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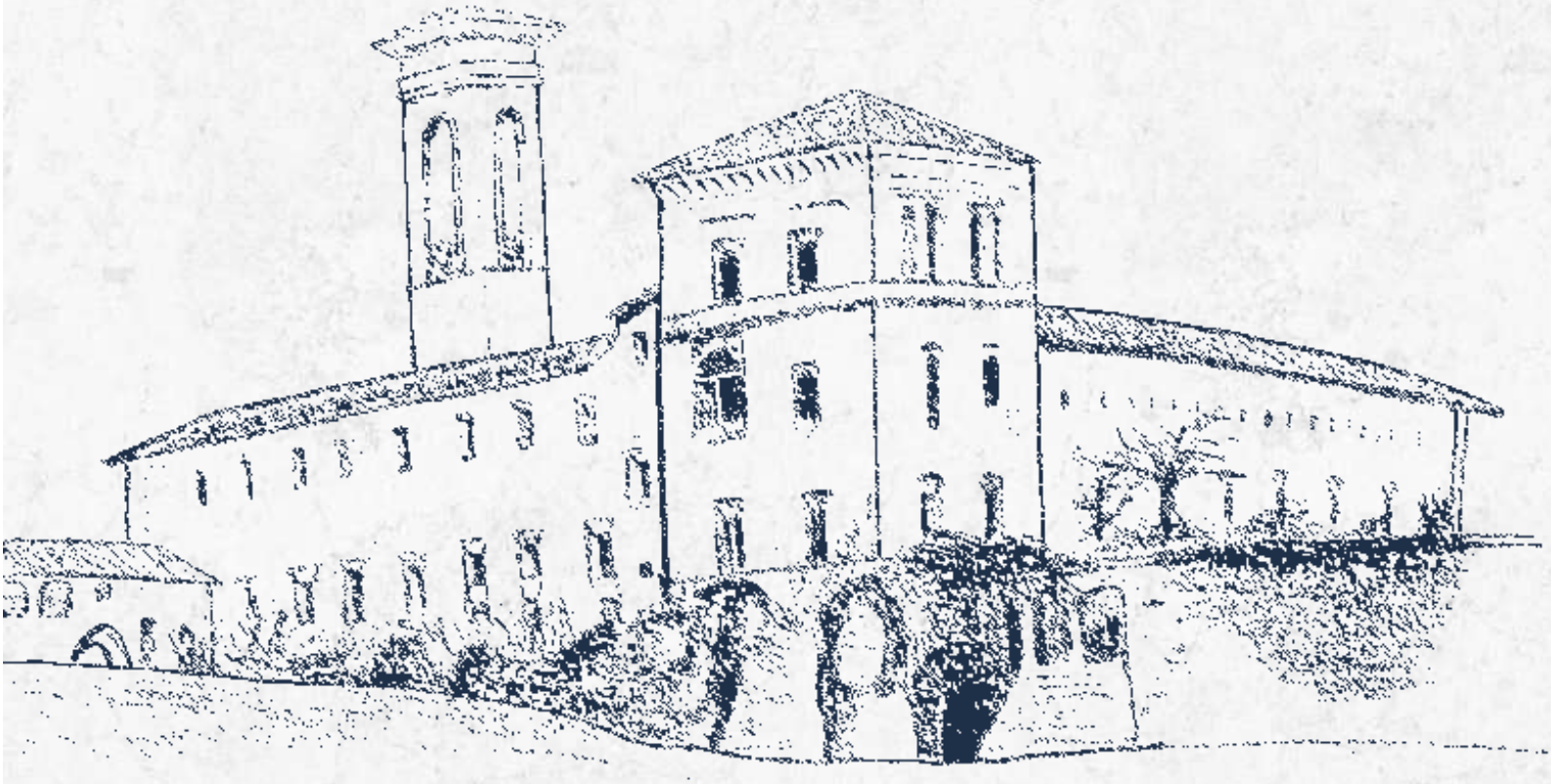

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The papers collected in this issue of the *E-Journal of International and Comparative Labour Studies (EJICLS)* were presented at the International Conference "Work and its Value. Interdisciplinary Reflections on an Ever-Changing Concept" promoted by ADAPT and ILO, which took place in Bergamo (Italy) on November 24-26, 2021. Afterwards, they were submitted to and accepted for publication in the EJICLS.

The Impact of New Forms of Self-Employment on Employment Law

Esther Guerrero Vizuete and Antonio Fernández García [*]

Abstract

Digitalization has not only brought new employment prospects for salaried workers; it has also led to the emergence of new forms of self-employed work that offer companies higher flexibility in the procurement of services. The European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) has identified nine systems of work – termed 'new forms of employment' – and has published several reports on the subject since 2015. This paper aims to analyses how these forms of work fit into the Spanish legal system, and to identify problems that may arise in relation to the adaptation of the regulatory system and its inherent weaknesses.

Keywords: *Collaborative Employment, Crowd Employment, Interim Management, Portfolio work, Self-employment.*

1. Introduction

Changes taking place in the structure of employment, mainly due to the digitalization and delocalization of business and commercial operations, have revealed that how people work is becoming increasingly heterogeneous. This diversity of forms of work is particularly evident in sectors that require skilled labour with a great degree of experience.

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Starting in 2015, the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) began publishing reports on 'new forms of employment,' with general updates in 2018 and 2020.[1] In total, nine forms of employment are mentioned and analysed in the framework of the European Union (EU): employee sharing, job sharing, interim management, casual work, ICT-based mobile work, voucher-based work, portfolio work, platform work, and collaborative employment.

This paper discusses the four emerging forms of work that are typically performed by the self-employed. Based on an initial analysis of their primary characteristics, we aim to analyse how these emerging forms of work fit into the Spanish legal system and to explore the issues that they may pose concerning the adaptation of the regulatory system and the weaknesses inherent to it.

2. Emerging Forms of Self-employment

Increasingly frequent reliance on decentralized production, from specific aspects of the production cycle to broader phases, is making it easier for the self-employed to work with companies as external contractors utilizing innovative solutions that, in many cases, lack adequate legal architecture. New forms of work respond to a demand for greater flexibility. However, they may also lead to a decrease in the quality of employment by weakening contractual conditions with the primary aim of reducing operating costs.

The business reality tends to coordinate as a form of legal bond and, concerning previous stages, in the new scenarios identified by EUROFOUND, "the self-employed are not limited to providing outsourced services; they can also facilitate their own integration into and coordination within the business

[1] EUROFOUND, *New forms of employment*, Publications Office of the European Union, Luxembourg, 2015; EUROFOUND, *Overview of new forms of employment: 2018 update*, Publications Office of the European Union, Luxembourg, 2018; EUROFOUND, *New forms of employment: 2020 update*, Publications Office of the European Union, Luxembourg, 2020.
The report is based on 67 individual case studies from across Europe that represent a variety of employment forms. Available at https://www.EUROFOUND.europa.eu/es/publications/report/2015/working-conditions-labour-market/new-forms-of-employment#tab-05 (accessed 28 September 2021). Specific monographs have also been published for some of them. For example, EUROFOUND, *New forms of employment: Developing the potential of strategic employee sharing*, Publications Office of the European Union, Luxembourg, 2016; EUROFOUND, *Employment and working conditions of selected types of platform work*, Publications Office of the European Union, Luxembourg, 2018; EUROFOUND, *Cooperatives and social enterprises: Work and employment in selected countries*, Publications Office of the European Union, Luxembourg, 2019.

production chain"[2]. In this way, the integration into the client company can be pointed out as identifying features of these new workers. They are external professionals who provide a very specific qualification (in the case of interim management), or time management adaptability not provided by salaried employees (platform work and crowd employment). Secondly, new self-employed workers are characterized by less independence and greater subordination. Faced with otherness, a distinctive aspect of classic self-employment, the new forms of employment identified lose part of that organic and functional independence to adapt to the client portfolio requirements (portfolio work). Finally, the trend toward the control of business risk should be highlighted, integrating itself into collaborative work formulas that seek to reduce their costs and increase their social protection (workers cooperatives, coworking, and umbrella organizations).

2.1. Interim Management

This is a new form of employment in which highly qualified experts are hired temporarily to execute specific projects or solve specific problems, thus integrating external management skills into the work organization. In general, these are supervisory staff who are temporarily vested with managerial and organizational powers in the company to execute projects or assignments.[3]
Although EUROFOUND does not provide data on this new form of employment in Spain, we were able to verify that this practice is also on the rise in Spain. Spanish companies, including Indal, Azkoyen, Levantina, and Spanair, have used these types of workers in their expansion and improvement processes.[4] An association of more than 250 professionals and companies (Interim Management Association of Spain or Asociación Interim

[2] Navarro Nieto points out that the decentralization of production and self-employment are two phenomena that loop back on one another. Navarro Nieto, F.: 'El trabajo autónomo en las "zonas grises" del Derecho del Trabajo,' in *International and Comparative Review of labor Relations and Employment Law*, 2017, n.4, p. 60-61.

[3] According to EUROFOUND, this practice has been gradually increasing in 18 EU countries. Figures are available for Austria, Bulgaria, the Czech Republic, Estonia, Italy, the Netherlands, Norway, Poland, and France. EUROFOUND, *New forms of employment, op. cit.*, pp. 40-52. Data is also available from the Institute of Interim Management (IIM) in the UK, *Interim Management Survey 2020*, 11th ed., 2020, https://www.iim.org.uk/survey/ (accessed 28 September 2021). There is no specific legislation regulating this type of employment except for a collective agreement in the Netherlands. EUROFOUND: *New forms of employment: 2020...*, *op. cit.*, p. 52.

[4] A. De Benito: *Una nueva herramienta para la gestión exitosa de la expansión internacional: el interim management,* in Muñiz Ferrer, Labrador Fernández and Arizkuren Eleta (ed.), *Internacionalización y capital humano*, Comillas Pontifical University, Madrid, 2012, p. 130.

Management España, AIME[5]) was also formed in 2015. Interim management, however, is not a particularly well-known practice in Spain or one that is in demand by companies or public administrations or by professionals who might wish to engage in it[6].

Although an interim manager can be hired as a salaried employee[7], more commonly the interim manager is hired by the company receiving the services as a self-employed professional without an employment relationship, a relationship governed by private law. This is a form of employment consciously chosen by workers to give companies flexibility in the implementation and execution of projects without having to make permanent modifications to their company structure.

In 2020, the most common profile for these types of workers in Spain was men between 51 and 60 years old with 3 to 10 years of experience in the profession. The most common specialist posts were general manager, accountant, and financial controller[8], which also seem to be in the greatest demand.[9] These professionals took part in business restructuring, strategic growth, internationalization, innovation, and diversification and held temporary management positions pending the permanent coverage of the position.[10]

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[5] https://interimspain.org/.

[6] This form of work is most often used in food (18%), industrial (12%), communications (11%), automotive (9%), services (7%), construction (7%), and energy (5%) sectors. In terms of company size, most interim managers have provided their services to companies with fewer than 100 employees (66%). Interim Management Association of Spain (Asociación Interim Management España, AIME), *Encuesta de 2021 sobre el mercado español de los Interim Managers*, 2021, https://interimspain.org/encuesta-sobre-el-mercado-espanol-de-los-interim-managers/ (accessed 28 September 2021).

[7] The employee can enter into an employment agreement with the company to provide services. This may involve a prior labor intermediation process in which a specialized business, called a recruitment agency or personnel service provider, or a head-hunter plays a key role. EUROFOUND, *New forms of employment, op. cit.*, p. 40. The worker may also be recruited by a personnel service provider and temporarily seconded to the company to provide services. This is possible because personnel service providers, as well as intermediaries, are temporary employment agencies specialising in this type of employment. In 2017, in Spain, 15% of these professionals provided services as employees [Interim Management Association of Spain (AIME), *Informe sobre el Estado del Interim Management en España 2017*, 2018, https://interimspain.org/informe-sobre-el-estado-del-interim-management-en-espana-2017/ (accessed 28 September 2021)] and it has been estimated that personnel service providers were involved in 30% of the projects, although data from 2020 shows a decrease to 15%. [Interim Management Association of Spain (AIME), *Encuesta de 2021 sobre el mercado español…, op. cit.*]

[8] Interim Management Association of Spain (AIME), *Encuesta de 2021 sobre el mercado…, op. cit.*

[9] Interim Management Association of Spain (AIME), *Informe sobre el Estado del Interim…, op. cit.*

[10] EUROFOUND, *New forms of employment, op. cit.*, p. 43.

Businesses gain several advantages from using this form of employment, including increased competitiveness, sustainability, and growth, which also benefit the labour market.[11] From the perspective of the self-employed specialist engaged in this type of work, the primary drawback is the lack of year-round employment, as getting back-to-back projects without gaps can prove exceedingly difficult. In 2020, 40% of Spanish interim managers worked less than 20% of the time in interim management. Only 7% worked all year round.[12] In addition, projects are often part-time (62% in 2017)[13], and psychosocial risks have been identified related to stress, professional isolation, and geographic mobility.[14] As for compensation, just over one-third of people who have done this form of work received a daily rate of less than €300[15], which would indicate that higher salaries may compensate for the lack of social protection, the job instability mentioned above, and international mobility required.[16]

2.2. Portfolio Work

EUROFOUND refers to this new form of employment as a self-employed or freelance worker with no employees who provide services to clients, undertaking small-scale assignments for them. This category includes professionals such as journalists, translators, communications specialists, artists, real estate agents, researchers and scientists, accountants, computer technicians, trainers, teachers, consultants, etc. However, traditional sectors such as construction, transport, commerce, agriculture, fishing, and forestry are also mentioned. Services are provided in the local or regional market, possibly in collaboration with other portfolio workers, with no physical workplace open to the public (most work at home). This group can include retired people who were formerly salaried workers and who have decided to extend their working life, as well as freelancers who have not yet been able to establish a larger business endeavour.[17]

[11] EUROFOUND, *New forms of employment, op. cit.*, p. 45.
[12] Interim Management Association of Spain (AIME), *Encuesta de 2021 sobre el mercado…*, *op. cit.*
[13] Interim Management Association of Spain (AIME), *Informe sobre el Estado del Interim…*, *op. cit.*
[14] EUROFOUND, *New forms of employment, op. cit.*, p. 43.
[15] The most common daily rates in Spain were as follows: less than 300 euros (32%), 300–400 euros (19%), 400–500 euros (15%), 500–600 euros (8%), 600–700 euros (7%), and 700–800 euros (5%). Interim Management Association of Spain (AIME), *Encuesta de 2021 sobre el mercado…*, *op. cit.*
[16] EUROFOUND, *New forms of employment, op. cit.*, p. 7.
[17] EUROFOUND, *New forms of employment, op. cit.*, p. 104-106.

The main characteristics of this form of work are that it is self-managed, independent work with an irregular income. In addition, the freelancer must constantly search for new clients, adapt his or her work to client requirements, and develop a business that is not reliant on a single company. Although being highly skilled is not explicitly mentioned, experience in the service offered, communication and sales skills, the ability to self-organize, and professional contacts are regarded as essential.[18]

In short, these are professionals who maintain ongoing connections with several companies. The broad definition for this group means that this new form of employment is also found in Spain[19], especially regarding the phenomenon of individual self-employment and self-employed workers with no employees.

In 2020, Spain had an estimated 1,601,769 self-employed workers with no employees, of which 482,376 were in the service sector, a figure that should be viewed with caution and as a simple approximation to quantify this new form of self-employment.[20] Is it possible to know whether portfolio work is undertaken in Spain voluntarily or out of a need for self-employment? Data from the annual reports of the international observatory Global Entrepreneurship Monitor (GEM) may be able to shed some light here. Up to the 2018 edition, a distinction was made between necessity-driven and opportunity-driven self-employment[21]. The former includes people whose motivation to form a company is driven by a lack of better job alternatives or employment. The latter are motivated to form a company by the identification, development, and exploitation of a unique business opportunity. Although the GEM data shows that entrepreneurs tend to act more out of opportunity than

[18] EUROFOUND, *New forms of employment, op. cit.*, p. 103-105.

[19] Between 2004 and 2013, the total number of portfolio workers in the EU is estimated to have increased by 45%, primarily in Cyprus, Denmark, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Norway, Portugal, and the United Kingdom. EUROFOUND, *New forms of employment, op. cit.*, p. 104.

[20]The self-employed without employees are involved in the following business activities: information and communications (41,799); financial and insurance (41,706); real estate (23,377); professional, scientific, and technical (179,153); administrative and support services (80,381); education (64,961); and, lastly, artistic, recreational and entertainment (50,999). Note that part of this figure could include financially dependent self-employed workers who do not have a diverse portfolio of clients. See the Ministry of labor and Social Economy's report *Trabajadores autónomos, personas físicas, en alta en la Seguridad Social,* https://www.mites.gob.es/ficheros/ministerio/sec_trabajo/autonomos/economia-soc/autonomos/estadistica/2020/4TRIMESTRE/publicacion_principal_diciembre_2020.pdf (accessed 6 October 2021).

[21] The GEM defines this category as people between 18 and 64 years of age who have begun a business within the past three and a half years.

necessity, it is concerning that those acting out of necessity increased from 14.5% (2005) to 22.6% (2018).[22]
One of the disadvantages of this new form of employment, apart from professional isolation, is that income can be irregular, and clients can be scarce at times. But there can also be excess work that overwhelms the worker, prevents full recovery in the event of illness, reduces rest, and/or impinges upon holiday time.[23]

2.3. Platform Work and Crowd Employment

Technological advances have allowed the traditional employer-employee relationship to be replaced with the provision of services via digital platforms, leading to a 'Balkanisation of the market,' where, in lieu of hiring workers, the model consists of putting those in need of services in contact with service providers.[24] Anyone with a computer can register on a platform that offers goods and services. As a result, digitization universalizes participation in the production market, which reduces costs and provides access to an unlimited number of customers. As Sierra Benítez points out, digital platforms do not have a workforce, but rather a service relationship. They do not hire people; they offer targets and results[25].
EUROFOUND defines up to ten types of paid work in which online platforms play a key role in bringing supply and demand together. These can be classified into four main groups:

a) Work determined by the platform and performed locally. This group includes services that do not require qualifications (on-location platform-determined routine work), such as personal transport services (Uber, Cabify), food delivery services (UberEats, Deliveroo, Glovo), and goods delivery services (Amazon Flex); on-location worker-initiated moderately skilled work, such as ListMinut, a platform providing services such as housework where workers choose from the tasks on the platform and do them in person; or on-

[22] Global Entrepreneurship Monitor (GEM), *Informe GEM España 2018-2019*, Editorial de la Universidad de Cantabria, Santander, 2019, p. 70. The opportunity-necessity dichotomy was abandoned in the 2019 edition and motivation was categorized into four types: making a difference in the world; creating wealth or generating high levels of income; continuing a family tradition; and earning a living due to lack of employment opportunities.
[23] EUROFOUND, *New forms of employment, op. cit.*, p. 106.
[24] A. Todolí Signes, *El trabajo en la economía colaborativa*, Tirant lo Blanch, Valencia, 2016, p. 19.
[25] E.M. Sierra Benítez, *La protección social de los trabajadores ante el desafío del nuevo trabajo a distancia, del trabajo digital y la robótica*, in *Revista de derecho de la seguridad social. Laborum*, 2017, n. 11, p. 153.

location platform-determined higher-skilled work, such as Be My Eyes, a volunteering platform for assisting the visually impaired.
b) Work determined by the platform and performed online. This includes services that require moderately-skilled workers (online moderately skilled click-work), in which the platform assigns tasks that are performed online (for example, creative tasks on the Crowdflower platform), or highly-skilled workers (online platform-determined higher-skilled work), for example, writing, translating or transcribing texts via the Clickworker platform.
c) Work determined by the client and performed locally. This group includes services that are specified by a client on a platform. These jobs may require lower qualifications (on-location client-determined routine work), such as the carsharing via the GoMore/Amovens platform; moderate skills (on-location client-determined moderately skilled work), in which the client chooses people to perform tasks in person, such as domestic services (Oferia); or highly skilled workers (on-location client-determined higher-skilled work), such as, for example, quality control in supermarkets via the app Jobber platform.
d) Work determined by the client and performed online. Work determined by a client is performed online by a specialist (online client-determined specialist work), for example, the Freelancer platform, which charges a commission to intermediate for all kinds of specialized work. This group also includes online contestant specialist work, where workers compete online by performing a task or part of a task (e.g., graphic design on the 99designs platform) and the client selects a winner. An interesting aspect of this type of work is that the work done is usually not the main income-generating activity of the service providers.[26]
Generally, these people are considered self-employed, although not all the services provided meet the criteria for self-employment. This is the case for the platform-determined services provided locally or online described in sections a) and b), which the different legal systems do not legally classify. In Spain, after a period of contradictory judicial decisions, the Supreme Court settled the issue by considering people who provide delivery services (called 'riders' in Spain) to be employees.[27]

[26] EUROFOUND, *Employment and working conditions…*, *op. cit.*, p. 23.
[27] Supreme Court ruling of 25 September 2020, rec. no. 4746/2019. For a current update on judicial decisions regarding this matter, see I. Beltran de Heredia Ruiz, *Employment status of platform workers (national court decisions overview – Argentina, Australia, Belgium, Brazil, Canada, Chile, France, Germany, Italy, Nederland, New Zealand, Panama, Spain, Switzerland, United Kingdom, United States & Uruguay)*, in the blog *Una mirada crítica a las relaciones laborales*, 2021, https://ignasibeltran.com/2018/12/09/employment-status-of-platform-workers-national-courts-decisions-overview-australia-brazil-chile-france-italy-united-kingdom-united-states-spain/#spa1 (accessed 28 September 2021).

For the services classified as c) and d), some consider the digital platform merely a notice board or intermediary connecting client companies with service providers. Crowd employment platforms are typically global in scope, have a virtual workforce, and attract companies as end-consumers. Crowd employment tasks are not assigned to a specific provider, which weakens many of the arguments put forward to discredit the non-employment nature of the contractual relationships that they facilitate. Although these new forms of employment provide workers both flexibility and additional income, among other advantages, their disadvantages include the fact that these service providers are invisible, professionally isolated, and primarily home-workers and that these jobs have been largely deregulated. New emerging forms of work also raise important questions about how to combat tax fraud and unfair competition, protect privacy and personal data, and prevent regulatory fragmentation of the labor market.[28]

2.4. Collaborative Employment

Although the analysis carried out below could be integrated into the scope of legal tools that favor the sustainability of self-employment, EUROFOUND refers to independent self-employed professionals and micro-enterprises that work together in some way to overcome their size limitations and professional isolation. For its study, this form of work is further divided into three forms of cooperation: worker cooperatives, umbrella organizations, and coworking.
All three are considered to provide flexibility, autonomy, a better work-life balance, less social and professional isolation, and increased productivity while fostering the development of skills, self-employment, entrepreneurship, and reducing business risk. However, the employment situation of workers is often unclear, which affects their level of social protection.[29]

2.4.1. Worker Cooperatives

Although EUROFOUND considers worker cooperatives a new form of employment, they have been around since the mid-19th century. It is true, however, that in recent years new forms of cooperatives have been devised to foster entrepreneurship and employment. This stimulus came in the wake of the financial crisis of 2008 when cooperatives in the EU were seen to have similar or better survival rates than conventional companies. Cooperatives and

[28] P. Páramo Montero, *Las nuevas formas emergentes de trabajo. Especial referencia a la economía colaborativa*, in *Revista del Ministerio de Empleo y Seguridad Social*, 2017, n. 128, p. 197.
[29] EUROFOUND, *New forms of employment: 2020...*, *op. cit.*, p. 49.

social enterprises are seen as potential sources of innovative solutions to the socio-economic challenges identified as EU priorities: inclusive growth, aiding regional economic development, smart growth, combating poverty and social exclusion and creating sustainable growth.[30] Cooperatives generally have worker-member ownership, a democratic system, and close cooperation between members in the different areas of production, strategic management, and marketing. They have become increasingly prevalent in Austria, France, Hungary, Germany, Greece, the Netherlands, Spain, and Sweden[31]. Most EU member states have specific legislation governing them, except for Croatia, Denmark, Ireland, Sweden, and the United Kingdom, where they are covered by general business regulations.[32]

In Spain, worker cooperatives[33] are quite common. These collective businesses allow members to choose how their social security contributions are made, either as part of the workforce as salaried employees or as self-employed workers (art. 14 Royal Legislative Decree 8/2015, of 30 October, approving the revised text of the General Law on Social Security, LGSS). Cooperatives are expressly mentioned in Art. 129.2 of the Spanish Constitution[34] and are governed by state and regional regulations.[35]

In Spain, worker cooperatives have been used in some sectors for grossly fraudulent practices. In one of the best-known examples, self-employed workers were falsely presented as worker-members of merely formal cooperatives. This was done in an ongoing and coordinated manner in the meat industry.[36] This deceit extends even to the worker cooperatives themselves because they are set up solely as front companies to decentralize production and cover up illegal transfers of phony self-employed workers. All of this was done to reduce staff and production costs for the companies they

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30 EUROFOUND, *Cooperatives and social enterprises: Work and employment in selected countries,* Publications Office of the European Union, Luxembourg, 2019, p. 3.

31EUROFOUND, *New forms of employment, op. cit.*, p. 118.

32 EUROFOUND, *New forms of employment: 2020...*, *op. cit.*, p. 48.

33 While it is difficult to estimate the number of worker cooperatives in the EU, EUROFOUND provides some figures in *EUROFOUND, New forms of employment*: *2020...*, *op. cit.*, p. 47.

34 'The public authorities (...) shall encourage cooperative societies by means of appropriate legislation,' and, in keeping with this, several tax and employment incentives have been established.

35 Law 27/1999 of 16 July on Cooperatives, Law 3/2011 of 4 March which regulates the European Cooperative Society based in Spain, Law 5/2011 of 29 March on Social Economy, and others.

36 A. Baylos Grau, *Carne sin explotación: los falsos autónomos en las cooperativas cárnicas*, in the blog *Según Antonio Baylos*…, 2019, https://baylos.blogspot.com/2019/05/carne-sin-explotacion-los-falsos.html (accessed 28 September 2021).

offer their services to, at the expense of eliminating the guarantees provided by labour legislation.[37] Another area in which activities are outsourced through cooperatives that erode the labour protections of their members is the transport of goods. Fraud occurs when the cooperative provides both the vehicle as well as the transport permit to the member. This allows drivers to work without a vehicle, without transport authorization, and without professional transport qualifications.[38]

Meanwhile, in the sector of online-platform-managed product delivery, worker cooperatives have begun to be established precisely to avoid the violation of labour regulations these platforms commit concerning their deliverers.[39]

Lastly, some types of entities set up as cooperatives fall under the definition of umbrella organizations (described below), whose operations in some cases border on legality or are even illegal. They have not been included under this heading because we believe they are not set up for collective self-employment in the social economy, but for individual self-employment or to help the self-employed overcome the shortcomings of the social security system, which does not benefit the self-employed who earn lower incomes.

2.4.2. Umbrella Organizations

Umbrella organizations can be found in Austria, France, Sweden,[40] and the United Kingdom[41], but also in Spain (constituted as cooperatives). They offer self-employed workers certain administrative services such as invoicing or tax assistance. As their name suggests, they act as an 'umbrella' for business activities. The main advantage of belonging to an umbrella organization is that it allows the self-employed member to pay into the social security system and obtain a certain level of social protection.[42]

Perhaps one of the most striking examples of this type of organization is that of the French wage portage companies, which were illegal in the 1980s but were definitively accepted in the Code du Travail in 2015. In the system, a qualified self-employed professional (economist, computer scientist,

[37] L.J. Dueñas Herrero, *Traiciones al cooperativismo en las industrias cárnicas*, in *NET21*, 2021, n. 2, https://www.net21.org/wp-content/uploads/2021/05/Traiciones-al-cooperativismo-en-las-industrias-carnicas.pdf (accessed 28 September 2021).

[38] R. Alfonso Sánchez, *Formas jurídicas de trabajo asociado en la economía social*, in Fajardo García (dir.), Senent Vidal (coord.), *Cooperativas de Trabajo Asociado y Estatuto jurídico de sus socios trabajadores,* Tirant lo Blanch, Valencia, 2016, p. 90.

[39] For example, Mensakas (Barcelona), La Pájara (Madrid), Rodant (Valencia), Botxo Riders (Bilbao), etc.

[40] EUROFOUND, *New forms of employment, op. cit.*, p. 118.

[41] EUROFOUND, *New forms of employment: 2020...*, *op. cit.*, p. 46.

[42] EUROFOUND, *New forms of employment, op. cit.*, p. 118.

consultant, etc.) offers their services to a company and agrees to provide those services for a given fee without becoming part of the company's hierarchy. At the same time, the employee finds a wage portage company and enters an employment contract. The wage portage company receives the fees invoiced for the provision of services to the client company. The wage portage company registers the employee with social security, handles social security contributions, and pays the employee's salary (minus a fee for management costs).[43] Wage portage is an innovative system that provides access to employment and social protection for self-employed professionals in a context of diversifying forms of work and the decreasing presence of workers of a certain age[44] in the labour market while reconciling what was once thought to be irreconcilable: autonomy and independence in the workplace with all the protections afforded salaried employees.[45]

This type of company can only operate as a wage portage company and must have official authorization as well as a financial guarantee to be able to meet its financial obligations to the worker in the event of default.[46] In 2018, there were 326 wage portage companies in France with a turnover of approximately 1.3 million euros[47] and a collective agreement for the sector.[48]

Another type of cooperative with a similar aim, supporting the self-employed, has also appeared in France. These are the *coopératives d'activité et d'emploi* (business and employment cooperatives), in which the entrepreneur signs a temporary contract with the cooperative (a 'salaried entrepreneur contract'), which is not an employment contract but allow allows the person to receive the social security benefits of an employee. When the contract ends, the signee can become a member or work outside the cooperative. The cooperative assumes fiscal, social, and accounting obligations related to a salaried

[43] P. Gómez Caballero, *Los aspectos individuales de las actividades fronterizas: en particular el trabajo autónomo*, in *Las fronteras del Derecho del Trabajo en el marco comparado europeo: autónomos y becarios*, Ediciones Cinca, Madrid, 2016, p. 52. UK umbrella companies work similarly.

[44] C. Lenoir – F. Schechter, *Le portage salarial doit sortir de ses ambiguités*, in *Droit Social*, 2012, n. 9, p. 772. The authors point out that by applying a task-based approach and transforming fees into wages, wage portage seems to offer double protection: for clients, who can adapt resource allocation to meet their needs more efficiently, and for workers, who can apply a strategy of returning to employment while ensuring the continuity of their rights.

[45] L. Casaux-Labrunée, *Le portage salarial: travail salarié ou travail indépendant?* in *Droit Social*, 2007, n. 1, p. 58.

[46] P. Gómez Caballero, *op. cit.*, p. 53.

[47] Data provided by the Fédération des Entreprises de Portage Salarial (FEPS). Disponible en https://syndicatportagesalarial.fr/branche/chiffres-portage-salarial/ (accessed 11 October 2021)

[48] Convention collective de branche des salariés en portage salarial du 22 mars 2017. Ârret du 28 avril 2017 JORF 30 avril 2017. Available at https://www.legifrance.gouv.fr.

entrepreneur's business activities, and provides support, training, etc.[49] So, these companies act more like umbrellas than cooperatives, since the workers do not become members until the initial period of salaried entrepreneurship is completed.[50]

Attempts have been made to imitate this practice in Spain, in the form of business development cooperatives, a form created by regional regulation in some areas, but also used in other communities as another type of cooperative. These organizations aim to promote entrepreneurship by providing assistance and support. However, the regulations governing them allow for them to serve merely as an 'umbrella' to help launch their members' business projects and minimize risks. There is a tendency to equate them with worker cooperatives to include tax and social security benefits[51], but they are not true worker cooperatives since the worker-members do not work together. The worker-members do not contribute to the company; they receive its services. They are therefore users[52], which makes these entities a hybrid or intermediate between worker cooperatives and service cooperatives.[53] This formula provides members with a legal framework that allows them to undertake an entrepreneurial endeavour while also facilitating management procedures related to their business activity as self-employed persons. The practice is provided for in some regional regulation, which states that 'invoicing must be performed by the cooperative in all cases.'[54] This stipulation allows these companies to issue invoices to clients for specific services, and the member is paid as a salaried employee for the actual time worked.

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[49] G. Fajardo García, I. Alzola Berriozabalgoitia, *Las cooperativas de emprendedores y su contribución al emprendimiento en economía social*, in *CIRIEC – España. Revista jurídica de economía social y cooperativa*, 2018, n. 33, pp. 10-11.

[50] G. Fajardo García, I. Alzola Berriozabalgoitia, *op. cit.*, p. 30.

[51] J.A. Altés Tárrega, *Análisis legal de las cooperativas de facturación y las cooperativas de impulso empresarial*, in A. Todolí Signes, M. Hernández Bejarano (coord.), *Trabajo en Plataformas Digitales: innovación, Derecho y mercado*, Thomson-Reuters Aranzadi, Cizur Menor (Navarra), 2018, pp. 394-406.

[52] A. Lozano Manor, *Cooperativas de trabajadores autónomos-cooperativas de impulso empresarial* in *Cooperativas de Trabajo Asociado y Estatuto jurídico de sus socios trabajadores, op. cit.* p. 715.

[53] M. Hernández Bejarano citing Sánchez Bárcenas. The author is opposed to classifying this type of company as a worker cooperative because the work is not pooled, not cooperative, but rather the company merely provides support for the business activities of individuals. Therefore, "special cooperative" is considered the most fitting classification for their corporate purpose. M. Hernández Bejarano, *Nuevos modelos de cooperativas de trabajadores autónomos: un análisis de las cooperativas de impulso empresarial y las cooperativas de facturación*" in *Economía colaborativa y trabajo en plataforma: realidades y desafíos,* Rodríguez-Piñero Royo and Hernández Bejarano (dir.), Bomarzo, Albacete, 2017, pp. 161-162.

[54] Art. 84.3 of Decree 123/2014 of 2 September, approving the provisions of Law 14/2011 of 23 December on Andalusian Cooperatives (amended by Law 5/2018 of 19 June).

Lastly, the number of freelance billing cooperatives has been on the rise in Spain in recent years. These companies are formally established as worker cooperatives that provide members (false worker-members) with invoicing services and social security enrolment (part-time under the general system under Art. 14 of the Spanish General Social Security Act) in exchange for a percentage of their income.[55] They sell themselves as a solution for self-employed people with low incomes or who do not provide services regularly, to avoid paying the minimum monthly social security contribution, mentioned above in the section on portfolio work as a major concern for any self-employed person. All this activity is fraudulent.

2.4.3. Coworking

Coworking involves sharing a workspace (which can be virtual, as in Germany), back office, and support. This form of work promotes cooperation and exchange between self-employed workers not necessarily related to tech start-ups (business incubators have been created for this sector)[56], although the profile of these workers is sometimes similar to that of the portfolio workers discussed previously (creatives, consultants, artists, journalists, etc.).[57]
With the coworking system, not only are facilities and services shared to increase efficiency but synergies are also generated among the freelancer participants, which can lead to joint projects and the acquisition of a more diverse portfolio of clients. Each member pays rent for their workspace and for the right to use meeting rooms, the internet, printer service, courier services, the canteen, etc. as well as for training and networking activities. Other advantages include a guarantee that the facilities will comply with occupational risk prevention regulations, reduced professional isolation (often found in some forms of self-employment like portfolio work), greater productivity, and improved professional skills and employability.[58]
Most coworking systems are found in Germany, Spain, the UK, France, and Italy. Spain is among the top 20 largest markets, with 939 coworking spaces,[59]

[55] J.A. Altés Tárrega, *op. cit.*, pp. 390-394. The same author states that business development cooperatives sometimes act in a similar manner to billing cooperatives.
[56]EUROFOUND, *New forms of employment, op. cit.*, p. 118.
[57] EUROFOUND, *New forms of employment, op. cit.*, p. 124.
[58] EUROFOUND, *New forms of employment, op. cit.*, p. 120, 121 and 126.
[59] Estudio global de crecimiento del coworking 2020, available at https://coworkinglafabrica.es/pronostico-del-coworking-2020-2021/ (accessed 21 november 2021).

although this figure is expected to decrease due to the need to maintain physical distance[60] and the possibility of remote work from home.

3. Legal Analysis and Weaknesses: Reflections on the Need to Revise Traditional Models

The different emerging forms of employment analysed here share a common trait: they are legally classified as self-employment. As with salaried work, there is no EU-wide concept of self-employment, and so its legal status is determined by the laws of each Member State.

In Spain, under Law 20/2007 of 11 July regulating the Self-Employed Workers' Statute (LETA, or *Ley Estatuto del Trabajo Autónomo*), a self-employed worker is someone who habitually and independently performs an economic or professional activity for profit. One initial noteworthy weakness of this is that the regulation fails to define the requirement of habitually performing an activity. This lack of definition creates a certain degree of legal uncertainty, especially considering that many of the forms of employment contemplated may not be performed continuously. This is the case with work done in the context of legal interim management (LIM), lawyers who are hired to execute specific temporary projects in the legal departments of companies and law firms; and the micro-tasks performed by professionals translating texts (smartling.com) or doing graphic design (upwork.com). 'Habitual' can be understood as a) work performed periodically; b) work performed that constitutes the central core of the subject's work life, or c) work from which sufficient income is obtained. Depending on which interpretation is applied to the term, the subjective scope of self-employment is either broadened or restricted. In practice, case law has adopted a quantitative criterion based on the minimum wage. This criterion is not exempt from criticism from the most authoritative opinion[61]*:* the social security administration itself has departed from it, applying a much stricter criterion in which workers must register as self-employed and pay social security contributions even if their level of income is low unless they can prove that their business activity is sporadic or

[60] EUROFOUND, *New forms of employment: 2020...*, *op. cit.*, p. 46.

[61] The Spanish Supreme Court, in its ruling of 29 October 1997 (rcud. 406/1997) stipulated that the amount of remuneration received by the self-employed is an appropriate criterion for measuring regularity of work and that exceeding the minimum wage received in one calendar year (currently €13,510) can serve as a suitable indicator of regular self-employment, even though the figure was established in association with the remuneration of salaried work. However, the opinion proposes going beyond this quantitative requirement and states that what is important is that the work is merely productive.

limited in scope. A more concise definition of the concept of self-employed is needed to prevent rigid regulation from stimulating the underground economy. The regulation of self-employment is subject to civil, commercial, and administrative legislation under the legal classification of the business established and individual agreements entered into by the client and the worker. Here, in our opinion, is where the second weakness is to be found: the regulations assume that the self-employed are professionals who can negotiate when in most cases they are obligated to accept the contract conditions offered to them. This is the case for portfolio workers, platform workers, and even some forms of collaborative employment. The result of their 'membership' can only be degradation of these groups' employment conditions that underscores the precariousness of self-employment: long working hours to guarantee the delivery of contracted services; unpaid unproductive time; greater exposure to occupational hazards; and fierce competition among service providers resulting in lower rates of compensation. In this regard, a suitable minimum wage[62] for self-employed workers is becoming increasingly necessary, because they do not enjoy the same contractual base salary as minimum-wage salaried employees do. This is an issue that has already been raised by some entities[63], along with the need for intervention by social agencies.

It is in this context of collective representation that the third of the weaknesses of the legal system governing self-employment is found. Recognizing the right to association restricted only to membership in a trade union and excluding all that collective action entails promotes the under-protection of self-employed workers. The emergence of these new forms of work does not always translate into situations of socioeconomic predominance, which is why these workers should be provided with a modern and flexible collective response that can only come from trade unionism[64] and collective bargaining. Classification as self-employed should not be an obstacle to the advocacy of trade unions[65] and

[62]The International Labor Organisation's Centenary Declaration for the Future of Work states that 'all workers, irrespective of their employment status or contractual status, should be guaranteed [....],' p. 7. Available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf (accessed 13 October 2021).

[63] The European Economic and Social Committee in its opinion on the 'Abuse of the status of self-employed,' 2013/C161/03 (OJEU, 6 June 2013) proposed setting minimum hourly rates through social dialogue that may vary even within the same Member State within regions.

[64] The author points out that trade unionism will provide a collective voice and response as well as social integration and governability. A. Ojeda Avilés, *La sindicación de los trabajadores autónomos y semiautónomos*, in *Revista Aranzadi Social*, 2000, n. 100, p. 5.

[65]The CJEU of 4 December 2014 (Case C-413/13 FNV Kunsten Informatie en Media) establishes that when a trade union acts as a representative of the self-employed persons affiliated with it, it loses its status as social partner and becomes an association of undertakings.

the promotion of the collective negotiation of certain aspects working conditions. However, in the opinion of the EU Court of Justice, this approach goes against rules on competition. The court has stated this in several rulings, finding that EU law has no provisions whereby members of the liberal professions are encouraged to seek collective agreements to improve their employment and working conditions[66], thereby misidentifying the concepts of 'undertaking' and 'self-employed.' The result is the inclusion of self-employed persons without employees under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), and possible inclusion in collective agreements of the 'false self-employed', a classification that cannot be attributed to the forms of employment examined here.

The existence of nomadic groups who work individually and independently for different clients in different sectors requires coordination of collective defense of their professional interests, not abandoning them to undertake on their own the individual negotiation of contractual conditions, which in actual practice does not occur.[67] To address this issue, the European Commission has launched a public inquiry to define the scope of application of EU competition law which, in certain circumstances, would allow the self-employed to improve their working conditions through collective agreements.[68] The draft Guidelines about collective agreements regarding the working conditions of solo self-employed people was presented on December 9, although some trade union organizations had already revealed its content[69], and opened the door to

[66] CJEU OF 12 September 2000 (Paulov, C-180/98 a C-184/98). In the opinion of Cabeza Pereiro 'When all is said and done, the underlying argument that the European Union has not provided for social dialogue mechanisms for self-employment similar to those in place for wage labour since the Maastricht Treaty is very unconvincing from a fundamental rights perspective.' J. Cabeza Pereiro, *Derecho de la competencia, libertad de establecimiento y de-colectivización de las relaciones de trabajo*, in *Revista Trabajo y Derecho*, 2015, n. 3, p. 7.

[67] In September 2018, The European Committee of Social Rights took an important decision on recognising self-employed workers' right to collective bargaining, taking the view that an absolute prohibition of this right would be excessive considering the object and purpose of Article 6.2 of the European Social Charter. Available at https://rm.coe.int/cc-123-2016-dmerits-fr/1680902967 (accessed 13 October 2021).

[68] Comments available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules_en (accessed 13 October 2021).

[69] For example, the International Federation of Musicians (FIM) https://www.fim-musicians.org/es/eu-collective-bargaining-for-self-employed-workers/ or the European Trade Union Institute (ETUI) https://www.etui.org/publications/collective-bargaining-and-self-employed-workers (accessed 13 October 2021).

collective bargaining to certain categories of self-employed people who are in a situation comparable to that of workers[70].

The fourth and final weakness we would like to address is social protection. The forms of self-employment we have analysed allow companies to satisfy their specific needs, whether of a technical nature, such as in interim management or of an economic nature, such as in platform work in which the primary goal is clearly to reduce costs.

The general dissatisfaction with the Spanish social security system for the self-employed is no secret; contributions are not linked to the worker's actual income and are viewed as excessively high. Therefore, most self-employed workers currently pay contributions at the minimum rate (85.5% in the fourth quarter of 2020), to maintain the lowest possible costs, even if it means sacrificing future social benefits. Moreover, this social protection is not comparable with that of employed workers, even though Spain's Self-Employed Workers' Statute (LETA) recognizes the need to establish a level of protection similar to that of employed workers in its preamble, as most self-employed workers have no employees to help them.[71]

This lesser social protection seems, to a certain extent, to be caused by reducing social security contributions as a way of promoting self-employment. We are referring to the so-called 'flat rate' contribution, which aims to encourage self-employment by reducing the amount of social security to be paid to €60[72] for 1–2 years, followed by reductions of variable percentages in the 12, 24, or 36 months following registration with the Special Regime for Self-Employed Workers (RETA) when certain requirements are met. In our opinion, the lower social security payment encourages the phenomena of false self-employment, which has two adverse impacts on workers: firstly, they are deprived of their labour rights, and secondly, they are left with reduced social protection due to the under-contribution this self-employment incentive

[70] European Commission. Draft for a Communication from the Commission "Guidelines on the application of EU competition law to collective agreements regarding the working condition of solo self-employed persons. Brussels, 9.12.2021 C (2021) 8838 final. An impact assessment report will be published in the second quarter of 2022 together with the final version of the Guidelines.

[71] Art. 23.1 of the LETA states that self-employed workers are entitled to the maintenance of a public social security system that guarantees them sufficient social assistance and benefits in situations of need, while Art. 26.5 and the second final provision of the LETA insist that the rights and benefits of the self-employed should converge with those in force for employed workers.

[72] If self-employed workers choose the minimum social security contribution, they must pay €286 per month, regardless of their actual income or whether they work full or part-time. It is important to remember that some of the forms of employment analyzed herein (platform work, crowd employment) are generally complementary sources of income.

entails. So, contribution formulas must be promoted that do away with the distinction between self-employment without employees and employed work. Sweden offers a good example of this. Swedish employers pay the same social security contributions for all forms of employees (whether they are salaried employees or self-employed) and are responsible for making these contributions on behalf of their workers. This is because contributions in Sweden are linked to income, not to the category of work[73], a demand of the self-employed in Spain that has not been met so far and which could resolve some of the issues regarding the social protection of workers engaged in emerging forms of employment.

Social protection depends on contributions to the social security system, which is set as the amount resulting from applying a rate of 30.6% to a base ranging from a minimum (944.40 €) to a maximum (4,070.10 €). These bases are not related to the self-employed worker's real income, which means that even in cases where no income is generated, the self-employed worker must pay the due amount.

The rigidity of social security contributions, disconnected as they are from the worker's real income, together with the tendency to pay contributions based on the minimum base rate to reduce costs, drives many self-employed persons to turn to systems like umbrella organizations and worker cooperatives to transform their freelance provision of services into a salaried provision of services for tax purposes. One might consider the possibility of these workers—using the same triangular relationship wage portage is based on—autonomously reaching agreements on the conditions of the provision of their services with their clients, and being subject to a protective system equivalent to that of salaried workers employing a contract with an intermediary company. This arrangement would be parallel with the current system for temporary employment agencies, which would mean supporting the employment of self-employed workers with the same instrument used to support the employment of salaried workers. This would give labour intermediation a wider scope of action, promote access to independent and flexible work better suited to the needs of both parties, and help to overcome the rigid separation between self-employment and salaried employment.

[73] A. Milanez – B. Bratta, *Taxation and the future of work: how tax systems influence choice of employment form, in OECD Taxation Working Papers,* 2019, n. 41. https://doi.org/10.1787/20f7164a-en.

4. Conclusions

EUROFOUND's reports on new forms of employment indicate that ICT-based mobile work, platform work, cooperatives, and coworking (the last two understood as collaborative employment) all exist in Spain. However, these reports should be approached with caution, as we have shown that interim management, portfolio work, and other practices associated with umbrella organizations included within the framework of collaborative employment are also found in Spain. Some of these new forms of self-employment are related to the activities of temporary employment agencies (interim management, wage portage), and as such, the legislation governing them should be adapted accordingly to encourage their expansion, especially at the EU level, given that globalization has blurred national borders. There are very few formal harmonized definitions of these phenomena, which would be an important precondition for establishing European Community regulatory frameworks and for quantifying and measuring them.[74]

In the Spanish legal system, the flexibility demanded by companies coexists poorly with the protectionism arising from labour law, which is why the self-employed are filling positions previously held by salaried workers. The point of departure is a body of regulation that views the self-employed as subjects with contractual power in their legal relationships. However, the economic reality reveals workers who change their professional career paths to become self-employed, who have no relevant infrastructure or subordinate employees and are not able to determine contractual conditions for the provision of their services. This is, therefore, a form of employment subject to precariousness similar to that of salaried employment.

This change in the profile of self-employed workers means the legal system for them will also have to be redefined to include provisions better suited to the peculiarities of the new services provided and the changing landscape of working conditions (because there is a risk that these new forms of work will increase the number of poor workers[75]) and to ensure an optimal level of social protection. Since new business models driven by digitalization are turning many self-employed workers into digital nomads characterized by professional isolation, individualism, and the collective lack of protection of their interests, there should be a push for quality self-employment in line with the European Pillar of Social Rights, with legislation that provides for the establishment of a

[74] EUROFOUND, *New forms of employment: 2020...*, *op. cit.*, p.5, p. 53.

[75] J.C. García Quiñones, *Nuevas tecnologías y nuevas maneras de trabajar colectivamente*, in L. Mella Méndez, P. Núñez-Cortés Contreras (Dir.), *Nuevas tecnologías y nuevas maneras de trabajar: estudios desde el Derecho Español y comparado (Alemania, Reino Unido, Polonia, Portugal y Argentina)*, Dykinson, Madrid, 2017, p. 88.

suitable minimum wage, that strikes a better balance between the workers' contributions to the social security system and their real income, and that promote collective bargaining and standardize employment conditions for those providing services in a given sector.

However, this horizon is very distant from the Spanish legislative response, which is characterized by inertia and a tendency toward clustering new forms of employment within the existing formal employment system as a response to the proliferation of self-employment. The rising rate of self-employment and the fact that its regulation does not always keep pace in terms of social protection have increasingly given rise to fraudulent practices and practices that border on illegality to assist self-employed people with low or irregular incomes. It is therefore imperative to prevent the devaluation of the rights of these workers and to re-examine the social security system to guarantee self-employed workers the same protections afforded to salaried workers. This is the only way to prevent social dumping.

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Minimum Wage as an Instrument to Provide Dignity at Work

Katarzyna Bomba *

Abstract

This paper analyses the minimum wage as an instrument to provide dignity at work. The major question is whether the minimum wage alone is sufficient to provide dignity at work and decent standards of living. The paper considers UN legal regulations, and ILO standards, including the Minimum Wage Fixing Convention No. 131, as well as the European Social Charter and the EU draft directive on adequate minimum wages. The paper examines the legal nature of the minimum wage, the criteria for fixing national minimum wages and whether this form of remuneration should be supplemented by social security benefits.

Keywords: *Minimum Wage; Social Huma Rights; Decent Work.*

1. Introductory Remarks

Human rights are indivisible and interdependent. The focus of social and economic rights is to ensure a minimum of social stability, without which people cannot freely participate in political life or exercise their civil liberties. For individuals, the sufficient income may arise from the realisation of property rights, the right to work for a decent wage or the right to social security. Property rights were the original basis for income. With the emergence of paid employment, the right to work, which provides the means of subsistence for professionally active people, was formulated. This was followed by the formulation of the right to social security, being a substitute

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for the right to work for those unable to work or temporarily left without a job[1].
Not every worker is capable of negotiating a wage that would provide him or her with an adequate material basis of subsistence. To ensure an individual the right to work of adequate quality, the state plays a regulatory role that covers social relations related to paid work. State intervention in this area is normatively expressed, *inter alia*, in the idea of a minimum wage. The question that emerges against this background is whether the minimum wage is an adequate instrument to ensure decent work and an appropriate standard of living for workers and their families. The role of the minimum wage in the modern labour market also requires in-depth analysis.

2. The Minimum Wage in International and European Law

In the search for the foundations of the minimum wage concept in international and European law, workers' rights to just and satisfactory wages deserve special attention. As provided by Article 23(3) of the UN Universal Declaration of Human Rights, everyone who works has the right to just and favourable remuneration, ensuring for oneself and one's family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection. A holistic interpretation of this provision leads to the conclusion that "just and satisfactory remuneration" is one of the elements of the right to quality work. According to Article 23(1)-(4) of the Declaration, this notion includes the right to work, free choice of employment, just and favourable conditions of work, protection against unemployment, the right to equal pay for equal work, the right (mentioned above) to just and favourable remuneration, as well as the right to form and join trade unions for the protection of workers' interests. The right to quality work is one of the basic human rights determining the fundamental conditions for pursuing a good life. It is worth noting that a good life is close to what might be called a "minimally decent life", understood in terms of pursuing the basic activities that human beings *qua* human beings need[2]. From this perspective, providing just and satisfactory remuneration is backed up by recognising that the inherent dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, as mentioned in the preamble of the Declaration. It should be noted that Article 23(3) of the

[1] A. Eide, *Economic and Social Rights*, (in:) J. Symonides (ed.), *Human Rights: Concepts and Standards*, Ashgate, UNESCO 2000, p. 120.
[2] S. M. Liao, *Human Rights as Fundamental Conditions for Good Life*, (in:) S. M. Liao, M. Renzo (eds.), *Philosophical Foundations of Human Rights*, Oxford University Press, Oxford 2015, p. 81.

Declaration states that, when necessary, wages may be supplemented by other social protection measures. Thus, it recognises that wages may not always meet the needs of workers and their families. Therefore, it may be supplemented by social security benefits.

With the inclusion of social rights in the catalogue of human rights, the Universal Declaration was fundamental to their development[3]. This found its normative expression primarily in the UN International Covenant on Economic, Social and Cultural Rights[4]. The Covenant formulates detailed solutions relating to the standards of paid work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts (Article 6(1)) and the derived right of everyone to the enjoyment of just and favourable conditions of work (Article 7(a))[5]. The Covenant lists such conditions as remuneration, which should ensure that workers receive a fair wage, determined in accordance with the principle of equal pay for work of equal value (Article 7(a)(i)), and enable a decent living for themselves and their families in accordance with the provisions of the Covenant (Article 7(a)(ii)). Thus, it follows from the Covenant that just and satisfactory remuneration consists of two elements. The first element relates to a fair wage and defines the rules for determining the amount of a fair wage as a consideration to be given in return for work done. The second relates to the determination of a minimum pay level, which would ensure a decent standard of living for the worker and his or her family in all cases. It follows from the structure of Article 7(a) of the Covenant that the minimum pay level is linked to external factors[6], such as the cost of living and other socio-economic conditions, rather than to the quantity and quality of the performed work (its economic equivalence).

The United Nations Committee on Economic, Social and Cultural Rights evaluates states' implementation of the obligation resulting from article 7 (a)(ii) of the Covenant with reference to a minimum wage[7]. It recognizes that national socio-economic conditions cannot justify setting a minimum wage in

[3] H. Collins, G. Lester, V. Mantouvalou, *Introduction: Does Labour Law Need Philosophical Foundations?*, (in:) H. Collins, G. Lester, V. Mantouvalou (eds.), *Philosophical Foundations of Labour Law*, Oxford University Press, Oxford 2018, p. 13.

[4] International Covenant on Economic, Social and Cultural Rights of 16.12.1966 r., https://www.ohchr.org/ (access: 30.06.2022).

[5] A. Eide, *Economic and Social Rights…,* p. 143.

[6] Z. Góral, *O kodeksowym katalogu zasad indywidualnego prawa pracy*, Wolters Kluwer, Warsaw 2011, p. 170.

[7] Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights*), sec. 19. https://www.escr-net.org/ (access: 30.06.2022).

disregard of this objective[8]. While the Committee notes that the criteria for determining minimum wage are flexible, in any case, they must take into account the socially acceptable standard of living so that the determined amount fulfils the worker's right to a decent wage and enables him or her to exercise the rights covered by the Covenant, *inter alia* with regard to education, health care and an adequate standard of living[9]. The Committee assumes that the minimum wage should remain in appropriate relation to the average remuneration and take into account national or regional wage levels (also those determined in negotiations) as well as the requirements for social or economic development, including the need to achieve high employment levels[10]. The minimum wage should be set in such a way that, together with social security benefits and legal instruments supporting families, it enables the worker and his or her family to enjoy a decent standard of living.

The preamble of the ILO Constitution, in turn, explicitly states that the realization of the principles of social justice in employment is a precondition for harmony and peace in the world. In these circumstances, fair working conditions with an adequate living wage must be ensured. The ILO's role in realising fair working conditions was further made more precise in the 1944 Declaration adopted in Philadelphia, setting out the ILO's aims and objectives[11]. The Declaration emphasizes that labour is not a commodity (Part I.a) and views human work and work conditions through this very prism[12]. Part III outlines the ILO's obligations, including supporting national efforts to formulate wage and remuneration policies that would ensure equitable distribution of the fruits of progress and a minimum living wage for all workers. This made one of the ILO's objectives to make a living wage a reality and an essential element of a fair society. This would be a wage that would allow the worker and his or her family to lead a simple but dignified life, at a level acceptable to their community, taking into account its economic development. This includes participation in social and cultural life[13]. This

[8] Committee on Economic, Social and Cultural Rights, *General Comment No. 23*…, sec. 19; B. Saul, D. Kinley, J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials*, Oxford University Press, Oxford 2016, p. 405.

[9] V. Brás Gomes, *The right to work and rights at work*, (in) J. Dugard, B. Porter, D. Ikawa, L. Chenwi (eds.), *Research Handbook on Economic, Social and Cultural Rights as Human Rights*, Edward Elgar Publishing, Cheltenham-Northampton 2020, p. 234.

[10] Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016)*…, sec. 21.

[11] ILO Declaration of Philadelphia. Declaration concerning the aims and purposes of the International Labour Organisation, 10.05.1944, https://www.ilo.org/ (access: 30.06.2022).

[12] A. Supiot, *L'esprit de Philadelphie. La justice social face au marché total*, Seuil, Paris 2010, p. 117.

[13] International Labour Organization, Committee of Experts on the Application of Convention and Recommendation, *General Survey of the reports on the Minimum Wage Fixing*

objective was restated in Part I.A(ii) of the 2008 ILO Declaration on Social Justice for a Fair Globalization, as well as in Part III.B(iii) of the 2019 ILO Centenary Declaration for the Future of Work. This objective was implemented in the ILO's actions on the minimum wage formula[14].

European law also provides the basis for establishing the right to a minimum wage. The European Social Charter[15], which treats rights relating to paid work as human rights, comes to the forefront[16]. The preamble explains that the adoption of the Charter serves the purpose of implementing ideas arising from a common heritage and facilitating economic and social progress, in particular, by defending and developing human rights and fundamental freedoms. In line with these assumptions, the objective of state policies includes the effective realisation of the rights and principles set out in Part I of the Charter, including the right of all workers to a fair remuneration sufficient for a decent standard of living for themselves and their families. (Part I, point 4). A worker's right to fair remuneration was further discussed in detail in Article 4 in Part II of the Charter. It follows that to guarantee the effective exercise of the right to fair remuneration, states undertake to recognise workers' rights to a remuneration that will give them and their families a decent standard of living (par. 1). The minimum wage provides a benchmark for the European Committee of Social Rights in assessing the state's compliance with the obligation under Article 4(1) of the ESC to ensure that workers are paid a fair remuneration. For this purpose, the Committee examines the relationship between the minimum wage and the average wage in a given country.

According to the Committee, the minimum wage should reach a decency threshold of 60% of the average wage. Under the ESC, a minimum wage set below this threshold is not automatically considered unfair. However, if, in a given country, the minimum wage is between 50-60% of the average national wage, the state needs to demonstrate that the workers and their families enjoy decent living standards. In particular, the European Committee of Social Rights assesses the cost of living, including health care, education, transport and others[17]. It also takes into account social transfers if these are made to full-time workers, regardless of their family situation. As a result, the assessment of

Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), *Report III (Part 1B)*, Geneva 2014, p. 27.

[14] E. Raynaud, *The International Labour Organization and the Living Wage*…, p. 11.

[15] European Social Charter, 18.10.1961, https://rm.coe.int/ (access: 30.06.2022).

[16] R. Brillat, *Labour Rights as Human Rights*, (in:) A. M. Świątkowski (ed.), *Ochrona praw człowieka w świetle przepisów prawa pracy i zabezpieczenia społecznego. Referaty i wystąpienia zgłoszone na XVII Zjazd Katedr/Zakładów Prawa Pracy i Zabezpieczenia Społecznego, Kraków 7-9 maja 2009 r.*, Warsaw 2009, p. 80.

[17] European Committee of Social Rights, *Digest of the case law*… 2018, p. 43.

the implementation of the fair remuneration postulate is not limited to the mere amount of the minimum wage. Z. Adams and S. Deakin rightly point out that in a free market economy, wages are the basic means of subsistence for workers and their families. The role of tax relief and benefits in adjusting household income to living circumstances is secondary in relation to the minimum wage[18]. Setting the minimum wage below 50% of average pay constitutes a violation of Article 4(1) of the ESC in any case. The European Committee of Social Rights recognises that irrespective of its relationship to the average wage, a worker's wage must be clearly above the national poverty line[19]. Thus, the concept of a minimum wage, although not stated *expressis verbis* in the Council of Europe's legal regulations, plays an important role in making a decent wage standard a reality.

In international and European law, minimum wages are explicitly provided for only in selected conventions and recommendations of the International Labour Organisation. They are also subject to a draft directive on adequate minimum wages in the European Union[20].

What must be noted with reference to the ILO's minimum wage regulations is that they vary in intensity from period to period. In 1928, the ILO adopted Minimum Wage-Fixing Machinery Convention No. 26[21], together with Recommendation No. 30 with the same title. Convention No. 26 only contains general principles for setting up mechanisms to establish minimum pay rates for workers employed in industries or parts of industries (especially in outworks) where there is no effective system for wage determination through collective labour agreements or otherwise, and where wages are exceptionally low. It also does not address how it should be implemented or the criteria for fixing minimum rates. These issues are regulated in Recommendation No. 30, which provides non-binding guidance for the correct implementation of the Convention's provisions. In 1951, Minimum Wage Fixing Machinery (Agriculture) Convention No. 99 was adopted[22]. Both Conventions are similarly structured. Convention No. 99 contains general rules on determining

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[18] Z. Adams, S. Deakin, *Article 4: The Right to a Fair Remuneration* (in:) N. Bruun, K. Lörcher, I. Schömann, S. Clauwaert (eds.), *The European Social Charter and the Employment Relations*, Oxford - Portland 2017, p. 218-219.

[19] European Committee of Social Rights, *Digest of the case law of the European Committee of Social Rights, Appendix*… 2018, p. 103.

[20] European Commission, Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, Brussels, 28.10.2020, COM(2020) 682 final.

[21] International Labour Organization, Convention No. 26 concerning Minimum Wage Fixing Machinery, https://www.ilo.org/ (access: 30.06.2022).

[22] International Labour Organization, Convention No. 99 concerning Minimum Wage Fixing Machinery (Agriculture), https://www.ilo.org/ (access: 30.06.2022).

minimum wages, leaving the details to the non-legally binding Recommendation. The limited practical scope of Conventions No. 26 and No. 99, coupled with States' obligations to provide a mechanism for fixing the minimum wage without detailed formulation of the requirements, meant that national regulations shaped based on these Conventions provisions did not guarantee that the minimum wage level would ensure an adequate standard of living for workers and their families. Moreover, at the same time, these conventions failed to see the minimum wage as an effective instrument of social protection or as an element of an economic development strategy[23]. In response to the far-reaching postulates for amendments in Conventions No. 26 and No. 99, the ILO decided to draft a new legal instrument. The work culminated in 1970 in the adoption of Minimum Wage Fixing Convention No. 131[24], with its complementary Recommendation No. 135.

These legal acts do not contain a definition of a minimum wage. The ILO Committee of Experts defines minimum wage as the minimum amount of remuneration that an employer is required to pay wage earners for the work performed during a given period, which cannot be reduced by collective agreement or an individual contract[25]. Such a minimum wage should enable meeting workers' basic and developmental needs. It is determined with the social and economic conditions in a given country taken into account to establish the highest possible level of guaranteed pay. The minimum wage should not have a significant negative impact on the employment level in the economic sectors with the lowest pay. According to the ILO Committee of Experts, the ultimate aim of ILO Convention No. 131 is to guarantee workers an income that ensures an adequate standard of living for themselves and their families while taking into account economic factors. The minimum wage policy must be considered both as an effective instrument of social protection and as part of an economic development strategy. The minimum wage is intended to provide adequate means of subsistence, but it does not guarantee that the amount set for a specific country meets this condition at a particular time[26].

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[23] International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135)*, *Report III (Part 1B)*, Geneva 2014, p. 5, sec. 9.

[24] International Labour Organization, Convention No. 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries, https://www.ilo.org/ (access: 30.06.2022).

[25] International Labour Organization, Committee of Experts…, *General Survey*… 2014, p. 33, sec. 68.

[26] International Labour Organization, Committee of Experts…, *General Survey*… 2014, p. 27, sec. 51.

Convention No. 131 is the first legally binding ILO document that obliges states to establish a universal minimum wage system that meets certain standards. It is also the first legally binding ILO regulation to formulate criteria for setting the minimum wage. Thus, a gradual widening of the subjective scope of the minimum wage and the development of detailed requirements for its determination can be observed. Not only did the assumptions for the legal structure of minimum wage change, but the function of the minimum wage also evolved from a poverty mitigation tool to an instrument of sustainable social and economic development. Convention No. 131 is now considered to be a legal act most fully formulating standards for the minimum wage[27].

3. Criteria for Fixing Minimum Wages

Detailed criteria for fixing minimum wages have been included in the relevant ILO legal instruments and the draft EU Directive on adequate minimum wages.

With respect to the ILO legal instruments, it should be noted that the first ILO Conventions do not explicitly formulate the criteria for fixing the minimum wage. It is only Convention No. 131 of 1970 in its Article 3 that lists, in a legally binding way, several social and economic factors that should be taken into account when setting minimum wages. Article 3 of Convention No. 131 provides that the elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include - a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups; b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

These provisions regulate social criteria and economic criteria separately. With regard to social requirements, it must be noted that the criterion of the needs of workers and their families constitutes an overriding indicator of a social nature for fixing the minimum wage. The needs of workers and their families must be satisfied with the remaining listed factors taken into account. The catalogue of criteria specified in the provision is close-ended. According to these regulations, the states should take these criteria into account *"so far as possible and appropriate in relation to national practice and conditions*." Therefore, the only viable conclusion is that Article 3(a) of Convention No. 131 leaves states

[27] W. Cunningham, *Minimum Wages and Social Policy. Lessons from Developing Countries*, World Bank, Washington 2007, p. xvi.

ample room to adapt these criteria to the national socio-economic situation. Convention No. 131 does not formulate the types of needs of the workers and their families that should be covered by the minimum wage. The link that Article 3(a) establishes between the needs criterion and several social factors reflects the complex nature of this indicator. Such a provision may give rise to practical problems at its application stage due to its detailed enumeration of criteria for fixing the minimum wage and its being legally binding[28]. It should be stressed that its interpretation should take into account the concept of an adequate living wage adopted in the ILO Constitution. As a result, the requirement listed in Article 3 (a) to meet the needs of workers and their families should not be limited to basic material needs.

As regards the economic criteria listed in Article 3(b) of ILO Convention No. 131, it should be noted that in determining the minimum wage, states should take into account factors of an economic nature, including the preconditions for economic development, the level of labour efficiency and the desire to achieve and maintain a high level of employment. The fact that the provision does not introduce a hierarchy between the specific economic criteria deserves to be stressed. These criteria are formulated in a very general way, without specifying what preconditions for economic development are at stake.

The draft EU directive on adequate minimum wage also refers to detailed criteria for setting their levels. In line with Article 5(1) of the Directive, the Member States with statutory minimum wages shall take the necessary measures to ensure that when setting and reviewing the statutory minimum wage criteria designed to promote their adequacy to ensure decent working and living conditions, social cohesion and positive convergence are taken into account. In relevant national legislation, decisions of the competent authorities or tripartite agreements, Member States define these criteria in accordance with their national practices. The criteria shall be established in a stable and clear way. According to Article 5, paragraph 2, of the Directive, the national criteria shall account for at least the following elements: a) the purchasing power of statutory minimum wages, taking into account the cost of living and the contribution of taxes and social benefits; b) the general level of gross wages and their distribution; c) the growth rate of gross wages; d) labour productivity developments. It should be noted that Article 5 of the Directive only refers to the determination of statutory minimum wages. It formulates an open catalogue of criteria that should be taken into account by the state when determining adequate minimum wages. At the same time, it does not provide a hierarchy between varied indicators. The catalogue provided in paragraph 2 focuses on maintaining the purchasing power of minimum wages and keeping

[28] E. Raynaud, *The International Labour…*, p. 23.

them in appropriate relation to the general level of wages and the economic growth rate. It does not make a direct reference to the requirement to provide for the needs of workers and their families. However, paragraph 1 implies that the criteria for fixing the minimum wage should be defined to ensure decent living conditions. It may be the case that the necessity to meet the needs of the workers and their families can be derived from the requirement to ensure decent living conditions. Indirectly, such a conclusion can also be drawn from the inclusion of "cost of living and the contribution of taxes and social benefits" among the criteria for setting minimum wages. It should also be noted that the literature proposes to delete "productivity" from the criteria for setting adequate minimum wages[29].

The criteria for fixing minimum wages in ILO regulations and the draft directive are highly general. Moreover, states have been left with a lot of freedom in adapting these criteria to national socio-economic conditions, as well as in adopting additional indicators. Limitations for the states in fixing minimum wages result primarily from the very nature of this instrument, which is intended to provide workers and their families with adequate means of subsistence. Such a method of regulating criteria for fixing the minimum wage promotes a compromise between the social needs of workers and their families and the financial capacity of employers, and the general economic development level of a specific country. International law and European law do not provide for a hierarchy between these two groups of factors. However, social requirements could be perceived as a priority since the meta-criterion of a decent living standard provides the basis for fixing the minimum wage.

4. The Significance of a Minimum Wage in Today's Labour Market

In the face of technological change and climate crisis, halting the process of the dehumanisation of work in the 21st century requires a revision of the concepts of work organisation and making production methods sustainable[30]. To remain active in this area, the ILO refers to the paradigm of sustainable development, which involves establishing rules to allow enterprises to thrive while sparing natural resources as much as possible while taking measures to ensure full and productive employment and decent work for all. Such a view of labour protection standards sets the requirements of the social aspect of sustainable development and has an impact on the achievement of economic and

[29] L. Visentini, *Directive on Adequate Minimum Wages: European institutions must respect the promise made to workers!*, Italian Labour Law e-Journal 2021, Issue 1, Vol. 14, p. 37.

[30] A. Supiot, *Labour is not a commodity: The content and meaning of work in the twenty-first century*, International Labour Review 2021, Vol. 160, No. 1, p. 5.

environmental objectives, thus contributing to guaranteeing decent work in the broad sense[31]. A minimum wage is one of the indicators adopted by the ILO to assess progress in the way countries provide for decent work[32].

Recognising a minimum wage as one of the requirements for decent work was reflected primarily in the 2008 Declaration on Social Justice for Fair Globalization. In this Declaration, the ILO reaffirmed its constitutional principles and specified that making progress and social justice a reality in ever-changing circumstances requires the development of further global programmes for full employment, improved living standards, a minimum living wage and the expansion of social security benefits to guarantee a basic income for all in need of such protection. It also states that, alongside other policies on working conditions, measures aiming to make such wages a reality should be part of the ILO's global and integrated strategy for decent work[33]. In the context of implementing the above-mentioned objectives, it is the 2010 Resolution concerning the recurrent discussion on employment that attracts attention. It states that the minimum wage should be understood as an instrument to reduce poverty and inequality, increase demand and support economic stability. Convention No. 131 should provide guidance for the implementation of these intentions[34].

The 2008 ILO Declaration is referred to in the 2015 Resolution concerning the recurrent discussion on social protection (labour protection)[35]. According to this resolution, remuneration policies are an element of a strategy for decent work and sustainable development. It recognises that a minimum wage is conducive to ensuring fair and equitable distribution of the fruits of progress. It protects workers against unduly low wages and is one of the instruments for overcoming poverty. It also stresses that it should apply to all workers, regardless of the legal basis of their employment.

Current ILO activities reflect this perspective. The 2019 ILO's Centenary Declaration on the Future of Work reaffirms its constitutional principles[36]. It also describes the conditions in a changing world of labour, including

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31 T. Novitz, *Engagement with sustainability at the International Labour Organization and wider implications for collective worker voice*, International Labour Review 2020, Vol 159, No. 4, p. 464-465.

32 ILO Declaration on Social Justice for a Fair Globalization, 10.06.2008, Geneva 2008, p. 13.

33 Part I.A(ii) of the 2008 ILO Declaration.

34 *Resolution concerning the recurrent discussion on employment,* 16.06.2010, (in:) *Resolutions adopted by the International Labour Conference at its 99th Session, Geneva June 2010*, International Labour Office, Geneva 2010, p. 11.

35 *Resolution concerning the recurrent discussion on social protection (labour protection)*, 12.06.2015, sec. 7-8, https://www.ilo.org (access: 30.06.2022).

36 A. Supiot, *The tasks ahead of the ILO at its centenary*, International Labour Review 2020, Vol. 159, No. 1, p. 122.

technological innovation and demographic, climate and environmental changes and globalisation. The declaration highlights the impact of persistent inequalities on the nature and future of work and respect for workers' dignity. Therefore, a human-centred approach to the future of work, based on 'trilateralism' and social dialogue, must be further developed. To this end, the very institution of labour must be strengthened, and all workers must be granted adequate protection measures. Such protection measures should be in line with the Decent Work Agenda and, therefore, require the provision of an adequate minimum wage, established by law or through negotiation[37].

Despite the ILO's universal mandate in labour protection[38], the minimum standards it sets may still not be adopted by member states. Minimum wage conventions are binding upon states only if ratified. ILO Member States' failure to directly apply these legal instruments has prompted a search for ways of making the standards formulated therein a reality outside the scope of normative activities of the organisation.

Close links between the ILO's decent work goals and the goals adopted in 2015 in the United Nations 2030 Agenda for Sustainable Development should also be stressed[39]. The 2030 Agenda provides for action to ensure decent work for all women and men and the implementation of its four pillars, i.e., job creation, social security, working conditions and social dialogue[40]. The 2030 Agenda provides a form of pressure on the states to take action conforming with these assumptions. It formulates 17 goals that address three different dimensions of development: social, economic and environmental. Goal 8 of the 2030 Agenda calls for the promotion of sustainable, inclusive and balanced economic development, full and productive employment and decent work. Moreover, it links the implementation of these postulates to labour law. In turn, the tenth objective of the Agenda concerns the reduction of inequalities within and between countries, among others, through the adoption of wage policies progressively leading to greater equality. Such an approach follows the objectives set out by the ILO in its Decent Work Agenda[41]. Not only does it

[37] Part III lit. B(ii) of the 2019 ILO Declaration.

[38] A. Supiot, *Labour is not a commodity: The content and meaning of work in the twenty-first century*, International Labour Review 2021, Vol. 160, No. 1, p. 126.

[39] UN General Assembly Resolution, Transforming our world: the 2030 Agenda for Sustainable Development, 25.09.2015, https://www.un.org/ (access: 30.06.2022).

[40] G. Casale, M. Fasani, *An Overview of the Main ILO Policies and Tools in the Organization of Promotional Activities on Social Rights*, (in:) A. Perulli, T. Treu (eds.), *Sustainable Development, Global Trade and Social Rights*, Wolters Kluwer International 2018, p. 177.

[41] ILO, *Time to Act for SDG 8. Integrating Decent Work, Sustained Growth and Environmental Integrity*, Geneva 2019, p. IX.

confirm the ILO's intentions regarding decent work and minimum wages, but it also contributes to strengthening their impact.

It should be noted that Goal 8 of the 2030 Agenda is reflected in the activities of the Council of Europe. This organisation supports member states in implementing sustainable development goals[42]. Article 4 of the European Social Charter refers to the right to fair remuneration, which makes decent subsistence possible, and, according to the European Committee of Social Rights, this objective is implemented with reference to the minimum wage[43]. In this way, the activities of the Council of Europe match the ILO minimum wage regulations. Therefore, it should be assumed that the minimum wage standard plays an important role today in the UN's efforts, in cooperation with the ILO and the Council of Europe, to promote sustainable socio-economic development and ensure decent working conditions. It appears that the adoption of this perspective results from the conviction that it is not possible to provide conditions for personal development without, at the same time, guaranteeing a material basis for subsistence.

The ILO's influence on shaping the European Pillar of Social Rights in the European Union is also noteworthy. In its 2016 report, "Building a Social Pillar for Social Convergence", the ILO indicated that a balanced approach to minimum wage policy based on the principles provided for in ILO legal instruments could reduce worker poverty in the EU and help limit competition based on reducing wages while promoting sustainable enterprises and sustainable economic development. In point 7 of the Recitals, the European Commission's draft directive on adequate minimum wages in the European Union[44] explicitly refers to Convention No. 131. The draft directive recognises minimum wages as a key element of the EU social market economy. The conclusions on promoting the ILO Centenary Declaration on the Future of Work, adopted in 2019 by the EU Council, are also noteworthy[45]. This perspective was confirmed in May 2021 in the declaration adopted at the EU Social Summit in Porto.

[42] *Indicative list (not exhaustive) of Council of Europe Conventions and Partial Agreements contributing to the United Nations 2030 agenda for sustainable development goals*, www.coe.pl (access: 30.06.2022)

[43] *Digest of the case law of the European Committee of Social Rights,* December 2018, p. 85, //rm.coe.int/ (access: 30.06.2022).

[44] COM(2020)682.

[45] EU Council Conclusions, The Future of Work: the European Union promoting the ILO Centenary Declaration, 24.10.2019, 13436/1/19 REV 1.

5. Conclusions

All workers have the right to a wage that provides them and their families with a decent standard of living. A minimum wage is one of the instruments fostering a decent standard of living. It follows from international and European regulations that ensuring a decent standard of living goes beyond satisfying basic human needs such as food and housing. It also covers social and cultural life. Thus, the minimum wage will not always be set at a decent level with regard to national social and economic conditions. In such situations, to ensure a decent standard of living for the workers and their families, other social policy instruments need to be implemented, particularly social security benefits. It is not exclusively the employer who is responsible for ensuring a decent standard of living for the workers and their families. It is a challenge for the whole of a society organised on the basis of human rights and the principle of social solidarity[46]. Therefore, when fulfilling this objective, the minimum wage may be supplemented by social transfers, especially social security benefits. However, it needs to be stressed that it is the minimum wage as an income from work that plays an essential role in providing decent living conditions for workers and their families. For this reason, it should be set well above the poverty threshold in all cases.

In the face of globalisation, pauperisation and the dehumanisation of work, a minimum wage is an essential tool for achieving the paradigm of sustainable social, economic and environmental development. The minimum wage primarily affects its social aspect. However, it remains not without influence on the economic and environmental dimensions. A properly shaped and enforced national minimum wage policy may contribute to ensuring decent work conditions in the 21st century. It makes it possible to distribute the fruits of progress throughout the whole society[47] to guarantee a minimum income that enables all the employed to earn their living[48]. However, poorly designed wage policies could jeopardise the well-being of workers and their families and increase the attractiveness of undeclared employment. For these reasons, preventing the dehumanisation of work requires more than simply setting a minimum wage[49]. It must be followed by the implementation of other social

[46] T. Mertens, *A Philosophical Introduction to Human Rights*, Cambridge University Press, Cambridge 2020, p. 253

[47] International Labour Organization, *Global Wage Report 2020-21. Wages and minimum wages in the time of Covid-19*, International Labour Office, Geneva 2020, p. 166.

[48] *ILO Declaration on Social Justice for a Fair Globalization*, Geneva 2008, p. 6.

[49] E. Albin, *Social inclusion for Labour Law: Meeting Particular Scales of Justice*, (in:) H. Collins, G. Lester, V. Mantouvalou (eds.), *Philosophical Foundations of Labour Law*, Oxford University Press 2018, p. 304.

protection measures. Only such a combination is capable of guaranteeing a decent standard of living for workers and their families.

The New Concept of a 'Worker' in the Field of Collective Dismissals

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Abstract

The most striking element in the delimitation of collective dismissal is the establishment of a numerical-percentage threshold from which an essentially individual act, such as dismissal, is transformed, for procedural purposes, into another act of collective significance. This quantitative component becomes qualitative when the focus of attention is established in the literal reference to "habitually employed workers". Here, the first of the elements of interest for the study appears, given by the notion of worker. Next to this, the personal nature of this component is translated into two other unavoidable references, such as the habitual nature of the service and the causes not inherent to the worker's person.

Keywords: *Caste prejudice; Racial Discrimination; Equality Act; Positive Duty.*

1. The Concept of a Worker as a Prerequisite for Collective Dismissal

The notion of "habitually employed workers" constitutes one of the determining assumptions in the classification of collective dismissal, making the subjective factor a fundamental factor for the application of Directive 98/59. By focusing on the trio of words, the criterion of the Court of Justice of the European Union coincides with that of practically all the other continental legal systems when it comes to separating employees from the self-employed, thus creating two opposing conceptual categories[1]. It ignores, however, a third

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[1] Martín Valverde, A.: "La jurisprudencia social del Tribunal de Justicia de la Comunidad Europea: evolución y tendencias recientes", *Revista Española de Derecho del Trabajo*, núm. 135 (2007).

one which is naturally called upon to constitute the grey or intermediate zone connecting the two fundamental nuclei.

In this sense, and just as it is a permanent headache for national judges to delimit how many figures conceal subordinate labour in the form of a civil or commercial contract, in order to give life to a "false self-employed person", the same dilemma is transferred to the European judiciary[2]. However, one difference will be fundamental: the concept of worker cannot be defined by reference to the laws of the Member States but must be interpreted autonomously and uniformly according to the concurrence or not of the three objectives criterion[3].

These guidelines selected by supranational case law prevent any possibility of the legislator or the national courts being free to place atypical figures in any other central category than the only two admitted in the Community acquis: either worker or self-employed; tertium non datur. The indices to be weighed up are: i) the fact of being someone else, as an essential element, regardless of whether it applies to the fruits or to the risks; ii) dependence, i.e., the performance of productive services under the direction and control of another person; iii) remuneration, as a consideration that is often called upon to decide the nature of the link, regardless of its form[4].

If we take into account these rigid elements foreseen for the demarcation, and focus the analysis of the concept of worker only in the context of collective dismissals, we will discover that the number of those usually employed may depend, and not just anecdotally, on whether or not certain relationships are classified as employment relationships; at the same time, it will allow us to verify, from this privileged vantage point and with greater rigour, the characteristics that define an employee.

The first judgment in time deals with the question of whether a member of a capital board of directors who, through a mandate contract, provides services for a public limited company in Germany, must be included in the workforce for the purposes of collective redundancy. The CJEU resolves the doubt in the

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[2] Cavalier, G. and Upex, R.: "The concept of employment contract in European Union Private Law", *The International and Comparative Law Quarterly*, Vol. 55, núm. 3 (2006) and Davidov, G.; Freedland, M. and Kountouris, N.: "The subjects of Labor Law: 'Employees' and other workers", en AA.VV. (Finkin, M. and Mundlak, G., Eds.): *Research Handbook in Comparative Labor Law*, Londres (Edward Elgar) (2015).

[3] STJUE 12 October 2004 (C-55/02), subject *Comisión c. Portugal* and García-Perrote Escartín, I.: "La aplicación por el Tribunal de Justicia de la Unión Europea de la Directiva sobre despidos colectivos y su repercusión en el Derecho español", *Actualidad Jurídica*, núm. 49 (2018).

[4] STJUE 20 September 2007 (C-116/06), subject *Kiiski* and Cabeza Pereiro, J.: "El concepto de trabajador en la jurisprudencia del Tribunal de Justicia de la Unión Europea", *Documentación Laboral*, núm. 113 (2018).

light of the questions referred for a preliminary ruling by the Republic of Latvia, in order to establish clearly "that a member of such a board who, in return for remuneration, provides services to the company which appointed him and of which he is an integral part, who carries out his activity under the direction or control of another body of that company and who may, at any time, be dismissed from his duties without restriction", fulfils all the requirements to be classified as an employee, even if it was a commercial and not an employment relationship formally intended to link the director to his rediscovered employer[5].

Along the same lines, there is a second pronouncement, for the case in which a German company intends to terminate its activity, terminating the employment contracts of all its employees and dispensing with the obligatory notification to the Administration of any collective redundancy plan, even though the measure would exceed the threshold of 20 workers provided for in the German regulations to be classified as such. The key was the consideration of three persons as employees or not: one of the cases called for an assessment of the case of unilateral voluntary termination of the contract; another case concerned the loss of the status of administrator in those who did not have any shareholding in the company; the last concerned those who undertook professional retraining but paid by the employment authority and not by the employer.

With a forcefulness worthy of note, the CJEU resolves the dispute by affirming the employment status of the three cases and calling for collective proceedings as soon as it wished to be dealt with in its margin.

Thus, first, the voluntary termination of the employment relationship does not detract from the fact that the person concerned was a member of the workforce for the historical purposes to be taken into account; secondly, it considers 'that although a member of the management of a capital company has a margin of discretion in the exercise of his functions which exceeds, in particular, that of an employee (...), it is no less true that he is in a subordinate relationship to [that company]'; lastly, it also considers that the status of employees is 'persons who carry out a preparatory trainee activity of a preparatory nature in the exercise of their functions'.), the fact remains that he is in a relationship of subordination to [that company]"; have the status of workers, given that such periods are carried out under the conditions of a real and effective paid activity, for an employer and under his direction"[6].

[5] STJUE 11 November 2010 (C-232/09), subject *Danosa* and Menegatti, E.: "The evolving concept of 'worker' in EU Law", *Italian Labour Law e-Journal*, Vol. 12, núm.1 (2019).

[6] STJUE 9 July 2015 (C-229/14), subject *Balkaya* and Van Peijpe, Y.: "EU limits for the personal scope of Employment Law", *European Labour Law Journal*, Vol. 3, núm. 1 (2012).

The two rulings that act as leading cases in the matter show a clear vocation for protection, or pro-worker, when defining the subjective scope of collective dismissal. The picture becomes even clearer if we weigh up some other issues present in these, or other cases assessed by the High Court[7]:

A) The Community legislator has sought to ensure a similar protection of workers' rights throughout the Community territory. Alongside such a guarantee, "and with equal importance" [8], it has sought to measure the burdens derived for companies within the European Union, trying to counteract the possible social dumping that could follow from the decision to install or relocate companies in those countries with less protective legislation in this area[9].

The above precaution means that, although there is a certain flexibility in allowing each State to establish how to calculate the number of employees affected, two unavoidable limits are nevertheless introduced: on the one hand, the European alternatives have, in their numerical extremes, the status of minimum provisions (consequently, they admit only the play of more favourable conditions, introduced by the national legislator or the social partners); on the other hand, when it comes to assessing whether or not an employee is a worker, or, as a result, whether or not an employment relationship is terminated for reasons not related to the worker's person, there is no margin for the national judge to ignore the pattern set by the European judicial body[10].

B) Subordination raises the question of whether the old question of personal and/or economic dependence should be weighed up from a rigid perspective, or whether it can be measured by means of a flexible criterion.

The example of the German company director is an unavoidable reference, and a model of flexicurity in this respect[11], leading the Court of Justice to advocate a "case by case" assessment under five basic parameters: i) the

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[7] González de Patto, R.M.: "El impacto de la reciente jurisprudencia comunitaria en el régimen jurídico español de despido colectivo", en AA.VV. (Molina Navarrete, C., Coord.): *Impacto sobre la legislación laboral española de la jurisprudencia del Tribunal de Justicia de la Unión Europea: XXXVII Jornadas Universitarias Andaluzas de Derecho del Trabajo y Relaciones Laborales*, Sevilla (Consejo Andaluz de Relaciones Laborales) (2019).

[8] Morin, M.L., et alii: "Economic redundancy: The paradoxes of exemplary protection", en AA.VV. (GALLIE, D., Ed.): *Resisting marginalization*, Oxford (Oxford University Press) (2004).

[9] STJUE 13 February 2014 (C- 596/12), subject *Comisión c. Italia* and Taylor, Ph.: "An umbrella full of holes? Corporate restructuring, redundancy and the effectiveness of ICE regulations", *Industrial Relations*, Vol. 64, núm. 1 (2009).

[10] STJUE 18 enero 2007 (C-385/05), subject *Confédération Générale du Travail y otros*.

[11] Kenner, J.: "New fronteries in EU Labour Law: from flexicurity to flex-security", en AA.VV. (Dougan, M. and Currie, S., Eds.): *50 Years of the European Treaties. Looking back and thinking forward*, Londres (Hart Publishing) (2009).

conditions of the contract; ii) the nature of the functions entrusted; iii) the framework for their performance; iv) the scope of the powers conferred on the person concerned, and finally; v) the control and power granted to the company in respect of this type of employee.

C) The note on remuneration has been appropriately qualified regarding the consideration that trainees deserve (when professional retraining); specifically, when it comes to classifying those who carry them out "without receiving remuneration from the employer but receiving financial assistance from the public body responsible for promoting employment for that activity". According to the CJEU, what is important is not where the consideration comes from, but that it exists and that the company is the subject on which it depends. It thus endorses what it has already held in other contexts in which it has held that remuneration exists even though its amount is low because it depends on limited productivity, not carrying out complete tasks or working a reduced number of hours per week[12].

D) At the end of the day, the legal nature that the law or case law of a Member State (employment, whether ordinary or special, senior management, commercial, etc.), or the origin or amount of the remuneration, cannot be detrimental to the rights conferred by the Directive, since what should prevail are the features of dependence, dependence and remuneration - higher or lower, it is repeated - as factors observed under the crucible of a reading in favour of the worker.

The situation is all the clearer when what is present is not a weak character in the characteristic notes of the contract, but rather the simulation that could find protection in the rule itself, as occurs in the case of the TRADE in Spain[13], since despite their functional autonomy, they carry out their activity with a strong economic dependence on the employer or client who hires them, and can be classified for these purposes as authentic "false self-employed"[14].

This appeal to the Spanish legal system would require a second, much more subtle, rectification to consider whether a reading is possible in which it would be feasible to dispense with the notes of voluntariness and outside involvement also demanded in Article 1.3 ET, in order to lead to a notion of worker based

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12 STJUE 3 July 1986 (C-66/85), subject *Lawrie-Blum*; STJUE 26 february1992 (C-3/90), subject *Bernini;* and STJUE 17 march 2005 (C-109/04), subject *Kranemann*.

13 Cruz Villalón, J.: "El trabajo autónomo económicamente dependiente en España: breve valoración de su impacto tras algunos años de aplicación", *Documentación Laboral*, núm. 98 (2013).

14 Valdés Dal-Ré, A.: "Lo Statuto del lavoro autonomo nella legislazione spagnola, con particolare riferimento al lavoro autonomo economicamente dipendente", *Diritto delle relazioni industriali*, Vol. 20, núm. 3 (2010).

exclusively on the concepts of dependence and remuneration[15]. This is undoubtedly a key factor in preventing domestic law from undermining the aim pursued by the European legal system and leading to disregarding a key element of the protection granted to all workers.

A nuance that has hardly been explored to date, but with unquestionable potential for expansion, is the consideration that should be given to occasional or menial work. Usually masked under the condition of friendly, benevolent, or neighbourly work in Article 1.3 d) ET, their unquestionable importance through formulas such as on-call work or zero-hours contracts has also led to other key pronouncements by the CJEU on the consideration (or not) as workers of those who provide their services through such unique links.

This is the case, in a paradigmatic example, with reintegration or re-education activities, whose valuation as work will depend on how much priority is given[16]: if the social purpose does so, there will be no benefit as an employee, because its beneficiaries "are not selected according to their capacity to carry out a certain activity but, on the contrary, it is the activities to be carried out that are conceived according to the capacity of the persons who have to carry them out, with the aim of maintaining, recovering or promoting their work aptitude"[17]; on the other hand, when the productive work is highlighted precisely through the remuneration paid by the company to the person to whom the right to reintegration has been recognised, it can only be considered that the person concerned carried out the activity "within the framework of a relationship of subordination, services in favour of his employer for which he obtains remuneration, in such a way as to satisfy the essential requirements of the employment relationship"[18].

In a second example, he focuses his attention on the preparatory activities for a profession which only represent a first contact with what could be a future job; he considers, however, that the person who carries out these periods of apprenticeship, which "can be considered as a practical preparation linked to the actual exercise of the profession in question, must be considered as a

[15] Maneiro Vázquez, Y.: "El régimen del despido colectivo en el ordenamiento europeo: contrastes y fricciones con el ordenamiento español", *Revista del Ministerio de Empleo y Seguridad Social*, núm. 12 (2017).

[16] Bell, M.: "Disability, rehabilitation and the status of worker in EU Law: Fenoll", *Common Market Law Review*, Vol. 53, núm. 1 (2016).

[17] STJUE 31 may 1989 (C-344/87), subject *Bettray* and Menegatti, E.: "Taking EU Labour Law beyond the employment contract: the role played by the European Court of Justicie", *European Labour Law Journal*, Vol. 11, núm. 1 (2019).

[18] STJUE 26 November 1998 (C-1/97), subject *Birden*.

worker, when the said periods are carried out under the conditions of a real and effective activity as an employee"[19].

1.1. "Habituality" as a Feature of the Worker: Members of the Workforce and Temporary Workers

Although the notion of worker does not distinguish between strictly temporary benefits and those of an indefinite nature, in the European definition of collective dismissal, the reference to "habitually employed workers", as the ultimate condition on which to weigh up the different contractual terminations, leads to the question of whether the latter should be considered, (or not), those that involve the fulfilment of an initially agreed condition or term. In short, the question must be whether a "temporary" worker is also a "regular" worker or not.

The obvious lacuna in this respect in the Spanish legislation has caused considerable controversy between the Administration and the Courts, and has been adequately answered by the CJEU, precisely when it resolved a preliminary ruling question from Spain.

In this respect, it makes a double distinction between, on the one hand, the consideration that the termination itself may merit and, on the other, the assessment to be made of the temporary worker in the group of employees in the service of the company.

As regards the first of these aspects, it draws attention to the fact that the termination of a temporary relationship does not take place at the sole will of the employer, "but by virtue of the clauses they contain or of the applicable regulations, when they come to an end or when the task for which they were concluded is carried out"; as a result, it confirms that the "regular" temporary worker does not deserve the same protection in this respect as the permanent worker and, conversely, those who are irregular because they have been contracted in fraud of the law will find the indirect protection of forming part of the number or percentage of terminations that can be taken into account when classifying the dismissal as collective[20].

In this way, an expansive tendency can be seen in the Community concept of collective dismissals, as it is extended both in its subjective aspect (European concept of worker) and in its objective aspect (new eligible dismissals).

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[19] STJUE 19 November 2002 (C-188/00), subject *Kurz* and Barnard, C.: EU *Employment Law*, 4ª ed., Oxford (Oxford University Press) (2012).

[20] Cortés, S.: "Redundancy declared void based on Directive's horizontal effect as regards collective redundancy thresholds (SP)", *European Employment Law Cases*, núm. 1 (2017) and Kenner, J.: "The enterprise, labour and the Court of Justice", en AA.VV. (Treu, T., and Perulli, A., Eds.): *Enterprise and social rights*, Alphen aan den Rijn (Kluwer Law International) (2017).

The perspective changes radically when we move from the singular situation of the temporary worker to his or her assessment as a possible member of the workforce, understood as a stable unit on which the ultimate index of a plural termination is based. While the Directive remains silent and tacitly refers to what is established by domestic legislation as to whether a relationship is consolidated or not, the lack of specificity of the national rule could well lead to the absurdity of considering that employees with a long-standing relationship with the company through temporary contracts are not common[21].
When integrating such an obvious gap, one could even invoke a triple legal reference which, by analogy, could serve to resolve the thorny issue of temporary staff: firstly, the systematic argument would lead to focusing attention on Article 6.4 RD 1483/2012, of 29 October (hereinafter, RDPDC), when it requires the employer, among the documentation to be provided, to submit information on employment contracts lasting less than one year; secondly, Articles 69.2 ET and 6. 5 RD 1844/1994, of 9 September, grant the right to be eligible for election in the elections foreseen for unit representatives to those who can prove 6 months' seniority in the company, understood as having sufficient roots in order to be able to act on behalf of the workforce; lastly, Articles 72.2 b) ET and 9.4 RD 1844/1994, when calculating the workers at a centre to determine the quality of the body and the number of members to be elected, consider that "every 200 days worked or fraction thereof will count as one more worker".
Called upon to propose a solution where there is no known judicial criterion, administrative practice came to favour the systematic criterion reproduced above, except when the workers' representatives invoked the criterion of the most favourable rule, in which case, and as a sign of good faith, they came to admit the application by analogy of the electoral regulations [22].

1.2. Reasons not Inherent to the Worker

The relevance of the worker as the central figure of the institution does not end with his direct protagonist in the numerical factor but is connected in the Directive with the evident subjective bias incorporated in its reference to the "reasons not inherent to the worker".
The reference to the European legal system is as amphibological or labile as it is difficult to translate into all continental legal systems. It constitutes an unparalleled autonomous category, as the only alternative that has arisen for the purpose of reconciling a core element that radically separates the national

[21] STJUE 11 November 2015 (C-422/14), subject *Pujante Rivera*.
[22] Fernández Domínguez, J.J.: *Expedientes de regulación de empleo*, Madrid (Trotta) (1993).

legal systems into two large groups: those that construct the termination of the employment relationship on a causal model and those that do so regardless of any reason whatsoever. In this way, the participation of the worker's will or not now of terminating the contract will stand as the ultimate taxonomic element, and shared by all, when it comes to deciding whether a specific decision to terminate the employment relationship should be taken into account or ignored when integrating the final calculation of terminations that set the threshold for collective dismissal[23].

The transposition carried out by the Spanish rule, mimetically reproducing the terms of the European rule, leaves the national interpreter with the task of reading one by one the salutary means of the employment contract set out in the Workers' Statute, and depending on the presence or absence of a free will of the worker in the termination of the contract, classifying that specific case as inherent or outside his or her person. As a result of which, proceed to calculate or discard it in a balance sheet, the results of which can be summarised as follows.

1.2.1. Terminations not Linked to the Employee's Will

The list of cases that must be considered to constitute a collective dismissal, in its quantitative and qualitative dimension, must be reduced to the causal expressions set out below:

A) Termination of temporary contracts, whether concluded in fraud of the law or by decision of the employer before the expiry of their term or of the condition that covered them, not in vain can they be placed in an analogous position to contracts for an indefinite period, the former having to enjoy identical protection to that granted to the latter[24].

The reason for the weighting of those entered in fraud of law within this category lies in the fact that, although the worker has formally given his consent, in its conformation there is the serious defect of violating the provisions of the law, which is why it is null, and void has no effect. As regards the latter, there is no difference with a dismissal when it is the employer who decides to unilaterally terminate a temporary contract prior to the date or event fixed for its termination.

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[23] Martínez Moreno, C.: "Los despidos colectivos (Directiva 98/59 CE y normas precedentes)", en AA.VV. (García Murcia, J., Coord.): *La transposición del Derecho Social Comunitario al ordenamiento español: un balance en el XX aniversario de la incorporación de España a la Comunidad Europea*, Madrid (Ministerio de Trabajo y Subjects Sociales) (2005).

[24] López Cumbre, L.: "Contratos temporales y extinciones por voluntad del trabajador, pero a iniciativa de la empresa. Consecuencias en el despido colectivo", *Análisis Gómez-Acebo & Pombo*, December (2015).

B) Withdrawal during the probationary period. When Art. 14 ET allows either of the parties to terminate their relationship without the need to invoke any reason, it grants a freedom whose effects are far from equal depending on who exercises it: if the worker does so, there is no doubt that such termination should not be counted; however, if the initiative is the employer's, it seems clear that there is no will on the part of the employee and, consequently, it should be included in the set of terminations to be weighed up[25].

C) Failure to call permanent discontinuous workers. Failure to comply with what derives from art. 16.2 ET means that the employer is subject to the effects of the reaction that the regulation itself classifies as dismissal, i.e., unilateral termination; on this occasion, moreover, without invoking any cause whatsoever.

D) Termination at the will of the employee due to serious and culpable breaches that could be imputed to the employer. This case, one of the most controversial, pits what is formally a manifestation of the employee's will (which would lead to excluding its consideration in this area) against what lies at the heart of the matter (an action or omission by the employer of which the employee's decision is merely a reaction). It is easy to imagine that anyone whose working conditions are altered in a way that undermines his dignity or professional training, whose wages are not paid in due time and form, who is not provided with effective employment, who suffers moral or sexual harassment at work, etc., is far from being free when it comes to continuing his relationship with the employer, who immediately or indirectly ends up being the efficient cause of the contractual termination[26].

E) Extinction of the employer's legal personality. Two notes of the CJEU come to clear up any doubts about its consideration: firstly, and from the causal point of view, there can be no doubt as to its lack of connection with the employee's will; secondly, and for the most complex cases of judicial termination of activities (which includes dismissals authorised by the Commercial Court under Royal Legislative Decree 1/2020, of 5 May, approving the revised text of the Insolvency Act), it is clearly established that the Directive applies to "a judicial decision ordering its dissolution and liquidation due to insolvency, even if national legislation provides for the

[25] Garrido Pérez, E.: "Ámbito material de aplicación de los despidos colectivos", en AA.VV. (Cruz Villalón, J., Coord.): *Los despidos por causas económicas y empresariales*, Madrid (Tecnos) (1996); Hießl, C. and Laleta, S.: "Implementation problems of the Collective Redundancies Directive and their consequences: the Croatian example", *Europäische Zeitschrift für Arbeitsrecht*, núm. 20 (2017) and Asquerino Lamparero, M.J.: *El régimen jurídico del periodo de prueba en el contrato de trabajo*, Albacete (Bomarch) (2017).

[26] Mercader Uguina, J. and De La Puebla Pinilla, A.: *Los procedimientos de despido colectivo, suspensión de contratos y reducción de jornada*, Valencia (Tirant lo Blanch) (2013).

immediate termination of the employees' employment contracts in the event of such termination"[27].

F) Forced retirement of the worker based on the decision contained in the collective agreement. Even when there is indirect consent through the consent given by the trade unions representing the workers, the power incorporated by the 10th additional provision. ET leads, without any doubt, to terminations that must be considered among those that are alien to the worker's person, as their "forced" nature acts instead of the consent of the affected party[28].

G) Dismissal. As a unilateral decision adopted by the employer, its assessment only requires weighing up whether the worker could have been the ultimate cause of such a decision. In a necessary synthesis of a much more extensive logical process, it can be concluded that, from the outset, any dismissal considered unfair or null and void must be included in the calculation, insofar as reasons of form or substance have led to such recognition by the author or to the judicial declaration, clearing up any questions about the absence of any participation by the worker affected. At the same time, it is appropriate to include individual-plural dismissals stated under the same causes as those set out in art. 51 ET, i.e., those due to economic, technical, organisational and production reasons, as well as those due to the lack of budgetary appropriations in the case of non-structural public programmes [arts. 52 c) and e) ET].

1.2.2.2. Termination Linked to the Employee's Will

The other forms of termination of the contract deserve a different interpretation to the above, even though, depending on the specific circumstances involved, this original classification can and should change in some specific cases:

A) Mutual original agreement (art. 49 ET). Contracts concluded for a specific duration or for a specific task are excluded from the calculation (except, as has been explained, if they have been concluded outside the law), since "such contracts are not terminated at the initiative of the employer, but only when they come to an end or when the task for which they were concluded is carried out", not in vain in that agreement the worker showed his express acquiescence.

B) Mutual agreement (art. 49 ET). The same consideration should be given to the concurring will of the parties whether it operates in a contract subject to a term or condition, or in an open-ended contract. However, attention should be

[27] STJUE 3 March 2011 (C-235/10 a C-239/10), subject *Claes*.

[28] De Castro Marín, E.: *Despido colectivo 'de hecho'*, Navarra (Aranzadi) (2018).

drawn to some examples from which the above conclusion can be questioned; specifically, reality shows cases of early retirements or voluntary redundancies which, far from being based on the "free" will of the worker, hide a real employment regulation plan concealed under such a channel, as a "lesser evil" offered to the workers in the face of the alternative (real "threat") of receiving the compensation strictly contemplated by law or being involved in insolvency proceedings[29]. Once this element of compulsion has been proven, there can be no doubt about its inclusion.

C) Resignation or abandonment of the worker. Conceived as a unilateral decision without cause in the first of these cases, and informal in the second, they are a clear example that the conscious action of the worker has been the ultimate reason for the termination of the employment relationship.

D) Termination at the employee's will be due to an employer's decision to transfer or substantially modify working conditions. Form and substance are once again dissociated in these cases, as they were in Art. 50 ET; however, the resolution, as far as this discourse is concerned, must be precisely the opposite. The form refers, also on this occasion, to a decision by the worker, as provided for in arts. 40.1 and 41.3 ET; however, and unlike the case under comparison, in the substance of the question there is no breach of the law by the employer, but precisely the opposite, which could even have led, in the case of collective modifications or transfers, to a prior consultation period with the workers' representatives[30]. Precisely the fact of acting in the heat of what the law empowers him to do, as well as the procedural variant included, invite us to consider the case as an alternative reaction offered to the worker in the face of what the law includes as a rule of order, consisting of being and passing through the expression of the employer's management power under the protection of Art. 20 ET[31].

E) Death, incapacity, or retirement of the employer. "Article 1(1) of Directive 98/59 must be interpreted as not precluding national legislation under which the termination of the employment contracts of several employees whose employer is a natural person as a result of the death of that person is not considered to be collective redundancy"[32]. With this wording, the CJEU resolves one of the most important discussions that had taken place in Spanish doctrine, and which concerned the subrogation of the employer derived from

[29] Desdentado Bonete, A.: "La delimitación legal del despido colectivo", en AA.VV. (Godino Reyes, M., Dir.): *Tratado de despido colectivo*, Valencia (Tirant lo Blanch) (2016).

[30] STJUE 21 September 2017 (C-149/16), subject *Socha*.

[31] STJUE 21 September 2017 (C-429/16), subject *Ciupa*.

[32] STJUE 10 December 2009 (C-323/08), subject *Rodríguez Mayor* and Fernández Fernández, R.: "Fallecimiento del empresario sin sucesión hereditaria y despido colectivo a la luz de la Directiva 98/59/CE", *Noticias de la Unión Europea*, núm. 32 (2011).

the "disappearance" of the natural person employer. The term in quotation marks was intended to include, together with death, the cases of retirement or declaration of permanent disability of the employer, it now being clear that the variables to be combined are not business succession versus collective dismissal, but the previous binomial plus another termination with its own cause and different from that provided for in art. 51 ET[33].

F) Dismissal. As a last case designed to demonstrate the heterogeneous and complex nature of the sample, even in the employer's own unilateral decision, there are cases in which the employer's will is blurred to the point that it does not matter whether or not it is inherent in the worker's person. The easiest solution is given by fair disciplinary dismissal since the ultimate ratio for contractual termination is caused by a serious and culpable breach of contract by the person sanctioned. Also linked to his or her person are the cases of supervening ineptitude or lack of adaptation to technical modifications of the job, where the lack of will does not limit the causal and direct involvement of the individual conditions of the dismissed person. Finally, and with all the doubts derived from the fact that no will is at stake, the cases of force majeure (including the factum principals) will have to be equated to those of the "disappearance" of the natural person employer, as they have autonomy as an institution, and in the Spanish system also with a specific administrative procedure (not consultation) for their processing[34].

1.2.3. The Minimum Number of Five "Extinctions" or "Dismissals" for the Cumulation Analysed

According to recital 8 of the Directive under examination, and to calculate the number of redundancies provided for in the definition of collective redundancies, "other forms of termination of the employment contract effected at the initiative of the employer should be treated in the same way as redundancies, provided that the 'redundancies' are at least five"[35].

As can be seen, under such an interpretation there is a new mismatch between the wording of the Directive and that of the Spanish provision, which is based on the deficient transposition of the Directive derived from having translated the expression "dismissals for reasons not inherent to the worker's person" into "dismissals for economic, technical, organisational or production reasons"; to this extent, the objective scope of what should be included under the

[33] Navarro Nieto, F.: "Los despidos colectivos: novedades normativas y balance jurisprudencial", Revista *Doctrinal Aranzadi Social*, Vol. 6, núm. 7 (2013).
[34] Fernandez Dóminguez J.J.: *Despido por fuerza mayor*, Madrid (Civitas) (2003).
[35] STJUE 11 November 2015 (C-422/14), subject *Pujante Rivera*.

reference to "similar terminations" can never coincide; consequently, the wording of the Spanish provision is more restrictive than that of the European provision, "since the numerical requirement imposed by the Directive only concerns dismissals, leaving similar terminations outside its scope".
The process of equalisation, however, must also lead to a rectification of the minimum of five dismissals for the accumulation to be applicable, since while the supranational rule refers, once again, to those "reasons not inherent to the person of the worker", the Spanish rule confines them to the more restricted scope - and, therefore, in need of extension - of economic, technical, organisational and production reasons.

1.3. Subjective Selection Criterion for Terminating Workers

The question relating to the person of the worker in the context of collective redundancies cannot end without a reference to the criterion adopted for selecting those whose employment relationship is to be terminated in cases in which the measure does not affect the whole, but only part of the workforce. In this sense, articles 51.5 and 68 of the Employment Contract, in addition to article 37 of Law 31/1995, of 8 November, on the Prevention of Occupational Risks, grant priority of permanence - limited to their professional group - to those holding a representative mandate, whether electoral (staff delegates and works council members), trade union (trade union delegates), or by appointment (prevention delegates), in order to provide a formal and material guarantee against possible employer reprisals for the performance of their representative work[36].
This is not, however, the only legal provision in this respect. To this should be added that contained in additional provision 16.ª ET, to recognise the preference of permanent staff in the service of the Public Administrations who have acquired this status in accordance with the principles of equality, merit, and ability, through a selective admission procedure called for this purpose. The concession of a mere preference, and not a guarantee, as well as its application within a complex and mobile system of professional qualification, has led to many lawsuits provoked by the application of such normative provisions, almost always settled through the special procedural modality of

[36] Valdés Dal-Ré, F.: "La designación de los trabajadores afectados por despidos económicos: el laberinto de la desregulación", *Relaciones Laborales*, núm. 1 (1999); Alburquerque, R.: "La fase previa al periodo de consultas: la comunicación de inicio del periodo de consultas a la representación de los trabajadores y a la autoridad laboral", en AA.VV. (Godino Reyes, M., Dir.): *Tratado de despido colectivo*, Valencia (Tirant lo Blanch) (2016) and Vivero Serrano, J.B.: "La designación de los trabajadores objeto de despido colectivo", *Aranzadi Social*, Vol. 6, núm. 7 (2013).

collective conflict, to examine the postponement linked to the exercise of trade union freedom as a fundamental right, acting under the provisions of article 124.2 of Law 36/2011. 124.2 of Law 36/2011, of 10 October, Regulating the Social Jurisdiction, understanding that "it is not only a formal requirement aimed at guaranteeing good faith in negotiations, but an essential prerequisite for assessing the adequate justification of dismissals"[37].

In addition to what constitutes a legal obligation, art. 51.5 ET provides for the possibility that, by agreement or agreement reached in the consultation period, the parties to the negotiation may establish different priority criteria in favour of groups such as, "among others", workers with family responsibilities, workers over a certain age or people with disabilities. The open wording of the expression in quotation marks overcomes many of the drawbacks of a formula that differed markedly from the European trend[38] (and this is evident, for example, in France[39] or Germany[40]), because there is no doubt that the conventional route makes it possible to cover numerous gaps related to the favourable treatment of pregnant workers or workers on parental leave, those who have reduced their working hours to care for children or family members, people with addictions who are undergoing treatment, and a long etcetera that is easy to complete due to the subject matter.

It is precisely the contrast with one of these work-life balance rights, that of pregnant workers, which provides a new assessment from which to analyse the discrepancies between European and national legislation.

This is an occasion stemming from Council Directive 92/85 of 19 October 1992 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, when it prohibits companies from dismissing them from the beginning of pregnancy until the end of maternity leave, except in exceptional cases not inherent to their condition[41]. It thus establishes a prohibitive or protectionist protection that expressly covers collective

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[37] Roqueta Buj, R.: "Los despidos colectivos en el sector público: causas y procedimiento", *Documentación Laboral*, Vol. 1, núm. 97 (2013).

[38] Morín, M.L. and Vicens, C.: "Despido económico, flexibilidad empresarial y estabilidad del trabajador. Lecciones de una comparación europea", *Revista Internacional del Trabajo*, Vol. 120, núm. 1 (2001).

[39] Pérez De Los Cobos Orihuel, F.: "El despido por causas económicas en Francia: estudio especial del despido colectivo", *Actualidad Laboral*, núm. 1 (1993).

[40] Gómez Gordillo, R.: "La extinción del contrato de trabajo en Alemania", en AA.VV. (Cruz Villalón, J., Coord.): *La regulación del despido en Europa: régimen formal y efectividad práctica*, Valencia (Tirant lo Blanch) (2012).

[41] Sánchez Torres, E. and Senra Biedma, R.: "Aspectos sustanciales y procesales de los despidos antifamiliares. A propósito de las SSTC 41/2002, de 25 de February 17/2003, de 30 de enero", *Relaciones Laborales*, núm. 1 (2005).

dismissal, which is not the case in Spanish law, where articles 53 and 54 ET only extend its protection to objective individual dismissal or dismissal classified as unfair[42].

The rectification, once again, does not come from the regulation, but from the CJEU when it applies the protection offered by Spanish law to the pregnant worker, not in vain "protection by way of reparation, even if it results in the reinstatement of the dismissed worker and the payment of the remuneration lost as a result of the dismissal, cannot replace preventive protection"[43]. In fact, "the protection afforded to the mother by the knowledge that she cannot be dismissed (except in exceptional cases) is not exactly the same as that in which], although she can be dismissed, she has a more or less intense expectation of obtaining a final judgement ordering her forced (and enforced) reinstatement in the company that has already dismissed her"[44].

In this way, the employer has the duty to justify that the pregnancy of the worker is unrelated to his choice to incorporate her among the employees who lose their jobs, for which he will have to specify the reasons by virtue of which the cause of the termination has a specific projection in the productive work of the pregnant woman.

Precisely, the natural or social possibility of biological inequality must be - and in fact is - considered, in itself, the ultimate cause of certain legal-social rules, insofar as, and as a paradigmatic example, the situation of maternity of women will act as a determining factor of the need for a singular treatment, not in the least because the protection can in no way be transferred to men, just as the condition of pregnancy, exclusive to the female sex, cannot be.

The context of this text is provided by another case law, from which it follows, in the case of a pregnant worker who was not given priority, "that dismissal on the grounds of pregnancy or for a reason essentially based on pregnancy can only affect women and therefore constitutes direct discrimination on grounds of sex, contrary to Articles 2(1) and (7) and 3(1)(c) of Council Directive 76/207 of 9 February 1976"[45].

It is urgent to raise awareness among those who are called upon to negotiate collective agreements of the timeliness/necessity of heeding the suggestion, included both in the Directive and in Spanish law, to introduce social criteria when establishing the priority of permanence of workers in the event of

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[42] Agustí Maragall, J.: "La prohibición de afectación de las trabajadoras embarazadas y en permiso de maternidad en los despidos colectivos ('salvo caso excepcional')", *Jurisdicción Social*, núm. 127 (2012).

[43] STJUE 22 February 2018, (C-103/16), subject *Porras Guisado*.

[44] Rodríguez Escanciano, S.: "La conciliación de la vida laboral y familiar en Castilla y León", *Revista de Investigación Económica y Social de Castilla y León*, núm. 7 (2004).

[45] STJUE 11 November 2010, (C-232/09), subject *Danosa*.

collective redundancies. Family burdens, disability or age are - among others - factors capable of indelibly marking entire groups in the labour market, which is why the solution would not only be appropriate, but also rational and fair.

2. Conclusions

After a comparative study of the European and national rules on collective redundancies in the light of what the Court of Justice of the European Union has been patiently deciding for more than four decades, a general reflection is necessary: it is urgent to update the Spanish law in order to adapt it to the continuous corrections that have arisen from a supranational reading of the notion of worker and the requirements of collective redundancies.

a) The concept of worker currently offers such rich profiles that it is very difficult to admit within it the traditional variants that used to accompany it, at the risk of creating excessive special statutes capable of blurring its essence. Collective dismissal offers a perfect vantage point from which to observe the need to simplify its identifying features, centring them exclusively on dependence and remuneration, thus eliminating both voluntariness (an anachronistic feature), and the fact of being outside (since neither in terms of benefits nor in terms of risks is it an element that can be fully demanded of many relationships today). In this way, a direct response would be found to some emblematic cases in which there is - well-founded - doubt as to their employment status, such as training relationships, jobs of little importance and senior management or those extravagant figures defined as dependent self-employed. Based on the two features mentioned above, one can only be a worker or not: tertium non datur.
b) The phenomenon of temporary employment, as an endemic disease that has been a feature of labour relations for too long now, has as one of its most salient effects the instability of workforces. For this reason, when the Directive demands that the habitual nature parameter be considered to measure the impact of a collective dismissal, the silence of the Spanish legislation is the only response. The simple administrative criterion established to determine the documentation to be provided in the consultation period cannot be the standard for deciding how and when the group of "regular workers" is formed. The period of one year provided for in Article 3 of the RDPDC, therefore, will have to be corrected in accordance with other indices included in Spanish law in the image and likeness of the supranational standard, such as the duration of a contract for more than six months, as this is the period for being eligible for the elections to be held in the company or work centre, or the duration of a relationship of more than 200 days, after which one more worker will have to

be added to the number that will finally decide both the representative body to be elected and its number of members.

c) All the causes for termination of the employment relationship must be brought back into the category included in the Directive, which refers to "reasons not inherent to the worker's person". Any means by which an employment relationship is terminated in which the will of the affected party is involved must be excluded from the set of terminations to be weighed up when considering the existence of a collective dismissal. Thus, a sense contrary, and with the necessary nuances, the following should be included: termination ante tempus of contracts subject to a term or condition as well as - in any case - of those concluded in fraud of law, withdrawal during the trial period, failure to call permanent discontinuous workers, termination on the initiative of the worker due to serious and culpable breaches by the employer, extinction of the employer's legal personality, forced retirement derived from a collective agreement, objective dismissals due to business causes or lack of public funding and, finally, dismissal classified or recognised as unfair with the option of compensation.

Collective Bargaining for Platform Workers: Who does the Bargaining and What are the Issues in Collective Agreements

María Luz Rodríguez Fernández [*]

Abstract

This article analyzes the right to collective bargaining of platform workers. While access to this right is guaranteed for platform workers who are classified as employees, such access is more debatable for self-employed platform workers. The article, therefore, analyzes ILO standards, CJEU judgments, and European Commission proposals that could underpin access to the right to collective bargaining for those who are genuinely self-employed. It also analyzes the differences in collective bargaining between workers on location-based platforms and those on online platforms, highlighting the difficulty of collective bargaining in the latter. Finally, the article analyzes the main issues of seven collective agreements for platform workers, from which the following conclusions are drawn: i) most agreements are negotiated at the company rather than the sector level; ii) most focus on guaranteeing a minimum wage and maximum working time, but they do not deal with algorithmic decisions or rankings; iii) all are negotiated by traditional unions, and iv) all of these agreements are related to location-based platforms.

Keywords: *Collective Bargaining, Platform Work, Self-Employed*

1. Diversity as a Hallmark of Platform Work

While the phenomenon of platform work is recent, there is already a considerable amount of literature covering its most notable characteristics[1].

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And to study the collective bargaining practices that can be applied to or for this business model, perhaps the most important of those characteristics is that it is a multiform business phenomenon. Some platforms must have their workers located in a certain area or territory to provide a particular service (courier, transport, caregiving). However, there are others whose workers provide their services online (consulting, software design, revising images for social networks), working most of the time on a computer in their own homes (where telework and platform work "shake hands"). This is how we differentiate between gig work and cloud work[2]. The former is a visible and locatable workforce; the latter is an invisible workforce, dispersed around the world. As a result, collective bargaining in the platform economy cannot be analyzed or be implemented, if applicable, according to a single paradigm, because these differences regarding platform workers mean that the same answers cannot be given to the same questions, such as who can negotiate a collective bargaining agreement, what is the scope of that agreement or even what law applies to the collective bargaining and the result of that bargaining.

A second characteristic that should be highlighted is that there are no official statistics about work in the platform economy. This notably hinders our ability to measure it and learn about the profiles of the persons who work in it. However, there are published reports that allow us to approximate the size of the phenomenon to a certain degree. Within the EU, the second COLLEEM Survey[3] estimates that 11% of people have worked at one time or another in the platform economy. The intensity of this work is vastly different according to the number of hours engaged in a job and the income that is earned. Only 1.4% of the European population work at their main job through a platform. For the majority (4.1%), such work is related to a second or marginal job. Therefore, what we have is a reduced number of workers for whom the platform economy represents a supplementary source of income[4]. Globally, the (meta) data indicate that between 0.3% and 22% of the adult population of

[1] Digital Future Society, "Digital platform work in Spain: what do we know? A literature review", (2020), https://digitalfuturesociety.com/report/digital-platform-work-in-spain-what-do-we-know/ (Accessed on 19 March 2022).

[2] Florian A. Schmidt, "Digital Labor Markets in the Platform Economy," (2017), https://library.fes.de/pdf-files/wiso/13164.pdf (Accessed on 19 March 2022).

[3] Cesira Urzí Brancati, Annarosa Pesole and Enrique Fernández-Macías, *New evidence on platform workers in Europe. Results from the second COLLEEM survey* (Luxembourg: Publication Office of the European Union, 2020), 14-16.

[4] Ursula Huws et al., "Work in the European Gig Economy. Research results from the UK, Sweden, Germany, Austria, the Netherlands, Switzerland and Italy", (2017): 22, https://uhra.herts.ac.uk/bitstream/handle/2299/19922/Huws_U._Spencer_N.H._Syrdal_D.S._Holt_K._2017_.pdf (Accessed on 19 March 2022).

working age work on digital platforms[5]. For 30% of these people, platform (online) work is their main source of income[6], from which we can deduce that for the majority globally, as in the EU, this kind of work is a secondary source of income.

Beyond that, within this set for platform workers, there is scarcely any homogeneity. For example, when asked about the reasons for working in the platform economy, those who work on online platforms claim that they want to supplement their income, while those who work on location-based platforms do so mainly because of a lack of alternative employment[7]. There are also notable differences regarding the level of education. While it is true that the level of education of platform workers tends to be higher than that of workers who do not work on platforms[8], among platform workers, over 60% of those who work online are highly educated, but only 21-24% of those who work on app-based delivery or transport platforms have that same level of education[9]. There are differences related to the work they perform, from developing a computer program to making home food deliveries on a bicycle, related to the wage they receive, and even related to how they perceive their job as an employee or as a self-employed worker[10]. Such differences consequently create a heterogeneous set of persons among platform workers, whose interests are also heterogeneous, thereby making it difficult to find a common nexus – beyond the obvious fact that they all work in the platform economy – and making it difficult to affirm (or not) their right to collective bargaining.

In any event, there does seem to be at least one element that is common to them all: the labor and social protection they enjoy is, as a general rule, weaker than that which is enjoyed by workers who do not work on platforms. The works of Berg et al.[11] and the ILO[12] show that the wages of these workers and

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5 ILO, *World Employment and Social Outlook: The role of digital labor platforms in transforming the world of work* (Geneva: ILO, 2021), 49.

6 ILO, *World Employment and Social Outlook: The role of digital labor platforms in transforming the world of work* (Geneva: ILO, 2021), 154.

7 ILO, *World Employment and Social Outlook: The role of digital labor platforms in transforming the world of work* (Geneva: ILO, 2021), 143-145.

8 Janine Berg et al., *Digital labor platforms and the future of work. Towards decent work in the online world* (Geneva: ILO, 2018), 36.

9 ILO, *World Employment and Social Outlook: The role of digital labor platforms in transforming the world of work* (Geneva: ILO, 2021), 141.

10 Ursula Huws et al., "Work in the European Gig Economy. Research results from the UK, Sweden, Germany, Austria, the Netherlands, Switzerland and Italy", (2017): 39, https://uhra.herts.ac.uk/bitstream/handle/2299/19922/Huws_U._Spencer_N.H._Syrdal_D.S._Holt_K._2017_.pdf (Accessed on 19 March 2022).

11 Janine Berg et al., *Digital labor platforms and the future of work. Towards decent work in the online world* (Geneva: ILO, 2018), 50-67.

their working time are worse than those who do not work on platforms, among other reasons because they spend a considerable amount of time waiting to access a job on the platform, or they have to pay fees to be able to access work on the platform or because their working time on the platform is added to their working time at their main occupation. On their behalf, the EU-OSHA[13] has warned of the risks to the health and safety of platform workers, who are not necessarily covered by suitable protective measures, especially because many of them do not have health or accident insurance. Finally, the work by Spasova et al.[14] shows that the social protection for these workers is much less intense than that of those who do not work on platforms, especially regarding unemployment protection. There are many distinct reasons for all of this, some derived from the characteristics of platform work, but mainly because the majority of people who work on platforms do so as self-employed workers, whether genuine or false self-employed[15].

2. Formulas for Alleviating the Weakness of Labor and Social Protection for Platform Workers

Due to the aforementioned situation, there are three tested formulas for improving the labor and social protection of platform workers. The first is to deny the self-employed nature of this kind of work, the second is to create specific legal figures according to which these workers can be legally classified and the third is to expand the rights of employed workers to self-employed workers[16].

It is well known that, from the very beginning, platform work has been followed by controversy around the world, mainly related to i) refuting that this is genuine self-employed work and ii) showing that the particular

[12] ILO, *World Employment and Social Outlook: The role of digital labor platforms in transforming the world of work* (Geneva: ILO, 2021), 154-156, 166.

[13] EU-OSHA, "Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU", (2017): 25, https://osha.europa.eu/en/publications/protecting-workers-online-platform-economy-overview-regulatory-and-policy-developments-eu/view (Accessed on 19 March 2022).

[14] Slavina Spasova et al., *Access to social protection for people working on non-standard contracts and as self-employed in Europe* (Brussels: European Commission, 2017), 41-47.

[15] María Luz Rodríguez Fernández, "Protección social para los trabajadores de la economía de plataforma: propuestas para aliviar su vulnerabilidad", *Revista de Derecho de la Seguridad Social* 57 (2020): 177.

[16] María Luz Rodríguez Fernández, "Calificación jurídica de la relación que une a los prestadores de servicios con las plataformas digitales", in *Plataformas digitales y mercado de trabajo,* ed. María Luz Rodríguez Fernández (Madrid: Ministerio de Trabajo, Migración y Seguridad Social, 2019).

characteristics of an employment contract are present. The judgments handed down in this regard have not necessarily followed the same criterion. Today, court decisions that declare the genuine existence of self-employed work coexist with those that declare the existence of an employment contract between the worker and the platform (with the latter gaining the majority). This judicial dynamic and the union mobilization that has most often been behind it[17] have subsequently been placed on the legislative agenda, and in certain countries, laws that presume the existence of employment contracts have been enacted, thereby deeming that platform workers are, at least initially, employees. This was the case of the law enacted in the State of California, known as AB25[18]; the case in Spain with the approval of Law 12/2021[19]; and the case of the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, published on 9 December 2021[20].

Spain has also been one of the pioneering countries to create intermediate figures, thereby breaking the binomial of employed work / self-employed work. This was done through the Statute of Self-employment of 2007[21], and not in the heat of the debate about the legal classification of platform work. Repeatedly, the Spanish figure of the "economically dependent self-employed worker" and the English figure of "worker" have been presented as examples of ways to resolve the particulars of platform work, which, at least for some, fails to comfortably fit within the figure of either employment or self-employment. The central idea of this option is to create a regulatory body of labor and social protection rights midway between those that apply to employed workers and those that apply to self-employment, such that they can be applied to these special workers, who are considered neither entirely self-employed workers nor entirely employees. The Argentinian bill, the Statute of

[17] Hannah Johnston and Chris Land-Kazlauskas, *Representación, voz y negociación colectiva: la sindicalización en la economía del trabajo esporádico y por encargo* (Ginebra: OIT, 2018), 6.

[18] Retrieved from https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5. As it is known, Proposition 22 was passed on 3 November 2020, which counteracted the effects of AB5. The text of P22 is available at https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf. However, in August 2021, this rule was declared unconstitutional by the Supreme Court of California.

[19] Retrieved from https://www.boe.es/buscar/act.php?id=BOE-A-2021-15767

[20] Retrieved from https://ec.europa.eu/social/main.jsp?langId=en&catId=89&furtherNews=yes&newsId=10120

[21] Retrieved from https://www.boe.es/buscar/act.php?id=BOE-A-2007-13409

the On-demand Digital Platform Worker, of May 2020, could be an example of this formula[22].

Finally, Italy and France could serve as examples of the third route. Italian Law No. 128 of 2 November 2019[23] has bolstered the presumption of the existence of an employment contract between the worker and the platform, but it has also established that, even though a worker may be a true self-employed worker, they have the right to the application i) of the collective bargaining agreement of the sector of activity in which they are engaged or ii), if such a collective bargaining agreement does not exist, the application of a "minimum level of protection" that, among other rights, guarantees the payment of insurance for accident or occupational disease. In turn, French Law No. 2016-1088[24], based on the concept of the platform's "social responsibility" to those who provide services through it, obliges the platform to pay the installments of the occupational accident insurance that a self-employed worker has taken out, as well as recognize their right to professional training and to belong to a union. There is also Law No. 2019-1428[25], which sets forth that self-employed transport and delivery platform workers should have a "card" that allows them to have access to "complementary social protection guarantees". As we can see, both of these pieces of legislation extend the rights of the world of employed work to platform workers, even if they might be genuine self-employed workers.

This different approach to achieving better occupational and social protection for platform workers is significant in terms of collective bargaining. If these workers are deemed to be employees, then it would automatically mean that they are awarded the right to collective bargaining under the terms and conditions that this right applies to all other employees. If a third figure is created or the labor and social rights of employed workers are extended to self-employed workers, the recognition of the right to collective bargaining is not quite so clear, given the doubts about whether or not self-employed workers can enjoy the right to collective bargaining.

3. Issues about the Collective Bargaining of Platform Employees

If the status of an employee is declared or recognized, then platform workers would enjoy the right to collective bargaining to the same extent as all other

[22] Retrieved from https://federicorosenbaum.blogspot.com/2020/06/anteproyecto-de-ley-de-estatuto-del.html

[23] Retrieved from https://www.gazzettaufficiale.it/eli/gu/2019/11/02/257/sg/pdf

[24] Retrieved from https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000032983213/

[25] Retrieved from https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000039666574/

employees. But there are a few issues related to the collective bargaining of this group that should be pointed out.

The first is who should be responsible for negotiating the representation of these workers. It is not mostly or merely a question of law, but rather a matter of calling attention to the difficulty of generating interest among this class of workers in the collective defense of their interests[26]. Let us think about what means to work in the platform economy. The relationship that connects workers and platforms is not usually continuous over time, rather it has a limited duration, or we could say it is intermittent. Workers enter and exit the platform throughout the day. There are some days when they connect and others when they do not. Many workers combine platform work with their main job, and many others provide services on several platforms at the same time, consequently entering and exiting each one. Worker turnover is one of the characteristics of platform work. Added to this is the difficulty of knowing who the employer is[27], given that often the only things that workers know are the name of the platform and their ID for connecting to it. There is an additional difficulty in pinpointing the sector of activity, given that even though transport, the design of computer programs, or caregiving exist as economic sectors, the respective workers do not provide their services at companies of these sectors, rather they do so through a platform. All of this makes it difficult to build the foundation on which collective bargaining is based: employment for a company in an economic sector whose conditions have to be regulated. In this case, neither employment nor the company nor the industry is clear.

On the other hand, workers of the platform economy who work online do so under conditions that certainly make it difficult to coordinate the collective protection of their interests. In addition to the stated characteristics of platform work, there is also the fact that these workers work in geographic isolation through their computers, and they often do not know if their employer is the platform to which they connect or is the company/person who, through the Internet, is requesting the task in question. Furthermore, the working model of these platforms tends to be that of an online task auction, such that workers are forced to compete among themselves to be able to get the work they are going to perform. Consequently, these workers of the online platform economy cannot be classified according to either the geographic area where they work or the company for which they work, or even their

[26] Hannah Johnston and Chris Land-Kazlauskas, *Representación, voz y negociación colectiva: la sindicalización en la economía del trabajo esporádico y por encargo* (Ginebra: OIT, 2018), 5.

[27] Emma Rodríguez, "El derecho a la negociación colectiva del trabajador autónomo en el contexto de la nueva economía digital", *Temas Laborales* 151 (2020): 147.

profession, given the highly diverse nature of the tasks they access online (from programming to reviewing images on social networks). The classic elements used as the foundations to build the interest groups that have given rise to the organization of collectives and actions by the same are missing. These are the territory, the company, and the profession[28]. Furthermore, the competition between these workers to access tasks online turns them into adversaries and acts against any feeling of unity[29]. And we must consider that online work platforms are global, with their workforces dispersed throughout the world. This means that workers of the same platform could be working online in India, Kenya, Ukraine, or Spain. Therefore, for collective bargaining, who should represent a workforce that is located globally?

Eppur si muove or, in other words, despite all the aforementioned, entities that represent these workers have emerged. Forums have occasionally arisen, especially among online platform workers, where they can share their experiences regarding a platform to serve as an example for other possible workers[30]. In other cases, specific platform worker unions have arisen, whose relations with classic unions are sometimes good and are at other times competitive. Finally, there are many cases in which classic unions have taken over the representation and defense of these workers. There are examples of all these situations: i) *Tukopticon* is one of the most well-known forums[31]; ii) the *Asociación de Personal de Plataformas*[32] (APP) [Platform Personnel Association] of Argentina is a union of platform workers, which also serves as an example of where there is tension between that specific union and the classic unions in that country; iii) the relationship between *Riders X Derechos*[33] [Riders for Rights] and the CC.OO. and UGT unions in Spain is an example of peaceful coexistence between specific and classic unions; and iv) the collective bargaining agreement signed by the CGIL, the CISL and the UIL in Italy for

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[28] Vili Lehdonvirta, "Algorithms That Divide and Unite: Delocalization, Identity, and Collective Action in "Microwork"", in *Space, Place and Global Digital Work. Dynamics of Virtual Work* (London: Palgrave Macmillan, 2016).

[29] Mark Graham and Alex Wood, "Why the digital gig economy needs co-ops and unions?", (2016), https://www.opendemocracy.net/en/opendemocracyuk/why-digital-gig-economy-needs-co-ops-and-unions/ (Accessed on 19 March 2022).

[30] Rochelle LaPlante and Six Silverman, "Building Trust in Crowd Workers Forums: Worker Ownership, Governance, and Work Outcomes", (2016), https://trustincrowdwork.west.uni-koblenz.de/sites/trustincrowdwork.west.uni-koblenz.de/files/laplante_trust.pdf (Accessed on 19 March 2022).

[31] Lilly Irani and Six Silverman, "Turkopticon: Interrupting Worker Invisibility in Amazon Mechanical Turk," *Proceedings of CHI* April 27-May-2 (2013).

[32] See at https://es-la.facebook.com/pages/category/Labor-Union/Asociación-de-Personal-de-Plataformas-AppSindical-713319192359559/

[33] See at https://www.ridersxderechos.org

the workers of JustEat is an example of classic unions taking over the defense of these "new" workers.

However, the collective action taken by these entities is not always the same. If we look closely, the formulas that are closest to those of a union as we know it are concentrated around location-based platform workers, while for online platform workers there is barely any information on union organization and actions, except for the example of forums. This also results in different strategies. For example, some collective entities are not seeking collective bargaining, among other reasons because, in the platform economy, the companies (above all those that operate online) are often non-corporeal. Rather, what they seek is to get the attention of consumers and the public powers so that the former think about consuming through the platform in question and the latter feel impelled to act in defense of these workers[34]. Other collective entities have followed a more classic union path, so to speak, and have opted for collective bargaining.

Once a collective bargaining entity has been defined, the next issue is the scope or level according to which negotiation takes place. This is where the difficulty of collective bargaining related to online platforms once again becomes evident. Even if the workers of these platforms were effectively deemed to be employees, once again the global nature of the platforms and the dispersion of their workforces make it difficult to find an entity that could represent those workers in negotiations. Similarly, it is extremely difficult to conceive of the level at which negotiations should take place. We must consider whether or not collective bargaining on a global scale would even be possible and if it could therefore be applied in all the countries where there are workers of a certain platform: what regulations would apply to negotiations of these characteristics and how would the application thereof be guaranteed in each country?

Collective bargaining in the case of location-based platform workers would involve fewer difficulties because the collective bargaining could take place in a certain territory. Nevertheless, we must think about whether it is more appropriate for negotiations to take place at the company/platform level or the sector level, given the aforementioned characteristics of platform work. The possibility of being able to work for several platforms at the same time, or the brevity of the links that are sometimes established between workers and platforms, would seem to indicate that collective bargaining at the sector level is advisable so that coverage could be obtained regardless of the platform where a worker is working at a given time, or to obtain that coverage whenever a worker decides to work for one of those platforms. Yet what happens, in this

[34] María Luz Rodríguez Fernández, "Sindicalismo y negociación colectiva 4.0", *Temas Laborales* 144 (2018): 38.

case, is that it is not easy to define the sector: if the industry is the economic activity performed through the platform (delivery or transport) or if the industry is composed of the platforms themselves.
Finally, the content of negotiations must be discussed. And concerning this content, rather than posing the topics or aspects that should be included in the collective bargaining of platform workers, it would be better to look at the practical implementation of collective bargaining agreements by reviewing some that already exist. This will furthermore help us to determine the agents that were involved and clear up any doubts about the entities of the collective bargaining and about the levels within which negotiations were understood to take place. However, one final consideration should be made: all existing collective bargaining agreements refer to location-based platform workers, and none refer to online platform workers. Perhaps this is the best proof of the fact that declaring the existence of an employment relationship and consequently declaring the unqualified application of the right to collective bargaining is not enough for such bargaining to take place in practice and subsequently represent the source of protection for these workers, given the complexity of uniting a global and dispersed workforce around collective bargaining. Consequently, this is where international labor standards must play a leading role in protecting these workers.

4. Main Issues of Collective Agreements in the Platform Economy

We are beginning to hear about some collective bargaining agreements that regulate platform work. Nordic countries seem to be in the lead, with agreements at Hilfr, Chabbler, Voocali, Bzzt, Instajobs, Gigstr, and Foodora[35], although they also exist in other countries and regarding other platforms. Some of these agreements will be analyzed below. Perhaps the most well-known agreement is the one that was signed in 2018 between the Hilfr ApS platform and the Danish union, 3F[36]. The initial formulation of this agreement, which included employees and self-employed workers for determining the hourly wage, has been declared to be against free competition law. We will return to this subject later, but right now we are going to focus on the content. Two essential elements need to be highlighted, one is the classification of the workers, and the other is the fact that this agreement is considered to be a trial collective bargaining agreement. These two elements tell us that, first of all, the

[35] Kristin Jesnes, Anna Ilsøe and Marianne J. Horver, "Collective agreements for platform workers? Examples from the Nordic countries", (2019), https://faos.ku.dk/pdf/faktaark/Nfow-brief3.pdf (Accessed on 19 March 2022).
[36] Retrieved from https://cogens2019.blogspot.com/2019/02/collective-agreement-between-hilfr-aps.html

classification of platform workers as employees or as self-employed is at the center of the union/business strategy in collective bargaining. Second, given the novelty represented by reaching an agreement on working conditions for a relatively recent sector, the parties prefer to act with caution, in the sense of testing a regulation of the working conditions, which is then subject to evaluation before becoming consolidated.

In the case of the agreement between Hilfr ApS and 3F, even though initially the condition of the employee is reached after having worked 100 hours for the platform, in the end, the worker merely has to notify the platform to either obtain this condition or remain a freelance worker, consequently leaving it up to the workers to decide on their status (para. 1). This was uncommon even for the Nordic model of labor relations[37], and it would not even be legally possible in the majority of legal systems, where mandatory rules are what define the existence of an employment contract. On the other hand, a "joint declaration" is made in the agreement, which effectively acknowledges that it is a trial, whose aim is "an attempt to build a bridge between digital platforms and the Danish labor market model", meaning that is an attempt to begin the path down which collective bargaining on platforms is standardized within the labor relations model. Renegotiation of the agreement will depend on Hilfr ApS becoming a member of the Danish Industries Confederation and on this Confederation being involved in the negotiations. The agreement signed in Italy in 2021 by CGIL, CISL, and UIL with JustEat is somewhat similar[38]. The subject of worker classification once again comes up where it declares that the parties are interested in "defining an innovative model of *subordinate* labor regulation of Riders (...) that favors the insertion of this category of workers within the organizational and regulatory context of *subordination*" (the italics are mine). Moreover, it is conceived of as an "experimental" collective bargaining agreement that will be subject to evaluation (Article 24).

A significant detail regarding these two agreements is that they are both reached at the company level and are both signed by traditional unions. And one final point regarding the latter: Article 5 declares part-time work to be a "common form of work at the company", thereby considering the "characteristics of the service", subsequently establishing the rules about working time. It seems that this subject of working time and how it is distributed should be one of the star subjects in the collective bargaining of platform work. Given that the workday is, to a large extent, defined by workers

[37] Kristin Jesnes, Anna Ilsøe and Marianne J. Horver, "Collective agreements for platform workers? Examples from the Nordic countries", (2019), https://faos.ku.dk/pdf/faktaark/Nfow-brief3.pdf (Accessed on 19 March 2022).

[38] Retrieved from https://www.eclavoro.it/wp-content/uploads/2021/04/accordo_integrativo_aziendale_riders_290321.pdf

connecting to or disconnecting from a platform, by accepting or rejecting the services proposed by a platform, and by whether or not these services are ordered during the connection time, it would seem logical to think that the regulation of working time would be one of the core points of this collective bargaining. This is what happens in the Italian agreement and in the collective bargaining agreement signed in Austria in 2020 by the Transport and Services Union, VIDA, and by the Association for the Transport of Merchandise with the Austrian Chamber of Commerce[39] to regulate the working conditions of delivery platform workers. Unlike the preceding agreements, this latter one is a sector collective bargaining agreement, which shows how there are several different levels at which collective bargaining is taking place in the platform economy. Its content is centered on the regulation of working time (Article VI), on determining a minimum hourly/weekly/monthly wage, and on something that is also essential in the platform economy: compensation for the personal assets that workers place at the disposal of a platform for performing the work, in this case, a bicycle and a mobile phone (Article XVIII).

Both types of content are consistent with the characteristics of the sector. Work in the platform economy involves "down" time (connected to the app, waiting to perform the service/task), which, if not somehow considered for remuneration purposes, could cause that remuneration to be significantly reduced. The same thing happens with the more than widespread practice of intensively hiring workers so that, by having many who are competing for the same service/task that is available on the platform, the price of that task will be lower. This practice is somewhat eliminated by establishing minimum wages. Yet it is still rather surprising that these collective agreements do not expressly refer to how "down" time should be considered (whether it is working time or rest time) and to how it should be remunerated. The Collective agreement on food delivery work for 2021-2023, signed by 3F and the Danish Chamber of Commerce (which applies to JustEat workers)[40], does determine how to include it. This collective agreement determines when working time on a platform begins and ends and when the time will not be remunerated, even if a worker is connected to the platform: "the times of the start and end of working hours are when the worker signs in and signs out respectively [but] no wages are payable for the time during the shift when a worker is not available for the performance of work" (Article 3.1).

[39] Retrieved from https://lohnspiegel.org/osterreich/arbeitsrecht/datenbank-der-tarifvertrage/kv_vida-wk-_2020

[40] Retrieved from https://www.danskerhverv.dk/siteassets/mediafolder/dokumenter/03-overenskomster/overenskomst-2020-2023/collective-agreement-on-food-delivery-work-2021-2023-madudbringningsoverenskomsten.pdf

On the other hand, it also makes sense that the collective bargaining agreements should refer to compensation for any personal assets placed at the disposal of the employer, given that this is one of the characteristics of the platform economy: the use of private assets as physical capital of the company[41]. Another example of this is the collective bargaining agreement signed in Chile in 2018 between the Cornershop Company Union and Delivery Technologies SpA[42]. It regulates the working conditions of so-called shoppers (negotiated at the company level by the union established at the company), according to which the platform is bound to pay an allocation to workers "whose purpose is to support the financing of the cost of their data plan in proportion to its use for smartphones as a work tool" (Article 19).

In Spain, a formula that is different from the aforementioned has been tried. In 2019, the UGT, CC.OO., and CIG unions signed an amendment to the 5th Labor Agreement with FEHR and CEHAT[43]. It has a national scope for the Hotel and Restaurant Services sector and includes digital platform riders within its functional scope (Article 4). Aside from the legal doubts (according to the legal-labor scheme in force in this country) that could arise by including riders in a collective bargaining agreement signed by business organizations of the hotel and restaurant services sector, the fact is that this formula, first of all, ventures on negotiating at the sector level and not at the company level; and second, it does not conceive of platform workers as essentially different from all other workers in the sector, to the extent that the collective agreement does not refer to what their working conditions could be, differentiated by the fact that services are provided through a platform. It would certainly be advisable to assess this union strategy, which is so different from the preceding ones, to see if such non-differentiation of the working conditions causes, or not, any dysfunctions when they are implemented (and if the collective agreement itself is being applied).

More recently, the CCOO and UGT unions have signed a collective bargaining agreement with JustEat[44]. This defines the open-ended contract as the contracting prototype on the platform and establishes a fixed employment quota of 80 percent, such that temporary workers will represent no more than 20 percent. Part-time contracting is also possible, but in this case with a minimum of 12 hours on weekends and a minimum of 16 hours for the full

[41] Nick Srnicek, *Platform Capitalism* (Cambridge: Polity Press, 2017).

[42] The author would like to thank the Chilean trade union CUT for providing access to the text of this collective agreement for use in this research.

[43] Retrieved from https://www.boe.es/boe/dias/2019/03/29/pdfs/BOE-A-2019-4645.pdf

[44] María Luz Rodríguez Fernández, "First collective agreement for platform workers in Spain", (2022), https://socialeurope.eu/first-agreement-for-platform-workers-in-spain (Accessed on 19 March 2022).

week. Mini part-time contracts of meager duration thus are not permitted. Finally, the platform undertakes not only to respect the right to data protection and the right to digital disconnection but also to inform the workers' representatives about the algorithm that the platform uses to manage the work. A joint committee is therefore created, the "algorithm committee," thereby complying with the duties of transparency and human judgment in algorithmic decision-making, which has become the banner of protest by platform workers throughout the world.

Other than the preceding, barely any traces of the characteristics of platform work are included in all the other analyzed agreements. Except for the above, no other collective agreement alludes to the algorithmic decisions that govern the lives of the workers, there are no explicit references to the rankings and their effects on working conditions, and there are scarcely any measures for protecting the data of workers. Only two of the collective agreements analyzed do so. The first is the Danish agreement between Hilfr ApS and 3F, in which workers are allowed to request, at any time, that derogatory, false, and offensive remarks be deleted from their profile, as well as any unfavorable assessments that have been received (Protocol 1). The second is the collective agreement signed by 3F and the Danish Chamber of Commerce. This collective agreement states that the provisions of the General Data Protection Regulation (EU) 2016/679 must be implemented such that the ongoing "practice of collecting, storing, processing, and disseminating personal data […] can continue" (Annex 26). Moreover, among the clauses that can be included in employment contracts is one that allows platforms "to collect data from the GPS and logistics systems to check that the car is only used in the service of the employer" (Annex 32). Even if this collective agreement is limited to supervising the work performed by platform workers, it fully legitimizes the extraction of workers' personal data by the platform.

In conclusion, this collective bargaining is just beginning and is more concerned about establishing the classification of platform workers as employees and guaranteeing basic rights regarding working time and wages than about getting into details related to working through a platform. This bargaining is practiced more at the company level than at the sector level and is led by traditional trade unions, which is a crucial point.

5. Issues about the Collective Bargaining of Self-employed Platform Workers

Platforms have burst onto the labor market under a narrative that refutes their nature as undertakings and denies that they have workers for which they are accountable. This means that the figure most used to staff a workforce is that

of an independent contractor or a self-employed worker. In those cases, in which this classification has not been "deactivated," the most recurring question is if self-employed workers of the platform economy have access to the right to collective bargaining.

It seems doubtful, at least in practice. And this is because the collective bargaining agreements tested to date have been disputed. On the one hand, the collective bargaining agreement signed in Italy in 2020 between the business association, AssoDelivery, and the UGL union[45], which regulated the working conditions of self-employed riders, has been declared to be illegal in the Judgement of 30 July 2021 by the Court of Bologna[46] because the signatory union "lacks valid negotiating power" because, in turn, it lacks "the requirement of greatest representation". On the other hand, as it was previously stated, the agreement between Hilfr ApS and 3F, which initially also determined the minimum hourly wage that freelancers should receive from the platform, was deemed on 26 August 2021 to be contrary to free competition by the Danish Authority of Competition and Consumer Affairs[47] based on the fact that "the minimum rate per hour could create a 'minimum price' that might restrict competition among [freelancers]". This is precisely the key to the legal debate: the extent to which collective bargaining agreements of self-employed workers can be understood to be contrary to free competition.

Collective bargaining has always had a hazardous relationship with free competition. The same thing that happened at the dawn of this institution – considered at the time to be a plot designed to alter the price of things – is happening again today regarding self-employed workers of the platform economy. However, the context within which the contradiction between collective bargaining and free competition is once again arising is not comparable to what it was then, among other reasons because the recognition of collective bargaining as a fundamental right means that the point of view according to which the dispute is judged could be different.

To begin with, the right to collective bargaining has, since 1998, been considered one of the Fundamental Labor Principles and Rights by the ILO, and its Convention No. 98 on the Right to Organize and Collective Bargaining

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45 Retrieved from http://www.bollettinoadapt.it/contratto-collettivo-nazionale-per-la-disciplina-dellattivita-di-consegna-di-beni-per-conto-altrui-svolta-da-lavoratori-autonomi-c-d-rider/

46 Retrieved from https://www.lavorodirittieuropa.it/images/Tribunale_Bologna_Nidil_ed_altri_c._Deliveroo.pdf

47 Retrieved from https://www.en.kfst.dk/nyheder/kfst/english/decisions/20200826-commitment-decision-on-the-use-of-a-minimum-hourly-fee-hilfr/

has been interpreted to include self-employed workers[48]. Thus, the 2012 Report of the Committee of Experts on the Application of Conventions and Recommendations[49] expressly states that "recognition of the right to collective bargaining is general in scope and all other organizations of workers [...] must benefit from it [...] the right of collective bargaining should also cover organizations representing […] self-employed workers" (para. 209). Further still, after the Judgement of the CJEU was handed down in the case FNK Kunsten Informatie Media, to which I will refer later, the Committee ratified its criteria in its 2018 Report[50]: "the Committee recalls that [...] the right to collective bargaining should also be applicable to organizations representing self-employed workers [...] the Committee is nevertheless aware that the mechanisms for collective bargaining applied in traditional workplace relationships may not be adapted to the specific circumstances and conditions in which the self-employed work. The Committee invites [...] to hold consultations with all the parties concerned with the aim of ensuring that all workers including self-employed workers may engage in free and voluntary collective bargaining" (p. 149).

The criterion of the EU has been developed differently. The Judgement of the CJEU in case C-67/96, Albany International BV, of 21 September 1999[51], made it clear that collective bargaining was an acceptable restriction of free competition due to pursuing the social policy objectives that are likewise relevant for the EU (paragraphs 59 and 60). To verify this compatibility, one must nevertheless examine the nature of the agreement to affirm that it is the outcome of collective bargaining and must examine its purpose to check that it contributes to improving the labor conditions of the workers (paragraph 62). This is the general doctrine that was applied subsequently to collective bargaining for self-employed workers in the Judgement of case C-413/13, FNV Kunsten Informatie en Media, of 4 December 2014[52]. In this case, the CJEU understands that free competition cannot be restricted, because the agreement is not the outcome of collective bargaining, but the result of an agreement between undertakings.

The starting point of this reasoning is that self-employed workers are "independent economic operators," and therefore a union that acts in their

[48] Valerio De Stefano, "Not as simple as it seems: the ILO and the personal scope of International Labor Standards," *International Journal Review* 160 (2021).

[49] Retrieved from https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2012-101-1B).pdf

[50] Retrieved from https://ilo.primo.exlibrisgroup.com/discovery/delivery/41ILO_INST:41ILO_V2/1251899630002676

[51] Retrieved from https://curia.europa.eu/juris/liste.jsf?language=en&num=C-67/96

[52] Retrieved from https://curia.europa.eu/juris/liste.jsf?num=C-413/13

representation in collective bargaining does not act as a trade union association, but rather as an association of undertakings (paragraph 28). Therefore, the signed agreements do "not constitute the result of a collective negotiation," such that they cannot restrict free competition (paragraph 30). This is the general doctrine on the collective bargaining of self-employed workers, no matter how much this same Judgement might subsequently open the door to possible collective bargaining if the workers in question are not genuine self-employed but rather "false self-employed." It is an important gateway to the right to collective bargaining. First, the definition of "false self-employed" given by this Judgement is very broad: "service providers in a situation comparable to that of employees" (paragraph 31). Second, because the classification as self-employed nationally does not mean that that classification is the same for the application of EU Law, including the right to collective bargaining: "the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law [...] as long as that person acts under the direction of his employer [...] does not share in the employer's commercial risks [and] forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking" (paragraph 36). Under these conditions, a bogus self-employed worker could have access to collective bargaining. However, for genuine self-employed workers, the general doctrine is that they cannot access this right.

It is hard to see that some self-employed workers of the platform economy might be undertakings, and it is, therefore, difficult to see that the agreements they could reach for the defense of their interests would be agreements between undertakings. It is true that, as we stated, vastly different worker profiles exist in the platform economy and that some of them are professionals who work with complete autonomy and power in the market of the digital platform. But there are other self-employed workers of platforms who are more vulnerable and whose economic and legal powers are far weaker than those of the platform for which they provide their services. This is the reason their working conditions are poor. It is therefore perhaps appropriate to recall, according to constitutions of so-called social constitutionalism, what is the ultimate foundation for recognizing the right to collective bargaining: to achieve greater equality in a legal relationship marked by the asymmetry of power held by both contracting parties to improve the working conditions enjoyed by one of those parties. This foundation can once again serve to justify access to collective bargaining by some self-employed workers of platforms, where the asymmetry of power and the resulting poor working conditions are evident.

This was the reason behind the creation of the "professional interest agreements" in the Spanish Statute of Self-employed Work of 2007, reserved for the collective regulation of the working conditions of economically dependent self-employed workers. These agreements represent the first European experience in collective bargaining for the self-employed established by law[53]. Agreements can be concluded between unions or associations representing self-employed workers and the undertaking for which such workers provide their activity, and they can include conditions such as how, when, and where self-employed workers carry out their activity. Agreements must be in writing, and whether or not the agreed working conditions are applied will depend on the consent of the self-employed person. Finally, when any clause in a contract between a self-employed worker and an undertaking is contrary to the content of a professional interest agreement, then it will be considered null and avoided once that self-employed person has consented to the application of the agreement (Article 13).

The preceding reasoning has also served as the foundation for compatibility between the collective bargaining of (some) self-employed platform workers and the free competition that has been decreed because of the public consultations on this matter by the European Commission in March 2021. The Draft for a Communication from the Commission, Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, was published on 9 December 2021[54]. It identifies the two cases in which collective bargaining by self-employed persons is not understood as a restriction of free competition under Article 101 TFEU: i) when the self-employed are in a "comparable situation" to that of workers; and ii) when the self-employed do not have sufficient bargaining power to influence their working conditions. Both cases refer to "solo self-employed persons," i.e., "persons who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labor from the provision of the services concerned" (paragraph 19).

[53] In practice, i) only a relatively small number of professional interest agreements exist; ii) most of them have been concluded in the transport sector; and iii) their content extends beyond the conditions of performing the activity and includes contract terminations and dispute settlement procedures (Fernando Rocha Sánchez, "El trabajo autónomo económicamente dependiente en España. Diagnóstico y propuestas de actuación", *Revista de Derecho de la Seguridad Social* 10 (2017)).

[54] Retrieved from https://ec.europa.eu/social/main.jsp?langId=en&catId=89&furtherNews=yes&newsId=10120

The three instances in which the European Commission understands that self-employed persons are in a situation "comparable" to workers are the following: First, in the case of economically dependent self-employed persons. Economic dependency means that at least 50% of the annual income obtained by the self-employed person comes from a single undertaking (paragraph 25). Second, the situation of self-employed persons will be comparable when solo self-employed persons work "side-by-side" with workers, meaning that the self-employed persons perform the same or similar task as the workers of their undertaking, under its direction and without assuming the economic risk (paragraph 26). The third instance is platform workers.

The first point to note is that collective bargaining is granted both to those who work on online platforms and to those who work on location-based platforms (paragraph 30), despite the difficulty of developing collective bargaining for online platform workers, as was previously explained. The second point to underline is that rationale for allowing collective bargaining for self-employed platform workers is twofold. In the Draft Guidelines of the European Commission, these self-employed persons are considered in a situation comparable to workers because they have "little or no scope to negotiate their working conditions [because] platforms are usually able to unilaterally impose the terms and conditions of their relationship" (paragraph 28). This consequently comes under the possibility of collective bargaining for self-employed workers provided for in the second case allowed in the Draft Guidelines, i.e., weak bargaining power (paragraph 34). Indeed, there are self-employed workers who, because their counterparty has a certain level of economic strength, do not have sufficient power to influence their working conditions. This is very often the case with platforms, whose market power often borders on a monopsony, such that even if the platform workers are genuinely self-employed, it is practically impossible for them to negotiate with the platforms. Thus, whether or not platform workers are in a comparable situation to employed workers, they do not possess sufficient bargaining power. It is precisely this asymmetry of bargaining power that underpins the right of platform workers to collective bargaining, whether they are employees or are self-employed.

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The Ageing Workforce and Industrial Relations: A New Role for the Italian Social Partners?

Michele Dalla Sega [*]

Abstract

This paper considers the initiatives put forward by Italy's industrial relations actors through collective bargaining in order to promote effective age management policies at the workplace. The analysis focuses on the potential benefits and critical issues of these measures, which are also compared with the strategies implemented in some other countries (i.e. France and Germany).

Keywords: *Industrial Relations; Demographic Ageing; Collective Bargaining; Age Management.*

1. Introduction

Demographic aging has been given increasing attention in Europe. Current projections report that between 2016 and 2060 the population aged 65 and older is expected to grow further, while the number of people of working age will decrease considerably[1]. These two factors have led European and national institutions to promote employment strategies focused on the activation of elderly people[2]. These initiatives should ensure economic growth and the

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[1] See European Commission, https://ec.europa.eu/social/main.jsp?catId=1062&langId=en#:~:text=Active%20ageing%20means%20helping%20people,to%20the%20economy%20and%20society. It is reported that «between 2016 and 2060, the share of people over 65 will grow from 19.3% to 29.0% of the total population. The percentage of people over 80 will more than double to 12.1%. During the same time, the working-age population (15-64) in the EU is expected to decline by 11.6%».

[2] See the Europe 2020 Strategy (European Commission, Europe 2020. A strategy for smart, sustainable, and inclusive growth. Communication from the Commission, 3 March 2010), where the European Commission proposed the target of employment at 75%, underlining the

sustainability of public pension systems, also in consideration of the fact that in Europe's 'pay-as-you-go' schemes, social security benefits are funded by the current workers' contributions[3].

Against this backdrop, this paper will examine the role the Italian social partners will play when dealing with demographic aging, considering an 'industrial relations law' perspective[4]. The paper is organized as follows: Section 1 will investigate the legislative measures put forward in the Italian context during the last reform of the pension system. Section 2 will examine to what extent collective bargaining and joint bodies can help to deal with an aging workforce, looking at this issue from an industrial relations law perspective. In this sense, an analysis will be conducted of the different approaches implemented by the social partners concerning demographic aging (Section 3). Section 4 will provide some concluding remarks, identifying some future challenges and the responses supplied in other countries.

2. Italy's Insufficient Response to Demographic Ageing

If one considers Italy's recent reforms of the labor market, it is safe to argue that lawmakers have given scant consideration to the promotion of older people's employment, implementing temporary and isolated provisions which followed two directions.

On the one hand, the last pension reforms have extended working life, raising age and contribution requirements dramatically. In particular, the 2011 reform made the requirements for pension eligibility more stringent, causing many workers to postpone retirement[5]. In addition, some mechanisms contained in the reform have made the system even more rigid, so now the amount of pension to be paid is closely linked to increasing life expectancy.

On the other hand, these reforms were not supplemented with systemic policies promoting the active participation of older workers in the labor

necessity to encourage the activation of elderly people out of the labor market, with the priority of improving their skills. See also, European Commission, Green paper on aging. Fostering solidarity and responsibility between generations, 27 January 2021.

[3] For a recent overview of OECD countries' pension systems, see Oecd, Pensions at a Glance 2021: OECD and G20 Indicators, OECD Publishing, Paris, 2021.

[4] See M. Tiraboschi, Teoria e pratica dei contratti di lavoro, Adapt University Press, Bergamo, 2016, p. 33; L. Spagnuolo Vigorita, La rivista "Diritto delle relazioni industriali", in Diritto delle Relazioni Industriali, 1991, p. 3.

[5] Article 24 of Law Decree 201/2011 of 6 December. For an analysis of the reform, see M. Cinelli, La riforma delle pensioni del "governo tecnico". Appunti sull'art. 24 della legge n. 214 del 2011, in Rivista Italiana di Diritto del Lavoro, 2012, p. 385; F. Fedele, A. Morrone, La legislazione sociale del 2011 tra crisi della finanza pubblica e riforma delle pensioni, in Rivista del diritto della sicurezza sociale, 2012, p. 105.

market. Analyzing the most recent pension reforms, a significant number of policy provisions concerning 'active aging'[6] were included, but only a few of them can be regarded as effective. For example, in 2012, the government allocated incentives to employers who hired unemployed workers aged 50 and older[7]. However, this was just an isolated attempt to deal with the issue and produced insignificant results[8]. Furthermore, the legislator adopted temporary solutions to facilitate the early retirement of some categories of workers, in order to mitigate the impact of more stringent requirements to access pension benefits[9]. Unlike long-standing policies – regarded as unappealing and politically unfeasible – these short-term solutions also gathered wide consensus in public opinion and among workers themselves[10].

3. The Role of the Italian Social Partners

Against the backdrop of this regulatory framework, this paper presents the main findings of research conducted on the age-management policies implemented by the social partners in recent years, either because of national legislation or through individual initiatives. Some of Italy's main reports on collective bargaining report an increase in the number of age-management provisions, which go beyond wage-setting schemes and point to older workers' higher participation in employment[11].

3.1. Methodology

This research analyzed the collective agreements laying down specific measures for older workers which were collected in the ADAPT database "*Fare*

[6] See, for example, the specific policy provisions on this issue in Law 247/2007 of 24 December.

[7] Article 4 of Law 92/2012 of 28 June.

[8] L. Guaglianone, Parti sociali e politiche di ageing. Una sfida tutta da giocare, in Rivista giuridica del lavoro, 2015, n. 2, I, 322.

[9] For a general overview of the last measures adopted by different governments, see D. Garofalo, Anziani e mercato del lavoro: risorsa o zavorra?, in R. Fabozzi, G. Sigillò Massara (eds.), Il diritto del lavoro e la sua evoluzione. Scritti in onore di Roberto Pessi, Cacucci, Bari, 2021, I, pp. 1263 ff.

[10] M.L. Aversa et al., L'age management nelle grandi imprese italiane: i risultati di un'indagine qualitativa, Isfol, Roma, 2015, p. 30.

[11] See for example, ADAPT's most recent analysis (Adapt, VIII Rapporto sulla contrattazione collettiva in Italia, Adapt University Press, Bergamo, 2022), Cgil (N. Brachini, B. De Sario, S. Leonardi (a cura di), Secondo rapporto sulla contrattazione di secondo livello, Cgil-Fondazione Giuseppe Di Vittorio, 2020) and Ocsel-Cisl (L. Sbarra, G. Romani (eds.), La contrattazione decentrata alla prova dell'imprevedibilità – 6° rapporto OCSEL, Ocsel, 2021).

Contrattazione"[12]. They deal with different issues and were concluded in different sectors. A clarification is needed in terms of methodology. When analyzing the terms of the agreements, it will be necessary to distinguish the different approaches adopted by the social partners. Furthermore, special attention will be paid to the different industrial relations systems, with an emphasis on the instruments used, the collective bargaining level at which solutions were adopted, and the relationship between law and collective bargaining.

3.2. Age-management and Collective Bargaining: Initial Solutions and Different Approaches

Looking at the different measures put forward, two main approaches can be identified which were adopted by the social partners. Industrial relations actors promote generational turnover, which brings together the need to handle the retirement of older workers and the recruitment of new staff. Concurrently, strategies aimed at the management of the older workforce in the company have been put forward, trying to identify solutions to some issues (lack of appropriate skills, health-related problems, low involvement of the older workforce in production processes).

3.2.1. Measures Promoting Workers' 'Generational turnover'

Recent strategies promoting generational turnover include *contratti di espansione* (literally: 'expansion contracts') a collective agreement that entered into force in 2019[13]. *Contratti di espansione* lay down several measures targeting older workers, among which are voluntary early retirement schemes, new recruitments, and refreshment courses. The employer and the workers' representatives negotiate the clauses of the plans, concluding specific agreements approved by the Ministry of Labour. Especially in the last year, the *contratto di espansione* attracted the interest of employers and the social partners, who have adopted this instrument to support company reorganization. However, the preliminary

[12] This is a database on collective bargaining, edited by ADAPT researchers that contains more than 4,000 collective agreements, negotiated at different levels (national, territorial, and company).

[13] Article 41 of Law 148/2015 of 14 September. For an analysis of the instrument, also in the light of the latest reforms, see M. Squeglia, La natura "polimorfa" del nuovo contratto di espansione: la risposta legislativa alla trasformazione digitale e all'industria 4.0, in Argomenti di diritto del lavoro, 2020, n. 3, I, pp. 589 ff.; C. Carchio, Il contratto di espansione, in S. Ciucciovino et al. (eds.), Flexicurity e mercati transizionali del lavoro, Adapt University Press, Bergamo, 2021, pp. 174 ff.

findings on its content show that this tool does not facilitate workers' active aging[14]. For example, early retirement schemes provided by the contratti di espasione are used to exclude older workers from the labor market, as they are unable to keep up with the ongoing transformations[15].

However, looking at different labor market sectors, different measures can be found which were established autonomously by the social partners through national and company agreements. They deserve special attention because they combine different instruments other than the provision of early retirement schemes. An example of this is Gefran's agreement of 2019[16], which introduces an experimental "generational turnover" program, so workers approaching the pension age can submit requests in the 12 months preceding retirement to change their contract from a full-time to a part-time one. Meanwhile, and in order not to lose the wealth of knowledge acquired by them, these workers will serve as mentors for younger ones.

As for Baxi, a close link can be observed between the solutions introduced at the national level by the social partners and the effective measures adopted in the company. The 2019 agreement[17] represents one of the first applications of the *banca del tempo* (working time accounts), an instrument introduced by the national collective agreement of metalworkers of 2016[18] allowing workers to set aside paid annual leave and overtime hours to continuously reduce working hours as they approach retirement. The "banca del tempo" can be used by employees who reach the requirements for public pension within five years. They will be able to collect up to a maximum of 64 hours annually, which could be used continuously in the period immediately preceding retirement.

Many other examples of generational turnover can be considered, in different kinds of companies[19], with a special focus on the labor market sectors where social partners, through collective bargaining, have introduced specific bilateral solidarity funds. Initially implemented to ensure income support to workers in cases of reduction or suspension of work, these measures can now pursue further goals, e.g. financial support for workers who enter early retirement

[14] See Adapt, VIII Rapporto sulla contrattazione collettiva in Italia cit., Part III, Chapter I.

[15] See. D. Garofalo, Anziani e mercato del lavoro: risorsa o zavorra? cit., p. 1235; V. Ferrante, Invecchiamento attivo e prolungamento della vita lavorativa, in AA. VV., Studi in onore di Tiziano Treu, Jovene, Napoli, 2011, III, pp. 1187 ff.

[16] Gefran company collective agreement of 26 November 2019. Signed by Gefran and the Fim-Cisl and Fiom-Cgil trade unions.

[17] Baxi company collective agreement of 24 March 2019. Signed by Baxi and the trade unions.

[18] Section IV, Title III, Article 5 of the Italian metalworking sector collective agreement of 26 November 2016. Signed by the Federmeccanica and Assistal employers' organizations and the Fiom-Cgil, Fim-Cisl, and Uilm-Uil trade unions.

[19] See, *ex multis*, the company agreements. Signed in Bayer in 2014, Luxottica in 2015, Ica Market in 2017, Celanese and Lamborghini in 2019.

schemes[20]. The numerous generational turnover processes in the banking[21] and in the chemical-pharmaceutical sector[22], where bilateral solidarity funds are operating thanks to the initiative of social partners, clearly show how this instrument can be used as an incentive to promote voluntary resignation.

3.2.2. Other Negotiated Strategies

To provide a full picture of the ways of managing an aging workforce, it is not enough to focus on the strategies for ensuring a gradual turnover between young and old workers. As seen, it is also possible to identify strategies that support the employability, productivity, and well-being of older workers through different instruments.

Many company agreements promote targeted training and vocational retraining programs for older workers, considering specific needs related to different career periods. For example, Sapio's company-level collective agreement of 2019[23] provides specific courses for young resources and for those who have a senior role in the company. Furthermore, the agreement introduces a "Senior Program", i.e. a training program developed to recognize, enhance, and consolidate the experience of older workers employed in the company. The goal is to support the employees in the last phase of their working life, providing them with tools and keys to emphasize the value of their contribution while not losing the wealth of skills they developed. To ensure skills transfer, other company-level agreements[24] promote reverse mentoring processes, with formal meetings between junior employees and senior colleagues, during which a mutual exchange of knowledge and expertise takes place. The nature of this exchange can thus involve older workers passing skills down to younger ones, who, because of their greater digital experience, can help the former become familiar with the technology[25].

In other cases, and to encourage the engagement of mature workers, collective agreements promote reward systems for the employees who have reached

[20] M. Martone, Il diritto del lavoro alla prova del ricambio generazionale, in Argomenti di diritto del lavoro, 2017, n. 1, I, p. 17. See also M. Squeglia, La previdenza contrattuale, Giappichelli, Torino, 2014, pp. 50 ff.

[21] See, most recently, the company agreements. Signed in Unicredit, Banca di Asti, Banca Popolare Puglia e Basilicata in 2022, Bper Banca, Intesa Sanpaolo and Crèdit Agricole in 2021.

[22] See, most recently, the company agreements. Signed in Alfasigma and Air Liquide in 2021.

[23] Sapio company collective agreement of 2019. Signed by Sapio and the Filctem-Cgil, Femca-Cisl and Uiltec-Uil trade unions.

[24] See, *ex multis*, the company agreements. Signed in Benetton in 2021, Capgemini and Lamborghini in 2019, Mutti in 2015.

[25] L. Di Salvatore, Organizzazione del lavoro e invecchiamento attivo, in Diritto delle Relazioni Industriali, 2019, p. 553.

certain seniority. The Banca Sella company agreement of 2016[26] pays a one-off bonus to the employees who reach 25 years of uninterrupted service, while in the Aeroporti di Puglia company agreement of 2016[27], the amount of the company performance bonus negotiated with workers' representatives is further increased for employees with 30 years' seniority.

Strategies cannot neglect the health and wellbeing of older workers, so occupational welfare[28] plays a major role in this respect. Collective bargaining has been focused more and more on this aspect in recent years[29]. In particular, in light of the growing health-related needs of an increasingly older working population, relevance should be given to the supplementary health care solutions promoted by the social partners through bilateral funds. The social partners have recently enhanced the bilateral sector healthcare funds, through national collective agreements. Additionally, the social partners have simplified and incentivized the enrolment mechanisms[30], in some cases with specific provisions targeted to older workers[31]. In some cases, the services laid down in specific healthcare plans have been extended, strengthening the prevention and care activities for chronic diseases, which usually affect the aging workforce. These national measures are often supplemented by the provisions included in company-level collective agreements, e.g. healthcare policies.

[26] Banca Sella company collective agreement of 29 April 2016. Signed by Banca Sella and the Fabi, First-Cisl, Fisac-Cgil and Uilca-Uil trade unions.

[27] Aeroporti di Puglia company collective agreement of 27 December 2016. Signed by Aeroporti di Puglia and the Filt-Cgil, Fit-Cisl, Uiltrasporti-Uil, Ugl Trasporti trade unions.

[28] See R. Titmuss, Essay on the Welfare State, Allen and Unwin, 1958, p. 100, who defines "occupational welfare" as «all social benefits provided by companies to their employees under the employment contract».

[29] See, *ex multis*, the last reports on this issue edited by Percorsi di Secondo Welfare (F. Maino (ed.), Il ritorno dello Stato sociale? Mercato, Terzo Settore e comunità oltre la pandemia. Quinto Rapporto sul secondo welfare, Giappichelli, Torino, 2021) and Adapt (M. Tiraboschi (ed.), Welfare for People. Quarto rapporto su il welfare occupazionale e aziendale, ADAPT University Press, Bergamo, 2021).

[30] For a general overview of the principal healthcare bilateral funds in Italy, see M. Tiraboschi (ed.), Welfare for People. Secondo rapporto su il welfare occupazionale e aziendale, ADAPT University Press, Bergamo, 2019, pp. 76 ff.

[31] Section IV, Title IV, Article 16 of the Italian metalworking sector collective agreement of 5 February 2021. Signed by the Federmeccanica and Assistal employers' organizations and the Fiom-Cgil, Fim-Cisl, and Uilm-Uil trade unions. The new provision introduces the extension of healthcare supplementary solutions for the retired who were registered in a bilateral sector health care fund before retirement.

4. Future Challenges for Effective Age-management Policies: A Cross-national Comparison

So far, reference has been made to measures that identify solutions related to training, occupational wellbeing, and flexible work arrangements. These solutions undoubtedly represent an innovation in the Italian system of industrial relations, even if there are still some aspects to be developed. The best practices presented here are still isolated and often refer to large companies where employee representation is effective. Therefore, to ensure these measures wider coverage, the social partners should insist on promoting active aging and the management of older workers, supporting companies that do not have adequate tools and experience in this area, and coordinating solutions at the different levels of bargaining[32].

Moreover, a change of pace is also needed in the content of collective agreements, to meet the future challenges of an aging workforce. The social partners should also overcome the simple "young in, old out" approach, promoting new ways of working to enhance the participation of older workers. Cross-national comparison can help in this sense. In Germany, workers councils have often been an active part of company innovation processes that take into consideration the different needs of older workers. One good example is that of the BMW plant in Dingolfing, where, with the support of the workers' council[33], the company introduced special production spaces, with targeted measures to lighten the workload for older workers[34]. This was accompanied by a consultation process between managers and employees, which made it possible to analyze the problems and jointly plan the changes to be made. The results were successful, considering the reduction in absenteeism and the number of requests for sick leave, in addition to higher productivity, thanks to the active involvement of older workers[35].

[32] The 2021 collective agreement illustrates that the social partners have set, at the national level, some important guidelines on flexible working hours and targeted training for older workers, which have now to be made effective by company agreements. For a preliminary analysis of the collective agreement see D. Frisoni, CCNL Igiene Ambientale: un rinnovo unificato tra formazione, sicurezza e gestione delle transizioni generazionali, in Bollettino Adapt, 2022, n. 74.

[33] C. Loch et al., How BMW is defusing the demographic time bomb, Harvard Business Review, 2010, p. 100.

[34] Examples include the use of special lifts, the provision of height-adjustable workbenches, and the choice of wooden flooring to facilitate pelvic movements during frequent movements.

[35] Centro Studi e Ricerche Itinerari Previdenziali (ed.), Lavoratori over 55 e active ageing. Approfondimento sull'invecchiamento attivo in Italia: dimensioni del fenomeno, criticità e possibili aree di intervento, 2018, p. 17. See also L. Di Salvatore, Organizzazione del lavoro e

It is clear that to extend these practices, the legislator can play an important role by encouraging negotiation. As seen, the last reforms have tried to follow this strategy, introducing some special arrangements. However, these essentially encourage generational turnover processes and not specific programs to promote the active aging of older workers.

France's case shows that legislation can provide a valuable contribution to dealing with this issue. According to a specific provision of the French labor code[36], the social partners, in companies with more than 300 employees, are obliged to negotiate every three years the so-called *accords sur la gestion prévisionnelle des emplois et des competences* [37]. These company agreements, to anticipate future skill needs as well as to prevent future employment crises, contain many provisions: training to adapt workers' skills, the setting up of joint committees or observatories to monitor skills requirements, and specific actions to enhance professional mobility of workers and to protect the most vulnerable employees, e.g. older workers. In most cases, the early retirement of older workers is not a compulsory process of these negotiated plans (as seen for the "*contratti di espansione*") but it is only implemented when no alternatives exist to keep employment[38]. To conclude, the negotiated, age-management solutions adopted in Italy can certainly be improved, especially when looking at what happens in other countries. These mechanisms require new synergies between the social partners and public institutions[39]. While waiting for lawmakers' proactive approach, the social partners can promote better coordination[40] between different levels of bargaining, with the aim to create more inclusive forms of protection to better adapt to a changing workforce.

invecchiamento attivo cit., pp. 548 s.; C. Loch et al., How BMW is defusing the demographic time bomb cit., pp. 99 ff.

[36] Art. L. 2242-13 of *Code du travail*.

[37] For an analysis of the instrument see H.J. Legrand, Sur un nouvel objet juridique non identifié la "GPEC", in Droit Social, 2006, pp. 330 ff.

[38] A. Martinon, La gestion prévisionnelle des emplois et des compétences, in Droit Social, 2011, p. 616.

[39] A. Rota, A proposito di invecchiamento attivo ed in buona salute: quale revisione delle politiche pubbliche nazionali e delle relazioni sindacali?, in Diritto delle Relazioni Industriali, 2016 p. 723.

[40] On the meaning and the concrete implications of vertical coordination of industrial relations systems see F. Traxler, The Contingency Thesis of Collective Bargaining Institutions, CESifo DICE Report, 2003, pp. 34 ff.

Big Data as a Tool to Enhance Recruitment Processes

Roberto Fernández Fernández [*]

Abstract

The selection of workers and the search for talent have become an essential aspect in companies to improve their competitive position in the market, as a proper selection of human resources can make a substantial difference to their competitors. The reality of labour intermediation has been significantly altered by the emergence of the Internet and social networks, so that the virtual space allows headhunters to obtain a large amount of data on candidates quickly, immediately and easily. To provide adequate protection to citizens, first the courts and then the legislator created a number of legal institutions that seek to set limits on the intrusion of new technologies into privacy. One of the best known is the right to be forgotten, which allows the interested party to request the de-indexation of past information that is not relevant at the present time.

Keywords: Social Network Sites; Recruitment; Algorithms; Right to be Forgotten; Privacy.

I. A New Way to Select Candidates: The E-Recruitment

Companies have a powerful weapon when selecting their workers and evaluating the suitability of candidates. That power has been increased by the amount of information that can be tracked through the Internet and social networks, since citizens offer through them, either voluntarily or involuntarily, a large amount of data[1].

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[1] "These sites invite users to disclose their personal information such as date of birth, gender, hometown and hobbies, for the purposes of creating a profile of themselves. They provide users with the ability to post their own content in the form of videos, pictures and comments

This search for data to find or certify the ideal candidate for the job may go further than necessary, with the employer investigating aspects that are inconsequential or very little relevant to determining the worker's professionalism. Information technology introduces a greater risk at this point, since it can lead to the reworking of a large amount of simple data in such a way that, combined with each other, it can practically give the profile of a person, and this not only through the direct collection of data, but also through the collection of fragmented and apparently inconsequential news which, combined, can give quite a lot of information about an individual or group of individuals[2].

In this way, information and communication technologies in general, and social networks in particular, allow access to a large volume of information and its rapid and cheap processing through the creation of corresponding algorithms that through profiling access detailed knowledge of when, how, where and with what result one has worked[3]. Always bearing in mind that it is neither easy nor simple to establish privacy filters on these platforms and to restrict who are the users who can see the content of the same, without prejudice to the fact that the network itself on many occasions requires certain data to be accessible to the general public.

Based on the above premises, one of the areas where companies struggle most in their competitive strategies is in attracting talent. Traditional recruitment mechanisms present a major limitation because the information provided comes from the candidates themselves, which often prevents them from obtaining a complete and reliable profile. Indeed:

> with the advent of the era of Big Data, this problem has been resolved successfully. In the context of Big Data, information access and sharing are very convenient, any individual can search the information they want to learn through the network at any time or anywhere easily. In addition, more and more organizations began to develop professional network training courses. Companies can according to its own situation choose purchase these courses directly or customize. Such software programs can record the data of study behaviors of every employee, who can not only use the online system to analyze their own training needs, but also can choose your favorite form of

which can be made publicly visible. Social networking sites also allow registered users to interact with their contacts, who they have previously invited to become a member of their network of friends. Online social networks differ greatly from offline social interactions; they are more publicised; have the potential to reach a wider audience and can remain in the public domain long after their first publication. For these reasons joining an online social network can prospectively have far reaching implications for the user", T. McDermott, *Legal issues associated with minors and their use of social networking sites*, *Communications Law*, 2012, Vol. 17, núm. 1, p. 19.

[2] J.L. Monereo Pérez y J.A. Fernández Bernat, *"Listas negras" de trabajadores conflictivos*, *Trabajo y Derecho*, 2016, núm. 16, p. 5 (smarteca).

[3] Social Court Decision, number 33, Madrid 11 February 2019.

> teaching. So that employee can make their training more targeted and improve training efficiency. In addition, employee can accept online test and feedback at any time, which can enhance learning interest effectively and ensure the learning effect. And after a certain time, based on the learning data, the software can also predict an individual's possible improve point. In addition, to keep abreast of staff mastery of new skills, managers can monitor employees' learning situation in the background[4].

For this reason, the Big Data offers hitherto unexplored possibilities and can help to overcome the difficulties identified: firstly, it provides companies with a wider platform, such as the internet and/or social networks, allowing them to build the candidate's fingerprint; secondly, a combination of these new tools with classic recruitment strategies constitutes an unknown source of information for recruiters, who can access personal images, living conditions, social relations, skills, etc., that will allow them to build a more faithful image of the candidate, both personally and professionally.

For the above arguments, it is necessary to be aware of how conduct at one point, which may appear innocent, can over time have a detrimental effect on finding future employment. Tracking of the candidate's comments and the information that the employer can obtain about him or her can constitute the differential element in order to obtain or not a job.

II The Power of the Internet and Social Networks in Candidate Selection

II.a Use of the Social Media in the Recruitment Process

In social networks you can access information such as the age of the candidate, places of study, home, hobbies, religious or political beliefs, sexual orientation, circle of friends and a large number of photos, videos, comments and personal opinions capable of generating a profile of the candidate[5]. All circumstances that may predispose the company to hire or not.

In addition, it is necessary to take into account the weak position of the candidates who, in their eagerness to find a job, may be more willing to provide the data requested by the person carrying out the selection process in the desire to get the job. The moment before the conclusion of the employment contract is particularly sensitive and important in terms of the processing of personal data. Common sense tells us that those seeking a job

[4] S. Zhan y M. Ye, *Human resource management in the era of Big Data*, *Journal of Human Resource and Sustainability Studies*, 2015, Vol. 3, núm. 1, p. 43.

[5] J. Llorens Espada, *El uso de Facebook en los procesos de selección de personal y la protección de los derechos de los candidatos*, *Revista de Derecho Social*, 2014, núm. 68, p. 56.

are willing to provide as much data as requested, since the purpose of the employment contract is to meet the vital needs of the candidate and his or her family (art. 35 Spanish Constitution)[6].

For this reason, it is necessary to consider the following two practices as illegal, at least in Spanish law: shoulder surfing, used to obtain access keys or passwords to a social network; asking the candidate to provide the company with access to social networks or to accept the company as a friend on that network[7].

Along with the data provided by generalist social networks, there are some of them (LinkedIn, Infojobs, Monster or Xing, among others) that are only dedicated to the professional field and to facilitate contracts between companies and workers. In this way, they can be used to obtain the professional career of the worker.

In addition, they can offer added value by becoming a business model because the use of premium services in this type of network, unlike other types of platforms, has a high yield of the number of premium users, who pay a monthly amount, to access advanced services[8].

Indeed, these are social networks and online platforms whose mission is to bring together professionals from all over the world so that they can be more productive and successful, and which can bring significant benefits to both workers and employers. In addition, the employer obtains a high degree of optimisation at zero cost because registration in these networks, apart from the subscription to premium services, is free of charge; however, their use should be based on good faith and respect for the fundamental rights of employees, which is not always the case. In any case:

> employers should not assume that merely because an individual's social media profile is publicly available they are then allowed to process those data for their own purposes. A legal ground is required for this processing, such as legitimate interest. In this context the employer should—prior to the inspection of a social media profile—take into account whether the social media profile of the applicant is related to business or private purposes, as this can be an important indication for the legal admissibility of the data inspection. In addition, employers are only allowed to collect and process personal

[6] C.H. Preciado Domènech, *El Derecho a la Protección de Datos en el Contrato de Trabajo*, Thomson Reuters – Aranzadi, Cizur Menor, 2017, p. 156.

[7] E.E. Taléns Visconti, *Incidencia de las Redes Sociales en el ámbito laboral y en la práctica procesal*, Francis Lefebvre, Madrid 2020, p. 31.

[8] INTECO y AEPD, *Estudio sobre la privacidad de los datos personales y la seguridad de la información en las redes sociales on line*, INTECO-AEPD, León, 2009, p. 44. It is available at the following link: [https://www.uv.es/limprot/boletin9/inteco.pdf].

data relating to job applicants to the extent that the collection of those data is necessary and relevant to the performance of the job which is being applied for[9].

II.b Big Data Analytics Used in Human Resources Practices

There are companies that specialise in searching for information on potential job candidates through the Internet or social networks in order to draw up their personal and professional profile. Likewise, alongside the classic headhunters, nethunters have emerged who are dedicated solely to searching for information in these digital media.

So, "it must be found that, in exploring the internet automatically, constantly and systematically in search of the information which is published there, the operator of a search engine 'collects' such data which it subsequently 'retrieves', 'records' and 'organises' within the framework of its indexing programmes, 'stores' on its servers and, as the case may be, 'discloses' and 'makes available' to its users in the form of lists of search results. As those operations are referred to expressly and unconditionally in Article 2(b) of Directive 95/46, they must be classified as 'processing' within the meaning of that provision, regardless of the fact that the operator of the search engine also carries out the same operations in respect of other types of information and does not distinguish between the latter and the personal data […] Also, the organisation and aggregation of information published on the internet that are effected by search engines with the aim of facilitating their users' access to that information may, when users carry out their search on the basis of an individual's name, result in them obtaining through the list of results a structured overview of the information relating to that individual that can be found on the internet enabling them to establish a more or less detailed profile of the data subject"[10].

Applications are also increasingly used during the selection procedure to allow for an initial screening of the applications submitted. The applications are fed into software with specific patterns that can quickly and easily select the candidates to move on to the next stages, in an action that can cover all the selective phases, given that the deployment of recruitment algorithms is not limited to background research: every process, from CV analysis to the

[9] Article 29. Data Protection Working Party: *Opinion 2/2017 on data processing at work*, 8 June 2017, p. 11. It is available at the following link: [https://ec.europa.eu/newsroom/article29/items/610169].

[10] European Union Court of Justice Decision C-131/12, 13 may 2014, case *Google Spain y Google*.

classification of candidates, the making of offers and the determination of salaries can be automated[11].

These applications make use of the potential of big data, which allows them to "the collection, analysis and the recurring accumulation of large amounts of data, including personal data, from a variety of sources, which are subject to automatic processing by computer algorithms and advanced data-processing techniques using both stored and streamed data in order to generate certain correlations, trends and patterns (big data analytics)"[12].

In any case, and regardless of the model used by the company and the technology employed to select workers, the company must respect the fundamental rights of workers in this process.

For the above reasons, it is necessary to avoid the existence of any discriminatory bias for any reason of a personal nature in the algorithms, given the growing power derived from Big Data, which makes it essential to adopt appropriate mechanisms of a limiting nature capable of combating information asymmetries and their consequences in terms of economic advantages and social control of companies[13].

In this regard, it is not enough to eliminate race, gender, ethnicity or age from the data set, as the algorithm could link other variables to these causes of discrimination, such as the postal code or years of experience, sometimes unknown to those who create, apply or are assessed by them. Moreover, algorithmic decisions can systematically exclude certain people from employment, leaving certain groups virtually unemployable, deepening the digital divide even for jobs that would not require technology[14].

Indeed, artificial intelligence is a tool that must be used ethically by companies. And that ethical sense must be clearly defined by the laws of the various countries or by collective agreements. We must return to the social control of technological change where respect for certain rights and minimum protections are demanded[15].

In this way, the algorithms used cannot establish biases capable of ending up in the application of arbitrariness or inequalities generating discrimination. To

[11] H. Álvarez Cuesta, *El impacto de la inteligencia artificial en el trabajo: desafíos y propuestas*, Thomson Reuters – Aranzadi, Cizur Menor 2020, p. 31.

[12] European Parliament, *European Parliament resolution of 14 March 2017 on fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law-enforcement (2016/2225(INI))*, It is available at the following link: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017IP0076].

[13] A. Mantelero, *Masters of Big Data: concentration of power over digital information*, 2012, It is available at the following link: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2048236].

[14] H. Álvarez Cuesta, *op. cit.*, pp. 33 y 34.

[15] J.L. Goñi Sein, *Innovaciones tecnológicas, inteligencia artificial y derechos humanos en el trabajo*, *Documentación Laboral*, 2019, Vol. 117, núm. II, p. 67.

avoid any discrimination, it is necessary to allow the participation of workers' representatives in the generation of these algorithms and to audit their results with continuous and dynamic checks. It is also important to inform candidates about the use and scope of data analysis.

This is in compliance with Article 35 of the General Data Protection Regulation when it states as follows: "where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data".

This assessment will therefore be required in the selection of employees by human resources analysis practices, as most (if not all) of the selection processes for future employees will involve "a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person" [art. 35.3.a) GDPR].

Indeed, the need for adequate management of data protection risks can be accounted for when the impact of a factor is very important for the rights and freedoms of citizens, even if the probability of occurrence is very low or negligible[16].

Consequently, proper compliance with GDPR requires that those who are going to use a system based on Artificial Intelligence and Big Data validate the procedures prior to the design/selection and implementation of the Artificial Intelligence solution for a given processing operation, so that it is possible to identify the privacy requirements to be incorporated and to effectively apply the privacy measures from the design and by default[17].

On the other hand, and to ensure that these procedures are safe and reliable in its execution, a desirable interaction between machine and man could be envisaged, so that, for example, the AI system could take into account measurable properties, such as the number of years of experience of a job applicant, while a human reviewer evaluates the applicants' skills that cannot be captured in the application forms[18]; with this combination it could better fight

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16 Agencia Española de Protección de Datos, *Gestión del riesgo y evaluación de impacto en tratamientos de datos personales*, Agencia Española de Protección de Datos, Madrid, 2021, p. 36.

17 Agencia Española de Protección de Datos, *Adecuación al RGPD de tratamientos que incorporan Inteligencia Artificial. Una introducción*, Agencia Española de Protección de Datos, Madrid, 2020, p. 31.

18 R. Binss y V. Gallo, *Automated Decision Making: the role of meaningful human reviews*, Oficina del Comisionado de Información, Londres 2019. It is available at the following link:

both the already seen biases of automation and the unconscious biases of individuals[19].

Furthermore, at the final stage of the procedure, the possibility of a human having the final say in all automated decisions should never be ruled out, given that the design of systems with a "dead man's lever" orientation should be avoided and the option should always be given for a human operator to override the algorithm at any given moment, with the procedure for those situations in which this course of action must be chosen[20], thus ensuring a human-centred approach to the subject.

III. Right to be Forgotten

We cannot forget the possibility that social networks and the Internet leave a digital footprint that can be followed and tracked many years later and provide information on a perennial basis about a citizen.

"It must be recalled, that the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference"[21].

In this respect, the right to information self-determination has recently given rise to a fierce debate between two disparate positions, the European and the American, on the opportunity and possible scope of the exercise of an alleged right to be left alone, understood as the right to demand the removal or deletion of personal information which, although true, entails or represents for the data subject an injury or damage that he or she understands he or she does not have a legal duty to bear[22].

Faced with this reality, first the European Courts, and then the Community and Spanish legislators, have acted, establishing a series of limits on the information that can be accessed and the use that can be made of it after a

[https://ico.org.uk/about-the-ico/news-and-events/ai-blog-automated-decision-making-the-role-of-meaningful-human-reviews/].

[19] J.S. Lublin, *Bringing Hidden Biases Into the Light. Big Businesses Teach Staffers How 'Unconscious Bias' Impacts Decisions*, *The Wall Street Journal*, 9 de enero de 2014. It is available at the following link: [https://www.wsj.com/articles/SB10001424052702303754404579308562690896896].

[20] Agencia Española de Protección de Datos, *Adecuación al RGPD de tratamientos que incorporan Inteligencia Artificial. Una introducción*, Agencia Española de Protección de Datos, Madrid, 2020, p. 28.

[21] European Union Court of Justice Decision C-136/17, 24 september 2019, case *GC y otros*.

[22] A.B. Casares Marcos, *El derecho al olvido como facultad integrante del derecho a la autodeterminación informativa del ciudadano*, *CEF Legal*, 2017, núm. 198, p. 57.

certain period of time[23]. Thus, the Court of Justice of the European Union has created what is known as the right to be forgotten.

Therefore, "the supervisory authority or judicial authority may order the operator of the search engine to remove from the list of results displayed following a search made on the basis of a person's name links to web pages published by third parties containing information relating to that person, without an order to that effect presupposing the previous or simultaneous removal of that name and information — of the publisher's own accord or following an order of one of those authorities — from the web page on which they were published"[24].

And that it is even, "in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful"[25], so that it will be necessary to evaluate in each individual case "whether the data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name. In this connection, it must be pointed out that it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject"[26].

For its part, Article 17 of the General Data Protection Regulation of 2016 establishes that the data subject has the right "to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;

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[23] "The availability of data from past interactions will undermine our right to oblivion, providing an ever-increasing resource of information about our inclinations that can be held against us at any point in time", M. Hildebrandt, *Ambient intelligence, criminal liability and democracy*, *Criminal Law and Philosophy*, 2008, Vol. 163, p. 166.

[24] European Union Court of Justice Decision C-131/12, 13 may 2014, case *Google Spain y Google*.

[25] European Union Court of Justice Decision C-136/17, 24 september 2019, case *GC y otros*.

[26] European Union Court of Justice Decision C-131/12, 13 may 2014, case *Google Spain y Google*.

(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
(d) the personal data have been unlawfully processed;
(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1)".

Thus, the Regulation clarifies the right to have personal data deleted from a particular database containing such data. That, and nothing else, is the right to forget. A right to the deletion of personal data[27].

However, the Community article does not provide a definition of what the right to forget is, nor does it appear in European case law, although it can be taken indirectly from some pronouncements, when it states that its content refers to the removal of links from a list of results when the search criteria is the name of a natural person[28].

In addition, article 17 of the General Data Protection Regulation of 2016 establishes "where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data".

In any case, the general rule of erase finds several exceptions in paragraph 3 of the provision, since the prerogative analysed cannot be invoked in the following cases:
(a) for exercising the right of freedom of expression and information;
(b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
(c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);
(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing;

[27] Spanish Constitutional Court Decision 58/2018, 4 June 2018.
[28] European Union Court of Justice Decision C-136/17, 24 September 2019, case *GC y otros*.

or (e) for the establishment, exercise or defence of legal claims.

In this way, the right to be forgotten means that the person concerned can demand the cancellation of the processing of his or her personal data when a period of time has elapsed that makes it inappropriate in relation to the purpose for which the data was collected, since the person concerned has no public relevance and there is no historical interest in linking the information with his or her personal data[29].

Consequently, the search engine, or the person responsible for the social network, cannot adopt a merely passive attitude, but will have to put in place the necessary measures to proceed with the deindexation of the data that is of no interest at the present time.

However, it is not possible to forget the difficulties in achieving such an outcome, because "the critique of the post-Costeja González [*Google Spain* case] paradigm has brought to light numerous issues with regard to its application and implementation. The diverse storage of personal data makes it very hard to identify all of the publications of the data which needs to be removed. The ease of replicability and transferability of data on the internet with technological developments has led to the lack of enforceability, which greatly hinders the implementation of the right to be forgotten"[30].

Indeed, "the prohibition or restrictions relating to the processing of special categories of personal data, […] apply also […] to the operator of a search engine in the context of his responsibilities, powers and capabilities as the controller of the processing carried out in connection with the activity of the search engine, on the occasion of a verification performed by that operator, under the supervision of the competent national authorities, following a request by the data subject"[31].

On balance, the right to be forgotten does not so much imply a total elimination of the data or facts collected in a given repository or social network, as the possibility of requesting search engines not to index certain information if it is not relevant and has already lost its importance[32], because under the new rule "internet users control the data they put online, not the references in media or anywhere else"[33].

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[29] R. Fernández Fernández, *Redes sociales y Derecho del Trabajo. El lento tránsito desde la indiferencia legislativa a la necesaria regulación legal o convencional*, Thomson Reuters – Aranzadi, Cizur Menor, 2020, p. 106.

[30] F.U. Ahmed, *Right to be forgotten: a critique of the post-Costeja Gonzalez paradigm*, *Computer and Telecommunications Law Review*, 2015, Vol. 21, núm. 6, p. 184.

[31] European Union Court of Justice Decision C-136/17, 24 September 2019, case *GC y otros*.

[32] R. Fernández Fernández, *op. cit.*, p. 106.

[33] O. Pastukhov, *The right to oblivion: what's in the name?*, *Computer and Telecommunications Law Review*, 2013, Vol. 19, núm. 1, p. 14.

Finally, the relevance of the right to be forgotten, both as an appropriate mechanism to control the collection of data through social networks and in the analysis processes by human resources departments, cannot be questioned. In this sense, the prerogative analysed recognises the right of all individuals to have information about them deleted by those who use their data when it is inadequate, inaccurate, irrelevant, out of date or excessive, or when the passage of time has characterised it as such. In this operation, the passage of time, the purposes for which the data were collected and processed or the nature and public interest of the information must be taken into consideration.

IV. Conclusion

The Internet and social networks have represented a hitherto unseen advance in the way citizens communicate, and their potential should be used as an advantage to improve people's quality of life. Indeed, new technological tools make it possible to obtain information about a person quickly, instantly and easily. Thus, companies have at their disposal a powerful weapon to build the profile of the candidate they consider most optimal for the vacant position.
However, the brightness of the Internet and social networks should not lead to the temptation to sacrifice certain fundamental rights beyond what is tolerable, such as privacy and data protection, because the person wants to occupy a privileged position in these digital devices.
For this reason, it is important to act in three areas: on the one hand, the managers of social networks or the Internet must establish clear and simple privacy policies that guarantee fundamental rights; on the other, citizens must be aware of the dangers that an excess of information may cause in their future professional career; finally, the public authorities must establish legislative provisions aimed at protecting citizens, a good example being the rights to data protection or to be forgotten.

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The "Danish Girls" in the Workplace and Labour Market. Barriers and Prejudices towards Gender Identity

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Abstract

The paper considers discrimination against transgender people - which often takes the form of multiple discrimination in employment relationships and the labour market - adopting an historical approach. In this regard, the focus is on the possible measures in favour of transgender people both in the labour market and in the employment relationship.

Keywords: *Discrimination against Transgender People; Intersectional Discrimination; Employment Relationship; Labour Market.*

1. Introduction

The expression "demographic transformations" refers to the "transitions" experienced by men and women in life and time, as a natural process that has become more complex and unpredictably rapid in modern societies due to the cultural and social changes of the past decades[1].
Today's challenge is about rethinking these phenomena from a different point of view. That is the ever-increasing range of people with gender dysphoria: even the "transition" experienced by the transgender population is a face of the multi-faceted process of demographic changes.

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[1] J. Bongaarts, *Human population growth and the demographic transition*, in *Philosophical transactions of the Royal Society of London. Series B, Biological sciences*, 2009, vol. 364, 1532, 2985–2990. https://doi.org/10.1098/rstb.2009.0137.

Nevertheless, people involved in those transformations face enormous problems, depending on the social unacceptance of diversity in all their forms. This provokes a condition of vulnerability, which has to be defined as a *«condition of life in which one's autonomy and self-determination is permanently threatened by an unstable position in the society and an unequal distribution of resources»*[2]. Thus, vulnerability is not linked to a biological characteristic of transsexual people, since it emerges when they enter society as transgender people.

LGBTIQ + people, and specifically transgender people, are considered vulnerable by several studies[3], some of which introduce a new idea of vulnerability, linked to the needs, interests, and values of the person[4]. The European Court of Human Rights[5] included LGBTIQ+ people among the so-called vulnerable subjects as well, breaking the silence of national legislators, not always able to take a strong position on this matter[6].

As pointed out by recent studies[7], the situation of vulnerability worsened due to the pandemic of Covid-19, which forced people to a lockdown at home. In this scenario, LGBTIQ+ people are more likely than non-LGBTIQ+ people to have precarious work or even to be unemployed and consequently poor, to be renters, or to be homeless. Furthermore, LGBTIQ+ elders are more likely to live alone than non-LGBTIQ+ elders. In addition, their families reject them due to their personal choices and conditions.

Consequently, vulnerability is caused by discrimination, stigmatization, and violence, which strongly limit the exercise of one's rights[8]. Vulnerability

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[2] C. Ranci, *Fenomenologia della vulnerabilità sociale*, in *Rass. it. di sociologia*, 2002, 2, p. 546 ss. See also E. Battelli, *I soggetti vulnerabili: prospettive di tutela della persona*, in *Il diritto di Famiglia e delle Persone*, 2020, 1, p. 283; S. Rossi, *Forme della vulnerabilità e attuazione del programma costituzionale*, in *Rivista AIC*, 2017, 2, p.10.

[3] See Texas State, *Prevalence of Bullying amongst Vulnerable Populations*, 2013, www.txssc.txstate.edu, where a specific attention is paid for young LGBTIQ+.

[4] M. Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, in *Emory University School of Law Legal Studies,* 2014, 14-292, p. 101 ss; S. Rossi, *Op. cit.*

[5]See the decision Alajos Kiss c. Ungheria (ric. n. 38832/06), 20 May 2010 and Kiyutin c. Russia (ric. n. 2700/10), 10 March 2011.

[6] B. Pastore, *Soggetti vulnerabili, orientamento sessuale, eguaglianza: note sulla logica di sviluppo del diritto*, in *GenIUS. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 2018, 2, p. 108.

[7] A. P. Romero, S. K. Goldberg, L. A. Vasquez, *LGBT People and Housing Affordability, Discrimination, and Homelessness*, UCLA School of Law, Williams Institute, https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf; United Nations Independent Expert on protection against violence and discrimination based on Sexual Orientation and Gender Identity – IE SOGI, *Report to the UN General Assembly: The Impact of the Covid-19 Pandemic on the Human Rights of LGBT Persons*, https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/COVID19Report.aspx.

[8] See S. Rodotà, *Eguaglianza e dignità delle persone lgbti*, in A. Shuster (a cura di), *Equality and justice, forum*, Udine, 2011, pp. 11-17;

acquires a juridical relevance and must be addressed by anti-discrimination measures, especially in employment, where many transgender people feel to be discriminated against.
According to the principle of substantial equality, the anti-discrimination law is the most important tool, since it aims at protecting those fundamental rights that are not yet fully respected by society. Its goal is to allow full development of personal life, guaranteeing the conditions through which enjoying a series of fundamental goods in the framework of real democracy[9].
To realize the needs and expectations of transgender people, each person should have the possibility to "build his own identity" and follow his inclinations[10].
Moving from an analysis of the international and European regulations (par. 2), the paper analyses the historical background of discrimination against transgender people (par. 2.1). Then, it focuses on the issues of multiple discrimination faced by transsexual workers (par. 3) in employment relationships (par. 4, 4.1) and in the labour market (par. 5, 5.1) to return to work its fundamental role: work, as a milestone of our Constitution (art.1), plays a crucial function, since it is an instrument of active citizenship. Thanks to it, one can realize itself: it represents a unique tool for fostering a policy of non-discrimination and inclusion[11].

2. The Marginality of Transgender People in ILO Conventions and European Law

With Convention No. 111 of 1958, the ILO intervened to prohibit discrimination based on *"race, colour, sex, religion, political opinion, national extraction or social origin"* (art. 1 par. 1) in accessing employment and professions as well as in working conditions. The discriminatory factors considered by Convention

[9] B. Pastore, *Op. cit.*, p. 105 ff.. espec, p. 106.
[10] S. Piccinini, *Osservazioni sull'"identità e sul diritto di acquisire una "personalità individuata" cioè una identità che favorisca condizioni per una "vita realizzata"*, in *Il Diritto di Famiglia e delle Persone*, 2020, 3, p. 1215 ff.
[11] In this perspective, see M. V. Ballestrero, *Eguaglianza e differenze nel diritto del lavoro. Note introduttive*, in *LD*, 2004, 3-4, p. 501 ss. According to the A., *«the equality on which labour law has been based, on the one hand, promotes the rebalancing of forces between strong contractors and weak contractors, and on the other hand, removes obstacles to the equality of workers, limiting the power of employers to differentiate the treatment of workers.»*. See also F. Marinelli, *Il divieto di discriminazione del lavoratore subordinato: ILO versus Unione europea*, in *DRI*, 2018, 1, p. 197 ff., espec. p. 199. Generally, about labour law, that supposes *«the existence of inferiority of one party compared to the other one, which does not allow participation and equality»*, see C. Smuraglia, *La Costituzione e il sistema del diritto al lavoro: lineamenti di una teoria generale*, Feltrinelli, 1958, p.46; M. S. Giannini, *Profili della protezione sociale delle categorie lavoratrici*, in *RGL*, 1953, 1, p. 3 ff.

no. 111 show some ambiguities that are still current. In this regard, on the one hand, art. 1 par.1 describes the causes of discrimination mentioned above, on the other hand, art. 1 par. 2 refers to consultation with trade unions and opens to the possibility of extending its application[12].
These ambiguities have not been overcome by the recent Recommendations No. 205 of 2017 (Recommendation on Employment and Decent Work for Peace and Resilience): whether point 2, letter f ("Guiding Principles") guarantees the *"need to combat discrimination, prejudice, and hatred on the basis of […] sexual orientation or any other reason"*, point 5, (*"Rights, Equality and Non-Discrimination"*), tackles discriminations against minorities, migrants and refugees. However, it glosses over the need for protection of the LTBTIQ+ community, based on both sexual orientation and gender identity.
Furthermore, the Convention 190 of 2019 on the "Elimination of Violence and Harassment in the World of Work" and the related "Recommendation No. 206 of 2019 (R206) offer the opportunity for some considerations. According to the provisions enshrined in points 12 and 13 II Part ("Protection and prevention") of R206, member states should guarantee measures to prevent harassment and violence in favour of women or vulnerable groups referred to in art. 6 of the Convention; in addition, as clarified by point 13, the reference to vulnerable groups and groups in situations of vulnerability in Article 6 of the Convention should be interpreted following applicable international labour standards and international instruments on human rights, as the *Yogyakarta Principles*[13].

[12] On this point, in fact, there is no prevailing orientation on the part of the scholar. On the one hand, there are those who have highlighted the exhaustiveness of the list, especially in relation to art. 26 of the 1966 Civil and Political Rights Convention (CPRC). See H.K Nielsen, *The Concept of Discrimination in ILO Convention no. 111*, in *International and Comparative Law Quarterly*, 1994, v. 43, pp. 831-832; on the other hand, there are those who consider that the Convention has provided for a list that includes discriminatory factors *"basic, [...] subject to expansion (but never to shrinkage)*, F. Marinelli, *Op. cit.* In favour of this perspective already J.M. Servais, *International Labour Law,* Kluwer, 2014, pp. 137-138.

[13] In 2006, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the *Yogyakarta Principles*: a universal guide to human rights which affirms binding international legal standards with which all States must comply. See https://yogyakartaprinciples.org/. About the link between Yogyakarta Principles and ILO Convention, see ILO, *Information paper on protection against sexual orientation, gender identity and expression and sexual characteristics (SOGIESC) discriminatio*n, International Labour Organization, 2019, pp. 6-7.

According to the ILO's recent studies[14], LGBTIQ+ people, and therefore also transgender people, would seem to be included among the vulnerable subjects, as victims of harassment at work and mobbing.
However, the recent recommendations mentioned above, as well as further ILO studies[15], do not refer to discrimination based on sexual orientation or gender identity.
Focusing on the European Union regulation, the role that the European Union plays in implementing anti-discrimination protection in favour of LGBTIQ+ people has been certainly more incisive, despite being characterized by a considerable delay. Just at the end of the last century[16], the EU included the principle of non-discrimination in Art. 2 of the Treaty of European Union (TEU) as a common principle for all the Member States and as a fundamental right of the European Union (Article 21, par.1 Charter of Fundamental Rights of the European Union)[17].

[14] C. Pagano, F. Deriu, *Analisi preliminare sulle molestie e la violenza di genere nel mondo del lavoro in Italia, Ufficio Oil per l'Italia e San Marino*, 2018 p. 15; see it on www.ilo.org/rome. The risk of harassment also affecting LGBTIQ+ people had already been highlighted some time ago by the *"Code of Conduct on Sexual Harassment in the Workplace"* of 1991, which contained guarantees to safeguard the dignity of homosexual men and women, considered subjects particularly exposed to sexual harassment. See *Commission Recommendation of 27 November 1991* on the protection of the dignity of women and men at work, in *OJ*, 1992, L 49, 1, supported by the Council Declaration of 19 December 1991 on the implementation of the Commission *Recommendation on the protection of the dignity of women and men at work, including the Code of Conduct to combat sexual harassment*, in *OJ,* 1992, C 27, 1. In this regard, see also M. Bell*, Sexual orientation and anti-discrimination policy: the European Community*, in Carver, Mottier (edited by), *Politics of Sexuality*, Routledge, Londra e New York, 1998, p. 58 ff.

[15] V. Ilo, *Settore privato, non discriminazione e uguaglianza*, 2021, www.ilo.org. Of the same view, F. Marinelli, *Op. cit.*, according to the A., *'the fact that the ILO protects some of these factors in acts on the side of Convention C111 does not seem to be a ploy capable of making up for that lack, if it is true that, on the one hand, the majority of the acts in question are not conventions but recommendations and that, on the other hand, none of them – contrary to Convention C111, and Convention C98 – falls within the eight fundamental conventions of the ILO".*

[16] Indeed, it should be pointed out that already with Recommendation no. 924 of 1981, the Council of Europe urged the member states to decriminalize homosexual acts, to apply an equal age of consent and to promote equal treatment in the labour market; positions reiterated in the recommendation of the Parliamentary Assembly of 26 September 2000, when the Assembly asked the Committee of Ministers to add sexual orientation to the causes of discrimination prohibited by the European Convention on Human Rights. On this point see M. Bonini Baraldi, *La discriminazione sulla base dell'orientamento sessuale nell'impiego e nell'occupazione: esempi concreti ed aspetti problematici alla luce delle nuove norme comunitarie*, in *Diritto delle Relazioni Industriali*, 2004, 4, p. 775.

[17] F. Marinelli, *Op. cit.*

Moving to our area of interest, the Directive 2000/78/EC establishes equal treatment in employment and occupation for homosexual persons[18], while the Directive 2006/54/EC (also known as "The recast Directive") introduces the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation. Both directives refer to the principles of direct and indirect discrimination as defined in Directive 2000/43/EC (that already exists in our legal system in Article 4 par. 1 and par. 2, law no. 125/1991 and in Article 43, Legislative Decree no. 286/1998[19]).
It is certainly known that the anti-discrimination measures for transgender people are included in the notion of gender. Therefore, Directive 2006/54/EC binds all EU states to respect the principle of equal treatment between men and women in employment and, in addition, it protects transsexuals and transgender people against any form of gender discrimination[20]. Otherwise, the Directive 2000/78/EC does not include the condition of transsexuality, since it mentions cases of discrimination based on sexual orientation[21].

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[18] The Directive applies to all types of employment contracts and prohibits direct and indirect discrimination, also prohibiting the employer from allowing others to operate forms of discrimination of all kinds against their employees (so-called horizontal discrimination). The Directive also requires member states to ensure that victims of discrimination can be sued, and that the burden of proof is placed on the defendant accused of discrimination. About the Directive, see, *ex multis,* D. Lioi, *Discriminazioni contro le persone LGBTI sui luoghi di lavoro: strategie di contrasto tra diritti, giurisprudenza e advocacy*, in M. D'Onghia, G. A. Recchia (edited by), *Pregiudizi Discriminazioni Diritti. Orientamento sessuale e identità di genere sui luoghi di lavoro*, Cacucci, 2018, p. 13 ff.; M. Bonini Baraldi, *Op. cit.;* L. Pallladin, *L'attuazione delle direttive comunitarie contro le discriminazioni di razzia, etnia, religione o convinzioni personali, handicap, età e orientamento sessuale,* in *Massimario di Giurisprudenza del Lavoro,* 2004, 1, p. 39 ff.

[19] A first draft distinguishing direct from indirect discrimination in the ILO system can already be found. See ILO, *Equality in Employment and Occupation. General Survey, International Labour Conference*, 75th Session, 1988 p. 23, where we can read that *"discriminatory treatment may consist both of the adoption of general impersonal standards that establish distinctions based on forbidden grounds".*

[20] Recital 3 of the Directive states that *"the scope of the principle of equal treatment between men and women cannot be limited to the prohibition of discrimination based on whether a person belongs to one or the other sex. This principle, given its purpose and given the nature of the rights it is intended to safeguard, also applies to discrimination resulting from a change of sex".*

[21] The perspective adopted by Directive 2000/78/EC has, in fact, a potentially reductive scope, since it is *"limited [...] not to all forms and ways in which gender is expressed".* See G. A. Recchia, *Gli strumenti giuridici di contrasto alla discriminazione per orientamento sessuale e identità di genere nei luoghi di lavoro*, in M. D'Onghia, B. Recchia (edited by), *Op. cit.*, p. 71. As noted, in fact, in the first part of a study by the European Agency for Fundamental Rights (FRA), Italy ranked among the nine member countries of the European Union that applied Directive 2000/78 within the minimum limits compatible with the Treaty establishing the European Union. See Fra, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States. Synthesis Report*, 2009, p. 17.

This interpretation is confirmed by the case *P.c. S. and Cornwall County Council* of 1996 of the Court of Justice, which considers discrimination on the grounds of transsexuality as a type of discrimination based on sex[22].
To fill the lack of a specific rule, the Directive 2006/54/EC leads to the applications of the Equal Opportunities Code (Legislative Decree no. 198/2006[23]) against discrimination based on gender identity. Such a Code prohibits discrimination in the workplace (and beyond) based on gender. It is therefore essential to refer to a multi-level system of law that finds an indefectible reference in the jurisprudence of the European courts.
Indeed, the concept of gender identity seems to play a crucial role in the European law with the Directive 2011/95/EU[24], which refers to both, sexual orientation and gender identity, whit the purposes of defining "social group" and therefore to enucleate a common concept of persecution against "membership of a particular social group" (see preamble no. 30 and Article 10 par. 1).
However, these are rather marginal aspects that do not fully satisfy the necessity of strong protection of a category that is assuming, certainly today more than in the past, a greater social weight. The judgment of the European Court of Justice of 1996, as well as the "Recast Directive" (2006/54/EC), confirm the marginality of people who have not completed the transition process, caged within the traditionalist dualism MTF[25] in the European agenda.
There is a change of course with the *European Union Strategy 2020 for LGBTIQ+ rights* – the first strategy launched to promote equality in the European Union for LGBTIQ+ people – which aims at giving *"particular attention to the diversity of LGBTIQ people's needs"* in terms of tackling discrimination, ensuring security, promoting equality and inclusion policies (including at work). The same

[22] According to the Court, article 5 of Directive 76/207/EEC on the *implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, as an expression of the principle of equality, *"it cannot be reduced only to discrimination due to belonging to one or the other sex"*, but *"may also apply to discrimination which originates, as in the present case, in the change of sex of the person concerned"*, because the dismissal caused by the change of sex would imply *"unfavourable treatment compared to persons of the sex to which she was considered to belong before that operation"*. See judgment of the Court of Justice of 30 April 1996, P v. S and Cornwall County Council, C-13/94.
[23] And subsequent modifications. See in this regard the Legislative Decree 6 November 2007, n. 196, which made substantial changes to the Decree on equal opportunities, introducing the articles 55 bis-decies.
[24] *Laying down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.*
[25] Transgender individuals can be classified as female-to-male (FTM) or male-to-female (MTF) where the first gender listed is the one assigned at birth.

Strategy highlights that the LGBTIQ+ minority is a multi-faceted category, which includes different subcategories, such as transsexual, non-binary, or intersex people, certainly more vulnerable, who experience violence, forms of marginalization, and segregation. Such experiences are more negative for LGBTIQ+ people[26].
As in the case of the ILO, therefore, the European Community does not combine the concept of vulnerability with gender identity through a specific legal provision.

2.1 The Historical Background of Discrimination Against LGBTIQ+ People

Focusing on the Italian situation, the LGBTIQ+ community was affected by a social stigma, especially until the end of the twentieth century.
The negative effects are still felt today as it emerges from the lack of specific anti-discrimination protections. The strategy of concealment and persecution of homosexuality during the fascist regime has strongly contributed to feeding prejudices towards LGBTIQ+ people, that still exist within Italian society. During the twenty years of Fascism, LGBTIQ+ people were considered a threat to the fascist community, which was based on the ideal of the fascist "new man", an emblem of virility and health. Considering that, in the twenty years of totalitarianism the persecution of homosexual persons has not implied a specific normative measure; this "legal abstention" ended with a *de facto* persecution both in terms of criminal law and discriminatory practices at work[27]. The repressive action was addressed not so much in the case of

[26] See *Union of Equality: LGBTIQ Equality Strategy 2020-2025*, 2020, p. 5.

[27] It was not, of course, an oversight, but the result of very specific choices. Comparing the text of the Penal Code (1930) with one of its first versions produced during the preparatory work (1926), it is noted that from the final text a provision of the draft that explicitly punished homosexuality in the event of constituting a public scandal has disappeared, pursuant to article 528 p.c. In this proposal, the perpetrator of such conduct was liable to a sentence of imprisonment of 1 to 3 years. The reason for the prediction of this crime was identified in the preservation of the species, being the homosexual act not aimed at reproduction. The provision, however, was later eliminated, an act in agreement with previous legal tradition. However, this certainly did not entail the criminal irrelevance of homosexuality traced back by jurisprudence within the conduct contemplated by art. 527 p.c., those against offenses to modesty, that is, to obscene acts. On the labor law level, homosexuality was often a justifying cause for the assignment to a lower job profile of the worker and in some cases even dismissal. See L. Benadusi, *Il nemico dell'uomo nuovo: l'omosessualità nell'esperimento totalitario fascista,* Feltrinelli, 2005, p. 115 ff.; see also D. Borrillo, *Omofobia. Storia e critica di un pregiudizio*, Dedalo, 2009; U. Grassi, V. Lagioia, G. P. Romagnani (edited by), *Tribadi, sodomiti, invertite e invertiti, pederasti, femminelle, ermafroditi... per una storia dell'omosessualità, della bisessualità e delle trasgressioni di genere in Italia*, Edizioni ETS, 2017.

homosexual behaviour, but towards homosexual persons themselves, especially those "victims of the pathological deformation". According to the fascist mentality, such deviation consists, for men, in expressing feminine personality, in contrast with the canon of virility, and for homosexual women, in expressing masculine identity, since they miss that femininity "inherent in the woman" and deceive the stereotype of "men breadwinner" and "women house-keeper", according to a hierarchical and patriarchal distinction of gender roles[28]. The externalization of their (homo)sexuality was, therefore, to punish, while the expression of sexual orientation within the private sphere did not produce legal effects.

This is briefly the cultural and legal background of the discriminatory policies in our country. The opposition against transgender people was even stronger when sexual orientation gave way to the individual's need to transition from one gender to another ("MTF" or "FTM").

Such segregation lasted even after the fascist period. In this regard, it is emblematic to remind the positions of the jurisprudence during the 80s which, dealing with recent demographic transformations, crystallized the stigma of our society. Against such positions, however, the Constitutional Court has ruled with the decision n. 161 of 6th May 1985. The judgment of constitutional legitimacy concerned Articles 1 and 5, Law no. 164 14th of April 1982 (*Rules on the rectification of gender attributions*), by which the legislator admitted the possibility of starting a gender transition and rectification of sex not only *"for a natural and objective evolution of a situation originally not well defined or only apparently defined"*, but also in cases motivated by a *"psychic alteration of the sexual instinct of an unclear nature"*.

The ruling on the constitutional legitimacy of the described measure had an important impact on jurisprudence and leads to some reflections on the Court of Cassation's decision issued on the 15th of April 1983[29], arising the issue of the constitutional legitimacy, which follows the previous jurisprudential guidelines[30].

Among the various reasons, the Court of Cassation considers that gender transition is not objectively *"natural" but* derives from a *"psychic alteration"*. It goes beyond the limits of the *"respect for the human person"* (art. 32 Cost.) and has repercussions *"on people who start a relationship with the person in gender transition"* and therefore in the *"relationship and as it takes place in our society"*, in which the

[28] P. Guazzo, *Al "confino" della norma. R/esistenze lesbiche e fascismo*, in P. Guazzo, I. Rieder, V. Scuderi (edited by), *File di "R/esistenze lesbiche nell'Europa nazifascista"*, Ombre Corte, Verona, 2010.

[29] In G.U. n. 60 of 1984, pages 1755-1759.

[30] See Cass. n. 1817/72, Cass. n. 3948/75; Cass. n. 1236/75; Cass. n. 2161/80; Cass. n. 1315/81.

"diversity of sex also corresponds to a diversity of duties and behaviours", thus causing *"serious consequences in the private life of individuals and the disturbance of collective life"*.
According to the decision of the Court of Cassation, the denial of the freedom to start a sex reassignment (transition) for reasons related to gender dysphoria was found not only a valid reference in art. 32 Const., but in the disturbance that it would have caused in collective life and social relations, therefore also at work.
Almost forty years later, it is necessary to analyse what are the labour protections in the Italian legal system in favour of transsexual people, which may be considered vulnerable subjects, strongly exposed to the risk of *"unworthiness"*, as *"their risk is a 'civil death' and a progressive expropriation of every right"*[31].

3. Discrimination against Transgender People: An Intersectional Approach

As highlighted by recent studies and reports[32], the fear of discrimination leads many LGBTIQ+ people to hide their sexual orientation and/or gender identity at work or in public[33].
Research shows that transsexual and Intersex people face even more difficulties in social life and at work. In this regard, there are differences between European countries, but there is a lack of appropriate measures to protect them due to cultural barriers.
One aspect has to be pointed out. In these cases, discrimination is not only based on the condition of being transgender or intersex. It is often based on other aspects, which interacting with transsexuality exacerbates the difficulties in everyday life.
The expression "intersectional" or "multiple discrimination" refers to the case of discrimination occurring based on more than one characteristic[34].

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[31] See S. Rodotà, *Il diritto di avere diritti,* Bari, Laterza, 2015, p. 207.
[32] See, above all, European Union Agency for Fundamental Rights (FRA), A long Way for LGBTI equality, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf; Stonewall research, *LGBT in Britain, Work Report*, https://www.stonewall.org.uk/system/files/lgbt_in_britain_work_report.pdf.
[33] According to the over-mentioned FRA Report, one in four (26%) respondents hide being LGBTI at work
[34] Cho S., Crenshaw K., McCall L., *Towards a Field of Intersectionality Studies: Theory, Applications, and Praxis*, in *Signs*, vol. 38, no 4, 2013, pp. 785-810; Bello B. G., *Diritto e genere visti dal margine: spunti per un dibattito sull'approccio intersezionale al diritto antidiscriminatorio in Italia*, in *Diritto & questioni pubbliche*, 2015, vol. 2, pp. 32 ff.; Bello B. G., *From "books" to "action": Has protection from discrimination become intersectional in Italy?*, in *Sociologia del diritto*, 2016, vol. 2, pp. 191 ff.; Fredman,

Regarding discrimination on the ground of gender[35], the World Conference for Women held in Beijing in 1995 pointed out that age, disability, social and economic status, ethnicity, and race can create barriers for women. Consequently, it developed a framework for recognizing multiple and coexisting forms of discrimination, which became part of the Beijing Platform for Action[36].

A similar action lacks for Transgender and Intersex people, who face the same problem even more than women since they commonly live in a condition of social isolation and stigmatization[37].

For this category, there is still no specific regulation or measure aiming at combating discrimination and the lack of proper tools leads them to hide the episodes of violence and harassment at work as well as in private or public life.

"Intersectional lenses" can be very effective in dealing with such kind of discrimination, both in understanding the issue and in adopting appropriate measures to combat it.

The main problem of our society is the acceptance of diversity in all its forms. Discrimination is mostly based on various characteristics, which exacerbate the condition of the vulnerability of the person. Consequently, in the case of transgender people, it could also occur that the discrimination is not only based on their condition of being transgender, but also on the way that such characteristic interacts with other aspects of identity and social position, such as ethnicity or class, or disability: sexuality and disability are rarely considered together and there is a wrong presumption of heterosexuality for disabled people. This false idea may hurt disabled LGBTIQ+ people, who feel to be discriminated against and socially not accepted[38].

Differences exist between MTF and FTM people: an American study shows that FTM transgender employees enjoy greater organizational acceptance and

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s. (2005). Double trouble: Multiple Discrimination and EU Law, European Anti-discrimination Law Review, No. 2, pp. 13-18.

35 Crenshaw K., *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour*, Stanford Law Review, 1991, Vol. 43, pp. 1241 ff.; Gottardi D., *Le discriminazioni basate sulla razza e l'origine etnica*, in Barbera M. (a cura di), *Il nuovo diritto antidiscriminatorio*, 2007, Milano, Giuffrè, 1 ff.

36 Beijing Declaration, United Nations, 1995,

37 IGLYO (International Lesbian, Gay, Bisexual, Transgender, Queer Youth and Student Organization) has invited public institutions to tackle the issue of the 'intersectional discrimination' of LGBTIQ+. See Bello, B.G., *Why do we need that the EU anti- discrimination law and policy go intersectional?*, in *IGLYIO on intersectionality*, 2014, vol. 2, http://issuu.com/iglyo/docs/4.09_iglyo_on_intersectionality .

38 The International Lesbian, Gay, Bisexual, Transgender, Queer & Intersex Youth & Student Organization (IGLYO), https://www.asgi.it/wp-content/uploads/2015/03/IGLYO-On-Intersectionality.pdf .

superior economic outcomes compared to MTF transgender employees[39]: in other words, the "appearance of a woman" after the transition exposes to the risk of being a victim of discrimination and social unacceptance.
An intersectional approach can provide for a more complete understanding of the phenomenon, by considering multiple forms of oppression and structural violence.
It can better inform strategies for the prevention of discrimination by considering the variety of characteristics that make the transgender category even more vulnerable.
As shown by the report "A long way to go for LGBTIQ+ equality"[40], those select findings from the 2019 survey on LGBTIQ+ people in the EU, North Macedonia, and Serbia, four in ten respondents (40%) who self-identify as members of an ethnic minority or have an immigrant background pointed out, as an additional ground for discrimination, ethnic origin or immigrant background.
More than a third of respondents (36%) who identify themselves as persons with disabilities indicated disability as an additional ground. In addition, of those who belong to a religious minority, 28% indicated religion as a further ground.
Another aspect that provokes multiple discrimination is the age: the situation seems to be more difficult for both, the elderly and young LGBTIQ+, who face the problem of social exclusion more than in other phases of their lives[41].

4. Discrimination against Transgender People in the Employment Relationship

According to Art. 4, Const., «the Republic recognizes the right of all citizens to work and promotes those conditions which render this right effective. Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society». Work is not only the milestone of the Italian Republic

[39] J. Rudin, Y. Yang, L.W. Ross, A. Farro, T.K. Billing, *Are FTM and MTF Transgender Employees Equally Transgressive?*, in Academy of Management Proceedings, 2015, 1, https://journals.aom.org/doi/abs/10.5465/ambpp.2015.15725abstract; Rudin J., Yang, Y., Ruane S.; Ross L.; Farro, A.; Billing T.K., *Transforming Attitudes About Transgender Employee Rights*, in *Journal of Management Education: A Publication of the OBTS Teaching Society for Management Educators*, vol. 40(1), 30-46.
[40] FRA Report,
[41] Participants aged 15 to 17 experienced more harassment than their older peers. Yet they also say they see more individuals standing up for LGBTI people at school – and hear more talk of LGBTI issues in educational settings.

(art. 1, Const.) and the main source of individual economic independence but is also an irreplaceable opportunity for each person to realize and express his or her personality.
The border between integration and social exclusion of an individual – and this seems to be even more true for transgender people – is represented by a safe, socially accepted, rewarded, and satisfactory job, which fosters social integration as well as the person's identity.
What happens if the person declares to be transgender in the workplace, at the time of hiring, or in the employment relationship? In the case of transgender people, the right to work risks being compromised by discrimination, both at the time of hiring and during the employment relationship.
In the first case, the employer deliberately decides not to hire the candidate since he or she is transgender.
Since we do not have any jurisprudential decision on this specific issue, considering the lack of Directive 2000/78/EC that do not specifically protect Transgender people in such circumstance, a comparison with discrimination against homosexual may suggest some reflections, by an analysis of the case "NH vs. Associazione Avvocatura per i diritti LGBTI-Rete Lenford".
The matter regarded the proper application of Dir. 2000/78/EC to a case of discrimination in accessing to work[42] and the balance between different constitutional rights, which have nevertheless a different importance within the

[42] Bilotta F., *La discriminazione diffusa e i poteri sanzionatori del giudice,* in *Responsabilità civile e previdenza*, 2018, fasc. 1, pp. 69 ff.; Id., *La molestia verbale viola la dignità della persona che lavora,* in *Responsabilità civile e previdenza*, 2019, fasc. 6, pp. 1881; Allieri G., *L'anticipazione della tutela antidiscriminatoria nell'accesso all'occupazione,* in *il Corriere giuridico*, 2020, fasc. 11, pp. 1329 ff.; Barbieri S., *Dichiarazioni pubbliche omofobe come discriminazione diretta nelle condizioni di accesso all'occupazione e al lavoro. Nota a margine della sentenza "NH"*, in *Eurojus*, 2020, 3, pp. 182 ff.; Borrillo D., *L'annuncio pubblico di una discriminazione futura costituisce già una discriminazione,* in *Responsabilità civile e previdenza,* 2020, 4, pp. 1155 ff.; Cassano G., *La discriminazione collettiva basata sull'orientamento sessuale: spunti per una riflessione sulla tutela in caso di vittima non identificabile,* in *Diritto delle relazioni industriali*, 2020, 3, pp. 893 ff.; Ceccaroni F., *Collective discrimination without an identifiable victim in eu law. Discrimination by public speech*, in *federalismi.it*, 2020, 33, pp. 41 ff.; Perrino A.M., *Diritto dell'Unione europea: condizioni di accesso all'occupazione e al lavoro*, in *Il Foro It.*, 2020, 6, pp. 304 ff.; Ranieri M., *L'insostenibile leggerezza delle parole. La Corte di Giustizia continua il suo cammino per l'affermazione della tutela antidiscriminatoria*, in *ADL*, 2020, 5, pt. 2, pp. 1180 ff.; Recchia G.A., *Il peso delle parole: le dichiarazioni pubbliche omofobiche nell'accesso al lavoro al vaglio della Corte di Giustizia*, in *Il Lavoro nella giurisprudenza*, 2020, 7, pp. 729 ff.; Rizzi Francesco, *Il caso N.H. I rimedi del diritto agli atti linguistici di discriminazione e la libertà di fare le cose con le parole*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2020, 4, pp. 575 ff.; Sperti A., *Il diritto della comunità LGBTI ad una tutela non "illusoria": recenti sviluppi giurisprudenziali sul conflitto tra la libertà di espressione e il divieto di discriminazione in base all'orientamento sessuale*, in *Giurisprudenza costituzionale*, 2020, fasc. 4, pp. 2249-2263

Constitutional Charter: from one side, the principle of equality (art. 3) and the right to work (art. 4 and 35) defended by the association Rete-Lenford, operating in Italy in defence of LGBTIQ+ rights; from the other side, the right to freely express one's thoughts in speech, writing, or any other form of communication (art. 21), a freedom that the defendant considered compromised in this specific case, but which nevertheless has been exercised to share a homophobic message.

The association Rete-Lenford promoted a lawsuit due to some discriminatory declarations by a famous Italian lawyer during a radio interview. In this regard, the defendant declared that he would never hire nor collaborate with a homosexual person in his law firm. Therefore, the association decided to sue the lawyer, claiming the violation of the legislative decree 9 July 2003, n. 216, adopted in implementation of the directive no. 2000/78/EC. The dispute had a positive outcome for the association and the judges condemned the lawyer to pay 10.000,00 euros for damages and to publish the decision in a national newspaper. The verdict was then confirmed by the Court of Appeal, so he decided to appeal the Court of Cassation, which opted for leaving the decision to the European Court of Justice.

The main issue is the scope of application of the directive since the lawyer's declarations did not occur in the specific context of a real hiring nor a selective procedure, protected by the over-mentioned European directive, but in the different circumstances of a radio interview.

On this point, the European Court of Justice specifies that the expression «conditions of access to employment and work» is referred to by art. 3, par. 1, a) of the European directive need a uniform interpretation throughout the European Union (paragraph 31 of the ruling). In addition, the anti-discrimination legislation aims at achieving the highest level of employment and social protection, a goal that justifies an extensive interpretation of the directive, which has to be applied also in this specific case.

Focusing on the issue of discrimination in access to work for Transgender workers, the aforementioned directive does not include transsexuality among the reasons for discrimination, so it could not be applied in case of discrimination in access to work suffered by a Transgender person.

Nevertheless, the application of the Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (implemented by Legislative Decree n. 5/2010 in emendation of the Code of Equal Opportunities), points out that «[…] the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. Given its purpose and the nature of the rights which it seeks to safeguard, it also applies

to discrimination arising from the gender reassignment of a person» (point 3). The problem is, consequently, the lack of a specific provision in favour of transgender and intersex people within the Italian legal system, which is still based on a "binary paradigm"[43].

Regarding the protection of transgender people in employment, important interventions have been taken by some Italian regions[44]. Tuscany was the first Region in Italy to promote a law against discrimination against homosexual and transsexual/transgender people. This law aims at adopting policies to recognize each person «the free expression and manifestation of their sexual orientation and their gender identity», guaranteeing both the right to self-determination and access on equal terms to the interventions and services provided by the region. The areas of competence of the law, therefore, concern professional training and labour policies, health and assistance, and the promotion of cultural events. For each of these areas, the regulation ensures effective equal access and treatment of LGBTIQ+ people in accessing regional services.

To fill the gap that still exists in the national regulation, it should be necessary to adopt an extensive interpretation of the Equal Opportunity Code in the light of the aforementioned directive, which has a wider scope than the Directive 2000/73/EC, since it finds application in case of discrimination

[43] See p.7 del FRA Report, 2008: «Furthermore, the report finds that the issue of transgendered persons, who are also victims of discrimination and homophobia, is adequately addressed in only 12 EU Member States that treat discrimination on grounds of transgender as a form of sex discrimination. This is generally a matter of practice of the anti-discrimination bodies or the courts rather than an explicit stipulation of legislation. In two Member States this type of discrimination is treated as sexual orientation discrimination. While in 13 Member States discrimination of transgender people is neither treated as sex discrimination nor as sexual orientation discrimination, resulting in a situation of legal uncertainty».

[44] Regional Law of Toscana 15.11.2004, n. 63, «Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere». In addition, other Italian regions adopted similar regulations. See, in particular L.R. Liguria 10.11.2009, n. 52, «Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere», L.R. Marche 11.02.2010, n. 8, «Disposizioni contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere», L.R. Piemonte, 23.3.2016, n. 5, «Norme di attuazione del divieto di ogni forma di discriminazione e della parità di trattamento nelle materie di competenza regionale», L.R. Umbria 11.4.2017, n. 3, «Norme contro le discriminazioni e le violenze determinate dall'orientamento sessuale e dall'identità di genere», L.R. Emilia-Romagna 1.8.2019, n.15, «Legge regionale contro le discriminazioni e le violenze determinate dall'orientamento sessuale o dall'identità di genere», L.R. Campania 7.8.2020, n.37, «Norme contro la violenza e le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere e modifiche alla legge regionale 16 febbraio 1977, n. 14 (Istituzione della Consulta regionale femminile)». Recently, Delibera della Giunta regionale Toscana n.329 del 29.03.2021, «Accordo tra Regione Toscana e Pubbliche Amministrazioni della Regione Toscana aderenti alla Rete RE.A.DY. per la promozione della rete, per rafforzare la collaborazione tra le Pubbliche Amministrazioni locali e l'integrazione delle relative politiche a livello regionale»

against transgender people as well, even in access to employment. As highlighted by point 6, «Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training, and promotion. They should therefore be prohibited and should be subject to effective, proportionate, and dissuasive penalties».

However, the social marginalization of Transgender people and the fear of being a victim of harassment lead them to renounce legal actions. In most cases, the discrimination is hidden, leading, among other things, to a serious lack of statistical data on the phenomenon, especially in Italy.

The second critical circumstance, in which transgender people risk being a victim of discrimination is the workplace. Some research shows that survey respondents feared that their sexual orientation or gender identity could lead to the loss of their jobs. Most transgender respondents said that they feared that coming out or transitioning at work would mean losing their jobs.

In the interviews, discriminatory hiring and firing were recounted as both a fear and a reality. Being transgender is a visible condition. This appearance has an immediate impact on all aspects of emotional, family, and even working life, immediately placing the person at risk of discrimination.

At work, the coming out of the person can even provoke vertical mobbing, therefore by management and employers, or horizontal, by colleagues.

Mobbing represents a difficult situation to manage, as it is difficult to prove. Thus, the lawsuit exposes the person to the risk of negative consequences at work, worsening his condition because he or she has sued the author for such behaviour. In addition, it is difficult to have witnessed mobbing episodes, and consequently, the person is induced to resign spontaneously.

From this point of view, it should be necessary a legal intervention aiming to introduce a lightened burden of proof, similar to the one regulated by Art. 40, Code of Equal Opportunity. In case of mobbing and discrimination, it is necessary to guarantee the right of defense (art. 24 of the Constitution), a fair trial (art. 111 of the Constitution), and the substantial equality (art. 3, paragraph 2, of the Constitution) in favour of a person, who finds itself in a weaker condition than the employer's one[45].

[45] R. Sacco, *Presunzione, natura costitutiva o impeditiva del fatto, onere della prova*, in *Riv. dir. civ*., 1957, I, 399 ff.; M. Taruffo, *Presunzioni, inversioni, prova del fatto*, in *Riv. trim. dir. proc. civ*., 1992, 733 ff..; L. De Angelis, *Profili della tutela processuale contro le discriminazioni tra lavoratori e lavoratrici*, in *RIDL.,* 1992, 1, p. 457; A. Vallebona, *L'inversione dell'onere della prova nel diritto del lavoro*, in *Riv. trim. dir. proc. civ.*, 1992, 809 ss.; G. Balena, *Gli aspetti processuali della tutela contro le discriminazioni per ragioni di sesso*, in *Giorn. dir. lav. rel. ind.*, 1995, p. 435; A. Guariso, *I provvedimenti del giudice*, in M. Barbera

This situation is characterized by an imbalance between the parties, to the detriment of the employee.
The asymmetry shows itself through different aspects, first that of collecting proofs, so it is necessary to adopt a solution more appropriate than the one achieved by the ordinary rules (art. 2697 c.c.), which due to their rigidity would discourage the applicant from taking legal actions[46].
From this point of view, the lightening of the burden of proof can be justified in the light of the principle of substantial equality (Art. 3, par. 2, Const.), since it removes a real obstacle to the full recognition of a right. According to Art. 3, par. 2, Const., the condition of vulnerability (and, therefore, of diversity) has to be protected.
Finally, it should be noted that the situation of discrimination at work worsened during the Pandemic of Covid-19[47]. During the outbreak, many LGBTIQ+ people have been forced to spend more time at home. But being at home does not mean this kind of abuse and discrimination stops.
British research[48] shows that LGBTIQ+ employees have been the target of negative comments or conduct from work colleagues in the last year because they are LGBTIQ+. In fact, with more people communicating through private messaging, it may be harder for managers or HR professionals to control employees and stop such conduct.
In addition, for many people, especially Transgender, home may be a place even more unsafe than the workplace: some ethnic groups are less likely to be open about their sexual orientation or gender identity around family and

(a cura di), *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Milano, 2007, p. 579 ff.; L. Curcio, *Le azioni in giudizio e l'onere della prova*, in *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, op. cit., 529 ss.; G. Ficarella, *La tutela giudiziaria contro le discriminazioni tra passi indietro e novità*, in *Il Giusto proc. civ*., 2010, 3, 252; R. Santagata de Castro, R. Santucci, *Discriminazioni e onere della prova: una panoramica comparata su effettività e proporzionalità della disciplina*, (parte I), in *ADL*, 2015, 3, 534 ss.

[46] Taruffo M., *La valutazione delle prove*, in Taruffo M. (a cura di), *La prova nel processo civile*, in P. Schlesinger, *Trattato di diritto civile e commerciale*, Milano, 2012, pag. 207 ss.; Tarzia G., *Manuale del processo del lavoro*, Milano, 1999, 366 ss.

[47] United Nations Independent Expert on protection against violence and discrimination based on Sexual Orientation and Gender Identity, *Report to the UN General Assembly: The impact of the Covid-19 Pandemic on the Human Rights of LBBT Persons*, in https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/COVID19Report.aspx; Kneale D., Bécares L., *The mental health and experiences of discrimination of LGBTQ+ people during the COVID-19 pandemic: Initial findings from the Queerantine Study*, in *medRxiv*; doi: https://doi.org/10.1101/2020.08.03.20167403.

[48] https://www.stonewall.org.uk/resources/lgbt-britain-bi-report-2020

accepted by familiars. So, it is necessary to adopt urgent measures to ensure that pandemic responses are free from violence and discrimination[49].

4.1. How to Prevent and Combat Discrimination in the Employment Relationship: Some Proposals

To avoid discrimination in the workplace, it might be suggested to operate on two different levels: prevention and sanction.
Preventing discrimination means, first, spreading an inclusive culture within the work environment, in which diversity is promoted as a value and an irreplaceable resource for all.
There are different tools to achieve this goal. The first profile on which it is required to pay particular attention is that of the language[50], since it is a vehicle of discrimination and violence within the working context, starting from the moment of the hiring.
Thus, the use of a gendered language is a way to avoid discrimination. As it is known, English does not have a grammatical gender as Italian or other languages do. Nevertheless, regardless of this linguistic difference, both in English and in Italian[51] exist use of gender-specific terms for referring to professions or people, such as "businessman" or "waitress," or using the masculine pronouns (he, him, his) to refer to people in general, for gender-neutral concepts[52]. It is the inadequate use of the language since it is based on a binary model and it, therefore, neglects existing differences, as in the case of non-binary persons.
It is not just a matter of grammatic. The use of gendered language reflects a specific social prototype, based on a patriarchal model that has existed in our culture and still survives in some realities: even the legal language often shows an improper use of the words. Therefore, it must adapt to the changes and needs of society, precisely because law and language are closely connected, and "language realizes law through its words[53]." This can lead women and

[49] United Nations Human Rights, *Report on the impact of the COVID-19 pandemic on the human rights of LGBT persons*, in https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/COVID19Report.aspx.
[50] Robustelli C., *Lingua e identità di genere,* in *Studi italiani di linguistica teorica e applicata*, 2000, vol. 29, 507 ss.;
[51] Lepschy G., *Sexism and the Italian language*, *The Italianist*, 1989, 7, p. 158 ff.; Sabbatini A., *Raccomandazioni per un uso non sessista della lingua italiana*, Presidenza del Consiglio dei Ministri, Roma, 1987
[52] Holmes J., *Speaking up: understanding language and gender*, in *Journal of Multilingual and Multicultural Development,* 2020, 41, 7, 652-654.
[53] Cavagnoli S., *linguaggio giuridico e lingua di genere,* in Bachiddu E., Pasquino M., *L'Università e il Work.life balance. Aspetti culturali, normativi e diversity management*, 67 ff., Università degli Studi di

LGBTIQ+ to experience social marginality and invisibleness, if not real discrimination or violence, even in the workplace.
Concerning transgender people, choosing the proper words in communication might be respecting the principle of identity: if the person we are talking with is in transition from masculine to feminine (MTF), it does not matter at what stage of the transition she is, if she feels that she is a woman, she must be treated as such. The same goes for FTM people[54]. This rule is very important for both cases, that of the hiring and that of the employment relationship. Therefore, it is correct to use proper words, taking into consideration the person's appearance.
The correct use of the language might reveal a practice and a policy aimed at enhancing diversity within the work environment - be it gender, sexual orientation, ethnic origin, disability, etc. - supporting different lifestyles and responding to their distinct needs. In this sense, one might refer to diversity management as an important tool for the inclusion of diversity in the workplace, according to the Directive 2006/54/EC, point 7: "In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and access to employment, vocational training and promotion, per national law and practice."
Diversity management is important from an ethical point of view since it promotes integration and a culture of respect for diversity. In addition, it has also a positive effect on the level of "employer branding"[55]. It improves not only the image of the company but also contributes in terms of performance of the business because, in an open-minded environment, people are subjected to less stress and work better.
The inclusion of diversity contributes to innovation and change because it allows for the exploitation of different points of view.
However, in case there are episodes of discrimination, the existing sanctioning instruments should be enhanced: so, it might be necessary to operate even on a "punitive" level.

Roma Tor Vergata, Comitato Unico di Garanzia, https://www.scosse.org/wordpress/wp-content/uploads/2016/03/Universita_e_Workflow_balance_O.pdf#page=66.

[54] http://www.parlarecivile.it/argomenti/genere-e-orientamento-sessuale/transessuale.aspx

[55] See the case of the IKEA campaign "#fateloacasavostra" to fight discrimination and violence against LGBTIQ+ on the occasion of the international day against homophobia on 17th May; See also the activity of "Parks - Liberi e Uguali", a non-profit association that for the past ten years has been involved in helping companies to create business opportunities related to the enhancement of diversity, with a prevailing focus on sexual orientation and gender identity.

According to the European directives, the compensation for damage has also punitive and preventive functions (Art. 15, dir. 43/2000/EC, Art. 17, dir. 78/2000/EC, Art. 8-inquires, dir. 73/2002/EC, Art. 25, dir. 54/2006/EC).
In this regard, the Directive 2006/54/CE, which also applies to discrimination arising from the gender reassignment of a person (point 3), establishes that « […] These forms of discrimination […] should therefore be prohibited and should be subject to effective, proportionate, and dissuasive penalties» (point 6).
This dissuasive effect is closely related to the "adequacy" of the measure, which inevitably depends on the extent of the compensation[56]. In fact, in order not to frustrate this vocation, the European legislator has imposed the general prohibition of limiting the compensation within a maximum limit by law. Thus, according to point 33, Directive 54/2006/EC, «It has been established by the Court of Justice[57] that to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate about the damage sustained. It is, therefore, appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to consider his/her job application».

5. Discrimination against Transgender People in the Labour Market

The protection of transsexual workers in the labour market offers the opportunity to tackle the issue from two points of view: the first one is that of the anti-discrimination law and the second one is that of the labour market law. From an anti-discrimination perspective, it must be highlighted the level of protection afforded to this category as vulnerable persons. From a labour market law point of view, it has to be verified the effective functioning of active labour market policies in Italy.
The goal of extending the employment service for transsexual people had already been expressed by the European Parliament with Resolution no. 1117 of 12 September 1989, which highlighted the high unemployment status of transsexual people (60%-80%) and the need for placement measures to facilitate their entry into the labour market[58].

[56] Amoriello L., *Alla ricerca della dissuasività. Il difficile percorso di affermazione dei principi UE in tema di danno non patrimoniale da discriminazione*, in *WP C.S.D.L.E "Massimo D'Antona"*, 264/2015, 3
[57] European Court of Justice, 2.8.1993, C – 271/91, *Marshall c. Southampton Southwest,* in *Riv. it. dir. lav.*, 1994, II, 3.
[58] See point no. 12 of the Resolution no. 1989/1117

After about 30 years, many analyses and research converge on an interpretation of the situation of discrimination at work for transsexual people certainly not comforting, showing marginal attention of the European Union towards the vulnerability of such category. This vulnerability is exacerbated by the Covid-19 pandemic, due to an economic recession that, by swelling the ranks of the unemployed, stirs up stereotypes and prejudices and leads to discriminatory behaviour[59].

It has already been argued that work plays an important role in social inclusion, both for the availability of income, and therefore of individual economic autonomy, and for the social status connected to it.

In the case of transgender people, however, a third factor points out how labour market policies are essential to achieving the anti-discrimination goal. If we exclude the Basic Income (so-called "Reddito di Cittadinanza"), and the other emergency measures launched by the "pandemic legislators"[60], the Italian Welfare State reveals its insurance nature, linked to social security and, where it exists, to the main role played by families, that build a strong network in supporting their members to fill the lack of government intervention. Nevertheless, the poor support by familiars of transgender people, due to widespread prejudices and preconceptions, even within the family, elevates work as the only solution for transgender people's emancipation since they are constantly experiencing situations of forced social exclusion. In addition, work is the only factor to access a series of public goods and services[61].

According to some recent studies by the European Commission, in 2019 only 51% of transsexual people are in employment as employed or self-employed persons[62]; a detail that becomes even more worrying if we consider that the European average of the employed workforce stands at 69.3%. The exclusion from the labour market shown by these data, which does not differ particularly

[59] G. Mattei, T. Russo, T. Addabbo, G. M. Galeazzi, *The COVID-19 recession might increase discriminating attitudes toward LGBT people and mental health problems due to minority stress*, in *International Journal of Social Psychiatry,* 2021, v. 67(4), p. 400–401. The European Union had also expressed itself on this point, see Ilga Europe, *COVID-19 and specific impact on LGBTI people and what authorities should be doing to mitigate impact*, 2020; see it on www.ilga-europe.org.

[60] On this point, reference is made to the volumes of D. Garofalo, M. Tiraboschi, V. Filì, F. Seghezzi (edited by*), Welfare e lavoro nella emergenza epidemiologica. Contributo sulla nuova questione sociale*, Adapt University Press, 2020-2021.

[61] Unar, *Le buone pratiche antidiscriminatorie a livello internazionale nello specifico ambito dell'orientamento sessuale*, 2012, p. 47.

[62] The 8.3% are in a state of not employment or unemployment, 26% are students, while about 11% were in unpaid or voluntary work, incapacity for work or civil or military service. V. European commission, *Legal gender recognition in the EU: the journeys of trans people towards full equality, Directorate-General for Justice, and Consumers*, 2020, p. 67.

from previous Italian[63] and EU[64] studies, demonstrates the difficulty in accessing the labour market.

These difficulties arise because of a gender expression that does not conform to the biological one. Unlike homosexual people, transgender people can hardly evade discrimination by concealing their identity and nature, greatly increasing the chances of suffering discrimination. The position of vulnerability and the impossibility of hiding their gender identity, allow us to hypothesize that in general homosexual or bisexual people are mostly affected by discrimination in the workplace, while transsexual and transgender people are subjected to stronger discrimination in access to work and dismissal[65].

Several causes hinder access to work for transgender people, such as the non-compliance of gender expression with the personal sex, further delicate in the initial phase of the "Real Life Test", when the personal documentation does not correspond to the gender of the person or problems of (alleged) incompatibility with some professional sectors[66]. A kind of resignation forces transgender people to accept the ordinariness of these obstacles, which, also due to unawareness of their rights, are even more common in the search for a job. Their research is directed towards "trans-friendly"[67] occupations and, therefore, it frustrates the possibility of choosing a job congenial "to their abilities" and skills.

The data show reduced possibilities to access to work: their position of vulnerability in the labour market obliges transsexual people to accept penalizing contractual conditions or to take refuge in the informal (or irregular) labour market, including prostitution for transsexual "MTF" people[68]. Those aspects often lead to the result of multifactorial discrimination, linked not only to transsexuality but ethnicity too[69]: the difficulty of coming out one's gender

[63] Research from 2011 shows that 45% of employers (out of 40 cases) refused the job offer of transgender people. See Arcigay, *Io sono, io lavoro. Report finale di prima indagine italiana sul lavoro e le persone lesbiche, gay, bisessuali e transgender/transessuali*, Tip. Negri, 2011, p. 47.

[64] According to some 2017 studies, about 37% of people surveyed felt discriminated against for their gender identity when looking for a job. See Fra, *Being Trans in the EU. Comparative analysis of data from the EU LGBT survey*, 2017, p. 4.

[65] Unar, *Op. cit.,* p. 42.

[66] Healthcare, education, and law enforcement are perceived as particularly difficult areas to work; see European Commission, Legal gender recognition in the EU, cit. p. 82.

[67] European Commission*, Legal gender recognition in the EU*, cit., p. 76.

[68] See E. Abbatecola, *Trans-migrazioni. Lavoro, sfruttamento e violenza di genere nei mercati globali del sesso*, Rosemberg & Sellier, 2018, p. 90 ff., where it emerges that, due to their economic and social vulnerability, the sex market seems to be the most available outcome in front of a society still closed to the changing and which is discriminating against those who violate the taboo of a gender identity that doesn't conform to the biological body.

[69] European commission, *Legal gender recognition in the EU*, cit., p.77.

identity, especially in the absence of a psychic-biological reconciliation process not yet started in the country of origin, is an obstacle for recognition of international protection by the territorial commissions[70].

The lack of specific regulation in both the European Union and in the Italian legal system (except in the case of Directive 2011/95/EU and the Directive 54/2006/EC) exacerbates discrimination based on gender identity and at the same time, it dissuades discriminated persons from reporting harassments and from claiming equal treatment at work.

If concerning anti-discrimination protections based on sexual orientation, the current legal system has a significant number of pronouncements – more at the supranational level[71] than at the Italian one[72] – there are few pronouncements concerning discrimination in terms of access to work for transgender people, testifying to the ineffectiveness of the inclusion of discrimination based on gender identity among those generically gendered, therefore based on the sex of the discriminated subject.

This is what emerges from some rulings of various national courts. In 2018, in Hungary, an employer's discriminatory behaviour against a transgender "MTF"

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[70] See P. Palermo, *Orientamento sessuale e identità di genere nel sistema dell'asilo in Italia anche alla luce della riforma Minniti,* in *GenIUS, Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 2018, 2, pp.43-59. In this regard, the ETUC calls for the inclusion of the cross-sectional category of LGBTIQ+ asylum seekers among vulnerable persons, in order to facilitate the recognition of international protection and offer them decent and safe jobs. ETUC, *Op. cit.*, p. 3.

[71] See here just the first application of Directive 2000/78/EC, Court of Justice. EU, 25 April 2013, C-81/12, Asociația Accept c. Consiliul Național pentru Combaterea Discriminării. On this point, see L. Calafà, *Homophobic statements in football: the FC Steaua Bucharest case and discrimination on grounds of sexual orientation at the Court of Justice*, in *RIDL*, 2014, 4, p. 133 ff.

[72] The trial is the first case of application in Italy of the prohibition of discrimination on the basis of sexual orientation with reference to employment and working conditions, according to the provisions of Legislative Decree no. 216/2003 implementing Directive 2000/78. The ruling of the Court of Justice, NH v. Associazione Avvocatura per i diritti LGBTIQ+, case C-507/18, dealt with the story of a well-known Italian lawyer, who, interviewed in 2013 during the telephone broadcast "La zanzara", made statements offensive and detrimental to the dignity of LGBTIQ+ people, emphasizing that in his professional office he would never have hired or accepted the collaboration of gays or lesbians, which could have *"disturbed the environment"*, creating *"a situation of great difficulty"*. After being unsuccessful in the first (Court of Bergamo, 6 August 2014) and in the second instance of judgment (Court of Appeal of Brescia, 11 December 2014), the lawyer appealed to the Court of Cassation (Cass. civile, 20 July 2018, n. 19443). Although there was no specific complainant or identifiable victim, the substantive courts concluded that *"conduct which, only on an abstract level alone, prevents or makes it more difficult to access employment is also liable to constitute discrimination."* On this point, *ex multis*, A. Sperti, *Il diritto della comunità LGBT ad una tutela non illusoria*, in *Giur. Cost.*, 2020, 4, p. 2249 ff. About the Cassation judgment see D. Lioi, *Op. cit.*, in M. D'Onghia, G. A. Recchia (edited by), *Op. cit.*, pp. 35-39.

person who had applied for a job as a sales assistant was found. The woman had not yet changed her name, but she had started the transition path by dressing and behaving like a woman. According to the Court's decision, the discrepancy between the applicant's sex and her behaviour was the cause of discrimination based on gender. The Dutch Equal Treatment Court reached the same conclusion, according to which the refusal of a taxi company to hire a transsexual woman, considering her *"inadequate"* for the job position, is discriminatory had to be considered discriminatory[73].

Going beyond the European Union borders, in the case *Schorer v. Billington* of 2008[74], in the United States, the Columbian Supreme State Court declared that the behaviour against Shorer based on sexual stereotypes was discriminatory, since it violated the *Title VII of the Civil Rights Act of 1964*, which establishes the general principle of non-discrimination in the workplace based on race, colour, religion, sex or national origin. The applicant had applied for a job position as a specialist in terrorism and international crime at the Congressional Research Service (CRS) and the Librarian Congress of the United States, obtaining the job position. As a response to the communication to the CRS on her choice to start a transition, the recruitment process was interrupted, forcing Schroer to activate the appeal procedure for violation of the Civil Rights Act based on discrimination by gender stereotype. What is interesting to underline about this case, which will pave the way for the recent ruling of the Supreme Court of the United States on gender discrimination against transsexual people[75], are two aspects. The first one concerns the Supreme Court's progressive approach to the European positions. The decision is based on an idea of gender equality that was already expressed in 1996 in the case P. v S. and Cornwall County Council; the second one concerns one of the defendant's reasons to avoid recruitment, according to which the discrepancy between the biological gender and the declared one would lead to delays in granting security: since the involved job position was of crucial importance, timeliness was essential. Therefore, the lack of specific anti-discrimination protection based on gender identity represents a limit for transgender people, because it allows the author

[73] For both cases recalled (and others), see European Commission, *Trans, and intersex equality rights in Europe. A comparative analysis*, Directorate-General for Justice and Consumers, 2018, p. 99 ff.

[74] See *Schorer v. Billington, Civil Action n. 05-1090*, on website https://www.courtlistener.com/opinion/1497100/schroer-v-billington/.

[75] The recent ruling concerns the dismissal of a transsexual person. See T. E. Lagrand, *Protection of Transgender Employees from Discrimination: Is There Convergence Between the Approaches of the US Supreme Court and the Court of Justice of the European Union?*, in *GenIUS. Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 2020, 1, pp. 1-18. See too G. A. Recchia, *La discriminazione per orientamento sessuale e identità di genere come "fondata sul sesso": la Corte Suprema degli Stati Uniti rilegge il diritto del lavoro federale*, in *Labor*, 2021, 1, pp. 69 ff.

of discrimination to detect the *"aporia"* between biological gender and the one that has been expressed by the person. This lack of protection certainly shows a further disadvantage for those who are already in vulnerable conditions.
From this point of view, however, returning within national borders, we should recognize a change of course of the Constitutional Court, which has scratched a wall and overcomes cultural barriers such as dualism and distinctions based on gender functions.
The Constitutional Court, with the judgment no. 221 of 5 November 2015, held that the obligatory nature of the surgery, to change sex, under Law no. 164/1982, is against Articles 2, 3, and 32 Cost., as well as art. 8 ECHR. Constitutional jurisprudence has recognized the right to gender identity as an essential element of the right to personal identity, including it in the rank of the person's fundamental rights. Thus, it is considered inviolable *"the right to express one's sexual identity, as a crucial factor in the development of one's personality"*, that people are required to recognize *"on behalf of social solidarity,"* and the right to sexual freedom, since *"sexuality is one of the most important ways of expressing the human personality."* As an absolute subjective right, the person can freely exercise it[76].
Therefore, whether the ruling of the Supreme Court finds a solution concerning the issue concerning the introduction of gender identity into our system, the problems regarding anti-discrimination protection in the labour market are still unsolved. The Court's ruling renews the perspective according to which looking at gender identity, while still the condition of the vulnerability of transgender people, and potential social exclusion, requires a serious reflection on the policies to be implemented. This implementation should regard "active" protection and not only a repressive-sanctioning one.
In addition to Articles 23, 27, 31, 42-49, Legislative Decree 198/2006 (*Code of equal opportunities between men and women*), the measures aimed at implementing an effective form of anti-discrimination protections based on gender identity in the market are still limited. In this regard, Article 8 of the Workers' Statute (Law no. 300/70) prohibits investigating workers' opinions during the recruitment phase, and Article 15 prohibits discriminatory behaviour. Moving the analysis to the field of work in the Public Administrations, Law no. 183/2010 (the so-called "Collegato Lavoro") has replaced the Committee for equal opportunities and mobbing with the Equal Opportunities Committee (CUG, Comitato Unico di Garanzia). At the same time, the legislative decree n.

[76] See B. Pastore, *Soggetti vulnerabili*, cit.; G. A. Recchia, *Gli strumenti giuridici di contrasto,* cit. The judgment of the Constitutional Court, 13 July 2017, n. 180, reiterated the concept, arguing that the aspiration of the individual to the correspondence of the sex attributed to him in the population registers with that subjectively perceived and lived undoubtedly constitutes an expression of the right to recognition of gender identity.

276/2003 provided for a Protective Statute of the worker on the labour market, within which Art. 10 extended the prohibition also to public and private subjects to make personal investigations. Such measure has had only partially positive feedback[77].

Those solutions seem to be not sufficient. It is necessary to balance contractual freedom (during the recruitment phase) and equality in access to the labour market, according to a solidaristic principle[78]. The relevance of the contractual party's personal qualities influences private autonomy, and its power impedes, or limits, the vulnerable groups from accessing work. The labour market becomes a space of preconceptions on personal qualities and provokes unbalancing in contractual relationships, directly affecting the work performance and the potential benefits that the worker could bring in terms of collaboration in the company (or to the company), *ex* 2094 c.c.

The idea is certainly not to promote a mechanism of mandatory recruitment like the job placement for disabled people (Law no. 68/1999)[79]; however, as in the case of disabled people, transgender people are in a condition of vulnerability and, therefore, they find difficulties in tackling such vulnerability and achieving a job placement, just using their professional skills.

According to recent statements of the European Trade Union Confederation (ETUC)[80], a greater effort with the nature of an active anti-discrimination measure is required to effectively face the condition of the vulnerability of transgender people and to satisfy their social needs[81]. The economic effort seems to be looming with the PNRR, which finances active employment

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[77] According to some surveys, a residual percentage of intermediaries in the search for work have refused the applications of LGBTIQ+ people: in 11.9% of cases, they are administration agencies, while in 7.5% they are other public subjects of guidance and support in the search for a job, such as CpI. See Arcigay, *Op. cit.*, p. 48.

[78] G. Carapezza Figlia, *Il divieto di discriminazione quale limite all'autonomia contrattuale*, in *RDC*, 2015, 6, p. 1388 ff.; see too M. Ciancimino, *La discriminazione contrattuale: profili rilevanti per la tutela della persona. Note a margine di un recente dibattito dottrinale*, in *Il diritto di famiglia e delle Persone*, 2018, 2, p. 667 ff.

[79] On the other hand, it is not detectable, except in exceptional cases, a *deminutio* of working capacity, nor are there any reward mechanisms deriving from a sort of "social recognition" by the State. On the placement for disabled people, see A. Riccardi, *Disabili e lavoro*, Cacucci, 2018, p. 23 ff.

[80] *ETUC calls on additional financial resources for the Member States and for Social Partners to enhance their capacity building activities and for campaigns that could contribute to the sensibilisation and also effectively target concrete issues and respond to attacks on LGBTIQ people on the national and local level.* Cfr. ETUC, *Op. cit*

[81] In general, about the need to protect differences and reassess different social needs regardless of budgetary needs, see S. Giubboni, A. Pioggia, *Lo stato del benessere: dalla redistribuzione al riconoscimento*, in *RDSS*, 2015, 2, p. 297 ff.

policies for an amount of 6.6 billion Euros through the GOL Plan (*Garanzia di Occupabilità per i Lavoratori*, Guarantee of Employability of Workers).
As highlighted by the Plan[82], it seems that the protection of LGBTIQ+ people, and therefore of transgender people (who find themselves in a *limbo* between sexual orientation and gender), has captured the attention of the legislator as vulnerable subjects, albeit concerning the specific objective of *"defining, in close coordination with the Regions, the essential levels of training activities"*. However, this hope is shattered in front of the GOL Program, elaborated by ANPAL (National Agency for Active Policies at Work) and the Ministry of Work[83], where transsexual persons are not intended among the vulnerable subjects considered. This category could be included among the beneficiaries of active policies as unemployed without income support (and specifically "*workers with less than one occupational role*"), referred to in the next point of the Plan, but this suggests in any case a partial reading of the effects that discriminatory conduct has for transgender people.
This interpretation, which implies exclusion from the Essential levels of the Performances ("LEP," Livelli Essenziali Delle Prestazioni)[84], therefore entails a discretion of intervention of the Regional Agency for Active Policies (ARPAL) (on a regional level) spread throughout the territory.
According to the idea that transsexual people are vulnerable, it would be possible to promote active anti-discrimination policies in the labour market: the condition of vulnerability justifies a difference by the principle of substantial equality (Art. 3, par. 2 Cost.)[85].
It seems more feasible the hypothesis that ANPAL attributes itself, to art. 9 par. 2, Legislative Decree no. 150/2015, further tasks, and functions, through the stipulation of agreements with the regions and autonomous provinces, on

[82] See above all the *transversal priorities*, declined on p. 35, and mission 5 C. 1, p. 206 ff. of the PNRR.
[83] See *Garanzia di occupabilità dei lavoratori* (GOL), Raffaele Tangorra, CNEL, 7 October 2021, on www.bollettinoadapt.it.
[84] Referred to the point M of Min. Decree 28 March 2018 n.4. About the LEP see, already, P. Pascucci, *I livelli essenziali delle prestazioni*, in E. Ghera, D. Garofalo (edited by), *Organizzazione e disciplina del mercato del lavoro nel Jobs Act 2*, Cacucci, 2016, p. 137 ff.
[85] On this point, see Constitutional Court 21 June 2006, n. 253, which declares unfounded the question of constitutional illegality of articles. 2 and 3, law of the Tuscany Region of 15 November 2004, n. 63 (Rules against discrimination determined by sexual orientation or gender identity), since *"it limits itself to affirming, in favor of these* (of transgender people, Ed.), *the objective of expressing specific regional employment policies, as subjects exposed to the risk of social exclusion"*. About the *"reparatory and promotional function"* of affirmative actions, see already M. V. Ballestrero, Op. cit., p. 505.

the direct management of employment services and active labour policies[86]. Such measures are directed in favour of the *"subjects who mostly need"*[87] public intervention in the field of employment services. In this perspective, therefore, through the European funds referred to in Art. 9, par. 1, let. f) and i), employment services could be implemented for transgender people, taking into consideration their *"state of need"*[88]; those services could be activated by the State and the regions.

These policies are directed to avoid intervention by the State aiming at giving mere assistance to such a category. Such drift of the State is a risk already widely predicted[89]: if it is true that Art. 4 of the Constitution does not refer to the right to work as a right to obtain a job *("according to his possibilities and choice")*, at the same time it is a duty of the Republic to make this right effective [90], with particular attention to vulnerable subjects[91], that means particular attention to

[86] About this argument see L. Valente, *Le competenze regionali*, in E. Ghera, D. Garofalo (edited by), *Op. cit.*, p. 37 ff., espec. p. 51.

[87] See the circ. of the Job Ministry 23 December 2015, no. 34. About this argument see R. Santucci, *Lo stato di disoccupazione*, in E. Ghera, D. Garofalo (edited by), *Op. cit.,* p. 159 ff.

[88] Deducible from art. 5 par. 2, Legislative Decree n. 147/2017 (Inclusion income, REI), and subsequently borrowed from art. 4, par. 11, d.l. n. 4/2019, conv. with mod. from law 28 March 2019, n. 26 (Citizenship income). For the purposes of access to the REI, in fact, the identification of the state of need took place according to the following factors of vulnerability and environmental / social factors: a) personal and social conditions and functions; b) economic situation; c) work situation and employability profile; d) education, instruction and training; e) housing status; f) family, proximity and social networks.

[89] D. Garofalo, *La dottrina giuslavorista alla prova del Covid-19: la nuova questione sociale*, in *LG*, 2020, 5, p. 429 ff., which, in reference to the emergency legislation, reads a "*mass welfarism", "which, if prima facie, may appear justified to counter the spread of the epidemic, at the same time is suitable to feed in the population, especially in the uno occupied part, the conviction that there is a State ready and able to provide for the needs of life without working*". In a perspective *de iure condendo* see Id, *La disoccupazione da pandemia: come passare dall'assistenzialismo di Stato ad una nuova politica per l'occupazione*, in D. Garofalo (edited by), *Covid-19 e sostegno al reddito*, Adapt University Press, 2020, p. 1 ff. The same opinion has R. Del Punta, *Nota sugli ammortizzatori sociali ai tempi del Covid-19*, in *RIDL*, 2, 2020, p. 251 ff.

[90] See L. Carlassare, *Solidarietà: un progetto politico,* in *Costituzionalismo.it,* 1, 2016, p. 62. See too F. Mancini, *Il diritto al lavoro rivisitato*, in *Politica del diritto*, 1973, 6, p. 687 ff., for which, it is a social right, *"such that the interest in which protection is conferred can be satisfied only through public intervention'*. Indeed, the debate is far from resolved in this almost peremptory expression, finding different nuances about the programmatic or perceptivity of the same. On the point we referred to D. Garofalo, *Formazione e lavoro tra diritto e contratto. L'occupabilità*, Bari, Cacucci, 2004, p. 28 ff., who considers the norm as a valuable programmatic, that is understood as *"a program to be carried out, a goal to be achieved"*.

[91] See, in this regard, the repealed article 15, law no. 264/1949, which, regardless of its juridical-temporal location, attributed to the state of need a proactive function: to define the subjects to be started primarily at work.

those subjects for whom the obstacles to achieving full realization in society are determined by prejudices related to their characteristics.
The enhancement of the right to work through training, employment services, and awareness policies, is reinforced by the limits on free private initiatives, under art. 41 par. 2 Constitution[92], does not represent an external limit to an efficient production for enterprises but could solve the problem of discrimination. It could also fill the lack of work[93] and, therefore, prevent the exclusion of transsexual people from the world of work.

5.1 Good Practices in the Labour Market

Until today, the active employment policies (including employment services, training, and the activities aimed at developing employability) have been entrusted exclusively to regional legislators, due to the principles of subsidiarity and legislative powers of the State and the regions in the matter of "safety and work" (Art. 117 par. 2 Cost.). The results are not entirely satisfying.
However, excluding best practices at the supranational level, which include experiences of particular interest[94], this research intends to focus on some programs implemented on the Italian territory.
In this regard, Piedmont has launched a project using the "POR-FSE 2007/2013" funds, for the strengthening of employability and socio-occupational integration of particularly disadvantaged people victims (or people at risk) of discrimination. According to the regional plan, during 2014, 4 months of job placements and paid internships were launched in favour of 126 people, 36 of whom were LGBTIQ+, mainly transsexual. It is interesting to underline that during the period of training for the internship workers were assisted by two tutors, one responsible for the work performed and the other (called "life friend") for the aspects related to individual professional enhancement. The project has involved the LGBTIQ+ territorial associations, which have strengthened its effectiveness through numerous seminars addressed to Job offices and company representatives[95]; the implementation of

[92] C. Smuraglia, *La Costituzione*, cit., pp. 58-59.
[93] In general, on the removal of the state of need through active policies, see most recently the interim report by S. Renga, *La tutela del reddito: chiave di volta per un mercato del lavoro sostenibile*, at the Aidlass Congress of Taranto, 2021, p. 20.
[94] Among the international good practices collected, it is worth mentioning, for example, the pilot experience of the municipality of Brighton (United Kingdom), which provided local private sector managers with guidance for the recruitment of transgender personnel. For a review of best practices see. UNAR, *Op. cit.*, pp. 68 -71.
[95] B. Gusmano, *La transessualità nei contesti lavorativi: ambito di intervento e buone prassi*, 2021, see it on http://www.portalenazionalelgbt.it/; A. Lorenzetti, *Buone pratiche per il contrasto alle discriminazioni e l'inclusione delle persone transgeneri,* in Consiglio Regionale del Friuli Venezia Giulia,

a "gender literacy"[96] and a culture of gender is necessary to prevent the (sub)culture of prejudice.

The intervention in the labour market in favour of transgender people also includes the activation of some job orientation desks scattered throughout the Italian territories, aimed at responding to the specific needs of transgender users in the cities of Turin, Verona, Bologna, Milan, Rome, Naples (in collaboration with the CGIL)[97].

A program of particular interest has been "Diversity on Job" which started, with the financing of EU funds, by the Ministry of Work, ANPAL (since 2015), and Unar (National Anti-Racial Discrimination Office) in 2014-2015, to implement the possibilities of employment of vulnerable subjects. The Italian project, called "Obiettivo Convergenza," provided for the financing of Campania, Puglia, Calabria, and Sicily that have launched 6 months of internships in enterprises in favour of 16 LGBTIQ+ people, except for heterosexual subjects. The selection of subjects started in the internship, certainly could appear paradoxically discriminatory, because it excludes heterosexual people, however, it is justifiable according to the principles of reasonableness[98] and substantial equality enshrined in art. 3 Cost.

To find the recipients of such measures, the project provided that people potentially interested to work would prove their sexual orientation or gender identity, as well as the discriminatory harassment they suffered. If the proof of their sexual orientation or gender identity is justified by the objective of identifying the beneficiaries of the project, the request to document the suffered discrimination is more problematic, since it emphasizes the idea of work as a tool to compensate the victims for the harassment suffered[99] and so it in contrast with Art. 1 Constitution, according to which Italy is *"democratic*

Rete Lenford, *La condizione transessuale: profili giuridici, tutela antidiscriminatoria e buone pratiche,* Quaderni dei diritti. Garante regionale dei diritti della persona, 2017, p. 50 ff.

[96] See F. Corbisiero, I. Marotta*, Diversity on the Job: buona prassi di inclusione lavorativa nella città di Napoli*, in F. Galgano, M. S. Papillo (edited by), *Diversity Management. Nuove frontiere dell'inclusione e sfide per i C.U.G. universitari. Atti del Convegno Università degli Studi di Napoli Federico II, Napoli, 5-6 dicembre 2019*, FedOAPress, 2020, p. 165 ff., espec. p. 169.

[97] B. Gusmano, *Op. cit.* On this point, there is a well-established interest of the CGIL towards the protection of LGBTIQ+ people. Already in the mid-90s the first desks dedicated to the "new rights" were born in the cities of Turin and Bologna, aimed at protecting people discriminated against for sexual orientation and gender identity and at the study of employment situations in the labour market of transsexual people. See I. Franco, *Portare più avanti il confine dei diritti*, in *Rassegna sindacale*, 1998, 2, p. 11-12; E. Degli Esposti, G. Lucca, *Si parte dallo sportello «Trans»*, in Id.

[98] F. Corbisiero, *L'inserimento lavorativo delle persone LGBT tra politiche di diversity management e buone prassi aziendali*, in M. D'Onghia, G. A. Recchia (edited by), *Op. cit.*, p. 95 ff., espec. p. 114.

[99] The same opinion, but in a general welfarist perspective and not linked to anti-discrimination protection, has S. Renga, *Op. cit.,* p. 76.

republic founded on work". The risk is that work, the aim of which is to make possible people's self-realization, becomes a tool of compensation against discrimination already suffered by the worker, according to a paternalistic logic[100].

6. Final Remarks

In conclusion, although this study is not intended to take any political position, the topic leaves the space for some reflections on the bill against homo-lesbo-bi-trans-phobia (the so-called "DDL Zan," n. 2005/2020), currently rejected by parliament. It is particularly difficult to refrain from a brief consideration since the political debate affects the lives of transgender workers.
As if the problem of the protection of LGBTIQ+ people against discrimination were only an issue for a few and not for all, once again their needs must rely on the sensitivity of a part of the Parliament, not finding a unanimous response in all political parties.
However, to achieve the goal of equality, according to Art. 3, par. 2, Const., the anti-discrimination protection cannot become an object of a political exchange, nor become extortion since it interests those citizens who are often deprived of that dignity that should be guaranteed to every person.
This consideration is also confirmed by the ruling of the Constitutional Court n. 221/2015, which recognizes the right to gender identity as a milestone of the fundamental rights of the person. Therefore, although the Constitutional Court recognized the right to gender identity as an essential and inalienable right, the legislator did not intervene to guarantee its protection. According to the ruling mentioned above and to Art. 1, let. d, "DDL ZAN," gender identity is «the perceived and manifested identification of oneself in relation to gender, even if it does not correspond to sex, regardless of having completed a transition process».
The "DDL ZAN" presents various provisions which confirm the point of view of this research, especially the promotion of a culture of inclusion. The need to introduce "proactive" measures emerges from the same title of the bill, "Measures to prevent and combat discrimination and violence for reasons based on sex, gender, sexual orientation, gender identity and disability", where the goal of "preventing" discrimination is placed before that one of "fighting" it.
This idea emerges above all from art. 8, which enhances the powers of the Office for the promotion of equal treatment and the elimination of

[100] Corbisiero's opinion has different nuances because he believes that the central paradox is in the certification of one's sexual orientation or gender identity. V. F. Corbisiero, *Op. cit.*, p. 115.

discrimination based on race or ethnic origin (under art. 7, legislative decree 9 July 2003, n. 215), also including the prevention and contrast of discrimination on grounds related to sexual orientation and gender identity. According to art. 8, the (three-year) strategy developed by the Office provides for measures aimed at preventing discrimination at work. This is an aspect of particular importance since repressive-compensatory measures of the anti-discrimination law interact with promotional and preventive ones. Although the extension of the powers of the aforementioned Office is an agreeable solution, even on this front, however, a legislative limit must be registered, concerning the financial support, which has not been implemented (Article 8, paragraph 2). However, if the Constitution entrusts the Republic with the task of eliminating the obstacles that hinder the achievement of substantial democracy (Article 3, par. 2, Const.), the Republic must itself make use of all the necessary means (especially economic) to ensure that this objective - certainly not secondary - is pursued and achieved.

The Agreements for Access to Employment of Persons with a Disability: a Genuine Tool to Promote People and Work

Massimiliano De Falco *

Abstract

The inclusion of persons with a disability has always been a sensitive issue in the mechanisms of protection and (equal) access in the labor market. Due to allegedly reduced performance, persons with a disability are often considered "second-class workers" (rather than resources) and, as a result, they have been relegated to tasks of secondary importance compared to the core business. In addition, large companies prefer paying sanctions for not having employed persons with a disability instead of hiring them under the mandatory quotas. An attempt will be made here to provide the key to understanding the phenomenon, leading the companies towards the model of the agreement under Art. 14, legislative decree no. 276/2003, which can include persons with a disability in the production processes and the value chain creation.

Keywords: Value of Work; Inclusion; Persons with a disability; Access to Employment; Framework Agreements; Reasonable Accommodations.

1. The Origins of Disability: the Medical Model

The inclusion of persons with a disability in the working context is an ongoing challenge that needs to be overcome both in the access phase and in the pursuance of the employment relationship.

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While the expression "job insertion" evokes the idea of a series of actions aimed at persons with a disability so that they are helped to achieve a profile of characteristics compatible with a given context of employment, the term "inclusion" recalls the need that the context itself must be structurally and systematically modified (to allow full and continuous accessibility)[1].

Before any reconstruction of disability at work, is the correct identification of the meaning that needs to be given to the term.

In the national legal system, the meaning assigned to the notion of disability has acquired different shades depending on the context in which it has been used[2]. In the "medical model" developed by WHO in 1980[3], it was understood as a synonym of impairment: following this approach, the definitions accepted by the *corpus* of legislation have, for a long time, placed the emphasis only on the elements that negatively affect the life of the person (i.e. the psychophysical limitations and social disadvantage that results from this perspective), without ever taking into account the influence of the environment in which it is inserted.

This restrictive interpretation of the disability factor seems to go alongside the uncertainty surrounding the definition at the European level, insofar as both the Charter of Fundamental Rights of the European Union (Art. 21 and 26[4]) and the Directive 2000/78/EC on «equal treatment in employment and occupation» did not explicitly and unequivocally define

[1] C. M. MARCHISIO, N. CURTO, *Diritto al lavoro e disabilità. Progettare pratiche efficaci*, Carocci, 2019, 21.

[2] The reference is to the concepts of «inability» (Art. 2, Law no. 118/1971), «handicap» (Art. 3, par. 1, Law no. 104/1992), «disability» (Art. 1, par. 1, Law no. 68/1999) and «unsuitability» (Art. 41, par. 6, legislative decree no. 81/2008). During the SARS-CoV-2 Emergency (which persists), a further case emerged that can be ascribed to disability *latu sensu*, namely «frailty» (legislative decree no. 18/2020), which identifies workers, who are most exposed to the risk of contagion.

[3] In the «International Classification of Functioning, Disability, and Health» (1980), disability was considered equivalent to physiological or psychological abnormalities, such as «limitations [...] of the ability to perform an activity of daily living in the manner considered normal for a human being». On this topic, see R. MEDEGHINI, E. VALTELLINA, *Quale disabilità? Culture, modelli e processi di inclusione*, Franco Angeli, 2006, 87.

[4] The Charter of Fundamental Rights of the European Union – in Chapter III, dedicated to «Equality» – prohibits «any discrimination based on any ground such as [...] disability» (Art. 21) and recognizes «the right of persons with disabilities to benefit from measures designed to ensure their independence, social, and occupational integration and participation in the life of the community» (Art. 26).

the perimeter of disability, thus leaving it up to the member states to identify its extremes on a case-by-case basis[5].
The absence of a definition among the sources of primary and secondary law of the European Union had made necessary the exegetical activity of the Court of Justice[6]. As is well known, in 2006, the judges of Luxembourg – called upon to pronounce for the first time the question of qualification – had interpreted the notion of «disability» (Art. 1, Dir. 2000/78/EC) «as a limitation resulting in particular from physical, mental or psychic impairments and which prevents the participation of the person in question in the occupational life»[7]. It was also pointed out that the effects on the abilities of the person had to last in time[8].
In this perspective, the relevance of the impairments alone (and the obstacles they entail) was confirmed, omitting the importance of adapting the environment to the concrete needs of the person[9].

2. The Biopsychosocial Model

The criticism of the 1980 classification system[10] led the WHO to develop the «biopsychosocial model»[11], marking a decisive reversal in the way disability is conceived. Having overcome the individual perspective, in

[5] G. LOY, *La disabilità nelle fonti internazionali*, C. LA MACCHIA (ed.), *Disabilità e lavoro*, Ediesse, 2009, 35 and Y. VASINI, *Discriminazione per disabilità: la normativa italiana è in linea con la normativa europea? LG*, 2017, 226.
[6] For an in-depth reconstruction of the orientation of the Court of Justice, see W. CHIAROMONTE, *L'inclusione sociale dei lavoratori disabili fra diritto dell'Unione europea e orientamenti della Corte di giustizia*, *VTDL*, 2020, 4, 897.
[7] ECJ July 11, 2006, C-13/05, *Chacòn Navas*, p. 43. Furthermore, «a pure and simple assimilation of the notions of handicap and illness was excluded» (p. 44), thus removing from the sphere of anti-discriminatory protection those persons whose penalization originated from the latter.
[8] By ECJ July 11, 2006, *cit.*, p. 45, see ECJ December 1, 2016, C-395/15, *Daouidi*, p. 44 which has clarified that anti-discrimination protection also covers impairments of short or uncertain duration, provided that their effects continue over an extended period.
[9] This interpretation also implied the exclusion of caregivers from the sphere of anti-discrimination protections. Subsequently, however, the Court of Justice – on the second occasion in which it was asked to define the problem (July 17, 2008, C-303/06, *Coleman*, p. 50-51) – retraced its steps, extending protection to workers who conduct care and assistance tasks for persons with disability.
[10] On the limits of the classification system of 1980, see M. PASTORE, *Disabilità e lavoro: prospettive recenti della Corte di giustizia dell'Unione europea*, *RDSS*, 2016, 1, 199.
[11] In the «International Classification of Functioning, Disability, and Health» of 2001, disability is defined as «the consequence (...) of a complex relationship between an individual health condition and the personal and environmental factors that represent the circumstances in which [the person] lives».

which the solution is medical therapy alone, we have come to a collective and universal interpretation of the phenomenon, in which intervention lies in action and social inclusion[12].

The definitive paradigm shift was recorded in the UN Convention «on the Rights of Persons with Disabilities»[13] – adopted on December 13, 2006, and in force since May 3, 2008 – which has determined a shift of the concept of equality from the formal to the substantial level[14]. After having actively participated in the negotiation phase, the European Union has acceded to the Convention[15], which, being a "mixed agreement"[16], constitutes «an integral part [...] of the legal system of the Union»[17]. Nevertheless, the Court of Justice has stated that the Convention does not have direct effect, but «has a programmatic nature» and, consequently, the provisions contained therein «are subordinate, as to execution or effects, to the intervention of further acts which are the responsibility of the contracting parties»[18], since «they are not, from the point of view of the content, unconditional and sufficiently precise»[19].

However, this did not prevent the Court of Justice from appreciating the content of the Agreement, starting from the concept of disability contained therein, following the principle of conforming interpretation enshrined in Art. 216, par. 2, TFEU[20]. Going beyond the state of health of

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[12] Even the Supreme Court of Cassation (October 25, 2012, no. 18334, *GC*, 2012, 2549) has noted that this shift has led to «a radical change in perspective concerning the way [...] to address the problems of persons with disability, now considered not only as individual problems but such as to be assumed by the entire community».

[13] On this topic, see N. FOGGETTI, *Diritti umani e tutela delle persone con disabilità: la Convenzione delle Nazioni Unite del 13 dicembre 2006*, *RCGI*, 2009, 98.

[14] D. GAROFALO, *La tutela del lavoratore disabile nel prisma degli accomodamenti ragionevoli*, *ADL*, 2019, 6, 21-57, 35.

[15] The ratification of the UN Convention – which represents the first international Treaty to which the European Union has been a signatory – took place with Council Decision no. 2020/48/EC of November 26, 2009.

[16] There are agreements that the European Union negotiates with third parties and whose subject matter does not fall within its exclusive competence, but within that shared with member states under Art. 4 TFEU, thus making it necessary for the latter to sign them as well. On this topic, see M. CREMONA, *External Relations of the EU, and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Working Paper Law, 2006, 22.

[17] From last, see ECJ September 11, 2019, C-379/18, *DW*, p. 39.

[18] ECJ March 14, 2014, C-363/12, *Z.*, p. 88-89.

[19] ECJ May 22, 2014, C-356/12, *Gatzel*, p. 69.

[20] According to which «the agreements concluded by the European Union are binding on the institutions of the Union and the Member States». Therefore, due to the ratification of the UN Convention, Dir. 2000/78/EC must be interpreted in the same direction (B. DE MOZZI, *Sopravvenuta inidoneità alle mansioni, disabilità, licenziamento*, *LDE*, 2020, no. 2).

the person, the UN has produced a definition in relative terms [Preamble, let. e)], that is, concerning the «interaction» between «long-term physical, mental, intellectual or sensory impairments» and the «various barriers»[21] that hinder the person's «full and effective participation in society on an equal basis with others» (Art. 1, par. 2).

In this way, (first) the United Nations and (later) the European Union embraced the biopsychosocial model: for anti-discrimination protection, the notion of disability is not medical, but relational, that is, considers processes of exclusion determined by economic and social barriers[22]. Therefore, this personal characteristic can no longer be measured *ex-ante*, but exclusively *ex-post* concerning the relationship with the environment where the person with functional impairments will be placed.

Concerning the European jurisprudence, this approach reflects the orientation, consolidated since 2013[23], that still characterizes the position of the Court of Justice. In this way, disability is now interpreted as a dynamic process, which escapes from a markedly welfarist (and passive) approach and which values, instead, the instances of dignity and social recognition of the person through an interventionist (and active) approach.

The UN Convention, ratified and put into effect even in Italy by Law no. 18/2009[24], affirms the right of every person to achieve the highest degree of autonomy and independence within any relational and working environment[25]. Even in the presence of a disease[26] or an impairment, there

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21 V. DI GREGORIO, *Il principio di non discriminazione nella tutela dei diritti delle persone con disabilità*, in *Riv. crit. dir. priv.*, 2019, 549, underlines how «disability studies have helped to change the point of view usually taken to look at the disability, identifying the cause of constraints and limitations to the freedom and autonomy of persons with disability, not so much in the disability itself, but [...] in the environmental, cultural, social, economic and political barriers present in the external environment».

22 F. MALZANI, *Inidoneità alla mansione e soluzioni ragionevoli, oltre il repêchage*, *ADL*, 2020, 966.

23 ECJ April 11, 2013, C-335/11 e C-337/11, *HK Danmark*, p. 38, where disability (in working contexts) is defined as «a limitation, resulting in particular from physical, mental or psychological impairments, which in interaction with various barriers may hinder the full and effective participation of the person concerned in working life on an equal basis with other workers».

24 A. DE AMICIS, *La l. 3 marzo 2009, n. 81 di ratifica della convenzione delle nazioni unite sui diritti delle persone con disabilità: i principi e le procedure*, *GM*, 2009, 2375.

25 M. L. VALLAURI, *Disabilità e lavoro. Il multiforme contemperamento di libertà di iniziativa economica, diritto al lavoro e dignità (professionale) della persona disabile*, V. BOFFO, S. FALCONI, T. ZAPPATERRA (ed.), *Per una formazione al lavoro. Le sfide della disabilità adulta*, Firenze University Press, 2012, 60.

is no disability if the conditions of the context allow the person to carry out normal activities on an equal basis with others; vice versa, there is a disability when the barriers encountered therein limit the accessibility and, therefore, the full realization of the person in the multiple dimensions of the daily life (including work[27]).

Far from representing a mere petition of principle, this shift seals the fundamental element of disability, linked to the inability of the structures to adapt to the needs of the disadvantaged person[28]. What emerges, then, is the need to create goods, services, and, more generally, spaces from an inclusive point of view[29], to ensure that everyone (worker) can enter accessible (work) places in response to the «collective duty to remove, in advance, any kind of even potential obstacle to exercise the fundamental rights of persons with a disability »[30].

However, it has been noted that the «Action Plans for the promotion of the rights and integration of persons with a disability » following the entry into force of the Law no. 18/2009[31] have not taken into consideration the cultural changes produced by a new way of conceiving the livability of environments[32].

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[26] Without prejudice to the exclusion of the assimilation of the notions of disability and disease (already sanctioned in 2006), the ECJ April 11, 2013, *cit.*, p. 39 and 41 also admitted that «at the origin of the limitation there may also be a [curable or chronic] illness, provided that the impairments produced by it are lasting».

[27] Concerning the issue of accessibility – identified by the UN Convention as a «general principle» (Art. 3, let. f), to «enable persons with disabilities to live independently and participate fully in all aspects of life» (Art. 9) – please refer to M. DE FALCO, *Accomodamenti ragionevoli: sovvenzioni nel settore privato, accessibilità ovunque*, *RIDL*, 2021, 4, 429-452.

[28] A. RICCARDI, *La "ridefinizione" del concetto di persona disabile nell'ordinamento sovranazionale*, R. PAGANO (ed.) *La persona tra tutela, valorizzazione e promozione. Linee tematiche per una soggettività globalizzata*, *DJSGE*, 2019, 298.

[29] The reference is to the «universal design» (Art. 2, UN Convention), which must be understood as a «systematic effort to prevent all forms of unequal treatment» (R. P. MALLOY, *Inclusion by design: accessible housing and mobility impairment*, *Hast Law J. Hastings Law Journal*, 2009, 699). This provision stands alongside Art. 63, par. 2, legislative decree no. 81/2008, which underlines that «workplaces must be structured considering, where appropriate, disabled workers».

[30] Constitutional Court April 29, 1999, no. 167, *Riv. Not.*, 1999, 973.

[31] See D.P.R. October 4, 2013 (approved on February 12, 2013) and D.P.R. October 12, 2017 (approved on October 19, 2016).

[32] Supreme Court of Cassation, February 13, 2020, no. 3691, *RCP*, 2021, 227. In this regard, it should be noted that last October 27, a Draft of the Delegated Law on disability was approved. In absolute synergy with the objectives of the National Plan for Recovery and Resilience, it aspires to «a reform consisting of the creation of a framework law on disability, [...] which will simplify access to services, the mechanisms for

3. The Occupational Conditions of Persons with a Disability

If it is true that, on a legal level, work identifies every human activity susceptible to economic evaluation[33], it is equally true that any person, regardless of his or her health condition, can conduct an activity capable of creating value for the company. Discarded the conception of work as a mere commodity of exchange[34], the dignity of the worker becomes central, beyond the traditional references to wages to which the value of work has long been anchored from the labor law point of view.

In this regard, it has been noted that economic studies have highlighted the ontological differences between the realization of profit and the creation (and dissemination) of value[35]. In this second hypothesis, the roles of corporate social responsibility, circular economy, and sustainability are exalted, following the development objectives set by the 2030 Agenda[36].

In practice, these theories have been fully accepted in the model of Benefit Companies (Art. 1, par. 376-384, Law no. 208/2015)[37], i.e. in those companies that add, in their social object, to the typical lucrative purposes (Art. 2247 c.c.) one or more purposes of «common benefit», to produce a positive effect – or to reduce a negative one – towards the subjects that interact with the company itself.

Nevertheless, more than twenty years after the Dir. 2000/78/EC[38], the employment inclusion of persons with a disability is still far from being achieved. Not even the hiring obligation identified in Art. 3, par. 1 of the (almost) coeval Law no. 68/1999 and the relative sanctions system[39] seem

ascertaining disability and strengthen the instruments aimed at defining the individualized intervention project».

33 M. BIAGI, *Istituzioni di diritto del lavoro*, Giuffrè, 2001, 1.

34 M. TIRABOSCHI, *Persona e lavoro tra tutele e mercato. Per una nuova ontologia del lavoro nel discorso giuslavoristico*, ADAPT University Press, 2019, 48.

35 See P. M. FERRANDO, *Teoria della creazione del valore e responsabilità sociale dell'impresa*, *Impresa Progetto. Electronic Journal of Management*, 2010, 1 and his bibliographical references.

36 B. CARUSO, R. DEL PUNTA, T. TREU, *Manifesto per un diritto del lavoro sostenibile*, *CSDLE*, *It.*, 2020, 15.

37 On this topic, see M. SQUEGLIA, *Le società benefit e il welfare aziendale. Verso una nuova dimensione della responsabilità sociale delle imprese*, *DRI*, 2020, 61-85.

38 On the social justice model promoted by the Dir. 2000/78/EC to protect persons with a disability, please refer to M. DE FALCO, *L'accomodamento per i lavoratori disabili: una proposta per misurare ragionevolezza e proporzionalità attraverso l'INAIL*, *LDE*, 2021, no. 3.

39 If the employer does not comply with the obligation to recruit, Art. 15, Law no. 68/1999 establishes the infliction of administrative sanctions for each working day of non-employment of the person with a disability, setting up the amount at five times the expected contribution exemption provided for by Art. 5. Recently, the Minister of Work

to have succeeded in undermining the prejudices – and discrimination – that, even today, surround the world of disability[40].
Subsequent modifications to the employment system have also come to the same unsatisfactory conclusions[41], failing to reverse the tendential reticence of employers to recruit persons with a disability. The effect of these measures has been controversial: if, on the one hand, they have ensured a widening of the range of subjects to be considered for the correct computation[42] and the relative methods of recruitment[43], on the other hand, they have generated critical application issues capable of slowing down the processes of inclusion[44].
In truth, the analysis of the employment conditions of persons with a disability[45] gives a clear picture of the disadvantage they suffer in the job market. Only 35,8% of people with functional limitations, who can work, are employed (compared with the 57,8% of people without limitations). Among these, only 20,7% are seeking employment, while the remaining 43.5% are inactive (among the people without limitations, this percentage is 27.5%)[46].

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has decreed the adjustment of this contribution exemption to 39.21 euros, thus tightening up the sanctions system: in this way, the sanction becomes 196.05 euros per day for each missed employment, and (if multiplied by 260 working days) it reaches 50,973.00 euros per year.

40 M. J. JOHNSTONE, *Stigma, Social Justice, and the rights of the mentally ill: challenging the status quo*, *Australian and New Zealand Journal of Mental Health Nursing*, 2001, 10, 200-209.

41 The reference is to Law no. 92/2012 [see M. GIOVANNONE, A. INNESTI, *L'attuazione del diritto al lavoro dei disabili*, M. MAGNANI, M. TIRABOSCHI (ed.), *La nuova riforma del lavoro. Commentario alla legge 28 giugno 2012, n. 92 recante disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita*, Giuffrè, 2012, 431] and to legislative decree no. 151/2015 [see D. GAROFALO, *Le modifiche alla l. n. 68/1999: semplificazione, correttivi, competenze*, E. GHERA, D. GAROFALO (ed.), *Semplificazioni sanzioni ispezioni nel Jobs Act 2. Commento ai d.lgs. 14 settembre 2015, nn. 149 e 151*, Cacucci, 2016, 23].

42 See Art. 4, legislative decree no. 151/2015, which also includes workers who were already disabled before the establishment of the relationship, if they reported a reduction in a working capacity greater than the threshold provided for entry.

43 See Art. 4, par. 27, let. a), Law no. 92/2012, which provided for the inclusion also of workers hired on a fixed-term basis, who, until then, had been excluded.

44 M. GIOVANNONE, *Il collocamento dei disabili nel mercato del lavoro post-emergenziale: criticità e prospettive*, *Federalismi*, 2021, 10, 100-124.

45 For further analysis, see the restatements of the latest available data (Istat and Inapp, 2019) made by FONDAZIONE STUDI CONSULENTI DEL LAVORO, *L'inclusione lavorativa delle persone con disabilità in Italia*, 2019.

46 S. L. OVERTON, S. L. MEDINA, *The Stigma of Mental Illness*, *Journal of Counseling and Development*, 2008, 86, 143-151 trace the issue of inactivity to the conviction of the persons with a disability that are not suitable for work, which leads them to abandon the idea of looking for one.

These prejudices are even sharper for the female component of the labor force, emphasizing historical gender differences in occupational levels[47]: 29,4% of women (versus 43,3% of men) are working, 16,6% (versus 43,3%) are seeking employment and 53,9% (versus the 31,6%) are inactive. At the same time, there is also a strong imbalance in employment rates towards the older age brackets of the population: only 17,5% of workers with a disability are under forty[48], while 68% are over fifty. In the 25-44-year-old cohort, the quota of persons with a disability seeking employment (31,2%) is almost double the quota of persons with a disability between 45 and 64 years old (16,8%).
The statistical evidence described above seems to reflect the phenomena – still too little investigated in the literature – of «multiple (or intersectional) discrimination»[49], for which the concomitant membership of two or more disadvantaged social groups multiplies the risk that a person will be a victim of events affecting his or her dignity[50]. The reference to the product of multiplication, to indicate the result of the interweaving of potential factors of exclusion, is illustrative of the fact that personal characteristics (such as disability, gender, and age, but also ethnic origin, political, religious, or sexual orientation) tend to feed on themselves cumulatively, giving rise to new forms of inequality, the result of their combination[51].

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[47] On this topic, see A. ZILLI, *EU Strategy against gender pay gap through wage transparency: the best is yet to come*, *Italian Labor Law e-Journal*, 2021.

[48] Among workers with a disability under 40 years old, there is a growing recourse to fixed-term employment contracts (11,5%), which considerably exceeds the derisory percentages of those over 50 years old. Moreover, although the incidence of part-time work is generally high among those workers with a disability (34,3%), it reaches record volumes among those under 40 years old (40,7%).

[49] See S. FREDMAN, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law*, 2016, who uses the term to express «the interaction of discrimination based on multiple factors in a synergistic manner such that they are no longer separable», resulting in «a specific form of qualitatively different discrimination» that is captured «in situations where there would have been no discrimination if the factors had been considered separately».

[50] Regarding the issue of multiple discrimination to which persons with a disability are subjected, on a practical level, it seems appropriate to point out the ambitious project *Disabilità: la discriminazione non si somma, si moltiplica. Azioni e strumenti innovativi per riconoscere e contrastare le discriminazioni multiple*, promoted by Federazione Italiana per il Superamento dell' Handicap (FISH) and financed by the Ministry of Labor and Social Policies with the Fund for the financing of projects and activities of general interest in the third sector (*https://www.fishonlus.it/progetti/multidiscriminazione/azioni/digital-talk.html*).

[51] This is what, at least on paper, was anticipated by the UN Convention of 2006, in Art. 6 (under the heading «Women with disabilities», where there is an express reference to

In addition, within profit-oriented organizations (such as, legitimately, companies), persons with a disability are often considered "second-class workers" (rather than resources) because of their presumed reduced performance. Frequently, they are relegated to tasks of secondary importance concerning the core business of the company: while 36,2% of workers with a disability occupy a white-collar role, only 19,8% of them are at the top of the pyramid, conducting intellectual or managerial activities (5,3%) or highly specialized technical professions (14,5%).
To complete the (sad) framework described, it should be noted that the occupational discomfort suffered by persons with a disability involves a redundancy that falls overwhelmingly not only on their economic condition but also on the family sphere, already weighed down by the burdens of care and assistance[52].
These evaluations, both on the phenomenological and on the legislative front, converge in outlining a scenario with "few lights and many shadows"[53], oppressed by the epidemiological emergency of Covid-19 and by the measures to contain the contagion, which ended up stopping (or slowing down) the already complicated access to the labor market of persons with a disability [54].

4. Inclusion through Agreements

In the light of what has been described before, it can be affirmed that the system of obligations, incentives, facilities, and sanctions introduced by the Law no. 68/1999 is still affected by cultural resistance, which does not allow diversity to be accepted as a resource, capable of generating value. At this point, it should be asked which instrument best meets the needs of companies and workers in making effective the «right to work of the person with a disability».

«multiple discrimination») and 7 (under the heading «Children with disabilities», although, in this second case, there is no reference to the possible accumulation of risk factors).
[52] M. TIRABOSCHI, *Occupabilità, lavoro e tutele delle persone con malattie croniche*, ADAPT Labour Studies e-book no. 36, 2015, 682, who – although referring specifically to «chronic diseases», highlights how «non-reversible pathological changes [...] require special rehabilitation and an extended period of supervision, observation, care», often at the expense of the family members of the person with a disability.
[53] G. GRIFFO, *La l. n. 68/1999 un bilancio dopo vent'anni*, S. BRUZZONE (ed.), *Salute e persona nella formazione, nel lavoro e nel* welfare, ADAPT University Press, 2017, 19.
[54] M. GIOVANNONE, *cit.*, 113.

The difficulty of employing a person with a disability through direct recruitment[55] is well known to the legislator, who has also imagined other channels for achieving inclusion, in ways that are functional to the productive needs of the employer[56]. These alternative paths correspond to multiple articulations of the agreement, which, for various purposes and with different methods of integration, contribute to satisfying the progressive coverage of the mandatory quota, or a part of it.

It seems particularly interesting to deal with the subject of the agreements provided for by art. 14, legislative decree no. 276/2003[57], which flank those provided by Law no. 68/1999[58], differing from them by the centrality of the public actor[59] and by the (exclusive) involvement of social cooperatives as host entity[60]. In particular, the article – abrogated in 2007 and restored the following year[61] – entrusts the promotion of work

[55] On this issue, it is useful to recall that Art. 6, legislative decree no. 151/2015 amended Art. 7, par. 1, Law no. 68/1999, providing that, to fulfill the recruitment obligation, «employers [...] employ workers utilizing a nominative request to the competent offices».

[56] It is about achieving «a sort of exchange between the easing of certain regulatory constraints (as an incentive means) and the employment of persons with a disability (as the final goal) ». In this way, see S. SLATAPER, *Le convenzioni con le cooperative sociali per favorire l'inserimento dei soggetti svantaggiati*, M. MISCIONE, M. RICCI (ed.), *Organizzazione e disciplina del mercato del lavoro*, in F. CARINCI (coord.), *Commentario al d. lgs. 10 settembre 2003, n. 276*, I, Ipsoa, 2004, 290-305, 291.

[57] N. ROSATO, *Nuove opportunità di inclusione per i "diversamente abili": l'articolo 14 del decreto legislativo 10 settembre 2003, n. 276*, M. TIRABOSCHI (ed.), *La riforma Biagi del mercato del lavoro*, Collana Adapt – Fondazione "Marco Biagi", Giuffré, 2004, 601, according to which Art. 14, legislative decree no. 276/2003, constitutes an additional opportunity to promote the employment of persons with disability.

[58] The system provided by Law no. 68/1999 allows three types of agreement, which differ depending on whether the employer: *i)* hires and uses the person with a disability within their organization (Art. 11); *ii)* hires the person with a disability, but assigns him/her to a third party for a certain period and formative purposes (Art. 12); *iii)* postpones the employment of the person with a disability until the expiry of the agreement since at the same time he/she is hired and used by a third party (Art. 12-*bis*). For a detailed recognition of the discipline, see D. GAROFALO, *L'inserimento e l'integrazione lavorativa dei disabili tramite convenzione*, *RDSS*, 2010, 2, 231-280.

[59] L. NOGLER, V. BEGHINI, *La lenta marcia verso le convenzioni per l'inserimento lavorativo dei disabili*, *Impresa Sociale*, 2006, 1, 130.

[60] On this topic, C. TIMELLINI, *La tutela dei lavoratori svantaggiati: il raccordo pubblico-privato e le cooperative sociali*, L. GALATINO (ed.), *La riforma del mercato del lavoro*, Giappichelli, 2004, 148 interprets Art. 14, legislative decree no. 276/2003 as «a bet on social cooperatives, as operative and dynamic entities capable of self-promotion and self-management».

[61] The Art. 14, legislative decree no. 276/2003 was abrogated by Art. 1, par. 37, let. a), Law no. 247/2007, but was subsequently restored by deletion of the abrogating provision [under Art. 39, par. 10, let. m), Law no. 133/2008]. The 2007 legislator intended to replace, through the introduction of Art. 12-*bis* in Law no. 68/1999, the

inclusion to the instrument of the «framework agreement on a territorial basis», whose effectiveness is conditioned by the validation granted by the Regions. Through the stipulation of the agreement[62], it is provided that the «social cooperative for the employment of disadvantaged people»[63] recruits the worker in place of the obligated company and that the latter, in return, assigns to the cooperative work orders, proportionate to the cost of staff included therein[64], for the entire duration of the contract.
Even from its title («Social cooperatives – social enterprises[65] – and job integration of disadvantaged people»), it is clear that Art. 14, legislative decree no. 276/2003 intends to address a wider audience than that identified by Art. 1, par. 1, Law no. 68/1999[66], with the intention, at least in theory, of incorporating the requests made within the definition of the bio-psychosocial model of disability (see above, Paragraph 2). In practice, however, in the absence of an obligation expressly provided for

model of the framework agreement, as this allowed employers to meet their hiring obligation without including the person with a disability in their organization. However, from this point of view, the agreement is established by Art. 12-*bis* appear to be worse than the instrument they were intended to replace (on this issue and for a complete comparison of the two agreements, see D. GAROFALO, *L'inserimento e l'integrazione lavorativa* cit., 261).

62 The stipulation of framework agreements is entrusted to the employment services, after consultation with the technical committee and the «trade unions representing the most representative employers and service providers at the national level», as well as the «associations representing, assisting and protecting cooperatives» [Art. 1, par. 1, let. b), Law no. 381/1991] and the related consortia (Art. 8, Law no. 381/1991).

63 The «social cooperatives for the employment of disadvantaged persons» [Art. 1, let. b), Law no. 381/1991] – as a *species* of the cooperative *genus* – are those cooperatives that are obliged by statute to include in their membership at least 30% of persons in a particular situation of the disadvantage under Art. 4, law no. 381/1991. For an overview of the discipline, see L. FERLUGA, *Il lavoro nelle cooperative sociali*, *VTDL*, 2019, 5, 1711.

64 On the value of the work order and the relative methods of quantification, see S. SLATAPER, *cit.*, 300.

65 The Law no. 76/2020 (of conversion of decree-law no. 137/2020) has modified the heading of Art. 14, legislative decree no. 276/2003, extending also to the social enterprises referred to in legislative decree no. 112/2017 the possibility of concluding framework agreements on a territorial basis, to facilitate the integration into the employment of disadvantaged workers and workers with disability.

66 The Art. 2, let. k), legislative decree no. 276/2003 [referring to Art. 2, let. f), EC Regulation no. 2204/2002] clarifies that «disadvantaged workers» – as well as «disabled workers», potential recipients of the contractual instrument in question – must be understood as «any person [...] who has difficulty entering the labor market without assistance».

disadvantaged workers, they could be included only if their recruitment was encouraged, especially by the Regions[67].
Regarding, on the other hand, persons with a disability who have «particular characteristics and difficulties in entering the ordinary cycle of work», integration into the social cooperatives «is considered useful for the coverage of the reserved quota» (Art. 14, par. 3).
Anyhow, the idea is to determine additional mechanisms to achieve the inclusion of people who, blamelessly, are in a condition of objective difficulty, especially in the employment search. The tension is towards the preparation of individual plans to implement the framework agreements[68], within which the connections between public and private actors are favored, to create integrated territorial networks. Therefore, it is a sustainable model with shared value, which stimulates partnership processes between companies and supports the role of social cooperation as a vector of inclusion.
For this reason, the alarmism of those who see in the institute a ghettoizing attitude, such as isolating workers with low-quality tasks, does not seem to be shareable[69]. On the contrary, social cooperatives are organizational contexts that are more sensitive and attentive to the needs of the people[70], able to value them, even on the regulatory side, as working partners. This system of participatory governance is evocative of the aims of the social economy[71], incorporating a solidaristic and mutualistic spirit, able to transform people from "objects of assistance" into "products generating value," for themselves and others[72].

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[67] On the other hand, framework agreements for «workers with a disability» require an indication of the maximum percentage limit of the reserved quota that may be covered by the agreement [Art. 14, par. 2, let. g), par. 3 and par. 4], to ensure that the recruitment obligation under Law no. 68/1999 is met.
[68] Regarding the minimum contents that must be identified in the framework agreements, see Art. 14, par. 2, legislative decree no. 276/2003.
[69] S. SLATAPER, *cit.*, 298; M. GARATTONI, *L'inserimento dei lavoratori svantaggiati nel sistema comunitario degli aiuti di Stato*, *RGL*, 2006, 650. instead, it is believed to adhere to the thesis of L. NOGLER, *Cooperative sociali e inserimento lavorativo dei lavoratori svantaggiati*, M. PEDRAZZOLI (ed.) *Il nuovo mercato del lavoro*, Zanichelli, 2004, 192, which qualifies as «unfounded risks of "ghettoisation" of workers with disability», as the result of mere prejudices against the world of cooperation.
[70] In this way, see E. MASSI, *Il nuovo collocamento obbligatorio*, Ipsoa, 2000, 64, whose position is supported by the results of the empirical study conducted by E. CHIAF, *Il valore creato dalle imprese sociali di inserimento lavorativo*, *Impresa sociale*, 2013.
[71] E. DAGNINO, *Diritto del lavoro ed economia sociale. Appunti per una ricerca*, in *DRI*, 2021, 4, 1058-1086.
[72] F. SCALVINI, *La cooperazione sociale di inserimento lavorativo*, *Impresa sociale*, 2006, 22.

In such a perspective, social cooperatives represent the highest expression of the Benefit Societies[73], where the common benefit is substantiated, on the one hand, in the neutralization of the negative effects produced by the failure to employ (both on the person and the company obliged) and, on the other hand, the positive impact that this model produces on the whole community, in terms of inclusion and sustainability. Thus, the social cooperative translates the value of the agreement into the wider value of the person and of their work.

5. Concluding Remarks

In practice, the mechanism introduced by Art. 14, legislative decree no. 276/2003 has been particularly appreciated[74], as it has been recognized as appropriate for satisfying the interests of the parties involved. First, it allows the employer with the obligation to recruit to fulfill it regularly, saving the greater burdens connected with direct recruitment or the payment of sanctions. Moreover, even if the employment in the social cooperative concerns non-disabled disadvantaged workers, the company can take advantage of goods and services that are currently produced in-house or bought from external suppliers, at the same – or lower – cost.
Secondly, Art. 14, legislative decree no. 276/2003 permits social cooperatives to emancipate themselves from a purely welfarist vision and to insert themselves in the value chain as active members of the production cycle, generating economic prosperity and social reinvestment. In fact, through the stipulation of the framework agreement, the cooperative guarantees work orders itself, that are functional to maintaining financial equilibrium, and pursues its social objective, ensuring work opportunities for people who would otherwise risk being excluded from the market.
Finally (and above all), workers can recover satisfaction, professionality, and, more generally, dignity through work, in a context supervised by the public administration. In this way, the inclusion of persons with a disability (or, more generally, disadvantaged people) in the social cooperative gives the possibility to appreciate their value, as (partner) workers and not as merely passive persons of care and assistance.

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[73] M. SQUEGLIA, *cit.*, 71.
[74] The latest Report to Parliament on the state of implementation of Law no. 68/1999, relating to the years 2016, 2017, and 2018, attests to the fact that employers prefer to make use of the agreements under Art. 14, Legislative Decree no. 276/2003 rather than those under Art. 12 and 12-*bis*, Law no. 68/1999 (in particular, see Tab. 46, p. 100).

The legal system, both European (Art. 5, Dir. 2000/78/EC) and national (Art. 3, par. 3-*bis*, legislative decree no. 216/2003[75]), is looking for «reasonable accommodation», i.e. the «appropriate measure, where needed in a particular case, to enable a person with a disability to have access to, to participate in, or advance in employment, or to undergo training» on an equal basis with others[76]. Whether the reasonableness of the solution is measured by the economic sustainability of the cost necessary for its implementation[77], also considering «the possibility of obtaining public funds or other subsidies» (Whereas 21, Dir. 2000/78/EC)[78], it should be noted that the agreement described does not lead to a «disproportionate financial burden», but, rather, an increase in value for the organization.
This creation of value benefits all the stakeholders involved, in a win-win perspective: if the benefit is immediately felt by the company burdened with the recruitment and by the person with a disability, the agreement mechanism also achieves the interest of the community, in a logic that generates widespread and shared wellbeing through inclusion.

[75] The transposition of the norm was not immediate: only after the sentence imposed on Italy by the ECJ on July 4, 2013, C-312/11 for insufficient transposition of Art. 5, Dir. 2000/78/EC (see. M. AGILATA, *La Corte di giustizia torna a pronunciarsi sulle nozioni di "handicap" e "soluzioni ragionevoli" ai sensi della direttiva 2000/78/CE*, *DRI*, 2014, 263), paragraph 3-*bis* has been added to Art. 3, legislative decree no. 216/2003, where public and private employers are required to adopt «reasonable arrangements [...] in the workplace».

[76] Consistent with this provision, the UN Convention of 2006 – in addition to encouraging reasonable accommodation (Art. 5, par. 3) – has included in the notion of «discrimination based on disability» (Art. 2) the «denial of reasonable accommodation» by the employer.

[77] The tension is towards solutions that do not entail a «disproportionate burden» (Art. 5, Dir. 2000/78/EC), compared to «the size, resources, and state of health of the company» (Supreme Court of Cassation April 28, 2017, no. 10576, *LG*, 2017, 988).

[78] In this regard, it is necessary to assess whether the economic sacrifice is «sufficiently remedied by measures existing within the framework of the disability policy of the Member State policy concerned» (Art. 5, Dir. 2000/78/EC). For a proposal of parameterization of the limit of "non-disproportionate" through the compensatory measures presented by INAIL, please refer to M. DE FALCO, *Accomodamenti ragionevoli*, cit.

Cyborgs in the Workplace? Some Preliminary Considerations

Sławomir Adamczyk and Barbara Surdykowska *

Abstract

The paper addresses the development of cyborgization technology and the potential impact on the world of work. The first section of the paper briefly comments on the current state of cyborgization (intelligent prostheses, lenses, the use of chips, intelligent exoskeletons). In the following section, an attempt is made to initially indicate the issues that will require in-depth analysis in the context of labor law, such as the employee's right to neurological improvements and to refrain from using them, and the ownership of technological improvements in the employer-employee relationship. Finally, the paper puts forward a thesis about the impact of the COVID-19 pandemic on the acceleration of the cyborgization process.

Keywords: *Cyborgization; World of work; New technologies.*

1. Introduction

It is trivial to state that the world of work is under tremendous transformational pressure these days because of a number of mutually stimulating factors such as climate change, transcontinental migration and demographic trends. Added to this, of course, is technological change that will affect the disappearance and creation of jobs, as well as changing of the relationships between actors in the labour market (for example employment through online platforms). Technological change is mostly

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associated with such phenomena as the development of artificial intelligence or robotization of workplaces. Additionally, there is something else that can be called the project of intelligent human reconstruction or simply cyborgization.

The year 2021 marks one hundred years since the birth of Stanisław Lem, one of the greatest creators of science-fiction literature. He was also a philosopher and futurologist, reaching far into the future with his acute mind. Decades ago he predicted the appearance of virtual reality, calling it phantomatics. He also anticipated the appearance of such mundane devices like the smartphone or the 3D printer.[1]Analyzing the phenomenon of cyborgization, Lem had a remarkably clear message that in the course of this process the bond of understanding of our communication with nature will eventually be broken, "*when man, in a thousand or a million years' time, gives up his entire animal heritage, his imperfect and impermanent body, for the sake of a more perfect design, and when he turns into a being so much higher than us that it will become alien to us.*[2]. Now, there are many indications that the breaking out of human evolution from the organic realm may occur much sooner[3]. Heading in this direction means serious repercussions for all areas of the life activity of the mankind, including that relating to work.

The discussion about the cyborgization of the human body is directly related to the broader discussion about post-humanism and trans-humanism[4]. Post-humanism can be defined as an activity in which, by means of scientific, technical, or biological innovations, the human body will be improved in a way that does not exclude the human being from remaining in their current biological and symbolic framework. Technological interference is emphasized here only insofar as the idea of a human being can be maintained. Trans-humanism, on the other hand, in its intentions to improve and perfect the human condition, resigns from the essentially human in favor of post-species forms that may emerge because of technological progress[5]. Lem can also be considered a literary forerunner in these considerations, as shown by his short story: "Do You Exist, Mr. Jones?" written at the climax of the Cold War and describing the dilemmas of a racing driver, still being repaired with subsequent body

[1] S. Lem, *Summa Technologiae*, Wyd. Literackie, Kraków, 1964

[2] Ibid.: 157, translation by Joanna Zylinska.

[3] N. Harari, *Homo Deus: A Brief History of Tomorrow*, Harper, New York, 2017

[4] C. Wolfe, *What is Posthumanism?*, University of Minnesota Press, Minneapolis, 2010

[5] B. Trocha, *Transhumanizm i posthumanizm w literaturze fantastycznej w perspektywie kliszy kulturowej i futurologicznej spekulacji*, in *Rocznik Lubelski*, 2016, n. 42(2), 115- 132

prostheses after accidents[6]. One of the ardent opponents of trans-humanism is Francis Fukuyama. According to him, this vision will end with selected individuals "raised" to the level of practical immortality and the rest left in old, sickly and dying bodies[7]. In 2004 he was very explicit in his judgments, "*our good characteristics are intimately connected to our bad ones.... if we never felt jealousy, we would also never feel love. Even our mortality plays a critical function in allowing our species as a whole to survive and adapt (and transhumanists are about the last group I would like to see live forever)*". Well, let's remember that Fukuyama was wrong once before, predicting the end of history. How will it be now?

This paper does not have the ambition to deal comprehensively with either technological change, or even the phenomenon of cyborgization, or their civilizational consequences[8]. Nor will the issue of human genetic modification be the subject of our considerations, although it is the potential source of the most lasting changes in human beings (through the replicability of genetic changes in successive generations)[9]. Probably, both processes: modification of human genome and progressive cyborgization of human body/mind will occur in parallel, which may bring interesting results, but this is a topic for a separate story.

Our intention is to create an extended essay in which, moving from practical examples, we want to reflect on some aspects of the cyborgization of the working man.

2. A Definitional Problem: When do we Become Cyborgs?

The subject of cyborgization of the human body became a focus of scientific interest as preparations for manned space flight began. In 1960, Manfred Clynes and Nathan Kline then working for the American space agency NASA presented the concept of creating human-mechanical hybrids, adapted to the extremely adverse conditions that mankind would

[6] S. Lem, Czy pan istnieje Mr Jones?, in *Dzienniki gwiazdowe*, Iskry, Warszawa, 1957

[7] F. Fukuyama, *Transhumanism*, in *Foreign Policy*, 2004, n.144, 42–43

[8] A comprehensive description of the possible effects of technological change on the work environment can be found, for example, in: J. M. Hirsch, *Future Work, University of Illinois Law Review*, 2020, https://www.illinoislawreview.org/wp-content/uploads/2020/06/Hirsch.pdf (accessed March 20, 2022)

[9] The most important reference at the moment in the context of genetic alterations is the new CRISPR technique, cf.
https://medicalfuturist.com/designer-babies-a-dystopian-sidetrack-of-gene-editing/ (accessed March 20, 2022)
https://www.theguardian.com/science/2019/mar/13/scientists-call-for-global-moratorium-on-crispr-gene-editing (accessed March 20, 2022)

encounter during space exploration[10]. The word "cyborg," first used then, was a hybrid of the two words "cybernetics" and "organism." Clynes and Kline presented the cyborg as the realization of the transhumanist goal: a human being freed from the strictly mechanical constraints of his organism and the conditions of his environment by means of external intervention.

It was so interesting that NASA commissioned further analyses, but ultimately did not take any practical steps towards realizing this concept. Instead, it was picked up eagerly and in large numbers by science fiction writers. For example, Anne Mc Caffrey[11] created a singing spacecraft that was one big hybrid of the female gender. Frederick Pohl[12] was more modest, as he merely cyborgized the protagonist of his novel Man Plus so that he could live on Mars and colonize that planet. Over the years, writers began to place cyborgs in dystopian Earth realities, just to mention the cyberpunk heroine of William Gibson's novel Neuromancer[13], who possesses double-edged 4-cm blades that extend from under her fingernails, or Paolo Bacigalupi's biotechnologically transformed and unhappy "Windup Girl"[14].

But let us return to the real world. The word cyborg began to have its flavor - as Chris Hables Gray writes it became "*as specific, as general, as powerful, and as useless as a tool or machine*"[15]. Some scientists, wanting to free themselves from association of this phenomenon with sci-fi literature, use other terms such as: biotelemetry, teleoperators, bionics[16], but we will stick to cyborgization.

As is usually the case in science, attempts are made to categorize. For example, Kevin Warwick[17] divides devices that lead to the cyborgization of the human body into:

- not integrated into the human body
- integrated into the human body but not the brain/nervous system
- integrated into the brain/nervous system for therapeutic purposes

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[10] M.E. Clynes, N.S. Kline, *Cyborgs and Space*, in *Astronautics,*1960, n. 5(9), 26-27, 74-76

[11] A. Mc Caffrey, *The ship who sang*, Walker & Co, New York, 1969

[12] F. Pohl, *Man Plus*, Random House, New York, 1976

[13] W. Gibson, *Neuromancer*, Ace, New York, 1984

[14] P. Bacigalupi, *The Windup Girl*, Night Shade Books, San Francisco, 2009

[15] C.H. Gray, *Cyborgs Citizen: Politics in the Posthuman Age*, Routledge, Abington, 2002, p.202

[16] V. van Deventer, *Cyborg Theory and Learning*, in S. Wheeler (ed.), *Connected Minds, Emerging Cultures: Cybercultures in Online Learning*, Information Age Publishing, Charlotte, 2009, 167-183

[17] K. Warwick, *Homo Technologicus: Treat or Opportunity?,* in *Philosophies*, 2016, vol. 1, 199-208, https://www.mdpi.com/2409-9287/1/3/199 (accessed March 20, 2022)

- integrated with the brain/nervous system to achieve capabilities not found in the natural state [18]

It is easy to see, considering this classification, a very wide field for the definition of a cyborg opens up. What is more, according to some interpretations, we ourselves become cyborgs thanks to the smartphones we use. Benjamin Wittes and Jane Chong[19] quote Prof. Tim Wu of Colombia University who at a meeting at the Brooking Institution stated: "*in all those science fiction stories, there is always this thing that bolts into somebody's head or you become half robot or you have a really strong arm that throws boulders or something. But what is the difference between that and having a phone with you - sorry, a computer with you - all the time that is tracking where you are, which you are using for storing all of your personal information, your memories, your friends, your communications, that knows where you are and does all kinds of powerful things and speaks different languages? I mean, with our phones we are actually technologically enhanced creatures (...)*".

This approach can be taken quite seriously as evidenced by June 2014 U.S. Supreme Court decision (Rilly vs. California) that held that a police officer cannot search the data on a detainee's phone without a warrant. As Justice John Roberts, writing the reasoning on behalf of himself and the other justices, pointed out: *"modern cell phones ... are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy"*.

We will not develop this thread further as in our opinion it only dilutes the discussion around the cyborgization of the human body. With regard to the legal battles over the recognition of a human person as a cyborg, much more fascinating is the story of artist Neil Harbisson, cited in the aforementioned report by Wittes and Chong, who attached an electronic antenna, called an "eyeborg" to his skull to enable him to overcome a severe form of color blindness. Harbisson first had to fight the British government for the right to keep this antenna on his passport photograph. Then, when Spanish policemen tried to rip that antenna out of his skull during a street riot, the question arose of whether this was an attack on property or on the integrity of the human body. This is by no means a trivial question, and we will develop it further later in the paper.

For the purposes of our discussion, by cyborgization (alternatively, cyborgization technology) we mean the use of devices integrated into the

[18] Note that the last two categories may not differ in the device itself but in the software that will be used.

[19] B. Wittes, J. Chong, *Our Cyborg Future: Law and Policy Implications*, report, Brooking Institution, 2014, https://www.brookings.edu/research/our-cyborg-future-law-and-policy-implications/ (accessed March 20, 2022)

human body that not only restore lost functions, but also support the anatomical, physiological, and informational functioning of the body. To refer to the simplest examples, according to such a definition a cyborg is a person with a pacemaker or an artificial arm controlled by thoughts [20].
In this view, devices leading to cyborgization can be most simply divided into 3 categories:

- Technologies external to the body (for example, various types of prostheses)
- Implants in the body (for example, a pacemaker)
- devices that modify brain activity, such as Google Glass[21]

3. Various Guises of Cyborgization

We are not competent enough to illustrate the degree of development of the technology even partially of cyborgization of human body and mind; this is not our intention. However, it seems necessary to somehow outline the field before proceeding to remarks aimed at relating these issues to the world of work.
The simplest form of cyborgization is the subcutaneous implantation of microchips designed to trigger some activity that would otherwise have to be triggered by our own manual or mental response. This type of self-cyborgization has its enthusiasts, although it is not yet a very developed social movement. For example, there are about 5000 people in the US who identify themselves as "grinders". The movement began in 1998 when Kevin Warwick, a cybernetics professor at Reading University, implanted an RFID tag in his arm so he could turn on lights with the snap of his fingers[22]. This subculture has surged in recent years as companies like Dangerous Things and Grindhouse Wetware have offered a growing number of gadgets that can sense electromagnetic fields or unlock a car without keys. Whether this will become a more common fad is hard to judge. We can imagine an infinite number of more and less pleasant applications with mainly social, entertainment and societal purposes: tattoos that will light up in a certain color depending on the settings of other people "looking" for partners for a certain purpose or with certain characteristics (this can really change the meaning of the phrase we met by

[20] W. Barfield, *CyborgHumans: Our Future with Machines*, Springer, New York, 2016
[21] W. Barfield, A. Wiliams, *Cyborg and Enhancement Technology*, in *Philosophies*, 2017, vol. 2, n.1:4, https://doi.org/10.3390/philosophies2010004 (accessed March 20, 2022)
[22] Later, he began to play with his chip further. At the university's cybernetics department, automatic doors opened without a card when he wanted to pass through and his office greeted him cheerfully: Good morning professor!

chance in a bar - it probably doesn't need to be explained). Many solutions of this type will be only a game for a long time, on the principle: if something is possible, why not try it. It's hard to imagine that someone will assemble a brain implant in order to switch on the light, without touching it, by means of thought, when they can already achieve this by giving a voice command to their smartphone. Soon, however, the implant will give enhancements that using a smartphone will not.

Professional microchipping seems to have a big future. In 2004, such a procedure was test-performed on a group of 160 high level prosecutors of Mexico to allow them automatic access to restricted areas[23]. It can be said that this concerned a closed group. However, it is now apparent that this trend is beginning to reach out openly to ordinary citizens. In Europe, several thousand Swedes are already traveling by train using an implanted microchip[24]. A real breakthrough in the popularization of this technology may be the initiative of the Polish-British start-up Walletmor, which has made available, for less than 200 euros, the world's first fully functional implant for cashless payments that works with Visa and Mastercard since 2021[25]. However, it is worth to keep in mind that this kind of "cyborgization" is still based on quite old, well known RFID technology and relies on the fact that we are accompanied by a chip placed under our own skin and not on a card in the wallet.

The possibilities offered by cyborgization have obviously caught the interest of artists, especially those who build their image through self-expression. In addition to already mentioned Harbisson, the most often pointed to artists are: Manel de Aguas-Catalan, photographer who developed "flippers" that allow him to perceive atmospheric pressure, humidity and temperature through several implants on both sides of his head; Joe Dekni - artist who developed and installed a sensory system that includes two implants in his cheekbones; Pau Prats - developer of a system that allows him to feel the level of ultraviolet radiation reaching his skin or Alex Garcia who implanted in his chest an implant that allows him to determine the level of air quality around him. The list could be very long. It is not the intention here to present the motivations that drove

[23] *B. Wittes, J. Chong, op.cit.*

[24] Euronews, *Microchips are getting under the skin of thousands in Sweden*, 2020, https://www.euronews.com/2018/05/31/microchips-are-getting-under-the-skin-of-thousands-in-sweden (accessed March 20, 2022)

[25] Notes from Poland, *World's first payment chip that can be implanted under skin launched by Polish-British startup*, 2021, https://notesfrompoland.com/2021/04/14/worlds-first-payment-chip-implanted-under-skin-launched-by-polish-british-startup/ (accessed March 20, 2022)

these people, but in any case, they can be provisionally qualified as "artistic".

Cyborgization is very often seen as an opportunity to "fix" the human body by enabling it to perform its natural functions that have not developed or have been lost, e.g., due to disease or accident. Examples include exoskeletons that allow people with spinal cord injuries to stand upright and walk. In 2012, a woman paralyzed from the waist down completed the London Marathon in such an exoskeleton. Another example is the intelligent self-learning bionic limb prostheses controlled by neural activity or electromyographic muscle signals[26]. It seems that soon such prostheses will be able to be controlled also by people who were born without limbs and therefore have no developed memory of moving them. The most popular neural prosthesis in the world is the cochlear implant. It works differently than ordinary hearing aids, which amplify sounds but are helpless when a person cannot hear them at all. A cochlear implant works differently: it converts sound into a nerve signal (an electrical impulse) that stimulates the auditory nerve. The solution is far from perfect, but it allows one to participate in conversation. At the moment, there are about 600,000 people in the world with this type of implant (including about 40,000 people who were born deaf). Around the year 2000, the first neural prosthesis of sight was implanted in a person who had lost sight 20 years earlier. The system is very simple: a digital camera worn on glasses takes pictures, these are transformed into electrical impulses, and these are sent to the visual center in the brain through a set of electrodes, which enter the brain through a socket at the back of the skull. It is true that the greatest development is around stimulating the optic nerve behind the retina and not entering the brain, but the indicated experience shows that "entering the brain" is already achievable. The quality of this vision is very poor, but at the same time this is research where new developments and their testing increase genuinely from month to month.

The topic of direct deep brain stimulation with implants is the most exciting, but also the most controversial. If we disregard Elon Musk's (probably unrealistic) media announcements about apes playing ping pong by their mind, this field is still at the threshold of its development. The most important practical applications of the brain-machine connection currently concern paralyzed people. It is worth to stop at this point: in 2000 Philip Kennedy with the team from Emory University in Atlanta

[26] C. Lo, *The magic touch: bringing sensory feedback to brain-controlled prosthetics*, Medical Device Network, 2020, https://www.medicaldevice-network.com/features/futureprosthetics/ (accessed March 20, 2022)

began working with the completely paralyzed John Ray. Functional brain scans identified an area of the brain that activated when John thought about moving - amplifying this impulse allowed him to move the cursor with his thoughts, and thus tap out text and communicate with the outside world. Implants used to treat Parkinson's disease are becoming more and more common.

If one would like to find out what this kind of interference with the human brain might look like in the distant future, one should read the novel "*Nexus" by* Ramez Naam[27], one of the creators of Microsoft's flagship software programs, or his more serious, popular-science work: "*More Than Human: Embracing the Promise of Biological Enhancement"*[28]. As you can see, the title speaks for itself. As far as the here and now is concerned, we can rest assured that in the foreseeable future it will be rather impossible to apply one of the classic topoi of sci-fi literature, i.e., erasing memories existing in human minds and "adding" memories. Although, nothing can be certain. Almost 10 years ago, American scientists succeeded in "implanting" false memories into the minds of mice, by transplanting cells from the brain of one mouse into another. The experiment was validated by several teams and a herd of laboratory mice experienced memories of events they never experienced[29]. The research continues. It is worth keeping in mind that there is no indication that the human brain will behave in a fundamentally different way than the mouse brain.

This brief and subjective overview of different dimensions of cyborgization already brings us directly to the issue of cyborgization of the working man. In our opinion, cyborgization devices and processes will not appear soon as a search for answers to some challenges existing in the labour market. So far it seemed that initially the process would be the opposite. Solutions will emerge either because of scientific developments or social, artistic, or other "soft" factors. In the beginning there will be "islands" or enclaves of people who have had their bodies and neurology modified simply because it was possible and not because the job market in any sense "expected" it of them. Likely, in the longer term, it will be the other way around and the consequences of the COVID-19 pandemic will accelerate this.

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[27] R. Naan, *Nexus*, Angry Robot, Nottingham, 2012

[28] R. Naan, *More Than Human: Embracing the Promise of Biological Enhancement,* Broadway Press, Louisville, 2005

[29] S. Ramirez et al, *Creating a False Memory in the Hippocampus*, in *Science,* 2013, vol. 26, n. 341, 387-39.

3. Dilemmas of the Cyborgized Working Man

If Adam Smith, father of modern economics, lived in our times he would certainly wonder about the ethical consequences of the cyborgization of the working man. The currently dominant turbo-capitalist vision of civilization development does not leave much room for moral dilemmas. Therefore, it is not surprising that cyborgization is perceived by the business community primarily from the perspective of efficiency and profit rather than the integrity of the human person. We are not hiding the fact that this may obviously raise many serious doubts. It is enough to look at some aspects of cyborgization on the example of two already implemented solutions.

Cyborgization, which involves enhancing a worker's physical abilities in manufacturing or construction by using exoskeletons, seems to have the best chance of rapid development. Different versions of these are being tested in many commercial laboratories. They can be controlled: mechanically, by voice, by implant sensors or - although this is a future concept - using bioelectric signals from the central nervous system. This is not a futuristic vision, it is evidenced by the fact that Ford automotive corporation, for example, is already in its third year of introducing (for now passive) exoskeletons for the upper body in its factories around the world. Opting for this direction of cyborgization opens up opportunities not only to enhance work efficiency, but also to take advantage of previously difficult-to-tap labour resources, namely people with physical disabilities. In addition to exoskeletons, another promising technology for cyborgization of the work environment is in the testing phase, namely smart contact lenses[30]. They may have various functions useful in everyday life (e.g. controlling sugar levels in diabetics), but the most important one will be the possibility of direct visual connection with a device in order to browse the set of information we need. Instead of impatient manipulations of the finger on the smartphone screen, it will be enough to look at it diagonally. This solution will serve all employees whose work is related to data processing. And again - the breakthrough effect will be achieved by directly connecting smart glasses to the brain, which has not yet happened, but the intentions are clear. For both applications indicated above, the target solution is the control by the brain. And this brings us to

[30] J. Chokkattu, *The Display of the Future Might Be in Your Contact Lens*, Wired, 2020, https://www.wired.com/story/mojo-vision-smart-contact-lens/ (accessed March 20, 2022)

a completely different level of reference. Let's consider the implications of brain interference in the context of employment relationships.

The first issue: the ownership of implants and other mechanisms of cyborgization technology. In the classical view of subordinated labour, the answer to the question of ownership of the tools with the help of which work is performed is obvious: the owner of the tools is the employer - the organizer of labour and directly or indirectly the owner of capital. However, let us consider the situation when a device is permanently connected to the brain/nervous system of a person. Should it also be treated as an ordinary tool? What will happen when an employee equipped with an employer-funded chip/implant/device connected to the nervous system/brain ends the relationship/contract linking them to a particular employer? Just as we now expect an employee to hand in their company laptop, will we expect them to remove from their nervous system a specific ability-enhancing/capacity-creating connection along with an already acquired set of knowledge?

Secondly, what about workers who will be afraid of improvements that interfere with their brain or nervous system? Although cyborgization processes will increase efficiency at work, they will inevitably change our sense of self and the sense that our "I" and our body are one. Resistance to cyborgization may also stem from religious reasons. Will the employer of the future be able to expect an employee to submit to certain procedures? It should be noted that these procedures will consist of the use of some hardware (and it is hard to imagine an employee having no knowledge or awareness that he or she is undergoing a given procedure (except in the most dystopian vision of the future) and some software. The will and consent of an employee at the time of software change may be something completely different than at the time of hardware implementation. In the case of software, there is also the problem of its potential hacking and, what is crucial, the right to its further improvement.

It is impossible at this point to predict the stage at which body modification will occur spontaneously - it will certainly be different in different parts of the world and in different age cohorts. However, we are interested in the second phase - the phase in which body modification will be the realization of market expectations. It is important to take into account that the processes will occur in parallel - the processes associated with the shrinking of jobs under the influence of AI development will occur independently of what is the subject of this paper - cyborgization.

Whether this second phase will occur is, of course, conditioned by a number of factors external to the subject of this paper - for example, the

question of whether the influence of climate change and migration processes will not lead to a fundamental remodeling of the global order, or rather, one should say - disorder.

To sum up: it seems that the combination of the process of development of artificial intelligence resulting in increasing market polarization (disappearance of jobs requiring average level of qualifications) will be the factor which will simultaneously drive cyborgization. This will result from the fact that work will not so much become a rare good, but in order for it to bring profit to the owner of capital (and this is the model of work in a capitalist economy) it will require the "use" of an improved human.

There is another aspect - geographical. The cyborgization of the brain combined with the development of superfast data networks (thanks to quantum computers) may cause the disappearance of national borders for the world of work, unfortunately in a very ghastly formula. Building walls on the U.S.-Mexico border, or anywhere else, will lose all sense, and cross-border labour mobility will take on a whole new meaning. Anyone who has seen the movie "Sleep Dealer" from 2008 by Alex Riviera knows what we mean. The dystopian vision shows labour migrants from Latin America who no longer have to sneak across the border to a "better" world, because staying in place they connect their nervous systems to the global network and earn money by controlling machines in factories located in the USA. Such a vision of cyborgization is also possible under the conditions of the current model of capitalism.

Let us also try to return for a moment to the field of classical issues of labour law. Its basic principle is the fact that the employer-employee relationship is a relationship of due diligent action, not of result. The employee undertakes to perform his duties diligently and conscientiously. Until now it was clear that the level of work efficiency that can be expected by the employer can be related to the efficiency of work of an average group of employees with a certain level of education or professional experience. By nature, there were outstanding individuals, i.e., employees who were able to perform work tasks faster, more efficiently or more creatively. In the near future, however, we will be faced with the problem of what should be the benchmark in a situation in which some employees will have specific augmentations, specific improvements. Is it their work efficiency that is to become the reference point for evaluating "non augmented" employees, promoting them, etc.?

And to conclude this part of the deliberations, let us consider the new context of the well-known provision of the ILO Declaration of Philadelphia. The fundamental assumption on which the labour law is based is the assumption that human work is not a commodity, which

results from the fact that there is an immaterial and direct link between man (to whom we ascribe an inborn and indelible dignity) and the process of work. There is no space here to develop this thought which has its roots, among others, in Catholic social doctrine. However, we must ask the question whether the work of a cyborg is not also a commodity? After such a question is posed, thoughts go in two directions. First direction: after transformations/modifications/augmentations, will we consider that the cyborg is no longer human? There are ethical, futurological or other considerations on this topic, but it is obvious that they are still quite underdeveloped. It seems that in this area we are still relying on rather superficial considerations, and at the same time it is an area of the core of philosophical considerations - what it means to be human. Since now we are not able to say what consciousness is (which can be seen in the considerations about when an AI will become conscious), we are also not able to say anything reasonable about when a cyborg ceases to be human. This is not the path we are concerned with. The second path assumes that, in the case of an unmodified human, although it is obvious that certain costs are involved in "becoming" an employee (for example, the cost of education incurred by parents, the cost of social development, etc.), the final factor that determines the effectiveness of his work is himself. In the case of cyborgs, it may be different. Maybe not at the beginning of the cyborgization path, but when the process is more advanced. The usability of an implant or other device may in the future be a key factor in the usability of a worker. We can assume that cyborgization technologies, once they get out of the "do it yourself" and "just for fun" periods, will be expensive. At the same time, they will be technologies that ensure our well-being and allow for complete self-fulfillment[31]. It is possible that in the situation of a general decrease in the number of jobs (which is and will be due to the development of artificial intelligence and not to the development of cyborgization) in order to find work we will have to gain access to expensive improvements - it is not excluded that the economic recipient of work will be the owner of rights (patents, licenses, etc.) to improvements. In that case, will we be able to treat the effect of the work of an "advanced" cyborg like any other commodity subject to the laws of supply and demand? We are probably not yet able to answer this question. Human work is subject to protection, among other reasons, because work is a source of self-fulfillment and a path of

[31] S. Chan, *Neural interface Technologies: Ethical and social dimension*, Royal Society, iHuman Working Group Paper, 2019, https://royalsociety.org/topics-policy/projects/ihuman-perspective/supplementary-material/ (accessed March 20, 2022)

development needed for people to maintain a sense of meaning and control in life. It seems that cyborg work will also be a source of self-fulfillment and development. The difference may be that access to it may be quite different than it is now.

3. A Few Concluding Thoughts. Will Capitalism Bet on the Cyborgization of the Working Man?

In most projections about the future of the world of work, robotization and the development of platform work supported by artificial intelligence algorithms are presented as the main drivers of change. However, the reality may turn out to be much more complicated and surprising. This is shown in an interesting report on expectations of work by 2035 based on a survey of 1,500 respondents recruited from workers and managers in several countries of Western capitalism[32]. It also includes the first lessons learned from the COVID-19 pandemic, which are very important because they show that business leaders have come to believe that employees are more important than technology, although they intend to invest primarily in the latter. Augmentation and enhancement are to be the answer to increasing employee productivity. This is met with understanding by employee respondents. Almost half (48%) of them would be willing to have a chip implanted in their body if it would significantly improve their productivity and pay. But at the same time, a larger percentage fear that the improved performance of enhanced workers will give them a competitive advantage in the job market, and generally lead to a divided workforce (enhanced and non-enhanced). The report's message is clear. Business leaders would like to bet on augmenting human workers in the future rather than simply replacing them with robots. On the workers' side, we have a coming to terms with this prospect, while at the same time fearing that "humans with chips in their bodies to enhance their performance will have an unfair advantage in the labour market."
If these trends are confirmed by other research, it could mean that we are facing a fundamental reorientation of the perception of the future of work. The post-pandemic pressure on the part of capital for cyborgization in the sense of economic benefits will cause this phenomenon to spread much faster in advanced capitalist societies than Harari prophesied. Thus, however, the question of the dignity of human labour will become crucial,

[32] Citrix, *Work 2035. How people and technology will pioneer new ways of working*, report, https://www.citrix.com/content/dam/citrix/en_us/documents/analyst-report/work-2035.pdf (accessed March 20, 2022)

with all the emerging dilemmas such as segregation of workers versus violation of the integrity of the human person. It seems that neither academics nor trade unions representing workers and certainly not politicians are ready to search for answers.
Let's look at it more broadly. What are the fundamental challenges posed by cyborgization? What do we as humanity need to rethink? At first, someone might say, not much - what is the difference between an ape using a stick and a human with an enhanced arm or a human wearing glasses? Only the scale of the tool's efficiency. This is a completely wrong approach. Cyborgization, we reiterate, in its most perfect form involves fusing the human nervous system with a machine. This raises specific questions about the autonomy of the human cyborg, whether certain values shared by humans will be shared by cyborgs and what is the legal status of a machine connected to the human nervous system. One may look at this through Hollywood rose-colored glasses[33]- and trust, as Donna Harraway, author of The Cyborg Manifesto, does, that human cyborgs will be "*conducive to the long range survival of humans*"[34]. However, the opposite may be true. Just note that the communication of cyborgs with enhanced brains may be many times faster than that of ordinary humans. This will create huge barriers in the relationship between the two communities. We encourage you to take a look at "Gateway" by Frederick Pohl[35], where you'll find a brief description of the reactions of space pilots ripped into the devices, to see how science fiction sees the reaction of the first fully digital humans. They seemed disgusted: "O, mother, how slowly these people communicate."

Much depends on whether there is any paradigm shift in the development of our civilization. The current model of capitalist economy is based on the mantra of accelerating labour efficiency. If this does not change, the working man will even be "pushed" down the path of forced cyborgization with all its consequences. It is to be expected that cyborgization introduced in such a way will entail increasing exclusion of those who will not submit to it or their growing aggression. As a result, mankind will be divided into "plebs" and cyborg culture[36]. Until democracy ends and the victors show the path to follow.

[33] K. Warwick, *Cyborgs morals, cyborg values, cyborg ethics*, in *Ethics and Information Technology*, 2003, vol. 5, 131-137
[34] D. Harraway, *A Manifesto for Cyborgs: Science, Technology and Socialist Feminism in the 1980*, in *Socialist Review*, 1985, vol. 80, 65-108
[35] F. Pohl, Gateway, St Martin's Press., New York, 1977
[36] K. Warwick, In the Mind of the machine, Arrow Books, London, 1998

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