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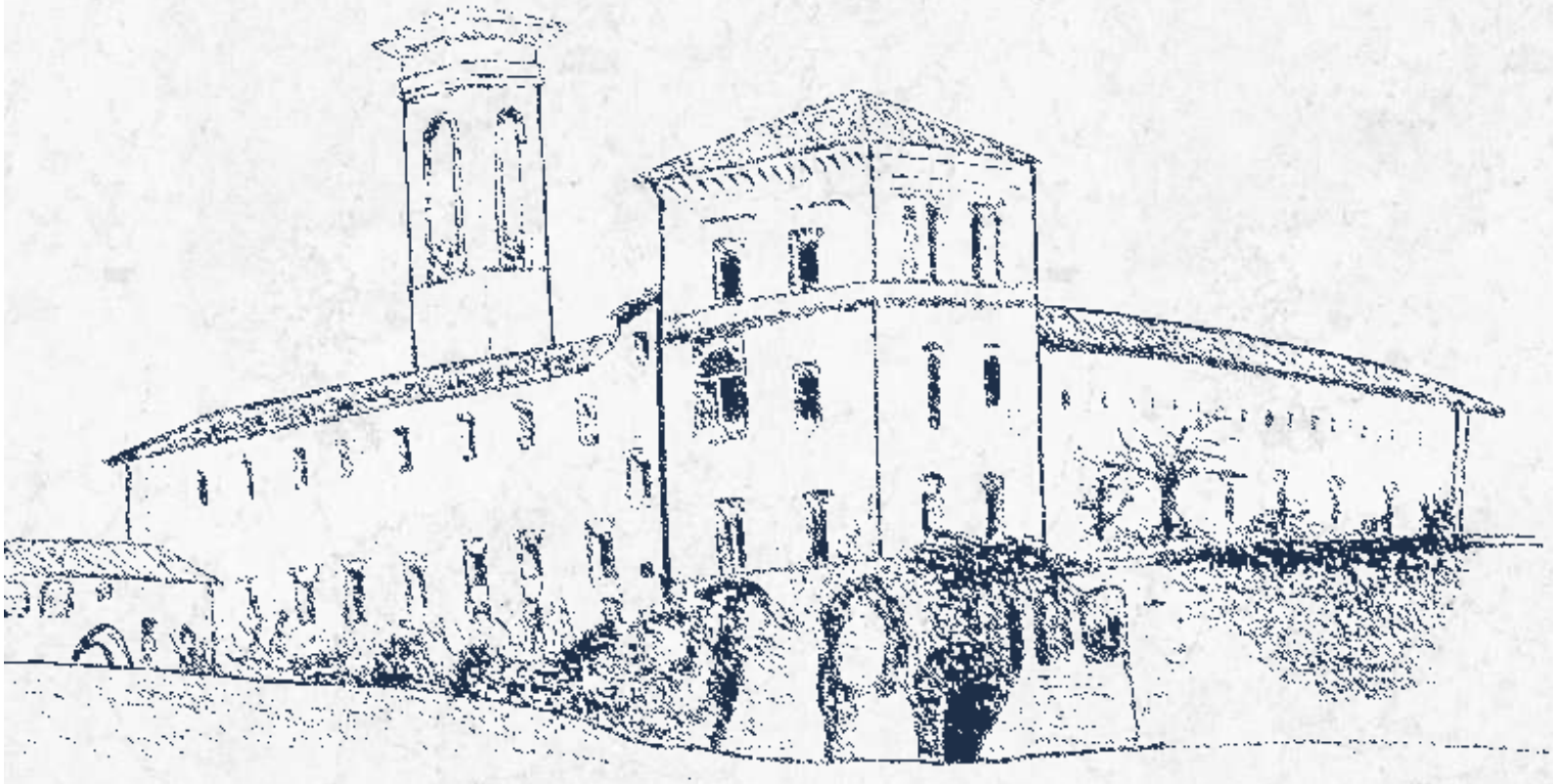

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Index

Labour Law

Industrial Relations

Labour Issues

Commentary

The New Regulation of Telework and Remote Work in Portugal: Considerations and Prospects

Catarina de Oliveira Carvalho *

Abstract

COVID-19 led to an extraordinary increase in both telework and remote work, exposing some of the fragilities and loopholes of the Portuguese applicable regulation and leading the Portuguese Parliament to approve a new law on teleworking in the form of an amendment to the Labour Code aimed at extending the protection of teleworkers. This paper intends to analyse this new regulation implemented by Law No. 83/2021 of 6 December regarding its concept and scope of application; the telework agreement and the principle of volunteering; teleworkers' rights and employers' duties related to equipment, tools and teleworking-related expenses; employers' duty to abstain from any contact during rest periods; privacy and data protection; health, safety and work-related accidents; and the right to telework, namely for work-life balance reasons. The final objective is to provide a critical overview of the legal regulation, assessing its strengths and weaknesses.

Keywords: *Telework; Remote work; Work-life balance; Duty not to connect; Portugal; Gender equality.*

1. Brief Introduction: The Context

On 5 November 2021, the Portuguese Parliament approved a new law on teleworking, amending both the Labour Code[1] and Law No. 98/2009 of 4

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[1] Approved by Law No. 7/2009, of 12 February. Portuguese legislation can be consulted at: www.dre.pt. An updated version of the Portuguese Labour Code is available at: https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1156&tabela=leis.

December, which regulate compensation for accidents at work and occupational illnesses[2]. This amendment was passed hastily, before the dissolution of Parliament, after the 2022 state budget was rejected[3]. Nevertheless, the reform of telework regulation had been under discussion since March 2021, because of the problems raised by the massive use of remote work due to the COVID-19 pandemic[4].

Portugal was the first member state to enact legislation to implement the European Framework Agreement on Telework of 16 July 2002 negotiated by the social partners at the European level. That was done through a provision contained in the 2003 Labour Code[5] (articles 233-243), which was later on modified by the 2009 Labour Code (articles 165-171). The wording of the national legislation followed almost verbatim the text of the European Framework Agreement, which was in some way surprising, since this is mainly a policy document[6], and it proved inadequate to cope with the new issues arising from remote work when performed during the pandemic[7].

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[2] An updated version is available at: https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1156&tabela=leis.

[3] The dissolution of Parliament was announced by the President after the rejection of the State budget for 2022 on 27 October 2021, although Parliament did not know exactly when it would take place, which justified the urge to approve all pending legislation. Dissolution occurred on 5 December 2021 (approved by Presidential Decree No. 91/2021) in order to give time for the approval of emergency legislation regarding the Covid-19 pandemic. See https://www.parlamento.pt/Paginas/2021/novembro/atividade-parlamentar-periodo-dissolucao.aspx?n=12.

[4] In the French context, M. Babin, *Télétravail et santé: le risque à distance*, in *La Semaine Juridique – Édition Sociale* 2020, No. 38, 27, also has no doubts that "this exceptional period will produce research and practices (and perhaps also litigation) in terms of the legal organization of telework".

[5] Approved by Law No. 99/2003, of 27 August, available at: https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=441&tabela=lei_velhas&nversao=6&so_miolo=.

[6] See M. R. Redinha, *Teletrabalho. Anotação aos artigos 233.º a 243.º do Código do Trabalho de 2003*, 1, available at http://www.cije.up.pt/download-file/216 (accessed May 20, 2022); M. I. Gomes, *O teletrabalho e as condições de trabalho: desafios e problemas*, in M. M. Carvalho (ed.), *E.Tec Yearbook 2020 AI & Robotics*, JusGov – Research Centre for Justice and Governance and University of Minho (School of Law), Braga, 2020, 146, available at: https://www.jusgov.uminho.pt/pt-pt/publicacoes/anuario-etec-2020-2/ (accessed May 20, 2022).

[7] M. I. Gomes, *op. cit.*, 147, 168, passim; J. M. V. Gomes, *O teletrabalho obrigatório em tempos de COVID-19 e algumas insuficiências do regime jurídico português*, in M. R. Palma Ramalho/J. N. Vicente/ C. de O. Carvalho (eds.), *Work in a digital era: legal challenges*, AAFDL, Lisboa, 2022, 183 205, passim.

In reality, although Portugal has regulated telework since 2003, there is no relevant case law[8], which can be easily understood if we take into account the statistics on the number of teleworkers in the country. In 2014, there were 805 teleworkers in absolute terms, 0.05% of the total number of employment contracts[9]. In 2018, this percentage went down to 0.03%, showing a downward trend[10]. Yet, these numbers contrast with the ones identified during the COVID-19 pandemic. In the second quarter of 2020, the employed population engaged in some form of remote work was estimated at 1,094.4 thousand people, that is 23.1% of the total employed population[11]. Telework and other forms of remote work became massive and, so new risks and challenges became evident, namely in terms of safety and health conditions, working time and rest periods, work-life balance, privacy, and isolation[12]. As a result, emergency legislation regarding telework and remote work was enacted and continually amended according to the pandemic evolution, often moving away from the principle of 'voluntariness'[13]. With the stabilization of the pandemic situation, this legislation was no longer in force, but there are surveys that point to a significant increase in companies' willingness to resort to teleworking[14]. According to a survey by CIP/ISCTE[15], 48% of the companies

[8] In this sense, M. R. Redinha, *O teletrabalho*, in A. Moreira (ed.), *II Congresso nacional de direito do trabalho – Memórias*, Almedina, Coimbra, 1999, 102, refers to telework as "much ado about nothing". Similarly, in Italy, B. Caruso, *Tra lasciti and rovine of the pandemic: piú o meno* smartworking*?*, in *Rivista Italiana di Diritto del Lavoro* 2020-I, 221-222, states that "agile work" has been practically absent from case-law, as well as its historical precedent, telework, in relation to which the author claims to know only three decisions over twenty years.

[9] See Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre as relações laborais 2016*, Lisboa, 2016, 177-178, available at https://www.portugal.gov.pt/pt/gc21/comunicacao/documento?i=20170322-mtsss-livro-verde (accessed May 20, 2022).

[10] Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre o futuro do trabalho*, Lisboa, March 2022, 61, available at: http://www.gep.mtsss.gov.pt/documents/10182/55245/livro_verde_do_trabalho_2021.pdf/daa7a646-868a-4cdb-9651-08aa8b065e45 (accessed May 20, 2022).

[11] Statistics Portugal (INE), available at: https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_destaques&DESTAQUESdest_boui=445841978&DESTAQUESmodo=2 (accessed May 20, 2022).

[12] See Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre o futuro do trabalho*, cit., 59 and 60.

[13] Regarding the Portuguese temporary and exceptional regulation of telework and remote work, see D. A. Sousa, *Breve viagem pelo regime de teletrabalho na "legislação COVID"*, in M. R. Palma Ramalho/ T. Moreira, *Covid-19 e Trabalho: o Dia Seguinte*, AAFDL, Lisboa, 2020, 49 ff.; T. C. Moreira, *Teletrabalho em tempos de pandemia: algumas questões*, in *Revista Internacional de Direito do Trabalho*, 2021, No. 1, 1305 ff., available at: www.ridt.pt (accessed May 30, 2022).

[14] Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre o futuro do trabalho*, cit., 63.

surveyed expect to continue to make use of this work arrangement in the future. Reduction of costs and employees' motivation are the main advantages of teleworking mentioned by employers, while the overlap with domestic and family tasks and the lack of communication between teams are pointed out as the main disadvantages thereof[16]. From the perspective of workers who spent a period on remote work during the pandemic, a significant number (43%) was more or much more dissatisfied compared to working onsite, while 37% claimed to be more or much more satisfied, and 21% were not interested in this comparison[17].

In this context, in May 2021, the Portuguese Parliament began to discuss a number of bills presented by the different political parties to increase the protection of teleworkers provided for in the Labour Code. Law No. 83/2021 was issued on 6 November 2021 and entered into force on 1 January 2022. The President enacted this piece of legislation, although stating that, in the future, these subjects should be discussed through social dialogue, and drawing attention to the fact that the law also provided implementation details[18].

2. Definition and Scope

According to the current definition, telework means the provision of work in the form of legal subordination of the employee to an employer, in a place not determined by the latter, using information and communication technologies (article 165 of the Labour Code).

Law No. 83/2021 introduced some minor changes to this definition, without amending its main aspects: work was performed outside the employer's premises through information and communication technologies[19], thus

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[15] Confederação Empresarial de Portugal (CIP)/ Marketing FutureCast Lab of ISCTE (University Institute of Lisboa), *Sinais vitais – Teletrabalho*, 2020, presentation available at: https://fronteirasxxi.pt/wp-content/uploads/2020/06/2020-06-01_CIP_SinaisVitais_Teletrabalho.pdf (accessed May 20, 2022).

[16] Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre o futuro do trabalho*, cit., 63.

[17] P. A. Silva, R. M. Carmo, F. Cantante, C. Cruz, P. Estêvão, L. Manso, T. S. Pereira, *Trabalho e desigualdades no grande confinamento (ii): desemprego, layoff e adaptação ao teletrabalho*, Estudos CoLABOR, No. 3/2020, CoLABOR, Lisboa, June 2020, 17, available at: https://colabor.pt/wp-content/uploads/2020/06/Trabalho-e-Desigualdades-no-Grande-Confinamento-II.pdf (accessed May 20, 2022).

[18] See https://www.presidencia.pt/atualidade/toda-a-atualidade/2021/11/presidente-da-republica-promulga-decreto-da-assembleia-da-republica-162056/ (accessed May 20, 2022).

[19] See J. L. Amado, *Contrato de trabalho. Noções básicas*, 3rd ed., Almedina, Coimbra, 2019, 132-133; M. R. Palma Ramalho, *Tratado de direito do trabalho. Parte IV – Contratos e regimes especiais*, Almedina, Coimbra, 2019, 171-172, 177-178; J. N. Vicente, *Modalidades de contrato de trabalho*, in J. L. Amado *et al.*, *Direito do trabalho – Relação individual*, Almedina, Coimbra, 2019, 483; L. Mella

excluding forms of remote work that do not involve their intensive use[20]. Consequently, not all remote work is legally considered telework.
Still, the new legislation has a more limited scope of application, since it refers to a place of work not determined by the employer, whereas in the past mention was made of work usually carried out outside the employer's company. Therefore, currently, it excludes, for instance, call centres. At the same time, in a somewhat contradictory way, the telework agreement must specify the regular place of work (article 166(4)(b) of the Labour Code)[21]. In fact, if the place of work is defined contractually, formally it is determined by both parties, including the employer, and it significantly reduces the employee's flexibility intended by this employment contract.
On the other hand, the new regulation extends the scope of some of its provisions, insofar as they are compatible to remote work beyond the employment contract when there is no legal subordination, but only economic dependence (article 165(2) of the Labour Code). The telework regulation is applicable *mutatis mutandis* to public employment (article 5 of Law No. 83/2021).

3. The Telework Agreement and the Principle of Voluntariness

As stated in the European Framework Agreement on Telework, this way of working should be entered into voluntary by the parties.
Therefore, according to article 166 of the Labour Code, performing telework rests on an agreement between employee and employer, which must be in writing (*ad probationem* requirement), despite some exceptions where the employee has the right to telework when this is compatible with the activity performed (see point 8). Furthermore, there is a probation period that allows either party to terminate the telework agreement during the first 30 days of its execution (article 167(4) of the Labour Code)[22].
With the recent legal reform, the principle of voluntariness is limited regarding the employer. When the activity performed is compatible with teleworking, the agreement entered into by the employee can only be refused by the employer

Méndez, *La configuración del teletrabajo en el Derecho Português: algunas reflexiones al hilo del ordenamento español,* in L. Mella Méndez/ L. Serrani (eds.), *Los actuales câmbios sociales y laborales: nuevos retos para el mundo del trabajo*, Vol. I, Peter Lang, Bern, 2017, 297.
[20] M. R. Palma Ramalho, *Tratado de direito do trabalho. Parte IV*, cit., 179.
[21] The place of work provided for in the telework agreement can be changed by the employee but only if the employer's consent is sought in writing (article 166(8) of the Labour Code).
[22] Before the 2021 reform of the Labour Code, this possibility was only recognized to onsite workers. The new wording of the legal provision provides a wider scope. See L. Mella Méndez, *op. cit.,* 305.

in writing, stating the reasons for it (article 166(7) of the Labour Code)[23]. In contrast, corroborating the aim of the amendment (teleworkers' protection), if the proposal for a telework agreement comes from the employer, the employee's refusal does not have to be substantiated and does not constitute a cause for dismissal or the application of sanctions (article 166(6) of the Labour Code). On the other hand, now the written agreement has to include the place of work, as explained above, and the work schedule, besides maximum (daily and weekly) working time limits (article 166(4) of the Labour Code). Although the objective is the protection of the employee, it can backfire on them, limiting their working flexibility and affecting some of the advantages traditionally recognized to telework, as illustrated below. That may be the reason why there is no administrative sanction for the employer who does not comply with this regulation, so the Labour Inspectorate cannot support the employee.

Moreover, if the telework agreement is a permanent, either party can terminate it by giving the other party 60-day written notice[24]. In this case, the employee resumes the activity onsite, without prejudice to their category, seniority and any other rights recognized to standard employees with identical tasks and working time (article 167(3)(5) of the Labour Code). It is not clear if these provisions are applicable also to employees who were hired as teleworkers from the beginning. If this is the case, this regulation can seriously affect the traditional powers of employers to direct and organize the labour force, making this contract less appealing.

4. Equipment, Tools, and Teleworking-related Expenses

The responsibility for providing the equipment and tools necessary to carry out work was one of the concerns raised during the pandemic crisis, along with the reimbursement of telework-related expenses[25]. Thus, the regulation of these issues by the new law is not surprising. The aim should be to make telework neutral in terms of costs for both parties, otherwise they will avoid it and its use will be limited, as before the COVID-19 pandemic.

The written agreement shall establish the ownership of the equipment, as well as the person in charge of their installation and maintenance (article 166(4)(g) of the Labour Code), a provision already existent in the previous regulation.

[23] The employer can use an internal regulation to identify the specific activities and conditions in which telework is admissible (article 166(9) of the Labour Code).

[24] In the case of a fixed-term contract, a maximum period of six months is established, although automatically renewable for an equal period if not ended, in writing, 15 days prior to its termination, by either party (article 167(2) of the Labour Code).

[25] See M. I. Gomes, *op. cit.*, 161, footnote 57.

Yet article 168 of the Labour Code now specifies that the employer is responsible for providing all the equipment necessary to carry out work and communicate with the employer. The written agreement shall determine if these are provided directly or purchased by the employee (with the employer giving consent on their characteristics and prices).
Furthermore, all additional expenses that are proven to have been incurred by the employee because of teleworking, e.g. increased energy and internet costs, as well as the respective maintenance costs, shall be paid by the employer[26].
How can the employee prove this correlation? The law clarifies that the additional expenses are the ones corresponding to the purchase or acquisition of goods and services which the employee did not previously own or benefit from, as well as those determined by comparison with the employee's expenditures in the same month of the previous calendar year. However, this criterion can raise some problems whenever the employee was already teleworking in the same month of the previous calendar year, namely due to the temporary and exceptional legislation which, during the lockdowns, enforced telework for all employees whose jobs were compatible with this way of working. Other practical problems can result from having several members of the family teleworking for different employers in the same household.
Collective bargaining can be a useful instrument to deal with legal loopholes[27], which seems to have been considered by the new law when it establishes that collective agreements shall regulate teleworking (article 492(2)(i) of the Labour Code), thus adding a new topic to the previous list of subjects that must be addressed thereby. However, the new regulation also added that collective agreements can be given priority over legal regulations governing telework only if they establish more favourable conditions (article 3(3)(k) of the Labour Code)[28].

[26] The compensation paid to the employee for the additional expenses related to the telework is deemed, for tax purposes, as a company cost and is not considered employees' income. This means that these amounts will not be subject to Personal Income Tax, nor social security contributions.
[27] J. L. Amado, *Teletrabalho: o "novo normal" dos tempos pós-pandémicos e a sua nova lei*, in *Observatório Almedina*, 29 December 2021, available at: https://observatorio.almedina.net/index.php/2021/12/29/teletrabalho-o-novo-normal-dos-tempos-pos-pandemicos-e-a-sua-nova-lei/ (accessed May 10, 2022). Less optimism regarding the role of collective agreements is shown by J. M. V. Gomes, *op. cit.*, 192-194.
[28] The 2003 Portuguese Labour Code adopted new provisions on the relation between the law and collective agreements, allowing for the latter, as a rule, to establish less favourable conditions than those prescribed by the law (it was the end of the traditional *favor laboratoris* principle set as a rule). Nevertheless, there are many exceptions to the new rule (mostly mentioned in article 3(3) of the Labour Code) where collective agreements are only allowed to

Surprisingly, also in this situation, there is no administrative sanction for the employer who does not comply with this regulation, so once again the Labour Inspectorate can do nothing about it.

5. Employers' Duties: The Duty of the Employer not to Connect

In 2018, a survey showed that 78% of Portuguese employees work outside their working schedule, while 66% admitted to answering work calls any day of the week, and 85% considered having "responsibilities that require them to be reachable"[29].

This empirical perception of an "ever-connected" or "always on" culture[30] had led, in 2017, to the presentation of several bills, by the different parliamentary representatives, aiming to regulate an employee's right or an employer's duty to disconnect[31], although none was successfully approved. The need for this regulation also gave rise to different views in legal research. Some authors considered it necessary[32], others saw it as a redundant revival of the employees' right to rest[33], already protected by the Portuguese Constitution (article 59(1)(d)) and the Labour Code (article 199). "Hyperconnectivity", or

set aside the legal regulation when establishing a more favourable treatment to employees. After the entry into force of Law No. 83/2021, telework is part of such exceptions.

[29] We refer to the survey carried out in 13 European countries by the consulting firm Michael Page, reported by the Portuguese newspaper *Público* (K. Pequenino, *Telemóvel e computador da empresa fazem portugueses levar trabalho para casa*, in *Jornal Público online,* 19 November 2018), available at: *https://www.publico.pt/2018/11/19/tecnologia/noticia/portugal-segundo-pais-leva-trabalho-casa-1851599* (accessed May 10, 2022).

[30] As T. C. Moreira, *Direito do trabalho na era digital,* Almedina, Coimbra, 2021, 106-107, puts it, "the anytime-anyplace opportunity cannot become always and everywhere", signalling the increasing confusion between what is urgent and what is important, which can lead to burnout syndrome, FOMO – Fear of missing out, and FOBT – Fear of being fired.

[31] These bills are described by D. A. Pereira, *Há vida para além do trabalho: notas sobre o direito ao repouso e a desconexão profissional*, in *Questões Laborais*, 2018, No. 53, 138-140; and T. C. Moreira, *Direito do trabalho na era digital*, cit., 121-124.

[32] For example, J. L. Amado, *Tempo de trabalho e tempo de vida: sobre o direito à desconexão profissional*, in M. Roxo (ed.), *Trabalho sem fronteiras – O papel da regulação*, Almedina, Coimbra, 2017, 127.

[33] Opinion of M. R. Palma Ramalho expressed in M. Deus, *Direito à desconexão*, in *Boletim da Ordem dos Advogados*, September 2019, 26, available at: https://portal.oa.pt/media/130361/boletim_ordem-dos-advogados_setembro_2019.pdf (accessed May 30, 2022). A similar debate is mentioned, in the Spanish context, by, *inter alios*, M. R. Vallecillo Gámez, *El derecho a la desconexión ¿"Novedad digital" o esnobismo del "viejo" derecho al descanso?,* in *Estudios financieros. Revista de trabajo y seguridad social*, 2017, No. 408, 167 ff., and in the Italian context, by E. Dagnino, *Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata*, in *Diritto delle Relazioni Industriali*, 2017, No. 4, 1033.

"infoxication"[34], became more critical during the pandemic, considering the intensive use of remote work[35]. Still, the Portuguese annual report on the evolution of collective agreements states that the regulation of telework and the right to disconnect is contained in only seven collective agreements (as compared to 12 in the previous year)[36]. This reduction was, however, attributed to the general decrease in collective bargaining during 2020 as a result of the pandemic[37].

After France[38], Italy[39], Belgium[40] and Spain[41] regulated the right to disconnect,

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34 F. Alemán Paez, *El derecho de desconexión digital: una aproximación conceptual, crítica y contextualizadora al hilo de la "Loi Travail Nº 2016-1088"*, in *Trabajo y Derecho*, 2017, No. 30 (electronic version).

35 Centro de Relações Laborais, *Relatório anual sobre a evolução da negociação coletiva em 2020,* Ministério do Trabalho, Solidariedade e Segurança Social, Lisboa, 2021, 206. Available at: https://www.crlaborais.pt/documents/10182/477060/Relat+Neg+Col+2020+pdf/6a3f2d40-b57b-4362-93b7-8d97e7a7a8b9 (accessed May 10, 2022).

36 See Centro de Relações Laborais, *Relatório anual sobre a evolução da negociação coletiva em 2020*, cit., 206-208. Also, Centro de Relações Laborais, *Negociação coletiva em números 2015 – 2020,* Ministério do Trabalho, Solidariedade e Segurança Social, Lisboa, 2022, 79-81, available at: https://www.crlaborais.pt/documents/10182/13332/NC_N%C3%BAmeros_2015_2020_pdf/07e48743-9958-46b6-bfca-b457452dbcc5 (accessed May 10, 2022). In Spain, the UGT trade union confederation laments that teleworking was gradually set aside and points out that few collective agreements on teleworking were signed in 2021: just 123 for Spain. See https://www.ugt.es/solo-123-acuerdos-colectivos-de-teletrabajo-en-2021 (accessed May 22, 2022). Regarding Italian collective bargaining, see E. Dagnino, *Il diritto alla disconnessione nell'esperienza contrattual-collettiva italiana*, in *Lavoro Diritti Europa*, 2021, No. 4, 2-13.

37 In 2020, there was a drop of 30% in collective bargaining compared to the previous year (there were only 169 collective agreements published), similar to what happened in 2011. See Centro de Relações Laborais, *Relatório anual sobre a evolução da negociação coletiva em 2020*, cit., 99.

38 Articles L2242-17 and L3121-64 of the French Labour Code. See, *inter alios*, J.-E. Ray, *Grande accélération et droit à la déconnexion*, in *Droit Social*, 2016, No. 11, 912-920; C. Mathieu, *Pas de droit à la déconnexion (du salarié) sans devoir de déconnexion (de l'employeur)*, in *Revue de Droit du Travail*, 2016, No. 10, 592-595 ; M. Péretié, A. Picault, *Le droit à la déconnexion répond à un besoin de régulation,* in *Revue de Droit du Travail*, 2016, No. 10, 595-598.

39 In the context of "smart working – lavoro agile" regulation, introduced by Law No. 81/2017, of May 22nd (article 19), although not qualifying disconnection as a right. See, *inter alios*, E. Dagnino, *Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata*, cit., 1024-1040; E. Dagnino, *'Working anytime, anywhere' and working time provisions. Insights from the Italian regulation of smart working and the right to disconnect*, in *E-Journal of International and Comparative Labour Studies,* 2020, Vol. 9, No. 3, 1-19; C. Timellini, *Il diritto alla disconnessione nella normativa italiana sul lavoro agile e nella legislazione emergenziale*, in *Lavoro Diritti Europa,* 2021, No. 4, 1-13, also developing its regulation in emergency legislation (Law No. 61/2021, of March 13th).

40 Articles 15-17 of *Loi du 26 mars 2018 relative au renforcement de la croissance économique et de la cohésion sociale.*

41 Article 88 of *Ley Orgánica No. 3/2018 de Protección de datos personales y garantía de los derechos digitales* (on the Protection of personal data and the guarantee of digital rights), of 5 December 2018, and article 18 of *Real Decreto-ley No. 28/2020 de trabajo a distanci*a (on remote work), of 22

in 2021[42], a new provision entitled "duty to refrain from contact the employee" was introduced in the Portuguese Labour Code (article 199-A). The new article 199-A expressly states that the employer shall refrain from contacting the employee during rest periods, save for situations of *force majeure*. Furthermore, the law determines that any unfavourable treatment of employees due to the exercise of their right not to be contacted, related for instance to career progression or working conditions, will be considered a discriminatory practice. The breach of this duty of the employer to refrain from contact is considered a serious administrative offense, thus calling for the intervention of the Labour Inspectorate.

This new provision was in some way unexpected, since it was introduced by the above-mentioned Law No. 83/2021 in the context of the reform of telework regulation. Although it contains another provision addressing the duty of the employer to avoid contacting teleworkers (article 169-B(1)(b) of the Labour Code), the latter refers to the new general legal rule (article 199-A)[43], which is applicable to all employees and not only to teleworkers. On the other hand, this new article does not mention explicitly a right to disconnect, nor does it address the use of digital media to establish such connection[44]. Nevertheless, the legislative preparatory work points towards digital connection as *ratio legis*[45]. The option to regard disconnection as a duty of the employer (an employer's "do not disturb period"[46]), rather than an employee's

September 2020, See, *inter alios*, F. Trujillo Pons, *La "desconexión digital" en el ámbito laboral*, 2nd ed., Tirant lo Blanch, Valencia, 2021, 129 ff. and 171 ff.; A. B. Muñoz Ruiz, *El derecho a la desconexión digital en el teletrabajo*, in *Trabajo y Derecho* (Monográfico), 2020, No. 12 (electronic version).

[42] Law No. 83/2021 was published on 6 November 2021 and entered into force on 1 January 2022.

[43] A similar articulation can be found in Spain (article 18 of the remote work regulation refers to the general rule of article 88 of *Ley Orgánica No. 3/2018*. See footnote 42.

[44] E. Dagnino, *Il diritto alla disconnessione nell'esperienza contrattual-collettiva italiana*, cit., 3, footnote 9, seems to exclude Portugal from the EU countries regulating the right to disconnect, namely because "*Si tratta, infatti, di un intervento che non prende in considerazione le diverse fonti e modalità di connessione del lavoratore alle proprie strumentazioni tecnologiche, agendo secondo una logica meramente preclusiva e non di attivazione di misure prevenzionistiche*".

[45] See *Boletim da Assembleia da República Comunicar*, June 2021, available at https://app.parlamento.pt/comunicar/V1/202106/74/artigos/art3.html (accessed May 10, 2022), containing links to the several bills presented at Parliament and their respective explanatory statements.

[46] J. L. Amado, *Desconexão profissional: direito ou dever?*, in M. R. Palma Ramalho/J. N. Vicente/ C. de O. Carvalho (eds.), *Work in a digital era: legal challenges*, AAFDL, Lisboa, 2022, 477.

right, seeks to increase the efficiency of this protection[47]. Moreover, it remains unclear whether disconnection should be considered a "right" by itself, a sort of "new generation right"[48]. The rights involved are the right to rest and leisure, the right to a maximum limit of working hours, the right to work-life balance, etc.[49]

Thus, the Portuguese legislator has moved away from other comparable legal regulations that require either (1) collective agreements or, at least, some sort of collective negotiation (e.g. France, Belgium, Spain[50]), or (2) individual agreements between the employer and the employee, such as the ones regarding the so-called smart working (*lavoro agile*) in Italy[51]. It is still early to assess whether this approach can be more effective in the promotion of employees' health, safety and privacy, as well as their rights to rest and to a work-life balance.

Nonetheless, the interpretation of this provision is open to discussion. Firstly, it does not specify what should be considered as a contact (e.g. does sending an email fall under the scope of application of the rule? Could it be sent with a disclaimer "no immediate answer is required"?). Secondly, the scope of the exceptions (situations of *force majeure*) seems rather limited, if we take into account the civil law definition of this legal concept (recalling the idea of inevitability or unforeseeable circumstances, often linked to natural phenomena such as fires or floods) and the total absence of a labour law approach to this concept from the legal literature or case-law[52]. Thirdly, what is

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[47] The question of addressing disconnection as a duty of the employer is also debated in the legal literature of other countries. See, for instance, C. Mathieu, *op. cit.,* 592-595; and E. Dagnino, *Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata*, cit., 1035.

[48] Regarding the definition of this right, see Dagnino, *Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata*, cit., 1030 ff.

[49] J. L. Amado, *Desconexão profissional: direito ou dever?*, cit., 476.

[50] A recent Spanish court decision from *Sala de Audiencia Nacional* of 22 March 2022 (available at: https://www.poderjudicial.es/search/documento/AN/9915176/Real%20Decreto%20alarma%20sanitaria%20Covid-19/20220404 - accessed May 10, 2022) declared a clause included in a telework agreement, which waived the right to disconnect in "exceptional circumstances" null and void. These were "circumstances of justified urgency in situations that may imply a business damage or business whose temporal urgency requires an immediate response or attention on the part of the employee". The court considered that "the limits to the right to digital disconnection in teleworking cannot be established unilaterally by the employer, but rather, as indicated by article 88 of the LOPD, by collective bargaining or, failing that, to what is agreed between the company and the workers' representatives".

[51] See the above-mentioned legal regulations and references regarding these countries.

[52] Some legal literature advocates a broad interpretation of the *force majeure* concept used in this article in order to include all the situations in which immediate contact proves to be necessary to prevent or repair serious damage to the company or its viability, calling into the

the personal scope of this provision? Literally, it only mentions the employer[53] but, to be effective, shouldn't it include, for instance, co-workers? Additionally, bringing into play the concept of "rest period" (defined as any period which is not working time, according to article 199 of the Labour Code[54]), it can pose major challenges[55], due to the binary nature[56] of the definitions of working time and rest period within the meaning of 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, which excludes intermediary categories of time[57]. Despite the recent nuances of the Court of Justice of the European Union (hereinafter, CJEU) case-law[58], stand-by time when the employee is not required to be present at the place of work is classified as "rest time", so not only the time linked to the actual provision of services must be regarded as "working time"[59]. Therefore, if the employer shall refrain from contacting the employee during rest periods, does this prohibition impact stand-by time? The duty to abstain from contact does not seem to be applicable to these situations,

interpretation the analogous regulation of overtime present in article 227(2) of the Labour Code. See J. L. Amado, *Teletrabalho: o "novo normal" dos tempos pós-pandémicos e a sua nova lei*, cit.

53 Supervisors should be included, since they have delegated employer powers. See J. L. Amado, *Desconexão profissional: direito ou dever?*, cit., 482.

54 Which follows the definition of 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 (article 2(2)).

55 See E. Dagnino, *'Working anytime, anywhere' and working time provisions. Insights from the Italian regulation of smart working and the right to disconnect*, cit., 12 ff.

56 See, *inter alios*, C. de O. Carvalho, *Reflexões sobre o conceito de tempo de trabalho no direito europeu e respetiva articulação com o direito nacional*, in B. Lobo Xavier et al. (eds.), *Estudos de direito do trabalho em homenagem ao Professor António Monteiro Fernandes*, Editor NovaCausa, V. N. Famalicão, 2017, 281 ff.; M. Véricel, *Distinction temps de travail et temps de repos en droit français et en droit de l'Union européenne*, in *Revue de Droit du Travail*, 2021, No. 4, 257.

57 "Temps du troisième type", as they were called by J.-E. Ray, *Les astreintes, un temps du troisième type: a propos de l'arrêt M. Taxis/Sté Brink's, cass. soc. 9 décembre 1998*, in *Droit Social*, 1999, No. 3, 250.

58 These variations started with the Matzak case (Case C-518/15), where the CJEU admitted that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes must be regarded as working time. Still, in the latest case-law (Cases Radiotelevizija Slovenija – C-344/19, RJ - C-580/19, and MG -C-214/20) the CJEU reframed the previous interpretation, introducing new criteria that can disqualify such periods as working time even when the employee has a very short period to respond to the call (e.g. the response time; the average frequency of the activities that the employee is actually called upon to undertake over the course of that period; the permission to carry out another professional activity). See, *inter alios*, M. Revuelta García, *Tiempo de trabajo y guardias en régimen de disponibilidad nopresencial. comentario a la reciente doctrina judicial europea y su reflejo en la realidad española*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, 2021, No. 59, 817 ff.; Marc Véricel, *op. cit.*, 258 ff.

59 E.g. cases Simap (C-303/98), Jaeger (C-151/02), Dellas (C- 14/04), Grigore (C-258/10).

otherwise home stand-by time would be excluded from the Portuguese legal framework, which was clearly not intended by the legislator. Nevertheless, this means that, in those cases where the duty of the employer not to connect could have the most sensible impact[60], determining some minimum periods of real and total disconnection of the employee, the new regulation will not apply. A similar problem can be raised regarding employees who are exempted from working hours, which can be the case of teleworkers under article 218(1)(c) of the Labour Code, since a specific framework is not established for such situations. Moreover, according to article 166(4)(d) of the Labour Code, the work schedule shall be defined on the written telework agreement. This new mandatory content of the telework agreement simplifies the operation of the employer's duty not to connect during rest periods. However, it is hardly applicable to the previously mentioned situations where there is exemption of working schedule and, once again, it significantly reduces the employee's flexibility aimed by this employment contract. Maybe that is why the Portuguese legislator, once again, did not provide for an administrative sanction applicable to the employer who does not comply with this mandatory content of the telework agreement, reducing the possibility of infringement control.

6. Privacy and Data Protection

The right to privacy and data protection is reinforced with the new telework legislation, aiming at the limitation of the employer's powers, particularly enhanced due to technological innovation. One of the characteristics of

[60] In this regard, there are divergent opinions in the EU and in the Council of Europe. According to the European Committee of Social Rights (Council of Europe), the assimilation of on-call periods to rest periods "constitutes a violation of the right to reasonable working time provided in Article 2§1 of the European Social Charter". Although on-call periods do not constitute effective working time, they cannot be regarded as a rest period, since "the absence of effective work, determined *a posteriori* for a period of time that the employee *a priori* did not have at his or her disposal, cannot (…) constitute an adequate criterion for regarding such a period as a rest period". Decisions on the merits of 7 December 2004 in Complaint No. 22/2003 Confédération générale du travail (CGT) v. France, and of 23 June 2010 in Complaint No. 55/2009, CGT v. France (available at: https://hudoc.esc.coe.int). For further developments, see J.-F. Akandji-Kombé, *Réflexions sur l'efficacité de la Charte sociale européenne à propos de la décision du Comité européen des droits sociaux du 23 juin 2010*, in *Revue de Droit du Travail*, 2011, No. 4, 235 ff.; C. de O. Carvalho, *Reflexões sobre o conceito de tempo de trabalho no direito europeu e respetiva articulação com o direito nacional*, cit., 303 ff.

telework is that work equipment can also serve as a monitoring tool, which allows for a constant supervision of teleworkers and the data they produce[61].
According to article 170(1) of the Labour Code, teleworkers are entitled to privacy, ensuring compliance with their working hours, rest time and family time.
The use of images, sound, writing and browser/computer history is forbidden, as well as other control mechanisms that collide with the employee's privacy (article 170(5) of the Labour Code). Ideally, work should be monitored by means of communication and information equipment and systems allocated to the employee's activity, following procedures that the employee is aware of and that are compatible with the respect for privacy (article 169-A(4) of the Labour Code). It is now expressly forbidden to demand permanent connection either through images or sounds, and all forms of control must abide by the principles of proportionality, transparency and information (article 169-A(5) of the Labour Code).
These new rules are inspired by the guidelines on remote control under teleworking issued, on 17 April 2020, by the Portuguese Agency on Data Protection (*Comissão Nacional de Proteção de Dados* – CNPD)[62] in order to guarantee the conformity of the processing of employees' personal data with the regulation on data protection and to minimize their impact on teleworkers' privacy. Following the pandemic and the subsequent adoption of measures of confinement and social isolation, the use of telework became widespread. It was in this context that the Portuguese Agency on Data Protection received several complaints and requests for clarification concerning employers' control instruments, related to either the recording of working time[63] or the monitoring

[61] See B. Torres García, *Spain's Law No. 10/2021 on teleworking: strengths and weaknesses*, in *E-Journal of International and Comparative Labour Studies*, 2021, Vol. 10, No. 2, 54; T. C. Moreira, *Teletrabalho em tempos de pandemia: algumas questões*, cit., 1310 ff.

[62] Comissão Nacional de Proteção de Dados (CNPD), *Orientações sobre o controlo à distância em regime de teletrabalho*, 17 April 2020, available at: https://www.cnpd.pt/media/zkhkxlpx/orientacoes_controlo_a_distancia_em_regime_de_teletrabalho.pdf. (accessed May 10, 2022). Regarding this issue, see also T. C. Moreira, *Teletrabalho em tempos de pandemia: algumas questões*, cit., 1313-1320.

[63] According to the Portuguese Agency on Data Protection, it is legal to record working time, which can be carried out remotely using specific technological tools. Nevertheless, this control shall be limited to reproducing the records made when work is performed on the employer's premisses, not collecting more information than necessary for that purpose. This interpretation is in line with the CJEU case law (case Federación de Servicios de Comisiones Obreras – C-55/18) where the Court concluded that Member States must implement appropriate mechanisms enabling the objective and reliable determination of the number of hours worked each day and each week, namely to demonstrate that the maximum working hours have not been exceeded. See T. C. Moreira, *Teletrabalho em tempos de pandemia: algumas questões*, cit., 1321-1323.

of the teleworking activity. According to these guidelines, the general rule forbidding the use of means of remote surveillance with the aim of monitoring employees' performance (article 20 of the Labour Code) is applicable to telework, considering that the use of these means involves an excessive limitation of employees' privacy in the light of the principles of proportionality and data minimisation[64]. The fact that work is provided from home does not justify an amplification of employers' control powers when compared to what can be legally carried out at their premises. Consequently, technological tools (software) that record the websites visited and the location of the terminal in real time, the use of peripheral devices that capture desktop images and start recording when access to an application begins, or control the document the employee is working on and record the time spent on each task (e.g. TimeDoctor, Hubstaff, Timing, ManicTime, TimeCamp, Toggl, Harvest), are banned. At the same time, the Portuguese Agency on Data Protection argues that it is not allowed to require permanent video camera connection or the recording of teleconferences between employer (and their representatives) and employees. Thus, it seems that the new law goes one step further, prohibiting permanent connection through sound.

In relation to possible visits from the employer to the telework location whenever it takes place at the employee's home, article 170(2)(3) of the Labour Code requires both a 24-hour warning and the agreement of the employee[65]. The aim of this visit must be strictly related to the control of the work performance, as well as of the use of the working instruments. Additionally, it must be carried out in the employee's presence, and within the agreed working schedule[66].

7. Health, Safety, and Work-related Accidents

The risks that telework poses to employees' health and safety, including psychological risks, seem to be of major importance and widely recognized[67].

[64] See article 5(1)c) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

[65] The consequence of the absence of the employee's consent is not determined by law.

[66] Once again there is no reference to the possibility of exemption of working schedule.

[67] See, inter alias, A. C. R. Costa, *Retos de la transformación digital del trabajo por el Derecho a la salud y la seguridad en el trabajo portugués – Sera que "en casa del herrero, cuchillo de palo"?*, in C. Molina Navarrete and M. R. Valecillo Gámez (dir.), E. González Cobaleda (ed.), *De la economía digital a la sociedad del ework decente: condiciones sociolaborales para una industria 4.0 justa e inclusiva*, Thomson Reuters Aranzadi, 2022, 386 ff.; L. Mitrus, *The major risks to health and safety in employment relations in the information age*, in M. R. Palma Ramalho/ J. N. Vicente/ C. de O. Carvalho (eds.), *Work in a digital era: legal challenges*, AAFDL, Lisboa, 2022, 213 ff.

Telework may not only intensify general risks, but also create new ones[68]. Many of these new risks can result from the employee's "(personal and professional) characteristics, the workplace, the equipment used, the distribution of working time and the management of the workload"[69]. At the same time, the execution of the employment contract outside the employer's premises challenges the application of the traditional legislation regarding health and safety[70], and can cause additional difficulties to the implementation of health and safety rules[71]. Thus, a specific regulation is justified. That was taken into account by the new Portuguese law on telework, unlike the previous regulation, which merely recognized this right and the equality of treatment of teleworkers and onsite employees, without further developments.

According to article 170(1) of the Labour Code, it is up to the employer to promote good working conditions for teleworkers, both from a physical and a psychological standpoint. So, the primary responsibility for teleworkers' health and safety belongs to the employer, despite possible surveillance difficulties.

This general principle is developed in the new provision of article 170-A of the Labour Code. First, telework is prohibited in activities that involve the use of or contact with substances and materials that are hazardous to the health or physical integrity of the employee, unless it is carried out in facilities certified for this purpose. Second, the employer shall organize "in specific and appropriate ways" the means necessary to fulfil their responsibilities in terms of occupational health and safety, namely regarding display screen equipment, and always respecting the privacy of the teleworker. For that purpose, the employer carries out occupational health exams before the implementation of telework and, subsequently, annually, to assess teleworkers' physical and psychological aptitude, the impact of telework on their health, as well as the appropriate preventive measures. This means that, besides information and training duties, the employer has the obligation to evaluate risk factors inherent to this way of working, which might not be detected in traditional prevention systems[72].

Additionally, health and safety professionals appointed by the employer can visit the workplace to assess the application of the health and safety conditions. This visit must be arranged in advance and can only take place within the work

[68] S. Rodríguez González, *Teletrabajo y riesgos psicosociales*, in L. Mella Méndez/ L. Serrani (eds.), *Los actuales cambios sociales y laborales: nuevos retos para el mundo del trabajo*, Vol. I, Peter Lang, Bern, 2017, 335 ff.; J. Gomes, *op. cit.*, 187 ff.; M. Babin, *op. cit.*, 30 ff.

[69] B. Torres García, *op. cit.*, 58.

[70] S. Bruurs/ S. Huybrechts, *Telework in Belgium: a patchwork of legal regimes*, in *E-Journal of International and Comparative Labour Studies*, 2021, Vol. 10, No. 2, 27; J. Gomes, *op. cit.*, 183.

[71] B S. Bruurs/ S. Huybrechts, *op. cit.*, 28; J. M. V. Gomes, *op. cit.*, 183, 190.

[72] J. M. V. Gomes, *op. cit.*, 190-191.

schedule, between 9 a.m. and 7 p.m. Contrary to what was mentioned in the previous point regarding the employer's visit to the workplace, it seems that the employee cannot refuse this visit. In such case, although no specific consequence is legally determined, the employer should not be held responsible[73].

Compliance can also be controlled by the Labour Inspectorate[74]. However, visits to the employee's home require at least a 48-hour advance-notice and must be accepted by the employee (article 171 of the Labour Code).

Furthermore, to reduce psychological risks associated with telework, the employer must take appropriate measures to avoid social isolation. Thus, face-to-face contacts with the management and colleagues shall be promoted by the employer according to the periodicity established in the telework agreement, which cannot exceed two months (articles 166(4)(h) and 169-B(1)c) of the Labour Code).

Besides, the teleworker has the right to participate in in-person meetings held at the company's premises, summoned up by employees' representatives, and may also participate in such meetings remotely, using the information and communication technologies related to the work performance[75] (article 169(1)(b) and (2) of the Labour Code). In turn, employees' representatives can use these technologies to communicate with teleworkers (articles 169(3) of the Labour Code).

Prior to the enforcement of Law No. 83/2021, the Labour Code already recognized the inclusion of teleworkers within the scope of Law No. 98/2009 of 4 December regulating compensation for accidents at work[76] and occupational illnesses under the principle of equal treatment[77]. However, legal literature considered such reference insufficient, and advocated for specific regulation[78]. The new law addresses this problem, amending both Law No. 98/2009 (article 8) and the Labour Code (articles 169(1) and 170-A(5)). It

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[73] Applying this solution to Belgium's structural telework, B S. Bruurs/ S. Huybrechts, *op. cit.*, 29.

[74] All employers' infringements to the health and safety provisions are considered very serious offenses.

[75] The so-called "right to technological sociability", i.e. communication via electronic means – see M. R. G. Redinha, *O teletrabalho*, 24, available at: https://repositorio-aberto.up.pt/bitstream/10216/18672/2/49720.pdf (accessed May 13, 2022).

[76] The Portuguese system of compensation concerning work-related accidents is based on a mandatory insurance contract, which remains a central aspect of the reparation system, as the public fund has a residual and subsidiary function.

[77] See M. R. G. Redinha, *Anotação ao artigo 239.º do Código do Trabalho de 2003*, in *Teletrabalho – Anotação aos artigos 233º a 243º do Código do Trabalho de 2003*, available at: https://cije.up.pt/download-file/216 (accessed May 13, 2022).

[78] J. M. V. Gomes, *op. cit.*, 194-195.

states that the legal regime for the compensation of accidents at work and occupational diseases applies to telework situations, the workplace being considered the one defined as such in the written telework agreement, and the working time being all the time during which teleworkers are performing work for their employer. Once again, the focus is the place of work identified as such in the written telework agreement, which can be "an excessively rigid solution in many situations"[79].

8. The Right to Telework to Ensure the Work-life Balance

Even before the entry into force of the new provisions of the Labour Code regarding telework, the 'voluntariness' principle mentioned above featured some exceptions, which were even increased by the new legislation and partially implemented Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers[80].

Provided that telework is compatible with the activity performed, employees are entitled to telework in the following situations (article 166-A of the Labour Code): *i)* Employees who are victims of domestic violence[81]; *ii)* Employees with children up to 3 years of age, as long as the employer can provide the necessary means to make that organisational change possible; *iii)* Employees with children up to 8 years of age provided that some requirements are met (see below); *iv)* Employees with recognized, non-primary informal caregiver status[82] for a period of up to 4 years, either continuous or interpolated, as long as the company has the necessary material resources.

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[79] J. M. V. Gomes, *op. cit.*, 201-202.

[80] This new Directive builds on the rules laid down in the previous Council Directive (EU) 2010/18 of 8 March implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive (EC) 96/34.

[81] Provided that a criminal complaint has been filed and the employee has left the family home, which are much-debated conditions in legal literature. See C. de O. Carvalho, *Protección social de las víctimas de violencia doméstica en Portugal*, in *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 2013, Vol. 1, No. 4, 12-14, 18 *passim*; and L. Mella Méndez, *op. cit.,* 310 ff.

[82] Portugal approved a new provision applicable to informal caregivers in 2019 (*Estatuto do cuidador informal* – Law No. 100/2019 of 6 September, available at https://dre.pt/application/conteudo/124500714), but the employment implications of this role for the "non-primary informal caregiver" (since the "primary informal caregiver" cannot have a paid professional activity) were left to the following regulations. Meanwhile – while identifying the legislative measures necessary to strengthen the labour protection of non-primary informal caregivers and the corresponding approval – article 13 of *Portaria* No. 2/2020 was temporarily applicable "to holders of parenting rights to whom the status of non-primary informal caregiver is recognized" the parenting rights provided for in the Labour Code.

These last two cases were included through Law No. 83/2021 to partially implement Directive (EU) 2019/1158. Yet their requirements differ, and some doubts can be raised regarding the adequacy of the Directive's implementation[83]. In both cases, no period of work qualification or length of service is needed.

According to article 3(f) of Directive 2019/1158, "flexible working arrangements" refer to "the possibility for workers to adjust their working patterns, including using remote working arrangements (…)". Moreover, article 9 of the EU legal act attributes the right to request flexible working arrangements for caring purposes to employees "with children up to a specified age, which shall be at least eight years, and carers[84]". Thus, Law No. 83/2021 widened the scope of telework in order to include employees with children up to 8 years of age and carers.

Nevertheless, regarding the first category (employees with children up to 8 years of age), some additional requirements must be me. To begin with, some common conditions are applicable: telework must be compatible with the activity performed, and the company must have the necessary material resources. As pointed out by some legal scholars[85], it is not complicated for the employer to claim that they cannot provide the necessary means to make that change possible in order to refuse it. The additional requirements demand that whenever both parents meet the conditions for teleworking, this right shall be exercised by both in successive periods of equal duration within a maximum period of 12 months. This can only be avoided in the case of single-parent families and in situations in which only one parent meets the conditions to carry out telework. Furthermore, this right is not applicable when the company

However, this general reference is rather ambiguous and does not seem do add any further protection. This last piece of legislation was recently revoked by *Decreto Regulamentar* No. 1/2022, of January 10, which aims to reinforce the labour status of the "non-primary informal caregiver", in particular, through a system of leave and flexible working time arrangements, under the terms to be defined in specific legislation (article 43).

[83] For further information, see C.de O. Carvalho, *Concilier vie professionnelle et vie familiale pour promouvoir l'égalité femmes-hommes au Portugal: perspectives à la lumière de la Directive 2019/1158*, in *Revue de Droit Comparé du Travail et de la Sécurité Sociale,* 2020, No. 3, 82-93.

[84] Carer is defined in article 3(1)(d) of the Directive as "a worker providing personal care or support to a relative, 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".

[85] M. R. Palma Ramalho, *Tempo de trabalho e conciliação entre a vida profissional e a vida familiar – Algumas notas*, in M. R. Palma Ramalho/ T. C. Moreira (eds.), *Tempo de trabalho e tempos de não trabalho: o regime nacional de tempo de trabalho à luz do Direito europeu e internacional*, AAFDL, Lisboa, 2018, 116.

has less than 10 employees. When these requirements are met, employers cannot refuse employees' request to telework.

The first additional requirement aims to promote gender equality. In fact, mandatory telework during the pandemic has proved that it can worsen gender inequalities[86]. As K. Arabadjieva[87] puts it, "The pandemic has acted as a magnifying glass, making the cracks in current economic and social models so obvious that they can no longer be ignored". In this sense, a Portuguese survey by Colabor[88] confirms that the pandemic "ends up reproducing old gender asymmetries in terms of the distribution of domestic work and childcare. Among men and women in households without children, the proportion that considers they have the necessary conditions for teleworking in terms of equipment and space, as well as time management, is higher than that reported for the sample. However, the difference in the case of women in households with children is far higher. The answers to the open questions are a further confirmation of this situation: "*Actually, we feel that we have failed as professionals, and as mothers. I don't work all the time I want or need to, and I end up neglecting my daughter in everything other than the basic aspects (cleaning and food)*". This problem has been there for well before the discussion about telework. However:

> one of the risks of the sudden and unprepared transition to telework in the context of a pandemic is the damage to the professional career of those who have sons and daughters – and, within these, of women – that can result from the adoption of forms of work organization and performance evaluation that are inappropriate to their reality and needs[89].

[86] A. de las Heras Garcia, *Análisis de la nueva regulación del trabajo a distancia*, in *Revista de Trabajo y Seguridad Social*, *CEF*, No. 452, 2020, 180, pointed out the risk of women being increasingly "relegated" to the status of teleworkers. See also M. B. Fernández Collados, *¿Es el teletrabajo una fórmula de conciliación de la vida personal, familiar y laboral?*, in *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, 2022, Vol. 10, No. 1, 204-205 and *passim*; E. Rodríguez Rodríguez, *La conciliación a la corresponsabilidad en el tiempo de trabajo: un cambio de paradigma imprescindible para conseguir el trabajo decente*, in *Lex Social: Revista De Derechos Sociales*, 2021, Vol. 11, No. 1, 52 ff. and *passim*.

[87] K. Arabadjieva, *Reshaping the Work-Life Balance Directive with Covid-19 lessons in mind*, Working Paper 2022.01, ETUI, Brussels, 2022, 35, available at: https://www.etui.org/publications/reshaping-work-life-balance-directive-covid-19-lessons-mind (accessed May 25, 2022).

[88] P. A. Silva *et al.*, *Trabalho e desigualdades no grande confinamento: perdas de rendimento e transição para o teletrabalho*, Estudos Colabor, No. 2/2020, CoLABOR, April 2020, available at https://colabor.pt/wp-content/uploads/2020/04/Estudos-CoLABOR-2.pdf (accessed May 20, 2022).

[89] Ibid., 5.

The problem is not limited to Portugal. There are several national[90] and international[91] studies and surveys showing that the pandemic has

[90] At national level, there are also several studies that point in the same direction. For example, in Italy, the results of a survey carried out by the *Confederazione Generale Italiana del Lavoro* (CGIL) together with the Fondazione Di Vittorio on *Smart working* (*Quando lavorare da casa è... SMART?*, available at https://www.bollettinoadapt.it/quando-lavorare-da-casa-e-smart/, accessed May 18, 2022) revealed gender disparities in the impact of teleworking, which is more alienating and stressful for women. In the UK, a study by the University of Sussex focused on the British experience in families with young children concluded that inequality in the sharing of parental tasks worsened during the period of confinement to the point that one of the researchers, Alison Lacey, states that, for many women, "[British] Society has regressed to a 1950s way of living". The proportion of women responsible for 90% to 100% of childcare increased from 27% to 45%. She adds that 72% of mothers claimed to be the default parent during the entire period of confinement and 70% responded that they were exclusively or almost exclusively responsible for their children's school attendance. Female employment was found to be disproportionately more vulnerable to the impact of COVID-19, with 73% of women telecommuting and with children in their first cycle classifying working from home as "difficult" or "very difficult", leading to frequent feelings of exhaustion. A similar disproportion was identified in the distribution of domestic work. This study is reported by *The Guardian*, 18 June 2020, "UK society regressing back to 1950s for many women, warn experts", available at https://www.theguardian.com/inequality/2020/jun/18/uk-society-regressing-back-to-1950s-for-many-women-warn-experts-worsening-inequality-lockdown-childcare (accessed May 25, 2022).

[91] For instance, the Eurofound e-survey *Living, working and COVID-19*, Publications Office of the European Union, Luxembourg, 2020, available at: https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef20059en.pdf. (accessed May 10, 2022), highlights "that respondents – especially women with children under 12 – were struggling to balance their work and personal life. Indeed, although teleworking was a key factor in ensuring business continuity, it has led to a rise in the number of people working from home, resulting in difficulties in managing work-life conflicts and an increase in the incidence of overtime" (21). "The pandemic has eroded the work-life balance of women more than men (…) Women are more widely affected by the pandemic in terms of health risks, pre-existing employment inequalities and care responsibilities" (59). "The COVID-19 crisis presents a serious risk of rolling back decades of gains achieved in gender equality. The unintended consequences of measures put in place by governments in spring 2020 in an attempt to control the spread of the pandemic has been to increase considerably women's share of unpaid work. In this regard, telework has also proved to be burdensome for many working mothers as they juggle work, home-schooling and care, all in the same pocket of space" (4). The same understanding is shared by J. Rubery/I. Tavora, *The Covid-19 crisis and gender equality: risks and opportunities. Social Policy in the EU*, in B. Vanhercke, S. Spasova and B. Fronteddu (eds.), *Social policy in the European Union: state of play 2020. Facing the pandemic*, Brussels, European Trade Union Institute (ETUI) and European Social Observatory (OSE), 2021, 92 (available at: https://www.etui.org/sites/default/files/2021-01/06-Chapter4-The%20Covid%E2%80%9119%20crisis%20and%20gender%20equality.pdf (accessed May 25, 2022)): "New forms of gender segregation could emerge if women are not only expected to telework but in fact remain home-based workers while men return to the office".

disproportionately affected women, threatening to reverse progress towards gender equality. During the pandemic, Portuguese emergency legislation allowed for employees with children under 12 years old that had to stay home due to the closing of schools to stop working to take care of them, being granted the right to a special social security allowance for that purpose[92]. The government's information regarding the payment of this special assistance allowance indicated that it had been paid mostly to women (82%)[93]. According to Palma Ramalho, "this lack of proportionality may arise from the gender pay gap (as women earn less that men, the financial family loss is lower if the member of the couple that stops working is the woman), but it also demonstrates that even during this crisis women tend to take the lead in caring their children"[94]. Consequently, despite recognizing that the growth in flexible working from home can improve work opportunities for women with care responsibilities, legislators should be aware that "these arrangements may also strengthen traditional gender roles in households, increasing women's unpaid care and housework if care services are not enhanced, and reducing their visibility and career perspectives in the labour market"[95]. That is the reasoning behind the additional requirement demanding that, whenever both parents meet the conditions for teleworking, this right be exercised by both in successive periods of equal duration, increasing incentives for men to take up parental entitlements. Although this requirement is not mentioned in Directive (EU) 2019/1158, which could raise doubts on the adequacy of the Portuguese implementation, it seems to be in line with the aim of the Directive to promote gender equality and the work-life balance. A more balanced participation of

[92] At first, this allowance was not paid if the employee could work remotely from home, aggravating hugely the challenges of work-life balance. This situation was only modified before the last lockdown (Decree-Law No. 14-B/2021, of 22 February). This new piece of legislation recognized teleworkers and remote workers in general the right to receive an allowance (equivalent to 2/3 of a worker's base salary, with minimum and maximum limits). However, this financial support could reach 100% of the base salary (with the aforementioned limits) in some cases, namely when both parents requested and benefited from this allowance, alternately, on a weekly basis.

[93] M. R. Palma-Ramalho, *Work-Life balance in times of COVID-19*, European network of legal experts in gender equality and non-discrimination FLASH REPORT – Portugal, 29 June 2020, available at https://www.equalitylaw.eu/downloads/5166-portugal-work-life-balance-in-times-of-covid-19-80-kb (accessed May 20, 2022).

[94] Ibid.

[95] M. Samek Lodovici *et al.*, *The impact of teleworking and digital work on workers and society*, Publication for the Committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2021, 67, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU(2021)662904_EN.pdf (accessed May 25, 2022). See also E. Rodríguez Rodríguez, *op. cit.*, 62 and *passim*.

men and women in family life is a pre-requisite to achieve gender equality at work.

A second requirement excludes micro-sized enterprises from the scope of application of this new right to telework (recognized to employees with children up to 8 years of age) because of their limited financial, technical, and human resources. Again, although this exclusion is not mentioned in Directive (EU) 2019/1158, recital 48 states that:

> In implementing this Directive, Member States should strive to avoid imposing administrative, financial or legal constraints in a manner which would amount to a disincentive to the creation and development of SMEs or an excessive burden to employers. Member States are therefore invited to thoroughly assess the impact of their implementing measures on SMEs in order to ensure the equal treatment of all workers, that SMEs are not disproportionately affected by the measures, with particular focus on microenterprises, and that any unnecessary administrative burden is avoided.

Still, one can have some reservations regarding the admissibility of a total exclusion of microenterprises from the scope of this right. The measures mentioned in recital 48 refer to the need to avoid any unnecessary administrative burden, and to the provision of "incentives, guidance and advice to SMEs to assist them in complying with their obligations pursuant to this Directive".

Regarding carers, the right to telework is acknowledged to employees with recognized non-primary informal caregiver status for a period of up to 4 years – either continuously or not – if the previously mentioned common conditions are met. Notwithstanding, and unlike employees with children up to 8 years of age, the employer can refuse the worker's request, but only on the grounds of compelling operational reasons or the impossibility of replacing the employee. Moreover, this justification has to be considered valid by the entity in charge of promoting equal opportunities between men and women (Commission for Equality in Labour and Employment – CITE[96]). If the CITE does not agree, the employer must challenge the decision before the court in order to obtain a ruling recognizing the justification for the refusal of the employee's request (article 57 of the Labour Code).

Finally, in both situations, this employee's right is limited to a narrow concept of telework, which, as explained above, does not include all forms of remote working arrangements. Thus, the scope of Directive (EU) 2019/1158 is not respected.

[96] *Comissão para a Igualdade no Trabalho e no Emprego* – https://cite.gov.pt.

9. Concluding Remarks

In general, it can be considered that the new Portuguese legal framework for teleworking improves employees' rights, addresses some of the problems raised during the lockdowns, and occasionally formulates some original responses, as in the case of the disconnection approach[97], as well as in the promotion of work-life balance through telework, encouraging a cultural shift towards an equal distribution of care work between men and women[98].

Still, this law is far from perfect. On the one hand, it goes into regulatory details of complex application in practice, and it does not always strive for clarity, which may increase litigation. On the other hand, the employee's protection is fostered at the expenses of flexibility (e.g. the written telework agreement must determine the work schedule and the place of work). Therefore, if the employee does not enjoy flexibility, that can eliminate some of the advantages attributed to teleworking[99] and reduce employees' interest in this way of working. The legislative perception of this limitation may even justify the surprising absence of administrative offenses in many provisions of the new regulation, thus preventing the intervention of the Labour Inspectorate.

Moreover, the impact of teleworking in terms of expenses should be neutral, which is not clear in the light of the recent regulation, otherwise employers and/or employees will avoid it. In addition, the role of collective bargaining is limited, since it can only deviate from the law in a manner more favourable to employees, which is not always easy to evaluate in practice. Hence, the role of collective agreements in the clarification of some doubts concerning the legal framework can be compromised and lead to judicial litigation.

Lastly, the new legal framework is shaped by the problems raised by the pandemic crisis, which can be open to criticism, since there was no global evaluation of the Portuguese labour market, nor "of the challenges companies will be facing in the near future". For instance, the Portuguese telework regulation is distinctly designed on the premise that the work will be executed at the employee's home, thus failing to provide legal arrangements for

[97] J. L. Amado, *Teletrabalho: o "novo normal" dos tempos pós-pandémicos e a sua nova lei*, cit.

[98] See K. Arabadjieva, *op. cit.* The author points out the important gender equality dimension of the regulation of telework and suggests revisiting the work-life balance Directive 2019/1158 in the aftermath of the pandemic to strengthen various aspects of the framework with the main objective of promoting gender equality in a more effective and transformative way.

[99] See A. Nunes de Carvalho, *O COVID 19 (des)organizou o tempo de trabalho?*, in M. R. Palma Ramalho/ T. Coelho Moreira (eds.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisboa, 2020, 148-149 and *passim*.

situations in which the work is not rendered in a single space or even in a single jurisdiction[100].

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[100] H. M. Braz/ T. L. Fernandez (IR Global), *TELEWORK: Portugal decides to change the statutory regulation on telework during a pandemic crisis*, available at https://www.irglobal.com/article/telework-portugal-decides-to-change-the-statutory-regulation-on-telework-during-a-pandemic-crisis/ (accessed May 20, 2022).

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Exploring the Social Dimension of Fintech Companies: Risks and Opportunities with Special Reference to the Spanish Legal Landscape

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Abstract

In recent years, the fintech phenomenon has given rise many debates in legal scholarship. According to the most commonly cited definition, it means "technology-enabled innovation in financial services that could lead to new business models, applications, processes or products with a concrete implication for the provision of financial services" (FSB, 2017). This study approaches the problem from the labour law perspective and consists of three parts: the origins, the concept and the five groups of labour-related risks and opportunities posed by fintech companies. The methodology based on the opposition between risks and opportunities is determined by the very nature of fintech. On the one hand, it alludes to the advances of the global technological revolution; on the other hand, it suggests a return to the origins of banking linked to the interests of local customers. In this sense, the initial idea of fintech startups is connected to the needs of the most vulnerable groups of population, who, in principle, lack access to traditional banking services.

Keywords: *Fintech, Disruptive Innovation, Digitalization, Job creation, Professional skills.*

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1. Introduction

In the current scientific, and not necessarily legal, landscape, the phenomenon known as "fintech"[1] has given rise to numerous debates and publications[2]. Undoubtedly, in the legal sphere, the most prolific and prominent reflections have been provided in the field of commercial and banking law, and there have been far fewer studies with a social or labour focus[3]. Thus, this contribution aims to provide a perception of fintech from the labour law perspective, although, of course, taking into consideration the multidisciplinary nature of the issue.

This approach to fintech companies allows us to shed light on the nature of work today, going back in time and looking for the roots of the phenomenon in its most remote and most recent antecedents. This is not merely a historical reconstruction, but a reference to the lessons of the past that can enrich reflection and suggest new ways of defining work[4]. An insight into the era of

[1] In this paper, we have chosen to use the term "fintech" (financial technology), according to the criterion of the majority usage in different sources, for example, the World Bank Group (WBG) and the International Monetary Fund (IMF) document *The Bali Fintech Agenda* - Chapeau Paper, 19 September 2018. Similarly, it seems more feasible to refer to both technology and business models of this type. However, we are well aware that other sources, in particular at the European Union (EU) area, use the term "FinTech". See the European Commission's Communication *FinTech Action plan: For a more competitive and innovative European financial sector* of 8 March 2018, COM (2018)109 final.

[2] See, inter alia: Rodríguez de la Heras Ballell, T. (2019), *Challenges of Fintech to Financial Regulatory Strategies*, Madrid, Barcelona, Buenos Aires, San Paulo: Marcial Pons; Deitch, J. (2020), *Disruptive fintech. The coming wave of innovation in financial services with thought leadership provided by Ceos*, Berlin: Walter de Gruyter & Co.; Mohan, D. (2020), *The financial services guide to fintech. Driving banking innovation through effective partnerships*, London, New York: Kogan Page; Ortuño Cámara, J. L. (2021), *Fintech con vocación social, una oportunidad en entorno Smart City*, Barcelona: Bosch Editor; Panzarino, H. and Hatami, A. (2021), *Reinventing Banking and Finance. Framework to navigate global fintech innovation*, London, New York: Kogan Page; Cuena Casas, M., Ibáñez Jiménez, J. W. (Dirs.) (2021), *Perspectiva legal y económica del fenómeno FinTech*, Madrid: La Ley; *Routledge Handbook of Financial Technology and Law* (2021), London: Routledge; Global Legal Group (2021), *Fintech 2021. A practical cross-border insight into fintech law*, 5th ed., International Comparative Legal Guides, London: Global Legal Group Ltd.; Martínez Sierra, J. M. (Dir.), Cetina Presuel, R. (Coord.) (2022), *Blockchain, fintech and the Law*, Valencia: Tirant lo Blanch.

[3] Cfr. Gil y Gil, J.L. (2022), "Las leyes singulares en el derecho del trabajo", *Variazioni su Temi di Diritto del Lavoro*, Numero straordinario, pp. 55 and 57.

[4] In this regard, we refer to the reflection suggested in the "Call for Papers" of the XI International Congress "Work and Its Value. Interdisciplinary Reflections on an Ever-Changing Concept", held in Bergamo (Italy), on 25, 26 and 27 November 2021, for the Track 5 "The Idea of Work Today and through History. Origins, Developments and Future Prospects", p. 4.

the creation and development of the so-called *relationship banks*[5] and a recollection of the "disruptive" companies serve this purpose.

It should be noted that *fintechs* as companies do not only comprise an ecosystem of innovative *startups* invading financial markets with ground-breaking technological solutions. They also include incumbent companies that adopt advanced technological strategies to effectively complement and innovate their traditional services.

With regard to the social field, and more specifically to the labour one, the study covers five groups of risks or challenges and their corresponding opportunities. The approach based on the "risk-opportunity" binomial is partly inspired by the *Bali Agenda* chapter of the same name[6].

The first challenge stems from the disruptive nature of the enterprise and reflects the debate of the 1990s on initiatives of this kind. However, in many cases, *startups* are linked to the local needs of the population and pursue sustainable objectives closely related to these needs.

The second risk invokes the problem of job destruction, which always comes with innovation and technology, and, as a counterpart, the opportunities for new jobs to ensure technological progress.

The third group is associated with the risk implied by the new digital skills required and the inequalities that these skills requirements foster in less developed countries and regions and among the most vulnerable groups of population. However, it goes without saying that the requirement for new skills implies new opportunities for training, qualification, and re-skilling of workers.

The fourth and, to some extent, the fifth set of risks concerns the particularities of working conditions that lead to greater autonomy, entrepreneurship and flexibility, but also to greater insecurity, precariousness and, above all, self-exploitation, to which Byung-Chul Han referred in his well-known book[7]. The issue of fintech shares many aspects with the platform work

[5] Panzarino and Hatami (2021), p. 2.

[6] "Opportunities and risks", IMF, WB (2018), *The Bali Fintech Agenda – Chapeau Paper,* Washington: World Bank Group, p. 5.

[7] Han, B. (2017), *Psychopolitics: Neoliberalism and New Technologies of Power*, London: Verso. "Han suggests that the psycho-political power of Big Data has nullified the contradiction of class struggle, arguing that Marx's 'distinction between proletariat and bourgeoisie no longer holds', as under Big Data '[t]here is no working class being exploited by those who own the means of production'. The data mined to steer the subconscious, unarticulated needs of consumers via platforms is disclosed voluntarily, and therefore allo-exploitation has been eclipsed by auto-exploitation: 'people are now master and slave in one'." Quoted by Kelly, J. F. (2019). "Psychopolitics: Neoliberalism & New Technologies of PowerBy Byung-Chul Han Verso, 2017, pbk £9.99 (ISBN 9781784785772), pp. 96", Review, *Studies on Social and Political Thought,* Vol. 29, p. 74.

extensively addressed in relation to riders and other collectives of the collaborative economy.

2. Origins of Fintech

The irruption of fintech startups in the financial market took place in the second decade of the 21st century and was situated in the context of the challenge posed within the also innovative system of digital banking[8]. This type of company is characterised by several common features, such as their relatively small size, agility in putting new technologies at the service of commercial interests and orientation towards new customer demands[9]. Thus, seen at the beginning as a peculiarity and even as an opportunity, they have ended up being considered as a "mortal threat" for the traditional banking and finance system. Moreover, as fintechs have started to attract customers, the banking world has been divided into two types of companies: on the one hand, incumbents offering digital services continued to operate and, on the other hand, new "challengers" were created, that were in competition with the established banking institutions. While traditional digitalised banking was able to offer a wide range of services and also to replace traditional banking by satisfying all the demands of its customers, the fintech startup was focused on specific services based on new technologies such as payments or advising.

One of the most outstanding characteristics of this type of company is its proximity to the customer. In fact, their success depends, to a large extent, on their ability to meet local needs. In this respect, Panzarino and Hatami state that one of the most striking manifestations of the digital revolution is that technological modernisation relates to the historical moment of the birth of modern banking, i.e., to the initial model of *relationship banks*[10]. According to several sources, the origins could be found in local initiatives in the territory of small Italian states, in cities such as Genoa, Florence, Siena and Venice[11]. This is the period of the late Middle Ages and early Renaissance, which is described as the rebirth of man from antiquity and the reassertion of humanity, affecting

[8] According to Panzarino and Hatami's study, the history of modern banking is divided into four stages: *The Relationship Banks*, which were born in the late Middle Ages, spanning the Renaissance era; *The Industrial Banks*, which emerged in the context of the Industrial Revolution; *The IT Banks*, which burst onto the financial scene after a series of innovations in the mid-20th century; and, finally, *The Digital Banks*, from the 1980s, when banks began to offer digital services, and up to the present day. See Panzarino and Hatami (2021), pp. 1-18.

[9] In this passage, we follow the reasoning of Panzarino and Hatami (2021), pp. 10 et seq.

[10] Panzarino and Hatami (2021), p. 17

[11] Hoggson, N. F. (1926), *Banking through the Ages*, New York: Dodd, Mead & Co., pp. 63 et seq.; Panzarino and Hatami (2021), pp. 2-3.

all strata of the population and manifesting itself in all walks of life, including the legal and commercial spheres[12]. Thus, the mentioned Italian cities had similarities in the methods of providing commercial services, but each developed its own approach to banking. Genoa probably came closest to what is today's banking model through the well-known *Banco di San Giorgio*[13]. This bank, whose official origin dates back to 1252, is considered to be one of the oldest and longest established in the world. During the seven centuries until the Napoleonic conquest, its power extended to the north-west coast of Italy and was decisive in the wars of the Republic of Genoa.

The first official loan of Genoa was recorded in 1148 and, from that date onwards, debts multiplied and were divided into parts: initially, each hundred lire constituted a *luogo*, and, later, each debt, contracted and accounted for separately, with its corresponding guarantees and different interests, was called a *compera*, hence the name *Compere di San Giorgio* or the *Casa delle Compere di San Giorgio*, which the institution received in 1252[14]. It was not until 1407, however, that the *Banco di San Giorgio* became the true public financial institution, fully committed to the needs of the State[15].

As it was mentioned above, satisfying customer demand is the main purpose of fintech startups. Thus, many of them have been created on the basis of a different model from that of traditional banking. While the latter aim to sell financial products, the new ones try to build a relationship of trust by providing the means for their customers to achieve their specific objectives "moving from a transactional model to one based on outcome"[16].

Moreover, in 2012-2013, it became clear to entrepreneurs and investors that banking was ready for the digital revolution already taking place in many sectors, including transport, tourism, retail, and entertainment. As a result, investment in fintech startups increased from 3.2 (in 2012) to 55.3 billion (in 2018). However, subsequent years saw a slight decline to 42.9 (in 2019) and 42.1 billion (in 2020)[17].

The end of this period is characterised by the international institutions' concern for the phenomenon[18]. In particular, several international and regional

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12 Störig, H. J. (2004), *Historia universal de la Filosofía,* 2ª reimpresión, Madrid: Tecnos, pp. 325-329. (Translated to Spanish by Gómez Ramos, A).

13 Hoggson (1926), p. 64.

14 Hoggson (1926), pp. 64-66

15 Hoggson (1926), p. 67.

16 Panzarion and Hatami (2021), p. 13.

17 *Ibid.*

18 See Chatzara, V. (2020), "FinTech, InsurTech, and Regulators", in Morano, T. & Noussia, K. (Eds.), *Fintech: Legal and Regulatory View,* New-York: Springer International Publishing, pp. 6 and ff.

bodies and organisations adopted documents analysing the situation and setting strategic objectives. Among others, it is worth mentioning: the *Report on Financial Stability Implications of FinTech. Supervisory and Regulatory Issues for Policymakers' Attention*, prepared by the Financial Stability Board (FSB)[19] on 27 June 2017; the *Financial Technology Action Plan: for a more competitive and innovative European financial sector*, presented by the European Commission on 8 March

[19] "The Financial Stability Board (FSB) was established in February 1999 as the Financial Stability Forum (FSF) by the ministers of finance and central bank governors of the G7, based on proposals by Hans Tietmeyer, then the president of the Bundesbank. The G20 summit in April 2009 then established the FSB with a broader mandate and an extended circle of members. The FSB's members comprise central banks, finance ministries and supervisory authorities from the G20 countries as well as Hong Kong, the Netherlands, Spain, Singapore and Switzerland, the European Central Bank, the European Commission and all committees and organisations with a major role in global financial stability analysis and regulatory debate. In addition, the FSB has now also extended exchange with numerous other countries. The FSB thus plays a pivotal role in the international debate on financial stability. The Bundesbank contributes its analyses and positions to the debate". Quoted by https://www.bundesbank.de/en/tasks/financial-and-monetary-system/international-cooperation/fsb/financial-stability-board-fsb--625728 [Accessed 16 August 2022].
"The FSB promotes international financial stability; it does so by coordinating national financial authorities and international standard-setting bodies as they work toward developing strong regulatory, supervisory and other financial sector policies. It fosters a level playing field by encouraging coherent implementation of these policies across sectors and jurisdictions. The FSB, working through its members, seeks to strengthen financial systems and increase the stability of international financial markets. The policies developed in the pursuit of this agenda are implemented by jurisdictions and national authorities. More specifically, the FSB was established to: assess vulnerabilities affecting the global financial system as well as to identify and review, on a timely and ongoing basis within a macroprudential perspective, the regulatory, supervisory and related actions needed to address these vulnerabilities and their outcomes; promote coordination and information exchange among authorities responsible for financial stability; monitor and advise on market developments and their implications for regulatory policy; monitor and advise on best practice in meeting regulatory standards; undertake joint strategic reviews of the international standard-setting bodies and coordinate their respective policy development work to ensure this work is timely, coordinated, focused on priorities and addresses gaps; set guidelines for establishing and supporting supervisory colleges; support contingency planning for cross-border crisis management, particularly with regard to systemically important firms; collaborate with the International Monetary Fund (IMF) to conduct Early Warning Exercises and promote member jurisdictions' implementation of agreed commitments, standards and policy recommendations, through monitoring of implementation, peer review and disclosure". Quoted by https://www.fsb.org/about/ [Accessed 18 August 2022].
In particular, see FSB (2017), *Financial Stability Implications from FinTech Supervisory and Regulatory Issues that Merit Authorities' Attention*, Financial Stability Board, 27 June 2017, available at: http://www.fsb.org

2018[20]; the *Bali Fintech Agenda* of 19 September 2018[21], or the *Report on Digital disruption in banking and its impact on competition* by the Organisation for Economic Co-operation and Development (OECD) in 2020[22].

3. Concept and Typology

What does the increasingly popular term "fintech" mean? At first glance, it is an abbreviation made up of two words ("technology" and "finance")[23], which refers to "technology-enabled innovation in financial services"[24] or to "the use of digital technology in finance"[25]. Among many more elaborate doctrinal proposals, reference can be made to Jackson's definition, which describes the phenomenon as "a wide range of private and regulatory innovations that have become possible through the rapid decline in the cost of computing, accompanied by the widespread availability of reliable, high-speed connectivity (typically over the internet), and an explosion of newly collected data about a broad swath of personal and commercial characteristics and behaviors"[26].
In this regard, the most widely cited source is the aforementioned Financial Stability Board (FSB) Report, which defines fintech as "technology-enabled innovation in financial services that could result in new business models, applications, processes or products with an associated material effect on the provision of financial services"[27]. As Rodríguez de las Heras points out, the

[20] EU (2018), *FinTech Action plan: For a more competitive and innovative European financial sector,* Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the European Committee of Regions, 8 March 2018, COM (2018)109 final.
[21] IMF, WB (2018), *The Bali Fintech Agenda – Chapeau Paper,* Washington: World Bank Group.
[22] OECD (2020), *Digital Disruption in Banking and its Impact on Competition,* available at: http://www.oecd.org/daf/competition/digital-disruption-in-financial-markets.htm [Accessed 1 May 2022]. This is a revised version of the paper prepared for an OECD Competition Committee roundtable held on 5 June 2019.
[23] According to the Cambridge dictionary, "fintech" is an abbreviation for "financial technology", which means "the business of using technology to offer financial services in new and better way", available at: https://dictionary.cambridge.org/dictionary/english/financial-technology [Accessed 17 August 2022].
[24] EU (2018), *FinTech Action plan…,* p. 2.
[25] Brummer, C.; Yadav, Y. (2019), "Fintech and the Innovation Trilemma", *The Georgetown Law Journal,* Vol. 107, p. 241.
[26] Jackson, H. E. (2020), "The Nature of the Fintech Firms", *Washington University Journal of Law and Policy,* Vol. 61 "The Rise of Fintech", pp. 10-11. See the full Vol. 61 "The Rise of Fintech" devoted to the fintech phenomenon.
[27] FSB (2017), *Financial Stability Implications from FinTech…,* p. 7. The same definition is mentioned, among other sources, in the *EU Action Plan*, EU (2018), p. 2., and in Omarova, S. T. (2020), "Dealing with Disruption: Emerging Approaches to Fintech Regulation", *Washington University Journal of Law & Policy*, Vol. 61, p. 25.

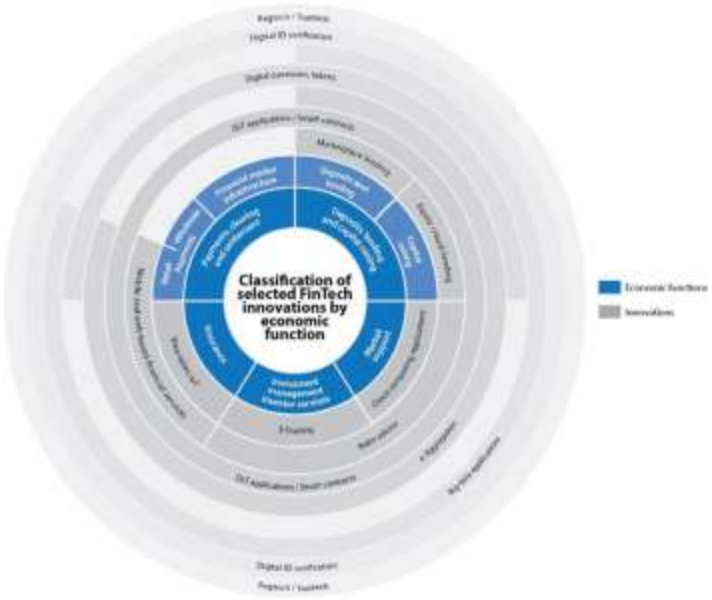
term can be considered as a framework concept to refer to the phenomenon[28], providing the general description for a series of innovations in the broad sense and leaving the door open for the precision of more specific innovations. In this sense, the FSB Report proposes to classify these according to the most prominent economic functions they provide[29]. This classification has a double rationale: first, it highlights the financial stability implications of fintech in the context of the current financial market structure; and second, it focuses the analysis on the activities and outcomes of these activities, rather than on the underlying service providers or technologies.

Figure 1 below graphically represents this criterion based on previous studies[30], organising fintech activities into five categories of financial services: (i) payments, clearing and settlement; (ii) deposits, lending and capital raising; (iii) insurance; (iv) investment management; and (v) market support. It is also noted that "there has been rapid growth of innovations touching all these categories of financial services, with activities at both the retail (i.e., households and small and medium enterprises (SMEs)) and wholesale (corporations, non-bank financial institutions and inter-bank) levels"[31].

The use of new technologies has had important implications for the welfare of market participants which may lead to a reduction of financial intermediation costs in lending, payment systems, financial advice and insurance, along with better products for consumers. Fintech companies offer more attractive services to consumers, particularly in terms of efficiency. According to the OECD study, fintechs ensure this in different ways[32].

[28] Rodríguez de la Heras Ballell, T. (2019), *Challenges of Fintech…,* p. 16.
[29] FSB (2017), p. 16.
[30] This builds on the FSB Financial Innovation Network (FIN) work, which draws on the categorisation from the World Economic Forum (June 2015), "The Future of Financial Services." Quoted by FSB (2017), p. 8.
[31] *Ibid.*
[32] OECD (2020), *Digital Disruption in Banking...,* pp. 12 et seq.

Figure 1. Classification of selected financial innovations by economic function



Source: FSB (2017). *Financial Stability Implications from FinTech. Supervisory and Regulatory Issues that Merit Authorities' Attention,* p. 9.

Firstly, they can more effectively screen loan applicants through Big Data-based statistical models, shovelling the information asymmetries that are at the heart of the banking business. As Brummer and Yadav underline, one of the most important innovations of fintechs consists of using "not just more data, but qualitatively different forms of data, spanning social media, websites, or digital metadata-that have never before been available"[33].
Secondly, the businesses are smaller, as they can dispense with staff (employees), such as loan officers or cashiers, and facilities, such as branches (buildings), as customers use their mobile phones applications for banking.
Thirdly, fintech companies allow for much more selective price discrimination, as they employ interest rate setting models with higher yields compared to those used by traditional institutions.
Fourth, they more easily reach out to less developed countries, as well as to disadvantaged population groups and SMEs that cannot be served sufficiently

[33] Brummer, Yadav (2019), p. 242.

ore at all by traditional banking institutions. In particular, many SMEs in developing markets often do not qualify for loans (e.g., they do not have their accounts audited).

Finally, as fintech companies do not have to deal with legacy technologies, they are characterised by a culture of efficient operational design, which, together with their size, allows them to be more innovative than traditional institutions.

Although a startup is the archetypical of fintech firm[34], traditional companies, which provide financial services based on new technologies, as well as BigTech, including the well-known GAFA (Google, Apple, Facebook and Amazon)[35], should also be taken into account. In particular, BigTech platforms benefit from access to valuable business data and the provision of financial services at lower cost and higher scale. Platforms focused on Internet search (Google) collect customer information from search activity; those that make use of social networks (Facebook) have direct personal data on users and their connections; and those that benefit from e-commerce (Amazon) count upon data on sellers and buyers and their habits[36]. As *ab initio* they have at their disposal the important infrastructures and means, BigTechs are potentially much more disruptive to the traditional financial business[37].

According to the classification offered by Panzarino and Hatami, one of the criteria for understanding the global fintech ecosystem is to pay attention to their objective and mission. From this point of view, five categories of fintech can be identified: 1) "challengers" or companies that aim to displace the banking infrastructure in their markets; 2) "innovative payments" or fintech companies that take advantage of the situation of financial services that are obsolete with respect to the needs of the rest of the digital economy; 3) "unbanked or fintech advocates" that use technologies to reduce the number of unbanked people; 4) "social banking challengers" or fintechs that use social media to deliver financial services (e.g. GAFA); and 5) "infrastructure builders" or fintechs that use technologies to rethink services from the inside out[38].

[34] See in the "Figure 2" the global landscape of top fintech startups, according to CB Insights, 14 September 2021.

[35] OECD (2020), *Digital Disruption in Banking*..., pp. 15 et seq.; Panzarino and Hatami (2021), pp. 100 et seq.

[36] OECD (2020), p. 15.

[37] *Ibid.*

[38] Panzarino and Hatami (2021), pp. 90 et seq.

Figure 2. The main fintech companies of 2021

Source: *CB Insights*, 14 September 2021.

Finally, to complete the picture, the Center for Finance, Technology and Entrepreneurship (CFTE) [39] refers to the 225 "Fintech Unicorns", i.e., startups of this type that have grown to be valued at more than one billion US dollars [40]. Thus, if the 100 traditional banking institutions represent a combined market capitalisation of 7.1 trillion, the 100 most valued fintech startups have a corresponding figure of 3.8 trillion (or the 38% compared to traditional

[39] The Centre for Finance, Technology and Entrepreneurship (CFTE) was established in 2017 in London. It is a global platform for education and the future of fintech services. See more information, in particular, at: https://courses.cfte.education/fintech-job-report/ [Access: 20 May 2022].

[40] The majority, or about the 90 percent, of "Fintech Unicorns" are private companies. From a geographical perspective, the USA accounts for the vast majority of them, followed by the UK, China, India and Brazil. However, China ranks second in terms of market value thanks to *Ant Group* and *Tencent*. CFTE (2022), pp. 22 et seq.

banking)[41]. This reflects the enormous growth potential and the complex and evolving nature of fintech. Indeed, the authors warn of the need for caution on the blurring boundaries between fintech startups, banks using new technologies and tech companies[42].

4. Risks and Opportunities

The emergence of fintech startups in the traditional banking landscape has generated the need to address the phenomenon in the context of potential risks and opportunities. This approach has been highlighted in numerous documents produced by the international and regional bodies and institutions referred to in the previous sections. Moreover, it is part of the very logic of the moment we are living through, i.e., the second wave of globalisation, announced in Sen's speech at the 87th session of the International Labour Conference, at the dawn of the 21st century: "This is a crucial moment in the history of working people across the world. The first flush of globalization is nearing its completion, and we can begin to take a scrutinized and integrated view of the challenges it poses as well as the opportunities it offers..."[43].

Thus, the 2017 Financial Stability Board Report lists among the potential benefits of fintech for financial stability: decentralisation and diversification that, in certain circumstances, can mitigate crisis in the financial system; efficiency in operations that can underpin solvent and stable models; transparency that involves the creation of financial instruments capable of addressing risks and obtaining better information on financial products and customers; and improved access to financial services, including for depressed regions and the most disadvantaged population groups, as well as for SMEs[44].

The list of risks is much longer and includes: 1) in terms of funding sources, maturity and liquidity mismatches and leverage; 2) in terms of operational sources, governance or operational process failures, cyber risk, third party relationship, legal or regulatory risks and business risk of vulnerable firms; and 3) the group of macro-financial risks[45].

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[41] CFTE (2022), p. 23.

[42] *Ibid.*

[43] Sen, A. (2008), "The Decent Work Agenda: Looking back, looking forward: A growing consensus", *World of Work,* nº. 64, p. 6. See also Sen, A. (2000), "Work and rights", *International Labour Review*, Vol. 139, nº. 2, pp. 119-128, reproduced in Special Supplement (nº. S1) of *International Labour Review*, Vol. 152 (2013), pp. 82-92.

[44] FSB (2017), p. 13.

[45] FSB (2017), pp. 14 y 15.

The 2018 *Bali Agenda* distinguishes between opportunities[46], risks[47] and challenges[48]. Also, the OECD document warns about the consequences of digital disruption, brought about by fintech, for the stability of the financial system[49]. In the same vein, our reflection on the social dimension of fintech will be articulated through the analysis of the five opposing groups of risks and opportunities: the disruptive companies vs. the socially committed companies; job destruction vs. job creation; the demand for new skills vs. the opportunities for training, qualification, and requalification; the danger of (self-)exploitation of workers vs. their increasing autonomy; and individual agreements vs. global regulation.

4.1 The Disruptive Company vs. The Socially Committed Company

The fintech phenomenon is closely linked to that of startups. According to the definition available on the website of *Forbes*, startups comprise "young companies founded to develop a unique product or service, bring it to market and make it irresistible and irreplaceable for customers.
Rooted in innovation, [it] aims to remedy deficiencies of existing products or create entirely new categories of goods and services, disrupting entrenched

[46] "Fintech offers wide-ranging opportunities; which national authorities are keen to foster. It holds the promise of reducing costs and frictions, increasing efficiency and competition, narrowing information asymmetry, and broadening access to financial services—especially in low-income countries and for underserved populations—although the benefits of technological change may take time to fully materialize. Ongoing innovations and technological advances support broader economic development and inclusive growth, facilitate international payments and remittances, and simplify and strengthen regulatory compliance and supervisory processes". IMF, WB (2018), para. 3.

[47] "At the same time, national authorities are concerned about potential risks posed to the financial system and to its customers. As the financial system adapts, concerns arise regarding a range of issues, including: consumer and investor protection; the clarity and consistency of regulatory and legal frameworks, and the potential for regulatory arbitrage and contagion; the adequacy of existing financial safety nets, including lender-of-last-resort functions of central banks; and potential threats to financial integrity. Moreover, the adoption process may also pose transition challenges, and policy vigilance will be needed to make economies resilient and inclusive, so as to capture the full benefits". IMF, WB (2018), para. 4.

[48] "In response, policymaking will need to be nimble, innovative, and cooperative and—importantly—will need to strike the right balance between enabling financial innovation on the one hand and addressing challenges to market and financial integrity, consumer protection, and financial stability on the other. This balance is critical to deliver the welfare benefits of financial innovation and avoid stalling the development of fintech with the risk of leaving the underserved behind". IMF, WB (2018), para. 5.

[49] OECD (2020), pp. 33 et seq.

ways of thinking and doing business for entire industries. That's why many startups are known within their respective industries as 'disruptors' "[50].
In turn, the Spanish Chamber of Commerce defines it "a new or early-stage company with high growth potential that markets products and services through the use of information and communication technologies"[51]. In this sense, a distinction must be made between a conventional SME and a startup. Conventional SMEs enter the market after having invested a certain amount of money and have to wait for a certain period of time to start enjoying profits. By contrast, startups enter the market very quickly to achieve the necessary growth and financing through digital transformation"[52]. In the Spanish legal landscape, the issue is addressed in the recent Law 28/2022 for the Promotion of the Startup Ecosystem, also known as the "Startup Law"[53]. This Law shall apply to startup companies, understood as "any legal entity, including technology-based companies created under Law 14/2011, of 1 June, on Science, Technology and Innovation, which simultaneously meet the following conditions:

> a) Be newly created or, not being newly created, when no more than five years have elapsed since the date of registration of the public deed of incorporation, in general, or seven years in the case of biotechnology, energy, industrial and other strategic sectors or companies that have developed their own technology, designed entirely in Spain, which will be determined by the order referred to in Article 4.1.
> b) Not having arisen from a merger, spin-off or transformation of companies that are not considered to be emerging companies. The terms concentration or spin-off are deemed to be included in the foregoing operations.
> c) Not distribute or have distributed dividends or returns in the case of cooperatives.
> d) Not be listed on a regulated market.
> e) Have their registered office, head office or permanent establishment in Spain.
> f) Have 60 % of the workforce with an employment contract in Spain. In cooperatives, the workforce includes, for the sole purpose of the aforementioned percentage, worker-members and worker-members whose relationship is of a corporate nature.
> g) To develop an innovative entrepreneurial project with a scalable business model, as provided for in Article 4 (Article 3.1 of the Law 28/2022).

[50] Quoted by Baldridge, R.; Curry, B. (2022), "What is a Startup?", Feb 4 2022, available at: https://www.forbes.com/advisor/investing/what-is-a-startup/ [Access: 18 August 2022].
[51] Available at: https://www.camara.es/blog/creacion-de-empresas/que-es-una-startup [Access: 1 May de 2022]. The translation from Spanish to English is ours.
[52] *Ibid.*
[53] Ley 28/2022 *de fomento del ecosistema de las empresas emergentes*, dated 21 December 2022, *B.O.E.* no. 306 of 22 December 2022.

The explanatory memorandum makes clear that emerging companies have specific characteristics that make it difficult to fit them into the traditional regulatory framework. Among the already mentioned aspects, there are: firstly, the high risk arising from their innovative character and the uncertainty about the future of their business model at the early stage of financing, as they require capital to mature and test their ideas before generating benefits; secondly, the potential for exponential growth through economies of scale, which requires large capital investments to enable rapid expansion in case of success; thirdly, their dependence on the attraction and retention of new capital; thirdly, their dependence on highly skilled and highly productive workers from the very beginning of the business project, where there is no revenue stream to remunerate them through classical wage instruments; and finally, the exposure to strong international competition to attract capital and talent from abroad[54].

The innovative nature of an emerging company must be accredited. According to Article 3.2 of the Law, the key is its purpose is to solve a problem or improve an existing situation by developing products, services or processes that are new or substantially improved compared to the state of the art and that involve a risk of technological, industrial, or business model failure.

However, the rapid impact of companies on the market is not a new phenomenon. In this respect, it is worth recalling the so-called "disruptive companies" and the concept of "creative disruption". This concept was first introduced in 1992 by Jean Marie Dru (then president of the advertising agency TBWA)[55] and refers to a radical change in a market, caused by the overturning of existing conventions. He is thus recognised as the "father of the concept", having published articles entitled "Disruption" in *The Wall Street Journal*, *Frankfurter Allgemeine* and *Le Figaro*[56]. Moreover, a few years earlier, the author had somehow anticipated this idea in his *Saut créatif*[57].

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[54] See section I of the Preamble to the Law 28/2022.

[55] See Dru, J. M. (1997), *Disruption*, París: Village mondial; Dru, J. M. (1997), *Disruption,* New Jersey: Ed. Wiley, also available in latter editions, including in Spanish. Dru, J. M. (1997), *Disruption,* Madrid: Ed. Eresma & Celeste Ediciones.

[56] As Consuelo Ferreiro points out, "[f]rom the beginning, there has been doubt about the attribution of authorship of this expression, disputed between French and American authors. The publicist Jean Marie Dru, who in 1992 registered the trademark 'disruption' and identified it with a 'creative methodology' oriented towards his clients, has been identified as the pioneer [(1984). *Le Saut créatif*. Paris: Jean-Claude Lattès; and (1997), *Disruption*. Paris: Village mondial]. But Harvard University professor Clayton M. Christensen is credited with introducing the term 'disruptive technology' in 1995 [Bower, J. L. and Christensen, C. M. (1995), "Disruptive technologies: Catching the wave", *Harvard Business Review*, Vol. 73(1), pp. 43-53], which he transformed two years later into 'disruptive innovation', and defined in the sense of

Later, the concept mutated into "disruptive innovation", which was better suited to the broad content (competition, market, and business models) and the modern discourse on entrepreneurship. Disruptive innovation thus describes a new product or service, usually offered by a small firm, with inferior and/or different performance aimed at a low-end market segment and then incrementally improved to the point of dominating (disrupting) firms in the mainstream market (and rendering incumbents in that market obsolete)[58].

Disruption is often presented as the essence of the fourth industrial revolution[59], which manifests itself through new forms of business activity and organization[60]. Thus, innovative companies are disruptive because they identify a vulnerable sector of the economy and abruptly transform the market with the use of new technologies and, at the same time, companies may be innovative as well when they abruptly transform the market, even if they are not classified as emerging.

Disruption implies a radically different way of acting from what has been known or done before by the company itself, if that is the case, or by its competitors. The niche of activity that is found comes either from facilitating access to a particular product or service to customers who previously did not use it because they lacked sufficient purchasing power, known as "lower-end technologies"; or from facilitating access to such a product or service by using new technologies whose previous non-existence prevented them from having customers or offering a product or service in a different, more efficient or more attractive way than the one used previously, known as "new market technologies". An example of this are the digital collaborative platform companies that organise an important part of their goods or services through a computer tool, an interface, whose use is allowed to certain people so that they

technologies that introduce abrupt and/or sustainable changes or ruptures in themselves". Christensen, C. M. (1997), *The innovator's dilemma: when new technologies cause great firms to fail*. Boston: Harvard Business School Press]". Ferreiro Regueiro, C. (2019), "El liderazgo femenino ante la cuarta revolución industrial", *Revista del Ministerio de Trabajo, Migraciones y Seguridad Social,* Vol. 1 Extra, pp. 149-150.

[57] Dru, J. M. (1984), *Le Saut créatif*, Paris : Jean-Claud Lattès.

[58] Christensen, C. M. and Raynor, M. E. (2003), *The Innovators Solution: creating and sustaining successful growth*, Harvard Business School Press, Boston.

[59] Schwab, K. (2016), *The Fourth Industrial Revolution,* Geneva: World Economic Forum. At the website of *World Economic Forum,* it may be read that "[t]he First Industrial Revolution used water and steam power to mechanize production. The Second used electric power to create mass production. The Third used electronics and information technology to automate production. Now a Fourth Industrial Revolution is building on the Third, the digital revolution that has been occurring since the middle of the last century. It is characterized by a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres", available at: https://www.weforum.org [Accessed 2 June 2018].

[60] Ferreiro Regueiro (2019), p. 149. Hereinafter, the reasoning of this author is followed.

become providers or suppliers of such goods or services, while being apparently autonomous - rather than under strict subordination, an economic dependence can be seen in the legal relationship - and the recipients are the so-called "clients"[61].

In Panzarino and Hatami's classification, referred to in the previous chapter, one type of fintech stands out that illustrates the disruptive nature, but, at the same time, aims to meet immediate demand. This refers to the "unbanked" or the fintech companies that use technologies to reduce the number people who have no access to banking services[62].

In particular, companies that support vulnerable groups of population are emerging in countries and regions with a large number of inhabitants, such as Brazil, India or South Africa. In these countries, traditional banking is unable or unwilling to meet the needs of all people and is limited to serving only a few. Meanwhile, the "champions of the unbanked", with less advanced technological means, in particular mobile phone applications, are proposing creative and innovative solutions to open access to finance for all groups of population. Such initiatives include the success stories of *M-Pesa* in Kenya, Tanzania and South Africa, *Nubank* in Brazil and *Paytm* in India[63].

In this respect, the "seductive" message of the emerging narrative about the world of finance becomes more and more powerful[64]. The focus is on the specifics of the transaction, and not so much on systemic dynamics, proposing solutions to isolated and well identified frictions in the financial market. It incorporates the purpose of contributing to the "social revolution" in its broader aspirations by rebuilding finance according to the principles of reciprocity, cooperation, and inclusion[65].

In this context, the phenomenon of "socialtech", which encompasses the model of micro-finance institutions and the technological factor to challenge the ineffective conventional system, stands out. Thus, socialtech companies are defined as financial start-ups that operate on digital platforms in the microfinance field with a clear social purpose[66]. It therefore deals with hybrid entities, combining financial and social objectives, to which they apply the

[61] Ferreiro Regueiro (2019), p. 150.

[62] Panzarino and Hatami (2021), pp. 90, 96-98.

[63] Panzarino and Hatami, pp. 96-98.

[64] Omarova, S. H. (2019), "New Tech v. New Deal: Fintech as a Systemic Phenomenon", *Yale Journal on Regulation,* Vol. 36, p. 737.

[65] *Ibid.*

[66] Souza Siqueira, E.; Diniz, E. H. and Gonzalez, L. (2018), "Socialtech: Fintech with Social Goals and hybridism in emergent technological platforms of social financial organizations" (Study in progress), Conference paper, July 2018, See discussions, stats, and author profiles for this publication at: https://www.researchgate.net/publication/339936556 [Accessed 10 May 2022].

operational logic of a startup. Hence, there is an - already announced danger that entities with similar objectives, but coming from different business models, will coincide in the same space. As an example of such initiatives, in Brazil, three cases are cited (*Avante, IOUU* and *Palmas*), which have similar characteristics in terms of their social mission for the provision of financial services through digital platforms, although they differ in their origins, objectives and organisational structures.

The coexistence of various models and logics makes the phenomenon of the "hybrid" enterprise particularly interesting, illustrated through the conflicts and challenges or through the advantages that such a "mixed" nature can generate[67]. On the one hand, they have to face the contradiction between social objectives and economic benefits, i.e., the trade-off between value creation and value capture[68]; on the other hand, they are able to access new resources and extend the repertoire of services in order to respond to complex and changing environments and to get closer to the demands of local communities and population groups.

Thus, by virtue of their social mission[69], socialtechs prioritise services aimed at the needs of their main target groups, usually vulnerable people in situations of poverty and social exclusion, and a personalised approach rather than a large-scale approach. They may also focus on operations to support and promote education, health, or development.

The commitment to sustainability makes these enterprises more successful than microfinance institutions without social objectives, although, like the latter, they ultimately aim to increase the scale of operations and maximise efficiency and effectiveness in view of the financial component of their nature.

Among other factors, the success of socialtech is due to individual entrepreneurship and forms of financing that include both government sources, crowdfunding, and private investments. In addition, as has been noted on many occasions, companies seek to meet local demand by making use of relatively short study cycles, launching the minimum viable product, and evaluating acceptance and growth assumptions. In this sense, experimentation and creativity are the hallmarks of this type of company.

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[67] *Ibid.*

[68] Battilana, J., & Lee, M. (2014), "Advancing Research on Hybrid Organizing -Insights from the Study of Social Enterprises", *Academy of Management Annals*, Vol. 8, nº 1, pp. 397-441; Souza Siqueira, Diniz and Gonzalez (2018).

[69] On social, financial and startup characteristics, see in more detail Souza Siqueira, Diniz and Gonzalez (2018).

4.2 Job Destruction vs. Job Creation

While it is true that disruption is associated with the fourth industrial revolution and Industry 4.0[70], it is no less true that these realities are presented as causes of job destruction. In this sense, the phenomenon of fintech adds to the debate on the involvement of the technological factor in the destruction, transformation, and creation of jobs, and is part of the complex and multidimensional process, baptised by Joseph Schumpeter as "destructive creation"[71].

The 20th century was still living with the conviction of a division between human and digital labour. In this scenario, workers focused on the most creative tasks, those that could not be reduced to the mere execution of orders or the application of algorithms, while machines were assigned to the performance of routine tasks, such as data processing. Today, however, technological progress makes it possible to automate even the most complex

[70] Chronologically, "after the automation of industry in the 18th and 19th centuries (Industry 1.0), the division of labour and chain production (scientific organisation of work) in the 20th century (Industry 2.0), and the technological revolution at the end of the 20th century (Industry 3.0)", we must now speak of "the era of the digitalisation of the economy". (2017), "Derecho y trabajo en la era digital: ¿'Revolución industrial 4.0' o 'economía sumergida 3.0'?", *El futuro del trabajo que queremos,* Volumen II, Madrid: Gobierno de España, Ministerio de Empleo y de la Seguridad Social, OIT, p. 405. (The translation form Spanish is ours). According to several sources, the term "Industry 4.0" was coined as part of the Federal Government's High Tech Strategy, describes a form of production in which all machines and products are digitally networked together. It was presented to a broader public for the first time in 2011 at the Hannover Messe, Germany's most important industrial fair. "Industry 4.0 in Hannover Messe", 2 April 2014, available at: https://www.deutschland.de/en/topic/business/globalization-world-trade/industry-40-at-hannover-messe [Accessed 18 August 2022]. Despite its terminological roots in Germany, the phenomenon itself is known in many other countries under the names of smart factories, the Industrial Internet of Things, smart industry or advanced manufacturing. Several States have developed and implemented initiatives related to Industry 4.0. See Ushakova, T. (2020), "Work-life balance and Industry 4.0 in the Legal Framework of the European Union", in Carby-Hall, J. and Mella Méndez, L. (Eds.), *Labour Law and the Gig Economy. Challenges posed by the digitalization of labour processes,* 1st ed., London: Routledge, pp. 190-208.

[71] "Creative destruction" or "restructuring" refers to the incessant process of renewal of the mechanism of production, whereby old economic structures are destroyed and replaced by new ones. Schumpeter, J. A. (1994), Capitalism, Socialism, and Democracy, London: Routledge, pp. 82-83. The empirical application of this metaphor finds expression in the analysis of outplacement factors and job volatility. Davis, S., Haltiwanger, J. and Schuh, S. (1996), Job Creation and Destruction, Cambridge: MIT Press. See also Ushakova, T. (2018), "De la máquina al trabajador y viceversa. Un ensayo sobre la implicación de las nuevas tecnologías en el mundo laboral", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, Vol. 6, núm. 1, pp. 122 et seq.

and non-routine tasks[72]. In fact, many studies warn about the increasing substitution of cognitive tasks by computers[73]. Moreover, the substitution and, consequently, the destruction of jobs is happening faster than the creation of new jobs[74]. It is not for nothing that the involvement of new technologies in the world of work is one of the most revealing focal points in the "Future of Work" debate[75]. "Will it be different this time?" - ask many wise men and scholars[76]. According to some of them, we are facing a critical departure from the pattern we have been accustomed to so far and are confronting a phenomenon of an entirely different nature[77]. There are predictions that technological unemployment will continue to rise, due to the negative impact of the innovative use of information and communication technology, the spread of robotic learning, the Internet of Things and 3D printing, or even an annunciation of a jobless future[78].

Technological change affects not only the quantity, but also the nature and quality of jobs. Indeed, the main concern expressed by the European Economic and Social Committee (EESC) in its Opinion on the European Commission's *Action Plan*, is about the loss of a significant number of jobs in financial institutions, caused by the emergence of fintechs. The EESC therefore recommends that EU Member States design and implement active labour market policies to enable workers affected by the introduction of

[72] UN, DESA/DPAD, in collaboration with UNDP, ILO and UN Women (2017), *The impact of technological revolution on labour markets and income distribution*, 31 July 2017, pp. 3 et seq. This study was conducted in response to a request by the Secretary-General's Executive Committee Decision No. 2017/43 of 23 March 2017.

[73] Benedikt Frey, C., Osborne, M.A. and Holmes, C. (2016), *Technology at work v 2.0: The future is not what it used to be*, Oxford: Oxford Martin Institute and Citi, p. 11; UN, ECOSOC (2016), *Foresight for digital development*, Report of the Secretary-General, 29 February 2016, UN Doc E/CN.16/2016/3, p. 10.

[74] Brynjolfsson, E. and McAfee, A. (2014), *The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies*, New York: W. W. Norton & Company Inc. Publishers.

[75] See, in this respect, the summary of ideas and open questions in: ILO (2017), *The centenary initiative on the future of work. Technological change and work in the future: How to make technology work for all?* Note Series, Issue 1, Geneva: International Labour Office. This note, based on a contribution from Irmgard Nübler, analyses the effects of technological changes on the quantity and quality of jobs and discusses policy challenges in developing a skilled workforce, avoiding job polarization, and assuring equal distribution of productivity gains.

[76] ILO (2017), *The centenary initiative on the future of work,* pp. 4 et seq. and Bergman, R. (2017), *Utopía para realistas*, Barcelona: Salamandra, pp. 175 et seq. (Available in English: Bergman, R. (2017), *Utopia for realists. And how we can get there,* London: Bloomsbury Publishing).

[77] Schwab (2016).

[78] Brynjolfsson, McAfee (2014).

innovative technologies in the financial sector to take up new jobs as soon as possible[79].

Some empirical studies corroborate the claim that, due to the novel approach and rapid growth of the fintech sector, fintech companies employ significantly fewer employees than in the traditional banking sector[80]. The reduction in workforce needs is impressive. It is "a few hundred or a few thousand jobs less" than ones required in banks: "whereas a banking institution may employ a hundred employees in a particular function, a fintech company needs only one person for the same task"[81]. On the other hand, the same sources point out that, in October 2021, there were 40,000 jobs available in the 225 "Fintech Unicorns"[82].

4.3 The Demand for New Skills vs. Opportunities for Training, Qualification and Requalification

Digitalisation and ecological transition (green and blue economies) are two essential transforming elements of the current economic model and, in particular, of the labour market[83]. The jobs generated by this transformation must therefore be filled by competent and professionally qualified workers.

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[79] EU (2018), *FinTech Accion plan: For a more competitive and innovative European financial sector,* Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, [COM (2018) 109 final], (2018/C 367/12), para 1.6. The same concern, albeit more nuanced, is expressed in the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on the *Coordinated Plan on Artificial Intelligence*. It states that "[g]iven the disruptive nature of many of the technological advances, policy-makers will develop strategies to deal with employment changes in order to ensure inclusiveness, as the pace with which some jobs will disappear and others appear is likely to accelerate, while business models and the way tasks or jobs are performed will change. This may make it necessary to modify current labour market and social protection arrangements to support transitions in the labour market". COM (2018) 795, para 2.4.

[80] CFTE (2022), *The Fintech Job Report: Technology is eating finance*, Torrazza Piemonte: Amazon Italia Logistica S.r.l.

[81] CFTE (2022), p. 32.

[82] CFTE (2022), pp. 28-29.

[83] See the Preamble of the Organic Law 3/2022 of 31 March on the organisation and integration of vocational training, *B.O.E.* núm. 78, 1 April 2022, and the study by Mella Méndez, L. (2022), "Sobre la Ley Orgánica 3/2022, de 31 de marzo, de ordenación e integración de la formación profesional: valoración general de una ambiciosa reforma", in *Briefs de la AEDTSS*, April 2022, available at: https://www.aedtss.com/la-ley-organica-3-2022-de-31-de-marzo-de-ordenacion-e-integracion-de-la-formacion-profesional-valoracion-general-de-una-ambiciosa-reforma/ [Accessed 20 May 2022].

Thus, the absence of corresponding skills and abilities represents a huge handicap for creativity and innovation.

In traditional banking institutions, jobs are characterised by a clear and precise description of professional categories and functions in each position. In contrast, in the "fintech ecosystem", the situation is much more uncertain and changing[84]. Due to the nature of this type of business, the demand for jobs is formulated on an *ad hoc* basis. Given this particularity, the classification of fintech jobs presents several challenges. Firstly, it depends on the specific circumstances, often far removed from the established system, and does not conform to banking classification profiles. Secondly, given the innovative nature, the required positions may be completely new and unknown in the labour landscape a few years ago. Thirdly, the functions of the same job may vary from one company to another. Moreover, as we have learnt from the previous section, the term "fintech" covers different sectors, from the most traditional, such as the insurance, to the most innovative, such as cryptocurrencies[85].

On the basis of the analysis of the 225 "Fintech Unicorns", the CFTE has developed an approach to the classification of jobs and skills required for these types of companies[86]. A distinction is made between the 14 "Fintech Job Families"[87], which, in turn, are grouped into three categories: the general category, which is present in most companies (such as legal advice, human resources or customer service); the technology category dealing with jobs specific to technology companies (including Tech Jobs and Non-Tech Jobs); and the finance category, which describes the jobs in demand in financial institutions. The table available in the CFTE Report shows that technology-based jobs account for 70 percent (in the Blockchain sector) to 30 percent (in the payments sector); finance-related jobs account for 35 percent (in the Insurtech sector) to 10 percent (in the Blockchain sector), and non-tech jobs

[84] CFTE (2022), p. 32.

[85] Cryptocurrency is decentralized digital money that's based on blockchain technology. The most popular versions are Bitcoin and Ethereum, but there are more than 19,000 different cryptocurrencies in circulation. Bitcoin was the first cryptocurrency, addressed, among others, by Satoshi Nakamoto in a 2008 paper titled "Bitcoin: A Peer-to-Peer Electronic Cash System." Nakamoto described the project as 'an electronic payment system based on cryptographic proof instead of trust'." Quoted by Ashford, K. (2022), "What is Cryptocurrency?", 6 June 2022, available at: https://www.forbes.com/advisor/investing/cryptocurrency/what-is-cryptocurrency/ [Accessed 20 August 2022].

[86] CFTE (2022), p. 33 et seq.

[87] These "Fintech Families" comprise: business development, core business, customer service, data science, design, engineering, finance, human resources, IT and operations, legal, marketing and communications, partnering, product management, and liability and risk. CFTE (2022), p. 33.

are account for 20 to 40 percent of cases in different sectors[88]. Overall, 80 percent of the jobs in fintech are similar to those in tech companies. Consequently, this leads to the conclusion that, in the "fintech" binomial "tech is eating finance", as reflected in the title of the CFTE study[89].

However, the main merit of this empirical study lies in the description of the skills required for jobs in fintech companies[90]. In this respect, in addition to the well-known "hard" and "soft" skills, mindset, industry knowledge and experience stand out. According to the distinction criterion applied, the difference between "hard" and "soft" skills lies in how easy they are to measure. In this line of thinking, it seems that "[e]verything becomes comparable and measurable, and subject to the logic of the market"[91]. Soft skills, such as teamwork or leadership skills, are less obvious and are difficult to measure. In our opinion, mindset-related competencies, such as adaptability or resilience, can be included in the group of soft skills[92]. Hard skills, on the other hand, can encompass knowledge of the sector, such as the application of artificial intelligence (AI) in responsibility or general knowledge of the fintech ecosystem.

The CFTE Report on fintech, although it does not include the Spanish companies of this type, can be useful as a reference, in particular, in the new model intended for vocational training[93]. The main achievement of the new law (LO 3/2022) consists in including in a single system three different subjects: vocational training, strictly speaking; accreditation of competences and professional orientation[94]. With regard to training, the new system starts by identifying the most valued professional competences in the labour market, then it elaborates the corresponding training offer and, finally, it facilitates the delivery and acquisition of the offered contents. In this respect, the main challenge is to cover the two generally separated and independent training sub-systems: that of the education system and that of employment, - and therefore to address both students and the active workforce (workers or unemployed). Success in education, as in the other two areas, will depend on "the appropriate

88 CFTE (2022), p. 41.

89 *Ibid.*

90 See Part 4. "The Skills in Fintech", pp. 45 et seq.

91 Han (2021), p. 45.

92 See, among others, White, D. (2021), *The Soft Skills Book. The Key Difference to Becoming Highly Effective and Valued*, Madrid et al.: LID, p. 17. In his brief and illustrative guide, the author refers to the growth mindset or the ability to develop new skills over time, which, in turn, allows you to learn faster and collaborate better, take risks and deal with mistakes naturally etc., citing the famous book by Dweck, C. (2006), *Mindset: The New Psychology of Success*.

93 Organic Law 3/2022, *B.O.E.* núm. 78, 1 April 2022.

94 Mella Méndez (2022).

solution to the different mismatches"[95] that may arise in the complex relationship between the education system and the labour market. This complexity is due to the "acceleration"[96] of changes brought about by the technological factor, unprecedented in history. In other words, what seemed to take a decade to happen five years ago is taking place in one, two or three years. The acceleration makes it difficult to predict the changes that will affect the labour market, work organisation and human resource management.

4.4 Workers' (Self)exploitation vs. Increasing Workers' Autonomy and Flexibility

Fintech companies themselves represent accelerated change: they feed on the changing landscape and accelerate transformation. Equally, they are exponents of "the multiple variants and combinations resulting from the interaction of disruptive technologies"[97] that produce effects on the organisation of work and the labour market.

One of the central concerns raised by disruptive technologies is the issue of data protection. While, in the field of fintech, the need to strengthen the security of transactions and the protection of customer data is particularly emphasised, in the regulatory framework of labour relations, specific regulations affecting the data protection of employees are being developed. Indeed, initiatives in this respect are seen as direct consequences of technological change, along with indirect ones[98] such as the reorganisation of working time, the right to disconnect[99] or remote working[100]. Thus, with regard to organisational factors, the need to pay attention to "the distribution of the

[95] *Ibid.*

[96] Del Rey Guanter, S. (2017), "Sobre el futuro del trabajo: modalidades de prestaciones de servicios y cambios tecnológicos", *El futuro del trabajo que queremos*, Volumen II, OIT, Madrid: Gobierno de España, Ministerio de Empleo y de la Seguridad Social, p. 362. Hereafter, the translation to English is ours.

[97] Del Rey Guanter (2017), p. 363.

[98] *Ibid.*

[99] Thus, following the first initiatives, in particular the French one, the Spanish Workers' Statute Law (Real Decreto Legislativo 2/2015, of 23 October, por el que se aprueba el texto refundido de la Ley del ET, *B.O.E.* no. 255 of 24 October 2015) incorporated a new Article (Article 20 bis) on workers' rights to privacy in relation to the digital environment and to disconnection: "Workers have the right to privacy in the use of digital devices made available to them by the employer, to digital disconnection and to privacy from the use of video surveillance and geolocation devices under the terms established in current legislation on the protection of personal data and the guarantee of digital rights". The article was added by final provision 13 of Organic Law 3/2018, of 5 December, on Personal Data Protection and Guarantee of Digital Rights, *B.O.E.* no. 294, of 6 December 2018.

[100] In Spain, Article 13 on remote work of the Workers' Statute was modified due to the enactment of Law 10/2021, of 9 July, on remote work. *B.O.E.* no. 164 of 10 July 2021.

working day, availability times and the guarantee of breaks and disconnections during the working day" is highlighted. And, with regard to the occupational risk factor, the distribution of working hours between face-to-face and remote work, on the one hand, and the legal distribution of actual working time and availability versus rest time, on the other, must be assessed[101].

In addition, the professional classification is affected: functions are redefined in relation to jobs and even entire processes. It is stated that "...probably, due to the great diversity of situations in the labour market, in service provision, in professional projects, in training needs.... that disruptivetechnologies cause in labour relations, the regulatory framework must consider with enormous flexibility the different contractual positions that may arise, so that it must be extremely cautious when establishing rigid models that may be in detriment to the diversification of positions that derive from new and unknown productive processes"[102]. In any case, "this contractual diversification must not be tantamount to maintaining or fostering situations of job precariousness"[103].

As stated in different sources, fintechs are looking for talent and, in this sense, they are betting on the new generations as "digital natives" who are attracted by this type of business where digital skills and knowledge are required in the financial business[104]. In addition, not insignificant pull factors are high salaries and a considerable degree of autonomy and flexibility. It seems that salaries in fintech companies still fall short of the numbers in traditional banking. However, they add benefits in terms of the employee's "emotional wage", such as flexible hours, identification with a dynamic and innovative structure, and even participation in the process of building of a new market[105].

In this context, the way is paved for the trend already noted in the general technological landscape. The worker is at risk of voluntarily submitting to an inhumane work regime. Thus, flexible working hours are translated into unlimited working hours, identification with the innovative structure becomes exclusive dedication to the professional activity, and participation in the creation of a new market leads to absolute absorption of the personality by the task. It is about personal optimisation and the constant increase of efficiency,

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[101] See, in more detail, Mella Méndez, L. (2020), "Sobre la organización del trabajo como factor de riesgo laboral en el trabajo a distancia", *Noticias CIELO,* nº 11, available at: http://www.cielolaboral.com/wp-content/uploads/2020/12/mella_noticias_cielo_n11_2020.pdf [Accessed 10 July 2022].

[102] Del Rey Guanter (2017), p. 363.

[103] *Ibid.*

[104] See, among other sources, information available in the web page of iProUP: https://www.iproup.com/empleo/18542-bancos-o-fintech-quien-paga-sueldos-mas-altos [Accessed 24 May 2022].

[105] *Ibid.*

the aims of which are not only the exploitation of working time, but also absorption of the person[106]. Blockages, weaknesses and errors are suppressed, while all results are made comparable and measurable and subjected to the internal logic of the market[107]. In this scenario, the working person embraces the motto of "quantified self" or "self-knowledge through numbers"[108]. A perfect example of this numerical appreciation of a worker can be illustrated by the approach to a collective dismissal. In this respect, the case of *Porras Guisado*[109] is significant, due to the confluence of the assumption of collective dismissal and discriminatory dismissal. In contrast to its very extensive case law on the protection of pregnant women, the Court of Justice of the European Union (CJEU) has not interpreted Directive 92/85[110] in conjunction with Directive 2006/54[111]. Although it is also true that the national court emphasised that it was not seeking to interpret anti-discrimination judicial protection under the latter provision[112]. In any event, the criteria applied by the company (*Bankia*) to carry out the collective dismissal have been taken into account, prioritising the situation of the worker by virtue of quantified criteria as part of the group affected by the dismissal. It dealt with the result of the assessment process carried out in the entity, which was specified in the consultation period and incorporated as a part of the agreement, being a relevant element that the worker in question was among those with the lowest scores[113]. Thus, the quantitative criterion linked to productivity prevailed over the qualitative one of the situation of pregnancy, with a slight nuance in favour of the latter[114].

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106 Han (2021), p. 45.
107 *Ibid.*
108 Han (2021), p. 79.
109 *Porras Guisado,* C-103/16, Judgment of the CJEU of 20 February 2018.
110 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth specific Directive within the meaning of Directive 89/391/EEC, Article 16.1), *OJ* L 348, 28.11.1992.
111 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ* L 204, 26.07.2006.
112 This reference for a preliminary ruling concerns the interpretation of Articles 10.1 and 10.2 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, and Article 1.1(a) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (para. 1).
113 Para. 21.
114 The CJEU held that Article 10.1 of Directive 92/85 must be interpreted as precluding national legislation which does not in principle prohibit, as a preventive measure, the dismissal

In this scenario, it is not only the working person who is at risk of being valued and self-valued in numerical terms. Customers are also susceptible to being part of the quantifiable society monitored by the *Bannoptikum*[115], i.e., a device which identifies persons and groups of persons who do not fit the profile of a desired customer, and which ensures the security and efficiency of the system[116].

4.5 Individual Agreements vs. Global Regulation

Undoubtedly, one of the peculiarities of employment in fintech companies is the possibility of using individual agreements. In this sense, depending on each position and in accordance with the strategy of each company, not only salary is negotiated, but also long-term incentives, variable components and flexible benefits, as well as work-life balance schemes that are adapted to the needs of the employees[117].

In the field of fintech, the labour legislation that generally regulates the regime of dependent workers or self-employed workers is applicable. Experts point out that, in Spain, there is no specific legislation applicable to those employed by companies of this type[118]. Therefore, the employment relationship of dependent workers is governed by the Workers' Statute (*Estatuto de los Trabajadores*)[119], and the contractual relationship of self-employed workers or, where appropriate, economically dependent self-employed workers, is regulated by the Self-Employed Workers' Statute (*Estatuto del Trabajo Autónomo*)[120].

In this sense, the flexibility of the legal framework has to respond to the plurality of professional situations involving fintech workers. Thus, one cannot

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of a pregnant worker or a worker who has recently given birth or is breastfeeding, and which only provides, by way of compensation, for the nullity of such dismissal where it is unlawful. On the other hand, it declared that there was not conflict between national and EU law in three other preliminary questions.

115 From German *bann* (prohibition, proscription, banishment). Quoted by Han (2021), p. 85.

116 Han (2021), pp. 85-86.

117 See more details at the web page of iProUP: https://www.iproup.com/empleo/18542-bancos-o-fintech-quien-paga-sueldos-mas-altos [Accessed 29 May 2022].

118 See López-Lapuente, L., Aguilar Alonso, I., Albuerne González, C. (2021), "Fintech Laws and Regulations. Spain 2021-2022", in *Fintech Laws and Regulations,* ICLG, available at: https://iclg.com/practice-areas/fintech-laws-and-regulations/spain [Accessed 20 June 2022].

119 Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, *B.O.E.* núm. 255, de 24/10/2015, as subsequently amended.

120 Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo, *B.O.E.* núm. 166, de 12/07/2007, as subsequently amended.

agree more with the statement that the regulation must avoid contractual reductions, the most obvious consequence of which is the limitation of technological development, with the repercussions for employment and the quality of work, in favour of regulatory provisions that, if no less protective, being adequately designed to accommodate the different forms of service[121]. Thus, it does not seem appropriate to take it for granted that self-employment, as distinct from that performed by salaried employees, is a category to be limited and assimilated as far as possible to the latter. All indications in the new organisational developments in companies based on disruptive technologies point to a more consistent development of self-employment.

It is therefore urgent to design and develop a regulation that contemplates and protects this figure, delimiting it with respect to salaried employment, providing it with minimum individual and collective rights, especially when it is a self-employed worker whose income basically comes from one client[122]. Therefore, it is not correct to assimilate self-employment with precarious or irregular work, nor should we start from the premise that the destiny of these workers is one of progressive labourisation, as happened recently in the case of platform delivery workers[123]. On the contrary, their contractual autonomy must be respected, but, at the same time, a network of minimum social rights must be extended to establish intermediate areas of protection, so that the protection gap between self-employed and salaried workers is not as wide as it is at present. It is clear that self-employment plays and will continue to play a very important role in the neo-technological economy. In this scenario, flexibility must be preserved, which, fundamentally, is manifested through

121 Del Rey Guanter (2017), p. 364. In this paragraph, the reasoning of the cited author is followed.

122 See Gil y Gil, J. L. (2021), "Collective Bargaining for the Self-Employed", *Comparative labor law and policy journal*, Vol. 42, Nº. 2, pp. 327-370.

123 "Twenty-third additional provision. Presumption of employment in the field of digital delivery platforms. By application of the provisions of Article 8.1, the activity of persons who provide paid services consisting of the delivery or distribution of any consumer product or merchandise, by employers who exercise business powers of organisation, management and control directly, indirectly or implicitly, by means of algorithmic management of the service or working conditions, through a digital platform, is presumed to be included within the scope of this law. This presumption does not affect the provisions of Article 1.3 of this regulation". Law 12/2021, of 28 September, which amends the revised text of the Workers' Statute Law, approved by Royal Legislative Decree 2/2015, of 23 October, to guarantee the labour rights of persons dedicated to delivery in the field of digital platforms. *B.O.E.* no. 233, 29 October 2021 (Ley 12/2021, de 28 de septiembre, *por la que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales*. *B.O.E.* núm. 233, de 29 de octubre de 2021).

individual autonomy in the configuration of the provision of the service, without being equated with a situation of lack of protection.

Following Del Rey Guanter's reasoning, neither is it advisable to cultivate a negative view of the fixed-term contract itself, considering that it should be eliminated or marginalised in favour of the permanent contract[124], even though this is the central idea of the recent reform of the Workers' Statute[125]. Without losing sight of the negative effects in all senses of an excessive rate of temporary employment, two premises must be assumed in this respect: firstly, the stability in employment represented by the permanent contract must be promoted for its positive consequences in different aspects, including those required in the field of technological change; secondly, this does not mean that fixed-term contracts should no longer be legally contemplated, especially in the case of economic and business developments resulting from the disruptive technological impact. However, this requires an effort to establish the regulatory framework to increase the levels of protection for temporary employees, so that their conception is radically removed from situations of job insecurity, especially the formation of ghettos of groups with little or no possibility of access to permanent contracts. In this respect, it seems that the very logic and *raison d'être* of fintech startups prevents them from moving away from the concept of temporariness, since, by becoming a solid and long-lasting business structure, they lose their status as innovative outposts.

According to experts, Spain has not yet designed a specific framework to regulate fintech companies as such[126]. Thus, in the Explanatory Memorandum to Law 7/2020, of 13 November, for the digital transformation of the financial system[127], the legislator reports the increasingly common use of terms "such as fintech, insurtech or regtech, referring to financial activity in general, insurance activity or the use of new technologies for regulatory purposes" and recognises that these terms "reflect the advances that are producing substantial changes in production processes, in the relationship with customers, in business models and in the very structure of the sector, due to the emergence of new players". It also endorses the Financial Stability Board's (FSB) definition of fintech.

[124] Del Rey Guanter (2017), pp. 364-365.

[125] Royal Decree-Law 32/2021, of 28 December, on urgent measures for labour reform, the guarantee of employment stability and the transformation of the labour market. *B.O.E.* no. 313 of 30 December 2021 (Real Decreto-ley 32/2021, de 28 de diciembre, *de medidas urgentes para la reforma laboral, la garantía de la estabilidad en el empleo y la transformación del mercado de trabajo*. *B.O.E.* núm. 313 de 30 de diciembre de 2021).

[126] López-Lapuente, Aguilar Alonso, Albuerne González (2021), Loc. cit.

[127] Ley 7/2020, de 13 de noviembre, para la transformación digital del sistema financiero *B.O.E.* núm. 300, of 14.11.2020.

However, when referring to supervision[128], it states that it does not intend to "modify the current framework for the distribution of competences between authorities, without prejudice to the collaboration between all of them in the new digital context", and describes as "supervisory authorities" the national financial authorities with supervisory functions that are competent in this area, "whether the Bank of Spain, the National Securities Market Commission or the Directorate General of Insurance and Pension Funds" [Article 3(b)]. A different level of conciseness is provided, for example, by Article 71 of Royal Decree-Law 19/2018, of 23 November, on payment services and other urgent measures in financial matters, section 1 of which clearly states that the sanctioning regime provided for in Title IV of Law 10/2014, of 26 June, on the regulation, supervision and solvency of financial institutions, shall be directly applicable to the providers of such services, as well as Royal Decree 2119/1993, of 3 December, on the sanctioning procedure applicable to parties acting in the financial markets, and whose paragraph 2 states that "the Bank of Spain is designated as the competent national authority to guarantee and oversee effective compliance with this Royal Decree-Law".

There are frequent warnings that the rules governing the financial sector do not provide sufficient security to meet the technological challenge, and that governance in the field of fintech requires renewed principles, rules and protocols to promote innovation and mitigate the social cost of innovation[129].

Many models of such a regulation can be mentioned. Taking into consideration the World Bank Report as a starting point, we can distinguish between seven models: firstly, *Wait & See* (allows innovation to be developed with no restriction, can work well in environments with limited regulatory capacity, involves a relevant degree of risk if there is no subsequent regulation, example: China); secondly, *Test & Learn* (innovations tested in real environments, with involvement of supervisory authorities, on a case-by-case basis, requires active involvement of supervisory authorities and presents difficulty for large-scale and for equal opportunities, examples: Philippines and Tanzania); thirdly, *Regulatory Sandbox* (this is a virtual environment, where innovators can test their products or services in a limited period of time, characterised by high transparency and replicability, advisable for active markets with a good degree

[128] In this respect, it follows the reasoning of Fernández Rivaya, J. and Gómez Miralles, J. (2021), "'Fintech': la importancia de contar con un entorno regulatorio estable y desarrollado que confiera seguridad jurídica", *Garrigues digital*, 20/07/2021, available at: https://www.garrigues.com/es_ES/garrigues-digital/fintech-importancia-contar-entorno-regulatorio-estable-desarrollado-confiera [Accessed 20 June 2022].

[129] World Economy Forum (2021), *Global Technology Governance Report 2021: Harnessing Fourth Industrial Revolution Technologies in a COVID-19 World*, Insight Report in Collaboration with Deloitte, December 2020, p. 6.

of supervision, and for potentially unlicensed actors); fourth, *Waiver & Exemptions* (exemptions from the licence or restrictive sections of the licence, normally provided for by law and therefore do not involving the decision of the supervisory authority, no special remedies are required); fifth, *Letters of No-objections* (involves a certificate issued by the national authority stating that it does not object to the product or service offered by the fintech, advisable for a small market where the risk involved in the innovation can be understood without difficulty, e.g. Kenya); sixthly, *Differentiated Ted Regulation* (differentiated regulation established by law, no need for involvement of supervisory authorities, does not require special resources for its maintenance, examples: India, Payment Banks & Trade Receivable Platform License); and seventh, *Regulatory Reforms & Law* (enactment of rules that support fintech startups and protect consumers, competition, stability and financial inclusion, involve legislative reform, examples: Mexico, European Union)[130].

It seems that the *Regulatory Sandbox* model is the one that has had the most impact in the doctrinal legal debate and legislative initiatives[131], and has even been extrapolated to the field of collective bargaining[132]. As explained in the BBVA entry on the concept, it originally emerged from the "sandbox", i.e. "the small enclosure where children can play and experiment in a controlled environment"[133]. It has gradually acquired new meanings, for example, in the field of IT, a sandbox is a closed test environment designed to safely experiment with web or software development projects, or, in the field of the digital economy, it refers to the testing ground for new business models that are not yet protected by a regulation in force, supervised by regulatory institutions. Likewise, these testing grounds are particularly relevant in the fintech world with a pressing need to develop regulatory frameworks for

[130] See the slides made by Saal, M., Grandstein, H. (2018), "Regulating Fintech", *Developing and Operationalizing. National Financial Inclusion Strategies for the Digital Economy,* New-York: World Bank Group, in particular, Slide 21.

[131] "Around the world, 57 countries currently operate 73 fintech sandboxes". WBG research; see Appendix 3 for full details. WBG (2020), *Global Experience from Regulatory Sandbox,* The World Bank Group: Washington, pp. 1, 5-6.
See about the early initiatives BBVA (2017), "¿Qué es un 'sandbox' regulatorio?", published on 20 November 2017, available at: https://www.bbva.com/es/que-es-un-sandbox-regulatorio/ [Access: 10 July 2022], and about the results of regulation in Singapore, South Korea and the United Kingdom in World Economy Forum (2021), *Global Technology Governance Report 2021*, p. 35.

[132] Mercader Uguina, J. R. (2021), "Sandboxes para la transición digital en la negociación colectiva: la luz de un tiempo nuevo", *Foro de Labos,* published on 21 December 2021, available at: https://www.elforodelabos.es/2021/12/sandboxes-para-la-transicion-digital-en-la-negociacion-colectiva-la-luz-de-un-tiempo-nuevo/ [Access: 10 July 2022].

[133] BBVA (2017), "¿Qué es un 'sandbox' regulatorio?". The translation to English is ours.

emerging models. In this sense, a *Regulatory Sandbox* is generally defined as "a controlled, time-bound, live testing environment, which may feature regulatory waivers at regulators' discretion."[134]

In Spain, Title II of Law 7/2020 on the digital transformation of the financial system, which is the central part of the Law, refers to regulatory sandboxing, as understood at European and international level. The explanatory memorandum defines it as "a set of provisions covering the controlled and limited testing of a project that can provide a technology-based financial innovation applicable in the financial system".

From a labour law perspective, it is argued that the *Regulatory Sandbox* model could be applied in the framework of collective bargaining, more than anything else, to disprove the thesis that technological innovation and collective bargaining are mutually exclusive[135]. "In other words, the ability to adapt to market conditions in a digital environment will depend on the rapid and efficient response of enterprises and workers in the framework of collective bargaining"[136]. Thus, the Collective Bargaining Agreement for the Banking Sector[137] incorporates Chapter XV on digital transformation and digital rights. Article 79 "Digital Transformation" reads:

> Given that digital transformation is a factor in the restructuring of Companies, with potential effects on employment and working characteristics and conditions, the parties recognise that collective bargaining, by its nature and functions, is the instrument to facilitate adequate and fair governance of the impact of the digital transformation of entities on employment in the sector, dynamising labour relations in a proactive sense, i.e. anticipating the changes and their effects, and balancing the relationship of these labour relations, preventing and mitigating possible risks of segmentation and exclusion.
>
> In the processes of digital transformation, companies shall inform the RLT[138] about the technological changes that are going to take place in them, when these are relevant and may have significant consequences on employment and/or substantial changes in working conditions.

This provision highlights the role of the social partners in addressing technological innovation. In addition, the Convention recognises and details a series of digital rights: the right to digital and work-related disconnection; the

[134] WBG (2020), *Global Experience from Regulatory Sandbox,* p. 65.
[135] Mercader Uguina (2021).
[136] *Ibid.*
[137] Resolution of 17 March 2021, of the Directorate General for Labour, registering and publishing the 24th Collective Bargaining Agreement for the Banking Sector. *B.O.E.* no. 76 of 30 March 2021.
[138] The *RLT (los representantes legales de los trabajadores)* means the legal representatives of workers.

right to privacy and the use of digital devices in the workplace; the right to privacy from the use of video surveillance, sound recording and geolocation devices in the workplace; the right to digital education and the right to artificial intelligence (Article 80). With regard to the latter, it states:

> New tools based on algorithms can add value in moving towards a more efficient management of companies, offering improvements in their management systems. However, the increasing development of the contribution of technology requires careful implementation when applied to people. Therefore, employees have the right not to be subject to decisions based solely and exclusively on automated variables, except in those cases provided for by law, as well as the right to non-discrimination in relation to decisions and processes, when both are based solely on algorithms, being able to request, in these cases, the assistance and intervention of the persons designated for this purpose by the Company, in the event of discrepancy.
> Companies shall inform the RLT about the use of data analytics or artificial intelligence systems when decision-making processes in human resources and labour relations are based exclusively on digital models without human intervention. Such information shall, at a minimum, cover the data feeding the algorithms, the operating logic and the evaluation of the results".

Undoubtedly, this regulation develops the provisions of the Workers' Statute, introduced by the latest reforms, in particular, Article 20 bis, introduced by Organic Law 3/2018, to which it explicitly refers, and also Article 64. 4 (d), following the amendment made by the aforementioned Law 12/2021 or the "Riders" Law, which provides for the right of the works council to "be informed... of the parameters, rules and instructions on which algorithms or artificial intelligence systems are based that affect decision-making that may have an impact on working conditions, access to and maintenance of employment, including profiling".
However, the most striking example of the product of collective bargaining is the provision of the Collective Agreement of the Department Store Sector[139], which refers to the government's commitments to the digital transition, quoted by Mercader Uguina in his essay:

> The Sectoral Observatory may refer to the sphere of each company or group of companies the establishment of Protocols for the digital transition and organisational changes, connected with the objectives and functions of the Sectoral Observatory, and may in turn provide for the articulation of

[139] Paragraph 2 of the eleventh transitional provision, relating to "Commitments for the governance of the digital and organisational transition of the sector". Resolution of 31 May 2021, of the Directorate General for Labour, registering and publishing the Collective Agreement for the Department Store Sector. *B.O.E.* no. 139 of 11 June 2021.

> innovative frameworks for social dialogue ('SandBox', observatories or laboratories).

This provision shows how the regulatory framework of the *Sandbox* can have an impact not only on the business model and regulation of fintechs, but also on the process of social dialogue that affects their workers. In the author's words, it is "a declaration of intent on how to tackle this reality through joint action by the social partners"[140].

5. Conclusions

1. The methodology of this paper, based on the opposition between risks and opportunities, is determined by the very nature of fintech. On the one hand, it alludes to the advances of the global technological revolution; on the other, it suggests a return to the origins of banking in its model of *relationship banking* closely linked to the interests of local customers. In this sense, the initial idea of "fintech" invokes technology with the purpose of crossing borders and national legal systems to embrace a model adapted to the needs of the most vulnerable groups, who, in principle, lack access to traditional banking services. In this first approach to the problem, the opposition between the "financial", as the most emblematic manifestation of the globalised and depersonalised world, and the "social", in its local and humanitarian expression, is so manifest that it seems to be a cognitive dissociation.
2. The definition most frequently used in different sources is the one provided in the 2017 Financial Stability Board (FSB) Report entitled *Financial Stability Implications from FinTech Supervisory and Regulatory Issues that Merit Authorities' Attention*, and refers to "technology-enabled innovation in financial services that could lead to new business models, applications, processes or products with a concrete implication for the provision of financial services". This concept has been used in doctrinal works (Omarova, Rodríguez de la Heras Ballell), in documents of international organisations (*EU FinTech Action Plan*) and in legal rules (Spain: Law 7/2020 of 13 November for the digital transformation of the financial system).
3. The first meaning (a business model) can be connected to fintech-type companies. In this respect, startups are those that "launch" new financial services and products on the market. In fact, the growing interest and concern about the phenomenon is largely due to the creation of new companies that fill the gaps left by traditional banking, challenge it and compete with it. However, such innovative financial services and products are also offered by traditional

[140] Mercader Uguina (2021). The translation to English is ours.

companies, which are trying to meet the technological challenges, by large companies (such as the well-known GAFA), which incorporate techno-finance into the scope of their operations, and by the former startups, once they have become established. In the latter case, once again, we are faced with the opposition between the initial premise of the locality and immediacy of the service and the aspiration for growth and consolidation.

4. Fintechs embody both Schumpeter's "destructive creation" and Dru's "creative disruption". This dichotomy is manifested through the labour market situation, determined by technological progress, and characterised by the destruction of jobs and the creation of new ones. In the field of fintech, the situation is illustrated by the actual demand of workers that are infinitely lower than those of traditional banks. At the same time, traditional banks are forced to modernise and to reduce jobs. It seems to be clear that job destruction predominates over job creation. For this reason, international organisations, including the EU, are warning states about the urgency of measures to protect workers against these risks, in particular through active employment policies. Paradoxically, the demand for highly qualified profiles in the fintech sector is very high and highlights the gap between training and the labour market and the shortcomings in the qualification and requalification of workers.

5. Although the protection of workers is less frequently invoked in the field of fintech than the danger to the security of the financial market and the protection of customers, the risk of insecurity, precariousness and exploitation or self-exploitation of workers is obvious and stems from the very nature of the business model.

Thus, a number of protective measures can be envisaged. Firstly, national employment policies, especially active policies for the qualification, requalification and placement of workers. In this respect, the State government and the company must share the corresponding commitments and responsibilities. Secondly, labour and social security law can offer useful tools, such as rules on teleworking, digital rights at work and other latent initiatives that have gained considerable momentum and have come to the fore in the wake of the pandemic. Thirdly, collective bargaining can play a pioneering role and seize this opportunity to address the challenges posed by technological progress. As we have seen, the so-called *Sandbox* model of fintech regulation can also offer advantages in the social dialogue process. Finally, at the international level, it would seem advisable to seek a minimum standard for the regulation of fintechs that is based on the common principles and values, in the context of this study, recognised in the social sphere. Thus, it would not be appropriate for the fintech phenomenon to suffer from a kind of "vertigo of

singularity"[141] within the legal framework, and for the "absolute singularity" of the other, which is labour law, to be manifested as something different and deliberately removed from the phenomenon. For it should not be forgotten that "the relation to the singularity of the other implies the universality of the law"[142]. Applied to the legal field, among others, this relationship requires a "third party"[143]. The third party is the one who comes to "interrupt the vertigo of singularity", and, in the case of fintech, this "third party" could be international law or regional law that establishes the common principles and values applicable to companies of this type and to people working in the sector.

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[141] This idea is inspired by the Derrida's passage, from Derrida, J. (1994), *Politiques de l'amitié. Suivi de L'oreille de Heidegger,* Paris : Editions Galilée, p. 306.
[142] *Ibid.*
[143] *Ibid.*

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Dialectics on the Principle of Enforcement of Collective Agreements in Nigeria: A Reappraisal

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Abstract

Collective agreement just like any other contract is bedevilled with enormous challenges. This paper examines the fate of Nigerian employees against the backdrop of the practice of statutory and common laws associated with the enforcement of duly concluded collective agreements in Nigeria. However, as this paper will reveal, a somewhat latitude to enforcing an ensuing collective agreement has evolved since the introduction of the National Industrial Court Act 2006 and the Constitution Federal Republic of Nigeria (Third Alteration) Act 2010. The findings expose several inconsistencies in the judicial approach, with the majority of its decisions being predicated upon the rule that collective agreements are not binding which is a relic of the antiquated common law principle that a collective agreement is merely a 'gentleman agreement'. This paper, in reflecting on the core labour standards of the International Labour Organisation (ILO), suggests policy reforms and positive change in judicial attitude as panacea to bridge the gap and pace up the lag behind international labour standards.

Keywords: *Collective Agreement, Nigeria, National Industrial Court Act, Constitution (Third Alteration) Act, Enforcement, International Labour Organization.*

1. Introduction

It is rather safe to begin by stating that collective agreements have gained increased relevance in the 21st century.[1] The compelling nature of collective

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agreement is tied to the fact that there is no contract of employment that can possibly reduce all its terms in a single document, or envisage all the terms that should form part of the contract in the future.[2] This provides collective agreements with veritable basis in augmenting gaps and deficits arising from contracts of employment.[3] When it comes to the enforceability of collective agreement, its enforceability in Nigeria remains problematic, because the courts have taken the common law position that collective agreement is at best 'a gentleman agreement', which is merely 'binding in honour', save where it is incorporated into the contract of service, whether expressly or by implication. The courts have taken this position because of the doctrine of privity of contract, as most collective agreements are usually between the employers on one hand and trade unions on the other. An individual employee seeking to benefit from it is not regarded as a party to it.[4] Additionally, parties to a collective agreement are presumed not to intend that it is binding on them; hence it is unenforceable.[5] This practice has created untold hardship for the individual employee who seeks to enforce the collective agreement and also offends his constitutional right to freedom of association. A somewhat legal reprieve, however, has evolved. With the coming into effect of the National Industrial Court Act 2006 and more importantly, the elevated status of the National Industrial Court (herein after referred to as "NIC") and the consequential expansion of its jurisdiction in the Constitution (Third Alteration) Act 2010, the NIC can now assume jurisdiction over labour disputes, including disputes concerning the interpretation and application of collective agreements.[6] Plausible as it may seem, the extent of the enforceability of such agreement remains to be seen several years after, bearing in mind the recent tilt by the Supreme Court towards the antiquated common law position. Against this backdrop, the objective of this paper is to reappraise the existential legislative and judicial attitude in Nigeria towards the enforcement of collective agreement; juxtaposing same with ILO's standard prescriptions on collective agreement with a view to identifying the loopholes, and suggesting panacea capable of bridging the gaps for enhanced effectiveness in labour dispute resolution. In achieving this, the paper is divided into parts. Part I is

[1] E.E. Uvieghara, *Labour Law in Nigeria,* Malthouse Press Limited, Lagos, 2001, 29.
[2] M. Zechariah, *New Frontiers on Legal Enforceability of Collective Agreements in Nigeria, in Current Jos Law Journal,* 2013, vol. 6, n. 1, 294.
[3] O.O. Ogbole, P.A. Okoro, *Critique of Ministerial Interference in Enforceability of Collective Agreements, in OAU Journal of Public Law,* 2020, vol. 1, n. 1,114.
[4] *Union Bank v Edet* (1993) 4 N.W.L.R. (Pt. 287) 288.
[5] *Union Bank v Edet op. cit.*
[6] National Industrial Court Act section 7(1)(c) & (6); Constitution (Third Alteration) Act section 254C(1)(j).

introductory. Part II focuses on the definition of collective agreement, negotiable issues to be included in a collective agreement and the regulatory framework for collective agreement under Nigerian labour jurisprudence. Part III scrutinises the inherent conflict of the dual application of statutory and common law interpretation and enforcement of collective agreement in Nigeria. In so doing, this part also critically analysed certain recognised, albeit limited circumstances under which collective agreements would be enforceable by the courts. The novel provisions on the enforceability of collective agreements arising from the Constitution (Third Alteration) Act and the powers conferred on the National Industrial Court were also discussed under this part. Part IV examines the standard prescriptions of ILO on collective agreements and the extent to which the Nigerian court can rely on it in its decisions. Part VI provides a conclusion to the study highlighting the gaps and laying to bare the deplorable Nigerian legislative and judicial attitude towards the enforceability of collective agreement when placed on the pedestal of international labour standards. This part further suggests recommendations in securing the enforcement of collective agreement in Nigeria.

2. Collective Agreement under Nigerian Labour and Industrial Law

Basically, collective agreement is the by-product of collective bargaining which has been defined as "a voluntary negotiation between employers or employers' organisations and workers' organisations with a view to the regulation of the terms and conditions of employment – which ends in a collective agreement".[7] Without collective bargaining, there can be no collective agreement.[8]
Under the Nigerian Labour and Industrial Law, the following laws define collective agreement; the Labour Act,[9] the Trade Dispute Act[10] and the National Industrial Court Act[11]. Collective agreement under the Labour Act is

[7] ILO, The Right to Organize and Collective Bargaining Convention (No. 98) 1949, Article 4.
[8] Although the right to collective bargaining is a core labor standard as defined by the International Labor Organization, workers in Nigeria continue to lack this basic right. Neither the Constitution nor the Labour Act is characterised with the recognition of the statutory duty to bargain. The legal draftsmen have opted for a paradigm which allows the social partners through the exercise of power to resolve their own arrangements. The power play is given legal impetus by the provisions on condition of employment vis-à-vis the protected right to freedom of association and the recognition of trade unions. See section 9(6) of the Labour Act 1974, section 40 of the Constitution Federal Republic of Nigeria and section 25 of the Trade Unions Act 1973; See also S.F. Obiora, *Collective Bargaining Trends in Nigeria – Living up to the International Labour Organisation Standards?, in Cambridge Law Review,* vol. 7, n. 1,123.
[9] Labour Act, Cap L1, Laws of the Federation of Nigeria 2004.
[10] Trade Disputes Act, Cap T8, Laws of the Federation of Nigeria 2004.
[11] National Industrial Court Act 2006.

defined as "an agreement in writing regarding working conditions and terms of employment concluded between an organisation of employers or an organisation representing employers (or an association of such organisation), of the one part, and an organisation of employees or an organisation representing employees (or an association of such organisation), of the other part".[12] The provision talks about working conditions and terms of employment of workers, and is analogous to the definition of collective agreement under the National Industrial Court Act,[13] unlike the definition under the Trade Dispute Act,[14] which relates it to "settlement of disputes on terms of employment and physical conditions of work". From the definitions provided under these Acts, the central motif is on terms of employment and conditions of work. The poser here becomes: What is the nature of issues to be included in a collective agreement as constituting the terms of employment and conditions of work? Without prejudice to the fluidity and dynamics of the collective bargaining process in Nigeria, we can examine the nature of issues to be included in a collective agreement under the following four broad categories, namely:

1. **Wage Related issues** – These include issues like how basic wage rates are determined, cost of living adjustments, wage differentials, overtime rates, wage adjustments and so on.
2. **Supplementary Economic Benefits** – These include issues as pension plans, paid vacations, paid holidays, health insurance plans, dismissal plans, supplementary unemployment benefits and so on.
3. **Institutional Issues** – These consists of rights and duties of employers, employees and unions, including union security, check off procedures, hour of work, quality of work-life program and so on.
4. **Administrative Issues** – These include issues such as seniority, employee discipline and discharge procedure, employee health and safety, technological changes, work rules, job security and training, attendance, leave and so on.[15]

Collective agreement in Nigeria is regulated by the dual application of the practice of statutory and common laws. The term has common features both

[12] Labour Act section 91.
[13] National Industrial Court Act section 54.
[14] Trade Disputes Act section 48.
[15] International Training Center of ILO, Bureau for Workers' Activities (Actrav) Course on Issues of Collective Bargaining, http://actrav-courses.itcilo.org/en/a3-02571/a3-02571-resources/collective-bargaining-reading-materials/chapter-3/at_download/file, accessed 15 September 2021.

in statutory and common laws' definitions. The difficulty, however, lies in the enforceability of collective agreement. Under common law, collective agreement is regarded as a gentleman agreement only binding in honour.[16] Statutorily, however, the phenomenon is subjected to the act of a third party before it could become enforceable at law as between the employer and employee.[17] This paper, therefore, contends that the orthodox application of statutory and common laws on collective agreement does not allow for a thriving employment and industrial relations. The reason is not far-fetched. Collective agreements are outcome of painstaking deliberation between employers of labour and their employees or employees' representative,[18] yet they are not considered as a binding document. As a prerequisite for enforceability, the hapless employees are placed at the mercy of an unwilling third-party, the Minister or Commissioner of Labour as the case may be,[19]to make an order upon the deposit of at least three copies of such agreement within 30 days of its execution.[20]

3. Enforceability of Collective Agreement in Nigeria: A Confused Approach?

After all the impetus given to the process of collective bargaining both in law and in practice, it is pertinent to ask this question: Is collective agreement in Nigeria enforceable in a court of law? Ordinarily, under the Nigerian labour law, there is no presumption of intention as to the binding force of a collective agreement between the parties. The nearest it has gone in attaching legal enforceability to a collective agreement is the provision of section 3(1) of the Trade Disputes Act which stipulates expressly that parties to a collective agreement are expected to deposit with the minister of labour and productivity at least three copies of the agreement within 30 days of its execution, and when such deposit is made the minister may by order make the agreement or part thereof binding on the parties to whom it relates. The effect of this provision is that for a collective agreement to be binding it will need the approval of the minister, who may in the latitude of his discretion decide otherwise or on the part he seems fit. The posers here become: Why does the Act in attaching legal

[16] *Ford Motor Co. Ltd. v Amalgamated Union of Engineering and Foundary Workers* (1969) 1 WLR 339.
[17] Trade Disputes Act section 3(1).
[18] I. Okwara, C. Aniekwe, I. Oraegbunam, *The Status of Collective Agreement in Nigerian Labour and Industrial Law: An Appraisal, in International Review of Law and Jurisprudence,* 2021, vol. 3, n. 2, 39.
[19] Section 39(1) & (3) of the Trade Disputes Act authorises the Minister in charge of Labour Matters to delegate his power under the Act with regard to collective agreement obligations to the appropriate State Commissioner charged with the welfare of labour.
[20] Trade Disputes Act section 3(1).

enforceability to a collective agreement subjects it to a confirmation order by the minister? Does not this condition precedent to the enforceability of collective agreement constitute an affront to the right to freedom of association;[21] if citizens given the right to associate are ruled out from enforcing agreement they entered into? Will it be sustainable for a law in derogation of this constitutional prerogative to usurp that power and hand it over to someone else? Undoubtedly, this conservative legislative approach has the adverse effect of impinging the voluntariness of collective bargaining and its prestige as a reconciliatory tool for trade disputes in Nigeria.

At this juncture, an issue which needs to be examined is what is the faith of any such collective agreement, if the minister does not make an order under the Act confirming the agreement? In answering this question, it appears that recourse will be made to the common law rules. It is the principle of common law that a contract of employment, as any other contract, is strictly the affairs of the employer and the worker. Under the doctrine of privity of contract the trade unions which, incidentally, are the principal negotiators on behalf of the workers are, therefore, regarded as interloper, since they are never parties to the original contract of employment between the worker and employer.[22] In the same token, an individual employee cannot seek a benefit under a collective agreement since most collective agreements are usually between the employer and representatives of the workers.[23] The probing question here becomes: Whether the individual employees who are members of the union are in the strict sense strangers to an agreement they donated powers to their representatives to reach on their behalf? This general attitude and reliance by the court on the doctrine of privity crystallised into the common law principle that collective agreements were and are not enforceable at law between the parties thereto.

If collective agreements are not enforceable and are generally "binding in honour", of what purpose is the process of collective bargaining? The answer is not far-fetched. Although a contract of employment is not compulsorily subject to the terms of collective accord, the agreement has its own special utility. In the first place, employers and workers do, in the majority of cases, honour their "gentleman's agreement" which is driven by the fact that neither of the parties wish the sanction to apply to their agreement. But, more importantly, collective terms are, in fact, usually incorporated into the contract

[21] Constitution Federal Republic of Nigeria section 40.

[22] It is still possible for a trade union which has reached an agreement with an employer or employers' association to be able to present credentials acceptable in law to show that it is a true agent of its members for whom it purported to have acted. The principle of agency is, however, a difficult principle to apply in relation to trade unions vis-à-vis their members.

[23] *Spring v National Amalgamated Stevedores and Dockers Society* (1965) 2 All ER 221.

of employment.[24] As aforesaid, a collective agreement based on the doctrine of privity does not translate to an employment contract, neither does it create one. An individual employee who intends to rely on such agreement in claim of a right or to derive a benefit must show that it has been incorporated into his contract of employment.[25] Quite often, this is done by express terms although they may be incorporated by reference. Where this is the case, the terms are automatically transmitted from collective down to individual level.[26] Once the collective agreement is incorporated into the contract of employment, by the act of the parties, then it becomes binging on them and enforceable.[27]

Failure to expressly incorporate some term of collective agreement does not, however, rule out the possibility of its being so incorporated as an implied term of the contract. But the possibility that the parties intend it to form part of the contract of employment must be very high; it must be of such a nature that, in the words of Lord Wright, "it can be predicted that it goes without saying; some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended....The implication must arise inevitably to give effect to the intention of the parties."[28] Thus in *Batisen v John Holt & Co.,*[29] which contained no express incorporation, the court said that the agreement would be deemed to have been incorporated where the parties have been acting on its terms. A systematic glance from the passage just quoted would reveal that the knowledge of the parties is a relevant factor in determining the question whether or not a term is to be presumed incorporated into a contract of employment. In the Nigerian case of *Daniels v Shell B.P. Petroleum Development Co.,*[30] it was decided that a custom or trade practice may be presumed to have been incorporated into the terms of employment where no express provisions are agreed. And as it were, most of the customs and practices in a trade today are often a direct result of collective

[24] A. Emiola, *Nigerian Labour Law (4th ed.),* Emiola Publishers, Lagos, 2008, 500.
[25] *African Continental Bank v Benedict Nbisike* (1995) 8 NWLR (Pt. 416) 725; *Ben Chukwumah v Shell Petroleum Development Co.* (1993) 4 NWLR (Pt. 289) 512, 543; *Union Bank of Nigeria Ltd v. Edet op. cit.*
[26] *National Coal Board v Galley* (1958) 1 All E.R. 91; (1958) 1 W.L.R. 16.
[27] Recently, the courts have begun to jettison the strict application of the privity rule in interpretation of collective agreement. They now hold that an employee can seek a benefit under a collective agreement. The employee must, however, first provide evidence and convincing prove of his membership. See Onuorah v Access Bank Plc (2015) N.L.L.R. (Pt. 186), where it was held that "actual proof of membership is the key to recovery under a collective agreement".
[28] *Luxor (Eastbourne) Ltd. v Cooper* (1941) A.C. 108, 137; (1941) 1 All E.R. 33.
[29] (1973) 8 CCHCJ/61.
[30] (1962) 1 All N.L.R. 19.

agreements. The decision of the Court of Appeal in *Sagar v Ridehalg & Sons Ltd.*,[31] indicates that a worker may be subject to a term of collective agreement although he might have known nothing about it.

Going forward, the enforceability of incorporated collective agreement in Nigeria was given judicial flavour by the Supreme Court in 2020, in the recent case of *B.P.E. v Dangote Cement Plc.*[32] Here, the appellant (BPE) supervised the privatization scheme which saw the sale of the Benue Cement Company Plc by the government to Dangote Industries Ltd. As a prelude to the sale, the majority of the employees of Benue Cement Company Plc were laid off and paid their terminal benefits. However, in the course of the privatization, the employees of Benue Cement Company Plc., who were sacked due to the privatization scheme, sued the appellant and the Benue Cement Company Plc., challenging the amount paid to them as terminal benefits, on the grounds that the computation of the benefits ought to be based on the Staff Handbook of Benue Cement Company Plc and not based on the allegedly fraudulent letters of 26th and 27th October 2004. They contended that the appellant gave them blank forms (i.e., the letters referred to above) to sign after which it proceeded to insert bloated figures in the documents as the employees' terminal benefits. On appeal, the Supreme Court, *per* Galumje (JSC), pointedly held as follows:

> Any collective agreements, except where they have been adopted as forming part of the terms of employment are not enforceable. The enforcement of such agreement is by negotiation between the parties to the agreement. In the instant case, there is no evidence that the exhibits referred to as entitling them to certain payment were adopted as forming part of the employment of the respondents....The exhibits are therefore not enforceable. See UBN Ltd v. Edet (1993) 4 NWLR (Pt. 287) 288. The failure to act in strict compliance with the exhibits is non justiciable. The order directing the appellant to pay balance of the terminal benefit by the lower court is totally wrong and it is hereby set aside.

From the above decision of the Supreme Court, specifically on the issue of collective agreements, three points can be deduced, namely: (1) That a collective agreement is not enforceable unless it has been incorporated by the parties; (2) that the enforcement of a collective agreement is by way of negotiation; and (3) that the failure to act in strict compliance with a collective agreement is not justiciable.[33]

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[31] (1930) All E.R. 228; (1931) 1 Ch. 310.

[32] (2020) 5 NWLR (Pt. 1717) 322.

[33] The above points were similarly the position of the Court of Appeal in *UBN vEdet, op. cit,* which the apex court referred to in the case at hand; See also V. Chukwuma, *B.P.E. v Dangote*

Despite Nigeria's dire collective labour outlook, it may be argued that the provision regarding enforceability of collective agreement under the Act is unequivocal and to all intents and purposes, the common law position is utterly usurped and statutorily precluded in Nigeria. Undoubtedly, it is the intention of the Act that once the Minister or Commissioner makes an order on the status of an agreement, then the agreement becomes enforceable at law as between the parties thereto. This contention appears to be a truism when considered in the light of the elevated status and expansive jurisdiction of the NIC under the law. By virtue of section 7(1) of the National Industrial Court Act, the NIC is vested with exclusive jurisdiction in civil causes and matters relating *inter alia* to labour, including trade unions and industrial relations. The court's jurisdiction is expanded under paragraph (c) of section 7(1) to include the "interpretation of collective agreements, trade union constitution as well as its own award or judgment".

In addition, there is an improvement on the jurisdiction of the NIC due to the amendment of the Constitution. The advent of the Constitution (Third Alteration) Act 2010 introduced a new dispensation in the Nigerian labour jurisprudence where labour disputes can be resolved with inflexibility and this includes the relaxation of the operation of common law rules where necessary. His lordship, Akaahs (JSC) aptly noted this point when he held as follows:

> … the constitution was amended by the Third Alteration to the 1999 Constitution which recognized the court as a specialised court and provided in section 254C the exclusive jurisdiction of the court over all labour and employment issues. Specialised courts of limited and exclusive jurisdiction are seen as fulfilling a growing need for expertise in increasingly complex areas of law. The resolution of labour and employment disputes is guided by informality, simplicity, flexibility and speed. Specialised business courts will no doubt play an important role in the economic development of the country.[34]

On the issue of jurisdiction of the court to enforce collective agreement, section 254C(1)(j)of the Constitution(Third Alteration) Act 2010 empowers the NIC to not only "interpret", but also to "apply" collective agreement. Section 254C(1)(j) states that the NIC shall have and exercise jurisdiction to the exclusion of other courts in civil cases and matters relating to the determination of any question as to the interpretation and application of any

Cement Plc: The Enforceability of Unincorporated Collective Agreement in Nigeria, in University of Lagos Law Review, 2021, vol. 4, n. 2, 257.

[34] *Skye Bank Plc v Victor Anaemem Iwu*(2017) 16 NWLR, at 162-163, paras. G-H, A-B, respectively.

collective agreement. This suggests that parties to a collective agreement no longer have to incorporate its terms in contract of employment before it can be enforceable. This is a breakthrough from the common law position and the NIC have been applying the law. In *Valentine Ikechukwu Chiazor v Union Bank of Nigeria,*[35] the NIC had suggested that this improvement is the basis for the recognition of collective agreement under the law. The NIC held that the implication of this provision is that since the court has the power to apply collective agreements, it follows that they are enforceable and binding. The NIC further held that the old position which treated collective agreements as binding in honour only is a common law principle which the NIC is empowered to relax by virtue of sections 13 and 15 of the National Industrial Court Act, where the principle appears to be in conflict with the rules of equity. Therefore, based on the above points, the NIC is fully empowered to apply a collective agreement once it is established that the parties are bound by the agreement. It is immaterial that it was not incorporated into the contract of employment. Similarly, citing *Valentines' case,* the NIC in the case of *Lijoka v First Franchise Service Limited,*[36] held as follows:

> The defendant's counsel had contended that the current state of law on collective agreements as espoused by the Supreme Court in Akauve Moses Osoh & Ors v. Unity Bank Plc (2013) 9 NWLR (Pt. 1358) 1 at 29 is that collective agreements are not legally binding and cannot create legal obligations unless the collective agreement has been incorporated into the employee's contract of employment. This argument of the defendant's counsel reveals the uncritical citation and application of case law authorities out of context. The point I seek to make here is that the cause of action in Osoh arose in 1994, when the action was filed at the High Court of Edo State, Benin long before the Third Alteration to the 1999 Constitution came into being...As at 1994, when the cause of action arose in Osoh, there was no provision of law that permits the interpretation and application of collective agreements as we have under section 254C(1) of the 1999 Constitution. Whatever it was in 1994, section 254C(1) of the 1999 Constitution as inserted by the Third Alteration to the 1999 Constitution has altered that position.[37]

It appears from the above-mentioned cases (*Valentine* and *Lijoka*) that the NIC in appropriating the latitude of interpretation and application of collective agreement provided for under the new labour dispensation is not disposed to accepting arguments that tends to bring back the old common law principle as

[35] NICN/LA/122/2014, the judgment of which was delivered on 12 July 2016.
[36] NICN/LA/527/2013, the judgment of which was delivered on 6 February, 2019.
[37] Per Hon. Justice B.B. Kanyip, at para. 84.

regards the unenforceability of collective agreements generally. It is apposite to assert that argument reminiscent of the old common law rule where a collective agreement is, at best, treated as a gentleman agreement may not fly.[38] Paradoxically, the trend and current posture of the NIC would have been simple but for the epileptic situation where the Nigerian courts still allow common law principles which has been buried in the United Kingdom,[39] which colonised Nigeria for its ghost to rare its ugly head in the courts and their decisions against the extant law on the issue at hand as evinced in the cases of *Osho & Ors v Unity Bank Plc*[40] and *B.P.E v Dangote Cement Plc.*[41] Although traces of progress and divergence can be seen under the Third Alteration Act, 2010, however, the judicial emancipation of Nigerian laws from these vestiges of common law has been sluggish and their traces and influence are still very much evident in the jurisprudence of our labour and industrial relations.[42]

Clearly, the above practice of the Nigerian Court appears to be a revolution and negation of the positive nature of Nigeria's legal system. This is especially so when a statute called in aid or issue is not in conflict with any provision of the Constitution or any other existing law. Nevertheless, the courts are enjoined to follow statutory law validly passed and to whittle down any conflicting provisions with the Constitution and other existing laws in specific cases during interpretation and exercise of judicial review powers, in order to arrive at a just decision. Equally, the legislature in appropriate cases may codify or modify decisions of the court to meet changing social, economic and political exigencies.[43] Therefore, if this proposition is eternally correct, legally speaking, then the cardinal rule of engagement in adjudication, interpretation and supervision by the courts and the corresponding enactment, repeal, re-enactment or amendment of laws by the legislature guided by the principle of

[38] See *PENGASSAN v MRS Oil Nigeria Plc & 4 Ors,* NICN/LA/595/2012, delivered on 27 May 2020, para. 50.

[39] Today in the United Kingdom, the doctrine of privity of contract no longer weighs down collective agreements and such agreements become automatically enforceable between the parties if they are reduced into writing and are stipulated to be legally binding. See Contracts (Right of Third Parties) Act 1999 and Trade Union and Labour Relations (Consolidation) Act, 1992.

[40] (2013) 9 N.W.L.R. (Pt. 1358) 1 SC.

[41] *B.P.E. v Dangote Cement Plc, op. cit.*

[42] S.F. Obiora, *op. cit* 151.

[43] For instance, in Nigeria, the legislature at the National Assembly has in recent past intervened and enacted laws to adopt or vary certain courts' decisions like the case of *Mr. Cyriacus Njoku v Dr. Goodlock Jonathan & Ors*. (2015) LPER 24496 (CA), on the issue of the constitutionalism of a Vice President or Deputy Governor, as the case may be, to complete the remaining tenure of office of a deceased President or Governor while in office and the qualification of the said persons to run for another two terms of four years each on the merit.

separation of powers, should apply.[44] In this wise, the courts in Nigeria should therefore be obliged to apply the provisions of every validly enacted laws and to *suo motu* raise issues of law relevant to any case at hand and invite counsel to the parties before the court concerned to address the court on such issue(s) notwithstanding that such issue(s) was/were not pleaded.[45] The crux of this ostensibly act of "descending into the arena" by the judge is to enable substantial justice to be done to the parties and to interpret the extant law of the land under the general powers of the court, although as a caution, it need be stated that insofar as a seemingly balanced judgment may be produced, the same might not remedy the judicial unfairness occasioned by the overly interventionist role in the proceedings.[46]

The above notwithstanding, the trial, lower and Supreme Courts in *Osoh & Ors. v Unity Bank Plc.,*[47] failed to adhere to the aforesaid proposition and principle, when neither of the three level of courts called on the parties in that case to address the court on the requirements contained in the Trade Disputes Acts 1990 and 2004. Sections 2 and 39(1) and (3) and 3 and 40(1) and (3), which provisions are in tandem and which require parties to any collective agreement to deposit three copies of such agreement with the Minister of Labour and Employment and/or Commissioner in charge of welfare of Labour at the State level, for an order before such collective agreement could become enforceable at law as between the employer and employees concerned. The decision in the said case certainly worked hardship both on the employer and employees as well as their representative unions concerned. For instance, the matter lasted needlessly for about eighteen years between the trial, lower and Supreme Court. Curiously, again, the three courts rather relied heavily on sections 19, 20 and 47 of the Act (1990), doctrine of privity of contract as well as common law principle – which sees collective agreements as between the parties only and as not binding and enforceable at law generally. This is seemingly an act of inchoate research on applicable law in the said case by these courts which obviously diminishes the right of the workers to belong to and be represented by a trade union as it affects trade disputes and collective bargaining in Nigeria.[48]

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[44] M. Akpan, *op. cit* 21.

[45] See *Nwigwe v Nwuge* (1999) 11 NWLR (Pt. 626) 314, *Usman v Garke* (1999) 1 NWLR (Pt. 587) 466; *Oshodi v Eyifunmi* (2000) 13 NWLR (Pt. 684) 298 and *Ukaegbu v Nwokolo* (2000) LPER – 3337 (SC).

[46] *Serafin v Malkiewicz & Ors* (2020) UKSC 23.

[47] *Osoh &Ors v Unity Bank Plc, op. cit.*

[48] Constitution of the Federal Republic of Nigeria 1999 section 40; Trade Unions Act section 1 (1).

There is no gainsaying the fact that the Supreme Court in *Osho & Ors v Unity Bank Plc*[49] and *B.P.E. v Dangote Cement Plc,*[50] given the recency of its recapitulation has reverted and further exhumed the coffin of the smothered common law approach where a collective agreement is, at best, treated as a gentleman's agreement. Far-reaching as the submission may seem, it need be stated that by the decision of the Supreme Court in *Skye Bank Plc v Victor Anaemem Iwu*,[51] all decisions of the NIC are now subject to the review of the Court of Appeal and by section 243(4) of the 1999 Constitution (as amended), the decisions of the Court of Appeal in respect of civil appeals from the NIC are final and cannot be further appealed to the Supreme Court. In the final analysis, a decision of the NIC can in appropriate cases be upturned by the Court of Appeal. The poser here becomes whether the Court of Appeal will likely be inclined towards the reasoning contained in the NIC judgments discussed above or rather opt to follow the Supreme Court's position in *Osho* and *BPE's case* in line with the doctrine of *stare* decisis? It will be interesting to see how this confusion will be dissipated in practice in the nearest future. How the court will exercise its inherent appellate jurisdiction in appropriating or derogating from these alternatives remains to be seen.[52] One can only hope that the Court of Appeal when confronted with the question of enforceability of unincorporated collective agreements will adopt the liberal approach of the NIC vis-à-vis the new labour dispensation introduced by the Constitution (Third Alteration) Act 2010. This liberalism in approach undoubtedly reinforces the actualization of the mandate of the NIC in counteracting all manifestations of social injustice and unfair labour practices in the Nigerian labour relations and to dissipate the operations of anachronistic common law principles that proliferates untold hardship for Nigerian worker.

[49] *Osoh & Ors v Unity Bank Plc, op. cit.*
[50] *B.P.E. v Dangote Cement Plc, op. cit.*
[51] (2017) 16 NWLR 24.
[52] For reasons of space, it is not the place of this article to explore under this head the "pyramidal" or "architectural hierarchy" of Nigerian courts to determine if the courts are bound to follow the recent Supreme Court decisions, or to appraise the legal impetus for derogation from it; rather the paper in glossing over the issue of judicial precedent, seeks to justify the flexible approach of the NIC in the light of recent developments in international labour standards. It is however opined that, though the NIC being a lower court and bound by the apex court's decision in *B.P.E v Dangote Cement Plc*, may still distinguish the decision, being that cause of action in *BPE's case* emanated before the coming into force of the Third Alteration Act, 2010 and it will not be counted against the NIC as a disrespect or gross insubordination to the apex court.

4. Dissipating the Confusion: A Peep into the International Labour Organization Standards

The ILO is the supreme authority on international labour standards. The ILO provides the major human rights instrument that guarantees and advance organisation rights and has carried out an enormous amount of standard-setting work during the 80 years of its existence as it has sought to promote social justice, and one of its chief tasks has been to advance collective bargaining throughout the world.[53] This task was already laid down in the Declaration of Philadelphia, 1944, part of the ILO Constitution, which stated "the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve...the effective recognition of the right of collective bargaining". [54]
In the ILO's instruments,[55] collective bargaining is deemed to be the activity or process leading up to the conclusion of a collective agreement. In Recommendation No. 91,[56] Paragraph 2, collective agreements are defined as:

> all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.

The Recommendation No. 91 goes on to state that collective agreements should bind the signatories and those on whose behalf the agreement is

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[53] N. Valticos *The ILO: A retrospective and future view, in International Labour Review,* 1996, vol. 135, n. 3-4, 473. See also N. Valticos, *International labour standards and human rights: Approaching the year 2000, in International Labour Review,* 1998, vol. 137, n. 2, 135.
[54] ILO, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference,* 1998, 23-24.
[55] The ILO has adopted a number or instruments dealing directly or indirectly with collective bargaining and related issues: the Collective Agreements Recommendation, 1952 (No. 91), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), the Rural Workers' Organisations Recommendation, 1975 (No. 149), the Labour Relations (Public Service) Convention, 1978 (No. 151), the Labour Relations (Public Service) Recommendation, 1978 (No. 159), the Collective Bargaining Convention, 1981 (No. 154), and the Collective Bargaining Recommendation, 1981 (No. 163).
[56] Collective Agreements Recommendation (No. 91), 1951.

concluded[57] and that stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement.[58] However, stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement.[59] It sets out the binding nature of collective agreements and their precedence over individual contracts of employment, while recognizing the stipulations of individual contracts of employment which are more favourable for workers.[60]
On several occasions, the Committee on Freedom of Association has expressed its preference for collective agreements over individual employment contracts, objecting to equal status being given to the latter or to their being used to the detriment of workers belonging to a union.[61] For its part, the Committee of Experts considers that granting primacy to individual agreements over collective agreements does not encourage and promote the effective recognition of the right to collective bargaining.[62] The framework within which collective bargaining must take place if it is to be viable and effective is based on the principle of the independence and autonomy of the parties and the free and voluntary nature of the negotiations; it requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organizations and workers' organizations as the parties to the bargaining.[63] This principle is embodied in the Right to Organise and Collective Bargaining Convention, No. 98, which was adopted in 1949, and which since has achieved near-universal acceptance: as of September 2020, the number of member States having

[57] Paragraph 3(1).
[58] Paragraph 3 (2).
[59] Paragraph 3 (3).
[60] The binding nature of collective agreements can be established either by legislative means or by the collective agreement itself, according to the method followed in each country. See paragraph 1(1) & (2).
[61] ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee,* (fourth edition) 1996 para.911. See also ILO, *306th Report of the Committee on Freedom of Association, in Official Bulletin*
1997, vol. 80, n. 1, paras.517-518.
[62] ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations, General report and observations concerning particular countries,* Report III (Part 1A), International Labour Conference, Geneva, 86th Session, 1998, 224.
[63] B. Gernigon, A. Odero, H. Guido, *ILO Principles Concerning Collective bargaining, in International Labour Law Review,* 2000, vol. 139 n.1, 34.

ratified it stood at 168,[64] which demonstrates the force of the principles involved in the majority of countries. Convention No. 98 does not contain a definition of collective agreements, but outlines their fundamental aspects in Article 4:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

In the preparatory work for Convention No. 151 (1978) the interpretation of the term "negotiation" was accepted as being "any form of discussion, formal or informal, that was designed to reach agreement", the term "negotiation" being deemed preferable to "discussion", which did not emphasize the need to endeavour to secure agreement.[65]

On the issue of drafting and registration of collective agreement, the Committee on Freedom of Association has opined that intervention by the public authorities in the drafting of collective agreements is not compatible with the spirit of Article 4 of Convention No. 98, unless it consists exclusively of technical aid.[66] The Committee goes on to observe that any situation which requires prior approval of collective agreements by the authorities amounts to a violation of the principle of the autonomy of the parties to negotiation.[67] According to the supervisory bodies, refusal to approve a collective agreement is permitted only on grounds of errors of pure form or procedural flaws,[68] or where the collective agreement does not conform to the minimum standards laid down by general labour legislation.[69]

The Committee on Freedom of Association has stated that if the public authority considers that the terms of the imposed agreement are clearly

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[64] ILO, Ratification of Convention No. 98, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::p11300_instrument_id:312243, accessed 21 September 2021.

[65] ILO, *Record of Proceedings,* International Labour Conference, Geneva, 64th Session, 1978, paras. 64-65.

[66] ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association,* (fourth edition) 1996, para. 868.

[67] ILO, *Freedom of Association Digest,* 1996, *op. cit,* paras. 868-869.

[68] ILO, *Freedom of Association Digest,* 1996, *op. cit,* paras. 868.

[69] ILO, *Freedom of association and collective bargaining,* General Survey of the reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Report III (Part 4B), International Labour Conference, Geneva, 81st Session, 1994, paras. 251.

contrary to the economic policy objectives recognized as being in the public interest, the case could be submitted for advice and recommendation to an appropriate consultative body, provided, however, that the final decision would rest with the parties[70]— the overall consideration being aimed at preserving the democratic and voluntary nature of the collective bargaining process. In this wise, the Committee on Freedom of Association has indicated that:

> Collective bargaining, if it is to be effective, must assume a voluntary quality and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining[71]

At this juncture, an issue which needs to be examined is whether the Nigerian Court, after five decades of its membership with ILO,[72] can establish jurisprudential principles based on ratified international labour standards? Can the court prefer any reasonable interpretation that is consistent with ILO's standard prescriptions when interpreting its labour statutes? Strictly speaking, section 254C (2) of the Constitution (Third Alteration) Act 2010 empowers the NIC exclusively to apply any ratified international treaty relating to labour and industrial relations. For clarity, section 254C (2) provides thus:

> Notwithstanding anything to the contrary in the Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.

In Nigeria, international agreements do not automatically have the force of law after ratification; there is a constitutional requirement for every international treaty to be domesticated before it can have the force of law.[73] However, by a curious irony, an exemption exists in terms of international labour treaty. The proviso in section 254C (2) of the same Constitution which states *"Notwithstanding anything to the contrary in the Constitution"* appears to exclude international labour treaty and convention from the scope of its application. It may be apt to say that whereas Nigeria adopts a dualist approach in dealing with treaties, a monist-like approach is used for international labour treaty and convention. The implication is that the NIC could enforce collective

[70] ILO, *Freedom of Association Digest,* 1996, *op. cit,* para. 872.
[71] ILO, *Freedom of Association Digest,* 1996, *op. cit,* para. 845.
[72] Nigeria is an ILO member since 1960.
[73] Constitution Federal Republic of Nigeria section 12(1); See also *Abacha v Fawehinmi* [2000] 6 NWLR 228.

agreement through section 254C (2) since Nigeria has ratified Convention No. 98. Domestication is not required before enforcement by the provision. This is buttressed by section 7(6) of the National Industrial Court Act which further provides a legal ground for the contention that non-domesticated treaties can be applied as examples of international best practices. The section provides that:

> The court shall, in exercising its jurisdiction or any of the powers conferred upon it by this Act or any other enactment or law, have due regard to good or international best practice in labour or industrial relations and what amounts to good or international best practices in labour or industrial relations shall be a question of fact.

Commenting on the effect of this section, Adejumo rightly observed that:

> By the provisions of section 7(6) of the National Industrial Court Act, the court is permitted and even enjoined to take into cognizance international best practices in industrial and labour relations in arriving at decisions in cases before the court. What amounts to international best practices in a particular instance is a question of fact to be proved by the person urging the court. This provision obviously permits the court to borrow from foreign jurisdiction in tandem with the present global village system. The various conventions of ILO which the member states are enjoined to apply come handy here; and the implication is that NIC will constantly have to take cognizance of these.[74]

It is submitted that a prohibitive and antagonistic interpretation of the Constitution should not be applied to cripple the implementation of Nigeria's voluntary membership and ratification of international agreements, especially as regards the Conventions and Recommendations of the ILO and any derogation from this constitutional prerogative by any court within Nigeria should constitute sufficient grounds for review and appeal. However, a remote problem that may likely arise in the application of ILO's Conventions and Recommendations is where such a prescription, though of international standards, is in conflict with an extant Nigerian statute or enactment: What will be the ramification of this in view of the supremacy of the Constitution?[75]

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[74] B.A. Adejumo, *The National Industrial Court of Nigeria: Past, Present and Future,* being a Paper Delivered at the Refresher Course Organized for Judicial Officers of between 3-5 years Post Appointment by the National Judicial Institute, Abuja, 24 March 2011, 5.

[75] Constitution Federal Republic of Nigeria section 1(1); See also the cases of *Danbaba v State* (2000) N.W.L.R. (Pt. 687) 396 at 410, per Suleiman Galadima, J.C.A., and *Abacha v Fawehinmi, op. cit.*, at 315-316, per Achike J.S.C.

5. Conclusion and Recommendation

It is trite that when the outcome of a collective bargaining process is subject to restrictions manifested in various forms imposed by law or by decision of administrative authorities, labour relations are subverted with the proliferated loss of confidence on the viability of the trade union mechanism particularly when the intervention in contemplation obviates the democratic principle of "free" and "voluntary" negotiation of agreement, which on several occasions have been vehemently refuted by the Committee on Freedom of Association.[76] From a detailed analysis of the central motif of this paper, it is clear that one of the challenges that plague the practice of collective bargaining in Nigeria is that of non-enforceability of collective agreement. Paradoxically, while it may be adduced that the issue of enforceability has statutory backing under section 3(2) of the Trade Disputes Act 2004, although not full-fledged in the true sense of ILO's standard prescriptions on "voluntarism" in negotiation, the issue of judicial recognition of such collective agreements has always become a revolving challenge in Nigeria. It seems lamentable that agreements wrapped up through collective bargaining cannot be readily enforced. This is because the Court in construing the law tilts unjustly towards the common law rule that collective agreements are generally unenforceable. This therefore has raised jurisprudential questions over the bindingness of Minister's order in Nigeria vis-à-vis the doctrine of *pacta sunt servanda* — that is, all agreements must be kept.[77]

In addition, there is no doubt that this interventionist policy under section 3 (2) of the Act wherein the Minister wields such wide discretionary powers is subject to abuse. The Minister may in dereliction of his duty or in the exercise of the latitude of his discretionary investitures under the Act refuse to make an order confirming the terms of a duly concluded collective agreement. The Trade Disputes Act in vesting the Minister with a power so wide, failed in a cautious manner to provide a "closed-list" of permissible circumstances under which the Minister could derogate from making any such order as a check to the exercise of such discretionary powers, taking into cognisance the principle of "free" and "voluntary" negotiation. As Okene rightly points out, "the Minister will never make such an order especially where the interests of the government whom he represents will be affected by the order".[78] Without the enforceability of collective agreements collective bargaining is but a mere vain exercise and cannot be effective. As aforementioned, the Committee on

[76] B. Gernigon, A. Odero, H. Guido, *op. cit* 46.
[77] M. Akpan, *op. cit* 22.
[78] O. Okene, *The Challenges of Collective Bargaining in Nigeria: Trade Unionism at the Cross Roads, in Labour Law Review,* 2010, vol. 4, n. 4, 97.

Freedom of Association has ruled that all collective bargaining agreement should be binding on the parties. The Committee on Freedom of Association has also ruled that making the validity of collective agreements signed by the parties subject to the approval of these agreements by the authorities is contrary to the principles of collective bargaining and of Convention No. 98. With the rising clamour for the adoption of a liberal judicial attitude towards the enforcement of collective agreement, and in line with international labour standards, it is the contention of the writer that the Nigerian labour law should be overhauled to accommodate provision for the automatic recognition and enforcement of collective agreements once concluded by the parties without further assurance.[79]The unfettered discretionary powers of the Minister as it relates to the procedural arrangement for the enforcement of collective agreement should be totally eroded to be line with global labour standard prescriptions which at the expense of compulsion and interference, gives primacy to voluntarism. Likewise, the Nigerian courts should in the spirit of judicial activism and in the light of liberalism of the new labour dispensation introduced by the Third Alteration Act 2010, embrace and adopt a flexible approach reflective of global labour standards towards the enforcement of collective agreement when the occasion arises, and as such, it is suggested that the Court of Appeal, as the final court of arbiter in matters relating to labour and industrial relations, should in restoring sanity to the judicial practice, look beyond the issue of judicial precedents in upholding the voluntary nature of collective agreement. In this wise, Nwoke has argued that:

> Without collective agreements being justifiable, voluntary collective bargaining will be reduced to the rejected stone rather than the cornerstone of industrial relations....This is because the non-enforceability of such agreements which took time, money and human resources to conclude is inimical to public policy and industrial harmony.[80]

[79] For instance, labour regulatory frameworks in Ghana, Kenya, Zambia, and South Africa (which are of common law jurisdiction like Nigeria) expressly provide that collective agreements relating to employment and labour are binding and enforceable. The implication is that the courts in those countries will enforce any collective agreement concluded between an employer and his employees without considering the common law position. See Section 105(2) of the Ghanian Labour Act (No. 651 of 2003); Section 59(1) of the Kenyan Labour Relations Act (No. 14 of 2007); Section 71(3)(c) of the Zambian Industrial and Labour Relations Act (No. 27 of 1993) and Section 23 of the South African Labour Relations Act (No. 66 of 1995).

[80] F. Nwoke, *Rethinking the Enforceability of Collective Agreements in Nigeria, in Modern Practice Journal of Finance and Investment Law,* 2000, vol. 4, n. 4, 353.

In a recent report, the ILO has queried the Nigerian practice of subjecting collective agreements to Ministerial approval before it can become binding on the parties.[81]

[81] ILO: *Committee of Experts on the Application of Conventions and Recommendations (CEARC): Individual Observation concerning Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87),* Nigeria, 96th Session, 2007.

Beyond Dualism: The Raise of Marginal Work in Italy

Lara Maestripieri and Antonio Firinu *

Abstract

The 'dualisation' debate has given new emphasis to studies investigating labour market segmentation. However, we argue that the traditional dual divide between insider/outsider workers becomes inadequate when analysing the Italian labour market – which features a long series of reforms that segmented the labour market into several categories of workers. This paper aims to investigate the interrelation between the institutional dimensions of labour markets and their consequences on workers' inclusion in social protection schemes, adopting an analytical framework to introduce an additional category of workers, i.e. marginal workers. Marginal workers are non-standard workers whose involuntary, intermittent and ambiguous character in the labour market prevents them from accessing social protection. Focusing on Italy, we provide empirical evidence, we put forward the following arguments a) marginal work is the result of a disjunction between social protection and non-standard work b) marginal work mainly concerns younger generations. One reason for this might be the systematic application of new dismissal rules to new entrants.

Keywords: *Dualisation; Labour market segmentation; Marginal work*

1. Introduction

Labour market segmentation theories have recently been given new momentum following the success of the book "The Age of Dualisation"[1].

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[1] Emmenegger, P., Hausermann, S., Palier, B., & Seeleib-Kaiser, M. (2012). *The age of dualization. The Changing Face of Inequality in Deindustrializing Societies*. Oxford University press.

However, recent studies have stressed how an analytical framework based on a dualistic view of labour markets – e.g., that related to the dualisation theory – falls short in analysing the complexity of the current labour markets. Research has demonstrated the simultaneous presence of different groups of outsiders with varying degrees of vulnerability. Today's instability, fluidity and heterogeneity of careers diversify the extent to which people are exposed to labour vulnerability and call for a modulation of the dualisation theory[2]. However, in these studies, the link is missing as to how deregulation was enforced in labour markets and its outcomes in creating new segments of outsiders[3].

In view of the above, the aim of this paper is to provide an analytical framework that conceives labour markets as a continuum, i.e., considering the shift from being an insider to holding multiple outsider positions. Building upon labour market segmentation and dualisation theories[4], we conceptualise marginal workers as a distinct group among the outsiders. While outsiders are usually defined as "*those with weak labour market integration involving non-standard employment forms*"[5], marginal workers are the most vulnerable ones among them. They are non-standard workers whose involuntary, intermittent and undefined character in the labour market limits access to social protection schemes.

In this paper, Italy is considered as a relevant example of marginal work, due to the specific nature of deregulation in this country. First, the labour market reforms of the last 20 years have always followed the principle of "deregulation at the margins"[6]. With this terminology, scholars indicate that dismissal rules have only been relaxed for new entrants to the labour market, skewing the chance of non-standard employment towards younger generations and leaving untouched the protection offered to those already employed when the reforms were enforced. Secondly, introducing more flexibility has not been adequately

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2 For example: Yoon & Chung, 2016; Pulignano e Doerflinger, 2018; Doerflinger *et al.*, 2020; Seo, 2021.

3 Jessoula, M., Graziano, P. R., & Madama, I. (2010). 'Selective Flexicurity' in Segmented Labour Markets: The Case of Italian 'Mid-Siders.' *Journal of Social Policy*, *39*(4), 561–583.
Bureau, M.-C., & Dieuaide, P. (2018). Institutional change and transformations in labour and employment standards: An analysis of 'grey zones.' *Transfer: European Review of Labour and Research*, *24*(3), 261–277.

4 E.g., Doeringer & Piore, 1971; Lindbeck & Snowden, 1988; Rueda, 2005; Emmenegger et al., 2012.

5 Fervers, L., & Schwander, H. (2015). Are outsiders equally out everywhere? The economic disadvantage of outsiders in cross-national perspective. *European Journal of Industrial Relations*, 21(4), 369–387. Citation at page 370.

6 Barbieri, P., Cutuli, G., Luijkx, R., Mari, G., & Scherer, S. (2019). Substitution, entrapment, and inefficiency? Cohort inequalities in a two-tier labour market. *Socio-Economic Review*, *17*(2), 409–431.

compensated by a transformation in the nature and entitlements of unemployment benefits[7]. Since flexibilisation has always targeted new entrants, we argue that the marginal work created has affected younger generations more than older workers.

The concept of marginal work draws from the previously recalled theories on labour market segmentation and dualisation. The idea of marginality was already present in Doeringer and Piore's work about secondary labour markets (1971)[8]. Marginal work stresses that outsiders do not enjoy the same rights as insiders[9] and is comparable with the similar "grey zone" concept[10]. Reflecting on Lindbeck and Snower (1988)[11], who theorised a different status for new entrants, we argue that there are different degrees of "outsiderness" and that younger generations tend to be more affected by extreme outsiderness (namely, what we call 'marginal work').

This paper answers the following questions: what are the consequences of deregulation on the Italian labour market? Are these consequences unequally distributed across generations? In this sense, this research intends to deal with the following issues:

a) to offer an analytical framework for understanding the rise of non-standard work in Italy, showing how a dualistic dichotomy between insiders/outsiders cannot grasp the complexity of the differences among workers;

b) to analyse the long-term effect of policy implementation, to test the hypothesis that marginal work is a phenomenon that is unequally distributed across the generations.

The ISTAT Italian Labour Force Survey (2009 – 2016) is the primary data source for the empirical analysis. The results of the investigation show that marginal work is a significant phenomenon in the Italian labour market and is unequally distributed across the generations, mainly affecting those under 36 years old.

This paper is organised as follows. The first paragraph considers the debate on labour segmentation, starting from its first theorisation in the 1970s and

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[7] Hacker, J. S. (2005). Policy drift: The Hidden Politics of US Welfare State Retrenchment. In W. Streeck & K. Thelen (Eds.), *Beyond Continuity*. Oxford University Press.

[8] Doeringer, P. B., & Piore, M. J. (1971). *Internal Labor Markets and Manpower Analysis*. M.E. Sharpe.

[9] Rubery, J., & Piasna, A. (2017). Labour market segmentation and deregulation of employment protection in the EU. In *Myths of employment deregulation: How it neither creates jobs nor reduces labour market segmentation* (p. 18).

[10] Bureau, M.-C., & Dieuaide, P. (2018). Institutional change and transformations in labour and employment standards: An analysis of 'grey zones.' *Transfer: European Review of Labour and Research*, *24*(3), 261–277.

[11] Lindbeck, A., & Snower, D. J. (1988). *The Insider-Outsider Theory of Employment and Unemployment*. MIT Press.

connecting it to the more recent discussions on dualisation. The second paragraph analyses the deregulation process in Italy, highlighting how the deregulation process in Italy has been progressively put in place through various reforms – which started in 1997 and ended in 2014. The third paragraph defines the analytical framework for studying the insider/outsider divide in the Italian context. The fourth paragraph describes the data source and the variable operationalisation made to explore marginal work in the Italian labour market. The fifth paragraph illustrates the empirical evidence for our arguments, while the conclusions show the policy implications of the analysis of marginal work.

2. Dualism and Deregulation in Deindustrialised Labour Markets

The first theorisation of dualism in labour markets dates back to Doeringer and Piore (1971)[12]. They coined the term "secondary labour market" to refer to low-wage employment offered by small-size enterprises with informal and unstructured work opportunities. They distinguish it from the employment offered in the context of medium- and large-size enterprises (called the "primary labour market"), characterised by in-firm and regulative institutions protecting workers from instability. Workers with employment disadvantages, such as lower educational attainment and less job experience, tend to find work in the secondary labour market. Employment in the secondary labour market is characterised by instability because of frequent turnover, and work is not organised to provide continuous employment. In a later paper, Piore defines those workers in the secondary labour market as having a marginal labour force attachment or being affected by marginality[13].

The insider/outsider theory proposed by Lindbeck and Snower led to the segmentation argument (1988)[14]. Their work emphasises conflicts between different types of workers caused by the core workers' (insiders) capacity to protect their employment to the detriment of others (outsiders). They were the first to use the terms 'insiders' and 'outsiders': insiders are employees whose jobs are protected by labour turnover costs. In contrast, outsiders do not enjoy the same power and pay the price of labour adjustments. In other words, they explicitly link the bargaining power of insiders and their capacity to influence policymaking with outsider marginalisation. The two authors also argue that there are different degrees of "insiderness": new entrants have a lower status as

[12] Doeringer, P. B., & Piore, M. J. (1971). *Internal Labor Markets and Manpower Analysis*. M.E. Sharpe.
[13] Piore, M. J. (n.d.). *Labor Market Segmentation: To What Paradigm Does It Belong?* 6.
[14] Lindbeck, A., & Snower, D. J. (1988). *The Insider-Outsider Theory of Employment and Unemployment*. MIT Press.

they have not yet acquired the same market powers as the more experienced insiders[15].

David Rueda took up the insider/outsider theory of employment and unemployment in 2005 in a completely different context to use it to explain partisanship in deindustrialised societies. He argued that differences between insiders and outsiders emerged during the industrial era when the economic growth of the 1960s and the union activism of the 1970s allowed some labour to be protected from unemployment (insiders) by reducing the employer's ability to fire them. The labour supply shock of the 1980s, caused by the rising number of women entering the labour market, the increased international competition, and the flexibility required by changing consumer behaviours, incremented the number of people working outside the insider model. This led to an increasing number of part-time and temporary workers whom employers used to make labour adjustments that could not be done with insiders[16].

Dualisation indicates this differential treatment of insiders and outsiders regarding access, rights and entitlements to protection from unemployment. Nevertheless, deindustrialisation did not trigger dualisation everywhere. It occurred in those countries that had protected economies with rigid employment protection in the industrial era, such as Italy. They proved highly vulnerable because they could not adapt smoothly to the economic shocks of the 1980s[17]. When they had to make their labour markets more flexible, they did so selectively by targeting those at the margins of the labour markets, such as new entrants, and protecting those already employed[18].

The main contribution of the more recent theory of dualisation is its attention to workers with non-standard contracts. Although Doeringer and Piore (1971)[19] had already emphasised the relation between non-standard jobs and secondary labour markets, Rueda (2005)[20] explicitly included part-time and temporary workers in the category of outsiders. They are outsiders because of

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15 Lindbeck, A., & Snower, D. J. (1988). *The Insider-Outsider Theory of Employment and Unemployment*. MIT Press.

16 Rueda, D. (2005). Insider–Outsider Politics in Industrialized Democracies: The Challenge to Social Democratic Parties. *American Political Science Review*, *99*(1), 61–74.

17 Rueda, D., Wibbels, E., & Altamirano, M. (2015). The origins of dualism. In P. Beramendi, S. Häusermann, H. Kitschelt, & H. Kriesi (Eds.), *The politics of advanced capitalism* (pp. 1–40). Cambridge University Press New York.

18 Barbieri, P., Cutuli, G., Luijkx, R., Mari, G., & Scherer, S. (2019). Substitution, entrapment, and inefficiency? Cohort inequalities in a two-tier labour market. *Socio-Economic Review*, *17*(2), 409–431.

19 Doeringer, P. B., & Piore, M. J. (1971). *Internal Labor Markets and Manpower Analysis*. M.E. Sharpe.

20 Rueda, D. (2005). Insider–Outsider Politics in Industrialized Democracies: The Challenge to Social Democratic Parties. *American Political Science Review*, *99*(1), 61–74.

their lower entitlements to social rights, determined mainly by social security regulations still based on the standard employment relationship[21]. His argument is that non-standard workers, especially if involuntarily employed, suffer from gaps in the generosity and duration of social protection. Dualism in social protection[22] interrelates with the dual labour market structure[23]. The insiders enjoy high employment protection and job stability levels and are primarily concentrated in large firms and public employment (the primary labour market). The outsiders, mostly in non-standard or self-employed positions, in small- and medium-sized companies (secondary labour market), receive little protection from the regulations and low remuneration and are often exposed to job instability[24].

In the last decade, there has been a multiplication of studies on labour market segmentation that called in question an analytical approach based on the two opposite poles (primary/secondary, insider/outsider)[25]. Focusing on the Italian case, Jessoula et al. (2010)[26] stress the importance of the category of so-called mid-siders, which includes self-employed workers and employees of small businesses. They enjoy less protection than classic standard workers (large companies and public employment); moreover, the authors indicate among the outsiders also those who are excluded, even partially, from employment relationships, that is, the unemployed and discouraged. Yoon and Chung (2016)[27] found that in the UK, there is a third segment of the labour market whose workers will have insecure pension coverage despite their current

[21] Fervers, L., & Schwander, H. (2015). Are outsiders equally out everywhere? The economic disadvantage of outsiders in cross-national perspective. *European Journal of Industrial Relations*, *21*(4), 369–387.

[22] Lindbeck, A., & Snower, D. J. (1988). *The Insider-Outsider Theory of Employment and Unemployment*. MIT Press.

Rueda, D. (2005). Insider–Outsider Politics in Industrialized Democracies: The Challenge to Social Democratic Parties. *American Political Science Review*, *99*(1), 61–74.

[23] Doeringer, P. B., & Piore, M. J. (1971). *Internal Labor Markets and Manpower Analysis*. M.E. Sharpe.

[24] Valadas, C. (2017). A Changing Labour Market under the Intensification of Dualization. The Experience of a Southern European Society. *Social Policy & Administration*, *51*(2), 328–347.

[25] See: Jessoula *et al.*, 2010; Yoon & Chung, 2016; Bureau & Dieuaide, 2018; Pulignano e Doerflinger, 2018; Doerflinger *et al.*, 2020; Seo, 2021.

[26] Jessoula, M., Graziano, P. R., & Madama, I. (2010). 'Selective Flexicurity' in Segmented Labour Markets: The Case of Italian 'Mid-Siders.' *Journal of Social Policy*, *39*(4), 561–583.

[27] Yoon, Y., & Chung, H. (2016). New Forms of Dualization? Labour Market Segmentation Patterns in the UK from the Late 90s Until the Post-crisis in the Late 2000s. *Social Indicators Research*, *128*(2), 609–631.

permanent jobs. Doerflinger et al. (2020)[28] evidenced the existence of five segments in the European Labour Markets based on the insecurity divides that cut across traditional divisions between permanent and temporary workers. On the same line, Seo (2021)[29] found three different types of outsiders: *typical outsiders* – characterised by insecure employment, low income and lack of job prospects – *dead-end insiders* – those insiders whose job does not guarantee sufficient income and/or job prospects – and *subjective outsiders* – those workers who feel insecure about their jobs despite their permanent contract. The most interesting paper – at least in terms of the proximity to our argument – is the one proposed by Bureau and Dieuaide (2018)[30]. In their paper, they theorise the constitution of "grey zones", in which laws are absent or weak due to the layering of several regulations. Although their interest is more addressed to the rising of new institutions, their approach is analytical, quite like the concept of marginal work, in which we propose to analyse the "grey zones" created by the Italian stratified deregulation process.

In conclusion, the reviewed research has demonstrated that new categories of outsiders are rising[31]. We argue that it occurs because different groups of outsiders can access different levels of social protection: i. because they have different contracts and associated benefits; ii. because institutional regulations might change over time, altering the generosity of the benefits different generations of outsiders can access.

The following section describes the process of deregulation that has occurred in Italy, showing how its outcome has been to differentiate the level of social protection reserved for different groups of outsiders across generations of workers.

3. The Nature of Italian Deregulation

Italy is the ideal case for a study of labour market segmentation. It has a productive structure characterised by a limited primary labour market (owing to the prevalence of self-employment and firms with under 15 employees) and

[28] Doerflinger, N., Pulignano, V., & Lukac, M. (2020). The social configuration of labour market divides: An analysis of Germany, Belgium and Italy. *European Journal of Industrial Relations*, *26*(2), 207–223.

[29] Seo, H. (2021). 'Dual' labour market? Patterns of segmentation in European labour markets and the varieties of precariousness. *Transfer: European Review of Labour and Research*, *27*(4), 485–503.

[30] Bureau, M.-C., & Dieuaide, P. (2018). Institutional change and transformations in labour and employment standards: An analysis of 'grey zones.' *Transfer: European Review of Labour and Research*, *24*(3), 261–277.

[31] Studies like: Jessoula *et al.*, 2010; Yoon & Chung, 2016; Bureau & Dieuaide, 2018; Pulignano e Doerflinger, 2018; Doerflinger *et al.*, 2020; Seo, 2021.

traditionally strong institutional barriers that divide insiders and outsiders[32]. The Italian case also stands out because the insider/outsider scenario is mainly based on an age/cohort divide. Barbieri et al. (2019)[33] argue that the deregulation process in Italy has been partial and targeted: the protections for insiders already in employment have remained unchanged through the various reforms. The deregulation has favoured an increase in non-standard employment, disproportionally targeting new labour market entrants, causing a generational effect on the younger cohorts[34]. The following historical reconstruction of the main deregulation reforms (from 1997 to 2014) aims to illustrate how this has occurred.

The first deregulation law in Italy was the Treu Law, introduced on 24 June 1997 (Law 196/97). It aimed to increase labour market flexibility and reduce the unemployment rate during the centre-left Prodi government (1996-1998). Its most crucial intervention concerned legal provisions for the indirect acquisition of work through different non-standard forms of employment, namely agency work and para-subordinate work. In particular, it determined the abolition of the public monopoly on temporary agency work – introduced with Act No. 1369/1960 -and recognition of the legitimacy of private employment agencies. It liberalised the use of para-subordinate contracts such as "coordinated and continuous collaboration (co.co.co)" arrangements and introduced "co.co.pro" contracts, activated for a specific (and supposedly limited-duration) project. These contracts stood in-between dependent work and autonomous contracts, as they were suitable for hiring collaborators without granting them the rights of dependent workers (including unemployment benefits or vacations). These contracts were appetible for employers, as their cost was lowered due to the scarce contributions scheme granted to workers. Consequently, these workers faced precarious conditions since the beginning: the Italian labour protection did not cover them due to workers being de-jure self-employed but de facto employees[35].

In 2001, Law 368/2001 introduced temporary work in Italy as a reception of the EU directive 1999/70/CE. Temporary work was only available in case of

[32] Jessoula, M., Graziano, P. R., & Madama, I. (2010). 'Selective Flexicurity' in Segmented Labour Markets: The Case of Italian 'Mid-Siders.' *Journal of Social Policy*, *39*(4), 561–583.

[33] Barbieri, P., Cutuli, G., Luijkx, R., Mari, G., & Scherer, S. (2019). Substitution, entrapment, and inefficiency? Cohort inequalities in a two-tier labour market. *Socio-Economic Review*, *17*(2), 409–431.

[34] Barbieri, P., Cutuli, G., Luijkx, R., Mari, G., & Scherer, S. (2019). Substitution, entrapment, and inefficiency? Cohort inequalities in a two-tier labour market. *Socio-Economic Review*, *17*(2), 409–431.

[35] Muehlberger, U., & Pasqua, S. (2009). Workers on the Border between Employment and Self-employment. *Review of Social Economy*, *67*(2), 201–228.

technical, productive or organisational reasons, so the law required to state the reason behind the fixed term status of the contract. Later, the Biagi Law (no. 276, December 2003) further liberalised the employment regulation system. It introduced several non-standard contractual arrangements (such as on-call work, occasional work, and so on). However, adequate security schemes have not adequately compensated for the increased flexibility[36]. Despite being formally covered in the event of unemployment, part-time, fixed-term and temporary agency workers faced insurmountable barriers to accessing ordinary unemployment benefits due to the strict eligibility requirements and the existence of minimum contribution thresholds. Parasubordinate workers were excluded from unemployment benefits[37].

This situation was not amended until 2012 with the Fornero reform (Law 92/2012), approved on 28 June 2012 during the Monti technical government (2011-2013) and under pressures caused by the sovereign debt crisis. The law relaxed the dismissal rules for standard employment for the first time since 1978[38]. It also provided stricter regulation of those contractual arrangements that were particularly at risk of abuse, like coordinated and continuous project collaborations and bogus self-employment[39]. The Fornero reform introduced a separate unemployment benefit for non-standard workers, less generous but with fewer requirements. So, its impact remains ambiguous; it did intervene to reduce social security inequalities for non-standard work[40].

The last reform introduced in Italy, the "Jobs Act" (Law 183/2014), addressed the two issues left unsolved after the Biagi law: contractual simplification and social protection for non-standard work. First, the law further eased the dismissal rules for permanent workers by introducing a new standard employment contract, the "increasing protection contract" (CTC), and cancelled the co.co.pro formula. The goal was to incentivise permanent CTC contracts instead, intending to simplify the contractual framework. However, the new dismissal rule was only introduced for the CTC contracts – following

36 Sacchi S, Berton F and Richiardi M (2009) Flessibilità del lavoro e precarietà dei lavoratori in Italia: analisi empiriche e proposte di policy. *Rivista Italiana di Politiche Pubbliche* 2009(1): 33–70.

37 Madama, I., & Sacchi, S. (2007). Le tutele sociali degli occupati in nuove forme di lavoro. Un'analisi della prassi applicativa. *Rivista Del Diritto Della Sicurezza Sociale*, *2007*(3).

38 Eichhorst, W., & Marx, P. (2020). How stable is labour market dualism? Reforms of employment protection in nine European countries. *European Journal of Industrial Relations*, *0*(0).

39 Tiraboschi, M., & Rausei, P. (2012). *Lavoro: Una riforma sbagliata. Ulteriori osservazioni sul DDL n. 5256/2012, Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita.* Adapt University Press.

40 Sciarra, S. (2013). Flessibilità e politiche attive del lavoro. Note critiche sulla riforma Monti-Fornero. *Giornale Di Diritto Del Lavoro e Di Relazioni Industriali*, *139*(2013), 471–488.

the pattern of deregulation for new entrants, like in the Treu and Biagi laws[41]. The "Jobs Act" was preceded by the Poletti Decree (DL. 34/2014), which abolished any limitation for companies to use fixed-term contracts.

The second aspect was the replacement of different social benefits with a single universal benefit[42]. The NaSPI – the new acronym for unemployment benefit - increased accessibility to all types of non-standard workers. The benefit is centred on a reasonably inclusive contributory requirement: 13 weeks of contributions in the previous four years of work plus 30 days of contribution in the previous year. The benefit amount is 75% of the average monthly wage, up to a maximum of 1,300 euros, and the duration is half the number of weeks of contribution, up to a maximum of two years. Co.co.co workers do not enter the system of NaSPI, but, for the first time, it offered an unemployment benefits system for co.co.co contracts (DIS-COLL), with a maximum duration of six months.

The succession of reforms that deregulated the Italian labour market can be fruitfully interpreted by applying the policy drift frame. As theorised by Hacker[43], "*policy drift refers to cases of institutional change that result not from 'formal revision', but from policies' failure to adapt to shifts in their social or economic context*"[44]. The inaction occurred between the Biagi law (2003) and the Fornero law (2012). During those nine years, the socio-economic conditions changed because of the increase in non-standard contracts determined by the Treu and Biagi laws. However, the unemployment benefits (left unchanged) were unfit to offer the same level of protection to all the non-standard workers. The Fornero reform (2012) and the Jobs Act (2014) issued new institutions to amend the situation *ex-post*. This ex-post correction was not enough to revert the erosion of social rights concentrated among the younger generations that previous laws had triggered. It still enforced a separate system for co.co.co workers. It created a "grey zone", as theorised by Bureau and Dieuaide (2018)[45].

41 Eichhorst, W., & Marx, P. (2020). How stable is labour market dualism? Reforms of employment protection in nine European countries. *European Journal of Industrial Relations*, *0*(0).

42 Eichhorst, W., & Marx, P. (2020). How stable is labour market dualism? Reforms of employment protection in nine European countries. *European Journal of Industrial Relations*, *0*(0).

43 Hacker, J. S. (2005). Policy drift: The Hidden Politics of US Welfare State Retrenchment. In W. Streeck & K. Thelen (Eds.), *Beyond Continuity*. Oxford University Press.

44 Béland, D., Rocco, P., & Waddan, A. (2016). Reassessing Policy Drift: Social Policy Change in the United States. *Social Policy & Administration*, *50*(2), 201–218. Citation at page 201-202.

45 Bureau, M.-C., & Dieuaide, P. (2018). Institutional change and transformations in labour and employment standards: An analysis of 'grey zones.' *Transfer: European Review of Labour and Research*, *24*(3), 261–277.

4. An Analytical Framework based on Marginal Work

In the previous paragraph, we showed how the Italian deregulation process could be interpreted as an empirical example of the policy drift theorised by Hacker (2005)[46]. While the general configuration of the labour market was changing due to the new rules regulating labour market entry, the social security system remained stable until the most recent reforms (2012 – 2014). This led to a progressive drifting of workers from the protection system, which would only be amended in recent years. We argue that those who drifted out of social protection because of the inaction of public regulation are the marginal workers.

According to Kanbur (2007)[47], marginality is a statement that needs to be defined in relation to some other group or category of society or an average standard. Standard workers enjoy the maximum benefits associated with participation in the labour market regarding access to welfare and economic reward thanks to their standard employment relationship. The centrality of standard work is also determined by the fact that it is still the most widespread form of employment (§ section 5), despite the steady rise in the percentage of non-standard work in recent decades[48].

Starting from this centre, the other groups (namely, the outsiders) occupy a weaker position within the labour market, characterised by higher social risks and lower social protection. In our theoretical framework, outsiders are composed of several groups. The first outsider group we find is voluntary non-standard workers, whom we assume to be less marginalised than involuntary non-standard workers, following Fervers and Schwander (2015)[49]. This group has chosen a non-standard working relationship, which could be for several different reasons (i.e., work-life balance, education, illness, etc.). On the other hand, the second group of outsiders, the involuntary non-standard workers, suffer from this condition and its disadvantage. Also, with a non-standard work contract and fewer entitlements to benefits compared to insiders, their marginalisation is higher than voluntary non-standard workers because they did

[46] Hacker, J. S. (2005). Policy drift: The Hidden Politics of US Welfare State Retrenchment. In W. Streeck & K. Thelen (Eds.), *Beyond Continuity*. Oxford University Press.

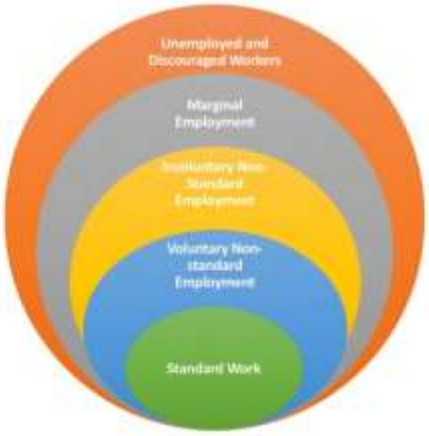
[47] Kanbur, R. (2007). *Conceptualizing Economic Marginalization. Key-notes for the Living at the Margins Conference*. https://goo.gl/6eGupG.

[48] Hipp, L., Bernhardt, J., & Allmendinger, J. (2015). Institutions and the prevalence of nonstandard employment. *Socio-Economic Review*, *13*(2), 351–377.

[49] Fervers, L., & Schwander, H. (2015). Are outsiders equally out everywhere? The economic disadvantage of outsiders in cross-national perspective. *European Journal of Industrial Relations*, *21*(4), 369–387.

not choose this condition[50]. However, they are usually given some degree of entitlement to social protection, according to the Jobs Act reform in 2014.
Going further, we identify another group, namely marginal workers, who are the result of the drifting process that has characterised the deregulation reforms in Italy. Marginal workers are those non-standard workers whose integration in the labour market is so frail and intermittent that it enables them minimal access to social protection and unemployment benefits. They are localised at the margins of the labour markets, in a grey area between under-employment and self-employment[51]. They may be in such a grey legislative position that they have no entitlements.
Lastly, in the area of exclusion from the labour market, we find unemployed and discouraged workers currently out of work. Depending on their previous contractual relationship, they may or may not be entitled to unemployment benefits.

Figure No. 1. A model of labour market marginalization



Source: Authors' own elaboration

[50] Rueda, D. (2005). Insider–Outsider Politics in Industrialized Democracies: The Challenge to Social Democratic Parties. *American Political Science Review*, *99*(1), 61–74.
Rueda, D., Wibbels, E., & Altamirano, M. (2015). The origins of dualism. In P. Beramendi, S. Häusermann, H. Kitschelt, & H. Kriesi (Eds.), *The politics of advanced capitalism* (pp. 1–40). Cambridge University Press New York.
[51] Bureau, M.-C., & Dieuaide, P. (2018). Institutional change and transformations in labour and employment standards: An analysis of 'grey zones.' *Transfer: European Review of Labour and Research*, *24*(3), 261–277.
Seo, H. (2021). 'Dual' labour market? Patterns of segmentation in European labour markets and the varieties of precariousness. *Transfer: European Review of Labour and Research*, *27*(4), 485–503.

The margin-centre metaphor is a powerful tool to identify those who progressively leak out of social protection in a situation where it is substantially more vulnerable than the rest of the non-standard workers. It is important to stress that not all non-standard workers are marginal workers (Allmendinger et al., 2013): although part-time and temporary workers enjoy fewer entitlements compared to standard workers[52], the social protection provided in the Jobs Act is now adequate to protect most non-standard workers from the risk of job loss, thus making a dualism that opposes standards/insiders and non-standards/outsiders less relevant. Therefore, as the following section will show, marginal work is a phenomenon that only involves specific types of non-standard workers.

5. Marginal Work Data Sources and Operationalisation

5.1 Marginal Work Operationalisation

The effect of the combination of long-term deregulation policies "at the margins", the new labour market and the social security framework, is to expose new entrants to the risk of becoming trapped in a situation of marginal work. To analyse this situation, this study focuses on three situations that allow us to explore the heuristic potentiality of marginal work. These three situations have been theoretically derived by examining the contractual categories more exposed to social risk in light of the current labour market and social protection framework. Nevertheless, these categories align with the risk categories identified in the Eurofond reports (see Eurofond, 2017).

The first is "marginal involuntary part-time" workers. Involuntary part-time work is a condition of underemployment and under-utilized labour; it is a phenomenon connected with business cycles, the structural characteristics of the labour market, and employers' preferences[53]. The more the non-standard contract is imposed by the counterpart and not voluntarily chosen, the more it increases the marginality of the person. Working fewer hours than desired implies reduced occupational and social insurance access. In addition,

[52] Hipp, L., Bernhardt, J., & Allmendinger, J. (2015). Institutions and the prevalence of nonstandard employment. *Socio-Economic Review*, *13*(2), 351–377.

[53] Insarauto, V. (2021). Women's Vulnerability to the Economic Crisis through the Lens of Part-time Work in Spain. *Work, Employment and Society*, *35*(4), 621–639.
Velitiotis, M., Matzaganis, M., & Karakitios, A. (2015). *Involuntary part-time employment: Perspectives from two European labour markets.* (No. 15/02; IMPROVE Discussion Paper). https://goo.gl/KRM8gi

involuntary part-timers are more frequently found in low-skilled positions in the secondary sectors and are more exposed to temporary employment[54].
The NaSPI introduced within the Jobs Act reform increased the accessibility of unemployment benefits for part-time workers. However, the amount and duration of their unemployment benefit are much lower than full-time workers. To fulfil the criterion of marginalisation in the event of job loss despite the unemployment benefit offered by the Jobs Act, the analysis focused on low-wage, involuntary part-time workers, defined as those who earn less than two-thirds of the median wage of part-timers in Italy (calculated in 2016). Workers in this category represent 2.55% of employed people in Italy (2016).[55]
A second position relates to those workers who are in an intermediate position between subordinate and independent work[56], so-called "para-subordinate workers". Contract types such as coordinated and continuous arrangements (co.co.co formula) or project contracts (co.co.pro formula), voucher contracts, or occasional employment are peculiarities of Italian labour market regulations, producing the most vulnerable temporary workers. They do not have a subordinate work contract and thus are excluded from the rights associated with this (i.e., sick pay, holidays, a severance package). However, at the same time, they do not enjoy the opportunities offered by independent work, such as autonomy in providing services (in terms of hours and location) and the possibility of having more than one buyer[57]. Furthermore, no economic penalty is associated with dismissal, as these workers are not entitled to a severance package when the contract ends. Their condition of marginality lies in their grey position between temporary subordinate employment and self-employment. The Jobs Act banned project contracts but left the regulation for coordinated and continuous arrangements untouched. The law acknowledges the specific nature of the latter contract, and these workers have a dedicated

[54] Velitiotis, M., Matzaganis, M., & Karakitios, A. (2015). *Involuntary part-time employment: Perspectives from two European labour markets*. (No. 15/02; IMPROVE Discussion Paper). https://goo.gl/KRM8gi

[55] This percentage refers to all dependent workers who are employed for less than 30 hours per week and state that they are part-timers because they could not find a full-time job and not because they voluntarily chose a reduced working schedule.

[56] Seo, H. (2021). 'Dual' labour market? Patterns of segmentation in European labour markets and the varieties of precariousness. *Transfer: European Review of Labour and Research*, *27*(4), 485–503.
Muehlberger, U., & Pasqua, S. (2009). Workers on the Border between Employment and Self-employment. *Review of Social Economy*, *67*(2), 201–228.

[57] Seo, H. (2021). 'Dual' labour market? Patterns of segmentation in European labour markets and the varieties of precariousness. *Transfer: European Review of Labour and Research*, *27*(4), 485–503.

unemployment benefit scheme (DIS-COLL) less generous than NaSPI. These workers represent 1.29% of employed people in Italy (2016).
Finally, a third position under consideration is the "dependent freelance", namely the freelancer in solo self-employment (i.e., without any employees[58]). Although independent work is likely to lead to high profits and autonomy for the worker, solo freelancers are frequently exposed to low income, insufficient coverage from social protection, and low pension contributions[59]. This is because freelance employment is usually considered an entrepreneurial activity, and, as such, the business risk is borne by the worker, who at the same time is not entitled to unemployment benefits as social protection does not cover loss of turnover[60].
In this paper, we only consider those freelance workers with limitations on the autonomy of their activity to be marginal workers. Previous legislative interventions have tried to take account of the phenomenon of so-called "bogus self-employment" (Fornero Law, 92/2012) by focusing on the criterion of economic dependence on a single buyer, which is not possible to measure with current survey data. As a proxy, limitations on the autonomy of how and when freelance services are provided indicate that workers are potentially exposed to economic dependence, with limited control over the duration and stability of their working activity[61]. Dependent freelancers represent 0.60% of employed people in Italy (2016).

5.2 Population and Data Sources

This paper presents an analysis based on the Italian Labour Force Survey 2009-2016,[62] intending to evaluate trends in non-standard and marginal work in Italy in the eight years following the financial crisis.

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[58] Hipp, L., Bernhardt, J., & Allmendinger, J. (2015). Institutions and the prevalence of nonstandard employment. *Socio-Economic Review*, *13*(2), 351–377.
[59] Hipp, L., Bernhardt, J., & Allmendinger, J. (2015). Institutions and the prevalence of nonstandard employment. *Socio-Economic Review*, *13*(2), 351–377.
[60] Eurofond. (2017). *Aspect of non-standard employment in Europe*. Publications Office of the European Union. https://goo.gl/xEM1R1.
[61] Eurofond. (2017). *Aspect of non-standard employment in Europe*. Publications Office of the European Union. https://goo.gl/xEM1R1.
[62] Given the small number of groups under investigation, the four 2016 trimesters were pooled. The analysis is based on the entire year of 2016. Graph 3 also provides a comparison up to 2009 in order to show the dynamic trend of marginal workers across the eight-year period. The choice of 2009 as the lower bound derives from the availability of in-depth information in the Italian Labour Force Survey, which is released specifically for research purposes.

The population in the analysis is aged 15-64 years, and it is further subdivided into three main age classes: young - under 25 years old; young adults - between 25 and 36 years old; and adults - over 37 years old. These thresholds were selected based on the literature and the timing of the institutional reforms: 25 is considered the lower limit of the "prime age" for labour market integration[63] as younger individuals are primarily inactive due to educational purposes, while 36 was the age in 2016 of those born in 1980, meaning they were 16 years old when the Treu Law (196/97) came into operation. In other words, the age of 36 is a symbolic threshold, marking the first generation to have spent their entire career in a deregulated labour market.[64] Age is an under-researched dimension of labour market stratification, yet it is highly relevant when it comes to the effects of institutional reforms[65]. The analysis excludes migrants from non-OECD countries because of their segregation into low-skilled and poor manual occupations[66].

The empirical section will first present a descriptive analysis showing the distribution of the different types of work identified (standard, voluntary non-standard, involuntary non-standard and marginal work) and how they changed in the eight years. Finally, the analysis is completed by running a logistic regression to estimate the probability of being a marginal worker according to the year of birth and the year of the survey (2009 and 2016). The model is controlled by gender, educational level in four ISCED classes (less than ISCED 2, ISCED 3 (2 years), ISCED 3 (4-5 years), ISCED 5-8), sector of activity in five classes (agriculture, manufacturing, construction, advanced business services and other services), and geographical distribution based on five classes (North-West, North-East, Centre, South and the Islands).

6. Empirical Evidence about Marginal Work

Marginal work affects 4.43% of the total labour force in Italy, an estimated 900,000 workers (Table 2). Although the standard employment relationship still represents the majority of employment (54.9%), there is quite a consistent percentage of non-standard employment: part-time, temporary contracts and self-employment account for approximately 40% of employment in Italy, of which almost one-third is involuntary (14.5% of total). However, the numbers

[63] Dieckhoff, M., & Steiber, N. (2012). Institutional reforms and age-graded labour market inequalities in Europe. *International Journal of Comparative Sociology*, *53*(2), 97–119.

[64] Law 30/2000 (Law Berlinguer) made 16 the compulsory school leaving age.

[65] Dieckhoff, M., & Steiber, N. (2012). Institutional reforms and age-graded labour market inequalities in Europe. *International Journal of Comparative Sociology*, *53*(2), 97–119.

[66] Fellini, I. (2015). Una «via bassa» alla decrescita dell'occupazione: Il mercato del lavoro italiano tra crisi e debolezze strutturali. *Stato e Mercato*, *105*, 469–508.

concerning involuntariness can be misleading, as the Italian Labour Force Survey does not ask self-employed workers if they have chosen or were forced to opt for an autonomous job. In line with what is supposed by the segmentation theory, marginal workers feel insecure about their job. Among persons who believe they are likely to lose their job in the next six months, the proportion of marginal involuntary part-timers (26.8%) and para-subordinate workers (34.6%) is relatively high, especially compared to dependent freelancers (11.4%). Contrary to what Doeringer and Piore (1971) supposed[67], marginal work is not only associated with jobs in the secondary sectors or lower hierarchical positions (except for involuntary part-time work). In the case of para-subordinate (34.9%) and dependent freelancers (41.1%), more than one-third of the workers have at least tertiary education (see table A3 in the annexe). Para-subordinate workers and dependent freelancers make up higher percentages in advanced business services. In contrast, involuntary part-time workers are strongly associated with traditional services such as real estate activities, retail, accommodation and restaurants (see annexe, Table A2). It is also interesting to note that marginal employment is almost non-existent in the manufacturing and construction sectors, except for dependent freelance contracts, which probably disguise bogus self-employment in construction firms, which in theory is forbidden by law (see Fornero Law 2012). The different distribution of the types of marginal employment is also evidenced by the professional positions occupied by different workers. Part-timers are more likely to be employed as skilled workers in services and as unskilled workers. Freelancers have a dual distribution: one is concentrated on unskilled workers; the other is executives, intellectuals and office workers. Para-subordinate workers, by contrast, are more homogenous, as they are primarily active in service positions (skilled or highly skilled). Upon analysing the evolution of marginal work over time (Table 2), it can be observed how the percentage of marginal work remains stable, at approximately 4% of total employment, even though legislators have tried to reduce the phenomenon in recent years, for example by discouraging the use of bogus self-employment (Law Fornero, 2012) and abolishing co.co.pro contracts (Jobs Act, 2014). The result has been a progressive shift of marginal workers from dependent freelance and para-subordinate workers to involuntary part-time workers. In contrast, the total number of marginal workers is stable at around 900,000. In 2016, involuntary part-time workers accounted for two-thirds of the total marginal workers, increasing from only one-third in 2009. Given the downgrading trend suffered

[67] Doeringer, P. B., & Piore, M. J. (1971). *Internal Labor Markets and Manpower Analysis*. M.E. Sharpe.

by the Italian labour market after the financial crisis[68], it can also be reasonably argued that this progressive movement from dependent freelance and para-subordinate work to involuntary part-time work is not only due to the effect of the labour reforms but is also associated with a contraction in the labour demand for high-skilled positions and advanced business services following the years of crisis, which has reduced the number of para-subordinate and freelance workers in recent years.

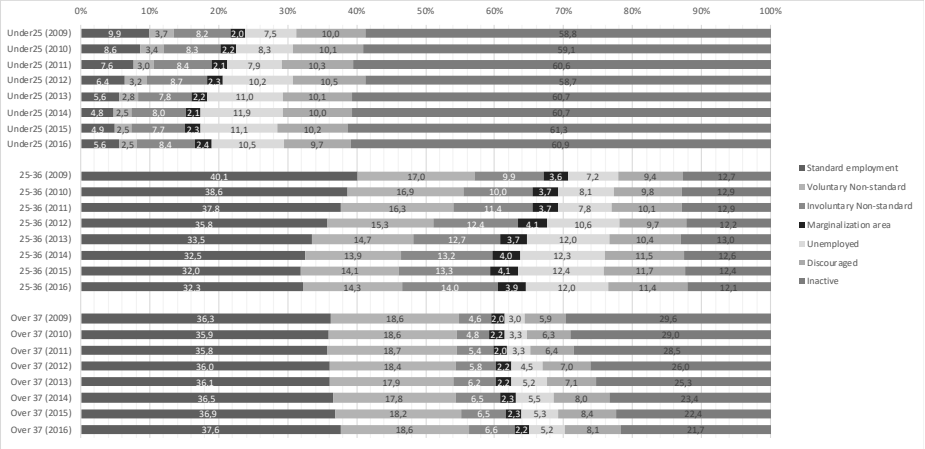
Table No. 2. Distribution of Marginal Work: Percentages and Absolute Values

	Dependent Freelance	**Para-subordinate Workers**	**Involuntary Part-Time**	**% of Total Employment**	**Absolute Values (estimation)**
Year 2009	24.08	42.99	32.93	4.10	856,881
Year 2010	24.94	40.99	34.07	4.43	911,075
Year 2011	18.53	45.05	36.43	4.20	858,908
Year 2012	20.42	41.48	38.11	4.64	941,133
Year 2013	18.13	39.76	42.11	4.54	895,719
Year 2014	17.95	36.9	45.15	4.66	913,436
Year 2015	14.23	32.41	53.36	4.68	922,038
Year 2016	13.38	28.96	57.65	4.43	883,546

Source: Authors' own elaboration from the Italian Labour Force Survey (2009 – 2016)

[68] Fellini, I. (2015). Una «via bassa» alla decrescita dell'occupazione: Il mercato del lavoro italiano tra crisi e debolezze strutturali. *Stato e Mercato*, *105*, 469–508.

Figure No. 3. Distribution of work by model of marginalization: percentages (2009-2016)[69]



Source: Authors' own elaboration from the Italian Labour Force Survey

Looking at Figure 3, the marginal work dynamic is influenced by the generation of workers. For older workers, the eight years are characterised by a slight growth in the rate of standard employment, to approximately 37% of the population. In contrast, the inactivity rate shows a contraction (-36.7%), primarily due to a reduction in the number of retired persons (from 10.2% of people over 37 in 2009 to 5.5% in 2016 - see Table A3 in the Annex). It can be assumed that these trends among older workers are the result of the pension reforms of the last decade, which aimed to increase the permanence of workers within the labour force (Laws 122/2010 and 148/2011, Sacconi Laws; Decree Law 201/2011, Fornero Law). However, instead of promoting employment (+3.7% for standard employment), the pension reforms have increased involuntary non-standard (+30.7%) and marginal work (+7.9%) and exclusion from the labour market (+43.3% for unemployment and +26.8% for discouragement). Nevertheless, the proportion of standard work still makes up the majority of workers over 37.

For the youngest workers, the under-25s, the trend reveals a significant contraction in standard employment. Although this is most significant for the under-25s (-78%) compared to the other age groups, the fact that under-25s are, for the most part, still involved in education (approximately 60% of the total population of that age group, as evidenced in Table A3) makes the phenomenon less worrying in terms of its effect on the labour market. The number of under-25s outside the labour market has been stable, growing only

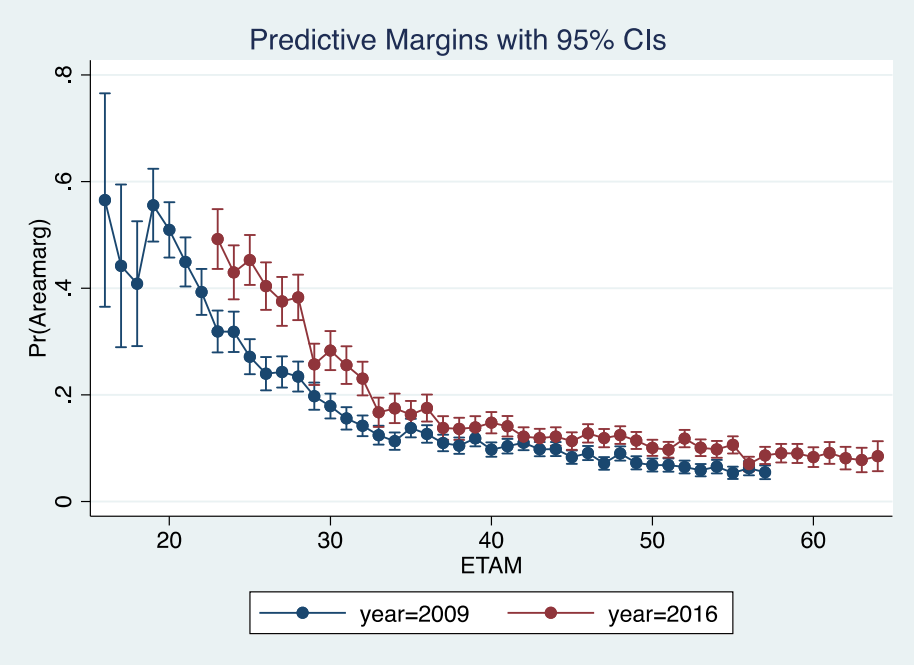
[69] Discouraged workers are those who would like to work but are not currently actively looking for a job.

slightly (+3.5%). In the most recent years, unemployment (+28.3%) and marginal work (+16.5%) grew amongst this group, but the percentage of total employment accounted for by marginal work (2.4%) is still less than in the prime age group (3.9%).

Workers between 25 and 36 years old are especially exposed to marginal work. For this group, the period saw a loss of approximately one-quarter of the total standard employment, decreasing from 40.1% of the total population in 2009 to 32.2% in 2016. At the same time, exclusion from the labour market increased, with 65.7% more unemployed and 21.7% more discouraged in 2016 compared to 2009. The process of drifting is evident when looking at the differences between the last six years: standard (-19.6%) and voluntary non-standard positions (-16.2%) were lost among this age group. The financial crisis undoubtedly magnified this process but affected this age group more than older workers. In the same years, a corresponding growth was measured in involuntary non-standard (+41.4%) and marginal work (+9.9%); in 2016, the two accounted for approximately 18% of the population of 25- to 36-year-olds, an increase of 4.5% from 2009.

The results of this descriptive analysis are further confirmed by analysing the effect of the year of birth on the probability of being marginally employed via logistic regression analysis. The younger generations always experience a higher likelihood of marginal employment, which is greater than previous generations when they were the same age. Looking at Figure 4, the two lines for 2009 and 2016 show the movement towards marginal work in 2016; however, the magnitude of the drift is not equally distributed across the age brackets and is more pronounced for the youngest generations (the graph only takes into account the generations of workers who were of working age in the two reference years, i.e., those born between 1953 and 1993). This is confirmed when controlling for gender, education, sector of activity and geographical residence (see Table A3 in the annexe). Notably, the gaps between 2009 and 2016 close approximately at the age of 36, as already mentioned, the first generation to have lived their entire working life in a deregulated labour market. For workers aged 37 and older, there is no empirical evidence of a difference between 2009 and 2016. Although the highlighted growth could be explained as an effect of the financial crisis, it is nevertheless evident that older workers were not affected by the crisis in the same way as the young and that deregulation led to a deterioration in labour market conditions borne mainly through younger workers.

Figure No. 4. Predicted probabilities of being a marginal worker by age, 2009 and 2016[70]



Source: Authors' own elaboration from the Italian Labour Force Survey

In conclusion, the empirical evidence presented in this section shows that the likelihood of being a marginal worker is more significant for those born after 1980, who have paid the cost of deregulation at the margins. In addition, marginal workers do not easily fit the profile of workers with an employment disadvantage: many are high-skilled, working in an advanced business sector and white-collar jobs. One might argue that marginal work results from individual inadequacy or a worker's lower capacity. However, this interpretation does not fit the profile of Italian marginal workers with human capital to offer in the labour market and are still young enough to be more productive than the average adult worker. Para-subordinate workers and dependent freelancers – two of the three categories of marginal workers identified in this paper – are strongly present among the highly skilled positions in the labour market, in contrast with the theory of labour market segmentation. Work experience does not seem a possible explanation since

[70] The graph shows the predicted probability by age and year, based on the model shown in Table A4 in the Annex, which controls for gender, education, sector of activity and geographical location. Although the model does not include age but year of birth, the authors consider it legitimate to use age in the graph as the two variables are perfectly collinear (correlation values -0.96): age was selected as it is more informative for the argument of this paper.

marginal work is also a significant phenomenon among the over-30s, not just the younger new entrants. It might be more realistic to argue that marginal work is a legacy of how deregulation has been implemented in Italy because of the disjunction between the social protection schemes and the changed economic conditions for workers, as predicted by the policy drift theory[71].

7. Discussion and Conclusions

This paper makes two main contributions to labour market segmentation theory and the more recent dualisation theory. First, following recent research[72], our paper evidenced the limitations of a dualist vision of the opposed insider/outsider poles, by highlighting that at least in Italy the outsiders consist of different groups. One of them, namely the marginal workers, consists of those who have drifted out of the social protection system[73] owing to inaction on the part of the government in making the necessary updates to benefits in light of the progressive introduction of more flexible contracts. Our empirical evidence confirms previous research[74], which theorised the importance of stratified deregulation processes in determining areas of work characterised by weak or absent social protection.

Second, we have given empirical evidence for our hypothesis that younger generations are more exposed to marginal work due to the specific nature of deregulation in Italy[75]. Through an empirical analysis of the Italian Labour Force Survey 2009-2016, this paper has demonstrated that a considerable proportion of non-standard workers drifted from standard employment in the eight years, a phenomenon particularly affecting the population of young adults (25-36 years old).

This research confirms previous empirical evidence in literature. The role of institutions in generating multiple categories of outsiders was already put in

[71] Hacker, J. S. (2005). Policy drift: The Hidden Politics of US Welfare State Retrenchment. In W. Streeck & K. Thelen (Eds.), *Beyond Continuity*. Oxford University Press.

[72] See: Jessoula et al., 2010; Yoon & Chung, 2016; Pulignano & Doerflinger, 2018; Doerflinger et al., 2020; Seo, 2021.

[73] Hacker, J. S. (2005). Policy drift: The Hidden Politics of US Welfare State Retrenchment. In W. Streeck & K. Thelen (Eds.), *Beyond Continuity*. Oxford University Press.

[74] Bureau, M.-C., & Dieuaide, P. (2018). Institutional change and transformations in labour and employment standards: An analysis of 'grey zones.' *Transfer: European Review of Labour and Research*, *24*(3), 261–277.

[75] Barbieri, P., Cutuli, G., Luijkx, R., Mari, G., & Scherer, S. (2019). Substitution, entrapment, and inefficiency? Cohort inequalities in a two-tier labour market. *Socio-Economic Review*, *17*(2), 409–431.

evidence by Jessoula et al., in 2010[76], by analysing those categories of workers which stood in-between insiders and outsiders in the Italian system. However, differently from them and similar to Yoon and Chung (2016)[77], our analysis showed how the process of implementing deregulation in Italy has also determined the progressive drifting of specific categories of workers outside the social protection systems, with a clear generational divided determined by "deregulation at the margins" approach[78]. Secondly, compared to studies like Doerflinger et al. (2020)[79] and Seo (2021)[80], we take a step further in including more workers among outsiders. Our analysis does not stem from a subjective perception of the worker regarding their job insecurity as in the cited research. We consider that being involuntarily employed in part-time work is a determinant factor for being a marginal worker together with dependent self-employment[81], as it predicts low-income revenue and scarce job prospects – already highlighted by Seo (2021)[82] as critical elements for segmentation. Although being an involuntary non-standard employed worker is a subjective condition as well, plenty of empirical evidence has demonstrated that such a condition exposes to a problematic integration into the social protection

[76] Jessoula, M., Graziano, P. R., & Madama, I. (2010). 'Selective Flexicurity' in Segmented Labour Markets: The Case of Italian 'Mid-Siders.' *Journal of Social Policy*, *39*(4), 561–583.

[77] Yoon, Y., & Chung, H. (2016). New Forms of Dualization? Labour Market Segmentation Patterns in the UK from the Late 90s Until the Post-crisis in the Late 2000s. *Social Indicators Research*, *128*(2), 609–631.

[78] Barbieri, P., Cutuli, G., Luijkx, R., Mari, G., & Scherer, S. (2019). Substitution, entrapment, and inefficiency? Cohort inequalities in a two-tier labour market. *Socio-Economic Review*, *17*(2), 409–431.

[79] Doerflinger, N., Pulignano, V., & Lukac, M. (2020). The social configuration of labour market divides: An analysis of Germany, Belgium and Italy. *European Journal of Industrial Relations*, *26*(2), 207–223.

[80] Seo, H. (2021). 'Dual' labour market? Patterns of segmentation in European labour markets and the varieties of precariousness. *Transfer: European Review of Labour and Research*, *27*(4), 485–503.

[81] Muehlberger, U., & Pasqua, S. (2009). Workers on the Border between Employment and Self-employment. *Review of Social Economy*, *67*(2), 201–228.
Hipp, L., Bernhardt, J., & Allmendinger, J. (2015). Institutions and the prevalence of nonstandard employment. *Socio-Economic Review*, *13*(2), 351–377.
Seo, H. (2021). 'Dual' labour market? Patterns of segmentation in European labour markets and the varieties of precariousness. *Transfer: European Review of Labour and Research*, *27*(4), 485–503.

[82] Seo, H. (2021). 'Dual' labour market? Patterns of segmentation in European labour markets and the varieties of precariousness. *Transfer: European Review of Labour and Research*, *27*(4), 485–503.

system, determined by the reduced number of working hours, which impacts their social contributions[83].

This analysis has important policy implications. The problem of younger generations depends on their unequal exposure to deregulation, which is different among the generations coming after the first reforms compared to those already employed. The insider/outsider divide thesis supporters have encouraged the relaxation of the norms against dismissal in standard employment relationships to favour transitions between insiders and outsiders. However, this strategy only spreads precariousness rather than dealing with the marginality suffered by outsiders[84]. Along with most Italian non-standard workers, the condition of marginal workers is involuntary: they accept these types of jobs because jobs with good working conditions (full-time and dependent) are not available. A universal benefit like a minimum income should give these workers sufficient bargaining capacity to refuse underpaid and precarious jobs. If this policy looks unrealistic in the current economic outlook, at least extending non-standard workers' access and entitlements to active labour market policies should sufficiently empower them to find a job with better conditions.

In conclusion, this analysis confirms the consolidation of multiple segmentations within the labour market in Italy, in which the traditional divide between insiders and outsiders has yielded more fragmentation than a simple dualism and a situation of marginality mainly concentrated among the younger generations.

[83] Insarauto, V. (2021). Women's Vulnerability to the Economic Crisis through the Lens of Part-time Work in Spain. *Work, Employment and Society*, *35*(4), 621–639.

[84] Rubery, J., & Piasna, A. (2017). Labour market segmentation and deregulation of employment protection in the EU. In *Myths of employment deregulation: How it neither creates jobs nor reduces labour market segmentation* (p. 18).

The International Mobility of the Highly-Skilled: Why Has Sweden so Many Foreign-trained Medical Doctors and the Netherlands so Few?

Gijsbert van Liemt *

Abstract

This paper discusses the role of pull factors in the international mobility of medical doctors by comparing the experiences of two host countries. Over 28% of doctors active in Sweden have been trained abroad. In the Netherlands foreign-trained doctors make up barely 3% of the total. How can this difference be explained? The Netherlands has long aimed for self-sufficiency. Sweden educates and trains fewer doctors than it needs- not because candidates are lacking but because of a lack of places in medical school (some 25% of the foreign-trained are Swedish citizens). Doctors in Sweden are typically employees. Doctors in the Netherlands are mainly self-employed. Health workforce planning in Sweden is highly decentralised and takes place within the public sector; in the Netherlands it is a more inclusive exercise that is organized at central level. In contrast to the Netherlands, few Swedes have their 'own' family doctor; this facilitates the acceptance of foreign-trained doctors. The re-registration requirement and strictness in the testing of language skills may also have played a role. The paper is based on official documents and other publications, in addition to interviews with practitioners and experts in the medical field in Sweden and the Netherlands.

Keywords: *International Migration; Workforce planning in Open Labor Markets; Healthcare systems.*

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1. Introduction

Medical doctors have a long tradition of moving across borders[1]. Doctors who emigrate risk leaving their home country understaffed. This loss of critical skills ('brain drain') presents countries of origin with difficult questions, a key one being: how many doctors should we train when so many emigrate after training? This paper argues that host countries face a similar, if more luxurious question. They may be tempted to educate fewer doctors than they need, but they still need to decide to what extent they want to depend on foreign-trained doctors.

The international mobility of the highly-skilled is greatly facilitated by the mutual recognition of diplomas. For example, the Nordic Common Labour market for health professionals provides mutual acceptance of competences for those who received their diploma in Denmark, Finland, Norway, Sweden or Iceland[2].

Automatic qualification recognition makes it even easier to work in another country[3]. Since 2005, the European Union (EU) encourages the intra-EU mobility of doctors (and a select group of other professionals) through automatic diploma recognition. According to EU Directive 2005/36/EC, healthcare professionals who received their diploma in an EU member state can exercise their profession in any other EU member state whether they move there permanently or just want to work there occasionally or on a temporary basis[4].

To put the significance of the EU's automatic recognition into perspective, it suffices to compare it with the hurdles that physicians trained outside the EU

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[1] For background and context information on the international mobility of health professionals see *inter alia* J.Buchan, M. Wismar, I. Glinos, J. Bremmer, J. (Eds.) *Health Professional Mobility in a Changing Europe: New dynamics, mobile individuals and diverse responses Volume II* (Observatory Studies Series No.32; European Observatory on Health Systems and Policies) 2014, other studies produced by the World Health Organization's European Observatory on Health Systems and Policies www.euro.who.int, and the Health Working Papers produced by the OECD's Directorate for Employment, Labour and Social Affairs (DELSA). https://www.oecd-ilibrary.org/social-issues-migration-health/oecd-health-working-papers_18152015.

[2] P-G Svensson, M. Rosberg Gustafsson, D. Kaplan *Sweden: Mobility of Health Professionals* (MoHProf Mobility of Health Professionals, WIAD Wissenschaftliches Institut der Ärtzte Deutschlands, Bonn, 2011; Statens Offentliga Utredningar (SOU) *För framtidens hälsa- en ny Läkarutbildning* SOU 2013:15, Stockholm 2013 www.regeringen.se.

[3] L. Glinos, J. Buchan "Health Professionals crossing the EU's internal and external borders: a typology of health professional mobility and migration" in J.Buchan et al 2014 *supra* 1 p. 142.

[4] M. Peeters, M. McKee, S. Merkur, "EU Law and health professionals" in: R. Baeten, E. Mossialos, T. Hervey (Eds.) *Health Systems Governance in Europe: the role of EU law and policy; Health economics, policy and management (*Cambridge University Press, Cambridge UK) 2010 p. 592.

(in the context of this paper, the term 'physician' is used loosely for doctors) have to overcome[5]. They need to obtain a work and residence permit and pass tests to assess their skill and educational level and experience. These procedures can be long and cumbersome. Not infrequently, non-EU trained doctors must undergo additional training in the host country.

In contrast, EU member states cannot refuse a license to a physician trained in another EU member state. Nor can they demand extra tests or adaptation periods[6]. They may set only two conditions. First, candidates must have a Certificate of Current Professional Status (CCPS) to certify that they are not subject to any restrictions in the exercise of their profession. Second, candidates must have knowledge of the language necessary for practicing in the host member state.

Despite the EU having certified them as perfect substitutes, there are huge differences in the extent to which EU member states rely on foreign-trained physicians. Their share ranges from 41 % in Ireland to virtually nil in Italy (Figure 1 provides figures for 2019 or nearest year).

Based on these considerations, this paper compares the contrasting experience of the Netherlands and Sweden. For the Netherlands, international migration of medical doctors is a comparatively minor phenomenon overall. For Sweden, foreign-trained doctors are a major source of supply. The questions this paper addresses are: Why do these two countries differ so much in their reliance on foreign-trained doctors? What are the consequences for workforce planning? Can one assume that Sweden will continue to be able to attract foreign-trained doctors? More fundamentally, can and should a domestic balance of supply and demand of medical doctors be an official policy goal and is such a goal compatible with their free mobility within the EU?

1.1. Why Doctors Move

Medical doctors move to other countries for a combination of 'push' and 'pull' factors, the latter often being the mirror image of the former[7]. The absence of advanced training facilities is an oft-mentioned push factor and the availability of such facilities an obvious pull factor. Other push factors are poor remuneration, unemployment, a stressful work environment, a poor quality of life, low morale, and lack of political or religious freedom.

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[5] See e.g. P. Herfs *International Medical Graduates in the Netherlands; a future of medical doctors or cleaners?* PhD Thesis, Utrecht University, Utrecht 2011.

[6] J. Buchan, I. Glinos, M. Wismar" Introduction to Health Professional Mobility in a changing Europe" in: Buchan et al 2014 *supra* 1 p.8.

[7] See e.g. the sources mentioned in note 1.

However, these factors say little about the attractiveness of individual host countries, particularly when these offer similar employment opportunities, training facilities and living conditions. Sweden and the Netherlands are among the wealthiest EU Member States and the local languages are not widely used outside their borders. It thus seems reasonable to assume that neither language nor attractive incomes are main explanations for the difference in their reliance on foreign-trained physicians. So, what does explain this difference? An obvious answer to this question would be to ask the physicians themselves. But research on this is scarce[8].

Medical doctors, just like other migrants, typically have different, and often multiple reasons for wanting to move to another country. One category consists of spouses or partners of persons who move for professional reasons. A second are refugees who are usually trained outside the EU. A third consists of spontaneous jobseekers who flee worsened working conditions at a time of economic hardship, look for further professional development or for improving their incomes, or who consider it interesting to be working for a while in a foreign country. There is a priori no reason to assume that the volumes involved are significantly different between Sweden and the Netherlands.

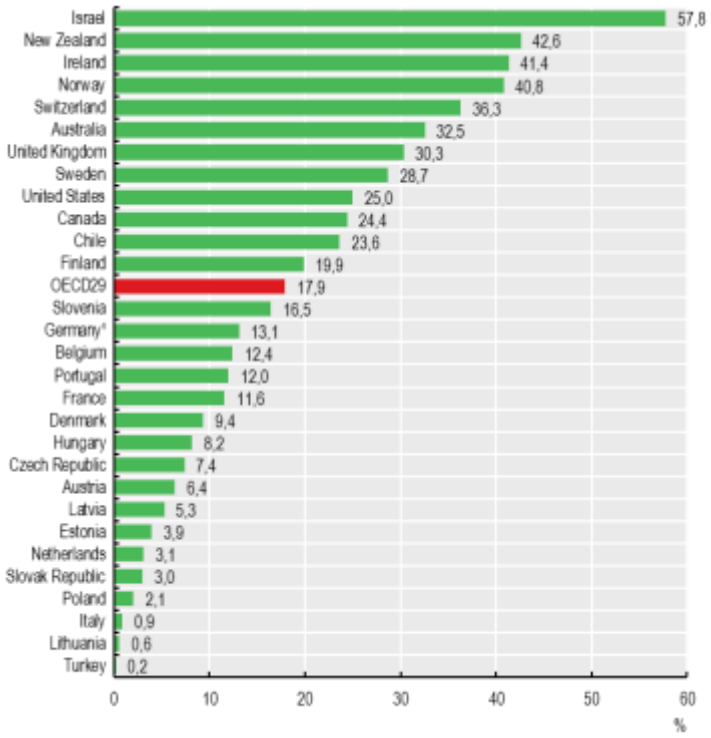
Two other categories, however, are more important for Sweden than for the Netherlands: the actively recruited, and natives trained abroad. In Sweden's decentralized healthcare system, regional authorities[9] and hospitals actively recruit foreign-trained health professionals. The second typically Swedish source of supply is native Swedes who receive their training abroad. There are also Dutch doctors trained abroad but their number pales in comparison to the thousands of young people with a Swedish background who study medicine abroad.

This paper is organized as follows. To provide context, Section 2 takes a closer look at the healthcare systems of the two countries, focusing on some key differences between them. Section 3 discusses demand for medical doctors and Section 4 domestic supply. Matching demand and supply through workforce planning is the subject of Section 5, whilst Section 6 considers the role of the foreign-trained as a source of supply. The last section provides some concluding remarks.

[8] The Advisory Committee on Medical Manpower Planning (*Capaciteitsorgaan*) began surveying the motives of foreign-trained doctors for coming to the Netherlands but gave up after a very low response rate.

[9] For administrative purposes Sweden is divided into 21 regions. Until 2019, Sweden had regions and counties but the latter were renamed regions as from 1 January 2019. To make it easier for the reader, all references to the counties have been changed into references to the Regions.

Figure 1. Share of foreign-trained doctors, 2019 (or nearest year)[10]



Source: OECD Health at a glance/OECD Health Statistics 2021 www.oecd-ilibrary.org.

2. The Healthcare Systems in Sweden and the Netherlands: Some Differences

Healthcare systems are notoriously hard to describe, let alone compare. They are made up of many different parts with complex rules and social codes, and strong interdependencies among the different parties involved[11]. Conflicts of

[10] The OECD data on reliance on foreign-trained doctors that this paper uses should be considered as approximations. Neither Sweden nor the Netherlands collects data on the number of practicing doctors. In contrast to Sweden where these do not exist, the Netherlands has public registers for active physicians (see Box 1) that show who is *allowed* to practice medicine. However, a significant number of those registered (some 4% in January 2016 according to *Capaciteitsorgaan*'s 2018 annual report www.capaciteitsorgaan.nl) are (Dutch and foreign-trained) specialists who work abroad but opted to continue their Dutch registration. Older doctors may stop working shortly after re-registration. The registers give no indication of how active each doctor is, how many hours each works.

[11] W. Meerding, M. van den Berg *De zorgstelselcompetitie* (publicatie 16-04; Raad voor Volksgezondheid en Samenleving, Den Haag, 2016).

interest and conflicting objectives among stakeholders contribute to their complexity[12]. They are subject to continuous change, the result of government initiatives, demographic developments, innovations in treatment and efforts to control costs. *Comparing* two countries adds a layer of complexity. On the whole, it is slightly easier to describe the Dutch than the Swedish system because the latter is highly decentralised. In Sweden the Regions are responsible for the management and organisation of healthcare. They have a high level of autonomy and differ from one another in many respects.

The Dutch and Swedish healthcare systems both seek to provide timely, high-level healthcare at reasonable cost. However, different actors (doctors, trainers, training institutions, patients, universities, politicians, civil servants and -in the Netherlands- insurance companies) do not necessarily have the same views on how these objectives can best be reached. For policy makers the challenge is to make optimal use of the insights, skills and experience of these actors.

Demand for healthcare keeps going up. Thanks to medico-technical developments, research and innovations ever more illnesses can be diagnosed and more medical conditions can be treated than before[13]. Heightened expectations of citizens[14] also increase demand.

A key question is how to keep costs from spiralling out of control. Expenditure on drug prices is held back by stimulating the use of generic drugs. Hospitals have reduced the number of patient days in hospital and increased the share of outpatient surgery[15] (although shortage of beds creates planning problems which can be time-consuming to solve). The regional concentration of highly specialized care such as regional cancer centers aims to increase the cost-effectiveness and the quality of care. Yet healthcare is very labour intensive and efforts to keep salaries under control can be a source of frustration for the professionals concerned.

Reducing demand should help lower costs. Waiting lists and own contributions discourage those seeking care. Yet containing demand is complex because patients are largely immune to rising costs. In most sectors, higher prices lead to lower demand but health and medical care constitute an exception. In Western Europe it is rare for patients to pay directly for the higher costs of the

[12] Socialstyrelsen *Tillgänglighet i hälso- och sjukvården* (Artikel nr 2018-2-16, Socialstyrelsen Stockholm, 2018) www.socialstyrelsen.se.

[13] Socialstyrelsen NPS *Nationalla Planerings Stödet* Stockholm, www.socialstyrelsen.se 2019

[14] SOU 2013:15 *supra* 2 p.67.

[15] E. Mossialos, M. Wenzl, R. Osborn, D. Sarnak (Eds.) *International Profiles of Health care Systems 2015* (The Commonwealth Fund, New York 2016 www.commonwealthfund.org; CBS (Statistics Netherlands) *CBS Statline https://opendata.cbs.nl.*

services rendered[16] because the "payer" (the government; insurance companies) is separated from the recipient, i.e. the patient. Higher prices for healthcare thus do not automatically result in lower demand[17]. Despite these and many other similarities the two countries differ in some key aspects. Note that these are often a difference in degree.

(a) Sweden has a decentralised healthcare system

Swedish Regions enjoy considerable autonomy, including fiscal autonomy[18]. They have great freedom to decide how they organize and provide care[19]. As in the Netherlands, Sweden's central government is responsible for formulating healthcare policy, for setting standards and for oversight. It must also ensure that all citizens, regardless of where they live, have access to health and medical care under the same or similar conditions[20]. But the implementation of these policies is decentralized to the Regions. The 21 Regions have their own IT systems, handling of waiting lists, role of private operators[21], list of approved medicines, level of provider fees, and compensation model[22].
The Regions also differ in their reliance on foreign-trained doctors[23]. A Region such as Stockholm, with few manpower challenges, recruits selectively abroad when the need for a specific competence arises. Others, in contrast, recruit actively abroad[24]: they use recruitment agencies and are present at international recruitment fairs where they compete with each other. They promote work in

16 S. Simoens, J. Hurst, J. *The Supply of Physician services in OECD countries* (OECD Health Working Papers No.21 OECD Paris 2006) www.oecd-ilibrary.org ; M. Grignon, Y. Owusu, A. Sweetman, A. *The International Migration of Health Professionals (*IZA Discussion Paper No.6517; Institute for the Study of Labor, Bonn, 2012) https://ftp.iza.org/dp6517.pdf.

17 Simoens et al 2006 *supra* 16 p. 30.

18 The high level of fiscal autonomy makes it difficult for the central government to use access to finance as a stick for driving through reform (Riksrevisionen *Staten och SKL- en slutrapport om statens styrning på vårdområdet* (RIR 2017:3; Riksrevisionen, Stockholm 2017) p.5 www.riksrevisionen.se.

19 Statens Offentliga Utredningar (SOU) 2017 *God och nära vård En gemensam färdplan och målbild* SOU 2017: 53, Stockholm 2017 p.26 www.regeringen.se.

20 Socialstyrelsen NPS 2019 *supra* 13 p.162.

21 Socialstyrelsen Nationella Planerings Stödet 2018 www.socialsyrelsen.se.

22 A-C. Olsson, Th. Parker, J. Reinbrand *ST i en föränderlig sjukvård: Nya förutsättningar för läkares specialiseringstjänstgöring* (Sveriges Läkarförbund, Stockholm 2014) p. 9.

23 Svensson et al. 2011 *supra* 2.

24 Their different recruitment strategies illustrate how far apart the Regions can be. Västra Götaland Region refrains from hiring doctors from Poland and the Baltic States to avoid 'brain drain'. In contrast, the Örebro region focuses its recruitment drive on Polish doctors, whilst Kalmar Region even opened its own recruitment agency in Poland (Svensson et al 2011, *supra* 2, pp.17-19).

their Region among Swedish students at foreign universities- where they compete with other Regions.

(b) The place of primary care in the system

Healthcare is typically divided into Primary, Secondary and Tertiary care. Primary care doctors are mainly General Practitioners (GPs), aka family doctors. Secondary and tertiary care is dispensed by medical specialists. Tertiary care is typically provided by higher-level specialists, often in academic hospitals[25]. It is slightly confusing that in many countries GP is now defined as a specialty in its own right.

Traditionally, Dutch primary care was built around private, single person practices, possibly with an assistant. Over the years, partnerships with two or more GPs and other disciplines have become more common, but these never reached the size of the much larger Swedish healthcare centres where groups of family doctors work together with other types of health professionals[26].

Swedish primary care centres are expected to fulfill a range of tasks that is broader than that of a Dutch GP practice. The average visit to a Swedish GP lasts longer (22.5 minutes compared to 9.8 minutes for a Dutch GP (see appendix table 1). Swedish GPs see fewer patients per year than their Dutch counterparts. The number of consultations per person is higher in the Netherlands than in Sweden. Swedes' reluctance to see a doctor[27] may be related to the shortage of GPs. Most patients do not have their "own" GP (see below); they cannot be sure whom they will meet.

Both countries try to steer patients to primary care because it is considered to be more cost-effective. The Netherlands appears to have been more successful in this than Sweden. In the Netherlands primary care doctors constitute a larger share of the total than in Sweden.

(c) Ownership and employment status

[25] R. Fujisawa, G. Lafortune, *The Remuneration of General Practitioners and Specialists in 14 OECD Countries: What are the factors Influencing variations across countries?* (OECD Health Working papers, No.41, OECD Paris 2008) https://www.oecd-ilibrary.org/docserver/228632341330.pdf?expires=1651756724&id=id&accname=guest&checksum=80AB352E7ADB14A71C02A49A7F6E3DC3.

[26] Statens Offentliga Utredningar (SOU) 2018 *God och nära vård- en primärvårdsreform* SOU 2018:39 SOU Stockholm, 2018 p.87 www.regeringen.se.

[27] see e.g. A. Björnberg *Euro Health Consumer Index 2016* (Health Consumer Powerhouse, 2017 www.healthpowerhouse.com.

In Sweden, the public sector plays a much greater role in the provision of healthcare than in the Netherlands. Swedish hospitals are typically publicly owned. In the Netherlands, hospitals are mainly private, not-for profit organisations[28]. In Sweden, primary care centres are typically owned and managed by the public sector and despite successive waves of privatization a majority still is. Nationally, 78% of those active in health and medical care in Sweden work in the public sector[29] but there are considerable differences by region. In Stockholm, the majority of primary care doctors work for a privately run healthcare centre[30].

With few exceptions, Swedish physicians work for a salary in an employment relation. Swedish GPs receive fairly detailed instructions on how to run their healthcare center and how to deal with patients. The autonomy that in other countries attracts students of medicine to primary care[31] is much circumscribed in Sweden. This has been mentioned as a reason why, despite relatively good incomes, becoming a GP is less popular in Sweden and why Swedish GPs switch jobs frequently[32].

The employment status of Dutch doctors is more varied. Dutch GPs are typically self-employed, whether they work alone or in a partnership with one or more colleagues. Dutch GPs have more autonomy in how they approach their job, discharge their duties and organize their working day. Dutch medical specialists are either self-employed (some 39% of the total), employed (50%) or a combination of the two (11%)[33] .

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[28] see e.g. M. Kroneman, W. Boerma, M.van den Berg, P. Groenewegen, J. de Jong, E. van Ginneken, *The Netherlands health system review* (Health Systems in Transition, Vol. 18 no.2 2016, WHO, Copenhagen, 2016 https://apps.who.int/iris/handle/10665/330244.

[29] Socialstyrelsen NPS 2019 *supra* 13.

[30] S. Pettersson, K. Engblom, *Läkarförbundets Primärvårdsenkät 2015: Metodbeskrivning och basuppgifter om primärvårdens läkarverksamheter* (Sveriges Läkarförbund, Stockholm, 2015) pp. 34-37 https://docplayer.se/14782478-Lakarforbundets-primarvardsenkat-2015-metodbeskrivning-och-basuppgifter-om-primarvardens-lakarverksamheter.html.

[31] S. Stordeur, C. Léonard, "Challenges in physician supply planning: the case of Belgium" in: *Human Resources for Health* 8:28 2010.

[32] Pettersson et al 2015 supra 30; M. Lövtrup ”Läkares arbetsmiljö har blivit sämre” *Läkartidningen* Volume 113 #1-2 2016; I. Svevonius *Jag vill avskaffa mig själv: låt proffsen styra vården* Stockholm 2019.

[33] Capaciteitsorgaan *Capaciteitsplan 2020-2023; Deelrapport 1: Medische Specialismen, klinisch technologische specialismen, spoedeisende geneeskunde* (Capaciteitsorgaan, Utrecht 2019) https://capaciteitsorgaan.nl. However, the employment status of Dutch and Swedish doctors is becoming more similar as, in the Netherlands, the share of both GPs and specialists who are employed is increasing (Capaciteitsorgaan (CO) *Capaciteitsplan 2016 Deelrapport 2: Huisartsgeneeskunde* (Capaciteitsorgaan, Utrecht, 2016) https://capaciteitsorgaan.nl; Capaciteitsorgaan *supra* 33 p.13; P. Meurs, M. Bontje, H. Borstlap, J. Legemaate *Gezond belonen:*

(d) Organization and Funding

In Sweden healthcare is universal and automatic. Financing and provision of care are handled within one organisational system. The Netherlands has a mandatory health insurance system: all citizens must take out a basic health insurance with a private insurance company. These companies have a duty to accept: they may not refuse customers for the basic insurance package. Nor may they demand a higher premium from people who are bound to make more and/or more expensive claims because of old age or due to a chronic illness. A national system compensates the companies for the different risk profiles of their portfolios[34].
In this "regulated market system" health insurers compete with each other for clients. Healthcare providers compete with each other for the business of the health insurers (GPs feel that their autonomy is increasingly circumscribed by the superior bargaining power and the detailed demands of the insurers). Patients choose the healthcare provider that suits them best -although this latter freedom is increasingly circumscribed by the insurers. Collectively, the insurance companies spend millions of Euros each year to attract customers.

(e) Patient satisfaction: accessibility and continuity of care

Both Swedish and Dutch healthcare score highly in international comparisons of medical quality[35]**.** However, among the Swedes confidence in the system is falling. Dutch patients have a more positive view of their caregivers' capability to provide information and support[36].
Much of the dissatisfaction among Swedes can be traced to poorly developed continuity of care[37]. In the Netherlands, continuity of care is a much appreciated right. Attempts in 2015 by the Dutch Government to limit this right were met with massive protests by patients and care providers alike. Nearly all Dutch patients have a steady contact with the primary care doctor of their choice compared to 26% of Swedish patients (in 2020, down from 50%

Beleidsopties voor de inkomens van medische specialisten (Commissie Inkomens Medische Specialisten) 2012 p.10 https://gezondezorg.org/files/arbeidsvorm_rapport-cie-Meurs.pdf.

[34] CPB (Centraal Plan Bureau) *Zorgkeuzes in kaart: Analyse van de beleidsopties voor de zorg van tien politieke partijen* (CPB, Den Haag, 2015) www.cpb.nl ; Meurs et al 2012 *supra* 33; Kroneman et al 2017 *supra* 28.

[35]according to Vårdanalys 2016 *Vården ur befolkningens perspektiv 2016- en jämförelse mellan Sverige och tio andra länder; Resultat från The Commonwealth Fund International Health Policy Survey* (PM 2016:5; Myndigheten för Vård- och OmsorgsAnalys MYVA Stockholm 2016) www.vardanalys.se.

[36] SOU 2017:53 *supra* 19 p. 27.

[37] Statens Offentliga Utredingar (SOU) 2018 *supra* 26 p.13.

in 2010[38]). For Sweden's patients to have a close link (*anknytning*) to the doctor of their choice was considered so important that the concept of PAL (*"Patientansvarig läkare"*/patient-responsible physician) was introduced into the Law in 1991. However, in 2010 PAL was taken out again[39] and replaced by '*fast vårdkontakt'* [steady contact with the health care center of choice].

The reasons for this change of heart are unclear although the shortage of primary care doctors must have made PAL difficult to apply. The high mobility of Swedish doctors must also have played a role: it is much more common for Swedish doctors (who are all employed) to switch jobs than it is for Dutch doctors (in large majority self-employed). A survey found that half of all primary care doctors in Sweden had worked less than five years at their current place of work[40].

Accessibility has many components, including distance to the healthcare center, level of own contributions, a patient's ability to obtain and understand relevant information[41] and, above all, waiting times. Waiting times are a source of irritation and frustration for patients everywhere. In Sweden, it can take a particularly long time before a doctor can see you or before you can undergo an operation. This has been a hot political issue in Sweden since the 1960s)[42]. There is strong pressure on politicians to improve the situation. However, the Central Government does not have the operational responsibility for healthcare, which lies with the Regions.

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[38] Vårdanalys 2016 supra 36; F. Mellgren "Läkarförbund kritiserar regeringens vårdreform" Dagens Medicin 21 december 2021).

[39] Much to the dismay of the Swedish Medical Association: 'Most people know the name of their hairdresser or dentist …they have the same physiotherapist … but those who take care of the most intimate we have, our body and soul, are a variety of anonymous doctors" (Heidi Stensmyren, Chairperson of the Swedish Medical Association SLF/SMA in Metro Debatt 9 april 2018).

[40] Pettersson et al 2015 *supra* 30. It is unclear why Swedish GPs switch job often. For sure, being an employee when, overall, GPs are in short supply makes it easy to find another job quickly. They 'vote with their feet' when they are not happy with their work environment. Switching employer is also a way to get a higher salary.

[41] Socialstyrelsen *Tillgänglighet i hälso- och sjukvården* (Artikel nr 2018-2-16, Socialstyrelsen, Stockholm, 2018) p.8 www.socialstyrelsen.se.

[42] Socialstyrelsen supra 46 p.51. Swedes have a comparatively high level of confidence in the public authorities (see e.g. Daun, Åke *Svensk Mentalitet: Ett jämförande perspektiv* Rabén & Sjögren, Stockholm 1989) but this confidence is severely tested by the perceived poor accessibility to healthcare. To the point that in several Regions "Vårdpartier" (political parties with good healthcare provision as their main rallying point) have successfully participated in elections, particularly in the thinly-populated Regions. The local success of these parties -with up to 30% of the votes- has so far not translated into a successful national election campaign (see e.g. A. Heimersson "Det våras för vårdpartierna- men kan de göra skillnad?" In Dagensarena 21 September 2018 https://www.dagensarena.se/innehall/det-varas-vardpartierna-men-kan-de-gora-skillnad

(f) Re-registration requirement

In the Netherlands medical doctors must re-register periodically to ensure that they are sufficiently active and that their knowledge is up-to-date (see Box 1). In Sweden no such register exists.

> Box No. 1. Time bound registration for medical doctors in the Netherlands
>
> All professionally active physicians must be registered according to Dutch law. This public register states what doctors are allowed to do (use a legally protected title) and are subject to (Dutch disciplinary law). Every five years they must ask for re-registration. This is granted provided they have been sufficiently professionally active in the preceding five years or can prove that they fulfil certain educational requirements. Those who do not re-register lose their registration.

It is an open question whether a re-registration requirement guarantees the competence of medical doctors. Dedicated professionals will want to keep their knowledge up-to-date regardless of a re-registration obligation[43]. In Sweden, a license is permanent but may be revoked due to malpractice, gross incompetence or conviction for a serious criminal offence. Nonetheless, some observers consider it remarkable that Sweden does not have a system that regularly tests the knowledge level of medical doctors[44].
It is not possible to say whether the absence of a re-registration requirement influences foreign-trained doctors' decisions to come to or remain at work in Sweden nor whether this requirement has kept foreign-trained doctors from coming to work in the Netherlands.

(g) Language requirements

Good knowledge of the local language is essential for doctors to be able to inform their patients in clear and comprehensible language and for a patient to

[43] The Swedish Doctors' Association's focus is on employers' giving doctors sufficient time for Continuous Professional Development (CPD) to keep their skills and knowledge up-to-date. This has been on a downward slope for many years. The Association considers that ten days should be the norm. In 2015, doctors were given on average six days for CPD, down from 8.5 days in 2004 (P. Wahlstedt *Fortbildnings enkät* Sveriges Läkarförbundet, Stockholm 2018).
[44] M.Ström "Genom att ta upp misstag belyser man problem (Intervju med Christian Unge)" *Läkartidningen* 7/2018 https://lakartidningen.se/aktuellt/nyheter/2018/02/christian-unge ; also: "Applådar är fint men sätter inte bröd på bordet" in *Dagens Medicin* 21 April 2020. https://www.dagensmedicin.se/opinion/debatt/applader-ar-fint-men-satter-inte-brod-pa-bordet.

give informed consent[45]. This includes understanding the subtleties of language and dialect, the nuances of non-verbal communication and social and behavioural norms[46] as well as the ability to give and receive instructions and discuss cases[47].

Through Directive 2005/36/EC the EU certifies that all EU trained doctors are perfect substitutes but it is unclear to what extent patients view them as such. Systematic research on this question is scarce but media reports suggest that this is not a foregone conclusion. The issue is sensitive from a political angle because of its potential xenophobic undertones. Many of the foreign-trained doctors have a good command of the Swedish language, but this is not the case for all of them.

The EU considered it important that the language requirement was not used to exclude doctors from the host country labour market. Both Sweden and the Netherlands interpreted this as systematic language controls not being allowed under 2005/35/EC, leaving that responsibility to the physicians and their employer. However, on occasion the employer's assessment of the language skills was colored by the desire to recruit the candidate, as an informed observer put it. Surveys showed that older patients in particular had trouble understanding their doctor[48].

Directive 2013/55/EU, the successor to 2005/36/EC, gave more prominence to patient safety and allowed competent authorities to apply language controls. It is unclear whether a less than strict enforcement of the language skill requirement has been a factor for foreign-trained doctors to choose to come to Sweden. But the year after Sweden introduced systematic language controls for EU-trained doctors, the number of licenses issued to these doctors dropped by no less than one-third of their previous years' levels[49].

Patients in places with a shortage of doctors are happy to have access to a doctor, any doctor. Elsewhere, their freedom to choose is often also limited: primary care doctors change job comparatively often. When turnover is high it

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45 Peeters et al *supra* 4 , p. 509.

46 Slowther et al. 2009 in: P. Wickramasekara 2014 *Assessment of the impact of health professionals on the labour market and health sector performance in destination countries* (ILO Asia Pacific Working Paper series, ILO; Manila) https://ideas.repec.org/p/ilo/ilowps/994855613402676.html.

47 M.Den Adel, W. Blauw, J. Dobson, K. Hoesch, J. Salt 2008" Recruitment and the Migration of Foreign Workers in Health and Social Care" in H. Kolb, H. Egbert (Eds.) *Migrants and markets: perspectives from Economics and the Other Social sciences* (Amsterdam University Press, Amsterdam, 2008 p.203).

48 See e.g. J. Widell "Utländska läkare svåra att förstå" *SVT Nyheter* 15 November 2012; also. J. Widell "Landstinget tummar på språkkraven" *SVT Nyheter* 16 November 2012).

49 F. Mårtensson "Hälften så många EU-legitimationer senaste halvåret" *Läkartidningen* 12/2017; H. Scarabin; E. Höglund "Språket är viktigt för patientsäkerheten" *Dagens Medicin* 3 Juni 2016.

is often futile to insist on seeing a specific doctor because he or she may have moved on. The acceptance of foreign-trained doctors is evidently greater when patients do not know which doctor they will see next.

3. Demand for Medical Doctors

It is difficult to say how many doctors a country needs. Demand for doctors' services is derived from the demand for healthcare- a concept that is hard to capture in numbers and that appears to be almost limitless: there is no end to new types of treatment, new techniques and new medicines that become available.

Doctor density- the number of doctors per 1,000 inhabitants- varies enormously around the world; within the EU it ranges from 2.4 in Poland to 6.2 in Greece[50]. The doctor density in Sweden (4.2) is higher than in the Netherlands (3.4) (appendix table 1).

But doctor density says little about the number of doctors who are *active* and about *how active* they are, i.e. how many hours they work per week, month or year. FTEs (Full-Time Equivalents) provide a more accurate picture. To illustrate the point, between 2007 and 2016 the number of GPs in the Netherlands increased by 21% whilst in terms of FTEs capacity increased by no more than 9%[51]. Yet, to keep track of doctors' working time is complex; hours worked often go unregistered; underlying trends need not point in the same direction.

On one side are the junior doctors who frequently work excessive hours. Traditionally the healthcare sector makes maximum use of doctors in training who are -often reluctantly- willing to work long hours to gain experience, in the knowledge that this will only last a few years[52].

Legislation limits the number of hours worked but actual practice is more complex. Swedish employers and trade unions are free to deviate from national legislation by locally negotiated collective agreements on working time, rest and holidays, and often do[53]. In the Netherlands most doctors are self-employed and thus free to decide how many hours they want to work.

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[50] OECD Health at a Glance 2021 (figures for 2019 or latest) OECD Paris https://www.oecd.org/health/health-at-a-glance.

[51] L. Van der Velden, R. Batenburg, *Aantal huisartsen en aantal FTE van huisartsen vanaf 2007 tot en met 2016: Werken er nu meer of minder huisartsen dan 10 jaar geleden en werken zij nu meer of minder FTE?* (Nivel, Utrecht, 2017) www.nivel.nl.

[52] Peeters et al *supra* 4 p.633.

[53] Barysch, Katinka *The Working Time Directive: What is the fuss about?* (Center for European Reform) 2013 p.3 www.cer.org.uk.

On the other is the trend for doctors to work fewer hours to achieve a better work-life balance. Partly this is related to the rapid feminization of the workforce (see appendix 1). Female doctors work fewer hours than their male counterparts do and are more likely to take career breaks or to work part-time[54]. But it is not just women doctors who seek a good work-life balance. The newest generation of doctors (both men and women) attaches greater importance to this than their older peers did[55]. Many young doctors have a partner with his or her own professional career and this frequently leaves them no choice.

In Sweden, a good work-life balance is considered a priority for healthcare personnel, just like it is for workers in other sectors of the economy. Regulated working hours and regulated free time are the norm. The maximum working hours set by law and collective agreements are by and large respected. Swedish doctors –who are employed- have much time to spend with their family or for other activities[56]. In the Netherlands a growing number of medical specialists opt for employment rather than be self-employed (who work longer hours)[57]. For planners the challenge is to predict the net effect on demand and supply of these different sources of pressure, changing preferences, and increased feminization.

Demand for doctors is in large part replacement demand, i.e. to replace doctors who retire or leave the profession for other reasons. In both countries, doctors are retiring later than before (although they may be working fewer hours towards the end of their working life). In Sweden, 8% of all practising doctors were over 65 in 2018, more than twice the percentage of ten years earlier[58]. The effect of this delayed retirement is partly undone by the fact that new doctors start their working life at an ever higher age.

When part of the tasks of a doctor are taken over by a health professional with fewer years of training (vertical substitution) this should reduce demand for doctors' services. In the Netherlands, the number of physician assistants and nurse practitioners has risen from fewer than 200 in 2005 to 4500 in 2019[59].

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[54] Stordeur et al *supra* 31.

[55] see e.g. S. Versteeg, E. Vis, L. van der Velden, R. Batenburg *De werkweek van de nederlandse huisarts in 2018: een vergelijking met 2013* (Nivel, Utrecht, 2018) www.nivel.nl.

[56] Many of the (politically controversial) "*hyrläkare/stafettläkare*" (locum doctors) who are essential for keeping healthcare running in the thinly populated Regions have a regular job elsewhere.

[57] Capaciteitsorgaan 2019 *supra* 33.

[58] P. Ruin "Han får trappa ner med full lön" in *Läkartidningen* 29 January 2020 https://lakartidningen.se/aktuellt/nyheter/2020/01/det-ar-bra-att-inte-behova-jobba-100-procent.

[59] Capaciteitsorgaan (CO) *Recommendations 2021-2024; Advisory Committee on Medical manpower Planning; Main Report concerning the intake in medical, clinical, technological, dental, mental healthcare, FZO*

Nonetheless, the shifting of certain tasks can be controversial (young doctors may see this as a threat); may not be permitted under the law (because only licensed doctors are allowed to do them); may lead to the deskilling of doctors (when these cease to perform certain tasks for which they have been trained); and may create confusion as to who is legally responsible in case of complications.

Higher productivity and efficiency, achieving higher levels of production without a commensurate increase in inputs, should also lower demand for doctors. In healthcare "input" is usually measured either in number of doctors or in total working time. "Production" typically refers to the number of procedures or the number of patients treated even though the OECD[60] rightly argues that doctor's productivity should rather be measured by improvements of patients' health and responsiveness.

Specialists in training are, in part, a cost to the host clinic because a trainer/supervisor must make time available to train them and, in part, a benefit -because they contribute to production. In general, it is hard to say how productive specialists in training are[61] but in the later stages of their training they are a valued resource to their training clinic. In fact, many hospital departments rely heavily on the inputs of junior doctors.

Judging by the number of consultations Dutch GPs would appear to be more productive than their Swedish counterparts are. Length of consultations explains part of the difference (see appendix table 1). However, these metrics must be considered in conjunction with the way the healthcare system is organised. When GPs must deal with complex (read: time consuming) cases, their productivity as measured by the number of patients they see goes down. In contrast, when a consult consists of a cursory examination followed by a referral a GP can see more patients.

4. Domestic Supply

To meet demand, doctors must be educated and trained domestically, or they must be recruited from abroad (discussed below)[62]. Domestic supply goes

(Hospital Training Fund), Physician assistant, nurse practitioners and related degree and postgraduate programmes (Capaciteitsorgaan, Utrecht, 2019) https://capaciteitsorgaan.nl

[60] OECD *The looming crisis in the Health Workforce: How can OECD countries respond?* (OECD Health Policy Studies, OECD, Paris) p.53 https://www.oecd.org/els/health-systems/41509461.pdf.

[61] A. Houkes-Hommes *De kosten van verruimen of loslaten van de numerus fixus* (SEO Economisch Onderzoek, Amsterdam 2010).

[62] Persuading them to prolong their working life beyond retirement, prolong their working week by e.g. employing them as locum doctors (*hyrläkare)* at another location, and persuading

through some distinct phases. A sufficient number of students is needed to fill the available places in medical schools. There must be enough trainers and training places for students to do their practical training and for junior doctors to do specialist training. Upon completion of their training these specialists must find an employment or (in the Netherlands) a private practice or a place in a partnership.

In both countries, there are far more candidates than there are places in medical schools. This limited number of places (*numerus fixus*- see below) tends to receive much attention even though adequate numbers of trainers and training places are equally essential. The job of trainer must be seen as attractive: a competent, dedicated supervisor should be recognized as such- in professional status, in financial compensation, or both.

The scheduled time to become a medical doctor is long in both countries and in Sweden particularly so. Swedish students graduate after 5.5 years and then do a minimum of 18 months mandatory practical service (AT *allmäntjänstgöring*) before they receive their doctor's license[63]. Dutch students receive their license after 6 years of study with progressively more practical training. For GPs the difference in length of study is particularly striking. In the Netherlands, a student can become a GP in nine years (six years to receive a license and three years GP specialization). In Sweden this takes at least 12 years (seven years basic training and five years specialization).

In actual practice the study takes considerably more time than scheduled. In Sweden, graduates must themselves find a place where they can do their AT. Waiting time for doing AT is on average 10 months[64]. The average time between graduation and obtaining a license went up from 30 to 36 months between 2008 and 2018[65].

In the Netherlands, *co-schap* internships are part of the curriculum but scheduling problems can result in many months waiting periods for students.

non-practising doctors to restart their practice are other methods. But the (potential) numbers involved are small. Moreover, whereas in Sweden non-practising physicians can start practising again at any moment, in the Netherlands, with its time bound license system, they must first re-apply for a license to practice.

[63] Sweden is in the process of transforming MD training. AT will be abolished. The study will last six years to bring it into line with the rest of the EU. The training of clinical skills will be integrated into the theoretical parts of the programme (SOU 2013:15 *supra* 2). However, the first students under the new system will be graduating in 2026/27 at the earliest. We will therefore continue to discuss the system as it exists today.

[64] M. Ström "Västerbotten tar bort var femte AT-tjänst nästa år" *Läkartidningen* 41/2019; "Väntar du också på AT? Du är inte ensam" *Läkartidningen* #8 2019 pp.370-371; Svensson et al *supra* 2.

[65] C. Krabbe 2021 *Statistikbaserade flödesbeskrivningar för yrkesgruppenläkare* Nationella Vårdkompetensrådet, Stockholm 2021 www.nationellakompetensradet.se.

However, the main delay occurs between graduation and the start of specialist training (interval time). Many graduates first want to acquaint themselves with a particular specialization and so improve their chances of obtaining a training place[66]. The average time between the start of the search for a training place and the start of this training is between 14 and 18 months[67]. Interval time is even longer because many do not start their search immediately (ibid).

In Sweden, the training of medical doctors is the joint responsibility of the central government and the Regions. Just like in the Netherlands, the central government finances initial education in medical school but the Regions are responsible for organizing and financing the mandatory post-graduate internships (AT) and the training of medical specialists (ST)[68]. To make the Regions responsible for AT and ST was a deliberate decision to achieve an adequate spread of medical doctors across the country. During their training, doctors get to know the Region and to integrate. Most remain professionally active in their Region of training but a significant minority does not[69]. AT and ST doctors are employed by their place of work or by the Region[70].

In the Netherlands, the Central Government finances post-graduate training although there is a difference between medical specialists and GPs. For specialists the government determines the total number of training places and their distribution among regions and training hospitals. It finances the costs of this training to avoid a distortion of competition among those hospitals that do and those that do not provide training[71]. Specialists-in-training have an employment contract with their training institution.

Those who want to become a GP are employed by a non-profit, publicly funded foundation (SBOH) that pays all the costs associated with being an employer, including the financial compensation to the trainers[72]. Employment

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66 M. Dekker "Wachten, wachten, wachten..." in *Medisch Contact* 21 August 2018 https://www.medischcontact.nl/arts-in-spe/nieuws/ais-artikel/wachten-wachten-wachten-....htm; Capaciteitsorgaan (CO) 2016 *Capaciteitsplan 2016 voor de medische, klinisch technologische, geestelijke gezondheid, FZO en aanverwante (vervolg) opleidingen Revisie 3.0* (Capaciteitsorgaan, Utrecht, 2016) p.6 https://capaciteitsorgaan.nl.

67 Capaciteitsorgaan 2016 *supra* 66 p.61.

68 SOU 2013:15 *supra* 2 p.106.

69 S. Pettersson, J.Reinbrand, J. *System och strategier för att öka antalet ST-läkare i allmänmedicin: Kunskapsunderlag om hur vi kan nå balans i primärvårdens läkarförsörjning* (Sveriges Läkarförbund, Stockholm) 2014 https://slf.se/app/uploads/2018/05/rapport-om-st-lakare-i-allmanmedicin.pdf; Svensson et al. *supra* 2 p.49.

70 SOU 2018: 39 *supra* 26 p.222. The Regions finance their training entirely, or together with the receiving clinic. Where all training clinics are publicly owned, the source of funding is thus the same. However, where they are not, privately operated clinics have shown reluctance to contribute to training when they felt insufficiently compensated (Olsson et al *supra* 22).

71 Capaciteitsorgaan 2016 *supra* 66 pp.21-22.

72 Capacitietsorgaan 2016 supra 66 p.22.

by SBOH relieves the GP trainer of the administrative burden that comes with being an employer. For GP trainees, SBOH employment avoids them being dependent for both employment *and* training on one and the same person. In case of an unworkable relationship between trainer and trainee the latter can be placed with another GP without the employment relationship being terminated.

5. Planning Supply

It is a moot point whether governments should engage in workforce planning but when it concerns medical doctors, many do. This 'medical exception'[73] is based on the view that doctors are particularly precious to and vital for society's well-being[74]; that governments have no choice given the long delays and the costs involved in education and training; and that it can help prevent geographical imbalances.

Moreover, a long-standing criticism of traditional workforce planning models – that they assume a one-to-one relationship between occupation and education[75]- is less applicable to the medical profession because it offers only limited possibilities for substitution. Other occupations may well employ graduates from different education programmes[76] but such substitution is not common among medical doctors, and this strengthens the case for planning. The skills acquired by physicians can be applied elsewhere, but the opposite (for outsiders to be active as medical doctors) is not common and can be punishable by law.

Both Sweden and the Netherlands restrict the number of places they finance in medical schools and so engage in workforce planning. They make an approximate judgement of the number of doctors needed in the future and then decide how many they want to train domestically. Swedish health

[73] P. Zurn, J-C. Dumont *Health Workforce and international Migration: Can New Zealand compete?* (OECD Health Working paper No. 33, DELSA/HEA/WD/HWP(2008)3; OECD, Paris 2008) https://www.oecd-ilibrary.org/social-issues-migration-health/health-workforce-and-international-migration_241523881673.

[74] H. Bradby *A review of research and policy documents on the international migration of physicians and nurses* (Max Planck Institute for the Study of Religious and Ethnic Diversity, MMG Working Paper 13-07, Göttingen, 2013) https://www.mmg.mpg.de/60718/WP_13-07_Bradby_A-Review-of-Research.pdf.

[75] F. Cörvers, H. Heijke *Forecasting the labour market by occupation and education: Some key issues* (ROA-W-2004/4 Researchcentrum voor Onderwijs en Arbeidsmarkt, Maastricht University, Maastricht 2004) https://doi.org/10.26481/umarow.2004004.

[76] H. Heijke *Working on heterogeneous human capital* (ROA-TR-208/6, Research Centre for Education and the Labour Market, Maastricht University, Maastricht 2008) https://doi.org/10.26481/umarot.2008006.

workforce policy goals may be less clear-cut than those of the Netherlands but avoiding a surplus appears to be a key feature of both. Educating too many medical doctors is costly. Low frequency of doctor-patient contacts negatively influences the quality of care[77]. Insufficient professional activity may lead to doctors losing their registration (in the Netherlands). Nonetheless, the ready availability of doctors makes it easier for patients to find a GP of their choice; they need not travel or wait so long to have an operation.

Health workforce planners seek to achieve a balance between future supply and demand[78]. Projections typically take the status quo as their point of departure, assume that supply and demand are more or less in equilibrium, identify the variables that influence demand and supply in the future and attempt to quantify these. Given the long time horizon this can be a complex exercise with considerable uncertainty on both the supply and the demand side[79]. Moreover, even the best projections cannot guarantee a balanced spread across specialties and geographies.

5.1. Health Workforce Planning in the Netherlands

In 1972 the Netherlands Government introduced a cap on the number of places available for medical education[80]. It tried different mechanisms for setting that number until in 1999, three groups of key stakeholders (the medical professions, the medical training institutes, and the health insurers) together established the Advisory Committee on Medical Manpower Planning (*Capaciteitsorgaan*)[81]. This Committee, entirely financed by the Ministry of Health, regularly estimates future demand for medical specialists and makes recommendations on the training capacity needed and the yearly number of students to be admitted. The Committee attempts to quantify the likely effects of feminization, of changes in the number of hours worked, in the *de facto* age of retirement, in international migration, in horizontal and vertical substitution, in the expected changes in demand for healthcare, and in efficiency measures within the medical profession. The *Capaciteitsorgaan* is a very small undertaking (some 5 FTEs) that relies on specialised institutes for analytical work.

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[77] Stordeur et al *supra* 31.

[78] T.Ono, G. Lafortune, M. Schoenstein *Health workforce planning in OECD countries: A review of 26 projection models from 18 countries* (OECD Health Working Papers No.62, DELSA/HEA/WD/HWP (2013) 3 OECD, Paris) 2013.

[79] Socialstyrelsen NPS 2018 supra 21; Capciteitsorgaan 2016 *supra* 66.

[80] M.Van Greuningen, R. Batenburg, L. van der Velden, "Ten years of health workforce planning in the Netherlands: a tentative evaluation of GP planning as an example" in: *Human Resources for Health* 10:21 p.2 2012.

[81] ibid, p. 3.

Each time, the *Capaciteitsorgaan* prepares several estimates based on different scenarios. The relevant 'chamber of experts' (e.g. the chamber for GPs; the chamber for medical specialists), each with representatives of the medical professions, the training institutes, and the health insurers then selects one or two of the scenarios that it considers the most plausible. These are then presented to the Minister for Health[82] who is not obliged to follow the recommendations and on occasion does not. However, they carry weight because they are the outcome of a process in which the main concerned parties -with different if not opposing views- managed to reach agreement. The Advisory Committee considered that educating and training enough doctors would make immigration unnecessary. For GPs that has indeed be the case. The number of licenses issued to foreign-trained specialists has been in decline since 2006[83].

Just like in Sweden, achieving a balanced regional spread of GPs is considered a challenge in the Netherlands, albeit of a different order of magnitude. In fact, finding enough qualified candidates for thinly populated areas is a problem that many countries are faced with. To attract graduates to work in underserved areas, their governments use fiscal and other incentives[84], including immigration policies[85] but within the EU these cannot be applied to EU-trained doctors. In the Netherlands, peripheral medical schools are allotted a more than proportional number of training places. Some medical schools established annexes in underserved areas. Combining centralized selection with decentralized allocation[86] is another way of trying to achieve a balanced geographical spread.

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82 Capaciteitsorgaan (CO) *Capaciteitsplan 2016 Bijlagen deelrapport 2: Huisartsgeneeskunde* (Capaciteitsorgaan, Utrecht, 2016) https://capaciteitsorgaan.nl.

83 Capaciteitsorgaan 2016 *supra* 67 p.13; Capaciteitsorgaan *Capaciteitsplan 2024 tot 2027 Deelrapport 1; Medische specialismen, Klinisch technologische specialismen, Spoedeisende geneeskunde* (Capaciteitsorgaan, Utrecht, 2022) https://capaciteitsorgaan.nl.

84 For example, graduates who practice in North Norway are partially exempted from the obligation to reimburse their student loan (Simoens et al *supra* 16 p.40).

85 Canada, the US and Australia are among the countries that offer special incentives to foreign doctors willing to work in 'underserved' areas. In the US, physicians on J-1 training visas who normally must return home after completing their residency, may remain in the US if they practice for at least three years in an area with a healthcare professional shortage (Government Accountability Office (US-GAO) *Foreign Medical Schools* (Report to Congressional Committees GAO-10-412, GAO Washington 2010) https://www.gao.gov/assets/gao-10-412.pdf.

86 Capaciteitsorgaan (CO) *Capaciteitsplan 2016 Bijlagen deelrapport 2: Huisartsgeneeskunde* (Capaciteitsorgaan Utrecht, 2016) p.13 https://capaciteitsorgaan.nl.

5.2. Health Workforce Planning in Sweden

The Swedish planning exercise takes place within the public sector. Quantifying long term supply and demand is seen as a challenge[87] if only because of the difficulties involved in establishing the *current* situation[88]. Sweden counts with a yearly inflow of 800 foreign-trained doctors[89]. The Swedish Government appears undecided about how dependent it wants to be on these foreign-trained doctors. Or in the words of the responsible minister: "…It is very positive that people with foreign medical training want to come to Sweden for work, but we cannot be totally dependent on this…" [90].

In the Swedish decentralized healthcare system the National Board of Health and Welfare (*Socialstyrelsen*) plays a supporting role. Once a year it publishes the *Nationella Planeringsstöd* (NPS- The National Planning Support) that estimates the nationwide supply of and demand for doctors and other health professionals[91] as a service for the Regional governments[92]. The information is compiled through a yearly survey of the Regions, with added information from other (mainly) public sources such as Statistics Sweden (SCB) and the Public Employment Office (*Arbetsförmedlingen*), as well as from the Association of Local Authorities and Regions (SKR/SALAR), the National Trade Union for University Graduates SACO, and the Swedish Doctors Association (SLF).

The yearly survey focuses on the *current* situation and asks the Regions for different specialties whether (a) demand exceeds supply, (b) these are in equilibrium, or (c) supply exceeds demand. As did earlier surveys, the 2019 NPS survey showed that virtually all Regions were short of doctors and that over half had shortages in over 20 specialties.

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87 MYVA in Socialstyrelsen NPS *Nationalla Planerings Stödet 2019* (Socialstyrelsen, Stockholm, 2019) p. 156 www.socialstyrelsen.se; Olsson et al *supra* 22 p.20.

88 Socialstyrelsen *Framtidens Vårdkompetens: Starkt samverkan för att möta sjukvårdens kompetensförsörjningsbehov* (Socialstyrelsen, Stockholm, 2019 p.50 www.socialstyrelsen.se www.framtidensvardkompetens.se.

89 For an estimated *net* inflow of 370 (Nationella Vårdkompetensrådet; Socialstyrelsen 2022 Kompetensförsörjning inom primärvården: Slutrapport 2022 www.socialsyrelsen.se).

90 Minister Helene Hellmark Knutsson in: J. Andersson; A. Lundbäck "Läkarutbildningen byggs ut- 440 nya platser fram till 2023" *Läkartidningen,* 13 September 2017 https://lakartidningen.se/Aktuellt/Nyheter/2017/09/Lakarutbildningen-byggs-ut--440-nya-platser).

91 SOU 2013:15 *supra* 2 p 108.

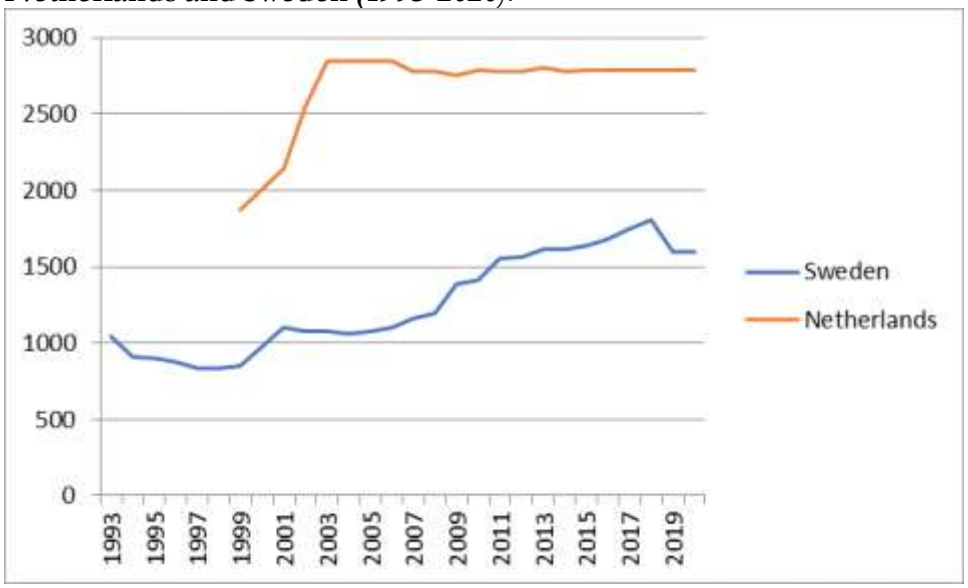
92 Socialstyrelsen *Ett nationellt stöd till landstingens planering av kompetensförsörjning* (Socialstyrelsen, Stockholm, 2016.

This exercise in which a nationwide picture is derived from the information supplied by the Regions is not without limitations. For one, there is no agreement on what constitutes a shortage. Shortages are defined as the gap between the current situation and a desired goal[93] but these goals, how to finance them, and by when they should be reached, are decided at the level of the individual Region[94]. Whether aggregating these Regional assessments provides a good nationwide picture is a matter for debate.
In addition, the quality of the NPS compilation can be no better than the quality of the underlying data, which varies by Region[95]. Many of the Regions were found to have weak planning coordination[96] and incomplete information on e.g. age distribution, capacity use[97] and the number of specialists in training and at which stage of their training they are[98].
Moreover, it is assumed that upon completion of their training, doctors stay and work in the Region of training. But that need not be the case and quite often is not[99]. As a result of inter-regional mobility, less popular Regions (many with a weak fiscal base) must train more doctors than they need. In fact, less popular Regions have a double problem. Many have trouble attracting sufficient graduates who want to do their AT and sufficient doctors who want to do their specialist training. And they have trouble retaining these after completion of their training (a form of domestic "brain drain").
It has been suggested that the Regions work closer together; and that they treat training as a collective responsibility rather than the responsibility of each individual Region as is the case now[100]. Regions with good training capacity could than train more specialists than they need. However, currently such collaboration is poorly developed[101]. Regions see each other as competitors. The Medical Association would like the National Government to take greater responsibility for allocating trainee places[102] but such a (re-) centralization is not uncontroversial.

[93] Socialstyrelsen NPS 2018 *supra* 21 p.9.
[94] ibid; Socialstyrelsen NPS *Nationalla Planerings Stödet 2010* (Socialstyrelsen, Stockholm, 2010) p.12 www.socialstyrelsen.se.
[95] see e.g. Socialstyrelsen NPS *Nationalla Planerings Stödet 2017* (Socialstyrelsen, Stockholm, 2017) p.27 www.socialstyrelsen.se.
[96] Pettersson et al 2014 *supra* 69 pp.6-7.
[97] Socialstyrelsen NPS 2019 *supra* 13 p. 157.
[98] ibid, p.164.
[99] ibid, p.156.
[100] Riksrevisionen *supra* 18.
[101] SOU 2013:15 *supra* 2 p. 108; Medical Association in Pettersson et al 2014 *supra* 69 p.13; Socialstyrelsen NPS 2019 *supra* p.13.
[102] Socialstyrelsen NPS 2019 *supra* 13 p.157.

In just ten years, between 1994 and 2004, the number of places for new students at Dutch medical schools virtually doubled from 1485 to 2850 and remained high thereafter (figure 2). Waiting lists had become a major political issue and the then minister, an experienced administrator and a medical doctor herself strongly defended the interests of patients. In that same period the number of starting places in Swedish medical schools hardly changed. Sweden had gone through a financial crisis in the early 1990s with drastic budget cuts, including in healthcare. In 2005/06 the number of new places in medical schools was no higher than it had been twelve years earlier. In fact, the number dropped some 20% between 1993/94 and 1998/99. Since 2006/07 it has been increasing.

Figure 2. Number of new students at all medical schools in the Netherlands and Sweden (1993-2020).



Sources: various.

6. The Foreign-Trained as A Source of Supply

In the Netherlands, the inflow of foreign-trained doctors declined after the number of places in medical schools increased[103]. On a five year rolling average the share of newly registered foreign-trained GPs decreased from 6% of the total in 2006 to 2.4% in 2015[104]. The share of newly registered foreign-trained

[103] CBS Statline https://opendata.cbs.nl/#/CBS/nl.
[104] Capaciteitsorgaan 2016 *supra* 33.

specialists halved from 18.9% in 2006 to 9.3% in 2015 and continued its downward trend thereafter (60 newly registered in 2021)[105]. Over 95% of the foreign-trained inflow underwent their training in another EU country, mainly Belgium and Germany[106]. In the early 2000s about half of the foreign-trained were Dutch nationals (mostly trained in the Dutch speaking part of Belgium) but that share has declined since[107].

In Sweden the number of foreign-trained doctors started to increase in the mid-1990s. By the early 2000s some 400 foreign-trained doctors received a Swedish doctors' license each year, a number that went up rapidly thereafter. By 2003, *more new licenses were issued to doctors who had been trained abroad than to the domestically educated* (940 vs. 855)[108]. The share of the foreign-trained in the total number active doubled to 28% between 1995 and 2017[109].

Only in 2017 did doctors trained in Sweden regain the majority of the number of new licenses issued (52%; with 37% awarded to doctors trained in EU/EES and 11 % to those trained outside EU/EES[110]) mainly as a result of a drastic decline in the number of licenses issued to non-Swedish doctors trained in other EU countries[111]. This turnaround is possibly connected to the sharpening of the language requirements that took place in 2016. By 2020, still 44% of all new licenses went to foreign-trained doctors[112].The share of the foreign-trained in the total number of professionally active doctors is unlikely to go down much in the near future despite the increased number of starting places (see figure 2).

A significant minority of the foreign-trained has a Swedish background. Before 2000 it was rare for Swedes to study medicine abroad but from the turn of the century their number increased rapidly. At its peak (2011-2014), some 3000, or *30% of the total* number of Swedes studying medicine, did so outside of Sweden[113]. Their number[114] has declined since but by 2016/17 still one fourth

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105 Capaciteitsorgaan 2022 *supra* 83.

106 Capaciteitsorgaan 2016 *Capaciteitsplan Deelrapport 1 Medische specialismen; Spoedeisende geneeskunde; Ziekenhuisgeneeskunde; Klinisch-technologische specialismen* pp.42-43.

107 Kroneman et al 2016 *supra* 28 p.120.

108 SOU 2013:15 supra 2 p.98.

109 Socialstyrelsen NPS *Nationalla Planerings Stödet 2011* (Socialstyrelsen, Stockholm, 2011) www.socialstyrelsen.se; Socialstyrelsen NPS 2017 supra 96; https://stats.oecd.org/Index.aspx?DataSetCode=HEALTH_WFMI.

110 Socialstyrelsen NPS 2019 *supra* 13.

111 Socialstyrelsen Årsredovisning 2017 www.socialstyrelsen.se.

112 Socialstyrelsen NPS *Nationalla Planerings Stödet 2022* (Socialstyrelsen, Stockholm, 2022) www.socialstyrelsen.se.

113 A. Ström "Färre vill plugga till läkare i Polen" *Läkartidningen* 2017, 114: EYAD.

114 Defined as students with a Swedish background who study with financial aid from the Swedish state (CSN). In actual fact their number may be higher.

(2489) studied medicine outside Sweden. Poland is the current favourite among the Swedes who study medicine abroad with 42% of the total followed at considerable distance by Latvia and Romania. The share of Denmark- once a clear favourite- dropped from 41% in 2007/08 to 5% ten years later[115].

6. Conclusion

In Sweden, over 28% of all medical doctors have been trained abroad. In the Netherlands this group makes up some 3% of the total. The question this paper has sought to answer is: why is the share of foreign-trained doctors so high in Sweden, and so low in the Netherlands. In both countries the vast majority of the foreign-trained received their diploma in another EU Member State. Thanks to EU Directive 2005/36/EC these doctors benefit from automatic diploma recognition that allows them to work anywhere in the EU. Sweden and the Netherlands do not differ much in income levels or in language difficulty as a barrier. So, what explains the difference in their reliance on foreign-trained doctors?

The short answer is that Sweden trains fewer doctors than it needs. The Netherlands has long aimed for self-sufficiency; it makes projections of the number of doctors needed in the future and of how many it needs to educate. The Swedish Government wants to reduce the country's dependence on foreign-trained doctors but it is unclear by how much.

Sweden's decentralized planning system assumes that each Region has the capacity to collect and analyze supply and demand data; and that, upon completion of their training, doctors stay in the Region of training. These assumptions are not met in actual fact. When the Regions do not have a clear picture of supply and demand it is difficult for the Central Government to have one.

Would the Swedish government formulate clearer goals if it had better data on the number practicing and the number needed? Is the lack of precision in its objectives the consequence of not being overly concerned about the dependence on foreign-trained doctors? Or is it part of a more general policy of not wanting to be seen engaging in workforce planning at central level? These are key, if as yet unresolved questions. In the fragmented landscape of Swedish healthcare it is hard to find an 'official view' on whether the low number of starting places in medical school is considered a problem.

In the Netherlands, self-sufficiency in the supply of doctors is a broadly supported policy goal. The three main interested parties (the medical professions, the medical training institutes, and the health insurers) with partly

[115] Socialstyrelsen NPS 2018 *supra* 21 p. 39-40.

overlapping, and partly opposing interests together periodically formulate agreed views of the expected demand for doctors, and make recommendations on how many should be educated. In Sweden, this planning takes place within the public sector, i.e. it is up to politicians and other top decision makers to adjudicate between potentially conflicting loyalties and to decide on the weight given to the interests of patients, to financial considerations, and to the existing organization[116].

Yet despite their differences, both countries face the same question: how to plan education numbers when it is impossible to predict the number of doctors who will migrate. The Dutch strategy to train enough doctors has by and large been successful. Even though self-sufficiency is not a policy goal, Sweden must also make assumptions on the expected number of foreign-trained when setting the number of starting places at medical schools.

This paper has suggested other possible explanations for Sweden's greater reliance on foreign-trained doctors but their relevance and weight could not be verified. The attention given to a good work-life balance, a lenient attitude towards language requirements, and the absence of periodic re-registration may have influenced foreign-trained doctors' decisions to come to or remain at work in Sweden.

Foreign-trained doctors are a fast and flexible, and a comparatively inexpensive source of supply. Their ready availability is convenient when the authorities have trouble agreeing on the number of new places in medical school. However, it assumes that Sweden will continue to be attractive to foreign-trained doctors. Considering that living and working conditions (including a good work-life balance) are well above those in most other countries, the country has reasons to be optimistic. But non-Swedish foreign-trained doctors are a volatile source of supply, as witnessed by the sharp drop in the number of licenses awarded to EU-trained doctors in early 2016.

The Netherlands trains so many doctors that there is risk of oversupply. This would make it harder for doctors to find a job in their specialty, potentially place pressure on their working conditions, and possibly force some to emigrate. This would make planners vulnerable to accusations that they encourage 'training for export' which, considering the sums involved, could prove to be politically controversial.

In sum, in both countries the freedom of EU-trained doctors to work anywhere in the EU complicates the tasks of health workforce planners. Both oversupply and undersupply can lead to controversy. For now, the question is how dependent each country wants to be on foreign-trained doctors and, to

[116] Björnberg *supra* 27.

paraphrase Richard B. Freeman[117] how to find a balance between domestic- and foreign-trained doctors in the workforce.

[117] R. B. Freeman "Labor market imbalances: Shortages, or Surpluses, or Fish Stories?" Paper presented at the Boston Federal Reserve Economic Conference "Global Imbalances- As Giants Evolve", Chatham Massachusetts June 14-16 2006 https://ideas.repec.org/a/fip/fedbcp/y2006n51x1.html.

Appendix 1: Doctors in Sweden and the Netherlands: Selected Indicators[118]

	Netherlands	Sweden
Share of foreign-trained doctors (2019)	3.1	28.7
Practising doctors per 1000 population (2020)	3.6	4.2
Medical Graduates per 100,000 population (2019)	15.1	13.5
Average visit time to a GP (minutes)*	9.8	22.5
Share of female doctors (2019)	56	50
Share of female doctors (2000)	35.3	39.6
Doctors Remuneration (ratio to average wage, 2019)		
Specialists (salaried)	3.3	2.3
Specialists (self-employed)	3.4	n.a.
General Practitioners (salaried)	2.3	n.a.
General practitioners (self-employed)	2.4	n.a.

[118] Source: OECD Health at a Glance 2021 OECD Paris https://www.oecd.org/health/health-at-a-glance; except (*): G. Irving, A. Neves, H. Dambha-Miller, A. Oishi, H. Tagashira, A. Verho, H. Holden, 2017 "International Variations in primary care physician consultation time: a systematic review of 67 countries" in *BMJ* https://bmjopen.bmj.com/content/bmjopen/7/10/e017902.full.pdf.

Appendix 2: Health Systems in Sweden and the Netherlands: Some key Indicators (latest available figures)[119]

	Netherlands	Sweden
Real GDP per capita (Euro)**	41.860	44.820
Overall Population (millions)**	17.6	10.5
Land area (1000 sq km)**	42	450
Population density	435	23
Total spending on health (% of GDP)	11.2	11.4
Hospital beds per 1000 population	3.1	2.1
Life expectance at birth	82.2	83.2
Population with healthcare coverage (%)	100	100
Access (%)		
Able to get same-, or next-day appointment*	77	49
% who did not take medicine, visit a doctor, or follow prescribed treatment for cost-related reasons*.	8	8

[119] Source: OECD Health at a Glance 2021 OECD Paris https://www.oecd.org/health/health-at-a-glance; except for (*): I. Papanicolas, L. Woskie, A. Jha, "Health care spending in the United States and other high income countries" in: JAMA. 2018; 319 (10):1024-1039; and (**) Eurostat.

The Value of Job Security: Does Calling Matter?

Eitan Hourie, Miki Malul and Raphael Bar-El [*]

Abstract

This paper tests the influence of an occupation as a calling on the value of job security and its connection with wage levels. The sample includes 495 workers from 10 occupations in the public and private sectors. The results from a linear regression indicate that those with occupations that the literature has defined as a calling value job security less than those in ordinary occupations. Workers in such occupations are 68.5% less likely to regard job security as a major factor than those in regular jobs. In addition, the salary level has no effect on this relationship. Finally, those who work in occupations that are regarded as a calling have less status quo bias than those in ordinary employment.

Keywords: *Calling; Tenure; Loss Aversion; Job Security; Status Quo Bias.*

1. Introduction

Employment can be viewed in several ways: as simply a source of income whose main benefit is material rewards, as a career in which promotions are the main benefit, or as a calling, pushing people to work for fulfillment and self-realization[1]. According to the last approach, people work to achieve a

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[1] Barry Schwartz, *The Costs of Living: How Market Freedom Erodes the Best Things in Life*, (Xlibris Corporation, 1994).

higher purpose such as making the world a better place[2] and regard their work as meaningful and purposeful[3].
Do people vary in the value they place on job security based on their occupation being regarded as a calling? Do material rewards such as salaries affect this valuation? To answer these questions, we used an analytical model[4] . This study is the first to use behavioral factors from the behavioral economics literature and classic economics to analyze the relationship between an occupation regarded as a calling and the demand for job security.

2. Methodology

We considered several possible scenarios.

Moving from a tenured position to a non-tenured position
In this scenario, the respondents are asked to imagine that they have a tenured job and receive an offer to take a non-tenured job. All of the other conditions such as hours and benefits are the same.

Let us define I_p^* as the wage required in a non-tenured job such that an individual is indifferent about being employed in a tenured job with a wage of I_t^0 and being employed in a non-tenured job with a wage of I_p^*.

1) $$I_p^* = I_t^0 + U_t + SQ$$

Where U_t is the non-pecuniary utility from tenure and SQ is the status quo bias.

Moving from a non-tenured position to a tenured position
In this scenario, the respondents are asked to imagine that they have a non-tenured job and receive an offer to take a tenured job. All of the other conditions such as hours and benefits are the same.

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[2] Amy Wrzesniewski, 'Finding Positive Meaning in Work', *Positive organizational scholarship,* (2003).
[3] Roy F Baumeister, *Meanings of Life*, (Guilford Press, 1991); Douglas T Hall and Dawn E Chandler, 'Psychological Success: When the Career Is a Calling', *Journal of Organizational Behavior,* 26 (2005).
[4] Hila Axelrad, Israel Luski, and Miki Malul, 'Behavioral Biases in the Labor Market, Differences between Older and Younger Individuals', *Journal of Behavioral and Experimental Economics,* 60 (2016).
Eitan Hourie, Miki Malul, and Raphael Bar-El, 'The Value of Job Security: Does Having It Matter?', *Social Indicators Research,* (2017).

Let us define I_t^* as the wage required in a tenured job such that an individual is indifferent about being employed in a non-tenured job with a wage of I_p^0 or being employed in a tenured job with a wage of I_t^*.

2) $I_t^* = I_p^0 - U_t + SQ$

Note that U_t might be different for each individual. However, for a given individual this value should be fixed and should not depend on the scenario we present to him or her.
Summing equations 1 and 2 allows us to estimate the value of the status quo bias (VSQ).

3) VSQ=$I_p^* + I_t^* = I_t^0 + I_p^0 + 2SQ$

The gap between equations 1 and 2 allows us to estimate the non-pecuniary value of tenure (VJS).

4) $VJS = I_p^* - I_t^* = I_t^0 - I_p^0 + 2U_t$

The framework assumes that the status quo bias is the same for both directions[5].The status quo bias in our model depends on the characteristics of the individual. Those who are strongly influenced by this bias will respond to this influence whether they are in a tenured or non-tenured position. We will first estimate the value of VJS and VSQ. Then, using a regression analysis we will estimate the correlation between an occupation regarded as a calling and the values of VJS and VSQ.

3. Empirical Estimation

The Sample

Our sample consists of 495 workers in Israel from 10 occupations in the public sector, who are assumed to have a relatively high level of job security, and the private sector, who are assumed to have less job security or none at all. These 10 occupations are social workers, lecturers, lawyers, administration workers,

[5] Hila Axelrad, Israel Luski, and Miki Malul, 'Behavioral Biases in the Labor Market, Differences between Older and Younger Individuals', Journal of Behavioral and Experimental Economics, 60 (2016), 23-28.

accountants, high school teachers, bank workers, high-tech worker, nurses and psychologists.
Of these 10 occupations, four were classified as occupations that previous research has identified as having a sense of calling: **teachers**[6], **social workers**[7], **psychologists**[8] and **nurses**[9]. We classified those in the other six groups as "regular" occupations.

We distributed the questionnaires between April and June 2013. Note that in April 2013, the last data Published by the Israeli Burau of statistics regarding

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[6] William Buskist, Trisha Benson, and Jason F Sikorski, 'The Call to Teach', *Journal of Social and Clinical Psychology,* 24 (2005); Dwayne Huebner, 'The Vocation of Teaching', *Teacher renewal: Professional issues, personal choices,* (1987); Ditza Maskit and Tamar Tal, 'The Choice of Men and Women in Preschool Education: The Timing of the Choice and Its Motives', in *A variety of shades - discourse and research,* (2016); Lawrence Blum, 'Vocation, Friendship, and Community: Limitations of the Personal–Impersonal Framework', *Identity, Character and Morality: Essays in Moral Psychology,* (1993); Carolyn P Swen, 'Talk of Calling: Novice School Principals Narrating Destiny, Duty, and Fulfillment in Work', *Educational Administration Quarterly,* (2019).

[7] Bryan J Dik and Ryan D Duffy, 'Calling and Vocation at Work: Definitions and Prospects for Research and Practice', *The counseling psychologist,* 37 (2009); Sarah Banks, 'Professional Ethics in Social Work—What Future?', *The British Journal of Social Work,* 28 (1998); Cynthia Bisman, 'Social Work Values: The Moral Core of the Profession', *The British Journal of Social Work,* 34 (2004); Meir Hovav, Eli Luntal, and Yossi katan, 'Social Work in Israel', in *Red Line,* (2012); Hall and Chandler; Sarah Banks, *Ethics and Values in Social Work*, (Macmillan International Higher Education, 2012).

[8] William E Henry, John H Sims, and S Lee Spray, *The Fifth Profession: Becoming a Therapist*, (Jossey-Bass, 1971); A Burton, 'Twelve Therapists: How They Live and Actualise Themselves', (San Francisco: Jossey-Bass, 1972); Barry A Farber and Louis J Heifetz, 'The Satisfactions and Stresses of Psychotherapeutic Work: A Factor Analytic Study', *Professional Psychology,* 12 (1981); Blum; Barbara Kramen-Kahn and Nancy Downing Hansen, 'Rafting the Rapids: Occupational Hazards, Rewards, and Coping Strategies of Psychotherapists', *Professional Psychology: Research and Practice,* 29 (1998); John C Norcross and Barry A Farber, 'Choosing Psychotherapy as a Career: Beyond "I Want to Help People"', *Journal of Clinical Psychology,* 61 (2005); Travis G Worrell, Gary E Skaggs, and Michael B Brown, 'School Psychologists' Job Satisfaction: A 22-Year Perspective in the USA', *School Psychology International,* 27 (2006); Shuki Sadeh, 'Psychologists Work with a Sense of Mission, but Are Treated Like the Cashiers in the Supermarket', *TheMarker,* (2016).

[9] Hege Forbech Vinje and Maurice B Mittelmark, 'Community Nurses Who Thrive: The Critical Role of Job Engagement in the Face of Adversity', *Journal for Nurses in Professional Development,* 24 (2008); DM Rinaldi, 'The Lived Experience of Commitment to Nursing: As Perceived by Nurses in Their Nursing Environment', *Columbi: Columbia University Teachers College,* (1989); Blum; Karolyn White, 'Nursing as Vocation', *Nursing ethics,* 9 (2002); Douglas T Hall and Dawn E Chandler, 'Psychological Success: When the Career Is a Calling', *Journal of Organizational Behavior: The International Journal of Industrial, Occupational and Organizational Psychology and Behavior,* 26 (2005); Dik and Duffy; Yudi Cao and others, 'The Mediating Role of Organizational Commitment between Calling and Work Engagement of Nurses: A Cross-Sectional Study', *International Journal of Nursing Sciences,* (2019).

wages were from 2011. the paper uses the previous three-year average (2009-2011) to indicate the standard salary in each occupation.
Table 1 below presents the details of the sample. The salaries are in new Israeli shekels (NIS), each equal at that time to about 25 American cents.

Table 1: Descriptive statistics of the sample

Occupation	N Non-Calling	Calling	Median monthly gross wage NIS
Administration workers	101		5,500
Managers	26		7,000
Bankers	72		8,000
Psychologists		22	10,000
Social workers		107	10,000
Lecturers	21		10,000
Teachers		84	8,000
Lawyers	39		10,000
Nurses		8	7,500
Hi-tech workers	15		16,000
Total	**274**	**221**	

About 45% of the respondents were employed in occupations regarded as a calling.

4. Results

Statistical tests

In light of the fact that wages vary even in the same occupation, we normalized the data, so that the values of job security and the status quo were translated into a percentage of the base wage. For example, on average the percent of VSQ of the base wages for all occupations is 22.9% and the percent of VJS is 28.8%.

Table 3 presents the descriptive statistics for the value of job security and the status quo bias for occupations depending on whether or not it is regarded as a calling.

Table 3: Comparison of % job security value (VJS), and % status quo value (VSQ) between the occupations

	Variable	
	% VSQ	**% VJS**
Regular occupation – average	0.290	0.229
N=212	(0.660)	(0.337)
Occupation as a calling – average	0.280	0.229
N=193	(0.724)	(0.369)
Total workers – average	0.288	0.229
N=405	(0.69)	0.352

The descriptive statistics revealed that the value of job security is about 23% of the base wage and the value of the status quo bias is about 28%. In order to compare the values for occupations regarded as callings and those that are not, we built an econometric model as described below.

Regression Results

Several equations were estimated where the dependent variables were the value of job security (VJS) and the value of the status quo bias (VSQ). The explanatory variables were:

I. **Calling** - an occupation characterized by a sense of vocation and calling, measured as a dummy variable (1 - calling occupation, 0 - normal occupation)
II. **Tenure** - whether the respondent had a tenured or non-tenured position, a dummy variable (0 – non-tenure, 1 - tenure).
III. **Risk aversion** - the respondents' level of risk aversion, measured using a questionnaire that came with the regular survey of the PSID in 1996 and in the survey of the Bank of Israel[10]. This is a continuous variable whose value ranges from 0 to 5. A high value indicates a high level of risk aversion.

[10] Idit Yotav-Solberg, 'Technological Changes, Risk Aversion and Wage Development', *Bank of Israel, Research Department,* 04.01 (2004).

IV. **Loss aversion** - the respondents' level of loss aversion. To estimate the degree of loss aversion in risky choices, we used the simple lottery[11] . This is a continuous variable whose value ranges from 0 to 6. A high value indicates a high level of loss aversion.

V. **Age** - the respondents' age, measured as a continuous variable.

VI. **Gender** - the respondents' gender, measured as a dummy variable (0 – women, 1 - men).

VII. **Children under 18** - whether the respondents had children under the age of 18, measured as a continuous variable.

VIII. **Mastery** - perceptions of control or fatalism - the respondents' subjective feelings that they can control the significant events in their lives, measured as a continuous variable (ranging from 0 to 5) using the index of Pearlin and Schooler[12] . A low value indicates a perception of a high degree of control (a low level of fatalism).

IX. **Lsalary banch** – Log gross wages based on the median wage for 2009-2011, which we used as the base wage for the respondent**.**

X. **Degree -** holder of an academic degree, measured as a dummy variable (1 - holder of academic degree, 0 - no academic degree)**.**

The results of the regression model presented in Table 4 indicate that workers employed in an occupation regarded as a calling estimate the non-pecuniary value of job security as **49.5**% ($e^{-0.685}$-1)[13] less than workers employed in regular occupations. These findings are consistent with findings in previous research[14].

we found that employees who are tenured place a higher value on job security.

Table 4: Econometric results

Variable	**VSQ**	**VJS**

[11] Ernst Fehr and Lorenz Goette, 'Do Workers Work More If Wages Are High? Evidence from a Randomized Field Experiment', *The American Economic Review,* (2007).

[12] L.I. Pearlin and C. Schooler, 'The Structure of Coping', *Journal of health and social behavior,* (1978).

[13] Robert Halvorsen and Raymond %J American economic review Palmquist, 'The Interpretation of Dummy Variables in Semilogarithmic Equations', 70.(1980)
Peter E %J American Economic Review Kennedy, 'Estimation with Correctly Interpreted Dummy Variables in Semilogarithmic Equations [the Interpretation of Dummy Variables in Semilogarithmic Equations]', 71.(1981)

[14] Lee Hardy, *The Fabric of This World: Inquiries into Calling, Career Choice, and the Design of Human Work*, (Wm. B. Eerdmans Publishing, 1990); Wrzesniewski.

Constant	-0.012	-20.191***
Calling	-0.06**	-0.685**
Tenure	0.069**	0.838**
Risk aversion	0.016**	-0.047
Loss aversion	0.008*	0.095
Age	0.002*	0.014*
Gender	0.013	-0.152
Children under 18	0.000	0.143*
Mastery	-0.001	0.057
Lsalary_banch	1.066***	2.853***
Degree	0.079***	-0.181
N	**311**	**311**
Adjusted R square	**0.628**	**0.080**
F	**53.25*****	**3.6*****

Dependent variables are in the form of Ln
*Significant at the 0.1 level
**Significant at the 0.05 level
***Significant at the 0.01 level

As expected, the control variables (age, having young children, tenure and the level of median wage in the occupation) have a positive impact on the value of job security.

There is no interaction between the occupation being regarded as a calling and the base salary. This lack of a relationship implies that the effect of regarding an occupation as a calling on the value of job security does not change with the wage level. We used the Kruskal-Wallis test to illustrate this result. We found no significant difference in the value of job security at different base wage levels (Table 5).

Table 5: Kruskal-Wallis Test results – VJS

Profession	**N**	**Mean Rank**

Psychologist		22	103.7
Social worker		102	96.29
Nurse		8	76.44
Teacher		61	98.47
Total		193	
Kruskal-Wallis	H	1.472	
Asymp. Sig.		0.689	

Regarding an occupation as a calling is correlated negatively with the status quo bias effect. Thus, those in such occupations have about a 6% less status quo bias than those in regular occupations. As expected, the control variables (age, tenure, risk aversion, loss aversion and the level of median wage in the occupation) have a positive impact on the value of the status quo bias.

5. Discussion

Our study is the first we know of to use behavioral factors from the behavioral economics literature and classic economics to analyze the relationship between an occupation regarded as a calling and job security. We show that workers in such occupations are **-68.5%** less likely to regard job security as a major factor than those in regular jobs. Previous studies[15] established that workers employed in the public sector are more likely to value job security than those employed in the private sector. Therefore, we would expect that those in occupations regarded as a calling to value job security more or at least similar to the value of job security for those in regular jobs. However, our results suggest that, when controlling for having tenure, working in an occupation regarded as a calling has a negative effect on the value of job security. The results of this paper might call for a rethinking regarding the form occupations regarded as a calling should be employed, i.e., tenure vs. non-tenure.

[15] Justin B Bullock, Jesper Rosenberg Hansen, and David J Houston, 'Sector Differences in Employee's Perceived Importance of Income and Job Security: Can These Be Found across the Contexts of Countries, Cultures, and Occupations?', *International Public Management Journal,* 21 (2018).

Spiros Simitis: In Memoriam

Manfred Weiss [*]

Born in Athens in 1934, Spiros Simitis came to Germany to study law. Already at the age of 22, he became Full Professor at the University of Giessen. In 1969, he moved to the Goethe University of Frankfurt, where in spite of many attractive offers elsewhere, he held his chair until he became Emeritus in 2003. He was Visiting Professor in many prestigious universities – e.g. the London School of Economics and Political Science, Yale University, the University of California in Berkeley and the University of Paris-Nanterre. It is impossible to list his awards: they are just too many. The same applies to his many important extra-curricular activities, as for example his membership in the Research Council of the European University Institute (1990-1996), the chairmanship of the High Level Expert Committee on Fundamental Social Rights in the EU (1998-1999) and the presidency of the German National Council on Ethics (2000 – 2005).

Even if Simitis is mainly regarded as an authority on the law on data protection, it would be misleading to categorise him merely as an expert in this field. He was a universal scholar of law with a global reputation. He has left traces in many legal disciplines. At the same time, he was an expert in legal theory, legal history, sociology of law, comparative law and politics of law. Simitis was not simply a professor of law, but a highly educated cosmopolitan intellectual and a highly estimated public figure. And he was a dedicated European, contributing very much to the promotion of the European Union (EU).

The theoretical foundation of Simitis' thinking was the philosophy of the Enlightenment. The focus of his scholarly and political efforts was the "autonomy of the individual", which also became the title of a *Liber Amicorum* dedicated to him. He argued in favour of the "re-discovery of the individual", that is a regulatory framework providing a realistic chance for everybody to live a self-determined life. The promotion of legal

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protection as well as protection by collectivisation were for him pre-conditions for this self-determination.

Simitis not only was interested in the "law in the books", but primarily in the "law in action". He did not stop at the analysis of legal norms and institutions, but he had a close look into legal reality. Therefore, the cooperation with representatives of social sciences always was self-evident for him. He was a dedicated interdisciplinary researcher.

Comparative research played a dominant role in Simitis' scholarship. He saw the danger of permanently re-inventing the wheel if experiences of other countries were not included. Functional comparative research was for him an indispensable tool to learn from experiences elsewhere. Simitis combined the comparative method with an in-depth historical approach - grounded on an admirable knowledge of universal history - showing thereby the evolution of legal structures.

It is not possible to sum up Simitis' complex scholarly work. Some snapshots may give an idea. As already indicated, he was an internationally recognised pioneer of data protection law. His writings in this field date back to the sixties of last century and led to the first law in this field, the law of the German State of Hesse of 1970. In that state, Simitis was Commissioner for Data Protection from 1975 to 1991, and he chaired the Commission on Data Protection of the Council of Europe from 1982 to 1988. He significantly influenced the Code of Practice on Data Protection of the International Labour Organisation (ILO). And the EU rules on data protection up to the General Regulation as well as the data protection laws of the Member States were highly influenced by him.

As already mentioned, data protection is only one area to which Simitis has contributed significantly. This applies to civil law, company law, constitutional law as well as European law. To just give two characteristic examples as an illustration: His proposals on product liability were a tremendous improvement on consumer protection law. And Simitis' role in emancipating the German family law from its paternalistic structure cannot be overestimated. However, his main interest next to the law of data protection was devoted to labour law.

He was particularly eager to transpose and enforce the fundamental rights as embedded in the Constitution into labour law. One of his main efforts in this context was devoted to not only formal but substantial equality of women in the labour market, in particular the promotion of work-life-balance. In collective labour law, Simitis' main focus was on workers' involvement in management's decision making. He had a wide understanding of workers' involvement ranging from collective bargaining via workers' participation at the workplace up to workers' representation

in company boards, always trying to construct an adequate and comprehensive problem-solving structure by trying to integrate foreign experiences into domestic institutional arrangements. Particularly important was his successful fight for the constitutionality of the Act on Workers' Representation in the Supervisory Boards of Big Companies of 1976.

Simitis' specific approach to labour law may best be illustrated by his famous essay on the juridification of industrial relations, published in 1984. Through an extremely enlightening historical analysis, covering a broad range of legal systems in many countries, he succeeded to reconstruct the evolution of juridification of employment relationships and industrial relations, linking this development to the phenomenon of industrialization and showing that the degree of juridification is not dependent on specific institutional arrangements but only can be identified if the perspective goes beyond the institutional patterns. And he insisted that the analysis also has to overcome the traditional categories of employment law and labour law, including all legal elements relevant to the social sphere in its broadest sense. In short: Here Simitis offered already many helpful indications on how to cope with the challenges for labour law today and in the future.

These few sketchy lines may give at least a vague impression of the complexity, the wide range as well as of the creative and innovative elements of Simitis' scholarly work. Finally, it should be added that as a professor, Simitis has enchanted generations of students. He was not only a great scholar and professor, but also was a wonderful person, with high integrity, charismatic and modest at the same time. From my long-lasting experience in collaborating with him, I can say that this was a great pleasure for me. He was my mentor, colleague and friend. Spiros Simitis died on 18 March 2023. The national and international scholarly community of law have lost a highly estimated and admired colleague. We will honour him by making sure his legacy lives on.

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ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at *www.adapt.it*.

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