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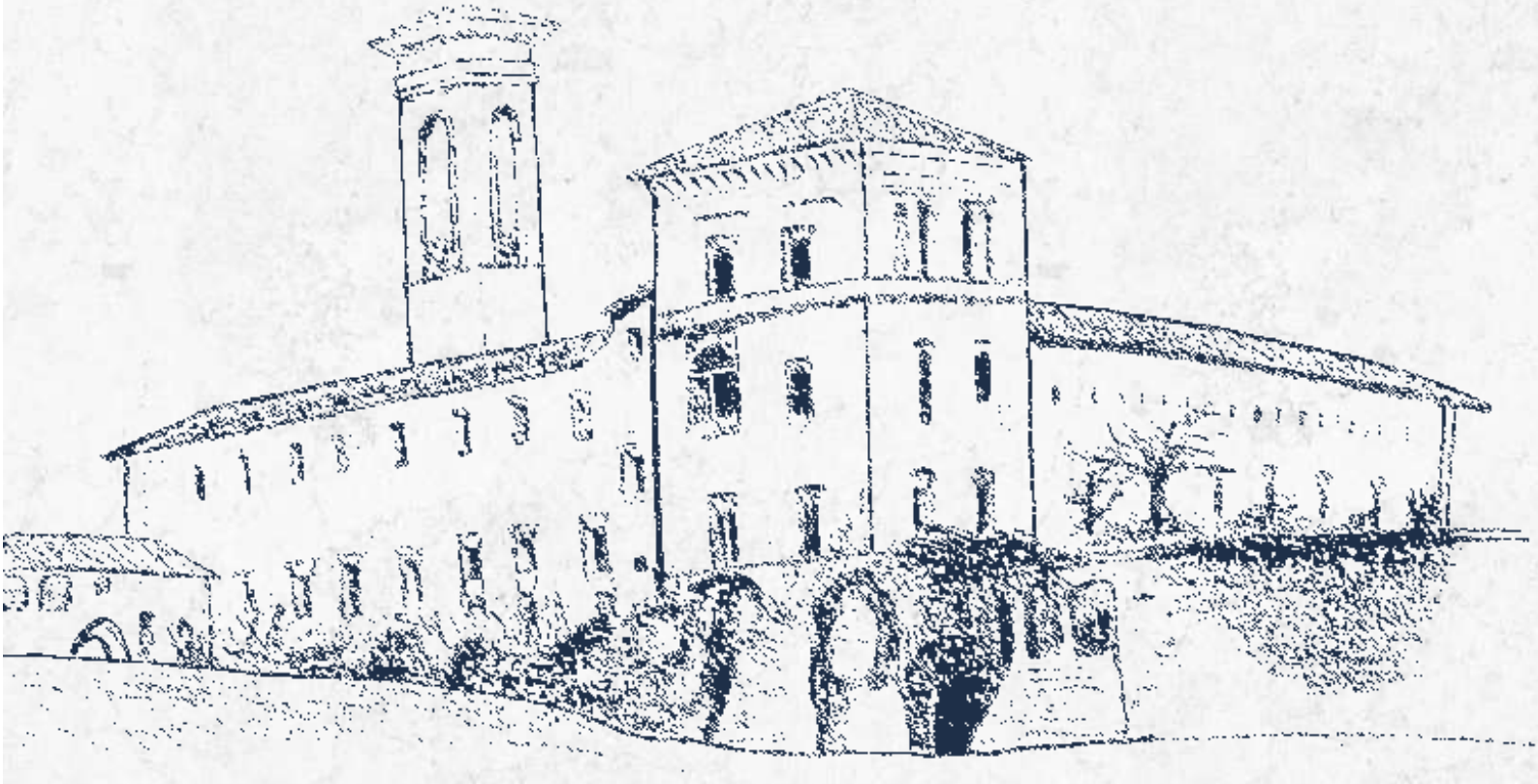

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Labour Issues

Digital Economy and Transformation of Working time: The Guarantee of Digital Labor Rights

J. Eduardo López Ahumada *

Abstract: This paper analyzes the transformations produced in working time from the perspective of the digital economy. This research work attempts to highlight the need to continue guaranteeing labor rights in the field of the digital economy. The current context is characterized by the progressive and incessant application of new resources and technological innovations in work activity. The new forms of productive organization are affected by the protective function of limiting the working day and compliance with minimum rest periods. This debate must lead to a new paradigm in the regulation of working time. The objective is that we continue to maintain the protective legal nature of working time. We are faced with a great challenge for society, in which Labor Law is called to deploy its protective function.

Keywords: Digital economy; working time; labor rights; Technological revolution; productive relocation

1. Introduction

Traditionally, the limitation of working time has had a direct relationship with the protective function of Labor Law. The institutions of working time are the foundation of legal-labor intervention and are especially affected by trends related to the organization and management of work by companies. The

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organization of working time is a central and structural aspect of the employment contract itself. The working day has its regulatory foundation in industrial work itself and has been transformed and adapted to new work realities. Specifically, there is a growing need to address the complex transformations produced at work with respect to the classic model of organizing the day and rest times.

The current context presided over by the progressive and incessant application of new resources and technological innovations in work activity proposes a new treatment, as well as a new conception of the protective function of limiting the working day and observing minimum periods. Rest. This is a new conception of the organization of working time, which must address new budgets and new factors present in work activity. This debate must lead to a new paradigm in the regulation of working time so that it continues to maintain its traditional protective nature. Obviously, we are faced with a great challenge for society, to which Labor Law is called to deploy its protective function, in the face of new phenomena that are in an unstoppable process of transformation and that pose complex problems, requiring new legal-labor responses. [1].

2. The application of working time in the field of the digital economy: budgets and legal keys or its regulatory treatment

The traditional legal conception of working time has been based on a clear distinction between effective working hours and non-working time. These interruptions in work provision are manifested in a series of periods of minimum rest, which guarantee disconnection from work and the psychophysical recovery of the worker. Hence, from a classical perspective, for the purposes of organizing working time, it has always been distinguished between the working day and rest, the latter in its manifestation as a period of interruption of work activity as expansive time oriented toward leisure and relaxation. necessary rest [2]. That is, we would be faced with the negative dimension of the working day, represented in non-working time or free time.

[1] The perspective of new challenges linked to the new economic reality has to face the challenge of guaranteeing the limitation of working hours and breaks. See S. Lee, D. McCaan y J. Messenger, El tiempo de trabajo en el mundo. Tendencias en horas de trabajo, leyes y políticas en una perspectiva global comparativa. Informes OIT, Ministerio de Trabajo e Inmigración, Madrid, 2008, pp. 220-ss.

[2] Regarding the distinction between work time and rest time, as necessary budgets in subordinate work. See M. R. Alarcón Caracuel, "La jornada ordinaria de trabajo y su distribución", en Aparicio Tovar, J. - López Gandía, J., *Tiempo de trabajo*, Bomarzo, Albacete, 2007, pp. 37-38. F. Pérez Amorós, "Tiempo y trabajo. Algunas consideraciones sobre el trabajo

Working time is the necessary budget of labor subordination itself, to the extent that it is the strict time that links the worker to the company and that the company can organize and control. Once the work day is over, the rest period manifests itself in time of disconnection, but clearly oriented towards the development of the person in their private sphere. This is manifested in the interest in leisure time and, in general, free time [3]. Without a doubt, this necessary guarantee of a minimum period of disengagement from work activity will be a necessary budget for digital disconnection, which is currently presented as a right of the greatest interest in the face of the weakening of the limits on working time [4]. The diffuse nature of the limits of working time in the current forms of work activity linked to the digital economy is revealed by the application of different figures that are presented as intermediate zones between working and non-working time. This refers, for example, to the presence of so-called waiting times, availability periods, work guards, etc.

These periods of availability are presented as intermediate figures, which are considered non-working time, in that they are not effective workdays in the strict sense [5]. However, these availability times imply a certain subjection of the worker, which entails the need for the company to pay or compensate for the application of said intermediate times. Indeed, these periods of non-work are moments of availability of the worker, and are paid time, although they are not considered effective working hours. We are facing a certainly controversial aspect, in the sense in which a time of subordination and, therefore, of expansion of the work connection with the company can be considered as non-work time and can be confused with free time. In reality, we are faced with a phase of disposition on the part of the employer and, therefore, time that the worker gives up based on a subordinate legal relationship. The classic limits of the working day have been distorted by the impact of technological innovation and new organizational forms. New problems have arisen in the

nocturno y a tumos", en Aparicio Tovar, J. - López Gandía, J., *Tiempo de trabajo*, Bomarzo, Albacete, 2007, pp. 95-96.

[3] In this sense, a differentiation has been made between the so-called working time, as a manifestation of labor subordination, and non-working time, in which a social dimension linked to the person's own development in society is evidently present. See G. Ricci, *Tempi di lavoro e tempi social*, Giuffre Editare, Milano, 2005, pp. 62-74.

[4] In relation to the diffuse nature and the weakening of the limits to the workday and the virtuality of rest time. See Vv.Aa., *Trabajo y empleo: transformaciones del trabajo y futuro de Derecho del Trabajo en Europa*, Supiot, A. (Coord.), Tirant Lo Blanch, Valencia, 1999, pp. 24-25.

[5] Regarding the consideration of effective working time and its effects in the field of new forms of work, we recommend the following research work. See J. Lahera Forteza, "Tiempo de trabajo efectivo europeo", *Trabajo y Derecho*, núm. 43, 2018, pp. 45-47.

interpretation of working time, which is manifested in the existence of gray areas related to the time available to work for workers [6].

The employment contract is delimited by the labor provision throughout the workday. The quantitative dimension of working time is presented as an index of delimitation of the work to be carried out, as well as for determining the worker's remuneration. However, for the purposes of this work we are much more interested in the reference to the determination of the working day, regarding its duration and temporal distribution. Obviously, this working time will be a necessary index to determine the time in which the worker remains in the company, providing services in a predetermined place or work center, which is generally contemplated in the employment contract.

The permanent connection that technological innovations allow is manifested in the confusion between the connection and the disposition of workers. This reality gives rise to situations of extension of the working day without respecting legal limitations. This statement is even strengthened by the reality of work development on many occasions outside traditional workplaces. Indeed, remote workplaces workers in front of new specific risks, with an obvious connection with the non-observance of the limits relating to the application of working time.

In this sense, there are new psychosocial risk factors related to the inappropriate and unjustified use of information and communication technologies without respecting the limits of working time. This is a psychosocial risk factor due to the heightened expectation of availability and the need for a quasi-automatic response, which in practice entails the existence of a genuine duty to respond to the company's requirements outside of working hours. This circumstance is a reflection of the absence of a specific business policy regarding a responsible remote work model that guarantees work disconnection. The aim is to increase competitiveness, allowing the use of communication devices outside of the workday. In relation to these business practices that are respectful of work disconnection, it is important to draw attention to the need to promote protocols, instructions or guides of good practices in the management of information and communication technologies, in order to discourage their inappropriate use. at the end of the workday.

From the point of view of working time, one of the important problems arises in the extension of the working day, either before its start or beyond the end of

[6] Regarding the problems of interpretation of the concept of working time and its distortion in the face of the existing gray areas in terms of worker availability times. See R. Aguilera Izquierdo – R. Cristobal Roncero, "Nuevas tecnológicas y tiempo de trabajo: el derecho a la desconexión tecnológica", *El futuro del trabajo que queremos*. Conferencia Nacional Tripartita, 28 de marzo de 2017, Palacio de Zurbano, Madrid, Iniciativa del Centenario de la OIT (1919-2019), Vol. 2, 2017 (Volumen II), pp. 331-342.

the work provision. Likewise, conflictive situations arise when carrying out atypical or unusual jobs, which are carried out outside of hours, such as during the night or on weekends, and all based on a model of permanent connection with the activity. labor. Likewise, the extension of the working day occurs due to the succession of different tasks or activities that are not previously planned and that generate extraordinary situations that prolong the working day. This is a real dilemma, related to the presence of temporal asynchronism, which allows constant interconnection and affects the working day, prolonging or advancing the start of working time.

In these extensions of working time, the presence of the performance of functions or tasks in the so-called waiting periods or downtime also plays an important role. These temporary periods can be considered as downtime, when now due to the use of technology they are work activity. These situations occur, for example, in cases of travel or travel, with the possibility of connecting after hours and performing certain tasks without being present at the company facilities. The development of flexible work formulas without clear business disconnection policies allows for an increase in working hours, using digital technology outside of working hours.

Likewise, it should be noted that this confusion in the quantitative and qualitative determination of working time presents a great problem in practice. Working time ceases to have a sense of unit of measurement of due work. Traditionally, the organization of working time itself has been shaped taking into account the limits of the working day, due to the legal nature of the employment contract. Without a doubt, this limiting function of the working day has traditionally been an essential objective of Labor Law, which has been presented as a necessary budget for legal intervention through the limitation of working time. In this sense, the control of the duration of working time has always been a key aspect, which has currently come to be relaxed by virtue of the elastic and diffuse nature of the application of the new working time, in contexts in which increasingly It is more difficult to achieve a true disconnection from work.

From this classic perspective, the organization of working time has been based on weekly work periods of forty hours, daily breaks of twelve hours, with the possibility of reduction to ten hours occasionally in the case of special days, and weekly breaks of one day. or a day and a half, in case of improvement. This is a clear reflection of the observance of international minimum standards and the ILO's own conventions in relation to working time. However, the current context has its own reason for being in the flexible conception of working time and in the possibilities of irregular and flexible distribution of working time. This allows the working day and breaks to be adapted to the needs of the companies. This effect has been clearly seen in periods of

economic crisis. This trend is led by a qualitative and flexible management of working time, which has in turn been intensified by the new possibilities allowed by the digital work model. Without a doubt, this facilitates new possibilities for the worker's disposition, along with the transformation and sudden modification of the provision of workers' services.

The flexible conception of work and rest time had its origin in labor reforms clearly contextualized in periods of economic crisis. We especially refer to the 1994 reform, followed by other adjustments in terms of irregular distribution, present in the 2012 labor reform itself. All of this now allows this flexible and elastic conception of working time to be applied to the work activity carried out in the digital age. This legal regime allows new possibilities, which stimulates, on the other hand, the development of new forms of employment. There is a frontal opposition with respect to the classic limiting and protective purpose of working time. This statement forces us to critically analyze the traditional paradigm of work and rest time, which is currently in a situation of clear decline. The connection with new ways of working is evident. Legal limitations on working time made sense in the Fordist industrial work model. However, the crisis of industrial work itself and the emergence of new forms of work promote the dynamics of irregular and flexible working time. This new reality allows different models of working time, depending on the type of work, when in reality the legal limitations on the working day have a general and transversal nature for all subordinate and employed work.

3. The necessary response to a new working time model

A new, certainly complex working time model is developed, which is characterized by its heterogeneous nature and its diffuse and fragmented application. Without a doubt, this is a certainly dangerous trend, as a new conception of working time develops, which moves away from the traditional parameters of limiting the working day and compliance with the necessary work rest. The adaptation of working time to the needs of the company and to the wide application possibilities allowed by new technological innovations applied to work activity occurs. It is true that in many cases these systems have been developed through collective bargaining, and in some cases, there has even been a reduction in working time [7]. This idea directs us to the problem of

[7] Indeed, in this area we must highlight the presence of an important modification in the sources that regulate working time. It is necessary to highlight the great role that collective bargaining has in the organization of working time, which deeply enriches the regime for the application of the working day and breaks. The use of collective bargaining has an absolutely essential function and is presented as a predominant factor in determining the limits that apply to working time.

legally moving towards the reduction of working time, this being a debate of a global nature [8].

Many of these formal reductions in working time have been compensated in practice with a greater possibility of adapting working time to the needs of the company. From this perspective, there has been an extension of working time compared to the formally permitted day. On many occasions, this allows extensions of working hours based on flexible hours and the adaptation of working time based on the needs of the productive activity. This greater margin of availability of working time has inevitably had a direct consequence on workers' rest from work, especially affecting the private sphere of workers, as well as the interest in reconciling personal, family and work life.

This type of situation has occurred in especially qualified jobs, with technical-professional content, which generally have greater autonomy in terms of working hours. This situation is combined with the workload, which gives rise to the distortion of the formal working day to the detriment of a working day that materially expands the permitted margins of the limitation of working time. That is to say, what a priori would mean a value, which is the possibility of self-managing work time by employees, actually becomes a double-edged sword. In fact, in this management, professional interest generally prevails over individual or personal interest, aimed at complying with vacation periods and developing free time [9].

The traditional argument for delimiting working time is found in the industrial model. Legal intervention in the regulation of the working day occurred in the first laws, addressing a working day model based on eight hours of daily work, in order to limit the effects of the development of long working hours. These days have a negative effect on the physical and mental health of workers. In turn, these limitations have direct effects on the reduction of workplace

[8] From the perspective of reducing working time in economic terms and its application in the field of digital work. See D. Cairós Barreto, *Una nueva concepción del tiempo de trabajo en la era digital*, Editorial Bomarzo, Albacete, 2021, pp. 65-ss. G. Matías Clavera, "El trabajo en el espacio y en el tiempo digital", *Revista del Ministerio de Trabajo e Inmigración*, núm. 11, 1998, pp. 39-78. Mª. C. Salcedo Beltrán, "Tiempo de trabajo en la sociedad digital: jornada de trabajo y "conexión" en los períodos de guardia localizada", *Relaciones contractuales en la economía colaborativa y en la sociedad digital*, coord. Guillermo García González, Maria Regina Redinha, María Raquel Guimaraes, Beatriz Sáenz de Jubera Higuero, Dykinson, Madrid, 2019, pp. 149-172.

[9] This peculiarity regarding the management of working time itself and its adverse consequences has fostered the need to rethink the traditional limits on working time. The application of these legal limits has occurred in a current context marked by the loss of specific weight of legal intervention in matters of working hours. See Vv.Aa., *Trabajo y empleo: transformaciones del trabajo y futuro de Derecho del Trabajo en Europa,* Supiot, A. (Coord.), Tirant Lo Blanch, Valencia, 1999, pp. 114-115. Vv.Aa., *Working time and workers' preferences in industrializedcountries. Finding the balance,* Messenger, J. Routledge, London, 2004, p. 2.

accidents, combating the high number of work accidents. Likewise, this model of working time in industrial companies established a standard application parameter, which came to normalize an application practice in companies and served as a model for collective bargaining at a sectoral level.

This first debate raised around the duration of working time has subsequently undergone a profound transformation, especially in times of crisis. Working time has been used as a tool that allows the adaptation of work activity to the needs of the company and market circumstances [10]. The improvements produced in the reduction of working time and the need to adapt it to the situation of the company and the market context have moved the debate from the quantitative dimension to the qualitative or distributive one [11]. This is, therefore, a new approach to working time. The debate is on the distribution and compensation of working time in the face of increases or decreases in productivity and the trend of economic growth. The technologies applied to work are promoting productivity, but they are also modifying the traditional parameters of interpretation of working time. It is easier to carry out work at any time and in any place by virtue of the location and permanent connection facilities [12]. Without a doubt, in this context, working time has been directed towards flexibility and the irregular distribution of the working day, as a means of stimulating economic growth and the consequent creation of employment.

These are the reference budgets that have founded and encouraged the constant debate on labor flexibility. These reflections have been dominating legislative policies and negotiable practices regarding working time. This orientation developed after the oil economic crisis of the 1970s and has been maintained cyclically in the crises of the 1980s and 1990s. This context has been equally crucial in the economic and financial crisis of the years 2008 to

[10] In this context, the fluctuating trend of the economy has had a direct influence. Recurrent imbalances and, with it, the realization of economic growth have traditionally had a strong impact on working time. We could go back to the first oil crisis, in the early 1970s, to see how, especially in Europe, there was an intense debate about the possible reduction of unemployment through a general reduction in working time.

[11] See I. García-Perrote Escartín – J. Mercader Uguina, "El permanente debate sobre la jornada laboral: una cuestión clásica (reducción del tiempo de trabajo) y otra reciente (el derecho a la desconexión del trabajo), *Revista de Información Laboral*, nº 10, 2016, Aranzadi Insignis, BIB 2016/80442.

[12] From this perspective, said discrimination in working time based on new technologies presents an important "alienating potential", as well as the presence of new generation occupational risks due to technological innovations linked to work. See M. Serrano Argüeso, "Digitalización, tiempo de trabajo y salud laboral", en *IUSLabor* 2/2019, pp. 9-10. J. A. Fernández Avilés, "NTC y riesgos psicosociales en el trabajo: estado de situación y propuestas de mejora", *DSL*, núm. 2, 2017, pp. 70-72.

2014, as well as during the pandemic caused by the coronavirus crisis [13]. Working time distribution techniques are presented as a management tool linked to the economic situation and that can turn against working people. The specific option to apply working time is not neutral but has a direct impact on the management of the company and its adaptation to the market. It has been highlighted that technology, in general, can be considered neutral, but its use is certainly not. This statement has a special impact in the workplace from the point of view of disproportionate, unjustified and invasive behaviors of the private lives of workers [14].

We could say that the economic trend and the organization of the company lead to flexibility and heterogeneity in the application of working time [15]. The introduction of technological innovations and the development of digital work increase the trend towards differentiated workdays. The traditional trend achieved in the field of industrial work, relating to the normalization and unification of the working time statute, would be abandoned. The current trend and the intensified trend focus on diversification, greater decentralization in the field of application of working time and in a context clearly marked by the individualization of working hours. It is true that there has been a significant increase in the importance of collective bargaining, but labor flexibility itself has also been introduced into the collective notion, which does not prevent the development of individualization of working time. Furthermore, especially in terms of working time, decentralization itself becomes more acute. Along with the law, the application of the collective agreement itself can be used, as generally sectoral, together with company collective agreements and subsequent company agreements, aimed at the application of working time to the reference business context [16].

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[13] In relation to the presence of the crisis factor in the concept of labor flexibility and, specifically, in the flexible organization of working time. See A. Baylos Grau, "Gobernanza laboral, crisis y cambio tecnológico en la acción colectiva", *Documentación Laboral,* núm. 117, 2019, pp. 100-101.

[14] In general, it has been indicated that technology, as noted, is impartial, its use is not, and the consequences of incorrect use also extend to the workplace. See. M. Serrano Argüeso, "Digitalización, tiempo de trabajo y salud laboral", en *IUSLabor* 2/2019, pp. 8-9. G. Cedrola Spremolla, "El trabajo en la era digital: reflexiones sobre el impacto de la digitalización en el trabajo, la regulación laboral y las relaciones laborales", *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo*, vol. 5, núm. 1, 2017, pp. 1-30.

[15] The regulation of working time has been characterized in recent times by the development of the notion of labor flexibility, as a parameter linked to the development of the company and new production models. This is a context that has greatly encouraged the flexible application of work time, discouraging the interventionist function of limits on working time.

[16] In relation to the challenges that this digitalization process presents from the perspective of union action in the field of collective bargaining. See J. M. Díaz Rodríguez, "La innovación tecnológica en la acción sindical ante las nuevas realidades empresariales", en Sanguinetti

4. The current trend towards diversification and individualization of working time

The tendency towards individualization of working time is especially dangerous, since it has a direct impact on the application of the principle of equality and leads to the existence of differentiated labor statutes. These disparate treatments can occur without there being an objective cause for differentiation. We are facing one of the new manifestations of job insecurity and the introduction of poverty in the working and employment conditions of working people. This is a situation that especially affects the protective action of Labor Law, as its own regulatory function has traditionally been conceived [17].

The current trend towards diversification and individualization of working time in the field of digital work must not lose sight of the essential purpose of the limits of the working day. The reason for the legal limits on the working day is to promote the health and safety of workers, ensuring the necessary rest and leisure time for the personal development of workers. It is a social challenge, to the extent that it aims to promote health and the demanded balance between work and personal life [18].

The development of working time in the context of the digital economy means abandoning the notion of predetermined time in general terms. This means losing knowledge of the calculation of the beginning and end of the work day, which would have to be carried out in a regular and uniform manner, and which is applied periodically, observing minimum periods of work rest. This is a job developed in the digital economy, which is characterized by its flexible, changing nature, constant sequence and fully connected conditions, and all of this in a highly competitive environment, which has productivity and efficiency as its special reference. of the business project. This flexible work model of the

Raymond, W. - Vivero Serrano, J. (coord.), *La construcción del Derecho del Trabajo de las redes empresariales*, Comares, Granada, 2019, p. 334.

[17] The phenomenon of job insecurity, together with the development of digital work, has been especially addressed from the perspective of European Social Law. MERCADER UGUINA, J., "Los "tiempos" de la Directiva (UE) 2019/1152: transparencia y lucha contra la precariedad laboral como objetivos", *Documentación Laboral,* núm. 122, 2021, p. 21.

[18] The balance between work and personal life is shown as a central objective that must guide the application of the working day and the consequent distribution of working time. In this sense, this balance is shown as a direct limit to one's own flexibility in the management of working time. See M. A. Ballester Pastor, "La flexibilidad en la gestión del tiempo de trabajo: jornada y distribución del tiempo de trabajo", *Revista de Derecho Social,* núm. 62, 2013, pp. 53-54. Igualmente, se recomienda el análisis del siguiente informe institucional. See Vv.Aa., "Transformación digital y vida laboral: las propuestas del informe Mettling", *Actualidad Internacional Sociolaboral*, nº 194, 2019.

digital economy leads to a considerable increase in irregularity and the heterogeneous component in the application of working time. In turn, this situation worsens to the extent that this working time develops in an indeterminate and unpredictable manner,

This situation is reproduced in the so-called distance or remote work time, which is more prone to this application inertia of work time. However, this situation also affects face-to-face work, when there are significant doses of work autonomy in its development. Indeed, this context is also linked to the very nature of business activity, which in these areas has significant instability in the development of business projects. The uncertainty of productive activity evidently has a direct impact on the application of working time [19]. For this reason, the possibility of redirecting working time to business needs takes on special value and special importance is given to the worker's time availability. From this perspective, the possible recourse to the development of sporadic or marginal jobs takes on greater significance, as well as the possibility of expanding work activity atypically on weekends, the development of on-call tasks or the claim or provision of bags of indeterminate hours [20].

This reference context has been stimulated by the application of digital technologies. It is a situation that has encouraged the development of flexibility in working time, even going so far as to denature its own limiting function. This directly affects the right of workers to safety and health at work. Without a doubt, this situation has been intensified by the application of new digital technologies, which are in an unstoppable process of development and whose effects constantly surpass labor legislation and force jurisprudence to constantly adapt the application of the Law. from Work to new forms of digital work development. As we say, this situation has been extraordinarily favored by new forms of work organization, which have been promoting the flexible and denatured application of working time.

This situation requires a new conception of work time in a limiting way. That is, a new intervention in the organization of working time, which responds to the challenges posed by the development of digital work. It is about, once again, using the protective nature of legal-labor regulations, directing its action towards the effective protection of the rights of workers. These are necessary changes if we want to continue to effectively address and protect the right to

[19] Certainly, the instability of business activity is shown as an aspect that favors the heterogeneous nature of working time. It is a factor that directly promotes the various types of working hours that can be applied based on the irregularity of business activity flows. Work activity adapts to each moment depending on the production process.

[20] We are faced with a series of resources that can be applied as a disincentive to hiring itself. That is, the use of specific reinforcements of the workforce through short-term temporary employment contracts is prevented.

limit the working day and guarantee the necessary rest. The protection of the worker must prevail over any other assessments or considerations of an economic nature or adaptation of working time to the context of the reference market. Otherwise, there would be an effective devaluation of labor rights, favoring socially unsustainable economic development.

The use of digital work implies a devaluation of the traditional factor of working time. However, at the same time, digitalization processes, automated procedures and, in general, the modernization of work activity by virtue of technological innovations lead to an increase in productivity and growth of the company itself. Without a doubt, this situation demands a correct solidarity application of working time, recognizing workers' contribution to the continuity of the company and the maintenance of employment thanks to their work. Therefore, there is no vision more supportive than guaranteeing an effective limitation of the working day and an absolute guarantee of rest and disconnection of the worker from his work activity [21]. We are faced with an important reflection that should mark the development of the digitalization of the economy and its application to production processes.

Currently, the debate on working time must focus on the protection of the different interests at stake. Obviously, the need to maintain daily, weekly and annual limits in relation to due working time [22]and limit the use of extraordinary and atypical work that can be carried out in the field of productive activities remains a priority. Increases in working hours must continue to be developed through overtime, including effective compensation measures. Maintaining the principle of necessary rest is key, with the observance of daily rest taking on special significance, together with the psychophysical recovery of the worker. This task consists of maintaining a direct limit to indeterminate and elastic work, as well as uninterrupted weekly rest, which is an essential factor from the point of view of the balance between

[21] It is important to achieve adequate solidarity indices, which focus on achieving a fair and balanced distribution of the benefits derived from the application of work technology and the digitalization of production processes. This debate must promote a process of improving working conditions, which has a direct translation into an improvement in living conditions, as well as its reflection in a fairer society.

[22] We are dealing with central aspects of the organization of working time, which have been specially identified and analysed by the ILO on different occasions. These are necessary budgets, which must be considered when taking into account the application of the working day itself. From the point of view of the ILO, these elements of judgment are taken into consideration for the monitoring and review of international instruments related to the organization of working time. In that sense, we recommend the analysis of the following institutional report of the institution. See ILO, *The time of job in he 21st century. Report for the debate of the Tripartite Meeting of Experts on the Organization of Working Time.* (October 17-21, 2011), pp. 37-ff.

work and the personal and family life of workers. We must also highlight the essential nature of the right to paid annual leave. The annual leave also ensures the necessary and uninterrupted rest and is shown as a necessary disconnection, without mechanisms of substitution or economic compensation being possible.

Along with this, attention to the needs of the company makes sense, which can favor the introduction of more flexible ways of organizing work time. However, these practices cannot disfigure the limiting function of the working day. Likewise, the introduction of dialogue and negotiation in the application of working time itself is very important. It is necessary to maintain the trend of collective management of working time, encouraging consultations and intervention of worker representatives in the application of working and rest time.

It is necessary to highlight the relevance of the balanced protection of the different antagonistic and legitimate interests that arise in the application of working time. Without a doubt, the best way to address these legitimate interests is based on the intervention of legislation and the consequent deployment of its protective action. In particular, said intervention must be effective, broad and rigorous, in order to achieve the unification of the legal regime of working time, which is being especially affected by the era of digitalization. This intervention must continue to be maintained in the face of labor flexibility. The presence of norms that establish limits of necessary rights must be reaffirmed. As we have indicated, said regulatory intervention is not the only resource, but, in turn, it requires the promotion of social dialogue and the development of collective bargaining.

From the point of view of collective bargaining, the rationalization of the different working time systems has special significance. The application of working time must be coordinated taking into account the structure itself and the levels of negotiation in each sector, these systems for applying working time reaching the companies themselves. We are, indeed, facing an essential issue to achieve the objective of standardization of working time and the development of uniform formulas for the application of working hours [23].

[23] This unifying trend in the organization of working time has been understood to respond to an evident social interest. The general and transversal nature of working time is especially affected by the transformations that work is experiencing in the field of the digital economy. See Vv.Aa., *Trabajo y empleo: transformaciones del trabajo y futuro de Derecho del Trabajo en Europa,* Supiot, A. (Coord.), Tirant Lo Blanch, Valencia, 1999, pp. 144-146. On the need to advance in the standardization of working time versus the individualization of working hours. See S. Lee, D. McCaan and J. Messenger, *El tiempo de trabajo en el mundo. Tendencias en horas de trabajo, leyes y políticas en una perspectiva global comparativa.* Informes OIT, Ministerio de Trabajo e Inmigración, Madrid, 2008, pp. 221-222.

The interest in the regulation of working time currently has a special significance. We are faced with an important instrument that can alleviate the risks derived from the development of new forms of work in the digital age. In this sense, the fight against job insecurity continues to be of special importance, thereby guaranteeing the desired objective of decent work, which is currently conditioned by the drift of the application of working time in labor digitalization processes. All of this calls for an adaptation of the limitation of maximum working time, together with the necessary application of the right to daily and weekly rest, as well as paid annual vacations.

5. The labor digitalization process and its impact from a global perspective

Globalization has an obvious impact on the world of work and, specifically, it affects the quality of work, as well as its development conditions and its typical forms of execution [24]. We must indicate that we are experiencing a process marked by polarization in the world of work, which will have effects on the formation of the future of work itself. Important social transformations that have occurred can be highlighted, such as the fact of a marked trend towards the reduction of the so-called middle class and a significant increase in the number of workers with very low incomes, who have been called poor workers. Correlatively, there has been an increase in a privileged segment of the active salaried population, which is identified as a small social minority, which has seen its economic situation improve. This gives rise to an unfair distribution of income and generates obvious problems in the future from the point of view of justice and social cohesion.

In general, the debate on the digitalization of work presents new challenges and opportunities. This is an issue of a global and transversal nature, which raises problems that transcend the borders of the countries themselves. The physical space for the development of work and the geographical location of work activity disappears. Obviously, many of these processes are contextualized in the use of connection platforms, whose operation is carried out on a global scale [25]. The development of the digital economy is producing important consequences from the point of view of the geographical relocation

[24] For a study of the impact of globalization and the development of globalization of markets in the world of work. See B. Hepple, *Labor Laws and Global Trade,* Hart Publishing, Oxford, 2005, pp. 13-14.

[25] It has been highlighted that the problem of the digitalization of production processes has become a phenomenon specific to transnational law, which requires a new consensus from the point of view of its governance. See C. Degryse, *Digitalisation of the economy and its impact on labor markets,* Working Paper 2016.02, Brussels, ETUI, 2016, p. 52-53.

of work. In this topic, the development of so-called transnational teleworking and its promotion from the perspective of production chains fostered by the development of multinational companies takes on special significance.

This telematic process generates important consequences from the point of view of a global labor market, which is digitalized and constantly interconnected [26]. This situation allows the proliferation of workers, whose working and employment conditions have been considerably reduced. New forms of employment allow you to work anywhere in the world. This affects the protection itself that in principle must be provided by national States. Likewise, this situation generates important effects from the point of view of the organization of national labor markets, if this process continues its unstoppable inertia of development. This conditions the national regulations themselves and affects the guarantee of social rights, which are financed by public income derived from taxes and contributions to public Social Security systems. We can point out that this process accused of digitalization on a global scale, promoted without controls, carries with it a certain risk of inequality. This situation especially affects low-income salaried workers, which can even lead to a transfer of productive activity from the formal economy to informal work.

The spread of digital work introduces new problems linked to relocation and its transformations from the point of view of the globalization of the economy. The process of globalization and its development has given rise to an increase in the mobility and displacement of workers, phenomena that are different from the traditional processes of labor migration. There is no doubt that trade liberalization and the promotion of foreign investments have direct consequences on labor markets, giving rise to a transfer of labor offers and demands transnationally. This situation develops in an increasingly globalized market for goods and services [27]. This consequence is widely known and developed, for example, within the European Union through the development of the freedom of movement of people and workers, which is linked to the free provision of services, as well as the free professional establishment. In

[26] In relation to the development of the concept of a global labor market, we recommend the following reference studies. See K. D. Ewing, "International regulations: the ILO and other agencies", in Frege, C. - Kelly, J., *Comparative Employment Relations in the Global Economy,* Rout ledge, Abingdon, 2013 p. 439.

[27] The digitalization and telematic transmission of production processes has direct consequences in the removal of barriers in the exchange of services in the international market. See J. Mercader Uguina, *El futuro del trabajo en la era de la digitalización y la robótica,* Tirant Lo Blanch, Valencia, 2017, pp. 4-5. The digitization process has an impact on the simplification of work processes, with the reduction of exchanges and, in turn, allows for a marked reduction in labor costs.

these free market manifestations, the development of transnational services means that work must adapt and develop in response to the needs of the market. The encouragement of these transnational activities is a driver of the development of the free-market economy [28].

Based on these arguments, the development of the digital economy affects the world of work, offering new possibilities for relocation and internationalization. This process of globalization of work is generated by a significant reduction in production costs and by the provision of services valued at lower costs. In many cases, these activities are relocated to developing economies, with basic social protection models and highly flexible labor systems, precisely to attract foreign investment in the form of social *dumping*. There is no doubt that economic globalization and the internationalization of markets cannot be understood without the development of the computer telecommunications revolution.

From the point of view of Labor Law, there is no doubt that this model has important consequences, since the valuation of the service prevails over the figure of the worker and the employer. The position of the parties to the employment contract, especially the employer party, is devalued in a transnational employment relationship and in many cases is impersonalized by the digital work itself. The development of telecommunications and the liberalization of economic borders generate new possibilities for relocating companies and, consequently, the provision of services. It is a process that opens new business opportunities due to the generalization of digital applications to production processes. All of this means that the place of provision of services is no longer relevant, since a significant portion of the work can be provided from places other than the company's own establishment, without requiring control and surveillance of the work. Digital technology and the Internet facilitate this work indirectly, allowing workers' performance to be assessed by other means.

There has been a generalization of the use of electronic devices and applications, which allow working without limitations in relation to space or time conditions. These factors allow the development of the physical relocation of work, moving towards a virtual location. These processes allow the development of phenomena related to mobile work and remote work, with important consequences from the point of view of guaranteeing labor rights in the digital sphere. It has been recognized that the use of digital technological

[28] In these contexts, any type of work, whether autonomous or subordinate, shows an important development and encourages, on the other hand, the mobility of workers. Work moves wherever the demand for capital demands the need to hire labor.

innovations allows greater productive performance, thanks to the integration of the transmission of data and information in the work activity itself. A large system of constant communication is produced, which affects the structures and methods of production and work.

In the European case, the European Commission itself warned of the important effects of the digital transformation process. Specifically, the evident acceleration of relocation and the transfer of some activities to other countries with lower wage costs stood out. Especially, this situation would have repercussions on the services sector, given the wide possibility of transfer of transnational services linked to consumption in commercial, cultural and leisure areas. Indeed, we are faced with an important source of employment, which the European Union insists on the need to promote in the European context. The objective is to avoid a transfer of services abroad. This is evident proof that the technological and information revolution has incredible potential to improve people's quality of life. It is essential to adequately control said application process, taking into account the centrality of the worker's position for protective purposes. From this perspective, the European Commission tries to strengthen the community role in order to increase the effectiveness of the economic and social organization [29]. We are referring to a true mechanism to reinforce social cohesion itself, given the serious problem that the alarming unemployment rates represent in the future.

From a purely economic perspective, technological globalization is destined to also increase job opportunities. However, one of the problems that this process represents is manifested in the possibility of generating employment that is different from the traditional model of self-employment. We are referring to unstable, cyclical employment that develops discontinuously, which has an impact on job insecurity. Precisely, this fight for the lowest labor cost is what opens the doors to the so-called social *dumping,* facilitating the search for those systems of labor relations and social protection with lower labor costs and, therefore, with less legal-labor protection. This context opens the possibility that less developed countries will be forced to downwardly reform their labor relations and social protection systems, in order to attract foreign

[29] In relation to this problem, we recommend monitoring the following reports that analyze the consequences of the digitalization process of the economy. These studies are carried out keeping in mind the terms of competitiveness, highlighting its direct effects on employment. European Commission, *Growth, Competitiveness and Employment. Challenges and clues to enter the 21st century. White Paper,* Communities Bulletin European, Supplement 6/93, Luxembourg, 1993, pp. 24-25. Likewise, we recommend the analysis of the 30th *Report on Europe and the global information society. Book Tracking White Growth, Competitiveness, Employment,* Bulletin of the European Union, Supplement 2/94, Luxembourg, 1994, pp. eleven.

investment and combat the competitiveness inherent to the process of transnational relocation present in the globalization of the economy [30].

6. Technological revolution and productive relocation

This process of technological revolution generates a marked effect of productive relocation. The use of digital and computer technologies transcends the reality of work and affects both the work and non-work spheres, transforming people's living conditions. For this reason, there has been talk of a new system of intangible economy, which is based on the development of mobile computing technologies. This has been the triggering factor for a new resort to remote work and teleworking, which began to develop at the beginning of this century. This is a formula to overcome homework. This remote work model has been transformed towards a much more flexible type of work, where working time conditions are evidently distorted. Precisely, under these models the determination of time and the way in which work is done loses meaning, especially affecting employed and subordinate work.

Information technologies and the use of telematic work devices allow a new form of control and compliance with company guidelines. Indeed, we are faced with new forms of worker insertion into a business organization, which raises new conflicts linked to permanent and real-time interconnection. The presence of constant and continuous flexibility is especially evident in working time. Without a doubt, one of the most relevant consequences related to digital work occurs with respect to the international perspective of the development of the work relationship. We are faced with another decisive factor, which demonstrates the loss of specific weight that the conditions of work and rest time have in the development of work performance.

For all these reasons, it is still necessary to face the challenge of controlling working time, especially from the perspective of the transnational projection of services. This has especially repercussions in the field of remote work and teleworking, whose precautions are necessary to guarantee decent working conditions, regardless of the place in which the services are provided. Along with this phenomenon of remote work and transnational teleworking, another important action gap occurs in relation to the development of transnational

[30] The problem is especially accentuated in economic contexts that are characterized by market instability and economic volatility. Obviously, economic and social instability is closely related to the globalization process. This situation can generate important imbalances, which have a special impact in the field of labor and social protection. These contexts worsen and intensify depending on the economic cycles, in line with the productive changes to which companies are subjected.

digital platforms. In this sense, we can highlight the joint application of teleworking with productive crowdsourcing, which certainly manifests itself as a real challenge to work standards. Labor legislation does not contemplate these realities, which in a limited way are projected on the geographical and individual relocation of workers. In short, a new area of international labor contracting is developing, which can occur with and without displacement of workers.

This process requires a new response from Labor Law. This implies the need to adapt labor standards to this unstoppable reality and all of this in the key of guaranteeing the rights of workers. One of the problems is the important drift that international *soft law* has had and the relaxation of State action from the perspective of intervention in labor. Therefore, the necessary development of transnational collective bargaining plays an especially important role. Without a doubt, this can be an effective tool in the work of regulating working conditions and can also serve as a way to refer and promote international regulatory action.

This objective also allows the possibility of developing the notion of decent work and recovering the projection of important international labor instruments, especially with regard to the ILO international conventions relating to working hours and the promotion of occupational health. Likewise, it is important to highlight the action of the international commitments derived from the ILO declarations regarding multinational companies, especially in the face of the insufficiency or lack of capacity to apply the standards when it comes to guaranteeing the rights of people. workers. This situation occurs especially in situations of labor abuse derived from the relocation and internationalization of labor relations [31].

It is a problem of social projection, which also transcends the scope of action of Labor Law. Of course, in this entire process, civil society and especially national and international trade union and business organizations have an essential role to play. Without a doubt, this work of support and decisive commitment to the protection of work is an essential factor for the guarantee of our social and democratic State of Law. This work contributes to the development of a framework of minimum working conditions, which not only benefits the society of each country, but also has a role aimed at promoting decent working conditions in less developed countries.

[31] Likewise, we can highlight the projection that the socio-labor clauses inserted in free trade agreements have in this matter. These are important instruments derived from Public International Law, which, in counterbalance to free trade, guarantee the observance of fundamental international rights at work.

Covert Surveillance at the Workplace and the ECtHR Approach: Possible Risks of Breaching GDPR Rules

Aljoša Polajžar *

Abstract: This paper addresses the issue of (im)permissibility and consequences of covert surveillance at the workplace – from ECtHR case law and GDPR perspective. In the first part the relevant ECtHR case law is examined. It follows that covert surveillance at the workplace is (under certain conditions) compliant with Article 8 ECHR – although the developments in ECtHR reasoning from case *Köpke* (2010) to case *Lopez Ribalda* (2019) show a more stringent ECtHR approach towards covert surveillance. Moreover, ECtHR itself highlighted in *Lopez Ribalda* (where there was no violation of Article 8 ECHR) that workers had (and should have resorted to) other available administrative, civil and criminal procedures (besides the employment dispute) to protect their right to personal data.

Keywords: *Labour law; ECHR; GDPR; Worker's right to personal data protection; covert surveillance.*

1. Introduction

The development of information and communication technology (ICT) has brought numerous new possibilities for employers to control workers at the workplace.[1] As has already been extensively discussed in literature the surveillance of a worker constitutes an interference with the worker's right to personal data protection.[2] Therefore, the main problem (especially for

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[1] See: Bhave, Devasheesh, Laurel, Reeshad 2020; Edwards, Martin, Henderson, 2018; Katsabian, 2019.

[2] See, *inter alia*: Atkinson, 2018; Eichenhofer, 2016; Eklund, 2019.

employers) is where to draw the line between lawful and unlawful monitoring (surveillance).

In the European regional legal framework (Council of Europe and the EU) the most important standards for assessing the limits of permissible monitoring stem, inter alia, from the European Court of Human Rights (hereinafter: ECtHR) case law and from the provisions of the General Data Protection Regulation[3] (hereinafter: GDPR). Both ECtHR case law relating to worker's personal data (privacy) protection[4] and the provisions of GDPR setting important safeguards for workers personal data protection[5] were extensively discussed in literature.

However, gaps in legal science and case law (both ECtHR and Court of Justice of the European Union (hereinafter: CJEU)) remain. A very important issue (up to now neglected in legal science) is the interplay between the standards (and outcomes) set in ECtHR case law and requirements of personal data protection under GDPR. This is particularly evident in case of covert monitoring (where the worker has not been informed of the monitoring in advance) at the workplace.

On the one hand (as it will be shown in the analysis within this paper), ECtHR has already decided that the exercise of covert monitoring of a worker at the workplace does not, in certain circumstances, constitute a violation of Article 8 (right to private life) of European Convention on Human Rights[6] (hereinafter: ECHR).[7] On the other hand, it is problematic in practice whether such results of ECtHR judgments (no violation of Article 8 ECHR) can guarantee the employers that they will not face legal consequences for breaches of GDPR due to covert monitoring. The provisions of GDPR apply directly and uniformly throughout the EU, thus it is any case essential that any (covert) surveillance complies also with the provisions of GDPR (and not only with Article 8 ECHR). Nonetheless, in this respect it is especially problematic (for employers in practice) that so far, no judicial decisions about worker's personal

[3] 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, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119.

[4] See: Bagdanskis, Sartatavičius, 2012; Calomme, 2017; D'Aponte, 2021; Klein, 2018; Kaiser, 2018; Lockwood, 2018; Stanev, 2019; Turanjanin, 2020.

[5] See: Brkan, 2017; Dimitrova, 2020; Halefom, 2022; Keane, 2019; Munteanu, Povey, 2022; Ogriseg, 2017; Sychenko, Chernyaeva, 2019.

[6] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950, as amended by Protocols Nos. 11, 14, 15 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

[7] See Dimitrova, 2020; Turanjanin, 2020.

data protection (in the context of covert surveillance and GDPR) have been adopted by CJEU.

Consequently, the thesis of the paper is that even if the covert surveillance at the workplace (conducted by the employer) does not under certain criteria (developed by ECtHR) violate Article 8 ECHR – this does not guarantee the employer that its exercise of the very same covert surveillance will not be found in violation with GDPR, and thus subject to legal consequences (e.g. administrative fines) under GDPR. Rather than ECtHR's case law standards (which interpret the ECHR), the key to ensuring legal certainty (for employers) in the exercise of covert surveillance in the workplace is the compliance of such surveillance with GDPR.

The main expected outcomes of this paper are, firstly, to critically evaluate the content and legal importance of the existent ECtHR case law on covert monitoring at the workplace. And secondly, to emphasise the importance of refocusing worker's personal data protection (above the national level) merely from the framework of the interpretation of Article 8 by ECtHR towards the EU law framework with CJEU as the main actor for interpretation of the relevant provisions of GDPR. Thus, cases concerning worker's personal data protection are to be more often referred to CJEU as question for preliminary ruling (instead of only individual complaints before ECtHR being launched).

The paper's scope will be limited to the analysis of selected legal sources connected to worker's personal data protection.[8] Within the legal framework of the Council of Europe relevant ECtHR case law will be analysed. Within the EU legal framework only the relevant GDPR provisions will be analysed – due to currently non-existent CJEU judgments regarding worker's personal data protection (in the context of GDPR).

Methodologically, the paper will be based on the normative-dogmatic method and the methods of analysis and synthesis. The selected judgments of ECtHR relating to the protection of the worker's personal data (workplace surveillance)

[8] At the outset, it is worth explaining that Article 8 ECHR (Right to respect for private and family life) covers various aspects of the protection of the personality rights and privacy of the worker. From the right to protection of worker's private sphere, spatial privacy, to communication privacy and the right to protection of personal data. In the case law under review (the context of covert workplace surveillance) ECtHR addresses the issue under the notion of "worker's privacy protection" (including both communication privacy, and personal data protection in the same term). Covert surveillance (for example video-surveillance) also involves the processing of the worker's personal data. In the context of this article, we will limit the research scope to ECtHR case law and GDPR provisions related to worker's personal data protection (and not other aspects of privacy (e.g., communication privacy) under EU law). Therefore, from the terminological point of view we will primarily focus on the right to personal data protection, except for cases where "worker's privacy protection" concept (covering also worker right to protection of personal data) is used within ECtHR case law.

will be analysed in detail. The possible limitations or inconsistencies of ECtHR approach – which may cause uncertainties regarding applicable legal standards and legal consequences of covert monitoring for employers – will be highlighted. Furthermore, case law and the issues at stake will be set in the context of the provisions of GDPR, which impose a number of obligations on employers as data controllers in relation to the processing of personal data[9], as well as legal consequences in the event of breaches.
First part of the paper will thus present the relevant excerpts of ECtHR case law on the (im)permissibility of covert surveillance at the workplace. Second part will present selected relevant provisions of GDPR in this respect – including employer's obligations, and legal consequences for infringing provisions of GDPR. Third part will be devoted to a critical discussion and analysis of the presented legal aspects relating to the exercise of covert surveillance at the workplace in light of the presented ECtHR case law, GDPR provisions, and the above set aims of the paper.

2. ECtHR case law on covert surveillance at the workplace

At the outset, the ECHR contains a list of fundamental human rights that are subject to dynamic and evolving interpretation by ECtHR in light of evolving social conditions and ideas.[10] By deciding specific cases, ECtHR has an indirect influence on the consolidation of human rights standards between Contracting States, especially in light of their diverse legal systems.[11] Furthermore, *Sychenko* & *Chernyaeva* note that ECtHR judgments have a significant impact on the level of protection of the worker's personal data.[12]
ECtHR has dealt with some important cases concerning the interpretation of Article 8 ECHR (Right to respect for private and family life) in cases of employer's (covert) surveillance of workers at the workplace. We will analyse the relevant case law according to the type of covert monitoring. Therefore, the relevant case law can be divided into two main groups. The first group includes cases where the usage of electronic work equipment (computer, telephone, internet usage etc.) has been covertly monitored. The second group includes cases where the employer has carried out covert video surveillance in the workplace.

[9] See: Voigt, von dem Bussche, 2017.
[10] Schabas, 2015, pp. 1, 48.
[11] Stone Sweet, Keller, 2008, p. 3.
[12] Sychenko, Chernyaeva, 2019, p. 172.

2.1. Covert monitoring of electronic work equipment usage (computer, telephone, internet usage)

In the first three judgments presented in this section (*Halford*, *Copland* and *Barbulescu*), ECtHR ruled that the covert exercise of surveillance constituted a violation of the worker's right to private life under Article 8 ECHR. Nonetheless, in the *Libert* case, ECtHR ruled that the covert surveillance did not constitute a violation of Article 8 ECHR.

2.1.1. *Halford v United Kingdom*

In *Halford v UK* the complainant alleged that the interception of telephone conversations (made on a work telephone) constituted a violation of Article 8 ECHR. The employer had not imposed any internal rules or restrictions on the use of work telephones, or otherwise alerted the worker to the fact that her communications might be subject to surveillance. This is also why the worker had a reasonable expectation of privacy in her use of the telephone. ECtHR expressly rejected the respondent State's argument that the worker did not enjoy a "*reasonable expectation of privacy*" on the work phones and that the employer (as the owner of work equipment) was, therefore, entitled to monitor worker's calls even without worker's knowledge or consent (covert surveillance). Even in these cases, the worker is protected by Article 8 of the ECHR, as ownership of work-related resources/equipment is irrelevant.[13]

2.1.2. *Copland v United Kingdom*

In *Copland v UK* the employer (public sector) exercised control over the worker's work telephone, email, and internet use. The monitoring had no legal basis in internal rules or legislation. The monitoring was carried out for the purpose of checking whether the worker was using work equipment excessively for private purposes. For this purpose, the employer collected data on telephone calls and websites visited (date, time of visit, etc.). The monitoring of telephone use was carried out for 18 months and of internet use for 2 months. In its reasoning, ECtHR confirmed that as in *Halford,* it was decisive that the worker had not received any warning that her use of work resources would be subject to surveillance (there were no internal rules at the employer), and therefore enjoyed a reasonable expectation of privacy. However, it is worth noting that, as a guide for the future, ECtHR has stated

[13] ECtHR, *Halford v the United Kingdom*, Case No. 20605/92, ECLI:CE:ECHR:1997:0625JUD002060592, paras. 16, 43-45.

that it does not exclude the possibility that control over a worker's use of the telephone, email or internet may be permissible under certain conditions (proportionality and legitimate aim).[14]

2.1.3. *Barbulescu v Romania*

The case represents the first time ECtHR has dealt with the monitoring by technical means (by a private sector employer) of the content of the worker's electronic communications. On the first instance ECtHR ruled (by 6 votes to 1) that there had been no violation of Article 8 ECHR (Eklund, 2019).
The Grand Chamber of ECtHR then reversed the above decision and ruled (by 11 votes to 6) that there had been a violation of the worker's right to private life under Article 8 ECHR. In the proceedings before ECtHR, the complainant alleged that his employer's dismissal was based on a violation of his right to private life. As the national courts failed to declare such dismissal unlawful, and thus protect his rights, Romania is liable for breach of Article 8 ECHR for failure to fulfil its obligations.[15]
The worker was employed by a private company and used a "Yahoo Messenger" work account for his work. The employer had internal rules governing the use of company equipment. Article 50 of those rules provided that any disturbance of the peace and discipline at the workplace was strictly prohibited, in particular the use of computers, printers and telephones for private purposes. The same rules did not contain any other provisions stipulating that the worker's use of ICT resources could be monitored. To this end, the employer prepared a circular reminding for workers that they (as employer) had a duty to supervise their work and to take punitive action against infringers, and would therefore supervise and punish any potential infringers. The worker has signed two documents acknowledging that he is aware of both the internal rules and the latter circular. This was followed by the monitoring of the worker's communication via the company computer. The employer recorded the content of the worker's communications, accumulating a total of 45 pages of content over the eight days of monitoring (5 of the processed messages were also sent from the worker's private Yahoo account). Some of the messages were of an intimate nature, exchanged with the worker's fiancée and brother. After the worker was informed of the

[14] ECtHR, *Copland v the United Kingdom*, Case No. 62617/00, ECLI:CE:ECHR:2007:0403JUD006261700, paras. 7, 10-11, 15, 41, 46.
[15] ECtHR, *Barbulescu v Romania* (Grand Chamber), Case No. 61496/08, ECLI:CE:ECHR:2017:0905JUD006149608, para. 3.

evidence gathered, his dismissal followed (in August 2007), which the worker unsuccessfully challenged before the national labour courts.[16]

ECtHR stressed the particular importance of the fact that the case concerns an interference with privacy in the context of an employment relationship, since the latter is a specific form of contractual relationship based on the legal subordination of the worker. Therefore, the State is obliged to protect the worker against the possibility of abuse of the employer's control of communications by means of appropriate safeguards.[17]

Within judgment's reasoning ECtHR has created abstract criteria or factors that national courts must take into account when assessing the limits of the permissibility of surveillance of a worker. It is important to consider:

- the existence of a notice to the worker that the monitoring is being carried out. To comply with Article 8 ECHR, such notice must be clear and given in advance;
- the extent of the surveillance and the degree of interference with the worker's privacy. In this respect, a distinction should be made between monitoring the flow of communication (traffic data) and monitoring the actual content of the communication. It is also important whether there is continuous monitoring of all communications or only intermittent monitoring of individual messages;
- the existence of legitimate interests for conducting the monitoring. In particular, the reasons for monitoring the content of the communication must be justified;
- the existence of other monitoring options that meet the employer's objectives without controlling the content of the communications (existence of less intrusive measures);
- the consequences of the monitoring for the worker (what the employer will do with the information obtained from the monitoring);
- the existence of adequate safeguards to protect worker's privacy, in particular the prohibition on the employer from knowing the content of the communication unless the worker has been informed in advance of this possibility.[18]

By applying the above mentioned criteria to the case at hand the ECtHR concluded that the employer attempted to justify the surveillance by arguing that the surveillance was necessary to protect against liability for possible unlawful acts of workers on the Internet, to prevent the leakage of business secrets and to ensure the security of the information system. However, in

[16] Ibidem, paras 11-17, 21, 23.
[17] Ibidem, paras. 117, 120.
[18] Ibidem, para. 121.

ECtHR's view, all these reasons were of a hypothetical or theoretical nature, as there was no evidence that the complainant had endangered the undertaking in any of these ways. It is therefore doubtful whether these grounds justify strict control over the content of the communications. Less invasive measures might be sufficient, which would be for the national courts to decide. Furthermore, in ECtHR's view, the advance notification did not meet the required standards, since the internal rules and the circular did not make it clear that the employer would be able to inspect the content of worker's communication.[19] For all the above reasons, the ECtHR held that the strict surveillance (flow and content) of the worker's communications via Yahoo messenger was impermissible and that Romania was liable for violating Article 8 ECHR by failing to ensure that the worker's right to privacy was adequately protected.[20]
Lastly, and very importantly, the judgment touch upon the conceptual issue according to which Contracting States have a wide margin of discretion to protect worker's right to a private life. In ECtHR's view, these measures do not necessarily have to be solely in the context of labour law, but can also be in the context of civil, criminal law etc. It is therefore necessary to make a comprehensive assessment of whether a particular State had an adequate legislative framework to protect the right to (communicative) privacy of the worker vis-à-vis the employer.[21]
And precisely this aspect was the main argument of the dissenting judges in their dissenting opinion, in which they took a closer look at the protection of worker's privacy (personal data) in the Romanian legal system. They argued that labour courts, which adjudicate on the unlawfulness of dismissals, were not the only option available to the worker. Firstly, from a criminal law perspective, the worker could have brought proceedings for the criminal offence of breach of secrecy of communications. Secondly, the legislative framework on the protection of personal data allowed the worker to report the matter to the supervisory authority and also to initiate a claim for damages for breaches of the legislation on the protection of personal data. Thirdly, the general rules of civil law also allowed for a claim for damages for the harm caused by unlawful conduct. The judges, therefore, considered that the worker should have also availed himself of these other legal possibilities, rather than focusing solely on challenging the lawfulness of the dismissal in the context of an employment dispute. The present judgment should, consequently, not be understood as a request to Contracting States that labour courts assume a protective role for cases where there are also more specialised remedies

[19] Ibidem, paras. 133-137.
[20] Ibidem, paras. 140-141.
[21] Ibidem, paras. 113, 116.

available to workers – for example, proceedings for breaches of data protection provisions under GDPR, etc.[22]

2.1.4. *Libert v France*

In *Libert v France* the worker claimed that there had been a violation of Article 8 ECHR due to the opening of his files stored on his work computer (without his knowledge and prior notification). The ECtHR ruled by 6 votes to 1 that there had been no violation of Article 8 ECHR. The worker was employed by the French National Railway Company (a State-owned company). On the day of his return to work, the worker was informed that his computer had been seized by the employer. At a meeting in the following days, the employer informed him that a large amount of pornographic material (pictures and films) were found on the hard drive of the company computer in a folder (entitled '*fun*'). The employee was neither present at the surveillance carried out nor informed of it.[23]

The employer had internal rules regarding the use of the company's IT system, which allowed the use of company equipment for work purposes only. The rules provided that occasional and reasonable use of e-mail and internet for private purposes was permissible. In doing so, the rules stipulated that private information (files and folders on the computer) must be clearly marked as 'private'.[24]

ECtHR concluded that the interference was legally foreseeable and in conformity with the law. According to ECtHR, the general statutory provisions of French law, in the light of national case-law, allowed the employer, under certain conditions, to open files stored on the disk of the worker's work computer. Secondly, the interference pursued a legitimate aim since the employer has a legitimate interest in the use of the company equipment for work purposes because of the need to ensure the smooth running of the work process. To this end, they may put in place control mechanisms to check that workers are diligently and conscientiously fulfilling their obligations under the employment relationship.[25] And lastly, the worker had failed to properly mark (in accordance with the employer's internal rules) the folder or files on the hard

[22] ECtHR, *Barbulescu v Romania* (Grand Chamber), joint dissenting opinion of Judges Raimondi, Dedov, Kjølbro, Mits, Mourou-Vikström and Eicke, Case No. 61496/08, ECLI:CE:ECHR:2017:0905JUD006149608, paras. 9, 12, 17, 26.

[23] ECtHR, *Libert v France*, Case No. 588/13, ECLI:CE:ECHR:2018:0222JUD000058813, paras. 7, 9, 12.

[24] Ibidem, para. 19.

[25] Ibidem, paras. 38-41, 44, 46.

drive as "*private*". ECtHR thus held that there had been no violation of Article 8 ECHR.[26]

2.2. Covert video surveillance in the workplace

The admissibility of covert video surveillance in the workplace has been dealt with in cases *Köpke v Germany* and *Lopez Ribalda and Others v Spain*. Moreover, and very importantly, in both cases ECtHR ruled that the covert surveillance did not constitute a violation of Article 8 ECHR.

2.2.1. *Köpke v Germany*

In *Köpke v Germany,* the worker alleged that covert video surveillance carried out by a detective agency on behalf of his employer violated his right to private life under Article 8 ECHR. ECtHR dismissed the claim as inadmissible (manifestly unfounded, see Article 35 ECHR). The worker was employed in a German department store (private sector). The employer had commissioned a detective agency to carry out video surveillance in part of the store because of suspicions of theft of products. After carrying out the covert surveillance and processing the data, the agency produced a report which led to the worker's dismissal due to shoplifting.[27]

ECtHR considered whether the German courts had struck the right balance between the worker's right to privacy (Article 8 ECHR) and the employer's interest in protecting private property (Article 1 to Protocol 1 ECHR). Importantly, the reason for the covert video surveillance was to verify the veracity of a reasonable suspicion that the worker had committed a criminal offence. It is the requirement of reasonable suspicion that is an important safeguard for the worker. This is precisely why it is important to enable the employer to gather evidence that will enable him to prove the criminal conduct of the worker and thus effectively protect his rights. ECtHR goes on to note that there were no other equally effective, less invasive measures available to the employer to protect its assets. Supervision by a supervisor, co-workers or transparent video surveillance are not sufficiently effective measures to detect this type of theft.[28]

Interestingly, ECtHR has explicitly stated that it allows for the possibility that the conflicting interests of the worker and the employer may be given a

[26] Ibidem, paras. 51-53.
[27] ECtHR, *Köpke v Germany*, Case No. 420/07, ECLI:CE:ECHR:2010:1005DEC000042007 (the judgment is not divided into paragraphs).
[28] Ibidem.

different weight in the future (in the light of the intrusion into worker's private life by new advanced technologies).[29]

2.2.2. *Lopez Ribalda and Others v Spain*

The mentioned ECtHR openness to a different approach can be seen in the more recent case of *Lopez Ribalda and Others v Spain*, which is factually essentially the same to the *Köpke* case. Not only did ECtHR not declare the complaint manifestly unfounded and dismiss it (as in *Köpke* according to Article 35 ECHR), but it even upheld the workers' claim at first instance (Chamber), ruling (by 6 votes to 1) that there had been a violation of Article 8 ECHR as a result of the covert video surveillance. Nonetheless, the Grand Chamber reversed this decision and ruled by 14 votes to 3 that there had been no violation of worker's right to private life under Article 8 ECHR.[30]
The workers were employed as salesclerks in a department store (private sector). The employer had launched an internal investigation and, as part of it, a covert video surveillance, due to the unexplained disappearance of goods (total value of approximately 80.000 EUR). After ten days of surveillance, the employer realised that the goods were being stolen by its workers and terminated the employment contracts of fourteen workers.[31]
ECtHR applied the criteria developed in *Barbulescu v Romania (*see above) in order to find a fair balance between the interests of the workers (protection of personal data, privacy) and the employer (protection of property).[32]
In the judgment ECtHR recognised the international validity and importance of the right to be informed about the exercise of (video)surveillance. The latter is particularly relevant in the context of employment relationships, as the employer is in a position of dominance vis-à-vis workers and potential abuses of dominance must be prevented. However, ECtHR points out that the requirement to give notice of the implementation of video surveillance is only one of the criteria to be taken into account when assessing the proportionality of a measure in a given case. In the absence of such notification, the assessment of the safeguards arising from the other criteria will be all the more important. This means that the absence of this prior notification can only be justified if there is an "overriding reason" to protect a public or private interest.[33]

[29] Ibidem.
[30] ECtHR, *Lopez Ribalda and Others v Spain* (Grand Chamber), Case Nos. 1874/13 and 8567/13, ECLI:CE:ECHR:2019:1017JUD000187413.
[31] Ibidem, paras. 10-16.
[32] Ibidem, paras. 116, 118, 122.
[33] Ibidem, para. 133.

As regards the other criteria, in the light of the disappearance of goods in recent months, there was a legitimate interest to protect employer's property. The surveillance was also appropriately limited in space and time (it lasted 10 days and until the thieves were discovered). Very importantly, ECtHR emphasised that the shop workers *enjoyed a low expectation of privacy. The* latter is very high in enclosed spaces (e.g. offices), but significantly lower in spaces (e.g. the shop) accessible to other workers, the public, etc. Therefore, the interference with the right to privacy did not reach a high level of seriousness.[34] Finally, and very importantly, ECtHR points out that the complainants had a number of other safeguards available to them under the domestic legal order, which they did not avail themselves of. They could have brought a claim for damages for breach of the law governing the protection of personal data and could have lodged a complaint with the competent supervisory authority, which could have imposed a fine on the employer. In this respect, ECtHR confirms the view (first expressed in *Barbulescu* case) that the protection of a worker's privacy can also be achieved through civil, administrative and criminal law rules – and not just through labour law. Accordingly, there has been no violation of Article 8 ECHR.[35]

The judges in the dissenting opinion focused on the question of the necessity of the monitoring. According to the dissenting opinion the employer has not yet exhausted all the possibilities for protecting its rights. He has not reported the thefts or the offences to the police, which, as the competent authority, would have carried out an investigation. The employer thus stepped into the shoes of the law enforcement authorities and carried out their tasks on its own using covert methods. Nor does the need to investigate a violation (crime) on the basis of the existence of a reasonable suspicion justify this type of covert private surveillance (investigation). The judges considered that the existence of "reasonable suspicion" as a condition for the imposition of surveillance is an important but not a sufficient safeguard. For example, a requirement for confirmation of the existence of reasonable suspicion by a third party could be an important additional procedural safeguard. In light of the increasing role and capacity of technology in today's society, individuals cannot afford to take justice into their own hands (with the help of technology). This must be prevented by a predictable legal framework with appropriate safeguards.[36]

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[34] Ibidem, paras. 124-126.

[35] Ibidem, paras. 135-136.

[36] ECtHR, *Lopez Ribalda and Others v Spain* (Grand Chamber), joint dissenting opinion of Judges Gaetano, Grozev, and Yudkivska, Case Nos. 1874/13 and 8567/13, ECLI:CE:ECHR:2019:1017JUD000187413, paras. 9, 11, 15.

3. The EU (GDPR) legal framework and worker's personal data protection

At the outset, within the EU law legal framework CJEU plays a very important role, as it is the only court with the power to interpret EU law. Through its interpretation of EU law, CJEU ensures that secondary law (e.g. GDPR) is compatible with primary EU law (e.g. EU Charter of Fundamental Rights[37] etc.). Therefore, CJEU also plays an important role in the protection of human rights.[38] In this context the preliminary ruling reference procedure under Article 267 of the Treaty on the Functioning of the European Union[39] (hereinafter: TFEU) is of particular importance.[40] In contrast to the system of protection under the ECHR, an individual has no right of individual appeal to CJEU after exhausting all national remedies.[41]

3.1. Safeguards for worker's personal data protection under GDPR

At the outset, as Article 1 of GDPR makes clear, its purpose is to protect the fundamental rights and freedoms of individuals and, in particular, their right to the protection of personal data. Also, recital 4 confirms that GDPR respects all fundamental rights recognised by the EU Charter of Fundamental Rights, in particular respect for private and family life and communications, the protection of personal data and the freedom of economic initiative.

3.1.1. Fundamental principles of data processing

Article 5, paragraph 1, point a, of GDPR sets out the fundamental principles relating to the processing of personal data. First, personal data must be processed lawfully, fairly and transparently. The requirement of lawfulness of processing is specified in Article 6 GDPR, according to which processing is lawful only where the conditions in the enumerated cases set out in that Article are met. The transparency of processing is specified, inter alia, in Article 12 GDPR, which imposes an obligation on the controller (employer) to provide individuals (workers) with all information relating to the processing in a concise, transparent, plain, easily accessible, and comprehensible form. Article 14 GDPR requires, inter alia, the provision of information on the purposes of and the legal basis for the processing of the personal data. As confirmed by the

[37] Charter of Fundamental Rights of the European Union, OJ C 326.
[38] Trstenjak, Brkan, 2012, pp. 121-122, 128.
[39] Treaty on the Functioning of the European Union, OJ C 326, 26. 10. 2012.
[40] Lenaerts, Maselis, Gutman, 2014, p. 48.
[41] Letnar Černič, 2015, p. 81.

Article 29 Data Protection Working Party (2017a) all the above applies also in the context of workplace surveillance, as workers must be informed in advance of the existence of surveillance and other relevant information in this respect.[42]

3.1.2. Data processing impact analysis (DPIA)

As outlined by the Article 29 Data Protection Working Party guidelines (2017b) the so-called data processing impact analysis is a preventive process aimed at describing actions, assessing the necessity and proportionality of processing. It helps to manage the risks to the protection of human rights (of workers) arising from the processing of personal data. It is also helpful for employers as it demonstrates due diligence prior to the implementation of control systems through the DPIA. It is important that employers carry out a DPIA before they start to carry out any monitoring or processing. The implementation of a DPIA can also help to increase the confidence of the persons (e.g., workers) whose data is being processed. Failure to carry out or incorrectly carrying out a DPIA (and the resulting unlawful processing of personal data) may lead to payment of heavy administrative fines. In this context it is important to point out that according to Article 29 Data Protection Working Party guidelines (2017b) the DPIA will likely to be required (mandatory) before introducing surveillance systems at the workplace.[43]

3.1.3. Administrative fines for GDPR infringements

An important feature of GDPR are the extremely high administrative fines, which in themselves have a deterrent effect on potential infringers. Under Article 83, paragraph 1 GDPR, the general principle applies that administrative fines must be dissuasive, proportionate, and effective in each individual case. Under Article 83, paragraph 5 GDPR, fines (up to 20,000,000 EUR or, in the case of an undertaking, up to 4% of the total worldwide annual turnover) are imposed for infringements of the basic principles of processing (see Article 5

[42] Article 29 Data Protection Working Party, Working document on the surveillance of electronic communications in the workplace, No. 5401/01/EN/Final WP 55, 2002, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2002/wp55_en.pdf (accessed March 13, 2023), p. 8.

[43] Article 29 Data Protection working party, Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679, No. 17/EN, WP 248, 2017b, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611236 (accessed March 13, 2023), pp. 4, 9-12, 14, 19.

GDPR), lawfulness of processing (see Article 6 GDPR), provisions on consent (see Article 7 GDPR), and most importantly for infringing, inter alia, the right to prior notification and information (which is not fulfilled in covert monitoring) in accordance with the transparency principle under Articles 12 to 14 GDPR. Moreover, failure to carry out a mandatory DPIA or to consult the supervisory authority, as well as carrying out a DPIA in an incorrect manner, may also result in fines for companies or employers of up to 10,000,000 EUR or up to 4% of the total worldwide annual turnover.[44] GDPR thus introduces heavy fines for virtually any breach of its provisions. As stated by *Grentzenberg & Kirchner* (2019) these new rules have a strong deterrent effect, forcing companies to implement GDPR properly. Given these high financial risks (potential fines), it is essential that companies are able to confirm their compliance with GDPR rules with appropriate documentation (including when carrying out surveillance of workers).[45]

3.2. GDPR and covert monitoring at the workplace

CJEU has not yet ruled on whether it would be permissible (under GDPR) to carry out covert surveillance (data processing without prior notification) under specifically justified circumstances. In this context, it is worth pointing out that a particularly relevant interpretation would be that of Article 14, paragraph 5, point b GDPR, which is a potential legal basis for a possibility to derogate from the obligation to priorly inform the employee about the processing of his or her personal data. According to the said legal provision paragraphs 1 to 4 (Article 14 GDPR) shall not apply "*in so far as the obligation referred to in paragraph 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing.*" Nonetheless, without CJEU case law on the matter (of covert surveillance at the workplace) it remains uncertain in which possible cases this exception could apply. This is even more so, given the development of the content of the guidelines by the GDPR supervisory authorities, which will be presented below.

The transparency principle (prior notification and giving all the necessary information regarding the data processing – surveillance) is emphasised in all relevant documents of the Article 29 Working party and the European Data protection Board related, inter alia, to processing of personal data (surveillance) at the workplace.[46]

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[44] See ibidem, p. 4.

[45] Grentzenberg, Kirchner, 2019, p. 146.

[46] See Article 29 Data Protection Working Party, 2002, op. cit., p. 14; A Article 29 Data Protection Working Party, Opinion 2/2017 on data processing at work, No. 17/EN WP 249, 2017a, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610169 (accessed

Moreover, a very interesting development – similar to the apparent progression of ECtHR case law towards more emphasis on worker's personal data (privacy) protection in the more recent *Lopez Ribalda* case (2019) versus the *Köpke* case (2010) – can also be seen in the development of the opinions of the Article 29 Working Party and the European Data Protection Board. If the Article 29 Working Party opinion (from year 2002), still allowed the possibility of carrying out covert surveillance in the workplace under certain justified grounds[47] – the newer Article 29 Working party guidelines (form year 2017) no longer mention the possibility of derogating from the principle of transparency by carrying out covert surveillance. Instead, in that section of the latter newer guidelines it is written: *"with new technologies, the need for transparency becomes more evident since they enable the collection and further processing of possibly huge amounts of personal data in a covert way."*[48] Similarly, the most recent European Data Protection Board (from year 2020) guidelines on processing of personal data through video devices (covering also the employment context) do not mention at any point any exception or possibility to carry out covert surveillance in the workplace (the topic of covert surveillance is not expressly addressed – only the rules on transparency of processing are emphasised).[49]

4. Analysis and discussion

In relation to presented ECtHR case law on covert monitoring at the workplace and relevant GDPR provisions the following observations may be made.

First, as can be seen from the *Köpke* and *Lopez Ribalda* cases, the exercise of covert surveillance can be in compliance with Article 8 ECHR. Indeed, ECtHR also explicitly stresses the importance of transparency (prior notification) in the criteria it has developed. However, ECtHR points out that the requirement to give notice of the implementation of video surveillance is only one of the criteria to be taken into account when assessing the proportionality of a measure in a given case. In the absence of such notification, the assessment of the safeguards arising from the other criteria will be all the more important. This means that the absence of this prior notification can only be justified if

March 13, 2023), p. 8; European Data Protection Board, Guidelines 3/2019 on processing of personal data through video devices, Version 2.0, Adopted on 29 January 2020, 2020, https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32019-processing-personal-data-through-video_en (accessed March 13, 2023), p. 26.

[47] Article 29 Data Protection Working Party, 2002, op. cit., p. 14 (point 3.1.3. "Transparency").

[48] Article 29 Data Protection Working Party, 2017a, op. cit., p. 8 (point 3.1.2. "Transparency").

[49] See European Data Protection Board, *op. cit.*, pp. 26–27.

there is an "overriding reason" to protect a public or private interest.[50] Important abstract criteria for assessing such cases were already developed in *Barbulescu* case,[51] and later confirmed in *Lopez Ribalda*.[52]

Second, in its assessment ECtHR places significant emphasis on the question whether the worker had the possibility to protect his right to privacy (personal data) also in the context of other available procedures under national law. All the presented ECtHR cases have in common that the employer gathered evidence through covert surveillance, with which he justified the dismissal. The worker, in turn, challenged the legality of this dismissal before the national labour courts, inter alia, on grounds of breach of his right to personal data protection (privacy). It is in this context that the ECtHR expressly points out that, in order to assess whether the worker has been afforded adequate safeguards under Article 8 ECHR (one of the criteria for assessing whether there has been a violation of Article 8 ECHR), account is also taken of whether the worker has availed himself of the other remedies available to him for a violation of the right to privacy (personal data protection). The ECtHR states, for example, that they could have brought a claim for damages for breach of the law governing the protection of personal data and could have lodged a complaint with the competent supervisory authority, which could have imposed a fine on the employer. Therefore, protection of worker's privacy (personal data) can also be achieved through civil, administrative and criminal law procedures (rules) – and not solely through labour law.[53]

Moreover, the above adequately illustrates the main issue of the topic. On the one hand, it is thus possible in a specific labour dispute (and later before the ECtHR) that the courts would uphold the employer's dismissal (based on covert surveillance) and decide that there was no violation of Article 8 ECHR (if the set criteria in *Barbulescu* and *Lopez Ribalda* cases are met). The employer may thus succeed in an employment dispute on the legality of the dismissal. On the other hand, in its judgments ECtHR explicitly states that the worker has other options (not only based on labour law) to protect his right to privacy (personal data). ECtHR does not further elaborate on possible results of these other procedures – it only highlights the fact that the worker did not resort to these procedures available under national law (although he could have done so). This means that, in practice, the employer may succeed before the

[50] See ECtHR, *Lopez Ribalda and Others v Spain* (Grand Chamber), Case Nos. 1874/13 and 8567/13, ECLI:CE:ECHR:2019:1017JUD000187413, para. 133.

[51] See ECtHR, *Barbulescu v Romania* (Grand Chamber), Case No. 61496/08, ECLI:CE:ECHR:2017:0905JUD006149608, para. 121.

[52] See ECtHR, *Lopez Ribalda and Others v Spain* (Grand Chamber), Case Nos. 1874/13 and 8567/13, ECLI:CE:ECHR:2019:1017JUD000187413, paras. 116, 118, 122.

[53] See Ibidem, paras. 135-136.

employment tribunals after exercising covert control. However, the worker may initiate other parallel proceedings against the employer to protect his right to data protection – e.g., a complaint before the competent national Data Protection Authority for breaches of GDPR. These proceedings may result in very high administrative fines being imposed, which is certainly an undesirable outcome for the employer.

Third, even if, according to ECtHR jurisprudence, certain criteria are available to the employer to give guidance on the conditions under which there is no breach of Article 8 of the ECHR in case of covert surveillance – there are several indications that ECtHR by no means offers a uniform and consolidated approach to this problem. It is clear from the cases discussed that the judges are sharply divided among themselves, with close voting results (e.g., 11 for, 6 against (*Barbulescu* v *Romania*); 4 for, 3 against (*Libert* v *France*) etc.) and changes in ECtHR decisions after appeal (e.g., in the *Barbulescu* and *Lopez Ribalda* cases). Moreover, the judges' approach is also changing over time in line with the evolution of technology, as exemplified by the judges' stricter approach in the substantially similar recent *Lopez Ribalda* case, as opposed to the approximately 10 years older *Köpke* case.[54]

Therefore, the above suggests that judges are becoming more and more stringent in assessing the permissibility of interference with a worker's right to privacy (personal data protection) by new technologies. Moreover, it is reasonable to assume that the adoption of GDPR has only accelerated this trend, as will possibly be evident from the first cases that will come before the ECtHR, where the GDPR was already in force at the time of the national proceedings. Indeed, it should be borne in mind that in all the cases discussed in this paper, the predecessor of the GDPR, Directive 95/46/EC[55], was still in force at the time of the alleged violation of worker's rights and national proceedings. In the light of all the above, there is a serious question whether the ECtHR case law in this area is clearly consolidated and whether further changes are possible in the future which will tip the balance in favour of the protection of the worker's personal data – and thus further subject the employer's exercise of covert control to legal uncertainty.

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[54] See ECtHR, Köpke v Germany, Case No. 420/07, ECLI:CE:ECHR:2010:1005DEC000042007, where the ECtHR has explicitly stated that it allows for the possibility that the conflicting interests of the worker and the employer may be given a different weight in the future (in the light of the intrusion into worker's private life by new advanced technologies.

[55] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281.

Fourth, contrary to ECtHR, CJEU has not yet developed case law in the area of worker's personal data protection in the context of employer's workplace surveillance – including the question of (im)permissibility to carry out covert surveillance (in line with GDPR) under specifically justified circumstances. Consequently, it is not yet clear whether it is possible to fully transpose the standards developed in ECtHR case law into GDPR framework. As a result, there is considerable legal uncertainty as to in which cases such covert surveillance could be found legally permissible under GDPR. However, as outlined in this article, under GDPR, the employer has several legal obligations before imposing surveillance (e.g., video surveillance, which implies the processing of worker's personal data). These are mainly related to the justification of the surveillance on an appropriate legal basis (see Article 6 GDPR), the provision of several information to workers before the imposition of the surveillance (see Articles 12 to 14 GDPR), as well as the possible mandatory performance of a DPIA. A breach of all these GDPR provisions may have serious legal consequences for employers (heavy administrative fines, damages claim, etc.). In this vein, the recent documents adopted by the Article 29 Data Protection Working Party and the European Data Protection Board do not address such exceptional cases where it would be permissible to derogate from the above GDPR requirements (transparency principle, prior notification before the start of surveillance, etc.).

Fifth, considering the aforementioned, a paradigm shift in the area of worker's personal data protection at the supranational level would be (in my view) highly desired. Meaning that in practice workers, their representatives or lawyers should not bring such cases only before the ECtHR (after exhausting national remedies), but also before the CJEU in the context of the questions referred for a preliminary ruling (during ongoing procedures on the national level). In these preliminary ruling proceedings the relevant questions regarding the interpretation of GDPR and EU Charter could be raised. It is striking that, while there have been a number of "worker's personal data protection" cases before the ECtHR, there has not yet been a single(!) case before the CJEU concerning worker' personal data protection at the workplace. Moreover, it is worth noting that, *inter alia*, *Köpke*, *Lopez Ribalda* and *Barbulescu* cases could have also been decided from an EU law perspective through a preliminary reference to CJEU – regarding the interpretation of the provisions of Directive 95/46/EC (predecessor of GDPR) and EU Charter. Why the national courts did not have recourse to a preliminary reference to the CJEU under Article 267 TFEU is also questioned by *Eklund* (2019)[56] and *Peers* (2016)[57] in the context of the *Barbulescu* case.

[56] Eklund, 2019, p. 126.

5. Conclusion

The paper addresses the issue of (im)permissibility and consequences of covert surveillance at the workplace – from ECtHR case law and GDPR perspective. In the first part the relevant ECtHR case law is examined. It follows that covert surveillance at the workplace is (under certain conditions) compliant with Article 8 ECHR – although the developments in ECtHR reasoning from case *Köpke* (2010) to case *Lopez Ribalda* (2019) show a more stringent ECtHR approach towards covert surveillance. Moreover, ECtHR itself highlighted in *Lopez Ribalda* (where there was no violation of Article 8 ECHR) that workers had (and should have resorted to) other available administrative, civil and criminal procedures (besides the employment dispute) to protect their right to personal data (privacy). Therefore, while ECtHR case law provides some guidance for possible outcomes of unjustified dismissal employment disputes – it by no means provides guaranteed guidance (without significant uncertainties) on possible outcomes of parallel administrative/punitive (administrative fines etc.) procedures for breaches of data protection rules (GDPR).
In this vein, the analysis showed that covert surveillance runs in contrast with the fundamental obligations under GDPR (transparency principle, right to prior notification etc.) and the relevant data protection guidelines issued on EU level. Consequently, since covert surveillance at the workplace has in its essence become a question of interpretation of EU law (GDPR in light of EU Charter) a paradigm shift in worker's personal data protection litigation is required – where the CJEU (instead of ECtHR) would be given the decisive role for setting new legal standards, which will be applicable in all EU Member States. Nevertheless, to achieve this turnaround, workers' representatives (legal counsel) will have to start to request the national courts to refer questions for preliminary ruling to the CJEU on these issues. It is striking that, while there have been a number of "worker's data protection" cases before the ECtHR, there has not yet been a single(!) case before the CJEU concerning worker' personal data protection at the workplace.

Bibliography:

Article 29 Data Protection Working Party, Working document on the surveillance of electronic communications in the workplace, No. 5401/01/EN/Final WP 55, 2002, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2002/wp55_en.pdf (accessed March 13, 2023).

[57] Peers, 2016.

Article 29 Data Protection Working Party, Opinion 2/2017 on data processing at work, No. 17/EN WP 249, 2017a, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610169 (accessed March 13, 2023).

Article 29 Data Protection working party, Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679, No. 17/EN, WP 248, 2017b, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611236 (accessed March 13, 2023).

J. Atkinson, Workplace Monitoring and the Right to Private Life at Work, in The Modern Law Review, 2018, vol. 81, no. 4, 688-700, https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2230.12357 (accessed March 13, 2023).

T. Bagdanskis, P. Sartatavičius, Workplace Privacy: Different Views and Arising Issues, in Jurisprudence, 2012, vol. 19, no. 2, 697–713, https://repository.mruni.eu/handle/007/11090 (accessed March 13, 2023).

P. Bhave, Devasheesh, H. Laurel Teo, S. Reeshad Dalal, Privacy at Work: A Review and a Research Agenda for a Contested Terrain, in Journal of Management, 2020, vol. 46, no. 1, 127-164, DOI: https://doi.org/10.1177/0149206319878254 (accessed March 13, 2023).

M. Brkan, Introduction: Employee's Privacy at the Forefront of Privacy Debates, in European Data Protection Law Review (EDPL), 2017, vol. 3, no. 4, 543-544, DOI: https://doi.org/10.21552/edpl/2017/4/19 (accessed March 13, 2023).

C. Calomme, Monitoring of employees' communications: ECtHR spells out positive obligations to protect employees' privacy, in European Data Protection Law Review (EDPL), 2017, vol. 3, no. 4, 545-549, DOI: https://doi.org/10.21552/edpl/2017/4/20 (accessed March 13, 2023).

Charter of Fundamental Rights of the European Union, OJ C 326, 26. 10. 2012.

M. D'Aponte, New technologies and respect for the worker's privacy in ECHR case law, in Revue de droit comparé du travail et de la sécurité sociale, 2021, no. 4, 192-203, DOI: https://doi.org/10.4000/rdctss.2718 (accessed March 13, 2023).

D. Dimitrova, Video surveillance at work in need of regulation?, in European Data Protection Law Review (EDPL), 2020, vol. 6, no. 1, 152-157, DOI: https://doi.org/10.21552/edpl/2020/1/21 (accessed March 13, 2023).

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281.

ECtHR, *Barbulescu v Romania* (Grand Chamber), Case No 61496/08, ECLI:CE:ECHR:2017:0905JUD006149608.

ECtHR, *Barbulescu v Romania* (Grand Chamber), joint dissenting opinion of Judges Raimondi, Dedov, Kjølbro, Mits, Mourou-Vikström and Eicke, Case No 61496/08, ECLI:CE:ECHR:2017:0905JUD006149608.

ECtHR, *Copland v the United Kingdom*, Case No. 62617/00, ECLI:CE:ECHR:2007:0403JUD006261700.

ECtHR, *Halford v the United Kingdom*, Case No. 20605/92, ECLI:CE:ECHR:1997:0625JUD002060592.

ECtHR, *Köpke v Germany*, Case No 420/07, ECLI:CE:ECHR:2010:1005DEC000042007.

ECtHR, *Libert v France*, Case No. 588/13, ECLI:CE:ECHR:2018:0222JUD000058813.

ECtHR, *Lopez Ribalda and Others v Spain* (Grand Chamber), Case Nos 1874/13 and 8567/13, ECLI:CE:ECHR:2019:1017JUD000187413.

ECtHR, *Lopez Ribalda and Others v Spain* (Grand Chamber), joint dissenting opinion of Judges Gaetano, Grozev, and Yudkivska, Case Nos 1874/13 and 8567/13, ECLI:CE:ECHR:2019:1017JUD000187413.

L. Edwards, L. Martin, T. Henderson, Employee Surveillance: the Road to Surveillance Is Paved with Good Intentions, Amsterdam Privacy Conference, Amsterdam, Netherlands, 2018, https://research-repository.st-andrews.ac.uk/handle/10023/17297 (accessed March 13, 2023).

J. Eichenhofer, Internet Privacy at Work the EctHR Barbulescu Judgment, in European Data Protection Law Review (EDPL), 2016, vol. 2, no. 2, 266-271,

DOI: https://doi.org/10.21552/EDPL/2016/2/23 (accessed March 13, 2023).

M. C. Eklund, Monitoring workers' e-mail correspondence and Internet use – A Finnish perspective – PART I, in European Labour Law Journal, 2019, vol. 10, no. 2, 116-133, https://journals.sagepub.com/doi/pdf/10.1177/2031952519852110 (accessed March 13, 2023).

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950, as amended by Protocols Nos. 11, 14, 15 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

European Data Protection Board, Guidelines 3/2019 on processing of personal data through video devices, Version 2.0, Adopted on 29 January 2020, 2020, https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32019-processing-personal-data-through-video_en (accessed March 13, 2023).

V. Grentzenberg, J. Kirchner, Data Protection and Monitoring, in J. Kirchner, P. R. Kremp and M. Magotsch (eds.), Key Aspects of German Employment and Labour Law: Second Edition, Springer, Berlin, 2019, 135-152.

H. A. Halefom, A pragmatic compromise? The role of Article 88 GDPR in upholding privacy in the workplace, in International Data Privacy Law, 2022, vol. 12, no. 4, 276-296, DOI: https://doi.org/10.1093/idpl/ipac015 (accessed March 13, 2023).

E. Kaiser, Monitoring Employees with Hidden Surveillance Cameras Breaches Their Right to Privacy, in European Data Protection Law Review (EDPL), 2018, vol. 4, no. 3, 396-399, DOI: https://doi.org/10.21552/edpl/2018/3/22 (accessed March 13, 2023).

T. Katsabian, Employees' Privacy in the Internet Age, in Berkeley Journal of Employment and Labor Law, 2019, vol. 40, no. 2, 203–255, DOI: https://doi.org/10.15779/Z38NG4GS3G (accessed March 13, 2023).

E. Keane, The GDPR and Employee's Privacy: Much Ado but Nothing New, in King's Law Journal, 2019, vol. 29, n. 3, 354-363, DOI: https://doi.org/10.1080/09615768.2018.1555065 (accessed March 13, 2023).

S. Klein, Libert v. France: EctHR on the Protection of an Employee's Privacy Concerning Files on Work Computer, in European Data Protection Law Review (EDPL), 2018, vol. 4, no. 2, 250-251, DOI: https://doi.org/10.21552/edpl/2018/2/16 (accessed March 13, 2023).

K. Lenaerts, I. Maselis, K. Gutman, EU procedural law, Oxford University Press, New York, 2014.

J. Letnar Černič, Realising the Charter of Fundamental Rights of the European Union in national and European fora, Dignitas, 2015, No. 65-66, 79-108, http://revije.nova-uni.si/index.php/dignitas/article/view/229 (accessed March 13, 2023).

G. Lockwood, Workplace Monitoring and Surveillance: The British Context, in Athens Journal of Law, 2018, vol. 4, no. 3, 205-228, https://www.athensjournals.gr/law/2018-4-3-1-Lockwood.pdf (accessed March 13, 2023).

L. Munteanu, M. Povey, Data Protection A Firewall between Employers and Trade Unions?, in European Data Protection Law Review (EDPL), 2022, vol. 8, no. 1, 41-51, DOI: https://doi.org/10.21552/edpl/2022/1/8 (accessed March 13, 2023).

C. Ogriseg, GDPR and Personal Data Protection in the Employment Context, in Labour & Law Issues, 2017, vol. 3, no. 2, 1-24, DOI: https://doi.org/10.6092/issn.2421-2695/7573 (accessed March 13, 2023).

S. Peers, Is Workplace Privacy Dead? Comments on the Barbulescu judgment, in EU Law Analysis, 2016, http://eulawanalysis.blogspot.com/2016/01/is-workplace-privacy-dead-comments-on.html (accessed March 13, 2023).

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, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119.

W. Schabas, The European Convention on Human Rights: A Commentary, Oxford University Press, Oxford, 2015.

S. Stanev, Monitoring of Employees' Personal Communications at Work. Practice of the ECtHR, in E-Journal of International and Comparative Labour

Studies, 2019, vol. 8, no. 1, 94-103, https://ejcls.adapt.it/index.php/ejcls_adapt/article/view/646 (accessed March 13, 2023).

A. Stone Sweet, H. Keller, The Reception of the ECHR in National Legal Orders, in A. Stone Sweet, H. Keller (eds.), A Europe of Rights: The Impact of the ECHR on National Legal Systems, Oxford University Press, New York, 2008, 3-28, DOI: https://doi.org/10.1093/acprof:oso/9780199535262.003.0001 (accessed March 13, 2023).

E. Sychenko, D. Chernyaeva, The Impact of the ECHR on Worker's Privacy Protection, in Italian Labour Law e-Journal, 2019, vol. 12, no. 2, 171-188, DOI: https://doi.org/10.6092/issn.1561-8048/10015 (accessed March 13, 2023).

Treaty on the Functioning of the European Union, OJ C 326, 26. 10. 2012.

V. Trstenjak, M. Brkan, Pravo EU: ustavno, procesno in gospodarsko pravo EU (EU law: constitutional, procedural and commercial law of the EU), GV založba, Ljubljana, 2012.

V. Turanjanin, Video Surveillance of the Employees between the Right to Privacy and Right to Property after Lopez Ribalda and Others v. Spain, in University of Bologna Law Review, 2020, vol. 5, no. 2, 268-293, DOI: https://doi.org/10.6092/issn.2531-6133/10514 (accessed March 13, 2023).

P. Voigt, A. von dem Bussche, The EU General Data Protection Regulation (GDPR): A Practical Guide, Springer International Publishing, Cham, 2017.

Towards a European Concept of Protection against Unjustified Dismissal

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Abstract: The purpose of the study is to examine trends in protection against dismissal in the field of European Union law. It aims to analyse the latest instruments, such as the EPSR and Directives 2019/1152 and 2019/1158. In this regard, it considers to what extent the new legal acts contribute to the development of a European concept of dismissal and how new realities (teleworking or artificial intelligence) affect the protection of the worker against unjustified dismissal.
The technological factor, which has been accentuated in pandemic and post-pandemic situation, will dictate the new needs for protection against dismissal. It seems clear that Article 30 CFR provides a legal basis for the development of a common concept, oriented towards protection against unjustified dismissal at EU level. Furthermore, it is relevant that a certain coherence in the approaches of different legal systems, those of the European Union, the Council of Europe and the International Labour Organisation (ILO), is ensured through the links between the CFR, the ESC (Revised) and the ILO Convention No. 158 on Termination of Employment.

Keywords: *European Union; Social Policy of the European Union; Dismissal; Unjustified Dismissal; Protection against Unjustified Dismissal.*

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1. Introduction

The institution of dismissal is one of the central aspects of labour law; therefore, this makes it crucial that it is considered as an object of approximation of legal, regulatory and administrative provisions in the field of social policy in the European Union (EU). As pointed out by M. Weiss in his study on prospects, "legislation on social minimum standards is unsystematic and fragmentary. Important areas, for example protection against unfair dismissals, are still missing. This deficiency has become particularly evident when during the management of the financial crisis in the context of the austerity strategy Member States in Southern Europe were forced to reduce their standards of dismissal protection and of minimum wage and were also forced to dismantle their collective bargaining systems"[1].

At the time of this statement, the EU had several rules that, in a way, manifest a willingness to safeguard certain common values for all Member States. Undoubtedly, its most emblematic expression is articulated in the Charter of Fundamental Rights of the European Union (CFR), in Article 30, which aims to protect against "unjustified dismissal", and Article 33(2), which aims to prevent "discriminatory" dismissal in the context of reconciliation of private and professional life. In addition, several directives establish the typology of dismissal by referring to collective dismissal, dismissal in the case of transfer of undertakings, dismissal resulting from maternity or from the exercise of various rights related to work-life balance or other employment rights protected by European legislation.

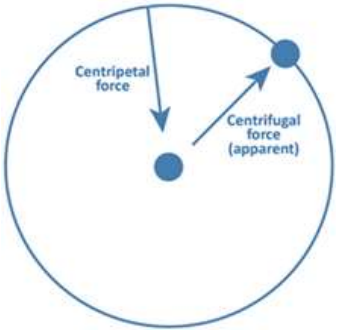
The European Pillar of Social Rights (EPSR) and the two recent directives, namely Directives 2019/1152 and 2019/1158, which have almost identical articles on the subject, provide an undeniable step towards a common model in the field of protection against unjustified dismissal. Indeed, the adoption and recent entry into force of these two instruments is one of the main *raisons d'être* of this study. Alongside this, the pandemic has accentuated the importance of the technological factor in the field of employment, including the institution of dismissal.

The key question is whether, despite these developments, M. Weiss's statement about the piecemeal and fragmentary nature of the institution in EU labour law is still relevant today. The answer to this question is provided by the methodological approach based on the analysis of centrifugal and centripetal forces (Fig. 1). The (simultaneous) action of both forces is articulated by reference to the four aspects of analysis into which the two parts of the paper

[1] Weiss, M. (2017), "The future of the labour law in Europe: rise or fall of the European social model?", *European Labour Law Journal*, vol. 8(4), p. 349.

are divided: EU objectives, competences of the institutions, legal acts, and common values. By culminating with the second set of arguments concerning centripetal forces, an optimistic and hopeful message is announced.

Figure 1. Centrifugal and centripetal forces



Source: Centripetal vs. centrifugal: what's the difference? In Busquet, M., Physics for Animators (2015), available at: https://physicsforanimators.com/centrifugal-force-useful-for-animation-but-not-really-a-thing/.

In this picture, the blue dot represents a common approach to the protection against unjustified dismissal and the arrows of centrifugal and centripetal forces, respectively the arguments against and in favour of the European conception of protection.

2. Centrifugal Forces

As shown in the image, although without claiming exact scientific explanation, the centrifugal forces are more "apparent" than real.

2.1 Objectives

The 1957 Treaty establishing the European Economic Community (TEEC) in its original version did not contain explicit references to the regulation of dismissal. In fact, European labour law was not in the agenda of the Treaty at all. The focus was exclusively on the establishment of the common market between the founding States and the philosophy of the original Treaty was based on the assumption that social progress somehow will come by itself once

the common market is established[2]. The first proposal in the social field appears in the Council Resolution of 21 January 1974 on a Social Action Programme, which provided for a directive on the approximation of the laws of the Member States relating to collective redundancies[3].
The legislative action was based on Article 100 TEC [now Article 115 of the Treaty on the Functioning of the European Union (TFEU)] and Article 117 TEC (now Article 151 TFEU). Article 100 referred to the competence of the Council to adopt, acting unanimously, directives for the approximation of such laws, regulations and administrative provisions of the Member States as directly affect the establishment or functioning of the common market; and Article 117 agreed on the need to promote the development of the common market and to improve living and working conditions in order to achieve their harmonisation through progress, and considered that such developments would result from the very functioning of the common market, which would favour the harmonisation of social systems, as well as from the procedures provided for in the Treaties and the approximation of national laws.
Thus, and this is still true today, there is a clear link between the functioning of the common market (or the internal market in today's terms[4]) and the development of social policy. From this perspective, and ultimately, protection against dismissal remains dependent on the economic factor.

2.2 Competences

Article 153 TFEU can be regarded as a cornerstone of the EU hard law competence in the field of labour and social law. Its very complicated story dates back to 1986, when Article 118 A was introduced within the TEEC by the Single European Act (SEA), for the first time providing the European institutions with an explicit competence in relation to the working environment, as regards of the health and safety of workers[5]. Then, the

[2] Weiss. M. (2015), "Introduction to European Labour Law: European Legal Framework, EU Treaty Provisions and Charter of Fundamental Rights". In: Schlachter, M. (ed), *EU Labour Law. A Commentary*, Wolters Kluwer, Alphen ann den Rijn, p. 4.
[3] *OJ* C 13, 12.2.1974.
[4] It should be noted that the present Article 151 TFEU is essentially identical to Article 136 TEC except for "Union" replacing "Community" and "internal market" replacing "common market". See, among others, "Commentary on Article 151 TFUE". In Ales, E., Bell, M., Deinert, O., Robin-Oliver, S. (eds), (2018), *International and European Labour Law. A Commentary,* Nomos, Baden-Baden; Beck, München; Hart, Oxford, and Jimena Quesada, L. (2016), *Social Rights and Policies in the European Union. New Challenges in a Context of Economic Crisis*, Tirant lo Blanch, Valencia, p. 24.
[5] See Ales, Bell, Deinert and Robin-Oliver, *op. cit.,* p. 157 and Jimena Quesada, *op. cit.,* pp. 48 and ff.

Maastricht Treaty extended qualified majority voting to several areas (only through the Agreement appended to Protocol on Social Policy, with the opt-out of the UK). However, the Protocol kept the unanimity rule for other areas, including protection of workers where their employment contracts is terminated, as well as the Amsterdam Treaty, the Nice Treaty and the Lisbon Treaty did. This requirement remains in the current wording of Article 153 TFEU. In the area of "protection of workers in the event of termination of employment contracts" [Article 153(1)(d)], among others, the Council, acting unanimously after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, decides in accordance with a special legislative procedure [Article 153(2)(b)]. Immediately after the passage quoted above, however, it is given the opportunity to decide, again by unanimity, that the legislative procedure shall be the ordinary legislative procedure.

2.3 Legal acts

It is significant that the first piece of legislation on dismissal was conceived in the context of the approximation of national legislation in order to better achieve the objectives of the common market. Thus, in the search of greater clarity and rationality, Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies[6] was adopted, as amended by Directive 92/56/EC[7], the successor to which is Directive 98/59/EC[8]. The latter states that "despite increasing convergence, differences still remain between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers"[9].

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[6] *OJ* L 48, 22. 2. 1975. It seems that Directive 75/129/EEC was agreed by the Council of Ministers as a part of the 1974-6 Social Action Programme, and, according to Blanpain, it had its origins in the conduct of AKZO, a Dutch-German multinational enterprise which wanted to make 5000 workers redundant. See Barnard, C. (2012), *EU Employment Law*, 4th Revised Edition, Oxford University Press, Oxford, p. 629.

[7] *OJ* L 245, 26.8.1992.

[8] *OJ* L 225, 12.8.1998.

[9] *OJ* L 225, 12.8.1998, p. 16. See Tiraboschi, M. (2022), "The Origins of a New European and International Legal Culture". In *Manfred Weiss. A Legal Scholar without Borders. Selected Writings and Some Reflections on the Future of Labour Law*, ADAPT University Press, p. 27.
The diversity of approaches in the national legislation of the Member States can be illustrated by the example of the recent question referred for a preliminary ruling by the *Tribunal Superior de Justicia de Cataluña* (High Court of Justice of Catalonia) whether "the Spanish legislation (Article 49(1)(e) of *Real Decreto Legislativo 2/2015 por el que se aprueba el texto refundido de la Ley del*

Moreover, the only specific Directive on dismissals merely lays down a set of procedural rules and does not require the existence of a justifiable cause for dismissals. Thus, it deals with a legal act that does not cover possible contractual terminations that merit the qualification of "unjustified dismissals"[10]. In the absence of such an explicit provision, this is left to the "national laws and practices" of the Member States. And, although European minimum requirements are very few, national legislations are obliged to establish a specific system of protection against "unjustified" dismissals[11].

Alongside the Directive on collective redundancies, and without being exhaustive, reference can be made to other directives which provide for protection against dismissal: Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[12], 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, who have recently given birth or are breastfeeding[13], and the more recent Directive (EU)

Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Law on the Workers' Statute) of 23 October 2015), which does not establish a period of consultation in situations where contracts of employment in excess of the number laid down in Article 1 of that directive are terminated as a result of the retirement of the natural person employer, compatible with Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies". Case C-196/23 lodged on 24 March 2023.

[10] Cruz Villalón, J. (2012), "La intervención de la Unión Europea en materia de despido". En: Cruz Villalón, J. (ed.), *La regulación del despido en Europa. Régimen formal y efectividad práctica*, Tirant lo Blanch, Valencia, p. 33.

[11] *Ibid.*

[12] *OJ* L 82, 22.3.2001. In the context of Directive 2001/23/EC, which recast Directives 77/187/EEC and 98/50/EC, it is noted that the lawfulness of dismissals on economic grounds may be called into question in the case of a transfer of business within the meaning of that Directive. The transfer does not in itself constitute grounds for dismissal. Seifert, A. (2019), "Descentralización productiva y el derecho del trabajo alemán", *Doc. Labor.*, n.º 118, p. 120.

As Arastey Sahún states, the aim is to provide a double guarantee: that the workers affected by the change cannot be dismissed as a consequence or occasion of the change and also that their working conditions are not modified. Arastey Sahún, M. L. (2005), "La protección por despido en la Constitución Europea", *Revista del Ministerio de Trabajo y de Asuntos Sociales*, n.º 57, pp. 368-369.

[13] It deals with the tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), *OJ* L 348, 28.11.1992, as amended by Directive 2007/30/EC, Directive 2014/27/EU and Regulation (EU)2019/1243. See, inter alia, Ushakova, T. (2015), "Protecting the Pregnant Women against Dismissal: Subjective and Objective Components in EU Law", In: Mella Méndez, L., Serrani, L. (eds.), *Work-Life Balance and the Economic Crisis. Some Insights*

2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union[14], and Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on reconciling family life and working life for parents and carers and repealing Council Directive 2010/18/EU[15].

Generally speaking, most of the provisions on dismissal are placed in two contexts: protection against unjustified dismissal, in particular in the process of collective redundancies and in the case of transfer of undertakings, and protection against dismissal in the area of reconciliation of family and working life. The distinction between "unjustified" dismissal in relation to "objective" dismissal and "discriminatory" dismissal makes it difficult to establish common criteria for protection. Thus, it follows from the case law of the CJ that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex[16], and thus requires enhanced protection[17].

In this regard, it should be noted that the directive has always been the most suitable instrument for operating in the field of shared competences [Article 4(2)(b) TFEU], in particular because of its legal nature: its binding force is based on the "result" element, while it is up to the national authorities to choose the "form and means". Thus, Article 153(2)(b) TFEU provides for the

from the Perspective of Comparative Law, vol. II. ADAPT, Cambridge Scholars Publishing, Cambridge, pp. 93-121.

[14] *OJ* L 186, 11.7.2019.

[15] *OJ* L 188, 12.7.2019.

[16] See, Directive 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, 26.7.2006. It states that "[i]t is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive" (Paragraph 23 of Directive 2006/54/EC).

"For the purposes of this Directive, discrimination includes: [...] any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC" [Article 2(2)(c)].

[17] In this connection, one of the recent questions for a preliminary ruling concerns "whether the German national provisions of Paragraphs 4 and 5 of the Kündigungsschutzgesetz (Law on protection against dismissal; 'the KSchG'), according to which a woman who, as a pregnant woman, enjoys special protection against dismissal must also mandatorily bring an action within the time limits laid down in those provisions in order to retain that protection, are compatible with 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 individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC". Case C-284/23, Request for a preliminary ruling lodged on 2 May 2023.

adoption of directives, minimum requirements to be applied progressively, taking into account the conditions and technical regulations of each Member State.

2.4 Common Values

Article 151 TFEU, which contains one of the fundamental precepts for the development of EU social policy, also provides that, in taking appropriate action, the Union and the Member States shall consider the diversity of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the economy.

As the study prepared by the European Commission shows, "Member States' regulations appear highly heterogeneous, even within groups of countries with similar socioeconomic characteristics. The biggest differences in employment protection legislation across the EU are in the regime for dismissing people on regular contracts. The differences relate not only to the legislation's stringency but also the instruments to protect workers against dismissal. The greatest differences concern the definition of fair and unfair dismissal and the related remedies"[18]. This being the case, protection against dismissal remains linked to the national legal systems and depends on the regulation of dismissal in each State.

It is important to note that the law on the protection against dismissal at the international level is quite recent. At the European regional level, the Community Charter of Fundamental Social Rights of Workers, of 1989, and the European Social Charter (ESC) of 1961 are silent on this issue. At the universal level, the first instrument specially dealing with termination of employment was the ILO Recommendation No. 119 of 1963 (now replaced by Recommendation No 166). The ILO Convention No. 158[19] and, particularly, Article 24 of the ESC (Revised), of 1996, still not ratified by all the Member States of the EU[20], served as sources of inspiration for Article 30 CFR[21].

[18] European Commission (2017), *Employment Protection Legislation*, European Semester Thematic Factsheet. European Commission, Brussels, 17.10.2017, p. 10.

[19] The C 185, Termination of Employment Convention, adopted on 22 June 1982 and in force from the 23 November 1985, has been ratified by only 36 State, barely one third of the EU Member States. See, inter alia, Servais, J.-M. (2020), *International Labour Law*, Wolters Kluwer, Alphen ann Rijn, pp. 164 and ff.

[20] Not (yet) ratified by Croatia, Czech Republic, Denmark, Luxembourg and Poland. "Signatures and ratifications of Treaty 163" available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=163.

The doctrine points certain obstacles to the application of Article 30 by the CJEU[22]. Firstly, the CFR does not bind States unless they are implementing EU Law. In this sense, Article 51 determines the scope of the Charter. It seeks to establish clearly that the CFR applies primarily to the institutions and bodies of the Union. As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law[23]. Article 51(2) also confirms that the Charter may not have the effect of extending the field of application of Union law[24].

Secondly, it deals with so called "justiciability" of certain rights. According to the well-known and broadly discussed Opinion of Advocate General Cruz Villalón, delivered on 18 July 2013 in *AMS* case[25], there would be a strong presumption that the fundamental rights set out in Title IV "Solidarity" of the Charter belong to the category of "principles"[26]. This promotion and

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See about common principles of dismissal law found in Article 24 of the ESC (Revised) in Van Voss, G. H. and Ter Haar, B. (2012), "Common Ground in European Dismissal Law", *European Labour Law Journal*, vol. 3 (3), pp. 221-223.

[21] Explanation on Article 30 — Protection in the event of unjustified dismissal. "This Article draws on Article 24 of the revised Social Charter. See also Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC". Explanations relating to the Charter of Fundamental Rights. *OJ* C 303, 14.12.2007, p. 26.

[22] See Ales, Bell, Deinert and Robin-Oliver, *op. cit.,* pp. 945-946.

[23] In its Explanations on Articles of the Charter, the Praesiduim quoted the following cases: Judgment of 13 July 1989, Case C-5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493. Explanations relating to the Charter of Fundamental Rights. *OJ* C 303, 14.12.2007, p. 32.

[24] *OJ* C 303, 14.12.2007, p. 32. In the same vein, Article 6(1) TEU confirms that "[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".

[25] See Judgment of 15 January 2014, Case C-176/12 *AMS* and Opinion of Advocate General Cruz Villalón delivered on 18 July 2013 in *AMS* case.

[26] See Delfino, M. (2015), "The Court and the Charter. A "Consistent" Interpretation of Fundamental Social Rights and Principles", *European Labour Law Journal*, vol. 6(1), p. 89.

"There is also a systematic argument. The group of rights included under the title 'Solidarity' incorporates mainly rights regarded as social rights with respect to their substance, for the content of which a form of wording such as that in Article 27 is preferred. That means that there is a strong presumption that the fundamental rights set out in that title belong to the

transformation can be carried out by acts of "implementation" to which Article 52(5) refers, i.e., "legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law". Therefore, a principle must be implemented through a secondary source of EU law[27]. In any case, the CJ concluded that those Articles (in that case, Article 27) could not be invoked in a dispute between individuals in order to disapply the national provision.

The Court also systematically excluded the application of Article 30[28], until the *AGET Iraklis* case[29]. In this case, the CJ reaffirms the idea of the exercise of the employer's power in its analysis of Article 30 in conjunction with Article 16 FDC, namely the protection against unjustified dismissal in relation to the freedom to conduct a business[30]. In this respect, it points out, inter alia, that, in the redundancy procedure, "the employer's freedom to carry out collective redundancies or not"[31] is not affected since the Directive does not specify "the circumstances in which the employer must consider making collective redundancies" and does not affect his freedom to decide whether and when to draw up a plan for collective redundancies[32]. However, it is noted that the conclusion could have been different if the application of national legislation, which in principle is not in conflict with Directive 98/59, had been to deprive that instrument of its useful effect.

category of 'principles'". Paragraph 55 of the Opinion. "The authors of the Charter relied on the experience of some Member States, where a similar distinction had allowed full justiciability of 'rights' and a reduced, or in some cases, no justiciability of 'principles'". Paragraph 47 of the Opinion.

[27] Delfino, Loc. cit., p. 89.

[28] For example, in its judgment of 5 February 2015 in *Poclava* case, C-117/14, the Court states that "[i]t should be recalled that, so far as actions of the Member States are concerned, the scope of the Charter is defined in Article 51(1) thereof, under which the provisions of the Charter are addressed to the Member States only when they are implementing EU law" (Paragraph 28). More references are available at: Ales, Bell, Deinert and Robin-Oliver, *op. cit.,* p. 946.

[29] Judgment of 21 December 2015 (Grand Chamber), Case C-201/15.

[30] See the more detailed analysis of the case in García-Perrote, I. (2018), "La aplicación por el Tribunal de Justicia de la Unión Europea de la Directiva sobre despidos colectivos y su repercusión en el Derecho español", *Actualidad Jurídica Uría Menéndez,* n.º 49, pp. 172 and ff.

[31] Paragraph 30.

[32] Paragraph 31.

3. Centripetal Forces

3.1 Objectives

Today, there is no doubt about a strong link between the functioning of the internal market and the development of social policy. As Scelle makes clear, the quarrel between the "economic" and the "social" is more theoretical than practical, and it must be resolved according to common sense[33]. The social aspect of the European integration process is reinforced in the famous passage of the CJ in the *Defrenne II* case, which emphasises the social objectives of the Community, describing it not merely as an economic union but, at the same time, as an engine for common action "to ensure social progress and seek the constant improvement of the living and working conditions of their peoples"[34]. Article 153(1)(d), which refers to protection "in the event of termination of the employment contract", is located in Title X on social policy. Intervention in this area must be linked to Article 3(3) TEU, which promotes the objective of an internal market and, together with EU action to achieve a highly competitive social market economy, is aiming at full employment and social progress. The Lisbon Treaty highlights the so-called "horizontal clauses". In this sense, in the definition and implementation of EU policies, they call for taking into account equality between men and women (Article 8 TFEU) and the promotion of a high level of employment and the guarantee of adequate social protection (Article 9 TFEU). As Anderson points out, the "horizontal social clause" of Article 9 is one of the promising examples of recent development of primary legislation that "the future of the European social model may be based on stronger principle of social solidarity"[35].

[33] "C'est également à la lumière du bon sens qu'il faut résudre le probléme, heureusment plus théorique que pratique, de la distinction entre le domaine social et le domaine économique". See Scelle, G. (2020), *L'organisation internationale du travail et le BIT*, Dalloz, Paris, pp. 86-87.

[34] Paragraph 10 of the Judgment of 8 April 1976, Case C-43/75 *Defrenne II*. It should be noted that there are three judgments related to the *Defrenne* case, namely: judgment of 25 May 1971, C-80/70; judgement of 8 April 1976, C-43/75, mentioned above, and judgment of 15 June 1978, C-149/77.

Recently, the EU reinforced the commitment to the focal point of these landmark rulings on equality in the Directive 2023/970 of the European Parliament and the Council, of 10 May 2023, to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, *OJ* L 132, 17.5.2023.

[35] Anderson, C. (2015), *Social Policy in the European Union*, Palgrave, London, p. 220.

3.2 Competences

As stressed above, a significant step to ensure common action was taken with the adoption of the SEA, which introduced Article 118 A within the TEEC, thus, for the first time providing the European institutions with an explicit competence in the employment field.
As is well known, the original Treaty of Rome only referred to the European Commission's task of promoting closer cooperation between Member States in certain social areas, "making studies, delivering opinions and arranging consultations" (Article 118 TEEC).
Article 118 A focused on "the working environment, as regards the health and safety of workers", which therefore was placed at the centre of the EEC's social commitment. In order to help to achieve this objective, the Council could act by a qualified majority adopting directives that include minimum requirements to be gradually implemented, having regard for conditions and technical rules present in each Member State.
The Maastricht and Amsterdam treaties opened the way for a wider material scope for intervention by the European institutions. Thus, the former Article 137 TEC [at present Article 153(1)(d) TFEU] for the first time expressly provided for the competence to adopt directives concerning "the protection of workers in the event of termination of employment contracts".
Although Article 153(2)(b) TFEU requires the decision under a special legislative procedure by unanimity in the area of workers' protection in the case of contract recession, it is also true that the Council can unanimously agree on the application of the ordinary legislative procedure in the same area.

3.3 Legal acts

Despite the unanimity required and the dispersion of protection against dismissal in different frameworks, the most recent directives point to a common approach in this respect by introducing horizontal provisions. In essence, it is "about brining rules closer together by defining common minimum standards"[36]. Thus, Directive 2019/1158 extends protection not only to pregnant workers, workers who have recently given birth or are breastfeeding, but also to workers exercising their right to take leave or flexible

[36] See Tiraboschi, M. (2022), "The Origins of a New European and International Legal Culture", In *Manfred Weiss. A Legal Scholar without Borders. Selected Writings and Some Reflections on the Future of Labour Law*, ADAPT University Press, p. 27.

working arrangements[37]. In almost identical terms, Directive 2019/1152 also lays down horizontal protection provisions which, inter alia, require Member States to take the necessary measures to protect against dismissal or its equivalent, as well as any act preparatory to dismissal of workers for having exercised the rights set out in the Directive[38].

Table 1. Protection from dismissal and burden of proof

Article 12 (Directive 2019/1158)	**Article 18 (Directive 2019/1152)**
Protection from dismissal and burden of proof 1. Member States shall take the necessary measures to prohibit the dismissal and all preparations for the dismissal of workers, on the grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6, or have exercised the right to request flexible working arrangements referred to in Article 9. 2. Workers who consider that they have been dismissed on the grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6, or have exercised the right to request flexible working arrangements as referred to in Article 9, may request the employer to provide duly substantiated reasons for their dismissal. With respect to the dismissal of a worker who has applied for, or has taken, leave provided for in Article 4, 5 or 6, the employer shall provide reasons for the dismissal in writing. 3. Member States shall take the measures necessary to ensure that where workers who consider that they have been dismissed on the grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6 establish, before a court or other	Protection from dismissal and burden of proof 1. Member States shall take the necessary measures to prohibit the dismissal or its equivalent and all preparations for dismissal of workers, on the grounds that they have exercised the rights provided for in this Directive. 2. Workers who consider that they have been dismissed, or have been subject to measures with equivalent effect, on the grounds that they have exercised the rights provided for in this Directive, may request the employer to provide duly substantiated grounds for the dismissal or the equivalent measures. The employer shall provide those grounds in writing. 3. Member States shall take the necessary measures to ensure that, when workers referred to in paragraph 2 establish, before a court or other competent authority or body, facts from which it may be presumed that there has been such a dismissal or equivalent measures, it shall be for the employer to prove that the

[37] See Ballester Pastor, M. A. (2019), "De los permisos parentales a la conciliación: Expectativas creadas por la Directiva 2019/1158 y su transposición al ordenamiento español", *Derecho de las Relaciones Laborales. Monográfico,* n.º 11, pp. 1129 and ff.

[38] Rodríguez-Piñero Royo, M. (2019), "La Directiva 2019/1152, relativa a las condiciones laborales transparentes y previsibles en la Unión Europea", *Derecho de las Relaciones Laborales, Monográfico,* n.º 11, pp. 1105-1106.

competent authority, facts capable of giving rise to a presumption that they have been dismissed on such grounds, it shall be for the employer to prove that the dismissal was based on other grounds. 4. Paragraph 3 shall not prevent Member States from introducing rules of evidence which are more favourable to workers. 5. Member States shall not be required to apply paragraph 3 to proceedings in which it is for the court or competent body to investigate the facts of the case. 6. Paragraph 3 shall not apply to criminal proceedings, unless otherwise provided by the Member States.	dismissal was based on grounds other than those referred to in paragraph 1. 4. Paragraph 3 shall not prevent Member States from introducing rules of evidence which are more favourable to workers. 5. Member States shall not be required to apply paragraph 3 to proceedings in which it is for the court or other competent authority or body to investigate the facts of the case. 6. Paragraph 3 shall not apply to criminal proceedings, unless otherwise provided by the Member State.

Source: Author's Own Elaboration, 2024.

Firstly, protection is envisaged which refers not only to dismissal, but also to "its equivalent" and to the "preparatory act", "which should include terminations of contract on other grounds (temporary contracts, probationary period)"[39]. As advanced in recital 43, an "equivalent act" could consist of a worker no longer being assigned work on demand.

Secondly, as on other occasions, the European legislator continues to relay on "causal" dismissal, stating that the employer must provide information on "duly substantiated grounds". Thus, Continental European countries, in particular Germany, Italy and the Netherlands, following the "Rhineland Model", traditionally stand for high standards of dismissal protection. This contrasts with the "Anglo-Saxon Model", which is characterised by a weaker protection against dismissal and allows employers to terminate employment contracts more or less at will[40].

Sometimes, national legislation emphasises this commitment even when European legislation does not explicitly mention it. This fact is highlighted in the judgment of 22 June 2022[41]. The CJ ruled on the question of whether the

[39] Rodríguez-Piñero Royo, Loc. cit., p. 1106.

[40] See Bij de Vaate, V. (2016), "Achieving flexibility and legal certainty through procedural dismissal law reforms: The German, Italian and Dutch solutions", *European Labour Law Journal*, vol. 8(1), pp. 7-8.

[41] Judgment of 22 June 2022, in Case C-534/20. The CJ ruled on the question of whether the second sentence of Article 38(3) of Regulation (EU) 2016/679 (GDPR) allows for the applicability of the German provisions governing the termination of a data protection officer's (DPO) employment pursuant to Paragraph 38 (2) and Paragraph 6 (4) sentence 2 Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG). According to the CJ, the German

GDPR allows for the applicability of the German provisions governing the termination of a data protection officer's (DPO) employment and decided that the provisions, under which a DPO's employment may only be terminated for just cause, even if the termination is not related to the performance of his or her duties, in principle do not conflict with EU law.

Furthermore, Article 10(2) of Directive 92/85 refers to the need for "justified reasons" provided in writing. In the *Porras Guisado* case[42], unlike its very abundant judicial practice on the protection of pregnant women, the CJ has not interpreted Directive 92/85 together with Directive 2006/54. Rather, it looked at the criteria applied by the company (Bankia) to carry out the collective redundancy. It was the result of the assessment process carried out in the entity, which was specified during the consultation, and in which the assessment of the worker in question, who was among those with the lowest scores, was incorporated as part of the agreement[43].

Thirdly, the burden of proof is distributed and not reversed, as would have been desirable[44], indicating that the employee has to provide facts that allow the assumption of unjustified dismissal or an equivalent act and, consequently, the employer is obliged to record the causes that are different from the exercise of the rights protected by the Directive. In this respect, the Member States are allowed to establish a more favourable evidentiary regime for the employee, for example by admitting prima facie evidence (indications). Thus, if the investigation of the facts is the responsibility of the courts or other competent bodies, the provision on the burden of proof does not apply. Moreover, criminal proceedings are excluded from the evidentiary scope.

A hopeful message in this respect is also conveyed by Article 23 "Protection from dismissal or termination of contract" of the Proposal for a Directive on improving working conditions in platform work, which consolidates the purpose of moving towards a horizontal arrangement of protection[45].

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provisions, under which a DPO's employment may only be terminated for just cause, even if the termination is not related to the performance of his or her duties, in principle do not conflict with EU law. See a more dilated analysis by Niemann, F., Albermann, T. (2022), "ECJ ruling: German provisions governing the termination of a data protection officer's employment are compatible with EU law, but subject to restrictions", available at: https://www.twobirds.com/en/insights/2022/germany/deutscher-kuendigungsschutz-fuer-datenschutzbeauftragte-ist-grundsaetzlich-mit-eu-recht-vereinbar [Accessed 20 July 2022].

[42] Judgment of 20 February 2018, *Porras Guisado* Case C-103/16.

[43] Paragraph 21.

[44] Miranda Boto, J. M. (2019), "Algo de ruido. ¿Cuántas nueces? La nueva directiva (UE) 2019/1152, relativa a relativa a unas condiciones laborales transparentes y previsibles en la Unión Europea y su impacto en el derecho español", *Temas Laborales,* n.º 149, p. 99.

[45] Proposal for a Directive of the European Parliament nad of the Council on improving working conditions in platform work, submitted by the Commission on 9 December 2021

The proposal for a Directive on the right to disconnect[46], which provides for protection against dismissal and other unfavourable measures by employers on the grounds that workers have exercised or attempted to exercise their rights (Article 5), points in the same direction. In line with Directives 2019/1152 and 2019/1158, it calls on States to safeguard the interests of workers in the sense that "where ... they consider that they have been dismissed ... because they have exercised or attempted to exercise their right to disconnect, they establish, before a court or other competent authority, facts from which it may be presumed that they have been dismissed or have suffered unfavourable

[COM(2021) 762 final]. According to the text as contained in the European Parliament legislative resolution of 24 April 2024 on the proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work [COM(2021)0762 – C9-0454/2021 – 2021/0414(COD)]. Its Article 23 "Protection from dismissal" reads:

"1. Member States shall take the necessary measures to prohibit the dismissal, termination of contract or their equivalent and all preparations for dismissal, termination of contract or their equivalent of persons performing platform work, on the grounds that they have exercised the rights provided for in this Directive.

2. Persons performing platform work who consider that they have been dismissed, their contract has been terminated or have been subject to measures with equivalent effect, on the grounds that they have exercised the rights provided for in this Directive, may request the digital labour platform to provide duly substantiated grounds for the dismissal, termination of contract or any equivalent measures. The digital labour platform shall provide those grounds in writing without undue delay.

3. Member States shall take the necessary measures to ensure that, when persons performing platform work referred to in paragraph 2 establish, before a court or other competent authority or body, facts from which it may be presumed that there has been such a dismissal, termination of contract or equivalent measures, it shall be for the digital labour platform to prove that the dismissal, termination of contract or equivalent measures were based on grounds other than those referred to in paragraph 4. Member States shall not be required to apply paragraph 3 to proceedings in which it is for the court or other competent authority or body to investigate the facts of the case.

5. Paragraph 3 shall not apply to criminal proceedings, unless otherwise provided by the Member State".

[46] Cited by European Parliament Resolution of 21 January 2021 calling on the Commission to prepare a directive "that enables those who work digitally to disconnect outside their working hours". [2019/2181(INL)], available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_ES.html#title1 [Accessed 15 May 2024]. See, inter alia, a critical analysis on the resolution by Rojo Torrecilla, E. (2021), "Sobre el derecho a la desconexión digital en el trabajo … y sobre los intentos de devaluar la importancia del diálogo social europeo y su trascendencia jurídica. A propósito de la Resolución del Parlamento Europeo de 21 de enero de 2021 (y unas notas sobre las conclusiones del abogado general del TJUE en el asunto C-928/19)", of 1 February 2021, available at: http://www.eduardorojotorrecilla.es/2021/02/sobre-el-derecho-la-desconexion-digital.html [Accessed 22 July 2022].

treatment, it shall be for the employer to prove that the dismissal or unfavourable treatment was based on other grounds".
In analogous way, the impact of artificial intelligence (AI) may be of interest. In this regard, the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules in the field of artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts warns about the "high risk of AI systems" for recruitment and selection of staff and for making decisions on promotion and termination of contracts[47].

3.4 Common values

One of the most important effects of the Lisbon reform is to make the CFR legally binding. The Charter refers to protection in the event of unjustified dismissal (Article 30) and in the context of reconciliation of family and professional life [Article 33(2)], which, in a way, reflects the dual configuration of protection against dismissal in the EU. In Bercusson's words, European labour law embodied in the Charter potentially acquires a constitutional character[48], and the CJEU's legitimate and challenging function will be to interpret and clarify the vague notions of the Charter, thereby acting as a true Constitutional Court[49].
In this sense, we can observe a certain similarity in the intention to make visible the common values of the Union in the Charter and the most recent initiative, the EPSR. The latter was also solemnly proclaimed, as was the CDF in 2000. Among its twenty principles, the European Pillar incorporates Principle 7 "Information on working conditions and protection in the event of dismissal". However, unlike in the case of the Charter, protection in the event

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[47] "AI systems used in employment, workers management and access to self-employment, in particular for the recruitment and selection of persons, for making decisions *affecting terms of the work related relationship* promotion and termination *of work-related contractual relationships for allocating tasks on the basis of individual behaviour, personal traits or characteristics and for* monitoring or evaluation of persons in work-related contractual relationships, should also be classified as high-risk, since those systems may have an appreciable impact on future career prospects, livelihoods of those persons *and workers' rights*". Cited by the Position of the European Parliament adopted at first reading on 13 March 2024 with a view to the adoption of Regulation (EU) 2024/… of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), Paragraph 57.
[48] Bercusson, B. (2012), *European Labour Law*, 2nd Edition, Cambridge University Press, Cambridge, p. 11.
[49] Weiss, "Introduction to European Labour Law …", p. 17.

of dismissal is not an independent principle, but a shared one under the same umbrella as the right to information of workers. It thus points to the future development, concerning transparent and predictable working conditions, brought about by Directive 2019/1152.
It is worth recalling Hepple's visionary message in relation to Article 30 CFR, which, in the context of the financial and economic crisis, conveyed hope for future Commission proposals on the subject. "In the longer term, it has the potential to contribute to a change in the culture of European labour law, from a defence against market fundamentalism into a pillar of social and labour rights"[50].

4. Final Considerations

In line with the ideas put forward at the beginning of this study, the centripetal forces, which ensure the construction of a European model of protection against unjustified dismissal, need to be privileged.
Centrifugal forces undoubtedly hinder this objective, although, as Figure 1 shows, these forces are more "apparent" or, if you like, more formal than real. Among the factors preventing the development of a common approach are: the opposition between economic and social interests, which often tips the balance in favour of the former; the difficulties involved in the distribution of competences between the EU and its Member States in the area of shared competences; the requirement for unanimity of decision in the area of workers' protection in the case of the recession of the employment contract; the differences in the configuration and typology of dismissal in the national legislation.
It is clear that protection against dismissal depends on the concept of dismissal in each legal system, as the European Commission demonstrates in its study. It is worth noting that the definition of dismissal can have different connotations even within one legal system. For example, in Spain, dismissal is approached from the perspective of the exercise of the employer's power[51], but admits the range of precisions from the act of private self-tutelage (*el acto de la autotutela privada)*, according to Gil Gil[52], to the violence of private power (*la violencia del poder privado*) noted by Baylos and Pérez Rey[53].

[50] Hepple, B. (2012), "Dismissal Law in Context", *European Labour Law Journal*, vol. 3(3), p. 154.
[51] Desdentado Bonete, A. (2017), " Resolución del contrato de trabajo y concurso. Un recorrido por la jurisprudencia", *Revista Española de Derecho del Trabajo,* n.º 196, pp. 55-82.
[52] Gil y Gil, J. L. (1994), *Autotutela privada y poder disciplinario en la empresa*, Centro de Publicaciones del Ministerio de Justicia, Madrid, pp. 33 and ff., and Gil y Gil, J. L. (2011), "El

In any case, at international (ILO) and European (Council of Europe, EU) level, the doctrine generally assumes that dismissal is a termination of employment at the initiative of the employer. Moreover, the design of protection is based on the premise that such a decision must be justified. It thus adopts the predominant European model of dismissal based on cause, in contrast to the US model of termination of employment at will. In this sense, Article 30 CFR ensures, dare we say, in general, protection against unjustified dismissal[54].

The directives, in particular Article 18 of the Directive 2019/1152 and Article 12 of the Directive 2019/1158 (See Table 1), transpose the horizontal provisions on the prohibition of dismissal on grounds related to the exercise of rights into their relevant spheres. Thus, employees "may request the employer to duly substantiate the grounds for dismissal". Thus, the requirement to state the reasons for dismissal applies both in the area of "objective" dismissal (e.g., in the case of collective dismissal, indicating the selection criteria) and in the area of "discriminatory" dismissal (e.g., dismissal of the pregnant woman, to show that it is not related to the fact of pregnancy).

Moreover, and this is particularly true in individual cases, the aim is to protect not only against unjustified dismissal, but also against any preparation for dismissal. Such preparatory acts can manifest themselves in different ways, for example, in the non-assignment of work to an employee on demand.

The directives also refer to the burden of proof, stating that, if the employee establishes the facts relating to the dismissal due to the exercise of his or her rights, the employer must prove the duly justified reasons. In this sense, the burden of proof can vary, from the more moderate approach of distribution, to the more extreme one of inversion, as is the case in some national systems, in order to protect against "discriminatory" dismissal. This is even more so as the directives do not preclude the evidentiary regime more favourable to the employee.

Undoubtedly, all of the above presupposes the existence of an effective remedy for unjustified dismissal, which, if it has been found as such by the competent administrative or jurisdictional body, implies reparation measures. In this respect, Principle 7 of the EPSR adds the requirement of a reasonable period of notice, the right to access to effective and impartial dispute

concepto de despido disciplinario", Capítulo VII. En: Sempere Navarro, A. V. (dir.) y Martín Jiménez, R. (coord.), *El contrato de trabajo*, vol. IV, Aranzadi, Cizur Menor, pp. 278 and ff.

[53] Baylos, A., Pérez Rey, J. (2009), *El despido o la violencia del poder privado,* Editorial Trotta, Madrid.

[54] Article 30 has potentially a much broader scope then that which is attributed to it in the Explanatory report drafted by the Praesidium of the European Convention. See Ales, Bell, Deinert and Robin-Oliver, *op. cit.,* p. 945.

resolution and, in the event of unjustified dismissal, the right to redress, including compensation.
In order to make further progress in shaping a common model of protection against unjustified dismissal, first and foremost, the European legislator has to continue to transpose horizontal provisions in this respect into employment or employment-related legislation. Such a dynamic stems from Article 9 TFEU and Principle 7 of the EPSR and has had its precedents in Directives 2019/1152 and 2019/1158. In addition, the yet undiscovered potential of Article 30 CFR needs to be explored.
Similarly, the social dimension of the EU needs to be strengthened, in particular by overcoming the contradictions surrounding the adjective "social"[55] and unanimity voting in the area of dismissal. At least in the sense of the horizontal clause of Article 9 TFEU, the social dimension of the Union puts under the same roof the fight against social exclusion, which involves shared competences and the ordinary legislative procedure with decision-making by qualified majority; social protection subject to the special legislative procedure with unanimous decision-making and training which falls within the scope of complementary competences [Article 6(e) TFEU].
Finally, the shaping of the common model of protection against unjustified dismissal in the EU contributes to greater coherence of European and international labour law, with the notable precedents of ILO Convention No. 158 and Article 24 of the ESC (Revised).

5. Bibliography

Ales, E., Bell, M., Deinert, O., Robin-Oliver, S. (eds) (2018), *International and European Labour Law. A Commentary*, Nomos, Baden-Baden; Beck, München; Hart, Oxford.

Anderson, C. (2015), *Social Policy in the European Union*, Palgrave, London.

Arastey Sahún, M. L. (2005), "La protección por despido en la Constitución Europea", *Revista del Ministerio de Trabajo y de Asuntos Sociales*, n.º 57, pp. 367-382.

Ballester Pastor, M. A. (2019), "De los permisos parentales a la conciliación: Expectativas creadas por la Directiva 2019/1158 y su transposición al ordenamiento español", *Derecho de las Relaciones Laborales. Monográfico,* n.º 11, pp. 1109-1132.

[55] See Jimena Quesada, *op. cit.,* p. 49.

Barnard, C. (2012), *EU Employment Law*, 4th Revised Edition, Oxford University Press, Oxford.

Baylos, A., Pérez Rey, J. (2009), *El despido o la violencia del poder privado,* Editorial Trotta, Madrid.

Bercusson, B. (2012), *European Labour Law*, 2nd Edition, Cambridge University Press, Cambridge.

Bij de Vaate, V. (2016), "Achieving flexibility and legal certainty through procedural dismissal law reforms: The German, Italian and Dutch solutions", *European Labour Law Journal*, vol. 8(1), pp. 5-27.

Blanpain, R. (2014), *European Labour Law*, Wolters Kluwer, Alphen ann Rijn.

Cruz Villalón, J. (2012), "La intervención de la Unión Europea en materia de despido". En: Cruz Villalón, J. (ed.), *La regulación del despido en Europa. Régimen formal y efectividad práctica*, Tirant lo Blanch, Valencia, pp. 17-39.

Delfino, M. (2015), "The Court and the Charter. A "Consistent" Interpretation of Fundamental Social Rights and Principles", *European Labour Law Journal*, vol. 6(1), pp. 86-99.

Desdentado Bonete, A. (2017), "Resolución del contrato de trabajo y concurso. Un recorrido por la jurisprudencia", *Revista Española de Derecho del Trabajo,* n.º 196, pp. 55-82.

European Commission (2017), *Employment Protection Legislation*, European Semester Thematic Factsheet. European Commission, Brussels, 17.10.2017.

García-Perrote, I. (2018), "La aplicación por el Tribunal de Justicia de la Unión Europea de la Directiva sobre despidos colectivos y su repercusión en el Derecho español", *Actualidad Jurídica Uría Menéndez*, n.º 49, pp. 169-188.

Gil y Gil, J. L. (1994), *Autotutela privada y poder disciplinario en la empresa*, Centro de Publicaciones del Ministerio de Justicia, Madrid.

Gil y Gil, J. L. (2011), "El concepto de despido disciplinario", Capítulo VII. En: Sempere Navarro, A. V. (dir.) y Martín Jiménez, R. (coord.), *El contrato de trabajo*, vol. IV, Aranzadi, Cizur Menor, pp. 263-313.

Jimena Quesada, L. (2016), *Social Rights and Policies in the European Union. New Challenges in a Context of Economic Crisis*, Tirant lo Blanch, Valencia.

Hepple B (2011) Fundamental Social Rights since the Lisbon Treaty. European Labour Law Journal, vol. 2(2): 150-154.

Hepple, B. (2012), "Dismissal Law in Context", *European Labour Law Journal*, vol. 3(3), pp. 207-214.

Kirchner J, Kremp P R, Magosch N (eds.) (2018) Key Aspects of German Employment and Labour Law. Springer, Berlin.

Mella Méndez, L., Serrani, L. (eds.) (2015), *Work-Life Balance and the Economic Crisis. Some Insights from the Perspective of Comparative Law*, vol. II. ADAPT, Cambridge Scholars Publishing, Cambridge.

Miranda Boto, J. M. (2019), "Algo de ruido. ¿Cuántas nueces? La nueva directiva (UE) 2019/1152, relativa a relativa a unas condiciones laborales transparentes y previsibles en la Unión Europea y su impacto en el derecho español", *Temas Laborales,* n.º 149, pp. 71-100.

Niemann, F., Albermann, T. (2022), "ECJ ruling: German provisions governing the termination of a data protection officer's employment are compatible with EU law, but subject to restrictions", available at: https://www.twobirds.com/en/insights/2022/germany/deutscher-kuendigungsschutz-fuer-datenschutzbeauftragte-ist-grundsaetzlich-mit-eu-recht-vereinbar [Accessed 20 July 2022].

Praesidium of the European Convention (2007). Explanations relating to the Charter of Fundamental Rights. *OJ* C 303, 14.12.2007

Rojo Torrecilla, E. (2021), "Sobre el derecho a la desconexión digital en el trabajo … y sobre los intentos de devaluar la importancia del diálogo social europeo y su trascendencia jurídica. A propósito de la Resolución del Parlamento Europeo de 21 de enero de 2021 (y unas notas sobre las conclusiones del abogado general del TJUE en el asunto C-928/19)", of 1 February 2021, available at: http://www.eduardorojotorrecilla.es/2021/02/sobre-el-derecho-la-desconexion-digital.html [Accessed 10 February 2022].

Rodríguez-Piñero Royo, M. (2019), "La Directiva 2019/1152, relativa a las condiciones laborales transparentes y previsibles en la Unión Europea", *Derecho de las Relaciones Laborales, Monográfico,* n.º 11, pp. 1089-1108.

Scelle, G. (2020), *L'organisation internationale du travail et le BIT*, Dalloz, Paris.

Seifert, A. (2019), "Descentralización productiva y el derecho del trabajo alemán", *Doc. Labor.*, n.º 118, pp. 117-135.

Sempere Navarro, A. V. (dir.) y Martín Jiménez, R. (coord.), (2011) *El contrato de trabajo*, vol. IV, Aranzadi, Cizur Menor.

Servais, J.-M. (2020), *International Labour Law*, Wolters Kluwer, Alphen ann Rijn.

Tiraboschi, M. (2022), "The Origins of a New European and International Legal Culture", In *Manfred Weiss. A Legal Scholar without Borders. Selected Writings and Some Reflections on the Future of Labour Law*, ADAPT University Press, pp. 26-34.

Ushakova, T. (2015), "Protecting the Pregnant Women against Dismissal: Subjective and Objective Components in EU Law", In: Mella Méndez, L., Serrani, L. (eds.), *Work-Life Balance and the Economic Crisis. Some Insights from the Perspective of Comparative Law*, vol. II. ADAPT, Cambridge Scholars Publishing, Cambridge, pp. 93-121.

Van Voss, G. H. and Ter Haar, B. (2012), "Common Ground in European Dismissal Law", *European Labour Law Journal*, vol. 3 (3), pp. 215-229.

Weiss, M. (2015), "Introduction to European Labour Law: European Legal Framework, EU Treaty Provisions and Charter of Fundamental Rights". In: Schlachter, M. (ed), *EU Labour Law. A Commentary*, Wolters Kluwer, Alphen ann den Rijn, pp. 3-26.

Weiss, M. (2017), "The future of the labour law in Europe: rise or fall of the European social model?", *European Labour Law Journal*, vol. 8(4), pp. 344-356.

Trapped by the Ghost of the Past: Amortization and Problems concerning the Collective Dimension in Hungarian Labour Law

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Abstract. Following a summary of the changes in the Hungarian political and labour law systems, this study reviews the changes in the regulation of the important collective labour law provisions codified in connection with the new social system. This paper shows how the joint presence of the trade union and the works council at the employer level causes functional confusion and problems of conflict of interest.

Keywords: *labour law regime; collective labour law institutions; social market economy; interest reconciliation;*

1. Political and labour law regime change (1988-1992)

The growing need for economic and social reform in the labour market at the end of the 1980s brought about a number of changes in the labour market. The law on business companies was passed in 1988, establishing the market economy and freedom of enterprise. Privatization was introduced, which eventually resulted in the majority of large Hungarian companies being foreign-owned. In 1992, after the political regime change, labour law was recodified - socialist legislation was transformed to the requirements of a social market

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economy. However, before that some labour law-related reforms were also undertaken, such as the establishment of the National Interest Conciliation Council in 1989, the Strike Law and the Law on the Right of Association in 1989. The latter legalized trade union pluralism.[1]
Under socialism, there were no real labour relations at national, sectoral or employer level. It was not only a monolithic system in politics (one-party system), and as a consequence also in the field of employee's representative organization. There was one trade union at national level (the National Council of Trade Unions), and all sectoral and employer-level trade unions were part of it. To sum up, the system is well–described by the quote from Lenin in my trade union membership book, which I took over in 1987 (!): "The Trade Unions are the most capable and collaborators of the state power whose entire political and economic activity is led by the self-conscious vanguard of the working class, the Communist Party".
The concept of labour relations in Hungary in the late 1980s and 1990s. This concept, which encompasses the actors of the world of work which is aimed at maintaining cooperation, resolving conflicts and resolving prevention and resolution of conflicts that have arisen. The former Labour Code (former LC), which entered into force in 1992 following the social and political changes to the system, contains general rights relating to labour relations: in the interest of protection of employees' social and economic interests and of maintaining peace in labor relations, this Act shall govern the relations between employees and employers, and their interest representation organizations. Within such framework, it shall guarantee the freedom of organization and the employees' participation in the formation of work conditions, furthermore, it shall govern the order of collective bargaining negotiations, as well as the procedures for the prevention and resolution of labor conflicts.[2]

2. Interest Reconciliation on a National Level - the tripartite industrial relations body from the political regime change to 2011

One of the consequences of the economic and political regime change was the emergence of tripartism in national industrial relations. In addition to the social partners, the state directly (specific employer), or indirectly (as regulator of bipartite relations and national conciliation forums actor/negotiator) engaged in industrial relations.[3]

[1] Gy. Kiss: *Munkajog (Labour Law*); Dialóg Campus, Budapest, 2020, 57-58.
[2] Section 14, former LC
[3] J. Lux: *Érdekegyeztetés makroszinten (Reconciliation of interests at macro level),* 2017, 2., http://polhist.hu/wp-content/uploads/2017/11/lux_erdekegyeztetes_makro_1989utan.pdf; accessed May 17, 2023.

The change of political regime was prepared by the last two Hungarian governments of socialism, under clear political pressure. As part of this, the institutionalization of national interest reconciliation in Hungary began in 1988, when the Grósz government[4] decided to establish the National Interest Reconciliation Council. It was finally established at the end of 1989, under the government of Prime Minister Miklós Németh.[5] After the political regime change, the first government - the Antall government[6] - significantly transformed the system of interest reconciliation, and in August 1990 the Interest Reconciliation Council (IRC) was established. Six national trade union federations and nine national employers' organizations were members of the IRC.

There was a real tripartism in IRC. The former LC codified the rights of the IRC. According to this the government, with the agreement of the IRC could

a) establish the provisions, in derogation from the former LC, concerning the termination of employment due to economic reasons affecting large numbers of employees, in the interests of preserving jobs;

b) regulate on the amount of the minimum wage and provisions on labour inspection;

c) submit recommendations to define the maximum duration of daily work time and to determine official holidays.[7]

The first substantial "disenfranchisement" in 17 years took place in 2009: on the proposal of the government, Parliament abolished the right of agreement of the tripartite body, which had been called the National Interest Reconciliation Council (NIRC).

For example, the government only needed to consult on the amount of the minimum wage for next year but did not need the agreement of the employee's and employer's sides of NIRC. After the consultation, the government was free to decide. The background: in the aftermath of the global financial and economic crisis that began in 2008, the government wanted to give itself more space for manoeuvre - including in the world of work. Finally, in 2011, on the proposal of the government - which is still in power after four national

[4] The Grósz government was the Council of Ministers of the Hungarian People's Republic from 25 June 1987 to 24 November 1988.

[55] The Németh government was the last government of the Hungarian People's Republic, in office from 24 November 1988 to 23 May 1990. It was during the Németh government that Parliament passed the laws essential to the regime change, which ensured a peaceful and, as far as possible, smooth transition.

[6] The government of József Antall is the first freely elected Christian-democratic, so-called centre-right government in Hungary after the regime change.

[7] Section 17.; former LC

elections - the Parliament abolished the NIRC by amending the former LC. The body that had provided the framework for the tripartism was abolished.

3. The legislator's changed approach -The end of tripartite real national reconciliation of interests

In parallel with the abolition of the NIRC, a law was passed on the National Economic and Social Council (NESC)[8]. The NESC is not a tripartite organization. The members of the NESC are – in addition to the employers' and employees' interest representation associations – the national chambers of commerce, civil organizations active in the field of national politics, the churches, the Hungarian representatives of science and art in Hungary and abroad.[9] In addition, the NESC has no substantive rights. The NESC has only consultative, opinion-forming and proposal-making powers, such as giving its opinion on planned government measures that directly affect business, employment or society at large, participating in the impact assessment of legislation and government decisions, or consulting on strategic issues relating to the European Union. The law explicitly states that the government is only obliged to consider the proposals and opinions of the NESC. [10]However, consideration does not mean a joint decision, the opinion is not binding on the government.

Alongside the NESC, the government set up the Permanent Consultative Forum of the Competitive sector and Government (PCFCG) in 2012. The PCFCG is not provided for by law and therefore has no codified rights. The government has invited three employers' and three workers' associations to the PCFCG. The government consults these bodies - for example on the minimum wage for next year. But it is only consulting, and no compromise is needed to reach a decision. A joint decision is not just a matter of formality. For example, when raising the minimum wage, the ability of all employers to bear the burden must be taken into account.

Because there is a big difference between the capacity of small and medium-sized enterprises and that of multinational companies. That is why it was an economic reality that the government had to get the agreement of the nine national employers' federations representing the whole economy in NERC, alongside the trade unions, to set the minimum wage for the new year.

The abolition of tripartism was accompanied by a change in the approach to labour legislation. After the political-economic regime change, the approach to

[8] Act XCIII of 2011 on the National Economic and Social Council
[9] Para (2) Section 2. Act XCIII of 2011.
[10] Para (1) and (3) Section 3. Act XCIII of 2011.

legislation was consensual. The government has sought to submit labour bills to Parliament with the consensus of the social partners. This approach has changed radically. Labour legislation has become essentially authoritarian rather than compromise oriented. This is assisted by the trade unions, which cannot exert any real pressure.
Overall, the role of national labour relations has become more formalized. Two decades after the political regime change, statutory tripartism was abolished. This is a step backwards into the framework of a different system, one that was thought to have disappeared. After more than two decades, the ghost of the past has returned and has been here ever since...
And, as a literature review concludes, in Hungary after 2011, social dialogue and reconciliation of interests a structural and qualitative transformation has taken place. There has been a reduction in the number of national and sectoral the weight of national and sectoral interest reconciliation, the organization and bargaining power of trade unions has weakened, and the content of consultation.[11]

4. Sectoral social dialogue - Collective bargaining without a real role

Although sectoral social dialogue is regulated by law, [12]the role of this social dialogue is limited and there are hardly any sectoral collective agreements in Hungary. Regardless of state legislation, a negative legacy of socialist labour legislation lives on. Because after more than three decades, it seems that the spirit of the past is still present in the sectoral bargaining between employers and trade unions. Or rather, the lack of it is proof of this.
The legal regulatory context - the impact of which goes beyond the legal framework. Act II of 1967 on the Labour Code (socialist LC) only allowed the conclusion of collective agreements covering one employer.[13] Collective agreements covering several employers or (sub)sectors could not be concluded.
Preparing for systemic change in labour law: the amendment of the socialist LC in 1989. The new legal instrument was a collective framework agreement, which could be concluded between an employers' representative organization or several employers on the one hand and a trade union on the other.[14] In other words, the socialist LC already gave the social partners a "break-out" in

[11] I. Képesné Szabó: *A magyar érdekegyeztetés átalakulásának főbb mozzanatai 2010 és 2015 között (The main moments of the transformation of the Hungarian reconciliation of interests between 2010 and 2015,)* Pécsi Munkajogi Közlemények (Pécs Labour Law Publications), 2016/1. 13-28.
[12] Act LXXIV of 2009 on Sectoral Dialogue Committees and certain aspects of intermediate social dialogue
[13] Para (2) Section 8., socialist LC
[14] Section 9/A. socialist LC

terms of collective bargaining and negotiation. The opportunity remains mostly an opportunity to this day.

This legacy has overwhelmingly not been gotten rid of. One negative consequence of this is that there is no collective protection for workers in small and medium-sized enterprises, where there are predominantly no trade unions. The lower the number of employees in a workplace, the less likely it is that trade unions will be present.

Presented in international perspective, based on the fact that the dominant level of wage bargaining in a given country, EU Member States can be divided into four groups:

1. mainly decentralized, company-level (Lithuania, Hungary, Malta, Slovakia, Romania, Croatia, Greece),
2. sectoral/sub-sectoral and company-level agreements coexist, but neither type is dominant (Slovakia, Bulgaria, Croatia, Greece);
3. sectoral/ or higher level negotiation is dominant (Germany, Netherlands, Belgium, Finland, Austria, Italy);
4. fragmented sectoral and company-level agreements co-exist, with a high level of sectoral

(Denmark, Slovenia, Sweden, France).[15]

In the V4 countries (Poland, the Czech Republic, Slovakia, Hungary), instead of the national or sectoral level of interest conciliation that is more common in Western Europe, the collective agreements are dominant. As summarized in the literature: in Hungary after 2011, social dialogue and reconciliation of interests structural and qualitative transformation took place after 2011. There has been a reduction in the number of national and sectoral the weight of national and sectoral interest reconciliation, the organization and bargaining power of trade unions has weakened, and the content of consultation.[16] Sectoral collective agreements and the number of workers covered by such agreements is low. This is a persistent weakness of the Hungarian social dialogue. There are currently three sectoral collective agreements are in force.[17]

And entering the field of practice. The small number of sectoral collective agreements and the limited scope is an advantage for employers. Most employers do not have any external constraints in their employment practices,

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15 https://www.eurofound.europa.eu/en/blog/2020/new-impetus-collective-bargaining-insights-ecs

16 I. Képesné Szabó: opt. cit. *A magyar érdekegyeztetés átalakulásának főbb mozzanatai 2010 és 2015 között (The main moments of the transformation of the Hungarian reconciliation of interests between 2010 and 2015)*

17 https://www.parlament.hu/documents/10181/39233854/Infojegyzet_2021_56_bertargyalasok.pdf/7a6514da-ce92-d27c-bc12-8626d1020594?t=1631605536593; accessed 22 May 2023

the company from the market regulation function of a collective agreement at a higher level does not expect anything.[18]

5. The regulatory role of collective agreements

This topic is related to the previous title (*Sectoral social dialogue - Collective bargaining without a real role*). Given that there are hardly any sectoral collective agreements, the majority of workers are not covered by collective agreements. It is not decisive that the regulatory character of the collective agreement is absolute dispositive, so that the Labour Code may deviate from the rules of the employment relationship - as a general provision - to the detriment of the employee. The reason: the rules of the Labour Code are so flexible (e.g., the organization of working time) that most employers are not motivated to conclude a collective agreement.

Around two thirds of workers in EU countries are covered by some form of collective agreement. According to the Hungarian Central Statistical Office, 18.5% of employees worked in such jobs, where there is a collective agreement in force (at sectoral or company level) this. figure was 20.6%.[19]

What lies behind the statistics. The Hungarian wage setting system is extremely individualized by Western European standards and decentralized. In other words, the decisive factor in wage formation is the role of individual bargaining, essentially the labour market supply and demand of the labour market. The role of collective bargaining is secondary, and within its structure, there is a relatively weak link between national and sectoral agreements, whereas, at least in one at least within a narrow group of companies, the impact of company-level collective the regulatory role of company-level collective agreements. This assessment is based on the classical Anglo-Saxon industrial relations tradition that the fundamental purpose of collective bargaining is to the individual employment relationships of employers (wages, working hours and terms and conditions of employment) of individual of

[18] L. Neumann: *Decentralizált kollektív alku Magyarországon (Decentralised collective bargaining in Hungary)* http://econ.core.hu/kiadvany/csopak/2.pdf; accessed 20 May 2023

[19] *Wage negotiations*, Parliament's Office; Info Note, 56/2021., /https://www.parlament.hu/documents/10181/39233854/Infojegyzet_2021_56_bertargyalasok.pdf/7a6514da-ce92-d27c-bc12-8626d1020594?t=1631605536593„ accessed 03 May 2023

employment, working time and working conditions and the terms and conditions of employment collective bargaining.[20]

6. A codification problem – trade union and works council together at the employer

Employee participation can be seen as the so-called cooperative aspect of industrial relations, as opposed to the conflictual, confrontational branch based on coalition rights, trade union activity and collective bargaining.[21] Under Hungarian labour law, participation rights are exercised by the works council. It was codified in the former LC, following the German model.
The legislator may have assumed, after the political-social regime change, that the trade unions' scope of action would go beyond the employer's framework. This did not happen.
Twenty years after Act I of 2012 on the Labor Code (LC), the legislature did not react to this circumstance. The current LC retains the legal institution of the works council.[22] Act CXXX of 2010 on legislation requires a prior impact assessment to be carried out.[23] This impact assessment would at least have questioned the legitimacy of the works council in the workplace. The fact that the employer is the main place where trade unions operate and that the works council is elected in the company means that the exercise of the rights of protection of employees' interests and right to participation are inappropriately mixed at the same level. The works council is elected by the employees of the employer. There is no conflict of interest rule, so a member or even the president of a trade union in the workplace can be elected as a member of the works council. The president of the trade union can even be the president of the works council. So under the regulations, there is a chance that the employer's management does not know who they are negotiating with! The trade union, which also has the right to strike, or the works council, which is obliged to collaborate. The different rights of the works council and the trade union can be merged and mixed up precisely in the persons exercising these rights.

[20] R. Bispinck: *Wage-Setting System – an Analysis of Differentiation, Decentralisation and Deregulation of Sectoral Collective Agreements*. In: Hoffman–Jacobi–Keller– Weiss (eds.): *The German Model of Industrial Relations between Adaptation and Erosion*. Hans Böckler Stiftung, Düsseldorf; 1998.
[21] Gy. Kiss: op. cit. *Munkajog (Labour Law),* 315.
[22] Chapter XX. LC
[23] Para 1 Section 17.

Moreover, with two exceptions, the works council's participatory rights are weak. The employer and the works council shall collectively decide concerning the appropriation of welfare funds.[24]
In addition, the employer is not obliged to reach a joint decision with the works council on any other measures. The works council's right to give an opinion does not bind the employer in its decision-making.
In another right, the LC strengthened the works council to the detriment of the union. This is the works agreement. According to Hungarian literature, the normative works agreement is a highly controversial legal institution. The legal background: Subject to the exception set out in Chapter XII (Remuneration for Work), the works agreement may contain provisions to govern the rights and obligations arising out of or in connection with employment relationships. Such agreements may be concluded on condition that the employer is not covered by the collective agreement it has concluded, or there is no trade union at the employer with entitlement to conclude a collective agreement.[25] A trade union shall be entitled to conclude a collective agreement if its membership of employees at the employer reaches ten per cent of all employees employed by the employer.[26] According to Hungarian literature, the normative scope of a normative agreement entails a number of risks. This legal option is ultimately
undermine the idea of collective bargaining and the role of trade unions. The legally and de facto determined position of works councils makes them incapable of engaging in real, meaningful, balanced collective bargaining with employers. Their role is essentially cooperative and impartial, they are not independent legal entities, their members are not protected by labour law (only the president), they are financially and organizationally. dependent - at least indirectly - on the employer, having the power to exert pressure and influence potential is minimal. For all these reasons, there is a chance that negotiations with the works council will be disproportionately dominated by the employer. In the case of collective bargaining by the union, the risk of this happening is much greater. [27]

[24] Section 263 LC
[25] Para 1 Section 268.
[26] Para (2) Section 276.
[27] G. Kártyás: *Üzemi tanács – A normatív hatályú üzemi megállapodás kritikája (Works council - A critique of the normative works agreement)*; Munkajog (Labour Law); In Tamás Gyulavári ELTE Eötvös. Budapest, 2016. 459–460.

7. Two factors outside the legal framework - Economic dependence and the lack of solidarity

Both circumstances have an impact on employment conditions. The consequence of the regime change is the gradual dominance of foreign-owned employers, which makes them interested in preserving the conditions that motivate investment. Hungarian economic policy is essentially written abroad. The largest domestic employers are Hungarian subsidiaries of foreign companies (multinationals). A prime example is the car industry: the Hungarian factories of Audi, BMW, Mercedes or Suzuki. Multinationals invest in Hungary because they get skilled workers for low wages. When looking at EU Member States, only Bulgaria has a lower monthly median wage than Hungary. (In the headquarters of the three German car factories, this amount is more than three times higher than in Hungary.) [28]

Reducing or eliminating the wage differential would remove the economic interest of multinationals in running Hungarian subsidiaries. The absence of sectoral collective agreements, including sectoral wage agreements, is a guarantee that the wage gap will persist in the longer term.

Domestically owned companies produce only half of the value added. This is also very low at international level, with only Ireland, home to the European headquarters and tax optimization activities of US technology firms, having a smaller role of local firms in the national economy in Europe than Hungary. One of the reasons why this can be a problem is that foreign companies usually transfer the profits they make in our country abroad, to the country of the parent company. Thus, the use of profits does not stimulate the Hungarian economy and does not increase prosperity. Overall, the vulnerability of the domestic economy to the world's largest companies is very high, and the role of the domestic economy is low.[29]

Another factor is the significant lack of solidarity. The number of trade unions and their members in Hungary is also steadily declining. In Hungary, about 4,580,000 thousand people were classified as employed (total population about 9.7. million). Last year, the number of trade union members decreased to 275,600 (approx. 5 % of all employees). One of the main reasons for this is the lack of solidarity at social or professional level. In my opinion, this is also a

[28] List of European countries by average wage, https://en.wikipedia.org/wiki/List_of_European_countries_by_average_wage, accessed 05 May 2023

[29] P. Bucsky: *Nem enyhült a magyar gazdaság függése a multiktól (The Hungarian economy's dependence on multinationals has not eased);* Közélet, vállalat (Public life, company); 24.02.2022.; https://g7.hu/kozelet/20220224/hiaba-a-nemzeti-tokes-szoveg-nem-enyhult-a-magyar-gazdasag-fuggese-a-multiktol/, accessed 10 May 2023

continuation of the ghost of the past. It was the slogan of the Kádár regime[30] that reversed the former communist approach: 'Those who are not with us are against us' was replaced by the new slogan: 'Those who are not against us are with us'. This meant that he who lived as a petty bourgeois had no criticism of the authorities, no problem with the regime. Self-exploitation could create an existence that forced passivity in community life. Although the political system has changed, this passive dominant approach has not.

The value structure of Hungarian society is one of the most frequently quoted by researchers, as being rational but closed thinking, the relative weakness of the importance attached to democracy, mistrust, lack of tolerance, paternalism and the need for paternalism and etatism. Paternalism and the dominant role of the state is one of the main characteristics of the socialist system before the regime change. Following the change of regime, the transition to a market economy and the privatization period, to avoid social insecurity. The general lack of trust in Hungarian society is also negative because it hinders the development of fundamental social values such as tolerance and solidarity. Research shows that Hungarians see an important role for the state in job creation and social security. As the literature shows, compared to the opportunity to have a say in politics and the various freedoms, Hungarian voters are more concerned with security of livelihood, material well-being and the promise of job security.[31]

Lack of solidarity has consequences in the world of work. Many of the institutions of collective labour law that compensate workers for their vulnerability are ineffective or inefficient. In many employers, trade unions do not play their role as interest representatives and, in the absence of collective agreements, the employer essentially sets the terms and conditions of employment alongside legislation setting minimum standards.

8. The ghost of the present - The challenges of digitization

The increasing role of forms of employment as a result of digitization, in addition to existing problems, poses new challenges for collective labour law and employee protection. Will the unions leave these groups of workers alone? Do they have the capacity to organize themselves?

But there is a role for collective bargaining, for the effective presence of trade unions. Some examples:

[30] The 1956-1989 period in Hungary, also known as the Kádár era, when János Kádár led the country as leader of the Hungarian Socialist Workers' Party.

[31] A. Bíró, A. Nagy, D. Dobsza, T. Kadlót, A. König: *Rendszerváltás, demokrácia és a magyar társadalom (Regime change, democracy and Hungarian society)*; Friedrich-Ebert-Stiftung, Budapest, 2016., 3-5.

a) *Teleworking*: this is an atypical employment relationship under the LC, which means that teleworkers have all individual and collective rights. In 2022, the definition of telework was significantly amended. Before the amendment, LC was compliant with the European Telework Framework Agreement: 'Teleworking' shall mean activities performed on a regular basis at a place other than the employer's facilities, using computing equipment, where the end product is delivered by way of electronic means. The new definition: teleworking means that the employee works part or all of the time at a place separate from the employer's premises.[32] This unduly broadens the definition of telework. Teleworkers can work with any work equipment. At the same time, the change affects guarantee issues in which employees cannot effectively assert their rights as individuals. Trade unionism would be important.
Such a key working condition is working time and rest periods. Most teleworkers work - for example in their homes – according to the flexible working arrangement. The consequence, according to LC, is that the employer does not have to apply the rule of records of working time and rest periods.[33] This possibility can be very open to abuse by the employer. The employer gives the teleworker many more tasks than can be performed during the working hours of the labour contract, but will not pay overtime. In the absence of collective action, workers individually have very little chance of asserting their rights. Another problem of working time:
the LC – in line with a number of national regulations – is also not in line with the legislative initiative voted by the European Parliament in January 2021. Hungarian law does not contain the right to disconnect a teleworker. Of course, there would be no need to wait for EU or national legislation. A collective agreement would be an excellent instrument to regulate the right to disconnect. If the sociological conditions for this existed in Hungary...
b) *Application/platform-based work* According to the authors, the lack of legislation could be a particular problem in application-based work (platform-based work). There is usually no reliable data on its volume. Together, the lack of accurate statistics and the diversity of digital platforms make it significantly more difficult for legislation to respond appropriately to this phenomenon. Although internet work websites are mostly not in Eastern and Central Europe (except Estonia), legislation should prevent problems, and not react when the problem – in the absence of legislation – becomes huge.[34] Because the type of

[32] Para (1) Section 196.
[33] Section 96. LC
[34] T. Gyulavári: '*Hakni gazdaság a láthatáron: az internetes munka fogalma és sajátosságai' [Gig economy on the horizon: the concept and peculiarities of Internet work];* Iustum Aequum Salutare, 2019. 42–43. https://ias.jak.ppke.hu/hir/ias/20191sz/02_Gyulavari_IAS_2019_1.pdf, accessed 10 August 2021.

contract is also unclear on this issue, legislation is absolutely necessary. In its absence, platform workers cannot expect any collective protection under Hungarian conditions. But for example, as private entrepreneurs (self-employed workers) they would not even be able to form a trade union under the law.

c) *Automation and robotics* There are approximately 730,000 employees in Hungary whose work could be performed entirely or predominantly by robots. That's about a fifth of all employees. Occupations that do not require skills can easily be automated. At least two-thirds of the jobs in this group can be performed by robots. The automation potential in Hungary even exceeds that of Western European countries. Presumably, because most companies moved production from Western European states abroad due to the expensive labour force. Labour is relatively cheap in Hungary. Still, it would be worthwhile for companies to automate because robots, especially their types that work with humans, are the so-called cobots (collaborative robots) that increase corporate productivity. Therefore, the role of re-education training is particularly important. The digital generation of employees will only replace the entire workforce in decades.[35]

Legislation must also respond to this process. The LC does not contain a rule at all on the employer's training task. Automation and robotization can result in termination of employment relationships by the employer. According to the LC, an employee may be dismissed – among other reasons – in connection with the employer's operations[36]. The reason for robotization is the employer's operations. In addition, the reason for termination in the case of automation may also be the employee's professional ability, or its absence to be precise.

According to my opinion, the proposed amendment to the LC would prevent redundancies in two ways, at least in part. On the one hand, by introducing the employer's obligation to provide re-education in jobs related to automation and robotics; on the other hand, the employment relationship may be terminated in connection with the employees' professional ability or for reasons in connection with the employer's operations if the employer has no vacant position available, which is suitable for the employee or if the employee refuses the offer made for his/her employment in that job. This amendment would provide a protection function for labour law in the light of current

[35] Zs. Balázs, *A hazai munkavállalók ötödétől már most elvehetnék a munkát a robotok' [Robots can already take the jobs from one-fifth of domestic workers]* Qubit, 04.12.2019. https://qubit.hu/2019/12/04/gvi-a-hazai-munkavallalok-otodetol-mar-most-elvehetnek-a-munkat-a-robotok, accessed 11 August 2021.

[36] Para (2) Section 62 LC

technological changes. All this should be considered even at the level of international regulation.[37]

But this time, the unions should also not wait for state legislation. Vocational training could be regulated in a collective agreement - adapted to local specialties - to protect workers - especially unskilled workers - from the negative effects of automation and robotization. This would require trust in solidarity and the power of workers' solidarity. Because not much can be done alone.

[37] I. Horváth – D. Pérez del Prado – Z. Petrovics – A. Sitzia: *The Role of Digitisation in Employment and Its New Challenges for Labour Law Regulation - The Hungarian, Italian and Spanish Solutions, Comparison, and Criticism*; ELTE Law Journal; 2021/2.; https://ojs.elte.hu/eltelj/article/view/5254, accessed 11 May 2023.

The Scope of Representation of Trade Unions in Portugal: A New Reality?

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Abstract: The recent Act no. 13/2023 (the so-called "Decent Work Agenda") introduced several changes to the Portuguese Labour Code, and, among other things, it expressly allowed, for the first time in the Portuguese legal scene, the collective representation of autonomous workers (who are economically dependent). However, the terms in which this was achieved are dubious and may entail a different framing of the traditional tasks of trade unions in Portugal. In addition, union activity in the undertaking was reinforced, since it may now take place even in companies where there is no union presence. However, this new provision is ambiguous and requires a tactful interpretation, to ensure its compatibility with the constitutional parameter.

Keywords: *Decent Work Agenda; Freedom of Association; Economically Dependent Self-Employed Workers; Union Activity in the Undertaking.*

Preliminary remarks

With Act no. 13/2023 (known as the "Decent Work Agenda"/"Agenda do Trabalho Digno"), of 3 April[1], the Portuguese Legislator modernised several aspects of the national labour regime, bringing it up to speed with the trends observed among other national and international legal orders.

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[1] Available at https://diariodarepublica.pt/dr/detalhe/lei/13-2023-211340863 (accessed on 21 December 2023). This diploma entered into force on 1 May 2023.

Some of the most interesting (and, perhaps, subtle) changes relate to union activity and are twofold: trade unions will, from now on, be able to organize economically dependent workers and will, also, be allowed to develop union activity in companies where there is no union presence. Possibilities that, as will be further explained, call for a change in the way union representation and activity are perceived in this national legal order.

1. Economically dependent workers

Until recently, in Portugal, the access to the rights to freedom of association, to collective bargaining, and to strike, was restricted to employees, that is, to those who possess an employment contract.

In fact, all of these rights are enshrined in the Portuguese Constitution (respectively, in Articles 55, 56, and 57[2]), whose wordings merely allude to "workers". Most Portuguese Authors[3], as well as the jurisprudence[4], take this to mean "employees", since, in the absence of an express definition, this concept should be read according to the common legal notion. In addition, several clues in the Labour Code show that this is (or, at least, was) also the Legislator's view[5].

The Decent Work Agenda changed this scenario, by extending some of these rights to economically dependent workers.

Firstly, it should be noted that, according to the new legal definition, economically dependent workers are those who provide their activity, without legal subordination, in the same civil year, in more than 50%, to the same beneficiary[6].

[2] Which formally belong to the constitutional catalogue of civil and political rights – enjoying, therefore, from their more robust protection regime.

[3] See, among others, J. Leite, *Direito do trabalho*, Vol. I. Coimbra, Serviços de ação social da UC, 2004, 46 and ff.; G. Canotilho/V. Moreira, *Constituição da república portuguesa anotada*, Vol. I, 4th ed. rev., Coimbra, Coimbra Editora, 2007, 286; and M. R. Ramalho, *Da autonomia dogmática do direito do trabalho*, Coimbra, Almedina, 2000, 61 and ff.

[4] See Judgement No. 474/02 of the Portuguese Constitutional Court, of 19 November 2002.

[5] For instance, when employees lose their employment contract, they might still (if they so wish) remain union members. However, if they subsequently become independent workers, they will have to leave the organization – see Article 444, No. 2, of the Labour Code. Furthermore, as will be discussed further below, collective agreements are, in principle, only applicable to employees affiliated to the signing trade unions (Article 496 of the Labour Code).

[6] See Article 140, No. 1, of the Code on Social Security Welfare Contributions (Act no. 110/2009, of 16 September) and Article 10, No. 2, of Labour Code (Act no. 7/2009, of 12 February). For further developments on this notion, see R. Redinha, *Trabalho economicamente dependente: the soft approach*, in *Questões laborais*, 2023, No. 63, 7-16.

Secondly, this category was already (albeit rather perfunctorily) regulated by the Labour Code[7], which granted it access to its provisions on personality rights, on equality and non-discrimination, and on health and safety. However, following the entry into force of the reform, these workers are now also entitled to the application of collective agreements (in force in the same activity, professional, and geographical domains)[8].

This novelty is further developed in the following provisions, in particular in Article 10-A, where, among other things, it is stated that these workers will benefit from trade union representation; from the negotiation, on their behalf and by trade unions, of collective agreements; and from the application of previously existing collective agreements, either by individual choice (through the – controversial[9] – mechanism enshrined in Article 497 of the Labour Code) or by governmental extension (Articles 514 and ff. of the Labour Code)[10].

Particularly regarding the first two segments (trade union representation and the negotiation of collective agreements on their behalf), how will this be achieved? At first sight, one could assume that, from now on, economically dependent workers will finally be able to create and join trade unions. Rights that, for a long time now, have been demanded by some national Literature[11] and acknowledged by the supervisory bodies of international conventions that bind the Portuguese State.

In effect, according to the Committee on Freedom of Association of the ILO, the right to freedom of association should not be restricted to those who possess employment contracts. In fact, "all all workers (…) should have the right to establish and join organizations of their own choosing. *The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship*, which is often non-existent, for example in the case of

[7] Available in English at: https://files.diariodarepublica.pt/diplomastraduzidos/7_2009_CodigoTrabalho_EN_publ.pdf?lang=EN (accessed on 21 December 2023).

[8] See Article 10, No. 1, of the Labour Code.

[9] For further developments, see J. Gomes, *Nótula sobre o artigo 497.º do Código do Trabalho de 2009*, *Questões laborais*, 2014, no. 44, 5-14.

[10] See Article 10-A, no 1, subparagraphs a) to d). On the delicate problems posed by governmental extensions of collective agreements see A. T. Ribeiro, *The extension of collective agreements by State intervention: the Portuguese regime and the protection it may offer to SMEs*, in *Employment relations and the transformation of the enterprise in the global economy. Proceedings of the thirteenth international conference in commemoration of Marco Biagi*, Torino, G. Giappichelli Editore, 2015, 247-262.

[11] See, among others, J. Reis, *O conflito colectivo de trabalho*, Gestlegal, Coimbra, 2017, 296 and ff. Conversely, advocating that this would encroach on the constitutional imperative, since, in the Author's view, freedom of association is an exclusive right of (subordinated) employees, see M. R. Ramalho, *Tratado de Direito do Trabalho. Parte III – Situações laborais colectivas*, 4th edition, Coimbra, Almedina, 2023, 50.

agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize"[12]. It is, therefore, "contrary to Convention No. 87 to prevent trade unions of self-employed workers who are not subordinate to, or dependent on, a person"[13].
In turn, according to the European Committee on Social Rights, "all classes of workers"[14] are entitled to freedom of association. Furthermore, "the world of work is changing rapidly and fundamentally with a proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law, of shifting risk from the labour engager to the labour provider. This has resulted in an increasing number of workers falling outside the definition of a dependent employee, including low-paid workers or service providers who are de facto "dependent" on one or more labour engagers. (…) In establishing the type of collective bargaining that is protected by the Charter, it is not sufficient to rely on distinctions between worker and self-employed, *the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour*. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining"[15].
Furthermore, such a development in Portuguese law would be in line with the most recent developments at EU level.
It is true that the CJEU's jurisprudence has stated that collective agreements aiming at independent workers are incompatible with EU competition law[16] (since such workers are perceived as companies and, therefore, their agreements would be in violation of Article 101, no. 1, of the Treaty on the Functioning of the European Union)[17].
However, as has been pointed out, this prohibition, by disenfranchising self-employed workers from the right to collective bargaining, means that their

[12] See ILO, *Freedom of association. Compilation of decisions of the Committee on Freedom of Association*, 6th ed., 2018, par. 387.
[13] See ILO, *Freedom of association*… cit., par. 389. Furthermore, "The Committee requested a Government to take the necessary measures to ensure that workers who are self-employed could fully enjoy trade union rights for the purpose of furthering and defending their interest, including by the means of collective bargaining" – see par. 1285.
[14] See Council of Europe, *Digest of the case law of the European Committee on Social Rights*, 2022, page 82 (available at: https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd).
[15] See Decision on the merits, of 12/09/2018, complaint No. 123/2016, *Irish Congress of Trade Unions (ICTU) vs. Irlanda*, pars. 37 and ff.
[16] See, CJEU, *FNV Kunsten*, C-413/13. Such agreements do not enjoy from the antitrust immunity that was extended to collective agreements by the jurisprudence inaugurated by CJEU, *Albany* (proc. C-67/96).
[17] On this, see J. Gomes/A. T. Ribeiro, *Algumas notas sobre a contratação coletiva e o direito da concorrência*, *Revista de Direito e de Estudos Sociais*, 2021, Nos. 1-4, 223 and ff.

precarious negotiating position will almost always result in degrading working conditions[18].

And, in the meantime, the European Commission has acknowledged that, irrespective of their lack of legal subordination, such workers are often subject to precarious conditions and bargaining imbalances, which leads to them having very little say in their working conditions[19]. Having this in mind, the Commission has recently stated that "collective agreements by solo self-employed persons who are in a situation comparable to that of workers fall outside the scope of Article 101 TFEU; and (…) the Commission will not intervene against collective agreements of solo self-employed persons who experience an imbalance in bargaining power vis-à-vis their counterparty/-ies"[20].

In sum, and returning to the Portuguese regime, such evolution would align the national regime with other domestic legal orders where this step has already been taken, and also with these international trends and legal readings.

However, Article 10-A is unclear on whether the Portuguese legislator has gone this this far. In fact, this provision adds (on its No. 2) that the right to collective representation of economically dependent workers shall be defined in specific legislation (still inexistent) that will ensure, among other things:

- their representation by trade unions,
- that the bargaining of collective agreements on their behalf will require previous consultation with associations of independent workers, representative in that sector,
- the application of previously existing collective agreements to these workers (if they so wish), as long as they carry out tasks that correspond to the corporate object of the undertaking, for a period of over 60 days.

This provision does not state, at any moment, that the access of these workers to collective bargaining and union representation will be achieved through their unionization. Conversely, it is expressly mentioned unions should consult with other representative associations when bargaining on their behalf… Which raises two questions:

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[18] S. Rainone/N. Countouris, *Collective bargaining and self-employed workers. The need for a paradigm shift*, ETUI Policy Brief, 2021.11, 3 (available at https://www.etui.org/sites/default/files/2021-07/Collective%20bargaining%20and%20self-employed%20workers_2021.pdf , accessed on 21/12/2023).

[19] Recital 8, Communication from the Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02).

[20] Recital 9, *Guidelines on the application*, cit.

1. How will such representative associations be identified, given that there are no criteria of representativeness in the Portuguese regime?[21]
2. Assuming that these workers could organize in trade unions, why should the latter have to consult with other organizations? Wouldn't this kind of demand be perceived as legal interference with union activity?[22]

The definitive answer to these questions depends on the approval of the aforementioned "specific legislation" (which might take its time, given the recent panorama of political instability, marred by the dissolution of the Parliament, the subsequent call for elections in March 2024, and, finally, the nomination of a minority Government, following the polarizing electoral results[23]). And here the Legislator faces two options. Either to allow the unionization of economically dependent workers (which would be in accordance with the international instruments that bind the State). Or to deny such possibility, even though trade unions will now be incumbent to represent these workers when bargaining collectively[24].
Given the wording of Article 10-A, No. 2, (and particularly the need to consult with other associations), it is probable that the Legislator will follow the second path, leading to a scenario in which trade unions will be able to bargain on behalf of workers that they do not (nor can) formally represent. Which would spark a significant change in the traditional representative functions of Portuguese trade unions. In fact, when bargaining, trade unions (in the private sector) typically represent their members, given that, in principle, a collective agreement will only apply to the employees that are affiliated with the signing union (Article 496 of the Labour Code)[25].

[21] Neither regarding these professional association, nor even trade unions.
[22] Raising precisely the point it is incumbent only to trade unions to determine who they represent and how they do it, see Confederação Geral dos Trabalhadores Portugueses – Intersindical Nacional, *Guia interpretativo e orientador da acção sindical para as alterações à legislação laboral* (available at: https://www.cgtp.pt/informacao/279-destaque/280-secundario/19001-guia-interpretativo-e-orientador-da-accao-sindical-para-as-alteracoes-a-legislacao-laboral), page 23.
[23] See https://www.dn.pt/politica/marcelo-dissolve-parlamento-sem-consenso-do-conselho-de-estado-17311061.html (accessed on 21 December 2023) and https://www.reuters.com/world/europe/portugals-minority-government-be-sworn-stability-doubtful-2024-04-02/ (accessed on 26 April 2024).
[24] M. R. Ramalho (*Tratado de Direito*…, *cit.*, 50) believes that either option presents constitutional problems, since, in the Author's view, these rights can only be enjoyed by employees.
[25] Even though there are several deviations to this rule (as the one consubstantiated in the governmental extension of collective agreements), they always refer to employees that, even if not members of the trade union at stake, can choose to become so.

This scenario begs the question of what would the motivation of trade unions be, in such case, to devote their (often scarce) resources to bargain on behalf of these workers (knowing that they are not, nor can became their members)?[26]
It should also be stressed that even though these provisions allude to the rights to collective representation and collective bargaining, the right to strike is conspicuously absent. As I previously noted, since this right has also been perceived, in the Portuguese legal order, as an exclusive of employees, will economically dependent workers be allowed to invoke it? The aforementioned Articles do not seem to permit it, *per se*. This doubt will, perhaps, be answered by the upcoming specific legislation. But even if such omission remains, could the right to collective bargaining be conceived without the necessary means to its materialization? Would it not, in this kind of situation, be reduced to a (as famously stated) "collective begging"?
Finally, as already stressed, these provisions enshrine not only the right to the bargaining of new agreements, but also to enjoy from pre-existing ones (either by individual choice, through Article 497, or by governmental extension). Which may cause several practical difficulties, since, when concluded, these instruments were not aiming at this specific category of workers. Should economically dependent workers benefit from all clauses or, for instance, only those related to the matters referred to in Article 10, No. 1?[27]
The lack of definitive elements precludes any further considerations for the moment, but the gaps and doubts surrounding this new regime are noticeable.

2 Union activity in the undertaking

Another novelty of this reform consists in the reinforcement of union activity in the undertaking. In fact, according to the new wording of Article 460, No. 2, of the Labour Code, the rights enshrined in Articles 461 (right of assembly), 464 (right to facilities), and 465 (right to diffusion of information) will also apply, *mutatis mutandis*, to companies where there is no union presence.
The aim of this change is not entirely clear. Some believe that it means that unions, which do not represent any workers at a given company, will now be allowed to call for assemblies, to demand room (inside the company) for their activities, and to distribute and post union-related information in pre-

[26] Posing similar doubts, see J. Gomes, *A Lei n.º 13/2023 de 3 de abril: uma mudança de paradigma em matéria de direito sindical?*, in *Reforma da legislação laboral – Trabalho digno, conciliação entre a vida profissional e familiar*, coord.: M. R. Ramalho, C. O. Carvalho, J. N. Vicente, Estudos APODIT 11, Lisboa, AAFDL, 2023, 74 and ff.
[27] Similarly, Confederação Geral dos Trabalhadores Portugueses – Intersindical Nacional, *Guia...*, cit., 20.

determined spaces[28]. However, this scenario raises constitutional doubts, since it intrudes on the rights to private economic initiative and the right to private ownership (Articles 61 and 62 of the Portuguese Constitution). Such encroachment is particularly visible regarding the right to demand facilities, given the associated costs (costs that are not predefined, since they will depend on the (varying) number of existing trade unions)[29]. And even if one argues that this intrusion is justified by the right to freedom of association, it still seems to lack proportionality[30].

It might, however, be possible to harmonize these provisions with the constitutional parameter.

Firstly, it should be stressed that the first draft of the new Article 460, No. 2, was different. It merely alluded to the right of assembly, and it clearly stated that trade unions were entitled to summon them. The final version of this provision went in a different way, merely mentioning that the rights contained in Articles 461, 464, and 465 can be enjoyed in companies without union representation, with the necessary adjustments.

This wording begs the question of which adjustments should take place. Allowing third parties to demand spaces or rooms within the company seems excessive. And the same goes for the organization of assemblies or the distribution of information (namely in the company's internal portal). It seems, therefore, more appropriate to acknowledge these rights to the company's workers. Nevertheless, even in this scenario, doubts are rife. Are such rooms to be granted on a permanent basis? Within the company, how many workers will be required for these rights to be exercised (one third? The majority?)?[31]. And will these workers be interested in using such resources? It is unlikely that they will, since they are not workers' representatives and, therefore, lack the protection afforded to that category.

Finally, regarding the right to assembly, and considering the final wording of Article 460, No. 2, (and the difference it bears from the initial proposal), I believe it should not be read as allowing outside unions to call meetings in the company, but merely as allowing the invitation of union leaders to take part of such assemblies – extending a possibility that already exists when there is union representation in the company (Article 461, No. 4, of the Labour Code).

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[28] See R. Martinez/G. da Silva, *Constituição e agenda do trabalho digno*, *Revista Internacional de Direito do Trabalho*, III, 2023, No. 4, 325.

[29] *Idem*, *ibidem*, 327.

[30] *Idem*, *ibidem*, 328.

[31] J. Gomes («A Lei n.º 13/2023…», cit., 83) believes the right to facilities may, in this case, be merely conceived as granting an access to the company or its proximities to trade unionists, when there is no union presence.

3. Final considerations

It is undeniable that this reform has made interesting steps towards the modernization of the Portuguese labour law and the reinforcement of the protection of workers, particularly by allowing economically dependent workers to access collective bargaining instruments.

However, these new provisions elicit several doubts, regarding their adequate interpretation and application and, in some cases, their efficacy is still dependent on other legal instruments that still do not exist. And, regarding the new possibilities of union activity in the undertaking, their implementation must be cautious (and modest) or, otherwise, they risk encroaching on the Constitution. All circumstances that severely limit the impact of this innovation.

Nevertheless, the measures regarding economically dependent workers are quite relevant and will contribute to a better adjustment of the Portuguese legislation with the rights to freedom of association and to collective bargaining, in the sense that they are given by the ILO conventions and the (Revised) European Charter of Social Rights (although, as previously underscored, the extent to which this will happen is still hazy).

It should also be noted that this particular change was, probably, motivated by the intention of providing a better protection of platform workers. In fact, another innovation of the Decent Work Agenda was the introduction of a new employment presumption (Article 12-A of the Labour Code) specifically applicable to this reality[32]. Which means that platform workers, who do not manage to activate this mechanism or, in general, to prove that they are inserted in an employment relationship, can still accede to some (now reinforced) labour protection, insofar they are considered economically dependent workers. Still, the broad terms in which this regime was conceived will lead to the encompassing of many other categories of workers.

Finally, in what concerns the scope of representation provided by Portuguese trade unions, we might be facing a shift from its previous, more traditional paradigm. It is still uncertain whether this was the choice made by the Legislator and the consequences to which it may lead. And only in time will we be able to ascertain the availability and willingness of trade unions to perform such tasks.

[32] For further developments see J. L. Amado, *As plataformas digitais e o novo art. 12.º-A do Código do Trabalho Português: empreendendo ou trabalhando?*, Revista do TST, 2023, vol. 89, No. 2, 294-312 and A. T. Ribeiro, *An employment presumption for platform work – the Portuguese experience*, https://global-workplace-law-and-policy.kluwerlawonline.com/2024/03/18/an-employment-presumption-for-platform-work-the-portuguese-experience/ (accessed on 26 April 2024).

References

AMADO, João Leal, *As plataformas digitais e o novo art. 12.º-A do Código do Trabalho Português: empreendendo ou trabalhando?*, *Revista do TST*, 2023, vol. 89, No. 2, 294-312.

CANOTILHO, J. J.; MOREIRA, Vital, *Constituição da república portuguesa anotada*, Vol. I. 4th ed. rev., Coimbra, Coimbra Editora, 2007.

CONFEDERAÇÃO GERAL DOS TRABALHADORES PORTUGUESES – INTERSINDICAL NACIONAL, *Guia interpretativo e orientador da acção sindical para as alterações à legislação laboral*.

COUNCIL OF EUROPE, *Digest of the case law of the European Committee on Social Rights*, 2022.

GOMES, Júlio, *A Lei n.º 13/2023 de 3 de abril: uma mudança de paradigma em matéria de direito sindical?*, in *Reforma da legislação laboral – Trabalho digno, conciliação entre a vida profissional e familiar*, coord.: Maria do Rosário Ramalho, Catarina de Oliveira Carvalho, Joana Nunes Vicente, Estudos APODIT 11, Lisboa, AAFDL, 2023, 59-84.

GOMES, Júlio, *Nótula sobre o artigo 497.º do Código do Trabalho de 2009*, *Questões laborais*, 2014, No. 44, 5-14.

GOMES, Júlio; RIBEIRO, Ana Teresa, *Algumas notas sobre a contratação coletiva e o direito da concorrência*, *Revista de Direito e de Estudos Sociais*, 2021, Nos. 1-4, 219-246.

ILO, *Freedom of association. Compilation of decisions of the Committee on Freedom of Association*, 6th ed., 2018.

LEITE, Jorge, *Direito do trabalho*. Vol. I. Coimbra, Serviços de ação social da UC, 2004.

MARTINEZ, Pedro Romano; SILVA, Gonçalves Luís da, *Constituição e agenda do trabalho digno*, *Revista Internacional de Direito do Trabalho*, III, 2023, No. 4, 279-362.

RAINONE, Silvia; COUNTOURIS, Nicola, *Collective bargaining and self-employed workers. The need for a paradigm shift*, ETUI Policy Brief, 2021.11.

RAMALHO, Maria do Rosário, *Da autonomia dogmática do direito do trabalho*, Coimbra, Almedina, 2000.

RAMALHO, Maria do Rosário, *Tratado de Direito do Trabalho. Parte III – Situações laborais colectivas*, 4th edition, Coimbra, Almedina, 2023.

REDINHA, Regina, *Trabalho economicamente dependente: the soft approach*, *Questões laborais*, 2023, No. 63, 7-16.

RIBEIRO, Ana Teresa, *The extension of collective agreements by State intervention: the Portuguese regime and the protection it may offer to SMEs*, in *Employment relations and the transformation of the enterprise in the global economy. Proceedings of the thirteenth*

international conference in commemoration of Marco Biagi, Torino, G. Giappichelli Editore, 2015, 247-262.
REIS, João, *O conflito colectivo de trabalho*, Gestlegal, Coimbra, 2017.

Job Guarantee as an Active Labour Market Policy for Tackling Long-term Unemployment: Empirical Findings from The Netherlands

Kees Mosselman, Louis Polstra, Arjen Edzes *

Abstract: This article analyzes two Dutch experiments in which the government guarantees a job to tackle long-term unemployment. The experiment with the Melkert jobs was carried out in the 1990s. Recently the municipality of Groningen implemented a project in which long-term unemployed people are offered a so-called basic job. The research results of this project demonstrate that the target group can do productive work on a regular basis and that basic jobs have a net positive social added value based on a Social Cost Benefit Analysis (SCBA). In this article we also pay attention to the recent academic debate between an unconditional basic income (BIG) and a job guarantee (JG).

Keywords: *Job Guarantee, long-term unemployed, Basic Income, Social Cost Benefit Analysis, social security.*

1. Introduction

The right to work is included in the Universal Declaration of Human Rights (UN, 1948, Article 23) and more recently in the Sustainable Development Goals (2015, goal 10). The right to work is also enshrined in law at national

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level. Article 19 of the Dutch Constitution states:" the promotion of sufficient employment is a matter of concern to the government."
After the Second World War, the policy of Western European welfare states was aimed at achieving full employment. In cases of unemployment, sickness, and disability, these states chose to provide income guarantees to their citizens. During periods of unemployment, individuals could resort to reintegration schemes, like training programs, offering an internship, job mediation and wage cost subsidy (SCP/CPB, 2004). During the 1990s, a political and ideological shift occurred, causing the full employment policy to no longer be a priority (Mitchell & Muysken, 2008). Furthermore, technological developments led to unemployment, especially at the lower end of the labor market. The position of low-skilled workers was weakened by globalization and/or by the displacement of middle-skilled workers who became prevalent after the surge in automation since 2000.
These developments have sparked societal discussions about fundamental and radical adjustments/changes to the welfare state system. There are proponents for the introduction of an unconditional basic income for everyone (BIG) and advocates for a Job Guarantee for everyone willing to work. In the Netherlands, experiments have been conducted with forms of job guarantees. In our article, we analyze two Dutch experiments after which we aim to answer the question: what lessons can we draw from the introduction of JG (Job Guarantee)?
However, before delving into these experiments, we want to briefly touch upon the debate between basic income and job guarantee.

2. The recent debate between BIG and JG

The discussion between job guarantee or basic income relates to the three elements that, according to Hannah Arendt (2012), shape our active life. These three elements are labour, work and action. Labour is about shaping our natural environment to survive. We have to make fire, build shelters and make clothes. Labour is in our modern time transformed in the production and consumption of goods. Work is a creative, but lonely activity. And action takes place in the public space, where people engage in politics through negotiation. According to Arendt, that is where one acquires freedom.
With a basic income, citizens no longer are obliged to exchange labour for their livelihood. A person is free to organize their life according to their own wishes. But the freedom of those who must pay the higher taxes decreases. Marx et al. (2018) used a microsimulation to explore the effects of basic income in the Netherlands. These effects are context-specific, because the social security and tax system differs per country. According to the authors,

with a basic income of € 982 per month for an adult and € 165 for a child, the personal tax would increase from 40.8% to 50.6% for the income group € 19,982 - €67,072 and for the income group higher than € 67,072 from 52.0% to 64.5%. This calls for a strong sense of solidarity. As a result 3.6% of the population are out of poverty, compared to 3.2% who end up in poverty without a basic income. It would be effectively a small net profit. When it comes to combating poverty, the question is whether other positive freedom-expanding measures do not yield more profit (Robeijns, 2018). For example, regulations for better and more accessible education, adequate and affordable housing, and better legal protection of cheaper health care.

To be eligible for social security benefits in the Netherlands, the person must work or live in the Netherlands. In 2019, the Netherlands had 735 thousand foreign employees (Heyma & Vervliet, 2022). In the same year, more than 95,000 young people came to study in the Netherlands (Elfferich, Favier & Snethlage, 2021). They all fall under the definition of Dutch residents. In the discussion about basic income, it is not clear whether they are also entitled to a basic income. Or whether it only applies to people with a Dutch passport? Europe has freedom of personal movement. What pull effect would the introduction of a basic income have in one country? The ethical principle of reciprocity, in which people feel obliged to contribute to society through work and other forms of social participation, is at stake when European citizens move from a country without a basic income to a country with a basic income. This issue is identified in research, but mostly neglected in the public debate about basic income, because it leads to the exclusion of non-Dutch people, while basic income is inclusion-driven (Schuring & Driessen, 2021).

In addition to combating poverty, the introduction of basic income is intended to have a second effect, namely the liberation of work as a necessary evil. The basic income offers citizens the opportunity to negotiate with the employer in the public space about the amount of their salary. Basic income would increase the freedom to enter the labour market. This strengthens the employee's negotiating position.

But the question remains whether the position of vulnerable employees, for example those with disabilities, would improve, especially when labour becomes costly. Calnitsky & Latner (2017) report an 11.3% decline in labour force participation in an experiment with basic income in the US. It appears to be mainly non-single women who work less, because they are often the lowest-earning partner (Brown & Immervoll, 2017). Basic income unintentionally perpetuates gender inequality.

There are indeed many negative aspects to work but work also has its positive sides. Work provides structure and social contacts (Paul & Batinic,

2010; Stiglbauer & Batinic, 2012). It has positive effects on health, self-confidence and self-esteem (Jahoda, 1982; Hollederer, 2015; Selenko, Batinic, & Paul, 2011). The Job Guarantee approach places particular emphasis on these benefits, but the labour must meet certain conditions. One of them is that the job must provide socially meaningful work. So they shouldn't be bullshit jobs, as described by Graeber (2018). The job must also offer development prospects. And not unimportantly, one must receive a salary that makes social participation possible.
This is also about positive freedom. However, this is not at the expense of the freedom of others. Such a job model, referred to in the Netherlands as "basisbanen" and in this article translated as "basic jobs", can be financed through savings from benefits and production can be financed from savings from benefits and production. This can be carried out in a budget-neutral manner without raising taxes.

3. Dutch experiments with basic jobs

In the 1990s, the Netherlands conducted nationwide experiments with a form of job guarantee. This involved the introduction of 40 thousand jobs, which were named after the erstwhile Minister of Social Affairs and Employment; the Melkert jobs. This experiment was studied using document analysis and interviews (Mosselman & Muysken, 2020).
More recently, there has been an experiment with 50 basic jobs in the municipality of Groningen. The municipality of Groningen is located in the north of the Netherlands and has over 210 thousand residents as of 2023. A formative evaluation study was conducted for this experiment, where data were collected through time registration, interviews with participants and supervisors, the self-sufficiency matrix, and file data (Mosselman & Polstra, 2023). Below, we will discuss both experiments separately.

3.1 Rise and fall of the Melkertbaan

In the 70s and 80s of the last century, unemployment in the Netherlands, as in the other Western European countries, was relatively high (CPB, 1994). High long-term unemployment and high youth unemployment were of particular concern. The government responded with predominantly Keynesian policies in the form of support for companies, employment programs and increasing government spending and social security.
After a gradual fall in unemployment in the second half of the 80s, another worrying increase followed to almost even 10% in 1994 (Melkert & Linschoten, 1996). Within this, the weak groups in society were

disproportionately affected. In this serious socio-economic situation, the government decided to create a total of 40,000 jobs in the public sector between 1994 and 1998, intended for the long-term unemployed and welfare recipients. This EWLW scheme (Extra Employment for the Long-Term Unemployed) was explicitly called a structural measure. The forty thousand jobs envisaged would be regular and permanent with a full salary. An important second objective of the scheme, in addition to promoting employment, was to improve the quality of services in the public sector. The remuneration started at the statutory minimum wage and could amount to a maximum of 130% of this statutory minimum wage and the saved social assistance benefits formed part of the financing of the EWLW scheme.

Over the course of the 90s, both the political and scientific economic climate changed. Responsible for this was the rise of neoliberal political economic ideas. In 1994, the OECD's Jobs Study was published, which was largely based on the vision of Layard, Nickel and Jackman (1991). This view, in which unemployment is attributed to obstacles in the labor market, gained a lot of authority within economic science. Because the socio- economic situation in 1998 was also better than in 1994, moving on to the regular labour market became the new credo. The 40,000 EWLW jobs were converted into entrance jobs (E-jobs) to illustrate that they were a stepping stone to a regular position. In the period 1998 – 2002, the number of E-jobs would be increased by 10,000. In addition, there were 10,000 transition jobs (T-jobs) with a better salary than E-jobs. Employees who had worked in an E-job for 5 years could move on to such a T-job with a higher salary. The biggest change, however, was that the E/T-jobs would be flexibly occupied. In fact, all E/T-jobs had been given an outflow target. This was a break with the original design of the Melkertbaan, namely an (extra) regular, permanent job within the collective sector.

Partly due to the favourable economic development in the cabinet period 1998 – 2002, there was increasing criticism of the design and financing of labour market policy (IBO, 2001). In accordance with the OECD's new vision, the abolition and phased phasing out of the E/T jobs scheme (Melkertbanen) was advocated. This plea was widely supported by politicians and civil society organisations, including the trade union movement. In those years the neoliberal view was on the rise, that the government cannot be responsible for full employment. According to this view, it is the responsibility of the individual job seeker to obtain a job on his own (as much as possible). The government is supporting in providing additional wage cost subsidies as part of the reintegration schemes.

3.2 The experiment Basisbanen Groningen

A decade after the experiment with the Melkert jobs, a debate arose again about the desirability of basic jobs. It was experimented with in several cities, such as Amsterdam, The Hague, Tilburg and Heerlen. In almost all cases, these were temporary jobs, which made the jobs a reintegration tool to help the long- term unemployed move into regular employment.
The municipality of Groningen decided to create permanent jobs for the long-term unemployed. This makes it the most compliant with the principle of job guarantee.

Characteristics of the Groningen approach

In March 2020, after a feasibility study (Mosselman & Ravenshorst, 2018), the municipality of Groningen started experimenting with basic jobs for welfare recipients who were longer than 3 years on benefits, with very poor or no prospect in the labour market. The first experiment involved 50 participants/basic job holders. Due to the corona pandemic, participants entered gradually. The study covers the period 1 March 2020 to 1 December 2022. In mid-2022, based on the (positive) interim reports of the researchers, the municipality of Groningen decided to change the basic jobs experiment into a permanent instrument as of 1 March 2023 and to expand it during the coming years to a total of 250 basic job holders.
The aim of the project is to create employment for people who cannot participate in the 'regular' labour market because of a mix of external reasons (mismatch job demands with qualification, (age) discrimination) and interpersonal reasons (physical restraints, psychological problems, poor language skills). But still they can perform certain labour activities. These jobs must also contribute to the well-being and financial self-reliance of participants. The jobs consist of activities for which the market does not pay, but which do have social added value and contribute to the quality of life in the neighbourhoods and villages of the municipality. The local community determines which activities are useful and meaningful. Resources should be available for sufficient and professional guidance/coaching of the participants. Selection of participants is done by 2 participation coaches from the municipality. The target group consists of people who receive benefits under the Participation Act, the so-called welfare recipients. These can voluntarily register as potential participants and case managers of the Service can also bring in potential participants. The two participation coaches held discussions with the potential participants and from these discussions 50 participants were selected on a voluntary basis.

Basic job holders, according to the file data, are older in age (averaging 54 years), are mostly single (90%), have been unemployed for a long duration (7.8 years), and have a lower education level (50% without an initial qualification). Basic job holders report facing numerous challenges, such as physical issues (33%), mental health problems (24%), and debts (30%), which places a regular job out of their reach. Half of them grapple with more than one issue.

Table No. 1. Characteristics basic job holders

		Basic job holders	
Age	20 t/m 29	0	0%
	30 t/m 39	2	4,1%
	40 t/m 49	10	20,4%
	50 t/m 59	20	40,8%
	60 and older	17	34,7%
	Avg./SD (years)	54,2	7,1
Household composition	Single*	44	89,8%
	Single with children	2	4,1%
	Cohabiting	1	2,0%
	Living together with children	2	4,1%
	Otherwise	0	0%
Education	Without qualification	23	48,9%
	Initial qualification	24	51,1%
Duration of benefit	Less than 3 years	11	23,9%
	3 to 5 years	3	6,5%
	5 to 10 years	17	37,0%
	10 to 15 years	10	21,7%
	15 to 20 years	3	6,5%
	20 years >	2	4,3%
	Avg/SD (months)	94,4	64,9

Source: Mosselman & Polstra (2023)

Participating organizations include: neighborhood businesses, care farms, training and work enterprises, community centers, repair cafes, recycling enterprises, local schools, sports clubs, playground associations, childcare facilities, healthcare institutions, residents' organizations, and housing corporations. The guidance on and around the job is provided by four professional work guidance/job coaching organizations that receive subsidies from the municipality for this purpose. They serve as the direct point of contact for employees, provide instruction and support in task execution, and represent the formal employer (the Municipality of Groningen) in matters such as sick leave notifications and leave requests. As the formal employer, the municipality pays the salary, which is equal to the statutory minimum wage. The contract duration becomes permanent after 3 years of positive assessment.

The tasks performed in the basic jobs include roles such as supporting community centers and sports clubs, assisting bicycle stewards, and cleaning up litter. The basic jobs often consist of sets of tasks. The majority of the basic job holders have an employment contract ranging from a minimum of 32 to a maximum of 36 hours per week, and the work should not displace paid employment or regular volunteer work. When drafting the project plan, it was further assumed that it should be possible to obtain a modest financial contribution from the job-providing parties. This assumption turned out to be overly optimistic during the research period.

Attention was paid to the need for adequate professional guidance. The participation coaches who conducted the selection interviews with potential participants continue to support the participants throughout the entire experiment, addressing changes in their daily life and the new income situation. These coaches, trained in the Mobility Mentoring methodology (Jungman & Wesdorp, 2017), regularly interact with the participants about various aspects of their well-being, such as perceived health, debt situation, housing, social network, family relations, etc. The work guidance is outsourced to four experienced and professional job coaching organizations. They receive a subsidy from the municipality for this purpose. Their coaching is based on the 'Supported Employment' method (Coenen, Hanegraaf & Valkenburg, 2012).

The intensity of guidance for the basic job holders by the work supervisors is around 2.5 hours per week at the start and in the initial months of the basic job. Afterward, the guidance and coaching intensity decreases to 2 hours per week, eventually stabilizing at a relatively consistent 1.5 hours per week. The work guidance encompasses both direct coaching and management.

Appreciation and well-being of participants

We will address consecutively (1) the assessment of well-being and health development, (2) the appreciation for the organization and structure of the basic jobs, and (3) the assessment of personal suitability.
The well-being of the participants has been monitored by the municipality's participation coaches using the so-called "Bridge to Self-Sufficiency" (Brug naar Zelfredzaamheid). This 'bridge' consists of five life domains: stability in the home situation, well-being, work and income, finances, and education. These life domains have been operationalized into eight variables: housing, care for family, health, social network, debts, savings, diploma, and net income. Each variable has five scoring possibilities, ranging from 1 to 5. The participation coaches, together with the basic job holders, fill in the Bridge to Self- Sufficiency. The complete scale is included in the appendix.
The assumption is that the degree of self-sufficiency and well-being of the basic job holders improves thanks to the fulfillment of the job and the associated guidance. Out of the 50 basic job holders, we have a complete data set on the self-sufficiency matrix for 38 of them. We made a comparison between the initial scores, scores after six months, and scores after one year. In the table below, we present the total scores for the eight operationalized variables. This clearly shows an improvement across the board for the group as a whole. Half a year after the start of the basic job, the total score improved by almost 8%, followed by a more moderate increase of 3.5% after the second half of the year. Considering that the score after one year is even 82.6% of the maximum achievable score. Therefore, the well-being of the basic job holders as a group has improved.

Table No. 2 total scores per pillar at start, after 6 months and after 12 months

	Start	After 6	After 12
Housing	154	172	176
Care	173	175	174
Health	146	146	148
Soc. contacts	152	153	161
Debts	163	171	180
Savings	81	108	116
Diploma	118	116	117
Income	140	175	184
Total	1127	1216	1256

Source: Mosselman & Polstra (2023).

Examining individual progress after 6 months, 30 participants scored higher, and 8 remained the same. After a year of working in a basic job, we mainly see further improvement. Only for 3 participants has the total score decreased very marginally compared to the score at the start of the work. For everyone else, we see an improvement.

We were able to interview 33 basic job holders about their perceived health, their satisfaction with life, their judgment on engaging in meaningful activities, and their judgment on the degree of involvement in society. Or the non-respondents some were long-term sick (not work-related), others had sheltered employment, had retired, voluntarily quit or refused an interview.

Out of the 33 participants, 20 find their health good to excellent, 8 consider it moderate, and 5 participants believe their health is poor. The average score of the basic job holders on satisfaction with their life and feeling part of society is 7.9. The score for satisfaction with what they do in life is 8.

The positive response from the basic job holders also applies to their tasks and their coaching. Basic job holders are enthusiastic about their tasks, their supervisors, and their colleagues. "This should have happened much earlier" was said multiple times. Most participants give a 7 for their tasks. Out of the 33 interviewed, 29 participants said they had a say in the choice of tasks. We learned from 2 participants that they suggested their tasks, and the remaining 2 did not want to have a say because they were fully satisfied with the tasks provided.

The average score for guidance is 7.4. They were almost unanimously enthusiastic about the tasks and the guidance. This applies to both guidance on the shop floor and coaching by job coaches and guidance and support from the participation coaches.

An interesting part of the interviews is the assessment the basic job holders had to make themselves about their suitability for a job in the regular labor market. We also posed this question about the suitability of the basic job holders for the regular market to their job coaches.

Out of the 33 basic job holders, 15 (46.9%) believe they are suitable for a regular job, and the job coaches consider 38.6% suitable (17 out of the total 44 guided participants) for the regular labor market.

The job coaches are enthusiastic about the commitment and learning ability of the basic job holders. Some participants appear to need little instruction and coaching, while others need more than average. In interviews with job coaches, it became clear that the guidance is much more and much broader than just 'coaching on the job'. Guidance is largely about promoting the personal development of basic job holders (OECD, 2006). Of the 44 participants they guide, 28 of them have potential for development identified,

they are unsure about 6 participants, and for 10 participants, they believe that little to no development can be expected.

Social costs-benefit analysis (SCBA)

A fundamental point of discussion, shared by all parties involved, is the financing of a basic job. The total cost of the basic jobs consists of gross wages and employer charges, guidance costs, and implementation costs. Total savings come from dropped benefits and ceased implementation costs. In the Dutch situation, there is a substantial difference between a social welfare benefit, especially for singles, and the gross wage costs. When conducting financial analyses of basic job projects for people on welfare with very poor or no prospect for a job in the regular labor market, this special situation must be taken into account.

Viewing this through the lens of 'broad prosperity' - for instance, by using an SCBA - one can identify several societal benefits of employment that could cast a completely different light on the matter compared to a strictly business-economic calculation. There is now enough empirical research indicating that work has positive effects on the health and well-being of workers and their households, as well as positive effects on the livability and social climate of neighborhoods, villages, and cities - in short, of communities (Jahoda, 1982; Hollederer, 2015; Selenko, Batinic, & Paul, 2011; Paul & Batinic, 2010; Stiglbauer & Batinic, 2012).

After completing the research project Basic Jobs Groningen, based on empirical material and recognized methods of monetizing the quality of life, we set up an ex-post SCBA (Van Eijkel, Gerritsen, Sadira & Versantvoort, 2020; Van Gils, Schoemaker & Polder, 2013). It appears that the Basic Jobs Groningen project yields a net societal benefit of just over €7000 per full-time basic job holder. The calculated business-economic loss for the municipality of Groningen is €5,000 per full-time basic job holder.

Of course, these calculations of societal benefits are fraught with great uncertainty, especially when dealing with small groups, as in our experiment. The significance of monetizing these societal benefits is to provide a valuation, allowing for comparison with the actual financial values. This is the advantage of this type of calculation. Work promotes health, and health has positive societal effects, which can be clarified by calculating the avoidable costs of illness.

4. Conclusions

Based on the two Dutch experiments, we can conclude that long-term unemployed people who cannot find a job on the regular labour market are capable of productive work. The condition is that job requirements are adapted to the capabilities of the long-term unemployed.
Another conclusion is, that basic jobs should not be judged on the transition to the regular labour market. Although basic job workers gradually develop new skills and abilities by working in a basic job, most of them remain at a distance from the regular labour market. We further conclude that in the financial analysis of basic jobs we should not only look at the business-economic calculation of costs and benefits for the municipality. Then the outcome is disadvantageous for the municipality even with a wage cost subsidy. A cost-benefit analysis that takes the social value into account (SCBA) provides a substantially positive outcome of basic jobs.

We learned the following lessons:

- The Groningen experiment shows that small-scale experiments with basic jobs are feasible. However, it proved challenging to organize combinations of useful tasks that can be executed as basic jobs and to select and motivate the individuals eligible for these basic jobs.
- When creating the job, the intrinsic limitations of unemployed individuals who cannot find a job on the regular labour market should have priority and not the job requirements. In other words, the job must adapt to the unemployed individual, not the other way around. The job itself should have societal value, be permanent, and not compete with existing jobs. These jobs should, therefore, be realized in the public or social sector.
- Working in a basic job and receiving guidance, both at work and in other areas of life, stimulates the development potential of the participants. After a few years, some participants might potentially move on to the regular labor market. However, transition in the long run should not be included as an objective. The Melkert jobs experiment teaches us that in the long run, this is the downfall of the basic job.
- Basic jobs at the statutory minimum wage are in the Dutch situation a financial loss for the municipality. Even after a wage subsidy paid by the national government, a substantial net cost per basic job holder remains.

5. Contemplation

Basic jobs can be seen as a collective provision, given that (a) people have the right to work, and (b) the regular labor market, including the reintegration tools, is unable to offer a job for a substantial group of people. As a collective provision, every citizen should be eligible. Municipalities could be held responsible for this. Tcherneva (2020) suggests transforming benefit organizations into employment organizations, which, in addition to a reintegration task for people close to the labor market, get a job creation task for those with no prospect in a regular job. The national government should take care of the financing.

When introducing basic jobs, long-term goals must be set and legally established. The work must be permanent, it should be worthwhile, but it should also not hinder any potential transition to a regular job.

References

Arendt, H. (2012). *The human condition (15th printing*). Chicago.

Brown, J. & Immervoll, H. (2017b). *Basic income as a policy option: Can it add up? Policy brief on the future of work*. OECD.

Calnitsky, D. & Latner, P. (2017). Basic Income in a Small Town: Understanding the Elusive Effects on Work. *Social Problems*, 64(3), 373-397.

CPB. (1994). *Central Economic Plan 1994*. The Hague: CPB

Elfferich, A., Favier, S. & Snethlage, F. (2021). *Incoming degree mobility in Dutch higher education 2020- 2021*. The Hague.

EMPATH (2022). *Mobility Mentoring 2022 IMPACT REPORT*. FY22_Impact_Report_FINAL.pdf, geraadpleegd op 30 September 2023.

Graeber, D. (2018). *Bullshit jobs: The rise of pointless work, and what we can do about it*. London.

Heyma, A. & Vervliet, T. (2022). *Arbeidsmigratie in 2030Mogelijke ontwikkelingen in vier scenario's*. Amsterdam.

Hollederer, A. (2015). Unemployment, health and moderating factors: the need for targeted health Promotion. *Journal of Public Health*, 23 (6), 319-325.

IBO. (2001). *Aan de Slag. Eindrapport van de werkgroep Toekomst van het Arbeidsmarktbeleid*. Den Haag: Ministerie Sociale Zaken en Werkgelegenheid.

Jahoda, M. (1982). *Employment and unemployment: A social psychological Analysis*. Cambridge.

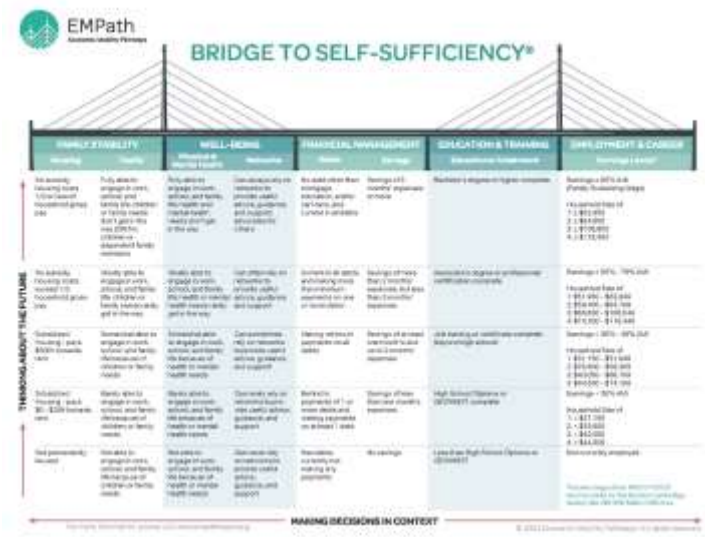
Jungmann, N. & Wesdorp, P. (2017*). Mobility Mentoring® Hoe inzichten uit de hersenwetenschap leiden tot een betere aanpak van armoede en schulden*. Den Haag.

Layard, R., Nickell, S. & Jackman, R. (1991), *Unemployment, Macroeconomic Performance and the Labour Market*. Oxford: University Press.

Marx, I., Van Lancker, W., Verbist, G. (2018). *Feit en fictie omtrent het basisinkomen in Nederland*. Hilversum/Antwerpen.
Melkert, A.P.W., & Linschoten, R.L.O. (1996). Sociale nota 1996; Brief minister en staatssecretaris ter aanbieding van de Sociale nota 1996. Den Hague.
Mitchell, W., & Muysken, J. (2008). *Full Employment abandoned, shifting sands and Policy Failures*.
Cheltenham. United Kingdom
Mosselman, C.A. & Muysken, J. (2020). *Melkertbanen: lessen voor de baangarantie*. Den Haag: WBS.
Mosselman, C.A. & Polstra, L. (2023). *De Praktijk van Basisbanen. Monitor van het experiment Basisbanen in Groningen*. Groningen: HanzeUniversity of Applied Sciences.
Mosselman, C.A. & Ravenshorst, W. (2018). *Basisbaan in Groningen. Een haalbaarheidsonderzoek*. Groningen: HanzeUniversity of Applied Sciences.
OECD. (1994). *Jobs Study: Facts, analysis, Strategy*. OECD, Paris.
OECD. (2006). *Boosting Jobs and Incomes: Policy Lessons from Reassessing the OECD Jobs Strategy*. OECD, Paris.
Paul, K. I. & Batinic, B. (2010). The need for work: Jahoda's latent functions of employment in a representative sample of the German population. *Journal of Organizational Behavior*, 31 (1), 45–64. Robeijns, I. (2018). *Het basisinkomen. Waarom zouden we dit (niet) willen?* Utrecht.
Schuring, C. & Driesen, M. (2021). *Draagvlak voor basisinkomen stabiel*. Amsterdam: I&O Research.
SCP/CPB. (2004). *Sociaal Europa*. Bijlage bij Staat van Europese Unie 2004. Den Haag: Ministerie Sociale Zaken en Werkgelegenheid.
Selenko, E., Batinic, B. & Paul, K. I. (2011). Does latent deprivation lead to psychological distress? Investigating Jahoda's model in a four-wave study. *Journal of Occupational and Organizational Psychology*, 84 (4), 723–740.
Stiglbauer, B. & Batinic, B. (2012). The role of Jahoda's latent and financial benefits for work involvement: A longitudinal study. *Journal of Vocational Behavior*, 81 (2), 259-286.
Tcherneva, P. (2020). *The case for a Job Guarantee*. Oxford: Polity Press.
United Nations (1948). *Universal Declaration of Human Rights*. New York.
United Nations (2015). *Sustainable Developmental Goals*. New York.
Van Eijkel, R., Gerritsen, S., Sadiraj, K. & Versantvoort, M. (2020). *De brede baten van werk*. Den Haag: CPB.
Van Gils, P.F., Schoemaker, C.G., & Polder, J.J. (2013). Hoeveel mag een gewonnen levensjaar kosten? Onderzoek naar de waardering van de QALY. *Dutch Journal of Medicine*, 157: A6507.

Annex

Title: The Bridge to Self-Sufficiency



Source: https://coresonline.org/resources/empath-bridge-self-sufficiency
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A Changing Work Environment for Managers in a Swedish Mining Company: Observations in the Wake of the Covid-19 Pandemic

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Abstract: The study is exploratory in nature, and the empirical material is used to explore the effects of the pandemic on the work environments of managers. Results are based on interviews in combination with a self-reported data regarding how the managers allocated their work time during a work week. The results are then summarized into six hypotheses for how the pandemic affected the work of managers: 1) the workday was densified due to remote meetings; 2) "double work" during meetings became the rule, rather than the exception; 3) meetings became more focused; 4) meetings became more accessible; 5) the manager became less operational; and 6) a new work culture was created.

Keywords: *Covid-19, Managers, Working from home, Mining, Sweden.*

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1. Introduction

Few would disagree that the Covid-19 pandemic has had a large impact on the ways people work. For a substantial portion of workforces, in general, this impact has meant a shift to remote working or working from home. While pandemic measures that were put in place to combat the spread of infection certainly put a strain on many people, the changes have also challenged several assumptions about work, including how, where, and even when, we work.

Covid-19 pandemic-related events are recent. However, coinciding with the work with this article, The *Swedish Agency for Work Environment Expertise* (SAWEE) presented two international compilations of research on the effects of the pandemic on work and the work environment. These publications helped orient our work, providing indication about the effects of Covid on working life. Below we summarise the salient points.

The first research compilation, *Work environment and health in organizations in epidemics and pandemics caused by coronavirus*[1], is based on 95 research projects from around the world; 85 of the studies included the subject of employees in the healthcare sector and the unique problems that the management of Covid-19-infected patients entailed. Out of the remaining ten studies, all ten address issues outside of the healthcare sector, and four deal with remote working. A Chinese study[2] in the compilation compares mental illnesses between those of: 1) employees working in an office, 2) employees working from home, and 3) employees alternating work between office and home. The results of that study show that the employees' work did not have a strong link to symptoms of ill-health, with the exception of those employees who alternated between the office and home reporting less somatization (diseases in which the physical symptoms cannot be explained using previously-available medical tests) than those who worked exclusively in the office. Three studies in the compilation addressed the subject of teachers who had been forced to teach remotely, and one study from Australia[3] showed that teachers

[1] SAWEE (2022a), *Work environment and health in organizations during epidemics and pandemics caused by coronavirus.* Knowledge compilation 2022:5.

[2] Song L, Wang Y, Li Z, Yang Y, Li H. Mental health and work attitudes among people resuming work during the COVID-19 pandemic: A cross-sectional study in China. *International journal of environmental research and public health*. 2020 Jul 14;17(14).

[3] Pather N, Blyth P, Chapman JA, Dayal MR, Flack N, Fogg QA, m.fl. Forced disruption of anatomy education in Australia and New Zealand: An acute response to the covid-19 pandemic. *Anatomical Sciences Education*. 2020 May;13(3):284–97

wanted to keep some of the pandemic-related digital elements even after returning to on-site teaching.

The second research compilation, *Distance working – A compilation of international research on work environment and health, life balance and productivity before and during the COVID-19 pandemic with special regard to women's and men's conditions*[4], has a broader scope and reviews research literature in three areas: 1) work environment and health, 2) work-life balance and 3) productivity. The studies addressing working from home are divided into two groups: studies conducted before the pandemic (2005–2021) and studies conducted during the pandemic (2020–2021), with the difference between the two groups being that the former consists of the voluntary choice to work remotely and the latter remote work forced by the pandemic.

The results from the pre-pandemic period show that experiences of working from home were mostly positive, and remote work was perceived positively with increased autonomy and flexibility in time and space[5] [6]. Reduced contacts with colleagues and managers, as well as social isolation, were negative factors[7] [8]). Interpersonal relationships and collegial support are, therefore, important prerequisites for remote work to go well. In these studies, no clear gender differences were found[9] [10] [11]. Work-life balance seems to have been better when working from home[12] [13], and

[4] SAWEE (2022b), *Teleworking – A compilation of international research on occupational safety and health, life balance and productivity before and during the COVID-19 pandemic, paying particular attention to women's and men's conditions*. Knowledge compilation 2022:2

[5] Charalampous, M., Grant, C.A., Tramontano, C. & Michailidis, E. (2019). Systematically reviewing remote e-workers' well-being at work: a multidimensional approach, European *Journal of Work and Organizational Psychology*, 28:1, 51–73

[6] Ferreira, R., Pereira, R., Bianchi, I. S., & da Silva, M. M. (2021). Decision factors for remote work adoption: Advantages, disadvantages, driving Forces and challenges. Journal of Open Innovation: Technology, Market, and Complexity, 7(1), 70.

[7] Charalampous et al., 2019.

[8] Oakman, J., Kinsman, N., Stuckey, R., Graham, M. & Weale, V. (2020). A rapid review of mental and physical health effects of working at home: how do we optimise health? *BMC Public Health* (2020) 20:1825.

[9] Martin, B.H. & MacDonnel, R. (2012). Is telework effective for organizations? A meta-analysis of empirical research on perceptions of telework and organizational outcomes. *Management Research Review,* Vol. 35 No. 7, 603–615.

[10] Charalampous et al. 2019.

[11] Oakman et al. 2020.

[12] Kotera, Y. & Vione, K.C. (2020). Psychological impacts of the New ways of working (NWW): A systematic review. Int. J. Environ. *Res. Public Health,* 17(14), 5080.

[13] Oakman et al. 2020.

productivity was often judged to be higher when working from home compared to working in the ordinary workplace[14].
During the pandemic, however, the picture was somewhat different[15]. Working from home was still positive, but a prerequisite for autonomy was that the workers have access to the resources and skills needed for performing the work[16]. In these studies, if the worker working from home was required to fend for him- or herself, then significant negative consequences could result in the forms of reduced mental well-being and efficiency. For families with younger children, both work-life balance and self-rated productivity were negatively affected by remote working[17 18 19 20]. Some results indicated that stress decreased over time, but for families with younger children at home the results indicate a continued high-stress load[21222324]. For single people with younger children and without childcare, the situation became even more problematic, because the risk of infection

[14] Martin & MacDonell 2012; Kotera & Voine 2020; Oakman et al. 2020.
[15] SAWEE 2022b.
[16] Felstead, A., & Reuschke, D. (2021). A flash in the pan or a permanent change? The growth of homeworking during the pandemic and its effect on employee productivity in the UK. *Information Technology and People*. https://doi.org/10.1108/ITP-11-2020-0758
[17] Allen, T. D., French, K. A., Dumani, S., & Shockley, K. M. (2020). A cross-national meta-analytic examination of predictors and outcomes associated with work–family conflict. *Journal of Applied Psychology*, 105(6), 539.
[18] Xiao, Y., Becerik-Gerber, B., Lucas, G., & Roll, S. C. (2021). Impacts of working from home during covid-19 pandemic on physical and mental well-being of office workstation users. *Journal of Occupational and Environmental Medicine*, 63(3), 181–190.
[19] van Zoonen, W., Sivunen, A., Blomqvist, K., Olsson, T., Ropponen, A., Henttonen, K., & Vartiainen, M. (2021). Understanding stressor–strain relationships during the COVID-19 pandemic: the role of social support, adjustment to remote work, and work–life conflict. *Journal of Management & Organization*, 1–22. doi:10.1017/jmo.2021.50.
[20] Ipsen, C., van Veldhoven, M., Kirchner, K., & Hansen, J. P. (2021). Six key advantages and disadvantages of working from home in Europe during covid-19. *International Journal of Environmental Research and Public Health*, 18(4), 1–19.
[21] Yerkes, M. A., Andre, S. C. H., Besamusca, J. W., Kruyen, P. M., Remery, C., van der Zwan, R., Beckers, D. G. J., Geurts, S. A. E. (2020). 'Intelligent' lockdown, intelligent effects? Results from a survey on gender (in)equality in paid work, the division of childcare and household work, and quality of life among parents in the Netherlands during the covid-19 lockdown. *PLoS ONE,* 15(11)
[22] van Zoonen et al. 2021.
[23] Schieman, S., Badawy, P. J., A. Milkie, M., & Bierman, A. (2021). Work-life conflict during the COVID-19 pandemic. *Socius,* 7, 2378023120982856.
[24] Aczel, B., Kovacs, M., van der Lippe, T., & Szaszi, B. (2021). Researchers working from home: Benefits and challenges. *PLoS ONE*, 16(3 March).

also reduced private support networks[25]. Still, most studies point to increased productivity associated with working from home even during the pandemic[26] [27]; one reason for this result was that there were more hours worked, in total, when working from home rather than at the primary workplace[28][29].

Reviewing the research compilations described above, we want to highlight two gaps. *First*, few of the studies address the work situations of managers. The few studies that do concern managers' work situations[30] indicate that managers were overloaded by virtual meetings. Despite this fact, managers in these studies also perceived that contact with employees was not enough, and the managers also found it difficult to assess how staff were doing and determine individual employees' needs for help and support. *Second*, few such studies concern industrial work. True, much industrial work is physical, on-location, and cannot be done remotely; however, the work of industrial managers can still be done from home. Even when completely remote work was not implemented in such situations, there were usually altered arrangements that limited contact with other people at the workplaces.

Managerial work in industrial workplaces arises as an interesting topic of research and study in the pandemic context, in particular because successful management relies on social interaction[31][32][33]. What is more, we find this topic to be underexplored, in general. While we may expect that some of the pandemic effects reported in other studies and contexts do exist regarding managers in industrial workplaces, we also find that there is little literature on how, concretely, work environments were altered in

[25] Otonkorpi-Lehtoranta, K., Salin, M., Hakovirta, M., & Kaittila, A. (2021). Gendering boundary work: Experiences of work–family practices among Finnish working parents during covid-19 lockdown. Gender, *Work & Organization* DOI: 10.1111/gwao.1277.

[26] Ipsen et al. 2021; Felstead & Reuschke 2021

[27] Sutarto, A. P., Wardaningsih, S., & Putri, W. H. (2021). Work from home: Indonesian employees mental well-being and productivity during the covid-19 pandemic. *International Journal of Workplace Health Management*, 14(4), 386–408 doi:10.1108/IJWHM-08-2020-0152

[28] Charalampous et al. 2019; Felstead & Reuschke 2021; van Zoonen et al. 2021.

[29] Kirchner, K., Ipsen, C., & Hansen, J. P. (2021). Covid-19 leadership challenges in knowledge work. Knowledge Management Research and Practice. *Journal of International Women's Studies*, 22(6), 138–149.

[30] Ferreira et al. 2021; Oakman et al. 2020; Kirchner et al. 2021.

[31] Ekvall, Göran, and Jouko Arvonen. 1994. "Leadership Profiles, Situation and Effectiveness." *Creativity and Innovation Management* 3 (3): 139–61.

[32] Peters T.J. & Waterman R.H. (1982) *In Search of Excellence: Lessons from America's Best-run Companies*. Warner Books.

[33] Charalampous et al., 2019; Oakman et al. 2019.

the wake of the pandemic. Our claim is that understanding these changes forms an important first step in better understanding the effects of pandemic measures on work.

These and similar thoughts came to us in the context of a research project that we conducted among managers in a Swedish mining company. The research was conducted during the pandemic and, while conducting interviews with 20 mining company managers, we learned of diverse ways in which the pandemic measures had affected the work of managers and their work environment. In particular, we noticed many positive experiences (of course, also coupled with negative effects); yet, this is not necessarily reflected in pre-existing research, and in particular not with reference to managers [34]. Our original research did not focus on the pandemic, nor did it focus on the measures implemented at work to combat Covid-19; the investigation was focused on the social and organisational work environment. Yet, due to timing of the research, the topic of the pandemic and its related measures arose in every interview conducted. Importantly, the material that we gathered has provided us with several examples of concrete effects of pandemic workplace measures, both on the ways managers conduct their work as well as their work environments. We believe that reporting on these insights can help future research in this area, even though our current reporting is limited by having to analyse empirical material that was gathered for a different purpose.

In this paper, thus, we explore how the pandemic and its associated workplace measures have affected the work and work environments of managers in a large Swedish mining company. Adapting to the limitations imposed as a "secondary analysis" of this kind, we generate several hypotheses about the effects of the pandemic measures on the work of managers in an industrial setting. These hypotheses, we hope, can be incorporated, in the future, into more systematic studies in the area. The present study, in other words, is exploratory in nature, aiming primarily to provide input for further and future research. One could raise objections to the approach of this study; however, given that both managerial work (and in particular, industrial managerial work) and the mining industry (and in particular managerial work therein) during the pandemic are

[34] Larsson J, Rapp L, Roxenfalk-Jatko K, Vinberg S, Mattson Molnar M, Johansson J, Jakobsson M & Lööw J (2022) *Organisatorisk och social arbetsmiljö för chefer* (*Organizational and social work environment for managers*). Luleå tekniska universitet och LKAB 2022:1.

underexplored in current, pre-existing literature, and there exists a lack of description of concrete effects on work stemming from pandemic measures, therein, the present study is justifiable and motivated. Still, the results of this study must be viewed with some caution.
In the following sections, we describe first how data was gathered in the original study and then next how we performed our "secondary analysis". After that, we present the results of our analyses in the form of descriptions of concrete effects on work that have, as we observe, stemmed from the pandemic. We end by presenting our hypotheses for further study and research.

2. Methods

The empirical material for this study comes from a larger research project titled "Organisational and social work environment for managers" that was conducted at a large Swedish mining company and with a focus on the social and organizational work environments of managers. In the present study, we revisit – through what we call a secondary analysis – relevant parts of the original empirical material, with the purpose of gaining more insight into the effects of the pandemic on managers' work environments. The original research study used both qualitative and quantitative methods: 1) an online questionnaire was sent out to all of the company's managers; 2) a second online questionnaire was sent out to the employees and their managers, within a subset of the managers; 3) the same subset of managers self-reported their work activities over the course of a week; 4) ten interviews were conducted within a sample of the subset of managers, to gain deeper insight into their average work week; and 5) ten interviews were conducted with young (35 years-old and younger) managers, with regards to both their roles and work situations[35].
What makes the material gathered suitable for further study, and for the purpose of this article, is, on one hand, that the material was gathered during the pandemic (yet, the original study did not focus, specifically, on the pandemic) and, on the other hand, that the material concerns the work situations of managers. Thus, in the present study, we analyse the original material gathered, but with the purpose of investigating how the Covid-19 pandemic affected the work of the managers in the original study.

[35] see Larsson et al., 2022.

In revisiting the research material – that is, conducting a secondary analysis – we will be focusing on two contexts: first, the work activities of managers and second, the work environments of young managers. The following two subsections detail the data collection activities related to these contexts. The section is then concluded with a description of the secondary analysis – that is, our analyses of the empirical data for the purposes of this article.

2.1. Study 1: the work activities of managers

This part of the original research aimed to map the work activities of managers, focusing especially on which tasks they spent their time on. We developed a self-reporting tool in Microsoft Excel, in which managers reported what tasks they had spent time on during the day and how much time they spent on each task. The tasks followed the categories previously introduced by Henry Mintzberg in his work *The nature of managerial work*[36]. The managers also reported on their health and workloads each day. The managers were instructed to report on their tasks over the course of a week (some managers reported for longer periods and others for fewer days; the average number of reported-on days was 5.4). A total of 45 managers participated in this part of the original research project.

To validate the data collection tool regarding managers' work activities, ten in-depth interviews were conducted. The interviewed managers were selected as a random sample of the total of 53 managers participating in the overall (work activity) research; likewise, those 53 managers were a random sample of all managers in the company. The interviews also aimed to gain an in-depth picture of the managers' workdays; a 19-item interview guideline was used to give the interviews direction.

The interviews were conducted through Microsoft Teams (due to the pandemic). Most interviewees had completed their self-reporting portion of the research by the time of the interviews. The tool for self-reporting had a function for summarizing the reported period in graphs; the interview guideline included a segment in which the interviewee was asked to share their screen and talk about their summarized work week using the graphs.

Two of the authors of this article participated in all of these interviews, whereby one of the authors led the interviews following the interview guideline and the other author focused on follow-up and probing

[36] Mintzberg, H. (1973). *The nature of managerial work*. New York: Harper & Raw.

questions. On average, these interviews lasted 92 minutes; the audio was recorded and later transcribed. For the purposes of this article, the data collected through the work-activity self-reporting serves mainly to provide context; we base our secondary analysis primarily on the interview data. All interviews were conducted in Swedish. The quotes included in this article have been translated into English by the authors.

2.2. Study 2: the work environments of young managers

The second part of the original research project consisted of interviews with ten younger managers (under the age of 35). The ten young managers were selected randomly. The only criterion for inclusion was that the manager was of an age of 35 years old or younger. The purpose of these interviews was to better understand how young managers experience their work environments. The interviews followed an interview guideline consisting of 34 questions that were divided into the following themes: 1) First meeting with the company; 2) Expectations of the managerial role, introduction, driving forces, and development; 3) Your leadership and the work environment in the employee group; 4) Support in the managerial role; 5) Own work environment and health; and 6) Future.
All but one of the authors of this paper participated in these interviews, and each interview was attended by two of the authors (in addition to the interviewee). The first author of this paper attended all of the interviews, while the others involved rotated and participated in two to three interviews each. The "rotating" researchers would focus on follow-up and probing questions, while the other conducted the interview in accordance with the interview guideline. All of these interviews were conducted through Microsoft Teams (due to the pandemic), audio from which were recorded and later transcribed. All interviews were conducted in Swedish. The quotes included in this article have been translated into English by the authors.

2.3. The secondary analysis

In the present study, a secondary analysis has been conducted on elements of the overall material gathered during the main research project. This secondary analysis is based primarily on the interview material gathered: 20 interviews[37] with managers of a large Swedish mining company and

[37] The interviewed consisted of twelve first line managers (production managers), seven middle managers (2 group manager, 3 section managers, 1 department manager and 1

encompassing around 25 hours in total. The transcripts of these interviews were analysed using the qualitative data analysis software Nvivo.

We used a top-down content analysis approach, wherein we identified keywords relating to the Covid pandemic and working from home (e.g., "covid", "pandemic", "remote working". This is close to the summative content analysis approach suggested by Hsieh and Shannon[38]. Nvivo then allows us to query the data material using these keywords, that is, allowing us to see in which contexts topics related to the pandemic and its effect are discussed. These statements were then put into summarizing codes. The results in the next section reflect these codes.

The two original interview studies focused on managers' work environments and workloads and not explicitly the Covid-19 pandemic. However, the effects of the pandemic came up in almost all of the interviews. As noted, we believe that there is important insight to be extracted here as a result. Thus, this current study is exploratory in nature; we use this approach to explore the material anew and generate questions for future, systematic studies.

This article is arranged such that preliminary the results of how managers spent their workday hours during a work week are presented. This first step is to contextualize subsequent results. We then report on the questions raised during the 20 interviews that were included in our research material. Finally, we summarize our results in the form of six hypotheses about how the work patterns examined were affected by the recently-concluded Covid-19 pandemic.

This research project has ethical approval from the Swedish Ethical Review Authority (Dnr: 2021-01392)

3. Results

3.1. Managers' work activities in a large Swedish mining company

Table 1 shows which activities the studied managers, who were working for the same large Swedish mining company at the time of the data gathering, spent their work hours on. The total working time reported in

HR manager and one top managers (district manager) The gender distribution in the group was nine women and eleven men.

[38] Hsieh, Hsiu-Fang, and Sarah E. Shannon. 2005. "Three Approaches to Qualitative Content Analysis." *Qualitative Health Research 15* (9): 1277–88.

the Excel tool was, on average, 38 hours, and the work activity that the managers spent most of their time on was "Scheduled meetings" (meetings planned in an agenda). Over the reporting period, such meetings totalled more than 50 percent of available work hours. The work activity that was carried out the least was "Spontaneous walks" (occurring either physically or digitally, whereby the manager spontaneously talks with an employee about how the employee is feeling and how the work is going), at 1.3 hours a week and corresponding to 3.6 percent of the total work time. These overall values also correspond to the averages of each manager's individual averages over a five-day period.

Table 1. Tasks and self-reported time spent during a five-day period for 45 managers within a large mining company in Sweden. Working hours (hours) and share (percent) for different tasks.

	Number of hours per five-day period	Share of working time during the five-day period, percent
Administrative tasks	8.8	23.3
Telephone	1.4	3.8
Scheduled meetings	19.2	50.3
Spontaneous meetings	2.8	7.4
Spontaneous walks	1.3	3.6
Operational production support work	2.7	7.1
Travel/transfer time	1.8	4.5
Total reported time	38.0	100

Source: Larsson et al. (2022).

It is notable that scheduled meetings occupied such a high portion of the overall work time, while the telephone seems to have decreased in importance. Our research material lacks reference values from before the pandemic, however the results correspond well to the pre-exiting studies that we have referenced in the introduction of this article, in that the time spent in meetings increased during the pandemic measures[39]. Spontaneous meetings and spontaneous walks together totalled just over 10 percent of time spent, which perhaps demonstrates that there were fewer opportunities for social interaction.

[39] Ferreira et al. 2021; Oakman et al. 2020; Kirchner et al. 2021.

In Sweden, the Covid-19 pandemic did not mean that workplaces were closed down to the same extent as was done in other countries. Instead, there were strong recommendations from the Public Health Agency of Sweden and the Government to stay home and work from home when possible. Even schools and childcare remained open throughout the pandemic period, assumed to facilitate working from home. Since our research investigation period coincided with the pandemic, it can be assumed that the high proportion of planned meetings, coupled with the low proportion of spontaneous meetings and walks, were direct results of the managers following the recommendations of the Swedish authorities to engage in part of their work from home.

3.2. Reflections on the effects of the COVID-19 pandemic on the managers' work

Increased number of digital meetings

Almost all interviewees mentioned in one way or another that the number of digital meetings via Microsoft Teams had increased. While primarily motivated by the pandemic, there were other advantages to digital meetings, as well – such as digital meetings being easy to schedule. Some respondents claimed that online meetings substituted emails:

> *Yes, there have been noticeably more meetings now, with Teams. It's easy to schedule a meeting now. You don't need a venue to meet; you can do it anywhere. There may even be more meetings now instead of emails; you can now make shorter calls on Teams.*

The number of physical meetings seemed to have decreased while there were, in actuality, more meetings taking place (rather than it being a simple equation of physical meetings being substituted with online meetings). Most respondents believed that the future would see an increased number of online meetings even when pandemic restrictions would disappear:

> *It has been a long time since the last time I was in the conference room. But I think I'll use Teams quite a bit in the future; even if we have a meeting down in the conference room, I think I might sit in my office and participate via Teams, just because there are advantages – but it depends on what kind of meeting it is, as well, of course.*

Perceived drawbacks of digital meetings

As the quote above illustrates, digital arrangements were preferred by some managers. While many managers agreed that the development was towards more online meetings, their experiences with online meetings differed. A common view, for example, was that physical meetings are better for several reasons, and that the human aspect was often missing in digital meetings. Motivations for preferring physical meetings differed, but among the motivations was the feeling that digital meetings were missing something. What was felt by the managers to be missing from digital meetings ranged from concrete elements, such as the ability to socialize afterwards, to the experience that online meetings can just be plain boring – as expressed, for example, in the two responses below:

> *If I am asked if I want a physical meeting rather than a digital meeting, I obviously choose physical meeting, meeting physically gives much more nuance to the meeting; you have a coffee afterwards, and you walk in the corridor and talk – it creates a much deeper relationship. When a digital meeting is finished, I just press the leave button and then it's over. So, that's the nuance I'm missing with digital meetings.*

> *Now there's a lot of digital meetings, so we've learned to handle Teams in a different way. And there are more efficient meetings, as well. Then also, it can be a bit boring too to sit in on-line meetings like that …*

Changing work routines

The positive effects of the measures introduced during the pandemic did not concern only the dynamics of working from home or being at work. The pandemic measures also directly affected work, itself, including that anyone could, more or less, be easily contacted:

> *Then one was used to physical meetings, but, with the pandemic, basically everyone now has much better communication conditions, such that you can reach basically everyone within the company in this way, which has changed the work significantly...*

The changed ways of working also led to meetings becoming more focused and efficient; meetings rarely veered off topic, for example. At the same time, however, this led to meetings consisting of "strictly business":

> *I've probably never experienced, in this entire pandemic, someone calling and saying, "I had nothing to say". Without distance communication there is much more ... What to say? ... If I were to start discussing other things digitally, then I feel like time is being wasted, that we slip off topic. Those other conversation parts have a really important role, but it's very difficult to do it digitally.*

Notably, the nature of online meetings also meant that many people worked with other tasks while attending a meeting, a fact that can be due to the meeting being either unimportant or passive, as these two responses show:

> If we have big digital meetings, it makes things very passive. Then, you can have other, follow-up works to do at the same time; or, sometimes you can have small, side meetings with others.

> I sit and approve purchases, or sign salary payments and timesheets, and things like that.

Increased efficiency and productivity

Online meetings are a necessary condition for most people to be enabled to work from home. In the present study, many employees still worked from their ordinary office; online meetings were introduced to decrease physical contact, while also making it possible for people who were working from home to still participate in meetings. However, many respondents also pointed out that working from home was more efficient. The quote below illustrates two dimensions of this efficiency: 1) being able to work while being more focused, due to not being disturbed, and 2) digital ways of working (online meetings, in this case) as being more efficient, in that such work methods "circumvent" otherwise time-consuming activities:

> *I've been working from home one day a week, but it has been good; I think I've been very effective when I've been working from home – you don't get disturbed by anyone. I think that a whole new world has opened up, especially with digital meetings; you could see that when we recruited holiday substitutes – we had time to interview maybe ten to fifteen potential substitutes in one day, where previously we only had time for five interviews… precisely because now you do not have to meet up with anyone, etcetera. It was that simple.*

The fact that the company studied is a mining company has actualized some specific effects of distance working necessitated by the pandemic. The studied mining company has production distribution to several locations and with large physical distances within each production unit; getting to one's workplace, or any other location, is associated with considerable undertaking in terms of time. These factors added to the notions of remote-working and online-meeting as positive for productivity:

> *Before covid, it was the case that you spent a portion of your workday getting to different premises within the company, but it is not so now. I think this will also change in the future; I don't think one will go all the way to the administration office for a meeting that you can attend digitally via Teams – then you might as well sit at home or in the office.*

Realization of redundant meetings

Yet, the ease of arranging online meetings also means that one sits in many unnecessary meetings. Most respondents believed that the number of digital meetings could be reduced. Some respondents described a strategy for dealing with what they felt were unnecessary meetings – working with something else at the computer while the meeting is on in the background. Here, for example, three different interviewees shed light on the same issue:

> *And then you sit and listen to what is being said in the digital meeting while working in parallel with something else, because in that way it doesn't feel like you're wasting two hours of your work week sitting in a meeting where you're affected by only ten minutes of the meeting content.*

> *Maybe it's time to discuss whether we have meeting routines that are actually ineffective and unwise (both before and after the pandemic).*

> *Should we even be in this meeting, at all? Why am I invited?*

The new normal

As noted, almost all respondents believed that the digital meetings would remain in the future, although not to the same extent, when the pandemic would be over. Despite the drawbacks, the effectiveness and time saved

because of digital meetings is difficult to deny, as expressed in these two responses:

> *I think a large portion of the meetings will continue to be digital in the future. The effectiveness of digital meetings has been found. There is not so much travel time between meetings. I think we're going to have a hard time going back to the physical meetings, and it's going to be hard to combine them. A structure has now been found in the digital meetings that also makes it very meeting-tight, back-to-back.*

> *I don't think we'll go back to how it has been before the pandemic. It's more cost-effective to have meetings via Teams. You avoid travel time and so on. But physical meetings are better than meetings via computer. I don't think we will fully return to physical meetings, but there will probably be more meetings via the computer, if I'm going to guess.*

At the same time, the opportunity to work from home was appreciated; combining the digital meetings with the ability to work from home may be important in the future:

> *I would like to keep the opportunity to work from home, because at home it is easy to "mute" and run to the toilet or pick up a cup of coffee. In the office, at work, you feel like a bad person if you run with your earbuds somewhere while in a digital meeting or point to your ears: "I'm in a digital meeting".*

Work – life balance

Several positives associated with working from home were mentioned in the interviews. These positives included smoother family "logistics" and taking care of pets, as can be seen below in the following three responses:

> *The positive thing about the pandemic is that you can work a lot from home. So even though the kids have been sick, I've been able to work from home, sit in on meetings and stuff like that, and be able to combine that all.*

> *One good thing that has come from this corona period is that we have started working from home, and that it really works. It's not something I want to do all the time, but if one needs some time now and then, for example perhaps if the preschool is closed, I have the option of working from home, as well.*

If the dog is sick, then I work from home.

Re-evaluation of leadership tasks/assignment/role/priorities

An interesting observation is that the measures that have resulted from the pandemic have caused some managers to come to the realization that they do not have to be involved in all details:

> *I think maybe there would have been more operational production support work if it had been a normal workday situation, but now we have taken covid seriously and we were quite early in switching to running weekly distance meetings, for example with collective staff digitally. We have tried to follow [the Swedish government] recommendations and meet as little in person as possible, and, as a result, I have not been so operationally-oriented. And that's pretty good... or it's very good, I think.*

Being physically present due to nature of work or solidarity

Yet, some managers claimed to have been mostly unaffected by the pandemic measures. This, again, recalls the specific nature of the mining industry; some things cannot be done from a distance:

> *The pandemic has not affected us very much. Since we are an operating business and our machines must run, our staff must be on site and working otherwise the business will stop. So, we have followed all of the same routines as before the pandemic, and have been physically on-site during this [pandemic] time. I would say this is what it looks like normally, regardless of the pandemic or not.*

In other areas, where production also needs to run continuously, the pandemic effects were clear even as production continued to run. In one example, operators became completely tied to their workplaces:

> *The process operators, they have been more or less isolated inside their control room. They have an expert knowledge we cannot do without; we can't run the production without them. And, if it happens that they get sick and we get a spread of infection, it can have devastating consequences for production – then you must call them, instead of going down and having that natural conversation.*

It is also important to realize that, while managers could work from home, this was not the case for the employees they were managing. Some of the respondents pointed out that they needed to be at the workplace precisely

because they felt it was required to be able to act as a manager, as these responses exhibit:

> *No, I've tried to be in the office so much. I have prepared a workplace where I can be at home, but I still think that we who are in a management position should be present in the workplace, we have production staff who must be on-site and it has been so throughout the pandemic. So, I've probably been on-site 80+ % of the time.*

> *I don't think there will be a huge difference when the pandemic is over. I haven't worked from home many days. I didn't want to do that, either. It feels a bit silly if I'm going to sit at home while the others are at work.*

Shift in organizational culture

There exists a recognition of the pandemic as having brought about a change in organizational work culture. While one respondent in our study held that everyone would return to the workplace after the pandemic to show solidarity and return to the old workplace culture, this position was also followed by a realization that not everyone has to be at the workplace. Another respondent noted how the pandemic had challenged notions of what work is important and where that work is conducted. Notable, for example are the statements below:

> *I think we're a little old-fashioned and we think that we have to show solidarity with those who can't be away from the workplace; as in, "yes, but we have the production to think about", and so on. So, I think, at first, the company will probably want everyone to be at work. Then people slowly come to realize the fact that not everyone has to be at the workplace.*

> *The old work culture that says "every minute outside the gate doesn't count" has been changed by the pandemic. With the pandemic, I think we have taken big steps towards relationship-oriented and trust-based leadership. Virtually all of the officials were sitting at home.*

Lack of social interactions affecting wellbeing

Some people felt worse during the pandemic, as an effect of not seeing and meeting people. In general, workplace interactions decreased, as expressed below:

I've felt a little worse during the pandemic. I like people and being with my people – my bosses and my management team – and being close to them and looking them in the face. I haven't been able to do that. And, so, I've actually felt worse during the pandemic time.

The weekly meetings where people meet on Mondays have suffered now, due to the pandemic.

4. Discussion and conclusions

This study has explored effects of pandemic measures on the work and work environments of managers in a large Swedish mining company. We used data gathered for other purposes but that included descriptions on this topic; while this design limits us with respect to generalisation and our ability to investigate the topic in-depth, we hold that the concrete descriptions should be shared, as they offer insight that can be useful for future studies.

4.1. Six hypotheses on effects of pandemic measures on work and the work environments of managers

In summary, we propose six hypotheses for how the pandemic measures have affected the work and work environments of managers in a mining company. Note that some of the hypotheses are mutually exclusive.

1. The workday is densified due to remote meetings

Pandemic measures lead to a densified workday; this is due to several changes. The number of meetings – while perhaps decreasing in time due to aspects of a social nature disappearing – increased, because the logistics surrounding the meetings were simplified (a physical location does not have to be booked, no travel to the meeting location is required, and there are virtually no turnaround times).

The effect of this change can be both positive and negative. A densified workday could lead to a shorter workday. On the other hand, if working hours remain the same, the effect is essentially work intensification. If not balanced with appropriate measures, this change could lead to ill health.

As well, an increase in meetings, and especially without social dimensions, could lead to a frustration with meetings.

2. "Double work" during meetings is the rule rather than the exception

If meetings come to claim more time from the manager's agenda while that manager is still left with the same tasks, then "double work" becomes the rule rather than the exception. By double work we refer to other work tasks being performed while attending a digital meeting. This situation is also increased when calling for or into a meeting becomes easier, as one does not have to impose the same limits on who is called to that meeting. Generally, more people attended meetings and on average those meetings were experienced to be less relevant. Instead of paying attention fully, managers instead used that time to answer emails and other tasks during the digital meetings.

This development should probably be avoided, as it will likely make the side tasks less effective. Furthermore, being somewhat attentive to a meeting while solving other tasks is likely to be taxing. Finally, if meetings are systematically used to accomplish other side tasks, then acting to decrease the number of meetings may not free more of the managers' time.

3. Meetings become more focused

Our third hypothesis is a precondition for the first hypothesis but contradicts the second hypothesis. That is, the workday can become densified if less time is spent on social interaction and more time is spent on the task at hand. However, for meetings truly to be more focused requires that everyone pays close attention to the meeting, which is hard to do when doing "double work".

The outcome of this predicament can be both positive and negative. For example, people may appreciate that the meeting is strictly focused on the task at hand, especially if this means the meeting can be kept shorter. However, the social role of meetings should not be underestimated. Particularly when working remotely, "natural" social interactions may not arise the same way that they would when working in the office; talking off-topic in digital meetings may, therefore, be an important substitute.

4. Meetings become more accessible

If meetings remain less resource-intensive (i.e., requiring less planning and participation by nature of simply logging in to an online meeting platform), we can understand this as the meetings becoming more accessible. This means, for example, that managers are likely to be invited to meetings that they previously were not invited to. If a manager is invited to the "right" meetings, this should, in turn, give a better sense or understanding of one's (e.g., organisational) context. Such a scenario could help a manager in their managerial roles. Additionally, by viewing one's contribution to a larger whole, such as through a broader range of meetings attended, one's motivation in one's work might be increased.
On the other hand, an increased "accessibility", as described here, might also simply only lead to more meetings whereby such meetings are not really needed. This situation may lead to frustration and a workday that is needlessly filled with meetings.
At the same time, this "accessibility" development also means that one can participate in meetings on one's own terms. For example, with physical meetings it is more difficult to enter and leave when the meeting is still ongoing; this is not the case with digital meetings. This factor means that managers are freer to enter and leave meetings as they are needed. This reality can have positive effects in reducing actual meeting time, but it also risks fragmenting the workday if the manager has to "jump" between many different meetings in one day. Finally, coming to realise that one can participate in meetings on one's own terms might mean that managers come to question the relevance of other meetings.

5. The manager becomes less operational

As an effect of working less at the physical workplace close to operations, the manager might come to realise that they do not need to have full control over or total insight into the workplace and that much of the day-to-day work will function without them. That realisation frees up the manager to focus more on strategic questions or, to a larger extent, engage in behaviours associated with relationship- or change-based leadership.
In this study, an arrangement with remote work essentially forced managers to forgo certain management practices (i.e., tasks focusing on operational aspects of the workplace). Here, remote work triggered changes in behaviour, however continuing the effect is not dependent on the continued practice of remote work (which may be the case for the effects described in the other hypotheses, as well). In fact, certain effects –

such as adopting a more relationship-oriented leadership style – may depend, at least in part, on the manager's physical presence. Thus, remote work in this case is a trigger for change, rather than being the change itself.
However, good leadership requires insight and some sort of presence at the workplace. Where certain roles of being a manager may have previously been automatically fulfilled simply by being present at the workplace, such "automatic role fulfilment" is not as likely when the manager does not have the same physical presence. Thus, there must be an arrangement for ensuring that the manager can somehow still gain insight into the workplace, even with remote work.

6. A new work culture

With new ways of managing, a new work culture will arise; this new work culture will, in turn, affect both managers and the employees they manage. With management being less physically present, for example, a culture that is more trusting and freer may grow at the workplace. Where remote work is possible, a larger acceptance can grow for doing work remotely. Being able to work from home can also foster a positive work-life balance; this culture will probably also be a condition for the long-term success of new work arrangements.
Of course, there is also a balance to be maintained. Little physical managerial presence should not be translated to no presence and no leadership. Freer and trusting workplaces must be backed up with responsibility. And while being less tied to a physical place of work can facilitate a good work-life balance, the opposite effect is also a common outcome when work can follow one everywhere.

5. Contributions and limitations

In the interviews that we conducted, we encountered a mostly positive view on remote work. This result is reflected in other studies, such as one by the Swedish Association of Graduate Engineers[40]; that study showed that Swedish engineers found working from home positive and that they experienced a better work-life balance while achieving good work results. Nine out of ten respondents in the Swedish Association of Graduate

[40] Swedish Engineers (2022) *Teleworking - decisive criterion when choosing an employer.* Stockholm: Swedish Engineers.

Engineers study said that they highly valued the opportunity to work remotely, and more than half of the engineers stated that they would not apply for a job with an employer that does not allow remote work.

However, as we see in our study, remote work is probably not the only determining factor of the results. Many effects are poised to result from remote work and similar measures, but with our hypotheses what we want to ask is: *Is it remote work itself, or the effects of remote work, that account for the positive experiences*? From a work and work-organisational design perspective, this is certainly an important question to answer. For example, is it the emergence of a new work culture, or a different type of managerial role, that engenders the positive experiences?

We note also, from our study, that many of many of the interviewees' comments revolve around meetings. This raises the question, then, of how many of the effects of remote work actually result from changes in meeting cultures and structures.

We have previously noted the circumstances of the origins of this study and its research materials. Here we want to note two additional limitations that are important to help understand the results at hand. First, the work environment experiences of working from home are generally positive, but with one exception. In the afore-mentioned international research compilation[41], it emerged that working from home in combination with children was difficult to organize during the pandemic shutdown. Sweden deviates at this point from large parts of the world, in that Sweden did not close down schools and childcare during the pandemic; meaning, children were away from home for most of the workday in Sweden during the pandemic. This difference is likely to have produced some important effects. For example, before the pandemic, a parent would have to stay home with a sick child but without the ability to work. During the pandemic, people were able to stay home with sick children and still work. Thus, when we come across positive experiences in our data material, some of these positive experiences may be accounted for with reference also to how childcare was handled in Sweden during the pandemic.

Second, our study's research was conducted in a large Swedish mining company. We hold that viewing the company as a case offers important insight into an under-researched industry and area. The importance of this case is, for example, in providing access to descriptions of how remote work functioned in situations where a physical presence at the workplace was still required for the functioning of the operations. Many of the managers in our study's material did, indeed, work from home to some

[41] SAWEE 2022b.

extent, even when the employees they were managing did not. We hold this difference to be an important aspect of the study, as well. However, one must keep in mind that the studied mining company is quite unique (internationally, if not nationally) in its adopting of new technology; in this mining company, many underground work areas have internet access and often wireless internet access – we know this may not be the reality of many other mining operations.

The mining context is also important to keep in mind when discussing the saving of time. For some people, working at a mine means long periods of transportation or commute, for example, from the surface of the mine to one's place of work underground; sometimes transporting oneself to a meeting physically may, thus, incur significant increase in travel time. This aspect should also be factored in when considering the results of this study.

Finally, this is an exploratory study and with all the restrictions that such a nature of study entails; however, we saw an opportunity to extract new observations from material we had collected for other purposes. We have found some interesting, unintended consequences and effects of Covid-19 pandemic measures, and we have gathered these consequences and effects into six hypotheses that can be fruitful for further and future studies.

Between Autonomy and Heteronomy: Frugalism and its Ambivalent Relationship to Labour

Serkan Topal [*]

Abstract: Frugalism is a way of life in which individuals aim for financial independence, thus allowing for early retirement. The phenomenon has hardly been researched so far and has only been made known through mass media reporting. Under the heading "Frugalism - Retirement at 40?!", numerous (blog) articles link frugalism and its search for independence from income earned by way of gainful employment to the motive of 'escape' from labour. However, as this paper will show, reports about this phenomenon up to date largely ignore that frugalism much rather entails a pronounced desire for the self-organisation of labour, meaning that generally a frugalist's goal is not to 'flee' from work, but to determine working conditions within his or her own responsibility – i.e., independently of external influences such as financial constraints and/or corporate hierarchies. In this 'new normal', frugalists are drastically shaking up the classic understanding of labour as an indispensable means of securing one's livelihood. Based on findings from an explorative study consisting of qualitative interviews with frugalists, this paper gives insights into 'frugalistic' work orientations and practices and will, thus, outline the meaning that frugalists attribute to work.

Keywords: *Frugalism; Financial independence; early-age retirement*

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1. Introduction

The word 'frugalism' is derived from the Latin word 'frugalis', meaning frugal, thrifty or undemanding. Frugalism is a way of life characterised by frugality, in which consumption is reduced, i.e., individuals live below their means, and passive income is generated, meaning income whose accumulation is not dependant on gainful employment. The goal is to achieve financial independence which, amongst other things, ought to make early retirement possible. 'Early' in this context means early compared to the average effective retirement age, which in Germany – where the empirical survey that substantiates this paper has been conducted – is approximately 64 years[1]. Thus, speaking of early retirement, this should always be seen in relation to the reference point of the average effective retirement age (in Germany).

Frugalism has its origins in the so-called FIRE movement, which emerged in the US around the 1990s. The emergence of FIRE was essentially linked to the publication of the bestseller 'Your Money or Your Life'[2], in which the authors address what they deem as the enormous importance of financial independence. Although first appearances of FIRE or frugalism could already be observed within the public sphere in the 1990s, the phenomenon still seemed to have a marginal, almost exotic character long after that[3]. Since the 2010s, however, frugalism has begun to be noted by broader parts of society, which can be traced back to the publication of the book 'Early Retirement Extreme'[4] that explores the question of how early retirement from working life can be realised. As of now, a Google search for the word 'frugalism' yields hits roughly along the lines of "Retire at 40? Here's how to make it work!"[5]. This generalisation

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[1] M. Brussig, *Die Entwicklung des Zugangsalters in Altersrenten im Kohortenvergleich: Anstieg bei Männern und Frauen*, IAQ Altersübergangs-Report 23/02, 2023

[2] V. Robin, J. R. Dominguez, *Your Money or Your Life*, Viking Books, New York, 1992

[3] N. Taylor, W. Davies, *The financialization of anti-capitalism? The case of the ‚Financial Independence Retire Early' community*, in Journal of Cultural Economy, 2021, 1-17

[4] J. L. Fisker, *Early Retirement Extreme. A philosophical and practical guide to financial independence*, CreateSpace Independent Publishing Platform, South Carolina, 2010

[5] ABC News, *Retirement at 40, What you can learn from frugalists about saving*, URL: https://newsabc.net/retirement-at-40-what-you-can-learn-from-frugalists-about-saving/, 2021, last access time: 23.04.2024

J. von Lindern, *Rente mit 40*, 2021, Zeit Online Arbeit, URL: https://www.zeit.de/arbeit/2019-09/rente-40-fruehrente-fire-bewegung-sparsamkeit-ruhestand-lebensfreude, last access time: 23.04.2024

F. Wagner, *Rente mit 40: Finanzielle Freiheit und Glück durch Frugalismus*, Ullstein Buchverlage, Berlin, 2019

of the phenomenon (falsely, as will be shown in this paper) creates the impression that frugalists would irrevocably leave the workforce at exactly 40 years of age, once they accumulated enough passive income so that the effect of interest alone would be sufficient for their subsistence.
So far, beyond the rather superficial definition presented at the beginning, there are no descriptions – neither in the scientific or the non-scientific literature – of the actual characteristics and peculiarities of frugalism as an alternative to a 'normal' working life where retirement is (mostly) an option when standard retirement age is reached or at least approaching. The focus on the dimension of work is grounded in a research interest in interpretations of work, i.e. in subjective interests, demands and expectations associated with work in general. In analysing this relationship between the individual and work in frugalism, the paper is organised as follows: Section 2 reviews the state of research on frugalism. Section 3 presents a theoretical framework that is used to situate the phenomenon of frugalism within (existing) sociological discourses, while also addressing deficits and desiderata in the research to date. Section 4 presents the methodological design of the empirical study. The presentation of the results of the study is then divided into three parts: first, frugalistic interpretations of the meaning of work (section 5) as well as interpretations of time and working time (section 6) are presented. Following this analysis of frugalistic notions of work, time and working time, the implications of frugalism for organisation and co-determination of work will be discussed (section 7). Lastly, the conclusion summarises key points while also pointing out potentially fruitful directions for future research on the topic of frugalism.

2. Frugalism in research and literature

The body of academic literature directly related to frugalism is still very limited – in fact, there are only a handful of articles that (in some shape or form explicitly) deal with frugalism: Taylor and Davies (2021) investigate the motivations of frugalists to strive for the status of financial independence by conducting an empirical study using semi-structured interviews with ten people who describe themselves as FIRE practitioners and blog about FIRE-related topics. Citing Boltanski and Chiapello (2005)[6], the authors argue that frugalism is an anti-capitalist phenomenon

[6] L. Boltanski, E. Chiapello, *The New Spirit of Capitalism*, in International Journal of Politics, Culture, and Society 2003, vol. 18, no. 3/4, 161-188

because it expresses 'artist critique' of capitalism[7]. In the course of this, frugalism is examined exclusively under the (counter-)horizon of the capitalist economic system. The explanations of Taylor and Davies seem abstract, i.e. detached from the everyday world of frugalists, so that frugalist patterns of action are hardly illuminated. In addition, the sample used by Taylor and Davies for the study consists only of people who have already achieved financial independence – any differences between frugalists who are already financially independent and those who are not can therefore not even be determined. Akin (2021)[8] provides an overview of the origins of frugalism and attempts to clarify what financial independence means for individuals from an economic perspective. Akin's paper is an attempt of defining what frugalism can be understood as from different disciplinal perspectives such as economics, sociology and psychology. Unfortunately, the article lacks any empirical foundation with which the phenomenon could be better grasped. Sidmou (2021)[9] tries to find out whether people, especially in times of crisis, see frugal consumption as an alternative to possibly otherwise less frugal consumption in order to counteract economic hardship caused by crises. Specifically, the study examines the economic hardship associated with the Covid 19 pandemic for many people who were no longer able to pursue their occupations and thus could not generate income, for example, due to lockdowns. By outlining frugalism simply as a way out of imminent or already occurring economic hardship, the author does not address the role that work plays with regard to the question of how frugalist individuals deal with economic necessities and their dependency on income from gainful employment. Moreover, as is the case with Akin (2021), the article has no empirical foundation.

Overall, a gap in existing research is evident in two respects: Firstly, just quite because the stock of publications on the topic of frugalism is still very limited, and secondly, from a methodological point of view, because in this study - unlike in previous research literature - an empirical foundation is provided, in which both frugalists with and without achieved financial independence are being analysed. This empirical foundation allows for adequately dealing with the – hitherto hardly discussed – question of what meaning frugalists subjectively attribute to work.

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[7] N. Taylor, W. Davies, *op. cit.*, p. 703

[8] M. S. Akin, *A New Approach to the Consumption Society: Frugalism and Financial Freedom*, in Fiscaoeconomia Journal, 2021, vol. 5, no. 1, 99-112

[9] H. Sidmou, *Frugal consumption, an alternative in times of crisis? A reflection on the responsible factors*, 2021, ACADEMIA Letters 743

3. Theoretical framework – subjective meanings of work over time

Finding a convincing, all-encompassing description of the notion of work has always proved difficult – not the least due to the „notorious vagueness"[10] of work as a term and concept. This paper is not trying to dissolve this research problem by any means, but, instead, poses the question of what subjective meanings individuals (in this case: frugalists) associate with work. The goal of developing a theoretical framework in this chapter is to embed this question in the context of other resp. previous associations of meaning with regard to work – thus tracing back (historical) changes in the subjective meanings of work.

Work is a „primordial part of the human condition"[11] and, as such, has received extensive attention from different research disciplines that have each in their different ways tried to work out what exactly it is that people 'think' of when they 'think' of 'work'. Historians show us that, initially, the "function of work was to meet the physical needs of one's family and community, and to avoid idleness which would lead to sin"[12]. This first connotation of work strictly and only as a means of stabilizing one's livelihood remained after the industrial revolution and throughout the 18th century well into the 20th century. While the religious aspect of work as a, so to speak, 'self-commitment before god', lost significance over time, the core understanding of work as a rather sacrosanct necessity remained. In this framing, work was understood as „de-subjectivized employment that hardly allows for personal initiative and creativity, that is experienced by the individual as externally determined or external pressure and that does not allow any subjective scope for decision-making or action"[13]. Post-industrial societies are gradually breaking away from these patterns of work that – especially in the late 19th and in the beginning 20th century – were confined to the paradigms of industrial standardisation[14].

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[10] G. G. Voß, *Was ist Arbeit? Zum Problem eines allgemeinen Arbeitsbegriffs*, in F. Böhle, G. G. Voß, G. Wachtler (ed.), Handbuch Arbeitssoziologie, Springer VS, Wiesbaden, 2010, 23-80, p. 23, own translation

[11] S. P., Vallas, *Work. A Critique*, Polity Press, Cambridge, 2012, p. 3

[12] R. Hill, *History of Work Ethic*, 1996, http://workethic.coe.uga.edu/hatmp.htm

[13] O. Penz, B. Sauer, *Affektives Kapital. Die Ökonomisierung der Gefühle im Arbeitsleben*, Campus, Frankfurt am Main, 2016, p. 135, own translation

[14] U. Beck, E. Beck-Gernsheim, *Individualisierung in modernen Gesellschaften – Perspektiven und Kontroversen einer subjektorientierten Soziologie*, in U. Beck, E. Beck-Gernsheim (ed.), Riskante Freiheiten, Suhrkamp, Frankfurt am Main, 2015, 10-42

This breakaway has been accompanied by a change in values, which was expressed in the form of changed demands to work and thus pointed to a change in work itself[15]. Various, then contemporary studies made an effort to point out this change of values in a systematic way: Kaplan and Tausky[16], for instance, developed a typology of six general meanings of work: 1. status and prestige 2. needed income 3. time absorption 4. interesting contacts 5. service to society 6. interest and satisfaction. As research has pointed out, the latter aspects (service to society and interest/satisfaction) have drastically gained in significance[17]. In their study from 1987, the Meaning of Work International Research Team, similarly, found that the outcomes of work and the identification with one's work were valued significantly higher than ever before. In this sense, a 'normative subjectivation'[18] of work refers to the shift in the self-image of the working individual that has arisen as a result of the detraditionalization processes within the post-industrial paradigm: accordingly, employees "relate work to themselves and not [any longer] themselves to work"[19], so that one can speak of a 'subject-centred' understanding of work.

Research has however pointed out that this demand for individualisation and self-reliance within work is not only evident with employees, but with employers as well, i.e. businesses demand their workers to be self-reliant in an increasing fashion[20]. The fulfilment of externally imposed requirements with little room for freedom of action and rigid resources is replaced – both by employees as well as employers – with active self-control and self-reliance: the rather reactive employee becomes a new type of active worker, characterised by the conscious organisation of his or her own working life[21]. In the social sciences, discourses on the change of

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15 K. M. Bolte, G. G. Voß, *Veränderungen im Verhältnis von Arbeit und Leben. Anmerkungen zur Diskussion um den Wandel von Arbeitswerten*, in L. Reyher, J. Kühl (ed.), Resonanzen. Arbeitsmarkt und Beruf — Forschung und Politik, 1988

16 H. R. Kaplan, C. Tausky, *The Meaning of Work among the Hard-Core Unemployed*, in The Pacific Sociological Review, 1974, vol. 17, no. 2, 185-198

17 R. Inglehart, *Modernization and postmodernization*, Campus, Frankfurt am Main, 1998
M. Kroh, *Wertewandel*, Dt. Institut für Wirtschaftsforschung, 2008

18 M. Baethge, *Arbeit, Vergesellschaftung, Identität. Zur zunehmenden normativen Subjektivierung der Arbeit*, in Soziale Welt, 1991, vol. 42, no. 1, 6-19

19 M. Baethge, *op. cit.*, p. 10, own translation

20 L. R. Soga, Y. Bolade-Ogunfodun, M. Mariani, R. Nasr, B. Laker, *Unmasking the other face of flexible working practices: A systematic literature review*, in Journal of Business Research, 2022, vol. 142, 648-662

21 H. J. Pongratz, G. G. Voß, *From employee to 'entreployee'? Towards a 'self-entrepreneurial' work force?* in Concepts and Transformation, 2003, vol. 8, no. 3, 239-254

values towards a post-industrial, more individualized meaning of work revolve around the notions of 'flexibilization'[22] and 'subjectification'[23] of work. Flexibilization alludes to increasing heterogeneity and variability of working conditions, i.e. the duration, location and distribution of daily or weekly work. Paired with digitisation-driven changes in today's working world, flexibilization of work promises work at any time and from anywhere, resulting in an increase in self-determination resp. autonomy. Subjectification, on the other hand, alludes to gainful employment becoming a means of achieving personal fulfilment and expressing aspirations, so that desires for self-expression and identity formation are asserted. Thus, 'subjectified' work can be understood synonymously as 'meaningful' work[24]. Research points to a trend in which both, subjectification as well as flexibilization, have become more and more widespread in today's working world[25]. Research perspectives on the subjectification and flexibilization of work try to highlight people's individual work orientations and practices and, by that, try to look for a 'window' into (1) how people understand what their work means, (2) what (personal) demands they have with regard to work (e.g., what they deem a 'good job') and (3) how they are likely to carry out their jobs in accordance with these meanings. In examining work orientations and practices within frugalism, the presentation of the results will constitute an attempt to answer these questions for frugalists as a specific group of people, which is to be described in more detail below.

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[22] W. Eichhorst, *Flexibilisation, and how Germany's reforms succeeded*, in T. Dolphin (ed.), Technology, Globalisation and the Future of Work in Europe, London, Institute for Public Policy Research, 2015, 57-62

W. Been, M. Keune, *Bringing labour market flexibilization under control? Marginal work and collective regulation in the creative industries in the Netherlands*, European Journal of Industrial Relations, 2022, vol. 0, no. 0, 1-18

[23] F. Kleemann, J. Westerheide, I. Matuschek, *Arbeit und Subjekt. Aktuelle Debatten der Arbeitssoziologie*, Springer Fachmedien, Wiesbaden, 2019

S. Hornung, T. Höge, *Humanization, Rationalization, or Subjectification of Work? Employee-oriented Flexibility between Ideals and Ideology in the Neoliberal Era*, in Business & Management Studies: An International Journal, 2019, vol. 7, no. 5, 3090-3119

[24] F. Hardering, *Meaningful Work: Sinnvolle Arbeit zwischen Subjektivität, Arbeitsgestaltung und gesellschaftlichem Nutzen*, in Österreichische Zeitschrift für Soziologie, 2015, vol. 40, 391-410

S. Voswinkel, *Sinnvolle Arbeit leisten - Arbeit sinnvoll leisten*, in Arbeit, 2015, vol. 24, no. 1-2, 31-48,

[25] L. R. Soga, *op. cit.*, p. 650

4. Data and methods

The research at hand is based on a survey which was conducted between April and November 2021, with a total of eleven individuals that were asked about their lives as frugalists in in-depth qualitative interviews. The survey process was divided into the following three phases: The first three interviews, which served to explore the field (*phase 1 – exploring*) were initially designed to be narrative and thus highly open-ended. In the five subsequent interviews (*phase 2 – going in-depth*), which were now more structured, the initial insights gained beforehand as well as focal points presented by the interviewees themselves were talked about more extensively. After evaluating the data material obtained in phases 1 and 2, the last three interviews (*phase 3 - addition of FI*) were used to search for already financially independent frugalists, since only one of the eight interviewees thus far was financially independent, but - as explained in section 2 - there was explicit research interest in these people as well.
The open-ended qualitative interview therefore proved to be an adequate instrument for data collection, as the aim of this study had been to generate data material that is characterised in its internal structure above all by the perspective-bound representational intention of the interviewees[26] themselves, meaning that the interest of this study lies in the subjective orientations of frugalists from their personal point of view.
The field was entered via the FIRE-hub (https://firehub.eu/), an international online hub for internet forums on the topic of financial independence in general and frugalism in particular. The first step was to observe what forum users were discussing and which topics seemed to be particularly relevant. The respondents were acquired in a forum identified via the FIRE hub that is German-speaking and has a user number in the four-digit range. Overall, the criteria for case selection were very general, which in turn is due to the exploratory approach of the study. The following is an overview of the interviewees included in the sample (see table 1).

[26] J. Strübing, *Qualitative Sozialforschung*, De Gruyter, Berlin/Boston, 2018, p. 104

Table 1. Socio-demographic characteristics of the respondents in the qualitative sample

Name (& Abbreviation)	Age	Educational Qualification	Occupational status	Job title	FI[27] (yes/no)
Ron Deckard (I01)	33	University degree	Employee	Engineer	No
Gideon Lart (I02)	33	University degree	Employee	Military Service Worker	No
Jack Dogan (I03)	42	University degree	Self-Employed	Software Developer	No
John Kersey (I04)	32	University degree	Employee	Software Developer	No
Tim Mullen (I05)	25	University degree	Employee	Engineer	No
Larry Kral (I06)	35	University degree	Employee	Police Officer	No
Max Orsen (I07)	32	University degree	Employee	Lawyer	No
Mitch Salin (I08)	43	Vocational training	Employee	Software Developer	Yes
Julia Richter (I09)	38	University degree	Employee	Sales Manager	Yes
Matthew Reger (I10)	55	University degree	Employee	Business Consultant	Yes
Tessa Roth (I11)	47	University degree	Self-Employed	Hotelier	Yes

All eleven interviews were transcribed in full and coded openly and, later, axially as well as selectively with regard to the dimensions of work

[27] FI = financially independent.

orientations and practices. The findings to be explicated in the following have been elaborated in the course of the systematics of theoretical sampling suggested by grounded theory methodology[28], i.e. the iterative alternation of data collection and analysis. In the presentation of the results, striking case studies are cited to illustrate particularly typical patterns, meaning that – not the least for the sake of conciseness – not all, but some cases will be presented in more detail. Personal characteristics of the respondents were replaced by characteristics of similar information content and thus pseudonymised to prevent inferences about their identity.

5. Interpretations of Work and its (subjective) meaning

With regard to 'specifically frugalistic' work orientations, it can first be stated across all individual cases that the frugalists can be characterised as preferring 'personality shapers'[29], insofar as gainful employment is largely seen as a space of experience for the development of personal interests. At the same time, the frugalists here have an inherent habitus of independence, in the sense that they, as part of a self-entrepreneurial logic, strive for self-control over their own personal resources, in particular time and capacity for work. Against this background, the unrestricted freedom of action within gainful employment is desired and even seen as absolutely necessary. These initial, rather general remarks will be illustrated by presenting a concrete discussion of 'frugalistic' demands and expectations with regard to work based on particularly striking case studies: Jack Dogan (I03) is 42 years old and has worked in the IT industry for most of his working life, in which he has been 'native' to a certain extent due to his degree in computer science. In his IT-job, he was not able to fulfil his expectations of experiencing meaning and self-fulfilment in work, whereby meaningfulness for him is connoted with the creation of added value for society at large. With the intention of being able to experience meaningfulness in his profession, Mr. Dogan (I03) decided to change his career a few years ago, switching to a field and a profession (now as a teacher) that he believes offers added value to society and thus, to him personally, has a meaningful character:

[28] B. G. Glaser, A. L. Strauss, *Grounded Theory. Strategien qualitativer Forschung*, Huber Verlag, Bern, 2010

[29] A. Witzel, *Prospektion und Retrospektion im Lebenslauf*, in ZSE – Zeitschrift für Soziologie der Erziehung und Sozialisation, 2001, vol. 21, no. 4, 339-355

> Work has to be fun, otherwise it's wasted time in the end. Yes, I studied and that's why I wanted to use the knowledge I acquired there, but I wasn't able to use it in my field in such an extremely meaningful way. Perhaps I had too few opportunities to do something, to make something. That's not necessarily the meaning of my life, to continue doing that. [...] I think I can perhaps do other things even better and use a greater lever there, create more value. Yes, and that's why I quit and then also thought for a long time about what I could do, whether I could start my own company or what people actually need right now and where I might also see a need that I would actually like to see addressed better and then ultimately found, however, that as a teacher I probably have the greatest leverage to make an impact. (I03)

Accordingly, the interviewee makes an assessment with regard to the (social) usefulness of his work: it does not seem sufficient to Mr. Dogan (I03) to apply the knowledge acquired during his studies in his job merely as an end in itself, but rather the application of knowledge must also and above all be connected with and result in the creation of meaning, which in his concrete case can only be made possible through the creation of added value to society. In this respect, work in and of itself is embedded in the context of an individual as a source (or resource) of meaning in the sense of 'meaning-making'[30]. This coincides with sociological discourses on 'meaningful work' outlined in section 3, according to which gainful employment is understood and interpreted as an individual shaping and attributing achievement and no longer as a mere 'experience' that one is subjected to.

This is based on a normative subjectification of work, since Dogan (I03) sees himself as an individual endowed with subjective expectations and demands to work in the first place, and – in contrast to the ideal-typical Fordist framework of work organisation – sees work as something that first and foremost should correspond to his personal demands, desires, ideas and goals. As in the case study of Mr. Dogan (I03), the sample as a whole show that work must or should be meaningful. Interestingly, the respondents express that, in their eyes, this were not the case for the vast majority people in society as a whole, as is made clear, for example, by the following statement by Larry Kral (I06): "But very few [...] are happy with their job and, I think, 80 or 85 percent don't like going to work and very few have made their calling their profession." Kral (I06) himself states that he is reluctant to work as a full-time civil servant, but that he also has

[30] R. Hitzler, A. Honer, *Bastelexistenz, Über subjektive Konsequenzen der Individualisierung*, in U. Beck, E. Beck-Gernsheim (ed.), Riskante Freiheiten, Suhrkamp, Frankfurt am Main, 2015, p. 307

side jobs that he enjoys (even at times when he does not usually work) and which, like his main job, bring him financial returns, i.e. they also help him on his way to financial autonomy:

> As I said, I have many side hobbies and side activities where I don't even ask myself at ten or eleven in the evening whether I'm going to sit down for two or three hours and whether I feel like it, because you simply do that because you have this intrinsic drive, which you don't have at all with externally determined work activities, no matter what they look like. (I06)

The decisive difference between the respondent's main occupation as a civil servant and his secondary occupations thus lies in the organisation of his work: while the former is predominantly externally determined or bound by instructions, i.e. the respondent himself can exert little to no influence on the content and conditions of his job (time, location, etc.), in the latter he has far more room for freedom of choice or "power of disposal" on the one hand, and on the other hand an inner, natural drive to pursue these activities, which is why, in contrast to the former, he enjoys doing them. The meaningfulness of work and the satisfaction or dissatisfaction with work are thus linked in particular to a dichotomy of autonomy versus heteronomy. As a special 'quality' of his frugalist way of life, Kral (I06) states – against the background of his pronounced striving for self-determination – to be able to get away more and more from the externally determined, reluctantly exercised job as a civil servant by means of accumulating financial reserves. However: knowing that his side jobs and his activities on the stock market, combined with his frugal lifestyle (the interviewee says he saves about 65 percent of his monthly income of about 4.000 Euros), give him a certain, if not yet complete, independence from his full-time job as a civil servant, an interpretation of the idea of self-determination and an inner independence can already be observed in this case – i.e., while he is still working in largely externally determined gainful employment:

> You simply go about your work in a completely different way or get up in a completely different way when you know that I can say what I want and do what I want and I don't have to walk in a lane somewhere, as they always say, and I don't have to kiss anyone's ass. It's just the way it is. What is worse than pretending to be somewhere all your life and pretending to some superior or something else? There is nothing more corrosive. You simply appear differently at work when you know in the back of your mind that I can speak my mind here and if it doesn't come across, then I'll just leave. One is freer. Frugalism is not about not working

> at all, but about being free at some point to determine who or what you want to work for. (I06)

This makes it clear that the aspect of hierarchy or, to a certain extent, the 'pecking order' at the company level is perceived as a major disadvantage of externally determined work. In this context, autonomy is understood, by all interviewees, as synonymous with extensive liberation from hierarchical constraints manifested or even implicit at the company level. This understanding of autonomy reminds of Harry Frankfurt's concept of autonomy (resp. freedom). According to Frankfurt, autonomy is to be understood as a correspondence between the will that has an effect on action and second-order desires[31]. In this context, second-order desires are those desires that themselves refer to a desire or will. The desire of the frugalists to have room for choices and self-determination by means of financial security can be interpreted as a second-order desire. The realisation of this second-order desire, namely by detaching oneself from dependency relationships such as those typically found in externally determined gainful employment, can be understood as the frugalists' specific idea of autonomy.

It should be noted that – as in the case of Mr. Kral (I06) – financial reserves can serve as a vehicle for detachment from externally determined work and enable a more self-confident appearance at the company level, especially in interactions with superiors. In knowing of their financial reserves, the interviewees seem to develop an awareness of increased 'bargaining power' within company level. Indications of this thesis are provided by the implicit use of financial reserves expressed in the interviews, in particular in order to insist, for example, on a more extensive or flexible use of remote and/or part-time work or to be able to force a change to remote and/or part-time work, which, prior to having accumulated financial reserves, may have been associated with fear or worry.

This is based on the fact that, in the perception of the respondents, superiors would not approve of an (extensive) use of remote and/or part-time work, i.e., this was rather frowned upon, as performance was still largely equated with full-time physical presence in the company. At this point, the question arises as to how financial reserves are actually used by frugalists to, for instance, insist on a transition to (more) remote and/or part-time work in the company and thus to claim individualised

[31] H. G. Frankfurt, *Freedom of the Will and the Concept of a Person*, in Journal of Psychology, 1971, vol. 68, no. 1, 5-20

employment constellations. The interviewees report that, in the knowledge of their financial reserves, they freely replied to critical statements by superiors regarding remote and/or part-time work by saying that they could simply quit, whereupon the superiors then ultimately gave in to those demands. Such a demonstration of 'bargaining power' in internal (hierarchical) structures can be found pointedly in the following statement by the already financially independent interviewee Mr. Salin (I08), for whom – like all interviewees – 'making a career' did not entail job satisfaction in general and self-fulfilment in particular:

> I just say, so it's actually pretty easy, the staff appraisals or the annual appraisals are quite funny, with me at least, I always tell my boss 'if you annoy me, I'll leave'. Because you can at any time. Suddenly you have the freedom to change your life if it doesn't suit you anymore and this freedom, so the dissolution of such dependency relationships or toxic dependency relationships is an incentive in any case. [...] That's an extremely unpleasant feeling, for me at least, if I'm in such a dependency relationship, even if I know that I can change jobs, but there, maybe, I will have the same situation again when things go bad. [...] The knowledge that you have this or that sum in the back and be it now perhaps 20,000, 25,000 euros, these 25,000 euros basically mean that you don't have to work at all for a year and don't even have to get unemployment benefits, because if you use that up, you can live on it for a year or most people can live on it for a year and that solves such levers or that reduces these levers that other people have against you. (I08)

On the one hand, this shows that achieving financial independence and retiring from work for good do not necessarily coincide or have to go hand in hand, as is often suggested in mass media coverage of frugalism. None of the interviewees would consider suddenly giving up work once they had achieved financial independence, instead they particularly refer to the general meaningfulness of work and a desire to 'leave something meaningful behind'. This can be interpreted as an indication that work resp. gainful employment is (also) seen by frugalists as a structuring and thus elementary element of life in general. So, there does not seem to be an extreme in the sense of a "clear-cut retirement"[32] in the cases studied, but rather, even after achieving independence from earned income, gainful employment does not seem to be categorically rejected, which means that, in the sense of a 'blurred retirement', there are no 'hard' contours, but rather blurred phases of retirement.

[32] R. Weiss, *The Experience of Retirement*, Cornell University Press, Ithaca, 2005, p. 41

On the other hand, this exemplary interview passage gives essential insight into the motivations of frugalists for saving financial reserves: the primary aim is to avoid a situation in which the lack of financial reserves makes it unavoidable to remain in an unsatisfactory, non-meaningful job and, in the worst case, one characterised by a toxic working environment, Rather, the aim is to ensure the possibility of self-determination under all circumstances, i.e., even in the absence of income from gainful employment, for example, after an unsatisfactory job is quit, as in the case of Mr. Dogan (I03). This is an example of a specific 'frugalist pattern': the financial reserves (i.e., the "sum in the back") are seen and used as a buffer, and to a certain extent as a safety net for possible financial setbacks and biographical uncertainties due employment discontinuities.
Finally, Mr. Salin (I08) himself asserts in the above quote that even a whole year of unemployment – a situation that, for most people, would usually cause financial hardship – would not pose a difficulty in his life because of his financial reserves. Based on the accumulation of financial reserves observed across all individuals in the sample, by means of which personal security and thus autonomy from external (especially financial) factors are to be achieved, the conclusion can also be drawn here, that the frugalists are generally characterised by a striving for security in their professional biographies. This, in turn, is ultimately to be understood as the ability to plan, expect, or predict one's own path within working life (and life in general) in the sense of 'expectational security'. Once again, the importance of creating as much freedom of action as possible becomes clear, within which the decision for or against remaining in an employment relationship is made less dependent on financial necessities, but rather dependent on personal moments such as meaning, fulfilment, fun, and satisfaction with the working atmosphere. In the course of financial independence, frugalists strive for self-responsible and self-directed use of their labour force.

6. Interpretations of time and working time

Not only do the cases presented here reveal such a subjectification of work, but also a specific relationship between work and time: if work is not perceived as meaningful and is not offering space for personal development, i.e., if the contents and conditions of any given job are not subjectively appealing, then carrying out said job is explicitly equated with a waste of time. Since this study focuses in particular on the micro-level of society, i.e. on the frugalists and their orientations and practices themselves, it is primarily a matter of reconstructing the way in which

internal flexibilization is expressed in the frugalist way of life, i.e. how the frugalists use concrete measures to achieve flexibilization of their work volume. Accordingly, the design of working time arrangements in the frugalist way of life and the motivations underlying them are to be examined here. In the course of this, the 'specifically frugalistic' relationship between time and work underlying the flexibilization of working time is to be explicated.

As before in the context of subjectification, a high degree of self-control and a (time) sovereignty can be observed in the context of the flexibilization of work. The presentation of a case study will help to enter into the discussion of these points: Julia Richter (I09) is 38 years old and has already achieved financial independence, i.e., she can cover her living expenses by way of passive income. Similar to the cases presented before, this interviewee has also made a career change: after 15 years of full-time employment in sales management, she now works part-time in a locally organised agricultural cooperative that supports small-scale agricultural enterprises in their work. In her opinion, this change from a job that she perceived as inflexible, meaningless and unfulfilling to a job that is much more in line with her wishes, expectations and demands and that can be arranged flexibly (or more flexibly) in terms of time has only succeeded because, thanks to her frugal lifestyle, she has financial reserves with which she can compensate for the double loss of income. The loss of income is double in that both the number of hours and the hourly wage are much lower in the new job than in the old one:

> I was able to hang up my sales job, precisely because I have this security, and I now work in a cooperative, in an agricultural cooperative, and can do things there that, from my point of view, are far more valuable than what I ever did at the sales company, because I simply help small farmers to sell their things and so on. [...] Just to get the freedom to say, look, if I want to now, I'll stop completely or I'll do a part-time job or I'll quit here and just do something somewhere, then I'll only earn half, but that's just mega fun [...]. and someone who has 70, 80 percent fixed costs and expects to work until 67 and hopes that he will still get a pension doesn't have that option. [...] We have shifted to part-time this year - because we can - and work only 25 hours a week. [...] All the possibilities that it offers you, that you suddenly don't have to work eight hours a day anymore, but only five, as in my case now, and you have more time for yourself. [...] When you only work five hours and have two small children as opposed to eight hours, it makes a huge difference. (I09)

In her perception, it was only possible for her to reduce her working hours considerably (from full-time to part-time) and to reduce her income

without financial burden because she is a frugalist and thus maintains a reduced lifestyle that keeps consumer spending low – "low" in the sense that she lives far below the conditions that would, in principle, be possible for her with her salary. In this case study, it becomes clear that the right to self-determination and the right to shape the time that becomes 'free' is in the foreground. Similar to the findings of the "time pioneers"-study carried out by Hörning et al. (1991)[33], this expresses an interest in the self-determined structuring of everyday time patterns. In this respect, a pattern of restructuring from time largely occupied by gainful employment to 'free' time (for instance: time filled with childcare) emerges. Illustrated by the case study of Mrs. Richter (I09), it is expressed across all individual cases that the state of being 'sovereign' over one's own (working) time is attributed an extremely high significance.

It seems that the fact of being able to organise working time independently from any other actor or institution, taking into account private demands and requirements, and thus to decouple individual working hours from company hours, is clearly seen as something desirable and as an achievement. This is implicitly based on a special way of dealing with the fact that time is scarce. It should be noted at this point that it is not primarily the costs of time that are considered, but above all the benefits of time, i.e., "its intrinsic value, that is, its value that cannot be quantified in monetary units"[34]. Consequently, non-working time or leisure time in the frugalists minds is decidedly not to be understood as a 'remainder' or as what is left over after labour[35], but rather it is precisely this time, perceived as leisure time free of external, binding expediency, to which the frugalists studied attach great importance.

The time gained through a reduction in working hours is to be understood here as a high good, whereby a qualitative increase in the experience of time[36] can be assumed: the newly 'won' time free of labour need not (or especially should not) be accompanied by a shift of labour to other, possibly non-employment-related, but nevertheless duty-bound areas. This way of dealing with or understanding time can be described as

[33] K. H. Hörning, A. Gerhardt, M. Michailow, *Zeitpioniere. Flexible Arbeitszeiten – neuer Lebensstil*, Suhrkamp, Frankfurt am Main, 1991

[34] M. Andresen, *Das (Un-)Glück der Arbeitszeitfreiheit*, GWV Fachverlage, Wiesbaden, 2009, p. 103, own translation

[35] J. Habermas, *Arbeit, Freizeit, Konsum. Frühe Aufsätze*, Prolit-Buchvertrieb, 1973

[36] K. H. Hörning et al., *op. cit.*, p. 163, own translation

'time sovereignty'[37]. This is accompanied by a use of time according to self-determined criteria and thus a creation of self-controlled free spaces as opposed to externally produced or controlled time orders, such as those typically found in labour. The frugalists interviewed seem to strive to keep time free of "schematic time use plans [and] perceive time as a quality of experience"[38] - thus time takes on an intrinsic value that cannot be directly exchanged for goods or services.
Time thus seems to be used explicitly as a resource for shaping one's life, whereby a subject-centeredness is evident here – observable, for example, in the statement made by Mrs. Richter (I09) of having "more time for yourself." It is obvious that the use of time as such is made a topic here – this presupposes a reflection on time arrangements or on temporal references as a whole, so that a reflexive understanding and awareness of time can be stated for the frugalists here. Overall, the reflection on how to 'deal' with time in particular and with the employment biography in general represents the dominant action pattern for the cases studied or, so to speak, a 'life planning'[39] in the sense of a heuristic. The life planning of the frugalists interviewed is fundamentally based on a mode of independent '(employment) biography management'[40] - this is accompanied by a pronounced striving for absolute autonomy. On the basis of the explanations of frugalistic employment orientations and practices presented in this section, a high degree of self-structuring and self-organisation achievements and demands can be stated overall – especially against the background of the exemplary importance of self-determination in employment presented on the basis of the cases of Mr. Dogan (I03) and Mr. Kral (I06).

7. Work how and (until) when you fancy: Frugalism and its implications for organisation and co-determination

Now, having caught glimpses of frugalists' particular, rather individualistic demands to work and, thus, their preferences, concerns and orientations

[37] J. Rinderspacher, *Arbeits- und Lebenszeiten im Wandel. Ansätze zu einer Politik der zeitstrukturellen Balance*, in ZSE - Zeitschrift für Soziologie der Erziehung und Sozialisation, 2003, vol. 23, no. 3., 236-250
U. Frosch, L. Vieback, S. Brämer, *Zeitkompetenz und Arbeitszeitsouveränität sowie deren Auswirkungen auf die individuelle erwerbsbiografische Gestaltungskompetenz*, GfA Dortmund, 2018
[38] K. H. Hörning et al., *op. cit.*, p. 155, own translation
[39] B. Geissler, M. Oechsle, *Lebensplanung junger Frauen. Zur widersprüchlichen Modernisierung weiblicher Lebensläufe*, Deutscher Studienverlag, Weinheim, 1996
[40] A. Witzel, *op. cit.*, p. 351

with regard to their working life, one might wonder how, if at all, this group of people fits into the established systems of organisation and co-determination of work. In other words: does the very principle of workers' participation resp. co-determination, namely collectivism[41], clash or leave room for those workers, whose 'ultimate concern'[42] it is to achieve complete and utter autonomy, as is the case with frugalists?

The previous remarks have shown that the organisation of work in the case of frugalism becomes primarily a self-organisation and, in a broader sense, self-reliance on the individual level, resulting in frugalists detaching themselves from the spatial, temporal and organisational spheres of work (i.e., corporate structures). Frugalists express a need for personalized work arrangements or, in other words, for "custom-tailored job solutions"[43], in which work corresponds with individual needs, goals and preferences. Frugalism entails an urge for self-reliance, inducing a responsibility-shift towards the (frugalist) individual and, by that, potentially posing a challenge for the collective pursuit of common relationships (e.g. within the workplace), interests and mutual support. Not only that, there is a growing body of research that shows that the responsibility-shift implied by self-reliance and individualism can promote self-exploitation[44], which in turn can result, for instance, in self-endangering efforts to achieve maximum financial performance.

To counteract such risks of self-reliance and individualism, the organisation of work needs to be more employee-oriented, allowing for (more) work flexibility and dissolving hierarchies and (corporate) structures of dependencies and power imbalances. That way, perceptions of labour as a, so to speak, 'dependency trap', could change. In theory, flat organisations resp. flat hierarchies are a prime example of an appropriate form of work organisation, that allows for the independency of its employees while maintaining a collective frame of reference. For instance, American video game developer Valve is known for upholding a flat

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41 P. Stewart, S. Genevieve, M. Smith, *Individualism and Collectivism at Work in an Era of Deindustrialization: Work Narratives of Food Delivery Couriers in the Platform Economy*, in Front. Sociol., 2020, vol. 5, 1-14

42 M. Archer, *Structure, Agency and the Internal Conversation*, Cambridge University Press, 2003

43 S. Hornung, T. Höge, *op. cit.*, p. 3104

44 S. Hornung, R. Doenz, J. Glaser, *Exploring employee attitudes on fairness of idiosyncratic deals*, in Organisational Studies and Innovation Review, 2016, vol. 2, no. 4, 9-15
H. Chung, *The Flexibility Paradox*, Bristol University Press, 2022

structure, where – in a system of 'open allocation' – employees can decide what to work on themselves[45].

However, as outside observers have pointed out, Valve has almost exclusively employed highly qualified workers, who are a good fit for a non-hierarchical environment in general. Well, what about low-skilled workers? This question leads back to the argument that the scope for subjectification and flexibilization of work is tied to the initial working conditions – generally, skilled work will leave relatively more room for freedom of action (and, by that, potentially for subjectification and flexibilization) in comparison to low-skilled work, where there is "narrow task autonomy"[46]. Potentially, this could lead to a polarisation or divide between high-skilled and low-skilled workers, insofar as the latter, in contrast to the former, might not benefit (at least by far not to the same extent) from the (autonomy) benefits that – with all risks of self-exploitation – can come with subjectification and flexibilization of work.

Where industrial organisation of work left little to no room for personal autonomy within the work process, subjectification and flexibilization of work organisation promise a potential increase in the freedom of action within work. In this sense, individualisation means a gain in decision-making opportunities, i.e. individually selectable options, but at the same time also a loss of a 'roof' of meaning that overarches individuals and is collectively binding. Previous research has problematised this especially with regard to a potentially dwindling ability of interest organisations such as unions and professional associations to mobilise increasingly atomised workers[47]. Findings show that while collectivism of labour is not in a fundamental decline, interest organisations should aim to be more aware of the varying demands that people (can) have with regard to their work – this calls, for instance, for (more) nuanced collective agreements that account for the diversity of peoples work orientations and practices.

The findings discussed here show that frugalism (especially if its prevalence were to increase) could very well have practical implications for the relationship between employers and employees: if companies want to retain frugalist employees who already have financial reserves and may be thinking about quitting their current job, they would most likely have

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[45] L. Kelion, *Valve: How going boss-free empowered the games-maker*, BBC News, 2013, last access time: 23.04.2024

[46] K. Laaser, S. Bolton, *Absolute autonomy, respectful recognition and derived dignity: Towards a typology of meaningful work*, in Int. J. Manag. Rev, 2022, vol. 34, 373-393

[47] D. Peetz, *Are individualistic attitudes killing collectivism?* in Transfer, 2010, vol. 16, no.3, 383-398

P. Stewart et al., *op. cit.*

to offer them personal autonomy with regards to the conditions and contents of their work. To propose a thought experiment: if in fact the number of frugalists increases, this could lead to mass layoffs if employers are not willing to make concessions, i.e. not allowing for (any) autonomy within their workplace. At the same time, an increase in the number of frugalists could stimulate a rise in work-life balance-centred HR policies, the core component of which would be a flexibilization of working hours.

Conclusion

The present paper explored 'frugalistic' work orientations and practices and, in doing so, discussed the meaning that frugalists attribute to work. Concrete findings are, on the one hand, an apparent subjectification of work, insofar as expectations and demands for meaningfulness and self-fulfilment are brought to gainful employment and subjective assessment models are used as a basis. At the corporate level, there is also an increased self-confidence of the frugalists towards their superiors in the knowledge of financial reserves, to assert personal expectations and wishes. The meaningfulness of gainful employment and the satisfaction or dissatisfaction with one's employment are ultimately linked to a dichotomy of autonomy versus heteronomy. It is shown that frugalists base their lives on available time structures and thus ultimately strive for complete sovereignty over their time, which ought to be as free as possible from external factors. Frugalists see themselves as autonomous subjects with the right to self-determination or organisation of their 'free' time - the aim is to create self-controlled freedom from externally produced or controlled time orders, such as those typically found in gainful employment. People can derive different meanings from most any job and these meanings are shaped by the individual's orientation to and beliefs about work in general[48]. Employers as well as interest organisations such as trade unions should take into account the diversity of meanings that people associate with work – this calls, for instance, for a (more) nuanced, employee-oriented approach with regard to elaborating collective agreements.

Then, collective bargaining has to (further) embrace workers, who first and foremost look for autonomy within their job. The example of an equally autonomy-seeking group, namely the self-employed, shows that this has been neglected in the past both by unions as well as works

[48] B. D. Rosso, K. H. Dekas, A. Wrzesniewski, *On the meaning of work: A theoretical integration and review*, in Research in Organizational Behavior, 2010, vol. 30, 91-127

councils within the dual system of interest representation in Germany: a survey among self-employed that are union members of ver.di, the second largest German trade union, showed that there is a high demand for significantly stronger commitment of their union to the concerns of the (solo) self-employed[49]. Despite all individualistic tendencies, it is evident that even autonomy-seeking groups of people do in fact have a positive attitude towards the idea of collectivism and representation of interests in general – it is then up to the trade unions and works councils to approach these groups of workers, that seek for both autonomy as well as security, more vehemently and directly.

Apart from that: since all the frugalists examined here work or have worked in highly-skilled fields and earn above-average wages, the hypothesis that the objective financial situation could be an essential factor for the 'success' of a frugalistic lifestyle is plausible. However, this assumption is based on a small study group and therefore requires further verification. This implicitly leaves open the question of the opportunities and risks of frugalism, i.e., whether it is closely linked to socioeconomic factors, that is, in particular, to gender, education, economic capital, social capital and social origin. Investigating this complex question requires a different research design than the one on which this paper is based on. It would be conceivable, for example, to determine possible correlations between socioeconomic variables and a 'frugalistic tendency' by means of a quantitative approach working with a large number of cases. At the same time, conducting a first quantitative study on frugalism would directly address another research desideratum, since there is still a complete lack of information on the actual prevalence of frugalism in society as a whole or on the (approximate) number of frugalists.

[49] H. Pongratz, *Interessenvertretung dringend erwünscht: Was Selbstständige von ihrer Gewerkschaft erwarten*, in WSI-Mitteilungen, 2017, 605-613

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