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Occupational Health and Safety and Older Workers: Are They in Need of a Special Legal Framework?

Ana Cristina Ribeiro Costa [*]

1. Historical Framework of Occupational Health and Safety Law

Occupational Health and Safety Law was born out of the need to improve working conditions and the working environment in the mid-nineteenth century. The advent of industrialization[1] brought the acknowledgment of poor labour conditions for many workers, who frequently found themselves and their families in circumstances best described as miserable. Consequently, the resulting recognition of the need to effectively regulate working conditions in order to avoid the depletion of the workforce, essential for the economic development, became widespread[2]. It was thus essential to ensure the survival of victims of occupational contingencies. This problem was encompassed in the context of social security by Bismarcks's 1884 Social Insurance Law, which

[*] Ana Cristina Ribeiro Costa is a PhD student, invited Lecturer at the Catholic University of Portugal - Porto Law School and lawyer at Gama Lobo Xavier, Luis Teixeira e Melo e Associados, Sociedade de Advogados, R.L. (Guimarães – Portugal). The author is a member of the Editorial Board of the Review *Questõ es Laborais* and Vice-President of the Young Labour Scholars' Association (*Associação de Jovens Juslaboralistas*). For further information contact ana.ribeiro.costa@hotmail.com. The findings of this paper were presented at the conference "The Great Transformation of Work" organized by the Doctoral School in Human Capital Formation and Labour Relations of ADAPT and the University of Bergamo, that took place on 6 and 7 November 2015 in Bergamo (Italy).

[1] On this subject, we will follow ours *Is "Legal Globalization" the Solution for the Disorientation of Health and Safety at the Workplace Law?*, *Católica Graduate Legal Research Conference 2014 – Conference Proceedings*, available at http://www.fd.lisboa.ucp.pt/resources/documents/Centro/CGLRC%202014%20Conference%20Proceedings.pdf, 200-218.

[2] M. M. ROXO, *Direito da segurança e saúde no trabalho. Da prescrição do seguro à definição do desempenho, uma transição na regulação*, Almedina, Coimbra, 2011, p. 15.

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came to cover eventualities such as the loss of earning capacity triggered by work-related accidents and occupational diseases.
The issue has been stressed by the International Labour Organization (ILO) since its inception, by approving several Conventions on the matter. Among them, the 1981 Convention nr. 155, demanding that signing States implement a national policy of Occupational Health and Safety, stands out as one of its most important documents[3]. Besides the Conventions and Recommendations, the ILO also publishes several Codes of Best practices and action plans.
Regarding European Union (EU) Law, the historical evolution of Occupational Health and Safety Law would be developed in stages: in four stages, for some legal doctrine[4], with others defining its development in two or three phases[5].
Firstly the EU legislation mentioned the protection of Occupational Health and Safety only as an instrumental goal, since its priority was to promote economic integration. At this stage, the only activities pursued by the EU consisted of a gathering of research and statistics. The juridical instruments were reduced to recommendations on a list of occupational diseases, on the conditions for compensation of occupational diseases' victims and on the medical surveillance of workers exposed to particular risks[6].
Politicians decided that social progress was not possible based solely on economic integration, and so the second phase began. A social action program was created to improve working conditions and to encourage progressive abolition of physical and psychological constrictions of jobs.
At that time, Directives on specific issues, such as chemical, physical and biological agents, among others, were approved, and institutions such as the European Foundation for the Improvement of Living and Working Conditions were created. It was then that the first Action Program of the European Communities on safety and health at work was created, for the period of 1978-1982, whereas the second program ('84-'88) reaffirmed the

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[3] On the importance of ILO's Conventions to the theme of Occupational Health and Safety, see A. OJEDA AVILÉS, *Derecho Transnacional del Trabajo*, Tirant lo Blanch, Valencia, 2013, p. 128.
[4] AAVV, *Lecciones de Derecho Social de la Unión Europea*, coord. Magdalena Nogueira Guastavino, Olga Fotinopoulou Basurko, José María Miranda Boto, Tirant lo Blanch, Valencia, 2012, p. 366.
[5] The two phases would be one until the Framework Directive came into force, although some legal doctrine considers the ending of the first phase as occurring in 1987, with the entry into force of the Single European Act. see *Manual de Derecho Social de la UnióanEuropea*, coord. Antonio Costa Reyes, Tecnos, 2011, p. 365. The scholars that define three phases divide them into the periods of 1971 until 1978 (first phase), 1978 until 1984 (second phase), and from this year on (third phase). B. CARUSO; S. SCIARRA; *Il lavoro subordinato*, G. Giappichelli Editore, Turin, 2009, pp. 78-82.
[6] AAVV, *Lecciones de Derecho Social…, cit.,* p. 367.

same goals[7]. Meanwhile, the idea that the social partners should be involved in these matters was encouraged.
The third phase began with the 1986 Single European Act, which brought into force the article (art.) 118-A, now art. 153 on the Treaty on the Functioning of EU (TFEU), currently stating that "*With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (…) (i) equality between men and women with regard to labour market opportunities and treatment at work; (…) 2. To this end, the European Parliament and the Council: (a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States; (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. (…)".* The new writing of this provision seemed to allow flexibility in the decision-making procedure. The unanimity rule was abandoned and a qualified majority became enough to legislate on this subject[8]. The goal was to define common minimum requirements that all Member States should attain. Thus, the third social action program harmonized various areas such as safety and ergonomics in the workplace, managers and workers' training, among others. Several Resolutions of the European Parliament were approved, in which the Commission was invited to create specific Directives on these matters.
Finally, consolidation of legal rules and stimulation of social agents and collective bargaining characterized the fourth phase.
We recall that the art. 156 of the TFEU states that, in order to achieve the goals prescribed by the art. 151 of the TFEU, the Commission shall have a strengthened role and shall encourage consultation with social partners and adopt all necessary dialogue between them, enforcing cooperation between Member States and coordination of their actions[9].
At this point, Directive nr. 89/391/CEE (hereinafter only referred to as Framework Directive) was approved, setting the minimum standards that

[7] *Ibidem*, p. 367. We will follow these authors in the next few paragraphs, corresponding to pp. 367- 375.
[8] A. OJEDA AVILÉS, *op. cit.*, p. 202.
[9] V. LAFUENTE PASTOR; R. VALLEJO DACOSTA, *Marco jurídico de la seguridad y salud en el trabajo*, Prensas Universitarias de Zaragoza, Zaragoza, 2010, p. 65.

should be followed by the Member States[10] as well as the general principles and rules that have to be incorporated on each national legislation and practices. Hence, universality of application and harmonization of national legislation were the cornerstones of the Framework Directive[11].

The Framework Directive was followed by its specific directives, which would regulate the workplace, working equipment and individual protection equipment, specific risks, specific activities, and specific groups of workers (young people, pregnant women, workers in temporary working companies, among others).

Simultaneously, the issue of the Community Charter of Fundamental Social Rights (1989) would boost European social policy and was an important element in the development of European soft law on this subject[12].

The General Framework for action of the European Community in the field of safety, hygiene and health protection at work for the period of 1994-2000 was developed, training was encouraged and priority was given to small and medium enterprises (SMEs).

Another community program was approved for the period between 1996-2000, which besides recognizing the special needs of SMEs, stressed the recognition of new health and safety risks and established investigation standards "*on the incidence and control of violence in the workplace (….), the influence of excessive stress and personal behaviour on the incidence of work accidents, occupational diseases and work-related diseases, (…) the implications for health and safety of new technologies, production techniques, the introduction of modern telecommunications and the resulting increase in homeworking (…), and the need for specific measures for women or young persons (….)*", among other measures, such as the creation of the SAFE (Safety Action for Europe) Program.

Concerning the specific matter we will address, it should be stressed that Council Directive 2000/78/EC, of 27-11, established a general framework for equal treatment in employment and occupation which materialized the principle of non-discrimination on grounds of age, among others, already proclaimed on art. 21 of the Charter of Fundamental Rights of the EU.

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[10] S. GONZÁLEZ ORTEGA stresses that the Framework Directive leaves such a broad margin to the Member States that one can hardly advocate that it has direct effect. «La aplicación en España de las Directivas Comunitarias en materia de salud laboral», *Temas Laborales*, nr. 27, 1993, p. 18.

[11] As states B. BERCUSSON, "*the provision of the Framework Directive (…) demonstrate how health and safety law has been «Europeanised» by EU Law*" - *European Labour Law*, Cambridge University Press, Cambridge, 2009, p. 346. In fact, this "comunitarization" of the national systems in the field of Occupational Health and Safety is based on the convergence that is intended by the EU legislation. Cf. AAVV, *Manual de Derecho Social de la Unión Europea*, *op. cit.*, p. 369.

[12] This idea is developed by S. BRIMO, *L'État et la protection de la santé des travailleurs*, Lextenso Éditions, Paris, 2012, pp. 160-163.

Active ageing has been promoted since the Nice European Council, in 2000, and has been reinforced by several European instruments since then[13]. In March 2001, the Stockholm European Council established the goal of raising the average employment rate in the EU for the 55-64 age-group to 50% by 2010, and asked the Council and the Commission to report on how to increase labour force participation and promote active ageing. A year later, in March 2002, the Barcelona European Council concluded that a significant increase in the average effective age at which people stop working in the EU should be achieved. Later on, the Council Decision 2003/578/EC, of 22-07, on the guidelines for the employment policies of the Member States[14] recalled the need to increase the employment rate for older workers. Moreover, the Council Recommendation 2003/579/EC, of 22-07, on the implementation of Member States' employment policies[15], identified certain actions to be taken with regard to the labour supply and active ageing.
In addition, the Europe 2020 Strategy[16] recognized the low employment rate of older workers and thus, the need to promote active ageing, through Member States' actions on new forms of work-life balance and active ageing policies, within the Flagship Initiative "*An Agenda for new skills and jobs*".
Furthermore, the Council's Decision of 21-10-2010 on the guidelines for employment policies has determined that the Member States shall promote active ageing, removing barriers to labour market participation of older workers and increasing their employability[17].
Consequently, in 2011, the European Parliament and the Council elected 2012 as the European Year for active ageing. However, some legal scholars recognise that active ageing policies were difficult to implement, due to the

[13] L. LÓPEZ CUMBRE, *La discriminación por razón de edad en la jubilación forzosa: el caso Palacios de la Villa*, *Revista del Ministerio de Empleo y Seguridad Social,* nr. 102, 2013, p. 339.
[14] *Official Journal* L 197, of 05-08-2003, p. 13.
[15] *Ibidem*, p. 22.
[16] Communication from the Commission Europe 2020, *A strategy for smart, sustainable and inclusive growth*, dated 03-03-2010, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF, accessed 20-09-2015.
[17] Legal opinion suggests, as measures to promote employment among older workers financial incentives to maintain them in the labour market (or hampering access to early retirements), promoting good conditions of Occupational Health and Safety, flexible working time arrangements, continuous access to education, among others. *Vd.*, on some of these, M. F. FLORES MALLO, *Envejecimiento demográfico y mercado de trabajo: análisis de los determinantes de la participación laboral de los trabajadores mayores en España*, *Revista universitaria de ciencias del trabajo*, n.º 9, 2008, 95-119.

economic crisis and high unemployment rates, especially among young people[18].
Regarding occupational health and safety in particular, the Community Strategy on Health and Safety at Work 2002-2006 was subsequently issued, establishing goals of physical, moral and social well-being at work, supporting best practices, social dialogue and corporate social responsibility. The idea that well-being should not only be achieved by the absence of accidents or illnesses, but also through complementary measures such as reducing and preventing them, taking into account the ageing population and the protection of young people at work, considering new forms of work organization and meeting the particular problems of SMEs, was enhanced. It was then determined that Community law was necessary for the improvement of working conditions, hence guidelines for the application of the Directives were created. This was the first time that older workers were taken into account in an Occupational Health and Safety Strategy, by stating that "*older workers (50 years plus) tend to have more serious industrial accidents leading to higher mortality, as they tend to be over-represented in the more dangerous manual occupations*".
Later came the Community Strategy on health and safety at work for 2007-2012[19], posing as a challenge the insufficient reduction of occupational risks, identifying categories of workers who were overexposed to them, such as young, insecure, older and migrant workers. This came as a breakthrough, for older workers were now considered as a special group. The need to promote active ageing through wellbeing at work and avoiding early withdrawal from the labour market was stressed[20] and the relationship between health at the workplace and general health of the population was emphasized.
The Community Strategy for the period of 2007-2012 aimed at improving the quality and productivity of work, intending to reduce accidents and supporting the idea that health at work improves public health in general, increases the viability of social security systems, as it decreases work accidents and occupational diseases, while reducing costs by improving enterprises'

[18] *See* A. NUMHAUSER-HENNING, *The EU ban on age-discrimination and older workers: potentials and pitfalls*, *The International Journal of Comparative Labour Law and Industrial Relations*, 29, n.º 4, 2013, p. 413.
[19] European Parliament Resolution of 15-01-2008 on the Community strategy 2007-2012 on health and safety at work (2007/2146 (INI)), published in the *Official Journal* C 41E/03, of 19-02-2009.
[20] Proposing some age management practices, such as job recruitment; learning, training and lifelong learning; career development; flexible working time practices; health protection and promotion, and workplace design; re-employment; employment exit and the transition to retirement; comprehensive approaches, cf. the report from European Foundation for the Improvement of Living and working conditions, *A guide to good practice in age management*, Office for Official Publications of the European Communities, Luxembourg, 2006, VIII.

productivity and competitiveness[21]. It brought forward six key issues: creating modern and effective legislation adapted to the evolution of the labour market; creating national strategies and coordinating occupational health policies with public health policies; promoting behaviour changes through training and encouraging companies by reducing contributions or insurance payments; considering the emerging risks, such as depression, promoting health at work, preventing violence, moral harassment and stress; collecting statistical data; and, finally, promoting safety and health at the international level by strengthening cooperation with third countries and international organizations.
With the end of the program of the Community Strategy for 2007-2012 on health and safety at work, the European Commission presented the report on the Evaluation of the European Strategy, mentioning a review prepared for the European Parliament's Committee on Employment and Social Affairs on the vulnerable groups of workers, among which women, migrant, younger and older workers[22] were included.
Finally, the EU Strategic Framework on Health and Safety at Work 2014-2020 was approved. Its main focus was placed on the economic and financial crisis. Portugal has one of the highest rates within the EU member states of expectations of major or some deterioration of health and safety, along with Latvia, Slovenia, Greece, Estonia and Sweden[23].
With its approval in June 2014, the fear of a throwback that dominated legal scholars' minds was confirmed as the paradigm of the adaptation of the work to the worker[24] seems to be changing into the worker's adaptation to the work. The approach is now enshrined in art. 145 of the TFEU, as the workforce

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[21] M. DEL M. ALARCÓN CASTELLANOS, *Marco general de la estrategia comunitaria de salud y seguridad en el trabajo (2007-2012) y su protección en España», Cuestiones actuales sobre Derecho Social Comunitario*, Ediciones Laborum, Murcia, 2009, p. 301. On the costs of occupational health standards and damages to the countries' economies, cf. JEAN-MICHEL SERVAIS, *International Labour Law*, Wolters Kluwer, Alphen aan den Rijn, 2011, pp. 219 and 220.

[22] Cf. the Commission Staff Working Document, *Evaluation of the European Strategy 2007-2012 on health and safety at work*, Brussels, 31-05-2013, available at file:///C:/Users/Tina/Downloads/SWD_2013_202_STAFF_WORKING_PAPER_EN.pdf, accessed 20-09-2015.

[23] Cf. «Workers' health and safety exposed to crisis», available at http://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CFgQFjAF&url=http%3A%2F%2Fwww.etui.org%2Fcontent%2Fdownload%2F13835%2F113961%2Ffile%2FChapter%2B6%2BBenchmarking%2B2014.pdf&ei=w6z7U5j3EOzy7Ab74oH4DA&usg=AFQjCNGZarGsS_5KlhISZk-MdYa42sj5lg&sig2=chX7Pa1GRk0zFcqBRNV-Jw&bvm=bv.73612305,d.bGQ&cad=rja, accessed 25-08-2014.

[24] According to M. BABIN, the logic underneath the principles of Occupational Health and Safety is the adaptation of the work to the worker, understood as the protection of the health in the centre of the work organization. *Santé et sécurité au travail*, Éditions Lamy, Rueil-Malmaison Cedex, 2011, p. 31.

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must adapt to the companies' needs. The Occupational Health and Safety policies were at first diluted in the Strategy of Lisbon and its goals of growth and competitiveness of companies[25] and later on positioned as secondary due to the implementation of the Europe 2020 Strategy, which was given priority.
Nevertheless, the EU Strategic Framework presented on June 2014 concentrates on the concept of "healthy and safe working environment" and defines the following goals: further consolidate the national strategies; to facilitate compliance with occupational safety and health legislation, particularly by micro and small enterprises; to encourage better enforcement of occupational safety and health legislation by Member States; to simplify existing legislation; to address the ageing of the workforce and emerging new risks; to prevent work-related and occupational diseases; to improve statistical data collection and develop the information database; and to better coordinate EU and international efforts to address occupational safety and health and engage with international organizations.
Concerning workforce ageing, the EU Strategic Framework recognized demographic changes as one of its biggest challenges, replaced the concept of "active ageing" by the one of "active and healthy ageing" and acknowledged older workers as a special category of workers who should deserve further investigation and funding.
Due to the principle of subsidiarity, there are shared powers between the Member States and the EU and it is up to Member States to implement certain goals, whereas it is up to the EU to intervene when the previous action by the Member States presents shortcomings. However, the diversity of social systems and the fear of Member States to give up on their sovereignty on social matters have hindered the development of this field. The European Parliament and the European Council intervene, therefore, on a normative level, side-by-side with non-legally binding instruments, aimed at cooperation, development of information and best practices' exchanges, research, statistics, initiatives for guidance and directions.
In any case, at a local level, until the 1990s Portuguese legislation excluded significant parts of the population (civil servants, agricultural workers, seafarers, craft work or independent workers) and was aimed at certain sectors or certain specific risk factors. Moreover, not all risks were identified, the differences between individuals were not considered (sex, age, physiological or

[25] Cf. P. TULLINI, *La sicurezza sul lavoro tra diritto comunitario e diritto interno*, in AAVV, *Diritto privato comunitario*, coordinators Pietro Perlingieri e Lucia Ruggeri, vol. II, Edizioni Scientifiche Italiane, Napoli, 2008, p. 242.

psychosocial characteristics), the interactions between different risk factors were not recognized; and emerging risk factors were not foreseen[26].
The regulation of occupational contingencies focused on responding to workplace induced illness, and it was only later on that prevention and elimination or reduction of risk factors began to be considered, influenced by international legal instruments.
Nowadays, the issue of occupational health and safety in Portugal is regulated in a dispersed manner and struggles to keep up with the pace of EU legislative production. Neither new legislative projects are foreseen nor the non-binding instruments are implemented by the national authorities or signed by national collective entities such as employers' associations and trade unions.
An Elderly Protection Strategy has recently been approved by the Portuguese Government but no measures related to employment have been determined[27]. Moreover, the National Strategy for health and safety has been approved by the Ministers' Council Resolution nr. 77/2015, of 18-09, and does not establish any instruments or goals especially related to older workers. The only repercussion of the EU Strategic Framework on Health and Safety at Work 2014-2020 as far as health and safety of older workers is concerned is their inclusion in the specific groups which shall be subject to preventing actions.

2. The Recognition of Special Categories of People to be Protected

Occupational Health and Safety law recognises the need of certain categories of workers to be protected with special measures.
In fact, international and national legislation recognizes the specificities of particularly vulnerable workers, providing for a special treatment of those who are sensitive, such as pregnant women, those with complications after birth and lactating women, minors and disabled workers.
In any case, the list is not closed[28], as other concepts may be included on the so-called "special risk groups". Art. 15 of the Framework Directive stipulates that "*Particularly sensitive risk groups must be protected against the dangers which specifically affect them*", directing towards a collective notion rather than on the individual. Thus, European legislation seems to focus on objective factors rather than subjective ones, or on the workers deemed to be particularly sensitive[29]. But even though European Law seems to be more restrictive,

[26] M. M. ROXO, *op. cit.*, p. 37.
[27] Strategy of Protection of the Elderly, Minister's Council Resolution nr. 63/2015, of 25-08.
[28] J. F. BLASCO LAHOZ; J. L. LÓPEZ GANDÍA; *Curso de Prevención de Riesgos Laborales*, 16ª ed., Tirant Lo Blanch, Valencia, 2015, p. 225.
[29] BLASCO LAHOZ; LÓPEZ GANDÍA, *op. cit.*, p. 226.

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mentioning groups and not individuals, the national laws have adopted different – wider – concepts[30].
Not all "sensitiveness" are protected, but only particular sensitiveness, which means only the most vulnerable workers, those most at risk and not merely those currently designated as sensitive deserve protection[31]. This vulnerability is defined as the ability to react strongly to some external sensation, but in occupational health and safety it is perceived as a personal condition that occurs in response to the working risks that the worker is subject to[32], encompassing not only specific but also the general risks[33]. Some tasks may not bring any risk to most of the workers but may put one of them at risk. It is up to the employer to detect this particular sensitivity prior to an employee's arrival or as soon it becomes apparent[34]. For instance, if some windows in the workplace are closed for lighting purposes, a claustrophobic worker may reveal a particular sensitivity in such a context[35].
However, the reasons for such protection are not only due to their personal characteristics or biological state[36] (such as their youth or maternity as well as their physical, sensorial[37]/[38] or psychic ability[39]), but also due to specific risks or to the type of contract concluded with the worker[40]. Besides that, different flexible work conditions, such as temporary working, flexible working time, overtime work, part-time work[41], night work, shift work[42], among others, may also determine this regime's enforcement.

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[30] A. MORENO SOLANA, *La Prevención de Riesgos Laborales de los Trabajadores Especialmente Sensibles*, Tirant to Blanch, Valencia, 2010, p. 38. In fact, the author stresses that the subjective factor is the one that matters in this field, as the objective risks are considered within this subject as risks that may affect vulnerable workers. *Op. cit.*, pp. 44-49.
[31] J. E. LÓPEZ AHUMADA, *Los Trabajadores Sensibles a los Riesgos Laborales. Protección Jurídico-Laboral*, Marcial Pons, 2010, p. 29.
[32] A. MORENO SOLANA, *op. cit.*, p. 32.
[33] A. MORENO SOLANA, however, stresses that the risks that matter are specific risks and the general risks that bring connected to the particularly vulnerable worker. *Op. cit.*, p. 56.
[34] J. E. LÓPEZ AHUMADA, *op. cit.*, p. 30.
[35] *Ibidem*, p. 34.
[36] Which does not need to have been previously recognised by a court to be considered – *Ibidem*, p. 33.
[37] Which does not need to have been previously recognised by official health authorities to be considered – *Ibidem*, p. 32.
[38] That is not sufficient to be considered as a working incapacity, but is enough to have influence in the work performance. *Ibidem*, p. 29.
[39] A. MORENO SOLANA, *op. cit.*, p. 52.
[40] BLASCO LAHOZ; LÓPEZ GANDÍA, *op. cit.,* pp. 225 e 226.
[41] J. E. LÓPEZ AHUMADA, *op. cit.*, p. 27.
[42] These workers benefit from special protection in what concerns working time and from specific provisions concerning the prevention of Occupational Health and Safety. J. E. LÓPEZ AHUMADA, *op. cit.*, p. 35. Recognising the hazards of some flexible working time

Thus, the above-mentioned provision of the Framework Directive shall be regarded along with the Council Directive 91/383, of 25-06, on the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, the Council Directive 92/85, of 19-10, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, and the Council Directive 94/33/EC, of 22-06, on the protection of young people at work.
In any case, the situation of particular sensitiveness might be pre-existent at the moment of the conclusion of the contract, it might occur during the contract enforcement, as a consequence of accidents of diseases occurred after hiring, or related to particular personal or biological condition the worker suffers, or it might be temporary, occurring during a particular period if the worker is subject to a certain circumstance or treatment[43], such as if the worker is subject to strong medication, if he or she is under the influence of drugs or alcohol or prone to psychological risks[44]. In this case, the situation must be obvious and apparent to the employer, or reported to him by the worker[45].
The particular sensitiveness of the worker might be detected by the employer when evaluating the worker's health, but can also occur if the employer is informed by another worker, or by the worker himself, as both of them have the duty to report any risks to the health and safety of workers (art. 13(2), subparagraph. d) of the Framework Directive). The employer's obligations are only due if he is aware of the worker's situation, as he is not obliged to evaluate the worker's subjective risks if he is unaware of any worker's particular sensitiveness[46].
The protection granted to these workers usually concerns health surveillance, risk evaluation, adjustment of the workstation, interdiction of certain activities or of certain methods of work organization or working time arrangements (such as night and shift work, among others). But these measures must be different than the regular standards for prevention and protection of health and safety, as they must surpass them[47].

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schemes for workers' health, cf. J. A. RIBEIRO DE OLIVEIRA SILVA, *A flexibilização da jornada de trabalho e seus reflexos na saúde do trabalhador*, *Revista do Tribunal Regional do Trabalho da 15ª Região*, n.º 42, 2013, pp. 137-144.

[43] BLASCO LAHOZ; LÓPEZ GANDÍA, *op. cit.*, p. 246.

[44] LÓPEZ AHUMADA, *op. cit.*, p. 30.

[45] *Ibidem*, p. 33.

[46] *Ibidem*, p. 40.

[47] MORENO SOLANA, *op. cit.*, p. 35.

3. The Need for a Special Legal Framework on Older Workers

According to Eurostat's statistics, "*The share of older people in the total population is expected to increase significantly over the coming decades. According to Eurostat, people aged 65 and older will make up 30% of the European Union population by 2060 – almost double the 2012 figure of 17%. At the same time, the working age population (currently characterised as people aged 15–64 years) which peaked at 67% in 2010 is predicted to decline steadily to 59% by 2060*"[48].

Following the increasing ageing population, the growth in the average life expectancy, the increase of the age when completing education, and the decrease of the birth rate[49], according to Eurostat studies, the employment rate of older workers, which is calculated by dividing the number of persons in employment and aged 55 to 64 by the total population of the same age group, from a rate of 39.9% in 2003 to a rate of 51.8% in 2014. In Portugal, this rate has actually decreased from 51.7% to 47.8%, which is not a common tendency throughout the rest of the EU[50]. But this is a recent trend, possibly related to a period of economic crisis that encouraged the early retirements[51]. The fact is that in 2007, in Portugal the workers aged between 45 and 64 years had an employment rate of 69.6% and those older than 65 years of 18%[52].

Recently, the recognition of the difficulties of sustainability and of social security in countries such as Portugal has led to the increase in the retirement age, hence the ageing of the workforce, which means that workers remain in their jobs until they are significantly older.

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[48] As stated in https://www.eurofound.europa.eu/print/news/spotlight-on/older-people/overview-work-care-and-inclusion-of-older-people, accessed 08-09-2015.

[49] On some of these data, *vd.*M. T. QUÍLEZ FÉLEZ, *Reflexiones en torno a las medidas para favorecer la continuidad de la vida laboral de los trabajadores de mayor edad y promover el envejecimiento activo*, *Revista del Ministerio de Empleo y Seguridad Social*, n.º 109, 2014, 209-228.

[50] See, http://ec.europa.eu/eurostat/tgm/download.do?tab=table&plugin=1&language=en&pcode=tesem050, accessed 08-09-2015.

[51] Recognising that in times of recession early retirements are a frequent tool used by employers and employees to adjust the labour market, see the EUROFOUND study «Impact of the recession on age management policies», available at http://www.eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2011/75/en/4/EF1175EN.pdf, accessed 12-09-2015.

[52] *See* «Employment and labour market policies for an ageing workforce and initiatives at the workplace. National overview report: Portugal», available at http://www.eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2007/0522/en/1/ef070522en.pdf, accessed 12-09-2015.

In fact, the Europe 2020 Strategy proposes that by 2020 the employment rate of workers aged 20-64 shall be of 75%, which "*includes getting more older people into work*"[53].

The truth is that the former policies of encouraging early retirements[54] to stimulate the employment of younger workers are increasingly being replaced by rhythm deceleration' policies, including reduction and flexibility of working time, gradual retirement and financial and fiscal incentives to the maintenance or return to the labour market[55]. In the United Kingdom there was a suggestion to increase the retirement age to 70 years old, creating the "*«decade of retirement» during which workers may reduce their working hours*"[56].

Another study concluded that although workplace accidents tend to decrease with the workers' rising age (accidents occur most often on the youngest age groups, and among the older age groups the percentage of accidents remains fairly stable in women, whereas for men the percentage decreases steadily with increasing age), the work-related health problems that put workers off work for long periods of time tend to increase in a significant manner[57], which happens for instance with musculoskeletal diseases in the neck and back[58].

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[53] See «Overview: work, care and inclusion of older people», available at http://www.eurofound.europa.eu/news/spotlight-on/older-people/overview-work-care-and-inclusion-of-older-people, accessed 12-09-2015.

[54] About the compulsory retirements and other restrictions as age discrimination, see D. SCHIEK, *Age discrimination before the ECJ – conceptual and theoretical issues*, *Common Market Law Review*, 48, 2011, 777-799, especially pp. 786-790.

[55] «Impact of the recession on age management policies», cit..

[56] See H. J. DESMOND, *Older and greyer – third age workers and the labour market*, *The International Journal of Comparative Labour Law and Industrial Relations*, 16, nr. 3, 2000, p. 247.

[57] See «8.6% of workers in the EU experienced work-related health problems Results from the Labour Force Survey 2007 ad hoc module on accidents at work and work-related health problems», available at http://ec.europa.eu/eurostat/documents/3433488/5283817/KS-SF-09-063-EN.PDF/10b62d3b-e4dd-403f-b337-af6ffd3de8de, accessed 08-09-2015.

Injuries tend to be more severe and are more likely to be fatal, even though they have a lesser risk of non-fatal accidents, due to their greater skills and experience, as explained in the report on *Occupational Health and safety risks for the most vulnerable workers*, Brussels, 2011, requested by the European Parliament's Committee on Employment and Social Affairs, available at http://www.europarl.europa.eu/document/activities/cont/201108/20110829ATT25418/20110829ATT25418EN.pdf, accessed 20-09-2015, p. 10, P. BOHLE; C. PITTS; M. QUINLAN, *Time to call it quits? The safety and health of older workers*, *International Journal of Health Services*, vol. 40, n.º 1, p. 26.

[58] P. CASTELLÓ; A. FERRERAS; G. GARCÍA MOLINA; A. PAGE; A. PIEDRABUENA; L. TORTOSA; *Trabajo y envejecimiento. Mejora de las condiciones ergonómicas de la actividad laboral para la promoción de un envejecimiento saludable*, *Seguridad y Salud en el Trabajo,* nr. 30, 2004, available at http://www.insht.es/InshtWeb/Contenidos/Documentacion/TextosOnline/Rev_INSHT/2004/30/artFondoTextCompl.pdf, accessed 13-09-2015. Moreover, it must be underlined that

Thus, even though older workers are a guarantee of the maintenance of expertise, of "*institutional memory and productivity, especially in specific skilled areas*", they are usually better in customer service and customer retention[59], are more efficient in the use of resources[60], and although age is not a declining condition[61], and work has been associated to positive health consequences in older workers[62], the truth is that they are particularly exposed to work-related accidents and occupational diseases, as they are particularly vulnerable, and their health is increasingly diminished, as their physical capacity is lower and influenced by the physical load, by the long-term effects of worsening health and by ageing[63/64].

In fact, "*aging is associated with a general decline in physical health, such as muscle strength, bone density and aerobic capacity*[65]*. However, the extent of the decline depend to a significant degree in individual factors such as lifestyle, body weight, fitness level and genetics*[66].

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this might be due to the long latency of some diseases, such as pneumoconiosis, occupational cancers, and problems related to asbestos. P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 26.

[59] See J. J. A. SHAW; H. J. SHAW, *Recent advancements in European Employment Law: towards a transformative legal formula for preventing workplace ageism*, *The International Journal of Comparative Labour Law and Industrial Relations*, 26, nr. 3, 2010, p. 278.

[60] P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 25.

[61] See W. BROMWICH, O. RYMKEVITCH, *Report on the Conference on "Age, ageing and ageism in working life", organised by the Marco Biagi Foundation and ADAPT in collaboration with the European Commission, University of Modena and Reggio Emilia, 26 November 2004*, *The International Journal of Comparative Labour Law and Industrial Relations*, 22, nr. 1, 2006, p. 130.

[62] P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 23.

[63] L. TORTOSA; G. GARCÍA MOLINA; A. PAGE; A. FERRERAS; P. CASTELLÓ; A. PIEDRABUENA; *op. cit.,* p. 29.

[64] As stated by NILS BRITZE on his communication «Managing Labour During Periods of Tight Labour Markets and Ageing Populations in the Knowledge-Based Economy», at the International Conference *The Great Transformation of work. Productivity, investment in human capital and the challenge of youth employment – VI Edition*, taken place in Bergamo, on 07-11-2015, the positive attitudes over older workers include the recognition that they are reliable, flexible, and less accident prone, as the negative perceptions include the difficulty to train them, their resentfulness to take orders from young people, and their lack enthusiasm for technological change.

[65] Among other physical consequences such as cardiovascular capacity, muscular resistance, elasticity and balance. See, RTM, *Sanità: I rischi dell'invecchiamento della forza lavorativa*, *Punto Sicuro*, n.º 3655, 09-11-2015, year 17, available at http://www.puntosicuro.it/sicurezza-sul-lavoro-C-1/settori-C-4/sanita-servizi-sociali-C-12/sanita-i-rischi-dell-invecchiamento-della-forza-lavorativa-AR-15342/ (accessed 15-11-2015).

[66] A wide subjective variation is recognised in what concerns the reduction of working capacity. *Ibidem*.

(…) Aging is associated with a reduction in the precision and speed of perceptual processes (…)"[67].

Other consequences of ageing are not yet well studied as far as their influence within the workplace is concerned. For instance, the occupational hazards "*that can cause menstrual disorders, such as occupational stress, exposure to heavy metals or solvents or exposure to environmental noise and hot and cold conditions, as well as the effect of shift work, in particular night shifts on the menstrual cycle, have not been carefully researched or at all addressed in the legislation. Similarly, the effect of the menopause on the health of female workers, although a crucial topic for ageing female workers, has been overlooked by researchers and legislators. In addition, the fact that work can increase difficulties in coping with either menstrual or menopausal syndromes (which include tiredness, occupational stress and anxiety, headaches and migraines, etc.) should be taken into account*"[68].

Moreover, in the 50-59 age group, 18% of the workers "*declared themselves not very satisfied or not satisfied at all with their working conditions as a whole*"[69]. In fact, workers of more advanced ages might be more predisposed to certain occupational risks, such as ionizing radiation. Current published studies are insufficient in their perceptions on the impact of work on psychological health[70].

Finally, changes in the working environment that cause job insecurity and lack of motivation, as well as certain working hours' schemes, such as shift and overtime work, might also have different consequences on the workers' health depending on the workers' age[71]. Besides that, recovering from an injury is more difficult, which means these workers are more predisposed to exhaustion and other adverse symptoms that may increase their exposure to further damages[72].

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[67] P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 25. Besides that, diminution of recent memory, slower reaction time, slower comprehension of complex ideas, among others. See RTM, *op. cit.*

[68] Report on *Occupational Health and safety risks for the most vulnerable workers*, cit., p. 35.

[69] EUROFOUND (2012), *Sustainable work and the ageing workforce*, Publications Office of the European Union, Luxembourg, p. 69, available at https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1266en.pdf, accessed 12-09-2015.

[70] P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 26.

[71] *Ibidem*, pp. 29-35. About these effects, see the report on *Occupational Health and safety risks for the most vulnerable workers*, cit., p. 55.

[72] P. BOHLE; C. PITTS; M. QUINLAN, *op. cit.*, p. 26. According to the report on *Occupational Health and safety risks for the most vulnerable workers*, cit, p. 10, "*Ageing is associated with a natural deterioration of physical and mental capacities. Whatever risks ageing workers are exposed to through their occupations will be superimposed on this natural process*".

The most common injuries among older workers are "*falls (poor balance, slower reaction times, visual problems lack of concentration); sprain and strain injuries (loss of strength, endurance and flexibility); and cardio-pulmonary injury (over-exertion, loss of heat and cold tolerance)*"[73].
Therefore, a new challenge is presented to occupational health and safety, as a new category of particularly vulnerable workers arises and demands for special treatment. However, is the existing legal framework sufficient and appropriate, or is there a need to create a specific legislation to protect older employees?
Countries such as Austria, Hungary and Estonia have encouraged employers and employees to have information and education on occupational health and safety, adapted to a growingly older workforce[74].
In fact, in our opinion there is a need to create or at least admit the recognition of a new category. The Portuguese National Strategy for health and safety approved by the Ministers' Council Resolution nr. 77/2015, of 18-09, as we previously explained, does not provide any instruments or goals especially related to older workers. Yet, it does include workers who are older than 55 years within the specific groups of workers which shall be subject to preventing actions, such as young workers, women, public workers, short-term workers, part-time workers, teleworkers, independent workers, migrant workers, disabled workers, workers with chronic diseases (see point 3 within goal 1). We will now analyse whether preventing actions, information and education are sufficient, or if other measures have to be undertaken.

4. The Special Treatment reserved to Older Workers and Occupational Health and Safety: a Proposal

Age is considered in labour law as a factor that may influence access to work, the achievement of the scholar and formation obligations and, as regards occupational health and safety, it may determine the forbidding of the performance of certain dangerous or unhealthy activities[75].
However, age is usually protected only on its lower spectre – children and young people – and there is no consideration for older workers. The exceptions are, in most of the Member States, the provision of mandatory and periodical exams for workers who are older than 50 years old[76].

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[73] See the report on *Occupational Health and safety risks for the most vulnerable workers*, cit., p. 52.
[74] «Impact of the recession on age management policies», cit.
[75] F. MALZANI, *Ambiente di lavoro e tutela della persona. Diritti e rimedi*, Giuffré Editore, Milan, 2014, p. 119.
[76] In Portugal, see art. 108 (3), subparagraph. b) of Law 102-09, of 10-09, that establishes the legal regime of the promotion and prevention of safety and health at work, demanding annual

Besides that, general provisions must be taken into account, such as the obligation to "*take the measures necessary for the safety and health protection of workers (…)*", taking account "*of changing circumstances and the aim to improve existing situations*" (art. 6 (1) of the Framework Directive), as well as the general principles of prevention, such as the adaptation "*of the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health*" (art. 6(2), subparagraph. e) of the Framework Directive). Additionally, employers must take "*into account the nature of the activities of the enterprise and/or establishment: (…) where he entrusts tasks to a worker, and take into consideration the worker's capabilities as regards health and safety*" (art. 6 (3), subparagraph. b) of the Framework Directive).
Moreover, the general obligations to evaluate all the risks to health and safety, taking into account all aspects that may influence health and wellbeing to this category of workers, and adapting the work to the worker, may impose the provision of special measures. Francesca Malzani recognizes that these workers are exposed to premature and involuntary departures of the labour market, or that their work becomes obsolete due to the introduction of new technologies, which demands the need of training for them to remain in the labour market[77].
In any case, in our opinion, special legislation should be enacted to ensure older workers are not subject to unnecessary risks to their health.
The review prepared on 2011 for the European Parliament's Committee on Employment and Social Affairs proposed as "*options to address the health and safety of ageing workers at EU level (….) the following: promotion of age management in enterprises, with the involvement of the social partners at EU level (e.g. through a framework agreement); development of guidance on age management in SMEs; research and awareness-raising on the issues affecting ageing women workers who also provide home care for relatives; taking advantage of the European Year for Active Ageing in 2012 to raise awareness of health and safety issues concerning older workers and the benefits of the transfer of knowledge and skills among workers in different age groups for the benefit of all*"[78].
Likewise, the EU Strategic Framework on Health and Safety at Work 2014-2020, proposed that "*successfully prolonging working careers depends strongly on appropriate adaptation of workplaces and work organisation, including working time, workplace accessibility and workplace interventions targeted at older workers. Life time employability should also be developed to cope with workers' changing capabilities because of*

exams for minors and workers beyond 50 years old. Also in Italy, enshrined in the art. 176 (3) of the D. Lg. Nr. 81/2008, as states F. MALZANI, *op. cit.*, p. 124.
[77] *Ibidem*, p. 125 and footnote 99.
[78] Report on *Occupational Health and safety risks for the most vulnerable workers, op. cit.*, p. 11.

ageing. Innovative ICT products and services (e.g. for ambient assisted 'working') offer a wide gamut of options for improvement of employability. In addition, reintegration and rehabilitation measures allowing for early return to work after an accident or disease are needed to avoid the permanent exclusion of workers from the labour market"[79].

As an example, measures could be undertaken on what concerns flexible working arrangements, such as favouring career breaks, part-time working[80], different distribution of the working hours, such as compressed hours[81], job sharing[82], homeworking, teleworking, and avoiding atypical work rhythms such as rotated shifts, overtime and night work. Additionally, functional (re-deploying) and geographic mobility shall be considered[83]. The supporters of the ideas of "working time accounts" or of a "life-course approach", that take into account of the different needs of the worker through lifetime, allowing them to combine work with different phases of their personal life (education, care, family) are increasing, even though legal doctrine recognizes the problems with the balancing with the employers' interests[84]. In fact, an important factor that may determine "*a workers capability to continue working is the availability of employment which meets their personal needs and inclinations*"[85].

Concerning risks evaluation, older workers should be considered separatelyas regards the evaluation of the load of work to be sustained, the time to maintain a certain position, the aerobic capacity, and the frequency and duration of manipulating loads. Studies should be done on the worker's labour history and occupational exposure, as well on their working methods. Ergonomic intervention[86] and professional planning shall be undertaken in order to adapt

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[79] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on an EU Strategic Framework on Health and Safety at Work 2014-2020, Brussels, 06-06-2014, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0332, accessed 20-09-2015, p. 7.

[80] A. WINCKELMANN-GLEED, *Demographic change and implications for workforce ageing in Europe raising awareness and improving practice, Cuadernos de Relaciones Laborales*, vol. 27, n.º 2, 2009, p. 34.

[81] S. BEVAN, M. LAGHINI, V. SHREEVE, T. TASKILA; *Living long, working well: supporting older workers with health conditions to remain active at work*, The Work Foundation, July 2015, p. 17, available at http://www.theworkfoundation.com/DownloadPublication/Report/386_Living_long_working_well_Final.pdf, accessed 15-11-2015.

[82] A. BLACKHAM, *Rethinking working time to support older workers*, *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 31, n.º 2, 2015, p. 120.

[83] LÓPEZ AHUMADA*, op. cit.*, p. 40.

[84] These "*flexible and tailored solutions*" might be the future of working time arrangements. A. BLACKHAM, *op. cit.*, pp. 140-132.

[85] See the report by S. BEVAN, M. LAGHINI, V. SHREEVE, T. TASKILA; *op. cit.*, p. 12.

[86] A very interesting example of workplace design might be seen on the report M. MORSCHHAÜSER; R. SÖCHERT; *Trabajo saludable en una Europa que envejece. Estrategias e*

the physical load and the worker's physical ability, reducing the exposure time to shores with physical demands, extending the time frame between those tasks. Furthermore, physical exercise and sports shall be promoted by the companies in the worker's free time[87], as well as promoting health through diet and avoiding smoking habits[88].
Finally, some legal scholars suggest that certain vulnerable workers are forbidden to engage in some activities, as well as the termination of employment as an extreme measure of prevention[89]. This is, for instance, what happens with pregnant or lactating women. When changing one's workstation is not possible, and no other work is available for the worker within the company, the termination of the contract for reasons of supervening disability is possible in some national laws[90].
But as far as older workers are concerned, should mandatory retirement be taken into account? The case law within the field of discrimination on grounds of age is fertile[91]. In particular as it relates to a certain "presumption of incapacity" of workers beyond a certain age, such as was discussed in the case

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instrumentos para prolonger la vida laboral, *European Network for Workplace Health Promotion*, BKK Bundesverband, 2006, especially pp. 53-54.
[87] L. TORTOSA; G. GARCÍA MOLINA; A. PAGE; A. FERRERAS; P. CASTELLÓ; A. PIEDRABUENA; *op. cit.*
[88] See RTM, *op. cit.*
[89] MORENO SOLANA, *op. cit.*, p. 76.
[90] About this possibility in Spanish law, MORENO SOLANA, *op. cit.*, p. 78. Within Portuguese legal framework, it is also possible, under art. 343, par. b) of the Labour Code, as long as proceedings under Law nr. 98/2009, 04-09, that regulates the regime for the compensation of the work-related accidents and occupational diseases, have been concluded.
[91] From *Mangold*, case C-144/04, of 22-11-2005, and *Palacios de la Villa,* case C-411/05, pf 16-10-2007, until *Wolf*, case C-229/08, of 12-01-2010, and *Hennings*, cases C-297/10 and C-298/10, of 08-09-2011. It is interesting to look at the case on the proceedings C-341/08, of 12-01-2010, where the European Court of Justice (ECJ) decided that article 6 of the directive does not oppose to *"a measure where its aim is to share out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim"*. The Court thus decided that the limitation of the age limit to exercise a certain activity is acceptable if it is undertaken regarding the labour market and in order to promote employment among young people. This is relevant, as this argument has been dropped by EU's institutions for some years now, as previously stated. More recently, the decision from the ECJ dated 26-09-2013 on the case C- 546/11 concluded, from our point of view, in an indirect way, that forcing workers to ask for a reduced retirement pension, by depriving them of a certain compensation that is refused to workers older than 65 years old, is the measure that is not compatible with the prohibition of non-discrimination on grounds of age ("*Articles 2 and 6(1) of Directive 2000/78 must be interpreted as precluding a national provision under which a civil servant who has reached the age at which he is able to receive a retirement pension is denied, solely for that reason, entitlement to availability pay intended for civil servants dismissed on grounds of redundancy*").

Richard Prigge, C-447/09[92]. In this case, collective instruments fixed retirement age of pilots as 60 years old, when general provisions for all workers determined retirement age is at 65 years old. The ECJ decided this measure was not necessary to public safety and for health concerns, and thus was not acceptable. Hence, a measure that creates an automatic termination of employment due to age creates a difference of treatment that is not acceptable. However, the Court recognized that "*as regards airline pilots, it is essential that they possess, inter alia, particular physical capabilities in so far as physical defects in that profession may have significant consequences. It is also undeniable that those capabilities diminish with age (…). It follows that possessing particular physical capabilities may be considered as a 'genuine and determining occupational requirement', within the meaning of Article 4(1) of the Directive, for acting as an airline pilot and that the possession of such capabilities is related to age*" (paragraph 67 of the decision).
Therefore, the ECJ accepted that the goals of guaranteeing air traffic safety are legitimate, but stressed that the derogations to the principle of non-discrimination have to be very limited, which means that the mentioned imposition to pilots was disproportional.
Thus, the dismissal shall be the last of the preventive measures to be determined and only if no other measure is possible to be undertaken.

5. Conclusions

The aforementioned case law forces us to consider the boundaries of occupational health and safety and the respect for the workers' individual rights. Even though some principles, such as the safety of the co-workers, clients, consumers and other people affected by the workers activity, might be relevant and justify certain derogations to the workers' individual rights, their dignity and privacy must be respected.
The older workers should not be forcibly excluded from the labour market, but their health shall be monitored, in order to take into account necessary changes and adaptations of their specific tasks and activities and, if deemed appropriate, the termination of employment. All decisions should be grounded and medically reasoned, to protect not only the worker, but also to justify the employer's decision. But the decision should also be casuistic and specified to each worker. Consequently, older workers cannot be included in a "group", as each worker might have his own specificities.

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[92] Among portuguese legal scholars, cf. T. COELHO MOREIRA, *Discriminação em razão da idade dos trabalhadores: anotação ao acórdão do TJUE, Richard Prigge, de 13 de setembro de 2011, processo C-447/09*, *Questões Laborais*, n.º 39, January-June 2012, 137-141.

Finally, it seems important to clarify who these older workers are – how old should a worker be to qualify as an older worker[93]? Or is it preferable to call him or her an "advanced age worker"? Or should age be considered a criterion to establish the incidence of the proposed regulation at all? Must we consider the regular retirement age as a criterion? Or is it necessary to consider these workers before they reach that age[94]?

From our point of view, if we are protecting workers who, due to their age and, consequently, to their health status, are especially vulnerable to certain risks, we shall not impose a certain age as a minimum reference, as a worker might have health problems that influence his professional activity and may not necessarily be considered "old". Thus, the special individuals to consider here are not, strictly, the "older workers", but preferably "*the workers whose age has and impact on their working activities*".

This leads to the conclusion that, in fact, the personal characteristic that demands attention is the worker's health[95], because age will only be relevant if it determines changes in the worker's health that, for its part, causes a specific impairment[96/97]. But this is not a recognition of a disability of the worker, which is a special category that is clearly different from the group herein at stake.

In any case, considering general health problems that occur with aging, and taking into account the needs of slowing transitions to retirement age and conciliation with family life, the proposed measures shall be undertaken, regardless of the specific health status of the worker, from a certain age onwards. In fact, not only the referred art. 15 of the Framework Directive imposes such measures, determining that special groups must be protected, but

[93] The criteria is not unanimous. For instance the report on *Occupational Health and safety risks for the most vulnerable workers*, *op. cit.*, p. 29, determines that "ageing workers", following the European Working Conditions Survey (EWCS), are workers aged 55 years and above.

[94] About this debate, see Y. SÁNCHEZ-URÁN AZAÑA, *Trabajadores de "edad avanzada": empleo y protección social*, *Revista del Ministerio de Trabajo y Asuntos Sociales*, n.º 33, 2001, pp. 217-222.

[95] Concerning the worker's health, *vd.* B. FERNÁNDEZ DOCAMPO, *La salud del trabajador como causa de discriminación*, *Nueva Revista Española de Derecho del Trabajo*, n.º 162, march 2014, 71-93.

[96] "*Work ability is the outcome of the balance between the individual's resources and work-related aspects*" - Jan Fekke Ybema, Femke Giesen, TNO, the Netherlands, «Older Workers», available at http://oshwiki.eu/wiki/Older_workers, accessed 20-09-2015.

[97] Relating age to disability, see the report on *Occupational Health and safety risks for the most vulnerable workers*, *op. cit.*, p. 11, stating that "*Disability and age are often associated, as the prevalence of disability or impairment is highest among older people. The issues of recovery time and return to work after accidents or long-term illnesses, noted for ageing workers, are also important when seeking to increase the participation of workers with disabilities in the workforce*".

also the above mentioned art. 6 (1), (2)subparagraph. e) and (3), subparagraph. b) of the Framework Directive requires such a treatment.
Finally, new challenges arise, such as the ability to conciliate the work with individual abilities and quality of life[98].

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[98] A. WINCKELMANN-GLEED, *op. cit.*, p. 34.

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The Regulatory Challenges of Fulfilling the Policy Goal of Protecting Workers from Occupational Diseases

Ugochukwu Orazulike *

1. PART A: Introduction and Context

The author makes a clear delineation of classifying occupational harm into two broad groups: occupational injuries; and occupational diseases. Occupational injury here is a work-related bodily harm a worker suffers while carrying out occupational duties, whether caused by accidents, the physical nature and demands of work, or the use and nature of work tools, instruments and machines.

Occupational disease in this article means any form of bodily impairment, or malfunction of the bodily system, which is caused by work-related exposures of a worker to suspended particles, vapours, gases or fumes, in the air, either in the form of singular biological or chemical (whether synthetic or natural) substance/mixture or a combination of substances. These two classes of occupational harm can be sometimes but not always caused by occupational accidents. It could well be possible though that some work-related injuries may lead to diseases, and that some work-related diseases may lead to bodily injuries. That last correlational situation in so far as it falls outside the frames of the aforestated definition for occupational disease is not of interest in this article.

* Ugochukwu Orazulike is Junior Fellow at the Erasmus School of Law, Erasmus University Rotterdam (The Netherlands). He is also a Doctoral Candidate and Teaching Assistant at the School of Law of the University of Manchester (UK). Email address: ugochukwu.orazulike@manchester.ac.uk. The findings of this paper were presented at the conference "The Great Transformation of Work" organized by the Doctoral School in Human Capital Formation and Labour Relations of ADAPT and the University of Bergamo, that took place on 6 and 7 November 2015 in Bergamo (Italy).

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This article directs its analysis primarily to the regulatory challenges of occupational diseases. It treats law and policy standards governing occupational diseases by considering the compliance challenges and enforcement of EU OSH law under the Framework Directive 89/391/EEC, particularly two individual directives concerning OEL standards: Directive 98/24/EC, and Directive 2004/37/EC.[1] The protection of the safety and health of more than 217 million workers in the EU, and the prevention of risks for occupational diseases which certain chemical agents or hazardous substances pose to a portion of that workforce is an objective which the European Commission takes seriously.[2] At the moment, there are a number of policy implementation challenges which the EU must solve in order to achieve its objective of eliminating the causes of occupational diseases both in the EU and worldwide. Three relevant determining factors for these policy implementation challenges are of relevance in this article. The first is the increasing economic challenge of enforcing and monitoring EU OEL standards at the Member State levels.[3] The second is the lack of appropriate knowledge among important stakeholders who play various regulatory roles in the enforcement of OEL standards at the Member State levels.[4] And finally, the consequence of economic constraints and lack of proper knowledge about the importance of OEL standards, leading to what may be referred to as the normalisation of non-compliance with OEL rules at the enterprise level, especially small scale enterprises.[5]

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[1] Council Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC); Directive 2004/37/EC of the European Parliament and of the Council on the protection of workers from the risks related to exposure to carcinogens and mutagens at work (Sixth individual Directive within the meaning of Article 16 (1) of Council Directive 89/391/EEC).

[2] EUR-Lex, EU Strategic Framework on Health and Safety at Work 2014 – 2020 at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0332. (accessed September 19, 2015); European Commission Press Release, Health and Safety: Commission Requests Italy and UK to Protect Workers from Hazardous Chemicals, 21 June 2012 at http://europa.eu/rapid/press-release_IP-12-667_en.htm?locale=en (accessed September 19, 2015).

[3] Commission Staff Working Document: Evaluation of the European Strategy 2007 – 2012 on Health and Safety at Work at file://nask.man.ac.uk/home$/Desktop/SWD_2013_202_STAFF_WORKING_PAPER_EN.pdf (accessed September 19, 2015).

[4] L. Schenk, Awareness and Understanding of Occupational Safety Limits in Sweden, in Regulatory Toxicology and Pharmacology, 2013, vol. 65, 305 – 310.

[5] D. Walters, K. Grodzki and S. Walters, The Role of Occupational Exposure Limits in the Health and Safety Systems of EU Member States, prepared by South Bank University for the UK Health and Safety Executive, Research Report 172, 2003.

What do the formal regulatory principles for OEL standards entail? With regard to the foregoing three implementation challenges identified EU OSH law stipulates legal standards for encouraging improvements at workplaces in order to guarantee a better level of protection for the health and safety of workers.[6] The rules while accounting for the administrative financial and legal constraints that could place undue burden on the creation and development of small scale enterprises also recognise that the improvement of workers' safety hygiene and health at work is an objective which should not be subordinated to purely economic considerations.[7] Accordingly, risk assessment is required to be carried out by employers at the enterprise level to determine the potential health impacts that chemical agents and other substances used in industrial processes have on workers exposed to those substances. The basis for such risk assessments depends often on a mandate bestowed on employers by legislations. Nevertheless this obligation requires an employer to make necessary risk evaluations to determine measures which can be taken to account for the health risks that business activities can pose to workers. And depending on the result of the risk assessment procedures enterprises are expected to adopt preventive measures to ameliorate those health risks, or determine less harmful business alternatives in terms of change of production process, or change of equipment if such option is technically feasible.[8]

In fulfilling its mandate for setting uniform scientific standards for the protection of workers from hazardous chemical agents the EU established the Scientific Committee on Occupational Exposure Limits (SCOEL) in 1995.[9] EU OEL standards are enacted through different layers of regulatory considerations: policy outline about harmful chemical agents or carcinogenic and mutagenic substances; scientific considerations of the nature of the agents; technical and economic considerations about regulating them; time-bound regulatory limits of exposures to hazardous chemical agents and substances; the health implications for workers and individuals exposed to the agents/substances; and the environmental implications of allowing the use of the chemical agents. EU OSH law allows Member States to implement and enforce OEL rules through their national OSH regulatory regimes which

[6] Paragraph 1 Preamble and article 1 Directive 98/24/EC; paragraph 2 Preamble and article 1Directive 2004/37/EC.

[7] Paragraphs 2 and 3 Directive 1998/24/EC; paragraphs 2 and 3 Directive 2004/37/EC; paragraph 17 Preamble to Directive 89/391/EEC.

[8] Paragraphs 14, 15 & 19, articles 3, 4, 5, 6 & 9 Directive 1998/24/EC; paragraph 11, 13, 14 &15, articles 3, 4, 5, 9 and 16 Directive 2004/37/EC. This process is referred to as Occupational Safety and Health Management System (OSHMS).

[9] Commission Decision of 3 March 2014 on setting up a Scientific Committee on Occupational Exposure Limits for Chemical Agents and repealing Decision 95/ 320/EC.

although sharing certain basic features, have national features dependent on historical, legal, geo-political, social, economic and regional specificities. From these channels of regulation two social and economic factors are wedded into the author's logic for analysis: the regulatory roles of workers in the national OEL regimes, in the implementation of legally envisaged OEL standards both within and beyond the enterprise; and, the economic constraints of EU Member States, both in the broader sense of enormous economic setbacks since the Eurozone crisis, and in the specific sense of sharp reductions in the economic budget for the enforcement of OEL standards at the national levels. To this second ambit of socio-economic factor is the economic challenge of small scale enterprises in implementing OEL standards also included.

What do we know about the occupational health impacts of some chemical agents currently used across industries? A study about colour vision impairment on male workers carried out by Zavalik et al. in 1998 showed that colour vision, an occupational disease caused by exposure to toluene pose occupational problems to workers.[10] There are also numerous studies concerning the occupational diseases of workers exposed to different chemical agents.[11] While some research studies indicate that the exposure of workers to industrial use of certain regulated chemical agents at levels below OEL standards are harmless or inconclusive,[12] significant number of studies point to

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[10] M. Zavalic et al, Assessment of Colour Vision Impairment in Male Workers Exposed to Toluene Generally Above Occupational Exposure Limits, in Occupational Medicine, 1998, vol. 48, n. 3, 175 – 180.

[11] K. Korhonen et al, Occupational Exposure to Chemical Agents in the Paper Industry, in International Archives of Occupational and Environmental Health, 2004, vol. 77, 451 – 460;K. Thoren, S. Hagberg and H. Westberg, Health Effects of Working in Pulp and Paper Mills: Exposure, Obstructive Airways Diseases, Hypersensitivity Reactions and Cardiovascular Diseases, in American Journal of Industrial Medicine, 1996, vol. 29, 111 – 122; T, Kauppinen et al, Assessment of Exposure in an International Study on Cancer Risks Among Pulp Paper and Paper Product Workers, in American Industrial Hygiene Association Journal, 2002, vol. 63, 254 – 261; W. Jin Lee et al, Mortality from Lung Cancer in Workers Exposed to Sulphur Dioxide in the Pulp and Paper Industry, in Environmental Health Perspectives, 2002, vol. 110, n. 10, 991 – 995.

[12] K. Teschke et al, Occupational Exposure to Chemical and Biological Agents in the Nonproduction Departments in the Pulp Paper and Paper Production Mills: An International Study, in American Industrial Hygiene Association Journal, 1999, vol. 60, 73 – 83; AS. Fonseca et al, Characterisation of Carbon Nanotubes in an Industrial Setting, in Annals of Occupational Hygiene, 2015, vol. 59, n. 5, 586 – 599; 'We conclude from the present field study that PVA fibres have a low potential to release fibres with critical fibrous (WHO) dimensions. Their use in fibre cement factories does not significantly increase the magnitude of the cumulative (personal and environmental) exposure of the worker to airborne organic (EHO) fibre.' H. de Raeve, J. van Cleemput and B. Nemery, Airborne Polyvinyl Alcohol (PVA) and Cellulose Fibre Level in Fibre Cement Factories in seven European Countries, in Annals of Occupational Hygiene, 2001, vol. 45, n. 8, 625 – 630 at 629.

clear correlations between occupational health problems, and prolonged high or cumulative exposures of workers to suspended particles of hazardous chemical agents – above legally permitted limits.[13] Of particular significance also is the risk which certain chemical agents can cause to female workers and the children of female workers in some industries.[14]

Apart from the health implications of exceeding formally enacted OEL standards for workers, there are economic consequences to occupational diseases, that is, economic implications for workers immobilised to work due to the harmful effects of exposures to chemical agents. The negative and positive links between occupational harm and wellbeing; and, the individual and societal economic costs have been recognised in the literature for quite some time.[15] Eurostat statistics show that there are around 23 million persons affected by work-related health problems or work accidents every year. Based on data from 2007, at least 8.6% of workers in the EU-27 reported work related ill health in a 12 month period; the fourth European Working Condition Survey showed that 28% of workers in Europe believe that they suffer from health problems which are caused or may have been caused by either their current or previous jobs; work-related health problems resulted to about 367 million calendar days of sick leave in 2007; 1.4 million individuals are estimated to never work again due to their work-related health problems; and workers with work-related health problems retire early, usually before the age of 55.[16]

[13] 'A review article that included all relevant reports prior to 1995…on health effects of workers in the pulp and paper industry revealed that high exposure to chlorine compounds and paper dust was associated with an increased prevalence of impaired lung function, allergic respiratory diseases and death, and reduced sulphur compounds were associated with increased mortality rate due to ischaemic heart disease' K. Korhonen et al 2004, p 459 (n 11); Some studies about interstitial lung disease aka nylon flock worker's lung carried out in parts of the US show that prolonged exposure of workers to nylon fibre in nylon flock processing may have caused interstitial lung disease. See W.L. Eschenbacher et al, Nylon Flock-associated Interstitial Lung Disease, in American Journal of Respiratory and Critical Care Medicine, 1999, vol. 159, 2003 – 2008; D.G. Kern et al, Flock Worker's Lung: Chronic Interstitial Lung Disease in the Nylon Flocking Industry, in Annals of Internal Medicine, 1998, vol. 129, n. 4, 261 – 272.

[14] E Andersson et al, Cancer Mortality in a Swedish Cohort of Pulp and Paper Mill Workers, in International Archives of Occupational and Environmental Health, 2010, vol. 83, 123 – 132; R. L. Zielhuis, A. Stijkel, M. M. Verberk and M. van de Poel-Bot, Health Risks to Female Workers in Occupational Exposure to Chemical Agents, Springer Verlag, Berlin Heidelberg, 1984.

[15] European Commission, Directorate-General for Employment Social Affairs and Inclusion, Socio-economic Costs of Accidents at Work and Work-related Ill Health: key messages and case studies, European Union, Luxembourg 2011.

[16] Ibid.

It is therefore estimated that the economic cost of occupational diseases to the individual worker, affected business enterprises, and the society, is quite enormous. For the individual worker immobilised by ill-health caused at the workplace there are physical and mental health aspects to such a situation, each with contingent economic consequences. Such a worker would face the financial consequences of loss of future earnings, medical costs associated to the occupational disease, and additional medical costs for some workers who may fall into depression due to loss of self-confidence and/or diminishing quality of life. A business enterprise may incur economic costs if a significant portion of its human resources are lost to occupational diseases. The business can lose time on business targets due to absence of parts of its workforce, it can miss output targets for its customers, it could incur economic costs for hiring and training new employees, and in extreme situations it may liquidate due to inability to acquire competent individuals to replace workers which it had lost to occupational diseases. For the society, there are economic burdens as well, on the healthcare system, and depending on the nature of the occupational illnesses additional costs for daily care of immobilised individuals.[17]

Despite the incidents reported in the literature showing the practical health impacts of various hazardous chemical agents, there are as well reported widespread cases of partial compliance or non-compliance,[18] and gaps in knowledge among OEL stakeholders, regarding the importance of full compliance with OSH standards.[19] There is also a serious challenge about the non-uniform and sometimes lax practices of recording and reporting occupational diseases across many EU countries.[20] Quite profoundly, this has thus far made monitoring and accurate comparative assessment of the OEL regimes of the EU problematic. One of the obstacles that affect a comprehensive evaluative assessment of EU OEL standards across Member States was identified in a study carried out by Spreeuwers et al. on registries of occupational diseases in various EU countries.[21]

[17] European Commission 2011 (n 15).

[18] Walters et al 2003 (n 5).

[19] Schenk 2013 (n 4).

[20] 'The registries of the various EU countries differ considerably…Furthermore, the level of under-reporting (as far as such is possible to define and assess) varies between countries. Because of these differences, figures on occupational diseases are not comparable between European countries; moreover, the figures are often regarded as not reliable even within a country.' D Spreeuwers, A.G.E.M. de Boer, J.H.A.M. Verbeek, and F.J.H. van Dijk, Characteristics of National Registries for Occupational Diseases: International Development and Validation of An Audit Tool (ODIT), in BMC Health Services Research, 2009, vol. 9, 194.

[21] 'In order to evaluate whether targets of reduction in occupational diseases and work-related disorders have been achieved by policy measures, we must be able to monitor these diseases.

Some crucial regulatory challenges of meeting the policy target for occupational diseases have been clearly identified in my introduction so far: that some occupational diseases are caused by chemical agents, that economic problems across countries in the EU bring more strains to national capacities for full compliance with OEL standards, that many workers or their health and safety representatives lack adequate knowledge about the usefulness of OEL standards, and that many small scale enterprises struggle to meet the technical and financial requirements of conforming with formal OEL standards.
From among these issues, the author explores the consequences of the recent socio-economic trends already identified in regard to how they affect the roles of workers and their health and safety representatives in the enforcement of OEL standards. This necessitates considering the role of unionised workers in the regulation of OEL standards. In this case the role of trade unions is relevant because trade unions partake in the enforcement and monitoring of OEL in many EU countries,[22] and their functions in the regulation of occupational protection at the workplace are firmly enshrined in EU OSH law.[23] In an era of declining trade union figures, what can trade unions do to fulfil: the roles endowed on them by OSH legislations; and, their social, professional and institutional roles of facilitating compliance with rules established to protect the health of workers at the workplace? Are trade unions important actors in the pursuit of EU's strategic target to improve the prevention of work-related diseases through the implementation of existing OEL standards?
Part B of the article grapples with the question of whether trade unions are indeed important for the improvement of occupational safety and health management systems (OSHMS) at the workplace. In essence, are trade unions useful for filling knowledge gaps that hamper the protection of workers (members) from occupational diseases?
Part C of this article presents an overview of national OEL regulatory frameworks. This part considers useful pointers for the social, professional and institutional responsibilities of workers, their unions and their safety and health representatives within the national OEL systems in 4 EU countries. It concerns using the concept of accountability to review the functional or structural mechanisms for the regulation of OEL standards at the national level: it is less about the content of the standards themselves.

'D. Spreeuwers, A.G.E.M. de Boer, J.H.A.M. Verbeek, and F.J.H. van Dijk, Evaluation of Occupational Disease Surveillance in Six EU Countries, in Occupational Medicine, 2010, vol. 60, 509 – 516 at 510.
[22] Walters et al 2003 (n 5); paragraph 16 Directive 98/24/EC.
[23] Articles 10,11 and 12 Directive 89/391/EEC.

Part D discusses the potential roles of courts in the prevention of occupational diseases, and to a limited extent the institutional aspect of compliance with and enforcement of OEL standards.[24] For illustration purpose, Joined Cases C 307/09 – C 309/09 Vicoplus SC PUH and others v Minister van Sociale Zaken en Werkgelegenheid is considered. Should trade unions promote the interests of non-member EU posted workers in regard to occupational diseases?
Part E provides a summation. Here, it is argued that the current socio-economic transformations across the EU have not yet caused any radical changes in the existing EU OSH law and policy. However, it is yet to be seen whether trade unions in dealing with changing socio-economic times, can use social, professional and institutional powers available to them, to protect workers from risks posed by occupational diseases.

2. PART B: The Role of Workers in the Regulation of OEL Standards

Part A of this article described the policy, economic, social and legal aspects of problems regarding the prevention of exposures of workers to hazardous chemical substances that cause occupational diseases. The policy problem is finding ways to reduce and if possible eliminate occupational diseases emanating from exposures to hazardous chemical agents. The economic problem is that austerity measures and economic regression across EU countries put strains on national implementation and enforcement regimes for OEL standards. In many cases the drastic reduction in the economic budgets for work inspectorates meant changes in the formal State institutions for enforcing OEL standards – where the State operated as regulator, now gradually being swapped with market-based service (implementation) systems, where the State operates more or less like a facilitator.[25] There are now instances of use of the so called occupational health services (OHSs) in the revision and establishment of OSHMS within enterprises, advisory and monitoring roles originally undertaken by work inspectorates, and more so as proof of compliance with OEL standards – both in the Netherlands and Sweden. The social aspect of the problem provided empirical research to highlight the consequences of these economic changes by presenting a grim but factual picture about the impacts of occupational diseases in a few work sectors. The legal challenge is a hypothesis built on the assumption that future

[24] European Commission Press Release 21 June 2012 (n 2).
[25] M. M. Lucio and M. Stuart, The State Public Policy and the Renewal of HRM, in The International Journal of Human Resource Management, 2011, vol. 22, n. 18, 3661 – 3671; J. T. Scholz and W. B. Gray, Can Government Facilitate Cooperation? An Informational Model of OSHA Enforcement, in American Journal of Political Science, 1997, vol. 41, n. 3, 693 – 717. The state-as-a-facilitator model is based on research concerning US OSHA.

legal disputes regarding breach of obligations concerning the rules for OELs will be determined subject to formal responsibilities and obligations entrenched in current EU OSH law.

From a legal perspective, EU OSH law accounts for roles that trade unions play in the guarantee of the safety, health and wellbeing of workers in their working environments. EU OSH law possess two streams of standard: statutory OSH standards, and, practice OSH standards. In the first stream, the statutory OEL rules emanate from EU Directives regulating hazardous chemical agents, carcinogens and mutagens.[26] Local regulations in Member States must at the minimum conform to regulatory baselines established in EU OEL rules. Recommendations for statutory OEL standards are contained in the national legislations of Member States some of which are formulated by formal bodies comprising workers' representatives. The national OEL regimes can establish higher OEL standards but should meet OEL standards set at the EU level. The content of OEL rules are therefore both derived from supranational EU rules, and national rules on similar subject matters – legally envisioned to conform to those EU rules. In the second stream of standards, practice standards are institutional practices that are put in place for the fulfilment of OSH objectives embedded in statutory rules or in EU policies. Theoretically speaking therefore, trade unions have important roles to play in the realisation of legal and policy objectives of protecting workers from hazardous chemical agents, and the prevention of occupational diseases at the workplace, pursuant to their institutional roles in the regulation of OEL standards.

What does empirical research show about the roles of unionisation in the promotion of OSH legal and policy objectives? Before attempting to offer some answers to that question, let me highlight some emerging trends in trade union membership and union density across EU countries. There are some rises and falls in the number of trade union members in various sectors of the EU Member States in the last two decades. The Report of European Foundation for the Improvement of Living and Working Condition (Eurofound) indicates, based on figures from 2003 and 2008, that for 22 countries out of 28, 10 recorded an overall increase in trade union membership whereas 12 recorded overall decrease.[27]According to the UK Department for Business Innovations and Skills, union membership levels in the private sector

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[26] The EU system for enacting OSH rules is so democratic that it requires that the social partners are consulted by the EU Commission in the process of setting and establishing OSH standards. See paragraphs 9& 10 Directive 2014/27/EU.

[27] See Eurofound, Trade Union Membership 2003 – 2008 at http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/trade-union-membership-20032008 (accessed September 19, 2015).

fell from 3.4 million in 1995 to 2.5 million in 2010; the proportion of employees who were trade union members amounts to14.4% in 2013; and union membership in the public sector fell from 3.9 million in 2012 to 3.8 million in 2013.[28] In Sweden, there is overall higher percentage figure of trade union membership than elsewhere outside the Nordic countries, but there are new interesting trends of decline in union membership: between white and blue collar workers; in the private versus the public sectors; particularly sharp decline in the union density figures of blue collar workers in the private sector of Sweden.[29]

Some research studies suggest that the strength of a trade union and its organisational capacity can influence organisational changes at the enterprise level.[30] Trade unions have been shown as capable of influencing employees feeling of wellbeing, when assessed between union covered workplaces versus non-union covered workplaces, in enterprises where employers engage in consultation with trade unions.[31] The study about the moderating effects of

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[28] Department for Business Innovation and Skills, Trade Union Membership 2014, Statistical Bulletin, June 2015. From the surveys, the 2014 data for the levels of union membership in the private sector shows that it continued to show a reversal in previous trend, with a rise in the level of union membership in private sectors for the fourth consecutive year; a non-statistically significant increase of 38,000 in 2013 bring the figure to 2.7 million. The percentage figure for 2014 is 14.2% that is 0.2 percentage point lower than in 2013. This is because union membership increased more slowly than the rise in the number of private sector employees. For the public sector, union membership fell for the same period by 79,000.

[29] The overall union density for blue and white collar Swedish workers in 2006 was 77%; by 2008, it was 71% and 72% respectively (for blue and white collar workers). In 2010, union density for white collar workers went up by 1% to 73% from 72% figure of 2008, whereas the figure for blue collar workers was 69% - a fall from the 7% fall to 70% in 2009. The development within the private sector is even more dramatic. In 2006 the union density was 74% of blue collar workers and 69% of white collar workers. In 2014, the figure was 68% of white collar workers, and 61% of blue collar workers. See A. Kjellberg, Kollektivavtalens täckningsgrad samt organisationsgraden hos arbetsgivarförbund och fackförbund, in Research Report 2013:1 (updated July 1, 2015) at http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1545448&fileOId=1545800 (accessed September 19, 2015).

[30] A. C. Frost, Explaining Variations in Workplace Structuring: The Role of Local Union Capabilities, in Industrial and Labour Relations Review, 2000, vol. 53, 559 – 578; A. C. Frost, Reconceptualising Local Union Responses to Workplace Restructuring in North America, in British Journal of Industrial Relations, 2001, vol. 39, 539 – 564; C. Lévesque and G. Murray, Union Involvement in Workplace Change: A Comparative Study of Local Unions in Canada and Mexico, in British Journal of Industrial Relations, 2005, vol. 43, n. 3, 489 – 514; D. Walters, Employee Representation and Occupational Health and Safety: the Significance for Europe, in Journal of Loss Prevention in the Process Industries, 1995, vol. 8, n. 6, 313 – 318.

[31] '…worker involvement in the introduction of organisational change is what matters for workers well-being, but even this is effective only in the presence of a trade union that has bargaining rights with the employer.' A. Bryson, E. Barth and H. Dale-Olsen, The Effects of

trade unions on employee wellbeing merely focused on trade union influences on decision making during organisational change. With regard to risk assessment requirements for hazardous chemical agents the study about union influence in times of organisational change can contribute to the improvement of preventive actions for work-related diseases in three ways: i) in the process of establishing an OSHMS for business activities that may cause occupational diseases to workers at the enterprise level,[32] ii) in the substitution of equipment or production process with the aim of meeting policy targets for OEL standards. In other words, when a change of chemical agent, work equipment or transformation of work process, could eliminate the need to carry out regular technical and expensive measurements of binding occupational exposure limits (BOELVs), indicative occupational exposure limit values (IOELVs), occupational exposure limit values (OELVs), or threshold limit values (TLVs),[33] and iii) when unions exercise their statutory right to consultation, or appeal over compliance with OSH standards.[34]

In a much more topic-related study, Morantz provides a thought provoking account of safety and health practices in US coal mining industry thereby exposing compelling insights into the question of whether trade unions help promote occupational health and safety at the workplace.[35] Morantz's study explored the activities of the United Mine Workers of America (UMWA) stretching back to its historical foundation in 1890, when three of the eleven principles in its Constitution sought for improvements in the safety and health conditions of mine workers. Another earlier study concerning the UMWA suggested that improvement in the knowledge of the regulatory procedures may have helped the betterment of UMWA in terms of dealing with the safety

Organisational Change on Worker Well-being and the Moderating Role of Trade Unions, Industrial & Labour Relations Review, 2013, vol. 66, n. 4, 989 – 1011 at 1007.

[32] Articles 3 (5), 4 & 5 Directive 98/24/EC; Subject to the rule about the employer's obligation to carry out risk assessment for regulated hazardous chemical agents, there are two angles to such risk assessment: i) the determination of risk inherent in used chemical agents, and ii) the assessment of the risks which those used chemical agents pose to the health and safety of workers.

[33] Article 6 (2) & (4) Directive 98/24/EC; articles 3 (2), 5 (e) Directive 2004/37/EC

[34] Articles 11(1) (2) (3) & (6) and 12 (1) Directive 89/391/EEC; article 11 Directive 98/24/EC; articles 12 (a) & 13 Directive 2004/37/EC.

[35] '…scholars have documented numerous ways in which unions help to promote safe work practices. For example, unions typically play a critical role in educating workers about on-the-job hazards; giving workers incentives to take greater care on the job; attracting more safety-conscious workers; inducing employers to abate known hazards; increasing regulatory scrutiny; and developing safety-related innovations' A. D. Morantz, Coal Mine Safety: Do Unions Make A Difference?, in Industrial & Labour Relations Review, 2013, vol. 66, 88 – 116 at 88 – 89.

and health issues affecting its members.[36] These studies provide empirical evidence indicating that trade unions could help educate workers about the hazards associated with their workplace as lack of awareness and understanding of the usefulness of OELs among workers, managers, and workers' health and safety representatives, was shown in Schenk 2013[37] as one of the major impediments to compliance with OEL standards at the enterprise level in Sweden.

There are further numerous accounts about the roles of trade unions in helping realise the goals of workers in the three market economies that exist within the EU: liberalised market economies (LMEs), social market economies (SMEs) – coordinated market economies (CMEs) and mixed market economies (MMEs).[38] The author will not analyse the literature on varieties of capitalism in detail here – in terms of how trade unions may or may not deploy their institutional, professional and political powers to help promote the cause of eliminating work-related diseases affecting workers. Most of these studies while providing credence to the value of unionisation for the achievement of policy and labour interests of workers have mainly different research assumptions as departure points.[39] Regardless of which position one may take on whether trade unions can help improve the protection of workers from, and the prevention of occupational diseases at the workplace, EU OSH law is unambiguous in how it accords importance to the institutional roles of trade unions. First in the statutory roles it bestows on unions.[40] And second, in the recognition of the historical, political, professional and institutional relevance of trade unions in all the Member States of the EU.[41]

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[36] D. Weil, Turning the Tide: Strategic Planning for Labour Unions, Lexington Books, New York, 1994.

[37] Schenk 2013 (n 4).

[38] K. Thelen, Varieties of Liberalisation and New Politics of Social Solidarity, Cambridge University Press, New York, 2014; A. Hassel, Adjustment in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe, LEQS Paper No. 76/2014, London School of Economics, 2014; J. Peters, The Rise of Finance and the Decline of Organised Labour in the Advanced Capitalist Countries, in New Political Economy, 2011, vol. 16, n. 1, 73 – 99; P. A. Hall and D. Soskice, Varieties of Capitalism: The Institutional Foundations of Comparative Advantage, Oxford University Press, 2001.

[39] For instance the issues of collective bargaining, fair pay, secure employment contracts, and overall working conditions, are generally speaking more popular in research studies about industrial relations and labour market policies.

[40] Directive 89/391/EEC.

[41] 'Relations between trade unions and centre-left parties are, for instance, close in many European countries as there has been a tight co-evolution of social democratic parties and trade unions.' Hassel 2014 (n 38) p 11; 'Also the changing structure of European companies promotes the development of European Labour Law: groups with cross-border activities need uniform law already for organisational reasons. At the same time a Europe-scale enterprise

In the last two decades, much have changed in the advancement of science and knowledge about occupational diseases, the economic performances of many EU Member States have undergone much transformation, much have also changed in the composition of trade union members and density, and, much changes have as well been exposed in the methods States use for the operationalisation of OEL standards. Yet, little seems to have changed in the institutional functions of workers representatives in the national OEL regimes of most EU Member States. Are the formal roles of workers representative (trade unions) crucial for the realisation of EU policy goals regarding occupational diseases?

3. PART C: Legal and Institutional Accountability of Workers Representatives in National OEL Regimes

In view of the uniformity objective in the practical effects of social policies in the EU, the rules for EU OSH standards are formulated with due cognizance to their binding effects, to the principle of subsidiarity and to respect for local circumstances and conditions.[42] Across EU Member States there are different implementation regimes for regulated hazardous chemical agents. The crucial ways by which trade unions can influence the OSH wellbeing of workers were outlined in Part B with help from empirical studies. Trade unions were shown to help influence organisational changes that occur at their workstations when they were consulted by employers (or management) regarding the transformation of work methods, tools, equipment, systems and so on. In situations where unionised workers could exercise a legal right to consultation by the employer, these empirical studies suggest that the influence of trade unions on employees' feeling of wellbeing was much more profound than otherwise. The studies by Morantz about the US UMWA show that the incorporation of safety and health objectives in the founding constitution of UMWA, and the subsequent strategic actions for the education and training of UMWA members, positive actions on the encouragement of compliance based practices at the workstation, and the coordination of the activities of UMWA

entails a Europe-wide coalition of employees to secure and exercise employee rights. With the advancement of the above mentioned trends, the pressure for innovation of labour law increases. It has to be adjusted in order to do justice to the current and future requirements.' W. Schmeisser, D Krimphove and R. Popp, International Human Resource Management and International Labour Law: A Human Resource Management Accounting Approach, Oldenbourg Wissenschaftsverlag GmbH, Munich, 2013.

[42] See articles 3a and 3b Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007/C 306/01) Official Journal of the European Union.

through their branch offices, helped facilitate goal-oriented outcomes for the improvement of the health and safety concerns of UMWA members.

In this part of the article, the author provides important pointers on the legal and institutional roles of trade unions in four EU countries: Germany, Italy, Netherlands and Sweden. The reason for selecting these countries is due to the legal and institutional structures of their OEL regimes, remarkable, in terms of how they embody some instruments for the best OEL practices.

Germany represents a dual OEL regime where OEL regulation uniquely depends on two parallel channels of enforcement, one by the State, and the other by the social partners. Italy is a country where OSH is firmly embedded in the national healthcare policy of the State. The right of workers to health and safety at work is as well guaranteed in the Constitution, and cannot be subordinated to purely economic concerns. So while most policy agreements in industrial relations are governed by collective agreements, the right of workers to protection from exposures to hazardous substances is unfettered. The hard question in Italy is how to empirically achieve targets for the occupational protection of workers from exposures to hazardous chemicals: not whether there is any Constitutional foundation upon which to pursue it.

In the Netherlands, reforms of social security regulations entailed the introduction of a market-oriented private enforcement mechanism for the pursuit of OEL goals. Dutch enterprises are mandated by law to seek the professional service of OHSs to assist them in the internal OSHMS of the enterprise. In the Netherlands also, workers have a constitutional right to bring complaints against their enterprises for non-compliance with OEL rules or when business activities within their enterprises may expose workers to occupational diseases. Trade unions in the Netherlands assist in monitoring the enforcement of OEL because although they could support workers who submit complaints of non-compliance with OEL rules against their employers, they document applications put forward by their members for non-compliance with OEL standards. And in Sweden, a country often described as relatively having a well-advanced and progressive OEL regime, the rights of workers to protection from hazardous work environment, the right of workers to consultation on working conditions at the workplace, and to information about the hazardous nature of employment were all long guaranteed in law, even before Sweden joined the EU. Sweden has a model of risk management system known as systematic work environment management (SWEM). The use of OHSs is also a recognised practice in the country therefore enterprises can employ OHSs for the development or improvement of their internal risk management systems through the use of SWEM.

By the time key legal and institutional roles of trade unions in the regimes of the four countries are laid bare hereunder, the selected idiosyncratic features

used to characterise these regimes are hoped to provide good insights into the avenues for rethinking social, professional and institutional accountability of trade unions and workers representatives, within the discourse of regulatory challenges for fulfilling the policy goal of protecting workers from occupational diseases. An overview of these national OSH regimes is presented but emphasis lays on the significance of the roles of workers or workers' representatives in the national regulatory regimes[43] in helping bridge the knowledge gap about the usefulness of OEL standards among workers, and their overall contribution to preventive actions for tackling the challenges of work-related diseases. The discharge of this role is a responsibility bestowed on unions, in the face of dwindling economic resources for the implementation and enforcement of OEL standards.

As noted by Schmeisser et al. 2013, in the context of vast transformations cutting across governments' and enterprises' (at the least small scale enterprises) economic base, trade unions should find innovative ways of fighting their OSH cause. A critique of the roles of trade unions in light of the type of functions that workers representatives carry out in OEL national regimes in the EU, and in contributing to filling the knowledge gaps about the importance of proper compliance with OEL standards is a form of evaluation *of social, professional, and/or institutional accountability* of trade unions.[44] Appraising the social, professional, and institutional responsibilities of trade unions is necessary so as to use such assessment of unions' performance on OEL regulation to: i) validate a perception of unions' relevance, and make them legitimate in the eyes of workers – both unionised and non-unionise, and in the eyes of society, that is, other external actors – government, employers, communities, shareholders, and investors. Just like employers or formal State bodies could be held accountable for their performance over different aspects of regulatory functions, trade unions should, even in the context of much more limited resources occasioned by economic setbacks, be appraised on the merits of their performance in contributing to the achievement of fundamental safety and health objectives of policies[45] ii) project unions as important stewards in

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[43] The account of OEL implementation regimes in the EU is primarily drawn from Walters et al 2003 (n 5).

[44] In May's position about regulating for result, it is expected that some form of performance-based assessment of the OSH policy targets of trade unions/OSH workers representatives can in theory be undertaken either by trade union officials themselves, members of the union, or independent committees from within or outside the union: P. J. May, Regulatory Regimes and Accountability, in Regulation & Governance, 2007, vol. 1, 8 – 26; U. Orazulike, Making Them Pay: A Proposal to Expand Employer Responsibility for Occupational Safety and Health, in Journal of Workplace Rights – Sage Open, 2015, vol. 5, n. 3, 1 – 10.

[45] Paragraph 1 Directive 2014/27/EU of the European Parliament and of the Council amending Council Directive 92/58/EEC, 94/33/EC, 98/24/EC and Directive 2004/37/EC

the regulation of OEL policies. Workers representatives have firmly embedded institutional roles across many EU countries: at some national boards that set national OELs standards; at the enterprise level, in the process of planning, designing and establishing OSHMS standards both at the national, regional, sector and enterprise levels; and through other mechanisms used in the enforcement of rules for hazardous chemical agents.[46]
Walters et al. 2003 divides the structural systems for the regulation of OELs in various EU countries into two broad categories: the linear system of OEL implementation and enforcement; and, the bi-linear or the so called 'dual system' of implementation and enforcement.[47] While many OEL regimes in the EU fall into the linear model, the OEL systems of Germany, and to some degree the French OEL regime, are the typical examples of dual OEL systems. I draw insights from Walters et al. 2003 to offer a snapshot account of the structural systems of national regimes for OEL, where workers are represented in the national regulation of OEL standards.
Germany has a long history of OSH regulation stretching back to the Industrial Code of 1869 (Gewerbeordnung). In that law, the employer owes employees a general obligation to manage the working environments and work tools in ways that guarantee the protection of workers from threats to life, and health harms. Later amendments in a revised version of the law in 1891 included the condition that such employer obligation meets the contextual circumstances of the business. The second ambit of OSH law in Germany is the Accident Insurance Law locally known as 'Unfallversicherungsrecht', dating back to the Industrial Accident Insurance Act of 1884 (Gewerbe-Unfallversicherungsgesetz). This second stream of regulation was included in the National Insurance Code 1911 (Reichsversicherungsordnung). Beyond these historical enactments, the current model of Germany's OEL

of the European Parliament and of the Council, in order to align them to Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures, states at follows: '…Good health and safety standards should not be considered as constraints, since they are fundamental rights and are to be applied without exception to all sectors of the labour market and all types of undertakings regardless of their size.' See also paragraphs 2, 9 &10 thereof.

[46] It is crucial to note the amendments to article 2 of Directive 98/24/EC, and that some chemical agents which do not meet the criteria for classification as hazardous under current regulation could be governed by rules for hazardous chemical agents. Under current regulation, the fact that chemical agents do not have established OELs does not mean that employers should not treat them as hazardous if those chemical agents would apparently cause occupational harms or diseases to workers – article 4 Directive 2014/27/EU; see also article 1(2) Commission Recommendation concerning the European schedule of occupational diseases C(2003) 3297.

[47] Walters et al 2003 (n 5).

enforcement (law making and law monitoring roles) is based on two channels of regulation namely: i) the State based mechanisms for OEL rule making and its monitoring (safety and health regulation of the Federal Republic of Germany), manned by Bundesminiterium für Arbeit och Sozialordnung (BMA) and ii) the non-State based mechanisms for OEL rule making and monitoring (autonomous health and safety system of the accident insurance funds), known as Unfallversicherungsträger (UVT). The non-State stream involves two institutions of the social partners, known as i) Unfallverhütungsvorschriften (UVV), and ii) Berufsgenossenschaften (BG) – BGen. The composition of these two bodies is based on the principle of parity entailing equal representation for both employers and employees. The institutions of the social partners have powers to issue and enforce autonomous OEL rules, called Accident Prevention Orders (Unfallverhütungsvorschriften) and Technical Inspection Service (Technischer Aufsichtsdienst).

In Italy the OSH right of workers is enshrined in its 1978 Constitution.[48] The Italian model of OEL regulation is also subject to central, regional and local unit negotiations and delineation of functions. Although national policies and legislations are mostly determined at the federal level, the Italian model of administration recognises the powers of regional authorities to adopt different means for the implementation of federal policies. The 1970s and 1980s reform on health and safety in Italy introduced fundamental changes that entrenched the primacy of working conditions and the principle that workers health must not be subordinated to economic considerations. Article 9 of the Workers Statute (the Terms and Conditions of Employment Act 300 of 1970) provides that workers as a community – not individuals, should be active in the implementation of preventive measures and general regulations on health. This condition has made its way into rules embedded in Italy's collective agreements

[48] 'Health and safety was an important issue in the labour struggles of the 1970s. As a consequence, it has been included in collective bargaining at national and enterprise level for many years. At the same time, the character of the Italian system for regulating health and safety at work before the transposition of the Framework Directive 89/391 was profoundly different to that of other EU member states in the way it conceptualised workers' occupational health, the responsibility for it and the structures and processes set up to protect and promote it. There was a notion of the rights of workers to have a collective control over their own health, which was, arguably, fundamental to the Italian approach and which was more explicit than in other EU countries.' Walters et al 2003 (n 5) p 138; Article 32 of 1948 Constitution of Italy recognised health as a fundamental right which must be achieved through preventive measures, taking account of technically feasible factors that should as well pursue work protection, and so based on this provision, health objectives cannot be undermined by economic reasons.

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at national, industry, sector and enterprise levels.[49] Regarding OEL standards, fundamental safety and health safeguards for workers are introduced in collective agreements, which in themselves are legally binding; trade unions in Italy could therefore influence the regulation of OELs through collective agreements.[50]

In the Netherlands, trade unions, employers unions and government representative are all together involved in the setting of OEL standards. For the determination of OEL standards, the OEL regime of the Netherlands distinguishes between health-based criteria for standard determination, and standard determination criteria that account for economic and technical considerations. Under the rules in the Netherlands, employees can put forward complaints to the work inspectorate against an employer about the rules regulating the use of hazardous chemical agents or mixtures.[51] This right enables trade unions to support employee complaints by operationalising internal union procedures for supporting employee complaints.

Since the Netherlands operates a form of corporatism that is based on the so called 'poldermodel or overlegeconomie' that is consultation economy, regular ongoing consultations and negotiations between the social partners, and with or without the government, at the national level, the regional level, the sector or industry level, and the enterprise level; are central to its institutional system for regulating OELs.[52] Collective bargaining arrangements are very useful and recognised modes of agreements in industrial relations in the sectoral level of Netherlands. As a result of certain market-oriented reforms introduced recently to change the social welfare system of the Netherlands, enterprises can, in fulfilling their legal obligation to keep working environments safe, employ the professional services of private OHSs – 'Arbodienst', to help them carry out legally mandated risk assessments, preventive OSH management or

[49] 'In general, national industry agreements provide for the role of trade unions in controlling the application of legal provisions and defining preventive measures. The organisation of prevention in small and medium-sized firms is also dealt with, notably through the organisation of regional industry structures.' Walters et al 2003 (n 5) p 140

[50] Walters et al 2003 (n 5).

[51] 'In inspection reports for 2000 in the chemicals sector, practices concerning dangerous substances were amongst the most frequent violations of the law but OELs are not mentioned. Similarly in reports for the same year for sectors dealing with paints, agrochemicals, rubber and plastics there was mention of work with dangerous substances, but no mention of violations or enforcement actions in relation to exposure limits.' Walters et al 2003 (n 5) p 156.

[52] 'These strategies have resulted in a large measure of consensus and a trade off between economic and social policy objectives. Thus, the role of bipartite and/or tripartite agreements (involving the government) to elaborate or complement legislation by the social partners or to avoid statutory regulation is prominent in the field of industrial relations and labour law.' Walters et al 2003 (n 5) p 150.

tailor-made OSHMS for the enterprise.[53] There was further development in 1999 by the Secretary of State which entails the introduction of the so called OHS covenanten (arboconvenanten) in the public sector and some areas of the economy.[54]

Sweden is one of the EU countries with the most advanced and grounded institutions for the regulation of safety and health at the workplace.[55] In Sweden, the system for setting and using exposure OELs standards in the determination of OSHM has been in place since the 1970s. This is a good example of an approach that lays emphasis on regulating work environments based on consensus, and on corporatist decision making at sectoral and national levels. The OEL regime of Sweden includes a highly developed external prevention services and strong representative participation of workers in activating health and safety protocols at the enterprise level. The central tenet of the Swedish OEL regulation is the so called systematic work environment management (SWEM)[56], established in 2001, designed to incorporate work environment as an integral part of the everyday activities of an enterprise.[57]

There is however new research studies that examined how SWEM worked in 21 small-scale manufacturing enterprises in Sweden. The result of the studies

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53 'At the workplace level several features have a bearing on the approach to dealing with chemical hazards. They include: statutory requirement on employers to contract with occupational health services to provide them with expertise in risk evaluation and control; role of workers' participation through work councils in arrangement for health and safety; strategies of the labour inspectorate to promote and support a systematic approach to occupational health and safety management.' Walters et al 2003 (n 5) p 149

54 'By 2002 there were 19 declarations of intention and 33 convenanten. The strategy can be considered an application of the idea of self-regulation and self-reliance.' Walters et al 2003 (n 5) p 153; cf. S. Tombs and D. Whyte, The Myths and Realities of Deterrence in Workplace Safety Regulation , in British Journal of Criminology, 2013, vol. 53, 746 – 763

55 R. M. Morillas, J.C. Rubio-Romero and A. Fuertes, A Comparative Analysis of Occupational Health and Safety Risk Prevention Practices in Sweden and Spain, in Journal of Safety Research, 2013, vol. 47, 57 – 65.

56 'SWEM refers to the requirement by every employer to investigate work environment issues of an ergonomic and a physical/chemical nature as well as psychosocial conditions. It encompasses the decisions made and measures taken to manage efficiently any problems arising and to prevent accidents and injuries. Essential activities have to be documented and followed up on.' See http://www.eurofound.europa.eu/observatories/eurwork/articles/working-conditions/systematic-work-environment-management-in-sweden accessed 19 September 2015.

57 K. Frick, Sweden: Occupational health and safety management strategies 1970-2001, in D. Walters (ed.), Regulating health and safety management in the European Union: a study of the dynamics of change, Presses Interuniversitaires Europenes, 2002, pp. 211-234; Walters et al 2003 (n 5).

suggest that SWEM underperforms in relation to the cost of implementing it, hence called for an improved cost-effective and simple model for regulating occupational risks and hazards management at the enterprise level.[58] The implementation of SWEM within the enterprise relates to safety and health regulatory rules or instructions established by 'Arbetsmiljöverket' – The Swedish Work Environment Authority (SWEA), pursuant to its mandate in the Work Environment Act – Arbetsmiljölagen.[59] According to that Act, employers and employees should work together to ascertain appropriate conditions for the workers' occupational conditions; and an employer must take all appropriate measures to prevent the exposure of workers to occupational diseases and accidents – including making special risk considerations that may affect a lone worker; and taking measures that account for the appropriateness of the workstation, work tools, protective equipment and other technical factors that could be of concern.[60] SWEA has further legal mandate to provide instruction or guidelines on how enterprises are expected to implement SWEM. It has therefore a supervisory and monitoring role in the enforcement of OEL standards in Sweden.

In similar vein as the Netherlands, enterprises in Sweden can employ the support of OHSs (företagshälsovård) to help them improve their OSHMS or business activities that require risk determination and assessment, evaluation, preventive measures and adoption of risk management actions.[61] At the

[58] See K. Gunnarsson, M. Andersson, and G. Rosen, Systematic Work Environment Management: Experiences from Implementation in Swedish Small-scale Enterprises, in Industrial Health, vol. 48, 185 – 196; D. Walters, R. Johnstone, K.. Frick, M. Quinlan, G. Baril-Gingras and A Thebaud-Mony, Regulating Workplace Risks: A Comparative Study of Inspection Regimes in Times of Change, Edward Elgar Publishing Limited, 2011.

[59] Arbetsmiljölagen SFS 1977: 1160; SWEA is entrusted with the authority to formulate relevant regulations for safety and health at the workplace; represents Sweden at the European level through its participation in the Advisory Committee on safety and Health (ACSH) and Senior Labour Inspectors' Committee (SLIC) see https://osha.europa.eu/en/about-eu-osha/national-focal-points/sweden (accessed September 19, 2015).

[60] See 3 kap 1a § (1994:479) and 2 § (2002:585) Arbetsmiljölagen SFS 1977:1160.

[61] L. Schmidt, J. Sjöström and AB. Antonsson, How Can Occupational Health Services in Sweden Contribute to Work Ability?, in Work, 2012, vol. 41, 2998 – 3001 'According to the Swedish legislation on occupational health and safety OHS should be an expert and particularly work to prevent and eliminate hazards in the workplace. OHS shall also have the skills to identify and describe the relationship between work environment, organisation, productivity and health…In Sweden the employers cover the costs of OHS. Therefore investments in OHS are more determined by economic state of the company than risks in the work environment.' p 2998 thereof.

moment just like elsewhere in continental Europe,[62] there are efforts in Sweden to transform the Swedish model of industrial relations.[63]

4. Part D: The Adjudication Challenge in Enforcing OEL Standards

At the Member State levels, the infringement of OEL rules may in some cases lead to court action. Non-compliance with OEL standards can lead to civil, administrative, and/or criminal sanctions depending on the law of the country concerned. There is perhaps no decided case by the European Court of Justice (ECJ) on violation of OEL provisions for workers pursuant to EU law. It is however a settled principle of 'acquis communautaire' that Member States of the Union have a duty to provide adequate compensation to victims in respect of losses caused to them by the breach of EU law. For illustration purpose here, let us look at a recent case judged by the ECJ in Joined Cases C 307/09 – C 309/09 Vicoplus SC PUH and others v Minister van Sociale Zaken en Werkgelegenheid, which may shine some light on OEL standards. In this case the ECJ considered the employment status of Polish workers posted as workers hired out for services, to the Netherlands. The important question for determination was whether the employers of the workers were bound by article 2 (1) of the Law on the employment of foreign nationals – Wet arbeid vreemdelingen (Wav) subject to article 1 (3) (c) of Directive 96/71/EC.
One of the joined cases C – 309/09 Olbek Industrial Services sp. zoo concerned 20 Polish workers posted to work for HTG Nederveen BV, a Dutch company, in order to carry out waste processing services for a period of several months. The legal dispute of who was the real employers of the Polish workers, and whether failure to obtain work permits for them subject to article 2 (1) of Wav constituted a violation of employment law in the Netherlands is not pursued here. On the other hand, the author intends to use the facts of the

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[62] Eurofound, The Future of Social Dialogue, Tripartism, Bipartism: Collective Employment Relations – Q4/2014 at http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations/the-future-of-social-dialogue-tripartitism-and-bipartism-collective-employment-relations-q4-2014 (accessed September 19, 2015).

[63] The Confederation of Swedish Enterprise (SN) and the Swedish Trade Union Confederation (LO) announced recently of their agreement to enter into a negotiation about how the Swedish model of social dialogue could be transformed. The most important point about the joint-declaration is the view that bipartite system for decision-making should be maintained, so that decisions regarding the regulation of working conditions in Sweden are made by the social partners; and not politician. See Svenkt Näringslivs, LO och Svenkt Näringslivs vill fortsätta att utveckla den svenska modellen at http://www.svensktnaringsliv.se/material/pressmeddelanden/lo-och-svenskt-naringsliv-vill-fortsatta-att-utveckla-den-svenska_599949.html (accessed September 19, 2015).

said case differently, to discuss the right of all EU workers to protection from occupational diseases assuming: i) the matter was brought to ECJ to address violation of EU OEL rules that led to exposure to occupational diseases, and ii) the right of the 20 Polish workers to compensation for occupational harm in the Netherlands was disputed. So how would claims for breach of OSH rights under EU law been decided under the foregoing circumstances, that is, i) failure by both Olbek Industrial Services and HTG Nederveen BV to obtain work permits for 20 Polish workers, and ii) if the work inspectorates had not discovered their situation, but instead matters brought to limelight in court by the occurrence of occupational harms from hazardous chemicals used in waste processing activities?
It is almost impossible to predict exactly how the facts of a matter about occupational exposure to regulated hazardous chemical substances, involving posted workers from new EU Member States will unfold. Nevertheless, it is clear that some of the important issues which courts may grapple with in their judgements in such cases would include all or some of the following: i) whether the host enterprise in the Netherlands has OSHMS in place; ii) whether the host enterprise employed the expertise of OHSs providers iii) whether the host enterprise comply with Dutch OEL law iv) whether the host enterprise had a history of compliance or non-compliance with OEL regulations v) whether the host enterprise was in breach of OEL standards derived from EU OSH standards vi) whether Polish workers who may have been harmed through exposure to hazardous chemical substances could secure compensation in Netherlands despite the fact that no work permits were obtained for their work in the waste processing operation vii) whether Netherlands established all appropriate measures to give effects to OEL rights of EU workers derived from EU regulations, and viii) whether EU law provides sufficient regulations for the protection of posted workers from new EU Member States from occupational harms.
In the event there is a dispute concerning the rules of OELs, the courts will be called upon to decide on OEL statutory standards, but the effectiveness of OEL practice standards depends indeed on the use of institutional functions of OSH stakeholders including trade unions to achieve the goal of eliminating occupational diseases at workplaces, thereby preventing the occurrence of legal disputes.

5. Conclusion

In my view, the goal of protecting workers from occupational diseases should be dearer to workers who work with business activities involving exposure to hazardous chemicals, carcinogens and mutagens, than to any other stakeholder. This is a good reason to imagine or envision contributions from such workers, either by themselves or through their trade unions and representatives in various bodies within the OEL regimes, to the EU strategic goal of protecting workers from occupational diseases. The view that trade unions should show professional, social and institutional accountability in the functions they discharge in the regulation of OEL standards takes cognizance of the limited economic resources that constrain what trade unions can achieve in their roles within their national systems. Assessment of accountability of trade unions concerns an appraisal of the discharge of current powers which are bestowed on trade unions by EU OSH law, the Constitutional laws of Member States, the power of collective bargaining in the national institutional systems of OEL regimes, the power of consultation and negotiation with employers over OSH issues, the power of monitoring compliance with OEL standards, and the capacity to improve knowledge of workers on the importance of OEL regulatory standards.
In the beginning, this article provided research studies that validate the EU OSH Strategic Framework 2014 – 2020. First, a case was made about the practice of non-compliance to OEL standards, and poor knowledge about OEL standards among workers, small scale entrepreneurs and workers' OSH representatives. This was followed by the presentation of figures on occupational diseases based on empirical findings from the field of occupational medicine. If the EU is to achieve the goal of improving the implementation of existing health and safety rules, and improving the prevention of work-related diseases, then a review of the regulatory roles of trade unions should be brought to bear.
Subsequently, I looked to empirical research from industrial relations to find empirical evidence that trade unions can improve OSH outcomes for their members, especially under circumstances where they exercise a statutory right to consultation or negotiation with employers.[64] In addition to that, empirical

[64] There is currently a rift between NHS employers UK and Junior Doctors Committee (JDC) within the British Medical Association (BMA) over new proposed reforms of medical practitioners' contracts in the UK. The contentious reform was proposed by Doctors' and Dentists' Review Body (DDRB), an independent body set up to advise the British government on pay for doctors and dentists in NHS, in a follow-up to the government's plan to provide an efficient seven-day health service within NHS UK. The JDC claims that the new contract reform will harm the working conditions and occupational wellbeing of junior doctors, and it

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research on UMWA pointed the number of ways in which UMWA made progress in the protection of its members from OSH harms, including targeted efforts to improve the knowledge of mine workers on occupational hazards or risks associated with mine workplaces.
Social and professional accountability was part of the mind-set in the review of legal and institutional roles of trade unions in the four national OEL regimes explored. Could trade unions trade lessons and success stories through the transplantation of OEL practices across borders? Based on the accounts of Walters et al. 2003, the role of trade unions in Germany's dual system of OEL regulation seemed to lead to improvements in the protection of workers from occupational diseases. The law making, monitoring, and documentation roles of Germany's professional bodies comprising both employers and employees sometimes collide with similar roles by Germany's work inspectorate but the important element of the system in my view is that it generates debates and leads to improvement in the protection of workers from occupational harms.
For Italy, an element of social, professional and institutional accountability can provide lessons on how the solidarity of trade unions in supporting regulatory methods that unify practices across districts, sectors or occupations, where empirical understanding of local specificity factors in Italy was shown by trade unions in regard to how best they propose OEL practices should be regulated. For trade unions in the southern part of Italy it is yet to be seen whether consultation and negotiation with employers will provide good OSH outcomes in collective agreements compared to the northern part of the country.
The Netherlands puts the power of complaints for non-compliance with OEL rules in the hands of workers. If workers in Netherlands and elsewhere alike obtain good knowledge about the risks non-compliance with OEL standards pose to their health, then it could be a reliable system for persuading employers to comply with OEL standards, or to seek substitutions that reduced the risks chemical agents pose to their workers.

expressed disappointment in the recommendations by DDRB. As this is a form of collective bargaining over pay and working conditions, there is already a crack in the way in which BMA negotiates with its employers – the (the Ministry of Health) State. The BMA continues to negotiate with NHS employers for its consultants, but the JDC is out of negotiation due to its decision not to re-enter contract negotiation with NHS employers. The controversy has already generated questions of accountability from communities and the public, based on the public relations showdown between JDC and NHS employers. This is a good example of how social, professional and institutional assessments can be made on how trade unions negotiate or consult with employers, and how much they succeed in truly achieving useful outcome for the OSH interest of their members. What is going on now between JDC and NHS employers seems to me though to be confrontation; instead of negotiation. For news about the proposed contract reform see http://www.nhsemployers.org/news/2015/07/ddrb-report-on-consultants-and-junior-doctors-contract-reform-published (accessed September 20, 2015).

The same could be said for Sweden where the right of workers to OSH, and the right of workers to consultation or negotiation including on matters concerning risk assessment and OSHMS, are constitutionally founded. Sweden is known for its relatively long history and productive use of negotiation in industrial relations. Sweden has a unique OSH regional implementation mechanism where trade unions already show outstanding institutional responsibility and accountability by offering technical and financial support for the improvement of OSH standards for small scale enterprises. Despite these legal and institutional safeguards which are meant to protect workers, there are some empirical studies about OEL regulation in Sweden which point to loopholes in the Swedish legal and institutional measures for occupational diseases – caused by gaps in knowledge among workers, and small scale employers. The technical and financial support through the Swedish regional trade union mechanism for supporting small scale enterprises is perhaps one step in the right direction to bridge those gaps in knowledge.
Finally, all these challenges do not uncover any striking changes in the existing legal rules for OEL standards, but as seen with the hypothetical analysis about the plight of Polish workers in Vicoplus – joined case C – 309/09 Olbek Industrial Services sp. zoo, contentious issues about gaps in OSH regulation at the EU and national levels, including how trade unions in the EU should pursue OSH concerns of workers in general (not just their members) may be uncovered in the future. The most difficult regulatory challenge for workers has less to do with the rules for OELs, but rather what workers may need to do in order to ensure that OEL standards are accordingly followed in practice. It is yet to be seen how unionisation across EU countries adapts the need for protecting workers from occupational diseases to changing social and economic times.

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Recent Trends in Collective Bargaining in Europe

Ana Teresa Ribeiro *

1. Introduction (the Crisis Background)

Europe has recently been undergoing a severe economic and financial crisis. Although several countries had already been introducing labour reforms in the past years, the crisis was undoubtedly an accelerating force that called for more and deeper changes. And, in some cases (such as Portugal and Greece), the reforms were even demanded by external entities as a condition for financial assistance. These impositions were laid down in Memoranda of Understanding, documents with detailed timetables for austerity measures and structural reforms, and to which the concerned countries had to adhere in order to receive the relevant credit tranches[1].

Naturally, and due to its impact in wage-setting, collective bargaining has been one of the targeted domains, which has led to the alteration of the bargaining landscape in Europe[2]. In fact, legislators not only changed the rules regarding the substance of wages, working hours, dismissal, pensions, and

* Ana Teresa Ribeiro is an Assistant Professor of Law/Lecturer at the Oporto Law School – Catholic University of Portugal and is currently working on her PhD thesis, under the subject of collective bargaining. The Author welcomes feedback on the present study: aribeiro@porto.ucp.pt. The findings of this paper were presented at the conference "The Great Transformation of Work" organized by the Doctoral School in Human Capital Formation and Labour Relations of ADAPT and the University of Bergamo, that took place on 6 and 7 November 2015 in Bergamo (Italy).

[1] A. FISCHER-LESCANO, *Competencies of the troika: legal limitations of the institutions of the European Union*. In *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, Oxford and Portland, 2014, p. 55.

[2] B. VENEZIANI, *Austerity measures, democracy and social policy in the EU*. In *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, Oxford and Portland, 2014, p. 132.

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unemployment benefits, but also the way working conditions/labour standards are set[3].
The purpose behind these changes was, mainly, to allow for an internal devaluation, instead of currency devaluation, to which the Member States inserted in the Eurozone can no longer resort to due to being locked to the single currency. Internal devaluation through the reduction of domestic wages and living standards was seen, therefore, as the key to restore competitiveness in internationally-traded goods and services[4].

2. Main Changes in the Landscape of Collective Bargaining

The Relation Between Sources of Labour Law. The Principle of the Most Favourable Source

The relations between norms created at multiple levels are generally determined by hierarchy rules[5]. Acts of parliament have priority over collective agreements and company rules; and collective agreements have priority over company rules and contracts of employment. However, this logic is reversed when, due to the principle of the most favourable source, a lower source contains standards that are more generous towards the employees. In this case, usually, the lower source has priority over the higher one. This idea, however, is not absolute[6]. In fact, since some companies or sectors may be unable to comply with statutory norms, due to their specific characteristics, some rules were made dispositive, instead of mandatory, allowing their deviation *in pejus*[7]. And such derogation is possible not only regarding statutory norms, but also among collective agreements.
This phenomenon is visible in France where lower levels agreements can provide worse conditions (towards employees) than the ones determined at a higher level. However, to achieve this, the company agreement must be a "majority agreement" (it must have been approved by the trade unions that won the majority of votes at the workplace elections).
Despite the opposition presented by French labour lawyers and trade unionists, who argued the absolute nature of the principle of the most

[3] A. JACOBS, *Decentralisation of Labour law standard setting and the financial crisis*. In *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, Oxford and Portland, 2014, p. 171.
[4] S. DEAKIN, *Social policy, economic governance and EMU: alternatives to austerity*. In *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, Oxford and Portland, 2014, ps. 92-93.
[5] A. JACOBS, *op. cit.*, p. 171.
[6] A. JACOBS, *op. cit.*, p. 172.
[7] A. JACOBS, *op. cit.*, p. 172.

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favourable source, in 2004, the French Constitutional Court ruled differently. And since then, further examples of this sort of norms have been appearing in the French regime[8].

In 2004, Statutes provided that sector or company-level agreements may include provisions that depart wholly or in part from rules enshrined in broader agreements, unless such departures are expressly forbidden at a higher level. This possibility was not open, however, to wages, their main subject being working hours. Later, in 2008, it was added that company agreements might also adapt wage increases laid down in higher/broader agreements, provided that the wage increase is at least equal to that in the higher/broader agreement and that minimum wages are respected. Finally, in 2013, the legislator went a step further, introducing the "*accord de maintien de l'emploi*". Currently, companies in serious economic difficulties may ask their employees to agree to a reduction of working time, work organisation and/or salary in exchange for employment stability (the prohibition of any dismissal on economic grounds). The maximum duration of this agreement is of two years, a number of statutory rules or wages below 120 per cent of the French statutory minimum wage must not be affected, and managers and executive staff must make proportional sacrifices. This concession bargaining must be signed by one or more of the representative trade unions that obtained, at least, 50 per cent of the votes in the company during the previous "social" elections. If an employee does not agree, he may be dismissed according to the normal rules on dismissal on economic grounds (Article L 5125 *Code du travail*)[9].

Something similar happened in Italy, in 2011[10], where an Act allowed for regional, local, or company agreements to derogate *in pejus* from national laws and collective agreement stipulations determined at national level[11]. The lower agreements must have been signed by the majority of the representative unions in the company/region[12].

According to B. VENEZIANI[13], the rationale behind this modification is to try and increase employment, to improve the quality of labour contracts, to put a

[8] A. JACOBS, *op. cit.*, ps. 173-174.

[9] A. JACOBS, *op. cit.*, ps. 178-179.

[10] Article 8 of *Manovra-bis, Decree no. 138*, ratified by *Legge no. 148/2011*, of 14th September 2011.

[11] B. VENEZIANI (*op. cit.*, p. 133).

[12] A. JACOBS, *op. cit.*, p. 174. According to B. VENEZIANI (*op. cit.*, ps. 133-134), this change defies the constitutional rule, since, when signed by a majority of the relevant union organisations, these derogating agreements are valid to all workers. In fact, Article 39 of the Italian Constitution states that *erga omnes* effects of collective agreements may only be pursued throughout a constitutional procedure.

[13] B. VENEZIANI, *op. cit.*, p. 133.

stop to illegal labour, to manage industrial and employment crises, and to encourage new investments, and the start-up of new activities.
Previously, in 2008, a cross-sectoral agreement had already provided that all sectoral agreements shall contain opening clauses, according to which at the enterprise level there may be deviation from sectoral standards under certain circumstances (economic difficulties, restructuring, introduction of significant new investment). Such deviations must be agreed to in a company collective agreement signed by a majority of the unitary workplace structures. The workplace must confirm the diverging company agreement if one of the signatory trade unions or, at least, 30 per cent of the employees request it[14].
This trend has been visible under German law for quite some time now. Opening-clauses were introduced in the 1980s, allowing for enterprise-level deviations regarding sectoral remuneration or working time arrangements. In the late 1990's, concession bargaining appeared. By 2005, 29 per cent of all employees working under a collective agreement in western Germany were covered by opening-clauses. And since the middle of the last decade, an increasing number of opening clauses has been concluded not only in the context of serious difficulties, but also to improve competitiveness, safeguard employment, and facilitate fresh investment[15]. Trade unions seem to have accepted their widespread use as the lesser of two evils, the other being the decline of the bargaining system[16].
In turn, in the Spanish regime, an Act of 1994 already contained a mandate to include opt-out clauses in collective agreements at sectoral and inter-sectoral level, allowing companies to adopt lower wages than those agreed at higher level, when temporarily experiencing economic difficulties. The subjects open for derogation were broadened by two Royal Decrees of 2010 and 2011 (10/2010 and 7/2011). And, more recently, an Act of 2012 has given company agreements priority over sectoral agreements, even when less favourable than the sectoral collective agreements and even if agreements at a higher level state otherwise. It is now possible for lower agreements to depart from almost all aspects of employment and working conditions[17]. The same Act also made the possibility more precise for employers to opt out from collective bargaining

[14] A. JACOBS, *op. cit.*, p. 179.
[15] BISPINK, DRIBBUSCH, and SCHULTEN, *German collective bargaining in a European perspective. Continuous erosion or re-stabilisation of multi-employer agreements? WSI Discussion Paper no. 171*, 2010, p. 6.
[16] A. JACOBS, *op. cit.*, ps. 77-178.
[17] Except in the matters of minimum terms of work and pay laid down by general collective agreements – *vd.* M. SCHMITT, *Evaluation of EU responses to the crisis with reference to primary legislation (European Union treaties and charter of fundamental rights)*. In *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, Oxford and Portland, 2014, p. 201.

(they may do it if the enterprise records a drop in its revenues or sales for six consecutive months)[18].
Finally, in Greece, there was the introduction of a new type of branch-level collective agreement whose contents may be less favourable, towards workers, than those of industry or occupational collective agreements[19].
It should be noted that under Portuguese law, the most significant change in this domain occurred in 2003. At that time, the Labour Code determined that, as a general rule, collective agreements (of every level) could depart in *in pejus* from Statute. Until then, the rule was that deviations should be *in mellius*, but currently this happens only for a number of selected issues. And it was unnecessary to intervene in the relations between collective agreements, since the rule has been, for quite a long time, that company agreements had precedence over broader kinds. It should be noted, however, that in spite of this, until recently, most agreements were concluded at sector or national level. This tendency has only inverted recently, with a significant decrease of this kind of agreements and a greater incidence of company level agreements.
One may wonder if this growing trend will lead to the weakening of labour law. The derogation *in pejus* of statutory norms through collective agreements was a technique created under the assumption that both parties (employers and trade unions) are of equal bargaining strength.
Nowadays, however, this is often not the case. The power of many trade unions has been fading, due to lower membership and to the rise of yellow unions[20]. And in this scenario, the growing number of cases in which it is possible for collective agreements to depart from Statute is, indeed, a way of weakening labour law[21]. There is, therefore, reason for concern. Particularly since, in some situations, the competence to opt-out of statutory rules is granted not only to trade unions, but also to other bodies of employees' representation, such as work councils. Here, the risk of abuse is greater, since these structures are generally considered even weaker and more permeable to pressure than trade unions[22].
To avoid this danger, in Italy, an earlier ambiguous definition of the parties to company agreements was replaced by "trade unions operating in the

[18] A. JACOBS, *op. cit.*, p. 181.
[19] SCHMITT, *op. cit.*, ps. 201-202.
[20] M. WEISS (*Re-inventing labour law?* In *The idea of labour law.* Eds.: Guy Davidov and Brian Langille. Oxford, Oxford University Press, 2011, p. 47) refers to the decline of trade unions.
[21] A. JACOBS, *op. cit.*, p. 174.
[22] A. JACOBS, *op. cit.*, p. 174. J. GOMES (*Algumas reflexões sobre as alterações introduzidas no código do trabalho pela Lei n.º 23/2012 de 25 de junho. Revista da Ordem dos Advogados*, 2012, ano 72, vols. II e III, ps. 608-609) points out some of the frailties of works councils, such as their reduced independence from the employer; lack of official financing sources, among others.

company". In contrast, in Spain, the law still attributes priority to negotiations with trade unions over bargaining with local work councils. But in companies without union representation, company agreements can be concluded by non-union groups of workers[23].

Decentralisation of Collective Bargaining

Depending on the level at which labour standards are set, one can speak of *centralisation* (when they are determined collectively and by broader sources) or *decentralisation* (when they are set in an individual way and by lower, narrower sources)[24]. Trade unions tend to favour the former, as it guarantees widespread application of the standards attained by their struggle. Employers, on the other hand, tend to favour the latter, as it gives them greater flexibility[25]. Most economies have developed a certain compromise between both regimes, and in some periods one may be more visible than the other[26].

Decentralisation is mainly achieved by allowing the departure from higher-level agreements provisions by lower level ones (which we previously analysed) and also by conferring priority to company level bargaining regarding some specific issues.

After the Second World War, most Member States adopted the rule according to which broader collective agreements have priority over narrower ones, unless these are more favourable towards the employees[27].

The transition to a more decentralised system was already in place in some countries even before the crisis (such as Sweden, Denmark, and the Netherlands). After the onset of the crisis, other countries followed this path[28]. For instance, in 2009, Ireland saw its long tradition of cross-sectoral bargaining implode. Issues that were previously dealt with at this level, now have to be negotiated by lower sources. And since the structures of collective bargaining are often not present at sectoral level, collective bargaining at company level must fill the gap. Consequently, in many firms employees can no longer enjoy these rights, as workers' representatives are not strong enough to have them included in company agreements. Still, it should be noted that, in the midst of

[23] A. JACOBS, *op. cit.*, p.181.
[24] A. JACOBS, *op. cit.*, p. 172.
[25] Larger firms may push towards decentralisation, to increase the scope for local adjustments for regulations (which allows them savings in operational costs). But smaller firms may prefer sector agreements (extended *erga omnes*), in order to ensure peace of the labour market and to save regulatory costs, since they lack the organisational back up (A. JACOBS, *op. cit.*, p. 185).
[26] A. JACOBS, *op. cit.*, p. 172.
[27] A. JACOBS, *op. cit.*, p. 175.
[28] A. JACOBS, *op. cit.*, p. 175.

the crisis, in France, Austria, Finland, and the Netherlands, central social partners were able to negotiate pacts, adapting the labour market regulations[29].
Lately, due to the crisis (and the blame attributed to "rigid" labour law systems), there has been increasing pressure in order to decentralise the establishment of employment conditions to company-level agreements. Many employers were not satisfied with the existing possibilities for derogation at sector-level bargaining[30].
Until recently, southern EU Member States had high levels of bargaining centralisation and bargaining coverage. This tendency was inverted and they are now confronted with the existing wage-setting arrangements and the de-collectivisation of labour relations[31]. This may lead to a greater convergence of collective bargaining structures in the EU, since a more fragmented and decentralised model is characteristic of several countries in northern regimes[32].
However, it should be noted that, in Italy, despite the trend towards decentralization, the national sectoral collective agreement continues to be the cornerstone of the system (which explains the shock provoked by the shift of Fiat towards a single-employer bargaining model)[33]. In fact, the relation between the national legal framework and multi-employer bargaining is strong, particularly where bilateralism has been established. Since the 1980s, and following the example of the building sector, employers' associations and trade unions have been setting bilateral bodies in industries where industrial relations are weak and that display a prevalence of micro enterprises, unstable employment, high employee turnover, and limited trade union presence. To leave the multi-employer bargaining system would also imply abandoning the bilateralism that has been contributing to the efficient governance of a highly complex, dynamic, and fragmented labour market[34].
Finally, we must stress that, although opposed by some, decentralisation is not, necessarily a negative phenomenon. But some conditions must be secured for this to be true. There must be a strong union workplace representation and

[29] A. JACOBS, *op. cit.*, p. 176.
[30] A. JACOBS, *op. cit.*, ps. 176-177.
[31] Recent data from Portugal and Spain shows that there has been a sharp decline in the bargaining coverage in these countries – A. JACOBS, *op. cit.*, p. 186. For more details on the Portuguese case, see *infra* Erga omnes *extension*.
[32] A. JACOBS, *op. cit.*, p. 186.
[33] P. TOMASSETTI, *The shift towards single-employer bargaining in the Italian car sector: determinants and prospects at Fiat. E-Journal of international and comparative labour studies*. 2013, vol. 2, no. 1, p. 94.
[34] We follow closely TOMASSETTI, *op. cit.*, ps. 109-110. The Fiat case seems to be an exception only accomplished thanks to the exclusive dominance of the group in the relevant labour market. Most Italian companies seem to lack the necessary bargaining power to impose structural constraints on trade unions, as a single-employer bargaining system would require – *idem*, *ibidem*, p. 110.

high union coverage in small firms. And allowing non-unionised employees' representatives to enter into agreements that depart *in pejus* from other of a higher level (even if only in the absence of union presence in a company) undermines trade unions and sector-level agreements, because trade unions are hardly present at company-level.
In addition, one must avoid the abusive exploitation of multiple unionism and of dual models of workers' representation at company-level. And in order for that to happen, representativeness criteria for trade unions must be observed.
Finally, decentralisation should be organised either by the partners themselves or by statute, but, in this case, with proposals from the most representative social partners at cross-sectoral level. If decentralisation is imposed by law against the wishes of these social partners, it becomes much more dubious. According to JACOBS[35], in the absence of one or more of these prerequisites, decentralisation becomes problematic, as has been the case of many recent developments of collective bargaining.

The Emergence of New Bargaining Actors

As previously mentioned, it is now becoming more common for bodies other than trade unions to intervene in collective bargaining in representation of workers' interests.
In Portugal, since 2009, work councils have been competent to enter into collective agreements (at company level), as long as this task is delegated to them by trade unions represented within that undertaking[36]. At first, this option was only available for enterprises with, at least, 500 employees. Since 2012, it has been open for undertakings with 150 or more employees[37]. The Memoranda also stated that work councils should be allowed to negotiate functional and geographical mobility conditions, as well as working time arrangements. This demand has not been fulfilled, since it asked for work councils to be given an autonomous competence to participate in collective bargaining, which did not happen[38].
In Greece, the bargaining monopoly of trade unions was abolished. Currently, collective agreements can be negotiated by other associations of employees

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[35] A. JACOBS, *op. cit.*, p. 187.
[36] These agreements will only apply to the employees affiliated to the trade unions that delegated this power.
[37] The Portuguese legislator was more liberal than the Memorandum, since it only required for the threshold to be lowered to 250 employees.
[38] Despite expressing some doubts, J. GOMES (*op. cit.*, p. 608) defends this was the Memorandum's intention.

("unions of persons"[39]) that represent at least three-fifths of the staff. In large firms (with 50 or more employees) such bodies of workers' representation can only be established in the absence of active trade unions in those companies. Conversely, in smaller firms, they may be created even in the presence of active unions. This has resulted in a new practice under which, in many sectors, collective agreements are now entered into with these workers' representatives. And, in these agreements, wages are on average 22 per cent below the sector's average. In addition, due to a rule according to which those trade unions must have at least 20 members in a company in order to negotiate agreements, these entities can no longer conduct company-level agreements (since 90 per cent of the jobs are in firms with fewer than 20 workers)[40].

Maximum Duration of the Agreements

In Portugal, before the Labour Code of 2009, it was possible to include clauses in collective agreements according to which those agreements would stay in force until being replaced by another one entered into by the same parties. However, in 2009, these "perpetuity clauses" were given an expiration deadline of five years[41], after which any of the parties will be able to terminate the agreement, even without any substitution.
Recently, with *Act no. 55/2014*, this term was reduced to three years. Clearly, there was an effort to allow social partners to free themselves more easily from unwanted conventions.
On the other hand, in Greece, open-ended agreements were also converted to fixed term ones, with a maximum duration of three years, from the time of their coming into force[42].

After-Effects of the Agreements

Another imposition from the Memoranda, regarding the Portuguese regime, was the shortening of the after-effects of expired, and not renewed, agreements. In fact, according to Portuguese law, the termination of an agreement does not produce immediate effects. There is a period of time

[39] M. SCHMITT, *op. cit.*, ps. 201-202.
[40] A. JACOBS, *op. cit.*, p. 182.
[41] This timeframe is calculated from one of three possible events: a) the last (integral) publication of the convention; b) the termination of the convention by one of its parties (since it doesn't produce immediate effects); c) the presentation of a proposal for the revision of the convention, that includes the revision of the perpetuity clause (see Article 501, no. 1, of the Labour Code).
[42] A. JACOBS, *op. cit.*, p. 183; and SCHMITT, *op. cit.*, ps. 201-202.

during which it will still be fully applicable, and during which the parties are supposed to try and negotiate its substitution. Until recently, these after-effects had a minimum duration of 18 months. *Act no. 55/2014*, 25th August, however, reduced it to 12 months[43]. Furthermore, Article 3, no. 1, of *Act no. 55/2014* prescribes that these deadlines should be reduced again in the near future. The goal is to decrease the after-effects to a period of merely six months (and "perpetuity clauses" should also have a smaller term, of two years). However, this change shall be preceded by a negotiation between the social partners.
At the end of the current timeframe, either party is free to inform the Ministry of Labour that the negotiating process was unsuccessful. And, from that moment on, the convention will only be applicable for an extra 45-day period (before *Act no. 55/2014*, it was 60 days).
In turn, in the Spanish regime, previously there was the rule that collective agreements would remain applicable until being replaced by a new one. Recently, Statute has limited this after-effect to one year after the scheduled end of the collective agreement (*Act no. 3/2012*)[44].

Erga Omnes Extension

The power to confer binding effect to collective agreements is an important instrument in their role towards workers' protection[45]. However, the tendency is to tighten the requisites to resort to this mechanism.
In Portugal, this change was conducted under the impulse of the Memoranda, which stressed the need to define clear criteria for the extension of collective agreements. And it added that the representativeness of the negotiating parties and the consideration of the implications of the extension for the competitive position of non-affiliated firms should be among those conditions[46]. This demand was fulfilled by the *Resolution of the Council of Ministers no. 90/2012*, which determined that from now on, an agreement would only be open to extension by State intervention if the following criteria are met:
- the extension of an agreement must be required by its signing parties (one

[43] See Article 501, no. 3, of the Labour Code. The 12 months countdown will suspend if the negotiations are interrupted for more than 30 days, due to conciliation, mediation, or mandatory arbitration between the parties (Article 501, no. 4). But even in this case, the minimum duration of the after-effects shall not exceed 18 months (Article 501, no. 5).
[44] A. JACOBS, *op. cit.*, p. 183.
[45] A. JACOBS, *op. cit.*, p. 183.
[46] Paragraph 4. 7. ii), of the *Memorandum of understanding on specific economic policy conditionality*: "(…) the Government will: (…) define clear criteria to be followed for the extension of collective agreements and commit to them. The representativeness of the negotiating organisations and the implications of the extension for the competitive position of non-affiliated firms will have to be among these criteria".

trade union and one employers' association);
- in order for all of the enterprises (and employees) of the sector to be included in the scope of the extension, the employer's side of the convention must employ, at least, 50 per cent of the workforce of that sector.
Due to the sharp decline of extensions and the strong protest from social partners, in 2014, the government introduced a new alternative criterion through *Resolution of the Council of Ministers no. 43/2014*. Since then, extensions are possible if the employer's side of the convention employs, at least, 50 per cent of the workforce of that sector **or** if the employers' association that signed the agreement is composed, at least, in 30 per cent by SME.
It should be stressed that despite the *inter partes* efficacy of Portuguese collective agreements, and the very low participations of SMEs in collective bargaining, until recently around 92 per cent of workers[47] were covered by these agreements. This was due to the very frequent extension of collective agreements by State intervention, the "true star in the sky of the Portuguese collective autonomy"[48].
Lately, the number of extensions has diminished quite visibly. While in 2009 and 2010, 103 and 113, respectively, were performed; in 2012 only 12 took place, there were nine in 2013, and merely 13 were produced in 2014. In the current year, so far, 33 extensions have been carried out[49]. Therefore, it is not surprising that – and according to information provided by social partners – while in 2008 two million employees were covered by these agreements, in 2013 only 200.000 were benefiting from them[50].
In Greece, similar stricter criteria for the extension of collective agreements were introduced. An extension is only possible when the employers covered by the agreement represent, at least, 51 per cent of the workforce in the respective sector[51]. But, in addition, extension procedures, regarding branch-level collective agreements, were suspended until the end of 2015[52].

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[47] *Estatísticas em síntese – Quadros de pessoal* 2010, p. 6 (available at: http://www.gep.msess.gov.pt/estatistica/acidentes/at2010sintese.pdf, accessed 22th September 2015).
[48] J. LEITE, "O sistema português de negociação colectiva", in *Temas laborais Luso-Brasileiros*, Coimbra, Coimbra Editora/Jutra, 2007, p. 149.
[49] Avaliable data at http://bte.gep.msess.gov.pt (accessed 22th September 2015).
[50] http://www.jornaldenegocios.pt/economia/emprego/lei_laboral/detalhe/ugt_alteracoes_ao_codigo_do_trabalho_vao_ajudar_a_dinamizar_contratacao_colectiva.html (accessed 30th December 2014).
[51] A. JACOBS, *op. cit.*, p. 184.
[52] M. SCHMITT, *op. cit.*, 201.

Legislative Intervention in the Contents of Collective Agreements

Additionally, in some cases, such as Portugal and Greece, the legislator went as far as suspending the application of agreements' provisions.
In the Greek regime, provisions conceding increases in wages or bonuses, were deemed inapplicable until unemployment returns to an acceptable level of under ten per cent of the active population[53].
Conversely, in Portugal it was determined that provisions regarding overtime payment, extra holidays, severance payment, and compensatory rest for overtime should be, respectively, suspended (in the first case), reduced (in the second) and considered null and void (for the last two). In fact, the statutory regime of these matters had been addressed in a recent reform, so the aim was to create a barrier against the past. Several commentators opposed this rule, calling it bizarre and even unconstitutional. However, when the Portuguese Constitutional Court (see *Judgment of the Constitutional Court no. 602/2013*) was called to pronounce itself on this issue, it merely decided against the reduction of extra holidays provisions and the invalidity of provisions regarding compensatory rest for overtime. In fact, since these are bargaining issues *par excellence*, and the legal measures were not suited to attain their purpose (because the parties could just negotiate new agreements and reinstate those conditions), the Court deemed the legislative step as an intolerable interference with trade unions' collective autonomy.
The intervention on clauses regarding severance payments was considered valid because this is a domain with strict statutory regulation and, therefore, less open to collective bargaining. The same happened with the intervention on clauses providing for overtime payment, because, despite being a typical bargaining issue, the bargaining parties were prevented from bargaining on it for a period of two years. And, therefore, the measure was considered adequate, necessary, and proportional[54].
In Ireland, as well, the 2009 Recovery Plan included a suspension of the private sector pay agreement, except in certain circumstances[55].

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[53] M. SCHMITT, *op. cit.*, ps. 201-202; A. JACOBS, *op. cit.*, p. 184.
[54] Restrictive legal measures, on issues that relate to fundamental rights, must be, among other things, adequate, necessary and proportionate (Article 18, no. 2, of the Portuguese Constitution). And, in addition, they must respect the core of the right (Article 18, no. 3). The Constitutional Court ruled that this had been the case.
[55] A. JACOBS, *op. cit.*, p. 184.

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3. The Recognition of Trends

Several golden rules of collective bargaining (related to the role and participation of unions; the relation of sources; the collective autonomy) have been subjected to change in the latest reforms[56].
This has led to the dismantling of national and sector level wage setting and its replacement by decentralised, company-level bargaining. Trade unions, bodies with more guarantees as to their independence, lost their prominence as bargaining agents to locally nominated, non-unionised employees' representatives. The principle of the most favourable source has been abandoned and individual bargaining has been given a major role in the determination of pay and labour conditions, in detriment of collective bargaining[57].
Based on a complaint presented by Greek trade unions, the ILO Committee on Freedom of Association stated that the suspension of collective agreements containing wage settlements could violate ILO Convention 98. It also stressed the importance of involving social partners in the framework of the agreements concluded with the European Commission, the International Monetary Fund, and the European Central Bank, the issues relating to fundamental human rights, freedom of association, and the collective bargaining process[58]. And, finally, it stated that procedures that systematically give priority to decentralised negotiations, with the intention of ensuring worse conditions than those established at a higher level, generally destabilise the negotiation mechanisms and the organisations of employers and workers. This behaviour weakens freedom of association and the right to collective bargaining, which clearly contradicts the principles of ILO conventions 87 and 98.
In turn, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) has criticised the tendency to give precedence to individual rights over collective rights on employment matters[59]. For instance, the CEACR has criticised the fact that, in certain countries, direct agreements between employers and groups of non-unionised workers are much more numerous than collective agreements concluded with representative workers' organisations. And it called on governments to take measures to prevent direct

[56] B. VENEZIANI, *op. cit.*, p. 134.
[57] S. DEAKIN, *op. cit.*, p. 93.
[58] Case 2820, November 1-6, 2012, *365th Report of the Committee on Freedom of Association* (available at: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_193260.pdf, accessed 22th September 2015).
[59] A. JACOBS, *op. cit.*, p. 189.

agreements with non-unionised workers from being used for anti-union purposes[60].
The European Committee of Social Rights has also been critical regarding the negative impact of decentralising collective bargaining. Concerning the Spanish rule that allows the suspension of wage clauses if they pose a threat to the company and to the employment's stability, the Committee stated that this could lead to the undermining of the mandatory nature of collective agreements if no procedural safeguards are provided for[61].
However, the verdicts of these Committees are being neglected in the new systems of EU Economic Governance. In 2012, the Directorate General for Economic and Financial Affairs recorded in a study that the new economic-political instruments of control must be used with the aim of reducing the wage-setting power of trade unions. Another document, issued by the same Commission Department in 2013[62], recommended further employment market reforms in Spain; the lowering of the minimum wage in Slovenia and France, and for Italy to create a general framework friendlier to big businesses (in a clear allusion to collective bargaining negotiations that are still taking place at a supra-company level)[63].

4. Analysis of the EU's Role

Another critical point concerns the validity of the Memoranda of Understanding. More than one voice has risen against the participation of the European Commission and the European Central Bank in the conclusion of these documents. It is argued that the negotiating procedure did not respect the general principal of Union law (as the European Parliament was not

[60] CEACR, *Giving globalization a human face. General survey on the fundamental conventions concerning rights at work in the light of the ILO declaration on social justice for a fair globalisation*, Geneva, 2008, ps. 82, 96-97 (available at: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf, accessed 22th September 2015).
[61] ECSR, Conclusions XX-3, Spain, Art. 6(2) ESC (available at: http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/State/SpainXX3_fr.pdf, accessed 22th September 2015).
[62] See Communication of the Commission of April 10, 2013, *Results of in-depth reviews under Regulation (EU) No. 1176/2011, on the avoidance and correction of macroeconomic imbalances COM (2013), 199* (available at: http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/com(2013)_199_final_en.pdf, accessed 22th September 2015).
[63] A. JACOBS, *op. cit.*, p. 191. Similarly, S. DEAKIN (*op. cit.*, p. 95) states the in new economic governance initiated by the EU institutions, namely the "Euro Plus Pact", agreed in March 2011, the reduction of labour costs and decentralisation of wage bargaining are still main goals for policy coordination.

sufficiently involved), nor the requirement for institutional competence under Union law, since the Commission acted in areas for which it lacked competence, such as wage setting. And, in addition, the encroachment on human rights was disproportionate[64].
It must be noted that the evaluation of EU responses to the crisis is a complex task, particularly concerning collective bargaining and wages, which are not regulated by European Law. For the EU to act in a field, it must have the competence to do so, which must be conferred by the Treaties. Article 153 TFEU lists the fields that may be subjected to an approximation of national legislations, through the adoption of minimum requirements by means of directives for their gradual implementation in Member States. Neither pay nor collective bargaining are included in this list. On the contrary, pay is expressly excluded from competence for harmonisation by Article 153(3) TFEU. Therefore, EU institutions may not impose any binding act on the Member States regarding this matter[65].
This does not signify that any action is prohibited. European social partners retain competence for developing contractual relations and, if they so desire, to reach agreements (Article 155(1) TFEU). And the list of fields within the European Commission's competence to encourage cooperation between Member States appears to be broad enough to cover pay – but this competence may give rise only to non-binding acts (Article 156). Moreover, the Union's lack of competence is not absolute, since the prohibition on discrimination in matters of pay is enshrined in the Treaty (Article 157), regulated by many directives and broadly interpreted by the Court of Justice[66].
Regarding collective bargaining, this is also one of the domains in which harmonisation directives cannot be issued (Article 153(1) TFEU), but cooperation may be encouraged (Article 156). Additionally, Article 152 states that the institutions must take into account the diversity between national systems. It is apparent, from these provisions that the TFEU excludes the competence of the Union to adopt mandatory rules for Member States on this issue. The same applies to acts of a European institution (such as the Council, the Commission, the European Central Bank) requiring a reduction of pay for overtime, or termination benefits, which, according to the jurisprudence of the CJEU, are considered pay. And the same applies to any acts requiring Member States to amend their legislation regarding the matters of competence of union

[64] A. FISCHER-LESCANO, *op. cit.*, p. 81.
[65] We follow closely M. SCHMITT, *op. cit.*, ps. 209-210.
[66] M. SCHMITT, *op. cit.*, p. 210.

representation; (non-union) parties entitled to enter into collective agreements; or the conditions for the validity of collective agreements[67].
Aside from considerations regarding their merits, the validity of the Memoranda is, therefore, highly questionable, due to the active role the European Commission and the European Central Bank played in their negotiation. The EU institutions should have chosen a different (non-binding) instrument to deal with the crisis in the most affected Member States.
All the changes that we have analysed translate a radical alteration of the structures and principles that were the essence of the system of collective bargaining.
One cannot ignore the placement of the right to collective bargaining and freedom of association within the Charter of Fundamental Rights, the European Social Charter, and the European Convention on Human Rights, as well as in several ILO Conventions. And as long as these instruments are binding, crisis management measures must be justified within the framework they provide (and also the one delivered by the Treaties)[68].
The weakening of collective bargaining and the floor of social rights may have the short-term effect of reducing nominal wages and making payment systems more responsive to immediate market pressures. However, the long-term effects of these actions are uncertain[69].
According to some commentators, the increasing divergence of wages and productivity growth has greatly been due to the absence, in the Eurozone, of coordinated wage bargaining[70]. Therefore, the most feasible route to deal with the crisis and to reduce unit labour costs is, on one hand, to promote the coordination of pay rises across the economy, and, on the other, to encourage investments in human capital and related aspects of workforce upgrading. The dismantlement of collective bargaining arrangements, makes it even more difficult to put in place mechanisms for coordinated wage determination, precisely when they are most needed as part of an integrated strategy, along with training and industrial policy, for the improvement of competitiveness[71].
In addition, one must highlight that the Troika's policies are counterproductive. To begin with, they have a negative impact on effective demand. The weakening of sector-level bargaining has a deeper impact within groups at the lower level of the earning scale, since they are less equipped to engage in voluntary wage bargaining. While the cuts to minimum wage and social security benefits affect directly the poor. And there is a higher propensity

[67] We follow closely M. SCHMITT, *op. cit.*, ps. 210-212.
[68] A. FISCHER-LESCANO, *op. cit.*, p. 57.
[69] S. DEAKIN, *op. cit.*, p. 93.
[70] S. DEAKIN, *op. cit.*, p. 93.
[71] S. DEAKIN, *op. cit.*, p. 93.

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to consume within lower income groups rather that among the ones of a higher income scale. In this kind of panorama, the combined effect of these changes is a drop in domestic demand, which is worsened by the greater ability of high income groups to move their capital and savings out of the jurisdiction altogether.
Lower domestic demand leads to an increased number of bankruptcies and higher unemployment, and, consequently, a reduction in tax revenue, while further stepping up the pressure for wage and benefits cuts[72].
In addition, there is also an increase of social costs. The reduction of public expenditure exposes disproportionately lower income groups (who have a greater risk of joblessness, poverty, and ill health), and these costs fall back onto the State in the form of additional charges on social assistance and health care programmes, precisely in a time in which they are least able to deal with these extra expenditures[73]. DEAKIN[74], therefore, appeals for the reverse of this policy and for the creation of a framework for effective wage coordination at both national and transnational level. And although this is not an easy solution, it seems, undoubtedly, to be the best way to ensure workers' rights, while promoting the competitiveness of European undertakings and economies.

5. Conclusion

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[72] S. DEAKIN, *op. cit.*, ps. 93-94.
[73] S. DEAKIN, *op. cit.*, p. 94.
[74] S. DEAKIN, *op. cit.*, p. 104.
[75] A. FISCHER-LESCANO, *op. cit.*, p. 57.
[76] S. DEAKIN, *op. cit.*, p. 93.

coordinated wage bargaining[77]. Therefore, the most feasible route to deal with the crisis and to reduce unit labour costs is, on one hand, to promote the coordination of pay rises across the economy, and, on the other, to encourage investments in human capital and related aspects of workforce upgrading. The dismantlement of collective bargaining arrangements, makes it even more difficult to put in place mechanisms for coordinated wage determination, precisely when they are most needed as part of an integrated strategy, along with training and industrial policy, for the improvement of competitiveness[78].
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[77] S. DEAKIN, *op. cit.*, p. 93.
[78] S. DEAKIN, *op. cit.*, p. 93.
[79] S. DEAKIN, *op. cit.*, ps. 93-94.
[80] S. DEAKIN, *op. cit.*, p. 94.
[81] S. DEAKIN, *op. cit.*, p. 104.

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The Case of Ireland's County Donegal: Stimulating Rural Labour Markets via Training, Tourism and Nurturing Social Enterprise and Entrepreneurship

Gordon B. Cooke, Jennifer K. Burns, Sara L. Mann, Kyle W.J. Vardy, Bronwyn L. Cass [*]

1. Introduction

Even casual observers can detect some of the ways that employment conditions are being transformed throughout the industrialized world. It was not many years ago that an individual would- or could- use word of mouth to find an opportunity to start a career within an organization. Then, in turn, that worker would slowly accumulate seniority and advancement opportunities within that same place of employment. Of course, that stereotype, of spending a whole career working for one employer, was true for only some workers, and that system was not without barriers, instability, and injustice. Nonetheless, recent transformations have created additional uncertainties for individuals in many occupations, industries, and locations. Due to its inherent characteristics, current conditions are often especially challenging for those in rural locations

[*] Gordon B. Cooke is Associate Professor of Industrial Relations, BN2017, Faculty of Business Administration, Memorial University of Newfoundland St. John's, Newfoundland and Labrador, Canada A1 B3X5 1-709-864-6204 gcooke@mun.ca (Corresponding author). Jennifer K. Burns, Kyle W.J. Vardy and Bronwyn L. Cass are graduates from the Master of Employment Relations, School of Graduate Studies, Memorial University of Newfoundland. Sara L. Mann is Associate Professor of Leadership & Organizational Management, Department of Management, University of Guelph, Canada. The findings of this paper were presented at the conference "The Great Transformation of Work" organized by the Doctoral School in Human Capital Formation and Labour Relations of ADAPT and the University of Bergamo, that took place on 6 and 7 November 2015 in Bergamo (Italy).

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today. Rural individuals often have to live with fewer local employment options, and fewer convenient opportunities to acquire education, skills, and/or work experience to break into good quality employment. As a result, rural regions potentially face a problem of aging and declining populations and a downward cycle if out-migration leads to lower economic activity which, in turn, provides incentive for more to leave.

The purpose of this study is to explore the strategic responses that local governments and public sector institutions and organizations can do to help communities and citizens stem the tide of these seemingly unstoppable labour market waves. In particular, we discuss the actions that have been undertaken in Ireland's County Donegal, based on a case study of that region that the first author has been undertaking since 2009. In addition to observational analysis, findings in this paper are based on several semi-structured interviews conducted within the region, as well as surveys from Letterkenny Institute of Technology (Lyit) students, and pilot surveys gathered from tourists. Because issues and activities within County Donegal have been studied to see its possible applicability to regions within Canada, many of the cited sources are from Europe (and Ireland in particular) or Canada[1]. County Donegal is worthy of a case study because its stakeholders, like so many elsewhere, are having to face the challenge of trying to ensure the economic vibrancy of their home.

This interdisciplinary paper utilizes academic themes and sources from management, rural studies, tourism, geography, educational studies and sociology. That said, this is primarily an industrial relations study. As such, we consider employment accessibility and quality, the importance of work within peoples' lives, and the interaction between environmental changes and the actions (and responses) of local stakeholders. We focus on the role of education and training, and direct and indirect job creation, and their relationship with out-migration. The tourism industry receives specific attention because of its importance in Ireland generally, and its prospects for employment growth within County Donegal. Tourism growth is also a frequent goal of small-scale social enterprises that tend to emerge in rural areas[2]. In the next section, some background information on County Donegal will be provided, followed by methodology, findings, and discussion.

[1] All authors of this paper are Canadian-based, and primarily study economic conditions in Canada.

[2] See, for example, J. Defourny and M. Nyssens. Social enterprise in Europe: recent trends and developments. *Social Enterprise Journal,* 2008, vol. 4, n. 3, 202-228.

2. Background Information

One point of clarification is required at the beginning. We have not formally defined 'rural' or 'remote' for the purpose of this paper. Instead, in the interview process, we sought the opinions of participants. In all cases, the interviews participants from County Donegal, whether or not interviewed in the capital of Letterkenny, directly or indirectly described the region as being rural. There are always some definitional challenges when trying to determine boundaries between what is urban versus rural versus suburban, and opinions vary. Immediately adjacent to County Donegal's Northwestern border is the city of Derry, having a population of approximately 100,000[3]. As such, that corner of County Donegal is more accurately described as being suburban, since daily commuting to Derry City is practical, notwithstanding cross-border complications. .

According to 2011 Irish Census figures, the population of Letterkenny is just under 20,000. As a whole, County Donegal has a population of about 161,000 people, but due its large area, its population density is only 33 persons per square kilometre, which is among the lowest of the 32 counties on the island of Ireland, and is also low on an absolute basis[4]. When looking at the location of the county holistically, some basic challenges leap to mind. One, neither the Irish nor Northern Irish rail systems enter County Donegal, and much of the intercity bus network only travels to Donegal town and/or Letterkenny to points outside of the county. In more remote areas, transportation is provided by independent operators on a small-scale basis. Two, given its location in the Northwest corner of the island, County Donegal is arguably the most isolated county within the Republic of Ireland, and is several hours drive away from the capital city of Dublin. Three, its shape and coastal location means that much of County Donegal is physically separated from other counties. Even Letterkenny is more than 30 kilometres west of Derry City, and 50 kilometres north of Donegal Town (near the southern boundary of the county)[5]. In terms of larger cities, County Donegal is approximately four hours driving distance from Dublin, while Belfast is roughly three hours away. On the whole, then, and notwithstanding the central core of Letterkenny and the areas adjacent to Derry City, there is a distinctly off-the-main-route 'feel' within this jurisdiction. Thus, without implying any negative connotations with the use of the term, we

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[3] Ireland and Northern Ireland, 2014.

[4] See Government of Ireland. 2015. Miscellaneous 2011 census data and reports downloaded on 4 September 2015 from www.cso.ie/en/census2011reports; V. Du Plessis, R. Beshiri, R.D. Bollman, and H. Clemenson. Definitions of rural. Rural and Small Town Canada Analysis Bulletin. Statistics Canada, 2001, vol. 3, n.3.

[5] Letterkenny Guide. 2015. http://www.letterkennyguide.com/ (accessed September 4, 2015).

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categorize all of County Donegal as being effectively rural, which is consistent with the way our interview participants typically describe it[6].

In our recent research[7], we explored how access to local education and employment are key factors affecting how young people decide whether to stay or out-migrate. In this paper, we considered the role of government and post-secondary educational institutions within County Donegal, and whether that would or could impact out-migration. In terms of public administration, Ireland has a powerful central government, but also with councils at a county level. Thus, we pay more attention was paid to actions of the Donegal County Council, as opposed to the Irish (Central) Government, because the former is necessarily focused on local issues. Within the county, there is one 'third level' (i.e. college or university) educational institution: the Letterkenny Institute of Technology. Although post-secondary students can commute to adjacent counties, the main choice, for those within County Donegal who seek to acquire third level education, is to attend Lyit or to out-migrate to a different location. Lyit's main campus is located in Letterkenny, and a second smaller campus is located in the small marine and fishery-oriented town of Killybegs, which is in a more remote coastal location about one hour southwest.

Lyit has a total about 3000 students, which is a relatively modest number, but nonetheless offers a range of programs in the health, physical and social sciences. For students, Letterkenny is an affordable location since basic accommodation is fairly plentiful and fairly inexpensive. While this community has struggled economically in recent years, that makes its services affordable and accessible to students. Because of its modest size, the city is walkable, and yet transportation to campus is good. Killybegs is also inexpensive, but intercity transportation is limited. Also, due to corporate and technological changes in the commercial fishery, there are fewer local employment options for students and others than in the past. We also note that the Killybegs campus was known as, and is still often referred to as the Killybegs Tourism College before its recent affiliation with Lyit. Tourism has been a fledgling industry within County Donegal for many years. However, the region has attracted proportionately fewer tourists than most other regions within Ireland and Northern Ireland, due to its more remote location and more limited transportation. Also, the county has been relatively less successful promoting

[6] For a much more definitive exploration of the concept of rurality, see Du Plessis, Beshiri, & Bollman, 2001.

[7] E.g. G.B. Cooke, S.L. Mann, and J.K. Burns. Education and employment choices among young rural workers in Canada and Ireland: A tale of two studies. In Vodden, K., Gibson, R. & Baldacchino, G (eds.), Place Peripheral: Place-Based Development in Rural, Island and Remote Regions, 2015.

and developing its attractions in a way that appeals to domestic and international visitors.
Turning to the country as a whole, Ireland had been a poor cousin within Western Europe for much of the 20th century, at least partially resulting from insular economic policies. That changed in the 1970s as Ireland joined the EEC (the forerunner of the EU), and consciously began to entice foreign multinational manufacturers to generate domestic employment[8]. Nonetheless, Ireland generally continued to struggle until the late 1980s[9]. However, after its government policies shifted towards open markets, low tax rates and a heavy emphasis on developing human capital, the fortunes of the country changed quickly and dramatically[10]. While some analysts point to the Irish Government's pro-business policies and/or European aid funds, one of the other catalysts for the economic renaissance is the emergence of a social partnership between labour, employers, and governments to proactively position Ireland for financial success and high employment and wages[11]. This partnership resulted in an environment in which low corporate taxes were retained, thereby stimulating economic and employment (and wage) growth, but also social payouts for unemployed and underemployed people rose too, roughly in lockstep. As will be discussed later, this is relevant to us because the key to economic vibrancy is to get income into as many hands as possible to allow it to circulate throughout a community.
The effect of the Celtic Tiger boom was immense, with average per capita income rising from well below to the EU average to the second highest among all members by 2004, and some of the persistent regional disparities that had existed across Ireland shrank sharply, as unemployment and per capita incomes converged[12]. While all areas of Ireland shared in the boom to varying degrees, and a case can be made that poor areas actually saw the biggest turnaround, the regional gaps, in terms of unemployment incomes, are better viewed as having declined not disappeared. For instance, in the rural Border region, which includes County Donegal, unemployment fell from 19.1% to 5.1% between 1988 and 2005, compared to the Irish national average of 16.3% and 4.3%,

[8] B.M. Walsh. Labour market adjustment in the Irish regions, 1998-2005. *Quarterly economic commentary*, Economic and Social Research Institute, Autumn, 2006, 80-100.
[9] P. Teague and J. Donaghey. The life and death of Irish social partnership: lessons for social pacts, Business History, 2015, vol. 57, n. 3, 418-437.
[10] See S. Dorgan. How Ireland became the Celtic Tiger. 2006.; E. Morgenroth. Trends in the regional economic activity of Ireland: The role of productivity, in C Aylward and R O'Toole (Eds.) *Perspectives on Irish Productivity: A Selection of Essays by Irish and International Economists*. Dublin: Forfas, 2007, 66-83.
[11] See Teague and Donaghey, 2015.
[12] Morgenroth, 2007; Dorgan, 2006.

respectively[13]. Nonetheless, some areas- and segments of the population- participated in the boom less fully than others.
While Ireland enjoyed buoyant employment for a decade, warning signs were emerging by 2005 or so. The problems came to a head in 2008 when the credit and construction-driven bubble burst in Ireland, as banking and financial problems emerged en masse across many countries. During that global financial crisis of 2008-2009, the Government of Ireland acted swiftly to cut spending and increase taxes to stabilize its banks as well as its own financial situation. While these austerity measures were painful and controversial, they did help stabilize conditions[14]. While the Irish recovery was underway a couple years later, the magnitude of the crisis needs to be appreciated. Between the start and end of 2008, the Irish unemployment rate rose from 5% to over 13%, and remained high for a couple more years.
Unfortunately, even during its height, the Celtic Tiger boom did not *fully* reach County Donegal. The jurisdiction continues to suffer from a relatively small and aging population and heavy reliance on government-provided income supports[15], which has been the unfortunate pattern for many decades[16]. County Donegal has the lowest labour force participation rate at only 58%, and thus, it is not surprisingly that it also has the lowest per capita disposable income of any Irish County[17]. The unemployment rate among young adults within County Donegal is even slightly higher than the rate overall[18], which is a potential catalyst for out-migration[19].
Ireland's western regions tend to have lower population density, lower per capita incomes, and lower labour market participation rates[20]. What is unique, however, is that County Donegal has especially low population density, and is especially far from the capital region of Ireland, and its economic performance tends to be near the bottom in county comparisons. For example, Haase and Pratschke (2012) have developed a 'deprivation index' which is a composite

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[13] Walsh, 2006.
[14] see Bank of Ireland. The Irish Economy: An Overview, 2010.
[15] Government of Ireland. Regional Quality of Life in Ireland 2013. Central Statistics Office [CSO], 2013., 2015.
[16] See E. Shanklin. Donegal's changing traditions: an ethnographic study. Volume 8. Taylor & Francis, UK, 1985.
[17] Government of Ireland. County Incomes and Regional GDP, 2009 (data). Central Statistics Office [CSO], 2012.; Government of Ireland,2015; Donegal County. Development Board [DCDB]. Making the Future Happen: Addressing the unemployment challenge in Donegal. Research report prepared for Donegal County Council's Research and Policy Division, 2010.
[18] Donegal County Development Board, 2010.
[19] See U.-D.K. Bæck and G. Paulgaard. Rural Futures? Finding one's place within changing labour markets. Orkana Akademisk: Nor, 2012.; Walsh, 2006
[20] See Morgenroth, 2007; Government of Ireland, 2015.

measure that considers education levels, population changes, and unemployment rates, and thus gives one representation of socio-economic advancement. According to their index, Donegal had the lowest score of any Irish county in both 2006 (during the economic boom) and in 2011 (after the boom ended)[21]. Moreover, County Donegal is second to only to Limerick City for having the highest number of 'unemployment blackspots', which are neighbourhoods identified as having at least 35% unemployment[22].
The overall message is that difficult economic times have returned to the citizens of County Donegal, on average. But, as discussed later in the paper, several strategic responses are being undertaken.

3. Literature Review

Employment Conditions: Current Realities

As mentioned in the introduction, the proportion of stable, permanent, full-time jobs – with fixed hours and good and pay benefits- are disappearing[23]. For many, if not most, people, 'non-standard' work has become the new standard. Simply put, a range of non-standard work arrangements such as part-time, temporary, casual, and/or on-call hours and employment status are common in most parts of the industrialized world, to varying degrees[24]. For instance, fewer than half of Canadian workers have a fixed, full-time schedule of a normal length, and 20% of Canadians have either a part-time and/or temporary job[25]. Turning to Western and Northern European labour forces, the average proportion of employees working a part-time schedule ranges from an average of about 10% to over 20%, and proportions having temporary employment are only marginally lower, on average, in 2013[26]. According to that same source,

[21] T. Haase and J. Pratschke. The 2011 Pobal HP Deprivation Index for Small Areas (SA). Introduction and reference Tables. 2012.
[22] Government of Ireland, 2015.
[23] J.-Y. Boulin, M. Lallement, and F. Decent working time in industrialized countries: Issues, scopes, and paradoxes. in Boulin, J.Y., M. Lallement, J. Messenger, and F. Michon (eds.), Decent Working Time, New Trends New Issues. Geneva, SUI: ILO, 2006, 13-40.

[24] See also, G. Betcherman and G.S. Lowe. The Future of Work in Canada: A Synthesis Report, Canadian Research Policy Networks, 1997.; G. Vallée. Towards Enhancing the Employment Conditions of Vulnerable Workers: A Public Policy Perspective. Vulnerable Workers Series, No. 2. Canadian Policy Research Networks, 2005.
[25] I.U. Zeytinoglu, G.B. Cooke, and S.L. Mann. Flexibility: whose choice is it anyway? Relations Industrielles/Industrial Relations, 2009, vol. 64, n. 4, 555-574.
[26] Organisation for Economic Cooperation and Development [OECD]. Miscellaneous online information, https://data.oecd.org/emp (accessed September 4, 2015), 2015.

the proportion of individuals in Ireland holding part-time or temporary employment was about 23% and 10%, respectively, while 16% were self-employed.

While these changes to the design of jobs are not inherently harmful in theory, much of the new `flexibility` and variation in work patterns is employer-driven, not employee-driven[27]. Thus, the reality on the ground is that the majority of these changes have been implemented to achieve operational objectives, rather than to address workers' needs or preferences[28]. As such, workers in these jobs frequently struggle to get to be able to work their preferred number of work hours per day, week, or year. While it is more common to want more hours, there are also others who would work less (hours per week, or weeks per year) if the opportunity arose[29]. Another modern reality is that many jobs do not have upward mobility in terms of access to employer-provided promotion or training. In turn, this limits workers' ability to advance within their current place of employment, or to acquire better opportunities elsewhere. The effect has been more polarized labour markets and stubbornly high pockets of unemployment and underemployment, in which individuals have trouble securing any employment, and even if they do, they frequently find themselves limited to peripheral jobs with relatively low pay, benefits, security, and upward mobility[30]. The long-term effect has been an exacerbation of income and wealth inequality across societies[31], which has grown into a social and political issue[32].

At a government policy level, developed nations have emphasized the deregulation of trade barriers, and a push for international trade agreements,

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[27] G. Bosch. Working Time and the Standard Employment Relationship. in Boulin, J.Y., M. Lallement, J. Messenger, and F. Michon (eds), Decent Working Time, New Trends New Issues. Geneva, SUI: ILO, 2006, 41-64. ; Zeytinoglu, Cooke, & Mann, 2009.

[28] Boulin, Lallement, & Michon, 2006.

[29] D. Anxo, J.-Y. Boulin, &C. Fagan, C. Decent working time in a life-course perspective, in Boulin, J.Y., M. Lallement, J. Messenger, and F. Michon (eds), Decent Working Time, New Trends New Issues. Geneva, SUI: ILO, 2006, 93-122.

[30] S. Lee and D. McCann D. Working time capability: towards realizing individual choice, in Boulin, J.Y., M. Lallement, J. Messenger, and F. Michon (eds), Decent Working Time, New Trends New Issues. Geneva, SUI: ILO, 2006, 65-91.; H Rainbird. Skilling the unskilled: Access to work-based learning and the lifelong learning agenda." Journal of Education and Work, 2000, vol. 13, n. 2, 183-197.

[31] Betcherman & Lowe, 1997; C.P. Green and G.D. Leeves. Job security, financial security and worker well-being: new evidence on the effects of flexible employment, Scottish Journal of Political Economy, 2013, vol. 60, n. 2, 121- 138.; R. Saunders. Risk and Opportunity: Creating Options for Vulnerable Workers. Vulnerable Worker Series, 7, Ottawa, ON: Canadian Policy Research Networks, 2006.

[32] Bosch, 2006; Economist, The. How inequality affects growth, 15 June 2015.

resulting in the freer movement of goods, services and capital[33]. This often results in a divergence of interests between employees seeking stability and good wages and benefits versus employers seek operational flexibility and efficiencies[34]. That said, employers and governments should not receive all of the blame. Work, and industrialized societies, are also being transformed by three long-term, and related, trends: industrial evolution, the impact of technology, and population migration. Broadly speaking, there is an ongoing evolutionary trend away from jobs in the primary and manufacturing sectors and towards service-based economics in the industrialized world[35]. Although there are exceptions, service-sector jobs have lower pay and benefits and are more likely to contain non-standard work arrangements[36]. Also, technological change, including automation and efficiency initiatives, has created upheaval in a number of industries, which has lowered the need for large numbers of manual workers and increased the need for a smaller number of highly-skilled, highly-educated workers[37]. Those trends have, in turn, contributed to the ongoing population shift, across many industrialized nations, from small, rural communities to, or adjacent to, large urban centres[38]. While one wave of migration occurred during the industrial revolution of the 1800s, the ongoing migration to cities remains unabated. People do not just move for work. Many continue to move voluntarily for what they perceive to be better access to services, education, and different lifestyles[39].

It is also important to look at differences within the labour force. For older individuals, the economic uncertainty, while undesirable, might merely mean

[33] Betcherman & Lowe, 1997; Boulin, Lallement, & Michon, 2006.

[34] See R.P. Chaykowski and M. Gunderson. The implications of globalization for labour and labour markets. In R.P. Chaykowski (Ed.), *Globalization and the Canadian Economy: The Implications for Labour Markets, Society and the State* (pp. 27-60). Kingston, CAN: School of Policy Studies, Queen's University, 2001, 27-60.

[35] e.g. Bosch, 2006; Organisation for Economic Cooperation and Development [OECD]. Innovation and Modernising the Rural Economy. 2014.

[36] I.U. Zeytinoglu. Flexible Work Arrangements: An Overview of Developments in Canada, in Zeytinoglu IU (ed) Changing Work Relationships in Industrialized Economies. Philadelphia, US: John Benjamins Publ, 1999, 41-58.

[37] See Bosch, 2006; Johnson & Scott, 1997.

[38] Organisation for Economic Cooperation and Development [OECD]. Trends in Urbanisation and urban Policies in OECD Countries: What lessons for China? 2010b.

[39] X. Tang. Career Choices for Current Post-secondary Students in Newfoundland and Labrador. Unpublished report, Memorial University of Newfoundland, MER Program, 2009. ; G.B. Cooke. High Fliers versus Upstream Swimmers: Young rural workers in Canada and Ireland, in Youth Unemployment and Joblessness: Causes, Consequences, Responses: 151-168. Association for International and Comparative Studies in the field of Labour law and Industrial Relations (ADAPT). Cambridge Scholars Publishing, UK, 2012, 151-168. ISBN (10): 1-4438-4056-4 & ISBN (13): 978-1-4438-4056-4.

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staying employed even beyond the normal or hoped-for retirement age, possibly in part-time or part-year work[40]. But, due to their experience and possibly seniority, they might be able to manage that transition to retirement fairly smoothly. For others feeling more vulnerable, it could mean jumping at employment opportunities whenever they arise, whatever the quality[41]. When jobs are less than full-time and full-year, the effect, all else equal, is that annual work hours decline, as do annual incomes. In response, some people must hold multiple non-standard jobs concurrently, or during the year, to get enough hours to make a living[42]. For example, a worker might hold full-time seasonal employment in one industry, perhaps during summer, but also rely on a part-time job throughout the year. As a whole, and notwithstanding regional and jurisdictional differences, workers in contemporary labour markets tend to feel a sense of unease about the changes that are occurring[43], and many feel a sense of instability that spills over into one's life outside of work creating emotional and financial stress due to the lack of certainty[44].

While older workers might defer retirement plans, the options can be quite different for younger workers. As newcomers trying to gain a foothold in labour markets, young workers are especially susceptible to being stuck in non-standard jobs[45]. Cynics could even argue that young adults who have a non-standard job are relatively lucky, since the unemployment rate among young adults has consistently been higher than the overall rate[46]. Put bluntly, completing high school is no longer sufficient to have a reasonable chance at a good quality job. Also, a relative lack of experience is an additional hindrance. Even young people with high levels of ambition and attained education can find it difficult to break into good quality employment that allows them to use and development their skills[47]. At the other end of the spectrum there is also a group of disengaged individuals who are neither in training/education programs nor actively participating in the labour market.

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[40] Lee and McCann, 2006.

[41] Green & Leeves, 2013.

[42] E.g. Vallée, 2005; G.B. Cooke, J. Donaghey, and I.U. Zeytinoglu. The nuanced nature of work quality: evidence from rural Newfoundland and Ireland. Human Relations, 2013, vol. 66, n. 4, 503-527.

[43] Boulin, Lallement, & Michon, 2006.

[44] Bosch, 2006; Vallée, 2005.

[45] Organisation for Economic Cooperation and Development [OECD]. Off to a good start? Jobs for youth. 2010a.

[46] E.g. R. Perciun and M. Balan. Youth Labour Market: Characteristics and Specific Issues. Internal Auditing and Risk Management, 2013, vol. 30, n.1, 31-42.

[47] M. Culliney. Going nowhere? Rural youth labour market opportunities and obstacles. Journal of Poverty and Social Justice, 2014a, vol. 22, n. 1, 45-57.

To recap, conditions have deteriorated overall, and yet the polarization of conditions-for the lucky few versus the rest- has seemingly grown. While the ways that work has been transformed has worrisome implications for everyone in the labour market, there can be additional concerns for those in more rural and remote locations in particular. Again, the characteristic that differentiates suburban locations from those that are truly rural is having some degree of remoteness from large urban centres. Suburbanites can, by definition, commute comfortably to an adjacent urban centre. As such, their situation is relatively similar to their purely urban counterparts. For those truly living rurally, where commuting to work to an urban centre is infeasible, local labour markets are critical.

Rural Employment: Policy Options

On average, rural labour markets are less diverse, and more reliant on traditional industries[48]. The industrial mix continues to evolve in many industrialized nations, towards service-based economies. This can be especially problematic as jobs in the primary sector (like fishing, farming, mining, and forestry), which have historically sustained rural communities, continue to decline[49]. While these jobs frequently involved hard work and provided low wages, they also provided wide scale employment in even remote locations, as well as a way of life and sense of identity[50]. With the declines of those sectors, rural individuals have had to transition to new fields and occupations, and potentially have to adapt by piecing together an income from multiple sources during a typical year. This could include periods of seasonal employment, followed by a mix of part-time employment, self-employment, freelancing, short-term government created work schemes and income supports, or periods of unemployment[51]. Given those economic realities, it follows that per capita income levels in rural areas are lower, on average[52]. This is often compounded

[48] M. Brezzi, L. Dijkstra, and V. Ruiz. OECD Extended Regional Typology: The economic performance of remote rural regions. OECD Regional development Working Papers, 20011/06, 2011.
[49] E.g. OECD, 2014.
[50] see D.A. Smith, K. Vodden, M. Woodrow, A. Khan, and B. Fürst. The last generation? Perspectives of inshore fish harvesters from Change Islands, Newfoundland. The Canadian Geographer/Le Géographe Canadien, 2014, vol. 58, n. 1, 95-109.; M. Corbett. Rural education and outmigration: the case of a coastal community. Canadian Journal of Education, 2005, vol. 28, n. 1&2, 52-72.
[51] e.g. Cooke, Donaghey, & Zeytinoglu, 2013; D. Gray and A. Sweetman. A typology analysis of the users of Canada's unemployment insurance system: Incidence and seasonality measures. Essays on the Repeat Use of Unemployment Insurance, 2001.
[52] OECD, 2014.

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because education levels are lower, and opportunities for skills upgrading and education are more limited[53]. Yet, as mentioned above, if acquiring valued skills is a gateway to good quality work, then a harmful cycle can be created in which (primarily young) people move away from rural areas for better job opportunities, leaving shrinking and aging communities. In turn, that lowers the economic and social vibrancy of the communities, and can lead to business closures, loss of employment, and further out-migration[54].

As the above literature describes, working conditions are changing, and for many, deteriorating. Moreover, those residing in more rural and/or remote regions often face additional challenges, and tend to have fewer good quality employment options, and fewer chances to upgrade their skills to better their prospects. As explored in the background information section, those experiences have also occurred within Ireland's County Donegal. The question is: what are the strategic policy responses? Fortunately, this is a topic that (rightly) has received attention from researchers and governments, and several policy options have been proposed. Yet, financial realities facing governments means that there is a need to prioritize resources and policy responses[55]. Two related options emerge: i) post-secondary education and skills development, ii) and income support via social programs and/or stimulating job creation. The reality is that young people are the most likely to out-migrate from rural areas, although older citizens sometimes do so as well, if local employment conditions are poorer than available elsewhere[56]. Thus, addressing job employment quality and quantity is the obvious policy lever, while providing access to educational institutions and ensuring cultural vibrancy are also relevant factors.

For long-term labour force participation, employment, and success, rural education levels need to be raised[57], because it allows new skills to be learned, but also more self-confidence to be gained, thereby enhancing employability of citizens, including discouraged ones[58]. In fact, governments need to stimulate a desire among the population at large, to embrace lifelong learning[59]. The idea is

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53 Corbett, 2005.

54 E.g. D. Gillies. Learning and leaving: education and depopulation in an island community, Cambridge Journal of Education, 2014, vol. 44, n. 1, 19-34; B. Jentsch. Youth migration from rural areas: moral principles to support youth and rural communities in policy debates. Sociologia Ruralis, 2006, vol. 46, n. 3, 229-240.

55 Organisation for Economic Cooperation and Development [OECD]. Better skills. Better jobs. Better lives. The OECD Skills Strategy. Paris, OECD, 2012.

56 See Culliney, 2014a.

57 See Donegal County Development Board, 2010.

58 V. Smith. Review article: Enhancing employability: Human, cultural, and social capital in an era of turbulent unpredictability. Human Relations, 2010, vol. 62, n. 2, 279-300.

59 Rainbird, 2000; OECD, 2012.

that, if labour markets are going to continue to change, so too must the skills sets, and comfort with change, among workers. It's also important to remember the different issues facing subgroups of citizens. At the one end, there are ambitious youth who might attend a local post-secondary institution, but only if sufficiently attractive programs are available. Else, they will leave for better programs elsewhere[60]. Governments would be wise to try to retain more of its local youth for the long-term by ensuring that local institutions offer academic programs that provide the credentials sought by (local) employers[61]. Conversely, there are long-time labour market participants who want or need new skills to change career paths, or to find a new job if their old one disappeared. Governments also need to provide sufficient funding so that a range of vocational training options are available to help workers of all ages to upgrade their skills, and to try to coax disengaged citizens back into the labour market[62]. Thus, programs must be practical, accessible, affordable, at convenient times, and also coordinated with local transportation options[63].

Being unemployed has substantial impacts on the morale and wellbeing of individuals, but also represents a lost opportunity at a community level[64]. When individuals are not meaningfully employed, whether they are looking for work, or discouraged and not currently considered to be in the labour market, or underemployed, policy makers have an obligation to try to rectify the situation. But, Ireland has an open economy, and has succeeded partially due to its ability to attract and retain foreign corporations. So, governments need to prudently implement policies that strike a balance so that employers can be competitive and efficient, while at the same time providing sufficient tax revenues to be able to offer social supports where needed.

A review of the literature suggests that two prongs are critical. One, the more people employed, the better. Thus, a goal of full employment should be the goal, even if that means sharing work[65]. It also means helping to get

[60] Cooke, Mann, & Burns, 2015.

[61] OECD, 2010a; G. Schmid. Non-standard employment in Europe: Its development and consequences for the European employment strategy. German Policy Studies, 2011, vol. 7, n. 1, 171-210.

[62] E.D. Looker. Regional differences in Canadian rural-urban participation rates in post-secondary education. Measuring the effectiveness of student aid (MESA) Project Research paper 2009-03. Toronto: CAN: Canadian Education Project, 2009.; OECD, 2006, OECD, 2012

[63] Culliney, 2014a; M. Culliney. The rural pay penalty: youth earnings and social capital in Britain. Journal of Youth Studies, 2014b, vol. 17, n. 2, 148-165.; Cooke, Mann, & Burns, 2015; Saunders, 2006.

[64] T. Boland and R. Griffin. The Sociology of Unemployment. Manchester University Press, UK, 2015.

[65] Betcherman and Lowe, 1997.

discouraged and disengaged individuals into at least some level of paid employment, and all of the benefits that accrue from being active and self-reliant[66]. Two, it means having policies and income supports in pace so that workers who lose (non-standard) employment qualify for benefits and are able to have a reasonable level of security and stability in times when paid employment disappears[67]. Although it can be controversial, governments also need to be willing to contemplate some direct job creation, even of a short-term nature, to help those in need[68]. Certainly, this is something that many people expect of governments, rather than to leave employment purely to the private sector.

According to the OECD, regions need to find local solutions involving community stakeholders, rather than imposing broad top-down policies involving blanket public funding allocations[69]. In other words, it is impractical, with current austerity budgets, to expect to spend public funds received via top-down allocations. Instead, local governments and local stakeholders need to reflect, analyze, and to prioritize to select the local business opportunities that have promise and are worthy of receiving public funds[70]. That potentially requires social enterprises or entrepreneurs interested in social goals to try to fill the void in rural and/or remote areas where for-profit opportunities are limited[71]. Tourism can provide some economic diversity, and is a logical choice for County Donegal because of the aforementioned tourism college and well-established markets (and potential customers) elsewhere in the country. More broadly, tourism is frequently thought of as an industry with employment potential for rural areas seeking economic diversity and job creation. Since rural regions are inherently 'away from urban', they can be seen as being more pristine, relaxed, and having wide open spaces to enjoy. The tourism industry also has the added benefits of having low barriers to entry for hard-to-employ people, because the industry is associated with a range of occupations[72],

[66] See V. Gash. Bridge or trap? Temporary workers' transitions to unemployment and to the standard employment contract. European Sociological Review, 2008, vol. 24, n. 5, 651-668.; Boland & Griffin, 2015; OECD, 2014.
[67] see Saunders, 2006; Bosch, 2006; Green & Leeves, 2013.
[68] see Bæck & Paulgaard, 2012.
[69] OECD (2014).
[70] OECD, 2014.
[71] See Defourny & Nyssens, 2008.
[72] R.D. Elkin and R.S. Roberts, R.S. Crafting a destination vision, in Travel, Tourism, and Hospitality Research: A handbook for managers and Researchers (Ritchie, J.R.B., and Goeldner, C.R., eds.). Wiley and Sons: US; 403-412, 1994.

including many are rather low-paying, and even of a seasonal nature[73]. While these jobs can be seen as undesirable to some, an expanded tourism industry created opportunities for young people, and older people, to ease into, or out of, the labour market, or for discouraged workers.
If the tourism industry is targeted for growth by stakeholders within County Donegal in particular, the challenge is to figure out what the specific attraction or attractions should be, and which potential customers are the most logical ones to target. Potential visitors want to assess what they can see and do in new areas. So, a rural area needs to get the message out, and promote their attractions. An investment in tourism can benefits locals too, if it means that cultural, historical, social, and/or natural attractions and events are developed for both groups (i.e. tourists and locals) to enjoy[74]. A rural area is unlikely to be able to attract tangibly more visitors unless it develops its attractions, events, and facilities (i.e. accommodations, restaurants, etc.) for tourists. Put simply, there are no shortcuts. To spur on rural tourism, governments need to take the lead and to make prudent capital investment to make it easy for visitors to come, spend, and be satisfied[75]. That means biting the bullet and spending capital funds to improve the physical infrastructure like roads, transportation systems, and high-tech networks.

4. Methodology

Research Design

This paper emerged from a much larger study comparing the employment conditions, lifestyles, and degree of life satisfaction of rural individuals in Ireland and the two Canadian provinces of Newfoundland and Ontario. After the conclusion of the original study research continued to explore a few emergent themes of interest: i) employment and education issues facing rural youth, ii) business development and sustainability issues, and iii) the current

[73] G.B. Cooke, J.K. Burns, and D.K. McManamon. The Case for Public Investment in Cultural Tourism in Gros Morne National Park (GMNP). Technical report funded by, and prepared for, Atlantic Canada Opportunities Agency, Newfoundland and Labrador, 2013.
[74] D.L. Constantin and C. Mitrut. Cultural tourism, sustainability and regional development: experiences from Romania. In Cultural Tourism and Sustainable Local development (Girard, L.F. and Nijkamp, P, eds). Ashgate: UK, 2009, 149-166.
[75] See G.B. Cooke, D. Hanlon, K.W.J. Vardy, J.K. Burns, S. Parveen, and D.K. McManamon. Adding Cultural Tourism to the Natural Assets of Gros Morne and its Environs: A Follow-up Report for ACOA. Technical report funded by, and prepared for, Atlantic Canada Opportunities Agency, Newfoundland and Labrador, 2014.; B. Prideaux. Creating visitor attractions in peripheral areas, in Managing Visitor Attractions: New Directions (Fyall, A., Garrod, B., and Leask, A. - eds.). Butterworth Heinemann: UK, 2003, 58-72.

and possible role that the tourism/hospitality industry plays in rural areas. Data collection of this phase began in September 2010, and continued into 2015.
The original focus on older rural individuals was due to the presumption that these individuals have potentially reached a stage in life in which their work and life priorities have changes, or at least crystalized. More specifically, these workers might be more willing and able to cope with the locally available employment options. In contrast, young rural individuals were of interest because, due to their career stage, they potentially need to focus on finding a path to good quality employment. On the other hand, these younger workers potentially face additional barriers to that type of employment, and thus, we wanted to see how and what they are deciding to do, if anything. This involved interviews with a range of young rural adults, but also surveys of students both campuses of the Letterkenny Institute of Technology (Lyit). Then, since the availability and quality of local employment was found to be a key aspect of rural living, the focus of the follow-up study was expanded to include interviews with business people and community activists and representatives to explore the issues revolving around operating a social or for-profit enterprise. Particular attention was paid to the tourism/hospitality industry because, again, it is viewed widely as being a possible growth opportunity for many rural areas.

Data and Analysis

As mentioned in the introduction, we use a case study approach in this paper to explore the strategic responses that local governments, public sector institutions and organizations, and grassroots community groups within County Donegal are taking, or could take, to respond to the transformation of work. A variety of sources of data have been used: i) semi-structured interviews with a variety of citizens, activists, students, and other stakeholders within County Donegal, ii) surveys with post-secondary students at both Lyit campuses, ii) pilot surveys from tourists within the County, and iv) observational analyses by the first author.
Between February 2009 and April 2015, the views of almost two hundred participants have been examined via semi-structured interviews within the broad 'comparative employment' research program across all jurisdictions of interest. Of that total, 34 participants from County Donegal have been interviewed, and of those, 14 are young adults. A rather flexible protocol was used during the interviews, so that the participants could share views on either the local economic conditions, employment options within the region, local lifestyles and quality of life, whether people typically commuted to work outside of the region on a daily (or longer) basis, discussions about who was able to acquire 'good quality' employment in the region, personal or family

employment histories (if the participant wished), and possible public policy options, if the participant wished to share any. The vast majority of the interviews were conducted by one interviewer and one participant. In a small number of cases, couples or friends opted for a paired interview. Plus, for the initial set of interviews in 2009, a group format was used when participants were sought via local newspaper advertisements to attend at a pre-arranged date and time. Otherwise, a snowball sampling approach was used to find participants, once an initial community contact was made. To ensure that we accessed a suitable mix of younger and older individuals, as well as community activists and representatives, and business operators, we also used purposive sampling[76]. Generally, the individual interviews lasted around 45-60 minutes, whereas the paired or group interviews lasted up to two hours, with a second interviewer as note-taker. The interviews were not digitally recorded. Instead, the interviewer(s) recorded handwritten notes during and after the interviews. It is also worth reminding readers that the interviews began in the first half of 2009, which was in the middle of the global financial crisis of 2008-2010. That crisis hit Ireland particularly hard, and yet the country has recovered rather strongly by 2015, albeit with some struggles in the interim. We raise this point simply to stress that the bulk of data collection occurred in the aftermath of a very serious economic downturn, and that presumably would have affected the responses of participants.

In 2012 and 2013, students were surveyed at Letterkenny Institute of Technology (Lyit). A total of 330 usable surveys were collected. Students were surveyed at both Lyit campuses (i.e. Letterkenny and Killybegs). Students were accessed by seeking permission from instructors to survey their students before, during, or after class. All students present in the classroom were given copies of the survey with an attached cover letter. Students were asked to fold the survey in half and to place into a circulated oversized envelope to ensure that individual surveys could not be linked to individual students. Although the completed surveys are best described as a convenience sample, they are thought to be roughly representative, and include students with majors in business, tourism/hospitality, health sciences, & other studies. The short survey consisted of questions asking students about their hometown, why they chose to attend Lyit, and then where they prefer, or expect, to live after graduation, as well as they priorities/goals. In this paper, only simple descriptive statistics are presented, along with some sample findings from

[76] See J. Creswell. Research design: qualitative and quantitative approaches. Sage Publications: US, 1994.

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open-ended questions which were asked to get more detail understanding of the life and work and location preferences of the respondents.

Small scale surveying of tourists was undertaken in 2012 and 2013 as a pilot study. Although the planned full study was not subsequently undertaken, the 'pilot surveys' provided additional context in this paper, because they reveal some of the thoughts of visitors to the area. As discussed in the literature review, tourism is thought to hold promise for rural areas as a possible way to expanded economic activity, or at least to diversity local economies. A total of 76 tourist surveys were collected in County Donegal, of which 58 were deemed to be usable. Visitors were approached at the Tourists Information centre in Donegal Town and Killybegs with the permission of local management, and were also approached at the Diamond (i.e. town square) in Donegal town, which is where intercity busses in and out of the county depart and arrive. Participants were asked about attractions and events that they have visited, their satisfaction with their visit, and also were asked about changes or improvements that they would like to see, as a way to assess current economic impacts as well as growth potential for the industry.

In addition, informal discussions with academics, bureaucrats, business owners, and citizens within the jurisdiction, over the past six years, also informed us of the economic and employment realities within County Donegal[77]. Thus, many of these discussions have been synthesized into some observations and analysis as it pertains to the local economy. This also includes observing tourist counts/levels at attractions at various times of the year.

5. Case Study Findings

Findings are sorted into tourist surveys, Lyit student surveys, community interview results, and finally, observational analyses. First, it is necessary to point out a logistical problem about different levels of government when assigning credit (or blame). As mentioned earlier, our attention has been on Donegal County Council (DCC) in this paper. Yet, the DCC does not operate independently of the Irish (central) Government. But, for the sake of convenience, it is presumed that the DCC plays, and has played, a key role with the local implementation of nationally implemented funding and programs. As a result, we give credit to the DCC for government policies that technically

[77] Special thanks is offered to Mr. Don McNeill of the Ulster Canada Initiative (UCI), and to Ms. Patricia Faherty of Seawinds B&B in Killybegs for the guidance, contacts, and information that each has provided over the past several years. Without that kindness and patience, we would not have been able to understand and explore County Donegal's people, features, opportunities and challenges.

originate from the Irish Government, even though this is an oversimplification.

Tourist Surveys

From the pilot surveys, we found that almost two-thirds of the visitors had travelled to County Donegal for the first time, and three-quarters of the visitors were from outside of Ireland. This is important because this initial visit sets expectations for the future. A higher number of repeat visitors would or could indicate that expectations had been met on previous trips. While we found that an impressive 92% of surveyed participants were either pleased or very pleased with their visit, there was one warning sign. Only 51% of visitors were pleased with the physical infrastructure for tourists. These results tell us that tourists are finding a visit to County Donegal to be a rewarding experience, but that it takes more effort than it should.
The other observation pertains to the distribution of the surveys, not the answers per se. Our small number of completed surveys (i.e. 58) is a reflection of the limited number of tourists at seemingly key sites within the county. While we were admittedly trying to survey visitors during the heart of the off-season, we were surprised to find a complete lack of visitors at several attractions even on weekends[78] , even though there are sizable tourist levels elsewhere in Ireland in these 'off' months. By our calculations (i.e. 18% of 7.0MM), there were more than 1.1 million overseas visitors to Ireland during January to March in each year since 2011[79], and so it appears that the off-season is tangibly weaker (i.e. less busy) in County Donegal than average.

Lyit Student Surveys

Rather than looking at responses to individual questions, we reflect on the survey findings as a set. Lyit has successfully recruited a small number of international students to attend. That adds to the vibrancy of the atmosphere, and also the learning experience of local students. Moreover, a tangible portion of these international students indicate that they would prefer to live in County Donegal after graduation.
Turning to local students with a hometown within County Donegal or in and adjacent county, the majority expect to work within that same region after graduation. Moreover, these students typically indicated that they chose to

[78] This occurred at Glengesh Pass, Slieve League, Mamore Gap, Grianan of Aileach, and the Baltany Stone Circle in winter in 2012 and/or 2013.
[79] Derived from Failte Ireland. Tourism Facts 2014; Latest updated figures. August 2015.

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attend Lyit because of the programs offered, the convenience, and/or the affordability because they could live close to home. The surveys further confirmed that the vast majority of surveyed Lyit students valued proximity to friends or family, and were disinclined to crave an urban lifestyle. Thus, the results suggest that Lyit is filling a niche. There are indeed a set of students who want an education, but have a strong preference for attending a nearby institution, and to stay and find employment in the area after graduation.
Among the questions on our survey, we asked students about where they expected to work after graduation, and where they preferred to work. We deem this to be an indication of what the head says (i.e. expectations) versus what the heart says (i.e. preferences) about life beyond school. We noticed, though, that among young (under age 30) Lyit students from County Donegal, a majority of those with a tourism-hospitality major are expecting *and* preferring to live outside of the county after graduation. That differs from the comparable students having a business, health or other major, where the majority do, in fact, expect and prefer to live within County Donegal after graduation. We take this a sign that these young people, who are necessarily thinking of their impending career, are sufficiently optimistic about their job prospects, on average, except for those in tourism-hospitality. Members of that latter group, though, presumably perceive that local conditions are not yet sufficiently favourable to work in tourism, compared to opportunities elsewhere.

Interview Highlights[80]

The interviews that have been conducted within County Donegal cannot be viewed as generalizable in a methodological sense. Rather, they provide indications of the views of the participants who agreed to share their opinions. Also, we remind readers that when the interviews began in 2009, Ireland had entered a painful, deep, and fast-acting recession. A handful of interviews are presented, several of which illustrate the situation that existed in 2009 and 2010. In contrast, some of the following observational analyses describe the improvements that have since occurred.
An older male participant[81], who typically held manual labour jobs such as in construction, felt, in 2009, that something more needed to be done. He felt that it was virtually impossible, in Southwestern Donegal, to get any good employment in the private sector, and certainly nothing that was permanent or full-time. There was only casual work for low pay and no benefits. He wanted

[80] The descriptions have been presented in a way to protect participant anonymity.
[81] For the sake of simplicity, participants are categorized as being young (i.e. 18-30 years), middle-aged (i.e. 30-50 years), or older (i.e. 50+ years of age).

governments to create more 'make work' jobs to get people some earned income. While he wanted to stay in the area, he was on the verge of having to look outside of the county. He thought that governments 'are killing small towns' by withdrawing services and funding.
One participant, interviewed in 2013, was particularly suspicious about the commitment of governments and social agencies to (truly) rural citizens. He said that people want to retain their culture and identify (and that meant staying in their home region, which in this case, was inside the Irish-speaking Gaeltacht). But, governments are focused too much on efficiency. Yes, there are programs and services within the county, but often they are provided in Letterkenny, not in smaller communities that are more than an hour away. He felt that both levels of Government talk a good game, but their policies are encouraging out-migration from smaller rural communities to larger towns and cities. During the same visit, we also interviewed a young adult female in this same small Gaeltacht community. She was quite disappointed in her local options. She is not on an academic path, but has tried to work as much as possible and to entre training programs to gain new work skills. But, she described a range of logistical problems that have hindered her. At times, she has been reduced to hitchhiking to try to get to government-provided training sessions in an adjacent community. If she does not attend almost all of the sessions, then she will not earn the certificate and could lose her social benefits. But, as a young person without a vehicle, she could not afford to take the bus each way to the training.
Another middle-aged single male, who had lived In Ireland and overseas, said that the key was to be creative and open-minded. If you are willing, there could be chances to do a little painting or odd jobs to get a chance to make a living. Yes, conditions are bad, that is the reality. Just because it is beautiful doesn't mean that there will be steady jobs. That's the way it is here. 'You have to do what you can to survive.' He was interviewed in 2009 during the peak of the downturn, and lived in one of the larger communities in western County Donegal. In that same community in 2009, a middle-aged couple with young children outlined how much they have enjoyed the lifestyle, and tranquility, and time for friends and family since relocating from an urban centre elsewhere in Ireland. Yet, there were feeling a financial pinch since their family income had fallen sharply, and only one of the two had been able to find local employment, and it was a non-permanent position.
In contrast, a business owner indicated, during a 2011 interview, that job applicants 'are not knocking down our door' even though the local economy continued to be weak. He is co-owner of a hospitality related business catering to local and international tourists enjoying the Glencolumbkille and Slieve League area. He attributed this to a couple things. One is that some of the

more ambitious folks have out-migrated, which 'is the way it always was' [before the Celtic Tiger years]. Also, he felt that because the tourist season is so seasonal, some of the remaining locals are uninterested in a job that would only last for a handful of months and is hard work. The business owner's main concern was that the region had the foundations for a good tourism industry but that the physical infrastructure (like roads and signage) was not developed enough, that there was insufficient coordination between the government and business operators, and insufficient coordination among business owners within the region to work together to satisfy customers. Thus, visitors might not be given accurate information about the attractions that exist in the area, nor the accommodations, thereby missing the opportunity to inspire them to extend their stay.

Finally, one young female participant was intent on leaving her small hometown to attend a university in a large Irish city. She was prepared for the move, and did not expect to be able to live in County Donegal ever again, given her lofty education and career goals (which were accessible essentially only in an urban centre). This is important, because there is no practical way to convince her to stay within the region. Unlike the majority of the Lyit survey participants, this individual is adamant about leaving the county, and will do so even before entering post-secondary education. We mention this because it is important to recognize that not all locals are intent on staying. In this case, the participant had considered her options regardless of location, and then determined that leaving made more sense.

Observational Analyses

In this section, we consider some of the strategic and operational decisions that have been happening behind the scenes by the Donegal County Council (DCC) or Letterkenny Institute of Technology (Lyit). In addition, we look at some of the economic challenges existing at a community level, based on our observations and analyses since 2009.

As it is responsible for a relatively small and remote region facing economic and geographic challenges, the DCC has logically decided to look outward, and to build partnerships, alliances, and markets. They deserve credit for the actions that they have taken, as exemplified by the Spaceial Northwest Project[82], which is a regional partnership with their counterparts in the neighbouring counties in Fermanagh, Tyrone, & Derry. That partnership seeks to facilitate and expand the business, political, and educational links and

[82] Spaceial NW Project. Miscellaneous online information, 2015., https://www.spaceialnw.eu (accessed September 4, 2015).

activity levels across the region. Donegal County Council has also been a supporter of the Ulster Canada Initiative, which is an informal alliance of business, political, and educational partners seeking to strengthen ties between Ireland, Northern Ireland, Canada, and beyond. The DCC is also conducting strategic planning with a cross section of community participants, via community-level forums, to look at social and economic challenges as it looks to the future. These sessions explored economic challenges, tourism facilities, and other issues.

County Donegal has a low population density, and that makes it challenging to provide social services, to retain schools and commercial activity, and to maintain the physical infrastructure in the region. To be blunt, tax dollars need to be stretched thinly. For example, the motorways between Donegal Town and Letterkenny, and between Letterkenny and the border at Derry City are modern and efficient. However, reaching the western and northern tips of the county, such as visiting Slieve League, Glencolumbkille, the Bloody Foreland, and Malin Head, means utilizing far poorer quality roads. These four attractions originally caught our attention because they could represent the backbone of a nature-lovers tour, if there was a way to link and promote them effectively, and if there were enough 'creature comforts' for visitors along the way, and some catalyst to unite community efforts. While we pictured a small 'bottom-up' tourism initiative given austerity budgets and limited public funding, the Wild Atlantic Way's emergence in 2014 was an unexpected development[83].

Like elsewhere in Ireland, a 'parish mentality' and local shopping norms means that even small communities (of as little as a few hundred residents) generally have been able to retain a small number of retail shops such as a general/hardware store, grocery store, butcher, café, pub, bakery, and 'takeaway', plus a post office outlet. Thus, there is some level of commercial activity, however modest, at a decentralized level throughout the county. There are also several small factories that continue to operate, including fish processing plants, commercial bakeries, and some light manufacturing. That said, in 2009-2010 in particular, but continuing into 2015, there are empty store fronts in most town and village centres throughout the county. Since the first author visited in 2009, store, pub, and restaurant closings have been detected each year since then, indicating that some business owners held on for a while beyond the financial crisis, but could not weather the storm of ongoing economic softness and uncertainty until conditions began to improve

[83] Wild Atlantic Way. Miscellaneous online information, https://wildatlanticway.com (accessed September 4, 2015).

noticeably by about 2013. We detected other visible signals of economic stress and poverty, such as the emergence of dollars stores and discount chains, second hand shops, and pop-up offices for social agencies and charitable organizations on 'main street' within many communities.

Two exceptions are Letterkenny and Donegal Town. Donegal Town, for its size, has noticeably more commercial activity (i.e. stores, restaurants, services, and customers/clients) than other communities in the area. But, as mentioned earlier, it benefits from its location at the Southeast corner of the county, and a transportation gateway into the region. Letterkenny's situation is more mixed. Its center experiencing several store closings during the financial crisis, and those vacancies have persisted or increased until today. On the other hand, there are several private sector plants and offices, of Irish and International ownership, just outside its borders in a large and growing industrial park. So, there are good jobs in the private sector in the region, but many people aspire to the security and stability of jobs in the public sector (even if seasonal and modest paying like in a postal outlet or tourist office). However, there remains a divide, like was described in the reviewed literature, between those holding skills and having good opportunities, and others with sporadic employment patterns. More broadly, there is a noticeable east-west divide within County Donegal, with even lower population density and less commercial activity in the western (and northern) portion of the county, on average. Notwithstanding the challenges that exist in tourism, we take comfort with the potential opportunities for coastal communities that can emerge due to the Wild Atlantic Way initiative described previously.

To North American observers like us, the idea of being able to receive social benefits (i.e. an unemployment cheque) while also holding employment is surprising, but also intriguing.

Yet, in Ireland, this so-called 'double dipping' is allowed, and working, under the guide of so-called 'FÁS' contracts. These were widely available in the period following the crash of 2008, and we typically interacted with people receiving about 40 hours of paid employment every two weeks. So, those able to get on this 'social scheme' had the stability of guaranteed part-time hours, and yet were able to augment it with any other available paid employment too. Thus, it is a shame the FÁS programs acquired such a stigma among Irish citizens, and has been renamed and restructured[84]. From examples we saw in County Donegal and elsewhere in Ireland in the wake of the economic

[84] For convenience, we refer to FÁS programs to represent any 'social schemes' that provide short-term paid employment opportunities within County Donegal. FÁS was the official name until about 2012, when the program and government department was restructured due to allegations of financial mismanagement.

downturn, the program was needed and beneficial at a community level. If anything, the suite of retraining/training options possible does not go far enough, given the pockets of structural unemployment and poverty in the county. We also see the non-financial benefits that can accrue when these types of partial employment opportunities exist in rural areas to stabilize family incomes, and to provide paid labour for community-run organizations to provide services.
Turning to Lyit, they face a decision as to how to compete with their peer group of institutions, while also trying to be responsive to any particular needs to local citizens. Also, as a 'technical institute' rather than university, and the only significant post-secondary institution within County Donegal, it would be fair to except Lyit to offer programs beyond those of a 'liberal art school', despite its modest size. In short, they have exceeded this expectation. During the economic crisis, the first author saw, firsthand, how Lyit was offering several short-term vocational training programs to allow displaced workers to get immediate training to quickly try to learn new skills and change careers. These programs are in food safety and preparation, bartending, customer service, among others. It is worth noting that the facilities at the Killybegs campus are modern and comprehensive, and specializing in those sorts of hospitality-related programs. There are also several educational and heal-care related programs, which are a perfect fit for rural areas, since health and education institutions are often among the most desirable (and stable) of the local employers, and it is a shame if there is a need to recruit 'outside' workers. It was also amazing to have recently interviewed a young adult living in a village north of Letterkenny. She had had a rather checkered educational and employment path to date, but was currently in a bridging program within County Donegal which was allowing her to qualify to apply to university and college programs in County Derry. Even though that would require crossing the UK border, the student had found the funding and application process to be seamless and efficient. Yet, at the same time, Lyit offers several information-technology and business related options. Perhaps most impressively is the 'Colab' located in Letterkenny, which is a massive, modern, and well-funded business incubator designed to nurture business start-ups[85]. While the funding for this incubator is primary from the Irish and European sources, credit has to go to Lyit and DCC for its existence and implementation as well[86]. It is an amazingly sophisticated and large operation given the modest

[85] See Colab. Miscellaneous online information, 2015. https://www.co-lab.ie (accessed September 4, 2015).
[86] Lyit and Donegal County Council are separate entities, and the latter does not formally influence the latter. However, it is our view that decision-makers within these two institutions

population level of Letterkenny and County Donegal. We believe that this business incubator is likely to spur on for-profit as well as social enterprises within the region, although we cannot detect any impact yet, except anecdotally.
Turning to tourism, the region is blessed to have a set of natural and historic facilities like the Grianan of Aileach, the Baltany Stone Circle, the Glengesh Pass, the Cliffs of Slieve League, Malin Head, the Mamore Gap, Glencolumbkille's religious sites, and the wildness of the Bloody Foreland in addition to the cultural fascination that outsiders often have with the Gaeltacht regions. But, there are simply far too many free attractions within the county. Whether one prefers isolation or crowds, commotion or tie for contemplation, the challenge for the people of County Donegal is to monetize its attractions. This does not mean charging admission feed. Rather, it means selling goods and services to visitors by filling a need or desire. The reality is that a tourist can spend a weekend visiting all corners of County Donegal without having the opportunity to spend money at the aforementioned attractions[87]. Locals sometimes roll their eyes when mentioning the 'Ring of Kerry', to signal that it is overly commercial. But, County Kerry had been an area with very high unemployment, and now has a vibrant (and famous) tourist industry furnishing employment to many citizens. Second, there are not enough customers currently, even with the Wild Atlantic Way promotion. It is highly seasonal, and too seemingly weather-dependent. Nonetheless, there is new excitement about future prospects. There are also a number of community initiatives that have been implemented or are underway to attract tourists, but also to benefit local citizens. For example, in Killybegs, the Killybegs International Carpet Making and Fishing Center is essentially community-run, on a shoestring budget, to try to get more visitors to spend more time in the town as they travel to Slieve League or the Gaeltacht. That is only one example of the grassroots social enterprises to protect the culture and history of communities, and to try to generate employment and economic spinoffs. Other examples are the Aislann in Kilcar and the Dolmen Centre near Portnoo, both of which combine information and facilities for visitors and locals alike. Then, there are clusters of new tourism and hospitality businesses elsewhere in the county, including Fort Dunree, in Dunfanaghey, and elsewhere, some of which are community-owned or operated as social enterprises. But, as was raised by at least one interview participant, visitors to County Donegal are more likely to

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are informally and appropriately cooperating to try to address the wants and needs of the citizenry within the county and region.

[87] One small exception is that a young student entrepreneur has reportedly been selling refreshments at the Slieve League parking lot at times over the past three summers.

stumble upon things to do rather than to travel via well-established and promoted itineraries. This, along with the low off-season tourist counts that we observed, also meshed with our own perceptions that the industry stakeholders needed to try to stretch the tourist season, to promote a clear destination, and to try to extend the length of stay to boost revenue per visitor. It was particularly disappointing to see so few opportunities for potential customers to spend money on goods or services at attractions within the county. We saw it as a danger that natural beauty, peace and tranquillity were offered, but rather few commercial services exist at the attractions we studied.[88]

Until the Wild Atlantic Way was launched, it was difficult to image what would be a sufficient anchor attraction to get large numbers of tourists to visit County Donegal, given its location and stern competition from other (more famous) locations and attractions in Ireland. As locals frequently admit, first-time visitors to Ireland often take the southern semi-circle including Dublin, Galway, Kerry, Cork, and Kilkenny, and only on subsequent visits would entertain the Northern options. That said, it is highly impressive how good the tourism offices are within County Donegal. The staff are well-trained and paid employees (as opposed to community volunteers), and, given the modest size of the tourism industry in the past, the county has surprisingly modern facilities in several communities, and they operate with relatively long hours, even in low season months.

Both levels of Government deserve significant accolades for their commitment to, and bold implementation of, the Wild Atlantic Way. There are distinct and appealing road signs around every significant intersection along the coastal route. Also, the website is professional-looking and enticing. This is a significant attempt to pull visitors to the western and northern edges/coastal roads of the county. Now, visitors to the famous Western Irish regions (i.e. Connemara or Burin or Ring of Kerry) will almost automatically also have County Donegal in mind, instead of as an afterthought. While more southern jurisdictions will benefit as well, County Donegal will benefit disproportionately from this, because there is a reason to travel to the whole route, and from tip to tip. For visitors to County Donegal, that is several hours' worth of travel, and one or more overnight stays, in most cases. That said, it is still likely that the revenue per visitor to County Donegal is lower than elsewhere in Ireland. Also, facilities are operating below well below capacity. Thus, there is certainly room for more tourism, and there are waves of tourists only a few hours away, if they can be enticed to visit. At the risk of

[88] Mr. Charlie McCarron, working under the supervision of Lyit Professors Paul McCusker & Ciarán Óhannracháin, is currently exploring ways that business operators and communities can monetize the Wild Atlantic Way, and related tourism activities, within County Donegal.

being overly cheeky, we would argue that until the Wild Atlantic Way brand was launched, the two things needed for the tourism industry in County Donegal to succeed were more customers and more businesses! Now, more visitors have been attracted, and they are being pulled to the coastal areas of the county. Hopefully, enough entrepreneurs will quickly and effectively satisfy the wants and needs of these visitors. Our worry is that County Donegal will be known for its natural, unspoilt beauty and tranquillity. That is certainly desirable, but the revenue per customer needs to be increased, and the tourist season stretched, so that local businesses are more profitable and create more employment and tax revenues.
Finally, a business owner in the most northerly part of Ireland, adjacent to Malin Head, warrants a special mention. The owner of the Doagh Famine Village has almost single-handedly created a winter tourism season in the Inishowen Peninsula via his annual 'Santa's Workshop' attraction. For several weeks in November and December, and several days per week, the attraction draws thousands of annual visitors from across the island to the area[89]. In addition to creating extra employment for his workers, this has spinoffs for other tourism and hospitality operators in the county. Needless to say, this sort of entrepreneurial flare, and the accompanying employment and tax revenue that is generated, is invaluable to rural regions.

6. Discussion

Labour market transformations are inevitable given this era of relatively free movement of goods, services, capital, and even labour, and unstoppable technological change. As a result, there is going to be ongoing upheaval within labour markets as companies emerge, grow, compete, and sometimes struggle or fail. It is unrealistic for workers to expect to have a steady, stable, secure job for a whole career. Rather, it is much more likely that an individual will change jobs, change employers, and even change industries and occupations over time. Unfortunately, that also means having to endure non-standard work arrangements of various types, and periods of underemployment or unemployment. While these changes affect urban areas as well, rural regions can be especially hard hit, as farming, fishing and other traditional industries struggle.
While the boundary between what is urban and what is rural (or remote) is rather elusive, it is clear to any visitor travelling from Dublin that County Donegal is at least a little off of the beaten path. This is not an insult. Locals

[89] See Doagh Famine Village. Miscellaneous online information, 2015. http://www.doaghfaminevillage.com (accessed September 4, 2015).

speak freely of being out of the way, off the main transportation grid, and even sometimes being left off of maps or of being an afterthought to policy makers in Dublin. The truth is that public transportation within the county is rather limited, and its citizens are used to the effort it takes to venture to elsewhere on the island, or to attract visitors to come. It is also important to grasp the important of place to many Irish citizens. In formal interviews and in casual conversations, people talk about a 'parish mentality'. When people living on the Inishowen Peninsula or Southwest Donegal are asked whether it would be easier to have higher incomes and steadier employment by moving an hour away (but not necessarily even outside of County Donegal), typically give a succinct answer: 'that's not home'. The effect is that those who like the lifestyle, and can live with the local employment options, are very likely to stay put. Others, whether seeking a different set of social, cultural, and/or economic options are candidates for out-migration. In our view, the Donegal County Council (DCC), and other influential stakeholders within the county like the Letterkenny Institute of Technology [Lyit] (the main post-secondary institution in the area), have an obligation to steer society towards a sustainable future. These stakeholders and others need to be decisive. Persistently poor conditions can lead to a culture and tradition of out-migration[90]. That is, the default becomes a plan to leave, not a plan to stay and find employment, or to create an opportunity. Using Ireland's County Donegal as a case study, we explored the strategies and actions that some major stakeholders have attempted given today's labour market transformations.
It would be an exaggeration to say that County Donegal is thriving because of the strategic prowess of its citizens, bureaucrats, politicians, entrepreneurs, and workers. Rather, the point is that several key stakeholders within County Donegal have banded together to show considerable initiative to try to respond to the economic realities. What have they done? The DCC has acted strategically by looking outward and partnering with neighbouring counties and jurisdictions abroad. They have also nurtured local industries, and have partnered with the Irish Government to bring big projects to the region, like the Co-lab business incubator in Letterkenny, and the local tranche of the Wild Atlantic Way. Lyit has also contributed by servicing three distinct client groups: i) young adults seeking a local option to earn a diploma or degree, ii) short-term vocational training or upgrading. While these might seem like obvious client groups to focus on, too few institutions actually commit the resources to do it. Many simply 'talk the talk' without actually taking the difficult, but necessary, actions. Finally, County Donegal is fortunate to have several grassroots, community driven initiatives underway trying to market the area's

[90] Bæck & Paulgaard, 2012.

cultural, historical and natural offerings for the benefit of tourists and locals. While youth out-migration is continuing, and that is unavoidable during times of economic weakness, a significant proportion of young, educated people are committed to stay, according to our Lyit surveys. That commitment is a vote of confidence in the region. The economic future of the region is unlikely to be centred on farming or fishing. Instead, the local government, the local education institution, and local community groups to be the catalysts for positive change to adapt the local economy to new opportunities. Based on our analyses, this is what they are trying to do, and with some success stories emerging or on the horizon.

In this case study, we utilized several sources of information as we analyzed the situation within Ireland's County Donegal. The purpose of this study was to explore the strategic responses that local governments and public sector institutions and organizations can do. Looking holistically at the various sources, the interview findings appear to be consistent with the ideas emerging from the tourist and student surveys, and with many of our observational analyses as well.

As a final thought, some limitations need to be mentioned. First, while we tried to consider a range of pertinent factors, the issues of community vibrancy and sustainability are highly complex. In this paper, we have focused primarily on employment-related challenges and effects. Needless to say, there are many relevant non-economic considerations which were beyond the scope of our paper. Second, for the sake of simplicity, we essentially attribute all government policy making to the local level (i.e. Donegal County Council) even for decisions and policies that sometimes should be partially or fully ascribed to the Central Government. Thirdly, we sometimes had to generalize about conditions across the county, even though the economic, employment, and social conditions vary. Suffice it to say that a young adult considering whether to stay or go faces tangibly different options if living in Letterkenny, Donegal Town, or near Derry City (and thus having easy access to local educational, training, and other supports) versus a youth an hour's west or north in a much smaller, more remote, community. These differences also hold for community initiatives. The mathematics of running a social enterprise geared towards tourists are quite different for a coastal community versus one on the busier and more-populated eastern-located transportation routes. Fourthly, since we are outsiders, it is inevitable that we have misinterpreted some local facts or realities, notwithstanding our attempts to be thorough. We apologize in advance for any of these errors, which are the sole responsibility of the first author.

In conclusion, it is important to return to the work transformations that are occurring. This will inevitably lead to ongoing upheaval and uncertainty for

individuals. The challenge, for them, is to understand these transformations, and to try to acquire the skills, experience, and adaptability that employers will be seeking. However, we believe that public policy makers need to show leadership by establishing conditions so that citizens and communities can survive and thrive. Ireland's County Donegal provides a case study of some of the strategic options that can be taken, and its current and future struggles and successes can provide insights for other jurisdictions in the developed world.

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EU Principles of Workers' Participation in the Management of Businesses and the Employee Shareholder in Britain: Rules, Interpretation and *Lacunae* of a New Subcategory of the Contract of Employment

Pierre de Gioia-Carabellese [*]

1. Introduction

In light of the Employment Rights Act 1996, as amended by the Growth and Infrastructure Act 2013, this work is aimed at providing a practical perspective of the employee shareholder contract, albeit through a doctrinal methodology that critically examines the possible flaws and inconsistencies of this new legislation.

First and foremost, the paper discusses the rights that the employee shareholder renounces in accepting the new status.

Furthermore, the contribution highlights the fact that a *numerus clausus* of employer may offer the new contract. Employers authorised to offer this personal work relationship to their workforce are not the same as those permitted to enter into an ordinary contract of service. Companies are the sole eligible employers for the purposes of this specific contractual relationship, although the shares can be allotted to the employee shareholder by the parent company of his employer. In this respect, an analysis of the combinations that these legal provisions engender will be illustrated.

[*] Pierre de Gioia-Carabellese is Associate Professor of Business Law, Heriot-Watt University (Edinburgh, United Kingdom). Email address: P.de_Gioia-Carabellese@hw.ac.uk.

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Moreover, the paper discusses and analyses the process with which the employer must comply in offering the new status. Emphasis is placed on the advice that the individual is expected to receive according to the new legal provisions. As far as this aspect is concerned, an issue that is addressed through rules of legal reasoning, is whether the lack of advice may give rise to either an obligation to reengagement or, merely, an action for damages.
Additionally, based on a purposive interpretation of the recently introduced legislation, the employee shareholder contract may constitute either the conversion of a previously existing contract of service or a brand-new contract offered from the outset to a newly hired individual. In light of these two underpinning philosophies of employee shareholder, the article undertakes a discussion and doctrinal analysis, which is concerned with the legal provisions of the new legislation, with particular attention drawn to the means by which the contractual relationship comes to fruition. Here, a conundrum shall be tested and hopefully resolved: when the original contract of service is modified by the employer with the consent of the employee (the employee shareholder by conversion), some statutory protections are made mandatory to the benefit of the weaker party, namely the written statement of particulars where the relinquished rights are specified, independent advice from a suitably qualified external advisor and a cooling-off period before the new contract can take effect. Conversely, should the new contract be offered to a new member of staff, for instance to a newly hired individual as a result of an *ad hoc* job advert (the employee shareholder since the beginning or *ab initio*), the legislature would appear to have offered little by way of clarity.

2. The Employee Shareholder within the Broader Sphere of the Contract of Service and the Worker Contract

A simple way of understanding the new category of employee shareholder (ES) would be to describe it as a relationship characterized by the swapping of shares for rights.[1] This is the main principle around which the concept has been configured: any employee, upon request from his employer,[2] can agree to sign a contract to become an employee shareholder with the resulting gain of

[1] Interestingly, although the terminology 'employee shareholder' is the one officially given to the new category in the final version of the legislation, the Growth and Infrastructure Bill initially referred to 'employee owner'. See HC Deb 18 October 2012, col 516.
[2] It will be clarified later in Section 3 below that not any employer can offer to an employee a contract to become an employee-shareholder; only an employer (or its parent undertaking) issuing shares may do so.

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tax-free shares.[3] The minimum amount of shares that can be issued is set at £2,000. In return, the employee retains some of the main statutory rights, although these are significantly watered down and, in some cases, they are sacrificed altogether.
The focus of this contribution is not to discuss whether, ideologically, this new status is legal and consistent with the established rights conferred on employees.[4] Rather, this work will explore and clarify, by means of a doctrinal methodology and in the light of rules of statutory interpretation, the essence of the recent legal provisions applicable to the employee shareholder, including the procedures that should be followed by the employer when making such an offer. More specifically, the research will analyse the rights that the employee shareholder is going to renounce, as a result of the acceptance of the offer to become an employee shareholder. Additionally, emphasis will be placed on the nature of the employer who is entitled to offer the employee shareholder contract, according to the new legislative provisions. Furthermore, the legal provisions aimed at protecting the employee shareholder when he accepts the new status will be discussed, with particular reference to the requirement for independent advice and the cooling off period. Finally, from a theoretical and speculative perspective, a possible demarcation line between two types of employee shareholder contract, the ES by conversion and that *ab initio*, will be presented and assessed.

3. The Statutory Employment Rights Renounced by the Employee Shareholder

3.1. The Right Not to be Unfairly Dismissed

The employee must realise that there are certain statutory rights which he/she will renounce in deciding to take up the offer of becoming[5] an employee shareholder. The first of these is the removal of 'the right not to be unfairly dismissed'.[6] Accordingly, the employee must be aware that, by renouncing this

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[3] For the tax implications of this share issue and, more generally, on the new scheme, see Department for Business, Innovation & Skills, 'Guidance Employee Shareholders'(1 September 2013, last update 7 February 2014) <*https://www.gov.uk/employee-shareholders*>accessed 16 December 2014.
[4] In this respect, the new category confirms a de-regulation in the employer-employee relationship. MR Freedland and PL Davies, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford Monographs on Labour Law, OUP 2007) 242-243.
[5] The position of a person recruited as an employee shareholder is considered below in Section 7.
[6] Employment Rights Act 1996 (ERA 1996) s 94(1).

right, he/she is deprived of the most significant statutory protection furnished on the termination of his/her contract of employment.[7] Nevertheless, there is still a degree of relative security for the employee shareholder, despite the waiver of his/her entitlement not to be unfairly dismissed. This is connected with two types of dismissal specified in section 205A(9) and section 205A(10) of the ERA 1996:

- Automatically unfair dismissals, in other words a dismissal for a reason such as that laid down in sections 103, 103A or 108 of the ERA 1996, for example where the employee is a member of a trade union, exercises his/her whistleblowing rights or for health and safety-related reasons. As a result of these additional automatic unfair dismissals, a new legal provision, conferred on the employee, rather than the employee shareholder, has been added to the ERA 1996, namely s 104G, specifically relating to the employee shareholder status.[8]
- A dismissal which is discriminatory in terms of the provisions of the Equality Act 2010 (EA 2010).[9]

3.2. The Right To A Statutory Redundancy Payment

Redundancy pay is also a right which is waived by the employee who becomes an employee shareholder. If an employee is made redundant under section 139 of the ERA 1996, a statutory redundancy package must be provided.[10] In the case of an employee shareholder, he/she will have received shares from the employer worth at least £2,000 or the increased (or decreased) value achieved in the meantime. However, the employee must be wary that the value of shares he/she possesses does not correlate to the potential redundancy package, the latter being an amount that does not fluctuate according to the highs and lows of the market and is calculated on a mandatory basis according to a legislative formula.[11]

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[7] An employer can dismiss an employee in a comparatively short period of time, namely before the employee has two years' continuous employment, without fear of being sued in an Employment Tribunal: section 108(1) of the ERA 1996.

[8] At scholarly level, this addition is regarded as '[r]ather ironic …' (Prassl J, 'Employee Shareholder "Status": Dismantling the Contract of Employment' (2013)42 ILJ 307-308).

[9] Section 205A(9)(b) of the ERA 1996.

[10] '[A]n employer shall pay… a redundancy payment by reason of being laid off or kept on short-time'. See the ERA 1996, s 135(1)(b).

[11] At the time of writing, and effective as from 6 April 2015, the redundancy pay is the weekly pay of the employee concerned, capped at £ 475, multiplied by the years of service, albeit up to a maximum of twenty. However, for years of service where the employee was 41 or older, the redundancy pay is one and a half week's pay. Accordingly, the maximum amount of statutory redundancy pay is £ 14,250.

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3.3. The Other Statutory Employment Rights Renounced by the Employee Shareholder

Those accepting the status of employee shareholder must renounce two additional rights: (1) the right to request flexible working and (2) the right to request time off to study or undergo training. These rights are not as important as those referred to in the previous Sections 3.1 and 3.2; nevertheless, they should be taken into account by an individual when accepting an offer to become, or to be, an employee shareholder.[12] On the entitlement to request flexible working,[13] such a right conferred exclusively on employees (but also on some agency workers),[14] is prescribed under section 80F and section 80I of the ERA 1996, although the relevant norms have been significantly amended by the Children and Families Act 2014.[15] It is worth mentioning that, although this right is renounced, the employee shareholder does retain the entitlement to request flexible working in the 14 days following his return from a period of parental leave.[16]

Additionally, the right to request time off to study or undergo training, legislated under section 63D of the ERA 1996, is also renounced by the employee shareholder.[17]

Although the right to request either flexible working or time off to study or undergo training are renounced, nothing prevents the employee shareholder and the employer initiating discussions, on a voluntary basis, for flexible working to be mutually agreed. As far as the option to negotiate flexible working is concerned, this notion is advocated by Michael Fallon, Minister of State, Department for Business, Innovation and Skills:

'While employee owners do not have the statutory right to request flexible working, it does not stop them having constructive conversations with their

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[12] See later in this contribution, at Section 7, the difference between employee shareholder by conversion and *ab initio*.

[13] Pursuant to s 205A(2), in particular s 205A(2)(b).

[14] See ERA 1996, s 80F(8)(b). D Cabrelli, *Employment Law. Texts, Cases, and Materials* (OUP 2014) 322.

[15] The new rules concerned with the flexible working entered into force on 30 June 2014.G Mitchell, 'Encouraging Fathers to Care: the Children and Families Act 2014 and Shared Parental Leave' (2015)44 ILJ 123-123; <http://adapt.it/englishbulletin/wp/wp-content/uploads/2014/07/carabellese_colhoun_flexworking.pdf> accessed 1 February 2015.

[16] See ERA 1996, s 205A(8). As parental leave is an EU right, the British Parliament did not have any choice.

[17] In this case, the abolition stems from section 205A(2)(a) of the ERA 1996.

employers about how they work to best suit the needs of the individual and the needs of the company. …'[18]

Mutatis mutandis, the same reasoning could be extended to the time off for study or training.

The rationale behind these two exclusions(both the right to request flexible working and the right to request time off to study or undergo training) is unclear. From a closer perspective, it may appear odd that the employee shareholder (heralded as a flexible category of job)cannot ask on flexible patterns of working under the prescribed statutory process. This right could have been the natural corollary of the new category, rather than an element regarded as not worthy of protection. Similarly, as far as the right to request time off for study is concerned, its nature (unpaid) and its limited impact, as well as the potential benefit for the employer, should have been motivators to include rather than exclude such an entitlement.

Although it is difficult to identify the rationale behind this choice, a possible explanation is that these rights are the only ones that, within the structure of the current British employment statute, can be displaced, as they are not the obvious outcome of the transposition of the mandatory EU legislation.[19] Nevertheless, there might be an explanation of a more theoretical nature: if it was demonstrated that the intention of the Growth and Infrastructure Act 2013 (GIA 2013) was to create a new *species* (the employee shareholder), the removal of two rights (the rights not to be unfairly dismissed and the right to receive a redundancy) may have been perceived as an inadequate measure. However, the removal of additional statutory rights, in comparison with the traditional employee, may render the novel employee shareholder a more credible autonomous character.[20]

4. The Categories of Employers Offering a Contract of Service

Although in common parlance there is an inclination to distinguish between private sector and public sector employers,[21] in reality the nature of the

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[18] HC Deb 6 December 2012, col 496.

[19] HC Deb 20 November 2012, col 123. Sarah Veale, Head of Equality and Employment Rights, Trade Union Congress, affirmed that '… [t]he areas that have been picked in this proposal [of Bill] are all domestic law'.

[20] The employee shareholder as a new autonomous category seems to be a fairly recurrent topic in the parliamentary debates on the Bill.(HC Deb 13 November 2012, col 7). See P de Gioia-Carabellese, 'The Employee Shareholder: the Unbearable Lightness of Being … an Employee in Britain' (2015)22 Maastricht Journal of European and Comparative Law 81-95.

[21] For mere statistical purposes, the Government defines the public sector as an area of employment in central government (eg NHS), local authorities maintained education

employer does not define *per se* the contract of employment. The contract of employment is treated as a unitary category. The contract conferring the stereotypical rights of an employee, may be created by any employer irrespective of its nature, either public or private.

4.1. The Nature of the Employer Permitted to Enter into a Contractual Relationship with an Employee Shareholder

The creation of the category of the employee shareholder would appear to alter the British approach to treating all public employees as engaged in a contractual relationship as close as possible to that existing in the private sector. Although section 205A of the ERA 1996 does not specifically refer to the nature of the employer, it can be inferred from the applicable legal provisions that individuals may not be hired as employee shareholders if the prospective employer (or the current employer, if an individual becomes an employee shareholder by the conversion of his/her existing contract[22]) is located in the public sector and is not incorporated as a company. The position is identical if the employer is in the private sector, but it is a business entity that has no capacity to issue shares.
In this respect, what matters is the nature of the employing entity as a 'company'. This is obvious from the terms of section 205A(1) of the ERA:
'An employee who is or becomes an employee <u>of a company </u>…' (emphasis added).
Section 205A(13) of the ERA goes on to define a company as 'a company or overseas company (within the meaning, in each case, of the Companies Act 2006 (CA 2006)) which has a share capital'[23] or 'a European Public Limited-Liability Company (or *Societas Europea*) within the meaning of Council regulation 2157/2001/EC of 8 October 2001of the Statute for a European Company.'[24]

establishments (albeit not any longer universities), public corporations (eg Royal Mail). S Deakin and GS Morris, *Labour Law* (6th edn, Hart Publishing 2012) 192.

[22] It will be clarified later in this contribution that, ontologically, there are two categories of employee shareholder agreement, those created by conversion on one hand and *ab initio* on the other. A recent and meditated analysis of the multiple employer can be read in J Prassl, *The Concept of the Employer* (Oxford Monograph on Labour Law, OUP 2015).

[23] ERA 1996, s 205A(13)(a).The CA 2006, s 3, refers to either a 'limited company' (limited by shares or by guarantee) or an 'unlimited company'; in the latter case, there is no limit on the liability of its members.

[24] ERA 1996, s 205A(13)(b).

4.2. Direct or Indirect Offer of an Employee Shareholder Contract

On the basis of section 204A(1) of the ERA, it is stipulated that employee shares may be either the shares issued by the employer or, alternatively, the shares issued by the parent company of the employer itself, seemingly in cases where the subsidiary of the latter had to be the employer of the prospective employee shareholder.[25] The outcome of this is that the legislation draws an obvious demarcation line between an employee shareholder, whose shares are issued by a company directly as the employer, and an employee shareholder whose shares are issued by the parent company on behalf of the subsidiary employing the individual.Also in this latter case, the issuer will be necessarily a company, according to the outcome of the analysis contained in Section 4.2.2 of this paper.

4.2.1. Shares Issued Directly to the Employee Shareholder by the Employer

Entities issuing shares are exclusively commercial entities, i.e. companies registered under the CA 2006 as private or public limited companies such as 'limited' and/or 'plc'. Therefore, they can be regarded as the eligible entity employing, directly or indirectly (through a parent company), an employee shareholder. Nevertheless, in cases where the capital of these entities was limited by a guarantee, rather than shares, practically also 'limited' and 'plc' would be prevented from using the ES scheme, as they would not be able to offer shares in exchange for the waiver of rights.

Furthermore, although they can be adopted as a means of running a business or a commercial activity in general terms, additional businesses and/or organisations, such as partnerships, limited liability partnerships and sole traders cannot and do not issue shares. First and foremost, they do not have a share capital, as required by the legislation. Secondly, pursuant to British Law,[26] partnerships cannot be regarded as companies, because they are not bodies corporate.[27]Accordingly, employers organised as partnerships, either limited partnerships or limited liability partnerships, do not have access to this category of contract. Such organisations are not in a position to offer to the

[25] Namely, s 205A(1)(b).

[26] Partnership Act 1890,as regards Partnerships, and Limited Partnerships Act 1907, as far as Limited Partnerships are concerned. Both these pieces of legislation extend to the England and Wales jurisdiction and to Scotland, but not to Northern Ireland.

[27] However, see limited liability partnership under the Limited Liability Partnerships Act 2000. This specific partnership is a body corporate, pursuant to section 1(2) of this specific piece of legislation.

employee shareholder what the legislation requires the employer must offer, ie shares.
An additional category of employer that seems to be banned from offering a contract of employee shareholder, is that of public organisations, such as local authorities. First and foremost, they are not 'companies'. Secondly, they do not issue shares; therefore, they cannot offer what an employer is required to give in return for the loss of rights pursuant to the ES scheme.
Nevertheless, the legislation on this point could lend itself to possible avoidance on the part of employers operating in the public sector. More explicitly, a local authority (Employer A), the memorandum of which allows that organisation to own or incorporate limited companies, might decide to proceed to such an end and therefore to use a subsidiary (Employer B) which is already part of that organisation. At this point, the contract of employee shareholder could be offered to the workforce of that public sector employer,[28] not through Employer A – simply because it does not have shares to offer - rather via the newly established commercial entity, Employer B. It goes without saying that, in this scenario, the shares of the employee shareholder shall be the shares of the direct employer, Employer B, although it is incontrovertible that the *dominus* of the relationship, the actual master, will not be the ostensible employer (Employer B), rather the factual one (Employer A).
Given the tenor of the legislation, it appears that the employer organised as an individual shall not be able to offer this contract to its workforce. An individual is not entitled to issue shares, nor securities in general terms. As such, there is no possibility for an employee shareholder contract between a worker and an employing individual to arise.

4.2.2. Shares issued by the Parent Company of the Employer

The second possibility for the employer is to offer to the employee shares which are not issued by that employer itself but rather – indirectly – by its parent company. This offer, which can be referred to as an 'indirect offer of shares', gives rise to particular questions.
First, a clarification is offered by the same legislation in respect of the concept of parent undertaking; the reference is made to the CA 2006.[29] Indeed, this piece of legislation provides definitions of both 'undertaking' and 'parent undertaking'. According to section 1162(2) of the CA 2006, the latter shall be categorised as such, in relation to another undertaking, if one of four

[28] The status could be also offered to new employee shareholders recruited *ab initio*. See later (Section 7) the definition of the ES by conversion and the ES ab *initio*.
[29] S 205A(13).

alternative circumstances are met: (1) the holding of the majority of the voting rights in the undertaking; or (2) the entitlement, as a member of the undertaking, to appoint or remove a majority of the board of directors of the subsidiary; or (3) the right to exercise a dominant influence over the undertaking either in force of provisions contained in the undertaking's articles or as a result of a control contract; or (4) the undertaking shall be a parent undertaking if it is its member and 'controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the undertaking.'[30]

Of similar importance, though, is the concept of undertaking, clarified at the previous section 1161(1) of the CA 2006: either a body corporate or partnership, or an unincorporated association carrying on a trade or business, with or without a view to profit.

As a result of the combined reading of the applicable employment law and company law legislation, a company has the capacity to offer shares of its parent company[31] and therefore to offer employee shareholder contracts to those employed by a subsidiary of the main organisation. This is due to the fact that there is a requirement in the legislation that the direct employer of the employee shareholder is a subsidiary organised as a company. Similarly, individuals employed by a partnership, when the partnership is owned by a company and the latter is a parent undertaking, may not be offered an ES contract. Although, according to the general theory of corporate law, a member of a partnership may be a company and although the company could be a parent undertaking of a partnership, the employing partnership would not fit into the concept of s 205A(1), which requires the contract of ES to be in place with a company.

Finally, because according to the new legal provisions under discussion, the parent company is required to issue shares, the entities coming within the definition of 'parent undertaking' does not include all such undertakings as are potentially allowed by the CA 2006, but only those undertakings issuing shares and with a share-capital. According to this line of reasoning, a parent undertaking which is a partnership, albeit potentially a parent undertaking of a subsidiary company, cannot be a useful parent undertaking for the purposes of the ES scheme; it may not issue shares, because it does not have a share capital. Similarly, 'an unincorporated association carrying on a trade or business, with or without a view to profit', that may be a parent company according to the CA 2006, shall not be a valid parent company for purposes of the ES scheme, again since it cannot issue shares.

[30] S 1162(3) of the CA 2006.

[31] So long as, ontologically, it is a company and its capital is limited by shares.

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4.3. The Category of Shares that may be Offered to the Employee Shareholder

4.3.1. Statutory Provisions Regulating the Written Statement of Particulars

Only shares which are fully paid-up may be offered to the ES. According to the ERA 1996, s 205A, the shares that the employee shareholder is able to receive (the employee shares) are not necessarily endowed with voting rights. From a company law perspective, non-voting ordinary shares represent a class the members of which are entitled to receive dividends and to share in surplus assets; however, they do not have any right to vote at members' meetings.
In this respect, the latest statute is not totally understandable; if the GIA 2013 heralds a new form of participation of the employee in the management of the employer, voting rights should have been a requirement, rather than merely an option. Voting rights confer the possibility of the shareholder to have his say in the general meeting; the lack of voting rights leads to the conclusion that the remuneration received by the ES is not for the purposes of participation, rather exclusively in exchange for a loss of rights.
Furthermore, according to what must be narrated in the written statement of particulars (WSP or WS of Particulars), employee shares may carry 'rights to dividends'. Similarly, the shares given to the employee shareholder may confer or not, depending on the indications of the WSP, 'any rights to participate in the distribution of any surplus assets', in case of winding-up of the company.[32]
If one or all of the rights just referred to in this Section 4.3.1. (voting rights, rights to dividends, rights to participate in the distribution of any surplus assets as a result of winding up) had to relate to a category of shares different from the ordinary category, the WSP shall explain 'how those rights differ from the equivalent rights that attach to the shares in the largest class (or the next largest class if the class which includes the employee shares is the largest)'.[33] This may indirectly confirm that, if these rights were already attached to the ordinary category of shares, no explanation in the WS of Particulars will be required.
Moreover, some legal provisions of section 205A(5) relate to the concept of transferability of shares. In this respect, the employee shares, depending on the decision of the employer, could be either redeemable,[34] or subject to

[32] ERA 1996, s 205A(e).
[33] ERA 1996, s 205A(f).
[34] Section 205A(g) of the ERA 1996. As emphasized at scholarly level, the redeemable shares are shares 'which are issued on the basis that they are to be or may be redeemed … at a later date by the company. The terms of issue may be that the shares will be redeemed at a certain point or that they may be, and in the latter case the option to redeem may be allocated to the shareholder or the company or both.' PL Davies and S Worthington, *Gower and Davies. Principles of Modern Company Law* (9th edn, Sweet and Maxwell 2012) 324.

restrictions on the transferability.[35] Additionally, they can provide the employee shareholder with pre-emption rights,[36] or be subject, according to section 205A(j) of the ERA 1996, to drag-along right[37] or tag-along right.[38] As to the former, it is worth mentioning that in the general corporate law theory, the pre-emption right provided to existing shareholders allows them not to be diluted by the issue of new shares. The possibility that the shares to be given to the employee shareholder may be devoid of any pre-emption right is a further reason for concern; an unaware employee shareholder receiving shares without pre-emption rights could be potentially further damaged by the dilution of his - already limited - rights to co-manage the company.[39]
In this respect, there is a slightly different regime of the novel section 205A(i) of the ERA 1996 and the CA 2006, s 566: the latter legal provision stipulates that the existing shareholders' rights of pre-emption do not 'apply to the allotment of equity securities that would … be held under or allotted or transferred pursuant to an employees' share scheme.' Ultimately, in the case of employees' share schemes, the pre-emption rights are excluded on mandatory basis, whereas for this particular class of shares (for the employee shareholder) it will depend on what the written statement of particulars indicates.Whatever the option is (pre-emption rights or not), one or more of these options shall be specified in the WSP.

4.3.2. Voluntary Provisions of the Written Statement of Particulars

The legislature does not require the WS of Particulars to specify whether the employee shares are required to be listed or not, in cases of both direct and indirect offers of employee shares. In this respect, there is no doubt that the employee shareholder scheme is permitted to 'employing entities' issuing listed shares; theoretically, the employee listed shares shall be those issued either by the same listed employer or by the listed parent company of the ES' employer.
This aspect is not mandatory; however, it is suggested that nothing prevents the employer from referring to the status (listed or not) of the shares.

[35] ERA 1996, s 205A(h).
[36] ERA 1996, s 205A(i).
[37] The drag-along rights are defined in the same ERA 1996, s 205A(13), as amended by the GIA 2013: ultimately, the expression 'drag-along rights', in relation to shares in a company, 'means the right of the holders of a majority of the shares, where they are selling their shares, to require the holders of the minority to sell theirs'.
[38] The tag-along, according to the ERA 1996, s 205A(13), is conversely 'the right of the holders of a minority of the shares to sell their shares, where the holders of the majority are selling theirs, on the same terms as those on which the holders of the majority are doing so'.
[39] *Contra*, J Prassl (n 8) 320, according to whom it is difficult to say whether the class of share of the ES can be 'considered exempt under the provision for employees' share schemes …'.

Probably, a more prudent provision would have made mandatory the indication in the written statement of particulars that the employee shares are not listed. Listed shares may be more easily liquidated by any investor, whereas the non-listed financial instruments are less flexible. Accordingly, as to the latter ones, the employee shareholder could have been better protected.Interestingly, as a result of this axiom, there might be possible crossovers and combinations: a worker employed by a listed company, could receive non-listed shares of a parent company. According to the same line of reasoning, the employee shareholder of a non-listed company shall be able to receive shares of a listed company, if the latter were the parent company of the employer.
Whether or not the ES is going to receive shares from the employer or from the parent company, it is possible to suggest that the listed shares may represent, at least in the short term period, a better option for the employee shareholder; they can be realised and converted into money more quickly. In addition, the non-listed shares, (probably the majority of those offered by employers adhering to the ES scheme[40]) may give rise to serious problems of evaluation. Non-listed shares do not have a trading value, which means that the valuation advice can be very expensive.[41]

4.3.3. Employee Shares and Miscellaneous

Furthermore, the GIA 2013 fails to definitively settle some interesting matters of international private law that may originate from a cross-border offer of shares. Although it is assumed that the contract of employee shareholder shall be governed by English or Scots law, according to the general criteria, nothing seems to prevent the prospective employee shareholder from receiving shares issued by an employing entity incorporated in a different country and/or by a parent company which, through a British subsidiary, is located outside Britain and allots shares according to that country of incorporation.According to the general principles of private international law, the relevant contract shall be nonetheless a contract of employee shareholder in Britain, although any potential claim relating to the shares shall be governed by the jurisdiction where the parent company issuing shares is located.

5. The Contract, the Requirement for Independent Advice and the Cooling-off Period

[40] Most employers in Britain are limited or private limited companies, the shares of which are not offered to the public. See J Prassl (n 8) 321.
[41] As regards the 'independent advice' and related issues, see below Sections 5.2 and 5.3.

The means by which an employee may become an employee shareholder are worthy of an in-depth analysis for two main reasons: firstly, the legal requirements radically diverge from those in place where an individual enters into a traditional contract of service; secondly, the new legislation has not entirely clarified all the steps involved in this procedure. It follows from this that there is both a need for a construction of the inconsistencies and/or flaws existing in the recently enacted legislative framework and for an opportunity to interpret, in a systematic way, the body of law affected by this new concept.

5.1. The Contract of Employee Shareholder and the Written Statement of Particulars of Employment

In considering the relevant steps that must be taken when offering the new status of employee shareholder, there are statutory guidelines in place that indicate the correct course of action. Firstly, there must be an agreement between the employer and the individual to become an employee shareholder. The terminology adopted by the legislation refers to 'agreement' and 'to agree', rather than 'contract'.[42] This may be consistent with the general theory of the contract of employment which, except for specific exceptions, does not require to be in writing.
In terms of section 1 of the ERA 1996, an employer is statutorily bound to provide the employee with a WS of Particulars within two months from the commencement of the employment. In a contractual relationship existing between an employer and an employee, the WS of Particulars is the evidence of the contract, rather than the contract itself.[43] In a similar fashion, the legislature requires the employer to provide the prospective employee shareholder with a 'written statement of the particulars of the status of employee shareholder and of the rights that attach to the shares …'.[44] In other words, it is possible to infer that the written statement of the employee shareholder borrows from the ordinary WSP of any employee the elements of which are prescribed under section 1 of the ERA 1996; this latter provision has not been derogated from, nor amended. Nevertheless, the WS of Particulars, if applied to the employee shareholder, should be adapted so as to encompass the specific remuneration given to the ES, particularly in the form of shares. The characteristics of the latter (whether affixed with voting rights or not,

[42] S 205A(1)(a): 'the company and the individual agree …'; s 205A(6): 'Agreement between a company and an individual …'.
[43] *System Floors (UK) Ltd. v Daniel* [1982] ICR 54.
[44] ERA 1996, s 205A(1)(c).

whether redeemable or not, etc., as already detailed in Section 4 above) shall be detailed in the ES written statement of particulars.

5.2. The Requirement for Independent Advice

First, when making a decision about his prospective employee shareholder status, the employee must receive legal advice on the matter from an adequately qualified independent person:
'[T]he individual … receives advice from a relevant independent adviser as to the terms and effect of the proposed agreement'.[45]
However, the legal provisions are not entirely without problems, if observed from two angles of observation: the eligible professionals entitled to release the advice; and the scope of this advice.
As to the former aspect, the independent advice may come from a variety of professionals: (a) a qualified lawyer; (b) certified trade union officials; or (c) any other person that has been approved by the Secretary of State to give the relevant advice. Other categories, such as in-house lawyers or in-house professionals working for the same employer or its group, do not appear to fulfil the criteria to undertake this task, particularly because they would not fit into the requirement of independence. This clarification is not provided by the ERA 1996, rather by the guidance notes published by the Government on the same date when the GIA came into force.[46] The categories of professionals that the BIS Guidance regards as eligible for purposes of the employee shareholder category are somewhat correspondent to those indicated by the ERA 1996, s 203(3A); this latter legal provision refers to the independent advice relating to an agreement between employer and employee the purpose of which is the derogation from mandatory rights. It is worth mentioning that, in the parliamentary debates in the House of Lords, it was initially argued that the advice should be given by an independent solicitor or barrister.[47] Nevertheless, the British Government rejected this position.[48] As a result, in the employee shareholder scheme, advisers may lack a legal background.
In relation to what the advice involves, the wording in the legislation refers to 'the terms and effect of the proposed agreement'. Although one particular interpretation seems to be that the advice is fundamentally of an employment law nature (it relates to the rights the employee is to renounce), for reasons of

[45] ERA 1996, s 205A(6)(a).
[46] See Department for Business, Innovation & Skills, 'Guidance Employee Shareholders' (n 3).
[47] HL Deb 6 February 2013, col 266.
[48] D Pannick, '"Respect for Law and Sausages": how Parliament Made Section 31 of the Growth and Infrastructure Act 2013 on the Sale of Employment Rights' 2014(85) The Political Quarterly 43-49.

protection of the weaker party, it should also logically touch on tax law and company law aspects, such as the shares and their valuation. Furthermore, because the advice is not qualified as 'legal' in the legislation,[49] this may even suggest that factors that are non-legal in nature, such as purely financial matters, need to be included, simply because the latter are not expressly excluded.[50]

As such, taking into account general principles of legal theory,[51] the latter interpretation seems to be the most reasonable one. First and foremost, this interpretation is justified by a common law literal rule:[52] the advice, according to the ERA 1996, s 205A(6)(a), shall relate to 'the terms and effect of the proposed agreement.' In other words, the expression 'terms and effect' seems to cover a perimeter that goes beyond the matters of a legal nature. Secondly, also if it was conceded that there is no scope for a literal interpretation of section 205A(6)(a), the application of a common law mischief rule would probably lead to the same conclusion;[53] in looking at the general principles of the GIA 2013, the underlining philosophy of the piece of legislation under discussion is to protect the employee against a too nonchalant loss of the main entitlement bestowed upon him/her, the right not to be unfairly dismissed.

Additionally, whether the advice is merely of an employment/company nature or extends to the financial aspects of the transaction too, it is stipulated that the employer is to reimburse to the employee the relevant costs incurred by the employee. The reimbursement is not unfettered, but rather subject to the criterion of reasonableness. This can be inferred from the tenor of the ERA 1996, s 205A(7):

'Any <u>reasonable</u> costs incurred by the individual in obtaining the advice (whether or not the individual becomes an employee shareholder)which would,

[49] See the ERA 1996, s 205A(6)(a), where reference is made to the 'advice' from a 'relevant independent adviser', without inclusion of the adjective 'legal'.

[50] The matter may also impact on the connected issue of the reasonableness of the costs of the advice that the employer is required to bear (see later in this same Section 5.2).

[51] N MacCormick, *Rhetoric and the Rule of Law* (OUP 2005, reprinted 2010) 39-40.
The Author observes:
'For each concept, each universal like "consumer", "producer", "product", "injury" "cause", we have to supply a particular instantiation in the case we put forward.
But each such term is subject to interpretation, and this is interpretation in the light of an understanding of the point of law, its fit with the surrounding law, and a sense of justice appropriate to the legal domain in question.'

[52] Among different Scholars, see more recently G Carney, 'Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions' (2015)36 Statute Law Review 55.

[53] Ibid 55.

but for this subsection, have to be met by the individual are instead met by the company'.[54]

This parameter of reasonableness is not totally obvious. There is a lack of contributions on this specific aspect, also in light of the novelty of the ES notion. Despite this, it is possible to reason that the GIA 2013 may have borrowed the term from statutory provisions of a contract law nature passed in recent decades: an example of this is the Unfair Contracts Terms Act 1977 (UCTA 1977). In this framework, the term is used in order to assess the validity of a clause excluding or restricting the liability of a party to the detriment of the other who is, fundamentally, a consumer.[55] This happens particularly in standard forms where there is inequality in the bargaining power between the two contracting parties.[56] Interestingly, in the ES notion, the 'consumer' protected by the criterion under discussion is the employer, rather than the ES. In other words, the traditional strong party existing in the employment law theory (the employer) becomes, in the ES scheme, the weak party to protect against any potentially exorbitant cost of the advice.

Nevertheless, this term (reasonableness) does not contradict, nor is it inconsistent with, the theory, advocated by this work,[57] that the degree of advice to the prospective employee shareholder must be exhaustive and extended to any term and condition of the ES contract, rather than a partial one, limited to purely employment law/company law advice.[58] Because the former has been corroborated in this Section 5.2. (advice relating to the 'terms and effect' of the ES agreement, rather than exclusively to the employment law/company matters), any cost relating to this exhaustive advice shall be borne by the employer, so long as it is reasonable.

5.3. Lack of Advice and Legal Consequences

If the requirement for independent advice (as above qualified) is not adhered to, the agreement will not be binding. In this respect, section 205A(6)(a) stipulates that, in the absence of advice, the agreement would have no effect.

This point is not totally clear. There is a lack of scholarly work on it. On one hand, the dearth of advice may impinge on the ES' entitlement to claim back the previous employee status, including the right not to be unfairly dismissed.

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[54] Emphasis added.

[55] Section 2 and 3 of the UCTA 1977.

[56] HG Beale (ed), *Chitty on Contracts,* vol I (31st edn, Sweet & Maxwell 2012)1086.

[57] See this same Section 5.2.

[58] According to this line of reasoning, a piece of advice not limited to employment/company law matters would be more expensive but still within the threshold of reasonableness.

On the other hand, it could be argued that non-compliance with the statutory steps would entitle the ES to merely claim damages.[59]
From an interpretative point of view, particularly through a systemic argument,[60] it can be deduced that the role played by the advice is central and necessary in the architecture of the new notion of ES. Despite the existence, from a merely contractual point of view, of a *consensus in idem*(ie the agreement on the new terms and conditions of the ES contract), the advice may be regarded as a condition precedent of a mandatory nature. The latter, if not met, does not allow the agreement to be effective. In these circumstances, the employee shareholder should be regarded as an individual who has never lost his/her previous status. As a result of this, the ES would be potentially entitled to claim unfair dismissal in cases where the circumstances under the ERA 1996, 94 ff, had to occur. Accordingly, he/she could obtain from the judiciary the potential re-engagement/re-instatement which is available to traditional employees.

5.4. The Cooling-off Period

Another step involved in the process is the length of time that must pass before the agreement between the employer and employee shareholder will be concluded. More specifically, the agreement 'is of no effect unless… seven days have passed since the day on which the individual receives the advice'.[61]
Once the offer has been put on the table for the employee, the latter has the right to withdraw it before seven days have elapsed from the date when the advice was administered. This should give the employee sufficient time to make a thoroughly informed final decision. Furthermore, section 205A(6) refers to the expression 'before the agreement is made'. In reality, in order to give sense to the expression and to better coordinate it with the rationale behind the cooling-off period, it may be suggested that the law maker wished to say as follows: 'before the agreement is effective'. Paradoxically, the original Bill of the GIA 2013 did contain a more consistent wording, namely:

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[59] A similar issue may be theoretically raised in connection with the consistency of the value of the shares. P Lokiec, 'Le Contract de Salarié-actionnaire' (2014)1 Revue de Droit du Travail 18.
[60] N MacCormick, *Rhetoric and the Rule of Law* (n 53) 127-128. See also S Veitch, E Christodoulidis and L Farmer, *Jurisprudence. Themes and Concepts* (2 nd ed,Routledge 2011); EE Savellos and RF Galvin, *Reasoning and the Law: the Elements* (Wadsworth 2001).
More recently, see R Ekins, 'Statutes, Intentions and the Legislative – A Reply to Justice Hayne' (2014)14 Oxford University Commonwealth Law Journal 3-20; K Hayne, Statutes, Intentions and the Courts: What Place does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction' (2014)13 Oxford University Commonwealth Law Journal 271-282.
[61] ERA 1996, s 205A(6)(b).

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'Where a company makes an offer to an individual for the individual to become an employee shareholder, an acceptance by the individual of the offer is of no effect unless seven days have passed since the day on which the offer was made.'
In the end, a motion in the House of Lords encompassing the final wording prevailed.[62]

5.5 Timing and Steps for the Effectiveness of The ES Agreement

In light of the stipulations contained in section 205A(6) of the ERA 1996, it is possible to summarise the steps that the employer must take for an agreement to be concluded with an employee whereby the latter becomes an employee shareholder. These steps, if followed, should guarantee the validity of the arrangements and, therefore, should minimise the legal risk that the employee shareholder may subsequently challenge the previous arrangements in an employment tribunal.
The offer to the employee to become an employee shareholder, with an indication of the amount of shares the employee will receive in exchange, should be communicated to the employee. This phase would appear to still include an informal process; therefore, it is possible to envisage that a mere conversation between the employee and the employer should suffice as a medium of communication in this respect. The conversation or communication to the employee should include the main aspects of the new contract, particularly the shares he/she is going to receive, and presumably a copy of the proposed contractual documentation. It is worth observing that an oral communication, which is not confirmed in writing, is unwise, for reasons of proof if there is a claim in the future that the communication never took place.
If the employee demonstrates an interest in the relevant proposal, an *ad hoc* agreement between the two parties should follow from the first meeting. In assuming that the employer may rely on a legal department and/or HR department, one could envisage that the agreement would be prepared by the employer, submitted to the employee and signed by the latter. However, in the case of a top professional who became the beneficiary of significant percentages of share capital in the company, it is possible to envisage negotiations between a legal team operating on behalf of the employer and a legal team representing the employee. Finally, because the legislation does not impose a limit on the number of individuals who may benefit from the offer of

[62] HL Deb 24 April 2013, col 1442.

shares, a standard form may be prepared by the employer. The purpose of this would be an efficient way for the employer of creating the agreement.

6. Protection from Detriment and Unfair Dismissal

The legislature has adumbrated various provisions in the ERA which protect the employee shareholder from possible retaliatory conduct on the part of the employer. Sections 47G and 104Gof the ERA 1996provide the right not to be placed at a disadvantage in employment[63] and for the employee not to be unfairly dismissed on the grounds of rejection of the offer.[64] Understandably these provisions apply to current employees, rather than newly recruited employee shareholders.[65]

7. The Employee Shareholder by Conversion and *ab initio*

The legislation governing the employee shareholder status enables an employer to either convert an existing contract of service into an employee shareholder contract or to directly hire an employee shareholder as such, through a normal recruitment process. This dual channel of recruitment of the employee shareholder workforce seems to be confirmed by a plain reading of the applicable legal provisions. Section 205A of the ERA, in referring to the 'employee shareholder', cites an individual 'who is or becomes an employee of a company'. The verbs 'to be' and 'to become' employed by the legislation may refer, respectively, to (a) the scenario of a conversion of the existing contract of service into a contract of ES (that is again applicable to an individual who already 'is' an employee) or (b) the individual becoming employed by the company as an employee shareholder, without being an employee of that company before. Commentators have focused on the first mode by which the employee shareholder relationship may be created (employee shareholder by conversion), whereby an existing employee agrees with the employer to become an employee shareholder. Nevertheless, it is clear from the legislative provisions that an individual can be hired directly as an employee shareholder in which case, the employee shareholder will be constituted *ab initio*.

[63] ERA 1996, s 47G, as amended.
[64] ERA 1996, s 104G, amended by the GIA 2013.
[65] See below in this paper, at the following Section 7, the difference between ES *ab initio* and ES by conversion.

7.1. Distinctions between the Employee Shareholder Contract ab initio and by Conversion

There is no doubt that the employee shareholder contract *ab initio* is a feasible option. Despite the silence of the legislation in this respect, the recruitment market involves the employer advertising the post and/or posts, clarifying that the specific professional they are looking for is an employee shareholder, with, probably but not necessarily, the indication of the amount of shares the prospective ES is going to receive. It is unclear whether any advertising material for such a post should also clarify the rights that the ES to be recruited is not going to exercise, in comparison with those conferred on an orthodox employee.

7.2. Loopholes in the Current Section 205A of the ERA 1996

The wording of section 205A(2), in mentioning the rights that the employee shareholder is going to lose[66] (as mentioned above, significantly the right not to be unfairly dismissed), refers to the 'employee who is an employee shareholder'. Literally, this legal provision could be interpreted with a paradoxical consequence: the employee who has become an employee shareholder does not lose any right, because this category (ES by conversion) is not mentioned at all in this provision. Probably, the most comprehensive wording should have been the following one:
'An employee who is <u>or has become</u> an employee shareholder does not have –
a) the right to make an application under section 63D (request to undertake study or training),
b) the right to make an application under section 80F (request for flexible working),
c) the right under section 94 not to be unfairly dismissed, or
d) the right under section 135 to a redundancy payment.'
In other words, the legislature, in phrasing section 205A(2) of the ERA 1996, did not resort to the same subtlety as the previous section 205A(1), where the difference between the initial employee shareholder and the ES by conversion has been clearly spelled out.
Yet, although the wording is not totally clear, it is not too speculative to affirm, from the general reading of the entire legal provisions and having in mind a 'commonsense construction rule',[67] that in both cases these rights are renounced. More specifically, the silence of the drafter does not prevent the

[66] As reminded above in this article, the right not to be unfairly dismissed.
[67] O Jones, *Bennion on Statutory Interpretation* (6th edn LexisNexis 2013) 512.See also J Bell and G Engle, *Cross Statutory Interpretation* (3rd edn Butterworths 1995) 21-47.

interpreter from inferring that the missing expression (again 'or has become') shall be implied.

7.3. The Requirement for Independent Advice and the Cooling-Off Period for the ES ab initio

Some additional sets of rules provided by the amended ERA 1996 seem to be more controversial and ambiguous, if applied to the ES *ab initio*. The requirement for independent advice and the cooling-off period, which are the foundations on which the protection of the employee shareholder lies, should apply- logically - to the employee shareholder *ab initio* too.
However, *prima facie*, it could be argued that this is not the case.
In essence, the literal terms of section 205A(6) of the ERA would suggest that the employee shareholder *ab initio* is not entitled to such protections:
'Agreement between a company and an individual that the individual is to become an employee shareholder is of no effect unless, before the agreement is made –
a) the individual, having been given the statement referred to in subsection (1)(c), receives advice from a relevant independent adviser as to the terms and effect of the proposed agreement, and
b) seven days passed since the day on which individual receives the advice.' (emphasis added)
Since section 205A(6) of the ERA 1996 refers exclusively to the employee who is to become an employee shareholder, both the advice and the cooling off period would not apply in the case of ES *ab initio*. It is not an employee who is to become an ES, he/she is already an ES.
This interpretation would lead to a binary system of employee shareholders: on the one hand, the employee shareholder by conversion, where the employee is protected before becoming an employee shareholder (advice and cooling-off period); on the other hand, the employee shareholder *ab initio*, who cannot avail himself of any of these legal safeguards.
In reality, this possible interpretation seems to be too speculative, and to a certain extent, contradicted by a more in-depth reading of the provisions under discussion. Therefore, there are strong arguments to say that both the independent advice and the cooling-off period do apply to the employee shareholder *ab initio* too.
Before justifying this conclusion, it is worth remembering that legal theorists authoritatively remind positivists of one of the most challenging tasks when interpreting a statute, i.e. 'not all legal rules, not even all legislated rules "in fixed verbal form", can always give a clear answer to every practical question

which arises. Almost any rule can prove to be ambiguous or unclear …'.[68] Additionally, the essential role played by the common law interpretation was already emphasised decades ago at the most authoritative level:
'All legal systems require a cement to bind them into a coherent whole; and the question which the common law systems will very soon have to face is whether a better cement than rigid precedent cannot be found in more codification and in methodized reasoning from clear principles in accordance with the civilian tradition. This judge should not be the parties' oracle, <u>but he must be something more than an animated index to the law reports.</u>'[69] (emphasis added)
Bearing this in mind, general rules of interpretation, particularly a commonsense construction rule,[70] may help solve the conundrum.
In essence, from a broader perspective, if the real intention of the legislation had been to deprive the ES *ab initio* of any protection (advice and cooling-off period), it would have shaped a specific regime for this subcategory of ES. Conversely, the micro-system of rules under section 205A do not refer to them at all. Indeed, it is undeniable that the first part of section 205A(6) of the ERA 1996 seems to be defective; the verb 'to become' should have been accompanied by the verb 'to be'. However, the same legal provision seems to offer an unexpected safe harbour to the interpreter; more precisely, it refers to 'individual' (letter a), rather than 'employee'.[71] In other words, if the intention of the legislature had been to restrict the protection exclusively to the ES by conversion, the term 'employee', rather than 'individual', would have been used in this case. The individual, the term eventually utilized, is a neutral nomenclature, consistent with and theoretically encompassing not only the individual who becomes an employee shareholder already working for the employer as an employee, but also the employee shareholder recruited as such from outside the organisation of the employer. Ultimately, the formal or syntactical ambiguity of this specific section of the ERA 1996 is resolved by the use of the commonsense rule of interpretation.[72]

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[68] N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978, reprinted 2003) 65.
[69] Lord Cooper, 'The Common Law and the Civil Law – A Scots' View' (1950)63 Harvard Law Review 473-474. Among Scholars, see also BN Cardozo, *The Nature of the Judicial Process* (New Haven and London 1921); N MacCormick, *Legal Reasoning and Legal Theory* (n 69) 19-52.
[70] O Jones, *Bennion on Statutory Interpretation* (n 67) 511-514. See also: N MacCormick, *Rhetoric and the Rule of Law* (n 53) 125; J Bell and G Engle (n 67) 21-47.
[71] R Poscher, 'Ambiguity and Vagueness in Legal Interpretation' in PM Tiersma and LM Solan (eds), *Language and Law* (OUP 2012) 128-144.
[72] O Jones, *Bennion on Statutory Interpretation* (n 67) 514.

7. Conclusion

The purpose of this work has been to analyse the provisions of the ERA introduced by the Growth and Infrastructure Act 2013, which carve out the contours of the new concept of employee shareholder.

It has also sought to identify the rights renounced by the employee shareholder, against the backdrop of the various employment rights furnished to individual employees engaged under a contract of employment.

Furthermore, the examination of the legal provisions governing the employee shareholder category has brought to light potential inconsistencies originating from the this novel body of law, the most significant of which is the chronological succession of steps (agreement, written statement of particulars, independent advice) that the employer must follow prior to the employee becoming an employee shareholder. Besides, an interpretation of the concept of legal advice has been provided. In this respect, having in mind principles of legal reasoning and rules of statutory interpretation, this paper has put forward solutions about what the advice should comprise, and the legal consequences in cases where the advice is not provided. The conclusion is that in these circumstances, the ES would be entitled to claim back his/her original status, as employee.

Moreover, this piece of work has also considered the implications of the nature of the shares to be issued to the employee shareholder and the possibility that they may be issued by the parent company of the 'employing entity'. This possibility, coupled with the nature of the employer that may have access to the new scheme (exclusively a company), in addition to the definition of parent company, may generate potential issues which were probed in this contribution.

The paper has sought to identify, by way of a speculative interpretation given the dearth of scholarly contributions in this area, two categories of employee shareholder: the employee shareholder whose status is created by conversion, and the less readily identifiable category of employee shareholder *ab initio*.[73] In the latter case, the individual on whom the status of ES is conferred, is recruited from outside the organisation. Nevertheless, it has been demonstrated in this contribution, by way of a considered analysis and interpretation of the applicable sources, that despite the fact that this additional category of ES is not so obvious in the legislative framework under discussion, the protection afforded to the ES by conversion (particularly, the entitlement to independent advice and a cooling-off period) shall be deemed as extended to the *ab initio* contractual relationship too.

[73] It seems that so far, among Scholars, this category has not been identified yet.

Ultimately, in looking at the new British legislation from an international perspective, it is possible to affirm that the UK employee shareholder is far from implementing any form of cooperation between employers and employees in the management of the company. In this respect, the underpinning philosophy of the EU legislation in the area of employment law has not been fully achieved[74]. Indeed, this new subcategory of employee will take part in the financial risk and, if fortunate, in the profit of the employer, thanks to the grant of shares. Indeed, this should be consistent with some legal frameworks brandished in the past by the EU legislation and never converted in an enforceable statute.[75] However, the low value of the financial benefit he can receive (the meagre £2000) measured against the significant waiver of rights that the employee is required to abandon suggests that this new category of UK employee is not exactly what the EU legislature had envisaged and, as far as the employee is concerned, may not be worth it.

[74] Reference is made to Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, [2002] OJ L80, or, more colloquially, 'Directive on National Information and Consultation'. This piece of legislation, which, as far as the UK is concerned, has been implemented by the Information and Consultation of Employees Regulations 2004, encourages workers and employers to strike deals on the kind of participation that the employees must be allowed in the work place. See, as regards the possible friction between employee shareholder and EU legislation, P de Gioia-Carabellese, 'The Employee Shareholder: the Unbearable Lightness of Being … an Employee in Britain' (2015)22 Maastricht Journal of European and Comparative Law 81,95.

[75] Particularly, the Council Recommendation 92/443/EEC (OJ [1992] L243/53), the so called PEPPER Recommendation.

Flexibilization of Labour in Kazakhstan: New Legal Framework and Institutional Decisions

Muslim Khassenov *

1. Introduction

Flexibility in labour regulation is one of the important constituents of investment climate. The "Labour market regulation" index is one of the key evaluation criteria of «Doing Business» international rating by the World Bank. Flexibilization of employment in this paper covers three aspects: the difficulties in labour relations existing before the adoption of the new Labour code, the new legal framework and its key elements, and the institutional decisions of possible challenges regarding labour liberalization reforms.
According to the evaluation of the World Economic Forum experts, one of the competitive advantages of Kazakhstan is the "Labour market efficiency" factor. Kazakhstan occupies the 15th position among 144 countries. This allows

* Muslim Khassenov is a Doctoral Candidate in Law from L.N. Gumilyov Eurasian National University (Astana, Kazakhstan). Adviser to the Chairman of the Board in the National chamber of entrepreneurs of Kazakhstan «Atameken». He has 6 years of experience in entrepreneurship and business promotion. He is the Founder and Executive Director of Think Tank "Project-analytical centre "SAUAP" (Kazakhstan). He has over 35 scientific publications on actual issues of Labour, International Public Law, Environmental Law and Human rights (Astana, Moscow, Warsaw, Vilnius). In 2015, he participated in drafting new Labour Code of the Republic of Kazakhstan, in 2012-2014 contributed to implementing fundamental research: «Creation of Unified legal space of the customs union in the sphere of socio-labour relations». his research interests include social partnership in labour, employment maintenance in economic crisis, Liberalization of labour relations, and Labour regulation in the Eurasian Economic Union. Email address: m.khasenov@palata.kz. The findings of this paper were presented at the conference "The Great Transformation of Work" organized by the Doctoral School in Human Capital Formation and Labour Relations of ADAPT and the University of Bergamo, that took place on 6 and 7 November 2015 in Bergamo (Italy).

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Kazakhstan to confidently join the group of the thirty leading countries in the international competitiveness rating.
However, Kazakhstan experiences the following problems in the field of labour relations:
1. Employers are burdened with numerous guarantees and compensatory payments. Employers bear considerable expenses during relocation and/or dismissal of employees, work under harmful conditions, work on week-ends, holidays, overtime work and down time. Moreover, as a consequence of the state budget deficit, the Government has implemented radical tax and social policy reforms which increase employer tax load three to sevenfold, as well as a new pension system (with 5% of employers' payments) and obligatory social medical insurance (2-5% of employers' payments).
2. Bureaucracy and abusive regulatory activities in procedures of hiring, dismissal, and relocation of employees.
3. Highly regulated norms of labour legislation, impossibility of temporary employment. In case of a labour contract conclusion and observance an employer cannot adapt his staff in accordance with the changing economic conditions.
4. Formal and informal employment. On average contributions to the pension fund are paid for a total of 7.5 – 8 months out of 12. Unofficial employment remains a widespread phenomenon. In Kazakhstan there exists a large unofficial economy in which about one third of self-employed people at the age from 15 to 64 years old work unofficially.
5. Instruments for collective agreement relations and social partnership are underdeveloped.

2. Premises of Labour Flexibilization in Kazakhstan

Jobs are mainly created by entrepreneurs who just start their activities, or by those who grow and develop, so it is necessary to keep the costs related to business creation and maintaining in a reasonable range.
If an employer is not able to react quickly and properly to the requirements of market conditions, rebuild his production system and business processes within a short time, and yet he has to bear considerable expenses to maintain inefficient jobs, it will be unprofitable for him to invest into the national economy.
Obviously, every step towards a higher labour flexibility meets interests of employers.
Businesses get rid of restrictions, managers improve performance by rotating and more efficiently using personnel, and firms gain higher profits. All expenses are recovered by the state — costly reforms and additional social

security benefits. Therefore, such a flexibilization scenario turns out to be a long-running indirect governmental donation to firms. Since the state budget originates from taxpayers, the employees contribute considerably to the donation[1].

As it may be seen from the practice, the previous Labour Code of the Republic of Kazakhstan[2] (hereinafter – former Labour Code) did not encourage employers to create more jobs. This reason made it difficult to use legal regulation mechanisms of labour relations which are successfully used by the countries with a stable market economy.

In this regard in May 2015 the President of the Republic of Kazakhstan set a task to liberalize labour relations, in particular, to develop a new Labour Code in which the limits of state interference into the labour issues[3] shall be properly defined – this includes the role of the state would be limited through establishing minimum standards, "game rules" by which participants of labour and other associate relations enter into negotiations, conclude contracts and agreements. A minimum standard of "protective" norms related to the employees' life and health protection, support of certain employees' categories with limitations on the labour market (women, young people, disabled people, etc.) shall also be set.

Maximum permissible norms for labour conditions, rights and responsibilities of employees and employers (minimum permissible remuneration of labour, maximum number of working hours, minimum annual paid leave, labour safety requirements and standards, basic minimum social guarantees for employees in general and for certain categories) shall be legally established.

In Kazakhstan it is proposed to form a legal framework for labour relations in accordance with the OECD labour standards through an optimal compromise of state and agreement-based regulation of labour relations based on the transition[4]:

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1 Andranik Tangian, Flexibility–Flexicurity–Flexinsurance: Response to the European Commission's Green Paper "Modernising Labour Law to Meet the Challenges of the 21st Century" // WSI-Diskussionspapier Nr. 149, January 2007, http://www.boeckler.de/pdf/p_wsi_diskp_149_e.pdf (accessed on January 06, 2016).

2 Labour Code of the Republic of Kazakhstan, dated 15 May, 2007 No. 251, http://adilet.zan.kz/eng/docs/K070000251_ (accessed on January 06, 2016).

3 Plan of the nation - 100 concrete steps to implement the five institutional reforms of President Nursultan Nazarbayev, http://www.inform.kz/rus/article/2777943 (accessed on January 06, 2016).

4 Guiding principles related to the international investments and multinational enterprises" approved by the OECD Council resolution dated June 21, 1976. http://www.oecd.org/daf/inv/investment-policy/ConsolidatedDeclarationTexts.pdf (accessed on January 06, 2016).

1) from rigid and excessive regulation to the minimization of state regulation of labour relations parties' rights and duties, with the concurrent increase of control over execution of labour legislation requirements;
2) towards local and individual regulation of labour relations based on self-regulation principles between employer and employees;
3) towards efficient balance between social protection, justice on the one hand and economic efficiency on the other.

3. Guiding International Practice

In late 2006 the European Commission published the Green Paper "Modernization of labour rights to solve the problems of the XXI century" in which it was noted that it was necessary to develop flexible labour relations and reform labour rights so that it would further the economic growth[5]. It was proposed to introduce a protected flexibility system as one of the mechanisms to reach that goal; this kind of system would allow increase adaptation skills of employees and organizations and make the labour market more flexible. The main idea of the document was to reach a "golden triangle": mobile labour force combined with a strong system of income protection with which the state would be able to implement a flexible labour market policy together with up-to-date and viable systems of social protection.
In order to develop a flexible labour market, each of the social partners' traditional role in the social state should be modified. To make employers create more jobs the state ensures possibilities for timely training of qualified staff. Employees should actively search for new forms of labour application.
The claims for flexibilization met stiff resistance, especially in countries with old traditions of struggle for labour rights. Wilthagen and Tros (2004: 179) reported[6] with a reference to Korver (2001) that the Green Paper: Partnership for a New Organisation of Work of the European Commission (1997) "which promoted the idea of social partnership and balancing flexibility and security" got a very negative response from French and German trade unions, because 'the idea of partnership represents a threat to the independence of unions and a denial of the importance of worker's rights and positions, notably at the enterprise level'[7].
The ILO published a report, concluding that 'the flexibilization of the labour market has led to a significant erosion of worker's rights in fundamentally

[5] Green Paper on Modernization of Labour Law, European Commission, 2006, p. 3.
[6] Wilthagen, T., and Tros, F. (2004) The concept of 'flexicurity': a new approach to regulating employment and labour markets, Transfer, 10 (2), 166–186.
[7] Korver, A. (2001) Rekindling adaptability. Working Papers on Social Quality (1). Amsterdam, European Foundation on Social Quality.

important areas which concern their employment and income security and (relative) stability of their working and living conditions' (Ozaki 1999: 116)[8].
The world economy trends have resulted in the replacement of the "welfare state" concept, introduced after the World War II, with the concept of the "workfare state". It actually means a gradual abandonment of those high social standards, which had been reached before, and a transition to a new policy that provides job for every unemployed person. Instead of the traditional concept of job security, i.e. "employment stability" or stability in provision of jobs, a new concept is being introduced into the labour relations legislation – employability which literally means employment potential, or person's ability to adapt and change profession and occupation at any age, in case if his/her former profession is not in demand anymore on the labour market.
In the Western European countries in order to maintain the economic efficiency and keep unemployment at low level, the so called flexicurity policy came into being. The idea of this policy is to increase the flexibility of legal regulation of labour on the one hand, including changing of working conditions and termination of labour relations on the initiative of employer, and a more active state policy to assist and support in the process of employment on the other.
"Flexicurity" here denotes an optimal configuration of labour market flexibility and social security (Keller and Seifert, 2002)[9].
As concluded by Esping-Andersen (2000b: 99), «the link between labour market regulation and employment is hard to pin down»[10]. Under certain model assumptions, the same empirical evidence that unemployment is practically dependent on the strictness of employment protection legislation was also reported by OECD (1999: 47–132)[11].
Thus, it could be noted that flexible labour market is an issue open for discussion and should be implemented with a complex of measures aiming to achieve a balance of interests of employees and employers.

[8] Ozaki, M. (Ed.) (1999) Negotiating Flexibility. The Role of Social Partners and the State. Geneva, International Labour Office.
[9] Keller, B., & Seifert, H. (2002). Flexicurity: Wie lassen sich Flexibilität und soziale Sicherheit vereinbaren? (Flexicurity - how can flexibility and social security be reconciled?) Institute for Employment Research, Nuremberg, Germany, 35(1), 90-106.
[10] Esping-Andersen C. (2000b) Regulation and context: Reconsidering the correlates of unemployment. In: Esping-Andersen, G., and Regini, M. (Eds.) Why Deregulate Labour Markets? New York, Oxford University Press, 99–112.
[11] OECD (1999) Employment Outlook. Paris, OECD.

4. Key Elements of the Labour Liberalization Reforms in Kazakhstan

The new Labour Code of Kazakhstan (hereinafter – new Code) was adopted on 23 November 2015.

By means of the new Code Kazakhstan experts' community and legislative establishment tried to find a solution for the problem of flexibility of legal regulation of labour relations, and ensure a possibility to widely use not only standard labour contracts, but various contracts which regulate non-standard (non-typical) employment as well.

The new Code has been adapted to possible crisis phenomena; it contains mechanisms which promote the increased stability of enterprises at the times economic instability (temporary relocation of staff to another employer with suspension of the main labour contract, simplified introduction of part-time work, etc.).

Liberty of labour relations parties (employer and employees) has been extended considerably. A compulsory minimum of issues regulated by labour contract has been legally determined, and the issues which should not be its subject (such as violation of employees' rights or determined solely by a legislator); other than that the content of a labour contract shall be determined by the agreement of parties.

The content of a labour contract becomes fundamentally new, it states that the main obligation of an employee is not only execution of his/her functions and following the rules of internal procedures, but also reaching certain labour results required by the employer. Evaluation of work results of an employee becomes a ground for an employer to take decisions related to work promotion, remuneration, social benefits and guarantees, rewards or bringing to disciplinary responsibility (including dismissal).

The new Code provides simplification of procedures for changing the labour contract conditions on the ground of economic and technological factors. Inefficient, long-term, and expensive mechanisms of changing labour contract conditions by employer's initiative, especially in a crisis situation (including introduction of a part-time regime and temporary relocation of staff to another job) make the specified problems more aggravated for employers. The procedures of labour contract changes by the initiative of employer established by the former Labour Code were complicated and required employers to spend a considerable amount of time, material expenses, and additional justifications.

Due to this employers were not able to use more flexible forms of employment under conditions of already established labour relations: any possibilities of changing the working regime and other conditions of labour contract by the initiative of employer were strictly limited by the cases of modification in the

working system structure and (or) reduction of workload (cl.48 the former Labour code).
As we see, legislators did not provide employers with an option to voluntarily change labour contract conditions determined by the parties. In order to enable employers to execute their rights, they must provide a proof that:
1) employee shall continue to work in accordance with the previous labour function, i.e. specialty, qualification and position as established by the employment contract shall remain unchanged;
2) changing of conditions established by the labour contract is caused by a verifiable necessity, namely modification in the working system structure and (or) reduction of workload, i.e. working reasons that make it impossible to preserve the conditions originally stipulated in the employment contract.
Here employers should have a possibility to unilaterally solve the issue of revision of labour contract conditions by economic reasons (crises, weak periods, sales slowdown, introduction of new technologies, introduction of innovative work methods, etc.): it is necessary to work out efficient mechanisms for adoption of such decisions. At this in such periods the employees shall be paid allowances from special crisis funds formed under terms of state-private partnership.
It should be noted that the ILO (2006:106) report finds: "Unemployment benefits have been one of the main pillars of the social insurance systems of industrialized countries. But they have been withering almost everywhere, and have scarcely spread to developing countries, even though they were proposed for a number of East Asian countries in the wake of the 1997–98 Asian crisis, and were introduced in the Republic of Korea." Although unemployment benefit schemes have been under strain, more countries currently have such schemes than in the 1980s, mainly because many Eastern European countries introduced them after the fall of communism when open unemployment emerged (ILO, 2006)[12].
In this regard it is proposed to:
- provide employers with the right to terminate a labour contract for costs-related reasons with an obligatory notification of employees, stating reasons, and a compensation payment to the amount of a two-month salary.
- specify classification of grounds for contract termination with extended costs-related reasons.
In order to prevent mass staff discharge and unemployment increase, as well as abuse by employers, provisions should be made for:

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[12] ILO (2006). ILO (International Labour Organization) 2006: Economic security for a better world. Geneva: ILO.

- elaboration of an exact list of costs-related grounds which determines justification and legitimacy of dismissal.
- development of a new employment law which provides enforcement of labour market institutions, increase of payments from the state fund of social protection in case of job loss.
- enforcement of social protection from unemployment through instruments of the 2020 Employment Roadmap (increase of micro-loans, retraining, reorientation to the services sector)
- strengthening of state control and enforcement of punitive sanctions for violation of labour legislation.

4.1. Considerable Extension of Grounds for Fixed-Term Employment Contracts

The former Labour code restricted possibilities of fixed-term employment specifying only a limited range of cases of a fixed-term employment contract (cl.29), thus decreasing the accessibility of labour market for youth, women with family obligations, disabled people, retired people, and other categories.
We insisted that the Labour Code should not have strict bans and limitations in regards of fixed-term employment contracts. Lists of cases of such employment contracts should be developed by the participants of labour relations – employers and employees – and specified in collective contracts and other acts of social partnership.
That's exactly why the new Code provides fixed-term employment contract to be concluded when labour relations cannot be established for an uncertain term taking into account the character of future work or its conditions.

4.2. Issues on Labour Payment, in Particular Simplification of Salary Revision During Economic Instability of Enterprises

Labour payment issues in the new Labour Code have been solved from a fundamentally new perspective. First of all, a system of minimum hourly rates was legally established which plays the role of a minimum labour payment standard. Employers should be given a right to individually solve issues regarding the selection of forms, mechanisms, and amount of payment for staff's labour by accepting local normative acts or with participation of staff representatives through conclusion of a collective contract. Employers have also been enabled to introduce mechanisms of individual reward for encouragement of higher labour efficiency and apply other encouragement methods.

4.3. Modification of Working and Rest Time Structure

First of all it is necessary to revise the norms related to regulation of working time, extending possibilities to employ staff beyond the established 8 hours working day. This would increase employer's authorities to regulate working time issues. Employers should be given possibilities to create more jobs with flexible working schedule.
In this regard for Kazakhstan it is proposed to:
- extend possibilities to apply accumulated working time,
- revise amount of overtime work for each employee,
- introduce the "scheduled overtime work" concept,
- simplify procedures for changing working time including the possibility of part-time work, in particular;
- provide possibilities to introduce part-time work by employer's initiative.

4.4. Differentiation of Labour Legislation

Social (protective) role of the Labour Code may not be performed in its entirety without a certain differentiation in labour regulation. This task has been not resolved yet. Currently there is a need for legitimization of a large number of employment contract variants. It is necessary to establish differentiation by health condition, climatic and working conditions and other parameters related to staff life and health.
Currently the key task is to create necessary conditions and prerequisites to support small and medium business in the country; therefore, the current labour legislation should contain a revised concept of the subjective differentiation.
Small business, being a key economy sector and a new jobs generator, needs to have special features for regulation of labour relations (simplification of staff dismissal by employer initiative during economic difficulties; reduction of the period of notification on dismissals or change of working conditions; decrease of discharge allowances; replacement of workplace assessment with certification, fundamental simplification of human resources record management; complete transfer of issues of training and other long-term leaves to employer's discretion, etc.). There should be an obligatory differentiation related to the business scale: it is impossible to impose the same requirements on micro-, small, medium business, and large industrial companies.
In the Labour Code there should be laid out provisions expressing labour regulation specifics of employees with professional peculiarities.
In this regard for Kazakhstan it is proposed to:

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- extend the subjective differentiation in labour regulation of some staff categories, including business scale differentiation;
- provide a simplified mechanism of labour regulation for micro- and small business entities.

4.5. Social Partnership and Regulation of Collective Relations

In the new Code there should be revised and amended norms on social partnership. In the section "Social partnership and collective relations in labour field" there should be established improved mechanisms to solve the tasks set before the labour legislation. This section should be based on the following principles:
I. Social obligations should be accepted by the parties on a voluntary basis taking into account interests of parties and feasibility of obligations. In this regard, the Code should exclude a possibility of employers being forced to follow numerous agreements of various types and levels which make employers assume numerous social obligations towards their staff under conditions when those obligations become impossible to satisfy.
II. Expertise of authorities in charge of republican and regional-level agreements (including industry-specific) shall be separated in the part related to quantity and content of additional social benefits, guarantees and compensations for staff.
If there are republican and regional agreements on additional benefits, guaranties and compensations for staff exceeding financial potential of an employer, such employer should be given a possibility to only perform core-level obligations.
III. The Code should provide that social partnership parties are obliged to enter collective negotiations (agreements) if these obligations cannot be realized due to external factors (including the cost related ones).

5. Conclusion

One of the possible ways to reach the balance between interests of employers and employees is to make maximum use of the social partnership mechanism, gradually legitimize flexibility of legal labor regulation through its specification in collective contracts based on agreements of social partnership parties and introduce obligatory record of legal interest of employees and trade unions. This is exactly the way that was chosen by countries striving for an optimal balance between economic efficiency and interests of employees and their labor protection.

Therefore, the liberalization of labor legislation should be developed along the following directions:
On the part of state:
1) Establish minimal guarantees and compensations to staff;
2) determine basic rights and duties of employers and staff;
3) establish necessary requirements in the field of labor safety;
4) ensure state control of labor legislation observation;
5) judicial resolution of labor disputes;
6) adoption of necessary social protection measures in case of job loss.
On the part of employers:
1) Extend rights and duties of employers on the issues of:
- hiring and discharging, staff relocation and dismissal;
- establishing of staff working time and rest;
- regulation of payment system and staff labor rate setting;
2) increase employer's interest in collective-contractual mechanisms of regulation of social-labor relations, including issues of granting of additional guarantees compensations, and salary increase;
3) optimize employer's costs through various types of guarantees and compensations;
4) strengthen employer's motivation to advance staff qualification;
5) increase employer's responsibility on observation of requirements, guaranties, including the issues of labor safety.
On the part of staff:
1) Strengthen the institution of individual-contractual relations with employers;
2) Extend staff rights and duties (employee's representatives) during concluding collective contracts and agreements, including the issues of:
- wage indexation;
- additional types of compensations and guarantees;
- additional types of leaves, etc.
3) Increase of staff (employee's representatives) interest in concluding collective contracts and agreements and regulation of labor relations within individual-contractual mechanisms.
4) Strengthen employee's motivation in qualification advancement, including his/her participation in development of professional standards, dual training.
5) Increase employee's responsibility in performing of individual labor contracts, as well as collective contracts and agreements.
Thus, the main purpose is to form a fundamentally new model of labor relations which combines support of entrepreneurship and takes into account interests of employees.

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Acknowledging and Promoting Research Work in the Private Sector

Michele Tiraboschi *

The Reasons for a Law to Acknowledge and Promote Research Work in the Private Sector

Human Technopole, a leading technology park that will host 1,600 researchers. This is what the Expo site may be turned into, as put forward by the Italian Prime Minister, Matteo Renzi, on 10 November 2015. This is certainly good news, but is also another missed opportunity to recognise and promote research work in the private sector, particularly in legal and contractual terms.
Indeed, a number of questions arise: Which type of contract will be used to recruit the 1,600 researchers mentioned above, especially overseas ones? Which options will they have in terms of career paths, remuneration and job satisfaction? Will they provide job or outplacement opportunities in the event of cessation or suspension of their working activity? Are there any economic incentives for companies that recruit researchers? Which labour laws will apply to researchers operating in business networks and industrial districts? Will it be possible to conduct research independently or on a project-by-project basis?
Neither Italian legislation nor the 450 collective agreements concluded at national level make provisions for this special category of workers. In Italy, and certainly in less developed countries, the idea still prevails that research is linked to the pursuit of an academic career. However, a significant number of Italian companies carry out high-quality research in cooperation with innovative business networks and industrial districts which are as efficient as leading universities and research centres worldwide. They often collaborate actively, although informally, but only thanks to the patience and the determination of men and women of goodwill that compensate for the lack of an established system.

* Full Professor of Labour Law at the University of Modena and Reggio Emilia (Italy) and ADAPT Scientific Coordinator. Email address: tiraboschi@unimore.it.

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It is the World Economic Forum[1] to remind us that the major changes underlying the new "great transformation of work" will take place over the next five years.
Without a well-defined strategy, we might face some serious consequences: technological unemployment, skills obsolescence, and a more pronounced mismatch between labour demand and supply. Demographic factors (aging, chronic diseases, and a general increase on the number and type of social risks, paired with decreasing financial sustainability due to low employment rates, high rates of inactivity, persisting high shares of undeclared work) exacerbate historical and structural inefficiencies in welfare, education, innovation and research systems. All the aspects referred to above are likely to place Italy and other European countries at a disadvantage globally.
Companies are evolving, moving from being "economic organisations" which are simply intended to produce or exchange goods and services, to genuine "learning organisations" that employ "hybrid" professionals, who can contribute to both research and changes to organisational and productive processes. Because of this great transformation, the mere fulfilment of tasks and orders that was the distinctive trait of the XX century is given less relevance. Similarly, mechanical and repetitive processes are hardly applied today, for they featured organisation and production patterns in place during Fordism and Taylorism.
By making workers' skills and learning processes more flexible, researchers can play a pivotal role in meeting the needs of new markets, based on the interconnection of so-called "intelligent systems". However, these systems are regarded as intelligent not so much for the amount of advanced technology implemented as for the involvement of people, forward thinkers and modern researchers who run them and promote their constant development.
Although research work can provide a significant contribution to innovation and development, researchers still occupy the grey area between industry and academia, a sort of "no man's land", which calls for actions on the part of public actors and the social partners at different institutional levels in order to acknowledge researchers' work in the private sector and to promote possible strategies and closer cooperation between different areas of research and innovation.
First of all, a need arises to adequately recognize and promote workers' special research skills that can be applied to a company's innovation and development processes. Among them are those who with a doctoral degree or an equivalent qualification; staff who have obtained researcher status that is valid for legal and contractual purposes following completion of training as part of their

[1]World Economic Forum (2015), *The future of jobs report.*

advanced-level apprenticeship contract for research purposes; staff employed in planning and research activities in innovative start-ups and certified business incubators; workers qualified as researchers in collective agreements concluded by the most representative trade unions at the national level; more generally, staff mostly engaged in the conception or creation of new knowledge, products, processes, methods and systems, irrespective of the employer's legal status, the economic sector, and applicable tax legislation.

A wide definition of what should be considered as research-related activity should also be adopted, encompassing all research, planning, and development activities, including those related to changes to work organization and staff management due to (or supporting) innovation in production or processes, or assessing their compliance with national legislation and their economic impact. Gaining, developing and promoting these skills is crucial, but presently this attempt is hindered by the lack of adequate systems to acknowledge them, also in terms of contractual arrangements, remuneration and career advancement.

Besides hampering skills recognition for access to work of researchers, the lack of a stable and coherent regulatory framework also gives rise to issues while they are in employment, considering their expositions to risks such as prolonged periods of unstable employment and financial distress. The European Charter for Researchers[2] stresses the importance to appreciate the multi-faceted role of researchers in performing their work and encourages Member States to improve their working conditions and opportunities for growth, especially in the early stage of their career. Further, the Charter encourages Member States to improve recruitment methods and career evaluation systems in order to create a more transparent, open, equal and internationally-accepted system of career development as prerequisites for a genuine European labour market for researchers.

Nevertheless, Europe has a relatively low number of researchers employed in the business sector, compared with the US and Japan[3]. An attempt to address the issue of researchers' professional recognition in the private sector has been pursued in France with the 2013 Law on higher education and research training[4]. Even if limited to the recognition of professional doctorates, Article 82 of the same law provides that post-graduate education must be valued when

[2] COMMISSION RECOMMENDATION of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers (2005/251/EC).

[3] Deloitte (on the behalf of) EUROPEAN COMMISSION - DG Research and Innovation, *Researchers' Report 2014* - Final Report.

[4] LOI n° 2013-660 du 22 juillet 2013 relative à l'enseignement supérieur et à la recherche, see it at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027735009&dateTexte=20130730

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applying for a job in the private sector, giving it special recognition in the grading system in collective agreements.
In Italy, an attempt to promote the professional recognition of researchers has been promoted by ADAPT with the Draft bill on Acknowledging and Promoting Research Work in the Private Sector[5]. Italy lags behind especially if legislation and collective bargaining are considered. National lawmakers are yet to define the main elements (e.g. their inclusion in the employee grading system) for a coherent regulatory framework ensuring the recruitment and the promotion of researchers in the private sector. In view of the above, the draft bill is intended to fill these vacuums by dealing with the following aspects:
- acknowledging the status of researchers;
- identifying researchers' main characteristics and activities, delegating collective bargaining and special laws to lay down the requirements to determine when they can qualify as researchers.
- defining different types of researchers according to qualifications, experience and skills developed;
- delegating the regulation of the employment relationship to the contractual parties to carry out research in the private sector and making provisions for a number of exceptions to the applicable laws governing the recruitment of researchers;
- making sure that this law also applies to industrial districts, business networks, universities and research centres (either public or private) irrespective of their legal nature;
- making sure that special funds are made available to grant researchers unemployment benefits when they are made redundant or their contract is terminated on economic grounds;
- providing researchers with the opportunity to carry out research independently (i.e. without the need to be a salaried employee in a strict sense) therefore providing for an exception to national legislation on project work and "employer-organised freelance work";
- simplifying and streamlining the rules to access economic incentives to support research;
- setting up "a register for researchers" at the Ministry of Labour and Social Policies to be linked with an online employment database for monitoring and transparency purposes, in order to identify the necessary elements to define researchers' work and training experience.

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[5] Draft Bill - *Acknowledging and Promoting Research Work in the Private Sector*, see ADAPT International Bullettin, http://adapt.it/englishbulletin/wp/the-reasons-for-a-law-to-acknowledge-and-promote-research-work-in-the-private-sector/.

The promotion of researchers' mobility is also an issue. On the one hand, geographical mobility should be encouraged, especially within Europe, through the establishment of recognised profiles based on the European Qualification Framework and to the multilingual classification of European Skills, Competences, Qualifications and Occupations (ESCO). At a European level, actions should also be taken to address certain shortcomings in all the Member States related to the definition of a common profile and researchers' recruiting paths that describe the state of art of researchers' work in the private sector and define their most relevant skills.

On the other hand, moving between jobs and the resulting occupational transitions, also at a national level, constitute yet another challenge particularly for adult researchers, because of a lack of adequate mechanisms for transferring and acknowledging the skills they developed. Conversely, enabling researchers to move to other institutions (either scientific, national or international ones) or from academia to industry and vice versa is crucial to promote successful research careers and facilitate knowledge and innovation transfer.

Recognition of researcher status should be considered also by public institutions and universities and all those public and private bodies carrying out research work. This could give experienced researcher coming from the private sector the opportunity to share their knowledge and to act as mentors for young researchers undergoing training.

Drawing on the "intersectoral mobility" perspective, which fosters the mobility of researchers from one sector to another[6], special attention should be paid to the establishment of knowledge networks, technological poles, and innovation districts. It is crucial to develop knowledge networks, technological poles, innovation districts and all the forms of aggregation of economic, physical, and networking assets, which should be combined with a supportive, risk-taking culture to create innovative contexts, which are widespread in USA and often involve SMEs[7]. Therefore, talent and technology appear to be the twin drivers of innovation and highlight the importance of those workers with special skills and education necessary to generate new ideas, manufacture new products, services or production methods, and sell them on markets.

Several barriers seem to persist to develop these experiences, not only related to physical, structural, technological aspects, but also to the low mobility of

[6] Karen Vandevelde, *Report from the 2014 ERAC mutual learning workshop on Human Resources and Mobility*, Brussels, March 26, 2014.

[7] Katz B., Wagner J. (2014), *The Rise of Innovation Districts: A New Geography of Innovation in America*, Brookings – Metropolitan Policy Program, May 2014.

researchers and the absence of adequate linkages between companies and institutions with a possible role in the innovation process.
To conclude, while several programmes and interventions promoted in this field have paid attention to modernising training and educational paths for researchers (by promoting work-based doctoral programmes and university-industry cooperation programmes)[8], much must be done to promote researchers' professional recognition and working conditions. Aspects like mobility initiatives targeting adult researchers, their skills formation and recognition, the opportunity to move from industry to academia at different stages of one's career, the appreciation of industrial experience when recruiting staff in academic positions, the possibility of joint responsibilities (shared between industry and academia) with respect to the training and preservation of human capital, research work organisation in line with economic and social challenges, have not been properly dealt with at the institutional and scientific level.
With a view of ensuring acknowledgment of this professional category, it is necessary to put in place a modern legal and industrial relations system that will help to appreciate the work of these professionals and to ensure them adequate contractual arrangements, while also assessing and offsetting their different levels of productivity.
From a systemic perspective, academia-industry mobility of researchers deserves better attention (e.g. by strengthening researchers' education and university-industry linkages). This will help, on the one hand, to address researchers' professional recognition at the end of training and when accessing the labour market; on the other hand, to better clarify the nature and organisation of research work in the academic and private sector so as to remove the persisting barriers hampering cooperatio

[8] Not only at a national level: If we look at European Commission (2006), *Mobility of Researchers between Academia and Industry. 12 Practical Recommendations*, half of the number of recommendations concern training for researchers.

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