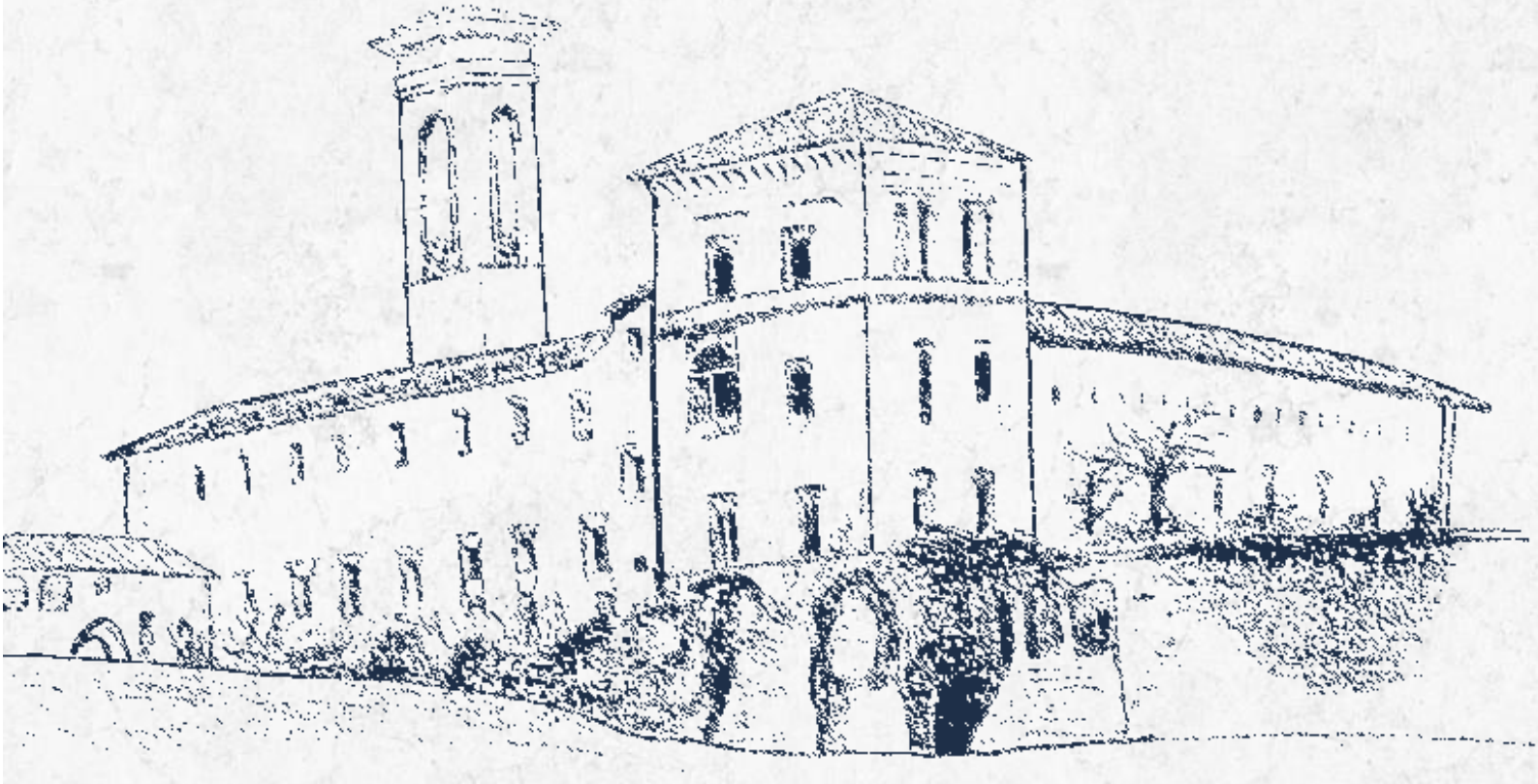
OPEN ACCESS
ISSN 2280-4056

E-Journal of International and Comparative

LABOUR STUDIES

Volume 14 No. 03/2025



ADAPT
www.adapt.it
UNIVERSITY PRESS

E-Journal of International and Comparative **LABOUR STUDIES**

ADAPT *International School of Higher Education in Labour and Industrial Relations*

E-Journal of International and Comparative

LABOUR STUDIES

Volume 14 No. 03/2025

ADAPT UNIVERSITY PRESS
www.adapt.it

Online Publication of the ADAPT Series
Registration No. 1609, 11 November 2001, Court of Modena
www.adaptbulletin.eu

Index

Labour Law

Industrial Relations

Social Security Law

Anti-Discrimination Law and Human Righs

Can a Destination Country's Labor Law be Applicable to Employees Enjoying a "Workation"?

Martina Menghi and Pieter Manden*

Abstract: This article deals with the investigates which employment law is applicable to employees during workations, according to EU law. Not surprisingly, in cross-border situations, the employee benefits of special protection. Working abroad might trigger the application of the law of the Host State, notably concerning two categories of rules: provisions that cannot be derogated from by agreement (1) and overriding mandatory provisions (2). Unfortunately, both categories are not defined by EU legislation. Provisions belonging to the first category, (mainly considered as, for instance, on minimum wage) are those of the State corresponding to the habitual place of employment. In case it is not possible to identify it, residual criteria might apply. Further, provisions belonging to the second category must always be applied by national courts, regardless of the law applicable to the employment contract. While legal scholars often disagree on categorisations and interpretations of such rules, the ECJ confirmed that this category of provisions must be interpreted strictly.

The posted worker Directive defines the rules (e.g., salary), which are 'overriding mandatory provisions' of the Host State, applicable to posted employees. It makes sense to ask whether these would be applicable to workationers too. However, several arguments speak in favour of not equating employees enjoying workations to posted employees and there is no evidence that these rules would be considered as overriding provisions during

* Martina Menghi, PhD from the University of Campania Luigi Vanvitelli (Italy), Senior Manager at WorkFlex. martina.menghi@getworkflex.com. Pieter Manden, MBA from the ESCP Business School (France), LLM in Tax Law from the University of Amsterdam (The Netherlands). Co-Founder and Managing Director of WorkFlex. pieter.manden@getworkflex.com.

workations. Even if a risk of application of some Host State employment law provisions exists, it appears strongly mitigated.

Keywords: private international law, international employment law, provisions that cannot be derogated from by agreement, overriding mandatory provisions.

Introduction

The aim of this paper is to highlight important criteria to consider when identifying applicable employment law for workationers temporarily working from abroad during a so-called 'workation' (a combination of work and vacation). These people, which we will refer to as 'workationers,' are employed in one State ('Home State') and temporarily working in another one ('Host State'). Given this context, it is crucial to define what must be considered as a workation given the fact that this definition will influence the outcomes for applicable laws.

A workation occurs when employees find themselves in a situation where these four cumulative requirements are met: (1) the main aspects of a temporary stay abroad are solely determined by an employee, such as the destination and the duration of their visit to a Host State. (2) The employer allows (but does not assign) the employee to temporarily work remotely outside of the Home State. (3) The trip does not have any business reason or purpose, i.e., the employer has no initiative nor need for the trip, which is privately driven, to occur. (4) The employee is bearing the relevant costs, e.g., the travel costs related to the trip.

By contrast, the opposite of the above features qualifies as a business trip, where there is an employer interest behind the trip; it is the employer that sends an employee abroad to perform their work in an employer-defined Host State and situation.[1]

This paper focuses on the legal framework in EU law, whether the existing international private law rules – both from primary and secondary levels and including relevant decisions of the European Court of Justice – fall short in

[1] Workations and business trips have the main common feature in their short duration. In both cases, the employee does not give up the residency in the Home State and works outside its territory on a temporary basis (where 'temporary' is generally being defined as 'of short duration', a few days or weeks, and in any case never exceeding 183 days per calendar year – this would have some significant implications, notably tax related).

It has been observed that "the distinction between business and leisure tourism" in a more and more digitalized world "seems to be outdated". M. Bassyiouny, M. Wilkesmann *Going on workation – Is tourism research ready to take off? Exploring an emerging phenomenon of hybrid tourism*, in *Tourism Management Perspectives*, 2023, vol. 46.

providing the necessary answers or not. This topic has been discussed a lot in recent literature but is far from being crystallized.[2]

As argued in this paper, there some relevant pieces of legislation that are available even if workations did not represent their scope of application at the time these rules were adopted in EU private law. On the contrary, the relevant rules were instead shaped with business trips in mind. Therefore, applying the existing rules to workationers is particularly complicated.

This paper does not intend to analyze specific national rules, if these exist.[3] National laws, if mentioned, are done so through examples and illustrations of practical implementations. Given the current legal framework, however, it should be possible to identify some common rules for workationers within the Member States.

The rules that will be analyzed were adopted before the Covid-19 Pandemic and the explosion of remote work during and following it.[4] As a result, the rules were never designed with the current reality in mind, which leads to an ambiguous situation.

At the same time, workationers already existed prior to the pandemic. Take Mario as an example: he is an associate at a big German law firm that deals with mergers, projects that usually take months. The negotiations for a new project start after Mario booked his vacation to Greece. If he is lucky enough to be allowed by the law firm to leave for vacation, instead of having to cancel it last minute, the most likely solution would be for him to constantly look at his mobile phone, read, and send emails to catch up and understand what is going on during his (physical) absence from the office. This raises some questions: does such a situation justify the application of Greek employment law? Is Mario considered to be on a business trip, or does he even qualify as a

[2] At the international level, outside the EU, 'For many decades, labour and employment lawyers had tended to neglect jurisdictional issues; and lawyers who were studying conflicts of law tended to ignore labour law issues'. M. A. Cherry, *Regulatory options for conflicts of law and jurisdictional issues in the on-demand economy*, *International Labour Organisation Paper*, 2019, 4.

[3] In German law, for instance, the Work Councils (*Betriebsräte*) have a co-determination right in defying the 'structuring of mobile work performed by means of information and communication technology' Works Constitution Act (Betriebsverfassungsgesetz - BetrVG), in so far as the matter is not prescribed by legislation or collective agreement. Therefore, they also have a co-determination right when considering how to regulate remote work while abroad. Dr. M. M. Knorr, Global Mobility: The dos and don'ts of mobile work or remote work from abroad, *Blog: Labor Law*, 2022, https://buse.de/en/blog-en/labor-law/global-mobility/ (accessed 11 October 2025).

[4] The massive transition to remote work has been analysed by several authors, not only from a legal but also economic and operational perspective, inter alia, T. Neeley, *Remote Work Revolution* HarperCollins, New York, 2021. D. Foroux, *Highly Productive Remote Work: A Pragmatic Guide*, North Eagle Publishing, 2020. I. Szapar, *Remote Work is the way*, Iwo Szapar, 2021.

posted employee? It seems that these questions, even if open, were not considered as relevant before the advent of workationers.[5]
Not surprisingly, in situations characterized by some degree of internationality, a cross-border dimension (employment in the Home State and temporary remote work in the Host State) presents potential law conflicts. Notably, one of the main risks is that the Host State's employment law becomes applicable. This has some very relevant practical implications. Amongst others, the following questions need to be answered: which minimum wage standards must be applied to these employees, those deriving from the law of their Home State or their Host State? Which law determines the maximum working hours, the minimum rest periods, and annual holidays?
Therefore, it is crucial to identify the applicable laws for the employment relation with certainty. In EU law, it is possible to seek the relevant answers in Regulation (EC) No 593/2008 of 17 June 2008 for the laws applicable to contractual obligations (Rome I) (hereafter 'the Regulation'). This is an instrument of 'universal application', meaning that any law specified in it shall be applied, whether it is the law of a Member State or not, as stated in its Article 2. The Regulation's general objective, as announced in Recital 16, is legal certainty in the European judicial area. The foreseeability of the substantive rules applicable to contracts must not be affected.[6]
It is crucial to investigate the applicable legislative framework. There is no doubt that the Regulation Rome I is applicable to workations. Therefore, its provisions need to be regraded in detail. The principle of the parties' choice is restricted by both Article 8 and Article 9, establishing limitations to its application. While both articles raise some interpretative issues, the criteria laid down in Article 9 deserve a deeper and more detailed analysis and is evaluated separately in the next chapter. Finally, the Posted Workers Directives is the topic of discussion in the last chapter to show how unlikely it is that a workationer can be considered as a posted employee.

1. Identifying the Limitations to the Parties' Choice according to Article 8

Article 8 presents the parties' choice as the general rule. However, it also lays down crucial criteria that acts as a counterweight, which requires identifying the provisions that cannot be derogated by an agreement (1.1.) according to the law of the habitual place of employment (1.2.).

[5] S. Stefanova-Behlert, N. Davidovic, *Arbeiten aus dem Ausland: Praktische Herausforderungen*, in *Unternehmensjurist*, 2023, n. 6.
[6] Case C-135/15, *Hellenic Republic* v. *Grigorios Nikiforidis*, [2016], Recital 46.

1.1. The Provisions that cannot be Derogated by an Agreement (Art. 8 (1))

According to the Regulation, an employment contract shall be governed by the law that the parties have chosen. Such a choice, however, may not have the result of depriving the employee of the protection derived by the application of some particular provisions. These provisions are those that cannot be detracted from by agreements under the law that would have been applicable in the absence of choice.

A recent decision[7] from the CJEU offers a comprehensive overview on the law applicable to the employment contract, which is worth summing up.

The Court ruled that the correct application of Article 8 of the Rome I Regulation requires subsequent steps to be accomplished: first, the national court must identify the law that would have applied in the absence of choice and determine, in accordance with that law, the rules that cannot be derogated from in an agreement. In a second step, the national court must compare the level of protection afforded to the employee under those rules with that provided for by the law chosen by the parties. Finally, if the level of protection provided for by those rules is greater, those same rules must be applied.[8]

To the extent that the parties have not chosen the law applicable to the individual employment contract, the contract shall in principle be governed by the law of the habitual place of employment.

As clarified by the Court, once the country of the habitual place of work of the employee is identified, it is necessary to look at the provisions that, according to the laws of that country, cannot be derogated from by agreement. Those laws will have to be applied to the employment contract of an employee, even if these employees work remotely in another country for some time, in the case they are more favorable.

---

[7] As a general rule, the Court recalls that the individual employment contract is to be governed by the law chosen by the parties. However, such a choice of law may not have the result of depriving the employee of the protection afforded to him/her by provisions under the law that cannot be derogated from by agreement and that would be applicable to the contract in the absence of such a choice. This primarily refers to the law of the country in which or, failing that, from which the employee habitually carries out his or her work in performance of the employment contract. If those provisions offer the employee concerned greater protection than those of the employment law chosen by the parties, the former provisions will override the latter, while the law chosen will continue to apply to the rest of the contractual relationship. Therefore, the same contract will be, in practice, governed by different laws.
Case C-152/20, *DG and EH* v. *SC Gruber Logistics SRL and Sindicatul Lucrătorilor din Transporturi v SC Samidani Trans SRL*, [2021].

[8] *Id.*, Recital 27.

Unfortunately, the Regulation does not give a definition of 'provisions that cannot be derogated from.' This means, as confirmed by the Court, whether a provision belongs or not to those that cannot be derogated, that will have to be decided according to national law: 'The referring court must itself interpret the national rule in question."[9]

A case-by-case analysis is necessary. The CJEU had the opportunity in several judgements to clarify, in practice, some guidelines. According to the Court's interpretation, the provisions in object 'can, in principle, include rules on the minimum wage.'[10]

Further, rules concerning safety and health at work,[11] protection against unlawful dismissal,[12] and rules on working hours[13] are some relevant examples coming from national jurisprudences. These are rules that have been considered as 'provisions that cannot be derogated from by agreement' by national courts.

Since it is unlikely that the Host State will become the habitual place of work for a workationer, the application of these provisions for workationers is quite unlikely to materialize. Provisions that cannot be derogated from through an agreement (Art. 8 (1)) applicable to these employees will be the ones of the State where they are employed, namely the Home State.

1.2. The Habitual Place of Employment (Art. 8 (2))

As a preliminary observation, employment contracts, in principle belong to the private law sphere. This means that, like in all private law contracts, the parties' will is crucial and therefore they are able to choose which law shall be applicable.

---

[9] *Id.*, Recital 29.

[10] *Id.*, Recital 32 and conclusions.

A. Poso, *È il luogo di esecuzione abituale della prestazione di lavoro che fissa il salario minimo. La Corte di Giustizia accoglie le istanze degli autotrasportatori rumeni*, *Labor*, 2021 https://www.rivistalabor.it/e-il-luogo-di-esecuzione-abituale-della-prestazione-di-lavoro-che-fissa-il-salario-minimo-la-corte-di-giustizia-accoglie-le-istanze-degli-autotrasportatori-rumeni/ (accessed 11 October 2025).

[11] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, OJ 1980 C 282.

It has been observed by some scholars that actually health and safety provisions are not simply provisions that cannot be derogated from by an agreement, they are overriding mandatory rules (See below, footnote 86).

[12] G. Monga, The law applicable to individual employment contracts, *Aldricus Working Paper*, 2020, https://aldricus.giustizia.it/the-law-applicable-to-individual-employment-contracts/?lang=en (accessed 11 October 2025).

[13] *Cour de cassation*, *civile*, *Chambre sociale*, Judgement 20-14.178 8 December 2021.

Employment contracts usually specify which law shall govern it, so this is expected to be the most common scenario.
However, the employment contract is indeed a peculiar one, where one of the two parties (the employee) is facing a situation of weakness compared to the other party (the employer). Considering negotiation power, the employee is *de facto* in the position of having less room to maneuver and less flexibility than their employer.
Therefore, the Regulation adjusts this unbalanced situation by providing employees with some further protections. In Article 8 (1) it establishes that, generally, an individual employment contract shall be governed by the law chosen by the parties. However, it also specifies that such a choice of law may not have the result of depriving an employee of the protection afforded to him/her by provisions that cannot be derogated from by an agreement under the law that, in the absence of choice, would have been applicable to the contract.
Therefore, it becomes decisive to answer the following question: how can one identify the law that, in the absence of choice, would have been applicable to the contract? Some authors refer to this law as the 'objective law' of the contract.[14]
The main criterion is laid down in in Article 8 (2) of the Regulation: '(t)o the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.'
Throughout this text we refer to the 'country in which or, failing that, from which the employee habitually carries out his work in performance of the contract' simply by saying the 'habitual place of work.'
The same provision also clarifies that the country where the work is habitually carried out shall not be deemed to have changed if the employee 'is temporarily employed in another country.'
It is relevant from the beginning to notice that a regular workation, meeting the criteria defined in our introduction, is very unlikely to change the habitual place of work of the employee. Given this, it is essential to define the adverb 'temporarily.' According to Recital 36 of the Regulation, 'work carried out in another country should be regarded as temporary if the employee is expected

[14] For instance, J. P. Lhernould, Cross-border telework and Covid-19. Impact on mobile workers' status, *European Commission Working Paper*, 2021, 38, and A. A. H. van Hoek, Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?, in *Erasmus Law Review*, 2014, n. 3, 158.

to resume working in the country of origin after carrying out his tasks abroad.'[15]

Article 8 has as an objective to ensure compliance with the provisions protecting the employee that are laid down by the law of the State in which that employee carries out his/her professional activities as much as possible.[16]

To have a complete understanding, it is also worth mentioning that the 'habitual place of work' is not the only criterion provided by the Regulation. In fact, in some cases determining that is not possible. Art. 8 (3) states that, in such cases, 'the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.' Further, according to Art. 8 (4) '(w)here it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.'

It is important to point out that these last two paragraphs (3) and (4) are residual to paragraph 2 and therefore the criterion of the country where the employee is 'habitually' working is the privileged one, having priority over the others and to be interpreted in a broad sense. Only if it is not possible to identify the country where the work activity is habitually carried out, then the place of business through which the employee was engaged and at the closest connection to another country will be looked at. According to the European Court of Justice ('CJEU'), 'it was the legislator's intention to establish a hierarchy of the factors to be taken into account in order to determine the law applicable to the contract of employment.'[17]

In our analysis, we mainly focus on the dualism between, on one hand, the 'country where the employee habitually works' and, on the other, 'country where the employee is temporarily on workation.' We assume that it shall ideally be possible to identify – and if necessary to distinguish – between the two countries.

Undoubtedly, the core notion lies in the definition of the adverb 'habitually.' Unfortunately, there is no definition in the Regulation, so there is a question of how to identify it. In some cases, it is easier to define than in others. In the lack of a definition for 'habitually' in the Regulation, we are facing a notion

[15] In EU law, recitals, introduced by the word 'whereas', indicate the rationale behind the adoption of pieces of EU legislation. They are not legally binding; however, they can serve as guidelines for the text interpretation, notably where an EU law is ambiguous. Since they describe the purpose of the act, they are used as interpretative instruments by the CJEU. 'The law of recitals in European Community legislation', T. Klimas, J. Vaitiukait, The Law of Recitals In European Community Legislation, in *ILSA Journal of International & Comparative Law*, 2008, vol. 15, n. 1, 63.

[16] See, to that effect, *Nikiforidis* judgement, above n. 6, Recital 48.

[17] Case C-384/10 *Jan Voogsgeerd* v. *Navimer SA*, [2011] ECR I at 13275, Recital 34.

characterized by 'flexibility.' Such flexible notions are quite common in the EU law and have the advantage of being used in several legal contexts, enabling the Court of Justice to fulfill the notion by giving an interpretation of their content and their limits.

It might be disappointing at first sight, but according to the Court there is no duration that can be taken as a standard reference. This might seem to be a disadvantage, but it is actually comprehensible. The identification of the 'habitual place of work' is not limited to a matter of countable and definable duration.[18] It is not possible to have a straightforward answer to the question 'How long does an employee have to work in a place before it becomes his/her habitual place of work?', simply because time worked in a given workplace is not the only factor enabling the assessment of the place of employment.[19] There are many other factors to be taken into account.

The CJEU indicated some useful criteria[20] for identifying the country of habitual place of work, including the following: the actual workplace (in the absence of a 'center of activities', it is the place where an employee carries out the majority of the activities); the nature of the activity carried out; the elements that characterize an employee's activity; the country in which or from which an employee carries out his/her activity or an essential part of it – or receives instructions on his/her tasks and organizes his/her work activity; the place where the work activity tools are placed; and finally, the place where an employee is required to present himself/herself before carrying out his/her duties or to return after having completed them.

The Court of Justice specified that the notion of 'habitual place of work' 'must be interpreted as meaning that, in a situation in which an employee carries out his activities in more than one State, the country in which the employee

---

[18] The duration per se must be evaluated taking into account the specific case circumstances, namely the activity, as well as the company sector. E. Traversa, *Il rapporto di lavoro con elementi di transnazionalità*, in F. Carinci, A. Pizzoferrato (eds.), *Diritto del Lavoro dell'Unione europea*, Giappichelli, Torino, 2021.

[19] For instance, 'Italy is the place of employment of a secretary who was hired just yesterday to work a local job at an office in Rome — but Italy is not the place of employment of a Tokyo-based banker who has been working in Milan for the last two months, closing a deal on a long business trip'. D. C. Dowling, Jr., *How to Determine Which Jurisdiction's Employment Laws Reach Border-Crossing Staff*, in *Labor Law Journal*, 2016, n. 67.

The duration has to be considered by taking into account the specific activity performed by the employee abroad. Therefore, a 5-year period might be regarded differently if performed by an engineer on a nuclear site, by a director in a bank branch or by an employee from the sales department. E. Traversa, above, n. 18, 335.

[20] See on this point G. Monga, *op. cit.*

Voogsgeerd judgement, above n. 8.

Case C-29/10, *Heiko Koelzsch* v. *État du Grand Duchy of Luxembourg*, [2011] ECR I, at 1595.

habitually carries out his work in performance of the contract is that in which or from which, in the light of all the factors which characterize that activity, the employee performs the greater part of his obligations towards his employer.'[21]
Furthermore, there can be situations in which the location an employee does most of their obligations for their employer is particularly complex. This is illustrated by case law before the CJEU.[22] The Court took the opportunity to first specify that in case of a contract of employment under which an employee performs for his employer the same activities in more than one Member State, it is necessary, in principle, to take account of the employment relationship's complete duration to identify the place where the employee habitually works. If other criteria fail, the habitual place of work will be the place where an employee has worked the longest.[23] This consideration, however, is intended to play a role only where it will not be possible to use the other criteria listed above, such as the actual workplace, the nature of the activity carried out and so on.
It has been pointed out that, generally, occasional tele-work should in principle not affect the identification of the habitual workplace. For example: an employee that habitually works in Germany and for a 6 month-period during the pandemic worked full-time from another EU Member State (e.g. Austria). Whether his/her employment contract stipulates that German law is applicable or not, German law will govern the contract.[24]
Once the Home State has been identified as the habitual place of work and its provisions cannot be derogated from through an agreement, is it possible to completely exclude the application of the Host State employment provisions to workationers? The (negative) answer lies in Article 9 of the Regulation. There are some provisions of the Host State that will have to be observed.

2. The Overriding Mandatory Provisions (Art. 9)

Article 9 of the Regulation refers to a Host State's 'overriding mandatory provisions': 'The Regulation shall not restrict the application of the overriding mandatory provisions of the *law of the forum*.'[25] 'Because of their importance for

[21] *Id.*, Recital 39.
[22] Case C-37/00, *Herbert Weber* v. *Universal Ogden Services Ltd.*, [2002] ECR I, at 2013.
[23] *Id.*, Recital 58.
[24] J. P. Lhernould, *op. cit.*, 40.
[25] As a general remark, the expression 'provisions' concerns different type of rules 'mandatory provisions could be contained not only in the collective agreements and arbitration awards affecting the contract of employment, but also in the following national laws: the law applicable to the individual contract of employment, the law of the place where the work has to be performed and the law of the competent forum.' G. P. Moreno, *Article 8: Individual*

the State that has enacted them, such provisions must be observed even in international situations, irrespective of the law governing the contract under the normally applicable choice-of-law rules of the Regulation."[26] Their respect is regarded as crucial by a country for safeguarding its public interests, such as its political, social, or economic organization. They are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Regulation.[27]

The difference between overriding mandatory provisions and overriding those analyzed under the previous section, namely the 'provisions that cannot be derogated from by an agreement', based on Art. 8, is not of immediate comprehension.[28] Unfortunately, the Regulation does not give a definition for overriding mandatory provisions (likewise to the previous article dealing with the provisions that cannot be derogated). Again, a case-by-case analysis is necessary.

The only specification from the legislature is to be found in Recital 37 of the Regulation where it is stated that the two categories of rules shall 'be distinguished.' Those of Art. 9 should be construed more restrictively: 'Considerations of public interest justify giving the courts of the Member

employment contracts, in U. Magnus and P. Mankowski (eds.), *ECPL Commentary – Rome I Regulation*, 2017, 599.

[26] A. Bonomi, *Article 9: Overriding mandatory provisions*, in U. Magnus and P. Mankowski (eds.), *op. cit.*, 604.

[27] Art. 9 (1) of the Regulation.

[28] E. Traversa, *op. cit.*, 331.

On the difference between the two categories, see the conclusions of the Advocate general Manuel Campos Sánchez-Bordona in the case *Gruber Logistics*, unfortunately not available in English, para. 64-68 :

L'analyse systématique permet de cerner la catégorie des « dispositions auxquelles il ne peut être dérogé par accord ». Elle impose de faire une distinction entre celles-ci et les « lois de police » mentionnées à l'article 9 du règlement Rome I ... Les lois de police, en tant que règles impératives « quelle que soit par ailleurs la loi applicable au contrat d'après le présent règlement » rendent inopérant (dans leur champ d'application) le choix d'un droit étranger que les parties aient formulé dans leur contrat.

La gravité de cette conséquence explique les restrictions que le règlement Rome I impose à la catégorie des lois de police:

– seules les lois de police du for peuvent être pleinement applicables;

– il pourra également être donné effet aux lois de police de l'État d'exécution du contrat, mais uniquement dans la mesure où lesdites lois de police rendent l'exécution du contrat illégale.

Par contre, les règles « auxquelles il ne peut être dérogé par accord » de l'article 3, paragraphes 3 et 4, de l'article 6, paragraphe 2, de l'article 8, paragraphe 1, et de l'article 11, paragraphe 5, sous b), du règlement Rome I, sont celles auxquelles il ne pourrait pas être dérogé dans un contrat domestique mais auxquelles, en revanche, il pourrait être dérogé dans un contrat international, moyennant le choix de l'ordre juridique régissant le contrat.

Dans ce cas, les règles facultatives et les règles non susceptibles de dérogation de l'ordre juridique choisi sont applicables, sauf si (et dans la mesure où) le règlement Rome I le prévoit autrement, ce qui est exceptionnel.

States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.'[29]

These two categories of provisions have complementary purposes: Art. 8 seeks to avoid that the general principle of 'freedom of choice' for the applicable laws to employment contracts will diminish the protection of an employee working in a Host State. Art. 9 aims to enable the Host State to safeguard its public fundamental interests by applying its core overriding rules to all contractual relations executed on its territory, regardless of the applicable law. In other words, the application of provisions that cannot be derogated from by agreement can be avoided (for instance because the habitual place of work is not in the Host State), while the overriding mandatory provisions are always applicable.

As a derogating measure, Art. of the Rome I Regulation must be interpreted strictly.[30] National courts, in applying it, do not intend to increase the number of overriding mandatory provisions applicable by way of derogation from the general rule set out in Article 8 (1) of the Regulation.[31]

'In considering whether to give effect to the provisions, regard shall be given to their nature and purpose and to the consequences of their application or non-application.[32]

It has been observed that due to its exceptional nature as 'derogating measure', the practical importance of Art. 9 should not be overestimated.[33] It is possible to identify overriding mandatory provisions in different legal areas (4.1.). When it comes to employment law, there are currently very few examples (4.2.).

---

[29] Recital 37 of the Regulation. As noted by the CJEU, 'Article 9 of the Rome I Regulation derogates from that principle that the applicable law is to be freely chosen by the parties to the contract. This exception has the purpose of enabling the court of the forum to take account of considerations of public interest in exceptional circumstances.' *Nikiforidis* judgement, above n. 6, 43.

[30] *Nikiforidis* judgement, above n. 6, 44.

The Court clarified that when a rule is 'of strict interpretation", its application might be invoked only in limited cases. It 'must be constructed in such a way as to limit its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect." Case, 225/85, *Commission of the European Communities* v. *Italian Republic*, [1987] ECR at 2625, Recital 7.

Furthermore, when a rule has to be interpreted strictly, 'its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions." Case 36/75, *Roland Rutili* v. *Ministre de l'intérieur*, [1975] at 1219, Recital 27.

[31] *Nikiforidis* judgement, above n. 6, 47.

[32] Art. 9 (3) of the Regulation.

[33] A. Bonomi, *op. cit.*, 604. See also R. Ellger, Overriding Mandatory Provisions, in *Max Planck Encyclopedia of European Private Law*, https://max-eup2012.mpipriv.de/index.php/Overriding_Mandatory_Provisions (accessed 15 October 2025).

Provisions concerning posted workers are considered as part of this category. We argue, however, that workationers are not to be considered as posted employees (4.3.).

2.1. General Examples of Overriding Provisions

As stressed, it is not easy to establish whether a provision is mandatory or not. In some cases, it is directly stated in the provision itself.[34] Some examples can be found in different areas of the law, such as family law, property law or public law.[35] Unfortunately, this is seldom the case. Indeed, the CJEU's decisions 'giving effect to foreign overriding mandatory provisions, as allowed by Art. 9 (3)' are particularly rare.[36] Without indication, it is a matter of interpretation, a decision made by examining the content of the rule and its underlying policy under domestic law.[37]
It is worth mentioning that the prevailing opinion in the German academic interpretation states that 'a clear distinction should be made between the mandatory norms pursuing public goals and those protecting individual interests.'[38] On the one hand, there are rules interfering with contractual law (named after the German verb '*eingreifen*', to interfere, ('*Eingriffsnormen*')), in order to pursue public interests. On the other hand, there are rules aiming to preserve and even re-establish a balance between the contract parties and the interests of some specific categories of individuals (e.g., the employees).[39] This methodology leads to the conclusion that employee's protection does not fall under the scope of overriding mandatory provisions.[40] This is not only a

[34] An example in French law concerning child's affiliation, Art. 311-15 of French Civil Code: 'if the child and his or her father and mother or one of them have their habitual residence in France, whether joint or separate, possession of status produces all the consequences arising from it according to French law, even if the other elements of filiation could have depended on foreign law.'
[35] T. Szabados, Overriding Mandatory Provisions in the Autonomous Private International Law of the EU Member States – General Report, in *ELTE Law Journal*, 2020, vol. 1, 10. On this point, see also A. Bonomi, *op. cit.*, 622.
[36] *Id.*, 619.
[37] *Ibid.*
[38] *Id.*, 622.
[39] *Ibid.*
[40] 'According to Art. 9 (1), respect for overriding mandatory rules should be considered crucial by a state for 'safeguarding its public interests'. Does this imply that rules aiming at the protection of individual interests cannot be regarded as overriding mandatory provisions? The legislative history of the Rome I Regulation provides no clarity on this matter. According to the German Supreme Court and to the majority opinion in the German literature, the answer is affirmative.' L. M. van Bochove, Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law, in *Erasmus Law Review*, 2014, n. 3, 149.

scholars' view, but it has also been confirmed by German courts. In this sense, the protection of employees would not be considered as within the scope of Art. 9. A renowned case law did not apply protection to a dismissal litigation. The German Federal Labor Court ('*Bundesarbeitsgericht*') refused to apply several German rules protecting employees against abusive dismissal.[41]

'It is highly debatable whether Art. 9 also covers mandatory rules that are designed to protect certain categories of individuals, in particular weaker parties, such as consumers, employees, tenants, commercial agents, franchisees, etc.'[42] However, there are also scholars promoting a different approach, according to which 'rules aimed at the protection of individual interests can also qualify as overriding mandatory provisions'[43] by arguing that 'although Art. 9 refers to the safeguarding of public interests ... this provision should not be construed as implying an a priori exclusion from its scope of all norms aimed at the protection of individual interest.'[44]

Beyond the different argumentations, the interpretative dispute is still open. For the moment, it is not (yet) possible to answer unilaterally and unequivocally the following question: which norms fall under the definition of overriding mandatory provisions? Therefore, due to this uncertainty, some scholars tend to promote a quite cautious interpretation of the existing rules by arguing that the overriding provisions of the Host State will become applicable to workations.

2.2. Employment Law Overriding Provisions

As previously mentioned, there are not many guidelines in overriding provisions in employment law currently. Thus, each national court can establish which national measures must be considered as overriding.[45] At the

[41] A. Bonomi, *op. cit.*, 623. The author quotes the decision from *Bundesarbeitsgericht*, 29 October 1992, in: IPRax 1994.

[42] *Id.*, 621.

[43] *Id.*, 625.

[44] *Id.*, at 623. See also L. M. van Bochove, *op. cit.*, 150: 'Until now, the CJEU has not addressed explicitly the issue as to whether the application of a rule based on the protective principle can be regarded as crucial by a state for the safeguarding of its public interest in the sense of Art. 7 Rome Convention/Art. 9 Rome I. In Unamar, the CJEU does not distinguish between 'private' and 'public interests' but speaks about 'an interest judged to be essential by the Member State concerned'.

[45] According to some authors, illustrations of a stricter interpretation can be found in Germany and Netherlands, while a wider interpretation belongs to France and Belgium. See A. A. H. van Hoek, *op. cit.*, 166. However, legal doctrine does not even seem to agree in qualifying the Dutch courts as promoters of the strict approach. See for instance L. M. van Bochove, *op. cit.*, 150: 'In

national level, a decision of the French State Council ('*Conseil d'État*') is considered as 'the leading case related to overriding mandatory provisions.'[46] It stated that a company employing more than fifty employees in France must establish an employee representative committee, even if the *lex societatis* of the company was Belgian law. Another case including the Supreme Court of Luxembourg ruled that the jurisdiction of the Luxembourgish courts was mandatory regarding employees working in Luxembourgish national territory. Such jurisdiction could not be derogated by a court-of-choice agreement.[47]

At the European level, two significant decisions were adopted by the CJEU,[48] where it was recognized that 'the overriding reasons relating to the public interest which have been recognized by the Court include the protection of workers.'[49] It is, in theory, conceivable that a country has 'a crucial interest in compliance with a specific overriding mandatory provision in the area of employment law.'[50] However, even if an overriding mandatory character can be recognized by employment law rules, it is important to determine to what extent. In fact, they should always be interpreted in compliance with EU law.[51]

According to the most extensive interpretation of Art. 9, national rules having an objective to protect an employee should be regularly regarded as applicable overriding provisions,[52] even if the employee works in the Host State only on a temporary basis. This would be quite impractical and does not really seem to be supported by any case law at the moment. Even though it cannot be ignored that such an argument might be invoked in the future, this interpretation would clash with the Regulation's wording which is to be interpreted strictly.

Lastly, it is also interesting to question whether the two categories of provisions – resulting from Art. 8 and Art. 9 – can be cumulatively applied. In

---

the Netherlands, according to the majority opinion in the literature, provisions aimed primarily at the protection of weaker parties can be applied as overriding mandatory rules.'

[46] *Conseil d'Etat, Assemblée*, 23 June 1973, 77982 quoted by T. Szabados, *op. cit.*, 22.

[47] *Cour de Cassation*, 2 July 1959, PAS. L. 17. 443 quoted by T. Szabados, *op. cit.*, 33.

[48] Joined Cases C-369/96 and C-376/96 *Criminal proceedings* v. *Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL*, [1999] ECR I at 8453.
See also Case C-165/98 *Criminal proceedings* v. *André Mazzoleni and Inter Surveillance Assistance SARL, as the party civilly liable, third parties: Eric Guillaume and Others*, [2001] ECR I at 2189.

[49] *Id.*, Recital 27. See also *Arblade* judgement, above n. 46, Recital 36, quoted by A. Bonomi, *op. cit.*, 624.

[50] *Id.*, 611.

[51] *Id.*, 628.

[52] 'Belgium and France employed a much wider notion of *lois de police*, under which *most of their mandatory labour protection* would apply to work performed within the territory.' A. A. H. van Hoek, *op. cit.*, 166. However, it is to notice that not even this interpretation goes as far as admitting that *all* mandatory labour protection would always apply.

other words, can a provision be considered 'non derogate-able' and 'overriding' at the same time?[53] This discussion seems open, and once again, different opinions coexist.[54] However, given the Recital 37 suggesting 'to distinguish' between them, it seems that a national provision either belongs to one category or to the other.

2.3. The (uneasy) Relation with Posting of Workers Rules

According to Recital 34 of the Regulation, 'The rule on individual employment contracts [notably the criteria in Art. 8] should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services' (hereafter: 'the Directive').[55] In other words, regardless of the law applicable to the employment contract, when employees are posted to a Member State they are ensured protection in its territory. As a result, the Host State's provisions concerning specific matters shall always prevail and be

[53] Scholars do not agree, A. Bonomi, *op. cit.*, 611: 'the conditions for a concurrent application of Art. 9 can probably more easily be satisfied in the area of employment law: thus, it cannot be a priori excluded that a country might have a crucial interest in protecting its citizens through mandatory regulations when involved in working activities abroad. In any case, these instances are probably quite rare: thus, the concurrent application of Arts. 6, 8 and 9, albeit theoretically possible, should be allowed only in very exceptional cases.'

[54] To give an illustration of persisting contradictory interpretations in the legal doctrine, consider that the prevailing opinion is that the posted workers' 'hard-core' measures belong to the Art. 9 rules. Nevertheless, it is interesting to notice that according to some other interpretations, Art. 3 would actually offer an illustration of the kind of terms of conditions covered by the category of norms that 'cannot be derogated from by agreement,' based on Art. 8 of the Regulation, instead of 'overriding mandatory provisions' based on Art. 9.
'The Court of Justice has not only approached a definition of this complex category [namely the provisions concerned by Art. 8], but has also tried to restrict its application to make mandatory provisions – in the field of Employment Law – compatible with community freedoms, thus favouring the integrative objective of the EU. In accordance with that has been mentioned, only a limited number of Employment Law provisions (those establishing minimum working conditions) can be characterised as mandatory in relation to Art. 8. In this respect, the following conditions could be mentioned as mandatory: health, safety and hygiene at work, right to strike, redundancy protection, or minimum rest periods. In relation to this, Art. 3 Directive 96/71/EC offers a good illustration of the kind of terms of conditions covered by this category, when listing the 'hard-core'.' G. P. Moreno, *op. cit.*, 599.

[55] It is worth mentioning that Art. 3 (10) of Directive 96/71 states that it 'shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of: — terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions.'

applied for the entire posting duration. These matters are listed in Art. 3 of the Directive,[56] constituting the 'hard-core' of posted employee's protection.
For the nucleus of mandatory rules for minimum protection to be observed, the aim is to ensure fair competition among service providers, i.e., the employers posting workers in the territory of another Member State. The promotion of the transnational provision of services requires a climate of fair competition.[57] The respect of a posted employees' hard-core protection in a Host State guarantees that the freedom to provide services is exercised in compliance with EU law. This is ensured by avoiding competition distortions, which would take place if the services providers were able to exploit different levels of the posted employees' protection.[58]
Due to their protective character within rules posting, the hard-core provisions of the Host State are to be considered as overriding mandatory provisions for posted employees. The wording used in the German implementation of the Directive also qualifies the hard-core provision as mandatory.[59] The provision clearly expresses its intention to be applied independently from the law of the contract.
Since 2014,[60] posted workers must be registered in their Host State. The aim of the registration is to notify the national labor authorities about the presence of posted employees in a national territory and facilitate controls and inspections. Therefore, it appears necessary to answer the question whether workationers are to be considered as posted employees or not. At the moment, the discussion appears controversial[61] and there is no absolute answer – neither in

[56] As amended by Directive 2018/957, of 28 June 2018, amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, also known as 'Enforcement Directive.'
[57] Recitals 5 and 13 of the Directive.
[58] One should not forget that the purpose of the Directive is facilitating freedom to provide services in the EU. E. Traversa, *op. cit.*, 155.
[59] The rules concerning the hard-core conditions are mandatorily applicable to employment relationships between employers established abroad and their workers employed in Germany, regardless of the law applicable to the employment contract. Act on Mandatory Working Conditions for Workers Posted Across Borders and for Workers Regularly Employed in Germany, (*Arbeitnehmer-Entsendegesetz – AEntG*). R. Ellger, *op. cit.*, 33.
[60] Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').
[61] 'Beyond the 'ideal type of posting', the interaction between the rules on the internal market and private international law are still cause for confusion and debate. As both areas of law are based on different logics – the one taking the service provider as its starting point and the other the individual contract of employment – this debate is unlikely to end with the Enforcement Directive.' A. A. H. van Hoek, *op. cit.*, 169.

legislation nor in case law. Strong arguments lead to the direction of a negative answer, however.[62] The first two arguments are substantial,[63] while the third one is formal.

First, workationers are not providing a cross-border service. The provisions referred to as mandatory by the Regulation are those of the country to which a worker is posted. Arguably, this means in the Host State where they are temporarily assigned by the employer, but this is not the same as a workation type of situation. Workationers are not 'assigned', rather, they travel exclusively in their personal interest. For this argument to apply, it is fundamental to exclude that the remote worker has any business reason to travel to the Host State. However, no tangible business purpose can be identified in the case of workationers: the trip is entirely privately driven.

Secondly, there is no service recipient in the Host State. In the circumstance that the remote worker performs activities providing a service on behalf of the Home Company in favor of a host entity might have a relevant impact on their qualification as 'posted employee.' If the employee will travel for business purposes, the trip may not be considered solely privately driven any longer. However, no host entity can be identified in case of workationers. If a posting is taking place, there is no doubt that the hard-core terms and conditions of the Host State will be applicable to the employee, according to Art. 3 of the Directive.

Last but not the least, formal requirements for registration must be considered. Beside the substantial arguments mentioned, there are also practical considerations. Inter alia, several Member States' posted workers registration

---

The authorities tend also to give some contradictory interpretations. In Belgium, for instance, it appears that the national law adopted a larger interpretation of 'posting' than the scope of the Directive itself. Therefore, every time an employee temporarily works in Belgium, even without a service recipient and a client, it would be considered as 'posted.'

[62] S. Stefanova-Behlert, A. Haberland, *Remote Work im Ausland - die neue Freiheit?*, in *ZAU – Zeitschrift für Arbeitsrecht im Unternehmen*, 2022, n. 4, 241. *Unbeachtlich für den Arbeitgeber sind ferner die Anforderungen aus der EU Entsenderichtlinie, insb. Beachtung ausgewählter Arbeitsbedingungen sowie Meldepflichten gegenüber lokalen Arbeitsbehörden, da in der Regel keine Entsendenkonstellationen i.S. der EU-Entsenderichtlinie gegeben sind. Bei Remote Working erbringen Beschäftigte nach wie vor Arbeitsleistungen gegenüber dem deutschen Arbeitgeber vom Ausland aus und nicht gegenüber einem lokalen Empfänger im Auftrag des deutschen Arbeitgebers, wie von der EU-Entsenderichtlinie vorgesehen.*

[63] J. P. Lhernould, *op. cit.*, 65. Some consultants share the same opinion. When asked whether a Posted Worker Notification is required for an employee who is not on a formal assignment but is working from home for a limited period of time for the benefit of the home entity, the following answer was given: 'Generally, a posting requires a willful and targeted decision to send somebody to provide services to a customer on behalf of their employer. If there is no recipient of a service, then Posted Worker Notification is generally not required.' Expateer Peer to HR, On-line blog, https://expateer.ch/entsenderichtlinie-eu-posted-worker-directives (accessed 15 October 2025).

forms systematically require a host company to be provided and the 'scope of service.' If these fields are not completed, the registration is rejected and/or considered incomplete. In some cases, it cannot even be submitted, as the online portals prevent registration if some fields are left empty. Further, the scope of service must be selected from a dropdown list in some cases. Not surprisingly, the private interest of employees is not listed amongst the possible services options.[64]

In summary, the lack of two constitutive elements of posting (1. and 2.), in combination with the considerations on the registration requirements (3.), are clear indicators that posting rules including the hard-core rules ex. Art. 3 (1) of the Directive are not applicable to workationers. Still, this interpretation is shared but not unanimous; clarity through legislation or case law is urgently needed. Until then, we can only speculate which national employment law provisions will be considered as overriding for workationers. National courts will have the last word, mainly on a case-by-case approach.

Furthermore, not even the CJEU appears in the position to question whether, in practice, a national law can be invoked as overriding: 'it is not for the Court to define which national rules are 'overriding mandatory.'[65] The CJEU is nonetheless entitled 'to review the limits within which the courts of a Contracting State may have recourse to that concept.' As such, it is not excluded by a proportionality check.[66]

It is not possible to predict how the CJEU will rule, so once again there is room for speculation. In the context of workationers, free movement of citizens might be invoked in the future. This has proven to be one of the favorite arguments of the CJEU and of great importance for European integration, as it is taking place in the established legal limits – provided that the employee does not become an unreasonable charge for the Host State. Citizens of the Union shall enjoy rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: the right to move and reside freely within the territory of the Member States.[67]

[64] See for instance, but not limited to: Italy, Austria, Luxembourg, Switzerland (even if not an EU Member, has its own registration portal).

[65] A. Bonomi, *op. cit.*, 630.

[66] The national mandatory provisions will have to comply with the principle of proportionality, i.e., 'they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it.' *Id.*, 628.

[67] According to Art. 20, TFUE.

3. Managing and Mitigating Legal Uncertainty: The Main Risks that Would Materialize if a Workation was Treated like a Posting

Once credit is given to the interpretation in which workationers are not to be qualified posted employees, it is possible to hypothesize which national provisions can be considered as overriding and therefore applicable in the Host State. As a starting point, it seems reasonable to take as reference the hard-core protection rules for posted employees themselves.[68] We will try to find out whether the hard-core rules would be applicable also to workationers, even though we exclude their qualification as posted employees.[69]

Using an *a contrario* methodology, it can be argued that if the Regulation explicitly refers to the mandatory character core rules for a posted employee, it was not the legislator's intention to include under this kind of protection the other categories of workers, i.e. the employees that are not posted but rather belong to a different classification, like, for instance, workationers. These rules, however, have a protective nature, and therefore it is worth questioning whether they might be invoked as 'overriding provisions.'[70]

Two general remarks must be made here: first, the hard-core provisions are often matters directly regulated by EU law, as will be illustrated.[71] This pushes us to reconsider the risks. Secondly, Art. 9 is applicable in active litigation. A national court will have to determine which national overriding provisions will be applicable to pending cases. Although Unlikely, we might observe this in cases of workationers on workations.[72] For example, a remote worker is

[68] Please note that the 'conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings' are not analysed, since this only concerns temporary agencies.

[69] The hard-core matters were originally seven. However, the Directive 2018/957 also added to the list the following two: (h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work; (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons. However, given the fact that we defined workations as situations where the remote employees bear the relevant costs related to the trip, they do not seem relevant.

[70] *'Die Existenz zwingender Arbeitsbedingungen muss im Einzelfall geprüft werden. Solche Vorschriften sind häufig im Bereich der Arbeitszeit, Feiertagsregelungen, Mindestgehälter etc. vorzufinden.*' S. Stefanova-Behlert, A. Haberland, *op. cit.*, 241.

[71] E. Traversa, *op. cit.*, 159.

[72] S. Stefanova-Behlert, A. Haberland, *op. cit.*, 242: *'Hingegen ist das Risiko des Entstehens eines Gerichtsstands für Beschäftigte am Einsatzort im Ausland – aufgrund der kurzen Dauer des Einsatzes – als gering einzuschätzen. Die geltenden Gerichtsstand Regelungen innerhalb der EU nach der Brüsseler Verordnung I knüpfen an den Wohnsitz der Beschäftigten bzw. an den gewöhnlichen Arbeitsort an. Beide dürfen sich bei kurzfristigen Auslandseinsätzen nach wie vor in Deutschland befinden.'*

temporarily abroad without being assigned by using a benefit granted from the employer; the probability for the employee to take legal actions in the Host State against the employer is quite low.[73] At the same time, unforeseeable circumstances might always occur, so the possibility cannot be completely excluded.[74]

Further, even in cases where there is no claim from an employee, it is important to notice that several issues, such as worker safety, maximum hours, or employment discrimination are considered as 'public enforcement' in many EU Member States, in the sense that their application is to be taken by national governmental authorities. Each national authority is responsible for either taking action to enforce the rules within its territorial boundaries.[75] Therefore, we argue that even if an employee does not submit any claim due to inspection or controls, employment authorities might – at least in abstract – question whether the national standards have been respected in the Host State.

De facto, the longer an employee stays in the Host State, the longer it's likely an inspection, control, and/or a litigation take place. On the other hand, one might also argue that inspections and controls at work are implemented 'randomly.' On average, however, it is unlikely they will concern workationers, working remotely from an Airbnb, hotel, or at a family house, as empirical evidence shows.

When it comes to posted workers controls, for instance, the sectors that are 'sensitive' from a social dumping perspective and, as such, are more frequently objects of national inspections and compliance checks are those mainly concerned. The best example is the construction sector.[76] Not surprisingly, this

[73] For the sake of completeness, it is also relevant to point out that according to paragraph 3 of Art. 9, in some cases, 'Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.' Therefore, in some extraordinary cases, a national court might apply an 'overriding mandatory provision' from another State. This is subject to a restriction: an overriding norm of the place of performance (i.e., of the foreign State in which the contract is performed) can only be applied insofar as it renders the performance of the contract unlawful. Therefore, there must be a 'prohibition rule" that orders the ineffectiveness of the performance of the contract. The scope of application of mandatory rules of the foreign place of performance is therefore extremely narrow and might include limited areas (e.g., prohibition of work).

[74] Not to mention the risk of abusive behaviours, which should be limited.

[75] M. A. Cherry, *op. cit.*, 19.

[76] For instance, 'Nearly 20,000 posted workers in Finland – shortcomings addressed by inspections of posting companies and contractors.' Data published by the Finnish Regional State Administrative Agency, https://www.sttinfo.fi/tiedote/69936099/nearly-20000-posted-

is also the sector where the majority of postings arise.[77] To illustrate this, if an engineer is posted from the Polish Home Company to the Netherlands to take part in business meetings with a Dutch client, and five employees are also posted to carry out their activities on the construction site within the same project, it is more likely that the five employees will be controlled by labor authorities rather than the former.

(a) Maximum Work Periods and Minimum Rest Periods;

Before analyzing whether working hours are to be considered as 'overriding provisions', it is worth stressing that this problem should not be overestimated. Since working hours are the object of an EU directive,[78] there are not significant discrepancies amongst the Member States beside a few exceptions.[79] The 'European working week' is mostly aligned, on average, at 40 hours per week.[80] Even considering that there are still differences at the collective bargaining agreement (CBA) level, the average difference oscillates between 35.6 and 40 weekly hours. In addition, it is also unclear whether these agreements are applicable to workationers in the first place (e.g. non all EU Member States systems have erga omnes effects for CBAs).
Furthermore, when looking at working hours there is quite a discrepancy between theory and practice, as can be seen inter alia in the Euro Surveys on 'actual working hours per week', which show the difference among 'statutory' and 'effective' working hours worked by the employees in the Member States.[81] Therefore, working hours might not be such a big concern despite legal uncertainty concerning their mandatory character.

workers-in-finland-shortcomings-addressed-by-inspections-of-posting-companies-and-contractors?publisherId=69818103 (accessed 15 October 2025).

[77] 45% of postings in the EU belong to the construction sector, services for 29.4% and agriculture and fishing for 1.5%. https://www.europarl.europa.eu/news/en/headlines/society/20171012STO85930/posted-workers-the-facts-on-the-reform-infographic (last visited 11 August 2024).

[78] Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

[79] Industrial relations and social dialogue, Working time in 2019–2020, https://www.eurofound.europa.eu/en/publications/2021/working-time-2019-2020 (last visited 15 October 2025).

[80] https://europa.eu/youreurope/business/human-resources/working-hours-holiday-leave/working-hours/index_en.htm (last visited 15 October 2025).

[81] Eurostat, Hours of work - annual statistics, 2022, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Hours_of_work_-_annual_statistics#Employed_people_by_length_of_the_average_working_week (last visited 15 October 2025).

A decision recently adopted in France where the weekly working hours are the shortest in the EU, namely 35/w, is interesting to note. The French Court ruled that working hours are not overriding, but rather they are provisions that 'cannot be derogated.' If we look back at the interpretation of mutual exclusion in the two categories, one might reach the conclusion that working hours are mandatory for posted employees but not for workationers.

(b) Minimum Paid Annual Leave;[82]

Like maximum work periods and minimum rest periods, the matter of minimum paid annual leave is regulated in the EU Directive 2003/88. According to Art. 7 of this Directive, Member States shall grant at least four weeks per year to employees. Contractual agreements might extend the minimum legal requirement.[83] Even if there might be differences among Member States, like for working hours, it seems reasonable to scale down the biggest concerns.
Given the fact that minimum paid holidays are usually accumulated per month yet taken on a yearly basis, this problem appears quite abstract. It seems rather impractical to admit that a remote worker might claim such entitlements during workations in the Host State when the stay lasts significantly less than one year.

(c) Remuneration, including Overtime Rates;[84]

Renumeration, including Overtime Rates is probably the most delicate aspect given this is where the biggest difference among Member States exists. It has been observed that in almost all jurisdictions in the world, rules on wage/hour tend to be mandatory and encompassing, even including guest workers temporarily working in a host country.[85]
Nevertheless, this argument seems, in principle, quite simplistic and contradicted by the reality of an interconnected and globalized world, where business trips, especially those with short durations are still quite common, despite the world moving on from the pandemic.

[82] As amended by Directive 2018/957, the original formulation of Directive 96/71 was 'minimum paid annual holidays.'
[83] Industrial relations and social dialogue, above n. 79, at 19.
[84] As amended by Directive 2018/957, the original formulation of Directive 96/71 was 'the minimum rates of pay, including overtime rates.' The new Directive on posted workers also specifies that this point does not apply to supplementary occupational retirement pension schemes.
[85] D. C. Dowling, Jr., *op. cit.*, 7.

For instance, if an employee hired in Milan, Italy, under an Italian employment contract, travels on a three-day business trip to Stockholm, Sweden, to negotiate a contract with a potential client, it is unlikely to imagine they will invoke the Swedish salary application before Swedish courts, even if the Host State salary may be higher than in an employee's Home State. Further, it is unlikely that the Swedish court will recognize their right to have access to the national minimum wage.[86]
Such a scenario would also raise concerns when it comes to legal certainty if employees were able to fully invoke standards of the Host State every time there is a business trip. As mentioned, making legal certainty fragile is exactly what the Regulation seeks to avoid. Further, according to the CJEU, 'provisions that cannot be derogated from by agreement' can, in principle, include rules on the minimum wage. As states, if these rules are covered by Art. 8, they would not be considered as overriding according to Art. 9 of the Regulation.

(e) Health, Safety and Hygiene at Work;

Scholars do not agree when it comes to qualifying occupational health and safety. According to some, 'local rules always apply due to the territorial principle.'[87] Another interpretation states that health protection is part of provisions that cannot be derogated from, based on Art. 8.[88]
The discussion around this topic is a good legal exercise, however it remains in the end quite abstract in the EU: health and safety at work is already a harmonized topic, where the standards are regulated in several pieces of EU legislation, such as the Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC).

(f) Protective Measures regarding the Terms and Conditions of Employment of Pregnant Women or Women who have recently given Birth, of Children and of Young People;

For the groups within this category, the need for protection is even bigger since they are not only employees, but also in a particularly weaker situation.

[86] Also, unlikely that the Swedish Court would admit its jurisdiction. Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters links jurisdiction for employment law litigation to the employee's place of residence or habitual place of work.
[87] Dr. M. M. Knorr, *op. cit.*
[88] M. Giuliano, P. Lagarde, *op. cit.*, 11.

Given the fact that the initiative of workations lies exclusively in an employee's own initiative, even if it shall not be excluded a priori, it is hard to imagine workationers in situations where they are able to invoke these kinds of protective rules in the Host State.
Here again, the matters are regulated at the European level and minimum standards are shared by EU Member States, as stated in Directive 92/85/CEE.[89]

(g) Equality of Treatment between Men and Women and Other Provisions on Non-discrimination.

Non-discrimination is a 'classic' EU topic.[90] The EU rights are built around a non-discrimination principle. Several directives have been adopted to fight against illegitimate discriminations,[91] and Member States commonly share the minimum standards.
As illustrated, Member States have a limited discretion in working around, through legislation, the 'hard-core' aspects of the employment relations. Therefore, even if differences exist, especially concerning salary standards, their scope should not be exaggerated.[92]
In practice, companies usually have thresholds calculated on the base of duration; this also goes for registering posted employees, even if in several countries, posting registration obligations apply from the first day of the posting. It is a matter of risk evaluation; therefore, it makes sense to advise companies operating in sensitive sectors where inspections are most likely to occur (e.g., construction) to be compliant with registration obligations from the very beginning. For companies posting mainly so-called 'white collars,' a more

[89] 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.
[90] Not only an object of secondary law, e.g., directives, but also protected by the Treaties, since the first versions (1957). See A. Montanari, N. Girelli, *Parità di trattamento e divieto di discriminazione*, *Diritto del Lavoro dell'Unione europea*, *op. cit.*, 200.
[91] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
Directive 2006/54/EC 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.
Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.
[92] E. Traversa, *op. cit.*, 160.

extensive and tolerant approach might be the best (e.g., registration only of postings exceeding a certain duration).
This premise highlights how, even if there is no doubt that rules concerning posted employees' obligations are better defined and established than those concerning workationers, risk assessment always plays a crucial role. In other words, it is hard to imagine that for companies adopting a 100% compliant approach would always have the best solution. Compliance checks imply costs and time. The effort required to guarantee full compliance is often not in line with the practical outcome.

Conclusions

Considering the above, it is worth noting that EU Member States have a legitimate interest, while complying with EU law, to guarantee the protection of workers on their territory. This can be achieved by imposing a mandatory observance of some local rules. To invoke the application of national law, however, a sufficiently close degree of connection with a Host State is required.
The rationale behind the posted workers Directive and its rules on minimum protection is to facilitate the freedom to provide services. The question is whether and to what extent the Host State might need to apply national employment law provisions to a remote worker. In this context, it is also to be taken into account whether a remote worker can harm competition or interact with the labor market of their Host State.
Generally, employers should evaluate whether workations might trigger an impact on the laws applicable to an employment relationship. Local employment laws could, in some cases, override the contractual wording and contractual choices. To summarize, whenever the first problem above mentioned is solved, i.e., when it is possible to clearly identify the Home State as the country where an employee habitually works, looking at the second problem becomes redundant. In fact, there is no need to look at the 'provisions that cannot be derogated', because they overlap with the ones of the State of habitual place employment, i.e., the Home State.
As we saw, however, it is in principle always relevant to look at the third problem, i.e., overriding mandatory provisions. In abstract terms, it is unfortunately impossible to predict with certainty which provisions might be considered applicable due to their 'overriding mandatory' character.
In several cases, the EU legislation is not specific enough or we are facing a lack of clear provisions. Clarifications at the legislative and judicial level would be more than welcomed. In the meanwhile, there is still much room for speculation and different interpretations. However, nothing prevents that

authorities' practices might change and evolve in different directions in the future. New EU legislation might be adopted, filling the current legal gaps and providing different answers than those given so far.

Lawmakers need to adjust existing rules to a new reality. There is an authentic need not only for employment, but for all legal areas where there might be significant consequences for workationers, starting with taxation.[93] Once again, reality is overtaking legal provisions.

This remains an unexplored territory and therefore it becomes crucial to adopt a cautious approach and not extend a 'permissive' interpretation on the existing rules. At the same time, if the law does not explicitly forbid something, it does not make necessary sense to automatically assume that it is incompatible with EU law.

Given the uncertainty of the applicable legislation, it cannot be excluded a priori that some local employment provisions might become applicable in the Host State. Therefore, a safe approach might be the preferred choice for some employers who tend to limit the workations of their employees to avoid the risk that in some cases, some provisions of the Host State become applicable. Nevertheless, several arguments go towards the other direction, meaning it enables employees to benefit from workations, without worrying too much that the local labor law will become applicable. At the end of the day, it is very unlikely that, in practice, the employment law of the Host State will become applicable to workationers.

[93] European Economic and Social Committee Opinion, Taxation of cross-border teleworkers and their employers | European Economic and Social Committee ECO/585-EESC-2022-00408

Public Interest as a Parameter for Whistleblowing

Esra Özen*

Abstract. Whistleblowing is protected because it serves the public interest. In some regulations on whistleblowing protection such as the British Public Interest Disclosure Act, as well as the case law of European Court of Human Rights see the public interest, among others, as a condition for the protection of whistleblowers. The European Whistleblowing Directive does not require explicitly that information given by a whistleblower should be in public interest. A whistleblower is protected, if the information relates to one of the matters regulated by Article 2 of the Directive, among other protection requirements foreseen by Article 6 of the Directive. If the information, however, is not covered by Article 2 of the Directive, a reasonable belief of whistleblower that the information is in the public interest is to be questioned by courts in charge. In that context, it must be clear what a public interest in terms of whistleblowing is, and how it can be differentiated from personal interests. Otherwise, the legal whistleblowing protection, which is supposed to protect public interests, might be invoked for an opportunistic use, namely for creating an artificial protection against purely employment related disadvantages.

Keywords: *Public Interest, Whistleblowing, European Whistleblowing Directive 2019/1937, European Court of Human Rights, and Public Interest Disclosure Act.*

* Assistant Professor, LL.M. (Göttingen), Ankara Yildirim Beyazit University, Labour and Social Security Law Department (Türkiye). Email address: esra.ozen@aybu.edu.tr. This article has been created based on findings of the dissertation of author, see, E. Özen, *Der gute Glauben eines Whistleblowers*, Peter Lang Verlag, Berlin, 2024, https://doi.org/10.3726/b21454. For checking the spelling and correct use of English, an artificial intelligence means, namely DeepL (free version) has been used. The author also thanks her colleague, Günay Atakan Ustaoğlu, for proofreading the article.

1. Introduction

Whistleblowing is an act of civil courage that serves public interest by reporting misconduct that threatens public interests, such as health and safety, democracy, and monetary interests of State and of persons.[1] The main reason for whistleblowing protection is safeguarding public interest by enforcing the laws in question.[2] Therefore, the British whistleblower protection law, known as the Public Interest Disclosure Act (PIDA), has introduced public interest as a reason to protect whistleblowers.[3] Conversely, the European Directive of Protection of Whistleblowers 2019/1937 (Directive), which also aims to enhance the efficiency of existing laws, does not involve such a condition.[4] There are some reasons for that, such as the difficulty to determine what "public interest" means due to its vague nature.[5] Nevertheless, reporting to serve public interest is also important for the Union law legislator who made it clear in their impact assessment that states a whistleblower must be distinguished from an "aggrieved worker".[6] Moreover, the European Court of

[1] J. P Near, M. P Miceli, *Whistle-Blowers in Organizations: Dissidents or Reformers?*, in *Research in Organizational Behavior,* 1987, vol. 9, p. 327. M. Skivenes, S. C. Trygstad, *Wrongdoing: Definitions, identification and categorizations*, in A. J. Brown et al. (eds.), International Handbook on Whistleblowing Research, Edward Elgar, Cheltenham et al., 2014, p. 95. P. B. Jubb, *Whistleblowing: A Restrictive Definition and Interpretation*, in *Journal of Business Ethics,* 1999, vol. 21, no. 1, p. 7.

[2] K. Pabel, *The ECtHR Case Law on Whistleblowing: A Fundamental Rights Benchmark for the European and National Legislator*, in *International Journal of Comparative Labour Law and Industrial Relations, 2025* vol. 41, no. 1, p. 10. E. R. Boot, *The Feasibility of a Public Interest Defense for Whistleblowing*, in *Law and Philosophy* 2020, vol. 39, no. 1, p. 7, https://doi.org/10.1007/s10982-019-09359-1. J. Asthon, *When Is Whistleblowing in the Public Interest? Chesterton Global Ltd. & Another v Nurmohamed Leaves This Question Open*, in *Industrial Law Journal*, 2015, vol. 44, no. 3, p. 458. A. J. Brown, *Towards "Ideal" Whistleblowing Legislation? Some Lessons from Recent Australian Experience*, in *E-Journal of International and Comparative Labour Studies*, 2013, vol. 2, no. 3, p. 13. R. Groneberg, *Whistleblowing: eine rechtsvergleichende Untersuchung des US-amerikanischen, englischen und deutschen Rechts unter besonderer Berücksichtigung des Entwurfs eines neuen § 612a BGB*, Schriften zum Sozial- und Arbeitsrecht, Duncker & Humblot, Berlin, 2011, p. 45.

[3] See the "protected disclosures", https://www.legislation.gov.uk/ukpga/1998/23/contents (accessed October 10, 2025); J. Lewis et al., *Whistleblowing: law and practice*, Oxford University Press, Oxford, 2017), marginal no. 4.07. J. Gobert, M. Punch, *Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998*, in *The Modem Law Review,* 2000, vol. 63, no. 1, p. 25.

[4] See Article 1 of the Directive, Official Journal of the European Union, published 26.11.2019, L 305/17, http://data.europa.eu/eli/dir/2019/1937/oj (accessed October 10, 2025).

[5] S. Gerdemann, N. Colneric, *The EU Whistleblower Directive and Its Transposition: Part 2*, in *European Labour Law Journal*, 2021, vol. 12, no. 3, p. 263, https://doi.org/10.1177/2031952520969096.

[6] „It is important to make a distinction between whistleblowers – who report violations which affect the public interest – and other categories of complainants, such as aggrieved workers, whose reports relate to personal grievances or breaches of individual working conditions

Human Rights (Court/ECtHR) established a whistleblower protection that requires protection for the public interest as well.[7] The last important ruling of the Court to mention, *Halét v. Luxemburg* 2023, has illustrated a problem zone: First, the Court rejected the whistleblower's complaint regarding the violation of his freedom of expression under Art. 10 European Convention of Human Rights (ECHR) because the information he disclosed about tax avoidance practices of certain companies was not of sufficient public interest.[8] The ruling was later reversed by the Grand Senate with an affirmation of public interest in the report.[9] How public interest can be identified in a whistleblowing case and how it differs from private interests, however, has not been discussed yet.

Accordingly, this article examines public interest as a parameter for whistleblowing. First, the regulatory concept of the Directive is outlined, including the positioning of public interest in the normative framework of protection. This study then addresses how to distinguish public interest from private interests in whistleblowing, which includes a discussion about the significance of and possible criteria for differentiating between public and private interests. Finally, conclusions about the interests involved – namely employers, whistleblowers, and jurisdiction on whistleblowing – are presented. This article gives priority to the Directive and the case law of the ECtHR. The German implementation of the Directive and German case law on whistleblowing, as well as British whistleblowing law are also taken up to contribute additional information to the discussion.

(public v. private interest).“ impact assessment- SWD (2018)116/973421, S. 8, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1721-EU-Whistleblower-protection_en (accessed June 29, 2025).

[7] ECtHR, Judgement of 12. February 2008– Case 14277/04 (*Guja v. Moldova*), marginal no. 85, https://hudoc.echr.coe.int/eng?i=001-85016, ECtHR Judgement of 21. July 2011 – Case 28274/ 08 (Heinisch v. Germany), https://hudoc.echr.coe.int/fre?i=002-446 (accessed October 10, 2025).

[8] ECtHR Judgement of 11. May 2021 – Case 21884/ 18 (Halet v. Luxemburg), https://hudoc.echr.coe.int/fre?i=002-13266. H. Yurttagül, *LuxLeaks Whistleblower Not Protected by Article 10 ECHR – Case Analysis of "Halet v. Luxembourg" (ECtHR, Appl. no. 21884/18)*, in *Jean-Monnet-Saar Europarecht Online* (blog), 2. June 2021, https://jean-monnet-saar.eu/?page_id=61634 (accessed October 10, 2025).

[9] ECtHR, Judgement of 14. February 2023 – Case 21884/ 18 (Halet v. Luxembourg), marginal no. 180, https://hudoc.echr.coe.int/eng?i=002-14005. S. Andreadakis, D. Kafteranis, *Halet v Luxembourg: The Final Act of the Luxleaks Saga*, in *Oxford Business Law Blog* (blog), 21. February 2023, https://blogs.law.ox.ac.uk/blog-post/2023/02/halet-v-luxembourg-final-act-luxleaks-saga. H. Yurttagül, *ECtHR GC Judgment in Halet v. Luxembourg: Did Halet Win the Battle But Whistleblowers Lose the War in Strasbourg?,* in *Saar Expert Papers*, 7. May 2024, https://intr2dok.vifa-recht.de/receive/mir_mods_00017258, https://doi.org/10.17176/20240507-144902-0 (accessed October 10, 2025).

2. Regulatory Concept of the European Whistleblower Directive

2.1. Public Interest as a Precondition for Whistleblowing Protection

Every legal regulation has a motivation, namely serving the public interest. Public interest is defined differently depending on the legal context in which it exists. In the realm of the European Whistleblower Directive, the term means a public interest that justifiably promotes the efficiency of Union law by encouraging potential whistleblowers to report relevant wrongdoings.[10] Recital No. 1 from the Directive makes it clear that the protection of whistleblowers should promote the enforcement of Union law in areas and insufficient reporting of wrongdoings seriously harms public interest. They are listed in Article 2 of the Directive, which constitutes the material scope of protection. Reports on violations against those laws listed in Article 2 are in the public interest.[11] The wording of public interest is not expressed in the Directive, except in the Article 15, in which the disclosure of wrongdoings is stipulated as a last resort.[12] According to Article 15 (1)(b)(i)(a), disclosure is protected "if the wrongdoing may constitute a direct or clear threat to the public interest, such as in an urgent matter or if there is a risk of irreversible damage". The public's interest may be considered as a condition to protect whistleblowers, especially when Article 15 (1)(b)(i) is a catch all clause that aims to extend the material scope of protection to other case constellations that were not covered by Article 2 at the time of the legislation. The disclosure of which would also be in the public interest.[13] In contrast, Art. 15(1)(b)(i) of the Directive does not recognize public interest as a precondition to protection if the norm is being assessed in terms of reporting channels instead of the material scope of the Directive.[14] In fact, Article 15 regulates reporting channels and does not exceed matters regarding public interest. Public interest is not at risk because of a

[10] Art. 1 of the Directive „The purpose of this Directive is to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law. ".

[11] W. Vandekerckhove, *Is It Freedom? : The Coming about of the EU Directive on Whistleblower Protection,* in *Journal of Business Ethics,* 2022, vol. 179, no. 1, p. 4, https://doi.org/10.1007/s10551-021-04771-x. see public interest reasoning for defining of the material scope of protection, in Recitals No. 10 in terms of environment protection, No.13 regarding consumer protection, No. 14 regarding data protection.

[12] S. Gerdemann, N. Colneric, *The EU Whistleblower Directive and Its Transposition: Part 1,* in *European Labour Law Journal,* 2021, vol. 12, no. 2, p. 204, https://doi.org/10.1177/2031952520969093.

[13] See a comparable British regulation on whistleblowing and related explanations, E. Özen, *op. cit.*, p. 340 f.

[14] E. Özen, *op. cit.,* p. 340.

violation, but because of its disclosure. This would be the case, for example, if a potential whistleblower's life is threatened due to an intended disclosure. In accordance with Art. 15 of the Directive, the whistleblower may speak out in public to use public attention as a shield.[15]

In conclusion, public interest in the Directive appears simply as a motivation to strengthen the enforcement of Union law where the European legislator has identified the deficiency of law enforcement. Public interest as a precondition to protect whistleblowers has not been found in the wording of the European Directive except with the vague objective in Article 15. For the protection of whistleblowers in accordance with Article 6 (1) of the Directive, it is only required that the whistleblower "had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive, and whistleblower reported either internally Accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15."

The reason for the lack of requisition for public interest in European whistleblowing protection is the fact that potential whistleblowers are not legal professionals and they might not be able to determine what is in the public interest.[16] Requisition of public interest might otherwise deter whistleblowers from reporting wrongdoings due to a fear of failed protection if the nature of the information is misidentified. This is why the introduction of the public interest in the British whistleblower law as a condition for protection has been strongly criticised as well.[17] If the whistleblower acts with reasonable belief that the report is in the public interest, and the whistleblower has followed the reporting procedure instructed in sec. 43C to 43H, they are protected according to sec. 43B of *Employment Rights Act* (ERA) 1996, which PIDA refers to. Whistleblowing is protected if a wrongdoing has been reported, which is listed in sec. 43B (1) ERA.[18] The public interest clause introduced in 2013 and discussed under section 3.1.1 of this paper has the specific objective of safeguarding what whistleblower protection means.[19] Otherwise, a public

[15] E. Özen, *op. cit.,* p. 343.

[16] N. Colneric, S. Gerdemann, *Die Umsetzung der Whistleblower-Richtlinie in deutsches Recht Rechtsfragen und rechtspolitische Überlegungen*, Bund Verlag, HSI-Schriftenreihe, Band 34, Frankfurt am Main, 2020, p. 154-155.

[17] D. Lewis, *Is a Public Interest Test for Workplace Whistleblowing in Society's Interest?*, in *International Journal of Law and Management,* 2014, vol. 57, no. 2, p. 143-145, https://doi.org/10.1108/IJLMA-10-2014-0056.

[18] The regulations are available online, https://www.legislation.gov.uk/ukpga/1996/18/section/43B (accessed October 10, 2025).

[19] J. Lewis et al., *op.cit.*, marginal no. 4.01.

interest in reporting violations of the areas listed by the whistleblower protection law is assumed.[20]
It is not surprising that public interest is required for protection in UK. Unlike the Directive, the motivation of whistleblowers – specifically, why they report – is considered in British whistleblower law.[21] It has been reported that workers in UK have a duty of loyalty not only to employers, but also to the public.[22] Hence, it makes sense that whistleblowers who seek personal gain from a report are not protected, according to sec. 43G (1)(c) and 43H (1)(c).

2.2. Differentiation from the General Information Interest of Public

Public interest in effective enforcement of law is not equal to public interest in feeding the public with information to provide public opinion on a subject. The case law of the ECtHR on freedom of expression is primarily concerned with the latter, namely with the significance of disclosed information for the public.[23] One example of this could be public interest in information about political figures, such as information about their private life or criminal accusations. The public has a justified interest in that information because it would have an influence on the public's opinion about the politician. When this kind of public interest is important, national law has less of a scope to restrict freedom of expression.[24] A disclosure of that type of information does not need to protect public interest in law enforcement. Similarly, the ECtHR is also aware of what makes a whistleblowing case: it points out that employees' freedom of expression deserves special protection because they are a part of a small group who have a unique opportunity in workplaces to report wrongdoings that undermine public interest.[25] This jurisprudence implies that

[20] J. Düsel, *Gespaltene Loyalität: Whistleblowing und Kündigungsschutz in Deutschland, Grossbritannien und Frankreich*, Nomos, Baden-Baden, 2009, p. 270.
[21] E. S. Callahan, T. M. Dworkin, D. Lewis, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, in *Virginia Journal of International Law,* 2004, vol. 44, no. 3, p. 895.
[22] U. Beyer, *Whistleblowing in Deutschland und Großbritannien: ein Vergleich anhand der Umsetzung von Art. 11 Abs. 1 und 6 RL 89/391 EWG*, 1., Europäische Hochschulschriften PL Acad. Research, Frankfurt am Main, 2013, p. 237.
[23] ECtHR, Judgement of 7. February 2012 – Case 39954/08 (Axel Springer AG v. Germany), marginal no. 96. ECtHR, Judgement of 10. December 2007 – Case 69698/01 (Stoll v. Switzerland) marginal no. 113 -115.
[24] ECtHR, Judgement of 10. December 2007 – Case 69698/01 (Stoll v. Switzerland) marginal no. 106.
[25] ECtHR, Judgement of 21. July 2011 – Case 28274/08, (Heinisch v. Germany), marginal no. 63. ECtHR, Judgement of 16. February 2021 – Case 23922/ 19, (Gawlik v. Liechtenstein), marginal no. 65. ECtHR, Judgement of 12. February 2008 – Case 14277/ 04 (Guja v. Moldau), marginal no. 72, http:// hudoc.echr.coe.int/ eng?i=001- 85016; ECtHR, Judgement of 14. February 2023 – Case 21884/18 – (Halet v. Luxembourg) marginal no. 113.

for the protection of freedom of speech, one does not need to serve public interest. If this is the case, however, the whistleblower should especially be protected. Either way, the disclosure of information is not an end in itself; it is just a way to report.[26]

Nonetheless, the difference between the public interest in effective law enforcement and the public interest in building a public opinion through information can be vague under a cases' circumstances. This is illustrated by the ECtHR decision made in the *Halét v. Luxembourg* proceedings in 2023; after whistleblower *Deltour* disclosed a number of multinational companies committing tax fraud in Luxembourg to the public, his colleague *Halét* gave further information to journalists about the companies involved.[27] The Court, in its 2021 ruling, decided that the information delivered by *Halét* was not new and did not serve public interest as much as Deltour´s disclosure. In 2023, however, the Grand Chamber of the ECtHR found a public interest in the disclosure because *Halét´*s information helps the public gain perspective about involved tax law and fraud in the case, which could be a highly complicated subject for non-professionals.[28] While the Court, in 2021, evaluated the contribution of the information given by *Halét* to the effective enforcement of tax law, the Chamber gave importance to the right of information for the public to have an idea about the issue. In any case, there is an interest in information about the disclosure of a violation of the law; everyone would want to know that violations of the law are being investigated. Wrongdoing, however, does not necessarily have to be "publicly disclosed" to take legal action; for example, the information about alleged wrongdoings had already been passed on by *Deltour* to the government for investigation. Conversely, the Chamber interpreted the public's interest in the case to be so wide that the information of interest to the public could constitute a public interest in the disclosure in terms of whistleblowing protection. As the information disclosed by *Halét* was considered merely additional, it is true that this information did not contribute to the legal proceedings; put simply, it satisfies the public´s curiosity about relevant tax violation. Should the information, however, support the legal prosecution, it should be disclosed to a competent state authority through discreet means in accordance with Article 10 of the Directive – there is no need for it to be disclosed directly to the public.

[26] Recital no. 90- 95 of the Directive; ECtHR, Judgement of 12. February 2008 – Case 14277/04 (Guja v. Moldau), marginal no. 80- 85.

[27] ECtHR, Judgement of 11. May 2021 – Case 21884/18 (Halet v. Luxembourg), marginal no. 109, https://hudoc.echr.coe.int/eng?i=001-210131 (accessed October 10, 2025).

[28] ECtHR, Judgement of 14. February 2023 – Case 21884/18 (Halet v. Luxembourg), marginal no. 184.

2.3. Structure of Whistleblowing Directive

2.3.1. Enumeration of the Subjects of Disclosure

When it came time to identify the public interest in the legislative process, the European Commission referred to examples from whistleblower protection laws around the world. British and US-American whistleblowing regulations have defined legal areas and violations revealed through whistleblowing are effectively prosecuted; furthermore, the disclosure of wrongdoings relating to those legal areas are supposed to be in the public interest.[29] This internationally well-known method is called "*objective list approach*".[30] The European legislator has a similar method, in which the enforcement of law is needed to be backed by whistleblowing, listed in Article 2 of the Directive and also in legal fields.[31] Article 2 of the Directive covers money laundering, terrorist financing, product safety and compliance, road safety, environmental protection, food and feed safety, animal health and welfare, public health, consumer protection, and the protection of privacy and personal data. The material scope of the protection, however, does not cover wrongdoings relating to employee protection.[32] The legislature justifies this due to a limited legal foundation.[33] Moreover, the legal basis of the Directive is not a labor law norm, as seen in Article 153 of the Treaty on the Functioning of the European Union (TFEU).[34] Currently, there lacks a comparable enforcement deficiency in employee protection. The enforcement of employee protection law is already ensured by the implementation of the EU legal requirements of the Employee Protection Directive 89/391. That ensures, among other things, an employees' rights and obligations to report and prohibits disciplinary measures.[35] Still, the Directive considers it possible that the material scope regulated in Article 2 of the

[29] Recommendation CM/Rec(2014)7 and explanatory memorandum, Principle 2, marginal no. 42: "While what is in the public interest will in many areas be common ground between member States, in other areas there may well be a difference of appreciation. What constitutes the public interest is, therefore, intentionally not defined in the recommendation. This is left to each member State, a position reflected by the European Court of Human Rights in its case law.", see https://rm.coe.int/16807096c7 (accessed June 29, 2025).
[30] E.R. Boot, *op. cit.* p. 20.
[31] S. Gerdemann, *Revolution des Whistleblowing-Rechts oder Pfeifen im Walde?,* in *Recht der Arbeit*, 2019, vol. 1, p. 19.
[32] G. Thüsing, S. Rombey, *Nachdenken über den Richtlinienvorschlag der EU-Kommission zum Schutz von Whistleblowern,* in *Neue Zeitschrift für Gesellschaftsrecht*, 2018, vol. 26, p. 1001.
[33] N. Colneric, S. Gerdemann, *op. cit.,* p. 23.
[34] impact assessment–SWD (2018)116/973421, p. 30, https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-218_en (accessed October 10, 2025).
[35] Recital no. 21 of the Directive.

Directive may be extended to areas including employee protection if the future developments justify it, according to Article 27 (3) of the Directive.
The European Directive left the definition of the public interest in terms of whistleblowing to Member States.[36] They may extend the material scope of the protection to other areas including employee protection if they see this necessary and proportionate, like the German legislator did. Sec. 2 (1)(2) of German whistleblower law "Hinweisgeberschutzgesetz" (HinSchG) protects disclosures of breached employee protection law.[37] As long as it does not fall short of the minimum standards of protection set by the Directive, Member States can freely shape the scope of whistleblower protection; as a result, national authority defines what the public interest is in whistleblowing law. While doing that, they can apply different regulatory approaches like those defined by *Vaughn*.[38] To be employed is an "*employment perspective,"* which means whistleblower protection aims primarily to enforce employment rights so that wrongdoings reported relate to specific matters in a work relationship; one example of such matters is safety and health risks in workplaces.[39] An "*open-government perspective,"* conversely, recognizes whistleblowing as a means to enhance democratic accountability; thus, most protected disclosures are about serious government misconduct such as corruption and abuse of power that undermines the democratic legal order.[40] If whistleblower protection follows the "*market regulation perspective,"* like *Sarbanes Oxley Act* of 2002, the focused-on subject is market efficiency. In that system, only wrongdoings that violate investor confidence in reliable information on the market are reported because the open market perspective is based on transparency of how the open market is regulated.[41] Lastly, a "*human rights perspective"* can be chosen, which encourages a broad access to information of all kinds. The Swedish freedom of information law, which works within a "*human rights perspective"* framework, is recognised as one of the world's most comprehensive rights for the protection of freedom of information.[42] Adopting this perspective into whistleblowing law

[36] Art. 25 of the Directive. S. Gerdemann, N. Colneric, *op. cit.*, p. 196-197.
[37] Reasoning for sec. 2 (1) (2) of the HinSchG, https://dserver.bundestag.de/btd/20/034/2003442.pdf#page=23.83, p. 58 (accessed October 10, 2025); see also the assessments of the proportionality of extending protection too far to other areas, E. Özen, *op. cit.*, p. 115 -120.
[38] It cannot be ruled out that these perspectives influence each other and that elements from several perspectives can be found in whistleblowing regulations, see R. G. Vaughn, *The Successes and Failures of Whistleblower Laws,* Elgar, Cheltenham, UK et al., 2012, p. 286. see also a matrix of perspectives on the nature of whistleblowing provisions, A. J. Brown, *op. cit.*, p. 9.
[39] R. G. Vaughn, *op. cit.*, p. 288.
[40] R. G. Vaughn, *op. cit.*, p. 292.
[41] R. G. Vaughn, *op. cit.*, p. 294.
[42] R. G. Vaughn, *op. cit.*, p. 297.

may, however, dismantle the difference between the public interest in an effective law enforcement and a public interest in information.[43]
The European Directive, like the "*market regulation perspective,"* protects reports about violations that harm the effective functioning of the single market.[44] Refences to the Union's financial interests being violated due to underreporting of wrongdoings and the stated need for strengthening fair competition in the market suggests that the Directive was inspired by the "*market regulation perspective"*.[45] However, it is not completely true that the European Directive falls within this regulatory approach. Rather, the Directive includes aspects from all the approaches described above and is a mosaic created from the pieces of the regulatory models selected by the European Commission. For instance, the Directive reflects elements of the "*employment perspective"* by emphasizing the protection of employees since they witness and report wrongdoings at workplace the most.[46] It differs from that perspective, however, since reports about employment-related issues such as wrongdoings against occupational safety and health regulations are not covered (yet) by the scope of protection under Article 2 of the Directive.[47] Similarly, considering that the personal scope of the Directive covers not only potential whistleblowers working in private sectors, but also those employed by public authorities, it is like the "*open-government perspective"* in the sense it promotes the accountability of public institutions. Nevertheless, the Directive differs because

[43] See 2.2.
[44] In many places in the Directive, whistleblower protection is justified by the contribution of whistleblowing to maintaining the well-functioning of the Single Market, see, for example, Recital nr. 12, 14, 16, 18, and 105 of the Directive.
[45] The Proposal of the Commission for a whistleblower protection directive highlights that according to a study carried out for the Commission in 2017, the loss of potential benefits due to a lack of whistleblower protection, in public procurement alone, is in the range of EUR 5.8 to EUR 9.6 billion each year for the EU. It has been also see the Proposal, Brussels, 23.4.2018 COM(2018) 218 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018PC0218 (accessed October 10, 2025); see also the protection of EU Budget as one of arguments for introducing a whistleblower protection in the Commission Staff Working Document "impact assessment", Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, Brussels 23.4.2018, COM(2018) 218 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0116#page=18.22, p. 12 (accessed October 10, 2025).
[46] See for example the Recital nr. 2, 9, 10 and 12 of the Directive.
[47] According to Art. 27 (3) of the Directive, the Commission will consider the need for additional measures such as including further areas of the Union law such as protection of worker´s health and safety and working conditions; see also the dynamic nature of the references to the Union acts set out in the Annex of the Directive, Recital nr. 19.

it excludes reports about abuses of state power under the concept of protection of "national security" from the material scope of protection under Article 2 and in relation with Article 3. Unlike the "*open government*" approach, the Directive imposes serious restrictions on public disclosure of wrongdoings according to Article 15. Finally, the Directive reflects the "*human rights perspective*" by referencing the ECtHR's case law on freedom of expression as an argument for regulating European whistleblower protection, which is enshrined in Article 10 of the European Convention on the Human Rights.[48] Despite this, the Directive primarily focuses on promoting effective enforcement of Union law rather than promoting freedom of expression.
Member States within the EU that have implemented the Directive have also created various regulatory approaches. For instance, some Member States extended the material scope to reports about employment-related wrongdoings such as violations of health and safety regulations, bullying, harassment, and discrimination,[49] which reflects the *employment perspective* more than other regulatory approaches. Others have been limited to transposing the content of the Directive, which seems to be the case according to the Commission´s 2024 report on the implementation of the Directive in the Member States.[50]

2.3.2. Public Interest as a Motivation of Whistleblower

Some whistleblower laws, like the British PIDA, include a prerequisite that a whistleblower should aim to protect public interest. That requirement is explained – beside solely preserving the spirit of the whistleblower protection[51]– by the premise that employees in British society have an obligation of loyalty not only to employers, but also to the public.[52]

[48] See the Recital nr. 31.
[49] As it is recommended by the European Economic and Social Committee in 2018, see the Opinion of the European Economic and Social Committee on 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Strengthening whistleblower protection at EU level' (COM(2018) 214 final) and on 'Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law' (COM(2018) 218 final) (2019/C 62/26), Nr. 4.2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018AE2855 (accessed October 10, 2025).
[50] See the Report from the Commission to the European Parliament and the Council on the implementation and application of the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, Brussels, 3.7.2024, COM(2024) 269 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52024DC0269 (accessed October 10, 2025).
[51] See 3.1.1.
[52] U. Beyer, *op. cit.,* p. 237.

Nevertheless, a whistleblower's motivation is not important to the Directive.[53] A whistleblower might have acted in the public interest, for self-interest, or for other reasons,[54] but Art. 6 presumes that they have a reasonable belief that the information is true and that it falls within the material scope of the Directive, which is defined in Art. 2. Information is not protected if it is clearly false.

The Directive also does not require that a whistleblower believes that their information falls within the material scope of protection. If the information passed on by a whistleblower relates to at least one of the matters stipulated by Art. 2, the whistleblower is protected without any research on their motivation. Thus, pursuing public interest as a reason for disclosure is not required.

The irrelevance of a whistleblower's motivation to European whistleblower protection is based on some reasonable explanations. First, it is known that no research has found evidence about a whistleblower's actual motivations.[55] Furthermore, research shows that examining the motivations of whistleblowers can have negative impact on encouraging potential whistleblowers to report wrongdoings.[56] Indeed, whistleblowers find out about the relevance of their information and their legal status as a whistleblower when they are sanctioned and when they seek legal advice and/or involve government bodies such as the courts to protect themselves.[57]

If the information does not relate any of the matters regulated by Art. 2, a whistleblower is examined for whether their relevant belief in the information's importance is covered by the material scope of the application of protection. The relevant belief of the whistleblower should not be subject to strict scrutiny. Along with the fact that whistleblowers do not have to know about the importance of the information for the public at the time of disclosure, it

---

[53] Recital no. 32 of the Directive. S. Gerdemann, *Whistleblower als Agenten des Europarechts,* in *Neue Zeitschrift für Arbeitsrecht NZA-Beilage*, 2023, vol. 3, p. 48; V. Abazi, *Whistleblowing in the European Union*, in *Common Market Law Review,* 2021*,* vol. 58, no. 3, p. 813, https://doi.org/10.54648/COLA2021051.

[54] P. Roberts, *Motivations for whistleblowing: personal, private and public interests,* in A. J. Brown et al. (eds.), International Handbook on Whistleblowing Research, Edward Elgar, Cheltenham et al., 2014, p. 216- 220. J. Düsel, *op.cit.*, p. 52.

[55] see the "Harm-Test", M. Kumar, D. Santoro, *A Justification of Whistleblowing*, in *Philosophy & Social Criticism*, 2017, vol. 43, no. 7, p. 678, https://doi.org/10.1177/0191453717708469. see also a summary of findings from English, German and Turkish studies on the motive of whistleblowers, E. Özen, *op. cit.,* p. 57-60.

[56] S. Gerdemann, N. Colneric, *op. cit.*, p. 204. R. Kölbel, N. Herold, *Wirtschaftskontrolle durch Whistleblowing? Empirische Befunde zu Entscheidungsprozessen von Hinweisgebern*, in *Neue Kriminalpolitik, 2015, vol.* 16, no. 4, p. 376, https://doi.org/10.5771/0934-9200-2015-4-375. U. Beyer, *op. cit.,* p.104.

[57] T. Byers, *Theranos Whistleblower Erika Cheung on Incentivizing Ethics* | Podcast, in *Stanford eCorner* (blog), accessed on 9. June 2024, https://ecorner.stanford.edu/podcasts/theranos-whistleblower-erika-cheung-on-incentivizing-ethics/ (accessed October 10, 2025).

would be just as difficult for a non-legal professional whistleblower to assume that the information is covered by a whistleblower protection law as it would be hard to assess whether the information is in the public interest. It is hardly possible that they would already know at the time of reporting that the report is legally protected and encouraged. The relevant belief should instead be assessed based on objective factors of whether a whistleblower is likely to assume that the information is relevant. These factors could be fact-based such as whistleblower´s specific knowledge about existing laws or practices as it is demonstrated by the German legislator during the transposing of the Directive. When applying German whistleblower protection law (the HinSchG) the national court will examine, in accordance with sec. 33(1)(2) HinSchG, whether a whistleblower has a reasonable assumption that the information is relevant to law enforcement, considering the individual case and the whistleblower's job-specific knowledge.[58]

In case of doubt, it is recommended to apply a broad understanding and accept the reasonable belief of a whistleblower regarding the importance of the information within public interest. This would promote the efficiency of the law enforcement and of whistleblower protection law itself.

Given this context, one might expect that the ECtHR would abandon its motive test, which the Court had systematically involved to balance interests within the framework of the criteria for assessing a whistleblowers' freedom of expression.[59] Indeed, it is possible that in a whistleblowing case from a country in which the motive test has been abolished, the Court considers removing motive tests by national law, which is appropriate measure under the Art. 10 of the ECHR. Nevertheless, a perpetuation of motive research via national law would also be conventional and acceptable for effective protection of whistleblowers. So far, it has been observed in case law that the Court has never deprived a whistleblower of protection in a typical whistleblowing case merely on the grounds of them having allegedly questionable motives.[60] For an adequate balance between the interests involved, a motive test would be conceivable if the information falls outside the scope of the national whistleblower protection law. In that case, the Court would examine all the usual elements for protection, namely public interest in the report, the motivation of the whistleblower, the choice of a discreet means of reporting, and the severity of the disadvantages and sanctions.

[58] Reasoning for sec. 33 (1)(3) of the HinSchG, *op. cit.,* p. 107.
[59] V. Abazi, *op. cit.*, p. 847.
[60] See ECtHR, Judgement of 17. September 2015 – Case 14464/11 (Langner v. Germany), marginal no. 47.

3. Distinction between Public Interest and Private Interests

In 2015, the Irish Department of Jobs, Enterprise, and Innovation published a code of practice in the Irish Protected Disclosure Act 2014 (PDA).[61] In the code, the Ministry explains the difference between a personal grievance and a protected disclosure. A personal grievance is a matter that affects the employee, i.e. the employee's position in relation to their duties, terms of employment, working procedures, or working conditions – such as a complaint about the selection criteria for a promotion, which should be dealt with through the organization's normal grievance procedure. A protected disclosure, in comparison, concerns misconduct such as the misuse of funds, bribery and fraud, or violation of occupational safety measures in a dangerous work situation. Nonetheless, the code provides no criteria for differentiation.
According to the opinion expressed in this article, the objective of the Directive states the public interest in a whistleblowing case is aligned to its ability to enhance the efficiency of law enforcement. That public interest differs from private interests, which are mainly rooted in the protection of employees' contractual interests. Besides legislation and jurisdiction, the case law of the ECtHR has used the public interest test in whistleblowing cases for a long time. Despite this, there still has been no clear, maintained criteria developed to identify public interest in a whistleblowing case.[62] This distinction is important to the discussion on identifying public interest and its differentiation from other interests.

3.1. Relevance of the Differentiation

3.1.1. Preserving the Spirit of Whistleblower Protection

The British whistleblower law illustrates how specific protection might be inappropriately used for personal interests. In the case *Parkins v. Sodexho* 2002, the Employment Appeal Tribunal (EAT) ruled that an employee is granted whistleblower protection even if their disclosure relates mainly to their

[61] S.I. No. 464/2015 - Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, Nr. 30, 31, https://www.irishstatutebook.ie/eli/2015/si/464/made/en/print (accessed June 29, 2025).
[62] F. Meyer, *LuxLeaks, Cum-Ex & Co - Neue Leitlinien des EGMR für Whistleblowing in transnationalen Kontexten und gesetzgeberischer Handlungsbedarf*, in *Juristenzeitung* 2023, vol. 78, no. 7, p. 265. R. Brockhaus, *Zwei problematische Aspekte beim Whistleblowing: Abwägungen und der Begriff des öffentlichen Interesses*, in: J. C. Joerden, R. Schmücker, E. Ortland, (eds.), Themenschwerpunkt: Recht und Ethik des Kopierens: = Law and ethics of copying, Jahrbuch für Recht und Ethik, Duncker & Humblot, Berlin, 2018, p. 447.

contractual interests.[63] The British legislature confronted that case law by introducing a public interest test into the law in 2013. The test requires examination on whether a whistleblower has an objectively justified belief that the disclosure is in the public interest.[64] The introduction of the public interest test is explained by the aim to counteract "*opportunistic use of the legislation for private purposes*".[65]

As it was explained before, the European Directive does not have "public interest test" itself. It is present in the impact assessment of the Directive proposal however, where the European legislator highlights that the whistleblower should be differentiated from "*aggrieved workers*".[66] Indeed, whistleblowers are protected because they shed light on conducts that threat not private interests but public interests (such as health and safety of the public, monetary interests of state, and more.) It is a voluntary act from individuals, who, despite legal and interpersonal reprisals report wrongdoings for public health and safety.

It is national law's responsibility to formulate the scope of application in accordance with the purpose of whistleblower protection so that the disclosure of relevant violations serves to an effective law enforcement. Legislative actors may have not foreseen this at the time of the legislation. Thus, there can still be other areas where law enforcement is deficient. The courts can identify further areas where the reports are in public interest in future cases. They can detect the public interest, as it was indicated above, with the help of some fact-based evidence like a whistleblower´s specific knowledge about existing laws or practices.

---

[63] As a result of the court's broad interpretation of the existence of a breach of contractual obligations within the meaning of sec. 43B(1) ERA, the employee enjoyed protection as a whistleblower, which led to the inclusion of the reporting of all types of breaches of contractual obligations in the protection, see Employment Appeal Tribunal, Judgement of 22. June 2001– Case 1239_00_2206 (Parkins v. Sodexho Ltd.), Industrial Relations Law Reports (IRLR), 2021, p. 109.

[64] O. Nwoha, *Whistleblower Protection in the UK: A Case for Reform,* in *Business Law Review* 2021, vol. 42, no. 5, p. 244, https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\BULA\BULA2021034.pdf.

[65] Employment Appeal Tribunal, Judgement of 10. July 2017- Case A2/2015/1433 (Chesterton Global Ltd. vs. Nurmohamed) [2015] IRLR 614, 616, marginal no. 18, „the sole purpose of the amendment to section 43B (1) by section 17 of the 2013 Act was to reverse the effect of Parkins v. Sodexho Ltd. The words 'in public interest' were introduced to do no more than prevent a worker from relying on a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications ", Chesterton Global Ltd. vs. Nurmohamed, *op. cit.*, marginal no. 17-36.

[66] impact assessment- SWD (2018)116/973421, p. 8, https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-218en (accessed October 10, 2025).

3.1.2. Avoiding an Inappropriate Protection against Dismissals

While transposing the Directive into German law, legal scholars expressed that new whistleblower law should not promote employees to obtain de facto protection against dismissal by playing the "whistleblower card" – "*Whistleblower-Karte*".[67] The use of whistleblower protection to safeguard oneself in private matters, such as an individual's protection against dismissal, would have a negative impact on the whistleblowing's reputation; this combats using whistleblowing as "a weapon" – "*Kampfmittel*".[68] The risk of exploiting whistleblower protection cannot be countered by the fact that to be protected under Article 6 of the Directive, the whistleblower must report a wrongdoing covered by law and must do so in advance of any disciplinary action such as dismissal.[69] This is because protection applies not only when such misconduct actually exists, but also when a whistleblower has a reasonable belief that this is the case. A competent court must still answer whether the report is in the public interest. In addition, it seems unlikely that an employee would learn of an upcoming dismissal and seek out misconduct to report to prevent it.[70] Whistleblowing is not a single act; rather, it is a process.[71] In that process, a whistleblower searches for sources, evidence, etc. on the company to prepare a report.[72] During that research, the employer may learn of an upcoming report by the employee and dismiss him or her before the report is made. In a case like this, the fact that the dismissal took place before the report was made does not necessarily mean that it was not made because of the report.
Moreover, whistleblower protection in that case would be disproportionate because the employer's interest would not have been sufficiently considered. This point was made clear by the European legislator as well. While searching for a convenient legal basis for the Directive, the legislator has pointed out that Art. 153 TFEU, which concerns regulating employment-relates issues, would be far-reaching and costly, contrary to the principle of proportionality. On the

[67] K. U. Schmolke, *Der Vorschlag für eine europäische Whistleblower-Richtlinie*, in *Die Aktiengesellschaft*, 2018, p. 779.
[68] K. U. Schmolke, *Die neue Whistleblower-Richtlinie ist da! Und nun?,* in *Neue Zeitschrift für Gesellschaftsrecht*, 2020, vol. 1, p. 10.
[69] Dissenting opinion, F. Bayreuther, *Whistleblowing und das neue Hinweisgeberschutzgesetz,* in *Neue Zeitschrift für Arbeitsrecht NZA-Beilage*, 2022, vol. 1, p. 28.
[70] N. Colneric, S. Gerdemann, *op.cit.,* p. 76. see however, F. M. Teichmann, *Das Hinweisgeberschutzgesetz (HinSchG) im Kontext generativer künstlicher Intelligenz – eine experimentelle Untersuchung möglicher Missbrauchsmöglichkeiten und ihre dogmatischen Implikationen*, in *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2023, vol. 8, p. 296.
[71] J. P. Near, M. P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, in *Journal of Business Ethics,* 1985, vol. 4, p. 2.
[72] E. Özen, *op. cit.,* p. 260- 265.

one hand, opting for Art. 153 TFEU would only have a limited effect on enhancing the enforcement of Union law in this area because there are already sufficient instruments in that area to support the enforcement of employment laws, such as Employee Protection Directive 89/391.[73] On the other hand, it would result in an increased number of reports on employment-related and private matters and thus following up on these reports would generate a high cost.[74] Therefore, the European legislator has refrained from opting for Article 153 TFEU.
Still, national legislators are entitled to extend the scope of the application, so far as it is proportionate, or in other words, so far as it creates a balance between the interests of employee, employer and the public.

3.1.3. Providing the Efficiency of Internal Reporting Channels

Most whistleblowing cases made public relate to public interests like health and safety, which is seen in disclosures like *Alte-Apotheker* and *Wirecard* in Germany.[75] The wrongdoings reported through internal channel of companies, however, often concern the interpersonal or contractual interests of employees. Studies show that more than half of reported cases relate to personal grievances, i.e. complaints by employees that relate specifically to their contractual interests.[76] This fact presents a challenge for employers who are responsible for adequate processing of whistleblowing reports in accordance with Art. 8 and 9 of the Directive. Companies of a certain size described in Art. 8 of the Directive are obliged to first set up internal reporting channels and reports must be documented and treated confidentially (Art. 9 of the Directive.)[77] If an employer falsely regards a report about misconduct as a

[73] Mentioned above, Recital no. 21 of the Directive.
[74] Impact assessment- SWD (2018)116/ 973421, p. 38, https:// ec.europa.eu/ info/ law/ better- regulation/ initiatives/ com- 2018- 218en (accessed October 10, 2025).
[75] R. Bender et al., *Bilanzskandal: Der Betrug bei Wirecard soll schon vor 15 Jahren begonnen haben,* in Handelsblatt, 28. July 2020, https://www.handelsblatt.com/finanzen/bilanzskandal-der-betrug-bei-wirecard-soll-schon-vor-15-jahren-begonnen-haben/26040098.html (accessed October 10, 2025). ndcompliance-Redaktion, 'Ndcompliance-Redaktion: Kündigungsschutzprozess Um Whistleblowing Im „Bottroper Apotheker-Skandal" Durch Vergleich Beendet' [2018] Newsdienst Compliance 21003.
[76] A. J. Brown et al., *Clean as a whistle: a five-step guide to better whistleblowing policy and practice in business and government. Key findings and actions of Whistling While They Work 2*, Griffith University, Brisbane, 2019, p. 12, siehe figure 7.
[77] see employer´s obligation to documentation, in accordance with sec. 11 of the HinSchG, J. Dilling, *HinSchG § 11 Dokumentation der Meldungen",* in S. Gerdemann, N. Colneric (eds.), BeckOK HinSchG, C.H. Beck, München, 2025, marginal no. 10-12. see also obligation to process reports confidentially within the framework of sec., 8 of the HinSchG, N. Colneric, S.

personal grievance, the employer would be accused of violating of whistleblowing related obligations in Art. 8 and 9 of the Directive.[78] That's why employers should know what type of report they are dealing with. Differentiating reports in the public interest from those relating mainly to interpersonal conflicts at one's workplace would help employers to ensure that reports of public interest comply with the requirements in the internal reporting procedure and are processed by the internal channels established under Article 8 of the Directive.

Furthermore, Recital No. 22 of the Directive calls for interpersonal conflicts to be forwarded to other competent authorities in the companies—if that differentiation can be made. That also helps prevent excessively overworking internal channels, which are supposed to primarily handle whistleblowing cases.[79]

Overall, this framework helps employers avoid liability risks due to inadequate processing of reports. Employers would be able to defend themselves against possible accusations—such as a case in which a whistleblower was disadvantaged due to the disclosure of information of public interest and/or that the report was not processed properly.

3.2. Differentiation Criterion: Existence of a Law Enforcement Deficiency

The opinion of this study is that the main differentiation criterion of public interest in whistleblowing law is a law enforcement deficiency, which can be seen throughout the previous explanations about the nature of public interest in whistleblowing. Public interest in whistleblowing is located by a cases connection to effective law enforcement. Thus, public interests can be distinguished from private interests in a reporting case by applying the following criterion: Is there a law enforcement deficit for what and where a report concerns? If so, there is a public interest in the report. The need to enhance the effectiveness of law enforcement may vary depending on national circumstances, time, legal system, etc. It is appropriate, in this respect, that the Directive identifies where it considers this need to exist, and leaves it open for Member States to include other areas.[80]

Gerdemann, *HinSchG § 8 Vertraulichkeitsgebot*, in S. Gerdemann, N. Colneric (eds.), BeckOK HinSchG, C.H. Beck, München, 2025, marginal no.11-27.

[78] S. Reuter, *Das Hinweisgeberschutzgesetz ist da – Was Unternehmen jetzt tun müssen*, in *Betriebs-Berater*, 2023, p. 1540.

[79] Recital no. 22 of the Directive regarding the forwarding of information to the competent authority. A. J. Brown et al., *Clean as a whistle, op. cit.*, p. 21.

[80] Art. 25 of the Directive.

How can one determine where there is a lack of law enforcement? This decision is first and foremost at the discretion of legislators. Besides the Recitals, the Directive provides some guidance by characterizing offenses that would be prosecuted through whistleblowing. The characteristics of those offenses can help national legislators and judges to detect public interest in further areas than those stipulated in Article 2 of the Directive. It has been observed that the European legislator picked out special cases in which violations have no victims or unlimited numbers of identified victims so the prosecution of committed violations through the victim´s report is hardly possible.[81] Another characteristic of the selected offenses is that the consequences of the violations committed in those areas are difficult to calculate and it is difficult to gather evidence.[82] All those factors make the cases so complex to solve that reporting insiders is of public interest – making it an effective enforcement of law.[83]

The punishable offenses based off the established elements can be illustrated as follows:[84] first, economic offenses – which are typically the subject of whistleblowing – are only pursued to a limited extent by state authorities. Economic offense cases are usually complex in nature, the victims of these offenses are usually not identifiable, and the relationship between the victim and the offender is usually unknown.[85] Consequently, it would not be possible to prosecute the offense with a victim's report. Second, environmental offenses – with consequences difficult to calculate – fit within the Directive. These offenses, such as radioactive waste, can have a negative impact on different interests, such as life, health, or the security of a country and the world, regardless of time and place. Finally, violations of tax law are characterised by the fact that they are hard to prove because the area of corporate taxation is not sufficiently transparent, which encourages criminals to commit offenses.[86] For that reason, insider knowledge is vital.

[81] See so called "*spill-over effect*" of violations, which should be prosecuted via whistleblower´s reports, impact assessment- SWD (2018)116/ 973421, p. 3, 20, 30. https:// ec.europa.eu/ info/ law/ better- regulation/ initiatives/ com- 2018- 218en (accessed October 10, 2025).
[82] Recital No. 10, 105 of the Directive.
[83] Recital No. 67 of the Directive.
[84] See for more detail, E. Özen, *op. cit.,* p. 130- 134.
[85] A. Aytekin İnceoğlu, *Ekonomik Suclar*, in *Galatasaray Üniversitesi Hukuk Fakültesi Dergisi,* 2020, vol. 1, p. 129- 130.
[86] A. Deltour, *Whistleblowing on Luxembourg's Tax Practices*, in R. Krøvel, M. Thowsen (eds.) Making Transparency Possible: An Interdisciplinary Dialogue, Cappelen Damm Akademisk, Oslo, 2019, p. 81- 83, https://doi.org/10.23865/noasp.64.ch0.

3.3. Other Criteria

So far, public interest has been invoked as a condition for protection or a factor to be considered in case law of the ECtHR on whistleblowing. For this reason, legal scholarship has also attempted to define public interest precisely to establish a legal certainty regarding its scope. Several criteria can be derived from existing legal research. Although the feasibility of these criteria is questionable, they could help identify further areas of law where whistleblowing would contribute to effective law enforcement. These criteria can be grouped as follows: Quantity of people affected, nature of the wrongdoing, and the instrument of law used to enforce whistleblower rights.

3.3.1. Quantity of People affected

The case law of the ECtHR and the British EAT on whistleblowing prompts a question on whether large numbers of people affected by misconduct justify public interest in a report. In the case of *Heinisch v. Germany*, the ECtHR validates a public interest of reporting staff shortages in a nursing home for the elderly as follows: "The information disclosed by the applicant is clearly of public interest. In societies with an ever-increasing proportion of elderly people in nursing homes and given the vulnerability of the patients concerned, who may often be unable to raise concerns about inadequate care, the disclosure of information about the quality or shortcomings of care by the employee is urgently needed to prevent misconduct."[87] Similarly in the case of *Chesterton Global v. Nurmohamed*, the EAT justified public interest in the disclosure of wage manipulation at a real estate company that affected meaningful amount of people. Said misconduct affected the interests of the employee who reported it and the interests of hundreds of other employees, which was a sufficient number of affected parties to classify the case as being of public interest.[88] The size of the company also played a role because – apart from its employees – the misconduct also affected other interested and active parties in the market.[89]

The quantity of people affected by a wrongdoing, however, is not always a reliable criterion for defining what constitutes the public interest in a disclosure. Legal scholarship in British case law raises a question about how

[87] ECtHR Judgement of 21. July 2011 – Case 28274/ 08 (Heinisch v. Germany), marginal no. 71.

[88] Employment Appeal Tribunal, Judgement of 10. July 2017- Case A2/2015/1433 (Chesterton Global Ltd. vs. Nurmohamed) [2015], *op.cit.,* marginal no. 14- 35.

[89] Employment Appeal Tribunal, Judgement of 10. July 2017- Case A2/2015/1433 (Chesterton Global Ltd. vs. Nurmohamed) [2015], *op.cit.,* marginal no. 36.

large the circle of affected people must be to qualify information as in the public interest.[90] This is a question which cannot be completely answered. There are violations that are absolutely in the public interest yet lack any identified victims from the violation because of its abstract nature – such as if a country had an impaired democratic electoral system. At first glance, there are no affected individuals to report abuses in the system; in reality, the whole society is affected – albeit only indirectly. Moreover, the use of such a criterion for defining public interest can deter potential whistleblowers from disclosure. For example, they may not want to make a report if they do not believe there is enough victims related to the wrongdoing. It is not possible for a whistleblower to examine how wide the circle of victims is; only State officials can do such an examination. As the EAT also stated, how public interest is determined in a disclosure requires a fact-sensitive analysis that calls for comprehensive consideration of the circumstances of each case.[91]

3.3.2. Nature of Wrongdoing

Another suggested criterion might be the wrongdoing's nature, but this may also not be reliable. Using the nature of the wrongdoing as a criterion for determining public interest comes from the case law of German Court of Constitution "Bundesverfassungsgericht" (BVerfG). The Court decided in 2001 to make employees testify against their employer accused of committing crime and to safeguard against employee dismissal. The Court stated the dismissal of an employee because of their testimony is not justified since there is a public interest in prosecuting criminal offenses.[92] An employee serves the public interest with a testimony. In the context of whistleblowing, this case law has been widely cited for grounding public interest in a disclosure.[93] Furthermore, another tendency has emerged where just a disclosure of criminal offenses are considered to be of public interest.[94] A public interest in reporting civil law violations – such as discrimination in workplaces – was denied in a

[90] D. Lewis, *op. cit.*, p. 151. J. Asthon, *op. cit.*, p. 458.
[91] Employment Appeal Tribunal, Judgement of 10. July 2017- Case A2/2015/1433 (Chesterton Global Ltd. vs. Nurmohamed) [2015], *op. cit.,* marginal no. 25.
[92] German Court of Constitution, Judgement of 2. July 2001 – Case 1 BvR 2049/00, in *Neue Zeitschrift für Arbeitsrecht*, 2001, p. 888.
[93] G. Forst, *Strafanzeige gegen den Arbeitgeber – Grund zur Kündigung des Arbeitsvertrags?*, in *Neue Juristische Wochenschrift*, 2011, vol. 48, p. 3477–3482; S. Sasse, *Hilfspolizist Arbeitnehmer – oder sinnvolle Neuregelung?*, in *Neue Zeitschrift für Arbeitsrecht*, 2008, vol. 17, p. 990–993.
[94] German Federal Court of Labour, Judgement of 3. July 2003 – Case 2 AZR 235/02, in *Neue Zeitschrift für Arbeitsrecht*, 2004, p. 427.

case in 2014.[95] This understanding of public interest in disclosure could have been influenced by how the German legislator transposed the Directive. While protection for disclosing criminal and administrative offenses is included in the material scope of the German HinSchG, these are not covered by the Directive.[96]

It is evident the criterion on the nature of the wrongdoing is unsuitable. The inclusion of disclosures of criminal offences in the public interest could prove unproportional. There is no clear answer to which types of criminal offenses are suitable to disclose within the scope of the public interest. It would be disproportionate that an employee uses any kind of offense – such as illegal parking – to protect his personal interest against an employer by relying on statutory whistleblower protection by reporting it.[97] Whistleblowing is protected because of its contribution to effective law enforcement, and a lack of law enforcement emerges independent of the nature of wrongdoing. That is why the European legislation does not make any difference between offenses in criminal and civil law while shaping the material scope of the protection. Accordingly, violations of personal data protection will also be prosecuted through whistleblowing (besides terrorist financing), and reporting such violations is in the public interest according to European whistleblower protection.[98]

3.3.3. Type of the Instrument used to enforce the Law

Similarly, the instrument of choice for law enforcement might not work well for identifying a public interest in disclosure. To explain, take the following case as an example: a wrongdoing is reported using means provided by the legal system in question. I f it is a criminal offense one should file a criminal complaint. If the violated law is civil in nature, such as data protection law, one would contact authorities other than public prosecutors. This could be an external government agency such as a data protection authority or an internal organizational body if the employer has established one, e.g. through an ethics guideline. It would be inconceivable to claim that there is a public interest in a disclosure just because it concerns a criminal complaint or a civil lawsuit. The means used to enforce the law does not determine which interest is enforced; rather, the interest to be protected determines which means should be used to

[95] Higher Regonal Court (Oberlandsgericht) Frankfurt a. M., judgement of 8. May 2014 – Case 16 U 175/ 13, in *Neue Zeitschrift für Arbeitsrecht Rechtsprechungsreport*, 2004, p. 439.
[96] Sec. 2 (1) (1 and 2) of the HinSchG, reasoning for sec. 2 (1) (1 and 2) of the HinSchG, *op. cit.,* p. 56 f.
[97] See risks for a utilizing the whistleblowing as a "*Kampfmittel*", above 3.1.2.
[98] Art. 2 of the Directive, see also Appendix Part I of the Directive, L 305/47.

enforce the law. The legislature decides how interests are enforced considering certain aspects such as the nature of the interest or the constitutional status of the legal interest concerned, e.g. human life and the extent and severity of the danger of impairment of the interest.[99] It then seems reasonable to stipulate a duty to report a crime. For example, sec. 138 of the German Criminal Code "Strafgesetzbuch" (StGB) states that if one witnesses a case of murder or manslaughter, they have a duty not only to the authorities but also to the person threatened.[100] By reporting the crime to the authorities or warning the person under threat, it would be possible to protect a person's life. Such reporting is in the public interest but not specifically in terms of improving law enforcement through reports. In conclusion, the involvement of a state body, such as an authority, or a private individual in law enforcement does not necessarily determine the nature of the interest pursued.

[99] German Court of Constitution, Judgement of 8. August 1978 – Case 2 BvL 8/77, in *Neue Juristische Wochenschrift* 1979, p. 362. German Court of Constitution, Judgement of 26. February 2020 – Case 2 BvR 2347/15 et al., in *Neue Juristische Wochenschrift*, 2020, 905, marginal no. 268. German Court of Constitution, Judgement of 24. March 2014 – Case 1 BvR 160/14, in *Beck-Rechtsprechung (BeckRS),* 2014, 49403, marginal no. 28-29.

[100] Sec. 138 StGB-Failure to report planned criminal offences "(1) Anyone who is aware of the intention or execution of 1. (omitted) 2. high treason in the cases referred to in Sections 81 to 83 (1), 3. treason or a threat to external security in the cases referred to in Sections 94 to 96, 97a or 100, 4. counterfeiting of money or securities in the cases referred to in Sections 146, 151, 152 or counterfeiting of payment cards with a guarantee function in the cases referred to in Section 152b (1) to (3), 5. murder (Section 211) or manslaughter (Section 212) or genocide (Section 6 of the International Criminal Code) or a crime against humanity (Section 7 of the International Criminal Code) or a war crime (Sections 8, 9, 10, 11 or 12 of the International Criminal Code) or a crime of aggression (Section 13 of the International Criminal Code), 6. a criminal offence against personal freedom in the cases of Section 232 (3) sentence 2, Section 232a (3), (4) or (5), Section 232b (3) or (4), Section 233a (3) or (4), in each case insofar as these are crimes, Sections 234 to 234b, 239a or 239b, 7. robbery or extortion (§§ 249 to 251 or 255) or 8. a crime dangerous to the public in the cases of Sections 306 to 306c or 307 (1) to (3), Section 308 (1) to (4), Section 309 (1) to (5), Sections 310, 313, 314 or 315 (3), Section 315b (3) or Sections 316a or 316c at a time when the execution or success can still be averted, and fails to report this to the authorities or the threatened party in good time, shall be punished with imprisonment of up to five years or a fine. (2) The same punishment shall apply to anyone who 1. of the execution of a criminal offence under Section 89a or 2. of the intention or execution of a criminal offence under Section 129a, also in conjunction with Section 129b (1) sentences 1 and 2, at a time when the execution can still be prevented and fails to report this to the authorities without delay. Section 129b (1) sentences 3 to 5 shall apply mutatis mutandis in the case of number 2. (3) Anyone who recklessly fails to report the offence, even though they have credible knowledge of the plan or commission of the unlawful act, shall be punished with imprisonment of up to one year or a fine.", translated by DeepL (free version).

3.3.3. Grey Area between Public and Private Interest

Despite attempts to draw distinctions, a case in the Irish court in 2022 confirmed an employee's complaint constituted a protected disclosure even though it concerned breaches of the employer's obligations under labour law – namely the duty to ensure health and safety in the workplace.[101] Even though the criterion proposed in this article, namely "Existence of a Law Enforcement Deficiency," can help identify public interest in further cases not (yet) covered by legislative protection, there might be cases in which a clear distinction between public and private interests cannot be made.

An adequate distinction between these interests might be difficult especially in technical occupational safety.[102] Misconducts in that area have far-reaching results such as endangering the safety and health of the public or pollution of the environment and water. The disclosure of misconducts in such cases serve the contractual interests of the employee being protected against safety risks in the workplace and the public. In those cases, a disclosure can be assessed as a public interest in whistleblowing protection law. A justification of public interest in technical occupational safety would also be of European interest considering the violations against technical occupational safety have negative impacts on the functioning of the internal market. Violations, for example, can have a negative impact on competition between Member States.[103]

By raising concerns on private matters such as irregular or inadequate remuneration of workers, serious violations can be brought to light, such as social security fraud, wage manipulation, and unregistered employment.[104] This was also case in the *Heinisch* ruling. The ECtHR validated a public interest in the disclosure even though the information was about an employer putting an

---

[101] Supreme Court of Ireland, Judgement of 1. December 2021– Case S:AP:IE:2021:000027 (Baranya v. Rosderra Irish Meats Group Ltd.), [2021] IESC 77, available online, https://www.courts.ie/view/Judgments/6c2c35a8-7f6d-4cf6-ba12-5fde40dcf113/4b7cab2e-7e78-48e2-a630-284bf315389a/2021_IESC_77_Charleton%20J.pdf/pdf (accessed October 10, 2025). L. Kierans, *The New Whistleblowing Laws of Ireland,* in S. Gerdemann (ed.), Europe's New Whistleblowing Laws: Research Papers from the 2nd European Conference on Whistleblowing Legislation, Göttingen University Press, Göttingen, 2023, p. 77-79, https://doi.org/10.17875/gup2023-2354.

[102] An argument in favour of protecting whistleblowers is that, R. Krause, *Zwischen Treuepflichtverletzung und Rechtsdurchsetzungsinstrument – Externes Whistleblowing im Wandel der Zeiten*, in *Soziales Recht,* 2019, vol. 9, no. 3, p. 150.

[103] See an argument for extension of protection to technical occupational safety due to the functioning internal market, G. Forst, *Die Richtlinie der Europäischen Union zum Schutz von Personen, die Verstöße gegen das Unionsrecht melden (Whistleblowing-Richtlinie),* in *Europäische Zeitschrift für Arbeitsrecht*, 2020, vol. 3, p. 286.

[104] This type of violation is appropriately covered by the sec. 2 (1) (2) of the HinSchG, see also the reasoning for that, *op. cit.,* p. 57.

excess workload on employee's, thus breaching the employee contract.[105] Empirical studies have also shown that private workplace issues can reach such a volume that they also affect the public interest – a so-called "mixed type of wrongdoings."[106]

Finally, some criminal offenses cannot be assessed as merely private matters, such as sexual harassment of children and young people in educational institutions, aid organisations or clinics[107] and gender-specific corruption – so-called *sextortion.*[108] Those are offenses that are brought into light by insider information. If one applied the "Existence of a Law Enforcement Deficiency" theory, one might consider there to be no lack of law enforcement because the victims of these offenses are identifiable and they must be able to file a complaint – or invoke other means of law enforcement to protect their interests. Nonetheless, an insider's disclosure can be qualified as whistleblowing and in the public interest for other reasons, such as hesitation for a report. In relation to that, a report by Transparency International states that underreporting of gender-based corruption is attributed to the fact that women affected believe they will be delegitimized and experience their reports not being taken seriously.[109] Other reasons mentioned within the framework for the proposed criterion of distinction are a difficulty proving the case and lack of witnesses, among others.[110] Under those circumstances, whistleblowing comes up as an effective means to enforce the law and the interests of victims

[105] ECtHR Judgement of 21. July 2011 – Case 28274/ 08 (Heinisch v. Germany), marginal no. 71.

[106] P. Roberts, J. Olsen, A. J. Brown, *Whistling While They Work: A Good-Practice Guide for Managing Internal Reporting of Wrongdoing in Public Sector Organisations,* ANU E Press, Australia, 2011, p. 20. A. J. Brown et al., Clean as a whistle op. cit., p. 15. See also a diagram showing, how private and public interests are intertwined, A. J. Brown, *op. cit.*, p. 13.

[107] According to a press release issued by the Federal Criminal Police Office on 8 July 2024, the number of reported cases of child sexual abuse rose by 5.5 per cent in 2023, while the number of reported cases of abuse of adolescents rose by 5.7 per cent, see the report, https://www.bka.de/DE/Presse/Listenseite_Pressemitteilungen/2024/Presse2024/240708_PM_PK_SexualdeliktezNvKinderuJugendlichen.html (accessed 29 June, 2025).

[108] A. Rychlíková, S*extortion: Why We Need a New Generation of Whistleblowers,* in *Southeast Europe Coalition on Whistleblower Protection (blog),* 8. January 2024, https://see-whistleblowing.org/sextortion-why-we-need-a-new-generation-of-whistleblowers/ (accessed October 10, 2025).

[109] N. Zúñiga, *Gender sensitivity in corruption reporting and whistleblowing*, in *U4 Helpdesk Answer 2020:10 (Transparency International Anti-Corruption Researc*h Cente (blog), 20. June 2020, p. 4, https://www.u4.no/publications/gender-sensitivity-in-corruption-reporting-and-whistleblowing.pdf (accessed October 10, 2025).

[110] H. Feigenblatt, *Breaking the Silence around Sextortion: The Links between Power, Sex and Corruption*, Transparency International, Berlin, 2020, p. 2, see also the economic and social consequences of gender-based corruption, p. 24.

who could not otherwise achieve remedies through traditional means of law enforcement.

4. Conclusions for Employees, Employers, and the Courts

It may not always be possible to make a clear distinction between public and private interests in a disclosure case, regardless of the criteria one uses to make a distinction between them. Still, if the application of the criterion proposed in this article, namely the "Existence of a Law Enforcement Deficiency," provides a degree of clarity between the two, this study achieved its objective.

This study also reached some conclusions for employees (as potential whistleblowers), courts (which must assess the application of protection), and employers, who are subject to some legal liabilities within the framework of whistleblowing protection law. Firstly, a non-legal professional whistleblower does not have to assess what information disclosed to the public means. If one thinks that a witnessed wrongdoing also affects the public, their main motivation as whistleblower is to eliminate said wrongdoing, whether or not they are pursuing both public and private interests – such as proper remuneration, relief from excessive overtime, etc. In any case, the regulatory concept of the Directive does not establish investigations of whistleblower's motives. The examination of a whistleblower's reasonable belief stated in Article 6 of the Directive applies only if their given information does not relate to any of the areas covered by Article 2 of the Directive.

Secondly, courts dealing with an alleged whistleblowing case can assess reasonable belief of whistleblowers if the information falls within the material scope of protection; in other words, they can assess the special circumstances of each case to see if the information such as a whistleblower's specific knowledge about wrongdoing. In doubt, an affirmation of reasonable belief of whistleblowers is of public interest to encourage whistleblowing and effective law enforcement. By doing that, the courts could identify further matters of public interest that had not been considered at the time of legislation and fill the gaps in the material scope of protection.

Lastly, considering the difficulties in distinguishing between public and private interests, employers who operate an internal reporting office are recommended to expand the scope of matters to those reported beyond legal protection. One example would be sexual offenses in the workplace, the disclosure of which through whistleblowing has been increasingly advocated in public. The expansion would avoid the risk of not having properly handled a report that would be classified as whistleblowing by a court or government agency. The improper handling of such reports might be tolerated to a certain extent because the legislation does not (clearly) cover the matter to which certain

reports relate. However, this could not protect the employer from further consequences such as a loss of reputation in case of a public disclosure of that misconduct and an accusation by the reporting employee that they were victimized.

Platform Work Regulations in Latin America: The (In)Effectiveness of Chile and Uruguay's Approaches

Federico Rosenbaum Carli*

Abstract. This study examines whether these regulatory and judicial approaches have effectively ensured decent work for platform workers and explores ways to enhance their impact, specifically addressing the following questions: 1. To what extent has Chile's regulation achieved its objectives, and what enforcement challenges have emerged? 2. How has Uruguay's judicial approach shaped labour protections, and what changes does the recent regulatory intervention introduce? 3. What lessons can be drawn from these cases to improve platform work regulation in Latin America and beyond? This study employs a comparative legal analysis of Chile and Uruguay, focusing on their regulatory trajectories and enforcement mechanisms. It examines legislation, judicial rulings, and administrative decisions, alongside reports from labour institutions and policy debates. By comparing a country with a formal regulatory framework to one where protections were primarily shaped by the judiciary, the study assesses the effectiveness of both approaches. It also identifies implementation challenges and broader implications for labour law.

Keywords: *Platform economy; Gig economy; Regulation effectiveness; Latin America; Chile; Uruguay.*

* Associate Professor at Universidad Católica del Uruguay (Uruguay). Email address: federico.rosenbaum@ucu.edu.uy. ORCID iD: https://orcid.org/0000-0003-1152-6561. A draft of this paper was presented at "9th Regulating for Decent Work Conference", held from July 2 to 4, 2025, at the International Labour Organization (ILO).

1. Introduction

1.1. Background and Context of Platform Work Regulation

Platform work has emerged as a form of employment generation and an attractive alternative for many workers seeking income. Therefore, several positive aspects of work carried out in the platform economy can be highlighted, such as the low barriers to entry for these forms of work (facilitating access for certain groups of people who are usually excluded from the labour market)[1]; a reduction in the costs of the product or service offered[2]; a reduction in transaction costs[3]; the generation of sources of employment for groups that are unemployed or cannot access formal employment (especially young people and migrants); etc.

However, the platform economy (particularly its *offline* or location-based modality) offers various challenges for workers, leading to numerous factual and legal qualification issues.

On one hand, the platform economy has formally expanded the boundaries of self-employment, blurred the time boundaries associated with work, negatively affected workers' health and safety, made collective action more challenging, and resulted in a significant lack of social protection for workers[4]. On the other

[1] M. L. Rodríguez Fernández, Anatomía del trabajo en la Platform Economy, AADTSS, 2018, 6, https://www.aadtyss.org.ar/docs/ANATOMIA_DEL_TRABAJO_EN_LA_PLATFORM_ECONOMY_MLRF.pdf (accessed April 23, 2025).

[2] M. L. Rodríguez Fernández, op. cit., 4.

[3] M. Sánchez-Urán Azaña, Economía de plataformas digitales y servicios compuestos. El impacto en el Derecho, en especial, en el Derecho del Trabajo. Estudio a partir de la STJUE de 20 de diciembre de 2017, C-434/15, Asunto Asociación Profesional Élite Taxi y Uber Systems Spain S.L. (1), in La Ley Unión Europea, 57, Wolters Kluwer, Spain, 2018.

[4] A. Aloisi, Commoditized workers: case study research on Labour Law issues arising from a set of 'on-demand/gig economy' platforms, in Comparative Labor Law and Policy Journal, 37 (3), 663, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2637485 (accessed April 23, 2025); C. Degryse, Digitalisation of the economy and its impact on labour markets, European Trade Union Institute, Brussels, 2016, 35, https://www.etui.org/fr/content/download/22130/184851/file/ver+2+web+version+Working+Paper+2016+02-EN+digitalisation.pdf (accessed April 23, 2025); V. De Stefano, The rise of the "just in time workforce": On-demand work, crowdwork and labour protection in the "gig economy", in Inclusive Labour Markets, Labour Relations and Working Conditions Branch, Conditions of Work and Employment Series, 71, International Labour Office, Geneve, 2016, 4-5, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf (accessed April 23, 2025); ILO, Ensuring decent working time for the future, in Report of the Committee of Experts on the Application of Conventions and Recommendations. Report III. 107th International Labour Conference, International Labour Office, Geneve, 2018, 297,

hand, attention has also been drawn to two major legal qualification issues surrounding these models, such as the definition of the nature of the activity carried out by digital platform companies and the nature of the relationship they establish with workers.

Diverse and even opposing reactions have emerged from these dilemmas that develop on different levels.

Primarily, we can highlight a certain level of discontent among workers regarding the work organization model of the platform economy, which has led to claims at the judicial level to obtain the protections mandated by labour law, seeking to be classified as dependent workers. Secondly, in some countries, control bodies have carried out significant work, generating inspections of digital platform companies, administrative sanctions, and even the promotion of legal proceedings to enforce the inclusion of these workers in social security systems, ensuring that they make the corresponding contributions.

Finally, a regulatory effort has been promoted in various countries, showcasing a commitment to intervene and provide solutions for these types of work, which have often been characterized as precarious employment[5] with a high degree of non-compliance with decent work parameters[6]. Thus, it is possible to find different regulatory proposals that, in several cases, have been approved at the national and regional levels[7].

---

https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40relconf/documents/meetingdocument/wcms_618485.pdf (accessed April 23, 2025); ILO, Trabajar para un futuro más prometedor – Comisión Mundial sobre el Futuro del Trabajo, International Labour Office, Geneve, 2019, 7, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662442.pdf (accessed January 2, 2024); M. L. Rodríguez Fernández, op. cit., 4; F. Rosenbaum Carli, El trabajo mediante plataformas digitales y sus problemas de calificación jurídica, Aranzadi-Thomson Reuters, Spain, 2021, 60-81.

[5] J. Woodcock and M. Graham, The gig economy. A critical introduction, Polity Press, United States of America, 2020; C. Bedoya-Dorado and J. Peláez-León, Los trabajos en la Gig Economy: una mirada desde la precarización laboral, in Lumen Gentium, 5 (1), 2021, https://revistas.unicatolica.edu.co/revista/index.php/LumGent/article/view/306 (accessed April 23, 2025); G. Boza and J. Briones, Precariedad laboral en el trabajo prestado mediante plataformas digitales en el Perú, in Revista Jurídica del Trabajo, 3 (9), 2022, http://www.revistajuridicadeltrabajo.com/index.php/rjt/article/view/147 (accessed April 23, 2025).

[6] CEPAL-OIT, Trabajo decente para los trabajadores de plataformas en América Latina, in Coyuntura laboral en América Latina y el Caribe, 24, United Nations, Santiago, 2021, 38, https://repositorio.cepal.org/server/api/core/bitstreams/c11b80df-b41c-41d0-877e-a9021eb71e66/content (accessed May 6, 2025).

[7] Examples of this are the cases of Canada (Ontario: Working for Workers Act - Bill 88), Chile (Law 21.431), Spain (Royal Decree-Law 9/2021), United States of America (California: Assembly Bill No. 5 and Protect App-Based Drivers and Services Act; and Washington: HB 2076), France (Laws Nos. 2016-1088, 2018-771 and 2019-1428), Italy (Legislative Decree No.

1.2. Divergent Approaches in Latin America: Chile and Uruguay

The divergent regulatory paths taken by Chile and Uruguay concerning platform work find a structural explanation in their distinct pre-existing legal frameworks for defining the employment relationship.

Both systems are founded on a rigid dichotomy between dependent and independent work, yet they differ fundamentally in their sources of law and formal structure, which conditioned their subsequent reactions to platform work.

Chile relies on a structured, codified system within its Labour Code. On one hand, article 7 of the Code formally defines the employment contract as one where the worker provides personal services under dependency and subordination. On other hand, article 8 establishes that every provision of services under the preceding terms presumes the existence of an employment contract. This clear, statutory presumption provided a fixed point for the legislator to intervene, resulting in Law 21,431 being primarily a modification designed to address this presumption in the context of digital platforms.

In contrast, Uruguay's labour law framework is characterized by its dispersed nature, as it lacks a systematized Labour Code or a statutory law that formally defines the contract of employment. Consequently, the definition of the employment relationship relies heavily on doctrine, jurisprudence, and international labour standards. In this context, the ILO Employment Relationship Recommendation, 2006 (No. 198) plays a transcendental role, serving as a primary source of criteria for the courts to determine the existence of a relationship based on the facts of work performance, prevailing over contractual formalities. This normative structure meant that the challenge of platform work fell almost entirely upon the judiciary, which was compelled to use the ILO Recommendation 198 criteria to establish that technological control equated to subordination, driving the protection before legislative action. These structural differences are important to understanding why Chile opted for early legislative reform and Uruguay was driven by definitive judicial precedent.

In this context, Chile's and Uruguay's responses to the factual and legal issues of platform work have been varied.

There has been limited jurisprudential development in the Chilean case to clarify the relationship between workers and platforms. However, since 2020, addressing this issue at the legislative level has been prioritized, with the

81 of June 15, 2015 and Decree-Law No. 101 of September 3, 2019), Mexico (Decree of December 24, 2024), Portugal (Law No. 45/2018), Uruguay (Law 20.396), and the European Union (Directive 2024/2831).

proposal of a bill establishing fundamental guarantees for platform workers. It was finally approved in 2022 by Law 21,431[8]. The Law legitimizes two types of contracts, allowing workers to be classified as employees or independent contractors.

In a different sense, the Uruguayan case has demonstrated very significant judicial activism, which has grown exponentially since the first ruling against Uber in 2019, with a total of 267 labour proceedings initiated against transportation and delivery companies until 2024[9]. However, despite the clear predominance of the judicial route and the overwhelming position adopted by labour courts agreeing that Uber drivers are dependent workers, in February 2025, Uruguay approved Law 20,396[10], which establishes minimum levels of protection for workers who perform tasks through digital platforms.

These two diverse approaches allow us to analyse the effectiveness and challenges of Chilean legislative regulation compared with the Uruguayan jurisprudential response and subsequent regulation. This analysis helps us draw specific lessons for the Latin American context and contribute to the global debate on regulating work through platforms.

1.3. Research Questions

This paper addresses the following research questions: 1) To what extent has Chilean regulation achieved its intended purposes? 2) What impact have judicial rulings and legislation enacted in Uruguay had? 3) What lessons can be drawn from these comparative experiences to improve the regulation of platform work?

2. Literature Review

2.1. Global Perspectives on the Regulation of Platform Work

The phenomenon of digital platforms can be interpreted from different perspectives. First, as a further expression of the trend toward the de-

[8]Accessible at: https://www.bcn.cl/leychile/navegar?idNorma=1173544.

[9] Observatorio de Relaciones Laborales, Conflictividad Laboral 2024. Informe anual, Universidad Católica del Uruguay, Uruguay, 2025, https://www.ucu.edu.uy/Institucionales/INDICE-DE-CONFLICTIVIDAD-LABORAL-uc1342/5421/Informe-anual-de-Relaciones-Laborales--borrador-elo.pdf (accessed May 15, 2025).

[10]Accessible at: https://www.impo.com.uy/bases/leyes-originales/20396-2025.

standardization of labour law[11]; second, as a manifestation of a broader trend that has allowed companies to externalize the risks they previously had to assume[12]; and third, as a disruptive change, where technology and capital have stimulated the growth of precarious work for unprotected self-employed workers[13].

Therefore, there is a debate about the importance of acting, such as regulating these phenomena, to prevent precariousness from spreading to the rest of the economy.

Regarding regulatory models for platform work globally, various approaches have different justifications.

A first line of opinion advocates establishing a regulatory definition of the legal relationship between digital platforms and workers, whether as employees or self-employed workers. This approach has not been commonly accepted at the comparative level (except for the Mexican case[14]).

A second model of regulatory intervention is based on creating intermediate categories between dependent and independent work. This regulatory approach recognizes two alternatives: on the one hand, the creation of a special status for platform workers, which falls within the scope of labour law protection but exclusively applies to certain specific rights, and on the other, the establishment of a special status for self-employed workers, situated outside the scope of labour law. The main argument put forward by those who support this regulatory model is that platform work does not adequately articulate the characteristic features of dependent work nor the status of the self-employed worker, so specific regulations for this type of employment would be necessary.

Another plausible regulatory alternative would be establishing a presumption of employment for work carried out through digital platforms. This could be achieved by strengthening a general presumption of employment, creating a specific presumption of employment applicable exclusively to these types of

---

[11] A. Goldin, Los trabajadores de plataforma y su regulación en la Argentina, in Documentos de Proyectos (LC/TS.2020/44), Comisión Económica para América Latina y el Caribe (CEPAL), Santiago, 2020, 15, https://www.cepal.org/es/publicaciones/45614-trabajadores-plataforma-su-regulacion-la-argentina (accessed June 12, 2020).

[12] S. Vallas and J. Schor, What Do Platforms Do? Understanding the Gig Economy, in Annual Review of Sociology, 46:1, 2020, 8, https://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-121919-054857 (accessed May 2, 2020).

[13] V. Dubal, Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy, in Wisconsin Law Review, 239, 2017, 752, https://repository.uclawsf.edu/faculty_scholarship/1598 (accessed April 23, 2025).

[14] Accessible at: https://www.dof.gob.mx/nota_detalle.php?codigo=5746132&fecha=24/12/2024#gsc.tab=0.

work, or establishing a general presumption applicable to all situations involving personal work. In a different vein, proposals have also been made to include a presumption of autonomy concerning the persons who provide the underlying services through digital platforms.

A fourth regulatory model does not attempt to resolve the legal issue of how to qualify the relationship between the parties. Instead, it includes the establishment of minimum rights for all persons who perform their work through digital platforms. The rationale is very pragmatic, as it argues that there is a lack of protection "on both sides of the border", making it irrelevant and meaningless to resolve the legal structure of the relationship between the parties, that is, whether it falls within or outside of labour law[15].

2.2. The ILO's Decent Work Agenda in the Platform Economy

The ILO has a long-standing tradition of addressing two issues underlying the current challenges posed by the platform economy. On one hand, there is the determination of the existence of an employment relationship, expressly addressed by the Employment Relationship Recommendation (No. 198) in 2006. On the other hand, there is the need to extend protection to all workers, regardless of their contractual status, in line with the proposal for a universal employment guarantee put forth by the Global Commission on the Future of Work[16].

Moreover, a third level of interest, which is more specific and concrete, has emerged following the global debate on regulating work in the platform economy at the ILO. This has sparked a dual discussion process aimed at approving standards for decent work in the platform economy.

It is worth recalling that at its 346th Session, the Governing Body decided to include on the agenda of the 113th Session of the International Labour Conference in 2025 an item on decent work in the platform economy and requested the Office to prepare a regulatory gap analysis to serve as a basis for a decision on the nature of the item to be included on the agenda of the Conference in 2025 and, if appropriate, in 2026[17]. This document was finally

[15] M. L. Rodríguez Fernández, Calificación jurídica de la relación que une a los prestadores de servicios con las plataformas digitales, in M. L. Rodríguez Fernández (Dir.), Plataformas digitales y mercado de trabajo, Ministerio de Trabajo, Migraciones y Seguridad Social, Spain, 2018.

[16] ILO, 2019, op. cit., 40.

[17] ILO, Consejo de Administración. 346ª reunión, Ginebra, octubre-noviembre de 2022. GB.346/INS/PV, International Labour Office, Geneve, 2022, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---

presented to the Governing Body on February 24, 2023, concluding (in substance) that, on the one hand, there are important international instruments that are applicable to work through digital platforms, and on the other, that there are possible regulatory gaps for this type of work, both because it is outside the scope of application of some standard, as well as because a particular topic has not been addressed by any international standard[18].

This led to the Governing Body finally deciding at its 347th Session to inscribe on the agenda of the 113th Session of the Conference (2025) a standard-setting item, under the double discussion procedure, on decent work in the platform economy[19].

In this context, the Office prepared a report on national legislation and practice, together with a questionnaire to be completed by member States in consultation with the most representative organizations of employers and workers[20]. Subsequently, the Office prepared a further report based on the governments' responses, outlining the main issues to be considered at the next International Conference, held in June 2025[21].

The Conference has recently examined both reports and decided to include on the agenda of its 114th Session (2026), for a second discussion, an item entitled "Decent work in the platform economy", with a view to the adoption of a Convention supplemented by a Recommendation[22].

relconf/documents/meetingdocument/wcms_863774.pdf#page=27 (accessed January 10, 2024).

[18] ILO, A normative gap analysis on decent work in the platform economy. GB.347/POL/1, International Labour Office, Geneve, 2023, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_869166.pdf (accessed January 10, 2024).

[19] ILO, Consejo de Administración. 347ª reunión, Ginebra, 13-23 de marzo de 2023. GB.347/INS/2/1, 2023, https://www.ilo.org/gb/GBSessions/GB347/ins/WCMS_873030/lang--es/index.htm (accessed January 10, 2024).

[20] ILO, Realizing decent work in the platform economy. ILC.113/Report V(1), International Labour Office, Geneve, 2024, https://www.ilo.org/sites/default/files/2024-07/ILC113-V%281%29-%5BWORKQ-231121-002%5D-Web-EN.pdf (accessed May 10, 2025).

[21] ILO, Realizing decent work in the platform economy. ILC.113/Report V(2), International Labour Office, Geneve, 2025, https://www.ilo.org/sites/default/files/2025-02/ILC113-V%282%29-%5BWORKQ-241129-001%5D-Web-EN.pdf (accessed May 10, 2025).

[22] ILO, Outcome of the Committee on Decent Work in the Platform Economy: Proposed resolution and Conclusions submitted to the Conference for adoption. ILC.113/Record No.6A, International Labour Office, Geneve, 2025, https://www.ilo.org/sites/default/files/2025-06/ILC113-Record-6A-CNP-EN.pdf (accessed June 13, 2025).

2.3. Existing Literature on the Regulation of Platform Work in Chile and Uruguay

In the Chilean case, a vast amount of literature has developed focusing on regulating platform work. In Uruguay, however, this development has been less extensive. Therefore, we will identify what has been researched, the main findings, areas of consensus, and the gaps this research seeks to address.

The enactment of Law 21,431 in Chile has sparked growing interest in analysing its content, scope, and potential impact. The existing literature includes studies that examine in detail the provisions of the Law, as well as the distinction between dependent and independent workers and the rights and obligations established for platforms and workers. These analyses explore the perceived strengths and weaknesses of the Law from a legal and public policy perspective[23].

Preliminary assessments also seek to understand how the Law is being implemented in practice, identifying potential compliance challenges and obstacles to the exercise of rights[24].

---

[23] F. Ruay, Trabajadores mediante plataformas en Chile. Comentarios a propósito de su regulación legislativa, in *Revista Jurídica del Trabajo*, 3 (7), Equipo editorial RJT, Uruguay, 2022, http://revistajuridicadeltrabajo.com/index.php/rjt/article/view/125 (accessed April 23, 2025); J. Leyton and R. Azócar, Análisis crítico de la regulación del trabajo en plataformas en Chile, introducida al Código del Trabajo por la Ley Nro. 21.431, in *Revista Jurídica del Trabajo*, 3 (7), Equipo editorial RJT, Uruguay, 2022, http://revistajuridicadeltrabajo.com/index.php/rjt/article/view/126 (accessed April 23, 2025); A. Sierra, Sobre la distinción del trabajador de plataformas digitales dependiente y el trabajador de plataformas digitales independiente. Análisis crítico de la Ley Nº 21.413, in R. Palomo (Ed.), El trabajo a través de plataformas digitales. Problemas y desafíos en Chile, Tirant Lo Blanch, Valencia, 2022; M. S. Jofré, Seguridad laboral en el trabajo vía plataformas digitales: la nueva regulación legal en Chile y sus desafíos, in R. Palomo (Ed.), op. cit., 2022; P. Contreras, La protección de datos personales de trabajadores de empresas de plataformas digitales de servicios y la regulación de la gestión algorítmica del trabajo bajo la Ley Nº 21.431, in R. Palomo (Ed.), op. cit., 2022; R. Palomo and D. Villavicencio, La organización y la negociación colectiva de los t rabajadores vía plataformas digitales en Chile, in R. Palomo (Ed.), op. cit., 2022; Y. Pinto, La Ley N° 21.431 y el reconocimiento de los trabajadores económicamente dependientes en el derecho chileno. Los déficits en su protección, in Revista Chilena de Derecho y Ciencia Política, 16 (1), 2025, https://doi.org/10.7770/rchdcp-v16n1-art422 (accessed May 15, 2025).

[24] Flacso Chile, Estudio de descripción de las condiciones de trabajo y empleo en el trabajo de plataformas digitales, conforme a lo dispuesto por la Ley n°21.431, 2023, https://www.subtrab.gob.cl/wp-content/uploads/2024/05/8-Informe-Final.-Trabajo-en-Plataformas-Digitales-de-Servicios-Ley-21.431.pdf (accessed May 15, 2025); Pontificia Universidad Católica de Chile, Evaluación de implementación y resultados de la Ley N°21.431, de trabajadores de plataformas digitales, en Uber y Uber Eats, 2023, https://politicaspublicas.uc.cl/publicacion/evaluacion-de-implementacion-y-resultados-de-la-

Regarding Uruguay, the existing literature analyses labour court rulings that overwhelmingly classified platform workers as dependent workers. These analyses identify the legal criteria used by the jurisprudence, the labour protections granted, and the consistency of court rulings. There are also scholarly developments on the adequacy of traditional Uruguayan labour legislation to address the particularities of platform work and the interpretive challenges that arose[25].

After reviewing the existing literature in both countries, a gap was identified that this research seeks to fill. In particular, what is missing is an in-depth analysis of the effectiveness of Chilean regulation in terms of compliance and effective protection of workers' rights, an assessment of the impact of the Uruguayan judicial approach (pre-regulation) on working conditions and legal certainty, direct and systematic comparative analysis of the approaches in Chile and Uruguay, as well as an investigation of the specific challenges of regulatory enforcement that have arisen in both contexts and an exploration of the implications for an international regulatory framework, drawing on the lessons learned from the Chilean and Uruguayan cases.

3. Data and Methods

3.1. Comparative Legal Analysis Framework

This research adopts a comparative analysis methodology to examine the effectiveness of different regulatory approaches to platform work implemented in Chile and Uruguay, focusing specifically on their impact on protecting

ley-n21-431-de-trabajadores-de-plataformas-digitales-en-uber-y-uber-eats/#:~:text=Descargar%20documento,file_download (accessed May 15, 2025); Consejo Superior Laboral, Evaluación implementación de la Ley 21.431, que modifica el Código del Trabajo regulando el contrato de trabajadores de empresas de plataformas digitales de servicios, Ministerio de Trabajo y Previsión Social, Chile, 2024, https://www.mintrab.gob.cl/wp-content/uploads/2024/08/Informe_Implementacion_Ley21.431_CSL2024.pdf (accessed May 15, 2025).

[25] F. Rosenbaum Carli, op. cit., 2021; F. Rosenbaum Carli, Match Point: Uruguayan Labor Appeal Court Establishes that Uber Drivers Are Dependent Workers", in International Labor Rights Case Law, 7 (2), Brill, Leiden, 2021, https://doi.org/10.1163/24056901-07020018 (accessed May 14, 2025); L. De León and N. Pizzo, Trabajo a través de plataformas digitales, second edition, FCU, Montevideo, 2022; B. Sande, Plataformas y Relación de Trabajo. Análisis desde la perspectiva del Derecho del Trabajo Uruguayo, in XXX Jornadas Uruguayas de Derecho del Trabajo y de la Seguridad Social, FCU, Montevideo, 2019; G. Gauthier, Plataformas digitales, relaciones laborales y diálogo social, in *El tripartismo, la OIT y Panamá*, Cuadernillo Nº 6, Universidad de Panamá, Panamá, 2024; J. Raso, La contratación atípica del trabajo, third edition, FCU, Montevideo, 2023.

workers' labour rights. This choice is justified by the contrasting nature of the regulatory responses in both countries within the Latin American context: an early and targeted legislative intervention in Chile and an initial jurisprudential construction in Uruguay, followed by recent legislation, as previously noted.

The specific analytical framework for this comparison will be structured around various dimensions, aiming to assess its effectiveness regarding labour rights. First, the regulation's coverage and scope will be examined. Second, the level of labour rights protection will be compared, analysing the substantive rights recognized for platform workers. Finally, emphasis will be placed on the feasibility of implementing and enforcing the regulation.

The effectiveness assessment will focus on determining whether regulatory approaches have led to a tangible improvement in protecting platform workers' labour rights in each country. It will, therefore, consider whether the regulation provides a clear and enforceable framework, whether workers have effective access to the recognized rights, and whether adequate mechanisms exist to ensure platform compliance.

3.2. Data Sources

This research will use different data sources to analyse the Chilean and Uruguayan cases.

On the one hand, Law 21,431 will be examined, constituting Chile's main regulatory instrument governing platform work. The study will also be complemented by a review of legal opinions from the Directorate of Labour related to the interpretive scope of the aforementioned Law and the context of platform work. Finally, various reports and emerging analytical documents on the implementation of the Law, issued by government organizations, academic institutions, and researchers, will be analysed.

Regarding the Uruguayan case, we will first review the main jurisprudence of the Labour Courts of Appeals that addresses the problem of classifying these workers. Second, we will examine Law 20,396, which regulates digital platform work in Uruguay. Finally, we will study the analytical reports describing the context of platform workers' legal claims.

4. Analysis of Legislative and Judicial Approaches

4.1. The Case of Chile: Implementation and Enforcement of Law 21,431

4.1.1. Scope and Key Provisions of the Law

Law 21,431 modifies the Chilean Labour Code and incorporates a new Chapter IX (articles 152 quárter P - 152 quinquies I) to regulate platform work within the category of special contracts. This Law regulates the relationships between digital platform workers, both dependent and independent, and digital service platform companies operating in Chile.

The parliamentary process began with the presentation of a bill initiated as a motion. The content and text of this motion differed from the final approved Law, although they shared the essence of its objectives. Thus, the motion states that the regulatory purpose is to establish fundamental guarantees for workers, especially regarding their safety and well-being.[26]

It is also worth noting that after the bill was introduced, a technical working group was established in 2020, integrated by representatives from the Executive Branch, the most representative workers' and employers' organizations, academics, representatives of workers and digital platform companies, and the ILO. Within this framework, those participating agreed on the need to regulate platform work, based on extending social security protection to these workers, as well as providing protection for personal data, ensuring rest periods, transparency criteria, and understanding of terms and conditions, the provision of information on remuneration conditions, and protection of fundamental rights. The work of the technical group was crucial in understanding the objectives ultimately set forth by the approved Law since what was agreed upon there became the "backbone" of the regulatory discussion, fully incorporated into the provisions of the Law[27].

The approved Law defines a digital services platform company as an organization that, for a fee, administers or manages a computer or technological system (executable in mobile or fixed applications) that allows digital platform workers to perform services for the users of said system in a specific geographic territory. Examples include services such as collecting, distributing, or delivering goods or merchandise, as well as minor passenger

[26] Accessible at: https://www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=14038&prmBOLETIN=13496-13.

[27] F. Arab and M. Frontaura, Descripción y análisis de la Ley 21.431, que regula el contrato de trabajadores de empresas de plataformas digitales de servicios, in Revista de Derecho Aplicado LLM UC, 9, 2022, 5-6, https://doi.org/10.7764/rda.0.9.51169 (accessed May 20, 2025).

transport. Platforms that are limited to publishing advertisements for the provision of services or the sale or rental of goods are expressly excluded[28] (article 152 quárter Q, a).

The digital platform worker is defined as the person who performs personal services, whether self-employed or dependent, requested by the users of the application administered or managed by the digital services platform company. The Law indicates that the status of dependent or independent worker will be determined according to the criteria regulated by the Labour Code when identifying the employment contract (personal service, remuneration, dependency, and subordination)[29] (article 152 quárter Q, b).

For this reason, on the one hand, the platform-dependent worker is identified as the subject who provides services under subordination and dependence on the platform company, governed by the general rules of the Labour Code, provided that they are not contradictory with the specific provisions of Law 21,431. Moreover, on the other hand, the independent digital platform worker provides services without subordination or dependence, where the platform company is limited to coordinating contact between the worker and the users[30].

Regarding the scope of the Law, it establishes that it regulates the relationships between digital platform workers and companies providing services within the national territory (article 152 quárter P). However, it has been raised that the Law raises doubts about its application to activities carried out through platforms intended for entertainment, such as game streaming and *online* entertainment content. Although the standard primarily focuses on passenger or freight transport services, the expression "or others" leaves open the discussion about its possible extension to other types of services provided through digital platforms[31].

Regarding the rights and obligations of the parties, the Law establishes a specific regulatory framework for each type of worker.

On the one hand, in the case of dependent workers, the Law refers to the general rules of the Labour Code, with some special provisions (Paragraph II). In particular, the employment contract must contain, at a minimum, the nature of the services, the terms and conditions of provision, the processing of the worker's data, the method of calculation and form of payment of remuneration, the designation of an official channel for the worker to file objections or complaints, the geographic area where services are provided, and the criteria for contact and coordination between the worker and users.

[28] F. Ruay, op. cit., 133.
[29] F. Ruay, op. cit., 133-134; J. Leyton and R. Azócar, op. cit., 177.
[30] F. Ruay, op. cit., 134-140.
[31] F. Ruay, op. cit., 133-135.

Regarding working hours, the worker's traditional and flexible distribution is permitted, establishing rules on connecting and disconnecting from the platform. Remuneration is also regulated, including a minimum amount per hour worked[32].

On the other hand, independent workers are governed by a special statute within the Labour Code (Paragraph III). The Law also regulates specific aspects of the contract, as it must be in writing and contain stipulations similar to those for dependent workers regarding the identification of the parties, payment terms and conditions, coordination criteria with users, geographic area of service provision, personal data protection, maximum connection times, designation of a communication address, complaints channel, and grounds for termination. Likewise, rules are established regarding the payment of fees, social security, the right to disconnection, and contract termination[33].

The novel aspect of the regulation refers to the introduction of standard rules for both types of workers, which include the right to information about the service offered, the protection of personal data, the right of access and portability of data, the prohibition of algorithmic discrimination, training and delivery of personal protection elements, insurance for damage to the worker's property, and collective rights (freedom of association and collective bargaining)[34] (Paragraph IV).

Finally, academia has raised specific critical objections regarding the inclusion of the independent worker in the Labour Code, as it has been considered an anomaly and a contradiction with the traditional logic of this regulatory framework[35]. It is also argued that the distinction between dependent and independent workers conceals an unfounded differentiation and diminished labour protection for independent workers. In this sense, it is argued that the Law creates a third way with attenuated protection, which could make the world of work more precarious[36]. For this reason, some authors criticize the Law's decision to force the "de-laborization" of platform activities by regulating dependent and independent workers similarly[37].

A closely related criticism is that the Law has not considered the inequality of bargaining power between the parties, allowing companies to choose the contractual form (dependent or independent) and opt for the one with the least protection[38]. Considering this aspect, it has been emphasized that in

[32] F. Ruay, op. cit., 134-136; J. Leyton and R. Azócar, op. cit., 164-173.
[33] F. Ruay, op. cit., 140-145; J. Leyton and R. Azócar, op. cit., 164-173.
[34] F. Ruay, op. cit., 147-148; J. Leyton and R. Azócar, op. cit., 173.
[35] F. Ruay, op. cit., 141.
[36] J. Leyton and R. Azócar, op. cit., 181.
[37] Y. Pinto, op. cit., 2-9.
[38] J. Leyton and R. Azócar, op. cit., 177-180.

practice, there is a tension between the supposed autonomy of platform workers and the control exercised by companies through algorithms and other mechanisms[39].

4.1.2. Compliance Mechanisms and Challenges Identified

Regarding the control of compliance with regulations and its challenges, some studies have pointed out difficulties in the supervision and application of the Law, as well as problems of access to justice for workers[40].

On the one hand, some authors raise doubts about applying the Labour Directorate's inspection regulations to the contracts of independent workers. This interpretation is reinforced by the lack of specific tools in the regulations for the Labour Directorate to inspect platform work efficiently. Likewise, the absence of an express obligation for independent workers to register and the lack of application of regulatory modernizations to this body exacerbate the inspection challenge for atypical labour relations in the digital sphere[41].

Nevertheless, it should be noted that after the Law came into force, the Labour Directorate issued opinion 1831/39[42], aimed at interpreting various aspects of the regulatory text, serving as a basis for the subsequent inspection action carried out by that body. Specifically, one of the aspects considered in the opinion is related to an updated interpretation of subordination and dependence, addressing traditional indicators and renewing the perspective of the demands posed by these new forms of work[43].

However, this opinion has generated differing viewpoints, particularly questioning the Labour Directorate's authority to rule on various aspects. Specifically, criticism has been directed at the incorporation of different criteria that could weaken the concepts of subordination and dependence outlined in the Labour Code for classifying a relationship as employment-related[44]. On the

[39] Flacso Chile, op. cit., 102-113.

[40] Flacso Chile, op. cit., 110-134; J. Leyton and R. Azócar, op. cit., 180-190.

[41] J. Leyton and R. Azócar, op. cit., 190.

[42] Accessible at: https://www.dt.gob.cl/legislacion/1624/articles-122851_recurso_pdf.pdf.

[43] R. Palomo, Discusión sobre pronunciamiento de la Dirección del Trabajo respecto al sentido y el alcance de la Ley N° 21.431, sobre trabajadores de plataformas digitales. Octubre 2022, in *Cuadernos de Última Jurisprudencia Laboral*, 8, Pontificia Universidad Católica de Chile, Santiago, 2023, 95, https://drive.google.com/file/d/18xUXkG80ZfXriD2IqheuWua8VjZqvOH2/view (accessed May 20, 2025).

[44] C. L. Parada, Discusión sobre pronunciamiento de la Dirección del Trabajo respecto al sentido y el alcance de la Ley N° 21.431, sobre trabajadores de plataformas digitales. Octubre 2022, in Cuadernos de Última Jurisprudencia Laboral, 8.Pontificia Universidad Católica de Chile, Santiago, 2023, 96,

other hand, restrictions on independent workers' access to the labour protection procedure due to violation of fundamental rights are highlighted[45].
Towards the end of 2022, the Labour Directorate launched the First National Platform Inspection Program to monitor compliance with occupational health and safety regulations. During this inspection, several instances of non-compliance by the platforms were identified, including inadequate worker training, insufficient information on work risks, and a failure to provide protective equipment, among others[46].
In another vein, it has also been highlighted that the regulation introduces limitations to the collective rights of platform workers, especially the restriction on unregulated collective bargaining, which undermines workers' ability to organize and bargain collectively[47].
Furthermore, problems have been diagnosed regarding working hours, such as long hours, as well as variable remuneration that generates insecurity for workers and poses significant risks to the health and safety of workers[48].
At the same time, some authors have also expressed their critical view regarding the deficiencies of the Law in the protection of independent workers, especially in the area of social security[49].
The workers have also perceived this critical context of significant challenges since they feel that the Law does not protect them adequately and that there is a widespread lack of knowledge about their rights[50].
A report from the Consejo Superior Laboral acknowledges the debates and differing opinions regarding the effectiveness of the Law and its impact on labour relations. It notes that the predominant type of contract is independent employment, with a lack of formality that Law 21,431 has yet to address. This factor influences these workers' difficulties in accessing social security and occupational health and safety. At the same time, it highlights the lack of sufficient information to verify compliance with the obligation to pay the minimum wage for these types of workers, as enshrined in the Law. Regarding

https://drive.google.com/file/d/18xUXkG80ZfXriD2IqheuWua8VjZqvOH2/view (accessed May 20, 2025).
[45] J. Leyton and R. Azócar, op. cit., 190.
[46] Consejo Superior Laboral, op. cit., 38.
[47] J. Leyton and R. Azócar, op. cit., 188.
[48] J. Leyton and R. Azócar, op. cit., 167; Fairwork, Fairwork Chile Ratings 2024: Labour Standards in the Platform Economy, Santiago, Chile, Oxford, United Kingdom, Berlín, Germany, 2024, https://fair.work/en/fw/publications/labour-standards-in-the-platform-economy/ (accessed May 15, 2025); Flacso Chile, op. cit., 114-132.
[49] Y. Pinto, op. cit., 2-16.
[50] Flacso Chile, op. cit., 101-110.

working hours and schedules, this body also highlights an increase in working hours following the Law's entry into force[51].

4.2. The Case of Uruguay: Judicial Interpretations and the New Regulatory Landscape

4.2.1. Trends in the Judicial Classification of Platform Workers and Analysis of Labour Protections Granted by Courts

In the Uruguayan case, the lack of specific legislative regulation for platform work until February 2025 caused labour justice to assume a significant role in legally defining the relationship between workers and platforms companies. Specifically, legal claims by platform workers have been concentrated in the delivery and passenger transport sectors. Between 2015 and 2024, Uber was the company most frequently sued, with 205 labour claims filed by drivers who considered dependent workers[52].

The unique feature of these labour lawsuits is that, in most cases, they are decided in a second instance before one of the four Labour Courts of Appeals in Uruguay. These courts have upheld a uniform interpretation, classifying Uber drivers as dependent workers and, therefore, subject to labour law protection.[53]

To support this conclusion, the Courts relied on the defining elements of an employment relationship: personal performance of work, remuneration, alienation, and subordination. Additionally, all the Courts cited the ILO Employment Relationship Recommendation, 2006 (No. 198), as a significant normative source. This standard allows the existence of an employment relationship to be determined primarily by considering the facts of the work performance and remuneration, above and beyond contractual formalities.

Regarding subordination (a central element of the debate in these cases), the Courts emphasized its adjustment to new labour realities. They dismissed the freedom of connection as a determining factor, focusing instead on the control exercised during the execution of the service. It was found that Uber exercises a power of direction and control through the unilateral setting of prices and conditions of service, the management of trips, the user rating system, and the imposition of Community Guidelines with mandatory instructions for action. Uber's power to deactivate or restrict access to the application was equated to

[51] Consejo Superior Laboral, op. cit., 16-22.
[52] Observatorio de Relaciones Laborales, op. cit., 15-16.
[53] For example, TAT 1er Turno, Sent. 111/2020, 03.06.2020; TAT 2do Turno, Sent. 151/2022, 17.08.2022; TAT 3er Turno, Sent. 131/2022, 02.06.2022; TAT 4to Turno, Sent. 233/2024, 13.11.2024.

a suspension or dismissal, demonstrating a disciplinary power typical of an employer.

Regarding the integration of workers into an external organizational structure, the courts determined that Uber is a transportation company and that the driver is an indispensable link in its production chain. Uber's profits directly depend on providing rides, demonstrating that its activity is not limited to intermediation. The prohibition on establishing contact between the driver and the user outside the application and Uber's exclusive customer base management reinforce the worker's alienation and integration into the platform's organization.

Regarding the issue of non-assumption of risks and benefits, it was established that while drivers provide the vehicle and cover its costs, Uber provides the fundamental tool (the platform and the brand), controls the price of the service, manages requests, and directs charges to users. It was argued that drivers lack entrepreneurial initiative, and their supposed freedom is merely apparent since they yield to algorithmic control.

The consistent classification of employment status by the courts has directly impacted the extension of the protections provided by labour law for these workers. This has allowed them access to a series of benefits and rights previously denied to them under the guise of a civil or commercial relationship. The classification of dependent workers grants drivers the right to receive all salary components inherent to an employment relationship, including annual leave, vacation pay, and Christmas bonuses. The determination that Uber is a transportation company is the element that enables the application of all sectoral labour regulations agreed upon within the scope of the Wage Councils[54], along with the recognition of other benefits such as attendance and seniority bonuses.

Despite this clear jurisprudential trend, the protection model based on judicial claims presents challenges and difficulties.

The main weakness is the lack of universal protection for all platform workers. Indeed, to obtain the protection guaranteed by labour standards, each worker is forced to initiate an individual judicial claim and subsequently obtain a favourable judgment. This process takes an average of one year, and despite being free of charge, there are associated costs (mainly due to the need to submit the claim in paper format and with a copy for each party involved). At the same time, there is the risk and uncertainty that the worker will be deactivated by the platform after initiating the claim, potentially depriving them of their source of income (which, in some cases, is their only source of

[54]TAT 1er Turno, Sent. 237/2024, 27.11.2024; TAT 2do Turno, Sent. 151/2022, 17.08.2022; TAT 3er Turno, Sent. 131/2022, 02.06.2022; TAT 4to Turno, Sent. 233/2024, 13.11.2024.

income). All of this can be daunting for the worker, creating a barrier to accessing justice for many, especially those in situations of greater economic or migratory vulnerability.
Additionally, potential disparities in protection may occur from one court case to another, as the specifics of the evidence presented in each trial can lead to different conclusions regarding the benefits to which the worker is entitled or the quantification of the amounts. The above, combined with individualized litigation, can generate legal uncertainty for all platform workers[55] since the effectiveness of protection depends mainly on the individual capacity to litigate and the evidence that can be gathered in each judicial process.

4.2.2. Key Features of Recent Regulatory Intervention

In contrast to the predominantly judicial protection model that has characterized platform work until now, Uruguay has taken a step toward regulatory intervention by enacting Law 20,396 in February 2025. This Law aims to create a specific legal framework for platform work and establish minimum levels of protection for workers, ensuring fair, decent, and safe working conditions.
It also introduces definitions of what is meant by a digital platform and companies that own digital platforms, referring to computer programs and procedures that connect customers with workers, facilitate goods delivery services or paid urban passenger transportation performed within the national territory, and may participate in setting the price or the methods of performing the service. The scope of the application covers all workers who perform these tasks, regardless of the legal classification of the relationship (employee or independent).
Among the provisions of this new Law, the transparency of algorithms and monitoring systems stands out. Companies must respect the principles of equality and non-discrimination when implementing algorithms. They are also required to inform workers about the existence of automated monitoring systems to control, supervise, or evaluate performance, as well as about the existence of automated decision-making systems that affect their working conditions, including access to assignments, income, health and safety, working hours, promotion, contractual status, and account restriction, suspension, or termination. Furthermore, workers have the right to obtain an explanation

[55] ILO, Decent work in the platform economy. MEDWPE/2022, International Labour Office, Geneve, 2022, 28, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40relconf/documents/meetingdocument/wcms_855048.pdf (accessed May 22, 2025).

from the company regarding any automated decisions that significantly affect them, and companies must provide access to a designated contact person to discuss and clarify these decisions.
The regulation also establishes that the terms and conditions must be transparent, concise, and easily accessible, and the contracting party must be accurately identified with reasonable advance notice of any changes. The Law prohibits unfair terms that unjustifiably exclude the company's liability or prevent remedies and establishes the jurisdiction of Uruguayan courts in international matters when the claimant is an employee domiciled in Uruguay.
Regarding occupational health and safety, the Law requires companies to assess the risks posed by automated systems to worker safety and health, introduce appropriate preventive and protective measures, and prohibit systems that exert undue pressure on workers. Companies must also train workers before starting the employment relationship, including on traffic regulations, personal safety, and health and hygiene for transportation and delivery.
For dependent work, the Law defines working time as the entire time the worker is available from when they log in to the application until they log out, excluding pause mode. A weekly limit of 48 hours is set on a single platform, and remuneration may be based on time or production, with a value proportional to the national minimum wage for piecework or per hour of work.
For self-employed workers, the Law includes these workers in occupational accident and occupational disease insurance. It also allows self-employed workers to opt for a special tax system, with access to social security benefits. An interesting development is the recognition of the right of self-employed workers to exercise freedom of association and to bargain collectively with the platform company, allowing them to sign agreements more favourable than the Law, applicable to signatories or members of associations.
The Ministry of Labour and Social Security will be responsible for verifying and monitoring compliance with this Law and the related labour and social security regulations, with the authority to conduct inspections and impose sanctions. The law took effect on May 13, 2025, and the executive branch developed it on July 8, 2025.

4.2.3. Potential Impact and Challenges of the New Regulation

The potential impact and effectiveness of the Law will depend on various factors, and its implementation will certainly face several challenges.
Since the Law allows two forms of hiring platform workers (dependent and independent), from a labour protection perspective, the potential it offers for

formalizing employment relationships in the sector (in the sense dictated by case law) is relatively minor. This is because, in the absence of any regulatory imposition or criteria to adequately determine the relationship between workers and platforms, it is highly likely that companies will not modify their model and that independent work will continue to prevail in practice. This is one of the drawbacks of regulatory models such as those in Chile and Uruguay, which limit themselves to guaranteeing minimum levels of protection for all workers, regardless of the employment relationship they establish with companies. Therefore, the final determination of the nature of the relationship will continue to be a point of potential conflict.

On the other hand, regulation of algorithmic transparency and monitoring systems could mitigate the opacity that drivers and delivery workers experience daily, where algorithmic manipulation and discrimination are recurring suspicions.

Furthermore, in terms of health and safety at work, mandatory training could clearly improve working conditions and reduce risks in work performance.

On another note, the fact that self-employed workers have the right to exercise freedom of association and collective bargaining is potentially significant, as it could remedy the weakness in terms of collective organization in the sector and the impossibility of collective bargaining in practice.

However, the implementation of Law 20,396 will not be without challenges.

First, as stated, in practice, the self-employment model could prevail, with the risk of progressive de-employment, as observed in other contexts.

Second, a significant challenge will be the effectiveness of regulatory compliance. While the Law grants the General Inspectorate of Labour and Social Security the authority to verify and monitor compliance, the Chilean experience shows that oversight is complex due to the dispersed nature of platform work and the need for oversight tools adapted to digital environments.

Another challenge will be overcoming the barriers to access to justice and the legal uncertainty that characterizes the purely judicial model. While the new Law establishes minimum rights for workers, the lack of universal protection and the need for each worker to file individual claims to assert their full rights will continue to be an obstacle for those with fewer resources or knowledge.

Finally, although the Law prohibits unfair terms and establishes the jurisdiction of Uruguayan courts to resolve disputes between workers and platforms, the practice could generate new forms of circumvention or resistance by platforms.

4.3. Comparative Overview of the Findings

Analysing regulatory and judicial approaches to platform work in Chile and Uruguay reveals a panorama of divergent responses, each with strengths and challenges in protecting labour rights.

Regarding worker classification and the scope of regulation, Chile has introduced a framework that formally distinguishes between dependent and independent platform workers, seeking to regulate both within the Labour Code. However, this duality has generated criticism from academia, which argues that the Law could foster "de-laborization" and precariousness by introducing attenuated protection. In Uruguay, jurisprudence prior to the Law had already established a unanimous tendency to classify Uber drivers as dependent workers, analysing different employment indicators and ILO Recommendation 198. The new Law, while also defining and applying to both types of platform workers (dependent and self-employed), does not impose clear criteria for qualifying the relationship, which could perpetuate the prevalence of the self-employed model and limit the scope of comprehensive protection for a dependent worker.

Regarding the protection of labour rights, Chile has incorporated specific rights for both types of workers into its Law and common standards on information, data protection, non-algorithmic discrimination, training, and collective rights. However, academia criticizes that, despite these provisions, independent workers lack robust protection in areas such as social security. The Consejo Superior Laboral has reported that one year after Law 21,431 came into force, long working hours, variable remuneration that generates uncertainty and risks to health and safety, and a widespread lack of awareness of workers' rights persist. In Uruguay, court rulings, when declaring labour status, extend to drivers' rights such as annual leave, vacation pay, Christmas bonuses, and attendance and seniority bonuses. The recent Law 20,396 seeks to enshrine minimum rights for all platform workers, including access to social security benefits and explicit recognition of freedom of association and collective bargaining for the self-employed. However, unlike the full protections previously granted by case law when defining labour status, this Law does not completely equate their rights to those of traditional dependent workers. Instead, it does introduce specific new rights for this class of workers that general labour regulations had not provided for, such as algorithmic transparency, the right to an explanation regarding automated decisions, and the jurisdiction of labour courts to resolve disputes between workers and platforms.

Regarding the viability of the application and compliance, both models face challenges. In Chile, oversight by the Labour Directorate is hampered by the

lack of specific tools for platform work and the absence of a mandatory registry of contracts for independent contractors. Although an opinion has been issued to interpret the element of subordination and oversight programs implemented that have detected non-compliance, their effectiveness is limited. In Uruguay, while consistent in its interpretation, the judicial model results in a lack of universal coverage of protections since it is obtained on a case-by-case basis after a judicial process that must be initiated individually and can be costly. This creates a barrier to access to justice and can lead to disparities in protection due to the variability of evidence in each case, generating legal uncertainty. The new Law 20,396, by assigning powers to the Ministry of Labour to verify compliance, seeks to centralize and make oversight more systematic. However, the Chilean experience suggests that adapting oversight tools to the digital environment is key to effective oversight. The Law, by prohibiting unfair terms and guaranteeing the jurisdiction of Uruguayan courts, seeks to improve access to justice. However, the challenge will be to prevent new forms of evasion or resistance by platforms.

In short, while Chile has opted for a legislative framework that defines categories and rights but has faced criticism regarding its implementation and the scope of protection for the self-employed, which may prove insufficient, Uruguay has validated labour rights through the courts, extending full protections on a case-by-case basis. While introducing new specific rights, Uruguay's recent legislative intervention establishes a minimum floor that may be less comprehensive than individual protections obtained through the courts, raising questions about the uniformity and scope of protection in the future.

5. Conclusions

5.1. Summary of Key Findings, Benchmarking, and Lessons for Regulating Platform Work in Latin America

As initially proposed, this study has explored the regulatory and judicial approaches to platform labour in two countries, Chile and Uruguay, revealing a wide range of findings and responses that have implications for the protection of labour rights in the region.

Regarding the extent of Chile's regulatory achievements and the challenges of their implementation, Law 21,431 was a pioneering legislative effort in attempting to formalize platform work and establish a dual framework for dependent and independent workers within the Labour Code. While its initial objectives encompassed formalization, social security, data protection, and fundamental rights, its effectiveness has been compromised by regulatory compliance challenges and persistent criticism. The duality of legal

classification, particularly the status of the independent worker, has been pointed out as a potential factor of de-laborization that makes work precarious and fails to address unequal bargaining power. Several studies indicate that, despite the Law, long working hours and variable remuneration persist, generating uncertainty and risks to workers' health and safety. The Labour Directorate has detected non-compliance with training, risk information, and the provision of personal protective equipment, underscoring the difficulties of enforcing the Law in this digital economy sector.

Answering the question about how the Uruguayan judicial approach shaped labour protections and what changes the recent regulatory intervention introduces, it is concluded that the Uruguayan model, prior to Law 20,396, was characterized by solid and uniform labour jurisprudence. The Labour Courts of Appeal consistently classified Uber drivers as dependent workers, extending them all the labour benefits inherent to a dependent employment relationship. This judicial protection was based on the principle of the primacy of reality and the provisions of ILO Recommendation 198, reinterpreting the indicia of employment (subordination, alienation, personal service, remuneration, and continuity) to adapt them to algorithmic control and integration into the platform's organizational structure. However, the effectiveness of this judicial model has been limited, as it requires each worker to initiate an individual claim, which has generated barriers to access to justice, potential disparities in protection, and legal uncertainty. The recent Law introduces a framework that seeks to establish minimum levels of protection for all platform workers, whether employed or self-employed. While the Law enshrines innovative rights such as algorithmic transparency and the right to an explanation of automated decisions and also recognizes the right to freedom of association and collective bargaining for self-employed workers, it is important to note that, unlike the full protections previously granted by case law, the Law appears to enshrine a minimum level of rights that may be less comprehensive than the rights of an employed worker.

Finally, when considering the lessons learned from these experiences to improve the regulation of platform work in Latin America (and potentially beyond the region), the comparative analysis confirms that the effectiveness of regulation does not reside solely in the enactment of Law but in its ability to adapt to the dynamics of platform work and guarantee effective and widespread labour protection. The Chilean experience demonstrates that a legislated dual model, while proactive, can generate precariousness if it does not mitigate the inequality of power and informality inherent in the sector, resulting in limited protection in practice. The Uruguayan model, meanwhile, through judicial channels, achieved comprehensive protection in litigated cases, but its reliance on individualized judicialization revealed limitations regarding

the universality and uniformity of protection. The subsequent Uruguayan Law addresses these shortcomings by introducing specific rights and a minimum protection floor. However, it raises questions about the scope of protection compared to court rulings. These realities suggest that discussions on the regulation of platform work at the regional and global levels must carefully consider the implications of classification models (whether binary or intermediate), the need for robust regulatory enforcement mechanisms adapted to the digital environment, and the importance of reducing barriers to access to justice for workers. The results from both countries highlight a tension between the need for social protection and the dynamic characteristics of the platform economy, a dilemma present in various jurisdictions worldwide.

5.2. Implications for an International Regulatory Framework and Policy Recommendations

The findings derived from the comparative analysis between Chile and Uruguay offer valuable implications for designing and strengthening an international regulatory framework for platform work, in which the ILO should assume a central role.

National experiences demonstrate that, despite legislative or judicial efforts, challenges persist in fully guaranteeing decent work. The persistence of informality and unequal power, coupled with the transnational nature of platforms, underscores the need for international solutions that establish a minimum protection floor, avoiding a regulatory race to the bottom.

The ILO, which has already initiated a dual discussion on decent work in the platform economy, can and should lead the creation of international standards to guide Member States. A global framework must address not only worker classification but also a minimum safety net of rights and protections for all forms of work, including algorithmic transparency, personal data protection, rights related to working time and rest, remuneration, occupational health and safety, freedom of association, collective bargaining and collective conflicts and their means of prevention and resolution, and mechanisms that ensure the viability of regulatory compliance[56].

In this context, the following policy recommendations emerge aimed at improving the regulation of platform work in Latin America and beyond.

First, strengthening labour authorities' capacity is essential. This involves equipping labour inspectors with tools and resources tailored to the digital

[56] F. Rosenbaum Carli, El camino hacia la regulación internacional del trabajo mediante plataformas digitales offline: una propuesta normativa, in Labor, 1, Universidade de Santiago de Compostela, Spain, 2024, https://doi.org/10.15304/labor.id9670 (accessed May 26, 2025).

nature of platform work, including access to platform data and specialized training. Chile's experience with its inspection program has identified significant non-compliance, suggesting the need for regular monitoring and effective sanctions.

Second, it is recommended to promote the formalization of activities conducted in the digital economy, ensuring universal access to and coverage of social security.

Third, it is crucial to guarantee a minimum safety net of rights and protections for all forms of labour, especially regarding algorithmic transparency. Laws must go beyond mere enunciation, establishing clear and accessible mechanisms for workers to understand how algorithms affect their working conditions (assignment, compensation, evaluation, and sanctions) and for them to challenge unfair automated decisions.

Fourth, freedom of association and the right to collective bargaining must be strengthened for all platform workers, regardless of their formal classification. Regulations must ensure that worker organizations can establish, be recognized, and bargain collectively effectively without restrictions that limit their bargaining power or expose their leaders and supporters to retaliation. This implies the need to recognize union structures adapted to the characteristics of this type of employment and establish collective bargaining frameworks binding on platforms.

Finally, it is recommended that permanent tripartite social dialogue spaces between governments, companies, and worker organizations be institutionalized. These working groups are essential for identifying implementation challenges, adapting regulations to rapid technological developments and new business and work models, and building consensus on balancing sector flexibility, ensuring decent work, and protecting labour rights.

Acknowledgments

This work would not have been possible without the invaluable information and perspectives generously shared by distinguished Chilean professors and researchers. I sincerely thank Francisco Tapia, Rodrigo Palomo, Rodrigo Azócar, and Jorge Leyton, whose expertise and in-depth analysis of labour law and the regulation of platform work in Chile have substantially enriched this research. Also noteworthy is the contribution received in Uruguay, primarily from academics such as Juan Raso Delgue and Jorge Rosenbaum Rimolo. Their willingness to share their knowledge and the rigor of their previous work have been fundamental pillars for the development of this study.

Social Dialogue: An Essential Element of European Cohesion and Competitiveness

Gianfranco Brusaporci and Riccardo Fazioli *

Abstract. Globalisation and recent crises - including the COVID-19 pandemic, inflation, geopolitical conflicts, and rising raw material costs - have placed European competitiveness under severe pressure. This uncertainty disproportionately affects workers, as evidenced by the growing number of working poor across the European Union. In response, the European Commission is developing new strategies following the Mario Draghi report, while political debate on economic competitiveness intensifies. This paper argues that strengthening the social dimension of the European economic model is essential to address these challenges. Social dialogue and collective bargaining are not only mechanisms for improving wages, working conditions, and workers' rights but also strategic tools for enhancing the competitiveness of European companies. The European Pillar of Social Rights identifies social dialogue as a cornerstone of EU policy, reaffirmed by the Val Duchesse Tripartite Declaration of January 2024, which emphasizes its role in fostering social cohesion and democratic resilience. By analysing the central role of social partners at both European and national levels, this study highlights how coordinated actions, negotiations, and agreements can mitigate socio-economic risks and support sustainable growth. Particular attention is given to European Sectoral Social Dialogue, which enables tailored solutions for specific industries through joint initiatives and agreements. These sectoral mechanisms are critical for developing a competitive model that combines economic performance with social equity, ensuring that Europe remains globally competitive while safeguarding its social fabric and demonstrating that effective social dialogue is

* Gianfranco Brusaporci (Corresponding author. Email address: gianfranco.brusaporci@fisascat.it) is International Relations Officer of Fisascat-CISL and Adjunct Professor at the Catholic University of the Sacred Heart (Italy); Riccardo Fazioli is International Relations Officer of Fistel-CISL (Italy). This article was written in memory of Emilio Gabaglio, a pioneer of European trade unionism and a father of European social dialogue.

indispensable for reconciling economic objectives with social justice in the European Union. This article then advances the debate by highlighting the strategic role of sectoral social dialogue in fostering sustainable European competitiveness.

Keywords: *European sectoral social dialogue; Collective bargaining; European economic competitiveness; Participation; European cohesion; Social rights.*

1. Introduction

The current public debate is focused on European Competitiveness. The so-called Draghi Report which was presented in September 2024 starts with this statement: "Europe has the foundations in place to be a highly competitive economy. The European model combines an open economy, a high degree of market competition and a strong legal framework and active policies to fight poverty and redistribute wealth. This model has allowed the EU to marry high levels of economic integration and human development with low levels of inequality. Europe has built a Single Market of 440 million consumers and 23 million companies, accounting for around 17% of global GDP"[1]. Unfortunately, today, EU is asking itself how to keep and improve these conditions. The last years and recent events have highlighted the weaknesses of European competitiveness. Between 2000 and 2014 the EU lost 8% of the worldwide value added in manufacturing value chains[2] and at the same time working poor are increasing year by year passing from 8% up to 10% in 2017[3]. In 2022 around 95.3 million people, 22% of the population, were indeed at risk of poverty or social exclusion[4]. Thus, economic growth together with social inclusion, which has been representing an essential part of contemporary European history, is under attack. This study seeks to enrich our understanding of the current situation of European competitiveness and in particular the sectoral competitiveness link to the specific role of the European social dialogue as a key element to tackle emergencies and new challenges, such as the recent pandemic, the Russian Ukrainian War, the inflation, the increasing manufacturing and economic role of other international players, the demographic, green and digital transition, etc. This article is trying to contribute to the current public debate on European competitiveness by answering this research question: "Why European Sectoral Social Dialogue can

[1] See The future of European competitiveness - Part A, European Commission, 2024;
[2] See JRC, Technical Report on European Competitiveness, European Commission, 2021;
[3] Eurofound, European workers at risk of poverty, 2017;
[4] Eurostat, People at risk of poverty or social exclusion, 2023;

influence the European Competitiveness?". It presents a new study of European competitiveness using the literature of European social dialogue and sectoral collective bargaining trying to explain that a higher level of employee-participation will permit higher sectoral performance and resilience. The research frames its analysis around the concept of social dialogue which can improve the following aspects: a) better management towards changes; b) better management of conflicts; c) improvement of social inclusion processes and reduction of inequalities. The article is structured as follows. Section 2 reviews the relevant literature on European competitiveness pointing out the relevance of the economic sectoral dimension and the social dimension at the European and national level. In particular section 2.4 illustrates the theoretical innovation of adding a complementary framework to European competitiveness, assessing the concept of European Sectoral Competitiveness which links the sectoral economic dimension to the social one. In Section 3 the article demonstrates the theoretical framework analysing the current situation and its limits, providing empirical examples developed by the cross-sectoral European social dialogue and the national sectoral collective bargaining. Reinforcing European sectoral social dialogue, then, able to include both social dimension and sectoral dimension, the EU could rise its competitiveness. Our final section is devoted to a summary and discussion.

2. European Competitiveness and The Key Role of Social Dialogue

2.1. European Competitiveness: The Essence of The Economic and Sectoral Dimension

The recent pandemic of Covid-19, the new global scenario and the new challenges that the EU is facing have put under the spotlight the economic horizon of Europe. To be competitive the EU needs to value its social aspect and at the same time it should develop new sectoral policies to meet its ambitions.

Competitiveness is a multifaceted concept that gains clarity when analyzed through a sectoral lens. Indeed, each sector has different peculiarities, such as cost structure, technologies, and market dynamics[5]; each sector is involved in various global value chains and interconnected through the exchange of intermediate goods[6]; each sector can play a specific role in economic growth

[5] Kancs A. and Kielyte J., Analysing Sectoral Competitiveness: A Framework of Strategic Management, 2001;

[6] Marczak M. and Beissinger T., Competitiveness at The Country Sector Level: New Measures Based On Global Value Chains, 2018;

and job creation[7]. Thus, analyzing competitiveness at the sectoral level helps identify key sectors for economic development. Mario Draghi's report – "EU competitiveness. Looking ahead" (2024) - in particular in its detailed analysis of Part-B, pointed out that there is a need to focus on specific economic sectors which have tailored needs[8]. Draghi states, therefore, that European competitiveness is based on an essential sectoral dimension. Indeed, the sectoral dimension is crucial because it highlights the strengths and weaknesses of different industries, which aggregate to influence overall economic performance. Indeed, the sectoral dimension of the concept of competitiveness has been discussed also by various scholars such as Krugman, Porter and others. Paul Krugman's "Competitiveness: A Dangerous Obsession" (1994) critiques the overemphasis on national competitiveness, arguing that it can lead to misguided policies. Krugman suggests that focusing on sectoral competitiveness provides a more accurate and actionable understanding of economic performance, as it avoids the pitfalls of treating nations like corporations competing in zero-sum games[9]. Porter's "The Competitive Advantage of Nations" (1990) introduces the so-called "diamond model", which identifies four key attributes that determine national competitive advantage: factor conditions, demand conditions, related and supporting industries, and firm strategy, structure, and rivalry. Porter underscores that competitive advantage is often rooted in specific sectors where these attributes are most favorable[10]. Similarly, Enn Listra's "The Concept of Competition and the Objectives of Competitors" (2019)[11] discusses how competition and competitiveness are context-dependent, varying across different sectors and levels of analysis. Listra's framework helps to understand how sector-specific factors, such as market structure and competitive strategies, shape the competitive landscape[12]. Finally, it is important to mention also the Key Findings of the Global Competitiveness Index 2017–2018 developed by the World Economic Forum which further supports the sectoral dimension by identifying 12 pillars of competitiveness, such as infrastructure, macroeconomic stability, and innovation capability. These pillars vary

[7] Ketels C., Structural Transformation: A competitiveness-based view, 2017;
[8] See The future of European competitiveness - Part B, European Commission, 2024;
[9] Krugman P., Competitiveness: A Dangerous Obsession, Foreign Affairs, 73(2), 28-44, 1994;
[10] Porter M., The Competitive Advantage of Nations, 1990;
[11] Listra E., The Concept of Competition and the Objectives of Competitors, Procedia - Social and Behavioral Sciences, 213, 25-30, 2019;
[12] Listra E., op.cit., pp. 25-30;

significantly across different sectors, influencing their competitive dynamics and potential for growth[13].
With regard to this assumption, which indicates that the sectoral dimension is primary for improving economic competitiveness, we can say that European social dialogue represents a key element which can positively contribute to European competitiveness. It highlights then the importance of tailored solutions that address the unique challenges and opportunities within specific industries, ultimately contributing to a more robust, inclusive and sustainable competitive advantage for the broader economy.

2.2. Competitiveness: The Essence of The European Social Dimension

This section emphasizes the critical role of the social dialogue in the broader context of enhancing European economic competitiveness. The ongoing debate on this topic underscores that achieving higher competitiveness in Europe is not solely a matter of economic policies but also requires a strong foundation of European social dialogue. The involvement of social partners, such as trade unions, employers' associations, and other relevant entities, is essential for maintaining the stability and resilience of the European social model, which in turn supports economic growth and competitiveness. Grimshaw, Koukiadaki, and Tavora (2017)[14] assess, indeed, the importance of social dialogue for economic performance, emphasizing its benefits for businesses. Social dialogue fosters cooperation and trust between employers and employees, leading to more innovative and productive workplaces. Moreover, the document "Strengthening social dialogue in the European Union. In "An Economy that Works for People"[15] highlights the necessity of robust social dialogue mechanisms to manage fair transitions in the labor market and to strengthen collective bargaining at both the EU and national levels. This approach ensures that economic advancements do not come at the expense of social equity and workers' rights, thereby fostering a more inclusive and sustainable economic environment. In addition, the Porto Social Agenda[16] reaffirms the commitment to the European Pillar of Social Rights, emphasizing the importance of social cohesion and the active involvement of social partners in the recovery process. This agenda outlines specific actions to promote fair

[13] World Economic Forum, Key Findings of the Global Competitiveness Index 2017-2018, 2017;
[14] Grimshaw D., Koukiadaki A. and Tavora I., Social Dialogue and Economic Performance: What Matters for Business - A Review, International Labour Organization, 2017;
[15] European Parliament, Strengthening social dialogue in the European Union. In "An Economy that Works for People", 20 settembre 2024;
[16] European Council, Porto Social Agenda, 7 maggio 2021;

working conditions, social protection, and equal opportunities, which are crucial for a balanced and competitive European economy. At the Val Duchesse Summit (2024) EU leaders and social partners renewed their commitment to addressing economic and labor challenges through strengthened social dialogue[17]. This summit underscored the importance of collaborative efforts to tackle issues such as unemployment, skills mismatches, and the digital and green transitions, which are pivotal for enhancing Europe's competitive edge. Mario Draghi's report (2024) discusses the need for sustainable competitiveness, highlighting that economic resilience and innovation are deeply intertwined with effective social dialogue[18]. Draghi argues that fostering a resilient economic environment requires not only sound economic policies but also strong social frameworks that support innovation and adaptability in the workforce. Similarly, Enrico Letta's "Report on the Future of the Single Market" (2024) stresses the importance of a robust Single Market supported by effective social policies. Letta emphasizes that economic integration and competitiveness are significantly enhanced when social policies are aligned with market dynamics, ensuring that the benefits of economic growth are widely shared and contribute to social stability[19].

Thus, following the perspectives of these analysis and institutional documents we can state that a real integration of social dialogue into the economic framework is indispensable for increasing the level and the resilience of European competitiveness. By ensuring that workforce and social partners are actively involved in shaping economic policies, Europe can achieve a more balanced and sustainable growth trajectory that benefits all its citizens. In particular, to enhance its competitiveness the EU should relaunch the various European sectoral social dialogues.

2.3. Competitiveness: The Essence of the National Social Dimension

With regard to the value of the social dimension at national level, it is crucial to emphasize the importance of sectoral collective bargaining, where social partners help to effectively manage changes, conflicts, emergencies, and adopt an inclusive approach while maintaining the social cohesion of a territory. According to Traxler and Brandl (2012), indeed, sectoral collective bargaining structures significantly influence macroeconomic performance by balancing

[17] Val Duchesse Tripartite Declaration, signed by the European social partners, the European Commission and the Belgian Presidency of the Council of the European Union, 2024;
[18] See The future of European competitiveness - Part A, op.cit.;
[19] Letta E., Report on the Future of the Single Market, European Commission, 2024;

productivity differences across sectors[20]. This balancing act is essential in ensuring that sectors exposed to international competition remain competitive while protecting those that are more sheltered. Brandl and Traxler (2010) highlight that economic and institutional determinants play a crucial role in labor conflicts, which can be mitigated through effective collective bargaining[21]. By addressing these conflicts proactively, collective bargaining helps maintain industrial peace and stability, which are vital for economic growth and competitiveness. Moreover, Traxler (2003) discusses how the centralization or decentralization of bargaining impacts macroeconomic performance and control over employment relationships[22]. Specifically, centralized bargaining can lead to more uniform wage structures and working conditions, which can reduce inequality and improve overall economic performance. Braakmann and Brandl (2016) find that hybrid collective bargaining systems - which combine elements of both centralized and decentralized bargaining – can positively impact company performance in Europe[23]. These systems allow for flexibility and adaptability, enabling companies to respond more effectively to economic changes and challenges. Brandl and Bechter (2016) analyze how the economic crisis has transformed collective bargaining systems in the EU, leading to more hybrid and multi-layered structures[24]. These transformations have made collective bargaining more resilient and capable of addressing complex economic challenges. Similarly, Pernicka (2021) uses a social field perspective to explain the forces of reproduction and change in collective bargaining[25]. This perspective highlights the dynamic nature of collective bargaining, which evolves in response to social and economic pressures and challenges. Finally, Garnero (2021) provides evidence that collective bargaining can reduce unemployment and wage

[20] Traxler F. and Brandl B., Collective Bargaining, Inter-Sectoral Heterogeneity and Competitiveness: A Cross-National Comparison of Macroeconomic Performance, British Journal of Industrial Relations, 50(1), 73-98, 2012;
[21] Brandl B. and Traxler F., Labour Conflicts: A Cross-national Analysis of Economic and Institutional Determinants, 1971–2002, European Sociological Review, 26(5), 519-540, 2010;
[22] Traxler F., Bargaining (De)Centralization, Macroeconomic Performance and Control over the Employment Relationship, British Journal of Industrial Relations, 41(1), 1-27, 2003;
[23] Braakmann N. and Brandl B., The Efficacy of Hybrid Collective Bargaining Systems: An Analysis of the Impact of Collective Bargaining on Company Performance in Europe, MPRA Paper No.70025, 2016;
[24] Brandl B. and Bechter B., The Hybridization of National Collective Bargaining Systems: The Impact of the Economic Crisis on the Transformation of Collective Bargaining in the European Union, Economic and Industrial Democracy, 37(1), 9-28, 2016;
[25] Pernicka S., Forces of Reproduction and Change in Collective Bargaining: A Social Field Perspective, 2021;

inequality, highlighting the benefits of coordinated bargaining systems[26]. By ensuring fair wages and working conditions, collective bargaining contributes to social cohesion and economic stability.
Sectoral collective bargaining, therefore, is an essential element for enhancing European competitiveness. It not only helps manage economic and social changes but also promotes a more flexible, inclusive and equitable labor market.

2.4. A New Framework for Assessing "European Sectoral Competitiveness"

As we have discussed above, the relevance of the social dimension in European economics is underscored by various academic studies and official documents from European institutions. The social dialogue represents a practice which not only addresses immediate labor market issues but also contributes to the broader goal of sustainable economic growth[27]. Moreover, we have seen the importance of the sectoral dimension when we evaluate the competitiveness of an economic system. By combining these two aspects, we can therefore say that European Sectoral Social Dialogue should be strengthened to achieve higher competitiveness for European industries and economy. It will support fair transitions in the face of global challenges, ensuring that the European workforce is resilient and adaptable. Figure 1 below represents the central role of the European Sectoral Social Dialogue.

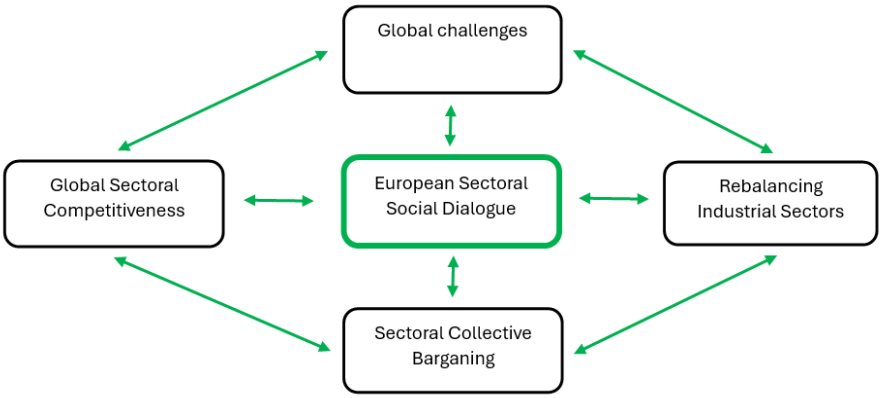


Figure 1 (Own elaboration)

[26] Garnero A., The impact of collective bargaining on employment and wage inequality: Evidence from a new taxonomy of bargaining systems, European Journal of Industrial Relations, 27(2), 185-202, 2021;
[27] European Commission, Sustainable economic growth and social dialogue, 2023;

In the face of global challenges, such as the recent pandemic, economic fluctuations, technological advancements, and environmental concerns, the need for robust and adaptive strategies to maintain and enhance global sectoral competitiveness has never been more critical (see Figure n.1). One of the pivotal mechanisms that can substantially address these challenges is the European Sectoral Social Dialogue. It serves as a cornerstone for fostering cooperation between employers and workers - with responsibility, vision and commitment - ensuring that both parties can navigate the complexities of the modern industrial and economic landscape.

A consolidate European Sectoral Social Dialogue, capable of defining and framing the priorities of the main European economic sectors, can indeed play a crucial role in rebalancing these sectors by promoting fair and equitable working conditions, which in turn enhances productivity and innovation. This dialogue should be increasingly instrumental in shaping solutions that are responsive to the needs of various sectors, thereby ensuring that European industries remain competitive on a global scale.

A key component of this dialogue is also the national sectoral collective bargaining. European Social dialogue and collective bargaining are more and more intertwined. They contribute to the improvement of working conditions, and various employment terms at the sectoral level, ensuring that agreements are tailored to the specific needs and challenges of each industry. By fostering a culture of negotiation and compromise, sectoral social dialogue and collective bargaining help to create a stable and predictable industrial environment, which is essential for long-term competitiveness. This concept is also mentioned in the new Directive of the EU on the adequate minimum wages in the European Union (2022).

Thus, an effective European Sectoral Social Dialogue is an indispensable tool for enhancing global sectoral competitiveness. It ensures that European industries can meet global challenges head-on, fostering a competitive, innovative, and socially responsible industrial landscape. In figure 2 below we show our thesis referring to the conceptual framework of Goertz (2006)[28]. This new framework is explained in light of the current political and economic situation of Europe. Our thesis can be explained by distinguishing three different levels of concepts. The first level identifies the main phenomenon of the study, the second represents the definition or the specification of the first level, while the third one is the operationalization of each attribute specified on the second level. The concepts are delineated with a scale down, from the more abstract to the more concrete. Under these conditions, our main contribution can be presented as follows:

[28] Goertz G., Social Science Concepts: A User's Guide, Princeton University Press, 2006;

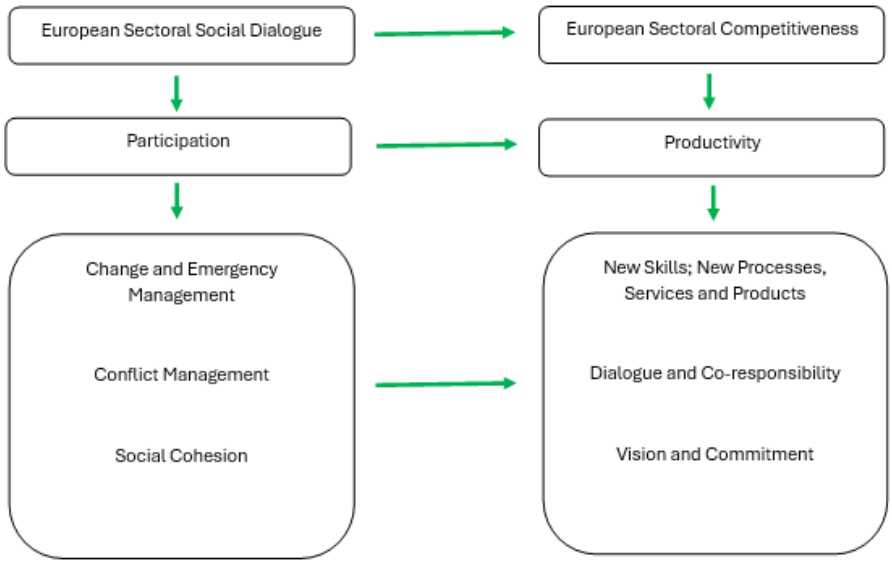


Figure 2 (Own elaboration)

Our conceptual framework, therefore, aims to demonstrate that there is a compelling correlation between a strong European sectoral social dialogue and effective European sectoral competitiveness. This is because we consider social dialogue as an essential aspect of employee participation which fosters productivity. In 1990, Biagi underlined that participation and social dialogue represent key elements in addressing technological innovations. He also stressed the relevance of a cultural transformation in society to embrace changes in the labor market[29]. Krekel, Ward and De Neve (2019) studied the correlation between employee well-being and firm performance[30]. In their study, the meta-analysis of 339 independent cases demonstrated that employee well-being is deeply correlated with customer satisfaction and reduced turnover, both of which positively influence productivity. Galeazzo, Furlan and Vinelli (2021) explored the role of employee participation and managerial authority in the context of continuous improvement initiatives[31]. Employee participation was identified as a key factor for the success of continuous improvement initiatives, which in turn improve productivity. Moreover, a

[29] Biagi M., La nuova disciplina del lavoro a termine, Ipsoa, p.49, 2002;
[30] Krekel C., Ward G. and De Neve J., Employee Well-being, Productivity, and Firm Performance, Saïd Business School Working Paper 2019-04, 2019;
[31] Galeazzo A., Furlan A. and Vinelli A., The role of employees' participation and managers' authority on continuous improvement and performance, International Journal of Operations & Production Management, 41(13), 34-64, 2021;

statistic developed by Gallup (2013) revealed that companies with higher employee engagement experienced a 21% boost in productivity compared to those with lower engagement levels[32]. The famous theory of Total Quality Management (TQM) also highlights the relevance of the engagement of the employees. Edwards Deming is the author who has most emphasized the crucial role of workers in TQM[33]. He stressed that quality cannot be achieved without the active involvement of all members of the organization. Deming promoted the idea that workers must be trained, motivated, and involved in decision-making processes to continuously improve quality. In particular he defined the so-called "Deming Cycle" or PDCA (Plan-Do-Check-Act), which encourages a systematic and collaborative approach to continuous improvement. This cycle requires the contribution and participation of all employees to identify and solve quality problems[34].
Finally, analysing the last level of the model, we can state that positive employee participation represents a higher level of change and emergency management. This translates into new skills and competences among workers of the sector which can foster major innovations within the specific industry. In addition, participation means a higher level of conflict management and better social cohesion which can lead effective co-responsibility between employers and employees, increasing commitment, improving the quality of work and reducing turnover[35].

3. Examining the Current Context and New Proposed Framework

3.1. The European Cross-Sectoral Social Dialogue: A Solid Instrument to Match Only Broad Needs

The so-called cross-sectoral European social dialogue - involving on the side of the European trade unions ETUC and on the side of the employers in the EU, Business Europe (private sector), UEAPME (SMEs) and CEEP (public employers) - is able to come up with concrete initiatives, analysing issues that

[32] Gallup, Employee engagement and productivity statistics. State of the Global Workplace: Employee Engagement Insights for Business Leaders Worldwide, Gallup Press, 2013;
[33] See Deming E. W., Out of the Crisis, Center for Advanced Engineering Study, Massachusetts Institute of Technology, 1982 and The New Economics for Industry, Government, Education, MIT Press, 1993;
[34] Deming E. W., The New Economics for Industry, op.cit.;
[35] Cheryl M.T., Your Guide to Employee Participation: What It Is and How To Increase It, AIHR, 2024;

are deemed to be of interest to all parties[36]. It has a positive perspective to impact all industries and the entire employed population in Europe, but it has the limitation of not being able to address the specificities of single sectors and therefore improve their competitiveness.

The importance of social dialogue as a democratic instrument capable of regulating relations between workers and employers, meeting the needs of both, finds one of its highest expressions when it has a cross-sectoral focus. In this case, the decisions that are the result of the confrontations between the parties transversally involve all economic sectors, laying the regulatory foundations on different and diverse aspects of working life.

The cross-sectoral European social dialogue plays an essential role in responding to the general social, environmental, economic and technological changes that arise, and in moving forward in the essential process that is European integration. It has produced important results, but it is not able to tailor specific solutions to the sectoral value chains. Social partners and their involvement in the cross-sectoral European social dialogue have evolved positively, producing important outcomes over time such as: frameworks of action, autonomous framework agreements and work programmes linked to the negotiating relationships. Among the main framework agreements resulting from the European social dialogue, mention must be made of the Framework Agreement on stress in the workplace (2004), the one on Harassment and Violence at Work (2007), the on Teleworking (2020), the one on Active Ageing (2017) and finally the one on Inclusive Labour Markets (2010). Here it should be recalled that these agreements between the European social partners could have, but did not, become a source of European legislation, in fact through the transposition of the agreement into a European directive, since the Treaties fully legitimise the fruit of the European social dialogue as a productive source of law (the agreements mentioned above remained agreements between the parties, but were implemented at the national level, by the national organisations belonging to the signatory parties)[37]. It should be noted that among the framework agreements transposed into European directives, there

[36] See ETUC, Business Europe, UEAPME, & CEEP. (2022, 2023, 2024). Cross-sectoral European social dialogue agreements;

[37] See Lapeyre J., The European Social Dialogue, The history of social innovation (1985-2003), European Trade Union Institute, 2018;

is the agreement on parental leave[38], the agreement on part-time work[39] and also the agreement on fixed-term employment contracts[40].
In addition, a number of so-called action frameworks were negotiated, which have less binding potential than framework agreements. The topics covered by these agreements are various: youth employment, vocational skills and the issue of gender equality. With respect to the latter agreements, it must be emphasized that their potential lies in outlining guidelines of political priorities for action that are monitored. Finally, again at the level of the European social partners, so-called 'work programmes' have been concluded, which have had a positive impact, broadening the scope compared to the above-mentioned agreements and dealing with subjects such as digitalization, the topic of company restructuring, and also the involvement of the social partners in the European Semester.
The issues addressed between the European social partners have, as we have listed, produced tangible results, but it remains decisive to remember that the legitimacy of these democratic subjects has been consolidated over the years and must be reaffirmed by strengthening trade union and employers' action to produce real changes by implementing the agreements concluded. The cross-sectoral European social dialogue is well structured and can really respond to issues that cut across many sectors, but the challenges for the future of Europe, which put European competitiveness at the centre, cannot afford the specific issues of interest of an increasingly specialised economy and sectoral value chains that are increasingly integrated at a global level. As we mentioned above, the European sectoral social dialogue can therefore be a key to responding to the lack of coordination that exists in Europe with respect to sectoral needs and new challenges, bringing to the attention of the European institutions the solutions that are deemed suitable to contribute to the growth of a given sector.

3.2. The Italian "CCNLs": A Solid Instrument to Tailor Sectoral Needs but Only at the National Level

In accordance to our conceptual framework, national sectoral collective bargaining can afford the specific needs of a sector facilitating the innovation and the adaptability of the companies, improving their productivity and

[38] Directive 2010/18/EU. Implementation of the framework agreement on parental leave concluded by UNICE, CEEP, and ETUC;
[39] Directive 1997/81/EC. Implementation of the framework agreement on part-time work concluded by UNICE, CEEP, and ETUC;
[40] Directive 1999/70/EC. Implementation of the framework agreement on fixed-term work concluded by UNICE, CEEP, and ETUC;

standardizing the working conditions, but it has the geographical limitation of being valid in a single country, which is not sufficient to address global challenges. If we look at the sectors that drive Europe we see different levels of collective bargaining in individual countries. In Italy we have an excellent coverage which is over 90% with multiple contracts covering all economic sectors. In particular, in Italy we see a strong collective bargaining, capable of guaranteeing workers' rights, which also enters into the organisation of work and which, albeit with differences that depend on the sector's performance, provides a response in times of crisis by trying to keep employment levels intact, and provides a response in times of expansion of the sector by trying to redistribute economic and welfare resources where possible.

Here below we analyze a few examples of Italian CCNLs or sectoral collective bargaining agreements which have recently innovated and adapted the sectors to the needs and the changes of the market. The National Collective Labour Agreements (the so-called CCNLs) give precise answers to the sector at national level, for both employers and employees. A CCNL can regulate, for example, new professional figures, wages, working hours, and at the same time define new elements that must meet the needs of companies such as the application of new technologies, the needs of training or retraining, development of new tasks and new work organisational models.

CCNLs look at the innovative aspects that can make a sector grow, therefore, as we said, responding to the needs of the parties: on the trade union side to protect and renew rights; on the employer side to provide answers related to the organisation of work, enabling the companies in the sector to grow. For example, it is worth mentioning a recent renewal of the CCNL in the dubbing sector (2023), where an important article was included that refers to artificial intelligence and provided an important principle of legitimacy with respect to the issue of artificial intelligence[41]. With this article, trade unions and employers state that technological innovations are bringing about major technical changes in the dubbing industry. It is reaffirmed that it is necessary to safeguard the creative aspects, also with respect to copyright, and the working conditions of workers. The parties agreed on the need to create rules with respect to the transfer of copyright, in compliance with national and European legislation. A fundamental principle is also made explicit, according to which the use of the voice actor's voice is only lawful with reference to the audiovisual product for which it was created, and the use, modification, or reworking of the voice to develop or train artificial intelligence algorithms is prohibited. This agreement was followed by campaigns and debates in the sector at the Italian national

[41] See National Collective Labour Agreements Dubbing Sector (2023);

level, aimed at protecting the artistic and professional heritage of workers in the dubbing sector. Public debates were promoted by social partners, but there were also meetings at the Parliamentary Commission for Culture, Science, and Education. An important concrete initiative was the one that led to the Mollicone Resolution[42]; this resolution focuses on the use of artificial intelligence and new technologies in the dubbing sector - recognized as an area of Italian artistic excellence - with a commitment to implement all necessary measures to protect workers' rights, with particular reference to copyright and related rights. This new provisions of the CCNL in the dubbing sector have been cited as a positive example in Brussels during the debate on European social dialogue in the audiovisual sector in June 2025.

Another concrete example that can be cited comes from the paper industry. In fact, in 2021 the renewal of the Paper and Paper Converting Collective Labour Agreement in Italy, saw the inclusion of the concepts of 'polyfunctionality' and 'polyvalence', referring to those workers who, thanks to their professionalism and in response to company needs, can concretely perform diversified activities not contemplated in the contractual declaratory of the level and also perform activities conceptually different from those normally performed and envisaged by the professional profile[43]. Thanks to the implementation of these concepts, on the one hand workers have obtained higher salaries, thanks to the recognition of specific task allowances, while companies have obtained greater flexibility in the use of human resources within the work organisation. In this CCNL, an important element related to the issue of productivity in the sector, which varies over time with peaks and troughs due to the normal evolution and seasonality of the market, is the element of flexibility of workers on work shifts. Here we see how the trade unions, in order to meet company needs, came up with the conception of a different organisational structure of shift work (specifically four shifts per day, for six hours per employee, over six days per week). This contractual element has the potential to increase employment - often with fixed-term contracts with the possibility of creating pools of manpower useful to companies in the sector - increase productivity by allowing maximum utilisation of production facilities, and increase wages (in fact considering a decrease in the number of hours worked for the same wage). These innovative changes introduced by the CCNL were welcomed, and several companies have implemented them. One concrete example is the one of Cartiere del Guarcino, a major company in the sector, which has adopted

[42] Mollicone Resolution, resolution number 7-00290 on the protection of copyright with particular reference to the use of new technologies - Chamber of Deputies, VII Commission - April 2025;

[43] National Collective Labour Agreements Paper and Paper Converting Industry (2021);

flexible staffing models to better adapt to its production needs, resulting in improved productivity and increased professionalism among the workers involved.
Furthermore, we can mention some of the innovative elements regulated in the last renewal of the so-called CCNL Confcommercio on Tertiary activities, Distribution and Services (2024), which has also tailored the new market needs. Indeed, it introduced new professional profiles to meet the emerging needs of the European labor market standard related to the ICT sector[44]. In particular, the new ICT classifications represent a significant evolution compared to the previous system. While the old classifications were based on generic levels (from 1st to 7th) and traditional roles such as technical employee, programmer, or system administrator, the new ones are founded on the European e-CF framework and recognize specialized roles such as Prompt Engineer, AI Engineer, DevOps, Cloud Architect, and Cybersecurity Specialist. The criteria for classification are no longer seniority or role, but competence, responsibility, and technological impact. Companies such as Retelit, ADP Italia, Tinexta Cyber, Var Group, and WSP Italia have adopted these changes, often in contexts of merger, or contract renewal. Various internal documents and company collective bargaining agreements highlight the intention to harmonize ICT classifications and annually monitor the correspondence between role and classification. Among the different new regulated elements of CCNL Confcommercio there are also the flexible clauses for part-time work which have been modified to offer greater flexibility. These new clauses include: The possibility to increase working hours (with additional pay for the extra hours); the ability to change the working hours following a notice; and the right of the employee to report the agreement in specific cases, such as unilateral changes to working conditions without adequate notice.

3.3. European Sectoral Social Dialogue: A Key Instrument to Be Reinforced

European economics, and in particular some of its sectors, such as automotive, metallurgical and telecommunication industries, due to their internal fragmentation, suffer from global competition and the new technological and environmental challenges. Although the political trajectory seems clear thanks to EU policies, there is no adequate economic and social response. A rapid change in key European economic sectors is needed to respond to the new

[44] National Collective Labour Agreements Tertiary Activities, Distribution, and Services (2024);

global system. Thus, the Digital Markets Act[45], the Digital Services Act[46], the AI Act[47], the European Packaging Regulation[48], the Green Homes Directive[49] and the Automotive Action Plan[50], which aims at reducing CO2 emissions in road transport, are part of a series of regulations designed to create a fairer and more competitive European market. However, these regulations also impose significant economic and social costs which each European industry should face. These regulations, indeed, deeply affect European sectoral policies, involving labour organisations in the transformations and processes that these rules will produce. It is clear, therefore, that Europe – in all its various economic sectors - must move forward very quickly if it wants to compete with the rest of the world; otherwise, the real risk in the EU is slow deindustrialisation of the Continent. Mario Draghi was clear in his contribution: we should work on key sectors for European competitiveness, invest in people through training and education in order to have quality jobs, focusing on the growth of Europe and the maintenance of its social fabric. Hence, neither the cross-sectoral European social dialogue, nor the national collective bargaining would be suitable to support and relaunch the European sectoral competitiveness considering the limits analyzed in the two paragraphs above. Only the European sectoral social dialogue would have the capacity to adapt and influence positively the evolution of each single industry with concrete solutions, as they are in a better position to understand what skills people need to work in a given sector. European sectoral social partners would have the task of driving changes and reforms necessary for the European Union to prosper.

As mentioned in our theoretical paragraph, our thesis is that if sectoral social partners work together fruitfully, with participation and co-responsibility, in the medium and long term, they are able to create tangible benefits contributing to European competitiveness. Thus, the results of the European sectoral social dialogue can be extremely rich and can include specific positive results between the European social partners. A strengthened European sectoral social dialogue can play a 'strategic stewardship' role for relaunching

[45] Regulation Act on Digital Markets (EU 2022/1925), Regulation of the European Parliament and the Council related to the digital markets;

[46] Regulation Act on Digital Services (EU 2022/2065), Regulation of the European Parliament and the Council related to the digital services;

[47] Regulation Act on AI (2024/1689), Regulation of the European Parliament and the Council related to artificial intelligence;

[48] Regulation European Packaging (EU 2023/852), Regulation of the European Parliament and the Council related to packaging rules;

[49] Directive 2024/1275, Green Homes Directive;

[50] European Commission (2025), Automotive Action Plan, focused on the reduction of CO2 emissions;

European competitiveness by acting as a unique guide and defining a new common European method focusing on the relevance of the single industry needs and overcoming the national geographical limits. One relevant good example of effective sectoral social dialogue is the joint recommendation signed in 2019 by IndustriAll Europe (Trade Union representing workers in various industries) and ECEG (European Chemical Employers Group) on the topic of technological innovations and how the sector positions itself in the global market to remain competitive. To reiterate the importance of discussion and dialogue, the document states that "It is essential to keeping our industries competitive and, hence, to offer quality employment. ECEG and IndustriAll Europe are convinced that this future face of the industry can and should be shaped together"[51]. According to the same chemical sector, with respect to the issue of sustainability, which certainly sees the chemical sector as one of those most impacted by European green policies, it is worth mentioning a joint statement of 2020 that addresses the issue of sustainability in the sector, with reference to chemical products, reaffirming and affirming the need that "Any strategy for sustainability should therefore equally address the ecological, social and economic aspect" and that "A balanced approach to these three dimensions is the basis for innovation and competitiveness"[52].

In the recent years, a central role of the dialogue between the social partners was seen during the COVID-19 pandemic, in dealing with a very delicate issue that is health and safety in the workplace. In particular, on the European side in the chemical sector, reference can be made, among many others, to a joint recommendation (2020) on the subject of COVID-19 virus infection, signed between IndustriAll and ECEG, which emphasised the need for workers to participate in the implementation of measures to combat contagion in the workplace, specifying that "These recommendations are meant to support employers and protect workers in the world of work and to encourage that workers and their relevant committees or representative bodies are involved in general risk assessment, design and implementation of measures". Referring to the same emergency and the pandemic of COVID-19, European social partners in food industry also developed in April 2020 a relevant joint protocol entitled: EU Social Partners EFFAT and Food Drink Europe - Guidelines to protect the health and safety of workers in food business during the COVID-19 pandemic[53]. The document signed was intended to protect the health and safety of workers in the food industry and ensure safe working conditions by

[51] IndustriAll Europe & ECEG (2020), Joint statement on sustainability in the chemical sector;
[52] IndustriAll Europe & ECEG (2020), Joint statement on sustainability in the chemical sector;
[53] EFFAT & FoodDrinkEurope (2020), Guidelines to protect the health and safety of workers in food businesses during the COVID-19 pandemic;

implementing measures such as: Enhanced hygiene practices; Social distancing; Personal protective equipment; Health monitoring; Communication and training. These measures were designed to safeguard workers' health while maintaining the continuity of food production and supply. They were also used and applied in other countries such as in Spain where the national social partners UGT Fica, CCOO Industria - trade unions - and FIAB – employer association – signed a similar document a few weeks after: Protocolo y Guía de Buenas Practicas de Protección y Prevención Laboral de las Personas Trabajadoras en el sector de Alimentación y Bebidas durante la Crisis Sanitaria Provocada por el COVID-19[54]. Another good example of a joint protocol developed during the pandemic was signed between EFFAT, EFFE, FEIS, and UNI-Europa in personal and household services (PHS) to address the challenges faced by workers in this sector during the emergency[55]. The involved European social partners highlighted the following key points: Health and Safety; Recognition and Support; Vaccination Priority; Social Dialogue. These measures aimed to safeguard the health and well-being of PHS workers guaranteeing at the same time the continuity of essential services during the pandemic.

Changing sector, but always linked to the issue of health in the workplace, we can mention the European sectoral social dialogue and the joint statement signed by ETNO (employer side) and UNI Europa ITCS to stop all kinds of violence and discrimination in the workplace[56]. This document aims to prevent and mitigate all kinds of violence and harassment in the telecommunications Sector.

As can be seen from these several examples, the topics are diverse and the agreements are many, the contribution that these make from the trade union-political point of view is high. In this context it is important to reiterate that the 'strength' of an agreement at European level is measured, on the one hand, by the legitimacy of the parties signing it and, on the other hand, by its concrete implementation. If you like, the first can be fostered through a negotiating mandate that is sanctioned by joining an organization, certainly by identifying the subjects and issues to be addressed, together with the instruments that can be used that are capable of producing obligations for the signatory parties and their adherents. The second is fostered through the will to

[54] See FIAB, CCOO-Industria, UGT-FICA (2020), Protocolo y Guía de Buenas Practicas de Protección y Prevención Laboral de las Personas Trabajadoras en el sector de Alimentación y Bebidas durante la Crisis Sanitaria Provocada por el COVID-19;

[55] EFFAT, EFFE, FEIS, UNI-Europa (2020), Joint protocol on Personal and Household Services (PHS) during COVID-19 pandemic;

[56] ETNO and UNI Europa ITCS (2022, 2023, 2024), Joint statement to stop all kinds of violence and discrimination in the workplace;

improve conditions and implement decisions, considering tangible the level of European sectoral social dialogue, which can be translated into more or less stringent agreements (indeed the words which define the agreements are important and change depending on the commitment that the social partners want to make) addressing changes and problems that affect the same sectors in all Member States and are dealt with differently by each individual country. Following trends and needs of a specific economic sector, the strength of a European sectoral agreement is that, within the prerogatives of the parties and the 'limits' of the negotiating mandates, it deals specifically with a subject that touches the sector itself, laying the foundations of a level that sets the bar for rights, duties and in general the objectives to be pursued at a 'high' level, below which European agreements and regulations and the national regulations of the individual Member States should not go. This is the challenge we face, in all sectors and especially in those that are strategic for the European Union.
In addition, the sectoral social dialogue actions on so-called 'transversal' topics can certainly be coordinated with the European relevant policies, deriving from the cross-sectoral dialogue, through specification and adaptation of trade union policy choices to the sectors they belong to. From this point of view, the sectoral social dialogue can interact with and complement the cross-sectoral dialogue and have a concrete perspective by implementing the choices within single sectoral agreements.

3. Discussion and Conclusion

In this article we offered a new perspective on the relevance of European Sectoral Social Dialogue as a key instrument to facilitate European competitiveness, shaping a dialogue based on the changes and peculiarities of a single sector or industry. Social partners working together could better respond to the various challenges that the global economy poses to our future economic and social prosperity. We have argued that an effective European sectoral social dialogue can play a guiding role for both EU policies and EU social partners in developing and harmonizing real European competitive sectors.
In particular, following the introduction chapter, we have analyzed in chapter N. 2: The importance of sectoral dimension linked to the concept of economic competitiveness in paragraph 2.1; then, in paragraph 2.2 and 2.3, we have illustrated the social dimension at the European and national level pointing out the geographical limits according to the new global challenges; Finally, in paragraph 2.4, we have defined our conceptual framework contributing to evaluating European competitiveness from a new perspective and assessing the relevance of the "European Sectoral Competitiveness". In chapter N. 3,

therefore, we have examined assets and limits and demonstrated the current contextual situation by reporting various agreements and activities developed by social partners. We have therefore analysed: the value of the cross-sectoral European social dialogue, in paragraph 3.1; The national collective bargaining - focusing on the example of the Italian CCNLs - in paragraph 3.2; The activities and gains of the European sectoral social dialogue in paragraph 3.3.

Acting on the European sectoral social dialogue and focusing on specific topics, would make it possible to increase the competitiveness of the European sectors and also to recompose the fragmentation of European social policies. Indeed, the World Economic Forum in its 2021/2022 edition has strongly emphasised the importance of the protection of the social dimension as one of the key factors in a country's competitiveness index, including labour market equity as one of the key indicators for defining a country's competitiveness. Central to this are social protection linked to the labour force, active labour policies, access to social services and also benefits linked to old age and disability. In this context, it is clear how social partners, through social dialogue and collective bargaining, can intervene to improve these indicators, increasing competitiveness, improving social cohesion and reducing inequalities. Social dialogue must be recognised among the determinants of Europe's competitiveness, considering it a 'transversal' factor, which does not only touch, for example, the labour market and the employment rate, but also touches all the other factors that are usually taken into account to define or measure competitiveness (i.e. economic factors, factors related to governance and factors related to infrastructure). According to this new perspective, other future research could delve deeper into the topic of how to measure the level and the effectiveness of European sectoral social dialogue. Others could also analyze better the multiple instruments and type of agreements used for European sectoral social dialogue focusing on and comparing some particular cases or practices.

We argue that recognising at the European sectoral level, a social, economic and industrial negotiating capacity is necessary and urgent to support Europe's integration process and its social and economic progress. Sectoral social dialogue at the European level can provide specific industrial policy guidelines to address the specific social needs of a sector, starting from making European political priorities its own. National sectoral bargaining could thus be coordinated by the European social dialogue on key issues, though it would perhaps be necessary to give more strength and authority to this participatory process. Thus, bargaining remains indispensable to reconcile the interests of the enterprise with those of the workers. Regulatory intervention alone, without the participation of the social partners, could not be effective because the complexity of interests that collective bargaining satisfies necessarily

requires confrontation between the actors that form, act and contribute to the growth and development in any economic and industrial sector.

Bibliography

Biagi M. (1990), Rappresentanza e democrazia in azienda: profili di diritto sindacale comparato Rimini, Maggioli, 14-16;
Biagi M. (2002), La nuova disciplina del lavoro a termine, Ipsoa, p.49;
Braakmann N., and Brandl B. (2016). The Efficacy of Hybrid Collective Bargaining Systems: An Analysis of the Impact of Collective Bargaining on Company Performance in Europe. MPRA Paper No.70025;
Braakmann N. and Brandl B. (2016), Collective Bargaining and Economic Performance, Labour Economics, 38, 1-12;
Brandl B., and Bechter B. (2016). The Hybridization of National Collective Bargaining Systems: The Impact of the Economic Crisis on the Transformation of Collective Bargaining in the European Union, Economic and Industrial Democracy, 37(1), 9-28;
Brandl B., and Traxler F. (2010). Labour Conflicts: A Cross-national Analysis of Economic and Institutional Determinants, 1971–2002, European Sociological Review, 26(5), 519-540;
Cheryl M.T. (2024), Your Guide to Employee Participation: What It Is and How To Increase It, published by AIHR;
Draghi M. (2024), The future of European competitiveness, European Commission;
Deming E. W. (1982). "Out of the Crisis." Center for Advanced Engineering Study, Massachusetts Institute of Technology;
Deming E. W. (1993). "The New Economics for Industry, Government, Education." MIT Press;
Directive 1997/81/CE. Agreement on part-time work;
Directive 1999/70/CE. Agreement on fixed-term employment contracts;
Directive 2010/18/UE. Agreement on parental leave;
Directive 2024/1275. Green Homes Directive;
Directive 2024/1760. Due Diligence Directive;
ETNO and UNI Europa ITCS. (2022, 2023, 2024). Joint statement to stop all kinds of violence and discrimination in the workplace;
ETUC, Business Europe, UEAPME, & CEEP. (2022, 2023, 2024). Cross-sectoral European social dialogue agreements;
Eurofund (2017), European workers at risk of poverty;
European Commission (2017), European Pillar of Social Rights - Proclaimed by the European Parliament, the Council, and the Commission at the Gothenburg Summit;

European Commission (2023), Sustainable economic growth and social dialogue;
European Commission (2025), Automotive Action Plan, focused on the reduction of the CO2 emissions;
European Council (2021), Porto Social Agenda;
European Parliament (2024), Strengthening social dialogue in the European Union. In "An Economy that Works for People", Legislative proposal on Corporate Sustainability Due Diligence;
Eurostat (2023), People at risk of poverty or social exclusion;
Fazioli R. (2024). Il dibattito europeo sulla partecipazione. La posizione del sindacato, Working Paper ADAPT n.4/2024;
Framework Agreement on Active Ageing (2017);
Framework Agreement on Harassment and Violence at Work (2007);
Framework Agreement on Inclusive Labour Markets (2010);
Framework Agreement on Stress in the Workplace (2004);
Framework Agreement on Teleworking (2020);
Galeazzo A., Furlan A., & Vinelli, A. (2021) The role of employees' participation and managers' authority on continuous improvement and performance. International Journal of Operations & Production Management, 41(13), 34-64;
Gallup (2013). Employee engagement and productivity statistics. State of the Global Workplace: Employee Engagement Insights for Business Leaders Worldwide. Gallup Press;
Garnero A. (2021), The impact of collective bargaining on employment and wage inequality: Evidence from a new taxonomy of bargaining systems. European Journal of Industrial Relations, *27*(2), 185-202;
Goertz, G. (2006). Social Science Concepts: A User's Guide. Princeton University Press;
Grimshaw D., Koukiadaki A. and Tavora I. (2017), Social Dialogue and Economic Performance: What Matters for Business - A Review. International Labour Organization;
IndustriAll Europe & ECEG (2019), Joint recommendation on technological innovations;
IndustriAll Europe & ECEG (2020), Joint statement on sustainability in the chemical sector;
IndustriAll & ECEG (2020), Joint recommendation on COVID-19 virus infection;
JRC (2021). Technical Report on European Competitiveness. European Commission;
Kancs A. and J. Kielyte J. (2001), Analysing Sectoral Competitiveness: A Framework of Strategic Management;

Ketels C. (2017), Structural Transformation: A competitiveness-based view;
Krekel C., Ward G. and De Neve J. (2019), Employee Well-being, Productivity, and Firm Performance. Saïd Business School Working Paper 2019-04;
Krugman P. (1994), Competitiveness: A Dangerous Obsession. Foreign Affairs, 73(2), 28-44;
Lapeyre J. (2018). The European Social Dialogue, The history of social innovation (1985-2003), European Trade Union Institute;
Letta E. (2024), Report on the Future of the Single Market, European Commission;
Listra E. (2019), The Concept of Competition and the Objectives of Competitors. Procedia - Social and Behavioral Sciences, 213, 25-30;
Marczak M. and Beissinger T. (2018), Competitiveness At The Country Sector Level: New Measures Based On Global Value Chains;
Mollicone Resolution, resolution number 7-00290 on the protection of copyright with particular reference to the use of new technologies - Chamber of Deputies, VII Commission - April 2025;
National Collective Labour Agreements Dubbing Sector (2023);
National Collective Labour Agreements Paper and Paper Converting Industry (2021);
National Collective Labour Agreements Tertiary Activities, Distribution, and Services (2024);
Pernicka, S. (2021). Forces of Reproduction and Change in Collective Bargaining: A Social Field Perspective;
Porter M. (1990). The Competitive Advantage of Nations;
Protocolo y Guía de Buenas Practicas de Protección y Prevención Laboral de las Personas Trabajadoras en el sector de Alimentación y Bebidas durante la Crisis Sanitaria Provocada por el COVID-19 (2020);
Regulation Act on AI (2024/1689), Regulation of the European Parliament and the Council related to the AI which has mofified directives 2010/13/EU and 2018/1972;
Regulation Act on Digital Markets (EU 2022/1925), Regulation of the European Parliament and the Council related to the digital markets which have modified directives 2002/21/EC and 2009/140/EC;
Regulation Act on Digital Services (EU 2022/2065), Regulation of the European Parliament and the Council related to the digital services which has modified directives 2000/31/EC;
Regulation European Packaging (EU 2023/852), Regulation of the European Parliament and the Council related to the rules on reduction, reuse, and recycling of packaging;

Traxler, F. (2003). Bargaining (De)Centralization, Macroeconomic Performance and Control over the Employment Relationship. British Journal of Industrial Relations, 41(1), 1-27;
Traxler F. (2003), Collective Bargaining and Competitiveness, Journal of Industrial Relations, 45(3), 345-365;
Traxler F. (2003), Centralization or (De)centralization of bargaining and macroeconomic performance. Economic and Industrial Democracy, 24(1), 151-171;
Traxler F. and Brandl B. (2012). Collective Bargaining, Inter-Sectoral Heterogeneity and Competitiveness: A Cross-National Comparison of Macroeconomic Performance. British Journal of Industrial Relations, 50(1), 73-98;
Traxler F. and Brandl B. (2012), Sectoral collective bargaining structures and macroeconomic performance. European Journal of Industrial Relations, 18(3), 205-221;
Val Duchesse Tripartite Declaration (2024), Signed by the European Social Partners, the EU Commission, and the Belgian Presidency of the Council of the European Union;
World Economic Forum (2017), Key Findings of the Global Competitiveness Index 2017–2018;
World Economic Forum (2021, 2022), Competitiveness index and the importance of the social dimension.

International Labor Organization Prescriptions and Enforceability of Collective Agreement in Nigeria: Is there now Light at the End of the Tunnel?

David Tarh-Akong Eyongndi, Nzeribe Ejimnkeonye Abangwu, Clement C. Chigbo, Itunu Kolade-Faseyi, Emmanuel Nnaemeka Nwambam, and Olasupo Bada *

Abstract. This article adopts doctrinal method in interrogating the potentials of the ILO Conventions and Recommendations, revolutionizing the law on the bindingness and therefore enforceability of Collective Agreement (CA) in Nigeria by explicating the National Industrial Court of Nigeria (NICN) stance towards application of International Labour Organisation (ILO) convention/recommendations and International Best Practices (IBP) and International Labour Standards (ILS) in adjudication aimed at addressing the question of whether there is now light at the end of the tunnel regarding enforceability of CA in Nigeria. It examines the law and practice of enforceability of CA in South Africa (SA), Kenya, Ghana, and Zambia, drawing lessons for Nigeria. It finds that the NICN have approved/applied ILO conventions/recommendations and IBP and ILS in adjudication thereby opening new vistas in labor and employment adjudication in Nigeria including

* David Tarh-Akong Eyongndi (Corresponding author: david.eyongndi@bowen.edu.ng or eyongndi18@gmail.com) is an Associate Professor, College of Law, Bowen University (Nigeria); Nzeribe Ejimnkeonye Abangwu is a Senior Lecturer at the Department of International Law and Security Studies, School of Law and Security Studies, Babcock University (Nigeria); Clement C Chigbo is a Solicitor of England and Wales, Advocate and Solicitor of Supreme Court of Nigeria, Professor, Department of Private and Business Law, College of Law, Afe Babalola University (Nigeria); Itunu Kolade-Faseyi is a Senior Lecturer, College of Law, Caleb University (Nigeria); Emmanuel Nnaemeka Nwambam is a Lecturer at Alex Ekwueme Federal University, Ndufu Alike, Ebonyi State (Nigeria); and Olasupo Bada is PhD Candidate at the School of Law and Security Studies, Babcock University, Ilishan (Nigeria).

the enforceability of CA antithetical to the common law prescription. It also found that Kenya, South Africa, Ghana, and Zambia have incorporated the ILO position on enforceability of CA into their domestic laws and explicates lessons for Nigeria therefrom. It recommends that Nigeria should incorporate the ILO prescription into its domestic laws and gives statutory fortification to the NICN's stance on enforceability of CA. Furthermore, if the NICN stance—which is a welcomed development—is appealed, it is recommended that the Court of Appeal should uphold it, thereby aligning Nigeria's position as laid down by the NICN with global best practice.

Keywords: *Collective Agreement, Collective Bargaining, Ghana, National Industrial Court of Nigeria, International Labor Organization, Trade Disputes, South Africa, Zambia.*

1. Introduction: Aim and Research Objectives

In labor and employment relations, employees seek enhanced terms and conditions of employment while employers aim at maximizing profit.[1] These divergent interests often clash, leading to trade disputes.[2] Thus, whenever there is a trade dispute between an employer and employees, efforts are often made towards settlement either by the parties themselves or with the intervention of a neutral third party.[3] One of the non-litigation means of settling trade disputes in Nigeria is by collective bargaining (herein simply referred to as CB),[4] which is a process through which an employer and their employees meet together either with or without the assistance of a neutral third party when a trade dispute has occurred to extensively negotiate in good faith the matters involved aimed at resolving the dispute, which ends by reaching a collective agreement.[5] It should be noted that while involvement of a neutral third party to facilitate communication between the disputants during collective bargaining in Nigeria has become common, it is not a universal practice; the standard and ideal practice is for bargains to take place only between the disputants without the

[1] K. W. Wedderburn, *Labour Law: From Here to Autonomy? in Industrial law Journal*, 1987, vol. 16, 1-29; D.T. Eyongndi, "Towards Repositioning the Industrial Arbitration Panel (IAP) for the Effective Settlement of Trade Disputes in Nigeria" *University of Ibadan Law Journal* 2019, Vol. 9, 114-129.
[2] G.G. Otuturu, "The Enforceability of Collective Agreements in Nigeria A New Approach" (2006) 4(2) *Nigerian Bar Association Journal*, 65.
[3] S Webb and B Webb, *Industrial Democracy* (London: Longmans Green and CO., 1926) 97.
[4] FC Nwoko, 'Rethinking the Enforceability of Collective Agreements in Nigeria A Collective' (2000) 4(4) *Modern Practice Journal of Finance and Investment,* 353-354.
[5] *Nigeria Arab Bank v. Shuaibu* [1991] 4 NWLR (Pt. 186) 450.

involvement of a neutral third party. This is an ingenious Nigerian innovation with the presence of the neutral party is hoped to prevent deadlock between the bargainers in the course of bargaining since the neutral third party is expected to facilitate communications and compromise especially when temper rises and resolution is threatened. In any event, whether with or without the involvement of a neutral third party (as it has become the case in Nigeria), the process is the same and the aim is usually to reach a resolution for the dispute. The Nigerian variant of collective bargaining, particularly in the public sector (whether federal or state government), is a situation where the desirable is not available and the available becomes desirable. This is largely due to the characteristic insincerity of the government within bargaining hence, a neutral third party needs to be present to ensure that communication towards resolution is sustained between the disputants and as well as assuage the fears of trade unions that usually bargain on behalf of their members. This becomes necessary when the fact that the employer especially the government in Nigeria (and globally) in the course of bargaining, enjoys undue advantage against the employees. Thus, for there to be a successful collective bargaining, the parties must do so with absolute transparency in good faith while the processes facilitator (as it is peculiar to Nigeria) must possess a high dose of persuasion acumen to persuade the parties to reach a compromise particularly where temper rises and reaching an agreement is threatened.[6] Good faith is needed and has become a component of collective bargaining in Nigeria due to the serious distrust demonstrated over time—particularly within the public sector regarding the process and outcome of the bargain with the government as employer and a party thereto. The peculiar situation in Nigeria is not to say that there is not a universal component for the process of collective bargaining but Nigeria has only innovated based on necessity.

At the end of the collective bargaining (CB) process, when the parties reach an agreement to settle the dispute, it is then written down and signed by the parties or their authorized representatives.[7] The agreement reached is known as a collective agreement (CA).[8] In Nigeria, like most common law jurisdictions, honor on the part of the parties to a CB is the only thing binding collective agreements.[9] For the agreement to become binding and therefore enforceable between parties, the law requires that the agreement must have expressly or necessary implication stated so and/or the agreement must be incorporated

[6] O.O. Ogbole, P.A. Okoro, *Critique of Ministerial Interference in Enforceability of Collective Agreements, in OAU Journal of Public Law,* 2020, vol. 1, n. 1,114.

[7] *Union Bank of Nigeria v. Edet* [1993] 4 NWLR (Pt. 287) 288.

[8] E.A. Oji and O.D. Amucheazi, *Employment and Labour Law in Nigeria* (Lagos: Mbeyi & Associates (Nig.) Ltd, 2015) 222.

[9] *Ibid.* at 222.

into the individual contract of employment of an employee.[10] Without the fulfilment of this requirement, as held by the Supreme Court of Nigeria in *Union Bank of Nigeria Ltd. v. Edet,*[11] based on the common law position applicable in Nigeria, no cause of action can arise from either party's reneging from their obligation arising from the agreement, thereby creating the unfortunate and time-wasting situation of agreement without an agreement usually to the greatest chagrin of the employee who mostly are affected by this state of the law. This is so despite the human and capital resources expended in the process of CB.[12] This disjunction, in relation to the nuances of the bindingness and enforceability of CA under Nigeria law, is explained by Obiora[13] in a comprehensive and articulated manner thus: when it comes to the enforceability of collective agreement, its enforceability in Nigeria remains problematic because the courts have taken the common law position that collective agreement is at best 'a gentleman agreement,' which is merely 'binding in honor', save where it is incorporated into the contract of service, whether expressly or by implication. The courts have taken this position because of the doctrine of privity of contract, as most collective agreements are usually between the employers on one hand and trade unions on the other. An individual employee seeking to benefit from it is not regarded as a party to it. Additionally, parties to a collective agreement are presumed not to intend that it is binding on them; hence it is unenforceable.

The implication of this is that *prima facie*, whether from common law or under statute (as Nigeria operates a dual system of bindingness and enforceability of CA), a CA is not binding as neither party has a legal obligation to perform or forbear the CA made to settle a dispute. This aside, an unbinding CA can become binding and enforceable by the act of one of the parties or by a neutral third party (who in this case, is different from the one who facilitated communication between the party that resulted into the making of the CA). Thus, it is safe to argue that, when parties engage in CB that culminates into a CA, the agreement reached is neither binding nor enforceable between them unless and until certain post-agreement acts are taken by the parties or a statutorily authorised neutral third party. It is only then they are rendered binding and therefore enforceable; Obiora has rightly stated this, saying:

---

[10] *Texaco v. Kehinde* [2002] FWLR (Pt. 94) 143.

[11] (1993) 4 NWLR (Pt 287) 288 at 291.

[12] M. Zechariah, *New Frontiers on Legal Enforceability of Collective Agreements in Nigeria, in Current Jos Law Journal,* 2013, vol. 6, n. 1, 294.

[13] S.F. Obiora "Dialectics on the Principle of Enforcement of Collective Agreements in Nigeria: A Reappraisal" *E-Journal of International and Comparative Labour Studies,* 2022, Vol. 11, n. 3, 75.

> Ordinarily, under the Nigerian labor law, there is no presumption of intention as to the binding force of a collective agreement between the parties. The nearest it has gone in attaching legal enforceability to a collective agreement is the provision of section 3(1) of the Trade Disputes Act which stipulates expressly that parties in a collective agreement are expected to deposit with the minister of labor and productivity at least three copies of the agreement within 30 days of its execution, and when such deposit is made the minister may by order make the agreement or part thereof binding on the parties to whom it relates.[14]

This subsequent act or steps are discussed in the later part of this work in detail.[15] The NICN by virtue of Section 254C (1) b, and j (i), (v), of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 (herein simply referred to as CFRN, 1999 (Third Alteration) Act, 2010), has exclusive original civil jurisdiction over the Trade Disputes Act that regulate trade disputes and collective agreements. By adjudicating over a dispute, the combine provisions of Sections 254C (1) (f) (h) and (2) of the CFRN, 1999 (Third Alteration) Act, 2010 and 7(6) of the National Industrial Court Act, 2006 (herein simply referred to as NIC Act, 2006) empowers the NICN with requisite jurisdiction over and power to apply international labour standards and international best practices in labour and employment to cases submitted to it. Moreover, the NICN by section 245C(2) of the Third Alteration Act, 2010 is empowered to deal with any matter connected with or pertaining to the application of international conventions, treaty, or protocol which Nigeria ratified relating to labor, employment, workplace, industrial relations or matter connected therewith, and the interpretation or application international labor standards (ILS). These provisions exist despite the seemingly protective and inhibitory provision of section 12 of the Constitution, which is has been obviated by section 254C (1) of the Third Alteration Act, 2010).[16] Nigeria is a member of International Labour Organization (ILO) and a signatory to the Freedom of Association and Protection of the Right to Organize Convention (No. 87) of 1948 and the Right to Organize and Collective Bargaining Convention (No. 98) of 1949,[17] both which were ratified on 17th October, 1960.[18] These conventions are a fortification and amplification of section 40 of

[14] S.F. Obiora (note 12) 80.

[15] I. Okwara, C. Aniekwe, I. Oraegbunam, *The Status of Collective Agreement in Nigerian Labour and Industrial Law: An Appraisal, International Review of Law and Jurisprudence,* 2021, vol. 3, n. 2, 39.

[16] See Section 254C (1) Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.

[17] A. J. Pouyat, *The ILO's freedom of association standards and machinery: a summing up, International Labour Review* 1982 vol.121 n.3, 288-292.

[18] See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103259 as accessed 30 April, 2025.

the CFRN, 1999 and section 9(6) of the Labor Act, 2004[19] which guarantee the right to freedom of association and formation of trade unions in particular.

The Collective Agreements Recommendation No. 91 of 1951, made pursuant to Convention No. 98, contain an international best practice on the bindingness and enforceability of CA. The said international best practice is that a CA, once signed by the parties or their legal representatives, becomes binding and therefore enforceable between the parties and persons on whose behalf the agreement was reached without the need for incorporation or any other post-agreement step being taken.[20] This IBP approved by the NICN, has the potentials of revolutionizing the jurisprudence on bindingness and enforceability of CA in Nigeria. This paper examines whether this prescription opens a new vista to the enforcement of CA in Nigeria. This paper also examines the stance of the NICN towards the adoption and implementation of this ILO international best practice on the bindingness and enforceability of CA aimed at determining whether there is now light at the end of the tunnel regarding the legal status and enforceability of CA under Nigeria's labor jurisprudence. Through comparative analysis, this paper gleans lessons from other jurisdictions; aimed at advancing a call for the review of Nigerian law, particularly the position in some selected African jurisdictions like Ghana, South Africa, Zambia, and Kenya—which like Nigeria, have a common law heritage with other strong socio-economic and cultural affinities to Nigeria.

This article is divided into six parts. Part one contains the introduction. Part two is an exegesis on the law and practice, with a consideration of the nuances of collective bargaining in Nigeria. Part three delves into the enforceability of CA in Nigeria under common law and statute in Nigeria. Part four looks at the influence of ILO prescription and the evolving jurisprudence by the NICN contingent on the ILO prescriptions for the enforceability of CA and its impact on trade disputes settlement in Nigeria. Part five examines the law and practice on the legal status and enforceability of CA in selected jurisdictions like Ghana, Kenya, Zambia, and South Africa to draw lessons for Nigeria and its' system. Part six contains the conclusion and recommendations. This paper adopts doctrinal and comparative methods, relying on primary and secondary date such as the CFRN, 1999, Nigeria's Labor Act 2004, the Trade Disputes Act, 2004, ILO Conventions 87 and 98 and recommendation 91, standard labor law textbooks, articles in learned journals, internet sources, newspapers publication, etc. The data were subjected to rigorous content and

[19] Labour Act Cap. L1 Laws of the Federation of Nigeria, 2004.

[20] N. Valticos, *International labour standards and human rights: Approaching the year 2000, in International Labour Review,* 1998, vol. 137, n. 2, 135.

jurisprudential analysis whereof, findings were made, conclusion drawn, and recommendations advanced.

2. Explicating the Law and Practice on Nuances of Collective Bargaining in Nigeria

This section of the paper, which espouses the concept of CB, does so by highlighting its meaning and process as well as discussing other nuances. This is done as a precursor to the interrogation of the nuances of CA which is the desired result of CB: it is the expected outcome for engaging in a successful CB. For clarity and considering the fact that the term trade dispute would and has already been used in this article, we consider it apt to elucidate more on it to give context to its usage in this work. Trade dispute, as used in this work, as defined under section 48(1) of the Trade Disputes Act, 2004 is a dispute between an employer and workers or between workers and workers, which relates to the employment or non-employment or terms of employment and/or physical conditions of work of any person. It extends to disputes between employers and employees, including disputes between their respective organizations and federations which are concerned with the employment or non-employment of any said person, the terms of employment, the physical condition of work of any person, and the conclusion or variation of any collective agreement. With this definition in mind, the Court of Appeal in *Apena v. NUPPP*[21] have deduced the nature of the parties and subject matter of a dispute for it to qualify as trade dispute. Thus, the parties in a trade dispute are the workers and their employer, workers themselves (such as within form of an intra-union dispute qua worker), workers organization (trade union or workers association), and employers' association, their federation of workers, or employer trade unions. Moreover, such a dispute to qualify as trade dispute, must have industrial coloration, meaning that it must pertain to or connected to the employment or non-employment of a person(s). A trade dispute could also relate to, pertain to, arise from, or relate to the terms and conditions of employment or physical conditions of work.[22] It should be noted that the requirement of physical condition of work is elastic and germane to the employee. These mandatory and mutually inclusive elements which must be present to be regarded as a trade dispute within labor and employment relations can be found on the presence of a single strand.[23] To explain, the

[21] [2003] 8 NWLR (Pt. 822)426.
[22] M. Zechariah, *New Frontiers on Legal Enforceability of Collective Agreements in Nigeria, in Current Jos Law Journal,* 2013, vol. 6, n. 1, 292-294.
[23] *Abdul-Raheem v. Olufeagba* [2006] 17 NWLR (Pt. 1008) 280.

presence of a single party and subject (e.g. between an employer and their employees relating to the physical condition of work only) will qualify a dispute as a trade dispute within the context of this work. The implication of the foregoing is that, any dispute that lacks the complete presence of the aforementioned parties and at least one of the subjects, does not qualify as a trade dispute within the context of this paper which is the case under the Trade Disputes Act.[24] For instance, a dispute between two trade unions of workers about the payment of electricity bill for a building being used by them as their registered office does not qualify as a trade dispute despite the fact that it is between the appropriate party but the subject matter is outside the statutorily recognised matters. Also, a strike called by a workers' trade union (federation) for political reasons (e.g. the outcome of a trade union election) does not qualify as a trade dispute and the protection afforded to workers or employers when embarking on a trade dispute is unavailable under such circumstances.[25]

To recap, we have underscored the fact that whenever there is a trade dispute, it need not lead to the irreconcilable breakdown of an employer-employee relationship which does no good to either of the parties and the economy. Thus, disputants usually explore CB either by themselves or under the moderation of a neutral third party (as it has become the practice in Nigeria) to amicably resolve their differences. CB in Nigeria is supported by both domestic and international legal frameworks. Section 40 of the Constitution of the Federal Republic of Nigeria, 1999 recognizes the right of assembly and the right to form or join trade unions which is a vehicle for collective bargaining by employers/employees alike. Thus, one can safely assert that the right to form or join a trade union of one's choice either as an employee or employer and participate in CB is constitutional in Nigeria. Section 9(6) of the Labor Act, 2004 guarantees the right to unionization and renders void and unenforceable any agreement requiring an employee to abstain from forming or joining a trade union in expression of the right of freedom of association. This right (i.e. freedom of association) anchors collective bargaining. Section 24(1) of the Trade Unions Act, 2004 empowers registered unions to engage in collective bargaining while section 3 mandates parties to undertaken a collective bargaining which results to a CA to deposit three copies of the collective agreement with the Minister of Labour, Employment and Productivity who has the discretionary power to sanction the agreement either in part or whole as binding and enforceable between the parties. Sections 3, 4, and 5 of the Trade Disputes Act recognize the right of employers and employees through their unions to engage in collective bargaining and allows the Minister to

[24] *Ekong v. Oside* [2005] 9 NWLR (Pt. 929) 102.
[25] *Adams Oshiomhole v. Federal Government of Nigeria* [2004] 8 NWLR (Pt. 860) 105.

apprehend a trade dispute and take necessary steps for its settlement to prevent it from escalation with attendant acrimonious outcome. Article 10(1) and (2) of the African Charter (Ratification and Enforcement) Act, 2004 recognizes and protects the right to freedom of association which is a fortification and an amplification of the right to CB in Nigeria. The ILO Conventions 87 and 98 recognize and promote CB by their recognition of the right to freedom of association. Thus, Articles 2 and 4 respectively recognize the rights of employees without any discrimination to form/join trade unions of their choice with the goal of protecting and advancing their interests through various means, including CB. According to the Governing Body of the ILO, collective bargaining is a 'fundamental aspect of the principles of freedom of association"[26] This is an attestation to the fact that collective bargaining expands the scope of the right of freedom of association since it is usually the trade union (i.e. a congregation of employees) that engages an employer in bargaining on behalf of its members.

Regarding the origin of the term "collective bargaining," Oji and Amucheazi[27] have rightly opined that the British academic Beatrice Webb reputedly coined the term in the late 19th century, using it in 1891 in a cooperative movement to characterize an alternative process to individual bargaining between an employer and individual employees. Individual employee bargaining is characterized by its lack of effectiveness in terms of the employer acceding to an employee demands due to the lack of requisite collective force/pressure which is present in collective bargaining. Philosophically speaking, CB can be likened to a bundle of broom which is extremely difficult to break if not impossible compared to a strand of broom which can be effortlessly broken by anyone no matter how weak. It is representative of the aphorism that "together we stand and divided we fall" as there is strength in unity (i.e. employees coming together to form an irrepressible and indomitable union).

According to Ebong and Ndum,[28] CB is the process of negotiation on a whole range of issues within the regulation of the terms and conditions of employment between workers and employers or government aimed at reaching a CA. For Agomo,[29] CB is collective dialogue or collective negotiation between the employers' representatives and workers' representatives to reach a

[26] ILO, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, (Sixth Edition) 2018 para. 1313.

[27] 212

[28] E.A. Ebong, and V.E. Ndum, "Collective Bargaining and the Nigerian Industrial Relations System-Conceptual Underpinnings" *IRE Journals,* 2020, Vol. 3, n. 11, 132-139 at 132.

[29] C.K. Kanu Agomo, *Nigerian Employment and Labour Relations Law and Practice* (Concept Publication Limited 2011), 292.

collective agreement on the issue. Okene[30] opined that CB involves a process of consultation and negotiation of terms and conditions of employment between employers and workers, usually through their representatives. It involves a situation where the workers union or representatives meet with the employer or representatives of the employer in a cooperative and respectful atmosphere to deliberate and reach an agreement on the demands of workers concerning certain improvements in the terms and conditions of employment. Mir and Kamal[31] comment on the meaning and utility of CB, noting that CB is an effective means of promoting industrial relations. It is that form of bargaining where the employer or his representative, and the employees or their representative bargain in good faith and arrive at an agreement relating to conditions and terms of employment in resolution of an impasse.

CB is a secondary aspect of industrial labor relations because its emergence explicates the unequal power equilibrium between individual employees and employers, wherein the scales tip against employees. This situation questions the reality of the doctrine of voluntariness and equality in labour and employment relations especially in Nigeria where the power pendulum, owing to several factors (including but not limited to high rate of unemployment and underemployment, increased and acceptance of non-standard forms of employment, inadequate and obsolete regulatory framework, docile institutional regulators, etc.) is permanently tilted against employees. In fact, employment relations in Nigeria is organised along the reality of the employee(s) "either takes it or leave" and not bargain culminating into mutual agreement as it ought to be. Although, each employee has a separate and independent contract of employment with the employer, which means that they ought to interact directly and independently with the employer on any matter pertaining to welfare or condition of employment as stated by the individual employment contract.[32] The inequality of bargaining power between an individual employee and their employer makes it impracticable for individual engagement, thereby necessitating collective action through several employees conglomerating into a union or association to engage their employer as there is power in unity enabling them to a great extent, counter the overwhelming power of capital. This conglomeration could be likened to the bundle of broom principle. Breaking a stick of broom is easy and a stick is incapable of sweeping the floor. If several sticks are tied into a bunch,

[30] O.V.C. Okene, "Collective Bargaining, Strikes and the Quest for Industrial Peace in Nigeria" http://www.nigerianlawguru.com/articles/labour law/15/09/2012 Accessed 1 May, 2025.

[31] A.A. Mir and N.A. Kamal, *Employment Law in Malaysia* (Kuala Lumpur: International Law Book Series, 2005) 111.

[32] O. Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (Lagos: Folio Publishers, 1991) 276.

however, breaking them becomes extremely difficult (if not impossible). In the same vein, sweeping with many brooms is faster and gets the floor clean easily. Thus, CB functions within the bundle of broom principle. The bargaining in CB exemplifies that each side (i.e. employees and the employer) can apply pressure to a certain degree during negotiation.[33] Hence, it is within the framework of CB that employees' trade unions are most relevant and prominent owing to the need (amongst other factors) to assert pressure for desired outcome.[34]

It must be stated that CB is different than consultation. The former differs from the latter because the element of negotiation and the outcome thereof is a product of compromise between the parties, while consultation is merely an opinion poll by an employer to enable decision making on issue(s)-less negotiation.[35] When CB leads to CA, it modifies—rather than replaces—the individual contract of employment because it is not the essence of the employer-employee relationship. From the definition of CB above, certain facts are apparent. One of these is that collective bargaining promotes industrial relations by aiding industrial harmony where it is creatively deployed and explored with outmost sincerity by the parties.[36] Regarding involved parties, CB takes place between employees, their representatives, or a trade union on one hand and an employer or an employer association on the other.[37] Collective bargaining requires that parties deal with each other with open and fair mind and sincerely commit to overcome any obstacle between them with the goal being a stabilized and harmonious employer-employee relationship. It brings matters within the joint regulation of management (employer) and labor (trade union/employees' representatives), which otherwise falls within the prerogative powers of management/capital. Moreover, if CB does not ultimately create equality of bargaining power between an employer and employees, it diminishes the managerial powers of the employer in terms of unilaterally determining terms and conditions of employment and welfare issues.[38] CB in a way gives the employees a sense of belonging elevating them

[33] O.A. Adewole, and O.G. Adebola, "Collective bargaining as a strategy for industrial Conflict Management in Nigeria" *Journal for Research in National Development,* 2010, Vol. 8, n. 1, 326-339.
[34] 212.
[35] E.E. Uvieghara, *Labour Law in Nigeria* (Lagos and Oxford: Malthouse Press Ltd, 2001) 388.
[36] C.I. Igbokwe, "Collective Bargaining as a catalyst to Industrial Harmony in Nigeria's Public Service. South East Public Service in perspective" *Journal of Policy and Development Studies,* 2024, Vol. 15, n. 2. 283-301.
[37] S.O. Koyonda, "Enforcement of Collective Agreements in Nigeria: Need for Legislative Intervention"
Nigerian Law and Practice Journal, 1999, vol. 3, n. 2, 37.
[38] V. Chukwuma, *B.P.E. v Dangote Cement Plc: The Enforceability of Unincorporated Collective Agreement in Nigeria, in University of Lagos Law Review,* 2021, vol. 4, n. 2, 257.

to stakeholders in the enterprise which in turn, enhances their commitment and impacts the overall growth and fortune of the concerned enterprise hence, it should be encouraged and creatively explored with transparency for optimal benefit.

Successful CB has some prerequisites. Pluralism and freedom of association is important. Acceptance of pressure from groups with diverse interests in a political system with which the government/employers can utilize to create dialogue and make compromise via concession is important. An employer (private/public) must accept employee's bargaining necessity through their union/association that furthers their interests. Furthermore, the employer must recognize trade unions as a bargaining agent. Aligned to this ideology, section 40 of the CFRN, 1999 as well as section 2(1) of the Trade Unions Act, 2004 affirm these prerequisites by recognizing the right of pluralism and freedom of association. Moreover, observance of agreements reached at the end of bargaining is a careful subject for the credibility of CB. When involved parties fail to be honorable because only their agreement is their bond, CB is less effective and less recommended. Unfortunately, the government of Nigeria as an employer, has often taken undue advantage of CB as a diversionary and dilatory tactics against employee demands instead of exploring resolution. A successful CB requires the support of labor administration authorities, to make available the necessary climate for bargaining, to restrict support for a party in breach of agreements reached from CB, to provide remedial process for settlement of disputes that might arise from the bargaining process, and as far as practicable, secure the observance of any agreement reached.[39] Good faith is an indispensable prerequisite for effective and efficient bargaining. It implies that parties would come to the bargaining table transparent and committed to the success of the process by being willing to make necessary and reasonable compromises aimed at settling the dispute.[40] Involved parties must transparently discuss and settle both procedural and substantive issues raised from CB. There is also need for proper internal communication, which requires the management and union to keep their managers and members respectively well-informed about the process. A lack of proper communication and information can lead to misunderstanding, ultimately disrupting bargaining and leads to industrial dispute.[41]

---

[39] S. Ajayi, "Collective Bargaining as a tool for Industrial Harmony and improved Productivity in Nigeria Banking Sector,*Academia*, 2020, Vol. 5, n. 2, 1-7.

[40] T. Fashoyin, *Industrial Relations in Nigeria* (Ibadan: Longman Nigeria Limited, 1992), 103.

[41] RM. Olulu, S. Alor and F. Udeorah, 'The Principle of Collective Bargaining in Nigeria and the International Labour Organization (ILO) Standards' *International Journal of Research and Innovation in Social Science,* 2018, Vol. 11, n. 4, 29.

3. Enforceability of Collective Agreement at Common Law and Statutes in Nigeria

Upon the occurrence of an industrial dispute, employees—via their representatives or union—often engage with employers through CB. Whenever CB is deployed, the natural expectation is that, after negotiation, a compromise will be reached via settlement of the dispute. Thus, CA is the product of a successful CB, containing the position reached by the bargainers in settlement of the dispute. This part of the paper examines the enforceability of CA under common law and statute as it is applicable in Nigeria.

Before further analysis, the meaning of CA and its nuances deserves an ample articulation. The Trade Disputes Act, 2004[42] defined a CA as any agreement in writing for the settlement of disputes and relating to terms of employment and physical conditions of work concluded between an employer, a group of employers, one or more trade unions, organizations representing workers, or the duly appointed representative of any body of workers.[43] By this definition, the parties involved in a CA is the trade union (on behalf of the employees) and the employer's trade union(s). The International Labor Organization (ILO) via Article 2 of the Convention Concerning the Promotion of Collective Bargaining[44] defined CA as agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers, or one or more employers' organizations on the one hand. On the other, one or more representative workers' organizations, or, in the absence of such organizations, the representatives of the workers duly elected and authorized by them in accordance with national laws and regulations shall be involved.

The Nigerian Court of Appeal in *Kwara State Polytechnic v. Adetilo*[45] defined CA as any agreement in writing for settlement of disputes relating to terms of employment and physical condition of work conducted between an employer, group of employers, representative of employers on the one hand and one or more trade unions or organizations representing workers, or the duly appointed representative of any body of workers, on the other hand. This definition, which is materially similar to the ones under the various Acts mentioned above, makes it clear that a CA must be in writing and must relate to a settlement of disputes dealing with terms and conditions of employment or the physical conditions of work. It is reached between an employer(s) or

[42] Trade Disputes Act, Cap. T8 Laws of the Federation of Nigeria, 2004.

[43] This definition is strikingly similar with the definition under the National Industrial Court Act, 2006, Labour Act, 2004.

[44] ILO Convention Concerning the Promotion of Collective Bargaining No. 154 of 1981

[45] [2007] 15 NWLR (Pt. 1056) 42 at 48-50.

their group with a trade union of workers for and on behalf of the concerned workers, who are ultimately the beneficiary of the settlement. For Odunaiya,[46] CA refers to any agreement that settles disputes relating to the terms of employment and physical conditions of work concluded between an employer or a group of employers and one or more trade unions or organizations representing workers. By the foregoing, the existence of an employer-employee relationship is the basis upon which a CA can be reached as a result of CB. It should be noted that a CA is of two forms: a procedural and a substantive agreement. The procedural agreement deals with the procedure for reaching the substantive agreement; that is the basic rules and procedure that enable smooth negotiation of the substantive issue that constitute substantive agreement. The substantive agreements, however, are concerned with the substantive subject matter for bargaining and pertain to the terms and conditions of employment.[47]

Within common law, CA are regarded as unenforceable and therefore, non-justiciable like every other "domestic or gentleman" agreement.[48] This is the case, despite the fact CA is the product of painstaking and thoroughly structured negotiation between the involved parties aimed at settling a trade dispute. The rationale for this paradox of agreement without agreement is that CA, unlike conventional contractual agreement, lacks the mandatory element of intention to create legal relations from the time the involved parties chose to bargain.[49] Common law considers CA to be "gentleman's agreement" which is only binding in honor and not through court action.[50] To stress the importance of the requirement of intention to create legal relations for an agreement to be binding and thus enforceable, Lord Stowell in *Dalrymble v. Dalrymble*[51] state that an agreement "must not be mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatsoever." Aside the advanced reason of lack of intention to create legal relations, lack of privity of contract in CB which results in a CA is another reason for the lack of

---

[46] V.A. Odunaiya, *Law and Practice of Industrial Relations in Nigeria*, (Lagos: Passfield Publishers, 2006)
325.

[47] E.Q. Kelsey, C. Obinuchi and S.P. Johnbull, "An Appraisal on the Status of Collective Agreement in the Nigerian Labour and Industrial law" *Nnamdi Azikiwe University Journal of Commercial and Property Law*, 2022, Vol. 9, n. 4, 118-138.

[48] V. Iwunze, "The General Unenforceability of Collective Agreements under Nigerian Labour Jurisprudence: The Paradox of Agreement without Agreement" *International Journal of Advanced Legal Studies and Governance,* 2013, Vol. 4, No. 3, 29.

[49] *UBN v Edet* [1993] 4 NWLR (Pt 287) 288; *ACB v Nbisike* [1995] 8 NWLR (Pt 416) 75.

[50] *Ford Motor Co. Ltd. v. Amalgamated Union of Engineering and Foundary Workers* (1969) 1 WLR 339.

[51] (1811) 2 Hag. Con. 5 at 105.

bindingness and non-enforceability of CA under Nigerian law. The contract of employment is between the individual employee and the employer, but the CB process and the resulting agreement is usually between a trade union for and on behalf of the workers and the employer or employer's unions. An individual employee, not being a party to the agreement, is prevented from enforcing CA at common law.[52] The Nigerian court in *New Nigeria Bank v. Egun*[53] held that in the absence of privity of contract between the respondent employee and the appellant employer, the respondent could not claim under a CA between his union and the appellant. As ridiculous and vexatious as this sounds particularly when the process of CB is considered, this is the position the law has taken. In fact, this position is an anachronistic ingraining of the obnoxious and degrading common law capital superiority mentality that made employment contract to be described as "master-servant" relationship. Of course, a servant is perpetually subservient to the master in all ramification and having an agreement, is considered an affront. Unsurprisingly, workers had little or no value under the operation of common law which was imported to Nigeria vial colonialism and its strong hold, remained even after the inglorious exit of the British.

Nigeria is a common law jurisdiction, and it is expected that the common law position is applicable. Thus, the common law position on the status and enforceability of CA is recognized in Nigeria as amplified in a plethora of cases[54] especially *Union Bank of Nigeria Ltd. v Edet.*[55] On the justification of lack of privity of contract as the reason for the non-enforceability of CA, in *Osoh v Unity Bank Plc*[56] the Supreme Court of Nigeria stated *ex cathedra* thus: "it is on the principle of want of privity of contract that the courts have showed great reluctance to enforcing collective agreements between collective parties, at the instance of an employee(s) …" thereby reinforcing and approving the now anachronistic common law position which has by reasons of necessity become uncommon. In *Nigeria Arab Bank Ltd. v. Shuaibu*[57] the court invigorated the position that "collective agreement is at best a gentleman's agreement, an extra-legal document devoid of sanction being a product of trade union pressure."[58] One will curiously wonder why in the interest of justice and

[52] *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge Ltd.* (1915) A. C. 847.
[53] (2011) 7 NWLR (Pt. 711) 1; *Union Bank of Nigeria Limited v. Edet* (1993) 4 NWLR 288.
[54] *Chukwumah v. Shell Petroleum Nigeria Limited* (1993) 4 NWLR (pt. 289) 512; *Abalogu v. Shell Petroleum Nigeria Limited* (1999) 8 NWLR (pt. 613) 12; *New Nigeria Bank Plc v. Osoh* (2001) 133 NWLR (pt. 729) 232.
[55] (1993) 4 NWLR, (Pt. 287) 288.
[56] [2001] 13 NWLR (Part 729) 232.
[57] [1991] 4 NWLR (Pt. 186) 450.
[58] *ACB v. Nwodike* [1996] 4 NWLR (Pt. 443) 470 at 483.

purposive progressive adjudication necessitating by local circumstances, the Nigerian court did not think it necessary to regard the bindingness and enforceability of CA as an exception to the doctrine of privity of contract. The impact of this reverse position to ensuring industrial harmony which is a dire need in Nigeria cannot be overemphasised but regrettably, the court continued in inglorious homage to colonial servitude fueled by common law and denigration of labour.

The courts in Nigeria have carved out exceptions to cushion the hardship foisted by the common law position that CA are not binding and enforceable but mere gentleman agreement binding in honour.[59] Thus, where either expressly or by necessary implication a CA has been incorporated into the terms and condition of an individual contract of employment of an employee, it becomes binding and enforceable between the employee(s) and their employer.[60] This was the position taken by the Court of Appeal per Chukwuma-Eneh, JCA (as he then was) in *The Registered Trustees of the Planned Parenthood Federation of Nigeria & Anor. v. Dr. Jimmy Shogbola*.[61] A CA is said to be expressly incorporate where the agreement clearly and unequivocally states so. It is said to have been incorporated by necessary implication when there is ample evidence to show that both parties have—since it was reached—taken steps that are consistent with the agreement despite absence of express agreement.[62] Such reliance short of an express agreement based on the doctrine of estoppel, parties are estopped from maintaining the position that such a CA is nonbinding and therefore unenforceable.[63] Knowledge of the indirect or conductual incorporation by a party as opposed to benefiting from the incorporation is all that is required for this exception to become operational.

Basically, when the custom and usages of an industry have absorbed a CA over time, it becomes binding and enforceable despite not have been expressly stated.[64] Thus if either party, especially the employer, has taken benefit from

---

[59] E.A. Kene, "Collective Agreements and their Legal Status in Nigeria: The Current Trends" *Benue State University Law Journal,* 2021, Vol. 10, 30-49, *Nigerian Society of Engineers v Ozah* (2015) 6 NWLR (Pt. 1454) 76 at 94 B-D (CA); *Texaco (Nig.) Plc.* v *Kehinde* (2001) 6 NWLR (Pt. 708) 244; *Rector, Kwara Poly v. Adefila* (2007) 15 NWLR (Pt. 1056) 86 H- A.

[60] *Texaco Nigeria v. Kehinde* [2002] FWLR (Pt. 94) 143.

[61] (2005) I WRN 15 at 167.

[62] *Cooperative & Commerce Bank (Nig.) Ltd. v. Okonkwo* [2001] 15 NWLR (Pt. 735) 114.

[63] *Unity Bank Plc* v *Owie* (2011) 5NWLR (Pt.1240) 273.

[64] In relation to this it must be noted that despite this paradigm shift ingrained in progressive adjudication, surprisingly, the courts have not always approved of it as seen in a few cases such as *African Continental Bank Plc v Nbisike* (1995) 15 NWLR (Pt. 416) 725 where both parties relied on the same collective agreement and the Court of Appeal, per Edozie J.C.A. held that the contract was not enforceable. The same disturbing and disappointing outcome was reached in *African Nigeria Plc v Osisanya* (2001) 1 NWLR (Pt 642) 598 where both the employer

the CA it is deemed incorporated into the employment contract between the concerned employee(s) and that employer.[65] Although a CA is reached between a registered trade union and an employer or association of employers, it becomes enforceable by the individual employee once it has been incorporated because the trade union bargained and reached the agreement for and on behalf of the members who formed it.[66] In fact, by this token and knowledge of the representative capacity of the employee through the union by the employer, ought to have persuaded the Nigerian courts long ago to abandon the anachronistic common law position which is slavish, slavery, and undignifying allegiance to imperialism, grandstanding and promotion of subservience against the employee.

Aside the above exception, it should be noted that under section 3(1) of the Trade Disputes Act, 2004, parties in a CA are obligated to deposit at least three copies of the agreement with the Minister for Labor, Employment and Productivity (MLEP) who shall then determine whether the agreement is binding and enforceable either in whole or part. Thus, in line with the foregoing, once the MLEP exercises this power by an instrument under their hand, a CA under scrutiny becomes automatically binding and enforceable between the parties to the extent specified in the instrument. As plausible as this is, one must question the propriety of the power vested in the MLEP to determine the enforceability or otherwise of a CA. This is so bearing in mind that the MLEP is an appointee of the Federal Government and where the government is a party to such an agreement, the neutrality of the Minister remains questionable if not unreasonable as argued by Eyongndi.[67] At present, the impracticality of a government functionary acting in a way and manner that does not favour the government is extremely difficult if not impossible. It is a situation of he who pays the piper, dictates the tune. In fact, the exercise of this power can endanger industrial harmony and make the potency of CB and CA in resolving trade dispute to be diminished. In fact, the rule against bias which is concerned more not about the actual occurrence of bias but the thought of it by ordinary members of the society, stands against the powers of the MLEP to determine the extent of the bindingness and enforceability of CA in Nigeria. In fact, where the MLEP exercises the power honestly and fairly,

---

and the employee relied on the collective agreement but the court held that the dismissal procedure contained in the collective agreement was not binding on the employee as the collective agreement was not justiciable.

[65] *Adegboyega v Barclays Bank of Nigeria* (1977) 3 CCHCJ 497 per Akibo Savage, J.

[66] *Kwara State Polytechnic v. Adetilo & Ors.* [2007] 15 NWLR (Pt. 1056) 42 at 48.-50.

[67] D.T. Eyongndi, "The Powers, Functions and Role of the Minister of Labour and Productivity in the Settlement of Trade Disputes in Nigeria: An Analysis" *University of Jos Journal of Law and Constitutional Practice,* 2016, Vol. 9, 75-90.

the possibility that the same might be construed by the public exist because his/her neutrality unlike an impartial umpire like the court, is not guaranteed.

4. ILO Prescription on the Legal Status of Collective Agreement and the NICN's Stance

The NICN is a specialized court that has gone through a tumultuous journey of constitutional and jurisdictional metamorphosis.[68] After its creation under section 20 of the Trade Disputes Decree No. 7 of 1976,[69] the purported exclusive jurisdiction and constitutionality of the NICN had raised serious controversies;[70] mostly due to its omission under the Constitution of the Federal Republic of Nigeria, 1979 and 1999 respectively.[71] The attempt at curing this omission by the enactment of the National Industrial Court Act, 2006 (NIC Act, 2006), proved unhelpful as the same issues persisted, as noted by Eyongndi and Onu.[72] To permanently address this quagmire, the CFRN (Third Alteration) Act, 2010 was enacted.

At present, the NICN's existence is pursuant to section 253A (1) of the CFRN (Third Alteration) Act, 2010. By virtue of section 254C (1), the NICN has and exercises exclusive original civil jurisdiction over labor, employment, and allied matters to the exclusion of any other court in Nigeria. While the NICN is a court of equal status with the State High Court, Federal High Court and High Court of the Federal Capital Territory, Abuja, it does not have coordinate jurisdiction with these sister superior courts but exclusive original civil jurisdiction. The NICN, under the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 experienced a radical and phenomenal

---

[68] A.E. Akeredolu, and D.T. Eyongndi, "Jurisdiction of the National Industrial Court under the Nigerian Constitution Third Alteration Act and Selected Statutes: Any Usurpation?" *The Gravitas Review of Business and Property Law, University of Lagos* 2019, Vol. 10, n. 1, 1-16.

[69] By virtue of Section 274 of the 1979 Constitution (which section 315 of the 1999 Constitution is its equivalent), the Trade Disputes Decree being an existing law, metamorphosed into an Act of the National Assembly, renamed the Trade Disputes Act, 1976.

[70] *Incorporated Trustees of Independent Petroleum Association v Alhaji Ali Abdulrahman Himma & Ors* Suit No. FHC/ABJ/CS/313/2004 ruling delivered on 23 January 2004; *Western Steel Workers Ltd v Iron and Steel Workers Union of Nigeria (No. 2)* [1987] 1 NWLR (Part 49) [284] – [303]; *Kalango & Ors v Dokubo & Ors* [1987] 1 NWLR (Part 49) 248; [2004] NLLR (Part 1) 180; *National Union of Road Transport Workers v Ogbodo* [1998] 2 NWLR (Part 537) [189] - [191]. See also *New Nigeria Bank Plc & Anor v AM Osoh & 4 Ors.* [2001] 13 NWLR (Part 729) 232.

[71] J.O.A. Akintayo, and D.T. Eyongndi, 'The Supreme Court of Nigeria Decision in *Skye Bank Ltd v. Victor Inu*: Matters Arising' *The Gravitas Review of Business and Property Law*, 2018, Vol. 9, n. 3, 110.

[72] D.T. Eyongndi, and K.O.N. Onu, "A Comparative Legal Appraisal of "Triangular Employment" Practice: Some Lessons for Nigeria" *Indonesian Journal of International and Comparative Law,* 2022, Vol. 9, 181-207.

rebirth with far reaching effects on Nigeria's labor and employment jurisprudence, containing potential to positively revolutionize labor and employment adjudication beyond the undesirable shackles of now uncommon common law. Thus, Section 254C (1) (j) of the (Third Alteration) Act, 2010 empowers the NICN to exercise exclusive jurisdiction over civil causes and matters relating to the determination of any question as to the interpretation and application of any CA. Section 254C (2) empowers the NICN to apply international conventions, treaty, or protocol which Nigeria has ratified relating to labor, employment, workplace, industrial relations, etc. Thus, in the interpretation and application of collective bargaining, the NICN by virtue of section 245C (1) (f) (h) of the (Third Alteration) Act, 2010 is empowered to apply international best practice and labor standards which is found in ILO Conventions, Recommendations and statutes/decisions of courts of jurisdictions with a more progressive and advanced labor and employment practices.

The effect of the provisions on the jurisdiction and powers of the NICN on adoption and application of international best practice and labor standards is interestingly far-reaching. By this provision, the NICN, in adjudicating over any of the species or affiliates of labor and employment matters mentioned under section 254C (1) (j) of the (Third Alteration) Act, 2010 and is constitutionally permitted to apply unratified conventions, protocols, treaties (and invariably international labor standards and best practices in these legal instruments) together with domestic laws in settling such disputes. This provision is a leeway for the NICN to internationalize and align Nigeria's substantive and adjudicatory labor and employment jurisprudence with international minimum standards.[73] For too long, Nigerian labor and employment law and practice was held down by obnoxious and redundant uncommon common law axioms which have created unquantifiable hardship from multiple areas, such as issues of damages for wrongful termination of employment[74] and termination of master-servant employment for any reason or no reason at all.[75] These common law perspectives have only cheapened labor while unjustifiably protecting capital's interest reinforcing the master-servant mien of the employers of those day and the slave position of the worker.

Thus, Nigeria is a member of the ILO and a signatory to the ILO Convention 87, Collective Agreements Recommendation No. 91 of 1951, Collective

[73] B. Gernigon, A. Odero, H. Guido, *ILO Principles Concerning Collective bargaining, in International Labour Law Review,* 2000, vol. 139 n.1, 34.

[74] *Obanye v. Union Bank of Nigeria* [2018] 17 NWLR (Pt. 1648) 375.

[75] *Chuknuma v. Shell Petroleum Development Company* [1993] 4 NWLR (Pt. 298) 512.

Bargaining Convention No. 154 of 1981, and the Right to Organize and Collective Bargaining Convention No. 98 of 1949.[76] The international best practice and international labor standard in relation to CB based on ILO Conventions 87 and 98 and Article 3 of the ILO–Collective Agreement Recommendation, 1951 (No.91)[77] is that, once reached, a CA is binding and enforceable between the signatories and their privies without need for any other step whatsoever to be taken.[78] Pursuant to this international minimum prescription, the position of the ILO Freedom of Association Committee[79] is that failure to enforce a CA is a breach of the right to CB and honest bargaining.[80] The logical and legal implication of the foregoing position is that, based on section 254C (1) (f) (h) (j), and (2) of the (Third Alteration) 2010, applying the ILO prescription in Article 3 of the ILO Collective Agreement Recommendation, 1951, the anachronistic common law position that CA is merely a gentleman's agreement; only bound by honor and made enforceable only when incorporated directly or indirectly into the individual contract of employment, has become redundant and inoperative in Nigeria.[81] This to say the least, is breath of fresh air after an excruciatingly choking experience under the brutish reign of common law to the chagrin of Nigerian employees.

It is welcoming to note that the NICN has been proactively cognizant and has given vent to the foregoing position in some cases, as will be seen. In *Mr. Valentine Ikechukwu Chiazor v. Union Bank of Nigeria Plc.*[82] the claimant relied on the CAs between the Nigerian Employers Association of Banks, Insurance and Allied Institutions (NEABIAI), the Association of Senior Staff of Banks, and Insurance and Financial Institutions (ASSBIFI). He alleged that the defendant failed to observe the provisions of the various CAs before dismissing him. The defendant countered that the claimant cannot rely on the CAs as they do not form part of the contract with the defendant and thus, are not binding on the

[76] ILO Conventions 87 and 98 was ratified by Nigeria on the 17th of October, 1960.

[77] H. Dunning, *The Origins of Convention No. 87 on freedom of association and the right to organise International, Labour Review* 1998 vol. 137 n. 2, 149-163.

[78] N. Valticos *The ILO: A retrospective and future view, in International Labour Review,* 1996, vol. 135, n. 3-4, 473.

[79] The Committee on Freedom of Association is a tripartite body set up in 1951 by the Governing Body of the ILO to deal with cases relating to freedom of association and collective bargaining. the Committee on Freedom of Association has built up a body of principles on freedom of association and collective bargaining, based on the provisions of the Constitution of the ILO and of the relevant Conventions

[80] ILO, Freedom of Association: Compilation of decisions of the Committee on Freedom of Association, (sixth edition) 2018 para.1340, see also paras. 1334-1336.

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

[82] Unreported Suit No. NICN/LA/122/2014 judgment delivered on July 12, 2016.

defendant since, according to the defendant, CAs are generally not binding and not enforceable. The defendant further argued that since the CA has not been expressly incorporated into the claimant's contract of employment and he had not shown he is a member of the trade union that reached the agreement with the defendant, he cannot take any benefit therefrom. The NICN sharply rejected the defendant's argument based on the ILO prescription anchored on Section 245C (1) (f) (h) and (2) of the CFRN (Third Alteration) Act, 2010.[83] This same reasoning and conclusion was reached by the NICN in *The Management of Compagnie General De Geophhysique (Nig) Ltd v PENGASSAN.*[84] In *Lijoka Olaniyi Dennis & 1677 Ors. v. First Franchise Ltd. & Anor,*[85] the application of a CA called the Ministerial agreement was also challenged by the Counsel as the defendant relied on the argument of its non-enforceability because it violates the privity of contract rule, which under common law renders a collective agreement nonbinding and unenforceable. The NICN, pursuant to the aforementioned provisions of the Constitution (Third Alteration) Act, 2010, held that the argument was untenable as it was dead on arrival.

The argument that CA, once reached, is binding and enforceable between the signatories and those on whose behalf it was reached has been graphically captured by the NICN in *Enyinnaya Amugo v Sky Bank Plc*[86] Kanyip, J (as he then was). Considering the profoundness of the dictum, we take the opportunity to reproduce *verbatim ad literatim* the pronouncement of the Court thus:

> I take the liberty to reiterate (repeat) the stance this court took in *Valentine*. In both cases (*Valentine and Osoh*), the cause of action arose long before the Third Alteration to the 1999 Constitution was promulgated. The state of the law under which these cases were decided is certainly different from that under which the instance case is to be decided. The law as to the applicability of collective agreements when these cases were filed is certainly not the same with the law in that regard today under the Third Alteration to the 1999 Constitution. Today, under section 254C (1) (j) (i), this court has jurisdiction in terms of the interpretation and application of any collective agreement. It is needless that a court has jurisdiction to interpret and apply a collective agreement if the intendment of the law maker is not that the collective agreement is to be binding as such. It should be noted that under section 7(1(c)(i) of the NIC Act

[83] *Samson Kehinde Akindoyin v. Union Bank of Nigeria Plc* Suit No. NICN/LA/308/2013 delivered on 15th April 2015.

[84] Unreported Suit No NICN/ABJ172/2014 the judgment of which was delivered on 17th March, 2016 p.17.

[85] Unreported Suit No. NICN/LA/526/2013 judgment delivered on 6th February 2019 (2019) 2 NICLR 27.

[86] Unreported Suit No NICN/LA/258/2016 the judgment of which was delivered on 13th March, 2018.

> 2006, the jurisdiction of this court was only in terms of interpretation of collective agreement; the issue of application was not included therein. So when the Third Alteration to the 1999 Constitution added application of collective agreement to the fray, this must mean that the law maker deliberately intended collective agreements to be enforceable and binding. I so hold.

In agreement with the above position, in *Ikechukwu Odigidawu v. Tecon Oil Services Nigeria Ltd*[87] the Lagos Division of the NICN presided by Oji J reaffirmed the position that from 2010 when the Constitution (Third Alteration) Act, 2010 came into force, the position that CA is only enforceable where it has been incorporated into the individual contract of employment of the employee on whose behalf the union reached the agreement is no longer tenable. The position that CA is only binding in honor being a gentleman's agreement originates from common law and the assuaging position that a CA only becomes binding when incorporated into the individual contract of employment of the employee is judicial amelioration of the common law hardship. This exception, was a judicial leeway to the rigidity and harshness of common law unexplainable, irreconcilable, pedestrian position and the unquantifiable hardship it imposed on vulnerable yet, crushed workers who had to groan and endure nonetheless. Thus, the pristine position of the law is that, equity as a system of law, emerged with the sole aim of cushioning or ameliorating the hardship of common law and it is from this perspective that section 254C(1) (f) (h) and (2) of the is viewed.[88] Interestingly, section 7(1(c) (i) of the NIC Act 2006, Sections 245C (1) (f) (h) and (2) of the Constitution (Third Alteration) Act, 2010 are not just equitable ameliorants of the unjustifiable rigid and harsh common law position but statutory and constitutional ameliorants standing over and above equity to do justice at all cost.[89] In fact, these sections of the NIC Act, 2006 and the Constitution (Third Alteration) Act, 2010 are a statutory amplification of the maxim that fiat justicia ruat caelum and this time around, it is the common law that is gladly falling. To this end, it is a matter of end of discussion to the common law position which has been a source of protracted industrial unrest in Nigeria. This is easy to agree with especially within the tertiary education sector through the quagmire of Academic Staff Union of Universities (ASUU) strike which has become an almost annual ritual until recent times ending at issuance of strike notice or warning strike by ASUU. The reason is because the Federal Government of Nigeria has consistently refused to implement the CA reached

[87] Unreported Suit No: NICN/LA/29/2017 Judgment delivered 25th March 2021.
[88] *Aghata N. Onuorah v. Access Bank Plc.* (2015) 55 NLLR (Part 186) 17.
[89] *Samson Kehinde Akindoyin v. Union Bank of Nigeria Plc* Suit No. NICN/LA/308/2013 delivered on 15th April 2015.

with ASUU in 2009 despite several review for easier implementation and ASUU could not approach the court to enforce the same despite the fact that the review had be done after the Constitution (Third Alteration) Act, 2010 had come into force.

Based on the findings in the preceding section, it is safe to assert that there is a new dawn in the bindingness and enforceability of CA in Nigeria ushered in by the NICN through ILO prescription encapsulated in section 254C (1) (f) (h) (j), and (2) of the (Third Alteration) 2010. It is hoped that the labor laws (e.g. Labor Act, Trade Disputes Act, and Trade Unions Act), would be amended to incorporate the aforementioned position to give it express and unambiguous statutory fortification beyond the pronouncement of the court.

Notwithstanding the laudability of the NICN stance, there is the legitimate apprehension that being a court of first instance, unless and until its position is affirmed by the Court of Appeal whose determination on civil appeals from the decision of the NICN is final, it is not yet *uhuru*. At present, there is no decision of the Court of Appeal on the NICN pronouncement on the provisions of section 7(1(c) (i) of the NIC Act 2006, and sections 245C (1) (f) (h) and (2) of the Constitution (Third Alteration) Act, 2010. One is hopeful that, judging from some decisions of the Court of Appeal on novel and pace setting decisions of the NICN, such as *Sahara Energy Resources Limited v. Mrs Olawunmi Oyebola*,[90] this NICN's laudable position highlighted above will not be set aside on appeal. In this case (i.e. the *Oyebola'S Case*) the NICN had awarded two year salary as damages for wrongful termination of the employment of the employee contrary to common law prescription applicable to the parties.[91] The appellant appealed against the award, contending that the law is that in cases of wrongful termination of employment, the amount of damages to be awarded is the monetary equivalent of the period of notice required for the termination of the employment as provided for under common law. The Court of Appeal, while recognizing this common law position, held that in appropriate cases where there is wrongful termination of employment, the amount of damages to be and would be awarded will be more than what was agreed by the parties hence the award of two year salary as damages was upheld as fair and justified under the circumstances as the termination impugned the character of the respondent. This position, which aligned with and upheld the decision of the NICN, introduced a paradigm shift in the jurisprudence of measurement of amount of damages for wrongful termination of employment in Nigeria as

[90] (2020) LPELR-51806(CA).

[91] *Isheno v Julius Berger Nig. Plc* [2012] 2 NLLR (41) 127, Oforishe *v N.G. Co. Ltd* [2018] 2 NWLR (Pt. 1602) 35; *Olaniyan & Ors. v. UNILAG* [1985] 2 NWLR (Pt. 9) 599.

argued by Abangwu, Oyibodoro, Eyongndi, Shaba and Opara[92] Thus, bearing this in mind, we are confident that the Court of Appeal will graciously trod this path regarding the enforceability of CA espoused by the NICN.

The position taken by the NICN in the cases above in relation to section 7(1(c) (i) of the NIC Act 2006, sections 245C (1) (f) (h) and (2) of the Constitution (Third Alteration) Act, 2010, like it did earlier in *Aloysius v Diamond Bank Plc*[93] in the words of Eyongndi and Imosemi,[94] is a welcome development. This has aligned the law and practice of enforceability of CA in Nigeria with international best practices. Despite the untenable reasons advanced under the common law for the non-bindingness and invariability, along with the non-enforceability of CA, one cannot stop but wonder why the parties would agree to bargain if the product would not bind them automatically once reached. The paradox of agreement without an agreement is not only bizarre, but rather unfortunate considering its negative implications and impacts on employment and labor relations particularly entrenchment of industrial harmony.

Extrapolating from the above analysis, one thing is clear: the NICN through proactive adjudication has given judicial approval to sections 7(1(c) (i) of the NIC Act 2006, and sections 245C (1) (f) (h) and (2) of the Constitution (Third Alteration) Act, 2010. By this act, the law and practice on bindingness and enforceability of CA in Nigeria is aligned with international standard. No doubt, the ILO is the universal labor organization that sets minimum global best practices and standards in labor and employment relations. Any ILO member State whose law and practice falls short on any matter which the ILO has prescribed a minimum benchmark is regarded as operating beneath ideal and failing acceptable parameters relating to its minimum core obligation expected of all responsible members.

In Nigeria, many industrial actions especially within the public sector are traceable to the non-implementation of CA reached with workers through their union(s) by the government. Regrettably, the non-implementation is usually hinged on the anachronistic and infantile untenable reason that CA are not automatically enforceable unless under limited conditions which the government will never accede to. Rather, successive Nigerian government (both federal and at the State level) would rather enter into endless renegotiation of CA rather than ensure its implementation. Regarding

---

[92] N.E. Abangwu, U.G. Oyibodoro, D.T. Eyongndi, S. Shaba, and F.N. Opara, "Measurement of Quantum of Damages for Wrongful Termination of Employment in Nigeria: Gleaning Lessons from Ghana and Malaysia" *Lentera Hukum Journal* 2025, vol. 12, n. 1**,** 62-93.

[93] [2015] 58 N.L.L.R. (Pt. 199) 92.

[94] D.T. Eyongndi, and A. Imosemi, "Aloysius v. Diamond Bank Plc: Opening a New Vista on Security of Employment through the Application of International Labour Organisation Conventions" *African Journal of International and Comparative Law,* 2023, Vol. 31, n.1 356-376.

organized labor issues and the usual mandatory fourteen days strike notice, the government feigns ignorance and a few days to the expiration of such notice, instead apply to the NICN for an *ex parte* injunction thus restraining workers from proceeding with a strike. It is rather alarming that the NICN has been inclined to and has been granting such sought orders against labor which effectively and carelessly scuttles such planned industrial actions. Given the penchant of Nigerian government at renegotiating and general reluctance at implementing agreements entered with organized labor, one wonders why the NICN cannot or has failed to direct the government to put labor on notice for parties to argue the merit or otherwise of granting such order sought by the government. While workers in Nigeria continue to grapple with the government's insincerity towards collective bargaining and the resultant CA when its enforceability takes center stage, it would seem that this unhealthy situation would soon become a thing of the past given the development ushered in by the NICN regarding the status and enforceability of CA in Nigeria pursuant to the Constitution (Third Alteration) Act 2010. If anyone is going to the bargaining table in the future, they will do so knowing that any agreement reached thereafter is binding and enforceable. In fact, the attitude with which parties will now approach the bargaining table will change.

Worthy of note is the fact that over the years, labor and employment relations in Nigeria has faced several challenges, with employees being the most affected. Ajayi and Eyongndi[95] have opined that several employees have had their employment terminated on account of HIV/AIDS positive status by their employers despite the prohibition of such termination. Aside the pains that accompanies job loss, the affected employees are exposed to stigmatization and its concomitant deprivation. Thus, decisions of the NICN such as the ones examined above which have counterbalanced the obsolete and uncommon common law prescription on the nature and enforceability of CA in Nigeria are welcome and gratifying. One can only anticipate that such ambitious and protectionist stances taken by the NICN will be given appellate approval by the Court of Appeal in the event of an appeal. The benefit of upholding the position of the NICN by the Court of Appeal in the event of an appeal includes but not limited to infusing trust in collective bargaining. If CA is enforceable, waste of resources (human, material and financial) can be prevented that are expended in the process of collective bargaining, thus standardizing and aligning Nigeria with international standards on the practice of collective bargaining and the resultant collective agreement. Also, the

[95] M.O. Ajayi, and DT Eyongndi, "Termination of Employment based on Employee's HIV Status: The Response of the National Industrial Court of Nigeria" 20(1) *Age of Human Rights Law Journal* (2023) Vol. 20, n. 1 205-224.

NICN's position if upheld by the Court of Appeal is capable of promoting industrial harmony through the enforcement of CA.

5. The Practice in some Selected Jurisdictions

The labor and employment relations practice of CB and the resultant CA is not limited to Nigeria. It is practiced in several jurisdictions including South Africa, Kenya, Ghana, and Zambia which are all countries in Africa with a common law background like Nigeria and are all developing nations with a conservative socio-political landscape. While Nigeria is the most populated black nation in Africa and the world with the fastest growing economy in West Africa Sub-region, South Africa would rank as the most developed and economically buoyant nation within the Southern Africa sub-region, with Kenya being the fastest developing economy in the East Africa-sub-region. Zambia on the other hand, is a developing nation; thus, these variables couple with their common law common denominator, makes making comparison between these jurisdictions justified. Even though, like Nigeria, common law prescription on the legal status and enforceability of CA was applicable in these jurisdictions, through proactive legislative action there has been a radical positive departure from the stiffen, rigid and harsh common law position on the legal status (bindingness). Enforceability of CA has grown in Ghana, South Africa, Kenya and Zambia. This section of the paper examines the law and practice of CA in these jurisdictions aimed at drawing lessons for Nigeria.

In Kenya, Section 57(1) and (2) of the Labor Relations Act, 2007 (LRA, 2007) empower registered trade unions to engage in CB to create a CA with an employer or group of employers.[96] The employer is duty bound to disclose vital information that will enable trade unions bargaining on behalf of its members to bargain in good faith. The information disclosed by the employer shall be treated with utmost confidentiality and shall not be disclosed to unauthorized persons. In fact, section 58(1) of the LRA, 2007 allows employees and employer groups/unions to conclude CA adopting any of the Alternative Dispute Resolution (ADR) mechanisms to be used in the resolution of any dispute that may subsequently occur. By virtue of section 59(1) thereof, a CA binds the parties to the agreement that all union employees employed by the employer, group of employers, or members of the employers' organization are included in an agreement's involved parties. It is also binding for employers who are or are becoming members of an employers'

[96] *A&B David, "Strength in Numbers: The way forward in Collective Bargaining Agreements" https://abdavid.com/strength-in-numbers-the-way-forward-in-collective-bargaining-agreements/ accessed 19 June, 2025.*

organization who is a party in the agreement, to the extent that the agreement relates to their employees. In fact, even persons who entered into CB on behalf of a trade union, but who subsequently left the trade union or their employment, are bound by a CA reached thereafter. The foregoing has been upheld by the Employment and Labor Relations Court in *Kenya Plantation & Agriculture Workers Union v. Coffee Research Foundation.*[97]

In comparison to Nigeria, the scope of bindingness of a CA under Kenyan law is wider and plausible because in Nigeria only the signatories and persons on whose behalf the agreement was reached are countenanced either to enforce it or it be enforced against them. In Ghana, however, the scope goes beyond the immediate parties to the bargain and to those involved persons by affiliation or association.

By virtue of section 59(5), LRA, 2007, a CA becomes enforceable and shall be implemented once it is registered by the Court and will become effective from the date agreed upon by the parties as was held by the Industrial Court in *Kenafric Industries Limited v. Bakery Confectionary Food Manufacturing and Allied Workers Union.*[98] It must be noted that paucity of funds by an employer do not justify postponement of the obligation to implement a CA as was held in *Kenya Union of Commercial Food and Allied Workers v Kenya National Library Service.*[99] By section 60(1) of the LRA, 2007, the parties are obligated to submit a CA for registration to the Industrial Court within fourteen days of its conclusion. It should be noted that, by the clear phraseology of section 59(5) of the LRA 2007, enforceability and implementation of a CA are systematically different, and the rights inure at different times. At the time a CA is concluded, its bindingness and enforceability status attaches automatically as was held in *Ndege v. Steel Makers Ltd.*[100] The implementation of it only becomes legally possible upon registration. This position of the law and practice on enforceability of CA in Kenya is laudable.[101]

In Ghana, Part XII of the Ghana Labor Act No. 651, 2003 (GLA, 2003) deals with CA. Section 96 thereof, empowers a trade union on behalf of employees to engage in CB and conclude a CA with an employer or employer association. Negotiation during CB must be carried out in good faith and guided by total and comprehensive disclosure by both parties as provided for by section 97(1) of the GLA, 2003. All information disclosed during the negotiation shall be

[97] (2014) eKLR.
[98] [2014] eKLR.
[99] (2016) eKLR.
[100] [2014] eKLR.
[101] B.M. Musilli, "Challenges in Implementing and Enforcing Collective Bargaining Agreement" (Nairobi: The Kenyan Institute of Public Policy Research and Analysis, 2018) 17-20.

treated with utmost confidentiality by the party receiving the information except if it was made public. Parties in the negotiation shall not make false or fraudulent misrepresentations as to those matter to the negotiations. Section 105(1) thereof specifies the legal effect of a CA. Hence, a concluded CA shall apply to all workers of the class specified in the CB certificate issued by the Labor Officer.

The provision of a CA relating to terms and condition of employment and personal obligations imposed on a worker/employer shall form—in part—the terms and conditions of employment between the parties.[102] Once reached, a CA becomes binding for the involved parties at the first instant for at least one year and the Chief Labor Officer has the power to extend the duration of the agreement. Thus, the common law position that a CA is only binding in honor is inapplicable in Ghana.[103]

In South Africa (SA), employees are permitted to engage their employer or association of employers in CB through their trade unions. Section 23 of the South African Labor Relations Act, 1995[104] (SA LRA, 1995) makes a CA binding between the signatories once reached, including their privies and workers who are not members of the trade union that reached the agreement, but it pertains to or/are captured therein. Section 199 of the SA LRA, 1995 states that an employment contract entered before or after a CA may not allow an employer to pay his workers remuneration less than what is stipulated in the CA. It further provides that any contract that purports to waive any collective agreement is invalid. The validity and enforceability of a CA is at once concluded. This affords employee ample protection and insulates collective bargaining from employer's shenanigans as seen in Nigeria.

In Zambia, section 71(3) (c) of the Zambian Industrial and Labor Relations Act, 1993[105] states that once a CA has been accepted by the Minister, it becomes binding between the employer and employee or between the parties. Thus, once a CA is concluded, there is no need for incorporation into the individual contract of employment of an employee for it to become binding and enforceable. All that is statutorily required is the approval of the Minister which is just an administrative act. The fact that the bindingness and invariably enforceability of a CA is contingent on the approval of the Minister even if styled as a mere administrative action, is not without legitimate concerns. In

[102] Section 105(2) Ghana Labour Act, 651, 2003.

[103] A.H. Kwarteng, J. Bawa, K. Kwaku and T. Koduah "Improving Labour Laws in Ghana: An Analysis of Collective Bargaining Agreements" *Journal of Labour and Society,* 2024, Vol. 27, n. 1, 1-24.

[104] Labour Relations Act, No. 66 of 1995.

[105]Zambian Industrial and Labour Relations Act No. 27 of 1993, Cap 269 of the Laws of Zambia.

the event that the government is a party to a CA which favors the employee one cannot dismiss the apprehension of the reluctance of the Minister to fail or delay to act. Where there is a failure or delay on his part, what remedy is available to an aggrieved union? Also, why would a Union be subjected whether real or imaginary to think of the possibility of administrative frustration occasioned by the refusal of the Minister or have to expend material and financial resources post-agreement to effectuate an agreement? Is the Zambian courts inclined to award damages in favor of the union for cost incurred in getting the Minister to sanction a CA? This are genuine concerns that the position of the law in Zambia raises.

Regarding the bindingness and enforceability of a CA, there is a striking similarity on the position of the law in Ghana, Kenya, and Zambia to the effect that once reached, a CA, the signatories to it, and their privies are bound by its terms and conditions without any need for further action. Thus, a CA in these jurisdictions, unlike Nigeria, is a legally binding contract and not a mere "gentleman's agreement" only binding in honor. In South Africa, the bindingness and enforceability of a CA is automatically once reached between the parties and there is no requirement for sanctioning it by any administrative/executive action. Agreement registration with the court of labor officer/Minister of labor is required for it to become enforceable. This is a striking difference between the position of the law in South Africa on one hand and Ghana, Kenya, Zambia and Nigeria on the other where bindingness is fragmented from implementation. The position in South Africa is preferred as it ensure that the enforceability and implementation of a CA is not delayed due to post-agreement approval process either by the court, labor Officer, or Minister, and it also enhances the fidelity of the process and infuses confidence in the process of CB. Also, the law in these jurisdictions (i.e. Kenya, South Africa, Ghana and Zambia), just like in Nigeria, expressly empower employees and employers to engage in CB, meaning that the process has statutory recognition and does not occur merely as a matter of industrial practice. Of note, in the provision under South African law it states that any contract that purports to waive a CA or any part thereof is invalid and therefore unenforceable. This is to ensure that no party to a CA, especially the employer who by default and design wields more power, does not take undue advantage of the inequality of power, to circumvent a CA that favors the employees. Thus, to safeguard the integrity of a CA and the process of CB, Ghana, Kenya, Zambia and Nigeria should amend its laws to adopt the South Africa position which makes a CA automatically binding and enforceable once reached without any formality of approval by the court, labor officer, or minister. Also, the prohibition of using any contract to render either in part or full

inapplicable a CA by the party thereto under South African law should be adopted by these other jurisdictions bearing in mind its utilitarian value.

It can also be observed that based on the law and practice in Kenya, Ghana, South Africa and Zambia, enforceability and implementation of a CA are systematically different and the rights inures at different times. At the time a CA is concluded, its bindingness and enforceability status attaches automatically. The implementation of it only becomes legally possible upon registration or approval by the court or labor officer based on the requirement of the law in each jurisdiction. In these jurisdictions, registration by the court or labor officer is a mere administrative act which performance can be compelled although this ought to be avoided considering the cost and needless delay that may ensue therefrom. In Nigeria, however, under section 3(1) of the Trade Disputes Act, upon adoption and submission of three copies of a CA by the parties, the Minister of Labor, Productivity, and Employment has the discretion to determine the extent to which the CA is approved and thereby made binding and enforceable between the parties. It is controversial if the Minister can be compelled to perform that duty and if it was legally possible, what about the attendant cost associated with it and delay arising from appeal? This position in Nigeria typifies the bourgeois attitude towards labor which is depicted in the now anachronistic appellation of "master-servant" used in the description of simple contract of employment. At all times, under the bourgeois system, the 'servant' is always subservient to and at the mercy of the 'master' whose wish is the servant's command.

In Zambia, based on the phraseology of 71(3) (c) of the Zambian Industrial and Labor Relations Act, 1993, a CA is only binding between the signatories, i.e. the parties on whose behalf and benefit it was reached and their privies. In Ghana, South Africa and Kenya, workers who are not members of a trade union that participated in the CB that birthed the CA but by association/affiliation are or ought to be contemplated, are bound by it. Thus, the coverage of the bindingness scope and therefore, enforceability of a CA under the law of Ghana, South Africa and Kenya is wider than Zambia hence, Zambia should review its law aimed at adopting the more preferred position in Ghana, South Africa and Kenya.

Comparing the foregoing positions in Kenya, South Africa and Zambia with what is obtainable in Nigeria, it is clear that the legal status, coverage, and enforceability of CA is radically different. While in these jurisdictions, (as exemplified by South Africa,) once concluded, a CA becomes binding and enforceable with "cosmetic registration requirement" post agreement (as it is the case in Ghana, Kenya and Zambia). In Nigeria, for a very long time, enforceability was only made possible through the court as the labor legal framework, aside from recognizing the right to engage in CB, is silent on the

legal status of the agreement as well as its enforceability. At present, the Constitution (Third Alteration) Act, 2010 is a game changer which has ushered a new dawn ably executed by the NICN. Also, the coverage sphere of a concluded CA in these jurisdictions regarding parties, is wider than Nigeria as it covers persons who are not primarily participants to the negotiation, but whose interest is involved or could be positively affected unlike Nigeria that is it only the parties to the negotiation. To ensure that the effect of this innovation introduced by the NICN is seen and felt, there is need for stakeholders in the labor and employment sphere, especially trade unions to be sensitized to ensure that they are taking advantage of this development in enforcing existing CA as the non-bindingness unenforceability challenge, has been a reason for several labor unrest with their resultant inimical results.

In Nigeria, even under the Third Alteration Act, 2010, unlike in South Africa where Section 199 SA LRA, 1995 provides that any contract that purports to waive a CA is invalid, there is no such provision in Nigeria either as a matter of statute or judicial pronouncement. The only right preserve is joining or forming of a trade union of one's choice via freedom of association. Thus, while it is necessary to amend the Trade Disputes Act to include the same provision in Nigeria's law, the NICN, where the opportunity present itself, a judicial declaration should be made to this effect bearing in mind its utilitarian value. The provision of section 3(1) of the Trade Dispute Act, 2004 that requires parties to a CA to deposit at least three copies with the Minister who has the unfettered discretion to determine if it will be enforceable and to what extent (which is the same with what is obtainable under Ghana, Kenya and Zambian law) unlike South Africa, should be expunged by review of the Act to pave way for automatic bindingness and enforceability once the agreement is reached.

While the NICN has in an impressive manner relied on the provisions of section 254C1 and 2 of the Constitution (Third Alteration) Act, 2010 to rely and apply ILO conventions, Recommendations and ILBP on the bindingness and enforceability of CA, since it is a court of first instance, there is real apprehension whether the position taken will be approved or upturned by the Court of Appeal in the event of an appeal. This unsettling concern is legitimate as the Supreme Court of Nigeria in *Skye Bank Plc. v Iwu*[106] have held that sections 234(2)-(4), and 254C (6) of the Constitution (Third Alteration) Act 2010 have not divested the Court of Appeal of its appellate jurisdiction provided under sections 240, 241 and 242 of the 1999 Constitution, and all decisions of the NICN are appealable to the Court of Appeal (either as of right or with the leave of the court) whose decision on such appeal, is final. While

[106] [2017] 7 SC (Part 1) 1.

we anticipate that the Court of Appeal will agree with the NICN, this anticipation is strengthened when the Court of Appeal decisions such as *Sahara Energy Resources Limited v. Mrs Olawunmi Oyebola*[107] where contrary to the prevailing position that the quantum of damages to be awarded in cases of wrongful termination of employment shall be the amount equivalent of the period of notice that ought to have been given to rightly terminate the employment. The NICN departed from this and awarded two year salary as damages instead. The NICN departed from the established position on the ground that the circumstances of the case required departure in the interest of justice. The Court of Appeal upheld the position of the NICN. It is hoped that the same will be done with the position taken by the NICN on the issue of bindingness and enforceability of CA bearing in mind its constitutionality.

6. Conclusion and Recommendations

Extrapolating from the analysis above, CB is an important tool for power equilibrium adopted by employees to negotiate enhanced terms and conditions of employment with their employer with the aim of ushering harmonious relations. At the conclusion of a successful CB, there is usually a CA that contains terms and conditions mutually reached by the bargaining party in resolution of a trade dispute. At common law, a CA is regarded as a gentleman's agreement only binding in honor due to the lack of intention to create legal relation and privity of contract. This position became applicable in Nigeria due to her British colonial ties. However, the Nigerian court over the years relaxed this rule by the exception that where a CA has been incorporated either expressly or by necessary implication into the individual contract of employment of an employee, it becomes binding and enforceable *qua* party couple with a few statutory exceptions which ameliorated the hardship created by the common law position. Despite this, the legal status and enforceability trend of CA in Nigeria remained challenging and created a paradox of agreement without an agreement, which has culminated into several labor unrest typified by the lingering ASUU strike.

In 2010, the Constitution (Third Alteration) Act, 2010 was enacted and the jurisdiction of the NICN was enhanced and fortified to have and exercise exclusive original civil jurisdiction over labor and ancillary matters including interpretation and enforcement of CA. The NICN has also been empowered to apply ratified ILO conventions and recommendations in the course of adjudication hence, ILO Conventions 87 and 98 and Collective Agreements Recommendation No. 91 of 1951, collective agreements are made

[107] (2020) LPELR-51806(CA).

automatically binding and enforceable between the signatories and their privy. This ILO position resonates with the inherent intention of collective bargaining and capable of entrenching industrial harmony which is a radical departure from what is obtainable in Nigeria. Fortunately, the NICN has given judicial approval to this ILO position by holding that collective agreement, once concluded and without more, is binding and enforceable between the parties and those on whose behalf it was reached. This position is *in tandem* with what has been done by the courts and legislature in several African countries like Ghana, South Africa, Kenya, and Zambia which also have common law ties but have since progressively moved on. While the alignment of the NICN is plausible, it is not a matter of end of discussion as the NICN is a court of first instance whose decisions are subject to review by the Court of Appeal which is the final court on civil appeals from civil decisions of the NICN. Although the Court of Appeal has not approved this novel and welcome position of the NICN engineered by the ILO prescription, it is hoped that, based on antecedents (as the Court of Appeal has upheld several innovative positions taken by the NICN in conforming Nigeria's labor and employment jurisprudence with international standard), the same will done in this instant. Based on the foregoing, it is recommended that like it is obtained in jurisdictions like Ghana, South Africa, Kenya, and Zambia the Nigerian Law Act, 2004 which is the primary labor legislation should be amended and the innovative provisions contained in the labor legislation of these jurisdictions wherein CA are made binding and enforceable once concluded should be introduced.

Also, the provisions of ILO Conventions 87 and 98 and Collective Agreements Recommendation No. 91 of 1951 which have been judicially approved by the NICN, should be given statutory recognition by incorporation into the provisions of the Labor Act.

Stakeholders within the labor and employment sphere particularly trade unions, should be sensitized on the new development ushered in by the decisions of the NICN which are to the effect that once concluded, CA is binding and enforceable between the signatories and their privies. This will enable parties (whether trade union or employer or employer organisation) who have an existing CA to approach the NICN to seek its enforcement towards engendering industrial harmony rather than resorting to endless and needless industrial actions.

It is also recommended that, to ensure that the novel position taken by the NICN with regards to the status and enforceability of CA which has aligned the position in Nigeria with international standard is maintained, the Court of Appeal—in the event that there is an appeal—should do like it commendably did in other instances, by upholding the instant NICN decision. Doing so by

the Court of Appeal will spotlights Nigeria as a progressive and standardized country whose employment and labor law and practice adheres with international core standards set by the ILO.

Exploring Employment Relations of Pseudo-Contracted Workers in the Greek Banking Sector: A Qualitative Analysis

Eleni Rompoti and Alexis Ioannides *

Abstract. This article presents findings from qualitative research on the Greek banking sector, focusing on pseudo-contracted workers employed through Business Service Providers (contractors) and performing their work on bank premises. Drawing on interviews with workers and trade union representatives, the analysis examines employment relations, job precariousness, and forms of collective organization among this under-represented workforce. Although the international literature on labor leasing and outsourcing has expanded substantially, pseudo-contracting as a concealed form of labor leasing remains largely unexplored at both theoretical and empirical levels. The findings demonstrate that banks and contracting firms enter into fictitious project-based agreements, while in practice workers perform fixed and ongoing operational tasks without enjoying the rights and protections afforded to permanent employees. The study contributes to debates on labor market segmentation, precarious employment, the deregulation of industrial relations, and the erosion of collective representation, underscoring the need for clearer regulatory frameworks governing in-house outsourcing arrangements that conceal the use of leased workers.

Keywords: *Trade Unions, Pseudo-Contracted Workers, Leased Workers, Business Service Providers, Employment Relations.*

* Eleni Rompoti (corresponding author, email address: robotieleni@yahoo.gr, erompoti1@tuc.gr) is a Postdoctoral Researcher in Human Resource Management and Industrial Relations at the Technical University of Crete. She holds a PhD in Industrial Relations and Labour Economics from the Democritus University of Thrace. Alexis Ioannides is a Professor of Labor Economics at the Democritus University of Thrace.

1. Introduction

Flexible, informal, and innovative forms of employment emerged in the 1980s and noted rapid expansion during the Great Recession of 2007; this also happened during the recent COVID-19 pandemic. Employers and businesses have increasingly adopted these models to reduce labor costs, boost productivity, and boost competitiveness. At the same time, flexible employment arrangements have also been used as a strategy to preserve jobs and mitigate rising unemployment during the financial crisis that began in 2007 in the USA and Europe and continued in Greece until 2018.[1]

Various novel employment forms—including temporary work, workers leased through temporary work agencies (TWAs) to user undertakings, part-time employment, seasonal work, project-based contracts, and outsourcing—have become a dominant global trend and now correspond to approximately one-third of the total workforce.[2] For instance, part-time employment has steadily increased across many EU countries over the past two decades[3] and worker

[1] C. Forde & G. Slater, "Agency working in Britain: Character, consequences and regulation," *British Journal of Industrial Relations 43* (2005): 249–271. https://doi.org/10.1111/j.1467-8543.2005.00414.x

D. Pavlopoulos, *Temporary employment in Greece and in the EU: An approach using longitudinal data.* Athens: INE/GSEE, 2015.

E. Rompoti, A. Ioannides & T. Koutroukis, "Employment flexibility and industrial relations reforms in Greece of memoranda," *E-Journal of International and Comparative Labor Studies 11* (2022): 40–63.

E. Rompoti & A. Ioannides, "Temporary agency workers and the economic crisis in EU and Greece," *Greek Review of Social Research 151* (2019): 99–135.

E. Rompoti and A. Ioannides, "Leased workers in the EU and in Greece," *Humanities and Social Sciences Research 6* (2023a): 1–13.

E. Rompoti and A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," *Administrative Sciences 13,* no. 11 (2023b): 235. https://doi.org/10.3390/admsci13110235.

[2] International Labor Organization (ILO), *What is temporary employment?* (n.d.), retrieved February 16, 2022, https://www.ilo.org/global/topics/non-standard-employment/WCMS_534826/lang--en/index.htm.

E. Rompoti & A. Ioannides, "Temporary agency workers and the economic crisis in EU and Greece," op. cit.

E. Rompoti & A. Ioannides, "Leased workers in the EU and in Greece," op. cit.

E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

B. Thomson & L. Hünefeld, "Temporary agency work and well-being: The mediating role of job insecurity," *International Journal of Environmental Research and Public Health* 18 (2021): 11154. https://doi.org/10.3390/ijerph182111154.

[3] S. Gialis & K. Gourzis, "Discussing the 'Covert Unemployment': Variations in the underemployment rates in the Greek regions during the financial crisis". In *Society, Unemployment, and Social Reproduction.* Athens: Gutenberg, 2017, 272–297.

leasing remains one of the fastest-growing forms of employment both globally and within Europe.[4] Within the EU-27, temporary employment for individuals aged 15–64 accounted for 11.6% of total employment; 17.8% was part-time employment, and 2.4% of workers in that demographic were leased through TWAs as of 2023.[5]

Despite the increased interest in flexible forms of employment, the labor status for in-house outsourced or pseudo-contracted workers remains largely unexplored in many EU countries, including Greece. There is a common confusion in literature between this form of employment and the leasing of workers through Temporary Work Agencies (TWAs), since the two practices share several common characteristics (e.g. workplaces at a user undertaking or the existence of two employers). Several studies suggest that the actual number of workers leased through TWAs in Greece may be higher than reported, as many are employed under fictitious contracts or through "pseudo-contracting" under Business Service Providers.[6] Evidence from the Greek banking sector further shows that in-house outsourced workers/pseudo-contracted workers

---

J. Horemans, I. Marx, & B. Nolan, "Hanging in, but only just: Part-time employment and in-work poverty through the crisis," *IZA Journal of European Labor Studies 5,* no. 1 (2016): 1–19.
C. Jenkins & C. Charleswell, "Debt, underemployment, and capitalism: The rise of twenty-first-century serfdom*," New Politics 15*, no. 4 (2016): 33–39.

[4] W. Eichhorst & V. Tobsch, Has atypical work become typical in Germany? Country case study on labor market segmentation. *Employment Working Paper No. 145*. Geneva: International Labor Organization, 2013.
K. Hakansson & T. Isidorsson, "Work organizational outcomes of the use of temporary agency workers*," Organization Studies 33*, no. 4 (2012): 487-505. https://doi.org/10.1177/0170840612443456.
International Labor Organization, *Private employment agencies, temporary agency workers and their contribution to the labor market*. Geneva: ILO, 2009.
J. Arrowsmith, *Temporary agency work and collective bargaining in the EU*. Dublin: European Foundation for the Improvement of Living and Working Conditions, 2008.

[5] Eurostat, "Temporary agency workers (annual average)," accessed September 13, 2024, https://www.ec.europa.eu/eurostat.
Eurostat, "Part time employment (annual average)," accessed November 13, 2024, https://www.ec.europa.eu/eurostat.
Eurostat, "Temporary employment (annual average)," accessed November 13, 2024, https://www.ec.europa.eu/eurostat.

[6] E. Rompoti & A. Ioannides, "Temporary agency workers and the economic crisis in EU and Greece," op. cit.
E. Rompoti and A. Ioannides, "Leased workers in the EU and in Greece," op. cit.
E. Rompoti and A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.
D. Zerdelis, *The professional leasing of employees*. Athens: Nomiki Vivliothiki, 2017.
G. Leventis, "Project contract that conceals leasing of employees," *Deltio Ergatikis Nomothesias 73* (2017): 185.

often exhibit characteristics similar to those of leased workers, thereby blurring the lines between these two forms of employment even more.[7]

Among the various types of flexible employment, outsourcing has gained attention as a cost-reduction strategy in both public and private sector organizations. Outsourcing, a business strategy where companies assign services or projects to external providers, comes in two forms: when contracted workers perform their work at the premises of the user company, they are called "in-house outsourced workers"; when they execute their tasks at the premises of the contracting company, they are "out-house outsourced workers."

Although research is increasingly engaged in issues related to Temporary Work Agencies (TWAs) and general outsourcing practices,[8] the legal and institutional aspects that should distinguish genuine contracting from unlawful leasing of personnel remain largely under-investigated in the Greek context.[9] This paper wishes to close this gap by presenting an in-depth case study related to the Greek banking sector, where the pseudo-contracting form of employment has become the norm given the otherwise vague or non-existent legal regulation.

The primary objective of this article is to investigate a specific form of flexible employment—contracted workers employed through Business Service Providers—with a particular focus on in-house outsourced workers, also referred to as pseudo-contracted workers, within the Greek banking sector. These workers in Greece typically receive low wages, experience limited labor rights, and—despite the formal outsourcing arrangements—perform duties

---

[7] E. Rompoti & A. Ioannides, "Temporary agency workers and the economic crisis in EU and Greece," op. cit.
E. Rompoti & A. Ioannides, "Leased workers in the EU and in Greece," op. cit.
E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.
D. Zerdelis, *The professional leasing of employees*, op.cit.
G. Leventis, "Project contract that conceals leasing of employees,"op.cit.

[8] J. Arrowsmith, *Temporary agency work and collective bargaining in the EU*. op. cit..
International Labor Organization, *Private employment agencies, temporary agency workers and their contribution to the labor market*. op. cit.
W. Eichhorst & V. Tobsch, Has atypical work become typical in Germany? Country case study on labor market segmentation. op. cit.

[9] E. Rompoti & A. Ioannides, "Temporary agency workers and the economic crisis in EU and Greece," op. cit.
E. Rompoti &A. Ioannides, "Leased workers in the EU and in Greece," op. cit.
E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.
D. Zerdelis, *The professional leasing of employees*. Athens: Nomiki Vivliothiki, 2017.
G. Leventis, "Project contract that conceals leasing of employees," op.cit.

very similar to those of workers leased through Temporary Work Agencies (TWAs). This article includes a comprehensive literature review on both TWAs and Business Service Providers, offering a conceptual clarification of the differences and overlaps between the two models which are often mistakenly treated as equivalent. The key research questions addressed by this study are as follows:

1. Definition and Legal Protection: How is the leasing of workers through Temporary Work Agencies (TWAs) defined according to the EU literature, and what protections does European Directive 2008/104/EC offer to these workers? What are the main features of this form of employment, and how is it different to "in-house outsourced workers/pseudo-contracted workers" employed by Business Service Providers? (See the theoretical framework in Part 2.)
2. Industrial Relations and Broader Impacts: What were the industrial relations like for in-house outsourced workers/pseudo-contracted workers in the Greek banking sector during the financial crisis? Additionally, what are the broader effects of flexible employment practices on working conditions and labor rights? (See the theoretical framework and empirical findings in Parts 2 and 4.)
3. Characteristics and Motivations: Do in-house outsourced workers/pseudo-contracted workers in the Greek banking sector exhibit characteristics similar to workers leased through TWAs? If so, what are the underlying motivations for employers to engage in "pseudo-contracting" practices in Greece? (See the theoretical framework and empirical results in Parts 2 and 4.)
4. Unionization and Advocacy for Workers' Rights: Have in-house outsourced workers/pseudo-contracted workers in the Greek banking sector formed unions or other collective organizations to claim their rights? If so, how do they define their industrial relations, and what wins have they achieved or what obstacles have they encountered? (See the empirical findings in Part 4.)

The main research assumptions are as follows:

First, in-house outsourced workers in the Greek banking sector are, in essence, pseudo-contracted workers, and contracting companies operate unlawfully as Temporary Work Agencies (TWAs) by leasing personnel. It is believed that these contracting companies are pseudo-contracting companies and enter into fictitious project agreements with banks.

Second, these pseudo-contracted workers experience worse working conditions compared to permanent employees in banks. It is further assumed that their employment relations worsened significantly during the financial crisis.

This paper lays out a comprehensive and empirically supported description of an understated and legally vague form of employment: pseudo-contracting

through business service providers. Based on theories of labor market segmentation,[10] the concept of the precariat,[11] and the deregulation of labor relations and collective representation,[12] this paper explains how pseudo-contracting undermines labor rights and enhances job precariousness. Qualitative research in the banking sector shows that in-house outsourced workers operate as leased workers, but with limited rights. This study contributes theoretically empirically by clarifying crucial concepts and underlining the institutional deregulation of labor markets in Europe.

The structure of this article is as follows: The second part provides a literature review on both the "leasing" of workers through TWAs and on in-house outsourced workers/pseudo-contracted workers through Business Service Providers by outlining the main features and distinctions between "leasing" and "pseudo-contracting." The third part details the research methodology employed. The fourth part presents the empirical findings related to labor relations and union activities among in-house outsourced workers/pseudo-contracted employees in the Greek banking sector. The fifth part contains the Discussions, the limitations, and suggestions for future research. The sixth part summarizes the principal conclusions from the study.

2. Literature Review

2.1 Flexible Forms of Employment: Employment Relations of Leased and Pseudo-contracted Workers in Greece and Europe

This section describes a new social class of workers who live and work under conditions of perpetual labor precarity. The analysis is based on existing literature regarding the concept of the precariat, as analyzed by Standing,[13] as well as the theory of labor market segmentation.[14] More specifically, our research highlights this new social class and focuses on the precarious situation of the pseudo-contracted workers (in-house outsourced workers) in the banking sector, who are leased workers in disguise.

The precariat, deriving from the Latin precarius, is a term that first appeared in the 80's. It refers to people that work – either mentally or manually – under flexible terms and those who are unemployed or retired individuals receiving a

[10] P. Doeringer & M. Piore, Internal Labor Markets and Manpower Analysis. Lexington, MA: D.C. Health, 1971.

[11] G. Standing, *The Precariat: The New Dangerous Class*. London: Bloomsbury Academic, 2011.

[12] W. Streeck, *How Will Capitalism End? Essays on a Failing System*. London: Verso Books, 2016.

[13] G. Standing, *The Precariat: The New Dangerous Class.* op. cit..

[14] P. Doeringer & M. Piore, Internal Labor Markets and Manpower Analysis. op. cit.

M. Reich, M. Gordon, & R. Edwards, "Dual Labor Markets: A Theory of Labor Market Segmentation," *American Economic Review 63*, no. 2 (1973): 359–365.

low pension as well. According to Standing,[15] the main characteristics of the precariat are, on the one hand, instability and insecurity in work (e.g. fixed term contracts, part-time employment, leasing or contracting employment, outsourcing etc.). On the other hand, they are characterized by low wages and a lack of social protection. Access to state benefits is limited and collective representation (i.e. weakened unionism) is either minimum or absent. Mental insecurity, constant anxiety regarding the work future, and lack of labor rights and career perspectives are all prominent characteristics of the precariat.

Both leased workers from Temporary Work Agencies (TWAs) and in-house outsourced workers/pseudo contracted workers employed through Business Service Providers (contracting companies) fit into the precariat definition, thus confirming the theory of labor market segmentation. These two forms of employment are often confused, yet they are not identical.

The method of leasing workers, or "temporary employment through Temporary Work Agencies (TWAs)," emerged in the United States as early as the 1940s. In Western Europe, this employment model was introduced in the 1960s and was later adopted by other European countries in the 1990s. In Greece, this practice was first implemented in the early 2000s.[16] Within the European Union (EU), "leasing" personnel through TWAs refers to the temporary placement of an employee at a secondary undertaking. More specifically, the employee signs a work contract with the TWA (direct employer) —either for a fixed or indefinite period and either for full-time or part-time employment—and is then leased or temporarily placed at another business or user undertaking (indirect employer). The indirect employer retains supervisory and managerial rights over the employee, determining the time, place, and mode of service provision.[17] Consequently, the primary

---

[15] G. Standing, *The Precariat: The New Dangerous Class.* op. cit.

[16] K. Papadimitriou, *Temporary Employment: "Leasing" by Profession*. Athens: Sakkoulas, 2007.
E. Rompoti, A. Ioannides & T. Koutroukis,"Employment flexibility and industrial relations reforms in Greece of memoranda," op. cit.
E. Rompoti & A. Ioannides, "Temporary agency workers and the economic crisis in EU and Greece," op. cit.
E. Rompoti & A. Ioannides, "Leased workers in the EU and in Greece," op. cit.
E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.
E. Voss, K. Vitols, N. Farvaque, A. Broughton, F. Behling, F. Dota, S. Leonardi, & F. Naedenoen, *The Role of Temporary Agency Work and Labor Market Transitions in Europe: Institutional Frameworks, Empirical Evidence, Good Practice and the Impact of Social Dialogue*. Brussels: Eurociett, 2013.

[17] European Parliament and Council, Directive 2008/104/EC on temporary agency work, *Official Journal of the European Union* L 327/9 (2008): 280–285.
Law 2956/2001, Restructuring of the Hellenic Manpower Organization and Other Provisions, *Greek Government Gazette* 258/A (2001).

characteristic of worker "leasing" is the "duality of employers." According to the European Directive 2008/104/EC, Temporary Employment through TWAs is safeguarded within the EU by ensuring equal pay and fundamental employment rights for leased workers, provided they possess the same qualifications as permanent employees in the user undertaking for the entire duration of their employment. In Greece, this Directive was transposed into national legislation through Laws 4052/2012, 4093/2012, and 4254/2014.[18] The maximum permitted duration of "leasing" workers varies among EU member-states, as the decision remains at the discretion of each individual government. In many countries, the maximum duration has gradually increased.[19]

Outsourcing gained momentum in the 19th century. The term "outsourcing" refers to the business practice of assigning core or secondary services or projects to external service providers.[20] This practice is primarily employed to reduce labor costs and to access specialized personnel with expertise and innovative ideas in their respective fields.[21] When outsourcing occurs within

---

Law 4052/2012, Law on the Competency of Ministry of Health and Social Solidarity, and Ministry of Labor and Social Insurance for the Implementation of the Law: Approval of Draft Contracts of Funding Facilitations Between the European Financial Stability Facility (EFSF) and the Hellenic Republic and the Bank of Greece, and Other Emergency Provisions for the Reduction of the Public Debt and the Rescue of the National Economy: And Other Provisions, *Greek Government Gazette* 41/A (2012).

E. Rompoti &A. Ioannides, "Leased workers in the EU and in Greece, op. cit.

D. Zerdelis, *The professional leasing of employees,* op. cit.

[18] Law 4052/2012, op. cit.

Law 4093/2012, Approving the Medium-Term Fiscal Strategy 2013–2016, *Greek Government Gazette* 222/A (2012).

Law 4254/2014, On Measures for the Support and Development of the Greek Economy and Other Provisions, *Greek Government Gazette* 85/A (2014).

[19] The shortest duration is 6 months in Spain and Finland, while the maximum, 42 months, applies in the Netherlands. The threshold is 12 months in Luxembourg and Portugal, 18 in Poland and 24 months in France, Germany, and Belgium. In the latter three countries, the initial maximum duration for this form of employment was 18, 12 and 6 months respectively; thus, the periods have been elongated by 6, 12 and 18 months respectively. In Greece and Romania, the maximum permitted period is 36 months, although the initial terms were 16 and 24 months; meaning they increased by 20 and 12 months, respectively. It is, therefore, noted a significant increase in the maximum duration in many countries. For a detailed presentation of the practice of leasing personnel and a comparison of data among the EU countries, see E. Rompoti & A. Ioannides, "Temporary agency workers and the economic crisis in EU and Greece," op. cit, and E. Rompoti & A. Ioannides, "Leased workers in the EU and in Greece," op. cit.

[20] E. Galanaki, Factors that Impact the Outsourcing of Human Resources Management Services. PhD diss., National Records of PhD Theses, 2005.

[21] C. Costa, "Information Technology Outsourcing in Australia: A Literature Review," *Information Management & Computer Security* 9 (2001): 213–224.

subsidiaries of corporate groups, it is "internal outsourcing," whereas when performed through external undertakings, it is classified as either "in-house outsourcing" or "outhouse outsourcing." "In-house outsourcing" requires contracted employees to work at the premises of the user-business, whereas "outhouse outsourcing" entails the completion of projects off-site. Notably, leasing workers via TWAs is inherently temporary, whereas outsourcing typically has a more "permanent" nature, as businesses often assign the same services or projects on an ongoing basis to external contractors (Business Service Providers).

While outsourcing and in-house outsourced workers share some common characteristics with leased workers through TWAs, such as the fact that they both work for a second user-undertaking, they remain as two distinct concepts. The fundamental difference lies in the nature of the employment arrangement. Leased workers are temporarily assigned to a user undertaking, whereas contracted workers through Business Service Providers are engaged to complete specific projects, either on-site as in-house outsourced workers or remotely as outhouse outsourced staff.

A grey area exists between workers leased through TWAs and in-house outsourced workers/pseudo-contracted workers, as some businesses exploit outsourcing arrangements to mask illegally leased personnel when these workers operate on the premises of a user undertaking.[22]

In many EU countries there is a lack of sufficient legislative regulation related to the illegal leasing of workers. Therefore, the EU case law has set a series of criteria and characteristics (11 in total) to make a distinction between the lawful leasing of workers through TWAs and the "fictitious" contracting or pseudo-contracting, which in reality conceals the leasing of workers.

For the EU countries, the most important criterion for the distinction between the two forms is the managerial right, as defined in the European Directive 2008/104/EC which is incorporated into national legislation. More specifically, in the case of leasing through TWAs, when a worker is placed on the premises of a user undertaking, the managerial right (meaning the right to set the

E. Doval, "Is Outsourcing a Strategic Tool to Enhance the Competitive Advantage?" *Review of General Management* 23, no. 1 (2016): 78–87.
E. Galanaki, Factors that Impact the Outsourcing of Human Resources Management Services, op. cit.

[22] E. Rompoti & A. Ioannides, "Temporary agency workers and the economic crisis in EU and Greece," op. cit.
E. Rompoti & A. Ioannides, "Leased workers in the EU and in Greece," op. cit.
E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.
D. Zerdelis, *The professional leasing of employees,* op. cit.
G. Leventis, "Project contract that conceals leasing of employees," op. cit.

conditions and to supervise the worker) is exercised by the user undertaking (indirect employer).

On the contrary, in the case of contracted workers through Business Service Providers, and independent of whether a worker provides services on the premises of a contracting business (outhouse outsourcing) or at the premises of the user undertaking-client (in-house outsourcing), the managerial right lies exclusively with the contracting business. Additional distinguishing characteristics exist, such as the provision of work equipment and the degree of integration/cooperation with permanent employees. A full and in-depth analysis of the eleven (11) criteria/characteristics that apply in EU countries for the distinction between workers' leasing through TWAs and pseudo-contracting is beyond the scope of this paper. For a more detailed presentation, see Rompoti & Ioannides.[23]

In Greece, contracting companies frequently operate unlawfully as TWAs by basically turning in-house outsourced workers into pseudo-contracted employees. Managerial and supervisory rights are, in practice, exercised by the user undertaking rather than the contractor, allowing this to happen.[24] Therefore, contracting companies are usually pseudo-contracting undertakings. Strong evidence in Greece leads us to believe that businesses make use of in-house outsourcing/pseudo-contracting to avoid temporary employment/leasing through TWAs. Specifically, businesses aim to circumvent the European Directive 2008/104/EC and the Greek laws that provide for wage and employment equality between workers leased through TWAs and permanent employees from user undertakings.

In Greece, workers leased through TWAs and contracted workers—whether in-house or out-house outsourced—are protected by the National General Collective Labor Agreement, which establishes minimum wage and working conditions as a safety net. However, contracted workers are not protected under the sector-, profession-, or business-level collective labor agreements that apply for the permanent employees of a user undertaking. As a result, in-house outsourced workers/pseudo-contracted workers are not remunerated the same as permanent employees. On the contrary, workers leased through

---

[23] E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

[24] E. Rompoti & A. Ioannides, "Temporary agency workers and the economic crisis in EU and Greece," op. cit.

E. Rompoti & A. Ioannides, "Leased workers in the EU and in Greece," op. cit.

E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

D. Zerdelis, *The professional leasing of employees,* op. cit.

G. Leventis, "Project contract that conceals leasing of employees," op. cit.

TWAs, as stipulated by the European Directive 2008/104/EC, receive equal pay as their co-workers that hold equivalent qualifications. This discrepancy contributes to pseudo-contracted workers' dissatisfaction, as they face increased job insecurity and are deprived of equal pay and career advancement opportunities.[25]

In Greece, neither the legislators nor case law has dealt with the issue of pseudo-contracting in depth, contrary to some other countries like Germany. German law on temporary employment or the leasing of workers through Temporary Work Agencies (TWAs) was amended on April 1st, 2017, to incorporate provisions against unlawful leasing of workers (§ 611a BGB).[26] More specifically, the law obliges the TWAs and user undertakings to expressly identify their agreements as "temporary cession or leasing of workers agreements." Otherwise, they are void and their leasing of workers is deemed unlawful.

Already in 2012, the Federal Labor Court of Berlin-Brandenburg (No. 15 Sa 1217/12) issued a significant ruling regarding pseudo-contracting cases in Germany. It was about collaborations between contracting businesses and user undertakings through project or service agreements. The Court ruled that relevant agreements shall expressly define who is the contractor and who is the user undertaking, what the scope of the project or service is, its term, and the rules on liability. In Germany, the agreement between businesses shall clearly state whether it relates to a leasing of workers or a project/service agreement.

In Italy, the Biagi reform (Law 276/2003) legalized several forms of work assignment, including work through contracting businesses (in-house and outhouse outsourcing) and temporary work/leasing of workers through Temporary Work Agencies (TWAs). The law expressly allows for external collaborators to provide their services within businesses through the method of in-house outsourcing. Although the method is typically lawful, in practice it is often used to conceal how workers are actually being leased, leading to a

---

[25] P. Ferreira & S. Gomes, "Temporary Work, Permanent Strain? Personal Resources as Inhibitors of Temporary Agency Workers' Burnout," *Administrative Sciences 12* (2022): 87, https://doi.org/10.3390/admsci12030087.
B. Thomson and L. Hünefeld, "Temporary Agency Work and Well-Being: The Mediating Role of Job Insecurity," *International Journal of Environmental Research and Public Health 18* (2021): 11154, https://doi.org/10.3390/ijerph182111154.

[26] German Civil Code (Bürgerliches Gesetzbuch – BGB), Section 611a "Employment Contract (Arbeitsvertrag)," introduced by the Act to Amend the Temporary Agency Work Act and Other Acts (Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze), in force since April 1, 2017, Federal Law Gazette I (2017), 258. Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz), *Temporary Agency Work Act (Arbeitnehmerüberlassungsgesetz – AÜG), Reform Act of 21 February 2017, Federal Law Gazette* I (2017), 258.

decline of the unified labor relation between permanent and temporary workers. These workers are deprived of labor protection and collective representation.[27] The main reason why employers turn to pseudo-contracting is to circumvent the European Directive 2008/104/EC that provides salary equality between workers leased through TWAs and permanent employees from a user undertaking. Moreover, they are seeking to avoid restrictions and prohibitions set by their national laws regarding the workers leased through TWAs.

Article 43 of the Workers' Statute in Spain also allows for the leasing of workers through TWAs. In practice, however, there is extensive use of in-house outsourcing by user businesses, largely concealing the leasing of personnel.[28] By doing so, user undertakings avoid providing pay equality and benefits that their permanent personnel enjoy.

Therefore, both in Greece and in Italy and Spain, in-house outsourcing has become one of the main deregulating mechanisms of the labor market since pseudo-contracting incidents are noted. Flexible forms of employment – such as in-house and outhouse outsourcing and the leasing of workers – confirm the theory of labor market segmentation or bisection of the nucleus ("insiders"); namely, the bisection of employees under stable employment, high salaries and protection, and the periphery ("outsiders") that contain the flexible, low paid and vulnerable workers.[29]

While this method of pseudo contracting may also be employed in other European countries, there is no empirical quantitative research confirming this assumption. To the best of our knowledge, the only empirical quantitative study on in-house outsourced/pseudo-contracted workers to date was conducted in Greece, specifically in the banking sector, revealing that these workers operate under pseudo-contracting arrangements with substandard employment relations.[30] In addition, there is a significant data gap regarding in-house outsourced workers/pseudo-contracted workers in the EU, as Eurostat does not provide relevant statistics. Consequently, the actual magnitude of this employment category remains unclear. This form of employment blossomed

[27] M. Tiraboschi, "The Italian Labor Market after the Biagi Reform," *International Journal of Comparative Labor Law and Industrial Relations* 21, no. 2 (2005): 149–192, https://doi.org/10.54648/ijcl2005009.

[28] Japan Institute for Labor Policy and Training (JILPT), Labor Law and Atomization of Work: Spain, JILPT Report no. 15 (2016), https://www.jil.go.jp/english/reports/documents/jilpt-reports/no.15_spain.pdf.

[29] P. Doeringer & M. Piore, Internal Labor Markets and Manpower Analysis, op.cit,
M. Reich, M. Gordon, & R. Edwards, "Dual Labor Markets: A Theory of Labor Market Segmentation," op.cit.

[30] E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

during the economic crisis primarily to circumvent legal protections and restrictions associated with temporary employment/leasing through TWAs (see Part 3: Methodology and Part 4: Results of the empirical research).

Strong evidence from past research suggests that all flexible forms of employment (e.g. involuntary part-time or temporary employment, leasing through TWAs, pseudo-contracted workers,) are used to cover "low quality" positions with low remunerations and benefits. These workers are deprived of the opportunity to move from temporary to permanent employment and to invest in their careers. More specifically, flexible forms of employment operate more like traps rather than steps towards professional advancement – they are a no stepping-stone job.[31] In particular, studies have shown that workers under fixed-term contracts are paid lower than their colleagues under permanent contracts.[32] Leased workers through TWAs are mostly driven to unemployment and social exclusion once their contracts expire. They may also get trapped in flexible forms of employment through a constant renewal of their contracts by covering fixed and ongoing needs in their user undertaking. Thus, they are left without the possibility of permanent employment/open-ended contracts at their undertaking.[33] Moreover, the low-paid jobs that

[31] D. Autor & S. Houseman, "Do Temporary-Help Jobs Improve Labor Market Outcomes for Low-Skilled Workers? Evidence from 'Work First'," *American Economic Journal: Applied Economics 2*, no. 3 (2010): 96–128.
J. Hveem, "Are Temporary Work Agencies Stepping Stones into Regular Employment?" *IZA Journal of Migration 2*, no. 21 (2013): 1–27.
International Labor Organization (ILO*), Non-Standard Forms of Employment.* Geneva: ILO, 2015.
E. J. Jahn & M. Rosholm, Looking Beyond the Bridge: The Effect of Temporary Agency Employment on Labor Market Outcomes*, European Economic Review 65* (2014): 108–125.
M. Kauhanen & J. Nätti, Involuntary Temporary and Part-Time Work, Job Quality and Well-Being at Work, *Social Indicators Research 120*, no. 3 (2015): 783–799.
D. Pavlopoulos, Temporary Employment in Greece and in the EU: An Approach Using Longitudinal Data, op.cit
E. Rompoti & A. Ioannides, "Temporary agency workers and the economic crisis in EU and Greece," op. cit.
E. Rompoti & A. Ioannides, "Leased workers in the EU and in Greece," op. cit.
E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

[32] A. Booth, M. Francesconi & J. Frank, "Temporary Jobs: Stepping Stones or Dead Ends?" *Economic Journal 112,* no. 480 (2002): 189–213.
E. Rompoti & A. Ioannides, "Leased workers in the EU and in Greece," op. cit.
D. Pavlopoulos, Temporary Employment in Greece and in the EU: An Approach Using Longitudinal Data, op.cit

[33] International Labor Organization (ILO*), Non-Standard Forms of Employment*, op.cit.
E. Rompoti & A. Ioannides, Temporary agency workers and the economic crisis in EU and Greece, op. cit.
E. Rompoti & A. Ioannides, "Leased workers in the EU and in Greece," op. cit.

characterize flexible forms of employment often do not provide an opportunity for further education and training, causing high job insecurity with negative effects on workers' physical and mental health.[34]

The role of trade unions has been pivotal in safeguarding stable employment and advancing labor rights. In Europe, unions emerged in the late 18th and early 19th centuries. In Greece their establishment occurred during the final quarter of the 19th century (1875 onwards) due to delayed industrial development. Despite initial setbacks, Greek unions progressively incorporated workers in flexible or informal employment and advocated for collective labor contracts as well as equal labor and insurance rights.[35]

The reforms and deregulations introduced during the economic crisis profoundly affected unionism, employment conditions, and industrial relations. In the private sector across Europe, wages were sharply reduced, favorable employee regulations dismantled, and sectoral collective agreements were decentralized, while company-level agreements—often under less favorable terms—were reinforced. In Greece, these measures included the suspension of seniority-based pay raises in the private sector and the abolition of the 13th and 14th salaries in the public sector. At the same time, permanent contracts declined while flexible forms of employment expanded, including project-based and subcontracting arrangements, self-employment, independent services, and outsourcing. Working time was reorganized by a reduction of full-time employment, a replacement with part-time or rotational work, an introduction of a six-day work week, and by a rise of teleworking. The institutional framework for employee protection was relaxed, collective dismissals increased, and fundamental pillars of industrial relations—collective bargaining, social dialogue, and trade union power—were significantly eroded.

E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

[34] P. Ferreira & S. Gomes, "Temporary Work, Permanent Strain? Personal Resources as Inhibitors of Temporary Agency Workers' Burnout," *Administrative Sciences 12* (2022): 87, https://doi.org/10.3390/admsci12030087.

L. W. Mitlacher, "Job Quality and Temporary Agency Work: Challenges for Human Resource Management in Triangular Employment Relations in Germany," *International Journal of Human Resource Management 19* (2008): 446–460.

E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

B. Thomson and L. Hünefeld, "Temporary Agency Work and Well-Being: The Mediating Role of Job Insecurity," *International Journal of Environmental Research and Public Health 18* (2021): 11154, https://doi.org/10.3390/ijerph182111154.

[35] R. Hyman, *Understanding European Trade Unionism: Between Market, Class and Society*. London: SAGE Publications, 2001.

T. Koutroukis, *Contemporary Labor Relations.* Athens: Kritiki, 2022.

D. Stratoulis*, Labor Relations in the Throes of the Neoliberal Whirl.* Athens: Greek Letters, 2005.

These changes were accompanied by a broader questioning of the role of the state and of the social contract between employer and employee.[36]

From a theoretical standpoint, Wolfgang Streeck interprets labor market deregulation as a structural element of the transition from post-war Fordist capitalism to neoliberal capitalism.[37] Under the post-war regime (1945–1970), industrial relations were characterized by collective bargaining, strong state regulation, and employment stability. From the 1980s onwards, however, this framework gradually disintegrated due to policies of flexibility, austerity, and the institutional weakening of trade unions.[38] According to Streeck, the new labor status prioritizes employer flexibility at the expense of worker security, marginalizing collective representation. Workers in the 21st century thus appear "socially isolated and politically powerless," with the rhetoric of competitiveness functioning as an ideological mechanism that legitimizes deregulation, wage suppression, layoffs, and the dismantling of labor and social rights. Consequently, labor relations have become subordinated to market logic, stripped of institutional counterbalances, social protection, and democratic accountability, signaling a profound shift in the social contract.

The Greek case exemplifies these dynamics vividly. Labor market deregulation during the crisis reinforced the already precarious situation of pseudo-contracted workers and exposed the diminished ability of unions to restore labor rights and collective bargaining. The personalization of employment

[36] A. Koukiadaki & C. Kokkinou, "The Greek System of Collective Bargaining in the Crisis," in *Joint Regulation and Labor Market Policy in Europe during the Crisis*, ed. I. Tavora and M. Martinez Lucio. Brussels: European Trade Union Institute, 2016, 120–140.
M. Lucio, A. Koukiadaki, & I. Tavora, "The Legacy of Thatcherism in European Labor Relations: The Impact of the Politics of Neo-Liberalism and Austerity on Collective Bargaining in a Fragmenting Europe," *Industrial and Employment Rights Journal 2,* no. 1 (2019): 28–57, https://www.jstor.org/stable/10.13169/instemplrighj.2.1.0028.
P. Marginson & C. Welz, "European Wage-Setting Mechanisms under Pressure: Negotiated and Unilateral Changes and the EU's Economic Governance Regime," *Transfer 21*, no. 4 (2015): 429–450.
E. Rompoti, A. Ioannides & T. Koutroukis, Employment flexibility and industrial relations reforms in Greece of memoranda, op.cit.
E. Rompoti & A. Feronas, "The Impact of the Economic Crisis on the Labor Market of Countries under the Economic Adjustment Regime: A Comparative Analysis," *Social Policy 5* (2017): 38–63.
I. Zisimopoulos & G. Oikonomakis, "Labor Relations in Greece: The Impact of Public Sector Restructuring," *Theseis,* no. 122 (January–March 2013).
I. Zisimopoulos & G. Oikonomakis, "The Impact of the Economic Crisis on the Greek Collective Bargaining System," *Theseis,* no. 144 (2018).
[37] W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*. London: Verso Books, 2014.
[38] W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism,* op.cit. W. Streeck, How Will Capitalism End? Essays on a Failing System, op.cit.

relations further accelerated the weakening of collective representation, curtailed social dialogue, and eroded union power. Employment in the secondary sector—traditionally a stronghold of unionism—declined, while tertiary sectors, where unions are either absent or comparatively weak in protecting workers' rights, have expanded.[39] Notably, there are no unions for "leased" employees through Temporary Work Agencies (TWAs) in Greece and unionization among contracted workers via Business Service Providers remains extremely limited.[40]

Greek unions today are considerably weaker than fifty years ago, a decline shaped by globalization, technological change, and declining interest in unionism, particularly among younger generations.[41] Additional contributing factors include poverty, unemployment, inflation, systemic violations of labor rights, and unions' inability to secure tangible gains for workers.[42] In the banking sector, pseudo-contracting has further undermined collective bargaining and entrenched individualized employment agreements, operating as a mechanism to bypass unionism, wage equality, and the implementation of fundamental labor rights (see Section 4, Results of the empirical research).

Overall, flexible forms of employment are increasingly promoted as "regular" employment, with employers primarily motivated by cost reduction and the

---

[39] M. Lucio, A. Koukiadaki, & I. Tavora, The Legacy of Thatcherism in European Labor Relations: The Impact of the Politics of Neo-Liberalism and Austerity on Collective Bargaining in a Fragmenting Europe, op.cit.
T. Koutroukis, *Contemporary Labor Relations, op.cit.*
E. Rompoti, A. Ioannides & T. Koutroukis, "Employment flexibility and industrial relations reforms in Greece of memoranda, op.cit.

[40] E. Rompoti & A. Ioannides, Temporary agency workers and the economic crisis in EU and Greece, op. cit.

[41] D. Katsoridas, *New Technologies and Employment: Changes in the Productive and Work Process.* Athens: Alternative Editions, 1998.
D. Katsoridas, *The Labor Question: The Composition of the Working Class in Greece and Its Trade Union Representation*. Athens: INE/GSEE, 2021.
I. Zisimopoulos, "Trade Unions and Union Density in Greece: A Brief Historical Overview, Theoretical Review of Determining Factors, and Recent Empirical Research," *Krisi 12* (2023): 9–71, available on ResearchGate.
I. Zisimopoulos & G. Oikonomakis, "The Impact of the Economic Crisis on the Greek Collective Bargaining System," op.cit.
T. Koutroukis, *Contemporary Labor Relations,* op.cit.

[42] D. Katsoridas, "Causes and Consequences of Unemployment and the Need for the Creation of an Unemployed Movement, in Unemployment: *Myths and Reality*. Athens: Alternative Editions, 1998, 1–25.
T. Koutroukis, *Contemporary Labor Relations,* op.cit.
O. Papadopoulos & G. Ioannou, "Working in Hospitality and Catering in Greece and the UK: Do Trade Union Membership and Collective Bargaining Still Matter?" *European Journal of Industrial Relations* (2023): 105–122.

dismantling of permanent positions. The operation of external contracting companies—many of which function unlawfully as TWAs in Greece—requires critical reassessment. Despite their diminished power, it remains imperative to reinforce unions to safeguard labor rights and demands.[43]

3. Methodology

3.1 The Explanatory Sequential Mixed Method Design

In our research on in-house outsourced workers/pseudo-contracted workers in the banking sector, we employed a mixed-method approach (quantitative and qualitative research) conducted in person. Specifically, we used the explanatory sequential mixed-method design for the workers (quantitative followed by qualitative research). In the explanatory sequential mixed-method design quantitative research is conducted first, followed by qualitative research to supplement and deepen the findings of the quantitative study. The main tool for data collection in our quantitative research was a questionnaire with closed-ended questions. Three semi-structured open-ended questions were included at the end of the questionnaire to allow for the collection of qualitative data. Therefore, this research used the mixed approach—the explanatory sequential mixed methods design—which combines quantitative and qualitative research.[44] To specify, in the explanatory sequential mixed-method design, qualitative research (open-ended questions) follows the quantitative research (closed-ended questions). The results of this qualitative research improve, extends, complements or interprets the initial results of the quantitative research.[45] Moreover, qualitative research showcases the personal experiences

[43] D. Katsoridas, Unions: The Urgent Need for Their Reconstruction, *Othoni (Quarterly Publication of EETE-OTE), no. 104* (2016): 1–10.
T. Koutroukis, *Contemporary Labor Relations,* op.cit.
M. Lucio, A. Koukiadaki, & I. Tavora, The Legacy of Thatcherism in European Labor Relations: The Impact of the Politics of Neo-Liberalism and Austerity on Collective Bargaining in a Fragmenting Europe, op.cit.
E. Rompoti, A. Ioannides & T. Koutroukis, "Employment flexibility and industrial relations reforms in Greece of memoranda, op.cit.

[44] J. W. Creswell & V. L. Plano Clark, *Designing and Conducting Mixed Methods Research*, 3rd ed. Thousand Oaks, CA: SAGE Publications, 2018.

[45] See Braun & V. Clarke, Using Thematic Analysis in Psychology, *Qualitative Research in Psychology 3*, no. 2 (2006): 77–101.
J. W. Creswell, Research in Education: *Design, Implementation, and Assessment of Qualitative and Quantitative Research*, 2nd Greek ed., scientific editing C. Tsarmpatzoudis. Athens: Pedio, 2016.
C. Teddlie and A. Tashakkori, *Foundations of Mixed Methods Research: Integrating Quantitative and Qualitative Approaches in the Social and Behavioral Sciences.* Thousand Oaks, CA: SAGE Publications, 2009.

and opinions of the workers, thus contributing to the identification of new topics and trends that may have been initially overlooked. In addition, the qualitative research allows for the disclosure of unexpected research dimensions, which may influence the direction of future research.
Moreover, the results of our qualitative research with the workers confirm, supplement or explain the results that derived from the interviews with unions' chairpersons. In-depth qualitative research using semi-structured questions was conducted with the chairpersons of the unions representing the pseudo-contracted workers in the banking sector (fourteen questions).
The explanatory sequential mixed-method design was implemented with employees from January to December 2019 (12 months) in Greece. The research was conducted in person and the same sample of workers were used in both the quantitative and qualitative research. More specifically, the sample consisted of 365 pseudo-contracted workers: 86.7% (317) worked in Athens, 7.8% (31) worked in Thessaloniki, and 5.5% (31) in Patras. The sample included 272 women (74.5%) and 93 men (25.5%). The employees' ages ranged from 23 to 59, with an average age of 38 years. Regarding their educational background, 66.4% were university graduates (see Appendices A, B, C). The duration of the interviews with the employees were 60 minutes. The time allocated for the completion of the questionnaire with the employees, closed-ended questions (quantitative research) were 30-35 minutes and the questionnaire with open-ended questions (qualitative research) lasted approximately 25-30 minutes. We tried to keep the duration as initially set to avoid exhausting the respondents and to develop a friendly mood for cooperation.

3.2 Qualitative Research with the Unions

Separate in-depth qualitative research was conducted with the representatives of pseudo-contracted workers, specifically with two chairpersons representing the unions of pseudo-contracted workers. The qualitative research on which this article focuses on highlights issues related to unionism and industrial relations of pseudo-contracted workers employed as in-house outsourced workers in Banking. All surveys were conducted in person.
Specifically, interviews were conducted with the chairman of a sector-level Union of Leased Personnel in the Banking Sector (SYDAPTT) and with a chairman of a business-level union representing employees in a large, well-

A. Tashakkori & C. Teddlie, eds., *SAGE Handbook of Mixed Methods in Social & Behavioral Research*, 2nd ed. Thousand Oaks, CA: SAGE Publications, 2010.

known pseudo-contracting company (alias "X").[46] The interviews with the chairpersons were conducted from 2019-2020. The interviews took place in person at the Prefecture of Attica. A "purposeful sampling" technique was employed with these union representatives (Chairpersons). In this process, the researchers intentionally selected individuals and locations to gain a deeper understanding of the research topic.[47] Each interview with the union representatives in the qualitative research lasted approximately 40 minutes.
In this qualitative research, interviews with the union chairpersons were held in person and guided by semi-structured open-ended questions that aimed to avoid limiting the opinions/views/perceptions of the respondents. To clarify, semi-structured or partially structured questions were specified in advance, but the order and structure could be changed and amendments were possible depending on the course of the conversation.[48] Semi-structured questions in interviews are a flexible strategy of disclosure, as they offer flexibility both to the interviewer and the respondent and facilitate the flow of interaction between them.[49] Moreover, semi-structured questions allow respondents to reference numerous experiences.[50]

3.3 Quantitative Research

There are no available data from Eurostat for the in-house outsourced/pseudo-contracted workers performing their tasks at the premises of the user undertaking, which makes it difficult to know the real size of this category. Thus, we conducted our own primary research. The sample of the

[46] To be mentioned that in order to avoid reference to the name of the pseudo contracting company, it is referred to by an alias.
[47] J. W. Creswell, Research in Education: *Design, Implementation, and Assessment of Qualitative and Quantitative Research,* op.cit.
[48] J. W. Creswell, Research in Education: *Design, Implementation, and Assessment of Qualitative and Quantitative Research,* op.cit.
N. Kyriazi, *Sociological Research: Critical Review of Methods and Techniques*, 2nd ed. Athens: Pedio, 2011.
A.Lydaki, *Qualitative Methods in Social Research.* Athens: Kastaniotis, 2012.
S. MacDonald &H. Headlam, *Research Methods Handbook: Introductory Guide to Research Methods for Social* Research. Manchester: Centre for Local Economic Strategies, 2009.
J. Mason, *Conducting a Qualitative Research,* trans. N. Kyriazi. Athens: Pedio, 2011.
G. Tsiolis, *Methods and Analysis Techniques in Qualitative Social Research*. Athens: Kritiki, 2014.
[49] N. Kyriazi, *Sociological Research: Critical Review of Methods and Techniques*, op.cit.
G. Tsiolis, *Methods and Analysis Techniques in Qualitative Social Research,* op.cit.
[50] Th. Iosifidis & M. Spyridakis, *Qualitative Social Research: Methodological Approaches and Data Analyse*s. Athens: Kritiki, 2006.
N. Kyriazi, *Sociological Research: Critical Review of Methods and Techniques*, op.cit.
G. Tsiolis, *Methods and Analysis Techniques in Qualitative Social Research,* op.cit.

quantitative research contained 365 workers from Athens, Thessaloniki and Patras. The same sample was also used for the qualitative research.

Our quantitative research, which was part of explanatory sequential mixed methods design, was based on a novel methodology. Respondent Driven Sampling (RDS), which is helpful in cases of hidden or hard-to-reach populations and when random sampling is either difficult or impossible, was used. It is a method employed when no official lists or records exist regarding the population researched, thus rendering standard sampling impossible.[51] From 2011 and on, the RDS methodology has been applied in over 600 studies, mainly in fields like health, culture, and arts.[52] Heckathorn was the first to use the method in a study related to injecting drug users in the USA in 1997. Since then, it has been employed in studies with hard-to-reach populations, such as with immigrants, the homeless, sex workers, and patients suffering from chronic diseases.

The RDS methodology was chosen because pseudo-contracted workers in Greece constitute a hidden or hard-to-reach population. Their details are not officially recorded and random sampling is impossible. Unfortunately, the fact that these pseudo-contracted workers have not yet been empirically studied narrows the possibility for discussion and comparison to results of previous studies. Our research on pseudo-contracted workers in the Greek banking sector is the first to apply the Respondent-Driven Sampling (RDS) methodology internationally for the study of pseudo-contracted/in house outsourced workers.[53] This novelty introduces a new methodology approach in the field of labor analysis and offers a reliable tool for the study of pseudo-contracted workers, even in other EU countries that lack of officially recorded data and where random sampling is not feasible. Moreover, this methodology

[51] D. D. Heckathorn, Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations, *Social Problems 44* (1997): 174–199.
D. D. Heckathorn, R. S. Broadhead, & B. Sergeyev, A Methodology for Reducing Respondent Duplication and Impersonation in Samples of Hidden Populations, *Journal of Drug Issues 31* (2001): 543–564.
Lucie Leon, Don Des Jarlais, Marie Jauffret-Roustide, & Yann Le Strat, Update on Respondent-Driven Sampling: Theory and Practical Considerations for Studies of Persons Who Inject Drugs, *Methodological Innovations 9* (2016): 1–9.
R. Magnani, K. Sabin, T. Saidel, & D. Heckathorn, Review of Sampling Hard-to-Reach and Hidden Populations for HIV Surveillance, *AIDS 19* (2005): S67–S72.
M. Spreen, Rare Populations, Hidden Populations, and Link-Tracing Designs: What and Why? *Bulletin de Méthodologie Sociologique 36* (1992): 34–58.

[52] Lucie Leon, Don Des Jarlais, Marie Jauffret-Roustide, & Yann Le Strat, Update on Respondent-Driven Sampling: Theory and Practical Considerations for Studies of Persons Who Inject Drugs, op.cit.

[53] E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

can be used on a wider basis in analyzing the labor market to study hard-to-reach populations.

According to existing literature, the main element for correctly implementing the RDS methodology is that the researcher follows three steps. These steps in our research were based on the pseudo-contracted workers of the Banking sector.[54]

The first step is seeds selection. Studies using the RDS methodology start with a small number of seeds (3-15 persons). Seeds are made of different individuals who are well-networked in the field being research. It is not compulsory that seeds are selected randomly. In our research with contracted workers, the initial seeds were thirteen (13).

The second step includes interviews and further recruitment of individuals. To clarify, the seeds first complete their interviews and are then given a set number of coupons in order to recruit more people.

These people belong in the same category as the initial seeds (e.g. same professions) and are possibly interested in participating in the research (wave 1). Thus, the RDS methodology is applied in populations that are linked (social network - colleagues). Then, the newly recruited persons of wave 1 complete their interviews and recruit other interested persons (wave 2). In their turn, those recruited in wave 2 complete their interviews and recruit others (wave 3), and so on until the desired sample is reached. Our research contained 19 waves.

From the onset of the research, the researcher should thoroughly check the individuals regarding whom has recommended who. The main idea of the RDS methodology is that seeds yield random "sprouts" (meaning new members of the sample). The sample should be large enough and should also maintain long referral chains (new sprouts) without repeating the sample participants.

In the third step, the researcher asks the participants how many people they know and come in daily contact with (e.g. workers of the same profession). The researcher aims to identify the number of their social contacts by asking this question (social network).

The collection of primary data was completed with a sample of 365 vulnerable bank workers (pseudo-contracted workers) from Athens, Thessaloniki and

---

[54] Lucie Leon, Don Des Jarlais, Marie Jauffret-Roustide, & Yann Le Strat, Update on Respondent-Driven Sampling: Theory and Practical Considerations for Studies of Persons Who Inject Drugs, op.cit.
Lisa G. Johnston, Avi J. Hakim, Samantha Dittrich, Janet Burnett, Evelyn Kim, & Richard G. White, A Systematic Review of Published Respondent-Driven Sampling Surveys Collecting Behavioral and Biologic Data, *AIDS and Behavior 20* (2016): 1754–1776.
Guri Tyldum & Lisa Johnston, Applying Respondent Driven Sampling to Migrant Populations. New York: Palgrave Macmillan, 2014.

Patras. In a population that, according to estimations of the unions, amount to around 4,000 individuals, simple random sampling requires a sample of approximately 180 individuals for a confidence level of 95%. However, as Salganik[55] notes, for the RDS researchers to be not only unbiased but also statistically efficient, a larger sample is required due to the design effect, which often is around 2. For that reason, a sample of 365 individuals were selected to represent the target population, thus limiting bias and enhancing the reliability of assessments.

The RDS (Respondent-Driven Sampling) methodology uses specialized statistical estimators aimed at reducing bias during data collection. Estimators aim at compensating two main bias sources.

The first source is related to different sizes of the participants' social networks. More specifically, individuals with a limited social network (i.e. who know less people) are allocated lower weight in calculating the estimators of the RDS Analyst compared to people with wider social networks.

The second source concerns deviations in the recruitment process, especially due to homophily – meaning the inclination of participants to recruit people that look like them and are within the same main social or demographic characteristics, such as race or educational level. In such cases, the data are weighted accordingly to reduce the chances of systematic bias from the recruitment of very similar individuals.

In this study on pseudo-contracted workers, the homophily effect was assessed for several characteristics. The homophily value was equal to 1, thus the impact was considered to be negligible. When a characteristic is examined and the homophily value is over 1, that means there is a higher homophily impact.

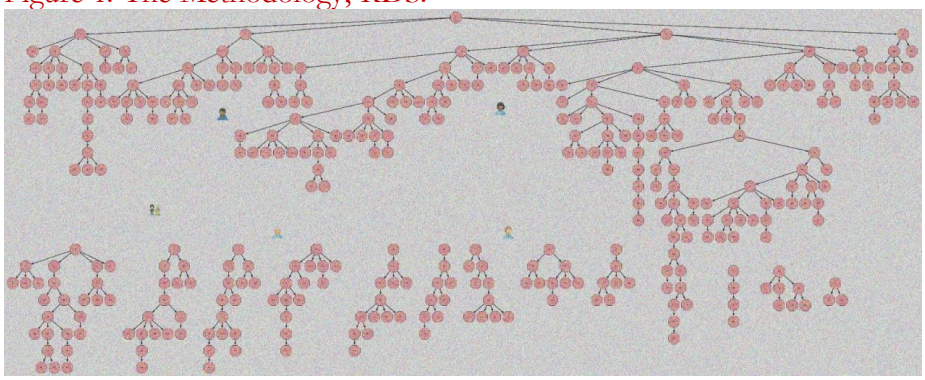
Calculations were conducted by using three estimators: RDS I, RDS II and RDS-SS, which were implemented with the RDS Analyst statistical software in this study.

The detailed description of the quantitative research and data processing exceeds the objectives of this article, which focuses on the presentation of the qualitative research results. For a more detailed analysis of the methodology and the results of the quantitative research, see articles by Rompoti & Ioannides.[56] For more details regarding our methodology, see Figure 1.

[55] M. Salganik, Variance Estimation, Design Effects, and Sample Size Calculations for Respondent-Driven Sampling. *Journal of Urban Health 83* (2006): 98–112.

[56] E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

Figure 1. The Methodology, RDS.



3.4 Questions and Data Processing in Qualitative Research

The parts of the qualitative research, both on the pseudo-contracted workers and the chairpersons, included questions on unionism and industrial relations of the in-house outsourced workers /pseudo-contracted employees. The findings from the interviews are presented by topic to maintain consistency and the sequence of results. Contact with the chairperson of the workers' union from the large pseudo-contracting company (alias "X") aimed at collecting some useful insight on the union as well as on the method of "pseudo-contracting." It also aimed to understand how these flexible forms of employment have affected the working conditions of pseudo-contracted workers and those of the permanent workers in the Banking Sector.

As far as the technical method employed, a tape recorder was used from the beginning as the main tool to accurately record the discussions with the workers and the unions' chairpersons, only after acquiring the consent of those who had agreed to participate. Our notes from the recording of the interviews proved to be an important tool for those who did not consent to the recording of their interview. The transcription stage was a time-consuming process, as it required a lot more time than was spent to complete each interview.

Primary data of the qualitative research with the workers and chairpersons of the unions were processed in consecutive stages following the logic and structure of Thematic Analysis as described by Braun and Clarke.[57] First, the primary data for analysis was prepared and organized. Second, the data was

[57] V. Braun & V. Clarke, Using Thematic Analysis in Psychology, *Qualitative Research in Psychology 3*, no. 2 (2006): 77–101. V. Braun & V. Clarke, Thematic Analysis, in APA Handbook of Research Methods in Psychology, ed. H. Cooper. Washington, DC: *American Psychological Association*, 2012, 51–77.
V. Braun & V. Clarke, *Successful Qualitative Research: A Practical Guide for Beginners*
London: SAGE, 2013.

investigated and codified. Third, the codified data was used to create thematic sections. Fourth, representation, reporting, and interpretation of qualitative findings happened, aimed at highlighting the employment relations and the main problems that workers are facing. Fifth, the accuracy of the findings was validified.[58] It is worth noting that the results contain word-for-word quotes from the interviews. This was considered of the utmost importance for the conceptualization and interpretation of the primary qualitative data. The use of exact quotes makes the narration more vivid and descriptive.

In qualitative research with both union chairpersons and employees, data were processed by the researchers themselves and not using any software. The aim was to maintain direct contact with primary data and record the complexity of the experiences that workers and unions faced. As Morison & Moir (1998) point out, researchers retain the full right to carry out research and study without the use of any computer software. Quality control criteria were used in the qualitative study both with the unions' chairpersons and the pseudo-contracted workers to ensure reliability and the validity of data. Researchers complied with the quality control criteria for qualitative research as set by Lincoln & Guba[59] and Mertens.[60] To be specific: First, the researchers' engagement in the research field was prolonged, meaningful and persistent. Second, they were debriefed by peers and specialists in the field of contracted workers (e.g. information from Labor Institute of the General Confederation of Greek Workers INE/GSEE). Third, they were validated by members of the researched group (e.g. member check, informant feedback, respondent validation). Fourth, they applied triangulation. They conducted qualitative and quantitative research with chairpersons from the unions and workers to check the findings and draw more documented conclusions. Fifth, they applied investigator triangulation; in the study with pseudo-contracted workers, more than one researcher participated in the interpretation of the data to reduce subjectivity. Sixth, the reliability of the thematic patterns was verified through information saturation, since the continuous reappearance of specific issues-

[58] V. Braun and V. Clarke, Using Thematic Analysis in Psychology, op.cit.
V. Braun & V. Clarke, Thematic Analysis, in APA Handbook of Research Methods in Psychology, op.cit.
V. Braun & V. Clarke, *Successful Qualitative Research: A Practical Guide for Beginners,* op.cit.
E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.
J. W. Creswell, Research in Education: *Design, Implementation, and Assessment of Qualitative and Quantitative Research,* op.cit.
J. W. Creswell & V. L. Plano Clark, Designing and Conducting Mixed Methods Research, op.cit.
[59] Y. S. Lincoln & E. Guba. *Naturalistic Inquiry*. London: SAGE Publications, 1985.
[60] D. Mertens, Transformative Research and Evaluation. New York: Guilford Press, 2009.

topics on the part of the respondents indicated that no new issues arose, thus confirming stability, reliability and validity of the findings.

3.5 Ethics and Conduct

The collection of primary data in our research, both quantitative and qualitative, followed the code of ethics and conduct.[61] The use of code numbers instead of names on the questionnaires ensured the anonymity of the respondents and established our respect towards the pseudo-contracted workers. Out of respect, we asked the respondents to choose the date, time, and place for the interviews, which were mainly near their workplaces. Before asking any questions, the objective and duration of the interviews were mentioned to ensure transparency and tackle any reservations the respondents had. Workers were free to leave at any time during the process and faced no pressure.[62] Finally, we committed to share research results to the respondents in our effort to offer useful data both to workers and to employment policymakers. The entire procedure was based on respect, morality, and confidentiality. Quality control criteria were applied both in the quantitative and qualitative research to enhance transparency, objectivity, reliability, and validity of the research.

4. Results of the Primary Qualitative Study

Introduction: Trade Unionism and Pseudo-Contracted Workers in the Banking Sector

This section presents the results of the qualitative research conducted with the union chairpersons and the pseudo-contracted employees in the banking sector. Questions regarding unionism and industrial relations were addressed (see Appendices A, B, C). These employees work on the premises of banks (in-house outsourced workers), and it has already been established that they are

[61] J. W. Creswell, Research in Education: *Design, Implementation, and Assessment of Qualitative and Quantitative Research,* op.cit.
C. Robson, *Real World Research*, trans. K. Michalopoulou. Athens: Gutenberg, 2010.
[62] J. W. Creswell, Research in Education: *Design, Implementation, and Assessment of Qualitative and Quantitative Research,* op.cit.
S. S. Manning & C. E. Gaul, The Ethics of Informed Consent: A Critical Variable in the Self-Determination of Health and Mental Health Clients. *Social Work in Health Care 25,* no. 3 (1997): 103–117, https://doi.org/10.1300/J010v25n03_09. C. Robson, *Real World Research*, op.cit. G. Tsiolis, *Methods and Analysis Techniques in Qualitative Social Research,* op.cit.

pseudo-contracted employees.[63] To clarify, contracting companies are usually pseudo-contracting firms and their employees are pseudo-contracted, as they exhibit characteristics of leased workers employed through Temporary Work Agencies (TWAs).

4.1. Results by thematic section based on the interviews with the chairpersons of the unions representing the pseudo-contracted workers in the banking sector

1. The Evolution of In-House Outsourcing in the Banking Sector

The Chairman of SYDAPTT and the chairman of the sole business-level union in a large pseudo-contracting company (alias 'X') report that the method of in-house outsourcing appeared around 2000 and began to skyrocket during the economic crisis (2008), maintaining an upward trend (2020). Approximately 4,000 in-house outsourced workers/pseudo-contracted workers are employed in banks across Greece.

2. Unionization, Members and Collective Fights of Pseudo-Contracted Employees

The union chairpersons report that they managed to organize collectively during the economic crisis and are able to freely advocate for their rights through the establishment of two unions, despite the severe impact of the crisis on the workforce (e.g., layoffs, wage cuts, individualization of industrial relations, and threats from employers discouraging union membership) and the shrinking power of unions in general. According to the chairperson of SYDAPTT, the sector-level union of pseudo-contracted workers was founded in January 2013 and has 500 members; all of which work as office employees in the banking sector. According to the chairman of the sole business-level union of a major pseudo-contracting company (alias 'X'), the union was founded in January 2015 and consists of 150 office employees in the banking sector (data up to 2020).

3. The Role and Membership of SYDAPTT and Business-Level Unions

The chairperson of SYDAPTT stated that theirs is a first-level union and all employees under indirect employment are entitled to join, i.e., those working

[63] E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

for businesses that lease personnel to the banking sector. More specifically, they can either be employees leased through TWAs or employees working for Businesses Service Providers (in-house outsourced workers/pseudo-contracted). Employees working through 'genuine leasing' (subsidiaries belonging to a group of banking businesses) are also included.
Moreover, SYDAPTT representatives are entitled to participate in elections and vote, alongside other first-level unions, to elect their representatives at the district level for second- and third-level labor unions such as GSEE.
The chairpersons of the two unions highlight the collective struggle of in-house outsourced workers, particularly pseudo-contracted and permanent employees. As the president of the major pseudo-contracting company known as 'X' characteristically states:

"Permanent employees must fight alongside pseudo-contracted employees, advocating for equal rights. As long as contracting businesses exist, the salaries and rights of both permanent and pseudo-contracted employees will continue to shrink. Therefore, the issue of pseudo-contracted workers should not solely be their problem, but it should also concern permanent bank employees, who have witnessed a 50% reduction in job positions".

(Extract from an interview with the chairman of a major pseudo-contracting company, alias 'X.').

4. Employment Conditions, Requests, Complaints, and Inequalities Between Permanent and Pseudo-Contracted Workers

The two chairpersons stated that the day when "pseudo-contracted" employees will fully replace permanent ones is not far off. As the chairperson of SYDAPTT union pointed out:

"Many departments and services are staffed exclusively by 'pseudo-contracted' employees, with one manager supervising them" (SYDAPTT chairperson, interview extract).

Consequently, according to the testimonials of the unions' representatives (i.e. the chairpersons), it is obvious that the "pseudo-contracted" employees, who have been providing services for several years in banks cover fixed and permanent needs and substitute permanent employees as part of the user undertaking.
As the SYDAPTT chairperson states, "pseudo-contracted" workers employed as office employees work in several services and undertake various tasks. These include call centers, accounting departments, legal services, customer support

services, consumer and housing loans, and loans in default. The SYDAPTT chairperson stated:

"Job positions in call centers are filled at ninety percent by 'pseudo-contracted' employees. However, there are many others serving in other job positions across various departments in the banks. There are also such employees at the bank stores, working as cashiers…" (SYDAPTT chairperson, interview extract).

As for the employment terms of pseudo-contracted employees, the chairpersons of the unions inform us that these are set according to the national general collective agreements (EGSEE). These agreements apply to employees throughout the country. On the contrary, the employment terms for permanent bank employees or permanent employees of bank subsidiaries are set according to the sector or business-level collective agreement. As the SYDAPTT chairperson stated:

"You usually see three to four cashiers in a bank store. Two are most likely 'pseudo-contracted,' and the other two are permanent bank employees. They do exactly the same job, but their employment terms as well as their salaries are different. The two 'pseudo-contracted' persons are paid based on the national general collective agreement, while the permanent bank employees are covered by the sector-level collective agreement."
As becomes apparent, the pay inequalities are vast, with salary differences being as much as double or more. These are "two-tier" employees, who have the same skills and do exactly the same job, in the same job position" (SYDAPTT chairperson, interview extract).
The large salary inequalities between the pseudo-contracted and permanent employees of the Banking Sector are also confirmed by the results of the quantitative research, which is part of the explanatory sequential mixed method with 365 employees.[64]
According to the SYDAPTT chairperson, their request to join the Federation of Bank Employee Unions (OTOE) as bank employees was rejected. OTOE does not recognize them as employees of the bank, and therefore, the employees contracted through Business Service Providers are only members of the Federation of Private Employees of Greece, ["OIYE" in Greek].
According to the chairpersons of the unions, namely the sector-level SYDAPTT and the business-level union of a major contracting undertaking (with pseudonym "X"), they have lodged several complaints with the Ministry of labor & Social Affairs and the Hellenic labor Inspectorate (SEPE), mainly

[64] E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.

on the grounds of unfair dismissals, abusive relocations, prohibition of participation in unions, and obstruction in defending their labor rights.
However, the chairpersons of the "pseudo-contracted" employees, both of the sector and business-level unions, informed us that up until 2020, they have not sought recourse from the Mediation and Arbitration Organization (OMED).

5. Legal Issues: Fictitious Contracts and the Circumvention of Labor Laws

The representatives of the unions, including the chairperson of SYDAPTT and the representative of a business-level union of a major pseudo-contracting undertaking (alias "X"), describe these agreements as "fictitious" contracts since the supervision of the project is always carried out by the banks and not by the contractors. All union representatives mentioned that the right to manage and supervise (e.g., giving instructions, issuing orders, checking the project) is exercised by the user-company (Banks) rather than the pseudo-contracting undertaking. They also stated that when any issue arises concerning the project or the services provided by these employees, banks are accountable for the latter, not the pseudo-contractors (Business Service Providers).
Moreover, they emphasized in their interviews that the workers using the equipment and hardware of the user businesses is concrete evidence of the "fictitious" nature of these contracts. The union chairpersons underlined that in many departments, "pseudo-contracted" employees work alongside and in teams with the permanent staff from user undertakings. Additionally, they pointed out that pseudo-contracted employees do not change job positions; instead, they remain in the same roles for years, covering ongoing and permanent needs of the user undertaking.
Given this, unions openly argue that these agreements constitute fictitious contracting between pseudo-contractors and user undertakings (bank), as the pseudo-contracting companies often operate "unlawfully" as temporary work agencies (TWAs). They report that the managerial and supervisory rights over pseudo-contracted workers are, in practice, exercised by user undertakings (bank) instead of pseudo-contracting companies, who should actually be legally responsible for them.
Consequently, contracted workers are effectively pseudo-contracted workers, as they share the same characteristics with "leased" workers employed through TWAs. The chairpersons of the unions claimed that employers, "under the guise/cloak" of project or service contracts, bypass the salary equality provisions that apply to workers leased through TWAs (Law 4052/2012). This means they have found a way to circumvent the Greek national Law 4052/2012, which incorporates the European Directive 2008/104/EC,

ensuring wage equality between leased and permanent workers for as long as the leased workers are employed by the user undertaking.
The union chairpersons' claims are further supported by the results of quantitative research conducted as part of an explanatory sequential mixed-method study involving 365 employees. A series of questions were asked regarding the distinguishing features between pseudo-contracted workers and those leased through TWAs. The findings confirmed that in-house outsourced workers/pseudo-contracted employees at Greek banks share the same characteristics with workers leased through TWAs, reinforcing their classification as pseudo-contracted workers.[65]

6. Impact of Legislative Changes on Pseudo-Contracted Employees

The representatives of the above unions stated in their interviews that a negative development in the labor sector is the government's decision to abolish two positive measures that had been enacted by the previous administration.
More specifically, the first measure concerns the law on contract termination and the requirement for justified dismissals (Article 48, Law 4611/2019).[66] The second measure pertains to the joint liability of a contractor (Business Service Provider) and a user undertaking (Article 9, Law 4554/2018)[67].
According to the union representatives, all employees, and especially "pseudo-contracted" workers, will be negatively affected. As they argued, pseudo-contracting businesses will now be able to proceed with dismissals more easily, without solid justification, whenever and however they choose. Additionally, they emphasized that "pseudo-contracted" workers are in a precarious position when it comes to defending their rights and demands as they find themselves caught between their employer (the pseudo-contracting business) and the user undertaking. This vulnerability becomes particularly concerning in cases of wage and insurance abuses, such as salary deductions or unpaid dismissal compensation.

[65] E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.
[66] Law 4611/2019, Article 48 (abolished), Fair Grounds for Dismissal. *Greek Government Gazette*, no. 4611/2019.
[67] Law 4554/2018, Article 9 (abolished), Liability of Awarding Body, Contractor, and Subcontractor vis-à-vis the Employees, *Greek Government Gazette*, no. 4554/2018.

7. SYDAPTT Union Victories

With regard to the SYDAPTT union's achievements, its chairperson highlighted several significant victories, including the successful conversion of some fixed-term contracts into indefinite-term contracts, the reinstatement of dismissed pregnant employees, the prevention of salary reductions for cleaning personnel (e.g., in a major Greek bank), and the establishment of minimum wage and leave entitlements for "pseudo-contracted" employees and bank security guards.

More specifically, the intervention of the union ensured that security guards receive the statutory minimum wage along with statutory overtime pay. Furthermore, the practice of requiring security guards to work for 10 consecutive days without a day off was abolished, and since 2019, they have also benefited from an 11% minimum wage increase.

The SYDAPTT chairperson also emphasized one of the union's most significant victories in favor of "pseudo-contracted" employees, marked by two landmark court rulings. They referred to a pivotal legal case that led to the first judicial recognition in Greece of "fictitious" contracting. Notably, 20 years after the introduction of the contracting system, Greek courts delivered two crucial judgments—one at the end of 2019 and the other in early 2020—confirming for the first time that contracting arrangements were "fictitious" and that the affected employees were actually "pseudo-contracted" or "leased workers".

The first ruling was issued in November 2019 by the Single-Member Court of First Instance of Athens, in favor of a woman employed at a call center in Athens. After her dismissal, she exposed both the inappropriate conduct of a major bank's management—where she had been providing her services—and the actions of the pseudo-contracting company that was her official employer. The court ruled that her dismissal had been motivated by resentment and vindictiveness by her employers, ordering the pseudo-contracting company to pay €13,682.72 in compensation—a significant victory for the union. Furthermore, the court determined that the contracting arrangement was "fictitious" since the bank, rather than the pseudo-contracting company, had been exercising managerial and supervisory control over the employee's work.

The second ruling was delivered in January 2020 by the Court of Appeals of Athens, which ruled in favor of an employee dismissed without cause from a subsidiary of a major Greek bank. The court formally recognized that the actual employer was the user undertaking to whom she had been providing her services, while the pseudo-contracting company—her nominal employer—was merely a façade for legal purposes. As a result, the court concluded that the employee was a pseudo-contracted worker and, in reality, a "leased worker".

According to the SYDAPTT chairperson, these legal victories validated the collective fights of the SYDAPTT union and set a crucial precedent in the fight for labor rights.

8. Conclusion: The Future of Pseudo-Contracted Workers in Banking

The phenomenon of pseudo-contracting is expected to increase rapidly in the future. According to union representatives, user undertakings will abdicate all responsibility, reiterating the same claim they have made for the past thirty years: "*They are not our employees, and legally, we are not entitled to intervene in third-party businesses*".

Table 1. Main findings per thematic section drawn from the interviews with the unions' chairpersons

Thematic Section	Key Findings
1. The Evolution of In-House Outsourcing in the Banking Sector	In house-outsourcing in Greece: • First appeared in 2000 • Rapidly expanded after the onset of the crisis in 2008 • Followed an upward course till 2020 • 4.000 workers are employed in banks.
2. Unionization, Members and Collective Fights of Pseudo-Contracted Employees	Despite the anti-unionism pressures, two unions of pseudo-contracted workers were established during the crisis: • 2013: Sector-level union SYDAPTT, (500 members) • 2015: Business-level union (alias X), (150 members)
3. The Role and Membership of SYDAPTT and Business-Level Unions	SYDAPTT: • Members are workers that are indirectly employed (e.g. leased through TWAs, in-house outsourced/pseudo-contracted workers, "genuinely" leased workers) • Participated in union-level elections SYDAPTT & Business-level union: • They underline the need for solidarity and equality between permanent and pseudo-contracted workers in Banks
4. Employment Conditions, Requests, Complaints and Inequalities Between Permanent and Pseudo-Contracted	Pseudo-contracted workers: • They do the same job as the permanent employees but under more

workers	unfavorable conditions • They have high pay inequalities compared to the permanent employees of the user undertaking • They will fully replace the permanent employees in the user undertaking
5. Legal Issues: Fictitious Contracts and the Circumvention of Labor Laws	Trade Unions report that: • Pseudo-contracted workers are under the direct supervision of the banks and not of the contracting businesses • Pseudo-contracted workers use the equipment of the banks and not of the contracting businesses • Pseudo-contracted workers never change posts and roles; thus, they cover fixed and ongoing needs at the banks • Contracting businesses conclude "fictitious" project agreements with banks, thus covering up that these workers are leased through TWAs • The Greek Law 4052/2012 and the European Directive 2008/104/EC on pay equality between permanent employees and workers leased through TWAs are violated
6. Impact of Legislative Changes on Pseudo-Contracted Employees	• The abolition of protective provisions in labor legislation (such as those concerning justified dismissal and joint liability between the contractor and the user company) weakens the ability of pseudo-contracted workers to challenge unfair dismissals and creates legal ambiguity regarding the responsibility of the actual employer
7. SYDAPTT Union Victories	SYDAPTT achieved significant victories, inducing: • Court judgments that accept the complaints regarding "fictitious" agreements, • Re-hiring of dismissed workers and • Ensuring pay rights for the security personnel
8. Conclusion: The Future of Pseudo-Contracted Workers in Banking	• Pseudo-contracting will rapidly increase in the future • Banks renounce their responsibilities,

	as they do not incorporate them in their human resources

Source: Data from primary qualitative empirical study, processed by the researchers.

4.2 Common results by thematic section from the interviews of the unions' chairpersons and the pseudo-contracted employees of the banking sector

1. Salary Discrepancies Between Permanent and Pseudo-Contracted Workers

As highlighted in interviews with the Chairperson of SYDAPTT, the Chairperson of the union representing the contracting company (alias 'X'), and several pseudo-contracted workers, a significant challenge they face is the considerable pay disparity between permanent and pseudo-contracted employees. This pre-existing issue was further exacerbated by labor market reforms implemented during the memorandum period. As the Chairperson of SYDAPTT markedly stated and which was corroborated by others: *'The pay disparity between a pseudo-contracted and a permanent employee is at least twofold. Moreover, the pay gap between a pseudo-contracted worker and a high-ranking executive, such as a "golden boy" manager, is overwhelming, reaching a ratio of one to seventy'* (Interview excerpt, Chairman of SYDAPTT).

2. Non-Payment of Accrued Wages

As highlighted by both the Chairperson of SYDAPTT and several pseudo-contracted workers, a significant issue is the non-payment of accrued wages, particularly among pseudo-contracted cleaning and security staff.

3. Lack of Career Advancement for Pseudo-Contracted Employees

A significant issue highlighted by both the Chairman of SYDAPTT and by employees during the interviews is the disparity in career advancement between permanent and pseudo-contracted workers. Pseudo-contracted employees are deprived of opportunities for professional growth. As noted by numerous employees, as well as the Chairpersons of SYDAPTT and the business-level union of the pseudo-contracting company (alias "X"), there are cases where pseudo-contracted workers have been employed in banks for 15 to 20 years without any career progression. All respondents emphasized that this stagnation negatively impacts both their financial earnings, which remain low,

and their overall professional development. These findings are further supported by the results of the quantitative research conducted as part of the explanatory sequential mixed-method study involving 365 employees.[68]

4. Discriminatory Practices Regarding Maternity Leave

Another problem highlighted by the Chairman of SYDAPTT, the Chairman of the business-level union of the pseudo-contracting company ("X"), and the interviewed employees, is the discrimination against female employees in relation to maternity. Specifically, it is at the discretion of the employer to grant cumulative maternity leave. Furthermore, when it comes to "pseudo-contracted" workers, new mothers are not entitled to the reduced working hours. Also, employees who gave birth were dismissed after the end of the 18-month post-partum period, which is the period during which an employer has no right to dismiss a new mother. As employees characteristically report from their experience, when they faced the issue of pregnancy, they were dismissed by employers under the pretext that they would not be able to cope with their work in their condition.

5. Health Benefits Disparities for Pseudo-Contracted Workers

Another very important problem underlined by both the Chairperson of SYDAPTT, the Chairman of the business-level union of the pseudo-contracting company (X), as well as several employees, concerns the huge differences in health benefits. As they characteristically stated: *"Pseudo-contracted employees" are not integrated into the TYPET health institution like the rest of the permanent employees of the banking sector and consequently the pseudo-contracted workers have no access to the TYPET clinics."* Several employees also mentioned the discrimination regarding other benefits, e.g. transportation by corporate buses only if there are vacant seats, which usually are covered for permanent employees.

[68] E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.
R. Magnani, K. Sabin, T. Saidel, & D. Heckathorn, Review of Sampling Hard-to-Reach and Hidden Populations for HIV Surveillance, op. cit.

6. Human Dignity Violations and Adverse Working Conditions

Some "pseudo-contracted" workers reported a series of cases and events that violate human dignity. As a standard example, several workers spoke about a refusal from their pseudo-contracting company to grant their employees permission to attend a colleague's funeral during work hours. Other cases reported to us concerned highly adverse working conditions in call centers located in a specific area of Athens. As many pseudo-contracted workers characteristically stated: *"They time the breaks, the visits to the toilet, the back office…"* Other employees reported, *"They time every call we make…"* and "*they forbid the use of personal mobile phones at the office, resulting in us not being able to communicate, not being reachable even if an emergency occurs for our family"* etc. (excerpts from interviews with employees). The Chairperson of SYDAPTT mentioned the dismissal of a "pseudo-contracted" employee from the contracting company after she reported offensive attitude from the manager of the user undertaking—the threats, provocations, the *"flying"* files, and the written insults she had received. The employee, however, addressed the issue to the pseudo-contracting company (fictitious employer) in vain and when she reported the incident, according to what the Chairman of SYDAPTT states, she received the following response: *"Did something happen? It must have just been your idea. Think it over a bit... We're closing the issue (i.e., the mouth) and moving on* ", *as ...(X ..name of Bank)... is one of the largest clients of our contracting business"*. A few days later, as the Chairman of SYDAPTT claimed in the interview, the pseudo-contracted employee was unfortunately fired.

Furthermore, the Chairperson of SYDAPTT, the Chairperson of the union of the pseudo-contracting company (alias X), as well as several employees reported incidents of colleagues being victims of sexual harassment and "bullying."

As the Chairman of SYDAPTT characteristically stated and others confirmed:

*"This is how the 'pseudo-contracted' bank employees are treated. Those who don't reveal the highly adverse working conditions and the personal insults continue to work. They consider us people from another world...second or even third class...they diminish us, they treat us as slaves." (*excerpt from an interview with the Chairman of SYDAPTT).

7. Payroll Mistakes and Discrimination in Remuneration

Both the Chairperson of SYDAPTT, the Chairperson of the union of the pseudo-contracting company (X), as well as several employees reported the frequent mistakes in payrolls—mistakes that are "accidentally" to the detriment of the employees. In addition, several employees in the interviews claimed that

the managers of their user undertaking discourage them from claiming what has been illegally withheld.

8. Dismissals and Issues regarding Sick Leave

Another important problem that arose for employees involved sick leave. As the Chairperson of SYDAPTT reported, employees who have taken many sick leaves were laid off, despite the presentation of required doctors' documentation. Also, the Chairperson of SYDAPTT herself told us about the case of an employee who requested leave from her boss because she was not feeling well. Unfortunately, the boss refused. The employee was admitted, whilst enduring severe pain, to the hospital that same evening for surgery.

9. Issues with Fixed-Term Contracts and Employee Recycling

The Chairperson of SYDAPTT, the Chairperson of the union of the contracting company (X), and several employees highlighted problems that "pseudo-contracted" employees face regarding fixed-term contracts, which are continuously renewed year after year. They also mentioned the "recycling" of employees, the adverse working conditions, and the intimidating behavior of bank executives.
The SYDAPTT Chairperson stated: *"There are individuals working for three to four years, signing contracts with a term of one to three months, changing the contracting undertaking depending on the project offer that the bank receives."* This result is also backed up by the results of the quantitative research which was part of the explanatory sequential mixed method in 365 employees.[69] More specifically, 23.8% of the workers are employed with constant renewals of fixed-term agreements, with an average term of 4 years of employment. The remaining 76.2% work under indefinite term agreements, with an average service of 10 years, and they cover fixed and ongoing needs of the banks while being trapped in "pseudo-contracting," without having the opportunity to join a banks' permanent human resources.

[69] E. Rompoti & A. Ioannides, "Pseudo contracted workers as a means of bypassing labor law in Greece," op. cit.
R. Magnani, K. Sabin, T. Saidel, & D. Heckathorn, Review of Sampling Hard-to-Reach and Hidden Populations for HIV Surveillance, op. cit.

10. The Impact of Fixed-Term Contracts on Job Security

The SYDAPTT Chairperson stated that Banks, under the pretext that their employees do not perform their jobs well, recycle them again and again with fixed-term contracts through the pseudo-contracting companies. The same Chairperson states:
"The situation is really bad, one month "leased" to a company, the next month to another. They "lease" you one month and "let you go" the next one, by sending a text message. These people are continuously under the fear of dismissal, they live in anxiety and constant insecurity" (interview extract of the SYDAPTT Chairperson).

11. Obstruction of Trade Union Freedom and Layoffs

Some other important problems highlighted by the Chairpersons and many of the employees interviewed are dismissals of an employee when joining a union and being elected to the Board of Directors of a union. These people stated that this is a clear case of obstruction of trade union freedom. They also reported blackmail and the "filing" of employee's personal data by pseudo-contracting companies. They also shared cases where a union is prohibited from distributing leaflets or holding meetings at the workplace. According to the Chairperson of SYDAPTT, union meetings are only allowed outside working hours.

12. Exploitation of Pseudo-Contracted Security Personnel

Furthermore, the Chairperson of SYDAPTT highlighted a case of pseudo-contracted security personnel who were not given regular leave during the summer months. Specifically, as the president of SYDAPTT stated: "*A well-known pseudo-contracting company that hires security guards was exploiting its employees. The employees were not paid the statutory extra pay for night shifts (twenty-five percent of the salary) nor for work on Sundays (seventy-five percent). It granted annual leave of only ten days instead of the statutory twenty-two (one day off every ten days) and would withhold six euros for each day of leave. Their gross salary was five hundred and fifteen euros".*

13. Layoffs Linked to National Collective Agreements

As the Chairpersons and several of the employees stated in their interviews, there were significant layoffs following the change in the national general collective agreement that took place in early 2012. This change occurred because some pseudo-contracted workers refused to accept the changes to their working conditions. Consequently, as noted by the respondents, there has

been a deregulation of Collective Bargaining and the promotion of individual employment contracts (individualization of employment relations and remuneration). Additionally, all these individuals reported that workers are experiencing salary reductions and a simultaneous decrease in working hours. Specifically, hours and salaries were reduced to avoid further layoffs. However, "reductions and layoffs" still occurred; full-time employees were let go and replaced by part-time workers, who worked only four or five hours a day.

14. Mass Layoffs and Pseudo-Contracting Company Practices

The Chairperson of SYDAPTT also mentioned mass layoffs of many "pseudo-contracted" employees even after the financial crisis was over. Specifically, between the summer of 2019 and January 2020, the dismissal of at least 50 employees at a large bank in Greece is particularly notable.
As the Chairperson of SYDAPTT stated:
"*Pseudo-contracting companies are pushing workers into unemployment and social exclusion. They send them home until they need them again... if they need them!!! They often tell them, 'I'm sorry, your contract is not being renewed... If we need you, we will contact you. We have your phone number.*" Workers with serious health issues and financial problems are being laid off. (excerpt from an interview with the Chairman of SYDAPTT).

15. Overtime Practices and Lost Job Opportunities

The issues with overtime (paid or unpaid) were significant. Over a six-month period, the Board of Directors of SYDAPTT calculated fifteen thousand (15,000) overtime hours at a single bank headquarters. The Chairperson of SYDAPTT, the Chairperson of the union at a pseudo-contracting company (X), and the employees believe that this overtime accounted for—and still accounts for—lost job positions, as new staff could have been hired instead. Currently, overtime for pseudo-contracted employees has been limited because of union strategies. SYDAPTT is pushing for new employees rather than relying on the overtime of both "pseudo-contracted" workers and other employees.

16. Job Insecurity, Dissatisfaction and Declining Employee Morale

As the Chairpersons and several of the employees interviewed stated, several problems are linked to leave time. Permanent employees always had priority in selecting the dates for their annual leave, narrowing down the periods for pseudo-contracted worker's leave. Additionally, all the participating employees

reported an increase in insecurity, a drop in morale, heightened anxiety, and work-related stress during the crisis. Some employees also claimed that working in shifts and on weekends led to a lack of quality free time and an imbalance between employees' personal and professional lives. As the Chairperson of SYDAPTT and many employees mentioned in interviews, no one knows how many pseudo-contracting companies there are, who they are, what services they provide, why they were established, or when they were established. There is also uncertainty about who they actually serve and who is truly pulling the strings behind them, suggesting a possible close cooperation between pseudo-contracting companies and executives of user undertakings, particularly the banks. As many employees aptly stated:
"Pseudo-contracting businesses are sprouting... like MUSHROOMS."

17. Challenges in Labor Relations and Employee Rights on Permanent Employees and Pseudo-Contracted Employees in the Banking Sector

Both the chairpersons and several of the employees interviewed emphasized that the "voluntary exits" of permanent employees during the economic crisis and beyond have significantly affected pseudo-contracted employees, as they replace permanent employees in full-time jobs, effectively preempting their "hostage" status in this form of employment.
As the Chairperson of SYDAPTT argued, unions fear that their employers are trying to replace all permanent bank employees with pseudo-contracted workers. These fears are confirmed in several ways. First, it's confirmed by a large bank's announcement (2020) to transfer eight hundred and fifty (850) permanent bank employees to a third-party contractor for managing non-performing loans. Secondly, threats from management in another powerful bank were angled toward permanent employees, stating that they should accept their transfer to another third-party contractor.
Also, according to the Chairperson of SYDAPTT, a large bank in Greece had already laid off twenty-four (24) permanent employees before January 2020. These are the first layoffs after many years (since the era of the dictatorship).
As the Chairperson of SYDAPTT, the Chairperson of the business-level union of the pseudo-contracting company (X) and several employees argued in their interviews that there are mass layoffs of pseudo-contracted workers when they are no longer needed and that there are hirings or re-hirings with worse working conditions during periods of increased demand for personnel to meet any needs. The increased obligations of pseudo-contracted workers during periods of high demand and their employment under worse working conditions have negatively affected labor relations.

It is worth noting that the Chairperson of SYDAPTT reported that in 2019, 2,656 permanent bank employees in Greece were either directly or indirectly forced to leave their jobs. This is a 6.7% reduction in jobs. Also, permanent bank job positions have shrunk by 44% in the last ten years. This happened either due to employee retirements, through "voluntary exit," or through the sale of a part of a bank to another company.

18. Pseudo-Contracted Workers and Union Membership

A significant portion of pseudo-contracted workers reported that they joined unions in their effort to negotiate sectoral or business-level collective labor agreements alongside union Chairpersons. Specifically, they seek not only salary increases but, more importantly, pay equality—meaning they want the same level as permanent employees of the Banks. They advocate for improved working conditions, fair labor relations (e.g., reduced working hours, higher wages, health and safety measures, and equality), the promotion of social dialogue, and the elimination of 'two-, three-, or multi-tier' employment categories.

As many pseudo-contracted workers characteristically state in their interviews: "I am a member of the union and my motivations are summed up in the phrase"...

Worker: *"Unity makes strength" (P, 55 years old).*
Worker: *"Joint action always brings better results" (Dim, 26 years old).*
Worker: *"The union provides security to protect my job" (Iak, 46 years old).*
Worker: *"Through collective action, we seek to limit layoffs or even to become permanent employees in the Banks at some point" etc. (Olg, 33 years old).*

Table 2. Main findings per thematic section drawn from the interviews with the unions' chairpersons and the workers

Thematic Section	Key Findings
1.Salary Discrepancies Between Permanent and Pseudo-Contracted Workers	Permanent bank employees are paid double compared to pseudo-contracted workers. The senior executives of the banks hold the most advantageous, skyrocketing the salary discrepancy to 70:1 between bank executives and pseudo-contracted workers.
2. Non-Payment of Accrued Wages	Many pseudo-contracted workers, especially in the departments of cleaning and security, are not paid for work performed.
3. Lack of Career Advancement for Pseudo-Contracted Employees	Pseudo-contracted workers are excluded from any career advancement opportunity, even after 15-20 years of service. No

	professional progression is possible.
4. Discriminatory Practices Regarding Maternity Leave	There have been cases where women are deprived of the right to accumulated maternity leave since it is at the discretion of the employer to allocate the leave. They have no right to reduced working hours and are dismissed after they give birth.
5.Health Benefits Disparities for Pseudo-Contracted Workers	Pseudo-contracted workers have no access to the TYPET Healthcare Fund and are also deprived of other corporate benefits compared to permanent employees.
6. Human Dignity Violations and Adverse Working Conditions	There are complaints for conditions that harm human dignity, such as the prohibition to contact family members while on duty, even in emergency, strict control of breaks, and unfair dismissals.
7. Payroll Mistakes and Discrimination in Remuneration	Frequent mistakes in payrolls, always to the benefit of the employer. Managers discourage workers to claim what is owed to them.
8. Dismissals and Issues regarding Sick Leave	Dismissals of workers facing health issues after they have taken multiple sick leaves and even though they presented all medical reports. Refusal to grant a sick leave even in case of emergency.
9. Issues with Fixed-Term Contracts and Employee Recycling	Pseudo-contracted workers: Conclude fixed-term work agreements (e.g 1-3 months) with the contracting businesses and these are renewed constantly for years (approx. 4 years of work) Conclude indefinite term agreements with the contracting businesses (approx. 10 years of work) without a perspective for stable work relation with the banks and are thus trapped in the practice of pseudo-contracting.
10. The Impact of Fixed-Term Contracts on Job Security	Workers under fixed term agreements are consumable for the contracting businesses and experience high work insecurity, fearing dismissals.
11. Obstruction of Trade Union Freedom and Layoffs	Dismissals due to participation in union activities and restriction of trade union freedoms.
12. Exploitation of Pseudo-Contracted Security Personnel	Exploitation of security guards by contractors, as the latter violate the work rights (e.g. not granting summer leaves) and violate statutory pays (e.g. unpaid overtime, salary below the statutory minimum).
13. Layoffs Linked to National Collective Agreements	Layoffs of workers that refused to accept the individual contracts after the change of the

	national labor collective agreement in 2012.
14. Mass Layoffs and Pseudo-Contracting Company Practices	Between 2019-2020, 50+ pseudo-contracted workers were dismissed despite the end of the crisis.
15. Overtime Practices and Lost Job Opportunities	Overtime (e.g. 15,000 hours overtime) in a bank branch substitute the need for hiring and lead to the reduction of new job openings.
16 Job Insecurity, Dissatisfaction and Declining Employee Morale	Pseudo-contracted workers get limited time off, have low morale, live in anxiety and have no balance between their professional and personal life.
17. Challenges in Labor Relations and Employee Rights on Permanent Employees and Pseudo-Contracted Employees in the Banking Sector	Permanent employees are replaced by pseudo-contracted workers under worse working conditions.
18. Pseudo-Contracted Workers and Union Membership	Joining a union raises hope for pay equality, collective labor agreements, better conditions at work, high quality and fair labor relations and permanent jobs at the banks.

Source: Data from primary qualitative empirical study, processed by the researchers.

5 Discussion

This research highlighted the unique and problematic conditions that pseudo-contracted workers in the banking sector face. Although they cover fixed and ongoing needs, they are employed under vulnerable contracts and are deprived of basic labor rights that those leased through lawful TWAs and permanent employees enjoy. This reality creates a unique class of "invisible" workers who suffer from systematic inequalities in terms of pay, social rights, and professional perspectives, even though they perform the same duties as permanent bank employees.

On a theoretical level, the findings support the approaches around the precariat[70] and labor market segmentation,[71] offering an empirical documentation of the existence of a "new lower class" of workers. The practices that employers use in pseudo-contracting violate the European Directive 2008/104/EC, they undermine collective bargaining, and they also undermine the concept of institutional protection of work. As Streeck[72] underlines, the decline of institutional mechanisms and collective bodies is a

[70] G. Standing, *The Precariat: The New Dangerous Class*, op. cit.
[71] P. Doeringer & M. Piore, Internal Labor Markets and Manpower Analysis, op. cit.
[72] W. Streeck, *How Will Capitalism End? Essays on a Failing System*, op. cit

main feature of the neoliberal deregulation – and this is vividly noted in the case of Greece.

International comparison at an institutional/legal level further emphasized the significance of the findings. Similar forms of pseudo-contracted work that are seen in Greece are also noted in other southern European countries such as Italy and Spain, where in-house outsourcing often conceals the actual leasing of workers.[73] On the contrary, the relevant legislation on TWAs in Germany has been amended to tackle unlawful leasing of personnel. Case law in Germany has also set strict conditions for the distinction between pseudo-contracting and leasing of workers.

The experience of pseudo-contracted workers (in-house outsourced workers) is a characteristic example of the consequences of neoliberal deregulation, which requires a clear political and legal reply aiming to restore labor equality and dignity.

Despite the objective difficulties, the actions of the two trade unions, "SYDAPTT" and "X" (contracting undertaking) shows that even under a status of precariousness, trade union organizations can deliver concrete outcomes. Their victories – such as court rulings, avoidance of pay reductions, re-hirings, and establishment of fundamental rights – underline the significance of collective action and institutional vindication.

It should be noted that the geographical and sectoral limitation of this study affects the ability to generalize the results in other sectors. Although the sample is considered adequate for a hard-to-reach population, there is a clear need to expand the research to different sectors and geographical areas.

The Respondent-Driven Sampling (RDS) methodology was successfully implemented in approaching an "invisible" population, offering a useful tool for future research—both on a national and on a comparative level among the EU countries—in the field of vulnerable work, especially when official or reliable data are not available.

Overall, the study highlights the urgent need for institutional re-regulation, which includes strengthening labor inspection mechanisms, clarifying the role of contracting companies, the compliance of lawfully operating TWAs with the European Directive, and strengthening collective forms of representation.

6. Conclusions

This article presented the findings from primary empirical research on pseudo-contracting workers in the Greek banking sector, combining qualitative

[73] M. Tiraboschi, The Italian Labor Market after the Biagi Reform, op. cit.

interviews with trade unionists and 365 workers, within the framework of a mixed research design (explanatory sequential mixed methods design).

An attempt was made to answer a series of research questions regarding unionism and the labor relations of these workers in the banking sector. Specifically, questions were asked about the establishment of unions, their members, their actions, their victories, and the labor relations within their sector. The study brought to light a largely invisible category of workers who are employed under fixed-term agreements even though they cover fixed and ongoing needs for the banks under more unfavorable terms compared to those of permanent employees.

The research confirmed the two main hypotheses that were set at the beginning. First, these workers are essentially leased employees, and the contracting companies operate unlawfully as Temporary Employment Agencies (TWAs). This practice allows employers to circumvent the obligations of Temporary Work Agencies, particularly the obligation of equal pay treatment, as stipulated by Law 4052/2012 and the European Directive 2008/104/EC. Second, the pseudo-subcontracted workers experience increased precarity, inequality, and exclusion from career advancement, even though they perform the same duties as permanent employees. This situation was significantly exacerbated during the crisis period.

The data on pseudo-contracted workers in the banking sector highlight systematic inequalities in wages, benefits, and inclusion in collective agreements. Many remain trapped in successive fixed-term contracts, living with a constant fear of non-renewal and without opportunities for promotion or full integration into the organization (the user undertaking). The simultaneous existence of two "employers" obscures responsibilities and weakens labor rights.

The findings related to pseudo-contracted workers in the banking sector are undoubtedly consistent with other empirical studies that focus on several types of precarious forms of employment (e.g. temporary or part-time work, leasing etc). Most vulnerable workers are employed in low-quality jobs, characterized by lower wages and limited benefits compared to their permanent colleagues. They are often trapped in a vicious cycle of successive temporary contract renewals, with minimal prospects for transitioning to stable or permanent employment. Furthermore, they get no opportunities for career advancement and experience high job insecurity, limited access to further training, and low levels of job satisfaction.

Despite the difficult environment, the actions of the unions have proved fruitful. The two active unions of the sector, including the SYDAPTT, achieved specific wins: prevention of wage cuts, conversion of contracts to permanent status, and protection of pregnant workers. These successes

underline the fact that collective representation and organization is feasible even under conditions of precariousness.

The study demonstrates that pseudo-subcontracting does not create new jobs but serves as a strategy to reduce labor costs, thus reinforcing the segmentation of the labor market and undermining collective bargaining. The findings are linked to theoretical approaches such as labor market segmentation and the precariat and align with the broader critique of neoliberal deregulation of labor relations, as argued by Streeck.

It is imperative to reconsider the legal framework related to the leasing of workers, to clarify the limits with pseudo-contracting, and to boost control mechanisms. At the same time, all employees must be covered by collective agreement and the representation by unions must be institutionally enhanced.

Future research can expand to other sectors where similar practices are engaged to gain a fuller understanding of pseudo-contracting and to accelerate efforts for fair and equal labor relations.

Acknowledgments

Eleni Rompoti wishes to thank for the Scholarship of Greek State Scholarships Foundation (IKY) during the years 2016-2019. The project was co-funded by Greece and the European Union (European Social Fund) through the Operational Program "Human Resources Development, Education and Lifelong Learning", within the framework of the "Strengthening Human Resources Research Potential via Doctorate Research" (MIS-5000432), which was implemented by the State Scholarships Foundation (IKY).

Appendix A

THE EXPLANATORY SEQUENTIAL MIXED METHOD DESIGN

Quantitative research

A. DEMOGRAPHIC/INDIVIDUAL CHARACTERISTIC

(Mark the correct answer in the box)

1. What is your gender? 1. Man ☐ 2. Woman ☐

2. What is your birth year? ……. (year)

3. What level of education do you have?

1. Primary school graduate ☐ 2. Lower secondary school graduate ☐ 3. Higher secondary school graduate ☐ 4. Graduate of Vocational Educational Institutes /O.A.E.D (post-high school) ☐ 5. University graduate ☐ 6. Holder of a Master's Degree ☐ 7. Holder of PhD ☐

4. In which city is your place of work?

1. Athens ☐ 2. Thessaloniki ☐ 3. Patras ☐
(not all closed-ended questions contained in the questionnaire are presented here, but only those related to demographics).

Qualitative research

The semi-structured interview guide for pseudo-contracted workers covers the following themes:
1. Could you please state the most significant problems that a pseudo-contracted employee faces at the premises of banks?
2. Have labor relations been affected during the period of the financial crisis and of the memoranda?
3. Are you a member of a union? If yes, what are the reasons you joined the union?
(open-ended questions were incorporated in the quantitative questionnaire. However, they are also separately presented in Appendix C, since qualitative research was also conducted).

Thank you for your time and collaboration!

Appendix B

Qualitative research

The semi-structured interview guide with the Chairman of SYDAPTT and the Chairman of the business-level union of a large pseudo-contracting company (X) covers the following themes:
1. When was your union founded?
2. Is your union a business-level, sector-level or more general union?
3. What rights-competences does your union have?
4. How many members are in your union?
5. Who are entitled to become members of your union?
6. At what positions do the members of your union work?
7. Do you sign a "Sector" or "Business-Level" or "National General" Collective Work Agreement?
8. What are the terms of the Collective Agreements (SSE in Greek) that you have signed as a union?
9. Has your request for classification of these employees as Bank Employees been accepted by the Federation of Bank Workers of Greece (OTOE in Greek)?

10. Have you filed any complaints against any agency to defend your employment rights?
11. Have you opted for recourse to the Mediation and Arbitration Organization (OMED in Greek) regarding any dispute between any workers and their employers?
12. Could you kindly mention some setbacks and some victories of your union?
13. What are the impacts of the financial crisis and the reforms in labor relations of the pseudo-contracted workers?
14. What are the dominating labor relations in your industry? What are the most crucial problems that pseudo-contracted workers face (e.g., pay inequalities, lack of advancement, long-term employment on the same project, etc.).

Thank you for your time and collaboration!

Appendix C

Qualitative research

The semi-structured interview guide for pseudo-contracted workers covers the following themes:
1. Could you please state the most significant problems that a pseudo-contracted employee faces at the premises of banks?
2. Have labor relations been affected during the period of the financial crisis and of the memoranda?
3. Are you a member of a union? If yes, what are the reasons you joined the union?

(open-ended questions were incorporated in the quantitative questionnaire. However, they are also separately presented in Appendix C, since qualitative research was also conducted).

Thank you for your time and collaboration!

Rethinking Sickness Absence Schemes to Promote Return to Work: Lessons from Comparative Experience

Maria Crespi Ferriol *

Abstract. This article critically assesses how rigid legal frameworks for sickness absence, such as those in Spain and Italy, limit the sustainable reintegration of workers with chronic illnesses. These systems are grounded in a binary understanding of work capacity that generally prevents any form of work during medical leave and assumes a full recovery upon return. Drawing on a comparative analysis of the more flexible sickness absence models implemented in the United Kingdom, the Netherlands, and Sweden, the article identifies shared features that enable the combination of reduced work capacity with partial reintegration under adapted conditions. The article concludes by analyzing the Spanish Government's attempt to modernize the system with a recent proposal to introduce part-time sickness absence, followed by a critical analysis of the main objections it has raised in the public debate.

Keywords: *Sickness Absence, Temporary Incapacity, Return to work, Work Reintegration, Chronic Illness and Employment, Ageing Workforce.*

1. Introduction

In recent years, sickness absence and the associated cost of temporary incapacity benefits have become a growing concern across Europe. From 2006 to 2020, the estimated average number of days lost to sickness absence per employee rose from 9.2 to 10.8—an increase of 17.4 percent.[1]

* Tenured Contract Senior Lecturer at the University of the Balearic Islands. Email address: mmar.crespi@uib.es.

[1] A. Antczak, K. Miszczyńska, *Measuring and Assessing Sick Absence from Work: a European Cross-sectional Study*, Comparative Economic Research, 2023, vol. 26, n. 4, 37-60.

The COVID-19 crisis in 2020 accelerated this trend, and in some countries absence rates have continued to reach new highs annually. In Spain, for instance, the prevalence of sickness absence due to common (non-occupational) illnesses more than doubled over the last decade, rising from 19 per 1,000 employees on leave in 2012 to 47 in 2023.[2] Consequently, public spending on sickness benefits has increased significantly. Across the European Union, these expenditures grew by approximately 20 percent between 2014 and 2021. According to the most recent harmonized data from Eurostat, it accounted for 1.2 percent of the EU's total GDP in 2021.[3]

Several Europe-wide factors help explain these increases, with two standing out in particular. First, falling unemployment levels—observed EU-wide following the post-crisis recovery—reduce the opportunity cost of taking leave, making it more feasible for workers to claim sickness benefits. This is because when workers are less fearful of losing their job or being unable to find another they are more likely to take medical leave.[4] Second, demographic aging is contributing to longer and more frequent sickness absence; for example, workers over 50 now represent over a third of the workforce in Spain and across much of Europe. Workers this age are also twice as likely as those under 35 to suffer from chronic conditions and they take longer to recover.[5] Compared to workers under 25, sickness absences are 26 percent longer for those aged 25–35, 49 percent longer for those aged 36–50, and 83 percent longer for those over 51.[6]

Not only do these figures explain the growing concern of public authorities with the current state of sickness absence benefits, but they also explain their concern for the future. European governments increasingly acknowledge sickness absence as a critical challenge for productivity, public spending, and the long-term sustainability of social protection systems. As the population continues to age in the coming decades, pressure on healthcare and social security systems is expected to intensify. Given these changes, labor market policies that support

[2] Statistics from the Ministry of Social Security on sickness absence: https://www.seg-social.es/wps/portal/wss/internet/EstadisticasPresupuestosEstudios/Estadisticas/est45/est46 (accessed July 30, 2025).

[3] Eurostat, *European System of Integrated Social Protection Statistics (ESSPROS)*, Publications Office of the European Union, Luxembourg, 2023.

[4] M. K. Shoss, L. M. Penney, *The economy and absenteeism: A macro-level study, Journal of Applied Psychology*, 2012, vol. 97, n. 4, 881–889.

[5] Eurofound, *How to Respond to Chronic Health Problems in the Workplace?*, Eurofound, Luxembourg, 2019, p. 4.

[6] AEVAL, *Evaluación de las medidas de racionalización y mejora de la gestión de la Incapacidad Temporal*, AEVAL, Madrid, 2009, p. 125.

employees on sick leave return to work are attracting interest in countries that have maintained a more traditional approach to sickness benefits. This shift is largely driven by the potential of such policies to contain rising costs by promoting adapted working conditions for convalescent employees, thus enabling a partial return to work before a full physical or mental recovery.

Countries such as Spain or Italy continue to uphold a traditional model of sickness absence maintained by a current legal framework that remains grounded in an understanding of illness as a passive condition. This model rests on a binary conception of work capacity where a worker is either deemed entirely unfit for work – and thus exempt from any laborious activities – or considered fully recovered and expected to resume their duties under the same conditions as before. Accordingly, this paper refers to such systems as "rigid" sickness absence models. Beyond the obligation to provide reasonable accommodation for persons with disabilities, no intermediate solutions are available for workers who have only partially recovered. Instead, those on medical leave are prevented from engaging in any form of work activity. As a result, legal framework prolongs periods of inactivity which generates substantial costs for the social security system, employers, and workers themselves.

This contrasts with the approach taken in the United Kingdom, the Netherlands, and Sweden, which have adopted more "flexible" sickness absence models that allow workers to return to work under safe conditions before full recovery. In these systems, return-to-work measures are designed to adapt job duties and working conditions to a worker's health status and residual functional capacity; thus, the focus shifts from what the worker cannot do to what they are still able to do. Accordingly, when a worker has partially regained their physical or psychological capacity, the priority is on identifying ways in which that capacity can be used rather than prolonging their inactivity. Employers and employees play active roles in identifying appropriate adjustments and negotiating work arrangements tailored to circumstances. This paradigm shift benefits both the public health and the financial sustainability of the system by reducing absenteeism and lowering the risk of long-term incapacity.

This paper outlines the main legal features of what is referred to as the "rigid" sickness absence model, highlighting the negative impact it has on the return-to-work prospects of workers on medical leave. These defining features are then compared and contrasted to "flexible" sickness absence models, focusing on their effects on absence rates and the respective legal features' strengths and limitations. Within this conceptual framework, this paper analyzes two recent developments that may signal an incipient shift

from a rigid to a flexible sickness absence model in Spain: (i) the return-to-work measures introduced through collective bargaining, and (ii) the proposal by the Ministry of Social Security in October 2024 to make sickness absence more flexible. The analysis of the public reception of the Ministry's proposal—and the reservations it triggered in political and social debate—sheds light on the fears and preconceptions that may be hindering the advancement of return-to-work policies in countries with similar rigid legal frameworks.

2. How Rigid Sick Leave Systems Undermine Return to Work

A temporary incapacity for work that results in sickness absence should be understood as an imbalance between a worker's health and the demands and requirements of their job. When these two variables do not align, a worker is deemed "unfit for work" and their employment contract is suspended. To address this situation, policy makers have traditionally relied on the provision of public or private healthcare services to restore the worker's health and return it to its previous state as much as possible. In addition, countries such as Spain or Italy devote considerable effort to verify the health status of workers on leave to prevent fraudulent claims.[7]
That said, this approach has only a limited capacity to contain sickness absence because it addresses only one side of the equation. In other words, while all their efforts are focused on restoring or monitoring a worker's health, the work-related variable remains unaltered. In contrast, innovative return-to-work programs act as a parallel or complement to the recovery itself. This dual intervention makes it possible to identify a new point of balance between a worker's health status and job demands more rapidly, which can shorten periods of sickness absence.
In rigid systems, the work-related variable remains fixed throughout the period of temporary incapacity because the legal framework conceptualises this process as a closed cycle: a worker's "usual job" serves as the legal benchmark both for granting medical leave and for authorizing return to work. Although Spanish or Italian legislation does not explicitly define the concept of "usual job" , it is generally interpreted as the position held by an employee prior to the onset of incapacity, including its essential tasks and working conditions.

[7] In Spain, employees can be required to undergo control-focused medical examinations carried out by the Medical Inspectors of the Social Security and the employers' insurance associations. Similarly, Article 5 of the Italian Workers' Statute states that employers can require that medical inspectors from the Social Security Authority examine employees that are absent from work for health-related causes.

Therefore, a worker can only return if they are assessed as capable of performing their "usual job" under the same conditions. No consideration is given to whether a worker could carry out ancillary tasks, assume alternative duties within the organization, or remain active in employment under adjusted conditions—such as reduced hours, modified schedules, or a change in work location. In other words, medical assessments of work capacity for employees on sick leave do not take into account the possibility of adaptations or reassignments as an alternative to sickness absence.

With the focus placed so rigidly on the "usual job," a medical examination conducted by general practitioners determines a worker's capacity or incapacity for work.[8] In practice, this decision is framed in absolute terms—a binary choice between two clearly distinct conditions with no room for nuance or gradual assessment: one is either fit or unfit for work. Abiding by this logic, a worker is placed on sick leave if an illness interferes with their ability to carry out their usual duties because their capacity is assessed only in relation to the very specific demands of their work. Consequently, a hospitalized and unconscious worker is treated in the same manner as one who, despite experiencing reasonable difficulties commuting, retains full intellectual capacity and can perform creative tasks.

This strict distinction between capacity and incapacity for work rests on the assumption that sick leave benefits and work are incompatible. In other words, a worker is not permitted to carry out any tasks for their employer until they recover and their leave is finished. The rationale behind this rule is to prevent fraud in cases where individuals receive benefits due to their inability to work. Nevertheless, both the Spanish[9] and Italian[10] Supreme Courts have acknowledged the possibility for a worker on sick leave to engage in other professional or self-employed activities during the period of incapacity, provided that such activities do not interfere with the recovery process.[11] This reveals that the courts admit

[8] G. Vitiello, *L'incapacità temporanea al lavoro e la certificazione di malattia*, Pratica Medica & Aspetti Legali, 2011, n. 2, 5-12.

[9] Judgment of the Spanish Supreme Court (Tribunal Supremo) of 13 April 2004, appeal number 1508/2003.

[10] Italian Supreme Court (Corte di Cassazione), Labour Section, Judgment No. 13063 of 26 April 2022.

[11] See G. Di Corrado, *La malattia del lavoratore*, in W. Chiaromonte, M. L. Vallauri (eds.), *Trasformazioni, valori e regole del lavoro. Scritti per Riccardo Del Punta*, Firenze University Press, Florence, 2024, 415-432, offering a critical reassessment of this interpretation in the case of the Italian system.

workers deemed unfit to perform their usual duties may still retain residual physical or mental capacities that would allow them to engage in alternative forms of activity. Thus, a paradox presents itself: while both systems implicitly recognize that work capacity is a relative rather than absolute condition, they lack structural mechanisms to channel such residual capacity back into the original employment relationship.

A worker may only return to work once they are deemed to be capable of working. In Italy, this occurs when the period indicated by the physician in a sickness certificate expires. In Spain, a worker returns only after a medical certificate declaring them fit for work is issued. Until that point, the legal framework does not provide for any professional interaction between the worker and their employer. A worker is thus treated as a passive subject; remaining disconnected from the workplace and required only to follow the prescribed medical treatment. Likewise, the employer plays no active role other than waiting for the worker's recovery. The employee-employer relationship is limited to control functions that verify the legitimacy of the absence, without any mandate to explore proactive alternatives to prevent or reduce it. In short, both parties to the employment relationship are deprived of the possibility to seek solutions that might reduce the duration or intensity of the worker's absence.

The most serious disadvantage of this inflexible model is that it postpones any return to work until an employee is considered capable of fully resuming their previous position under the same contractual conditions. In other words, workers who might be able to carry out work-related tasks with reasonable workplace accommodations are kept out of the labor market for longer than necessary. This delay is particularly problematic considering empirical evidence indicating that the longer a worker remains absent, the lower their chances of successful reintegration and the greater the decline in their overall quality of life.[12] For example, recent research conducted in the United Kingdom finds individuals who have been out of work for less than one year are nearly five times more likely to return to employment than those who have been out of work longer.[13]

---

[12] NIDMAR: *Disability management in the workplace: A guide to establishing a joint workplace programme*, Port Alberni, 1995, p. 3.

[13] Department for Work and Pensions, Department for Business and Trade, *Keep Britain Working Review: Discovery. Independent Review of the Role of Employers in Tackling Health-Based Economic Inactivity and Promoting Healthy and Inclusive Workplaces*, https://www.gov.uk/government/publications/keep-britain-working-review-discovery (accessed July 17, 2025).

A further structural limitation of these inflexible models lies in their tendency to treat the return to work following a serious and prolonged illness as a seamless transition, disregarding the residual effects of one's condition. In many cases, even if a worker is deemed capable of working, they may experience lasting physical or psychological impairments after having been on sickness absence for some time. These impairments are overlooked by a binary model that equates return to work with a full medical recovery. In Spain, this structural blind spot contributes to high relapse rates among workers who had initially shown sufficient ability to re-join the labor force.[14] For example, individuals recovering from cancer are often forced to take renewed medical leave shortly after returning to work—not due to a recurrence of the disease, but because the workplace fails to offer transitional support.[15] In the absence of a phased reintegration procedure or an adjustment period, these workers may find themselves absent again or eventually granted permanent incapacity benefits.[16]

It must be acknowledged, however, that certain legal obligations do exist to accommodate workers with debilitating health conditions. First, European directives impose duties to adapt the work of employees who are particularly sensitive to occupational risks.[17] Second, they also stablish the obligation to implement reasonable adjustments that facilitate the integration of workers with disabilities.[18] These requirements are binding across all European countries and apply to workers returning to work after a period of sickness absence too. The enforcement of these obligations is undoubtedly essential and highly beneficial in supporting a healthy and sustainable return to work.[19] What must be emphasized, however, is that countries operating under rigid sickness absence models

[14] SÁNCHEZ GALÁN, L., BAIDES GONZALVO, P. y REGAL RAMOS, R.: *Recaídas en incapacidad temporal: impacto de su regulación y control*, Medicina y Seguridad del Trabajo, 2019, núm. 256.

[15] J. M. Vicente Pardo y A. López Guillén García: Aptitud sobrevenida tras la incapacidad laboral prolongada por cáncer, Medicina y Seguridad del Trabajo, 2019, núm. 225.

[16] See, for example, in relation to the Italian system, M. Sammicheli, M. Scaglione, *An explanatory case report about critical differences of 'inability to work' in Italian welfare and social security systems*, Journal of Health and Social Sciences, 2019, vol. 4, n. 1, 117-122.

[17] Article 15, Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC).

[18] Article 5, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[19] S. M. Candura, M. Frascaroli, F. Scafa, *Il reinserimento lavorativo dopo malattia o infortunio: il ruolo del medico del lavoro*, INAIL, Roma, 2014.

do not integrate such accommodations into the legal framework governing sick leave and sickness allowances. In general, work adjustments are not conceived as supportive to a worker's recovery, but rather as a response to an already consolidated impairment of health.

3. Integrating Return to Work into the Legal Framework of Temporary Incapacity: The Case of Flexible Sick Leave Systems

Since the early 2000s, several European countries have undertaken far-reaching reforms to overcome the "rigidity" problems of the legal schemes governing sick leave and sickness benefits. These reforms were primarily driven by the need to contain rising public expenditure on sickness benefits. In all these cases, the focus of protection has shifted away from the worker's incapacity to perform certain tasks and towards their remaining employability.[20] Thus, when a worker is considered as having partially recovered their physical or psychological capacity, priority is given to identifying ways in which this capacity can be used rather than prolonging the period of inactivity. The various pathways of utilizing and retaining residual ability are commonly referred to as "activation measures" or "return-to-work programmes."[21]

Return-to-work plans are technical recommendations aimed at adjusting working conditions to match the capabilities of employees whose work capacity has been affected by illness or injury.[22] They allow workers on sick leave to return to work safely while still receiving medical treatment. These plans can encompass a wide range of functional or organizational adjustments, including change in workplace location, teleworking arrangements, transportation support to the workplace, functional mobility, modified working hours, or training initiatives aimed at enabling a worker to carry out their original duties.[23] This enables them to carry out their original tasks in an adapted form or allows them to take up alternative work involving less physically and psychologically demanding tasks. From a public policy perspective, enabling the use of such return-

[20] S. Devetzi, S. Stendahl, *Introduction*, in *Too Sick to Work? Social Security Reforms in Europe for Persons with Reduced Earnings Capacity*, Wolters Kluwer, Alphen aan den Rijn, 2011, p. 4.
[21] Eurofound, *Preventing Absenteeism at the Workplace. Research Summary*, Eurofound, Luxembourg, 1997, p. 20.
[22] International Social Security Association, *ISSA Guidelines: Return to Work and Reintegration*, ISSA, Geneva, 2013, p. 2.
[23] European Agency for Safety and Health at Work, *Rehabilitation and Return to Work: Analysis Report on EU and Member States Policies, Strategies and Programmes*, European Agency for Safety and Health at Work, Luxembourg, 2016, p. 25.

to-work arrangements requires institutional recognition that work capacity can be managed flexibly during recovery, rather than assessed exclusively in all-or-nothing terms.[24]

The concept of return-to-work measures belongs primarily to the field of occupational medicine and does not have an exact counterpart in legal terminology. This is particularly true in countries that operate under rigid sickness absence models. Nevertheless, this concept bears certain similarities to the concept of reasonable accommodation for persons with disabilities—both in terms of the wide variety of measures it may encompass[25] and the fact that it often applies to individuals with long-term or chronic illnesses.[26] In fact, some return-to-work measures may qualify as reasonable accommodations when implemented for workers with disabilities. For instance, the Court of Justice of the European Union confirmed in the HK Danmark[27] case that the part-time return to work granted to two Danish employees on sick leave due to musculoskeletal disorders constituted a valid form of reasonable accommodation. That said, return-to-work plans offer a practical advantage over reasonable accommodation measures, as they typically apply to a broader group of workers and are not necessarily limited to those with a legally recognized disability.[28]

According to data from ESENER-2,[29] the countries where employers most frequently report having procedures in place to support employees returning to work after sickness absence are the United Kingdom, Sweden, and the Netherlands. Based on the assumption that they exhibit legal frameworks more conducive to return-to-work initiatives, these countries were selected for this comparative analysis.

---

[24] European Agency for Safety and Health at Work, *Rehabilitation and Return to Work*, cit. p. 8.

[25] Recital 20 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation provides a useful illustration of what reasonable accommodation measures may entail. It states: "*Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources*."

[26] C. Carchio, *Rischi e tutele nel reinserimento lavorativo delle persone con malattie croniche e trapiantate: prime riflessioni alla luce del d.lgs. n. 62/2024*, Labour & Law Issues, 2024, vol. 10, n. 1, 1-18.

[27] CJEU, 11 April 2013 (Joined Cases C-335/11 and C-337/11, Ring and Skouboe Werge)

[28] European Agency for Safety and Health at Work, *Rehabilitation and Return to Work*, cit.

[29] European Agency for Safety and Health at Work, *Second European Survey of Enterprises on New and Emerging Risks: Overview Report*, European Agency for Safety and Health at Work, Luxembourg, 2016, p. 27.

A central feature of the UK approach is the *Fit Note*, introduced in 2010 to replace the previous *Sick Note*. Issued by general practitioners, the Fit Note enables not only a declaration of incapacity (*not fit for work*), but also an intermediate option (*may be fit for work*) that establishes the presence of residual work capacity. When this option is selected, the physician may include specific recommendations—e.g., phased return, adjusted duties, altered hours, or telework—to facilitate early reintegration. These recommendations are not binding, but they open a dialogue between an employer and an employee about possible adaptations. Notably, no formal medical discharge is generally required; workers may return as soon as adjustments are in place or recovery is sufficient, provided the note has not expired. This system grants a high degree of discretion to the parties concerned in negotiating the terms of the worker's return to work, as both the payment and administration of Statutory Sick Pay (SSP) have been fully transferred to employers. If no agreement is reached or accommodations cannot be made, the worker is treated as fully unfit and continues to receive SSP. Refusal to undertake suitable alternative work may, in certain circumstances, justify dismissal in some cases.

Research suggests that the introduction of Fit Notes had a modest positive effect in reducing long-term sickness absence and overall absenteeism.[30] Still, the system is currently under review following the identification of several issues undermining its effectiveness. First, the role of the general practitioner as the primary technical authority in supporting employees' return to work entails certain limitations.[31] These stem, on the one hand, from a lack of training in occupational health and, on the other, from the considerable burden of clinical duties that general practitioners are required to manage. As a result, 93 percent of Fit Notes issued by general practitioners deem a worker to be "not fit for work." Moreover, when workplace adjustments are recommended, the guidance provided is often too vague to meet employers' practical expectations. There is also a degree of uncertainty regarding the expected conduct of employers along with medical recommendations. Employers often lack clear protocols on how to initiate conversations or engage in negotiations concerning a potential phased or flexible return to work.

In the Netherlands, a turning point came with the adoption of the Gatekeeper Act in 2002.[32] Under this legislation, employers and

[30] S. Dorrington, E. Roberts, A. Mykletun et al., *Systematic review of fit note use for workers in the UK*, Occupational and Environmental Medicine, 2018, n. 75, p. 538.

[31] Department for Work and Pensions, *op. cit.*

[32] M. A. Yerkes, *Transforming the Dutch Welfare State: Social Risks and Corporatist Reform*, Bristol University Press, Bristol, 2011, p. 56.

employees must agree on a return-to-work plan within the first eight weeks of absence. Every six weeks, both parties are mutually obligated to meet, cooperate, and review progress. Measures may include adapting the original job, retraining for a new position, therapeutic part-time work, or other forms of temporary adjustment.[33] It is also permissible for the employee to engage in therapeutic activities that may provide some support to the employer, or to do part-time work. In the latter case, an employee receives a corresponding portion of their wage for the hours actually worked, along with a supplementary allowance for the non-worked hours, which is paid either by their employer or their insurance provider.[34] All steps of the return to work process must be documented and are subject to review by social security authorities. Should these authorities determine that an employer has not taken adequate steps to support their employee's reintegration, they may be sanctioned and required to continue wage payments for a third of incapacity. Workers, for their part, may lose their benefits if they do not cooperate.

International comparative studies generally identify the Dutch model as a success story—not only for its effectiveness in reducing sickness absence rates, but also for its impact in lowering the number of claims for disability or permanent incapacity benefits.[35] Several features of the Dutch system make it effective: (i) it imposes legally binding obligations on both employers and employees; (ii) it establishes an incentive structure that ensures compliance with the legal duty to design and implement a reintegration plan; and (iii) it ensures the effective coordination of the various actors involved in the return-to-work process.[36] In addition, the

[33] F. Pennings, *The New Dutch Disability Benefits Act: The Link Between Income Provision and Participation in Work*, in S. Devetzi, S. Stendahl (eds.), *Too Sick to Work? Social Security Reforms in Europe for Persons with Reduced Earnings Capacity*, Wolters Kluwer, Alphen aan den Rijn, 2011.

[34] L. Kools, P. Koning, *Graded return-to-work as a stepping stone to full work assumption*, Journal of Health Economics, 2019, vol. 65, p. 191.

[35] J. van Sonsbeek, R. Gradus, *Estimating the effects of recent disability reforms in the Netherlands*, Oxford Economic Papers, 2013, vol. 65, p. 849. The authors attribute a 25 percent reduction in the rate of access to permanent disability benefits to the impact of recent sickness absence and disability policy reforms.

[36] O. Mittag et al., *Intervention policies and social security in case of reduced working capacity in the Netherlands, Finland and Germany: a comparative analysis*, International Journal of Public Health, 2018, vol. 63, p. 1086. See also E. Vossen, N. van Gestel, *The activation logic in national sickness absence policies: Comparing the Netherlands, Denmark and Ireland*, European Journal of Industrial Relations, 2015, vol. 21, n. 2, 165–180.

system benefits from strong engagement by social partners who include return-to-work measures in collective bargaining agreements.[37]

In Sweden, reforms have redefined temporary incapacity as a condition of "reduced work capacity due to illness" since the 1990s. Medical certificates must specify the degree of incapacity—100 percent, 75 percent, 50 percent, or 25 percent—determining the portion of working time during which an employee is required to perform work duties. This assessment is dynamic and adjusts as recovery progresses. Since 2008, a structured "Rehabilitation Chain" establishes specific medical review deadlines and gradually expands the frame of reference for assessing work capacity. During the first 90 days, the evaluation focuses on whether a worker can perform their usual tasks or any suitable temporary duties offered by the employer. After 90 days, a change of position within the company may be required. From day 180 on, the assessment shifts to a worker's capacity to perform any job available in the general labor market. Studies indicate that these measures contributed to a decline in sickness absence rates.[38]

An important feature of this model is that, while working reduced hours, workers still receive a public benefit that compensates for the partial loss of income corresponding to the portion of the workday they miss. This distinguishes Sweden and the rest of the Nordic countries from others such as Italy, where part-time work is also available as a way to employ workers with reduced work capacity. According to Legislative Decree nº 81/2015, workers diagnosed with oncological or chronic-degenerative conditions are entitled to request a transition to part-time employment in the Italian system. However, the corresponding wage reduction is not compensated by any public benefit, which results in a significant loss of income. This shortcoming has been identified as one of the main reasons for the limited uptake of the measure.[39] Moreover, unlike the Swedish system, the Italian measure is not a generalizable solution. Instead, it suffers from a significant drawback of being designed with a limited scope of application, based on restrictive and ambiguous eligibility criteria.[40]

---

[37] Yerkes, *op. cit.*, p. 56.

[38] Nordic Social Statistical Committee, *Sickness Absence in the Nordic Countries*, Nordic Council of Ministers, Copenhagen, 2015, p. 45.

[39] S. Fernández Martínez, *La permanencia de los trabajadores con enfermedades crónicas en el mercado de trabajo: Una perspectiva jurídica*, Adapt University Press, Modena, 2018, p. 185.

[40] F. Alifano, G. Impellizzieri, *La tutela del lavoratore con malattia cronica tra (nuove) figure professionali e soluzioni organizzative*, Paper presented at the 5th World Congress CIELO Laboral 2025, *Towards a Reconfiguration of Social Law in Light of the Transformation of Work?*, Bordeaux, June 4–6, 2025

4. Integrating Return to Work into the Legal Framework of Temporary Incapacity: The Case of Flexible Sick Leave Systems

Until recently, legislative efforts in Spain that address the growing number of workers with chronic illnesses have focused primarily on safeguarding the employment contract.[41] This is true for Italy as well, where anti-discrimination law concerning disability has increasingly been used to enable ill workers to retain their jobs for longer periods.[42] However, this gradual strengthening of employment protection for sick workers does not reduce the rigidity of medical absences, nor does it address the adverse effects such rigidity continues to produce. Instead, it remains a largely defensive strategy[43]— one that does not guarantee a worker's prospects to sustain their employment given the constraints of their health condition, despite the formal safeguards afforded to the employment contract.

Due to the legal rigidity both in Italy[44] and Spain[45], concrete measures of collective bargaining have been introduced to facilitate the return to work of absent employees and reduce the need for full sickness absence among sick workers. These measures remain partial and fragmented, however, and are insufficient in addressing the challenges posed by an aging workforce and the increasing prevalence of chronic conditions.

For this reason, particular attention should be paid to the proposal presented by the Spanish Government in October 2024, which is currently under negotiation between social partners. The Spanish

[41] For example, in 2020, the possibility of dismissing workers who accumulated repeated and intermittent absences due to health reasons was abolished. Shortly thereafter, in 2022, all forms of discrimination on health-related grounds were prohibited, including dismissals directly linked to the worker's illness. More recently, the legal provision allowing employers to automatically terminate the employment contract when the Social Security medical services determined that the worker was suffering from a permanent condition preventing them from performing their usual occupation has also been repealed.

[42] C. Carchio, F. Cucchisi, *La tutela del lavoratore malato cronico e trapiantato: sfide e prospettive alla luce del modello bio-psicosociale di disabilità*, Paper presented at the 5th World Congress CIELO Laboral 2025, Towards a Reconfiguration of Social Law in Light of the Transformation of Work?, Bordeaux, June 4–6, 2025.

[43] G. Impellizzieri, Luci e ombre del contributo della giurisprudenza all'evoluzione del rapporto tra malattia (cronica) e lavoro, Università degli Studi di Urbino "Carlo Bo", Urbino, 2025.

[44] Alifano and Impellizzieri, *La tutela del lavoratore con malattia cronica*, cit.

[45] J. J. Fernández Domínguez, *Incapacidad temporal y vigilancia de la salud. Programas de incorporación al trabajo (un análisis desde la negociación colectiva)*, Documentación Laboral, 2025, n. 134, 33-61.

Government announced the introduction of flexible sick leave publicly, outside of the established channels of dissemination and without prior consultation with trade unions or employer organizations. This procedural deviation triggered immediate criticism, particularly from certain left-wing political parties and trade union representatives, who viewed the measure as a potential threat to workers' rights. Nevertheless, negotiations between social partners are currently ongoing and being conducted with a degree of discretion, despite the rocky start.[46]

4.1. Return-to-Work Provisions in Spanish Collective Agreements

A first group of collective agreements recognize a general right to temporary job reassignment for employees with "reduced work capacity." For instance, the III Collective Agreement for Sales Network Staff of Aguas Danone (2020), and the Provincial Agreement for the Packaging and Processing of Natural Spices, Condiments, and Herbal Products in the Province of Burgos (2023) establish an obligation for employers to temporarily modify the employee's position without any reduction in salary. The Collective Agreement for the General State Administration (2019) goes further by requiring an employee to first receive professional training tailored to their new position if necessary. Another noteworthy feature is the possibility of modifying one's place of work to allow access to rehabilitation services, particularly when the relevant medical facility is located at a considerable distance from the worker's residence.

A second, more extensive group of recent collective agreements introduces return-to-work measures specifically designed for employees recovering from cancer. These agreements reflect growing societal awareness of the challenges these individuals face in resuming employment. In some instances, these measures may be extended to workers recovering from other serious health conditions. In the latter cases, however, approval is typically subject to an assessment by the company's occupational health service and contingent upon an employer's organizational capacity. These clauses are found primarily in agreements created by large companies or in collective bargaining processes within the public sector.

[46] At the time of writing, the reform remains at a preliminary stage of development and has not yet been formalised in any official legislative text or policy document. As such, the analysis presented here should be understood as a provisional and exploratory assessment, based on the limited information currently available and subject to future developments in both the legislative process and social dialogue.

The most common form of work adjustment for employees with cancer is a reduction of working hours and a proportional reduction in salary based on medical evaluation. For example, the III Collective Agreement of the Naturgy Group (2023) and the VIII Collective Agreement of Repsol, S.A. (2023) both allow cancer patients to request part-time work arrangements. In the public sector, several collective agreements provide for the gradual reintegration of cancer survivors into full working hours without any reduction in salary. For example, employees of the regional administration of the Generalitat of Catalonia are entitled to a phased return plan, under which the working day is reduced by 50 percent during the first month, 25 percent during the second, and 10 percent during the third, with a minimum of two hours of daily work. In many cases, flexible schedules and favorable access to telework, relative to other employees in the organization, accompany these reductions.

These temporary work adaptations are recognized as a cancer patients' subjective right and medical proof of illness is usually sufficient to access them. Nevertheless, certain agreements, such as the Collective Agreement for the regional public administration of the Community of Madrid (2025), require additional evaluation of whether any adaptations will contribute to the worker's full functional recovery, if they will help employees avoid situations of hardship, or remove difficulties in job performance. The involvement of occupational risk prevention services is required in some cases, either through a prior report or through continuous supervision and monitoring of the measure's implementation.

One notable shortcoming of most collective agreements is that they do not expressly involve workers' legal representatives in the return-to-work process, which runs counter to technical recommendations of the Spanish National Institute for Occupational Safety and Health.[47] Explicit provisions should be introduced to ensure their participation, both to support employees and to safeguard against the inappropriate implementation of these measures. The involvement of legal representatives would also promote a more comprehensive preventive culture—one that extends beyond the narrow confines of traditional occupational risk prevention to encompass a broader vision of workplace health and safety.

[47] Technical Guidance Note No. 1116 Maintenance and Return to Work: Procedure, p. 2.

4.1. Legislative Reform Proposal for a Partial Sickness Absence Scheme

According to information publicly available at the time of writing[48], the proposed flexibilization of sickness absence or temporary incapacity in Spain is framed as a measure that would (i) allow for benefits to be received by a worker in cases where they hold multiple jobs, and (ii) enable workers on long-term sick leave to gradually return to work when their health permits.[49]

The first part recognizes that a worker who performs services for multiple employers or combines salaried and self-employed work may be declared temporarily incapacitated for one of these jobs while being allowed to continue the other. This aspect of the reforms is relatively uncontroversial and has received support from employers and trade unions. Its implementation would also be straightforward, as it reflects a line of interpretation already accepted by Spanish courts.

The second part, regarding a gradual return to work, has proved more contentious. Although the government has not provided a detailed clarification on the adaptations proposed that support this reintegration, public debate has interpreted the proposal as the introduction of a "part-time temporary incapacity" model. This mechanism would allow workers who cannot yet perform their full working hours due to illness or injury—but who are recovering from their most limiting symptoms—to resume work on a reduced basis. Under this measure, employees would gradually reintegrate by assuming a reduced workload in respect to their ability. Spain's approach resembles the Swedish model in this sense, where partial work activity does not result in a significant loss of income since public benefits compensate for the hours missed by an employee on leave. Unlike the Nordic model, however, the government clarified that its initial approach is a return-to-work plan would be voluntary for the worker.

According to official statements, this proposed flexibilization would apply only to long-term cases of temporary incapacity due to chronic illnesses. This aligns with established rationale for return-to-work plans in comparative law and practice, which typically reserves flexibility for prolonged conditions due to medical, technical, and economic considerations. Return to work is generally conceptualized as a process

[48] July 2025.

[49] eldiario.es, *La Seguridad Social da un giro respecto a las bajas flexibles: reincorporación gradual con alta médica*, eldiario.es, 14 October 2024, https://www.eldiario.es/economia/seguridad-social-da-giro-respecto-bajas-flexibles-reincorporacion-gradual-alta-medica_1_11731922.html (accessed December 29, 2024).

whereby a disease or accident places the worker in a stage of professional inactivity, where at least partial recovery is required before any attempt to resume work can be made. The re-approach to work after partial recovery typically begins by readjusting the demands of a job to a worker's capacity.[50] These return-to-work plans are thus designed for illnesses marked by acute episodes, with symptoms progressively alleviated due to medical treatment.[51]

When presenting the proposal, the Minister referred explicitly to the case of cancer survivors as an example because it enjoys a broad social consensus regarding the need for improved legal and labor treatment.[52] In fact, 55 percent of workers in Spain who return to work after cancer already report having done so gradually, while half of those who did not would have preferred a phased return despite a lack of legal regulation.[53] However, in the absence of publicly supported return-to-work schemes, the burden is currently borne either by employers—who voluntarily implement or negotiate collective agreements—or by workers themselves, who already face significant economic costs beyond the workplace. Undertaking the proposed reform would entail standardizing and generalizing the right to reduced working hours for all patients in the same situation and ensuring a more equitable distribution of its costs among the various parties involved.

Confusion has clouded the public reception of the proposal because of ambiguity around the timing of adapted work reintegration for those with chronic illnesses. Specifically, the possibility that return-to-work measures might shorten the duration of a worker's absence has been interpreted in certain trade union and political circles as a restriction of workers' rights,

---

[50] A. E. Young, R. T. Roessler, R. Wasiak et al., A Developmental Conceptualization of Return to Work, Journal of Occupational Rehabilitation, 2005, n. 15, 557-568.

[51] In contrast, in cases involving short-term but incapacitating illnesses, such as gastroenteritis or the common flu, there is generally no intermediate phase between medical leave and recovery during which the worker might require or benefit from any form of job accommodation.

[52] El Mundo, *Escrivá quiere que los trabajadores de baja se reincorporen a su empleo aunque no estén del todo curados*, El Mundo, 3 October 2024, https://www.elmundo.es/economia/2024/10/03/66fe659ce85eceee628b458b.html (accessed December 29, 2024).

[53] Federació Catalana d'Entitats contra el Càncer (FECEC), *1er Barómetro Cáncer y Trabajo en España*, FECEC, Barcelona, 2023, https://juntscontraelcancer.cat/wp-content/uploads/2024/10/DEFINITIU_1er_Barometro-de-Cancer-y-Trabajo-en-Espana-2024_CAT.pdf (accessed February 23, 2024).

that is, depriving them of the necessary rest time for a proper recovery.[54] Some warn that the proposal would effectively compel sick workers to return to work prematurely;[55] other criticisms focus on the potential impact on workers' health, questioning whether the proposed change might compromise their physical or mental well-being by allowing them to return to work before full recovery.[56] In response, the government clarified that any reintegration measures would apply only after a medical certificate of fitness for work is issued by a public health service, confirming that a worker has sufficiently recovered.

Amid these criticisms, it should be emphasised that even if the proposed measures apply to workers who are not fully recovered, that would never entail an obligation to perform tasks beyond a worker's functional capacity. This would be legally prohibited under Article 25 of the Occupational Risk Prevention Act (LPRL), which expressly forbids assigning workers to positions for which they are manifestly unfit. The novelty of the proposal lies in introducing legal mechanisms to support gradual reintegration, thereby facilitating a smoother return to work. The purpose is not to increase the level of suffering the law can impose on the worker; rather, it reduces a high level of demand that an employer may impose once the suspension of an employment contract is lifted.

Moreover, research in occupational medicine has shown that, contrary to traditional assumptions, many health conditions do not require complete rest for effective recovery.[57] In fact, some studies suggest that combining medical treatment with adapted work participation can lead to a faster and more sustainable recovery compared to recovery in traditional sickness absence models.[58] In addition, a loss of connection with the workplace

---

[54] USO, *Baja laboral flexible: pérdida de derechos y más poder a las mutuas*, USO, 3 October 2024, https://www.uso.es/baja-laboral-flexible-perdida-de-derechos-y-mas-poder-a-las-mutuas/ (accessed January 3, 2025).

[55] El País, *Los socios del Gobierno arremeten contra las bajas flexibles y critican a la Seguridad Social por falta de detalles*, El País, 5 October 2024, https://elpais.com/economia/2024-10-05/los-socios-del-gobierno-arremeten-contra-las-bajas-flexibles-y-critican-a-la-seguridad-social-por-falta-de-detalles.html (accessed January 2, 2025).

[56] La Vanguardia, *El Gobierno estudia una baja médica flexible que permita combinar recuperación y empleo*, La Vanguardia, 3 October 2024, https://www.lavanguardia.com/economia/20241003/9992735/baja-medica-flexible-trabajar-combinar-empleo-trabajo-gobierno.html (accessed January 3, 2025).

[57] J. Gervás, A. Ruiz Téllez, M. Pérez Fernández, *La incapacidad laboral en su contexto médico: Problemas clínicos y de gestión*, Fundación Alternativas, Madrid, 2006, p. 32.

[58] L. C. Bosman, J. W. R. Twisk, A. S. Geraedts, M. W. Heumans, *Effect of partial sick leave on sick leave duration in employees with musculoskeletal disorders*, Journal of Occupational Rehabilitation, 2020, vol. 30, p. 204.

generates a sense of isolation and devaluation in a worker, which may lead to psychosocial impairments that hinder their return to work.[59] Adapted work activity should therefore be regarded as part of the therapeutic intervention aimed at supporting a worker's full rehabilitation.[60] In other words, a properly managed and gradual return to work would improve—rather than jeopardize—the health of employees on sick leave.

In line with stated evidence, international recommendations emphasize that return-to-work plans or measures should preferably be implemented following an early intervention.[61] That is, they should be activated as soon as the worker's health condition allows. As previously discussed, a return to work becomes more difficult the longer a worker is absent due to the progressive deterioration of work-readiness over time. Therefore, even when such measures are intended for workers with long-term illnesses, a more advisable approach is (i) to begin planning return-to-work strategies as soon as it becomes clear that the absence will be prolonged, and (ii) to implement them as early as medically feasible.

Another line of criticism raised by Spanish trade unions and political actors is that, although the government presented it as a voluntary measure for workers, they would not be truly free to refuse participation in return-to-work schemes in practice. For example, employers may use the plans or measures as a tool to pressure workers on sick leave to return to work prematurely. Within the inherently unequal power dynamics of the employment relationship, a gradual return to work would not constitute a genuinely free choice for the worker according to this criticism. In other words, an employee could be compelled to return against their will under pressure from an employer seeking to reduce the financial costs associated with absenteeism.

These concerns are not unfounded, as some employers do engage in improper practices of pressuring workers who are on sick leave. Nevertheless, specific legal safeguards can be introduced to mitigate this risk, the most obvious being a requirement that any progressive return to

[59] J. M. Vicente Pardo and A. López-Guillén García, Problemas y factores psicológicos en el retorno al trabajo tras incapacidad temporal prolongada por cáncer de mama, Medicina y Seguridad del Trabajo, vol. 63, n. 248, 2017, show that approximately 36 percent of breast cancer patients develop minor psychiatric disorders, not so much at the initial stage of diagnosis—as might be expected—but rather during the final phase of medical treatment. These conditions hinder return to work and are more likely to arise when the period of sick leave has exceeded one year or when the worker perceives limited support in the workplace, among other risk factors.

[60] European Agency for Safety and Health at Work, *Rehabilitation and Return to Work*, cit. 24.

[61] International Social Security Association, *op. cit.*, p. 2.

work be prescribed by a physician within the public health system. Such a decision would be based on medical and objective criteria, independently assessed, and would rule out premature reintegration. Additional safeguards could include involving workers' representatives in the design and implementation of return-to-work plans, which would ensure transparency and balance in the process. A specific protection against retaliation could also be established for workers on sick leave by declaring null and void any employer action aimed at undermining or interfering with their protected status.

5. Concluding Remarks

This article highlights the serious challenges posed by application of rigid sickness absence models that obstruct the return to work for employees with chronic illnesses, such as those present in Spain and Italy. The structural rigidity of these legal frameworks prevents any form of work activity during medical leave because it rests on a binary conception of health—one that is ultimately simplistic, reductive, and counterproductive. On the one hand, it disregards the possibility that partially recovered workers may have regained some degree of work capacity and therefore offers no legal tools to support their reintegration. On the other hand, a rigid system generally requires workers who have been absent for extended periods to resume all their previous duties at once, without appropriate transitional or adaptive measures. As a result, workers remain on leave for longer than necessary, increasing the risk of long-term inactivity and escalating the economic burden on the social security system.

In contrast, international comparative analysis offers a more reasonable alternative: the flexibilization of sickness absence, as implemented in countries such as the United Kingdom, the Netherlands, and Sweden. These approaches provide better accommodation for partial work capacity and promote earlier reintegration under adapted conditions. While each national reform reflects specific historical and institutional contexts, a cross-country analysis reveals that all three models share a set of core structural features.[62] These stand in clear contrast to the defining traits of rigid sickness absence models, as described in Section Two. Table 1 illustrates this contrast by comparing the key characteristics of rigid

[62] M. Crespi Ferriol, *Incapacidad temporal y programas de retorno al trabajo: una reforma necesaria*, Trabajo y Derecho: Nueva Revista de Actualidad y Relaciones Laborales, 2021, n. 73, 33-50

systems with more flexible approaches that actively support a return to work.

Rigid Model of Sickness Absence	Favorable approach to Return-to-Work
Temporary incapacity is the standard response to workers' health impairments.	Work inactivity is considered a last resort and only happens when no alternative solutions are viable.
Work capacity is treated as a binary condition, with no room for intermediate solutions.	Work capacity is regarded as a continuum, allowing for intermediate solutions between full capacity and total incapacity.
Workers on sick leave are generally excluded from engaging in work.	Workers whose capacity has not been reduced to zero are encouraged to work to the extent possible, provided it does not hinder their recovery.
Workers return to the same job position under the same working conditions held as before.	Temporary adaptation of job duties or working conditions is encouraged if it enables an earlier return to work.
Both workers and employers are placed in a passive or merely expectant role until there is medical authorization to return to work.	Workers and employers are actively involved in implementing measures to support an earlier and sustainable return to work.

Table 1: Key features of rigid and flexible sickness absence models (Author's elaboration, 2025).

Empirical studies generally support the effectiveness of sick leave schemes and flexibilization reforms, showing that combining medical convalescence with adapted work tasks can promote health improvement, ease the transition from absence to employment, and help prevent relapses. Return-to-work measures contribute to reducing sickness absence rates and can prevent the premature exit of workers with health conditions from the labor market. While significant challenges have impeded the implementation of such reforms—and persistent shortcomings keep certain schemes under review—their practical operation offers valuable insights. Analysing both their strengths and limitations provides important lessons for countries that continue to rely on rigid sickness absence models but are considering a transition towards more flexible approaches.

Encouragingly, there are signs of an incipient shift. Certain collective agreements have already introduced proactive return-to-work measures through qualitative or quantitative job adaptations in Italy and Spain. However, in the Southern European industrial relations models, collective bargaining has a limited capacity to influence employment relations. As a

result, these measures—although innovative—remain relatively scarce, have a limited personal scope, and are sometimes restricted in substance to specific conditions such as cancer.[63] In contrast to this relative insufficiency, comparative international analysis shows that the key enabling factor for the widespread and effective implementation of return-to-work programs is the existence of a coherent legal framework that supports the process.[64]

Given this, the recent initiative by the Spanish Government that proposed a structural legislative reform of sickness absence that supports individuals with long-term illnesses return to work should be highly valued. The proposal to introduce part-time temporary incapacity may offer a path towards legal modernization, aligning the Spanish system with the best international practices and with empirical evidence on sustainable work reintegration. Nonetheless, the strong public backlash against this proposal suggests that the reform will be far from easy or uncontested. This is due to persisting misconceptions regarding the incompatibility of illness and work, and the presumed harm of combining them. Moreover, legitimate concerns have been raised regarding the need to provide workers with sufficient legal safeguards to protect them from potential abuse during the implementation of return-to-work measures. These concerns reveal some barriers that may be preventing similar transitions in other countries with comparable systems, such as Italy.

In short, the transition towards a sickness absence model that supports return to work is both a complex issue from a legal standpoint and a politically and socially sensitive topic. Meaningful change will require not only regulatory innovation, but also a broader cultural transformation in the way incapacity and recovery are understood. Integrating into the collective imagination a more complex, but also more realistic, sustainable, and mutually reinforcing relationship between health and work would bring about this change.

[63] Alifano and Impellizzieri, *La tutela del lavoratore con malattia cronica*, cit.

[64] European Agency for Safety and Health at Work, *op. cit.*, p. 8.

The Impact of the European Committee of Social Rights Monitoring Tools in Strengthening the Labour Rights of People with Disabilities and Illnesses in times of Crisis: The Case of Portugal

Joana Neto *

Abstract. This article aims to discuss the low impact of the European Committee of Social Rights monitoring tools on Portugal's national Labour Law, namely in times of crisis, despite its potential to support major changes in the legislation of the Member States, namely related to the discrimination at workplace against people with disabilities (pwd) or illnesses. To point out that position this research discusses the system of reports that were taken and the absence of complaints on this subject.

Keywords: *Discrimination, People with disabilities and illnesses; European Committee of Social Rights; Portugal; European Social Charter.*

1. The European Social Charter: A Brief Overview

1. Main Goals and Structure

The European Social Charter (ESC), revised in 1996 by the European Social Charter Revised (ESCR), is a Council of Europe treaty that deals with fundamental social and economic rights, complementing the European Convention on Human Rights (ECHR), related with civil and political rights. The ESC covers a significant range of human rights concerning to employment and social protection, housing, health, education, etc. The Charter aims to guarantee access to these rights without discrimination, on equal terms, for everyone, including people in vulnerable situations, such as people with disabilities (pwd).

* CEAD, FD, Lusófona University; University of Minho – School of Law; joana.neto@ulusofona.pt; joana.neto@direito.uminho.pt.

The implementation of the ESC by States Parties is supervised by the European Committee of Social Rights (ECSR) through the collective complaints procedure and the reporting system, a complex system that, as has been argued, should be regarded as a unitary system[1].As will be shown, Portugal is one of the countries with more complaints, but none of them are related with the protection of pwd. Moreover, as will be exposed more deeply, the reporting system is not delivering results in the matter at hand.

The ESC, signed in Turin on 18 October 1961, entered into force on 26 February 1965, subsequently revised in 1996, and the European Social Charter Revised (ESCR), together with the European Convention on Human Rights (ECHR), form part of the Conventions issued by the Council of Europe.

So, the ESC is composed by 5 texts: the ESC, two additional protocols, one amending Protocol reforming the supervisory mechanism and the Revised European Social Charter. The body responsible for monitoring the Charter Texts application is the ECSR.

The Council of Europe is a supranational body, made up of 47 Member States and 6 Observer States, with a European scope, created on 5 May 1949 with the aim of defending human rights and fundamental freedoms. This international organisation, based in Strasbourg, has bodies that monitor compliance with its legal instruments: the European Court of Human Rights (ECHR), the Committee of Ministers (the decision-making body composed by the ministers of foreign affairs of each Member State or their permanent diplomatic representatives) and the ECSR.

In international literature, the ESC has been the subject of several studies, particularly focussing on its level of binding force including at judicial level[2], including in the case of States that have not ratified the Revised CSE[3] many of them with the intention of counteracting its weak local

[1] L. JIMENA QUESADA, *Interdependence of the Reporting System and the Collective Complaint Procedure: Indivisibility of Human Rights and Indivisibility of Guarantees, European Social Charter and the challenges of the XXI century – La Charte Social Européenne et les défis du XXIe siècle,* Marilisa D'Amico e Giovanni Guiglia (ed), Ed. Scientifiche Italiane, Nápoles, 2014.

[2] C. NIVARD, *La justiciabilidad de los Derechos Sociales en el Consejo de Europa, Lex Social, Vol. 6*, n.º 2/2016,2016, 12-30, C. SALCEDO BELTRAN, *La Aplicabilidad Directa De La Carta Social Europea Por Los Órganos Judiciales, Trabajo Y Derecho,n.º 13/2016* (Enero), Nº 13, 1, 2016, pp. 1- 27.

[3] I. ALZAGA RUIZ, *La aplicabilidad de la Carta Social Europea por los órganos jurisdiccionales internos, Trabajo y derecho, n.º64*, 2020, pp. 1-64.

implementation but valuing its potential impact on strengthening social rights[4], particularly in crisis contexts[5].

The binding nature of the decisions of the ECSR has been discussed, particularly with regard to a decision condemning Spain[6].Although the binding nature of the decisions of the ECSR has been claimed by doctrine[7]. This understanding is not unanimous. It is argued that there is a duty to take account of the pronouncements of human rights treaty bodies, they are not enforceable[8].

The discussion around monitoring mechanisms and their effectiveness has offered important contributions[9] and stills one of the main goals regarding the subject matter.

---

[4] M. MIKKOLA, (2000), *Social Rights as Human Rights in Europe, European Journal of Social Security, 2(3),* 259-272. Available at: https://doi.org/10.1023/A:1010028716459 ; F. JIMÉNEZ GARCÍA, *La Carta Social Europea (Revisada): Entre el desconocimiento y su revitalización como instrumento de coordinación de las políticas sociales europeas, Revista Electrónica de Estudios Internacionales*, 2009, 1697-5197, n.º17.Available at: CartaSocialrevisada (urjc.es) ; L. JIMENA QUESADA, *Introducción: sostenibilidad y efectividad de los derechos sociales, incluso y sobre todo en tiempos de crisis, La jurisprudencia del Comité Europeo de Derechos Sociales frente a la crisis económica* in Carlos L. Alfonso Luis Jimena Quesada, Marian Carmen Salcedo Beltran, Bomarzo, Albacete, 2014, pp.13-48;

[5] N.A. PAPADOULOS, *Austerity Measures in Greece and Social Rights Protection under the European Social Charter Comment on GSEE v. Greece case, Complaint No. 111/2014, European Committee of Social Rights*, 5 July 2017, European Labour Law Journal, Vol. 10(1), 2017 85–97.

[6] Regarding the Complaint No. 218/2022, *Confederación Sindical de Comisiones Obreras* (CCOO) v. Spain, despite the Committee's unanimous finding of a violation of Article 24.b of the Charter, Carmen SALCEDO BELTRAN submit a concurring opinion where emphasizes the obligation to respect ratified human rights treaties incorporated into the Spanish legal system.

[7] L. JIMENA QUESADA, *La primera decisión de fondo contra España del comité europeo de derechos sociales: evidentemente vinculante, Lex Social, Revista De Derechos Sociales, 14 (1*), 2024, 1–6[6].

[8] A. SPAGNOLO, *They are not enforceable, but states must respect them: an attempt to explain the legal value of decisions of the European Committee of Social Rights, European Papers, Vol. 7*, 2022, n.º3, pp.1495-1516, [1516].

[9] B. LIBERALI, Il sistema di controlo della Carta social europea: il sistema dei rapporti nazionali, La Carta Social Europea e la tutela dei diritti sociali –Atti del convegno del 18 gennaio 2013, Università degli Studi di Milano, a cura di Marilisa D'Amico, Goivanni Guiglia e Benedetta Liberali, Edizione Scientifiche Italiane, Nápoles, 2013; P. STANGOS, Les rapports entre la Charte Sociale Européenne – Le rôle singulier du Comité Européen des Droits Sociaux et de sa jurisprudence, Cahiers de Droit Européen, n.º 49, 2013, pp. 319-393; L. JIMENA QUESADA, Introducción: sostenibilidad y efectividad de los derechos sociales, incluso y sobre todo en tiempos de crisis, La jurisprudencia del Comité Europeo de Derechos Sociales frente a la crisis económica in Carlos L. Alfonso Luis Jimena Quesada, Marian Carmen Salcedo Beltran, Bomarzo, Albacete, 2014, pp.13-48; H. CULLEN, The Collective complaints mechanism of the

The national literature has also sought to analyse the application of the CSE at national level, calling on the case law of the CJEU[10], discussing the monitoring procedures[11] and its effectiveness in crisis contexts[12], or referring to its impact on the protection of specific matters and articles of ESC/ESCR such as wages[13], collective bargaining[14], health and safety at work[15], the right to social and medical assistance[16], but also from a more general perspective[17].

European Social Charter, EL Rev. 2000, 25 Supp (Human rights Survey), 18-30; H. CULLEN, The Collective Complaints System of European Social Charter : Interpretative Methods of European Committee of Social Rights, Human Rights Law Review 9:1, 2009, 61-93; P. ALSTON, Assessing the Strenghts and Weaknesses of the European Social Charter's Supervisory System, in G. de Búrca de Witte (eds.), Social Rights in Europe, Oxford, Oxford University Press, 2005; R. CHURCHILL/ U. KHALIQ , The Collective Complaints System of the European Social Charter: An Effective Mechanism for ensuring Compliance with Economic and Social Rights?, *EJIL* (2004), 15, n.º 3, 2004, pp. 417-456; K. LUKAS, The Collective Complaint Procedure of the European Social Charter: Some Lessons for the EU?, Legal Issues of Economic Integration, Volume 41, Issue 3, 2014, pp. 275-288.

[10] F. C. ALVES, Understanding the revised European Social Charter: Treaties and their municipal law effects, *Revista Jurídica de Los Derechos Sociales, Lex Social, Monográfico 1*, 2017, pp 17-41, [19].

[11] R. CARVALHO., The monitoring mechanisms of the RESC conducted by the European Committee of Social Rights: the report system and the collective complaints procedure, *Revista Jurídica de los Derechos Sociales Lex Social*, Monográfico 1, 2017, 42-61.

[12] C.S., BOTELHO, Os direitos sociais em tempos de crise – Ou revisitar as normas programáticas, Almedina, Coimbra, 2015; C. CARVALHO, O impacto da jurisprudência do Comité Europeu de Direitos Sociais em matéria laboral no ordenamento jurídico português, Revista Jurídica de los Derechos Sociales Lex Social, I, 2017, 211-243; C. MARTINS DA CRUZ, A Carta Social Europeia no contexto do direito do trabalho de excepção, Revista do CEJ, Lisboa, n.º1(1º Semestre 2020), 2020, pp.203-236.

[13] L. ALVES, *El cumplimiento de la Carta Social Europea en materia de salarios. Un estudio comparado de los ordenamientos laborales portugués, español e italiano*, Atelier Libros Jurídicos, 2014, Barcelona.

[14] L. ALVES, *Breve nota sobre o "direito de negociação coletiva" na Carta social europeia, Estudos em homenagem ao Professor Doutor Manuel António Pita*, Org. Luís Vasconcelos de Abreu, 2022, pp. 507-517.

[15] A. RIBEIRO COSTA, The European Committee of Social Rights Audacity in Protecting Occupational Health and Safety, Revista Jurídica de los Derechos Sociales, Monográfico 1 (2017), 2017, pp. 244-265.

[16] J. GOMES, O Artigo 13.º da Carta Social Europeia Análise das Conclusões do Comité Europeu de Direitos Sociais relativas a Portugal, Católica, Faculdade de Direito, Escola do Porto, 2020 and M. ROUXINOL, A jurisprudência do Comité Europeu de Direitos Sociais, Centro de Estudos Judiciários, Oral intervention., 2017 Available at: https://educast.fccn.pt/vod/clips/22yt8jsgpa/streaming?locale=pt

[17] M. ROUXINOL, A jurisprudência do Comité Europeu de Direitos Sociais, Centro de Estudos Judiciários, Oral intervention., 2017 Available at: https://educast.fccn.pt/vod/clips/22yt8jsgpa/streaming?locale=pt

More specifically in the field of the protection of the rights of pwd, doctrinal analysis has focussed on the points of confluence between the objectives of the CSE and EU anti-discrimination law[18]. At national level, although there are some contributions[19]the analysis with that focus has been less densified.

In fact, the ESC represents a step towards recognising the indivisibility of human rights, supporting the complementarity between civil and political rights and economic and social rights, thus aligning itself with the meaning of UN Resolution 32/130 and reconciling economic and social rights[20].The ECHR incorporates civil and political rights, and the ESC complements it by incorporating a collection of social rights.

It is important to highlight that, although the protective content of social rights is significantly higher in the ESC/ESCR than in the ECHR, Community law is not bound by their level of protection, unlike in the ECHR (Article 53 of the CFR).

Therefore, ECHR case law obliges Member States to carry out an exhaustive proportionality test in favour of the poor and vulnerable before imposing limitations on their rights[21]. The complementarity between the CSE and the ECHR, which was affirmed in the Turin Process and guarantees a high-level system of protection, has therefore been upheld[22].

---

[18] G., QUINN, The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose' in Gráinne de Búrca, Bruno de Witte, and Larissa Ogertschnig (eds), Social Rights in Europe (Oxford, 2005, online edn, Oxford Academic, 22 Mar. 2012) https://doi.org/10.1093/acprof:oso/9780199287994.003.0014, accessed 24 Aug. 2024; M. BELL, Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination', in Gráinne de Búrca, Bruno de Witte, and Larissa Ogertschnig (eds), Social Rights in Europe (Oxford, 2005,online ed, Oxford Academic, 22 Mar. 2012), .https://doi.org/10.1093/acprof:oso/9780199287994.003.0013, accessed 29 Sep. 2025.

[19] F. VENADE SOUSA, *The Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of Persons with Disabilities: a dynamic pro unione and pro homine with particular reference to the CJEU case-law*, 2019 https://revistas.uminho.pt/index.php/unio/article/view/255.

[20] I. ALZAGA RUIZ, *La aplicabilidad de la Carta Social Europea por los órganos jurisdiccionales internos, Trabajo y derecho, n.º64*, 2020, pp. 1-64, [3].

[21] A. ARANGUIZ, *Bringing the EU up to speed in the protection of living standards through fundamental social rights: Drawing positive lessons from the experience of the Council of Europe, Maastricht Journal of European and Comparative Law*, 28(5), 2021, 601-625, [624].

[22] C. MARTINS DA CRUZ, *A Carta Social Europeia no contexto do direito do trabalho de excepção, Revista do CEJ*, Lisboa, n.º 1(1º Semestre 2020), 2020, pp.203-236, [234].

So, like it was mentioned, the ESC is not within the domain of European Community. The EU's lack of adherence to the CSE raises a number of questions, namely divergences between the decisions of the CJEU and those of the ECtHR, as well as with the decisions of the ECSR[23].
In fact, some authors highlight the divergences between the ESC and European Union law, particularly in initiatives such as the European Pillar of Social Rights (EPSR).Unlike the Opinion of the Secretary General of the Council of Europe on the European Union initiative to establish a European Pillar of Social Rights, the EPSR makes no reference to the ESC and does not incorporate provisions of the Revised ESC and his system of collective complaints[24].The plenary session of the European Economic and Social Committee, on 15 June 2023, approved an opinion, related to *A protocol on social progress*, with reference SOC/7567[25], with the objective of the recognition of the ESC for the purpose of reforming the EU Treaties which includes a protocol on social progress, that, among other things, 'ensure that, in the event of conflict, the rights and freedoms of employees and their families are not violated'.
The *Part II* of the CSE includes wide-ranging list of rights with different nature and scope foreseen on set of articles that concretise the enumeration of principles contained in *Part I*. The content of these rights includes labour rights, namely the right to work, right to fair regulation of labour and trade union rights included on *Part III* of the CSE, consisting only of Article 20, determines the commitments that result for the contracting parties from ratifying the charter. According to this rule, the scope for binding is different in Part I, which sets out its objectives, and Part II, which, by establishing a scope for acceptance and/or refusal, is only partially binding[26].

2. The Evolution of the Labour Protection of Vulnerable Groups, Namely Disabled People in the ESC and the Revised ESC

The recognition of the rights of pwd in the ESC up to the present day is the result of an evolutionary process. This process is related to the way in

[23] I. ALZAGA RUIZ, *La aplicabilidad de la Carta Social Europea por los órganos jurisdiccionales internos, Trabajo y derecho, n.º 64*, 2020, pp. 1-64,[4].
[24] X.M. CARRIL VÁZQUEZ, *Los golpes bajos de la Unión Europea a la Carta Social Europea, Lex Social, Revista De Derechos Sociales*, 13 (2), 2023, 1–22, [14-17]. Available at: https://doi.org/10.46661/lexsocial.8350
[25] Available at: Social Progress Protocol | EESC (europa.eu)
[26] M. RODRÍGUEZ PINERO, M., *La carta social europea y la problematica de su aplicacion*, 1978, 11-19, [5].

which the concept of disability has been shaping according to the different models of protection on the grounds of disability that have emerged historically.

The definition of disability, consistent with a human rights approach, should be focused on the barriers faced by pwd and not on their limitations or impairments[27]like resulted from the medical conception of disability model, and combine the factors of person with the factors of context[28]. The relational or biopsychosocial model, anchored in a human rights perspective, makes it possible to overcome the limitations of a medical model with only focus on the individual rehabilitation and a social model that disregards the specific limitations of the disabled person[29].

The 1991 and 1996 version of the ESC include the right to employment and the labour protection of vulnerable persons, like pwd. The Revised ESC of 1996 provided a wider protection of disabled persons and on Article E, about Non-discrimination, determines that the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as health.

According to the explanatory report of the Revised CSE[30], the original text had a limited impact on the area of rehabilitation and should accommodate a concern to promote autonomy and the right to independent living from the perspective of the social paradigm of human rights[31].

After the revision of Article 2, *the right to just conditions of work*, two paragraphs have been amended (paragraphs 3 and 4), the others remain unchanged. On *Paragraph 3* the provision provides for an increase in annual holidays, from the two weeks to four weeks. On *Paragraph 4*, the provision, which in the Charter provides for additional paid holidays or reduced working hours for employees engaged in dangerous or unhealthy

---

[27] L. WADDINGTON, M. PRIESTLEY, *A human rights approach to disability assessment. Journal of International and Comparative Social Policy 37*, 2021, 1–15, [2] https://doi.org/10.1017/ics.2020.21

[28] T.A. DEGENER, *A new human rights model of disability, in Della Fina, V. et al. (eds), The United Nations Convention on the Rights of Persons with Disabilities*, New York, 2017, pp. 41-59.

[29] J. NETO, *Deficiência, doença e discriminação: os 3 D's da desigualdade laboral, A discriminação em razão da deficiência e doença pela lenta da Convenção dos Direitos das Pessoas com deficiência, Prontuário de Direito do Trabalho I/2021*, Centro de Estudos Judiciários, Lisboa, 2021, pp.181-209, [184-185].

[30] Explanatory Report to the European Social Charter (Revised) Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ccde4

[31] F. VENADE SOUSA, *Direitos fundamentais das pessoas com deficiência e jurisprudência multinível*, Universidade Católica Editora, 2021, 68

occupations, has been amended to reflect policies which aim to eliminate the risks to which employees are exposed and so the aim is that additional paid holidays or reduced working hours should only be provided where it has not been possible to eliminate or reduce sufficiently the risks inherent in dangerous or unhealthy occupations. This provision should be seen as a complement to the revised Article 3, which emphasise the prevention of occupational accidents. Two new paragraphs have been added to paragraph 6, the obligation on the Parties under this paragraph is to ensure that employees are informed about the essential aspects of their contract or employment relationship. The "essential aspects" of the contract or employment relationship of which employees shall be informed have not been specified in the provision.

However, the mentioned report makes a reference to the minimum requirements in European Community Directive (91/533) that states the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (Article 2). The provision covers all employees, but the appendix stipulates that two exceptions can be made to employees whose contract of employment covers a very short period of time or whose contract or employment relationship is of a casual or of a specific nature provided it is justified by objective considerations; in the paragraph 7, the general recognition of the fact that night work places special constraints on employees, both men and women led to the inclusion of this paragraph in the Revised Charter.

In the revised version of the ESC, Articles 1, 2, and 3, determine the rights to work, just conditions of work, and safe and healthy conditions at work and Article 15 also determines the right of persons with disabilities to independence, social integration and participation in the life of the community.

According to Article 15.2 ESC, the access to employment of pwd should be promote through all measures tending to encourage employers to hire and keep in employment pwd in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. Such measures may require recourse to specialised placement and support services.

Therefore, the scope of protection of the CSE and of the CSER expressly cover the legal protection of pwd, namely their right to access and maintain employment. In a certain way, the revision of the charter seems to be following part of the evolution of the disability models. Nevertheless, the reference to sheltered employment may raise questions about the controversial options of segregated hiring, which should be

passed over policies of access to employment in an open and inclusive market.

3. Monitoring Procedures

The European Committee of Social Rights (ECSR) is a *quasi*-judicial body (Papadopoulos, 2017:89), responsible to rule on the conformity of the situation in States with the ESC, using two monitoring tools: the *National Reports System* and the *Collective Complaints Procedure.*

The *National Reports System* is formally regulated by Part IV, Articles 21-29 , of the 1961 Charter, as amended by the 1991 Turin Protocol (ETS No. 142). The reporting procedure is being applied on the basis of a unanimous decision taken by the Committee of Ministers. The States Parties must regularly submit a report on the implementation of the Charter in law and in practice. Those National reports are examined by the Committee, which rules on whether the described national situations compliance with the Charter. The ECSR examines not only those national reports, but also the comments received from third parties and information received in meetings. After a global evaluation of all that information, the ECSR makes a legal assessment of the conformity of the situation with the Charter Texts and adopts conclusions regarding the implementation of the ESC by each of the States concerned.

The *Collective Complaints Procedure* was introduced by the Additional Protocol to the ESC providing for a collective complaints system adopted in 1995 and entered into force in 1998. This system aims to strength the role of the social partners and non-governmental organizations and can be logged without domestic remedies having been exhausted. The procedure is started by the social partners and other non-governmental organizations that directly apply to the ECSR for rulings on possible non-implementation of the Charter in the countries that have accepted its provisions and the complaints procedure. The Committee takes non-binding decisions of conformity or non-conformity with one or more of the provisions of the Charter.

The acceptance of the the *Collective Complaints Procedure* has implications for the *Reports Procedure*.

Since 2014, the Report procedures[32]have changed. So, the States, that have accepted the Collective Complaints procedure, must do simplified report every two year and the States that have not accepted the Collective Complaints procedure need to do an annual report.

[32] Available at: https://www.coe.int/en/web/european-social-charter/national-reports

More recently, the decision of 27 September 2022 of the Ministers' Deputies establishes a new reform of the system of presentation of reports relating to the application of the ESC. According to the new rules, States Parties which having not accepted the collective complaints procedure, should submit a report every two years responding to questions on one of two groups of Charter provisions. The reform measures, adopted by the Committee of Ministers, aimed at modernising the ESC system[33]in order to ensure the respect for social rights and ensure greater effectiveness of the ESC. The emphasis was on reinforcement on the dialogue between the Charter organs (ECSR and Governmental Committee), States Parties and organisations concerned (like the national human rights institutions and national equality bodies), the trade unions and other civil society organisations. So, in addition to the regular reporting procedure, the new reform introduced the possibility of asking States Parties to submit *ad-hoc reports* related to new or critical issues arise for analysis or review by the ECSR. Even if the ECSR, in the context of the *ad hoc reporting* procedure, will not make conclusions on the conformity of the situation with the Charter, may propose general orientations.

The reporting system are organized by thematic groups. The themes were divided into four and each one incorporates a set of articles[34]. Directly related with the topic of this article, we have Group 1 *Employment, training and equal opportunities,* includes Article 1, Article 9, Article 10, Article 15, Article 18, Article 20, Article 24 and Article 25 and Group 3 called *Labour rights,* contains Article 2, Article 4, Article 5, Article 6, Article 21, Article 22, Article 26, Article 28, Article 29

So, the ESC includes the dimension of employment protection, namely protection in health and safety at work, against harassment, the access of pwd to rehabilitation and employment and collective labour rights and the protection from discrimination, specifically on the grounds of disability provided for in *article E*.

[33] CM (2022)114-final, 4.4 Implementation of the Report on Improving the European Social Charter system, 27/09/2022. Available at: https://search.coe.int/cm?i=0900001680a8412f

[34] The Group 1, Employment, training and equal opportunities , includes Article 1, Article 9, Article 10, Article 15, Article 18, Article 20, Article 24 and Article 25; the Group 2, Health, social security and social protection, Article 3, Article 11, Article 12, Article 13, Article 14, Article 23, Article 30; Group 3: Labour rights , contains Article 2, Article 4, Article 5, Article 6, Article 21 - Article 22, Article 26, Article 28, Article 29 and Group 4, Children, families, migrants, related to Article 7, Article 8, Article 16, Article 17, Article 19, Article 27, Article 31.

In the *Group 1,* related with non-discrimination, it is important to highlight the *article 15* that provides a fundamental principle to the guarantee of the right to maintain the employment of pwd, the right to reasonable accommodation of the workplace in the ordinary working environment and to adjust the working conditions to the needs of the disabled. It is also relevant to underline *article 25* about protection in the termination of the contract, context in which pwd and chronic illness are especially vulnerable. The *Group 3* includes a wide range of labour rights and that means individual and also collective rights.
The ECSR and the Governmental Committee decided to request an *ad hoc report* on the cost-of-living crisis (decision adopted by the Governmental Committee during its 146th meeting from 9 to 12 May 2023).
In turn, the States are organised according to the number of complaints. Portugal is one of the countries with the highest number of complaints and therefore included in Group A. Between 1993 and 2024, Portugal submitted 9 reports on the application of the Charter and 19 on the application of the Revised Charter. Portugal was also submitted an *ad hoc report* on the cost-of-living crisis. On 15 January 2024, the 18th report concerns the follow-up given to the relevant decisions of the Committee in the framework of the collective complaints' procedure. The assessments of the Committee on the follow up to decisions in complaints have been published in March 2024.
In this study, we will take into account Conclusions of the ECSR concerning Portugal about the thematic group *Labour rights* from 2022 and *Employment, training and equal opportunities* from 2020. However, according to the applicable rules, the Conclusions of 2020 only refer to the information submitted by the Portuguese Government on the follow-up given to the relevant decisions of the ECSR in the framework of the collective complaint's procedure.

4. The Third Parties Organisations and NGOs Role

The inputs bring by third parties organisations are very relevant to a more accurate diagnosis of reality. For example, regarding the latest *ad-hoc report*, the ETUC addict information and material it received from its affiliates, namely the ETUC Austerity Watch and its statutory bodies like the ETUC Executive Committee (hereafter 'ETUC EXCO').
It is possible to find references to disability in these contributions which explain the impact of the public policies in the most vulnerable groups and namely to the inclusion of pwd, particularly in the case of Serbia. The ETUC Austerity Watch #3 (November 2023) mentions the introduction

in 2023 of the modified "Swiss formula", following the approval in 2003 of the Law on Pension and Disability Insurance, had significant impacts.[35].
The comments submitted by the ETUC concerning the supervision cycle XXII-4 / 2023 on 'Children, families and migrants' had some interesting inputs. ETUC comments refer three situations related with the protection of pwd, namely in Latvia, Lithuania and Moldova[36] but not with the articles analysed in this article.
Recognising NGOs influence, the Council of Europe provides international NGOs with the opportunity to acquire participatory status. There is a list of international non-governmental organizations NGOs registered (Disabled Rights), like European Disability Forum or Alzheimer Europe (AE)[37].
They start to have a consultative status for INGOs and this status was changed from consultative to participatory in 2003 and since 2016 the status is regulated by Resolution (2016)3 of the Committee of Ministers of the Council of Europe. According to the list of available NGOs there is a set of registered entities associated to the protection of pwd that may have a decisive contribution in the presentation of complaints regarding non-discrimination and protection of pwd.
Intersectional discrimination, due to more than one factor of discrimination, is still overlooked by organisations that seem to be more focused on the criteria of discrimination based on the factor they are working on.
Take, for example, the report by ILGA-Europe[38], which in response to the ECSR's request for information on at-risk-of-poverty rates for the population as a whole, as well as for children, analysed the following whole, as well as for children, families identified as being at risk of

[35] ETUC, *Comments submitted by the European Trade Union Confederation (ETUC) concerning the cost-of-living crisis,* 2024, pp. 58-59. Available at: https://rm.coe.int/etuc-comments-cost-of-living-2024/1680b11b37

[36] ETUC, *Comments by the European Trade Union Confederation (ETUC) concerning the supervision cycle XXII-3 / 2022 on 'Labour Rights'*, 2022. Available at: https://rm.coe.int/etuc-observations-on-labour-rights-to-the-ecsr-/1680a82900

[37] 1 July 2019 - 30 June 2023: European Action of the Disabled (AEH); 1 January 2021 - 31 December 2024: Validity - Mental Disability Advocacy Center (MDAC); 1 January 2022 – 31 December 2025: European Disability Forum (EDF); 1 July 2022- 30 June 2026: Alzheimer Europe (AE); International Association Autism-Europe (IAAE); Inclusion International - Inclusion Europe; Rehabilitation International (RI); Mental Health Europe.

[38] ILGA-Europe, *Comments submitted by the ILGA-Europe to the ECSR, concerning the cost-of-living crisis on ad-hoc Report on the Cost-of-Living Crisis*, 28/6/2024. Available at: 1680b0fc12 (coe.int)

poverty, pwd and older persons. Please show the trend over the last 5 years, as well as forecasts for upcoming year, does not seem very geared towards a response that addresses this condition of double vulnerability, and does not give a clear answer as to the impact of discrimination against LGBT pwd. It is therefore desirable for the various NGOs to work together so that, for certain purposes, they can respond in a concerted and informed way to the issues raised.

The contribution of the UGT-P (Portugal), the only trade union centre that contributed to the Comments submitted by the European Trade Union Confederation (ETUC) concerning the cost-of-living crisis to the ETUC EXCO of October 2022, on October 9th[39], is completely silent when it comes to the labour rights of pwd. UGT emphasizes the tripartite Medium-Term Agreement for the Improvement of Income, Salaries and Competitiveness, but don't refer to pwd or other vulnerable groups, thus neglecting an important dimension of the guarantee of the right to work under equal conditions for all employees. The text does not mention any demands or objectives that could be achieved in line with the ESC.

However, the ETUC, both in its Comments and in the studies to which it refers, makes several references to disabled employees, noting this increased vulnerability.

5. Applicability by jurisdictional bodies

The ESC, particularly in its revised version, has sparked a doctrinal discussion, which is far from over, about the degree of binding nature of its rules[40]. This subject is related with the doctrinal controversy of 'dualism/monism' about the international conventions.

According to the monist view which international law needs to be transposed by national law in order to be binding on citizens. The traditional dualist view affirms the existence of two different and autonomous sets of legal rules, with national law prevailing over international law, and the monist view with the primacy of international law[i]. Both, the moderate monist perspective and the moderate dualist perspective, have been commonly sympathised with. For example, doctrine qualified the Spanish system as a moderate dualist[41].

---

[39] ETUC, *Comments submitted by the European Trade Union Confederation (ETUC) concerning the cost-of-living crisis*, 25/7/2024. Available at: 1680b11b37 (coe.int)

[40] F. ALVES, *Understanding the revised European Social Charter: Treaties and their municipal law effects», Revista Jurídica de Los Derechos Sociales, Lex Social, Monográfico 1*, 2017, pp 17-41, [40].

[41] I. ALZAGA RUIZ, *La aplicabilidad de la Carta Social Europea por los órganos jurisdiccionales internos, Trabajo y derecho, n.º64*, 2020, pp. 1-64,[13].

As has already been argued, without prejudice to its *nomen iuris* ('Charter'), the Vienna Convention on the Law of Treaties should be applied to the CSE/CSER. This conclusion can be drawn from the degree of binding force that States have attributed to these instruments. The ESC/ESCR, like was mentioned above, is a Council of Europe treaty that it's called the Social Constitution of Europe, guaranteeing a wide range of human rights with a focus on social rights[42]. Despite the lack of knowledge about the Charter system, its potential as an instrument for coordinating the social policies of European states has been, pertinently, defended[43].

However, its application by judicial operators is limited. There is no evidence to clearly attribute a jurisdictional status to the ECSR's conclusions or even to its decisions derived from collective complaints. Its generic content is also an obstacle and makes it difficult for courts to apply it[44] As Martins da Cruz[45] states, the affirmation of the principles of non-regression, proportionality and reasonableness, proclaimed in the decisions and reports of the CESR, are an important tool to stop the suppression or undue restriction of social rights. Nevertheless, it would be important for the decisions and recommendations of the CESR to address the lack of knowledge about this legal instrument and also the lack of more effective mechanisms for monitoring and enforcing compliance, which could be decisive for the affirmation of these fundamental rights in contexts of economic crisis. It is no coincidence that the affirmation of these social rights presupposes state intervention, so their guarantee may depend on the implementation of public policies.

Notwithstanding the foregoing, it is possible to find good examples. According to the decision on the merits of the Collective Complaint No. 13/2002 International Association Autism-Europe (IAAE) v. France[46]article 15 applies to all pwd regardless of the nature and origin of

---

42 M. MIKKOLA, *Social Rights as Human Rights in Europe, European Journal of Social Security,* 2(3), 2000, 259-272. Available at: https://doi.org/10.1023/A:1010028716459

43 F. JIMÉNEZ GARCÍA, *La Carta Social Europea (Revisada): Entre el desconocimiento y su revitalización como instrumento de coordinación de las políticas sociales europeas, Revista Electrónica de Estudios Internacionales*, 2009, 1697-5197, n.º17. Available at: CartaSocialrevisada (urjc.es)

44 J. SAN CRISTÓBAL VILLANUEVA, *The applicability of the European Social Charter by the spanish jurisdictional bodies: reflections from the perspective of the regulation of labor appeals. Revista de Trabajo y Seguridad Social*. CEF, 460, 2021, 175-204,[204].

45 C. MARTINS DA CRUZ, *A Carta Social Europeia no contexto do direito do trabalho de excepção, Revista do CEJ*, Lisboa, n.º1(1º Semestre 2020), 2020, pp.203-236, [235]. C. NIVARD, *La justiciabilidad de los Derechos Sociales en el Consejo de Europa, Lex Social, Vol.* 6, n.º 2/2016,12-30, [26].

46 Decision on the merits: *International Association Autism-Europe v. France, Collective Complaint No. 13/2002*. Available at: Decision on the merits: International Association Autism-Europe v. France, Collective Complaint No. 13/2002 (coe.int)

their disability and irrespective of their age. The decision in question is pointed to as an example of similar detail to that of the European Court[47].

2. The Portuguese Case

1. The Ratification Process

The ESC was ratified by Parliament Resolution 21/91 of 6 August 1991. So, Portugal ratified the ESC after the transition to democracy in 1974 and a few years after joining the European Union in 1986, accepting all the social rights with exception of the 'lock out' (forbidden by the Portuguese Constitution), accepted the Additional Protocol providing for a system of collective complaints, but this international instrument has had little impact on the national legal system[48]. After the 1996 revision, in which it adopted the name 'Revised ESC', the Portuguese Parliament Resolution 64-A/2001 of 17 October 2001 ratified the Revised ESC, accepting all its 98 paragraphs. However, has not yet made a declaration enabling national NGOs to submit collective complaints. To date only Finland has done it, and it could be important to strengthen the rights of pwd.

Portugal also ratified the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol on 23 September 2009.

Although Portugal has been proactive in the ratification of the charter documents, there is no evidence of an effective enforcement of the rights associated to the protection of the labour rights of pwd.

2. The Legal Protection of pwd Today

The Portuguese Constitution incorporates a wide range of social rights into the fundamental rights, which concretise the Social State and an idea of equality and prohibition of discrimination. Those rights presuppose the obligation of positive discrimination with the aim of compensating for social inequalities and achieving real equality.

---

[47] C. NIVARD, *La justiciabilidad de los Derechos Sociales en el Consejo de Europa, Lex Social, Vol. 6*, n.º 2/2016,12-30, [26].

[48] C. CARVALHO, *O impacto da jurisprudência do Comité Europeu de Direitos Sociais em matéria laboral no ordenamento jurídico português, Revista Jurídica de los Derechos Sociales Lex Social, I*, 2017, 211-243;

The list of rights enshrined in the CRP also includes the rights, freedoms and guarantees of employees that are part of the 'Labour Constitution', in Articles 53 to 57. Those rights include protecting rules for more vulnerable groups of people, namely pwd, and the 'credit rights' enshrined on economic, social and cultural rights, Articles 58 to 59.
The human rights model of understanding disability inspired by the Convention on the Rights of Persons with Disabilities, ratified by the Portuguese state in 2009, had an impact on Portuguese legislation, giving legal backing to the valorisation of the will and autonomy of pwd[49].
The Portuguese Labour Code, approved by Law 7/2009, transposes, among other directives, Directive 2000/43 (Racial Equality Directive) and Directive 2000/78/EC (Employment Equality Directive), but also Directive 2006/54, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Protection against discrimination in the labour context is covered by the section on equality and non-discrimination and includes the general provisions on equality and non-discrimination, namely the prohibits direct and indirect discrimination set out in Articles 23 to 32 of the Labour Code, but also the prohibition of harassment and equality and non-discrimination on grounds of sex.
Law 38/2004, of 18 August defines the general bases of the legal regime for the prevention, habilitation, rehabilitation and participation of pwd and includes rules on the right to work and employment (Art. 26), reconciling work and family life (Art. 31) and the right to work (Art. 31).
With regard to access to employment, we must also consider Article 5, on discrimination in labour and employment, of Law 46/2006, which prohibits and punishes discrimination on the grounds of disability and the existence of an aggravated health risk, complements the provisions of the Labour Code and establishes that the elements that constitute discrimination against pwd.
In turn, Article 85 and 86 of the Labour Code stipulates the right to equal treatment for disabled employees in terms of vocational training. Article 86 refers to vocational training measures to benefit disabled employee and include the right to reasonable accommodation at the workplace and provide, also, for positive action measures in favour of disabled or chronically ill employees in terms of access to employment, exemption from forms of working time organisation such as the adaptability regime,

[49] J. NETO, Assisted Decision-Making (Capacity): A New Legal System Where the Will of People with Disabilities Really Matters? The Portuguese Experience, International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique, Volume 36, Abril de 2022, Springer, pp. 745–765, [751].

bank hours or concentrated hours and between 8pm one day and 7am the next, and the absence of an obligation to do extra work. However, the heading of Article 86, positive action measures, is criticised and considered to be 'an expression with imprecise contours'[50].

We can classify the labour protection of pwd in *direct protection* to pwd, namely the reasonable accommodation and *indirect protection*, that includes the positive action measures. We don't find any significant progress regarding indirect *protection*, the majority of measures are related to parenting measures for people with children with disabilities, where we find the right to telework or parenting rights, improved in the 2023 reform of the Labour Code.

Within the framework of anti-discrimination legislation it is include the legislation on quotas for the employment of pwd in the public and private sector. for pwd with a degree of incapacity equal to or greater than 60% but the percentage required is only 2% of disabled employees.

Both Laws, *Law against discrimination of pwd* that dates from 2006 and also the *Law on the Prevention, Habilitation, Rehabilitation and Participation of Persons with Disabilities* (that forbids direct and indirect discrimination on the basis of disability inter alia with respect to education and training) cover the labour dimension and also protect people with aggravated health risk.

3. Labor Code Amendments: The Social Rights Enforcement in times of Crisis

During Troika intervention, the ECSR found incompatibility of different States' provisions with Article 15 ESC. The non-compliance was related with the presence of disability definitions focusing on individual impairments rather than on the barriers that disabled people face[51]. The Committee argued violations of Article 15.2 ESC linked with lack of employment legislation prohibiting discrimination on the grounds of disability, insufficiency of measures protecting employees with disabilities from dismissal and of a legal obligation for employers to continue to employ a person who becomes disabled following an occupational injury or disease and also a sharp pay gap between employees in sheltered

[50] J. VICENTE, Breves Notas sobre o estatuto jurídico laboral das pessoas com deficiência ou doença crónica no Código do Trabalho, Estudos do Instituto de Direito do Trabalho, Volume VIII, Instituto de Direito do Trabalho da FDUL, Lisboa, 2020, pp. 19-47, [33].

[51] M. SMUSZ-KULESKA, *Protection of the rights of persons with disabilities under the European Social Charter, Acta Iuris Stetinensis 2020*, No. 3 (Vol. 31), 2020, 107–122, [121], DOI: 10.18276/ais.2020.31-07.

workplaces and those in the open labour market (ranging from 5% to 30%)[52].

The effectiveness of social rights, particularly those recognised by the ESC, is particularly challenging in contexts of economic crisis, as was the case in Portugal during the 2008 crisis[53] and for the austerity measures imposed by the Troika intervention[54]

It is important to reflect about the compliance between the application of ESC and austerity measures, namely related with employment, that could openly violate social and human rights, with a significant impact in most vulnerable people. Also at constitutional level, as has been argued in Portuguese doctrine, fundamental rights constitute limits on corporate powers, as can be seen from Article 18 number 1 of the Portuguese Constitution, which refers to the horizontal effectiveness of fundamental rights with labour projection[55].

The austerity measures implemented in Greece and Portugal during the severe crisis (2010-2014), after Memoranda of Understanding, have significant economic and social impacts[56]. Memoranda include measures, within the framework of a markedly neo-liberal economic vision, like reducing labour rights and making labour legislation more flexible in order to increase working time, reducing the corresponding compensation, make it easier and cheaper for employers to terminate contracts and to reduce the power of trade unions in collective bargaining. However, the decisions of the Committee didn't seem to have impact, at least with a dissuasive effect

However, the Committee decisions have the potential to perform an important role to the enforcement of the protection of social rights and in particular labour rights and even to enforce changes in the legislation of

---

[52] M. SMUSZ-KULESKA, M. (2020), *Protection of the rights of persons with disabilities under the European Social Charter, Acta Iuris Stetinensis* 2020, No. 3 (Vol. 31), 107–122, [118] DOI: 10.18276/ais.2020.31-07.

[53] L. ALVES, *El cumplimiento de la Carta Social Europea en materia de salarios. Un estudio comparado de los ordenamientos laborales portugués, español e italiano, Atelier Libros Jurídicos*, Barcelona, 9, 2014.

[54] C. CARVALHO, The European Pillar of Social Rights, the new Directive on work-life balance and its impact on the Portuguese legal system, Labour 2030, II International Congress, Work Innovation, are we ready? The future is digital. And it's on!, 2019, 54-71, [58].

[55] J. ABRANTES, Direitos fundamentais como limites aos poderes empresariais, Estudos do Instituto de Direito do Trabalho, Volume VIII, Almedina, 2020, pp. 7-18[13].

[56] ETUC (The functioning of the troika: a report from the ETUC chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.etuc.org/sites/default/files/press-release/files/the_functioning_of_the_troika_finaledit2.pdf

the State (Papadopoulos, 2019:97). Greece case law[57], namely *GSEE v. Greece case*, Complaint No. 111/2014, ECSR, 5 July 2017 [58], is a good example of the Committee's role. The complainant trade union, GSEE, alleges that some of the new legislation enacted as part of the austerity measures adopted in Greece during the economic and financial crisis affects employees' rights in a manner that is contrary to the Charter. According to the Committee's concluding remarks the complaints were particularly serious due to: a) the large number of provisions concerned and the effects for persons protected by the rights violated; and b) the number of victims of these violations, affecting a significant part of the population; c) the persistent nature of some of these violations, already identified in the examination of previous complaints.

The situation of vulnerable groups, due to age, disability, state of health, etc, has also been addressed in different contexts. For example, the case of the collective Complaint 167/2018 (*Sindacato autonomo Pensionati Or.S.A. v. Italy*)[59] concerned an alleged violation of Article 12 (3) ESC due to the total or partial suspension of the automatic indexation of a large share of pensions in 2011. The measure was extended in 2015 and revised in 2018, considering the position of particularly vulnerable persons[60].

3.1. Troika Intervention: during and afterwards

From 2011 till 2015, during Troika intervention, were *hard times* to pwd. As abovementioned where made The Tripartite Agreement[61] and a

---

[57] G. GIOVANNI, *The European Committee of Social Rights case law during the economic crisis: the decisions concerning Greece, Revista Jurídica de los Derechos Sociales, Lex Sociale*, 2017, pp. 190-210.

[58] Complaint 111/2014, *GSEE v. Greece case,* ECSR, 5 july 2017. Available at :https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-111-2014-greek-general-confederation-of-labour-gsee-v-greece

[59] Complaint 167/2018, *Sindacato autonomo Pensionati Or.S.A. v. Italy*. Available at: https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-167-2018-sindacato-autonomo-pensionati-or-s-a-v-italy

[60] E. DE BECKER, Overview of recent cases before the European Court of Human Rights and the European Committee of Social Rights (June 2023 – December 2023), European Journal of Social Security, 26(1), 2024, 73-83. Available at: https://doi.org/10.1177/13882627241236488.

[61] Letter of Intent, Memorandum of Economic and Financial Policies (Portuguese version), and Technical Memorandum of Understanding Available at: https://www.imf.org/external/np/loi/2011/prt/051711.pdf

subsequent Legislative amendment[62]to the Portuguese Labour Code that, among other changes, has determined the reduction of compensation payable when labour contracts terminated and that has introduced mechanisms for making dismissal rules more flexible, namely in cases of dismissal for objective reasons. The Portuguese Constitutional Court rejected some amendments. A part of the Portuguese literature regarding that period argued that it sought to legally support the restriction and even rendering useless the rights and guarantees of employees[63].

After Troika, from 2015 to 2019, pwd *start breading*, there was an enlargement of the protection of pwd: extension of the law on quotas, pilot projects to support independent living and the new social inclusion benefit.

The report on the Social Progress Protocol expressly mentions the contradiction between austerity policies and the principle of social progress advocated by the ESC.[64]

3.2. Pandemic period and Labor Code Reform

During the pandemic period (2019-2021), the structural inequalities experienced by the most vulnerable groups, particularly pwd, have become even more apparent. One decree published during this period, namely related to the declaration of emergency sparked a discussion about whether it discriminated against pwd. According to the Decree 2-A/2020 of 20 March, which executed the declaration of emergency, persons aged 70 or more were subject to a special duty of protection, regardless of having previous medical conditions and a special restriction on circulation without any reasonable justification being advanced for that. In particular, they were explicitly prevented from exercising any professional activity which was not the case for persons under 70, even if they had a previous medical condition, as long as they were not under medical leave. However,

---

[62] Act 23/2012, 25th July. Available at: https://diariodarepublica.pt/dr/en/detail/act/23-2012-178501

[63] A. GARCIA PEREIRA, *As transformações recentes do Direito do Trabalho. Portugal - uma doutrina e uma jurisprudência ainda mais erosivas do que a lei, As transformações recentes do Direito do Trabalho Ibérico,* Livro Razão, Coord. Francisco Liberal Fernandes e Maria Regina Redinha, Porto, 2016, pp. 181-193,[181]. Available at: https://sigarra.up.pt/fdup/pt/web_gessi_docs.download_file?p_name=F1854330697/Livro_Razao.pdf

[64] See point 2.5

since the declaration of calamity, in 2020, no other potentially discriminatory measures have been established in Portuguese legislation[65].
The pandemic period (2019-2021) was the *back to the bottom*, a high unemployment even if accompanied by State support for vulnerable groups[66]. In 2023, after the pandemic period, it was a *losing chances* moment to pwd. Labor's Code Reform was has taken several important steps towards strengthening labour protection for employees in general, but was disappointing concerning the extending parental rights and granting the right to telework to parents with children with disabilities (does not cover disabled people), increasing compensation for dismissal on economic grounds and some restrictions to some flexibilization working time ways, but new measures strengthening labour protection for pwd[67].

3.3. Inflation Crisis and the Mitigation Measures

In the context of the inflationary crisis, the Portuguese government envisaged a series of measures that considered the vulnerable situation of certain groups, particularly pwd. In practice, and according to the Portuguese report, these are measures that fulfil Article 15 (Right of pwd to autonomy, social integration and participation in community life) and Article 23(The right of elderly people to social protection) of the Charter.
Regarding Article 23 CSE (The right of elderly people to social protection) has been published a few legislative acts to increase the social benefits, pensions and to introduce exceptional measures to support families. The general regime of the disability and old age pensions were increased by 3.57% compared to December 2022.
According to the *ad-hoc report*, social transfers, in 2022, related to illness and disability, family, unemployment and social inclusion contributed to reducing the risk of poverty by 5.1 pp a contribution greater than of the previous year (4.6 pp). The inequality indicators (both Gini and S80/S20) have also shown a decreasing trend, particularly when we look at a longer period (the last eight years).

The report also highlights that on December 16, 2021, the Government approved the National Strategy to Combat Poverty (ENCP) 2021-2030, as a central element in eradicating poverty, framed in the

[65] D. LOPES, J. VICENTE, *Country report 2021 on the non-discrimination directives Reporting period 1 January 2020 – 31 December 2021*. 2021, 152-153.
[66] Available at: https://www.coe.int/en/web/european-social-charter/national-reports
[67] J. NETO, *A agenda do trabalho digno: atos e omissões em matéria de tutela laboral em razão da deficiência in Revista do Centro de Estudos Judiciários*, 2022-II, 2024, 121-148,[148].

strategic challenge of reducing inequalities. It mentions also that the ENCP was defined in conjunction with the European Pillar of Social Rights1 and the respective Action Plan and the Sustainable Development Goals of the 2030 Agenda and refers the dialogue with other public policy instruments aimed at individuals and population groups in vulnerable situations, such as the National Strategy for the Inclusion of Pwd (ENIPD 2021-2025).

3.4. Review of Developments in Labour Protection on grounds of Disability in Portugal

If we analyse a chronology related to the developments of labour protection on grounds of disability in Portugal since the Troika intervention (2011-2014), we can see that during that period there were profound changes in labour legislation, namely easing and making cheaper the dismissals, with a major impact in more vulnerable people, including pwd. One of the amendments rejected by the Portuguese Constitutional Court was precisely related to the elimination of the obligation to verify the existence of another available workplace before the dismissal by termination of employment[68].

After the end of the Troika's intervention, since 2015, although the changes in the Labour Code were not totally reverted, there was a set of legislative amendments with positive impact on the legal protection of the rights of pwd: like the extension of the law on quotas, pilot projects to support independent living and the new social inclusion benefit.

However, the pandemic period was a setback for pwd in terms of employment, increasing levels of unemployment, although the social benefits granted by the State.

After the recovery from this dark period this year came into force a major reform of the Labour Code. However, the vulnerable groups, namely pwd, have not been the focus. So, there was not an extension of the rights of persons with disabilities but only an enlargement of parenting rights of the employees with children with disabilities and the attribution to these employees of the right to telework.

3.5.Portuguese reports and Committee Conclusions

[68] *Constitutional Court Decision 602/2013, Case 531/12, Relator (Conselheiro Pedro Machete).* Available at: https://www.tribunalconstitucional.pt/tc/acordaos/20130602.html

The Portuguese reports regarding pwd *Article E* of the revised Social Charter, which prohibits discrimination in the enjoyment of all the rights recognised by the Charter. and *Article 15* which determines the right of pwd to independence, social integration and participation in the life of the community as we shall see, they were often regarded as the fulfilment of a bureaucratic responsibility to account for a collection of legislative measures.

3.5.1. Portuguese Reports

If we go back to the 2008 Report of the ECSR on the application of Article 15 of the Revised European Social Charter (henceforth ESCR) in Portugal, it mentions Article 28 of Basic Law 38/2004, which imposes employment quotas for people with disabilities (5% in the public sector, 2% in the private sector) is a very residual %.
The CEDS concluded that Portugal complied with Article 15 of the CSER, but in the conclusions of the 2012 report on the application of the same Article 15 it referred to the 2010 Report on Anti-Discrimination Measures, according to which quotas were not being applied in practice, although the law provided for fines for non-compliance, which is why new data on their implementation was requested.
In the Committee decision it is stressed that there should be obligations on the employer to take measures in accordance with the reasonable accommodation requirement to ensure effective access to employment and to retain employed pwd, in particular those who have been incapacitated during the employment.
The Portuguese government's 16th report on the implementation of the CSE sent to the CEDS, dated 25/01/2021, refers to the country's structural problems in terms of poverty and inequalities, which mainly affect the most vulnerable groups, leading to social exclusion, and mentions people with lower qualifications and Roma communities.
As abovementioned, the last regular report, up to the date of this study, for Group 1, dates from 2015 and for Group 3 from 2022. In 2015, eight states were invited to make a follow-up: Belgium, Bulgaria, Finland, Greece, Ireland, Italy and Portugal.
Thus, the *11th Portuguese report*, on Group 1, deals with Article 1, 9, 10, 15, 18, 20, 24 and 25 for the period 2011 – 2014, namely with the right to work, the right of pwd to independence, social integration and participation in the life of the community, as well as protection upon termination of the contract. According to the conclusions of the Committee, dated 2016, on this report there were a number of situations

where the Portuguese State was considered not to be following the CSE, namely article 1&1 regarding full employment policies. The period under review was marked by high levels of unemployment in Portugal. Further information was also requested on other articles, namely on discrimination based on sex, women with disabilities often face forms of multiple discrimination due to the duplication of vulnerability factors: sex and disability[69].

The *17th Portuguese report*, on Group 3, deals with a set of rights, namely those related to article 2, on fair working conditions and which have an impact on pwd. However, the rights of pwd are only referred to in order to mitigate the effects of COVID-19, with support measures being emphasised in the context of the suspension of teaching and non-teaching activities, social protection measures for illness and parenthood, and alternative ways of working.

Teleworking was allowed, at certain times, to employees with parental responsibilities could benefit from this regime, whenever their professional duties permitted it, in the case of essential employees assigned to the service, they could benefit from the aforementioned care services for dependants. This regime was compulsory, when duties allowed, if requested by an employee with a child or other dependent under the age of 12, or, regardless of age, with a disability or chronic illness, that, according to the guidelines of the health authority, is considered a patient at risk and is unable to attend school activities and training in a group or class context. This solution was subsequently laid down[70].

Portugal has also presented its *Ad Hoc Report* drawn up in accordance with the new reporting system under the ESC (corresponding to the 19th report)[71]. The process aims to identify elements of good practice that the Committee can apply and to formulate guidelines or statements on the interpretation of certain provisions of the Charter. This *Ad Hoc Report* can also be seen as a way of counteracting the slowness of the reporting process, which has been criticised for hindering the feasibility of the Charter[72].

---

[69] J. NETO, *As mulheres com deficiência e o emprego: dose dupla de desvantagem in Questões Laborais, n.º 62*, Almedina, Coimbra, 2023, pp. 79-115.

[70] According to article 5b(c) of DL 79-A/2020 of 1 October (consolidated version), supplemented by DL 99/2020 of 22 November.

[71] Available at: https://www.coe.int/en/web/european-social-charter/portugal (15 january 2024)

[72] I. ALZAGA RUIZ, *La aplicabilidad de la Carta Social Europea por los órganos jurisdiccionales internos, Trabajo y derecho, n.º64*, 2020, pp. 1-64, [10].

The report specifically emphasises the case of pwd due to their particular vulnerability to the inflationary crisis and identifies the measures taken by the Portuguese state to mitigate this impact.
We cand find third party organisation comments concerning the Ad hoc reports on the cost-of-living crisis (2024), but the analysis vulnerable groups, namely people with disability are neglected, especially in Portugal.
It is clear from these reports that the way in which the Portuguese state reports on the state of the art in terms of protection from discrimination is linked to two factors: greater or lesser care in transparent reporting on the reality in question and, above all, greater or lesser focus on these matters. This is why there is a disparity between what was reported during the Troika period (2011-2014) and the reality experienced by pwd, as opposed to the greater signalling of problems in a period in which inclusion policies took on greater centrality (from 2015 onwards).
The Observatory on Disability and Human Rights and human rights reports point to a recovery in employment levels for pwd since 2016[73].
Portugal's reports during the troika period don't seem to reflect the reality at time. In the opposite direction, confirming the evidence that inclusion policies, since 2015, have had positive effects on the employment of pwd if we only analyze the period between 2016 and 2019, the overall trend observed in the registered unemployment of the population with disabilities had an improvement[74]. However, with the pandemic crisis, there was a significant increase. In short, the effects of the pandemic crisis were more serious on the employability of pwd, registering, in 2021, absolute values of unemployment never before verified[75].

3.5.2. ECSR Conclusions

A. 2012 Conclusions

In its 2012 conclusions on Portugal[76], the ECSR highlighted several omissions of requested information in the report submitted by Portugal,

[73] Disability and Human Rights Observatory (2017), *Persons with Disabilities in Portugal – Summary of the main Human Rights Indicators 2017* (english version). Available at: Persons with Disabilities in Portugal – Summary of the main Human Rights Indicators 2017 (english version)
[74] Disability and Human Rights Observatory (2021), *Persons with Disabilities in Portugal – Human Rights Indicators 2021*. Available at: https://oddh.iscsp.ulisboa.pt/en/publicacoes-en/publications-of-oddh-researchers-en/report-oddh-2021/
[75] *Ibidem*.
[76] *Conclusions of ECSR on HUDOC, Portugal*, 2012.

namely the total number of disabled people of working age, the number of those who were employed in an open market context, but rather in sheltered jobs. The Committee added that there was also no information on the rate of progression of pwd from sheltered employment to the normal labour market and asked for additional information on how the Labour Code concept of 'employees with reduced capacity 'is fulfilled. In this regard, it questioned the Portuguese state in order to find out if there was any provision which actually materialised the level of capacity reduction it had in mind.

B. 2016 Conclusions

In the 2016 conclusions, concerning to the *Article 15*, paragraph 1, regarding the vocational training of pwd, the Committee requests that the next report indicate the number of students with other types of disability than physical and sensory disability. The report states that the Institute for Employment and Vocational Training (IEFP) oversees vocational training, in particular the qualification programme for pwd and incapacities which grants support for entities undertaking vocational qualification actions for pwd in the geographical areas covered by the operational programme concerning human potential (POPH).
In its previous conclusion (Conclusions 2012), the Committee asked how working capacity is assessed for the purposes of applying Article 84 of the Labour Code, which refers to 'persons with reduced working capacity'. It also asked whether the law explicitly specifies the degree of disability at which these provisions apply. In the absence of information in the report, the Committee reiterates its request. The Committee reiterates also its question as to whether employees hired under the above-mentioned programmes are subject to normal conditions of employment, including in terms of remuneration.
With regard to *Paragraph 2 - Employment of persons with disabilities,* the report explains that the measures regarding the employment of pwd referred to in the 7th report were complemented by increases in the support provided for under certain measures, and by giving priority access to given measures to pwd or incapacity.
Concerning *Article 15, paragraph 3*, related to the *integration and participation of pwd in the life of the community*, the Committee mention to its previous conclusions (2012 and 2008) and the report details of the National Strategy for Disability for 2011-2013 (ENDEF). The Portuguese report allude to division of the strategy into five strands: disability and multiple discrimination, justice and exercising rights, autonomy and quality of life,

accessibility and design for all and administrative modernisation and information systems and indicates that a working group is drawing up a new strategy to promote accessibility for pwd.[77]
The Committee mentioned conclusions 2012 where asked for comments on the fact that NGOs representing pwd were not systematically consulted and their opinions were not taken into consideration. In reply, the report states that the participation of NGOs representing pwd is ensured by the National Institute for Rehabilitation (INR), which is responsible for promoting the rights of pwd.
With exception to IEFP, that funded 85 persons in 2012 and 215 in 2013, the other agencies responsible for the system had reduced, during the troika intervention, the funded persons.
The Committee mentions the legislative acts that entered into force during the reference period which concerned the database on technical aid.
The Conclusions also mentioned questions related to the communication, mobility and transport, housing, culture and leisure, including measures to support athletes and trainers that were introduced in preparation for the 2012 London Paralympics, and the fact that, according to Portugal's initial report (2012) some departments within the Secretariat of State for Culture provide special services designed for pwd (production of Braille and audio books, audio guides, video guides in sign language and facilities for artists with disabilities).
Considering the information available, the Committee concluded that the situation in Portugal was in conformity with Article 15§1, 2 and 3 of the Charter.

C. 2022 Conclusions

According to the 2022 findings[78], a number of rights were found to be non-compliant, namely the right to fair compensation on public holidays and the elimination of risks for employees in danger or in violation of health and safety conditions at work. According to the report there is no provision for reduced working hours, additional paid holidays or another form of compensation in dangerous and unhealthy occupations. On this issue, the report points out that breaks and interruptions for health and

[77] *Conclusions of ECSR on HUDOC* (2016).
[78] *Conclusions of ECSR on HUDOC* (2022), Available at: https://hudoc.esc.coe.int/eng#{%22sort%22:[%22escpublicationdate%20descending%22],%22escdctype%22:[%22CON%22],%22escstateparty%22:[%22PRT%22]}

safety reasons are included in the working time. The truth is that this response was insufficient.
In the context of the Covid-19 crisis, the Committee asked the States Parties to provide information on the impact on the right to just conditions of work and on general measures taken to mitigate adverse impact, namely regarding the right to reasonable working time in the following sectors: healthcare and social work; law enforcement, defence and other essential public services; education, transport.
The report states that alternative ways of providing work were introduced as a response to the Covid-19 pandemic. The legal limits for overtime were suspended in certain public entities and were then followed by private social solidarity institutions, non-profit associations, cooperatives and other social economic entities that carry out essential activities in the social and health areas, namely health services, residential or care facilities or home support services for vulnerable persons, elderly persons and pwd. The Committee asked, "that the next report clarify what the suspension of legal limits for overtime meant in practice".
However, the Committee conclude, once again, that the situation in Portugal is in conformity with Article 2§1 of the Charter.

3.5.3. Portugal Collective Complaints and Committee Conclusions

In the case of Portugal, the complaints system does not seem to contribute to strengthening the rights of pwd. There are no complaints about this vulnerable group which may be an indicator of the lack of knowledge of this pan-European protection mechanism.
To date, Portugal has one pending complaint[79] and thirteen proceeding complaints. The list of violated rights is significant but none of the complaints submitted analysed the rights of pwd, in particular the potential violation of Article 15. Of the collective complaints submitted by Portugal, only one directly addresses discrimination in access to social housing by Roma communities[80], and this has not been remedied. The others are mainly about the exercise of collective rights, namely of police or militarized forces.
Thus, the conclusions do not the path by which it might be possible to reverse the situation of non-compliance and do not contribute significantly to changing the anomalous situations.

[79] ECSR, Complaint No. 199/2021. Available at: . No. 199/2021 European Organisation of Military Associations and Trade Unions (EUROMIL) v. Portugal
[80] Complaint 61/2010: *European Roma Rights Centre (ERRC) v. Portugal*

In summary, most of the complaints filed concern collective labour rights and do not focus on vulnerable groups.

4. Concluding Remarks

The prevalence of social rights is the basis of a legal system both national and international anchored to the paradigm of human dignity[81]. In fact, the ESC it is unequivocally relevant to the enforcement of the social rights[82], in the spectrum of international conventions. However, the ESC has already been designed like the weakest link of the conventions that enshrine social and labour rights[83]. This finding is entirely appropriate to the Portuguese case. This conclusion, with the appropriate caveats, has been withdrawn in the literature in relation to other States Parties, such as Spain. The lack of realisation of the rights enshrined in the CSE has been denounced, particularly as a result of situations of repeated non-compliance in crisis contexts. Firstly, regarding the monitoring procedures it is possible to summarise some criticised shortcomings in a few points: i) the system of reports is very complex, long and not adjusted to the fast changes of the labour market transformation and not very effective in articulating with changes in employment legislation and non-binding; ii) the limited involvement of NGOs in the field of disability has meant that complaints about discrimination against pwd and illnesses have not been voiced; and iii) some of the Charter's rights are less clearly set out or even ignored in the conclusions, such as the right to reasonable accommodation of work arising from Article 15 of the ESC. With specific regard to Portugal, the mechanisms for monitoring the ESC are unknown and not well publicised.

The doctrine also identified other problems in the monitoring system, namely the uncertainty of the roles of the CEDS and the Governmental Committee; the lack of effective participation of the social partners in the

[81] G. GIUGLIA, *A Jurisprudência do Comité Europeu de Direitos Sociais em Tempos de Crise Económica: as decisões relativas à Grécia, Revista Jurídica de Los Derechos Sociales (2017), Lex Social*, 2017.

[82] L. ALVES, *El cumplimiento de la Carta Social Europea en materia de salarios. Un estudio comparado de los ordenamientos laborales portugués, español e italiano*, Atelier Libros Jurídicos, Barcelona, 2014.

[83] L. ALVES, *Breve nota sobre o "direito de negociação coletiva" na Carta social europeia, Estudos em homenagem ao Professor Doutor Manuel António Pita*, Org. Luís Vasconcelos de Abreu, 2022, pp. 507-517, [508].

Reporting System and the absence of significant political sanctions as a result of the procedure[84].

Still, there are some aspects to point out about the ESC, not only the extended set of fundamental rights that it integrates but also the complaints system that it contemplates. The complaints system does not require the exhaustion of domestic remedies unlike most international complaint mechanisms, which makes it more flexible and efficient.

The request for the ad-hoc reports it's also a clearly a positive sign. It shows flexibility to adapt its procedures to extraordinary needs or specific contexts that require monitoring and identification of good practices that all states can benefit from. However, it could also indicate that the existing procedure has some shortcomings. Even so, it seems that the practical impact of this system on domestic legal systems remains to be seen, and Portugal is a clear example. Despite the fact that the ECSR on National Labour Law does not have, at least nowadays, an effective impact on the Portuguese Labour Law, especially with regard to the employment protection of pwd, it is possible to overcome points of resistance by revising the monitoring mechanism and disseminating decisions more widely, which should be promoted by the Portuguese State. The strengthening of the ESC and the social rights it provides for, which have tended to be under attack in times of crisis and have a particularly significant impact on the most vulnerable groups, would also stand to gain from its recognition in the framework of EU law. The measures taken during the Troika, although omitted from the Portuguese report, were in clear collision with the objectives of the ESC, but somehow the monitoring system was unable to flag it properly. From 2015-2019 the government intended to break with that trajectory. Given the emerging needs, and perhaps above all for this reason, the implemented public policies focused on social protection with positive impacts on social exclusion and levels of poverty among pwd, and less on employment protection. Nevertheless, it is believed that complementarity between labour and social protection could have even more significant results. In this regard, it would be useful to ask Member States directly about positive discrimination measures in favour of employees with disabilities or with disabled dependants, including quota systems, reasonable accommodation measures in the workplace, changes to labour legislation to enforce the rights of vulnerable groups, and public support

[84] A. DRZEMCZEWSKI, *Fact-finding as Part of Effective Implementation: The Strasbourg Experience*, in A. Bayefsky (ed.), The U.N. Human Rights Treaty System in the 21st Century (The Hague, Kluwer, 2000),2000, pp. 115-130.

available in cases where a disproportionate burden on the employer is invoked. It is also important to ensure the effective participation of social partners, in the case of Portugal this could be through the Economic and Social Council, a constitutional recognised body (article 92 of the Constitution of the Portuguese Republic) where they have a seat, as well as NGOs, in the monitoring process and also through a specialised report by independent experts to complement the States' report[85]. In line with these questions, carried out in more detail, it would be possible to issue recommendations with a higher potential for effectiveness. Finally, as it has been argued with regard to the case law of the Italian Constitutional Court[86], the national courts must provide a justification when they ignore the decisions of the ECSR, in line with a duty to take account of the positions of human rights treaty bodies, even if they are not binding in themselves, or if they are directly applicable[87].

[85] That could be similar do the European Network of Legal Experts.

[86] G. GUIGLIA, *Italian Constitucional Court and Social Rights in times of crisis: in search of a balance between principles and values of contemporary constitucionalism, Rivista n.º3/2018*, Associazione Italiana Dei Costituzionalisti, 2018.

[87] A. SPAGNOLO, *They are not enforceable, but states must respect them: an attempt to explain the legal value of decisions of the European Committee of Social Rights, European Papers, Vol. 7*, 2022, n.º3, 2022, pp.1495-1516[1516.

Adapt International Network

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at *www.adapt.it*.

For more information about the E-journal and to submit a paper, please send a mail to *LS@adapt.it*.

DEAL Centre for International and Comparative Studies Law Economics Environment Work
THE MARCO BIAGI DEPARTMENT OF ECONOMICS
UNIVERSITY OF MODENA AND REGGIO EMILIA
ADAPT International.it
Building the Future of Work