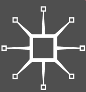

Work Beyond the Pandemic

Towards a Human-Centred Recovery

Edited by
Tindara Addabbo · Edoardo Ales
Ylenia Curzi · Tommaso Fabbri
Olga Rymkevich · Iacopo Senatori

palgrave
macmillan

Work Beyond the Pandemic

Tindara Addabbo • Edoardo Ales
Ylenia Curzi • Tommaso Fabbri
Olga Rymkevich • Iacopo Senatori
Editors

Work Beyond the Pandemic

Towards a Human-Centred Recovery

palgrave
macmillan

Editors
Tindara Addabbo
Department of Economics "Marco Biagi" and Marco Biagi Foundation
University of Modena and Reggio Emilia
Modena, Italy

Ylenia Curzi
Department of Economics "Marco Biagi" and Marco Biagi Foundation
University of Modena and Reggio Emilia
Modena, Italy

Olga Rymkevich
Marco Biagi Foundation
University of Modena and Reggio Emilia
Modena, Italy

Edoardo Ales
University of Naples "Parthenope"
Naples, Italy

Fondazione M. Biagi
Modena, Italy

University of Western Cape
Western Cape, South Africa

Tommaso Fabbri
Department of Economics "Marco Biagi" and Marco Biagi Foundation
University of Modena and Reggio Emilia
Modena, Italy

Iacopo Senatori
Department of Economics "Marco Biagi" and Marco Biagi Foundation
University of Modena and Reggio Emilia
Modena, Italy

ISBN 978-3-031-39950-3 ISBN 978-3-031-39951-0 (eBook)
https://doi.org/10.1007/978-3-031-39951-0

© The Editor(s) (if applicable) and The Author(s), under exclusive licence to Springer Nature Switzerland AG 2024
This work is subject to copyright. All rights are solely and exclusively licensed by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.
The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.
The publisher, the authors, and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, expressed or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Paper in this product is recyclable.

Contents

1 Introduction 1
Ylenia Curzi, Tommaso Fabbri, and Olga Rymkevich

Part 1 Poverty, Inequality and Vulnerability at Work: Beyond the Pandemic 11

2 Regulatory Instruments and Policies for Sustainable Transitions in the Post-Pandemic Labour Market 13
Emanuele Menegatti, Riccardo Salomone, and Iacopo Senatori

3 Labour Market and Social Exclusion in Italy: The Case of the Working Poor in the Pandemic Era 37
Chiara Mussida and Dario Sciulli

4 Vulnerability at Work: The Case of Chronically Ill Employees 57
Silvia Profili, Alessia Sammarra, and Laura Innocenti

5 Gender Equality and Public Policies 71
Tindara Addabbo and Mariagrazia Militello

Part 2 Technology and Wellbeing at Work: Two Sides of a Coin 95

6 Post-pandemic Recovery and Digital Skills: The Perspectives of the Social Partners 97
Ilaria Purificato

7 AI for a More Human Friendly Workplace Recovery After COVID-19 113
Beryl ter Haar and Marta Otto

8 The Right to Disconnect as a Tool to Tackle Inequalities Resulting from Remote Working 133
Irmina Miernicka

9 The Role of Working Time Guarantees in the Era of Growing Autonomy 151
Gábor Kártyás

10 Psychosocial Risks and Mental Health of Employed Persons in the Post-Covid World of Work 171
Olga Chesalina

11 Lockdowns and Domestic Violence: The Impact of Remote Work Regulations on Women Workers in Türkiye During the COVID-19 Pandemic 191
Ceren Kasım

12 Regulatory Choices and Legal Disputes in the Fight Against COVID-19 Infections in the Workplace: A Comparison of Vaccine Mandates in the Italian and US Contexts 211
Susan Bisom-Rapp and Marco Peruzzi

Part 3 Changing and Enhancing Institutions of Employment, Social and Cohesion Policies 231

13 Some Ideas about the More Useful Methodological Approach to the Question of What Kind of Role for Labour Law in a Human Centred Post COVID Recovery 233
Juan-Pablo Landa

14 More Public? Did the Pandemic Influence the Paradigm of the Labour Relations? 251
Izabela Florczak

15 Against All Odds: A History of Resilience and Human Centred Recovery for the EU 267
Edoardo Ales

Index 293

Notes on Contributors

Tindara Addabbo Full Professor of Economic Policy, Department of Economics “Marco Biagi”; member of the Scientific Committee of the Marco Biagi Foundation, University of Modena and Reggio Emilia, Italy.

Edoardo Ales Full Professor of Labour Law and Industrial Relations, Department of Economics, Law, Cybersecurity, and Sport Sciences, University of Naples “Parthenope”, Italy; member of the Scientific Committee of the Marco Biagi Foundation, University of Modena and Reggio Emilia, Italy; extraordinary Professor at the Faculty of Law of the University of Western Cape (South Africa), affiliated to CENTROW; invited Professor of Social and Labour Market Regulation, Department of Political Sciences, Luiss, Italy.

Susan Bisom-Rapp Dean Steven R. Smith Professor of Law, California Western School of Law, San Diego, CA, USA.

Olga Chesalina Senior researcher at Max Planck Institute for Social Law and Social Policy, Munich, Germany.

Ylenia Curzi Associate Professor of Human Resources Management, Department of Economics “Marco Biagi”; member of the Scientific Committee of the Marco Biagi Foundation, University of Modena and Reggio Emilia, Italy; coordinator of the International PhD programme “Labour, Development and Innovation”.

Tommaso Fabbri Full Professor of Human Resources Management, Department of Economics “Marco Biagi”; coordinator of the Scientific

Committee of the Marco Biagi Foundation, University of Modena and Reggio Emilia, Italy.

Izabela Florczak Assistant Professor, Department of Labour Law, University of Lodz.

Laura Innocenti Assistant Professor of Human Resources Management, Department of Industrial Engineering, Information and Economics, Università degli Studi de L'Aquila, Italy.

Gabor Kártyás Assistant Professor of Labour Law, Faculty of Law, Pázmány Péter Catholic University Budapest, Hungary.

Ceren Kasim Research associate in Labour Law, University of Hildesheim, Germany.

Juan Pablo Landa Full Professor of Labour Law and Social Security, Department of Business Law, University of the Basque Country, Spain.

Emanuele Menegatti Full Professor of Labour Law, Department of Sociology and Business Law, University of Bologna; President of the Forlì Campus; adjunct professor at the Curtin University, Law School, Perth, Australia, visiting lecturer at the Sydney University Law School, Australia.

Irmina Miernicka Assistant Professor, Department of Labour Law, University of Lodz.

Mariagrazia Militello Associate Professor of Labour Law, Department of Law, University of Catania, Italy.

Chiara Mussida Associate Professor of Economic Policy, Department of Economic and Social Sciences, Università Cattolica del Sacro Cuore, Piacenza, Italy.

Marta Otto Assistant Professor, University of Warsaw, Warsaw, Poland.

Marco Peruzzi Associate Professor, Department of Juridical Sciences, University of Verona, Italy.

Silvia Profili Full Professor of Human Resources Management, Department of Human Sciences, Università Europea di Roma, Rome, Italy.

Ilaria Purificato Research fellow in Labour Law, Department of Economics "Marco Biagi", University of Modena and Reggio Emilia, Italy.

Olga Rymkevich Researcher, Marco Biagi Foundation, University of Modena and Reggio Emilia, Italy.

Riccardo Salomone Full Professor of Labour Law, University of Trento, Italy; member of the Scientific Committee of the Marco Biagi Foundation, University of Modena and Reggio Emilia, Italy.

Alessia Sammarra Full Professor of Human Resources Management, Department of Industrial Engineering, Information and Economics, Università degli Studi de L'Aquila, Italy.

Dario Sciulli Associate Professor of Economic Policy, Department of Economics, Università G. d'Annunzio Chieti-Pescara.

Iacopo Senatori Associate Professor of Labour Law, Department of Economics "Marco Biagi"; member of the Scientific Committee of the Marco Biagi Foundation, University of Modena and Reggio Emilia, Italy.

Beryl ter Haar Professor and Head of the Centre for International and European Labour Law Studies (CIELLS), University of Warsaw, Poland; endowed Professor of European and Comparative Labour Law at the University of Groningen, the Netherlands.

List of Figures

Fig. 3.1	The evolution of the employment conditions of the working poor. (Source: own elaboration on 2019, 2020, and 2021 EU-SILC data)	44
Fig. 3.2	The evolution of predicted probabilities of being working poor. (Source: our elaboration of 2019–2020–2021 EU-SILC cross-sectional data for Italy)	50
Fig. 3.3	The evolution of predicted working poor probabilities by subgroups. (Source: our elaboration of 2019–2020–2021 EU-SILC cross-sectional data for Italy)	51
Fig. 4.1	Barriers to disclosure	61
Fig. 4.2	Perceived discrimination among chronically ill employees	64
Fig. 4.3	The most frequent work adjustments implemented to accommodate CIEs' needs	65

List of Tables

Table 3.1	Descriptive statistics	42
Table 3.2	Estimation results by year	46
Table 5.1	Employment rates by gender age group 20–64. Year 2022	73
Table 5.2a	Employment rates 25–54 years old by gender and presence of children—year 2021	74
Table 5.2b	Employment rates 25–54 years old by gender and age of the youngest child year 2021	74
Table 5.2c	Gap in employment rates 25–54 years old M-W year 2021	74
Table 5.3a	Percentage of part-time employment on total employment by gender age 20–64—year 2021	75
Table 5.3b	Involuntary part-time on total part-time employment by gender age 20–64—year 2021	75
Table 5.3c	Percentage of part-time employment on total employment amongst adult couples aged 18–64 by gender and presence of children—year 2021	76
Table 5.3d	Main reason working part-time on total part-time employment by gender age 20–64—year 2021	76
Table 5.4a	Minutes per day by gender in work activities age group 15–64. Latest year available	77
Table 5.4b	Gender gap in minutes per day in work activities age group 15–64. Latest year available. M-W	78
Table 5.5	Percentage of children (under 3 years old) cared for by formal arrangements other than by the family—year 2021	78

Table 5.6a In general, how do your working hours fit in with your family or social commitments outside work? 79
Table 5.6b In general, how do your working hours fit in with your family or social commitments outside work? 80
Table 7.1 Human and machine augmented collaborations 117

CHAPTER 1

Introduction

Ylenia Curzi, Tommaso Fabbri, and Olga Rymkevich

This book is the fifth editorial initiative[1] of an ongoing research project carried out by the Marco Biagi Foundation (University of Modena and Reggio Emilia, Italy), seeking to cast light on the new challenges and trends in the world of work. The present volume specifically focuses on the socio-economic consequences of the Covid-19 pandemic, this last intended both as a booster of critical issues and dynamics that were already shaping the labor market, employment relations, economy and wider society, and as an opportunity to relaunch a critical analysis on the future of work, encouraging scholars to engage with practically relevant and impactful research which is closer connected to the real world (Cooke et al., 2022).

Y. Curzi • T. Fabbri
Department of Economics "Marco Biagi" and Marco Biagi Foundation, University of Modena and Reggio Emilia, Modena, Italy
e-mail: ylenia.curzi@unimore.it; tommaso.fabbri@unimore.it

O. Rymkevich (✉)
Marco Biagi Foundation, University of Modena and Reggio Emilia, Modena, Italy
e-mail: olga.rymkevich@unimore.it

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_1

The Covid-19 crisis has profoundly affected the world of work across large swathes of the economy, but the burden of the crisis has fallen unevenly on already vulnerable groups. In many OECD countries, workers in low-paid occupations, in non-standard jobs—such as part-time, temporary and self-employed workers—those holding a low level of skills and education or with health limitations have suffered large income losses. Employment rate and hours worked by these groups have fallen disproportionately (OECD, 2021b). In addition, sectors that traditionally employ these groups of workers (e.g. accommodation and food services) were still struggling with the economic consequences of the pandemic in the first months of 2022, and are likely to continue to do so in years to come. This is expected to widen the socio-economic gaps in labour market outcomes and to increase poverty (OECD, 2022).

The crisis has also disproportionately hit women and youth. According to the *Living, working and COVID-19* e-survey, carried out by Eurofound in 2020 to investigate the impact of the pandemic on the way people live and work across Europe, more women than men became unemployed (Eurofound, 2020), and women were more affected than men by the pandemic in terms of care responsibilities and health risks. The same survey also points to the young people as the other group of biggest losers, unveiling that individuals under 35 were more likely to become unemployed and to feel excluded from society during the pandemic compared to other age groups.

Moreover, the spread of the Covid-19 pandemic has accelerated organizational transformation processes, such as digitization and automation, spreading the adoption of remote e-work, thus turning what previously was an underused or resisted work practice into a vital resource enabling a significant portion of organizations and workers to continue working during the crisis (OECD, 2021b). Consistently, workers in jobs that were amenable to remote work—that is, mainly urban-based, well-educated, highly paid white-collar employees in the service sector such as education, financial, information and communication services, professional, scientific and technical services as well as public administration—have proven to be better able to adjust to the crisis in terms of employment rate, hours worked, income and financial security (Eurofound, 2020; OECD, 2021a; OECD, 2021b). However, in most countries for which data are available, these benefits have come at the cost of higher quantitative work demands and work intensity experienced by the workers (longer working hours, more frequent work interruptions, more frequent work in the evening and

during weekends), that are an indicator of poor job quality, which may negatively affect workers' well-being and potentially their productivity (Eurofound, 2020; OECD, 2021a). In this regard, the Covid-19 crisis has worsened one of the main challenges that was already associated with the use of remote e-work before the virus outbreak (Wang et al., 2021).

In response to the economic and social issues that the Covid-19 pandemic has highlighted, ILO member states and their employer and worker representatives adopted a global call for action for a human-centred recovery in June 2021 (ILO, 2021). The call for action invites countries' governments as well as employers' and workers' organizations to work to achieve an economic and social recovery from the crisis that puts people at the center, that is fully inclusive, sustainable and resilient, and prioritizes policies aimed at creating decent work for all and at addressing the inequalities exacerbated by the crisis. Specifically, the call for action targets four key areas: (1) inclusive economic growth and employment, with policies to support skills development and sustainable enterprises; (2) protection of all workers (e.g. stronger measures to advance gender equality, combat violence in the workplace, promote occupational safety and health, guarantee a minimum wage and adequate limits on working time); (3) universal social protection, starting with income security, (un)employment protection and essential health care; (4) promotion of the fundamental role of social dialogue in ensuring a job-rich recovery.

In echoing other scholars (Cooke et al., 2022), we argue that the pursuit of such ambitious goals involves an extension of the "call for action" to universities and other research institutions. Aligned with prior studies (Buckley et al., 2017; Seelos et al., 2023), we also contend that this represents for scholars a "grand" challenge as it requires them to broaden the scope of their research by integrating insights from multiple disciplines and focusing on different levels of analysis as well as on the interdependencies between them.

This book attempts to take an initial step in this research direction. It identifies three main topics emanating from the difficult challenges posed by the Covid-19 pandemics. Further, it brings together the contributions of experts from different disciplinary backgrounds (labour law, labour economics, organizational studies and human resource management) to offer a multidisciplinary, multi-level analysis which provides a deep and rich understanding of the conditions under which a human-centred pandemic recovery could be realized. The book proposes an original mix of

theoretical and empirical research including case studies and case law from different national contests such as Turkey, Italy and the US.

The book is divided into three thematic parts. The first part addresses the crucial issue of how to tackle poverty, inequality and vulnerability at work, tremendously exacerbated by the pandemic. The chapters collected in this part deal with a wide range of matters such as the analyses of the respective EU policies and the available legal, economic and managerial tools to tackle the problems of poverty, inequality and discrimination at work. Specific attention is given to the phenomenon of the working poor (i.e. working people with incomes below a given poverty line due to low-income jobs and low familial household income) and to the workers at major risk of in-work poverty such as elderly, disabled or individuals affected by chronical diseases and women.

The first chapter authored by **Emanuele Menegatti, Riccardo Salomone and Iacopo Senatori** addresses the regulatory instruments and policies enacted or under discussion, particularly in EU countries, under the conceptual frameworks of "sustainability" and "just transitions", to tackle the structural changes of the labour market that the pandemic has partially caused and partially unveiled. It is divided into three parts, respectively focused on three welfare instruments that address different but complementary labour market issues. The first one considers the public schemes of income support based on social transfer and how they can tackle the problem of poverty. The second analyses job retention schemes established to govern "in-work" transitions during periods of partial or total employment discontinuity. The final section concludes with a reflection on changing paradigms and strategies of public investment in labour market policies.

The chapter by **Chiara Mussida and Dario Sciulli** investigates whether and how individual and household socio-demographic characteristics, as well as labour market conditions, affect the likelihood of being among the working poor (i.e. workers employed for more than half the year and living in households at risk of poverty) in Italy. The authors use data for three years, 2019, 2020 and 2021, just before and after the Covid-19 pandemic. The chapter offers both a descriptive and econometric investigation. The findings suggest a protective role of education against the probability of being working poor, the existence of territorial duality and a relatively higher risk of being in disadvantaged conditions associated with the presence of household members with disabilities and children. Notably, the effect of gender is less clear as it depends on the role females

play in the household. In addition, self-employed workers were the most disadvantaged category and their situation worsened during the pandemic. All in all, the analysis shows that the years under investigation were characterized by a widening of the pre-existing inequalities in the Italian labour market.

The chapter by **Silvia Profili, Alessia Sammarra and Laura Innocenti** is dedicated to the problem of vulnerable workers. Based on an exploratory study conducted in a large Italian company, using a sample of 1107 workers affected by a chronic condition, this chapter examines the work experiences of chronically ill individuals to understand what factors can facilitate or hinder their full and productive participation at work. The findings offer insights into how to make the workplace more inclusive for this vulnerable group of workers: by encouraging them to share their health status at work, by fostering a work environment free of discrimination and by implementing flexible work arrangements which meet their specific needs and expectations. The contribution of the study is both to theory, as it extends the literature on diversity and human resource management, and to practice, as it offers insights into how to make the organization an aware and supportive partner in addressing the needs of employees with a chronic illness.

The chapter by **Tindara Addabbo and Mariagrazia Militello** deals with gender inequalities in the labour market exacerbated by the pandemic. Gender inequalities in the employment likelihood and employment positions are still persistent as evidenced by gender equality index, and they have been exacerbated by the impact of pandemics. At the basis of the different problems—underrepresentation of women, difficulty of balancing work and family obligations, lack of protection of women in workplace—there is a structural discrimination of women both within labour market and family life, ossified on the one hand in traditional patterns of work organization built on male breadwinner model, and on the other in a stereotyped conception of gender roles. The two aspects are inextricably connected. The real point is the sexual division of work, paid work for men and paid and unpaid work for women. The chapter reconstructs the existing employment inequalities by gender and refers to the different policies enacted to address the access to the labour market and the inequalities that characterize women's employment in the access to apical positions and in terms of wage gap.

The **second part** presents a reflection on the two sides of the coin that technology has and is going to produce on well-being at work, also by

providing some country-related studies (Turkey, Italy and the US). The chapters collected in this part shed light on the controversial issues related to the spread of the technology and its effects on the workers' well-being, arguing that the technologies themselves are neutral, and the impact they might produce largely depends on the way the stakeholders use them.

The first chapter by **Ilaria Purificato**, starting from the statement that digital skills play a fundamental role in the process of technological innovation, focuses on the social partners' approach to this issue. Two trends emerge from the analysis of collective agreements in selected production sectors: the increasing participatory management of the circular process leading to digital skills training of the workers, and the potential inclusive function of these type of skills.

The chapter by **Beryl ter Haar and Marta Otto** starts from the assumption that an abrupt and forced change in working practices caused by Covid-19 found both employers and employees unprepared. For many workers, the world of work changed almost overnight when, in early 2020, we had to switch to remote working due to Covid-19 lockdown measures of governments. While remote working felt revolutionary for many, when considered in the world of automation, it is just the tip of the "iceberg". An increasing number of scholars in economics, politics and labour law argue that we are at the brink of a fundamental change in the evolving relationship between people and technology. So far, this has resulted in responses in legal doctrine and by legislators of a "risk-based approach". This chapter explores a yet rarely frequented path—one which focuses on the positive aspects automation has to offer and how it can help us create a more human-friendly workplace, including new forms of regulation based on safeguarding and fostering (new) twenty-first-century fundamental labour values.

Irmina Miernicka in her chapter provides a useful insight on the right to disconnect as a remedy to the phenomenon of increasing connectivity at work. The aim of this chapter is to discuss whether the right to disconnect can be perceived as a tool to combat inequalities resulting from remote working. The author presents the risks to equality posed by the development of ICT usage in the professional sphere and analyses solutions proposed by the European Parliament in a resolution with recommendations to the Commission on the right to disconnect passed in 2021. Consequently, the author concludes that legal regulation on the right to disconnect at the EU level may bring tangible benefits for the most vulnerable groups of workers, such as women, workers with caring

responsibilities, young and elderly workers or workers with disabilities. Nevertheless, some interpretative doubts arise when it comes to the key issues which need to be included in the future legislation, such as definition of the right to disconnect, its nature or personal scope.

In a similar vein, the chapter by **Gabor Kártyás** challenges the idea that autonomy should eliminate working-time guarantees. The author highlights that some level of autonomy and flexibility is present in the typical employment relationship too. The national measures introduced during the pandemic are used as an illustration that the rules of working time can be applied even in extraordinary circumstances. Moreover, on the one hand, full work time autonomy might limit the employer's possibilities of work organization, while on the other, it does not guarantee real working-time autonomy for the workers who remain subordinated to the employer's orders. In fact, the author argues that modern technology alone does not bring more autonomy for the workers if not accompanied by radically different models of the exercise of workers' rights. Therefore, according to the author, traditional legal framework of working time should be guaranteed and aligned to the specific needs of a given sector, also by collective bargaining.

In her chapter, **Olga Chesalina** aims to determine whether a systematic and holistic approach concerning mental health and psychosocial risks of workers is already applied in the EU law or at least follows from the new regulatory initiatives. To achieve this goal, regulatory acts as well as the recent legislative proposals at the European level concerning regulation of working conditions, mental health, psychosocial risks and well-being at work are investigated. Furthermore, the personal and material scope of the right to mental health at work is analyzed. Special attention is paid to the issue of the right to mental health of self-employed persons in general, and in particular, self-employed platform workers. In conclusion, some proposals concerning the regulation of mental health and psychosocial risks at work in the EU law are elaborated. The chapter offers an interdisciplinary approach focusing on the interrelation between labour and social law in consideration of numerous empirical studies.

The chapter by **Ceren Kasim** analyses the existing legal protections for women working remotely against domestic violence in Turkey. As during the pandemic, a great number of workers were forced to work from home, the number of cases of the reported domestic violence against women has significantly increased. Considering that remote work could remain a widely used practice also when the pandemic is over, in the author's view

it is extremely important to provide sufficient protection against domestic violence also from a labour law perspective.

The chapter by **Susan Bisom-Rapp and Marco Peruzzi** provides a comparative analysis between the United States and Italy in relation to the different regulatory approach to combat Covid-19 infections in the workplace and examines how Italy and the United States approached Covid-19 vaccine mandates for workers. Of particular interest are the regulatory choices made, including the choice not to regulate, and the consequences of those choices on the employment relationship. Additionally revealing are the legal grounds upon which regulatory actions were challenged, and how courts balanced the interests at stake. Finally, the way in which the debates over workplace vaccine mandates were framed illuminates national culture and the extent to which each country views labour rights as human rights. To provide context for these insights, the chapter examines convergence and divergence in the two countries' initial responses to the global health emergency presented by Covid-19, and the way in which workplace vaccine mandates were initially embraced.

Finally, the **third part** draws attention to the role that national and supranational institutions should play in developing employment policies aimed to foster a human-centred recovery from the pandemic.

The first chapter by **Juan-Pablo Landa** provides some reflections about the possible ways to regain the central role of labour law in a future human-centred economic system, in front of the new challenges (climate change, technological/digital revolution) and the lessons from the Covid crisis. The chapter presents a critical view about the risks for labour law researchers to follow and adopt alternatives or utopian methodologies for improving labour relations in the future, justified by a context of a changing world in view of post-pandemic or post-war learnings. The chapter contains ideas and thoughts about the way to rebuild the central role of labour law in a future human-centred economic system, in front of the new challenges (climate change, technological/digital revolution) and learnings from the Covid crisis.

Izabela Florczak in her chapter states that the labour law is private law, regulated in a specific dimension, due to the nature of the social relations which it covers. The employment relationship remains a relationship between the employee and the employer, regulated, within the limits of the applicable norms, by their will. This does not mean, however, that the elements of public law have not been recognized in labour law. However, the pandemic has resulted that worldwide (1) many public health

responsibilities (such as providing protective measures or even enforcing vaccination) have been/are possibly going to be imposed on employers; (2) employers are an indispensable and vitally important part of the functioning of society, and their role is not simply that of a remunerator of work done. This chapter analyses to what extent the paradigm of the employer as a private law entity has been changed during the pandemic.

The chapter by **Edoardo Ales** systematically investigates the actions endeavoured by the EU in order to cope with the odds that have plunged the first decades of the new millennium: natural disasters linked to climate change and human negligence, side effects of globalization, financial and sovereign debt crisis, pandemic and war. The EU has mobilized all the available legislative instruments and policies, even coming up with new ones, in the view of showing solidarity towards Member States, citizens and workers affected by those odds. Economic, social and territorial cohesion (Articles 175 ff. TFEU); exceptional occurrences beyond Member States' control (Article 122 TFEU); safeguard of the stability of the Euro area (Article 136(3) TFEU): those have been the grounds of EU action. However, support granted out of the EU budget has been gradually transformed into loans at a favourable interest rate, made yet conditional upon structural social reforms, ending up in a mix of the two, linked as well to a strict conditionality. Furthermore, financial support from the EU budget has been understandably made conditional upon the respect of the rule of law, to be widely conceived in the framework of Article 2 TUE. More recently, EU resources have been earmarked to the military support of Ukraine, not only out of the Defense Headings of the Multiannual Financial Framework (MFF) but also by allowing Member States to request their reallocation from socially oriented funds. Such a possibility is likely to challenge the very meaning of human-centred resilience and recovery as defined by all the instruments at stake.

Note

1. *Working in Digital and Smart Organizations: Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, by E. Ales, Y. Curzi, T. Fabbri, O. Rymkevich, I. Senatori, G. Solinas (Eds.) Palgrave Macmillan 2018; *Performance Appraisal in Modern Employment Relations: An Interdisciplinary Approach* by T. Addabbo, E. Ales, Y. Curzi, T. Fabbri, O. Rymkevich, I. Senatori (Eds.) Palgrave Macmillan 2020; *The Collective Dimensions of Employment Relations: Interdisciplinary Perspectives*

on Workers' Voices and Changing Workplace Patterns by T. Addabbo, E. Ales, Y. Curzi, T. Fabbri, O. Rymkevich, I. Senatori (Eds.) Palgrave Macmillan 2021; *Defining and Protecting Autonomous Work: A Multidisciplinary Approach* by T. Addabbo, E. Ales, Y. Curzi, T. Fabbri, O. Rymkevich, I Senatori (Eds.) Palgrave Macmillan 2022.

References

Buckley, P. J., Doh, J. P., & Benischke, M. H. (2017). Towards a renaissance in international business research? Big questions, grand challenges, and the future of IB scholarship. *Journal of International Business Studies, 48*, 1045–1064.

Cooke, F. L., Dickmann, M., & Parry, E. (2022). Building sustainable societies through human-centred human resource management: Emerging issues and research opportunities. *The International Journal of Human Resource Management, 33*(1), 1–15.

Eurofound. (2020). *Living, working and COVID-19, COVID-19 series.* Publications Office of the European Union.

International Labour Organization. 2021. Global call to action for a human-centred recovery from the COVID-19 crisis that is inclusive, sustainable and resilient. https://www.ilo.org/wcmsp5/groups/public/%2D%2D-ed_norm/%2D%2D-relconf/documents/meetingdocument/wcms_806092.pdf.

OECD. (2021a). *Teleworking in the COVID-19 pandemic: Trends and prospects.* OECD Publishing.

OECD. (2021b). *OECD employment outlook 2021: Navigating the COVID-19 crisis and recovery.* OECD Publishing. https://doi.org/10.1787/5a700c4b-en

OECD. (2022). *OECD employment outlook 2022: Building Back more inclusive labour markets.* OECD Publishing. https://doi.org/10.1787/1bb305a6-en

Seelos, C., Mair, J., & Traeger, C. (2023). The future of grand challenges research: Retiring a hopeful concept and endorsing research principles. *International Journal of Management Reviews, 25*(2), 251–269.

Wang, B., Liu, Y., Qian, J., & Parker, S. K. (2021). Achieving effective remote working during the COVID-19 pandemic: A work design perspective. *Applied Psychology, 70*(1), 16–59.

PART 1

Poverty, Inequality and Vulnerability at Work: Beyond the Pandemic

CHAPTER 2

Regulatory Instruments and Policies for Sustainable Transitions in the Post-Pandemic Labour Market

Emanuele Menegatti, Riccardo Salomone, and Iacopo Senatori

This chapter is the outcome of a joint reflection among the authors. However, the sections *Sustainability and the Labour Market: Concepts, Principles and Instruments* and *In-work transitions* can be attributed to Iacopo Senatori; the section *Poverty, pandemic and digital revolution* can be attributed to Emanuele Menegatti, and the section *Conclusion. Labour law and labour market policies after the pandemic* can be attributed to Riccardo Salomone.

E. Menegatti (✉)
University of Bologna, Bologna, Italy
e-mail: e.menegatti@unibo.it

R. Salomone
University of Trento, Trento, Italy
e-mail: riccardo.salomone@unitn.it

I. Senatori
Department of Economics "Marco Biagi" and Marco Biagi Foundation, University of Modena and Reggio Emilia, Modena, Italy
e-mail: iacopo.senatori@unimore.it

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_2

Sustainability and the Labour Market: Concepts, Principles and Instruments

The pandemic has sharpened the disruptive effects exerted on the labour markets by the major transformative events that the European narrative describes as the "Twin Transitions" (digital and environmental: European Commission, 2020), and has aggravated the need to put in place rapid and efficient solutions to protect people from new risks and sources of vulnerability.

Macro-transitions like the digital and environmental ones, be they the outcome of a gradual evolution or of an unforeseen shock, spread their effects at the micro level, affecting individuals in all the aspects of their lives, including work. In the modern labour market, people may face different forms of transitions throughout their working life course: from paid to unpaid work or to unemployment, between different jobs within the same company or outside, between different employment statuses and so forth. Therefore, modern labour market and welfare institutions must be designed in such a way as to protect workers from the risks stemming from transitions (Schmid, 2015).

The concept of sustainability is key to the post-pandemic recovery strategies enacted by labour market regulators worldwide. From a European perspective, it stands at the core of the "Recovery and Resilience Facility" (RRF). Established by Regulation (EU) 2021/241, the measure represents the main instrument of the unprecedented EU-wide investment plan known as "NextGenerationEU", which aims at supporting and steering the national initiatives towards a recovery process aligned with the objectives of economic, territorial and social cohesion, as stated in Articles 174 and 175 TFEU. Among the matters addressed by the RRF, several are directly relevant to the labour market, namely fighting poverty, tackling unemployment in order for member state economies to rebound while leaving nobody behind, creating high-quality and stable jobs, including and integrating disadvantaged groups, strengthening social protection and welfare systems (Recital 14).

Significantly, the concept of sustainability pops up in the most important sections of the Regulation. It is mentioned among the definitions (Article 2), as a constitutive element of the key notion of "Resilience", defined as "The ability to face economic, social and environmental shocks or persistent structural changes in a fair, *sustainable* and inclusive way" (Article 2 (5), emphasis added). It also appears in the enumeration of the

six policy areas, referred to as "pillars", that describe the scope of the instrument. More specifically, it constitutes a component of the third pillar called "smart, sustainable and inclusive growth" (Article 3 (c)).

Overall, in the Regulation's architecture, sustainability and the related adjectives are mentioned twenty-six times. Often the concept appears in combination with other principles, enshrined in a series of documents that the RRF repeatedly mentions as sources and benchmarks of the "socially sensitive" targets pursued by "NextGenEU": the European Pillar of Social Rights, the European Green Deal, the Just Transitions plans and the UN Sustainable Development Goals.

Within this articulated system of cross-references, sustainability plays the role of a meta-principle, or, one may say, of a connector between the various social, economic and environmental goals set out in the documents recalled by the Regulation. In fact, these cross-references, as intricated and erratic as they can seem at a first glance, in the very end converge to indicate the UN Sustainable Development Goals as their common denominator. This aspect is confirmed and clarified in the European Commission's *Annual Sustainable Growth Strategy 2021* (European Commission, 2020b), which explains that the RRF aims to a "more sustainable, resilient and fairer Europe for the next generation in line with the United Nations Sustainable Development Goals".

In the light of this finding, this chapter adopts sustainability as the conceptual framework to discuss, from a joint legal and policy perspective, the possible instruments for a human-centred recovery in the labour markets. The underlying idea is, in other words, that the institutional setting and the implementation of labour market initiatives should be respectively designed and tested against the paradigm of sustainability.

However, to support this line of reasoning, the concept needs to be anchored to a sound normative ground, which the definitions included in the policy documents mentioned above do not decisively provide. In fact, not always the policy discourse takes sufficiently into account the background of existing principles, values and societal goals, and fails to provide guidance on how to solve conflicts and mismatches between the different centres of interest and dimensions of sustainability.

We assume that a normative definition of sustainability, relevant for a labour market analysis, should consist of at least the following two elements:

1. Social rights as means for an effective protection from risks. In an era of labour market transitions, new risks and new conditions of vulnerability emerge. Therefore, to reaffirm the protective role of labour law, the welfare systems and the labour market institutions should be regulated to effectively meet the emerging needs;
2. Quality of work, construed as function of a worker's freedom to govern transitions. When an external event (like an economic crisis, company restructuring or layoff) impacts on the worker and causes a transition, the way out should be planned in the worker's interest, taking into consideration the disparate personal attitudes towards change. In fact, while some workers, facing a transition, may be eager to undertake new career pathways and take up new challenges, others may wish to be kept at shelter from the impact of external events into their personal sphere.

These two normative elements of sustainability resonate with several principles and provisions enshrined in the aforesaid policy benchmarks of the European recovery strategy: the UN Sustainable Development Goals, namely Goal 8 ("Sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all"), and principally the European Pillar of Social Rights, which declares the right to social protection for workers and the self-employed "regardless of the type and duration of their employment relationship" (Principle 12), to unemployment benefits and the assistance from public employment services (Principle 13), to minimum income benefits (Principle 14) and to training and active support to employment, including transfer social protection and training entitlements during professional transitions (Principles 1 and 4) in order to "manage successfully transitions in the labour market".

From a theoretical perspective, the proposed normative definition finds a correspondence in the theory of "Transitional Labour Markets", insofar as this theory advocates the idea "to empower individuals to take over more risks during the life course" but at the same time "making the market fit for workers", thus enabling individuals to approach labour market fluctuations according to their changing preferences or work capacities, in contrast with pure workfare policies of a neoliberal inspiration (Schmid, 2015, 72).

Against such background, the chapter will focus on three welfare instruments that address different but complementary labour market issues. The next part will consider the public schemes of income support based on social transfer and how they can tackle the problem of poverty. Then, the

focus will shift to short-time work schemes established to govern "in-work" transitions during periods of partial or total employment discontinuity. The final section will conclude with a reflection on changing paradigms and strategies of public investment in labour market policies.

Poverty, Pandemic and Digital Revolution

The pandemic has had a huge negative impact on employment income. Thanks to a massive use of social transfer, the governments have managed to contain it. In the first phase of the pandemic, from midMarch to midJune, more than 1.1bn people received cash payments aimed at coping with the widespread strict lockdowns. But as economic activities slowly resumed, the number of programmes were accordingly reduced and almost disappeared in the post-pandemic stage (Gentilini, 2022, 6).

Nonetheless, the income support programmes experimented during the pandemic suggest thinking about the idea of a new paradigm of social transfer that is able to cope with economic shocks, which are unfortunately recurrent in recent times, also as a way for eradicating poverty once and for all (De Wispelaere & Morales, 2021). The issue is even more topical considering the impact that the digital revolution can have on labour markets and poverty. "Techno-pessimists", predicting a dystopian future of unprecedented mass destruction of jobs, are increasing in number (Brynjolfsson & McAfee, 2014; Ford, 2015). For example, according to some, 47 per cent of total US employment is at risk of automation over some unspecified number of years (Frey & Osborne, 2013). Even though those figures are much controversial, an era of technological unemployment is not a realistic scenario in the short run, structural—albeit perhaps temporary—unemployment seems on the way. It is less apparent if we look only at unemployment rates, which are currently generally even lower than that of the pre-pandemic. But it is more striking if we consider the reduction in the number of hours worked (underemployment), exacerbated by the increasing casualization of work. Involuntary part-time, fixed-term jobs, casual and on-demand work (including platform work) are spreading.

The Structural Inadequacy of Current Paradigms of Social Protection

As the pandemic showed very clearly and automation is now confirming, underemployment is the main driver of poverty risk for in-work population, whereas the lack of employment opportunities is obviously the main one for out-of-work population. It is a fact that these situations are not adequately addressed by social protection systems, except for the above-mentioned temporary programmes set up during the pandemic. Current welfare models are still based on the prevalent twentieth-century model of social inclusion (Standing, 2017; Dumont, 2022). So far, mostly in developed countries, states tended to see work as the main means of social inclusion. Engagement in productive employment is considered a right as well as a duty for individuals. Accordingly, social protection has been targeted at those who are unable to work, delivered mainly through contributory schemes of social insurance. Some non-contributory social assistance comes normally into play as a complement to social insurance, to fill in its gaps. It is a sort of compensation for the state not being able to fulfil its duty to create the conditions for ensuring work for everyone. Reciprocity is at the core of welfare intervention. It involves the duty of people receiving the benefits to do or seek labour in return.

This model worked rather well in an economy based on standard industrial employment (stable and full-time). On the contrary, it turned out to be manifestly unable to cope with open and flexible economies, most recently hit by the Covid-19 crisis and in a process of a broader transformation because of the digital revolution (Standing, 2017, p. 180–181).

It seems rather clear nowadays that work is far from being available to everyone, notwithstanding the efforts made by many national governments. Employment strategies, workfare policies and public work programmes have not delivered the expected results. Very often they have just pushed and trapped people into precarious employment, with the effect of disrupting their own job search or training (Van Parijs & Vanderborght, 2017, pp. 46–47). At the same time, systems of social protection have turned up to be not able to protect an increasing group of people in need. As the pandemic has demonstrated, many are vulnerable to economic shocks and not adequately covered by social insurance and social assistance schemes (Ståhl & MacEachen, 2021). First and foremost, independent contractors and precarious workers with small contributory records and as a result unable to meet the minimum requirements of the social insurance.

Also young people looking for their first jobs, long-term unemployed and employees quitting voluntarily their occupations.

A change of paradigm in the realization of social inclusion looks therefore unavoidable. It should be implemented through strategies no longer centred on work and wage-earning, but rather on generalized income support schemes, in which basic security is decoupled from the employment status. What John Rawls in his later work calls a "social minimum" shall be granted to everyone, independently from contributory records (Rawls, 2001). Enough income to give them the freedom to make meaningful choices about their lives and attain full social, political and moral inclusion.

The "income security" target finds broad support in many national constitutions as well as in important international and supranational acts. For example, Articles 22 and 25 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Economic, Social and Cultural Rights, Article 34 (3) of the Charter of Fundamental Rights of the European Union. It does not seem unreasonable to argue that states have a positive obligation, stemming from the international normative framework, to grant people enough resources to meet their minimum needs (Bronzini, 2014, p. 17).

Which Instrument? Guarantee Minimum Income Versus Universal Basic Income

Income support can take place through many different instruments. However, the two best-known generalized non-contributory tools are the guaranteed minimum income (GMI) and the universal basic income (UBI). The former involves means-tested and conditional benefits aimed at providing working-age households with enough income to prevent poverty. On the contrary, UBI is available to all members of a given political community unconditionally. Therefore, it is universal in principle, independent of a person's level of income, employment status or other indicators commonly used to determine eligibility for social security benefits.

While forms of GMI are already widespread across Europe and indeed the entire globe, UBI is still just a fascinating theory. It has been partially implemented so far only in Alaska and in some local and temporary pilots (i.e. Finland, the Netherlands, Scotland, Ontario, South Korea). However, those experiments did not bring any decisive support for arguments in favour or against UBI. Mostly, because they were not properly designed to

address the concerns about basic income policies and confirm the benefits that they are supposed to deliver (Standing, 2017; Chrisp & De Wispelaere, 2022). Discussions on UBI are therefore still a matter of theoretical speculation. However, some arguments in favour of a UBI emerge from the vast experience of GMI schemes. They have highlighted how means-testing and conditionality, differently from universality and unconditionality, is likely to lead to (Guy Standing, 2017; Van Parijs & Vanderborght, 2017; Dumont, 2022):

- Negative incentives to work, which may encourage opportunistic behaviour (such as engaging in parallel undeclared work activities).
- High administrative costs for managing them and relevant burdens for the claimants.
- Stigmatization for percipients, so undermining social cohesion.
- Low take-up rates in many countries, as a result of the just-mentioned stigma, but also because of complexity and even ignorance.
- Pressure on people to take precarious and low-paid jobs, often not in line with their skills.

To be sure, there is no shortage of arguments also against UBI. First of all, the apparent paradox of money given, differently from GMI, to everyone and not just to the poor. However, there is a long history of strong moral and economic arguments which can provide justifications for this. I already mentioned the relevant human rights dimension invoked by anti-poverty policies. UBI, more than GMI, is a means to achieve social justice. As explained for the first time by Thomas Paine in the late eighteenth century (Paine, 1795), it is a way of sharing the profits resulting from the exploitation of common resources and amenities. Coming to the present day, Guy Standing and other economists pointed out its distributive function in remunerating the contribution that each of us provides to the global productive process in the digital economy (Standing, 2017). The sole fact of being active in the Internet and social network supports big tech profits. We all contribute to the creation of a kind of collective intelligence that is exploited for the profit of a few.

Moreover, in playing its distributive function, UBI is able to deliver positive externalities on society, labour markets and economies.

As for society, the fact that the benefit is given to everyone strengthens solidarity, entailing a sense of belonging to a community, and overcomes the social stigma of subsidies for those living on welfare.

Turning to labour market implications, the absence of selectivity makes the basic income a way of emancipating people: it gives them the ability to make free decisions (Van Parijs & Vanderborght, 2017, pp. 4–28). On the contrary, means-testing creates disincentives to work: it is not convenient to take up jobs because of the unit-by-unit replacement of benefits-household total income, which can imply a lower income, considering also the expenses normally associated with employment (i.e. travel and food costs, costs of care of dependants); furthermore, accepting jobs may be also not convenient considering the complex administrative procedure to re-claim the benefits once the worker gets unemployed again. If the benefit is otherwise recognized to everyone, independently from the level of household income, people are more likely to accept jobs, even discontinuous ones. This avoids the so-called unemployment trap.

The fact that UBI comes with no strings attached, that is to say no obligation for its beneficiaries to work or be available on the labour market, avoids the employment trap (Van Parijs and Vanderborght, 2017: 64). People can refuse or quit bad jobs and decide to look for another job, and in the meantime engage in training to learn new skills. Young people are not compelled to seek income once they finish their studies but can have access to unpaid or low-paid internships or more education in general. People can even choose to engage with unpaid productive activities at home or in the community.

From economic and public finance perspectives, a basic income is simpler, cheaper and faster to manage than minimum income and other means-tested and conditional tools, so entailing huge savings on state budgets (Dumont, 2022, pp. 304–308). It boosts the purchasing power of people on low income, with a positive impact on aggregate demand and thus the GDP.

Here comes the major argument against UBI. As one can easily imagine, it is about its economic viability. Estimates are breath-taking, stressing its utopian component (Standing, 2017). Perhaps the problem should not be overestimated since it is just a temporary matter. In the medium-long run, UBI can pay for itself because of the economic growth it would ensure. Moreover, the improvement of people health and well-being associated to UBI, as confirmed by the Ontario pilots (Mohammad Ferdosi et al., 2020), would decrease spending on health and social services. In

any case, researchers have put forward many ways for ensuring its sustainability (Ter-Minassian, 2020): savings on administration of means-tested schemes, cutting on regressive policies (i.e. fossil fuel incentives), new taxes (carbon tax, land value tax, wealth and inheritance taxes, tax on financial transactions, tax on robots) and, above all, an increase of corporate taxation and income tax rate for each bands. In this latter regard, the amount of the increase would probably be marginal in developed countries (like 2–3%) and quite huge in developing countries, since the latter tend to have quite low taxation, even for high income.

A second traditional counter argument to UBI is that the holders of an unconditional cash transfer would prefer to stay lazy rather than engage in work or training. However, this is not confirmed by the findings coming from pilots and even by common sense. For example, as observed in a research paper (Jones & Marinescu, 2022), Alaskans work on average at the same rate as comparable states; part-time work even increased by 1.8 percent. The explanation is very simple. Welfare can just provide cash transfer to cope with people's very basic needs. If they want more, and normally they do, or they look for the self-realization or social connections work can deliver, they need to take up jobs. Even when they are not interested in increasing their income, they are likely to engage in productive activities in a broad sense, such as education, childcare and engagement in the community, which are beneficial for society and economy too.

Just a Matter of Political Viability

The introduction of a basic income appears as one good solution to undertake the above-mentioned change of paradigm towards a more efficient system of social protection. The arguments against UBI are mostly attached to ideological and preconceived viewpoints. Economic viability is perhaps the strongest counter argument, however surmountable. Affordability is therefore mostly a political issue. Politicians do not traditionally show much interest in promoting UBI policies, perhaps because positive outcomes can be seen only in the long run, far beyond the next elections. Therefore, voters should be convinced about the benefits it can bring in the first place. Surveys and analyses conducted during the pandemic showed that many who were not already in precariousness and need and whose income was put at risk by the pandemic shocks shifted their preference towards the inclusion of the whole population into a universal social safety net (Nettle et al., 2021). A YouGov poll launched in late 2020

found that in six European countries, about two-thirds of respondents were in favour of a UBI (WeMove Europe, 2020).

However, as the acute phase of the pandemic ended and economic activities went back to normal, the support for a UBI attenuated. Which is not much unexpected since taxpaying voters are typically more prone to accept welfare with strings attached and prefer existing social policy arrangement over new untested ones (Weisstanner, 2022). Thus, it is not surprising that the pandemic assistance itself did not evolve into sustained basicincome schemes. Anyway, the world's experience with covid19 could still make its eventual adoption more likely. It is perhaps the right moment in history to make a decisive step in this direction. Even if a pandemic is a very rare event, similar devastating impacts on employment could be caused by the digital transformation of work. This suggests another strong and rather pragmatic argument in favour of UBI: Do we have better options? Driverless cars and delivery robots are massively tested in California. They soon will replace taxi drivers, uber drivers, riders and so on. Mass labour displacement is around the corner. Thus, we need to move and do it very fast before it is too late.

In-Work Transitions

The shock impressed to the labour market by the pandemic increased the volatility of employment relationships, particularly in those sectors and occupations affected by lockdowns that could not resort to remote working to ensure the continuity of production. This gave rise to different responses by welfare systems around the globe.

For instance, whereas the US enacted at state and federal levels an extraordinary programme of unemployment benefits for workers who had been laid off, sometimes to be rehired once the production had been resumed (Casey & Mayew, 2022), EU countries resorted to job retention schemes, already existing in the traditions of national welfare systems like, for instance, Germany, Italy and France. These national instruments have also been complemented by an EU-enacted initiative, known with the acronym SURE (*European instrument for temporary Support to mitigate Unemployment Risks in an Emergency*), established with EU Council Regulation 2020/672. The European instrument provided financial assistance to member states to implement, primarily, short-time work schemes or similar measures aimed at protecting employees and the self-employed,

thus reducing the incidence of unemployment and loss of income (Article 1(2)).

Unemployment benefits and job retention schemes have similarities and differences. Both are insurance-based instruments, financed by contributions from the employers and the employees, and often supplemented by government subsidies. However, unlike unemployment insurance, which intervenes after the termination of the employment relationship, under a job retention scheme the financial support is provided to companies or workers while the employment relationship is still in force, to offset the impact on wages of a partial or total reduction of working time.

Although the two instruments can be used as "functional equivalents", some have pointed out that they should rather be conceived as complementary measures, addressing different labour market risks (Müller et al., 2022), respectively related to a structural or temporary discontinuity of the undertaking. In other words, unemployment insurance is designed to support workers in their transition to the external labour market, whereas job retention schemes operate in case of internal transitions.

There is a widespread scholarly consensus on the positive contribution brought by job retention schemes to mitigate the social effects of the pandemic (Christl et al., 2021; Giupponi et al., 2022). This confirms the general appreciation for this category of welfare instruments, which tend to be considered as more effective and socially fair than the alternative arrangements that are usually activated in similar situations, like the freezing of overtime, the reduction of working time accounts balances and layoffs (Icon Institute, European Network of Public Employment Services, 2020); although layoffs can only inappropriately be considered as full equivalents of the former, as it was mentioned above.

Indeed, job retention schemes stabilize the labour market by preserving the skill assets in the interest of both workers and employers, save the costs related to the replacement of workers and the search of new jobs and provide companies and workers with a longer time span to devise their own labour market strategies, like reskilling or job-seeking. Although they operate under eligibility criteria that tend to favour the insiders and the most skilled workers, they also permit to target companies materially affected by an economic need. Therefore, altogether, they ensure an efficient allocation of government resources (Cahuc, 2018). In this regard, they seem to be aligned with the definition of sustainability adopted in this chapter, consisting in a combination of social rights and workers' empowerment. They are also consistent with the idea of "work-life insurance",

elaborated within the theory of transitional labour markets, construed as an instrument aimed at covering "income risks that go beyond unemployment during an individual's work-life course" (Schmid, 2020, 467).

However, the effectiveness of such schemes depends on their institutional and operational design. The fast transformation of the labour market, characterized by the emergence of new risks linked to changing work arrangements and other exogenous factors, like the pandemic shock and the digital and environmental transitions, imposes a rethinking of the systemic function and the rules governing these instruments, with a view to ensure that the needs of workers are effectively met and that a correct system of incentives and cost-effectiveness is in place to steer the players towards the expected results. The innovations made in some national short-time work programmes as a response to the recessions that characterized the first decades of 2000s, from the sovereign debt crisis to Covid-19, provide interesting examples of the possible evolution of this instrument (Arranz et al., 2019; Casey & Mayew, 2022).

Functional Evolution and Institutional Design of Short-Time Work Schemes

Short-time work schemes (STWS) are the most common category of job retention instruments. They are known with different names, like *Kurzarbeit* in Germany and *Cassa Integrazione Guadagni* in Italy, and obviously they present different design and functioning features across the jurisdictions that adopt them (Icon Institute, European Network of Public Employment Services, 2020). The element they have in common is that the compensation for the hours not worked is paid to the company, which then distributes it to the workforce affected by the time reduction. In contrast, other job retention schemes, like the "furlough", provide for the benefit to be paid directly to workers who have been temporarily suspended, who can use it also to seek another occupation, whereas "wage subsidy schemes" pay for the hours worked, thus relieving companies affected by a temporary hardship while allowing them to retain their workforce (Müller et al., 2022).

The regulatory variations among job retention instruments and within the STWS are explained by the different aims pursued by regulators, and particularly by the different strategies devised to control the balance between incentives and moral hazards from the point of view of the beneficiaries of the schemes. For instance, highly selective eligibility criteria

referred to the economic situation of the company may aim at preventing deadweight losses, as they permit not to subsidize companies that have sufficient resources of their own or that, conversely, are already in the verge of bankruptcy. In a similar vein, the calculation of employers' contributions on an experience rate basis, which imposes higher costs to companies that have materially used the scheme, is meant to promote the self-responsibility of the beneficiaries and prevent abuses.

However, it could be maintained that the classification of different schemes is becoming purely theoretical. The succession of shocks occurred in the first decades of 2000s prompted several reforms of STWS, aimed at addressing the structural changes of the labour market and the challenges brought by new social risks. In the course of this process, STWS have undergone a process of "hybridization", incorporating the functions and characteristics of other instruments, and remaining no longer relegated to the role of ensuring a "passive" support for jobs and wages during economic downturns. The institutional setting has also been enriched, with the involvement of more players and the reinforcement of the functional connections between different labour market institutions.

An example can be drawn from the experience of the Italian *Cassa Integrazione Guadagni*, which was subject to two major reforms in 2015 and 2021, respectively implemented by Law no. 148/15 and Law no. 234/21: the latter shaped to some extent on the example of the extraordinary (and temporary) measures enacted to cushion the occupational (and income) effects of the pandemic (Faioli & Bologna, 2021).

The evolution of the Italian STWS addresses four main topics: the subjective scope, the public-private relationship, the functions pursued by the financial support, including the possibility for the beneficiaries not just to resume their previous occupations but also to find a new job in either the internal or the external labour market, and the integration with the system of public employment services with regard to placement and training.

With regard to the scope, there is an aspiration towards the "universalization" of the coverage. The aim is to cope with the increasingly structural and "horizontal" character of labour market risks, no more confined to specific sectors and occupations. To this end, several eligibility thresholds have been lowered, like the size of the companies (measured by the number of employees) and the seniority of the beneficiary workers. In the same perspective, the caps in the amount of the allowances have been levelled to the maximum rate, with a view to ensure a uniform protection and remove the disparity against workers with the poorest payrolls. These

innovations undoubtedly represent a progress; however, the evolution is still incomplete and far from a real "universalization", as the scheme still excludes some categories of workers who are nonetheless exposed to the same social risks as the protected groups, like the independent contractors tied to the company by a relationship of functional and/or economic dependence (Matsaganis, 2022).

Of course, the breadth and generosity of an STWS depend on the entity of the dedicated financial resources, deriving from the contributions imposed on companies and workers, sometimes integrated by the government budget. In the Italian case, a crucial leverage for the universalization of STWS is the involvement of social partners in their financing and administration, through the bilateral funds established by collective agreements. The 2021 reform made the establishment of such funds mandatory for the employers with more than one employee. Under this architecture, the standard scheme (*Cassa Integrazione Guadagni Straordinaria*) acquires a residual function, as it is set to intervene only in case the funds are not operating. Furthermore, the law lays down minimum requirements concerning the governance of the funds, their coverage and the amount of the contributions and allowances paid, to ensure that workers do not receive a worse treatment than the one granted by the standard, government-run scheme. Overall, this regulatory solution stimulates a reflection on public-private partnerships and the role of the state in STWS, which will be addressed in the next section.

Besides the scope, another significant trend concerns the function of STWS. The recent Italian reforms have placed a strong emphasis on the fact that the financial support should also prepare workers for external transitions or, if remaining in the same company, to move to a new occupation, even with different skills requirements. This idea of linking STWS with a broad conception of labour market transitions resonates with the prominent role assigned to training in the structure of the scheme.

Firstly, training, which is normally treated as a simple option in STWS schemes operating across Europe (Icon Institute, European Network of Public Employment Services, 2020), has become a mandatory requirement in Italy, since the worker's entitlement to the allowance has been made conditional to her participation in training initiatives, with the aim of maintaining or enhancing her skills "in connection with the demand expressed by the territory" (Article 25-ter, Legislative Decree n° 148/15).

Secondly, the STWS incentivizes the external re-employment through the temporary payment of a wage subsidy (hence a different form of job

retention scheme, which confirms the process of hybridization of STWS mentioned above) to supplement the payroll of workers that, in the context of a specific programme (Re-employment Agreement, *Accordo di ricollocazione*), take on a job with a new employer.

Finally, reskilling and upskilling are becoming the cornerstone of all the different programmes included in the Italian STWS. In fact, these programmes are increasingly going beyond the simple aim to support the recovery from a downturn, to embrace a broader set of goals like the upgrade of the production process, organization or equipment. For instance, the concept of restructuring of the undertaking, which represents one of the eligibility criteria for the access to the basic programme *Cassa Integrazione Guadagni Straordinaria*, has been broadened to include “transition processes” linked to “professional requalification” or “skill enhancement” (Article 21, Legislative Decree n° 148/15). Similarly, a specific programme called Occupational Transition Agreement (*Accordo di transizione occupazionale*, Article 22-ter, Legislative Decree n° 148/15) provides for an additional measure of financial support to promote internal or external transitions of workers at risk of being laid off, on the basis of a plan that must include training and reskilling initiatives.

This said, the last direction of change of STWS comes rather intuitively. Considering the crucial role of public employment services (PES) in providing the infrastructure for training and placement initiatives, it does not come by surprise that STWS in Italy have reinforced their institutional and operational linkages with PES. This evolution represents a step forward, strongly advocated by scholars who believe that new social risks can only be addressed with a joint and coordinated mobilization of different labour market instruments and players (Cahuc, 2018).

The Governance of Short-Time Work Schemes: Role of Social Partners and Responsibility of the State

A feature common to different kinds of STWS EU-wide is the involvement of social partners (Müller et al., 2022). By means of the various instruments at their disposal, like consultation, negotiation and codetermination, they intervene in different stages: the authorization of the activation of a programme, the monitoring of its implementation, the raising of the amounts of the allowances and also the direct establishment, financing and administration of specific schemes, including the payment of

allowances and the provision of training and other complementary services, like in the case of Italian bilateral funds addressed above.

Undoubtedly this kind of public-private partnership, based on the participation on equal grounds of employers and employees, via their representatives, is an added value. Besides providing relief to government spending, it ensures that STWS are designed and administered according to a democratic process, preventing decisions that could be tainted by bias and abuse. One example can be made with regard to the training programmes that accompany the wage insurance. The decisions concerning the activation of the programme, its contents (whether they should be company-specific or targeted to the broader employability of workers) and the sources of financing, if left to the initiative of the employer alone, could be hampered, as the employer may lack either adequate resources to invest or even incentives against the risk of losing her investments in case the worker moves to another company.

However, one should not mistake partnership for discharge of responsibility (from the state to private players), nor for surrender of authority. In fact, the state holds the pivotal role as regulator and provider of services and financial resources.

The theory of transitional labour markets, which has been praised as a virtuous model of reflexive regulation for its capacity to promote self-regulation by the private actors of the labour market (Rogowski, 2013), maintains that the state, as "social insurance principal", plays a decisive function in surrogating the scarcity of resources or incentives by private players (Schmid, 2015; see also Behrendt & Nguyen, 2019, 215 on the key role of "non-contributory social protection schemes, financed by general taxation, in closing coverage gaps and ensuring at least a basic level of protection for everyone"). This is certainly true However, it should not place the state in an ancillary role vis-à-vis the private actors, including social partners. The state bears, on constitutional grounds (in Italy, for instance, under Articles 4 and 38 of the Constitution), the primary responsibility to organize the labour market in order to ensure the exercise of social rights like work and welfare. This circumstance provides the justification for the exercise of a steering role of the state on the other players of the labour market. In this regard, the Italian experience of STWS seems to establish a fair balance between two basic functions of the state: exercise of public authority and support of the private initiative.

Conclusion. Labour Law and Labour Market Policies after the Pandemic

Somehow paradoxically the pandemic has had a positive impact on public investment in labour market policies, namely in the EU. The financial resources deployed in reaction to the Covid-19 pandemic have increased funds and budgetary expenditures for public agencies. However, making labour market policies efficient and sustainable remains a challenge, due to the rise of new labour and societal needs, in terms of levels of unemployment, poverty and social exclusion. As a matter of fact, economic repercussions of the pandemic were strongly asymmetrical: in Italy, for example, job losses were concentrated in specific sectors (Basso et al., 2021) and mainly affected workers with unstable and poorly protected jobs (Carta & De Philippis, 2021). Human and economic costs of Covid-19 are without any doubt severe all over the world and threaten to scale back years of progress on reducing global poverty and inequality and further damage social cohesion and global cooperation. Russia-Ukraine crisis aside, the world is going to face other impactful long-term risks: climate action failure, environmental damage, biodiversity loss and so on.

Labour lawyers and policymakers must therefore change their approach and analytical tools.

Re-Inventing Labour Laws?

Within the post Covid-19 scenario we have firstly to ask ourselves whether it is necessary to change the rationale of labour law. New opportunities and research paths are emerging, and many of the contributions included in this book may serve as landmarks for discussion and strategies to cope with reforms, policy design and innovations in Italy, in Europe and all over the world, along the path opened years ago by Marco Biagi. With his life, Professor Marco Biagi taught us not to spare ourselves (Biagi, 1999a; Biagi, 1999b; Biagi, 1999c). He taught us enthusiasm, cooperation and ability to face new challenges, with forward-looking decisions, being able to respect academic tradition not forgetting the past and at the same time to generate concrete innovation starting from academia and going through policymaking processes and this is an absolutely crucial issue, even nowadays.

But what is labour law for nowadays? In short, labour law is a way of regulating life: life of people, life of companies, life of public institutions

and private actors in the socio-economic sphere. Considering the potential of digitalization, climate change and social development in the post-Covid-19 era, should we therefore change the rationale of labour law? Our answer is no. But there is a concrete risk for all kinds of labour regulation, of being useless or ineffective in relation to future needs of workers, companies, institutions and social partners. This is evident in the field of the labour market, where laws and policy interventions are also at risk of being rigid and poor, sort of like *sludge* (Sunstein, 2022). To minimize risks, interdisciplinary approaches are crucial, and our understanding of trends and needs for labour law is going to be enriched by different styles of research in social sciences. In short, a much more modern-day tool for regulating life and protecting unemployed people, workers and companies is needed.

That is also to say we should try to fruitfully re-conceptualize old ideas for the post-pandemic world of work. Innovations, in fact, rupture with the past, make headway thanks to the reaffirmation of a certain continuity with what has gone before. From this point of view, the promotion of labour laws as vehicles for social reform is a point of no return for the history of law. And that is to say—quoting Hugo Sinzheimer, the founding father of European labour law—that social law is unequal law. It favours the weak over the strong. It contradicts the abstract ideal of equality of purely liberal legal thought in order to balance out material inequality (Sinzheimer, 1927). Reaffirmations of these common roots are essential methodological indications of the importance to build a human-centred system of law after the Covid-19 pandemic.

A New Equilibrium between Public and Private Financial Investment for Labour Markets

What kind of impact on public investment did Covid-19 crisis have?

In relation to the post-Covid-19 evolution, we have to ask ourselves if in the medium term public resources invested for the future of work are going to be a problem for European economic stability. And here is an important point we have to focus on. The European reaction to the Covid crisis has increased the possibility of public expenses. Nonetheless, persistence of instability and rapid collapses of geopolitical situation highlight alarming perspective for the future of investment in employment policies, while new dimensions of fragmentation, fragility and vulnerability emerge in the labour market and come out besides the more traditional ones (e.g.

women's participation in the labour market, migrant and refugees workers, NEETs, etc).

Covid-19 crisis has made the need for innovation to address mismatches and segmentation within the labour market even more pressing. Making active labour market policies efficient and sustainable is a challenge, due to the fact that public financing cannot meet in the medium term the increase of new labour and societal needs, in terms of rising levels of unemployment, poverty and social exclusion, among others.

European institutions have recognized the urgency to foster alternative sources of labour market policies and welfare funding, supporting schemes that connect public, private and third sectors (European Commission, 2018). More generally, the debate on sustainable investment is heated all over the world. For instance, in the US, a discussion is open on the compatibility of a sustainable economy, and especially ESG and impact investing, with the fiduciary duties of corporations and their institutional shareholders (Schinckus, 2017; Schoenmaker, 2019).

Within this scenario, it is therefore necessary to explore all the possibilities to build up welfare and labour market policies through social investment and financial innovations. And this is for sure an open field of policymaking for experts of all kinds. Moreover, this trend towards "sustainable finance" is happening in the absence of a framework capable of facing the specificities of social impact investing. The development of this kind of financial product requires operational criteria that are highly complex in terms of legal structure, number of actors involved, design and outcomes evaluation. This frame has a meaningful consequence. The unexplored framework in which impact investing takes place entails serious risks of "social washing" as a result of the uncertainties in terms of monitoring tools and remedies available in case of non-compliance with non-financial or social obligations.

Digitalization and Labour Market Policies

Covid-19 era boosted digital transformation, but also increased potential productivity for specific sectors, jobs and occupations. This trend is going to be intensified by the European recovery framework, where digital transition is one of the key pillars. This trend will make digital ability increasingly necessary at all levels while new skills and training needs are emerging. In short, digital competence is a fundamental challenge for social growth and economic development now and in the future. All of these aspects will

have a relevant impact, affecting law, regulations and both the supply and demand sides of the labour market.

These are the main reasons why we have now to explore a kind of regulation which could be a much more modern-day tool for regulating life and protecting workers in a post-Covid-19 world. Conventional active labour market policy features traditional programmes for the reemployment of job seekers, such as job search assistance, training and subsidized jobs. These programmes are expensive, and whether they are effective is a classical question. But digitalization is going to have a great impact on processes of change in the operational models of public employment services and on the ways that active labour market policies are delivered.

The most important question for labour lawyers and policymakers in the near future should therefore be which type of assistance will be more effective for different types of jobseekers. Recent studies show that low-cost interventions that provide tailored labour market information can improve search behaviour and employment outcomes for some jobseekers even in the absence of labour-intensive counselling or monitoring. Many economists have demonstrated that novel policies are able to speed up re-employment at a lower cost than conventional programmes, and researchers show that digital tools or other light-touch treatments significantly improve jobseekers' outcomes. Labour lawyers, it is time to move on!

References

Arranz, J. M., Garcìa-Serrano, C., & Hernanz, V. (2019). The changing use of short-time work schemes: Evidence from two recessions. *European Journal of Industrial Relations, 25*(1), 5–22.

Basso, G., Grompone, A., & Modena, F. (2021). The (little) reallocation potential of workers most hit by the COVID-19 crisis. *Politica economica*, 151–186.

Behrendt, C., & Nguyen, A. Q. (2019). Ensuring universal social protection for the future of work. *Transfer, 25*(2), 205–219.

Biagi, M. (1999a). Editorial. *The International Journal of Comparative Labour Law and Industrial Relations, 15*(1), 2–3.

Biagi, M. (1999b). Editorial. *The International Journal of Comparative Labour Law and Industrial Relations, 15*(2), 83–84.

Biagi, M. (1999c). Editorial. *The International Journal of Comparative Labour Law and Industrial Relations, 15*(3), 227–228.

Bronzini, G. (2014). Il reddito di cittadinanza, tra aspetti definitori ed esperienze applicative. *Rivista del Diritto della Sicurezza Sociale, 14*(1), 1–34.

Brynjolfsson, E., & McAfee, A. (2014). *The second machine age: Work, progress, and prosperity in a time of brilliant technologies*. W.W. Norton &.

Cahuc, Pierre. 2018. Wage Insurance, *Part-Time Unemployment Insurance and Short-Time Work in the XXI Century*. IZA DP No. 12045.

Carta, Francesca and Marta De Philippis. 2021. "The impact of the COVID-19 shock on labour income inequality: Evidence from Italy". *Tech. Rep*.: 606.

Casey, B. H., & Mayew, K. (2022). Kurzarbeit/short time working: Experiences and lessons from the Covid-induced downturn. *National Institute Economic Review*, 1–14.

Chrisp, J., & De Wispelaere, J. (2022). Parading utopia on the road to nowhere? An introduction to the special issue on the policy impact of the European basic income experiments. *European Journal of Social Security, 24*(3), 167–176.

Christl, M., Poli, D., Silvia, Hufkens, T., Peichl, A., & Ricci, M. (2021). The role of short-time work and discretionary policy measures in mitigating the effects of the Covid-19 crisis in Germany. *CEsifo Working Papers, 9072*, 2021.

De Wispelaere, J., & Morales, L. (2021). Emergency basic income during the pandemic. *Cambridge Quarterly of Healthcare Ethics, 30*(2), 248–254.

Dumont, D. (2022). Universal basic income as a source of inspiration for the future of social protection systems? A counter-agenda. *European Journal of Social Security, 24*(4), 299–318.

European Commission. 2018. *Action plan: Financing sustainable growth*. COM(2018) 97final.

European Commission. 2020. *A strong social Europe for just transitions*. COM(2020) 14 final. Brussels, 14.1.2020.

European Commission. 2020b. *Annual Sustainable Growth Strategy* 2021. COM(2020) 575 final. Brussels, 17.9.2020.

Faioli, M., & Bologna, S. (2021). *Job retention schemes in Europe: Italy*. European Trade Union Institute. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350775#

Ferdosi, M., McDowell, T., Lewchuk, W., & Ross, S. (2020). *Southern Ontario's basic income experience*. McMaster University Labour Studies.

Ford, M. (2015). *Rise of the robots: Technology and the threat of a jobless future*. Oneworld Publications.

Frey, C. B., & Osborne, M. A. (2013). The future of employment: How susceptible are jobs to computerisation? *Technological Forecasting and Social Change, 114*, 254–280.

Gentilini, U. (2022). Cash transfers in pandemic times. In *Evidence, practices, and implications from the largest scale up in history*. World Bank.

Giupponi, G., Landais, C., & Lapeyre, A. (2022). Should we insure workers or jobs during recession? *Journal of Economic Perspectives, 36*(2), 29–54.

Icon Institute, European Network of Public Employment Services. (2020). *Short time work schemes in the EU* (*Study report*). European Commission.
Jones, D., & Marinescu, I. (2022). The labor market impacts of universal and permanent cash transfers: Evidence from the Alaska permanent fund. *American Economic Journal: Economic Policy, 14*(2), 315–340.
Matsaganis, M. (2022). False starts, wrong turns, and dead ends. How (not) to ensure social protection for all workers. In T. Addabbo, E. Ales, Y. Curzi, T. Fabbri, O. Rymkevich, & I. Senatori (Eds.), *Defining and protecting autonomous work. A multidisciplinary approach* (pp. 31–50). Palgrave Macmillan.
Müller, T., Schulten, T., & Drahokoupil, J. (2022). Job retention schemes in Europe during the COVID-19 pandemic – Different shapes and sizes and the role of collective bargaining. *Transfer, 28*(2), 247–265.
Nettle, D., Elliot Johnson, M., & Saxe, R. (2021). Why has the COVID-19 pandemic increased support for Universal basic income? *Humanities and Social Sciences Communications, 8*(1).
Paine, T. (1795 (2005)). Agrarian justice. In *Common sense and other writings*. Barnes & Noble.
Rawls, J. (2001). *Justice as fairness: A restatement*. Harvard University Press.
Rogowski, R. (2013). *Reflexive labour law in the world society*. Edward Elgar.
Schinckus, C. (2017). Financial innovation as a potential force for a positive social change: The challenging future of social impact bonds. *Research in International Business and Finance, 39*(B), 727–736.
Schmid, G. (2015). Sharing risks of labour market transitions: Towards a system of employment insurance. *British Journal of Industrial Relations, 53*(1), 70–93.
Schmid, G. (2020). Beyond European unemployment insurance. Less moral hazard, more moral assurance? *Transfer, 26*(4), 465–480.
Schoenmaker, Dirk. 2019. A framework for sustainable finance. Rotterdam School of Management, Erasmus University, Working Paper.
Sinzheimer, H. (1927). *Grundzüge des Arbeitsrechts*. Fischer.
Ståhl, C., & MacEachen, E. (2021). Universal basic income as a policy response to COVID-19 and precarious employment: Potential impacts on rehabilitation and return-to-work. *Journal of Occupational Rehabilitation, 31*(1), 3–6.
Standing, G. (2017). *Basic income: And how we can make it happen*. Penguin.
Sunstein, C. R. (2022). *Sludge. What stops us from getting things done and what to do about it*. MIT Press.
Ter-Minassian, T. (2020). Financing a Universal basic income: A primer. In U. Gentilini, M. Grosh, J. Rigolini, & R. Yemtsov (Eds.), *Exploring Universal Basic income: A guide to navigating concepts, evidence, and practices* (pp. 153–179). World Bank.
Van Parijs, P., & Vanderborght, Y. (2017). *Basic income. A radical proposal for a free society and a sane economy*. Harvard University Press.

Weisstanner, D. (2022). COVID-19 and welfare state support: The case of universal basic income. *Policy and Society, 41*(1), 96–110.

WeMove Europe. (2020). Results of the YouGov poll about UBI. https://www.wemove.eu/it/results-yougov-poll-about-ubi (last consulted on 3 September 2023).

CHAPTER 3

Labour Market and Social Exclusion in Italy: The Case of the Working Poor in the Pandemic Era

Chiara Mussida and Dario Sciulli

Introduction

The euro area labour market has been severely hit by the COVID-19 pandemic and associated containment measures (e.g., Casarico & Lattanzio, 2022). Temporary employees, the young, and workers with low levels of education were the most affected by the shock, while teleworking may have played a role in supporting employment and hours worked for some workers in certain sectors (Anderton et al., 2021). Nonetheless, already before the shock, the European labour markets were facing an increasing share of low-paid and/or low-skilled occupations and precarious jobs. The spread of these flexible working arrangements contributed to the increase

C. Mussida (✉)
Università Cattolica del Sacro Cuore, Piacenza, Italy
e-mail: chiara.mussida@unicatt.it

D. Sciulli
Università G. d'Annunzio Chieti-Pescara, Chieti-Pescara, Italy
e-mail: dario.sciulli@unich.it

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_3

of the phenomenon of the working poor, which are conventionally defined as workers (employed for over half of a year) living in households at risk of poverty. The working poor, indeed, represent a substantial group in the overall poverty statistics, and already before the COVID-19 pandemic they are estimated to constitute 10% of European workers (Eurofound, 2017). Factors of different nature contribute to working poverty. These include low pay, household characteristics, quality of employment and gender, and other individual characteristics. The phenomenon suggests that having a job, that is, being employed, is no longer enough to ensure a decent standard of living. The spread of precarious contracts, low-paid jobs, and underemployment imply that the labour market has stopped being a stable source of prosperity for many people and their families (Olsthoorn, 2014). Although it is difficult to identify clear trends, there is an association between increases in non-standard forms of employment in many countries and the expansion in the proportion of Europeans at risk of in-work poverty (Eurofound, 2017).

The European Pillar of Social Rights, adopted in 2017, sets out 20 key principles and rights essential for fair and well-functioning labour markets and social protection systems. It explicitly recognizes the need for policies and measures to tackle in-work poverty and inequality. On 4 March 2021, the European Commission presented its action plan to fully implement the Pillar, turning the principles into concrete actions to benefit EU citizens. It proposes a new target for the EU to reduce the number of people at risk of poverty or social exclusion by at least 15 million by 2030. In-work poverty, therefore, is a significant problem across Europe that requires specific policy attention from governments and the social partners.

In this work, we explore whether and how individual and household socio-demographic characteristics and labour market conditions affect the probability of being a working poor in Italy, a country characterized by important labour market reforms in the last decade and in which the relevance of working poor is above 10% already before the COVID-19 pandemic. The increase in this relevance is partly associated with the mentioned reforms which contributed to the spread of precarious and flexible employment conditions (Cirillo et al., 2017). As recognized in the literature (see, for instance, Malgarini et al., 2013, and Mancini, 2007), Italian labour market institutions changed significantly since the late 1990s, with a softening of the Employment Protection Legislation (EPL) for temporary employment. The main interventions included the introduction of temporary and atypical contracts characterized by a lower level of protection, and

the reduction of firing restrictions for open-ended contracts.[1] Temporary employees as a proportion of total employees reached 17.1% in 2018, and exceeded the EU average (14.1%).[2] Given the mentioned positive association between flexible/temporary work arrangements and the phenomenon of working poor, Italy represents an interesting case of investigation. The aim of this work is to identify the groups/categories that are more likely to face the risk of in-work poverty and uncover how this evolved during the pandemic period. Policy interventions to improve the quality of job and against the risk of poverty (individual and household level) are also suggested. The scant available literature mainly explored either the causes of the phenomenon of the working poor or its determinants. We aim to fill this gap in the literature by offering novel evidence on the working poor in Italy. The paper proceeds as follows. Section 2 reviews the existing literature. Section 3 describes the data and the sample. The empirical model and the determinants of working poor are discussed in Section 4. Section 5 offers some concluding remarks.

Literature

On the causes of the phenomenon of working poor, Halleröd et al. (2015), for instance, explore whether in-work poverty is a low-wage or an unemployment problem (or a mix of these conditions) in Europe, and if this is the same problem across all European countries. They use EU-SILC data for 22 countries and derive a set of distinct clusters of labour market trajectories from information about monthly labour market status and estimate in-work poverty risk for each trajectory. The findings suggest that in-work poverty is a problem that affects mainly the self-employed, thereby confirming previous studies (i.e. Crettaz, 2011; Fraser et al., 2011; Lohmann & Marx, 2008), and people in a marginal labour market position, that is, those who for different reasons move in and out of employment. These results also suggest that in-work poverty is mostly an unemployment problem, not a low-wage problem, with systematic differences across countries.

Brülle et al. (2019) investigate two major labour market sources of in-work poverty risks, that is low hourly wages and part-time employment, as dimensions of job quality. They study the period between 1992 and 2011 in Germany, using data from the German Socio-Economic Panel (SOEP) and multivariate analysis. The results show that while low wages are unequally distributed across occupations and industries, shifts in

employment between sectors explain only a minor part of the change in low wages. However, they reveal a polarization of low-wage risks by skill level and sector of employment, on the one hand, and full-time and part-time employees, on the other hand.

On the determinants of the working poor, the literature suggests that individual, household, and institutional factors all play a part in explaining in-work poverty in Europe (Lohmann, 2009). A study from the Eurofound (2017), confirming previous evidence (see, for instance, Spannagel, 2013) identified, among others, factors at the individual level, that is education, gender, age, the number of hours the individual works and the contract type, and household factors, that is size and work intensity of the household and the presence of dependants.

Interestingly, the composition of the household is one of the main factors behind in-work poverty (Crettaz, 2015). Studies suggest that if the low-paid person is also a single earner with dependants, then the risk is high. In particular, single women typically face an increased poverty risk compared with single men (Pena-Casas & Ghailani, 2011). Nonetheless, if the low-paid person is the secondary earner in the household and has taken the job in order to supplement the household's income, then the risk is likely to be low (Marx & Nolan, 2012; Mussida & Sciulli, 2023a). Interestingly, this suggests that being a female per se is negatively associated with the risk of being a working poor, while being a female head of household likely increases that risk.

Moreover, the work intensity of the individual and the type of contract are significant factors affecting the probability of being a working poor. Working part-time, having a temporary contract, or being self-employed are positively associated with the risk of in-work poverty (Marx & Nolan, 2012; Horemans et al., 2016).

Few studies explored the determinant of the working poor phenomenon specifically for Italy (i.e. Barbieri et al., 2018; Raitano et al., 2019). Barbieri et al. (2018) investigate the determinants of the risk of being working poor in Italy by using linear probability models. Data are from the Bank of Italy (SHIW) for the period 2000–2016. The authors find that the incidence of the phenomenon increased significantly with the Great Recession. The individual characteristics negatively associated with the risk of being working poor are being male and highly educated. There is instead a positive association with working with a temporary contract or part-time and for the one-earner's household type.

Raitano et al. (2019) explore the characteristics of the working poor in Italy. According to the labour market status, self-employed have a higher risk of being working poor compared to employees. Among employees, those with fixed-term contracts and working part-time experience a relatively higher probability of being working poor. As for individual characteristics, the risk is higher for male workers with respect to females. This is likely due to the fact that female women in Italy are often the 'second earner' in the household. Age is positively associated with the probability of being working poor, as youth in Italy tend to live with their parents (Barbieri et al., 2018). Working poor likelihood is also much greater for workers without Italian citizenship, thereby signalling problems of labour market integration. Education, instead, is negatively associated with the probability. The risk is largely heterogeneous across household types, and it increases with the number of household members and their needs, being the highest for single-parent households with dependent children.

Inspired by the existing literature, we offer novel evidence on the individual and household socio-demographic characteristics and labour market conditions affecting the probability of being a working poor in Italy, and how this evolved over the 2019–2021 period.

Data

We use cross-sectional data from the European Union Statistics on Income and Living Conditions (EU-SILC) survey. The survey is conducted in most countries across the European Union by the relevant National Institutes of Statistics using harmonized questionnaires and survey methodologies. Our analysis covers the years 2019, 2020, and 2021, and therefore the period just before and immediately after the COVID-19 pandemic. Each year, we select data for Italy for samples of individuals between 16 and 64 years of age. This selection leaves us with 17,020, 10,110, and 13,838, observations for the years 2019, 2020, and 2021. We explore the determinants of the probability of being working poor in each year, to capture the possible evolution of the phenomenon. Descriptive statistics of both dependent variable and covariates are reported in Table 3.1.

The dependent variable used in our investigation, which is described in Section 4.1, is a dummy variable that equals 1 for working poor, and 0 otherwise. Working poor is conventionally measured as an individual (of working age) who is classified as employed (either employee or self-employed) for over half of the year and who is at risk of poverty. At risk of

Table 3.1 Descriptive statistics

	2019		*2020*		*2021*	
	Mean	*Std Dev.*	*Mean*	*Std Dev.*	*Mean*	*Std Dev.*
Working poor	0.112	0.315	0.104	0.306	0.109	0.311
Female	0.457	0.498	0.452	0.498	0.450	0.497
Low education	0.262	0.440	0.250	0.433	0.249	0.433
Middle education	0.511	0.500	0.483	0.500	0.485	0.500
High education	0.227	0.419	0.266	0.442	0.265	0.442
Age 16–24	0.038	0.192	0.032	0.175	0.028	0.164
Age 25–34	0.159	0.366	0.140	0.347	0.137	0.344
Age 35–44	0.241	0.428	0.238	0.426	0.233	0.422
Age 45–54	0.322	0.467	0.326	0.469	0.326	0.469
Age 55–64	0.239	0.427	0.264	0.441	0.277	0.447
Household size	2.772	1.278	2.742	1.222	2.773	1.242
Home owner	0.703	0.457	0.761	0.427	0.751	0.432
Number of members with disabilities	0.240	0.549	0.264	0.556	0.288	0.590
Number of elderly members	0.071	0.257	0.065	0.247	0.073	0.259
Number of children aged 0–3	0.061	0.256	0.069	0.272	0.057	0.249
Number of children aged 4–15	0.365	0.683	0.386	0.694	0.372	0.684
Female head of household	0.349	0.477	0.337	0.473	0.347	0.476
Italian	0.901	0.298	0.929	0.257	0.932	0.252
North-West	0.247	0.431	0.223	0.416	0.226	0.418
North-East	0.243	0.429	0.260	0.439	0.246	0.431
Centre	0.273	0.445	0.268	0.443	0.266	0.442
South	0.237	0.425	0.249	0.433	0.262	0.440
PC-FT	0.596	0.491	0.557	0.497	0.592	0.491
PC-PT	0.085	0.279	0.099	0.299	0.103	0.303
TC-FT	0.094	0.292	0.125	0.330	0.082	0.274
TC-PT	0.038	0.192	0.039	0.193	0.031	0.175
SE-FT	0.172	0.377	0.165	0.371	0.172	0.378
SE-PT	0.015	0.121	0.015	0.121	0.019	0.137
Number of other members employed	0.700	0.750	0.617	0.669	0.635	0.696
Observations	17,020		10,110		13,828	

Source: own elaboration on 2019, 2020, and 2021 EU-SILC data

poverty is defined as the fraction of people living with an equivalized income below a threshold defined to be 60% of the national median. Equivalized income is the total disposable household income (after taxes and social transfers) divided by an equivalence scale that gives a weight to each person in the household, which is the modified OECD scale.[3] From the first row of Table 3.1, we note the phenomenon under investigation,

that is working poor, includes more than 10% of our sample in all the three years explored.

Our control variables can be classified into individual and household characteristics. Individual characteristics refer to the characteristics of the individual who is at risk of being working poor. We include gender; the age ranges [16, 24], [25, 34], [35–44], [45–54], and [55–64]; education; citizenship; and area or residence. Household characteristics include controls for the household size, presence of children of different age range (aged from 0 to 3 years and aged from 4 to 15 years), elderly, and individuals with disabilities in the household, home ownership, and the gender of the head of household.

Notably, we have added some potentially relevant individual controls for the employment/working conditions. In detail, we combine information on the type of contract, that is permanent or temporary, and the working time, that is part-time or full-time, for employees and self-employed. We obtained six dummy variables for permanent contracts (PC), temporary contracts (TC), and self-employed (SE) working either part-time (PT) or full-time (FT). This information is very important to explore what are the employment conditions more significantly associated with the risk of being a disadvantaged worker, that is a working poor. Figure 3.1 shows the evolution of the working conditions of the working poor in our samples. We see an important heterogeneity of the risk of being a working poor among working conditions. In general, for all the categories explored, that is permanent workers, temporary workers, and self-employed, we note a disadvantage for those working part-time. We see that permanent employees working full-time do represent the lowest share of working poor, and this is decreasing over time, while the shares of both self-employed and temporary full-timer workers increase with the COVID-19 outbreak. Finally, at the top of Fig. 3.1, we see relatively important shares for temporary workers and self-employed both working part-time increasing overtime.

Empirical Analysis

This section focuses on empirical analysis. We first illustrate the empirical strategy (subsection 4.1) and then focus on the description of empirical results (subsections 4.2 and 4.3).

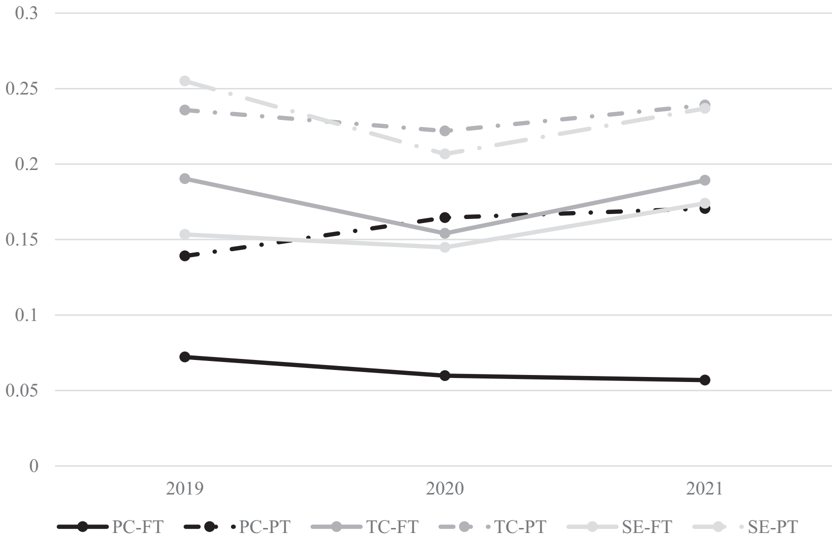

Fig. 3.1 The evolution of the employment conditions of the working poor. (Source: own elaboration on 2019, 2020, and 2021 EU-SILC data)

The Econometric Model

We analyse whether and how individual and household socio-demographic characteristics and labour market conditions affect the probability of being a working poor by applying a discrete choice probit model. We run the model for each year analysed here, thus allowing us to uncover the way the effect of mentioned characteristics evolved over time.

The probit model is a statistical probability model with two categories in the dependent variable: being or not a working poor. Probit analysis is based on the cumulative normal probability distribution. The binary dependent variable, y, takes on the value of 1, in case the individual is a working poor, and 0 otherwise. The probit analysis provides statistically significant findings of which socio-demographic and labour market variables increase or decrease the probability of being a working poor. The model allows for household intra-group correlation. This means estimates are robust to arbitrary intra-household correlation, as it is assumed that observations are independent across households but not necessarily independent within households.

The probability of choosing any alternative over not choosing it can be expressed as follows:

$$P_i = \text{Prob}\left(Y_i = 1 \middle| X_{i1}, X_{i2} \ldots, X_{ik}\right) = \Phi\left(\sum_{j=1}^{k} \beta_j X_{ij}\right)$$

where Φ represents the cumulative distribution of a standard normal random variable, X_{ij} is the *j*-th independent variable, and β_j is the corresponding regression coefficient. The effect of a specific variable on the outcome is interpreted by means of the average marginal effect (AME), which accounts for the partial change in the probability.

The Determinants of the Working Poor in the 2019–2021 Period

This subsection describes results emerging from the application of the probit model to Italian EU-SILC cross-sectional data for the years 2019, 2020, and 2021. To make easier the comparison across years we report all estimated AMEs in Table 3.2. This would allow us to learn about the way observable variables affect the probability of being working poor, and whether and how this has changed over time, in light of mutated conditions due to the COVID-19 pandemic.

We note that being female is associated with a lower probability of being a working poor. The AMEs remained stable over the period analysed, varying from -3.8 p.p. in 2019, to -3.7 p.p. in 2020 and 2021. This result contrasts that related to the role of female household heads. This is associated with a higher probability of being working poor, being the AMEs positive and statistically significant. The effect, however, declined over time, passing from +4.3 p.p. in 2019, to + 3.5 p.p. in 2020 and +2.8 p.p. in 2021. This contrasting finding may be interpreted in light of the male breadwinner model, which is still predominant in Italy. The distribution of total work may be unequal at the gender level (Burda et al., 2013) because the burden of unpaid work for housework, caring activities, and family responsibilities is usually in charge of females. This means they mainly play an additional role in the labour market and contribute to household income formation more marginally than males. Thus, when they are responsible for the household, the mentioned inequalities are reflected in the higher risk of being working poor.

Table 3.2 Estimation results by year

	2019			*2020*			*2021*		
	AME	*R.s.e.*		*AME*	*R.s.e.*		*AME*	*R.s.e.*	
Female	-0.038	0.005	***	-0.037	0.006	***	-0.037	0.005	***
Female head of household	0.043	0.004	***	0.035	0.006	***	0.028	0.005	***
Low education	Base-category								
Middle education	-0.021	0.004	***	-0.028	0.006	***	-0.031	0.005	***
High education	-0.061	0.006	***	-0.064	0.007	***	-0.075	0.007	***
Age 16–24	Base-category								
Age 25–34	-0.007	0.010		-0.010	0.013		0.003	0.012	
Age 35–44	0.011	0.010		-0.007	0.013		0.015	0.012	
Age 45–54	0.044	0.010	***	0.020	0.013		0.044	0.012	***
Age 55–64	0.013	0.010		-0.002	0.013		0.026	0.012	**
Household size	-0.098	0.003	***	-0.078	0.003	***	-0.073	0.003	***
Homeowner	-0.049	0.004	***	-0.043	0.006	***	-0.053	0.005	***
Number of members with disabilities	0.022	0.004	***	0.016	0.005	***	0.008	0.004	**
Number of elderly members	0.032	0.011	***	0.054	0.013	***	0.023	0.011	**
Number of children aged 0–3	0.115	0.008	***	0.079	0.009	***	0.079	0.009	***
Number of children aged 4–15	0.103	0.004	***	0.088	0.005	***	0.080	0.004	***
Italian	-0.027	0.006	***	-0.064	0.008	***	-0.058	0.007	***
North-West	-0.088	0.005	***	-0.090	0.007	***	-0.086	0.006	***
North-East	-0.102	0.006	***	-0.117	0.007	***	-0.100	0.006	***
Centre	-0.071	0.005	***	-0.084	0.006	***	-0.072	0.005	***
South	Base-category								
Number of other members employed	0.176	0.003	***	0.172	0.004	***	0.165	0.004	***
Permanent contract/ Full-time (PC-FT)	Base-category								
Permanent contract/ Part-time (PC-PT)	0.033	0.007	***	0.060	0.009	***	0.064	0.008	***
Temporary contract/ Full-time (TC-FT)	0.047	0.007	***	0.043	0.007	***	0.055	0.008	***
Temporary contract/ Part-time (TC-PT)	0.061	0.011	***	0.077	0.014	***	0.070	0.012	***
Self-employment/ Full-time (SE-FT)	0.112	0.007	***	0.116	0.009	***	0.142	0.008	***

(*continued*)

Table 3.2 (continued)

	2019			*2020*			*2021*		
	AME	*R.s.e.*		*AME*	*R.s.e.*		*AME*	*R.s.e.*	
Self-employment/ Part-time (SE-PT)	0.132	0.023	***	0.122	0.029	***	0.170	0.024	***
Observations	17,020			10,110			13,828		

Source: our elaboration of 2019–2020-2021 EU-SILC cross-sectional data for Italy

Looking at the role of education, estimation results are those expected. Being low education the base category, middle and high education reduce the risk of working poor. In addition, we note that the insurance role of education has increased during the pandemic, with the AMEs associated with middle education passing from -2.1 pp. to -3.1 p.p., while the AMEs associated with high education passing from -6.1 p.p. to -7.5 p.p. The role of age is less evident, being most of the estimated AMEs not statistically significant. An exception is represented by individuals aged 45–54, for which the probability of being working poor is higher than the base category (see Barbieri et al., 2018).

We control also the role of household size and find it decreases the risk of being working poor. However, the protective effect appears to be declining over the analysed periods. As expected, also being a homeowner is associated with a lower probability of being a working poor. The effect has been non-linear along the years analysed, being passed from -4.9 p.p. to -4.3 p.p. and -5.3 p.p.

The risk of being working poor increases as the number of members with disabilities also increases in the household. This finding is in line with the literature suggesting disability is a determinant of poverty risk (e.g., Parodi & Sciulli, 2008; Davila-Quintana & Malo, 2012). This can be explained by the role of extra costs of disability, the effects on labour market outcomes of family members (e.g., Mussida & Sciulli, 2019; Calegari et al., 2022), and the effects on employment and wages of persons with disabilities themselves (Oguzoglu, 2010; Jones & Latreille, 2010). The positive association, however, declined across the years here analysed, being +2.2 p.p. in 2019, +1.6 p.p. in 2020, and +0.8 p.p. in 2021. This finding is possibly related to the protective role played by disability benefits in a period characterized by relevant labour income loss for other household types. Quite surprisingly, the risk of being working poor

increases with the number of self-sufficient elderly members. The AMEs were non-linear along the period analysed, being passed from +3.2 p.p. to +5.4 p.p. and to +2.2. p.p. in 2021.

We considered how the number of children in the household affects the probability of being working poor, by introducing variables for kids aged 0–3 and 4–15, separately. As expected, they both increase the risk of being a working poor. This may be explained in terms of the labour market outcomes of mothers. On average, they decrease their labour supply during pregnancy, childbirth, and the early years of children's lives. This has been found to determine an increased risk of income poverty (e.g., Mussida & Sciulli, 2023b). In addition, they experiment with difficulties in re-entering later the labour market and experience a widespread use of part-time work to reconcile caring duties and market work. The period characterized by the pandemic, however, was characterized by a lowering of such detrimental effects, being passed from 11.5 p.p. in 2019 to +7.9 p.p. in 2021 for children aged 0–3, and from +10.3 p.p. to +8 p.p. for children aged 4–15.

We also considered the role of nationality by introducing a dummy variable indicating if individuals had Italian citizenship or not. We find that being Italian reduces the probability of being working poor. This result is quite expected, as immigrants are more likely to experience poverty status and marginalization in the labour market (i.e., Raitano et al., 2019). In addition, the period investigated has seen an increase in between-group inequality, as the effect passed from -2.7 p.p. in 2019 to -6.4 p.p. in 2020 and -5.8 p.p. in 2021.

Territorial dummy variables confirm the usual gap among Italian regions, with the Southern region experiencing a disadvantage with respect to the Central and Northern ones. This reflects both the higher poverty rates characterizing the South of Italy and the gaps in the local labour markets. Territorial dualities in terms of the probability of being working poor, however, remained substantially stable over the period analysed, with a peak in 2020. The AMEs associated with the North-West passed from -8.8 in 2019, to -8.6 in 2021 (with a peak of -9 in 2020). Similarly, in the North-East, the AMEs passed from -10.2 in 2019 to -10 in 2021 (with a peak of -11.6 in 2021). In the Centre, the AMEs passed from -7.1 in 2019 to – 7.2 in 2021 (with a peak of -8.4 in 2020). This finding is consistent with evidence suggesting that the pandemic and the subsequent containment measures widened labour market inequalities across Italian regions.

Looking at the labour market conditions, we control for two different aspects: the household labour supply, considering the number of other employed members, and the individual labour market conditions, by considering both the type of employment and the time relationship (full-time/part-time).

The former shows a quite unexpected positive relationship between the number of other household members employed and the probability of being working poor. The effect declined over the period analysed, being passed from +17.6 p.p. in 2019 to 16.5 p.p. in 2021. The positive association possibly indicates the number of employed members increases in the household to compensate for low-earning conditions, a sort of additional worker effect.

Finally, we describe how individual employment status affects the probability of being a working poor. Thus, we intersect information on employment status (self-employment, and permanent and temporary employment) and time at work (full-time and part-time) and obtain six groups of workers. Being the permanent contract (PC)/full-time (FT) subgroup the base category, we note that the other subgroups of individuals experience a higher risk of being working poor. With few exceptions, the gap strengthened over the analysed period. Considering the permanent contract/part-time (PC-PT) subgroup, the risk of being working poor was 3.3 p.p. higher than the base category in 2019, and the gap widened to 6.4 p.p. in 2021 (6 p.p. in 2020). Also, being a temporary worker increases the probability of working poor, and the gap with the reference group widened during the period analysed. In particular, those employed with a full-time relationship (TC-FT) experienced a risk of being working poor higher by 4.7 p.p. in 2019 and 5.5 p.p. in 2021, while those employed with a part-time relationship (TC-PT) experienced a risk of being working poor higher by 6.1 p.p. in 2019 and 7 p.p. in 2021. According to our estimates, the self-employed were the most disadvantaged group, and they also suffered a worsening gap during the pandemic period. Those declaring full-time work (SE-FT) experienced a higher risk of being working poor by 11.2 p.p. in 2019 with respect to the PC-FT group, which worsened up to 14.2 p.p. in 2021. Those declaring part-time work (SE-PT) experienced a higher risk of being working poor by 13.2 p.p. in 2019 with respect to the PC-FT group, which worsened up to 17 p.p. in 2021. Our results highlight the more precarious condition of self-employed and temporary workers and stress the higher risk of being of working poor associated with part-time work. This may be partly due to the higher risk of

being low-paid workers of such employment conditions, that is, temporary and part-time jobs, as low pay has been found to be a major predictor of working poor probabilities (e.g. Marx & Nolan, 2012; Horemans et al., 2016).

In addition, these results essentially confirm the asymmetric effects on the labour market determined by the pandemic and subsequent restrictive measures, which affected strongly less protected employment conditions and then contributed to the spread of inequalities (e.g., Fana et al., 2020; Casarico & Lattanzio, 2022).

The Change of Predicted Working Poor Probabilities

We provide additional evidence by calculating how predicted working poor probabilities have evolved over the analysed period. For this purpose, we estimate a pooled probit model including year-dummy variables and plot predicted probabilities in Fig. 3.2. According to this exercise, we note

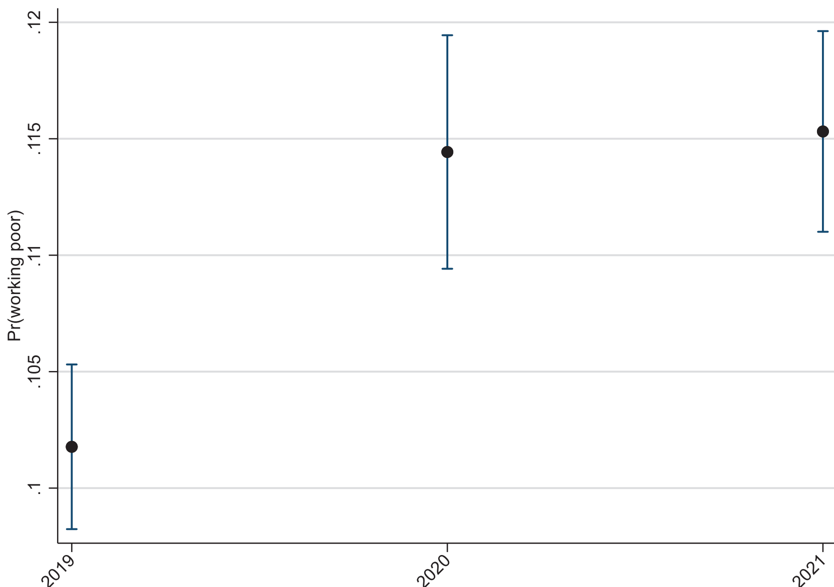

Fig. 3.2 The evolution of predicted probabilities of being working poor. (Source: our elaboration of 2019–2020–2021 EU-SILC cross-sectional data for Italy)

that the risk of being working poor has increased in 2020 and 2021, being passed from 10.2% in 2019 to 11.4% in 2020 and 11.5% in 2021. The increase from 2019 and subsequent years appears to be statistically significant.

With the aim of providing a more robust analysis of the changing impact across years of selected covariates (i.e., employment condition, area of residence, nationality, gender, gender of the household head, and education), we provide a further investigation based on augmented specifications, where we interacted the covariates of interest with time dummy variables. Related results are summarized in Fig. 3.3, where predicted probabilities of being a working poor associated with mentioned covariates are plotted on. An advantage of using the augmented specification lies in the possibility of directly evaluating if the change over time is statistically significant or not.

According to the employment status, the PC-FT condition is that determining a lower risk of being a working poor, as it represents around

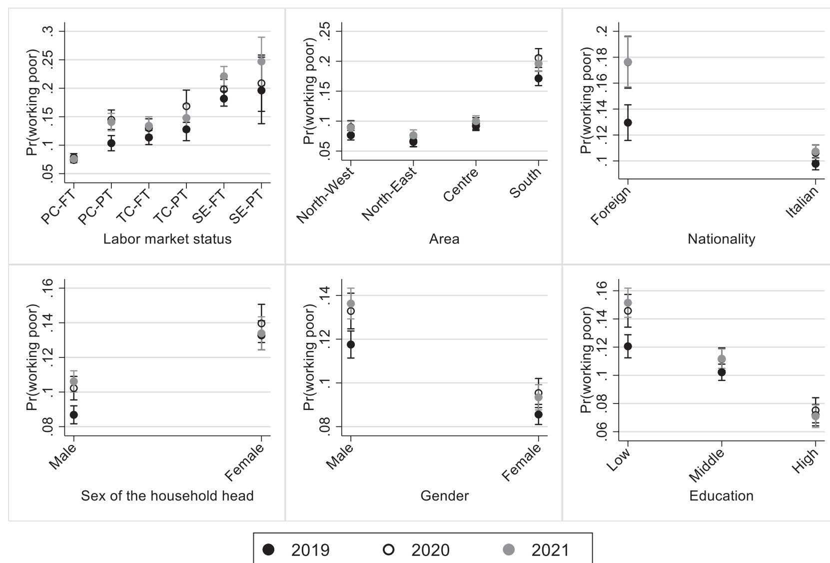

Fig. 3.3 The evolution of predicted working poor probabilities by subgroups. (Source: our elaboration of 2019–2020–2021 EU-SILC cross-sectional data for Italy)

7%, which has remained stable over the investigated period. Among those employed with a permanent relationship but with a part-time contract, the mentioned risk is higher than the base category (around 10% in 2019), and it has increased up to 14% in the subsequent years. Individuals with a temporary job experienced a probability of being a working poor slightly higher than the PC-PT group (around 12% in 2019), with a peak (around 17%) in 2020 for those with a part-time contract. The self-employed show a risk of being working poor much higher than employees, with predicted values around 18–20% in 2019, which increased further in subsequent years. This was particularly true for part-timers, even though the confidence interval is particularly wide because of the small size of this specific subgroup.

Looking at regional differences in predicted working poor probabilities, we note individuals living in the Southern regions experience a risk that is almost double than individuals living in other areas in 2019. In addition, while in the Centre-North of Italy predicted probabilities remained substantially stable, in the South there was an increase in the predicted probabilities of being working poor in subsequent years, with a peak in 2020. Figure 3.2 also confirms the income and earning disadvantage of foreign workers. The risk of being working poor was around 3% greater for foreign workers than for Italian ones in 2019. The situation for the former significantly worsened during the pandemic, being the predicted probability of being working poor rose up to 18% from 13%, while that of Italians remained stable. Remarkable is also the role of gender in determining the risk of being working poor. As stressed above, the effect associated with female workers changes significantly based on the role they play in the household. When they are the head of the household, the risk of being working poor is higher than in the case of the head of the household is a male. The contrary happens when they do not play such a role. In both cases, however, there was a statistically significant increase in the predicted probabilities of being working poor for males during the biennium 2020–2021, while the conditions of females remained more stable. We conclude our description by focusing on the role of education. As emerged above, low-educated workers are exposed to a greater risk of being in working poor conditions. In 2019, the predicted probability was 12% for low-educated, 10% for middle-educated, and around 7% for those with high education. The years characterized by the pandemic were marked by a widening of the differences among workers with various educational levels. In particular, there was a significant increase in the

predicted probability of being working poor for low-educated workers, which reached around 14% in 2020 and around 15% in 2021, whereas the situation of highly educated remained stable with a slight improvement in 2021 and that of middle educated has slightly worsened. This remarks the potential role of the pandemic years in exacerbating the inequalities across workers subgroups.

Conclusion

This contribution aims at analysing the working poor phenomenon in Italy and highlighting the possible evolution associated with the pandemic period and the subsequent containment measures. For this purpose, we analyse three waves of the cross-sectional EU-SILC database for Italy, with particular reference to the years 2019, 2020, and 2021. We provide some descriptive evidence and quantitative analysis based on probit regression models aimed at estimating the risk of being working poor in Italy and uncovering the role played by selected explanatory variables.

Our analysis essentially confirms evidence that emerged from the scarce literature, including the protective role of education against the probability of being working poor, the existence of territorial duality, and the higher risk of being in disadvantaged conditions associated with the presence of household members with disabilities and children. The effect of gender on the probability is less clear and appears to depend on the role females play in the household. In addition, in line with the findings of previous studies, foreign workers appear to be more at risk of working poor than Italians. Finally, our results confirm the existence of significant inequalities in the labour market according to employment status. In particular, while individuals employed with a full-time permanent contract appear to face a low risk of being working poor, the related probabilities are positively correlated with temporary employment, part-time work, and self-employment.

In this context, the years of the pandemic and subsequent containment measures were accompanied by an evolution of such conditions. First, there emerged a slight worsening of the predicted risk of being working poor, which increased from 10.2% in 2019, to 11.5% in 2021. Looking at the role of selected covariates, we noted a significant worsening associated with workers with permanent contracts employed in part-time jobs, and a general worsening, even not statistically significant, of temporary workers and self-employed. Similarly, there was a stronger worsening of the

conditions for workers living in the Southern regions, foreign workers, and low educated. More generally, the analysis shows the years under investigation were characterized by a widening of inequalities in the labour market.

Notes

1. For details on the process of labour market reforms in Italy, see Cirillo et al. (2017).
2. Figures available online at https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20190524-1
3. Modified OECD scale: $1 + 0.5(N_A - 1) + 0.3\ N_{CH}$, where N_A, N_{CH}, and N_D are the number of adults, children, and disabled people in the household. The scale implies that a weight is assigned to each household member as follows: a weight of 1.0 is assigned to the first adult, 0.5 to the second and each subsequent person aged 14 and over, and 0.3 to each child under 14.

References

Anderton, R., Botelho, V., Consolo, A., Da Silva, A., Foroni, C., Mohr, M., Vivian, L. (2021). The impact of the COVID-19 pandemic on the euro area labour market. *Economic Bulletin Articles*, European Central Bank, vol. 8.

Barbieri, P., Cutuli, G., & Scherer, S. (2018). *In-work poverty* in un mercato del lavoro duale: individualizzazione riflessiva dei rischi sociali o stratificazione della diseguaglianza sociale? *Stato e Mercato, 114*(1), 419–460.

Brülle, J., Gangl, M., Levanon, A., & Saburov, E. (2019). Changing labour market risks in the service economy: Low wages, part-time employment and the trend in working poverty risks in Germany. *Journal of European Social Policy, 29*(1), 115–129.

Burda, M., Hamermesh, D., & Weil, P. (2013). Total work and gender: Facts and possible explanations. *Journal of Population Economics, 26*(1), 239–261.

Calegari, E., Fabrizi, E., & Mussida, C. (2022). Disability and work intensity in Italian households. *Review of Economics of the Household, 20*(2), 533–552.

Casarico, A., & Lattanzio, S. (2022). The heterogeneous effects of COVID-19 on labor market flows: Evidence from administrative data. *Journal of Economic Inequality, 20*, 537–558.

Cirillo, V., Fana, M., & Guarascio, D. (2017). Labour market reforms in Italy: Evaluating the effects of the jobs act. *Economia Politica, 34*(2), 211–232.

Crettaz, E. (2011). *Fighting working poverty in post-industrial economies: Causes trade-offs and policy solutions.* Edward Elgar.

Crettaz, E. (2015). Poverty and material deprivation among European workers in times of crisis. *International Journal of Social Welfare, 24*(4), 312–323.

Davila-Quintana, C. D., & Malo, M. A. (2012). Poverty dynamics and disability: An empirical exercise using the European community household panel. *Journal of Socio-Economics, 41*(4), 350–359.

Eurofound. 2017. *In-work poverty in the EU*, publications Office of the European Union, Luxembourg.

Fana, M., Torrejón, P. S., & Fernández-Macías, E. (2020). Employment impact of Covid-19 crisis: From short term effects to long terms prospects. *Journal of Industrial and Business Economics, 47*(3), 391–410.

Fraser, N., Gutiérrez, R., & Peña-Casa, R. (Eds.). (2011). *Working poverty in Europe: A comparative approach.* Palgrave Macmillan.

Halleröd, B., Ekbrand, H., & Bengtsson, M. (2015). In-work poverty and labour market trajectories: Poverty risks among the working population in 22 European countries. *Journal of European Social Policy, 25*(5), 473–488.

Horemans, J., Marx, I., & Nolan, B. (2016). Hanging in, but only just: Part-time employment and in-work poverty throughout the crisis. *IZA Journal of European Labor Studies, 5*(1), 1–19.

Jones, M., & Latreille, P. L. (2010). Disability and earnings: Are employer characteristics important? *Economics Letters, 106*(3), 191–194.

Lohmann, H. (2009). Welfare states, labour market institutions and the working poor: A comparative analysis of 20 European countries. *European Sociological Review, 25*(4), 489–504.

Lohmann, H., & Marx, I. (2008). The different faces of in-work poverty across welfare state regimes. In H.-J. Andreß & H. Lohmann (Eds.), *The working poor in Europe: Employment, poverty and globalisation* (pp. 17–46). Edward Elgar.

Malgarini, M., Mancini, M., & Pacelli, L. (2013). Temporary hires and innovative investments. *Applied Economics, 45*(17), 2361–2370.

Mancini, M. (2007). *Regimi di protezione all'impiego ed effetti sul mercato del lavoro: l'evoluzione della flessibilità in Italia*. I Temi dei Rapporti ISAE.

Marx, I., & Nolan, B. (2012). *In-work poverty* (GINI discussion paper no. 51). Amsterdam Institute for Advanced Labour Studies.

Mussida, C., & Sciulli, D. (2019). Does the presence of a disabled person in the household affect the employment probabilities of cohabiting women? Evidence from Italy, France, and the UK. *Journal of Family and Economic Issues, 40*(3), 338–351.

Mussida, C., & Sciulli, D. (2023a). *Low pay and household poverty in Italy* (Working papers 635). ECINEQ, Society for the Study of Economic Inequality.

Mussida, C., & Sciulli, D. (2023b). Childbirth and poverty in Europe: A bivariate dynamic approach. *Review of Income and Wealth, 69*(1), 34–59.

Oguzoglu, U. (2010). Dynamics of work limitation and work in Australia. *Health Economics, 19*(6), 656–669.

Olsthoorn, M. (2014). Measuring precarious employment: A proposal for two indicators of precarious employment based on set-theory and tested with Dutch labor market-data. *Social Indicators Research, 119*(1), 421–441.

Parodi, G., & Sciulli, D. (2008). Disability in Italian households: Income, poverty and labour market participation. *Applied Economics, 40*(20), 2615–2630.

Pena-Casas, R., & Ghailani, D. (2011). Towards individualizing gender in-work poverty risk. In N. Fraser, R. Gutierrez, & R. Pena-Casas (Eds.), *Working poverty in Europe: A comparative approach* (pp. 202–231). Palgrave Macmillan.

Raitano, M., Jessoula, M., Pavolini, E., & Natili, M. (2019). *ESPN thematic report on in-work poverty – Italy, European Social Policy Network (ESPN)*. European Commission.

Spannagel, D. (2013). *In-work poverty in Europe: Extent, structure and causal mechanisms* (COPE research paper). Combating Poverty in Europe.

CHAPTER 4

Vulnerability at Work: The Case of Chronically Ill Employees

Silvia Profili, Alessia Sammarra, and Laura Innocenti

Introduction: Work and Chronic Illness

Workers with chronic diseases account for a quarter of the working population in the European Union. This share increased by 8 per cent between 2010 and 2017 and will grow further as the population ages in many countries. However, chronic diseases are not limited to older employees, as the proportion of younger workers (aged 16–29) with chronic illnesses reached 18 per cent in 2017 (Eurofound, 2019).

The term chronic diseases covers various conditions such as diabetes, oncological and cardiovascular diseases, and arthritis. These diseases are of long duration, generally progress slowly, and often require ongoing management over years if not decades (Nolte & McKee, 2008).

S. Profili (✉)
Università Europea di Roma, Rome, Italy
e-mail: silvia.profili@unier.it

A. Sammarra • L. Innocenti
Università degli Studi de L'Aquila, L'Aquila, Italy
e-mail: alessia.sammarra@univaq.it; laura.innocenti@univaq.it

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_4

Although there is a strong connection between disability and chronic illness, they are distinct phenomena. Disability cannot be equated with illness: not all chronically ill individuals develop a disability and vice versa (Australian Institute of Health and Welfare 2018). Further, a distinguishing feature of many chronic illnesses is their uneven and oscillatory progression, with peaks and periods of respite that may occur on a daily basis (Rolland, 1987). This places the 'ill' employee in a 'grey zone', being healthy and able at times while having significant disabilities in other periods (Varva, 2015). In acknowledging these differences, one should recognize that chronically ill employees (CIEs) can have needs and expectations that are different, albeit related, to those of workers with a disability (Profili et al., 2022).

However, the management of chronically ill employees has yet to feature on the programmatic agenda of most HR departments, nor among the Diversity, Equity and Inclusion initiatives promoted by many companies. One reason for this lack of attention to the problem is the lack of awareness of the costs to individuals and organizations of failing to include and involve chronically ill people at work. In addition to the direct costs of healthcare, which amount to 700 billion euros in the European Union for cardiovascular disease alone, productivity losses of 54 billion euros per year are estimated (Wilkins et al., 2017). Furthermore, several studies show that chronic diseases significantly influence job retention, absenteeism, turnover, and early retirement decisions (Busse et al., 2010). For instance, research in the Netherlands found that the labour market participation rate is much lower for people with diabetes than for other workers: 62 per cent versus 77 per cent in the case of those under 45, and 29 per cent versus 50 per cent among those over 45 (Detaille et al. 2006). Early exit from work results in an economic-financial loss and may cause social isolation and reduced self-esteem (Spelten et al., 2002). In contrast, working during an illness and returning to work can improve the quality of life for many patients (Maunsell et al., 1999). It has been observed that work is a protective factor for people with chronic diseases. Recent studies have shown that returning to work increases the likelihood of experiencing an improvement in one's physical and mental health (Carlier et al., 2013).

In addition, people with chronic illnesses often face widespread prejudice in the workplace, which sometimes results in subtle forms of discrimination with negative consequences for pay levels, development opportunities, and career prospects (Beatty & Joffe, 2006; OECD/EU, 2018).

For the organization, exclusion from work or difficulties in re-integration following an illness can have numerous negative implications, especially in terms of loss of resources and professionalism, bad organizational climate, and low motivation.

This scenario highlights the need to develop effective strategies to ensure sustainable employment, prevent the spread of discriminatory behaviour, and implement flexible solutions that facilitate the full re-integration into work of workers affected by chronic conditions.

Against this backdrop, this chapter aims to provide evidence and recommendations that will enable organizations to understand the expectations of chronically ill workers and remove the obstacles they often face at work. Our goal in this chapter is not so much to analyse the issue from an economic or social perspective, or in its welfare implications, but rather to understand the work experiences of chronically ill people through exploratory research carried out using a large sample of workers with long-standing illnesses. The aim of this research is to understand what factors can facilitate or hinder their full and productive participation in the organizational life, enabling them to enhance their motivation, skills, and abilities.

An Exploratory Study on Workers with Chronic Illnesses

The exploratory study presented in this chapter is part of a broader research programme promoted by the Lavoroperlapersona Foundation to help organizations understand the expectations and experiences of employees with chronic illness and remove the obstacles they often face at work. As part of this study, a survey was administered in 2018 to permanent employees of a large company operating in the energy sector in Italy. A sample of more than 6400 individuals was involved. Among these, 1107 employees have reported being affected by one or more chronic diseases and voluntarily completed our questionnaire. In the following sections, we illustrate some of the findings that are related to three relevant topics:

- illness disclosure.
- the risk of discrimination against chronically ill employees.
- flexible work adjustments.

Chronically Ill Employees' Disclosure at Work

At work, the general assumption is that people are physically able to perform their tasks, and functioning bodies are taken for granted (Beatty, 2012; Pinder, 1995). This expectation influences all the role-based interactions among people working together, posing the challenge to CIEs as to whether or not to communicate about their personal condition.

Illness disclosure is a high-stakes decision because it can put CIEs in a vulnerable position. Individuals with chronic conditions are often reluctant to tell others about their health problems, fearing potential negative reactions such as rejection, discrimination, and even loss of employment (Gignac & Cao, 2009). Self-disclosure was defined by Collins and Miller Lynn (1994) as the 'act of revealing personal information about oneself to another' (p. 457). This choice is even more difficult for CIEs if their condition is hidden and not perceptible to others. Employees suffering from invisible diseases may choose not to reveal their difference, aiming to 'pass' as normal even though this decision may have negative consequences. This decision entails psychological and organizational costs, as individuals may experience stress from feeling inauthentic, fear of potential discovery, and the loss of potential benefits. Indeed, unless employees choose to inform managers and colleagues of their illness, the organization will not be able to provide them with specific support.

For CIEs who present visible symptoms, disclosure is an inevitable step they face as they cannot avoid providing information regarding their conditions. This decision is influenced by the need to explain conditions that might interfere with physical and cognitive abilities and, to some extent, affect workplace performance. Chronic illnesses vary widely in their symptoms, with peaks and periods of remission. The uncertainty as to when symptoms will come and go increases CIEs' vulnerability, as it may often be challenging to respect workload scheduling with the fear of appearing unreliable. To maintain their work image as competent employees, CIEs have to justify why a task that could be done one day cannot be performed the next after providing information about their illness. It is important to note that disclosure can be partial, when employees only inform supervisors and colleagues about the presence of a chronic disease, or full, when employees share detailed information about how that chronic illness affects them at work (Munir et al., 2005). To gain access to instrumental support, such as workplace accommodation, benefits, and treatment, or to

receive legal protection, employees should provide full disclosure (Gignac & Cao, 2009).

It is worth noting that disclosure decisions can be even harder for employees who perceive themselves as already disadvantaged before considering their illness. Women with chronic illnesses tend to be less inclined to share their health status as they already experience a lack of power within their workplace due to their gender. Female workers know they generally have a weaker position than men in the internal and external labour markets. This lack of power is further exacerbated by a disease, discouraging women from disclosing any problems (Werth et al., 2018).

Overall, the decision over revealing health conditions is very stressful, and CIEs are torn between the possible advantages, in terms of psychological and organizational support, and the fear of being stigmatized and excluded. To better understand the rationales behind the disclosure decision, we investigated possible dimensions that could hinder or promote revealing health-related information in our sample of CIEs.

The results show that almost half of the sample (41 per cent) consider their health condition to be strictly personal information (Fig. 4.1). According to our evidence, CIEs are rather reluctant to share information concerning their private sphere, even with significant others at work, preferring to maintain a clear distinction between the professional and personal domains.

The fear of being pitied is the second most significant barrier (28 per cent) that discourages CIEs from disclosing their situation. Chronic illness

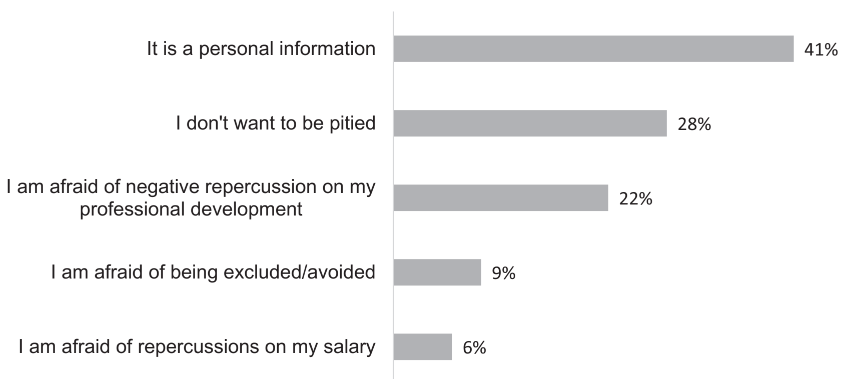

Fig. 4.1 Barriers to disclosure

often dramatically affects an individual's identity, leading to a reassessment of the self and life goals (Beatty & Joffe, 2006). In this painful path of growing awareness, sick people strive to maintain their self-value and want to be treated with respect, not commiseration.

Possible repercussions on their career path also reduce CIEs' willingness to disclose (22 per cent). Vulnerable employees may be afraid that managers will react to their condition by lowering expectations regarding their capacity to perform well on the job, and eligibility for development initiatives, such as training or internal mobility.

Our research shows that over one-third of CIEs in our sample did not inform their managers about their needs in being able to better cope with their health conditions during work. Nearly 20 per cent of the CIEs chose to keep information about their disease private, even from their colleagues.

Our results support evidence from previous studies that highlighted CIEs' resistance to sharing their condition, keeping their true social identity hidden in the workplace, with negative consequences for themselves and the organization. In general, people only feel 'authentic' and express their full potential when they can really be 'themselves' in the presence of others. Consequently, withholding personal information to avoid stigmatization may interfere with authentic self-representation (Clair et al., 2005). Furthermore, people with a hidden social identity may struggle to maintain their legitimacy in social interactions at work. For example, an employee with a severe health problem may need to carry out a certain task in a different way than usual (e.g. while standing up instead of sitting), so either they have to explain why, or else accept the potentially negative reactions of managers and colleagues who may judge them as lazy or unreliable (Charmaz, 2000). Moreover, an employee who has decided not to reveal their situation may struggle to balance conflicting relational needs. For example, a worker who has kept their illness hidden will have to avoid social interactions with colleagues outside of work that may involve partners or friends, as they may inadvertently reveal their health conditions, thus limiting possible social interactions and running the risk of isolation in the workplace.

As such, disclosure is a double-edged sword potentially contributing to increased anxiety and insecurity in a vulnerable population. Organizations therefore should create the conditions necessary to accompany and sustain CIEs in this burdensome choice.

The Risks of Discriminating Against Chronically Ill Workers

Perceived discrimination refers to an individual's experience of being treated differently based on membership of a social grouping, for example based on race, sex, or age (Fiske 1998). Research has shown that discrimination has detrimental effects on various individual, group, and organizational outcomes (Goldman et al., 2006). At the individual level, evidence shows that employees who feel discriminated against report higher levels of psychological stress (Shrier et al., 2007), lower levels of physical health (e.g. James et al., 1994), and poorer performance (e.g. Triana & Garcia Maria, 2009). At the group level, discrimination may result in differences in pay, job status, and job type between discriminated groups and those not discriminated against (Gutek, 2001). At the organizational level, discriminatory behaviours may negatively affect an organization's reputation (Rindova et al., 2005) and increase discrimination-related litigation (Goldman, 2001).

Most research has focused on sex, race, and age discrimination, and only a few studies have examined discrimination on the grounds of disability and poor health (Villanueva-Flores et al., 2017). However, research suggests that the adverse effects of perceived discrimination are widespread among people with chronic illnesses. According to Nebiker-Pedrotti et al. (2009), 4–20 per cent of people with diabetes feel that they have been unable to get a job because of their condition, while 7–19 per cent say they have lost their jobs because of this disease. These percentages are in line with those found for other chronic diseases such as cancer (7–10 per cent), obesity (up to 17 per cent), and HIV/AIDS (6–18 per cent) (Nebiker-Pedrotti et al., 2009).

Research also indicates that CIEs may not gain access to a job or a promotion because of physical or cognitive limitations (Beatty & Joffe, 2006) or can face and fear discrimination as a consequence of revealing their situation in the workplace (Ragins, 2008). In light of this evidence, we have investigated CIEs' perceptions of discrimination, that is the extent to which chronically ill people believe that they are stereotyped and have experienced some form of discrimination in the workplace because of their disease.

Perceived illness discrimination was measured using a four-item scale that was initially developed to measure discrimination against older workers (Redman & Snape, 2006). Items were adapted to measure the extent

to which a respondent had experienced discrimination because of their chronic disease(s) and measured using a five-point Likert-type scale ranging from 'strongly agree' to 'strongly disagree'. An example item is: 'My chronic illness prevents me from getting jobs for which I think I am qualified'.

Our findings (Fig. 4.2) show that 10 per cent of employees affected by a chronic condition have experienced some form of discrimination in their company. Furthermore, 41 per cent seemed to be unsure, which is concerning. Only 49 per cent said they are not discriminated against because of their health condition. It is also worth noting that our results indicate that age and gender are not correlated with perceived discrimination.

These results are even more significant given that a perception of a climate of discrimination against people with a chronic condition can negatively affect all employees, even those who are not directly the target of discriminatory attitudes and behaviour. Such a perception can negatively affect the organizational climate of inclusion (Profili et al., 2017), that is the collective perception of belonging to an organization in which all individuals are respected and treated fairly regardless of their individual characteristics.

Given the potentially detrimental effects of perceived illness-related discrimination at the individual, group, and organizational levels, our results suggest that employers should make training and communication interventions to increase awareness of chronic illness conditions among all staff, to prevent perceived discrimination and to reduce stereotypical expectations and negative attitudes towards these vulnerable employees.

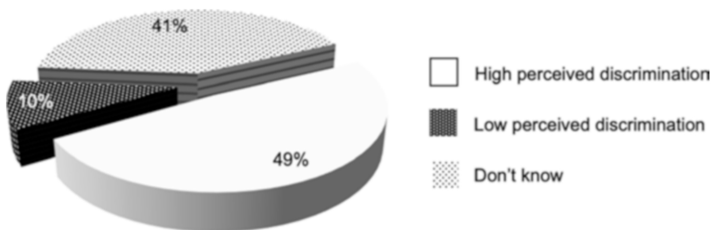

Fig. 4.2 Perceived discrimination among chronically ill employees

Flexible Work Adjustments

Organizations that claim to prioritize inclusion and corporate social responsibility should be creating conditions where workers with chronic illnesses can maintain an active role in the world of work (Branicki et al., 2021). Previous studies (Boot et al., 2013; Profili et al., 2022; Varekamp & Van Dijk, 2010) have highlighted the importance of flexible work adjustments in accommodating the unpredictability of fluctuating symptoms and the changing abilities and motivation that result from the chronic condition. Possible adjustments include a range of interventions: from time flexibility to job changes, from workstation adaptation to teleworking and hybrid working. Some employees may require adjustments to their job role, work environment, or work schedule.

Figure 4.3 shows the most common implemented adjustments reported by our sample, with workstation adaptation, hybrid working, and teleworking being the most frequent.

However, whether and how those adjustments were implemented depended on the individual's manager. CIEs' willingness to engage in an open and constructive dialogue with their supervisor was crucial in enabling the identification of the most appropriate adjustments and their ongoing adaptation. In addition, the HRM (Human Resource Management) Department played an important role in facilitating the identification and implementation of appropriate management interventions. Often, people with limitations and their line managers needed to be

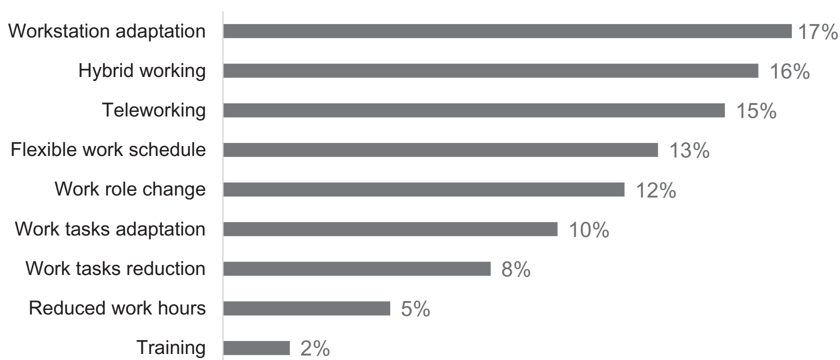

Fig. 4.3 The most frequent work adjustments implemented to accommodate CIEs' needs

'accompanied' in the process of adopting 'work adjustment' solutions that were initially resisted (Profili et al., 2022).

The most frequently reported obstacle among line managers was their need for a greater awareness and more knowledge of the regulatory framework. Many also reported the need for clear guidelines and policies on managing chronically ill workers' requests for flexible work adjustments. In several cases, line managers lamented that they needed more specific knowledge and time to implement targeted measures to meet the needs of such employees. In several cases, a supervisor's previous experience of accommodating a chronically ill or disabled employee enabled them to implement effective adjustments.

Among chronically ill employees, the most frequently reported obstacle was the fear of being stigmatized or even discriminated against by their supervisors and co-workers. Several chronically ill employees reported that the fear of resentment and friction with co-workers prevented them from requesting or accepting accommodations even when they were considered useful.

Discussion and Conclusions

Where companies do have policies addressing illness and disability, these policies are mainly designed for dealing with acute illnesses and fail to address some of the unique features of chronic illnesses (Beatty, 2012), which are long-term, can have ambiguous and oscillatory symptoms, and have unpredictable trajectories.

Overall, the picture emerging from the exploratory study presented in this chapter turns the spotlight on a dimension of diversity—being a chronically ill worker—that is widespread but under-investigated.

Our study shows that chronically ill workers often prefer to keep information about their health status private from their supervisors, colleagues, and/or HR business partners, a phenomenon already noted in studies conducted in other organizational contexts and countries. It is essential, therefore, to promote awareness-raising initiatives to establish an inclusive culture that helps people will chronic illnesses share their status at work. Our results suggest that organizations should put considerable effort into providing flexible work adjustments that increase CIEs' ability to manage their work and sustain their employment. More importantly, organizations should respond to this challenge by offering work adjustments that

can be flexibly used and by supporting their customized implementation (Profili et al., 2022).

Our study also revealed that the successful implementation of work adjustments involves several stakeholders: chronically ill workers, line managers, and co-workers. Further, promoting a supportive culture is critical to avoid the emergence of resentment and friction at the work-team level that can discourage the acceptance and effective implementation of appropriate work modifications. Training and communication interventions that increase awareness of chronic illness conditions among all staff, particularly line management, can reduce negative attitudes and stigma, and increase trust.

Acknowledgements This study has been supported by grants from Lavoroperlapersona Foundation (Italy) and from the European Academy of Management (EURAM).

References

Australian Institute of Health and Welfare (2018). *Chronic conditions and disability 2015*. Cat. no. CDK 8. Canberra: AIHW.

Beatty, J. (2012). Career barriers experienced by people with chronic illness: A US study. *Employee Responsibilities and Rights Journal, 24*(1), 91–110.

Beatty, J., & Joffe, R. (2006). An overlooked dimension of diversity: The career effects of chronic illness. *Organizational Dynamics, 35*(2), 182–195.

Boot, C. R. L., van den Heuvel, S., Bültmann, U., de Boer, A., Koppes, L., & van der Beek, A. (2013). Work adjustments in a representative sample of employees with a chronic disease in The Netherlands. *Journal of Occupational Rehabilitation, 23*(2), 200–208.

Branicki, L., Kalfa, S., & Brammer, S. (2021). "Conceptualizing responsible return to work: Corporate social responsibility in relation to employee return to work after cancer" work. *Employment and Society, 35*(6), 1091–1114.

Busse, R., Blümel, M., Scheller-Kreinsen, D., & Zentner, A. (2010). *Tackling chronic disease in Europe: Strategies, interventions and challenges*. World Health Organization.

Carlier, B., Schuring, M., Lötters, F., Bakker, B., Borgers, N., & Burdorf, A. (2013). The influence of re-employment on quality of life and self-rated health, a longitudinal study among unemployed persons in The Netherlands. *BMC Public Health, 13*(1), 1–7.

Charmaz, K. (2000). Experiencing chronic illness. In G. Albrecht, S. Scrimshaw, & R. Fitzpatrick (Eds.), *Handbook of social studies in health and medicine* (pp. 277–292). Sage.

Clair, J., Beatty, J., & Maclean, T. (2005). Out of sight but not out of mind: Managing invisible social identities in the workplace. *Academy of Management Review, 30*(1), 78–95.

Collins, N., & Miller Lynn, C. (1994). Self-disclosure and liking: A meta-analytic review. *Psychological Bulletin, 116*(3), 457–475.

Detaille, S.I., Haafkens, J.A., Hoekstra, J.B., van Dijk, F.J.H. (2006). What employees with diabetes mellitus need to cope at work: views of employees and health professionals, *Patient Education and Counseling, 64*, 183–90.

Eurofound. (2019). *How to respond to chronic health problems in the workplace?* Publications Office of the European Union.

Fiske, S. T. (1998). Stereotyping, prejudice, and discrimination. In D. T. Gilbert, S. T. Fiske, & G. Lindzey (Eds.), *The Handbook of Social Psychology*, (4th edn., pp. 357–414). New York: McGraw-Hill.

Gignac, M., & Cao, X. (2009). Should I tell my employer and coworkers I have arthritis? A longitudinal examination of self-disclosure in the workplace. *Arthritis Care & Research, 61*(12), 1753–1761.

Goldman, B. (2001). Toward an understanding of employment discrimination claiming: An integration of organizational justice and social information processing. *Personnel Psychology, 54*(2), 361–387.

Goldman, B., Gutek, B., Stein, J., & Lewis, K. (2006). Employment discrimination in organizations: Antecedents and consequences. *Journal of Management, 32*(6), 786–830.

Gutek, B. (2001). Working environments. In J. Worell (Ed.), *Encyclopedia of women and gender* (pp. 1191–1204). Academic Press.

James, K., Lovato, C., & Cropanzano, R. (1994). Correlational and known-group comparison validation of a workplace prejudice/discrimination inventory. *Journal of Applied Social Psychology, 24*(17), 1573–1592.

Maunsell, E., Brisson, C., Dubois, L., Lauzier, S., & Fraser, A. (1999). Work problems after breast cancer: An exploratory qualitative study. *Psycho-Oncology: Journal of the Psychological, Social and Behavioral Dimensions of Cancer, 8*(6), 467–473.

Munir, F., Leka, S., & Griffiths, A. (2005). Dealing with self-management of chronic illness at work: Predictors for self-disclosure. *Social Science & Medicine, 60*(6), 1397–1407.

Nebiker-Pedrotti, P., Keller, U., Iselin, H.-U., Ruiz, J., Pärli, K., Caplazi, A., & Jardena, P. (2009). Perceived discrimination against diabetics in the workplace and in work-related insurances in Switzerland. *Swiss Medical Weekly, 139*(7–8), 103–109.

Nolte, E., & McKee, M. (2008). *Caring for people with chronic conditions. A health system perspective* (European observatory on health systems and policies series). Open University Press.

OECD/EU. (2018). *Health at a glance: Europe 2018: State of health in the EU cycle*. OECD Publishing. https://doi.org/10.1787/health_glance_eur-2018-en.org

Pinder, R. (1995). Bringing back the body without the blame? The experience of ill and disabled people at work. *Sociology of Health & Illness, 17*, 605–631.

Profili, S., Innocenti, L., & Sammarra, A. (2017). A conceptual framework of age diversity climate. In *Age diversity in the workplace* (Advanced series in management) (Vol. 17, pp. 95–116). Emerald Publishing Limited.

Profili, S., Sammarra, A., Innocenti, L., & Bos-Nehles, A. (2022). The role of line managers in the implementation of work adjustment practices for chronically ill employees: A qualitative study. In *Research handbook on line managers* (pp. 285–304). Edward Elgar Publishing.

Ragins, B. R. (2008). Disclosure disconnects: Antecedents and consequences of disclosing invisible stigmas across life domains. *Academy of Management Review, 33*(1), 194–215.

Redman, T., & Snape, E. (2006). The consequences of perceived age discrimination amongst older police officers: Is social support a buffer? *British Journal of Management, 17*(2), 167–175.

Rindova, V., Williamson, I., Petkova, A., & Sever Joy, M. (2005). Being good or being known: An empirical examination of the dimensions, antecedents, and consequences of organizational reputation. *Academy of Management Journal, 48*(6), 1033–1049.

Rolland, J. (1987). Chronic illness and the life cycle: A conceptual framework. *Family Process, 26*(2), 203–221.

Shrier, D., Zucker, A., Mercurio, A., Landry, L., Rich, M., & Shrier, L. (2007). Generation to generation: Discrimination and harassment experiences of physician mothers and their physician daughters. *Journal of Women's Health, 16*(6), 883–894.

Spelten, E., Sprangers, M., & Verbeek, J. (2002). Factors reported to influence the return to work of cancer survivors: A literature review. *Psycho-Oncology: Journal of the Psychological, Social and Behavioral Dimensions of Cancer, 11*(2), 124–131.

Triana, M. D. C., & Garcia Maria, F. (2009). Valuing diversity: A group-value approach to understanding the importance of organizational efforts to support diversity. *Journal of Organizational Behavior, 30*(7), 941–962.

Varekamp, I., & Van Dijk, F. (2010). Workplace problems and solutions for employees with chronic diseases. *Occupational Medicine, 60*(4), 287–293.

Varva, S. (2015). *Malattie croniche e lavoro* (Adapt Labour Studies, e-Book series n. 27). Adapt University Press.

Villanueva-Flores, M., Valle, R., & Bornay-Barrachina, M. (2017). Perceptions of discrimination and distributive injustice among people with physical disabilities:

in jobs, compensation and career development. *Personnel Review, 46*(3), 680–698.

Werth, S., Peetz, D., & Broadbent, K. (2018). Issues of power and disclosure for women with chronic illness in their places of work. In *Palgrave explorations in workplace stigma* (pp. 171–186). Palgrave Macmillan Ltd..

Wilkins, E., Wilson, L., Wickramasinghe, K., Bhatnagar, P., Rayner, M., & Townsend, N. (2017). *European cardiovascular disease statistics*. European Heart Network.

CHAPTER 5

Gender Equality and Public Policies

Tindara Addabbo and Mariagrazia Militello

Introduction

As Gender Equality Strategy 2020–2025 pointed out "The promotion of equality between women and men is a task for the Union, in all its activities, required by the Treaties. Gender equality is a core value of the EU, a fundamental right and key principle of the European Pillar of Social Rights. It is a reflection of who we are. It is also an essential condition for an innovative, competitive and thriving European economy. In business, politics and society as a whole, we can only reach our full potential if we use all of our talent and diversity. Gender equality brings more jobs and higher productivity—a potential which needs to be realized as we embrace the green and digital transitions and face up to our demographic challenges".

In this perspective, this chapter will focus on gender equality in the labour market and structural inequalities in the distribution of care

T. Addabbo (✉)
Department of Economics "Marco Biagi" and Marco Biagi Foundation, University of Modena and Reggio Emilia, Modena, Italy
e-mail: tindara.addabbo@unimore.it

M. Militello
University of Catania, Catania, Italy

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_5

responsibilities within the family and tries to verify the reasons for these differences and the possible legislative solutions.

The structure of this chapter is as follows: the first section starts by showing the gender inequalities in employment in European countries, and then, focusing on three countries characterized by different levels of gender gap into employment provides an overview on inequalities in other key indicators of the labour market and in the determinants that have been associated to the observed differences providing descriptive statistics. The second section analyses the main factors affecting the different levels of female employment in the literature while the third section analyses the role of work-life balance policies to the achievement of gender equality. The final section provides some concluding remarks.

Gender Inequalities in Paid and Unpaid Work

Main labour market indicators confirm a rather heterogeneous presence of female labour supply across European countries with different outcomes in terms of observable gender inequalities in paid labour.

On average in EU 27 employment rates for men aged from 20 to 64 is 80% and for women 69% with a 10.6 percentage points of gap at women's disadvantage (Table 5.1). A gap computed by the difference between the employment rates of men and women of working age (20–64 years) that ranges from 0.8 percentage points in Lithuania to 21 percentage points in Greece. In this context Italy stands at the last place in terms of female employment rate (55%) and shows a gender gap of about 20 percentage points. Southern European countries are characterized by lower female employment rates than on average, however, though Spain and Italy are both Southern European countries, one can notice an almost 10 points higher female employment rate in Spain (64%) and a lower gender gap in employment at the disadvantage of women than in Italy. According to the European Institute for Gender Equality (EIGE) (2022), Italy is also the EU country with the lowest achievement in terms of gender equality in the work dimension with a mark of 63.2 out of 100 against 73.6 for Spain and 83 out of 100 for Sweden and 71.7 for EU 27. Gender inequalities in the employment likelihood have also been exacerbated by the impact of pandemics (Addabbo, 2021; Queisser, 2021; Profeta, 2021; Nivakoski & Mascherini, 2021).

The observed differences in employment rates are even wider if one considers the impact of children on employment rates (Tables 5.2a, 5.2b).

Table 5.1 Employment rates by gender age group 20–64. Year 2022

	M	*F*	*M-F*
Belgium	75.7	68.1	7.6
Bulgaria	79.5	71.8	7.7
Czechia	88.6	73.7	14.9
Denmark	82.8	77.4	5.4
Germany	84.9	77.1	7.8
Estonia	83.3	80.4	2.9
Ireland	83.9	72.6	11.3
Greece	76.9	55.9	21.0
Spain	**75.0**	**64.1**	**10.9**
France	77.0	71.2	5.8
Croatia	74.5	65.0	9.5
Italy	**74.7**	**55.0**	**19.7**
Cyprus	84.2	72.1	12.1
Latvia	78.6	75.5	3.1
Lithuania	79.4	78.6	0.8
Luxembourg	78.0	71.5	6.5
Hungary	85.1	75.3	9.8
Malta	87.2	74.1	13.1
Netherlands	86.9	79.0	7.9
Austria	81.2	73.4	7.8
Poland	83.1	70.2	12.9
Portugal	80.4	74.8	5.6
Romania	77.7	59.1	18.6
Slovenia	81.2	74.3	6.9
Slovakia	80.7	72.6	8.1
Finland	79.0	77.8	1.2
Sweden	85.0	79.2	5.8
Iceland	87.3	82.1	5.2
Norway	**83.7**	**78.0**	**5.7**
EU 27	80.0	69.4	10.6

Source: our elaborations on Eurostat Employment and activity by sex and age—annual data (lfsi_emp_a) from Labour Force Survey data

The gender gap at the advantage of men in terms of employment rates increases with the presence of children in all countries but with a higher impact in the two Southern European countries analysed in this essay. The largest gap in employment rates can be observed in Italy when in the presence of more than 2 children in the family (44 percentage points of differences in the employment rates of fathers and mothers) or if the youngest child is younger than six (34 percentage points) (Table 5.2c).

Table 5.2a Employment rates 25–54 years old by gender and presence of children—year 2021

	Total		*Without children*		*With one child*		*With 2 children*		*With more than 2 children*	
	M	*W*	*M*	*W*	*M*	*W*	*M*	*W*	*M*	*W*
EU 27	85.1	74.6	81	77.1	89.8	74.9	91.4	73.8	86.7	58.4
Spain	80.7	70.1	75.9	70.7	85.5	69.6	89.7	72	81.2	57.6
Italy	80.2	60.1	74.7	62.6	87	60.6	89	56.7	85.4	41.1
Norway	85.8	81.1	80.7	78.1	91	80.4	93.6	88.7	91.7	81.9

Table 5.2b Employment rates 25–54 years old by gender and age of the youngest child year 2021

Age of the	*<6*		*Six to eleven*		*12 or over*	
youngest child	*M*	*W*	*M*	*W*	*M*	*W*
EU 27	89.9	66.9	90.5	74.9	89.9	77.8
Spain	84.8	67.5	89	71.5	87.1	69.5
Italy	87.9	53.6	88.6	59.9	86.2	60.5
Norway	92.7	80.1	91.4	88.9	92.4	84.9

Table 5.2c Gap in employment rates 25–54 years old M-W year 2021

	Total	*Without*	*1 child*	*2 children*	*>= 3 children*	*< 6*	*Six to 11*	*12 over*
EU 27	10.5	3.9	14.9	17.6	28.3	23	15.6	12.1
Spain	10.6	5.2	15.9	17.7	23.6	17.3	17.5	17.6
Italy	20.1	12.1	26.4	32.3	44.3	34.3	28.7	25.7
Norway	4.7	2.6	10.6	4.9	9.8	12.6	2.5	7.5

Source: our elaboration from Eurostat metadata LFST_HHEREDCH

Turning to the type of work contract, one can see how the countries analysed differ in terms of the presence of part-time work contract by gender (Table 5.3a). Part-time work, as on average in EU 27 countries, is more spread amongst women (Table 5.3a) with a higher percentage of women working part-time on total employment in Norway (32.6%) and Italy (31.4%). However, involuntary part-time work is much more spread

Table 5.3a Percentage of part-time employment on total employment by gender age 20–64—year 2021

	PT	
	M	*W*
EU 27	7.6	28.2
Spain	6	22
Italy	8.3	31.4
Norway	13	32.6

Source: Eurostat metadata LFSA_EPPGA

Table 5.3b Involuntary part-time on total part-time employment by gender age 20–64—year 2021

	Involuntary % of PT	
	M	*W*
EU 27	31.7	21.6
Spain	59.8	52.1
Italy	78.1	57.3
Norway	16.7	17.6

Source: Eurostat metadata LFSA_EPPGAI

in Italy and Spain rather than on average in EU 27 and in Norway (Table 5.3b). The highest presence of involuntary part-time work is amongst men in Italy (78% of them work part-time involuntary) and in Spain (almost 60% of men work involuntary part-time) followed by women in Italy (57% of women working part-time work part-time involuntary) (Table 5.3b).

Part-time work for adults living as a couple is more widespread for women living as couples with children (Table 5.3c).

Turning to the main reasons given for working part-time consistently with the high presence of involuntary part-time work, the main reason is no full-time job in Spain and Italy, followed by family reasons for women (20% of women working part-time in Spain and 30% of women working part-time in Italy) and by education or training or for other reasons for men (Table 5.3d).

Table 5.3c Percentage of part-time employment on total employment amongst adult couples aged 18–64 by gender and presence of children—year 2021

	With children		*Without children*	
	M	*W*	*M*	*W*
EU 27	5.1	34.3	7.7	27.5
Spain	3.5	23.3	6.2	18.1
Italy	5.8	37.1	7.3	26.6
Norway	5.1	23.5	10.0	27.9

Source: Eurostat metadata LFST_HHPTETY

Table 5.3d Main reason working part-time on total part-time employment by gender age 20–64—year 2021

Main reason	*No full-time job*		*Family reasons*		*Education or training*		*Own illness or dis.*		*Other reasons*	
	M	*W*	*M*	*W*	*M*	*W*	*M*	*W*	*M*	*W*
EU 27	31.7	21.6	8	33.5	17.1	6.9	8.4	4.9	34.7	33.2
Spain	59.8	52.1	3.5	20.1	11.4	6.1	2.3	1.3	23.1	20.5
Italy	78.1	57.3	3.1	30.4	3.5	1.8	2.4	1.7	12.8	8.8
Norway	16.7	17.6		10.9	28.7	21.5	16.3	19.9	36.1	30.1

Source: Eurostat metadata LFSA_EPGAR

A measure that considers jointly the average hourly earnings, the monthly average of the number of hours paid and the employment rate, is the gender overall earnings gap. Eurostat (2023) shows that in 2018, the gender overall earnings gap was 36.2% on average in EU countries, 27.6 in Norway, 33 in Spain, and 43 in Italy (see Eurostat, 2023, Table 1).

Eurofound (2022) based on EWCTS survey confirms gender segregation of sectors, occupations and workplaces and highlights the persistence in gender inequalities in the distribution of paid and unpaid work: on average men spend about 6 hours more than women per week in paid work, whereas women spend 13 hours more than men in unpaid work a week and 7 hours of total (paid and unpaid work) per week in 2021. A factor that is positively related to work-life balance is the flexibility measured with a positive reply to being able to take time off very easily. Flexibility appears to be less spread for women (29% of women could do so) than for

men (37% of men can enjoy flexibility at work). Eurofound (2022) also finds evidence across EU countries of higher occurrence of work-life conflicts for women than for men.

Behind the observed inequalities in the labour market there is a different allocation of time by gender and a different role in social reproduction (Table 5.4a). Time use surveys referred to the latest available year show gender inequalities in the time allocation. As shown in Table 5.4b, in fact, summing up paid and unpaid work (that includes routine housework; shopping; care for household members; childcare; adult care; care for non-household members; volunteering; travel related to household activities; other unpaid activities) total working time is 1 hour and almost 20 minutes higher for women in Italy (Table 5.4b) and 1 hour and 14 minutes in Spain, whereas the total working time is higher for men in Norway. Women spend on average almost three hours more than men daily in unpaid work in Italy against one hour more in Norway. The much higher gap in unpaid work reveals a much more unequal distribution of work in Southern Countries like Spain and Italy and leaves women in these countries less time for other activities. A gap that has even increased during pandemics when, due to confinement, closures of childcare services and schools have occurred. Farré et al. (Farré et al., 2022a, 2022b) did find in Spain a rather small effect of the lockdown in the gendered distribution of tasks within Spanish households where gender norms rather than differences in bargaining power or in time availability seem still to dominate the observed inequalities in time allocation by gender.

According to OECD data on the enrolment rates of young children by type of programme and by age group referred to year 2020, the enrolment rate of children under 3 years in International Standard Classification of Education (ISCED) 0 level is 5.2% in Italy against 41% in Spain and 58.3%

Table 5.4a Minutes per day by gender in work activities age group 15–64. Latest year available

	Men			*Women*		
	Paid	*Unpaid*	*Total*	*Paid*	*Unpaid*	*Total*
Italy	221	131	352	133	306	439
Norway	277	168	446	200	227	427
Spain	236	146	382	167	289	456

Source: Our elaborations from Oecd Time Use Database

Table 5.4b Gender gap in minutes per day in work activities age group 15–64. Latest year available. M-W

	Paid	*Unpaid*	*Total*
Italy	88	-176	-88
Norway	77	-59	18
Spain	69	-143	-74

Source: Our elaborations from Oecd Time Use Database

Table 5.5 Percentage of children (under 3 years old) cared for by formal arrangements other than by the family—year 2021

Italy	26%
Norway	65%
Spain	57%

Source: Eurostat based on EU-SILC data

TEPSR_SP210 https://ec.europa.eu/eurostat/databrowser/product/view/ILC_CAINDFORMAL

in Norway (OECD, 2022). By using European Union Statistics on Income and Living Conditions (EU-SILC) (statistics on income, social inclusion and living conditions) the percentage of children (under 3 years old) cared for by formal arrangements other than by the family shows 40 percentage points difference amongst Italy and Norway (Table 5.5).

According to Italian National Institute of Statistics (ISTAT) (2022) estimate, the coverage rate in year 2020/2021 is 29% with a high regional heterogeneity from regions in the Centre-North of the country with a coverage rate above 40% as Umbria (44%) and Emilia Romagna (40.7%) to regions in the South of Italy with a coverage rate below 12% (as for Campania and Calabria).

A universal legal entitlement to early childhood education and care (ECEC) is at age three in Spain, one in Norway while there is no universal legal entitlement to ECEC in Italy (European Education and Culture Executive Agency, Eurydice, Parveva et al., 2022).

Turning to the take-up of parental, paternity and maternity leaves in the three countries analysed a positive impact of earmarked and more generous parental leaves on fathers' take-up of parental leaves can be detected in Norway (Bungum & Kvande, 2022). The 2019 reform introduced by the gender equality law replaced the term paternity leave with birth and childcare leave and benefit for the parent other than the biological mother,

introducing sixteen weeks for all employed fathers (including self-employed) and of them six compulsory following births with a 100% coverage (Meil et al., 2022) a much longer duration than the ten days of the paternity leaves (i.e., paid 100% of father's wage, more than the 80% granted to mothers as maternity leave) introduced in Italy (Addabbo et al., 2022).

The ratio of fathers taking the leave over eligible fathers produce a take-up rate of 89% for Spain (Meil et al., 2022), on the other hand, even if compulsory, the majority of fathers do not take advantage of paternity leave (Addabbo et al., 2022), one should actually notice that, differently from the prohibition to work during the maternity leave, paternity leave in Italy is a potestative right that can be waived.

On average, according to data from the European Working Conditions Telephone Survey (EWCTS) 2021, 85% of people who are working consider that their working hours fit well or very well with their family or social commitments outside work in Norway without differences by gender, this percentage is lower in Spain and in Italy with a higher degree of satisfaction for women than for men (Table 5.6a). The percentage of workers that experience the highest degree of balance between working hours and other family or social commitments outside work is the lowest in Italy with respect to Norway and Spain (Table 5.6b). A higher work-life balance on average for women has been detected also before pandemics by using European Working Conditions 2015 survey, though women with higher care responsibility show a lower fit than women without caring responsibilities (Eurofound, 2017).

During pandemics a general deterioration of work-life balance has been experienced especially for women (Eurofound, 2020).

Table 5.6a In general, how do your working hours fit in with your family or social commitments outside work?

	M	*W*
Italy	75%	78%
Spain	78%	80%
Norway	85%	85%

Source: Our elaborations from European Working Conditions Telephone Survey (EWCTS) 2021

Table 5.6b In general, how do your working hours fit in with your family or social commitments outside work?

	Italy		*Spain*		*Norway*	
	Man	*Woman*	*Man*	*Woman*	*Man*	*Woman*
Very well	23.8	21.22	35.22	38.54	41.7	41.15
Well	51.54	57.07	43.21	40.97	42.87	43.42
Not very well	18.58	15.67	11.86	13.66	11.38	12.51
Not at all well	6.08	6.04	9.71	6.83	4.05	2.92
Total	100	100	100	100	100	100

Source: Our elaborations from European Working Conditions Telephone Survey (EWCTS) 2021

Female Labour Supply Determinants in Italy, Norway and Spain

What are the factors affecting the different levels of female employment in the three countries analysed in the previous section?

A first factor affecting labour supply is the *model of taxation* and the existence and amount of *in-work benefits*. Consistently with the expected impact of taxation on female labour supply according to the family labour supply model, Colonna and Marcassa (2015) found a negative impact on second-earner's (usually women due to the wage gap at their disadvantage) labour supply in the presence of the high tax rate and tax credits and transfers that can be found in Italy. On the other hand, by applying the French tax system with a taxation not at the individual level but to the family income as a whole, plus cash-benefits provided to families would have a negative impact on female labour supply in Italy reducing the tax rate of income of family with more than three children as found by Brunori et al. (2020). The introduction of *in-work benefits* in Spain has been estimated to have a positive effect on female labour force participation rate especially for low-income households by Oliver and Spadaro (2017).

Unpaid work and its unequal distribution between partners in the family shown in the previous section affect both female labour supply probability (by increasing more the fixed costs for women in entering the labour market than for men) and the gender gap in wages. The *unbalanced gender allocation of time* with a higher share of unpaid work for women has been found to have a negative impact on women's wages and a positive

one on their partner's wages thus contributing to the increase in the wage gap at their disadvantage (Matteazzi & Scherer, 2021).

The more unequal the unpaid work distribution between partners, the higher the exposure for the partner performing most of care work to the risk of being out of the labour market or to work less hours.

The three countries are characterized by different parental, paternity and maternity leaves design and duration and by a different presence of childcare services (Koslowski et al., 2022).

By using the Italian component of EUROMOD (the multi-country European wide tax-benefit model) Figari and Narazani (2020) show that in a context like Italy with limited access to public childcare, a higher investment in childcare increases female labour supply with a higher impact on mothers with a lower income level than mothers with higher household income and a higher impact for women living in the South of Italy (characterized by lower female labour supply and low presence of childcare facilities). Moreover, during pandemics, the difficulties connected with schools and childcare services temporary closures generated more difficulties in balancing paid work and family life for families with children, with an increased burden especially for women (Del Boca et al., 2020).

As shown in Sect. 1, childcare services are much more extended in Scandinavian countries and the reform that has expanded childcare services for 1–2 years old in Norway has been found to have a positive impact on the probability of mothers' employment with a long-term effect for mothers with more than one child on both of their employment probability and their hours of work (Kunze & Xingfei, 2019).

Turning to parental, maternity and paternity leaves, their impact on female labour supply has been widely analysed in the literature (see Lassen et al., 2022 for a survey of the literature). Earmarked paternity leaves have been found to be effective in increasing fathers' leave-taking (Kvande & Brandth, 2019) and their involvement in childcare, though the evidence of their impact on female labour supply has been found to be mixed (Lassen et al., 2022) and heterogeneous across EU countries with a positive impact of paternity leaves on mothers' labour supply and hours of work in some of them (Bacheron, 2022). With reference to the Spain reform on the introduction and length of paternity leaves on fathers' leave uptake, Jurado-Guerrero and Muñoz-Comet (2021) find a positive impact of the extension of the duration of paternity leaves on fathers' uptake with a reduction in the social gaps in the uptake. An indirect positive impact of the introduction of paternity leaves and fathers' eligibility can be also

related to the change that their introduction produces on their children's gender norms showing more egalitarian attitudes towards gender roles also in terms of a more equal allocation of time within the couple as found by Farré et al. (2022a, 2022b).

The different institutional factors at work in Italy and Spain have been found to affect the impact of the economic crisis on female labour supply in the two countries showing the prevalence of the added-worker effect for women in Spain, and of the discouraged worker effect for women in Italy (Addabbo et al., 2015).

Inequality at Work and Unequal Distribution of Care Work at Home

The European Commission in a Communication made before the outbreak of the pandemic about the initiative to support work-life balance for working parents and carers stated that "Taking action (in the field of equality between men and women) is not only a question of fairness, gender equality and optimal allocation of skills but also a question of countries' fiscal sustainability. It is both a social and an economic imperative".

Inequality between men and women related to access and to working conditions in the labour market and in the distribution of care responsibilities within the family, of course depends on a widespread cultural attitude but it is also the result of both lack of adequate measures as well as application of inadequate legislative solutions (Alessi, 2018; Militello, 2020).

The problem of (in)equality is made up of several issues, all connected to each other and related, on one hand, to the old question of women's work, mostly underrepresented (except in the poor and precarious sectors of the labour market) and underpaid; and, on the other hand, to the overrepresentation of women in unpaid care work.

So, the inequality cannot be considered as a whole, but it must be faced from different perspectives, starting with the evaluation of what has not worked so far.

From a legal standpoint, the analysis must concern the existing measures and those that should be adopted, in relation to the objectives pursued.

Since the field of investigation is very broad, the following reflections will be developed on the analysis of the instruments used to guarantee the

right to conciliation. In fact, as an International Labour Organization (ILO) report from 5 years ago stated, "motherhood carries a wage penalty resulting from the interruption of the career trajectory and the tendency to regard mothers as being less ambitious and available for work than men" (Report ILO, 2018).

Starting from this point of view, the recent 1158/2019/EU directive adopted by the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers has pointed out the importance of contribution of work-life balance policies to the achievement of gender equality "by promoting the participation of women in the labour market, the equal sharing of caring responsibilities between men and women, and the closing of gender gaps in earnings and pay" (cons. no. 6).

Through this directive, the European legislator has expressly recognized the importance of work-life balance as an essential instrument to achieve gender equality (Busby, 2018), highlighting that "work-life balance remains a considerable challenge for many parents and workers with caring responsibilities, in particular because of the increasing prevalence of extended working hours and changing schedules, which has a negative impact on women's employment" (cons. no. 10).

As already mentioned, the actual situation—structural discrimination in the labour market and unequal distribution of care responsibilities—is largely due to a strong and widespread resistance to a structural and cultural change and further re-enforced by the application of an apparatus of legislative rules that are still standing on the idea that the leave and the parenting remain mainly a mothers' issue, as the main part of the burden of work-life balance. This means that this cultural vision has always influenced the national legislators in their choices, as will be seen later.

In the case of caring responsibilities, the problem relates to stereotyped roles within the family and the impact of what would be a personal choice—irrespective of the mandatory nature of the leave—on paid work. Because the point is that there should not be an impact; fathers and mothers should be able to choose how to care for their children, without worrying about how this will affect their work. Currently, this is not the case.

For this reason, the legislative action should follow two different paths: it should concern, on one hand, the regulation of parental leave, that in most legal systems is mandatory only for mothers with fathers in a subordinate position even where the regulation is advanced as it is in Norway; and on the other, the work and working hours organization which is still

built mainly to meet employer's interests and does not take into account the workers' personal needs.

The only way to equality would be by putting the fathers on an equal footing with mothers with respect to not only care responsibilities but also work, eliminating the differences for the employers in choosing a man or a woman for an employment or a promotion.

At the basis of the different problems affecting gender inequality there is a structural discrimination of women both within labour market and family life, ossified on both traditional patterns of work organization built mainly on male breadwinner model, and on the other in a stereotyped conception of gender roles (Ales, 2008). The two aspects are inextricably connected. So, the real point is the sexual division of work: paid for men and paid and unpaid for women.

Most of the solutions adopted by the legislators to solve these issues fail to get to the heart of the problem, that is the fact that women's condition is not comparable to any other minority group condition, because women are not a minority. As Marzia Barbera observed, "Being a woman does not constitute the category of an interest group among others, but a way of being of the human person" (Barbera, 1999, p. 115).

Being a woman should not be an obstacle neither at work nor in the family. Yet, it is.

Starting from this, because gender equality is a social and an economic imperative, as the Commission said, and discrimination is a violation of human dignity and it depends on structural mechanisms, the role of law is to modify them, as long as being a woman will no longer be an obstacle. Until this happens, with regards to caring responsibilities, for how much time the choice about who cares—whether father or mother—will not be indifferent for employers, this choice should not be free for parents.

Not by chance, the above-mentioned directive identified paternal leave and flexible working schedules as the principal tools for achieving work-life balance.

On one hand, European legislator has indicated to the Member States the need to adopt "the necessary measures to ensure that fathers or, where and insofar as recognized by national law, equivalent second parents, have the right to paternity leave of 10 working days that is to be taken on the occasion of the birth of the worker's child. (…) " (art. 4). Furthermore, workers should be provided with a right to an adequate allowance while on leave, to increase incentives to men in particular to take periods of leave.

On the other hand, the directive has pointed out the need to take "measures to ensure that workers with children up to a specified age (…) and carers, have the right to request flexible working arrangements for caring purposes (…)" (art. 9, co. 1).

Finally, Member States shall take the necessary measures to prohibit less favourable treatment on the ground that they have applied for, or have taken, leave or that they have exercised the rights to flexible working arrangements. This provision is essential to strengthen the protection against discrimination on specific grounds of parenthood and caring responsibilities, because considering a discrimination against a worker with care responsibilities an indirect form of discrimination grounded on gender is itself a form of discrimination.

Work-life Balance Instruments in Italy, Spain and Norway

With reference to work-life balance, the national legal systems differ from each other both with regard to the specific instruments adopted and to the approach chosen for the division of care responsibilities.

Since it is not possible to consider all European legal systems, the brief analysis will focus on three countries analyzed in the first part of the paper, two of which are part of the European Union and one is not: Italy, Spain and Norway.

One thing common to all legal systems considered is that the question is not so much the lack of tools rather than the fact that the existing tools have always been used in the wrong direction. The main goal normally pursued has always been to ensure women can be mothers and workers at the same time; instead of trying to spread the culture of equal sharing of care responsibilities. Because of this, even the most advanced systems, such as the Norwegian one, show their weakness with respect to the issue of gender equality.

Italy

In Italy there is a very advanced legislation, but mainly on maternity protection, providing mandatory maternity leave for 5 months, paternity leave (only in specific situations, i.e., when mother cannot take care of the child) and parental leave for both parents, paid only at 30% of wage. Recently, the legislator introduced a 10 days paternity leave, not

mandatory as maternity one, with the decree n. 105/2022 implementing the directive 1158/2019.

Although the Italian legislation provides the protection and support of both mothers and fathers, in fact it presents an asymmetrical architecture, clearly unbalanced in favour of mothers. The origin of this approach lies in the art. 37 of the Constitution and in reference to that "essential family function" performed by the mother which must be ensured through the provision of adequate working conditions and which, in fact, has contributed to the crystallization of a precise division of roles within of both the family, with an unequal distribution in care responsibilities, and the labour market (Ales, 2016). So, the problem is not the lack of protective instruments at all but the idea that the mother primarily has to take care of the child; because of this, the Italian legal system does not have tools that strengthen the role of the father and guarantee equal distribution of care responsibilities. This regulation has serious repercussions on the labour market (Alessi et al., 2023).

Spain

With regards to the instruments, the situation is different in Spain where recently the legislator adopted new rules on parental protection (legislative decree n. 6/2019). From 1 January 2021, new fathers (or equivalent second parent) will be entitled to 16 weeks of paternity leave, a period of time equivalent to maternity leave and non-transferable. Until now, men in Spain were entitled to 12 weeks of birth or adoption leave.

Now, both parents will have to share the first 6 weeks of leave together, which coincide with the first month and half of the child's life (even adopted). The following 10 weeks are voluntary; parents can decide whether to use them full-time or share them with each other (Romero, 2022).

In three years, Spain has become one of the states with the most progressive legislation in the EU. For the sociologist Constanza Tobìo, this measure marks the end of a process in terms of permits; "it conveys the message that parents have the right and the obligation to care, under the exact same conditions and on the same terms as women" (Tobìo, 2020).

There are still not enough data to verify how this reform affects effective gender equality at work and at home, since this depends both on the fathers' effective use of the new birth leave (*permiso por nacimiento y cuidado de menor*); and then on the ability and willingness of the father to

share care responsibilities with the mother. So, due to the lack of data, it is not yet possible to study the uptake of the 16 weeks of leave, but it is possible, for example, to observe the increase in fathers' take-up rates of leave from 4 to 5 weeks. During the economic crisis and in the first three years of recovery, the rates of use of the two weeks of leave ranged from 66% to 71% of employed fathers; extending to four weeks in 2017 and five weeks in 2018, an 80% utilization is estimated. This is a significant use and, when compared to that of mothers, the gender gap is almost nullified.

Norway

Finally, Norway has been a pioneer in parenting protection, with the introduction of four weeks paternity leave as early as 1993 that became of about three months after more or less twenty years (Kvande & Brandth, 2017). As stated in a recent paper (Hack, 2023), today the leave scheme is based on three key concepts: first, the child's need for contact with one of the parents throughout the first year of life, then the health of both mother and child, and finally gender equality. The parental leave scheme provides 15 weeks reserved for the father, 18 weeks for the mother, and others 16 weeks that can be distributed between the parents as they decide. Finally, both parents are entitled to one year of unpaid leave after the end of the parental benefit period.

Despite the fact that to be entitled to paid parental leave, mother and father need to have been professional active before using the leave, an important aspect of the regulation is that the father's quota can be used even if the mother is at home with the child. This underlines the importance attributed to the role of the father in the care of the child, which is a fundamental step to achieve sharing of responsibilities. But, at the same time, the withdrawal of paternity leave beyond the father quota is conditioned to the mother's activity and it is provided only for fathers, not for mothers. It was a point much discussed to the point that so as to have required the intervention of the National Insurance Court in 2015 and it was also criticized by European Free Trade Association's (EFTA's) Surveillance Authority in an infringement case in July 2018.

In a recent proposal, the Norwegian legislator introduced a period of 8 weeks for the father—which coincides with the minimum period required by the directive 1158/2019—not conditioned by the activity of the mother.

Given this legislative framework, of course, the fathers' condition has changed, also creating a gendered change in society. But it was not enough to ensure gender equality in the labour market (Bjørnholt, 2011). Despite Norway being considered one of the most egalitarian countries in the world, ranking second after Iceland in 2018 by the Global Gender Gap Report (World Economic Forum, 2018), there are still some critical issues: for example, the job sectors in which women are present often have lower wages; many women work on part-time contracts, even if over time the percentage has decreased (Forseth, 2019).

Family Friendly Working Time

As briefly described, the three countries considered have different leave regulations which necessarily affect the division within the family and also on the labour market. But this is only a part of the issue, because, in addition to the regulation of maternity, paternity and parental leaves, the other very important step to achieve work-life balance is the provision of a flexible working time.

As mentioned above, the directive pointed out the importance of the role of working time on work-life balance; for this reason, "in order to encourage workers who are parents, and carers to remain in the work force, such workers should be able to adapt their working schedules to their personal needs and preferences. To that end and with a focus on workers' needs, they have the right to request flexible working arrangements for the purpose of adjusting their working patterns, including, where possible, through the use of remote working arrangements, flexible working schedules, or a reduction in working hours, for the purposes of providing care" (cons. no. 34).

Working time is also considered a fundamental dimension of decent work; in this direction, to be decent, working time should be *family friendly*; promote gender equality; and facilitate worker choice and influence over their hours of work. The ILO report points out that the amount of working hours is one of the most important factors in determining whether one's work is compatible with family responsibilities and that both "inflexible" working hours and limited childcare tend to reinforce the traditional "male breadwinner—female homemaker" division of labour within households and create difficulties in combining paid work and family duties (Messenger, 2004).

Normally, the flexibility of working time translates into its reduction, in particular in the form of part-time work (Alessi, 2012). But, as the directive pointed out "while working part-time has been shown to be useful in allowing some women to remain in the labour market after having children or caring for relatives with care or support need, long periods of reduced working hours can lead to lower social security contributions and thus reduced or non-existing pension entitlements" (cons. no. 35). In fact, part-time jobs are often of lesser quality than comparable full-time jobs in terms of wages, career opportunities and part-time work is gender-segregated in nearly all of the countries in which it exists.

For this reason, the best working time measures to balance family and professional life are flexible working schedules, with the provision of the right for the workers to adapt working time when they need to handle their family responsibilities (ILO's Workers with Family Responsibilities Convention 1981, n. 156).

The point is that flexible working time measures have not to be only family friendly, but have to be family friendly and promote gender equality. Because in the first case, if they were only family friendly, they would have the effect of further segregating women, as happened with part-time work.

In this direction, there are many types of flexible working time arrangements that can contribute to reconcile work and family life: for example, a periodic planning of work and working hours modifiable by employees on personal needs; the provision of flexi-time programmes or concentrated hours; the schedule of meetings shared with workers; the provision of a system for managing worker requests; but, above all, the right to adapt and modify work and working time to personal care needs unless it is impossible for the employer and in exceptional cases (Militello, 2020).

In other words, working hours should be adapted to worker's needs, on the basis of the principle that the organization must be modelled on human beings and not vice versa. This would help ensure that care work did not weigh on paid work; today this is not the case as the burden of care work penalizes women almost exclusively.

Concluding Remarks

The descriptive statistics analysed in this essay confirm the existence of gender inequality in the access to paid work as shown by lower women's employment rates than men, a gap that appears even wider taking into

account the presence of children in the household and the youngest child's age. A comparative analysis amongst countries characterized by differences in the presence of childcare services and in the system of parental leaves (Norway, Spain and Italy) confirms how those differences reflect themselves in the observed inequalities in employment by gender across these countries.

Departing from descriptive analysis, the impact of different public policies on employment inequalities by gender has been confirmed by the literature as shown in the second section of this chapter. A further analysis of the system of public policies that can affect a different presence of women and men in paid labour carried out in this section, let us conclude that in order to reduce the observed inequalities in the participation to paid work a set of policies can be suggested.

Social infrastructure should be maintained and improved especially in countries where still the coverage of ECEC is lower addressing also regional inequalities in their provision mirrored in differences in women's labour supply.

Incentives for increasing fathers' take-up of parental leaves leading to a more equitable allocation of unpaid work in the couple should also be introduced. To monitor the impact of different parental leaves systems, better data should be collected and made available on the take-up of different types of leaves, their length and the way they are used by parents.

Work-life balance within firms should be enhanced and targeted to both parents to avoid reproducing traditional gender norms in the allocation of time conducive to persistent gender inequalities in the labour market.

As recently pointed out by the mentioned directive, work-life balance, in addition to being considered an objective in itself, has become the instrument for pursuing gender equality; to this end, it is very significant that the object of the directive relating to the balance between professional activity and family life concerns the provision of measures aimed at achieving not just balance, but equality between men and women as regards opportunities on the labour market and treatment at work, *by facilitating work-life balance*.

This change of meaning has enriched the notion of conciliation with the meaning of sharing, of co-presence and equal representation in the labour market and in the family, with the result of suggesting the progressive and definitive overcoming of the boundaries determined by the division of gender through the adoption of measures addressed no longer

only to the mother, but to the working parent, and conveyed by the obligation of equal treatment and by the prohibition of discrimination.

A chance of the leaves regulation is fundamental, as Norwegian experience shows, but is not enough. The other step is a working time reform that gives workers—men and women—more control over their time. An important role in this area could be played by collective bargaining. But the organization of work and working time falls within the employers' powers, difficult to change.

A collective effort of the legislator, employers and collective actors will be needed; however, the change seems to have begun; we just have to see where it will lead.

References

Addabbo, T., Rodriguez-Modrono, P., & Galvez Munoz, L. (2015). Gender differences in labor force participation rates in Spain and Italy under the great recession. *Revista de Economia Mundial, 41*, 21–42.

Addabbo, T. (2021). L'impatto della pandemia sul ben-essere in una prospettiva di genere. In: Carlo Adolfo Porro e Pierluigi Faloni (a cura di) *Emergenza Covid-19: impatto e prospettive, Collana Prassi sociale e teoria giuridica*. Mucchi Editore.

Addabbo, T., Cardinali, V., Giovannini, D., & Mazzucchelli, S. (2022). Italy country note. In A. Koslowski, S. Blum, I. Dobrotić, G. Kaufmann, & P. Moss (Eds.), *International review of leave policies and research 2022*. https://www.leavenetwork.org/annual-review-reports/

Ales, E. (2016). voce "Maternità e congedi parentali". In *Enciclopedia del diritto. Annali* (Vol. IX, pp. 531–556). Giuffrè.

Ales, E. (2008). Il modello sessuato di ruolo sociale e i suoi antidoti: l'adult worker model nell'ordinamento italiano. *Lavoro e diritto, 22*(3), 533–554.

Alessi, C. (2018). Lavoro e conciliazione nella legislazione recente. *Diritto delle relazioni industriali, 28*(3), 804–822.

Alessi, C. (2012). *Flessibilità del lavoro e potere organizzativo*. Giappichelli.

Alessi, C., Bonardi, O., Calafà, L., D'Onghia, M., Militello, M., Saracini, P., Vallauri, M. L. (2023). Diritto di conciliazione. Prospettive e limiti della trasposizione della direttiva 2019/1158/UE. *Quaderno della Rivista Diritti Lavori Mercati, 14*, 7–158.

Bacheron, J. 2022. "The impact of paternity leave on mothers' employment in Europe", AMSE Working Papers, WP10.

Barbera, M. (1999). L'eccezione e la regola, ovvero l'eguaglianza come apologia dello status quo. In B. Beccalli (Ed.), *Donne in quota. È giusto riservare posti alle donne nel lavoro e nella politica?* (pp. 91–130). Feltrinelli.

Bjørnholt, M. (2011). Daddy leave in Norway. https://www.ingenere.it/en/articles/daddy-leave-norway

Brunori, P., Maitino, M. L., Ravagli, L., & Sciclone, N. (2020). French do it better: The distributive effect of introducing French family fiscal policies in Italy. *International Journal of Microsimulation, 13*(1), 2–18.

Bungum, B., & Kvande, E. (2022). Norway country note. In A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman, & P. Moss (Eds.), *International review of leave policies and research 2022*. Available at: https://www.leavenetwork.org/annual-reviewreports/

Busby, N. (2018). The evolution of gender equality and related employment policies: The case of work-family reconciliation. *International Journal of Discrimination and the Law, 18*(2–3), 104–123.

Colonna, F., & Marcassa, S. (2015). Taxation and female labor supply in Italy. *IZA Journal of Labor Policy, 4*(1), 1–29.

Del Boca, D., Oggero, N., Profeta, P., & Rossi, M. (2020). Women's and men's work, housework and childcare, before and during COVID-19. *Review of Economics of the Household, 18*(4), 1001–1017.

EIGE. 2022. *Gender equality index*. Available at: https://eige.europa.eu/gender-equality-index/2022/

Eurofound. (2022). *Working conditions in the time of COVID-19: Implications for the future* (European working conditions telephone survey 2021 series). Publications Office of the European Union.

Eurofound. (2020). *Women and labour market equality: Has COVID-19 rolled back recent gains?* Publications Office of the European Union.

Eurofound. (2017). *Sixth European working conditions survey – overview report (2017 update)*. Publications Office of the European Union.

European Education and Culture Executive Agency, Eurydice, Parveva, T., Motiejunaite, A., Noorani, S., et al. (2022). *Structural indicators for monitoring education and training systems in Europe 2022: overview of major reforms since 2015*. Publications Office of the European Union. https://data.europa.eu/doi/10.2797/479169

Eurostat. (2023). *Gender statistics – statistics explained*. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_statistics

Farré, L., Felfe C., González L., Schneider P. 2022a. *Changing gender norms across generations: Evidence from a paternity leave reform*, BSE Working Paper 1310| December 2021.

Farré, L., Fawaz, Y., Gonzalez, L., & Graves, J. (2022b). Gender inequality in paid and unpaid work during covid-19 times. *Review of Income and Wealth, 68*(2), 323–347.

Figari, F., & Narazani, E. (2020). The joint decision of female labour supply and childcare in Italy under costs and availability constraints. *Economia Politica: Journal of Analytical and Institutional Economics, 37*(2), 411–439.

Forseth, U. (2019). Il paradosso norvegese non esiste. https://www.ingenere.it/articoli/paradosso-norvegese-non-esiste.

Hack, M. (2023). Working life out of balance? Legal responses in the EU and Norway to parenthood and caregiving in times of crisis. *DLM.int.,* 1, 107-128.

ISTAT. (2022). Offerta di nidi e servizi integrative per la prima infanzia, anno educativo 2020/2021, Statistiche Report.

Jurado-Guerrero, T., & Muñoz-Comet, J. (2021). Design matters most: Changing social gaps in the use of fathers' leave in Spain. *Population Research and Policy Review, 40*, 589–615.

Koslowski, A., Blum, S., Dobrotić, I., Kaufman, G. and Moss, P. 2022. 18th international review of leave policies and related research 2022. https://www.leavenetwork.org/annual-review-reports/review-2022/

Kunze, A., & Xingfei, L. (2019). *Universal childcare for the youngest and the maternal labour supply* (NHH Dept. of Economics Discussion Paper No. 3, Available at SSRN: https://ssrn.com/abstract=3336802 or). https://doi.org/10.2139/ssrn.3336802

Kvande, E., & Brandth, B. (2019). Designing parental leave for fathers – promoting gender equality in working life. *International Journal of Sociology and Social Policy, 40*(5/6), 465–477.

Kvande, E., & Brandth, B. (2017). Fathers on leave alone in Norway: Changes and continuities. In M. O'Brien & K. Wall (Eds.), *Comparative perspectives on work-life balance and gender equality* (pp. 29–44).

Lassen, A. S., Rosenbaum P., Steingrimsdottir H. 2022. *Maternity leave and paternity leave: Evidence on the economic impact of legislative changes in high income countries* (IZA DP No. 15129, March 2022).

Matteazzi, E., & Scherer, S. (2021). Gender wage gap and the involvement of partners in household work. *Work, Employment and Society, 35*(3), 490–508.

Meil, G., Escobedo, A., & Lapuerta, I. (2022). Spain country note. In A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman, & P. Moss (Eds.), *International review of leave policies and research 2022.* http://www.leavenetwork.org/lp_and_r_reports/

Messenger, J. C. (Ed.). (2004). *Working time and workers' preferences in industrialized countries. Finding the balance.* ILO.

Militello, M. (2020). *Conciliare vita e lavoro. Strategie e tecniche di regolazione.* Giappichelli.

Nivakoski, S., & Mascherini, M. (2021). Gender differences in the impact of the COVID-19 pandemic on employment, unpaid work and well-being in the EU. *Intereconomics, 56*(5), 254–260.

OECD. (2022). *Education at a glance 2022: OECD indicators.* OECD Publishing. https://doi.org/10.1787/3197152b-en

Oliver, X., & Spadaro, A. (2017). Active welfare state policies and labour supply in Spain. *Hacienda Publica Espanola/Revista de Economia Publica, 222*, 9–41.

Profeta, P. (2021). Gender equality and the COVID-19 pandemic: Labour market, family relationships and public policy. *Intereconomics, 56*(5), 270–273.
Romero, B. G. (2022). Permisos por nacimiento y cuidado de menor y su discutida acumulaciòn por el progenitor ùnico en caso de familia monoparental para preservar el interés del menor. *Revista de Jurisprudenzia Laboral, 6*, 1–8.
Queisser, M. (2021). COVID-19 and OECD labour markets: What impact on gender gaps? *Intereconomics, 56*(5), 249–253.
Report of the director general, International Labour Conference, 107th Session. (2018). 'The women at work initiative: the push for equality'.
Tobìo, C. (2020). https://elpais.com/sociedad/2020-12-31/permisos-de-paternidad-16-semanas-para-avanzar-en-la-igualdad.html
World Economic Forum. (2018). *The global gender gap report*.

PART 2

Technology and Wellbeing at Work: Two Sides of a Coin

CHAPTER 6

Post-pandemic Recovery and Digital Skills: The Perspectives of the Social Partners

Ilaria Purificato

Introduction

On May 5, 2023, more than three years after the announcement of the first case of Covid-19 infection, the World Health Organization declared the end of the international health emergency caused by the Covid-19 pandemic.

In January 2020, Italy recorded the first case of Covid-19 in Europe. From that moment, a rapid and uncontrollable spread of disease began, which led the Italian government to adopt urgent measures for the containment and management of the emergency.

In order to balance the necessity to protect the health of citizens and the needs of production, the government has put in place a set of measures (Gaglione et al., 2020), including the use of smart working, albeit in "simplified" ways compared with the provisions of Legislative Decree No. 81/2017 (Brollo, 2020).

I. Purificato (✉)
University of Modena and Reggio Emilia, Modena, Italy
e-mail: ilaria.purificato@unimore.it

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_6

The use of remote work was just one of the forms through which companies and public administrations have begun to push on a process of technological innovation. This process was essential to safeguard employment and services in the pandemic period, while in the post-pandemic scenario it becomes an essential strategy in the pursuit of economic recovery goals, potentially increasing production, competitiveness and efficiency of the country.

The pandemic has launched a clear signal, both economically and socially, that it is necessary to foster a culture of digitalization.

Looking beyond the period of the most intense health emergency, and focusing more on economic and social recovery strategies, the European Union has intervened by allocating subsidies to stimulate growth, investment and reforms through a special program (Next Generation EU) in favor of those Member States that presented recovery plans functional to the achievement of goals that can be traced within a list of items. This list includes digital transformation.

The National Recovery and Resilience Plan presented by Italy, "Italia Domani", identifies three main strategic axes, namely ecological transition, social inclusion, and digitization and innovation, and it is divided into sixteen components grouped into six missions, which are transversally linked. The first of these missions is dedicated to "Digitalization, innovation, competitiveness, culture and tourism". This mission brings together, on the one hand, the need to promote digital transformation in the public administration (Macrì, 2022), companies and communication infrastructures, and, on the other, the need to intervene to remove the conditions that hinder the technological transformation of the country.

As highlighted in the same document, infrastructural gaps also linked to geographical differences, social gaps and low levels of digital skills are among the main elements causing Italy to be late in the path toward greater digitalization of companies, public administration and, in a broader sense, society.

Taking into account the relevance recognized to digitalization, also at institutional level, as one of the tools for driving the social, economic and productive fabric beyond the global crisis, this contribution focuses on one of the factors affecting the spread and development of technological innovation, namely digital skills. Where in this Chapter the term digital skills is taken to mean the definition given in the *Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning*, according to which these coincide with con

"the confident and critical use of Information Society Technology (IST) for work, leisure and communication".

Indeed, it is argued that investing in digital skills training can be the drive of change (Garofalo, 2019) if it is adequately accompanied by interventions aimed at smoothing out the differences that prevent equal access to digital tools, especially infrastructural ones.

The contribution explores the issue of digital skills development on the part of workers, proposing to understand, by studying selected collective agreements, what role the social partners play in the processes aimed at promoting the development of digital skills. Specifically, this Chapter outlines current trends with regard to the instruments of collective representation through which digital skills training is promoted, and the functions carried out by digital skills training beyond promoting and protecting the employability of workers and the competitiveness of enterprises.

The Italian Way to Promote Vocational Training of Employees

As a preliminary remark, it is necessary to clarify that it seems difficult to divide the figure of the worker from that of the citizen in a reflection on digital skills, since the process that leads an individual to have good digital skills does not begin with his or her entry into the world of work, but it is also closely connected with his or her educational and training path. Indeed, certain digital skills can be an entry requirement for the performance of certain jobs.

At the same time, with entry into the world of work, the training path does not end for the worker, especially if one considers that the structural plans promoted at European and national level are aimed at promoting the implementation of digital technologies in companies and public administrations.

In Italy, despite the fact that even before Covid-19 there were programs to foster industrial innovation (Industry 4.0 National Plan), the emphasis on digital skills, at least on a legislative level, seems to be mostly attributable to programs that are a direct implementation of the National Recovery and Resilience Plan (while on the topic of skills certification, see Nicolosi, 2022).

The "Piano Nazionale Nuove Competenze" (henceforth "PNC") (Decree of December 14, 2021) is part of this project, which in turn is

made up of three measures: the “Fondo Nuove Competenze” (Impellizzieri, 2021), the “Programma GOL” and the “Sistema Duale”. The PNC has a very broad subjective scope of application as it addresses young people, unemployed and employed adults, guaranteeing economic support for training and planning actions to be implemented. All the three measures are aimed at ensuring that individuals falling within their scope can receive adequate training, albeit in different ways and driven by different goals.

In detail, on the basis of the most recent intervention of the Ministry of Labour and Social Policies and the Ministry of Economy and Finance (Interministerial Decree of September 22, 2022), which financed again the “Fondo Nuove Competenze”, employers who, among other conditions, submit training projects aimed at increasing basic or specialized skills in relation to digital transformation processes may apply for access to it.

The direction taken by the PNC is the same as that outlined by the “Strategia Nazionale per le competenze digitali”, which is the result of the joint work of the Ministries of Education, of University and Research, of Economic Development and of Public Administration. First of all, it highlights that the entire workforce should be the recipient of the digital skills enhancement, including unemployed people. Then, it provides that the greatest number of actors will be involved in a synergistic action toward the modernization of production systems, the design of effective training paths and the implementation of conditions that allow for expanded access to connectivity.

However, it should be clarified that the regulation about the economic measures functional to the training promotion is much more stratified. Indeed, the Italian legal system already regulated other ways of providing economic support to companies providing training to their workers, which are not related to emergency situations, that is, the “Fondi paritetici interprofessionali nazionali per la formazione continua” (Article 118, Act No. 388/2000) and the “Fondi bilaterali” (Article 12, Legislative Decree No. 276/2003).

In particular, the former are association-based bodies established on the basis of interconfederal agreements concluded by the most representative employers’ organizations and trade unions at national level with the aim of financing company, territorial or sectoral training plans agreed between the social partners in the industrial, agricultural, service and craft sectors.

Considering that the two funds are aimed at financing different elements (the “Fondo Nuove Competenze” covers the hourly cost of the employee carrying out the training, while the “Fondi paritetici interprofessionali nazionali per la formazione continua” cover the cost of the training course), it is the aforementioned Interministerial Decree of September 22, 2022, that clarifies the existing relationship between them. The act specifies that “Fondi paritetici interprofessionali nazionali per la formazione continua” could “take part in the implementation of the ‘Fondo Nuove Competenze’ by financing training projects”; therefore, there is no alternative relationship between them.

As regards the national legislation regulating the more general right to training and education, this appears fragmented. In addition to the Constitutional provision (art. 35), there are the measures set out in Legislative Decree no. 13 of January 16, 2013, on the definition of the general rules and essential levels of performance for the identification and validation of non-formal and informal learning and of the minimum service standards of the national system of skills certification, as well as other scattered references such as Articles 5 and 6 of Act no. 53/2000.

Data on Digital Skills Levels in Italy

The urgency to take measures to promote digital skills is evident when one consults the available data. Such data on the level of diffusion of digital skills in Italy show not encouraging numbers when compared to those of other EU Member States.

The overview that emerges from a comparison of data on digital skills levels in Italy between the period immediately prior to the spread of Covid-19 and the period when the pandemic was in the midst of its affirmation shows a persistent lag.

Indeed, looking at the 2020 and 2021 Digital Economy and Society Index reports (DESI, 2020, 2021), which respectively use data collected in 2019 and 2020, it emerges how Italy was at the bottom of the ranking, occupying twenty-eighth place in one case and twenty-fifth in the other.

Specifically, in the pre-pandemic period, in the sample of men and women in the sixteen to seventy-four age group, less than 50% (42%) had basic digital skills, while those with advanced digital skills were 22%, corresponding to eleven points lower than the European average.

The situation concerning the human capital remained practically the same in 2020, in other words in the full pandemic period, against a

significant increase in the use by small and medium-sized enterprises of digital technologies. While in 2019 Italy was in twenty-second place in the ranking, in 2020 it climbs to tenth place with 69% (compared to a European average of 60%) of small and medium-sized enterprises having at least a basic level of digital intensity.

It is evident how a two-speed path can have a slowing effect on the pursuit of the goals oriented toward a greater digitalization of the production system.

The initiatives and strategies undertaken to raise the diffusion and level of digital skills of the human capital in Italy, also in the context of the National Recovery and Resilience Plan, already bore fruit in 2021 (DESI, 2022). Indeed, the percentage of citizens with a basic level of digital skills has risen to 46%, although this is still very low compared to the European average (54%).

Methodology Issues

As outlined in the first paragraph, the Italian government is seriously considering the issue of digital skills, proposing in its National Recovery and Resilience Plan to strengthen "digital citizenship" as the first step to enable individuals to access the world of work more easily, as well as to participate in democratic life and to be able to use digital services.

The skills training process is addressed, first and foremost, to the citizen, affecting different stages of his or her life, consequently involving a synergic intervention between different actors.

In the work phase, digital skills could constitute both a possible assessment criterion for entry into the world of work, as well as the possible reason for exclusion in the event of skills obsolescence.

In order to understand the social partners' approach to the issue of employee training in digital skills, it has been analyzed several collective agreements that were concluded between 2021 and 2022 and that refer to certain sectors (metalworking, agro-industrial, craft, gas-water, energy and oil, electricity, chemical industry) that need to implement technological innovations in their production systems by their nature, in order to remain competitive and sustainable.

In these collective agreements, those clauses that directly or indirectly refer to digital skills training were studied, while the provisions on apprenticeships were not.

The analyzed collective agreements allocate among the different levels the regulation of the main aspects connected to training, thus following that pattern whereby the national collective agreement outlines the framework within which the decentralized level agreement is called upon to intervene for the definition of the detailed aspects (Ales & Senatori, 2015). After all, one could not think any differently if one considers that the definition of training paths is closely connected to the needs of the employees and the company and, therefore, must be regulated taking these needs into consideration.

The First Trend: Worker Involvement in Matter of Digital Skills Training

The analysis of the selected collective agreements reveals a first significant fact, even at a formal level, namely that there is little explicit reference in the text of the agreements to the term "digital skills". In most of the cases, instead, "transversal skills" is used, under which the analyzed skills can be traced or the reference to digital skills can be grasped through deductive logical reasoning from the generic reference to "skills".

For instance, this occurs in cases where the reference to skills updating is followed by the reference to "resources financed within the framework of the 'Fondo Nuove Competenze'" (NCA for gas-water sector), or when the need for training emerges in relation to the "digital transformation of work" or to "digitalization" (e.g., NCAs for energy and oil, agro-industrial sectors).

Therefore, it is not surprising that digital skills training is placed within the collective agreements analyzed within the broader continuing education programs in which employees take part to improve their professional qualification levels and keep updated their skills.

Significant are the provisions of the NCA for metalworking sector which refers to a "subjective right" to continuous training (Art. 7, sect. IV, Title VI). This choice is based on the idea that the investment in continuous training is a strategic action, starting from the same training in digital skills to make up for the existing gap and go hand in hand with the increase in the levels of technological and organizational innovation of production processes (Bavaro, 2017; Impellizzieri & Machì, 2021). Although it should be noted that other national collective agreements also regulate a guaranteed minimum number of hours of training for

employees, leaving the concrete definition to the company planning (see NCA for electricity sector).

Among the analyzed collective agreements, only a low percentage of them expressly identifies the "Fondo Nuove Competenze" as an instrument that can be used to cover the hourly costs of employees in training as an incentive for companies to promote the participation of workers in training program, despite the fact that most of them were signed after the "Fondo Nuove Competenze" implementation (NCAs for gas-water and chemical industry sectors).

The analysis of collective agreements also shows two interesting trends.

The first relates to the techniques for regulating the different issues concerning the object and the organization of training programs.

In particular, the collective agreements examined, especially those at sectoral level, give importance to the nature of the relations established between workers, employers and their representatives, pushing toward collaboration rather than conflict, as the key to dealing with changes. Changes that can be triggered by periods of crisis or ongoing transformations such as the digital one.

Therefore, they provide for an intensification of social dialogue and workers' involvement in the management of digitization-related challenges, including the planning of training experiences.

This worker involvement can be achieved at different levels and through different modalities. With reference to the former, reference is made to initiatives promoted at national level and at company level, while when one speaks of different modality of involvement one refers, first of all, to merely periodic informative "appointments" aimed at monitoring what are the lines of technological development and the "training needs related to technological innovations", as well as the guidelines for vocational training (NCA for gas-water sector).

Furthermore, worker involvement is achieved through the creation of joint and bilateral commissions specifically responsible for workers' training. These commissions, as is the case, for instance, for the collective agreement for energy and oil sector, can have strategic planning functions for training-related profiles.

Alternatively, at company level, it is envisaged that a member of the Rappresentanze Sindacali Unitarie (RSUs) could be recognized as a delegate competent in the matter, who, in turn, will have to follow training courses to achieve all the necessary knowledge on the subject (e.g., NCA for metalworking, electricity, energy and oil sectors).

Finally, another way through which the continuous dialogue between the social partners is strengthened, also in matter of digital skills and transformation, is the creation of national and territorial observatories or the extension of competences for those already existing. Therefore, for instance, in the energy and oil NCA, the intensification of the activity of the observatories is indicated as a strategy to increase participation at the company level, in order to be able to more easily intercept the changes taking place and intervene promptly even while the NCA is in force. In particular, the activity of the observatories would make it possible to create spaces for the social partners to intervene in a timely manner and respond to the needs that arise from time to time. Precisely in relation to the current period of energy and digital transition, as well as the development of automation, the modernization of human capital skills is identified as an area for intervention.

This finds evidence also in some company collective agreements which, as anticipated, are the privileged level in implementing the definition of training issues and, specifically, training in digital skills.

Considering the company agreement of the Ducati, it can be observed how the definition of continuous training aspects, such as the analysis of training needs and the implementation of the subjective right to continuous training, falls within the sphere of competence of a specific Bilateral Technical Commission (CTB training and professionalism). The latter has informative, consultative, investigative and prepositive but not negotiating functions.

In general, what the NCA for metalworking sector defines as a "cyclical process" seems to be present in the various collective agreements, which is articulated in the planning of training, registration and monitoring-evaluation, to be carried out jointly by the parties.

Nevertheless, from the analyzed collective agreements it emerges that there is not a complete overlap between the participative approach promoted in collective agreements at the national level and the solutions adopted at the company level. In any case, at the different levels, what is promoted is mere worker involvement and not genuine workers' participation, when considering the definitions used in Council Directive 2001/86/EC of October 8, 2001, supplementing the European Company Statute, which precisely defines worker involvement as "any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions" to be taken (Art. 2).

Differently, it can be argued that the participatory models built around the subject of training are to be classified as models of "weak participation" (Baglioni, 2009) since they are predominantly based on information, consultation and, at most, purposeful impulses of trade unions and workers' representatives.

In general, the "participatory" management of issues related to vocational training within these collective agreements can be considered in line with the orientation adopted in the European Social Partners Framework Agreement on Digitalization signed in June 2020 (Senatori, 2020).

As stated by the Italian trade unions, this framework agreement sets out interesting values that, if implemented in the transposition phase, could help to envisage measures capable of harnessing the awareness achieved during the pandemic and responding to the challenges of digital transformation, also in line with the provisions contained in the National Recovery and Resilience Plan (Cisl, 2021).

These guidelines are intended to drive action by employers, employees and their representatives on a partnership basis, in order to better understand and address the opportunities and challenges of digital transformation in the world of work, and to prevent or minimize the risks that may result. A section is dedicated to digital skills. It is provided that these should be part of continuous training programs, in order for workers to be able to cope with the changes resulting from technological transformation.

It is essential that training plans can intercept and address future needs. And it is mainly in order to keep pace with the speed of technological advancement, which inevitably affects the skills to be developed, that the framework agreement on digitalization calls for the information and involvement of workers' representatives in order to monitor and assess workers' existing skills and develop predictions of "future" skills so that the most appropriate training measures can be jointly chosen. Indeed, it is essential that training meets standards of quality and effectiveness, and this is achievable in so far as the training programs meet the specific needs identified by the company and the workers' representatives.

The Second Trend: Digital Skills Training as Potential Inclusive Instrument

The second trend that can be observed relates to the functions that training in digital skills, in this case, could carry out.

In particular, in addition to the more classic functions of safeguarding the employability and competitiveness levels of the companies, a further one seems to emerge, namely the function of strengthening inclusiveness first and foremost in the work environment.

The collective agreement of the Parmalat company seems to be very clear in orienting training toward company competitiveness goals, since there are several explicit mentions. Then, if one considers the influence that the "Fondo Nuove Competenze" can exert on collective bargaining with regard to training, it is not surprising that its function of safeguarding employability is reinforced. Indeed, according to the provisions of the "Fondo Nuove Competenze", in order for the employer to have access to the subsidy, it is necessary for a collective agreement to be concluded setting out a different distribution of working time due to changed production and organizational needs of the undertaking. In this way, part of the working time can be spent on training.

From an interpretative point of view, the generic reference to the "change in the productive and organizational needs of the enterprise" can acquire a twofold meaning. On the one hand, from a pan-emergency perspective, the phrase can be considered indicative of the effects of the restrictions adopted on companies and, therefore, the measure acquires a welfare function. On the other hand, from a post-pandemic perspective, production and organizational changes can be considered the result of digital transformation processes and, as a consequence, the measure would take on a promotional purpose.

Another observation regarding the functions attributable to digital skills training relates, as mentioned above, to its potential as instrument of inclusion.

This seems to emerge quite clearly in the "Protocol for the enhancement of the person in the company" of Enel company (March 29, 2022) in which, at point 20, it is stated that it is "fundamental to invest in skills to contribute to socially responsible approaches, accompanying people in change, without leaving anyone behind, with a view to orienting and protecting the professional paths of the person in the direction of his or her present development".

The NCA for the chemical industry is more explicit, since, in Article 58, point 3, it stresses how digitalization could be an opportunity to strengthen social inclusion, mainly through the introduction of tools that guarantee greater spatial-temporal flexibility in the performance of work. In this way, workers can access better work-life balance management, and the most vulnerable can participate in working life in a more agile way.

However, in order for the changes resulting from digitization to be an opportunity for all workers, it is necessary to design specific training courses that take into account their specific needs.

Furthermore, for instance, the Smart Working Agreement of the Snam company refers to the importance of activating training initiatives since they will have the purpose to "ensure inclusion opportunities", among others.

Also at European level, within the European Social Partner Framework Agreement on Digitalization, in the part of measures to be taken into account in the field of training, the social partners agree that all strategies undertaken should respect equal opportunities policies in order to ensure that technology could be an advantage for all workers.

This "inclusive" function seems to be particularly evident in situations where training is addressed to workers who carry out their activities in agile mode—which in turn can be considered as an inclusive measure (Brollo, 2022, p. 4 ff.)—and it is functional to the updating and acquisition of technical and digital skills, which are indispensable to perform activities in this modality. It is the same National Protocol on Agile Work (December 7, 2022), at the Article 13, to establish that in order to guarantee "equal opportunities in the use of work equipment and in the enrichment of professional skills" to all those who work in agile way it is "necessary to provide training courses aimed at increasing specific technical, organisational and digital skills".

Otherwise, the profile of workers' access to training is protected by law.

Indeed, at the domestic level, in addition to the provision of the Constitution, the Legislative Decree No. 216 of 2003, which implements Directive 2000/78/EC on equal treatment in employment and occupation, states that the principle of equal treatment must be recognized with reference to "access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience" (Article 3, paragraph 1, letter c).

Moreover, the inclusive function of employees' training is also appreciable if one looks beyond the provision contained in collective

bargaining. One might consider, for instance, the data published by Istat (ISTAT, 2022, p. 6), which reveal that in 2021 only 17.6% of women will have obtained a STEM degree compared to 33.7% of men. Therefore, guaranteeing the training of female workers in digital skills can contribute to preventing their exclusion from the ongoing digital transformation.

In the same way, training in digital skills can be the way to reduce the so-called digital divide, that is, the inequality in access to information and communication media by certain geographical areas or population groups.

Indeed, it has been stated that nowadays "digital inclusion depends more on knowledge, skills and attitudes than on access and use" (Ferrari, 2013). The provision of specific training programs for workers with a low level of digital literacy caused by previous unequal infrastructural conditions of access to technology is geared toward greater equality of opportunity in the world of work.

Conclusion

The Covid-19 pandemic has given us a clearer idea on the importance of technological innovation in the economic, social and productive level. The need to quickly implement new technologies and rely on digitization to stem a global crisis has, however, highlighted the most critical aspects and obstacles to digital transformation in our country.

One of these critical points has been identified in low levels of digital skills. Indeed, a low level of digital literacy is a barrier to any transformation process toward an innovative direction.

In order to overcome the crisis caused by the Covid-19 pandemic and to mitigate its negative economic and social effects as much as possible, European Union has prepared various measures for Member States to allow them to intervene on their internal criticalities by means of public funds.

In Italy, a good share of these public funds has been invested to bridge the digital skills gap and the infrastructural problems underlying the digital divide.

This Chapter investigated whether and how the social partners are involved in addressing the issue of digital skills training.

The analysis started from the observation of the collective agreements of certain sectors that can be considered to be most affected, due to their nature, by this transformation. Although the sample analyzed cannot be

considered complete, it has nevertheless provided a picture of two ongoing trends.

The first reveals a certain inclination toward a participatory management of the cyclical process around training plans that also concern digital skills, albeit with a mismatch between national collective agreements and decentralized collective agreements since the latter apparently have little tendency to implement the framework dictated at sector level.

Secondly, there is the trend that recognizes an inclusive function to training, also on digital skills.

In the opinion of the writer, the trend toward a participative management of training issues, especially with a view to adapting workers' skills to the rapid changes dictated by the ever-new technologies, is essential. Such an approach is considered to meet the needs of both parties, on the one hand, guaranteeing the productivity and competitiveness of the company and, on the other, preventing the worker from risking "vocational obsolescence".

However, it has been noted that this approach to participation, in a broad sense, is promoted more at the national than at the decentralized level. This certainly constitutes a limitation when one considers that training programs should be as tailor-made as possible on the basis of workers' and employers' needs.

An interesting solution adopted in one of the company contracts analyzed (Bonfiglioli company) is that of directly involving workers in the company's results through the use of a result bonus, linked to the development of skills as a strategic tool for improving company results and promoting digital transformation. In the present case, the result bonus is gained through the inclusion, among the factors contributing to its formation, of an element of collective enhancement of training, in turn made up by taking into consideration the participation of individuals in terms of hours of technical and digital training on the company platform and safety training.

These findings suggest that there is a certain awareness also on the part of the social partners regarding the relevance that digital skills are assuming and will assume, even in the short term, for workers as well as for the companies. This is evident since the definition of a subjective right to training in the collective agreement of one of the sectors most exposed to changes in production processes, also due to exogenous factors such as technological innovation. Nonetheless, the impression is that the social partners do not feel a real urgency to intervene on the issue, or

alternatively, although they are aware that they have to contribute to defining the aspects related to digital skills training, they have not yet identified the most suitable tools for its implementation.

This inclination toward the involvement of workers' representatives in the definition of training-related aspects also emerges from the provisions regulating the accreditation of funds to finance vocational training. For example, a precondition for access to the "Fondo Nuove Competenze" is that a collective agreement for the rescheduling of working time be signed with the trade unions. Likewise, in the case of "Fondi paritetici", it is necessary that the training path be shared in advance with the trade union representatives. The role of the trade unions is not limited to being merely formal if these provisions are implemented by the opposing parties in the right spirit, as they can well contribute to the definition of the training aspects. Therefore, these emergency provisions can offer an opportunity for the sedimentation of a collaborative approach between the social partners that can be cultivated even once they are over.

Probably, at least in an initial phase, a rewarding approach can be a good incentive for both parties in initiating a shared process for the achievement of digital skills training goals.

Certainly, also in view of the importance that digital skills have at a social level and of the fragmented distribution of competences in the matter, a synergic intervention of the various institutions and social partners is necessary. The latter, also thanks to the data collected in corporate contexts, should collaborate with the territories, the Regions and the State in the preparation of constantly updated training programs aimed at the citizen-worker throughout his or her life, as well as setting minimum and uniform quantitative and qualitative goals to be verified at least once a year.

As a precondition, however, it is necessary to continue to bridge the infrastructural differences between the North and South of the country (INAPP, 2022), in order to ensure equal access to the Internet and equal use of digital devices.

At the same time, monitoring of the development of digital skills by citizens should be intensified in order to set up specific training programs aimed at achieving minimum levels of digital literacy, especially for fragile people, that do not exclude citizens from enjoying their rights, given the digital transformation of most services.

References

Ales, E., & Senatori, I. (2015). *Collective bargaining and workers' (trade union) representation: The company level in Italy*. In: Presentation for LLRN international conference.

Baglioni, G. (2009). *Lavoro e decisioni nell'impresa*. Il Mulino.

Bavaro, V. (2017). Il contratto nazionale dei metalmeccanici 2016: una prospettiva sulle relazioni industriali italiane. *Giornale di Diritto del Lavoro e Relazioni Industriali, 156*, 729–740.

Brollo, M. (2020). Smart o emercency work? Il lavoro agile al tempo della pandemia. *Il lavoro nella giurisprudenza, 6*.

Brollo, M. (2022). Fragilità e lavoro agile. *Lavoro Diritti Europa, 1*.

Cisl. (2021). *Accordo europeo sulla digitalizzazione*, 9 giugno 2021, https://www.cisl.it/notizie/notizie-contrattazione/accordo-europeo-su-digitalizzazione/.

European Commission. 2020. Digital economy and society index (DESI).

European Commission. 2021. Digital economy and society index (DESI).

European Commission. 2022. Digital economy and society index (DESI).

Ferrari A. (2013). DIGCOMP: A framework for developing and understanding digital competence in Europe, *JRC Scientific and Policy Reports.*

Gaglione, G., Purificato, I., & Rymkevich, O. (2020). COVID-19 and labour law: Italy. *Italian Labour Law e-Journal, 13*(1) special issues.

Garofalo, D. (2019). Rivoluzione digitale e occupazione: politiche attive e passive. *Il lavoro nella giurisprudenza*, 4.

Impellizzieri, G. (2021). Fondo nuove competenze e contrattazione collettiva: una rassegna ragionata. *Diritto delle Relazioni Industriali*, 3.

Impellizzieri, G., & Machì, G. (2021). Verso un 'sistema' della formazione nel settore metalmeccanico? *Boll. Spec.* ADAPT, 1.

INAPP. (2022). I divari sulle competenze. Approfondimenti territoriali e in ottica di genere. *INAPP report*, 27.

Industry 4.0 National Plan. https://www.governo.it/sites/governo.it/files/industria_40_MISE.pdf.

ISTAT. (2022). *Livelli di istruzione e ritorni occupazionali. Anno 2021*, Statistiche report, 25 ottobre 2022.

Macrì, I. (2022). Il PNRR italiano per la digitalizzazione e l'innovazione della pubblica amministrazione. *Azienditalia, 8*.

Nicolosi, M. (2022). Il sistema delle competenze dopo le linee guida ministeriali del 2021 e nel PNRR. *Giurisprudenza Italiana*, 11.

Senatori, I. (2020). The European framework agreement on digitalisation: A whiter shade of pale? *Italian Labour Law e-Journal, 13*, 2.

CHAPTER 7

AI for a More Human Friendly Workplace Recovery After COVID-19

Beryl ter Haar and Marta Otto

'In order to shape the future, we must first imagine it…'
'If you can imagine it, you can achieve it' (Believe It—Seaside).

Introduction

For many workers, including us, academics, the world of work changed almost overnight when in early 2020 governments decided to go in lock down in efforts to limit the spread of the COVID-19 virus. We had to switch to tele- or remote working, using various online tools and platforms to keep access to the (digital) workplace and to stay in contact with colleagues, clients, and customers. While for some of us this was not

B. ter Haar (✉)
University of Warsaw, Warsaw, Poland

University of Groningen, Groningen, Netherlands
e-mail: b.terhaar@uw.edu.pl

M. Otto
University of Warsaw, Warsaw, Poland
e-mail: m.otto3@uw.edu.pl

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_7

new (in Denmark, e.g., teleworking was already common practice), for others it felt revolutionary: What before was thought of as impossible seemed to be possible almost overnight (cf. Daugherty & Wilson, 2022, 2–3; 230–231).

And yet, when considered in the world of Artificial Intelligence (AI), Internet of Things (IoT), Algorithms and Robotisation, or in short all together automation, the global experiment on remote working was just the tip of the "automation iceberg". Interestingly, an increasing number of scholars in economics, politics, business management, and labour law (a.o. Daugherty & Wilson, 2022; Estlund, 2021; Susskind, 2020; Ross, 2016) argue that we are on the brink of watershed moments in the evolving relationship between people and technology in the workplace that will soon leave their mark on the work and work relationships. What to expect from this "mark" is hard to imagine, but it is clear that it will be disruptive and transformative. Platform labour and crowdsourcing, for example, have already introduced work forms and relationships that poorly fit the dichotomy between the status of employee and self-employed entrepreneur, nor the traditional ideas of working from 9 am to 5 pm at the premisses of the employer. Furthermore, digital employee monitoring systems enable the employer to follow his workers as a true watchdog. Such intensive employer monitoring considerably limits an employee's autonomy and moreover forms blatant infringements on privacy rights and various social rights (right to just working conditions, working time, collective bargaining rights, etc.).

Given the disruptive nature of these developments, it is not surprising that they are met with fear, concerns, and critics. Such, especially by those members of society who have lost or are about to lose their job, or who have seen the nature of their job change due to automation. New forms of work raise concerns about the quality of the new jobs that are created in terms of their meaning for society; what they bring for the individual worker (too monotone; too stressful; too intensive, because simple routine work has been automated; too isolated); or in terms of delivering decent income (Graeber, 2019; Cavallini & Avogaro, 2019; Weill, 2014; and the EU funded project Working Yet Poor). Responses from the (labour) law society have been to find ways to regulate these automation developments. Courts are struggling to interpret new labour relations in accordance with existing legislation, especially with regard to the qualification of the worker as employee or self-employed entrepreneur (Hiessl, 2022). Legislators try to be creative by introducing a new, third, category

of worker (Cherry & Aloisi, 2017) and with laws that often hold negative obligations in order to control risks that are associated with the automation development (a.o. Mélypataki, 2019; Ponce Del Castillo, 2020; Adams-Prassl, 2019, Aloisi & Gramano, 2019).

All these fears, concerns, critics, and judicial and regulatory responses, which are justly and much needed to redraw the boundaries between desirable and undesirable, have one downside, namely, that they seem to leave barely room for a different sound in the debate. In our view, the recovery after COVID-19, but more generally, the advent of the digital worker era, presents an excellent opportunity to ***re-imagine, re-think, re-shape, and re-regulate work***. Therefore, this contribution is structured as follows. In Sect. 2 we will start with re-imagining a digital work era by sketching some of the state-of-the-art AI-human work relations and interactions. We will continue in Sect. 3 by re-thinking the fundamental values needed to create and sustain a human-friendly hybrid AI-human workforce. This will be based on the ideas of the EU's Industry 5.0, Japan's Society 5.0, and more general socio-economic ideas that promote a paradigm of wellbeing for people and planet over profit and growth. In Sect. 4 we will attempt to identify the main regulatory gaps and analyse what kind of regulatory challenges need to be addressed. The main approach in this section is to seek means that move beyond risk-based limiting regulatory activities and extend such activities to enable and facilitate the creation and sustain human-friendly AI-human workforces. Lastly, in Sect. 5, by means of conclusions, we will consider what steps we have to take to get on the avenue to actually achieve and sustain a human-friendly AI-human workforce.

Re-imagining a Hybrid AI-Human Workforce

In 2019 IPsoft launched a marketplace-type platform at DigitalWorkforce.ai (https://hire.digitalworkforce.ai/1store/user/home). The company used the experience gained from developing *Amelia*, a digital worker. Their digital workers are for "hire" or to be "employed", for example, as an engineer in the IT department or a coordinator in the HR department. DigitalWorkforce.ai suggests that 'such employees will be great for smaller companies that need to grow quickly, perform many repetitive tasks on a daily basis, and are limited by their budget.' Digital workers are expected to help with, among other things, troubleshooting and configuring equipment or creating reports. The platform offers *Amelia* for customer service,

banking, insurance, healthcare, retail, and TMT, whereas the list of specialisations, especially in HR and ITSM services, keeps growing. In their research, based on experience working with about 1500 organisations, Daugherty and Wilson (2018) found hybrid human-digital workforces in the same industries as DigitalWorkforce.ai is targeting and more, such as agriculture and life sciences.

Many predictions are made what the development of AI will mean for the human workforce. For example, the Gartner Institute (2018) predicts that already by 2025, a third of the traditional workforce will be replaced by digital workers. Susskind (2020) and Daugherty and Wilson (2018) claim that it is likely that an even higher percentage of jobs will become (and many already are) hybrid. However, such predictions may be too unnuanced since they do not take into account the development of AI itself and how this may affect jobs or work activities.[1] In their latest work *Radically Human* (2022), Daugherty and Wilson discern three stages in the development of AI and the creation of a hybrid workforce.

In the first stage, AI was used to automate repetitive, high-volume, and routine tasks. In this stage, humans were subservient to AI and often replaced by them, which has led to various predictions of a dystopian future with not enough jobs or work for the human workforce (e.g. Estlund, 2021; Benanav, 2020; and to a certain extent also Susskind, 2020).

In the second stage, AI is used to augment human capabilities. In this stage humans are not replaced by AI, instead AI and humans are collaborating as they complement each other's capabilities. Table 7.1 illustrates this idea. What is interesting in this stage is that the focus is not on jobs, instead it is on certain aspects of work activities. Of course, when most of the work activities of a certain job are falling together with the strengths, the capabilities of the AI (or machine as Daugherty and Wilson call it), humans may become obsolete in certain jobs or at least less of such jobs will be available for humans. However, as Susskind (2020) stresses, knowing and understanding what the capabilities of AI are will also make it possible to know and understand what kind of skills human workers need for the work activities that cannot (yet) be done by AI. By adjusting our educational and training programmes to the needed skills, knowledge, know-how, etc., it would then be possible to maintain a high level of employment for human workers.

In the third stage, humans and the human are ascendant to a human-centred AI. In this stage the human-AI workforce will form an almost symbiotic collaboration. According to Daugherty and Wilson (2022, 5)

Table 7.1 Human and machine augmented collaborations

Lead	*Empathise*	*Create*	*Judge*	*Train*	*Explain*	*Sustain*	*Amplify*	*Interact*	*Embody*	*Transact*	*Iterate*	*Predict*	*Adapt*
Human-only activity				**Humans** complement **machines** **Humans + machines** Hybrid activities			**Machines** augmenting **human** capabilities			**Machine**-only activity			

Source: Daugherty and Wilson (2018), 8

we are currently moving towards this stage. The move towards this stage has been accelerated by the COVID-19 pandemic which compelled companies to fast-forward in digital technologies. Moreover, companies that were already excelling in technological innovations invested even more in further technological innovations, which in turn led to a burst of new approaches in the development of AI which is more human-centred and humane (Daugherty & Wilson, 2022, 2–3; 6). Daugherty and Wilson call it radical, because the developments are both revolutionary and rooted. The developments turn the 'assumptions about the basic building blocks of innovation – intelligence, data, expertise, architecture, and strategy – upside down' (Ibid, 6). What the third stage basically comes down to is that AI will become more humane as new "learning" methods are and will be used which will enable AI to gain qualities that so far have been considered human-only. When AI becomes more humane, it will be easier for humans to interact with it and serves human needs better. At the same time, as has been the case with many disruptive inventions in the past, humans will adapt to collaborating with AI in work as well as other activities, which will further "humanise" AI (Ibid, 12; 230–32).

One of the effects of the hybrid human-AI workforce in the first and second stage is that the work activities in which humans complement AI or that are "human-only" become more intensive due to a lack of alteration with the routine activities. The work activities will also intensify, because in general the activities the human worker performs will be more complex, in need of contextualisation, etc. (cf. Daugherty & Wilson, 2018; Cukier et al., 2021). We can illustrate this effect more concretely with the example of *Amelia*. *Amelia* is marketed as an AI that can deal with the first line of customer service. That means that she can answer easy, practical questions of customers. The second line of customer service, where the more difficult customer inquiries are being referred to, is performed by the human worker. And, while the work activities for the human customer service will intensify, empirical research indicates that in general these activities are experienced as more fulfilling, more satisfactory, by the human worker (cf. Daugherty & Wilson, 2018, 38 and 105ff). Thus, it is not the full job of customer service that will be taken over by *Amelia*, indeed, by addressing the easier, routine, inquiries, she will save time for the human customer service worker to focus on those more difficult inquiries. Together, they form a complete customer service worker, each with their own tasks to perform.

Furthermore, as response to the first and second stage development of a hybrid human-AI workforce, arguments have been made that although it is possible to automate many tasks and activities, it remains questionable whether it is also desirable to have tasks and activities automated (Langford 2020; Alston 2019). Indirectly, the third stage of the development of a hybrid human-AI workforce addresses this question. One of the reasons to raise this question is because in stage 1 humans are replaced by AI and in stage 2 humans and AI augment each other, meaning that for certain tasks humans work in service of AI. The third stage is "radically" different, or as Daugherty and Wilson call it "radically human", because humans will be ascendant to AI. In other words, humans will be in control of AI and AI will serve the needs of humans.

Re-thinking Fundamental Values to Create a Human-Friendly Hybrid Workforce

Technology is not a threat for society, it should be perceived as a support.
Philosophy of the Japanese Prime Minister Shinzo Abe (Önday, 2020)

The Enlightenment started with essentially philosophical insights spread by a new technology. Our period is moving in the opposite direction. It has generated a potentially dominating technology in search of a guiding philosophy.
Henry A. Kissinger (2018)

While the first- and second-stage hybrid human-AI workforces already exist in practice, it is to be seen when and to what extent the third stage of a hybrid or better symbiotic human-AI workforce will manifest. One thing is clear though the world's workforce is transforming from a purely physical human-machine-based one towards a workforce that is hybrid in the sense of partly physical (humans and machines) and partly digital (AI). It is also clear that companies are driven to seek a transition to a hybrid human-AI workforce based on a *sui generis* promise of operational success, that is, lower costs, greater efficiency, and enhanced productivity (Daugherty & Wilson, 2018, 135ff; 2022, 229; Gartner Institute, 2018). However, to a larger extent, and especially since after the COVID-19 pandemic, the drive for the transition is also a social, a human-centred, one. Within the European Union (EU), for example, Industry 4.0 has been complemented by Industry 5.0, in Japan it is Society 5.0, and in academic literature, especially in social sciences (economic theory, sociology,

anthropology, business management), it is positioned in a socio-economic paradigm of wellbeing for people within the boundaries of the planet. These concepts, ideas, and approaches bring new values that drive technological development and therewith the character of the hybrid human-AI workforce. In this section we will elaborate on the ideas underpinning Japan's Society 5.0 (Sect. 3.1), the EU's Industry 5.0 (Sect. 3.2), and very briefly the socio-economic wellbeing paradigm (Sect. 3.3).

Japan's Society 5.0

The term "Society 5.0" appeared in 2016 for the first time in a five-year policy strategy of the Japanese Council for Science, Technology, and Innovation (STI) as a government-wide vision for the future of Japan (H-UTokyo Lab., 2018; UNESCO, 2019). It envisions a 'sustainable, inclusive socio-economic system, powered by digital technologies such as big data analytics, artificial intelligence (AI), the Internet of Things and robotics' (UNESCO, 2019). More particularly, Society 5.0 is a society in which advanced information technologies, the Internet of Things, robots, artificial intelligence, and augmented reality are actively used in daily life, industry, health care, and other spheres of activity. The main objective being not economic profits, but the wellbeing and convenience of every citizen. Society 5.0 is therefore a society which is characterised by a higher level of integration, and interpenetration, facilitating the embedding of cyberspace (AI) in the physical space (the real world) (cf. H-UTokyo Lab., 2018; Fukuyama, 2018). This vision is driven by three major challenges, namely, technological change, economic and geopolitical change, and change in mindset (Keidanren, 2018). It is especially the latter drive that is of interest: What change in mindset?

The embedding of AI in the real world is not new. What is new is the approach and the scale by which it is proposed to be done in Japan's Society 5.0. Thus, instead of having AI (or any other cyber-system) operating with a limited scope, within Society 5.0, AI will 'operate throughout society in an integrated fashion' (UTokyo Lab., 2018, 2). This means that AI will be embedded in every aspect of (physical or real) life, including energy, transport, medical care, shopping, education, work, and leisure, with the aim to make life happier and more comfortable. As such, AI will shape human life in the real world (UTokyo Lab., 2018, 2–3). However, AI will do this in a manner that serves the human. More generally, the Japanese government's 2017 strategy describes Society 5.0 as a

human-centred society in which economic development, the resolution of social problems, and the quality of life are balanced (UTokyo Lab., 2018, 4). Balancing these interests is a huge challenge, which requires the further consideration of two relationships in particular: the relationship between technology and society and the technology-mediated relationship between individuals and society (UTokyo Lab., 2018, 5). To achieve such balancing many concepts, including capitalism, property, and values (of life), need to be re-considered and re-imagined (UTokyo Lab., 2018, 25ff and 155ff).

Ultimately, what Japan's idea for its Society 5.0 comes down to is 'to realize a society where people enjoy life to the fullest' and in which '[e]conomic growth and technological development exist for that purpose, and not for the prosperity of a select few' (Fukuyama, 2018, 50; and similar UTokyo Lab., 2018, xii). That Japan is among the frontrunners having a strategy for AI and fundamentally re-thinking its advancement is not surprising since it is facing serious societal problems with its shrinking and ageing population (UNESCO, 2019; Fukuyama, 2018, 47) and it offers a unique opportunity to further transform its economy after the so-called two lost decades (UNESCO, 2019; Önday, 2020). However, when it comes to high aspirations for the development of AI, Europe, or better the European Union, is not staying behind.

The EU's Industry 5.0

The year 2021 marked a decade since the introduction of the term "Industry 4.0" on the public forum, referring to a smart, digital, and connected industrial manufacturing. The year 2021 also marked the advent of "Industry 5.0". Whereas Industry 4.0 is perceived as a temporal continuity of the previous industrial revolutions, such is not the case with Industry 5.0. Nor is Industry 5.0 an alternative to the current industry status quo. Instead, it is a new direction for technological progress. As explained by Breque et al. (2021) in their policy brief for the EU, *Industry 5.0—Towards a sustainable, resilient, and human-centred European industry*, the most important difference between Industry 4.0 and Industry 5.0 is the relationship between humans and machines in the production process. The latter moves away from the question of what can be achieved with technology, which remains the determining factor in the development of Industry 4.0, towards the question of what technology can do for humans, or how

technology can complement the human worker in the interest of the human worker.

More specifically, the European Commission stresses on its website dedicated to Industry 5.0 that it complements Industry 4.0 by 'specifically putting research and innovation at the service of the transition to a **sustainable, human-centric** and **resilient European industry**' [emphasis in original] (https://research-and-innovation.ec.europa.eu). To this end, the EU's Industry 5.0 approach contributes to three of its priority policies: (1) An economy that works for people; (2) The European Green Deal; and (3) A Europe fit for the digital age (Ibid). This means that while the current EU's development of Industry 4.0 is moving towards digitalisation and artificial intelligence (AI) to increase the efficiency and flexibility in production, Industry 5.0 brings into Industry 4.0 a human-centric approach which links the digital transformation of the industry more closely to social development goals, such as social equality and sustainability.

However, from the *ESIR Policy Brief No.3*, entitled "Industry 5.0: A Transformative Vision for Europe", which is featuring on the EU's website about Industry 5.0, we understand that the EU's aspirations go much further than merely a refocus of the development of AI. In fact, the authors of the *ESIR Policy Brief No.3* aspire a 'deep systemic transformation' that 'takes into consideration learnings from the pandemic and the need to design an industrial system that is inherently more resilient to future shocks and stresses and truly integrated European Green Deal social and environmental principles' (pp. 3 and 7). To achieve this, the authors of the *ESIR Policy Brief No.3* argue that Industry 5.0 'means first and foremost a decisive move away from neo-liberal capitalism models' and instead a move towards 'a more balanced view of value over time and a multi-valent understanding of capital – human and natural as well as financial' (p. 7). To make this systemic transformation, Industry 4.0 lacks key design and performance dimensions, which Industry 5.0 has. Besides regenerative features of industrial transformation embracing the circular economy (dimension 1), and a mandatory environmental dimension which crafts new ways of thriving in respectful interdependence with natural systems (dimension 3), Industry 5.0 includes an inherently social dimension which includes 'the adoption of technologies that do not substitute, but rather complement human capabilities whenever possible' (dimension 2) (p. 5).

More fundamentally, to enable a full transition to Industry 5.0 it needs a European enterprise model that is based on principles of fairness,

resilience, sustainability, circular economics, and multi-valent forms of capital (p. 7). To achieve all this, the authors of the *ESIR Policy Brief No.3* plea for a new role for governments (Government 5.0), characterised by 'a degree of resource fluidity, strategic agility and leadership in the public sector' and by harnessing the power of public-private collaborations (pp. 15 and 17). More concretely, government 5.0 should be about policy processes that break existing path dependencies in order to be able to make the systemic change, supported by compliance processes that happen in parallel instead of sequentially and by public funding for research and development in service of creating new, sustainable economic models, new markets, industrial ecosystems, etc. Such, combined with an ambitious agenda for systemic transformation which strives for a (gradual) reorientation towards the United Nations sustainable development goals (SDGs) (p. 14–15).

In addition to Government 5.0, corporations also have an important role to play, starting with a change in their mindset and orientation of their actions towards Industry 5.0 objects. The latter means a move away from the shareholder model of capitalism and short-term gains and instead meeting, among others, requirements of de-carbonisation, resiliency measures, circular economy principles, regenerative practices and stakeholder approaches '(a people-planet-sustainable prosperity approach)' (pp 17, 18, and 23). A changed mind-set needs to be fostered by various means, such as investment in research and innovation, procurement policies, and a new educational curriculum. A new educational curriculum is key in fostering the transformation as it creates 'mind-sets, skills and capabilities that are trained to understand complexity, think in systems, use complexity friendly tools and methodologies, design principles, experimental learning, action and reflection cycles and iterations' (p. 21).

Socio-economic Wellbeing Paradigm

The aspirations reflected in Japan's Society 5.0 and the EU's Industry 5.0 do not stand by themselves. Indeed, in academic writing many ideas have been proposed that indicate a paradigm shift in socio-economic theory moving away from the current neoliberal free market capitalist paradigm towards a paradigm that can be labelled as the wellbeing paradigm. All these ideas have been developed against the background of the big challenges the world is currently facing, particularly climate change,

demographic change, increasing inequality and precariousness, as well as digitalisation.

While each of these ideas has its own specific focus, they have several commonalities (Ter Haar, 2023). These commonalities include a shift away from GDP and profit making for shareholders, towards the wellbeing of people and planet based on the recognition of the fact that the world is complex. The latter means that the economic system is to be embedded within society, including the recognition that there are diverse ways in which people's needs and wants can be achieved (Raworth, 2017, 71; Fioramonti, 2017, 167ff and 207ff; Mazzucato 2021, 198). An embedded economy includes ideas of a circular economy, regenerative energy, and distributive economy. Whereas the first two are strongly related to climate change, the latter is related to fighting poverty, inequality, and precariousness, as well as to digitalisation. Distributive economy encompasses ideas to make people freer from income through work, for example, by the introduction of a universal basic income (Raworth, 2017; Bregman 2017) or by other forms that distribute wealth in another way, including a shift of taxes not on income, but on wealth (Piketty 2015; Varoufakis 2021).

Another commonality that is shared by these ideas are approaches that are agnostic to growth and move beyond productive work. Core to these approaches is that workers are not a commodity and that work should be fulfilling, enriching, and of value to society and the individual human (Ter Haar, 2023). This implies that economic growth is in fact no longer related to a monetary interpretation measured by GDP, instead growth will become a much more complex notion. Such complexity encompasses, among others, the redefinition of certain economic concepts, including the rational homo economicus. Indeed, the human is seen and treated in its diversity as socially adaptable, engaging in different roles related to the economy, for example, as citizens, employees, entrepreneurs, consumers, and parents (Raworth, 2017, 128). Within these roles people engage in a wide range of values 'many times a day as we switch from bargaining to giving to competing to sharing in our constantly changing economic landscape' (Ibid; Montgomery, 2015). Following from this, it is clear that humans are motivated by more than just cost and price, indeed humans are motivated by various social dynamics, such as values, heuristics, norms, and networks. These social dynamics can be influenced by nudges and network effects 'because they tap into underlying norms and values – such

as duty, respect and care – and those values can be activated directly' (Raworth, 2017, 125ff).

More generally, the paradigm shift in this socio-economic thinking is fundamentally changing the purpose, values, and goals. Societies, for example, are to be based on values such as of loyalty, liberty, fairness, hierarchy, care, and sanctity. Business activities are expected to contribute to the realisation of those values, which means, among others, that work activities are not about increasing productivity to create higher profits, instead they are about offering people the possibility to develop their full potential or capabilities and delivering them feelings of self-esteem, belonging, satisfaction, etc. (Collier, 2018). Against such a background, the development and use of AI will also change fundamentally. It will no longer be part of the employer's prerogative as an instrument to increase productivity at the workplace, instead it will be about how it can contribute to achieving the broad societal goals and the more specific human needs, both within the workplace and in private life.

Re-shaping Regulatory Approaches

Japan's Society 5.0, the EU's Industry 5.0, and the new socio-economic wellbeing paradigms are all aspirational ideas that are full in development and far from realisation. Nonetheless, the sounds to follow the presented paths are rather strong and moves in the indicated directions to make deep systemic transformations are found in policies and regulations of various countries (e.g. wellbeing economy governments at https://weall.org/wego), cities (e.g. Amsterdam at https://doughnuteconomics.org/stories/1), and regions (the EU with, among others, the digital and green transition, NextGenerationEU). What stands out in all these aspirations, ideas, and policy activities is the human-centred approach they all take, often complemented with respect for the boundaries of the planet. Effectively these approaches limit a purely profit and productivity-driven approach to digitalisation.

More particularly, the profit and productivity-driven approach to digitalisation causes many conflicts with human rights and labour rights (Albin, 2023; Lobel, 2022; ILO Global Commission on the Future of Work, 2019), which has resulted in regulatory responses that are risk based (Aloisi & DeStefano, 2023) or that have the effect of limiting certain developments (e.g. the ban on ChatGPT in Italy—McCallum, 2023).

Such a risk-based approach can be found in EU legislation, with as most pronounced examples as Regulation 2016/679, also known as the General Data Protection Regulation (GDPR), the Commission's proposals to regulate platform labour (COM/2021/762 final), and the draft AI Regulation, also known as the AI Act (COM(2021) 206 final). Risk-based approaches are also found in the ILO's approach presented by the ILO Global Commission's landmark report *Work for a Brighter Future*. More particularly, as aptly observed by Albin, 2023, the ILO recognises the potential of technologies to free workers from arduous labour and dangerous work and how technologies can reduce the incidence of work-related stress and injuries. However, the main concern of the ILO Global Commission is on technologies being deployed by an employer and with the infringement of rights.

As is well known, a risk-based regulatory approach has gained popularity in organising today's complex reality as it offers a method to further compliance with certain rights and obligations, often fundamental human and labour rights, in situations where either developments move extremely fast, as in AI, or it is difficult if not impossible to foresee the consequences of regulatory activities, as in supply chain management and corporate social responsibility (CSR). While the positive side of such a risk-based approach is that it offers a (quasi-)legal framework to hold certain parties responsible, these approaches rely on forms of self-governance and self-assessment of which its effectiveness is debatable (Otto, 2022; Aloisi & DeStefano, 2023; García-Muñoz et al., 2011, 2014). Moreover, as Aloisi and DeStefano (2023, 12) rightly point out, a risk-based approach still allows and enables the adoption of technology despite its harms. Particularly, since it makes risks the main standard for assessing the performance of the addressees of the regulations, rather than compliance with labour rights standards. Therefore, following Hidvegi et al. (2021) (and similarly Otto (2022)), Aloisi and De Stefano argue that this is an undesired development and instead an approach of prescriptive frameworks protecting non-waivable (labour) rights should be followed. However, with this, they lose sight of the fact why prescriptive frameworks are not used in the first place and a turn is taken for a risk-based approach through governance and procedural rules.

In the end, both the ILO Global Commission and Aloisi and De Stefano promote forms of participation rights to control the use of AI in the context of work. More concretely, the ILO Global Commission proposes steps to 'actively' manage 'technology to ensure decent work' and to

ensure 'human in command' and puts forth other mechanisms, such as union involvement, to counteract the sole management of technologies by employers. Aloisi and De Stefano (2023, 25) conclude that a 'meaningful shift towards human-centric models requires collective codetermination and, importantly, co-design of AI- and algorithm-based systems throughout their entire life cycle.' A strong stakeholder's approach and emphasis on participation rights can also be found in the more general socio-economic ideas underpinning the wellbeing paradigm described in Sect. 3.3 (cf. Schwab with Vanham 2021; Frey, 2018, 34–6).

Yet, as elaborated in the *ESIR Policy Brief No.3* (p. 7), while participation rights are crucial, they will not be enough to make the deep systemic transformation that is needed for a socio-economic system that is truly people- and planet-centric. Furthermore, the authors of the *ESIR Policy Brief No.3* stress that a cost-benefit analyses, which is currently part of the EU's Better Regulation agenda, is also not a good approach, instead a path should be walked that is inspired by the need to achieve progress towards the goals, principles, and values of Industry 5.0. Therefore, as already indicated in Sect. 3.2, governments need to act with 'a degree of resource fluidity and strategic agility' (p. 15). When combined with the more general socio-economic ideas underpinning the wellbeing paradigm, which includes the recognition that the world and societies are complex, that humans are motivated by various social dynamics, and that businesses operate by certain ethical rules (Raworth 2017; Henderson, 2021), regulation itself should also be more refined to respond and reflect to such complexities. In such a context Feldman (2018) proposes a legal system that embraces a hybrid approach of explicit and implicit mechanisms, including traditional enforcement mechanisms and soft mechanisms such as nudging, de-biasing, accountability, and reflection, as well as enabling. However, before elaborating further on re-shaping regulatory approaches, it is necessary to identify what the values and legal principles are and whether the existing ones suffice or new ones need to be formulated.

Conclusions: Re-regulatory Avenues for a Human-Friendly AI-Human Workforce

In its joint solemn European Declaration on Digital Rights and Principles (COM(2022) 28 final), the EU is proclaiming that its vision for a digital transformation 'puts people at the centre, empowers individuals and

fosters innovative business' and that it should encompass 'digital sovereignty, inclusion, equality, sustainability, resilience, security, trust, improving quality of life, respect of people' rights and aspirations and should contribute to a dynamic, resource-efficient and fair economy' (par. 3 preamble). In terminology this comes rather close to the rhetoric used in Japan's Society 5.0, the aspirational vision of the EU's Industry 5.0, and the wellbeing paradigm in broader socio-economic writing. They all bring a new purpose for AI, or the development of technologies in general, namely, contributing to the achievement of societal values in general and the needs of people and planet more particularly.

More regulatory technically, to guide the development of AI and its application in society and at workplaces, any regulatory system should be based on the aspirational values and principles underpinning the wider social-economic context it needs to operate in. In this case, those of Society 5.0, Industry 5.0 or the wellbeing paradigm. From a regulatory point of view, such a re-calibration would be interesting and effective, since as we see it values fulfil various important functions: *normative* (determining the content of legal regulations); *rationalising* (they give meaning to legal decisions, indicating the desired results of their implementation); *evaluative* (they are criteria for assessing the content and results of fulfilling legal norms); *interpretative* (they determine the direction and scope of interpretation of legal norms).

In theory at least, the values introduced into the system of law should take on the normative shape of legal principles. Such legal principles should be perceived as a necessary reaction of the normative order to a specific novelty, requiring normative 'internalization'. The values are also to be translated into approaches that guide the evaluations and interpretations of the legal principles. Interesting approaches to highlight for further consideration are Albin's "accommodation approach", which is inspired by disability regulations (Albin, 2023), and Méda's "care approach", which signifies 'that, from now on, production must obligatorily *care for* and *care about* our natural heritage, social cohesiveness and human labour' (Méda, 2016, 24). The more general post-growth and post-productive work approaches could also serve as such, although they would need further refinement for which suggestions are provided in the edited books by Bueno et al. (forthcoming 2023) and Seidl and Zahrnt (2022).

To conclude, a more human-friendly human-AI workforce requires a deep systemic transformation for which the first ideas and steps are already taken. To achieve the goals, values, and (legal) principles of the new reality

the transformation is aiming for, regulatory techniques need to be reshaped and its avenues need to be re-regulated. Such definitely requires a move away from risk-based regulations towards hybrid legal system combining explicit and implicit regulatory mechanisms that are based on new approaches, including at least an enabling or empowering approach, such as a stakeholder approach based on extensive participation rights, and more innovative approaches such as Albin's accommodation approach and Méda's care approach.

Note

1. N.B., we use the term "work activities" in two understandings in this chapter. Firstly, to distinguish between work as a complete job and certain tasks in a particular job. Secondly, to distinguish between work as an economically gainful activity in the current neoliberal free market capitalist paradigm, on the one hand, and activities performed by humans in a post-growth and post (productive) work paradigm, on the other hand (see Sect. 3.3).

References

Adams-Prassl, J. (2019). What if your boss was an algorithm? The rise of artificial intelligence at work. *Comparative Labor Law & Policy Journal, 41*(1), 123–152.

Albin, E. (Forthcoming 2023). Technologies as accommodations: A post-work utopia or a possible reality? In N. Bueno, B. ter Haar, & N. Zekić (Eds.), *Labour law utopias: Post growth and post (productive) work approaches*

Aloisi, A., & DeStefano, V. (2023). Between risk mitigation and labour rights enforcement: Assessing the transatlantic race to govern AI-driven decision-making through a comparative lens. *European Labour Law Journal (Special Issue Contribution)*, 1–25.

Aloisi, A., & Gramano, E. (2019). Artificial intelligence is watching you at work. Digital surveillance, employee monitoring, and regulatory issues in the EU context. *Comparative Labor Law & Policy Journal, 41*(1), 95–121.

Alston, P. (2019). Universal basic income as a social rights-based antidote to growing economic insecurity. In K. Young (Ed.), *The future of economic and social rights*, foreword by A. Sen (p. 377). Cambridge University Press.

Benanav, A. (2020). *Automation and the future of work*. Verso Books.

Bregman, R. (2017). *Utopia for Realists and how we can get there*. Bloomsbury.

Breque, Maija, De Nul, Lars and Petridis, Athanasios, eds. 2021. "Industry 5.0: Towards a sustainable, human-centric and resilient European industry". R&I Papers Series – Policy Brief. Available at: https://data.europa.eu/doi/10.2777/308407 (last accessed 9 May 2023).

Bueno, N., ter Haar, B., & Zekić, N. (Eds.). (Forthcoming 2023). *Labour law utopias: Post growth and post (productive) work approaches.* Oxford University Press.

Cavallini, G., & Avogaro, M. (2019). Digital work' in the 'platform economy': the last (but not least) stage of precariousness in labour relationships. In J. Kenner, I. Florczak, & M. Otto (Eds.), *Precarious work. The challenge for labour law in Europe* (pp. 176–196).

Cherry, M. A., & Aloisi, A. (2017). "Dependent contractors" in the gig economy?: A comparative approach. *American University Law Review, 66*, 635–689.

Collier, P. (2018). *The future of capitalism. Facing the new anxieties.* HarperCollins Publishers.

Cukier, K., Mayer-Schönberger, V., & Véricourt, F. (2021). *Framers: Human advantage in an age of technology and turmoil.* Dutton.

Daugherty, P. R., & Wilson, H. J. (2018). *Human + machine. Reimagining work in the age of AI.* Harvard Business Review Press.

Daugherty, P. R., & Wilson, H. J. (2022). *Radically human. How new technology is transforming business and shaping our future.* Harvard Business Review Press.

Estlund, C. (2021). *Automation anxiety. Why and how to save work.* Oxford University Press.

Feldman, Y. (2018). *The law of good people. Challenging states' ability to regulate human behaviour.* Cambridge University Press.

Fioramonti, L. (2017). *Wellbeing economy: Success in a world without growth.* Pan McMillan.

Frey, B. S. (2018). *Economics of happiness.* SpringerLink.

Fukuyama, M. (2018). Society 5.0: Aiming for a new human-centered society. *Japan Economic Forum – Japan Spotlight: Special Article, 2*, 47–50.

García-Muñoz Alhambra, A., ter Haar, B., & Kun, A. (2011). Soft on the inside, hard on the outside: An analysis of the legal nature of new forms of international labour law. *International Journal of Comparative Labour Law and Industrial Relations, 27*(4), 337–363.

García-Muñoz Alhambra, A., ter Haar, B., & Kun, A. (2014). Independent monitoring of private transnational regulation of labour standards: A feasible proposition for a "transnational labour inspectorate" system? In E. Ales & I. Senatori (Eds.), *The transnational dimension of labour relations: A new order in the making?* (pp. 254–290).

Gartner Institute. (2018). *Predicts 2018: AI and the future of work.* Available at: https://www.gartner.com/en/documents/3833572 (last accessed 9 May 2023).

Graeber, D. (2019). *Bullshit jobs. The rise of pointless work and what we can do about it.* Penguin Random House.

Haar, Beryl ter. (Forthcoming 2023). Economic paradigm shifts for labour law. In N. Bueno, B. ter Haar, & N. Zekić (Eds.), *Labour law utopias: Post growth and post (productive) work approaches.*.

Henderson, R. (2021). *Reimagining capitalism in a world on fire. How business can save the world*. Penguin Random House.

Hidvegi, F., Leufer, D., & Massé, E. 17 February 2021; last updated 13 January 2023. "The EU Should Regulate AI on the Basis of Rights, Not Risks", AccessNow. Available at: https://www.accessnow.org/eu-regulation-ai-risk-based-approach/ (last accessed 14 May 2023).

Hiessl, C. (2022). The classification of platform workers in case law: A cross-European comparative analysis. *Comparative Labour Law & Policy Journal, 42*(2), 465–518.

Hitachi-UTokyo Laboratory (H-UTokyo Lab.). (2018). *Society 5.0. A people-centric, super-smart society*. Springer Open.

ILO Global Commission on the Future of Work. (2019). Report work for a brighter Future. Available at: https://www.ilo.org/global/publications/books/WCMS_662410/lang%2D%2Den/index.htm (last accessed 14 May 2023).

Keidanren. Society 5.0. Co-creating the future (excerpt translation into English from Japanese) 2018. Available at: https://www.keidanren.or.jp/en/policy/2018/095.html (last accessed 9 May 2023).

Kissinger, H. A. (2018, June). How the enlightenment ends. *The Atlantis*. Available at: https://www.theatlantic.com/magazine/archive/2018/06/henry-kissinger-ai-could-mean-the-end-of-human-history/559124/ (last accessed 9 May 2023).

Langford, M. (2020). Taming the digital leviathan: Automated decision-making and international human rights. *American Journal of International Law, 114*, 141–146.

Lobel, O. (2022). *The equality machine: Harnessing digital technology for a brighter, more inclusive future*. PublicAffairs.

Mazzucato, M. (2021). *Mission economy. A moonshot guide to changing capitalism*. Harper Business.

McCallum, S. (2023, April 1). ChatGPT banned in Italy over privacy concerns. Available at https://www.bbc.com/news/technology-65139406 (last accessed 14 May 2023).

Méda, D. (2016). *The future of work: The meaning and value of work in Europe* (ILO Research Paper No. 18). Available at: https://www.ilo.org/global/research/publications/papers/WCMS_532405/lang%2D%2Den/index.htm (last accessed 18 May 2023).

Mélypataki, G. (2019). Effects of artificial intelligence on labour law and labour market: Can AI be a boss? *European Integration Studies, 15*(1), 69–80.

Montgomery, S. (2015). *The soul of an octopus*. Simon & Schuster.

Önday, Ö. (2020). Society 5.0 – its historical logic and its structural development. *Journal of Scientific Reports, 2*(1), 32–42.

Otto. (2022). A step towards digital self- & co-determination in the context of algorithmic management systems. *Italian Labour Law E-Journal, 15*(1), 51–64.

Piketty, T. (2015). Capital and wealth taxation in the 21st century. *National Tax Journal, 68*(2), 449.
Ponce Del Castillo, A. (2020). *Labour in the age of AI: Why regulation is needed to protect workers* (ETUI foresight brief #08).
Raworth, K. (2017). *Doughnut economics. Seven ways to think like a 21st-century economist*. Penguin Random House.
Ross, A. (2016). *The industries of the future*. Simon & Schuster.
Schwab, K., with Vanham, P. (2021). Stakeholder capitalism: A global economy that works for progress, people and planet. : Wiley.
Seidl, I., & Zahrnt, A. (Eds.). (2022). *Post-growth work. Employment and meaningful activities within planetary boundaries*. Routledge.
Susskind, D. (2020). *A world without work. Technology, automation, and how we should respond*. Metropolitan Books.
UNESCO. (2019, February). Japan pushing ahead with society 5.0 to overcome chronic social challenges. *UNESCO NEWS*. Updated April 2023. Available at: https://www.unesco.org/en/articles/japan-pushing-ahead-society-50-overcome-chronic-social-challenges (last accessed 9 May 2023).
Varoufakis, Y. (2021). *Another now*. Melville House.
Weill, D. (2014). *The fissured workplace. Why work became so bad for so many and what can be done to improve it*. Harvard University Press.

Websites

City of Amsterdam and Doughnut Economics. https://doughnuteconomics.org/stories/1 (last accessed 14 May 2023)
DigitalWorkforce.ai. https://hire.digitalworkforce.ai/1store/user/home (last accessed 9 May 2023).. https://amelia.ai/ (last accessed 9 May 2023).
ESIR Policy Brief 3. https://research-and-innovation.ec.europa.eu/knowledge-publications-tools-and-data/publications/all-publications/industry-50-transformative-vision-europe_en (last accessed 9 May 2023).
EU funded project Working Yet Poor. - https://workingyetpoor.eu/ (last accessed 9 May 2023).
EU Industry 5.0. https://research-and-innovation.ec.europa.eu.
General EU policy information about Industry 5.0. https://research-and-innovation.ec.europa.eu/research-area/industrial-research-and-innovation/industry-50_en (last accessed 9 May 2023).
Wellbeing economy governments. https://weall.org/wego (accessed 14 May 2023).

CHAPTER 8

The Right to Disconnect as a Tool to Tackle Inequalities Resulting from Remote Working

Irmina Miernicka

Introduction

The COVID-19 pandemic has led in many cases to the relocation of workplaces to workers' homes and to a change in the way they communicate with their employers. Remote working (ICT-based mobile working) continues to be widely used in varied businesses. It is anticipated that more workers would be willing to work under this arrangement and that more employers might offer it in the future. Both employers and workers are aware of its advantages—flexibility, which may result in a better work-life balance and increased productivity and reduced costs. On the one hand, it allows to save time normally spent on commuting to the office and lessen costs of renting and maintaining office space. The digital technology provides the opportunity for improved information and communication flows, as well as skills development. On the other hand, such working pattern frequently makes it difficult for workers to disconnect from work, which over time leads to physical and mental health problems, as well as to

I. Miernicka (✉)
University of Lodz, Lodz, Poland
e-mail: irmina.miernicka@wpia.uni.lodz.pl

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_8

disruption of the work-life balance, blurring private and work spheres. Remote working poses the risk of information overload, ineffective cooperation and social isolation. Moreover, the specific economic conditions in which such working arrangement is currently developing must be considered. The COVID-19 pandemic has greatly accelerated the spread of such work organization across different industries, thus enabling many businesses to operate relatively smoothly. At the same time, workers have felt a greater need to be involved and available, often excessively as they fear they might lose their jobs. Therefore, they sacrifice their leisure time, health and rights granted.

This chapter focuses primarily on the inequalities that remote work and the associated increased availability, caused by the usage of digital tools for working purposes, can create. The right to disconnect is presented as one of the tools that can serve to rectify these inequalities.

Risks to Equality at Work Arising from Remote Working

Firstly, it should be explained what is meant by "remote working". I understand remote working mostly as an ICT-based mobile work, which enables a worker to operate from various possible locations outside the premises of their employer, such as at home, a client's premises, co-working spaces or on the road. Work is supported by modern technologies, including laptops, computers, smartphones or tablets. It should be emphasized that this working pattern is different from traditional teleworking in the sense it is even less "place-bound" and does not have to be provided this way on a regular basis (Eurofund, 2020a, p. 7). The following types of ICT-based remote work can be distinguished:

- occasional ICT-based mobile work,
- highly mobile ICT-based mobile work,
- self-employed ICT-based mobile work (Eurofund, 2020b, p. 5).

As noticed, whereas appropriate use of digital tools has brought many economic and social benefits to both employers and workers, digital transformation should be based on respect for fundamental rights and values and have a positive impact on working conditions. Unfortunately, remote working may cause inequalities between workers and even lead to

discrimination of specific group of workers on various grounds. This may have several dimensions. Remote working can itself constitute basis for granting less favourable working conditions. There may be situations in which remote workers, e.g., experience precarious employment conditions, are paid less or are not entitled to certain benefits simply because they use this form of work. Of course, such a distinction on this basis alone will not be legitimate. Next, the spread of remote working can create a new obstacle called housing inequality, as housing conditions are often perceived as problematic by remote workers. Inefficient space, accommodation conditions and poor telecommunication environment at home may result in a decrease of productivity (Armillei et al., 2021).

Without diminishing these problems, I, however, would like to focus on another aspect of unequal treatment that may be induced by ICT-based mobile working. Such working pattern may cause increased workers' availability—the greater use of digital tools for work purposes has resulted in a "ever-connected" culture, which can have detrimental effects on fair working conditions. As surveys show, those who regularly work from home are more than twice likely to work in excess of the requisite maximum 48 hours per week and are at risk of resting for less than the requisite 11 hours between working days compared to those working on their employer's premises. Additionally, such workers more frequently report working in their free time are also more likely to work irregular hours (Eurofund, 2020c, p. 5). Unfortunately, the excessive connectivity is often seen by employers and superiors as an advantage, expected and rewarded. Some workers spending more time on their work results in others wanting, or even needing, to keep up with them so that they are not treated less favourably. Nevertheless, for some groups of workers this is often not possible, which can lead to them being unjustifiably considered as "inferior", less committed workers. This involves:

- women and workers with caring responsibilities;
- young workers;
- elderly workers;
- workers with disabilities.

Women are particularly vulnerable to economic and social impact of the COVID-19 crisis, due to their still traditional role of caregiver of the home and family. They spend more time than men in fulfilling caring responsibilities and more often work fewer hours in paid employment.

Moreover, they are more likely to leave the labour market due to household responsibilities. As surveys present, family responsibilities prevented more women (24%) than men (13%) from giving the time they wanted to their job. Additionally, the sectors that have been most affected by social distancing and restrictive measures cover inter alia tourism, retail, hospitality and aviation—women account for 61% of workers doing this type of work (Eurofund, 2020d, pp. 4–15). The increase of remote working during the COVID-19 crisis can also pose a higher risk to workers with caring responsibilities, such as single parents, families with children and families with dependent relatives requiring care.[1] Being engaged in essential caring tasks makes them less able to be "constantly available" and respond to contacts. Additionally, young workers very often make up the majority of occasional ICT-based mobile workers (Eurofund, 2020a, p. 9). It is common for this category of workers to combine work with educational activities, to which they also need to devote sufficient time. Finally, being available out of regular working hours impedes the body's recovery mechanisms, contributing to negative health impacts, which can be particularly disruptive for elderly workers and those with disabilities. Increase in connectivity at the workplace should not result in any form of unequal treatment or discrimination in terms of recruitment or career development. One of the tools to prevent this might be the right to disconnect from digital tools, including ICT.

Right to Disconnect in Selected EU Member States

Increased availability outside of working hours has been around for a long time and is not merely the result of a pandemic, however the development of digital tools and remote work has intensified this phenomenon. The use of digital tools for professional purposes has led to the culture of "always-available" workers, working anytime, anywhere (Dagnino, 2020, p. 2) (Ray, 2015, p. 516) (Eurofound & International Labour Office, 2017). Consequently, the right to disconnect has either already been regulated by law or is applied in practice in some Member States. However, the methods of this regulation or application vary widely—they differ in terms of the personal scope, the manner of implementation or the consequences of violation.

The first European state to introduce a right to disconnect into the national labour code was France. The French Cour de Cassation in 2001 stated that an employee is not obliged neither to tolerate work at home

nor to bring work-related documents and tools there,[2] and a few years later ruled that the employee could not be punished for being not reachable by cell phone outside of office hours.[3] Based on this, in 2017 the right to disconnect was regulated in an act called the El Khomri law, amending French labour law. Procedures for the full exercise of the employee's right to disconnect and the establishment of mechanisms to regulate the use of digital tools while respecting rest and vacation periods as well as personal and family life are the subject of mandatory annual negotiations between social partners at workplace level when employing 50 or more employees (Lerouge & Trujillo Pons, 2020, pp. 457, 459–460) (Pansu, 2018, pp. 100–101).

France became an inspiration for other European countries, which have legally guaranteed the right to disconnect, adopting their own way of regulating it. Spanish law established a right to digital disconnection in data protection legislation, as one of the key issues to provide the right to privacy in the use of digital devices in the workplace. It sets forth a legal framework for the social partners to agree on the right to disconnect in sectoral or company-level collective agreements. As a result of negotiations, an internal policy shall be prepared, defining the modalities for exercising the right to disconnect along with awareness-raising measures on reasonable use of technological tools. The right to disconnect applies to workers in the public and private sectors (Lerouge & Trujillo Pons, 2020, pp. 460–461). Italian legislation, on the other hand, provides such a right for employees with whom the employer has entered into individual agreements providing for so-called lavoro agile, i.e., work without precise restrictions on hours or place of work. Such an agreement shall stipulate how the work is performed outside the employer's seat and also identify the rest periods together with the technical and organizational measures necessary to ensure that the employee is then disconnected from the technological equipment (UNI Global Union, 2020, pp. 4–5) (Dagnino, 2020, p. 5).

According to the amendments in Slovak labour code, which entered into force in 2021, the right to disconnect was granted to each employee working remotely, working from home and working in these forms on an occasional basis. Such employees are entitled to abstain from using work equipment during their designated rest periods (e.g., vacations, public holidays) if they were not ordered or agreed to work on-call or overtime at that time. Consequently, employers cannot punish their employees for exercising this right (Dolobáč, 2022, pp. 121–123).

In November 2021, the Portuguese Parliament passed a law imposing financial penalties on employers with more than ten employees for contacting remote workers outside working hours (unless there was an emergency). The new legislation only mentions a prohibited activity but does not directly introduce the right to disconnect as a separate employment right (BBC News, 2021). Belgium also passed a new law in early 2022 that allows civil servants to disconnect from work. At the same time, there was a discussion about extending the new legislation to private sector employees (European Trade Union Confederation, 2022) and, as it turns out, it has yielded results. According to the so-called Labour Deal, employers with at least 20 employees in the private sector are required to lay down written arrangements regarding disconnection, including inter alia practical modalities for exercising this right, guidelines on the use of digital tools and awareness-raising measures on the reasonable use of digital tools (Van & Wynant, 2022).

In Ireland, in 2021, the Workplace Relations Commission (WRC) developed a code of good practice containing practical guidance on implementing the right to disconnect in a company. While non-compliance with the Code is not an offence itself, the courts and the WRC can rely on its provisions where they are relevant to the matter at hand. The right to disconnect consists of three elements:

- the employee's right not to perform regular work outside normal working hours,
- the right not to bear the negative consequences of refusing to work outside working hours,
- the obligation to respect the right of another person to disconnect (Workplace Relations Commission, 2021).

Germany, in turn, considered that the rules already in force on working hours and rest periods were sufficient. The right to disconnect is subject to voluntary consultation by social partners and is regulated at the level of specific workplaces (Secunda, 2019, pp. 29–30). The German model is therefore a corporate self-regulation. In the last decade, well-known companies such as BMW, Audi and Telekom, and even the German Ministry of Labor, have implemented codes of conduct limiting the possibility of contact with employees outside normal working hours only to exceptional situations. Volkswagen introduced limited email sending to employees'

mobile phones in 2011, Daimler in turn gave employees the option to use software removing incoming emails while on vacation (Bell et al., 2021, p. 27) (BBC News, 2014).

European Parliament Proposals on the Right to Disconnect

The necessity to disconnect from digital tools firstly has been recognized by the European social partners in 2020. They noticed that the EU and national governments had an important role to play by, on the one hand, allowing and supporting employers and workers to take their opportunities and, on the other, leaving them autonomy to find tailor-made solutions to deal with the challenges in the specific enterprises. According to the European Social Partners Autonomous Framework Agreement on digitalization, measures to be considered include inter alia:

- training and awareness-raising measures;
- providing guidance and information for employers and workers on how to respect working time rules and teleworking and mobile work rules including on how to use digital tools, including the risks of being overly connected particularly for health and safety;
- commitment from management to create a culture that avoids out of hours contact;
- appropriate compensation for any extra time worked (achievement of organisational objectives should not require out of hours connection);
- support procedures to guard against detriment for workers for not being contactable.[4]

The measures proposed in the agreement are rather of "soft" nature and focus mainly on awareness-raising activities. Nevertheless, it explicitly mentions protection from adverse treatment as one of the key elements to effectively implement the right to disconnect.

The development of digital tools, particularly highlighted by the COVID-19 pandemic (Eurostat, 2021; Eurofund, 2020e; Eurofund, 2020f, p. 12), has led also the European Parliament to consider disconnection as an urgency for workers. In January 2021, it presented a Resolution with recommendations to the Commission on the right to disconnect, accompanied by an annex which is the text of a proposed

legislative proposal—a Directive of the European Parliament and of the Council on the right to disconnect (hereafter, the proposal).[5] According to the European Parliament, in order to prevent social dumping, it is necessary to define minimum requirements for the protection of all workers in the European Union who use digital tools for professional purposes, since some Member States have undertaken to regulate this right at national level. The European Parliament noted that the European Social Partners Autonomous Framework Agreement on digitalization provides for the social partners to take implementation measures within the three years starting from 2020 and that a legislative proposal before the end of that implementation period would disregard the role of social partners. The European Commission, in the follow-up to the European Parliament's resolution, invited social partners to find commonly agreed solutions to challenges raised by telework, digitalization and the right to disconnect. The Commission committed to further explore the context and implications of the right to disconnect beyond the pandemic. Consequently, in June 2022 the European social partners signed a joint 2022–2024 Work Programme which includes negotiations inter alia on legally binding measures to regulate telework and institute the right to disconnect.[6] Social partners agreed to negotiate an update on the 2002 Autonomous Agreement on Telework (hereinafter 2002 Agreement), which then would be put forward to adoption as a legally binding agreement implemented through European directive, introducing the right to disconnect in line with previous recommendations of the European Parliament (European Trade Union Institute - ETUI, 2022).

The proposal of the directive presented by the European Parliament lays down minimum requirements, does not constitute valid grounds for reducing the general level of protection already afforded to workers within Member States and is without prejudice to other rights conferred by legal acts of the Union. The proposal particularises and complements the provisions of Directives 89/391/EEC, 2003/88/EC, (EU) 2019/1152 and (EU) 2019/1158, without prejudice to the requirements laid down therein. This ensures that the right to disconnect is clearly linked to the core institutions of labour law and applied in compliance with previous regulations.

The proposal of the European Parliament covers all relevant elements, i.e., the scope of application, definitions, the role of Member States, means of implementation, protection against adverse treatment, the right to redress, the information obligation towards employees and sanctions.

Below I will briefly outline the most important concepts, without going into an in-depth analysis of them, as this is not the subject of this chapter.

As defined by the European Parliament, "disconnect" means not to engage in work-related activities or communications by means of digital tools (such as phone calls, emails or other messages), directly or indirectly, outside working time. Employers should not require workers to be directly or indirectly available or reachable outside their working time and that co-workers should refrain from contacting their colleagues outside the agreed working hours for work purposes. The right to disconnect should entitle workers to switch off work-related tools and not to respond to employers' requests outside working time, with no risk of adverse consequence.[7] The personal scope of the proposal includes all workers, independent of their status and their working arrangements, working in all sectors, both public and private[8]—using digital tools for professional purposes is determinant.

Measures implementing the right to disconnect cover:

- the practical arrangements for switching off digital tools for work purposes, including any work-related monitoring tools;
- the system for measuring working time;
- health and safety assessments, including psychosocial risk assessments;
- the criteria for any derogation from the requirement to implement right to disconnect (only in exceptional circumstances and subject to the employer providing each worker concerned with reasons in writing, substantiating the need for the derogation on every occasion on which the derogation is invoked);
- the criteria for determining how compensation for work performed outside working time will be calculated;
- the awareness-raising measures.[9]

Member States shall ensure that detailed arrangements are implemented in a fair and transparent manner, after consulting the social partners at the appropriate level. Member States may also, in accordance with national law and practice, entrust the social partners to conclude collective agreements at national, regional, sectoral or employer level providing for or complementing the measure described above.[10] Employers whereas should provide each worker in writing with clear, sufficient and adequate information on their right to disconnect, including a statement setting out the terms of any applicable collective or other agreements.[11]

Protection Against Adverse Treatment While Exercising the Right to Disconnect

Crucially, the exercise of the right to disconnect cannot result in unequal treatment or other adverse consequences related to recruitment, career opportunities or retaining employment. The proposal of the European Parliament explicitly addresses the issue of equal treatment of workers and notes that the absence of a statutory right to disconnect may result in some workers being disadvantaged. The European Parliament clearly states that remote working has a disproportionate impact mainly on workers with caring responsibilities and can make it particularly difficult for them to find a healthy work-life balance. Especially women spend more time than men in fulfilling such caring responsibilities, work fewer hours in paid employment and may leave employment entirely.

Taking all these factors into account, the proposal introduces several tools aimed at protecting workers. Firstly, it lays down an explicit ban on discrimination against workers exercising their right. Member States shall ensure that discrimination, less favourable treatment, dismissal and other adverse measures by employers on the ground that workers have exercised or have sought to exercise their right to disconnect are prohibited.[12] This means that workers will be protected from the negative consequences of being disconnected, while at the same time employers will not be able to promote continuous availability. Secondly, engagement in active protection of workers in case they enforce their rights is required. Member States shall ensure that employers protect workers, including workers' representatives, from any adverse treatment and from any adverse consequences resulting from a complaint lodged with the employer or resulting from any proceedings initiated with the aim of enforcing compliance with the rights provided for in the directive.[13] Thirdly, it introduces a reversed burden of proof. Member States shall ensure that where workers who consider that they have been dismissed or subject to other adverse treatment on the grounds that they exercised or sought to exercise their right to disconnect establish, before a court or other competent authority, facts capable of giving rise to a presumption that they have been dismissed or subject to other adverse treatment on such grounds, it shall be for the employer to prove otherwise.[14] Fourthly, the proposal of the European Parliament ensures right of redress and access to swift, effective and impartial dispute resolution. It should be provided by Member States to the workers whose right to disconnect is violated.[15] Member States should

also lay down rules on effective, proportionate and dissuasive sanctions applicable to infringements of national provisions.[16] Last but not least, employers are obliged to clearly inform workers on their rights and adopted measures. To achieve this goal, Member States shall ensure that employers provide each worker in writing with clear, sufficient and adequate information on their right to disconnect, including the measures for protecting workers against adverse treatment.[17]

Conclusions

The right to disconnect is of vital importance to the workers and employers. It has even been classified by the European Parliament as a fundamental right that is inherent in the new work patterns.[18] Whereas appropriate use of digital tools has brought many economic and social benefits to both employers and workers, digital transformation should be based on respect for human rights and European Union values, thus having a positive impact on workers and their working conditions.[19] The right to disconnect is of particular importance to the most vulnerable workers. As practice shows, employers or co-workers frequently demand availability after regular working hours, and workers themselves still don't know their rights, and sometimes are even convinced that they have be always available. The starting point is therefore to raise awareness of both employer and workers, which is already happening through public discussion and research on new risks associated with using ICT for professional purposes. Nevertheless, legal regulation at the European Union level may be necessary to convert these soft measures into specific actions in favour of workers, especially the most vulnerable. Although legal acts relating to non-discrimination and equality are already in place, in my opinion they do not guarantee sufficient protection for workers in the digital era, as they do not take into account the specific conditions of work provision and the new risks involved. The introduction of the right to disconnect in the form of a directive will strengthen the protection of workers by providing an effective tool for combating some of the inequalities arising from remote working. Above all, it will force all Member States to guarantee the possibility to exercise the right to disconnect in practice. Workers who cannot be available outside regular working hours because of family or educational obligations, health or even financial constraints will be explicitly protected against unfavourable treatment. It will also facilitate combining their responsibilities with private and family life and, in some cases,

may prevent these workers from quitting the labour market. Furthermore, it will make it easier to pursue claims in practice, thanks to the reversed burden of proof. Attention should also be drawn to the educational value—the very proposal for a directive is causing public discussion and thus raising awareness of both workers and employers.

The EU legislation on the right to disconnect can only be of a general nature. It is about adopting legal provisions that, on the one hand, do not nullify the benefits of digitization and, on the other hand, oblige employers to take specific actions, thus ensuring effective protection of workers. Detailed arrangements ought to be "tailored" for a specific workplace. At the same time, the future directive should be more elaborate than the existing laws of Member States. The idea, after all, is to provide uniform protection for workers throughout the EU, so it cannot be limited to simply stating that they have the right to disconnect.

There are naturally some shortcomings of the proposal of the European Parliament, which should be discussed, as they might have a negative impact on effective enforcement of this right and ensuring workers' equality. They concern mainly the definition of the right to disconnect, its legal nature, as well as a personal scope—these are crucial issues as they define the scope of practical application of this right. I am a supporter of the wide definition of the right to disconnect, as only this form will allow workers to fully enjoy the advantages of it. Therefore, in my opinion, it would be necessary to clarify that disconnection covers contacts with both superiors, co-workers and customers of the employer. In addition, the right to disconnect should be understood broadly, not only as the right not to respond to various work-related calls, but also the prohibition of being disturbed by any work-related matters by anyone during leisure time, with certain exceptions (Miernicka, 2022, p. 130). The definition should therefore incorporate the duty of others to respect a worker's right to disconnect.

Significant doubt that arises concerns the nature of the right to disconnect. Should it be understood only as a right, or also as a worker's duty, the non-compliance of which may bring negative consequences? After all, one of the most important values is at stake—the health of a worker. Going further, does a worker's right constitute an employer's duty to disconnect or should an employer only allow him to exercise his right? In exercising the right to disconnect, the conduct of workers themselves is essential—firstly, they should manage their time properly and find time to rest and, secondly, respect the right of another person to disconnect. After all, every worker is responsible for ensuring the health and safety of himself and

others at work. Therefore, the right to disconnect should be treated as a shared responsibility between employer and workers (Kurzynoga, 2022, p. 10). So as not to undermine the flexibility of working time, I believe that an employer's duties should primarily involve awareness building, providing the tools and supervision rather than forcing a worker to disconnect.

In the laws of the Member States adopted so far, the categories of workers granted the right to disconnect have been shaped differently and are often limited to remote workers. My view is that the right to disconnect should be given to the broadest possible group of workers. In this context, the proposals of the European Parliament are accurate—this right would be applied to all sectors, both public and private, and to all workers, independent of their status and their working arrangements, provided they use digital tools for work purposes.[20] Thereby, it covers not only remote workers, but also those working on the employer's premises. They may work with digital tools constantly, regularly, as well as incidentally. Moreover, such work also means performing tasks on a computer or other devices that do not involve communication (Moras-Olaś, 2021, p. 313). There is however an inaccuracy, as the proposal refers to the Directive 2003/88/EC, which provides derogation from the minimum rest periods in case of managing executives or other persons with autonomous decision-taking powers. Consequently, it is not clear if they can exercise their right to disconnect. One could postulate that the future directive explicitly states there are no subject exemptions. I believe it is important given the high level of mental and physical strain managing executives face, provided that practical solutions consider the interests of an employer and the special regulations applicable to this group (Miernicka, 2022, p. 131). A similar view on this issue was also expressed by the ETUC (European Trade Union Confederation, 2021).

There might be also some problems with implementation of measures proposed by the European Parliament, however most of them can be (or even should be) resolved at the level of the workplace. Many tools can be used, starting with soft measures (introduction of relevant policies, awareness-raising activities, training), through organizational solutions that structure work processes (no-connection time, bulk email best practices, emergency communication channels), and ending with more advanced technical tools. The technology solutions currently in use allow for measures such as autoresponders, messages forwarding, servers blocking, messages delaying, clock-in systems, reminders from the system

indicating that the right to disconnect may be violated, availability information in the footer of emails or chats. Real involvement of employers and workers will make it possible to adapt internal policies and procedures to the specifics of an organization as effectively as possible, considering such factors as industry, work organization, employment structure, digital tools used, working time systems and schedules, categories of customers served or extraordinary circumstances requiring increased availability. Therefore, I do not agree with the statement that the introduction of the right to disconnect will nullify the flexibility of work—it is all about finding such tailored solutions that allow flexible working and at the same time prevent the infringement of workers' rights. It must be also emphasized that the right to disconnect is not about impeding contact with a worker but about developing such communication rules which, on the one hand, ensure that workers properly fulfil their tasks and, on the other hand, they are provided with adequate time for rest, private and family life (Miernicka, 2022, pp. 137–138). The proper enforcement will also level the position of different groups of workers, as employers will not be able to favour increased availability after working hours. Thus, workers, who are currently the most vulnerable groups, i.e., those with family responsibilities, educational duties or the elderly, will be able to disconnect from digital tools and devote their time to other tasks without the risk of negative consequences. Legal regulation on the right to disconnect can bring tangible benefits both for wellbeing and equality of workers and the development of workplaces.

Notes

1. Point G of the European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).
2. Cour de Cassation, Case 99-42.727, https://www.legifrance.gouv.fr/juri/id/JURITEXT000007046319?init=true&page=1&query=99-42.727&searchField=ALL&tab_selection=all (24.01.2023).
3. Cour de Cassation, Case 01-45.889, https://www.legifrance.gouv.fr/juri/id/JURITEXT000007473856?init=true&page=1&query=01-45.889&searchField=ALL&tab_selection=all (24.01.2023).
4. BusinessEurope, SMEunited, CEEP, ETUC, *European Social Partners Autonomous Framework Agreement on digitalisation*, 22.06.2020, s.10, https://www.etuc.org/en/document/eu-social-partners-agreement-digitalisation (25.04.2022).

5. European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html (27.04.2022).
6. The Work Programme has broader scope and covers also such priorities as green transition, youth employment, work-related privacy and surveillance, improving skills matching in Europe and capacity building—full text available here: https://www.businesseurope.eu/sites/buseur/files/media/reports_and_studies/2022-06-28_european_social_dialogue_programme_22-24_0.pdf (22.01.2023).
7. Art. 2 and motive 10 of the European Parliament directive proposal.
8. Art. 1(1) of the European Parliament directive proposal.
9. Art. 4(1) of the European Parliament directive proposal.
10. Art. 4(2) of the European Parliament directive proposal.
11. Art. 7 of the European Parliament directive proposal.
12. Art. 5(1) of the European Parliament directive proposal.
13. Art. 5(2) of the European Parliament directive proposal.
14. Art. 5(3) of the European Parliament directive proposal.
15. Art. 6(1) of the European Parliament directive proposal.
16. Art. 8 of the European Parliament directive proposal.
17. Art. 7 of the European Parliament directive proposal.
18. Point H of the European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).
19. Point B of the European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).
20. Art 1 par 1, Proposal for a Directive on the right to disconnect.

References

Armillei, F., Boeri, T., & Le Barbanchon, T. (2021). *Remote working, housing inequality and social mobility*. https://www.g20-insights.org/policy_briefs/remote-working-housing-inequality-and-social-mobility/ (28.03.2023).

BBC News. (2014). *Should holiday email be deleted?* Retrieved from https://www.bbc.com/news/magazine-28786117 (28.03.2023).

BBC News. (2021). *Portugal bans bosses texting staff after-hours*. Retrieved from https://www.bbc.com/news/business-59263300 (28.03.2023).

Bell, M., Lasek-Markey, M., Eustace, A., & Pahlen, T. (2021). *A right to disconnect: Irish and European legal perspectives*. A public policy report of the COVID-19, legal observatory, School of law, Trinity College Dublin, https://www.tcd.ie/law/2020.21/Final%20RTD%20report.pdf (28.03.2023).

Dagnino, E. (2020). Working anytime, anywhere' and working time provisions. Insights from the Italian regulation of smart working and the right to disconnect. *E-Journal of International and Comparative Labour Studies, 9*(3), 6–23.

Dolobáč, M. (2022). Legal protection of mental health of employees in Slovakia. *Studia Iuridica Toruniensia, 30*, 113–126.

Eurofound & International Labour Office. (2017). *Working anytime, anywhere: The effects of the world of work*. Publications Office of the European Union and the International Labour Office, https://www.eurofound.europa.eu/publications/report/2017/working-anytime-anywhere-the-effects-on-the-world-of-work (28.03.2023).

Eurofund. (2020a). *Labour market change: Trends and policy approaches towards flexibilisation* (Challenges and prospects in the EU series). Publications Office of the European Union, https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef19034en.pdf (28.03.2023)

Eurofund. (2020b). *Telework and ICT-based mobile work. Flexible working in the digital age* (New forms of employment series). Publication Office of the European Union, https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef19032en.pdf (28.03.2023).

Eurofund. (2020c). *Right to disconnect: Exploring company practices.* Publications Office of the European Union, https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef21049en.pdf (28.03.2023).

Eurofund. (2020d). *Women and labour market equality: Has COVID-19 rolled back recent gains*? Publications Office of the European Union, https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef20068en.pdf (28.03.2023).

Eurofund. (2020e). *Living, working and COVID-19* (COVID-19 series). Publications Office of the European Union, https://www.eurofound.europa.eu/publications/report/2020/living-working-and-covid-19 (28.03.2023).

Eurofund. (2020f). *New forms of employment: 2020 update*. Publications Office of the European Union, https://www.eurofound.europa.eu/publications/report/2020/new-forms-of-employment-2020-update (28.03.2023).

European Trade Union Confederation. (2021). *Position on the right to disconnect*. Retrieved from https://www.etuc.org/en/document/etuc-position-right-disconnect (28.03.2023).

European Trade Union Confederation. (2022). *Belgian workers win right to disconnect*. Retrieved from https://www.etuc.org/en/belgian-workers-win-right-disconnect (28.03.2023).

European Trade Union Institute - ETUI. (2022). *European social partners signed a joint Work Programme including negotiations on the right to disconnect.* Retrieved from https://www.etui.org/news/european-social-partners-signed-joint-work-programme-including-negotiations-right-disconnect (28.03.2023).

Eurostat. (2021). *How usual is it to work from home?* Retrieved from https://ec.europa.eu/eurostat/web/products-eurostat-news/-/edn-20210517-2 (28.03.2023).

Kurzynoga, M. (2022). Propozycje Parlamentu Europejskiego unormowania prawa pracowników "do odłączenia" (the right to disconnect). *Praca i Zabezpieczenie Społeczne, 5*, 3–13.

Lerouge, L., & Trujillo Pons, F. (2020). Contribution to the study on the "right to disconnect" from work. Are France and Spain examples for other countries and EU law? *European Labour Law Journal, 13*(3), 450–465.

Miernicka, I. (2022). Prawo do odłączenia się w świetle rezolucji Parlamentu Europejskiego z dnia 21 stycznia 2021 roku zawierającej zalecenia dla Komisji w sprawie prawa do bycia offline. *Przegląd Prawa i Administracji, 129*, 123–140.

Moras-Olaś, K. (2021). Prawo do bycia offline jako podstawowe prawo pracownika. *Studia z Zakresu Prawa Pracy i Polityki Społecznej, 4*, 305–323.

Pansu, L. (2018). Evaluation of "right to disconnect" legislation and its impact on employee's productivity. *International Journal of Management and Applied Research, 5*(3), 99–119.

Ray, J. E. (2015). Actualité des TIC. Tout connectés, partout, tout le temps? *Droit Social, 6*, 516–527.

Secunda, P. (2019). The employee right to disconnect. *Notre Dame Journal of International & Comparative Law, 9*(1), 1–39.

UNI Global Union. 2020. *Legislating a right to disconnect*. https://uniglobalunion.org/report/legislating-the-right-to-disconnect/ (28.03.2023).

Van Olmen, & Wynant. (2022). *Labour deal 2022: Right to disconnect*. Retrieved from https://www.vow.be/en/node/350#_ftn2 (28.03.2023).

Workplace Relations Commission. (2021). *Code of practice for employers and employees on the right to disconnect*. https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf (28.03.2023).

CHAPTER 9

The Role of Working Time Guarantees in the Era of Growing Autonomy

Gábor Kártyás

Introduction

A common claim to support the idea that labour law's traditional working time regulations are irrelevant in the modern workplace is that workers enjoy broad autonomy over the measure and schedule of their working time. The Covid pandemic meant a great leap towards work untangled to the workplace in many sectors, and the different working-from-home settings have been often coupled with some form of flexible work time arrangement. Such redesigning of working conditions could be inevitable to upkeep work during lock-downs but employers and employees might also want to preserve the best practices for the post-covid period. The question for labour law is whether and how to adopt traditional working time rules to settings where workers are no longer under the subordination of the employer as regards the temporal aspects of employment.

The main goal of this chapter is to challenge the idea that autonomy shall displace working time guarantees. First, it will be highlighted that

G. Kártyás (✉)
Pázmány Péter Catholic University, Budapest, Hungary
e-mail: kartyas.gabor@jak.ppke.hu

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_9

some level of autonomy and flexibility is present in the typical employment relationship too. The measures in EU law on working time contain provisions which offer a moderate level of flexibility for both parties and those could be well used during the pandemic. Second, full work time autonomy limits the employer's influence on the organisation of work in a level that would render the operation of most businesses impossible. During the pandemic an unprecedented proportion of workers performed remote work but telework in itself does not mean better work-life balance or more autonomy over the schedules. It is of crucial importance that workers who have only formal or partial autonomy shall not be left out of the protection of working time measures.

The chapter is structured as follows. First, we overview how working time is regulated in the subordinated employment relationship. In section "Flexibility in the Standard Setting" we explore the sources of flexibility within the legal framework of EU law. The national measures introduced during the pandemic will be used as an illustration that the rules of working time can be applied even in extraordinary or unforeseen circumstances. In section "What Would Full Working Time Autonomy Mean?" we analyse the elements of working time autonomy to show that full autonomy may be reached only by a handful of workers and then we turn to the strict interpretation of the autonomous worker concept in EU law. The chapter ends with some concluding remarks.

Working Time and Subordination

Working time, perhaps second only to wages, is the working condition that has the most direct impact on the day-to-day lives of workers. The number of hours worked and the way in which they are organised can significantly affect not only the quality of work but also life outside the workplace. Working time is also critical for enterprises. Hours of work and their organisation are important in determining productivity and whether an enterprise is profitable and sustainable (ILO, 2018).[1]

While the traditional employment relationship is characterised by fixed working time defined by the mutual agreement of the parties and by the employer's prerogative to allocate the working hours by unilateral decisions,[2] in a growing number of cases there are either no fixed measure of working time and/or the worker schedules his/her own working hours. Teleworkers may choose the hours they want to spend in work, gig-workers (like food delivery riders) are not obliged directly by their

employer to perform a fixed number of hours, zero-hour contracts do not contain the traditional obligations to provide work and to accept the work offered. New demands for more flexible working time arrangements have risen, also as a result of the increasing labour market participation of women (Rogowski, 2013).[3]

Work time autonomy or sovereignty means that the working hours are not defined by the employer but workers can decide when and how much to work. As in these new settings the worker is no longer under the subordination of the employer as regards the temporal aspects of employment, protective rules such as the maximum level of working time or minimum rest periods seem to lose their original meaning. However, this idea may be challenged by two basic reasons. First, some level of autonomy and flexibility is present in the typical employment relationship too. Second, full work time autonomy limits the employer's influence on the organisation of work in a level that would render the operation of most businesses impossible. Under the next point we explore the sources of flexibility inherent in the traditional employment relationship.

Flexibility in the Standard Setting

The traditional employment relationship can be characterised with the rigid organisation of working time, where the number of working hours is fixed in the employment contract (usually eight hours a day) which shall be performed according to a schedule previously set by the employer. However, not even the typical employment contract can be associated solely with the five days working week and the repetitive daily schedule where work starts in the morning and finishes in the middle of the afternoon. Working time is not a synonym of rigidity and not the opposite of flexibility (Campbell, 2017). The employer's right to order overtime, to schedule working time in shifts or to change the already scheduled hours within a certain deadline make possible the organisation of work also in special sectors requiring continuous production like manufacturing, emergency services or maintenance work. There is nothing new in these activities: the need for special, flexible schedules existed much before digitalisation has come. Labour law had to elaborate working time rules that enable the operation of such sectors while also guarantee the protection of workers.

As an illustration, we briefly overview those elements of the EU's working time provisions that can be used as a source of flexibility.

Sources of Temporal Flexibility in EU Law

The working time directive (hereinafter: WTD)[4] was last amended in 2003 and is still in force today, as the European legislators could not agree on the issues to be revised (like the scope of the directive, the nature of on-call work, scheduling annual leave, etc.) (Nowak, 2018). A piece of legislation adopted almost two decades ago could be easily seen as outdated which misses to answer the various contemporary challenges of digitalisation or the employees' call for better work-life balance. Still, there are a number of tools to enhance working time flexibility within the EU legislative framework as it stands now.

To begin with, EU law calls for a maximum level of 48 hours weekly working time, including overtime.[5] Consequently, Member States relying on the 40 hours working week can enable employers to order 416 hours of overtime annually. That is approximately two and a half month of extra working time, which means that employers can oblige employees to perform working time for 14 months within a year (deducting annual leave). Thus as regards the amount of working time, Member States can offer employers a significant room to manoeuvre in case of labour shortage or production peaks. By ordering overtime, employers can get more work with no hiring and training costs. Also, when the peak in workforce demand ends, it is easy to get back to normal hours without losing skilled staff (Arrowsmith, 2013). From the aspect of the workers, although overtime generally comes with higher pay rates, it remains a very irregular source of income, as employees are required to work overtime according to the needs of the business and to fluctuations in demand and cannot therefore rely on it as regular and foreseeable income (Lang et al., 2013).

Most guarantees in the WTD are not rigidly worded and subject to a set of possible derogations. Therefore Member States enjoy a broad discretion to introduce flexible working time schedules that still respect the minimum standards in the directive. Popular examples are shift work, split-shifts and working time accounts.

In case of continuous processes, capital intensive industries and services with long operating hours, shift work is a wide-spread way to organise working time (Arrowsmith, 2013). Shift work allows companies to extend their operating hours beyond the working time of individual workers; to make more intensive use of their fixed assets and to better accommodate peak periods of demand.[6] Shift work may require workers to work at different times over a given period of days or weeks, thus derogations may be

made from the provisions on daily and weekly rests. The WTD offers the same derogations in case of split-shifts, when periods of work are split up over the day. It is not regulated into how many parts daily working time might be divided, nor the minimum duration of breaks between the working periods. Nonetheless, the directive calls for the safety and health protection of shift workers appropriate to the nature of their work and prescribes that the workers affected by the derogation are afforded equivalent periods of compensatory rest or—in exceptional cases—other appropriate protection.[7]

Working time accounts or working time banks can be used if the demand for labour appears unequally throughout the year. In this case employers can calculate working hours averaged over a longer period (e.g. months, quarters or even annually) and escape regular overtime and/or idle time. The aim is to provide a greater degree of flexibility in the organisation of working time, allowing employers to vary weekly working time, as long as average working time over the set reference period does not exceed the set limit (Lang et al., 2013). The longer the reference period, the more numerous the possibilities are to allocate the same amount of working time within the same month/quarter/year.

Following the WTD's provisions on maximum weekly working time and on daily and weekly rest periods, unequal schedules may grant employers a remarkable level of flexibility. Although there is no exact rule on the maximum daily working time, the 11 hours daily rest period means that daily working time may reach 13 hours (from which the compulsory break shall be deducted). On a weekly basis, the WTD requires 24 hours of weekly rest plus six times 11 hours daily rest periods, which leads to a maximum working time of 78 hours/week (minus breaks).[8] Nonetheless, weeks with such excessively long hours presuppose that the employer schedules proportionally less hours (even no hours at all) to other weeks during the course of the same reference period. From the workers' viewpoint, even if an unequal schedule means no change in the total hours to be worked under a given period, it comes with less predictability and makes it more complicated to reconcile work and private life (Pisarczyk, 2018). The conjunction of long, variable and highly utilised hours has implications for the overall quality of life, not just working life. The externalised costs can appear in personal, household and societal levels (Arrowsmith, 2013). To reach a fair balance between the parties' interests, the WTD limits the longevity of a reference period, up to a maximum of

6 months, or—for objective or technical reasons or reasons concerning the organisation of work—12 months in collective agreements.[9]

As for the perhaps most extreme form of flexible working time arrangements, it has to be pointed out that the so-called on-call or zero-hour contracts are not contrary to the WTD. Thus EU law does not exclude an employment relationship where there is no minimum level of working time prescribed in the contract and the employee may be required to perform anytime the employer decides so, which results in unpredictable schedules and income (Messenger, 2018). Until workers being "on-call" are guaranteed the minimum rest periods and maximum weekly working time as prescribed in the directive, Member States may open these contractual possibilities to the employers. More protective measures are introduced by the transparent and predictable working conditions directive from August 2022.[10]

In EU law there are also institutions that mean some level of employee-oriented working time flexibility. Labour law recognises employees as human beings with a life outside the workplace and offers a wide range of paid and unpaid leaves to meet individual (or social) needs (Campbell, 2017). This principle appears also in EU law: it is enough to refer to the "force majeure" clause in the work-life balance directive, which entitles workers to time off from work on grounds of urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable.[11] The clause may apply to a wide spectrum of work-private life interferences, irrespective of other provisions on paid annual leave, maternity and parental leaves.

Article 13 of the WTD should also be mentioned here. This general provision obliges employers to take account of "the general principle of adapting work to the worker" when they organise work according to a certain pattern. In lack of relevant case law, it is not clear how "individualised" schedules shall be and the employer shall consider only safety and health requirements or also aspects of the worker's private life (work-life balance).

There are also different types of unequal working time schedules that can serve employee-oriented flexibility. For example, work time banking arrangements may allow workers to accumulate credit hours, and in some cases to use their "banked" hours to take full days off. Compressed working weeks can be similarly attractive for workers. These involve the same number of working hours being scheduled over fewer days than is typical in a standard workweek, which also results in longer working days (e.g.

10 hours a day for 4 days a week) (Messenger, 2018). Flexible working arrangements—which give the possibility for workers to adjust their working patterns, including remote working, flexible working schedules or reduced working hours—are explicitly addressed in the new work-life balance directive.[12] However, there is not an absolute right to receive flexible working arrangements for a care-related reason, but only a right to request such arrangements, and have the request seriously considered by the employer (Waddington & Bell, 2021). Employers shall respond in a "reasonable period of time", taking into account the needs of both the employer and the worker and shall provide reasons for any refusal or for any postponement of such arrangements. This new provision clearly marks a shift towards more employee influence over working time schedules, but does not change the basic principle that schedules are primarily defined by the employer upon the needs of its operation.[13] Naturally, EU law cannot define or list the possible worker-friendly "flexible arrangements", as each worker's personal circumstances define what schedules could fit best to their needs.

Collective Agreements and Working Time

As seen above, the directive itself makes possible various flexible working time arrangements. Besides, it permits significant derogations in collective bargaining agreements. In EU labour law it is the WTD which illustrates the best how EU law builds on the flexible transmission of directives into national law by collective agreements (Ewing, 2015).

Article 18 of the working time directive allows derogations from the articles on daily rest, breaks, weekly rest period, length of night work and reference periods by means of collective agreements. Importantly, such derogations are open not only for agreements of universal application, but also for "agreements concluded between the two sides of industry at a lower level".[14] Nonetheless, the directive prescribes that such derogations shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection. Besides this general provision on derogations in collective agreements, the directive expressly refers to the possible regulatory role of collective agreements in various cases.[15] What is more, the details of rest breaks shall be defined primarily in

collective agreements, and national legislation may regulate it only if the bargaining was not successful (Bercusson, 2009).[16]

Yet there is only a limited case law on how to interpret the mentioned clauses on possible derogations. In the *Accardo* case, the CJEU emphasised the importance of legal certainty as regards the rules derogating from EU law.[17] In *Jager*, the Court stated that derogations must be interpreted strictly. As regards “equivalent compensating rest periods”, the Court—taking the directive’s aim as a starting point—set the requirement that such rest periods must follow on immediately from the working time. Moreover the Court confirmed that it is only in entirely exceptional circumstances that the directive enables other appropriate protection instead of compensatory rest.[18] In *Isére*, the Court ruled that the provision that an employee shall not perform more than 80 days of annually under a specific employment contract cannot be considered as an institution which grants appropriate protection instead of guaranteeing the daily rest periods as prescribed in the WTD.[19]

The Court’s practice suggests that collective agreements making use of the derogation clauses will be subject to strict scrutiny if the question of their legal compliance with the directive’s requirements will put to question in a future case. The cogent basis of the WTD is the right to health and safety at work and all possible national derogations and opt-outs shall be subordinated to this principle (Sciarra, 2006). Nevertheless, the possible derogations from the directive by collective agreements enable parties to adjust the traditional guarantees of the WTD to the exact needs of their relevant workplace or sector.[20] As an example, empirical evidence shows there are various techniques used in practice to regulate working time in the platform economy by collective agreements (Gyulavári & Kártyás, 2022).

Flexible Working Time Measures Used During the Pandemic

Member States strongly relied upon the flexibility inherent in the “traditional” working time regulations when the first wave of the pandemic hit Europe.

All Member States introduced short working time (temporary unemployment, temporary wage subsidy) schemes, where a decrease in the measure of working time is coupled with a state allowance to (partly) cover the wage loss of the employee (OECD, 2020). According to Eurofound, during the first wave of the pandemic alone (between March

and September 2020) close to 4 million employers and over 40 million workers in the EU benefited from such measures (Eurofound, 2021a). The ILO estimates that the global hours actually worked during 2020 fell by nearly 9% by comparison with the last quarter of 2019. Nearly half of the working hour losses was the result of people working fewer hours—or no hours at all—but staying in their employment relationship (ILO, 2021). While short working time schemes might be essential to avoid or at least decrease job losses, they also place a higher level of risk to the participating employees (Pisarczyk, 2018), who generally—even if state support is available—have to give up a part of their remuneration.

During lock-downs some Member States called for the mandatory use of paid annual leave or working time credits gathered in unequal schedules (e.g. Austria, Denmark), and it was also common to extend the statutory leaves for caretakers (e.g. Austria, Cyprus, Greece, Italy, Poland, Slovenia).[21] In the meantime some Member States allowed temporary extension of working time in case of extraordinary emergencies (Germany) (Sagan & Schuller, 2020) or for truck drivers in the supply of essential goods (The Netherlands) (Bennaars & ter Haar, 2020). Extended working hours, limitations on rest periods and provisions to delay annual leave were applied primarily in the health care, transport and logistics sectors, for example, in Finland, France, Italy, Luxembourg, Poland and Portugal (Eurofound, 2021a).

The mentioned transitional measures and also the long-standing institutions of the WTD show that working time regulations can also be applied in specific circumstances requiring higher level of flexibility.

What Would Full Working Time Autonomy Mean?

With the development of digital technologies, more and more jobs could be performed without the rigid boundaries of a fixed workplace and/or a strictly set and controlled schedule. It is not a utopia anymore that some workers—making use of information and communication technologies—can freely decide when, where and how much to work. Without being subordinated to their employers as regards working time, the traditional protections on maximum daily or weekly working time or minimum rest periods seem superfluous. However, it shall be emphasised that work time autonomy has far-reaching impacts on the whole operation of the employing entity and consequently it can be achieved in very limited cases.

Full work time autonomy presupposes the following three basic elements:

- The employer is always ready to offer work to the worker: whenever the worker decides to take up work, there is always paid work available.
- Adequate workforce stands at the disposal of the employer: if workers enjoy the freedom mentioned in the first point, employers can only guarantee that the work will be done (products are prepared, clients are serviced) in a reasonable time if they have a robust source of workforce.
- Decent wage is available: workers are actually able to reach a decent wage without obeying the employer's direct or indirect pressure to be available during certain times.

As regards the first point, full work time autonomy—in a strict sense—would mean that the employer is always able to assign relevant tasks for the worker standing by for work, be it any hour of the day, or during the night, the weekend or on feast days. Only employers having a vast pool of clients or workload may claim that they are in fact able to offer work whenever the worker decides to accept tasks.[22] However, empirical evidence suggests that this is rarely the case. Gig-workers often face waiting time because tasks are available only during certain periods (De Stefano, 2016). The ILO Survey of Crowdworkers in 2015 reported that 90% of respondents would like to do more crowdwork than they were actually doing (Berg, 2016). Workers with zero-hour contracts or on on-call work have no specific working hours set in their contract with the—at least theoretic—right to refuse the employer's call to work. However, in practice this contractual setting leads to a broad fluctuation of working hours, unreliable rests and little or no input for workers into their schedules (ILO, 2018). The pandemic also revealed that working from home is not necessarily purely beneficial for workers and does not always come with more influence on working hours. According to the data of Eurofound, compared to employees working only at their employer's premises, a higher share of workers working from home during the pandemic worked long hours of between 41 and 60 hours per week (35% as opposed to 19%) (Eurofound, 2021b). Research from EU, USA and Japan shows that working-from-home arrangements often mean longer working hours than working from the office and time spent in home office does not substitute

but rather supplement regular working hours (Eurofound & ILO, 2017). Such extension of working time clearly does not stem from the workers' autonomy rather from the mere technical possibility that workers using information technologies can take up work from anywhere and anytime, even if it is not formally ordered by the employer. This is especially true in case of sporadic teleworking, which is not based on the parties' mutual agreement (Katsabian, 2020).

As for the second aspect, if employers waive their rights to order the worker to be available for a minimum amount of hours and/or during certain periods, such companies' clients must regularly wait until a worker appears (or log in in the online world) to answer their call. Nonetheless, the more workers the company employs to eliminate the risk not to have enough workforce standing ready for work, the higher the workers' competition for tasks will become and—at least for certain times—some workers will remain without a job to complete. This is especially apparent in the platform economy where workers around the globe can compete for online tasks, which also has an adverse effect on wages.[23]

Lastly, many workers employed in flexible time arrangements (gig-workers, zero-hour contracts) are associated with income insecurity and low wages (ILO, 2018). Aloisi points out that for platform workers "flexibility is just a kind of solace: to earn a significant sum of money, workers might also have to work more hours every day than a "standard" worker. Since they have to be available "around the clock", this kind of flexibility does not entail a greater freedom for the worker" (Aloisi, 2016). An empirical study on crowdworkers revealed that their work–life balance is marked by an interaction of two factors: the availability of work and dependence on income from the platform. Workers were most likely to realise the potential working time flexibility of crowdwork if demand for their services was high and they did not rely entirely on income from the platform (Messenger, 2018). As regards the various forms of part-time employment, short working hours do not always come with positive effects on work-life balance, especially when part-time work is involuntary and underemployed workers earn less income than they would prefer (Servais, 2017; Messenger, 2018).

The mentioned examples show that digitalisation or any technical development in itself will never guarantee real working time autonomy for workers. It is also necessary that employers applying modern technologies are able and also ready to waive their rights to influence the workers' decisions on when and how much to work. Technological change alone will

not bring work time autonomy if it is not coupled with the employer's limited control over the work.

Autonomous Workers in the WTD

The WTD also acknowledges that certain measures of working time may not be applied in case of "autonomous workers". According to Article 17 (1), Member States may derogate from provisions on daily rest, breaks, weekly rest, maximum weekly working time, length of night work and reference periods in Article 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves. Importantly—unlike when derogations are made in collective agreements—it is not required to offer equivalent periods of compensatory rest for autonomous workers. However, still due regard shall be paid for the "general principles of the protection of the safety and health of workers". The later condition suggests that any derogation based on the autonomy is possible only if it does not threat the safety and health of the worker.

The directive contains a non-exclusive list of some workers that fall within this category, including managing executives or other persons with autonomous decision-taking powers, family workers and workers officiating at religious ceremonies in churches and religious communities. The Commission considers that the derogation could also apply to certain experts, senior lawyers in an employment relationship or academics who have substantial autonomy to determine their working time.[24]

The ECJ follows a strict interpretation of this derogation and excluded workers from its scope of application who enjoy only partial autonomy over their working time. With a very laconic reasoning, it pointed out that "it is apparent from the express wording of that provision" that it applies only to workers whose working time as a whole is not measured or predetermined or can be determined by the workers themselves.[25] Consequently, if the factual circumstances show that the employer has even a very limited control over the working time of the employee, the derogation shall not apply. For example, in a case where university experts had full-time employment contracts (40 hours/week) and besides that they were involved in a project on post-doctoral research. From the mere fact that the measure of working time was stipulated in the contract, the Court concluded that at least some of their working time, even in the case of university lecturers,

was determined by their employer, which precludes the derogation for autonomous workers being applicable to them. However, the ECJ called the national court to ascertain whether that was the case.[26]

The stringency of this approach can be well illustrated by the *Hälvä*-case.[27] The case involved a child protection association which provided accommodation for children as close as possible to a family environment in seven "children's villages", each with several houses for children. The case was about "relief parents" working for such association who substituted the "foster parents" while the latter were absent (justified by days off, annual leave or sick leave). During the absence of the foster parents, they were responsible for the daily running of a children's home and the care and upbringing of the children. The relief parents were employed as autonomous workers and their working time was organised accordingly in a very flexible manner: they worked for continuous 24 hour periods which may last several days, with the right to one day off per week and, on average, two weekends off per month. However the referring Finish court had doubts whether these employees enjoyed whole working time autonomy and the derogation for autonomous workers could be applied.

The facts showed that the special character of their job indeed guaranteed a certain level of autonomy for the relief parents. The employer's representatives did not control their day-to-day work and the employer did not issue orders in respect of the working periods and rest periods during working days. Within the limits imposed by the needs of the children, a relief parent may decide on the organisation and content of his/her work. However, there were also some constraints to that freedom to organise his/her own working time. First, a care and education programme was prepared for each child, to be followed by the relief parent in caring for the child, and with respect to which they had to write a report. Furthermore, the relief parent consulted with the foster parent regarding the running of the children's home for which she/he was responsible, together with practical matters related to it. Importantly, their contracts of employment stipulated that they were to work 170 or 190 periods of 24 hours annually from which 30–33 days of annual leave had to be deducted. The director prepared, in advance, lists indicating day by day the house in which the relief parent was to work. The latter agreed with the foster parent the time at which the relief period begun.

From this outset, the ECJ concluded that it cannot be argued that relief parents enjoy autonomy over their working time as a whole, as it was largely predetermined by the contract of employment and by the employer,

since the number of 24 hour periods to be performed every year is fixed by contract. Also, at regular intervals, the employer drew up in advance lists indicating the 24 hour periods during which the relief parent was responsible for running a children's home.[28] The Court also refused that the employer had no control over the relief parents' work. It pointed out that the employer stipulated in advance both the beginning and the end of the working time and the employer decided which relief parent shall work in which house, while they had to agree with the foster parent the time at which the substitution period started. The relief parent was also required to write a report on how he/she implemented the case and care programme prepared for each child.[29] The Court added that even if they were free to decide their rest periods within the 24 hours, this did not allow them to freely determine the number of hours they work during those periods; moreover, the Court added that these periods of inactivity might be considered as working time. Also, they had to follow the routines of the house set by the foster parents.[30]

The detailed assessment of the relief parents' working conditions show that these workers undeniably enjoyed a certain level of autonomy over their working time, but "as a whole" it was not measured or determined by the workers themselves. The strict interpretation of the derogation means that only a very limited number of workers (if any) employed under the "flexible arrangements" mentioned in point 3 would qualify as autonomous workers (teleworkers, gig-workers, workers in zero-hour contract, etc.). The workers' whole control over their working time means no control on their employer's side, which is hardly acceptable for most employers. For example, for an autonomous worker the employer could not even assign tasks like attending a meeting, be present during visits, or meeting with the client at a predetermined time; however, these should not exclude the application of the derogation (Erikson, 2021).

Nonetheless, the ECJ's narrow interpretation does not limit the use of arrangements involving "partial" working time autonomy. It just means that in such cases the basic protections of the WTD shall still be respected. Alternatively, parties may also conclude collective agreements for "semi-flexible" schedules to deviate from some provisions of the directive, while guaranteeing equivalent periods of compensatory rest periods (or other appropriate protection in exceptional cases).

Conclusions

Through the development of technology more and more workers can—in theory—enjoy some form of autonomy in the organisation of their own working time. Although, it seems early to celebrate the great leap towards working time autonomy, at least until employers are ready to withdraw their rights to control their workers. Modern technology alone does not bring more autonomy for the workers if it is not accompanied with radically different models on the exercise of employers' rights.

While there are a growing number of workers who enjoy a certain level of discretion over their working time, most of them are still subject to the employers' (indirect) orders or other influence deciding when and how much to work. Modern work environments may make it possible for workers to perform their tasks from anywhere and anytime, but at the same time it will not alter the employers' need for significant control over the measure and schedule of working time. Some influence over working time shall not be understood as autonomy, as prescribed in Article 17 (1) of the WTD. For example, home office and/or flexible hours arrangements—broadly used during the pandemic—might mean only a curtailed form of working time autonomy.

The more workers remain subordinated to the employer, the more important it is that the traditional guarantees of working time regulations shall stay in place. Otherwise some work time arrangements would simply allocate upon the worker a whole set of risks of insecurity of work and income (Adams et al., 2014). Such "protective gaps" can disconnect workers from the system of guarantees and lead to increased precariousness. Moreover, the de-mutualisation of risks (De Stefano, 2016) may shift burdens away from the employer not only towards the employee, but even further, towards his/her family or the state (Campbell, 2017).

The traditional legal framework of working time—as outlined in the WTD—does not seem to be incompatible with contemporary requirements, especially when these institutions are aligned to the specific needs of a given sector or workplace by collective bargaining. Working time rules may need careful adjustment to the changing circumstances (as seen during the pandemic), but shall not be repealed on some rumours of future work environments offering more flexibility for workers.

Notes

1. The ILO's decent work concept also contains elements concerning working time (the measure of working time and paid annual leave) (ILO, 2008).
2. See for instance the ILO Recommendation on the Employment Relationship 2006 (No. 198), point 13.
3. See also 2010/707/EU Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States, OJ L 308, 24.11.2010, p. 46–51, Guideline 7 (it was applicable until 2015).
4. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9–19.
5. WTD Article 6.
6. There are almost infinite number of shift systems in operation, with variance among shift systems along a number of dimensions, such as: the number and length of shifts; shift starting and ending times; whether shifts rotate or not and if so, the direction of rotation; the number of days off and whether those days off are consecutive or not, etc. (Messenger, 2018).
7. WTD Article 2(5), Article 12 and 17 (2), (4).
8. WTD Articles 3–6.
9. WTD Articles 16, 17(3), 18–19.
10. Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186, 11.7.2019, p. 105–121, Article 10–11.
11. See Article 7 in Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, p. 79–93.
12. Directive 2019/1158 Article 9 and 3(1) f).
13. Note that the right to request flexible arrangements is further conferred by various factors. Member States may limit the duration of such flexible working arrangements to a reasonable period and may make the right conditional on certain period of work qualification or a length of service qualification, which shall not exceed six months. The provision applies only to a limited circle of care-givers, including parents with children up to a specified age, which shall be at least eight years, and carers who provide personal care or support to a relative (son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in civil partnership), or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State. Directive 2019/1158 Article 9 and 3(1) d) and e).

14. Nonetheless, declining trade union membership and yellow trade unions can question the equal power of the bargaining parties, especially in case of lower level bargaining (Jacobs, 2014).
15. As regards the definition of night worker and work involving special hazards or heavy physical or mental strain, the limits of weekly working time, the reference periods for the calculation of length of night work and the possible derogations to certain activities or sectors. WTD Articles 2 (4) (ii), 8 b), 6 a), 16 c), 17 (2).
16. Vigneau, analysing the French reform of working time laws in 2016, describes this legislative technique as "suppletive law" that applies only if there is no collective agreement to be applied (Vigneau, 2018).
17. CJEU, 21 October 2010, C-227/09, *Antonino Accardo and Others v Comune di Torino*, ECLI:EU:C:2010:624 para. 55.
18. CJEU, 9 September 2003, C-151/02, *Landeshauptstadt Kiel v Norbert Jaeger*, ECLI:EU:C:2003:437 para. 89., 94., 98.
19. CJEU, 14 October 2010, C-428/09, *Union syndicale Solidaires Isère kontra Premier ministre and Others*, ECLI:EU:C:2010:612 para. 54–60.
20. Collective agreements potential to adapt the legal framework to the changing needs of the parties is well illustrated by a research conducted in Southern-France from 1982 to 2002. The study analysed 2000 company-level collective agreements during these 20 years and concluded that the focus of working time rules shifted from the protection of health and safety towards market oriented issues. However, this change does not mean a turn towards precarious work, as the agreements still respected principles that are important also for the employees' side, like stability of employment (Thoemmes, 2010).
21. See the national reports in: Italian Labour Law e-Journal 2020.
22. Empirical research shows that one basic expectation of online workers is that online platforms dramatically increase the pool of available jobs. In addition, they also increase the likelihood that workers will find suitable matches for their skills and preferences (Agrawal et al., 2013).
23. For more examples see: Kártyás 2022.
24. Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time, C/2017/2601, [2017] OJ C 165/1., 45.
25. CJEU, 7 September 2006, C-484/04, *Commission v United Kingdom*, ECLI:EU:C:2006:526, para. 20. In her Opinion, Advocate General Kokott delivered the same conclusion but—unlike the Court—she built her reasoning not only to the directive's wording, but also on the provision's context and objectives (see para. 23–30).
26. CJEU, 17 March 2021, C-585/19, *Academia de Studii Economice din Bucureşti v Organismul Intermediar pentru Programul Operaţional*

Capital Uman – Ministerul Educaţiei Naţionale, ECLI:EU:C:2021:210 para. 62–63.
27. CJEU, 26 July 2017, C-175/16, *Hannele Hälvä and Others v SOS-Lapsikylä ry*, ECLI:EU:C:2017:617.
28. C-175/16. para. 33–34.
29. C-175/16. para. 35–38.
30. C-175/16. para. 39–40., 43–44.

References

Adams, A., Freedland, M., & Prassl, J. (2014). *The 'zero-hours contract': Regulating casual work, or legitimating precarity?* (Working paper). http://www.labourlawresearch.net/papers/zero-hours-contract-regulating-casual-work-or-legitimating-precarity (last downloaded: 03.11.2021), 19.

Agrawal, A., Horton, J., Lacetera, N., Lyons, E. (2013). *Digitization and the contract labor market: A research agenda* (NBER working paper 19525). http://www.nber.org/papers/w19525.pdf (last downloaded: 03.11.2021).

Aloisi, A. (2016). Commoditized workers – The rise of on-demand work, a case study research on a set of online platforms and apps. *Comparative Labor Law and Policy Journal*, 661–662.

Arrowsmith, J. (2013). Working time in Europe. In J. Arrowsmith & V. Pulignano (Eds.), *The transformation of employment relations in Europe. Institutions and outcomes in the age of globalization* (pp. 120–121). Routledge.

Bennaars, H., & ter Haar, B. (2020). COVID-19 and labour law: The Netherlands. *Italian Labour Law e-Journal*, 2020/1S, 6.

Bercusson, B. (2009). *European labour law* (2nd ed., p. 299). Cambridge University Press.

Berg, J. (2016). Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers in *ILO Conditions of Work and Employment Series*, 13–14.

Campbell, I. (2017). Working-time flexibility. Diversification and the rise of fragmented time systems. In D. Grimshaw, C. Fagan, & G. Hebson, & I. Tavora (Eds.), *Making work more equal. A new labour market segmentation approach* (pp. 111–113, 119). Manchester University Press.

De Stefano, V. (2016). The rise of the 'just-in-time workforce': On-demand work, crowdwork and labour protection in the gig-economy. *ILO Conditions of work and employment series*, 5–6.

Erikson, M. (2021). Introducing the autonomous employee category: The chance to create a flexible and secure employment relationship? *European Labour Law Journal*, 2021/3, 397.

Eurofound. (2021a). *Working time in 2019–2020* (pp. 3–4). Publications Office of the European Union.

Eurofound. (2021b). *Workers want to telework but long working hours, isolation and inadequate equipment must be tackled*, https://www.eurofound.europa.eu/publications/article/2021/workers-want-to-telework-but-long-working-hours-isolation-and-inadequate-equipment-must-be-tackled (last downloaded: 03.11.2021).

Eurofound, & ILO. (2017). *Working anytime, anywhere: The effects on the world of work* (pp. 21–23). Publications Office of the European Union/The International Labour Office.

Ewing, K. D. (2015). The death of social Europe. *King's Law Journal*, 2015/1, 81.

Gyulavári, T., & Kártyás, G. (2022). Why collective bargaining is a 'must' for platform workers and how to achieve it. In J. M. Miranda Boto & E. Brameshuber (Eds.), (pp. 107–110). Collective bargaining and the gig economy, Hart Publishing.

ILO. (2008). *Measurement of decent work based on guidance received at the Tripartite Meeting of Experts on the Measurement of Decent Work*, *https://www.ilo.org/integration/resources/mtgdocs/WCMS_115402/lang--en/index.htm* (last downloaded: 01.31.2022).

ILO. (2018). *Ensuring decent working time for the future. General Survey concerning working-time instruments* (pp. 264–265, 274). International Labour Office, 2.

ILO. (2021). *Work in the time of COVID. Report of the Director-General*. International Labour Conference 109th Session, 7.

Italian Labour Law e-Journal. 2020. *Special Issue: Covid-19 and labour law. A global review*. 2020/1S.

Jacobs, A. (2014). Decentralisation of labour law standard setting and the financial crisis. In N. Bruun, K. Lörcher, & I. Schömann (Eds.), *The economic and financial crisis and collective labour law in Europe* (p. 174). Hart.

Kártyás, G. (2022). Working time flexibility. Working time flexibility: Merits to preserve and potentials to adjust to change. In T. Gyulavári & E. Menegatti (Eds.), *Decent work in the digital age: European and comparative perspectives* (pp. 159–160). Hart Publishing.

Katsabian, T. (2020). It's the end of working time as we know it – New challenges to the concept of working time in the digital reality. *McGill Law Journal, 12*.

Lang, C., Clauwaert, S., & Schömann, I. (2013). *Working time reforms in times of crisis* (ETUI working paper, 16, 21).

Messenger, J. 2018. *Working time and the future of work* (ILO future of work research paper series, No. 6), Geneva, 6–7, 16–19, 24.

Nowak, T. (2018). The turbulent life of the Working Time Directive. *Maastricht Journal of European and Comparative Law*, 2018/1.

OECD. (2020). *Job retention schemes during the COVID-19 lockdown and beyond*. https://www.oecd.org/coronavirus/policy-responses/job-retention-schemes-during-the-covid-19-lockdown-and-beyond-0853ba1d/#boxsection-d1e52. (last downloaded: 03.11.2021).

Pisarczyk, Ł. (2018). Negotiating working time in times of crisis. *Bulletin of Comparative Labour Relations*, 197–198, 200.

Rogowski, Ralf. 2013. Reflexive labour law in the world society. Edward Elgar, 223–224.

Sagan, A., & Schuller, C. (2020). Covid-19 and labour law in Germany. *European Labour Law Journal*, 2020/3, 294.

Sciarra, S. (2006). National and European public policy: The goals of labour law. In G. Davidov & B. Langille (Eds.), *Boundaries and frontiers of labour law. Goals and means in the regulation of work* (pp. 252–254). Hart.

Servais, J.-M. (2017). *International labour law* (p. 184). Kluwer Law International.

Thoemmes, J. 2010. Increasing use of 'market' concepts in negotiations and contextualising factors. In C. Thornley, S. Jefferys, & B. Appay (Eds.), *Globalization and precarious forms of production and employment* (pp. 149–150, 159). Edward Elgar.

Vigneau, C. (2018). Negotiating working time in times of crisis: The 'El Khomri law'. *Bulletin of Comparative Labour Relations*, 206.

Waddington, L., & Bell, M. (2021). The right to request flexible working arrangements under the Work-life Balance Directive – A comparative perspective. *European Labour Law Journal*, 2021/4, 511.

CHAPTER 10

Psychosocial Risks and Mental Health of Employed Persons in the Post-Covid World of Work

Olga Chesalina

Introduction

The coronavirus pandemic has contributed to an explosion of working-from-home patterns accompanied by extended working hours and blurred boundaries between working and rest time. Alongside this development, a shift from direct and in-person monitoring of worker's activities to indirect remote digital control and management can be recognized. Studies show that remote workers, due to inadequate work environments (including intensive use of ICT equipment),[1] may experience high levels of stress and anxiety as well as feelings of social isolation and loneliness (European Parliament, 2021, p. 47).[2] In particular, the "always on" culture is seen as a reason for significant physical and psychosocial risks for teleworkers.[3] In this context, women who have to take care of children or other family members seem to be suffering the most.[4] Permanent availability makes it

O. Chesalina (✉)
Max Planck Institute for Social Law and Social Policy, Munich, Germany
e-mail: chesalina@mpisoc.mpg.de

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_10

more difficult to switch off, and this contributes to negative psychological health impacts (Eurofound., 2021, p. 5). At the same time, many workers could not carry out their work remotely during the coronavirus pandemic (e.g. health and care workers and on-location platform workers) and they were also exposed to psychosocial risks, with some of them being of the same nature (e.g. work overload) as that of remote workers.

The goal of this chapter is to determine whether a systematic and holistic approach concerning the mental health and psychosocial risks of workers is already applied at the EU level or follows from new regulatory initiatives. "Holistic approach" in this context is understood as the use of the full range of both direct and indirect measures aimed at guaranteeing mental health and the prevention of psychosocial risks at work. To achieve this goal the regulatory acts as well as the recent legislative proposals at the European level concerning the regulation of working conditions, mental health, psychosocial risks and well-being at work are analysed. In addition, some proposals concerning the regulation of mental health and psychosocial risks at work in EU law are elaborated. The chapter takes an interdisciplinary approach focusing on the interrelation between labour and social law in consideration of numerous empirical studies.

Situation at a Glance

The most important hard law source in the field of occupational health and safety (hereinafter OSH) is the Framework Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (hereinafter the Framework Directive). The Framework Directive is aimed at fixing minimum requirements in OSH. The main incentive for the elaboration of the Framework Directive was a huge number of work accidents including fatal work accidents (Fuchs & Marhold, 2020, p. 527). The work of the EU in the field of OSH has been largely influenced by Scandinavian countries, where a comprehensive (and not only technical) concept of OSH was introduced into legislation as early as in the 1970s (Birk, 1999, p. 656). The Framework Directive itself does not provide a definition of health but is based on the concept provided by the World Health Organization (hereinafter WHO), which defines health as a state of complete physical, mental and social well-being and not merely as the absence of disease or infirmity.[5]

The Framework Directive is based on the *prevention principle*, which requires employers to ensure workers' health and safety in every aspect

related to work and addresses *all risks*, including psychosocial risks. Also, the Court of Justice of the European Union (hereinafter CJEU)[6] uses a broad interpretation of the notion of "risk", embracing not only physical but also psychosocial risks (Ales, 2018a, p. 1218).

Originally, the draft versions of the Framework Directive included explicit references to psychosocial risks and to the psychosocial well-being of the worker (Peruzzi, 2017, p. 55). However, in the adapted Framework Directive, psychosocial risks were not directly named. Also later expressed suggestions to mention psychosocial risks explicitly under the Framework Directive were not realized.[7] Only some directives adopted in the development of the Framework Directive include some references concerning mental stress, mental fatigue or psychosocial factors (Directive 90/270/EEC—Display Screen Equipment, Directive 92/85/EEC and Directive 2010/32/EU) (Valdés de la Vega, 2013, p. 25) or include provisions linked to the prevention of psychosocial risks (e.g. Directive 90/270/EEC).

On the one side, the "all-embracing" broad scope of the Framework Directive that covers all risks[8] without mentioning them by name has an advantage because such elasticity allows also coverage of those risks that did not exist at the moment of the adaptation of the Framework Directive. While the Framework Directive does not differentiate "between the certain risks and only probable ones", some scholars consider that this can be understood as "implying the precautionary principle (Art. 191 TFEU), which requires to control, besides the well-known risks, also those that are still hypothetical and not completely known" (Peruzzi, 2017, p. 55). In this sense, the Framework Directive is a cornerstone for a systematic and holistic approach in OSH.

Psychosocial risks do not present a homogenous category. Edoardo Ales (2013, p. 417) makes a distinction between "psychophysical risk", which is related to poor work organization which can produce negative consequences on the psychophysical sphere of the employee, and "psychosocial risk" which is related to behaviour coming either from the employer or from colleagues which can produce negative consequences on the emotional and relational sphere of the worker. One can further develop this classification by adding "psycho-technical risks" connected to the use of digital technologies and artificial intelligence (hereinafter AI). The "all-embracing" broad scope of the Framework Directive allows coverage also of new emerging risks such as "psycho-technical risks".

On the other side, the boundless broad scope of the Framework Directive, which does not name psychosocial risks, poses huge challenges

concerning its implementation and enforcement. In the Report of the European Commission of 2004 on the "Practical Implementation of the Provisions of the Health and Safety at Work Directives", it was highlighted that there are problems with the practical implementation of the Framework Directive in relation to psychosocial risk factors and work organizational factors on national standards for OSH.[9] This is not surprising since such *risks are not directly mentioned* in the Framework Directive. Measures and obligations of employers to encourage improvements in the safety and health of workers at work concentrate on physical risks and the physical health of workers; labour inspectorates concentrate on "high-risk sectors" (Cefaliello, 2022, p. 327, 338).

Issues concerning psychosocial risks and mental health at work are still mostly a subject of non-binding acts and policy documents (soft law instruments). To mention in this context are the Framework Agreement on Work-Related Stress (2004) and the Framework Agreement on Harassment and Violence at Work (2007). Unfortunately, in this field it is rarely the case that "soft" law has a "hard" impact (Prassl, 2016, p. 63). For example, the evaluation report of 24 February 2011 concludes that "the implementation of the agreement (on work-related stress) has not yet ensured a minimum degree of effective protection for workers from work-related stress throughout the EU" (Eurofound, 2012).

Many of the issues concerning mental health have already been on the agenda for a long time. On several occasions, members of the European Parliament (MEPs) called on the European Commission to turn promises into action and to boost mental health policy and put it at the heart of EU policy-making.[10] In the European Pact for Mental Health and Well-Being of 13 June 2008 it was agreed that "there is a need for a decisive political step to make mental health and well-being a key priority". The European Pact for Mental Health and Well-Being called on the European Commission to issue a proposal for a Council Recommendation on mental health and well-being. However, such a recommendation has not been elaborated until now.

Nevertheless, in last years the EU has recognized that psychosocial risks are one of the main challenges for occupational health and safety management for the future. Due to the new challenges and new ways of working caused by the coronavirus pandemic, more attention has been paid to psychosocial risks and the mental health of employed persons in the recent initiatives. The EU Strategic Framework on Health and Safety at Work for 2021–2027[11] (hereinafter the Strategic Framework) focuses on

psychosocial risks as one of the important challenges. In the Strategic Framework the additional rise of psychosocial risks is seen as a result of increased remote-working trends on the one side and of the enormous pressure on essential workers in health and care sectors on the other side. In order to address this challenge, the Commission will review Directive 89/654/EEC (Workplace Directive) and the Display Screen Equipment Directive by 2023. However, the goal to remove obsolete provisions from the Display Screen Equipment Directive had already been pronounced in 2017—but to no avail. The Framework Strategy only briefly mentions a proposal of the legal framework on AI but does not deal with the risks of algorithmic/automated decision-making systems. Identifying general hazards related to remote work (like permanent connectivity, a lack of social interaction and increased use of ICT), the Framework Strategy does not mention hazards resulting, for example, from constant monitoring or increased work intensification.

On 21 January 2021, a European Parliament Resolution (hereinafter Resolution) was adopted with recommendations to the Commission on the right to disconnect including the Draft Directive on this issue. On 25 March 2021, the European Commission responded to the Resolution and outlined its follow-up to the requests of the Resolution. It is interesting that the Strategic Framework considers this initiative and its follow-up as part of the action plans concerning psychosocial risks. The implementation of the right to disconnect would address different hazards of a psychosocial nature, classified in accordance with the ISO 45003:2021[12]: a) aspects of work organization: lack of control over workload; work overload; unpredictable working hours; continual requirements to complete work at short notice; and uncertainty regarding work availability, including work without set hours[13] as well as social factors at work like poor communication and relationships between managers, supervisors and workers; work tasks, roles, schedules or expectations that cause workers to continue working in their free time; conflicting demands of work and home; work that impacts the workers' ability to recover. The Resolution underlines the detrimental effect of the ever-greater use of digital tools for work for the physical and mental health of workers and for safety at work and workers' well-being. Among the measures implementing the right to disconnect, the Draft Directive lists health and safety assessments, including psychosocial risk assessment. Up to now, there are no quantitative data on the impact of the right to disconnect on worker well-being and mental health (Vargas-Llave et al., 2020, p. 52). Monitoring and assessment of

incidences of stress and burnout can "provide evidence of the impact of the implementation of the right to disconnect" (Vargas-Llave et al., 2020, p. 57) on work-life balance and mental health.

Finally, as a result of the recent initiative of the European Parliament "Mental Health in the Digital World of Work" the European Parliament resolution of 5 July 2022 on mental health in the digital world of work was adopted.[14] The Resolution follows the human rights approach in relation to mental health. It addresses not only all forms of employment (salaried employment as well as self-employment) but also the different groups of the population. The Resolution urges to "develop a new paradigm to factor in the complexity of the modern workplace in relation to mental health, as the regulatory instruments currently in force are not sufficient to guarantee the health and safety of workers and need to be updated and improved" (Point 16).

To conclude, it can be said that even though occupational health and safety is one of the most comprehensively regulated fields of EU law (Ales, 2018d, p. 1207), it seems that EU law until now lacks a systematic and holistic approach concerning mental health at work and the prevention of psychosocial risks. Some of the directives are out of date, and some initiatives have not been realized until now or are only in their planning stage. The European Parliament stresses in its Resolution of 10 March 2022 "A New EU Strategic Framework on Health and Safety at Work Post-2020" that Council Directive 89/391/EEC "may not prove effective enough for the world of work in the 21st century and the latest developments in labour markets, including the assessment and management of psychosocial risks; [...] calls on the Commission to propose, in consultation with the social partners, a directive on psychosocial risks and well-being at work aimed at the efficient prevention of psychosocial risks in the workplace; [...] calls on the Commission and the Member States to establish mechanisms for the prevention of such risks and the reintegration into the workplace of affected employees, and to shift from individual-level actions to a work organisation approach in line with the general principles of hierarchy of prevention included in Directive 89/391/EEC" (Point 5).[15]

Material Scope of the Right to Mental Health at Work

The legal basis for workplace health and safety is Art. 153 of the Treaty on the Functioning of the European Union (hereinafter TFEU). Article 31 of the Charter of Fundamental Rights of the European Union (hereinafter CFEREU) under the heading "just and fair working conditions" focuses on the "health, safety and dignity" perspectives of working conditions.[16] The working conditions described in Art. 31 CFEREU are restricted to working and rest time without definition of their quantitative limits (Ales, 2018c, p. 1207). Until now, the CJEU has not interpreted Art. 31 of the Chapter in relation to normative acts adopted on the basis of Art. 153 TFEU (Valdés de la Vega, 2013, p. 8). In addition, the revised European Social Charter (hereinafter ESC) stipulates the right to safe and healthy working conditions (Art. 3).

The European Pillar of Social Rights provides that workers have the right to a healthy, safe and well-adapted work environment (Principle No. 10). In accordance with Art. 5 of the Framework Directive, the employer shall have a duty to ensure the safety and health (including mental health) of workers in every aspect related to the work; in accordance with Art. 6 the employer shall take the measures necessary for the safety and health protection of workers.

The WHO defines mental health as "a state of wellbeing in which the individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her own community" (WHO, 2001). Deriving from the definition of health of the WHO, the absence of mental illness is not equivalent to a good state of mental health.

The ILO-WHO Joint Committee on Occupational Health considered that occupational health should "aim at the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations" (ILO, 2009; Lörcher, 2019, p. 551). The concept of well-being at work is developed by the ILO and covers physical, moral and social well-being and not just something that can be measured by an absence of accidents or occupational illnesses.[17]

It is problematic that EU law does not contain definitions of terms such as psychosocial risks, psychosocial health, work-related stress, work life quality and well-being at work (Vroonhof & De Winter, 2021, p. 21).

Some policy documents rather ascribe relevant questions under the category "mental health" without explicit reference to psychosocial risks (Peruzzi, 2017, p. 64).

Personal Scope of the Right to Mental Health at Work

The Personal Scope of the Framework Directive

The Framework Directive applies to employees but not to self-employed persons. The recent EU Strategic Framework for 2021–2027 stresses that the OSH applies to people recognized as workers while it does not to people qualified as self-employed. The evaluation in 2017 of the EU occupational safety and health directives stressed that self-employed workers (in particular those self-employed working alongside workers) should be included in the scope of the Framework Directive 89/391/EEC because of the uncertainty over their employment status.[18]

Until now, there is no case law of the CJEU concerning the Directive in general and its personal scope in particular (Ales, 2018b, p. 1217). However, a recent judgement from the UK,[19] in which the term "worker" of the Framework Directive and the Directive 89/656/EC was interpreted in a broad sense, might have an impact on the further development of European labour law.

Theoretically, the broad interpretation[20] of the statement in Art. 3 (b) of the Framework Directive that "the employer bears responsibility for the undertaking" allows the conclusion that the employer is responsible for anyone who performs their activity there, including self-employed persons (working within the employer premises) (Ales, 2017, p. 261). In the end, the type of employment should not make a difference in terms of health and safety (Riesenhuber, 2021, p. 475). The responsibility of the employer is justified not only by the subordinate position of the employee but also by the responsibility of the employer for the effective functioning of the enterprise or business (Riesenhuber, 2021, p. 475).

Self-Employed Persons in General

Until now, following the Framework Directive, the protection from psychosocial risks is directed primarily at workers. Concerning protection in relation to self-employed persons, it is important to differentiate between

genuine self-employed persons on the one side and bogus and dependent self-employed persons on the other side. In the first case, the focus is on the human rights nature of the right to safe and healthy working conditions, which is guaranteed independently from employment status. The ILO has recognized safe and healthy working conditions as one of its fundamental principles and rights at work.[21] It is a step forward from considering "safe and healthy workplaces" as one of the basic working conditions (ILO, 2019, p. 38) to one of the fundamental workers' rights (Kocher, 2022, p. 194). This inclusion should strengthen the universal application of this right and its human rights nature, as well as protect all employed persons.[22] The purpose of Art. 3 of the ESC stipulating the right to safe and healthy working conditions is directly related to the purpose of Art. 2 of the European Convention on Human Rights (the right to life), which applies to all workers, including the self-employed (Lörcher, 2017, p.185; Schlachter, 2022, p. 247). The realization of the duty of self-protection of genuine self-employed persons is not impossible in itself (Schlachter, 2022, p. 247). In the end, in the case of remote work, there are also difficulties as regards the implementation of the prevention policy in the organization, and this part of the responsibility is shifted from the employer to the remote workers themselves.

In the second case, the question arises as to the accountability of principals, clients, counterparts of a civil law contract or platform operators for the health and safety at work of bogus/dependent self-employed persons. Empirical evidence (Eurogip, 2013, p. 43) shows that often recognized cases of mental disorders concern employees in the service sector (e.g. retail, food services and transport). Plenty of hazards of a psychosocial nature (e.g. work overload, time pressure and limited opportunity to participate in decision-making) in this sector are similar for employed and self-employed persons due to the character of the activity/task performed. Furthermore, in the service sector cases of bogus self-employment and dependent self-employment are quite common. If the employment status is a determinant for the application of OSH regulations, any misclassification can be a way (for employers) to avoid statutory obligations (Schlachter, 2022, p. 248).

Particularly Sensitive Risk Groups

The Framework Directive takes into account "particularly sensitive risk groups" that must be protected against dangers which especially affect

them (Art. 15). These groups include, in particular, workers with a fixed-duration employment relationship or a temporary employment relationship. In order to encourage improvements in OSH of these workers, Council Directive of 25 June 1991 was adopted, providing measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (91/383/EEC). The reason for the specific regulation of OSH of these workers was evidence that such workers, especially in certain sectors, are more exposed to the risk of accidents at work and occupational diseases than other workers (Recital 4 of Directive 91/383/EEC), because they "do not belong to the core workforce being rather contingent to the undertaking, therefore needing to be made specifically acquainted with the environment in which they are going to operate" (Ales, 2017, p. 265). The purpose of Directive 91/383/EEC was to ensure that workers with a fixed-duration employment relationship have the same level of protection as regards OSH as (permanent) employees, in other words, to provide the equal treatment of core and contingent employees. Directive 91/383/EEC stipulates some measures targeted at achieving the abovementioned purpose: access to personal protective equipment, provision of information to workers and workers' training. These measures are focused on the characteristics of the work, special occupational qualifications and skills required for the respective job. The temporary character of an employment relationship itself is not seen in EU law as a psychosocial risk factor.

In the community strategy on health and safety at work for 2002–2006, a negative correlation between the type of contract (with regard to non-standard contracts) and the state of health was acknowledged. Workers in non-standard or precarious employment situations are described as a sensitive group. However, the new (more flexible and temporary) forms of work have been seen as undergoing an (unavoidable) process which just required adjustment (not abatement). The EU Strategic Framework for 2021–2027 acknowledges "the overall developments of new forms of work and business models, especially those linked to the internet-enabled on-demand economy" and focuses on psychosocial risks connected with the *development of digital technologies and remote work trends*. Psychosocial risks resulting from insecure, short-time forms of employment are not addressed. It is interesting that ISO 45003:2021 interprets work organization broadly and considers insecure employment as hazards of a psychosocial nature related to work organization.

Since the beginning of the twenty-first century, plenty of research concerning the interrelationship between the kind of employment (standard or non-standard, precarious) and health outcomes has been conducted. The Whitehall Studies established a new field of public health research by demonstrating the connection between socio-economic status, psychosocial factors and health outcomes (Gorman, 2012; Howard, 2016). People of the lowest socio-economic status are estimated to be two to three times more likely to develop a mental disorder than those with the highest (Safran et al., 2009; Young-Mee & Sung-il, 2020). For example, a disadvantaged environment can expose individuals to greater uncertainty and conflicts. These experiences can create chronic stress, which cumulates throughout life (Adler & Rehkopf, 2008). Numerous studies indicate that workers in non-standard arrangements are at a higher risk of suffering from physical and mental injuries than workers in standard work arrangements (Cummings & Kreiss, 2008).

The challenge of insecure short-time employment is a structural issue (Davies, 2022, p. 422) that goes far beyond the internal management of psychosocial risks. Insecure employment as a socio-economic risk factor (European Commission, 2014, p. 11) has an external dimension connected with the threat of unemployment and income losses. To tackle this structural problem, labour and social law reforms and the conclusion of collective agreements with the goal of limiting non-standard vulnerable forms of employment are required. Some regulatory measures, for instance, can include economic incentives. For example, in France's Decree of 30 March 2021, a bonus-malus system on employer contributions to unemployment insurance was introduced with the aim to encourage companies to limit the excessive use of short-term contracts.[23] Also in the Netherlands, employers now pay a lower contribution for unemployment insurance for employees on a permanent contract than they do for employees on a temporary contract.[24]

Platform Workers

Even the broad interpretation of Art. 3(b) of the Framework Directive would not cover self-employed persons who work beyond employer/principal premises. Such self-employed persons include, in particular, platform workers. Even though there is a growing tendency to classify on-location platform workers as employees in the case law of EU member states, they are de facto still often considered self-employed persons.

Platform workers represent modern “particularly sensitive risk groups” (especially on-location platform workers). Following the traditional approach for specific additional regulations in the field of OSH, these groups of workers, like temporary agency workers in the 1990s, are characterized by high volatility, as they do not belong to the group of core workers of a business. However, it is problematic to find a comparable permanent employee since (in most cases) platform workers of one and the same platform company are employed on the same basis, mostly as self-employed platform workers. At the same time, it is possible to compare the situation of on-location platform workers with workers employed by a traditional company (e.g. in the service sector).

Some categories of platform workers can be exposed not only to physical risks but also to psychosocial risks. First studies demonstrate that for some categories of platform workers (e.g. delivery riders) psychosocial risks are likely to be higher than for other categories of platform workers (e.g. highly qualified crowdworkers) on the one side and then for workers of traditional companies on the other side (Lenaerts et al., 2021, p. 15). There are different reasons for this. Many of them are connected to algorithmic management that leads to higher work intensity, dependence on good ratings, power asymmetries and depersonalization of work, among others. This makes the situation of platform workers different from that of other workers (standard and non-standard). Other reasons (sources of psychosocial risks) are similar to those existing in other non-standard and also standard employment relationships. They are connected with poor working conditions (e.g. unpredictable working times and incomes, social isolation, short-time jobs and lack of collective voice) and digital surveillance (Lenaerts et al., 2021, p. 15). This may result in distress (stress, exhaustion, depression, frustration), etc. (Bérastégui, 2021, p. 87). As empirical studies on psychosocial risks of platform workers are still rare, it is difficult to draw conclusions as to which are the key risk factors of platform workers: algorithmic management as a new psychosocial risk factor, “traditional” risk factors or a combination of both. The answer to this depends on the outcome of the question as to which psychosocial risks and which groups of platform workers[25] should be addressed in the Directive on improving working conditions in platform work.

The Resolution of the European Parliament of 16 September 2021 on fair working conditions, rights and social protection for platform workers sought to address challenges concerning the mental health of platform workers irrespective of their employment status.[26] The Resolution

addresses typical/traditional risks (e.g. unpredictable working hours and social isolation) as well as risks connected to AI and algorithmic management including rating systems and incentivizing practices (work intensity and overload). The proposal for a Directive on improving working conditions in platform work provides a more restricted approach to the mental health of platform workers than the Resolution, limited to risks resulting from the application of automated systems, leaving unanswered risks related to "typical" sources of workplace stress. In particular, Part 2 of Art. 7 of the Draft Directive provides that digital labour platforms shall:

> *[…] evaluate the risks of automated monitoring and decision-making systems to the safety and health of platform workers, in particular as regards possible risks of work-related accidents, psychosocial and ergonomic risks, […]*
>
> *[…] introduce appropriate preventive and protective measures.*
>
> *They shall not use automated monitoring and decision-making systems in any manner that puts undue pressure on platform workers or otherwise puts at risk the physical and mental health of platform workers.*

This formulation is vague and does not define the specific thresholds, i.e., the point when automated systems put at risk the physical and mental health of workers.

What is also problematic is that Art. 7 Part 2 of the Draft Directive shall not be applied in relation to self-employed platform workers (as it refers only to "platform workers" and not "persons performing platform work").

The regulations concerning the risks of automated systems nowadays are relevant not only for platform work but far beyond the gig economy sector. For this reason, some questions arise: Should the personal scope of the future Directive be limited to platform workers with the goal of improving their working conditions? In such a case, it would be suitable to address in the future Directive typical/traditional psychosocial risks as well as risks connected to AI and algorithmic management. The following speaks in favour of such a regulation: algorithmic management still prevails in platform work; further, it would help to increase the attention on the health and safety problems of platform workers. On the other side, since automated monitoring and systems are widely used beyond platform work, also in traditional employment relationships, it is questionable whether the appropriate solution would be to elaborate a separate Directive devoted to algorithmic management.

Conclusion

To conclude, the following outcomes shall be stressed and proposals for future regulation in EU law be made.

1. As has been shown, despite the fact that OSH is one of the most comprehensively regulated fields of EU law, EU legislation until now lacks a systematic and holistic approach concerning mental health at work and the prevention of psychosocial risks. The Framework Directive was adopted in the 1990s when the technical concept of OSH dominated. Even if the Framework Directive addressed all risks, including psychosocial risks, EU law on psychosocial risks and mental health at work is still in its infancy; issues related to psychosocial risks and mental health at work are still mostly a subject of ineffective soft law regulatory instruments. EU law on OSH does not contain the definitions of terms such as psychosocial risks, mental/psychosocial health, work-related stress, work life quality or well-being at work. As a result of the lack of uniform definitions at the EU level, it is not possible to provide overall protection measures against all risks and to develop an effective EU policy that would allow for the implementation of the Framework Directive in relation to psychosocial risks and for harmonization of national policies in this field.
2. Nevertheless, in the last years the EU has recognized that psychosocial risks are one of the main challenges for occupational health and safety management for the future. It remains to be seen whether and how soon the new initiatives and policy proposals will be translated into EU law. It has to be borne in mind that some initiatives in this field that were announced in the 2000s have not been realized until now.
3. The Framework Directive is a cornerstone for a systematic and holistic approach in the field of OSH, but it is not effective enough in regulating traditional as well as new emerging psychosocial risks (e.g. related to AI). The boundless broad scope of the Framework Directive poses a huge challenge concerning its implementation and enforcement, especially when taking into account the focus of labour inspections on high-risk objects and sectors. There should be agreement with Frans Pennings and Bernd Schulte: "The broader the definition, the weaker the enforceability. In order to maximise the

impact of an instrument, the material scope has to be sharply defined" (Pennings & Schulte, 2006, p. 44).

4. It is questionable which source of European labour law should address psychosocial risks: the Framework Directive or the to-be-adopted Framework Directive on psychosocial risks as has been proposed in the European Parliament Resolution of 10 March 2022. In our opinion, the structure of the Framework Directive is perfectly suitable for such amendments; it would be possible to add Art. 5 Point 1 with reference to psychosocial risks and to incorporate psychosocial risk assessments in Art. 9 Point 1 (a). The Framework Directive would establish certain guidelines in relation to psychosocial risks for a separate Directive on psychosocial risks. A separate Directive on psychosocial risks would help to avoid a fragmentation in the regulation of psychosocial risks, the latter of which is one of the shortcomings of some new EU initiatives.
5. However, the Framework Directive, as well as almost all other directives, and some new EU legislative initiatives (concerning platform work, right to disconnect) do not cover self-employed persons. The characteristic feature of some new EU legislative initiatives that are relevant for mental health at work is that they seek to protect persons irrespective of their employment status. At the same time, they provide obligations in the field of OSH only in relation to employers, limiting the personal scope to employees. Therefore, a paradigm shift concerning the personal scope is necessary. The extension of the personal scope of regulations raises the question of the allocation of responsibilities in the field of OSH and mental health at work between different actors (employees, self-employed, employers, state, social security agencies, platform providers, principals, etc.).
6. EU law has a tradition of special protection of "particularly sensitive risk groups" who must be protected against dangers which especially affect them. Platform workers belong to the modern "particularly sensitive risk groups". There are good reasons for addressing in a separative directive any status issue and working condition including psychosocial risks of platform workers. However, automated monitoring and decision-making systems are no longer an issue exclusively related to platform work since today such systems are increasingly also used in traditional employment relationships. This would be an argument in favour of a broader solution that would

address all workers subject to such systems, e.g. in a separate directive on algorithmic management.

7. In the European legislation on OSH, in contrast to ISO 45003:2021, short-time forms of employment are not seen as a hazard of a psychosocial nature. While a negative correlation between the type of contract (with regard to non-standard contracts) and state of health at work is acknowledged, the new (more flexible and temporary) forms of work have been seen as undergoing an (unavoidable) process which merely required adjustment (not abatement). Job insecurity should be tackled on different levels: from inclusion into risk assessment at the workplace to collective bargaining and structural reforms in labour and social law at a national level. At the European level, job insecurity should be addressed in a future directive on psychosocial risks.

Notes

1. Opinion of the European Economic and Social Committee on “Challenges of Teleworking: Organisation of Working Time, Work-Life Balance and the Right to Disconnect”, 24 March 2021, Point 4.1.5., https://op.europa.eu/en/publication-detail/-/publication/3f71d1e8-c8bd-11eb-84ce-01aa75ed71a1/language-en
2. Council Conclusions of 14 June 2021 on Telework, https://data.consilium.europa.eu/doc/document/ST-9747-2021-INIT/en/pdf
3. Cf. Fn.1, Point 4.3.1.
4. Teleworking, Unpaid Care and Mental Health during Covid-19, https://www.europarl.europa.eu/news/en/headlines/society/20220303STO24641/teleworking-unpaid-care-and-mental-health-during-covid-19
5. Constitution of the World Health Organization, https://www.who.int/governance/eb/who_constitution_en.pdf
6. Case C-84/94 United Kingdom v Council [1996] ECR I-5793, point 15.
7. European Commission. Commission Staff Working Document: Ex-post Evaluation of the European Union Occupational Safety and Health Directives. SWD (2017) 10 final. 2017, p. 197.
8. In accordance with Art. 5 (1) of the Directive, the employer shall have a duty to ensure the safety and health of workers in every aspect related to work.
9. European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social

Committee and the Committee of Regions on the practical implementation of the provisions of the Health and Safety at Work Directives 89/391 (Framework), 89/654 (Workplaces), 89/655 (Work Equipment), 89/656 (Personal Protective Equipment), 90/269 (Manual Handling of Loads) and 90/270 (Display Screen Equipment) (COM(2004) 62 final), 2004, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0062&from=EN
10. European Parliament Pushes for the EU's Long-Term Action on Mental Health, https://www.mhe-sme.org/european-parliament-pushes-for-the-eus-long-term-action-on-mental-health/
11. EU Strategic Framework on Health and Safety at Work 2021–2027. Occupational Safety and Health in a Changing World of Work, Brussels, 28.06.2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0323&qid=1626089672913#PP1Contents
12. "Occupational health and safety management—Psychological health and safety at work—Guidelines for managing psychosocial risks", https://www.iso.org/obp/ui/#iso:std:iso:45003:ed-1:v1:en
13. In particular, it allows for addressing the issue of hyper-connection.
14. Mental Health in the Digital World of Work (2021/2098 (INI)), https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/2098(INI)&l=en; https://www.europarl.europa.eu/doceo/document/TA-9-2022-0279_EN.html
15. https://www.europarl.europa.eu/doceo/document/TA-9-2022-0068_EN.pdf
16. Every worker has the right to working conditions which respect his or her health, safety and dignity. Art. 31 CFEREU.
17. Communication from the Commission—Adapting to Change in Work and Society: A New Community Strategy on Health and Safety at Work 2002–2006, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52002DC0118
18. European Commission. Commission Staff Working Document: Ex-post Evaluation of the European Union Occupational Safety and Health Directives. SWD (2017) 10 final. 2017, p. 29.
19. [2020] EWHC 3039 (QB) (Admin).
20. The broad interpretation leaves disregarded the first part of Art. 3 (b) employer: any natural or legal person who has an employment relationship with the worker.
21. Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work of 10 June 2022, https://www.ilo.org/ilc/ILCSessions/110/reports/texts-adopted/WCMS_848632/lang%2D%2Den/index.htm

22. Verwaltungsrat. 341. Tagung, Geneva, March 2021, https://www.ilo.org/wcmsp5/groups/public/%2D%2D-ed_norm/%2D%2D-relconf/documents/meetingdocument/wcms_770201.pdf
23. Access to Social Protection for Workers and Self-Employed—French National Plan, 2021, https://ec.europa.eu/social/main.jsp?mode=advancedSubmit&catId=22&advSearchKey=socprotecnatplan-fr
24. Access to Social Protection for Workers and Self-Employed—Dutch National Plan, 2021, https://ec.europa.eu/social/main.jsp?mode=advancedSubmit&catId=22&advSearchKey=socprotecnatplan-nl
25. For example, some policy-makers focus on on-location platform work in the transport and tourism sectors.
26. Resolution of the European Parliament of 16 September 2021 on Fair Working Conditions, Rights and Social Protection for Platform Workers—New Forms of Employment Linked to Digital Development (2019/2186(INI)), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0385_EN.html

References

Adler, E. N., & Rehkopf, D. H. (2008). US disparities in health: Descriptions, causes, and mechanisms. *Annual Review of Public Health, 29*, 235–252.

Ales, E. (2013). Occupational health and safety: A comparative perspective, in: An EU law perspective. In E. Ales (Ed.), *Health and safety at work*. Kluwer Law International.

Ales, E. (2017). The "risk approach" in occupational health and safety (with an eye to Italy): Alternative or complement to the "core/contingent approach"? In E. Ales, O. Deinert, & J. Kenner (Eds.), *Core and contingent work in the European Union*. Hart Publishing.

Ales, E. (2018a). Commentary on Art. 3 of directive 89/391. In E. Ales, M. Bell, O. Deinert, & S. Robin-Olivier (Eds.), *International and European labour law: article-by-article commentary*. Hart Publishing.

Ales, E. (2018b). Commentary to Art. 3 framework directive. In E. Ales, M. Bell, O. Deiner, & S. Robin-Olivier (Eds.), *International and European labour law: Article-by-article commentary*. Hart Publishing.

Ales, E. (2018c). Commentary to Article 31 CEFREU. In E. Ales, M. Bell, O. Deinert, & S. Robin-Olivier (Eds.), *International and European labour law: Article-by-article commentary*. Hart Publishing.

Ales, E. (2018d). Part 6. Health and safety law. In E. Ales, M. Bell, O. Deinert, & S. Robin-Olivier (Eds.), *International and European labour law: Article-by-article commentary*. Hart Publishing.

Bérastégui, P. (2021). *Exposure to psychosocial risk factors in the gig economy*. ETUI, The European Trade Union Institute. https://www.etui.org/publications/exposure-psychosocial-risk-factors-gig-economy
Birk, R. (1999). Die Rahmenrichtlinie über die Sicherheit und den Gesundheitsschutz am Arbeitsplatz – Umorientierung des Arbeitschutzes und bisherige Umsetzung in den Mitgliedstaaten der Europäischen Union. *ZIAS, 1*, 645–667.
Cefaliello, A. (2022). Towards effective enforcement of occupational health and safety law in the European Union. In Z. Rasnača, A. Koukiadaki, N. Bruun, & K. Lörcher (Eds.), *Effective enforcement of EU labour law*. Bloomsbury Publishing.
Cummings, K., & Kreiss, K. (2008). Contingent workers and contingent health. *JAMA, 299*(4), 448–450.
Davies, A. C. L. (2022). Stress at work: Individuals or structures? *Industrial Law Journal, 51*(2), 403–434.
Eurofound. (2012). Stress at work. https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/stress-at-work
Eurofound. (2021). *Right to disconnect: Exploring company practices*. Publications Office of the European Union.
Eurogip. (2013). What recognition of work-related mental disorders? A study on 10 European countries. https://www.eurogip.fr/images/publications/Eurogip_recognition_of_work_related_mental_disorders_81EN.pdf
European Commission. (2014). Promoting mental health in the workplace.
European Parliament. (2021). The impact of teleworking and digital work on workers and society. Study requested by the EMPL Committee. https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU(2021)662904_EN.pdf
Fuchs, M., & Marhold, F. (2020). *Europäisches Arbeitsrecht*. Verlag Österreich.
Gorman, S. (2012). Inequality, stress and health: The Whitehall studies. https://scienceblogs.com/thepumphandle/2012/10/03/inequality-stress-and-health-the-whitehall-studies.
Howard, J. (2016). Nonstandard work arrangements and worker health and safety. *American Journal of Industrial Medicine, 60*(1), 1–10.
ILO. (2009). *General survey*. ILO.
ILO. (2019). *Work for a brighter future – Global commission on the future of work*. International Labour Office – ILO.
Kocher, E. (2022). *Digital work platforms at the Interface of labour law*. Hart Publishing.
Lenaerts, K., Waeyaert, W., Smits, I., & Hauben, H. (2021). Digital platform work and occupational safety and health: A review. https://osha.europa.eu/en/publications/digital-platform-work-and-occupational-safety-and-health-review

Lörcher, K. (2017). Article 3. The right to safe and healthy working conditions. In N. Bruun, K. Lörcher, I. Schömann, & S. Clauwaert (Eds.), *The European social charter and the employment relation*. Hart Publishing.

Lörcher, K. (2019). Commentary on Art. 31. In F. Dorssemont, K. Lörcher, S. Clauwaert, & M. Schmitt (Eds.), *The charter of fundamental rights of the European Union and the employment relation*. Hart Publishing.

Pennings, F., & Schulte, B. (2006). Some current points of discussion concerning social security conventions. In F. Pennings (Ed.), *Between soft and hard law*. Kluwer Law International.

Peruzzi, M. (2017). Effectiveness and problematic aspects of the EU framework on psychosocial risks. In L. Lerouge (Ed.), *Psychosocial risks in labour and social security law* (pp. 53–66). Springer.

Prassl, J. (2016). The interaction of EU law and national law: Between myth and reality. In A. Bogg, C. Costello, & A. C. L. Davies (Eds.), *Research handbook on EU labour law* (pp. 42–63). Edward Elgar Publishing.

Riesenhuber, K. (2021). *Europäisches Arbeitsrecht*. De Gruyter.

Safran, M., et al. (2009). Mental health disparities. *American Journal of Public Health, 99*(11), 1962–1966.

Schlachter, M. (2022). The self-employed persons under the European social charter. In C. Schubert (Ed.), *Economically-dependent workers. A handbook*. Beck-Hart-Nomos.

Valdés de la Vega, B. (2013). Occupational health and safety: An EU law perspective. In E. Ales (Ed.), *Health and safety at work*. Kluwer Law International.

Vargas-Llave, O., Weber, T., & Avogaro, M. (2020). *Right to disconnect in the 27 EU member states*. Eurofound. WPEF20019. https://cooperante.uni.lodz.pl/wp-content/uploads/2020/08/wpef20019.pdf

Vroonhof, P., & De Winter, T. (2021). *Mental health and well-being in the digital world of work post COVID – EMPL workshop proceedings, publication for the committee on Employment and Social Affairs*. Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament. https://www.europarl.europa.eu/cmsdata/243603/QA0721140ENN.pdf

WHO. (2001). Mental health: Strengthening mental health promotion. Factsheet no. 220. http://www.who.int/mediacentre/factsheets/fs220/en/

Young-Mee, K., & Cho Sung-il. (2020). Socioeconomic status, work-life conflict, and mental health. *American Journal of Industrial Medicine, 63*(8), 703–712.

CHAPTER 11

Lockdowns and Domestic Violence: The Impact of Remote Work Regulations on Women Workers in Türkiye During the COVID-19 Pandemic

Ceren Kasım

Introduction

The COVID-19 pandemic has triggered an unprecedented, unique collective experiment in the history of humankind, with governments intervening through lockdowns following its emergence and the measures taken by governments to deal with it. Unfortunately, the crisis caused by the pandemic has created an environment where those who were already disadvantaged have suffered the most. It has highlighted and exacerbated existing inequalities within societies, affecting women specifically. Indeed, women working remotely during the pandemic have found the situation more drastic and challenging than was the case before. A particularly concerning issue is an increase in domestic violence cases against women.

C. Kasım (✉)
University of Hildesheim, Hildesheim, Germany
e-mail: kasimintizamoglu@uni-hildesheim.de

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_11

Following the outbreak of COVID-19, the Turkish authorities, as well, imposed drastic restrictions on everyday life to stop or at least slow down the spread of the virus. One of the main regulations was the, mostly mandatory, transition to remote work, especially by means of working from home. This also resulted in a transition of the 'paid work', which is associated with the public sphere, to the realm of the private unpaid 'non-work'. Especially, this transition had a direct impact on the women workers working remotely at home, unproportionally affecting childcare responsibilities to household management. It is particularly noteworthy to observe with regard to the subject of gender-based domestic violence against women in Türkiye. Indeed, the reported domestic violence cases against women increased noticeably. Unfortunately, there were not enough legal regulations that applied a gender perspective in all crisis response design and implementation. Although gender equality and the empowerment of women and girls have a transitional potential of critical importance in response to a crisis, enabling a sustainable recovery and building resilience.

This chapter argues that a human-centred recovery from COVID-19 can only be achieved by an inclusive needs assessment of the women workers with a clear gender perspective, specifically designed to prevent and punish all forms of gender-based violence, and protect and support victims in the workplace—in case of remote work in home offices and also in connection with domestic violence. The chapter aims to introduce and assess the legal protections that exist for women working remotely against gender-based domestic violence against the backdrop of the COVID-19 pandemic in Türkiye. This contribution will begin with introducing the use of remote work in Türkiye during the COVID-19 pandemic crisis, followed by highlighting specifics of the women workers who are working remotely from home during the pandemic. The chapter will discuss the mandatory character of remote work during the pandemic, along with the connection between the traditional public-private dichotomy and performing work in the home office, considering patriarchal gender roles. Additionally, it will reflect on the increase in cases of gender-based domestic violence against women during the pandemic and the growing anti-gender movements. The chapter will then examine legal regulations about remote work and protection against gender-based domestic violence in Türkiye. By way of conclusion, the chapter will emphasize the importance of a human-centred recovery that takes into account the specific needs of women workers.

Remote Work in Türkiye: Shifting from High-Skilled Luxury to Common Practice

Following the outbreak of COVID-19 and especially after its spread around the world and the declaration by the World Health Organization that it constitutes a pandemic, the Turkish authorities imposed drastic restrictions on everyday life to stop or at least slow down its spread (Kasım, 2020, p. 1). As a result, many Turkish companies either initiated or, for those companies with existing remote work policies, expanded their implementation starting from March 2020. Studies from the beginning of the pandemic period show that 54% of Turkish companies ordered remote work for their head office employees in the first week of the pandemic in Türkiye, increasing to 94% in the third week (Centel, 2020, p. 17; Mercer, 2020, p. 2). A recent study indicates that 49.04% of employees have switched to a hybrid model of both remote and rotational work, 35.56% have switched to remote work only and 10.04% switched to rotational work only (İlkkaracan & Memiş, 2020, p. 1). Remarkably, 59% of companies plan to continue working according to the remote working model once the pandemic is over (Centel, 2020, p. 17; Mercer, 2020). Some leading Turkish companies have already announced that they will make remote work permanent, especially for office employees, in the post-pandemic period (Koç, 2021; Sabancı, 2021). For instance, Koç Holding has made remote work permanent for 35,000 office workers, while some have already started new remote working programmes (Koç, 2021; Sabancı, 2021). The prevalence of remote work across various industries and types of work contradicts its previous position in the Turkish labour market. Prior to the pandemic, it was primarily utilized by highly skilled workers with the aid of technological advancements, but it is now becoming increasingly common across all job sectors (Kıcır, 2019). This indicates that remote work, once a luxury of high-skilled workers in the Turkish labour market, is becoming more common across the entire labour market. In this way, remote work, initially viewed as a temporary solution during the COVID-19 pandemic, is likely to persist for an extended period.

Rethinking Gender Roles During Mandatory Home Office Policies

As a result of the COVID-19 restrictions in Türkiye, remote work has become mandatory to some extent for various sectors and types of work (Kasım, 2020, p. 3). With curfews and travel limitations in place, remote work has been limited to workers' homes or home offices, causing paid and unpaid work to blend into the same space. This has created uncertainties about the beginning and end of paid work, as well as questions about when and where work is taking place and who should be considered as a worker.

Remote work, carried out in a home office and practised by women workers, challenges the long-established and much-criticized public-private dichotomy. In the Western liberal democratic tradition, the creation of a division of the public-private spheres has functioned as a political tool that inter alia defines the regulatory limits of the state (Thornton, 1991). By proclaiming itself responsible only for the public sphere, the state refrains from regulating the areas of human social life deemed 'private', while the public sphere is regarded as the relevant regulatory area of jurisdiction (Thornton, 1991, p. 449)—even though the state also has a saying on the 'private' but chooses to regulate only when it is politically desired (Thornton, 1991, p. 459). Thus, it is a publicly given political decision through state activity where and what is to be considered public or private in legal terms. Despite the ambiguousness and obscurity of the boundaries of the so-called spheres—public and private—and despite all the critics, the understanding of the public-private dichotomy still has an effect on the regulatory systems of the Western liberal states (Thornton, 1991, p. 448, 449). Rationality and abstract thinking are ascribed to the public sphere; the private is however defined by irrationality and affectivity (Thornton, 1991, p. 452). As a result, the men—supposedly carriers of the logical mind, far from nature, more to the civilized world—are attributed to the realm of the public, whereas the women—supposedly mystique, natural caregivers, and child carers—are associated with the private (Thornton, 1991, p. 449, 450, 459). In this way, the women are bound to the private sphere as represented in the family and the men are inextricably linked to the public (Thornton, 1991, p. 449, 450, 459). Consequently, the public-private dichotomy not only reflects but also reproduces and, in many ways, creates gender-based inequality in society. It demonstrates itself to be an instrument that enables men to preserve

their influential position and social power in the public (Thornton, 1991, p. 459). In this context, the family belongs to the private sphere, whereas government matters are associated with the public (Thornton, 1991, p. 449). Parallel to this division, regarding the world of work, the public world of work—referred to as work—is affiliated with men, while the world of home—non-work—is allocated to women (Thornton, 1991, p. 452, 453). However, remote work practised in the home office blurs public-private division by bringing the public 'work' from the public world of work into the private sphere at home—into the castle of private 'non-work'.

The Turkish Labour Act No. 4857 also reflects the public-private divide by defining work in connection to the employment contract, with public spaces being considered work and private spaces being considered non-work. An illustrative example can be the exclusion of domestic work from the scope of the Labour Act. Notably, domestic work falls outside the scope of the Labour Act, despite being based on contractual relations and being paid (Art. 4(1) Labour Act No. 4857). During the COVID-19 pandemic, women in Türkiye were almost twice as likely as men to switch to remote work (İlkkaracan & Memiş 2020, 1). In parallel, the working hours and workload of women both in unpaid and in paid work increased drastically (İlkkaracan & Memiş 2020, 1). Women carried out nearly four times as much unpaid household and care work as men during the pandemic (İlkkaracan & Memiş 2020, 1). In households with both female and male partners, the average workload (paid and unpaid work) of the former has increased, while the latter's decreased (İlkkaracan & Memiş 2020, 1). The closure of schools and day-care facilities, along with the rise of home-schooling and remote work, has led to the resurgence of (or at least the greater visibility of) classic gender roles in the Türkiye. Certain state regulations, such as the Presidential Office Circular of 14 April 2021, have further reinforced patriarchal gender roles. This circular, which aims to regulate civil servants' remote work and working in rotating shifts during the pandemic, grants pregnant women and female staff with children under 10 years of age an administrative leave. While this is a positive step towards achieving work-life balance, it is also controversial since it only applies to women civil servants with young children, with male civil servants being exempted from this regulation. Although this circular only applies to civil servants, it serves as an illustrative example of how the state perceives women workers in society: as mothers and child carers—those naturally responsible for reproduction and nurturance.

When the Home Is Not Safe

Since a large number of workers were instructed to work remotely from their homes during the pandemic, everything that happened at home became directly workplace-related—including domestic violence. Even prior to the COVID-19 pandemic, one in three women globally had reported experiencing physical or sexual violence, usually by an intimate partner, according to the World Health Organization (2021). As in Türkiye, the Organization for Economic Cooperation and Development (OECD) data from 2019 revealed that 38% of women in Türkiye had experienced physical and/or sexual violence from an intimate partner at some time in their life, placing Türkiye as 22nd among 38 OECD member countries (OECD, 2022). Research conducted by Turkish National Police Academy members, shortly before the pandemic, revealed that 301 women were victims of femicide in 2016, 350 in 2017, and 281 in 2018 (Taştan & Küçüker Yıldız, 2019, p. 2). Notably, 72.8% of these femicides occurred in the victim's homes, while 3.2% took place at the workplace (Taştan & Küçüker Yıldız, 2019, p. 5). Furthermore, 96.2% of the perpetrators were men (Taştan & Küçüker Yıldız, 2019, p. 16).

During the COVID-19 pandemic, the situation did not improve in Türkiye. In fact, like many other countries, Türkiye experienced an increase in violence against women, which acted as a shadow pandemic (World Health Organization, 2021). In fact, in 2020, 300 femicides and 171 suspicious deaths of women were reported in Türkiye, with 60% of the femicides occurring in the victim's own homes (Kadın, 2020). The slogans of the Turkish government's campaign against the COVID-19 pandemic were called 'Life fits in a home' (Hayat eve sığar.), 'Stay home, stay healthy.' (Evde kal, sağlıklı kal.) However, for many women, the home is not always a safe place to stay; the workplace can be a refuge. Data from 2021 paints a grim picture. In the year 2021, 280 femicides were reported by women's organizations, and 217 women were found suspiciously dead (Kadın, 2021). So, in the second year of the pandemic, the year the Türkiye withdrew from the Istanbul Convention—Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 2011—the number of reported femicides may remained almost unchanged from 2020, but the number of reported suspicious female deaths increased by 50% (Kadın, 2021). Dramatically, 64% of women, 4% more than in 2020, were killed in their own homes (Kadın, 2021). Unfortunately, despite the efforts of the women's organizations,

the employment status of the femicide victims could not be determined (Kadın, 2021).

Research conducted by Sosyo Politik in Türkiye revealed that 84.8% of the interviewees did not experience violence in the household before the quarantine process (Sosyo Politik, 2020, 4). Among those who did experience violence during the quarantine process, 23.7% experienced psychological violence, 10.3% economic violence, 4.8% digital violence, 1.7% physical violence, 1.4% sexual violence, and 1.1% were persistently followed (Sosyo Politik, 2020, 4). In terms of perpetrators, 32% were exposed to violence by their spouse, 15.4% by their father, 14.8% by their brother, 11.6% by their mother, 7.5% by their sister, 7.1% by their boyfriend, 7.1% by their relatives, and 4.5% by their son (Sosyo Politik, 2020, 4). Furthermore, the demand for shelters increased significantly during the pandemic, with the Federation of Women's Associations reporting a 78% increase in shelter demands in March 2020 compared to the previous year in Türkiye (Yılmaz, 2020).

As the pandemic compelled a significant segment of the workforce to work remotely from home, domestic violence, typically confined outside the workplace, began to permeate the work environment as the workplace became interwoven with the home. The discourse surrounding domestic violence and private-public divide faces numerous challenges in the context of domestic violence against women engaged in remote work. While remote work is on the rise and blurring the supposed boundaries between public and private, gender-based domestic violence against women who work remotely makes it imperative to question these very divisions. Given the expectation that remote work will remain commonplace once the pandemic is over, it is crucial for women workers to secure adequate protection against domestic violence, which could ensure a human-centred recovery with human rights, decent work, and fundamental principles at the centre.

Anti-gender Movements and the Istanbul Convention in the Midst of the Pandemic Crisis

While violence against women was on the rise in pandemic-stricken Türkiye, the country announced its withdrawal from the Istanbul Convention on 20 March 2021—despite being its first signatory—and denounced it effectively on 1 July. The Istanbul Convention recognizes

violence against women as a form of gender-based violence and a manifestation of historically unequal power relations between women and men (Preamble CETS). It emphasizes the role of the private sector in preventing violence against women, including domestic violence (Art. 5(2), Art. 9, and Art. 17 CETS). The Convention also states that 'violence against women'—referring to all acts of gender-based violence, whether occurring in public or in private life—should be understood as a violation of human rights and a form of discrimination against women (Art. 3 CETS).

According to Özkazanç (Özkazanç 2022a, Özkazanç 2022d, Özkazanç 2022e), the withdrawal of Türkiye from the Istanbul Convention is related to the emergence of the anti-gender movement in the country, which has been growing since 2011 and running parallel to the transnational movement after 2019 (Özkazanç, 2022b). This transnational movement criticizes the concept of gender and has been active since the early 1990s (Butler, 2019, p. 1). The anti-gender movement refers to gender as 'gender ideology' and, as Butler (2019) notes, seeks to do more than simply remove the word 'gender' or even banish gender theory. It aims to challenge the rationale for various policies and institutions (Butler, 2019, p. 1). This movement believes that it is natural for women to perform domestic tasks, while men are better suited for public roles (Butler, 2019, p. 3). It opposes the notion of gender-based violence and, instead, focuses on 'intrafamilial' violence, arguing that men can also be victims (Butler, 2019, p. 5). As gender was viewed as a danger, the Istanbul Convention's definition of gender and its gender-focused approach was considered a threat (Özkazanç, 2022c). The Turkish government's decision to close the Ministry of State for Women and Family in 2011 and establishing the Ministry of Family and Social Policies, as well as the merging of the ministries of Labour and Social Security in 2018 under the name of 'Ministry of Labour, Social Services, and Family', illustrates this perspective at the structural level of government in Türkiye. For instance, the main regulatory instrument in Türkiye regarding violence against women is also called Act on the Protection of the Family and the Prevention of Violence against Women (APFPV), emphasizing the protection of the family.

International Labour Organization (ILO) Employment and Decent Work for Peace and Resilience Recommendation, 2017, No. 205, (R205) on the other hand, emphasizes the importance of adopting a phased multi-track approach for enabling recovery and building resilience which includes applying a gender perspective in all crisis response activities (R205 p. 8). ILO Recommendation No. 205 recognizes that crises affect women and

men differently and that gender equality and the empowerment of women and girls are critical to enabling recovery and building resilience (R205 Preamble and p. 9). Thus, crisis response should include a coordinated and inclusive needs assessment with a clear gender perspective, particularly in the aftermath of a conflict or disaster (R205 Preamble and p. 9). Furthermore, Recommendation No. 205 urges members to prevent and punish all forms of gender-based violence and to protect and support victims (R205 p. 15). Therefore, adopting a gender-based perspective and effectively addressing gender-based violence are essential for achieving human-centred, sustainable, and inclusive recovery and resilience.

Examining Legal Regulations on Remote Work

The Republic of Türkiye is not a signatory to the International Labour Organization's Home Work Convention of 1996 or, as a non-EU member, the European Union Framework Agreement on Telework of 2002. However, remote work is not a new concept in Turkish employment law. The 2016 amendment to the Turkish Labour Act No. 4857 recognizes remote work as a type of employment relationship, which requires a written remote work employment contract (Art. 14(4) Labour Act No. 4857). Remote work is defined based on the use of technological communication tools within the scope of the work organization created by the employer (Art. 14(4) Labour Act No. 4857). Despite the need for clear guidelines on remote work, the relevant parties had to wait until March 2021 for the formalization of the Remote Work Regulation (RWR). As a result, when the pandemic forced employers to require their employees to work from home, there were no specific regulations to provide detailed guidance on the practice of remote work.

The RWR covers various subjects, such as the arrangement of the workplace (Art. 6 RWR), materials and work tools (Art. 7 RWR), production costs (Art. 8 RWR), determining working time (Art. 9 RWR), communication between employees and employers (Art. 10 RWR), data protection (Art. 11 RWR), and occupational health and safety (Art. 12 RWR). However, apart from data protection and occupational health and safety, the RWR allows the parties of the employment contract to determine the main variables of remote work based on mutual agreement between them. This allows for flexibility for both parties involved in the employment contract. However, given the typical power imbalance between employers and employees, the regulation ultimately prioritises employers' flexibility over

the security of employees. Additionally, it fails to address the specific needs of women employees and provide adequate protection for all employees.

A remote work employment relationship may be established directly, from the very beginning with a remote work employment contract or an existing employment contract may be converted to a remote work employment contract with a mutual agreement (Art. 14(1) RWR). Although an employee in an existing employment relationship may also request to work remotely, an employer is not obliged to accept the employee's request (Art. 14(2) RWR). Therefore, employees do not enjoy any recognized right to remote work according to the RWR.

However, the Remote Work Regulation allows employers to switch to remote work without the employee's consent, at their sole discretion, in force majeure or similar (Art. 14(6) RWR). According to Baycık et al. (2021), the employer has the right to require employees to work remotely in cases such as pandemics (Baycık et al., 2021, p. 1691). However, no exceptions are provided for situations such as care responsibilities or domestic violence. Although remote work can have a positive effect on gender equality (Tomei, 2021), granting employers the sole decision-making power to switch to remote work may also pose a risk of ignoring the needs of women workers, such as victims of gender-based domestic violence.

An essential provision that could be helpful for the women working remotely at home who are exposed to domestic violence or fear such an incident is Article 14(5) RWR. Article 14(5) RWR entitles the employee whose employment contract was converted to remote work to request to work at the workplace again. According to this, the request is to be made in writing and it is then evaluated by the employer in line with the procedure determined at the workplace (Art. 14(2) RWR). While evaluating the request, suitability for remote working due to the nature of the job and the employee should be used as a criterion (Art. 14(2) RWR). Whereas the employer may also determine other criteria (Art. 14(2) RWR). The employer is also obliged to evaluate the request of the employee to work at the workplace as a priority (Article 14(5) and (2) RWR). This should be interpreted in connection with the employer's duty of care. Employer's duty of care includes, among other things, the protection of the employee's personality, life, health, and bodily integrity (Kaplan, 2003). If the employer is aware of domestic violence or if the employee, who is exposed to domestic violence or fears such an incident, informs the employer about the situation, the employer's duty of care requires an action of the

employer. In this case, a request to work at the workplace should be evaluated considering the duty of care and the bodily integrity of the employee. Although, it is unclear from the text of the regulation if the employees whose employment contracts were from the very beginning established as remote work are also entitled to request to work at the workplace.

Still, the employer is obligated to inform the employee about occupational health and safety precautions, to provide the necessary safety training, to provide health surveillance, and to take the necessary occupational safety measures related to the work equipment provided (Art. 12 RWR). The employer should also consider the nature of the remote work undertaken by the employee (Art. 14(4) Labour Act No. 4857 and Art. 12 RWR). In this way, the employer must ensure that the working conditions of the remote worker are safe and do not threaten their health (Astarlı & Baysal, 2021, p. 2). An interpretation of this regulation, considering the needs of women workers as a group, should ensure that the occupational health and safety regulations included also cover domestic violence, as domestic violence is above all a health and safety issue. International Labour Organization Violence and Harassment Convention, 2019, No. 190, also emphasizes violence and harassment and associated psychosocial risks should be considered in the management of occupational safety and health. Occupational health and safety regulations could involve, for instance, a violence prevention plan which includes policies and procedures, a reporting mechanism, and training, but also paid, job-protected leave to help the victims to recover themselves.

Examining Legal Regulations on Domestic Violence

From an international law perspective, Türkiye is not a member of the Istanbul Convention (CETS), nor has it signed the International Labour Organization Convention Violence and Harassment Convention, 2019, No. 190. However, Türkiye has been a member state of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) since 1985. CEDAW is a Convention that emphasizes fundamental human rights, the dignity and worth of the human person, and equal rights for men and women. The Convention condemns all forms of discrimination against women and aims, among other things, to eliminate discrimination against women in the field of employment. Additionally, General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) inspired the

legal definition of violence against women in the Istanbul Convention (Henneberger, 2018, p. 206). Despite Türkiye's denouncement of the Istanbul Convention, the Turkish National Act on the Protection of the Family and the Prevention of Violence against Women (APFPV) states that in its implementation, the international conventions to which Türkiye is a party, as well as the Istanbul Convention, should serve as a foundation (Art. 1(2,a) APFPV). It remains to be seen whether judges will use the Istanbul Convention in their interpretations and decisions.

The prohibition of discrimination plays a prominent role in Turkish national law. Article 10 of the Turkish Constitution declares that men and women have equal rights, and the state has an obligation to ensure that this equality exists in practice. Similarly, the Turkish Labour Act proclaims the principle of equal treatment, stating that no discrimination based on sex or similar reasons is permissible in the employment relationship (Art. 5 Labour Act). The employer may not discriminate against an employee due to the employee's sex or maternity, except for biological reasons or reasons related to the nature of the job, in the conclusion, conditions, execution, and termination of the employment contract (Art. 5(3) Labour Act). As gender-based violence against women is a violation of human rights and a form of discrimination against women (see Istanbul Convention Art. 3(1)), the state also has the duty to protect women workers from domestic violence, including those working remotely (Art. 10 Constitution, Art. 5 Labour Act i.c.w. Art. 1(2,a) APFPV).

The main regulatory instrument in Türkiye regarding violence against women is the Turkish Act on the Protection of the Family and the Prevention of Violence against Women (APFPV). The APFPV defines violence against women as all kinds of attitudes and behaviours inflicted on women solely because they are women or that affects only women resulting in discrimination based on sex and a violation of women's human rights (Art. 2(1,ç) APFPV). Domestic violence is described as all kinds of physical, sexual, psychological, and economic violence that occur within the family or the household or against other members of the family, even if the victim and perpetrator do not share the same household (Art. 2(1,b) APFPV). Notably, there is no mention of gender or the term gender-based violence in the Act.

Encouragingly, the Turkish Act on the Protection of the Family and the Prevention of Violence against Women includes provisions that relate to women workers. Notably, a judge has the authority to forbid the perpetrator from approaching the victim, their place of residence, school, or

workplace, which is particularly significant for women whose home and workplace are one and the same (Art. 4(1) APFPV). However, on 30 March 2020, the General Assembly of the Council of Judges and Prosecutors (CJP)—Hakimler ve Savcılar Yüksek Kurulu—issued additional measures in response to the COVID-19 pandemic. According to cautionary decisions issued under APFPV should be evaluated in a manner that does not endanger the health of obliged persons—perpetrators—under coronavirus measures. This situation, as highlighted by Bulgurcuoğlu and Kelebek Küçükarslan, exposes women to a risk of both violence and disease/virus with considerable uncertainty (Bulgurcuoğlu & Kelebek Küçükarslan, 2020, p. 77). At a time when women are most vulnerable and in dire need of support, discrimination and gender-based violence against women, which have been exacerbated by the COVID-19 pandemic, have increased, the decision by the Council puts victims of domestic violence in greater danger, jeopardizing the psychological and physical well-being of women. In such circumstances, and when social ties are fragile, the CJP's decision weakens a crucial protection avenue for women. Rather than addressing the needs of women during the pandemic, which necessitated a human-centred crisis response, the system's shortcomings were imposed on women, at the expense of their lives. Women have been treated as collateral damage in the ongoing battle against the pandemic.

Additionally, under the APFPV, a judge has the power to order the relocation of a victim's workplace (Art. 4(1,a) APFPV). This decision is carried out by the relevant authority in accordance with the applicable legislation governing the victim's employment (Art. 10(7) APFPV). However, Dulay Yangın has raised concerns that this provision may result in women workers experiencing adverse effects on their wages, career opportunities, and other rights (Dulay Yangın, 2020, p. 5). The Constitutional Court has also recognized that denying a woman's request for a workplace change due to violence can violate her right to protect her material and moral existence (Anayasa Mahkemesi, 17.07.2019, 2016/14613, K. Ş.).

Furthermore, the APFPV stipulates that if the protected person is employed and has children, nursery or kindergarten facilities should be provided for a limited period of two months to support their participation in working life (Art. 3(1,d) APFPV). Although this provision is a positive step towards enabling victims of domestic violence to continue working, it may be deemed inadequate due to its restricted timeframe.

In its 2021 report, the women's organization Kadın Cinayetlerini Durduracağız Platformu highlighted, however, that out of the 280 femicide victims, 33 had previously filed complaints with authorities or obtained a restraining order (Kadın, 2021). Regrettably, this highlights the limited effectiveness of legal precautionary measures. However, in a promising way, in a ground-breaking ruling, the Constitutional Court in Türkiye held public officials accountable for not taking adequate measures to prevent a femicide. In the case of S. E., who was killed by her ex-husband, the Constitutional Court ordered the prosecution of public officials who were found to have been negligent in preventing and protecting against femicide. The court concluded that the victim's right to life had been violated and that the femicide was the result of the ineffective implementation of preventive measures due to public officials' negligence (Anayasa Mahkemesi, 29.09.2021, 2017/32972, T.A.).

Finally, it is pertinent to discuss the institutions of collective labour law. According to the Turkish Trade Union and Collective Bargaining Act (TUCAA), trade unions are obliged to pay attention to gender equality in their activities (Art. 26(3) TUCAA). This obligation could be interpreted as including activities to prevent domestic violence (Dulay Yangın, 2020, p. 6). For example, the 2020 collective agreement between Mudanya Municipality and the General Labour Union (Genel İş Sendikası) includes provisions on the prevention of domestic violence. Accordingly, cases of domestic violence, violence against children, sexual abuse, and harassment are considered grounds for dismissal without compensation (Mudanya, 2020).

Conclusion

The COVID-19 pandemic, the lockdowns following its emergence along with other government measures to control the spread of the virus, created an unprecedented, unique collective experiment in human history. Unfortunately, the crisis generated by the pandemic has had a disproportionate impact on those who were already marginalized, exacerbating existing inequalities within societies and particularly affecting women. Indeed, women working remotely during the pandemic have found the situation more drastic and challenging than was the case before. A particularly concerning issue was the rise in domestic violence cases against women, which has been reported in many countries, including Türkiye.

In Türkiye, the pandemic crisis has both highlighted and exacerbated social inequalities in the world of work, especially for women workers working remotely in home offices. Remote work, once a luxury of high-skilled workers in Türkiye, has now become a widespread practice across the labour market. As a result, working remotely at home, which was initially considered a temporary measure at the beginning of the pandemic, is likely to remain for a long time. Remote work practised in the home office blurs the pubic-private dichotomy by bringing the public 'work' from the public world of work into the private sphere at home—into the castle of private 'non-work'. The slogan of the Turkish government's campaign against the COVID-19 pandemic was 'Stay home, stay healthy'. But for many women, the home is not always a safe place to stay and the workplace can be a refuge. During the pandemic, many employees were required to work from home, causing every aspect of their home life to become associated with work, including domestic violence. As the boundaries between home and work have become blurred, domestic violence has become a part of the work environment, as the home is now an integral part of the workplace.

However, Turkish legal regulations were not prepared to cope with the unforeseen surge in remote work practices, which became mandatory and commonplace in the labour market during the COVID-19 pandemic crisis and practised at home. When employers began requiring their employees to work from home due to the pandemic, there were no detailed regulations in place in Türkiye employers or employees on the intricacies of remote work. Moreover, the later released Turkish Remote Work Regulation, while based on a mutual agreement between the employer and the employee, does not accord sufficient weight to the protection of employees', especially women workers', rights. However, considering the typical imbalance in the strength of the parties of the employment contract, the regulation results in favouring flexibility for employers over security for employees. Consequently, the regulation also overlooks the specific needs of women workers, including protection for domestic violence victims. Parallel to this, the withdrawal from the Istanbul Convention raises concerns about the adequate protection of women workers, particularly during unique situations like the pandemic. Inclusive, diverse crisis management should have considered the needs of the women as a group. Promisingly, the Turkish National Act on the Protection of the Family and the Prevention of Violence against Women contains detailed provisions regarding the specific protection of women workers. In the context of

Turkish law, besides the Act on the Protection of the Family and the Prevention of Violence against Women, occupational health and safety measurements according to the Remote Work Regulation and trade unions' role in gender equality could also be a promising tool in the fight against domestic violence against women. Unfortunately, a direct association with remote work, particularly working from home, is missing.

In summary, neither the individual needs of women nor the needs of women workers as a group were adequately and comprehensively addressed during this unique period of the COVID-19 pandemic crisis in Türkiye. Not enough legal regulations reflected a gender perspective in all crisis response design and implementation. Meanwhile, as violence against women has increased, legal provisions have not proved sufficient to provide the necessary protection. Instead, women have been left alone in the home with increased care responsibilities, no childcare facilities, relatively less social support, more housework, and additional paid work responsibilities resulting from remote work, in the ongoing fight against the pandemic.

The next steps will be crucial. To meet the needs of women in an unequally structured work environment and to promote not only de jure but also de facto equality between women and men in the world of work, new approaches are required. Such approaches should address the needs of women workers as a group considering the complex and intersectional nature of the discrimination they experience. It is essential to recognize that gender equality and the empowerment of women have a transitional potential that is critical to responding to crises, enabling a sustainable recovery, and building resilience.

References

Astarlı, M., & Baysal, D. (2021). *Remote work under Turkish law*. Baysal & Demir.

Baycık, G., Doğan, S., Dulay Yangın, D., & Yay, O. (2021). COVID 19 Pandemisinde Uzaktan Çalışma Tespit ve Öneriler. *Çalışma ve Toplum, 3*, 1683–1728.

Bulgurcuoğlu, S. E., & Kelebek Küçükarslan, G. (2020). Covid-19 Pandemisinde (Yeniden) İnşa Edilen Mekânda Kadına Yönelik Ev İçi Şiddeti Anlamak. *Hacettepe Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi*, 2021, *39*(1), 71–83.

Butler, J. (2019). What threat? The campaign against "gender ideology". *Glocalism: Journal of Culture, Politics and Innovation, 3*, 1–12. https://doi.org/10.12893/gjcpi.2019.3.1

Centel, T. (2020). Covid-19 Salgını ve Türk Çalışma Yaşamı. *Sicil, 43*, 11–17.

Dulay Yangın, D. (2020). Aile İçi Şiddetin İş Hukukuna Yansımaları. Not published.

Hâkimler ve Savcılar Kurulu Genel Kurulu (HSK). (2020). 30/03/2020 tarihli ve 2020/51 sayılı kararı. https://www.hsk.gov.tr/Eklentiler/files/uu.pdf

Henneberger, J. (2018). Der Gewalt in der Istanbul-Konvention. *djbZ Zeitschrift des Deutschen Juristinnenbundes, 4/2018*, 206–209.

İlkkaracan, İ., & Memiş, E. (2020). *Research brief. Gender gaps in the care economy during the Covid-19 pandemic in Turkey*. UNDP.

Kadın Cinayetlerini Duduracağız Platformu. (2020). We will end femicide platform 2020 report. https://kadincinayetlerinidurduracagiz.net/veriler/2949/2020-report-of-we-will-end-femicide-platform

Kadın Cinayetlerini Duduracağız Platformu. (2021). We will end femicide platform 2021 report. https://kadincinayetlerinidurduracagiz.net/veriler/3005/2021-annual-report-of-we-will-stop-femicides-platform

Kaplan, E. T. (2003). İşverenin Koruma ve Gözetme Borcunun Kapsamı, Kamu-İş, C: 7, S: 2/2003: 2–16.

Kasım, C. (2020). COVID-19 and labour law: Turkey. *Italian Labour Law e-Journal, 13* (Special iss. 1), 1–4. https://illej.unibo.it/article/view/10806/10715. Updated on 28 May 2020, https://illej.unibo.it/article/view/10806/11106, p. 1.

Kıcır, B. (2019). Evden çalışma özgürlük mü esaret mi? *Dokuz Eylül Üniversitesi Sosyal Bilimler Enstitüsü Dergisi Cilt, 21*(1), 173–196.

Koç Holding, 35 bin ofis çalışanı için uzaktan çalışmayı kalıcı hale getiriyor. (2021, January, 01). NTV. https://www.ntv.com.tr/ekonomi/koc-holding-35-bin-ofis-calisani-icin-uzaktan-calismayi-kalici-hale-getiriyor,mzUeg818XUGZEKEBJJXSjg

Mercer. (2020). Mercer Türkiye / Peryön COVID-19 Nisan 2020 Anketi. https://www.mercer.com.tr/rapor-ma-kale-arastirma/nisan-covid19-anketi.html

Mudanya Belediyesi'nden Aile İçi Şiddete Karşı Toplu Sözleşme Kalkanı. (2020). https://mudanya.bel.tr/arsiv/mudanya-belediyesi-nden-aile-ici-siddete-karsi-toplu-sozlesme-kalkani

OECD. (2022). Violence against women (indicator). https://doi.org/10.1787/f1eb4876-en

Özkazanç, A. (2022a, April, 9). Otoriter Sağ Popülizmin Yükselişi ve Küresel Kadın Hareketi. *Kısa Dalga*. https://kisadalga.net/yazar/otoriter-sag-populizmin-yukselisi-ve-kuresel-kadin-hareketi_27536

Özkazanç, Alev. (2022b, April, 16). Türkiye'de karşı – hareketin gelişimi. *Kısa Dalga*. https://kisadalga.net/yazar/turkiyede-karsi-hareketin-gelisimi_28059

Özkazanç, A. (2022c, April, 23). İstanbul Sözleşmesine İtirazlar: Türkiye ve Doğu Avrupa. *Kısa Dalga*. https://kisadalga.net/yazar/istanbul-sozlesmesine-itirazlar-turkiye-ve-dogu-avrupa_28652

Özkazanç, A. (2022d, April, 30). İstanbul Sözleşmesi'ne itirazlar: Truva Atı suçlaması ve alternatif sözleşme girişimleri. *Kısa Dalga*. https://kisadalga.net/yazar/istanbul-sozlesmesine-itirazlar-truva-ati-suclamasi-ve-alternatif-sozlesme-girisimleri_29224

Özkazanç, A. (2022e, May, 7) Istanbul Sözlesmesi'nden cekilme kararı neden verildi? *Kısa Dalga*. https://kisadalga.net/yazar/istanbul-sozlesmesinden-cekilme-karari-neden-verildi_29852

Sabancı Holding uzaktan çalışmayı kalıcı hale getiriyor. (2021, March, 17). NTV. https://www.ntv.com.tr/ekonomi/sabanci-holding-uzaktan-calismayi-kalici-hale-getiriyor,1cuEiCQ7nECuhntKOpBm0g

Sosyo Politik Saha Araştırma Merkezi. 2020. Covİd-19 Karantİnasından Kadının Etkİlenİmİ ile Kadın ve Çocuğa Yönelİk Şİddete İlİşkİn Türkİye Araştırma Raporu. https://sahamerkezi.org/wp-content/uploads/2020/04/kadın-covid-ek.pdf

Taştan, C., & Küçüker Yıldız, A. (2019). *Dünyada ve Türkiye'de Kadın Cinayetler: 2016-2017-2018 Verileri ve Analizleri*. Polis Akademisi Yayınları: 68.

Thornton, M. (1991). The public/private dichotomy: Gendered and discriminatory. *Journal of Law and Society, 18*(4), 448–463.

Tomei, M. (2021). Teleworking: A curse or a blessing for gender equality and work-life balance? *Intereconomics, 56*(5), 260–264.

World Health Organization. (2021). *Violence against women prevalence estimates, 2018: Global, regional and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women*. World Health Organization.

Yılmaz, Ç. (2020, April 10). Salgın döneminde kadına şiddet arttı. *Milliyet*.

Legal Instruments and Judgements

4857 Sayılı İş Kanunu (Labour Act No. 4857), RG, 10.06.2003, 25134, https://www.resmigazete.gov.tr/eskiler/2003/06/20030610.htm#1; İş Kanunu ile Türkiye İş Kurumu Kanununda Değişiklik Yapılmasına Dair Kanun, (Act on Amending the Labour Act and the Turkish Employment Institution Act) RG, 20.05.2016, 29717, https://www.resmigazete.gov.tr/eskiler/2016/05/20160520-24.htm

Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun (Act on the Protection of the Family and the Prevention of Violence against Women), RG, 08.03.2012, 28239, https://www.resmigazete.gov.tr/eskiler/2012/03/20120320-16.htm

Anayasa Mahkemesi (Constitutional Court of the Republic of Türkiye), 17.07.2019, 2016/14613, K. Ş. https://www.anayasa.gov.tr/media/6207/2016-14613.pdf

Anayasa Mahkemesi (Constitutional Court of the Republic of Türkiye), 29.09.2021, 2017/32972, T.A. https://www.resmigazete.gov.tr/eskiler/2021/12/20211202-6.pdf

CEDAW General Recommendation No. 19. 1992. Violence against Women. Adopted at the Eleventh Session of the Committee on the Elimination of Discrimination against Women, in 1992. (Contained in Document A/47/38).

Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 2011.

Sendikalar ve Toplu İş Sözleşmesi Kanunu, RG. 18.10.2012, 28460, https://www.resmigazete.gov.tr/eskiler/2012/11/20121107-1.htm

UN Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW).

Uzaktan Çalışma Yönetmeliği (Remote Work Regulation), RG, 10.03.2021, 31419, https://www.resmigazete.gov.tr/eskiler/2021/03/20210310-2.htm

CHAPTER 12

Regulatory Choices and Legal Disputes in the Fight Against COVID-19 Infections in the Workplace: A Comparison of Vaccine Mandates in the Italian and US Contexts

Susan Bisom-Rapp and Marco Peruzzi

Convergence and Divergence in National Responses to the COVID-19 Crisis

Several years on, it is easy to forget how modernly unprecedented and destabilizing COVID-19 was for most of the world. The World Health Organization (WHO) declared COVID-19 a public emergency of international concern on 30 January 2020 (WHO, 2020a). By 11 March 2020, WHO declared the fast-spreading virus a pandemic (WHO, 2020b). COVID-19 produced agonizing and deadly illness on a massive scale.

S. Bisom-Rapp (✉)
California Western School of Law, San Diego, CA, USA
e-mail: sbisom-rapp@cwsl.edu

M. Peruzzi
University of Verona, Verona, Italy
e-mail: marco.peruzzi@univr.it

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_12

Initially, however, there was great uncertainty about how the virus was transmitted. Personal protective equipment (PPE) for healthcare workers was in short supply. Hospital staff were stretched to the breaking point. Effective treatments and vaccines did not yet exist. The effects on civil society generally and the workplace more specifically were substantial. An estimated 94% of the world's working people lived in countries that to an extent shuttered businesses during the initial weeks and months of the crisis (ILO, 2020).

Italy, the first country in Europe to be struck, declared a state of emergency on 31 January 2020. The declaration was based on Italy's Civil Protection Act of 2018, and empowered the chief of the Civil Protection Office, who serves under the Prime Minister, to issue special orders. Interestingly, despite COVID-19's impact being confined to the country's northern regions, Italy's initial legal interventions were mainly national. Centralized decisions were based on the recommendations of an expert committee. At the national level, from mid-March 2020, after WHO had declared COVID-19 a pandemic, a special commissioner sought to coordinate the government's actions. Prime Minister Giuseppe Conte managed the early stages of the pandemic through executive rule-making and statutory decree, causing increasing political tension and strife (Palermo, 2021).

In January 2021, one year after the crisis began, a new government headed by Prime Minister Mario Draghi was installed. Not long after COVID-19 vaccines became available, on 1 April 2021, Italy's first national workplace vaccine mandate was adopted for healthcare workers (Decree Law no. 44). Mandates were later extended to other sectors and to older-aged people. As discussed in more detail below, challenges to the legality of the vaccine obligation were framed in terms of Italy's constitutional principles and rights, an analysis of the reasonableness of the actions of the legislature, and ultimately, occupational health and safety factors. These principles, and a balancing of collective and individual rights, structured the debate in the courts, and are familiar to those well-versed in the jurisprudence of European Union member states.

The US also, through the actions of the Secretary for Health and Human Services (HHS), declared a national public health emergency on 31 January 2020, acting under the Public Health Service Act. President Donald Trump issued a proclamation on 13 March 2020 declaring the COVID-19 outbreak in the US a national emergency. Yet Trump's response thereafter downplayed the public threat despite evidence to the

contrary. For Trump, the priority was opening the country back up and returning to normal (Parker & Stern, 2022). Failure of the federal government to act decisively left decisions on highly consequential public health efforts, such as those related to masking and testing, to state and local governments (Berquist et al., 2020). Individual American states diverged considerably in their pandemic responses (Hale et al., 2020). This heterogeneity coincided with significant debate and political polarization about the pandemic's nature and the steps that should or should not be taken to protect the public (Kerr et al., 2021). The federal government's approach to COVID-19 became more evidence-based and coherent when President Joe Biden's administration began in January 2021, but the heterogeneity in pandemic response among the American states continued.

The US federal government's first statement about workplace vaccine mandates was issued In December 2020. Anticipating COVID-19 vaccine availability, the national Equal Employment Opportunity Commission (EEOC) published non-binding, workplace COVID vaccine guidance for employers. Once vaccines were more readily available, many private employers, on their own initiative, enacted workplace vaccine mandates (Dhooge, 2022). Some state and local governments enacted vaccine mandates in various forms for government workers, while other states prohibited workplace mandates or banned "employment discrimination based on vaccine status." In November 2021, Biden's government issued two vaccine mandates, one for the healthcare sector and the other for large employers. The national mandates were challenged and heard by the US Supreme Court. The sector-specific mandate survived, and the large employer mandate failed before the Court. Both cases were decided on narrow grounds of statutory construction, forestalling an important conversation about what is sacrificed and gained when vaccine mandates are adopted.

In the section below, we examine how the legality of workplace vaccine mandates was challenged, analyzed, and resolved in Italy. Thereafter, we do the same for the US case.

Italy: Framing Vaccine Mandate Legality in Terms of Constitutional Rights and OHS Principles

In Italy, various pairs of factors were used to structure and secure occupational safety given the challenges of COVID-19. Legal analysis of those factors proceeded by making distinctions and observing interactions and

even circularity between the factors. The salience of these factor pairs shifted as the pandemic wore on as more scientific information about COVID-19 became available.

The first pair of factors relevant to the COVID-19 crisis was prevention and precaution. Legally, the emergency sources correctly placed the system for combating and containing contagion within the precautionary principle: at the beginning of the pandemic, the scientific uncertainty was extremely high (Balletti, 2023).[1] Over time, the progressive reduction of scientific uncertainty made it possible to move from a precautionary approach to a risk assessment and management approach. This returned to the EU-derived occupational safety discipline a principal role in the reconstruction of the systematic framework regarding the risk of contagion. Notably, the model adopted by the emergency regulations enhanced a novel form of involvement of workers' representatives for the occupational health and safety protection system. More specifically, the model referenced the protocols shared between the social partners, and within these protocols, provided for the establishment of joint company committees where participation took on the characteristics of co-management/co-administration.[2]

The second pair of factors relevant to the COVID-19 crisis was worker health and public health. The intersecting relationship between these factors has mirrored the circular relationship between the working environment and the external environment. The possible impact of the former on the latter is expressly considered in the occupational safety regulations (Legislative Decree No. 81/2008), as evidenced by the definition of prevention in Article 2(1)(n), which provides for "respect for the health of the population and the integrity of the external environment."[3] In the pandemic, however, the relationship between the factors flowed in the opposite direction: with COVID-19, it was the risks of the external environment that penetrated the working environment in an escalating manner (Lazzari, 2020; Buoso, 2020).

This problem of permeability of the external environment to the workplace was addressed by the introduction, depending on the sector, of compulsory vaccination (by Law Decree No. 44/2021) or so called "Covid-19 green passes" (by Law Decree No. 52/2021), aimed at creating a gate barrier system. In particular, the vaccination obligation was introduced in April 2021 first for healthcare personnel only (with a deadline initially extended until 31 December 2022, then brought forward to 1 November 2022), then also for workers employed in residential, social welfare and

social-health facilities, in the school and university sector, in the security sector and in penitentiary institutions, for the police and finally for the over-50s (until 15 June 2022). The compulsory green pass was introduced in June 2021 and was progressively required for access to public spaces and workplaces, depending on the case, in the basic version, which could also be acquired by swabbing, or in the reinforced/"super" version, that is issued only upon vaccination or recovery. Failure to comply with the obligation, vaccine, or green pass, resulted in suspension from work and from pay, with the right to keep the job, until the obligation was met or until the national vaccination plan was completed or, in any case, until the end of the state of emergency and epidemiological crisis or the deadline established by law.

These measures, especially compulsory vaccination, increased the debate concerning the relationship between at least two pairs of factors: the right to health and the right to work; health as an individual interest and health as a collective interest. The tension in the country and in the courts on these issues was immediately strong and heated.

Regarding the case law, in the first phase of the pandemic, the courts mostly prioritized the public interest, ruling in favor of emergency legislation, in particular with regard to compulsory vaccination, and therefore declaring the suspension from work and pay to be legitimate (e.g. see Trib. Modena, 23 July 2021, no. 2467; Consiglio di Stato, 20 October 2021 no. 7045).

Judgments reflecting hostility to mandatory vaccination appeared starting in June 2022, and mark a second phase in the caselaw. In particular, the judges' reasoning started to include statements such as: "[T]he purpose of preventing the disease and ensuring conditions of safety in health care" through vaccination has proved "unattainable," resulting paradoxically in the "opposite phenomenon to what was intended to be achieved," namely "a spread of contagion with the formation of multiple viral variants and the prevalence of infections and deaths among those vaccinated with three doses;" especially given "the lack of benefits to the community," the Constitution "does not allow sacrificing the individual for a real or supposed collective interest and even less allows subjecting him to medical experiments invasive of the person;" moreover, "after two years we still do not know the components of the serums and the medium and long-term effects […] while we know that in the short term they have already caused thousands of deaths and serious adverse events" (Court of Florence, 6 July 2022).

In another case, the court concluded that the vaccination obligation "is useless and seriously prejudicial to [the worker's] right to therapeutic self-determination" and "his/her right to work," as recognized by the Constitution; in fact, it "does not stand in necessary correlation with the purpose of avoiding contagion and protecting the health of third parties, i.e. his public health;" "[O]n the contrary, at present, the only instrument that allows…pursu[it] [of] the purpose indicated by the legislator" is the so-called buffer: "only the latter instrument, in fact, makes it possible to exclude, albeit for a limited period of time (two or three days), with a probability that is actually high, higher than 90%, a person [who] is a carrier of the virus and, therefore, at the same time can transmit it to others" (Court of Sassari, 9 June 2022).

Regarding the individual and collective dimensions of the right to health and between the right to health and the right to work, the Constitutional Court intervened most recently in 2023 with three decisions confirming the legality of the vaccination requirement for health sector employees. As highlighted by some scholars, the content and the reasoning of these judgments is consistent with the long-established constitutional caselaw on the compatibility of a legislative vaccine requirement with Article 32 of the Constitution (De Matteis, 2023).

In Judgment No. 14 of 2023, the Constitutional Court noted that the pandemic, by causing a health emergency with very peculiar features, dramatically revealed the conflict between the individual's right to health and that of the community, a conflict contemplated by Article 32 of the Constitution which, as interpreted by the Constitutional Court, postulates a necessary balancing of the individual's right to health with the coexisting right of others and, therefore, with the interest of the community. The interest of the community referred to in Article 32 constitutes the expression, in the field of health protection, of the duties of solidarity referred to in Article 2. This balancing implies the duty of each individual not to harm, not to endanger the health of others by their conduct, while respecting the general principle that the right of each individual is limited by the mutual recognition and equal protection of the coexisting right of others. This balancing process may take the form of a compulsory health treatment.

The compatibility with Art. 32 of a law imposing compulsory vaccination requires that such treatment be directed not only to improving or preserving the health of the person subjected to it, but also to preserving the health of others; it also requires that it should not adversely affect the state of health and that, in the event of further damage, the payment of a

fair indemnity should be recognized, regardless of the parallel protection for compensation (pursuant to Law 210/1992). In this sense, the constitutional caselaw anticipates that there is a potentially serious risk of adverse event connected with vaccination. For this reason, the imposition of a given health treatment is reserved to the legislator's discretion, to be exercised in a reasonable manner. Additionally, the right to indemnity is provided for in the face of the remote risk of adverse events, even serious ones, which, unlike compensation for damages, is due even where the impact on a specific person is unforeseeable.

The reasonableness of the legislator's choice to affect the fundamental right to health, and interfere with the freedom of self-determination, must be determined by the actual health and epidemiological situation and in relation to the ever-evolving findings of medical research. This is an exercise of political discretion necessarily founded on scientific evidence, that is, kept within an area of scientific reliability in light of the best knowledge attained at that historical moment, as defined by the medical-scientific and institutionally appointed authorities.

Moreover, for a legislative choice to be effective, it must be prompt and anchored to the state of current scientific knowledge and made with the awareness that present impact of the infectious disease will likely be temporary in nature. Indeed, any law drawn up on the basis of medical-scientific knowledge is by its very nature transitory because it is adopted in light of knowledge at the time. Those empirically driven understandings are destined to be superseded as scientific medicine evolves. It is precisely because of this dynamic relationship that such legislative interventions, while deemed reasonable for the time, must nonetheless be reassessed. These insights explain the legal changes one observes in the imposition of compulsory vaccination on healthcare workers, including the consequences of non-compliance and the duration of the obligation itself. This principle also explains the repeated changes that affected pandemic management more generally; the government's approach was continually modified in response to the evolving health situation and medical knowledge.

As noted, the legislator must act within a framework of scientific reliability and make a decision that is reasonable as well as appropriate and not disproportionate to the goal pursued. To that end, the contributions of the health authorities, which affirmed the non-experimental nature of the vaccine, its efficacy, and its safety are notable. In particular, the health authorities have certified that the benefits outweigh the risks. In short, the

scientific authorities unanimously attest to the safety of vaccines for the prevention of infection and their effectiveness in reducing the circulation of the virus. It is on this scientific data that the legislature's policy choice was based. Thus, it was not unreasonable to resort to compulsory vaccination in a context of circulation of a respiratory virus characterized by rapid and unpredictable contagion. This assessment of reasonableness and suitability applies all the more so to healthcare sector professionals and employees, who are among those most exposed to the virus. This is because the vaccination requirement also safeguards those members of the public who come into contact with healthcare workers and prevents the interruption of essential services.

Having verified the suitability of the vaccination requirement for those working in the health sector, and the reasonableness of the recourse to it, compliance with the principle of proportionality regarding the purposes pursued must be assessed. When there is a question concerning the balancing of two rights, in addition to considering the reasonableness of legislative choices, the so-called proportionality test must be employed. This test requires an assessment of whether the rule is necessary and appropriate for the attainment of the objectives insofar as, among several appropriate measures, it prescribes the least restrictive of the rights being compared and establishes burdens that are not disproportionate to the pursuit of those objectives.

The measure must, in the first place, be held not to be disproportionate because no similarly appropriate measure existed at the time. In particular, the periodic carrying out of diagnostic tests would have been unreasonably expensive and would have entailed an intolerable strain on the health system, both in terms of logistics, organization, and staff deployment. A sufficiently accurate test result was not immediately available, and by the time it was received was already obsolete since a negative result may have already been overtaken by infection that occurred after testing was performed.

Again, regarding proportionality, the sanction imposed by failure to comply with the vaccine mandate is suspension from the job, with reinstatement upon compliance or the end of the epidemiological crisis. This is a calibrated choice in terms of duration, given that a predetermined duration of the vaccine mandate was introduced from the outset, and in terms of sanction severity, since it is a suspension and not a termination of the employment relationship.

Confirming this reasoning, in Judgment No. 15/2023, the Constitutional Court also specified that compulsory vaccination for health personnel must assessed in context: that is to say, the mandate must be considered in light of the actual availability of vaccine treatments at the time, and subsequent extension to additional categories must be considered based on the necessary balance between costs and benefits. Moreover, the fact that vaccination cannot prevent possible subsequent infection, or the possibility of viral transmission to others, is not sufficient to invalidate the legislative choice to impose compulsory vaccination. In a situation characterized by a very rapid circulation of the virus, vaccines are nonetheless capable of significantly reducing viral circulation, with effects that are all the more appreciable in environments or places intended to house persons who are fragile or in need of assistance.

Finally, regarding the alleged conflict with the constitutional right to work, the Court points out that this right does not necessarily imply the right to perform the work where the same constitutes a risk factor for the protection of public health, and the maintenance of adequate conditions of safety in the provision of care and assistance. Nor does the choice to provide as a sanction suspension from work and pay evidence disrespect for the principles of reasonableness and equality: on the one hand, the situation of temporary inability to work, which results in the loss of remuneration under the general principle of mutuality, still derives from an individual choice of the worker and not from an objective fact; on the other hand, the legislature's choice not to require relocation of non-compliant workers can be justified on several levels. In the healthcare sector, there is a pressing need to safeguard public health and maintain adequate safety conditions to protect patients in fragile situations, and given this, there is a need to relieve healthcare employers from organizational rigidity and avoid burdening the healthcare structures, that is those most exposed to the impact of the pandemic.

As is clear from the above, the legality of compulsory vaccination in the Italian healthcare sector was evaluated under Italian constitutional law principles, which also reside in European and international human rights instruments. Gradually, as the pandemic has receded, an occupational health and safety framework will be used to manage COVID-19 as an endemic disease. The US case stands apart from such legal frameworks and will be discussed next.

US: Framing the Legality of Workplace COVID Vaccine Mandates in Terms of Employer Prerogative, Anti-Discrimination Law, Statutory Construction, or Public Health

In significant contrast to Italy, the US government first addressed the legality of workplace COVID-19 vaccine mandates as a matter of employer prerogative circumscribed by employment discrimination law. Equal employment opportunity (EEO) law became an essential framework for evaluating the legality of workplace vaccine mandates in the American private sector. State and federal government actions regarding compulsory vaccination were analyzed differently, with the former being on stronger legal ground than the latter. This has resulted in a muddled legal landscape on workplace vaccine mandates, as will be described below, with the national government apparently in the weakest position to impose compulsory vaccination during a public health emergency.

Private employers in the US enjoy tremendous latitude to form, structure, and terminate employment relationships. The US is exceptional in its embrace of the at-will employment rule in all the American states but one. This default rule, which is the basis of most US private sector employment relationships, permits employers to terminate workers without good cause, with no notice, without procedural due process, and without redundancy pay (Arnow-Richman, 2014).

Nonetheless, acting as a brake on employer prerogative is American EEO law (Corbett, 2021). Fear of legal challenges under American EEO law prompts many employers to provide a modicum of due process and justify in writing any adverse actions taken against employees. These litigation prevention measures inoculate employers against employment discrimination law claims (Bisom-Rapp, 1999). EEO law thus provides a measure of job security protection to American employees because adverse employment actions are unlawful if taken based on protected statuses such as race, gender, national origin, religion, sexual orientation, gender identity, age, and disability.

Given this strange interaction between at-will employment and EEO law, it is hardly surprising that in December 2020, the Equal Employment Opportunity Commission (EEOC), which is the executive agency responsible for enforcing federal EEO law, issued guidance for employers on their freedom to require COVID-19 vaccination with the caveat that

employers must provide accommodations based on disability and religion (Thompson, et al., 2021). The EEOC guidance, which was revised in 2021 and 2022, clarifies that national EEO laws do not prohibit employers from requiring COVID-19 vaccination as a condition of employment. However, national EEO laws also require employers to make exceptions for certain employees to any vaccine mandate adopted. More specifically, employees with a disability that prevents them from receiving a COVID-19 vaccine will be entitled to reasonable accommodation so long as accommodation does not cause undue hardship to the employer. Additionally, employers must provide accommodations to those employees who eschew COVID-19 inoculation based on a sincerely held religious belief. As with disability, the accommodation must be provided unless it would constitute an undue hardship for the employer to grant the request.

Notably, the EEOC guidance is not binding law and was issued by an executive agency. In fact, the subject of workplace vaccine mandates was not addressed through the legislative action by the US Congress. On the contrary, with respect to private employers, the EEOC guidance plainly left it to those firms subject to federal EEO law to decide when and if to engage in private rule-making. The federal Occupational Safety and Health Administration (OSHA), yet another national executive agency, followed with its own non-binding guidance in the summer of 2021. OSHA recommended employers consider drafting policies requiring employees to be vaccinated or else undergo regular COVID-19 testing. These dual advisories meant that once COVID-19 vaccines became widely available, the right to work during the pandemic might turn on what one's employer deemed best for its business. If the employer wished to condition employment on receiving a COVID-19 vaccine, the employer was empowered to do so, with minimal limitations, in most sectors in the US economy, and in states that did not prohibit or limit vaccine mandates.

The first US employers began announcing their own mandatory vaccination programs in March 2021. One of the first healthcare employers to require COVID-19 vaccination was the Houston Methodist Hospital system. Under the policy, those employees who refused vaccination faced dismissal. More than 100 of Houston Methodist's 26,000 employees sued hoping to prevent their employer from implementing the policy.[4] The lead plaintiff, registered nurse Jennifer Bridges, claimed in part that being forced to choose between her job and COVID-19 inoculation constituted wrongful termination in violation of public policy. The US District Court was unsympathetic, noting that Texas does not recognize such a claim.

Citing the EEOC guidance on mandatory vaccination, the court stated that nonetheless if such a claim were cognizable in Texas, "the injection requirement is consistent with public policy." As for the argument that the mandate was coercive, the judge disagreed, noting that the plaintiff could refuse vaccination, but if she did, "she will need to work somewhere else."

By October 2022, more than 700 legal claims had been filed in the US challenging vaccine mandates adopted by employers. The majority of these claims alleged religious discrimination or failure to accommodate a sincerely held religious belief (Farber et al., 2022). Employers have for the most part successfully fought off those challenges (Iafolla, 2022). This makes sense for two reasons. First, American employers have tremendous authority to set the terms and conditions of employment, at least where their workers are not unionized, and most US workers lack union representation. Thus, the at-will employment rule has protected most private employers who have adopted workplace vaccine mandates.

Second, most organized religions do not object to or prohibit vaccination, leaving employee objectors in a weak legal position. Most employers considering employee objections to vaccination must determine whether the objecting employee has a sincerely held, personal religious belief even if it is not grounded by theological doctrine. The belief must be religious rather than political in character, but vaccine hesitancy during the pandemic was often driven by politics albeit often expressed in religious terms (Reiss, 2021). Yet even where an employer finds a religious belief is sincerely held, as a matter of EEO law, as it existed during the pandemic, the employer need not have granted an accommodation that would cause the employer undue hardship, defined as anything more than a *de minimis* cost. This gave private sector employers the flexibility to embrace workplace vaccine mandates without granting many exceptions so long as they were not located in a state that bans or restricts compulsory vaccination (Wojcik, 2022).

While during the pandemic, private employers in many states enjoyed great latitude regarding compulsory vaccination, there is uncertainty on the horizon. In *Groff v. DeJoy*, the US Supreme Court clarified the employer's duty of reasonable accommodation in religious discrimination cases by revisiting the definition of employer undue hardship. Many commentators note that the Court has made it more difficult to prove undue hardship, which is a victory for religious employees who require accommodation. This will make it harder to deny an exemption to compulsory vaccination based on an employee's sincerely held religious belief.[5]

The federal government took quite a while to adopt a vaccine mandate for federal government employees and federal contractors, but it eventually did so. In September 2021, President Biden issued Executive Orders 14043 and 14042, requiring vaccination of federal employees and contractors respectively. Additionally, in November 2021, the Secretary of Health and Human Services (HHS) declared that healthcare facilities receiving federal Medicare and Medicaid funding must require staff, except for those exempt for medical or religious reasons, to receive COVID vaccination. Also in November 2021, the Secretary of Labor issued a similar mandate for US employers with 100 or more employees. That order, issued through OSHA, only provided for medical exemptions. None of these national mandates was issued through legislation by the US Congress.

The HHS and OSHA mandates—the former for the health sector and the latter for large employers—were challenged and their legality evaluated by the US Supreme Court in 2022. One survived and the other did not. Unfortunately, the Court did not resolve either case using fundamental rights principles, but instead engaged in statutory interpretation, which failed to illuminate the costs and benefits of compulsory vaccination as a condition of work. Unlike the Italian case, the American precedents fail to grapple with the impingement on bodily autonomy that must be balanced against a collective interest in health. Nor do they engage deeply with the right to work as a fundamental right, despite some justices' protestations that failure to take a jab could cost someone their job. What the judgments reveal, however, is a juridical battle taking place in the high court over the size and power of federal administrative agencies. Conservative justices seek to pare back the federal government. The liberal wing of the Court is inclined to preserve the status quo (Somin, 2022).

The HHS case, which reviewed the health sector vaccine mandate, considered the statutory provisions empowering the Secretary to promulgate requirements to protect the health and safety of patients in "hospitals, nursing homes, ambulatory surgical centers, hospices, [and] rehabilitation facilities."[6] These entities receive funds from the federal government's health insurance programs for the elderly and disabled, and low income individuals. "[P]revent[ing] the development and transmission of communicable diseases" has long been part of what the Secretary has required of these health sector entities. Moreover, before issuing the mandate, the Secretary determined that COVID-19 vaccination was necessary to safeguard the patient population, which is "elderly, disabled, or … in poor

health," and hence more vulnerable to the deadly virus. Five of the nine justices agreed that issuing the vaccination requirement as an interim final rule was "within the authorities that Congress" conferred on the Secretary.

Four justices dissented arguing that the "[g]overnment has not made a strong showing that it has statutory authority to issue the rule." The dissenters protested that the power claimed by the Secretary was sweeping and would compel millions of workers to submit to an unwanted medical procedure at pain of losing their jobs. If Congress had wanted to grant such authority to the federal government, and to usurp the traditional role of state governments as the guardians of public health, Congress would have said so clearly in its legislation.

In contrast, OSHA's large employer vaccine mandate was struck down.[7] A majority of the Court found that "OSHA's mandate exceeds its statutory authority." OSHA issued the mandate under the Occupational Safety and Health Act's "emergency temporary standards," which require the agency to show that (1) workers are exposed to great danger from toxic substances or new hazards, and (2) the rule is necessary to protect the employees. The majority noted that agencies like OSHA are "creatures of statute … [and] possess only the authority Congress has provided." Reviewing the statute, the Court stated that the Secretary is only empowered "to set *workplace* safety standards, not broad public health measures." Since COVID-19 was a danger in the external environment, and is a "universal risk," it could not be addressed by OSHA.

State governments did act concerning COVID-19 vaccine mandates for public employees. Here heterogeneity in approach is evident for state and local governments in their role as employers (Szymanski, 2022). By the spring of 2023, 11 states generally allied with President Biden's Democratic Party required some type of vaccine mandate for state government employees. Yet 17 other states, those where former President Trump's Republican Party dominates, banned vaccine mandates for state workers (Iafolla, 2023).

Those states which adopted mandates for state government workers, and had those mandates challenged in court, generally prevailed. This was due in part to an old US Supreme Court judgment, *Jacobson v. Massachusetts*.[8] In *Jacobson*, a man who refused to be vaccinated for smallpox challenged a state law requiring inoculation as violating the US Constitution's liberty interest. More specifically, Jacobson asserted that the law impinged upon his bodily autonomy. The Court disagreed, noting that liberty is not free from restraint, and that the state legislature,

utilizing its police power, could make reasonable determinations of when vaccination was necessary to protect the collective public health. In other words, the state has the power to act for the common good, even where the liberty of an individual is impacted, so long as the state's regulation is deemed reasonable. While there might be cases where a court would judge a decision to mandate vaccination unreasonable, this was not such a case.

In the years prior to COVID-19, legal challenges to state-issued vaccine mandates, for example for school children, typically failed due to judicial fealty to *Jacobson* and one other relatively old Supreme Court judgment.[9] During the pandemic, *Jacobson* was invoked by states to justify compulsory COVID-19 vaccination for their workers and workers in particular sectors. Unlike *Jacobson*, however, some cases challenging state government COVID-19 vaccine mandates alleged that compulsory vaccination burdened the free exercise of religion guaranteed by the US Constitution. Thus, as with the private sector cases, religion became a framework for contesting vaccination mandates.

Nonetheless, state governments prevailed. Relying in part on *Jacobson*, for example, the federal Second Circuit Court of Appeals refused to enjoin New York State's emergency COVID-19 vaccine mandate for health sector employees, which provided an exemption for those whose medical conditions make vaccination dangerous but not for those with religious objections.[10] Similarly, the federal First Circuit Court of Appeals denied a preliminary injunction to healthcare workers challenging a State of Maine regulation requiring COVID vaccination of those working in healthcare facilities.[11] That regulation also had no exemption for religious objectors. The US Supreme Court in October 2021 rejected without opinion an appeal of the latter case.[12]

The frequent invocation of *Jacobson* during the pandemic has not strengthened it as precedent. Rather, there are signs that the case has been weakened as state government action has been challenged as burdening religious exercise (Parmet, 2021). One commentator opined that pandemic era court decisions reveal a deep split in American views about religious freedom in the face of legal restrictions aimed vanquishing a public health crisis (Movesian, 2022). The US Supreme Court increasingly appears more concerned with avoiding encumbrance on religious liberties than with protecting public health. In the next pandemic, we may find national and state government paralyzed to act in the interests of all Americans. That may mean we will need to rely on the wisdom of America's private employers to protect us.

Conclusion

As COVID-19 moves from pandemic to endemic, public health scholars are considering whether differing disease and death rates, and varying acceptance of public health interventions, illuminate national culture in different countries. Relatedly, we believe that how Italy and the US approached COVID-19 vaccine mandates for workers—how and when mandates were imposed, the terms under which mandates were legally challenged, and how courts resolved those disputes—illuminates each country's national culture relating to workers' rights.

In Italy, reference to constitutional principles and fundamental rights, reasonable and proportionate legislative action, and social dialogue, demonstrates that its jurisprudence is in harmony with that of other European Union member states and the International Labor Organization (ILO). The US, in contrast, revealed the extent to which that country relies on libertarian, free-market principles to set the conditions of work, and antidiscrimination law, increasingly the prohibition of religious discrimination, as an imperfect tool for limiting employers' prerogatives. At the same time, the federal government was revealed as an impotent force for protecting the health of most American workers. US law and practice does not conceptualize labor rights as human rights.

Notes

1. In the Communication on the precautionary principle, the European Commission explained that "the precautionary principle is relevant only in the event of a potential risk, even if this risk cannot be fully demonstrated or quantified or its effects determined because of the insufficiency or inclusive nature of the scientific data" (European Commission, 2000, p. 13). While its application is part of risk management, a full risk assessment is precluded by scientific uncertainty (p. 12). The choice of the appropriate response to adopt is therefore "the result of an eminently political decision, a function of the risk level that is 'acceptable' to the society on which the risk is imposed" (p. 15); in this perspective, measures must not be disproportionate and "must not aim at zero risk, something which rarely exists. [...] In some cases, a total ban may not be a proportional response to a potential risk. In other cases, it may be the sole possible response to a potential risk" (p. 17). Regarding the Italian legal system, some scholars maintain that the precautionary principle has entered and therefore operates in the regulatory framework of occupational health and safety through

the general clause of the safety obligation laid down in Article 2087 of the Italian Civil Code and the employer's obligation to assess all risks related to health and safety in the workplace, set out in Directive 89/391/EC, transposed at national level by Delegated Decree no. 81/2008 (Tullini, 2008; Bonardi, 2008); others hold that it is only the principle of prevention that operates under the said regulatory sources in this field (Balletti, 2023; Buoso, 2020; Pascucci, 2008).

2. Article 29-bis of Law Decree 8 April 2020, no. 23, as converted in Law 5 June 2020, no. 40, which referred to shared protocol regulating measures to combat and contain the spread of COVID-19 in the workplace, signed on 24 April 2020 between the Government and the social partners (subsequently updated on 6 April 2021).
3. For a more general perspective of analysis, *see* Tomassetti (2018).
4. Bridges v. Houston Methodist Hospital, 543 F.Supp.3d 525 (2021).
5. On 29 June 2023, the US Supreme Court decided Groff v. DeJoy, which held that to deny a religious accommodation request, an employer must demonstrate that granting the request would constitute "a burden [that] is substantial in the overall context of [the] employer's business." This gives employers less freedom to deny religious accommodation requests than they had prior to and during the COVID-19 pandemic.
6. Biden v. Missouri, 142 S.Ct. 647 (2022).
7. National Federation of Independent Business v. Dept. of Labor, 142 S. Ct. 661 (2022).
8. 197 U.S. 11 (1905).
9. Zucht v. King, 260 U.S. 174 (1922).
10. We the Patriots USA, Inc. v. Hochul, 17 F.4th 266 (2021).
11. Does 1-6 v. Mills, 16 F.4th 20 (2021).
12. 142 S.Ct 17 (2021).

References

Arnow-Richman, R. (2014). Mainstreaming employment contract law. *Florida Law Review, 66*, 1513.

Balletti, E. (2023). Il principio di precauzione nel diritto del lavoro. *Variazioni su temi di diritto del lavoro*, 177 ss.

Berquist, S., et al. (2020). COVID-19 pandemic in the United States. *Health Policy & Technology, 9*, 623–638.

Bisom-Rapp, S. (1999). Bulletproofing the workplace. *Florida State University Law Review, 26*(4), 959–1047.

Bonardi, O. (2008). La Corte di giustizia e l'obbligo di sicurezza del datore: il criterio del *reasonably practicable*. *Rivista italiana di diritto del lavoro, 1*, 12 ss.

Buoso, S. (2020). *Principio di prevenzione e sicurezza sul lavoro*. Giappichelli.

Corbett, W. (2021). Firing employment at will and discharging termination claims from employment discrimination. *Cardoza Law Review, 42*(6), 2281–2343.

De Matteis, A. (2023). Le attese sentenze della Corte costituzionale del 9 febbraio sull'obbligo di vaccino. *Lavoro diritti europa, 1*, 1 ss.

Dhooge, L. (2022). Pushing the needle: Vaccination mandates in the age of COVID. *San Diego Law Review, 59*, 481–530.

European Commission. (2000). Communication on the precautionary principle, 2.2.2000, COM(2000), Brussels.

Farber, M., et al. (2022). COVID-19: A litigation update. *National Law Review, 12.*

Hale, T., et al. (2020). *Variations in US states' responses to COVID-19* (BSG working paper 2020/034). University of Oxford.

Iafolla, Robert. (2022). Workplace vaccine mandate exemption lawsuits falter in court. *Daily Labor Report*

Iafolla, Robert. (2023). Law on vaccine mandates Sparks doubts for response to next virus. *Daily Labor Report.*

International Labour Organization. (2020). ILO monitor: COVID and the world of work.

Kerr, J., et al. (2021). Political polarization on COVID-19 pandemic response in the United States. *Personality & Individual Differences, 179*, 110892.

Lazzari, C. (2020). Per un (più) moderno diritto della salute e della sicurezza sul lavoro: primi spunti di riflessione a partire dall'emergenza da Covid-19. *Diritto della sicurezza sul lavoro, 1*, 136 ss.

Movesian, M. (2022). Law, religion, and the COVID-19 crisis. *Journal Law & Religion, 37*, 9–24.

Palermo, F. (2021). COVID-19 pandemic and its impact on Italy's governance and security. *PRISM, 9*(4), 119–132.

Parker, C., & Stern, E. (2022). The Trump Administration and the COVID-19 crisis. *Public Administration, 12843*, 1–17.

Parmet, W. (2021). From the shadows: The public health implications of the Supreme Court's COVID-free exercise cases. *Journal Law Medicine & Ethics, 49*, 564–576.

Pascucci, P. (2008). Dopo la legge n. 123 del 2007. *WP C.S.D.L.E. "Massimo D'Antona". IT, no. 73.*

Reiss, D. (2021). Vaccines mandates and religion. *Journal Law Medicine & Ethics, 49*, 552–560.

Somin, I. (2022). A major question of power: The vaccine mandate cases and the limits of executive authority. *Cato Supreme Court Review, 2022*, 69–95.

Szymanski, C. (2022). Il caso "National Federation of Independent Business v. Osha" e l'obbligo vaccinale dei dipendenti negli Stati Uniti. *Diritti lavori mercati*, 307 ss.

Thompson, D., et al. (2021). What should ethical and strategic employers do about COVID-19 vaccines? *University San Francisco Law Review, 56*, 219–273.
Tomassetti, P. (2018). *Diritto del lavoro e ambiente*. Adapt University Press.
Tullini, P. (2008). Sicurezza sul lavoro e modello sociale europeo: un'ipotesi di sviluppo. In *Scritti in onore di Edoardo Ghera, II* (1257 ss). Cacucci editore.
Wojcik, M. (2022). Sincerely held or suddenly held religious exemptions to vaccination? *Human Rights, 47*, 20.
World Health Organization. (2020a). Statement on the second meeting of the International Health Regulations Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV).
World Health Organization. (2020b). WHO Director-General's opening remarks at the media briefing on COVID-19.

PART 3

Changing and Enhancing Institutions of Employment, Social and Cohesion Policies

CHAPTER 13

Some Ideas about the More Useful Methodological Approach to the Question of What Kind of Role for Labour Law in a Human Centred Post COVID Recovery

Juan-Pablo Landa

Introduction

This chapter will represent a critical view about the risks for Labour Law researchers to follow and adopt alternatives or utopian methodologies for improving labour relations in the future, justified by a context of a changing world in view of post pandemic or post war learnings.

In few words, this chapter contains ideas and thoughts about the way to rebuild the central role of Labour Law in a future human centred economic system, in front of the new challenges (climate change, technological/digital revolution) and the learnings from the COVID crisis.

Hypothetically, it is not necessary to project a new/idealistic brave world, forgetting our own History. If you prefer, the History of our

J.-P. Landa (✉)
University of the Basque Country, Leioa, Spain
e-mail: juanpablo.landa@ehu.eus

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024
T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_13

current western social model founded on the ideas of political democracy, free market and human rights that comes from the Enlightenment XVIII Century.[1] I will try to answer on the presumed rather than foreseeable future of Labour Law as of what would Labour Law be like without its actual object: the organization of productive labour. If an intelligent and automatized society frees human beings from the burden of productive labour, what meaning would Labour Law have—or free will, or even many of social rights? Could Labour Law be reconstructed around the regulation of any kind and type of human activity that is socially valued but not necessarily productive (that would be for cyborgs and artificial intelligence) provided that is compatible with happiness of being?

I suggest that in order to respond to these questions, methodologically we must not be swept away by current philosophies or constructivist theories that are based on a relativisation of History and may lead us to a new dogmatism directed towards theory aside facts or recreating reality as the final result of some sort of social construct accepted by tradition or justified by seeking some supposed social happiness.

The Importance of the Research Methodology to Approach the Future of Labour Relations

It is a feature of the *homo sapiens* to create ideas, also utopian ideas that can be the driving force of change in society, or of certain aspects of its social organisation. Sometimes, utopian changes simply also represent the nostalgia of a golden age historically overcome.[2] Eventually, a methodological approach based on utopian ideas may help to rethink a system of alternative or different labour relations for the future, too.

Throughout History utopian ideas have served to theorise the justification of human productive labour and to frame labour relations politically and legally.[3] Nonetheless, in our western culture social sciences prefer to lay the groundwork for future challenges using the historical methodology and to "*analyse the past with a view to helping to better shape and improve the future*" (Eurofound, 2020a, p. 5). Few doubt that our current political, economic and social model comes from the ideas of the Enlightenment, *du Siècle des Lumières*, in particular – and without underestimating "*les philosophes*"- from the ideas of B. Spinoza, J. Locke, E. Kant … and Adam Smith.

The most newly proposed utopia aims to address a hypothesis that carries within a question apparently existential in nature for the liberal and democratic model: how much longer will the liberal ideas from the Enlightenment withstand in face of the transforming force of climate change and the changes that the technological revolution and globalization will force on the industrial relations systems? How should we respond to the existential vacuum that is looming and that will inexorably change the current model of the western labour (and life) system[4]?

Let us play along with this controversial proposal, which is based on the risky methodology that our discussion arises from a utopia on the future viability of an economic model capable of sustaining our existence as a laborious society in a world radically happy or even autocratically addressed. This is an approach that differs from the traditional methodology of historical research, which reasons upon verifiable facts and theories that are checked and criticised – sometimes endlessly repeated.

I will analyse the challenges that Labour Law faces as currently known. Firstly, the experience of Labour Law in the COVID-19 crisis as it is particularly telling. I will then discuss another important challenge for Labour Law in the twenty-first century, which is the role played by Labour Law among the policies that aim to diminish the consequences of climate change in the world, such as the Paris climate conference of 2015 and its 2050 net-zero goal. I will also reflect on the effects of the biggest technological change of the digital revolution, industry 4.0 or 5G on the object and purpose of Labour Law. I will end discussing about the model of the labour market that will presumably prevail in the foreseeable future.

I will leave out of my analysis the consequences of the Ukrainian war, which are currently unpredictable. Although it already has clear implications for the functioning of the EU or for the paradigm of globalisation, which will no longer function on the idea of peace and free trade, but in an environment of war with its effects on economic growth, commodity prices or inflation rates.

Alongside the lessons of the pandemic and the just transition to build a more sustainable economic model, the war in Ukraine is, on the contrary, helping to erode the foundations of the political and economic liberalism that forms the legal-political framework of the EU and the West, an essential frame of reference for countries in the rest of the world. The unpredictable duration of the war and the uncertainty about its end are reinforcing the state of emergency we knew during the pandemic.

Thus, our State of law, to a greater or lesser extent, is moving towards a type of State more akin to the imperial States of enlightened despotism, guided by the State's more significant intervention in private relations, for example with policies on public aid to individuals and companies (at the cost of disproportionate public spending, out of control). Another characteristic of this "transformation" of the State is a certain devaluation of freedoms (confinement, control of public information, imposition of authoritarian and exclusionary ideologies based on "political correctness" …).

This "transformation" is also helped to a large extent by the technological revolution, the use of AI. No doubt it does, because under the justification of the indisputable cultural and scientific progress that it brings with it, it favours the concentration of power. This is also favoured by the passivity of the people in the face of the inevitable. In this way, democracies are progressively submitting more and more to the technocratic and political despotism of public power with the support of many media outlets. In short, we are moving towards a welfare state for the people but without the people. In this way we are not far from the Chinese model of society.

The Keys for this Future Are Found in Our Present and Can Be Read in the Past

Among our Labour Law authors (Bueno et al., 2021) some draw that there is a need for a major paradigm shift because "for social and environmental reasons it has also become clear that the liberal 'market utopia', is not offering its promises". They urges to think about the alternatives, in particular they follow post-growth economic ideas have recently proposed fully fledged alternative economic models, such as Kate Raworth's *Doughnut Economics* (Raworth, 2017), Bruno Frey's *Economics of Happiness* (Frey 2018) or Lorenzo Fioramonti's *Wellbeing Economy* (Fioramonti, 2017) among others.

This is why I suggest rethinking – critically, of course – our recent social past. To establish that the crisis of 1929 did indeed somewhere give way to a "revolution", for how else could we describe Fascism or Nazism. However, the crisis of 2008 did not stir up a revolution, and the crisis of COVID 2019 indicates, rather than a revolution, a correction of the functioning of our productive economic model but without replacing it. The

important thing that occurred during 2019 has been the opportunity to check out a life "without economic growth", a central issue for a green economy. We could even evaluate the economic costs of a "suspended" life with production limited to satisfy the basic needs of humanity in pandemic times.

This time there has not been a revolution either. The answer given by the EU[5] and the USA[6] similar to that by Franklin Delano Roosevelt with the New Deal in 1933, are massive public programmes of economic relaunch and public debt. They are not the usual neoliberal policies more applied in 2008 crisis. The intervention of the State in the economy is a phenomenon more and more real and probably the prelude to a hybrid economy between liberal capitalism and state economy, with a free market more regulated by financial and commercial institutions shaped for a global governance of the world economy (IMF, WBG, WTO, G7, G20 …).

The past Porto Summit of the European Council has approved the proposal for new employment, skills and social inclusion targets put forward by the European Commission in its 2030 Action Plan: at least 78% employment, at least 60% adult training and social exclusion reduced by at least 15 million people. We may think the same but under different conceptual and political discourses. In any case, if I am mistaken, we should remember the "sense of reality" of A. Smith.[7] We could go on discussing about "post-growth" while our political leaders and international institutions design target plans for economy growth, salary raises, employment and skills growth, education and health system improvement. All this entails that we keep on growing. Rationally, of course, in a sustainable and inclusive manner, evaluating and checking for any deviation, especially when inflation is rising.

Lessons from a Unique Economic Crisis (Globalization of the Pandemic and Nationalization of the Anti-Crisis Responses)

The COVID-19 pandemic is a great source of inspiration for the Labour Law of the future, its function and its objectives. It is of devastating consequences for many companies of different economic sectors.[8] I fully agree with JM. Servais when he says that all around the world the State is back. Everywhere, even in those countries fiercely laissez-faire, governments have been asked to help enterprises no matter how big or small. The latter

being not only more vulnerable, but also the first source of employment (Servais, 2021, p. 1).

Certainly, the answers given to this situation have a less global and more national bias. They reaffirm the leading role of the nation states, supported in the case of the EU by its financial structures (Recovery and Resilience Mechanism EU, the European Social Fund Plus). The national states have tried to boost economy and employment, sustain jobs and income, with medium and long term plans for work organization (teleworking) or part-time work, paid holidays or unemployment subsidies, as well as financial help and tax breaks for specific sectors of the economy.

Some –very few- States have wanted to apply the new trends driven by the pandemic and the *Great Pause* which means redefining the economic policies to guarantee the basic needs of the population.[9] The greatest example of a State that has prioritized the health economy over the objectives of economic relaunch has been New Zealand and its popular resigned Prime Minister Jacinda Arden. They have approved a national budget focused on care for people and planet without emphasizing income (James Magnus-Johnston, 2020b), with five priorities: improving mental health, reducing child poverty, addressing inequalities of indigenous people, thriving in a digital age and transitioning to a low emission economy … that "*suggests a transition to degrowth*" (Magnus-Johnston, 2020b).

This is an inspiration for the supporters of "ecological economy of degrowth". In my opinion, this case confirms the importance of the role of the State and the national policies to confront the challenges awaiting the "wellbeing state" of the future. But careful, a budget not focusing on income or GDP doesn't mean de-growth because a budget must be "balanced". The New Zealand experience is a national experience not easily exportable to any other country. New Zealand is a solid democracy, a country scarcely populated, rich in nature, with a stable system of industrial relations and a very characteristic feature of the nations in the Pacific: the strong cultural and economic contrast between the ancient settlers and the indigenous people, the main factor of social and economic inequalities.

With regards to working conditions and social security, governments have revised or completed their Labour and Social Security laws. Initially, with labour medium term measures, but in general, widening the scope of social protection, guaranteeing a basic income for those who have lost, even temporarily, their job or means of livelihood (Servais, 2021, p. 3). However, despite the economic intervention of the States, those public

policies may have affected civil liberties and social rights, as well as international treaties.[10]

The experience of these two years of pandemic shows that public measures in support of the economy and employment (such as the use of partial unemployment subsidies, the temporarily suspension of job contracts, teleworking or reduction of working hours) have been an instrument of extraordinary public intervention to defend the survival of firms and employment of workers under temporary closure. An instrument that ought to be extended to situations different from the current ones and translated into a permanent regulatory framework to deal with the development plans for economic activity in the face of negative situations that will not endanger the viability of the company as it has been done in Spain.[11]

Experiences that ought to enshrine the "flexicurity" measures, but also should entrust collective bargaining to design the internal flexibility measures needed, as an efficient answer to keep employment and defend company competitiveness, also in the case of circumstantial economic difficulty (Eurofound, 2020c). Flexicurity measures that should complement (despite antitrust rules) the putting in motion of public stimuli for companies to recover economic activity in a market transformed by the pandemic.[12]

A Key for the Future Mostly Accepted: The Crisis of Productive Work as a Consequence of Climate Change

Despite the consequences of COVID-19, climate change is a bigger challenge in the medium and long run for the human beings. It is a fact that fewer people dare to contest. The world (Rio Summit, Paris Summit) has begun to discuss how to face it,[13] because it is a global challenge which no country should ignore**.**

Climate change also poses serious challenges for labour law scholars: the targets of the twenty-first century against climate change mean the destruction of jobs in polluting economic activities (energy, mining, transport sectors…) or the need for new skills (clean technologies, clean mobility, decent employment for new personal services …). These processes will probably carry the growth of unemployment rates and the need for policies of just transition and sustainable development with distributional effects and capability for lagging inequalities between persons, sectors, and countries (Galgóczi, 2021). This calls for the improvement and activation

of policies of employment and the investment of national and transnational funds (as the just transition fund of EU) to foster the transition from old to new jobs (Doorey, 2021; Ghaleigh, 2020).

In order for these transitions to be effective, apart from the opportunities brought by the development of new sectors such as the "Green economy", the biggest challenge for increasing employment rates will probably be to sufficiently value activities that have been considered unproductive until now, or of small added value, normally attributed to women, but that have been left vacant since the incorporation of women to the market of productive work. I am particularly referring to "the caregivers". The traditional concept of productive employment has to change in order to admit these new demands for services that are more and more socially needed. The void left by the family paradigm change has surfaced the need for thousands of jobs for the assistance and care of persons and homes.

Next to this we could also revisit the concept of paid work to include new non dependent services or singularly dependent services (economically but not organizationally dependent) which are organized in a manner that is more and more non materialized, such as those operating in the gig economy or platform economy, etc. Besides the "slow work", which, as with the "post work", is something more than theoretical ideas, because they are factual realities that a new Labour and Social Security Law will have to give proper answers, not easily treated from the point of view of contractual relations.[14] It should also change our system of industrial relations, to recognize the providers of these new services of collective representation rights or how to exercise its trade union's rights (T. Novitz, 2020, p. 510).

In my opinion this necessary adaptation of our system of labour relations to the protection required by the new work services providers should start with the analysis or inspiration that our own labour categories offer. For instance, some of these service activities are found to be highly demanded in the future. Many of these services -in their broad sense- of caregivers are designed, in reality, as real public services in many countries, which makes me think that the formula of labour employment contract should be refused and redirect this activity to another tailor made solution more adapted to this growing reality.

My thinking is inspired by the triangular public relationship of affiliation and contribution between the Social Security, the employer and the employee, in order to suggest a singular labour relation in three ways (there already are in Labour Law similar experiences when there is a

temporary employment agency in between) that would allow the Public Service Administration not to be the sole employer or, in its case, would not make the patient or user be the employer, as too often it happens in Spain.

Another Major Industrial Revolution. The Industry 4.0 or the Challenge of the Digitalization of the Economy

If the "Great Pause" caused by the pandemic has extraordinarily revalued teleworking, as well as given employees more autonomy over the decisions on tasks, it has also permitted firms the experience of the advantages of digitalization of work organization and the decision making process. Each time much production stages are dematerialized (artificial intelligence) or robotized, which, in theory, allows for important increases of productivity.

The revolution introduced by the development of industry 4.0 is a disruptive trend for Labour Law. Dependent workers will be progressively replaced by intelligent machines capable of achieving by themselves the set goals, reacting in real time to the signals received (Supiot, 2020, p. 126). Consequently, workers will not be directed, will be "programmed", and in the best case scenario, "replaced" by "intelligent machines" (Supiot, 2020, p. 127). This will have a positive outcome as well: human work will be limited to works of creation or care giving, that a machine is not yet capable of doing.

Besides, the progress in connectivity (the launch of the 5G network) and the applications of artificial intelligence give way to more debate. Strong discussions from geopolitics (the power of big corporations) to ethical questions (data privacy or cybersecurity). More specifically, the implementation of 5G connections will favour the best way to transmit data between machines. 5G transmission is faster: is like an invisible cable that puts an end to the rigidity of factory (M. Lorenzo, 2021, p. 1). In the "smart factories" managers can rethink the configuration of the factory with great agility. This is explained in two words: more flexibility and security in avoiding mistakes, fundamental for the good management of decisions also outside the factory. 5G technology acts as the invisible wire to unite all elements of production. For instance, it will make it possible to control the quality of the process in detail and at a distance or share information with experts in real time.

The adaptation of the future worker to these changes, visible now and here, will require important programs of retraining and skills for new professional profiles. This will also mean that there will be an important surge of companies dedicated to training and skill adaptation. The training market will be their main beneficiary.

On the other hand, it is urgent to define reactive strategies from all of us: from the States, from the EU,[15] from the trade unions.[16] In view of the challenge of how to organize the new compound non-standard workers to defend their own interests can have a negative impact on the rules of free competition (Eurofound, 2020c, p. 61).

Many workers will be led to unemployment if they cannot retrain in time for the acquisition of new skills, at the risk of long term unemployment or social exclusion if public services, private agencies, associations and unions do not intervene to avoid it. Once again the intervention of the State as a “last resource” will be crucial. To this effect, like in other countries, Spain has just approved a sort of basic income.[17] The so called minimum vital income (approved by the RD Ley 20/2020 of 29th of May) is not a *universal basic income* because it is exclusively aimed at the basic needs of persons in risk of social exclusion for their poverty situation, and granted on the basis of their low annual income.[18]

What would the role of Labour Law be then? If there is no dependent worker, but more autonomy or a mere control of results or through numerical indicators, what concept of social justice are we to use? Aimed at what kind of workers, and in which circumstances for their protection? Would it be enough to have the guarantee of wages but in exchange for what kind of services, what type of exchange is it being paid for? The protection of security and safety for the service provider, wherever he is, and what responsibility will his employer have, if the activity and the place where it takes place are not under his control?

Maybe there ought to be a different Labour Law for digital workers, protected and secure but built upon different elements to those of the exchange of labour for wages, a worker with more autonomy, as it already happens with the Spanish regulation on health and safety of workers, that covers dependent workers, freelance workers or public employees cross wise. The future relation of the self-sufficient employee will probably be a hybrid model, a new legal concept somewhere between dependent employment (from which it will extract the rights of association and collective representation) and self-employment (with sufficient guarantees in social security, pensions and risk prevention).

How Will the Actual Labour Market Models Reply to the Change Vectors That We Already Know Here and Now?

The objective of Labour Law is not only the regulation of the employment contract and collective relations, it is also the law of the labour market. As the regulator of the employment relationship Labour Law will have to assume new functions to adapt to the changes we have mentioned before. Not only the economic protection, but also new functions such as facilitation the acquisition of new skills for workers (Caruso et al., 2020), or opening up the organization of labour to the cooperation between managers and service providers (Landa, 2019, p. 21). Labour Law, as the law of the labour market, will have to wider its objectives and open up its field of intervention to new questions of economic, sociological, psychological nature and so on, with a view to being more efficient in its proposals of legal regulation, offering to every "new juridical form of exchange between persons" a legal solution adapted to that relationship.

At this moment there are two big models of regulation of the labour market: the free labour market and the coordinated/continental market, and their variations in Northern Europe and Southern Europe. From the point of view of labour market outcomes, it is said that the free labour market model produces more inequalities and more poverty rates with respect to other models, although recent data about precarious and poor workers are not conclusive (Le et al., 2021, p. 107).

The EU lacks competence on direct regulation of the labour market, but has coordination powers through its studies and recommendations on labour market policies, as well as indirect competences through the implementation of the single market, free competition and state aids, or the free circulation of workers and services. Once Brexit is over, the EU also develops a strong political activity around the institutionalization of a European Pillar of Social Rights.

The truth is that this European framework drives and determines the policies of Member States to achieve upward convergence of living, working conditions and social protection (Eurofound, 2020a, p. 63). For a long time now the European policy on the European labour market supports a central idea among Member States that focuses on the goodness of flexicurity seeking to balance flexibility and security in the labour market.[19]

The instruments that ensure the component "security" are looked down upon, however they have allowed to solve the problems of "just

transitions" (with the help of national public social services systems) in the crisis of COVID-19, and they will likely be useful to provide solutions for training and transition between jobs in the climate crisis that is set to be the next big crisis probably.

Another important contribution of the European model of labour market is the fostering of European social dialogue within the social global dialogue. Specially interesting have been the examples of social dialogue in multinational companies, moreover when having collective agreements between company and unions in the international field such as the joint declaration in the textile sector that has been supported to by world brands as clothing textile sector. With an aim to prevent the negative labour effects consequence of the technological revolution it would be very important to have this kind of agreements in the future in sectors that could transform the manufacturing and services such as advanced robotics and electric vehicles.

Labour Law has enough legal tools to keep favouring its function of balancing the interests and protection of workers old and young. Conveniently adapted to the announced changes it can continue to perform its traditional role of governance of the labour market.

Conclusion

In my opinion, without an in depth exam of our History we are in danger of falling in old dogmatisms that under the guise of novelty they really shelter an ideal social construction that is justified for its novelty, its ideological goodness or because it seeks a generalized social happiness (as was declared, historically speaking, by the Declaration of Independence of America of 1776!).

We must declare a risky methodology to formulate hypothesis that are neither proved nor provable, with no factual background or solid experimentation that would support them, only "good practices" that cannot be generally evidenced. Although the fourth technological and digital revolution could let us get rid of criteria such as productivity and could free the immense majority from the need to work, this would not mean the end of work, or the universal human happiness as it is being suggested (Frey & Stutzer, 2002). Rather, the human activity, work in its broad sense, is intrinsic to humans and the survival of our species. We have not made it to the twenty-first century by chance or inertia. It has been a matter of great and constant "work". To the point that without the intervention of the

"homo faber" I fear that our species will perish. It may perish all the same, surely, but it will perish sooner.

I state, inspired by the "utilitarism" of A. Smith, that to face the challenges awaiting as human beings it is best to act – always with rationality and pragmatism – with the objective of seeking what benefits us individually (so, as a species); and not with goals of impossible achievement or difficult attainment. As shown by the pandemic there are expendable workers, but others are very necessary for our collective wellbeing: healthcare workers, farmers, grocery clerks, delivery drivers and caregivers.

In short: some, or many, will have to "work". We could get our inspiration from Ancient Rome and have a raffle to see who has to work, or take turns, or recreate more sophisticated forms of slavery (we have never ceased to try so). Let us not be melodramatic, work is certainly changing its own perception as a human need. Socially considered the work of the future will have a less "productive" dimension and a more "relational" one.[20] We will give the name work to activities very different from those that today relate to dependent and paid work but that we will still recognize as work because it will be a gainful occupation. In all probability it will be a more autonomous work, with better training and more employee involvement in decision-making (European Company Survey. 2019).

At the same time, as we see at present, the technological revolution is not going to eliminate poor quality work, short time and precarious work that will continue to justify the existence of Labour Law to protect and balance interests, this is, the validity of its more classic function will continue to prevail: to regulate more precarious or discontinuous forms of employment relationships while at the same time enabling flexibility for employers in recruiting and retaining a workforce and remaining competitive (Eurofound, 2020c, p. 61).

Likewise, industrial relations systems will continue to provide the necessary mechanisms for the State to develop, either its expansive economic policies with high redistributive effects (COVID crisis), as well as to implement an income pact in inflationary periods (War crisis), in pure liberal economics logic.

I am aware that the Labour Law market of the future will depend on the economic model of each world region. It may be that there is no radical, revolutionary change in the economic model of most of these world regions. Perhaps, we may see changes that are more nuanced, such as those observed nowadays. At present, for instance, is it possible that we have a capitalist economic model that rather than following the neo-liberal

path is a mixed version of a regulated, partially state-owned or publically intervened economy, and a market economy where free competition is challenged by monopoly business groups, especially in the field of digital technologies and services. An outcome, maybe inevitable, of the competition between economic blocks, the West versus the East again.

Notes

1. I believe that for a discussion amongst Labour Law authors it may be more pressing, firstly, to reflect on the centrality of the value of human labour as a fundamental element of any society of the future and its model of production; and secondly, maybe, on the future role of the State or its welfare institutions (basic income, pensions…).
2. Since the Republic of Plato, the examples of worlds or utopian systems are many. To cite a few, *Utopia* by T. Moro or *Brave new World* by A. Huxley, although they could also be considered—the latter, for example—dystopias.
3. For instance, T. Moro valued human labour absolutely, since in *Utopia* he stated that all men should work in the field to reap the benefits of the community.
4. To my view, it will be especially true if the war against autocratic political model is lost.
5. The Next Generation EU Recovery Instrument of €750 billion.
6. Biden succeeded in having Congress (a close 50–49 in the Senate) approve his economic rescue plan of nearly two trillion dollars, much larger than the European plan.
7. The much-criticised Scottish national Adam Smith because he was someone who held a positive view on economic inequality, seen as both the necessary cause and natural consequence of a dynamic growing economy. See Walraevens, B. (2021), p. 214.
8. The International Labour Organization (ILO) says so, having found that many enterprises are facing a catastrophic situation, threatening their operations, especially small companies, whilst millions of workers run the risk of a reduction or loss of income. Due to anti COVID-19 measures work hours have been cut down in retail, tourist and food services, arts and culture, construction … (ILO Monitor, 2021, p. 3).
9. "*The economic policies must be oriented towards meeting basic needs, promoting essential activities and facilitating a 'Great Pause' while we figure out to overcome this global pandemic*" (Janoo & Dodss, 2020).
10. "There is no vaccines for cruelty. The pandemic has eroded democracy and the respect for human rights" underlined *The Economist* of 17 October 2020.

11. Measures which, beyond the COVID emergency, have been integrated into the current labour legislation (articles 47 and 47 bis of the Workers' Statute Law), and continue to be used in view of the repercussions on the activity of *companies* as a result of the economic war between the EU and Russia.
12. As I'll develop infra (Section "Another Major Industrial Revolution. The Industry 4.0 or the Challenge of the Digitalization of the Economy"), it has also been relevant the impact of COVID-19 in the acceleration of the digitalization of production. Eurofound, "Living, working and Covid-19: First findings". April 2020. And the consolidation of the 4th industrial revolution in the future. "COVID-19: Policy responses across Europe", Publications Office of the European Union, Luxembourg, 2020b.
13. An example, the Spanish Bill 7/2021 for climate change and energy transition, with a view to meet the targets of the Paris Agreement of 2015.
14. The question is focused on considering whether current Labour Law ought to be revised to ensure a better protection for compound non-standard workers and dependent self-employed people (Eurofound ter, 2020, p.61).
15. The European proposal of Regulation of harmonized rules on AI of 21 April 2021 (Artificial Intelligence Act.). The European Commission has proposed harmonized rules regarding AI applications, emphasizing that its approach is shaped by EU values and risk-based, ensuring both safety and fundamental rights protection.
16. European Trade Union Institute for Research (ETUI) has criticised this proposal of Regulation because it fails to address the specificity of AI uses in employment, therefore an <ad hoc> Directive on AI in employment is consequently necessary (A. Ponce, 2021).
17. Otherwise known as a guaranteed income, living wage, minimum income or reverse income tax (Magnus-Johnston (2020).
18. In my view, Spain is not totally in line with the idea of the "Job Guarantee Program" neither, a pillar of a new economic governance centred on promoting wellbeing (G. Argitis & N. Koratzanis, 2021).
19. It must be emphasized that flexibilization in the labour market could be seen as a neutral concept, neither positive or negative per se, for employers and workers. From a labour market perspective it is important to ensure a win-win situation for employers and workers through flexibilization trends (Eurofound 2020).
20. The concept of "relational work", building on relational sociology where work functions "as a relational networking labour. In the digital era human labour not only is an instrumental transaction around economic resources, but also an exchange relationship between people who constitute complex social networks" . Cfr.Rodriguez Luesma C Garcia Ruiz, P. & Pinto Garay, J. (2020, p.16).

References

Argitis. G. & Koratzanis, N. (2021, March). "A European job guarantee to foster wellbeing" social Europe.

Bueno, N., Ter Haar B. & Zekic, N. 2021. Utopias & Labour law, V LLRN conference, Papers not published yet.

Caruso, B., Del Punta, R. & Treu, T. (2020). *Manifiesto por un Derecho del Trabajo sostenible*. (M. Rodriguez-Piñero, Trans.). Rev. Derecho de las Relaciones Laborales, 8: 1107–1153.

Doorey, D.S. (2021). *Just transitions law: Putting labour law to work on climate change*. https://ssrn.com/abstract=2938590.

Eurofound. (2020a). *Living and working in Europe 2019*. Publications Office of the European Union.

Eurofound. (2020b). *COVID-19: Policy responses across Europe*. Publications Office of the European Union.

Eurofound. (2020c). *Labour market change: Trends and policy approaches towards flexibilisation, challenges and prospects in the EU series*. Publications Office of the European Union.

Fioramonti, L. (2017). *Wellbeing economy: Success in a world without growth*. McMillan.

Frey, B. (2018). *Economics of Happiness*. Springer, p.88.

Frey, B. S., & Stutzer, A. (2002). The economics of happiness. *world economics, 3*(1) January–march.

Galgóczi, B. (2021). Is Europe socially fit for the "fit for 55" package? *Social Europe*, July, https://socialeurope.eu/is-europe-socially-fit-for-the-fit-for-55-package

Ghaleigh, N. S. (2020). Just transitions for workers: When climate change met labour justice. In A. Bogg & A. Young (Eds.), *The constitution of social democracy*. Hart. https://ssrn.com/abstract=2938590

ILO Monitor. (2021). *COVID-19 and the world of work* (7th ed.). ILO publications.

Janoo, A., & Dodss, G. B. (2020). The great pause, published by open democracy. https://www.opendemocracy.net/en/oureconomy/great-pause/

Landa, J. P. (2019). Trade unions' rights, work councils' functions and the legal framework for governing transnational corporations: A Spanish perspective. In J. L. López (Ed.), *Collective bargaining as collective action: the Spanish case in perspective* (Oñati socio-legal series) (Vol. 9 (1), pp. 19–31).

Le, H., Wood, G., & Yin, S. (2021). Labour market outcomes of different institutional regimes: Evidence from OECD countries. *Cambridge Journal of Economics, 45*, 85–108.

Lorenzo, M. 2021, April 27. Ericsson technology and innovation director. *Journal El País*.

Magnus-Johnston, J. 2020a. Social solidarity requires a universal basic income. Resilience.org. April 29, 2020/5.

Magnus-Johnston, J. 2020b. New Zealand deprioritizes growth, improves health and wellbeing. Resilience.org. April 29, 2020/5.

Novitz, T. (2020). El enfoque de la sostenibilidad en la OIT y la representación colectiva de los trabajadores. *Revista Internacional del Trabajo, 139*, 507–530.

Ponce, A. (2021). *The AI regulation: Entering an AI regulatory winter*. ETUI Publications. https://www.etui.org/publications/ai-regulation-entering-ai-regulation

Raworth, K. (2017). *Doughnut economics. Seven ways to think like a 21st century economist*. Random House.

Rodriguez, L. C., Garcia Ruiz, P., & Pinto Garay, J. (2020). The digital transformation of work: A relational view. *Bussiness Ethics: A European Review, 30*(1), 157–167.

Servais, J.M. 2021. Las consecuencias sociales del COVID-19: una mirada jurídica comparada después de un año. www.cielolaboral.com

Supiot, A. (2020). El mandato de la OIT al cumplirse su centenario. *Revista Internacional del Trabajo, 139*(1).

Walraevens, B. (2021). Adam Smith's view of economic inequality. *Cambridge Journal of Economics, 45*, 209–224.

CHAPTER 14

More Public? Did the Pandemic Influence the Paradigm of the Labour Relations?

Izabela Florczak

Introduction

Work is an important part of human life—we spend a great deal of time at work. It is indicated that average person spends 90,000 hours at work during their lifetime (Gettysburg College, One third of your life is spent at work). That is more than ten years of life. Other sources indicates that on average, people now spend approximately 13 years and two months of their lives at work. If employees often work overtime, an additional year and two months can be added to the above (Belli, 2018). Further sources points out that average worker spends nearly a quarter of their time on the job during a typical 50-year stint of employment. Same source state that British employees will averagely work for 1795 hours a year (from 8760 total it gives 20% of a year spend at work) (Skoulding, 2018).

The environment in which we work shapes our habits, influences our health and even social attitudes. By way of example, it is worth pointing out that precarious employment is one of the factors and manifestations of

I. Florczak (✉)
University of Lodz, Lodz, Poland
e-mail: iflorczak@wpia.uni.lodz.pl

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_14

exclusion, understood as a multifaceted process of gradual withdrawal of individuals from social life (Mayes, 2001, p. 15). The weakening of social ties is caused, in this case, by the very widespread insecurity in the labour market (Kiersztyn, 2014, p. 14), which is an effect of the unwillingness of employers to employ workers in a long-term, stable relationship. Such a situation results in a general life malaise, realising the hypothesis of social withdrawal by the person affected market (Kiersztyn, 2014, p. 14). It is worth noting here the existence of the opposite view, according to which people who work in conditions they consider undignified begin to organise themselves in order to improve their situation, which has a positive impact on their social and civic attitudes (Estanque & Costa, 2012, p. 277). At that time there is a realisation in practice of the mobilisation hypothesis, which is the opposite of the withdrawal hypothesis. (Kiersztyn, 2014, p. 14).

The working environment and relations within it therefore plays a crucial social role—which, it seems, could be observed in an intensified way during the apogee of the SARS-CoV-2 virus pandemic, which started at the beginning of 2020. At the same time, it seems that further extraordinary states confirm the thesis raised above.[1]

The object of this chapter is not to find an answer to the question of whether labour law relations are public law or private law. Such a discussion has been going on, as an example, in the Polish labour law doctrine for several years, due to the view presented in the literature about the evidently public character of labour law (see Musiała, 2017a, pp. 2–7; 2017b, pp. 77–88; 2019, pp. 12–18; 2020; Sobczyk, 2015; Sobczyk, 2017). Its only added value seems to be the mere demonstration of the directions of the public impact of labour law. Indeed, this discussion ignores the fundamental threads relevant to determining the legal nature of labour law, which must be related to the study of the genesis of its origin. And this, in terms of continental law, should be unequivocally associated with the attempt to find appropriate tools to protect the rights of those employed in a transforming economy that was undergoing a transition to economic democracy (Dukes, 2011, p. 59). At the same time, it does not appear that over the course of several decades of labour law career, despite the changing socio-economic conditions in the labour market, the role of labour law has changed to such an extent as to preclude the recognition of the function that underpinned its formation as up-to-date.

In this chapter, I adopt a conception of the specific role of labour law, and the relationships that arise within its sphere of influence, which

naturally links together domains commonly considered to be public and private. Attempts to categorise labour law (and the relationships that arise within its sphere of influence) as exclusively private or public result in cognitive errors in its analysis, as pointed out by Karl E. Klare (1982, p. 1362; 1419):

> The easy consensus on the meaningfulness of the public/private distinction, coupled with total chaos regarding its application to specific instances, gives rise to the suspicion that the distinction is not an analytical tool but an after-the-fact rhetorical device used to justify political conclusions. Analysts seeking to expand employee rights vis-a-vis the employer generally do so by appealing to the public character of the subject under discussion, but the contortions of public/private analysis are sufficiently complex that this will not always be true. Few labor law analysts ever examine the conceptual validity of the public/private distinction itself. There is apparently a political value in clinging to the distinction, even if there is no common ground on what it means.
>
> Public/private, rhetoric conduces to the belief that the individual and the community are radically distinct and antagonistic. This way of thinking suppresses the truth that in significant measure we are the ensemble of -our social relations and shared meanings, and that our individuality is in many ways defined in relationship to our shared meanings and symbols.

The thesis of this chapter is to argue that in a time as extraordinary as a global pandemic, due to the important social role played by the work environment, there has been a noticeable increase in the publicising of the role of social relations arising within it.

Concept of Public Tasks and Labour Law

Public tasks can be understood in two ways. Firstly, they can be obligations legally imposed on public authority bodies to satisfy collective needs or pursue the public interest. With this view, public tasks are reserved exclusively for entities in the public sphere. The second approach links public tasks not to the entity that is obliged to perform them, but to the object of the task itself. Thus, a public task will be such a task which, from an objective point of view, is not in the interest of the entity which is obliged to perform it. At the same time, it is worth pointing out that this interest may be understood very differently. For example, focusing on

labour law considerations, it is worth referring to the obligations related to the employee's illness.

Taking care of public health is certainly a public task, carried out, as a rule, by entities of a public nature or a publicly organised system—even if it is performed by private entities. Public organisation is then about setting boundaries for the operation of a privately administered system. However, in many jurisdictions, employers are, in part, complicit in ensuring the health of employees (the protection of which is, in principle, a public task). This is done, for example, by having to cover part of the costs of an employee's sickness absence. In any case such absence must be structured organisationally. Such structuring may involve one employee's sickness absence necessitating an increase in working hours for others, and consequently incurring costs associated with, for example, overtime.

Of course, the example described can be qualified as a manifestation of the risks incurred by the employer in running the workplace. This risk is related to the occurrence of unforeseeable circumstances concerning (in this case) the employee (about social risk of an employer see: Pisarczyk, 2008, p. 29; pp. 236–256). Like any risk, the risk in the employment relationship is related to the fact that its non-occurrence causes gains and its occurrence leads to losses. However, it is worth noting that this particular example makes the employer part of the public health system.

As I indicated above, this public character is expressed by the objective recognition that the employer has no interest in looking after the health of an incapacitated employee. At the same time, such a view is subject to an obvious axiological fallacy—given the objectively exhaustible resources of employees (resulting in the impossibility of not working with sick people, in favour of employing only healthy ones), employers should care that their employees are healthy and fit for work. Therefore, a period of illness and convalescence should be regarded as, in general, positive. An employee who remains in good health (which the period of illness contributes to improving) contributes positively to the functioning of the workplace.[2]

If, therefore, the employer remains partly involved in the functioning of the health system, this involvement is derived from his interest. It is also worth pointing out that such an involvement is a consequence of the direct relationship which employer has with the employee. A relationship that is based on the employee's consumption of his or her resources (time, health) in favour of the employer's accumulation of resources, which are in return partly redistributed to the employees.

The example described is evidence of the employer's co-participation in the implementation of public tasks, resulting from the structuring of employment ties in the economic system, as will be discussed in the next section.

The Role of the Workplace at the Society

It will be a truism to say that the work environment is often the only, and usually the main, social environment in which modern people function, especially in developed countries. I am even tempted to compare modern workplaces to tribal societies, where the centre of life interests is concentrated within a specific structure. The tribe has a defined organisational structure and an internal hierarchy. It operates with a purpose based on established rules, carrying out tasks in accordance with recognised values. The tribe, which is the workplace, shapes not only the social attitudes within its operations—by influencing the feelings of the individual, it also shapes him or her in non-work related areas.

It is though reasonable to point out that due to timeframe people spend at work, working environment can make a huge impact on the quality of life. Therefore, the organisation of this environment should take place in accordance with generally accepted standards.

The so called COVID-19 pandemic has resulted in an increase in the actual participation of employers in public policy tasks worldwide. Many public health responsibilities (such as providing protective measures or even enforcing vaccination) have been imposed on employers. It was noticed even more than in the pre-pandemic era that employers are an indispensable and vitally important part of the functioning of society, and their role is not simply that of a remunerator of work done.

It is therefore worth looking at whether the employer paradigm has indeed changed during the pandemic, by making its social position public. If so, are these changes relatively permanent, replicable with other emergencies, or should they be seen as a short-term solution for the times of the COVID-19 pandemic. Consideration of these elements will provide a starting point for determining whether, at a time when many multinational corporations have budgets and revenues larger than some countries, this direction of change is not justified and desirable (Cartwright, 2017, p. 2).

Pandemic Pollicisation of the Role of the Employer? Models of Public Vaccination Policies with Regard to the Employers' Obligations

From the point of view of social issues related to public action during a pandemic, one of the most important issues was that related to vaccination against the SARS-CoV-2 virus. In the early stages of the pandemic, matters relating to such areas of combating the spread of the virus as:

- identifying the entity responsible for supplying disinfectants and protection (masks, gloves);
- the possibility of enforcing obligations connected with the use of disinfectants and protective measures;
- the possibility of testing workers for the presence of the virus;
- the possibility for the employer to verify that the worker is subject to quarantine or isolation obligation, were the most urgent to be regulated by law. In the next phase, the focus was on vaccination obligations.

In this respect, many different regulatory models were possible, each with their own variations. The first model, the most restrictive one, imposed vaccination on the general public. In this model, the employer may have been prevented from verifying compliance with the vaccination obligation. Such verification was then only possible through state services, not imposing obligations of a public law nature on the employer.

The second possibility in this model is to give the employer the tools to verify the fact of carrying out the obligatory vaccination. Then, especially in the situation when:

- the employer could have imposed sanctions for non-vaccination
- and/or
- sanctions could have been imposed on the employer for employing non-vaccinated employees,
- the employer could have been considered to be performing duties reserved for public *dominium*. Indeed, in both abovementioned scenarios, the role of the employer was linked to the need to participate in the process of enforcement of public vaccination obligations in an active way—through specific actions: checking that the vaccination certificate was in place and/or undertaking the specific actions when it was found to be missing.

In the second version of the first model, the non-existence of any sanctions for non-vaccination/non-verification of the fact of vaccination, weakens the possibility of considering the employer's position as an activity of public-law obligations. This is because the obligation imposed on an employer—to verify the vaccination, becomes illusory despite the fact that there is a legally sanctioned obligation imposed on the employee to receive the vaccination.

The second model assumes the existence of a vaccination obligation with the possibility of exemption from it in the case of qualification to a legally defined group (recovered) or having a negative virus test result. This model existed in Austria under the name "3-G"—"Getestet, Geimpft, Genesen" (Tested, Vaccinated, Recovered). The 3G rule applied at the workplace unless a worker have had absolutely no contact to other people at work. Contacts within the meaning of the act imposing 3G rule have not include a maximum of two physical contacts per day which took place outdoors and have not last longer than 15 minutes each. Compliance with those rules was checked through on-site inspections. In the absence of evidence, there were administrative fines of €500 for employees and €3600 for employers. The law introducing the 3G rule also provided that the owner of a workplace with more than 51 employees shall appoint a COVID-19 officer and prepare and implement a COVID-19 prevention policy.[3]

The issue has been similarly regulated in Italy. Under the law in force from 15 October 2021,[4] employers may have only allowed to work these employees who have had a Green Pass. Italy's Green Pass, or *certificazione verde*, was a digital or paper certificate showing that the holder has been vaccinated, tested negative or recovered from COVID-19. These rules confirmed that the rationale behind the green pass obligation for workers was to strengthen safety in the workplace and support—and not slow down—business activities. Therefore, the rule clarified that the system of green pass controls did not affect the organisational prerogatives of the employer, who was in fact legitimised to ask workers to communicate in advance that they did not have a green pass. In any case, the employer remained obliged to control workers who have not given prior notice and who have entered the workplace.

In this model, the employer was responsible for allowing to work workers who, based on the applicable laws, should have not participate in any social activity. It was convenient for the employer that his actions were based on a legal provision. This causes far less tension within the

workplace itself, as the decision to apply the relevant procedures is the result of the need to apply the generally applicable law. In the discussed model, the control obligation is ceded to the employer, while the control bodies are obliged to control the rules by employers, less frequently in relation to individual employees.

The third model discussed is one that naturally assumes the need for employers to carry out some of the public health responsibilities during pandemic. As already noted, employers have an interest in ensuring that workers activities are not interrupted by quarantine, isolation or virus. For this reason, many employers wanted to control the vaccination coverage of their workers on their own initiative. The awareness of policy makers of such a phenomenon has discouraged them from making changes to the law, which would have imposed obligations on employers to control SARS-CoV-2 vaccination and cause public concern, especially in those societies where the percentage of anti-vaccinationists is high. For example, in Israel the position of Regional and National Courts has been very clear where the value of common interest embodied in public health protection needs were put above a private interest understood as an workers` right to privacy and right to work. This has led to the confirmation of the employers` right to exclude the unvaccinated worker without an up-dated COVID test from the workplace (Ilany & Skąpski, 2021, p. 12).

This model, in theory, has not imposed any public law burden on employers related to the need to verify the health situation of workers in relation to COVID-19. On the other hand, however, it shifted all the COVID-19-vaccination related tasks, on employers, as stakeholders in the health status of workers. These tasks were carried out without direct legal tools as a basis for action. A change in this model could therefore consist in equipping employers with a tool that unambiguously confirms their legitimacy to carry out policies related to the prevention of the spread of COVID-19. However, the introduction of an appropriate regulation should not have been done to the exclusion of the application of appropriate mechanisms in relation to other spheres of social life: participation in mass events, participation in cultural life or even the possibility of entering a restaurant. Thus, the possibility of verification of vaccination should then have been regulated equally in relation to different spheres of social life.

Involving employers in vaccination verification responsibilities can be analysed from several points of view. Firstly, it can be noted that this process has resulted, in different ways, in the co-responsibility of employers for the public task of preventing the spread of a pandemic. Employers have

been able to participate in the performance of this task either in fulfilment of the obligations imposed on them or voluntarily. In doing so, the voluntary actions were not the result of the implementation of the obligations imposed on the employers, but of their own initiative. Secondly, it is important to note that by gaining the tools to be able to control the vaccination of employees, which are standardised by law, employers were able to shape their internal personnel policies in a more coordinated manner. Even if the legislation only gave them the possibility to obtain information on vaccination (without being able to impose sanctions for non-vaccination), the employer gained the knowledge necessary to, for example, separate employees according to whether they were vaccinated or not. This increased the chances of counteracting the downtime that could occur in the event of mass sickness.

The examples described of employer activity undertaken during the epidemic with regard to enforcing the obligation to vaccinate are clearly linked to the social role played by the relationships formed in the workplace. It should additionally be borne in mind that the need to maintain the continuity of workplaces was not only enforced by their internal interests. It should also be seen from a general social point of view. This is because the more companies were forced to temporarily cease their operations, the more supply chains and spheres of activity of various branches of the economy would be paralysed. If local shops had to close due to illness, the population living in the area would be deprived of the opportunity to shop. In this context, the social role of workplaces was also invaluable, as they were often the ones that became outbreaks, due to the presence of many people in close proximity. In such a situation, even the use of preventive measures (disinfection, gloves, masks) may not have had the intended effect.

Thus, in carrying out the task of verifying vaccinations, the employers were looking after both their own interests and those of the general public. In doing so, it seems natural that it was these entities, being highly structured, that had such legal and/or social obligations, which I understand as arbitrarily, not arising from legislation, controlling the vaccination of employees by employers.

Voluntary Activities Undertaken by Employers During Pandemic. Public Tasks and CSR

In times of pandemic, many employers undertook additional, voluntary social activities that benefited their workers. These activities were aimed at preventing the spread of the SARS-CoV-2 virus, and can certainly be classified as activities in the field of corporate social responsibility. Among the measures taken by employers to increase the vaccination rate of their workers organising vaccination campaigns or allocating additional financial resources to financially reward vaccinated employees occurred. This latter action has become the subject of controversy on the basis of the Polish legal system. One of the Polish company provided for a special allowance of PLN 100 for undergoing vaccination against SARS-CoV-2. The company indicated that the purpose of this measure was social activation and the advertising of health-promoting attitudes, as well as the improvement of health and safety conditions at work. The procedure was subject to scrutiny by the National Labour Inspectorate as to its acceptability. The National Labour Inspectorate did not question the company's payment of a one-off benefit for receiving the SARS-CoV-2 vaccine (Gruza, 2021).

As mentioned, such employers' activities as voluntary activities undertaken during pandemic can be classified as a manifestation of corporate social responsibility. The concept of CSR imbues the employer's actions with activity aimed at protecting the widely understood *common good*. At the same time, it is worth noting that the implementation of public tasks, described above, is something different from socially responsible activities. To some extent, the scopes of activities undertaken on the two aforementioned levels may cross, however, they are not identical.

Whether the voluntary measures taken by employers during a pandemic to counteract its spread were public tasks, or whether they were more the implementation of corporate social responsibility, depends not only on what type of action we were dealing with. The above must also, and perhaps above all, be analysed from the point of view of the theoretical paradigm of the employer's public tasks and the concept of CSR, which role is increasingly recognised as based on a strong globalist transition process according to which business firms are seen as political actors in that they progressively self-regulate and take over traditional responsibilities of the state as providers of citizenship rights and public goods (Mäkinen & Kourula, 2012, p. 650).

Thus, depending on the adopted conception, the evolution of the social role of employers, also in the context of their voluntary actions during a pandemic, can be classified either as increasing participation in the implementation of public tasks or as taking them over. The difference between these two concepts is related to the determination of which entity (state or company) is originally charged with a given public duty. If it is the state, it should be considered that employers, through the action of their companies, merely participate in the performance of a public task. If, on the other hand, the state divests itself of certain tasks in favour of companies—then they become independent creators of their performance.

The Position of Employers in Social Dialogue During a Pandemic. From Marasm, Through the Spectre of Collapse, to Unprecedented Agreement. The Case of Poland

In describing the evolutions that occurred during the pandemic in the paradigm of the presence of employers in the sphere of public service delivery, it is worth referring to an example in which the social partners, including employers, stepped into the role of animators of public service delivery. This reflection focuses on another example from Poland, a country where social dialogue is at a very low level. An example of this is the change in the law that was introduced during the pandemic. By amending the law on special solutions related to the prevention, counteraction and combating of COVID-19, the possibility was introduced for the Prime Minister to dismiss members of the Social Dialogue Council.[5] The Council for Social Dialogue constitutes a forum for tripartite dialogue in Poland and cooperation between the workers' side, the employers' side, and the governmental side, functioning at the central level. The amendment was introduced by an Act of 31 March 2020.[6] After numerous voices against such measures, the relevant provisions were removed in the same year (with effect from 5 December[7]). However, they shook the social partners' confidence in the way the tripartite dialogue was centrally interfered with. The situation described had nothing to do with the pandemic—the change in the law regarding the Social Dialogue Council was carried out on the occasion of an amendment to the law dedicated to COVID-19 issues. Actions that took place 2020 were there side unanimously interpreted by the social partners as an attempt to limit the autonomy of the Social

Dialogue Council and, in the process, the independence of the organisations of trade unions and employers (Duda & Potocki, 2021, p. 14).

The weakness of social dialogue, and thus the weak role of employers in creating the public environment, was also evident during the pandemic. At the early stage of the pandemic, despite the increased demand, the Social Dialogue Council met very infrequently. The low frequency of meetings in problem teams and ad hoc teams within the Social Dialogue Council was, according to trade unionists, one of the main weaknesses of social dialogue in Poland during the pandemic. Of the thirteen teams and subgroups analysed, two met in 2020 as often as in 2019, while one met more often than in the previous year. In the remaining ten teams and sub-teams, meetings were held less frequently. In contrast, the number of meetings of the Presidium of the Social Dialogue Council and the number of plenary meetings exceeded or equalled the number of meetings in 2019. Trade unionists point out that this state of affairs was not even changed by requests from trade unions for meetings. For example, these requests were responded to by convening a meeting with an incomprehensible delay (Duda & Potocki, 2021, p. 14).

Actions that took place 2020 were there side unanimously interpreted by the social partners as an attempt to limit the autonomy of the Social Dialogue Council and, in the process, the independence of the organisations of trade unions and employers. In the Act of 31 March 2020 (Article 46) amending the Act on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and emergencies caused by them, as well as some other acts, there was a provision empowering the Prime Minister to dismiss members of the Social Dialogue Council who are representatives of the workers' side, the employers' side and the governmental side, with or without a request from these organisations. This power could be exercised by the Prime Minister in the case of loss of confidence related to information concerning work, cooperation or service in the state security organs (within the meaning of the lustration act) and misappropriation of the activities of the Council, which led to the impossibility of conducting a transparent, substantive and regular dialogue between workers' and employers' organisations and the government side.

On 20 January 2022, an event unprecedented in national social dialogue took place. Members of the Social Dialogue Council (including the three largest trade union organisations and six employer organisations) signed an appeal to the authorities to make vaccination against the

SARS-CoV-2 virus mandatory (APEL strony pracowników i strony pracodawców Rady Dialogu Społecznego w sprawie szczepień przeciw COVID–19).

Among other things, the appeal pointed out that it was indisputable that the most effective method of combating infectious diseases including COVID-19 is vaccination, which was associated with benefits both in the area of social life and the working environment. At that time, vaccination against the SARS-CoV-2 virus outside the health sector, were not mandatory, hence public awareness played a huge role in preventing transmission of the infection through vaccination (APEL strony pracowników i strony pracodawców Rady Dialogu Społecznego w sprawie szczepień przeciw COVID–19).

The unprecedented nature of the action described is to be seen both in unusual on such a scale the agreement of the workers' and employers' organisations and in the fact that these actors became the fuse for change. Although this fuse turned out to be a misfire (as in the end mandatory vaccinations were not introduced), the situation has become an important precedent showing that the public role played by employers can exist in yet another, hitherto unknown version. This role would consist not only in carrying out public tasks, but in demanding their legal sanction and subsequent compliance by the state. The above would be justified by the need to care for the common good.

Conclusion

The analysis made for the purposes of this chapter, due to the limitations of its length, is certainly not exhaustive. However, it is a contribution to further analyses concerning changes in the performance of public tasks by employers that affect the degree to which labour law relations are saturated with public characteristics. The above issues need to be developed especially in the context of the axiology underlying the burden of public duties on employers. This applies both to times of pandemic (or other extraordinary phenomena), which are by definition transitory and specific in terms of the challenges to be met, and periods characterised by stability.

The relationships regulated by labour law, analysed from the point of view of the obligations of employers and the roles they fulfil, are evolving due to changing social relations in the world of work. What has remained constant since the very systemic emergence of labour law is its specific role, which is linked to the type of relations it regulates. Relationships

which by their very nature are imbued with 'socialisation', as they are directed towards the performance of numerous social functions. Labour law, which regulates various types of relations, thus remains a kind of hybrid between public and private law, carrying out public tasks to varying degrees through the activities of employers. The degree of their (mandatory, regulated by the law or voluntary) involvement in the fulfilment of public tasks depends on a number of factors. These factors include, for instance, the distribution of power between the state and employers—in a situation of greater social influence by employers, they should take over some of the public tasks, as they guarantee its better implementation. Factors influencing the involvement of companies in public tasks are, of course, also the economic system in which they operate.

The SARS-CoV-2 pandemic has shown that the public role of relations shaped by labour law remains extremely important, even becoming crucial in emergency situations. The above observation should therefore encourage constant attention to the level of dialogue between the social partners—so that they are not only competent to undertake new activities of a public nature, but also socially empowered to do so. Such empowerment consists of building a coherent message that employers can and should participate in the performance of different types of public tasks.

Notes

1. One such state is certainly the ongoing war in Ukraine and its impact on the formation of various processes related to the broadly understood world of work in Poland—a country whose labour market realities, due to its geographical neighbourhood to Ukraine, have been put to the test in various respects due to the ongoing war. This test confirms the strong embedding of labour law relations in the public sphere, as will be discussed in detail further on.
2. More progressive views even focus on the fact that health improvement programmes should be implemented in workplaces, for the overall wellbeing of employees (Litchfield et al., 2018, p. 3).
3. 3. COVID-19-Maßnahmenverordnung – 3. COVID-19-MV; 25. Oktober 2021; 441. Verordnung; https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2021_II_441/BGBLA_2021_II_441.html
4. Disposizioni urgenti per l'accesso alle attivita' culturali, sportive e ricreative, nonche' per l'organizzazione di pubbliche amministrazioni e in materia di protezione dei dati personali. (21G00153) (GU Serie Generale n.241 del 08-10-2021), 1–6, https://www.gazzettaufficiale.it/eli/id/2021/10/08/21G00153/sg

5. Such a dismissal could have taken place in case of:

    1) loss of confidence related to information concerning work, cooperation or service in state security bodies within the meaning of art. 2 of the Act of 18 October 2006 on disclosing information on documents of state security bodies from the years 1944–1990 and the content of such documents;
    2) misappropriation of the Council's activities leading to the impossibility of conducting a transparent, substantive and regular dialogue between the organisations of employees and employers and the government party.

    The second premise in particular has caused significant social tensions.
6. Ustawa z dnia 31 marca 2020 r. o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw (Dz. U. poz. 568 z późn. zm.).
7. Ustawa z dnia 27 listopada 2020 r. o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw (Dz. U. poz. 2157).

References

"APEL strony pracowników i strony pracodawców Rady Dialogu Społecznego w sprawie szczepień przeciw COVID–19." https://www.cpsdialog.gov.pl/index.php/aktualnosci/101-aktualnosci/652-apel-strony-pracownikow-i-strony-pracodawcow-rady-dialogu-spolecznego-w-sprawie-szczepien-przeciw-covid-19.

Belli, G. (2018). "Here's how many years You'll spend at work in your lifetime." https://www.payscale.com/career-advice/heres-how-many-years-youll-spend-work-in-your-lifetime/.

Cartwright, R. (2017). *Mastering the globalization of business.* Macmillan Education UK.

Duda, K., & Potocki, P. (2021). *Dialog społeczny w czasie pandemii COVID-19.* Fundacja Centrum im. Ignacego Daszyńskiego & Fundacja im. Friedricha Eberta.

Dukes, R. (2011). Hugo Sinzheimer and the constitutional function of labour law. In *The idea of labour law*. Oxford.

Estanque, E., & Costa, H. A. (2012). Labour relations and social movements in the 21st century. In *Sociological landscape - theories, realities and trends.* IntechOpen.

Gettysburg College. One third of your life is spent at work. https://www.gettysburg.edu/news/stories?id=79db7b34-630c-4f49-ad32-4ab9ea48e72b.

Gruza, Ł. (2021). PIP dopuszcza bonus dla pracownika za szczepienie. Ale nie gwarantuje, że sądy też. *Dziennik Gazeta Prawna, 25*(10).

Ilany, Y., & Skąpski, M. (2021). Employer's right to ban unvaccinated (COVID-19) employees from the workplace in Israel and Poland. *Praca i Zabezpieczenie Społeczne, 8*, 3.

Kiersztyn, A. (2014). Prekariat i postawy obywatelskie Polaków. *Polityka Społeczna, 4.*

Klare, K. E. (1982). Public/private distinction *in* labor law. *University of Pennsylvania Law Review, 130/6.*

Litchfield, P., Cooper, C., Hancock, C., & Watt, P. (2018). Work and wellbeing in the 21st century. *International Journal of Environmental Research and Public Health, 13*(11), 106.

Mäkinen, J., & Kourula, A. (2012). Pluralism in political corporate social responsibility. *Business Ethics Quarterly, 22*, 4.

Mayes, D. G. (2001). Introduction. In *Social exclusion and European policy*. Edward Elgar.

Musiała, A. (2017a). Prawo pracy: prawo publiczne czy prawo prywatne. *Praca i Zabezpieczenie Społeczne, 12.*

Musiała, A. (2017b). Publicznoprawny a prywatnoprawny element władzy w ramach instytucji stosunku pracy. In *Księga Jubileuszowa Prof. Grzegorza Goździewicza*. TNOiK.

Musiała, A. (2019). Pracodawca jako podmiot administrujący. *Monitor Prawa Pracy, 9.*

Musiała, A. (2020). *Polskie prawo pracy: czyje? Res publica!* Wydawnictwo UAM.

Pisarczyk, Ł. (2008). *Ryzyko pracodawcy*. Wolters Kluwer.

Skoulding, Lucy. 2018. How long does the average UK employee spend at work?. https://www.accountancyage.com/2018/10/02/how-long-does-the-average-uk-employee-spend-at-work/.

Sobczyk, A. (2015). *Wolność pracy i władza*. Wolters Kluwer.

Sobczyk, A. (2017). *Państwo zakładów pracy*. Wolters Kluwer.

CHAPTER 15

Against All Odds: A History of Resilience and Human Centred Recovery for the EU

Edoardo Ales

Introduction

In the beginning there was the European flood of 2002, which occurred not only in some Member States (Austria and Germany, above all) but also in countries at that time negotiating their accession, like Bulgaria, Czech Republic, Hungary, Romania and Slovakia. The event killed 232 people and left €27.7 billion in damage. Operating within the framework of the economic, social and territorial cohesion and relying on article 175(3) TFEU, the Council adopted Regulation (EC) No 2002/2012 of 11 November 2002 establishing the European Union Solidarity Fund (EUSF),[1] as amended, first, by Regulation (EU) No 2014/661 of 15 May 2014.[2] Then, and more substantially, Regulation 2002/2012 has been amended by Regulation (EU) No 2020/461 of 30 March 2020,[3] in order

E. Ales (✉)
University of Naples "Parthenope", Naples, Italy

Fondazione M. Biagi, Modena, Italy

University of Western Cape, Western Cape, South Africa
e-mail: edoardo.ales@uniparthenope.it

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0_15

to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency. The reference is to the pandemic, of course.

In the same framework of the economic, social and territorial cohesion but with the specific purpose "to define the tasks, priority objectives and the organisation of the Structural Funds" (article 177 TFEU), the Council and the Parliament have adopted Regulation (EU) No 2020/2221 of 23 December 2020 amending Regulation (EU) No 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (so called REACT-EU).[4]

Again, in that framework, the European Parliament and the Council have adopted Regulation (EU) No 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility (RRF).[5] On the other hand, in order to "ensure that the conditions necessary for the competitiveness of the Union's industry exist" (article 173 TFEU), even in the wake of the pandemic, the Parliament and the Council, relying also in that case on article 175(3) TFEU, have adopted Regulation (EU) No 2021/523 of 24 March 2021[6] establishing the InvestEU Programme and amending Regulation (EU) No 2015/1017.[7]

The economic, social and territorial cohesion is also the framework within which the Council has adopted Regulation (EC) No 2006/1927 of 20 December 2006 establishing the European Globalisation Adjustment Fund (EGF),[8] as amended by Regulation (EC) No 2009/546 of 18 June 2009,[9] repealed and substituted by Regulation (EU) No 2013/1309 of 17 December 2013,[10] at turn repealed and substituted by Regulation (EU) No 2021/691 of 28 April 2021.[11]

A second framework within which the EU Institutions have operated is that of the exceptional occurrences beyond a Member State's control (article 122(2) TFEU), as activated in the wake of the financial and sovereign debt crisis, the combined effects of which brought some Member States of the Eurozone (Greece, Ireland and Portugal) on the edge of default. Article 122 TFEU has been used as legal basis for the adoption by the Council of Regulation (EU) No 2010/407 of 11 May 2010 establishing a European financial stabilisation mechanism (EFSM); but also for the adoption by the Council and the Parliament of Regulation (EU) No 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an

emergency (SURE) following the COVID-19 outbreak; as well as of Regulation (EU) No 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (ILLe-J, 2020).

A third framework, intimately linked to the second and to the events that have triggered its activation, is the safeguard of the stability of the euro area as a whole, within which Member States whose currency is the euro may establish a stability mechanism (article 136(3) TFEU). It has resulted in the signature, on 2 February 2012, of the Treaty establishing the European Stability Mechanism (ESM).

Such a massive flow of money, in the form of grants or loans, together with any other financial support coming from any EU budget headings, due to the questionable conduct of some Member States have been submitted to the rule of law test, introduced, as financial rule which determines the procedure to be adopted for establishing and implementing the EU budget (article 322(1)(a) TFEU), by Regulation (EU, Euratom) No 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.[12]

The outbreak of war in Ukraine and the support provided by the EU have added a heavy burden to its budget in direct terms as demonstrated by the approval by the European Parliament of the Commission's proposal for a regulation on establishing the Act in Support of Ammunition Production (so called ASAP), which will cost 513 million. On top of that, the proposed regulation allows resources allocated to Member States under shared management[13] being transferred, at their request to an instrument financially supporting industrial reinforcement for the production of the relevant defence products in the Union, including through the supply of their components, with the risk that resources allocated for human centred recovery purposes would be diverted, by some national government to favour their arms industry while supporting Ukraine.

Being aware of that risk, in the following paragraphs it will be investigated how all those instruments contribute to realize a human centred recovery from all the odds the EU, its Member States, Citizens and workers have been faced in the last two decades.

From Natural Disasters to the Pandemic, with a View on the Side Effects of Globalization: The Economic, Social and Territorial Cohesion Route to a Human Centred Recovery

As already emphasized, the economic, social and territorial cohesion perspective and its relevant operational provision (article 175(3) TFEU) have been used, respectively, as stepping stone and legal basis for the adoption of a wide range of EU instruments that share a purpose of recovery from the odds occurred in the last two decades. This is mainly due to the encompassing nature of the very notion of economic, social and territorial cohesion ("promotion of the overall harmonious development of the Union": article 174 TFEU) and to the versatility of article 175(3) TFEU ("if specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies").

The EUSF

Therefore, one can easily understand why, despite the existence of several structural funds, on 11 November 2002, only two months after the European flood, the Council adopted Regulation 2002/2012, establishing the European Union Solidarity Fund (EUSF). A little over twenty years later, the EUSF is going to be activated by the Italian Government committed to recover Romagna where another devastating flood killed 15 people and left billion in damage. The EUSF is instrumental for the Union to show, in case of major natural disasters, "its solidarity with the population of the regions concerned by providing financial assistance to contribute to a rapid return to normal living conditions in the disaster-stricken regions" (recital 1). Such an additional instrument enables the Union "to act swiftly and efficiently to help, as quickly as possible, in mobilising emergency services to meet people's immediate needs and contribute to the short-term restoration of damaged key infrastructure so that economic activity can resume in the disaster-stricken regions" (recital 2).

Some years later, Regulation 2014/661 amended Regulation 2002/2012, with a view to make the notion of (major) natural disaster unambiguous, in the sense that it "should be further defined as a disaster

that has caused direct damage above a threshold expressed in financial terms" (recital 9).

Some days after the outbreak of the pandemic, Regulation 2020/461 amended Regulation 2002/2012, adding that the Union should show its solidarity with Member States and the population concerned, also in the event of major public health emergencies, "by providing financial assistance to help the population affected, to contribute to a rapid return to normal living conditions in the affected regions and to contain the spreading of infectious diseases" (recital 2). "A major crisis situation may result from public health emergencies, in particular an officially declared virus pandemic" (recital 4). Therefore, one could say that the EUSF has been the first instrument of recovery available at the very beginning of the emergency.

The EUSF operates on the ground of the subsidiarity and proportionality principles as affirmed by Art. 5 TUE. In fact, "Union assistance should only be awarded upon application by the affected State" (recital 8 Regulation 2020/461); "action under this Regulation should be confined to major public health emergencies" (recital 6); "Union assistance should be complementary to the efforts of the States concerned and be used to cover a share of the public expenditure committed to dealing with the most essential emergency operations resulting from the emergency situation" (recital 7).

In its actual version, Regulation 2002/2012 defines a "major public health emergency" as any life-threatening or otherwise serious hazard to health of biological origin in an eligible State seriously affecting human health and requiring decisive action to contain further spreading, resulting in a public financial burden inflicted on the eligible State for emergency response measures estimated at over EUR 1500000000 in 2011 prices, or more than 0,3% of its GNI [Gross National Income]" (article 2(2a)).

The assistance shall take the form of a non-repayable financial contribution from the EUSF and shall provide essential emergency and recovery operations consisting of "(a) restoring the working order of infrastructure and plant in the fields of energy, water and waste water, telecommunications, transport, health and education; (b) providing temporary accommodation and funding rescue services to meet the needs of the population concerned; (c) securing preventive infrastructure and measures of protection of cultural heritage; (d) cleaning up disaster-stricken areas, including natural zones, in line with, where appropriate, eco-system based approaches, as well as immediate restoration of affected natural zones to

avoid immediate effects from soil erosion; (e) measures aiming at rapidly providing assistance, including medical, to the population affected by a major public health emergency and to protect the population from the risk of being affected, including prevention, monitoring or control of the spread of diseases, combating severe risks to public health or mitigating their impact on public health." (article 3(2)).

The amendments provided for by Regulation 2020/461 only partially touch the very core of Regulation 2002/2012, that is, article 4 (contents of the application) and article 8 ("report on the implementation of the financial contribution from the Fund with a statement justifying the expenditure, indicating any other source of funding received for the operations concerned, including insurance settlements and compensation from third parties").

Indeed, article 4 does not contain any references to "major public health emergency". In fact, as far as the application is concerned, all available information shall be provided by the Member State regarding: "(a) the total direct damage caused by the natural disaster and its impact on the population, the economy and the environment; (b) the estimated cost of the essential emergency and recovery operations; (c) any other sources of Union funding; (d) any other sources of national or international funding, including public and private insurance coverage which might contribute to the costs of repairing the damage; (e) a short description of the implementation of Union legislation on disaster risk prevention and management related to the nature of the natural disaster".

On the other hand, article 8, although insisting on "the state of implementation of relevant Union legislation on disaster risk prevention and management" (lett. b), also requires the implementation report to set out "the preventive measures taken or proposed by the beneficiary State to limit future damage and to avoid, to the extent possible, a recurrence of similar natural disasters or *public health emergencies*" (lett. a); "the experience gained from the disaster or *emergency* and the measures taken or proposed to ensure environmental protection and resilience in relation to climate change, natural disasters and *public health emergencies*" (lett. c); and "any other relevant information on prevention and mitigation measures taken related to the nature of the natural disaster or *public health emergency*" (lett. d).

Crucial for the functioning of the assistance procedure is the adoption, once an agreement has been reached with the European Parliament and the Council, of an implementing decision by the Commission, awarding

the financial contribution from the EUSF, to be paid immediately and in a single instalment to the beneficiary State (article 4(4)).

Responsibility for selecting individual operations and implementing the financial contribution from the EUSF, the management of operations supported by it as well as the financial control of the operations shall lie with the beneficiary State, that shall designate bodies responsible for the management and control of the operations supported by the EUSF (article 5(5)(6)).

Without prejudice to the powers of the Court of Auditors or the checks carried out by the beneficiary State in accordance with national laws, regulations and administrative provisions, the Commission may carry out on-the-spot checks on the operations financed by the EUSF. The Commission shall give notice to the beneficiary State with a view to obtaining all the assistance necessary. Officials or other servants of the Member State concerned may take part in such checks (article 5(8)).

It is rather clear that the EUSF mechanism is quite relaxed, leaving to the beneficiary Member State a relevant margin of manoeuvre in selecting targets, managing the non-repayable financial contribution, reporting to the Commission. Even the reference to "the state of implementation of relevant Union legislation on disaster risk prevention and management" and "the preventive measures taken or proposed by the beneficiary State to limit future damage and to avoid, to the extent possible, a recurrence of similar natural disasters or *public health emergencies*", looks like a formal more than a substantive requirement the assistance is made conditional upon.

Such a relaxed approach, together with the kind of essential emergency and recovery operations to be pursued by the beneficiary State and the non-repayable nature of the financial support make the EUSF a good example of human centred recovery instrument.

The EGF

Although not comparable to a major natural disaster or a major public health emergency, the side effects of globalization have stated to be perceived by the EU in the first decade of the new millennium, as explicitly recognized by Regulation 2006/1927: "Notwithstanding the positive effects of globalisation on growth, jobs and prosperity and the need to enhance European competitiveness further through structural change, globalisation may also have negative consequences for the most vulnerable

and least qualified workers in some sectors. It is therefore opportune to establish a European Globalisation adjustment Fund (the EGF), accessible to all Member States, through which the Community would show its solidarity towards workers affected by redundancies resulting from changes in world trade patterns" (recital 1).

The EGF provides "specific, one-off support to facilitate the re-integration into employment of workers in areas, sectors territories, or labour market regions suffering the shock of serious economic disruption [and] promote entrepreneurship, for example through micro-credits or for setting up cooperative projects" (recital 3).

As it happens with the EUSF, the Member States "remain responsible for the implementation of the financial contribution and for the management and control of the actions supported by Community financing, [and shall] justify the use made of the financial contribution received" (recital 9).

One of the main features of EGF is that its life-cycle is linked to the Multiannual Financial Framework (MFF). Therefore, it is submitted to a quinquennial assessment and revision procedure that can result in a new regulatory framework or in the abandonment of it. Till now, the first has always been the case: as already mentioned, Regulation 2013/1309 on the European Globalisation Adjustment FundEGF (2014–2020) has repealed and substituted Regulation 2006/1927; Regulation 2021/691 on the European Globalisation Adjustment Fund for displaced workers has repealed and substituted Regulation 2013/1309. This means that we will have the EGF operating at least until 2027.

It is worth to be immediately mentioned that Regulation 2006/1927 has been amended by Regulation 2009/546. This is important for at least three reasons.

First, to the original subject-matter of Regulation 2006/1927 ("with the aim of stimulating economic growth and creating more jobs in the European Union" and "to enable the Community to provide support for workers made redundant as a result of major structural changes in world trade patterns due to globalisation where these redundancies have a significant adverse impact on the regional or local economy"), it adds the "support to workers made redundant as a direct result of the global financial and economic crisis, […]. Member States applying for an EGF contribution (…) shall establish a direct and demonstrable link between the redundancies and the financial and economic crisis". (article 1a). Such an addendum was justified by the issuing by the Commission, on 26 November 2008, of the Communication on a European Economic

Recovery Plan (European Commission, 2008) based on the fundamental principles of solidarity and social justice, as a response to the financial crisis.

Second, Regulation 2009/546 modified EGF intervention criteria, in particular, reducing the number of redundancies due "to major structural changes in world trade patterns lead[ing] to serious economic disruption, in particular a substantial increase of imports into the European Union, the rapid decline of the EU market share in a given sector or a delocalisation to third countries" required for the financial intervention from 1000 to 500. A trend that has been confirmed by Regulation 2013/1309 and accentuated by Regulation 2021/691, which reduces the limit to 200.

Third, consistent with the introduction of the financial and economic crisis into the subject matter of EGF, the application shall add it to "and major structural changes in world trade patterns" when proposing the "reasoned analysis of the link between the planned redundancies and a demonstration of the number of redundancies and an explanation of the unforeseen nature of those redundancies" (art. 5(2)(a) as modified).

On the other hand, Regulation 2009/546 did not modify the eligible actions under the EGF, i.e., "active labour market measures that form part of a coordinated package of personalised services designed to re-integrate redundant workers into the labour market, including: (a) job-search assistance, occupational guidance, tailor-made training and re-training including ICT skills and certification of acquired experience, outplacement assistance and entrepreneurship promotion or aid for self-employment; (b) special time-limited measures, such as job-search allowances, mobility allowances or allowances to individuals participating in lifelong learning and training activities; and (c) measures to stimulate in particular disadvantaged or older workers, to remain in or return to the labour market". On the contrary, the EGF shall not finance passive social protection measures. (article 3).

Regulation 2009/546 did not modify either the principles according to which assistance from the EGF shall not replace actions which are the responsibility of companies by virtue of national law or collective agreements; it shall complement actions of the Member States at national, regional and local level, including those co-financed by the structural funds; it shall provide solidarity and support for individual workers made redundant as a result of structural changes in world trade patterns. On the contrary, the EGF shall not finance the restructuring of companies or sectors (article 6).

In any case, the financed amount may not exceed 50% of the total of the estimated costs of the action proposed by the applicant Member State.

The second cycle of EGF, governed by Regulation 2013/1309, has been strictly related to the launch of the Europe 2020 strategy on 26 March 2010 (Ales, 2017a), one of the three priorities of which was "inclusive growth by empowering people through high levels of employment, investing in skills, fighting poverty and modernising labour markets, training and social protection systems so as to help people anticipate and manage change, and build an inclusive, cohesive society". On top of that, Regulation 2013/1309 has been adopted at the edge of the economic and financial crisis that started in 2008. Therefore, EGF should keep on covering redundancies resulting from such disruptions (recitals 1 and 4).

Furthermore, workers made redundant and self-employed persons whose activity has ceased should have equal access to the EGF independently of their type of employment contract or employment relationship and be regarded as EGF beneficiaries (recital 7).

In such a perspective, is crucial to recall that the financial contribution from the EGF may be made available for active labour market measures that form part of a coordinated package of personalised services, designed to facilitate the re- integration of the targeted beneficiaries and, in particular, disadvantaged, older and young unemployed persons, into employment or self-employment.

Regulation 2013/1309 designs the ideal coordinated package of personalised services, to be drawn up in consultation with the targeted beneficiaries or their representatives, or the social partners, which should anticipate future labour market perspectives and required skills, as well as be compatible with the shift towards a resource-efficient and sustainable economy.

The package may consist in particular of: "(a) tailor-made training and retraining, including information and communication technology skills and certification of acquired experience, job-search assistance, occupational guidance, advisory services, mentoring, outplacement assistance, entrepreneurship promotion, aid for self- employment, business start-ups and employee take-overs, and co-operation activities; (b) special time-limited measures, such as job-search allowances, employers' recruitment incentives, mobility allowances, subsistence or training allowances (including allowances for carers), if conditional on the active participation of the targeted beneficiaries in job-search or training activities; (c) measures to

stimulate in particular disadvantaged, older and young unemployed persons to remain in or return to the labour market" (article 7(1)).

The costs of the measures under point (b) may not exceed 35% of the total costs for the coordinated package of personalised services. The cost of investments for self-employment, business start-ups and employee takeovers may not exceed EUR 15000. The total amount of the EGF financial contribution shall not exceed 60% of the total estimated costs.

Without prejudice to the Commission's responsibility for implementing the general budget of the Union, Member States shall take responsibility in the first instance for the management of actions supported by the EGF and the financial control of the actions (article 21).

The third cycle of the EGF, governed by Regulation 2021/691, is, at least formally, tightly related to the European Pillar of Social Rights (Ales, 2017b; Deinert, 2022). Actually, "the Pillar acts as an overarching guiding framework for the European Globalisation Adjustment Fund for Displaced Workers (EGF) […], allowing the Union to put the relevant principles into practice in the case of major restructuring events".

However, the only innovation of Regulation 2021/691 that seems to be somehow connected to the Pillar concerns the introduction of the notion of 'displaced worker', to be understood as "a worker, regardless of the type or duration of his or her employment relationship, whose employment contract or relationship is ended prematurely by redundancy, or whose employment contract or relationship is not renewed, for economic reasons". The same could be said about the notion of 'self-employed person' as a "natural person who employs fewer than 10 workers", which, on the other hand, confirms the prevalence of the entrepreneurial/employer status on the personal commitment, thus furtherly pushing away the EU concept of self-employment from that of autonomous work. To be noted that the ceiling to the investments for self-employment, business creation and employee take-overs has been increased to EUR 22000 per beneficiary.

Despite the last critical remarks, one could still count the EGF among the instruments clearly inspired to the idea of human centred recovery from the ongoing side effects of globalization. As a matter of fact, although adopting the co-financing approach (to 60%, incidentally), EGF aims to offer non-repayable financial support to displaced workers and self-employed (the beneficiaries) who suffers from the end of any kind of occupation to be understood as the capacity to contribute to society through work, irrespective of the legal form in which it is provided.[14]

The NextGenEU

Although adopted in April 2021, Regulation 2021/691 does not contain any references to the pandemic, as if the side effects of globalization have not been amplified by it or, on the contrary, the pandemic has slowed down the globalization process and its side effects. Whatever the case, meanwhile, the Commission had proposed (European Commission, 2020) and the Council welcomed (European Council, 2020) a new recovery instrument, the so called Next Generation EU (Italian Labour Law e-Journal, 2022). On 14 December 2020 the Parliament and the Council adopted Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis. We will come back on it later, due to the different framework in which it has been conceived and activated (exceptional occurrences beyond a Member State's control: article 122(2) TFEU).

On the contrary, economic, social and territorial cohesion and article 175(3) TFEU are the source of inspiration and the legal basis for Regulation 2021/241 establishing the RRF, the legislative instrument the whole national Recovery and Resilience Plan (RRP) mechanism stemmed from. Referring to the Pillar, Regulation 2021/241 is clearly oriented towards a human centred approach: "recovery should be achieved, and the resilience of the Union and its Member States enhanced, through the support for measures that refer to the policy areas of European relevance structured in six pillars (the 'six pillars'), namely: green transition; digital transformation; smart, sustainable and inclusive growth, including economic cohesion, jobs, productivity, competitiveness, research, development and innovation, and a well-functioning internal market with strong small and medium enterprises (SMEs); social and territorial cohesion; health, and economic, social and institutional resilience with the aim of, inter alia, increasing crisis preparedness and crisis response capacity; and policies for the next generation, children and the youth, such as education and skills" (recital 10).

This is confirmed by the statement that: "reforms and investments in social and territorial cohesion should also contribute to fighting poverty and tackling unemployment in order for Member State economies to rebound while leaving nobody behind. Those reforms and investments should lead to the creation of high-quality and stable jobs, the inclusion and integration of disadvantaged groups, and enable the strengthening of

social dialogue, infrastructure and services, as well as of social protection and welfare systems" (recital 14).

The establishment of the RRF is also the product of the awareness that: "currently, no instrument foresees direct financial support linked to the achievement of results and to the implementation of reforms and public investments of the Member States in response to challenges identified in the context of the European Semester, including the European Pillar of Social Rights and the UN Sustainable Development Goals, and with a view to having a lasting impact on the productivity and economic, social and institutional resilience of the Member States" (recital 17).

Member States needing to receive support from the RRF shall submit to the Commission a duly reasoned and substantiated RRP. The RRP shall detail how it represents a comprehensive and adequately balanced response to the economic and social situation of the Member State concerned, thereby contributing appropriately to attainment of the six pillars.

The RRP shall provide a detailed set of measures for its monitoring and implementation, including targets and milestones and estimated costs, as well as its expected impact on growth potential, job creation and economic, social and institutional resilience, including through the promotion of policies for children and the youth, and on the mitigation of the economic and social impact of the pandemic, contributing to the implementation of the Pillar, thereby enhancing the economic, social and territorial cohesion within the Union.

The RRP should include an explanation of how it contributes to effectively addressing the relevant Country Specific Recommendations (CSR) adopted by the Council in the context of the European Semester.

The RRP should also include an explanation of how it ensures that no measure for the implementation of RRP reforms and investments does significant harm to environmental objectives, ('do no significant harm' principle).

Financial support under the RRF may take the form of *sui generis* Union non-repayable contributions determined on the basis of a maximum financial contribution calculated for each Member State and considering the estimated total costs of the RRP. Financial support may also take the form of a loan, subject to the conclusion of a loan agreement with the Commission, on the basis of a duly substantiated request by the Member State concerned.

The request for loan support shall be justified by the higher financial needs linked to additional reforms and investments included in the RRP,

relevant in particular for the green and digital transitions, and by a higher cost of the RRP than the maximum financial contribution allocated via the non-repayable contribution.

For reasons of efficiency and simplification in the financial management of the RRF, Union financial support for RRP should take the form of financing based on the achievement of results measured by reference to milestones and targets indicated in the approved RRPs. To that end, additional loan support should be linked to additional milestones and targets compared to those relevant for the financial support (i.e., the non-repayable financial support).

Contribution by the RRF is contingent on the satisfactory fulfilment of the relevant milestones and targets by the Member States set out in the RRP, the assessment of such plans having been approved by the Council.

One can conclude that the RRF is a well balanced instrument, based on an agreement to be reached between the European Institutions and the Member States who need to be supported in the recovery and resilience effort after the pandemic. Financial support is provided in the form of non-repayable contribution. Only under request of the Member States loan agreements can be concluded with the Commission. Financing based on the achievement of results in line with the contents of the RRP embodies the fairest version of the conditionality principle. Besides, the analysis of RRP shows that the mechanism is effectively oriented towards a human centred recovery and resilience, to be understood as "the ability to face economic, social and environmental shocks or persistent structural changes in a fair, sustainable and inclusive way" (article 2(1)(5) Regulation 2021/241).

React-EU

A peculiar implementation of the economic, social and territorial cohesion approach can be found in Regulation 2020/2221 establishing the Recovery Assistance for Cohesion and the Territories of Europe ('REACT-EU').

That peculiarity shall be acknowledged in the use of article 177 TFEU instead of article 175(3) TFEU as legal basis, the former fitting more the purpose of the EU legislator as it provides that "the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and consulting the Economic and Social Committee and the Committee of the Regions, shall define the tasks,

priority objectives and the organisation of the Structural Funds" as well as "the general rules applicable to them and the provisions necessary to ensure their effectiveness and the coordination of the Funds with one another and with the other existing Financial Instruments".

Regulation 2020/2221, in accordance with the principles of subsidiarity and proportionality, lays down rules and implementing arrangements regarding the additional resources provided as REACT-EU, under which an additional exceptional amount of up to 47.5 billion for budgetary commitment from the Structural Funds for the years 2021 and 2022 is made available to support those Member States and regions that are most affected by the pandemic crisis and its social consequences and that are preparing a green, digital and resilient recovery.

In order to allow the maximum of flexibility, allocations shall be established by the Commission at Member State level, with the possibility of using REACT-EU resources to support the most deprived and the Youth Guarantee (Council of the EU, 2013). In such a perspective, support shall be provided for job creation and quality employment, in particular for people in vulnerable situations, and for social inclusion and poverty eradication measures. Investments in education, training and skills development, including reskilling and upskilling, in particular for disadvantaged groups, shall be provided for. Equal access to social services of general interest, including for children, the elderly, persons with disabilities, ethnic minorities and the homeless shall be promoted.

Since the pandemic has affected regions and municipalities differently, the involvement of regional and local authorities, social partners and civil society, in accordance with the partnership principle, is important for the preparation, implementation, monitoring and evaluation of crisis repair supported by REACT-EU.

As for the European Regional Development Fund, Member States are allowed to use the REACT-EU resources primarily for: a) investments in health services, including cross-border, and institutional, community and family-based care; b) providing support in the form of working capital or investment support to SMEs, in particular in the sectors most affected by the pandemic and needing rapid revitalisation, such as tourism and culture; c) investments contributing to the transition towards a digital and green economy; d) investments in infrastructure providing non-discriminatory basic services to citizens; e) economic support measures for those regions which are most dependent on sectors most affected by the crisis.

As for the European Social Fund, in the context of the exceptional circumstances caused by the pandemic, Member States shall use the REACT-EU resources primarily to support access to the labour market, ensuring job maintenance, including through short-time work schemes and support to the self-employed as well as entrepreneurs and freelancers, artists and creative workers, even if such support is not combined with active labour market measures, unless those measures are imposed by national law. The REACT-EU resources allocated to such schemes are to be used exclusively to support workers.

In order to enable Member States to quickly deploy the REACT-EU resources, Member States are exempted from the obligation to comply with *ex ante* conditionalities. It is nevertheless necessary that Member States carry out at least one evaluation by 31 December 2024 to assess the effectiveness, efficiency, impact and inclusiveness of the REACT-EU resources as well as how these resources have contributed to achieving the goals of the new dedicated thematic objective.

InvestEU

A further example of peculiar implementation of the economic, social and territorial cohesion approach can be found in Regulation 2021/523 establishing the InvestEU Programme, as it, although relying on the legal basis of article 175(3) TFEU, find its source of inspiration in article 173 TFEU, which is located outside the Economic, Social and Territorial Cohesion Title (XVIII), inside the Industry Title (XVII). According to article 173(1) "The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist".

Consequently, if compared to the financial support approach adopted by EUSF, EGF, RRF and REACT-EU, the InvestEU Programme offers a different perspective to recovery, based on the development of a more favourable economic environment in which the social and human dimensions shall take the centre stage.

As a matter of fact, Regulation 2021/523 establishes the InvestEU Fund, which shall provide for an 'EU guarantee' to support financing and investment operations carried out by the 'implementing partners' that contribute to objectives of the Union's internal policies. 'Implementing partners' are eligible counterparts such as a financial institution or other financial intermediary with whom the Commission has concluded a guarantee agreement. 'EU guarantee' means an overall irrevocable,

unconditional and on demand budgetary guarantee provided by the Union budget under which the budgetary guarantees take effect through the entry into force of individual guarantee agreements with 'implementing partners'.

Indeed, the InvestEU Fund is just one constituent of the InvestEU Program, which includes also the InvestEU Advisory Hub, the InvestEU Portal and blending operations.

The general purpose of the InvestEU Program is to support the policy objectives of the Union by means of financing and investment operations that contribute, among the other, to: (a) the competitiveness of the Union, including research, innovation and digitization; (b) growth and employment in the Union economy, the sustainability of the Union economy and its environmental and climate dimension and to the creation of high-quality jobs; (c) the social resilience, inclusiveness and innovativeness of the Union; (d) the promotion of scientific and technological advances, of culture, education and training; (e) the promotion of economic, social and territorial cohesion; (g) the sustainable and inclusive recovery of the Union economy after the pandemic.

The InvestEU Program has the following specific objectives: (a) supporting financing and investment operations related to sustainable infrastructure; (b) supporting financing and investment operations related to research, innovation and digitization; (c) increasing the access to and the availability of finance for SMEs and for small mid-cap companies and to enhance the global competitiveness of such SMEs; (d) increasing access to and the availability of microfinance and finance for social enterprises, to support financing and investment operations related to social investment, competences and skills, and to develop and consolidate social investment markets.

In such a perspective, the InvestEU Fund operates through four 'policy windows' (targeted areas for support by the 'EU guarantee') that mirror the just mentioned specific objectives, namely, sustainable infrastructure; research, innovation and digitization; SMEs; and social investment and skills.

The social investment and skills 'policy window' includes microfinance, social enterprise finance, social economy and measures to promote gender equality, skills, education, training and related services, social infrastructure, including health and educational infrastructure and social and student housing, social innovation, health and long-term care, inclusion and

accessibility, cultural and creative activities with a social goal, and the integration of vulnerable people, including third country nationals.

Each 'policy window' consists of an EU compartment and a Member State compartment. The EU compartment shall address Union-wide or Member State specific market failures or suboptimal investment situations in a proportionate manner. The Member State compartment shall give Member States as well as regional authorities via their Member State the possibility of contributing with a share of their resources from the funds under shared management to the provisioning for the 'EU guarantee' and of using the 'EU guarantee' for financing or investment operations in order to address specific market failures or suboptimal investment situations in their own territories, including in vulnerable and remote areas such as the outermost regions of the Union, as to be set out in the contribution agreement, in order to achieve objectives of the funds under shared management.

Concluding on the point, one could argue that the InvestEU Program may be seen as an effective complement to the financial support approach in the view of a human centred recovery enshrined into the economic, social and territorial cohesion framework provided by the TFEU, which, at turn, could be deemed to be the most favourable legislative environment at EU level within which that kind of recovery may flourish.

From the Financial Crisis to the Pandemic, with View on the Sovereign Debt Crisis: The 'exceptional occurrences beyond a Member State's control' and the 'safeguard the stability of the euro area' Routes to a Human Centred Recovery

In the Conclusions of the extraordinary meeting of the European Council (Economic Affaires) on 10 May 2010, it was announced the establishment of a European Financial Stabilization Mechanism (EFSM), as formalized by the adoption, the day after, of Regulation 2010/407, on the legal basis of article 122(2) TFEU. According to the latter, "where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned".

That was the case of Greece, explicitly mentioned in the just referred Conclusions, although Regulation 2010/407, with a good deal of pre-cognition, stayed somewhat vague, stating that "the unprecedented global financial crisis and economic downturn that have hit the world over the last two years have seriously damaged economic growth and financial stability and provoked a strong deterioration in the deficit and debt positions of the Member States". (recital 3). Indeed, "the deepening of the financial crisis has led to a severe deterioration of the borrowing conditions of several Member States beyond what can be explained by economic fundamentals. At this point, this situation, if not addressed as a matter of urgency, could present a serious threat to the financial stability of the European Union as a whole". (recital 4).

Between 2010 and 2011, Memorandum of Understanding (MoU) containing an adjustment program prepared by the beneficiary Member State to meet the economic conditions attached to the Union financial assistance, would have been signed, besides Greece, by Cyprus, Ireland and Portugal. Unfortunately, as well-known, Union financial assistance for the purposes of Regulation 2010/407, should only take the form of a loan or of a credit line granted to the Member State concerned (article 2). Non-repayable contribution was excluded. This has meant for those countries an increase of the sovereign debt outside the financial market, towards the European Institutions, which, in many cases, has jeopardize, at least in the medium run, a socially oriented, human centred recovery from the financial crisis.

The situation did not improve with the introduction, as the sovereign debt crisis worsened (European Council, 2011), of article 136(3) TFEU, according to which "the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality". As a matter of fact, the Treaty signed on 2 February 2012, establishing the European Stability Mechanism (ESM), which has assumed the tasks fulfilled by the EFSM, confirms that financial assistance shall be mainly granted in the form of loans to an ESM Member (article 16), "subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions". (article 12).

The strict conditionality imposed by the ESM Treaty has discouraged until now ESM Members to profit from the financial assistance, even at the risk of borrowing money from the open financial market, at higher interest rates and exposing their sovereign debt to speculation that may endanger the stability, and the same existence, of the Euro. Furthermore, strict conditionality acts as serious deterrent to the amendment of the ESM Treaty, agreed by the Members in 2021 but still fiercely opposed by the Italian Government, insofar as it introduces a provisions according to which "where relevant in order to internally prepare and enable it to appropriately and in a timely manner pursue the tasks conferred on it by this Treaty, the ESM may follow and assess the macroeconomic and financial situation of its Members including the sustainability of their public debt and carry out analysis of relevant information and data". Even if it should be clear enough that the exercise of such prerogatives is made conditional upon an ESM Member request of financial assistance, the fact that this has been not made explicit in article 3 is likely to increase mutual distrust between the ESM and a Member State that in the past has been threatened with being put under tutelage against its own political will.

The unattractiveness of ESM and the risks of speculation for already highly indebted Member States in recurring to the capital market led to a substantive change in the financial assistance mechanism as clearly shown by Regulation 2020/672 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak. In fact, according to article 4 "the financial assistance shall take the form of a loan granted by the Union to the Member State concerned. To that end, and in accordance with a Council implementing decision (…), the Commission shall be empowered to borrow on the capital markets or with financial institutions on behalf of the Union at the most appropriate time so as to optimise the cost of funding and preserve its reputation as the Union's issuer in the markets".

SURE has provided "financial assistance to a Member State which [was] experiencing, or [was] seriously threatened with, a severe economic disturbance caused by the COVID-19 outbreak for the financing, primarily, of short-time work schemes or similar measures aimed at protecting employees and the self-employed and thus reducing the incidence of unemployment and loss of income, as well as for the financing, as an ancillary, of some health-related measures, in particular in the workplace".

The positive outcome of the SURE experiment, as confirmed by the high number of Member States that have recurred to it, has motivated the European Institutions to replicate the 'protected' loans mechanism also in Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis. As already mentioned when analysing Regulation 2021/241, the 'protected' loans mechanism has complemented the non-repayable financial assistance that characterizes the human centred recovery instruments put in place in order to tackle the pandemic.

It is important to stress that, as it happened with Regulation 2021/241, neither Regulation 2020/672 nor Regulation 2020/2094 rely on the notion of strict conditionality that informs the ESM. All the three, even when the 'protected' loans mechanism is at stake, refer to the principle of "financing based on the achievement of results", which does not exclude the responsibility of the Member States but avoids formal and substantive interferences by the European Institutions within the political sphere of the Member State needing the financial assistance. In my view the principle of financing based on the achievement of results should be adopted also within the ESM, in order to win some more confidence in it from the Member States.

Rule of Law and State of War: Old and New Challenges for a Human Centred Resilience and Recovery

The immense economic effort and the huge flow of money the European Institutions are showering on the Member States to tackle all the odds they have been experiencing since the beginning of the new century, require a consistent monitoring mechanism on the implementation of the Union budget within the framework of article 322(1)(a) TFEU. In particular, still in the midst of the pandemic, the European Parliament and the Council adopted Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget.[15]

Regulation 2020/2092 "establishes the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States", which refers to "the Union value enshrined in Article 2 TEU" and includes "the principles of legality implying a transparent, accountable, democratic and pluralistic law-making

process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law".

According to article 2 Regulation 2020/2092, "the rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU", such as "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Regulation 2020/2092 specifies that breaches of the principles of the rule of law concern the proper functioning of the authorities (a) "implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures"; (b) "carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems" as well as (c) "the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union".

Moreover, breaches of the principles of the rule of law concern the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (b) and (c); the prevention and sanctioning of fraud; the recovery of funds unduly paid; the effective and timely cooperation with Office européen de lutte antifraude (OLAF)[16] and, in case, with European Public Prosecutor's Office (EPPO)[17] in their investigations or prosecutions in accordance with the principle of sincere cooperation; any other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union. (article 4).

One could say that the rule of law represents the sustainable face of conditionality and that it plays an essential role within the human centred recovery, obliging Member States to act in the respect of the basic principles and values of the EU, without misusing or wasting resources. Such a vision has been shared also by the Court of Justice in her decision on the

action for annulment of Regulation 2020/2092 brought by Poland and supported by Hungary on the basis that its adoption exceeds EU competences.[18] The action has been dismissed on the grounds that "Article 2 Treaty on the European Union (TEU) is not a mere statement of policy guidelines or intentions, but contains values which, (…) are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles comprising legally binding obligations for the Member States." (para. 264). "Even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another" (para. 265).

The unprecedented economic effort made by the European Institutions to recover from the pandemic has been confronted with the state of war in which Europe has found herself from February 2022. Therefore, on the one hand, there is a scarcity of resources to be invested in warfare; from the other hand, as always happens, war is a golden opportunity for arms industry to flourish. In some Member States the latter is even, although partially in public hands. Even if arms support to Ukraine is provided for free, Member States have to buy ammunitions and equipment from (public)private undertakings, needing money for it.

In such a framework, there has been some discontent on the Commission proposal (European Commission, 2023), approved by the European Parliament for a regulation on establishing the Act in Support of Ammunition Production (ASAP). In fact, as already mentioned, the proposed regulation allows resources allocated to Member States under shared management being transferred, at their request to an instrument financially supporting industrial reinforcement for the production of the relevant defence products in the Union, including through the supply of their components, with the risk that resources allocated for human centred recovery purposes would be diverted, by some national government, to favour their arms industry while supporting Ukraine.

One may wonder whether supporting Ukraine, with due account to all the circumstances, could be seen as an act of human centred resilience or, as any involvements in war an accomplice to violence and destruction.

Notes

1. *OJ L 311, 14.11.2002, p. 3–8.*
2. *OJ L 189, 27.6.2014, p. 143–154.*
3. *OJ L 99, 31.3.2020, p. 9–12.*
4. *OJ L 437, 28.12.2020, p. 30–42.*
5. *OJ L 57, 18.2.2021, p. 17–75.*
6. *OJ L 107, 26.3.2021, p. 30–89.*
7. Regulation (EU) 2015/1017 of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013—the European Fund for Strategic Investments.
8. *OJ L 404, 30.12.2006, p. 26–38.*
9. *OJ L 167, 29.6.2009, p. 12–23.*
10. *OJ L 347, 20.12.2013, p. 855–864.*
11. *OJ L 153, 3.5.2021, p. 48–70.*
12. *OJ L 433 I, 22.12.2020, p. 1–10.*
13. The reference is to Regulation (EU) 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.
14. Court of Justice of the European Union (CJEU), 12 January 2023, C-356/21, *J.K.*, ECLI:EU:C:2023:9.
15. As accompanied by the Communication from the Commission 2022/C 123/02, Guidelines on the application of the Regulation (EU, The European Atomic Energy Community (EURATOM)) 2020/2092 on a general regime of conditionality for the protection of the Union budget.
16. European Anti-fraud Office.
17. European Public Prosecutor's Office.
18. CJEU, 16 February 2022, C-157/21, ECLI:EU:C:2022:98.

References

Ales, E. (2017a). The European employment strategy as enhanced coordination: A holistic approach to EU social commitment. *European Labour Law Journal, 122.*

Ales, E. (2017b). The European pillar of social rights: An ambitious ‘soft-law guide’ to efficient employment and social outcomes. In B. Singer (Ed.), *European employment policies: Current challenges* (p. 43).

Council of the EU. (2013). Council Recommendation 22 April 2013 on establishing a Youth Guarantee (2013/C 120/01).

Deinert, O. (2022). The legal effect of the EPSR. *DLM.Int, 1*(2), 15.

European Commission. (2008). *A European economic recovery plan*, COM(2008) 800 final.

European Commission. (2020). *Europe’s moment: Repair and prepare for the next generation*, COM(2020) 456 final.

European Commission. (2023). *Proposal for a regulation of the European Parliament and of the council on establishing the act in support of ammunition production*, COM(2023) 237 final.

European Council. (2011). Decision 25 March 2011, 2011/199/EU.

European Council. (2020). Special meeting (17, 18, 19, 20 and 21 July 2020) – Conclusions.

Italian Labour Law e-Journal. (2020). Covid-19 and labour law. *A Global Review, 13*(1S) Special Issue.

Italian Labour Law e-Journal. (2022). *The NextGeneration EU in action: Impact on social and labour policies. Italian Labour Law e-Journal, 15*(1S).: Special Issue.

Index[1]

A
Accommodation approach, 128, 129
AI-human workforce, 115–119, 127–129
Albin, E., 125, 126, 128, 129
Amelia, 115, 118
Anti-gender movement, 192, 197–199
Arden, Jacinda, 238
Artificial intelligence (AI), 113–129, 173, 175, 183, 184, 234, 236, 241, 247n15, 247n16
Atypical contracts, 38

B
Balancing of collective and individual rights, 212
Basic income, 19–22, 238, 242, 246n1
Bogus self-employed person, 179

C
Care approach, 128, 129
Caregivers, 135, 166n13, 194, 240, 245
Childcare services, 77, 81, 90
Chronically ill workers, 59, 63–64, 66, 67
Climate change, 8, 9, 31, 123, 124, 233, 235, 239–241, 247n13, 272
Collective bargaining and working time, 114
Compulsory vaccination, 214, 215, 217–220, 222, 223, 225

[1] Note: Page numbers followed by 'n' refer to notes.

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

T. Addabbo et al. (eds.), *Work Beyond the Pandemic*,
https://doi.org/10.1007/978-3-031-39951-0

Corporate social responsibility (CSR), 65, 126, 260–261, 279
Covid-19, 1–4, 6, 8, 18, 23, 25, 30–32, 37, 38, 41, 43, 45, 97, 99, 101, 109, 113–129, 133–136, 139, 191–206, 211–226, 235, 237, 239, 244, 246n8, 247n12, 255, 257, 258, 261–263, 265n6, 265n7, 269, 278, 286, 287

D
Deep systemic transformation, 122, 125, 127, 128
Digital citizenship, 102
Digital divide, 109
Digitalisation, 31–33, 98, 102, 103, 106, 108, 122, 124, 125, 139, 140, 153, 154, 161, 241–242, 247n12
Digital skills, 6, 32, 97–111
Digital tools, 33, 99, 134–141, 143, 145, 146, 175
Digital workers, 115, 116, 242
Discrimination, 4, 5, 58–60, 63, 64, 83–85, 91, 135, 136, 142, 198, 201, 202, 206, 213, 220, 222, 226
Diversity, 5, 66, 71, 124

E
Economic, social and territorial cohesion, 9, 267, 268, 270–280, 282–284
Employee-oriented working time flexibility, 156
Equal employment opportunity law, 220–222
Equal use of digital devices, 111
EU budget, 9, 269
European Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency (SURE), 23, 269, 286
European social dialogue, 244
European Social Partners Framework Agreement on Digitalization, 106
European Stability Mechanism (ESM), 269, 285–287
Exceptional occurrences, 9, 268, 278, 284–287
Excessive connectivity, 135

F
Feldman, Y., 127
Financial and sovereign debt crisis, 9, 268
Flexibility, 7, 65, 76, 77, 89, 108, 122, 133, 145, 146, 152–159, 161, 165, 199, 205, 222, 239, 241, 243, 245, 281
Flexible work arrangements, 5
Flexicurity, 239, 243
Framework Directive 89/391/EEC, 172, 178

G
Gender-based violence against women, 202
Gender equality, 3, 5, 71–91, 192, 199, 200, 204, 206, 283
Gender gap, 72, 73, 78, 80, 83, 87
Globalisation, 9, 235, 237–239, 270–280
Green economy, 237, 240, 281
Green pass, 214, 215, 257

H
Health status, 5, 61, 66, 258
Home office, 160, 165, 192, 194–195, 205

Human-centred AI, 116
Human centred resilience and recovery, 9, 287–289

I
ICT, 6, 134, 136, 143, 171, 175, 275
ICT-based mobile work, 133–136
ILO Convention No. 190, 201
ILO Recommendation No. 205, 198, 199
Inclusion, 18, 19, 22, 58, 64, 65, 78, 98, 107–110, 128, 179, 186, 237, 278, 281, 283
Income support, 4, 16, 17, 19
Industry 4.0, 99, 119, 121, 122, 235, 241–242
Industry 5.0, 115, 119–123, 125, 127, 128
Involuntary part-time, 17, 74, 75
Istanbul Convention, 196–199, 201, 202, 205
Italy, 1, 4, 6, 8, 23, 25, 27–30, 37–54, 59, 72–82, 85–86, 90, 97–99, 101–102, 109, 125, 159, 212–220, 226, 257

J
Job-retention schemes, 4, 23–25, 28
Just transitions, 15, 235, 239, 240, 243–244

K
Klare, Karl E., 253

L
Labour market inequalities, 48
Labour market models, 243–244
Labour market policies, 4, 17, 30–33, 243
Labour supply, 48, 49, 72, 80–82, 90
Liberalism, 235

M
Méda, D., 128, 129
Mental health, 7, 58, 133, 171–186, 238

N
National culture, 8, 226
National Recovery and Resilience Plan, 98, 99, 102, 106, 278
Natural disasters, 9, 270–280, 284
Neoliberal policies, 237

O
Occupational safety, 3, 178, 201, 213, 214

P
Pandemic, 1–5, 7–9, 14, 17–26, 30–33, 37–54, 72, 77, 79, 81, 82, 97, 98, 101, 106, 109, 118, 119, 122, 133, 134, 136, 139, 140, 151, 152, 158–160, 165, 171, 172, 174, 191–206, 211–217, 219, 221, 222, 225, 226, 227n5, 235, 237–239, 241, 245, 251–264, 268, 270–287, 289
Partial unemployment subsidies, 239
Particularly sensitive risk groups, 179–182, 185
Platform worker, 7, 161, 172, 181–183, 185
Post work, 240
Precautionary principle, 173, 214, 226n1
Predicted probabilities, 50–53

Probit models, 44, 45, 50
Proportionality, 218, 271, 281
Psychosocial risks, 7, 141, 171–186, 201
Public character of labour law, 252
Public funds, 109
Public tasks, 253–255, 258, 260–261, 263, 264

R
Reasonable accommodation, 221, 222
Recovery and Resilience Facility (RRF), 14, 15, 268, 278–280, 282
Religious discrimination, 222, 226
Remote work, 2, 7, 98, 134, 136, 152, 175, 179, 180, 191–206
Right to disconnect, 6, 7, 133–146, 175, 176, 185
Right to health, 158, 215–217
Right to work, 215, 216, 219, 221, 223, 258
Risk-based regulation, 129

S
Self-employed (SE), 2, 5, 7, 16, 23, 39–41, 43, 49, 52, 53, 79, 114, 134, 178–179, 181–183, 185, 247n14, 276, 277, 282, 286
Shift work, 154
Short working time, 158, 159
Smith, Adam, 234, 237, 245, 246n7
Social dialogue and workers involvement, 104
Social inclusion, 18, 19, 78, 98, 108, 237, 281
Social insurance, 18, 29
Social investment, 32, 283
Social reproduction, 77
Social rights, 16, 24, 29, 114, 234, 239
Social transfer, 4, 16, 17, 42
Society 5.0, 115, 119–121, 123, 125, 128
Subordination, 151–153
Sustainability, 4, 14–17, 22, 24, 82, 122, 123, 128, 283, 286

T
Teleworking, 37, 65, 114, 134, 139, 161, 238, 239, 241
Temporal flexibility, 154–157
Transitional labour markets, 16, 25, 29
Türkiye, 191–206

U
Unemployment benefits, 16, 23, 24
Unequal work time schedules, 156
Universal basic income (UBI), 19–23, 124, 242
Utopia, 159, 235, 236

V
Vaccination, 9, 214–225, 255–260, 262, 263
Vaccine mandate, 8, 211–226
Vulnerable workers, 5

W
War in Ukraine, 235, 264n1, 269
Welfare, 4, 14, 16, 18, 21–24, 29, 32, 59, 107, 214, 236, 246n1, 279
Well-being, 3, 5–7, 21, 115, 120, 123–125, 127, 128, 146, 172–177, 184, 203, 238, 245, 247n18, 264n2
Workers' training, 104, 180
Workers with caring responsibilities, 6, 83, 135, 136, 142

Working-from-home, 137, 151, 160, 171, 192, 206
Working poor, 4, 37–54
Working time directive (WTD), 154–159, 162–165
Work-life balance, 72, 76, 79, 82–85, 88, 90, 108, 133, 134, 142, 152, 154, 156, 157, 161, 176, 195
Work time autonomy, 7, 152, 153, 159, 160, 162
World Health Organization (WHO), 97, 172, 177, 193, 196, 211, 212

Z

Zero-hours contracts, 153, 156, 160, 161, 164