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Improving working conditions in platform work in the light of the recent proposal for a directive

edited by

Stefano Bellomo, Domenico Mezzacapo, Fabrizio Ferraro, Dario Calderara

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Foreword

The aim of this collective work, which is divided into three sections, is to bring together several contributions by scholars from different Countries through the leitmotif of the analysis of work through digital platforms, also and above all in the light of the latest proposal for a European Union directive aimed precisely at improving the working conditions of platform workers.

Particularly, this collective work provides the opportunity to develop a choral reflection on improving working conditions in platform work and the idea of giving shape to a collective volume stem from the fruitful and constructive dialogue established during two Meeting of the European sub-section ELLYS, European Labour Law Young Scholars, held respectively on 5-7th May 2021 in Lisbon and on 8th July 2022 in Rome.

The title of the book "Improving working conditions in platform work in the light of the recent proposal for a directive" evokes the intent to encourage a comparative reflection focused on modern work. For reasons of consistency, it was decided to divide the writings into three subgroups.

The first section focuses on the analysis of digital platform work, also in the light of the 9 December 2021 Proposal for a directive, in various aspects, including issues concerning the use of artificial intelligence.

The first paper, written by Djamil Tony Kahale Carrillo, address the issue of the transparency of the use of automated control and decision-making systems in digital platform work: the author analyses in detail Article 6 of the Proposal for a Directive on the digital platform obligation to inform workers of the existence of such control tools, which can be a source of so-called algorithmic discrimination.

In the second contribution, by Fermín Gallego Moya, an examine of the recent Spanish legislation on riders emerges; this legislation fits perfectly into the proposal for a EU directive on digital platforms, with a view to providing new solid bases for adapting Labour Law to economic/productive changes, in order to keep intact the traditional balances of protection of the weaker party in the employment relationship.

The third contribution, written by Enrica De Marco, is an analysis of the impact of artificial intelligence and digital platform work on gender equality, which must also be respected in such contexts in relation to job transformation, recruitment, job assignment and performance appraisal. In this context, the call for more transparency derives from the lack of regulation of the new phenomenon of algorithmic management, which poses challenges to both employees and the self-employed, especially from the perspective of gender equality protection.

In the fourth contribution, which revolves around the concept of the person performing work through a digital platform, Paolo Iervolino tries to show how the directive runs the risk of falling into contradiction since it would not take into account all the types of platforms, even those recently introduced, present on the market.

The last paper, written by Jakub Tomšej, of the first section examines the proposal for a directive on platform work by carrying out a reflection from the point of view of Czech law: the author hopes that the current internal system in the Czech Republic, which presents a high level of flexibility, welcomed by the majority of workers, will not be deprived of one of its main advantages by the proposal, the future of which, at least at the time of writing, is not clearly known.

The second section analyses issues related to the development of workers' rights through digital platforms, also with reference to the pandemic experience.

The first contribution of the second section is a paper, by Giuseppe Antonio Recchia, on the impact of the directive on the improvement of working conditions for platform providers on the Italian legal system. More specifically, the author questions the collective dimension of the proposed directive and its possible implementation in Italy, in order to highlight how the rights recognized are not in fact able to overcome the shortcomings of a weak legislation.

In the second paper, Mª Belén Fernández Collados focuses on the social protection and work-life balance of workers through digital platforms, with particular reference to Spanish law. The author emphasis-

es that, in Spain, beyond the recognition of individual and collective Labour rights, the disadvantage of digital platform workers, who are not recognized as employees, lies in their reduced social protection and the lack of real tools to reconcile family, personal and work life, since there are no reconciliation formulas comparable to those of employees.

The third contribution of the second section, by Marianna Russo, is more wide-ranging and it offers an argument that goes beyond digital platform work. The author analyses the issue of job security and the measures to implement it in the light of emergency legislation. The COVID-19 experience has left a great legacy in the field of occupational health and safety, through the shared anti-conflict protocols, the focus on personal protective equipment and technological tools, the massive use of remote work and the widespread use of anti-COVID-19 vaccines. The question that remains open is, therefore, how much of this legacy will be maintained in a non-emergency condition.

The last paper of the second section, written by Jáchym Stolička and Štěpán Pastorek, is also dedicated to the emergency context with reference to the Czech immigration legislation, which appeared too complex and inadequate to the needs of an employment sector that is constantly evolving, especially when looking at the digital platform sector. The authors hope that the weaknesses that emerged during the pandemic in the management of immigration will be addressed by new, clearer legislation that better meets the needs of modern society. Generally speaking, what emerges from the contributions in the second section is the desire to highlight the profound changes in the production and service management contexts and to provide innovative solutions that break with the previous system, treasuring what emerged during the pandemic phase of European and national legislation.

In the third section, the authors made considerations on the intervention of the draft directive on qualification, also with reference to transposition and coordination with national regulations.

The first essay of the third and last section, written by Antonio Alessandro Scelsi, analyzes the evolutionary dynamics of the proposal for a directive of the Parliament and of the Council on the improvement of working conditions of platform workers, launched on 9 December 2021. In particular, starting from a communication launched by the European Trade Union Confederation, it dwells on the potentially disruptive impact exerted on the presumption of subordination governed

by Article 4 of the directive by a provision, set out in recital 23, which would allow platforms to take out private social insurance for their workers, without this being relevant as a criterion indicating the existence of an employment relationship.

In the second contribution, Savino Balzano does a reflection on the term 'Gig Economy' which, according to the author, in itself represents several contradictions regarding its etymological origin and the choice of its use. The focus of the paper is on the question whether this expression hides the old habit of those who are the strongest party in the labour contract to flex the position of individuals for the benefit of the market of large industrial and financial groups.

The third essay, by Ceren Kasim, discusses the theoretical foundations of the laws protecting against dismissal, starting precisely with the relationship between the employer, as the economically and often politically weaker party to the employment contract, and the employee. In this context, the rules of the law on protection against dismissal promote the maintenance of social peace. Protection against dismissal is an instrument to achieve material equality in employment and serves to preserve the economic, social and cultural rights of workers.

The third section ends with a contribution, written by Mariana Pinto Ramos, dedicated to the Portuguese legal framework related to teleworking during the pandemic. The author points out that the phenomenon of the explosion of telework or remote work in terms of numbers (as it has emerged in several countries, Italy included) has occurred precisely during the pandemic, so forcing legislators to intervene to adapt this institution to the contingencies. It emerges from the fact that the regulations on smart working, at least in the Portuguese context, could have been bolder so as to allow greater flexibility in labour relations.

All this is part of a European context in which the proposal for a directive is intended to increase the protection of platform workers at european level, with the aim, on the one hand, to reduce the phenomenon of "grey labour" as much as possible; on the other one, to provide genuine self-employed workers, who account for 90% of all platform workers in the countries of the European Union, with general and minimal protections; and, on the third hand, to increase the traceability and transparency of platform workers through the introduction of a series of reporting and information obligations on the part of the platform. This focus on digitalisation on the part of the European institutions could be defined as "digital constitutionalism", during which

- having become aware of the inadequacy of traditional institutions to cope with technological instances - politics, national and supranational legislators bring the safeguarding of the human person and his dignity back to the centre of the debate, including in the protection of the latest generation of rights, such as the digital ones.

To summarise and present the contributions, it is possible to emphasise how the treatment and examination of digital platform work and the proposal for a directive allowed the authors to range, especially in the second and third sections, over broader themes of labour law, which is constantly evolving precisely on the basis of technological innovations that cannot be taken into consideration merely as a tool at the service of digital platforms, but as a reality that now underpins every dynamic within industrial and labour relations.

S. Bellomo, D. Mezzacapo, F. Ferraro and D. Calderara

Section I

1. La transparencia y el uso de sistemas automatizados de control y toma de decisiones en las plataformas digitales: Algunas consideraciones a la discriminación algorítmica

Djamil Tony Kahale Carrillo, Catedrático de Derecho del Trabajo y de la Seguridad Social Universidad Politécnica de Cartagena (UPCT)

Sumario: *1. Situación de la Propuesta de la Comisión para mejorar las condiciones laborales de las personas que trabajan a través de plataformas digitales - 2. Situación en España - 3. Algunas consideraciones: ¿existe la discriminación algorítmica?*

1. Situación de la Propuesta de la Comisión para mejorar las condiciones laborales de las personas que trabajan a través de plataformas digitales

El artículo 6 de la Propuesta de la Comisión para mejorar las condiciones laborales de las personas que trabajan a través de plataformas digitales, titulado "Transparencia y uso de sistemas automatizados de control y toma de decisiones" [1], señala la exigencia de las plataformas digitales de informar a los trabajadores de plataformas de las siguientes cuestiones:

a) Los sistemas de seguimiento automatizado que se utilizan para controlar, supervisar o evaluar el rendimiento laboral de los trabajadores de plataformas a través de medios electrónicos. Lo que podría denominarse herramientas de control:
   - El hecho de que dichos sistemas se utilizan o están en proceso de utilizarse.
   - Las categorías de acciones controladas, supervisadas o evalua-

[1] Los resultados de esta investigación provienen de la ayuda concedida por el Ministerio de Universidades en el marco del Programa Estatal para Desarrollar, Atraer y Retener Talento, subprograma estatal de Movilidad, del Plan Estatal de Investigación Científica, Técnica y de Innovación 2021-2023.

das por dichos sistemas; incluida la evaluación por parte del destinatario del servicio.

b) Los sistemas automatizados de toma de decisiones que se utilicen para tomar o apoyar decisiones que afecten significativamente a las condiciones de trabajo de los trabajadores de la plataforma; en particular, su acceso a las asignaciones de trabajo, ingresos, seguridad y salud seguridad y salud en el trabajo, tiempo de trabajo, promoción y situación contractual, incluida la restricción, la suspensión o la finalización. Lo que podría denominarse herramientas de dirección:

   - El hecho de que dichos sistemas se utilizan o están en proceso de utilizarse.
   - Las categorías de decisiones que se toman o se apoyan en dichos sistemas.
   - Los principales parámetros y la importancia relativa de esos parámetros principales en la toma de decisiones automatizada, incluyendo la forma en que los datos personales del trabajador de la plataforma o comportamiento del trabajador de la plataforma influyen en las decisiones.
   - Los motivos de las decisiones de restringir, suspender o cancelar la cuenta, rechazar la remuneración del trabajo realizado; sobre la situación contractual del trabajador de la plataforma o cualquier decisión con efectos similares.

Se advierte que aquella información se deberá facilitar por escrito, en forma de documento, que podrá estar en formato electrónico, que se presentará de forma concisa, transparente, inteligible y fácilmente accesible, utilizando un lenguaje claro y sencillo. Información que se facilitará a más tardar el primer día laborable, así como en caso de cambios sustanciales y en cualquier momento a petición de los trabajadores de la plataforma.

Las plataformas digitales de trabajo, a su vez, informarán, de toda aquella información, a los representantes de los trabajadores de la plataforma y a las autoridades laborales nacionales. Asimismo, se advierte que las plataformas digitales de trabajo no tratarán ningún dato personal relativo a los trabajadores de la plataforma que no estén intrínsecamente relacionados y sean estrictamente necesarios para la ejecución del contrato entre el trabajador de la plataforma y la plataforma laboral digital. En este sentido, las plataformas digitales no podrán:

a) Tratar datos personales sobre el estado emocional o psicológico del del trabajador de la plataforma.
b) Tratar datos personales relativos a la salud del trabajador de la plataforma, excepto en los casos contemplados en el artículo 9, apartado 2, letras b) a j), del Reglamento (UE) 2016/679.
c) Tratar cualquier dato personal en relación con conversaciones privadas, incluido los intercambios con los representantes de los trabajadores de la plataforma.
d) Recoger cualquier dato personal mientras el trabajador de la plataforma no esté ofreciendo o realizando un trabajo de plataforma.

Con relación a las excepciones que hace referencia el apartado b, antes señalados, respecto a los contemplados en el artículo 9, apartado 2, letras b) a j), del Reglamento (UE) 2016/679, se señalan los siguientes respectivamente:

- "El tratamiento es necesario para el cumplimiento de obligaciones y el ejercicio de derechos específicos del responsable del tratamiento o del interesado en el ámbito del Derecho laboral y de la seguridad y protección social, en la medida en que así lo autorice el Derecho de la Unión de los Estados miembros o un convenio colectivo con arreglo al Derecho de los Estados miembros que establezca garantías adecuadas del respeto de los derechos fundamentales y de los intereses del interesado".
- "El tratamiento es necesario para proteger intereses vitales del interesado o de otra persona física, en el supuesto de que el interesado no esté capacitado, física o jurídicamente, para dar su consentimiento".
- "El tratamiento es efectuado, en el ámbito de sus actividades legítimas y con las debidas garantías, por una fundación, una asociación o cualquier otro organismo sin ánimo de lucro, cuya finalidad sea política, filosófica, religiosa o sindical, siempre que el tratamiento se refiera exclusivamente a los miembros actuales o antiguos de tales organismos o a personas que mantengan contactos regulares con ellos en relación con sus fines y siempre que los datos personales no se comuniquen fuera de ellos sin el consentimiento de los interesados".
- "El tratamiento se refiere a datos personales que el interesado ha hecho manifiestamente públicos".

- "El tratamiento es necesario para la formulación, el ejercicio o la defensa de reclamaciones o cuando los tribunales actúen en ejercicio de su función judicial".
- "El tratamiento es necesario por razones de un interés público esencial, sobre la base del Derecho de la Unión o de los Estados miembros, que debe ser proporcional al objetivo perseguido, respetar en lo esencial el derecho a la protección de datos y establecer medidas adecuadas y específicas para proteger los intereses y derechos fundamentales del interesado".
- "El tratamiento es necesario para fines de medicina preventiva o laboral, evaluación de la capacidad laboral del trabajador, diagnóstico médico, prestación de asistencia o tratamiento de tipo sanitario o social, o gestión de los sistemas y servicios de asistencia sanitaria y social, sobre la base del Derecho de la Unión o de los Estados miembros o en virtud de un contrato con un profesional sanitario y sin perjuicio de las condiciones y garantías contempladas en el apartado 3".
- "El tratamiento es necesario por razones de interés público en el ámbito de la salud pública, como la protección frente a amenazas transfronterizas graves para la salud, o para garantizar elevados niveles de calidad y de seguridad de la asistencia sanitaria y de los medicamentos o productos sanitarios, sobre la base del Derecho de la Unión o de los Estados miembros que establezca medidas adecuadas y específicas para proteger los derechos y libertades del interesado, en particular el secreto profesional".
- "El tratamiento es necesario con fines de archivo en interés público, fines de investigación científica o histórica o fines estadísticos, de conformidad con el artículo 89, apartado 1, sobre la base del Derecho de la Unión o de los Estados miembros, que debe ser proporcional al objetivo perseguido, respetar en lo esencial el derecho a la protección de datos y establecer medidas adecuadas y específicas para proteger los intereses y derechos fundamentales del interesado".

2. Situación en España

El artículo 2 de la Propuesta de Directiva define plataforma digital de trabajo como toda persona física o jurídica que preste un servicio comercial siempre que cumpla los requisitos siguientes:

- Que se preste, al menos en parte, a distancia a través de medios electrónicos, como un sitio web o una aplicación móvil.

- Que se preste a petición de un destinatario del servicio.
- Implica, como componente necesario y esencial, la organización de trabajo realizado por personas, independientemente de que dicho trabajo se realice en línea o en un lugar determinado.

Como se desprende de la definición, para su utilización se emplean algoritmos para la asignación de tareas o la adecuación de clientes y trabajadores. Por ello, el legislador español, a través de la Ley 12/2021, de 28 de septiembre, por la que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales[2], siguiendo el camino de la Propuesta de Directiva, incorpora en el artículo 64.4 del Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores[3], que el Comité de Empresa será informado:
«por la empresa de los parámetros, reglas e instrucciones en los que se basan los algoritmos o sistemas de inteligencia artificial que afectan a la toma de decisiones que pueden incidir en las condiciones de trabajo, el acceso y mantenimiento del empleo, incluida la elaboración de perfiles».

Bajo este contexto, se observa que el legislador español ha ido un paso más en el tiempo con relación a la Propuesta de Directiva; en el sentido de ya contener en la normativa regulación sobre la información que deben tener los representantes de los trabajadores. No obstante, la Propuesta de Directiva contiene más detalle que la legislación nacional. Por tanto, España tendrá que, en el caso de aprobarse la Propuesta, incluir en su norma lo referente al tema de estudio. Queda claro que la Propuesta contiene más detalle. Por lo que resulta plausible la actuación de la Unión Europea en mejorar las condiciones laborales de las personas que trabajan a través de plataformas digitales.

3. Algunas consideraciones: ¿existe la discriminación algorítmica?

La Unión Europa (UE) ha advertido de los riesgos para los derechos fundamentales como consecuencia del uso de algoritmos informáticos, sistemas de Inteligencia Artificial y decisiones automatizadas por lo

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[2] BOE núm. 233, de 29 de septiembre de 2021.

[3] BOE núm. 255, de 24 de octubre de 2015.

que "debe hacerse una distinción entre cantidad y calidad de los datos a fin de facilitar la utilización eficaz de los macrodatos (algoritmos y otras herramientas analíticas); y que los datos y/o los procedimientos de baja calidad en los que se basan los procesos de toma de decisiones y las herramientas analíticas podrían dar lugar a algoritmos sesgados, correlaciones falsas, errores, una subestimación de las repercusiones éticas, sociales y legales, el riesgo de utilización de los datos con fines discriminatorios o fraudulentos y la marginación del papel de los seres humanos en esos procesos, lo que puede traducirse en procedimientos deficientes de toma de decisiones con repercusiones negativas en las vidas y oportunidades de los ciudadanos, en particular los grupos marginalizados, así como generar un impacto negativo en las sociedades y empresas"[4].

En este mismo sentido, la Organización Internacional del Trabajo (OIT) ha indicado que "los avances tecnológicos requieren también de la reglamentación del uso de datos y de la responsabilidad sobre el control de los algoritmos en el mundo del trabajo (…) Se ha demostrado que los algoritmos utilizados para encontrar puestos de trabajo pueden perpetuar sesgos de género (…) Encauzar y administrar la tecnología en favor del trabajo decente. Esto significa que los trabajadores y directivos han de diseñar la concepción del puesto de trabajo. Significa también que se adopte un enfoque de la inteligencia artificial «bajo control humano» que garantice que las decisiones definitivas que afectan al trabajo sean tomadas por personas. Debería establecerse un sistema de gobernanza internacional de las plataformas digitales del trabajo que exija a estas plataformas (y a sus clientes) que respeten determinados derechos y protecciones mínimas"[5].

El Dictamen del Comité Económico y Social Europeo sobre la "Inteligencia artificial: las consecuencias de la inteligencia artificial para el mercado único (digital), la producción, el consumo, el empleo y la sociedad" (Dictamen de iniciativa) (2017/C 288/01) define Inteligencia Artificial (IA) como aquel "concepto que engloba muchas otras (sub) áreas como la informática cognitiva (cognitive computing: algoritmos capaces de razonamiento y comprensión de nivel superior —huma-

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[4] Resolución del Parlamento Europeo, de 14 de marzo de 2017, sobre las implicaciones de los macrodatos en los derechos fundamentales: privacidad, protección de datos, no discriminación, seguridad y aplicación de la ley (2016/2225(INI)).

[5] INTERNATIONAL LABOUR ORGANIZATION (2019): *Trabajar para un futuro más prometedor*, ILO.

no—), el aprendizaje automático (machine learning: algoritmos capaces de enseñarse a sí mismos tareas), la inteligencia aumentada (augmented intelligence: colaboración entre humanos y máquinas) o la robótica con IA (IA integrada en robots). Sin embargo, el objetivo fundamental de la investigación y el desarrollo en materia de IA es la automatización de comportamientos inteligentes como razonar, recabar información, planificar, aprender, comunicar, manipular, observar e incluso crear, soñar y percibir".

A la Inteligencia Artificial, asimismo, se le ha definido como aquellos "sistemas de software (y en algunos casos también de hardware) diseñados por seres humanos que, dado un objetivo complejo, actúan en la dimensión física o digital mediante la percepción de su entorno a través de la obtención de datos, la interpretación de los datos estructurados o no estructurados que recopilan, el razonamiento sobre el conocimiento o el procesamiento de la información derivados de esos datos, y decidiendo la acción o acciones óptimas que deben llevar a cabo para lograr el objetivo establecido. Los sistemas de IA pueden utilizar normas simbólicas o aprender un modelo numérico; también pueden adaptar su conducta mediante el análisis del modo en que el entorno se ve afectado por sus acciones anteriores"[6].

Por último, también se ha definido la IA como aquel "conjunto de métodos, teorías y técnicas científicas cuyo objetivo es reproducir, mediante una máquina, las habilidades cognitivas de los seres humanos. Los desarrollos actuales buscan que las máquinas realicen tareas complejas previamente realizadas por humanos. Sin embargo, el término inteligencia artificial es criticado por expertos que distinguen entre "fuerte" IA (pero capaz de contextualizar problemas especializados y variados de forma completamente autónoma manera) y AI "débiles" o "moderados" (alto rendimiento en su fi campo de entrenamiento). Algunos expertos argumentan que las IA "fuertes" requerirían avances significativos en la investigación básica, y no solo simples mejoras en el rendimiento de los sistemas existentes, para poder modelar el mundo en su conjunto. Las herramientas identificadas en este documento se desarrollan utilizando métodos de aprendizaje automático, es decir, IA "débiles""[7].

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[6] GRUPO INDEPENDIENTE DE EXPERTOS DE ALTO NIVEL SOBRE INTELIGENCIA ARTIFICIAL (2019): *Directrices éticas para una IA fiable*, Comisión Europea, Bruselas: p. 48.

[7] *Carta ética europea sobre el uso de la inteligencia artificial en los sistemas judiciales y su entorno*, de 4 de diciembre de 2018.

De las anteriores definiciones se puede inferir que el algoritmo juega un papel importante, dado que representa el papel básico y central dentro de aquellas tecnologías y, por ende, se ha presentado como herramienta imponente en las relaciones laborales. La Real Academia Española, no obstante, define algoritmo en dos acepciones[8]. Por una parte, como aquel conjunto ordenado y finito de operaciones que permite hallar la solución de un problema. Por otra, el método y notación en las distintas formas del cálculo.

La Carta ética europea sobre el uso de la inteligencia artificial en los sistemas judiciales y su entorno, de 4 de diciembre de 2018 define algoritmo como aquella "secuencia finita de reglas formales (operaciones lógicas e instrucciones) que permiten obtener un resultado de la entrada inicial de información. Esta secuencia puede ser parte de un proceso de ejecución automatizado y aprovechar modelos diseñados a través del aprendizaje automático". Los matemáticos, sin embargo, lo definen como aquel "conjunto de reglas que, aplicada sistemáticamente a unos datos de entrada apropiados, resuelven un problema en un número finito de pasos elementales"[9]. Por consiguiente, los algoritmos contribuyen, por una parte, a formalizar un conjunto de reglas de decisión; por otra, a efectuar cadenas de cálculos que permiten el análisis de múltiples variables, seleccionando, de entre ellas, la mejor[10].

Las principales características comunes de los algoritmos son las siguientes[11]:

a) Precisos: Objetivos, sin ambigüedad; es decir, se distinguen con claridad.
b) Ordenados: Muestran una secuencia clara y precisa para poder llegar a la solución.
c) Finitos: Contienen un número determinado de pasos para llegar a un fin.
d) Concretos: Ofrecen una solución determinada para la situación o problema planteados.
e) Definidos: Están delimitados, solo procesan la información y las operaciones que tienen.

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8 www.rae.es

9 PEÑA MARI, Ricardo (2006): *De Euclides a Java, la historia de los algoritmos y de los lenguajes de programación*, Nívola, Madrid.

10 MERCADER UGUINA, Jesús (2019): "Algoritmos y derecho del trabajo", *Actualidad Jurídica Uría Menéndez*, núm. 52: p. 64.

11 GÓMEZ FLORES, Luis (2017): "Algoritmo", *Vida Científica*, Vol. 5, núm. 10.

Sin embargo, se ha señalado que los algoritmos "son fórmulas, parámetros, reglas o instrucciones que accionan las plataformas digitales de las empresas de reparto. Los algoritmos, es decir las fórmulas, parámetros, reglas o instrucciones, las diseña y decide implementarlas el empresario, o alguien en su nombre. Las plataformas digitales, cual otra herramienta o maquinaria, son propiedad del empresario, que como tal goza y dispone de las mismas comprometiendo a otros (ajenidad y subordinación). El empresario, por medio o a través de su plataforma digital de gestión algorítmica (sistema de inteligencia artificial), organiza, dirige o administra y controla la empresa (directa, indirecta o implícitamente) de acuerdo a sus intereses, decisiones empresariales que, también, inciden en las condiciones de trabajo, en el acceso y el mantenimiento del empleo de los repartidores, cuya subordinación laboral a tales instrucciones empresariales resulta así manifiesta"[12].

Los algoritmos se están utilizando en procesos de contratación, promoción profesional, evaluación de desempeño profesional, asignaciones de tareas, remuneración y despido[13]. Por tanto, áreas de los recursos humanos en el que las manifestaciones discriminatorias por razón de sexo son más sobresalientes; especialmente, en las plataformas digitales.

Las plataformas digitales de trabajo, por ejemplo, emplean algoritmos para la asignación de tareas o la adecuación de clientes y trabajadores. Todo ello ha generado que se transforme un proceso clásico de recursos humanos que normalmente implicaba la interacción humana. Las prácticas tradicionales de recursos humanos basan la selección de personal, en gran medida, en los niveles de formación y la experiencia. Bajo este contexto, la selección algorítmica se configura por un conjunto de indicadores tales como las puntuaciones, las reseñas de clientes o consumidores, los índices de cancelación o aceptación de trabajos y los perfiles de los trabajadores[14].

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[12] PÉREZ AMORÓS, Francisco (2021): "¿Quién vigila al algoritmo?: los derechos de información de los representantes de los repartidores en la empresa sobre los algoritmos de las plataformas de reparto", *e-Revista Internacional de la Protección Social*, Vol. VI, núm. 1: pp. 173-187.

[13] FERNÁNDEZ GARCÍA, Antonio (2020): "Trabajo, algoritmos y discriminación", en AA.VV., *Vigilancia y control en el Derecho del Trabajo Digital*, Thomson Reuter-Aranzadi, Cizur Menor: p. 512.

[14] INTERNATIONAL LABOUR ORGANIZATION (2021): *Perspectivas Sociales y del Empleo en el Mundo. El papel de las plataformas digitales en la transformación del mundo del trabajo*, OIT, Ginebra.

En este mismo sentido, nace el término de látigo digital que es aquella nueva forma de disciplina y control establecidas a través del uso de tecnologías de la información y la comunicación, de manera que los horarios de los trabajadores se fijan y se supervisan por ordenador; generalmente con un algoritmo integrado de mejora continua basado en el promedio de tiempo que tardan los trabajadores en completar determinadas tareas[15].

El proceso de asignación algorítmica, a su vez, puede tener en cuenta los planes de suscripción del trabajador y los paquetes opcionales adquiridos. En este tipo de proceso se puede correr el riesgo de excluir a algunos trabajadores del acceso a las tareas; de manera particular, a los procedentes de países en desarrollo y a los que tienen ingresos más bajos. Así como a colectivos vulnerables, en este caso, a las mujeres. Los algoritmos, como ya se ha adelantado, valoran, evalúan y califican el rendimiento y el comportamiento de los trabajadores de las plataformas utilizando una serie de parámetros, como las reseñas y las opiniones de los clientes.

El GT29 (actual, Comité Europeo de Protección de Datos) ha destacado en sus Directrices sobre decisiones individuales automatizadas y elaboración de perfiles a los efectos del Reglamento 2016/679 (WP251rev.01) que "la elaboración de perfiles y las decisiones automatizadas pueden plantear riesgos importantes para los derechos y libertades de las personas que requieren unas garantías adecuadas. Estos procesos pueden ser opacos. Puede que las personas no sean conscientes de que se está creando un perfil sobre ellas o que no entiendan lo que implica. La elaboración de perfiles puede perpetuar los estereotipos existentes y la segregación social. Asimismo, puede encasillar a una persona en una categoría específica y limitarla a las preferencias que se le sugieren [...] En algunos casos, la elaboración de perfiles puede llevar a predicciones inexactas. En otros, puede llevar a la denegación de servicios y bienes, y a una discriminación injustificada".

Por ello, resalta, a su vez, que "los algoritmos de aprendizaje automático están diseñados para procesar grandes volúmenes de información y generar correlaciones que permitan a las organizaciones crear perfiles de personas muy exhaustivos y sólidos. Aunque, en el caso de

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[15] AGENCIA EUROPEA PARA LA SEGURIDAD Y LA SALUD EN EL TRABAJO (2018): *Estudio prospectivo sobre los riesgos nuevos y emergentes para la seguridad y salud en el trabajo asociados a la digitalización para 2025*, Oficina de Publicaciones de la Unión Europea, Luxemburgo: p. 45.

la elaboración de perfiles, conservar datos puede presentar ventajas, dado que el algoritmo podrá aprender de un mayor número de datos, los responsables del tratamiento deben cumplir el principio de minimización de datos al recoger datos personales y garantizar que conservan dichos datos durante no más tiempo del necesario y de forma proporcional a los fines del tratamiento de los datos personales".

Se han dado voces al manifestar, por una parte, que los "algoritmos pueden ser sumamente precisos pero son ciegos a las emociones a diferencia de las personas pero cuando incorporan sentimientos pierden su fría lógica, se humanizan y pueden, también, discriminar. Ello ocurre porque el aire que respiran los algoritmos, los datos, pueden encontrarse viciado por lo que las decisiones automatizadas resultantes se encontrarán, igualmente, corrompidas (sesgos, discriminación, etc.)"[16].

Por otra, a "las empresas que utilicen los mismos análisis razonables de Big data o algoritmos de IA les costará diferenciarse estratégicamente. Las personas con competencias sociales muy desarrolladas son capaces de valorar el contexto emocional y las conexiones de las decisiones estratégicas. Pueden llevar la contraria, hacer preguntas difíciles o ilógicas. Tienen imaginación y saltos intuitivos que la IA tardará en replicar"[17].

Todo ello trae como resultado la creación de un nuevo tipo de discriminación: "discriminación algorítmica" que es aquella que se origina cuando un individuo o colectivo recibe un tratamiento arbitrario como consecuencia de la toma de decisiones automatizadas[18]. Bajo este contexto, también entra la discriminación que realiza el algoritmo a la mujer. Por ello se afirma que las diferencias de oportunidades en el mundo del trabajo para la mujer se ha diversificado de la siguiente manera: "a) en el acceso al empleo, con serias desventajas incluso con altos niveles de formación de las mujeres; b) en las condiciones de permanencia en el mercado de trabajo, especialmente por seguir enfrentando las mujeres mayoritariamente las responsabilidades de hogar y familia y debido a la persistencia de brecha salarial por trabajo de igual valor; y c) la promoción profesional a puestos de especial responsabi-

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16 MERCADER UGUINA, Jesús (2021): "Algoritmos: personas y números en el Derecho Digital del trabajo", *La Ley*, núm. 2.394: p. 9.

17 BRUNO CASSIMAN, Sandra (2018): "Las personas son la ventaja competitiva", *Insight*, núm. 150: pp. 10-11.

18 MERCADER UGUINA, Jesús (2021): "Algoritmos: personas y números en el Derecho Digital del trabajo", *La Ley*, núm. 2.394: p. 9.

lidad o que requieren capacidades de liderazgo, lo que responde a sofisticados sistemas filtros de elección/exclusión de las mujeres o techo de cristal"[19].

Las tecnologías basadas en el big data, en ocasiones, agudiza la discriminación a consecuencia de sesgos implícitos en los datos, reforzando sesgos sexistas, incluso racistas y clasistas que intentaban resolver. La negociación colectiva juega un papel importante para evitar este tipo de discriminación contra la mujer por lo que se aboga una revisión sólida en la toma de decisiones en el uso de IA. Por consiguiente, verificar los prejuicios y la discriminación es clave, dado que aquellos sistemas deben ser lo más inclusivos y sostenibles posible. Por lo que se requiere una verificación adecuada para que no existan sesgos para categorías particulares de trabajadoras, edad, género, personas con discapacidad, minorías étnicas o determinantes socioeconómicos.

La falta de transparencia respecto de cómo la IA analiza los datos y aprende podría llevar a que se comportase de manera imprevistas e insegura. En el caso de los algoritmos de aprendizaje profundo, no es posible determinar qué factores utiliza el programa para alcanzar su conclusión. Si los trabajadores no entienden cómo funcionan los sistemas, podrían resultarles difícil interactuar con ellos correctamente, reconocer cuándo no funcionan bien y saber cómo reaccionar en esos casos. Los trabajadores también podrían padecer estrés si no saben lo que está ocurriendo, qué datos se pueden recoger acerca de ellos y con qué fines.

Por consiguiente, puede producir problemas de salud y bienestar, así como a una baja productividad y a un incremento de las bajas por enfermedad. Si se informara a los trabajadores de cuál es su rendimiento en comparación con el de otros —o quizá con el de las máquinas—, podría generar presión sobre el rendimiento, ansiedad y baja autoestima. Sin embargo, desde otra óptica, los nuevos tipos de algoritmos analíticos/inteligentes combinados con el acceso a grandes conjuntos de datos podrían facilitar una supervisión más efectiva de la salud y seguridad en el trabajo en tiempo real y un mejor conocimiento de aquellos riesgos en general[20].

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[19] RAMOS QUINTANA, Margarita (2017): "El futuro de las mujeres. El futuro de la humanidad: más derechos efectivos para un empoderamiento real", en AA.VV., *Conferencia Internacional Tripartita. El futuro del trabajo que queremos, Iniciativa del Centenario de la OIT (1919-2019)*, Ministerio de Empleo y Seguridad Social, Madrid: pp. 245-246.

[20] AGENCIA EUROPEA PARA LA SEGURIDAD Y LA SALUD EN EL TRABAJO

Existen sindicatos que abogan por la "recopilación, el procesamiento de los datos de los empleados y el diseño del algoritmo deben regularse a través de la negociación colectiva y hay que prestar especial atención al riesgo de una monitorización excesiva y de opacidad en los algoritmos. La RLT (representación legal de los trabajadores) debe estar informada de las condiciones y criterios de aplicación en las decisiones de procesos automatizados para garantizar que se respetan los derechos y condiciones laborales de las personas trabajadoras"[21].

La IA conlleva nuevos retos, dado que permite a las máquinas aprender y tomar decisiones y ejecutarlas sin intervención humana. Las decisiones adoptadas mediante algoritmos pueden dar datos incompletos y, por tanto, no fiables, que pueden ser manipulados por ciberataques, produciendo el sesgo o simplemente estar equivocados. Aplicar de forma irreflexiva la tecnología a medida que se desarrolla produciría resultados problemáticos; así como la renuencia de los ciudadanos a aceptarla o utilizarla.

Para poner solución a la permeabilidad de la IA y los algoritmos frente al sesgo invisible se proponen las siguientes recomendaciones[22]:

a) La utilización de datos no sesgados para crear algoritmos.
b) La conformación de equipos de programación más diversos e inclusivos que ayuden a identificar y prevenir los sesgos de género, edad y raza en los datos usado.
c) El aumento de la presencia de mujeres especialistas en programación y desarrollo de software.
d) La formación en perspectiva de género de profesionales TIC.
e) La realización de auditorías de los algoritmos con el objetivo de descifrar las asunciones en las que basan sus conclusiones y la legislación en materia de discriminación, igualdad de género y derechos humanos para regular su funcionamiento y codificación. Bajo este contexto, el GT29 señala que deben realizarse comprobaciones de los algoritmos utilizados y desarrollados por los sistemas

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(2018): *Estudio prospectivo sobre los riesgos nuevos y emergentes para la seguridad y salud en el trabajo asociados a la digitalización para 2025*, Oficina de Publicaciones de la Unión Europea, Luxemburgo: p. 12.

21 COMISIONES OBRERAS (2020): *Guía de negociación colectiva y digitalización 2020*, Cuadernos de acción sindical, CCOO, septiembre: p. 25.

22 MATEOS SILLERO, Sara y GÓMEZ HERNÁNDEZ, Clara (2019): *Libro Blanco de las Mujeres en el ámbito tecnológico*, Secretaría de Estado para el Avance Digital, Ministerio de Economía y Empresa, Ministerio de Economía y Empresa, Madrid.

de aprendizaje automático para comprobar que funcionan según lo previsto, y que no producen resultados discriminatorios, erróneos o injustificados[23].

f) La rendición de cuentas y el establecimiento de marcos éticos para regular los algoritmos.
g) La tarea de aumentar la transparencia en los procesos de toma de decisiones de algoritmos.

El GT29 recomienda que "en lugar de ofrecer una compleja explicación matemática sobre cómo funcionan los algoritmos o el aprendizaje automático, el responsable del tratamiento debe considerar la utilización de formas claras y exhaustivas de ofrecer información al interesado, por ejemplo: (i) las categorías de datos que se han utilizado o se utilizarán en la elaboración de perfiles o el proceso de toma de decisiones; (ii) por qué estas categorías se consideran pertinentes; (iii) cómo se elaboran los perfiles utilizados en el proceso de decisiones automatizadas, incluidas las estadísticas utilizadas en el análisis; (iv) por qué este perfil es pertinente para el proceso de decisiones automatizadas; y (v) cómo se utiliza para una decisión relativa al interesado"[24]. La OIT aboga por promover la transparencia y la rendición de cuentas en materia de programación de algoritmos para los trabajadores y las empresas[25].

Los responsables del tratamiento deben indicar procedimientos y medidas adecuados para evitar errores, imprecisiones o discriminaciones. El GT29, en este sentido, señala que "estas medidas deben utilizarse de forma cíclica, no solo en la fase de diseño, sino también de forma continua, ya que la elaboración de perfiles se aplica a personas". De esta manera, permite comprobar que "los algoritmos utilizados y desarrollados por los sistemas de aprendizaje automático funcionan según lo previsto, y que no producen resultados discriminatorios, erróneos o injustificados".

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[23] GRUPO DE TRABAJO SOBRE PROTECCIÓN DE DATOS DEL ARTÍCULO 29 (2018): *Directrices sobre decisiones individuales automatizadas y elaboración de perfiles a los efectos del Reglamento 2016/679*, (WP251rev.01), Adoptadas el 3 de octubre de 2017 y revisadas por última vez y adoptadas el 6 de febrero de 2018: p. 36.

[24] GRUPO DE TRABAJO SOBRE PROTECCIÓN DE DATOS DEL ARTÍCULO 29 (2018): *Directrices sobre decisiones individuales automatizadas y elaboración de perfiles a los efectos del Reglamento 2016/679*, (WP251rev.01), Adoptadas el 3 de octubre de 2017 y revisadas por última vez y adoptadas el 6 de febrero de 2018: p. 35.

[25] INTERNATIONAL LABOUR ORGANIZATION (2021): *Perspectivas Sociales y del Empleo en el Mundo. El papel de las plataformas digitales en la transformación del mundo del trabajo*, OIT, Ginebra: p. 12.

La Agencia Española de Protección de Datos recuerda que el Reglamento (UE) 2016/679 del Parlamento Europeo y del Consejo, de 27 de abril de 2016, general de protección de datos (RGPD)[26], prohíbe, con carácter general, la toma de decisiones basadas "únicamente en el tratamiento automatizado, incluida la elaboración de perfiles" cuando produzca "efectos jurídicos en el interesado o le afecte significativamente de modo similar" (por ejemplo, ser descartado de un proceso de selección).

Sin embargo, aquellas decisiones se podrán llevar a cabo cuando sean necesarias para la celebración o ejecución de un contrato. En la medida en que se trata de una excepción a la regla general, dicha necesidad debe ser interpretada restrictivamente. Por ejemplo, es "admisible la decisión automatizada en procesos de selección con numerosos candidatos para realizar una primera criba excluyendo a quienes incumplen alguna condición o requisito esencial, como la ausencia de titulación suficiente (Directrices sobre decisiones individuales automatizadas y elaboración de perfiles a los efectos del Reglamento 2016/679 del Grupo de Trabajo del Artículo 29".

No resulta admisible que las decisiones basadas en la utilización de algoritmos y la elaboración de perfiles en el proceso de selección causen discriminación. En el supuesto de que el resultado de la decisión vulnere derechos fundamentales, el diseño del algoritmo debe ser modificado. Por ejemplo, "Contratación de un número significativamente mayor de hombres que de mujeres".

Por lo que "el procedimiento debe contemplar algún mecanismo de intervención humana si la persona afectada así lo solicita, además de un cauce para que esta persona exprese su opinión y, en su caso, impugne la decisión. Asimismo, tendrá derecho a recibir una explicación de la decisión tomada después de tal evaluación (considerando 71 del RGPD). Para ser considerada como intervención humana, el responsable del tratamiento debe garantizar que cualquier supervisión de la decisión sea significativa, en vez de ser únicamente un gesto simbólico. (…) Debe llevarse a cabo por parte de una persona autorizada y competente para modificar la decisión. Como parte del análisis, debe tener en cuenta todos los datos pertinentes"[27].

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[26] Diario Oficial de la Unión Europea L 119/1, de 4 de mayo de 2016.

[27] AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS (2021): *La protección de datos en las relaciones laborales*, Agencia Española de Protección de Datos, Madrid: p. 24.

Los sindicatos, por ejemplo, recomiendan, por una parte, impulsar la igualdad de género y la diversidad entre las personas encargadas de programar y auditar algoritmos; dado que resulta casi imposible diseñar algoritmos inclusivos y con perspectiva de género si aquellos que confeccionan estas herramientas no representan a la sociedad en donde se aplicarán sus decisiones. Por consiguiente, se deben establecer normas de diversidad en los equipos que programan estas soluciones informáticas, que favorezcan la presencia de mujeres y colectivos minoritarios en los mismos, todo ello al objeto de transponer el equilibrio de género existente en la sociedad. Por lo que abogan por las carreras profesionales específicas que favorezcan el equilibrio de género, al establecer cuotas si fuese preciso o creando becas académicas que persigan este objetivo[28].

Por otra, como ya se ha adelantado, indican que todas las decisiones algorítmicas que tengan impacto sobre los trabajadores deberán auditarse. Ello acreditaría y certificaría que "las decisiones son independientes de cualquier sesgo en el set de datos de entrada, que están separadas de dichos datos de entrada en términos de proceso y suficiencia, y verificará que los resultados finales son competentes, veraces, justos, precisos, sin omisiones y que respetan los derechos y libertades de las personas trabajadoras. No debemos olvidar que estamos, al fin y al cabo, ante herramientas de trabajo, y, por tanto, deben estar sometidas al mismo grado de seguridad, inspección y trazabilidad que sus hermanas tangibles. Todas estas auditorías podrán realizarse regularmente, al objeto de evaluar el impacto durante la vida efectiva de cada algoritmo. El Estado dotará a las Inspecciones de Trabajo de los recursos necesarios para poder ejecutar estas auditorías, creando unidades especializadas a tal efecto, que tendrán la potestad legal de comprobar la idoneidad del desempeño de cualquier algoritmo aplicable en las relaciones laborales. Adicionalmente, se les dotará de las atribuciones disciplinarias y sancionadoras que sean precisas para hacer cumplir la normativa vigente en cada momento"[29].

A la norma jurídica, además desde el plano a la ético-social, le corresponde "trazar el debido equilibrio transaccional para crear las condiciones de uso o de gestión algorítmica que maximicen sus ventajas y minimicen los riesgos"[30]. Por ello, como ya se ha comentado, en el caso

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[28] SERVICIOS DE ESTUDIOS DE UGT (2021): *Las decisiones algorítmicas en las relaciones laborales*, UGT, Madrid: pp. 6-7.

[29] SERVICIOS DE ESTUDIOS DE UGT (2021): *Las decisiones algorítmicas en las relaciones laborales*, UGT, Madrid: pp. 6-7.

[30] MOLINA NAVARRETE, Cristóbal (2021): "«Duelo al sol» (digital). ¿Un algoritmo

del legislador español ya se ha hecho eco en el que la representación legal de los trabajadores tenga derecho a "ser informado por la empresa de los parámetros, reglas e instrucciones en los que se basan los algoritmos o sistemas de inteligencia artificial que afectan a la toma de decisiones que pueden incidir en las condiciones de trabajo, el acceso y mantenimiento del empleo, incluida la elaboración de perfiles".

Los sindicatos abogan que se "debe hacer reflexionar al empleador sobre el porqué y si realmente es necesario introducir la gestión algorítmica en las relaciones laborales. Si la respuesta se limita a un simple "porque podemos", o "porque es la moda", o "porque todo el mundo lo hace", no se debería seguir adelante. La gestión algorítmica debe tener un propósito definido, unos objetivos claros y una lógica explicable y beneficiosa para la gestión del trabajo. Alegar que algo, por muy moderno o innovador que sea, es mejor que lo actual per se, es un argumento falaz y debe descartarse desde su génesis". Por lo que se debe "clarificar que el uso de algoritmos, en ningún caso y en ninguna circunstancia, podrá ser usado por el empleador para evadir la responsabilidad de sus actos. Las decisiones que afectan a las personas trabajadoras son siempre responsabilidad del empleador y siempre deben obedecer a la ley aplicable, además de que deben responder a una razón explicable y de acuerdo con criterios transparentes"[31].

Por último, señalan, por un lado, que el marco conceptual de la negociación colectiva conducirá sobre dos líneas de trabajo: principios rectores y políticas aplicables, como puede observarse en la siguiente tabla.

PRINCIPIOS RECTORES Y POLÍTICAS APLICABLES	
Principios rectores	Protección de datos, y de los principios principales aquí reseñados, desde el inicio del diseño y por defecto
	Proporcionalidad, necesidad, idoneidad y transparencia
	Codecisión con la representación legal de los trabajadores
	Priorizar la prevención por encima de la detección
	Gobernanza colectiva/conjunta en la recopilación y tratamiento datos

controla mi trabajo? Sí; a tu empresa también", *Revista de Trabajo y Seguridad Social. CEF*, núm. 457, 2021: p. 7.

[31] SERVICIOS DE ESTUDIOS DE UGT (2021): *Las decisiones algorítmicas en las relaciones laborales*, UGT, Madrid: pp. 8 - 9.

PRINCIPIOS RECTORES Y POLÍTICAS APLICABLES	
Políticas aplicables	Participación de sindicatos y personas trabajadoras en todas las etapas
	Implementar y hacer cumplir la codecisión en la legislación laboral en todos los estados miembros de la UE
	Las empresas deben recopilar certificaciones y códigos de conducta
	Priorizar una gobernanza colectiva/conjunta

Fuente: SERVICIOS DE ESTUDIOS DE UGT (2021): *Las decisiones algorítmicas en las relaciones laborales*, UGT, Madrid: pp. 9 y 10.

Por otro, advierten de que la proliferación de despidos realizados por algoritmos demuestra la necesidad de acelerar una ley europea sobre Inteligencia Artificial que acote, regule y disuada de estas prácticas a pesar de que se trate de prácticas vetadas por el Reglamento General de Protección de Datos. La Comisión Europea (CE) presentó, como ya se ha señalado, su propuesta para promulgar una Ley de Inteligencia Artificial, que regulará el funcionamiento de los algoritmos y la IA en las relaciones laborales. Por consiguiente, todas las empresas deberán cumplir unos requisitos antes, durante y después de la puesta en marcha de algoritmos laborales. Por lo que urge a acelerar la promulgación de dicha Ley otorgándole máxima prioridad, dado que es necesario poner coto a unas herramientas informáticas que atentan contra derechos fundamentales de los trabajadores[32].

En definitiva, "la inteligencia artificial, además de explicable, ha de ser equitativa e inclusiva, sin sesgos y no reproducir desigualdades o incluso aumentarlas. Aun en un mundo de máquinas, el algoritmo lo crea el humano por lo que el diseño y desarrollo de los sistemas de inteligencia artificial han de tener en cuenta aquellas premisas y no escudarse en la aparente objetividad del número. Por su parte, el derecho ha de desplegar las garantías propias de la protección de derechos fundamentales y adaptarlas cuando sea necesario en este entorno digital imparable"[33].

El artículo 7 de la Propuesta de la Directiva dispone, con relación al control humano de los sistemas automatizados, que los Estados miem-

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[32] https://www.ugtcomunicaciones.es/wordpress/ugt-reclama-acelerar-la-ley-europea-de-ia-para-frenar-la-proliferacion-de-despidos-algoritmos/

[33] ALAMEDA CASTILLO, María (2021): "La igualdad y la máquina: el algoritmo hace más débil al que ya lo es", en https://www.adeccoinstitute.es/diversidad-e-igualdad/la-igualdad-y-la-maquina-el-algoritmo-hace-mas-debil-al-que-ya-lo-es/

bros velarán por que las plataformas digitales de trabajo supervisen y evalúen el impacto de las decisiones individuales tomadas o apoyadas por sistemas automatizados de seguimiento y toma de decisiones. Por ello, las plataformas digitales de trabajo deberán realizar las siguientes cuestiones:

- Evaluar los riesgos de los sistemas automatizados de seguimiento y toma de decisiones para la seguridad y la salud de los trabajadores de las plataformas, en particular por lo que respecta a los posibles riesgos de accidentes laborales, riesgos psicosociales y ergonómicos.
- Evaluar si las salvaguardias de dichos sistemas son adecuadas para los riesgos identificados teniendo en cuenta las características específicas del entorno de trabajo.
- Introducir las medidas de prevención y protección adecuadas.

No utilizarán los sistemas automatizados de supervisión y toma de decisiones de ninguna que ejerzan una presión indebida sobre los trabajadores o que pongan en peligro la salud física y mental de los trabajadores de plataformas. Asimismo, se exigirá que se garanticen los recursos humanos suficientes para supervisar el impacto de las decisiones individuales adoptadas o apoyadas por sistemas automatizados de seguimiento y toma de decisiones. Se aclara que las personas encargadas por la plataforma laboral digital de la función de supervisión deberán tener la competencia, la formación y la autoridad necesarias para ejercer dicha función. Por lo que estarán protegidas contra el despido, las medidas disciplinarias u otros tratos adversos por anular decisiones o sugerencias de decisiones automatizadas.

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2. Encaje de la reciente normativa española sobre riders en la propuesta de directiva comunitaria sobre plataformas digitales

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Sumario: *1. Introducción -2. La Sentencia del Tribunal Supremo de 25 de septiembre de 2022 -3. La intervención del legislador. La ley 12/2021. A. La presunción de laboralidad de la disposición adicional 23 del Estatuto de los Trabajadores. B. La información sobre el funcionamiento algorítmico. C. Breve valoración de la acción legislativa española - 4. La propuesta de Directiva comunitaria -5. El "encaje" de la futura Directiva en el ordenamiento español.*

1. Introducción

La calificación jurídica que haya de otorgarse a la prestación de servicios a través de plataformas digitales es una cuestión que vienen resolviendo los jueces y tribunales, aplicando a cada caso concreto las reglas comunes de un Derecho del Trabajo que aún no ha reparado del todo en la singularidad que representan estas nuevas formas tecnológicas de prestación de servicios.

En España, el colectivo que presta servicios en plataformas digitales es cada vez mayor, habiendo mostrado distintos colectivos sociales y, entre ellos, los sindicatos mayoritarios, una preocupación prioritaria por la realidad socio-laboral de los repartidores de plataformas digitales (o *riders*), llegando a calificar de "esclavismo" la prestación en las plataformas digitales de reparto que, además, se nutren muy significativamente de ciudadanos extracomunitarios en situación irregular.

La preocupación por regular este fenómeno es global[1] y, en este sentido, la Unión Europea ha elaborado una Propuesta de Directiva

[1] Según CÁMARA BOTÍA, A., *La prestación de servicios en plataformas digitales: ¿Trabajo dependiente o autónomo?*, Revista Española de Derecho del Trabajo, núm. 222/2019,

comunitaria para mejorar las condiciones laborales en las plataformas digitales, propuesta normativa que abordó el Seminario internacional en el que se incluye esta colaboración.

Ello es necesario porque, desde el auge de las plataformas digitales, los órganos jurisdiccionales de todos los Estados miembros de la Unión Europea, se enfrentan diariamente a diferentes problemas, pero con un protagonista indiscutible: la calificación jurídica de laboralidad o autonomía de la prestación de servicios, decisión de la que depende el nivel de protección, laboral y social, de las personas que desarrollan dicha actividad.

En España, los diferentes Juzgados de lo Social y Tribunales Superiores de Justicia han venido abordando los asuntos planteados de forma diversa, algo que derivaba, por una parte, de las circunstancias concretas del caso planteado y, por otra, de la interpretación singular de los preceptos legales, si bien es cierto que de forma mayoritaria los pronunciamientos judiciales eran favorables a la laboralidad.

Parece obvio que si una plataforma acomete su actividad con idénticos criterios organizativos en diferentes territorios no debiera encontrar soluciones judiciales diversas para calificar un mismo tipo de vínculo con los prestadores del servicio, como laboral o como autónomo[2].

2. La sentencia del tribunal supremo de 25 de septiembre de 2020

Y en este contexto, la intervención de nuestro Tribunal Supremo, en su labor unificadora de la doctrina (no siempre fácil debido a la rigidez de nuestras reglas procesales), se antojaba necesaria y la misma se produjo el 25 de septiembre de 2020, mediante el dictado de una sentencia

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pág. 77, la Revolución Digital ha generado, junto con la automatización del trabajo y la digitalización de los procesos productivos, una nueva forma de organización empresarial que genera dudas justificadas sobre el estatuto jurídico aplicable a su personal, "fundamentalmente si se trata de trabajadores autónomos o dependientes".

[2] Como señala FERNÁDEZ DOCAMPO, M. B., *El trabajo autónomo ante las nuevas formas de organización empresarial en el contexto de la economía digital*, en Temas Laborales, núm. 158/2021, pág. 183, este escenario obliga a reflexionar sobre el presente modelo de relaciones laborales articulado en torno a la distinción binaria entre el trabajo dependiente y el trabajo dependiente… para facilitar la identificación de los que no siendo verdaderos autónomos figuren como tal, y con ello, permitirles el ejercicio de sus derechos como auténticos trabajadores por cuenta ajena.

que abordaba la laboralidad de los servicios prestados para una de las plataformas de mayor implantación en nuestro país: Glovo.

Nuestro Alto Tribunal era consciente de que el supuesto a enjuiciar únicamente podía resolverse tomando en consideración los singulares postulados fácticos del caso que se le presentaba (no iba a resolver de una tacada el problema de todas las plataformas, sino exclusivamente el asunto en cuestión); pero al mismo tiempo era conocedor de que la respuesta que adoptase en este asunto iba a servir de guía a los órganos judiciales para resolver litigios análogos. De lo que quizás no fue tan consciente el máximo órgano de nuestra justicia ordinaria es que su resolución sería posteriormente utilizada por el legislador español para definir el marco legal del colectivo de *riders* en nuestro país.

La importantísima Sentencia de 25-09-2020, Rec. 4746/2020, resuelve el recurso de casación para la unificación de doctrina interpuesto por un repartidor de Glovo frente a la Sentencia del Tribunal Superior de Justicia de Madrid, de fecha 19-09-2029, Rec. 195/2019, que había desestimado la existencia de relación laboral en su caso, entendiendo que aquel se encontraba correctamente calificado como Trabajador Autónomo Económicamente Dependiente (TRADE)[3], descartando la concurrencia de las notas de dependencia y ajenidad porque el repartidor de Glovo, según parecer del tribunal madrileño, organizaba con total autonomía su propia actividad, sin sometimiento alguno al círculo rector y organicista empresarial, podía rechazar solicitudes de trabajo asignadas y disponía de la infraestructura productiva y del material propio necesario para el ejercicio de la actividad, aportando los medios imprescindibles para su desarrollo, siendo retribuido en virtud del resultado alcanzado en la ejecución.

Pese al pronunciamiento del Tribunal capitalino, hay que insistir que la doctrina judicial, de manera abrumadora[4], era favorable a la laboralidad[5], si bien esta falta de unanimidad propició la unificación

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[3] Aquel que depende económicamente de un cliente, que puede ser una persona o una empresa, al que presta sus servicios de forma habitual, personal y directa, percibiendo del mismo al menos el 75% de sus ingresos.

[4] Así lo afirma BELTRÁN DE HEREDIA RUIZ, I., *STS 25/9/20: Los repartidores de GLOVO son trabajadores por cuenta ajena (y no necesitan una regulación especial)*, en Una mirada crítica a las relaciones laborales, Blog de Derecho del Trabajo y Seguridad Social.

[5] Véase Sentencias del Tribunal Superior de Justicia de Cataluña de 21-02-2020 (Rec. 5613/2019), 7 y 12-05-2020 (Rec. 6774/2019 y Rec. 5613/2019), en asuntos de Glovo, y 16-06-2020 (Rec. 5997/2019), en el caso Deliveroo; Sentencias del Tribunal Superior

de doctrina por el Tribunal Supremo plasmada en la Sentencia que comentamos. En ella debía analizar si existía o no subordinación entre el prestador de servicios y la plataforma Glovo, más allá de la independencia formal derivada de la calificación de autonomía (TRADE) abrazada por las partes.

Y en este sentido, lo primero que hace el Tribunal Supremo, como punto de partida para su enjuiciamiento, es afirmar la "flexibilización" actual de los criterios de dependencia y ajenidad propios del vínculo laboral. Y así, tras analizar la evolución jurisprudencial, nacional y comunitaria, de tales elementos, declara que "en la sociedad postindustrial la nota de dependencia se ha flexibilizado", propiciando, las "innovaciones tecnológicas… la instauración de sistemas de control digitalizados de la prestación de servicios", de forma que el empleo del método indiciario es el más oportuno para identificar si en el caso concreto concurre o no la relación laboral. Y a este respecto, el Alto Tribunal recuerda una serie de "hitos" jurisprudenciales relevantes, de entre los cuales podemos extraer los siguientes:

- Que no exista obligación de aceptar una prestación de servicios no determina que no estemos ante un trabajador (precisión efectuada analizando el principio de igualdad de retribución entre trabajadores y trabajadoras).
- La realidad fáctica debe prevalecer sobre la calificación otorgada al negocio jurídico por las partes concernidas, debiendo tomarse en consideración la totalidad de circunstancias concurrentes en el caso, a fin de constatar si se dan las notas de ajenidad, retribución y dependencia, en el sentido en que estos conceptos son concebidos por la jurisprudencia. Y en tal sentido, es indicio de existencia de vínculo laboral la diferencia entre la escasa cuantía en inversión que el trabajador ha de realizar para desarrollar su actividad (teléfono móvil y vehículo menor), y la mayor inversión que realiza la principal y entrega al repartidor.
- La "autonomía profesional" no elimina la nota de dependencia si aun de forma flexible el trabajador queda sujeto a la esfera organicista y rectora de la empresa, siendo indicios comunes de dependen-

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de Justicia de Madrid de 03-02-2020 (Rec. 749/2019), 18-12-2019 (Rec. 714/2019) y 27-11-2019 (Rec. 588/2019), en asuntos Globo, y 17-01-2020, en relación a Deliveroo; Sentencia del Tribunal Superior de Justicia de Castilla-León/Valladolid 17-02-2020 (Rec. 2253/2019), en caso Glovo; o Sentencia del Tribunal Superior de Justicia de Asturias de 25-07-2019 (Rec. 1143/2019), también en asunto de Glovo.

cia: a) la asistencia al centro de trabajo del empleador o al lugar de trabajo designado por éste y el sometimiento a horario; b) el desempeño personal del trabajo (compatible con un régimen excepcional de suplencias o sustituciones); c) la inserción del trabajador en la organización de trabajo del empleador o empresario, que se encarga de programar su actividad; d) la ausencia de organización empresarial propia del trabajador.

- Son indicios comunes de "ajenidad": a) la entrega o puesta a disposición del empresario por parte del trabajador de los productos elaborados o de los servicios realizados; b) la adopción por parte del empresario, y no del trabajador, de las decisiones concernientes a las relaciones de mercado o de las relaciones con el público, tales como fijación de precios o tarifas, selección de clientela o indicación de personas a atender; c) el carácter fijo o periódico de la remuneración del trabajo; d) el cálculo de la retribución o de los principales conceptos de la misma con arreglo a un criterio que guarde una cierta proporción con la actividad prestada, sin el riesgo y sin el lucro especial que caracterizan a la actividad del empresario o al ejercicio libre de las profesiones.

De forma que debe entenderse concurrente si: a) los frutos del trabajo pasan *ab initio* a la empresa, que asume la obligación de retribuir dichos servicios que están garantizados; b) no se prueba que el prestador de servicios asuma riesgo empresarial de clase alguna; c) no se acredita la realización de una inversión en bienes de capital relevante, pues la inversión que constituye elemento esencial de la actividad contratada se entrega directamente por la demandada.

- El "no establecimiento de retribución o salario fijo" no es un elemento difuminador del contrato de trabajo.
- La libertad de horario no excluye en todo caso la existencia de un contrato de trabajo.
- La aportación de vehículo por el trabajador no tiene relevancia económica excluyente del vínculo laboral, siendo la actividad personal del mismo la que se revela como predominante.
- No desvirtúa la laboralidad de la relación el hecho de que la prestación de servicios no se desarrolle a tiempo completo y/o en régimen de exclusividad.

Partiendo de tales hitos, el Tribunal Supremo español analiza exhaustivamente la prestación de servicios para Glovo, concluyendo que se

dan las notas de dependencia, ajenidad y subordinación características del contrato de trabajo. Y así:

a) En primer lugar, se descarta que la calificación jurídica de TRADE, asumida por las partes, sea correcta, pues no concurren las condiciones que la normativa (art. 11.2 Ley del Estatuto del Trabajador Autónomo) establece, dado que el demandante no lleva cabo su actividad "con sus propios criterios organizativos" sino con sujeción estricta a los establecidos por Glovo, sin disponer, además, de "infraestructura productiva y material propios, necesarios para el ejercicio de la actividad e independientes de los de su cliente", dado que el actor únicamente aporta su móvil y la motocicleta, medios insignificantes en comparación con la infraestructura esencial para el ejercicio de esta actividad, que viene representada por la plataforma/programa informático desarrollado por Glovo, que pone en contacto a los comercios con los clientes finales, y sin el cual es imposible la prestación de servicios por el demandante.
b) En segundo término, se afirma que la nota de subordinación no se altera por la posibilidad de rechazar un servicio, elegir la franja horaria de trabajo o compatibilizar la prestación para varias plataformas. En cuanto al primero (aparentemente definidor de un régimen de independencia), la clave se encuentra en que el sistema de puntuación de Glovo atribuye preferencias en el acceso a los servicios dependiendo de la evaluación de desempeño del repartidor, lo que en la práctica condiciona su libertad de elección de horarios, porque si no está disponible para prestar servicios en las franjas horarias con más demanda, su puntuación disminuye y con ella la posibilidad de que en el futuro se le encarguen más servicios y consiga la rentabilidad económica que busca, lo que equivale a perder empleo y retribución. Además, la empresa penaliza a los repartidores, dejando de asignarles pedidos cuando no estén operativos en las franjas reservadas, salvo causa justificada debidamente comunicada y acreditada. La consecuencia es que los repartidores compiten entre sí por las franjas horarias más productivas, existiendo una inseguridad económica derivada de la retribución a comisión sin garantía alguna de encargos mínimos, que propicia que los repartidores intenten estar disponibles el mayor período de tiempo posible para acceder a más encargos y a una mayor retribución.

c) Ofrece el Tribunal Supremo "otros indicios" determinantes de la existencia de relación laboral, entre ellos: el establecimiento de sistemas de control de la actividad productiva basados en la valoración de clientes; el sometimiento permanente a control empresarial a través de la geolocalización por GPS y la verificación del cumplimiento de las indicaciones a través de la plataforma; o la compensación económica de los tiempos de espera.
d) Y, por último, detalla la concurrencia de la "ajenidad" (inherente al vínculo laboral), en sus distintos niveles:

- En el "mercado", al tomar la plataforma todas las decisiones comerciales: precio de los servicios prestados, forma de pago y remuneración a los repartidores, que no perciben sus honorarios directamente de los clientes finales de la plataforma sino de Glovo (de ahí que ésta no es una mera intermediaria entre clientes finales y repartidores)
- En los "riesgos", pues el hecho de no cobrar por el servicio malogrado no supone que el trabajador responda del buen fin de la operación asumiendo el riesgo y ventura de la misma, sino que es una consecuencia obligada de la retribución por unidad de obra.
- En los "frutos", pues la empresa se apropia de manera directa del resultado de la prestación del trabajo, sin que el repartidor intervenga de ninguna manera en los acuerdos que Glovo establece con los comercios y clientes a los que se servirán los pedidos.
- En los "medios", evidenciada por la insignificancia económica de la estructura material aportada por el repartidor, con respecto a la plataforma digital (la instalación técnica que emplea para su desarrollo y explotación de la marca es el medio esencial de producción, sin el cual el repartidor no podría desarrollar su actividad).

En conclusión, el Tribunal Supremo concluye que "Glovo no es una mera intermediaria en la contratación de servicios entre comercios y repartidores. No se limita a prestar un servicio electrónico de intermediación consistente en poner en contacto a consumidores (los clientes) y auténticos trabajadores autónomos, sino que realiza una labor de coordinación y organización del servicio productivo. Se trata de una empresa que presta servicios de recadería y mensajería fijando el precio y condiciones de pago del servicio, así como las condiciones esenciales para la prestación de dicho servicio. Y es titular de los activos esenciales para la realización de la actividad. Para ello se sirve de repartidores que

no disponen de una organización empresarial propia y autónoma, los cuales prestan su servicio insertados en la organización de trabajo del empleador, sometidos a la dirección y organización de la plataforma, como lo demuestra el hecho de que Glovo establece todos los aspectos relativos a la forma y precio del servicio de recogida y entrega de dichos productos. Es decir, tanto la forma de prestación del servicio, como su precio y forma de pago se establecen por Glovo. La empresa ha establecido instrucciones que le permiten controlar el proceso productivo. Glovo ha establecido medios de control que operan sobre la actividad y no solo sobre el resultado mediante la gestión algorítmica del servicio, las valoraciones de los repartidores y la geolocalización constante. El repartidor ni organiza por sí solo la actividad productiva, ni negocia precios o condiciones con los titulares de los establecimientos a los que sirve, ni recibe de los clientes finales su retribución. El actor no tenía una verdadera capacidad para organizar su prestación de trabajo, careciendo de autonomía para ello. Estaba sujeto a las directrices organizativas fijadas por la empresa. Ello revela un ejercicio del poder empresarial en relación con el modo de prestación del servicio y un control de su ejecución en tiempo real que evidencia la concurrencia del requisito de dependencia propio de la relación laboral.

Para prestar estos servicios –sigue diciendo el Alto Tribunal- Glovo se sirve de un programa informático que asigna los servicios en función de la valoración de cada repartidor, lo que condiciona decisivamente la teórica libertad de elección de horarios y de rechazar pedidos. Además, Glovo disfruta de un poder para sancionar a sus repartidores por una pluralidad de conductas diferentes, que es una manifestación del poder directivo del empleador. A través de la plataforma digital, Glovo lleva a cabo un control en tiempo real de la prestación del servicio, sin que el repartidor pueda realizar su tarea desvinculado de dicha plataforma. Debido a ello, el repartidor goza de una autonomía muy limitada que únicamente alcanza a cuestiones secundarias: qué medio de transporte utiliza y qué ruta sigue al realizar el reparto", datos todos ellos que determinan la concurrencia de las notas definitorias del contrato de trabajo entre el actor y la empresa demandada previstas en el art. 1.1 del ET".

Es evidente que la flexibilidad con la que aborda el Tribunal Supremo los tradicionales indicios de laboralidad permite encuadrar buena parte del trabajo en plataformas digitales dentro del ámbito del Derecho del Trabajo; repárese en la forma en que se neutralizan o, al menos,

se relativizan, dos grandes argumentos en contra de la laboralidad de los servicios prestados para estas plataformas. El primero, la facultad de aceptar o rechazar las propuestas empresariales, ficticia si se tiene en cuenta que ello "afecta" finalmente al prestador de servicios; el segundo, la falta de un horario y jornada predeterminados que, en este contexto, se considera escasamente relevante.

3. La intervención del legislador. La ley 12/2021

La anterior sentencia ha tenido una influencia directa en la acción legislativa en España, animando el diálogo social que el Gobierno venía manteniendo, sobre diferentes materias, con los agentes sociales (los sindicatos UGT y CCOO y las asociaciones patronales CEOE y CEPIME). Y así, tan solo un mes después del dictado de la sentencia del Alto Tribunal, se constituyó la "Mesa de Diálogo Social para la regulación de las plataformas digitales", que alcanzó un acuerdo en fecha 10-03-2021, denominado "Laboralización de *riders* y seguimiento de las plataformas en el ámbito digital".

El contenido del acuerdo se plasmó en el Real Decreto Ley 9/2021, de 11 de mayo, por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de las plataformas digitales. Es cierto que los primeros borradores de la norma contemplaban un ámbito de aplicación más ambicioso, al incluir a todo tipo de plataformas digitales, si bien el texto aprobado acabó incluyendo solamente a plataformas de reparto (con todo, es palmario que, proviniendo del consenso social, su contenido se utilizará como herramienta hermenéutica en conflictos, atinentes a otro tipo de plataformas, que encajen en los mimbres allí establecidos).

Una vez superada la fase de convalidación parlamentaria, se publicó la Ley 12/2021, de 28 de septiembre, conocida como Ley "*Rider*". Se trata de una norma que, como se ha destacado, surge del diálogo social entre Gobierno, Sindicatos y Patronal, y viene a suponer un primer paso en la regulación de los efectos de la digitalización en el trabajo (las nuevas posibilidades tecnológicas evolucionan los medios de producción pero no pueden eliminar la aplicabilidad de las normas laborales a la actividad económica que se acomete). Tarea que acomete desde dos flancos: el primero, introducir una nueva Disposición Adicional al Estatuto de los Trabajadores, la núm. 23, que incorpora una

presunción de laboralidad en el ámbito de las plataformas de reparto; el segundo, establecer la obligación, por parte de las empresas que utilicen algoritmos que puedan afectar a las condiciones laborales (por tanto, no solo plataformas digitales), de informar a los representantes de los trabajadores sobre su alcance[6].

A. LA PRESUNCIÓN DE LABORALIDAD DE LA DISPOSICIÓN ADICIONAL 23 DEL ESTATUTO DE LOS TRABAJADORES

La nueva Disposición Adicional vigesimotercera introducida en el Estatuto de los Trabajadores por la Ley 12/2021, bajo el título de "Presunción de laboralidad en el ámbito de las plataformas digitales de reparto", establece que: "*Por aplicación de lo establecido en el artículo 8.1, se presume incluida en el ámbito de esta ley la actividad de las personas que presten servicios retribuidos consistentes en el reparto o distribución de cualquier producto de consumo o mercancía, por parte de empleadoras que ejercen las facultades empresariales de organización, dirección y control de forma directa, indirecta o implícita, mediante la gestión algorítmica del servicio o de las condiciones de trabajo, a través de una plataforma digital. Esta presunción no afecta a lo previsto en el artículo 1.3 de la presente norma*".

Se trata, es palmario, de un texto inspirado en la Sentencia del Tribunal Supremo de fecha 25-09-2020 que, en sintonía con esta, viene a "reforzar" la presunción de laboralidad del colectivo *rider*, al tiempo que flexibiliza (por primera vez con rango normativo) el requisito de dependencia jurídica. En este sentido, la propia Exposición de motivos de la Ley 12/2021 reconoce que la nueva disposición adicional "incorpora los criterios y parámetros establecidos por el Tribunal Supremo en dicha sentencia,…valiéndose para ello de la prevalencia del principio de realidad…, y de la necesidad de adaptar los requisitos de dependencia y ajenidad al contexto actual" en el que las facultades empresariales pueden ser ejercidas de numerosas maneras, y ente ellas, por medio de la gestión algorítmica del servicio o de las condiciones de trabajo

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[6] Para MELLA MÉNDEZ, L., *La protección de los repartidores de plataformas tras el RD-Ley 9/2021: ¿Se está ante una verdadera presunción "iuris tantum" de laboralidad?*, en Revista Española de Derecho del Trabajo, núm. 214, julio 2021, pág. 147, estas dos medidas son de una importancia extraordinaria y enlazan con la causa de la precariedad laboral de los trabajadores de plataformas, intentando solventarla de una manera rápida, eficaz y definitiva.

a través de una plataforma digital, que son, por lo tanto, los activos clave y esenciales de la actividad. En consecuencia, la forma indirecta o implícita de ejercicio de las facultades empresariales abarca los supuestos en los que una cierta flexibilidad o libertad por parte de la persona trabajadora en la ejecución del trabajo sea solo aparente, por llevar en realidad aparejada consecuencias o repercusiones en el mantenimiento de su empleo, en su volumen o en el resto de sus condiciones de trabajo.

En definitiva, una vez que el Tribunal Supremo ha resuelto que un repartidor de una concreta plataforma digital, en las condiciones de inserción en el ámbito organizativo declaradas, es un trabajador por cuenta ajena, la normativa estatal, afianzada además en el consenso entre sindicatos y patronal, consigue dotar de generalidad a dicho postulado, de manera que pueda aplicarse directamente a todos los repartidores que presten servicios en plataformas dedicadas al reparto.

Hay que resaltar que la redacción de la norma viene a "contradecir" los argumentos empresariales que, en la batalla judicial, cuestionaban la laboralidad de estos servicios basándose en la libertad horaria y de jornada del repartidor, o en la posibilidad de rechazar tareas asignadas sin aparentes consecuencias negativas; y lo hace elevando a rango legal la interpretación judicial según la cual la gestión del trabajo a través de algoritmos debe ser considerada ejercicio efectivo del poder de dirección y control empresariales[7].

De esta forma, siempre que el algoritmo determine las condiciones de prestación del servicio, o afecte a las condiciones de trabajo, se entenderá cumplido el requisito de la dependencia. Y en este sentido, aunque el algoritmo se "alimente" de datos aparentemente lógicos y objetivables, ello no elimina la nota de dependencia ni, por ende, la laboralidad, pues aunque el repartidor pueda elegir entre una serie de opciones disponibles en la plataforma, las mismas se han diseñado por un algoritmo adaptado a las preferencias empresariales, teniendo consecuencias para el repartidor, lo que evidencia un ejercicio -al menos implícito- del poder de dirección. Por otra parte, cuando la plataforma ofrece al cliente final distintas opciones (como la de elegir al repartidor concreto), aflora nuevamente la nota de dependencia.

El inciso final (la no afectación de la presunción instaurada a lo previsto en el art. 1.3 ET) viene a apuntar a que la nueva normativa no

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[7] TODOLÍ SIGNES, A., *Cambios normativos en la digitalización del trabajo: Comentario a la "Ley Rider" y los derechos de información sobre los algoritmos,* en Iuslabor 2/2021, pág. 42.

altera materialmente el concepto de trabajador. Tampoco añadiría nada nuevo a la presunción "tradicional" del art. 8.1 ET (el contrato de trabajo "se presumirá existente entre todo el que presta un servicio por cuenta y dentro del ámbito de organización y dirección de otro y el que lo recibe a cambio de una retribución de aquel"), convirtiéndose, más bien, en una aplicación de esta al "caso concreto" (las plataformas de reparto), zanjándose de manera definitiva el problema de calificación jurídica de este colectivo. De esta forma, se vendría a apuntalar que la conocida presunción de laboralidad también será aplicable a los casos en que se presten servicios en plataformas que utilicen algoritmos para la gestión de los trabajadores.

En apariencia, la presunción de la Disposición Adicional 23 es más rígida que la del art. 8.1., dado que para su aplicación exige varios requisitos: 1) que las actividades sean de reparto o distribución; 2) que la empleadora ejerza facultades de dirección de forma directa o implícita a través de una plataforma digital; y 3) que se use un algoritmo para gestionar el servicio o para determinar las condiciones de trabajo. Sin embargo, no obviemos que se trata de una norma que, al ser fruto del acuerdo, ha tenido que integrar sensibilidades contrapuestas[8], pudiendo extraerse dos lecturas complementarias: que agrada a la patronal dado que la norma se establece en forma de presunción, lo que en principio permite articular prueba contraria a la laboralidad; y que no disgusta a los sindicatos, pues la norma define de manera flexible y generosa los elementos precisos para una aplicabilidad casi automática.

Con todo, la redacción de la disposición que analizamos sí plantea dudas doctrinales sobre la verdadera naturaleza de esa presunción ¿estamos ante una presunción "iuris tantum" o "iuris et de iure"? La respuesta no es sencilla; en puridad, el art. 8.1. ET, más que una presunción, contiene un mandato legal, definiendo como laboral el vínculo que integre dichos elementos. Partiendo de ahí, la conexión explícita entre la Disposición Adicional 23 y el citado art. 8.1. ET determinaría una identidad en su régimen jurídico. Y es que, en realidad, lo que la nueva normativa *rider* está apuntando es que si se dan los tres re-

[8] Destaca TODOLÍ SIGNES, A., op. cit., pág. 42, que la norma final publicada en el BOE acaba incorporando las dos facetas: de un lado, se establece en forma de presunción, de otro lado, se fija una serie de requisitos que, en caso de cumplirse, implicarán que se está materialmente, y no solo procesalmente, ante un trabajador laboral.

quisitos referidos, deben entenderse concurrentes la dependencia y la ajenidad, de manera que para excluir la laboralidad, habría de alegarse y acreditarse la existencia de un elemento distinto capaz de eliminarla, algo que se antoja sumamente difícil.

Por ello se ha dicho[9] que más que ante una presunción iuris tantum, estamos ante una "regla material de interpretación" fijada por el legislador, un auténtico "mandato legal de laboralidad" para el supuesto concreto de los repartidores de plataformas según el cual, dándose la situación fáctica descrita en la norma, la relación profesional entre las partes se somete, necesariamente, a la legislación laboral.

Con todo, la interpretación final de la disposición dependerá de los tribunales, pero siempre debe estar guiada por la necesidad de proteger laboralmente a quien es trabajador dependiente o subordinado. Al margen de la misma también deberían poder situarse aquellos prestadores de servicios que, aun siendo económicamente dependientes, deseen acometer la tarea de manera autónoma.

Y en cualquier caso, parece igualmente claro que la actuación del legislador y de los agentes sociales será necesaria en el futuro para el completo desarrollo y aclaración del régimen jurídico de los repartidores incluidos en el ámbito del Derecho del Trabajo.

B. LA INFORMACIÓN SOBRE EL FUNCIONAMIENTO ALGORÍTMICO

La otra modificación legislativa es la inclusión de una nueva letra d) en el artículo 64.4 ET, en virtud de la cual el Comité de empresa, con la periodicidad que proceda en su caso, tendrá derecho a "*ser informado por la empresa de los parámetros, reglas e instrucciones en los que se basan los algoritmos o sistemas de inteligencia artificial que afectan a la toma de decisiones que pueden incidir en las condiciones de trabajo, el acceso y mantenimiento del empleo, incluida la elaboración de perfiles*".

Se trata, es obvio, de una actualización necesaria de la norma, que tiene en cuenta un hecho clave: que las empresas, cada vez más, emplean los citados algoritmos para tomar decisiones que afectan, de lleno, a los trabajadores, comenzando por la propia selección del personal, la determinación de cuadrantes horarios, sistemas de evaluación y ascensos, e incluso despidos, desconociendo normalmente los

[9] MELLA MÉNDEZ, L., op. cit, pág. 157.

destinatarios de estas medidas que la tecnología ha sustituido en tales decisiones a la acción humana[10].

La relevancia de esta nueva letra del art. 64.4 es evidente; en primer término, porque dicha ampliación de los derechos informativos no se ciñe a las plataformas digitales, sino que extiende su ámbito de aplicación a todas las empresas que empleen dichos algoritmos o sistemas de inteligencia artificial en la gestión del trabajo; en segundo lugar, por el contenido de dicha información: no se trata únicamente de conocer la "existencia" del algoritmo, sino de entender su "funcionamiento"; y en tercer lugar, porque el derecho de información, en su faceta colectiva, surge ante el mero "uso" del algoritmo, aunque éste no sea determinante de la decisión final, que puede basarse en otros elementos y/o en la intervención humana.

Ahora bien, también es cierto que los términos en que dicha información ha de prestarse no están definidos, surgiendo la duda de si la información ha de ofrecerse con carácter general, en el momento de implementar el algoritmo; si ha de informarse del "uso" que vaya a dársele y de las consecuencias del mismo para los trabajadores; si puede exigirse conocer el grado o porcentaje de "participación" del algoritmo en las medidas que se pretenden adoptar y cuáles son las mismas (selección, ascensos, ceses…); si está la empresa obligada a facilitar la información que ha sido suministrada al algoritmo para su funcionamiento; en fin, si puede exigirse una justificación empresarial concreta y *ex post*, de las medidas adoptadas con base en aquel.

La respuesta a dichos interrogantes, desde luego, debería ir de la mano del derecho fundamental a la no discriminación que, a la postre, trata de garantizarse mediante el acceso informativo implantado por la nueva letra d) del art. 64.4 ET. Si se desconocen las fuentes de "alimentación" del algoritmo, difícilmente puede combatirse el carácter discriminatorio de sus decisiones.

Por descontado, la norma tiene un contenido limitado que ha de ser completado por la negociación colectiva, siendo los convenios colectivos los que deberán regular el uso de tales algoritmos.

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[10] Para MANCEBO GUTIÉRREZ, O., *Los algoritmos como herramienta en las relaciones laborales: retos de futuro,* Actualidad Jurídica Aranzadi, núm. 977/2021, pág. 1, la aplicación del marco algorítmico puede provocar una despersonalización de las relaciones laborales, comportando una pérdida encubierta de derechos para los actores más débiles de la cadena laboral; aquellos sobre los que las decisiones afectan puesto que no conocen en su conjunto y de forma global quién las adopta y el mecanismo por el que se adoptan tales decisiones

C. BREVE VALORACIÓN DE LA ACCIÓN LEGISLATIVA ESPAÑOLA

La regulación comentada, como era de esperar, ha sido objeto de crítica y elogio, pero lo que es innegable es que España, a través de una norma de origen negociado y pionera, se ha convertido en referente europeo en la regulación de plataformas digitales (es cierto que únicamente de reparto), apostando por la consideración de que los nuevos instrumentos tecnológicos no son más que novedosos medios de producción que, como tales, han de convivir con las normas laborales; éstas, eso sí, precisan un replanteamiento de los diferentes indicios utilizados hasta el momento para la calificación de laboralidad, con el fin de adaptarlos a los nuevos retos de la economía digital.

La fijación, por ley, de los indicios de laboralidad, posee un carácter didáctico evidente que vendrá a reforzar el carácter laboral de aquellas prestaciones que, incluso en plataformas distintas al reparto, compartan elementos comunes. Ello permitiría vislumbrar una menor conflictividad judicial a la hora de determinar la naturaleza del vínculo existente entre las plataformas digitales y quienes prestan servicios en ellas, pues, concurriendo los elementos señalados, será difícil sustraerse a la acción normativa. Sin embargo, es igualmente previsible que las nuevas estrategias organizativas intenten "sortear" dichos indicios para escapar de "ataduras" laborales, lo que convertirá a la jurisprudencia, una vez más, en garante de los derechos del colectivo "realmente" trabajador, labor para la que nuestro ordenamiento cuenta, afortunadamente, con mimbres potentes[11].

Por lo demás, la "conquista" de la laboralidad (que debe comportar el acceso a la protección laboral y de seguridad social inherente al trabajo subordinado) no conlleva automáticamente la dignificación de este colectivo[12], siendo muchos los ámbitos en los que se requiere

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[11] Para MORENO GENÉ, J., *Presunción legal de laboralidad del trabajo en plataformas digitales de reparto*, en Revista de Estudios Jurídico Laborales y de Seguridad Social, núm. 4, abril 2022, pág. 197, cabe esperar que con esta intervención normativa se ponga fin de una vez por todas a la inaceptable actitud de "rebeldía" de las plataformas digitales de reparto que, sorprendentemente, a día de hoy aún pretenden seguir actuando como si el legislador y los tribunales laborales, incluido el Tribunal Supremo, no se hubieran pronunciado todavía sobre esta cuestión, ya sea manteniendo la calificación de autónomos de sus trabajadores, o bien, acudiendo a empresas interpuestas para la ejecución de su actividad de reparto.

[12] Según MORENO GENÉ, J., op. cit., pág. 198, estamos ante una "primera batalla", que no pondrá fin a la conflictividad existente en este ámbito, pero que abre el camino a otras batallas jurídicas dirigidas a dignificar el trabajo que se presta a través de plataformas digitales.

la intervención legislativa (y, desde luego, convencional): tiempos de descanso, disponibilidad, garantía de privacidad, seguridad y salud laborales, retribución mínima, conciliación, derechos colectivos, etc. En este contexto, es criticable que la norma no haya conseguido regular, también, alguno de los aspectos más acuciantes, como la cuestión de los horarios o la jornada de trabajo.

4. La propuesta de directiva comunitaria

Como es sabido, solo la Unión Europea puede establecer normas comunes que se apliquen a todas las plataformas digitales que operan en su suelo, garantizando la igualdad de condiciones laborales y una gestión algorítmica adecuada, a través de normas mínimas cuya transposición corresponde luego a cada Estado miembro; intervención mínima, para garantizar los objetivos de la Comisión Europea, que no limita aquellas normativas de los Estados miembros que, como España, ya cuentan con disposiciones en la materia, algunas claramente más favorables.

En este contexto, con fecha 09-12-2021 (con posterioridad, por tanto, a la promulgación de la Ley española), ha visto la luz la propuesta de Directiva comunitaria relativa a la "*mejora de las condiciones de trabajo en las plataformas digitales*", texto en el que se aborda, con carácter general, cuál debe ser la regulación comunitaria en este ámbito[13]. El objetivo final, acorde con el principio de "realidad", es que los "falsos autónomos" tengan la posibilidad de acceder a las condiciones laborales establecidas en sus legislaciones nacionales en consonancia con la situación laboral que verdaderamente les corresponde[14] y que la propuesta de Directiva contribuye a aclarar.

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[13] Como señalaba ROJO TORRECILLA, E., *Pues sí, la saga Glovo (y los glovers) merecen un caso práctico. Notas a la sentencia del TS de 25 de septiembre de 2020, que declara la laboralidad, y recordatorio de las sentencias del JS núm. 39 de Madrid de 3 de septiembre de 2018 y del TSJ de Madrid de 19 de septiembre de 2019 (y II),* en El Blog de Eduardo Rojo, 2 de octubre de 2020, era necesario garantizar la aplicación uniforme del Derecho de la Unión, más aun teniendo en cuenta que los distintos tribunales europeos calificaban de manera dispar esta prestación de servicios. Por tanto, solo sabiendo si el ofrecimiento de estos servicios en el mercado constituye un ejercicio de libertad de establecimiento y de la libre prestación de servicios o si, por el contrario, las relaciones jurídicas establecidas al efecto encajan en el concepto europeo de trabajador, podremos dilucidar qué normas europeas son aplicables a las mismas y garantizar su aplicación homogénea.

[14] ORTEGA LOZANO, P.G., *Economía colaborativa, condiciones laborales dignas y la lógica*

En este sentido, la propia nota de prensa de la Comisión subraya que la propuesta incluye medidas "para determinar correctamente la situación laboral de las personas que trabajan a través de plataformas digitales, así como nuevos derechos tanto para los trabajadores como para las personas que trabajan por cuenta propia por lo que respecta a la gestión algorítmica". El objetivo principal, "garantizar que a las personas que trabajan a través de plataformas digitales se les reconozca la situación laboral que corresponde a su modalidad de trabajo real". Para ello, proporciona una lista de criterios de control para determinar si la plataforma es realmente un "empleador", de manera que, cumpliendo dos de estos criterios, se presume, desde un punto de vista jurídico, la condición de empleador.

También resalta la Comisión que el futuro texto comunitario viene a "aumentar la transparencia en el uso de algoritmos por parte de las plataformas digitales", garantizando un "seguimiento humano del respeto de las condiciones laborales", facultando, tanto a trabajadores como autónomos, a "impugnar las decisiones automatizadas".

El análisis del contenido de la Directiva en ciernes excede del objetivo del presente trabajo, por lo que, siguiendo al Profesor Eduardo Rojo[15], simplemente indicaremos, de manera sintética:

El capítulo I regula las disposiciones generales, e incluye cuál es su objeto y ámbito de aplicación y las distintas definiciones utilizadas en el texto.

El capítulo II lleva por título "Estatuto de empleo" e incluye la correcta determinación de la situación laboral, la presunción legal de laboralidad (a la que sí haremos cumplida referencia), y la posibilidad de su refutación.

El capítulo III versa sobre la gestión algorítmica, y aborda la transparencia sobre los sistemas automatizados de control y toma de decisiones y su utilización, el control humano de los sistemas automatizados, la revisión humana de las decisiones significativas, los derechos de información y consulta de la representación del personal o de las propias personas trabajadoras, y las reglas sobre aplicación de algunos

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algorítmica: la propuesta de "Directiva sobre la mejora de las condiciones laborales en el trabajo de plataformas", en Revista Española de Derecho del Trabajo núm. 251, 2022.

[15] ROJO TORRECILLA, E., *El trabajo en plataformas digitales. Análisis de la propuesta de Directiva presentada por la Comisión Europea el 9 de diciembre y de los textos conexos. La importancia de la "primacía de los hechos" y del control humano de la gestión algorítmica,* en El Blog de Eduardo Rojo, 13 de diciembre de 2021.

preceptos de la norma a quienes prestan servicios sin que exista una relación laboral.

El capítulo IV trata sobre la transparencia en el trabajo de la plataforma, regulando la obligación de la declaración de dicho trabajo, y el acceso a la información de todas las autoridades competentes sobre el trabajo en plataformas.

El capítulo V está dedicado a los recursos y ejecución, reconociendo primeramente el derecho al recurso de toda persona trabajadora cuando considere infringidos sus derechos, el reconocimiento del derecho a intervenir las organizaciones representativas del personal en los procedimientos en nombre o en apoyo de las personas que realizan trabajo de plataforma, los canales de comunicación para las personas que realizan dicho trabajo, el acceso a todas las pruebas necesarias por parte de los tribunales cuando exista un litigo sobre la situación laboral de quien presta el servicio, la protección frente a tratos o consecuencias adversas por haber ejercido sus derechos una persona trabajadora, la protección contra el despido, y la determinación de que las autoridades competentes velarán por la supervisión del cumplimiento de las normas e impondrán en su caso las sanciones adecuadas.

El capítulo VI, por último, regula las disposiciones finales, con la cláusula general de no regresión y mantenimiento de las disposiciones más favorables, la transposición y aplicación de la norma, la posibilidad de confiar a los agentes sociales dicha aplicación, la revisión de la norma transcurrido un cierto tiempo (que se fija en cinco años) desde su entrada en vigor, y justamente la regulación de dicha entrada (a los veinte días de su publicación en el DOUE), así como la especificación de que sus destinatarios son los Estados miembros.

Descrita la estructura de la futura norma comunitaria, sí queremos comentar algunos extremos en la medida en que guardan relación con la previa acción legislativa española.

Y así, en cuanto a la presunción de laboralidad, a diferencia de lo sucedido en España, la Comisión no limita su propuesta al sector del reparto, sino que amplía el ámbito subjetivo de aplicación a **todos los trabajadores de plataformas en todos los sectores** productivos; lo relevante no es, por tanto, el sector, sino que la plataforma "actúe como empresario", fijándose, para ello, en la facultad de control empresarial del trabajo, que concurrirá cuando se cumplan dos de los siguientes elementos: 1) La plataforma determina efectivamente la remuneración de los trabajadores o establece límites máximos a la misma; 2) Se exige

a los trabajadores que respeten normas específicas y vinculantes en cuanto a la apariencia, la conducta hacia el destinatario del servicio o la realización del trabajo; 3) La plataforma supervisa la realización del trabajo o evalúa la calidad de sus resultados, incluso por medios electrónicos; 4) La plataforma restringe efectivamente, incluso mediante sanciones, la libertad de organizar el propio trabajo, en particular el tiempo de trabajo y la capacidad de aceptar o rechazar tareas o de utilizar subcontratistas o sustitutos; y 5) Se restringe efectivamente la capacidad del trabajador de crear una base de clientes o de realizar trabajos para un tercero.

La presunción así "activada" podrá destruirse si la plataforma demuestra que, conforme al concepto de trabajador de la legislación interna aplicable, el prestador del servicio es realmente autónomo (la propuesta de Directiva no ofrece ninguna definición ni de trabajador ni de autónomo).

Parte de la doctrina ha criticado la presunción así establecida en la medida en que una lista de indicios cerrada, pese a favorecer en cierto modo la seguridad jurídica, puede ser fácilmente "burlada", diseñando un sistema de trabajo que los evite. Se corre el riesgo, además, de reducir el debate jurídico a estos cinco indicios; siendo palmario, además, que dicha lista podría haber integrado otros tantos indicios, igualmente definidores de la subordinación, tales como prestar servicios bajo la marca de la empresa, o en la actividad principal ofrecida por la empresa contratista.

En cuanto a la gestión algorítmica, la propuesta comunitaria apuesta por asegurar los derechos de información y transparencia en el uso de los algoritmos en el trabajo, incluyendo derechos de consulta sobre dicho uso (también a nivel colectivo, en plataformas que empleen a asalariados), así como obligaciones empresariales que se traducen en que exista un componente humano en la toma de decisiones que afecten a los trabajadores.

Se trata de un precepto novedoso que obliga a la plataforma a proporcionar información sobre las acciones de monitorización hacia los trabajadores, la supervisión y evaluación de los mismos, así como los principales parámetros que dichos sistemas tienen en cuenta para las decisiones algorítmicas, información que debe ponerse a disposición de las autoridades laborales y representantes de los trabajadores de la plataforma digital. Siendo plausible la "extensión" que se hace de tales derechos a los trabajadores autónomos, de manera que no existan

colectivos de "primera" y "segunda" clase en lo que respecta a un aspecto tan sensible.

5. El "encaje" de la futura directiva en el ordenamiento español

La presunción de laboralidad "comunitaria" se inserta en un precepto cuya transposición, compleja, habrá de abordarse en su momento por cada Estado miembro, trasladando sus criterios a una legislación interna que, a su vez, será aplicada por los tribunales encargados de interpretar esas singulares "condiciones" de laboralidad en plataformas, recogidas en las leyes de transposición[16].

No obstante, parece claro que la propuesta de Directiva **está pensando en países que, a diferencia de lo que sucede en España, no cuentan en su legislación con una presunción de laboralidad. En nuestro país, la Directiva t**endrá que transponerse teniendo en cuenta que el art. 8.1 ET ya incorpora una presunción de laboralidad con carácter general.

También es claro, porque así lo aclara la propuesta de Directiva, que dicha presunción legal de laboralidad "europea" no tendrá efectos retroactivos, esto es, no podrá aplicarse a situaciones anteriores a la fecha límite de transposición de esta norma.

En España se da, además, la circunstancia de que el texto comunitario ha seguido el ejemplo español, abordando la regulación del trabajo en plataformas desde el mismo doble punto de vista: el establecimiento de una presunción de laboralidad y la regulación de la gestión algorítmica (en este punto hay que resaltar la importancia de la normativa española, que fue criticada por quienes consideraban tan innecesario como poco relevante el reforzamiento de la presunción de laboralidad o el reconocimiento expreso de derechos de información y consulta de la representación del personal en todo lo relativo a la gestión algorítmica de las condiciones de trabajo).

No obstante, las diferencias entre nuestra reciente Ley *rider* y la propuesta de Directiva son suficientes como para entender que España tenga que acometer una labor de transposición.

En efecto, se ha dicho[17] que la presunción de laboralidad que nuestra Ley 12/2021 ha incorporado en el Estatuto de los Trabajadores me-

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16 ORTEGA LOZANO, P.G., op cit.

17 PÉREZ DEL PRADO, D., *El juego de los futuribles: hipótesis para una hipotética*

diante la Disp. Ad. 23 es muy distinta a la que la propuesta de Directiva incorpora en su art. 4.1 (aunque ambas compartan como elemento clave la "dependencia"), siendo la norma española más sencilla, al tiempo que define aquella presunción desde la perspectiva de la persona trabajadora ("personas que presten servicios retribuidos…"). Por el contrario, la Propuesta de directiva construye la presunción desde la posición de la plataforma que "controla" la actividad.

A su vez, la presunción española parece más sólida y tuitiva que la propuesta comunitaria, en la medida en que el solo uso del algoritmo por la plataforma implica, de manera implícita, la existencia de dependencia; la propuesta de la Comisión, en cambio, exige exteriorizar las funciones de dirección (control) a través del haz de facultades que describe.

Dicha perspectiva "tuitiva" debiera pues tenerse en cuenta a efectos de una hipotética transposición. Y en el caso de que el legislador nacional entendiese como "forzosa" la inclusión de los cinco criterios de control definidos por la ya Directiva, en ese caso bastaría con indicar su carácter ejemplificativo (*numerus apertus*) para no limitar la mayor flexibilidad de la regla española. Hay quien incluso ha afirmado en algún foro[18] que la transposición de la futura Directiva podría hacerse de una forma tan sencilla como eliminar, de la Ley 12/2021, la restricción al sector del reparto o distribución.

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[18] PÉREZ DEL PRADO, D., op. cit.

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3. The impact of artificial intelligence and platform work on gender equality Remarks on the recent Proposal for a Directive

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Summary: *1. Gender equality, artificial intelligence and platform work – 2. Machine learning based technologies – 3. Digital transition and the need for transparency in platform work – 4. The impact of artificial intelligence and platform work on labour markets – 5. The impact of artificial intelligence and platform work on individuals – 6. The impact of artificial intelligence and platform work on gender gap – 7. Remote working and gender pay gap – 8. The Italian National Recovery and Resilience Plan: last call for gender equality?*

"*The Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work aims to provide for an important body of legal minimum standards in labour rights across the Union, and it must be wisely used to ensure that gender equality is respected in the transformation of the workplace, as it can affect hiring, task assignment, performance evaluation as well as promotion. In this context, the urge for more transparency comes from the lack of regulation of the new phenomenon of algorithmic management, that poses challenges to both workers and self-employed, especially from the perspective of protecting gender equality.*".

1. Gender equality, artificial intelligence and platform work

"Digital transformation brings fast change that affects our labour markets": with these words the President of the European Commission stressed, in her political guideline, that out time to find the right way to improve the labour conditions of platform workers is running very fast.

Digitalisation is changing the world of work and, while enhancing flexibility, it is carrying multiple risks for employment and working conditions as well as widening the gender gap.

Latest statistics leave no doubt: as reported by the European Institute for Gender Equality (EIGE), in the European Union and United Kingdom only 16% of artificial intelligence skilled workers are women, and the gap in the workforce widens with career length[1].

For these reasons the European Union, in its Gender Equality Strategy for 2020-2025, recognises artificial intelligence as a key driver of economic progress. Of course, the recognition of new technologies as an area of strategic importance for the development of an effective European gender strategy undoubtedly plays a key role in ensuring that work through platforms and artificial intelligence systems reflect the diversity of society.

In this context, Covid-19 pandemic has emphasized the growing use of artificial intelligence, platform work and remote working, which poses new challenges and risks, especially if there is a lack of a common discipline to regulate its principal aspects.

For this reason, the Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work aims to provide for an important body of legal minimum standards in labour rights across the Union, and it must be wisely used to ensure that gender equality is respected in the transformation of the workplace, as it can affect hiring, task assignment, performance evaluation as well as promotion[2].

2. Machine learning based technologies

Algorithmic management plays a key role in decisions making processes of artificial intelligence and platform work, so it is fundamental to understand the technology on which it is based in order to fully comprehend its significant impact on working conditions[3].

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1 Eige (2021), Artificial intelligence, platform work and gender equality, Luxembourg, Publications Office of the European Union, 11.

2 Earlier see Sciarra S. (2007), EU Commission Green Paper 'Modernising labour law to meet the challenges of the 21st century, Industrial Law Journal, Vol 36, pages 375–382.

3 For some initial thoughts on this theme see Dagnino, E., (2017), People Analytics: lavoro e tutele al tempo del management tramite big data, Labour Law Issues, 3, 1.

In fact, common denominator of any artificial intelligence technique is the algorithm, which can be defined as "an explicit, precise, unambiguous, mechanically-executable sequence of elementary instructions, usually intended to accomplish a specific purpose"[4].

Thus, it is a procedure aimed at achieving a specific result, through a defined sequence of steps, each logically connected to the previous one, according to a pattern whereby specific input values correspond to specific output values.

Algorithms – through a constant process of decoding reality in logical-mathematical terms – are now not only limited to encoding, millions and millions of data, but aspire, in the not so far future, to become "definitive algorithms", capable of deducing from data all the knowledge of this world, past, present and future[5].

The most common technique for "training" a neural network is to propose to the network a set of correct examples, that is, a series of input and output pairs where the output indicates the correct result for the corresponding input.

In this regard, we speak of "machine learning", to indicate the aptitude of the algorithm to "learn" the program automatically from the processing of the data, without the need for manual programming of every single step to be followed: in fact, through self-learning, a machine is able to create relationships between the given data, identify recurring patterns, generate new examples identify any anomalies and, therefore, even predict certain types of behaviour[6].

Traditionally, three main categories of machine learning have been identified, which are distinguished in relation to the type of feedback or "training" on which the learning system is based: supervised learning, in which the examples provided to the algorithm consist of a series in input accompanied by a label, which indicates the result or a value judgment; unsupervised learning , in which a learning algorithm is used through input data but without corresponding output variables, with the goal of finding relationships or patterns among the various

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[4] Erickson J. (2019), Algorithms, Creative Commons, Attribution 4.0 International, 2019, http://jeffe.cs.illinois.edu.

[5] Domingos P. (2020), The Ultimate Algorithm. The self-learning machine and the future of our world, Bollati Boringhieri, Turin.

[6] The term was coined by the U.S. computer scientist Samuel A. L., Some studies in machine learning using the game of checkers, IBM Journal of research and development, 1959.

data analyzed, without using labels or categorization; reinforcement learning, used to teach the machine to perform a given task without giving prior instructions, but helping it determine what actions to follow, by sending positive or negative feedback.

With the advent of "big data"[7], new techniques for learning through algorithms are developed, such as what is known as "deep learning"[8]. It represents a subset, or rather an evolution, of machine learning techniques, based on so-called artificial neural networks, built on computational models inspired by the human brain, which allows for unanticipated, nonlinear and unpredictable machine reactions, which are, therefore, beyond the control of the developer himself.

In this case, the network "learns" through "training sets", i.e., a set of data on which the computer will train, comparing the received data and learning its characteristics according to the initial settings indicated by the software. During learning, the network compares the result obtained with the correct result indicated in the entered set of examples, and in case of deferral from the programmed result, it corrects its configuration of the weights on the connections[9].

It is not possible to ignore the dangers inherent in the use of deep learning models, which are characterized by such complexity that, even in the eyes of the programmers and developers themselves, their mechanism of operation and the processes on the basis of which a certain decision was made or a certain behaviour assumed. We speak, in this regard, of black box systems[10], to indicate precisely the characteristics of the relevant processes, which are not only opaque ex post, but also unpredictable ex ante, because they are designed to respond not only to predefined stimuli, but also to new stimuli, independently identified by the algorithm.

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7 Although there is no certain agreed definition, the term "big data" refers to "a new generation of technologies and architectures designed to economically extract value from very large volumes of a wide variety of data by enabling high-speed extraction, discovery and analysis". See Gantz J., Reinsei D. (2011), Extracting Value from Chaos, in ICD Iview, June, sponsored by EMC. The multimedia content can be viewed at http://www.emc.com/digital_universe.

8 The Economist, The data deluge., February. 27th, 2010, On the cover a man with an overturned umbrella under a deluge of data.

9 This has undoubtedly facilitated the achievement of results that were not even imaginable a few decades ago, of which self-driven cars are a shining example.

10 The term was coined by MC Arthur L. (2019), Machine Learning for Philosophers, Beneficial AI Society, Edinburgh.

Opacity, unpredictability and autonomy: these are all characteristics that inevitably pose heavy questions about the ability of traditional normative categories of labour law to govern, especially from the standpoint of employer responsibility, such complex and by their nature highly variable phenomena.

For that reason, it will not be possible to ignore the side effects that will inevitably emerge from these new technologies, not only at the socioeconomic level, but also and above all at the legal and ethical level, as well as in the perspective of gender equality. In this perspective, the scientific dimension will necessarily and appropriately have to be combined with the legal and ethical dimensions, in that perspective of new and global governance of techno-scientific progress[11].

3. Digital transition and the need for transparency in platform work

Algorithmic management is nowadays used in a growing number of ways in the labour market, but especially in the digital labour platforms' business model[12].

Platform work refers to an economic model where the fixed job gives way to services work rendered on demand, at the request of the consumer or user of the service. The so called "gig economy", that of online platforms, has therefore increased the number of workers on-demand, mostly performing temporary activities, and is shaping the economy of the European Union and its labour markets[13].

To fully understand the effects of the digital transition at work, it is sufficient to consider the latest statistics show that digital labour platforms have grown by around 500% in the last 5 years and, current-

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11 Punzi A. (2003), *L'ordine giuridico delle macchine*, Giappichelli, Torino.

12 In Italy labor platforms have now invaded several sectors, from home meal delivery (Foodora or Deliveroo) to transportation (Uber) and home services (TaskRabbit), instantly connecting potential customers and service providers. For a complete view of the theme of labour platforms see Aloisi A., De Stefano V. (2022), Your Boss Is an Algorithm: Artificial Intelligence, Platform Work and Labour, Hart Publishing.

13 As pointed out by C. Giorgiantonio, L. Rizzica (2018), Il lavoro nella gig economy. Evidenze dal mercato del food delivery in italia, Questioni di economia e finanza 472, 5, the expression "gig economy" is borrowed from the world of music, where the term "gig" denotes a performance linked to a single engagement and - therefore - unique, occasional. The work in the gig economy is, in fact, purely occasional, referable to the single daily (or a few hours, minutes) performance.

ly, over 28 million people in the European Union work through these platforms[14].

As highlighted by the European Commission in the explanatory memorandum of the Proposal for a directive, nine out of ten platforms active in the Union are estimated to classify people working through them as self-employed, which, when really happens, is a way to develop entrepreneurial activities by developing business, innovation, accessibility of services as well as creating jobs.

In the European Commission perspective, the achievement of the goal of improving the legal, economic and social condition of platform workers cannot disregard two elements: on the one hand, the correct qualification of the legal situation in which the worker operates through digital platforms and, on the other, the regulation of the algorithmic management of such platforms.

Due to its potential, digital labour platforms may represent an important element not only to efficiently match supply and demand for labour, but also to help people facing barriers in access to the labour market, such as women, young people or people with disabilities, earn more possibilities.

From a labour law perspective, the complexity of the platform work imposes some considerations about the potential labour effects of the processes of digitization of production systems and labour relations, given that technological innovation represents a challenge for the economic and labour system from the perspective of the future sustainability of the change introduced[15].

Digital labour platforms use automated systems to assign tasks, to monitor, evaluate and take decisions for the people working through them: it is the algorithmic management that is used in a growing number of ways in the labour market, but especially in the digital labour platforms' business model[16].

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[14] Data are reported in the section "Context of the proposal" of the explanatory memorandum of the Proposal for a directive on improving working conditions in platform work, available at http://ec.europe.eu.

[15] With reference to the duration and intensity of online work see Daubler W. (2016), *Challenges to Labour Law*, in A. Perulli (a cura di), *L'idea del diritto del lavoro, oggi. In ricordo di Giorgio Ghezzi*, Cedam, Padova, 497.

[16] Choudary S. P.(2018), The architecture of digital labour platforms: Policy recommendations on platform design for worker well-being, ILO Future of Work Research Paper Series, No. 3; Aloisi, A. (2016), Commoditized workers: Case study

As algorithmic management creates efficiencies in the matching of supply and demand of work, understanding how algorithms influence decisions is crucial to comprehend its significant impact on working conditions. Thus arises the need for greater transparency in platform work expressed in the Proposal for a directive, due to the lack of clear automated and decisions making systems, in addition to the insufficient transparency regarding the efficient access to remedies for decisions taken or supported by such systems.

It then seems that the urge for more transparency comes from the lack of regulation of the new phenomenon of algorithmic management, that poses challenges to both workers and self-employed, especially from the perspective of protecting gender equality.

4. The impact of artificial intelligence and platform work on labour markets

In order to assess what the impact of artificial intelligence and platform work is on the national and European labour market, it is worth pointing out that this technological evolution could raise new and articulated critical issues, not only regarding gender gap[17].

In particular, the fear is, on the one hand, that of the potential elimination of many jobs, given that every technological change has a strong impact on employment levels; on the other hand, that of the qualitative transformation that job performance may undergo. These are relevant changes which testify to the significant destabilization that technological and scientific developments in recent years are capable of bringing to the labour system[18].

For these reasons, it is not surprising that, from the progressive awareness of the radical change that is transforming economic and labour realities, those who foresee considerable progress in the labour

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research on labour law issues arising from a set of 'on-demand/gig economy' platforms, in Comparative Labor Law & Policy Journal, 37, 3,. 653–690.

17 OECD (2016), The Risk of Automation for Jobs in OECD Countries A Comparative Analysis, OECD Social, Employment and Migration Working Papers, No. 189; OECD (2018), Automation, skills use and training, OECD Social, Employment and Migration Working Papers, No. 202.

18 For a broad vision on the issues of automation, artificial intelligence and the preservation of "human" employment levels, see De Stefano V. (2018), Negotiating the algorithm: automation, artificial intelligence and labour protection, International Labour Office, Working Paper No. 246.

market, in terms of greater efficiency of businesses and greater competence and professionalism of individuals[19], are contrasted by those who, on the other hand, show concern about the considerable changes that digital innovation in the economy and labour is bound to spill over into the workforce[20].

Obviously, as far as it is of interest here to investigate, the problem of the destabilization of the labour market balances arises with reference to jobs performed via platform.

As carefully noted, one of the most obvious effects of the digitization of socio-economic and labour relations is the considerable reduction in transaction costs, made possible by the construction of a communication system that facilitates the encounter between the labour provider and the service user. A platform is a digital infrastructure, where the worker can be freely contacted by any party interested in his or her work service and the work service can be freely agreed upon by the parties on the basis of individual negotiation or, alternatively, adjust to a rate predetermined by the platform operator[21].

Thus, the use of platforms in work is capable of easing the meeting of labour supply and demand, helping to achieve that disintermediation of the labour market that represents one of the most incisive requirements in the path toward the revival of social and labour dynamics.

Indeed, in a distributed labour market, such as the one realized by digital technologies, it becomes possible to find available labour providers, to obtain, at any time desired, the performance of the required service, at the place and in the manner agreed upon[22].

This is a real revolution in the labour market, which undoubtedly benefits, first and foremost, businesses, which would thus be able to make use of workers only where they are needed for the performance

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19 Ciccarelli R. (2015), La rivoluzione dei lavori, in Allegri G., Bronzini G. (eds), Libertà e lavoro dopo il Jobs Act. Per un garantismo sociale oltre la subordinazione, Derive Approdi, Roma,. 142.

20 Degryse C. (2016), Impacts sociaux de la digitalisation de l'économie, WP ETUI, 2, 9; Drahokoupil J., Fabo B. (2016), The platform economy and the disruption of the employment relationship, ETUI Policy Brief, 5, 2.

21 Ichino P. (2017), Le conseguenze dell'innovazione tecnologica sul diritto del lavoro, Rivista Italiana di Diritto del Lavoro, 2017, 4, 1, 525.

22 It is intended to share here the reflection that the realization of a global digital market for the provision of goods and services implies the creation of a labor market subject to strong competitive pressure, the same competitive pressure from which the legal status of subordinate employment is intended to remove the worker. See Tullini P. (2016), Economia digitale e lavoro non standard, Labour Law Issues, 2, 2, 5.

of a certain service, without the obligation to employ them in their employ in order to rely on their labour activity.

5. The impact of artificial intelligence and platform work on individuals

In this context, it is possible to expect that the worker who renders his service through a platform, on his part, would lose the connotation of being an employee of the company, since he would be contractually free to consent or not to the performance of a given activity. It would be, in other words, a way of realizing the work life balance of the employee, who would be free to choose between performing a paid activity and performing other personal or family activities.

Of course, even with such an advantage, this form of work organization, that sets the worker free from the traditional spatial-temporal coordination with the employer, entails a high risk for the worker himself, not only for job stability but also and above all for the guarantee of protections, which in many cases would remain the responsibility of the worker.

Indeed, in a labour market based on disintermediation and the distribution of data and controls, as well as the absence of a central authority to manage the network, the level of protection for the labour provider is bound to necessarily retrogress.

The worker, once again, becomes the weaker party to the relationship, but not because of the employer's hetero-direction nor because of his condition of economic, technical and social inferiority, but rather as a result of uninterrupted competition with other platform workers[23] .

This creates, in other words, a vicious system of stressing workers to maintain a certain standard of efficiency, the threshold of which would settle at the average of services rendered with reference to a specific activity by workers operated in the platform.

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[23] As authoritatively noted on gig economy and labour platforms, the marketplace in which workers operate subjects them "to permanent confrontation with those offering their own services, thus to precisely the 'examination stress' that in the area of traditional salaried employment, forms of collective self-defense typically tend to limit." See Ichino P. (2017), Le conseguenze dell'innovazione tecnologica sul diritto del lavoro, Rivista Italiana di Diritto del Lavoro, 2017, 4, 1, 525.

For this reason, relying on the spontaneous regulation of the marketplace to match supply and demand of work via platform could re-propose the problem of downward competition of worker protections that initially occurred in similar terms in the subject of the employment relationship.

This is a particularly significant problem, which has been limited by the alluvial guarantor legislation on subordinate employment over the past fifty years.

Regarding the proper qualification of the worker's legal situation by platform, the proposal requires member states to establish procedures that, looking at the substantive characteristics of the case (so-called principle of primacy of facts), enable them to arrive at the correct qualification of the worker's legal status as an employed or self-employed worker[24].

After all, the correct framing of the relationship that binds the worker to the platform employer produces relevant consequences as to the social security and welfare rights and protections assured, which are welfare insured, which are far more relevant in the case of subordinate employment than in the case of self-employment.

For this reason, the introduction of a "iuris tantum" legal presumption allows that, when the conditions provided for in the directive, which are symptomatic of the existence of a form of "control" exist, the employment relationship is presumed to be subordinate[25].

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[24] So Article 3 of the Proposal for a directive refers to the member states the definition of procedures to verify and ensure the correct legal framework of the employment relationship carried out through digital platforms, in order to ascertain the existence or otherwise of a relationship of subordination which, if found, determines the consequential application of all the legal labour protections provided by both domestic and European legislation. The classification, in particular, must be made by giving preeminent importance to the concrete attitude of the employment relationship, thus disregarding its formal classification.

[25] Article 4 of the Proposal for a directive, in particular, introduces a legal presumption of subordination that operates in case the employment relationship has at least two of the indicated elements: effective determination of the level of remuneration or setting maximum limits for that level; obligation of the worker through digital platforms to abide by specific binding rules regarding the outward appearance, behaviour towards the recipient of the service or performance of the work; supervision of the performance of the work or verification of the quality of the results of the work, including by electronic means; limitation, including through sanctions, of the freedom to organize one's own work, such as working hours or periods of absence; effective limitation of the possibility of building one's own clientele or performing work for third parties.

6. The impact of artificial intelligence and platform work on gender gap

To fully understand what the impact of artificial intelligence and platform work is, it is fundamental to look more deeply into what the social impact of the gig economy is, that means look into its reflections on the gender gap.

Today, in the aftermath of the biggest pandemic in recent times, economic success and social progress in business are two inseparably linked aspects, which call for a rethink of the organisation of work and production that, by making it possible to detect and measure virtuous behaviour and responsibility over the long term, is in line with the Sustainable Development Goals proclaimed by the United Nations in its 2030 Agenda for Sustainable Development[26].

At the same time in Europe, the recent Directive (EU) 2023/970 strengthens the application of the principle of equal pay for equal work of equal value between men and women, whereas, The European Strategy for Gender Equality 2020-2025 contains the strategic goals and actions needed to make significant progress towards a gender equal Europe by 2025[27]. As the description of the strategy states "the goal is a Union in which women and men, girls and boys, in all their diversity, are free to pursue their own life choices, have equal opportunities to fulfil themselves and can, to an equal extent, participate in and lead our European society".

Unfortunately, gender biases are often transmitted to artificial intelligence systems by design, because they tend to reflect the views and personal biases of the designers of the systems and it may sometimes amplify broader societal norms.

The potential for gender bias and discrimination in algorithmic management could also amplify gender inequalities. Understanding

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[26] The Agenda is divided into 17 goals and 169 target to promote future development and require that the pursuit of the macro-objective of sustainable development inspired by the 2030 Agenda is declined in the national context of individual countries, which shall adopt and implement specific national strategies and plans to implement the Agenda, with the full involvement of all stakeholders concerned. Further information can be found at https://sdgs.un.org/goals.

[27] Communication of the European Commission on its strategy for equality between women and men in Europe, dated march 5th 2020: "progress is slow and gender gaps persist in employment and in pay, care and pensions; in management positions; and in participation in political and institutional life". The main objectives of the strategy include ending gender-based violence, combating sexist stereotypes, reducing the gender gap in the labour market, ensuring equal participation in different economic sectors, and fighting the pay and pension gap.

how algorithms influence or determine decisions such as the access to future task opportunities or bonuses, is fundamental, given the implications for the income and working conditions of people working through digital labour platforms.

Currently, however, there is insufficient transparency regarding such automated monitoring and decision-making systems and people lack efficient access to remedies in the face of decisions taken or supported by such systems.

Algorithmic management is a relatively new and – apart from EU data protection rules – largely unregulated phenomenon in the platform economy that poses challenges to both workers and the self-employed working through digital labour platforms.

Chapter III of the Proposal for a directive (Articles 6 to 10) deals with algorithmic management, whereas Chapter IV (Articles 11 to 12) deals with transparency regarding work through digital platforms.

The goal of ensuring effective improvement of the condition of the worker is pursued, in the Commission's proposal, not only through enhancing the transparency and accessibility of the criteria governing the operation of the automated systems by the individual worker, the union representatives and the relevant public authorities, but also through specific provisions on the protection of the worker's personal data as well as the introduction of requirements for human monitoring of automated systems in order to assess the resulting risks to workers' health and safety.

Therefore, a higher level of transparency of artificial intelligence systems and work platforms would be really helpful in tackling problems such as gender based discrimination at work, but unfortunately the proposal for a directive does not expressly mention gender gap and does not provide anything specific about it.

For this reason, it would be useful to use data to assess some specific issues from a gender perspective as well as to examine the opportunities and challenges for gender equality in the labour markets transformed by artificial intelligence and platform work.

As mentioned, there's new evidence from the European Institute for Gender Equality that shows that artificial intelligence and platform work have the potential to improve gender equality in the economy.

However, on the other hand, there is also a danger they reinforce discrimination, while spreading insecure work and a lack of social protection. In facts platform works are parts of the economy of the future but it is fundamental to make sure they're designed and regulated in a way that protects women.

To make sure artificial intelligence and platforms works for both women and men, the Europen Union and Member States should conduct gender impact assessments of new technologies, require publicly funded projects to have balanced numbers of women and men, and train engineers and computer scientists in how to avoid bias.

These are just some initial reflections that, with reference to the impact on gender gap, speculate how the proposal for a directive may finally represent the opportunity and the best tool to reduce gender inequalities that still harm our labour market as well as our economy.

7. Remote working and gender pay gap

At the same time, the massive use of remote working that has been globally experienced over the last two years inevitably calls for a rethink of the tools available to reduce the gender gap and enhance gender equality, especially with reference to remuneration rights.

It is clear that remote working has indeed reshaped our time, our way of working, our lives. For this reason, in the pursuit of sustainability, especially the social one, of companies, remote working could be used as a tool to free women's career paths from those mechanisms that delay or hinder their development in organisations.

This is an issue that, although it emerged even before the health emergency, has recently gained a prominent role in rethinking the remuneration systems of all those workers who, forced by the Covid-19 emergency, suddenly found themselves working from home[28].

The challenge of remote working has in fact raised many new issues related to the economic treatment of the employee, with particular reference to the issue of the necessary valorisation of the individual result, which must now be imposed as a reference point for the employer in encouraging individual and corporate productivity and in the pursuit of effective equality of pay between genders[29].

In fact, remote working, used in a structural and shared manner, and therefore outside the logic of emergencies or as an easy welfare

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[28] On the differences between remote working and the previous telework see Martone M. (2018), "Lo smart working nell'ordinamento italiano", Diritti Lavori Mercati, Issue 2, 293.

[29] In this regard, please refer to the reflections contained in the Italian Chamber of Deputies Report "Parità di genere", february 10th 2022.

solution, acts as a pay equalizer because time - in the office or at work - is no longer a determining factor for pay: it is no longer the time worked which counts, but the objectives[30].

The right to equal pay for women and men for equal work or work of equal value is one of the fundamental principles enshrined in the Treaty of Rome. The need to ensure equal pay is expressed in Directive 2006/54/EC, supplemented in 2014 by a Commission Recommendation on pay transparency.

Despite this legal framework, the effective implementation and application of this principle in practice continues to be a challenge in the EU. The lack of pay transparency has been identified as one of the main obstacles.

Nowadays the gender pay gap in the EU continues to be around 14 %. The pay gap has long-term repercussions on women's quality of life, puts them at greater risk of poverty and perpetuates the pension pay gap, which stands at 33 % in the EU. The Covid-19 pandemic and its economic and social consequences make it even more urgent to address this problem, as the crisis has hit female workers particularly hard.

The European Parliament has in recent years repeatedly called for further action at EU level to improve the implementation of equal pay provisions and on march 4th 2021 a proposal for a Directive of the European Parliament and of the Council has been presented to enhance the application of the principle of equal pay for men and women for equal work or work of equal value through pay transparency and enforcement mechanisms.

In this context it is not by chance that Italian latest legislative action on gender has recently focused on the world of work, which has been the subject of numerous legislative interventions aimed at achieving gender equality by recognising equal rights and greater protection for working women.

In particular the issue of pay equity is extremely relevant in the current Italian legal context, as evidenced by the recent law on pay equity No. 162 of 2021[31].

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[30] On the relevance of the result in remote working, reference should be made to the considerations already expressed in De Marco E. (2020), "Retribuzione e premialità del lavoro da remoto", Martone M. (eds), Il lavoro da remoto, Piacenza, 121.

[31] In this framework, support instruments for the creation and development of enterprises with a majority or total participation of women have been strengthened,

The Law considerably broadens the notion of direct and indirect discrimination (referred to in Article 25 of the "Codice delle Pari Opportunità"), no longer consisting only in "treatment" but also in "any change in the organisation or conditions and times of work" motivated not only by "state of pregnancy, maternity or paternity" but also simply by "sex, age, or the needs of personal or family care" that is in any case likely to put the worker at a disadvantage compared to other workers or that may limit the opportunities for participation in the life or choices of the company or access to the mechanisms of progression or career advancement.

Of particular impact is the extension by Article 46 of Law No. 162 of 2021 of the obligation for public and private companies with more than 50 employees (previously the threshold was 100) to draw up a report at least every two years on the situation of male and female staff: the Ministry of Labour will publish on its institutional website the list of companies that have submitted the report and those that have not. The ministerial decree will also regulate the methods of access to the report by employees and trade union representatives of the company concerned, in compliance with the protection of personal data, in order to benefit from judicial protection.

The possibility for stakeholders such as employees and trade union representatives to access the data of the staff situation report makes it possible to strengthen the protection against discrimination for the purposes of the so-called statistical proof aimed at the judicial ascertainment of discrimination and the mitigation of the burden of proof on the employee who claims to have suffered discrimination pursuant to Article 40 of the "Codice delle Pari Opportunità".

In conclusion, Law no. 162 of 2021 constitutes a further important step, addressing a number of issues related both to the fight against the gender pay gap and to the relevance of "care work" in the configuration of the prohibition of discrimination, without forgetting the promotion of the presence of women in the bodies of public companies, including unlisted ones.

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as well as the promotion of the participation of women in the bodies of listed companies. Last but not least, increasing attention has also been paid to measures aimed at combating violence against women, with three objectives: to prevent crimes, punish perpetrators and protect victims.

8. The Italian National Recovery and Resilience Plan: last call for gender equality?

In the Italian system, the centrality of issues related to overcoming gender inequalities has recently been reiterated in the National Plan for Recovery and Resilience (so called PNRR) which, in order to boost national development in the aftermath of the pandemic, identifies gender equality as one of the three cross-cutting priorities pursued in all the missions that make up the Plan[32].

Within such an ambitious project as the one outlined in the PNRR presented by the Draghi government, the choice was made to decline gender equality in the form of a priority, which transversally runs through the entire Plan, and to allocate resources worth 7 billion euros to the promotion of an effective culture of equality in each of the missions of which the Plan is composed[33].

The innovative decision to consider the fight against gender inequality as a common need in each of the PNRR's areas of intervention represents a significant step forward, given that enduring gender inequalities, however exacerbated during the pandemic, have deep origins in our culture and, on closer inspection, have never been severed in the regulatory path that has so far characterized our legal system.

Indeed, there is no doubt that our legal system is characterized by still too deep-rooted cultural stereotypes of a clear division of roles within the family unit, in which the man has the task of supporting the family from an economic point of view and the woman has the task of taking care of domestic care. A model around which all the legislation of the last century was built, which, in an attempt to combine the role of a working woman with that of a mother, was for a long time declined exclusively in the female.

Today, also on the impetus of the experience remotely gained during the health emergency, it is more important than ever to promote effective forms of work-life balance, seizing the historic opportunity of the PNRR to promote the values of inclusion and gender equality pursued by the UN Generation Equality campaign and the European Strategy for Gender Equality 2020/2025 in our system as well.

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[32] Martone M (2022), Il lavoro nel PNRR, Giurisprudenza Italiana, 12.

[33] For a wider reflection on this topic see De Marco E (2022), PNRR e contrasto alle disuguaglianze di genere, Giurisprudenza Italiana, 12.

Anyway, within such a complex and articulated project as the one outlined in the PNRR, the absence of significant references to the potential impact of artificial intelligence, platform work and remote work on gender gap is quite surprising. Indeed, one cannot help but notice that references to this particular works rendered with the use of technological devices and algorithms, have not received the deserved attention among the interventions planned by the PNRR.

In this context, appropriate planning of interventions aimed at "normalizing" the use of artificial intelligence, platform work and remote work, while respecting the characteristics of the specific activities, could have contributed not only to promoting a more effective reconciliation of women's and men's life and work times, but also to implementing that pay parity between female and male workers that is unfortunately still far off today.

The aim of the next reforms should be to spread a new culture of results, in which a central role is assigned to productivity and the result of performance, on the basis of which pay is to be determined, regardless of the place and time of work but considering gender equality as a priority.

Only doing so it would become possible to overcome those practices, mainly linked to the time spent in the company, which have historically favoured men and harmed women, who are also in charge of family care tasks.

At the same time, only in this way will it be possible to attempt to reduce that gender gap that is still more entrenched in Italy than in other states and that, while exacerbated by the pandemic, is unfortunately ancient in the Italian legal system.

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4. The meaning of "*person performing platform work*": how about "*influencer*"?

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Summary: *1. The state of the art on work through platforms - 2. Recipients of the proposal: problems and perspectives - 3. Influencers - 3. 1 The effective determination of the remuneration level or setting maximum limits for this level - 3.2 The obligation, for the person performing work through digital platforms, to comply with specific binding rules regarding the outward appearance, behavior towards the recipient of the service or the execution of the work - 3. 3 Supervision of the work execution or verification of the work quality results, including by electronic instruments - 3.4 Effective limitation, including through sanctions, of the freedom to organize one's own work, in particular the ability to choose working hours or periods of absence, to accept or refuse assignments, or to use subcontractors or substitutes - 3.5 Effective limitation of the ability to build one's own clientele or to perform work for third parties - 4. Why not also include influencers? – 5. The ETUC solution - 6. The legal presumption: relative or absolute?*

1. The state of the art on work through platforms

Despite the wonderful plasticity of Article 2094 of the Civil Code[1], it is hard to imagine that the platform worker was the typical social worker referred by the Civil Code back in 1942. Indeed, the case on which Italian labor law is modeled has been severely challenged in light of technological developments. Till the point that in Italy "*the legislature has tried to cope, by preparing disciplines as appropriate as possible, with the profound and rapid transformations known in recent decades in the world of*

[1] M. Barbieri, *La ragione di un commento a un accordo aziendale importante*, in *LLI*, vol. 7, no. 1, 2021, p. 78.

work, also as a result of technological innovations, transformations that have profoundly affected traditional economic relations"[2] through a rule that sets a legal framework distinguishing among effects and qualifications: art. 2, Legislative Decree No. 81/2015. This article has been the first tentative to govern all the legal aporias that *riders* (the typical social worker of the new work era) presented.

Our Supreme Court in the well-known judgment No. 1663/2020 was clear in stating that it makes "*no decisive sense to question whether such forms of collaboration, so connoted and from time to time offered by the rapidly and constantly evolving economic reality, can be placed in the realm of subordination or autonomy, because what matters is that for them, in a middle ground of boundaries, the legal system has expressly stipulated the application of the rules on subordinate labor*."

The point, however, is that labor law (and law in general) cannot disregard the qualifications: every discipline needs a case, and one depends on the other[3].

In fact, a few months later than the well-known ruling, even the riders were requalificated in employees. This way has been the same of Justeat, which signed with the three major Italian confederations the first corporate collective agreement adapting the subordination to riders.

But even the EU legislature seems to have understanding that it is not possibile disregard the qualification. So-supported also by the European Trade Union Confederation (ETUC)-he decided to solve all the problems related to digital platforms through a proposed directive that would introduce an unprecedented legal presumption of subordination[4].

Unprecedented because the legal presumption of subordination will operate if the digital platform controls the "*performance of work*" of the person during the work. And control over the execution of the work is found where there is the presence of at least two of the five elements listed: (a)effectively determining, or setting upper limits for the

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[2] Cass., 24 gennaio 2020, n. 1663, in *www.adapt.it*

[3] Explicity F. Carinci, *Tribunale Palermo 24/11/2020. L'ultima parola sui* rider*: sono lavoratori subordinati*, in *LDE*, 1, 2021; but also M. Persiani, *Note sulla vicenda giudiziaria dei riders*, in *LDE*, 1, 2020.

[4] First comments belong to M. Barbieri, *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma*, in *LLI*, vol. 7, no. 2, 2021, C.5 e F. Pisani, *La proposta di direttiva UE per i lavori delle piattaforme digitali e il Real Decreto-Ley 9/2021 spagnolo*, in *LPO*, 1, 2022, p. 65; but also the monographic issue of *LLI* V. 8 N. 1 (2022)

level of remuneration; (b)requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work; (c)supervising the performance of work or verifying the quality of the results of the work including by electronic means; (d)effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes; (e)effectively restricting the possibility to build a client base or to perform work for any third party.

It seems to be an adapted subordination, like housework, sports work, beacause introduces indices of subordination that do not belong to the countries of the European Union[5]. But since most EU countries base their qualifying judgments on the typological method[6], the legislature rightly thought that by pointing to new ones, it would be easier to govern technological evolution.

Indeed, it will be enough for at least two out of five indices for the legal presumption of subordination.

2. Recipients of the proposal: problems and perspectives

Perhaps the most important aspect of the directive, however, is that the legislature distinguishes the recipients of the subordination presumption between "platform workers" and "person performing platform work".

The distinction is indeed «singular»[7] because it assumes that different relationships with platforms exist in the idea of the directive.

First, it is clear that when referring to platform workers the legislature is referring to those forms of self-employment that we call parasubordinate in our system.

More problems might be encountered instead in identifying persons performing platform work. This is a broad linguistic expression

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[5] M. Magnani, La proposta di direttiva sul lavoro mediante piattaforme digitali, in Bollettino ADAPT 9 maggio 2022, n. 18 e P. Tullini, *La Direttiva Piattaforme e i diritti del lavoro digitale*, in *LLI*, vol. 8, no. 1, 2022, R. 46.

[6] M. Pallini, *Il lavoro economicamente dipendente*, Padova, 2013, p. 23 ss.

[7] M. Barbieri, *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma*, in *LLI*, vol. 7, no. 2, 2021, C.9.

that obviously includes genuine self-employment[8], that is not considered at all by EU labor law, since it is attributable to entrepreneurial activity trough art. 101 TFUE. But after all, the legislature intends to include in its scope «both the so-called on-demand workers, whose services are intermediated through a platform, although they take place concretely in a physical space (consider, above all, the case of riders or Uber drivers), and crowd-workers, i.e., those who perform work activities (such as data entry or the preparation of diagrams) in a virtual context (insofar as they involve, of course, flesh-and-blood workers)»[9].

If these are the prerequisites, can we exclude that those workers who work on a digital platform that is not owned by the person commissioning the work fall within the scope of the directive?

An interpretation consistent with the purposes of the intervention of the proposal should lead to the view that these hypotheses can also benefit from the legal presumption. From a literal point of view, however, it is true, however, that "*the rebuttable presumption proposed to address the problem of misclassification of the employment status will only apply to digital labour platforms that exert a certain level of control over the performance of work. Other digital labour platforms will thus not be concerned by the presumption*"[10].

But it would be completely unreasonable with the aim of the directive to think that those workers who are monitored in the performance of work through a digital platform would be outside the proposal only because the digital platform is not owned by the commissioner. In fact, even in these cases the control would be through a digital platform.

If these workers will be exluded from the proposal, it would only be applied without problems to riders. Because it is true that the legal presumption would operate if there were only two elements out of five, but the five elements indicated are modelled on the characteristics of the riders. It would be very difficult to find more than two elements in classic crowd-workers.

However, there would be a category of workers who, just like riders, would have all the characteristics envisaged in the proposed direc-

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8 P. Tullini, *La Direttiva Piattaforme e i diritti del lavoro digitale*, op.cit., R.48.

9 M. Biasi, *Lavoro tramite piattaforma e presunzione relativa di subordinazione: ABC-Test californiano e proposta di Direttiva europea a confronto*, in *LDE*, 2, 2022, p. 6.

10 See *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A52021PC0762*.

tive. But these workers are precisely the ones who run the risk of being formally excluded from the legal presumption.

These workers are the so-called influencers, self-employed workers who create content within social networks at the request of brands that control the proper performance of the work requested through the same platform. But however, a platworfm not owned by those companies.

3. Influencers

Can we exclude influencers from the recipients of the directive merely because the companies commissioning the content are not the owners of the social network?

They integrate all the elements mentioned in the draft directive.

3.1. The effective determination of the remuneration level or setting maximum limits for this level

Companies ask influencers to create content for a fixed fee. This is «a classic contract in which the social-economic function is to ensure a clear exchange between compensation and social content»[11]. But the remuneration is a consequence of what happens on the platform. Because companies choose the person they ask to promote their products on the basis of the followers number or their interactions.

So, even in this respect, there is an incidence of the platform with respect to the performance.

3.2. The obligation, for the person performing work through digital platforms, to comply with specific binding rules regarding the outward appearance, behavior towards the recipient of the service or the execution of the work

It has been pointed out that this element has nothing to do with the classic indices of subordination to which Italian jurisprudence has been accustomed[12]. In a first approximation, it could be said that this

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[11] P. Iervolino, *Sulla qualificazione del rapporto di lavoro degli* influencers, in *LLI*, vol. 7, no. 2, 2021, I. 36.

[12] M. Magnani, cit.

index has been specifically calibrated to the case of riders, but not only, because influencers also peacefully integrate this element.

This is precisely what is required of influencers: companies have an «interest in seeing their product line associated with the image of a certain person»[13] and for this reason they demand contents that reproduces the person together with that product.

Besides the outward appearance, companies also impose a certain behaviour towards the recipients of the service (in our case, the followers) because they ask the influencer to promote the product in such a way that consumers are enticed to buy: the influencer is paid to explain to his followers that the product he is promoting is 'good'.

Indeed, we can say that in the case of influencers, "*the performance of the work*" consists precisely in "*complying specific binding rules with regard to outward appearance*" as well as "*behaviour towards the recipient of the service*", thus fully integrating the element envisaged by the proposed directive (pheraps more than riders).

As we said, for the purposes of the legal presumption, even two out of five elements would are enough, but we intend to go further, so as to show that in the case of influencers - just like riders - the other elements also exist.

3.3. Supervision of the work execution or verification of the work quality results, including by electronic instruments

Every company that asked for content creation has the possibility to verify the results of the request by means of social networks, since the latter is at the same time the place where the fulfilment of the service takes place.

Indeed, supervision can only take place through social networks, which are in effect "*electronic instruments*".

It would remain to be understood, in this case, the compatibility with Article 4 of the Workers' Statute, but this is a matter beyond the scope of our investigation; what is relevant for the purposes of this paper is to point out the existence of this requirement as well, thus one more than what is required for the legal presumption of subordination by the draft directive.

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[13] P. Iervolino, *Sulla qualificazione del rapporto di lavoro degli* influencers, op.cit.,

But let us go further, however, because the other two requirements also exist.

3.4. Effective limitation, including through sanctions, of the freedom to organize one's own work, in particular the ability to choose working hours or periods of absence, to accept or refuse assignments, or to use subcontractors or substitutes

Like the original wording of Article 2, Legislative Decree No. 81/2015 required, it often happens that «the commissioning brand always ends up (hetero)organising (in some way) not only the "manner of execution", but also (paraphrasing) "the time and place of work" of the influencer's "exclusively" personal work performance, imposing on the latter the day and time of the various publication (sometimes the number is circumscribed in the contract, as already mentioned, for a certain period) contents»[14].

In fact, the influencer cannot publish content unless it is first approved by the company commissioning the content creation.

Here we are again, the requirement of the draft directive is fulfilled. Because the influencer is not autonomous in deciding publication times, he/she must always be authorised in advance or in any case be hetero-organised by the commissioning company in terms of publication times, requiring this a certain cyclicity in the promotion of products.

3.5. Effective limitation of the ability to build one's own clientele or to perform work for third parties

In a first approssimation, it could be said that an influencer is free to publish every kind of contents. Not, because it frequently happens that a certain person enters into a contract with a company to advertise only that particular product: for example, a girl might have an agreement whereby she only advertises a hair brand.

This would inevitably limit the possibility of working for other clients, not in absolute terms of course, but for that product line.

This would be a constraint of exclusivity that «leads the client to impose on the influencer (also by conclusive facts) not to publish - be-

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[14] P. Iervolino, *Ivi*, I. 41.

tween one post and another - promotional photos of competitors, since these could create doubts among followers as to which brand to use in certain circumstances (i.e. which is the most valuable product)»[15].

It is therefore evident that the influencer's clientele is considerably influenced by the client, depending on the latter's interest in the promotional activity.

The fifth element required by the directive for the legal presumption of subordination is thus also fulfilled.

4. Why not also include influencers?

After all, it seems most appropriate to reconsider the addressees of the proposed directive. Not so much because subordination is the right remedy for the issue of work in the digital platforms' times, but because the work of influencers «more than everything extent aspires to social recognition, professional and reputational credit, and identity enhancement»[16]. Only with a strictly literal interpretation of the normative dictate influencers would be exluded from the recipients of the proposal, even if those workers are currently clamouring for social recognition.

In fact, in this period are born bodies representing influencers as an unrecognised professional category are emerging in Italy: this is the case of Assoinfluencer, which has, moreover, already been heard at the Chamber of Deputies in a fact-finding investigation on work in social networks.

Poiché allora la proposta deve divenire a tutti gli effetti una direttiva, appare quanto mai opportuno che il legislatore comunitario si renda conto delle aporie che potrebbe ingenerare un dettato normativo del genere. A meno che, come prospettato in precedenza, gli influencer non rientrino già nell'ambito di applicazione della direttiva per mezzo del riferimento a "person performing platform work", posto che essi, molto più di qualsiasi altro lavoratore tramite piattaforma, integrano tutti i requisiti dalla proposta di direttiva prospettati ai fini dell'operatività della presunzione legale.

È bene comunque che venga chiarito dal legislatore che le imprese si servono sempre più delle piattaforme digitali non solo quando

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15 P. Iervolino, last.cit.

16 P. Tullini, *C'è lavoro sul web?*, in *LLI*, vol. 1, no. 1, 2015, p. 5.

queste sono di loro proprietà, ma anche quando queste sono di pubblico dominio.

5. The ETUC solution

As we said, the presumption mechanism, preferred over other regulatory choices (e.g. tertium genus) has been strongly advocated by the European Trade Union Confederation (henceforth ETUC). Thus, the interpretation of "*person performing platform work*" can only be given by what ETUC considers platform economy.

In this way, an ETUI working paper was published just last May[17]. ETUI, as we know, is the study centre of ETUC and the working paper is entitled precisely "*The platform economy in Europe*". ETUI in this document distinguishes "Internet work" from "platform work" as kind of works given by platform economy.

Obviously, the second case is nothing more than a repetition of what the directive means by "*platform worker*", that is why attention must be paid to the first concept. In fact, "*internet worker*" could fully express the meaning of "*person performing platform work*".

So, according to ETUI "*these are typically conducted without an explicit or implicit contract for long-term employment*". Whereas, according to the directive proposal, the person doing the platform work is a genuine self-employed person.

It means that "*person performing platform work*" and "*internet worker*" are the same thing. In fact, they carry out an activity without an explicit contract and in any case not a contract as might perhaps be understood in the light of the European Court of Justice.

But ETUI tells us something more: according to them, *influencers* are an example of an 'internet worker'.

So, if the aim of the directive is expression of the ETUC will and its study centre includes *influencers* - like *riders* – into the platform economy workers, the relative presumption of subordination must also be applied to those workers who operate on a platform not owned by the principal.

There are no reasons to exclude *influencers* from the recipients of the directive.

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[17] A. Piasna, W. Zwysen, J. Drahokoupil, *The platform economy in Europe. Results from the second ETUI Internet and Platform Work Survey*, in *Working Paper* 2022.05.

6. The legal presumption: relative or absolute?

It is unclear how the legal presumption mechanism will operate[18].

Obviously, a relative presumption «can be overcome in twenty-seven different ways»[19]. But what if all five proposal elements are integrated?

It is true that the Community legislator does not propose a gradation of presumption, it being sufficient for the purpose of the directive's operation that only two out of the five indices proposed by the directive are present. But we also know that judgments on the qualification of the relationship are based on the *id quod plerumque accidit*, and with the integration of all five elements, the principal will hardly be able to overcome the legal presumption.

Because the relative presumption becomes an absolute presumption if the indices typified by the legislator are integrated.

But the real question is: do these workers really need subordination?

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[18] M. Magnani, cit.

[19] M. Barbieri, *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma,* cit., C.10.

5. Towards an EU directive on platform work: reflections from the Czech law perspective

Jakub Tomšej[1]

Summary: *1. Opening remarks. – 2. Platform work in the Czech Republic. – 3. Classification of a platform worker under the Czech law. – 4. Towards an EU directive? – 5. Conclusion.*

1. Opening remarks

A lot has been written about the challenges of gig economy and the mixed feelings it creates when it comes to the legal position of platform workers. New ways of matching supply and demand surely not just increase customer satisfaction, but also allow for a more efficient use of means and create new working possibilities by removing barriers for diverse groups of employees. Notwithstanding that, the topic of protection of workers in the gig economy remains a challenge, and even though this challenge has been present in academic discussions for around ten years and has in the meantime also started to appear in court rulings and legislation drafts, the level of protection and comfort provided by country laws in Europe still remains inconsistent.

This article aims to provide some reflections on the recent proposal for a directive of the European Parliament and the Council on improving working conditions in platform work from the perspective of the Czech Republic as one of the countries where regulation of platform work is very limited. In the first part of the article, I will briefly present the situation in the country and the main reflections on the local regulation. The second part of the article will focus on the proposal and the major changes it would bring. I will conclude with several remarks on the potential transposition of the directive in the national law.

[1] The article was supported by the Charles University, project UNCE/HUM/034 "Závislá práce v 21. století: otázky a výzvy".

2. Platform work in the Czech Republic

The issue of platform work, or gig economy is not expressly regulated in the Czech Republic. This does not mean that providing services through an on-line platform is not regulated at all: it would merely need to be assessed based on general regulation that applies for the business activity where a certain platform is active. For example, in the case of Uber, this means that Uber drivers must meet all requirements prescribed by the local law for entrepreneurs in the area of taxi transport. Even though Uber has gained most attention as a typical form of gig economy which is quite famous in the country, several other companies operating in diverse fields of business can be identified, including some local ones.

One of the specifics of the Czech labour market is a very low unemployment rate. Notwithstanding all recent developments, the unemployment rate has been below 3% during the last several years.[2] Employers often complain about difficulties to find suitable candidates for their job position, as well as about increased competition and solicitation of employees. This situation is very beneficial for employees who are looking for permanent employment, as there is a higher likelihood that they will find it easily. As a result, it is more difficult to argue that employees end up in gig economy due to lack of other opportunities; this argument may, however, be correct in case of some vulnerable groups of employees: notably foreigners coming from Eastern European countries with limited knowledge of Czech language who will represent a significant percentage of platform workers.

There can be various reasons why individuals choose to work for a platform. In the case of the Czech Republic and other CEE countries, flexibility can, however, play the decisive role. As outlined in one of my other papers[3], the Czech Republic shows a surprisingly low number of part-time employment opportunities, and even though COVID-19 and discussions around the implementation of the WLB directive have increased awareness of remote working options, many employers still

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[2] As shown in data published regularly by the Czech Statistical Office, available at https://www.czso.cz/csu/czso/zamestnanost_nezamestnanost_prace.

[3] Tomsej, J.: On the balance between flexibility and precarity: atypical forms of employment under the laws of the Czech Republic, in Kenner, J., Florczak, I., Otto, M.: Precarious work. The challenge for labour law in Europe. Edward Elgar Publishing 2019.

have not yet fully embraced flexible working schemes. Employees who are unable to work in a full-time job in a regular daily pattern may thus have a difficulty to find a sufficiently flexible opportunity, and may find themselves attracted to an option where no-one tells them when to switch on (and off) the application, where they are free to work only during evenings and weekends, or where they can appoint a substitute who uses their car and account while they have other commitments.

From that point of view, references made in the proposal of the directive made to the flexibility enjoyed by people working through platforms may be highly relevant.

3. Classification of a platform worker under the Czech law

Unlike some other national laws, the Czech law does not make reference to any third category of workers between the employees and the self-employed. Under the Czech Labour Code, an employee would be defined using the criteria of dependent work: whoever carries out dependent work, must do so in a relationship governed by local employment law, and an employment law relationship should only be concluded for the performance of dependent work.[4]

The concept of dependent work is defined using a set of criteria which corresponds to the usual control test conducted in many other jurisdictions. Under the Czech Labour Code, the criteria for the test of dependent work are: the superiority of the employer and the inferiority of the employee, the employee acting in the employer´s name and according to his instructions, and personal performance of work by the employee. The Czech Labour Code further defines additional criteria that would need to be fulfilled – namely work for a wage, at the employer´ cost and responsibility, at the employer´s workplace or some other agreed workplace, and within predefined working hours.

The absence of a third category of workers means that any work that does not meet the criteria set above shall be classified as self-employed activity and protection awarded by the Labour Code to employees, shall not apply.

The main theme that sometimes appears in practice, however, is bogus self-employment. There is a phenomenon which is often referred to

[4] Pichrt, J., Štefko, M.: Labour law in the Czech Republic, Kluwer Law International B.V. 2018, p. 28.

as the "Švarc system" (named after a businessman who made this malpractice famous while being convicted for it) where companies pretend to hire services from independent suppliers while these suppliers are in reality natural persons performing work in a dependent status.

Bogus self-employment is prohibited under Czech law. It represents a public offence for which both an employer and an employee can be fined. Besides, as self-employment is subject to lower mandatory deductions, there is always some risk that local authorities may reclassify the legal relationship into an employment one, and claim repayment of any outstanding taxes, social security or health insurance. As a worst case scenario, it may even be classified as a crime.

While bogus self-employment represents a scheme that is older than the gig economy, it is often argued that platform workers in the Czech Republic are prone to be subjected to it. From that point of view, the legal relationship between a platform and its workers must always be carefully examined. For example, even if we take into consideration the Uber BV v Aslam case and the conclusions that the Supreme Court of the United Kingdom reached, it appears unlikely that the factors discussed by the court would be sufficient to trigger an employment status of Uber drivers as long as these retain the ability to organise their driving activity independently.[5]

However, there are other examples where a conclusion about false self-employment can be made easier. Czech media have previously reported about investigation held against Rohlik.cz – a leading local online grocery store offering deliveries of its product using a network of delivery drivers. According to the media, none of the delivery drivers had an employment contract. An investigation of the Czech Labour Inspection Authority has, however, determined that the prevailing nature of their relationship with the company was dependant work. It appears that the key differentiator was the fact that the delivery drivers have formed an organisation structure that was supervised by the company, and, for example in the event of sudden absence of a delivery driver due to sickness, it would be the company who is responsible to arrange for a substitute. This is inconsistent with the concept of self-employment where a supplier would be obliged to carry out

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[5] Tomšej. J., Leave Uber drivers alone: do they really need to be employees?, in Bellomo, S., Preteroti, A.: Recent labour law issues. A multilevel perspective, G. Giapichelli editore 2019.

certain services and subcontract a third party if unable to carry out the services by himself or herself.

4. Towards an EU directive?

As the topic of protection of platform workers has not yet made it from academic discussions to a theme that would raise attention of politicians or even wider public, it appears unlikely that near future will see any changes in local legislation. Also, while in some other countries collective bargaining may be a suitable vehicle to carry some of the platform worker´s claims[6], no such tendencies are visible in the Czech Republic where the role of social partners is weaker in some other EU countries. From that point of view, an intervention at the EU level seems to be the only available path to progress in this area.

It appears important that the draft directive maintains the notion that digital labour platforms promote innovative services and create many opportunities for consumers and businesses. They can efficiently match supply and demand for labour and offer possibilities to make a living or earn additional income, including for people who face barriers in access to the labour market, such as young people, people with disabilities, migrants, people with minority racial and ethnic background or people with caring responsibilities. At the same time, the draft makes an understandable effort to regulate certain challenges associated with platform work, attempting to create more favorable conditions to up to 43 million workers who – according to estimations mentioned in the draft directive – will work through digital labour platforms by 2025.

Tranparency, fairness and accountability represent the key values that the draft directive embraces. Most importantly, the directive envisages an obligation of the member states to have appropriate procedures in place to verify and ensure the correct determination of the employment status of persons performing platform work. The goal of the regulation is to make sure platform workers enjoy the rights deriving from Union law applicable to workers.

In this respect, the draft directive also emphasises that the determination of the existence of an employment relationship shall be guided

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[6] Boto, M., Brameshuber, E.: Collective bargaining and the gig economy. A traditional tool for new business models. Bloomsbury Publishing, 2022.

primarily by the facts relating to the actual performance of work. This is surely an important criterion which is – however – already present in the Czech legal regulation.

A completely new element would, on the other hand, consist in the existence of a legal presumption of an employment relationship. It will be triggered if the digital labour platform controls the performance of work as defined by the directive.

The definition of control is, according to Article 4 (2) of the draft directive, based on the fact that the platform fulfills at least two of the following criteria:

"(a) effectively determining, or setting upper limits for the level of remuneration;
(b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
(c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;
(d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;
(e) effectively restricting the possibility to build a client base or to perform work for any third party".

While the idea of shifting the burden of proof to the digital labour platform rather than insisting that a platform worker needs to prove the existence of factors establishing an employment relationship seems legitimate, the criteria quoted above may come as a surprise. We can imagine an example of a digital labour platform that has adopted a uniform price policy towards its customers, resulting into a regulation of remuneration of platform workers, and that has a pre-defined code of conduct requiring workers to maintain professional and polite standards of communication towards customers. These two reasons alone would, according to the proposed directive, be sufficient to trigger the presumption allowing to classify a platform worker as an employee, even though in all other aspects the contractor would retain an independent position.

This is significantly different from the usual control test that would be conducted under Czech law and where the legal relationship would

need to be assessed from various angles to ascertain whether there is a relationship of superiority and inferiority. It appears unlikely that the two elements mentioned above would be sufficient.

As a result, if the proposal was successfully passed as a directive, it could trigger a complicated situation where the concept of dependant work would need to be interpreted differently for the platform workers and for other categories of workers.

5. Conclusion

The draft directive contains many further positive elements that could improve the situation of platform workers. This includes in particular rules relating to algorithmic management where the directive increases transparency on automated monitoring and decision-making systems and regulates certain sets of information that need to be provided to contractors of digital labour platforms. An obligation to regularly monitor and evaluate the impact of individual decisions taken or supported by automated monitoring and decision-making systems is also envisaged. Significant decisions will need to be reviewed by a human and platform workers will have the right to obtain an explanation for any such decision.

All these positive developments could, however, be easily shadowed by the new concept of legal presumption of control, which is surely the most controversial element of the directive. Even though the directive clearly provides for an option to rebut this presumption, the way it is currently drafted represents a relatively steep turn from the current understanding and interpretation of the concept of control in an employment relationship. In countries like Czech Republic, this could finally lead legislators to implement a third category of workers and reshape the concept of dependent work in a holistic way. There is, however, high risk that as a result of this change, even platform workers who are used to carry out their work in a rather independent way could be forced to switch to a more regulated regime and the system would lose its advantages. In addition to this, it could be argued that the entire change is not necessary because – as shown in the case of Rohlík.cz discussed above – even the current definition makes it possible for inspection authorities to challenge false self-employment schemes.

At the time of drafting of the article, the future of the directive is not yet clear. It needs to be reiterated that the current system in the Czech

Republic features a high level of flexibility which is welcomed by most platform workers. We can only hope that the legal regulation will find its ways to improve the position of platform workers without depriving the system of one of its key benefits.

Section II

6. On the digital labour side, is power still collective power? Notes on the proposal for a Directive on improving working conditions in platform work and its impact on the Italian legal system

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Summary: *1. Introduction – 2. Platform workers do organise with or without the law – 3. The collective scope of the proposal for a Directive on platform work – 4. Falling at the hurdles: an evaluation of the proposal for a Directive's collective protection of platform workers – 5. Which collective rights can the proposed Directive deliver to the Italian legal system?*

1. Introduction

In his seminal work, "Labour and the Law", Otto Khan-Freund stated that "on the labour side, power is collective power",[1] on the grounds that the employment relationship is always a power relationship, based on the inherent inequality of bargaining power between the two parties. Such socio-economic imbalance has proven, through the years, to affect not only the traditional employment relationships, but also, if not more, new forms of work, whether non-standard or even self-employed, pushing for a rediscover of the 'personal' scope of work as the essence (and the reason) of the contractual imbalance.[2]

Once again, Khan-Freund's words have proven prophetic as, on the one hand, the collective autonomy (from organization to action to bargaining) is the only authentically incisive form of workers' power, and, on the other hand, "the main object of labour law has always been, and we venture to say will always be, to be a countervailing force to

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1 O. Khan-Freund, *Labour and the Law*, Steven & Son (III ed.), 1983, 17.

2 From an Italian standpoint, see, *inter alia*, A. Perulli, T. Treu, *In tutte le sue forme e applicazioni*, Giappichelli, 2022.

counteract the inequality of bargaining power which is inherent" in the labour relations.[3]

As platform work does not seem to be exempt from this relation of command between platforms and those working for/on them, it appears fundamental to assess whether and how the existing and forthcoming legislation seeks to support such counter-collective power.

To this purpose, we will analyse to what extent the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, launched at the end of 2021, provides for platform workers' collective rights, and its possible implementation in Italy.

2. Platform workers do organise with or without the law

When looking at the gig economy as a social phenomenon, one key fact becomes clear.

Exactly as it happened in the aftermath of the first industrial revolution and the development of Taylorist factories, workers – and, therefore, platform workers also – show a tendency to organise *outside* the given legal framework, *i.e.*, regardless of the State's recognition of such organizational capacity as a right.[4]

The premises are often the most obvious, namely negotiating or, at least in the initial stages of organizing, *contesting* the exchange price of (digital) labour. It may be recalled, in fact, how public opinion became aware for the first time of the, albeit at the time quite limited in numbers, work 'hidden' behind digital platforms when in August 2016 hundreds of Deliveroo's riders took to the streets of London striking against a proposed change in the courier pay structure that would have resulted in a perspective income not sustainable without working longer hours or rushing. The standoff, which lasted six days and was resolved largely in the riders' favour, revealed both an already existing solidarity between the couriers – the platform's suggestion to discuss the new contract terms on a one-on-one basis was quickly dismissed as the protesting riders would only discuss the terms collectively – and the presence of a grassroot organisation siding with the strikers

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[3] O. Khan-Freund, *Labour and the Law*, 18.

[4] A. Lassandari, *La tutela collettiva del lavoro nelle piattaforme digitali: gli inizi di un percorso difficile*, in Labour & Law Issues, 4(1), 2018, VI.

(Independent Workers of Great Britain, founded only four years before). Even more significantly, the strike was not initiated through recognised unions or using established legal processes, but occurred outside of the formal industrial relations system without the protections such systems afford, but also circumventing their constraints.[5]

However, representation and collective action are not a given for this new form of work. Indeed, it's been remarked how platform workers, irrespective of their labour market status (employee or self-employed) or type of platform work (online or on-location), face far more obstacles to organizing and being heard than those who work in traditional workplace settings.[6]

A few reasons can be given. First of all, platforms are based on labour processes which seem to lack a collective nature: tasks, whether it's the transport of passengers or the photo/data check offered online to a crowdworker, do not require the (traditionally) necessary coordination among those who perform the same job for the same company, leaving all organisational issues, at least *prima facie*, to the individual interaction between the worker and the platform. Besides, most platform work is performed in isolation and sometimes in anonymity, or at least, in the case of food delivery, transport, and manual labour, spread over geographically expansive areas: as a consequence, platform workers have limited chances to meet and build networks, while also being in a direct competition with each other, according to schemes such as 'the fastest wins the task offered' or a ranking-based distribution of more lucrative tasks/working time slots. There are also subjective factors, since the uncertainty and vulnerability of working conditions has built, at least initially, the bias that these are *jobs not worth fighting for*; however, while platform work faces high workforce turnover rates, a second misconception – the idea that it's a temporary or a second job for those involved – has been debunked.[7]

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5 J. Woodcock, C. Cant, *Platform Worker Organising at Deliveroo in the UK: From Wildcat Strikes to Building Power*, in Journal of Labor and Society, 22, 2022, 223 ff.

6 European Commission, *Study to gather evidence on the working conditions of platform workers*, Final Report, March 2020, 84 ff.

7 See A. Piasna, W. Zwysen, J. Drahokoupil, *The platform economy in Europe*, in ETUI Working Paper n. 5, 2022, 42 ff.: according to the report, about a quarter of platform workers can be classified as main platform workers, since platform work represents a significant part of their working lives (i.e. they work more than 20 hours a week on digital labour platforms or earn more than 50 per cent of their income from this type of work).

And yet, as already mentioned, the individualistic model of platform economy has been undermined by sufficient evidence that collectivism can still work. Moreover, it could be argued that it is precisely platform workers' vulnerability and their economical (and even hierarchical) dependency that help and reaffirm the relevance of collective representation and bargaining.

In the few years since the first wildcat strikes, we have witnessed an accelerated digest of century-long organizing and campaigning strategies. Although in different national contexts platform workers' tactics have taken different forms and involved different dynamics, similar trends can be traced all over Europe and, for that reason, we will focus here on the platform workers' mobilisation in Italy, which, like in other countries, appears to have developed mainly in food delivery platforms.[8]

A first trend is the rise of self-organised and grassroots unions, operating outside the established channels of workers' representation and borne out of a bottom-up approach in mobilisation; in the Italian case, self-appointed informal unions, such as *Deliverance* in Milan, *Deliverance Project* in Turin, *Riders Union* in Bologna, have moved initially at a 'safe distance' from the more established and representative unions, suspicious of the risk of diluting or 'institutionalising' their campaigns and demands.[9] However, the awareness of the intrinsic weakness of this representation model has paved the way for a more fruitful relationship, an alliance of sorts, with traditional trade unions: an example is the *Carta dei diritti fondamentali del lavoro digitale nel contesto urbano*, a trilateral pact signed in may 2018 between the Bologna Municipality government, workers' representatives (not only Riders Union Bologna, but also the three main confederal Italian unions CGIL, CISL and UIL) and a few food delivery platforms, establishing provisions for fixed hourly wage rates and compensation for overtime work, accident and sickness insurance, freedom of association and the right to strike;[10] more recently, the bond was strengthened in the network *RidersXIDi-*

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[8] For a general and more detailed overview, see M.T. Carinci, *Case Law Approaches and Regulatory Choices on Platform Work: The Italian Case*, in M.T. Carinci, F. Dorssemont (eds.), *Platform Work in Europe. Towards Harmonisation?*, Intersentia, 2021, 57 ff.

[9] A. Tassinari, V. Maccarrone, *Riders on the Storm: Workplace Solidarity among Gig Economy Couriers in Italy and the UK*, in Work, Employment and Society, 34 (1), 2020, 43.

[10] M. Marrone, G. Peterlongo, *Where platforms meet infrastructures: digital platforms, urban resistance and the ambivalence of the city in the Italian case of Bologna*, in Work Organisation, Labour & Globalisation, 14 (1), 2020, 119.

ritti, set up among new and old unions to launch joint campaigns at national level, such as the #*nodeliveryday* (26 March 2021).[11]

A second trend is the use of strategic litigation to challenge the misclassification of riders' employment contracts or to address the contractual imbalance between the couriers and the platform. The most significant decisions – here it will suffice to mention the Court of Cassation's recognition of riders' quasi-subordinate status allowing to claim employee's protections in full,[12] the Tribunals' decrees awarding health and safety protections during the 2020 Covid-19 spread,[13] and the unprecedented ruling on Deliveroo's app and reputational ranking system deemed to be in violation of anti-discrimination law[14] – are well-documented examples of litigation being used by trade unions as part of a broader strategy, making legal claims likely to secure new (or improved) rights and protections as well as resolving industrial disputes on grounds where platforms look less like the proverbial Goliath.[15]

A third trait is to be found in the way the mobilisation also serves the purpose to create pressure on the lawmaker and the public opinion, and is often linked to the use of (strategic) litigation. In the Italian case, for example, the initial judicial defeat in the claim for riders' rights,[16]

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11 It has to be noted how mainstream unions also worked to set the grounds for a collective framework of protection: in December 2017, the renewal of the national collective agreement for the logistics service sector (signed by CGIL, CISL and UIL sectoral federations) committed to regulate new forms of work employed in the delivery of goods by bicycles and similar modes of transport; a few months later, its implementation (*Accordo integrativo del 18 luglio 2018 del CCNL Logistica e Trasporti*) included the "rider" in the job classification scheme and provided clauses on working conditions such as wage levels, working time, insurance and social security measures. Unions were aware that such choice wouldn't affect per se the status qualification of riders already engaged by platforms but offered a set of standards for the judges to refer to when ruling the consequences of a misclassification, together with the chance of opening possible company-level collective bargaining.

12 Corte di Cassazione, 24 January 2020, n. 1663.

13 Among many, Tribunale di Firenze, (decree) 1° April 2020, n. 886; Tribunale di Bologna, (decree) 14 April 2020, n. 745.

14 Tribunale di Bologna, 31 December 2020, which deemed Deliveroo's ranking system discriminatory as it did not factor-in the legitimate grounds a rider may have for not cancelling a session or for not showing up to work (e.g., illness or the intention to strike), and *de facto* limited access to future bookings for riders with legitimate justification; for an in-depth analysis of the judgement, S. Borelli, M. Ranieri, *La discriminazione nel lavoro autonomo. Riflessioni a partire dall'algoritmo Frank*, in Labour & Law Issues, 7(1), 2021, I.18 ff.

15 J. Moyer-Lee, N. Countouris, *The "Gig Economy": Litigating the Cause of Labour*, in ILAW, *Taken For A Ride: Litigating The Digital Platform Model*, Issue Brief, March 2021, 32 ff.

16 Tribunal di Torino, 11 April 2018, n. 778.

delivered at the same time of the Bologna Charter signing, was pivotal in the involvement of riders' union in the Ministry of Labour's round table for social dialogue and future legislation on platform work, leading to the Law no. 128/2019 and a set of specific provisions for "self-employed couriers delivering goods by means of two-wheelers vehicles in urban areas".

All these developments cannot conceal two key shortcomings. Food delivery riders are not the only platform workers needing protection; if the Covid-19 crisis has helped and expanded the demand for home delivery services, all kinds of platform work are increasing in numbers and do not show any sign of slowing down. Furthermore, the platform/worker relationship does not operate in a legal *vacuum*: digital platforms have consistently hired and organised work through service contracts, qualifying those who work on and for them as self-employed. Such status affects not only the individual but also the collective dimension of the protection.

3. The collective scope of the proposal for a Directive on platform work

Against this background, in December 2021 the European Commission presented a set of measures with a view to improving the working conditions of people working through digital platforms; the measures include a proposal for a Directive on Platform Work (COM(2021) 762 final) and a draft for a Communication regarding "Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons" (C(2021) 8838 final).

Although forming one single package (so-called *Platform Work Package*), it is the proposed Directive that has attracted most attention, and particularly the introduction of a legal presumption of employment, set to curb the platform and worker's relationship misclassification: the presumption, largely influenced by Spain's 2021 *Ley Riders*,[17] has ignited a wide debate not only among scholars,[18] but also among trade

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[17] On the Spanish legislation, and the way it incorporated the doctrine of the Supreme Court promoting a modification of the labour regulation, J. Gorelli Hernandez, *Sobre la presunción de laboralidad de los repartidores de plataformas digitales*, in Trabajo y Derecho, 2022, 91.

[18] On the topic, see at least A. Rosin, *Towards a European Employment Status: The EU Proposal for a Directive on Improving Working Conditions in Platform Work*, in Industrial

unions and platforms, mirrored in the diverse reactions of EU Member States and the strenuous route towards the Directive's yet-to-come adoption.[19] The Platform Work Directive (PWD) plays the lion's share, incidentally, due to the fact the various rules are provided through a choice of different regulatory instruments, of which communications have generally no legal significance: while the intent is consistent – the Guidelines would help a clearer (and fairer) interpretation of Article 101 TFEU, which has often lead the Court of Justice to consider genuine self-employed as undertakings under EU competition law therefore their collective agreement as in breach of said Article 101[20] – the medium appears not as impactful.

The proposed Directive, however, does not stop at ensuring a correct employment status but, in line with Principle 5 of the 2017 European Pillar of Social Rights,[21] aims also to promote transparency, fairness and accountability in the algorithmic management of platform work: to these purposes, some provisions consider the collective scope of platform work and the choice seems all the more judicious as digital transparency and fairness can be realistically challenged and gained only at the collective level, by the skills and strength of representative unions.[22]

Law Journal, 51(2), 2022, 478 ff. and M. Barbieri, *Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma*, in Labour & Law Issues, 7(2), 2021, C.1 ff.; T. Treu, *La digitalizzazione del lavoro: proposte europee e piste di ricerca*, in Federalismi.it, 2022, n. 9, 196-197 stresses how, apart from raising a few objections to the use of a Directive in this matter, the proposal may be "of dubious effectiveness in giving greater certainty to those concerned".

19 As it's set in the EU legislative procedure, the Commission proposal went on to be discussed between EU Parliament and Council; while the Parliament set to improve its text with the Draft European Parliament Legislative Resolution (PR – PE731.497v01-00) of June 2022, the Council, under the Czech presidency, seemed to move into the opposite direction, by suggesting some amendments – including raising the threshold to trigger the presumption to a three out of seven criteria (from the original two out of five) – which would have weakened its content. Having rejected such suggestions, finally, in December 2022, the European Parliament's Employment Committee adopted a set of revisions, later approved in January 2023, that finally enables the Parliament to begin negotiations with the Council and the Commission on the final text.

20 See the ECJ judgements in Case C-67/96, A*lbany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* and C-413/13, FNV *Kunsten Informatie en Media*.

21 According to which, "regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions and access to social protection".

22 For further observations, see J. Adams-Prassl, *The Challenges of Management by Algorithm: Exploring Individual and Collective Aspects*, in E. Menegatti, T. Gyulavári

It is useful to list and analyse these provisions, but not before having made a distinction between them, as they provide:

a) (genuine) collective rights,
b) collective enforcement of individual rights,
c) freedom of organisation.

It is a classification akin to a series of concentric rings, where the strongest core of protection gradually widens into the next circle to become more nuanced.

Articles 9 and 12 are at the centre of this scheme, awarding information and consultation rights, in a way that can be now considered common for the European legislation.

According to Article 9, platform workers' representatives (as well as national labour authorities) shall be made available, upon their request, information and be ensured consultation on "decisions likely to lead to the introduction of or substantial changes in the use of automated monitoring and decision-making systems"; the expression is to be read in conjunction with Article 6(1), which defines the automated monitoring systems as those "which are used to monitor, supervise or evaluate the work performance of platform workers through electronic means" and the automated decision-making systems as those "used to take or support decisions that significantly affect those platform workers' working conditions, in particular their access to work assignments, their earnings, their occupational safety and health, their working time, their promotion and their contractual status, including the restriction, suspension or termination of their account". In other words, the information and consultation right encompasses the duty to disclose the adopted (or soon-to-be adopted) work technologies, extracting the algorithm out of what is often considered a 'black box',[23] the code-based schemes which rule platform work. Given the highly technical nature of the information, Article 9(3) enables platform workers' representatives to be "assisted by an expert of their choice" to better understand the digital control, and imposes the expert's ex-

(eds.), *Decent Work in the Digital Age. European and Comparative Perspectives*, Bloomsbury, 2022, 231 ff. On the PWD provisions, see C. Spinelli, *La trasparenza delle decisioni algoritmiche nella proposta di Direttiva UE sul lavoro tramite piattaforma*, in Lavoro Diritti Europa, 2022, n. 2.

[23] The expression has been famously used by F. Pasquale, *The Black Box Society. The Secret Algorithms That Controls Money and Information*, Harvard University Press, 2016.

penses on the platform, provided that it has more than 500 workers and the expenses are proportionate.

It is worth mentioning that Directive 2002/14/EC is explicitly referenced, and therefore the PWD enshrines a 'qualitative' notion of information and consultation,[24] as the data transmission must enable representatives to acquaint themselves with the platform's decisions and the algorithmic system, to conduct an adequate study and prepare for consultation, and to exchange views and establish a dialogue with the platform, "with a view to reaching an agreement on decisions within the scope of the employer's powers".[25] While Article 9 applies to all digital labour platforms – representing a step forward from the 2002 Directive's scope, limited only to undertakings employing at least 50 employees (or to establishments employing at least 20 employees, according to the choice made by the Member State) – its potential is, however, held back by two elements: on the one hand, Recital 33 states that "digital labour platforms should not be required to disclose the detailed functioning of their automated monitoring and decision-making systems, including algorithms, or other detailed data that contains commercial secrets or is protected by intellectual property rights", hinting that the right to information and consultation is not entirely unconditional and a "total disclosure" could be difficult to achieve; on the other hand, the wording of the provision remains generic when setting, if not the actual arrangements, at least a regular time interval that platforms should comply to when allowing for workers' representatives participation, so that it's up to each Member State's legislation to set effective and enforceable rights.

A second, and more precise, rule is set in Article 12, which requires digital labour platforms to give access to relevant information such "the number of persons performing platform work through the digital labour platform concerned on a regular basis and their contractual or employment status" and "the general terms and conditions applicable to those contractual relationships". The information should be provided every 6 months (12 months for micro, small or medium-sized com-

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[24] Article 2, points (f) and (g), of Directive 2002/14/EC.

[25] Article 4(4)(e) of Directive 2002/14/EC. The Directive Proposal on platform work also extends the 2002 Directive provisions on the Members States duty to establish the practical arrangements for exercising the right to information and consultation at the appropriate level (Article 4, paragraph 1), to award adequate protection and guarantees to those involved in the information and consultation procedure (Article 7), and the protection of confidential information (Article 6).

panies), and every time terms and condition are unilaterally modified, to "representatives of persons performing platform work", as well as labour, social protection and other relevant authorities, and may be also subject to a request for clarification to which platforms are obliged to respond. Although, as it's been noted,[26] the provision is overall less protective than the draft AI Act[27] and the 2018 EU General Data Protection Regulation, and is mainly drafted to warrant transparency for the benefit of national authorities, it is still relevant as it gives workers' representatives the chance to better investigate the platform's work organization (numbers and status of workers on a regular basis) and the link between the algorithmic management and workers' contractual terms and conditions.

Beyond these norms, the PWD allows for some individual rights to be exercised also in a collective form. In particular, as the EU Commission identifies in Article 6(1) automated monitoring and decision-making automated systems and specifies, through a comprehensive catalogue, which relevant information is to be provided in writing to platform workers[28] (and, thanks to Article 10, also to those performing platform work who do not have an employment contract or are not in an employment relationship position), Article 6(4) sets the possibility for such information to be made available to platform workers' representatives, upon their request. Similarly, when it comes to enforcing workers' rights, Article 14 guarantees that judicial and administrative procedures can be also engaged by their representatives "on behalf or in support",

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[26] A. Ponce Del Castillo, D. Naranjo, *Regulating algorithmic management. An assessment of the EC's draft Directive on improving working conditions in platform work*, ETUI Policy Briefs, 2022, n. 8.

[27] Proposal For a Regulation of The European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act), COM/2021/206 final.

[28] As stated in Article 6(2) the information shall concern: "(a) as regards automated monitoring systems: (i) the fact that such systems are in use or are in the process of being introduced; (ii) the categories of actions monitored, supervised or evaluated by such systems, including evaluation by the recipient of the service; (b) as regards automated decision-making systems: (i) the fact that such systems are in use or are in the process of being introduced; (ii) the categories of decisions that are taken or supported by such systems; (iii) the main parameters that such systems take into account and the relative importance of those main parameters in the automated decision-making, including the way in which the platform worker's personal data or behaviour influence the decisions; (iv) the grounds for decisions to restrict, suspend or terminate the platform worker's account, to refuse the remuneration for work performed by the platform worker, on the platform worker's contractual status or any decision with similar effects".

for a single person[29] or for more than one in what appears to be a (quasi) class action,[30] as long as having the approval of the person(s) involved. Here, especially, the Directive shows its conceptual weakness, as the collective representation of the interests of platform workers is presented as 'ancillary' to the individual protection: the prospect is almost inevitable given that, as it's been remarked, platform workers' rights are carved out of the regulatory framework of personal data protection, pertaining to every *person*;[31] to this purpose, the workers' representatives involvement does not bring a different (collective) interest but helps the compliance and control over algorithmic management rules.

Lastly, a broader, but less incisive, right is enshrined in Article 15, which requires Member States to ensure the creation of unmonitored, in-platform communication channels for labour organizing; the provision, building up on the freedom of association, as recognized by ILO Convention n. 87 to all workers and not exclusively to employees, aims to foster voicing mechanisms, but raises a few doubts on the chance of finding actual implementation, not only due to the lack of related sanctions, but even more on the practical side, due to the feasibility of creating solidarity and counterpower channels within the same platform.[32]

4. Falling at the hurdles: an evaluation of the proposed Directive's collective protection of platform workers

Without diminishing the importance of the drafted initiative – for example, in the legal standing of representatives of all persons performing platform work (and not only of employees) – and being fully aware of the possibility that the final wording of the Directive may

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29 Art. 14(1).

30 Art. 14(2).

31 P. Tullini, *La Direttiva Piattaforme e i diritti del lavoro digitale*, in Labour & Law Issues, 8(1), 2022, R.52.

32 The provision could, however, prove useful for the collective organizing of a digital and globally dispersed workforce such as crowdworkers, whose triadic relationship with platforms and requestors/requestors makes less clear who could the employer be, and whose working conditions are based on individualized transactions, increasing the level of competitiveness. On these aspects, see N. Potocka-Sionek, *Crowdwork and Global Supply Chains: Regulating Digital Piecework*, in C. Stylogiannis, I. Durri, M. Wouters, V. De Stefano (eds.), *A Research Agenda for the Gig Economy and Society*, Edward Elgar, 2022, 215 ff. and G.A. Recchia, *The collective representation of platform workers: struggles, achievements and opportunities*, in A. Lofaro (ed.), *New Technology and Labour Law*, Giappichelli, 2023, 161 ff.

differ, and in no small amount, from that of the Commission's proposal, as well as from the one approved by the Parliament which allows for the start of the interinstitutional negotiations, it is useful still to highlight some critical issues of a set of rules, as aptly noted, less incisive in offering a coherent protection.[33]

A first problem is in the lexicon of collective protection: the term 'trade unions' appears in the Recitals but is replaced in the Articles by 'workers' representatives' or the long-winded 'representatives of persons performing platform work'. It's been argued that the choice may open to the inclusion of (other) non-institutional or grassroots initiatives and forms of representation, which have played and still play a significant role in the platform economy's highly fragmented context;[34] however, the far too ambiguous formula may lead to a narrower national interpretation and implementation, and remains to be seen whether it represents a broadening or a softening of the collective representation. It surely signals a conceptual approach which sees the 'collective' more like as a *sum* rather than a *combination* of individuals.

A second drawback is to be found in the continuing relevance of the work classification for the purposes of determining the relevant protective schemes. In other words, platform workers' status *still* matters.[35] Despite the ambition "to set new minimum standards in working conditions to address the challenges arising from platform work"[36] and the explicit intention to apply "the provisions on algorithmic management which are related to the processing of personal data […] also […] to genuine self-employed and other persons performing platform work in the Union who do not have an employment relationship"[37], the

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33 L. Ratti, *A Long Road Towards the Regulation of Platform Work in the EU*, in J.M. Miranda Boto, E. Brameshuber (eds.), *Collective Bargaining and the Gig Economy. A Traditional Tool for New Business Models*, Hart, 2022, 52.

34 A. Aloisi, N. Potocka-Sionek, *De-gigging the labour market? An analysis of the 'algorithmic management' provisions in the proposed Platform Work Directive*, in Italian Labour Law e-Journal, 15(1), 2022, 41.

35 Article 2 of PWD distinguishes between 'person performing platform work' as "any individual performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved" and 'platform worker' as "any person performing platform work who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice".

36 Recital 13.

37 Recital 16.

right to information and consultation enshrined in Article 9 is granted only to representatives of those in employment contracts/employment relationship.[38] Which is to say that only those who can be recognized as 'workers', albeit in the wider scope offered by the legal presumption mechanism, can be granted collective – and hence, actually effective – access to transparent information about the platforms' black boxes and their impact on their working conditions.

Quite significantly, the draft of the European Parliament legislative resolution on the proposed Directive of May 2022[39] tried and overcome the resistance to the recognition of collective rights outside the area of subordination, suggesting an amendment of Article 10 (which lists the rights laid pertaining to the protection of natural persons in relation to the processing of personal data in the context of algorithmic management outside an employment contract or employment relationship) so to include also self-employed workers in the collective aspects of protection; however, the motion seems to have been dropped from the Report finally passed in December 2021 by the Committee on Employment and Social Affairs (A9-0301/2022) and later voted by the European Parliament.

Two more points can be pointed out in the collective involvement in the digital transparency. The PWD, for one thing, ends up offering a narrow space of protection. As the inspiration for the Directive can be traced to Spain's *Ley Riders*, it should be remarked how the Spanish legislator has provided the *comité de empresa* (works council) with the right to be informed of the criteria, rules and instructions on which the algorithms or artificial intelligence systems that affect decision-making are based on, and which may affect working conditions, accessing to and maintaining the employment (including profiling).[40] Unlike what set in Article 9 (and Article 6, at an individual level) of the proposed Directive, the national provision acknowledges that algorithmic manage-

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38 V. De Stefano, *The EU Commission's proposal for a Directive on Platform Work: an overview*, in Italian Labour Law e-Journal, 15(1), 2022, 7 argues that "excluding persons performing platform work outside the framework of employment relationships from the collective aspects of that protection, namely the information and consultation duties vis-à-vis workers' representatives, seems to be entirely insufficient for adequately tackling the challenges of algorithmic management in platform work".

39 Available at https://www.europarl.europa.eu/doceo/document/EMPL-PR-731497_EN.pdf.

40 See Article 64(4), *Estatuto de los Trabajadores*, as amended by *Ley* 12/2021.

ment and surveillance is not in use only on platforms and is not implemented through exclusively automated means. In addition, the scope of the collective protection appears in the Directive draft to be quite modest: awarding a right to be informed and consulted is in line with a contemporary idea of social dialogue, *i.e.* allowing (even the hardest-hitting) company's decisions to be accepted by the counterparts. What about the chance of demanding changes or, at least, challenging, the algorithmic management? The various texts of the proposed Directive do not tackle the issue,[41] while such right may instead represent a good example of participatory practices, pushing the protections beyond the recognition of the simple, and only individual, right to review (and possibly rectify) algorithmic decisions, enshrined in Articles 8(2) and (3).[42]

Overall, notwithstanding the prospect of enabling of collective organisation and representation in the platform economy, the proposal falls short of securing two crucial collective protections: the right to be recognized as workers' representatives - the fact that workers' representative are mentioned does not mean that they are entitled to be introduced in every platform - and the right to bargaining, as information and consultation are not as strong means for fair and decent working conditions.

5. Which collective rights can the proposed Directive deliver to the Italian legal system?

As a conclusion of this overview, it is possible to analyse the proposed Directive from the perspective of the Italian legal system and guess which impact it may have at the national level and which implementation it may require.

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41 At the time of writing, the Parliament draft's Article 9(1) offers only small changes ("Without prejudice to the rights and obligations under Directive 2002/14/EC, Member States shall ensure information *and effective* consultation of platform workers and workers' representatives or, where there are no such representatives, of the platform workers concerned by digital labour platforms, on decisions likely to lead to the introduction of or substantial changes *affecting working conditions and health and safety* in the use of automated monitoring and decision-making systems referred to in Article 6(1), or *changes in the allocation or organisation of work* in accordance with this Article").

42 On this issue, see A. Alaimo, *Lavoro e piattaforme tra subordinazione e autonomia: la modulazione delle tutele nella proposta della Commissione europea*, in Diritto delle relazioni Industriali, 32(2), 2022, 652.

As it's been already pointed out, the collective protection of platform work still depends on the classification of the labour relationship. Therefore, the analysis would have at first to determine whether the introduction of a legal presumption might alter the 'perimeters' of the current Italian divide between employment and self-employment. Since such review goes beyond the scope of this contribution, it will suffice to say that the PWD impact would be negligible on this point: the criteria listed to support the legal presumption are similar to the subordination 'indexes' which in our legal system lead the jurisprudence to ascertain - and not to assume - the existence of a subordinate employment relationship.[43]

We can therefore maintain the standpoint of the possible platform workers' classification in the current Italian regulatory framework in relation to relevant collective rights; three categories are possible:

a) employees, as enshrined by Article 2094 of the Civil Code; full recognition of freedom of association, right to collective bargaining and to strike is acknowledged, with a set of trade union prerogatives in workplaces with more than 15 employees, including a trade union representation structure;[44]
b) hetero-organized collaborators, according to Article 2 of Legislative Decree no. 81/2015 (as amended in 2019), which awards employment protections to "workers whose predominantly personal performance is organized by the client even by means of digital platforms"; full recognition of freedom of association and the right to strike therefore is recognized, but trade union rights are, however, highly debated and collective bargaining concerns peculiar «economic and regulatory standards, by reason of the particular production and organizational needs of the relevant sector»,
c) solo self-employed, as recognized by Article 409 Code of Civil Procedure and/or Article 47-*bis* ff. of Legislative Decree no. 81/2015 (only in the case of self-employed riders); in this case, it is more apt to talk about collective *freedoms* rather than rights.

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[43] For a more detailed review, see A. Donini, *Alcune riflessioni sulla presunzione di subordinazione della Direttiva Piattaforme*, in Labour & Law Issues, 8(1), 2022, R.39 ff.

[44] An example is provided by the company-level collective agreement of Just EatTakeAway.com Express Italy Srl of 29 March 2021, on which see G.A. Recchia, *L'Accordo integrativo aziendale Just Eat Takeaway: quando la* gig economy *(ri)trova la subordinazione e il sindacato*, in Rivista giuridica del lavoro, 72(3), 2021, 449 ff.

In this scenario, the PWD would positively impact on the employees' collective protection as it would expand the procedural standards for information and consultation rights referred to in Legislative Decree no. 25/2007 (currently set on a 50 employees' threshold). It has to be remarked how, well before the proposal reached any important stage of its discussion, in May 2022 a draft Government Bill on digital work tried to follow the example of the Spanish legislator by providing information and consultation rights for trade union representatives and workers' elected representatives (and in their absence, for the territorial offices of the comparatively most representative trade unions at the national level) in the event of the introduction or modification of automated decision-making or monitoring systems in the employment relationship (Article 5), sanctioning the failure to comply as anti-union conduct pursuant to Article 28 of the Workers' Statute. The proposed intervention, however, failed to materialise in an Act and the subsequent Parliament elections of September 2022, as well as the appointment of a right-wing Government, has resulted in a less labour-friendly approach to platform work.[45]

A first result has however been scored. As the proposed Directive expands on the right to transparency and information beyond the scope of Directive 2019/1152 on transparent and predictable working conditions in the European Union, the Legislative Decree no. 104/2022, implementing the 2019 Directive, has amended Legislative Decree no. 152/1997 and introduced a specific provision (Article 1-*bis*) which awards for the right to be informed on automated monitoring and decision-making systems, regardless of employment status, to be given "directly or through trade union representatives at company or territorial level". The rule clearly pre-empts the PWD transposition on this topic.[46]

Beyond that, little else can be added; as the proposed Directive is unlikely to provide more substantial collective rights for platform workers, no domino effect can be expected in the national legal system. Only the Guidelines on collective bargaining rights for (solo) self-employed workers might strengthen the chances for trade unions

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[45] Such shift has found evidence in the negotiation of a compromise text under the Czech Presidency of the EU Council, where the Italian Government seemed to side with the more conservative countries; see https://www.euractiv.com/section/sharing-economy/news/czech-presidency-makes-new-attempt-on-platform-workers-directive.

[46] For further remarks, see A. Zilli, *La trasparenza nel lavoro subordinato. Principi e tecniche di tutela*, Pacini, 2022, 143 ff.

and workers' organizations to sign collective bargaining agreements concerning platform workers not recognized as employees (or hetero-organized workers) without risking being targeted as a breach of competition law.

The promotion of a legal recognition of the 'collective power' of platform work remains timid; who, how and to which effect will 'negotiate the algorithm' remains to be seen. In the light of the proposed Directive's goal of "improving working conditions in platform work", Otto Kahn-Freund would have probably frowned.

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7. Protección social y conciliación: el hándicap del trabajador en plataformas digitales no reconocido como trabajador por cuenta ajena en España

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Sumario: *1. Nuevas tecnologías, trabajo en plataformas y replanteamiento del Derecho del Trabajo – 2. Protección social y trabajo autónomo – 3. Conciliación y trabajo autónomo – 4. Conclusiones*

1. Nuevas tecnologías, trabajo en plataformas y replanteamiento del Derecho del Trabajo

El Derecho del Trabajo y su carácter tuitivo, desde sus más remotos orígenes, quedan exclusivamente circunscritos a una relación laboral voluntaria, retribuida, por cuenta ajena y dentro del ámbito de organización y dirección de otra persona, física o jurídica, denominada empleador o empresario[1]. También desde entonces, la incorporación de nuevas tecnologías al proceso industrial ha sido una constante a la que el Derecho del Trabajo ha tenido que ir dando respuesta, si bien, cabe afirmar que, desde la primera revolución industrial, los retos a los que ha tenido que hacer frente la regulación laboral han sido indefectiblemente tres: 1) las consecuencias de la suplantación de las personas por máquinas; 2) la obsolescencia de la formación del trabajador/a y su sobrevenida ineptitud; y 3) los riesgos para la salud derivados del empleo de esas nuevas formas de producción.

A finales del siglo XX, la denominada tercera revolución industrial, caracterizada por la fusión de las tecnologías de la comunicación y el uso de internet y de las tecnologías renovables, incorpora un nuevo

[1] Artículo 1.1 del Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (ET en adelante).

reto al Derecho del Trabajo: la injerencia en el derecho a la intimidad de esas nuevas tecnologías. No obstante, ha sido la conocida como cuarta revolución industrial, caracterizada por la digitalización, la que ha supuesto un desafío más insólito: el propio cuestionamiento del Derecho del Trabajo como ordenamiento regulador de los servicios prestados a través de tales tecnologías, la "huida del Derecho del Trabajo".

Muchos son los factores que han influido en esa "huida del Derecho del Trabajo", forjada, y tal vez justificada, por el nacimiento de la industria digital en general, y la economía de plataformas en particular, bajo un contexto socioeconómico caracterizado por la globalización y por las reverberaciones de una crisis económico-financiera que no parece redimirse tras más de una década, cuando este tipo de modelo productivo destaca precisamente por sus escasos costes de transacción[2]. Junto a la flexibilización del concepto de lugar y tiempo de trabajo en el desarrollo de la prestación laboral, la industria digital, y más en concreto, la prestación de servicios a través de plataformas, comporta un nuevo modelo de organización, así como una mayor interconexión de personas y cosas, produciéndose un cambio estructural en la relación empresa-trabajador-cliente[3].

¿Por qué se cuestiona el Derecho del Trabajo como marco regulador de la *platform economy*?[4]. La prestación de servicios a través de páginas *webs* o *apps* se caracteriza fundamentalmente por la transparencia en los procesos, porque la organización y atribución de las tareas se ejercita a través de algoritmos, y por la existencia de una cierta autonomía y no exclusividad a la hora de desarrollar la actividad requerida[5]. De tales características, es en la autonomía y la no exclusividad, donde pueden albergarse ciertas dudas relacionadas con la ajeneidad y, fun-

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[2] Cavas Martínez, F.: "Las prestaciones de servicios a través de las plataformas informáticas de consumo colaborativo: Un nuevo desafío para el Derecho del Trabajo ", *Estudios financieros. Revista de trabajo y seguridad social*, n. 406, 2017, pp. 29-31.

[3] *Cfr.* Torrecilla García, J.A., Pardo Ferreira, C. y Rubio Romero, J.C.: "Industria 4.0 y transformación digital: nuevas formas de organización del trabajo", *Revista de Trabajo y Seguridad Social, CEF*, número extraordinario 2019, pp. 30 y ss.

[4] Para Rodríguez Escanciano, S. y Álvarez Cuesta, H.: *Trabajo autónomo y trabajo por cuenta ajena: nuevas formas de precariedad laboral*, Bomarzo, 2019, estas nuevas formas de trabajo determinan tres claras consecuencias: 1) desempleo; 2) huida del trabajo por cuenta ajena; y 3) viralización de las condiciones de trabajo creadas por la tecnología.

[5] Mercader Uguina, J. R.: *El futuro del trabajo en la era de la digitalización y la robótica*, Valencia, Tirant lo Blanch, 2017.

damentalmente, con la dependencia de la relación, pese a que determinados pronunciamientos judiciales han reconocido contundentemente la laboralidad de la prestación de servicios de determinadas plataformas como Uber en EE.UU. y en Reino Unido[6], o Deliveroo[7] y Glovo[8] en España.

La doctrina judicial española no ha sido unánime en el reconocimiento de la laboralidad de la prestación de servicios a través de plataformas, de ahí la importancia de la conocida sentencia del Tribunal Supremo de 2020[9], primera dictada en unificación de doctrina, que inspiró la normativa por la que se incorpora al Estatuto de los Trabajadores una disposición adicional vigesimotercera que introduce una presunción de laboralidad en el ámbito de las plataformas digitales de reparto[10], de tal manera que, se presume la laboralidad, salvo prueba en contra, de las "personas que presten servicios retribuidos consistentes en el reparto o distribución de cualquier producto de consumo o mercancía, por parte de empleadoras que ejercen las facultades empresariales de organización, dirección y control de forma directa, indirecta o implícita, mediante la gestión algorítmica del servicio o de las

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6 Caso *O'Connor* v. *Uber Technologies* de 11 de marzo de 2015 del Tribunal de Distrito de los Estados Unidos para el Distrito del Norte de California y la sentencia del *Employment Tribunal of London* 26 de octubre de 2016, Aslam v. Uber. Estos y otros pronunciamientos han sido ampliamente tratados por la doctrina científica. Para mayor abundamiento *Vid.* Gutiérrez Arranz R.: "Las relaciones laborales en la economía colaborativa: el caso Uber en EE.UU.", *Nueva Revista Española de Derecho del Trabajo*, núm. 187, mayo 2016, pp. 171-176, Ginés i Fabrellas A y Gálvez Durán S.: "Sharing economy vs.uber economy y las fronteras del Derecho del Trabajo: la (des)protección de los trabajadores en el nuevo entorno digital", *Indret, Revista para el análisis del Derecho*, núm. 1, enero 2016, http://www.indret.com/es/, o Jarne Muñoz P.: "Uber ante el Tribunal de Justicia de la Unión Europea: la incidencia del recurso a las plataformas en línea en la calificación jurídica de los servicios prestados", *Revista Democracia Digital e Governo Electrónico*, Florianópolis, núm. 13, año 2015, http://buscalegis.ufsc.br/revistas/index.php/observatoriodoegov/article/view/34412

7 STSJ de Madrid de 17 enero de 2020 (AS 2020, 534).

8 STSJ de Asturias de 25 julio de 2019 (AS 2019, 1826).

9 STS de 25 septiembre de 2020 (RJ 2020, 5169).

10 Real Decreto-ley 9/2021, de 11 de mayo, por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales. Decreto tácitamente sustituido por la Ley 12/2021, de 28 de septiembre, por la que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales.

condiciones de trabajo, a través de una plataforma digital"[11], si bien, tal presunción no es aplicable a las personas prestadoras del servicio de transporte.

Así pues, pese a la extendida creencia de un necesario replanteamiento de la concepción tradicional del Derecho del Trabajo y un cambio en la protección de los derechos de los trabajadores más acorde con la realidad laboral producto no sólo de la *platform economy*, también de la *on-demand economy* y la *gig-economy* [12], bien a través de la creación de un nuevo y específico marco jurídico para estas actividades[13], bien con la adaptación del existente a través de una relación laboral especial atendiendo a sus particularidades[14], lo cierto es que el legislador español parece haber considerado que no es preciso un nuevo marco jurídico, ni una relación especial, sino que basta con adaptar los elementos que configuran la relación jurídico laboral a estas nuevas realidades[15], optando por la clásica distinción entre relación laboral y prestación de servicios, y en consecuencia, entre trabajador por cuenta ajena y trabajador autónomo.

La mencionada presunción de laboralidad de los denominados *riders* no es tampoco una clara apuesta del legislador por la laboralidad de todos los trabajadores de la *platform economy* (queda exclusivamente limitado a plataformas digitales de reparto) y su incumplimiento es conocido[16], de modo que el trabajador en plataformas digitales suele prestar sus servicios como trabajador autónomo (falso autónomo), en

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11 Para mayor abundamiento sobre este tema *vid*. Mella Méndez, L.: "La protección de los repartidores de plataformas tras el RD-ley 9/2021: ¿se está ante una verdadera presunción «iuris tantum» de laboralidad?", *Revista española de derecho del trabajo*, n. 244, 2021, pp. 143-184.

12 Para Sierra Benítez, E. M.: "El tránsito de la dependencia industrial a la dependencia digital: ¿qué derecho del trabajo dependiente debemos construir para el siglo XXI?", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*", n. 4, vol. 3, 2015, pp. 93-118, Para la normativa laboral y de seguridad social española carece de un marco regulador suficiente donde encuadrar las nuevas formas de trabajo y la incipiente entrada de la inteligencia artificial en la industria 4.0.

13 Mercader Uguina, J. R., *op. cit.* p. 114.

14 Todolí Signes, A.: *El trabajo en la era de la economía colaborativa*, Tirant Lo Blanch, Valencia, 2017, p. 76.

15 Así lo estima también Jover Ramírez, C.: "El fenómeno de la «gig economy» y su incidencia en el derecho del trabajo: aplicabilidad del ordenamiento jurídico laboral británico y español", *Revista Española de Derecho del Trabajo*, n. 209, 2018.

16 Tras la incorporación de la presunción de laboralidad la firma Deliveroo decidió dejar de operar en España y aunque otras marcas como Just Eat decidieron cumplir la Ley, otras como Glovo incumplen sistemáticamente la normativa. De hecho en

concreto, como trabajador autónomo económicamente dependiente de un empleador (TRADE)[17]: una situación que comporta importantes consecuencias en materia de protección social y conciliación.

2. Protección social y trabajo autónomo

El concepto de protección social engloba tanto el nivel contributivo, como el asistencial y la protección social complementaria, si bien, el hecho de que la prestación de servicios de los trabajadores de plataformas sea considerada dependiente o autónoma tiene efectos básicamente en el nivel contributivo de protección y a veces en el complementario, cuando la empresa ofrece a sus trabajadores este tipo de protección, una situación muy excepcional.

El sistema español de Seguridad Social gira en torno al Régimen General, al que pertenecen los trabajadores dependientes. Los trabajadores autónomos quedan incluidos en el Régimen Especial de Trabajadores Autónomos (RETA), que tradicionalmente se ha caracterizado por un menor número de contingencias protegidas, pero también por una menor aportación contributiva. El hecho de que un trabajador de plataformas sea encuadrado en el Régimen General o en el RETA es crucial, tanto por la aportación contributiva, como por la posible prestación que pueda recibir, algo totalmente lógico en un sistema contributivo que se caracteriza por la relación entre cotización y prestación.

El encuadramiento de los trabajadores de plataformas digitales como autónomos no sólo determina el transvase de los costes de producción (en este caso de los costes sociales) en el propio empleado, también su infra protección.

No obstante, debe advertirse que en España el RETA ha ido evolucionando hasta otorgar al trabajador autónomo prácticamente la misma protección que recibe el trabajador dependiente. Así pues, aunque el trabajador dependiente sigue estando más protegido, en la actualidad, las diferencias son mínimas en referencia a las contingencias pro-

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septiembre de 2022 la Inspección de Seguridad Social y Trabajo notificó a Glovo un conjunto de multas por vulnerar la Ley Rider que alcanza los 78,9 millones de euros.

17 A este respecto, *vid.* Calvo Vérgez, J.: La problemática de los llamados "falsos autónomos" en el mercado laboral español, *Revista Aranzadi Doctrinal*, núm. 8, 2020. Para facilitar a la Administración detectar estos fraudes, Calvo Vérgez propone un registro de TRADE a través del sistema RED, para facilitar a la Inspección de Trabajo controlar qué empresas son las que hacen uso de esta figura jurídica.

tegidas, lo que ha supuesto también un aumento de la cuota e incluso un cambio sustancial en su cálculo. En 2019 se implantó un incremento progresivo del tipo general de cotización desde 2019 a 2021[18] que ha culminado en un nuevo sistema de cotización en 2022[19] y también en el aumento de las bases de cotización[20]. Además, hasta 2019 el trabajador autónomo sólo estaba obligado a cotizar por contingencias comunes y desde ese año ha de cotizar también por contingencias profesionales, cese de actividad y formación continua, equiparándose las contingencias protegidas a las del trabajador por cuenta ajena y repercutiendo claramente en la cuota de autónomo.

Esta equiparación debe ser matizada ya que, aunque a partir de 2023 la idea es que se aplique una base de cotización cercana a los ingresos reales del trabajador[21], la realidad hasta 2022 ha sido que el trabajador ha elegido su base de cotización y normalmente ha optado por la base mínima, lo que comporta una menor protección frente a las contingencias que se hace patente fundamentalmente a la hora de la jubilación o de una incapacidad permanente.

Resulta sumamente interesante ver cómo ha evolucionado la cuota de autónomo en los últimos años y cómo va a ser a partir de 2023 al

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18 Real Decreto-ley 28/2018, de 28 de diciembre, para la revalorización de las pensiones públicas y otras medidas urgentes en materia social, laboral y de empleo (BOE 29-12-2018).

19 Real Decreto-ley 13/2022, de 26 de julio, por el que se establece un nuevo sistema de cotización para los trabajadores por cuenta propia o autónomos y se mejora la protección por cese de actividad (BOE 27-07-2022).

20 *Vid.* Rodríguez Martín-Retortillo, R. M.: "El impacto de la reforma de la Seguridad Social en el trabajo por cuenta propia: Alcance de las medidas en los trabajadores autónomos del RETA y del régimen especial del mar", *Temas laborales: Revista andaluza de trabajo y bienestar social*, n. 163, 2022, pp. 236 y ss.

21 Conforme a la nueva redacción del art. 308 LGSS, la cotización se realizará en función de los rendimientos anuales obtenidos en el ejercicio de sus actividades económicas, empresariales o profesionales. A efectos de determinar la base de cotización "se tendrán en cuenta la totalidad de los rendimientos netos obtenidos por los referidos trabajadores, durante cada año natural, por sus distintas actividades profesionales o económicas, aunque el desempeño de algunas de ellas no determine su inclusión en el sistema de la Seguridad Social y con independencia de que las realicen a título individual o como socios o integrantes de cualquier tipo de entidad, con o sin personalidad jurídica, siempre y cuando no deban figurar por ellas en alta como trabajadores por cuenta ajena o asimilados a estos". La Ley de Presupuestos Generales del Estado establecerá anualmente una tabla general y una tabla reducida de bases de cotización para este régimen especial. Ambas tablas se dividirán en tramos consecutivos de importes de rendimientos netos mensuales. A cada uno de dichos tramos de rendimientos netos se asignará una base de cotización mínima mensual y una base de cotización máxima mensual.

cotizar en función de los rendimientos anuales obtenidos en el ejercicio de sus actividades económicas, empresariales o profesionales conforme al art. 308 LGSS, una evolución y una predicción que puede verse en las tablas 1 y 2.

Tab. 1. Evolución de las bases de cotización y cuota mínima del trabajador autónomo

Año	Base mínima	Base máxima	Cuota autónomos (base mínima)
2012	850,20€	3.262,40€	253,35€
2013	858,70€	3.425,70€	255,89€
2014	875,70€	3.597,00€	260,89€
2015	884,40€	3.642,00€	263,55€
2016	893,10€	3.751,20€	266,14€
2017	919,80€	3.803,70€	274,10€
2018	932,70€	4.070,10€	277,94€
2019	944,40€	4.070,10€	283,32€
2020	944,40€	4.070,10€	286,15€
2021	944,40€	4.070,10€	288,98€
2022	960,60€	4.139,40€	294€

Tab. 2. Predicción de las bases y cuotas de cotización en el periodo 2023-2025

	BASES Y CUOTAS POR TRAMOS 2023-2025						
	TRAMOS DE RENDIMIENTOS NETOS	2023		2024		2025	
		BASE MÍNIMA MES	CUOTA	BASE MÍNIMA MES	CUOTA	BASE MÍNIMA MES	CUOTA
TABLA REDUCIDA	<=670	751,63	230	735,29	225	718,95	200
	> 670 y <=900	849,67	260	816,99	250	784,31	220
	>900 y <= 1.125,9	898,69	275	872,55	267	849,67	260
TABLA GENERAL	> 1.125,9 y <=1.300	950,98	291	950,98	291	947,71	290
	> 1.300 y <=1.500	960,78	294	960,78	294	960,78	294
	> 1.500 y <=1.700	960,78	294	960,78	294	960,78	294
	> 1.700 y <=1.850	1013,07	310	1045,75	320	1143,79	350
	> 1.850 y <=2.030	1029,41	315	1062,09	325	1209,15	370
	> 2.030 y <=2.330	1045,75	320	1078,43	330	1274,51	390
	> 2.330 y <=2.760	1078,43	330	1111,11	340	1356,21	415
	> 2.760 y < =3.190	1143,79	350	1176,47	360	1437,91	440
	> 3.190 y <=3.620	1209,15	370	1241,83	380	1519,61	465
	> 3.620 y <= 4.050	1274,51	390	1307,19	400	1601,31	490
	> 4.050 y <=6.000	1372,55	420	1454,25	445	1732,03	530
	> 6.000	1633,99	500	1732,03	530	1928,1	590

Dicho todo lo cual, en la actualidad, la acción protectora del RETA, al igual que la del Régimen General, cubre la asistencia sanitaria en los supuestos de nacimiento y cuidado del menor, enfermedad y accidente común o profesional, así como la cobertura de accidentes de trabajo y enfermedades profesionales y las prestaciones económicas en las situaciones de incapacidad temporal, riesgo durante el embarazo,

nacimiento y cuidado del menor, riesgo durante la lactancia, cuidado de menores afectados por cáncer u otras enfermedades graves, incapacidad permanente, jubilación, muerte y supervivencia y prestaciones familiares por hijo o menor a cargo[22].

Sin obviar el gravamen que supone el pago del seguro social en su totalidad para un trabajador tan precario como el trabajador de plataformas digitales y dadas las últimas subidas del tipo y de la base de cotización, debe incidirse también en que la ampliación de las contingencias protegidas, hasta la fecha, no ha determinado una auténtica equiparación en la protección, básicamente por las dificultades a la hora del reconocimiento de una posible contingencia como profesional y de la prestación por cese de actividad.

Por lo que hace a la calificación de una posible contingencia como profesional, debe subrayarse la diferente repercusión que ello conlleva (no precisa periodo de carencia previo; para el cálculo de la base reguladora se incluyen las horas extraordinarias; en caso de no estar dado de alta se aplica el alta de pleno derecho y el principio de automaticidad en las prestaciones; acceso a indemnizaciones específicas en los casos de muerte y supervivencia; recargo de prestaciones por infracción de medidas preventivas; reconocimiento de lesiones permanentes no invalidantes; y tratamiento preventivo específico para las enfermedades profesionales). De tales diferencias, claramente, la más relevante para el caso de los trabajadores de plataformas digitales es la posibilidad ante un accidente de trabajo del cobro de la prestación por incapacidad temporal, incapacidad permanente, muerte o supervivencia sin un periodo de cotización mínimo. Además, recuérdese que para el trabajador autónomo sólo se protege la incapacidad permanente parcial para profesión habitual cuando deriva de contingencias profesionales y que en cuanto a la temporal, si deriva de contingencias comunes la prestación económica no se devenga hasta el cuarto día de la baja, siendo la cuantía igual al sesenta por ciento de la base reguladora y ya, a partir del vigésimo primer día de baja, asciende al setenta y cinco por ciento de la base reguladora, mientras que si la incapacidad temporal

[22] Ello sin perjuicio de que en el RETA existan ciertas peculiaridades con respecto a la prestación por jubilación (no se reconoce la jubilación parcial, ni la jubilación anticipada por causa no imputable al trabajador, ni con, ni sin condición de mutualista y con coeficientes reductores, ni existe la integración de lagunas de cotización) y la prestación por incapacidad permanente (la incapacidad permanente parcial para la profesión habitual sólo se protege cuando deriva de contingencias profesionales y las lagunas de cotización no son integradas con la base mínima).

proviene de una contingencia profesional, desde el día siguiente de la baja se devenga la prestación económica y en una cuantía del setenta y cinco por ciento de la base reguladora.

¿Cómo influye el hecho de estar encuadrado en el Régimen General o en el RETA? Pues influye y mucho, porque a los trabajadores autónomos no se les aplica la presunción de laboralidad dispuesta en el art. 156.3 de la Ley General de la Seguridad Social[23] para el trabajador dependiente, conforme a la cual "Se presumirá, salvo prueba en contrario, que son constitutivas de accidente de trabajo las lesiones que sufra el trabajador durante el tiempo y en el lugar del trabajo"[24]. En el RETA la delimitación del nexo de causalidad es mucho más restrictiva, no sólo no se aplica la presunción del art. 156.3 LGSS, sino que, además, no basta con que el accidente se haya sufrido con ocasión del trabajo, debiendo ser "consecuencia directa e inmediata del trabajo que realiza el trabajador por su propia cuenta y que determina su inclusión en el campo de aplicación del RETA"[25]. La exigencia de que, para su calificación como laboral, el accidente traiga su causa inmediata y directa en la actividad desarrollada, y la consiguiente supresión del principio de ocasionalidad, es justificada por la doctrina judicial en "la dificultad de deslindar si el autónomo está trabajando, trasladándose al centro o, sencillamente, en su tiempo libre", dado que si para el trabajador por cuenta ajena queda claro que la jornada laboral se inicia cuando éste se encuentra en su puesto de trabajo (art. 34.5 ET), tal consideración no puede trasladarse cuando la prestación de servicios se realiza por cuenta propia[26]. La doctrina de suplicación ha señalado que "la razón de que se instaure un concepto más restrictivo surge de las mayores dificultades que supone el control de la actuación del trabajador autónomo y de investigar los accidentes de este tipo de trabajador, ya que en sus accidentes laborales no interviene la Inspección de Trabajo y existe una mayor posibilidad de fraude", al no estar sometidos a control laboral u horario de trabajo, volumen o rendimiento de actividad laboral

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[23] *Vid.*, entre otras las SSTSJ de Andalucía/Granada de 23 de julio de 2008 (AS 2008\2953); STSJ de Asturias de 25 de mayo de 2012 (JUR 2012\195717); y STSJ de Madrid de 20 de noviembre de 2015 (JUR 2016\5243).

[24] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social (BOE 31-10-2015).

[25] STSJ de Castilla-La Mancha de 6 de junio de 2022 (JUR 2022\266343).

[26] STSJ de Castilla y León/Burgos de 25 de julio de 2022 (JUR 2022\296450).

directa[27]. Así, mientras que se viene considerado accidente de trabajo el infarto de miocardio de un trabajador dependiente acontecido durante el tiempo y en el lugar de trabajo, aplicándose la presunción del art. 156.3 LGSS, el trabajador autónomo tendrá que probar la conexión entre el infarto y el desarrollo del trabajo realizado por cuenta propia[28]. Es más, en los casos de los trabajadores de plataformas, en concreto en los repartidores de comida a domicilio autónomos, probablemente el accidente entraría en el campo de los accidentes laborales de tráfico, entre los que se distingue entre los accidentes *in itinere* (al ir o al volver al trabajo) y los accidentes en misión de servicio en los que la determinación de la etiología laboral y la aplicación o no de la presunción del art. 156.3 LGSS será siempre contenciosa y difícil de determinar, perjudicando claramente al trabajador.

Pero donde más desprotegido sigue estando el trabajador autónomo es con respecto a la situación de desempleo o cese de actividad. El trabajador autónomo está obligado a cotizar por cese de actividad, pero las causas, requisitos y acreditación para el acceso a la prestación hacen que muy pocos trabajadores autónomos puedan recibirla. Sin entrar en el cese de actividad provocado por la pandemia generada por el SARS-CoV-2 ni en las medidas extraordinarias adoptadas a este respecto[29], cuyo tratamiento excedería los límites de este trabajo[30], deben apuntarse las cinco causas previstas en el art. 331 LGSS: a) Económicas, técnicas, organizativas o de producción que impidan seguir con la actividad económica o profesional que se estaba desarrollando; b) Fuerza mayor, determinante del cese temporal o definitivo de la

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27 STSJ de Cantabria (Sala de lo Social, Sección 1ª) de 21 de febrero de 2014 (AS 2014\725).

28 En este sentido, la STSJ de Galicia de 29 de mayo de 2015 (AS 2015\1333) determina la no laboralidad del infarto de miocardio de un trabajador autónomo económicamente dependiente.

29 Vid. Calvo Vérgez, J.: "La prestación extraordinaria diseñada para los trabajadores autónomos a resultas de la reducción de la actividad motivada por la crisis del COVID-19: principales rasgos configuradores", Revista Aranzadi, n. 2, 2021.

30 Sobre el mismo Vid. Álvarez Cortés, J. C.: "La protección de los trabajadores autónomos por cese de actividad durante el estado de alarma y la protección tras su finalización", Trabajo, Persona, Derecho, Mercado: Revista de Estudios sobre Ciencias del Trabajo y Protección Social, n. 1, 2020 (Ejemplar dedicado a: Respuestas laborales y de protección social a la pandemia por coronavirus), pp. 181-222 y "La evolución de la protección por cese de actividad de los trabajadores autónomos durante la pandemia", Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo, Vol. 9, n. Extra 5 (Número especial), 2021, pp. 147-188.

actividad económica o profesional; c) Pérdida de la licencia administrativa, siempre que constituya un requisito para el ejercicio de la actividad económica o profesional y no venga motivada por la comisión de infracciones penales; d) Violencia de género determinante del cese temporal o definitivo de la actividad de la trabajadora autónoma; Divorcio o separación matrimonial, mediante resolución judicial, en los supuestos en que el autónomo ejerciera funciones de ayuda familiar en el negocio de su excónyuge o de la persona de la que se ha separado, en función de las cuales estaba incluido en el correspondiente Régimen de la Seguridad Social.

Sin perjuicio de las constantes intervenciones legislativas que ha suscitado la protección del cese de actividad durante la crisis sanitaria, centrando la alusión al cese de actividad "ordinario", de las cinco causas que lo pueden propiciar, la que mayores problemas interpretativos ha suscitado es la primera de ellas, razón por la cual ha sido reformulada por el Real Decreto-ley 13/2022, de 26 de julio, si bien, esta reforma no entrará en vigor hasta el 1 de enero de 2023. Piénsese que en el primer trimestre de 2022 se denegaron el 40% de las solicitudes de la prestación por cese de actividad y que el motivo fundamentalmente alegado ha sido precisamente la dificultad para acreditar las pérdidas, no se trata de que no se hayan generado esas pérdidas, sino de que muchos de los trabajadores autónomos carecen de una prueba de ello, entre otras razones porque los profesionales que tributan en el sistema de Estimación Objetiva (módulos) no están obligados a llevar un libro de ingresos y gastos. Los otros dos motivos en los que se ha fundamentado la denegación de la prestación son: no tener cubierto el periodo mínimo de cotización y no estar al corriente del pago de las cuotas de cotización a la Seguridad Social[31].

Por último, cabe ahondar en el ahorro económico que, para el empleador, para la plataforma digital, supone que sus trabajadores queden encuadrados en el RETA, pues ello significa obviar los derechos individuales y colectivos propios de la relación subordinada, pero es que, en materia de Seguridad Social, el ahorro en costes directos e indirectos es superlativo. Con respecto a la Seguridad Social, no sólo evita el pago del seguro obligatorio: el ahorro de los costes sociales va más

[31] https://www.autonomosyemprendedor.es/articulo/tu-negocio/causas-suele-denegar-cese-actividad-autonomos/20191211143330021225.html

allá, puesto que el hecho de no tener a su cargo un trabajador dependiente esquiva cualquier tipo de responsabilidad.

El empleador es el sujeto responsable en materia de Seguridad Social y ello no solo conlleva el pago de la cuota empresarial por contingencias comunes, por contingencias profesionales, por desempleo, formación y FOGASA, así como, en su caso, la cuota extraordinaria por la realización de horas extras. Además, el empleador es el sujeto responsable del acto de afiliación, alta, baja y variación de datos, así como del cálculo e ingreso en la Tesorería General de la Seguridad Social de las cuotas de cotización (tanto las del empresario como las del propio trabajador), lo que significa que cualquier error o incumplimiento podrá ser constitutivo de infracción conforme a la Ley de Infracciones y Sanciones del Orden Social[32]. Todo ello sin obviar que la consideración del trabajador como autónomo libera al empresario de toda responsabilidad en materia de seguridad y salud laboral, es decir, la plataforma elude las obligaciones previstas en la Ley de Prevención de Riesgos Laborales[33] y las normas para su desarrollo: reconocimiento médico y vigilancia de la salud del trabajador, formación en materia de prevención de riesgos laborales, evaluación de los riesgos laborales y planificación de su prevención…

Pero más allá de ese coste en prevención, la autonomía del trabajador de plataformas libera a la plataforma de una responsabilidad cuasi-objetiva en caso de enfermedad profesional o accidente de trabajo. Si el trabajador de plataformas digitales padece una contingencia profesional habiendo sido encuadrado en el RETA y no en el Régimen General, dicha contingencia no va a repercutir en un coste para la empresa y podrá sustituirlo por otro sin más, mientras que si es un trabajador dependiente tendrá que seguir haciéndose cargo de su cotización durante el tiempo que dure la incapacidad temporal y del pago delegado. Es más, de la obligación de seguridad y salud laboral pueden derivar una serie de responsabilidades: responsabilidad administrativa, responsabilidad civil, responsabilidad penal y recargo de prestaciones por falta de medidas de seguridad[34].

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[32] Real Decreto Legislativo 5/2000, de 4 de agosto, por el que se aprueba el texto refundido de la Ley sobre Infracciones y Sanciones en el Orden Social (BOE 08-08-2000).

[33] Ley 31/1995, de 8 de noviembre, de prevención de Riesgos Laborales (BOE 10-11-1995).

[34] Sobre dichas responsabilidades Vid. Fernández Collados, M. B.: La responsabilidad

En definitiva, por mucho que en España se haya avanzado en la protección del trabajo autónomo, el trabajador de plataformas gozará de una mayor protección si es encuadrado en el Régimen General.

3. Conciliación y trabajo autónomo

Paradójicamente, la aparente libertad y flexibilidad en la organización del tiempo de trabajo característico del trabajo autónomo ha contribuido al falso mito de que el trabajo autónomo facilita la conciliación de los intereses personales, familiares y profesionales, cuando lo cierto es que el autoempleo normalmente requiere una jornada mucho más extensa[35] y carece de instrumentos laborales de conciliación[36].

Las medidas de conciliación de la vida familiar y laboral están relacionadas con el patrón de trabajo voluntario, personal, por cuenta ajena, retribuido y dependiente. Los instrumentos de conciliación lejos de conformar fórmulas de reorganización del tiempo de trabajo, son básicamente tiempos de ausencia del trabajo a cargo del empresario (permisos retribuidos), a cargo del trabajador (reducciones de jornada y excedencias) o del propio sistema de Seguridad Social (suspensión del contrato de trabajo por nacimiento y cuidado de menor, riesgo durante el embarazo y riesgo durante la lactancia natural). Tales instrumentos laborales de conciliación son inaplicables al trabajo autónomo, pero han sido modelo referencial a la hora de arbitrar fórmulas que pudieran encajar en el trabajo autónomo[37].

Hasta el año 2007, en el que se promulgó el Estatuto del Trabajador Autónomo (LETA)[38], la conciliación de la vida familiar y laboral del trabajador autónomo es prácticamente invisible. La LETA, por primera

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empresarial en materia de seguridad y salud en el trabajo, Aranzadi, 2014.

35 El II Estudio Nacional del Autónomo señala que tan sólo un 16,3% de los autónomos realiza una jornada diaria de ocho horas y casi la mitad trabaja una media de diez o más horas diarias. https://www.infoautonomos.com/autonomos-espana-ley/estudio-nacional-del-autonomo-ena-febrero-2019/

36 *Cfr.* Pérez Agulla, S. y Gil Plana, J.: "Los trabajadores autónomos y la conciliación de la vida familiar, personal y profesional", en Mella Méndez L. (Dir.): *Conciliación de la vida laboral y familiar y crisis económica. Estudios desde el Derecho Internacional y Comparado*, Editorial DELTA, 2015, p. 87.

37 Barrios Baudor, G.L.; "La conciliación de la vida personal, familiar y profesional de los trabajadores autónomos: estado de la cuestión y propuestas de reforma", *Estudios financieros. Revista de trabajo y seguridad social: Comentarios, casos prácticos: recursos humanos*, n. 345, 2011, p. 60.

38 Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo (BOE 12-07-2007).

vez, reconoce expresamente el derecho de las personas trabajadoras autónomas a la conciliación de la vida familiar y profesional (art. 4.3.g) LETA) y recoge una serie de medidas que -en sentido muy amplio- pueden considerarse instrumentos de conciliación de la vida familiar y laboral del trabajador autónomo.

Tales medidas, más que emular los permisos, excedencias y licencias propias del trabajo por cuenta ajena, garantizan el cese en la actividad (los tiempos de ausencia) liberando al trabajador autónomo de los costes de los seguros sociales propios o de los trabajadores que necesiten contratar para poder disfrutar del tiempo necesario para conciliar, e incluso, permitiendo la contratación de otra persona en el caso de los trabajadores autónomos económicamente dependientes, cuya característica definitoria precisamente es no tener trabajadores a su cargo.

En definitiva, un trabajador de plataformas encuadrado en el RETA, un trabajador autónomo, no dispone de los derechos laborales de conciliación propios del trabajado dependiente (permisos retribuidos, licencias y excedencias). Únicamente queda equiparado al trabajador por cuenta ajena con respecto a la percepción de una prestación por nacimiento y cuidado de menor con una duración de 16 semanas, durante la cual podrá bonificarse el 100% de las cuotas de cotización a la Seguridad Social, con independencia de que contrate o no una persona para seguir manteniendo la actividad[39]. Dado que este derecho puede ser ejercido indistintamente por uno u otro progenitor, supone un gran paso para el trabajo autónomo, ya que hace tan sólo unas décadas las trabajadoras autónomas se veían abocadas a seguir trabajando durante el puerperio, inculcándose su propio derecho a la salud, más allá de un derecho a la conciliación no reconocido en aquel entonces a trabajadores y trabajadoras autónomas.

Si un trabajador autónomo necesita uno o varios días para atender cuestiones familiares o domésticas asume el coste correspondiente a

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[39] Originariamente la bonificación del 100% de la cuota de autónomo, introducida en el art. 38 LETA por la Ley 31/2015, de 9 de septiembre, por la que se modifica y actualiza la normativa en materia de autoempleo y se adoptan medidas de fomento y promoción del trabajo autónomo y de la Economía Social, estaba condicionada a la contratación de otra persona para su sustitución a través de un contrato de interinidad. Desde octubre de 2017, sin embargo, la Ley 6/2017, de 24 de octubre, de Reformas Urgentes del Trabajo Autónomo, elimina dicho requisito, lo que significa que, en todo caso, el trabajador o la trabajadora autónoma durante el disfrute del permiso por nacimiento y cuidado de menor no tendrá que pagar sus cuotas a la Seguridad Social, siempre que dicho permiso dure como mínimo un mes.

dejar de prestar los servicios, pero si lo que precisa es poder desarrollar el cuidado constante de una persona dependiente, el LETA lo que prevé es la bonificación de la cuota de seguridad social por contingencias comunes condicionada a la contratación de una persona para desarrollar su actividad laboral, una opción que tampoco parece muy viable para el trabajador de plataformas que o deja de prestar el servicio o se acoge a esta "fórmula" de conciliación basada en la contratación de otro trabajador a su cargo para prestar sus servicios.

El art. 30 LETA, respondiendo a lo previsto por la propia Disposición Final Segunda de la LETA, viene a configurar la posibilidad de que los trabajadores autónomos puedan disfrutar de una medida conciliatoria muy *sui generis*, una especie de híbrido entre una excedencia y una reducción de jornada por cuidado de menor o familiar a cargo, sin asumir los costes en seguridad social, bonificándose el 100 por cien de la cuota por contingencias comunes (no el resto de las cuotas -contingencias profesionales, cese por desempleo y formación profesional-).

No es una figura equiparable a ninguno de los tradicionales instrumentos laborales de conciliación del trabajo dependiente. No es una excedencia porque los autónomos no se encuentran en situación asimilada al alta, siendo precisamente un requisito la permanencia en situación de alta (art. 30.2 LETA), por lo que los autónomos podrán seguir realizando su actividad profesional, pero disponiendo del tiempo necesario para poder hacer frente a sus obligaciones familiares al tener contratada una persona por cuenta ajena. No es tampoco una reducción de jornada por motivos familiares, porque la persona contratada por cuenta ajena lo podrá estar a tiempo completo, o a tiempo parcial, y sólo en el caso de estarlo a tiempo parcial, la bonificación será del 50%, no del 100% (art. 30.2 LETA).

El incentivo tiene una duración máxima de 12 meses y consiste exclusivamente en la bonificación del 100% de la cuota por contingencias comunes, que resulte de aplicar a la base media que tuviera el trabajador en los doce meses anteriores a la fecha en la que se acoja a esta medida, el tipo mínimo de cotización vigente en cada momento establecido en el RETA, y en el caso de que el trabajador llevara menos de 12 meses de alta en el RETA, la base media de cotización se calculará desde la fecha de alta (art. 30.1 LETA)[40].

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[40] Como a partir de 2023 cambia la forma de cotización en el RETA, desde el 1-1-2023,

Dos son los requisitos fundamentales para poder acceder a esta medida o bonificación: la necesidad de hacer frente a unas determinadas obligaciones familiares sin contar con trabajadores a su cargo y la contratación de un trabajador por cuenta ajena.

No podrá beneficiarse de esta bonificación por cualquier obligación familiar, el art. 30.1 LETA determina exclusivamente 3 supuestos:

- Por cuidado de menores de 12 años a cargo.
- Por tener a su cargo un familiar, por consanguinidad o afinidad hasta el segundo grado inclusive, en situación de dependencia debidamente acreditada.
- Por tener a su cargo un familiar, por consanguinidad o afinidad hasta el segundo grado inclusive, con parálisis cerebral, enfermedad mental o discapacidad intelectual con un grado de discapacidad reconocido igual o superior al 33% o una discapacidad física o sensorial con un grado de discapacidad reconocido igual o superior al 65%, cuando dicha discapacidad esté debidamente acreditada, siempre que dicho familiar no desempeñe una actividad retribuida.

Esta medida queda restringida a los trabajadores autónomos que carezcan de trabajadores a su cargo, tanto en la fecha de inicio de la aplicación de la bonificación, como durante los doce meses anteriores a la misma, si bien, a estos efectos, no se tomará en consideración la contratación a través de un contrato de interinidad para la sustitución del trabajador autónomo durante los periodos de descanso por nacimiento y cuidado de menor, riesgo durante el embarazo o riesgo durante la lactancia natural (art. 30.4 LETA).

La bonificación está condicionada a la permanencia en alta en el RETA de la persona beneficiaria durante el periodo de disfrute de la bonificación y durante los seis meses posteriores a la misma, así como a la contratación de un trabajador por cuenta ajena, a tiempo completo o parcial, que será ocupado en la actividad profesional que da lugar

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la bonificación será del 100% de la cuota por contingencias comunes que resulte de aplicar a la base media que tuviera el trabajador en los doce meses anteriores a la fecha en la que se acoja a esta medida, el tipo de cotización para contingencias comunes vigente en cada momento, excluido el correspondiente a la incapacidad temporal derivada de contingencias comunes. A efectos del cálculo de esta bonificación, la base media se calculará con las bases de cotización, provisionales o definitivas, existentes en el momento de la aplicación inicial de la bonificación, sin que la cuantía de la bonificación sea objeto de modificación como consecuencia de la regularización de las bases de cotización provisionales a la que se refiere el art. 308.1.c) LGSS.

al alta en el Sistema de Seguridad Social de la persona beneficiaria. Cuando el contrato se realice a tiempo parcial, la jornada laboral no podrá ser inferior al 50% de la jornada de una persona trabajadora a tiempo completo comparable y la bonificación de la cuota será del 50% (art. 30.2 LETA).

La persona a la que se contrate por cuenta ajena habrá de mantenerse contratada durante todo el periodo del disfrute de la bonificación. Aunque, en todo caso, la duración del contrato deberá ser, al menos, de 3 meses desde la fecha de inicio del disfrute de la bonificación (art. 30.2 LETA). Ello no significa que el contrato por cuenta ajena no pueda extinguirse por causas objetivas o por despido disciplinario reconocido uno u otro como procedente, o por la dimisión, muerte, jubilación o incapacidad permanente total, absoluta o gran invalidez del trabajador o por resolución durante el periodo de prueba, incluso sin haber transcurrido los tres meses, pero siempre que se contrate a otra persona en un plazo máximo de 30 días. En caso de incumplimiento de este requisito habrá de procederse al reintegro del importe de la bonificación, que quedará limitado exclusivamente a la parte de la bonificación disfrutada que estuviera vinculada al contrato cuya extinción no se hubiera producido en los supuestos antedichos. Igualmente, el trabajador autónomo habrá de reintegrar el importe de la bonificación, si causa baja en el RETA sin que hayan transcurrido seis meses desde el vencimiento del plazo de disfrute de la misma (arts. 30.2 y 3 LETA). Con estas medidas se pretenden evitar altas fraudulentas.

Las personas beneficiarias de la bonificación tendrán derecho a su disfrute una vez por cada una de las personas causantes a su cargo señaladas en el apartado 1 del artículo 30 LETA, siempre que se cumplan el resto de requisitos previstos en el art. 30 LETA (art. 30.5 LETA).

Así pues, la única alternativa de conciliación para los autónomos es la contratación de otra persona para poder disponer de más tiempo y mayor flexibilidad para poder atender las cargas familiares, una solución que únicamente supone la bonificación de la cuota de cotización a la seguridad social, siempre que el motivo de conciliación sea uno de los recogidos en la propia Ley, no cuente con personas contratadas a su cargo, y además sólo por un periodo de 12 meses, cuando es de sobra conocido que crianza y cualquiera de las otras cargas familiares previstas en el art. 30 LETA se prolongan mucho más en el tiempo.

Igualmente, si se trata de un TRADE, cuyo carácter insustituible complica sobremanera la conciliación de la vida familiar y profesio-

nal[41] y que representa la situación jurídica en la que suelen contratarse a la mayoría de los trabajadores de plataformas digitales, la única vía de conciliación prevista también en la LETA es la excepción a la prohibición de tener trabajadores a su cargo por motivos de conciliación. Dado que precisamente uno de los rasgos definitorios del TRADE es "no tener a su cargo trabajadores por cuenta ajena ni contratar o subcontratar parte o toda la actividad con terceros, tanto respecto de la actividad contratada con el cliente del que depende económicamente como de las actividades que pudiera contratar con otros clientes" (art. 11.1.a) LETA), la Ley 31/2015 modificó el art. 11.2.a) LETA, exceptuando de la prohibición de tener a cargo trabajadores por cuenta ajena cinco casos concretos:

- Supuestos de riesgo durante el embarazo y riesgo durante la lactancia natural de un menor de nueve meses.
- Períodos de descanso por nacimiento, adopción, guarda con fines de adopción y acogimiento familiar.
- Por cuidado de menores de siete años que tengan a su cargo.
- Por tener a su cargo un familiar, por consanguinidad o afinidad hasta el segundo grado inclusive, en situación de dependencia, debidamente acreditada.
- Por tener a su cargo un familiar, por consanguinidad o afinidad hasta el segundo grado inclusive, con una discapacidad igual o superior al 33 por ciento, debidamente acreditada.

En los cinco casos previstos en el 11.2.a) LETA el TRADE podrá contratar una única persona, incluso si concurren dos o más de los supuestos previstos, y sólo se permitirá la contratación de una persona por cada menor de siete años o familiar a cargo.

La contratación del trabajador por cuenta ajena se regirá -en lo no previsto expresamente por la LETA- por el art. 15.1.c) ET y sus normas de desarrollo, y el TRADE tendrá carácter de empresario conforme al art. 1.2 ET.

Cuando la contratación se deba al cuidado de un menor o un familiar a cargo, el contrato se celebrará por una jornada equivalente a la reducción de la actividad efectuada por el autónomo sin que pueda su-

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[41] *Cfr.* Guerrero Vizuete, E.: "La desnaturalización de la figura del trabajador autónomo dependiente económicamente a través del fomento del ejercicio de su derecho a la conciliación profesional y familiar", *Revista Española de Derecho del Trabajo*, n.188, 2016.

perar el 75% de la jornada de un trabajador a tiempo completo comparable, en cómputo anual, entendiéndose a estos efectos por trabajador a tiempo completo comparable lo establecido en el art. 12 ET.

Aunque la duración del contrato estará vinculada al mantenimiento de la situación de cuidado de menor de siete años o persona en situación de dependencia o discapacidad a cargo del trabajador autónomo, en todo caso tendrá una duración máxima de doce meses. Puede verse aquí el paralelismo entre esta herramienta de conciliación para el TRADE y la regulada en el art. 30 LETA antes analizada como única alternativa a la conciliación de los trabajadores autónomos. Es más, dado que el TRADE es un trabajador autónomo, y fundamentalmente porque el propio art. 11.2.a) LETA así lo reconoce expresamente, el TRADE podrá beneficiarse de la bonificación de su cuota de cotización por la contratación de un trabajador por cuenta ajena conforme al art. 30 LETA.

Para evitar la concatenación de contratos temporales, se marca un periodo mínimo de 12 meses -desde el final del contrato- para poder celebrar un nuevo contrato con un trabajador por cuenta ajena si vuelve a ocasionarse cualquiera de las causas previstas en el art. 11.2.a) LETA, con una salvedad: que después de la contratación por riesgo durante el embarazo, el nuevo contrato se deba a que el TRADE se acoja a su derecho a disfrutar del periodo de descanso por nacimiento y cuidado de menor.

4. Conclusiones

En España. más allá del reconocimiento de derechos laborales individuales y colectivos, el hándicap del trabajador en plataformas digitales no reconocido como trabajador por cuenta ajena reside en una merma en su protección social y la carencia de instrumentos reales de conciliación de la vida familiar, personal y laboral.

El gran avance de estos últimos años en la protección social contributiva del trabajador autónomo no es suficiente. El aumento de las contingencias protegidas y de la cuota de contribución, con una futura contribución que pretende serlo por las ganancias reales del trabajador autónomo, no termina de ofrecer una protección equiparable a la del trabajador por cuenta ajena. Las dos piedras angulares de la diferente protección entre trabajadores por cuenta ajena y autónomos son la dificultad a la hora de calificar los accidentes y enfermedades

de los trabajadores autónomos como accidente de trabajo o enfermedad profesional y las dificultades a las que se enfrentan a la hora de acceder a la prestación por cese de actividad pese a estar obligados a cotizar por ella.

En cuanto a la conciliación, no existen fórmulas propiamente de conciliación equiparables a las de los trabajadores por cuenta ajena y la única solución parece ser la de la contratación de otra persona, una fórmula que no parece tener cabida para el trabajador en plataformas digitales.

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8. Is work safer after the COVID-19 pandemic experience?

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Summary: *1. COVID-19 emergency and protection of working conditions. – 2. Anti-contagion protocols, personal protective equipment, and technological tools. – 3. Remote working as a safety measure. – 4. Mandatory vaccination of workers – 5. Brief conclusions beyond the pandemic.*

1. COVID-19 emergency and protection of working conditions

Protecting the psycho-physical integrity of the worker is a topical issue, which cannot be separated from the continuous comparison with progress and evolution of health and safety techniques, as well as with ever new forms of potential injuries to the worker-person. Therefore, working conditions are always in the spotlight and are constantly regulated by legislation, collective agreements, and company policies.

What has the Coronavirus emergency changed in occupational health and safety?

Since the first months of 2020, the COVID-19 pandemic – with its exceptional virulence[1] – has put a strain on production activities and work organization all over the world[2]. In this dramatic scenario Italy was one of the first countries to face the health, economic and social

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1 More than 170 million confirmed cases worldwide since the start of the pandemic and about three and half million confirmed deaths: see *www.who.int*.

2 "The impact of the COVID-19 pandemic is of unprecedented scope and magnitude, affecting the health and socioeconomic situation of millions of people across the globe": Eurofound 2020, p. 1.

emergency[3], taking on the difficult role of precursor in the field of containment measures.

After declaring the national state of emergency[4], the frantic succession of regulatory interventions[5] is the clearest sign of the complexity to promptly define an organic framework for the prevention and management of risks from COVID-19, in consideration of both the extraordinary nature[6] of the event and the situation of uncertainty from a medical-scientific point of view[7].

In this challenging context, not only did workplaces play a crucial role in containing the risk of contagion, but they also guaranteed continued productivity. As a matter of fact, the world of work is fundamental to fight the outbreak, ensuring not only the health and safety of individuals, but also livelihood and wellbeing.

In order to keep workers and customers safe, more attention must be dedicated to the safeguards in the workplaces. Indeed, the perceived risk of contracting the virus because of their job was quite high, considering that 44% of the European employees participating in the Eurofound survey declared they believe they are at risk of contracting COVID-19 at work. The self-reported risk varies considerably across different sectors of activity and it is mentioned by a very large proportion of those working in transport (54%), commerce and hospitality (64%) and health (70%)[8].

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3 Furthermore, Italy was one of the European countries most affected by the pandemic, with over 21 million cases and 174,000 deaths: see *www.salute.gov.it.*

4 See the resolution of the Italian Council of Ministers 31.01.2020. The state of emergency ended on 31.03.2022.

5 In the last year the legislative production was plentiful and mostly expressed in the form of law decrees and decrees of the President of the Council of Ministers. See Maresca 2020; Natullo 2020, 10; Pascucci 2020, p. 117.

6 "We have never before seen a pandemic sparked by a coronavirus. This is the first pandemic caused by a coronavirus.
And we have never before seen a pandemic that can be controlled, at the same time": WHO 2020.

7 The World Health Organisation declared the outbreak a Public Health Emergency of International Concern on 30 January 2020, gave the official name COVID-19 on 12 February 2020 and recognized it as a pandemic on 11 March 2020. Due to the recent identification of the virus, and, consequently, the lack of accurate and validated data, the technical guidelines on the WHO website are constantly updated: see *https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance*.

8 Eurofound 2020, 42.

At the same time, keeping workplaces open – especially services considered essential[9] – has a vital importance not to paralyze the country and its economy. In this perspective, it is necessary to take adequate measures to prevent work from becoming a vehicle for contagion[10].

What are the tools to make workplaces as safe as possible even during the pandemic?

The traditional protection measures provided for by the so-called consolidated text on safety at work[11] were not enough to cope with an insidious enemy such as the Coronavirus, so the emergency regulatory provisions have introduced a lot of measures to mitigate and prevent the spread of the pandemic in the workplace: for example, the massive shift to remote working[12], incentives to purchase personal protective equipment and to disinfect and sanitize work environments[13], social distancing and the mandatory use of facial masks, vaccine obligation

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9 In addition to hospitals, the following activities were considered essential: supermarkets and food shops, pharmacies, banks and post offices, agricultural activities and agri-food industries, gas stations, funeral homes… See DPCM 22 March 2020.

10 The infections in the workplace from COVID-19 reported to INAIL (that is the Italian institute against accidents at work) from the beginning of the pandemic to the date of last 31 March 2021 are 165,528, approximately one quarter of all reports of accidents at work received from January 2020 to March 2021 and about 4.6% of the number of infected people communicated to the Italian Health Institute (ISS) on the same date.

11 Legislative decree 9 April 2008, no. 81. To deepen, see *ex multis*, Carinci 2008, 971; G. Santoro Passarelli 2008; Galantino 2009; Natullo 2009, 91; Bacchini 2010; Carinci, Gragnoli 2010; L. Zoppoli, Natullo, Pascucci 2010; Pascucci 2017.

12 See art. 1, paragraph 2, lett. o, law decree 23.02.2020, no. 6, converted by law 5.03.2020, no. 13; art. 3 DPCM 23.02.2020; art. 2 DPCM 25.02.2020; art. 4, paragraph 1, lett. a, DPCM 1.03.2020; art. 1, paragraph 1, lett. n, DPCM 4.03. 2020; art. 2, paragraph 1, lett. r, DPCM 8.03.2020; art. 1, paragraphs 6, 7, lett. a, and 10, DPCM 11.03.2020; artt. 75 and 87 law decree 17.03.2020, no. 18, converted by law 24.04.2020, no. 27; art. 263 law decree 19.05.2020, no. 34, converted by law 17.07.2020, no. 77; art. 31, paragraph 1, lett. a, law decree 16.07.2020, no. 76, converted by law 11.09.2020, no. 120; art. 1, paragraph 6, lett. ll, DPCM 7.08.2020; art. 32, paragraph 4, law decree 14.08.2020, no. 104; art. 5 law decree 8.09.2020, no. 111; art. 1, paragraph 9, lett. ll), no. 1), DPCM 24.10.2020; art. 1, paragraph 9, lett. nn, no. 1), DPCM 03.11.2020. In doctrine, see, *ex multis*, Alvino 2020; Brollo 2020a, 553; Brollo 2020b, 167; Cairoli 2020; Caruso 2020, 215; Dagnino 2020; Martone 2020, 3; Russo 2020a; Russo 2020b; Russo 2020c; Senatori 2020; Turrin 2020; Biasi 2021; Del Conte 2021; Del Vecchio 2021. The adoption of remote working has been an effective anticontagion measure used all over the world: see ILO 2020.

13 Art. 95 law decree 19.05.2020, no. 34, converted with modifications by law 17.07.2020, no. 77, introduced a tax credit for the expenses incurred for the sanitation of the workplace and for the purchase of personal protective equipment. Recently, art. 32 law decree 25.05.2021, no. 73, provides a similar credit tax for the year 2021.

for health workers[14], health administrative staff, teachers and administrative school staff, military, police forces and public aid[15], and over 50s[16]; the extension of the obligation of the COVID-19 green certificate to all public and private employees[17].

In addition, legislative discipline has been further detailed by anti-contagion protocols signed by social partners and the involved Ministry. These documents are useful guidelines for employers and employees in order to identify the highest risk of exposure in work environments and how to take appropriate measures to protect workers, customers and, in this way, the whole community.

Based on current medical-scientific knowledge, health and safety at work can be guaranteed by following these actions and procedures.

2. Anti-contagion protocols, personal protective equipment, and technological tools

Managing health and safety in the workplaces is an integral part of the employer's duties.

In Italy health and safety in the workplaces are a fundamental issue as evidenced by numerous regulatory provisions dedicated to the topic. Furthermore, links and cross-references between OSH discipline and other policies are several, in order to realize an integrated protection system.

Already in the Civil Code of 1942, still in force, there is the art. 2087, which states that "the entrepreneur is required to adopt the measures that, according to the particular nature of the work, experience and technique, are necessary to protect the physical integrity and moral personality of the employees".

In this way, the art. 2087 c.c. has introduced in the Italian legal system a general safety obligation in the workplace.

The Italian Constitution, entered into force in 1948, does not have a specific provision on the matter, but, reading articles 32 and 41 together, it is possible to understand that art. 2087 c.c. has a constitutional

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[14] Art. 4, paragraph 2, law decree 1.04.2021, no. 44, converted with modifications by law 28.05.2021, no. 76.

[15] Law decree no. 172/2021, converted by law no. 3/2022.

[16] The art. 1 of the law decree no. 1/2022 has introduced the obligation of anti-Covid vaccine for all citizens over 50.

[17] See the law decree no. 127/2021, converted by law no. 165/2021.

coverage. The art. 32 recognizes health as a fundamental right of the individual and as a collective interest, while the art. 41 establishes that the freedom of private economic initiative has some limits, including the prohibition of causing damage to safety.

Furthermore, Italy is a member of the United Nations and the European Union and therefore it has implemented international conventions and European directives on health and safety at work.

Over the years many special laws on the matter have been enacted, which have been collected in the legislative decree 9 April 2008, no. 81, known as Consolidated Law on health and safety protection in the workplace. This normative text is particularly detailed and contains 306 articles and 51 annexes[18].

In this perspective and in compliance with the provisions of the consolidated text on safety at work, employers[19] not only have to do a risk assessment to find out about the hazards and risks in their workplaces, but they also must put measures in place to ensure they cannot cause harm to employees. To sum up, managing occupational health and safety is one of the employer's duties, who is primarily responsible for the implementation of safety regulations and therefore is required to adopt the most adequate measures to protect health and safety of employees in the workplace.

However, because of the exceptional nature of COVID-19 and its disruptive impact on public health, the employer is not able to assess the risks in the workplace and identify suitable arrangements on their own, especially in a context of absolute novelty and uncertainty[20].

Therefore, some shared COVID-19 anti-contagion protocols have been issued, which are the result of concerted action between the Government and the social partners[21]. They are guidelines aimed at providing operational indications to increase, in the workplace, the effectiveness of the provisions of the legislative decrees, introducing fur-

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18 For a wide and updated overview, see VV.AA. 2022.

19 Art. 2 of the consolidated law on safety at work gives a wide definition of "employer", who is "the holder of the relationship with the employee or, in any case, the subject who, according to the type and structure of the organization in which the worker is employed, has the responsibility of the organization itself or of the production unit, exercising decision-making and spending powers".

20 See Marazza 2020, p. 267; Russo 2020a, p. 35.

21 See the protocol signed on 14.03.2020, integrated on 24.04.2020 and updated on 6.04.2021 and on 30.06.2022 for private workplaces; for public administrations the protocol was signed on 3.04.2020.

ther measures[22] and allowing the continuation of production activities in conditions of healthiness and safety.

The general protocols were gradually joined by those relating to specific sectors of activity, especially the riskiest ones[23]. Also large companies have provided for a specific anticontagion protocol: for instance, the car manufacturer FCA[24], the electricity provider ENEL[25], the leading communications company TIM[26]. In this way the regulation of measures to contain the spread of the contagion is more detailed and suited to specific and concrete needs of the production activity.

These protocols are very important not only for the identification of the most effective and innovative measures to contain the contagion[27], but also because compliance with their provisions – and, obviously, with the legislative discipline – circumscribes the space of the employer's responsibilities deriving from art. 2087 of the Italian civil code[28]. Even though achieving zero risk is mathematically impossible[29], with the adoption and observance of the anti-contagion protocols, employers are exempt from any civil and criminal liability.

Conversely, non-compliance with protocols in a way that does not ensure adequate levels of protection "determines the suspension of the activity until the safety conditions are restored"[30].

In the first months of the COVID-19 emergency one of the most debated issues was the obligation – or not – to update the risk assessment document, introducing the worksite risk assessment for COVID-19

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22 See art. 9 D.P.C.M. 11.03.2020.

23 For example, see the Protocol for the prevention and safety of workers in the Health, Social and Welfare Services in relation to the health emergency COVID-19, signed on 24.03.2020; shared protocol for transport and logistics signed on 20.03.2020.

24 Signed on 9.04.2020.

25 Active from 4.05.2020.

26 Signed on 28.04.2020.

27 According to Confcommercio, which is one of the most important employers' associations, "the Covid protocols agreed during the lockdown have worked so that workplaces were safe places. Businesses and workers have done their part responsibly": *https://www.confcommercio.it/-/coronavirus-fase-2-ambienti-lavoro*. In doctrine, see Tiraboschi 2021, 143.

28 On the point, see the circular of INAIL no. 22/2020.

29 See INAIL circular n. 22/2020.

30 Art. 1, paragraph 15, law decree 16.05.2020, no. 33, converted with modifications by law 14.07.2020, no 74.

exposure[31]. Currently, the problem has been solved by European and national legislation.

The EU Directive 2020/739, approved on 3 June 2020 by the European Commission, has amended the Directive 2000/54 on the protection of workers from risks related to exposure to biological agents at work and has included SARS-CoV-2 in the list of biological agents known to infect humans. Italy, as a member State of the European Union, has brought into force the laws, regulations and administrative provisions necessary to comply with this Directive[32].

In light of the above, it is recommended to take into consideration the COVID-19 risk at work and, consequently, to provide workers with the appropriate levels of protection.

Among the most effective containment measures is the use of masks as personal protective equipment. Although at the beginning of the pandemic the use of the mask was only recommended in presence of symptoms[33], scientific progress has subsequently highlighted two fundamental aspects: the urgency to limit the transmission of the infection as much as possible by asymptomatic individuals and the importance of adopting all the necessary precautions, especially in environments where it is particularly difficult to maintain social distancing.

In this perspective, legislative provisions[34] and – even before – anti-contagion protocols[35] lay down the mandatory use of masks and other personal protective equipment[36], depending on the type of the activity carried out.

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31 This requirement was unanimously considered mandatory only for the health sector: see Pascucci 2020, p. 128; Giubboni 2020, p. 5; Guariniello 2020, p. 10; note from National Labour Inspectorate of 13.03.2020, no. 89.

32 See, in particular, art. 4 law decree 7.10.2020, no 125, converted with modifications by law 27.11.2020, no. 159; art. 13 *sex decies* law decree 28.10.2020, no. 137, converted with modifications by law 18.12.2020, no. 176.

33 Probably this first position was conditioned by the difficulty of supplying and distributing masks, as well as by the need to make an adequate number of them available for healthcare workers, directly exposed to the risk of contagion: see *https://www.sanita24.ilsole24ore.com/art/dal-governo/2020-04-27/coronavirus-fase-2-mascherina-tutti-scienza-dice-si-095504.php?uuid=ADxiowM*.

34 See art. 16 law decree 17.03.2020, no. 18, converted with modifications by law 24.04.2020, no. 27; art. 66 law decree no. 34/2020.

35 See paragraph no. 6 of the shared protocol for private workplaces signed on 14.03.2020, as implemented on 24.04.2020.

36 For instance, face shields, gloves, goggles, coveralls, gowns.

Furthermore, in order to monitor and contain the spread of the Coronavirus infection, some innovative digital solutions have been developed – such as contact tracing apps – to identify contiguity with virus-positive subjects. The Italian Privacy Authority expressed favor on the matter[37], as long as criteria of voluntariness, transparency, specificity and exclusivity of the purpose, selectivity and minimization of data are respected. Moreover, the introduction of the use of these applications should take place through a regulatory provision.

Are these technological tools[38] applicable in the company to control employees' movements in order to ensure health and safety in the workplace?

The Guidelines on use of location data and contact tracing tools in the context of the COVID-19 outbreak, adopted on 21 April 2020 by the European Data Protection Board, underline that "one should not have to choose between an efficient response to the current crisis and the protection of our fundamental rights"[39]. Therefore, implementation of this kind of measures that allow the right to health to be achieved in the best possible way should be balanced with the protection of the freedom, dignity and privacy of the worker, in the manner provided for by national and supranational laws. In particular, regarding the Italian legal system, the use of these technological tools should be carried out in compliance with art. 4 of Workers' Statute – that concerns audiovisual systems and other remote control tools – and the provisions of the so-called Privacy Code[40].

Also the use of tools on how to screen workers to prevent clusters has been hotly debated.

Actually, the issue depends on the way in which it is carried out. For example, the use of thermoscanner at the entrance to the workplace is a non-invasive method, because the measurement of body temperature does not violate the freedom and dignity of the worker

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37 Opinion on the regulatory proposal for the provision of an application aimed at tracking COVID-19 infections, written by the Italian Privacy Authority on 29.04.2020; Provision of authorization for the processing of personal data carried out through the COVID-19 - App Immuni alert system, issued by the Italian Privacy Authority on 1.06.2020.

38 For example, geolocation systems, sensors, wearable devices…

39 EDPB 2020, 10.

40 Legislative decree 30.06.2003, no. 196, as modified by legislative decree 10.08.2018, n. 101, on the arrangements for the adaptation of national legislation to the provisions of EU Regulation 2016/679.

and, consequently, it is not in conflict with art. 5 of the Workers' Statute[41]. In addition, the shared anti-contagion protocol provides for this possibility[42], because a fever above 37.5 degrees can be an alarm signal and this type of control might help to respond to clusters in an effective, efficient and ethical manner.

In the first months of the pandemic the use of serological tests to verify the presence of asymptomatic subjects in the company was a controversial issue because it was a more invasive procedure, because a small blood sample is required to check the presence or absence of antibodies against Coronavirus, and it was still in the experimental phase[43]. Even the Italian Privacy Authority dealt with this matter and clarified that, in the context of prevention and safety in the workplace or anti-contagion safety protocols, the employer might request its employees to carry out serological tests only if arranged by the competent company doctor or other health professional, according to the rules relating to the epidemiological emergency[44]. However, their growing reliability and the possibility of identifying and combating outbreaks of infection more promptly have facilitated their use even in the workplaces.

As seen above, precisely to support companies in the considerable economic effort to provide for the purchase of personal protective equipment, as well as tools for disinfecting and sanitizing the work environments and technological devices to guarantee social distancing and the prevention of clusters, incentives have been provided[45].

3. Remote working as a safety measure

Working remotely has been specifically considered an effective measure to limit the spread of Coronavirus in the workplace, as attested by the many regulatory provisions on the subject[46].

There are two main reasons. Firstly, remote working reduces the presence of employees in the workplaces, allowing social distancing.

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41 For a different point of view, see M.T. Carinci 2020, p. 12.

42 See paragraph 2 of the anti-contagion protocol for private workplaces.

43 See law decree 10.05.2020, no. 30, converted with modifications by law 2.07.2020, no. 72.

44 Italian Privacy Authority, FAQ 14.05.2020, in *https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9343635*.

45 See footnote no. 13.

46 See footnote no. 12.

Secondly, employees can avoid travelling by car or – even more dangerous! – by public transport.

With this measure, as well as with using personal protective equipment and sanitizing the workplace, health and safety of workers are protected in the best possible way based on current medical-scientific knowledge.

The regulatory provisions do not refer to teleworking, which is very popular internationally, but in Italy has a very specific but not very widespread regulation[47]. They mention agile work[48] – commonly named smart working – but establish the simplification of the discipline of law no. 81/2017 to facilitate its use as much as possible[49]. For example, based on emergency legislation, agile work "is automatically applicable to any subordinate employment relationship […] even in the absence of the individual agreements" between the parties[50].

Another simplification concerns precisely the fulfillment of safety obligations on "general risks and specific risks connected to the particular method of execution of the employment relationship"[51], that can be satisfied electronically. In order to ensure timeliness and simplification of obligations, the emergency legislation refers to the INAIL website to find the necessary documentation on safety.

Beyond these simplifications, the most relevant difference from the genuine agile work is that in the law of 2017 the work is "smart" because it is not bound by two of the typical characteristics of subordinate work: place and time. In fact, a smart worker's performance should be 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

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47 In the context of private work there is the interconfederal agreement on teleworking signed on 9.06.2004, that has implemented the European framework agreement of 2002. In the public sector teleworking is regulated by the Law 16.06.1998, no 191, the Decree of the President of the Republic no. 70/1999 and the national framework agreement signed on 23.03.2000.

48 Introduced by law 22.05.2017, no. 81.

49 On the point see Brollo 2020, p. 188; Biasi 2021, p. 160.

50 The agreement is the focal point of the genuine agile work, because it establishes all the fundamental aspects of the relationship, from the methods of execution of the working performance outside the company premises to the forms of exercise of the managerial power of the employer, from the tools used by the worker to the rest times, from the techniques to ensure disconnection to control power of employer.

51 Art. 22 of law no. 81/2017.

collective bargaining, and can be done using technological tools[52]. It is a new organizational model of subordinate work, which is mainly parameterized on the results.

Due to the restrictive measures of freedom of movement imposed by emergency legislation, the emergency smart working has been performed in a fixed location, which coincides with the worker's domicile. In this way it becomes home-working, a kind of "attenuated teleworking", without, however, having the complete transposition of the teleworking discipline, which establishes the involvement of trade unions and the preparation of projects with the indication of objectives, verification and updating criteria, costs, and benefits.

The results on the spread of this hybrid smart working during the pandemic crisis appear to be quite satisfactory. The percentage of smart workers in companies went from 1.2% in the pre-COVID period to 8.8% in the so-called lockdown[53]. However, the most surprising data concern Italian public administrations, given that 73.8% of them adopted smart working during the lockdown[54], while the previous year only 16% of them had started smart working projects for their employees[55].

The importance of remote working in mitigating the transmission of COVID-19 at the workplace is particularly evident for vulnerable workers, who are more likely to be affected than others, because of their personal illnesses or caring for disabled family members. The greater the fragility, the more dangerous the risk will be, so employees with disabilities or who have a person with disabilities in their family "have the right to perform their work in smart working modalities"[56] until the end of the epidemiological state of emergency. Obviously, this will only be possible if the tasks are compatible with remote working.

However, all that glitters is not gold. Therefore, besides the advantages, there are inevitably critical issues, manifested above all in the days of forced isolation – the so-called "lockdown" – in which the use (and, sometimes, the abuse) of technology was the only way to connect

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52 See art. 18 of law no. 81/2017.

53 See report "Tempo di bilanci per lo *smart working*. Tra rischio retrocessioni e potenzialità inespresse" in *www.consulentidellavoro.it*.

54 See all data in *http://www.funzionepubblica.gov.it/lavoro-agile-e-covid-19/monitoraggio-lavoro-agile*.

55 On the agile work in the Public Administrations during the pandemic, see Di Carluccio 2020; Russo 2020b.

56 Art. 39 decree law 17.03.2020, no. 18, converted by law 24.04.2020, n. 27.

with the rest of the world. The psychological and physical impacts on remote workers may be numerous, especially during a long-term period.

Leaving aside the problems related to ergonomic aspects[57], they may have a greater risk of contracting pathologies deriving from the so-called hyperconnectivity[58], as highlighted by the research report "Working anytime, anywhere: the effects on the world of work", written by Eurofound and ILO even before the pandemic[59].

Nowadays work hyperconnectivity is unquestionable because remote workers can be reached by continuous and multiple types of communication, such as email, instant messaging, mobile phone call, contact and web information services. So they constantly live and work deeply close to digital tools. This way of working might generate some insidious consequences.

Firstly, a specific risk may be the probability of isolation of the worker, who is likely to be trapped in an exclusive relationship with the machine and not involved in a face-to-face communication. In the most severe cases this might lead to mental disorders.

Secondly, the work hyperconnectivity realizes a sort of constant availability and the increase of work-related stress[60]. In this perspective, the first effect is greater intensity at work, which, on the one hand, may be a good thing, aimed at higher productivity and better results. However, on the other hand, it might lead to overworking and it should be related to the statistics on the growing number of workers at burnout risk[61].

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[57] For example, because of the posture of those who spend many hours in front of the pc.

[58] "Hyperconnectivity" is a term invented by two canadian social scientists to indicate the availability of people for communication anywhere and anytime: see Quan-Haase, Wellman 2005, p. 285.

[59] Eurofound and ILO 2017, p. 34.

[60] Fenoglio 2018a, p. 625.

[61] A recent study conducted by the Center for Emotional Intelligence and the Child Study Center of Yale University and University of Leipzig , reported by The New York Times, argues that 20% of workers are at serious risk of burnout: on the point see *http://www.ansa.it/canale_saluteebenessere/notizie/medicina/2018/11/07/lo-stress-e-unepidemia-oggi-la-giornata-mondiale_e7dd302d-c96d-4ca7-aa01-a7969d2ee3d7.html*. Compare it with the results of the research "Workers prone to stress and burn-out at work", carried out in 2011 by Eurofound: *https://www.eurofound.europa.eu/it/publications/article/2011/luxembourg-workers-prone-to-stress-and-burn-out-at-work.* On the topic see also Moeller, Ivcevic, White, Menges, Brackett 2018, p. 86.

Finally, it is important to focus on the increasingly blurred boundaries between paid work and private life, because the invasion of digitalization in the employment relationship may create a lot of interference in the personal lives of employees. In this perspective, the Court of Justice of the European Union has repeatedly highlighted the need to keep working time and rest periods separate[62], but it is not so simple because of a kind of "time porosity"[63], which is a mixture of the "online and off-line dimensions of the worker"[64].

The so-called right to disconnect is exactly the faculty of not using technological work tools and not engaging in work-related electronic communications out of service hours, without disciplinary consequences[65]. In other words, employees cannot be disadvantaged by keeping off their mobile phone or pc, not answering phone calls or picking up emails and messages during their holidays and rest periods[66]. Work and rest times must also be respected during the smart working performance.

Therefore, the right to disconnect has a transversal scope, concerning fundamental issues such as working time, health and safety and work-life balance. It is just the emergency legislation that recognizes the "right to disconnect" for agile workers for the first time in Italy[67].

Anyway, "working from home during the COVID-19 pandemic is unlike teleworking under normal conditions, as workers are working from home for a prolonged period, under difficult external circumstances. This situation itself is provoking higher levels of anxiety than usual in workers, which is linked with anxiety due to the health, social and economic implications of the crisis"[68]. Therefore, the employer, during risk assessment, should focus on how to stay healthy and safe

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62 See CJEU 3 October 2000, C-303/98; CJEU 9 September 2003, C-151/02, in *https://curia.europa.eu*.

63 See Genin 2016, p. 280.

64 Brollo 2017, p. 119; Dagnino 2019, p. 27.

65 On the right to disconnect see Ray 2002, p. 939; Ray 2016, p. 912; Dagnino 2017, p. 1024; Fenoglio 2018b, p. 549; Leccese 2019, p. IX; Zucaro 2019, p. 215; Russo 2020c, p. 682.

66 Eurofound and ILO 2017, p. 50.

67 Art. 2 law decree 13.03.2021, no. 30, converted with modifications by law 6.05.2021, no. 61. Indeed, art. 19 law no. 81/2017 does not recognize the "right to disconnect", but states that the individual agreement has to discipline the techniques and measure to ensure the disconnection of the worker from the technological tools.

68 ILO 2020, p. 12.

when working from home, elaborate measures and implement strategies to reduce the psychological and physical impacts of remote working as much as possible.

4. Mandatory vaccination of workers

Waiting for medical-scientific research to discover an effective cure for COVID-19, the only remedy is to try to prevent the disease – or, at least, to reduce the lethal effects – with the vaccine.

In this perspective, vaccination – in addition to social distancing and the use of masks – is the most effective tool to guarantee not only one's own health, but also public health.

In the EU resolution no. 2361/2021[69], with respect to ensuring a high vaccine uptake, what is assured is that "the vaccination is not mandatory and that no one is under political, social or other pressure to be vaccinated if they do not wish to do so"[70] and "no one is discriminated against for not having been vaccinated, due to possible health risks or not wanting to be vaccinated"[71].

These European provisions match with Italian constitutional principles about the self-determination of one's own health, because the art. 32 of the Constitution protects health as a fundamental right of the individual and recognizes their right to receive the treatment they need and, at the same time, the freedom not to receive treatment if they do not want to. However, the second paragraph of the art. 32 of the Italian Constitution establishes that "nobody can be obliged to a specific health treatment except by law". This happens because health is also recognized as an interest of the community and, therefore, the balance between individual freedom and the risk to collective health is made by the legislator.

What about in the case of outbreaks in hospitals or nursing homes due to healthcare workers' refusal to be vaccinated? This is the most significant example of the complexity of this balance.

In order to protect public health and maintain adequate safety conditions, the emergency legislation lays down that health workers who

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[69] Adopted by the Parliamentary Assembly of the Council of Europe on 27.01.2021, about COVID-19 vaccines: ethical, legal and practical considerations.

[70] Point. no. 7.3.1. of the aforementioned resolution.

[71] Point. no. 7.3.2. of the aforementioned resolution.

carry out their activities in health and social care structures – public and private – or in pharmacies, in parapharmacies and in professional offices are required to have free vaccination for the prevention of SARS-CoV-2 infection[72].

In light of the above, vaccination becomes an essential requirement for the exercise of the profession and for the work performance. Therefore, vaccination can be omitted or postponed only in case of proven danger to health, in relation to specific documented clinical conditions.

The refusal to get vaccinated without justification leads to suspension of tasks involving interpersonal contacts or, in any other form, the risk of spreading the contagion[73]. In these cases, the employer gives the employee, where possible, other tasks – even lower ones – as long as they do not involve risks of contagion[74]. If this is not possible, the worker is totally suspended from the service and, for the period of suspension, no remuneration is due until the end of the emergency state[75].

In a broader perspective, it is worth remembering that also according to WHO "mandatory COVID-19 vaccination might appear to be particularly plausible for health workers given that vaccination of this population might be seen as necessary to protect health system capacity"[76]. Indeed, "forms of mandatory vaccination are not uncommon in health care settings, including requirements that unvaccinated health workers stay at home during outbreaks, policies in which vaccination is required as a condition of employment, requirements that unvaccinated health workers be transferred to settings where the risk is lower, and so-called 'vaccinate-or-mask' policies"[77].

Nevertheless, in Italy the introduction of a mandatory anti-COVID vaccine for health workers – and then for other categories, such as teachers and administrative school staff, military, police forces and

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72 Art. 4, paragraph 2, law decree 1.04.2021, no. 44, converted with modifications by law 28.05.2021, no. 76. On the topic, see Cerbone 2021; Ichino 2021, 10; Pisani 2021a, 13; Pisani 2021b; Taschini 2021.

73 Art. 4, paragraph 6, law decree no. 44/2021.

74 Currently, this possibility of relocation has been canceled by the art. 1 of the law decree 26.11.2021, no. 172, converted with modifications by law 21.01.2022, no. 3.

75 Art. 4, paragraph 8, law decree no. 44/2021.

76 WHO 2021, 3.

77 WHO 2021, 4.

public aid and also for all over-50 workers – is still a controversial issue, which raises a high level of litigation[78].

The main debates involve the compatibility of the mandatory vaccine with the EU legislation and with the Italian Constitutional principles and the solutions proposed by case law are different. Indeed, the Court of Padua[79] referred the matter to the Court of Justice of the European Union, while the Court of Rome[80] and the Court of Milan[81] rejected the unvaccinated worker's appeal and the Court of Velletri[82] upheld the appeal.

What is evident is that the difference of positions in jurisprudence is the sign of the complexity and delicacy of the issue and these difficulties explain the slowness and gradualness of national legislative responses[83].

Actually, even though WHO encourages voluntary vaccination against COVID-19 before contemplating mandatory vaccination, the same U.N. agency recognizes the possibility to provide for stricter regulatory measures if other policies are not successful[84]. Obviously, "decisions about mandatory vaccination should be supported by the best available evidence and should be made by legitimate public health authorities in a manner that is transparent, fair, nondiscriminatory"[85]. And this the way carried out for the anti-COVID vaccination in Italy.

Moreover, vaccination policies have involved the participation and the input of social partners, since, in Italy, Ministers of Labour and Health signed with social partners a specific protocol on the possibility

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78 See, for example, Regional administrative Court of Lazio 2.09.2021, no. 4531; Court of Padua 7.12.2021; Court of Rome 8.12.2021; Court of Velletri 14.12.2021; Regional administrative Court of Lazio 2.03.2022, no. 2455; Court of Padua 28.04.2022; Court of Milan 17.05.2022, in *IlGiuslavorista.it*; Regional administrative Court of Lombardia 16.06.2022, no. 1397. In doctrine, on the topic, see, *ex multis*, Gragnoli 2021; Pascucci 2021; Pisani 2021b; Russo 2021.

79 Court of Padua 7.12.2021, in *IlGiuslavorista.it*, 26.07.2022, with comment written by Russo.

80 Court of Rome 8.12.2021, in *Il Giuslavorista*, 2022.

81 Court of Milan 17.05.2022, in *IlGiuslavorista*, 2022.

82 Court of Velletri 14.12.2021, in *IlGiuslavorista*, 2022.

83 There has been a succession of regulatory interventions that have introduced the vaccination obligation to the riskiest categories of workers: law decree no. 44/2021; law decree no. 111/2021; law decree no. 122/2021…

84 WHO 2021, p. 4.

85 WHO 2021, p. 4.

to get vaccinated in the workplaces to facilitate the implementation of the anti-COVID-19 vaccination plan[86].

5. Brief conclusions beyond the pandemic

Finally, returning to the the title of this paper, the question is: is work safer after the COVID-19 pandemic experience?

It should be the case, because the provisions issued are numerous and are constantly updated based on monitoring on infections and the development of scientific data. In this perspective, the Italian policy response to the pandemic has been quite effective through the varied and useful tools used in order to achieve the goal of the greatest possible safety in the workplace, during such a serious health emergency. The exceptional nature of the situation and the seriousness of the danger required extraordinary measures and facilitated the taking of decisions that were shared and participated as much as possible[87]. The involvement of all parties has guaranteed the greatest awareness of employers and employees and their active participation to keep workplaces as safe as possible during the pandemic. The aim was to protect the "common good", that is not only the health of employees – and, through them, also of their families and, therefore, of the entire population – but also the continuity of production activities so as not to paralyze the economy of the Country.

However, satisfying results depend on compliance with the rules. In this perspective, the sanction of the suspension of the activity in case of non-compliance with protocols has been a good incentive. Moreover, during the COVID-19 emergency, the labour inspectors have been involved in the supervision system on compliance with the measures to contain the spread of the infection[88]. As highlighted in the annual report on supervisory activity of the National Labour Inspectorate[89],

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[86] National protocol for the implementation of company plans aimed at activating the extraordinary anti-COVID-19 vaccination points in the workplace, signed on 6.04.2021.

[87] On the topic see Pascucci 2019, p. 107.

[88] The art. 4, par. 9, of the law decree no. 19/2020, converted by the law no. 35/2020, establishes that the prefect ensures the execution of containment measures in the workplace also making use of the inspection staff of the health local authorities competent for the territory and the National Labour Inspectorate.

[89] See *https://www.ispettorato.gov.it/it-it/in-evidenza/Documents/Rapporto-annuale-2020.pdf*, 54.

in the year 2020 the inspection staff carried out 17,080 checks on the correct implementation of anti-COVID measures in the workplace[90]. Most of the interventions concerned the tertiary sector (7,851), then the industrial sector (4,418), the construction sector (3,777) and finally the agricultural sector (1,034).

The dramatic epidemiological situation kept attention on urgency to adopt all possible safety measures to tackle the COVID-19 infections and to prevent work from becoming a vehicle of contagion for employees and for the whole community, but what will happen after this health emergency?

Will we run the risk of over-relaxing and forgetting all that we have painfully learned in this tough period?

In light of the above, the COVID-19 experience has left us a great legacy in the field of health and safety at work, through the shared protocols anti-contagion, the particular attention to personal protective equipment and technological tools, the massive use of remote working and the wide diffusion of anti-COVID-19 vaccines.

Now it's up to us to decide whether to hide it under the mattress or invest it in the best possible way for the well-being of the workers and, consequently, the company's productivity.

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[90] In 2021 the checks on the COVID-19 measures in the workplaces were 16.341, as reported in the Annual Report 2021 wirtten by the National Labour Inspectorate: *https://www.ispettorato.gov.it/it-it/studiestatistiche/Documents/Relazione-attivita-INL-e-Rapporto-Vigilanza-2021-12082022.pdf*, 4.

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9. Social Issues in "the Best in Covid Country"

Jáchym Stolička, Štěpán Pastorek[1]

Summary: *1. Introduction. – 2. Weakening of the subordination principle. – 3. Work 24/7 - erasing the difference between working time and leisure time. – 4. Technostress. – 5. Employment of foreigners from third countries in the Czech Republic. – 6. Employee card and work permit. – 7. Coronavirus consequences. – 7.1 Restrictions upon entry and in communication with the state's authorities. – 7.2 Inflexibility of the system in the area of changing work performance parameters. – 7.3 Unfair treatment of employers abusing the weaker position of employees. - 8. What is next for employing foreigners? Conclusions*

1. Introduction

Even before the outbreak of the coronavirus pandemic in early 2020, it was widely discussed internationally in the professional and lay public that the labour market, the way work was conducted and industrial relations in general, would undergo many changes in the coming years.[2] Regarding the maturity of the economy and the geopolitical location of states in Europe and abroad, these expected changes were

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[2] See *Automation and AI: how it will actually affect the workplace*, Adam McCulloch, accessible via: https://www.personneltoday.com/hr/analysis-ai-automation-impact-on-jobs-hr-employment/

to be fundamental. It was largely assumed that the cause of these changes would be digitization, robotics and, in general, the advent of modern technologies produced by the fourth industrial revolution.[3]

The expected entry of new technologies into all aspects of human life, including work, was perceived by the professional and lay public as mainly positive and with optimistic expectations. A person usually has a positive attitude towards everything that can make life easier, including work. In many professions, the expected advent of new technologies means a harbinger not only of facilitating otherwise strenuous work, but also of increasing the efficiency of their outputs. As a negative aspect of this growing phenomenon, it has often been discussed that the legal systems of European states are not prepared for these rapid changes, especially due to their relative rigidity. Legislative processes are not able to respond quickly enough to the high pace at which new technologies are entering our lives. This can cause considerable problems, especially in the protection of employees as the weaker party to the employment relationship.

Although it was clear before the pandemic that the advent of new technologies would bring many changes to lawmakers, employees, and employers that they would have to deal with over time, no one could have imagined how a pandemic would accelerate the onset of these challenges. Due to pandemic measures, various atypical forms of employment (home-office, teleworking, etc.), which were previously normally used as employee benefits, have become a necessity in many countries, including the Czech Republic. In many of its regulations, the Government of the Czech Republic called on all employers whose nature of work and operating conditions allow it to allow their employees to use home office.[4] However, the transition of employers to the performance of work in the "distance form" has very quickly revealed several legal and social problems, which will be discussed in the following part of the article.

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[3] The Fourth Industrial Revolution (or Industry 4.0) is the ongoing automation of traditional manufacturing and industrial practices, using modern smart technology.

[4] See Resolution of the Government of the Czech Republic no. 1102/2020 from 26 October 2020 on the adoption of a crisis measure, accessible via: https://www.pravniprostor.cz/clanky/pracovni-pravo/home-office-usneseni-vlady-cr-ze-dne-26102020-c-1102-o-prijeti-krizoveho-opatreni

2. Weakening of the subordination principle

Every country which has a legal system that we can list as a "continental" in some way defines the basic concepts applicable to labour law, which also provides a definition of a particular employment relationship. The law no. 262/2006 Coll., Labour Code (hereinafter only as the "Labour Code"), valid on the territory of the Czech Republic, uses the terms *basic labour relationship, dependent work, employee and employer*, where each of these terms must meet certain conceptual features. It is nevertheless not decisive what specific definitions are involved. More importantly, the so-called basic labour relations in today's digital age, strengthened by the influence of coronavirus, are beginning to appear insufficient for the performance of atypical forms of work, which are gaining in importance.

According to us, the reasons for the inadequacy of basic labour relations as we know them are mainly the actual change in the position of their participants, but also the change in dependent work as a subject of labour relations. A natural person performing work for another person for remuneration no longer has to be – *stricto sensu* – defined as an employee. Likewise, the person for whom this work is performed no longer has to be *stricto sensu* called an employer. The relationship of superiority and subordination between parties is weakening and dependent work may become independent work.

At first glance, the changes in the established concepts of labour law, have one common consequence. It is a weakening of the subordination principle in labour relations. In the Czech Republic, the defining feature of dependent work is that the employee performs it for the employer in person, on his behalf and according to his instructions, while there is no equal status between employee and employer – dependent work is performed in relation to employer's superiority and employee's subordination.[5] Not only the Czech Labour Code, but also the Labour Code of Slovakia[6] and other European countries consider the principle of subordination as one of the main conceptual

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[5] Section 2, paragraph 1 of Labour Code: "Dependent work" (in Czech „závislá práce") means work that is carried out within the relationship of the employer's superiority and his employee's subordination in the employer's name and according to the employer's instructions (orders) and that is performed in person by the employee for his employer.

[6] Section 1, paragraph 2 of Slovak Labour Code.

features of dependent work and labour relations in general.[7] However, the performance of work through atypical forms of work outside the employer's workplace causes the disappearance of the difference between employee and employer and thus also the dilution of the subordination principle.

The weakening of the subordination principle is significant for all new models of work performed outside the employer's workplace through distance communication, whether it is home office, teleworking, calling work or working in a digital crowd.[8] Similarly, the work can be carried out through shared platforms. Employers are also increasingly reluctant to control work – either because of the high workload of other work tasks or more often because of the new digital ways of doing work, which make it practically impossible to control.[9] At the same time, the phenomenon of a friendly relationship between employer and employee, in which the superiority of one participant is difficult to realize, is on the rise (even during the current pandemic).

When it comes to the performance of work in a traditional employment relationship, the trend today, regardless of the pandemic, is also the emphasis of employers on the mental well-being of employees in the workplace. Modern companies are increasingly introducing relaxation zones equipped with hammocks to rest, pool tables or table football, in which employees can stimulate their mental well-being as complementary parts of the policies of care for employees. Today's progressive employers do not close the door even to employees with children for whom workplaces are equipped with kindergartens or "children's corners". The same is true for pets which can accompany employees in the workplace. It also often happens that an employer spends free time and holidays with her employees, which can degrade the seriousness of a professional relationship to a more friendly one. Apart from the undisputed pluses of such approach, there can be also its downsides – e.g. an employee may begin to feel that she is a the same level as her employer, which can have a number of negative consequences, such as a loss of authority and morale in the workplace, as well as the unenforceability of work results.

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7 C-415/93 (Bosman), 15. 12. 1995

8 BARANCOVÁ, Helena.: Pojem zamestnanec v európskej digitálnej perpektíve. Právny obzor, 101, 2018, č. 4, s. 339.

9 Ibid.

It should be noted here that the phenomena described above can have a mainly positive and trouble-free effect in other circumstances, as it certainly helps with work-life balance. However, through the prism of labour law, in which the basic employment relationship is based on the principle of superiority and subordination of its participants, these tendencies can cause difficulties. This is not to combat the de facto inequality between employer and employee, which has been discussed above. Corporations as employers continue to be market-strong entities from an objective point of view, but within a force where the power is represented by a manager, this dominance is fragmented into a friendly environment. It is therefore a matter of reducing superiority in the legal, not *de facto*, sense.

Nevertheless, it cannot be concluded that the weakening of the subordination principle would be a problem from the point of view of labour law. Rather, it is a logical outcome of the above-described changes, which are experienced by individual participants in labour relations in their legal status as well as in labour relations in general. The possible response of labour law may be the introduction of a new type of employment relationship, for which the subordination principle would not be a defining feature and would better suit the needs of today's digital age.

3. Work 24/7 - erasing the difference between working time and leisure time

The topic of working time, on which the overall satisfaction of the employee at the workplace depends, as well as the effective execution of specific work tasks, should not be left out.[10] Few people deal with the situation where employees' job positions are maintained but to the extent that it is very difficult to schedule the employee's work so that it represents a complete period of time – working time. This discussion is also gaining importance because the amount of employee remuneration is tied to the time worked in many professions. Reducing working hours would also mean reducing employee's in-

[10] ŠVEC, Marek, OLŠOVSKÁ, Andrea: Transformácia pracovného a sociálního prostredia zamestnancov: Práca 4.0 - 24/7? In Pracovné podmienky zamestnancov v období štvrtej priemyselnej revolúcie. Praha: Leges, 2018. s. 75.

come. Moreover, if the time worked at is unclear, the remuneration becomes not only smaller, but also difficult to quantify.[11]

From the logic of the matter, it can be assumed that the growth of new technologies should have a positive impact on labour productivity – the increase in productivity must be directly proportional to the reduction of employee working time. However, the reality is different. Paradoxically, new technologies do not increase leisure time, but increase the need for the employee's time autonomy in that she is able to perform the assigned task regardless of the place or part of the day in which she is currently located. This situation, when the employee is almost always ready to perform the assigned tasks 24 hours a day, 7 days a week, is called "work 24/7" by some authors.[12]

One of the negative consequences of *work 24/7* is blurring the difference between private and professional life of employee, but also the removal of differences between digital, physical, and biological spheres of life, where work performance is not focused on space, place and time, but on the performance of work. It follows from the foregoing that, in the era of coronavirus, the traditional assessment and scheduling of working time is losing importance in a number of professions, as it becomes unlimited and uncountable. The legislator thus faces a difficult task of adapting labour law to these new conditions.

Due to the unrestricted reachability of the employee by the employer, when the employee is forced to perform work even after the end of working hours, for example via e-mail communication or SMS messages, a new concept has been established in recent years, especially in foreign legislation - *the right to disconnection*.[13]

The pioneers in enshrining this right in the legal system are mainly the French, who in Article L2242-8 of their Labour Code with effect from 1 January 2017 introduced for employers with more than fifty employees the right of employees not to reply to work emails after working hours (*le droit à la déconnexion*). However, it must be emphasized that this is a right, not an obligation, and it is therefore purely up to the employee to decide whether to check the e-mail correspondence after working hours. However, if he does not do so, the employee is not entitled to sanction him in any way.

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11 Ibid.

12 Ibid.

13 Ibid.

The constitution of the right to disconnection currently seems to be a possible solution in other states, including the Czech Republic. However, its introduction into the legal system is hampered by the fact that it is increasingly more difficult to distinguish between working hours and rest periods when performing work 24/7, which is a necessary precondition for the enactment of the right to disconnection. According to the French Labour Code, such a right arises for employees only after the end of working hours. If its end can be determined only with difficulty, it will also be difficult to determine whether the employee has the right to disconnect or not.

4. Technostress

Closely related to the issue of work 24/7 is one of the other phenomena that come with modern technology society in terms of mental well-being and health of employees. In today's dynamic times, in which a high emphasis is placed on the speed of work, which is in itself tied to the ability to use technological means, employees are often exposed to pressure from various angles. As society changes, so does work as such, which moves from the material to the virtual environment, and where communication between the participants in labour relations without knowledge of new technologies is practically impossible. This is evidenced by the fact that already according to the study conducted in 2004, 24 % of employees checked work emails from home every ten minutes, another 11 % of employees checked their work emails even when taking leave, and 39% of employees never deleted read work emails.[14] It can be argued that today these numbers will be even greater.

Although labour relations are now governed by the word "flexible", their flexibility can often be illusional, as the employee is required to be always available. Checking e-mail box or mobile phone does not take much time for employees, but this can lead to employer's requirement to monitor them all the time. Although an employee is not bound by the obligation to respond to emails and SMS messages of her employer outside working hours, her fear of the employer's reaction or even loss of employment, if she did not check the email box or mobile phone and thus neglected a possible new task, makes her to endure this practice. Moreover, if there is a kind of friendly relationship between the em-

[14] ŽIDKOVÁ, Zdeňka: Technostres. In Bezpečnost a hygiena práce, č. 2004, s. 13.

ployee and the employer, which has been discussed above, the driving force of the employee is not the anger of the employer, but rather the weakening or loss of a good relationship with him.

In essence, an employee is constantly exposed to stress, which is mostly caused by the rise of modern technology and the employer's emphasis on the ability to control it. In foreign literature, the term *technostress* is adopted for this type of employee stress.[15] This is not a new concept, but rather a kind of dusting off of an old concept, which was called a modern disease in the 1980s, caused by employees' reluctance to introduce new technologies into work processes due to their ignorance and inability to work with them.[16] Today, however, the content of the term technostress is subject to certain changes.

Nowadays, the employee is not stressed by ignorance of modern technologies, but by their excessive use. The employee is required to be always online, and to be able to perform one or more work tasks immediately without further ado. This way of performing work is sometimes also called multitasking. Its unfortunate consequences are especially increased mental effort and stress, which in the most extreme form can lead to burnout syndrome, that can be characterized by cynicism, decreased empathy, emotional coldness, distance, communication disorders, aversion to work and avoiding contact with colleagues.[17]

There can be no doubt that technostress is undesirable, and it is necessary to protect employees from it. However, this protection is hampered by the fact that employers, who are supposed to take care of the safety and well-being of employees and their work environment, can still feed this stress on employees by forcing them to overuse modern technologies, and by the fact that technostress can manifest itself in different professions using different modern technologies in different ways. Therefore, comprehensive legal protection, regardless of the specifics of each case of technostress, is not without difficulties.

The problems outlined above, and the neuralgic issues associated with them are only a selection of many others, that seem to be very pressing in today's unpredictable times. It must be noted that there are also other areas of labour law that were hugely influenced by corona-

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15 DOLOBÁČ, Marcel: Technostres - ochrana duševného zdravia zamestnanca. In Pracovné právo v digitálnej dobe. Praha: Leges, 2017. s. 55

16 Ibid.

17 Ibid.

virus pandemic which exposed weaknesses of current legislation and its (un)ability to react flexibly to a situation that has never occurred before and thus to changing needs of a modern society.

We will demonstrate these problems on an example of legislation of the Czech Republic governing employment of foreigners from countries outside of the European Union.

5. Employment of foreigners from third countries in the Czech Republic

Even before the time of coronavirus pandemic, access to the labour market in the Czech Republic for foreigners from third countries[18] (hereinafter only as "TCNs") was limited as is the case in most of the European countries. The restrictions come on one hand from the quota on a maximum number of applications for certain residence permits that can be submitted by TCNs every year in their countries of origin[19] and on the other hand from the necessary procedure during a change of a job/position in case of TCNs who are already residing in the Czech Republic but do not have a free access to the labour market.

In the Czech Republic, TCNs can be divided into three groups in terms of the possibility of entering the labour market. These are (i) TCNs who have free access into the labour market, (ii) TCNs who have the type of residence permit with which (limited) access to the labour market is necessarily connected, and (iii) TCNs whose residence title is not necessarily linked to the performance of work, which is allowed only by issuing a separate work permit. A separate group then consists of family members of European Union citizens who are treated as Czech nationals when it comes to employment.[20] For the purposes of this paper, we will

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[18] According to the Czech legislation, national of a so-called third country is a person who is not a citizen of the Czech Republic or a citizen of another country of the European Union. However, the definition of a foreigner given in § 1 paragraph 2 of Act No. 326/1999 Coll., on the stay of foreigners in the territory of the Czech Republic and on the amendment of certain acts, also considers a citizen of another state of the European Union to be a foreigner. However, pursuant to § 85 of Act No. 435/2004 Coll., On Employment, a citizen of the European Union and her family member and a family member of a citizen of the Czech Republic are not considered foreigners for the purposes of employing employees from abroad.

[19] See § 181b of the Act No. 326/1999 Coll. in conjunction with the Regulation of the Government of the Czech Republic No. 220/2019 Coll.

[20] See § 3 paragraphs 2 a 3 of the Act No. 435/2004 Coll. Nevertheless, the situation is

focus on those TCNs who plan to enter the Czech Republic for the purpose of employment and TCNs who are already employed in the Czech Republic without free access to the labour market.

Because the area of employment of TCNs in the Czech Republic is very broad and complex, emphasis will be placed only on its selected aspects, while a thorough analysis of residence permits of TCNs will not be presented.[21] Important note must be made regarding the current validity of the information referred to in this paper. From the nature of things, it cannot be guaranteed that all information provided below will be up to date, as the situation is evolving rapidly, and it is not realistic to take into account all the changes that occur over time.[22]

6. Employee card and work permit

The main type of residence permit issued to TCNs who will be working in the Czech Republic for a longer period[23] is called "employee card". An employee card was introduced into the Czech legal system on 24 June 2014 with the aim to implement the Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

In the Czech Republic, the employee card comes in two main types: (i) dual and (ii) non-dual, the difference being that whilst the former combines both the work permit and permission to stay, the latter is used only as a permission to stay. Dual employee cards are thus issued for TCNs without free access to the labour market while non-dual employee cards can be given to foreigners with free access to the labour market or foreigners who have a separately issued work permit.[24]

First condition that must be met to receive a dual employee card is the necessity to announce a vacancy to the regional branch of the Labour Office stating that an employer is interested in employing TCNs

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more complicated than it seems, as the possibility of working is also depended on the residence status of a family member of EU citizen.

21 Simplified explanations of certain areas will be provided where necessary.

22 This article reflects information available on 30 March 2021.

23 I.e., more than 3 months.

24 See § 42g of the Act No. 326/1999 Coll.

with this type of residence permit. After a vacancy is announced by an employer, the test of labour market is performed. This means that for 30 days[25] the Labour Office is searching for a Czech national or a person with a free access to the labour market to fill the vacancy. If 30 days passes and the position is still vacant, it receives an identification number and is listed in the *Central register of job vacancies that can be filled by holders of employee cards* (hereinafter only as the "Register"). Only then can an application be made for a dual employment card, which is inextricably linked to a vacancy in that register.

Because of this procedure a dual employee card always relates to a specific job (there can also be more job positions at the same time) for which it was issued, or which was notified by a TCN as her new job position in connection with changing employer or job procedure.[26] That means that every change in work conditions that was not approved by the Ministry of Interior – weekly working hours, amount of wage, place of work etc., will result into a situation of illegal work.[27] The same goes for accepting a part-time job, which is also subject to previous consent of the Ministry of Interior.[28] This proved to be very important when it comes to the coronavirus pandemic impacts described in detail below.

When it comes to situations where a TCN has a work permit issued by a regional branch of the Labour Office[29], the restrictions on the access to the labour market are similar to those of TCNs with dual employee card. It is again necessary to announce a vacancy to a regional branch of the Labour Office and undergo a test of labour market – only then a work permit can be issued. Every change in work conditions is subject to the issuance of a new work permit. This can be difficult to make in time since most of the cases of TCNs with a work permit are situations of short-term stay in the territory (short-term visas up to 90 days).

Because of the above-mentioned restrictions in changing work conditions where every change is subject to notification/permission issued

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25 For some positions, the period can be shortened to 10 days.

26 If a TCN fulfilled conditions established for making such change by the Act No. 326/1999 Coll.

27 See § 5 para e) of the Act no. 435/2004 Coll.

28 Employment based on the agreement to complete a job (*Dohoda o provedení práce*) is prohibited in general for dual employee card holders. As this type of agreement is very popular for part-time jobs in the Czech Republic, many employers a TCNs use it without knowledge about this restriction.

29 See § 89 and following of the Act no. 435/2004 Coll.

by a state authority, a number of TCNs find themselves performing illegal work every year.[30] The reasons for performing illegal work vary. It may be an intent to reduce contributions paid to the state and gain a competitive advantage, high demand for workers in certain areas which cannot be quickly satisfied by currently available workforce, or – importantly – an undesirable consequence of the complexity of legislation, when employers and foreigners are often unable to identify their rights and obligations without professional assistance, do not distinguish between different types of residence permits and often derive access to the labour market from erroneous assumptions.

7. Coronavirus consequences

Coronavirus pandemic has affected almost every country in the world in many areas of life. Although industry and production almost came to a halt in many countries in the spring of 2020, they gradually recovered after states realized that long-term production downtime was not economically sustainable. The area of employment of TCNs, which has always been inherently linked to the need for international travel, was at a crossroads – should we put ban on the arrival of new foreign employees and thus protect the state's population from possible introduction of the disease or should we continue to allow new foreigners to enter the country and start to work? In my opinion, the Czech Republic, as a state hugely dependent on labour of TCNs[31], chose a not very suitable way of imposing restrictions with many exceptions, which also changed very quickly. Even for experts, it was often very difficult to follow the current rules.

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[30] According to the current statistics of the Labour Inspection, in 2019, a total of 8,160 inspections were carried out, within which illegal work was detected in 622 citizens of the Czech Republic, 207 EU citizens and 3,513 TCNs. See *Roční souhrnná zpráva o výsledcích kontrolních akcí za rok 2019*, Státní úřad inspekce práce, accessible via: http://www.suip.cz/_files/suip-ff57ab22e75b0e506741d3b6dace9e9c/suip_rocni-souhrnna-zprava-o-vysledcich-kontrolnich-akci-za-rok-2019.pdf

[31] Even in 2020, the number of foreigners in the Czech Republic increased by around 40 000, of which 31 500 come from third countries. As of 31 December 2020, there were a total of 634 790 of foreigners in the territory, of which 380 951 were from third countries. Of the foreigners who do not have a permanent residence permit, 50,8% are those who reside in the territory for the purpose of employment. See: *Čtvrtletní zpráva o migraci, IV. 2020*, Ministry of Interior of the Czech Republic. Accessible via: https://www.mvcr.cz/migrace/soubor/ctvrtletni-zprava-o-migraci-iv-2020.aspx

The current legislation also proved to be a challenge as it was not very well prepared for the skyrocketing demand for home-office and temporary need to perform work different from the one that TCNs had a consent for issued by the Ministry of Interior.[32]

Problems of TCNs with restricted access to the labour market in the coronavirus era can be divided into three main areas: (i) restrictions upon entry and in communication with the state's authorities; (ii) inflexibility of the system in the area of changing work performance parameters for TCNs who already work in the Czech Republic; (iii) unfair treatment of employers abusing the weaker position of employees.[33]

There were also several positive changes that helped TCNs to cope with their difficult situation, some of which will be mentioned below. However, since the purpose of this paper is to reflect on the problematic aspects of the coronavirus pandemic, most of the attention will be paid to them.

1.1. Restrictions upon entry and in communication with the state's authorities

Following the declaration of a state of emergency of the Government of the Czech Republic (hereinafter referred to as the "Government") on 12 March 2020[34], entry to the state was prohibited for all foreigners, with the exceptions specified in resolutions of the Government.[35] After loosening measures in the summer of 2020, similar restrictions were reintroduced during autumn of 2020.

In spring 2020 entry was allowed only for foreigners who already had a residence permit in the Czech Republic, citizens of the European Union and other foreigners with a residence permit in the European Union who transited home, foreigners whose entry was in the interest of the state or the so-called commuters. Therefore, with a few ex-

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[32] In this connection, it must be again reiterated that the below described problematic areas concern mainly TCNs who do not have a free access to the labour market.

[33] Detailed reflection on these issues can be also found in my previously published paper in Czech language: Š. Pastorek, *Selected aspects of employment of foreigners from third countries during the SARS-CoV-2 pandemic* In: Labour law and social security law at the time of the coronavirus, J. Pichrt, Morávek J. (eds.), Prague: Eva Roztoková Publishing, 2020, 153 pages. ISBN: 978-80-7630-008-8.

[34] See Resolution of the Government No. 194 of 12 March 2020.

[35] E.g. Resolution of the Government No. 334 of 30 March 2020.

ceptions of specialists, the process of issuing permits for the arrival of third-country nationals who had traveled to the Czech Republic for the purpose of employment was stopped.

These restrictions were coupled with a significant reduction in the activities of embassies of the Czech Republic. Because most of the submissions must be done still in person, the reception of applications for residence permits was suspended, all ongoing administrative proceedings in cases of short-term visas were stopped and all ongoing administrative proceedings in cases of long-term visas and long-term residence permits were interrupted. This turned out to be a problem not only for TCNs, but also for their employers, as all previous efforts and activities to issue a residence permit were thwarted by the cessation of administrative proceedings. This sometimes resulted into considerable financial losses on both sides since not all areas of business ceased or reduced their operations.

The situation of TCNs who were already staying in the Czech Republic has been marked by fundamental changes in activities of the Department of Asylum and Migration Policy of the Ministry of the Interior of the Czech Republic (hereinafter as the "DAMP") which is the main administrative body covering the area of residence of foreigners. Access to most of the DAMP's offices was limited only to most important cases and submission of documents that need to be submitted in person according to Czech legislation was allowed to be done through post office or data-boxes. Interestingly, it required a situation such as the coronavirus pandemic to occur that forced the state to use means of modern times (e-mails, data-boxes etc.). Unfortunately, this change did not last long – since the end of the state of emergency at the beginning of summer 2020, there has been a return to the necessary personal participation of foreigners in many submissions at the DAMP's offices.[36]

Importantly, TCNs were informed via the DAMP website that those of them who were staying legally in the territory on 12 March 2020, may remain in the territory for the duration of the state of emergency without the need to resolve their residence matters.[37] This statement gave many TCNs a false impression that if, for example, their

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[36] Since November 2021 access to the DAMP's offices is in most of the cases subject to previous appointment which can cause problems in urgent situations.

[37] The state of emergency ended on 17 May 2020; validity of this measure was nevertheless extended to 16 June 2020.

residence permit for the purpose of employment (e.g. dual employee card) is about to expire, they do not have to deal with it until the end of the state of emergency and apply for its extension only afterwards. In reality, however, the DAMP measure only meant that a TCN whose residence permit expires during the state of emergency will be "tolerated" in the territory until the end of the state of emergency. This tolerated stay of a TCN was not considered as equivalent to the existence of a valid residence permit.

In spring 2020 and again during autumn 2020 the validity of work permits, and the validity of short-term visas issued for the purpose of employment, which were about to expire were extended for set periods of time.[38] This was only possible if the employment relationship was also extended. This measure therefore enabled foreigners to extend their stay and the performance of dependent work in the territory even in situations where the usual rules do not allow their stay in the territory for more than 90 days.

Changes were also introduced regarding dual employee card holders. The usual procedure for a change of employer for a holder of dual employee card is the notification of such a change where the condition for successful change is, inter alia, the fact that this card was issued for at least 6 months, and a TCN may not take up a new position until at least 30 days have passed since the notification to the DAMP was made.

Based on a governmental regulation, for a TCN who was to perform work for an employer performing crisis measures or assisting in the implementation of crisis measures in a state of emergency, it was sufficient to notify the DAMP of such a change. The conditions for the performance of employment were considered to be fulfilled by the notification made. At the same time, the obstacle of changing employers in the first 6 months after the final decision on issuing an employee card was removed.[39] These changes lasted until the end of the state of emergency on 11 April 2021.

As is apparent from the above-mentioned, the situation became quite confusing during the first wave of the coronavirus pandemic. The huge number of measures incorporated into many governmental

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[38] See Resolutions of the Government no. 214 of 15 March 2020 and 875 of 24 August 2020.

[39] See Resolutions of the Government no. 267 of 19 March 2020, 1050 of 16 October 2020 and 210 of 26 February 2021.

regulations that very frequently changed or canceled combined with the low knowledge of the current legislation by TCNs caused considerable problems.

During autumn of 2020, a number of measures were again introduced to regulate the migration to the Czech Republic. These measures included even more exceptions from general rules than regulations that were in place during spring 2020. An obvious effort to respond to the fact that certain segments of the Czech economy have been dependent on foreign workers for a long time is apparent. Exception of foreigners that could enter the country included[40], inter alia, these categories:

a) short-stay visas for the purpose of seasonal employment and employment, if a TCN is employed in food production, health care or social services;
b) short-stay visas for the purpose of employment, if they are issued in Ukraine to nationals of Ukraine, provided that they do not exceed the limit of such applications laid down by the Ministry of Foreign Affairs;
c) short-stay visas for scientific, key and highly qualified staff;
d) foreigners whose entry is in the interest of the Czech Republic;
e) visas for stays of more than 90 days for the purpose of seasonal employment;
f) special work visas;
g) temporary residence, if the application is submitted by a foreigner included in government programs in order to achieve economic or other significant benefit for the Czech Republic;
h) EC blue cards, long-term residence permits for the purpose of scientific research.

From the provided non-exhaustive list of foreigners and types of residence permits provided above, a clear trend can be read to allow entry into the territory of the state only to those persons whose stay contributes in some respect to the interests of the Czech Republic or

[40] For more see, inter alia: Protective measure of the Ministry of Health no. MZDR 20599/2020-32/MIN/KAN of 2 October 2020, Protective measure of the Ministry of Health no. MZDR 20599/2020-56/MIN/KAN of 14 February 2021. Full list of protective measures can be found on a website of the Government – accessible via: https://www.vlada.cz/cz/epidemie-koronaviru/dulezite-informace/nouzovy-stav-a-mimoradna-opatreni-_-co-aktualne-plati-180234/

those foreigners whose residence status will not allow them to stay in the Czech Republic for a longer period.

Finally, it is interesting to note that some exceptions did not meet the requirement for legislation to lay down general rules without targeting specific groups. In this regard, an example worth mentioning is the Resolution of the Government No. 458 of 24 April 2020 which stipulated that: *"the entry of specialists and key employees from the Republic of Korea necessary for the implementation of the first phase of investments in Hyundai Motor Manufacturing Czech s.r.o. in connection with the start of production of a new ecological car model in the Czech Republic, it is in the interest of the Czech Republic."* It is therefore clear that even in times of emergency, the Government had a special interest in helping the functioning of a particular employer, when no other entity received a similar exemption.

1.2. Inflexibility of the system in the area of changing work performance parameters

It must be stated from the outset that it is quite natural that a state has not been fully prepared for a pandemic situation of a disease of this magnitude. It is therefore no surprise that many problems arose and numerous weak points in the legislation and its rigidity were exposed.

In addition to the areas already mentioned, such as the setting of a "tolerance" period of stay for TCNs in connection with the confusing instruction that TCNs do not have to deal with their residence permit matters during the state emergency, the inflexible legal regulation of dual employee cards became fully apparent.

As was described above, the process of issuing a dual employee card is always associated with the need for the employer to notify the vacancy to the Register. With this announcement, the employer sets the parameters of the vacancy in terms of its characteristics - type of work, place of work, remuneration, etc. This means that a foreigner is entitled, but also obliged, to perform work only to the extent and under the conditions that the employer "preset" before issuing a residence permit, otherwise he could commit illegal work. In my opinion the restrictiveness of this system proved to be fundamentally problematic from several points of view.

First, it is an aspect of the employer's operational need to temporarily transfer employees to a different type of work than that agreed in

the employment contract, or to change the content of the employment contract. Such a need arose, for example, from those employers who, because of the loss of product sales, reoriented their focus to a different area of business, or from those employers who had to close down as a result of governmental measures and wanted to use their employees in other – still functioning – activities.

However, the rigidity of the system did not allow for an appropriate reaction, the result being that an employer could not legally transfer the holder of dual employee card to another job. Likewise, it was not possible to easily change the type of work by an agreement concluded with a dual employee card holder, as the process of changing her position strictly demands announcing new conditions to the Labour Office, performing test of labour market, and subsequent consent given by the DAMP.

The second aspect is a change in the place of work. In this respect, it is appropriate to draw attention to the fact that a dual employee card is normally issued for a vacancy that has a registered place of work with a maximum scope of one municipality (e.g., Prague).

As in the case of a transfer to another job, it is not possible for an employee to be "moved" to another place of work without further ado, even if she agrees to it and even if it is the same type of work as she performed in the original place. Again, there would be the performance of illegal work. The question therefore stands how to assess the situation of a worker who is temporarily working from home which is situated outside of the registered place of her work. Even a few months after the outbreak of the pandemic, there was no clear answer to this issue from the DAMP. In March 2021 DAMP's representatives expressed the opinion that temporary work at home-office is not subject to notification of a change in the job conditions of the employee card holder. However, this position is still not an officially published confirmation. It thus seems quite paradoxical that despite the general recommendation of the use of the home office by the Government, this area is not clear for certain group of employees.

In our opinion, a need for clear and more flexible rules for TCNs working in the Czech Republic is more than apparent. Current state of the legislation did not sufficiently correspond to the reality on the labour market even before the coronavirus pandemic, at least for professions where the presence of an employee at the workplace is not a necessity all the time. This has become even more apparent during the last year.

1.3. Unfair treatment of employers abusing the weaker position of employees

It was relatively soon apparent that the coronavirus pandemic will first affect the low-income professions, workers who are employed on part-time jobs and, last but not least, people whose awareness of their rights and obligations is generally low. These also include TCNs, whose position is further problematized by the fact that they are frequently tied to their jobs because of their residence permits that do not allow for a simple change of a job.

A number of situations where TCNs were forced to sign various agreements to change the parameters of employment, even though they got into a situation of illegal work or were deceived when signing documents whose content they did not understand, occurred.

The fact that these issues occurred to a quite large extent is also evidenced by the fact that the working team for the employment of foreign workers of the Council of the Economic and Social Agreement (hereinafter only as the "CESA")[41] also dealt with the matter.[42] CESA expressed an opinion that employers must treat TCNs in the same manner as Czech employees. At the same time, it was found that employers of employee card holders who are forced to terminate the employment relationship due to the economic effects of the epidemic must follow the procedure required by the law when terminating the employment relationship. At the same time, it was found that employers should, where appropriate, assist employee card holders with the registration of jobseeker status. Last but not least, it was concluded that a sanction consisting in the future restriction of their participation in government-approved migration programs can be applied to employers who have abused the vulnerable position of TCNs.

These recommendations, albeit commendable, could not have a major impact on the problematic situations described above. Unfortunately, employers who are determined to abuse the weaker position of employed foreigners are usually not intimidated by the possibility of

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41 Council of the Economic and Social Agreement is a tripartite body consisting of representatives of employees, employers and the state.

42 Conclusions of 23 March 2020 can be found in Czech language here: https://www.mpo.cz/cz/zahranicni-obchod/ekonomicka-migrace/zavery-z-mimoradneho-jednani-pracovniho-tymu-rady-hospodarske-a-socialni-dohody-pro-zamestnavani-zahranicnich-pracovniku-dne-25--brezna-2020--253687/

imposing sanctions, for example because of the fact that the probability of detecting their unfair practices is not very high.

A TCN who does not want to engage in the illegal practices of his employer[43] has limited ways of resolving such a situation without endangering her residence status. If such an employee was to proceed in the manner provided by law, the first step would probably be to notify the State Inspection of Labour[44] of the employer's actions. An investigation into the matter would commence, which could result in a conclusion on illegal work and the imposition of a fine.[45]

However, this conclusion would also carry a major risk for the employed foreigner and her co-workers, as they risk imposing a fine as well, or worse – the conclusion about the performance of illegal work may lead to the revocation of residence permits and in some cases to the imposition of administrative deportation, which would prevent their re-entry into the territory of the EU for up to 3 years.[46] Only: (i) in cases where a TCN is a witness or injured party in criminal proceedings and her participation in the proceedings is necessary; (ii) in cases where a TCN is a victim of the crime of trafficking in human beings or a person for whom an illegal crossing of the state border has been organized or allowed, or a person who has been assisted in an unauthorized stay in the territory and whose testimony is relevant to detecting the perpetrator or organized group involved in organizing or facilitating illegal crossing of the state border or facilitating to unauthorized residence in the territory; a TCN is allowed to stay in the Czech Republic based on a special types of residence permits issued for the necessary time period.[47] Because of these limited possibilities and risk of losing their residence permits, many foreigners resort to accepting the employer's demands and end up working illegally.

Even if a TCN decides to leave her job without notifying the authorities about practices of her employer and seek a new job, the possibility of changing employers is nowadays fundamentally hampered by the

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43 Provided that she is able to detect them at all.

44 State inspection of labour is an administrative body that oversees adherence to the law by both employees and employers.

45 Amongst other consequences would be e.g. labeling of the employer as "unreliable", which would have a major impact on his possibility of employing other foreigners.

46 See § 119 para 1 c) of the Act No. 326/1999 Coll.

47 See § 33 para 1 b) and § 42e of the Act No. 326/1999 Coll.

situation on the labour market, when the number of vacancies and the willingness of employers to hire new workers is low.

In our opinion, a system that does not discourage foreigners from announcing unfair or even criminal practices of their employers needs to be set up. Only with the support and assistance provided to employees in these difficult situations can the phenomenon of illegal work performed by foreigners be successfully combated. I am far from thinking that a change in legislation is all-saving. Of course, it depends on many other factors such as awareness of foreigners about their rights accompanied by more thorough knowledge of the law among employers, as well as the availability of support for foreigners including for example free legal advice.[48]

8. What is next for employing foreigners? Conclusions

The field of employment of foreigners in the Czech Republic is traditionally associated with complex legislation, which changes very often. In addition, changes are sometimes made for political reasons, with the original proposal being a "victim" of numerous amendments of members of the Parliament during the legislative process. The result is a generally low awareness of foreigners about the content of their rights and obligations.[49]

During the coronavirus pandemic, system inflexibility and weaknesses became more apparent than ever. The issuance of many different measures in the area of regulation of entry and residence of foreigners in the Czech Republic, insufficient government ability to communicate its measures externally to the public (and less so to foreigners) and sometimes incomprehensible instructions given to foreigners by DAMP proved to be problematic.

It is thus a question of how the Czech Republic will cope with these problems. In fact, we are faced with two possibilities: (i) we will wait for the pandemic to subside and then return to the old ways, stating that the problems were caused only by a completely non-standard situation that no one was or could be prepared for, or (ii) we would

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48 As is already successfully practiced by NGOs or integration centers for foreigners.

49 No exception is a situation of a TCN who, before reaching a permanent residence permit, "experiences" three quite different legal regulations of her residence permit. This happened for example between 2016 and 2019 in case of employee card holders.

approach the matter as challenge and consider new and clearer legislation that would better meet the requirements of modern society.

Progress in the area of employment cannot be stopped, the period of the coronavirus pandemic will never be forgotten, nor will the circumstances in which the work took place and the problems of both employers and employees that occurred. Because of this, we believe that the latter mentioned approach is the right one to take.

Section III

10. The escape from (presumption of) subordination

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Summary: *1. An intense lobbying activity. – 2. Why "strong" para-subordination instead of actual subordination? Consequences in terms of applicable legal discipline and cost differentials. – 3. Beyond ambiguity: which notion of subordination? – 4. The latest developments in the draft of the proposed European directive. The social partners' tug-of-war over the presumption of subordination. A view from Italy.*

1. An intense lobbying activity

In May 2022, the European Trade Union Confederation denounced, on its website[1], the attempt being made by some digital platforms to dissuade their employees from asserting the presumption of subordination, envisaged in the draft directive of EU Commission[2], when it becomes concretely usable in court.

Specifically, in the awareness that such an instrument «would likely lead to a reclassification of most platform workers» - as stated by some MEPs from conservative backgrounds[3] - the platforms have reportedly reached an agreement with some insurance companies to offer their employees private insurance that would guarantee an alternative social "safety net" to that of public social security.

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1 The ETUC statement was released on May 11, 2022, and is available at the following web address: https://www.etuc.org/en/pressrelease/platforms-trying-trick-workers-out-rights

2 Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work, December 8th 2021, (COM(2021)0762 – C9-0454/2021 – 2021/0414(COD).

3 See Bertuzzi L., *Leading MEP pushes for tight employment protection in platform workers directive*, in https://www.euractive.com , may 10th 2022.

One such company is "Indeez", which states on the home page of its website that it is «guided by the belief that independent workers should have equal access to the protection and work benefits that a salaried worker takes for granted» in pursuit of the broader goal of making self-employment «more sustainable and attractive»[4].

In the same year, the "insurtech" (i.e., insurance company for workers in technologically advanced industries) Indeez, would begin operating in the European market, particularly in France and the United Kingdom, by entering into a partnership with another insurance company, Crawford & Company.

That company began developing its business in the Asia-Pacific market in 2021, leveraging the local network of another insurance company, the British-U.S. multinational Willis Towers Watson[5]. The purpose of this partnership, according to statements made by general managers of the two firms, would be to create protection and welfare programs tailored to the needs of the region's gig worker community, on the assumption that the gaps in protections provided in these countries are quite significant and many of these workers have no guaranteed income or health care.

This model, in short, although it arose with the appreciable intention of offering welfare networks, albeit of a "private" kind, in countries where it is not given to rely on a strong system of social security protections, would seem to have been imported into the European market for diametrically opposite purposes. And, in fact, this would seem to present aspects of undoubted congruence with the work of labor-based platforms, which have always carried out a massive propaganda aimed at exalting the potential, inherent in autonomy, to liberate labor from its most painful and alienating aspects, and to seek, through this, the complicity of the employees themselves in order to avoid the application of labor legal framework and to discourage the use of litigation[6].

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[4] This is the link to the company's website: https://indeez.eu.

[5] The news is reported at the following online article: https://www.wtwco.com/en-PH/News/2021/11/wtw-partners-with-indeez-to-serve-the-needs-of-gig-workers-and-digital-platforms-in-asia-pacific

[6] This is a viewpoint that can also be found in the recent Amendment 221, signed by some MEPs from the Conservative bloc, which states: «Platform work can offer benefits for students and those who wish to combine study and work at the same time, as well as create access to employment for young people who are not studying, not working and not in training (NEETs) and for people with lower skill levels».

It is not surprising, then, to see the fervent journalistic activism displayed by some MEPs who have sided with the platforms, advancing their point of view[7].

The one under consideration represents, as is evident, an unfavorable option for workers for at least three reasons: *a)* Private insurance cannot be compared with access to a state social security system which follows the worker from one job to another and offers a safety net in case of unemployment; *b)* Private insurance makes workers more vulnerable and dependent on platforms, since they would lose access to social security benefits in any case in case of termination; *c)* finally, the withholding of the insurance premium from the monthly accrued compensation would risk further eroding the wages of workers, which are often lower than those to which they would be entitled if they were employed by the platform (although in some circumstances the absence of additional on-the-job costs for platforms fosters an apparent increase in the net paycheck).

Actually, such a context is a product of the platforms' effective lobbying on the Commission. These, in fact, obtained the inclusion in the draft directive of an express exemption for private insurance companies from the scope of the presumption of subordination. Specifically, recital 23 provided that «Where a digital labour platform decides – on a purely voluntary basis or in agreement with the persons concerned – to pay for social protection, accident insurance or other forms of insurance, training measures or similar benefits to self-employed persons working through that platform, those benefits as such should not be regarded as determining elements indicating the existence of an employment relationship».

This period is preceded by the statement that «ensuring correct determination of the employment status should not prevent the improvement of working conditions of genuine self-employed persons performing platform work».

From the overall regulatory framework of the directive, it is therefore possible to infer that the EU legislator is pursuing the objective of drawing platform work into the sphere of subordination, without prejudice to the possibility of platforms to grant better treatment to

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[7] Kanev R., Skyttedal S. (et. al.), *Digital workers prioritize flexibility – not employment*, June 6th 2022, available at https://www.politico.eu/article/digital-platforms-workers-economy-challenges/

genuinely self-employed workers, without this being relevant from the point of view of the legal qualification of the relationship. And, for that matter, the tenor of the guidelines on collective bargaining for the self-employed would seem to collide with such a reconstruction[8].

2. Why "strong" para-subordination instead of actual subordination? Consequences in terms of applicable legal discipline and cost differentials

While, on the one hand, news of similar attempts by platforms to mount a "counteroffensive" gives us the extent to which the presumption of employment and the rules on algorithmic management and transparency in Chapters III and IV can serve as formidable tools for supporting-or, rather, empowering-union action[9], on the other hand, the backlash resulting from a new fragmentation of the collective interest cannot be underestimated, given the existence of a certain amount of workers interested in maintaining the status quo. It cannot be ruled out, therefore, that such a move aims to depower the union's renewed bargaining strength, such as might result from the approval of the draft directive, making it more difficult to achieve the goal of bringing platform workers more or less back within the sphere of subordination through the contractual instrument.

Thus, the platforms' attempt would be to promote a quasi-integral assimilation of the self-employment relationships held with their user-providers, in terms of labour protections, to actual employment. In this way, they would aspire to persuade workers not to seek in the courts a conversion of the contractual type. The result of such an op-

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[8] EC, Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, C(2022) 6846 final, September 29th 2022; about that, among the many, see the contributions of Rainone S., *Labour Rights Beyond Employment Status: Insights from the Competition Law Guidelines on Collective Bargaining*, in Addabbo T., Ales E. (et al.), *Defining and protecting autonomous work. A multidisciplinary approach*, 2022, Palgrave, London, 167 ff.; Gruber-Risak M., Hatzopoulos V., Mulcahy D., *Policies to support the self- employed in the labour markets of the future*, in *Policy Contribution*, 2022, 8; Aloisi A., *Platform work in Europe: Lessons learned, legal developments and challenges ahead*, in *ELLJ*, 2022, 13, 1; Countouris N., De Stefano V., Lianos I., *The EU, Competition Law and workers' rights*, in *UCL Research Papers*, 2021, 2; cfr. Bellardi L., *Nuovi lavori e rappresentanza. Limiti e potenzialità di innovazione della realtà sindacale attuale*, in *DRI*, 2005, 1, 70 ff.

[9] See Senatori I., Spinelli C., *Litigation (collective) Strategies to Protect Gig Workers' Rights*, 2022, Giappichelli, Torino.

eration would be the development of a model of "strong para-subordination" (so strong as to offer the same protections as subordination) not dissimilar to that envisaged by the discipline of hetero-organized collaborations, introduced by the Italian legislator in 2015 as part of the reforming intervention carried out with the so-called Jobs Act (Art. 2, co. 1, Legislative Decree No. 81/2015)[10].

The needle in the balance, as can easily be guessed, beyond the consequences for workers in terms of access to social protections in case of unemployment, is that of the economic treatment of "waiting time"[11]. In fact, the extensive application of the protections of subordination, without provision for the change in the legal type formally declared by the parties in the contract, does not result in the necessary recognition of minimum working time and hourly pay. It is, in short, a move aimed at ultimately safeguarding the possibility of platforms to continue making use of their extreme form of just-in-time production, offloading the risk of a job tasks lack onto the shoulders of workers.

Should a judge order their employment in their employ, in fact, they would no longer be able, barring attempts to devise *contra legem* adaptations of the discipline of subordination, to sustain the idea that the relationship is characterized by the succession of a myriad of short-

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[10] See, among the many, Razzolini O., *I confini tra subordinazione, collaborazioni etero-organizzate e lavoro autonomo coordinato: una rilettura*, in *DRI,* 2020, 2, 345 ss.; Del Punta R., *Sui "riders" e non solo: il rebus delle collaborazioni organizzate dal committente*, in *RIDL,* 2019, 2(2), 358 ff.; Perulli A., *Il lavoro autonomo, le collaborazioni coordinate e le prestazioni organizzate dal committente*, in *WP CSDLE "Massimo D'Antona".IT*, 2015, 272, 1 ss.; M. Magnani, *Autonomia, subordinazione, coordinazione nel d.lgs. n. 81/2015*, in *WP CSDLE "Massimo D'Antona".IT*, 2016, 294; Marazza M., *Le collaborazioni organizzate: problemi applicativi*, in *GC*, 29 gennaio 2016, 3; Zoppoli A., *La collaborazione organizzata: fattispecie e disciplina*, in *WP CSDLE "Massimo D'Antona".IT*, 2016, 296; Voza R., Collaborazioni organizzate dal committente e autonomia collettiva, in *DLM*, 2016, 3, 527 ff.

[11] On the field of so-called "interstitial" or "third type" times, see Ferraresi M., *Disponibilità e reperibilità del lavoratore: il tertium genus dell'orario di lavoro*, in *RIDL*, 2008, 1, 93 ff.; Mazzanti C., *I tempi intermedi nella nozione binaria di tempo di lavoro*, in *ADL*, 2019, 2(2), 221 ss.; about the «relativization of the relevance of the physical location of performance», see Bellomo S., Rocchi L., *Orario di lavoro, reperibilità, fruizione del tempo libero. La Corte di Giustizia e il parziale superamento della sentenza Matzak del 2018*, in *RIDL*, 2021, 2, 2, 223 ff.; cfr. Moscaritolo I., *Le ore di guardia trascorse dal lavoratore al proprio domicilio con obbligo di recarsi nel luogo di lavoro in "tempi brevi" costituiscono "orario di lavoro"*, in *DRI*, 2018, 3, 959 ff.; Leccese V., Se il lavoro iperconnesso diventa occasione per scaricare sull'uomo il rischio di impresa, Report to the National Conference AGI 2019, in GLav., 2019, XXXIX, 9 ff.; Ferraresi M., *Problemi irrisolti dei tempi di disponibilità e reperibilità dei lavoratori*, in *DRI*, 2022, 2, 423 ff.; A. Tursi, *Le metamorfosi del tempo di lavoro*, *ivi*, 464 ff.

terms self-employment contracts[12]. In other words, this is an emergency maneuver aimed at rescuing the model of "pulviscular" intermittency[13] (i.e., involving repeated switching on and off of the relationship, within' the scope of the opted shift) and, ultimately, neo-mercantilistic[14] and post-salarial[15] re-founding of labor. These transformations, in particular, could be observed on the deconstruction of the traditional temporal coordinates of the relationship[16], the facultization (merely apparent)[17] of work performances and the adoption of piecework pay systems.

The latter, moreover, would be adopted on the mendacious assumption that wages can be commensurate with the pace of work (thus productivity) concretely followed by the worker. However, it appears self-evident that it is the platform, on the basis of orders coming from customers, that determines how many assignments (i.e., how many tasks) the worker can perform[18]. In this respect, an even total assimilation in treatment will never produce the same protection as the recognition of the legal status of employment.

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[12] About that thesis, see Ichino P., Le conseguenze dell'innovazione tecnologica sul diritto del lavoro, in *RIDL*, 2017, I, 525.

[13] *Ex pluris, see* Voza R., *La destrutturazione del tempo di lavoro: part-time, lavoro intermittente e lavoro ripartito*, in P. Curzio (a cura di), *Lavoro e diritti dopo il decreto legislativo 276/2003*, Cacucci, 2004, 253 ff.

[14] In this regard, refer to the important reflections made by Grandi M., *"Il lavoro non è una merce": una formula da rimeditare*, in *LD*, 1997, 557 ss.; Gallino L., *Il lavoro non è una merce. Contro la flessibilità*, 2007, Laterza, Bari, 97 ss.; Supiot A., *The Spirit of Philadelfia: Social Justice vs. the Total Market*, 2012, Verso Books, Londra – New York; Speziale V., *La mutazione genetica del diritto del lavoro*, in *WP CSDLE "Massimo D'Antona".IT*, 2017, 322, 40.

[15] See Chicchi F., Leonardi E., Lucarelli S., *Logiche dello sfruttamento. Oltre la dissoluzione del rapporto salariale*, 2016, Ombre Corte, Verona; Siotto F., *Fuga dal tempo misurato: il contratto di lavoro tra subordinazione e lavoro immateriale*, in *RIDL*, 2010, 2, I, 411.

[16] For an extensive dissertation on the topic, see Bavaro V., *Il tempo nel contratto di lavoro subordinato. Critica alla de-oggettivazione del tempo lavoro*, 2008, Cacucci, Bari;

[17] Several EU member states Supreme Courts have reached this conclusion, and, in particular, Tribunal Supremo, Sala de lo Social, Sept. 25, 2020, No. 805, in LLI, 2020, 6(2), 3 ff., with note by Todolì Signes; see also the paper by G. Pacella, *Il Tribunal Supremo spagnolo ci insegna qualcosa sul lavoro dei riders*, ibid., 16 ff.; Trib. Palermo, november 24th 2020, in *LLI*, 2020, 6(2), 63 ss., with a comment by Barbieri; v. Cavallini G., *Libertà apparente del rider vs. poteri datoriali della piattaforma: il Tribunale di Palermo riapre l'opzione subordinazione*, in *Giustiziacivile.com.*, 24 december 2020; Riccobono A., *Lavoro su piattaforma e qualificazione dei riders: una «pedalata» verso la subordinazione*, in *RGL*, 2021, 1, 241 ss.; may I be permitted to refer Scelsi A. A., *Una nuova onomastica digitale per i poteri del datore di lavoro*, in *Labor*, 2021, 3, 343 ss.

[18] On this profile, may I be permitted to refer once again to Scelsi A. A., *L'altra contrattazione di secondo livello dei rider: il modello Runner Pizza e il perdurante equivoco fra discontinuità oraria e intermittenza*, in *DRI*, 2022, 2, 555 ff.

3. Beyond ambiguity: what model of subordination?

If, as mentioned above, the counteroffensive of platforms threatens to break workers' union unity, on the other hand, it is equally important to ask what model of subordination the social partners aspire to develop. Undoubtedly, it is a matter of working out regulatory models that balance the need for hourly flexibility typical of some production sectors with the need of workers to receive a fair wage, which also includes in its calculation – as previously said – the time lapses of simple "waiting" between one task and another, and to receive an adequate number of working hours per week[19]. It is therefore important for the social partners to devote their efforts in finding the point of maximum balance between the various interests at stake, in order to avoid a transmigration of the most precarious aspects of the gig model into the area of subordination, as has happened, for example, with the proliferation of ten-hour part-timers (as in the case of Just Eat company) or the unbundling of waiting time from the calculation of hourly pay (as in the case of Runner Pizza company)[20].

The road to the approval of a shared organizing scheme that allows workers to have a decent job appears to be as slippery and fraught with obstacles as ever, given the strenuous resistance put up by the platforms at the various stages of the institutional negotiations currently underway in the so-called European trialogue.

The outcome of the negotiation will define which of the two visions of platform work will prevail: whether that of the micro-job for students looking for extra earning opportunities (or people at risk of

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[19] Regarding the well-known agreement signed by Just Eat Takeaway with the transport workers' federations belonging to the three major Italian trade union confederations, by which the company decided to bring riders «back into the organizational and normative context of subordination», it has been argued in doctrine that it was «a company contract under Article 8 by which a kind of part-time (10 hours per week base) on-call was constructed»; These are Tiraboschi's remarks, taken from a Twitter post dated April 5, 2021; on this topic, see Ingrao A. , *Le parti e la natura dell'accordo di secondo livello che disciplina la "subordinazione adattata" dei ciclo - fattorini Just eat – Takeaway.com Express Italy*, in *LLI*, 2021, 1, 116 ff.; Leccese V., *La disciplina dell'orario di lavoro nell'accordo integrative aziendale per i ciclo-fattorini di Takeaway.com Express Italy (gruppo Just Eat)*, *ivi*, 156 ff.; Leccese V., *Il part-time e il lavoro intermittente nell'accordo integrative aziendale per i ciclo-fattorini di Takeaway.com Express Italy (gruppo Just Eat)*, *ivi*, 143 ff.

[20] See Scelsi A. A., *op. cit.*; Tiraboschi M., *Accordi in deroga ex articolo 8 e loro conoscibilità. A proposito di un recente contratto aziendale di regolazione del lavoro dei rider e di alcuni orientamenti della magistratura*, in Boll. ADAPT, 2021, n. 4.

poverty looking for a survival income) or that of a decent job with fair pay and adequate working hours[21].

4. The latest developments in the draft of the proposed European directive. The social partners' tug-of-war over the presumption criteria. A view from Italy.

In the current phase, as mentioned, the trialogue between the European institutions has opened. This will lead to the final proposal for an EU directive.

If, on the one hand, the Gualmini Commission has succeeded in strengthening the initial proposal[22], obtaining the shift of the presumption criteria in the recitals (in such a way that they constitute an open and non-exhaustive list, so as to guide the court's finding without limiting it) and the provision for an automatic reclassification mechanism by the labour inspectorate[23], on the other hand, the lobbying by the platforms might have some positive effect[24]. In particular, it is rumored that the criteria required to trigger the presumption will increase to three from the current two[25]. Such a change could greatly complicate the effective operativeness of the legal presumption, considering that platforms could consequently modify their organizational model more easily and adapt it to the specifics of the new criteria. Looking at the Italian context, such a provision may indulge Assodelivery's desires[26],

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21 See Pollet M., *Gig workers or full timers. Europe balancing's act*, June 24th 2022, available at https://cepa.org/article/gig-workers-or-full-timers-europes-balancing-act/

22 See the online article entitled "*European Parliament rapporteur sets higher bar than European Commission on digital platform workers"*, published on May 10th 2022, Agence Europe Bulletin, available at https://agenceurope.eu/en/bulletin/article/12949/23

23 The mechanism is described in detail in the draft MEP report produced by the Gualmini committee, available at https://www.europarl.europa.eu/doceo/document/EMPL-PR-731497_EN.pdf

24 About platforms' economic overpower and the risks that this could affect the outcomes of the negotiation, as well as, in every case, the trigger of legal presumption, see Rankin J., *Uber whistleblower calls on Europe to tackle 'undemocratic' power of tech companies*, in *The Guardian*, 25th October 2022, available at https://www.theguardian.com/technology/2022/oct/25/uber-whistleblower-calls-on-europe-to-tackle-undemocratic-power-of-tech-companies?CMP=share_btn_tw

25 See Voet L., *Le spectre d'Uber hante les débats sur les travailleurs des plateformes*, in https://www.euractiv.fr, 25th October 2022.

26 Assodelivery is the association founded in November 2018 to ensure unified representation for the main Italian food delivery industries at the negotiating table convened at the Ministry of Labor, in sight of a specific legislation aimed at

expressed during a parliamentary hearing last March 30. At that juncture, in fact, the organization representing food delivery employers considered a provision such as that contained in recital 23 to be "fundamental", even calling for its inclusion among the articles of the directive[27].

Regarding recital 23, furthermore, the status of the directive draft is as it follows: there are, on the one hand, amendments proposing to simply eliminate the problematic insertion mentioned above, and, on the other hand, amendments that merely aim at reducing the scope of application by tying it to the provision of such private insurance in agreements concluded with workers' representatives[28].

As for the automatic reclassification mechanism, however, Assodelivery says it is concerned due to the fact this could lead many workers to "forced subordination". For that reason, the employer association believes that they should be allowed to decide whether or not to avail themselves of the presumption. Considering that this would allow the parties to waive the legal type of subordination, this may constitute an inadmissible proposal which sacrifices the primacy of facts principle[29] on the altar of flexibility. Specifically, Assodelivery would like to see workers not allowed to be automatically reclassified, without being allowed to adhere to a challenge to their status, as well as – and here they border on the absurd – «limiting unpredictable and contradictory interpretations of the criteria for triggering the presumption mechanism, specifying the situations of concrete application of the same and limiting such situations to cases in which it appears

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regulating the work of riders. It is joined by Glovo, Deliveroo, Uber Eats, Social Food and Food to Go. See https://assodelivery.it.

27 Assodelivery, *Tutelare il vero lavoro autonomo tramite piattaforma,* audizione alla Camera dei Deputati del 30 marzo 2022, disponibile al seguente link: https://www.camera.it/application/xmanager/projects/leg18/attachments/upload_file_doc_acquisiti/pdfs/000/007/624/Posizione_AssoDelivery_-_Proposta_di_Direttiva_UE.pdf

28 Amendments to the recitals of the directive are available at the following link: https://www.europarl.europa.eu/doceo/document/EMPL-AM-732875_EN.html

29 This principle, as is well known, is affirmed in ILO Recommendation No. 198/2006, para. 9, and recurs in numerous rulings of the Court of Justice: CJEU Nov. 11, 2010, C-232/09, Dita Danosa v. LKB Līzings SIA; CJEU Oct. 14, 2010, C-428/09, Union syndicale Solidaires Isère v. Premier ministre and others; CJEU Jan. 13, 2004, C-256/01 Debra Allonby v. Accrington & Rossendale College and others. On this point, see S. Borelli, *The Concept of Worker and the Quality of Employment*, in S. Borelli, P. Vielle (eds.), *Quality of Employment in Europe. Legal and Normative Perspectives*, 2012, P.I.E., Brussels, 107 ff.; E. Menegatti, *Taking EU labor law beyond the employment contract: the role of the European Court of Justice*, in *ELLJ*, 2020, 11(1), 26 ff.

more likely that the concrete case concrete case under consideration consists of false self-employment».

Everyone does their own work, needless to say.

The hope in which we should trust is that beyond the legitimate political differences and various orientations of the institutions involved in the negotiation process, a final draft will be reached that can explain some effectiveness on countering mis-classification phenomena (endemic and in some ways intrinsic to the gig economy paradigm itself). In other words, in order for this important intervention to retain its practical utility, the presumption of subordination shall not be too easily circumvented or rebutted in court[30].

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[30] It is necessary to note that, pending the publication of the contribution, the European Parliament has officially adopted its final position on the Directive proposal. This has incorporated a significant portion of the regulatory guidelines outlined in the so-called Gualmini draft, decoupling the presumption of subordination from the reference to an exhaustive list of indices (thus, relocated to the recitals section and substantially increased in their number). As of today, therefore, the presumption mechanism presents much narrower escape routes. In addition, it is worth noting that the text of recital No. 23 has been amended as follows:
"The employment status should not prevent the improvement of working conditions of genuine self-employed persons performing platform work. Member States should take particular care in their national policies to ensure effective protection for workers, especially those affected by the uncertainty surrounding the existence of an employment relationship, including female workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers, and workers with disabilities".

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11. Gig economy: «old wine in a new bottle»?[1]

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First of all, I would like to thank the organizers of this event: I think that moments like this are very valuable and they help so much to understand the state of the world of work in our country and in general in much of the world. This is really important because, from the state of the world of work, obviously derives the rights of the women and men who are part of it and, of course, the rights of who, precisely thanks of his work, try to live a free and dignified existence, as recalled by our Constitution.

I begin this very short speech of mine by apologizing, since it will certainly be less "legal" than the other very interesting ones that have preceded it. However, I am convinced that it is really important to try to step outside the boundaries of our matter in order to fully understand also the cultural location of the phenomena we analyze. Personally, moreover, I set this method as a real scientific goal, since I am a doctoral candidate in comparative private law and therefore I consider it a primary duty.

The culmination of a critical reflection on the gig economy phenomenon can, with due approximation, be placed in 2018, coinciding with a news event that shook international public opinion. In that year, in fact, Don Lane, an English courier from the German logistics company *Dpd* died of a severe diabetes that had been afflicting him for some time, an illness that he had allegedly neglected due to the pace

[1] This short article, with a not strictly academic slant, collects my speech at the conference entitled *Improving working conditions in platform work in the light of the recent proposal for a directive*, held in Rome on 8 July 2022 at the Department of Legal Sciences of the University of Rome La Sapienza. I take this opportunity to renew my thanks for the kind invitation.

of work and the general working conditions he was subjected to[2]. The case caused quite an outcry also because, the day before his death, the worker was fined 150 pounds by *Dpd* for not having made all the deliveries scheduled for that day: the delivery, however, was not actually possible as the worker underwent a medical examination related to the very disease that had been plaguing him for some time and which would shortly afterwards cause his death. The indignation was such that it led *Dpd* to change its company policy on medical examinations of workers[3].

One of probably the most important elements to be highlighted first of all concerns the narrative surrounding the gig economy phenomenon (as with other important "innovations" in the world of work, such as smart working): in fact, one must begin by questioning oneself as to their real revolutionary scope, as to whether or not (and, if so, to what extent) the transformation that they have had the capacity to bring about in the working model, in the working relationship[4]. The first feeling one generally gets when it comes to gig economy is that of being confronted with something profoundly new, innovative, revolutionary. As such, evidently, related to our common idea of development, primarily technological, and therefore unstoppable, something we cannot avoid at all.

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[2] What emerges from the chronicle of the incident is particularly disturbing and becomes clearer when reading the words of Don Lane's widow, Ruth Lane, and Frank Field (House of Commons' work and pensions committee): «Lane had collapsed twice, including once into a diabetic coma while at the wheel of his DPD van during deliveries, when the company fined him in July after he went to see a specialist about eye damage caused by diabetes. He collapsed again in September and finally in late December having worked through illness during the Christmas rush. He died at the Royal Bournemouth hospital on 4 January, leaving behind a widow, Ruth, and a 22-year-old son. He had worked for DPD for 19 years. (…) In the days before he died, he was feeling sick and vomiting blood, Ruth said, adding that he told her: "I really don't want to work, but I have to.". "They are like employees, not self-employed," she said. (…) "How can modern Britain allow workers who are dedicated to their job to be driven to an early grave by such appalling exploitation?" said Field. "DPD have been told time and again that their punitive regime is totally unjust, particularly as their workers are labelled 'self-employed'. Such mistreatment of workers smacks of sweated labour from the Victorian era». *DPD courier who was fined for day off to see doctor dies from diabetes*, *The Guardian* of 5 February 2018.

[3] As reconstructed in C. Crouch, *Se il lavoro si fa gig*, Bologna, 2019, 7.

[4] A. Perulli, S. Bellomo (Eds), *Platform work and work 4.0. Platform work and work 4.0: new challenges for labour law*, Padova, 2021; S. Bellomo, F. Ferraro (Eds), *Modern Forms of Work: A European Comparative Study*, Rome, 2020; S. Bellomo, A. Preteroti, *Recent labour law issues. A multilevel perspective*, Torino, 2019.

In essence, can we really consider the gig economy as something radically new (again, of course, restricting our reasoning to the employment relationship and the dynamics involved in it)[5], or would it be more realistic to consider it as «old wine in a new bottle»[6]? It might be useful to start from the same word, *gig*, which now seems to have the capacity to clearly qualify the economy within which we move. In fact, it is curious how a decidedly ancient expression was chosen, for some dating back to the Middle Ages[7], to qualify a phenomenon unanimously considered to be linked to the present day: the word would in fact be traditionally ascribable to something that *turns*, with a speed and frequency that is all but unpredictable (as it is linked to atmospheric agents such as the wind), perhaps a tool used in textiles. This is certainly an interesting root, evoking the dynamics of platform work: it tends to be unpredictable, depending on the *calls* and their flow determined by the users who use the platform, and in a certain sense this flow recalls the wind, in a circular dynamic devoid of linearity and conclusions, since one call is followed (hopefully for the operator) by the next.

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[5] G. Santoro-Passarelli, *Civiltà giuridica e trasformazioni sociali nel diritto del lavoro*, in *Dir. Rel. Ind.*, 2, 2019, 417-467; R. Voza, *Il lavoro e le piattaforme digitali: the same old story?*, *WP CSDLE "Massimo D'Antona"*, 2017; M. Weiss, *Digitalizzazione: sfide e prospettive per il diritto del lavoro*, in *Dir. Rel. Ind.*, 3, 2016, 651-663; V. Comito, *La sharing economy. Dai rischi incombenti alle opportunità possibili*, Roma, 2016; G. G. Balandi, *Concetti lavoristici impigliati nella rete*, in *Riv. trim. dir. proc. civ.*, 4, 2016, 461-469; P. Tullini, *Digitalizzazione dell'economia e frammentazione dell'occupazione. Il lavoro instabile, discontinuo, informale: tendenze in atto e proposte d'intervento*, in *Rivista giuridica del lavoro e della previdenza sociale*, 4, 2016, 748-764.

[6] «A key posit is that the gig economy is just the latest trend catchphrase capturing a spectrum of flexible (or precarious) work arrangements that have existed in one form or another since the ascendancy of capitalism in the sixteenth century. Indeed, it could be argued that such work arrangements, aside from the post-Second World War welfare state phase in mature, western states, have constituted the dominant arrangement in capitalist societies. The gig economy then could be interpreted as "old wine in a new bottle". However, the emergence of the gig economy has also been posited in terms of technological advancements that have led to the automation of certain functions and the coming together of information technology and telecommunications technologies». A. De Ruyter, M. Brown, *The Gig Economy*, New York, 2019, 1.

[7] «One of the earliest uses of the word "gig" was in the medieval period where a gig referred to something that spins around. Indeed, the rotary washing line, a relatively recent invention, is sometimes colloquially referred to as a "whirligig". The only stable pattern the whirligig has is its rotatory motion, but the direction, speed and frequency of rotation is unpredictable, sporadic and temporary, subject to the vicissitudes of the wind». A. De Ruyter, M. Brown, cit.,

The sense most commonly attributed to the expression, in any case, is traced back to the world of show business: a sense that may, however, be distorted from its original meaning.

In fact, it refers to those entertainers who, truly autonomous and freed from the client, perform in different places, at different times, emancipated from any possible form of heterodirection and, above all, perform for a plurality (even a vast one) of different subjects. Some have observed how the association of the gig economy with show business «seems more like a cynical attempt to associate a problematic form of employment with the glamour of show business than a sincere attempt to define a new form of employment relationship»[8]. However, it must be recognised that, even if associated with the world of entertainment, the expression does not necessarily imply the existence of particularly edifying working conditions: in fact, some put forward the hypothesis that it represents the acronym, perhaps developed in the American jazz scene, of *God Is Good*, meaning the absolutely fortuitous and "providential" nature of the work performance and its remuneration[9].

Right from the start, there is a gap in meaning between what the gig expression might lead one to think of as positive, attributable for example to the carefree attitude we usually glimpse (perhaps unfoundedly) in a life devoted to art or entertainment, and the reality of things.

The characteristics of gig work would therefore be freedom, autonomy, carefreeness, and unpredictability (of place, time, client). It is difficult, however, to categorise in this sense what the chronicles give us of these categories of workers, where the person remains de facto bound to the functioning of the platform (declined in the singular, as the sole employer), at its complete disposal and under its strict direction and organisation[10]. In view of this, we also report a more colourful reconstruction of the term gig associated with this way of working, probably arbitrary and provocatively polemical: that provided by those who link its etymology to that of the word «gigolo»[11].

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8 C. C. Crouch, *Se il lavoro si fa gig*, Bologna, 2019, 10.

9 A. De Ruyter, M. Brown, *The Gig Economy*, New York, 2019, 3.

10 On this point, see extensively A. Somma (Ed.), *Lavoro alla spina, welfare à la carte. Lavoro e Stato sociale ai tempi della gig economy*, Sesto S. Giovanni, 2019

11 «The relationship between stakeholders in the gig economy is also served well by another use of the word gig, as part of the word "gigolo". The gigolo is a male escort or social companion who is supported by a woman in a continuing relationship,

If you think about it, it is an all-too-recurrent narrative linked to great many phenomena concerning the world of work and its most recent transformations: think of the issue of flexibility in contractual forms, the weakening of protections and safeguards reserved for people in relation to the employment relationship, smart working. These are all processes presented as connected to the "changing world" and, therefore, to be addressed almost residually, in the small spaces vacated by these revolutions, by what for some is to be understood as the only possible progress[12].

And so, speaking of the gig economy, is it all that new, innovative and unprecedented?

Indeed, the word gig in itself represents several contradictions: it is still not very clear, for example, where it comes from or why it was adopted to qualify what we are talking about.

These brief remarks, which I have thought to intrigue, stimulate and perhaps even amuse, simply to try to mischievously advance a doubt: could the gig economy be, as someone wrote, «old wine in a new bottle»? could it be a new guise, that of, for example, an algorithm, behind which it tries to hide the well-known need to flex, perhaps precarize, the position of individuals to the advantage of the market of large industrial and financial groups? Could the narrative around the gig economy ultimately be the search for new arguments to achieve the same goals at the expense of individuals and their rights? A narrative that evidently describes itself as inevitable and progressive. We maybe will discover the truth at the end of the story.

Thank you very much for your patience and attention.

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often living in her residence or having to be present at her beck and call.». A. De Ruyter, M. Brown, *The Gig Economy*, New York, 2019, 6.

12 This type of narrative, moreover, has been strongly supported by the OECD, starting with the well-known 1994 *The Job Study*.

12. Protecting workers in uncertain times: theoretical foundations of dismissal protection

Ceren KASIM[1]

Summary: *1. Introduction – 2. Dismissal Protection from a Historical Perspective - 3. Justifying the Idea of Protection against Dismissal - 3.1 From the Worker`s Perspective - 3.2 From the Employer`s Perspective - 3.3 From the Job Seeker`s Perspective - 3.4 From a Societal Standpoint - 3.5 Analysis - 4. Criticism of Protection against Dismissal - 4.1 From the Worker`s Perspective - 4.2 From the Employer`s Perspective - 4.3 From the Job Seeker`s Perspective - 4.4 From a Societal Standpoint - 4.5 Analysis - 5. Conclusion.*

1. Introduction

The coronavirus pandemic and the crisis it caused exacerbated social inequalities and worsened the situation of the most vulnerable groups in society. Taking the social group of women as an example, women account for 39 per cent of global employment but 54 per cent of overall job losses caused by the pandemic, according to the United Nations (UN).[2] Employment losses were also higher for young workers than for older workers.[3] McKinsey calculates that women's jobs were 1.8 times more vulnerable to this crisis than men's jobs.[4] An example from Germany may also help to illustrate the situation. According to a report,

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1 PhD Candidate, Georg August University of Göttingen, ORCID: 0000-0003-1232-6916. This paper is based on different chapters of the author's unpublished PhD dissertation, submitted in April 2021. The paper was presented on 4 May 2021 at the ELLYS Annual Meeting. The author wishes to thanks the attendees for their questions and comments.

2 *UN Women* 2020; *ILO Monitor*, p. 2, 8-9. *McKinsey* 2020.

3 *ILO Monitor*, p. 2, 8-10.

4 *McKinsey* 2020.

the famous fashion retailer H&M was planning to lay off about 800 employees in Germany because of the pandemic crisis, and this would have mainly affected young female employees on parental leave.[5] The company denied the report, but the case itself could nevertheless be a warning for the post-pandemic era. During the pandemic many countries introduced measures to address the effects of the pandemic on the labour market.[6] Economic support to companies, short-time work regulations, such as in Germany, or bans on dismissals, such as in Turkey, became common. After the pandemic-related support and bans are lifted, the economic recession caused by the pandemic crisis may be expected to lead to a wave of dismissals in the short term, but perhaps also in the medium term.

Dismissal protection is one of the most controversial topics in labour law. Despite the efforts of the International Labour Organisation (ILO), there is no global consensus on protection against dismissal. Only 36 out of the 187 ILO member states have ratified the ILO Convention No. 158. Even in countries with statutory dismissal protection regulations, a reduction in the degree of protection can be observed.[7] As demands for flexibility increase with digitalization, protection against dismissal is increasingly seen as an archaic element of labor law. In the post COVID-19 era in particular, when the awaited economic recession begins, there will certainly be an urgent need to protect workers against dismissal. The crisis and the resulting exceptional social, political and legal situation also require a rethinking of the concept of protection against dismissal in the context of labor law and an in-depth theoretical analysis of the foundations of employment protection law. For this reason, this paper focuses on the theoretical grounds for dismissal protection laws.

2. Dismissal Protection from a Historical Perspective

The idea of protecting workers from dismissal has developed step-by-step over the history of European labour rights. The first restrictions on termination can be traced back to the sixteenth century.[8] From this

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5 *Spiegel* 2021.

6 See ILLeJ 2020.

7 *Treu*, p. 4.

8 *Göller*, 13-14, *Hug*, Kündigungsrecht I, 59 ff. *Toews*, 12.

time, the conditions for the termination of a journeyman's contract changed, particularly under the influence of the newly founded associations of journeymen.[9] Journeymen's contracts were still concluded for a limited period of time, but they no longer ended after the expiry of the contract period; rather, it was necessary to give notice of termination before the expiry of the period.[10] The dismissal restrictions at that time served to give the journeyman time to prepare for the possible consequences of a dismissal.

On the other hand, during the Age of Absolutism the rulers wanted journeymen's contracts to be as long as possible, for periods such as ten years.[11] The aim was to have rare or infrequent job changes. To leave his job, a journeyman needed either to obtain his employer's consent or to find a replacement worker.[12] Otherwise, he could expect a penalty or to be forced by the law enforcement agencies to continue the employment relationship.[13] Long-term employment contracts that were non-terminable or were very difficult to terminate, and the desire of workers for freedom and shorter terms of commitment, characterized the Age of Absolutism.[14]

After the Age of Absolutism, economic liberalism shaped economic life in Europe.[15] The state recognized the freedom of the individual, and it was seen as the duty of the state to protect this freedom.[16] All restrictions on economic freedom were considered unjust.[17] In a reflection of the idea of economic liberalism, the doctrine of the free termination of employment prevailed.[18] As an expression of freedom of contract, both sides to the employment contract had the freedom to terminate.[19]

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9 *Göller*, p. 13-14; *Toews* p. 12.

10 *Göller*, p. 14; *Hug*, Kündigungsrecht I, p. 59 ff. For a different view, see *Toews*, p. 14.

11 *Göller*, p. 19; *Hug*, Kündigungsrecht I, p. 64; *Toews*, p. 17, 18; *Kasım*, p. 79.

12 *Göller*, p. 19; *Hug*, Kündigungsrecht I, p. 64.

13 *Göller*, p. 19; *Hug*, Kündigungsrecht I, 64; *Kasım*, p. 79.

14 *Göller*, 20; *A/P/S/Preis*, 1. Part A para. 1; *Kasım*, p. 79.

15 *Göller*, p. 22 ff.; *Hueck/Nipperdey*, Lehrb. I, Lehrb. I, § 62 617; *Kittner/Kohler*, BB Beilage 2000, 1 (18); KSchR/*Deinert* Einl. 50 para. 19; *Wüllenweber*, S. 25; Kasım, 79.

16 *Göller*, p. 22; *Kasım*, p. 80; *Jellinek*, p. 75.

17 *Hug*, Kündigungsrecht I, p. 65; *Kasım*, p. 80.

18 *Hueck/Nipperdey*, Lehrb. I, § 62 617; Toews, p. 58; *A/PS/Preis*, 1. Part A para 1; *Kasım*, p. 80.

19 *Hueck/Nipperdey*, Lehrb. I, § 62 617; Toews, p. 58; *A/P/S/Preis*, 1. Part A para 1; *Kasım*, p. 80.

The collective bargaining agreements of the time saw this in the same way.[20] At the beginning of the post-Absolutism era, freedom of contract and the possibility of terminating one's employment contract at any time meant freedom, and freedom of movement, for workers.[21] However, they later caused the fear of dismissal. The employers exploited the precarious situation of workers.[22] They terminated employment contracts on a daily or even hourly basis.[23] Fearing unpredictable dismissals, the workers accepted any working conditions determined by the employers.[24] Because forced labour certificates still existed, it was almost impossible for many workers to find new work.[25] Trade union members were particularly affected.[26] The wishes and the voice of the workers for better working conditions increased in intensity.[27] People began to question the symmetry of the rights and obligations of the worker and those of the employer with regard to the termination of the employment contract.[28] This was the hour of the birth of dismissal protection. In this period, the goal of dismissal protection was not only to obtain security, but also to deal with the power imbalance of the parties to the employment contract.[29] The underlying concept was based on the observation that the pursuit of equal rights within the general framework of equality, without taking into account the unequal social and economic positions of the parties involved in the employment contract, exacerbates material inequality between employers and workers under the guise of equality. At the end of the nineteenth century, the first regulations restricting terminations were made.[30]

From a historical perspective, the idea of protecting workers from unfair dismissal developed step-by-step over time, especially after industrialization on the European continent, in conjunction with em-

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20 *Göller*, p. 25 ff; *Kasım*, p. 80.

21 *Göller*, p. 27 ff.; *Kasım*, p. 81.

22 *Kasım*, p. 81.

23 *Göller*, p. 26; *Kasım*, p. 81.

24 *Göller*, p. 27 ff.; *Toews*, p. 25; *Kasım*, p. 81.

25 *Toews*, p. 27 ff.; *Syrup*, p. 218; Herkner, Die Arbeiterfrage I, 133 ff., 138, 140.; *Kasım*, p. 81.

26 *Toews*, p. 27, 28; *Syrup*, 160; *Herkner, p.* 140 ff.; *Kasım*, p. 81.

27 *Kasım*, p. 81.

28 *Kasım*, p. 81.

29 *Kasım*, p. 86.

30 *Göller*, p. 28 ff.; *Kasım*, p. 81.

ployment and labour relations.[31] From the beginning, dismissal protection laws served above all to secure the position of trade unions and the civil rights of workers. Accordingly, today's protection against dismissal should be seen as a compromise between the social partners that reflects a questioning of the laissez-faire idea of the employment relationship that prevailed for a long time and the associated unlimited contractual freedom of the parties to the employment contract.[32] Dismissal protection is one of the instruments for achieving material equality in the world of work, and serves to preserve the economic, social and cultural rights of workers.[33]

3. Justifying the Idea of Protection against Dismissal

In the course of its historical development, employment protection has been used in the pursuit of many different objectives in society and has fulfilled many different functions in the world of work.[34] However, there are many different ideas about the importance of dismissal protection for the labour market and for society as a whole.[35] This section presents the arguments in favour of protection against dismissal, addressing the following questions: What positive effects does protection against dismissal have in the world of work? Why does it make sense to have employment protection? What are the arguments in favour of dismissal protection from the perspective of workers, employers, job seekers and society?[36]

3.1. From the Worker`s Perspective

From its origins, protection against dismissal addressed the different power positions of the parties to the employment contract.[37] The first restrictions on termination were intended to give workers the opportunity to prepare for a possible early termination of their contract, be-

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31 *Kasım*, p. 86.

32 *Kasım*, p. 87.

33 *Kasım*, p. 87.

34 *Kasım*, p. 91.

35 *Kasım*, p. 91.

36 *Kasım*, p. 91.

37 *Kasım*, p. 91.

cause of the weak economic position of workers in the labour market and their dependence on the jobs being offered by the employers.[38] The protection against dismissal in its current form, with all its instruments regarding notice periods, severance payments and the right of continuation of employment, also addresses the unequal distribution of power in the employment relationship. Since the employer is the economically and (often) politically stronger party in the labour relationship, and since a job is in most cases the only or main material livelihood for the worker, the assertiveness and the political and economic influence of the parties to the employment contract differ considerably.[39] The social and economic dependence of the worker is more visible in the case of a dismissal, because of the related social and economic insecurities.[40] Thus, the protection against dismissal primarily serves to balance these differences in strength, and aims to neutralize the differences in the power of employers and workers on the labour market.[41]

Protection against dismissal has effects not only on the termination of the employment contract, but also on the labour law relations prior to termination.[42] During the existence of the employment contract, legal protection against dismissal means, above all, stable labour relations and security for the worker.[43] Protection against dismissal causes the labour markets to be less flexible, and consequently requires more investment by employers in their workers.[44] In other words, employers invest more on 'human capital' in labour markets with dismissal protection than they do in labour markets without dismissal protection.[45] In this way, dismissal protection also has positive effects on internal mobility in the workplace.[46] At the same time, it helps to preserve the knowledge and skills acquired by the worker for the benefit of both the worker and the employer.[47] The worker is educated and increas-

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38 *Kasım*, p. 91.

39 *Kasım*, p. 92.

40 *Adomeit*, p. 15.

41 *Kasım*, p. 92.

42 *Kasım*, p. 92.

43 *Kasım*, p. 92.

44 *Kasım*, p. 92.

45 *Höland*, in: Blank (Ed.) 23 (31, 38 n 48); *Walwei*, MittAB 2000, 101 (104); Böcklerimpuls 5/2005, 3; *Jahn*, 92, 210, 115; *Wolter*, NZA 2003, 1068 (1070); *Kasım*, p. 92.

46 *Höland*, in: Blank (Ed.) 23 (38 n 48); *Walwei*, MittAB 2000, 101 (104); *Kasım*, 93.

47 *Coen*, p. 62; *Dorndorf*, ZfA, 1989, 345 (356); vH/L/K/ *Krause* § 1 para 10; *Schwerdtner*,

es the value of his/her work through induction, by gathering experience and by taking action.[48] In particular, the preservation of his/her job, taking into account increasing specialization with regard to rapid changes in technology and performance improvement, is important for the worker.[49] In this respect, the loss of a job and the consequential unemployment can be connected with serious damage to the acquired knowledge and skills and the connection to the working life, as well as with the danger of obsolescence for the labour force.[50] Dismissal protection has a preventive function against arbitrary or hasty dismissals and prevents unfair dismissals of workers.[51]

Another possible positive effect on the world of work of the protection against dismissal is protection against the commodification of the human labour force.[52] A labour market in which there is protection of existing employment contracts and unrestricted competition between job holders and job seekers means, above all, substitutability at will, which results in a competition of performance displacement, and undercutting on the part of the workers.[53] This leads to the danger that the personal rights in the employment relationship are ignored.[54] Dismissal protection laws counteract this and help to prevent workers from feeling alienated from the work they do, which would impair good coexistence.[55] Furthermore, the protection against dismissal is an important instrument for the self-determined organization of workers' lives and the ability of workers to plan their lives.[56]

Moreover, another argument is not to be disregarded: the protection against dismissal makes the enforcement of the employment contract effective, and has positive effects on the degree of organization of the workers.[57] It gives workers the chance to act more courageously,

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Arbeitsrecht I, 115; *Kasım*, p. 93.

48 *Dorndorf*, ZfA, 1989, 345 (356).

49 *Schwerdtner*, Arbeitsrecht I, 115.

50 *Coen*, 62, 72; *Dorndorf*, ZfA, 1989, 345 (356).

51 As: *Rühle*, DB 1991, 1378 (1379); *Wolter*, NZA 2003, 1068 (1072); *Falkenberg*, DB 1991, 2486 (2487). Different view: *Coen*, 24.

52 vH/L/K/*Krause* § 1 para 9; *Kasım*, p. 93.

53 vH/L/K/*Krause* § 1 para 9.

54 vH/L/K/*Krause* § 1 para 9.

55 *Herschel*, RdA 1975, 28 (31).

56 *Wolter*, NZA 2003, 1068 (1070).

57 *Kasım*, p. 94.

without fear of dismissal, and to exercise and pursue their rights without fear.[58] In this way, it enables the effective enforcement of the employment contract and helps to avoid the exploitation of workers in insecure positions, which was the case at the beginning of the twentieth century.[59] The sense of security also facilitates joint actions by workers and can have a democratizing effect on society.[60] Workers who feel safe have more desire and courage to form associations.[61] The stability of employment relationships is also in the interest of trade unions.[62] Making it more difficult to terminate an employment contract at any time helps to ensure stability in the labour market and supports union organization, which has positive effects on the implementation of collective agreements.[63]

From this point of view, the topic of the post-dismissal period is of interest. Despite the digitalized world of work, the productive power of workers is still strongly tied to work and the workplace; they have fewer options available to them than does financial capital in a capital market.[64] After the dismissal of a member of the workforce, the employer usually needs a new worker to fill the position and to allow the work to continue.[65] Since the number of job seekers is, in many areas, higher than the number of vacancies, the chances of the employer filling the job of the dismissed worker with a new worker are high.[66] Instead of filling the position with a new worker, the employer also has the options of eliminating the job or distributing the work to other workers.[67] On the other hand, the time after the termination of his/her employment is often not easy for a worker to cope with. In the case of a dismissal, the worker is very likely to lose her/his only or main materi-

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58 *Kasım*, p. 94.

59 *Kasım*, p. 94.

60 *Kasım*, p.94.

61 *Kasım*, p.94.

62 *Kasım*, p.94.

63 A/P/S/*Preis*, 1. Part B paras 13, 18; *Kasım*, p.94.

64 *Jahn*, p. 111; *Kasım*, p. 94.

65 *Adomeit*, p. 15; *Coen*, 10, 11; *Kasım*, p. 94.As in *Fabricius*, Kollision von Beschäftigungspflichten aus Doppelarbeitsverhältnissen, ZfA 1972, 35 ff.

66 *Coen*, p. 10, 11; *Kasım*, p. 94. As in *Fabricius*, Kollision von Beschäftigungspflichten aus Doppelarbeitsverhältnissen, ZfA 1972, 35 ff.

67 *Kasım*, p. 94.

al livelihood.[68] They can fight to get their job back, but in order to do so they would have to bring a claim for protection against dismissal.[69] If they fullfil the relevant requirements, they will receive unemployment benefit. In any case, they are now 'out of work' and has to find a new job.[70] Since the supply is almost always greater than the demand, the probability of finding a new job immediately is, in many cases, not as high as the probability of the employer filling the vacant job immediately. In addition, there is always the risk of short-term or long-term unemployment.[71] In addition, a job is not only a means for a worker to earn a living, but also a social environment for self-realization.[72] Furthermore, the loss of a job can be followed by the risk of personality deterioration, since work usually serves as a socialization factor in society.[73] All this can contribute to social stigmatization for the dismissed worker. In addition, the dismissed worker has to bear the costs of legal action, living costs, mobility costs and the like.[74]

All these reasons speak for protection against dismissal from the perspective of the worker.

3.2. From the Employer`s Perspective

Protection against dismissal is desirable not only from the perspective of the workers, but also from the perspective of the employers, for various reasons. First and foremost, protection against dismissal means that the development of company-specific knowledge is enabled and expanded.[75] Furthermore, protection against dismissal gives workers independence and freedom to develop new ideas; in this way it has a positive influence on the expansion of company innovation and the willingness to act creatively.[76] In addition, workers become very willing to accept technological or organizational changes caused by

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68 *Kasım*, p. 94.

69 *Coen*, p. 11: *Kasım*, p. 94.

70 *Coen*, p. 11; *Kasım*, p. 94.

71 *Kasım*, p. 94.

72 *vH/L/K//Krause* § 1 para 9.

73 *Reuter*, RdA 1978, 344 (346).

74 *Jahn*, p. 111.

75 *Kasım*, p. 96.

76 *Däubler*, NJW 2002, 2292 (2292).

technological and organizational innovations, because the protection against dismissal reduces the fear of dismissal.[77] In this way, companies reduce their costs of searching for new workers without running the risk of not reaching and maintaining quality standards, and internal mobility and flexibility within the company are increased.[78] Statutory protection against dismissal acts as a motivational tool alongside wages, career promises, etc.[79] The promise of long-term employment strengthens a worker's sense of security, resulting in increased trust in the company and a willingness to use their own knowledge and skills to fulfil the company's requirements.[80] The longer a company employs workers, the more those workers feel connected to the company, identifying themselves more strongly with the company and its goals.[81] The intensified social ties improve the working atmosphere and result in a higher motivation and greater willingness to perform.[82] Stable working relationships increase the quality and effectiveness of the work, promote efficiency and play a productivity-enhancing role.[83]

All these reasons speak for protection against dismissal from the perspective of the employer.

3.3. From the Job Seeker`s Perspective

A special feature of a dismissal protection law is that it does not only affect workers and employers; rather, every provision of a dismissal protection law has a direct or indirect effect on job seekers, due to the competition between workers holding jobs and job seekers. From the job seeker's point of view, there is also much to be said in favour of protection against dismissal, because the aim is to avoid permanent replaceability as a result of a rapid and unexpected return to unem-

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77 *Jahn*, p. 129; *Walwei*, MittAB 2000, 101 (104).

78 *Jahn*, p. 54, 121.

79 *Jahn*, p. 121, 122; *Rühle*, DB 1991, 1378 (1378).

80 KSchR/*Däubler* Einl. 178 para 539.

81 KSchR/*Däubler* Einl. 178 para 539; *Höland*, in: Blank (Ed.) 23 (38 n 48).

82 KSchR/*Däubler* Einl. para 539; *Rühle*, DB 1991, 1378 (1378); *Walwei*, MittAB 2000, 101 (104).

83 *Jahn*, 54, 115; *Rühle*, DB 1991, 1378 (1378); *Wolter*, NZA 2003, 1068 (1070); *vHH/L/K/Krause* § 1 para 10; *Seifert/Pawlowsky*, MittAB 1998, 599 (601).

ployment.[84] It would only be worth the job seeker having access to a job if it were not possible for the employer simply to dismiss workers.[85]

In addition, a job holder has a greater interest in a job than a job seeker, because the disadvantage of losing one's job is greater than the advantage of a new employment relationship.[86] This is based, in particular, on the importance of the job for the worker.

All these reasons speak for protection against dismissal from the perspective of the job seeker.

3.4. From a Societal Standpoint

The protection against dismissal primarily influences the relationship between the parties to the employment contract and the position of job seekers in the labour market, but it also affects the interests of the general public.[87] The stable employment relationships achieved through norms on protection against unfair dismissal promote the preservation of 'social peace'.[88] In this way they serve the social sense of justice.[89] At the same time, statutory protection against unfair dismissal offers the parties to the employment contract the predictability desired by both sides in the employment relationship.[90]

Since information on the labour market is not equally distributed, job seekers are not always sufficiently informed about the skills required and the preferences of job providers or the creditworthiness and development of their corporate structures.[91] For this reason, labour market players are looking for signs that can help them to make an assessment.[92] One of these signs concerns the statutory protection against dismissal. Predictability helps to build mutual trust, which is also the basis for mutual cooperation between workers and employers.[93] If the parties assume that they will have permanent employment

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84 vHH/L/K/*Krause* § 1 para 9.

85 *Nenninger*, p. 298.

86 vHH/L/K/*Krause* § 1 para 9.

87 *Toews*, p. 92.

88 *A/P/S/Preis* 1. Part B para 8.

89 *Kasım*, p. 98.

90 *Kasım*, p. 98.

91 *Jahn*, p. 120.

92 *Jahn*, p. 120.

93 *Kasım*, p. 98.

contact with each other, this has an impact on their strategic decision-making.[94] With protection against dismissal, they worry about their common future, and therefore both parties to the employment contract invest more in the mutual cooperation.[95]

On the one hand, this results in the confidence to cooperate with the other party in a way that is based on reciprocity.[96] On the other hand, the norms of protection against dismissal have employment policy implications by influencing labour market supply and demand. The regulations protecting against dismissal are at the same time decisions about the release of the worker, which are bound up with consequences such as the unemployment or the continued employment of the worker, but they also concern the entrepreneurial freedom of the company within the framework of personnel deployment.[97] In particular, protection against dismissal acts in the market as a macroeconomic stabilizer of employment against the economic cycle.[98] The delaying effect of protection against dismissal (a slower adjustment to different economic phases) helps to create stable employment relationships despite a changing economic situation.[99]

It is important not to ignore other supporting arguments regarding protection against dismissal from the perspective of society as a whole. One of these is the reduction of possible contract costs through protection against dismissal, by means of the establishment of generally applicable rules and standardized legal procedures.[100] Every time a contract is concluded, contract costs must be calculated, and since the protection against unfair dismissal stabilizes the conclusion of the contract, it also minimizes the contract costs.[101] Paying workers overtime instead of using temporary workers or similar flexible forms of work can be cheaper because of savings of 'search, induction and ancillary personnel costs'.[102]

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94 *Seifert/Pawlowski*, MittAB 1998, 599 (602).

95 *Seifert/Pawlowski*, MittAB 1998, 599 (602); *Jahn*, p. 92.

96 *Seifert/Pawlowski*, MittAB 1998, 599 (599, 601 ff.); *Jahn*, p. 120.

97 *Rüthers*, NJW 2002, 1601 (1604, 1605); KSchR/*Deinert* Einl. para 7.

98 *Höland*, in: Blank (Ed.) 23 (31); *Jahn*, p. 103, 125, 127, 128; *Rühle*, DB 1991, 1378 (1378 ff.).

99 *Rühle*, DB 1991, 1378 (1378); *Höland*, in: Blank (Ed.) 23 (31); *Jahn*, p. 125, 131.

100 *Jahn*, p. 26; *Rühle*, DB 1991, 1378 (1378).

101 *Kasım*, p. 99.

102 *Jahn*, p. 54.

All these reasons speak in favour of protection against dismissal from the perspective of society as a whole.

3.5. Analysis

In summary, the arguments presented justify the statement that workers should be protected against unfair dismissal. This is not only true from the perspective of the workers, but also the positive effects of the dismissal speak for a protection against unfair dismissals from the position of the employers, the job seekers and especially from the perspective of the society as a whole. Once again, it is important to emphasise the function of dismissal protection, which balances social and economic power differences between the parties to employment contract and can thus preserve the sense of social justice. This is connected with the promotion of stable labour relations and the workers' sense of security with the cultivation of social ties between the workers themselves and between the workers and the company.[103]

4. Criticism of Protection against Dismissal

The existence or non-existence of protection against dismissal is one of the core issues in the debate on employment protection. Numerous arguments – ranging from entrepreneurial freedom to the rights of job seekers – speak against laws protecting workers against dismissal and make it necessary to take a clear position.

4.1. From the Worker`s Perspective

The protection against dismissal means, above all, job security and a strong local connection for workers, but whether these are desired by all workers can be questioned.[104] A high level of job security also results in higher costs for employers, with the possible consequence of lower pay for workers.[105] The legal protection against dismissal prevents or makes it more difficult to dismiss workers, even if, for ex-

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[103] *Kasim*, p. 99.

[104] *Kronberger Kreis*, p. 25.

[105] *Kronberger Kreis*, p. 24, 25.

ample, the company does not have the necessary orders.[106] For this reason, employers shift the risk to workers and pay lower wages than they would in a situation without legal protection against dismissal.[107] However, job security is not of such great importance to all workers; some prefer more movement and more money to job security.[108] However, this is not possible if there is protection against dismissal. The statutory protection against dismissal excludes the possibility of individual agreements between workers and employers on different working conditions such as job security, costs, remuneration, and so on, and creates security for all without respect for their personal preferences and wishes.[109] The mandatory norms of dismissal protection also reduce the flexibility of workers' offers, because workers cannot offer their services outside the legal regulations.[110]

Even if job seekers are not interested in protection against dismissal, they still experience protection if there is statutory protection against dismissal; this means higher costs for all employees, especially those on lower wages.[111]

All these reasons speak against a statutory protection against dismissal from the position of the worker.

4.2. From the Employer`s Perspective

Whereas there are many arguments in favour of protection against dismissal, there are also many voices raised against this protection from the perspective of the employer. Protection against dismissal has a major impact on entrepreneurial freedom by affecting the company's freedom to take decisions. As a result, the effective and free management of the company suffers an impediment.[112] It has been said that protection against dismissal exerts a negative influence on the economic objectives of companies. The mandatory standards of laws giving protection against dismissal prevent companies from making

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106 *Kronberger Kreis*, p. 26.

107 *Kronberger Kreis*, p. 24, 25.

108 *Kronberger Kreis*, p. 25.

109 *Kronberger Kreis*, p. 24 ff.

110 *Löwisch*, JZ 2000, 806 (811).

111 *Kronberger Kreis*, p. 29.

112 *Barton*, Arbeitgeber 1987, 470 (470).

decisions that are economically favourable to them. The companies obey the regulations giving protection against dismissal and therefore forfeit their competitive opportunities, or they try to find ways to circumvent these regulations.[113]

According to another view, employment protection is a barrier in the labour market, a brake on the adaptability of companies, and an obstacle against the contracting of new employment relationships.[114] Protection against dismissal primarily means additional redundancy costs for companies.[115] If companies strive to adapt their workforce to their production needs, they may not be able to do so because of protection against dismissal.[116] If they are increasing production, companies usually want to employ additional workers.[117] However, protection against dismissal holds them back from making new hires.[118] Potential layoff costs are a part of total labour costs, and because companies cannot predict future labour needs with sufficient certainty and have concerns about potential inconvenience, they refrain from hiring permanent workers despite improved order books or an economic upturn.[119] In the event of declining production or in times of economic recession, companies usually want to reduce their workforce.[120] However, the additional costs resulting from employment protection make it difficult simply to terminate employment contracts in times of economic recession. Stringent protection against dismissal has the effect that employers seek to conclude fixed-term employment contracts, favouring flexible forms of work such as temporary employment contracts and the like, rather than permanent employment contracts.[121]

It is also necessary for companies to introduce technological innovations in their operations. To do this, they need redundancies and new hires in the workforce, because very rapidly changing technol-

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113 *Löwisch*, JZ 2000, 806; *Stebut*, RdA 1997, 293 (293, 295).

114 BTDrucks, 10/2102, 15, 16; BTDrucks, 13/4612, 8; *Barton*, Arbeitgeber 1987, 470 (471); *Rüthers*, NJW 2002, 1601 (1604).

115 *Kronberger Kreis*, p. 16; *Jahn*, p. 26.

116 *Kronberger Kreis*, p. 15; BTDrucks, 10/6555, 1.

117 *Kronberger Kreis*, p. 15.

118 *Walwei*, MittAB 2000, 101 (104); *Kronberger Kreis*, 16.

119 *Jahn*, p. 53, 125; BTDrucks, 10/6555, 1; *Löwisch*, JZ 2000, 806 (806); *Höland*, in Blank (Ed.), 23 (39).

120 *Kronberger Kreis*, p. 15.

121 *Hromadka*, in: Blank (Ed.), 11 (11); *Höland*, in: Blank (Ed.), 23 (27).

ogies always require new knowledge and skills to adapt to changing situations. Workers in the workforce may have knowledge that cannot be used in the current situation, or they may be qualified in a different area. Teaching new knowledge can cost a great deal of money and time, and, despite the money and time, it can be unsuccessful. Furthermore, the opportunity for the company can be lost before success can occur.[122] In this way, protection against dismissal can have a major negative impact on the competitiveness of companies.[123]

Employment protection is also considered to be a threat to efficiency and the quality of work. The movement of workers from employment to temporary unemployment and from unemployment to employment is a factor that increases efficiency in the labour market.[124] Competition between workers thus increases the quality of work. However, employment protection worsens the quality of work and hinders the efficiency of the labour market by jeopardizing the competition between job holders and job seekers and by making it more difficult to switch between unemployment and employment.

All these reasons speak against a statutory protection against dismissal from the position of employers.

4.3. From the Job Seeker`s Perspective

Jobs that become vacant after a dismissal are, strictly speaking, new employment opportunities for job seekers, and if the employers' rights to dismiss are restricted, the job seekers' job opportunities are also restricted.[125] By recognizing the right of the job holder to the continuance of the employment contract, the legislator intervenes with regard to the job seeker's freedom of job choice.[126] Employment protection protects the status quo of job holders at the price of job seekers' access to their jobs.[127] According to one view, job holders enjoy a guaranteed

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122 *Jahn*, p. 129.

123 *Jahn*, p. 129.

124 *Kronberger Kreis*, p. 15.

125 *Papier*, DVBl. 1984, 801 (813); *Barton*, Arbeitgeber 1987, 470 (471); *Reuter*, in: Gamillscheg et al. (Ed.) 404 (417 ff., 421ff.); *Reuter*, RdA 1978, 344 (349).

126 *Papier*, DVBl. 1984, 801 (813); *Barton*, Arbeitgeber 1987, 470 (471); *Reuter*, in: Gamillscheg et al. (Ed.) 404 (417 ff., 421ff.); *Reuter*, RdA 1978, 344 (349).

127 *Oetker*, p. 16.

freedom of occupation and freedom of choice of place of work.[128] Uniform membership of a class should not be the basis for workers' interests.[129] Workers are individuals who pursue different, conflicting and competing interests.[130] Employment protection can reflexively reduce job seekers' chances of finding a job.[131]

This criticism of dismissal protection describes the existence of statutory protection against dismissal as discrimination against job seekers.[132] The protection of the continuance of the employment contract under dismissal protection laws protects the insiders, those who are 'inside', who are in the employment relationship.[133] The outsiders, those who are 'outside', may have fewer opportunities for movement, may find that there are few available jobs, and consequently may enter employment relatively infrequently.[134] The protection of the continuance of the employment contract for job holders has a negative effect in terms of distributive justice, and privileges job holders over job seekers.[135]

In addition, the protection against dismissal affects workers' ability to compete for the job of their choice.[136] It disrupts competition and, ultimately, it may work in favour of the lower-skilled job holder rather than the higher-skilled job seeker, or even in favour of the job holder threatened with termination over the suitable and vulnerable job seeker.[137] Hiring costs, including search, negotiation, and training costs, and firing costs, including notice periods, legal costs, and so on, act as a protection mechanism for the job holders, the insiders, against losing their jobs, and give the insiders power to set their wages above the competitive level.[138] The insiders have the option of concluding company agreements or collective bargaining agreements and the like, or they negotiate their wages individually. However, the new hires must

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128 *Reuter*, 25 Jahre BAG, 410 ff., 418.

129 *Reuter*, 25 Jahre BAG, 411. Kritik zum Klassenbegriff *Reuter*, 25 Jahre BAG, 411 ff..

130 *Reuter*, 25 Jahre BAG, 405ff.; *Reuter*, RdA 2004, 16 ff..

131 BVerfG 13.6.2006, BVerfGE 116, 135, 152. vHH/L/*Krause*, § 1 para 15.

132 *Kronberger Kreis*, 3.

133 *Höland*, in: Blank (Ed.), 23 (31).

134 *Höland*, in: Blank (Ed.), 23 (31); *Jahn*, p. 92, 116 ff.

135 *Papier*, DVBl. 1984, 801 (813); *Reuter*, RdA 1978, 344 (349, 350); *Jahn*, 112.

136 *Herschel*, RdA 1975, 28 (32).

137 *Stebut*, RdA 1997, 293 (294); *Reuter*, RdA 1978, 344 (349).

138 *Jahn*, p. 116, 117.

cooperate with the insiders. If the insiders do not cooperate with the new hires, this has a negative impact on the productivity of the new hires or former outsiders.[139] In the end, the price to be realized for new hires may be much higher than the price of planning, which causes a downward trend in hiring.[140] As a result, unemployment increases.[141] For this reason, job seekers, the outsiders, cannot increase their chances of employment even by undercutting the insiders' wages.[142] Employment protection gives this unfair power to insiders and hurts outsiders' chances of finding new jobs.

All these reasons speak against legal protection against dismissal from the perspective of the job seeker.

4.4. From a Societal Standpoint

A major point of criticism of protection against dismissal stems from the idea of society as a whole with regard to balancing interests. From this point of view, strictly speaking, protection against dismissal is not about a balancing of the employer's interest in terminating the employment contract and the worker's interest in the continuation of the employment relationship.[143] There is no doubt that the employment relationship creates a balance of interests between the parties to the employment contract, who, in accordance with their private autonomy, bind themselves exclusively in accordance with their interests.[144] However, this has nothing to do with protection against dismissal. The legal or statutory binding force of the protection against dismissal is not created by the parties themselves but is an 'external' force.[145] The binding force that is created by the norms of the dismissal protection law does not originate from the parties to the employment contract, but is based on the legislator.[146] However, in accordance with the requirement of justice for everyone, the legislator is obliged to take into account the in-

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139 *Jahn*, p. 117, 119.

140 *Jahn*, p. 117, 119.

141 *Jahn*, p. 117, 119.

142 *Jahn*, p. 117.

143 *Reuter*, RdA 2004, 161 (164).

144 *Reuter*, RdA 2004, 161 (164).

145 *Reuter*, RdA 2004, 161 (164).

146 *Reuter*, RdA 2004, 161 (164).

terests of all people.[147] Dismissal protection affects not only the interests of employers and job holders, but also the interests of job seekers. Consequently, the workforce should not be regarded as a single entity.[148] Job seekers and job holders have competing interests in a job. The protection against dismissal must also take note of and consider the existing competition between workers.[149] The protection of the livelihood of workers cannot be defined as the protective purpose of the protection against dismissal. The interest in protecting a livelihood is not only the job holder's interest in the employment relationship, but also the job seeker's interest in the employment relationship; in principle, both interests are equal.[150] Justifying the protection against dismissal through the same interest is not logical and also not permissible.[151] There is also no reason to value the interests of the job holder in his or her livelihood more highly than the corresponding interests of the job seeker.[152]

In addition, the following difficulties arise from employment protection from the point of view of the proponents of unlimited free exchange of goods in the labour market. From this viewpoint, employment protection impairs the voluntary exchange of goods, which is the core of a functioning free market. An efficient labour market can only be achieved if the players in the labour market can act freely and without restriction. Restricting contractual freedom through legal protection against dismissal entails efficiency losses for the contracting parties.[153] Moreover, employment protection reduces the mobility of the labour market, thus causing inflexible labour markets by making it more difficult to switch from unemployment to employment and back from employment to unemployment.[154] Since employers have to offer potential new workers, job seekers, not only a job but also legal protection against dismissal, they shy away from concluding permanent employment contracts, which prevents the creation of new jobs or de-

147 *Reuter*, RdA 2004, 161 (164).

148 *Reuter*, in: Gamillscheg (Ed.), 405 (410 ff.).

149 *Reuter*, in: Gamillscheg (Ed.), 405 (414).

150 *Reuter*, RdA 2004, 161 (164); *Reuter*, in: Gamillscheg (Ed.), 405 (421 ff.).

151 *Reuter*, RdA 2004, 161 (164).

152 *Reuter*, RdA 2004, 161 (164), *Reuter*, RdA 1978, 344 (350).

153 *Walwei*, MittAB 2000, 101 (103).

154 *Walwei*, MittAB 2000, 101 (102); *Kronberger Kreis*, p. 17.

stroys those jobs that already exist.[155] In this way, dismissal protection has a negative effect on job mobility, prolongs the duration of unemployment and increases the proportion of the long-term unemployed.[156]

It is also worth mentioning that there are those who criticize the complexity of laws protecting against dismissal. The standards set in these laws are often complicated and are sometimes not easy to understand even by experts.[157] This causes difficulties in the application of these laws. The employer cannot estimate what will come after the dismissal, should the worker go to court.[158] This causes uncertainty on the part of employers.[159] Employers have to bear ongoing wage costs, legal costs, consultancy costs and court costs.[160] For this reason, instead of defending themselves in court, employers tend to make severance payments.[161] The lack of clarity in dismissal protection law and the legal uncertainty act as a psychological barrier to new hires for companies.[162]

4.5. Analysis

However, the extent to which these criticisms are correct must be questioned. Especially, the understanding of a dismissal protection law as an external commitment must be viewed skeptically.[163] Actual self-determination is a prerequisite of private autonomy.[164] However, de facto self-determination of the formation of the contract is questionable in the absence of an approximate balance of power of the parties involved, where it is possible for one of the parties to unilaterally determine the terms of the contract.[165] Can we also speak of 'self-determination' in this case? Or is it more of an external determination? For years,

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155 *Kronberger Kreis*, p. 29; *Jahn*, p. 166; *Stebut*; RdA 1997, 293 (293, 295).

156 *Jahn*, p. 296, 326 ff.; *Walwei*, MittAB 2000, 101 (102); *Löwisch*, NZA 2003, 690.

157 BTDrucks, 13/4612, 8; *Barton*, Arbeitgeber 1987, 470 (470); *Löwisch*, NZA 2003, 689 (689); *Rüthers*, NJW 2000, 1601 (1601, 1602).

158 *Kronberger Kreis*, p. 20, 22; *Barton*, Arbeitgeber 1987, 470 (470); *Rüthers*, NJW 2000, 1603, 1608.

159 *Kronberger Kreis*, p. 20, 22; *Rüthers*, NJW 2002, 1601 (1603).

160 *Löwisch*, NZA 2003, 689 (690); *Rüthers*, NJW 2002, 1601 (1603).

161 c*Kronberger Kreis*, 22; *Rüthers*, NJW 2002, 1601 (1603).

162 BTDrucks, 13/4612, 8; *Löwisch*, NZA 2003, 689 (690).

163 *Reuter*, RdA 2004, 161 (164).

164 *Kasım*, p. 118.

165 *Kittner*, AuR 1995, 385 (385, 386).

especially during the first wave of industrialization, the imbalance of power between the parties to labour contracts and the powerful position of employers led to the exploitation of the workforce.[166] From the beginning, the protection against dismissal was a reaction against this tendency and was intended as a kind of empowerment project for the workers. In this context, the arguments that the protection against dismissal exists against the will of the workers and that it impairs competition between workers must also be viewed skeptically.[167]

There are accusations that the legal protection against dismissal prevents possible individual agreements between workers and employers on different working conditions. However, individual agreements tend to be the great exception in the absence of an approximate balance of power between the parties to the employment contract. Rather, the dominant employer dictates the conditions. Accordingly, protection against dismissal should rather be seen as a protector of contractual freedom, since the most important prerequisite of contractual freedom is the free will of the contracting parties. [168]

Finally, the consequences of the dismissal protection law regulations of the labour market must be questioned. Indeed, there are numerous divergent results of empirical studies on the effects of dismissal protection on employment.[169] Protection against dismissal is to be regarded merely as one variable among many others, whose effect on the labour market depends on several other factors.[170] If the legislator, in the name of society and as a reflection of social reality, decides in favour of protection against dismissal, this decision is not based solely on labour market policy objectives. [171] When making the decision, it is important to think through thoroughly what effects a dismissal will have, who will be affected by a dismissal and in what form, and how undesirable consequences of a dismissal can be avoided or mitigated.[172] By means of the decision, the legislator positions itself as to

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166 See *Kasım*, § 5 A and § 5 A. II.

167 *Kasım*, p. 118.

168 *Kasım*, p. 119.

169 *Jahn*, p. 22, 23.

170 *Kasım*, p. 120.

171 *Kasım*, p. 120.

172 *Kasım*, p. 120.

whose rights it wishes to protect, how and to what extent.[173] The decision for protection against dismissal is a deliberate decision for the improvement of legal positions with regard to the social and economic distribution of rights of disposal.[174]

5. Conclusion

Protection against dismissal challenges the classical ideal of the symmetry of rights. Since the employer is the economically and (often) politically stronger party in the employment contract and the employment relationship, and since a job is in most cases the only or the main material basis of existence for the worker, the political and economic strength of the parties to the labour contract are considerably different. Dismissal protection serves primarily to equalise these power differentials, and aims to neutralise the differences in power between employers and workers in the labour market.

Protection against dismissal makes the enforcement of a contract effective. It has a positive effect on the degree of organization of workers. It gives workers the chance to act confidently, without fear of dismissal, and in safety, and to exercise the rights they are entitled, without fear. Dismissal protection protects workers against the commodification of human labour as well as against social stigmatization. It preserves the independence and freedom of workers to develop new ideas, increases operational innovation and promotes workers' willingness to act creatively and to expand the development of company-specific knowledge. It increases their willingness to cooperate, and their mobility and flexibility within the company. At the same time, the protection against dismissal offers predictability to the parties to the employment contract, which is desired by both sides in the employment relationship. It is an important instrument that allows workers to plan and shape their own lives.

Above all, protection against dismissal is a means of equalizing the power differences between the parties to the employment contract and neutralizing the different power positions in the labour market. Because of the lack of balance, individual agreements tend to be the exception; the stronger partner, in this case the employer, usually dom-

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[173] *Kasım*, p. 120.

[174] *Höland*, in: Blank, S. 23 (38); *Walwei*, MittAB 2000, 101 (101, 102); *Kasım*, p. 120.

inates. Therefore, strictly speaking, dismissal protection can be seen as a protection of freedom of contract. Accordingly, dismissal protection empowers workers to overcome the imbalance of power in the labour market, in order to achieve true equality, distributive justice and real freedom of contract. Stable employment relationships achieved through the norms of dismissal protection law also promote the preservation of social peace; in this way they serve to maintain and nurture a sense of social justice. Protection against dismissal is an instrument for achieving material equality in the world of work, and it serves to preserve the economic, social and cultural rights of workers.

In the aftermath of the COVID-19 pandemic, it is critical in our pursuit of a fair, diverse, inclusive, and sustainable economic recovery to evaluate and continually rethink dismissal protection policies. At this historic moment, a stronger commitment to maintaining a harmonious balance between employers and workers in the world of work is needed. This balance is essential not only to protect vulnerable and disadvantaged workers, but also to uphold the principles of social justice.

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13. (Tele)working in the pandemic: challenges for the Portuguese legal framework

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Summary: *1. Introduction — 2. The former teleworking legal framework under the Portuguese Labour Code — 3. Teleworking special legal framework under COVID-19 legislation — 4. The new legal framework for teleworking in 2022 — 5. The employer's duty of no-contact the worker after working hours: a new way to describe the "right to disconnect"? — 6. Conclusions*

1. Introduction

It is known that the classic paradigm of Labour Law is being constantly disrupted by technology and its evolution as the engine of Humanity's progress. Therefore, we are currently far from the classic paradigm of work from the 18th century, *i.e.*, the "typical" labourer and industrialised worker, whose work was necessarily performed physically in the workplace, which, in turn, was necessarily located in the company's premises.

The impact of technology on labour relations is not, however, a new topic in Labour Law[3]. We can even talk about a symbiosis between science and technology that has repercussions on Labour Law, which is one of the sectors of the legal system that, by its very nature, is most ex-

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

[3] Alonso Olea, *Introducción al Derecho del Trabajo*, 4ª ed., Editoriales de Derecho Reunidas, Madrid, 1981, pp. 100 e ss.

posed to the influences of technological changes[4]. Hence, the so-called *Industry 4.0*[5] has profoundly changed the way work is done.

In fact, the *resurgence* of teleworking as a "new" way of providing work or as *atypical work*[6] has gained greater relevance in recent years, not only due to the constant innovation of technology[7] and the changes in the labour market, but also due to the demand, by workers, for greater flexibility at work, in search of a greater and better work-life balance.

Moreover, the COVID-19 pandemic[8] has boosted the resurgence of teleworking in the world[9] and the Portuguese labour market was no

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4 Teresa Coelho Moreira, "Algumas questões sobre trabalho 4.0", *in Prontuário de Direito do Trabalho*, II, CEJ, 2016, (pp. 245-264) p. 245.

5 This term originated from the German government and was later adopted by the European Commission. As Andreja Rojko explains "*Industry 4.0 is a strategic initiative recently introduced by the German government. The goal of the initiative is transformation of industrial manufacturing through digitalization and exploitation of potentials of new technologies. An Industry 4.0 production system is thus flexible and enables individualized and customized products.*" – cf. "Industry 4.0 Concept: Background and Overview", *in International Journal of Interactive Mobile Technologies*. 2017, vol. 11, issue 5, pp.77-90.

6 Defining telework as a concept of atypical work, cf. in the portuguese doctrine, António Monteiro Fernandes, *Direito do Trabalho*, 20ª ed., 2020, Almedina, pp. 243 e ss.; Bernardo Lobo Xavier, *Manual de Direito do Trabalho*, 4ª ed., 2020, Rei dos Livros, pp. 394 e ss.

7 It is already discussed, at present, the possible arrival of Industry 5.0 by 2024, which will involve intelligent robots and machines enabling humans to work more efficiently, especially in a manufacturing context. Esben Østergaard, states that "*Industry 5.0 will make the factory a place where creative people can come and work, to create a more personalised and human experience for workers and their customers.*" e que "*By connecting the way in which man and machine work together, estimates say that Industry 5.0 will mean that over 60% of manufacturing, logistics and supply chains, agri-farming, and the mining and oil and gas sectors will employ chief robotics officers by 2025.*". Cf. "What is Industry 4.0?", available in https://www.twi-global.com/what-we-do/research-and-technology/technologies/industry-4-0 [last access in 02.01.2022].

8 The COVID-19 pandemic, also known as the coronavirus pandemic, is an ongoing global pandemic of coronavirus disease caused by severe acute respiratory syndrome coronavirus (SARS-CoV-2). The virus was first identified in the Chinese city of Wuhan in December 2019. The World Health Organization (WHO) declared a Public Health Emergency of International Concern on 30 January 2020, and a pandemic on 11 March 2020. That urged governments around the world to take matters seriously and prepare for the first wave of the public health emergency with several drastic measures, one of which was the nationwide lockdowns in many countries – cf. "WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020", available in www.who.int [last access 02.01.2022].

9 As the lockdowns or stay-at-home measures entered into force, a large proportion of the workforce was instructed to stay home and continue to work remotely - if their functions made it possible. Organizations that were previously familiar with teleworking, as well as organizations that haven't experimented with teleworking before, were sending their workers home, creating the conditions for the most extensive mass teleworking experiment in history. – cf. ILO Practical Guide:

exception. In fact, during the first few months of the pandemic, most of the Portuguese businesses way of working abruptly changed, due to the confinement rules applied to the country[10], from a fully present and face-to-face regime of work provision to a totally remote and digital work model[11].

Therefore, and because of the enforced experience of teleworking within the pandemic, which led to a paradigm shift in the provision of work[12], the Portuguese legislator felt compelled to review the legal framework that had been in force in the Labour Code since 2003[13].

Given the relevance and pertinence of the study of teleworking in the current labour context, we will begin by analyzing the teleworking legal framework that was in force in the Portuguese Labour Code until December 31st, 2021, moving on to the special legislation approved within the COVID-19 pandemic on telework and ending with the review of the most recent amendment to the Labour Code, which alters

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Teleworking during the COVID-19 pandemic and beyond, 2020, available in www.ilo.org [last access in 02.01.2022].

10 By way of example, according to public data from the Portuguese National Statistics Institute (INE), in the week from 27 April to 1 May 2020, a week characterised by restrictions arising from the state of emergency, it was found that about 58% of respondent companies had people teleworking and 20% had more than 50% of staff actually working in this situation. The percentage of companies with staff teleworking at the time was increasing with the size of the companies, reaching 93% in large companies and not exceeding 30% in micro companies. By sector, reflecting the nature of the economic activity carried out, 67% of companies had more than 75% of workers working at home. On the other hand, the sector that reported the least use of this form of work was the lodging and restoration sector.Cf. "Inquérito Rápido e Excecional às Empresas – COVID-19 – Semana de 27 de abril a 1 de maio de 2020", of 5th May 2020, available in www.ine.pt [last access 02.01.2022].

11 With exceptions for health professionals, essential services workers and those whose activity was not compatible with telework (*e.g.* factory workers).

12 In a scenario such as the COVID-19 pandemic, teleworking has proven itself an important aspect of ensuring business continuity, whereas under normal circumstances its benefits include reduced commuting time, increased opportunity for workers to focus on their work tasks away from the distractions of the office, as well as an opportunity for better work-life balance. Teleworking offers the opportunity for a more flexible schedule for workers and the freedom to work from an alternative location, away from the premises of the employer. There may also be risks, such as isolation (particularly for individuals living alone), and the loss of contact with fellow workers, which it is essential to anticipate and prevent. – cf. ILO Practical Guide: *Teleworking during the COVID-19 pandemic and beyond*, 2020, available in www.ilo.org [last access 02.01.2022].

13 More specifically, in Articles 233 to 243 of Law 99/2003, of August 27th, known as Labour Code 2003, currently revoked by the Labour Code 2009, approved by Law 7/2009, of February 12th, last amended by Law 18/2021, of April 8th. Currently, teleworking is regulated in articles 165 to 171 of the Labour Code.

the teleworking regime of the Labour Code with effect from January 1st, 2022, and enshrines a duty of non-contact by the employer, following, in a unique way, the example of other European countries that already expressly provide for a right to disconnect[14].

2. The former teleworking legal framework under the Portuguese Labour Code

The introduction of telework in the Portuguese labour legislation came with the Labour Code of 2003[15], as a response to the increasing idealization of work flexibility[16] and the need to accompany the constant technological evolution[17]. The current Labour Code[18] of 2009 maintained this trend, with recent and important changes for 2022[19].

The teleworking legal framework has been regulated, until recently, in articles 165 to 171 of the Labour Code[20]. This framework is always based on a mutual agreement between employer and worker (*i.e*. a

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14 For instance, take notice to the french legal system that is considered to be a pioneer in legally recognising this new right. As early as 2013, a national cross-sectoral agreement on quality of life at work encouraged businesses to avoid any intrusion on workers' private lives by specifying periods when devices should be switched off. This right was subsequently made law on 8 August 2016, and is now regulated by Article L.2242-17 of the French Labour Code. Also Belgium, Italy and Spain have legislation that includes the right to disconnect. Without prejudice of a further analysis of the concept further below, Eurofound defines the right to disconnect as a worker's right to be able to disengage from work and refrain from engaging in work-related electronic communications, such as emails or other messages, during non-work hours – cf. Eurofound, EurWork - European Observatory of Working Life, "Right to Disconnect", December 1st 2021, available in www.eurofound.europa.eu [last access 02.01.2022].

15 Law 99/2003, of August 27th, which approved the first portuguese Labour Code.

16 It results from the explanatory memorandum of the 2003 Labour Code proposal that the orientation that presided over its elaboration respected the "openness to the introduction of new forms of work, more adequate to the needs of workers and companies". In this way, the importance of overcoming the most conservative barriers of traditional labour relations was assumed as a necessary adjustment to new labour realities.

17 Bernardo Lobo Xavier, *Manual do Direito do Trabalho*, cit., pp. 395-396.

18 Approved by Law 7/2009, of February 12th .

19 With the approval of Law 83/2021, of 6 of December that enters into force on 01.01.2022.

20 The norms followed, in the most part, the regime of the 2003 Code, suppressing, however, some provisions regarding occupational safety and health (article 239), the regular working period (article 240), the exemption of working hours (article 241), as well as the specification of some secondary duties (article 242) specifically directed to this form of provision of the labour activity. Without prejudice, part of the regime that was suppressed was then included in the current article 169 that establishes the equality of treatment of the teleworker with the other workers of the company that

negotiated solution) and necessarily entails subordinated labour[21],usually outside the employer's premises (but not necessarily at home, since the parties have ample margin to set the rules on work location), using information and communication technologies, which must be predominant (Article 165)[22].

The teleworking regime can then be applied through an agreement with a worker of the company or through the signing of an employment contract with a new worker, admitted in the telework modality. The law requires this regime to be formalized through a written agreement that must contain some formalities[23].

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do not provide this type of work - cf. "Anotação ao artigo 165º", in AA.VV., *Código do Trabalho Anotado*, coord. Pedro Romano Martinez, 12ª ed., 2020, Almedina, pp. 421-422.

[21] Both the 2003 and the 2009 Labour Codes only dealt with subordinate work, *i.e.* work performed under a regime of legal subordination. The concept of *legal subordination* is a difficult concept to grasp and one which we will not go into more deeply in this work for economy of time, but which, in simple terms, corresponds to the subjective legal position of the worker in the employment relationship, i.e., a position of subjection before the authority and power of the employer. In other words, the legal subordination of the worker to the employer may be understood as the result of the collection of powers and duties of the parties within the employment relationship. That is, the legal subordination arising from the employment situation gives rise to the employer's power of direction, embodied in the power to give orders and instructions, with the corresponding duty of obedience to the orders and instructions, in the worker's legal sphere. Therefore, the element of subordination or dependence of the worker before the creditor of the work activity is unanimously recognised as the fundamental distinctive element of the employment contract. For further development of the concept cf. Maria do Rosário Palma Ramalho, "Delimitação do contrato de trabalho e presunção de laboralidade no novo Código do Trabalho – breves notas", in *Trabalho subordinado e trabalho autónomo: presunção legal e método indiciário*, 2011, pág. 37; *Da Autonomia Dogmática do Direito do Trabalho*, Almedina, 2001, pp. 85 ss., as well as, from the same Author, *Do Fundamento do Poder Disciplinar Laboral*, Almedina, 1993, pp. 428 e ss., and also *Tratado de Direito do Trabalho,* II, 8ª edição, Almedina, 2021, pp. 23 e ss; cf. also Estêvão Mallet, "A subordinação como elemento do contrato de trabalho", in *Revista de Direito e de Estudos Sociais*, Julho-Dezembro 2011, pp. 11-13; Teresa Coelho Moreira, "Algumas notas sobre as novas tecnologias de informação e comunicação e o contrato de trabalho subordinado", *in Estudos de Direito do Trabalho*, Vol. II, Almedina, pp. 119-139; or on the concept of legal subordination as heterodetermination of the provision of work cf. António Menezes Cordeiro, *Direito do Trabalho*, vol. II, Almedina, 2020, pp. 449 e ss.

[22] Not to be mistaken, therefore, with the regime of home-work, approved by Law 101/2009 of September 8th and which regulates "*the provision of activity, without legal subordination, at the worker's home or premises, as well as that which occurs in order to, after purchasing the raw material, supply the finished product for a certain price to the seller thereof, provided that in any case the worker is in economic dependence of the beneficiary of the activity*" (article 1). Despite this regime, Portugal did not ratify the ILO Convention C177 ("Home Work Convention") of 1996 (No. 177).

[23] Such as (i) identification, signatures and domicile or head office of the parties; (ii) Indication of the activity to be performed by the worker, with express mention of the telework regime, and corresponding remuneration; (iii) Indication of the

If an agreement is made with a worker of the company, it cannot last more than three years, or the period established in collective bargaining agreement, and in the first 30 days of the execution of this agreement, either party may terminate it. When the agreement terminates, the worker may resume work, under the terms agreed upon or those provided for in collective bargaining agreement.

If an employment contract is concluded, in this modality, with a new worker, the agreement does not have a maximum duration period, and this worker can start working in the same regime as the other workers of the company, either permanently or for a determined period, by written agreement with the employer.

Regarding its scope of application, it has always been discussed amongst scholars if the teleworking legal framework under Labour Code imposed exclusivity (or not) of this form of work, *i.e*. if the parties could only agree in an "all-or-nothing" kind of arrangement, whereas the worker is either on full-time teleworking or full-time present at employer's premises. Some authors defended that article 165 of the Labour Code did not exclude the possibility of a partial teleworking regime or a hybrid scheme, even though, in practice, the reality was that teleworking was seldom implemented in companies[24], and when it was, a full-time teleworking regime would be used[25].

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normal working period; (iv) if the period foreseen for the provision of work under a telework regime is shorter than the foreseeable duration of the employment contract, the activity to be performed after the end of that period (v) ownership of the work instruments as well as the person responsible for their installation and maintenance and for paying the inherent consumption and use costs; (vi) identification of the establishment or department of the company where the worker will be based, as well as who the worker should contact in the context of the provision of work.

[24] According to data from the National Statistics Institute (INE), the number of teleworkers has been increasing in recent years, especially in the northern part of the country. Additionally, at the end of last year, in just four years, this indicator has increased by more than 70% to a total of 120,000 workers. In the second quarter of 2015, according to INE, there were 68,300 Portuguese working from home. However, since that time, that number has almost doubled to a total of 120,700 workers in the second quarter of 2019 – cf. "*Organização do trabalho e do tempo de trabalho - 2.º Trimestre de 2019*", of November 19th, 2019, available at www.ine.pt [last access 02.01.2022]. In the second quarter of 2020, the employed population who indicated that they had always or almost always worked at home was estimated at 1,094.4 thousand people, which represented 23.1% of the total employed population. Of these, 998.5 thousand persons (91.2%) indicated that the main reason for having worked at home was due to the COVID-19 pandemic – cf. "*Trabalho a partir de casa devido à pandemia abrangeu um milhão de pessoas - 2.º Trimestre de 2020*", of August 5th, 2020, available at www.ine.pt [last access 02.01.2022].

[25] Given the rather minimal implementation of the teleworking until recently, there is

In exceptional circumstances, teleworking may be unilaterally requested by the worker[26], most notably those who have children up until three years or are victim of domestic violence. In fact, there is any legal provision in the Labour Code establishing the possibility of the employer to unilaterally impose the provision of work in a teleworking regime[27]. Therefore, we are faced with a regime tendentially voluntary or (exceptionally) unilaterally imposed, but always by and in benefit of the worker[28].

Regarding working tools, in the absence of a stipulation in the contract, those used by the worker are presumed to belong to the employer, who must ensure their installation, maintenance and payment of the inherent costs. The worker, in return, must observe the rules of use of the work tools provided and, unless otherwise agreed, may not use them for purposes other than those inherent to the performance of his or her work.

Teleworkers have the same rights and duties as other workers who perform their duties physically on employer's premises, namely in relation to vocational training and professional promotions or career expectations, limits on normal working hours and other working conditions, health and safety at work and compensation for damages arising from an accident at work or occupational illness.

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no known national case law on this subject.

26 The employer may not oppose any of these requests.

27 In this sense, we could say that the telework legal framework in Portugal has always gone further than the European Framework Agreement on Telework of 2002 in providing situations where the worker can unilaterally impose it against the employer. For more information on the European Framework Agreement on Telework of 2002 please see the "Implementation of The European Framework Agreement On Telework - Report By The European Social Partners, Adopted By The Social Dialogue Committee On 28 June 2006" of September 2006, available at https://www.eurofound.europa.eu/ [last access at 02.01.2022]. Despite the Social Partners efforts, in 2008, the European Commission issued its own report on the implementation of the agreement. It concluded that while the agreement had been successful – with key provisions being implemented in 21 Member States – there was still scope for improvement, including a more extensive definition of telework; ensuring equal treatment for teleworkers; and increasing awareness of the agreement among certain groups and countries – cf. Commission Staff Working Paper – "Report on the implementation of the European social partners' Framework Agreement on Telework" (COM(2008) 412 final), available at https://eur-lex.europa.eu/ [last access at 02.01.2022].

28 Cf. Duarte Abrunhosa e Sousa, ""Legislação Covid" e teletrabalho obrigatório", *in Cielo Laboral*, n.º 4, 2021 (pp. 1-6) pág. 1, available at www.cielolaboral.org [last access 02.01.2022].

In the context of vocational training, the employer shall provide the worker, if necessary, with appropriate training on the use of information and communication technologies inherent to the exercise of the respective activity.

Also, the employer should avoid isolation of the worker, namely through regular contacts with the company and other workers. However, the employer must respect the worker's privacy and his family's rest time, and provide him with good working conditions, both physically and mentally.

Whenever teleworking is carried out at the worker's home, the visit to the (tele)workplace must only have the purpose of monitoring the work activity, as well as the work tools, and can only take place between 9 a.m. and 7 p.m., with the direct assistance of the worker or a person designated by him/her.

This framework has been in force since the approval of the Labour Code 2009, until the December 31st, 2021. If not for the COVID-19 experience regarding the need to promote teleworking, most probably the Portuguese legislator wouldn`t have felt the need to review this legal framework.

3. Teleworking special legal framework under COVID-19 legislation

Within the COVID-19 pandemic, special legislation[29] was enacted on several labour matters, including a specific regime that, while resorting to the same concept of "teleworking" under the Labour Code, does have different characteristics.

The details of each special regime have varied over time since the start of the pandemic, according to the type of measurements and/or intensity of mandatory confinement, ranging from "soft" to "hard teleworking", that included: (i) possibility for the company to unilaterally impose "teleworking"; (ii) possibility of workers requesting telework-

[29] The first law to be approved, under Covid-19 special legislation scheme, that regulated teleworking was Decree-Law 10-A/2020, of March 13th, which stated in article 29 that «*During the enforcement of this Decree-Law, the regime of teleworking may be determined unilaterally by the employer or requested by the worker, without the need for agreement between the parties, as long as it is compatible with the functions performed*.». This special regime was a derogation of the Labour Code framework which, on the contrary, demands an agreement between parties and never permits the employer to unilaterally impose teleworking to workers, even though the opposite is possible.

ing when not voluntarily adopted by the company (specially for workers subject to special health risks[30]); (iii) mandatory "teleworking" for all workers of certain municipalities; or (iv)mandatory "teleworking" for all workers, except for dully justified cases[31].

In October 2020, a new law was approved, establishing an exceptional and transitory regime for reorganizing work and minimizing the risks of transmitting COVID-19 disease within the scope of labour relations[32].

According to this diploma, when teleworking was not imposed or possible due to the nature of its duties, companies would still have: (i) the obligation to manage work schedules in a staggered manner when work is performed at company premises (which is normally the case in factories); (ii) to adopt technical and organizational measures to ensure physical distance and protection of workers; (iii) is required to issue a statement for workers to present to law enforcement agents, if pulled over (to justify the breach of confinement for work related reasons); and, (iv) employer should notify workers, in writing, if work on site is necessary, and the reasons why teleworking may not be implemented (this decision may, however, be challenged by the worker, namely before the labour inspection).

Additionally, the diploma further regulated the special teleworking regime, stating, in article 5-A[33], that: (i) teleworking is mandatory, regardless of the employment relationship[34], whenever the functions in question allow it and the worker has the conditions to exercise them, without the need for a written agreement between the employer and

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30 According to the General Health Administration (DGS), are considered people with special health risks for COVID-19 the following: (i) the elderly; (ii) people with chronic diseases - heart disease, lung disease, cancer or high blood pressure, among others; (iii) People with compromised immune systems (undergoing chemotherapy, treatment for autoimmune diseases (rheumatoid arthritis, lupus, multiple sclerosis or some inflammatory bowel diseases), HIV/AIDS infection or transplant patients). In some DGS orientation's a reference to pregnant women was also made.

31 This framework was in force, alternately, during 2020 and 2021.

32 Decree-Law 79-A/2020, of October 1st.

33 As reffered in Decree-Law 94-A/2020, of November 3rd, that amended Decree-Law 79-A/2020, of October 1st , and added article 5-A regarding teleworking. However, these provisions are not applicable to essential services workers, as established in article 10 of Decree-Law 10-A/2020, of March 13th, as well as to those in relation to which teleworking is not compulsory.

34 Which, again, differs from the Labour Code regime which entails a subordinated labour relationship.

the worker; is mandatory for all companies with establishments in the territorial areas already widely publicised, regardless of the number of workers[35]; and for the companies that use or benefit from the services in relation to temporary workers and service providers who are working for these entities.

Teleworking continues to be mandatory when requested by the worker, conditioned to its compatibility with the job, in the following situations: (i) existence of a medical certificate, attesting that the worker is covered by the exceptional regime of protection for immunosuppressed and chronically ill people; (ii) disabled worker, with a degree of disability equal to or greater than 60% or; (iii) when the physical spaces and the organisation of the work do not allow compliance with the guidelines of the General Health Administration ("DGS") and Labour Inspection ("ACT"), provided that the functions in question allow it[36].

Exceptionally, when the employer believes that the conditions for the worker to exercise his/her duties have not been met, they shall communicate their decision to the worker, with a written justification, and it is incumbent upon the worker to demonstrate that the functions in question are not compatible with the teleworking regime or the lack of adequate technical conditions for its implementation.

The worker may, within three working days after the employer's communication, request the Labour Inspection to verify the requirements and the facts invoked by the employer, giving its decision within five working days, considering, namely, the activity for which the worker has been contracted and the previous performance of the activity in a teleworking regime or through other means of distance work provision.

During this time, the employer must provide the necessary work and communication equipment for teleworking. However, when such provision is not possible and the worker so consents, teleworking may be carried out through the means that the worker already has but the employer is responsible for programming and adapting them to the needs inherent to the provision of telework.

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35 Since previously these provisions were limited to companies with 50 or more workers.

36 In the event of incompatibility of professional duties with teleworking, absences from work were considered justified.

In this context, a worker who does not have the conditions to exercise their functions in a teleworking regime, namely adequate technical or housing conditions, must inform the employer, in writing, of the reasons for his or her impediment.

A teleworking worker has the same rights and duties as other workers, without any reduction in pay[37], under the terms stipulated in the Labour Code or in an applicable collective bargaining instrument, namely regarding limits to normal working hours and other working conditions, occupational health and safety at work and compensation for damages resulting from an work accident or occupational illness, while retaining the right to receive the meal subsidy[38] that was already due.

Therefore, in all national territory, a "hard teleworking" regime, when imposed by the Government, had the following characteristics: (i) it is applied to all professionals *lato sensu*, regardless of the nature and type of contract, also covering independent workers, interns, workers of temporary work agencies and even outsourced workers working in the company's premises; (ii) it is based on a legal obligation, not on mutual agreement between company and worker; (iii) it is mandatory for all whenever (a) compatible with the professional activity and (b) the necessary work conditions are assured; (iv) the use of IT technologies is not mandatory (*i.e*. while from a practical point of view such technologies are usually necessary, they are not actually required for the special regime to apply); (v) work should be performed at the worker's home (*i.e.,* while the special regime does not specifically state it, the underlying objective is to confine workers at home, not having them simply working outside company's premises, such as in shared workspaces).

This "hard teleworking" legal framework was imposed, alternately, from March 2020 until the end of May 2021, when the Government approved a progressive "un-lock down" framework, where each

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[37] This meant that employers had the obligation to pay the full salary if the execution of the employment contract was maintained and also the obligation to pay any other complements that may exist, with some exceptions, such as travel allowance or shiftwork allowance (unless otherwise regulated by the employment contract or collective bargaining agreement).

[38] Given the doubts arising from the Covid-19 special legislation, the portuguese legislator felt the need to expressaly state that the meal allowance – if paid when work was done face-to-face – was due. This results from Decree-Law 94-A/2020, but not from the general Labour Code regime.

week, "hard Covid-19 measures" where smooth out, in order for people to regain their freedom and businesses could reopen or return to normal operation. However, even when not mandatory, teleworking was always suggested and advised by the Government.

Thus, the COVID-19 pandemic has been evolving markedly in Portugal over the past months, especially since November 2021, as in other European countries, in general. Looking at the public health indicators, the Omicron variant has been the main driver of this growth, and it is anticipated that, in short time, will be substantially more prevalent than the others COVID-19 variants.

Given these data and knowing in advance that the Christmas and New Year holidays are, by their nature, times of fraternization and social interaction, the Portuguese Government decided to reinforce the measures to fight the pandemic, in a preventive way, to mitigate the risks potentially associated with the holidays season.

Thus, and in accordance with the Resolution of the Council of Ministers 157/2021, of November 27th, that declared a state of emergency in connection with the pandemic COVID-19 and, more recently, the Resolution of the Council of Ministers 181-A/2021, of December 23rd, teleworking became (again) mandatory from a short period of time, from December 25th 2021, remaining until 9 January 2022[39].

During the term of these COVID-19 special legal acts, the new framework for teleworking entered into force in 1st January 2022 and the application of both regimes had to be combined, albeit with some doubts[40].

4. The new framework for teleworking in 2022

While new specials measures to prevent COVID-19 contaminations were approved, Law 83/2021 was published in the Official Gazette of December 6th, 2021, which, by amending the Labour Code, defined new general rules for telework, effective from January 1st, 2022. These

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[39] The Government does not rule out, however, that given the evolution of the Covid-19 infections in Portugal, it will be necessary to maintain mandatory telework for longer.

[40] Despite the doubts arising from the compatibility of the two frameworks, the special covid-19 regime should prevail before the general labour law framework, since it is a special law that prevails before a general one, according to an *a contrario* argument and application of article 7(3) of the Civil Code (Decree-Law 47344/66, of November 25th).

amendments significantly develop the regulation of various aspects of teleworking, seeking to adapt it to the demands and needs resulting from the work experience during the pandemic.

Prior to the publication of this new law, the Portuguese government presented in June 2021 a "Green Paper on the future of work"[41] ("Green Paper") with the goal of creating guidelines in preparing the country for the challenges of the future of work; transforming uncertainties into opportunities; responding to the challenges that the digital revolution poses in the labour context; and, above all, guaranteeing and promoting decent work.

A revision of the general Labour Code teleworking regime was already discussed in the Green Paper, with the aim of discussing and approving new provisions that would promote the creation and development of *hybrid models* that combine face-to-face work and remote work, in a perspective of balance in the promotion of opportunities and mitigation of telework risks, such as social isolation; regulations on the payment of telework costs to workers, namely installation, maintenance and payment of expenses related to the used work tools; new policies to safeguard the privacy of workers and their families; the assurance of equal treatment at work (payment, working conditions, training and career progression) for teleworkers; the obligation of compliance with occupational health and safety rules, as well as the right to compensation in case of work-related accidents, even when the work is carried out at the worker's home; promoting the incorporation and specific regulation of teleworking in collective bargaining, in order to encourage agreements between the parties; and development of policies that guarantee the inclusion of some groups that traditionally have greater difficulty in accessing the labour market, through the creation of remote jobs, particularly in regions with lower population density, for example through the installation of shared coworking centers.

Therefore, in the Green Paper, some key points were already under discussion, namely that (i) the teleworking implementation agreement shall fix the work time within which the worker shall have the *right to disconnect*[42] all communication systems with the employer, without

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41 "Livro Verde sobre o Futuro do Trabalho", available in www.portugal.gov.pt [last access 02.01.2022].

42 Without prejudice of a further analysis of the (portuguese) "right to disconect", it is important to context that the Green Paper was discussed almost at the same time that Portuguese Charter of Human Rights in the Digital Age was approved by Law

any disadvantage or penalty; (ii) that the legal act aims to be applicable, with the necessary adaptations, *to all situations of distance work without legal subordination,* but in a regime of economic dependence.

However, no specific rules for the possible implementation of *hybrid* schemes (partial face-to-face and remote work) were presented, nor was elucidated if the recognition of a right to disconnect was only applicable under the teleworking regime or not.

These suggestions in the Green Paper were very criticized, mainly because most of the scholars and practitioners understood that was an insufficient regime to justify a legislative change.

Despite those critics, the review of the teleworking general regime was approved and entered into force in January 1st, 2022. This new framework brings all the major changes already promoted and discussed in the Green Paper and can be summarized as follows.

Teleworking is now defined as the provision of work under legal subordination of the worker to an employer, in a place not determined by the latter, using information and communication technologies, and some provisions may be applied to situations of distance work without legal subordination, but in a regime of economic dependence (cf. Article 165).

The scope of application of this regime has not been changed, since both a worker of the company and a worker admitted for this purpose are eligible to exercise the activity through teleworking (cf. Article 166/1).

If the employer proposes a teleworking agreement, the worker's opposition does not have to be justified and the refusal cannot constitute grounds for dismissal or justify the application of any disciplinary sanction (cf. Article 166/6).

No. 27/2021, of 17 May. Thus, this document provides the rights, freedoms and guarantees of citizens in cyberspace and several rights are listed, such as the right to "forgetfulness"; to protection against abusive geolocation; to the development of digital skills or even the right of assembly, demonstration, association and participation in a digital environment. Interestingly enough, the Green Paper goes further than the Charter, since it seeks to expressly enshrine the right to disconnection (the right to disconnection or disconnection from work). This reality, paradoxically, was not mentioned in the Charter, which is more concerned with ensuring access to and use of the Internet (Article 5 of the Charter). The Charter, however, complements the labour regime by ensuring the safeguard of the privacy of workers and their families, particularly in cases where telework is done at home, reinforcing the right to privacy in a digital environment against the use of potentially intrusive software (art. 8 of the Charter).

If the hired activity is in the way that it is inserted in the functioning process, and considering the resources at its disposal, compatible with teleworking, the proposal of agreement made by the worker may only be refused by the employer in writing and justifying the grounds for refusal (cf. Article 166/7).

Therefore, teleworking continues to require formalization through a written agreement[43], which (i) may be part of the initial employment contract, or (ii) be a new and autonomous agreement (cf. Article 166/2).

As for the duration and termination of the telework regime, the law provides that the telework agreement may be concluded for a fixed term[44] or for an indefinite term[45] (cf. Article 167).

In general terms, either party may terminate the agreement, regardless of its fixed or indefinite duration, during its first 30 days (Article 167/4). Therefore, in the termination of the teleworking agreement within the scope of an employment contract of indefinite duration, or whose term has not been reached, the worker has the right to resume the activity in a face-to-face regime, without prejudice to their category, seniority and any other rights recognised to workers in a face-to-face regime with identical functions and/or duration.

The new teleworking legal framework, similarly to the previous one, maintains some exceptional cases of unilateral imposition of telework by the worker, now extending its range of options to workers

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[43] This agreement defines (i) the permanence regime or the alternation of periods of distance work and face-to-face work; (ii) the identification, signatures and domicile or head office of the parties; (iii) the place where the worker will habitually carry out his work, which will be considered, for all legal purposes, his place of work; (iv) the normal daily and weekly working period; (v) the working hours (vi) the contracted activity, indicating the corresponding category; (vii) the remuneration to which the worker will be entitled, including complementary and accessory benefits; (viii) the ownership of the work instruments, as well as the person responsible for their installation and maintenance; (ix) the frequency and method of face-to-face contact made by the employer in order to reduce the isolation of the worker. The workplace provided for in the agreement may be, however, changed by the worker by written agreement with the employer. The employer may define by internal regulations, and in compliance with the General Data Protection Regulation, the activities and conditions under which the adoption of telework in the company may be accepted by the employer.

[44] If for a fixed term - this agreement cannot exceed 6 months, being automatically renewed for equal periods, if none of the parties declare in writing, up to 15 days before the end, that they do not want its renewal.

[45] If it is of indefinite duration - either party may terminate it by written notice to the other, which will take effect on the 60th day thereafter.

with children up to 8 years old[46] in cases where both parents meet the conditions to exercise their activity under a telework regime and provided that it is exercised by both parents in successive periods of equal duration within a maximum reference period of 12 months; for single-parent families or situations where only one of the parents, demonstrably, meets the conditions for exercising an activity through teleworking[47] (Article 166-A).

It is also entitled to exercise the activity in a teleworking regime, for the maximum period of four consecutive or interpolated years, the worker who has been recognised the status of informal caregiver, by means of proof of the same, under the terms of the applicable legislation[48], when this is compatible with the activity performed and the employer has the resources and means for the effect[49].

Regarding work tools, the employer is responsible for providing the worker with the equipment and systems necessary for carrying out the work and for worker-employer interaction, and the agreement must specify whether they are supplied directly or acquired by the worker, with the employer's agreement as to their characteristics and prices.

The worker shall be fully compensated by the employer for all additional costs which the worker incurs as a direct consequence of acquiring or using computer or telematics equipment and systems for carrying out the work, including the additional costs of energy and of the network installed at the place of work in conditions of speed compatible with the communication service requirements, as well as those of maintenance of the same equipment and systems (Article 168).

Under the new legislation, additional expenses are those corresponding to the acquisition of goods and/or services which the worker did not have before the conclusion of the agreement, as well as those determined by comparison with the worker's homologous expenses in the same month of the last year prior to the application of that agreement[50]. This norm has been one of the most controversial issues regarding the

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46 When before was up to 3 years of age.

47 The employer still cannot oppose these requests.

48 Law 100/2019, of September 6th

49 In these cases, the employer may object when the requirements for teleworking are not met or based on imperative requirements of the company's operation.

50 The payment of the compensation is due immediately after the expenses are incurred by the worker, being that this compensation, for tax purposes, is considered as a cost for the employer and not as income of the worker.

new law, which seems to be normal, given that this is an unprecedented novelty in the Portuguese legislation on telework and also due to the short time provided to companies to prepare and adapt to the new labour demands.

Given the requirement of a written agreement to regulate the teleworking regime, there is greater legal security in what concerns the determination of the retribution, as well as the complementary and accessory payments since the parties' agreement is required. Nevertheless, it is still a new burden for the employer to take care of, which did not previously exist.

Thus, it should be through the teleworking agreement that the parties establish values and payment conditions, although its definition and practical implementation does not find in the text of the law any guidelines. In fact, the law imposes the obligation of the employer to pay the additional expenses of the worker with teleworking but hides behind indeterminate concepts that make its practical implementation very challenging.

Additionally, the law provides that as the equipment and systems used in teleworking are supplied by the employer, the conditions for their use beyond the needs of the service are those established by internal regulation[51].

Workers who provide their activity through teleworking have the same rights and duties as other workers with the same category or identical function, namely as regards training, career promotion, limits on working hours, rest periods, including paid holidays, health and safety at work protection, compensation for work accidents and occupational illnesses, and access to information from worker representative structures (Article 169).

Specifically, the teleworker has the right to: (i) at least the same remuneration as he/she would earn in a face-to-face regime, with the same category and identical function; (ii) to participate in face-to-face meetings that take place at the company's premises upon the convening of the trade union and inter-union committees or the workers' committee, under the terms of the applicable law, and may use the information and communication technologies allocated to the provision of work to participate in these meetings, and the collective rep-

[51] If there are no such internal regulations, or if they omit the conditions, they are defined by the agreement.

resentation structures may use the said technologies to disseminate information; and the teleworker is included in the number of workers of the company for all purposes relating to collective representation structures, and may apply for these structures.

The employer shall respect the worker's privacy, working hours and family rest and relaxation periods[52], and provide him/her with good working conditions, both physically and mentally (Article 170).

The capture and use of images, sound, writing, history, or the use of other means of control that may affect the right to privacy of the worker is prohibited.

The Labour Inspection is responsible for monitoring compliance with the rules governing telework (Article 171), including legislation on health and safety at work, and for contributing to the prevention of occupational risks inherent in this form of work provision[53].

Remote work meetings, as well as tasks that, due to their nature, must be carried out at precise times and in articulation with other workers, must take place within working hours and be scheduled preferably 24 hours in advance (Article 169-A).

Workers are required to be present at the company's premises or other location designated by the employer, for meetings, training sessions and other situations requiring physical presence, for which they have been summoned at least 24 hours in advance.

It is, however, the employer's responsibility to pay for these journeys insofar as they eventually exceed the normal cost of transport between the worker's home and the place where he would normally carry out his work in a physical presence regime.

Powers of direction and control[54] of the provision of teleworking work shall be exercised preferentially by means of the equipment and communication and information systems allocated to the worker's ac-

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[52] For this reason, whenever telework is carried out at the worker's home, the visit to the workplace requires prior notice of 24 hours and the agreement of the worker, having as its sole purpose the control of the work activity, as well as of the work instruments and can only be carried out in the presence of the worker during the agreed working hours. Also, when accessing the worker's home, the actions undertaken by the employer should be appropriate and proportionate to the objectives and purposes of the visit.

[53] Inspections that involve visits by the inspection authorities to the home of the worker requires their consent and 48 hours notice of the inspection.

[54] This control must respect the principles of proportionality and transparency, being forbidden to impose permanent connection during the working day by means of image and sound.

tivity, according to procedures previously known by the worker and compatible with respect for their privacy.

The law enshrines special duties of the employer (Article 169-B/1), namely: (i) to inform the worker, when necessary, of the characteristics and method of use of all devices, programs and systems adopted to remotely monitor his activity; (ii) to refrain from contacting the worker during rest time; (iii) to endeavour to reduce the isolation of the worker, promoting, with the frequency established in the telework agreement, or, in case of omission, at intervals not exceeding two months, face-to-face contact with his superiors and other workers; (iv) to guarantee or pay for the maintenance and troubleshooting of the equipment and systems used in teleworking, which belong to them; (v) to consult, in writing, the worker before introducing changes in the equipment and systems used in the provision of work, in the assigned functions or in any characteristic of the contracted activity. In addition to disciplinary responsibility, breaches of the duties indicated may result in civil liability, under the general terms.

The worker, in turn, also has special duties (Article 169/2), namely to inform the company in good time of any malfunction or defect in the operation of the equipment and systems used in the provision of work; to comply with the employer's instructions concerning the security of the information used or produced in the development of the contracted activity; to respect and observe the restrictions and constraints previously defined by the employer concerning the use for personal purposes of the work equipment and systems supplied by the employer; to observe the employer's guidelines on health and safety at work[55].

The law once again provides specific rules on safety and health at work (Article 170-A), stating that telework is prohibited in activities that involve the use of or contact with substances and materials hazardous to the health or physical integrity of the worker, except if performed in facilities certified for this purpose[56].

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[55] In addition to disciplinary responsibility, breaches of the duties indicated may lead to civil liability under the general terms.

[56] The employer organises, in specific and appropriate ways, respecting the worker's privacy, the necessary means to fulfil its responsibilities in terms of occupational health and safety at work, promoting the carrying out of occupational health exams before the implementation of teleworking and, subsequently, annual exams to evaluate the worker's physical and mental aptitude to carry out the activity, the repercussion of the activity and the conditions in which it is carried out on the worker's health, as well as the preventive measures that are deemed appropriate.

Finally, the legal scheme of compensation for accidents at work and occupational illnesses[57] applies to teleworking situations (Article 170-A/5), the place of work being considered the place chosen by the worker to habitually carry out his activity and the working time all the time during which, it is proven, he is providing his work to the employer.

Given the novelty of the regime, its practical implementation, with consequent challenges and problems, are not yet fully known. To this extent, it will be necessary to wait for a greater consolidation of the regime in the Portuguese labour market so that we can, with greater accuracy, find the practical solutions that the law has not provide us.

5. The employer's duty of no-contact the worker after working hours: a new way to describe the "right to disconnect"?

The Portuguese legislator, in a not uncritical way, decided to include in a law that aimed, in general, to change the general framework of telework, enshrined in the Labour Code, a *duty of abstention of contact of the employer* or, as more well known, the worker's right to disconnect.

In particular, the new article 199-A - which is incorporated in the Labour Code - applies to all employment relationships, whether face-to-face or at a distance and it finally addresses directly the issue that so much debate has bring lately regarding the existence of a "right to disconnect" of any worker.

On an EU level, and according to the Eurofound concept[58], the right to disconnect refers to a worker's right to be able to disengage from work and refrain from engaging in work-related electronic communications, such as emails or other messages, during non-work hours.

Despite the concept put forward by Eurofound, there is no European legal framework directly defining and regulating the right to

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Therefore, the worker shall give access to the place where he/she works to the professionals designated by the employer who, under the terms of the law, are responsible for the evaluation and control of safety and health conditions at work, during a previously agreed period, between 9am and 7pm, but always within working hours.

57 Law 98/2009, of September 4th.

58 Cf. European Observatory of Working Life, "Right to Disconect", of December 1st, 2021, available in https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect [last access in 20 December 2021].

disconnect[59]. On January 21st, 2021, however, the European Parliament passed a resolution[60] in favour of the right to disconnect, calling on the Commission[61] to prepare a directive "that enables those who work digitally to disconnect outside their working hours"[62]. This directive "should also establish minimum requirements for remote working and clarify working conditions, hours and rest periods". The resolution is accompanied by a legislative proposal that defines disconnecting as "not [engaging] in work-related activities or communications by means of digital tools, directly or indirectly, outside working time".

Following the will of the EU, the Portuguese legislator decided, however, differently from other European countries[63], and purposely,

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59 The Working Time Directive (Directive 2003/88/EC), however, refers to a number of rights that indirectly relate to similar issues, in particular the minimum daily and weekly rest periods that are required to safeguard workers' health and safety. Furthermore, the right to disconnect is related to attaining a better work–life balance, an objective that has been at the core of recent European initiatives – for example, Principle 9 ('Work–life balance') and Principle 10 ('Healthy, safe and well-adapted work environment and data protection') of the European Pillar of Social Rights, as well as the Work–Life Balance Directive – although they do not refer specifically to the right to disconnect.

60 European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html#title1 [last access on 20 of December].

61 In its EU strategic framework on health and safety at work, the Commission explains that it will "ensure appropriate follow-up", without mentioning any particular dates or instruments. It therefore appears that the issue of the right to disconnect is not considered urgent in the eyes of the Commission, which seems to want to evaluate the effects of the 2020 European agreement on digitalisation with regard to the application of the right to disconnect in companies before initiating a legislative procedure.

62 As context, since the outbreak of the COVID-19 pandemic, working from home has increased by almost 30%. This figure is expected to remain high or even increase. Research by Eurofound shows that people who work regularly from home are more than twice as likely to surpass the maximum of 48 working hours per week, compared to those working on their employer's premises. Almost 30% of those working from home report working in their free time every day or several times a week, compared to less than 5% of office workers – cf. Eurofound.europa.eu.

63 France was the pioneer in expressly recognising this new right in a law. As early as 2013, a national cross-sectoral agreement on quality of life at work encouraged businesses to avoid any intrusion on workers' private lives by specifying periods when devices should be switched off. This right was subsequently made law on August 8th, 2016, and is now regulated by Article L.2242-17 of the French Labour Code. Also Belgium, Italy and Spain have legislation that expressly recognises the right to disconnect. In Portugal, some Authors defended that the consagration of a right to disconect was not needed since the Labour Code already provided norms that assured the right of the worker to disconect, even though not expressly but

to put the burden of compliance on the employer, reinforcing the idea that is not just a right of the worker to be able to disconnect from work and, therefore, not be disturbed outside working hours, but also, and mostly, a duty of the employer to abstain of such acts. This configuration of the law was deliberate, in order to avoid that the worker had to claim and enforce his right putting himself in a vulnerable position to possible retaliations by the employer.

In general terms, this ban on employers contacting workers outside working hours applies in case work is performed within a relationship of legal subordination and also for work not performed within such relationship but where the worker is subjected to economic dependency. Therefore, the employer must refrain from contacting the worker (*lato sensu*) outside working hours and during rest periods, except in situations of force majeure.

The law also provides that any less favourable treatment given to a worker, namely as regards working conditions and career progression, because of exercising the right to disconnect, is considered a discriminatory action.

However, the law does not provide a specific answer regarding how the employers should reconcile the duty to refrain from contact with the need to do so, particularly in situations of force majeure. In fact, the law does not provide for a definition of force majeure in this case, even though it is safe to say that the law is referring to situations that are characterised by unpredictability and inevitability[64] in which it is essential[65] to contact the worker outside working hours, in order

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rather through the conjunction of several norms regarding rest periods and limits of working hours.

[64] António Monteiro Fernandes, "O "dever de abstenção de contacto" na Lei 83/2021", in *Direito Criativo Blog*, available in O "dever de abstenção de contacto" na Lei 83/2021 | Direito Criativo [last access 02.01.2022].

[65] Also on the concept of force majeure in the context of the new telework law, cf. João Leal Amado, "Teletrabalho: o "novo normal" dos tempos pós-pandémicos e a sua nova lei", in Observatório Almedina, 29th of December 2021, available at Teletrabalho: o "novo normal" dos tempos pós-pandémicos e a sua nova lei. – Observatório Almedina [last access 20 December 2021]. According to the Author, the law comprehensively exempts situations of force majeure. This classic indeterminate concept should, in the Author's opinion, be interpreted in this case with some flexibility so as to cover situations of the type provided for by in Article 227(2) of the Labour Code, regarding overtime work – not only traditional situations of force majeure or unforeseeable circumstances (fire, earthquake, flood, etc.), but all those that cannot be postponed and in which immediate contact is "indispensable to prevent or repair serious damage to the company or its viability".

to prevent damages to business and to the employer. However, said situations will have to be accessed on a case by case basis and the employer must have solid grounds to justify the contact, in case it needs to be sustained before the labour inspection or even the court.

Also, the duty to abstain from contact is designed, in most cases, for a reality in which workers have fixed working hours, excluding specific provisions for workers working under exemption from working hours or on call. Hence, in cases that workers are under flexible working hours arrangements, the risk of a contact is minor, for the precise reason that working hours vary and are often justified by the nature of the job, even though mandatory rest periods must be respected. So, the major risk of noncompliance of this duty lies in those workers with a fixed working schedule, where is clearer the beginning and end of the workday.

Since the reality may vary from worker to worker and there is no need for a contractual amendment, it is suggested for employers to implement a "soft" approach[66] through awareness raising, training and the management of out of hours connection. This soft approach may be materialized in a company-level policy or agreement[67] on the duty of the employer to abstain of contacting worker outside working hours and respective measures regarding the operationalisation of said duty.

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[66] As promoted by the European Comission in European Pillar of Social Rights and on the Communication "EU strategic framework on health and safety at work 2021-2027, Occupational safety and health in a changing world of work", COM (2021) 323 final, of 28.06.2021.

[67] Some examples of the content that may be included in such document are: (i) that disconnection remains the responsibility of worker (transferring the burden to the worker); (ii) policies include the right not to respond to messages outside agreed working hours without suffering negative consequences (allowing to previously rearrange working time according to business needs); (iii) awareness raising of the importance of rest time/negative effects of constant connection on health and work–life balance; (iv) training for workers and managers, including on the responsible use of email and organisation of work processes; (v) managers leading by example (by promoting a culture of no contact outside justified reasons); (vi) messages accompanied by reminders that communications need not be answered if outside working hours or not urgent; (vii) complaints procedure relating to breaches of the duty; (vii) agreement of hours of availability/non-availability and specification of time of disconnection (e.g. public holidays, annual holiday); (viii) procedures for monitoring connection; (ix) reinforcement that these rules do not imply any less favourable treatment given to an worker; (x) reinforcement of the consequences of non-compliance, namely disciplinary responsibility.

The major challenge regarding this duty of absence of contact lies in its practical application and coordination with the work life of businesses and its workers, especially in a global labour market where workers from all around the world have to work together, facing the challenges of different time zones, different work schedules and different work conditions.

6. Conclusions

Whereas before it was a forgotten and occasionally used work regime, teleworking has currently gained increasing recognition and attention, not only due to the greater demand for a work-life balance, but mainly due to its widespread (and forced) implementation in the context of the global fighting of the COVID-19 pandemic.

In fact, the COVID-19 pandemic has led to a step change in the prevalence of teleworking across many businesses and employers all around the globe. If this increase is only temporary or will it last in the future it is an uncertainty, but all appoints to a change in the way of providing work where teleworking will have a crucial role.

Illustrative of the growing importance of telework is the fact that in Portugal, in only 2 years, three different telework legal schemes have been implemented: the already existing legal framework in the Labour Code in force since 2009, the special framework under the COVID-19 legislation and, more recently, the newest amendment to the Labour Code (which we can call Teleworking 2022).

Despite the critics and challenges arising from said frameworks, teleworking is new paradigm of work within most countries, including Portugal. It is expected that the trend will stay but many questions are still to be answered regarding the new regime that recently entered into force.

In particular, it was expected that this new teleworking law would bring some major changes with real impact to employers and workers. However, there is still the need to balance the interests of the worker versus the employer and the law provides more doubts than certainties.

In fact, the teleworking framework will have to accompany the constant changes of the labour market, adapting to its needs, as we currently see with the new reality of work 4.0 and platform work.

For now, the Portuguese law could have been bolder, allowing a greater flexibility of labour relations, without overburdening the em-

ployer, so in our opinion, it fell short of its potential in the labour context in which we currently find ourselves.

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