table of contents

editorial

311 SOPHIE ROBIN-OLIVIER
Protecting Migrant Workers in the EU: a Mission for the Court of Justice

essays

317 CONSTANZE JANDA, HELEN HERMANN
Discrimination Beyond Categories? "Associated Discrimination" in European and German Labour Law

337 LUCA RATTI
What is the Minimum Wage Directive Really About? An Analysis of Directive 2022/2041 on Adequate Minimum Wages, its Implications and Objectives

353 ANA RIBEIRO, MILENA DA SILVA ROUXINOL
A Portuguese Tale on the Minimum Wage Directive and the Role Played by Autonomous but Economically Dependent Workers

focus on Social Dialogue in Transition: Navigating Change in Europe

371 PAULINA BARAŃSKA, BARBARA SURDYKOWSKA
Social Dialogue in Safety and Health Regulations on Remote Working: a New Challenge for Social Partners. The Case of CEE Member States

395 CHIARA CRISTOFOLINI
Digital Trade Unionism in the Making? Insights from the Italian Experience

421 FILIP DORSSEMONT
Council Recommendation of 12 June 2023 on Strengthening Social Dialogue in the European Union (O.J. 6 12 2023): How Sweet and Soft is the Candy of Santa Claus?

437 Pieter Pecinovsky
The Role of the Social Partners in the European Semester: Key Stakeholders or Mere Theory?

461 Carla Spinelli
Industrial Relations Practices in the Digital Transition: What Role for the Social Partners?

477 *Authors' information*

479 *Abbreviations*

editorial

Sophie Robin-Olivier

Protecting Migrant Workers in the EU: a Mission for the Court of Justice

Contents: **1.** Resilience of equal treatment in the framework of EU immigration policy. **2.** Posted TCN as migrant workers.

The European Court of Justice's approach to labour migration is multifaceted and may even appear, at times, contradictory. On the one hand, the Court has, in a number of cases, and again recently, interpreted EU legislative instruments in the domain of immigration policy in favour of migrant workers, whose right to equal treatment is conceived extensively[1]. The Court has followed a rather consistent path on equal treatment, as if it could disregard the increasing prominence of "national preference" in many European countries, where extreme right parties are gaining strength, if not yet acceding to power. On the other hand, when the mobility of third-country nationals (TCN) for work purposes takes place under the auspices of free provision of services and the so-called "posting of workers", their protection has not been a priority. The Court has conceived free provision of services extensively, as one could expect, and strictly reviewed national immigration law limiting the mobility of service providers' employees. At a time of restrictive immigration policies in Member states, free provision of services is used as a means of providing migrant workers from third countries to employers across Europe in search of cheap labour. This is done most efficiently through posting by temporary work agencies, which very purpose is to pro-

[1] CJEU, Judgement of 19 December 2024, *Caisse d'allocations familiales des Hauts-de-Seine*, Case C-664/23.

vide manpower. In this process, the protection of workers that can be achieved by the equal treatment rule, in the framework of labour migration policies, is inactivated. As a result, highly mobile and very vulnerable posted TCN are victims of extensive exploitation, on the EU territory[2].

However, the case law of the Court of Justice is paving the way to more convergence between protective interpretation of EU legislation on labour migration and limited attention to the risk of TCN exploitation in the framework of free provision of services. In a series of cases[3], recently confirmed[4], the Court distinguished the activity consisting in "the loan of manpower" from other business activities[5]. It implicitly admitted that workers posted for the purpose of the former could be considered ordinary migrant workers, falling under national immigration law. This also means, whenever EU immigration law applies, that they should benefit from equal treatment, as interpreted by the Court of Justice.

1. *Resilience of equal treatment in the framework of EU immigration policy*

Non-discrimination is a central provision in all EU directives concerning migrations, and has been taken seriously by the Court of Justice. The Court made it clear that the right to equal treatment in the Directives concerning the status of third country nationals constitutes a general rule[6]. As a result, when derogations from that right are possible, Member states can only rely on them if they have stated clearly that they intended to do so[7]. The most extensive equal treatment rule benefits to long-term residents, covered by Directive 2003/109. Adopted on the basis of the progressive pre-Lisbon

[2] On this phenomenon, see namely: Robin-Olivier, *Posting of workers in the European Union: an exploitative labour system*, in *EPs*, 2022, 1, p. 679. See also, recently, Verschueren, *Posting of third-country nationals in the EEA: Need for clarification of the conditions in a legislative initiative*, in *ELLJ*, 2024, 15, 4, pp. 875-890.

[3] CJEU, Judgement of 10 February 2011, *Vicoplus,* Case C-307/09 to C-309/09; Judgement of 14 November 2018, *Danieli*, C-18/17.

[4] CJEU, Judgement of 20 June 2024, *SN*, Case C-540/22.

[5] *Ibid*. § 79.

[6] CJEU, Judgement of 24 April 2012, *Kamberaj*, Case C-571/10, § 86 (concerning Directive 2003/109) and Judgement of 21 June 2017, *Martinez Silva*, Case C-449/16, § 29 (concerning Directive 2011/98).

[7] CJEU, *Kamberaj*, cit.

provisions of the TFEU, it aims at fostering integration of third country nationals, who have settled in a Member state[8]. Long-term residents benefit from equal treatment for access to employment and self-employed activity; conditions of employment and working conditions; education and vocational training, including study grants; recognition of professional diplomas, certificates and other qualifications; tax benefits; access to goods and services and the supply of goods and services made available to the public; procedures for obtaining housing; freedom of association and affiliation and membership in an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation[9]. Although Directive 2003/109 holds an important limit, since it allows Member states to restrict equal treatment in respect of social assistance and social protection to "core benefits"[10], the Court of Justice imposed a restrictive interpretation of this limit[11].

Other immigration Directives also contain equal treatment rules. This is namely the case of Directive 2011/98 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. In an important case decided in 2020, the Court rejected Italy's reservation of the benefit of equal treatment to holders of a single permit whose family members reside in Italy[12]. This solution has been recently confirmed in a decision that addressed a highly contestable aspect of French immigration law[13]. In that recent case, the Court affirmed that the French legislation could not, for the purposes of determining the entitlement to social security benefits of a TCN holding a single permit, refuse to take into account dependent children born in a third country whenever they cannot prove that they have entered the territory of that

[8] CJEU, Judgement of 26 April 2012, *European Commission v Netherlands*, Case C-508/10. On this objective of integration, and the extensive conception of equality that it entails, see also: CJEU, Judgement of 14 March 2019, *Y.Z.*, Case C-557/17, § 63.

[9] Art 11(1) of Directive 2003/109.

[10] Art 11(4) of Directive 2003/109/EC. In this respect, recital 12 to this Directive states that "with regard to social assistance, the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care".

[11] CJEU, *Kamberaj*, cit.

[12] CJEU, Judgement of 25 November 2020, *WS*, Case C-302/19.

[13] CJEU, *Caisse d'allocations familiales des Hauts-de-Seine*, cit.

Member State lawfully. The Court confirmed that Directive 2011/98 provides a right to equal treatment, which is the general rule, and that the derogations from that right, which the Member States have the option of establishing, must be interpreted strictly[14]. This decision can be regarded as an act of resistance in the context of prevailing anti-migrant sentiment in the political sphere. While this course of action may incur a heightened risk of hostility directed towards the Court, and courts in general, it is a risk worth taking in the name of justice and fairness.

2. *Posted TCN as migrant workers*

Protection of TCN is not yet clearly emerging in the case law concerning posting of workers for provision of services. However, some elements in recent case law developments open the path to an evolution towards TCN being considered as migrant workers rather than posted workers, when posting is a way to circumvent direct employment. In the *SN* case[15], Ukrainian employees were posted to the Netherlands by a Slovak employer to carry out metal work for a Dutch company in the port of Rotterdam. The Dutch regulation stipulated that for a posting exceeding three months (which corresponds to the duration of Schengen visas), a residence permit must be obtained. The validity of this permit could not exceed that of the residence and work permit granted by the sending Member State. Furthermore, the acquisition of this permit necessitated the payment of a substantial fee. In its decision, the Court of Justice accorded significant deference to the arguments advanced by the Dutch government, which sought to justify the restriction on the free movement of services under immigration law. It held that the requirement of a residence permit could be justified (if proportionate), not only for public policy reasons, but also to increase "legal certainty for posted workers". It is noteworthy that this particular strand of the defence of Dutch legislation addresses one of the sources of vulnerability faced by posted workers, which consists in their uncertain immigration status. However, this part of the case is not the central one. The primary focus is directed towards the maintenance of public order and security, with one legitimate

[14] *Ibid*. § 45.
[15] CJEU, *SN*, cit.

objective being the verification that migrants do not constitute a threat to public policy or public security[16]. In addition, freedom to provide services remains well defended: in particular, the limitation of the validity of the residence permits can only be accepted, according to the Court, if the initial period of validity is not "manifestly too short to meet the needs of the majority of service providers" or if it is possible to renew that period of validity without meeting excessive formal requirements.

The limited attention paid to posted workers' rights comes as no surprise: this is not what the Court of Justice was questioned about. The case was brought before the Dutch court by the Ukrainian migrant workers who contested the payment of a fee to obtain a residence permit, not their exploitation as workers. And as for the question brought to the Court of Justice by the Dutch judges, it concerned the conformity to EU law of restrictions to free provision of services resulting from the application of immigration law. But in some discreet, but very interesting developments, the case underlines that TCN, who are assigned by temporary work agencies or placement agencies to employers established on the territory of the receiving State, belong to the category of migrant workers and should not be treated as employees of a service provider.

This distinction was sufficiently important for the Court to mention it in an *obiter dictum*, which points at the specificity of the "loan of manpower"[17] to exclude this operation from the specific regime of posting. Temporary work assignment or placement of workers beyond borders falls outside the domain of posting, and cannot serve to circumvent immigration law. Indeed, immigration law constitutes, first and foremost, a restrictive regime limiting mobility of migrant workers. However, the equal treatment rule, as emphasised by the Court of Justice's case law, also entails a protective dimension.

As the Court stated in *Team power Europe*, EU law should not foster "distortion of competition between the various possible modes of employment in favour of recourse to temporary agency work as opposed to undertakings directly recruiting their workers"[18]. However, the distinction between loan of manpower and service provision will not be easy to implement, especially when chains of contracts are put in place to conceal the actual activity of firms involved. But limiting the use of posting as a means to provide

[16] CJEU, *SN*, § 102.
[17] CJEU, *SN*, § 80.
[18] CJEU, Judgement of 3 June 2021, Case C-784/19, § 65.

workers, a source of severe forms of exploitation of TCN, is needed. Ultimately, the prevention of this bypass to accessing national labour markets may result, one can hope, in the opening of new legal channels for labour migration.

essays

Constanze Janda, Helen Hermann

Discrimination Beyond Categories? "Associated Discrimination" in European and German Labour Law

Contents: **1.** Introduction. **2.** Protection against discrimination by association. **2.1.** Protected characteristics and concepts of discrimination. **2.2.** Congruence of protected characteristic and disadvantaged person? **2.2.1.** The CHEZ case. **2.2.2.** The Coleman case. **3.** Discrimination against parents in German labour law. **3.1.** Basic Principles of German equality law. **3.2.** Case law of the Federal Labour Court. **3.3.** Associated discrimination vs. Prohibition of victimisation. **3.4.** Unresolved issues of associated discrimination. **3.4.1.** The Coleman case vs. other protected categories. **3.4.2.** Immediate victim vs. disadvantaged person. **3.4.3.** The need for a "qualified relationship". **4.** Further Implications: the work-life-balance-directive. **5.** Need for changes in Equal Treatment Law? **6.** Conclusion.

1. *Introduction*

The term "associated discrimination" or "discrimination by association" refers to unfavourable treatment of a person who has or is assumed to have a close relationship to a person with a protected characteristic (race or ethnic origin, gender, religion or belief, disability, age or sexual orientation). Surprisingly, this form of discrimination received little attention in scientific literature and has rarely been litigated in courts. Nevertheless, it is probably widespread, for example when parents of young children are discriminated against in job applications.

Although EU law comprises a broad range of directives to implement the principle of equal treatment, it does not explicitly mention the concept of associated discrimination. The ECJ recognised this form of discrimination as unlawful as early as 2008 in its "Coleman" judgement. The German Federal Labour Court, however, did obviously not take note of this decision.

While directive 2019/1158/EU on the "Work-life balance for parents and carers" intended to promote the participation of parents in the workforce, the debate on its implementation in German labour law provides a new opportunity to take a closer look at discrimination by association.

Part II. of this paper will give an overview on EU equality law and the jurisprudence of the ECJ. In part III. we will discuss unfavourable treatment of parents and caregivers as a problem in German labour law, while in Part IV. we will identify further implications resulting from the work-life balance directive. In concluding (Part V.), we will reflect on the need for legislative changes.

2. *Protection against discrimination by association in EU Law*

Directive 2000/43/EC[1] establishes a framework for combating discrimination on the grounds of racial or ethnic origin in labour law and civil law, whereas directive 2000/78/EC[2] covers the categories religion and belief, disability, age and sexual orientation and refers to employment and occupation. Gender equality is covered by directive 2006/54/EC[3] for employment law, and directive 2004/113/EC[4] for civil law.

2.1. *Protected characteristics and concepts of discrimination*

Age and gender are of particular importance for the discrimination of parents or caregivers. The notion "age" often evokes the image of elderly or very old people, but it includes young age likewise. As originally understood, "gender" included the biological assignment to the female or male sex only. It is meanwhile recognized that it also covers persons who do not identify with any gender; the term therefore encompasses every kind of gender identity.

[1] Dir. 2000/43 CE of 29 june 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, p. 22.

[2] Dir. 2000/78 CE of 27 november 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, p. 16.

[3] Dir. 2006/54 CE 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, OJ L 204, p. 23.

[4] Dir. 2004/113 CE of 13 december 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, p. 37.

All EU equal treatment directives distinguish between direct and indirect discrimination. Moreover, they address multiple discrimination, i.e. unfavourable treatment based on several characteristics, which particularly often affects women, cf. recital 14 dir. 2000/43/EC and recital 3 dir. 2000/78/EC. Intersectional discrimination is not explicitly mentioned in EU secondary law. As with multiple discrimination, intersectional discrimination is linked to different categories but has a greater negative impact than the sum of its individual instances or – as for example in the case of headscarf bans[5] – creates discrimination as a result of their combined effect[6]. However, according to the case law of the ECJ, the concept of discrimination presupposes that unfavourable treatment must constitute discrimination on each of the individual grounds in itself. Therefore, the discriminatory effect resulting from the mere combination of two or more overlapping criteria shall not be relevant in EU discrimination law[7].

2.2. *Congruence of protected characteristic and disadvantaged person?*

As for the wording of the anti-discrimination directives, it is not obvious whether they protect persons from unfavourable treatment on grounds which they do not fulfil in their own person. However, the "grounds" or "characteristics" mentioned in EU secondary legislation do not describe "properties" that would be unalterably attached to a person. Rather, equal treatment law aims to prevent and sanction discriminatory attributions[8]. It therefore focusses on the mindset and attitudes of those persons who do not respect the equal treatment principle.

This is reflected in recital 6 dir. 2000/43/EC for the category "race", according to which the EU rejects theories "which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories". This clearly shows that "equal treatment irrespective of a person's racial origin" is in-

[5] See Weinberg, *Ansätze zur Dogmatik der intersektionalen Benachteiligung*, in *EuZA*, 2020, p. 64; Kahlo, Stein, *Intersektionale Diskriminierungen und das AGG*, in *NJW*, 2022, p. 2797.

[6] In detail Weinberg, *cit.*; Kahlo, Stein, *cit.*; Holzleithner, *Handbuch Antidiskriminierungsrecht*, Mohr Siebeck, 2022, para. 13.

[7] ECJ, 24. November 2016, C-443/15 (Parris), ECLI:EU:C:2016:897, para. 81 on discrimination based on a combination of age and sexual orientation.

[8] Mangold, Payandeh in *Handbuch Antidiskriminierungsrecht*, Mohr Siebeck, 2022, para. 1; para. 81 ss.

tended to protect them against racist attributions[9]. The fact that this concern is not reflected in the wording of the directive has been criticised for a long time[10].

2.2.1. The CHEZ case

These considerations also apply to the notion of "ethnic origin". Insofar, the ECJ refers to the case law of the ECtHR on Art. 14 ECHR[11]. The court defines "ethnic origin" as belonging to societal groups that are marked, among others, by a common nationality, religion, language, cultural and traditional origins and backgrounds. However, the elements of this definition are difficult to distinguish and difficult to prove. Consequently, the ECJ decided that it is not a prerequisite that disadvantaged persons themselves are a member of a particular ethnic group.

In the CHEZ case[12], a female entrepreneur ran a shop in a district that was mainly inhabited by persons of Roma origin. The energy supplier did not – as usual – install the electricity meters on the consumers' properties at a height of 1.7 meters, but on the concrete pylons of the overall electricity supply network at a height of six to eight meters. Obviously, the energy supplier intended to prevent electricity theft which he assumed were predominantly committed by consumers of Roma origin, however without expressly mentioning this. The claimant held that she was suffering direct discrimination on grounds of ethnic origin, even though she was herself of Bulgarian origin.

The ECJ followed her reasoning by referring to the wording and the objective of art. 2(1) dir. 2000/43/EC that defines the principle of equal treatment as comprising "direct or indirect discrimination based on racial or ethnic origin", but not "based on *his or her* ethnic origin". According to the court, the scope of the directive shall not be interpreted restrictively. It

[9] Lasserre, *"Rasse"-Begriff der Grundrechtecharta*, in *NZA,* 2022, p. 302. The German legislator distances from race theories as well, cf. BT-Drucksache 16/1780 of 08 June 2006, p. 30.

[10] Unabhängige Beauftragte der Bundesregierung für Antidiskriminierung, *Grundsatzpapier zur Reform des Allgemeinen Gleichbehandlungsgesetzes*, 2023, p. 3; Ludyga, *Rasse als Rechtsbegriff?*, in *NJW*, 2021, p. 914 with numerous references.

[11] ECtHR, n. 43577/98 and 43579/98 (Nachova and Others v. Bulgaria); ECtHR, n. 27996/06 and 34836/06 (Sejdi and Finci v. Bosnia and Herzegovina), para. 43 to 45 and 50.

[12] ECJ, 16 July 2015, C-83/14 (CHEZ Razpredelenie Bulgaria AD), ECLI:EU:C:2015:480.

refers to the characteristics mentioned in art. 1 dir. 2000/43/EC (racial or ethnic origin) – not to a certain category of persons, but to "all persons", cf. recital 16 dir. 2000/43/EC. Hence, the equal treatment principle shall "benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds"[13].

Even if the term "associated discrimination" was not mentioned in the decision, the ECJ has placed this very form of discrimination under the protection of the directive and sanctioned stigmatisation that goes beyond the categorical classification of the disadvantaged person[14]. Yet, the court did not limit its reasoning to direct discrimination, but also considered an indirect discrimination, because the placement of the electric meters could be regarded as an "apparently neutral practise" that disproportionally affected persons of Roma origin[15]. This argument has been criticised as a misguided interpretation of the criterion "neutrality" and due to the lack of a relevant comparison group in the case[16]. Moreover, criticism referred to the circumstance that the ECJ implied that discrimination required "malicious intent" and thus rendering it difficult for claimants to prove[17].

Another aspect of the CHEZ ruling is that it specified the nature of the disadvantage that the discriminated person has to suffer: Even though art. 2(2)(b) dir. 2000/43/EC seems to presuppose a "particular disadvantage", this does not necessarily have to refer to a certain right, but may include any disadvantageous circumstances. Hence, "particular" refers to a group of persons particularly affected and not to the "quality" of the disadvantage, nor does it require a certain seriousness of the disadvantage[18]. This would lead, according to criticism in academic literature, to a situation in which there is

[13] ECJ, 16 July 2015, C-83/14 (CHEZ Razpredelenie Bulgaria AD), ECLI:EU:C:2015:480, para. 56.

[14] Hartmann, *Diskriminierung durch Antidiskriminierungsrecht?*, in *EuZA* 2019, p. 42.

[15] ECJ, 16 July 2015, C-83/14 (CHEZ Razpredelenie Bulgaria AD), ECLI:EU:C:2015:480, para. 93 ff.

[16] In detail Atrey, *Redefining Frontiers of EU Discrimination Law*, in *Public Law* 2017, p. 189; cf. Connolly, *The myth of associative discrimination*, in *NILQ*, 2021, 72, p. 534 ff. In contrast, Suk, *New Directions for European Race Equality Law*, in *Fordham Int. Law J*, 2017, 40, p. 1219 ff. agrees with the EJC's reasoning.

[17] Connolly, *The myth of associative discrimination*, cit., p. 524.

[18] Suk, *cit.*, p. 1217 ff. and p. 1222; Fredman, *The Reason why: Unravelling Indirect Discrimination*, in *Ind. Law J*, 2016, 45, p. 237.

less damage to be compensated than behaviour, for the ECJ implied that discrimination would require not more than "conduct of a discriminatory nature and a victim"[19].

2.2.2 The Coleman case

Even before the CHEZ case, in the Coleman case in 2008, the ECJ had to decide on associated discrimination in labour law[20]. An employee was pressured by her employer into "voluntary dismissal" after giving birth to a severely disabled child who required specialised and particular care. She repeatedly missed work due to her care obligations and was confronted with hostile and humiliating comments from her employer and colleagues. The claimant asserted that this constituted an unfavourable treatment on grounds of the disability (art. 1 dir. 2000/78/EC) of her child.

In his opinion, the Advocate General stated that "*directly targeting a person who has a particular characteristic is* not the only way of discriminating against him or her; there are also other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they, too, affect the persons belonging to suspect classifications"[21].

The ECJ followed this reasoning and endorsed for a broad understanding of the notion of "discrimination". Neither the wording nor the objective of directive 2000/78/EC presupposed that the principle of equal treatment is limited to persons who themselves have a disability. Rather, it shall "combat all forms of discrimination on grounds of disability"[22]. Thus, the ECJ essentially argued with the *effet utile* of EU law and affirmed that the claimant was discriminated against because of her son's disability.

Moreover, associated discrimination is also recognized in the case law of the ECtHR on equal treatment under art. 14 ECHR, which expressly

[19] Connolly, *The myth of associative discrimination*, cit., p. 516.

[20] ECJ, 17 July 2008, C-303/06 (Coleman), ECLI:EU:C:2008:415.

[21] Opinion of AG M. Poiares Maduro, 31 January 2008, C-303/06 (Coleman), ECLI:EU:C:2008:61, para. 12.

[22] ECJ, 17 July 2008, C-303/06 (Coleman), ECLI:EU:C:2008:415, para. 38.

refers to the ECJ decision in the Coleman case[23]: *it thus follows, in the light of its objective and nature of the rights which it seeks to safeguard, that Article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics. The Court therefore finds that the alleged discriminatory treatment of the applicant on account of the disability of his child, with whom he has close personal links and for whom he provides care, is a form of disability-based discrimination covered by Article 14 of the Convention*[24].

3. *Discrimination against parents in German labour law*

3.1. *Basic principles of German equality law*

The EU equal treatment directives have been implemented in German national law with the General Act on Equal Treatment (AGG) in 2006. It covers direct and indirect discrimination on grounds of race or ethnic origin, gender, religion or belief, disability, age – including young age[25] – or sexual orientation (sec. 1 AGG). Besides, it addresses multiple discrimination (sec. 4 AGG), and there is a broad consensus that its scope comprises intersectional discrimination, even though this is not explicitly mentioned in its wording.

Moreover, sec. 7(1) AGG states that unfavourable treatment also occurs where the person committing the act of discrimination only assumes the existence of any of the grounds referred to in sec. 1 AGG. This is referred to as *Putativdiskriminierung*, i.e. discrimination by perception. Despite the wording and the systematic position of the provision in the act's subdivision "Protection of employees against discrimination", the concept of discrimination by perception is not limited to labour law but constitutes a general principle in German equality law[26].

Hence, it is not a precondition that persons facing unfavourable treatment fulfil any of the protected characteristics. This was clearly demonstrated in the so-called "Ossi case". The colloquial word "Ossi" refers to persons

[23] ECtHR, 22 March 2016, n. 23682/13 (Guberina v. Croatia), para. 41.

[24] ECtHR, 22 March 2016, n. 23682/13 (Guberina v. Croatia), para. 78 ss. for tax discrimination against the father of a disabled child.

[25] BT-Drucksache 16/1780 of 08 June 2006, p. 31.

[26] *Commentary on sec. 1*, in ERMAN/Armbrüster, *AGG Commentary*, 17th ed. 2023, para. 15.

who were born and grew up in the former GDR. A woman applying for a vacancy in West Germany was rejected because of her East German origin, which she regarded as unfavourable treatment on grounds of her ethnic origin. The Stuttgart Labour Court[27] held that she could not invoke her ethnic origin. Although the term "Ossi" may refer to persons living in a common area, East Germans lacked a common language and a sufficiently long shared history and culture. These considerations may be correct. However, the court did not consider the pejorative characterisation of the plaintiff because of her East German origin and the negative attributions associated with it. Much like "race", ethnic origin often is an "ideological construct" that is based on a "myth of belonging"[28]. If courts were required to verify a person's ethnicity in discrimination cases, this would put judges in the position of having to conduct "dubious ancestry studies"[29]. Therefore, the scientific community advocates for a post-categorical approach that sanctions negative attributions, without presupposing the disadvantaged person's affiliation to a particular group[30]: "a person who thinks evil[31] does not deserve protection, while at the same time those who are exposed to discriminatory and stereotypical mindsets do"[32].

The protected characteristics mentioned in sec. 1 AGG undoubtedly provide guidance and legal certainty. However, they may have an arbitrary effect and can perpetuate and reinforce unequal treatment, as persons are labelled as "different" in this way and "sorted" into categories that need to be overcome[33].

3.2. *Case law of the Federal Labour Court*

This reasoning will have to guide the legal implications of discrimina-

[27] Stuttgart Labour Court, 15 April 2010, 17 Ca 8907/09.

[28] SCHIECK, *Diskriminierung wegen "Rasse" oder "ethnischer Herkunft"*, in *AuR*, 2003, 51, p. 46.

[29] SCHIECK, *cit.*, p. 46; cf. GREINER, *Putativ-Diskriminierung wegen Ethnie oder Rasse*, in *Der Betrieb* 2010, p. 1941; HARTMANN, *cit.*, p. 28.

[30] HARTMANN, *cit.*, p. 31; KAHLO, STEIN, *cit.*, p. 2796 ff.; in detail BAER, *Handbuch Antidiskriminierungsrecht,* Mohr Siebeck, 2022, para. 5.

[31] Cf. MCCRUDDEN, *The New Architecture of EU Equality Law after CHEZ*, in *Eur. Equality Law Rev.*, 2016, 1, p. 8 ff.: "stigma, offence and humiliation".

[32] *Commentary on sec. 7*, in BeckOK/*Horcher*, *AGG* Commentary, 2023, para. 9.

[33] HARTMANN, *cit.*, p. 26.

tion against parents in the labour market, for they are based on stereotypes related to both young children and to women. Despite all the societal developments in recent years, women are still underrepresented in the German labour market, mainly because they are regarded as solely responsible for informal care tasks[34].

Art. 1 dir. 2006/54/EC as well as sec. 1 AGG provide for equal treatment of women in employment. Recital 23 dir. 2006/54/EC underlines that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of gender. Therefore, it shall be expressly covered by the directive. However, the term "motherhood" is interpreted rather narrow. According to the German Federal Labour Court (*Bundesarbeitsgericht*, BAG), "maternity" refers to the protection of a woman in respect of imminent or recent childbirth[35]. Hence, the term includes only pregnant women, breastfeeding mothers and women who have recently given birth, but not mothers as such.

The concept of associated discrimination is obviously not recognised in German jurisprudence. Even though the Coleman case has been broadly discussed in scientific literature, the BAG ignored it in a similar case. A woman applying for a position had been rejected; her application documents were returned to her with the handwritten note "one child, 7 years old!". The BAG denied discrimination on grounds of gender, for due to the age of the child there was no immediate link to pregnancy, birth or breastfeeding. Furthermore, the court did not see evidence for discrimination in the fact that the employer obviously assumed that the claimant, as a mother, was "responsible" for taking care of the child. It held that this only constituted gender-related discrimination if the reconciliation of work and family was an obstacle to recruitment for women alone. The employer's reference to the age of the child could be "neutral if it were made to all applying parents, regardless of their gender"[36].

This decision raises the question of how likely it would be that a young

[34] BMFSFJ, Zweiter Gleichstellungsbericht der Bundesregierung, BT-Drucksache 18/12840, p. 11 identifies a gender care gap of 52.4% to the detriment of women, based on data from 2012 and 2013. BMFSFJ, Dritter Gleichstellungsbericht der Bundesregierung, BT-Drucksache 19/30750, p. 29 is based on the gender care share, i.e. the proportion of informal care work performed by women in couple relationships; this amounted to 66% in 2017.

[35] Federal Labour Court, 18 September 2014, 8 AZR 753/13, para. 26.

[36] Federal Labour Court, 18 September 2014, 8 AZR 753/13, para. 31.

father, like a young mother, would be reduced to his caring duties. Besides, the court does not discuss in the slightest whether the result of its decision is acceptable: Is it reasonable that young parents remain excluded from the labour market as long as mothers and fathers are equally affected? In its decision, the BAG did not mention associated discrimination on grounds of the age of the child, although it pointed out that in her application, the plaintiff had not specified the age of the child, so that the employer had been forced to "painstakingly … calculate it himself"[37]. Six years after the ECJ's decision in the Coleman case, there was an obvious lack of awareness of the different manifestations of discrimination! Age discrimination was ignored. The stereotype of childcare decreases as the child gets older – one would certainly never have to expect a remark like "one child, 17 years old!".

The decision of the lower instance court likewise revealed a blind spot in this respect. The Higher Labour Court stated that the remark "one child, 7 years old!" constituted a neutral criterion[38]. In its reasoning it also referred to the age of the child and addressed the "compatibility of work and caring for a minor child of *primary school age* [author's note]"[39], but implicitly attributed these tasks to the everyday reality of women and analysed the case exclusively from the perspective of gender discrimination.

3.3. *Associated discrimination vs. prohibition of victimisation*

The German Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*, ADS) points out that discrimination of parents is often considered in the light of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) only. Sec. 612a BGB states that an employer may not discriminate against an employee in an agreement or a measure because that employee exercises their rights in a permissible way ("prohibition of chicanery" or "prohibition of victimisation"). The ADS refers to a case in which a young father asked for parental leave after the birth of his child. The employer threatened him with dismissal and argued that child care could be taken over by his wife; he then assigned him inappropriate work tasks[40].

[37] Federal Labour Court, 18 September 2014, 8 AZR 753/13, para. 32.
[38] Higher Labour Court Hamm, 6 June 2013, 11 Sa 335/13, para. 31.
[39] Higher Labour Court Hamm, 6 June 2013, 11 Sa 335/13, para. 36.
[40] Unabhängige Bundesbeauftragte für Antidiskriminierung, Jahresreport 2022, p. 12.

Distinguishing associated discrimination due to the age of the child and violations of the prohibition of victimisation is challenging. It is important, however, as both entail different legal consequences. An infringement of sec. 612a BGB results in the invalidity of the legal act in question, for example a dismissal. However, liability for damages is only due in case of negligent conduct[41]. In the Maïstrellis case[42], the ECJ recognised direct discrimination on grounds of gender if fathers are allowed to take parental leave under strict conditions only. However, the decision referred to a statutory provision that would have prevented the employer from granting parental leave to a father if his spouse is not gainfully employed. It therefore depends on whether a person – according to sec. 612a BGB – is facing disadvantages in an individual case, or whether this occurs in (hypothetical) comparison to another person – according to the approach of antidiscrimination law[43].

The prohibition of victimisation applies in existing employment relationships only and presupposes that an employee "exercises their rights in a permissible way". It does not aim at the prevention of unequal treatment, but rather protects the freedom of employees to decide whether to exercise their rights. The case described above was less a matter of the employee's fatherhood, but rather the fact that he intended to take parental leave. Unfavourable treatment was therefore not related to the assumed burden of caring for a small child, but to a traditional, outdated role model of the employer, who lacked understanding for the employee's temporary absence during parental leave. If, on the other hand, parenthood becomes less important in the employment context as the child gets older, this indicates associated discrimination. It is unlawful in the pre-employment relationship already, as well as in existing employment contracts, independent of the gender of the parent and does not refer to parenthood as such. The age of the child does not have to be addressed explicitly, but can also be an implicit factor.

3.4. *Unresolved issues of associated discrimination*

Associated discrimination is an integral part of discrimination law. Yet, some details still require clarification.

[41] See only BENECKE, *Umfang und Grenzen des Maßregelungsverbots und des Verbots der "Viktimisierung"*, in *NZA*, 2011, p. 482.

[42] ECJ, 16 July 2015, C-117/99, para. C-222/14 (Maïstrellis), ECLI:EU:C:2015:473.

[43] BENECKE, *cit.*, p. 483.

3.4.1. The Coleman case vs. other protected categories

So far, case law has only dealt with associated discrimination on grounds of disability or age. The concept can, however be applied to any protected characteristics, for example in case of unfavourable treatment of a person based on religion or belief, sexual identity[44], race or ethnic origin of another person.

The German language version of the equal treatment directives seems to suggest the opposite. In the Coleman case, the ECJ has clarified that dir. 2000/78/EC covers "all persons" and "on grounds of" all categories mentioned in the directive. With regard to gender, it appears that art. 2(1) lit. a) dir. 2006/54/EC in the German version does not cover associated discrimination, as it sanctions discrimination against a person "*aufgrund ihres Geschlechts*" ("on grounds of their sex"). The same applies to art. 2(2) lit. a) dir. 2000/43/EC for racial or ethnic discrimination. Here, too, the German wording of the directive refers to unfavourable treatment of a person "*aufgrund ihrer Rasse oder ethnischen Herkunft*" (on grounds of "their" racial or ethnic origin). This distinction is also made in case of sexual harassment: art. 2(1) lit. c) dir. 2006/54/EC refers to unwanted conduct related to "*das Geschlecht einer Person*" (the sex of a person) which has the purpose or effect to offend the dignity of "*der betreffenden Person"* ("the person concerned"). The BAG therefore denies associated discrimination due to the sex of another person[45]. As for racist harassment, art. 2(3) dir. 2000/43/EC refers to unwanted conduct ... related to "*Rasse oder der ethnischen Herkunft einer Person*" ("racial or ethnic origin of a person").

However, this distinction is not reflected in other language versions of the equal treatment directives. Moreover, their objective requires a broad interpretation that aims at the *effet utile* of the equal treatment principle[46]. Even

[44] In the Maruko case, the ECJ decided that an/the unfavourable treatment of a person living in a homosexual partnership constituted a direct discrimination on grounds of sexual orientation rather than an associated discrimination of a person on grounds of another person's sex, ECJ, 1 April 2008, C-267/06 (Maruko).

[45] German Federal Labour Court, 22.04.2010, 6 AZR 966/08, para. 17.

[46] Benedí Lahuerta, *Ethnic discrimination, discrimination by association and the Roma community*, in *CMLR*, 2016, 53, 3, p. 817; Eriksson, *Broadening the scope of European nondiscrimination law*, in *Int. J. Const. Law*, 2009, 7, p. 751; Connolly, *The myth of associative discrimination*, in *NILQ*, 2021, 72, 3, p. 514; Waddington, *Case 303/06, S. Coleman v. Attridge Law*, in *CMLR*, 2009, 46, p. 672; Lindner, *Die Ausweitung des Diskriminierungsschutzes durch den EuGH*, in *NJW*, 2008, p.

though discrimination law follows a categorical and piecemeal approach[47], it does not suggest a different level of protection for different categories. It would be incomprehensible if the mother of a Black child were less protected from discrimination than the mother of a child with a disability[48]. This conclusion is supported by primary law: Both art. 13 TEC and art. 19 TFEU oblige EU institutions take appropriate action to combat discrimination "*based on* sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation", without specifying that the disadvantaged person must belong to one of the categories mentioned[49].

3.4.2. Immediate victim vs. disadvantaged person

If parents experience unfavourable treatment in their working life because of their young children, may claim compensation according to sec. 15 AGG. This could be doubted, referring to the reasoning of the Advocate General in the Coleman case[50]: "indeed, the dignity of the person with a suspect characteristic is affected as much by being directly discriminated against as it is by seeing someone else suffer discrimination merely by virtue of being associated with him. In this way, the person who is the immediate victim of discrimination not only suffers a wrong himself, but also becomes the means through which the dignity of the person belonging to a suspect classification is undermined"[51].

This wording might indicate a difference between an "immediate victim of discrimination" and another person. Most probably the Advocate General merely intended to distinguish between direct and indirect discrimination, for in his conclusions he affirms the discrimination of both the other person and the "immediate victim". Hence, this reasoning does not have any effect on the claimant's status.

The ECJ did not even discuss this question in his judgement. Further-

2752; Leder, *Diskriminierung auch bei Benachteiligung eines Arbeitnehmers*, in *EWiR,* 2008, p. 604; Prasad, Muckenfuss, Foitzik, *Recht vor Gnade*, Beltz Juventa, 2020, p. 112; Sacksofsky, in *Handbuch Antidiskriminierungsrecht*, Mohr Siebeck, 2022, para. 14 and para. 80.

[47] Sutschet, *Assoziierte Diskriminierung*, in *EuZA*, 2009, p. 250.

[48] Sutschet, *cit.*, p. 251.

[49] *Ibid*.

[50] For more details see Sutschet, *cit.*, p. 248.

[51] Opinion of AG M. Poiares Maduro, 31. January 2008, C-303/06 (Coleman), ECLI:EU:C:2008:61, para. 13.

more, it remains ambiguous whether the third party / the "immediate victim" must actually belong to the protected group. This would limit the scope of application of associated discrimination as it would imply that it would not cover discrimination by perception[52].

3.4.3. The need for a "qualified relationship"

Finally, the question arises whether a "qualified relationship" between the disadvantaged person and the "immediate victim" is required. In his opinion in the Coleman case, the Advocate General explicitly referred to "third persons who are closely associated [author's note] with them and do not themselves belong to the group"[53]. Some authors argue in favour of such a "close relationship", which shall obviously be identical with the nuclear family[54]. Others, however, plead for including non-family ties[55], any "family ties" or "concrete" personal or social bonds[56] or even just "some" connection[57].

The *effet utile* requires a broad understanding of the concept of associated discrimination as shown in the CHEZ[58] case, where mere local proximity was sufficient[59]. Consequently, associated discrimination does not require any form of personal relationship[60]; it is only relevant that the person causing the unfavourable treatment assumes – whether rightly or not – that such a connection exists[61]. It is essential that both members and non-mem-

[52] CONNOLLY, *The "associative" discrimination fiction*, in *NILQ*, 2021, 72, 1, p. 33; in contrast BENEDÍ LAHUERTA, *cit.*, p. 810 ff.

[53] Opinion of AG M. POIARES MADURO, 31. January 2008, C-303/06 (Coleman), ECLI:EU:C:2008:61, para. 12.

[54] BAYREUTHER, *Drittbezogene und hypothetische Diskriminierungen*, in *NZA,* 2008, p. 987 and ERIKSSON, *cit.*, p. 751 mention child, spouse, partner, sibling, parent.

[55] LINDNER, *cit.*, p. 2752; ROSENDAHL, *cit.*, p. 7 mentions, for example, a bond based on voluntary work; PRASAD, MUCKENFUSS, FOITZIK*, Recht vor Gnade*, Beltz Juventa 2020, p. 112 mention family, partners and friends.

[56] BÜRO FÜR RECHT UND WISSENSCHAFT, *Evaluation des Allgemeinen Gleichbehandlungsgesetzes*, Nomos, 2016, p. 18; see also ECtHR, 22 March 2016, n. 23682/13 (Guberina v. Croatia), para. 78.

[57] *Commentary on sec. 3*, in SCHLEUSENER, SUCKOW, PLUM/PLUM., *AGG Commentary*, 6th ed. 2022, para. 183; LEDER, *cit.*, p. 604.

[58] ECJ, 16 July 2015, C-83/14 (CHEZ Razpredelenie Bulgaria AD), ECLI:EU:C:2015:480.

[59] ATREY, *cit.*, p. 187.

[60] CONNOLLY, *The myth of associative discrimination*, cit., pp. 511 and 517.

[61] SUTSCHET, *cit.*, p. 252; see also ECtHR, 31. May 2007, n. 40116/02 (Šečič v. Croatia),

bers of the protected group "suffer together"[62] or experience "associated harm"[63]. This does not lead to sanctioning unintended, merely accidental inconvenience[64], but is rooted in the fact that a person disapproves of another person's equal status. If the disadvantaged person does not have any or just a very loose relationship to a person with the protected characteristic, it may however have an effect on the burden of proof[65], especially regarding the causality of discrimination[66]. Furthermore, this could be considered when assessing the amount of the compensation[67].

4. *Further Implications: the work-life-balance-directive*

The fact that caring responsibilities are not fairly divided between the women and men and that women still face structural disadvantages in the labour market, were the main reasons for the adoption of the Work-Life Balance Directive, cf. recitals 6 and 10 dir. 2019/1158/EU[68]. The more likely men are to take up such informal work, the more disadvantages they will face on the labour market. Access to employment or the promotion of their career will be more difficult if they ask for flexible working hours or if they are unavailable to work at short notice due to urgent care responsibilities. Such disadvantages do not result from gender, but from taking on responsibility for a third person – a young child or a person in need of care.

Associated discrimination reacts to stereotypes, which are a result of outdated role models. Yet, discrimination law does not oblige member states to consider new rules in labour law in order to enforce working conditions

para. 66 and ECtHR, 28. March 2017, n. 25536/14 (Škorjanec v. Croatia), para. 56 for a racist hate crime.

[62] Suk, *cit.*, p. 1216.

[63] Connolly, *The myth of associative discrimination*, cit., p. 518. Nonetheless, the author criticises the vagueness of the association criterion, Connolly, *The "associative" discrimination fiction*, cit., p. 40.

[64] Hartmann, *cit.*, p. 42 f. and Connolly, *The myth of associative discrimination*, cit., p. 536, refers to this as a mere "collateral damage".

[65] Bayreuther, *cit.*, p. 987.

[66] Sutschet, *cit.*, p. 253.

[67] Bayreuther, *cit.*, p. 987.

[68] Dir. 2019/1158 EU of 20 june 2019 on work-life balance for parents and carers, OJ L 188, p. 79.

that enable parents to carry out their care obligations by suspending their work duties[69]. This is the objective of the Work-Life Balance Directive. According to art. 11 dir. 2019/1158/EU, Member States shall take the necessary measures to prohibit less favourable treatment of workers on the ground that they have applied for or taken parental leave or leave for caring for relatives and family members, time off work due to urgent family reasons or flexible working time arrangements. According to art. 14 dir. 2019/1158/EU Member States shall introduce the necessary measures to protect employees from any adverse treatment by the employer or other negative consequences resulting from a complaint for the purpose of enforcing compliance with the directive. Both provisions presuppose an existing employment relation and are similar to the prohibition of victimisation according to sec. 612a BGB. Hence, the question arises of whether effective protection of parents and caregivers is actually achieved.

In Germany, only rudimentary changes in labour law have been introduced[70], such as an obligation of the employer to give reasons for refusing flexible working time arrangements, care leave or family care leave. Furthermore, it is possible to lodge a complaint with the Federal Anti-Discrimination Agency. However, the risk of discrimination of parents in employment and occupation cannot be entirely banned[71].

5. *Need for changes in Equal Treatment Law?*

Associated discrimination is not a new, previously unregulated form of discrimination, but lies within the scope of "traditional" anti-discrimination rules. It does not necessarily lead to a shift from protecting the victim of discrimination to sanction conduct[72], for it presupposes a violation of the dis-

[69] Bayreuther, *cit.*, p. 987.

[70] Act on the further implementation of Dir. 2019/1158/EU of the European Parliament and of the Council of June 20, 2019, on work-life balance for parents and family carers of 19 December 2022, Federal Law Gazette I, p. 2510.

[71] Nebe, Gröhl, Thoma, *Der Diskriminierungsschutz von Sorgeleistenden*, in *ZESAR*, 2021, pp. 157 and 210 criticise this gap.

[72] Connolly, *The "associative" discrimination fiction*, cit., p. 35. The author also criticises that the concept of associated discrimination does not offer any remedy to the third person, *op. cit.*, p. 36. This, however, is not a question of the concept as such but rather of is legal consequences.

advantaged person's dignity due to their – real or perceived – relation to a third person.

Nevertheless, parents are not sufficiently protected from discrimination, especially if they have small children. Due to their caring responsibilities, they are suspected of not being able to perform to their full potential at work. Many parents and caregivers do perceive difficulties on the labour market, but also on the housing market and even in their leisure time[73]. However, they are apparently not aware that they may be discriminated against or even able to claim compensation.

The German Federal Anti-Discrimination Agency has demanded legislative changes, such as the clarification of the category "age" as comprising young as well as old age. Furthermore, it also advocates for including of "parenthood" or "caring responsibilities" as a protected characteristic[74]. In contrast to those categories traditionally protected in EU discrimination law, parenthood is not an unalterable characteristic, but freely chosen. However, like religion or belief, it is based on a highly personal decision and therefore deserves comparable protection[75].

Moreover, it should be clarified that associated discrimination falls within the application area of equality law and that all disadvantaged persons may claim for compensation. These proposals could be promoted by the ECJ, which will soon have the opportunity to clarify its jurisprudence: In January 2024, the Italian *Corte di Cassazione* has asked the ECJ whether associated discrimination can also be applied in case of indirect discrimination of a caregiver and whether the caregiver is, like the disabled person, entitled to reasonable compensation[76]. The decision will be awaited with interest, for it remains controversial whether applying discrimination by association in cases of indirect unfavourable treatment would overstretch this concept, especially for cases of intersectional discrimination[77].

In order to ensure effective protection and to overcome its "conceptual

[73] In detail JANDA, WAGNER, *Diskriminierung von und wegen Kindern*, Nomos, 2022, p. 71 ff.

[74] Unabhängige Bundesbeauftragte für Antidiskriminierung, *Grundlagenpapier zur Reform des Allgemeinen Gleichbehandlungsgesetzes*, Nomos, 2023, p. 3.

[75] JANDA, WAGNER, *cit.*, p. 121; ERNST & YOUNG LAW GMBH, *Rechtsexpertise zum Bedarf einer Präzisierung und Erweiterung der im Allgemeinen Gleichbehandlungsgesetz genannten Merkmale*, Nomos, 2019, p. 95.

[76] Cass., Sez. IV, 17 January 2024, n. 1788/2024.

[77] ATREY, *cit.*, p. 192; cf. ERIKSSON, *cit.*, p. 752; MCCRUDDEN, *cit.*, p. 7 ff.

shortcomings"[78], equal treatment should no longer be thought of in terms of characteristics, but of circumstances[79]. The latter refer to both the attitudes and behaviour of the perpetrator who denies equality and human dignity of their counterparts, and its impact on the victim[80].

6. *Conclusion*

Associated discrimination allows for protection beyond traditional role models. Although the gender-specific discussion of caring responsibilities in case law reflects their statistical distribution in society, it perpetuates traditional role attributions. This suggests that the discrimination of young parents is not problematic if only men and women are equally affected. However, equal access to employment is an essential prerequisite for securing a decent livelihood. Beyond the legal framework, there is a need for greater awareness of associated discrimination – both among potentially disadvantaged persons and legal advisors, in case law and among employers.

[78] HARTMANN, *cit.*, p. 43.

[79] LINDNER, *cit.*, p. 2751 favours a "trans-individual" approach.

[80] *Commentary on sec. 3*, in ERMAN/ARMBRÜSTER, *AGG Commentary*, 17th ed. 2023, para. 9a; HARTMANN, *cit.*, p. 39; ATREY, *cit.*, p. 194.

Abstract

Based on the ECJ's Colman and CHEZ decisions, the authors explain how the wording of European law allows for the assumption of associated discrimination. In this context, the article addresses criticism of the vagueness of the criteria laid down therein and the danger of proliferation and manipulation. Furthermore, the authors establish a link between associated discrimination and the discriminatory characteristics of age and parenthood. German law in particular lacks awareness of the need to understand discrimination on the basis of care work as associated discrimination, from which both practitioners and those affected could benefit.

Keywords

Associative discrimination/discrimination by association, Unfavourable treatment of parents and caregivers, Labour law.

Luca Ratti

What is the Minimum Wage Directive Really About? An Analysis of Directive 2022/2041 on Adequate Minimum Wages, its Implications and Objectives

Contents: **1.** Introduction: the European Pillar of Social Rights (EPSR) and its legacy on the regulation of adequate minimum wages. **2.** Core objectives and provisions of the AMWD. **3.** Enhancing trade union strength and collective bargaining. **4.** The competence conundrum beyond Article 153(5) TFEU. **5.** A three-steps test. **6.** Conclusion: the broader implications of the AMWD.

1. *Introduction: the European Pillar of Social Rights (EPSR) and its legacy on the regulation of adequate minimum wages*

Directive 2022/2041/EU (hereinafter the AMWD) came as a response to growing concerns about wage disparity and in-work poverty within the EU. Rooted in the European Pillar of Social Rights (EPSR), the Directive is part of a broader strategy to promote upward social convergence and ensure that economic disparities do not erode social cohesion. This legislative measure also addresses the structural challenges faced by workers in securing wages that provide a decent standard of living, reinforcing the EU's commitment to improve living and working conditions.

Despite its political nature, the true watershed in addressing such objectives at EU level is constituted by the European Pillar of Social Rights (EPSR). The Pillar articulates key principles such as fair wages, secure employment, and equal opportunities that have significantly influenced the political agenda of the Von Der Leyen Commission 2019/2024.

In particular, Principle No. 6 of the Pillar sets out the worker's right to

a fair wage that guarantees a decent standard of living. It also expresses the two main objectives of adequate minimum wages: on the one hand, to meet the needs of workers and their families in the light of national economic and social conditions; on the other hand, to ensure access to employment and incentives to seek work. Finally, it adds that an adequate minimum wage should help combat in-work poverty. These statements, although without any legal effect of their own[1], enabled the European Commission to give impetus to the important legislative initiative that culminated in the adoption of Directive 2022/2041 on adequate minimum wages.

The innovation of Principle 6 extends beyond its literal scope, reflecting the EPSR's role in shaping EU social policy. Early critics argued that Principle 6 would merely urge Member States and social partners to strive toward EPSR commitments, constrained by the exclusion of "pay" from the scope of Article 153(5) TFEU[2]. However, the Commission's determination to implement the EPSR surmounted historical barriers to wage-related interventions. This shift, later formalized in the EPSR Action Plan[3], highlights Principle 6's programmatic character, encouraging a purposive interpretation of the Directive[4]. It remains that the EPSR's entitlements do not amount to enforceable rights, since the Pillar functions primarily as a compass to orient and concretise policy priorities. Therefore, the "right" to fair wages in Principle 6 must be regarded as guidance for EU policymakers rather than stand-alone individual right[5].

As it is clear from its title, Directive 2022/2041 embodies the vision announced in the EPSR, linking wage adequacy to broader socioeconomic goals. Rather than prescribing a uniform wage floor across the EU, the Directive prioritizes procedural harmonization, requiring Member States to adopt mechanisms for assessing and maintaining wage adequacy.

While the strive for adequacy is certainly the flagship element of the

[1] Garben, *Choosing a Tightrope Instead of a Rope Bridge - The Choice of Legal Basis for the AMW Directive*, in Ratti, Brameshuber, Pietrogiovanni (eds.), *The EU Directive on Adequate Minimum Wages: Context, Commentary and Trajectories*, Hart Publishing, 2024, p. 25.

[2] Garben, *The European Pillar of Social Rights: An Assessment of its Meaning and Significance*, in *CYELS*, 2019, 21, p. 101.

[3] EU Commission, The European Pillar of Social Rights Action Plan, COM(2021)102.

[4] Menegatti, *Much ado about little: The Commission proposal for a Directive on adequate wages*, in *ILLEJ*, 2021, 14, 1, p. 21.

[5] Barnard, *Are Social "Rights" Rights?*, in *ELLJ*, 2020, 11, 4, p. 357.

AMWD, its complex articulation reveals other important aspects that cannot be underestimated, for their influence on the legal systems of labour law of EU Member States. This article will unfold some such aspects with the aim to see whether the Directive is really about what its title seems to promise or is instead to be seen as an instrument to promote collective bargaining on wages in a context of significant decline of social dialogue at all levels. The article will first analyse the main objectives of the Directive and then confront them with its actual provisions and procedures. It will conclusively argue that an interpretation of the AMWD in the light of EU primary law would suggest considering that purpose as functional to the primary objective to improve living and working conditions.

2. *Core objectives and provisions of the AMWD*

The primary aim of the AMWD is to ensure that workers in the EU receive a wage that allows them to live in dignity. The Directive emphasises the importance of collective bargaining as a means to achieve wage adequacy and mandates the use of specific reference values to guide wage assessments.

Article 1 articulates the Directive's main objectives as establishing a framework for: "(a) adequacy of statutory minimum wages with the aim of achieving decent living and working conditions; (b) promoting collective bargaining on wage-setting; (c) enhancing effective access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements"[6].

The Preamble of the Directive recalls the multiple positive effects of minimum wages: reducing poverty at national level, maintaining domestic demand and purchasing power, stimulating job creation, reducing wage inequality, the gender pay gap and in-work poverty. The minimum wage is all the more considered an important tool to support sustainable and inclusive economic recovery after periods of crisis.

Recitals 6 and 7 emphasise the role of minimum wages "in the protection of low-wage workers", which is "increasingly important and essential to foster a balanced, sustainable and inclusive economic recovery". The

[6] Cf. Kovács, *Subject matter (Article 1)*, in Ratti, Brameshuber, Pietrogiovanni (eds.), *cit.*, p. 142.

prevention and reduction of wage inequalities and the promotion of economic and social progress are express goals of a protection system based on the minimum wage with its widest dissemination and adequacy. Competition in the internal market must therefore be based on "high social standards, including a high level of worker protection, [and] the creation of quality employment". Recital 8 emphasises that when set at appropriate levels, minimum wages – whether determined by national legislation or collective agreements – "protect the income of workers, particularly the disadvantaged, and help to ensure a decent standard of living as recognised by the International Labour Organisation's Convention 131 on Minimum Wage Fixing. Minimum wages that ensure a decent standard of living (...) can contribute to poverty reduction at the national level, can help support domestic demand and purchasing power, strengthen work incentives, reduce wage inequalities, gender gaps and in-work poverty, and limit the fall in income in unfavourable periods".

Two basic pillars lay the foundation of the protections introduced by the AMWD: on the one hand, the coverage of collective bargaining; on the other hand, the adequacy of minimum wages.

Article 4 titled "Promotion of collective bargaining on wage setting" shows how much the Directive serves as a tool to strengthen collective bargaining across all Member States. As recalled in Recital 22, robust collective bargaining contributes to ensuring that adequate minimum wages provide workers with a decent standard of living. The way Article 4 pursues the goal to promote collective bargaining is entirely procedural, so that both Article 4(1) and 4(2) introduce obligations for the Member States to put in practice procedures aimed to facilitate collective bargaining on wage setting.

Article 5 outlines the procedural requirements for determining wage adequacy, which include consideration of the cost of living, general wage levels, productivity trends, and the distribution of wages. Notably, the Directive does not establish a uniform minimum wage. Instead, it empowers Member States to develop their own frameworks, provided they adhere to the principles of adequacy and fairness. This decentralised approach respects the diversity of economic conditions across the EU while promoting a common standard of social protection. The criteria set out in Article 5 do not result in a uniform level of adequacy of statutory minimum wages at European level. The interpretation (i.e. determination) of adequacy is therefore

left to the Member States, which may result in different levels of minimum wage protection from one Member State to another[7].

Other important provisions include the rule limiting variations and deductions from the minimum wage (Article 6), the measures for workers' access to the legal minimum wage (Article 8), the assurance that economic operators respect the wages set by collective agreements and legal minimum wages, if any, in the execution of public contracts or concession contracts (Article 9), the right of recourse and protection against unfavourable treatment or consequences (Article 12), and finally the obligation for Member States to provide for 'effective, proportionate and dissuasive' sanctions for violations of national provisions establishing minimum wage protection (Article 13).

From the above it may seem the three objectives of the AMWD – namely to ensure adequacy of statutory minimum wages, promote collective bargaining on wage-setting, and enhance workers' access to minimum wage protection – are equally balanced throughout the text. In fact, it is not the case.

From a purely quantitative point of view, the text of the directive contains a total of 60 references to 'collective bargaining', out of which collective bargaining is considered as: a right (5 times), as a complement to the right to organise (4 times), as a phenomenon to be promoted (7 times), to participate to (2 times) or to engage in (1 time). All the more, out of a total of 40 Recitals comprising the Directive's preamble, several of them – namely no. 6, 16, 18, 20, 22, 23, 24, 25, 31, and 33 – refer as such to collective bargaining.

In comparison, references to "adequacy" recur only 20 times, and 17 times on "adequate" as an attribute of minimum wages. But even these two terms are mostly referred to minimum wages provided through collective bargaining.

The quantitative consideration of the expressions mostly used in the body and preambles of the Directive triggers the question contained in the title of this paper: what is the AMWD really about?

[7] Cf. Sagan, Schmidt, *Article* 5, in Ratti, Brameshuber, Pietrogiovanni (eds.), *cit.*, p. 199.

3. *Enhancing trade union strength and collective bargaining*

A significant aspect of the AMWD is its emphasis on strengthening trade unions and enhancing their capacity to engage in effective bargaining. The Directive highlights the need for adequate resources, including access to information and financial support, to enable unions to represent workers' interests robustly. Measures such as tax deductions for union membership fees are proposed as incentives to increase union participation.

The protection of union representatives from discrimination and unjust dismissal is another pivotal provision. By safeguarding the rights of union leaders, the Directive seeks to create a favourable environment for collective bargaining, ensuring that workers can negotiate wages and working conditions without fear of reprisal.

All the more, the AMWD underscores the importance of collective redress in enforcing wage standards. Individual workers often face significant barriers when attempting to assert their rights, such as legal costs and power imbalances with employers. The Directive empowers trade unions to initiate legal action on behalf of workers, facilitating the enforcement of collective agreements and enhancing access to justice. This provision acknowledges the essential role that trade unions play in safeguarding workers' rights. By enabling collective redress, the Directive strengthens the legal framework for wage protection and promotes greater accountability among employers.

Therefore, not only Article 4 on the promotion of collective bargaining on wage setting, but also Article 7 on the involvement of social partners at decision-making level, Article 8 on effective access, and Article 12 on redress stand out as fundamental provisions aimed to support, strengthen, and promote collective bargaining as a labour market institution.

In fact, it is well established that the effectiveness of collective bargaining depends not only on the strength of trade unions but also on the cohesiveness of employers' organizations. In many central and eastern European countries, employer associations are fragmented and lack the capacity to engage in sectoral bargaining. The AMWD addresses this challenge by encouraging the formation of strong, representative employer organizations.

Examples of successful interventions include Austria's and Slovenia's chamber systems, where compulsory membership for employers has bolstered sectoral bargaining. These systems provide a model for other Member

States seeking to enhance the regulatory capacity of employer organizations and promote more comprehensive wage agreements.

Sectoral bargaining is another central element of the AMWD, as it ensures that collective agreements setting wages do cover a broad spectrum of workers. The Directive encourages the use of multi-employer collective agreements and leverages public procurement as a tool to support collective bargaining. Article 9, in particular, mandates that public contracts consider the compliance of companies with collective agreements, creating economic incentives for adherence to wage standards. This strategic use of public procurement highlights the Directive's innovative approach to labour market regulation. By linking wage adequacy to public spending, the AMWD seeks to promote fair labour practices and foster a culture of social responsibility among employers.

To prevent wage avoidance and ensure that all workers benefit from adequate wages, the AMWD advocates the use of extension mechanisms. These mechanisms make collective agreements binding on all employers in a sector, even those not directly involved in negotiations. In practice, evidence shows both effective and ineffective examples of extension practices, which illustrate the challenges of implementing such measures uniformly across the EU.

The regulatory capacity of national authorities is crucial in this context. Member States must develop robust oversight mechanisms to prevent employers from circumventing wage agreements, ensuring that the Directive's objectives are met in practice (Article 13).

All the aforementioned aspects may lead to raise a fundamental competence issue. Should the AMWD be interpreted as meaning that its main purpose is in fact to promote collective bargaining, is the legal basis chosen by the EU legislature – namely Article 153(1)(b) TFEU on "working conditions" – the correct one? The question is far from being fictional.

The claim filed by Denmark in case C-19/23 – mainly focused on asking to the CJEU whether the AMWD is correctly based on Article 153(1) despite the "pay" exception as per Article 153(5) –, touches also on the specific issue here discussed, namely whether Article 153(1) is respected when an EU Directive ultimately aims to intervene in the regulation of collective bargaining under a "working conditions" legal basis.

4. *The competence conundrum beyond Article 153(5) TFEU*

Immediately after the approval of the AMWD, two dissenting Member States in the Council had announced their wish to claim for its annulment based on an alleged violation of the competence limits. Already in January 2023, the Kingdom of Denmark filed such claim, later supported by Sweden. The claims raised in case C-19/23 resulted to be based on the following questions.

"In support of the principal claim, the Government claims in the first place that, in adopting the contested directive, the defendants infringed the principle of the conferral of powers and acted in breach of Article 153(5) TEU. The contested directive interferes directly with the determination of the level of pay in the Member States and concerns the right of association, which is excluded from the competence of the EU legislature pursuant to Article 153(5) TFEU.

In support of its principal claim, the Government submits, in the second place, that the contested directive could not validly be adopted on the basis of Article 153(1)(b) TFEU. That is because the Directive pursues both the objective set out in Article 153(1)(b) TFEU and the objective set out in Article 153(1)(f) TFEU. The latter objective is not ancillary to the first and presupposes the use of a decision-making procedure different from that followed when the contested directive was adopted (see Article 153(2) TFEU). The two decision-making procedures are incompatible since the adoption of acts under Article 153(1)(f) TFEU – in contrast to those adopted under Article 153(1)(b) TFEU – requires unanimity (see Article 153(2) TFEU).

In support of its claim put forward in the alternative, the Government submits that, in adopting Article 4(1)(d) and Article 4(2) of the contested directive, the defendants infringed the principle of the conferral of powers and acted in breach of Article 153(5) TFEU. Those provisions interfere directly with the determination of the level of pay in the Member States and concern the right of association, which is excluded from the competence of the EU legislature pursuant to Article 153(5) TFEU"[8].

Most doctrinal attention has been focused – rightly so – on the first argument, based on an alleged violation of Article 153(5) TFEU. This claim

[8] Action brought on 18 January 2023 - *Kingdom of Denmark v European Parliament and Council of the European Union* (Case C-19/23).

would decide of the life or death of the AMWD as such. In case the CJEU would uphold that argument, the entire edifice of the Directive will crumble[9].

Instead, more subtle is the perspective opened by the second claim, linked to the existence, in Article 153, of a different legal basis dealing with "representation and collective defence of the interests of workers and employers, including co-determination" (Article 153(1)(f)). The claim is based on the fact that such competence would not only be different from "working conditions" as per Article 153(1)(b) but would also have required unanimity instead of qualified majority, in accordance with a special legislative procedure, after consultation of the European Parliament and the Economic and Social Committee and the Committee of the Regions (Article 153(2) last part)[10].

EU secondary law based on Article 153(1)(f) is so far limited to Directive 2002/14 on information and consultation rights[11] and Directive 2009/38 on European Works Councils[12]. Despite being different in nature, they are both typical harmonisation directives aiming at establishing minimum requirements applicable throughout the EU while not preventing Member States from laying down provisions more favourable to employees[13]. Dealing with employees representative bodies, those directives encourage Member States to ensure that an appropriate set of measures is in place to support and facilitate their relevant rights[14].

[9] GARBEN, *Choosing a Tightrope Instead of a Rope Bridge – The Choice of Legal Basis for the AMW Directive*, in RATTI, BRAMESHUBER, PIETROGIOVANNI (eds.), *cit.*, p. 25.

[10] Cf. ALES, *Art. 153 TFEU*, in ALES, BELL, DEINERT, ROBIN-OLIVIER (eds.), *International and European Labour Law*, Hart/Beck/Nomos, 2018, p. 163.

[11] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

[12] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast).

[13] Recital 18, Directive 2002/14. Recital 9, Directive 2009/38.

[14] Cf. e.g., Article 11, Directive 2009/38.

5. *A three-steps test*

While confronting the aforementioned directives with the AMWD, allegedly based on the same legal basis, an assessment must be made with regards, first of all, (i) to the type of measures introduced by the latter. Once clarified those measures, it will have to be determined (ii) whether in fact they are directed to regulate (in the form of harmonisation measures) the topic of "representation and collective defence of the interests of workers and employers, including co-determination" (Article 153(1)(f)). In case of positive assessment of the two previous steps, it should be considered (iii) whether the "representation and collective defence" legal basis results to be a proper distinct legal basis in the architecture of the AMWD or, instead, can be qualified as secondary to the "working conditions" one.

i) The AMWD focuses on promotional measures mainly in its Article 4. The obligations for Member States deriving therefrom can be divided into two distinct categories. The first, comprising core obligations, originates from the Commission's proposal and includes two primary duties. Member States must, on the one hand, promote the development and strengthening of social partners' capacity to engage in collective bargaining on wage setting, particularly at the sectoral or cross-industry level; and, on the other hand, encourage constructive, meaningful, and informed wage negotiations between social partners, ensuring equal footing and access to adequate information (Article 4(1)(a)-(b)). Additionally, Article 4 imposes two further primary obligations: safeguarding the right to collective bargaining on wage setting; and protecting workers and trade union representatives from retaliation, provisions that directly transpose Articles 1 and 2(1) of ILO Convention No. 98 (1949).

Secondary obligations under Article 4(2) arise when a Member State's collective bargaining coverage rate falls below 80%. In such cases, the Member State must establish a framework to foster collective bargaining, either through legislation developed in consultation with social partners or by autonomous agreement. Moreover, an action plan must be introduced to promote collective bargaining, outlining specific measures with a clear scope aimed at progressively increasing coverage while respecting the social partners' collective autonomy.

ii) An overall consideration of Article 4 allows to argue that, while aiming at the promotion of collective bargaining on wage setting, the Member

States obligations deriving therefrom do not have an impact *stricto sensu* on the "representation and collective defence of the interests of workers and employers". Such interests, in fact, are defended and represented according to the legislation and practices typical of each Member State. Several provisions of the Directive aim to meticulously pay attention to safeguard social partners' collective autonomy and preserve the specificities of each system of industrial relations. This aspect is made evident by the many references in the same AMWD to what the directive *does not* do and what Member States are entitled to maintain[15].

Yet, one could also claim that an interpretation based on a broad reading of the "representation and collective defence" legal basis as per Article 153(1)(f) may be founded when considering the overall function of the AMWD vis-à-vis domestic systems of employees' representation. In such case, an argument would be that, *in concreto*, collective bargaining on wage setting cannot be really promoted without some form of intervention of the actors involved therein.

[15] Cf. Article 1(2) ("This Directive shall be without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements"); Article 1(3) ("In accordance with Article 153(5) TFEU, this Directive shall be without prejudice to the competence of Member States in setting the level of minimum wages, as well as to the choice of the Member States to set statutory minimum wages, to promote access to minimum wage protection provided for in collective agreements, or both"); Article 1(4) ("Nothing in this Directive shall be construed as imposing an obligation on any Member State:

(a) where wage formation is ensured exclusively via collective agreements, to introduce a statutory minimum wage; or (b) to declare any collective agreement universally applicable"); Article 1(5) (the acts of the Member States concerning minimum wages of seafarers "shall be without prejudice to the right to collective bargaining and to the possibility to adopt higher minimum wage levels"). See also the iteration of the negative form ("this directive shall not") in the narrative of draft Preamble 19 (emphasis added): "this Directive *neither* aims to harmonise the level of minimum wages across the Union *nor* does it aim to establish a uniform mechanism for setting minimum wages. It *does not* interfere with the freedom of Member States to set statutory minimum wages or to promote access to minimum wage protection provided for in collective agreements, in accordance with national law and practice and the specificities of each Member State and in full respect for national competences and the social partners' right to conclude agreements. This Directive *does not* impose and *should not* be construed as imposing an obligation on the Member States where wage formation is ensured exclusively via collective agreements to introduce a statutory minimum wage or to declare collective agreements universally applicable. Moreover, this Directive *does not* establish the level of pay, which falls within the right of the social partners to conclude agreements at national level and within the relevant competence of Member States".

iii) This being the case, one should consider the third step mentioned above, concerning whether the "representation and collective defence" legal basis is equally important as the 'working conditions' one in the overall architecture of the AMWD.

In several occasions, the EU legislature decided to base Directives on a dual legal basis, examples range from internal market, to criminal matters[16]. In the specific field of social policy, two examples stand out as particularly noteworthy. Directive (EU) 2019/1158 on Work-Life Balance for Parents and Carers is based on Article 153(1)(i) and (2)(b) TFEU (social policy) and Article 157(3) TFEU (gender equality), its aim being to improve work-life balance while promoting gender equality in employment and caregiving responsibilities. Directive 2024/2831 on Improving the Working Conditions in Platform Work is based on Article 153(1)(c) and (2)(b) TFEU (social policy) and Article 16 TFEU (data protection), its aim being improving the working conditions of platform workers while protecting personal data of persons performing platform work. In both directives, but particularly in this latter on platform work, it is hard to judge whether one legal basis is predominant (therefore primary) and the other subservient (or secondary), reason why the choice for a dual legal basis appears entirely compliant with EU law.

The case of the AMWD seems more intricate. In order for a Treaty provision to stand out as proper legal basis, there must be an autonomous set of rules dictated by the directive that stems from such legal basis and would be deprived of significance if put under another legal basis. If examination of an EU legislative measure "reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the

[16] Cf. Directive 2003/87/EC Establishing the EU Emissions Trading System (ETS), based on Article 192(1) TFEU (environment) and Article 114 TFEU (internal market); Directive 2010/75/EU on Industrial Emissions, based on Article 192(1) TFEU (environment) and Article 114 TFEU (internal market); Directive (EU) 2016/680 on the Protection of Personal Data in Criminal Matters, based on Article 16 TFEU (data protection) and Article 87(2)(a) TFEU (police cooperation); Directive 2009/128/EC on the Sustainable Use of Pesticides, based on Article 192(1) TFEU (environment) and Article 43 TFEU (common agricultural policy); Directive 2014/65/EU (MiFID II), based on Article 53(1) TFEU (freedom to provide services) and Article 114 TFEU (internal market).

main or predominant purpose or component"[17]. On the contrary, as clarified by the CJEU, the use of dual legal bases requires that the objectives pursued are inextricably linked and do not subordinate one legal basis to the other. Therefore, dual legal bases are permissible only when the components of a legislative act are indissociable and pursue multiple complementary objectives[18].

In the case of the AMWD, it does not seem possible to identify as necessary the legal basis of "representation and collective defence". Everything in the Directive amounting to supportive measures to representation and collective defence (e.g., Article 4(1)(d) and Article 4(2)) is functionally directed towards the overall objective of improving working conditions of employed persons in the EU, in particular for what concerns their minimum wages. All the more, the significant emphasis put by the Directive on the need to promote collective bargaining derives primarily from the assumption made in the Directive's Preambles, for which high collective bargaining coverage helps reduce inequalities[19].

Consequently, the "working conditions" legal basis results to be sufficiently broad to accommodate all measures directed to achieve the objectives listed in Article 1. Such objectives do not need an autonomous legal basis, "representation and collective defence" being functional and subordinate to achieve improved "working conditions". The improvement of "working conditions" is evidently the main or predominant purpose or component of the AMWD, therefore it appears correct that the Directive is based on Article 153(1)(b).

[17] CJEU, Case C-36/98 *Spain v Council*, paragraph 59; Case C-211/01 *Commission v Council*, paragraph 39; Case C-338/01 *Commission v Council*, paragraph 55.

[18] Cf. e.g., Case C-178/03, *Commission v. Parliament and Council*, paragraph 43.

[19] According to Recital 13, "Minimum wage protection provided for in collective agreements in low-paid occupations is adequate and therefore provides a decent standard of living in most cases, and has proven to be an effective means by which to reduce in-work poverty." Furthermore, according to Recital 25, "Member States with a high collective bargaining coverage tend to have a small share of low-wage workers and high minimum wages. Member States with a small share of low-wage earners have a collective bargaining coverage rate above 80%." On this point cf. *si licet* RATTI, *La riduzione della povertà lavorativa nella Direttiva sui salari minimi adeguati*, in *VTDL*, 2022, pp. 53-54.

6. *Conclusion: The broader implications of the AMWD*

Directive 2022/2041 represents a significant step toward achieving wage adequacy across the EU, but it is not without its limitations. By focusing on procedural harmonization, the Directive respects national sovereignty on wage setting while promoting the improvement of working conditions through both legislation and collective bargaining. The lack of a uniform wage floor is fully justified by the tight legal basis deriving from Article 153(1)(b) TFEU read in the light of the limitations deriving from Article 153(5) TFEU.

Several Member States have undertaken reforms to align with the AMWD's requirements[20]. In Ireland, for example, the government has established a tripartite working group to draft legislation that incorporates the Directive's adequacy criteria[21]. Germany, on the other hand, has experienced a renewed debate on wage adequacy, with significant increases to the minimum wage in response to inflationary pressures. Romania introduced measures to strengthen collective bargaining[22].

Italy's approach to wage regulation remains subject to intense debate. Lacking a statutory minimum wage, Italy relies on collective bargaining to set wage standards. The AMWD does not impose direct obligations, but the Directive's influence is evident on the ongoing discussions about wage adequacy and working poverty, particularly in the light of recent rulings by the Italian Court of Cassation that have referenced the adequacy criteria outlined in the AMWD[23], raising questions about the role of EU law in shaping domestic wage policies.

When asking ourselves what the AMWD is really about, one should consider the main objectives pursued by the legislature and read them in the

[20] Cf. MÜLLER, *Dawn of a New Era? The Impact of the European Directive on Adequate Minimum Wages in 2024*, ETUI Policy Brief 2024.02 (https://www.etui.org/sites/default/files/2024-03/Dawn%20of%20a%20new%20era-The%20impact%20of%20the%20European%20Directive%20on%20adequate%20minimum%20wages%20in%202024_2024%20%281%29.pdf).

[21] Cf. DOHERTY, *Make me good…just not yet? The (potential) impact of the Adequate Minimum Wage Directive*, in *ILLEJ*, 2024, 17, 1, p. 211 ff.

[22] MÜLLER, SCHULTEN, *Not Done Yet - Applying the Minimum Wage Directive*, in Social Europe, 2.5.2024.

[23] Cass. 2 October 2023 no. 27711; Cass. 2 October 2023 no. 27713; Cass. 2 October 2023 no. 27769; Cass. 10 October 2023 no. 28320; Cass. 10 October 2023 no. 28321; Cass. 10 October 2023 no. 28323.

light of EU primary law, in particular its legal basis. The overall architecture of the directive reveals important features that, while valuing supportive measures to collective bargaining, makes them functional and subordinate to the improvement of working conditions.

The AMWD's success will depend on the willingness of Member States to implement meaningful reforms and the ability of the EU to enforce compliance. Excluding that a fundamental right to receive a minimum wage can be derived from EU primary sources[24], the role of the Court of Justice in interpreting the Directive will be crucial. This will happen already in the annulment case C-19/23 on the legal basis, but also future cases coming from requests for preliminary ruling may contribute to shape the future of wage regulation. Yet, for now, the emphasis remains on national-level action in the strive to tackle income inequalities and grant wage adequacy.

[24] Cf. BRAMESHUBER, *Constitutionalisation and Social Rights – A Fundamental Right to Adequate Minimum Wages?* in RATTI, BRAMESHUBER, PIETROGIOVANNI (eds.), *cit.*, p. 126; BOGG, *Art. 31 – Fair and Just Working Conditions,* in PEERS, HERVEY, KENNER, WARD (eds.), *The EU Charter of Fundamental Rights*, Beck/Hart/Nomos, 2014, p. 845; ALES, *Article 31 CFREU*, in ALES, BELL, DEINERT, ROBIN-OLIVIER (eds.), *cit.*, p. 1207.

Abstract

Directive 2022/2041 on Adequate Minimum Wages (AMWD) is a landmark development in European Union labour law, aimed at strengthening wage standards and enhancing collective bargaining mechanisms across Member States. This article provides a comprehensive analysis of the Directive, examining its origins, objectives, and impact, with the aim to assess its validity from a legal basis perspective.

Keywords

Minimum wages, Collective bargaining, EU social dialogue.

Ana Ribeiro, Milena da Silva Rouxinol

A Portuguese Tale on the Minimum Wage Directive and the Role Played by Autonomous but Economically Dependent Workers

Contents: **1.** Introduction. **2.** The Portuguese minimum wage and Directive (EU) 2022/2041. **3.** Directive (EU) 2022/2041 and the promotion of collective bargaining. **4.** A new framework for autonomous workers who are economically dependent. **4.1.** A new definition of the concept. **4.2.** The widening of the protection – towards a new paradigm. **4.2.1.** Application of pre-existing collective provisions. **4.2.2.** Collective representation and negotiation of new collective agreements. **5.** Conclusions.

1. *Introduction*

The Directive on adequate minimum wages in the European Union (Directive (EU) 2022/2041) has raised a lot of anticipation and controversy, namely due to the concern that it may endanger States' sovereignty on this matter and/or the autonomy of national social partners[1].

In any case, so far, its transposition has been deemed underwhelming. In fact, while several Member States (namely Portugal) have not met the deadline[2],

[1] See, among others, https://www.cgtp.pt/cgtp-in/areas-de-accao/internacional/assuntos-comunitarios/16969-cgtp-in-rejeita-criterios-e-mecanismos-que-podem-significar-tectos-para-o-salario-minimo-nacional (accessed on 13 December 2024). The action brought on by Denmark against this legal instrument (Process C-19/23, still pending) also reflects this friction.

[2] In the meantime, the Government has presented a draft law (to be approved by the Assembly of the Republic) to ensure the transposition of the Directive, through the required legal changes to the Labour Code and to the General Act on Labour in Public Service The document (Proposal of Law No 43/XVI/1.ª) is available for consultation at https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=314435 (accessed on 9 January 2025). In the meantime, neither the social dialogue agreements on this matter, nor

others made only minimalistic changes, essentially confirming that the existing national legislation is in line with the Directive[3].

Specifically regarding Portugal, one may wonder what will be the Directive's impact. However, the answer to this question depends on what part of the Directive one considers. As will be discussed below, it is unlikely that this instrument will lead to significant alterations regarding the amounts and the procedures surrounding the determination of the national minimum wage[4]. But the coverage of collective agreements might be a whole other issue entirely. This is due to the "ambiguous formulation"[5] used by Article 2 of the Directive, that defines workers for the purpose of this Directive as those, in the EU, who have an employment contract or employment relationship as defined by law, collective agreements or practice in force in each Member State, with consideration to the case-law of the Court of Justice. In fact, this definition may pose a dilemma in countries where the notion of worker does not entirely match that of the Court and where some categories of workers have not, consequently, been allowed to enjoy collective agreements.

That is the case of Portugal, where, until very recently, the access to collective agreements was restricted to employees – that is, to those who possess an employment relationship –, with the exclusion of self-employed workers, even when in a situation of economic dependency. Although it should be noted that this last category, that of autonomous but economically dependent workers, was provided with a "collective status" – namely the right to collective bargaining (even if with misty contours) – in the context of the latest reform to the Labour Code.

the legal instruments determining the minimum wage, since 2022, have made any reference to the Directive.

[3] See SAUNTON, *Has the Minimum Wage Directive had an impact? In conversation with Torsten Müller*, https://www.etui.org/news/has-minimum-wage-directive-had-impact (accessed on 13 December 2024).

[4] Similarly, stating that the Directive's impact will be reduced in Portugal, see MOREIRA, PÉREZ DEL PRADO, *Iberian States*, in RATTI, BRAMESHUBER, PIETROGIOVANNI (eds.), *The EU Directive on Adequate Minimum Wages. Context, Commentary and Trajectories*, Bloomsbury, 2024, p. 473 and MARTINS, *EU Directive on adequate minimum wages: review and outlook from Portugal*, in *RDT*, 2023, 2, p. 147.

[5] MENEGATTI, *Scope (Article 2),* in RATTI, BRAMESHUBER, PIETROGIOVANNI (eds.), *cit.*, p. 155. This formulation has been previously used in Directives (EU) 2019/1152 on transparent and predictable working conditions, (EU) 2019/1158 on work-life balance for parents and carers, and (EU) 2024/2831 on improving working conditions in platform work.

Taking this panorama into consideration, the purpose of this article is to o.er an overview of the potential impact of this EU instrument in the Portuguese legal order and of the recent legal changes that (seemed to) have allowed economically dependent workers to access the rights of freedom of association and to collective bargaining.

2. *The Portuguese minimum wage and Directive (EU) 2022/2041*

This Directive has three main purposes, that are present in its Article 1. It wishes to provide a framework for (a) the adequacy of statutory minimum wages with the aim of achieving decent living and working conditions; (b) promoting collective bargaining on wage-setting; and (c) enhancing effective access of workers to rights to minimum wage protection where provided for in national law and/or collective agreements.

Regarding the Member States where there is a statutory minimum wage (which is the Portuguese case), the Directive establishes substantive and procedural impositions present in Articles 5 and ff.

First, Member States shall establish the necessary procedures for the setting and updating of such minimum wages. And, when doing so, they shall be guided by criteria set to contribute to their adequacy, with the aim of achieving a decent standard of living, reducing in-work poverty, as well as promoting social cohesion and upward social convergence, and reducing the gender pay gap (Article 5, par. 1, of the Directive). The definition of these criteria belongs to the Member States, who shall do it in a clear fashion (and who may also decide on the relative weight of the elements that compose them). However, despite this leeway, the national criteria must include the following:

a) the purchasing power of statutory minimum wages, taking into account the cost of living;

b) the general level of wages and their distribution;

c) the growth rate of wages; and

d) long-term national productivity levels and developments (Article 5, par. 2, of the Directive).

The Portuguese regime is already quite aligned with this first set of demands. In fact, Article 273, par. 2, of the Labour Code[6] states that, when de-

[6] Approved by Act No 7/2009, of 12 February, available in English at:

termining the statutory minimum wage, the needs of workers, the increase in the cost of living, and the evolution of productivity are taken into account, among other factors, with a view to adapting it to the criteria of income and price policy. While the general level of wages and the growth rate of wages are not specifically mentioned, it should be noted that the aforementioned factors are illustrative, which allows the inclusion of other elements (such as these). Still, given that the Directive asks for clarity in the criteria used for this effect, the Portuguese legal provision should be amended to ensure full compliance with this demand[7]. In any case, it is doubtful that this change will lead to significant alterations in the concrete determination of the statutory minimum wage.

The Directive also urges the Member States to assess the adequacy of statutory minimum wages. And, to that end, it suggests the use of indicative reference values commonly used at international level such as 60 % of the gross median wage and 50 % of the gross average wage, and/or indicative reference values used at national level (Article 5, par. 4, of the Directive). Despite the fact that this "double decency threshold"[8] is not mandatory, some countries have implemented it, either through legislation or informally[9]. That is not the Portuguese case[10]. Nevertheless, as stressed by the data collected

https://files.dre.pt/diplomastraduzidos/7_2009_CodigoTrabalho_EN_publ.pdf (accessed on 13 December 2024).

[7] If the aforementioned Proposal of Law No No 43/XVI/1.ª comes to fruition, such clarification will take place (still, there is no express allusion to the purchasing power of statutory minimum wages, taking into account the cost of living. Instead, the already existing references to the needs of workers and the increase in the cost of living, which are expressions enshrined in the Portuguese Constitution – Article 59, par. 2, *a)* – are maintained). In turn, the General Act on Labour in Public Service (Act No 35/2014, of 20 June) does not state any criteria for the determination of the minimum wage for civil servants. However, it ensures that their salaries shall not be lower than the statutory minimum wage, applicable to workers of the private sector – see Article 147 of Act No 35/2014.

[8] See MÜLLER, *Dawn of a new era? The impact of the European Directive on adequate minimum wages in 2024*, ETUI Policy brief, 2024, p. 1. As noted by the Author, however, further measures should be put in place to ensure that a minimum wage that meets the double decency threshold effectively ensures a decent standard of living. Member States should examine whether a minimum wage that respects such threshold is sufficient for a worker to be able to afford the country's-specific basket of goods and services. And that might not be the case when wages overall are very low and so also are median and average wages (*Ibid.*, p. 2).

[9] MÜLLER, *cit.*, pp. 8-9.

[10] The Proposal of Law No 43/XVI/1.ª merely states that national or international indicative benchmarks may be used to assess the adequacy of the statutory minimum wage.

by ETUC[11], in 2024, the Portuguese statutory minimum wage almost met these conditions. However, that does not mean that the Portuguese minimum wage is adequate, since, as it is well known, Portuguese salaries are globally low[12]. To achieve more realistic results, it would be advisable to use additional barometers, such as measuring the minimum wage against a calculated "basket of goods and services" that is required to ensure a decent and secure living[13].

In addition, the Directive makes procedural demands that are already met in Portugal, such as ensuring that regular and timely updates of statutory minimum wages take place at least every two years (Article 5, par. 5), that there are consultative bodies to advise the competent authorities on issues related to the statutory minimum wages (Article 5, par. 6), and that social partners are involved in the setting and updating of statutory minimum wages in a timely and effective manner (Article 7). In fact, in Portugal, the determination of the statutory minimum wage takes place annually and is

[11] See https://wage-up.etuc.org/ (accessed on 13 December 2024). According to the data, the Portuguese minimum wage represents 68% of the gross median wage and 48% of the gross average wage. In its 2014 Conclusions, Portugal, the European Committee of Social Rights stated that the Portuguese minimum wage did not ensure an adequate standard of living. However, in the 2022 Conclusions, Portugal, the Committee noted that in 2020 the minimum wage amounted to 53% of the average wage. And, when the net minimum wage lies between 50% and 60% of the net average wage, it is for the State Party to establish whether this wage is sufficient to ensure a decent standard of living.

[12] In-work poverty is present in the Portuguese labour market, since, as of 2022, 1 in 10 workers was poor – Peralta, Carvalho, Fonseca, *Portugal, Balanço Social 2023. Relatório executivo*, p. 4. In 2024, for the private sector, the national minimum wage was € 820 (set by Decree-Law No 107/2023, of 17 November) and it was increased to € 870 for 2025 (through Decree-Law No 112/2024, of 19 December). Initially, the goal was to ensure that, by 2026, the minimum wage would stand at € 900. However, this amount has been revised (to € 920) and the new goal is to ensure that, by 2028, the minimum wage reaches € 1.020 (see *Acordo de médio prazo de melhoria dos rendimentos, dos salários e da competitividade*, 2022, https://ces.pt/wp-content/uploads/2022/10/Acordo-Medio-Prazo_Melhoria_Rendimentos_Salarios-e-da-Competitividade_9out2022.pdf, and *Acordo Tripartido sobre valorização salarial e crescimento económico 2025-2028*, 2024, https://ces.pt/wp-content/uploads/2024/10/2024_Acordo-Tripartido-sobre-Valorizacao-Salarial-e-Crescimento-Economico_2025-2028-1.pdf). In turn, for civil servants, remunerations must always observe this minimum amount, and the lowest amount of the Single Remuneration Table was € 821,83 in 2024 (see https://www.dgaep.gov.pt/upload/catalogo/SRAP_2024_V1.pdf, accessed on 13 December 2024). This figure was increased to € 878,41 in 2025 (see https://observador.pt/2024/11/06/governo-e-sindicatos-afetos-a-ugt-assinam-novo-acordo-da-funcao-publica/, accessed on 4 December 2024).

[13] See Bethany Saunton, *cit.* and Müller, *cit.*, p. 2.

preceded by discussions at a tripartite consultative body (the Standing Committee on Social Dialogue, which is composed of members of the Government, trade unions, and employers' associations (Article 273, par. 1, of the Labour Code))[14].

3. *Directive (EU) 2022/2041 and the promotion of collective bargaining*

As previously stressed, one of the self-announced purposes of Directive (EU) 2022/2041 is to promote collective bargaining on wage-setting[15].

Given the sensitive nature of this domain, Article 1, par. 2, of the Directive clearly states that this instrument is without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements. And, again, on par. 4, it is stressed that the application of the Directive shall be in full compliance with the right to collective bargaining and that nothing in it shall be construed as imposing an obligation on Member States to introduce a statutory minimum wage (where wage formation is exclusively ensured via collective bargaining) or to declare any collective agreement universally applicable. Nevertheless, the Directive confers an emphasis to collective bargaining since it recognizes the role this mechanism plays regarding salaries. In fact, "Member States with a high collective bargaining coverage tend to have a small share of low-wage workers and high minimum wages" and "the majority of the Member States with high levels of minimum wages relative to the average wage have a collective bargaining coverage above 80 %"[16]. For this reason, Article 4 of the Directive requires Member States where collective bargaining coverage is less than a threshold of 80% to provide a framework to enable conditions for collective bargaining and to determine an action plan to this effect. And,

[14] In addition, the Labour Inspection services already enforce the respect of the statutory minimum wage (Article 8 of the Directive – although one could argue that there is always space for improvement, particularly regarding the development of the capability of enforcement authorities), and the Code of public procurement (approved by Decree-Law No 18/2008, of 29 January), one of the factors for the award of the contract may be the observance of the Labour Code and collective agreements. This last aspect should be reinforced, to ensure the compliance with Article 9 of the Directive.

[15] Article 1, par. 1, *b)*, of Directive (EU) 2022/2041.

[16] See Directive (EU) 2022/2041, recital 25.

it should be stressed, such obligation applies to all Member States. Including the ones where there is a statutory minimum wage[17].

Particularly relevant to this effect is, as acknowledged in the Directive, collective bargaining at sector or cross-industry level. Yet, "traditional collective bargaining structures have been eroding during recent decades" and "sectoral and cross-industry level collective bargaining came under pressure in some Member States in the aftermath of the 2008 financial crisis". Therefore, "sectoral and cross-industry level collective bargaining (…) needs to be promoted and strengthened"[18].

It is quite clear that the EU has reversed its position vis-à-vis collective bargaining and is now providing signals in the opposite direction from the ones it gave during the 2010s crisis. In fact, and particularly regarding the countries subject to economic intervention during this period, the "Troika" (the European Central Bank, the International Monetary Fund, and the European Commission) endeavoured to promote the decentralization of collective bargaining[19]. Whereas now the EU requires Member States to fight against the erosion of sector and cross-industry level collective bargaining…

According to the OECD, collective bargaining coverage in Portugal is high, albeit below 80% (in 2021, it was of 77,2%). This means that, unless there is a complete change of paradigm and considering that, in Portugal, collective agreements have limited personal scope[20], the controversial exten-

[17] Member States are asked to provide information regarding the period of 2021-2023 until 15 October 2025.

[18] See Directive (EU) 2022/2041, recital 16, emphasis added.

[19] Regarding the measures imposed to Portugal, with this purpose, by the Memoranda of Understanding, see Ribeiro, *The extension of collective agreements by State intervention: the Portuguese regime and the protection it may offer to SMEs*, in Ales, Basenghi, Bromwich, Senatori (eds.), *Employment relations and the transformation of the enterprise in the global economy. Proceedings of the thirteenth international conference in commemoration of Marco Biagi*, Giappichelli Editore, 2015, pp. 247-262.

[20] According to Article 496 of the Labour Code, in principle, collective agreements, in the private sector, only apply to workers affiliated with the signing trade unions. Given the low levels of union density displayed in the Portuguese system, this would lead to a meagre coverage of collective agreements (in fact, union density is estimated to be low – around 8-9% in the private sector – see Ministério do Trabalho, Solidariedade e Segurança Social, *Atualização do Livro Verde sobre as Relações Laborais 2016*, 2018, p. 15, https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3d%3dBAAAAB%2bLCAAAAAAABAAzMTA3AgDOpLYiBAAAAA%3d%3d, accessed on 13 December 2024). Thanks to extension ordinances enacted by the Ministry of Labour, that is not the case.

sion ordinances that are currently used to ensure the agreements' wider application will have to be maintained[21].

Furthermore, when considering the notion of worker for the purpose of this instrument, civil servants are to be included, since the Directive does not exempt them. "All those who can be classified as workers in both the private and public sector fall under the personal scope of the Directive. This includes civil servants, whether appointed by law or employed with a standard labour contract"[22]. However, in Portugal, collective bargaining on the public sector may not lead to the celebration of collective agreements. But rather to legal or administrative instruments that reflect the agreed upon terms[23]. Will this phenomenon be considered to ascertain collective bargaining coverage?

Also doubtful is whether Article 2 of the Directive also encompasses autonomous but economically dependent workers. In fact, as underlined by EMANUELE MENEGATTI, even though this category is not expressly named in recital 21 of the Directive, its inclusion is supported by the jurisprudence of the Court of Justice of the European Union (CJEU), whose notion of worker is wider than the traditional concept of employee, usually used by national courts[24].

In fact, the element of direction/control, in the traditional employment

[21] Portuguese Literature has been denouncing the long-term negative effect of these ordinances regarding union density. On this matter, see ANA TERESA RIBEIRO, "The extension of collective agreements by State intervention: the Portuguese regime and the protection it may offer to SMEs", cit.

[22] DIRECTORATE-GENERAL FOR EMPLOYMENT, SOCIAL AFFAIRS & INCLUSION, *Report Expert Group, Transposition of Directive (EU) 2022/2041 on adequate minimum wages in the European Union*, November 2023, p. 13.

[23] Article 347, par. 2, a), Act No 35/2014.

[24] MENEGATTI, *cit.*, pp. 155 and 165. We allude to "a notion" of worker since, as noted by the Author, despite the Court's fragmented approach, according to which there would not be a single definition of worker in EU law (Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, par. 31; C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, par. 63; C-543/03, *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse*, par. 27), recent decisions seem to have broken away from this paradigm, moving towards the idea of a single notion of worker for the different purposes of EU law (see C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, par. 34; C-428/09, *Union syndicale Solidaires Isère v. Premier ministre and Others*, par. 28; C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v. Ruhrlandklinik gGmbH*, par. 32). Stating also that the Court has a tendency to unify the concept of worker, see RISAK, DULLINGER, *The concept of "worker" in EU law: Status quo and potential for change*, ETUI, 2018, p. 41.

test, has been significantly watered down by the Court's jurisprudence, encompassing also scenarios of coordination (such as the duty to report and to cooperate with corporate bodies), while little relevance is given to the commitment to an ongoing engagement[25].

And despite its hybrid formulation, a purposive interpretation of Article 2, that takes into account the fragile bargaining position of economically dependent workers, as well as the often poor working conditions that they face, leads to the conclusion that these workers should enjoy from the right to adequate statutory minimum wages, as well as from the right to collective bargaining[26]. Which means that such an access has to be ensured and these workers must be taken in consideration, when assessing the coverage of collective agreements.

What does that mean to the Portuguese legal regime, considering that, until very recently, it relied exclusively on the traditional concept of subordination to determine the personal scope of collective agreements? As will be detailed below, there were recent changes to this panorama, however, it is not clear how they should be read and put into practice.

4. *A new framework for autonomous workers who are economically dependent*

4.1. *A new definition of the concept*

Although legal subordination is the traditional criterion for circumscribing the scope of Labour Law and even though such concept should not be mistaken for that of economic dependence, the question of how the borders of Labour Law should be defined has been in permanent dialogue with that other of defining the terms in which autonomous (that is, non-subordinated) but economically dependent workers should be protected.

And so, beyond dogmatic conceptions such as those underlying the categories of *lavoro senza aggetivi*, or *travail sans phrase*, legal systems have shown signs of a certain tendency to equate, or bring closer together, to a certain extent and given certain conditions, economically dependent work with

[25] See Menegatti, *cit.*, p. 165 and Judgements *Dita Danosa v. LKB L zings SIA* (C-232/09) and *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* (C-229/14).

[26] In this sense, Menegatti, *cit.*, p. 167. See also Rainone, Countouris, *Collective bargaining and self-employed workers*, ETUI policy brief, 2021, p. 5 ff.

legally subordinated work, either in the form of applying some labour law rules to it, or through the conception of a formally distinct regime, but with obvious affinities with labour law. None of this is new. It is very well known, for example, the Spanish so-called TRADE (*trabajador autonomo economicamente dependiente*), referred to in the *Estatuto del Trabajo Autonomo* (Act No 20/2007, of 11 July). And the Portuguese legal system is no exception to this trend. As mentioned before, the concept of economically dependent worker has been set in the legal system for a long time. However, it has never been entirely unambiguous in the Portuguese legal scene. The consensus has gone beyond a negative circumscription: "autonomous work is work that is not performed under legal subordination"...[27]. The scarce literature that referred to the issue discussed if the criterion should be linked to the way in which the activity was undertaken, or, alternatively, to the economic return.

Act No 13/2023, of 3 April, known as the *Decent Work Agenda*, brought a large-scope reform in the domain of Labour Law and one of its key points is what we can easily consider a redefinition of the status of autonomous, although economically dependent workers[28].

With this Act, the Legislator set forth that economic dependency is considered to exist for this effect when the subject in question is a natural person who, directly and without the intervention of third parties, provides their activity, in more than 50 per cent, to the same beneficiary (a single one, or several, if they are in a corporate relationship of reciprocal holdings, control or group, or if there are common organizational structures between them), obtaining the income from that activity under the terms of Article 140 of the Code on Social Security Welfare Contributions (Act No 110/2009, of 16 September) (Article 10, par. 2, of the Labour Code). This means that there is economic dependency if this beneficiary absorbs more than 50 per cent of the worker's total activity, provided that the latter has an obligation to contribute to Social Security and the annual income from providing services is equal to or greater than six times the so-called *IAS* (*indexante de apoios sociais*/social support index). The provider must supply the beneficiary with a declaration stating that these

[27] Lambelho, *Trabalho autónomo economicamente dependente: da necessidade de um regime jurídico próprio*, in Aa.Vv. (org. João Reis/Leal Amado/Liberal Fernandes/Regina Redinha), *Para Jorge Leite - Escritos Jurídico-Laborais*, Coimbra Editora, Coimbra, 2014, p. 433.

[28] Describing this new regime, Redinha, Trabalho economicamente dependente: *the soft labour approach*, in *Ques Lab*, 2023, 63, p. 7 ff.

requirements have been met, along with supporting evidence (Article 10-B of the Labour Code).

Several doubts arise from this legal definition, namely those deriving from the fact that the income of the worker may vary considerably from one year to another, which leads to the possibility that when he/she starts benefitting from the legal protection therefor designed, the requirements for that are no longer fulfilled! From our point of view, however, the most important difficulty might be the following: has the Legislator intended to provide a closed concept of autonomous but economically dependent worker, or, which is different, its intention has been to establish a presumption, even *juris et de jure*, of having such quality if those conditions verify? If the correct answer is this latter, that leads to the conclusion that other subjects can be recognized as autonomous but economically workers, if they meet the traditional criteria used for that qualification. Maybe the impact of the problem is more theoretical than practical, but, be as it may, it might be worth discussing it.

4.2. *The widening of the protection – towards a new paradigm*

4.2.1. Application of pre-existing collective provisions

As previously said, the category of autonomous but economically dependent workers was already considered in the Labour Code. According to Article 10, par. 1, they were covered by the labour provisions on personality rights, equality and non-discrimination, and occupational health and safety. It must be underlined that, despite the shyness of this provision, the Labour Code legislator surpassed the level of protection previously granted; indeed, until then, that category of workers was entitled to the application not of legal provisions, but of a set of *principles* on the above-mentioned subjects, a vague expression that was never totally understood by the Literature[29].

The novelty is that, after the entry into force of the *Decent Work Agenda*, those workers also became entitled to the application of *collective agreements* – that is, not only, anymore, to the legal prescriptions on the above-men-

[29] Conversely, the delimitation of subjects was made in non-exhaustive terms, which allowed a wideness that seems impossible at the light of the current wording. See ANA LAMBELHO, *cit.*, pp. 448-449.

tioned subjects, but also to the provisions contained in collective agreements, as long as in force in the same activity, professional, and geographical domains (Article 10, par. 1, after being amended).

Such application is not, however, as effortless as one could suppose after reading Article 10, par. 1. In fact, this novelty is further developed in Article 10-A. This latter provision clarifies, in its par. 2, that the collective status of autonomous but economically dependent workers depends on the issuance of specific legislation, which shall detail how the bargaining of collective agreements aiming at these workers shall occur and, in what concerns the application of previously existing collective provisions, shall secure that it derives from the use of the mechanism enshrined in Article 497 of the Labour Code (subparagraph *c)* of par. 2). The latter is a controversial tool[30] that allows employees – and, in the future, *mutatis mutandis*, autonomous but economically dependent workers – to choose a collective agreement already in force in the company. Furthermore, the application of these agreements to that category shall occur in the "terms therein established" (Article 10-A, par. 1, c)).

Alternatively, according to Article 10-A, par. 1, d), those workers may become included in the scope of previously existing collective agreements by means of governmental extension, in the terms established in Articles 514 and ff. of the Labour Code. In regard of this possibility, no reference to specific legislation is made, but we would say that the governmental bodies in charge of the extension shall ensure the adequacy of the regulation to autonomous workers, namely by determining partial extensions[31].

Should the application of preexisting agreements, both through the individual choice of a collective agreement or its governmental extension, to autonomous workers be restricted to the subjects referred to in Article 10, par. 1, of the Labour Code?... Although the answer is far from being clear, we would say that if the application is without material limitations, it is highly probable that issues of inadequacy will occur…

[30] On this, referring to further literature, Ribeiro, *The Scope of Representation of Trade Unions in Portugal: A New Reality?*, in *EJICLS*, 2023, 12, 13, p. 84.

[31] Act No 13/2023 stated that the prerogative set in Article 497 is not possible for employees already covered by governmental decisions of extension, an option that is not coherent with the idea of privileging autonomy rather than heteronomy… See Júlio Gomes, *Nótula sobre as alterações recentes ao artigo 497.º do Código do Trabalho*, in *Ques Lab*, 2023, 63, p. 288.

4.2.2. Collective representation and negotiation of new collective agreements

The creation of a collective status for autonomous but economically dependent workers, as enshrined in Act No 13/2023, goes further than the aspects mentioned *supra*, which, albeit representing in itself a shift of paradigm regarding the protection of that category, seems less disruptive than other novelties comprised in the "Decent Work Agenda".

According to Article 10-A, par. 2, *a)* and *b)*, those workers are now entitled to trade union representation and to the negotiation, by these unions and on their behalf, of collective agreements.

This inclusion of (a sort of) autonomous workers within the borders of trade union activity and representation, besides being recognized in neighbouring legal systems[32], corresponds to the vision of several international bodies based on legal instruments that bind Portugal[33].

In what concerns, especially, the European Union, aside from the jurisprudence already alluded above, the fact is that, more recently, the European Commission acknowledged that "collective agreements by solo self-employed persons who are in a situation comparable to that of workers fall outside the scope of Article 101 TFEU; and (…) the Commission will not intervene against collective agreements of solo self-employed persons who experience an imbalance in bargaining power vis-à-vis their counterparty/ies"[34]. Accordingly, some Literature had been pointing out that ex-

[32] Namely, the Spanish and the German systems. On the latter, RICHARDI, BAYREUTHER, *Kollektives Arbeitsrecht*, Verlag Franz Vahlen, München, 2016, 3rd ed., p. 23. See, for more general considerations, MCCRYSTAL, *Collective bargaining beyond the boundaries of employment: a comparative analysis*, in *Melb. Univ. Law Rev*, 2014, 37, 3, p. 662 ff.

[33] The Committee on Freedom of Association of the International Labour Organization has already had the occasion of noting that "all workers (…) should have the right to establish and join organizations of their own choosing. *The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship*, which is often non-existent, for example in the case of (…) self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize. Otherwise, Convention No. 87 is violated" (*Freedom of association. Compilation of decisions of the Committee on Freedom of Association*, 6th ed., 2018, pars. 387, 389 and also1285, emphasis added). Providing this and further information, RIBEIRO, *The Scope of Representation*, cit., p. 85 ff.

[34] Communication from the Commission, *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02), recital 9. See, also, Council Recommendation C/2023/1389, on strengthening social dialogue in the European Union, of 12 June 2023, recitals 23 and 24.

cluding self-employed workers from the right to collective bargaining increases the risk of degrading working conditions, due to imbalanced conditions for negotiation. According to SILVIA RAINONE and NICOLA COUNTOURIS[35], "there is a rising number of self-employed workers whose livelihood are characterised by increasing precariousness and whose working conditions could be improved by ensuring that collective agreements fall outside the scope of competition law" and "access to collective bargaining should ensure that employing businesses with a dominant bargaining position do not push labour conditions downwards".

In Portugal, these issues are not ignored. Authorised voices[36] had already held that autonomous workers should be able to create and join trade unions, as a mere expression of the need for protection of a category that, in some cases, is indeed very close to that of (subordinated) employees, since the first steps towards that enlargement had already been taken, given the legal enshrinement of the applicability of some of the regimes conceived for those with an employment contract *stricto sensu*.

But we cannot say that there is a consensus. The entry into force of the new regulation aiming at autonomous but economically dependent workers has originated an adverse reaction from some scholars, who consider this category as an *intruder*, an *outsider* in what concerns the rights to freedom of association and to collective bargaining, given the way in which they are constitutionally enshrined[37]. The major argument is that extending these rights to autonomous workers might violate the Portuguese Constitution. In fact, the Constitution includes the right to freedom of association in a section dedicated to fundamental labour rights and recognises it to *employees*, while determining that the entities empowered to negotiate collective agreements are trade unions. Still, it seems to us that the scope of the constitutional concept(ion) of employee (worker?) may be discussed and, even if we should conclude it covers strictly those who perform a professional activity under an employment contract, we would have to debate if the assignment of freedom of association to employees and the right to collective bargaining to trade unions entails necessarily, under penalty of unconstitutionality, exclusivity.

[35] RAINONE, COUNTOURIS, *cit.*, p. 1.

[36] With convincing and deeply founded arguments, REIS, *O conflito colectivo de trabalho*, Gestlegal, Coimbra, 2017, p. 296 ff.

[37] DO ROSÁRIO RAMALHO, *Tratado de Direito do Trabalho. Parte III - Situações laborais colectivas*, 4th edition, Coimbra, Almedina, 2023, p. 50.

Regardless of this discussion, the new legal framework poses a set of problems[38]. The new Article 10-A of the Labour Code establishes, on par. 2, *b)*, that specific legislation (to be issued and still not existing) shall ensure that the negotiation of collective agreements on behalf of autonomous but economically dependent workers requires previous consultation of associations of self-employed workers, representative in that sector. In other words, on the one hand, Article 10, par. 1, b), prescribes that the bodies entitled to negotiate on behalf of those workers are trade unions, but, on the other hand, par. 2, b) requires the consultation of a different entity, which is an association of self-employed workers. Naturally, these associations may exist, under the general freedom of association. However, several questions arise. Is the consultation of those associations a mandatory requirement for the negotiation of collective agreements, that, in any case, is for trade unions to conduct? Will the application of such agreements depend on workers joining such associations? Or should they join the unions in charge with the burden of negotiating? Will double membership (trade unions and self-employed workers associations) be required? Will it be permitted? And which associations are at stake, since criteria of representativeness are still lacking in Portugal (not only for trade unions, but also for other kinds of professional associations)? What is exactly the role played by self-employed workers associations? We would say that reconciling the role of both trade unions and self-employed workers associations is a challenging task, which entails the risk of interference with unions activity…

These (and, probably, other) questions remain unanswered and, with the aforementioned "specific legislation" lacking, it is audacious to propose answers. In any case, we would venture to say that, even if permitted, autonomous workers' affiliation with trade unions is not going to be a mandatory requirement for collective agreements to apply. Nor with self-employed workers associations. The wording of Article 10-A, par. 2, a) and b) suggests this conclusion. If this suspicion is accurate, if the negotiation on behalf of these workers occurs irrespective of their membership, then this regime entails a disruption of the pre-existing framework, according to which, in principle, collective agreements only apply to the employees that are affiliated with the signing union (Article 496 of the Labour Code). The fact is that, despite this principle, the exceptions are several and on a broad-

[38] Again, Ribeiro, *The Scope of Representation*, cit., pp. 87-89.

spectrum: not only are employees entitled to, by an individual decision, require to be covered by any agreement that is applicable within the enterprise, but collective agreements may also become applicable to employers and employees not originally covered, due to an extension ordinance. These possibilities exist as well in regard of autonomous but economically dependent workers. But, possibly, in this field, the Legislator might have gone even further in stepping away from the principle of affiliation.

In addition, if unionisation of autonomous workers does not become allowed, it means that, despite the steps forward taken with this "Decent Work Agenda", the Portuguese Legislator might have failed to seize the opportunity to fully reconcile the national system with International and European guidelines, which recommend recognizing autonomous workers the right to join trade unions.

5. *Conclusions*

It does not seem that the impact of the Directive on adequate minimum wages will be significant in what concerns the determination of the Portuguese statutory minimum wage. Regarding the coverage of collective agreements, however, its effects might be interesting given the exclusion of economically dependent workers from collective bargaining that (in practical terms) still subsists.

The Portuguese Legislator had recently taken steps to ensure the access of this category of workers to collective agreements, but their materialization is taking time. And given the changes that, in the meantime, have taken place in the political landscape, there is a chance they will not see the light of day. In fact, according to the social media, the new Government intends to introduce changes in the Labour Code and one of them is, precisely, aimed at this subject[39].

Therefore, and for the moment, it is unclear, whether Portugal will fully comply with this Directive.

[39] See https://www.publico.pt/2024/10/16/newsletter/ambiente-trabalho (accessed on 13 December 2024).

Abstract

This Article aims at assessing the potential impact of the Directive on adequate minimum wages in the European Union, in the Portuguese legal order, by examining the current legal framework. In particular, it delves into the changes that might occur regarding the coverage of collective agreements, taking into account that, until recently, in Portugal, economically dependent workers were not legally entitled to benefit from these instruments. Therefore, it takes notice of the new regime applicable to these workers and the issues that trouble its practical application. Issues that might lead to the (partial) incompatibility of the Portuguese legal regime with the Directive.

Keywords

Minimum wage directive, Portuguese minimum wage, Economically dependent workers, Collective bargaining, Collective representation.

Focus on Social Dialogue in Transition: Navigating Change in Europe

Paulina Barańska, Barbara Surdykowska

Social Dialogue in Safety and Health Regulations on Remote Working: a New Challenge for Social Partners. The Case of CEE Member States

Contents: **1.** Introduction. **2.** Setting the problem. **3.** Social dialogue on remote working OSH regulations in CEE. **3.1.** CEE trade union demands on OSH in the area of remote work. **4.** Remote work OSH regulations in CEE Member States. **4.1.** Employer OSH obligations in remote work. **5.** Trade union assessment of regulations on OSH in remote work. **6.** Conclusions.

1. *Introduction*

The development of teleworking is directly linked to technological change and is a "legacy" of the Covid-19 pandemic, during which teleworking solutions were introduced due to the social distance rules imposed by the crisis. Although teleworking was introduced in workplaces around the world as a temporary measure to contain the spread of the Sars-Cov-2 virus, it was quickly adopted as a preferred way of working by many organisations and workers alike. According to Eurostat, 9% of the total European workforce teleworked in 2023. It is therefore expected that remote working will become increasingly common, especially for workers who care for dependents. Teleworking has already been the subject of several publications. It has been analysed from various angles, such as the environmental aspect (reduced carbon footprint due to less commuting), various aspects of employee management and work-life balance. However, little research has been conducted on the provision of safe and healthy working conditions in teleworking, *i.e.* which aspects of safety and health are at the discretion of the employee, and which obligations are the responsibility of the employer.

Nevertheless, it is important to investigate the provision of safety and health in teleworking for several reasons. Safety and health is a fundamental right at work and needs to be respected. Employees who perform work duties at the employer's premises are entitled to safe and healthy working conditions. Employers must fulfil occupational safety and health (OSH) legal obligations such as completing an occupational risk assessment of the material working environment and analysis of the risks stemming from organisational factors and social relations at work. Based on the results of the risk assessment, the identified occupational hazards have to be eliminated, or minimised. Generally, working with display screen equipment can cause physical health hazards such as musculoskeletal disorders, ocular and visual problems, headaches, cardiovascular diseases, diabetes, and strokes, as well as mental health problems such as anxiety, insomnia or depression that stem from psychosocial risk factors. Consequently, employers have a legal duty to reduce such health hazards by providing ergonomic workstation equipment and minimising psychosocial risk factors by introducing adequate organisational measures, adapted to the type of work carried out.

However, there has been observed a poorer provision of safety and health in remote working compared to the work performed at the employer premises. This was particularly the case during the pandemic. Workers were then assigned telework as an emergency measure aimed at preventing the spread of the virus, regardless of their capacity to ensure ergonomic workstations or the lack of it. Consequently, workers in telework were faced with such adverse working conditions as improper office furniture, prolonged use of laptops and mobile devices, improper lighting, room temperature and noise levels, or even electrical hazards. Equally, remote working has been conducive to numerous psychosocial risk factors such as long working hours, increased quantitative job demands, higher work pace, monitoring of job performance, blurred boundaries between private and professional spheres, social isolation, and technostress to name but a few.

Owing to the poor provision of safety and health in teleworking during the pandemic, negotiations with social partners across Member States were initiated to improve the working conditions of remote workers. Regulations on remote working have emerged in most EU Member States, to varying degrees as a result of action by the social partners (negotiations between them), action by the public authority followed by consultation with the social partners, or fully independent action by the public authority. Therefore, the

present paper aims to assess the effectiveness of the agreed provisions in ensuring safety and health in remote working. The analysis will be focused 3 on the regulations introduced in EU Central and Eastern European (CEE) Member States. Full remote working (provided exclusively outside the employer's premises) and hybrid working models (combining work from the employee's home with work at the office/employer's premises) are analysed. Without any doubt, the introduction and operation of remote working presents numerous challenges that span across various aspects. However, research on collective bargaining related to telework in CEE Member States remains very limited. Therefore, this paper aims to fill this void by assessing the collective bargaining on telework in the CEE region. In the paper, we would like to focus exclusively on the aspects resulting from the employer's obligation to provide safe and healthy working conditions for workers. We would like to answer the question of to what extent the social partners in the CEE Member States have addressed the issue of ensuring the right to health and safety at work for remote workers (bilateral or trilateral).

Above all, we would like to capture to what extent these works/discussions/negotiations were deepened and to what extent the social partners returned to this topic at a time when they already had more experience with remote working. In other words, what were the dynamics of taking up the topic? Most CEE Member States are characterised by a relatively underdeveloped social dialogue, and the number of workers covered by collective agreements is very low in some of them (*e.g.* the Baltic countries or Poland). To varying degrees, we can speak of the development of tripartite dialogue. The question arises to what extent these conditions have been an obstacle to addressing the topic of health and safety for remote workers in an effective manner. The social partners may have been inspired to take up this topic by a direct need, related to the development of remote working, or it may have been indirectly linked to the implementation of the European agreement on digitalisation. Individual CEE Member States "started" in a different place: the number of remote workers before the COVID-19 pandemic had varied between the countries, and there had been established more or less specific regulations on teleworking. Specifically, we would like to explore whether the social partners undertook in their discussions/negotiations/consultations with public authorities concerning areas such as:

- ergonomics of remote workers' workstations;
- occupational risk assessment;

- OSH-related training;

- employer inspections related to OSH obligations and the employer's obligation to comply with OSH regulations.

We intend to examine to what extent the discussions/negotiations/consultations have led to specific regulations taking into account the specificities of remote working and to what extent there has been a formal "sticking together" of regulations and rules that were previously in force and functioned in the area of classic work organisation. In the paper, we intend to focus on measures taken at the national/sector level. The level of individual workplaces and possible good practices at this level will have the character of a complementary outlook at social dialogue activities on OSH in the context of remote working at the national or sectoral level. Our study methodology has included a literature review focusing on the impact of collective bargaining on workers' health, and a legal analysis of national laws on teleworking. The research has been crucially complemented by qualitative interviews conducted in January 2024 with trade union OSH officers across the CEE region, namely: Croatia, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

2. *Setting the problem*

The purpose of this paper is to explore the extent to which trade unions in Central Europe recognise the new OSH challenges associated with the development of remote working. Independently of this specific question, however, it is worth taking a brief look at the literature to see if we have an answer to the question of the impact of trade unions on workers' health.

Negotiating working conditions, including OSH, in telework poses important questions on the role of trade unions and social dialogue in addressing issues faced by remote workers, particularly in the context of a workforce often characterised by high education levels and higher income – groups that historically have lower union density[1].

While union density may be lower among white-collar and upper-income professionals, trade unions serve a broader purpose than merely

[1] HEWITT, *Panoptic Employment: Remote Worker Health Data Under Surveillance*, in *Colum. Sci. & Tech. L. Rev.*, 2023, 24, p. 349.

representing their direct membership. Their role extends to shaping labour standards and policies that benefit all workers, regardless of their union status[2].

This is particularly relevant in the case of remote work, as its widespread adoption presents challenges and opportunities that affect labour markets at large as it is part of a broader shift toward flexible, technology-driven labour markets. Unions have a stake in ensuring this transition is fair and sustainable, addressing emerging issues like algorithmic management, surveillance, and the erosion of boundaries between work and personal life (Indeed, European research shows that sectors that the rise of telework has been more equitable in sectors with stronger trade union presence, including in jobs driven by technological development[3].

The literature shows that it is difficult to analyse the impact of union membership/working for a unionised employer and being covered by collective agreements on OSH or lack thereof. We also have to contend with a relatively small number of studies on trade union policies on health and safety or, more broadly, on health.

Of course, we can start with the trivial observation that it would be possible to study the impact globally and at the workplace level, possibly at the level of a particular sector.

Trying to answer the first question would be very difficult – of course, trade unions take action to shape public policy on health and safety in a particular way, but it does not seem possible to isolate methodologically the impact of union policy on public policy and then assess its impact on public health. The research conducted so far tends to rather focus on determining the impact of trade unions on health at the workplace level.

One study shows that trade unions, and in particular collective bargaining at the workplace, have a role to play in supporting workers' physical and mental health, with a stronger and more statistically significant impact on

[2] Chung, Seo, *Flexibility stigma across Europe: How national contexts can shift the extent to which flexible workers are stigmatised*, Social Indicators Research, 2024, 174(3), pp. 945-965.

[3] Veverková, *Enhancing the social partners and social dialogue in the new world of work in the Czech Republic*, in Vaughan-Whitehead, Ghellab, Munoz de Bustillo Llorente (eds.), *The New World of Work* Edward Elgar Publishing, 2021, pp. 155-187; Zwysen, *Remote work as a new dimension of polarisation: Individual and contextual determinants of the relationship between working from home and job quality*, in Countouris, De Stefano, Piasna, Rainone (eds), *The future of remote work*, ETUI, 2023.

mental health. The study did not find any physical health benefits from union membership compared to working in a unionised environment[4].

The relationship between employment and public health is well described[5], but studies of the relationship between collective bargaining and workers' health are fewer and focus mainly on three types of approaches.

A first set of studies looks at the relationship between union membership and health using cross-sectional or macro-level data. For example, Sochas and Reeves[6] have shown, using European comparative data, that health inequalities are high when unions represent only part of the workforce, but low when a high proportion of the workforce is unionised. Similarly, higher union density is associated with lower depressive symptoms among workers[7]. The same type of analysis has also been carried out looking at differences between industries based on union density[8].

A second set of studies has focused on the individual relationship between union membership and health, mainly using individual longitudinal data. The results from these studies are quite contradictory, showing either a positive[9] a negative relationship[10]. A few other studies have focused on the advantages of using a longitudinal approach to assess the relationship between union membership and wages or job satisfaction, but such a perspective is still rare when considering health[11].

A third set of studies takes a collective approach by focusing on the bargaining process within companies, particularly through health and safety committees. These committees are set up to negotiate working conditions

[4] Wels, *The role of labour unions in explaining workers' mental and physical healthin Great Britain. A longitudinal approach*, in *Soc. Sci. Med*, 2020, 247, 112796.

[5] Ross, Mirowsky, *Does Employment Affect Health?*, in *JHSB*, 1995, 36, 3.

[6] Sochas, Reeves, *Does collective bargaining reduce health inequalities between labour market insiders and outsiders?*, in *SER*, 2022.

[7] Reynolds, Buffel, *Organized Labor and Depression in Europe: Making Power Explicit in the Political Economy of Health*, in *JHSB*, 2020, 61(3), pp. 342-358.

[8] Appleton, Baker, *The Effect of Unionization on Safety in Bituminous Deep Mines*, in *J LABOR RES.*, 1985, 6(2), pp. 209-210; Taylor, *A reanalysis of the relation between unionization and workplace safety*, in *IJHS*, 1987, 17(3), pp. 443-453.

[9] Wels, *Are there health benefits of being unionized in late career? A longitudinal approach using HRS*, in *Am J Ind Med*, 2018, 61(9), pp. 751-761; Wels, *The role of labour*, cit.

[10] Eisenberg-Guyot, Mooney, Barrington, Hajat, *Does the Union Make Us Strong? Labor-Union Membership, Self-Rated Health, and Mental Illness: A Parametric G-Formula Approach*. AJE, 2020, 186(2), pp. 227-236.

[11] Wels, *Are there health*, cit.; Wels, *The role of labour*, cit.

and safety issues in the workplace and involve trade unions or workers' representatives. For example, using cross-sectional data from Korea, it has been shown that health and safety committees reduce workplace accidents, but appear to be less effective in non-unionised workplaces[12].

Bryson has shown for the UK that union representation in health and safety committees is associated with lower health and safety risks compared to non-unionised workplaces[13].

Recently, a growing body of evidence has highlighted the link between workers' health and the role of trade unions. Studies have shown that collective bargaining at the workplace is associated with better health outcomes for workers and that the absence of such bargaining is often associated with greater vulnerability at work[14]. Also other research confirms these findings showing that the absence of a workplace union or staff association being connected to both poorer physical and mental health among workers[15]. It seems that some of the increased interest in this topic in the literature can easily be linked to the COVID-19 pandemic and the research that has been conducted on its impact on workers' physical and, in particular, mental health.

However, it should be remembered that the nature of the trade union-health relationship is complex and the few studies on the subject are contradictory, with some showing a negative relationship between trade union membership and physical or mental health[16]. While the general tendency would be to consider trade union membership – i.e. whether a worker is actually a member of a trade union – as the exposure, other studies have emphasised that the role of trade unions in workplaces goes beyond membership behaviour[17].

[12] Kim, Cho, *Unions, Health and Safety Committees, and Workplace Accidents in the Korean Manufacturing Sector*, in *SHW*, 2016, 7(2), pp. 161-165.

[13] Bryson, *Health and safety risks in Britain's workplaces: where are they and who controls them?*, in *IRL*, 2016, 47(5-6), pp. 547-566.

[14] Cai, Moore, Ball, Flynn, Mulkearn, *The role of union health and safety representatives during the COVID-19 pandemic: A case study of the UK food processing, distribution, and retail sectors*, in *IRL*, 2022, 53, pp. 390-407; Kromydas, Demou, Leyland, Ktikireddi, Wels, *Trade unions and mental health during an employment crisis. Evidence from the UK before and during the COVID-19 pandemic*, 2023, https://www.medrxiv.org/content/10.1101/2023.10.30.23297780v1.

[15] Wels, *The role of labour*, cit.

[16] Eisenberg-Guyot, Mooney, Barrington, Hajat, *Does the Union Make Us Strong?*, cit.

[17] Wels, *Does the Union make us strong? Labor-Union membership, self-rated health, and mental illness: a parametric G-formula approach*, in *AJE*, 2021, 190, pp. 1178-1178.

In this sense, unions would also help to explain the health outcomes of those who are not unionised. Looking at the workforce, studies have highlighted that union presence – which measures whether union representatives are involved in collective bargaining and health and safety committees at the workplace level – is a more relevant distinction because it includes the potential health benefits that affect those in a unionised workplace who are not union members.

Collective bargaining institutions are likely to have positive effects on health. This is partly because collective bargaining tends to empower unions, which aim for higher and more equal wages, greater job security and better working conditions and safety at work, all key social determinants of health[18].

However, there are still important gaps in our understanding of the health effects of collective bargaining.

First, health researchers have typically focused on the health effects of trade union membership rather than collective bargaining institutions[19], with mixed results, particularly when using more causal methods[20].

On the other hand, union density and other measures of collective bargaining seem to be more consistently associated with better health[21] and life satisfaction[22].

Reves[23] (2021) focuses on collective bargaining institutions rather than union membership because individual health outcomes are likely to be in-

[18] HAGEDORN ET AL., *The Role of Labor Unions in Creating Working Conditions That Promote Public Health*, in *AJPH*, 2016, 106, pp. 989-995.

[19] REYNOLDS, BRADY, *Bringing You More than the Weekend: Union Membership and Self-Rated Health in the United States*, in *Soc Forces*, 2021, 90, pp. 1023-1049; REYNOLDS, BUFFEL, *Organized Labor and Depression*, cit.; EISENBERG-GUYOT ET AL., *Does the Union Make Us Strong? Labor-Union Membership, Self-Rated Health, and Mental Illness: A Parametric G-Formula Approach*, in *AJE*, 2021, 190, pp. 630-641.

[20] WELS, *The role of labour*, cit.; EISENBERG-GUYOT ET AL., *Does the Union Make Us Strong?*, cit.

[21] EISENBERG-GUYOT ET AL., *Solidarity and Disparity: Declining Labor Union Density and Changing Racial and Educational Mortality Inequities in the United States*, in *Am J Ind Med*, 2020, 63, pp. 218-231; REYNOLDS, BUFFEL, *Organized Labor and Depression,* cit.; MULLER, RAPHAEL, *Does Unionization and Working under Collective Agreements Promote Health?*, in *HPI*, 2021, pp. 1-17; REEVES, *The Health Effects of Wage Setting Institutions: How Collective Bargaining Improves Health but Not Because It Reduces Inequality*, in *SHI*, 2021, 43, pp. 1-20.

[22] RADCLIFF, *Class Organization and Subjective Well-Being: A Cross-National Analysis*, in Soc Forces, 2005, 84, pp. 513-530.

[23] REEVES, *cit*.

fluenced by how unions, employers' organisations and, in some countries, governments come together to shape labour and welfare policy.

Only a few economic studies look at how trade unions directly affect health, and these are limited to two outcomes: sickness absence and occupational accidents[24]. The authors present pathways, assessments and studies of the direct links between unions and various indicators of health.

All studies recognise reverse causality: workplace hazards may lead to more unions because unions are more likely to form in workplaces with significant hazards. Some studies attempt to remove reverse causality with instrumental variables and/or longitudinal data[25], allowing researchers to test whether unions reduce the number of injuries from existing high levels. A further complicating factor is that unions are likely to help workers apply for and receive workers' compensation benefits[26]. The authors' assessment is that unions reduce fatal injuries, but the results for non-fatal injuries are controversial[27]. There is a consensus in the literature that unions increase reported sickness absence. However, there is no consensus on how to explain the association. Most researchers suggest that unions do not cause sickness but rather encourage workers to take more days off when they are genuinely ill. Union workers may not feel as threatened by employer retaliation for taking days off as non-union workers. Finally, studies show that unions improve self-rated physiological and psychological health[28].

[24] Legh, Chakalov, *Labor unions and health: A literature review of pathways and outcomes in the workplace*, Preventive Medicine Reports, 2021, 24.

[25] Donado, *Why do union workers have more nonfatal occupational injuries?*, in *Ind. Labor Relat. Rev.*, 2015, 68 (1), pp. 153-183.

[26] Hirsch, Macpherson, Dumond, *Workers compensation recipiency in union and nonunion workplaces*, in *Ind. Labor Relat. Rev.*, 1997, 50 (2), pp. 213-236.

[27] Economou, Theodossiou, *Join the union and be safe: The effects of unionization on Occupational Safety and Health in the European Union*, in *Labour*, 2015, 29 (2), pp. 127-140.

[28] Reynold, Brady, *cit.*; Dollard, Neser, *Worker health is good for the economy: Union density and psychosocial safety climate as determinants of country differences in worker health and productivity in 31 countries*, in *Soc. Sci. Med*, 2013, 92, pp. 114-123; DeFina, Hannon, *Drug use, de-unionization and drug death rates*, in *Soc Currents*, 2019, 6 (1), pp. 4-13.

3. *Social dialogue on remote working OSH regulations in CEE*

As the COVID-19 pandemic advanced, trade unions and the remaining social partners increasingly observed the need to extend the safety and health protections at work to employees who were instructed to switch to full-time teleworking[29].

Consequently, around 2021 governments in CEE Member States embarked upon developing permanent provisions, as opposed to ad-hoc, temporary solutions. Most frequently, governments looked into amending the already existing labour code provisions on telework, however, there was noted practice of drafting a new set of laws regulating remote working in the transforming world of work. The development of regulations on teleworking, and the inclusion of OSH provisions followed a process of tripartite consultations and negotiations with social partners at varying dynamics across the CEE region.

It has to be noted that not always the representative CEE trade unions were actively consulted with due diligence on the process. Several surveyed trade unionists reported that their organisations were only presented with the final draft law for comments. There had been no tripartite discussions that trade unions had been invited to before having been presented with the proposal of the regulations on remote working (Estonia case)[30]. Accordingly, there was no space provided for trade unions to voice and discuss their demands in those instances. Trade unions could only act in a reactive way to the proposal unilaterally presented to them by the government. On the other hand, it has to be admitted that some trade unions in the CEE region have not been particularly active in negotiating the regulations on remote working. This was attributed in the conducted survey to the rather "passive" attitude to health and safety in remote working, as it emerged, and to some extent still is, a relatively new phenomenon when it comes to its larger application.

Nevertheless, where the CEE trade unions were included to a lesser or

[29] Kotíková et al, *Flexibilní formy práce-homeworking v ČR a vybraných evropských zemích*. Vydal Výzkumný ústav práce a sociálních v cí, 2020, vvi.

[30] Cf. TWING Project case studies: Estonia https://twingproject.eu/wp-content/uploads/2024/07/Case_studies_ET.pdf; Poland https://twingproject.eu/wp-content/uploads/2024/07/Case_studies_PL.pdf for more details on obstacles to social dialogue on telework.

larger extent in tripartite consultations on teleworking regulations, several common trade union demands could have been identified across the CEE region. Whether these have been met or further trade union strategies for effectively meeting those demands have been implemented will be presented in the next chapter.

3.1. *CEE trade union demands on OSH in the area of remote work*

Equality of treatment

Most of the representative trade unions in CEE Member States participating in the study have reported that they fundamentally advocated for equal treatment of remote workers with employer premises-based workers in the scope of health and safety protection provided by the employer. This meant that trade unions asked for remote workers to enjoy the same working conditions in contractual and health and safety provisions as if they had applied should the workers have worked at the employer's premises. Some trade unions also called for equality in the treatment of remote workers to be applied regardless of whether the place of work was mutually agreed between the worker and employer or chosen at the worker's discretion.

There was also voiced common disapproval of shifting the responsibility for OSH from the employer onto workers in telework, in terms of providing adequate work tools, ergonomic office equipment and psychosocial conditions meeting the health and safety standards, those already enshrined in the labour code, as concerning workplace bullying or gender-based violence and harassment, as well as those scientifically proven.

Reimbursement of costs by the employer

Directly related to the demand for equal treatment in working conditions of remote workers, was another common demand for the reimbursement of costs incurred by remote workers when adapting their workstations to safety and health standards. Standard labour code OSH provisions place an obligation on the employer to provide workers with ergonomic office equipment. As such, trade unions called for the application of this rule equally to employees in telework. Any reimbursement of the costs incurred by telework was to be exempt from income tax.

Moreover, the employer is also obliged to provide and cover all costs arising from the performance of work duties. Consequently, trade unions demanded that employers reimbursed remote workers for the use of their office equipment, including energy and internet costs. Some trade unions, such as the Slovenian ZSSS union, even proposed to apply sanctions on those employers who failed to reimburse remote workers for all such costs. The rules on workers' right to financial compensation should have also been clearly defined so that no deviations could have been made.

Collective bargaining

Several trade unions, notably in Latvia and Slovenia, placed a strong emphasis on collective bargaining in establishing rules on remote working at sectoral and company levels. Any provisions limiting OSH rights of remote working were to be introduced only through collective agreements concluded with the workplace or representative trade unions, establishing compensatory measures.

Moreover, trade unions reported concerns about ensuring the participation and consultation of remote workers in defining OSH risks and preventive measures, i.e. fulfilling Article 11 of the OSH Framework Directive. The Slovenian ZSSS trade union advocated for the introduction of special provisions promoting trade union organising amongst remote workers.

Prevention of psychosocial risks

The issue of psychosocial risks in remote working was also emphasised by the CEE trade unions in the tripartite negotiations on remote working. Trade unions became alert by the intensification of psychosocial risks in remote working which needed to be addressed in the OSH provisions. National OSH research institutes, such as the Polish Institute for Labour Protection, as well as the European Agency for Safety and Health at Work and the Eurofound, concluded in their studies that remote working increases such risks as increased quantitative and qualitative job demands, loss of autonomy at work due to increased monitoring of the performed tasks, social isolation and lack of support at work, disturbed work-life balance and the blurring of private and professional sphere, and technostress to

name a few[31]. Accordingly, several trade unios in the region, such as, the Lithuanian LPSS, Latvian LBAS, the Polish NSZZ Solidarność, or the Slovenian ZSSS trade unions advocated for addressing the psychosocial risks in the regulations on remote working, including the practical implementation of the European Framework Agreement on Digitalisation.

The two latter trade unions also made explicit calls for the inclusion of the right to disconnect for remote workers in the provisions. Although the labour code usually guarantees the right to disconnect, as employees cannot freely work overtime, but only when agreed with the employer and remunerated accordingly, trade unions observed that the working culture facilitates and motivates full-time availability of employees in telework, and therefore the right to disconnect was not working properly in practice. Only the Slovenian ZSSS trade union saw their demands for the right to disconnect fulfilled and introduced in the regulations on remote working.

Obligatory worker training on OSH in remote work

Lastly, the CEE trade unions advocated for strengthened employer obligations providing comprehensive OSH training to remote workers. The employer was also to be made responsible for the safety and health of workers who needed to adapt to changes in the digitalised working environment and its OSH risks. It was emphasised that workers needed to be trained on the physical ergonomics of the remote workstation as much as on the psychosocial risks present in telework, as well as the preventive measures developed by the employer.

[31] Broughton, Battaglini, *Teleworking during the COVID-19 pandemic: risks and prevention strategies*, EU-OSHA, Publications Office of the European Union, 2021; Caprile et al., *Telework and health risks in the context of the COVID-19 pandemic: evidence from the field and policy implications*, EU-OSHA, Publications Office of the European Union, 2021, https://osha.europa.eu/sites/default/files/202112/TW_during_pandemic_risks_prevention.pdf; Eurofound, *Telework and ICT-based mobile work: Flexible working in the digital age*, New forms of employment series, Publications Office of the European Union, 2020; Mockałło, Bara ska, *Nowe formy pracy–ich charakterystyka oraz związki z dobrostanem osób pracuj cych*, in *Bezpieczeństwo Pracy: nauka i praktyka*, 2022, pp.10-14; Mockałło, *Nowe Formy Pracy a Dobrostan Pracowników*, CIOP-PIB, 2022, https://m.ciop.pl/CIOPPortalWAR/file/95982/Nowe_formy_pracy_a_dobrostan_pracownikow.pdf; Sanz de Miguel, Caprile, Arasanz, *Regulating telework in a post-COVID-19 Europe: recent developments*. EU-OSHA, Luxembourg: Publications Office of the European Union, 2023, https://osha.europa.eu/sites/default/files/documents/Regulating_telework_post-COVID-19_Europe_en.pdf; Caprile et al., *cit*.

4. *Remote work OSH regulations in CEE Member States*

4.1. *Employer OSH obligations in remote work*

The following part provides a brief overview of the regulations on occupational safety and health in remote work that have been introduced in the CEE Member States, as well as the gaps that have been identified.

In the majority of the CEE Member States, national governments have developed regulations for remote work based on older labour law provisions on telework that were introduced in the decade of the 2000s, when telework emerged as a novel but sporadic way of working. Accordingly, the processes of regulating telework amid the COVID-19 pandemic consisted of amending existing legislation rather than creating new provisions. There were a few Member States, such as Poland, where new legislation on telework was drafted, repealing the earlier telework legislation introduced in 2007.

Standard employer OSH obligations

The study of the developed laws on telework in the CEE region shows that provisions commonly uphold the employer's responsibility for OSH in telework in all instances where the place of remote work has been agreed with the employer, which is also the fundamental condition for binding employer OSH obligations regarding remote workers in the analysed CEE regulations on telework. Let us remind the reader, that one of the principal employer obligations is to protect worker's health and life with all the available means. It should be no different in the case of employees working remotely at the place agreed on with the employer. The main employer OSH obligations encompass such aspects as conducting, in participation and consultation of workers or their representatives, occupational risk assessment for all the existing risks to the health and life of workers, development, implementation and periodic evaluation of preventive measures, as well as provision of OSH training to workers, specific to the work carried out.

Occupational risk assessment in remote work

Accordingly, the employer's obligation to conduct an occupational risk assessment of the working conditions in remote work has been included in

the regulations on telework introduced in CEE Member States. The obligation is usually framed as stemming from the general employer OSH duty to conduct risk assessment corresponding to the hazards present in the working environment. Some Member States, such as Poland, also included the employer obligation to account for the psychosocial risks specific to telework in the occupational risk assessment[32].

Worker participation in OSH in remote work

Although OSH provisions in EU Member States must comply with Article 11 of the OSH Framework Directive laying down the principles of worker consultation and participation in the occupational risk assessment, development and implementation of prevention measures, it is not clear how this obligation is ensured by the regulations on telework in the CEE Member States. The exception seems to be Latvia where an employee who is performing remote work shall cooperate with the employer in the evaluation of the occupational risks and provide information to the employer on the conditions of the place of remote work which may affect the workers' safety and health[33]. Yet, some provisions on telework, as in the case of Poland, seem to limit this worker's entitlement, establishing a possibility for employers to develop an *a priori*, universal occupational risk assessment in telework, which can be uniformly applied to all remote workers[34].

Prevention of OSH hazards in remote work

Neither do the CEE regulations on telework commonly define employers' obligations to define prevention measures for all occupational risks present in remote working, particularly in the area of psychosocial risks. As risks to the mental health of workers are not recognised in labour law in the EU nor Member States as occupational hazards, the lack of binding employer guidelines on the prevention of these risk factors in telework may leave remote workers exposed to adverse psychosocial working conditions. The introduction of the right to disconnect seems an adequate solution in the

[32] Art. 67^{31} § 5 of the Labour Code.
[33] § 8 (11) of the Labour Protection Law.
[34] Art. 67^{31} § 5 of the Labour Code p. 4.

present circumstances, however, it has only been granted in Slovenia in the CEE region[35].

As for the risks to the physical health of workers in telework such as musculoskeletal disorders, headaches, and eye strains, the employer obligations vary across the region. Some Member States have considered the prevention of such hazards by employers, based on organising ergonomic workstations of remote workers, in the same manner as this is practised at the employer's premises. In such instances, it is the employer who is responsible for arranging ergonomic work equipment and furniture for remote workers. This has been the case, e.g., in Lithuania, Slovakia and Slovenia.

Reimbursement

Whereas other Member States have ruled that it is the worker who is responsible for organising an ergonomic workstation. Often it is practised that workers sign a statement confirming that they adequate OSH conditions at the place where the telework shall be performed, as to relieve the employer of the burden of being responsible for OSH in teleworkers. This is practised in: Estonia, Hungary, Poland, and is often a precondition for obtaining employer authorisation for telework, even in such Member States as Slovenia where the employer must equip remote workers with ergonomic office equipment.

In those CEE Member States where the workers have been made entirely responsible for OSH in telework and for adapting the workplace to the requirements of an ergonomic workstation, there has been introduced an explicit obligation on employers to refund workers on the incurred costs. Accordingly, workers must be reimbursed for the cost of ergonomic workstations in Croatia, Latvia (subject to parliamentary adoption of the compromise proposal), Slovakia and Slovenia. Whereas other CEE Member States have only introduced a facultative reimbursement of remote workers on the cost of ergonomic equipment, subject to an individual or collective bargaining agreement. Such has been the case in e.g. Estonia, Hungary and Poland. As the agreement depends on the goodwill of the employer, remote workers may find it difficult to cover the cost of ergonomic office equipment and risk exposure to adverse physical health working conditions in such countries.

[35] Art. 142.a of Labour Relations Act (ZDR-1).

Employer control of OSH in remote work

Some CEE Member States have introduced an explicit obligation for employers to inspect the safety and health at work of teleworkers. In Croatia, for example, the regulations impose a binding obligation on the employer to check that the workplaces of teleworkers comply with health and safety standards, but only in cases where the place of work is mutually agreed between the employee and the employer. Similar provisions have been introduced in Hungary and Latvia. The employer is granted the right to enter the employee's premises where telework is performed to inspect the health and safety of the workplace, provided that the conditions for such inspections have been agreed between the employee and the employer and at a time agreed with the employee. The employer must ensure the protection of the privacy of the worker and other residents of the place where telework is carried out during the inspection of the working conditions. The provisions also often allow the inspection to be carried out using ICT tools, either online or by providing the employer with images of the workplace, which is a common practice in Hungary, for example. In Estonia, on the other hand, no such obligations have been introduced and reference is made to the worker's declaration of compliance with the health and safety requirements in telework before authorising remote working. Similar provisions have been introduced in Estonia and Poland, although the employer is given a voluntary right to control the working conditions of telework, under the general conditions defined in other CEE Member States where the employer controls OSH in telework.

Worker training on OSH in remote work

The employer obligations on conducting OSH training for remote workers tend to refer to the general OSH provisions establishing such employer duty. Standard clauses in the CEE regulations on telework refer to general OSH provisions stating that the OSH training needs to be adapted to the hazards present in the working environment. In some Member States, such as Poland, the OSH training in telework can be conducted online, subject to written confirmation by the workers of having participated in such training.

Accordingly, the provisions on OSH training for remote workers tend

to be very general. An exemption seems to be Slovakia where the employer has been obliged to notify and inform employees in telework on the activities preventing OSH hazards at work with display screen equipment[36]. However, it seems that some detailed guidelines, particularly, regarding the psychosocial risk factors in telework, should have been included in the regulations. As the general OSH laws only account for the OSH hazards pertaining to the material working environment, there is a risk that the hazards to the mental health of remote workers are not thoroughly covered in the OSH training, increasing the workers' exposure to adverse psychosocial working conditions in present in telework.

5. *Trade union assessment of regulations on OSH in remote work*

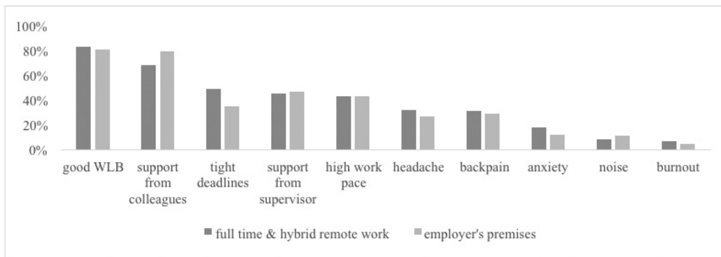
This chapter will account for the trade union assessment of the effectiveness in preventing OSH hazards of the introduced provisions on telework in the CEE region, accompanied by an analysis of official data sources in the field.

The central concern of the surveyed CEE trade unions has been the inequality of treatment in the level of safety and health of remote workers compared to employees working at employer's premises. Accordingly, we could see that several CEE Member States transferred the responsibility for OSH from the employer to the remote worker in the regulations on telework, despite the general OSH employer obligations stating the opposite. Such has been the case in Croatia, Estonia, and Poland. The surveyed trade unions from those Member States expressed their discontent with how the OSH has been addressed in regulations on telework, prompting fears of inadequate protection of remote workers. E.g. Croatian trade unions have reported that "in practice most of employers have been using telework, not work at an alternative place (working from home) provisions so they can avoid health and safety obligations" (Katarina Rumora, NHS). Moreover, in Croatia there have not been concluded any collective agreements, encompassing OSH employers in telework, which may further impact the poor provision safety and health in remote workers.

[36] § 7 of Act no. 124/2006 Coll. on safety and health protection at work and on amending some laws as amended.

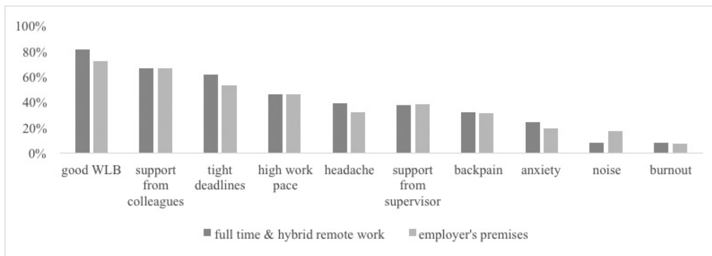
Indeed, some of these fears seem to be reflected in official data sources. According to the European Working Conditions Survey, conducted by Eurofound in 2021, full-time and hybrid remote workers in Croatia and Poland enjoy a better work-life balance, however, experience higher time pressure (tight deadlines), lower support from supervisors and more frequently suffer from headache, back pain, anxiety and job burnout than employers working at employer's premises (Figure 1 and Figure 2). In turn, Estonian remote workers enjoy greater social support a work than their Croatian and Polish counterparts, however, also experience a higher level of bodily and mental afflictions than persons working at employer's premises (Figure 3).

FIGURE 1. – *Exposure to OSH risks of employees in telework and working at employer's premises* in Croatia



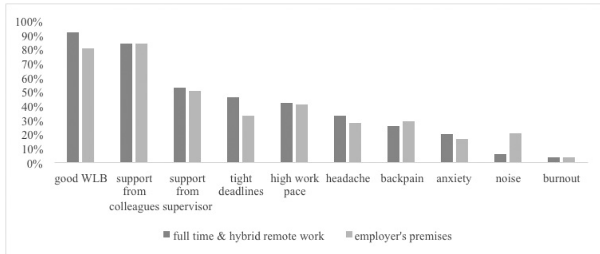
Source: Authors' elaboration based on Eurofound, EWCTS 2021

FIGURE 2. – *Exposure to OSH risks of employees in telework and working at employer's premises* in Poland



Source: Authors' elaboration based on Eurofound, EWCTS 2021

FIGURE 3. – *Exposure to OSH risks of employees in telework and working at employer's premises* in Estonia



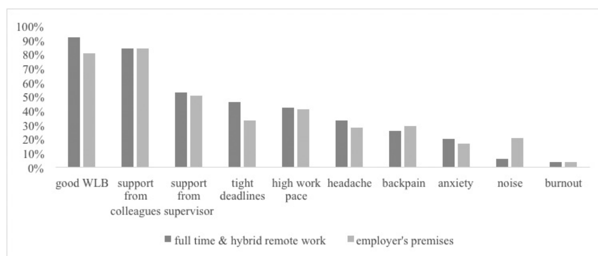
Source: Authors' elaboration based on Eurofound, EWCTS 2021

The lesser exposure to OSH hazards of Estonian remote workers, for example, lower level of back pain in employees who telework compared to employees working at employer's premises may be the result of advances in bipartite social dialogue on telework. In 2017 there was a Goodwill Agreement (non-binding national agreement) on telework between the Estonian Trade Union Confederation (EKAL) and the Employers Confederation, which was renewed in 2021. There have also been ongoing collective bargaining negotiations on an agreement on telework for the energy sector, with a proposal for full reimbursement of costs incurred by workers to adapt the workstations to ergonomic design requirements. Conversely, the bipartite social dialogue on telework has been much less prominent in Croatia, Poland, or Hungary. On the other hand, Estonia and Poland are the only CEE Member States that recorded a higher number of accidents in remote working in 2020 compared to 2013 (Figure 4). However, this latest available data only covers the period before the amended regulations on telework were introduced starting from the third wave of the pandemic in 2021. Nevertheless, all CEE Member States recorded a lower level of occupational accidents in remote working compared to the EU average, although this may be also due to poorer reporting in those countries.

In turn, there can be observed lesser exposure to occupational risk factors in those CEE Member States that have achieved a stronger social dialogue and established greater OSH employer obligations in telework. As observed by the surveyed trade unions, the strength and effective implementation of provisions guaranteeing OSH in telework depends on the

strength of social dialogue, but also on the culture of the organisation. In Slovenia, Slovakia or Latvia the surveyed trade unions reported some considerable achievements in collective bargaining on working conditions in telework. The Slovenian ZSSS trade union has concluded a number of sectoral agreements on telework, including collective agreements for real-estate business, public utility services, , and a collective agreement for the newspaper, publishing and bookselling sector, to name but a few. Whereas the Slovak KOZ and Latvian LBAS trade unions have been active in negotiating collective agreements on telework at the company level. For example, remote workers in Latvia and Slovakia enjoy greater social support at work than employees working at employer's premises as well as their counterparts in other CEE Member States (Figure 5 and 6). The exposure of remote workers to remaining riskfactors is at similar levels compared to the other countries in the region and higher than that of employees working at employer's premises. Nevertheless, additional statistical difference tests would be required to assess whether all these differences are significant, which the authors have not performed on this occasion as outside of the scope of the study. The protection of workers in telework may also be strongly shaped by the working culture, which varies across the CEE Member States, although may exhibit common cultural characteristics, inherited from the socioeconomic past and a similar transformation (if not a "shock therapy") to liberal democracies.

FIGURE 4. – *Persons reporting an accident at work and working from home [% of persons employed]*



Source: Authors' elaboration based on Eurostat, 2020 [hsw_ac14]; missing data for Czechia

FIGURE 5. – *Exposure to OSH risks of employees in telework and working at employer's premises* in Latvia

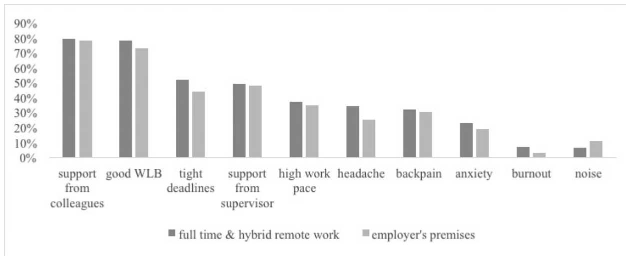
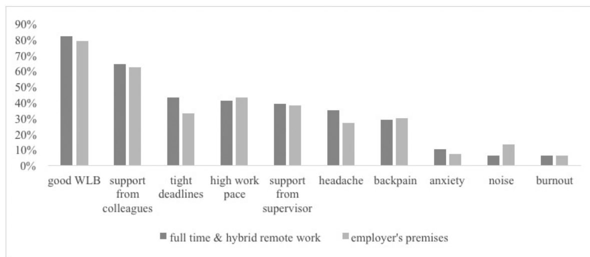


FIGURE 6. – *Exposure to OSH risks of employees in telework and working at employer's premises* in Slovakia



6. *Conclusions*

The challenges for trade unions concerning teleworking are primarily in the area of attracting new members. This topic has not been the focus of this paper. Undoubtedly, however, working away from the employer's premises with little interaction with other employees poses a challenge for organising.

The information we gathered from representatives of the trade union movement in CEE in the area of health and safety in remote working allows us to formulate the following assessment.

Unions have sought to maintain the same rules in the area of health and safety as for "classic" workers. Of course, certain challenges (such as the right to disconnect) have become more pronounced, but steadily the right to disconnect is not an issue that only affects remote workers.

Unions were put in a rather stalemate situation: on the one hand, a sizeable group of employees pushed hard for remote work (especially in the form of a hybrid solution) seeing it as a *de facto* tool to make working hours more flexible or to save time on commuting. To a lesser extent, there was pressure on employers to fully fund ergonomic workstations. Throughout the discourse on remote working, there was a strong emphasis on the employee's right to privacy, which does not allow the employer to "impose" working at a particular desk, chair or lighting. A discourse that boils down to the statement: "everyone has the right to furnish his or her home as he or she wishes" was clear.

At the same time, employers have not been eager to incur the additional costs of ergonomic equipment, which would have to be delivered to the employees' homes in most cases.

As we all know, the effects of not working ergonomically, working with poor lighting, working with an improper keyboard, will not be visible immediately. The effects will only reverberate through the employee's health years later. For many, the effects are too distant in time to see the causal relationship. This trivial thought also applies to the trade unions, who have, in our view, insufficiently emphasised the need to ensure an effective obligation on the part of the employer to guarantee work tools that meet health and safety requirements. With remote working, the focus was on psychosocial risks, which are of course very important (in the context of alienation of the remote worker or the blurring of the boundaries between work and leisure). However, the analysis shows that the classic problem of workstation ergonomics was too easily forgotten.

Abstract

The subject of this paper is the process of trade union involvement in the development of remote work arrangements in Central and Eastern Europe. We were interested in the area of securing the right to safe and healthy working conditions. The paper is based on a survey of trade unionists in CEE.

The consequences of poor ergonomics, inadequate lighting and inappropriate keyboards are not immediately visible and often affect workers' health years later. This delayed impact can obscure the causal link. In our view, trade unions have not sufficiently emphasised the employer's responsibility to provide safe work equipment. While discussions on remote work have prioritised psychosocial risks, the critical issue of workplace ergonomics has been overlooked, despite its longstanding importance.

Keywords

Remote work, Trade unions, Central and Eastern Europe, Health and safety.

Chiara Cristofolini

Digital Trade Unionism in the Making? Insights from the Italian Experience*

Contents: **1.** Introduction: workers' representation in the digital era. **2.** Digitalisation for trade unions renewal: challenges and opportunities. **3.** Workplace representation from a digital perspective. **4.** Workplace elections and online voting. **5.** Digitally driven strategies for workers' engagement outside the workplace. **6.** Conclusions: multi-speed digital trade unionism.

1. *Introduction: workers' representation in the digital era*

Digitalisation stands as one of the main drivers of work environment transformation[1]. With the increasing adoption of innovative technologies, enterprises are reshaping conventional business approaches and traditional employment structures. On the one hand, companies are relying more on

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[1] Tullini, *La digitalizzazione del lavoro, la produzione intelligente e il controllo tecnologico nell'impresa*, in Tullini (eds.), *Web e lavoro: profili evolutivi e di tutela*, Giappichelli, 2017, p. 3 ff.; Valenduc, Vendramin, *Digitalisation, between disruption and evolution*, in *Transfer*, 2017, 23, 2, p. 121 ff.; Tebano, *Lavoro, potere direttivo e trasformazioni organizzative*, Editoriale Scientifica, 2020; Novella, *Impresa*, in Novella, Tullini (eds.), *Lavoro digitale*, Giappichelli, 2022, p. 5 ff.; Eurofound, *Digitisation in the workplace, Luxembourg:* Publications Office of the European Union, 2021; Delfino, *Artificial Intelligence, Robotics and Fundamental Rights*, in *ILLeJ*, 2023, 16, 2, p. 35 ff.

flexible and precarious forms of employment[2]. On the other, there is a heightened demand for diverse work arrangements, such as remote and ICT-based mobile work. Initially seen as an exception in the workplace, remote work has surged in prominence, especially following the unprecedented global changes generated by the Covid-19 pandemic[3].

One common thread running through all such developments is the gradual disappearance of the workplace as a physical space. The massive introduction of information and communication technologies has given factories and offices a radically different shape as compared to the past. An increased number of workers – be they standard or non-standard – perform their activities in virtual offices or using hybrid modes (*e.g.*, working from home a few days a week). They work on-demand via apps (*e.g.*, riders and Uber workers), or are geographically dispersed in different locations (*e.g.*, posted workers). As a result, the shape, pace, and space of workers' daily routines are changing: in a growing number of cases, the presence of employees in offices or factories is no longer a categorical imperative.

Such workplace transformation poses significant challenges to workers' representation models[4]. Traditionally, trade unions strongly relied on in-per-

[2] Such as gig work and platform work. *See* Aloisi, *Platform work in Europe: Lessons learned, legal developments and challenges ahead*, in *ELLJ,* 2022, 13, 1, p. 4 ff.; Rosin, *Platform work and fixed-term employment regulation*, in *ELLJ* 2021, 12, 2, p. 156 ff.; Gumbrell-McCormick, *European Trade Unions and "Atypical" Workers*, in *IRJ*, 2011, 3, p. 293 ff.; Delfino, *Lavoro mediante piattaforme digitali, dialogo sociale europeo e partecipazione sindacale*, in *federalism.it*, 2023, 25, p. 171 ff.

[3] *See* the various contributions on remote work contained in Santagata de Castro, Monda (eds.), *Il lavoro a distanza: una prospettiva interna e comparata*, QDLM, 2022, 13; Senatori, Spinelli, *(Re-)Regulating Remote Work in the Post-pandemic scenario: Lessons from the Italian experience*, in *ILLeJ*, 2021, 14, 1, p. 209 ff.; Messenger, *Some reflections on the experience of telework during the Covid-19 pandemic: a paradigm shift and its implications for the world of work*, in Countouris, De Stefano, Piasna, Rainone (eds.), *The future of remote work*, Brussels: ETUI aisbl, 2023, p. 19 ff.

[4] Ales, *The impact of Automation and Robotics on Collective Labour Relations: Meeting an Unprecedented Challenge*, in Gyulavari, Menegatti, *Decent Work in the Digital Age. European and Comparative Perspective*, 2022, Bloomsbury Publishing, p. 39 ff.; D'Avino, *Workers' representation and union rights in the fourth industrial revolution: the Spanish case*, in this journal, 2022, 2, p. 45 ff.; Nissim, Simon, *The future of labor unions in the age of automation and the dawn of AI*, in *Technol. Soc.*, 2021, 67, 101732. Borelli et al., *Lavoro e tecnologie. Dizionario che cambia, "Digital Workplace"*, Giappichelli, 2022, p. 81; Donini, *Il luogo per l'esercizio dei diritti sindacali: l'unità produttiva nell'impresa frammentata*, in *LLI*, 2019, 5, 2, p. 98 ff.; Monda, *Lo Statuto alla prova di "Industria 4.0.": brevi riflessioni sulla c.d. disintermediazione sindacale*, in Rusciano, Gaeta, Zoppoli L. (eds.), *Mezzo secolo dallo Statuto dei lavoratori*, *QDLM*, 2020, p. 345 ff.

son interactions: union representatives would meet employees at the factory entrance or in production facilities and offices to directly discuss employment issues and present membership applications. The increased physical distance hinders conventional methods, making it more difficult for trade unions to engage and connect with workers.

These issues have led to a flourishing debate on the impact of digitalisation on collective labour relations, highlighting the need for trade unions to adapt their practices to the new environment[5]. Within this framework, scholars have recently begun investigating the role played by digitally driven strategies in overcoming the impact of physical distance[6]. Technology and digital devices are considered appropriate tools to strengthen the representative function of trade unions, especially in supporting the engagement of non-standard, hybrid and digital workers.

Building on this literature, the paper aims to contribute to the emerging debate on trade union renewal strategies, investigating the case of Italian trade unions. I start by highlighting the characteristics that make CGIL (Italian General Confederation of Labour), CISL (Italian Confederation of Trade Unions) and UIL (Italian Labour Union) theoretically well-suited for examining the digitally driven strategies and responses adopted to cope with the blending of physical and digital workspaces (§. 2). Then, I discuss the ability of such unions to act in the digital space. Firstly, I show the impact of

[5] Literature investigates the impact on the traditional industrial relations system (*see* BACCARO, HOWELL, *Trajectories of Neoliberal Transformation: European Industrial Relations since the 1970s*, CUP, 2017) and the challenges to the trade unions' power of representation (VANDAELE, *Will Trade Unions Survive in the Platform Economy? Emerging Patterns of Platform Workers' Collective Voice and Representation in Europe*, ETUI Working Paper, 2018; RECCHIA, *The collective representation of platform workers: struggles, achievements and opportunities*, in LO FARO (ed.), *New Technology and Labour Law. Selected topics*, Giappichelli, 2023, p. 153 ff.; GARGIULO, SARACINI, *Riflettendo su parti sociali e innovazione tecnologica: contenuti,* ratio e *metodo*, in GARGIULO, SARACINI (eds.), *Parti sociali e innovazione tecnologica*, *QDLM*, 2023, p. 9 ff.).

[6] PANAGIOTOPOULOS, BARNETT, *Social Media in Union Communications: An International Study with UNI Global Union Affiliates,* in *BJIR,* 2014, 53, 3, p. 508 ff.; ETUC, *Digitalisation and workers participation: What trade unions, company level workers and online platform workers in Europe think*, 2018, available at: https://www.etuc.org/sites/default/files/publication/file/2018-09/Voss%20Report%20EN2.pdf; GEELAN, *The internet, social media and trade union revitalization: Still behind the digital curve or catching up?*, in *NTWE*, 2021, 36, 124 ff.; CARNEIRO, COSTA, *Digital unionism as a renewal strategy? Social media use by trade union confederations*, in *JIR*, 2020, 64, 1, p. 26 ff.; FORD, SINPENG, *Digital activism as a pathway to trade union revitalization*, in *IJLR*, 2022, 1-2, p. 48 ff.

digitalisation on the exercise of trade union rights in the workplace and the role played by collective bargaining in introducing digital union rights (§§ 3-4). Secondly, I discuss the use of digital communication tools to shape workers' collective will and collective interest (§ 5). Lastly, I draw some conclusions on the state and shape of the current union representation model (§ 6).

2. *Digitalisation for trade unions renewal: challenges and opportunities*

From the trade unions' perspective, digitalisation can be depicted as a two-faced Janus, generating both challenges and opportunities.

On the one hand, technology fosters fragmentation and disintermediation. Social media and digital devices promote direct relationships among employees, companies and consumers, providing immediate access to information as well as virtual platforms for communication. These developments empower individual workers but reduce their interest in intermediation and representation[7].

The most recent developments suggest that the problem of disintermediation is now coupled with that of digital disruptors. According to a TUC report, in the last few years there has been an explosion in "new non-traditional actors providing ways for workers to access support and advice at work, or to come together to campaign or self-organise"[8]. Some of these so-called digital disruptors are still in the start-up stage, but others are already engaging hundreds of thousands of workers. Such developments suggest that

[7] *See* NEGROPONTE, *Being Digital*, Alfred A. Knopf, 1995; SAUNDRY, STUART, ANTCLIFF, *Broadcasting discontent - Freelancers, trade unions and the internet*, in *NTWE*, 2007, 22, 2, p. 178 ff.; WELLMAN, *Physical Place and Cyberplace: The Rise of Personalized Networking*, in *IJURR*, 2001, 25, 2, p. 227 ff.; KERR, WADDINGTON, *E-communications: An aspect of union renewal or merely doing things electronically?*, in *BJIR*, 52, 4, 2014, p. 658 ff.; CALVELLINI, *Nuove tecnologie e partecipazione diretta dei lavoratori: problemi e prospettive*, in GARGIULO, SARACINI, *cit.*, pp. 17-23. On the issue of disintermediation see also the detailed analysis by CARUSO, *La rappresentanza delle organizzazioni di interessi tra disintermediazione e re-intermediazione*, in *WP C.S.D.L.E. "Massimo D'Antona".IT -326/2017*.

[8] TUC DIGITAL LAB, *Unions and digital disruption*, February 2021, pp. 4-5. As a result, the TUC called on trade unions to engage with digital innovation, drawing on lessons from the ways these so-called digital disruptors operate.

intermediation might not disappear in the digital age, but trade unions may no longer be the (only) actors representing the interests of workers.

However, the literature suggests that digitalisation can also be a harbinger of opportunities. Scholars emphasise that information and communication technologies (ICTs) could play a significant role in enhancing trade union functions: providing innovative devices to support and organise collective actions, promoting collective bargaining, developing new trade union services, and creating national and international cooperation networkers with relevant stakeholders to promote workers' rights[9].

Digital union tools have become more relevant by virtue of the diversity and fragmentation of workplaces. Technology allows to overcome the physical barriers to communication, and it may be used to engage the growing number of workers situated in virtual environments or dispersed across different locations[10].

Globally, trade unions are starting to explore the opportunities of technological developments as part of their renewal strategies. In the UK, for instance, trade unions are using technology such as apps and interactive platforms to address the challenges posed by the "digital disruptors"[11]. In 2019, the Trade Union Congress (TUC) established a dedicated Digital Lab to create strategic principles for unions navigating digital transformation and to identify best practices.

The Italian trade union system presents interesting features for furthering the discussion on the opportunities and challenges of digitally driven strategies to defend the interests of workers and cope with the blurring of physical workplaces.

Firstly, Italian trade unions are considered to be comparatively strong

[9] SAUNDRY, STUART, ANTCLIFF, *cit.*, p. 179; SHOSTAK, *CyberUnion: Empowering Labour through Computer Technology*, M. E. Sharpe, 1999; WARD, LUSOLI, *Dinosaurs in Cyberspace?: British Trade Unions and the Internet*, in *Eur. J. Commun.*, 2003, 18, 2, p. 147 ff.; DIAMOND, FREEMAN, *Will unionism prosper in cyber-space? The promise of the internet for employee organization*, in *BJIR*, 2002, p. 569 ff.

[10] FORD, SINPENG, *cit.*, p. 48 ff.; CABEZA, *Representation, Trade Union Activity and Technologies*, in *Onati Socio-Leg. Ser*, 2019, 9, 1, p. 96 ff.

[11] TUC DIGITAL LAB, *cit.*; SIMMS, HOLGATE, ROPER, *The Trades Union Congress 150 years on*, in *Empl. Relat*, 2019, 41, 2, p. 331 ff. On the Spanish case, *see* D'AVINO, *cit.*, pp. 47-48; on the Australian case, *see* FORSYTH, *The future of Unions and worker representation. The digital picket line*, Hart Publishing, 2022, pp. 96-97.

in terms of collective bargaining coverage and union density rate. According to the ICTWSS database, collective bargaining has almost 100% coverage, and trade union density amounts to 32.5%. Although the latest empirical studies question the official density figure – pointing to an overestimation by around ten percentage points[12] – the overall positive data make the Italian case an experience from which valuable lessons can be drawn.

At the same time, the three most representative trade unions, CGIL, CISL and UIL, are operating in an increasingly challenging environment. Since the 1990s, their representative power has been eroded by the growth of grassroots unionism, such as COBAS and USB[13]. Moreover, looking closely at the trade union membership figures, it emerges that the membership is increasingly composed of pensioners. In CGIL, pensioners have been the major category since 1993; in CISL, the number of pensioners exceeded that of employed people for the first time in 1998[14].

The competitive landscape and the high rate of pensioners determine distinct challenges for the historically most representative Italian trade unions. Indeed, this scenario can drive CGIL, CISL and UIL in two opposite directions: it could trap them in the here-and-now, given the lower digital skills of older people, or it could act as a trigger for innovation, showing the need to expand the membership. As the impact of digital transformation on the workforce continues to grow[15], it is reasonable to conclude that prospective

[12] Batut, Lojkine, Santini, *"Which side are you on?" A historical study of union membership composition in seven Western countries*, in *IR*, 2023, 63(2), p. 12 ff.

[13] On such independent, rank-and-file organisations, *see* Armeni, *Gli extraconfederali. Cobas e autonomi: chi sono, cosa pensano, cosa vogliono*, Roma: Lavoro, 1988.

[14] Carrieri, Feltrin, *Al bivio. Lavoro, sindacato e rappresentanza nell'Italia d'oggi*, Interventi Donzelli, 2016, pp. 32-34.

[15] Firstly, 56% of workers now use at least one of the typical tools of advanced technologies, such as automated machinery and information-sharing computer systems (*see* Canal, Gosetti, Luppi, *Qualità del lavoro e digitalizzazione. Riflessioni aperte sul caso italiano*, in *SINAPPSI*, 2024, 2, pp. 74-75). Moreover, 1.5% of the population aged between 15 and 64 work through digital platforms, standing halfway at the European average, which amounts to 3% (see ISTAT, *Il lavoro tramite piattaforma digitale: differenze per età, genere e titolo di studio*, 2022, 21st February 2024). Lastly, the number of agile workers and smart workers has exponentially increased compared to the pre-Covid period, with almost all large companies (96%) introducing forms of remote working (such data are discussed by the Observatory on Smart Working of the School of Management of the Polytechnic University of Milan, and are available at the website: https://www.osservatori.net/it/ricerche/comunicati-stampa/smart-working-italia-numeri-trend).

members are also experiencing significant effects due to digitalisation. This trend underscores the necessity for the implementation of digital renewal strategies.

All these features make the Italian case particularly compelling. While the data show that the three most representative trade unions have successfully organised and represented workers in factories in the past, the new context indicates that many challenges are still ahead.

3. *Workplace representation from a digital perspective*

The Italian Constitution expressly protects freedom of association and the right to organise. Article 39(1) states that "Trade unions may be freely established", thereby safeguarding both the individual and the collective dimensions in a complementary and mutually reinforcing manner[16]. The constitutional protection is further strengthened by the 1970 Workers' Statute (Law No. 300 of 20th May 1970), which affirms the right of all workers to form and belong to trade unions and to engage in union activities within the workplace (Article 14).

The Workers' Statute introduced a system for representing workers at the company level through the so-called "*rappresentanze sindacali aziendali*" (company trade union representatives, RSAs). According to Article 19, RSAs can be established in a production unit at the initiative of employees who are represented by the trade unions that have stipulated the collective agreements applicable in that unit or that have participated in the collective bargaining process[17].

[16] Without claiming to be exhaustive, *see* the pivotal works of GIUGNI, *Art. 39*, in BRANCA (ed), *Commentario della Costituzione*, I, Zanichelli-Il Foro, p. 257 ff.; RUSCIANO, *Lettura e rilettura dell'art. 39 della Costituzione*, in *DLM*, 2013, 2, p. 263 ff.; NAPOLI, *Il sindacato*, Vita e Pensiero; NOGLER, *Dal «principio lavorista» al diritto costituzionale sull'attività umana: primo abbozzo*, in DELLA MORTE, DE MARTINO, RONCHETTI (eds.) *L'attualità dei principi fondamentali della Costituzione dopo settant'anni*, il Mulino, 2020, p. 190.

[17] Following a referendum, Article 19 was initially amended by Presidential Decree 28th July 1995, n. 312 (ALLEVA, *Quesiti referendari e proposte di innovazione legislativa*, in *RGL*, 1994, 1, p. 537 ff.). Moreover, in 2013, the Constitutional Court (Const. Court., 23rd July 2013, No. 231) declared the constitutional illegitimacy of such article insofar as it does not provide that workplace representation may also be constituted by trade unions which, although not signatories to the collective agreements applied in the production unit have nevertheless participated in

This system has since been enriched by the introduction of "*rappresentanze sindacali unitarie*" (unitary workplace union structure, RSUs), following the inter-confederal agreement of 23rd July 1993, between Confindustria and CGIL, CISL, UIL. RSUs are elected by all employees, regardless of their union affiliation, and are formally independent from trade unions. The single channel of representation at the company level – *id est*, the RSU – has been further refined by the inter-sectoral agreement on representation between Confindustria and CGIL, CISL and UIL of 14th January 2014. This agreement marked a shift to a more pluralistic approach that aimed at loosening the grip of the three main union confederations over company-level representation, especially through RSAs[18]. Nonetheless, CGIL, CISL, and UIL still play an influential role within RSUs, because workers' representatives are often elected from candidates of trade union lists[19].

Therefore, both RSAs and RSUs are essential parts of the Italian trade union model of workplace representation.

The Worker's Statute confers upon these bodies a broad spectrum of rights, including the right to conduct unlimited meetings outside of regular hours and to hold paid assemblies during working hours (subject to the limits outlined in Article 20 of the Statute or the relevant collective agreement). Furthermore, these bodies are entitled to organise on-site referendums (Article 21, Workers' Statute), to use the union notice boards (Article 25, Workers' Statute), and to recruit members in the workplace (Article 26, Workers' Statute).

These provisions have been instrumental in enabling union representa-

the negotiations relating to the same agreements. Among the many contributions on the subject, *see* the analysis of Carinci F., *Il buio oltre la siepe: Corte costituzionale 23 luglio 2013, n. 231*, in *DRI*, 2013, 4, p. 899 ff.; Pessi R., *Rappresentanza e rappresentatività sindacale tra contrattazione collettiva e giurisprudenza costituzionale*, in *DRI*, 2013, 4, p. 950 ff.; Caruso B., *La Corte costituzionale tra don Abbondio e il passero solitario: il sistema di rappresentanza dopo la sentenza n. 213/13,* in *RIDL*, 2013, 4, p. 900 ff.; Del Punta R., *L'art. 19 Statuto dei lavoratori davanti alla Consulta: una pronuncia condivisibile ma interlocutoria*, in *LD*, 2013, 4, p. 527 ff.; Liso F., Magnani M., Salomone R., *Opinioni sul nuovo art. 19 dello Statuto dei lavoratori*, in *DLRI*, 2014, 1, p. 105 ff. *See*, also, Zoppoli A., *Art. 19 dello Statuto dei lavoratori, democrazia sindacale e realismo della Consulta nella sentenza n. 213/2013*, in Zoppoli L., Zoppoli A., Delfino (eds.), *Una nuova costituzione per il Sistema di relazioni sindacali?*, Editoriale Scientifica, 2014, p. 415 ff.

[18] The innovations are discussed at length by Zoppoli L. *Le nuove rappresentanze sindacali unitarie e il gattopardo democratico*, in *RIDL*, 2014, 3, p. 65 ff.

[19] Damiani, Pompei, Ricci, *Opting Out, Collective Contracts and Labour Flexibility: Firm-Level Evidence for the Italian Case*, in *BJIR*, 2020, 58,3, pp. 558-562.

tives to expand their influence in workplaces. However, the rise of digitalisation has prompted a debate on the adequacy of the 1970 Workers' Statute[20]. Its provisions were indeed primarily designed for physical work environments, encompassing aspects such as the exercise of union rights within the "production unit" and the trade unions' prerogative to "affix" union materials on boards. The rigid "material" requirements hinder their applicability in a digital context, posing challenges to the capacity of trade unions to effectively safeguard the interests of workers in the workplace.

In response, since the mid-1990s, social partners have engaged in negotiations on the digitalisation of the rights established by the Workers' Statute[21]. Until recently, however, these collective agreements were exceptions to the norm, which typically mandated that union rights be exercised only on-site[22]. This situation reflected the lower level of digitalisation in Italy, which fell behind in the EU Digital Economy and Society Index and in the digital competencies ranking[23]. Nevertheless, following the national trend – that positions Italy at the top of the overperforming countries by virtue of the progress in the past 5 years – the transition towards digitalisation has ac-

[20] MAGNANI, *Nuove tecnologie e diritti sindacali*, in *LLI*, 2019, 5, p. 4; MONDA, *cit.*, p. 345 ff.; MARAZZA, *Tecnologie digitali, poteri datoriali e diritti dei lavoratori. Brevi annotazioni introduttive*, in BELLAVISTA, SANTUCCI (eds.), *Tecnologie datoriali, poteri datoriali e diritti dei lavoratori*, Giappichelli, 2022, p. 9; ANIBALLI, *Diritti e libertà sindacali nell'ecosistema digitale*, Edizioni Scientifiche Italiane, 2022, p. 29 ff.; TAMPIERI, *È antisindacale il divieto assoluto di volantinaggio «elettronico» tramite la e-mail aziendale*, in *LG*, 2023, p. 831.

[21] The first dispute on the issue dates back to Pret. Milano (Magistrate's Court of Milan), 3rd April 1995, in *RIDL*, 1995, 2, p. 758, on which BELLAVISTA, *Il diritto di affissione ex art. 25 St. lav. e i sistemi aziendali di comunicazione elettronica con i dipendenti*.

[22] The pace of digital transformation in the Italian industrial relations system was slow, especially when compared to other experiences. In the United States and the United Kingdom, the debate on e-unions started as early as 2000, when scholars began to examine the ability of trade unions to face the challenges and seize the opportunities presented by digitalisation (*see* FREEMAN, *The advent of Opens Source Unionism?*, in *CPOIB*, 2005, 1 (2-3), 2005, p. 79 ff; WARD, LUSOLI, *cit.*, p. 147 ff.; DIAMOND, FREEMAN, *cit.*, p. 569 ff.). In Germany, the Reform of the Works Constitution Act of 23rd July 2001 (*Gesetz zur Reform des Betribsverfassungsgesetzes* – BetrVerf-Reformgesetz, BGBl. I 2001 S. 1852) already introduced the information and communication technology (*Informations-und Kommunikationstechnik*) among the goods and equipment that the employer must make available to the work councils (§ 40 BetrVG) (recently on the topic DÄUBLER, *Interessenvertretung durch Betriebsrat und Gewerkschaften im digitalen Betrieb*, HIS-Schriftenreihe, Bund Verlag).

[23] ISTAT, *Cittadini e competenze digitali*, 22th June 2023, p. 2.

celerated in recent years, flowing into a profound change with the Covid-19 pandemic[24].

The pandemic crisis triggered a digital renewal. During this time, trade unions were prevented from, *inter alia*, holding on-site assemblies (Article 20, Workers' Statute) and referendums (Article 21, Workers' Statute), using the union notice boards (Article 25, Workers' Statute) and recruiting members within the workplace (Article 26, Workers' Statute). Social partners responded to the restrictions by prompting a sudden digitalisation, either through collective agreements or informal practices[25]: in many cases, RSAs and RSUs started to use the electronic union notice boards (including virtual spaces on the company intranet or cloud)[26], as well as to hold online assemblies, referendums, and consultations[27].

The emergency phase compelled social partners to overcome the technical problems, such as the provision of technological infrastructure, and the legal issues, such as compliance with privacy rules[28]. But most importantly, the crises

[24] UE COMM., *Digital Economy and Society Index (DESI) 2022*, Report, 2022, p. 17 *available at: https://digital-strategy.ec.europa.eu/en/policies/desi*.

[25] In Italy, it was the social partners who reacted promptly, as shown by the guidelines issued by Fiom-CGIL, Fim-CISL, Uilm, Federmeccanica, and Assistal on 18th June 2020, acknowledging the use of IT tools for exercising specific trade union rights. This contrasts with Germany, where specific provisions were introduced in response to the Covid-19 pandemic permitting meetings to be held online (§129, BetrVG as amended first by the *Gesetz zur Stärkung der Impfprävention gegen Covid-19 und zur Änderung weiterer Vorschriften im Zusammenhang mit der Covid-19 Pandemie* – 10.12.2021, BGBl. I S. 5162, and then by *Gesetz zur Stärkung des Schutzes der Bevölkerung und insbesondere vulnerabler Personengruppen vor Covid-19* – 16.09.2022, BGBl. I S. 1454).

[26] *See* for instance, national collective agreement, Assotelecomunicazioni-Asstel and Slc-CGIL, Fistel-CISL, Uilcom-UIL, 12 November 2020; company agreement, Tim s.p.a. and Slc-CGIL, Fistel-CISL, Uilcom-UIL, UGL Telecomunicazioni, 4th August 2020; company agreement, ENI s.p.a. and Filctem-CGIL, Femca-CISL, Uiltec-UIL, 28th October 2021.

[27] *See* company agreement, Intesa Sanpaolo s.p.a. and Fabi, First-CISL, Fisac-CGIL, Uilca-UIL, Unisin, 29th April 2020; company agreement, Tim s.p.a. and Slc-CGIL, Fistel-CISL, Uilcom-UIL, UGL Telecomunicazioni, 4th August 2020; national collective agreement, ABI and Fabi, First-CISL, Fisac-CGIL, Uilca-UIL, Unisin, 21st December 2020; company agreement, ENI s.p.a. and Filctem-CGIL, Femca-CISL, Uiltec-UIL, 28th October 2021; national collective agreement, Assolavoro and Felsa-CISL, Nidil-CGIL, Uiltemp, *Accordo in materia di proroga e rinnovo delle disposizioni urgenti per fronteggiare l'emergenza epidemiologica Covid-19*, 10th February 2021. On the topic: DONÀ, MAROCCO, *Diritto di assemblea ex art. 20 St. lav. e nuove tecnologie digitali*, in *LLI*, 2019, 5, 2, p. R7 ff.; CASSAR, *Lavoro 2.0 e diritti sindacali: spunti di riflessione e proposte operative su tele-assemblea e referendum sindacale online*, in *LP*, 2020, 7-8, p. 422 ff.

[28] In many cases, the enterprises agreed to provide trade unions with the necessary plat-

led social partners to overcome cultural resistance. As a result, after the pandemic phase, the trend towards expanding the use of technology still remains.

This progression is largely attributed to the growing remotisation of work. Social partners have recognised that workers without a designated workplace, such as teleworkers, encounter significant challenges in accessing union materials and information related to union activities, particularly when they are disseminated solely through trade union notice boards located in company offices or during in-person assemblies. As a result, an increasing number of national collective agreements and company agreements stipulated by branch trade unions affiliated with CIGL, CISL and UIL address the specific needs of remote workers, ensuring that they are afforded the same union rights and freedoms as their on-site counterparts[29].

This trend is also affecting those sectors characterised by the geographic dispersion of employees, such as the agency work industry[30], reflecting the growing recognition among CIGL, CISL and UIL of the need to digitally organise workers to tackle the challenges arising from the absence of a traditional workplace.

However, advancement in this area remains highly fragmented. The spread of digitalisation is not uniform across all sectors and territories; it is rather significantly influenced by the bargaining power of the respective trade unions. A significant example is the renewal of the collective agreement within the cooperative sector, signed on 26th January 2024, which notably lacks any provisions for digital trade union rights[31].

forms and technology to exercise trade unions' rights (*see* ANIBALLI, *Observatory on the digitalisation of Industrial Relations*, Report, September 2023, p. 6). However, trade unions have made efforts to develop their own technological network. For instance, CGIL created the platform Polis (now FuturaLab) to hold assemblies and union elections. This platform was subsequently tested for negotiations and elections of the company's workers' representatives.

[29] *See*: national collective agreement, Confindustria Energia and Filctem-CGIL, Femca-CISL, Uiltec-CISL, 21st July 2022, Part I, Section A, "Industrial Relations", let. d); national collective agreement, Conflavoro Pmi and Fesica-CONFSAL, 28th February 2022; company agreement on smart working, Fastweb s.p.a. and Slc-CGIL, Fistel-CISL, Uilcom-UIL, UGL Telecomunicazioni, 27th September 2023; company agreement, Cellniex Italia s.p.a and Slc-CGIL, Fistel-CISL, Uilcom-UIL, 1st April 2022.

[30] The collective agreement for staffing agencies provides for electronic notice boards for the dissemination of information, as well as a telematic platform for the exchange of information between the trade union and employers called SIU (Article 1 and Article 53, Assolavoro and Nidil-CGIL, Felsa-CISL, UilTemp, 15th October 2019).

[31] National collective agreement, Associazione Generale Cooperative italiane – solidarietà,

Moreover, the digitalisation transformation does not cover all the rights protected by the Workers' Statute. Only a limited number of agreements acknowledge, for instance, the right of workers to participate in online assemblies. The focus has primarily been on the right to use a union board, as outlined in Article 25 of the Workers' Statute or to implement new tools for recruitment.

4. *Workplace elections and online voting*

The broad-based involvement of employees at the company level also requires that they actively exercise their right to establish RSAs or RSUs. However, the shift towards flexible and remote work arrangements led to a digital task management conducted outside of the traditional workplace, which may limit workers' physical presence on-site during election days. Consequently, there is an increasing demand for workplace elections to incorporate online voting alongside conventional methods of in-person voting at the ballot box.

On this matter, it is important to note that Italy lacks a comprehensive legal framework governing collective bargaining. Instead, the regulation has been developed autonomously through a series of agreements established among the three historically most representative union confederations – CGIL, CISL, and UIL – and employer associations such as Confindustria[32].

In particular, the electoral procedure for establishing RSUs is currently governed by the inter-confederal agreement of 10th January 2014, which does not mention online voting. On the contrary, most rules implicitly entail analogue voting[33]: some provisions include references to the "production unit",

Confcooperative Federsolidarietà, Legacoopsociali and Fp-CGIL, Fp-CISL, Fisascat-CISL, Fpl-UIL; Uiltucs-UIL, 26th January 2024.

[32] The most relevant agreement on the matter is the inter-confederal agreement of 23rd July 1993 between Confindustria and CGIL, CISL and UIL which, as indicated above, introduced the RSUs. Further inter-confederal agreements followed, including those of 2009, 2011, 2013, and 2014. The three framework agreements adopted by the social partners between 2011 and 2014 produced new rules for collective bargaining, which remain in place today.

[33] See Bonalumi, *Testo unico sulla rappresentanza e votazioni digitali. Questioni aperte e prospettive*, in *Federalismi*, 2023, 21, pp. 175-176; Aniballi, *Diritti e libertà sindacali nell'ecosistema digitale*, cit., p. 178 ff.

and others to the existence of multiple voting locations in case of several production sites[34].

During the pandemic, this framework did not prevent trade unions from using online voting. Although only a few cases involved collective agreements or guidelines that explicitly endorsed, even indirectly, the use of electronic voting[35], digital devices were employed to facilitate elections for the workers' representatives in the company.

Following the conclusion of the emergency period, this practice persists in specific digitalised sectors, such as telecommunication and banking. This is on the argument that digital devices facilitate more straightforward consultations with workers, allowing for the inclusion of those not physically present at the employers' premises, thereby potentially enhancing voters' turnout[36].

However, the regulatory uncertainty is triggering conflicts on the legitimacy of the elections, so much so that, on several occasions, online voting has been questioned before the Committee of Guarantors[37].

[34] *See* the Third Section, "Disciplina della elezione della RSU", of the Second Part, "Regolamentazione delle rappresentanze in azienda" of the Agreement.

[35] The national collective agreement signed by Assotelecomunicazioni-Asstel and Slc-CGIL, Fistel-CISL, Uilcom-UIL, on 12th November 2020, entirely bargained and signed remotely, recognised the right of the Electoral Commission to determine the electoral procedure, provided that the system promotes the "highest workers participation" (Article 8, (5)). The company agreement Vodafone Italia s.p.a. and Slc-CGIL, Fistel-CISL, Uilcom-UIL, 29th October 2020, specifies that the right to assembly include that of voting online. The company agreement Olivetti s.p.a., and Slc-CGIL, Fistel-CISL, Unilcom-Uil, UGL Telecomunicazioni, 28th September 2020, as well as the company agreement ENI s.p.a. and Filctem-CGIL, Femca-CISL, Uiltec-UIL, 28th October 2021, state that remote works and on-site workers should enjoy "the same trade union rights and freedoms".

[36] Daniele Carchidi (Slc-CGIL), *Innovazione digitale nella partecipazione Sindacale*, Webinar, 5th December 2023. Research studies conducted in the early 2000s in the UK provide evidence for this premise, showing that the use of online ballots for pre-strike elections led to increased participation in strikes and higher acceptance rates of collective agreements (*see* DIAMOND, FREEMAN, *cit.*, p. 569 ff. On the topic of online voting, *see* also GREENE, KIRTON, *Possibilities for remote participation in trade unions: mobilising women activists*, in *IRJ*, 2003, 34, 4, p. 319 ff.).

[37] Article 20, Section 2, inter-confederal agreement of 10th January 2014, states that appeals against the decisions of the Electoral Commission shall be filed within 10 days to the Committee of Guarantors. This Committee is composed, at the provincial level, of a member designated by each trade union, which submitted a list of candidates concerned by the appeal, a representative of the local employers' association, and is chaired by the Director of the Territorial Directorate of Labour.

The Committee has so far taken the view that the inter-confederal agreement shall be interpreted extensively as long as the intention of the contractual parties and workers' fundamental rights are preserved. Therefore, it concluded that the online voting system is legitimate if it provides the same guarantees as analogue voting, namely the secrecy of voting, the privacy of users, and the identity of electors[38].

Nonetheless, the existing framework remains ambiguous. In the public sector, for instance, the competent authority for assessing trade union representativeness excluded, from the final count, votes cast through online voting methods. This decision was based on the claim that such methods are not explicitly mentioned or addressed by any framework agreement governing workplace elections[39].

Moreover, online voting presents unique challenges that do not occur in conventional voting methods. Indeed, information security reframes conventional issues such as privacy protection and secrecy of the voting process[40]. While a broad interpretation of the 2014 inter-confederal agreement – or, more precisely, an interpretation from an evolutionary standpoint – is theoretically valid, the actual evaluation of compliance with standards for confidentiality and computer security requires the establishment of clear benchmarks. And these benchmarks cannot be easily inferred from interpretation alone.

This is highlighted by the recent German draft bill to reform the *Betriebsverfassungsgesetz* (BetrVG, Works Constitution Act of 25th September 2001, as amended last in July 2024)[41]. The proposal introduces the possibility

[38] The record of the Committee of Guarantors' meeting is available on the LinkedIn page of the Observatory on the digitalisation of Industrial Relations.

[39] A dispute emerged after USB-Pubblico impiego filed a complaint with the Provincial Committee of Guarantors. The Committee upheld the decision of the Electoral Commission to use online voting to elect the unitary workplace union structure. However, the same results were later deemed invalid by the Joint Committee at ARAN due to the voting method used. On the issue *see*, BONALUMI, *cit.*, pp. 182-183. Regarding the role and functions of the Joint Committee, *see* Protocollo di intesa per la costituzione ed il funzionamento del Comitato paritetico di cui all'art. 43 del d.lgs. 165/2001 (tornata 2022-2024), adopted on 2nd November 2021.

[40] These issues are analysed by ANIBALLI, *Diritti e libertà sindacali nell'ecosistema digitale*, cit., p. 178 ff.

[41] Originally adopted in 1972, it was newly published on 25th September 2001 and last amended by Article 1 of the Act of 19th July 2024.

to vote online (§ 18a Ref-E-BetrVG) with the aim of making works council elections more resilient to digitalisation transformation[42].

The draft bill goes beyond a mere legitimation of the use of online voting; it provides a detailed set of comprehensive and stringent requirements designed to safeguard the integrity of the voting process. These provisions aim to ensure that each cast vote is secure and confidential, preventing any form of external interference and eliminating the risk of double voting. For instance, the draft bill mandates that elections must comply with the "Protection Profile for E-Voting Systems for non-political Elections" established by the German Federal Office for Information Security[43]. Additionally, when preparing and conducting the online voting, the election committee is required to adhere to the high protection standards set forth in the technical guidelines from the German Federal Office for Information Security[44].

The German Bill highlights that information security should not rely on individual agreements or be subject to case-by-case judgements. Instead, there should be a comprehensive framework applicable to all electoral procedures. Consequently, social partners will need to establish regulations for the electoral process to create a unified framework. This is crucial to prevent, as the most recent elections have shown[45], the voting method from becoming a new field of conflict.

[42] Referentenentwurf des Bundesministeriums für Arbeit und Soziales und des Bundesministeriums für Wirtschaft und Kilmaschutz - *Entwurf eines Gesetzes zur Stärkung der Tarifautonomie durch dies Sicherung von Tariftreue bei der Vergabe öffentlicher Aufträge des Bundes und weitere Maßnahmen* (Tariftreuegesetz) presented at the beginning of September 2024, available at: https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Referentenentwuerfe/tariftreuegesetz.pdf?__blob=publicationFile&v=3. The Draft Bill states that, as part of the trial of online works council elections, the option of casting votes electronically is to be created for the regular works council elections in companies where a works council already exists. Online voting is offered as an additional option alongside traditional voting methods (ballot box and postal voting). The decision to implement online voting in a particular company is to be made by the works council and the employer. The final decision on the use of online voting is to be made by the election committee responsible for conducting the works council election.

[43] *See* Bundesamt für Sicherheit in der Informationstechnik, *Protection Profile for E-Voting Systems for non-political Elections*, BSI-CC-PP-0121, 2023.

[44] *See* Bundesamt für Sicherheit in der Informationstechnik, *Technische Richtlinie TR-03169 IT-sicherheitstechnische Anforderungen zur Durchführung von nicht-politischen Online-Wahlen und-Abstimmungen*, 2023.

[45] For instance, in 2022 online voting was rejected during the election of the unitary workplace union structure in the company Luxottica (*see*: CISL Quotidiano Veneto, *RSU*

5. *Digitally driven strategies for workers' engagement outside the workplace*

The digitalisation of company trade union rights, discussed in the previous paragraphs, forms only one piece of a larger picture that revolves around the increased use of technology to shape workers' collective will and collective interest. The ongoing renewal process currently lacks the cohesive framework that characterises other trade union movements, where digital tools have been established for some time[46]. Nonetheless, digital trade unionism has emerged as a pivotal topic of discussion during the most recent organisational assemblies of CGIL, CISL and UIL[47]. The actions implemented by these confederations present a range of distinct characteristics, yet they converge on several key objectives.

Firstly, there is a concerted effort to enhance and streamline processes

Luxottica, Femca Cisl primo sindacato, https://maglietteblu.it/wp-content/uploads/2022/07/Corriere-delle-Alpi_FEMCA_CISL_primo_sindacato.pdf); in another case, the RSU had decided to hold the next election online, but Uilm opposed this decision (*see* Uilm, *St di Agrate: voto elettronico per l'elezione delle RSU?, No, grazie*, available at https://www.uilmnazionale.it/st-di-agrate-voto-elettronico-per-lelezione-delle-rsu-no-grazie/).

[46] Digital transformation is a significant focus for the renewal strategies of British trade unions. It is based on the idea that investing in technology and developing new tools "can help make the organisation of hard-to-reach workers more economically viable" (Tait, *Future Unions: Towards a Membership Renaissance in the Private Sector*, The Changing Work Centre, November 2017, pp. 10-11). Moreover, digital tools are seen as essential for engaging young workers (Coatman, *The Missing Half Million: How Unions Can Transform Themselves to be a Movement of Young Workers*, TUC, January 2020) and fostering a "sense of community" among geographically dispersed workers (Brock, *Getting Organised: Low-Paid Self-Employment and Trade Unions, The Changing Work Centre*, June 2019, p. 12). Lastly, technology is viewed as a crucial means to tackle the challenges posed by digital disrupters (TUC Digital Lab, *cit.*, pp. 7-11). For further reference *see*: Simms, Holgate, Roper, *cit.*, p. 331 ff.; Forsyth, *cit.*, p. 126 ff.

[47] The organisational assembly takes place every four years and focuses on administrative matters relevant to achieving the union's strategic agenda. At the latest events, trade unions discussed the reform of their communication system to speed up the use of modern and digital channels. *See*, for instance, CGIL del Trentino, *CGIL 2030. Il lavoro crea il futuro, Organisational Assembly*, 2021, p. 23, *https://www.cgil.tn.it/news/detail?id=5146*; CISL-Scuola, *Documento conclusivo. Assemblea Organizzativa Nazionale*, 18th October 2023, *https://www.cislscuola.it/uploads/media/asse-org-18102023-doc-finale.pdf*; Fnp-CISL, *Guidiamo il cambiamento. Assemblea nazionale organizzativa*, 16-17th November 2023, https://www.pensionati.cisl.it/public/pdf/pdf_1095_ASS.%20ORG.%20FNP%202023%20relazione%20Segretaria%20nazionale%20Foresi.pdf; CISL, *Guidiamo il cambiamento. Assemblea Organizzativa Nazionale CISL*, 5-6th December 2023, p. 9 https://www.faicisl.it/attachments/article/4226/Fai%20Proposte%20n.%207-9%20Luglio-Settembre%202023.pdf.

and procedures to support operational efficiency and reduce costs. Secondly, a critical focus is placed on engaging members and delegates with tailored communications. Thirdly, these initiatives strive to create a sense of community across geographic distances. This includes a commitment to connecting with a diverse array of workers, such as gig workers, platform workers and remote workers. The latter objective is particularly significant in the context of this paper, as trade unions introduce digital tools specifically designed to address workplace fragmentation. This is all the more relevant given the existing legislative gaps in workplace representation[48]. Indeed, as discussed earlier, the Workers' Statute fails to support the participation of digital or hybrid workers, as the rules governing assemblies, referendums, and union boards require their physical presence.

Among the first forms of the digital-led renewal strategy is the use of interactive websites, social media, and other digital channels to keep members, *friends*, and *followers* informed on trade union activities. Company issues, once confined to the employers' premises, have gained greater public attention. Workers' representatives are in the position to employ digital technologies (*e.g.* websites, newsletters, Facebook, x-twitter, YouTube, Instagram, WhatsApp and Telegram channels etc.) to share internally – among members and other union delegates – and externally – among prospective members, *followers*, *friends* and other social stakeholders – information "on matters of trade union and labour interest" (Article 21, Workers' Statute) or "concerning trade union activity" (Article 22, Workers' Statute) and more generally, on issues of trade union relevance and interest to workers or employers[49].

As a result, these channels of communication play an increasingly relevant role in shaping the process and the results of negotiations, as well as the outcomes of referendums[50]. Furthermore, these channels are used to support

[48] On the topic, *see* MONDA, *cit.*, p. 345 ff.; MAGNANI, *Nuove tecnologie e diritti sindacali*, cit., p. 3; RECCHIA, *Alone in the crowd? La rappresentanza e l'azione collettiva ai tempi della sharing economy*, in *RGL*, 2018, 1, p. 156; VOZA, *Il lavoro e le piattaforme digitali: the same old story?*, in *WP C.S.D.L.E. "Massimo D'Antona".INT-336/2017*, p. 8.

[49] MARAZZA, *"Social", relazioni industriali e (nuovi percorsi di) formazione della volontà collettiva*, in *RIDL*, 2019, 1, p. 57 ff.; MARAZZA, *"Social media" e Relazioni industriali. Repertorio di questioni*, in *LLI*, 2019, 5, 2, p. 1 ff.; BINI, *Il social network: da luogo a soggetto della rappresentanza sindacale digitale?*, in *LLI*, 2019, 5, 2, p. 9 ff.

[50] For instance, Fisac-CGIL, First-CISL and Uilca-UIL use social media to launch widespread campaigns aimed at informing and consulting workers about the collective bargaining process. Once the agreement is reached, social media are used to communicate the content of

collective actions[51] and trade union policy initiatives[52], with the understanding that effective communication strategies can significantly influence public engagement. Digital channels have also been applied in trade union recruitment, with the launch of social media campaigns based on catchy material and slogans prepared by communication departments[53].

These developments offer promising avenues for promoting trade unions' democratic legitimation through enhanced transparency. Recent studies underscore the connection between transparency, accountability and the democratic legitimacy of organisations. Transparency serves as a meaningful tool for fostering consensus among union members, facilitating informed participation in decision-making processes that affect them. In this context, technologies are relevant, as they enable the sharing of documents and information about union activities with members and with the wider community. Moreover, the commitment to transparency builds a culture of accountability[54]. It empowers members to assert their rights and to understand the dynamics of power within the organisation, allowing for the ongoing evaluation of its various forms[55].

However, to fully benefit from these innovative practices, trade unions shall overcome the fragmentation of the current information and commu-

the agreement and the benefits resulting from the negotiations (these considerations emerged during the interview conducted with the branch trade union Uilca). Moreover, Fiom-CGIL, Fim-CISL and Uilm-UIL have recently involved their members in the preparation of the list of topics for national collective bargaining, launching a ten-question online survey among those employed in the metallurgic sector (*see* the news "Fiom-Fim-Uilm, campagna di ascolto per rinnovo ccnl" 14th December 2023, available at the website: https://www.collettiva.it/copertine/lavoro/fiom-fim-uilm-campagna-di-ascolto-per-rinnovo-ccnl-swaoodcr).

[51] On the role of social media in supporting collective actions, *see* La Tegola, *Social media e conflitto: i nuovi strumenti dell'attività sindacale*, in *LLI*, 2019, 5, 2, p. 146 ff.

[52] An interesting example is the "ASTEnetevi" campaign, promoted by Flai-CGIL, Terra!, daSud and Filiera Sporca, which led to the signing on 28th June 2017, of a Memorandum of Understanding between the Ministry of Agricultural Policies, Federdistribuzione and Conad, aimed, among other things, at overcoming the practice of reverse auctions or double discounting. In this case, social media have played a fundamental role, enabling trade unions to target a broad audience of employees, consumers, and clients.

[53] UIL, for instance, has created different materials for different platforms: Facebook, Instagram, and Twitter see: https://terzomillennio.uil.it/campagna-di-tesseramento-2024/.

[54] Transparency is understood as a distinct characteristic of materials: while a glass wall is transparent, a brick wall is not. In this sese, Arena G., *La trasparenza nell'amministrazione condivisa*, in Gori, Sensi (eds.), *La trasparenza per gli enti di terzo settore*, Pisa University Press, p. 65.

[55] Carrieri, Feltrin, *cit.*, pp. 92-93.

nication systems. The three Italian confederations, CGIL, CISL and UIL, are composed of two intertwined dimensions (vertical-branch and horizontal-confederal), each divided into three different stages (territorial, regional and national). The existing union's communication and information system often replicates such a union structural framework, with almost every association opening one or more communication channels. For example, CGIL alone currently has more than 1050 Facebook accounts, to which Twitter accounts, Instagram, YouTube, and websites must be added[56].

On the one hand, such diversification of information sources may help to contain the problem of echo chambers and algorithm content selection related to social media[57]. These digital tools often have algorithms showing users similar content to their prior engagements and content they will likely engage with in the future[58]. This creates echo chambers, where users only access information or opinions that reflect and reinforce their own, limiting their exposure to diverse perspectives and news. Different platforms have different algorithms and target audiences. Therefore, the existence of various virtual spaces increases the chances of reaching and engaging more diverse people.

On the other hand, however, a disjointed framework can lead to fragmentation, primarily due to the risk of information overload. This occurs when the public is confronted with an excess of information disseminated through multiple formats and channels[59]. The sheer volume of information hinders an individual's capacity to utilise these materials effectively. Even when generally accessible language is employed, it remains unlikely that individuals will fully comprehend the presented information[60].

[56] The number results from the research conducted on CGIL Facebook profiles. Regarding the number of websites, a similar approach is applied: besides the national confederation website, there are many other websites for the regional associations, local associations, and the branch trade unions.

[57] PANAGIOTOPOULOS, *Towards unions 2.0: rethinking the audience of social media engagement,* in *NTWE*, 2012, 27, 3, p. 178 ff.

[58] PUGLISI, PARRA-ARNAU, FORNÉ, REBOLLO-MONEDERO, *On content-based recommendation and user privacy in social-tagging system*, in *CS&I*, 2015, 41, p. 17 ff.

[59] BAWDEN, ROBINSON, *The dark side of information: Overload, anxiety and other paradoxes and pathologies*, in *J. Inf. Sci.*, 2009, 35, p. 182.

[60] This is because information overload often involves losing control over a situation. *See* AUXIER, VITAK, *Factors Motivating Customization and Echo Chamber Creation Within Digital New Environments*, in *SM+S*, 2019, 5, 2, p. 3.

This situation creates a transparency challenge. Transparency does not imply indiscriminate publicity; instead, often, the quantity of data often undermines the quality of information. As highlighted by constitutional jurisprudence, an overload of information does not assure transparency; rather, it creates a "bulimic effect", resulting in "opacity by confusion"[61]. The more information that is disseminated, the more difficult it becomes for recipients to discern what is pertinent and to grasp the overall flow of publicly available data. Therefore, to prevent publicity from generating opacity instead of transparency, information must be filtered according to the criteria of utility and purpose.

Trade unions are becoming increasingly aware of these issues. It is by no coincidence that CGIL has focused on the need to streamline and homogenise the system by integrating the overall information and communication framework[62], or that UIL has developed a digital platform conceived as a virtual space where members, delegates and citizens are involved in discussions and participatory dialogue[63].

Moreover, building on the Covid-19 pandemic experiences, the three most representative trade unions are leveraging technology to create participatory devices that actively involve members in defining union strategic priorities[64]. One noteworthy development is the creation of Apps that provide information on trade union activities "anytime, everywhere". The Apps deliver updated news more effectively and timely, and they allow real-time communication between trade unionists and members, overcoming geographic distances, as well as the space and time restrictions that usually apply

[61] With these words Const. Court., 23rd January 2019, n. 20, par. 5.3.1, commented by Sitzia, Fameli, *Diritto alla riservatezza e trasparenza: la Corte costituzionale e il "test di proporzionalità"*, in *LPA,* 2020, 1, p. 203 ff. On the issue of over-information see the detailed analysis by Byung-Chul, *Transparenzgesellschaft*, Matthes & Seitz, 2012, it. transl. *La società della trasparenza,* Nottetempo, 2014, pp. 83-84, for whom "The more information is released, the less intelligible the world becomes".

[62] CGIL del Trentino, *CGIL 2030. Il lavoro crea il futuro, Organisational Assembly*, 2021, p. 23, https://www.cgil.tn.it/news/detail?id=5146.

[63] In 2021, UIL launched the digital platform called "Terzo Millennio".

[64] The most relevant platforms are digitacgil.it; NoiCISL; Sindacato-Networkers.it; ViVaCe; "Idea Diffusa". As the literature highlights, participatory and deliberative democracy plays an increasingly relevant role. *See* Mancini, *Il sindacato di fronte all'economia di internet: "Idea diffusa", l'intelligenza collettiva della Cgil*, in *LLI*, 2018, 1, R. 48.

to workplaces. Trade unions have developed general Apps[65] to daily inform workers on trade union and labour matters and provide them with relevant documents, such as the collective agreements in force. Additionally, thematic Apps have been introduced to address specific topics, such as health and safety, keeping workers and union representatives informed and involved[66].

Most of these platforms and Apps also offer digitalised or hybrid union services aimed at increasing union membership by bridging personalised services with collective engagement[67]. This approach enables trade unions to connect with unorganised workers outside their workplaces and engage individuals who may not be particularly sensitive to workers' solidarity or loyal to unions. As a result, digital and hybrid services are relevant in linking individual protection with the collective labour movement, counteracting the risk of disintermediation and compensating for the blurring of workplace boundaries[68]. Although the process is still in its early stages, particularly regarding digital enrolment[69], the overall trend indicates a growing expansion of digital services.

It emerges from the foregoing that technology is becoming increasingly

[65] Examples of general Apps are: APP Flc CGIL Palermo; APP Silp-CGIL; APP Spi-CGIL; APP Flai-CGIL; APP Fiom-CIGL; APP PoliziaPenitenziaria-FP-CGIL; APP VVF-CGIl; Spi-Lombardia; APP Noi-CISL; APP CISL-Funzione Pubblica; APP CISL-Scuola; APP CISL Veneto; APP MyFisascat; APP Fisascat-CISL Firenze; APP We Fai-CISL; APP Fisascat-Cisl Veneto; APP UIL Veneto; APP UIL-FPL; APP-UilTrasporti; APP-TerzoMillennio UIl; APP-UIlSgk.

[66] An example in this regard is the "Spazio Sicurezza" App by Filctem-CGIL Emilia Romagna, which aims to support the daily activities of workers' safety representatives. The App contains up-to-date information on occupational health and safety legislation and a compendium of collective agreements and State-Region agreements. Another example is the App Sportello Salute Sicurezza CISL Milano Metropoli.

[67] These services range from legal and tax counselling to discounts on travel, banking, insurance, social security and welfare services. Especially CISL and UIL, since the 1990s, have been trying to counteract the membership decline by implementing trade union services. On the topic, *see* Feltrin, Maset, *Come resistere al declino. L'opzione dei servizi nei Sindacati*, in *QRS*, 2010, 3, p. 177 ff.; Cristofolini, *Profili organizzativi e trasparenza finanziaria dei sindacati rappresentativi. Uno studio comparato*, FrancoAngeli, 2021, p. 93 ff.

[68] Rego, Ramos, *Can Electronic Vote Bring Workers Closer to Trade Unions? The Case of Portuguese Teachers*, in *ERRJ*, 2022, 32, p. 49 ff. On the topic, see the interesting example of CGIL Bergamo, examined by Imberti, La *nuova "cassetta degli attrezzi" del sindacato tra spazi fisici e luoghi digitali: l'esperienza di Toolbox Cgil di Bergamo*, in *LLI*, 2019, 5, 2, p. 117 ff.

[69] In several cases, the membership application must still be filled out in writing and handed over to the trade union office or a trade union delegate. CGIL and CISL offer the possibility to fill out a pre-registration form on the website.

important for Italian trade unions. The current model of workers' representation – or the means to "furthering and defending the interests of workers" (Article 10, ILO Freedom of Association and Protection of the Right to Organise Convention, n. 87 1948) – encompasses three key functions: negotiating working conditions through collective bargaining; counterbalancing employers' power through strikes and collective actions; and protecting the individual interests of workers by providing various services. Digital transformation has influenced all these functions to varying extents, prompting organisational renewal.

6. *Conclusions: multi-speed digital trade unionism*

The actions and tools examined in the previous paragraphs mark the steps of the comprehensive renewal process that CGIL, CISL, and UIL have been undergoing in recent years. As emphasised, the digital transformation of Italian trade unions began later than in other countries and initially progressed at a slower pace. However, the pandemic has accelerated this renewal, leading to the introduction of additional representation tools and the expedited development of existing processes.

The conventional model of representation, characterised by workplace assemblies, union leafleting, and face-to-face consultation, certainly remains relevant and should not be abandoned. While digital tools can provide valuable benefits, they do not serve as a comprehensive solution for all problems and come with their own challenges for trade union representation. Simply reaching out to more people does not ensure meaningful engagement with workers. Additionally, the use of digital platforms, such as social media, which may contribute to individualism and deresponsabilisation, which may impede, rather than promote, workers' solidarity.

Consequently, it is essential to regard conventional and digital tools not as opposing entities but as complementary resources. As there is no one-size-fits-all model of representation, digital trade unionism should not replace traditional methods. Instead, it should enhance them by facilitating the engagement of workers who might otherwise be unreachable. In other words, trade unions should adopt a 'hybrid' model: when traditional union practices prove inadequate, alternative organisational strategies rooted in the core values of unionism should be employed.

This perspective is consistent with the general organisational principle embraced by CGIL, CISL and UIL, which advocate for tailored solutions for specific groups of workers requiring collective representation. For instance, unions have already developed dedicated forms of representation for atypical workers, such as Nidil-CGIL, Felsa-CISL, and Uiltemp-UIL[70]. Furthermore, some unions have established self-organised sections and dedicated services for migrant workers[71]. At the present time, the workplace dynamics of flexibility and fragmentation present trade unions with new challenges that require new, tailored solutions. Digital tools may play a significant role by enabling unions to extend their reach beyond the physical boundaries of employers' premises, thereby engaging workers who operate in virtual spaces or are scattered across various locations.

In these cases, new technologies serve not just as innovative communication tools; they become instrumental for carrying out traditional union tasks, that is, effectively organising and representing workers. This is evident in their mandate to further and defend "the interests of workers" (Article 10, ILO, Freedom of Association and Protection of the Right to Organise Convention, n. 87 1948) and safeguard "[their members'] interests" (Article 12, CFREU). Therefore, trade unions need to combine traditional and digital tools to enhance their 'union toolbox' and develop an effective representation model.

From this perspective, Italian trade unions are making significant strides. Digital devices are no longer only used for information purposes but as a proper and innovative representation model and a contemporary way to exercise trade union rights.

However, many issues remain open. First, digital trade unionism is not spreading uniformly across all sectors, regions, and worker groups. The analysis of CGIL, CISL and UIL's digital presence paints a yet multi-speed process. The most innovative practices, such as digital trade union company rights

[70] Colella, *Dal sindacato tradizionale al sindacato atipico? Strategie per la rappresentanza dei "nuovi" attori nel mercato del lavoro italiano. Il caso di NIdiL-CGIL*, in *SL*, p. 49 ff.; Durazzi, *Inclusive unions in a dualized labour market? The challenge of organizing labour market policy and social protection for labour market outsiders*, in *Soc. Policy Adm.*, 2017, 51, 2, pp. 271-272.

[71] De Luca, Pozzi, Ambrosini, *Trade unions and immigrants in Italy: how immigrant offices promote inclusion*, in *JIR*, 2018, 60, 1, p. 101 ff.; Di Noia, *Un'agorà digitale per la rappresentanza (e la formazione di una "coscienza di classe") dei lavoratori stranieri in agricoltura*, in *LLI*, 2019, 5, 2, p. 80 ff.

or Apps and platforms, are mainly implemented in already strongly unionised sectors (such as the metallurgic sector) or highly digitalised fields (including IT and banking). Additionally, these advancements are more common in prosperous and industrialised regions (such as Lombardy and Emilia-Romagna) and among large multinational enterprises. Last but not least, digital innovation is mainly driven by financially strong branch trade unions (*e.g.* Fiom-CGIL, Uiltucs) or local unions (*e.g.* CISL Milano; Filctem-CGIL Emilia Romagna). In contrast, smaller and weaker unions, as well as small and medium-sized enterprises, especially in less industrialised areas, are falling behind, exacerbating the digital divide.

This patchworked spread of digitally driven tools highlights, first of all, the need to reform Law No. 300 of 20th May 1970 in order to adapt trade union rights to the realities of the digital age. In today's framework, digital tools play a relevant role in the continued existence of trade unions and are instrumental in promoting the right for "everyone to form and to join trade unions" (as stated in Article 12, CFREU). This is in accordance with the principles outlined in Article 39 of the Italian Constitution and Article 14 of the Workers' Statute.

Furthermore, the establishment of digital rights represents a fundamental requirement for conducting effective collective bargaining, which is protected under Article 39 of the Italian Constitution, Article 28 of the CFREU, and several ILO conventions, including the Collective Bargaining Convention n. 154, 1981. The bargaining power of trade unions is closely linked to their membership volume; as such, ensuring tools to reach and engage a large number of workers is essential. Consequently, the need for reform is consistent also with Principle 8 of the European Pillar of Social Rights, which explicitly encourages Member States to enhance the capacity of social partners to foster social dialogue, thereby reinforcing the role of trade unions in contemporary society.

To balance the rights of trade unions with those of companies, workers' representatives shall have access to the company's technological infrastructures to perform their activities "without prejudice to the normal course of business" (Article 26, Workers' Statute and Article 41(1), Cost.). This access should include a range of digital communication channels, such as company emails, digital union boards, and intranet platforms. Currently, these rights are only recognised in specific sectors where trade unions have successfully negotiated collective agreements that explicitly grant them. This creates a

significant disparity, as many employees, particularly in less unionised or fragmented sectors, lack these fundamental rights.

Legislative intervention is necessary but not sufficient on its own. The multi-speed picture of trade union digitalisation reveals that organisational renewal is also essential. The various measures and tools investigated in this paper highlight trade unions' growing awareness of the transformative potential of digitalisation. Yet, for digitalisation to effectively serve as a viable means, trade unions must also address the existing territorial and sectoral fragmentation. This requires a proactive approach that encompasses multiple avenues of action.

Given that this process remains largely uncharted, establishing rigid renewal agendas is premature at this stage. Nevertheless, at least two actions seem crucial. Firstly, trade unions should integrate workers' digital rights into their collective bargaining demands to promote uniformity. Secondly, they should organise training programmes for trade unionists on the impact of digitalisation. Such programmes should cover a broad range of skills, ensuring that participants are empowered to leverage tools such as social media, mobile applications, and digital platforms to enhance their organisational influence and reach. By fostering a deeper understanding of these technologies, trade unions will be better prepared to adapt to the rapidly evolving digital landscape.

Abstract

Digitalisation is transforming the workplace, leading to greater fragmentation and the merging of physical and digital environments. This paper explores digital trade unionism as a strategy to address these challenges through a comprehensive analysis of the three historically most representative trade unions in Italy: CGIL, CISL, and UIL. It examines the digital initiatives implemented both inside and outside the workplace, emphasising the role of collective bargaining in establishing digital rights. Furthermore, the paper highlights the growing use of digital communication tools to shape and represent collective interests. In conclusion, the paper provides insights into the current state and evolution of the Italian union representation model.

Keywords

Digital trade unionism, Italian trade unions, Workplace representation, Collective interest, information and communication systems.

Filip Dorssemont

Council Recommendation of 12 June 2023 on Strengthening Social Dialogue in the European Union (O.J. 6 12 2023): How Sweet and Soft is the Candy of Santa Claus?

Contents: **1.** Introduction. **2.** Social Dialogue in the European Union, what's in a name? **3.** The EU and the social dialogue in the European Union prior to the Recommendation. **4.**The genesis of the adoption of the Recommendation. **5.** The structure of the Recommendation. **6.** *In liminis*: definitions. **7.** The issue of recognition of the actors. **8.** The issue of information to the actors. **9.** The issue of protection and non-discrimination. **10.** The issue of the bargaining levels and of derogation. **11.** The issue of coverage. **12.** The issue of facilitating the dialogue. **13.** The Recommendation in the light of international instruments. **14.** Comparing the Social Dialogue in the European Union and at the level of the European Union.

1. *Introduction*

This contribution seeks to analyse the Council Recommendation of 12 June 2023 on strengthening social dialogue in the European Union (O.J. 6 12 2023), hereafter called the Recommendation. In the first section, the scope of the Recommendation is analysed. This recommendation will be confronted with the state of the art prior to its adoption. Subsequently, the genesis and the adoption will be analysed. The structure of the Recommendation will be presented as a diptych, constituted by two panels. The first panel dealing with the definitions will be analysed as well as the substance of the recommendation. The recommendation will be analysed in the light of international instruments at ILO level and last but not least compared with the state of the art of social dialogue at the level of the European Union.

2. *Social Dialogue* in *the European Union, what's in a name?*

The Recommendation deals with a concept which is deeply rooted in the often blurry newspeak of the institutions of the European Union: social dialogue. The Recommendation defines this concept in the broadest way possible, taking into account a vast array of levels, actors as well as procedures.

Thus Point 1) of the section on Definitions defines Social Dialogue as follows:

"'Social dialogue' means all types of negotiation, consultation or exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic, employment and social policy, that exist as bipartite relations between labour and management, including collective bargaining, or as a tripartite process, with the government as an official party to the dialogue, and can be informal or institutionalized or a combination of the two, taking place at national, regional, local or enterprise level across industries or sectors, or at several of those levels at a time".

As far as the levels are concerned, they all deal with social dialogue *within* the boundaries of the Nation States which are members of the European Union. Although the notion of "dialogue" has a constitutional value due to Article 154 (1) TFEU, the Recommendation does not deal with the Social Dialogue at the level of the European Union. The latter has been the object of another instrument, adopted by the European Commission in the same year[1]. The definition comprehends all possible levels within the boundaries of nation states at a geographical level (national, regional or local) as well as all levels of industrial relations (cross sectoral, sectoral and enterprise level).

As far as the actors are concerned, the Recommendation deals with bipartite as well as tripartite kinds of dialogue. It deals with institutionalized forms of dialogue and informal ones. The types of dialogue can range from the exchange of information, over consultation to "negotiations". The word negotiations suggests that there is a potential outcome which is binding, *id est* an agreement. In my view, the definition of "collective bargaining" of

[1] COM(2023) 40 final, *Strengthening social dialogue in the European Union: harnessing its full potential for managing fair transitions* (focus on the European social).

the Recommendation, is a *species* of negotiations. What distinguishes it from negotiations in the generic meaning, is the fact that it has a bipartite character.

The essence of the Recommendation is about "capacity building", hence the empowerment of actors of the social dialogue.

"Capacity building" is defined as the enhancement of the skills, abilities and powers of the social partners to engage effectively and at different levels in social dialogue[2].

The majority of the recommendations requires action by Member States. Hence there are obligations to promote, to encourage, to enable, to foster and to support. Solely the fifth recommendation (*ensuring*) suggests that trade unions, representatives need to be endowed with rights that they can invoke against the managerial side[3]. Some recommendations deal with the tripartite social dialogue others are specific to collective bargaining *sensu stricto.*

3. *The EU and the social dialogue in the European Union prior to the Recommendation*

The Recommendation is not the first, let alone the most binding, "intervention" of EU institutions with regard to "social dialogue" which takes place within the boundaries of the Nation States. Any legislative intervention is hampered by the exclusion from the legislative competences under the EU Social Policy Title of the subjects listed in Article 153 (5): *id est*, pay, the right of association, the right to strike or the right to impose lock-outs. The obstacle is not insurmountable. In fact, the issue of social dialogue is not excluded. Collective bargaining is not mentioned. Furthermore, the Social Policy Title explicitly recognizes an EU competence in the field of information and consultation, two procedures which are explicitly mentioned in the Recommendation. As a general rule, exceptions indeed need to be interpreted narrowly. Thus, it would be erroneous to interpret the exclusion of the freedom of association in a too generic way, as including *e.g.* "collective bargaining". Freedom of association needs to be understood as the right to form

[2] See Number 4 of the Section Definitions.

[3] *E.g.* The fifth recommendation of the Recommendation.

and join trade unions. The most relevant restriction constitutes the requirement of unanimity with regard to the exercise of legislative competences related to representation and collective defense of the interests of workers and employers, including co-determination[4]. Inevitably social dialogue raises issues of representation and the procedures and instruments concerned will facilitate the collective defense of workers and employers' interests.

Prior to the adoption of the Recommendation, EU institutions have dealt with issues of social Dialogue within the boundaries of the Nation States by instruments of hard law. These interventions have both facilitated as well as restricted the Social Dialogue. They sprang from primary law, secondary EU law and from the case law of the EU.

As far as primary law is concerned, Article 153 (3) constitutes a gentle nudge allowing Member States to entrust the implementation of directives which are adopted on the basis of the EU legislative competences enshrined in Article 153 (2) TFEU to management and labour. This should in practice amount to agreements concluded between management and labour at the national level. The word entrust is not deprived of ambiguity. It suggests that autonomy is not an original competence recognized in a second time by State authorities, receiving the outcome of the exercise of the autonomy in their legal order. It rather indicates that the autonomy is the result of some kind of delegation. Such an approach to collective autonomy is at odds with a more pluralist approach to the concept of a legal order. Furthermore, according to Article 153 (3) the mere fact that agreements are effectively concluded, does not alter the fact that States are liable to ensure that the results imposed by that directive are fully realized. In a complementary way, the Recommendation also refers to the role of Member States in the tenth Recommendation which relates to measures to support national social partners, at their request, to participate effectively in social dialogue*, including in collective bargaining and the implementation of Union level autonomous social partner a*greements.

A number of EU Directives combatting discrimination have clearly restricted on the one hand the collective autonomy of social partners declaring null and void discriminatory clauses in collective agreements[5], albeit impos-

[4] See Article 153 (2) TFEU.

[5] Article 14 Directive 2000/43, Article 16 Directive 2000/78 and Article 23 Directive 2006/54.

ing to Member States an obligation to promote social dialogue between social partners with a view to foster equal treatment[6]. Other directives have empowered management and labour to derogate under certain conditions from the mandatory obligations imposed by these directives. The latter was the case for rules in the field of working time[7] as well as for information and consultation in establishments and enterprises[8].

Collective agreements do not only have to respect principles of non-discrimination, enshrined in directives but also general principles of EU law, such as principles of free movement. Management and labour are thus being assimilated in the exercise of their legal autonomy with Member States. EU Economic law has thus been mobilized by employers to challenge the outcome of collective autonomy. Furthermore, in both Viking and Laval, the CJEU has restricted the recourse to collective action, insofar as this would hamper the freedom to provide services and the freedom of establishment. The CJEU has erroneously construed the right to collective action as the exercise of legal autonomy, whereas in essence it is about the exercise of economic power through material rather than legal acts, quite often omissions to act[9]. Hence both collective agreements as well as the avenue towards their conclusion can be blocked.

In sum, the Recommendation innovates by the fact that it seeks to adopt a systematic stance towards social dialogue in an attempt to *strengthen* it, rather than to weaken it.

4. *The genesis of the adoption of the Recommendation*

The adoption of the Council Recommendation was rapid and swift. It took less than five months between the adoption of the proposal by the

[6] Article 11 Directive 2000/43, Article 13 Directive 2000/78 and Article 21 Directive 2006/54.

[7] Article 5 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

[8] Article 18 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[9] See CJEU, 11 December 2007, Case C-438/05 (*International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*) and CJEU, 11 December 2007, C-341/05 (*Laval un Partneri Ltd v. Sweden*).

Commission[10] and the adoption of the Recommendation by the Council. The legal basis for the Recommendation is Article 292 TFEU. Since the Commission considered that the subject matter is intertwined with the subjects listed in Article 153 (1) *littera* (f), unanimity was required. Since this was not a legislative initiative subjected to the procedure of mandatory consultation of management and labour, the procedure of Article 154 TFEU did not have to be followed. The Commission opted for a more informal consultation. According to the Commission's Proposal, the Commission has organized "targeted consultations included exploratory seminars and a dedicated hearing with social partners at Union level (31 May 2022)". It also organized "meetings at Commissioner level with the leaders of the European cross-industry social partner organisations, discussions in the Social Dialogue Committee meetings (8 February, 14 June and 27 September 2022) and exchanges with Member State representatives in the Employment Committee (19 May 2022)"[11].

Furthermore, the call for evidence on the Social Dialogue Initiative, including on the Draft Council Recommendation, was published on the "Have your say" web page and was open for public feedback from 22 September to 20 October 2022. The Commission received 61 contributions, more than half of them coming from social partner organisations[12].

5. *The structure of the Recommendation*

The Recommendation can be broken down in a set of recitals, phrased in twenty-eight statements, preceded by "whereas", a set of four definitions followed by a set of fifteen recommendations. Twelve recommendations are addressed to the Member States, two to the Employment Committee and the Social Protection Committee and a third one to the European Commission.

The Recitals give a better understanding of the context of the recom-

[10] 25 January 2023, COM (2023) 38 final: *Proposal for a Council Recommendation on strengthening social dialogue in the European Union*.

[11] COM(2023) 40 final, *Strengthening social dialogue in the European Union: harnessing its full potential for managing fair transitions* (focus on the European social).

[12] 25 January 2023, COM (2023) 38 final: *Proposal for a Council Recommendation on strengthening social dialogue in the European Union*.

mendation[13]. This context is both described in a societal and a legal way. The societal considerations refer to the need to manage a series of crises, stemming from the economic crisis, the Covid crisis, the ecological crisis, the geopolitical crisis due to the War in Ukraine, the migration crisis and the challenges due to technological shifts.

The legal context which is described in the recitals integrates EU instruments[14], ILO instruments[15] and elements of comparative labour law[16]. Last but not least, a kind of Monti-clause is being put forward in the last recital (28) which states "This Recommendation is without prejudice to the competences of the Member States regarding pay, the right of association, the right to strike and the right to impose lock-outs, in line with the provisions of Article 153 (5) TFEU, or to the autonomy of the social partners".

The essence of the Recommendation is about "capacity building", which is the object of a definition. Some of the Recommendations have no added value at all in my view, since they tend to recommend the respect of fundamental labour rights enshrined in hard law[17].

In concreto, the following issues are dealt with underneath in more detail:

- the issue of recognition of the actors;
- the issue of information to the actors;
- the issue of protection and non-discrimination;
- the issue of the bargaining levels and of derogation;
- the issue of coverage;
- the issue of facilitating the dialogue.

6. In liminis*: definitions*

I have already dwelled on the very broad definition of Social Dialogue. The definitions of "collective bargaining" and "collective agreement" are intertwined and are clearly influenced by Article 2 of the ILO Convention

[13] See Recitals 5, 6, 7, 8, 13, 22, 24, 25, 26 of the Recommendation.

[14] See Principle 8 of the *European Pillar of Social Rights*, *The European Pillar of Social Rights Action Plan* (COM/2021/102final), *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02).

[15] ILO Convention No. 135; See also the indirect reference to ILO Conventions No. 87 and 98 in recital 22, which refers to Directives 2012/24/EU and Directive 2014/23/EU.

[16] See recitals 19 and 20.

[17] See Recommendation 1 a).

No. 154 (collective bargaining) and by the ILO Collective Agreements Recommendation 1951 (No. 91) (collective agreements). However, some divergences need to be highlighted.

First, the ILO consistently uses the word organisations, avoiding the word trade unions. This fleshes out that there is an institutional role for both parties to be played and strengthens the idea of equality between management and labour. The distinction between on the one hand employer organisations and on the other hand "trade unions" is unfortunate. Secondly, the ILO Convention No. 154, contrary to the ILO Recommendation No. 91, identifies that collective agreements have an *obligatory* part. Collective agreements also "regulate relations between employers or their organisations and a workers' organization or workers' organisations". This aspect is not treated in the definition of the Recommendation.

In my view, collective bargaining is erroneously construed as dealing with issues of common interest. Indeed, this focus on common interests stems from the comprehensive definition of social dialogue. The ILO instruments have never linked bargaining in such consensual way. It is difficult to understand why the collective agreement should be the only agreement which is deprived of dialectics. The ILO instruments have in fact reserved such a consensual approach to procedures of worker's involvement (consultation and co-operation) at enterprise level or to the tripartite social dialogue[18].

7. *The issue of recognition of the actors*

The fourth recommendation seeks to confirm the role of representative trade unions and employers organisations as actors of the social dialogue. At first sight, this recommendation is at odds with the fact that there has never been an obligation at an international level obliging States to introduce a system of representativeness. The fourth recommendation in fact states the opposite after the opening statement. It recommends that the choice to reserve the right to bargain collectively to representative actors is based on an open and transparent determination of the representative status through objective and pre-established criteria. Furthermore, these criteria and proce-

[18] See the *Tripartite Social Dialogue. An ILO guide for improved governance* (2013) and especially *R113 - Consultation (Industrial and National Levels) Recommendation* (1960).

dures need to be established in consultation with the trade unions and the employer organisations. This recommendation mirrors the ILO Recommendation No. 163 (1981). The EU Recommendation avoids a vicious circle which is inherent in the ILO recommendation nr 163. Point 3 of the ILO Recommendation No.163 in fact states:

"As appropriate and necessary, measures adapted to national conditions should be taken so that –

(a) representative employers' and workers' organisations are recognised for the purposes of collective bargaining;

(b) in countries in which the competent authorities apply procedures for recognition with a view to determining the organisations to be granted the right to bargain collectively, such determination is based on pre-established and objective criteria with regard to the organisations' representative character, established in consultation with *representative* employers' and workers' organisations".

The question indeed arises how one can identify the representative organisations to be consulted when the criteria are not yet established. The EU Recommendation solves this problem to organise a broader consultation with the trade unions and the employer organisations, irrespective of their representative status.

This requirement of objective and pre established criteria is not extended to the recognition of social partners outside formal collective bargaining, for example in a context of tripartite social dialogue.

Another element of the fourth recommendation is indebted to another ILO Convention No. 135 Workers' Representative Convention (1971), which stipulates that where trade union representatives and elective representatives co-exist, the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives. The Recommendation is interesting, insofar as most EU Directives introduce a concept of workers' representatives as defined by the law and practices of the Member States. This Recommendation to some extent seeks to restrict this freedom to define the notion of workers' representatives.

8. *The issue of information to the actors*

The third recommendation stipulates that "social partners have access to relevant information on the overall economic and social situation in their Member State and on the relevant situation and policies for their respective sectors of activity, which is necessary to participate in social dialogue and collective bargaining".

This recommendation stresses the importance of Information for both tripartite social dialogue as well as for collective bargaining. At first sight, no mention is being made on the issue of information at company level for the purpose of company level social dialogue or collective bargaining.

The importance of information for the sake of collective bargaining has already been fleshed out previously in the Adequate Minimum Wage Directive 2022/2041[19].

9. *The issue of protection and non-discrimination*

The EU has no systematic approach in combatting discrimination based upon trade union membership. Prior to the Recommendation, the AMW Directive stressed already the issue of protection and non-discrimination in the limited field of collective bargaining on minimum wages[20]. The third recommendation takes this logic of protection and non-discrimination a step further *ratione materiae atque ratione personae* by stating that: "workers, trade union members, and their representatives, are protected when exercising their right to collective bargaining against any measure that may be harmful to them or which may have a negative impact on their employment. Employers and their representatives should be protected against any unlawful measures when exercising their right to collective bargaining".

The fact that employers are covered by this obligation to protect is remarkable. Thus, the ILO Convention No. 98 solely construes and prohibits intimidation of union members from the employer's side[21].

Ratione materiae, the protection goes beyond the issue of minimum

[19] See Article 4 1) b) AMW Directive.
[20] See Article 4 1) c) AMW Directive.
[21] See Article 1 ILO Convention No. 98.

wages. It is fairly incomprehensible why the stronger employer side should ratione personae be protected against unlawful measures when exercising their right to collective bargaining.

Contrary to the AMW Directive and the ILO Convention No. 98, there is no specific rule which recommends protecting employers and workers organization against acts of interference.

10. *The issue of the bargaining levels and of derogation*

The seventh Recommendation deals with the issue of the coordination between the levels of collective bargaining. It states that collective bargaining should be able to take place at all appropriate levels, and that Member States should encourage coordination between and across those levels.

The Recommendation does not explain how this coordination needs to be arranged. It focuses astonishingly on the States, whereas Point nr 4 of the ILO Recommendation No. 163 tends to favour a more autonomous arrangement of the coordination of these levels among the bargaining parties. In case State authorities regulate the coordination, the recitals do not give a lot of guidance. Recital 16 of the Recommendation highlights that the functioning of the collective bargaining system is determined [...] by a combination of features, such as[...] the use of the favourability principle, the hierarchy of norms and the use of deviations practices, either from collective agreements or from law". This descriptive *catalogue raisonné* suggests that any regulation of the co ordination level is fine, irrespective whether it seek to set a floor of rights at sectoral or cross sectoral level or whether it is fully decentralized.

11. *The issue of coverage*

The eight recommendation tends to "promote a higher level of coverage of collective bargaining and enable effective collective bargaining, including by:

(a) removing institutional or legal barriers to social dialogue and collective bargaining covering new forms of work or non-standard forms of work;

(b) ensuring that the negotiating parties have, within the applicable legal framework, the freedom to decide on the issues to be negotiated;

(c) implementing a system of enforcement of collective agreements, either by law or as agreed by collective agreement, depending on national law or practice including, where appropriate, inspections and sanctions".

This recommendation might constitute a source of inspiration for the enigmatic action plans which are envisaged in the AMW Directive in the case the coverage of collective agreements drops underneath the level of 80 percent in those countries. Although the AMW Directive does urge Member States to come up with "measures" to promote the coverage, no measures are suggested at all[22].

12. *The issue of facilitating the dialogue*

The tenth Recommendation relates to a set of policies which Member States are recommended to undertake to facilitate the Social Dialogue. Thus it states:

"10) support national social partners, at their request, to participate effectively in social dialogue, including in collective bargaining and the implementation of Union level autonomous social partner agreements by taking actions such as:

(a) promoting the building and strengthening of their capacity at all levels, depending on their needs;

(b) using different forms of support, which may include logistical support, training and the provision of legal and technical expertise;

(c) encouraging joint projects between social partners in various fields of interest, such as the provision of training;

(d) encouraging and, where appropriate, supporting social partners to put forward initiatives and develop new and innovative approaches and strategies to increase their representativeness and membership bases;

(e) supporting social partners to adapt their activities to the digital age as well as to explore new activities fit for the future of work, the green and demographic transitions and new labour market conditions;

(f) promoting gender equality and equal opportunities for all in terms of representation and thematic priorities;

[22] See Article 4 2) AMW Directive.

(g) promoting and facilitating their collaboration with Union level social partners;

(h) providing appropriate support to implement in the Member States social partner agreements concluded at Union level".

The implementation of this recommendation does not in my view require an adaptation of a legal framework, but in investments through financial means in policies.

13. *The Recommendation in the light of international instruments*

An analysis of the Recommendation clearly shows a direct influence of the heritage of the ILO. Although the Recommendation only refers to one instrument (ILO Workers' representatives Convention No. 135), other instruments seem to be so close to the substance of the Recommendation, that an influence can hardly be denied (*e.g.* ILO Conventions No. 87 and 98, ILO Convention No. 154 as well as ILO Recommendation No. 91).

The Recommendation is more fleshed out than the international instruments in terms of capacity building. It focuses on obligations for Member States to promote the social dialogue, but is rather mute on the obligation of Member States to respect the outcome of the social dialogue. Thus, there are no references to obligations to refrain from wage moderation policies. Neither is there any reference to the idea that Member States should respect the autonomy of social partners in their internal matters. Last but not least, the Recommendation is mute on the quintessential idea of the primacy of collective autonomy above individual autonomy[23].

[23] See ILO Recommendation No. 91:

"(1) Collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded. Employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement.

(2) Stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement.

(3) Stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement.

(4) If effective observance of the provisions of collective agreements is secured by the

The added value of the Recommendation in this respect is weak. Thus, the ILO Recommendation nr 163, enshrines *a right* to training as an obvious tool of capacity building. Although training is mentioned in the Recommendation, the word "right" is avoided. The ILO Recommendation No. 163 takes a more clear-cut stance on the issue of the levels of collective bargaining. Thus, it states: "In countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is co-ordination among these levels".

14. *Comparing the Social Dialogue in the European Union and at the level of the European Union*

The recommendation does *not* deal with the institutionalised Social Dialogue at European level, neither at "transnational" level. The Commission had previously issued a Communication on the Strengthening social dialogue in the European Union: harnessing its full potential for managing fair transitions, which primarily deals with the European Social Dialogue[24]. In fact, it is also concerned with the national Social Dialogue. In fact, in this Communication the proposal for a Recommendation by the Council is in fact being announced.

The question can be raised whether the European Institutions tend to respect the standards they now recommend to the Member States. The Communication does profess commitments to strengthen the social dialogue at the level of the European Union in several respects. Thus, the European Commission states that it will in close cooperation with social partners:

(a) "modernise the legal framework for Sectoral Social Dialogue Committees through a possible revision of the relevant Commission Decision;

(b) within the current structure of the Sectoral Social Dialogue Committees, facilitate synergies between existing committees, promote the inclusion of new segments of economic sectors in them subject to the fulfilment of the relevant criteria, and adjust the approach for conducting representativeness studies in cooperation with Eurofound;

parties thereto, the provisions of the preceding subparagraphs should not be regarded as calling for legislative measures".

[24] COM(2023) 40 final.

(c) launch a process to review how Sectoral Social Dialogue Committee meetings are organised;

(d) continue to explore the modalities for the setting up of a new sectoral social dialogue for social services at EU level".

Furthermore, the Commission states that it will:

(a) "provide European social partners, at their request and during their negotiations on social partner agreements whose implementation through EU law is envisaged, with administrative support and legal advice;

(b) strengthen the emphasis for projects that support the implementation of autonomous social partner agreements in future social dialogue calls for project proposals".

Last but not least, the Commission states it will: "set up, in cooperation with social partners, a research network for analyzing and promoting EU social dialogue and to following its implementation; support European social partners to improve awareness of EU policies and labour market institutions among their member organisations".

However, in my view the Social Dialogue at the level of the European Union would have benefitted more from a stronger commitment of the Commission to trigger the implementation of agreements concluded by management and labour after a joint request to do so. Such a political commitment would have been beneficial, in the aftermath of the disenchanting outcome of the EPSU case[25]. Furthermore, although as evidenced by the recent Adequate Minimum Wage Directive, is much concerned with the issue of the coverage of Collective Agreements, the institutionalized system of the European Social Dialogue does not ensure any efficient measure outside the transposition of a European Agreement by means of a decision, *id est* a directive to ensure a sufficient coverage of these agreements, in case no implementation takes place, neither a system to measure it or an obligation to come up with some action plan.

Unfortunately, the Communication lacks a clear cut vision on the coordination of levels of bargaining at EU level (cross sectoral and sectoral) and at transnational level (cf. Transnational company agreements).

[25] See CJEU, 2 September 2021, C-928/19P (*European Federation of Public Service Unions (EPSU) c. European Commission*).

Abstract

This contribution seeks to analyse the Council Recommendation of 12 June 2023 on strengthening social dialogue in the European Union (O.J. 6 12 2023). The scope of the Recommendation is analysed. The recommendation will be confronted with the state of the art prior to its adoption. Subsequently, the genesis and the adoption will be analysed. The structure of the Recommendation will be presented as a diptych, constituted by two panels. The first panel dealing with the definitions will be analysed as well as the substance of the recommendation. The recommendation will be analysed in the light of international instruments at ILO level and last but not least compared with the state of the art of social dialogue at the level of the European Union.

Keywords

European Union, Social Dialogue, Freedom of Collective Bargaining, Freedom of association, Information, Non Discriminatrion.

Pieter Pecinovsky

The Role of the Social Partners in the European Semester: Key Stakeholders or Mere Theory?

Contents:
1. Introduction. **2.** Involvement of the social partners in economic governance at European level. **2.1.** Consultation of European social partners. **2.2.** Social partner involvement for the ASGS. **2.3.** The role of social partners in the Alert Mechanism Report and the Macroeconomic Imbalance Procedure (MIP). **3.** The role of social partners in the Joint Employment Report (JER) within the European Semester. **4.** Involvement of the social partners in economic governance at national level. **4.1.** National Reform Programmes. **4.2.** Involvement of the national partners by the EU Institutions. **5.** Latest developments and upcoming reforms. **6.** Conclusions.

1. *Introduction*

EU economic governance is an ever-changing and expanding system, used by the EU to steer the member states' financial, economic and social policy. It has proven to be a rather controversial method, which often has more actual impact than the at-first-sight soft-law approach of the recommendations implies. This contribution's intention is not to explain the workings or structure of the European Semester, not to look at its (in the past often negative) impact on social policy. The purpose is to define the theoretical and actual involvement of the social partners at the European and national level in the European semester from a legal perspective. In which way is this involvement legally cemented or based on merely good practices or guidelines?

Since the proclamation of the European Pillar of Social Rights in 2017, the European Semester should no longer have been used as a tool to impose flexible labour markets and decrease employment law and social security protection. Instead, it would be used as an instrument to guide EU Member

States to the Walhalla of the Social Pillar. This was made explicit by a significant increase in social country-specific recommendations, promoting social dialogue and collective bargaining, supporting adequate minimum wages and highlighting the importance of decent working conditions. The involvement of social stakeholders, aka the social partners, is a key element in this turnaround. However, the question is whether the EU and the member states are legally obliged to involve the social partners, or that this remains a mere recommendation.

In the first part, we will look at the EU itself, and how it involves social partners at the European level of the European Semester in different instruments of economic governance. Next, we move to the national level. Based on a study of the national reform programmes of 2023, using an imperfect method of looking at the actual references by the programmes to the social partners themselves, we try to see which member states dedicate significant importance to their involvement and which do not. Finally, we take a look at recent evolutions and reforms, to see whether an increase in the role of social partners can be expected or not.

This contribution is based on the research done for the author's intervention during the 21st International Conference in Commemoration of Professor Marco Biagi in March 2024 in Modena.

2. *Involvement of the social partners in economic governance at European level*

2.1. *Consultation of European social partners*

The European Semester, a cycle of economic and fiscal policy coordination within the EU, was established under Regulation (EU) No 1175/2011, which amended prior legislation to enhance economic oversight and coordination[1]. This regulation is part of the EU's "Six-Pack" legislation aimed at enhancing economic governance and fiscal stability within the EU, specifically in relation to the European Semester and the coordination of national economic policies. According to Article 2a(4) of this regulation:

[1] European Union. Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies. Official Journal of the European Union, L 306, 23 November 2011, 12-24.

"Relevant stakeholders, in particular the social partners, shall be involved within the framework of the European Semester, on the main policy issues where appropriate, in accordance with the provisions of the Treaty on the Functioning of the European Union (TFEU) and national legal and political arrangements".

This rather general provision emphasizes the EU's commitment to consulting social partners, which include trade unions and employer associations, ensuring that their perspectives are considered in shaping the main policy priorities of the EU's economic governance processes. The provision leaves a lot of room for the Commission to shape the consultation process. At the time of its adaptation, the financial and economic crisis was still raging throughout the EU. In fact, the crisis was one of the main reasons for the shaping of the European semester. Alas, in this crisis mode, the Commission often did not really involve the European social partners and if it did, it often ignored their message.

In March 2015, the European Commission launched a renewed effort to enhance social dialogue at the EU level, aiming to deepen the involvement of social partners in economic and social policymaking[2]. This initiative culminated in the 2016 Joint Statement on the New Start for Social Dialogue, which reinforced the role of European social partners in the European Semester[3]. Key developments included first a consultation at key points: the European Commission committed to consult the social partners at pivotal stages of the European Semester, allowing their input on significant policy issues, especially on employment and social issues. Second, the new approach introduced structured consultation formats that encouraged more active engagement from social partners, thus increasing their influence over the formulation of both policy and legislative measures within the EU.

Each year, the European Commission invites EU-level social partners to provide direct input for the Autumn Package – a key phase of the European Semester. This package includes the Annual Sustainable Growth Strategy (ASGS)[4], which sets out the overarching economic priorities of the EU

[2] European Commission, *A New Start for Social Dialogue – High-Level Conference, 5 March 2015*, 2015, https://ec.europa.eu/social/BlobServlet?docId=16099&langId=en.

[3] European Commission, *A New Start for Social Dialogue – Statement of the Presidency of the Council of the European Union, the European Commission, and the European Social Partners*, 27 June 2016.

[4] European Commission, *European Semester Autumn Package*, https://commission.europa.eu/business-economy-euro/european-semester/european-semester-timeline/european-semester-autumn-package_en.

for the year ahead (see futher). As part of this process, in September, before the publication of the ASGS, the Commission meets with social partners to gather their perspectives on proposed economic policies and priorities, ensuring that their views are integrated into the framework of the European Semester[5]. However, this meeting is not enshrined in any formal rule but merely developed by practice in an effort to involve the EU-level social partners, even if it can be seen as an implementation of art. 2a(4) of Regulation(EU) No 1175/2011. Although this practice has for now ensured the social partners a seat at the table, this does not guarantee their close involvement for the future. The Commission could legally opt to diminish or alter the consultation of the social partners.

Through these mechanisms, European social partners have a structured role in shaping EU economic policy, contributing insights and recommendations that reflect the interests and concerns of workers, employers, and broader social constituencies.

2.2. *Social partner involvement for the ASGS*

As seen, in practice, the European social partners are consulted by the Commission during the September meetings and the social partners usually submit or even publish their opinion (usually separately). However, there is also a more formal consultation process.

As said, the Annual Sustainable Growth Survey (ASGS), is a cornerstone document within the European Semester's "Autumn Package". As the primary policy instrument in this cycle, the ASGS provides a comprehensive analysis of the latest trends in economic and social policies across the EU and sets out overarching priorities for the European Union. It guides Member States on policy directions for the upcoming year, establishing economic and social goals that are aligned with the EU's sustainable growth agenda.

[5] Some EU social partners also publish their views on the ASGS, see e.g. BusinessEurope, SME United and SGI Europe, *Annual Sustainable Growth Strategy 2025 Social Partners' Consultations – Employers' views*, 10 October 2024, https://www.businesseurope.eu/sites/buseur/files/media/position_papers/social/2024-10-14_joint_employers_contribution_consultations_asgs_2025_october_2024_final.pdf; European Trade Union Committee for Education, *ETUCE's Contribution to the ETUC Position on the Annual Sustainable Growth Survey 2025*, 16 October 2024, https://www.csee-etuce.org/en/news/etuce/5557-etuce-s-contribution-to-the-etuc-position-on-the-annual-sustainable-growth-survey-2025.

The ASGS acts as a platform for coordination among various EU institutions, fostering a cohesive approach to policy-making across Member States. Once published, the ASGS is transmitted to key EU bodies, including the European Parliament (EP), the European Council, the Council of the EU, the European Central Bank (ECB), the European Economic and Social Committee (EESC), the Committee of the Regions (CoR), and the European Investment Bank (EIB). This dissemination is meant to underscore the collaborative nature of the European Semester, aiming to ensure, at least formally, that all relevant actors contribute to and align with the EU's policy trajectory.

One crucial aspect of this process is the formal consultation of social partners, particularly within the European Economic and Social Committee (EESC). The consultation is based on art. 304 TFEU, which mandates that the EESC provides opinions on issues of interest to the EU, particularly in areas related to economic, social, and employment policies. The EESC represents organized civil society at the EU level, and its mandate includes promoting the active involvement of social partners – namely the workers' group, the employers' group, and the civil society group. These groups are fundamental stakeholders, representing a broad spectrum of societal interests and priorities, which are essential for inclusive economic governance.

Within the EESC, the Section for Economic and Monetary Union and Economic and Social Cohesion plays a vital role. This section is responsible for reviewing the ASGS and publishing an official opinion on it, which serves as an input into the European Semester process. This opinion integrates insights from various social partners, providing a balanced and representative perspective on the economic and social challenges facing the EU. By contributing this analysis, the EESC aims to enhance the legitimacy and responsiveness of EU economic governance. The EESC typically adopts its opinion on the ASGS during its February plenary session each year. For instance, the opinion on the ASGS 2024 was adopted at the plenary session held on February 14-15, 2024[6].

The 2024 ASGS of November 2023 also reaffirmed the significance of social dialogue and stakeholder involvement in the European Semester process, emphasizing that:

[6] European Economic and Social Committee, *Annual Sustainable Growth Survey 2024*, Official Journal of the European Union, C 123, 14 February 2024, pp. 12-24.

"The involvement of the European Parliament, the Council, social partners, and other key stakeholders will continue to be a key feature. Close cooperation is vital, achieved through regular meetings at key Semester and Recovery and Resilience Facility (RRF) stages. Member States are urged to actively engage with stakeholders, including social partners, local and regional authorities, as well as relevant civil society organisations"[7].

This statement highlights the European Commission's commitment to fostering an inclusive governance process by integrating feedback from diverse societal actors. It underscores the importance of maintaining regular meetings and close cooperation at critical stages of the Semester and RRF processes. By encouraging Member States to actively involve social partners, local and regional authorities, and civil society organizations, the Commission seeks to ensure that policy decisions reflect a broad spectrum of perspectives and are responsive to the needs of the population.

On paper, the social partners are formally involved through the EESC and the Commission is further promoting social partner involvement in the European Semester by encouraging the Member States and itself to do so in the ASGS document. On a critical note, one could wonder what the actual impact of the EESC is. It is unclear whether the Commission really takes the opinion into account when drafting the country reports or the country specific recommendations. Presumably, the September meeting between the social partners and the Commission is more important, as this input is able to shape the content of the ASGS itself while the formal EESC opinion only arrives months later.

2.3. *The role of social partners in the Alert Mechanism Report and the Macro economic Imbalance Procedure (MIP)*

The Alert Mechanism Report (AMR) initiates the annual cycle of the Macroeconomic Imbalance Procedure (MIP)[8], which is a framework within

[7] European Commission, Annual Sustainable Growth Survey 2024. COM(2023) 901 final.

[8] Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, *Pb.L.* 23 November 2011, no. 306, 25-32; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, *Pb.L.* 23 November 2011, no. 306, 8-11; Bekker, Klosse,

the European Semester aimed at identifying and addressing macroeconomic imbalances across EU Member States. These imbalances can include vulnerabilities related to external deficits, excessive debt, or other risks that could potentially undermine economic stability within the EU. The MIP seeks to monitor, prevent, and correct such imbalances, supporting the EU's broader objective of sustainable and balanced growth.

The AMR is underpinned by Regulation (EU) No 1176/2011, which establishes the framework for monitoring and correcting macroeconomic imbalances[9]. Article 3(4) of this regulation outlines the Commission's obligation to ensure that the AMR is shared with key EU bodies, including the European Parliament, the Council, and the European Economic and Social Committee (EESC). The article reads:

"The Commission shall transmit the annual report to the European Parliament, the Council, and the European Economic and Social Committee in a timely manner".

This requirement underscores the importance of transparency and communication among EU institutions regarding macroeconomic risks and the necessity for collective awareness of economic vulnerabilities. However, despite the procedural involvement of the EESC, the regulation does not mandate a formal EESC opinion on the AMR. As such, while the EESC receives the report, it does not traditionally issue an official response or report on it.

A notable feature of the AMR process, as it currently stands, is the limited formal involvement of social partners. While the AMR is a critical document within the MIP framework, aimed at identifying potential economic vulnerabilities, social partners are not explicitly mentioned within the AMR itself. This lack of direct reference to social partners suggests that, unlike other

EU Governance of Economic and Social Policies: Chances and Challenges for Social Europe, in *EJSL*, 2013, 2, pp. 106-108; Buti, Cardot, *The EMU Debt Crisis: Early Lessons and Reforms*, in *JCMS*, 2012, vol. 50, 6, pp. 906-909; Essl, Stiglbauwer, *Prevention and Correction of Macroeconomic Imbalances: the Excessive Imbalances Procedure*, in *MPE*, 2011, vol. 4, 11, pp. 99-112; Oberndorfer, *A new economic governance through secondary legislation? Analysis and constitutional assessment: from New Constitutionalism, via Authoritarian Constitutionalism to Progressive Constitutionalism*, in Bruun, Lörcher, Schömann (eds.), *The economic and financial crisis and collective labour law in Europe*, Hart Publishing, 2014, pp. 43-46; Skulova, *Macroeconomic imbalance procedure in the Euro area: ex post analysis*, in *ESJ*, 2015, 2, pp. 161-163.

[9] Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, *Pb.L.* 23 November 2011, no. 306, 25-32.

aspects of the European Semester where social dialogue is explicitly encouraged, the AMR remains a largely technical document focused on quantitative assessments rather than stakeholder engagement.

Nonetheless, social partners at the EU level, including employer organizations and trade unions, are consulted periodically on broader European Semester processes, which indirectly includes aspects of the MIP cycle. These consultations allow social partners to voice their concerns and perspectives on the general economic direction and the implications of policy recommendations. However, these consultations are not integrated into the AMR itself, and social partners have limited formal influence on the identification of macroeconomic imbalances at the outset of the MIP cycle.

The absence of a formal EESC report or direct social partner involvement in the AMR process reflects a gap in the integration of social dialogue within the MIP framework. While the MIP's focus on technical economic indicators necessitates a data-driven approach, the lack of structured input from social partners may limit the consideration of social and labour market dimensions in the identification of economic risks. Given that macroeconomic imbalances can have profound effects on employment, wages, and social cohesion, integrating social partners more substantively into the MIP process could enhance the responsiveness and social legitimacy of EU economic governance.

3. *The role of social partners in the Joint Employment Report (JER) within the European Semester*

The Joint Employment Report (JER) is a key component of the European Semester, serving as a monitoring tool that assesses social and employment trends across the EU[10]. This report is mandated by Article 140 of the Treaty on the Functioning of the European Union (TFEU), which provides the legal basis for the coordination of employment policies among Member States. Article 140 TFEU outlines the EU's role in facilitating cooperation on employment policies, setting the stage for the JER to evaluate

[10] Jacobsson, *Soft regulation and the subtle transformation of states: the case of EU employment policy*, in *JESP*, 2004, vol. 14, 4, p. 358; Moscher, Trubek, *Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy*, in *JCMS*, 2003, vol. 41, 1, p. 69.

each Member State's progress in aligning with the Guidelines for the Employment Policies of the Member States.

The JER is a collaborative assessment tool that highlights significant achievements and challenges in the EU's employment and social sectors. It not only reflects on the progress made by Member States but also evaluates the effectiveness of their actions in line with the EU's employment policy objectives. A prominent feature of the JER is its reliance on a scoreboard of indicators drawn from the European Pillar of Social Rights (EPSR). This scoreboard provides a quantitative basis for monitoring progress on social and employment rights, covering domains such as fair working conditions, social protection, and access to the labour market.

The European Commission takes the lead in drafting the JER, which is subsequently reviewed and approved as a formal proposal. This process involves an in-depth analysis of employment and social data from all Member States, reflecting on trends and developments relevant to achieving EU employment objectives. Once approved, the JER is presented to other EU institutions, including the European Parliament and the Council, as part of the European Semester's broader framework of economic and social coordination.

Despite the comprehensive nature of the JER and its importance within the European Semester, there is no formal opinion from the European Economic and Social Committee (EESC) associated with the JER. While the EESC is a key consultative body representing social partners, civil society organizations, and other stakeholders, it does not produce an official response to the JER, limiting the direct input of these groups in the JER's findings and recommendations.

In the text of the 2024 JER[11], an interesting dynamic emerges regarding the involvement of social partners. Although the report does not explicitly show signs of direct consultation with social partners during its preparation, it does frequently reference social partners and their contributions to employment and social policies. This frequent mention underscores the importance of social partners in implementing and supporting the employment guidelines across Member States. For instance, the report highlights various

[11] European Commission, Directorate-General for Employment, Social Affairs and Inclusion, Joint Employment Report 2024: Commission proposal, Publications Office of the European Union, 2023, https://data.europa.eu/doi/10.2767/17157.

national-level initiatives where social partners have collaborated with governments to address employment challenges, improve working conditions, and support social protection reforms.

However, the absence of an official consultation mechanism or formal opinion from the EESC in the drafting of the JER indicates that the role of social partners in shaping the report's content is limited. Social partners, while acknowledged for their role at the national level, do not have a structured avenue to influence the report's recommendations or assessments at the EU level. This contrasts with other European Semester documents where social partners are directly consulted or formally involved, such as the Annual Sustainable Growth Survey (ASGS).

4. *Involvement of the social partners in economic governance at national level*

In general, the national social partners have four significant opportunities to influence the EU member states and the EU Institutions during the European semester. First, the social partners can have an impact on the EU member states when they are drafting and submitting their national reform programmes. As member states usually submit their programmes in April or May, the early spring is the ideal moment for EU member States to involve the social partners or for the social partners to seek more involvement. As the social partners are closer to the national authorities than to the EU institutions, this is the most important involvement that they usually can obtain. Second and third, in the end of May the Commission publishes the Country Reports and the Country Specific Recommendations addressed to the member states. Fourth, around the end of June, the Council approves the Country Specific Recommendations, after which the European Semester starts all over again in September. Below, we will analyse the possible social partner involvement in more detail.

4.1. *National Reform Programmes*

The National Reform Programmes (NRPs) are key documents submitted annually by EU Member States as part of the European Semester[12].

[12] Art. 121 3 and 148, 3 TFEU; Degryse, *The new European Governance*, in *ETUI Working Paper*, 2012, Brussel, ETUI, 2012, pp. 40-41.

These programmes outline each country's specific plans to address economic and social challenges and implement reforms recommended by the European Commission in the year before.

There are no fixed rules for the member states how to draft these NRPs, neither how they should involve social partners. Of course, there is some unofficial guidance from the Commission (which is not public), and the Member states can ask the assistance of the Technical Support Instrument to draft and design their NRP[13]. In general, Member States are advised to involve stakeholders such as regional and local governments, social partners, and civil society in drafting the NRPs[14]. Therefore, an informal recommendation (or template) exists which asks Member States to report on how they have actually involved and consulted these stakeholders. Therefore, a method of analysing the involvement of the social partners in the drafting of the NRPs is to study the text and to see if the social partners are mentioned, and secondly whether the NRP clarify whether the the social partners were involved.

Our research has focused on the NRPs of the 27 Member States for 2023[15]. The involvement of social partners in the preparation of National Reform Programmes (NRPs) is a complex phenomenon that is difficult to quantify and analyse. Several factors contribute to the challenges in obtaining concrete data or indications of the extent and quality of social partner involvement.

One major challenge stems from the wide variation in how NRPs are drafted and presented by Member States. These differences make it difficult to compare or extract consistent data about social partner engagement. The length and format of NRPs vary significantly, ranging from e.g. Estonia's concise summary[16] to France's extensive documents exceeding

[13] European Commission, Technical Support Instrument (TSI), https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/technical-support-instrument/technical-support-instrument-tsi_en.

[14] This also indirectly follows from the text of the Country Specific Recommendations, which usually asks the Member States to involve the social partners in their reforms (see futher).

[15] European Commission, 2023 European Semester: National Reform Programmes and Stability/Convergence Programmes, https://commission.europa.eu/business-economy-euro/european-semester/european-semester-timeline/2023-european-semester-national-reform-programmes-and-stabilityconvergence-programmes_en.

[16] Estonia, Estonia 2035, Action plan of the Government of the Republic, 11 May 2023, https://commission.europa.eu/document/download/39f8eb27-9bb8-47d6-a452-16f1620e2db3_en?filename=Eesti%202035__tegevuskava_ENG_30.06_0.pdf.

200 pages[17]. Some NRPs include dedicated annexes focusing on social partners, such as Austria[18] and the Netherlands[19], while others provide minimal or implicit references to their role. With 27 EU Member States, NRPs are presented in different languages, and social partner involvement may be described using varying terminologies or organisational frameworks. Synonyms or ambiguous references to committees, councils, or stakeholder groups can obscure the specific involvement of social partners. Also, translation inconsistencies can further complicate data extraction and cross-country analysis, as we had to analyse non-English documents through translations provided by AI-powered translation tools.

Furthermore, social partner involvement is not a uniform concept and can range from informal consultation to active co-drafting of reforms. The varying degrees of involvement make it challenging to assess and compare the quality or impact of their contributions. In some cases, social partners may be involved through structured dialogues, while in others, their participation might be limited to informal or peripheral feedback.

Next, certain NRPs emphasize the implementation of overarching European policies, such as the European Pillar of Social Rights (EPSR). While this focus is crucial, it can overshadow specific details about the procedural aspects of social partner involvement, making it harder to isolate their role.

Finally, the absence of a standardised framework or template for documenting social partner involvement in NRPs means that Member States have significant discretion in how (or whether) they report these contributions. This lack of uniformity further complicates efforts to evaluate their role systematically.

Taking into account the methodological difficulties explained above, our research came to the following results, which might not be 100% exact, but give a good indication:

[17] France, Programme National de Réforme 2023, avril 2023, https://commission.europa.eu/document/download/85627134-0692-4f38-b196-9bc62d4931fa_fr?filename=2023-France-NRP_fr.pdf&prefLang=en.

[18] Austria, Social partner activities 2022/2023, Annex 1 to the NRP, https://commission.europa.eu/document/download/b3fc2c07-ecd9-4b26-89a5-6a0347cee1b2_en?filename=56_11_Annex%202.pdf.

[19] Sociaal Economische Raad (Netherlands), Bijdrage van de Sociaal-Economische Raad aan het Nationaal Hervormingsprogramma 2023, Annex 4 to the NRP, https://commission.europa.eu/document/download/28aa3a50-8aeb-409d-a463-df4c06e29fc1_nl?filename=2023_Netherlands_nrp_annex_4_nl.pdf&prefLang=en.

Country	Social partners mentions	Social partners consulted?
Austria	40	Yes
Belgium	21	Yes
Bulgaria	0	No
Croatia	6	Minimal/unclear
Cyprus	13	No
Czechia	1	Unclear
Denmark	0	Expert Committee?
Estonia	0	Unclear
Finland	6	Yes
France	33	Yes
Germany	7	Yes
Greece	10	Unclear (possibility)
Hungary	7	No
Ireland	12	Yes
Italy	0	No
Latvia	8	Yes
Lithuania	3	Yes
Luxembourg	112	Yes
Malta	4	Yes
Netherlands	142	Yes
Poland	5	Yes
Portugal	3	Unclear
Romania	5	Yes
Slovenia	18	Yes
Slovakia	0	No
Spain	5	Yes
Sweden	40	Yes

The table above indicates for every EU Member State the number of mentions of the social partners (taking into account as much variation of these references as possible) in the NRPs, including all the annexes to the NRPs. Next, the table indicates whether it is clear from the NRP that the social partners were consulted or not.

Regarding the number of mentions, we see that most NRPs of 2023 did mention the social partners, but there is an enormous variation among the member states. The Netherlands and Luxembourg count the most mentions, but that is also logical as these countries have attached specific annexes to their NRP which includes the consultation of the social partners. Also Sweden, Austria, France, and Belgium Slovenia have a high to relatively high number of mentions of the social partners. On the other side of the spectrum, five countries did not mention the social partner at all in their NRPs. This mostly concerns Eastern-European Member States, but also includes Italy and Denmark. Especially the fact that Denmark did not mention the social partners can be regarded as peculiar, as this Member States is known for a strong tradion of social dialogue[20]. However, this could possibly explained by the strong autonomy of the social partners towards the government (although the same is often said about Sweden)[21]. Most Eastern-European and Southern-European have a very low to relatively low number of mentions of the social partners. The exceptions are Slovenia (18) and Greece (10). Of course, the weaker social dialogue tradition in Eastern-Europe[22] is not a new phenomenon, and is thus also reflected in our findings. In general, only 10 out of 27 Member States counted more than 10 social partner mentions in their NRPs. This seems to indicate that, in general, there

[20] Hansen, Fabricius, *Industrial relations and social dialogue. Denmark: Developments in working life*, in *Working paper*, Eurofound, 2023. https://www.eurofound.europa.eu/en/publications/eurofound-paper/2024/denmark-developments-working-life-2023; Ishikawa, *Key features of National Social Dialogue: a social dialogue resource book*, International Labour Office, 2003, https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=467c0879b39f1005f3eb641aec9b8e35a56865d2.

[21] See e.g. Refslund, Lind, *Wage autonomy, political reforms and the absence of social pacts in Denmark*, in Ebbinghaus, Weishaupt (eds.), *The Role of Social Partners in Managing Europe's Great Recession. Crisis Corporatism or Corporatism in Crisis?*, Routledge, 2021, pp. 75-95.

[22] Greskovits, *Ten years of enlargement and the forces of labour in Central and Eastern Europe*, in *ERLR*, 2015, 21, 3, pp. 269-284; Mailand, Due, *Social dialogue in Central en Easter Europe: present state and future development*, in *EJIR*, 2024, vol. 11, 2, pp. 179-197; Schnabel, *Union Membership and Collective Bargaining: Trends and Determinants,* in Zimmermann (ed.), *Handbook of Labor, Human Resources and Population Economics*, Springer, 2020.

is room for improvement for the importance that the NRPs award to these important stakeholders.

Of course, a purely quantitative approach does not say much on itself. It is not because the social partners are mentioned that they are actually involved and consulted in the drafting of the NRP. Most Member States (but definitely not all of them) have included a chapter in their NRP dedicated to the consultation of stakeholders. If this is the case, it is relatively easy to find out whether the social partners were consulted. If there is no chapter dedicated to stakeholder involvement, we tried to discern the involvement or consultation from the general text of the NRPs. In any case, the majority of the Member States, 16 out of 27, clearly indicated to have consulted and involved the social partners in the drafting of their NRP. In 6 instances, the involvement was not clear, and for 5 Member States, there was no sign of involvement. The worst pupils seem to be Bulgaria and Italy, who neither mentioned the social partner nor mentioned any involvement. Again, most Member States with a lack of social partner involvement belong to the Eastern-European group. Finally, it is also interesting to notice that sometimes Member States have mentioned the social partners several times, but did not indicate that they were involved or consulted (e.g. Cyprus and Hungary). As a conclusion, also for this indicator, we could state that there is certainly room for improvement.

4.1. *Involvement of the national partners by the EU Institutions*

The EU Commission publishes at the end of May (or sometimes June) the Country Reports and the Country Specific Recommendations (CSRs).

Country reports provide a detailed analysis of the economic, social, and fiscal situation in each EU Member State[23]. Taking a look at the Country reports for 2023[24] and 2024[25], the documents do not mention any involvement of stakeholders, including social partners. Even if the Commission bases

[23] European Commission, *European Semester Spring Package*, https://commission.europa.eu/business-economy-euro/european-semester/european-semester-timeline/european-semester-spring-package_en.

[24] European Commission, *2023 European Semester: Country Reports*, 24 May 2023, https://economy-finance.ec.europa.eu/publications/2023-european-semester-country-reports_en.

[25] European Commission, *2024 European Semester: Country Reports*, 19 June 2024, https://economy-finance.ec.europa.eu/publications/2024-european-semester-country-reports_en.

their information on contacts with the national social partners, there is no official trace of this, neither is there any legal obligation to do so. However, there seems to be an informal practice of the national social partners by the Commission. At least in Belgium, the National Labour Council and the Central Economic Council are informally consulted by the Commission[26]. Unfortunately, it was not possible to find out whether a similar consultation takes place in the other Member States within the scope of our research.

The legal basis for the European Semester, particularly Articles 121 and 148 of the Treaty on the Functioning of the European Union (TFEU), provides a framework for economic coordination and employment policies but offers limited explicit mention of social partner involvement. While Article 148 acknowledges the role of the European Economic and Social Committee (EESC) as a consultative body, the direct engagement of social partners in shaping CSRs is not mandated by EU law. This has led to variability in the extent and transparency of their involvement across Member States.

In 2015, the Commission launched a renewed commitment to social dialogue, culminating in the 2016 Joint Statement on the New Start for Social Dialogue[27]. This initiative sought, amongst other purposes, to strengthen the engagement of social partners in EU governance processes, including the European Semester. The European Pillar of Social Rights (EPSR), introduced in 2017, further bolstered the role of social partners within the Semester[28]. Its implementation, particularly through the integration of social objectives into the European Semester, has encouraged a stronger focus on

[26] This was confirmed to the author by the President of the National Labour Council.

[27] European Commission, *A new start for social dialogue*, Publications Office of the European Union, 2016, p. 11; European Commission, *European Social Dialogue*, E-newsletter, 28 June 2016, no. 2.

[28] European Commission, *Social summit for fair jobs and growth: strengthening the social dimension of Europe*, press release, 16 November 2017, IP/17/4643; European Parliament, Council of the European Union and European Commission, *European Pillar of Social Rights*, Publications Office of the European Union, 2017, p. 23; European Council, *Conclusions of 14 December 2017*, http://data.consilium.europa.eu/doc/document/ST-19-2017-REV-1/en/pdf; European Commission, *Establishing a European Pillar of Social Rights*, 26 April 2017, SWD(2017) 201 final; DEAKIN, *What Follows Austerity? From Social Pillar to New Deal*, in VANDENBROUCKE, BARNARD, DE BAERE (eds.), *A European Social Union after the Crisis*, Cambridge University Press, 2017, pp. 192-210; LÖRCHER, SCHÖMANN, *The European pillar of social rights: critical legal analysis and proposals*, in *Report 139*, 2016, p. 119; RASNACA, *Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking*, in *ETUI working paper*, ETUI, 2017, 5, p. 44.

collective bargaining and social dialogue, particularly in Eastern European countries. Many CSRs since 2015 have explicitly called for the strengthening of national collective bargaining frameworks and social dialogue structures, reflecting a recognition of their importance for labour market stability and inclusivity (although there have been less and less specific CSRs targeting social dialogue in the later years)[29].

While the European Commission appears to consult national social partners where feasible, these efforts are not very transparent. The absence of a formalized framework for such consultations means that their influence can vary significantly across Member States. This inconsistency risks undermining the potential contributions of social partners to the policy-making process.

The 2023 CSRs reiterated the importance of involving social partners alongside local and regional authorities and other stakeholders[30]. They emphasize that this engagement is crucial not only for the implementation of Recovery and Resilience Plans (RRPs) but also for broader economic and employment policies. Ensuring "broad ownership of the overall policy agenda" requires systematic and effective involvement of social partners, as stated explicitly in the recommendations[31]. Also, the 2024 CSRs encourage the EU Member States to involve relevant stakeholders, explicitly mentioning the social partners, but the CSRs do not reveal how the Commission itself has involved these stakeholders as well[32].

The CSRs are approved by the Council in June or July. Usually, the Council approves the proposed recommendations by the Commission. However, there have been some rare instances where the Council has made some

[29] Rainone, *The 2022 Country Specific Recommendations in the social field: quo vadis, EU recovery? An overview and comparison with previous European Semester cycles*, in *ETUI working paper*, ETUI 2022, 08, p. 20; Rainone, *An overview of the 2020-2021 country-specific recommendations (CSRs) in the social field. The impact of Covid-19*, in *ETUI Background Analysis*, Brussels, ETUI, 2020, 1, p. 15.

[30] European Commission, 2023 European Semester: Country Specific Recommendations / Commission Recommendations, 24 May 2023 https://commission.europa.eu/publications/2023-european-semester-country-specific-recommendations-commission-recommendations_en.

[31] See e.g. the 30th consideration of the CSRs for Belgium of 2023.

[32] See the 5th consideration of the CSRs of 2024; European Commission, *2024 European Semester: Country Specific Recommendations / Commission Recommendations*, 19 June 2024, https://commission.europa.eu/publications/2024-european-semester-country-specific-recommendations-commission-recommendations_en.

changes to the draft CSRs proposed by the Commission after the targeted Member State managed to convince the other Member States to do so. As an example, we refer to the case of Sweden in 2012. In its draft recommendations, the Commission had indicated that more flexibility at the lower end of the wage scales and a differentiation in labour protection would benefit the employment of young workers[33]. The Swedish trade unions were alarmed about this intervention in their wage policy[34] and, with the help of the Swedish Government, were able to obtain that the final CSRs 2012, as approved by the Council, did not include any mention of the flexibilisation of wages for young workers[35]. In particular, the Council recognised that Sweden has a wage formation system in which the social partners have the power to set wages and that government intervention would not be in line with the Swedish system so encouraging greater flexibility in wages was considered inappropriate[36]. National stakeholders thus can have a significant impact through the lobbying of their own government. But of course, the social partners are not as powerful as in Sweden in every Member States and not every government will be as willing to go as far for their demands. It is safe to say that this sort of involvement remains are rare sight.

[33] EU Commission, CSRs for Sweden 2012-2015, 30 May 2012, COM (2012)328 def., recommendation 3; Andersen, Ibsen, Alsos, Nergaard, Sauramo, *Changes in wage policy and collective bargaining in the Nordic Countries*, in Van Gyes, Schulten (eds.), *Wage bargaining under the new economic governance, alternative strategies for inclusive growth*, Brussels, ETUI, 2015, pp. 152-153.

[34] Danielsson, Johnsson, *The European Union wants to lower the Swedish wages*, in *Europaportalen*, 1 June 2012, www.europaportalen.se/2012/06/eu-kommissionen-vill-sanka-svenska-loner.

[35] Council of the EU, Recommendation of 10 July 2012, CSR Sweden, *Pb.C.* 24 July 2012, no. 219, 85-87, a recommendation 3; Clauawaert, *The country-specific recommendations (CSRs) in the social field*; *An overview and initial comparison*, *Background analysis*, in *ETUI*, 2013, 2, p. 14; Danielsson, *Small union success before the holiday*, in *LO-blog*, 10 July 2012, http://loblog.lo.se/allmant/liten-facklig-framgang-infor-semestern/); ETUC, The ETUC position on the current economic governance and Semester process, with regard to their effects on collective bargaining and wage-setting mechanisms, Final document adopted at the Annual Collective Bargaining Summer School, Firenze, 10-11 June 2013, p. 2, https://www.etuc.org/sites/default/files/document/file/2018-06/ANNEX_1_and_2_for_Item_12_2.pdf.

[36] Council of the EU, Explanations of modifications to Commission recommendation for the Country Specific Recommendations, no. 11941/12, Brussel, 6 July 2012, 11, https://data.consilium.europa.eu/doc/document/ST-11941-2012-INIT/en/pdf.

5. *Latest developments and upcoming reforms*

In the later years of the first von der Leyen Commission, several additional actions were taken to boost social partner involvement. First, the Commission Communication on Strengthening Social Dialogue of 25 January 2023[37] underscored the EU's commitment to embedding social dialogue into the fabric of its policy-making processes. Specifically, the Communication acknowledges the need for structured dialogues with social partners at critical junctures of the European Semester cycle. By institutionalizing these engagements, the European Commission aims to ensure that social dialogue becomes a central element of economic and employment policy coordination. However, while this Communication reinforces the EU's rhetorical support for social dialogue, its practical impact depends on the extent to which Member States adopt these practices at the national level and how effectively social partners can influence key decisions.

Building on the Commission's Communication, the Council Recommendation on Strengthening Social Dialogue of 12 June 2023[38] also explicitly called for the systematic, meaningful, and timely involvement of social partners in policy-making. This includes not only employment and social policies but also economic and other public policies where relevant. Importantly, the Recommendation emphasizes the need for such involvement within the context of the European Semester. If effectively implemented, this Recommendation has the potential to standardize practices across the EU, ensuring that social partners have a stronger voice in shaping policies that directly affect labour markets and social systems. However, achieving this goal will require Member States to overcome structural barriers, such as weak traditions of social dialogue or limited institutional capacity.

Further, the 2024 reform of the Stability and Growth Pact and Six Pack rules introduces another dimension to the evolving role of social partners[39].

[37] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening social dialogue in the European Union: harnessing its full potential for managing fair transitions, Brussels 25 January 2023, COM (2023) 40 final.

[38] Council Recommendation on Strengthening Social Dialogue of 12 June 2023, C/2023/1389, OJ 6 December 2023.

[39] Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97, OJ L, 2024/1263, 30.4.2024;

While the social partners were consulted on this reform, the reform itself does not contain explicit rules about an increased social partner involvement. The ETUC criticised the reform, stating "The reform underestimates the relevance of social dialogue and threatens collective bargaining. Social partners are listed as stakeholders, yet the SGP does not value social dialogue and collective bargaining when defining investments and reforms or accompanying economic and industrial transformations"[40]. This omission raises concerns about the consistency and depth of social partner engagement in macroeconomic policy coordination. The lack of new, binding rules on social partner involvement in the Stability and Growth Pact reform risks perpetuating the current ad hoc approach. While consultations may take place, their effectiveness and impact will likely depend on the willingness of individual Member States and EU institutions to prioritize social dialogue.

A possible future reform with a significant impact is the Social Imbalances Procedure (SIP)[41]. The SIP emerged as a conceptual framework proposed by Belgium and Spain during the Porto Social Summit of 2021[42]. Supported by the European Commission in the 2022 Joint Employment Report (JER)[43], the SIP seeks to introduce an upward social governance mechanism akin to the Macroeconomic Imbalances Procedure. Its goal is to address social imbalances systematically, with a particular focus on promoting social rights and ensuring a balanced approach to economic and social policies. At the heart of SIP lies the concept of a "Social Alert Mechanism",

Menguy, *Reform of the Stability and Growth Pact: Which changes for the governments?*, in *JGE*, 2024, vol. 15 https://www.sciencedirect.com/science/article/pii/S2667319324000247; Pench, *Three risks that must be addressed for new European Union fiscal rules to succeed*, in *Policy brief*, 16 May 2024, https://www.bruegel.org/policy-brief/three-risks-must-be-addressed-new-european-union-fiscal-rules-succeed.

[40] ETUC, *Economic governance reform: ETUC priorities against austerity and for investments*, Adopted at the Executive Committee Meeting of 26-27 March 2024, https://www.etuc.org/en/document/economic-governance-reform-etuc-priorities-against-austerity-and-investments.

[41] Sabato, Vanhercke, Guido, *A "Social Imbalances Procedure" for the EU. Towards operationalisation*, in *ETUI Working Paper*, ETUI, 2022, 09.

[42] Belgian-Spanish Non Paper ahead of the Porto Social Summit, 21 April 2021, https://europeanunion.diplomatie.belgium.be/sites/default/files/2023-05/Belgian-Spanish%20Non%20Paper%20ahead%20of%20the%20Porto%20Social%20Summit.pdf.

[43] European Commission, Directorate-General for Employment, Social Affairs and Inclusion, *Joint Employment Report 2022: as adopted by the EPSCO Council on 14 March 2022*, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2767/342787.

which would function as an early-warning system to identify and address social disparities within and between Member States. This mechanism is supported by key EU institutions, including the European Economic and Social Committee (EESC)[44], as well the EMCO (the Employment Committee) and SPC (Social Protection Committee)[45], which have explored its feasibility. By introducing such a framework, the SIP could reinforce the European Pillar of Social Rights (EPSR) and strengthen the social dimension of the European Semester[46]. However, its potential impact remains uncertain and it is still far from certain if the SIP will ever see the light of day as we did not hear much about the topic in 2024.

Finally, the Val Duchesse Summit on 31 January 2024 represented another milestone in the EU's efforts to bolster social dialogue[47]. A key outcome anticipated from this summit is a Tripartite Declaration[48], potentially paving the way for a Pact for Social Dialogue by 2025. Such a pact would aim to institutionalize and deepen the involvement of social partners in EU policy-making processes, with a focus on both national and EU levels. The declaration and subsequent pact may also inspire legislative action, including a possible directive to formalize social partner engagement. The intention to create a new Pact for Social Dialogue was also confirmed in Mission Letter by Commission President Ursula von der Leyen to Commissioner-designate Roxana Mînzatu in September 2024 and is currently under preparation[49]. If realised, this could enhance the consistency and transparency of social dialogue across

[44] EESC, Opinion on the Social Imbalances Procedure, adopted on 27 April 2023, SOC/748, https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/social-imbalances-procedure.

[45] Employment Committee and Social Protection Committee, Opinion of the Employment Committee and the Social Protection Committee on the proposal by Belgium and Spain for the introduction of a Social Imbalances Procedure in the European Semester, 9222/22, Brussels, 18 May 2022.

[46] Also see the favourable resolution of the ETUC, Resolution on the Social Imbalances Procedure for the EU, 16-17 March 2022.

[47] European Commission, *Val Duchesse Social Partner Summit*, https://ec.europa.eu/social/main.jsp?catId=1632&langId=en.

[48] European Commission, Belgium, ETUC, Business Europe, SGI Europe, SME United, *Val Duchesse Social Partner Summit Tripartite Declaration for a Thriving European Social Dialogue*, https://ec.europa.eu/social/main.jsp?catId=1632&langId=en.

[49] European Commission, *Mission letter to Roxana Mînzatu*, Brussels, 17 September 2024, https://commission.europa.eu/document/download/27ac73de-6b5c-430d-8504-a76b634d5f2d_en?filename=Mission%20letter%20-%20MINZATU.pdf.

Member States, addressing long-standing disparities in its application. However, the specifics of the pact, including its scope, binding nature, and integration with the European Semester, remain under discussion.

6. *Conclusions*

The analysis of the role of social partners in EU economic governance emphasizes the nuanced and evolving nature of their involvement at both European and national levels. While there are institutional frameworks that highlight the importance of engaging social partners, their actual integration and influence vary widely across Member States and governance mechanisms.

The European Union has made strides in embedding social dialogue, especially since the introduction of the European Pillar of Social Rights in 2017, which reinforced the need for inclusive policymaking. Mechanisms like the Annual Sustainable Growth Strategy (ASGS) and tools within the European Semester provide structured opportunities for consultation. However, these engagements often remain informal or non-binding, leaving room for variability in their application and effectiveness.

At the national level, significant disparities exist in how Member States involve social partners in drafting National Reform Programmes (NRPs) or engaging with the EU's economic coordination processes. While countries like the Netherlands and Luxembourg demonstrate robust consultation practices, others, particularly in Eastern and Southern Europe, exhibit limited or unclear involvement, reflecting historical and institutional challenges in fostering social dialogue.

Despite recent initiatives like the Commission Communication and Council Recommendation on Strengthening Social Dialogue (2023), and the Val Duchesse Summit of 2024 and the prospect of a Pact for Social Dialogue by 2025, challenges persist. A key issue is the lack of binding rules that mandate consistent and meaningful social partner involvement. This omission is particularly evident in critical frameworks like the Stability and Growth Pact reform, which underestimates the relevance of social dialogue in shaping economic policies.

Future reforms, such as the potential Social Imbalances Procedure (SIP), offer hope for elevating the role of social partners by introducing mechanisms

to address social disparities systematically. However, these proposals remain speculative, and their implementation will require substantial political will and structural adjustments across Member States.

In conclusion, while the EU recognises the value of social partners in ensuring balanced and inclusive economic governance, their role often oscillates between being key stakeholders and mere symbolic participants. Bridging this gap will necessitate not only formalising their involvement but also fostering a cultural shift towards greater recognition of their contributions at all levels of governance. Without such efforts, the EU risks undermining the social legitimacy of its economic policies and the broader objectives of the European Pillar of Social Rights.

Abstract

This article examines the evolving role of social partners in the context of EU economic governance, particularly within the European Semester. While the European Union has introduced frameworks and initiatives to integrate social dialogue into its policy-making processes the extent and depth of social partner involvement vary significantly across Member States. Through legal analysis and a review of National Reform Programmes (NRPs), the article highlights both the formal structures and practical realities shaping the role of social partners. It explores disparities in engagement practices, critiques the absence of binding rules mandating consultation, and evaluates new developments, including the prospect of a Social Imbalances Procedure (SIP) and a potential Pact for Social Dialogue. The findings underscore the need for institutional reforms to enhance the consistency, transparency, and impact of social partner contributions at both national and EU levels.

Keywords

European Semester, Social dialogue, EU economic governance, National reform programmes, Stability and growth pact.

Carla Spinelli

Industrial Relations Practices in the Digital Transition: What Role for the Social Partners?

Contents: **1.** Introduction. **2.** What do social partners ask for: the EU Framework Agreement on Digitalisation (FAD) 2020. **3.** The EU Legal Framework on industrial relations practices in the digital transition prior to the FAD. **4.** Any change of approach in the recent regulatory developments? **4.1.** Regulation (EU) 2024/1689 on Artificial Intelligence. **4.2.** Platform Work Directive (EU) 2024/2831. **5.** The current scenario: participatory models versus or plus collective bargaining?.

1. *Introduction*

Work organisation systems are increasingly characterised by the dominance of new digital technologies, which are putting pressure on industrial relations systems at national and supranational level.

No one could disagree that "it should be part of Europe's digitalisation model to draw on the strength of the social partners and the efficiency gains the AI revolution offers while safeguarding workers' rights"[1].

In the context of the digital transition, the main challenges facing workers' representatives and trade unions are to strengthen their rights to information and consultation on the one hand, and to counteract the growing pervasiveness of employer control on the other[2].

[1] Oosterwijk, *Algorithmic management - a codetermination challenge*, in *Soc. EU*, 2024, 5th March.

[2] Menegatti, Gyulavári, *Decent Work in the Digital Age: European and Comparative Perspectives*, Hart Publishing, 2022; Miranda Boto, Brameshuber, *Collective Bargaining and the Gig Economy*, Hart Publishing, 2023; Senatori, Rymkevich, *Digital Employment and Industrial Relations in Europe*, Giappichelli, 2023.

The aim of this article is to explore what kind of synergies actually exist between EU law, participation procedures and collective bargaining to address the current challenges in the world of work due to digitalisation. The most relevant EU secondary legislation – taking into account existing and future sources of regulation - and framework agreements will be considered. The aim is also to check whether the EU is practising what it preaches by strengthening the involvement of the social partners.

In other words, this paper aims to examine the role that social partners should be able to play in the digital age.

In this perspective, the analysis of the EU Framework Agreement on Digitalisation 2020 (sec. 2) will be the starting point of any reflection, in order to highlight the demands of the social partners themselves, which appear at EU level as a (possible) synthesis of the demands at national level. It will then be necessary to examine the more relevant EU regulatory instruments for dealing with digitalisation at work, both before (section 3) and after (section 4) the FAD, in order to find out whether they provide for any kind of involvement of the social partners and according to which pattern of industrial relations practices. Such an examination will lead to some observations on the regulatory role of information and consultation procedures and/or collective bargaining on the risks of digitalised work at EU (and national) level (par. 5).

The study is based on the research carried out for the author's intervention during the 21st International Conference in memory of Professor Marco Biagi, held in Modena in March 2024.

2. *What do social partners ask for: the EU Framework Agreement on Digitalisation (FAD) 2020*

In the midst of the Covid-19 pandemic, the European social partners – Business Europe, the associations representing small and medium-sized enterprises (SME United) and the public sector (Ceep) together with the European Trade Union Confederation (ETUC) and the liaison committee EUROCADRES/CEC – shared and formalised under Article 155 T.F.U.E. a precise commitment to a more inclusive market, oriented to govern the change brought about by digital technologies in the productive organisation, labour relations and consequently in the market. An autonomous agreement

has been used, the implementation of which, on the basis of the principle of subsidiarity, is left to the national trade unions affiliated to the signatory organisations according to the specific practices existing in their domestic systems.

The European Social Partners Framework Agreement on Digitalisation (FAD) of 2020[3] outlines a five stages circular process of shared management between the actors of the system – companies, workers and their representatives – demanding support interventions for the latter, in terms of information and services, necessary to engage effectively in the different phases of the process.

The Agreement identifies then four issues that should also be discussed and taken into account as part of the process. These are: digital skills and securing employment; modalities of connecting and disconnecting; Artificial Intelligence and guaranteeing the human in control principle; respect of human dignity and surveillance[4].

Regarding the identification of the industrial relations practices which can operate most effectively, the FAD does not offer clear indications, as it simply refers to country-specific procedures and tools. However, the involvement of employee representatives seems more compliant with the purpose and the general setting of the agreement. Indeed, collective bargaining as a regulatory instrument is rarely mentioned in the text, for instance as a way to achieve clarity on the use of digital devices and right to disconnect, or to implement specific rules on privacy pursuant to article 88 of the "General Data Protection Regulation" (GDPR)[5].

The signatory parties of the FAD have not openly required a reinforcement of the legal framework to support their action, but they have recalled the role that EU and national governments have to play by setting up the framework conditions for workers and employers to lay down appropriate solutions, in line "with a subsidiary approach".

[3] European Social Partners' Autonomous Framework Agreement on Digitalisation (22 June 2020), available at https://www.etuc.org/en/document/eu-social-partners-agreement-digitalisation.

[4] Mangan, *Agreement to Discuss: The Social Partners Address the Digitalisation of Work*, in *ILJ*, 2021, 50, IV, p. 696 ff.

[5] Senatori, *The European Framework Agreement on Digitalisation: a Whiter Shade of Pale?*, in *ILLeJ*, 2020, vol. 13, II, p. 171 ff.

3. *The EU legal framework on industrial relations practices in the digital transition prior to the FAD*

In the background of the FAD there were already some EU legal sources offering a slight support to the involvement of social partners in managing and supervising digital workplaces.

Among those, Regulation (EU) 2016/679 on data protection is the essential complementary tool to take into account when digitalisation risks to affect fundamental rights through data processing.

The "General Data Protection Regulation" (GDPR) provides mainly for an individual approach to the topic addressed. However, there are a few articles of the GDPR which refer to collective agreements.

For example, article 9 states that the processing of the so-called "sensitive data" is allowed if necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law, in so far as it is authorized by Union or Member State law or a collective agreement, pursuant to Member State law, providing for appropriate safeguards for the fundamental rights and the interests of the data subject (paragraph 2, letter b). So, it allows a collective agreement to authorize, as an alternative to the law, the processing of such special categories of personal data: namely, those ones revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, genetic data, biometric data, data concerning health or data concerning a natural person's sex life or sexual orientation.

Moreover, according to article 88, which regulates the "Processing in the context of employment", Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organization of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship (paragraph 1). Those rules

shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place (paragraph 2).

Recital 155 specifies that Member State collective agreements include "works agreements" and adds that they may provide for specific rules on the processing of employees' personal data for the conditions under which personal data in the employment context may be processed on the basis of the consent of the employee.

On the other hand, room for workers' representatives to present their views to the controller with regards to the Data Protection Impact Assessment (DPIA) is carved out by Article 35, paragraph 9, but only "where appropriate".

Few years later, as one of the first intervention to implement the European Pillar of Social Rights, Directive 2019/1152/UE on "Transparent and Predictable Working Conditions" was enacted.

It aims to tackle the asymmetry of power between employers and workers on relevant information regarding working conditions through increasing predictability and certainty in the employment relationship. Despite this, workers' representatives and trade unions are never involved in the flow of information, regardless of their potentially beneficial role on strategically using data to increase workers' protection.

Social partners, and workers' representatives in particular, are only mentioned:

- in Recitals 37-38, according to which Member States should allow social partners to provide for better protection through collective agreements even adopting different provisions if they are more appropriate, for the pursuit of the purpose of the Directive;

- in art. 17, in order to protect workers' representatives from any adverse treatment by the employer.

However, as already said, the most relevant EU regulatory instrument preceding the FAD with which the EU Social Partners approach to digitalisation remains more consistent is the I&C Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

An evolutionary interpretation suggested that by mandating informa-

tion and consultation duties «on decisions likely to lead to substantial changes in work organisation or in contractual relations» (Article 4, paragraph 2, let. c), this Directive would pose an obligation to inform and consult employees' representatives on any decision concerning algorithmic management[6]. However, some shortcomings persist, since the Directive has a limited scope in terms of workers covered (exclusively employees) and the information and consultation rights cover only significant changes which affect the organisation.

4. *Any change of approach in the recent regulatory developments?*

A more comprehensive and focused approach can be found in the recent regulatory developments, since the digital transition, together with the green and energy ones, were (and are still now) at the core of the EU strategic policies during the first mandate of President von der Leyen. According to the related agenda, the EU's digital strategy aims to make this transformation work for people and businesses, while helping Europe to strengthen its digital sovereignty and set standards, rather than following those of others. In the last months of the previous legislature two fundamental legal instrument have been adopted, at the end of very complicated negotiations conducted during the procedure for their approval: the Artificial Intelligence Act, the world's first comprehensive regulation on artificial intelligence, and the Platform Work Directive, aimed at avoiding misclassification and improving working conditions for these workers.

5. *Regulation (EU) 2024/1689 on Artificial Intelligence*

The Regulation on Artificial Intelligence (EU) 2024/1689 (AI Act) aims to foster the development and uptake of safe and trustworthy artificial intelligence systems across the EU's single market by both private and public actors. At the same time, it aims to ensure respect of fundamental rights of EU citizens and stimulate investment and innovation on artificial intelligence in Europe (Recital 1 and 2; Article 1, paragraph 1).

[6] De Stefano, Taes, *Algorithmic management and collective bargaining*, in *FB*, ETUI, 2021, p. 29.

The AI Act has adopted a wide definition of Artificial Intelligence, which covers every "machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments" (Article 3, paragraph 1).

The scope of application includes providers and deployers of AI systems that have their place of establishment or are located in the EU, or even in a third country as far as the output produced by the AI system is used in the Union (Article 2, paragraph 1).

The AI Act sets harmonised rules for the development, placement on the market and use of AI systems in the Union following a proportionate risk-based approach, that does not create unnecessary restrictions to trade, whereby legal intervention is tailored to those concrete situations where there is a justified cause for concern or where such concern can reasonably be anticipated in the near future.

The AI Regulation imposes regulatory burdens only when an AI system is likely to pose high risks to fundamental rights and safety. The adverse impact caused by the AI system on the fundamental rights protected by the Charter of Fundamental Rights of the EU is of particular relevance when classifying an AI system as high-risk. For non-high-risk AI systems, only very limited transparency obligations are imposed.

AI systems used in educational and vocational training like those used in employment, workers' management and access to self-employment, listed in Annex 3, paragraph 3 and 4 of the Regulation, should be classified as high-risk, since those systems may appreciably impact future career prospects and livelihoods of these persons[7].

According to Recital 92, the Regulation cannot undermine the obligations for employers to inform or to inform and consult workers or their representatives under Union or national law and practice, including Directive 2002/14/EC, on decisions to put into service or use AI systems. In case of planned deployment of High-Risk AI Systems at the workplace, it remains

[7] On the crucial issue of AI's impact on the labour market, working conditions and labour standards, see PONCE DEL CASTILLO (ed.), *Artificial intelligence, labour and society*, ETUI, 2024, available at https://www.etui.org/publications/artificial-intelligence-labour-and-society.

necessary to ensure information of workers and their representatives where the conditions for those information or information and consultation obligations in other legal instruments are not fulfilled. Recognising such information right is considered ancillary and necessary to the objective of protecting fundamental rights that underlies the AI Act. As a consequence, an information requirement to that effect should be laid down in the Regulation, without affecting any existing rights of workers.

Moreover, the AI Act shall not preclude the Union or Member States from encouraging or allowing the application of collective agreements which are more favourable to workers in terms of protecting their rights in respect of the use of AI systems by employers (Article 2, paragraph 11).

Article 26 foresees the obligations of deployers of High-Risk AI Systems, which burden also any employer who is "using an AI system under its authority" (Art. 3, paragraph 4)[8].

According to an amendment adopted by the European Parliament on 14th June 2023 to the Proposal for the AI Act, a new paragraph 5.1. should have been added to art. 26, providing that: "Prior to putting into service or use a High-Risk AI System at the workplace, deployers shall consult workers' representatives with a view to reaching an agreement in accordance with Directive 2002/14/EC and inform the affected employees that they will be subject to the system".

In the final version of the Regulation, the current paragraph 7 states instead that: "Before putting into service or using a High-Risk AI System at the workplace, deployers who are employers shall inform workers' representatives and the affected workers that they will be subject to the use of the High-Risk AI System. This information shall be provided, where applicable, in accordance with the rules and procedures laid down in Union and national law and practice on information of workers and their representatives".

The involvement of workers' representative has thus been limited to the right to be informed about the use of the High-Risk AI System, which do not necessary lead to either a consultation or even an agreement.

Another amendment of the EU Parliament was cut back in its ambitions. The obligation to provide for the Fundamental Rights Impact Assessment (FRIA), according to Art. 27, concerns only deployers that are bodies

[8] CRISTOFOLINI, *Navigating the impact of AI systems in the workplace: strengths and loopholes of the EU AI Act from a labour perspective*, in *ILLeJ*, 2024, vol. 17, I, p. 79 ff.

governed by public law, private actors providing public services, and deployers that are banking and insurance service providers using AI systems listed as high risk in Annex III, point 5, (b) and (c) of the Regulation. However, even for those limited categories of deployers, the FRIA will need to be carried out only for aspects not covered by the Data Protection Impact Assessment (DPIA) according to the GDPR or other legal obligations[9].

6. *Platform Work Directive (EU) 2024/2831*

Algorithmic management is one of the main feature of the new digital work, which emerged most clearly in platform work, raising questions of accountability and transparency. It consists in a new organisational paradigm which implies the partial or even total replacement of managerial prerogatives[10].

The European Commission adopted in 2021 a Proposal for a Directive to regulate such phenomenon in this specific area of the gig economy, aiming at countering its opacity.

The Platform Work Directive (EU) 2024/2831, enacted as a result of a strong compromise among the stakeholders, introduces measures to facilitate the determination of the correct employment status of persons performing platform work; promotes transparency, fairness, human oversight, safety and accountability in algorithmic management in platform work; improves transparency with regard to platform work, including in cross-border situations, and it also lays down rules to improve the protection of natural persons in relation to the processing of their personal data[11].

The Directive lays down minimum rights to apply to every person performing platform work in the EU, whether or not under an employment contract or in an employment relationship (Article 2, paragraphs 3 and 4).

As the ETUC underlined: "The Directive also recognises the role of

[9] Le Bonniec, *Another Path for AI Regulation: Worker Unions and Data Protection Rights*, in *ILLeJ*, 2024, 17, 2, p. 115 ff.

[10] The topic is widely analysed, see at least: Aloisi, De Stefano, *Your Boss Is an Algorithm*, Hart Publishing, 2022.

[11] Mangold*, Platform work and traditional employee protection: The need for alternative legal approaches*, in *ELLJ*, 2024, vol. 15, IV, p. 726 ff.; Rainone, Aloisi, *The EU Platform Work Directive. What's new, what's missing, what's next?*, in *ETUI PB*, 2024, 6th August.

trade unions in all aspects of the platform economy, including on issues such as algorithm management. Despite calls for weakening these provisions, they were left untouched by numerous attacks confirming the strong need for the collective bargaining in the platform economy"[12].

Directive (EU) 2024/2831 foresees in several norms the involvement of trade unions, workers' representatives freely elected by platform workers and even, what is worth to stress, representatives of persons performing platform work not under an employment contract, insofar as they are provided for under national law and practice (Article 2, paragraphs 6 and 7)[13].

To safeguard the rights and freedoms of natural person, when processing their personal data by means of automated monitoring systems or decision-making systems, digital labour platforms are required to carry out a Data Protection Impact Assessment (DPIA). Being this the case, the platforms shall seek the views of persons performing platform work and their representatives and then provide the assessment to workers' representatives (Article 8, paragraph 2).

To guarantee transparency on automated monitoring or decision-making systems, platform workers' representatives shall receive information by digital labour platforms on their use, together with persons performing platform work and, upon request, competent national authorities (Article 9, paragraph 1).

That information shall be very detailed, concerning: "(a) all types of decisions supported or taken by automated decision-making systems, including when such systems support or take decisions not affecting persons performing platform work in a significant manner; (b) as regards automated monitoring systems: (i) the fact that such systems are in use or are in the process of being introduced; (ii) the categories of data and actions monitored, supervised or evaluated by such systems, including evaluation by the recipient of the service; (iii) the aim of the monitoring and how the system is to achieve it; (iv) the recipients or categories of recipients of the personal data processed by such systems and any transmission or transfer of such personal data including within a

[12] Press release 11.3.24.

[13] For a deeper analysis which compares the provisions on collective representation and collective rights of platform workers respectively enshrined in the Proposal adopted by the European Commission on December 2021 and in the amendments presented by the European Parliament on 22 December 2022, see PURIFICATO, SENATORI, *The Position of Collective Rights in the "Platform Work" Directive Proposal: Commission v Parliament*, in *HLLJ*, 2023, I.

group of undertakings; (c) as regards automated decision-making systems: (i) the fact that such systems are in use or are in the process of being introduced; (ii) the categories of decisions that are taken or supported by such systems; (iii) the categories of data and main parameters that such systems take into account and the relative importance of those main parameters in the automated decision-making, including the way in which the personal data or behaviour of the person performing platform work influence the decisions; (iv) the grounds for decisions to restrict, suspend or terminate the account of the person performing platform work, to refuse the payment for work performed by them, as well as for decisions on their contractual status or any decision of equivalent or detrimental effect" (Article 9, paragraph 1).

The information shall be provided in the form of a written document and shall be presented "in a transparent, intelligible and easily accessible form, using clear and plain language" (Article 9, paragraph 2).

Workers' representatives are entitled to receive comprehensive and detailed information about all relevant systems and their features. They shall receive that information prior to the use of those systems or to the introduction of changes affecting working conditions, the organization of work or monitoring work performance or at any time upon their request (Article 9, paragraph 4).

The human in command principle is expressly recognised by the Directive in its articles 10 and 11, being enforced also through the involvement of workers' representatives.

An evaluation of the impact of individual decisions taken or supported by automated monitoring and decision-making systems on persons performing platform work shall be carried out by digital labour platforms with the involvement of workers' representatives, regularly, and in any event every two years. Information on such evaluation shall be transmitted to platform workers' representatives (Article 10, paragraphs 1 and 4).

The right to request the human review on the decisions taken or supported by an automated decision-making system shall be recognised not only to persons performing platform work but also to the representatives acting on behalf of them, in accordance with national law or practice. The digital labour platform shall respond to such request by providing "a sufficiently precise and adequately substantiated reply in the form of a written document" no later than two weeks after the receipt of the request (Article 11, paragraph 2).

Information and consultation rights of platform workers' representatives are enshrined in general terms in Article 13 and qualified as additional to those provided for by Directives 89/391/EEC, 2002/14/EC and 2009/38/EC.

Workers' representatives of platform workers are entitled to information and consultation rights – as defined in Article 2, points (f) and (g), of Directive 2002/14/EC and under the same modalities concerning their exercise laid down in that Directive – "on decisions likely to lead to the introduction of or to substantial changes in the use of automated monitoring or decision-making systems".

What is more, "the platform workers' representatives may be assisted by an expert of their choice, in so far as this is necessary for them to examine the matter that is the subject of information and consultation and formulate an opinion". The expenses for the expert shall be borne by the digital labour platform which has more than 250 workers in the Member State concerned, provided that they are proportionate.

Specific arrangements for representatives of persons performing platform work other than platform workers' representatives are set in Article 15.

The exercise of the rights provided to workers' representatives under Article 8(2), Article 9(1) and (4), Article 10(4) and Article 11(2), examined above, are extended to representatives of persons performing platform work other than workers' representatives, but only "insofar as they are acting on behalf of those persons with regard to the protection of their personal data".

To draw some preliminary conclusions, it can be said that the Platform Work Directive enforces the information (and consultation rights) of workers' representatives and open up the floor to other representative bodies, even if for a limited scope.

To complement the collective rights of persons performing platform work as self-employed the "Guidelines on collective agreements by solo self-employed people"[14] should be taken in due account.

The Guidelines clarify when certain self-employed people can get together to negotiate collectively better working conditions without breaching EU competition rules. The Guidelines apply to solo self-employed people who work completely on their own and do not employ others[15].

[14] Communication from the Commission (2022/C 374/02).

[15] Rainone, *Labour rights beyond employment status: insights from the competition law Guidelines*

The Guidelines form part of the actions seeking to ensure that the working conditions of platform workers are adequately addressed, however, the scope of the Guidelines is not limited to solo self-employed people working through digital labour platforms and covers also situations of solo self-employed people active in the offline economy.

7. *The current scenario: participatory models versus or plus collective bargaining?*

In the light of the above overview of some selected EU regulatory instruments on digitalisation, some tentative observations can be made on industrial relations practices in this field, which will need to be verified later by a more in-depth analysis of their future developments.

There is no doubt that information and consultation procedures, which are well established in the traditional EU industrial relations system, remain crucial in providing good support for managing the risks posed by digitalised workplaces.

In fact, the right of workers' representatives to be informed has been strengthened much more than the right to be consulted, since the obligation to "seek their views" is less frequently mentioned in the norms examined. On the contrary, the content of the information to be provided is very detailed, it must be provided in writing and in good time, and when they are released by a digital labour platform an expert chosen by the workers' representatives can help them to examine the issues involved.

From this point of view, transparency as a means of protection seems to be more important than the direct involvement of workers' representatives, as demanded instead by the social partners in the FAD.

Furthermore, representatives other than workers' representatives are only involved when personal data are processed.

Finally, the role of collective bargaining seems to be limited to enhancing the level of protection offered by the legal provisions, and to increasing workers' rights if and when a collective agreement can be signed according to national rules and practices.

on collective bargaining, 2022, in Aa.Vv. (eds.), *Defining and protecting autonomous work*, Springer, p. 167 ff.; Giampà, *Collective Bargaining for Solo Self-Employed Persons in the European Union. Assessing the Efficacy of the European Commission's Guidelines*, in this journal, 2024, I.

Regarding the impact of digitalisation on the world of work, the EU legal framework is still rather fragmented, and even the most recent measures have some shortcomings. The legal basis of the AI Act does not allow to adequately regulate the impact of artificial intelligence on employment relationships, and the chapter of the Platform Work Directive on algorithmic management is too limited in scope. These (and other) critical issues explain why the ETUC insists on calling for an EU directive on algorithmic systems in the workplace, in particular when it comes to algorithmic management, in order to complement the rules already in force[16].

Beyond formal declarations, the EU legal framework does not yet seem to provide effective support for the involvement of trade unions and workers' representatives in digitalisation. It is not really a kind of "auxiliary" legislation, but it may have a spill-over effect.

There are at least other two forthcoming regulations to monitor in the adopted perspective: the Proposal for a Directive amending Directive 2009/38/EC on European Works Councils and transnational information and consultation rights and, even more so, the Proposal for a Directive on Telework and the Right to Disconnect, which follows the failed attempt of the EU Social Partners to update the 2002 Framework Agreement on Telework.

It should be also noted that, Roxana Mînzatu's mandate[17] as Executive Vice-President for Social Rights and Skills, Quality Jobs and Preparedness (as renamed), includes an initiative on algorithmic management. Further legislative developments on the impact of digitalisation in the world of work can therefore reasonably be expected[18].

As digitalisation is a complex organisational process involving recurrent decisions affecting different aspects of working conditions, information and

[16] ETUC, *Resolution calling for an EU Directive on Algorithmic Systems at Work*, adopted at the ETUC Executive Committee of 6 December 2022, available at https://www.etuc.org/sites/default/files/document/file/2023-01/Adopted%20ETUC%20Resolution%20calling%20for%20an%20EU%20Directive%20on%20Algorithmic%20Systems%20at%20Work%20.pdf.

[17] See the Mission Letter published on 17th September 2024, available at https://commission.europa.eu/document/download/27ac73de-6b5c-430d-8504-a76b634d5f2d_en?filename=Mission%20letter%20-%20MINZATU.pdf.

[18] To support a dedicated, legally binding, instrument which can fill the gaps, see the Open Letter in AA.VV., *Algorithmic Management and the Future of Work in Europe*, in *Soc. EU*, 2024, 4th November.

consultation procedures are certainly better suited to address the challenges in a partnership approach, respecting the different roles of the parties involved, but collective agreements can help to achieve better results in terms of stronger protection.

Full awareness of the relevance of collective bargaining in managing the significant impact on workers resulting from the introduction of digital technologies emerges from the European sectoral social dialogue texts on digitalisation[19].

Positive examples of successful synergies between workers' representatives and trade unions when information and consultation procedures, or even strategic litigation, lead to the signing of a collective agreement, can be found in the experience of TCAs on anticipation of change and restructuring the organisation of work in companies[20] as well as from Due Diligence litigation in Global Supply Chains[21].

These experiences confirm that a strong commitment on the part of the social partners themselves is necessary to activate any virtuous circle of joint regulation. Therefore, the many failed attempts of social dialogue at EU level and the delays in implementing the FAD at national level[22] do not inspire much confidence at present.

[19] Among the most recent ones, see, for example: the Joint Declarations of the EU Social Partners for the Banking Sector of December 2021, on remote work, and of May 2024, on Artificial Intelligence; the joint statement of the EU Social Partners in the MET industries of February 2023; the Agreement on Digitalisation signed in October 2022, the EU social partners for central/federal government, all available at https://employment-social-affairs.ec.europa.eu/policies-and-activities/european-employment-strategy/social-dialogue/social-dialogue-texts-database_en.

[20] Spinelli, *Trans-National Restructuring Processes: the Role of Collective Bargaining Beyond Information and Consultation*, in Ales, Basenghi, Bromwich, Senatori (eds.), *Labour and social rights: an evolving scenario*, Giappichelli, 2016, p. 173 ff.

[21] Spinelli, *Regulating Corporate Due Diligence: from Transnational Social Dialogue to EU Binding Rules (and Back?)*, in this journal, 2022, I, p. 103 ff.

[22] ETUC, Business Europe, SGI Europe, SME United, *Implementation of the ETUC1/BusinessEurope/SMEunited/SGI Europe, Framework agreement on Digitalisation*, 3rd Joint Report, 2023, available at https://resourcecentre.etuc.org/sites/default/files/2023-12/FINAL%20Third%20joint%20report%20-%20Implementation%20of%20the%20Digitalisation%20agreement.pdf.

Abstract

This contribution aims at analysing the contemporary challenges the world of work affords because of digitalisation from the perspective of industrial relations practices. What kind of synergies among EU law, participation procedures and collective bargaining, in view to address such challenges, do really exist? The goal is also to verify if the EU practices what it preaches, by boosting social dialogue.

Keywords

Digitalisation, EU labour law, Information and consultation rights, Collective bargaining, Workers' representatives.

authors information

Paulina Barańska
Representative of the National Commission for Occupational Health and Safety, NSZZ Solidarność Gdansk
(p.baranska@solidarnosc.org.pl)

Chiara Cristofolini
Researcher in Labour Law at the University of Trento
(chiara.cristofolini@unitn.it)

Milena da Silva Rouxinol
Assistant Professor at the Universidade Católica Portuguesa - Porto
(mrouxinol@ucp.pt)

Filip Dorssemont
Full Professor in Labour Law at the Université catholique de Louvain
(filip.dorssemont@uclouvain.be)

Helen Hermann
Associate Research at the German Research Institute for Public Administration Speyer (FÖV)
(helen.hermann@foev-speyer.de)

Constanze Janda
Professor at the German University of Administrative Sciences Speyer
(janda@uni-speyer.de)

Pieter Pecinovsky
Legal Advisor, Van Olmen & Wynant-Legal firm - Brussels
(pieter.pecinovsky@vow.be)

Luca Ratti
Associate Professor in European and Comparative Labour Law at the Université du Luxembourg
(luca.ratti@uni.lu)

Ana Ribeiro
Assistant Professor at the Universidade Católica Portuguesa - Porto
(aribeiro@ucp.pt)

Sophie Robin-Olivier
Full Professor in Law at the La Sorbonne Université
(sophie.robin-olivier@univ-paris1.f)

Carla Spinelli
Full Professor in Labour Law at the University of Bari
(carla.spinelli@uniba.it)

Barbara Surdykowska
Expertise Office, NSZZ Solidarność - Gdansk
(b.surdykowska@solidarnosc.org.pl)

abbreviations

The list of abbreviations used in this journal can be consulted on the website www.ddllmm.eu/dlm-int/.

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