative models for individual negotiations.

In addition, with regards to the relationship between collective agreements and current legislation, it should be specified that collective bargaining will not be able to remove the legal guarantees of smart working but may regulate the conditions for resorting to smart working.

I believe that even in the event of a potential contrast between individual and collective agreements, this could still be resolved by referring to general principles, based on which the law identifies the competence of collective bargaining in the regulation of the framework of employment relationships.

The discipline of smart working in the P.A.

The discipline of *smart working* provided for by the law n. 81/2017 applies to both public administration[37] and the private sector. While complying with the indications present in articles 14 and 3 of the law n. 124/2015, and articles 18 and 3 of the law n. 81/2017, the Presidency of the Council of Ministers has issued the directive n. 3/2017 in order to actuate paragraphs 1 and 2 of article 14 of the law n. 124/2015, and in order to introduce some guidelines regarding smart working[38].

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[36] S. Mainardi, *Il potere disciplinare e di controllo sulla prestazione del lavoratore agile*, in L. Fiorillo, A. Perulli (curated by), *Il Jobs act del lavoro autonomo e del lavoro agile*, 2018, Giappichelli, p. 216.

[37] Besides the explication from the law in force, art. 18 c. 3, this factor was already clear thanks to the discipline of smart working carried out by the head II of the DDL AS 2233-B. Likewise, it was provided that the discipline of smart working would be applied to "the employment relationships employed by the public administrations referred to in Article 1, paragraph 2, of Legislative Decree of the 30 March 2001, n. 165. Consequent modifications, according to the directives issued, also pursuant to Article 14 of the Law of 7 August 2015, n. 124, and without prejudice to the application of the various provisions specifically adopted for such relations".

[38] V. Talamo, *Diversamente agile? Lo Smart Work nelle pubbliche amministrazioni*, in A.

One of the main objectives of the reform that has affected the civil service – called "Madia" Law no. 124/2015 – concerned the adoption of new forms of work that are able to promote a better reconciliation of life and work time of public employees.

As a matter of fact, article 14 of the above law promotes teleworking and other "new spatio-temporal modes of carrying out work".

This periphrasis undoubtedly refers to the so-called *smart working*, hence it could be argued that the law n. 124/2015 predates and introduces the recent law n. 81/2017.

The heading of Article 14 makes it clear that the introduction of new modalities of spatio-temporal execution of work is oriented towards the reconciliation between living and working needs, while not being limited to the protection of parental care.

It is worth making a clarification, as the law n. 81/2017 does not provide for a direct application to the public administration of the arrangements regarding smart working. In fact, articles 18 and 3 specify that the discipline of smart working should be applied as long as it is compatible (examination of compatibility)[39] with the abor relations that the public administration[40] depends on. This must be in accordance with the directives also issued under article 14 of the law n. 124/2015, with the exception of the application of the diverse arrangements that are specifically adopted for these relationships, thereby affecting the legal subject of spatio-temporal flexibility[41], which is already being modified for employees of the public administration[42].

Perulli, L. Fiorillo (curated by), *Il Jobs Act del lavoro autonomo e del lavoro agile*, 2018, Giappichelli, pp. 260 – 264.

[39] A. Sartori, *Il lavoro agile nella pubblica amministrazione*, in G. Zilio Grandi, M. Biasi (curated by), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile*, 2018, Cedam, p. 490; which states that the law n. 81/2017 extends the application of the regulation of agile labor to the employment relationships of P.A., following "a triple filter: the provisions must be compatible with public employment relationships (compatibility screening); they must be applied according to the directives issued also pursuant to art. 14 of the law 8 August 2015 n. 124; the provisions specifically adopted for such relations are reserved".

[40] art. 1, c. 2, of the d. lgs. March 30, 2001, n. 165.

[41] As can be seen from the art. 14 of the law n. 124/2015 and subsequently from the heading of the directive n. 3/2017 entitled "Organizational measures for the experimentation of new time-space modalities of performance of work performance".

[42] D. Calderara, *Il lavoro agile nella pubblica amministrazione: prime ipotesi applicative*, in *LPA*, 2018, n. 2, p. 71.

Brief conclusions

The digitalization of forms of work brought enormous changes in the world of work, but the benefits related to distance working – in this specific case about smart working – are manifold, such as improved work-life balance, productivity, efficiency and greater flexibility of business models.

The aspect that characterises smart working, from the point of view of the employee, is the potential to attain a good work-life balance; for the employer's point of view, it is the potential to increase productivity and reduce rental and office costs.

These, in fact, are some of the positive aspects mentioned above, which are essential in order to be able to consider digitised work as useful and capable of generating improvements to the lives of employees, as well as employers.

From the worker's point of view, carrying out the work in a smart manner makes it possible, based on individual choice, to set flexible work hours and hence achieve a better harmonisation in the management of work and life timelines. Both parties interested in a smart contract bear the responsibility to implement and develop the potential offered by the law. This means that not only it could be used as a tool to reduce business running costs[43], but also to increase efficiency and productivity through new internal structures made possible by the new law together with digital technology tools[44].

The innovative aspect of smart work lies upon the elimination of physical and temporal space as a fixed variable constrained within the business' premises. This gives value to the autonomy of all parties involved.

To conclude, smart work has the effect of lightening the worker's freelancing power, regulating the latter through a private or collective deal as per the dynamics examined in the present text.

In this way, this confirms how much modern forms of work are indispensable and required to allow the development of the world of work, hand in hand, with respect to the modern socio-political context in which we all live and work and towards the productive system to be found in the never-ending transition to the digital age.

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[43] A. Preteroti, *La responsabilità del datore di lavoro per il buon funzionamento degli strumenti assegnati al lavoratore agile*, in G. Zilio Grandi, M. Biasi (curated by), *Commentario breve allo statuto del lavoro autonomo e del lavoro smart*, 2018, Cedam, p. 601.

[44] G. Proia, *op. cit.*, in G. Zilio Grandi, M. Biasi (curated by), *Commentario breve allo statuto del lavoro autonomo e del lavoro smart*, 2018, Cedam, p. 178.

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Proia, *Trattamento dei dati personali, rapporto di lavoro e l'<<impatto> della nuova disciplina dei controlli*, in *RIDL*, n. 4, 2016, p. 552;

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SECTION III

New Balances and Workers' Rights in the Digital Era

11. The concept of 'worker' in EU Law: Chance or hindrance for the regulation of Modern Forms of Work?

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> "*In the changing world of work, with the emergence of new forms of employment that often lie in the grey zone between traditional employment and self-employment, the scope of protection offered by labour and employment law has once again become an urgent issue. Defining the concept of 'worker' is thus of the utmost (and growing) importance.*"[1]

Introduction

EU Law does not include a comprehensive body of labour law. However, there are different norms in primary law for which the term worker is directly or indirectly relevant. The obligation to pay equal pay for equal work (or work of equal value) for men and women in Article 157 TFEU is only applicable to workers.[2] Also the freedom of movement as defined in Article 45 TFEU applies only to workers.[3] Furthermore, the ECJ accepts an unwritten exception from the ban on cartels (Article 101 TFEU) for collective bargaining agreements as long as they regulate the working conditions of workers.[4] For the competence

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1 Clauwaert S., Jepsen M., Foreword to Risak M., Dullinger T., *The concept of ‚worker' in EU law*, 5.

2 Judgement of the ECJ in *Allonby*, C-85/96, paragraph 43; Barnard C., *EU Employment Law,* 298.

3 Judgement of the ECJ in *Lawrie-Blum*, 66/85, paragraphs 12 ff; Barnard C., *The Substantive Law of the EU*, 239 ff.

4 Judgement of the ECJ in *Albany*, C-67/96, paragraph 60.

to enact legislation under Article 153 TFEU, which is related to workers, working conditions and employment contracts, at least some parts of legal doctrine suggest that it is only applicable to workers.[5] In secondary law, there are a few directives applicable to workers only and special provisions for workers in regulations regarding the applicable law[6] and international jurisdiction.[7]

However, none of these provisions legally defines the term worker. Therefore, the concept of worker in EU Law has been shaped by numerous decisions of the ECJ. It is necessary to analyse whether the concept of worker can adapt to changes in the world of work and still be fit for purpose for those who are in need of protection. This especially concerns situations where persons, despite not having a contract of employment as such, are economically dependent on a single or a small number of principals or clients/employers for their source of income. This often results in inequality of bargaining power, putting the persons concerned in a similar situation to that of workers.[8]

The concept of worker

The starting point of the analysis is the concept of worker. As mentioned above, the term worker is used in various articles of primary law and in several directives and regulations. The ECJ regularly points out that there is no single definition of worker in EU Law. Most importantly the definition of worker used in the context of Article 45 TFEU (free movement of workers) does not necessarily coincide with the definition applied in relation to Article 48 TFEU (coordination of social security systems).[9] However, the ECJ seems to interpret the term worker homogenous in the field of labour and employment law (including

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5 Krebber S. in Callies C., Ruffert M. (ed. by), *EUV/AEUV*, Article 153 TFEU, paragraph 2.

6 Article 8 Rome I Regulation (Regulation [EC] No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations).

7 Articles 20 ff Brussels Ia Regulation (Regulation [EU] No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

8 Risak M., Dullinger T., *The concept of ‚worker' in EU law*, 12 f.

9 Judgement of the ECJ in *Martinez Sala*, C-85/96, paragraph 31.

the unwritten exemption of Article 101 TFEU) except for secondary legislation referring to the national definition of worker/employee.[10]

According to the famous *Lawrie-Blum*-formula, the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.[11] However, the activities performed have to be real and genuine, which excludes activities on such a small scale as to be regarded as purely marginal and ancillary.[12]

Over time, the ECJ has had several opportunities to explain what this phrase means and to develop case law indicating which facts are relevant for the classification as worker. According to this case law, the Community concept of worker must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned.[13] The requirements of remuneration and real and genuine activities also apply to self-employed persons and are therefore not capable of distinguishing workers and self-employed persons.[14] They rather distinguish economically active persons and economically inactive persons, which is especially relevant in the context of free movement.

According to the case law of the ECJ the following facts are relevant for classification as worker and must be taken into account:

- That the person is under the direction of his contractual partner, especially regarding time and place of work, the services to be performed and the manner in which that work or those tasks are to be performed.[15]

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10 For a detailed explanation see Dullinger T., *Arbeitnehmerbegriff(e) des Unionsrechts und das österreichische Arbeitsrecht*, in *Zeitschrift für Arbeits – und Sozialrecht*, 2018, 4 (5 f); Kountouris N., *The Concept of ‚Worker' in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 2018, 192 (193, 202 ff).

11 Judgement of the ECJ in *Lawrie-Blum*, 66/85, paragraph 17.

12 Judgement of the ECJ in *Levin*, 53/81, paragraph 17; judgement of the ECJ in *Raulin*, C-357/89, paragraph 13.

13 Judgement of the ECJ in *Fenoll*, C-316/13, paragraph 29; judgement of the ECJ in *Union syndicale Solidaires Isère*, C-428/09, paragraph 29.

14 Judgement of the ECJ in *Walrave*, 36/74, paragraph 4; Dullinger T., *Arbeitnehmerbegriff(e) des Unionsrechts und das österreichische Arbeitsrecht*, in *Zeitschrift für Arbeits – und Sozialrecht*, 2018, 4 (6).

15 Judgement of the ECJ in *Allonby*, C-256/01, paragraph 72; judgement of the ECJ in *Lawrie-Blum*, 66/85, paragraph 18; judgement of the ECJ in *Haralambidis*, C-270/13, paragraphs 30, 33; judgement of the ECJ in *AGEGATE*, C-3/87, paragraph 36.

- That the working person is under the supervision of the contractual partner and that the latter, where appropriate, may sanction the working person.[16]
- The fact that the working person is bound by a lasting bond, which brought him to some extent within the organisational framework of the business of the company and therefore the person is an integral part of the company.[17]

These characteristics are essentially the same as those used in many national legal systems to distinguish between workers and self-employed persons.[18] In Austria, for example, a worker is defined as a person who cannot determine the working time, place of work and work-related behaviour himself, is subject to the supervision of his contractual partner, who can also sanction the working person in the case of misconduct and is thus integrated into the operational structure of the contractual partner.[19] The ECJ focuses in the same way on personal subordination rather than economic considerations in its assessment, whether some activity is performed under an employment contract or as a self-employed person.[20]

However, the ECJ goes beyond the understanding of the concept of worker common in many countries in two respects. First, according to the case law of the ECJ a working person does not need to be obliged to work to be qualified as a worker.[21] Therefore, the mutuality of obligation test, according to which an employment contract only can exist if the working person is obliged to work and the contractual partner is obliged to provide work respectively pay the working person,[22] is not relevant in EU Law.

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16 Judgement of the ECJ in *Lawrie-Blum*, 66/85, paragraph 18; judgement of the ECJ in *Haralambidis*, C-270/13, paragraph 30; judgement of the ECJ in *Danosa*, C-232/09, paragraph 47; judgement of the ECJ in *Balkaya*, C-229/14, paragraph 38.

17 Judgement of the ECJ in *Danosa*, C-232/09, paragraphs 51, 56; judgement of the ECJ in *Balkaya*, C-229/14, paragraph 39; judgement of the ECJ in *Holterman*, C-47/14, paragraph 45; judgement of the ECJ in *Becu*, C-22/98, paragraph 26.

18 Kountouris N., *The Concept of ‚Worker' in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 2018, 192 (198).

19 Judgement of the Austrian Supreme Court 9 ObA 40/16x; Melzer-Azodanloo N., *Labour Law in Austria*, 43 f.

20 Risak M., Dullinger T., *The concept of ‚worker' in EU law*, 42, 44.

21 Judgement of the ECJ in *Raulin*, C-357/89, paragraphs 8 ff; judgement of the ECJ in *Allonby*, C-256/01, paragraph 72.

22 Barnard C., *EU Employment Law*, 146.

Second, in a few cases the ECJ took economic elements into account. These are the sharing of the commercial risks of the business,[23] the freedom to engage own staff[24] and the fact that the working person is incorporated into the undertaking of the service recipient and forming an economic unit with it.[25] However, these decisions remained isolated and most of them did not concern social policy but competition law.[26] Nevertheless, this question is highly relevant, because the ECJ so far did not accept an intermediate category of quasi-subordination or economic dependence.[27]

Implications of this concept

According to what has been said so far, it is thus personal dependence that provides access to protective regulations under labour law. However, the legal and political background of many labour law provisions is not this personal dependence, but a form of economic dependence. In the past, it was assumed that personal and economic dependence went hand in hand. The former was therefore a practicable method of defining the scope of application of labour law not only for the provisions regarding the personal dependence but also those regarding economic dependence.[28] Due to the development of the world of work, particularly through digitalisation, however, personal and economic dependence are increasingly diverging.

Because of the focus on working in personal subordination, in some cases it will not be possible to qualify modern forms of work, like crowd working or various other forms of platform-based work, as employment relationship, although the working persons are economically dependent and in need of protection in the same or at least a similar way as workers. These people are not inside the scope of EU employment law and therefore are not protected.

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23 Judgement of the ECJ in *AGEGATE*, C-3/87, paragraph 36.

24 Judgement of the ECJ in *AGEGATE*, C-3/87, paragraph 36; judgement of the ECJ in *Haralambidis*, C-270/13, paragraph 33.

25 Judgement of the ECJ in *Becu*, C-22/98, paragraph 26.

26 Risak M., Dullinger T., *The concept of ‚worker' in EU law*, 44.

27 Kountouris N., *The Concept of ‚Worker' in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 2018, 192 (211).

28 For a detailed explanation and further references see Risak M., Dullinger T., *The concept of ‚worker' in EU law*, 10 f. The ECJ, of course, has never disclosed the underlying reasoning behind its concept of worker.

At this point, something interesting happens. In the past, the fact that the concept of worker is an autonomous one for many regulations[29] was primarily seen as prohibiting the national legislation from excluding certain persons from the protection derived from EU Law. This concerned, for example, civil servants,[30] part-time workers,[31] persons in training[32] or employment relationships with special objectives like rehabilitation.[33]

However, in respect of new forms of employment the far more relevant question is, whether the autonomous concept of worker in combination with primary law and/or secondary legislation is prohibiting the national legislation from protecting working persons that do not qualify as workers in the sense of EU Law. Problems arise under the aspect of the ban on cartels (Article 101 TFEU), the freedom to provide services (Article 56 TFEU) and the possibility to circumvent national protective legislation through choice of law clauses under the Rome I regulation.

Ban on cartels

The focus of the discussion in legal doctrine lies on the question whether working persons who cannot be qualified as workers can be granted the right to conclude collective bargaining agreements (CBAs) by national legislation. This is questionable, because according to the case law of the ECJ CBAs are to be qualified as anti-competitive agreements under Article 101 TFEU.[34]

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29 For example Article 45 TFEU (judgement of the ECJ in *Lawrie-Blum*, 66/85, paragraph 16), Article 157 TFEU (judgement of the ECJ in *Allonby*, C-85/96, paragraph 66), the directives regarding equal treatment (judgement of the ECJ in *O*, C-432/14, paragraphs 22 ff), the working-time directive (judgement of the ECJ in *May*, C-519/09, paragraphs 21 f), the directive on collective redundancies (judgement of the ECJ in *Balkaya*, C-229/14, paragraphs 33 ff), the Rome I regulation (Junker A., D*ie Einflüsse des europäischen Rechts auf die personelle Reichweite des Arbeitnehmerschutzes*, in *Europäische Zeitschrift für Arbeitsrecht*, 2016, 184 [186]) and the Brussels Ia regulation (judgement of the ECJ in *Holterman*, C-47/14, paragraphs 36 f).

30 Judgement of the ECJ in *Lawrie-Blum*, 66/85, paragraph 20.

31 Judgement of the ECJ in *Nolte*, C-317/93, paragraph 19.

32 Judgement of the ECJ in *Balkaya*, C-229/14, paragraphs 49 ff.

33 Judgement of the ECJ in *Fenoll*, C-316/13, paragraph 34.

34 Judgement of the ECJ in *Albany*, C-67/96, paragraphs 46 ff.

For workers in the sense of EU Law the ECJ accepts an unwritten exemption from the ban on cartels and does not qualify CBAs as prohibited anti-competitive agreements as long as they are the result of collective negotiations between management and labour in pursuit of the goal to adopt measures to improve conditions of work and employment (*Albany*-exemption).[35] In the *FNV Kunsten* case, the ECJ had to deal with the question whether this unwritten exception also applies to persons similar to workers.[36] Unfortunately, the ECJ mixed up two different phenomena: Bogus self-employment, where "real" workers are wrongly treated as self-employed, and Persons who are worker-like because they are economically dependent on their contractual partner. Because the decision is rather unclear this question has not been answered to date. If the ECJ were to answer this question in the negative, the possibility of concluding CBAs for persons similar to workers, as called for in parts of the literature, would be inadmissible under EU Law.

No restriction results from Article 101 TFEU, though, for legislation that wishes to enact protective provisions for persons similar to workers.[37] This is where the freedom to provide services comes into play.

Freedom to provide services

Under Article 56 TFEU restrictions on the freedom to provide services within the EU shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. According to the case law of the ECJ this includes direct and indirect discrimination and non-discriminatory restrictions.[38]

Although the mere existence of mandatory legal provisions governing the exercise of a particular service is not in itself sufficient to trigger a requirement of justification,[39] the ECJ's case law repeatedly

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35 Judgement of the ECJ in *Albany*, C-67/96, paragraphs 59 f.

36 Judgement of the ECJ in *FNV Kunsten*, C-413/13. For a detailed analysis see Rebhahn R., *Neue Formen der Arbeit – Unionsrechtliche Aspekte*, in Tomandl T., Risak M. (ed. by), *Wie bewältigt das Recht Moderne Formen der Arbeit?*, 9 (13 ff); Mazal W., *Arbeitnehmerähnliche Selbständige*, in Tomandl T., Risak, M., *Wie bewältigt das Recht Moderne Formen der Arbeit?*, 106 (118 ff).

37 Judgement of the ECJ in *CHEZ Elektro Bulgaria*, C-427/16, paragraphs 40 ff.

38 Barnard C., *The Substantive Law of the EU*, 303.

39 Barnard C., *The Substantive Law of the EU*, 309.

assumed the existence of a restriction even in the case of mere restrictions on exercise of a service that do not concern market access. For example in cases regarding double burden due to double regulation,[40] the keeping available of documents,[41] the submission of certain notifications[42] or regulations regarding the amount of remuneration.[43] This case law is consistent with the view in legal doctrine that one of the guiding priciples behind the free movement of services is home-state control, meaning that a provider may, in principle, provide his services in accordance with the rules of his home state.[44]

Particularly relevant in this context are those decisions of the ECJ in which a legal presumption of worker status was considered a restriction of freedom to provide services. In one case, all persons working in a sector should fall within the scope of application of labour law, irrespective of the modalities of employment.[45] In the other case, for certain activities the status of worker was rebuttably presumed.[46] In both cases, the ECJ ruled that these provisions were in conflict with the freedom of services.

The same is true mutatis mutandis for the freedom of establishment (Article 49 TFEU). Although parts of legal doctrine argue that home-state control is not relevant in the case of freedom of establishment and only provisions regarding market access should be considered restrictions[47] the ECJ often qualifies mere restrictions on exercise of a service that do not concern market access as restriction of the freedom of establishment. For example provisions regarding the interest on savings deposits in the case of a bank[48] or the obligation to contract for insurances.[49]

Protective regulations for persons working as self-employed under EU Law could therefore be inapplicable in cross-border situations, unless a justification is found for each individual provision.[50] The main

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40 Judgement of the ECJ in *Gouda*, C-288/89, paragraphs 12 f.

41 Judgement of the ECJ in *Arblade*, C-369/96, paragraph 58.

42 Judgement of the ECJ in *Commission/Belgium*, C-577/10, paragraphs 39 f.

43 Judgement of the ECJ in *Konstantinides*, C-475/11, paragraph 49.

44 Barnard C., *The Substantive Law of the EU*, 292.

45 Judgement of the ECJ in *SETTG*, C-398/95, paragraphs 6 ff.

46 Judgement of the ECJ in *Commission/France*, C-255/04, paragraph 38.

47 Korte S. in Callies C., Ruffert M. (ed. by), *EUV/AEUV*, Article 49 TFEU, paragraphs 53 f.

48 Judgement of the ECJ in *Caixa-Bank*, C-442/02, paragraphs 13 f.

49 Judgement of the ECJ in *Commission/Italy*, C-518/06, paragraphs 65 ff.

50 For an in depth analyses of the case law of the ECJ and a detailed explanation see Dullinger T., *Unionsrechtliche Vorgaben und Grenzen für nationale Regelungen*

reason for this result is the fact that every protective regulation reduces the legal and economic flexibility of both the service recipient and the person employed. At the latest when several such protective provisions come together, it can be assumed that the ECJ would see this as a restriction of the freedoms concerned.[51]

This is highly relevant because in many cases it is quite easy to create a cross-border situation by founding an establishment of a company abroad or when providing the service via a platform. At the same time the ECJ seems quite strict in the examination of justification. For example, it qualified an entitlement to paid leave for self-employed persons as unjustified because "*a right to paid leave on the part of a service provider (established either indirectly by a presumption of salaried status or directly) is difficult to reconcile with the concept of self-employment. Entitlement to leave paid by an employer is one of the most fundamental characteristic rights of salaried employment. By contrast, self-employed activity is characterised precisely by the absence of a right to paid leave*."[52] However, this decision did not specifically concern economically dependent self-employed persons.

Even if it is possible to introduce protective provisions for worker-like self-employed persons at national level in conformity with EU Law, a major problem remains: the risk that these provisions could be circumvented by means of choice of law or choice of forum clauses.

Risk of circumvention

In cross-border cases the question arises which country's law is applicable and how the question of international jurisdiction is to be answered. These issues are exhaustively regulated by EU regulations (Rome I regulation,[53] Brussels Ia regulation[54]).

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für arbeitnehmerähnliche Personen, in Dobreva V., Hack-Leoni S., Holenstein A., Koller P., Nedi R., *Neue Arbeitsformen und ihre Herausforderungen im Arbeits – und Sozialversicherungsrecht*, 9 (18 ff).

51 Rebhahn R., *Arbeitnehmerähnliche Personen – Rechtsvergleich und Regelungsperspektive*, in *Recht der Arbeit*, 2009, 236 (247); Dullinger T., *Unionsrechtliche Vorgaben und Grenzen für nationale Regelungen für arbeitnehmerähnliche Personen*, in Dobreva V., Hack-Leoni S., Holenstein A., Koller P., Nedi R., *Neue Arbeitsformen und ihre Herausforderungen im Arbeits – und Sozialversicherungsrecht*, 9 (23).

52 Judgement of the ECJ in *Commission/France*, C-255/04, paragraph 51.

53 Regulation No 593/2008.

54 Regulation No 1215/2012.

According to Article 4 paragraph 1 litera b Rome I regulation a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence. In this case, this would be the worker-like person. However, according to Article 3 Rome I convention the parties are free to choose the law of another country. Only where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (Article 3 paragraph 3 Rome I regulation). Article 8 paragraph 1 Rome I regulation limits the possibility to choose the applicable law for workers only.

Regardless of the applicable law, overriding mandatory provisions can be applied (Article 9 Rome I regulation). However, there are two problems. First the definition of overriding mandatory provisions is rather restrictive. It only includes provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this regulation (Article 9 paragraph 1 Rome I regulation). It is highly questionable if the greater part of the potential provisions protecting worker-like persons could be qualified as overriding mandatory provisions.[55] And even if they could, they themselves could be circumvented through a choice of forum clause. While courts apply overriding mandatory provisions of their own legal system without restriction, they apply foreign overriding mandatory provisions only in the case of overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful (Article 9 paragraph 3 Rome I regulation). According to article 25 Brussels Ia regulation the parties of a contract are – within certain limits – free to choose the forum. The restrictions in Articles 20 ff only apply to workers.

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[55] Dullinger T., *Unionsrechtliche Vorgaben und Grenzen für nationale Regelungen für arbeitnehmerähnliche Personen*, in Dobreva V., Hack-Leoni S., Holenstein A., Koller P., Nedi R., *Neue Arbeitsformen und ihre Herausforderungen im Arbeits – und Sozialversicherungsrecht*, 9 (30).

In this way, national protection rules for worker-like persons could easily be circumvented by choosing another applicable law and in the case of overriding mandatory provisions choosing another forum, which is widely possible for self-employed persons.

At the same time, the EU has no legislative competence for general contract law[56] and it is unclear whether the legislative competence in Article 153 TFEU includes worker-like persons.[57] Even if this was the case, it is rather clear that the EU to this day did not enact any protective measures applicable to worker-like persons.[58] It is therefore either not in a position to provide sufficient protection for this group of persons itself or chose to do not make use of this possibility.

Possible Scenarios

Against this background, there are three possible scenarios. Firstly, the economic approaches in the case law of the European Court of Justice on the concept of worker could be taken up. This would lead to a broadening of the concept of worker and economically dependent persons would enjoy the protection of European labour law. At the same time, Member States would be free to provide for a higher level of protection for such persons in an effective way, because neither the ban on cartels nor the free movement to provide services would prohibit such legislation. Furthermore, the special provisions for workers regarding the applicable law and international jurisdiction would prevent circumvention of these national rules.

Secondly, the ECJ could accept an intermediate category between employees and genuine self-employed persons. In the *FNV Kunsten*-case he has perhaps already done this. In this way, under Article 153 TFEU, the EU could have the competence to regulate employment conditions for these persons. As far as Article 101 TFEU is regarded this could lead to the permissibility of inclusion of worker-like persons in CBAs. Under the Rome I Regulation, this could prevent the circumvention of national protection rules. The main difference with the first alternative is that this approach would allow for the inclusion of worker-like persons in only some of the provisions.

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[56] Rebhahn R., *Neue Formen der Arbeit – Unionsrechtliche Aspekte*, in Tomandl T., Risak M., *Wie bewältigt das Recht Moderne Formen der Arbeit?*, 9 (34).

[57] Rebhahn R., Reiner M. in Schwarze J., *EU-Kommentar*, Article 153 TFEU paragraphs 12 ff.

[58] Rebhahn R., *Neue Formen der Arbeit – Unionsrechtliche Aspekte*, in Tomandl T., Risak M., *Wie bewältigt das Recht Moderne Formen der Arbeit?*, 9 (30).

If neither of the first two scenarios occurs, there is a risk that effective protection for economically dependent self-employed persons will not be possible. The EU would not have the legislative power to adopt these rules; Member State rules could be combated as a restriction on the freedom to provide services and could largely be circumvented by the choice of another legal system.

Conclusion

The case law of the ECJ is thus both an opportunity and an obstacle in the protection of worker-like persons. If in the future the ECJ increasingly takes up the economic arguments in its case law, it will guarantee a certain level of protection for persons similar to workers. Member States can then effectively complement this protection. If, on the other hand, the ECJ focuses on personal independence as the sole decisive criterion and the refuses to accept an intermediate category, there is the risk of a situation in which neither the EU nor the member states can provide effective protection for persons similar to workers.

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12. Lost in Taxation: Why We Should Try to Stick to Insurance-Based Social Security in the Wake of New Forms of Work

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Introduction

Social security can be described as a comprehensive body of schemes, shaping solidarity with individuals who face either the threat of a lack of earnings, either the threat of particular costs[1] following the development of a contingency (social risk), e.g. sickness, unemployment, old-age, parenthood. Social security system's personal scope of coverage can comprise all individuals inhabiting a particular state or only the working population, active in its territory, especially salaried workers, self-employed persons, civil servants and other subgroups.[2] In the latter case, a social security system as a rule coincides with the notion of social insurance, in the former with the notion of a residential or universal social security scheme. Both textbook categories of social security schemes, offering public income protection to the individual or the individual and his or her family members, vary greatly not only in the way they are financed, but commonly also in the amount of benefits they offer.

The contribution explores, from a strictly theoretical point of view, a rather narrow part of the complex relationship between labour-related social security schemes, i.e. social insurance schemes, and new forms

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1 Pieters, D., *Social Security: An Introduction to the Basic Principles*, Alphen aan den Rijn, Kluwer Law International, 2006, p. 21.

2 See *ibid.*

of work,[3] interpreted as any lawful and substantial economic activity falling outside the scope of a traditional employment relationship. It does not address social assistance schemes,[4] which normally offer income support and social care services to permanent residents and/or nationals of a particular state. They are thus only indirectly linked to the notion work of performance, as a rule according to the principle of equal treatment of workers. In the text, the term *social protection* therefore generally coincides with the term *social security*.

The contribution focuses on the particular question of substituting contribution-funded schemes with contribution-funded social security schemes as to instantly include under the personal scope of coverage all economically active individuals falling outside the traditional notion of an employment relationship, possibility also outside the traditional notion of self-employment as one's officially registered and steady, long-term economic activity. Self-employed persons namely often enjoy equal formal coverage as traditional workers.

The issue of substitution is examined by means of a thorough comparison between a social insurance relationship and the strength of insured persons' social claims, and the legal status and the strength of social claims of persons, enjoying social protection within a universal, tax-funded social security scheme. The contribution also briefly addresses the potential role of socially earmarked taxes in the wake of recent new forms of work. Tax advantages, e.g. tax reductions for children, different forms of subsidies, "negative taxes", or tax-free allowances,[5] mostly elements of the so-called hidden welfare state,[6] and universal basic income are excluded from the debate.

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[3] The term *atypical employment* is used synonymously.

[4] One of the possible issues concerning the relationship between social assistance schemes and new forms of work is how to correctly, timely and equitably determine the socio-economic position of the social assistance recipient, since his income, obtained either at home or from abroad (e.g. crowdsourcing at the level of the global market), can vary significantly from month to month, even from week to week. The administrative decision can thus become instantly dated if the socio-economic position is not evaluated on a regular monthly basis. With regular evaluation, however, come regular infringements into one's private sphere. Income obtained from abroad can also be subject to double-taxation if no bi – or multi-lateral agreements exist.

[5] See Spiegel B. (ed. by), Daxkobler, K., Strban, G., Van der Mei, A. P., *The relationship between social security coordination and taxation law. Analytical report 2014*. FreSsco, European Commission, 2015, p. 17.

[6] Some authors even refer to the *hidden bounties* of the tax system. See Sinfield, A., *Tax*

With ever-changing work patterns and social practices, triggered by significant technological development, just like Bob Harris in the movie *Lost in Translation,* traditional social security schemes, especially Bismarckian social insurance schemes, might have reached a midlife crisis. However, with fewer resources available due to an increase of forms of work with a lesser contribution burden or even contribution-free work, accompanied by the impact of negative demographic growth, it could prove difficult to buy a Porsche in order to get out of the crisis or, in other words, to keep providing effectively a sufficient level of social protection to all economically active individuals, regardless of the particular type of their economic activity[7] which creates an active incomes.[8] Even more so to endeavour to raise progressively the system of social security to a higher level as stipulated by Article 12 of the Revised European Social Charter.

As recognised by Article 22 of the Universal Declaration of Human Rights and Fundamental Freedoms, which stipulates that everyone *as a member of the society* possesses the right to social security, the right presupposes that the system is accessible to everyone, regardless of their social position or professional category.[9] In line with a pure, sometimes even idealistic or utopian notion of universality, every person should enjoy sufficient and effective coverage.[10]

Welfare – Making Some More Secure than Others, in: Van Langendonck (ed. by), *The Right to Social Security*, Intersentia, Antwerp – Oxford, 2007, p. 99.

7 See also Principles 5 and 12 of the European Pillar of Social Rights.

8 The relationship between passive income and public income protection becomes especially relevant when the maintenance of a steady passive income, e.g. from renting out property via Airbnb, Booking, car-sharing apps, etc., requires one's steady work-performance and secures livelihood for him or herself and his or her family members. From a social solidarity and public interest's point of view, it is also of key importance that any passive income, which secures one's actual livelihood or a higher standard of living in relation to his lower active income, e.g. salary, contributes to the carrier's or state's social funds either by means of contribution payment or taxation. Otherwise the principle of contributing to one's own financial capabilities and the principle of vertical solidarity, e.g. in public health insurance, diminishes.

9 Vonk, G., Katrougalos, G., *The public interest and the welfare state: a legal approach*, in: Vonk, G., Tollenaar Albrtjan (ed. by), *Social Security as a Public Interest. A Multidisciplinary Inquiry into the Foundations of the Regulatory Welfare State*. Intersentia, Antwerp – Oxford – Portland, 2010, p. 83.

10 On the notion of communitarian gatekeeping (especially in regard to the European Social Model) see Mišič, L., *Theories of Political Philosophy as Guiding Principles in Social Security*. Studies on Labour Law and Social Policy, 2018, 25(3), p. 274 ff., Mišič, L., *The National Welfare State, Four Categories of EU Citizens, and the Pursuit of Liberal Equality*, in: Kopetzki, M. (et al.) (ed. by), *Autoritäres vs Liberales Europa. Tagung junger*

The contribution presupposes a clear-cut division between contribution – and tax-funded schemes, even if studies show, that more and more benefits are financed by a mix of contributions and taxes, especially in case of pensions in countries, where the right to social security is provided mainly by social insurance.[11]

New Forms of Work and Social Security: The Act of Decoupling

Due to structural and crisis-driven economic and labour market developments, non-standard work and new forms of self-employment have been on the increase in Europe over the past two decades.[12] The rise of new forms of work, such as marginal work or on-demand work, commonly combined with platform work and crowdsourcing,[13] is proverbially going to have the strongest effect on contribution-funded Bismarckian social insurance schemes. Since those social protection systems have traditionally been developed to offer public income protection to salaried workers, employed full-time with a single employer in an open-ended bilateral relationship characterized by workers' personal subordination and economic dependency,[14] they are facing future challenges regarding both personal and material scope of coverage, coupled with challenges regarding their long-term financial sustainability. A decrease in the number of full-time salaried workers as aforementioned namely relates to a decrease in the amount of funds

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*Europarechtler*innen*. Band 2. Jan Sramek Verlag, Wien, 2019, p. 3. ff., and Mišič, L. *Equality of Opportunity in the EU: Rethinking the European Pillar of Social Rights in Light of Free Movement as a Supranational Principle of Justice*. Zbornik znanstvenih razprav (forthcoming, spring 2020).

11 Spiegel B. (ed. by), Daxkobler, K., Strban, G., Van der Mei, A. P., *op.cit.*, p. 15.

12 Spasova S. (et al.), *Access to social protection for people working on non-standard contracts and self-employed in Europe*, Brussels, ESPN, 2017, p. 7.

13 Little issues regarding Bismarckian social insurance schemes surface when, for example, platform workers are treated as dependent workers. According to Schulz-Weidner and Väänänen things however become complicated when platform work is regarded as self-employed work, which it is by default, or even covered by a third status such as in Italy. Even more so in cases where such workers are covered either on a mandatory either on a voluntary basis, depending on the particular social insurance scheme. See Schulz-Weidner, W., Väänänen, N., *Are social security systems adapted to new forms of work created by digital platforms?* Study by European Social Insurance Platform (ESIP), 2019, p. 9.

14 See Schoukens, P., Barrio, A., *The changing concept of work: When does typical work become atypical?* European Labour Law Journal, 2017, 8(4), p. 312.

gathered by means of social security contribution payment. Whereas the expansion of the working age population in the developing world creates a window of opportunity for the development and financing of social protection, the opposite trend in high-income countries gives rise to concerns about an eroding contribution base for social insurance.[15] From this perspective, universal social security schemes seem more resilient to change. However, both taxes and social security contributions have a strong link to labour and affect its supply. Whilst taxation reduces the income of individuals and households (*income effect*), and changes economic subjects preferences in regard to different tax rates (*substitution effect*), the availability of replacement income (cash benefits) supposedly reduces aggregate labour supply and employment by weakening the incentive to look for work.[16] At the same time, social security contributions also reduce the income of individuals and households and possess the power to change their economic preferences, e.g. in relation to private insurance, private investments or savings schemes, or even life-styles (moral hazard ahead!). Whenever tax-funded social security is primarily financed through income tax, the differences between Bismarck and Beveridg-type systems also grow significantly smaller.[17]

In general, social security, especially labour-related social security schemes, however reflect past policy designs, making it necessary to fundamentally rethink the design of those schemes if the idea is to provide a proper protection for platform workers,[18] marginal workers, crowd workers or any other workers, falling outside the traditional notion of an employment relationship. According to Principle 5 of the

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15 Behrendt, C., Nguyen, Q. A., *Innovative approaches for ensuring universal social protection of the future of work*. International Labour Organization, Geneva, 2018, p. 2.

16 Cichon, M. (et al.), *Financing social protection*, International Labour Organization, Geneva, 2004, pp. 114-115.

17 See also Samson, M., *Supporting Social Protection Systems. Concept Paper N. 4*. DG for International Cooperation and Development, Brussels, 2015, p. 14. Taxes and social security contributions also share a public-financial nature, they all reduce one's salary or income and are thus perceived similarly by its payers, and are stipulated by heteronomous legal rules. See Strban, G., *Terminološke zagate pri vsebinskem razlikovanju poimenovanj v pravu socialne varnosti*, in: Jemec Tomazin, M., Škrubej, K., Strban, G., *Med jasnostjo in nedoločenostjo. Pravna terminologija v zgodovini, teoriji in praksi*. GV Založba, Pravna fakulteta UL, Ljubljana, 2019, p. 236.

18 See Schoukens, P., Barrio, A., Montebovi, S., *The EU social pillar: An answer to the challenge of the social protection of platform workers?* European Journal of Social Security, 2018, 20(3), p. 237.

European Pillar of Social Rights, *innovative forms of work* that ensure quality working conditions should be fostered. A push in innovative forms of work should require a push in new ways of guaranteeing social protection.

The abovementioned notion of proper protection ought to entail formal and actual proper access to social protection, since self-employed persons and other economically active individuals, who are not traditional workers, commonly face hindrances regarding the fulfilment of minimal insurance periods, minimal income thresholds, etc., that limit access to a particular social right even if they enjoy formal coverage. In some countries, low-income groups are exempted from mandatory insurance. A number of social protection systems have set minimum income or work tile requirements for participation in the scheme, excluding – from the outset – non-standard workers with (irregular low income), leaving them without any social protection at all and having to rely upon social assistance benefits when a social risk occurs.[19] Hindrances for example also include the need for a proved existence of an objective reason why a self-employed person has seized with gainful employment when claiming unemployment benefits, whilst individuals, performing work on grounds of civil law contracts outside the realm of self-employment as a rule do not enjoy coverage within public unemployment insurance schemes. They also might not be able to rely on private unemployment insurance schemes, if the latter only offer additional income protection to the protection afforded within a public scheme for workers, which might be the rule. If private unemployment insurance or income loss insurance is offered to self-employed persons, possibly even individuals performing work on grounds of civil contracts, whilst not being self-employed, the benefits might not be worth the high premium.

At the same time, the extension of legal coverage does not always translate into effective coverage: limited contributory capacities, complex administrative procedures and weak compliance and enforcement mechanisms may hinder the take-up and adequacy of benefits for some workers even if they are legally covered.[20]

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[19] Schoukens, P. *Extending formal coverage: mandatory versus voluntary approach*. DG Employment, Social Affairs and Inclusion, Brussels, 2019, p. 9. For a list of social protection schemes, setting minimum income or work requirements see p. 24 ff.

[20] Behrendt, C., Nguyen, Q. A., *op. cit.*, p. 16.

Unsurprisingly, one of the key aims, included in the Proposal for a Council Recommendation on access to social protection for workers and the self-employed, was thus to allow all individuals in employment and self-employment to adhere to corresponding social protection systems, i.e. closing formal coverage gaps, whilst ensuring effective coverage.[21] The same could be said for individuals performing any lawful and significant economic activity which ensures livelihood to themselves and their family members. However, extending coverage without addressing the financial side could put the long-term financial sustainability of social security systems under great pressure. Alternative sources of financing ought to be explored.[22] As for example observed by the ILO, unless mechanism are in place to ensure social security coverage for workers in non-standard employment arrangements through an extension of contributory or tax-financed social security schemes, such workers are likely to possess inadequate coverage or no coverage at all. This can result in them facing greater exposure to social risks (contingencies) with regard to income security and effective access to health care.[23]

The theoretically most straightforward way of extending coverage – not taking into account potential constitutional amendments, complex legislative amendments and the imposition of extensive transitional periods as to respect the principle of legal certainty and predictability and the demands of proprietary protection of social rights – is the way of "decoupling social protection from employment"[24] by means of introducing a comprehensive tax-funded social security scheme. More precisely, by means of substituting a contribution-funded, i.e. social insurance scheme with a tax-funded universal social security scheme. Untying social protection from the employment relationship – that is, granting individual entitlements to tax-financed benefits based on need rather than on earnings or contributions – would namely extend coverage to non-standard workers and get around the problem of

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21 European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, COM(2018) 132, p. 2.

22 See Schoukens, P., Barrio, A. *op. cit.*, p. 328 and Schoukens, P. (et al.) *op. cit.*, p. 238.

23 ILO, *Strengthening social protection for the future of work. Paper presented at the 2nd Meeting of the G20 Employment Working Group.* International Labour Organization, Hamburg, 2017, p. 10.

24 See Behrendt, C., Nguyen, Q.A. *op. cit.*, p. 5.

tracking entitlements across jobs and over the lifecycle.[25] The act of decoupling or breaking the link between work performance and public income protection, commonly associated with the simultaneous introduction of additional private insurance, however comes at a price.

Some observers, as just mentioned – the substation of the distributional criteria of *merit* with the criteria of *need* –, for instance advocate for decoupling social protection from employment by limiting social protection systems to safety nets for the poor, i.e. social assistance schemes, or a universal basic income.[26] The suggestion seems to follow the traditional division between Bismarck and Beveridge-types of social security systems with the latter offering coverage to the entire state population, whilst financing uniform, lump-sum benefits from general revenue, and the former offering to the insured person means for a proportional maintenance of to an certain extent individualized standard of living, established and exercised prior to the realisation of a social risk.

Social Insurance vs. Tax-Funded Social Security

One of the key differences between contribution – and tax-funded social security schemes is the (in)existence of a social insurance relationship. As the name suggests, the latter represents an integral part of social insurance schemes. It is established either on a compulsory or – less common – voluntary basis.[27] A social insurance relationship can be defined as a double-sided public relationship of mutual rights and obligations between the insured person and the social insurance carrier in which the former is obliged to pay social security contributions in order to enjoy insurance coverage, provided by the latter.[28] Yet, how can the presence or rather lack of a social insurance relationship influence the way we are to perceive and regulate the relationship between social security and new forms of work?

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[25] OECD, *The Future of Social Protection: What Works for Non-standard Workers?* OECD Publishing, Paris, 2019, p. 25.

[26] Behrendt, C., Nguyen, Q. A., Rani, U., *Social protection systems and the future of work: Ensuring social security for digital platform workers*. International Social Security Review 2019, 72(3), p. 27.

[27] According to OECD, voluntary insurance schemes, offering voluntary protection to non-standard workers, risk adverse selection of members. Workers with the highest risk have the biggest incentive to join. See *op. cit.*, p. 27.

[28] See Strban, G. Temelji obveznega zdravstvenega zavarovanja, Cankarjeva založba, Ljubljana, 2005, p. 91 ff.

First, since there exists a direct link between the insured person's duty to pay contributions and the insurance carrier's duty to provide benefits,[29] the relationship is individualized. Unlike a traditionally "reflexive"[30] right to social assistance (e.g. income support), the right to social insurance benefits can be considered "subjective".[31] From this perspective, it is difficult to understand the right to tax-funded social security benefits as a subjective right.

Concerning cash benefits, the individualisation of the relationship also correlates to the individualisation of the amount of the cash benefit, corresponding to the amount of the contribution-levied income obtained in a particular calculation period. Cash benefits provided within social insurance schemes thus as a rule enjoy a high level of proprietary protection. Put in terms of political philosophy, in a strongly libertarian or classical liberal sense, the working individual is the owner of fruits of his labour. If his personal income has been compulsorily redistributed by means of contribution payment obligation, the least the general legislator or the courts can do is to offer special protection to benefits financed by such as a rule involuntary transactions, thus limiting the level of exploitation of one's possessions and private autonomy for the benefit of others.[32] In tax-funded social security, there exists no direct link between the taxpayer and person enjoying coverage, even if they even if they accidentally coincide. Put differently, a lack of a direct link between the taxpayer and the social security institution might lower the strength of taxpayers' social claims against the

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[29] Spiegel B. (ed. by), Daxkobler, K., Strban, G., Van der Mei, A. P., *op. cit.*, p. 11.

[30] The meaning behind the term *reflexive right* however evades me due to a lack of further explanation. It is possible, that the author refers to Hepple's reflexive law argument in his scepticism about the legal enforceability of the global right to work as described by Rogowski. According to Hepple, the welfare state cannot guarantee participation in productive employment but only in social security, in practice only a right to social assistance. See Rogowski, R., *Reflexive Labour Law in the World Society*, Edward Elgar, Cheltenham – Northampton, 2013, p. 51. The term *reflexive right*, as used by the author, is however very difficult to be associated with Deakin's and McLaughlin's notion of "reflexive regulation", as put by the authors a means of stimulating self-regulation in order to fulfil policy objectives or promoting the idea that the role of the law is to promote a learning process around the question of what works best as a route to achieving social or economic policy goals. See Deakin, S., McLaughlin, C., *The Regulation of Women's Pay: From Individual Rights to Reflexive Law?* Working paper No. 350, Centre for Business Research, University of Cambridge, 2007, pp. 7-8. In this contribution, it is thus understood solely as an antonym for a *subjective right*.

[31] See Pieters, *op. cit.*, p. 6. The author however notes that benefits nowadays commonly take on a mixed nature.

[32] See Mišič 2018, *op. cit.*, p. 286.

state, making it less controversial, at least from a constitutional law's point of view, for the general legislator to lower the level of social security, similar to the commonly decreased levels of social protection afforded within tax-funded social assistance schemes during times of economic turmoil. Private interests, when supported by a strong property claim, seem more resilient to the possible negative impacts of public claims or public interest promotion, commonly corresponding to plain utilitarian demands of long-term financial sustainability. According to Kjønstad, constitutional law and human rights best safeguard social security benefits when two or more fundamental legal principles, such as non-discrimination, protection of property, protection of earned rights, legal expectancy, prohibition against retroactive legislation and the principle of proportionality, are combined.[33] One could claim that the stronger the protection of property and of acquired or "earned" rights or rights in the course of acquisition,[34] the stronger the principle of irretroactivity and quasi-irretroactivity of law, and the finer or more delicate the weighing procedure within the proportionality test. Even if the concept of "possessions", first applicable to contributory benefits only, was later extended by the European Commission of Human Rights and the European Court of Human rights as to embrace non-contributory benefits and social assistance provided by a statue,[35] the link between a social security contribution and an opposite obligation of equal or comparable value is by nature stronger than the link between the said obligation and a tax obligation, since taxes do not represent a payment for a specific benefit provided by a particular legal person.[36]

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[33] Kjønstad, A., *Social Security and Private Property – Human Rights and Constitutional Law*, in: Van Langendonck (ed. by), *The Right to Social Security*, Intersentia, Antwerp – Oxford, 2007, p. 185. Extensively on cases, in which the ECHR afforded property protection to (even non-contributory) social rights in: Mišič, L., *Socialna pravičnost kot vprašanje upravičenosti redistribucije v sistemu socialnih zavarovanj*, Doctoral Thesis, Faculty of Law, University of Ljubljana, Ljubljana, 2019, p. 118-122.

[34] In Slovenia, the Constitutional Court ruled that different cash benefits stemming from social insurance, including a pension, are protected not only by the right to social security, but also the right to property. See Kresal, B., Kresal Šoltes, K., Strban, G., *Social Security Law in Slovenia*. Wolters Kluwer, Alphen aan den Rijn, 2016, p. 29.

[35] Gómez Heredero, A., *Social security as a human right. The protection afforded by the European Convention on Human Rights*. Council of Europe Publishing, Strasbourg, 2007, p. 63. See also Cousins, M., *The European Convention on Human Rights and Social Security Law*, Intersentia, Antwerp – Oxford – Portland, 2008, pp. 18-23. See also selected case-law in Kapuy, K., Pieters, D., Zaglmayer, B., *Social Security Cases in Europe: The European Court of Human Rights*, Intersentia, Antwerp – Oxford, 2007, pp. 3-13, p. 29 ff.

[36] See Spiegel B. (ed. by), Daxkobler, K., Strban, G., Van der Mei, A. P., *op. cit*., p. 11.

The inexistence of a direct link between the taxpayer and the social security institution or a lack of individualisation of social security also relates to the generalisation of provided benefits. It should not come as a surprise that the act of decoupling social protection from employment, as abovementioned, commonly relates to the introduction of minimum floors, offering universal benefits for all, whilst safeguarding a higher level of income protection within the realm of additional public, semi-public or private insurance or private investment and savings schemes. Decoupling social protection from employment and weakening existing forms of coverage does not provide adequate levels of protection, whilst the weakening of existing social insurance mechanisms in favour of private insurance and savings arrangements, with their limited potential for risk pooling and redistribution, is likely to exacerbate inequality, including gender gaps.[37]

When discussing the act of decoupling employment and social protection, it is thus essential to safeguard sufficient space for redistribution and risk pooling based on different financing mechanisms, including both contributory and non-contributory elements.[38] A mere shift to a tax-funded social security scheme could give a far too significant role to private insurance, which as a rule benefits socio-economically best-off members of the community most,[39] since they can afford tailor-made insurance coverage, especially when private schemes are established as an alternative, not an addition to a public scheme. It is safe to say that economically active individuals, who fall outside the traditional notion of an employment relationship, do not form part of the best-off members of the community, unless they belong to the small group of highly sought after, in return highly paid freelancers or, for example, top CEOs, employed on grounds of affluent civil law contracts. A liberal egalitarian understanding of social justice, involved strongly with the promotion of equality, equal opportunities and concern for the least advantaged members of the community, offers political and moral support for legislation which limits one's economic freedom in order to enhance the level of social protection for all members of the community, with marginal utility of a public scheme

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37 Behrendt, C., Nguyen, Q. A., *op. cit.*, p. 7.

38 *Ibid.*

39 For a liberal egalitarian argument in favour of social insurance see Mišič 2018, *op. cit.*, pp. 280-283.

and its corresponding benefits benefiting the worst off members of the community most.[40] Such an account of social justice can offer support for a solidarity-based social insurance scheme, safeguarding individuals' freedom of conduct or personal autonomy by means of a common dispersion of costs accumulated by the occurrence of a particular contingency, enabling them to use their disposable income for things and services or activities offering personal fulfilment.[41]

In tax-funded social security, the primary tax burden is as a rule followed by a secondary private payment or investment whenever individuals' needs and wants or desires surpass those covered by minimal floors. The latter typically include, but are not limited to, cash transfers for children, maternity benefits, disability pensions, support for unemployed persons, old-age pensions and access to essential health care.[42]

Second, social security contributions, paid within a two-sided social insurance relationship, may also include membership elements regarding participation in the self-governing processes of the insurance carrier,[43] when the latter is established in line with the principle of functional decentralisation. On the one hand, the act of decentralisation, in which the state or government transfers its particular tasks and competences onto another legal entity, can lead to a more efficient implementation of rights and system management through highly specialised legal entities in every branch of social insurance. On the other hand, it allows for the principle of legislative self-government to function fully.[44] The principle secures a shift of powers from the state

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[40] See *ibid*., p. 283.

[41] See *ibid.*

[42] Ortiz, I., Schmitt, V., De, L. (ed. by)., *Social Protection Floors. Volume 2: Innovations to extend coverage*. International Labour Organization, Geneva, 2016, p. 2. Social protection floors should however be considered most relevant in regard to developing countries, not highly developed social welfare states. As observed by Dijkhoff, risk-based social security has appeared difficult to apply worldwide, especially for developing and emerging countries with large informal economies. See Dijkhoff, T., *The ILO Social Protection Floors Recommendation and its relevance in the European Context*, European Journal of Social Security, 2019, 21(4), p. 354. However, whenever a person falls outside the social security system's personal scope of coverage due to performing atypical employment, the question of universal minimal floors surfaces regardless of the level of socio-economic development of the particular state of employment.

[43] See Spiegel B. (ed. by), Daxkobler, K., Strban, G., Van der Mei, A. P., *op. cit*., p. 11.

[44] See Strban, G., Mišič, L., *Social partners in social security: two common forms of recognition and selected issues*, in: Pichrt, J., Kodlinská, K., *Labour law and social protection in a globalized world: changing realities in selected areas of law and policy*,

to the community of insured persons, whose rights are at stake, and a shift from the state to employees and employers as subjects primarily financing the system.[45]

One also should not underestimate the role of social partners and collective bargaining in social security. The shift or at least a balance of powers occurs with the statutory inclusion of social partners in the structure of the carriers' representative and executive bodies, such as assemblies, councils or boards of directors.[46] Social partners namely enjoy formal government recognition within different institutions and through the recognition of internally or externally effective proceedings, with either a direct (e.g. drafting the insurance carriers' statutes) either an indirect (e.g. appointing the social insurance carriers' directors) effect on social security, in which they partake. The formal recognition or inclusion of insured persons and social partners in social insurance carriers' representative and governing bodies might strengthen insured persons' social claims. In a centralised social security system, in which the government gathers under its powers all competences regarding the establishment, implementation and financing (by general taxation) of social security, the general legislator alone defines the frontiers of social solidarity. On the one hand, he can transgress differences and individual interests of particular professions, e.g. the potential clash between employees and self-employed persons, or differences and individual interests of employees and employers. On the other hand, he is possibly more prone to succumb to purely utilitarian demands of the general public interest,[47] weakening individual claims and/or claims of distinct categories of persons covered. It is common knowledge that atypical workers, especially when dispersed as contractors on a global scale, enjoy little or no collective bargaining power. Even more so when they have to compete against one another in the open market.

Kluwer Law International, Alphen aan den Rijn, 2018, p. 46. For a comparative study on devolution and decentralisation in social security see Vonk, G., Schoukens, P. (ed. by), *Devolution and Decentralisation in Social Security. A European Comparative Perspective*. Eleven International Publishing, Den Haag, 2019.

45 See Strban, G., Mišič, L., *op. cit.*, p. 46.

46 *Ibid.*

47 See also Mišič, L., *Social insurance and the state: can't live with her, can't live without her*, in: Perulli, A., Bellomo, S. (ed. by), *New Industrial Relations in the Era of Globalization: A Multilevel Analysis*, Wolters Kluwer Italia, Milano, 2018, pp. 143-147.

Third, the recipient of the social security contribution is a specialized juridical person, typically governed by public law and established for the sole purpose of providing particular social security rights.[48] The resources it allocates and distributes are socially earmarked. They are to be used according to the sole purpose of financing social security. Depending on the state's constitutional provisions or specific legislative provisions, the government can serve as a guarantor of contribution-funded social rights, ensuring co-financing by taxation in times when social insurance carriers' expenditure surpasses their revenue or even on a regular basis. Tax-funded social security is, on the one hand, more flexible and to some extent less dependent on the number of employees concerning financing, but, on the other hand, can fall victim to ever changing political preferences of the general legislator if preventive measures such as a constitutionally safeguarded right to social security or an effectively evoked social state principle (germ. *Sozialstaatsprinzip*) are not in place.

Socially Earmarked Taxes

According to Pieters, the most common way to collect financial means for the social security system is to rely on contributions of the persons concerned and on government subsidies.[49] Sometimes other "alternative" forms of financing are added, such as "earmarked" and "affected" taxes, proceeds consisting of capital gains of the social security contributions and user charges.[50]

Socially earmarked taxes are considered taxes, the revenues of which do not flow into the state's general, but rather to a specific part of the budget meant to finance social security.[51] Comparatively, they can be collected from employers (e.g. for marginally employed persons in Austria), from self-employed persons, purchased goods and duties on cigarettes, beer, spirits and tobacco, from all work-related income (France), from all active income (Estonia) or all income in general (Ireland).[52] Even if there exists no certain identity between the taxpayer

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48 Spiegel B. (ed. by), Daxkobler, K., Strban, G., Van der Mei, A. P., *op. cit.*, p. 11.

49 Pieters, *op. cit.*, p. 101.

50 *Ibid.*

51 Spiegel B. (ed. by), Daxkobler, K., Strban, G., Van der Mei, A. P., *op. cit.*, p. 15.

52 *Ibid.*

and the recipient of a social security benefit (especially in cases, where social security is financed by tax-revenue from general consumption, e.g. of alcohol or tobacco), socially earmarked taxes could become an important way of financing an adequate level of social protection for atypical workers if they were paid from revenue or profits of companies, additionally profiting from employing cheaper, flexible, collectively unorganized labour which is commonly in mutual competition. Additional resources provided by earmarked taxation however do not solve the in-depth discussed general challenges brought about by the introduction tax-funded social security, and in theory might work best as alternative sources of financing a higher level of social protection within contribution-funded social security schemes.

Conclusion

As observed by OECD analysts, recent years have witnessed a rise in new ways of working which has been driven by a mixture of technological advances, the emergence of new business models and management philosophies, as well as by deliberate policy decisions on the part of governments.[53] Especially in the latter case, the general legislator clearly possesses an obligation to pass legislative amendments, which constructively answer to the transformed ways of how individuals or families earn their income, and guarantee effective access to adequate social security schemes for workers or rather *persons*, involved in atypical employment. A growing number of jobs that are broken into separate tasks or "gigs" mean that there is a growing number of workers (gig and on-call), who are not covered by standard labour regulations and institutions.[54] The case is similar concerning more traditional types self-employed persons (e.g. journalists, artists, tourist guides) who are unable to obtain steady and long-term comparable income. As long as social security and traditional employment remain coupled, the lack of labour law applicability relates to a lack of social security coverage.

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[53] OECD, *The emergance of new forms of work and their implications for labour relations. Issue note*. Paper presented at the 1st Meeting of the G20 Employment Working Group, Buenos Aires, 2018, p. 2.

[54] *Ibid.*

As suggested, the most straightforward way of decoupling social security and traditional employment as to provide for a much wider personal scope of coverage, also covering different types of atypical workers, is to substitute a contribution-funded, Bismarckian social insurance scheme with a tax-funded universal social security scheme. In the latter case, the income protection scheme would remain public, not private. It is however difficult to image a situation, in which such extension of social security coverage would not lead to (i) a significantly lower level of social protection, opening the gates to additional, possibly even alternative private insurance schemes, which as a rule benefit socio-economically best-off members of the community most, to (ii) a weakening of individuals' social claims, to (iii) lower levels of proprietary protection of acquired rights and rights in the course of acquisition, and to (iv) increased levels of the general legislator's discretion concerning social rights. Put plainly, tax-funded social security might become *lost in taxation*.

How then, should, policymakers and the general legislator in national welfare states, tailored according to a Bismarckian social insurance scheme, cope with ever changing work patterns as to effectively provide a sufficient level of social protection to all economically active persons, regardless of the type of their employment?

One of the possible solutions is to widen the statutory personal scope of coverage and impose a social security contribution-payment obligation to all forms of work, regardless of its duration and the amount of active income obtained (e.g. marginal employment, zero-hour contracts), whilst offering a variety of tax advantages, subsidies and – not to forget – minimal calculation amounts for cash benefits of low earners as to ensure that even if they obtain low income, possibly due to no fault of their own,[55] their cash benefits are calculated from a higher calculation amount and that their livelihood is secured. Additional expenses due to the imposition of an *every work* or *every contract counts* principle could be covered by socially earmarked taxes collected from revenue of companies, producing additional profits by employing commonly cheaper atypical workers.

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[55] Similar conditions however bring a *social security (insurance) scheme* closer to a *social assistance scheme*, mixing *merit* or *desert* with *need-based deservingness* and should therefore be approached with caution.

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13. New forms of work: the qualification of the relationship through the jurisprudence of civil law systems

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Summary: 1.1. A comparison of court rulings: a precursory issue. 1.2. A comparison of court rulings: the connection between time predetermination to practice the profession and the existence of subordination. 2. The qualification of employment relationships: a legislative task.

A comparison of court rulings: a precursory issue

Proposing a reconstruction of the case law thus far attained in terms of work through digital platforms is predictably a complex job both for quantitative reasons (given that, to date, the number of judgements on cases of employment through digital platforms is very high and well-known), and qualitative reasons (given that many controversies on the matter did not stop at the first instance, but went further, up to the Supreme Court, as occurred in France). Therefore, it was decided to consider the different judgements of the civil law[1] systems proceeding by subjects specifically relating to those issues that, not only the case law itself set as decisive to determine the tangible case, but even the legal doctrine considered crucial for the elaboration of its argumentations in terms of work through digital platforms.

Thus, the first issue to consider concerns the legal nature of the platforms themselves, namely it is a question of clarifying whether they are born with the aim of putting users into contact (for which, not surprisingly,

[1] The most well-known common law rulings are: Employment Tribunal of London, 28th October 2016, No. 2202550; Superior Court of California – County of San Francisco, 16th June 2015, No. CGC – 15 – 546378; United States District Court – Northern District of California, 3rd November 2015, No. 3:13-cv-04065-VC.

the term "prosumer"[2] was coined, meaning the role of a *producer* and a *consumer* at the same time), performing a mere intermediary activity, or if it is a business of people transport or food and drink delivery at home[3].

Most case law is now oriented toward this second way.

In fact, the most significant verdict to qualify the platforms «whose objective is to connect, through a smartphone application upon payment, non-professional drivers who use their own vehicle for people wishing to move in the urban area» as a business activity, is due to the Court of Justice of the European Union[4], in the case that involved the company of Uber System Spain[5], sued by Elite Taxi for unfair competition. In this instance the European Court stated that an intermediary service having this aim «must be considered inextricably linked to a transportation service and thus part of the qualification of services in the transport sector, in accordance with art. 58, section 1, TFUE». The ruling of the European case law marked a furrow in which, indeed, the case law of the internal legal systems was already placed[6].

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[2] The term was first coined by Alvin Toffler (*The third wive*, 1980, New York) to identify the digital market operators who can simultaneously be "producers" and "consumers", namely producing the service but also making use of it. For a detailed study please refer to: A. Quarta, *l diritto dei consumatori ai tempi della peer economy. Prestatori di servizi e prosumers: primi spunti, in Europa e diritto privato,* 2017, file 2, pp. 667-681; R. Bocchini, *La centralità della qualità del servizio nel dibattito in tema di network neutrality, in Diritto dell'informazione e dell'informatica*, 2016, file 3, pp. 517-538; G. Anna, M. Bellomo, "There ain't no such thing as a free lunch".*Una riflessione sui meccanismi di mercato dell'economia digitale e sull'effettività delle tutele esistenti, in Concorrenza e mercato*, 2016, file 1, pp. 205-228.

[3] Not being able to account for the most pertinent issue to the profiles of public law and competition, for a detailed study please refer to: C. Carta, *Regole della concorrenza e tutela della forza lavoro: il (fragile?) schermo della community*, in *Lavoro, Diritti, Europa*, 2018, no. 2; M. Midiri, *Nuove tecnologie e regolazione: "Il caso Uber"*, in *Rivista Trimestrale di diritto pubblico*, 2018, file 3, pp. 1017-1038; L. Belviso, *Il trasporto locale non di linea fr tradizione e innovazione tecnologica. Anche la Corte Costituzionale si pronuncia*, in *Rivista della regolazione dei mercati*, 2017, file 1, available at http://www.rivistadellaregolazionedeimercati.it/materiali/FASCICOLO_1_2017/10_belviso.pdf.

[4] Court of Justice of the EU, Grand Chamber, December 20th 2017, C-434/15. For an accurate comment on the verdict of the European Court of Justice, please refer to: M. Delfino, *Il lavoro mediante piattaforme digitali tra tradizione e innovazione: il caso Uber*, in *Diritti, Lavori e Mercati*, 2018, 2, pp. 335 – 347; M. Midiri, *Nuove tecnologie e regolazione: "Il caso Uber"*, in *Rivista Trimestrale di diritto pubblico,* 2018, file 3, pp. 1017-1038; B. Gomes, *Les plateformes en droit social, L'apport de l'arrêt Elite Taxi contre Uber*, in *Revue de Droit du Travail*, 2018, no. 2, pp. 150-156.

[5] However, it is beneficial to account for the case that tangibly concerned the Uber company, as it does not only have to do with people transport but also food and drink delivery at home, under the UberEats version.

[6] It is accounted for by: O. Pollicino, V. Lubello, *Un monito complesso ed una apertura*

To remember, in particular, the verdicts of the Court of Milan[7] and Turin[8] and, ultimately, the Court of Appeal of Paris[9], which clarified that: «[…le chauffeur…] a ainsi intégré un service de prestation de transport créé et entièrement organisé par la société Uber BV, qui n'existe que grâce à cette plateforme, service de transport à travers l'utilisation duquel il ne constitue aucune clientèle propre, ne fixe pas librement ses tarifs ni les conditions d'exercice de sa prestation de transport, qui sont entièrement régis par la société Uber BV»[10].

The main subject of the case law rulings concerns the fact that Uber –for example – organizes the activity by unilaterally establishing the cost of the service as well as the terms of the contract and taking civil responsibility in case of damage to clients[11].

A comparison of court rulings: the connection between time predetermination to practice the profession and the existence of subordination

The specification of the legal nature of digital platforms, meaning that they conduct business activities, determines an equally important effect even for the profile of the qualification of the employment relationship: if

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al dibattito europeo rilevante: Uber tra giudici e legislatori, in *Osservatorio Costituzionale*, 2017, file 2, June 5th 2017, spec. pp. 9-10-11.

7 Court of Milan, business bureau, May 25th 2015, in Adapt, June 15th 2015, no. 23, with a note by M. Loconsole, *Sharing economy o concorrenza sleale? Breve commento ragionato al caso "Uber pop"*; Court of Milan, business bureau, July 9th 2015, in *Rivista italiana di diritto del lavoro*, 2016, file 1, II, with a note by A. Donini, *Regole della concorrenza e attività di lavoro nella on demand economy: brevi riflessioni sulla vicenda Uber*, pp. 46-50.

8 Court of Turin, business bureau, March 1st 2017, no. 1553, in *Diritto dell'informazione e dell'informatica*, 2017, file 2, with a note by G. Resta, *Uber dinnanzi alle corti europee*, pp. 330-334.

9 Cour D'Appel de Paris, January 10th 2019, n. 18/08357, with a note by B. Krief, *En étant un travailleur «contraint», le chauffeur* Uber *devient un salarié,* in *Bulletin Joly Travail*, February 2019, pp. 8-13.

10 («The driver provided a transportation service created and entirely organized by the Uber company, which does exist only thanks to this platform and through which the driver cannot have his own customers, fix fares freely or set the operating conditions of the service, which are entirely managed by the Uber company»).

11 In Brazil, for example, Uber was sentenced to refund a customer who missed the flight because of the delay caused by the driver who was providing the transport service to the airport, please refer to: 8° Juizado Especial Civil, November 7th 2016, 0801635-32.2016.8.10.0013, at https://www.conjur.com.br/dl/uber-condenada-maranhao-porque.pdf.

the platform can be considered an enterprise, *de facto*, there is a possibility that its collaborators work on behalf (and not simply in the name of) the platform itself, although different solutions remain possible, and that therefore they are included in a business organization of tangible and intangible means, ownerships and platform availability.

If, on the other hand, the activity of the platforms in question is considered a mere intermediary activity between users, namely those who provide the transport/delivery service and those who purchase it, there is a possibility that the providers work through an organization imputable to them.

Therefore, once clarified the precursory yet essential passage of the qualification of the activity of the platforms, it is possible to analyze the other issues inherent to the service of the workers of digital platforms.

Following the well-known verdicts that, in civil law systems, have qualified the employment relationship between *drivers*[12] and *riders*[13] in terms of subordination, or in terms of autonomy[14], the issue that the case law untangled to determine whether the workers of the main digital platforms encountered were self-employed or employees, concerned the connection between time predetermination to practice the

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[12] Please refer to 33ª Vara do Trabalho de Belo Horizonte, February 14th 2017, no. 0011359 – 34.2016.5.03.0112 in *Rivista Italiana di Diritto del Lavoro*, 2017, II, with a note by G. Pacella, *Lavoro e piattaforme: una sentenza brasiliana qualifica come subordinato il rapporto tra Uber e gli autisti*, pp. 570-578, ruling reversed in the following instance of the Tribunal Regional do Trabalho da 3a Região, 9a Turma, Minas Gerais, May 27th 2017, in *Diritto delle relazioni industriali*, 2018, n. 2, with a note by A. Ingrao, *Uberlabour: l'organizzazione "uberiana" del lavoro in Brasile e nel mondo. Il driver è un partener di Uber o un suo dipendente?*, pp. 705-713.

[13] Juzgado de lo Social de Valencia, June 1st 2018, n. 244, at https://adriantodoli.com/2018/06/04/primera-sentencia-que-condena-a-deliveroo-y-declara-la-laboralidad-del-rider/, with a note by A. Todolì, *Primera sentencia que condena a Deliveroo y declara la laboralidad del* rider, June 4th 2018; in *Labour and Law Issues*, 2018, no. 1, with a note by G. Pacella, *Alinità del risultato, alienità dell'organizzazione: ancora una sentenza spagnola qualifica come subordinati i fattorini di Deliveroo.*

[14] As for the case of *drivers,* even the Chinese law seems still settled in this direction. There are three cases discussed before the local courts of Beijing: Sun Yongling v Beijing Yixin Yixing Automotive Technology Development Services Ltd Labour Dispute Beijing First Intermediate People's Court, Civil Judgment (2015) Yi Zhong Min zhong Zi of No 176*; Wang Zheshuan v Beijing Yixin Yixing Automotive Technology Development Services Ltd Labour Dispute,* Beijing Shijingshan District People 's Court Civil judgment (2014) Shimin Chu Zi No. 367; *Zhuang Yansheng and Beijing Yixin Yixing Automobile Technology Development Service Co., Ltd Labour Dispute Appeal*, Beijing First Intermediate People's Court, Civil Judgment (2014) Yi Zhong Min zhong Zi of No. 6355, for which cfr. M. Zou, *The regulatory challenges of "Uberization" in China: classifying ride-hailing drivers,* in *International Journal of Comparative Labour Law and Industrial Relations,* 2017, vol. 33, no. 2, pp. 269-294.

activity and the existence of a subordination bond. In other words, the most acute question is to understand if the degree of autonomy of workers in establishing not only *if* but also *when* in their job, is decisive for the purposes of the qualification, to such an extent that it is ruled out that they are employees. It is, indeed, well known that the company sets time slots (*slots* in the most common language used by food and drink delivery platforms) within which *riders* and *drivers* are included according to self-assignment mechanisms, for which reason the choice of the service delivery is entrusted to them.

As far as we are concerned, in fact, the Italian case law thus far expressed on the case of the qualification of delivery men relationships[15], has ruled out that they are employees by virtue of the fact that they can decide if and when to work. Furthermore, the interpretative option led the two first instance judgements to exclude not only the implementation of art. 2094 c.c., but also art. 2 pursuant to Legislative Decree no. 81/2015, conversely implemented by the latest judgement of the Court of Appeal of Turin. For both Courts of First Instance the freedom of digital delivery men to decide if and when to work originally compromises the company exercise of the executive and disciplinary power since the hypothesis of ascertaining the subordination bond between the parties would be completely deprived of content from the beginning, namely by simply looking at the genetic stage of the relationship. As carefully observed by an accurate comment on the verdict, the courts evaluated only one segment of the employment relationship with the platform, the early stage, omitting to evaluate also the other segment, or the executive stage of the work service[16].

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[15] Court of Turin, May 7th 2018, no. 778, with a note by M. Del Conte, O. Razzolini, *La gig economy alla prova del giudice: la difficile reinterpretazione della fattispecie e degli indici denotativi*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2018, no. 3, pp. 673-682; G. A. Recchia, "*Gig economy" e dilemmi qualificatori: la prima sentenza italiana*, in *Il Lavoro nella giurisprudenza*, 2018, no. 7, pp. 726-734; P. Ichino, *Subordinazione, autonomia e protezione del lavoro nella gig-economy*, in *Rivista italiana di diritto del lavoro*, 2018, II, pp. 294-303; with a note by E. Gramano, *Dalla eterodirezione alla eterorganizzazione e ritorno. Un commento alla sentenza Foodora*, in *Labor*, 2018, file 5, pp. 609-619; with a note by P. Tullini, *Prime riflessioni dopo la sentenza di Torino sul caso Foodora*, in *Lavoro, Diritti, Europa*, 2018, file 1, at www.lavorodirittieurpoa.it; I. Massa Pinto, *La libertà dei fattorini di non lavorare e il silenzio sulla Costituzione: note in margine alla sentenza Foodora*, in *Osservatorio Costituzionale*, 2018, no. 2; Court of Milan, September 10th 2018, no. 1853 with a note by M. Forlivesi, *Nuovi lavori, vecchie interpretazioni? Note a margine di una recente sentenza del Tribunale di Milano sulla qualificazione giuridica dei c.d."riders"*, in *Labor*, 2019, file 1, pp. 112 – 120.

[16] In fact M. Forlivesi, quote, mentions the «(pre)choice of the judge» to rule out

In Brazil, law mainly addressed the Uber case considering that, according to the legal doctrine, it is one of the most important forms of *sharing economy* in the Brazilian territory[17]: the existence of the subordination bond is ascertained by the judges, in accordance with art.3 of the CLT, in respect of the legal personality, onerousness and non-randomness requirements of the work service[18]; however, even for the Brazilian courts the freedom for the drivers to decide if and when to work has represented, more often than not, a turning point to exclude the subordination bond[19], since «o motorista pode ficar off line, […] decidindo quando, como e a forma de utilização da plataforma; […] tinha liberdade de definir seu próprio horário de trabalho (utilizando os recursos on line e off line)»[20].

Even in Spain[21], the Juzgado de lo Social de Madrid[22], at first ruled that the delivery men of the Glovo platform were self-employed, specifically accounting for the freedom of the *riders* to place themselves on

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subordination.

17 G. Davidov, *The Status of Uber Drivers: A Purposive Approach*, in *Spanish Labour Law and Employment Relations Journal,* 2017, no. 2, pp. 6-15; P. Borba Vilar Guimarães, L. do Monte Silva, *Self Regulation In The Contemporary Urbanism: Smart Cities And Urban Mobility*, in *Revista de Direito da Cidade*, 2016, vol. 8, no. 4, pp. 1231-53,which emphasize the cost-effectiveness of transportation for the Brazilian population via Uber rather than through public transit services: «Tendo em vista que adquirir um veículo ou pagar o transporte de um local para outro, de forma individual, através de Táxis, para parcela da população é um meio custoso, observa-se a existência de ônibus e metrôs que compartilham os custos desses meios de transporte, diminuindo os valores para cada indivíduo».

18 33ª Vara do Trabalho de Belo Horizonte, February 14th 2017, no. 0011359 – 34.2016.5.03.0112; Tribunal Regional do Trabalho da 2° Região, April 20th 2017, no. 1001492-33-2016-5-02-0013, available at jusbrasil.com.

19 Please refer to: Tribunal Regional do Trabalho da 3° Região , April 5th 2019, no. RO 0011423320175030179; Tribunal Regional do Trabalho da 3° Região, August 3rd 2018, no. RO 0010798-32.2017.5.03.0106; Tribunal Regional do Trabalho da 2° Região, September 20th 2017, no. RO 10015774-25.2016.5.02.0026; Tribunal Regional do Trabalho da 3° Região, March 23rd 2017, no. 0011359-34.2016.5.03.00112; Tribunal Regional do Trabalho da 3° Região, December 9th 2016, no. 0011863-62.2016.5.03.0137; Tribunal Regional do Trabalho da 1° Região, November 22nd 2016, no. 0100129-75.2016.5.01.0203 (RO), all available at jusbrasil.com.

20 Tribunal Regional do Trabalho da 3° Região, March 23rd 2017, no. 0011359-34.2016.5.03.0112 (RO), at jusbrasil.com. (« the driver can switch to the offline mode, deciding when, how and in what way the platform is to be used; he has the freedom to define his working time (using online and offline mechanisms) »).

21 For a total revision of the Spanish body of laws on the case of the delivery men of *food delivery* platforms, please refer to: M. López Balaguer, *Trabajo en plataformas digitales en España: primeras sentencias y primeras discrepancias*, in *Labour and Law Issues*, 2018, no. 2.

22 Juzgado de lo Social de Madrid September 3rd 2018, no. 284.

a day and in a working time slot and to accept the implementation of the service. Indeed, the court argued that «el demandante no tenía jornada ni horario. Él decidía la franja horaria en la que deseaba trabajar, elegía los pedidos que le interesaban y rechazaba los que no quería, decidía con libertad la ruta a seguir hasta cada destino, no tenía obligación de comenzar o finalizar su jornada en una determinada hora […]. El actor decidía el cómo, el dónde y el cuándo de la prestación de servicios, tenía el dominio completo de su actividad y podía incluso desistir de un servicio previamente aceptado a mitad de ejecución sin sufrir por ello penalización alguna (hecho probado sexto)»[23].

Therefore, the time flexibility characterizing these employment relationships meets and clashes with the two legal components that, also in accordance with the Spanish legal system, define the subordination bond, the so-called "trabajo por cuenta ajena" (art. 1 E.T), namely: ajenidad e dependencia (*i.e.* «work on behalf of third parties, namely: alienation and employment»).

However, shortly after, another Spanish body of laws[24] acknowledged that the relationship between the *riders* and the technological platform is to be considered an employment relationship. The judgement is significant also because it suggests a different methodological approach to qualify the relationship between the parties involved: the judge examines the context and the market in which they both meet. In fact, after listing the indicators that exclude the existence of an employment relationship, it proposes other indicators ("nuevos indicios") deriving from new forms of work through technological platforms and that, as a result, would force the providers to take them into account to qualify the relationship between the parties.

The Spanish case law thus ruled, in conjunction with the aforementioned judgement, that the delivery men of Glovo are to be considered

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23 («the claimant did not have set days or work hours. He did decide on the time slot in which he wished to work, chose the rides of interest and refused those he did not want, he freely decided the route to follow with no obligation to begin or end the work day at a set time. The claimant did decide how, where and when to provide the service, he was able to manage his activity in complete autonomy and could even refuse a service previously accepted while providing it without being subject to any disciplinary sanctions»).

24 Juzgado de lo Social de Madrid, February 11th 2019, no. 53, for a comment please refer to the article by A. Todolì, Análisis a la Primera Sentencia que declara la laboralidad de Rider de Glovo (y declara nulo el despido), February 13th 2019, at https://adriantodoli.com/2019/02/13/analisis-a-la-primera-sentencia-que-declara-la-laboralidad-de-rider-de-glovo-y-declara-nulo-el-despido/.

subordinate workers. In particular, regarding the freedom of work hours, the court argued that: «la pretendida libertad en la elección de horas o franjas horarias, que depende de un sistema de puntuación que hace que el trabajador tiene que plegarse a las exigencias empresariales si quiere configurar un horario que resulte rentable. Ello hace que la flexibilidad laboral que pretende hacer ver la empresa se convierta en una manera de hacer competir a los recaderos para lograr las mejores horas que ya no son las más compatibles con su vida personal, sino las que la empresa considera más rentables o de alta demanda»[25].

Namely, the time flexibility is, however, the result of a choice that aims to identify the most profitable time slots for the company and certainly not to preserve a better conciliation between life and working time for delivery men.

Lastly, a further judgement by the court of Madrid followed, which, while not significantly enriching the debate already underway in Spain[26], resumed last February's ruling of the same court, and confirmed that «debe […] afirmar plenamente la laboralidad de la relación»[27].

Here recurs the subject that had oriented the judge's ruling in the previous case, i.e. «En éste contexto las parcelas de libertad para decidir días y horas de trabajo y aceptación de servicios concretos no le proporcionan ninguna facultad o poder que pueda condicionar el desarrollo de la actividad empresarial ya que GLOVO […] cuenta con tan amplio elenco de repartidores dispuestos a trabajar que la ausencia de unos es suplida automáticamente con la presencia de otros y también cuando el repartidor rehúsa atender algún servicio asignado»[28].

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[25] Juzgado de lo Social de Gijón, February 20th 2019, no. 61. («the claimed freedom to determine the schedule or the time slot depends on a scoring system that makes the worker adapt to the business needs to configure a working time that will result profitable. This means that the work flexibility expected by the company becomes a competition for those delivery men who need to choose the best time slots, which are not the ones compatible with their personal life rather those that the company considers more profitable and highly demanding»).

[26] For a brief comment please refer to the article by A. Todolì, *Nueva Sentencia que declara la laboralidad en Glovo. Aplica el Convenio Colectivo del Transporte categoría de Mozo*, April 9th 2019, at https://adriantodoli.com/2019/04/09/nueva-sentencia-que-declara-la-laboralidad-en-glovo-aplica-el-convenio-colectivo-del-transporte-categoria-de-mozo/.

[27] Juzgado de lo Social de Madrid, April 4th 2019, no. 133. (« it must be fully confirmed that it is an employment relatioship»).

[28] («in this context the freedom to decide on the day, the work hours and whether to accept a specific work service do not imply any ability or authority that can affect the development of the business activity since Glovo has at its disposal such a wide list

It is therefore clear that the freedom of the delivery man to decide on the time slot to register for the service is an unimportant matter to the platform, which has such a reserve army of delivery men at its disposal that its organization is not compromised even in case of multiple refusals.

As far as the French legal system is concerned, a first law orientation had repeatedly excluded the employment nature of the delivery men of food delivery[29]; after all, as observed by the legal doctrine, «la plupart des arrêts rendus par la cour d'appel de Paris proviennent de la même chambre sociale, composée à l'identique, avec le même président et les mêmes asseurs (pôle 6, chambre 2). Ces arrêts sont donc très proches (pour ne pas dire indentiques…) dans leur construction et leur rédaction»[30].

However, the literature had already observed that the subject of the freedom of work hours, for example the *livreurs*, was fragile, since: «le livreur est certes libre de choisir les créneaux pendant lesquels il entend travailler, mais, dés lors qu'il se connecte, il perd toute liberté piusqu'il lui faut alors accepter les courses prescrites, sauf à risquer la mise en œuvre à ses dépens de la clause résolutoire prévue au contract». And thus «comment ne pas y voir un pouvoir dedirection qui, s'ajoutant au pouvoir de sanction prévue par le contract, caractérise l'existence d'un état de subordination du travailleur?»[31].

Also the Italian legal doctrine, commenting on the verdict with which the Court of Appeal of Paris had ruled out the subordination nature of the relationship between cycle couriers, found a space for subordination carved out by the judges themselves, «where the condi-

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of delivery men willing to work that one unavailable is automatically substituted by another available even when refusing to provide the service assigned»).

29 For Takeateasy: Cour d'Appel de Paris, April 20th 2017, no. 17/0051; Cour d'Appel de Paris, December 14th 2017, no. 17/04607. For Deliveroo: Cour d'Appel de Paris, November 9th 2017, no. 16/12875, also in *Rivista italiana di diritto del lavoro,* 2018, I, with a note by A. Donini, *La libertà di lavoro sulle piattaforme digitali*, pp. 63-71.

30 A. Fabbre, *Les travailleurs des plateformes sont-ils des salariés?*, in *Droit Social*, 2018, no. 6, pp. 547-558, here p. 549. («most of the judgements ruled by the Court of Appeal of Paris come from the same chambre sociale, identically composed with the same president and the same members. These judgements are therefore very similar (not to say identical) regarding their elaboration and drafting»).

31 A. Fabbre, *Plateformes numériques: gare au tropisme "travailliste"!*, in *Revue de Droit du Travail*, 2017, no. 3, pp. 166-170, here p. 170. («the delivery man is certainly free to choose the time slots in which he intends to work but, as soon as connected, he is deprived of any freedom since he must accept the rides assigned, or else he is subject to the rescissory clause of the contract at his expenses. And thus: how can we not witness an executive power that, along with the disciplinary power provided for by the contract, characterizes the existence of the subordination status of the worker?»).

tions of the service are unilaterally determined by the employer with the ensuing employment of a *service organisé*, according to a logic appropriately juxtaposed with the one of the local hetero-organization»[32].

Conversely, the Spanish legal doctrine highlighted the reasons for the ruling of the Court of Appeal of Paris, relating to «enorme libertad a las partes contratantes y, especialemente, al profesional que no subordina en momento alguno su prestacíon a las especiales condiciones que le vengan impuestas desde la plataforma»[33].

At a later time, the authoritative ruling of the French Chambre Sociale[34] on the case of the TakeEatEasy platform, qualified the employment relationship between the parties of the home food delivery platform in terms of subordination[35] according to the principle of predominance, also proven in the rulings of the Brazilian and Spanish case law, for the purposes of the qualification of the actual service performance based on the deed will of the parties as well as on the exercise of a control power (geolocation system) and sanctions (disconnection from the platform) by the company.

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[32] R. Voza, *Nuove sfide per il* welfare*: la tutela del lavoro nella gig economy*, in *Rivista del diritto della sicurezza sociale*, 2018, no. 4, pp. 657-685, here p. 672.

[33] J. R. Mercader Uguina, *La prestacíon de servicios en plataformas profesionales: nuevos indicios para una nueva realidad*, in A. Todolí, M. Hernández Bejarano (directores), *Trabajo en plataformas digitales: innovacíon, derecho y mercado*, Aranzadi, Navarra, 2018, pp. 155-176, spec. p. 161. («the wide freedom of the contractors and, above all, the worker who never subordinates the service to special conditions imposed by the platform»).

[34] Cour de Cassation, Chambre Sociale, November 28th 2018, no. 1737, with a note by C. Courcol-Bouchard, *Le livreur, le plateforme et la qualification du contract*, in *Revue de Droit du Travail*, 2018, no. 12, pp. 812-819; M. Peyronnet, *Take Eeat Easy contrôle et sanctionne des salariés*, in *Revue de Droit du Travail*, 2019, no. 1, pp. 36-40; C. Larrazet, *Régime des plateformes numériques, du non-salariat au projet de charte sociale*, in *Droit Social*, 2019, no. 2; and finally a comment by the CGT union, *Mémoire en intervention volontaire de la CGT dans l'affaire TakeEeatEasy*.

[35] The qualification of the Uber drivers remains undefined: the motions to convert the collaboration contracts stipulated by the company into employment contracts, presented before the Conseil de prud'hommes of Paris (e.g. please refer to the lawsuit introduced by the lawyer J. P. Teissonnière, on April 14th 2017, in *Semaine sociale Lamy*, 2017, no. 1767, pp. 8-9) are not heterogeneous: at first both the lawsuit proposed by the URSSAF against Uber (decided by the Court of Cassation civ., 2e ch., 7 juillet 2016, no. 15-16110) and the ruling made by the Conseil de prud'hommes of Paris (December 20th 2016, no. 14/11044) ascertained that the workers of the platform were false self-employed. However, the same Conseil de prud'hommes de Paris later issued an opposite ruling, excluding that the collaboration contract between Uber and one of its drivers could be considered an employment contract (Cons. prud'h. Paris, January 29th 2018, no. F16/11460).

Therefore, as observed by the French legal doctrine in the comment on the ruling of the Chambre sociale[36], the motivation for the judgement is not based on the *notion* of subordination rather on the *evidence* of its existence, to the point that the judges did not consider necessary to ensure the triad representing the classical definition of subordination in the strict sense in the French legal system, deriving from the previous case law[37], but rather necessary to focus on two empirical and factual elements of geolocation and disconnection from the platform to deductively obtain the existence of the subordination bond.

It is hence a ruling that, although being scant in its motivations, «[…] est significatif de la relative ouverture de la jurisprudence quant à la qualification de contract de travail. Et elle augure d'une très large requalification à venir des travailleurs des plateformes […]»[38].

These rulings are to be added to those of the Belgian and Dutch legal systems, which both ruled out that the delivery men of home food delivery platforms can be defined as self-employed. Specifically, the Belgian Commission administrative de règlement de la relation de travail (CRT)[39] rejected the qualification of delivery men as self-employed based on the fact that: «les modalités de réservation des sessions de même que les conséquences associées au fait de ne pas être disponible pendant les plages acceptées, sont très contraignantes. Elles imposent, *de facto*, au coursier de rester à disposition de la plateforme pendant toutes les plages qu'il a réservées plus d'une semaine à l'avance»[40].

Indeed, resuming the consolidated case law of the Court of Cassation, the CRT clarifies that: «La circonstance que celui qui exécute le travail dispose de la liberté de donner suite ou non à une offre de travail de son employeur et qu'il peut, le cas échéant, la refuser, n'empêche

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36 E. Dockès, *Le salariat des plateformes. À propos de l'arrêt TakeEatEasy*, in *Le Droit Ouvrier*, January 2019, no. 846.

37 As reported by the legal doctrine, the notion of subordination dates back to the Cour de Cassation, July 6th 1931, no. DP 1931.1.131, no. P. Pic, in E. Dockès, quote, p. 5.

38 E. Dockès, quote, p. 5. («is important with respect to the openness of case law in relation to the qualification of the employment contract. It does wish for a wider revitalization for the future of employees of digital platforms»).

39 Commission Administrative de règlement de la relation de travail (CRT) – Chambre Francophone, March 9th 2018, no. 113, available at: https://commissionrelationstravail.belgium.be/docs/dossier-113-fr.pdf.

40 («the conditions to book time slots and the consequences of not being available at the time accepted are very restrictive. In fact, these oblige the delivery man to be available to the platform in the time slots reserved more than one week before»).

donc pas que, dès qu'il a accepté le travail, l'employeur dispose de sa main-d'œuvre et affecte celle-ci selon les dispositions du contrat»[41].

At first, the Dutch case law had decided not to acknowledge the relationship between the *riders* and the Deliveroo platforms as an employment relationship[42]; however, a second orientation[43] acknowledged that the company is the employer and, thus, the relationship with the delivery men can not be considered a self-employment relationship. The subject through which the Court of the Netherlands comes to its decision is interesting, once again, in relation to the alleged freedom of workers since, as observed by the judge of the tangible case, the mechanism of the Deliveroo company, entrusted with the task of assigning and allocating the single delivery job (so called *Frank*), identifies those delivery men who are closest to the restaurant from which the delivery must leave; therefore, as observed by the court, the *rider* who intends to obtain the assignment of the task must be nearby the restaurant: a matter of fact with effects and relevance even in terms of legal employment relationships as this means that the *rider* must already be available to make the delivery. This, according to the Court of The Netherlands, relativizes the concept of freedom of the delivery man and, in conjunction with the ascertainment of the other elements referred to in art. 7:610 (lid 1) of the Burgerlijk Wetboek[44], helps confirm the existence of an employment relationship between the parties.

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41 («the circumstance under which the employee has the freedom to be available or unavailable to work and to refuse does not prevent that, once accepted the job, the employer has a workforce available according to the contract provisions»).

42 Rechtbank Amsterdam, July 23rd 2018, no. 6622665 CV EXPL 18-2673, at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:5183.

43 Rechtbank Amsterdam, January 15th 2019, no. 7044576 CV EXPL 18-14763, at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2019:198.

44 Art. 7:610: «1. De arbeidsovereenkomst is de overeenkomst waarbij de ene partij, de werknemer, zich verbindt in dienst van de andere partij, de werkgever, tegen loon gedurende zekere tijd arbeid te verrichten.
2. Indien een overeenkomst zowel aan de omschrijving van lid 1 voldoet als aan die van een andere door de wet geregelde bijzondere soort van overeenkomst, zijn de bepalingen van deze titel en de voor de andere soort van overeenkomst gegeven bepalingen naast elkaar van toepassing. In geval van strijd zijn de bepalingen van deze titel van toepassing».
(«1. The employment contract is the agreement under which one party, the employee, is committed to working for a certain period of time at the service of the other party, the employer. 2. When an agreement meets both the resolution of paragraph 1 and that of another special type of contract regulated by law, the provisions of this agreement as well as the provisions of the other type of agreement apply jointly. In the event of a conflict, the provisions of this agreement are applied»).

Thus, some brief concluding remarks on the matter are needed: the absence of heterodirection with respect to the time predetermination, entrusted to the self-management of the same drivers or delivery men, doe not rule out subordination for two essential reasons.

First and foremost because, although there is no predetermination of if and when to work in the genetic stage, this is found in the executive stage; on several occasions the case law has confirmed, even in the past, that for the purposes of the ascertainment of the subordination bond, it is not relevant to verify what the parties established in the negotiation program, which is a precursory phase of the employment relationship, but rather verify the exercise of powers by one party over the other in the executive stage of the employment relationship. In fact, a recent ruling by the Italian Court of Cassation decided that: «since subordination is limited to a truly agreed relationship, the fact that […], the individual worker was free to accept or not to accept the offer, be or not to be at work without the need for justification and with the prior consent of the worker to be replaced by others […] remains irrelevant»[45]. Thus, protracting the agreement over time is not necessary[46] and, in particular, as observed by the Cassation, «the predisposition and subjection are the depiction of the content of the relationship in its tangible implementation», so that, «the fact that the employee is free to accept or not to accept the offer and to be or not to be at work […] does not pertain to this subject, but it is external not only logically but even temporally (as it comes before the service implemenation)»[47].

In this particular case, the subject of the decision concerned male and female workers of horse-racing agencies, whose relationship is characterized by the same features that can be found in digital work *riders*: namely the ability to manage their availability to work, in the times (if and when to accept the call) and in the ways (to be replaced without justification) preferred.

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[45] Cassation, February 13th 2018, no. 3457.

[46] Cassation, July 10th 1999, no. 7304; August 1st 2008, no. 21031; January 7th 2009, no. 58, according to which the subordination bond «does not include in its distinctive and indefectible characteristics the duty of the worker to be available to the employer, with the consequence that the shortage and irregularity of the services rendered by a worker […] do not qualify the employment relationship as independent».

[47] Cassation, February 13th 2018, no. 3457.

However, as known to that part of legal doctrine that already addressed the comments on the judgement[48], the Italian case law, finally, expressly but unreasonably refused to consider these principles applicable, deeming the comparison with the employment relationship through digital platforms as irrelevant and beyond the limits of the analogy. Yet, the peculiarity of the relationship characterizing both the case of workers of betting agencies and the case of workers through digital platforms, does not make the comparison between the cases inappropriate.

Furthermore, another consideration can be added: is the connection between hetero-direction, time duty and subordination indefectible?

Specifically, we are referring to a heterorganization that even a well-known constitutional case law once defined as an element to determine subordination in the strict sense[49], and that was also adopted by the Italian legal doctrine[50].

Should the reference to the case law of the Constitutional Court appear anachronistic, it is worth referring to the Court of Appeal of Paris[51], which acknowledged the "salarié" nature of a Uber driver, and built the decision of the existence of subordination around the fact that the platform organizes the work activity[52], depriving employees of

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[48] Court of Appeal of Turin, February 4th 2019, no. 26, with a note by R. De Luca Tamajo, *La sentenza della Corte di appello di Torino sul caso Foodora. Ai confini tra autonomia e subordinazione*, in *Lavoro, Diritti, Europa*, 2019, file 1; with a note by P. Tullini, *Le collaborazioni etero-organizzate dei riders: quali tutele applicabili?*, in *Lavoro, Diritti, Europa*, 2019, file 1; with a note by M. Paoletti, *Ciclofattorini: una sentenza interessante, un problema ancora molto aperto*, in *Lavoro, Diritti, Europa,* 2019, file 1; with a note by T. Sacchetti, L. Fassina, *La tutela del lavoro nell'economia delle piattaforme: note di politica del diritto e di politica sindacale a margine della sentenza Foodora*, in *Lavoro, Diritti, Europa*, 2019, file 1, available at www.lavorodirittieurpoa.it; con nota di F. Martelloni, *La Corte di Appello di Torino tira la volata ai riders di Foodora*, in *Questione Giustizia*, April 17th 2019.

[49] In reference to the Constitutional Court, February 5th 1996, no. 30, a judgement arisen from the masterful reflection of Luigi Mengoni. The same subject was later resumed by the Court of Cassation, February 19th 2016, no. 3303; April 8th 2015, no. 7024; April 17th 2009, no. 9256 and January 16th 2007, no. 820 with a note by A. Allamprese, *Subordinazione e doppia alienità: la Cassazione batte un colpo*, in *Rivista Giuridica di diritto del lavoro*, 2007, II, pp. 658-659.

[50] Please refer to the remarks of D. Gottardi, *Da Frankenstein ad Asimov: letteratura "predittiva", robotica e diritto del lavoro*, in *Labour and law issues*, 2018, vol. 4, no. 2, especially p. 8, nt. 16; M. Roccella, *Spigolature in tema di subordinazione. lo strano caso del sig. B*, in *Rivista giuridica del lavoro*, 2007, no. 2, pp. 131-148; Idem, *Lavoro subordinato e lavoro autonomo, oggi*, CSDLE "Massimo D'Antona", no. 65/2008.

[51] Cour D'Appel de Paris, January 10th 2019, no. 18/08357.

[52] (Re)evaluating the concept of organization is paramount when it comes to digital

every other decision-making power –in the executive stage of the relationship. In fact, the aforementioned ruling of the Court of Appeal of Paris reads that: «à propos de la liberté de se connecter et, partant, du libre choix des horaires de travail, il convient tout d'abord de souligner que le fait de pouvoir choisir ses jours et heures de travail n'exclut pas en soi une relation de travail subordonnée, dès lors qu'il est démontré que lorsqu'un chauffeur se connecte à la plateforme Uber, il intègre un service organisé par la société Uber BV, qui lui donne des diretives, en contrôle l'exécution et exerce un pouvoir de sanction à son endroit»[53].

Finally, it can be assumed that in employment relationships through platforms, the freedom of both parties to leave the negotiation program partially undefined does not exclude subordination a priori, if in the executive stage of the service the judge ascertains that one party (employer) exercises powers over the other (provider)[54]. Even the European Court of Justice in the cases of Allonby[55] and *AberCrombie & Fitch Italia*[56], referred to by the Italian legal doctrine with regards to the digital workers, ruled that the fact that no obligation to accept an assignment encumbers the workers is irrelevant in the process of qualification of the employment relationship.

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platforms, since «the connection between work and organization, which is the theoretical basis of the reflections on the employment contract up to the present day, encompasses unprecedented elements», L. Corazza, *Note sul lavoro subordinato 4.0,* in *Diritto delle relazioni industriali*, 2018, no. 4, pp. 1066-180, here p. 1074. For clarifications on the subject please refer to: M. Franceschetti, D. Guarascio, *Il lavoro ai tempi del management algoritmico. Taylor è tornato?*, in *Rivista giuridica del lavoro,* 2018, no. 4, pp. 705 – 727 (where authors propose an analysis of the effects of technological transformations on the work organization, specifically in reference to the workers' skills); A. Salento, *Industria 4.0, imprese, lavoro. Problemi interpretativi e prospettive*, in *Rivista giuridica del lavoro*, 2017, no. 2, pp. 175-194.

53 («most importantly, as for the freedom to connect and, therefore, choose the working time, it should be observed that the fact of choosing the working time and days does not exclude the existence of an employment relationship since the driver integrates a service organized by the Uber company, which gives guidelines, controls the service implementation and exercises a disciplinary power in place of the drivers»).

54 The wide literature on the subject imposes to refer to the major contributions, please refer to: M. Martone, *Subordinazione. Una categoria del ventesimo secolo*; R. Pessi, *L'autonomia privata ed i limiti alla disponibilità del tipo* in M. Martone (a cura di), *Contratto di lavoro e organizzazione*, vol. IV, *Contratto e rapporto di lavoro*, t. I, in M. Persiani, F. Carinci (diretto da), *Trattato di diritto del lavoro*, Volume I, 2012, Cedam, respectively pp. 4-47 and pp. 49-90.

55 Trial C-256/01, 13th January 2004.

56 Trial C-143/16, 19th July 2017.

Moreover, in countries with a Roman law tradition, the interpretation of subordination has always given great importance to the hetero-direction component[57] which, however, is not left out in the definition of subordination but rather evaluated together with the heterorganization component.

The qualification of employment relationships: a legislative task[58]

It is clear that in terms of judgement on merits the judges are aware of identical issues on the matter: as much as each digital platform that allows *on demand* work has specific elements characterizing the organization of the platform itself, in general it can be believed that the same platform operates equally in every territory where a market space is found. Thus, Uber Brazil is not too distant from Uber France, and so forth for other civil law systems considered as elements of comparison.

Furthermore, it can be noticed that even in terms of legitimacy judgements, given the analogy between the sources that, in each of the two legal systems regulate the relations in question, the judges apply the same principles of law in the hermeneutic process. The comparative example between Italy and Brazil regarding the regulation of the employed worker will suffice, in accordance with art. 3 of CLT[59] of the South American legal system, «Considera-se empregado toda pessoa física que prestar serviços de natureza não eventual a empregador, sob a dependência deste e mediante salário»[60]: a provision that is noticeably very similar to that included in art. 2094 c.c.

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[57] Based on this dominant and classical interpretation of subordination in terms of hetero-direction please refer to the accurate remarks by L. Mengoni, *Il contratto di lavoro nel ventesimo secolo,* in *Il diritto del lavoro alla svolta del secolo*. Reports of the labour law study days, Ferrara, May 11th-12th-13th 2000, Milan, 2002, pp. 3-22.

[58] Consider that this paper was completed in July 2019, when the Decree, September 3, 2019, n. 101 (and the conversion law, 2 November 2019, n. 128) had not yet come into force in Italy. The decree extended the application of art. 2 of Decree no. 81/2015, modified, to collaborators who also work via digital platform. The decree also extended the application of specific protections to riders qualified as self-employed.

[59] Consolidação das Leis do Trabalho of 1943.

[60] («the subordinate worker is considered to be the person who provides the entrepreneur with non-casual employment services, employed by the latter upon payment»)

The same is valid for the provision of art. 1 of the Estatuto de los trabajadores[61] pursuant to which: «Esta ley será de aplicación a los trabajadores que voluntariamente presten sus servicios retribuidos por cuenta ajena y dentro del ámbito de organización y dirección de otra persona, física o jurídica, denominada empleador o empresario»[62].

The analogy between the provisions referred to is evident. And also in reference to the French legal system, which does not have a legislative definition of subordination but rather legal[63], the Cour de Cassation ruled that «le lien de subordination est caractérisé par l'exécution d'un travail sous l'autorité d'un employeur qui a le pouvoir de donner des ordres et des directives, d'en contrôler l'exécution et de sanctionner les manquements»[64].

Therefore, in view of the fact that the comparison between the different legal systems does not seem risky and since the analysis of the judgements leads us to trace reflective profiles that can be worth and foster an international debate, it is believed that the reference to the legal source should stop at a certain point. It cannot be ignored that what determines a change of direction between one ruling and another is not the geographical origin of reference, hence it is not the comparison between legal formants belonging to different legal systems that worries, but the different status of litigation considered in relation to the same conflict: a tangible fact in the French legal system as well as in the Italian one that, while still downplaying the subordinate nature of the relationship, following the latest ruling of the Court of Appeal of Turin, is being revised with respect to the two previous case laws.

And thus, in all likelihood, the divergences in the qualification and regulation of the case of digital platform work do not come from reasons

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61 Real Decreto Legislativo no. 2 of October 23th 2015.

62 («this law will apply to those workers who willingly provide their paid service on behalf of third parties within the organization and under the supervision of another person, natural or legal, named employer or entrepreneur»).

63 The legal doctrine subsequently elaborated the concept of subordination so called *juridique*: for further information on the subordination category in the French legal system please refer to: A. Jeammaud, *L'avenir sauvegardé de la qualification de contrat de travail. À propos de l'arrêt Labbane*, in *Droit social*, no. 3, pp. 227-237; A. Supiot, *Les nouveaux visages de la subordination*, in *Droit Social*, 2000, no. 2, pp. 131-145; J. Pélissier, A. Lyon-Caen, A. Jeammaud, E. Dockés, *Les grands arrêts du Droit du Travail*, Dalloz, 2008, 4 ed.

64 Cour de Cassation, November 13th 1996, no. 94-13187, in *Droit sociale*, 1996, with a note by J. J. Dupeyroux, p. 1067. («the subordination bond is distinguished by the implementation of a job under the authority of the employer who is entitled to give orders and directives, supervise the execution and sanction non-fulfillments»).

relating to the different historical-juridical context which the judgements of the courts belong to, but from the source referred to. Namely, the case law is a source that, in the absence of a legislation[65], cannot be considered fully adequate to define the employment relationship in question.

What leads us to believe that the case law can provide an abstract and not merely concrete definition of the case is the principle around which the case law itself is building its regulatory function: the principle of prevalence of the executive stage of the relationship over the deed will of the parties. Many of the judgements analyzed, in the qualification process of the case, do not lack an explicit reference to this principle[66] which, however, must be applied only in the specific case.

In contrast, it seems that the case law is willing to define the case abstractly: as accurately pointed out by Tullini[67], it is striking that, for example, in the judgement of the Court of Turin[68], the first judgement of the Italian legal system on the case of Foodora *riders*, the judge, as a first step, explicitly clarified that he did not want to address the low payment and the exploitation condition of the *riders*, meaning that only the abstract qualification profile is of interest and that, as a result, those tangible issues can be omitted which, on the other hand, should be a fundamental component in the decision of a dispute in court[69]. Thus, the specific case is not entirely accounted for and the refusal of the case law to address it is certainly a methodological choice –rightly says Tullini – but perhaps also a political choice.

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65 Except for France where the Loi Travail no. 1088 became law on August 8th 2016, on the subject of "Travailleurs indépendants recourant, pour l'exercice de leur activité professionelle, à une ou plusieurs plateformes de mise en relation par voie électronique", a law that hence regulates self-employed workers of digital platforms; and Portugal where Law no. 45 entered into force on August 10th 2018, on the subject of "Regime jurídico da atividade de transporte individual e remunerado de passageiros em veículos descaracterizados a partir de plataforma eletrónica", limited to the transport sector.

66 The principle was reiterated several times by the Italian case law. Lastly please refer to: Cassation, October 27th 2003, no. 16119; Cassation June 30th 2014 no. 14757; Cassation, June 25th 2018, no. 16690.

67 P. Tullini, *Prime riflessioni dopo la sentenza di Torino sul caso Foodora*, in *Lavoro, Diritti, Europa*, 2018, no. 1, spec. p. 1-2.

68 Court of Turin, May 7th 2018.

69 Even the acute analysis of I. Massa Pinto is critical on this subject, quote, spec. pp. 1-2.

In light of the plentiful case law on the subject, it is believed that the time is right to bring the qualification of the employment relationship back to its roots in terms of legislation[70].

In recent years there have been assembly bills which affected even our legal system; yet none found consent in the parliamentary approval *process*[71].

Therefore, having acknowledged that neither the case law nor the collective bargaining, given the well-known limits of effectiveness, can provide solutions that guarantee legal certainty to the phenomena in progress[72], a legislative intervention is the appropriate instrument, not because it modifies the code norm in terms of subordination, rather because it clarifies the very meaning of subordination[73].

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[70] However, in the legal doctrine there are those who suggest an intervention firstly aimed at the qualification of the relationship and, secondly, at their regulation: «the doctrinal and legislative effort to qualify (first) and discipline (then) these jobs is not procrastinable anymore», V. Cagnin, *Gig-economy e gig-workers: uno sguardo oltreconfine*, in A. Perulli (a cura di), *Lavoro autonomo e capitalismo delle piattaforme*, Cedam, 2018, pp. 31-47, here p. 35.

[71] Today in Italy we can account for the assembly bill that regulates the relationship of digital workers which should have been included in the Legislative Decree no. 87/2018 (Dignity Decree) and that, however, was not included in the conversion to Law no. 96 of August 9th 2018; please consider also the proposal of September 2017 by Pietro Ichino, at https://www.pietroichino.it/?p=46512. For an accurate analysis of the assembly bills proposed in the Italian legal system please refer to E. Dagnino, *Le proposte legislative in materia di lavoro da piattaforma: lavoro, subordinazione e autonomia*, in G. Zilio Grandi, M. Biasi (edited by), *Commentario breve allo Statuto del lavoro autonomo e del lavoro agile*, Cedam, 2018, pp. 207-226. Also in France, a group of 18 jurists specialized in labour law proposed a modification to the labour code aimed, among other things, to regulate new forms of work through digital platforms. For now, as seen before, it appears that only in Portugal Law no. 45 of August 10th 2018 entered into force, in terms of "Regime jurídico da atividade de transporte individual e remunerado de passageiros em veículos descaracterizados a partir de plataforma eletrónica": thus a law of a purely sectoral nature. Finally, on April 28th 2019, by means of one of the *social network* channels of the Minister of Labour, Luigi Di Maio, the intention to include the regulation of the employment relationship between *riders* in the minimum wage law under discussion in senate was revealed.

[72] The authoritative legal doctrine clearly expressed itself against the legislative source and in favour of the contracting source to regulate the work of the *riders*: «if the union's love for the category had not made it lose sight of the category itself, the rebel *riders* of Foodora today, as well as *pony-express* yesterday, could have satisfied their thirst for justice through the collective bargaining; a much more reliable method than a botch law or the ruling of a judge who wears the Pink Panther's magnifying glass», U. Romagnoli, *In mezzo al guado del diritto del lavoro*, at Nuovi-Lavori.it, May 15th 2018.

[73] A project already in place in the French legal system due to the proposal formulated by a group of 18 jurists, "Groupe de Recherches pour un Autre Code du Travail", presented at the University of Paris X Nanterre on March 31st 2017 (for which please refer to: AA.VV., *Proposition de Code du Travail*, Dalloz, Paris, 2017) and already

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14. Technology, work relationships and unionism: is it the time for an upgrading of trade unions?

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Introduction

The following observations develop briefly on a delicate and current issue that concerns the relationship between new technologies and trade union representation. In particular, the question that arises – among others – concerns the influence of the use of different and emerging technologies on the function of trade unions and its actions.

The question has its roots in a syllogism whose foundation here is taken for granted: new technologies impact on the organization of work; work organization affects unionism; the traditional forms of representation are, in turn, affected by the influence on their action within the workplace and, more generally, on the ability to operate as an intermediate body.

Likewise, the role traditionally played by trade unions and their intermediary function between the various interests at stake is taken for granted here[1].

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[1] Among others, see F. Santoro-Passarelli, voce *Autonomia collettiva*, in *Enc. dir.*, IV, Milano, 1959, p. 369 e ss.; G. Giugni, *Introduzione allo studio della autonomia collettiva*, Milano, 1960; C. Assanti, *La coppia "collettivo-collettivo": responsabilità del sindacato ed "indivisibilità delle posizioni soggettive"*, in *Diritto e giustizia del lavoro oggi*, Milano, 1984, p. 109 e ss.; B. Caruso, *Rappresentanza sindacale e consenso*, Milano, 1992; S. Bellomo, *Il sindacato nell'impresa*, in F. Carinci (a cura di) *Il lavoro subordinato*, in

The role of the so-called gig economy – founded on the fragmentation and disintermediation of relationships, or on the self-representation of one's interests – can be traced back to the emergence of new realities populated by small entrepreneurs and workers, individualized and detached from the collective perspective.

Therefore, it is sensible to ask whether the interaction of workers, facilitated in particular by the use of web, social, etc. applications, could lead to overcoming the role of trade unions as it is known to be understood, or to bring out trade union organizations with different clothes and languages compared to the past.

The new phenomenon: digital platforms and work

Constantly the labour market since its origins has constantly had to dialogue with innovations that have established much diverse areas, including technological, in order to pursue efficiency, effectiveness, competitiveness and connection.

The triumph of new technologies, which has favored the birth of «... a third type of society, the post-industrial one that I would prefer to call telematics, [or artificial intelligence] destined to replace the industrial one and its production methods and to reduce dramatically human work [2]», has determined a metamorphosis of the ways work is organized and produced, as well as a reconfiguration of time and work space.

The digitalization of the employment relationship (hence the expression "work on a digital platform") by altering the original interactions between workers and employer has impacted on work performance, on legal-economic protection and, even before, on how to obtain them[3].

Tratt. Bessone, XXIV, t. I, *Il diritto sindacale*, Torino, 2007, p. 95 e ss.; G. Santoro-Passarelli (edited by), *Rappresentanza sindacale e contratto collettivo*, Napoli, 2010.

[2] G. Santoro Passarelli, *Ricerche trasformazioni socio-economiche e nuove frontiere del diritto del lavoro civiltà giuridica e trasformazioni sociali nel diritto del lavoro*, in *DRI,* fasc. 2, june 1st 2019, 417. See also B. Caruso, *Impresa, lavoro, diritto nella stagione del Jobs Act*, in *GDLRI*, 2016, 2, 223.

[3] See, also for international references, A. Rota, *Il web come luogo e veicolo del conflitto collettivo: nuove frontiere della lotta sindacale, Web e lavoro. Profili evolutivi e di tutela*, a cura di P. Tullini, 2017, 197 ss.; M. Marazza, *Social, relazioni industriali e (nuovi percorsi di) formazione della volontà collettiva*, in *RIDL*, 2019, 1, 57 ss.

It is a triangular relationship: a person who offers his services, one who buys the service and a digital platform[4].

The match between job supply and demand is therefore conditional: "we do not qualify as workers and employers, but relations are preferably established without formal schemes and regulation devices"[5].

Working through digital platforms may mean that after having registered on a site and downloaded the relevant app on their smartphone, workers receive instructions from the latter on the needed place and time of fulfillment of the work.

Thus, it becomes more complicated to identify the employer[6]: the exercise of traditional employer powers – managerial, control and disciplinary – is appointed to the apps, with the effect that it becomes difficult to understand if it is possible to exercise the representation of collective interests and trade union rights[7].

The facets that have just been mentioned could even affect trade unions.

So, considerable concerns emerge for labour scholars, such as "the potential dehumanization of the work rhythms organized and directed by the machines (...); the difficulty of identifying and managing recovery times for psychophysical energies and minimum rest (...); the difficulty of clearly identifying the owner and the person exercising the managerial and organizational power "[8].

The lack of physicality of the production unit and of the employer who interacts with the employees (the employer, in fact, uses technological tools to manage the organization of work performance) means that the trade union organizations would not have the interlocutor with whom to start the negotiation.

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[4] According to art. 1, l. n. 128/2019, which introduced into the d. lgs. n. 81/2015 Chapter V-bis art. 47-bis, "digital platforms are considered to be the IT programs and procedures used by the client who, regardless of the place of establishment, are instrumental to the activities of delivery of goods, setting their remuneration and determining how the service will be performed".

[5] P. Tullini, *C'è lavoro sul web?*, in *LLI*, 2015, I, 10.

[6] See G. Santoro Passarelli, *Ricerche trasformazioni socio-economiche e nuove frontiere del diritto del lavoro civiltà giuridica e trasformazioni sociali nel diritto del lavoro*, *cit.*, 424. Dealing with the difficulty of identifying the employer, the author uses the expression "a-centric company", which digital platforms refer to.

[7] P. Loi, *Un'introduzione al tema del lavoro nella gig economy*, in *QRGL*, 2017, 2, 26.

[8] S. Ciucciovino, *Le nuove questioni di regolazione del lavoro nell'industria 4.0 e nella gig economy: un problem framework per la riflessione*, in *DRI*, 2018, 4, 1054.

These are difficulties whose impact is perceived, first of all, at the epidermal level where only it is considered that anyone, regardless of his role or the functions performed, is now forced to interface with "non-human" intermediaries; the subjects who protect collective interests, however, particularly feel the difficulty of intercepting their interlocutors in a context in which the contacts between the subjects animating the relationship and the market are mediated by IT tools which, clear enough , are not designed to protect collective interests[9].

Attempting a legal qualification of the employment relationship on the platform is the first operation to be performed to try to understand the union phenomenon in the context of the so-called digital workers.

These types of works – which have eradicated the classic and rigid conception of time, space and performance of a service – have introduced wide margins of flexibility, requiring careful consideration of the legal framework of work services, since the usual categorization of the concept of subordination, in both the legal and social perspective, looses much of its original meaning[10].

On this point, the jurisprudence[11] discarding the traceability of the works on the platform to the employment relationship referred to art.

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[9] F.MARASCO, *Nuove forme di contrattazione sindacale nelle relazioni industriali su piattaforma,* in *LLI,* vol. 5, no. 2, 2019, 165 ss.

[10] C. DEGRYSE, *Digitalisation of the economy and its impact on labourmarkets, ETUI ResearchPaper* – WP 2016; O. RAZZOLINI, *La nozione di subordinazione alla prova delle nuove tecnologie*, in *DRI*, 2016, 4, 974.

[11] See Court of Appeal of Turin 4 February 2019, n. 26 (which confirms the reconstructions of the Turin Tribunal, 7 May 2018, n.778; in the same sense, Tribunal of Milan September 10th 2018, n.1853); see also *I commenti sulla decisione del Tribunale di Torino, 7 maggio 2018, n. 778*, in *LG*, 2018, 7, 721, commented by G. RECCHIA, *Gig economy and qualifying dilemmas: the first Italian sentence – the comment*; S. LIEBMAN, A. ALOISI, *The black and white rights of riders (and other gigworkers),* in www.viasarfatti25.it, July 30th 2018, who contest the decision by emphasizing that "the classic employer prerogatives (organization, control and discipline) have undergone an elevation to digital power which was not taken into account in the process. For some gig-workers, especially those operating in the home delivery sector, it is difficult to deny the existence of a hetero-direction constraint during the performance, or at least an intense organization activity with respect to the times and places of the same to be part of the client. Turin judges approached the story with an eye to the past. A wasted opportunity to test the platform-economy of a provision of the Jobs Act which, without too many upheavals, promised to extend the application of employment protection to a group of only nominally independent workers."; see also E. GRAGNOLI, *Una complessa, ma significativa decisione sulla qualificazione dei contratti stipulati con i gestori delle cosiddette piattaforme digitali (nota di commento a Tribunale Torino 7 maggio 2018),* in www.dirittolavorovariazioni.com; P. ICHINO, *Subordinazione, autonomia e protezione del lavoro nella gig-economy*, in *RIDL*, 2018, II, 294 ss; M. SACCAGGI, , *La sentenza Foodora: i rider, come i pony express, sono liberi di*

2094 of the Italian Civil Code, stated that digital workers must be qualified now as self-employed workers now as hetero-organized workers, as described in art. 2, d. lgs. n. 81/2015, since they are free to provide or not, or revoke their availability for the work shifts, offered by the company. This peculiarity would prevent recognizing the presence of the requirement of mandatory performance, which instead distinguishes the subordination.

On the other hand, it has also been highlighted[12] how the freedom to grant one's availability or not, integrates a form of apparent autonomy: the willingness of the worker not to perform the job, achieved by disconnecting from the platform, would seem to be, indeed, what could be called "withdrawal from the contract".

On the protection front, on the other hand, there is the problem of formalizing useful tools to allow consultation and protection of the parts, apparently different from those of the subordinate social type, given the discontinuity, flexibility and de-materialization of the performance of digital works.

Furthermore, the variety of applicable collective agreements and the diaspora of workers – which import the fragmentation of the collective dimension of interests – suggest tracing other ways to bring together the instances of which they are bearers.

The *trait d'union* that connects digital workers consists of contractual weakness, economic dependence (not just in a technical-functional sense) and the lack of opportunity to express the freedoms and protections of labour law, in the same way as traditionally provided by art. 35 of the italian constitution.

Following this approach, the constitutional principle would indirectly suggest the possibility of recognition of trade union activity[13] also in favor of digital workers, well beyond their legal-formal nature,

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non lavorare, ADAPT, 14 May 2018, n. 18; P. Tullini, *First reflections after the Turin ruling on the "Foodora case". The legal qualification of the employment relationships of gig-workers: new pronouncements and old methodological approaches*, in *LDE*, 2018, 1, 1 ss.

12 P. Tullini, *Prime riflessioni dopo la sentenza di Torino sul "caso Foodora"*, *cit.*, 1 ss.

13 Such reconstruction finds also legitimacy in international and european regulatory texts: see art. 23 Universal Declaration of Human Rights; art. 22 International Covenant on Civil and Political Rights, art. 8 International Covenant on Economic, Social and Cultural Rights, ILO Convention n. 87 and 98; Articles. 28 and 53 of the Charter of Fundamental Rights of the European Union.

in order to achieve a collectivization of interests and forms of bargaining that ensure at least minimum levels of protection[14] .

However, digital platforms could impact on the classic trade unions representation in favor of "brand new" workers, which stimulates the following further considerations.

The relationship between technology and trade union representation: is there a risk of disintermediation?

Digital work could find a specific position in labour market, beyond union intermediation[15] because the management of job dynamics is demanded to the direct match between consumers and workers, driven by algorithms.

In fact, "if once the role of large trade unions and employers, as tools for collecting and mediating interests in the political arena", was universally recognized as indispensable, according to some observers and opinion makers, this role today would be perceived as a cost no longer sustainable, both by governments and citizens[16].

The online/digital communication channels encourage the composition of distinct and autonomous aggregation centers, responsible for contractual decentralization. They are in any case able to interact with the employer, but they have a negotiating capacity consisting not of the synthesis of interests, but of the sum of those individual interests of the individualistic kind[17].

This would explain the reason for the substantial overcoming of the attractiveness of unions towards digital workers and employers.

However, we have to remember italian constitutional principles and the Constitutional Court case-law[18]: unions are bearers of interests

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[14] In this regard, experiences already gained are relevant: Nidil-Cgil for autonomous and parasubordinated; Alai-Cisl for socially useful workers; Cpo-Uil which represents the unemployed and those enrolled in the mobility lists.

[15] B. Caruso, *La rappresentanza delle organizzazioni di interessi tra disintermediazione e reintermediazione*, WP C.S.D.L.E. "Massimo D'Antona", n. 326/2017, 3 ss.

[16] *Ivi*, 3 ss.

[17] About the nature of collective interests protected by trade unions, as a summary of workers' interests, see F. Santoro Passarelli, *Nozioni di diritto del lavoro,* Napoli, 1995, 19. Si v. anche M. Persiani, *Diritto sindacale*, Padova, 2016, 23.

[18] C. Cost. 24 marzo 1988, n. 334,*www.cortecostituzionale.it*. The Constitutional Court stated that "art. 19, lett. a) of the l. n. 300/1970 encouraged "a process of aggregation and coordination of interests owing to various professional groups, also in order

of other subjects, including unemployed, with respect to the particular ones of those who populate the individual company.

In this perspective, the issue of intermediation is intertwined with that of the evaluation of the conduct of an employer who interacts directly with the workers or a group of them (other than the union), both during union negotiations and in case of failure.

This is a topic which, albeit with reference to different working organizations, has been traced back to the problem of anti-union status "... of the overcoming of trade union bodies by the employer and, that is, the (...) attempt to deal directly with workers", when bypassing the union is in fact an obstacle to the protection of the collective interest[19].

Starting from this assumption, it can be deduced that a perfect substitution between subjects with both collective and individual interests does not seem immediately feasible.

Otherwise, there would be no reason for the different nature of the interests (individual; collective) and the qualification itself.

In other words, as has been said, "the link between the inability of the collective relationship plan and that of the individual relationship necessarily postulates the existence of a legal or contractual relationship that imposes the collective relationship plan [...]. In the absence of this constraint, but also when the obligation towards the union is fully fulfilled (for example when the negotiation started has definitively ended without success, unless there is an obligation to contract), the employer returns, necessarily, in the full faculty of negotiating relationships on the level of individual employment relationships"[20].

The jurisprudence itself, moreover, recalls how «everything which does not constitute an obstacle to the birth of the union in the workplace and to its activity, must be considered lawful»[21].

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to recompose, where possible, the particularistic thrusts in a unified framework [as well as] equip trade union organizations – due to the complex intertwining between industrial conflict and social conflicts – of instruments suitable for reaching a synthesis between microeconomic and macroeconomic claims"

19 F. Lunardon, *Il contratto collettivo aziendale: soggetti ed efficacia*, in *DLRI*, 2012, par. 3. In the same sense, see Cass., Of April 9, 1992, n. 4319, in www.coertedicassazione.it, which affirms that the employer is not allowed to "interfere, with the weight of his power of supremacy, on individual workers, in the phase of free formation of the collective will".

20 M. marazza, *op.cit.*, p. 73.

21 Cass. 16 aprile 1976, n. 1366, in *www.cortedicassazione.it*.

The argumentative path which sees the algorithm – far from trade union logics – scrutinizing preferences of users and stimulating their interests towards certain issues (more corresponding to their preferences), therefore, can also be agreed and generates the composition of a manipulated will that it is not the synthesis of individual interests[22].

The need to revalue the collective interest would emerge also in the light of the principle of equal treatment, i.e. the obligation of the employer not to diversify the regulatory and economic treatment based on the type of contract that binds it to the worker.

This would represent "a form of guarantee regarding the genuineness of the needs that justify the use of non-standard employment relationships, precisely because it is intended to exclude that the reason lies in the reduction in the cost of labour connected to them"[23].

The union presence would also reduce the risk of dumping, which is known to develop in a market characterized by downward contractual competitiveness.

These are considerations that are not intented to suggest the uselessness of technological tools in the market and in the relationship: the use of digital platforms could in fact result in an increase in the representative strength, since the rapidity of the exchange of information of work interest and ease of access to them could well be a driving force for the growth of the consensus (and, supposedly, to some extent the bargaining power) of trade union organizations.

It would allow workers to participate dynamically in the determination of the union's decision-making choices[24], also implementing the potential to gain influence on the employer.

Given that, also as regards work on the platform "on the labour side, power is collective power"[25], then "it is necessary to start from the goal that you want to achieve, namely the protection of the worker"[26].

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[22] P.Tullini, *L'economia digitale alla prova dell'interesse collettivo*, in *LLI*, vol. 4, no. 1, 2018, 8: "In other words, the collective synthesis of the interests of work is not a conceptual a priori, and it is not independent of real experience or the institutional mechanisms that promote it". See also E. Gragnoli, *La comunicazione con strumenti elettronici nell'azienda e le prerogative dei sindacati,* in *MGL*, 1995, 338; C. Crouch, *Il declino delle relazioni industriali nell'odierno capitalismo*, in *SM*, 2012, 1, 55 ss.

[23] C. Alessi, *Professionalità e contratto di lavoro*, Milano, 2004, 219.

[24] A. Brunetti, D. Di Nunzio, C. Mancini, *Storie di frontiera e sfide quotidiane della Cgil di oggi*, Associazione Bruno Trentin, Rapporto di ricerca n. 2/2015

[25] O. Kahn Freund, *Labour and the law*, London, III ed., 1983, 17.

[26] T. Scacchetti, L. Fassina, *La tutela del lavoro nell'economia delle piattaforme: note di politica*

The l. n. 128/2019, in fact, modifying art. 2, co. 1, d. lgs. n. 81/2015, stated that the provision contemplated therein – that is "the discipline of the employment relationship also applies to collaborative relationships which result mainly[27] personal, continuous and whose organization are organized by the client " – also applies to workers on digital platforms (pursuant to art. 2, par. 1, second sentence, as inserted by art. 1, co. 1, lett. a, ln 128/2019).

Therefore, trade union rights for digital workers must be recognized, since the rules of the l. n. 300/1970, albeit with the necessary adjustments to allow trade union organizations to adapt their way of "doing unionism"[28].

Leaving aside to investigate here what rights (and to what extent) provided by l. n. 300/1970 can be exercised by the workers targeted by l. n. 128/2019, it is in any case worth remembering an important experience of italian union organization representing food-delivery riders via app, called Riders Union: in addition to implementing claims, this organization has been able to become a qualified social actor in institutional dialogue.

The positive effects are different and consist in: a) signing the territorial collective agreement, defined as the Charter of fundamental rights of digital work in the urban context, with the Municipality of Bologna, Cgil, Cisl, Uil and the Bolognese food-delivery platforms Sgnam and myMenu; b) in initiating negotiations with the Ministry of Labour for the study and drafting of a draft law on the riders employment[29].

This explains how it could be plausible that in a not at all remote future, contemporary communication channels and digital platforms could become exponential centers of collective interests, thus representing the new frontiers of the functioning system of the labour market, of the collective actions and conflicts, to which, perhaps, legal subjectivity must be recognized.

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del diritto e di politica sindacale a margine della sentenza Foodora, in *LDE*, 2019, 1, 6-7.

[27] Adverb inserted by l. n. 128/2019.

[28] See the Labour Academy call for 2019 "New technologies and industrial relations. Representation, union rights and collective negotiation" organized with the scientific coordination of the "Freccia Rossa Group" and Mercatorum University as part of the "Luci sul Lavoro" Festival held in Montepulciano between 11 and 13 July 2019.

[29] For further informations see M. Forlivesi, *Alla ricerca di tutele collettive per i lavoratori digitali: organizzazione, rappresentanza, contrattazione*, *LLI*, 2018, n. 1, 40.

Furthermore, the diffusion of negotiated solutions widely shared on the web could favor the development of economic and social policies of interest not only for the digital workers involved, overcoming the conflict and the unequal treatment between insiders and outsiders[30].

The "digital" trade union organizations would also acquire the function of protecting social interests, developing a "digital social bargaining" that can offer services to workers on the platform and to third parties, rediscovering the mutualistic and assistance requests they have brought in the past[31]. Therefore, new technologies do not seem to impact on «what» trade unions do, being more incisive on the «how» they do it: «… it performs an instrumental function to create the contacts at the basis of the intermediation, like the printed paper or the post, […] Does not seem able, at first glance, to modify the nature of the activity and the roles of the parties involved»[32].

Forms and means change, but not contents: physical protest can be replaced by the organization of protest initiatives that can take place simultaneously and unexpectedly in all the places where the digital company operates, seizing by also exploiting the support of consumers, that may well not exercise their purchasing power, or release bad reviews online on employer companies[33].

The same means that traditionally animate collective conflict are subject to a restyling process: the web is converted into a space of conflict, entrusting self-protection of the interests of the category with "other" places than the traditional ones.

Concluding remarks

According to premise, that is, whether or not there is a risk of union disintermediation, it is perhaps possible to support a sort of union associations' upgrade: "the digital world (platforms, social networks, apps, etc.) can represent an opportunity to review union activity.

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30 About *insiders/outsiders* see v. P. Ichino, *Il lavoro e il mercato. Per un diritto del lavoro maggiorenne*, Milano, 1996.

31 See L. Gallino, *Il declino del sindacato tra crisi di rappresentanza e sfide future*, in Nuvole, n. 34/2008: "we must not forget that trade unions have developed, and have grown, in the form of or around mutual aid funds".

32 A. Donini, *Mercato del lavoro sul web: regole e opportunità*, *DRI*, fasc.2, 2015, 433.

33 Cfr. *www.facebook.com/ridersunionbologna e www.facebook.com/ deliverancemilano*.

A possible obstacle to "syndicate" in a highly functional context is found in the little flexibility of the traditional system of union representation: if the language changes, the so called «rules of engagement» and intermediation techniques must necessarily be recalibrated according the needs of digital workers.

Nonetheless, the introduction of extra-union aggregation centers does not seem to represent a limit to the upgrading process, since the individualization of the management of union-relevant dynamics is limited by the constitutional protection of trade unions prerogatives.

In digital employment relationships, however, it is evident that the union is actively called to play its role by rediscovering modern ways of participation beyond the traditional tools of representation.

In order to implement the new language of union intermediation, union action must also operate outside of the employment relationship, offering protections "in the non-work phases and for the entire duration of active life"[34].

It must be said, however, that digital platforms "place themselves in the interstices of the rules, defining their borders in such a way as to place themselves outside the definitions of the law or favoring activities that are lacking in obvious legal relevance"[35]. Beyond the boundaries of such conduct, digital platforms are able to "set barriers, to indicate constraints" and "to build resources"[36], while still being able to form the basis for the implementation of an industrial relations system up to date and really effective.

Thus social media, as means of explicating the personality of those who frequent them, can be attributed to constitutionally relevant social formations[37].

The use of digital platforms does not necessarily have to mean a stop to trade unions relations because of technological innovation.

The individualistic needs of digital workers must not necessarily be understood as incompatible with collective protection models.

In order to successfully interact with the globalization of work, trade unions must restore themselves and be able to fit into the new

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[34] L. Bellardi, *Nuovi lavori e rappresentanza. Limiti e potenzialità di innovazione della realtà sindacale,* in *DRI*, fasc. 2, 2005, 70 ss.

[35] A. Donini, *op.cit*, 433 ss.

[36] N. Lipari, *Ancora su persona e mercato,* in *RTDPC,* 2014, n. 2, 430.

[37] For further informazions about social formations see T. Martines, *Diritto costituzionale*, Milano, 2010, 606 e ss.

paradigm of economic and social relations; it is unimaginable to trace new paths for representation, avoiding to confront the challenges posed by the digital world.

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15. Is the smart working the new frontier for Italian workers' well-being?

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Introduction

It is useless to deny it: digitalization is changing our lives and, obviously, also the way we work.

It is not necessarily a bad thing, even though "the relationship between innovation and employment is a 'classical' controversy, where a clash between two views can be singled out"[1]. Indeed, digitalization opens the ground for new forms of work organization, but it also raises a lot of questions about wages, labor rights, social protections and risks of extensive technological unemployment[2]. Again, technological innovations can make new job opportunities not only by promoting emerging sectors[3], but also combining work-

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1 Van Roy V., Vértesy D., Vivarelli M., *Technology and employment: Mass unemployment or job creation? Empirical evidence from European patenting firms*, in *Research Policy*, 2018, n. 47, p. 1762.

2 OECD, *Automation and independent work in a digital economy*, in *www.oecd.org*, 2016; McAfee A., Brynjolfsson E., *The Second Machine Age: Work, Progress, and Prosperity in a time of brilliant technologies*, Norton & co., New York, 2016.

3 Actually, as evidenced in Van Roy, Vértesy, Vivarelli 2018, cit., p. 1769, "European policy makers should also pay attention to the fact that the labor-friendly nature of new technologies appears obvious in only high and medium-tech manufacturing, while, unfortunately, Europe is specialized in more traditional and mature manufacturing and service sectors".

life balance. Moreover, according to recent studies[4], the greater elasticity caused by digitization could have beneficial "welfare effects" in the workplace.

Actually, this is positive as long as the flexibility of work has adequate safeguards, especially in the field of health and psychosocial risks[5].

Obviously, these innovations are now unavoidable: "some changes in the labor market are associated with globalization, technological change and transformations in the organization and functioning of enterprises, often combined with restructuring in a highly competitive environment"[6].

In fact, new technologies are not only changing market strategies and firm organization, but they are also transforming the labor law, by increasing the range of the implementing rules on working and introducing new tools[7].

Actually, as highlighted by international scholars, the information technology advances very rapidly and the law is struggling to keep up with it[8]. As a matter of fact, the legal provisions "are likely to be out-of-date or redundant by the time they are implemented"[9] and sometimes collective bargaining is faster than law in adapting to changes.

Smart working – that in Italian is named "lavoro agile" – is a proof of this.

It is an interesting innovation in the way of conceiving the employment relationship both in private and public work.

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4 Van Roy, Vértesy, Vivarelli 2018, cit., p. 1769.

5 Weiss M., *La platform economy e le principali sfide per il diritto del lavoro*, in *Diritto delle Relazioni Industriali*, 2018, n. 3, I, p. 715.

6 Rosioru F., *The changing concept of subordination*, in *www.adapt.it*, 2013.

7 See Weiss M., *Digitalizzazione: sfide e prospettive per il diritto del lavoro*, in *Diritto delle Relazioni Industriali*, 2016, n. 3, p. 651; Ichino P., *Le conseguenze dell'innovazione tecnologica sul diritto del lavoro*, in *Rivista Italiana di Diritto del Lavoro*, 2017, n. 4, p. 525.

8 See Dau-Schmidt K. G., *Labor Law 2.0: The Impact of New Information Technology on the Employment Relationship and the Relevance of the NLRA*, Articles by Maurer Faculty, 2015, Paper 1778, p. 1582; Brynjolfsson E., McAfee A., *Race against the machine: how the digital revolution is accelerating innovation, driving productivity, and irreversibly transforming employment and the economy*, Digital Frontier Press, 2011.

9 Malan D., *The law can't keep up with new tech. Here's how to close the gap*, in *www.weforum.org*, 21.06.2018.

Smart working: what is it and how does it work?

Before entering the Italian legal system with the art. 18 of the Law no. 81/2017, that is part of the wide Italian labor market reform named Jobs Act, the smart working was already present in the Italian collective bargaining, especially in the collective agreements at company level[10].

It is not a new form of employment relationship[11]. It is a way of carrying out subordinate work, established by an agreement between employer and employee.

The work is "smart" because it is not bound by two of the typical characteristics of subordinate work: place and time. In fact, smart worker's performance is carried out, partly within company premises and partly outside, without a fixed location, within the limits of maximum duration of daily and weekly working hours, established by the law and collective bargaining, and can be done through the use of technological tools[12].

Smart working differs from teleworking[13], which requires that the activity is carried out completely outside the company premises and in a fixed and predetermined place, that is generally the employee's home[14].

As the art. 18 of Law no. 81/2017 points out, the aims of the smart working are to increase competitiveness and to facilitate the work-life balance. In practice, in the employer's perspective, smart working allows a considerable saving in terms of reduction of spaces and energy,

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10 For a broad overview see Tiraboschi M., *Il "lavoro agile" nella contrattazione collettiva oggi*, in *Working Papers Adapt*, n. 2, 2016.

11 Santoro Passarelli G., *Lavoro eterorganizzato, coordinato, agile e il telelavoro: un puzzle non facile da comporre in un'impresa in via di trasformazione*, in *Working Papers "Massimo D'Antona"*, 2017, n. 327, p. 8. For more detailed information on the nature and discipline of smart working, see Santoro Passarelli G., *Diritto dei lavori e dell'occupazione*, Giappichelli, Torino, 2017, p. 244.

12 See art. 18 of Law 22.05.2017, no. 81.

13 In Italy there is no law on teleworking in the context of private work, but the interconfederal agreement signed on 9 June 2004 has implemented the European framework agreement of 2002. In the public sector teleworking is regulated by the Law no. 191 of 1998, the Decree of the President of the Republic no. 70 of 1999 and the national framework agreement signed on 23 March 2000.

14 To deepen the differences between teleworking and smart working see Santoro Passarelli G., *Il lavoro autonomo non imprenditoriale, il lavoro agile e il telelavoro*, in *Rivista Italiana di Diritto del Lavoro*, 2017, n. 3, p. 382; Martone M., *Il lavoro agile nella l. 22 maggio 2017, n. 81: un inquadramento*, in Zilio Grandi G., Biasi M. (a cura di), *Commentario breve allo Statuto del lavoro autonomo e del lavoro agile*, Cedam, Padova, 2018, p. 466.

a more effective system for evaluating results[15], a decrease of the absenteeism rate and, above all, a flexible work organization that is more responsive to production needs; while, in the employee's perspective, it allows the reduction of transport and travel to reach the workplace and the opportunity to organize life and work more easily (i.e., going to take kids to school or taking care of elderly people, attending a university course, etc…)[16].

The pact that provides smart working arrangements has to be written *ad probationem* and can be for a fixed or indefinite period[17]. In the latter case, withdrawal may take place with a notice of not less than thirty days. It should be pointed out that the withdrawal does not extinguish the employment relationship, that continues with the traditional methods of subordinate work.

The pact lays down the modalities to be implemented when the employee works outside the company premises, with regard to the forms of exercise of the employer's managing, monitoring and disciplinary[18] power and the technological tools used by the worker. In particular, rest periods and smart worker's right to disconnect[19] must be regulated and ensured in the pact.

The employer is responsible for the safety and proper functioning of the technological advices assigned to the smart worker.

The use of smart working cannot penalize the workers involved: the law lays down that the smart worker cannot receive a lower economic and regulatory treatment than the one applied to the workers who carry out the same tasks exclusively within the company[20]. Furthermore, the right to lifelong learning can be recognized.

This is the summary of what the law requires, but a lot of issues have not been addressed: as seen above, the law does not clarify operative aspects or the way smart working should be organized, but refers to the pact between the parties[21]. Therefore, collective agreements can

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15 Because the work performance can be organized by phases, cycles and objectives, as evidenced by the art. 18 of Law no. 81/2017.

16 See the results of the research undertaken by the School of Management of Polytechnic of Milan in *www.osservatori.net*.

17 Art. 19 of Law no. 81/2017.

18 Art. 21 of Law no. 81/2017.

19 See the next paragraph.

20 Art. 20 of Law no. 81/2017.

21 On the need for more detailed legislation see Spinelli C., *Tecnologie digitali*

now contribute little[22] and it is very important that employer and employee regulate carefully the most delicate and insidious issues[23] and try to give an answer to the unresolved questions.

Strenghts and weaknesses of the smart working

As seen above, there are a lot of positive effects of smart working: a reduction in commuting time, better overall work–life balance, more flexibility in terms of working time organization, higher productivity, etc…

However, some risks and critical issues cannot be overlooked.

A specific risk regarding smart working (and teleworking, too) is the probability of isolation of the worker, which could lead to mental disorders. This kind of risk must be assessed during risk assessments in order to elaborate measures to prevent the possibility of working in isolated places that are not easily reachable, particularly difficult or remote. Therefore, in this perspective it is very important the choice of the place (or the places) – included in the individual pact of smart working – where the worker can perform his/her professional activity.

Furthermore, the absence of specific constraints about working time and workplace creates many problems with regard to employer's safety obligations towards the smart worker[24]. Indeed, the law no. 81/2008, the so-called consolidated text on health and safety in the workplace, pays great attention to both the working environment and the working time.

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e *lavoro* agile, Cacucci, Bari, 2018, p. 114; *contra*, Martone 2018, cit., p. 464.

[22] For the doubts on the compression of the role of the social partners see Fenoglio A., *Il tempo di lavoro nella new automation age: un quadro in trasformazione*, in *Rivista Italiana di Diritto del Lavoro*, 2018, n. 4, p. 625.

[23] Del Punta R., *Verso l'individualizzazione dei rapporti di lavoro?*, in L. Corazza, R. Romei, *Diritto del lavoro in trasformazione*, Il Mulino, Bologna, 2014, p. 33.

[24] To deepen this issue, see Delogu A., *Obblighi di sicurezza: tutela contro gli infortuni e le malattie professionali nel lavoro agile*, in AA.VV., *Il lavoro agile nella disciplina legale, collettiva ed individuale. Stato dell'arte e proposte interpretative di un gruppo di giovani studiosi,* in *Working Papers "Massimo D'Antona"*, 2017, n. 6, p. 113; Guariniello R., *Lavoro agile e tutela della sicurezza*, in *Diritto e Pratica del Lavoro*, 2017, n. 32-33, p. 2010; Malzani F., *Il lavoro agile tra opportunità e nuovi rischi per il lavoratore*, in *Diritti Lavori Mercati*, 2018, p. 32.

As noted by the research report "Working anytime, anywhere: the effects on the world of work" written by Eurofound and Ilo, the "distance workers" generally work longer than "traditional" employees. Thus they have a greater risk of contracting pathologies deriving from hyper-connectivity[25].

Finally, it should be kept in mind that the smart working can have some side effects with possible dangerous consequences for health and well-being: for instance, ergonomic aspects, intensity at work, blurring boundaries between paid work and private life.

This last point is the real tip of the iceberg: how can the smart worker manage successfully the relationship between professional, personal and family life?

The art. 19 of the law no. 81/2017 introduces in the Italian legal system the so-called "right to disconnect", that is the basic principle to "pull the plug" from working in the rest periods[26].

Also the Court of Justice of the European Union has repeatedly highlighted the need to keep working time and rest periods separate[27], but it is not so simple for distance workers, who experience a kind of "time porosity"[28], that is a mixture of the "online and off-line dimensions of the worker"[29].

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[25] Eurofound and the International Labour Office, *Working anytime, anywhere: The effects on the world of work*, Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva, 2017, p. 34.

[26] In France see the art. L. 2242-17, no. 7, *Code du travail. To deepen the right to disconnect see Allamprese A., Pascucci F., La tutela della salute e della sicurezza del lavoratore «agile», in Rivista Giuridica del Lavoro, 2017, n. 2, I, p. 307; Dagnino E., Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata, in Diritto delle Relazioni Industriali, 2017, n. 4, p. 1024; Donini A., I confini della prestazione agile: tra diritto alla disconnessione e obblighi di risultato, in AA.VV., Il lavoro agile nella disciplina legale, collettiva ed individuale. Stato dell'arte e proposte interpretative di un gruppo di giovani studiosi, in Working Papers "Massimo D'Antona", 2017, n. 6, p. 90;* Casillo R., Competitività e conciliazione nel lavoro agile, in Rivista Giuridica del Lavoro, 2018, n. 1, I, p. 115; Fenoglio A., Il diritto alla disconnessione del lavoratore agile, in Zilio Grandi G., Biasi M. (a cura di), Commentario breve allo Statuto del lavoro autonomo e del lavoro agile, Cedam, Padova, 2018, p. 549; Russo M., I limiti all'obbligo di diligenza del prestatore di lavoro, in Rivista Giuridica del Lavoro, 2018, n. 2, p. 162.

[27] See CJEU 3 October 2000, C-303/98; CJEU 9 September 2003, C-151/02, in *https://curia.europa.eu*.

[28] See Genin E., *Proposal for a theorethical framework for the analysis of time porosity*, in*International Journal of Comparative Labour Law and Industrial Relations*, 2016, vol. 32, n. 3, p. 280.

[29] Brollo M., *Il lavoro agile nell'era digitale tra lavoro privato e pubblico*, in*Il Lavoro nelle Pubbliche Amministrazioni*, 2017, n. 1, p. 119.

The fact of working remotely through technological tools realizes a sort of constant availability and the increase of work-related stress[30].

From another point of view, the distance work and the use of new technologies entail the need for a greater attention in an efficient monitoring system of the productivity and, at the same time, in the limits to the employer's monitoring power. In fact, this monitoring activity – inherent to the employer – involves the liberty, dignity and privacy of the worker and – in the light of the technological evolution – could become very intrusive and insidious[31].

Smart working in Italian Public Administrations: rules, collective agreements and empirical data

While in private work there has been a real boom in smart workers[32] even before the introduction of the Law no. 81/2017[33], in the Public Administrations the situation is quite different. In fact, even though the Public Sector is trying to make up for lost time, in 2018 only the 8% of public administrations has already started structured projects of smart working. However, there is an increase compared to 5% in 2017, but there is still much to do. Indeed, the art. 14 of Law no. 124/2015[34] on the reorganization of public administrations provides that "Public administrations, within the limits of the budget resources available under current legislation and without new or greater burdens on public finance, adopt organizational measures aimed at setting annual targets for the implementation of teleworking and for experimentation, also to promote parental care,

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30 Fenoglio A., *Il tempo di lavoro nella new automation age: un quadro in trasformazione*, in *Rivista Italiana di Diritto del Lavoro*, 2018, n. 4, p. 625.

31 Del Punta R., *La nuova disciplina dei controlli a distanza sul lavoro (art. 23 d. lgs. n. 151/2015)*, in *Rivista Italiana di Diritto del Lavoro*, 2016, n. I, p. 77; Marazza M., *Dei poteri (del datore di lavoro), dei controlli (a distanza) e del trattamento dei dati (del lavoratore)*, in *Csdle WP Massimo D'Antona*, 2016, n. 300; Maresca A., *Jobs Act, come conciliare potere di controllo e tutela della dignità e riservatezza del lavoratore,* in *Forum Tuttolavoro Ipsoa*, 2016; Russo M., *Quis custodiet ipsos custodes? I "nuovi" limiti all'esercizio del potere di controllo a distanza*, in *Labour & Law Issue*, 2016, vol. 2, n. 2, p. 1.

32 According to the research undertaken by the School of Management of Polytechnic of Milan, in 2018 there have been about 480.000 workers in Italy (about the 12% of workers) who have used the smart working modalities of performing their duties.

33 In fact, the 82% of large companies and the 76% of mid-size companies had already introduced or thought to introduce smart working before the law.

34 Law 7 August 2015, no. 124.

of new space-time modalities for the performance of work activity that allow, within three years, at least 10% of employees, if they so request, to make use of these methods".

Moreover, the paragraph 3 of the art. 1 of the aforementioned Law no. 81/2017 establishes that the provisions on smart working apply, as they are compatible, also in public employment and the directive of the President of the Council of Ministers no. 3/2017[35] sets the guidelines for the implementation of smart working in the public administrations. In particular, through the filter of this Directive, the rules laid down for the private sector by law no. 81/2017 enter the public sector[36] and try to transform it in the light of the technological innovations and the need of the work-life balance.

However, the Italian public sector is traditionally conservative with regard to the modalities of carrying out the working activity and innovations require time of introduction and metabolization.

The main obstacles to the use of smart working are, above all, the technological delay and the perception of a complex regulatory framework which is still not sufficiently clear.

Therefore, despite the many regulatory impulses, the diffusion of the phenomenon within the Italian public administrations is still taking its first steps, but the best practices so far introduced[37] are giving successful results and an encouraging impact on the employees' well-being and performance, as it happens in the private sector[38].

In order to increase the spread of the smart working within the P.A., the last round of collective agreements of the four sectors[39] of the

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35 Directive 1 June 2017 no. 3, regarding "addresses for the implementation of paragraphs 1 and 2 of article 14 of the Law of 7 August 2015, no. 124 and guidelines containing rules concerning the organization of work aimed at promoting conciliation of employees' work and life times".

36 See Brollo M., *Il lavoro agile nell'era digitale tra lavoro privato e pubblico*, in *Il Lavoro nelle Pubbliche Amministrazioni*, 2017, n. 1, p. 119.

37 The first agreements on smart working in the public sector were signed in 2017 by the Municipality of Milan and the Municipality of Turin. Among the central administrations it should be noted the significant experiences of the Presidency of the Council of Ministers and of the Ministry of Economy and Finance, that are pilot projects on the smart working.

38 According to the mentioned research of Polytechnic of Milan, the 39% of smart workers is completely satisfied with the possibility of avoiding stress during home-office travel and to improve their balance between private and professional life. Furthermore, there are other positive consequences, such as the increase in the quality of the results produced, in the efficiency and professional motivation.

39 Art. 6 of the National Collective Agreement on Central functions, art. 6 of the

public administration – signed in the 2018 – has introduced a kind of Joint Body for innovation, which has the task of permanently activating collaborative relationships on organization and innovation projects, improvement of services, promotion of legality, quality of work and organizational well-being, with particular reference to smart working.

This Commission – established within each administration – must be composed of members of the administration and union representatives.

It is still too early to reap the fruits of these Commissions' commitment[40], but it's clear that it could be one of the most important challenges of human resources management in the Italian public administrations.

Conclusions

New technologies have brought enormous changes in the employment relationship and, surely, much more changes are yet to come.

Even though the research report written by Eurofound and ILO shows that Italy is in the last position in the ranking of percentage of employees doing teleworking and smart working in the European Union[41], interesting signals can be detected.

Surely the tax relief provided – by the art. 25 of the legislative decree no. 80/2015 and the Interministerial decree 12 September 2017 – for smart working arrangements have contributed to its growth in the private sector, while the public sector is still taking its first steps.

There are a lot of benefits associated with distance work, such as the improvement in work-life balance, productivity, efficiency, more flexibility in entrepreneurial business models, organizational structures and institutions, a reduction in the absenteeism rate… On the other side, there can be some risks and disadvantages, such as the isolation, the tendency to lead to longer working hours and to create an overlap between paid work and personal life.

National Collective Agreement on Local functions, art. 7 of the National Collective Agreement on Health, art. 9 of the National Collective Agreement on Education.

40 For example, one of the goals of the work done by the Joint Body for innovation set up by the National Labor Inspectorate is the directive – signed on 15 January 2019 – for launching a pilot project on smart working.

41 Eurofound and ILO 2017, cit., p. 15.

Another critical issue could be that the involvement of trade unions is not required by the law. The experience of smart working in the private sector before the introduction of the law no. 81/2017 shows that the signing of collective agreements can improve the quality of the individual pacts of smart working. In fact, the involvement of trade unions, also through their workplace representatives (named RSA or RSU), can prove useful in guaranteeing smart workers further and more detailed rules than those minimal conditions set out by Italian law.

Collective bargaining is generally "the most suitable instrument to guarantee, on a case-by-case basis, an orderly development, that is closer to the reality to be regulated by the many hypothesis of remote work through telematic tools"[42].

However, even if it is not a strict requirement, the adoption of smart working is often preceded by the signing of agreements with trade unions on the issue, as attested by important collective agreements at company level[43] and the provision of the Joint Body for innovation in the public sector.

Anyway, the latest research on the matter, shows that only 1% of smart workers is completely not satisfied[44]. Therefore, it can be a very positive experience to improve the well-being at work.

Finally, returning to the question that gave the title to this paper (Is the smart working the new frontier for Italian private and public workers' well-being?), the answer could be yes, because it could be an effective opportunity to make sure that "the technical-productive organization of the company" (or of the administration) "must be shaped on man and not the other way around"[45].

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[42] Tiraboschi M., *Il lavoro agile tra legge e contrattazione collettiva: la tortuosa via italiana verso la modernizzazione del diritto del lavoro*, in *Working Papers "Massimo D'Antona"*, 2017, n. 335, p. 33.

[43] For example, see collective agreements at company level signed by Bayer, Siemens, Ferrovie dello Stato, Enel, TIM, Vodafone, Ferrero, Barilla.

[44] See the mentioned research of Polytechnic of Milan.

[45] Mengoni L., *Diritto e valori*, Il Mulino, Bologna, 1985, p. 379.

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16. Telework and Equal Pay in Japan: A Comparison with the EU

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Summary: 1. Introduction. – 2. Background. – 3. Telework in Japan. – 4. Equal pay for equal work in Japan. – 5. European connections. – 6. Conclusion.

Introduction

In Japanese, when talking about forms of work or work styles, the word *hatarakikata* – literally, "way(s) of working" – is used. In recent years, Japanese politicians and stakeholders have discussed at length about the ways of working that are most widely applied in the country and their deficiencies. In particular, regular overtime work has been listed as one of the main issues, since it might be considered the root cause of gender inequality in the household division of labor and low levels of productivity. About the former, in 2007, the Government reached an agreement with the representatives of workers and companies on a series of work-life balance objectives that are in course of implementation.[1] With regard to the latter, Prime Minister Shinzō Abe established a panel of experts in order to draft an Action Plan that was released on March 28, 2017.[2] According to it, there are three basic problems that need to be tackled:

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1 See the Work-life Balance Charter (*Shigoto to seikatsu no chōwa kenshō*) and the Action Plan for the Promotion of Work-life Balance (*Shigoto to seikatsu no chōwa suishin no tame no kōdō shishin*), available at http://wwwa.cao.go.jp/wlb/government/index.html (last visit: May 20, 2020). Both have been amended on June 29, 2010, and subsequent legislation was drafted/amended on their basis, in an effort at mainstreaming.

2 Available at https://www.kantei.go.jp/jp/singi/hatarakikata/ (last visit: May 20, 2020). Provisional English translation available on the same page.

(1) unjustified difference in treatment between regular and non-regular workers;[3] (2) long working hours;[4] and (3) single-track career paths.[5]

Among the solutions that were proposed under the label of *hatarakikata kaikaku*,[6] there is the gradually stricter application of the equal pay for equal work principle, first by issuing specific guidelines[7] that clarify when differential treatment is unjustified, then by passing laws on the basis of which workers can redress their claims in court, supplemented by a free-of-charge alternative dispute resolution system. With regard to long working hours, a set of criminal sanctions for companies that break the rules will be enforced. Finally, in order to remove time and place restrictions so that workers may adapt their work style to their needs, the Government intends to encourage side jobs and telework. Of course, this kind of transition will entail also a number of organizational innovations that require self-management skills on part of the workers. The hope is that over the years it will lead to a more inclusive labor market that benefits from the diversity of its human capital instead of imposing just one model, which might not be the most efficient and might not suit everybody.

In any case, it is striking how many times European countries are mentioned in the documentation produced by the Government and, more in general, by Japanese academia regarding this topic. It is clear

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3 In Japan, non-regular workers (*i.e.* workers who are not full-time employees with undefined-term contracts) amount to almost 40% of the workforce (2018 average). Data from the Statistics Bureau of Japan, available at https://www.stat.go.jp/data/roudou/sokuhou/nen/dt/pdf/ndtindex.pdf (last visit: May 20, 2020).

4 Japan has one of the lowest productivity levels among developed countries. Data from the Organization for Economic Co-operation and Development (OECD), available at https://doi.org/10.1787/pdtvy-data-en (last visit: May 20, 2020).

5 In Japan, intra-company transfers are quite common, but workers tend to stick with the same employer for most of their lives because switching might jeopardize their careers. Therefore, the current system does not encourage the development of multiple careers nor mastering skills on which the workers can capitalize later on in different companies. This phenomenon tends to affect women in particular, since it rewards absolute "loyalty" to the same company, whereas women often experience temporary disruptions in their careers because of child-rearing and other life events.

6 Reform of the way(s) of working.

7 Guidelines on the prohibition of unequal treatment towards part-time, fixed-term and dispatched workers (*Tanjikan, yūki koyō rōdōsha oyobi haken rōdōsha ni taisuru fugōrina taigū no kinshi nado ni kansuru shishin*), Notification No. 430 of the Ministry of Health, Labor and Welfare (MHLW), December 28, 2018. Available at https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000190591.html (last visit: May 20, 2020). It has entered into force on April 1, 2020, as part of the reform of Act No. 76 of June 18, 1993 on improving the management of part-time workers and fixed-term workers (*Tanjikan rōdōsha oyobi yūki koyō rōdōsha no koyō kanri no kaizen nado ni kansuru hōritsu*), a.k.a. Part-time Employment Act (PEA).

that an extensive comparison was at the basis of at least some of the considerations regarding the weakness of the current legal framework and the criticism against the lack of flexibility of the local workplace culture. Of course, there are also observers who described the whole operation as a "poison cake" aimed at surreptitiously erasing the protections for regular workers. It is also undeniable that sometimes foreign systems have been idealized or simply used as a tool to advocate for change without deeper analysis. Nevertheless, how Japan expressly and willingly builds on comparison as a way to improve its legal system is certainly unique – although in a way it might resemble the idea of best practices sharing that also the European Union (EU) encourages among its Member States through directives and other hard or soft law means.

In light of the above, the aim of this paper is to give an overview of the most recent labor law reforms in Japan especially with regard to how telework and the equal pay for equal work principle have been introduced to make the best use of a diverse workforce. Considering that a number of EU Member States – the Netherlands, Sweden, Germany, France, etc. – have clearly served as references in the process of elaborating the new policies, the research will also try to highlight the European influences and preliminary assess their impact and feasibility in the Japanese case.

Background

As any other country, Japan is a complex reality that cannot be summarized in a few words without oversimplifying it. Moreover, many myths and misconceptions surround it and are sometimes exceptionally hard to dispel. For the purposes of this paper and for the sake of brevity, only a few data deemed to be relevant for the research have been selected. First, with regard to long working hours, according to the statistics produced by the OECD,[8] the average annual hours actually worked per worker in Japan for the latest available year (2018) are 1680, which is around the same as Italy (1723). It is notably higher than Germany (1363) and Sweden (1474), which boast the lowest averages, but it does not constitute a striking exception. In terms of trend, a slow

[8] Available at https://stats.oecd.org/index.aspx?DataSetCode=ANHRS (last visit: May 20, 2020).

decrease is clearly visible in each country, although in Japan – and Italy – it is more significant. However, differences in the sources and under-reporting make it difficult to compare among countries or even to rely too much on these data: considering that Japan has went as far as to implement a law for the prevention of *karōshi* – death by overwork, usually by stroke or suicide –, it is clear that there is a stress-related social problem that might be caused by excessively long working hours among other issues and that needs to be addressed.

Second, from the point of view of efficiency and productivity, in the OECD statistics for gross domestic product per hours worked expressed in US dollars[9] for the latest available year (2019), Japan ranks well below the G7 average – 42,226.4 USD, compared to 51,126.1 USD – albeit the situation seems to be steadily improving. In addition, the OECD data on the gender wage gap[10] project a bleak image of Japan as a country where women are significantly underpaid – more than 20% less than men for the year 2017. Only South Korea fares worse among OECD countries – mainly as a result of contractual discrimination, since most of the full-time jobs and positions of responsibility are still monopolized by men,[11] although also in this regard the situation seems to be slowly getting better. As partial and inherently inaccurate as this quick overview might be, it clearly confirms the three main issues listed in the Government's Action Plan mentioned in the introduction, which can be reformulated as follows: (1) lack of protection for non-regular workers; (2) toxic workplace culture;[12] (3) lack of flexibility in terms of ways of working. On the bright side, it is undisputable that there is a broad discussion going on – whatever its underlying motives might be: international pressure, fears related to Japan's shrinking population, real concerns about empowering women and other minorities, etc. – about fostering and capitalizing on a more diverse workforce, which might increase awareness and gradually make room for change.

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9 Available at https://stats.oecd.org/Index.aspx?DataSetCode=PDB_LV (last visit: May 20, 2020).

10 Available at https://stats.oecd.org/index.aspx?queryid=54751 (last visit: May 20, 2020).

11 See https://www.stat.go.jp/data/roudou/sokuhou/nen/dt/pdf/ndtindex.pdf (last visit: May 20, 2020).

12 See, in particular, the issue of so-called "black companies" or *BLACK gaisha*, which are the extreme example of a negative working environment.

Telework in Japan

In Japan, the word telework – phonetically Japanized as *terewaaku* – is used in reference to what in the EU is nowadays often rebranded as smart working. The country is considered by scholars to be a latecomer in the field of flexible work, if not dead set against it, when compared to the US and Europe. Talk with any Japanese "salaryman" after a few drinks and they will probably start complaining about the Shōwa[13] mindset of their management, who cannot even let go of the most time-wasting paperwork and are overly suspicious of the slightest change. However, it is also important not to dwell on one-sided criticism and explore the efforts that have been made in this regard. If we broaden the view beyond Japan's borders, it can be said that the idea of teleworking was born in the sixties, although it was not until the nineties that a sufficient infrastructure was finally ready in some parts of the world. However, at the time, Japanese companies were quite wary because of the poor results of the attempts at teleworking of the seventies and the eighties, and this can be considered one of the reasons for the delay in adopting it as a more generalized strategy.[14]

In the years that followed, new and more compelling challenges emerged: firstly, globalization, with its intrinsic drive towards meeting the highest international standards – and possibly exceeding them, in order to win the race; secondly, a whole series of global-scale issues – sometimes related to how companies operated around the world until that point – that were there to stay and possibly worsen in lack of coordinated international action, such as climate change. These developments, coupled with increasingly more reliable IT infrastructures, called for a re-examination of what was once dismissed as a poor and unappealing alternative to the well-established traditional way of working.[15] As a matter of fact, there are also many ways of teleworking – to name a few: satellite office, mobile work, etc. –,[16] but this paper will take into consideration only what is best known as *zaitaku kinmu*

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[13] The Shōwa period spanned from 1926 to 1989.

[14] Higa K., Lee H.G., Shirakawa H., *Nihongata TELEWORK dōnyūhō ni mukete – jirei DATA ni yoru kōsatsu* [Toward Telework Adoption Methodology for Japanese Organizations – Case-based Approach], in *Nihon TELEWORK Gakkaishi* [The Japanese Journal of Telework], Vol. 1, No. 1, 2002, p. 21.

[15] *Id*.

[16] *Id.* for a useful scheme.

– literally, "work from home" – or telecommuting, *i.e.* when regular employees work while staying in their own dwellings – or somewhere else, such as a coffee shop – via telecommunication technology and without physically commuting to the company.

At this point of the analysis, it is important to remember the link between *hatarakikata kaikaku* and teleworking, which can be conceived as a strategic response to different kinds of diversification, in terms of workforce – more women, more foreigners, more elders, for example –, ways of working – in different places and at different times – and types of employment – regular or non-regular, such as part-time, dispatched, temporary, etc. In a highly diversified future scenario, teleworking becomes a fundamental tool to capitalize on the untapped opportunities that it might offer. Moreover, considering the sharp division between work and other life events, which is particularly evident in Japan, teleworking might become the cornerstone of harmonization.[17] In this regard, it is worth mentioning that the Work-life Balance Charter of 2007[18] defines a society in which work-life balance has been achieved as a «society where each citizen can work while feeling rewarded and fulfilled, and can choose and achieve different forms of work according to his/her life stage also from the point of view of family and community life – child rearing phase, elderly years phase, etc. – while fulfilling his/her job tasks», *i.e.*: a society where economic independence by work is possible (objective 1); a society where you can save enough time for a healthy and comfortable life (objective 2); and a society where you can choose among various ways of working and living (objective 3). A connection with the concept of decent work as developed by the International Labor Organization (ILO) and/or to the EU definition of job quality can be identified in these aims.

It is also worth remembering, however, that there might be some pitfalls along the way. First of all, it has been pointed out that increased flexibility does not necessarily mean that workers' needs are met, especially if it results in a generalized employment instability. Therefore, any such reform must be part of a wider strategy aimed at increasing the protections for people in the process of switching jobs

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[17] As summarized in Shimozaki C., *Hatarakikata kaikaku to TELEWORK* [Work-style Reform and Telework], in *Nihon TELEWORK Gakkaishi* [The Japanese Journal of Telework], Vol. 14, No. 1, 2016, p. 3.

[18] See Note 1.

– *i.e.* safety nets – and at ensuring that no discrimination in terms of career or salary and welfare is taking place between different categories, so that flexible work does not wind up to become yet another means of exploitation. Moreover, additional self-management capabilities will be required on part of the worker, who might feel under much more stress than before, and might in the end fall victim to burnout or lose motivation. On the other hand, the combination of work with new technologies, although traditionally seen as a threat, can become an instrument for job creation and social inclusion. To provide a recent example, the Japanese company Ory Lab Inc.[19] has developed a robot called OriHime-D that was successfully employed in a coffee shop in order to enable people affected by amyotrophic lateral sclerosis and other diseases that heavily affect motor skills to work as waiters via their robotic avatar. The ultimate aim of the company is to ensure a fulfilling place in the society (*yakuwari*) for everybody thanks to technology. However, despite the efforts of some actors, until fairly recently it is undeniable that Japanese employers have not really invested on telework, which was introduced only by 13.9% of companies, of which only 29,9% allowed telecommuting.[20] The main concerns were fear of data leaks, and the management and evaluation of workers.

It was not until 2003 that Japanese companies had to adopt teleworking as a business continuity strategy for the first time. That year, the Severe Acute Respiratory Syndrome (SARS) outbreak, originating in the Guangdong (Canton) province of China before spreading to 32 countries, infecting 8,098 people and taking 774 lives, forced Japanese companies operating in China to adopt telecommuting in order to ensure the workers' safety without damaging the business. The case drew the attention of researchers who considered it a trial run for more widespread future pandemics.[21] By analyzing the data collected from twenty companies, the following four patterns were identified:

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19 https://orylab.com/ (last visit: May 20, 2020).

20 Data by the Ministry of Internal Affairs and Communications for the year 2017, available at https://www.soumu.go.jp/johotsusintokei/whitepaper/ja/h30/html/nd144310.html (last visit: May 20, 2020). See also the documents produced by the Cabinet of Japan regarding the creation of a cutting-edge IT country, available at https://www.kantei.go.jp/jp/singi/it2/decision.html (last visit: May 20, 2020).

21 See Masaki A., *PANDEMIC toki ni okeru TELEWORK no kenkyū: 2003 nen SARS hasseiji no TELEWORK jirei no kentō* [A Study on Telework in a Pandemic: Case Study of SARS in 2003], in *Nihon TELEWORK Gakkaishi* [The Japanese Journal of Telework], Vol. 8, No. 2, 2010.

1. *taikigata* (watch-and-wait model): the employees were asked to temporary work from home after coming back from infected areas for the length of the quarantine period. Mostly used by manufacturing companies, *e.g.* Daikin;
2. *daitaigata* (substitution model): the employees' homes served as alternative to the office that had to be closed because a carrier or possible carrier of the virus was reported. Chosen by many IT companies, *e.g.* Motorola, HP, Intel;
3. *yobōgata* (precaution model): no virus carriers were reported in the office, but employees were asked to work from home as a precautionary measure. Chosen by many IT companies, *e.g.* NTT Communications and Tōshiba;
4. *kōtaigata* (rotation model): the employees were divided into two groups, one working from home and the other one in the office. Mostly used by financial institutions, *e.g.* Bank of East Asia, because they are more likely to suffer major drawbacks if they slow down their activities for even a few days.

At the time, only 2.4% of Japan-related companies in Asia closed their offices, although almost 90% temporarily suspended overseas business trips and almost 70% reported some kind of impact on their businesses due to the SARS outbreak. However, according to the author of the mentioned paper, it was likely that more and more companies would include in their Business Continuity Plan (BCP)[22] for risk management some specific provisions on teleworking as countermeasure in times of epidemic. It would certainly be interesting to collect more data on how Japanese companies reacted to the 2020 COVID-19 pandemic and whether they managed to build on this previous experience.

Equal pay for equal work in Japan

As mentioned in Section 2, in Japan there is a significant wage gap between men and women. It can be said to derive from the difference in treatment between regular and non-regular workers, since women predominate in the latter category, as well as from societal norms, which tend to pressure women into lower career expectations because of real or potential family-related burdens. Therefore, it is clear that the equal pay for equal work principle – in Japanese, *dōitsu rōdō dōitsu*

[22] In Japanese, *jigyō keizoku kaikaku*.

chingin – has not found widespread and effective application as of yet. The ILO Equal Remuneration Convention, which dates back to 1951, was transposed into national legislation – article 4 of Act No. 49 of April 7, 1947, a.k.a. Labor Standards Act (LSA) –, but it lacked strength and, ultimately, coverage for other minority groups. However, the situation has started to change in recent years. In particular, article 8 of the PEA was amended in 2007 in order to introduce for the first time a provision against discrimination of part-time workers that advocates for a balanced treatment. Its scope of application has been expanded in subsequent reforms and the latest amendment – encompassing definite-term workers and dispatched workers – has entered into force in April 2020. The key point is that any differential treatment must be justified, *i.e.* the employer must prove its *gōrisei* (reasonableness/rationality), otherwise the worker is entitled to compensation, although a certain degree of differentiation is allowed because of freedom of contract or business freedom, which is guaranteed by the Constitution of Japan. It is however early for a more thorough analysis of its implementation. For now, the Ministry of Health, Labor and Welfare has released detailed guidelines and offers free consulting and *kaizen* (amelioration) funds in order to smooth the transition.[23]

European connections

In Japan, it is quite common to study foreign examples in order to learn from the successes and mistakes of others. The practice can be dated back at least to the first documented encounters with nearby countries and has been perfectioned over time in terms of complexity and depth, despite some fluctuations – notably, the *sakoku* policy, *i.e.* around two hundred years of almost complete isolation spanning from the 17th to the 19th century. In the legal field, in particular, Japanese scholars have steadily shown a great deal of curiosity towards foreign systems, in particular during the "modernization" process that took place during the 19th and 20th century under the *wakon yōsai* (Japanese spirit, Western techniques) motto. Building on this previous experience, Japan is still actively interested in best practices at home and abroad. In Europe, on the other hand, comparison is sometimes used as a political tool – to make a reform proposal look more convincing

[23] See https://www.mhlw.go.jp/hatarakikata/same.html (last visit: May 20, 2020).

because it worked somewhere else – and is often met by suspicion and hostility because of the differences that make each system unique, and therefore make foreign solutions supposedly inapplicable – a mentality that, by the way, exists in Japan as well –, although the institutionalization of harmonization within the European Union has provided a permanent forum for dialogue. A fair amount of humility, sensitivity and knowledge is required when observing what happens beyond the borders of a given country, and the abruptness of changes might threaten the process especially nowadays. Regarding the topic of this paper, as well, although the discussion has been going on for decades, recent developments have definitely urged more drastic action.

Research on telework and, more in general, work-life balance involving an extensive comparison with foreign countries have started in Japan around the end of the nineties. More substantial investigation, conducted also by the Government,[24] was carried out in later years and was expanded after the shrinking population issue started gaining attention. Japanese researchers have often – if not always – pointed out Japan's generalized lack of balance between work and the rest of life, which makes it almost impossible for those who are in charge of the latter – usually, women – to have fulfilling careers, and at the same time puts under considerable psychological restraint the bread-winners, who are forced to accept any compromise in order not to lose their jobs, therefore making the job market less and less welcoming for women and other minorities. The result is the establishment of a vicious circle that makes everybody unhappy. Moreover, researches have also resorted to comparison with other countries, in particular Sweden, France, Germany, the United Kingdom (UK), The Netherlands and the United States (US), in order to better understand Japan's issues. In a comprehensive study published in 2012, the Japanese efforts towards work-life balance were deemed to be insufficient – especially in terms of introduction of flextime and telecommuting – despite the diffused awareness on the importance of the matter. In addition to long working hours, the country was deemed to be plagued by a standardization of the way of working that lead to lack of flexibility. On the other hand, among the lessons that could be learned from other countries as means to achieve work-life balance, the following

[24] For example, see https://www8.cao.go.jp/shoushi/shoushika/meeting/priority/kaikaku/k_3/19html/s2_3_5.html (last visit: May 20, 2020).

were listed: actual equal treatment between men and women in the workplace (US), progressive management of flexible work styles (UK), freedom of choice of work style on part of the employee (The Netherlands), autonomy under one's own responsibility and trust between management and employees (Sweden). Therefore, despite lacking a specific model, success stories from abroad seemed to have served as starting points for a deeper self-examination (*hansei*) rooted in the Japanese context.

Conclusion

Having worked in Japan for almost seven years, I cannot deny that noticeable changes have occurred in the meantime. It might be true that it took longer than it could have, as pointed out by many researchers, because of internal resistance, but it is finally happening and the pace has certainly increased in recent years, as a result of compelling situations. The solution that Japan seems to have adopted is to break the vicious circle mentioned in the previous Section by trying to "jump start" a virtuous circle via numerous attempts that, for now, have not proved to be particularly effective, although, as noted also in Section 2, a gradual improvement in some parameters – despite not necessarily being connected to such attempts – can be seen. In particular, regarding the three main obstacles to work-life balance – (1) lack of protection for non-regular workers; (2) toxic workplace culture; (3) lack of flexibility in terms of ways of working – Japan seems to have collected the fruits of international comparison by initiating the "tuning up" (*seibi*) of its national legislation in order to ensure equal treatment of non-regular workers and promote more flexible ways of working. The results of this process, however, will probably become clearer in the next years.

With regard to teleworking, the recent COVID-19 pandemic has certainly provided an unexpected chance, since the number of regular employees working from home has reportedly doubled since April 2020.[25] At the same time, many issues were pointed out by workers: difficulties in communication with colleagues, fears of negative evaluation, fears of burdening the employees still going to the office, lack

[25] Data by Persol Research Institute, published on the Nikkei newspaper. See https://www.nikkei.com/article/DGXMZO58176480X10C20A4000000/ (last visit: May 20, 2020).

of exercise, impossibility of performing certain tasks, extraordinary expenses (printers, electricity bills, etc.). Moreover, managers have sometimes proved to be unfit or unprepared for the challenge, for example by providing incomplete information to workers regarding the available options or by forcing them to go to the office in order to carry out nonessential procedures, such as signing the register of personnel (*shukkinbō*). In addition, some companies seem to be considering seizing the opportunity to do some restructuring and fire many employees for economic reasons. On the other hand, it seems that more than 70% of women would like to continue teleworking even after the end of the pandemic,[26] and some companies have expressed the will to proceed in that direction, *e.g.* DWANGO Co., Ltd., which is the company operating what is basically the Japanese YouTube (Niconico).

It is also important to remember that Japan is a country that is relatively accustomed to cyclical disasters – earthquakes, typhoons, etc. – and might therefore have a tendency to react to such threats by elaborating plans for every contingency that will hopefully ensure a quicker response and recovery in the future – although things do not always turn out as expected. During the current COVID-19 pandemic, Japanese companies seem to have adopted – on a larger scale – the same risk-management strategies that they had previously tried out in different contexts, as a reaction to SARS as well as other unexpected events – such as terrorist attacks in Europe. If that is the case, however, it might just be a change linked to a temporary need, which will disappear once the crisis is settled. It is also possible that the issues experienced by Japanese companies while trying to implement teleworking will prompt a backlash towards it and a revamping of the less complicated traditional option. One can only hope that the silver lining for such a negative collective experience could be at least an advancement towards more inclusive and, ultimately, healthier ways of working.

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