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Contingent work is not contingent. Which models of regulation for the new forms of work?

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Abstract: Contingent work represents a sort of paradigmatic epiphenomenon of a new expression of the Labour Law need to reconsider itself, its identity and its same scope in a future perspective. The employment contract looses its capacity to select the situations that need protection. By the way, workers’ professionalism always requires to be safeguarded, also through innovative legal instrument. In this sense, soft law and corporate social responsibility in particular, seem to represent privileged regulative tools, to be considered and explored in order to achieve the essential protective objectives of the subject, called to be protagonist in a deeply changed world.

Keywords: contingent work, technological revolution, corporate social responsibility.

I. Introduction

The paper here presented intends to propose a critical reflection on some of the principal issues posed by the structural diffusion of forms of contingent work in the contemporary labour market, as an evident expression of the impact achieved by the technological revolution on the organisational and production current models.

The heterogeneous diversity of forms of contingent work, as well as the impressive dimension of the diffusion of this phenomenon, impose to consider this issue – from a quantitative, as well as from a qualitative point of view – not just as a contingent expression of the labour market development, but as a deep conceptual challenge for labour lawyers.

It is possible to say that contingent work represents, in fact, a sort of paradigmatic epiphenomenon of a new expression of the Labour Law need to reconsider itself, its identity and its same scope in a future perspective.

Indeed, the interpreters have to face «a challenge involving the very same basic institution of Labour Law: the contract of employment, and its actual capacity to work as a selective tool capable of conferring protection to those who need and deserve it» (Lo Faro, 2017, 12).

Effectively, the issue plays a central role because, as highlighted by the authoritative Italian doctrine just quoted, «the idea of contingent work rather indicates a series of developments beyond the employment contract» (Lo Faro, 2017, 7).

And so – reasoning in a holistic and, at the same time, in a problematical way – some questions arise from the topic object of investigation and, in particular: are Labour Law classical categories still capable to interpret and regulate complex phenomenon like gig-economy, sharing-economy and crowd-working?

The traditional dogmatic paradigm of Labour Law seems to be insufficient to regulate and protect a universe of situations that are emerging from the reality and deserving legal protection, even though they now remain out of the borders of a subject built on the subordination paradigm.

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It seems essential, in fact, «to incorporate bit of innovation into the tradition set of labour law values» and so «it still remains to be verified which concrete regulatory tool of protection, traditionally presupposing the subordinate relationship, could be extended to independent workers who are very weak in the market relations» (Caruso, 2017, 5).

As a consequence, in this context, a specific question deserves particular attention. As said before, the employment contract does not lend itself to represent an instrument still capable to identify the area of labour protection. But it is important to keep in mind that the same employment contract is generally and institutionally considered as a tool for the protection of the essential value of workers’ professionalism.

As stated by authoritative doctrine, in fact, precisely the professionalism necessary to carry out the employees’ tasks represents the object of the employment contract (Marazza, 2002, 303: «l’oggetto del contratto di lavoro subordinato non coincide, quasi fosse un calcolo aritmetico, con la somma dei compiti che il lavoratore si impegna a svolgere (a + b + c), bensì con la professionalità necessaria al loro svolgimento»).

So, particularly in the light of what has just been said, the consequent issue to consider de jure condendo could be: which set of regulative instrument could be imagined in order to guarantee an adequate level of protection for workers’ professionalism, in the contemporary scenario?

In the paper, this question is considered, along with other relevant issues, in order to reason critically on the possible regulation of new forms of work emerging in the contemporary scenario, imposing a deep reflection (and probably a sort of reconceptualization) for labour lawyers.

II. A new technological revolution and its impact on the employment relationship

We are witnessing a radical change in our lives: it is indisputable that a technological revolution is taking shape in the contemporary scenario.

Protagonist is the so called “Internet of Things”, a new way in using internet, based on the automatic interaction among things. In other words, we can say that Internet of Things connects human intelligence and artificial intelligence: «L’Internet delle Cose connette l’intelligenza umana e delle machine in modi nuovi, assolutamente importanti e a volte terrificanti. Capisce il senso del movimento nelle e fra le cose, comprese le persone, gli animali, le correnti d’aria, i virus, e tanto altro ancora. Riconosce rapporti e prevede modelli che sono fin troppo complessi da afferrare per l’intelletto e i sensi umani» (Greengard, 2017, 9).

For this reason, as highlighted in doctrine: «no es exagerado afirmar que asistimos a una nueva revolución tecnológica que, sin duda, se revela como un proceso de carácter estructural en nuestra sociedad» (Colàs Neila, 2012, 42).

An example of such a disruptive phenomenon is represented by the capillary diffusion of apps facilitating the direct connexion between offer and demand of “job performance”, by using state-of-the-art technological devices. It represents clearly the deep impact originated by this technological revolution on the contemporary productive model, called to face the diffused fragmentation and the emergence of new models of labour.

We are facing a «cambio de escenario que sin retórica puede definirse como cambio de época» (Romagnoli, 2003, 11), that imposes a holistic approach, in which “reading” the contemporary reality, through both the juridical and the economic lens.

A reflection in terms of law cannot in fact be separated from the economic and the productive scenario in which the system considered is contextualized.

In particular, it is evident that the contemporary situation is characterized by the deep influence of technological innovation on the working of the so-called “on-demand” economy; as highlighted in the interesting study Workers on tap, published in The economist, 3-9 January 2015, 7 et seq.: «The rise of the on-demand economy poses difficult questions for workers, companies and politicians».

As placed in light by one of the world’s most authoritative labor law scholars, who recently sadly passed away: «el revolucionario cambio tecnológico da impulso a una sociedad de trabajo en red que genera oportunidades no conocidas antes para el comercio y la inversión» (Hepple, 2003, 28).
The framework of reference is represented by an (almost) totally globalized market, in which the digital process is an innovation factor of the work relationship paradigms (Démoulain, 2012), that are revolutionaryly interested by a disintermediation trend, in which we observe a «universo di micro imprenditori senza impresa», highly individualized (Caruso, 2017, 8).

And it is undeniable that the same content of the work performance is deeply affected by the evolution of the production organization models, originated by the technological revolution and the economic crisis.

In particular, the concrete activities to be carried out by the worker are undergoing a deep structural change, rendering indispensable a more “intellectual” component, in order to solve problems and improve the productive processes. As stated above, undisputed protagonists in the so called “industry 4.0” are the things, interacting autonomously with each other, thanks to the use of artificial intelligence (AI) solutions, and so the same role of the “person that works” is experimenting a deep and conceptual change, producing significant consequences also on the juridical dimension of the topic.

Being concretely possible for the single employee to monitor the different phases of the productive processes simply through a smartphone or a tablet, the time-space dimension of the employment relationship results directly interested by this digital and organizational revolution.

Above all, though, task, qualification and categories are some of the principal institutions interested by a deep phase of reconceptualization, in which the same figure of the employee is no more conceived on the classical and “ford-based” model of the mere “doer”, but on the “thinker” that is critically aware of what is happening around him and pro-actively intervenes on the productive processes, as a “co-decision-maker” and as a “co-problem-solver”.

In order to do that in a proper and fruitful way, it is essential the employee constantly updates a high level of professionalism, maintaining always a rich corpus of skills: «dalle basse competenze ci si sposta verso competenze molto più elevate. (...) Nel cuore del processo produttivo si sta verificando una migrazione da attività di trasformazione manuale ad attività centrali sulla regolazione, il settaggio, la manutenzione e il miglioramento, che nell’Industry 4.0 significa fare tutte queste operazioni in modo più creativo e intelligente. Siamo molto distanti dal fordismo, con un processo produttivo wireless, sostanzialmente controllabile dalla rete» (Bentivogli, 2015, 12).

III. A new paradigm for Labour Law: contingent work

Within the context so far briefly represented, it is possible to say that contingent work represents a sort of paradigmatic epiphenomenon of a new expression of the Labour Law need to reconsider itself, its identity and its same scope in a future perspective.

We are talking about an extremely generalized phenomenon, which cannot be reduced to a mere transitional problem of the labor market, and which demands to be understood first and foremost in its conceptual dimension.

This inclusive notion evokes in fact many other different concepts (flexible, precarious, atypical work), expressive of a heterogeneity of contractual solutions, that differ from the classical and “standard” employment relationship, based on the open-ended and full time employment contract.

«By focusing on the idea of contingent work, on the contrary, we intend to designate a diverse kind of non-standard work, which, differently from atypical work, radically “falls outside the employment model”» (Lo Faro, 2017, 7; see also Deakin, 2007, 1161).

In other words, «while the idea of atypical work alludes to a variety of flexible arrangements within the employment contract; the idea of contingent work rather indicates a series of developments beyond the employment contract» (Lo Faro, 2017, 7).

Therefore, the substantial overcoming of the same relevance of the employment contract, which characterizes this new and innovative concept category, represents the central question of the issue.

For this reason, the unprecedented impact produced by the technological revolution on productive models affects the economic, as well as the social and labor dimensions of the system, that needs an
organic reflection and probably a structural rethinking, in the light of historical changes and complex phenomena (see Kaplan, 2016).

Work has deeply changed its own identification profile, presenting itself today in a completely different way from the past: we are assisting to an organizational evolution, in which the same employment relation is totally oriented to the satisfaction of contingent necessities, according to a proper “on-demand” model.

As above-mentioned, this situation is confirmed by the wide diffusion of applications and digital platforms that, using mobile devices, have changed the profile of consumption patterns and work organization, favouring technological intermediation through the network, between consumers and workers.

It is the age of platforms that make up the so-called gig-economy: «La que se ha denominado uber economy se basa en plataformas virtuales, páginas webs o apps, cuyo objetivo declarado es el contacto directo entre clientes y prestadores de servicios, calificados como trabajadores autónomos» (Sagardoy De Simón – Núñez-Cortés Contreras, 2017, 72).

In this respect, many doubts about the existence of labor elements in these typologies of services and interesting interpretive elements can be found in the jurisprudence of different countries (very famous, among the others, is the Californian case “Bervick versus Uber Technologies Inc.”).

Without entering into the substance of the different legal situations, the question of the possibility of applying the classic categories of labor law to innovative realities is of great interest: the very notion of subordination, characteristic and typical of work, requires a sort of check, in the light of a new phenomenology, marked by opposing concepts of autonomy and coordination.

«It is essential to consider how many important dimensions of work in the gig-economy share similar attributes with other non-standard forms of employment. Recognizing these similarities helps to avoid unnecessary subdivisions in labour discourses and allows including work in the gig-economy into policies and strategies aimed at improving protection and better regulation of non-standard work» (De Stefano, 2016, 21).

«In particular, the workers who utilize intermediaries to identify customers to deliver services, such as car rides, do not fit neatly into existing legal categories of independent contractors and employees» (Harris – Krueger, 2015, 27).

Therefore, the economic model of the so-called sharing economy seems to impose a rethinking and a revision of the classic criteria of identification of the employment relationship.

The reason is represented by the requirement to ensure legal coverage to contingent relationships, characterized by significant elements of autonomy, according to the “on-demand” model, but not totally corresponding to the traditional and “genuine” autonomous employment model.

This phenomenon effectively needs to be verified, thinking of possible solutions in order to adapt the “classical” institutional elements to the new scenarios.

In this sense, the proposal elaborated by Seth D. Harris (Cornell University) and Alan B. Krueger (Princeton University), in the study: “A proposal for moderning labor laws for the twenty-first century work: the independent worker”, seems worthy of consideration, among the different formulated.

Preliminarily, it is interesting to underline how the title of the proposal evokes another model of “modernization of labor law”, based on the idea of flexicurity, precisely in the so-called “Green Paper on the Modernization of Labor Law” [COM (2006) 708], although the approach to the conceptual model is very different.

In relation to the purpose of the proposal, the authors propose to draw a new and innovative legal status, located in the grey zone between autonomy and subordination. It should be hopefully capable of filling a regulatory gap concerning “independent workers”, who cannot be properly considered as self-employed (because, for example, service conditions are very often determined by platforms), neither as employees (because, for example, independent workers can choose when to work).

«We have sought to craft a new employment status that we call “independent workers”, to fill this void and improve the efficiency and fairness of the labor market, and reduce legal uncertainty. Many workers in the “offline economy” who are currently classified as independent contractors, such as taxi drivers, would also fit into this new category» (Harris – Krueger, 2015, 27).
Contra, see De Stefano, 2016, 21: «the proposal of introducing a new category of employment to regulate forms of work in the gig-economy does not seem a viable solution to enhance labour protections of the relevant workers and provide a predictable framework of rights, costs and liabilities for the parties involved».

This last interpretative position seems to be commendable, on the ground that the elaboration of a third new category does not look like an effective solution, in terms of labour protection, but rather a complicating taxonomic factor.

IV. The global context. The complexity of labor law, in the dichotomy territoriality of law/spatiality of economics

Actually, the key-point we need to consider, in order to properly understand the contingent work phenomenon in the light of its legal coverage, is represented by the global context in which it has spread, substantially characterized by the dissociation between the localized territoriality of law and the delocalized spatiality of economics.

We are referring to a dichotomy that is etiologically due to the contemporary globalized scenario, in which the true main character is embodied by the «entreprise dans un monde sans frontières» (Supiot, 2015).

Considering this phenomenon (whose epiphany is indeed well represented by the multinational company model) from a labor law point of observation, it should be pointed out the significant issue of the adequacy of the “traditional” regulatory instruments to guarantee an effective protection of the workers’ fundamental rights, in order to reduce the risks of social dumping, naturally caused by the competition between legal and economic systems (Napoli, 2006).

Moving forward gradually, it is important to specify that, from an institutional point of view, globalization has determined a sort of “re-scaling” in the juridical and social regulation, that has brought to a significant diversification in the regulatory models and techniques (Perulli, 1999).

So, in order to be able to consider the juridical effects of the peculiar phenomena provoked by globalization, it appears important to move from an attentive and unhurried evaluation of how labor law regulatory framework is currently seen by its exegetes in the overall juridical context.

There seems to be no doubt about the fact that the main characteristic of the labor law corpus of regulations in the various Western (and European in particular) legal systems is represented by its complexity, which has grown over the years and decades.

One of the most authoritative French scholars speaks with extraordinary strength about the: «vision d’un droit du travail perçu comme une forêt trop obscure et hostile pour qu’on s’y aventure (...)» (Badinter – Lyon-Caen, 2015, 11).

The obscurity of the regulation of a phenomenon, work, which is in constant development, is one of the most important aspects in contemporary legal systems, afflicted by a pathological regulatory hypertrophy, which has made labor law «obèse, malade» (Badinter – Lyon-Caen, 2015, 12-13).

The seriousness of the issue can be first of all appreciated in its “quantitative” dimension, with an extraordinary number of regulations disciplining work (Lokiec, 2015, 70).

The main consequence of this multiplication of legal provisions can be grasped also in qualitative terms, in the poor comprehensibility of regulations in general and in the modest quality of labor regulations in particular (Descartes, 2011, 106).

In addition, considering the topic in a general perspective, it is possible to highlight that labor market regulation is therefore connected to the natural development of the economic profiles of market itself, in a highly global and transnational context.

So, to reason in purely national terms, with exclusive reference to single systems, is indeed a short-sighted and anachronistic approach in our contemporary global dimension.

We are living a particular phenomenon which could be considered prima facie “aporistic”: the market’s dimension today is global and transnational, but at the same time, it is divided into an heterogeneity of further markets, each of which with peculiarities and specific aspects of their own (Pessi, 2011, 825).
Any organic reasoning about labour market regulations can therefore only be contextualized in a global scenario of wider breadth.

Any regulatory intervention cannot exclude the awareness of the existence of a hiatus between the wide (and supranational) space of economics and the circumscribed (and national) territoriality of law. On the contrary, it does not seem possible to imagine a national regulation capable of conditioning global competitive dynamics.

Particularly important are, then, the repercussions on the labor market of the phenomena of the so-called production de-localization, which are a paradigmatic consequence of the free circulation of capital.

As is known, the free circulation of capital is accompanied by the free circulation of services, and consequently, by the flourishing of transnational phenomena which are today particularly significant, imposing to proceed to an updating of the employment safeguard tools.

Thus, we understand the need to “readjust” the system of guarantees proposed to protect the employee’s interests, as a consequence of its insertion in a new global economic-productive context (Pessi, 2011, 830).

Only by updating itself, labor law will be able to continue its fundamental mission of «sensore delle tendenze», proper of the «ramo del diritto più sensibile alle transformazioni sociali e istituzionali» (Mariucci, 1997, 168).

In the natural inclination to reformism, typical of labor law’s identity, the juridical labor regulations are placed in a particular position, which requires as known a work of continuous revision and constant updating in their adaptation to newer and newer contexts.

The technological, economic and social transformations that the present-day production scenario has known and is getting to know, impose on the labor law jurist to open up to the constant dialogue with other disciplines.

Indeed, we need a constant and permanent work of renewal of the normative paradigms which make up labor law in its totality (Mazziotti di Celso, 1990, 1).

As mentioned above, the function and the role labor law are called to perform have been interested by the evolutionary events determined by the changing economic, political and institutional scenarios (Caruso, 2005, 3).

Nowadays, the very principles, the founding rules and perhaps even the values of reference of this branch of law, are called to a general rethinking, as a consequence of the greater “conditioning” economic logic places on regulations (Rodríguez-Piñero y Bravo-Ferrer, 2006, 55: such a significant change is «en buena parte consecuencia del creciente condicionamiento de la regulación jurídica del trabajo por el pensamiento económico, la lógica de empresa y los imperativos del mercado, que reflejan nuevas ponderaciones de valores e intereses y nuevos equilibrios de poder que están llegando a afectar a la propia identidad cuando no a la subsistencia de esta rama del Derecho»).

To contemporary labor law has been attributed a totally new function, and in reality, extraneous to it: scholars have efficaciously spoken of a «catalizador del amplio impacto de la crisis», considered as a true «instrumento de política económica» (Calvo Gallego – Rodríguez-Piñero Royo, 2014, 4).

A particularly indicative element of this resides in the fact that the reform perspectives of labor law have been outlined frequently by economists without an advantageous dialogue with law and often without an attentive analysis of the impact that a regulation can have from the economic point of view.

There seems, however, to be no doubt about the particularity of the directions the subject is taking: they are not and cannot be inspired by purely economic purposes, being labor law conceived in the perspective of correcting the intrinsic distortions of the market.

Otherwise, “anti-social” effects would be favoured (for example, in the ambit of the natural dependence of the employee towards the power of the employer). Labor law contributes (rectius, should contribute) to the overcoming of these effects, facilitating the balance between the interests expressed by contractual parties in objectively unequal positions.

The interests involved in this search of equilibrium – an equilibrium labor law teleologically tends to – are expressed on one hand by the request of tools capable of guaranteeing the competitiveness of the enterprises, and on the other hand, by the need to protect employment conditions and employment levels.
As a consequence, we can say that the great challenge contemporary labor law is called to face, is the development of new and efficacious tools, suitable to achieve the fundamental balancing between values that traditionally characterizes the subject: the protection of employment (and of the job itself) and the protection of the economic efficiency and the competitiveness of the enterprise.

It is clearly a difficult regulatory challenge, made complex by epochal socio-economic transformations, by the unstoppable globalization of markets and economies, with effects of extraordinary impact on the production system.

V. Workers’ professionalism, between hard and soft law: CSR as a complementary form of labor regulation

So, in the light of what has just been said, the key-question to consider is: which set of regulative instrument could be imagined in order to guarantee an adequate level of protection for workers and, in particular, for their professionalism in the global context so far presented?

As said above, the employment contract does not lend itself to represent an instrument still capable to identify the area of labour protection. But it is important to keep in mind that the same contract of employment is generally and institutionally considered – at least in the Italian juridical framework – as an instrument for the protection of the essential value of workers’ professionalism.

In this respect, a clarification seems necessary, making reference to the Italian doctrinal scenario. In fact, while according to a first, “classical” interpretative thesis, the object of the employment contract is to be found in the worker’s tasks, as contractually agreed (Giugni, 1973), another part of the doctrine, recognizing the centrality of the mutual (“sinallagmatica”) dimension of the relationship, proposes a vision that identifies the object of the employment contract in the same exchange between work performance and remuneration (see Carabelli, 2004, 17, who identifies the object of the employment contract in the “scambio “secco” tra retribuzione ed attività lavorativa”).

Between these two interpretative guidelines, a third orientation instead recognizes the object in the worker’s professionalism, expressed and “summed up” in the contractually agreed tasks (ex multiis, see Marazza, 2002, 303).

So, following this orientation, the object of the employment contract is represented by the workers’ professionalism. But, if the employment contract is – as said above – no more capable to select the legal situations that need to be protected by the Labour Law instruments, it seems interesting to reason on the possible legal solutions hopefully adequate in order to guarantee protection to those workers who, differently, would be exposed to vulnerability.

«To promote labour protection in the gig economy, the first thing that is needed is a strong advocacy to have jobs in this sector fully recognized as work. This is an essential step to counter the strong risk of commodification that these practices entail. (...) a cultural struggle to avoid that workers are perceived as extensions of platforms, apps and IT devices is pivotal not only from the theoretical perspective of combating dehumanization and the risk of creating a new group of invisible workers but also, from a practical standpoint, to stress the recognition of the ultimate human character of the activities in the gig-economy, even if they are mediated by IT tools» (De Stefano, 2016, 21).

The risk of commodification and deregulation in the scenario of the new forms of work is concrete and not just abstract or hypothetical. In order to limit and neutralize this scenario, the conceptual effort to adapt classical forms of protection to innovative forms of work seems to be essential. In the framework of reference so far presented, an interesting role could be played by the flowering of new forms of labor regulation, in addition to the “classical” ones.

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The issue affects – as is evident – the very essence of the general theory of labor law: the old and the new techniques of regulations have to be considered in fact in the light of the old and the new functions of the subject, viewed in an interdisciplinary transnational approach (Caruso, 2005, 2).

Focusing the attention on soft law, through the study of concrete experiences, it is possible to say that its principal characteristics can be identified – among the others – in the widespread use of a normative technique based on general principles (instead of specific precepts), on a persuasive approach
(instead of a coercive one), on the involvement of many different subjects (instead of only few institutional subjects), on the monitoring of the phenomena object of regulation.

As a result of their autopoietic connotation, evident appears the positive peculiarity that characterizes soft law techniques, in terms of greater adaptability to the specific enterprise context.

In this scenario, among the different soft law techniques, a peculiar role is played by CSR, essentially defined by the European Union Commission – in the Green Paper “Promoting a European Framework for Corporate Social Responsibility” (2001) – as «a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment. (…) This responsibility is expressed towards employees and more generally towards all the stakeholders affected by business and which in turn can influence its success» (Barbera, 2014, 639).

Here it is not presented an analytical investigation on the conceptual dimension of CSR: a short paper would not be the right place for such an ambitious activity. More modestly, the present contribution is designed to propose some reflections and avenues to be explored on the relationships between hard and soft law and, in particular, between labor law and CSR, with a view to ensuring effective forms of protection for contingent workers.

From this perspective, it seems interesting to consider the question proposed exactly ten years ago by an authoritative Italian jurist: «davvero bisogna diffidare a priori della Csr, come di una “quinta colonna” della diabolica (e quasi ontologizzata) “economia”?» (Del Punta, 2006, 42).

In other words, it is necessary to consider CSR as a sort of “Trojan horse” in the controversial relationship law/economics?

Notwithstanding the foregoing, in order to develop some reflections able to provide possible answers to this central and still relevant question, it is important to highlight right now the substantial axiological affinities, existing in terms of values, between labor law and CSR, despite the objective different philosophical and methodological backgrounds (Salomone, 2004, 387: «l’idea di promuovere una responsabilità sociale di impresa si identifica in fondo nel diritto del lavoro stesso, (…) considerando i profili etici attinenti alla dimensione umana del lavoro»; see also Bakan, 2004).

Both labor law and CSR can be considered as instruments for the implementation of an equilibrated trade-off between the reasons and the values proper of the business efficiency on the one hand, and the social reasons and values on the other (Cagnin, 2013).

But, reading between the lines of the Green Paper (§2), it is possible to find an interesting contribution to the debate on the relationship CSR/laborlaw: «Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing “more” into human capital, the environment and the relations with stakeholders».

CSR, in practice, expresses something more than the mere observation of juridical dispositions, representing a sort of “self-correction” of organizational and managerial paradigms, based on a need of generalized involvement of a pluralistic panel of actors.

Voluntariness, as the key-characteristic of CSR, determines as a consequence the impossibility of a taxonomic assimilation to the model of legal provision (stricto sensu), being not possible an imposition of the CSR practices.

In this sense, the tension between the “voluntariness” of CSR and the “binding nature” of law knows, with reference to labor law, a peculiar expression in the specificity of the “norma inderogabile”, cornerstone and foundation of the subject (ex multiis, see De Luca Tamajo, 2013).

But, in a more systematic dimension, it is possible to say that the substantial difference between labor law and CSR can be appreciated first of all comparing their two identity dimensions: the first one has its roots that «affondano nel terreno del conflitto industriale, determinato dal modello di produzione capitalistica che contrappone, inevitabilmente, chi detiene i mezzi di produzione a chi vive della produzione» (Persiani, 2003, 629); the second one, on the contrary, expresses a culture (above all managerial) based on inclusion and cooperation.

Furthermore, the intrinsic ambiguity of CSR, whose theoretical basis is contaminated by different areas of knowledge (sociology, ethics, philosophy and economics), contributes to render its projection in the labor law dimension, a sort of “challenge”. The two set of regulatory frameworks are, in fact, based on different conceptual assumptions: the ones proper of CSR are intrinsically cooperative, while labor
law has a structurally conflict-based identity, in whose spirit the legal provision is the only instrument of regulation conceivable.

But, looking at the possible point of contact between the two regulatory spheres, an interesting profile that CSR presents, in terms of legal value, can be noticed in the wide use of general clauses, that typifies the corpus of CSR and can be found in labor law as well (Bellomo, 2015).

At this regard, it is possible to recognize a sort of “opening” for an attractive force exercisable by the legal sphere towards CSR, in a possible process of institutionalization that should be accompanied with care, without distorting its genuine, original spirit, but giving life to a fruitful synergy: «la CSR è un segnale positivo e dovrebbe essere integrata, per via legislativa, nei sistemi di governo dell’impresa» (Gallino, 2005, 244).

Precious seems, in this sense, to recall a warning on the integrative nature of soft law techniques, that «possono integrare le tecniche hard, con compiti funzionali diversi ma complementari» (Caruso, 2016, 232).

In fact, being aware about the impossibility for CSR to substitute the traditional dimension of labor law, it appears interesting to point out a possible extensive effect of the concept of regulation, that would so widen its dimension, covering and complementing gaps possible existing in the regulatory scenario.

In this respect, paying attention to avoid distortions of the CSR spirit, an extraordinary potential in terms of adhesion to the socially responsible policies, could be developed by collective bargaining: «Il sistema delle relazioni sindacali potrebbe essere, insomma, il più adatto a fare da sponda verso una qualche istituzionalizzazione sia pure “debole” (ivi compreso il profilo di eventuali “sanzioni” intersindacali), della tematica in discorso, sospiro la CSR verso una possibile “zona grigia” al di là della pura volontarietà ma comunque sempre al di qua della soglia della doverosità giuridica» (Del Punta, 2006, 50).

Exactly the inclusion of CSR themes in the collective agreements spectrum could be considered as an expression of the sharing attitude of common values, in a cooperative and participatory approach, that seems particularly coherent with the sharing and cooperative approach on which is based the new production model originated by the technological revolution above briefly considered.

Ultimately, as highlighted by authoritative Italian doctrine, CSR, with the peculiar “ambiguity” that characterizes it, could represent an interesting “answer” to the deep question of labor protection, deriving from the diffusion of new contingent forms of work (Del Punta, 2008, 120: «credo che sarebbe sbagliato sottovalutare la CSR. Essa ha una dote che potrebbe consentirle di andare lontano, l’ambiguità: quella di presentarsi corredata dal magico aggettivo “sociale”, quando scaturisce, in realtà, da un affinamento delle strategie aziendali e in particolare delle grandi multinazionali»).

VI. Conclusions

In the light of what has been so far argued, it can be interesting to propose some final reflections on the integration between two regulatory dimensions, the “traditional” one and the “innovative” one.

In order to reach a hopefully fruitful result, it does not seem redundant to emphasize the centrality of a balanced approach of “technical neutrality” (Pessi, 2014, 722), in the consideration of CSR as complementary to the legislative panel of labor protection.

The effectiveness of this integrative relationship can be appreciated only by the analysis, conducted in concrete on practices and case studies, with reference to specific institutions proper of the labor law framework. The theoretical elaboration needs in fact a practical pendant, in order to demonstrate the real possibility of a virtuous relationship between “tradition” and “innovation” in labor regulation (Perulli, 2008).

This substantial trade-off between hard law, whose main peculiarity is represented by its nature “inderogabile”, and soft law, expression of an autopoietic trend of regulation, has to be contextualized in a complex scenario of pluralism in the labor law sources, that overcomes the traditional hierarchy, promoting a model based on interactions and contaminations (Delmas-Marti, 2009).
Corporate Social Responsibility represents therefore an expression of the transformation process that is affecting the legal framework of social phenomena: in a heterogeneous and pluralistic dimension, we are in fact witnessing a significant reduction in the authoritative and binding structure of regulation ("La RSI diventa perciò una manifestazione del processo di trasformazione pluralistica e policentrica delle fonti di regolazione dei fenomeni sociali, che va sotto il nome di “governance multilivello”, espressione con la quale Tursi intende riferirsi al processo in atto di alleggerimento della componente autoritativa della norma e di allentamento della struttura gerarchica dell’ordinamento, a vantaggio della funzione compositiva dei conflitti veicolata dalla normazione c.d. soft, basata sull’orientamento ai risultati e agli obiettivi e sulla cooperazione istituzionale tra una pluralità eterogenea di centri di regolazione") – Garofalo, 2017, 68).

Exactly the initially considered concept of “complexity”, paradigmatic expression of the contemporary scenario, has to be considered in its pervasive dimension, revealed also by the crisis of the so-called “giuspositivismo statuale” (Romano, 1969). The deep question posed by Peer Zumbansen reverberates inevitably in the contemporary scenario: «Can there be law beyond the State?» (Zumbansen, 2013, 1).

The problem of the relationship between old and new techniques (and forms) of labor regulation reflects in fact the dichotomy between the traditional national State-based identity of the subject and the tendency to identify new models of institutional governance, based on a multi-level dimension.

As highlighted by the most prestigious Italian doctrine, it seems necessary to identify the origins of regulatory powers, especially in such an evolutionary phase, in which the regulatory competence proper of the sovereign States is experimenting a significant overcoming, toward a global dimension (Sciarra, 2013, 44: «individuare l’origine di poteri normativi che, nel superare le competenze degli Stati, si espandono oltre gli stessi, verso l’ordinamento globale. Il problema, non solo teorico, consiste nel verificare se e come gli Stati possano legittimare soggetti privati (...) che, nel prefiggersi obiettivi transnazionali, agiscono sfruttando una propria forza espansiva e si appropriano di una funzione regolativa, al di là di riconoscimenti formali».

There is no doubt about the role of the so called “corpi sociali” or “formazioni sociali intermedie” (Galgano, 2001: «l’espressione “formazione sociale intermedia tra l’individuo e lo Stato” finisce con l’essere una nozione un po’ troppo ristretta, ambigua, sicuramente insufficiente, perché la società del nostro tempo è diventata una società cosmopolita, una società internazionale, una società globale») – whose interdependency constitutes the figure of the contemporary society – that are the leading players of soft law. In this regard, it seems unquestionable their heterogeneity, being inserted in a legal system that goes beyond the territorial bounds of the single countries.

In this framework, the time seems to be ripe for a reflection oriented to the elaboration and the development of a new role for Unions, called to play a strategic role in a difficult, but indispensable, operation of “re-intermediation”, based on participation (Caruso, 2017). As it was pointed out about thirty years ago, «organising and representing contingent workers is a formidable challenge» (Bronfenbrenner, 1988, 3).

In this sense: «Il soft law di ultima generazione, dunque, non si accontenta di svilupparsi negli interstizi del sistema a scopo di puntellare l’efficienza, con qualche margine di controllo di legalità ma, connettendosi strettamente al principio di sussidiarietà e alle sue implicazioni partecipative – soprattutto nella dimensione orizzontale – vuole recuperare margini ampi di legittimità anche sul piano costituzionale» (Caruso, 2005, 12).

Actors and factors of labor law regulation are now located outside the national sphere (D’Antona, 2000, 221), so that the same topoi and categories of the subject are affected by a pluralistic and osmotic process of hybridisation/interaction among many different spheres, expression of many different set of interests, «che genera un modello di diritto sociale anch’esso plurimo e diversificato, policentrico e interrelato» (Caruso, 2005, 4).

In conclusion, in front of a new paradigm of labor law (Rodríguez-Piñero y Bravo-Ferrer, 2006), inserted in the sphere of innovative models of productions, based on a 4.0 logic, the regulatory dimension

«Il diritto globale, nutrito dai tanti regimi normativi che esprimono interessi transnazionali, viene conoscibile e, in ultima analisi, anche giustiziabile, in virtù di una sempre più stretta integrazione fra le fonti» (Sciarra, 2013, 45).
of the subject is called to elaborate hermeneutic contributions useful for a possible re-conceptualization of labor law, partially imposed by the morphological change of the socio-economic contexts of reference.

In this context, it appears worthwhile to consider CSR – that «nasce in risposta alla mancanza di un diritto internazionale del lavoro» (Cagnin, 2013, 218) and in reaction to the dichotomy between the territoriality of law and the spatiality of economics (see Perulli, 2000, 939 on the «deterриториializzazione delle attività economiche») – as a significant opportunity, in a different perspective of regulation, which values the enhancement of the promotional, encouraging function of law (Oppo, 2008, 276, on the «possibile raccordo tra responsabilità giuridica e responsabilità sociale dell’impresa»).

Along these lines, contingent work’s need of protection could represent a significant occasion for a mature promotion and systematization of CSR, as instrument (promotional and complementary to the “traditional” framework of labor law) to be considered in order to achieve the essential protective objectives of the subject, called to be protagonist in a deeply changed world.

VII. Bibliography


Contingent work is not contingent. Which models of regulation...


Access to social security for digital platform workers in Germany and in Russia: a comparative study

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Abstract: A common feature of platform work in Germany and Russia is that in both countries the new forms of employment can usually only be classified as self-employed work in the form of ‘solo self-employment’, despite the fact that platforms use direct and indirect control mechanisms indicating a personal or at least an economic dependency of the digital workers on the platforms. The difference is that, in Germany, as the main rule, self-employed persons are not obligatorily insured in the state pension insurance scheme, whereas in Russia, unlike Germany, the state pension insurance scheme is mandatory for all self-employed persons.

Considering the different legal frameworks in Germany and in Russia, the article analyses various reform proposals aiming at tackling the above-mentioned challenges for the social security systems, and looks for adequate responses to ensure access to social security for digital platform workers. In particular, the following questions are investigated: Is it sufficient to subsume digital work under the existing employment categories? Could it be an appropriate solution for the access of digital workers to social security to introduce a new employment category only in social law?

Keywords: digital platform worker, social security, self-employed person.

I. Introduction

Platform economy is characterized by crowdwork and work on demand via apps (De Stefano, 2016: p.1). From the legal point of view it is very important to distinguish between these two types of digital platform work. In the case of crowdwork, internal tasks are addressed to an indefinite and unknown large number of organisations or individuals via crowdworking platforms. This work is both managed and carried out online. It corresponds to non-manual work requiring digital skills. (Eurofound, 2015). In the case of work on demand via apps the execution of specific services, such as transport, cleaning and running errands etc. is offered to an indefinite number of individuals by means of electronic platforms (app companies) (De Stefano, 2016: p.1). This work is managed online and carried out offline, usually manual work, requiring task-specific skills. Recently, work on demand has spread into the retail and hospitality sector, including restaurants (Bhattarai, 2018).

Different legislative responses at national and international level are required depending on the respective kind of digital platform work. Particularly problematic is that companies, by means of digitization, can ‘hire’ people from all countries - including developing and emerging countries - at the lowest wages, without carrying any social obligations and without any transaction costs.

While the challenges of the platform economy for labour law are lively discussed and researched, there are, so far, only very few studies (see below) and publications (e.g. Preis & Brose, 2017; Suárez,
2017) on the challenges that the platform economy and the approaches to appropriate solutions constitute for the social security systems.

The questions on the social security of platform workers are a very young field of research dealt with in recent studies. It is necessary to get more information about the motivation of digital platform workers, and there is a lack of information on the share of migrants and refugees among the platform workers.

From the point of view of social law, the central challenges of the platform economy are the lack of social security for digital workers as well as the fiscal sustainability of the social security systems. The fiscal sustainability of the social security systems is endangered not only by insufficient social security for digital workers (especially in old age) which can increase state social assistance expenses. Digital work also favours the shadow economy and informal work; new groups of invisible workers emerge (De Stefano, 2016: p. 21).

Russia in Eastern Europe and Germany in Western Europe belong to the countries where platform work is widely spread. The difference is that, in Germany, as the main rule, self-employed persons are not obligatorily insured in the state pension insurance scheme, whereas in Russia, unlike Germany, the state pension insurance scheme is mandatory for the self-employed. Considering the different legal frameworks in Germany and in Russia, in this article various reform proposals, aiming at tackling the above-mentioned challenges for the social security systems shall be analysed. Based on this analysis, adequate responses are being searched for to ensure access to social security for digital platform workers. In particular, the following questions are investigated: Is it sufficient to subsume digital work under the existing employment categories? Could it be an appropriate solution for the access of digital workers to social security to introduce a new employment category only in social law?

II. Situation in Germany

1. Statistical data

At least three empirical studies have been carried out on social issues of platform crowdwork in Germany. Two studies deal with crowdwork in a narrow sense (Leimeister, Durward & Zogaj, 2016 and Bertscheck, Ohnemus & Viete, 2016), and one study covers both crowdwork and work on demand (Huws, Spencer, & Joyce, 2016).

According to the trade union IG Metall about one million people in Germany are engaged in crowdwork (IG Metall, 2017). According to the study carried out by Leimeister et. al. in 2016, 67 per cent of the crowdworkers were registered on platforms in the last 12 months. However, studies have shown that in Germany, in most cases, crowdwork is only carried out as a secondary occupation in addition to a main occupation: 39 per cent of the interviewees were employed and 31 per cent were in a vocational training or study (Bertscheck, Ohnemus & Viete, 2016).

2. Legal framework

In Germany, obligatory social insurance is traditionally linked to a dependent employment and does not cover self-employed persons. According to § 7 sec. 1 sentence 1 of the Fourth Book of the Social Security Code (‘SGB IV’) employment is dependent work, in particular in an employment relationship. The existence of employment is indicated by the presence of activities carried out by direction and an integration into the work organization of the issuer of the directions (translation from: Lingemann, Steinau-Steinrück & Mengel, 2016: p. 546). The German social law category ‘employment’ is broader than the labour law category ‘employment relationship’.

The self-employed persons are subject to obligatory social insurance in the following situations:

— Homeworkers or other persons working in the place of their choice for another person or institution are subject to all branches of social insurance on condition that they have one ‘client’
(Auftraggeber) from whom they ‘directly’ receive assignments (§ 12 sec. 2 of the Fourth Book of the Social Code – SGB IV).

— Self-employed artists and writers are also subject to all branches of social insurance (Artists’ Social Security Act – Künstlersozialversicherungsgesetz).

Furthermore all ‘solo self-employed persons’ are subject to obligatory pension insurance if they receive orders only from one client (§ 2 sent. 1 no. 9 of the Six Book of the Social Code – SGB VI) and in some other cases.

However, these requirements for the obligatory social or pension insurance are not met by digital workers, at least in most cases (Mecke, 2016; Brose, 2017). According to the current social law, crowdworkers and on-demand workers can only be subsumed as solo self-employed persons who can be insured within the social security scheme only voluntarily.

However, there are many characteristics that distinguish ‘digital’ self-employed (especially crowdworkers who fulfill ‘microtasks’ and workers on-demand in the service sector) from ‘classical’ self-employed workers. Some researchers demonstrate the elements of their personal and/or economic dependency from the platforms (Däubler, 2015: p.341), which is typical for an employment relationship. In particular, General Terms and Conditions of Business (GTCB) settled by the platform provide direct and indirect control and surveillance mechanisms, on which the crowdworkers have no influence. The control mechanisms used by the platform at all stages, from the registration on a platform to the evaluation of the work results, at least indicate an economic dependency (which is common for ‘employee-like persons’): The platform decides who gets access to the platform and for whom access will be blocked. The prior check of qualifications as part of the registration process is comparable to a job application procedure.

In addition, the work processes (e.g. through screenshots, tracking of workflows, mouse activities, etc.) and the work results are controlled. Instead of instructions/directions and performance control, evaluation, rating and feedback systems are used. Furthermore, digital workers have no influence on the amount of remuneration, because it is unilaterally determined either by the client or the platform (Däubler, 2015: p. 340). The tendency that the control mechanisms partly replace classical directives of the employers (Weisungsrecht) is also observed in the field of homework and telework. In the decisions of the German Federal Social Court while interpreting whether there is an employment relationship or not, however, control mechanisms still do not play a decisive role (Greiner, 2016: p. 306).

In the case of digital work, similar to non-standard work, the risks are transferred from the platform/client (‘employer’) to the digital worker (‘employee’). The German Federal Social Court, testing the existence of an employment relationship, refers to the question who in fact carries entrepreneurial risks. In some cases the result is that, in particular, precarious contract designs are rewarded with the exemption of mandatory social insurance law. However, this approach ignores that the weaker part of the contract relationship is even more in need for social protection when the entrepreneurial risks are shifted to him or her (Greiner, 2016: p. 308). The Federal Labour Court, however, makes no distinction between voluntarily and involuntarily borne risks (Waas, 2017: p. 260). I share the opinion that anyone who voluntarily bears such risks shall be qualified as a self-employed worker and persons who either do not bear such risks or do so involuntarily shall be qualified as employees (Waas, 2017: p. 260).

In some cases, the platform's general terms and conditions provide that the payment of the service/task is carried out according to the lottery principle in such a way that only the best result (job) will be paid. If the crowdsourcer/crowdworking platform is located outside Germany, the crowdworker, as a rule, cannot even rely on the German legal regulations concerning the GTCB (Däubler, 2015: p. 342).

If the crowdsourcer/crowdworking platform determines by what time the jobs must be executed (Selzer, 2015: p. 39; Kocher & Hensel, 2016: p. 986), this indicates a personal dependency. The German Federal Labour Court has developed criteria indicating the existence of personal dependency as the core feature of an employment relationship. One of these criteria is that someone is not free to refuse tasks offered by his or her contractor. However, at the moment the German Federal Labour Court interprets these criteria in quite formal terms. For example, in its decision of 14 July 2016, the German Federal Labour Court (9 AZR 305/15) stated that showing that for the plaintiff it was ‘practically unthinkable’ to refuse tasks was not enough to prove personal dependency. The fear that no more tasks will be assigned
once a job has been refused proves only economic dependency. Digital workers, especially workers on demand, like Uber drivers, would therefore probably not be considered as employees, because, formally, they can refuse orders. However, they may receive lower ratings and even no more orders/be excluded from the platform if they repeatedly do so.

An interesting approach in this context are the holdings of Austria’s Supreme Administrative Court (VwGH) in its decision of 1 October 2015 (2015/08/0020): The existence of personal dependency and, accordingly, an employment relationship can be denied if the crowdworker can refuse a job proposal without any sanction and if he/she has been aware of this possibility/right (Bruckner & Krammer, 2017: p. 278).

But even if the relationship between the platform and the crowdworker cannot be interpreted as an employment relationship, the control mechanisms used by the platform indicate at least an economic dependency (which is common for ‘employee-like persons’). This expresses the ‘need for social protection’ comparable to that of employees (Selzer, 2015: p. 44-45), one of the criteria required for ‘employee-like persons’. However, it is not common that digital workers receive orders only from one client, which, according to the current German legislation, is a necessary condition for the application of the provisions of the social pension insurance (SGB VI) to ‘solo self-employed persons’ (§ 2 sentence 1 no. 9 SGB VI). Furthermore, also the provisions according to which homeworkers (§ 12 sec. 2 SGB IV) are subject to all branches of social insurance, usually do not apply, because the requirement that the homeworker must receive assignments ‘directly’ from one client is not met. According to the study by Leimeister et. al., more than 33 per cent of the crowdworkers perform services for different platforms.

As shown above, current legislation and court decisions do not take into account new manifestations of personal/economic dependency and the need for social protection of ‘digital workers’. Therefore it shall be examined which reforms/changes would be possible in current social and labour law in order to fulfil this task.

3. Discussed social law reforms

3.1. Introduction of an intermediary employment category

Some labour law scholars consider it necessary to create a new intermediate category for digital workers because the latter do not fit into the categories ‘employee’ and ‘self-employed persons’ (Harris & Krueger, 2015; De Stefano, 2016: p. 19). According to Prof. Davidov, the introduction of a third (intermediate) group between employees and independent contractors could help to find the right balance between universalism and selectivity and protect workers who share only some of the characteristics of employees by bringing them into the scope of some labour and employment laws (Davidov, 2017: p. 8). Some German scholars also consider it advisable to introduce an intermediate category between employees and self-employed persons in social law in order to tackle new forms of dependency of digital work and guarantee a minimum social insurance protection for the persons concerned (Preis & Brose, 2017: p. 49).

The problem is that even in cases in which national legislation provides for a third category in labour and in social law, this category would not necessarily cover the same persons in labour and in social law and guarantee them the same level of labour and social protection.

To quote an example from German law: German labour law knows the category of ‘employee-like persons’ who are granted a limited number of labour rights. These persons are predominantly homeworkers and commercial agents. German social law does not use the term ‘employee-like persons’, but includes some groups of economically dependent persons into social insurance, such as homeworkers and artists. Homeworkers and artists are insured like employees, meaning that they pay only a part of the contributions and get the same social insurance coverage as employees. Another group of economically dependent persons, the ‘solo self-employed who receive orders only from one client’, are only covered by the pension insurance scheme and have to pay the contributions themselves.

It seems that the level of social protection of homeworkers is higher and more significant than the level of protection of their labour rights. The example of homeworkers and artists in Germany shows that it is possible to disconnect social protection from the employee status and to guarantee an adequate level of social protection for these persons.
At the same time, court decisions on platform workers have already shown that, if there is an independent intermediate category in labour law, platform workers are more often classified in this category than as employees, e.g. as workers in the United Kingdom (see Pimlico Plumbers Ltd v Smith [2017]; Aslam, Farrar and others v Uber BV [2016]). The experience of some countries (e.g. Italy) shows that the introduction of an intermediary category will rather contribute to the circumvention of the existing ‘employee’ category and become an obstacle for (digital) workers to achieve appropriate labour and social law protection (Cherry & Aloisi, 2017: p. 675) than to tailor-made solutions and more precise regulations.

3.2. General social security law

The 71st German Jurists Forum (DJT) has demanded that only those digital workers who are economically independent should be considered as ‘self-employed digital workers’. Further, a reversal of the burden of proof for the existence of an employment relationship was recommended in order to improve the protection of the crowdworkers. In addition, the 71st DJT has demanded to include self-employed crowdworkers into the social security system (2017). However, the solutions proposed by the DJT are very far-reaching and not clear. For example, it remains open whether the term ‘employee’ should be extended or the economic dependency should only indicate the existence of a personal dependency. Related to the proposal on ‘independent digital workers’, it remains open whether the requirement of activity for only one client (§ 2 sent. 1 No. 9 SGB VI) should be abandoned or whether the digital workers should be treated like homeworkers (by extension of § 12 sec. 2 SGB IV). In the last case, the question arises who (apart from the digital worker) is obliged to pay social insurance contributions (e.g. the platform operator or its client).

For cases with no (or not enough) personal dependency but only economic dependency from the platform it could be considered to widen the scope of § 12 para. 2 SGB IV (social insurance of independent homeworkers). The advantage of this solution would be that in this case the platform or the client are obliged to pay social insurance contributions in all branches of the social insurance. Not only in Germany (Krause, 2016: p. 106) scholars emphasize that the provisions related to homework should be modernized in order to cover the new forms of employment: “cognitive homework is hard to shoehorn into statutory definitions of industrial homework” (Finkin, 2016). According to my opinion it would be a possible solution to modify and widen the scope of homework in relation to crowdworkers. However, this solution does not fit workers on demand who provide traditional services such as transport or cleaning, because these services are beyond the scope of the Homework Act. Workers on demand are usually domestic workers. Also in Germany domestic work is frequently part of the “shadow economy”. In Germany, no specific legislation exists for domestic work, but general labour law applies.

In relation to the payment of contributions, the regulations introduced in the French Labour Code in 2016 have to be mentioned, which are applicable to self-employed persons who have access to one or more platforms offering electronic networking for their professional activities (Art. L. 7341-1 to Art. L. 7342-6). Among other things, this chapter of the Labour Code stipulates that if a worker concludes (takes out) an insurance against accidents at work or joins the voluntary accident insurance, the platform refunds his payment of contributions within the limit set by decree. It has to be observed how the French regulation will work in practice and if this might be a solution also for other branches of social insurance.

Anyway, the practical realization of the platforms’/clients’ obligation to pay social insurance contributions seems quite difficult: The crowdworker is not in direct relationship with the client and often does not know for whom he works. In addition, contributions from platforms/clients in times of globalization could lead to a withdrawal of crowdwork from countries which have provided such regulations, as the platforms/their clients are able to choose crowdworkers worldwide. It would be desirable to create the framework conditions for payment of social contributions at least on a European level.

3.3. Pension insurance

The replacement of traditional core workplaces/jobs due to automation and digitalization, in addition to the demographic change, endangers the future financial viability of the social security systems. In
the Green Paper Work 4.0, the German Federal Ministry of Labour and Social Affairs raises the question as to how ‘long-term strategies to secure the income base of the statutory pension system and the social insurance system as a whole might look like? How can – in the view of a changed labour world, new forms of work and a changed age structure the population – the contribution basis be kept at a sufficient level to finance an adequate level of social security?’

In relation to required reforms in the field of pension insurance the most radical solution, which was demanded by unions (German Trade Union Confederation - DGB; United Services - ver.di) and social associations (German social association - Sozialverband Deutschland) (BMAS 2016: p.178), would be the introduction of a compulsory social insurance for everyone, generating income by work (Erwerbstätigenversicherung). This conception is not new (Buchholz & Wiegard, 2014) and is discussed now again in the context of digitalization (Tornau, 2016: p.26).

A further proposal made by trade unions (e.g., ver.di), politicians and scholars to preserve the pension level is to include digital workers along with solo self-employed workers in the compulsory statutory pension insurance scheme. In the White Paper Work 4.0 of the German Federal Ministry of Labour and Social Affairs this solution is given preference, arguing that with the inclusion in statutory pension insurance, self-employed persons will receive the same rights and obligations as all insured persons (BMAS, 2016: p. 173). The same solution is provided for in the German Government’s coalition agreement (Koalitionsvertrag, 2018: p. 93).

The idea of including solo self-employed workers in the compulsory statutory pension insurance scheme is also not new (Waltermann, 2010 a; Waltermann, 2010 b). The 68th German Jurists Forum proposed already in 2010 to incorporate the solo self-employed into the compulsory statutory pension insurance scheme and open up the voluntary state-subsidised private old age pension (‘Riester pension’) to them (DJT, 2010). In particular, it was proposed to delete from § 2 sentence 1 no. 9 b) SGB VI the requirement that solo self-employed workers shall only be covered by the compulsory statutory pension insurance if they work ‘basically only for one client’.

However, digital self-employed workers differ significantly from each other in terms of income. The spread of the household income among digital self-employed workers is even greater than among the ‘classical’ self-employed (Leimeister, Durward & Zogaj, 2016: p. 43). The study on the socioeconomic background and the motives of crowdworkers in Germany (Bertscheck, Ohnemus & Viete, 2016) and the study ‘Crowdworker in Germany’ (Leimeister, Durward & Zogaj, 2016) have shown that about 60 per cent of the crowdworkers are included in a private pension scheme. For digital workers who are already insured in a private pension scheme, the inclusion into the statutory pension insurance is not necessary.

The study by Leimeister has shown that more than 50 per cent of the digital workers who carry out mostly unskilled and low-skilled ‘microtasks’ (which proved to be particularly precarious) are not insured in a pension scheme at all. For such digital workers, inclusion in statutory pension insurance does not solve the problem of old-age poverty, as contributions paid out of a very low income would only lead to pension entitlements below the social welfare level. Therefore, if this group of low-income crowdworkers had to pay contributions to the compulsory pension insurance themselves, their precarious situation would only get worse.

It cannot be assumed that, by inclusion into statutory pension insurance, solo self-employed persons will have the same rights and obligations as all the other insured persons (employees) and pay the whole sum of the contributions themselves (Hanau, 2017: p. 215).

Another solution debated is to either introduce a professional pension fund for digital workers (Interview 2016; p. 26) or widen the scope of the Artists’ Social Security Act. It is interesting that, according to the German Crowdsourcing Association e. V. and the artists’ social security fund, crowdworkers are not yet included in the artists’ social security fund (Bundestag 2014, p. 12). In practice, however, some self-employed persons who are writing texts for onlineshops, guides or blogs are covered by the social insurance scheme for artists (Ludwig, 2016). In my opinion, the fund makes no difference between self-employed journalists or artists and crowdworkers, but lumps them together.

The problem with the above mentioned solutions (introduction of a professional pension fund for digital workers, widening the scope of the Artists’ Social Security Act, or inclusion of crowdworkers into the statutory pension insurance for self-employed persons) is that they already assume that digital
workers are a homogeneous group outside of the scope of the existing labour law and the existing obligatory social insurance schemes.

3.4. Unemployment insurance

Another important issue is the effect of digitalization on unemployment insurance. In Germany, a person is entitled to unemployment benefits if he/she has been in an employment relationship for 12 months during the last 24 months (§ 142 of the Third Book of the Social Code – SGB III). Self-employed persons can contribute to the public unemployment insurance scheme if certain conditions are fulfilled: he/she must work at least 15 hours a week in their own business and must have contributed to the unemployment insurance scheme for at least 12 months within the past two years (§ 28 a SGB III). It has become more and more difficult to meet these requirements due to the ‘technological unemployment’ and due to the fact that the newly arising jobs in the platform economy are often not covered by social insurance. Interruptions in employment histories have become common. Furthermore, the requirement of a 12-month employment relationship during the previous 24 months (framework period) does not take into account that in times of the platform economy, transitions between dependent and independent work happen more often.

The Federal Labour Agency has proposed to extend the framework period from two to three years (BA, 2015: p. 20). Possibly one could think about the introduction of a ‘shorter’ waiting period (e.g. six months in the last 12 months) in exchange for a shorter period of unemployment benefits (e.g. six months instead of the regular period of 12 months).

Another approach to solve the problem of interruptions in employment biographies would be the transition from an unemployment insurance to a labour insurance (Arbeitsversicherung), which has been proposed and discussed for years and which is also planned in the White Book. Work 4.0 (BMAS, 2016: p. 114). Such a labour insurance would help to take into account the new patterns of work histories with mixed forms of employment and transitions between dependent and self-employed work.

III. Situation in Russia

1. Statistical data

Although until now no comprehensive statistical data on the total number of digital workers in Russia is available, the studies already carried out demonstrate that platform economy is growing rapidly: In 2016 the monthly active users (MAU) of Yandex.Taxi grew by 120%, of Gett (another transport platform) by 85%, and of Uber by 140% compared to 2015 (Balashova, Li & Vovnjakova, 2017). The equivalent of TaskRabbit in Russia, YouDo, has over 70000 registered freelancers (in spring of 2013 there were about 1000 of them). This platform provides different services: courier services, home repair, trucking, web development, legal assistance, etc. 50% of the digital workers registered on YouDo have a higher education; 45.3% of them are between 25 and 34 years old; 44% of the workers are additionally involved in a dependent employment. There are also platforms that specialised on one special kind of services, e.g. courier and delivery (Peshkariki.ru) or repair services (Remontnik.Ru) (Suvorova, 2016).

Crowdworkers (electronic freelancers) in Russia are often very well educated. The highest demand for freelancers is in the following areas: IT, marketing, promotion of goods and services, design, advertising, sales, recruitment, consulting, accounting, design and construction (Polorotov, 2017). The internet platform ‘FL.ru’ dominates the Russian-language Internet and is one of the largest freelance marketplaces in Europe and the world with more than 1.5 million registered users (Shevchuk & Strebkov, 2017: p. 403).

2. Legal framework und already implemented reforms

Russian legislation knows no intermediate categories between employees and freelancers such as ‘employee-like persons’ or ‘workers’ (like in the UK). According to Art. 20 of the Labour Code of the
Russian Federation (further – LC RF) an employee is a natural person who enters into labour relations with an employer. Contrary to Germany, where homeworkers are not per se employees (and in most cases self-employed), homeworkers in Russia are persons who enter into labour contracts to perform work at home, using materials, tools, and mechanisms issued by the employer or acquired by the homeworker at his own expense (Art. 310 LC RF). Separate chapters of the LC RF are devoted to the labour relations of homeworkers (chapter 49) and domestic workers (chapter 48). In 2013 a new chapter 49.1 on the particularities of the labour regulations of distant workers (teleworkers) was added to the LC RF. According to Art. 312.1 LC RF, distant work refers to labour which, pursuant to the labour contract, is performed outside the employer’s premises, branch office, representative office, or at another site beyond the employer’s control using informational and tele-communicational networks (including the Internet) for the interaction with the employer on issues related to work performance. This means that the Russian legislator distinguishes between homework (mainly physical, low-qualified or non-qualified work) and distant work (high-qualified intellectual work), though the special regulations for both groups are the same. Homeworkers and distant workers can, for example, be dismissed on grounds provided for by both the Labour Code and the labour contract (Lyutov & Gerasimova, 2017: p. 584).

Although, according to Art. 312.1 LC RF, digital workers can in some cases be subsumed under distant workers, they are nearly always classified as self-employed persons (individual entrepreneurs). Unlike Germany, self-employed persons are, however, insured under the social security scheme and obliged to pay social insurance contributions to pension and health insurance (Art. 430, 431 of the Tax Code of the Russian Federation), where they have to pay the whole sum of their contributions themselves. On the contrary, in case of dependent employment in Russia the employer pays the whole sum of the contributions to social insurance (without the participation of the employees). In Russia there are no minimum income thresholds, from which on social insurance for self-employed persons becomes mandatory. Due to high social insurance contributions during the last six years, the number of registered individual entrepreneurs in Russia decreased by 8% (Faljahov, 2016), while the number of the non-registered self-employed persons increased. In 2016 15.4 million people were employed in the informal economy, what is equivalent to 21.2 per cent of the total number of employed people¹ in Russia (Egorova 2017). The spreading of mobile, Internet and cloud technologies favours the increase of the economy’s informal sector (Egorova, 2017) and the circumvention of the legal regulations (Drahokoupil & Fabo, 2016).

Since 2015 the introduction of a new employment category ‘freelancer’ has been actively discussed in Russia. There were different proposals as to who should be covered by this new category und regarding the question as to how many taxes and social contributions have to be paid by ‘freelancers’.

On 26 July 2017 the Civil Code of the Russian Federation was amended. According to the new item 1 of Art. 23 (citizen’s entrepreneurial activity) a citizen shall have the right to engage in entrepreneurial activities without forming a legal entity from the moment of his state registration in the capacity of an individual entrepreneur, with the exception of the cases, listed in item 2 of Art. 23. The new item 2 of Art. 23 lists certain types of entrepreneurial activity, for which it may be provided for by law that citizens may perform such activities without state registration as individual entrepreneurs. Before this amendment was made, it was not allowed to engage in business activities without state registration.

Since 1 January 2017, certain cases were established in item 70 of Art. 217 of the Second Part of the Tax Code according to which a ‘freelancer’ can provide services with regard to personal, domestic and (or) other similar needs without state registration as an individual entrepreneur: tutoring; cleaning, housekeeping, services concerning supervision and care of children, of sick persons, persons who have reached the age of 80 years, as well as other persons in need of constant external care according to the decision of a medical organization. For these freelancers ‘tax holidays’ have been introduced for two years, which means that their income of the years 2017 and 2018 is exempt from taxation, if they have been enrolled by tax authorities.

The effectiveness of such regulations raises great doubts. On the one hand, since there is no legal obligation for freelancers to enrol with tax authorities, most individuals have no incentives to do it.

¹ The majority of them are not self-employed persons working in the informal sector but employed persons without a labour contract.
voluntarily and pay taxes as of 2019. On the other hand, the new regulations favour the conclusion of civil-law contracts with domestic workers (including some categories of workers on demand) instead of labour contracts. Such regulations do therefore not contribute to the social protection of digital workers.

IV. Conclusion

Recently, different solutions have been discussed in order to guarantee access to social security for digital platform workers. Some of the social security problems of digital platform workers are old-fashioned problems of social security of solo self-employed persons and false self-employed persons. Earlier reform proposals concerning these groups have now anew been discussed in the context of platform work.

Digital platform workers cannot a priori be classified as employees or self-employed persons or bogus self-employed persons or homeworkers or domestic workers, because the correct classification in each case depends on the nature of the activity (inclusive of whether the work is carried out online or offline) as well as on the design of the relationship between the digital work the platform and the client. Digital platform work does not constitute an independent form of employment. There seems to be no one-fits-all-solution to guarantee access to social security for digital workers.

Adequate responses for an access to social security for digital platform workers (except for those who are really self-employed) should have the objective to guarantee a minimum level of protection to digital workers and simultaneously find a person (depending on the type of platform work – a platform provider or requester/client) who is responsible for the payment of their social security contributions. This obligation is justified by the new forms of dependency caused by platform work.

It is not sufficient to include platform workers in the compulsory statutory social insurance scheme. The Russian experience, where the self-employed are obligatorily insured in the social security scheme and obliged to pay social insurance contributions to both pension and health insurance themselves, has shown that such regulations only favour the shadow economy and may prove futile, especially in countries where the level of guaranteed social protection is very low and where there is no regulatory stability. Also from the German perspective the inclusion of digital workers into social/pension insurance risks a worsening of the situation of the self-employed digital workers with a low income if the contributions has to be paid out of these low incomes, while, on the other hand, their chances to receive a pension above the social welfare level are low.

The German example of homeworkers and artists shows that realising access to social security is also possible only via social law reforms by disconnecting the social protection from the labour employment status. At the same time, a new third category would not necessarily cover the same persons under labour and social law and guarantee them the same level of labour and social protection. Furthermore, instead of tailor-made solutions and more precise regulations, an introduction of a third category might lead to the erosion of the ‘employee’ category and to the diminution of labour and social protection.

Notwithstanding the above, any national legal solution reaches its limits when platform operators or their clients are based abroad. It would therefore be desirable to create framework conditions for the payment of social contributions at least at the European level. The European Commission has launched a Proposal for a Council Recommendation on access to social protection for workers and the self-employed (European Commission, 2018). The wording of the Proposal for the Recommendation reveals two goals: first, to close formal coverage gaps and ensure adequate effective coverage of the self-employed; and second, to ensure the social and especially the economic sustainability of national protection systems.

I consider positive the goal of the proposed Recommendation to ensure for all workers and the self-employed formal and effective coverage of social protection and transparence of social protection entitlements. However, the EU soft law instruments cannot force member states to change the organisation of their social security schemes.

The next problem is that the proposed Recommendation does not really address the new challenges connected with platform economy, and especially the challenges faced by misclassification and circum-
vention of legal regulations through platforms. The proposed Recommendation lays down the criteria for ‘worker’ status, meaning a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration. A definition for the term ‘self-employed person’ is not included in the proposal. Even if the criterion ‘for and under the direction of another person’ is the main feature of an employment relationship, this criterion in such abstract form does not take into account new manifestations of personal dependency of persons working for digital platforms.

Reference List


Undeclared work and legal instruments for combating it in Spain*

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Abstract: This article analyses the measures adopted in Spain to combat undeclared work, although only with respect to activities included in the scope of the Spanish Workers' Statute (workers under employment agreements). For the purposes of this analysis, the measures have been broken down into three main groups: control measures; measures to combat illegal employment and, finally, measures to promote legal employment. The paper concludes with some reflections on the effectiveness of these measures.

Keywords: undeclared work, control instruments, promotion of declared work, sanctions against undeclared work, Spain.

1. The need to combat unreported employment. Undeclared work or unreported employment (i.e. “any paid activities that are lawful as regards their nature but not declared to the public authorities”,1 such that they do not comply, fully or partly, with the obligations related to the provision of an economic activity2) has always been perceived as a threat that affects many areas: the labour market, since it favours unfair competition; the social protection system, as a risk to its long-term future; and the rights of workers, mainly those who work on the informal market, but also those who are in formal employment, because their working conditions may suffer downward pressure due to unfair competition stemming from undeclared work.

From this perspective, undeclared work is fraud that has serious consequences for society as a whole, where those who comply with the established rules suffer the effects twice over: firstly, because those who are working off the books do not contribute as they should to the sustainability of public finances, and in particular to the public social protection system, thus forcing those who declare their

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2 Whether they be existing administrative, tax, or social security obligations, or any other obligation resulting from civil legislation and, in general, from all laws that regulate both self-employment and salaried work. In this regard, Report 2/1999 of the Spanish Economic and Social Committee (21 April 1999) defined the shadow economy as “all activities relating to the production of goods and the rendering of services for the market that evade both tax-based laws, in the broader sense, and any other type of economic legislation, including labour regulations, but also others, such as those relating to the environment, technical standards, safety, etc.” This definition demonstrates the economic aspect of undeclared work, to which the attention of the legislator is drawn.

http://www.CES.es/Documents/10180/18510/inf00299
work to shoulder this financial burden; and secondly, because those in regular employment receive fewer services than they would if everyone contributed their share to public spending.

The pressure of irregular migration on EU Member States, together with the current economic situation in these countries resulting from the 2008 crisis, has brought with it renewed concern about the need to combat undeclared work. In this regard, it has been stated that undeclared work is an obstacle to the growth of employment and, consequently, to the growth of the economy in a period of special difficulty for European economies. Moreover, it has been claimed that the possibility of finding employment in the underground economy contributes to a “pull factor” for illegal immigration into the EU.

The measures against undeclared work also respond, therefore, to the objective of seeking “legal, orderly, responsible and employment-related immigration.” From this point of view, a first conclusion can be drawn regarding the renewed concern of states with regard to unreported employment. In the present context we see undocumented workers (migrant workers, in particular) as uncooperative people who do not contribute financially to support the Welfare State – while claiming benefits – and who are a threat to economic growth in the country that supports them. Consequently, irregular migration is considered a threat that must be controlled. An analysis of this discourse would, however, go beyond the objectives of this article.

2. The measures proposed to control undeclared work. As a result of the approaches described above, states have introduced various initiatives to support the fight against undeclared work in a period of economic crisis, a crisis that has been taken into consideration when justifying the various measures adopted. In the case of Spain, the latest of these initiatives is included in the Plan to fight irregular work and social security fraud for the period 2012–2013 (Plan de lucha contra el empleo irregular y el fraude a la Seguridad Social para el periodo 2012–2013), approved by the Council of Ministers on 27 April 2012. This action plan aims to achieve four major objectives, including, firstly, bringing the underground economy to the surface, in order to regularise working conditions and generate greater income for the social security system through the payment of social contributions.

The measures adopted in Spain, as a result of the initiatives adopted under action plans such as that outlined above to promote regular employment and to combat undeclared work, may be classified from an employment perspective into three broad categories: control measures, measures to combat illegal employment and, finally, measures to promote legal employment.

2.1. Control measures. Historically, the regularity and legality of work has mainly been controlled by the Labour Inspectorate, an organisation that was originally tasked with the mission of “ensuring compliance with the legal provisions relating to working conditions and the protection of workers in

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5 Thus states the preamble to Royal Decree-Law 5/2011, of 29 April, on measures for the regularisation and control of irregular employment and the promotion of housing rehabilitation.

6 This is reflected in the second recital of Directive 2009/52/EC of 18 June 2009, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

7 Preamble to Law 13/2012, of 26 December, on combating irregular employment and social security fraud.

8 This is the case both in Royal Decree-Law 5/2011, of 29 April, and in Law 13/2012, of 26 December, mentioned above.

9 For an analysis of the most recent measures to combat undeclared work, see BAVIERA PUIG, I. “Avances en la lucha contra el empleo irregular y el fraude a la seguridad social”. Aranzadi Social No 9/2014. With regard to the 2012 Plan to fight irregular work, MARTÍNEZ RAFECAS, D. El Plan de Lucha contra el empleo irregular y el fraude a la Seguridad Social: balance y perspectivas. Ministry of Employment and Social Security. 2014. See also PÉREZ AGULLA, S. “Plan de lucha contra el empleo irregular y el fraude a la seguridad social”. Revista española de Derecho del Trabajo, No 155/2012.

10 As well as this objective, the programme aims to: combat fraud by introducing incentives related to employment policies (such as credits or reductions in employer contributions to social security); fight existing unemployment benefits fraud; and uncover cases of social security benefits fraud.

11 Although other bodies also carry out control duties. This is the case with the body that manages social contributions (General Treasury of Social Security) or the body that deals with unemployment benefits (Public State Employment Service).
the exercise of their profession. Along with these functions, the Inspectorate has also taken on control duties in other areas, such as workplace health and safety and the social security system.

It therefore stands to reason that one of the first steps taken after the adoption of Law 13/2012, to combat irregular employment and social security fraud, was to strengthen the institution of the Labour Inspectorate, an objective that has been achieved through various measures:

a) Providing the inspection services with more personnel – particularly striking in a period in which, as a consequence of the crisis and the need to contain public spending, there have been significant cuts in public employment – and giving inspectors greater powers by regulating their access to electronic documents, among other aspects.

b) Specifying and increasing the list of bodies on which the obligation to collaborate with the Labour Inspectorate falls, and classing this duty as an “active” obligation (providing data, reports and relevant background information within the scope of its responsibilities) and not only as a “passive” obligation (providing the information requested to the Inspectorate).

c) Adding new grounds for extending the period allowed to complete the inspection procedures, although there is a limit to the time granted for an extension. Thus, current regulations establish that the maximum period of nine months for carrying out inspection activities may only be extended for a new maximum period of nine months (previously there was no time limit for this extension of inspection activities) in the following cases: when the inspection activities are particularly difficult and complex; when in the course of the activities it is found that the subject of the inspection has obstructed the inspection body or concealed any of its activities or the people who perform them; or, lastly, when the inspection requires international administrative cooperation.

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12 Article 3(1)(a) of Convention No 81 of 1947, on labour inspection in industry and commerce.
13 In this regard, Article 12 of Law 23/2015, of 21 July, on the structure of the labour and social security inspection system, entrusts the Inspectorate with the task of monitoring and demanding compliance with legal provisions and regulations in applications, registrations, affiliations, worker registration and deregistration, contribution and collection of social security system payments, and with regulations related to access to and use of social security benefits.
14 Provided for, respectively, in: Article 5(3)(3) in fine; Article 9; Article 14(2); and the eighth additional provision of repealed Law 42/1997, of 14 November, on the Labour Inspectorate – all these articles were introduced by Law 13/2012, to combat irregular employment and social security fraud. Currently, 13(3)(c), Article 16, and Article 21(4) of Law 23/2015, of 21 July, on the structure of the labour and social security inspection system.
15 Royal Decree-Law 3/2015, of 22 March, which provides for an extraordinary and additional offer of public employment to combat fraud both in the area of taxation and in the area of laws relating to labour and social contributions.
17 In this way, from the generic reference, before Law 13/2012, to “Public Administrations and all people exercising public functions”, a more precise list is now provided: “authorities, whatever their nature, representatives of the bodies of the General State Administration, of the Administrations of the Autonomous Communities and of local entities; autonomous bodies and public business entities; chambers and councils, professional colleges and associations; all other public entities, and those who, in general, exercise public functions” (Article 9(1) Law 13/2012).
18 The bodies that must provide information to the Labour Inspectorate now also include the General Council of Notaries and the social welfare mutuals, which were not previously listed among the agencies affected by said obligation.
19 With regard to this obligation to collaborate, the law (Article 16(6) of Law 23/2015) sets as limits to these obligations of assistance and collaboration the legally established limitations regarding the privacy of the person, the secrecy of correspondence, and information provided to the Public Administrations for exclusively statistical purposes. Furthermore, the gathering of personal data not collected from the interested party by Inspectorate officials in the exercise of their powers will not require express and unequivocal notification of the interested parties as required by Article 5(4) of Organic Law 15/1999, of 13 December, on the protection of personal data (Article 16(11)). Nor will the submission to the Inspectorate of personal data subject to automated processing require the consent of the affected party (Article 16(3)).
20 Which must be respected unless the delay is attributable to the subject of the inspection or to dependent persons (Article 21(4) Law 23/2015).
21 These situations are defined in Article 17 of Royal Decree 138/2000, of 4 February, approving the regulation of the organisation and functioning of labour and social security inspection.
22 This last reason, which was introduced by Law 25/2009, of 22 December, was, until the adoption of Law 13/2012, the only grounds for extending the inspection period.
Along with this extension of the maximum periods allowed for completing inspection activities, the maximum period during which they may be suspended has been increased from three to five months, incorporating some exceptions to said maximum period: that the interruption is caused by the subject of the inspection or dependent persons, or when it has been found to be impossible to continue the inspection activities since a court ruling that may affect the outcome remains pending.

d) Improving the system for notification of the administrative acts of the Inspectorate, regulating electronic notification of the administrative acts of the Labour Inspectorate through its Public Notice Board, making it mandatory for said notifications to comply with Organic Law 15/1999, of 13 December, on the protection of personal data.

These legislative initiatives were retained in Law 23/2015, of 21 July, on the structure of the labour and social security inspection system. This law, in addition to an administrative reorganisation of the state services and the autonomous community services of the Inspectorate, provides for the possibility of creating, within the State Labour and Social Security Inspection Agency, a National Anti-Fraud Office, as the body in charge of promoting and coordinating the implementation of measures to combat undeclared work, irregular employment, and social security fraud, and any other measures that become necessary. But what is surely most noteworthy in this new regulation of the Labour Inspectorate are the provisions regarding the presumption of certainty of facts related to undeclared work that are set down in the communications drawn up in compliance with the agreements or cooperation instruments with the Labour and Social Security Inspectorate, and which are carried out by officials that represent the Authority or are the agents thereof; this is also the case for facts verified by the Authorities of the Member States of the European Union with powers equivalent to those of the Labour and Social Security Inspectorate. Said presumptions are in addition to the traditional presumption of certainty of the facts set forth in the payment and infringement notices resulting from the checks carried out by the Labour Inspectorate.

On the other hand, collaboration mechanisms between the Labour Inspectorate and other bodies and public authorities that participate in the fight against undeclared work have been stepped up. This has been achieved through the creation of a Special Unit of Collaboration and Support for Courts and Tribunals and the State General Prosecutor’s Office in the fight against irregular employment and social security fraud. The function of this Unit, created by Order ESS/78/2014, of 20 January, is to collaborate and provide assistance in the prosecution of crimes related to unreported employment and social security fraud and, in particular, in the tasks of inspection, coordination, advice and support that may be necessary. To this end, it is envisaged that this Unit will provide the courts and the Public Prosecutor with the necessary reports, gathering and including, as the case may be, the information provided in the rest of the units that make up the Labour and Social Security Inspection System.

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23 Following Law 15/2014, of 16 September, on streamlining the public sector and other administrative reform measures, these notifications are published on the Single Public Notice Board of the Official State Gazette.


25 Second additional provision of Law 23/2015. According to the preamble to this regulation, this Office seeks to deal with fraud globally, given its far-reaching dimension, since “fraud not only supposes an undue drawdown of resources from the social security system (generation or use of undue benefits) or a failure to contribute to its cost (total or partial absence of social contributions). Fraud is linked, most of the time, to cases of labour exploitation in which workers are denied the most elementary rights, the most important of which is the recognition of their status as workers, as occurs in a situation of undeclared work”.

26 Article 16(8) Law 23/2015.

27 Article 16(10) Law 23/2015.

28 A presumption currently set down in Article 23 of Law 23/2015.

29 The sixth final provision, entitled “Collaboration in the fight against irregular employment and social security fraud” granted the government a period of six months to create, within the General Directorate of the Labour and Social Security Inspectorate of the Ministry of Employment and Social Security, a Special Unit of Collaboration and Support for Courts and Tribunals and the State General Prosecutor’s Office in the fight against irregular employment and social security fraud, organically and functionally dependent on the Central Authority of the Labour and Social Security Inspectorate.

30 Article 2 of Order ESS/78/2014.
The latest initiatives against undeclared work also seek to involve parties from labour relations and, in general, all of society. In this regard, Royal Decree-Law 5/2011, of 29 April, for cases involving companies that resort to contract arrangements, introduced the obligation (later set forth in Law 13/2012) to check, prior to the start of the contracted activity and during the entire period of the contract, the affiliation and registration of the contracted workers with social security. This obligation falls upon those who contract or subcontract works or services that correspond to their registered company activity, or that are provided on an ongoing basis in their workplace (in which case it is irrelevant if the works and services correspond to the activity of the company in question).

The verification obligation introduced by Royal Decree-Law 5/2011, and in contrast to the “obligation” provided for in Article 42 of the Workers’ Statute, is a true obligation: failure to comply will result in sanctions. What is not regulated by this legislation is the mechanism to be used to carry out this verification, which is regulated in Article 42 of the Workers’ Statute, and includes the possibility that the contracting employer may require a certificate that all social security obligations have been paid from the General Treasury of Social Security. The Ministry of Employment and Social Security has tried to resolve this shortcoming, implementing a mechanism similar to that provided for in Article 42 of the Workers’ Statute: the Ministry authorises contracting companies to obtain online information on the social security affiliation and registration status of the workers employed by the contractors, although there is a requirement that the contractor companies authorise the General Treasury of Social Security to provide this information.

Along the same lines of action aimed at involving others in the prosecution of undeclared work, stemming from the idea that everyone should participate in the common goal of eradicating fraud, in August 2013 the Spanish Employment Minister Fátima Báñez announced the creation of a collaboration mechanism for this purpose: the mailbox to fight labour fraud. This measure was the first de facto introduction, without any legal foundations, of a whistleblowing mechanism in Spain, namely, a mechanism for reporting an irregularity committed within a company to the competent authority.

This collaboration method does not mean that the control of legality in labour matters will no longer be centralised in the Labour Inspectorate, since this body is responsible for the assessment of irregularities in labour matters. In fact, the mailbox only informs the Inspectorate of the commission of an irregularity, which means that it serves as a criterion for carrying out an inspection task.

According to the rules governing the activity of the Labour Inspectorate in Spain, it may act upon various different grounds: following an order from a higher authority, an order resulting from inspection

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31 On the measures introduced by this regulation, see ALEGRE NUENO, M. “Aspectos problemáticos de las nuevas medidas para combatir el empleo sumergido contenidas en el Real Decreto Ley 5/2011, de 29 de abril”. El Derecho, No 4/2012.
32 On the problems of interpreting this legal text, see GUTIÉRREZ TRASHORRAS, “La nueva regulación de las infracciones y sanciones en materia de falta de alta, compatibilización indebida de prestaciones y el fraude en medidas colectivas”, in CAMINO FRÍAS (coord.) et al. Lucha contra el empleo irregular y el fraude a la Seguridad Social. Thomson Reuters. 2013
33 Indeterminate legal concept for which a definition has been attempted in the case law, considering said activity to be that which is “inherent” or “absolutely indispensable” for the business of the principal company, which is specified in the provision “works or services that belong to the productive cycle thereof”, excluding complementary or non-core activities (inter alia, Supreme Court judgment of 15 November 2012, appeal for unification of doctrine No 191/2012).
34 The concept of providing services on an ongoing basis is not defined by law, so a definition must be provided by the courts. In any case, it excludes occasional activities, which are not permanent.
35 This precept provides for a similar “obligation” in the case of contracts related to the activity of the contracting company, which consists of the “duty” to verify that the contractor companies are up to date in the payment of their social security obligations (social contributions). The consequence of failing to observe this obligation, however, is only to lose the option to opt out of the joint and several liability provided for in the same article (in the event that, once the social security contributions certificate has been requested, the body in charge of issuing the certificate – the General Treasury of Social Security – does not reply within the 30 days established by law). There is therefore no sanction for any eventual breach of this obligation.
36 Failure to comply with this obligation is classified as a serious administrative infringement in Article 22(11) of the Law on Labour Infringements (Royal Legislative Decree 5/2000, of 4 August) which is punishable by a fine of up to €6,250,626 (an infringement – hence a fine – being applicable to each of the affected workers).
37 Mechanism approved by the Spanish Data Protection Agency (report 0047/2010 and report 412/2009)
38 The only legal reference to this form of collaboration is found in the new law that regulates the Labour Inspectorate (Law 23/2015), which provides for cooperation with the Labour Inspectorate to be carried out preferably by electronic means (Article 18(3)).
plans or programmes, at the reasoned request of other bodies, by virtue of a complaint or on the initiative of the Labour and Social Security Inspectors, in line with criteria of effectiveness and timeliness.40

Thus, a complaint as grounds for starting an inspection is provided for in Spanish legislation. In any event, this complaint cannot be compared with the complaint system via the anti-fraud mailbox: the complaint cannot be anonymous, since, according to the law, an anonymous complaint will not be processed.41 Conversely, the defining feature of complaints made through the mailbox is, precisely, their anonymity, with the purpose of encouraging the reporting of irregularities.

The legality problems and issues raised by anonymous whistleblowing go beyond the scope of this article. Suffice it to say here that this initiative has not been met with calm acceptance,42 since it does not seem to be in line with the opinion of the Spanish Data Protection Agency, a body that has spoken in favour of limiting anonymous complaints, claiming that confidential treatment may be offered through other mechanisms.43 In addition, the anonymous whistleblowing procedure does not even seem to respect the guidelines proposed by the Article 29 Data Protection Working Party, which recognises that anonymous reports pose a specific problem “with regard to the essential requirement that personal data should only be collected fairly”. Therefore, the Working Party considers that, in order to satisfy this requirement, only identified reports should be communicated through whistleblowing schemes, admitting the possibility of anonymous complaints, but only exceptionally, concluding that the whistle-blower reporting systems should be established in such a way that they do not encourage anonymous reporting as the usual way to file a complaint.44

2.2 Measures to combat illegal employment. Once the existence of undeclared work has been verified, the promotion of regular employment requires that the detected irregularities be sanctioned.

a) Administrative sanctions. The most recent laws relating to sanctions for undeclared work have been aimed at increasing the size of administrative sanctions for undeclared work, although only in the case of sanctions related to the financial safeguarding of the social security system and not, however, for those related to the protection of workers’ rights that may be violated.45

In this regard, Royal Decree-Law 5/2011, of 29 April, on measures for the regularisation and control of irregular employment and the promotion of housing rehabilitation, introduced, among the measures aimed at combating undeclared work, an increase in certain sanctions against employers.46

This increase affected, among others:

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40 Article 20(3) Law 23/2015.
42 This may be seen in the complaint made before the Ombudsman by the National Association for the Effective Defence of the Worker.
43 This association also filed a complaint with the Ombudsman about the incentive or compensation for the resolution of irregularities, as provided for in Clause 5(e) of the specific administrative clauses and technical conditions for the conclusion of a framework agreement with employment agencies for their collaboration with public employment services in the integration of unemployed people in the labour market, which demands that the procedure conclude with the imposition of sanctions for the incentive to be applied. (https://sede.sepe.gob.es/es/portal trabaja/resources/sede/licitaciones/convocatorias/recursos/pdf/PCAP_17_13.pdf)
44 This complaint, unlike the previous one, was heeded by the Ombudsman, who requested that the Spanish Government modify said incentive. The Ministry of Employment, however, refused to eliminate this incentive, aimed at combating irregularities that unemployed persons who are receiving unemployment benefits may commit. (https://www.defensordepueblo.es/resoluciones/incentivos-a-las-agencias-de-coloacacion-2/)
45 This could simply be preventing the defendant from knowing the name of the complainant.
46 Gutierrez Trasorraras, L. “La nueva regulación de las infracciones...” op. cit., pp. 191 et seq.
— Sanctions related to infringements for failing to affiliate or register workers that start working for them, or for undertaking said proceedings late as a result of an inspection.47
— Sanctions related to infringements consisting of employing beneficiaries of or applicants for pensions or other regular social security benefits that are incompatible with working as a paid employee, when they have not been registered with social security prior to commencement of their activity.48
— Sanctions imposed for obstruction of the inspection when the aim of said inspection is to check the registration status of the workers who provide services in a company, as well as sanctions related to the breach of employer obligations, leading to the commission of the infringements referred to in the previous point.49

b) Additional sanctions. The increase in the size of the administrative sanctions stipulated for undeclared work has not been the only way to strengthen the State’s punitive power against this offence. Other measures have been introduced, alongside those mentioned above, in the form of additional sanctions, also aimed at discouraging undeclared work.

The first additional sanction consists of the publication of the sanctions imposed for the aforementioned offences – once final – in order to make the identity of the offenders public and exposing them to public condemnation. This sanction is not immune from criticism. Firstly, because the principle of non bis in idem (double jeopardy) could be violated. Secondly, because of the risk of violating the principles of proportionality and legality, given the way in which the sanctions are established,50 and, finally, because of the potential violation of the right to the protection of personal data.51

Regarding this last point, it should be remembered that the fundamental right to data protection is intended to guarantee people control over their personal data, over their use and destination, so as to prevent the illegal trafficking of data and the damage this may cause to personal dignity.52

With regard to this sanction, no report has been published by the Spanish Data Protection Agency. However, in report 0550/2006, regarding the publication of sanctions in the field of sport, the agency considered that the publication of such sanctions, without the consent of the interested party, may only be considered under Article 11(2) of Organic Law 15/1999, on the protection of personal data (which provides for said publication when it is established by a legal instrument having the force of law), provided that it is a consequence of the nature of the penalty, without providing for the possibility of the general publication of sanctions.53

The second additional sanction for undeclared work is a toughening up of the exclusion of sanctioned companies from benefits provided for in employment promotion programmes (subsidies and credits on social contributions to be paid by the employer). Thus, in the case of companies that have...
been sanctioned for the infringement laid down in Article 23(1)(a) of Royal Legislative Decree 5/2000, the period of exclusion from enjoyment of said benefits was increased from one to two years by Royal Decree-Law 5/2011. Furthermore, this Royal Decree added a similar sanction in the cases of sanctions for the infringement laid down in Article 22(2) of Royal Legislative Decree 5/2000, although in this case the exclusion time is limited to one year, except in case of repeated offences, in which case the exclusion time is extended up to two years.

This type of sanction was addressed in Law 13/2012, which sought to introduce more effective sanctions since, without aggravating the sanctions regime; this made it more just, thus reinforcing its deterrent power. In effect, although with this law the additional sanctions — consisting of the loss of aid provided when participating in employment promotion programmes — remained unchanged, this sanctions regime was required in order to better comply with the principle of proportionality. Thus, in the case of both the infringements related to the lack (or lateness) of the registration or affiliation of workers (Article 22(2) Royal Legislative Decree 5/2000) and the infringements related to the employment of beneficiaries of, or applicants for, pensions or other regular social security benefits that are incompatible with working as a paid employee, when they have not been registered with social security prior to the start of their activity (Article 23(1)(a) of the same legal instrument), the company will be sanctioned with the automatic loss of aid, credits and, in general, the benefits resulting from employment programmes “in proportion to the number of workers affected by the offence”, targeting the benefits of greater amount over the benefits of lesser amount at the time of the commission of the offence.

Finally, the third additional sanction prescribed to discourage undeclared work consists of including the commission of the infringement laid down in Article 22(2) of Royal Legislative Decree 5/2000 in those situations that prohibit entering into government contracts. In this case, according to Article 61(2) of said regulation, the prohibition may not last for more than five years.

c) Criminal sanctions. The increased severity of sanctions for irregular employment has not only affected administrative sanctions, but has also had an impact on criminal sanctions. Thus, in criminal matters, Organic Law 7/2012, of 27 December, which modified the Criminal Code on transparency and the fight against tax and social security fraud, introduced various measures aimed at combating illegal employment using tax offences as the model and with the aim of strengthening the preventive dimension of criminalisation.

This regulation reduced the amount applicable in cases of contributions fraud, or undue rebates or deductions, from EUR 120,000 to 50,000 in its definition of the crime of social security fraud. This reduction was justified taking into account economic, political and social criteria, in response to the need to act firmly against behaviour that endangers the financial sustainability of the social security system. Behaviour that, in the opinion of the legislator, calls for emphatic condemnation in times of particular economic difficulty (p. IV of the preamble to the law).

54 of their activity.
55 Sanctions for not requesting, in a timely manner, the initial affiliation or registration of workers who begin working for them, the offence being applicable to each of the affected workers.
56 Article 46(2) of Royal Legislative Decree 5/2000, of 4 August, with the wording established in Law 13/2012, of 26 December.
57 Proportionality rule introduced in Article 46(1)(a) Royal Legislative Decree 5/2000, which aims to prevent a single offence of this type from giving rise to the loss of all the aid that the company could benefit from, making the number of workers affected irrelevant. See LÓPEZ PARADA, R.A., “Otras modificaciones introducidas en la Ley de Infracciones y Sanciones en el Orden Social por Ley 13/2012, de 26 de diciembre, de lucha contra el empleo irregular y el fraude a la Seguridad Social” in CAMINO FRÍAS (coord.) et al. Lucha contra el empleo irregular y el fraude a la Seguridad Social. Thomson Reuters. 2013, p. 303. LÓPEZ PARADA describes the problems in enforcing this rule, mainly due to the impossibility of determining the number of affected workers and the comparison parameter for applying the rule of proportionality.
58 Article 49(1) of Law 30/2007 on Public Sector Contracts (currently Article 60 of Royal Legislative Decree 3/2011, of 14 November) with the wording set down in Royal Decree-Law 5/2011.
59 LOZANO ORTIZ, J.C., “El nuevo delito contra la Seguridad Social” in CAMINO FRÍAS (coord.) et al. Lucha contra el empleo irregular y el fraude a la Seguridad Social. Thomson Reuters. 2013, p. 340. Punishable by a fine and imprisonment from one to five years.
In addition, Law 7/2012 introduced a new type of – aggravated – offence in certain cases of particularly serious behaviour as a result of the amount evaded (more than EUR 120,000) or for other concurrent circumstances of particular seriousness, such as fraud committed by a criminal organisation or group, or the use of individuals or corporations or entities without legal personality as intermediaries, businesses or fiduciary instruments or tax havens or tax-free territories, concealing or hindering the determination of the identity of the party subject to social security obligations or the perpetrator of the offence, the determination of the amount defrauded or the assets of the party subject to social security obligations or the perpetrator of the offence. In the case of this aggravated offence, and insofar as the maximum prison sentence was increased from five to six years, the statute of limitations for the offence was indirectly modified, and extended to 10 years.

In both cases (ordinary and aggravated offences) the prison sentence is accompanied by a fine and the loss of the possibility of obtaining public subsidies or aid and the right to receive benefits or tax incentives or social security payments during a period of four to eight years.

These are not the only developments that were introduced by Organic Law 7/2012. In line with efforts to combat the harmful effects of non-compliance with the obligation to pay social security contributions as a result of undeclared work, this law added a new offence applicable to those who simultaneously employ a large number of workers without registering them in the corresponding social security scheme or, as the case may be, without having obtained the corresponding work permit. These cases are punishable by fines and imprisonment of six months to six years.

To conclude the description of the developments introduced by Organic Law 7/2012 in the criminal field, it should be noted that in the case of criminal proceedings, and contrary to the case of administrative rules, the sanctions that have been toughened not only relate to the economic protection of the public social security system, but also to the protection of the rights of workers employed illegally. Thus the maximum deprivation of liberty rose from three to six years for those who, through deception or abuse of a situation of necessity, impose on their employees labour or social security conditions that harm, suppress or restrict the rights recognised by legal provisions, collective agreements or individual contract.

2.3 Measures to promote legal employment. Ultimately, the fight against undeclared work must promote legality, through certain instruments that create incentives for the regularisation of unreported employment. These instruments offer, under certain conditions, an “amnesty” for cases of non-compliance with the obligations arising from the employment contract.

This approach was used once before in Spain in 1997, to bring to light irregular temporary contracts. A form of amnesty was introduced in labour legislation to facilitate the transformation of fraudulent temporary contracts into permanent contracts. The mechanism allowed for the formalisation of an employment-promotion contract – a permanent contract that, as an incentive to recruitment, offered reduced compensation in the event of a dismissal for economic and business reasons found to be inadmissible – when concluded with workers recruited under fixed-term contracts until the year following the entry into force of the Royal Decree-Law that introduced this option. Beyond that date, and for a period of four years, the contracts could be transformed under the terms provided for in the collective bargaining instruments.

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61 Punishable by a fine and imprisonment from two to six years.
62 Twenty-five percent in companies or workplaces that employ more than one hundred workers; fifty percent in companies or workplaces that employ more than ten and no more than one hundred workers; all employees in companies or workplaces that employ more than five and no more than ten workers.
64 Royal Decree-Law 8/1997, of 16 May.
65 This period of amnesty was subsequently extended for successive periods. Thus, Royal Decree-Law 5/2001, of 2 March, provided for the possibility of converting temporary contracts formalised before 31 December 2003 into permanent employment-promotion contracts; Royal Decree-Law 5/2006, of 9 June, did the same with those formalised before 31 December 2007; and Royal Decree-Law 10/2010, of 16 June, with those formalised before 31 December 2010. Finally, Royal Decree-Law 10/2011, of 26 August, allowed for the conversion of temporary contracts formalised before 31 December 2011 into permanent employment-promotion contracts. With this development, the amnesty would foreseeably have continued to be extended if it were not for the fact that Royal Decree-Law 3/2012, of 10 February, repealed the permanent employment-promotion contract, widening the scope of the incentive – compensation for unfair dismissal – that said contract entailed.
Regarding irregular employment, Royal Decree-Law 5/2011, of 29 April, provided for the voluntary regularisation of undeclared work. It offered, in essence, the possibility, until 31 July 2011, of regularising the situation of those workers in respect of whom the initial affiliation or registration in social security had not been requested.

This voluntary regularisation was rewarded with an “amnesty”66, which consisted of an exemption from administrative sanctions stipulated by Spanish law (Royal Legislative Decree 5/2000) for offences related to the irregular employment of workers for whom the initial affiliation or registration in social security had not been requested. This form of amnesty was subject to certain requirements. First, that the regularisation had to have been carried out within the stipulated time limit (by 31 July 2011).67 Second, that the regularisation was not related to situations of irregularity for which a social security security had already been brought against the company, or for which the Labour and Social Security Inspectorate had received complaints, claims or reports of any nature related to said situations in that company, or actions brought before the labour courts. Third, that the regularised work had been formalised through an employment contract with the worker, in any permanent or temporary or fixed-term contract modality, including training contracts;68 in this case the initial duration of the contract could not be less than six months from the date of the application for registration with social security.69

Moreover, the amnesty affected certain provisions of the Workers’ Statute regarding the rights of workers to be considered permanent workers under certain circumstances. Specifically, the amnesty expressly excluded the rebuttable presumption (iuris tantum) provided for in Article 15(2) of the Workers’ Statute, by virtue of which the contracts of those workers who had not been registered with social security were considered to be permanent, unless proven otherwise, after a period equal to that which could have been legally established for the trial period.70

These measures were accompanied by others aimed at making the economic impact for the company as a result of the regularisation more bearable. In particular, it provided for the possibility of postponing social security contributions and for joint collection when registering the regularised situations.

However, Royal Decree-Law 5/2011 added a requirement, which, if omitted, entailed the loss of all these benefits.71 The first additional provision made the rights related to the amnesty conditional on the benefitting employers not terminating the contract of the workers affected by regularisation before six months.72

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66 SEMPERE NAVARRO and MARTÍN JIMÉNEZ do not consider that this measure is an amnesty inasmuch as it does not entail the cancellation of debts relating to social contributions or the exemption from liability for the payment of benefits, but is simply an exemption from administrative liability. SEMPERE NAVARRO MARTÍN JIMÉNEZ, El empleo sumergido: comentarios al Real Decreto-ley 5/2011 de 29 de abril. Valencia. Tirant lo Blanch. 2011, p. 52. However, page 57 states that this Decree-Law is “the first time that full acquittal (an “amnesty” in common parlance) for a clear and serious breach of labour and social security obligations had been introduced in the field of labour law”.

67 In contrast to the amnesty on fraudulent temporary contracts, the term for voluntary regularisation was not extended.

68 Provided that the requirements for conclusion of the contract were met.

69 A stipulation that could ultimately contradict the provisions on fixed-term contracts set down in Article 15 of the Workers’ Statute (for example, with regards to the temporary contract, the regulation of which establishes a maximum duration that, in general, may not exceed six months from the increase in the temporary need for labour, this period would be exceeded if the regularisation was carried out through this contractual modality) or that would entail the regularisation process leaving out the option to apply for fixed-term contracts of less than six months (in this respect, see SEMPERE NAVARRO MARTÍN JIMÉNEZ, op. cit., pp. 66 and 67).

70 Article 4(2) of Royal Decree-Law 5/2011. All other presumptions regarding employment contracts would not be affected by this Royal Decree-Law (for example, the presumption established in the event of non-compliance with the required written form of contract – Article 8(2) Workers’ Statute – or in the event of evasion of the law (fraus legis) in temporary hiring – Article 15(3) Workers’ Statute).

71 The regulation, in such cases, stipulated the automatic loss of the right to receive the benefits established in the Royal Decree-Law, with effect from the date of regularisation. Moreover, it established the obligation to repay the aid, credits and general benefits resulting from the employment programmes obtained as a consequence of recruitment carried out within the framework of the regularisation. In addition, employers who failed to comply with the legal framework of regularisation were required to pay all applicable social security contributions; this without prejudice to the enforcement of sanctions established in Royal Legislative Decree 5/2000 and excluded by the amnesty.

72 Excluding terminations due to disciplinary dismissal, or due to resignation, death, retirement, total or absolute permanent disability, or severe disability.
In relation to this type of measure, Law 13/2012, of 26 December, put an end to another situation akin to these amnesties – if we consider the justification given by the legislator. Before this law, and in the event of non-payment of social security contributions, regulations provided for the automatic reduction of 50% of the amount of the sanction provided that the offender agreed to settle the amount in the legally stipulated period. After the 2012 reform, this reduction could only be applied in the event that the amount to be settled exceeded the amount of the initially proposed sanction. The justification that can be read into this regulation relates to the application of the principle of proportionality, which requires that the commission of the offence not be more beneficial to the offender than compliance with the rules that have been violated.

3. The effectiveness of the measures taken against irregular employment. Regrettably, in Spain, a transparent public mechanism has not yet been established to gauge the effectiveness of the aforementioned measures to combat undeclared work. Both Royal Decree-Law 5/2011 and Law 13/2012 provided for an evaluation of the outcomes with a view to introducing any necessary changes.73 In spite of these legal provisions, no official data on these evaluations have been published; all that has been published are some press releases by the Ministry of Employment and Social Security.

Regarding the effectiveness of the amnesty introduced by Royal Decree-Law 5/2011, the Opinion on the preliminary draft law to combat irregular employment and social security fraud74 stated that the measure did not seem to have had the expected result; in the absence of published results, this conclusion was inferred from the evolution of registration figures recorded during the amnesty period.75

The press releases from the Ministry of Employment and Social Security, however, gave a more positive, optimistic account of the adopted measures, highlighting the number of contracts and bogus companies, and the number of regularised work contracts. Thus, the press release of 12 November 201276 stated that in the period from January to October 2012, the plan to combat irregular employment had led to the detection of 1,174 fictitious companies (an increase of 443 per cent over the same period of the previous year). It also stated that the number of cancelled fake registrations – false employment contracts created to access benefits – had been 20,051 (55.19 per cent more than in October 2011). Lastly, it stated that a total of 16,254 inspections had been carried out, compared to 8,931 the previous year.

The press release of July 201477 gave figures for 2012 and 2013,78 evaluating the impact of the electronic mailbox against labour fraud, and highlighting the fact that this whistleblowing system had led to 4,359 inspection actions up to June 2014, which resulted in the uncovering of 1,097 jobs and the processing of cases to the tune of more than one million euros.

A positive outcome for this mailbox was again announced in the August 2015 press release,79 underlining its increased use compared to the first year of its existence and the “growing social awareness against these behaviours that undermine the balance of the labour market and the sustainability of the Welfare State”.

The publication of the results in the fight against undeclared work as it is being waged does not seem to be the most appropriate approach, since it does not offer consistent evaluation parameters; and

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73 Six months after the entry into force of the regulation – 7 May 2011 – in the case of the Royal Decree-Law; and in the six months following 31 December 2013 in the case of the Law (Second Additional Provision and Sole Additional Provision, respectively).
75 A negative assessment of the measures proposed in Royal Decree-Law 5/2011 – on its generality, ambiguity and lack of realism – was given by Professor DE LA VILLA, who contended that the regulation had been passed without any real conviction in its effectiveness; he argued that it had been designed to be little more than a procedure from which, at best, some favourable statistics could be obtained. DE LA VILLA GIL, L.E., “La economía sumergida y los arañazos superficiales a la realidad social a través de las medidas adoptadas por el gobierno. Breve comentario al Real Decreto-ley 5/2011, de 29 de abril”. Revista General de Derecho del Trabajo y de la Seguridad Social, No 26/2011.
76 http://prensa.empleo.gob.es/WebPrensa/noticias/laboral/detalle/1810
77 http://prensa.empleo.gob.es/WebPrensa/noticias/Ministro/detalle/2264
78 Information repeated in the following press releases:
- December 2014 (http://prensa.empleo.gob.es/WebPrensa/noticias/laboral/detalle/2388)
- April 2015 (http://prensa.empleo.gob.es/WebPrensa/noticias/ministro/detalle/2506)
79 http://prensa.empleo.gob.es/WebPrensa/noticias/laboral/detalle/2615
said results may also prove to be highly unreliable, as a consequence of the political interest in showing
the positive effects of the measures adopted. The unreliability of this data is demonstrated by comparing
the data on the mailbox from the Ministry of Employment and Social Security published in the months
following the aforementioned press releases. Thus, by contrast with the data offered by the press release
of July 2014, that data offered in the press release in August 2014⁸⁰ is remarkably different; the latter press
release stated that the mailbox to fight labour fraud, in its first year of operation, had enabled the Labour
Inspectorate to initiate 8,192 inspections (4,359 was the number reported in July), unearthing 1,592 un-
reported jobs (1,097 in July) and clawing back a total of EUR 1.4 million in social security contributions.

Therefore, a thorough examination of the mechanisms to evaluate the measures adopted in the
fight against undeclared work seems absolutely necessary for a rigorous and scholarly analysis of their
effectiveness. This issue has been a constant complaint with all employment policies.

Collective transnational bargaining: practical implementation experiences from European Works Councils in Spain*

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Abstract: Council Directives 94/45/EC and 2009/38/EC impose transnational collective bargaining in Community-scale undertakings so as to create procedures for informing and consulting employees in said undertakings. More than twenty years after the first Directive was passed, this article examines the agreements reached by European-scale companies with headquarters in Spain and tries to construct a typical model for European Works Councils among companies in Spain.

Keywords: European Works Council, EWC, collective transnational bargaining.

I. Introduction

The first European experiences with regulating workers’ transnational representation dates back to the 1980s. These initial practices, which were developed in France and Germany as a result of the internationalization of their companies, extended worker representation to the workforce in other States, using the regulations for determining workers’ representation in company groups on the national scale.

The French and German initiatives encouraged debate in the European Union, which, after a first attempt at a Directive (the Vredeling proposal of 20 October, 1980), finally passed Council Directive 94/45/EC of 22 September on the establishment of a European Works Council or a procedure in Community-

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1 In 1983, one year after the second Auroux Law came into force in France, the transnational company Saint-Gobain informally extended its group works council to workers in other workplaces located in other States. The companies BSN, Bull and Scansped helped consolidate this process between 1984 and 1989. However, in 1985 the company Thomson constituted what is considered to be the first European Works Council. Later would come councils at Volkswagen, with the German ID Metall union, and that of ELF Aquitaine, through an agreement with French unions. Regarding the evolution of this first phase of European Works Councils, see: KÖLER, Holm-Detlev, GONZÁLEZ BEGEGA, Sergio, “¿Hacia un sistema de relaciones industriales europeo? La experiencia de los Comités de Empresa Europeos (CEUs)”, in Cuadernos de Relaciones Laborales, no. 1, 2004, p. 9 to 10; BOGONI, Milena, El Comité de Empresa Europeo, Albacete, Bomarzo, 2010, p. 9; ANTONELLO BENITES, Flavio, “Los Comités de Empresa Europeos y los cambios organizativos en los centros de trabajo”, in AA.VV. (Coord. Rodríguez Piñero-Royo, Miguel C.), El empleador en el derecho del trabajo. XVI Jornadas Universitarias Andaluzas de Derecho del Trabajo y Relaciones Laborales, Tecnos/Consejo Andaluz de Relaciones Laborales, Madrid, 1999, p. 257. For an in-depth analysis of the European Works Council at Saint-Gobain, see: GONZÁLEZ BEGEGA, Sergio, Empresa transnacional y nuevas relaciones laborales: La experiencia de los comités de empresa europeos, Catarata, Madrid, 2011, p.197–234.

2 Draft Directive dated 24 October 1980, on procedures for informing and consulting employees, known as the “Vredeling Directive” in honour of the Dutch Commissioner who proposed it. (OJ no. C 297, of 15.11.80, p. 3). The aim of this proposal
scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. This regulation would later be updated by Council Directive 2009/38/EC, of 6 May.³

As is well known, both Directive 94/45 and the subsequent Directive 2009/38/EC stipulate that Community-scale undertakings must approve mechanisms for informing and consulting their workers,⁴ either through specific procedures or through the creation of a European Works Council (hereinafter EWC).

European regulations are characterised by giving a central role to collective autonomy and to the member States: the central role given to collective autonomy is because national and European regulations will only be applied if no agreement can be reached between the parties. The importance of national legislation arises from the fact that it determines important issues such as the concept of worker, the formula used to calculate the number of workers, the guarantees for worker representatives, Council operation costs, or sanctions for non-compliance.⁵ Thus, we can say that the Directives have attempted to establish a minimum baseline that can be improved upon by agreements between the parties or by national legislation.

Analysing the success or failure of the implementation of information and consultation processes in Europe is a difficult task given that, although unions have demanded the creation of a public Community registry on several occasions, we do not have official data on a European level regarding collective bargaining processes that lead to the approval of ad hoc information and consultation processes or an EWC.

The only unofficial data is provided by the European Trade Union Institution (hereinafter ETUI) database.⁶ The problem with this database is that, precisely due to its unofficial nature, it may contain agreements that have since been terminated by one of the parties, or may omit current agreements if the ETUI is not aware of their approval.⁷

While this data must be considered with a certain degree of caution, it may be able to show how information and consultation processes are evolving in Europe.

At this time, 1,127 companies have an agreement in force that approves the creation of an EWC,⁸ which represents just over 50% of the 2,492 Community-scale undertakings identified by the ETUI. The

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³ The modifications made under Directive 2009/38/EC have been, without a doubt, the most significant. However, Directive 94/45/EC was also modified by Directive 97/74/EC, of 15 December, 1997 (OJ L 10, of 16 January 1998), which expanded the legal scheme set out in Directive 94/45 to include the United Kingdom of Great Britain and Northern Ireland, States which had been excluded from application until that time.

⁴ Determining whether a European undertaking or group of undertakings has a Community scale is not without difficulties. However, as the aim of this article is not to provide a detailed analysis of the problems arising from determining European scale, we can succinctly summarize that Community-scale undertakings are those undertakings or groups of undertakings that employ 1,000 workers or more across all member States and which provide employment for at least 150 or more workers in two group workplaces or companies located in two different States. Furthermore, in order to consider that several undertakings are related within one group, one of these undertakings must exercise a position of control over the others. An undertaking exercises control over another when it has developed a dominating influence, for example, for reasons of ownership, financial participation or articles of association. Unless otherwise proven, it shall be assumed that one undertaking exercises control over another when: it holds the majority of the undertaking's subscribed capital, it has the majority of the votes corresponding to the shares issued by the undertaking, or it can name more than half of the members of the undertaking's board of directors or management board. If, in accordance with the above rules, several undertakings could be said to exercise control over another, it will be assumed, unless otherwise proven, that the undertaking that exercises control over the group is that which can name more than half of the members of the board of directors or management board. Control may be exercised directly or indirectly, through other controlled companies.

⁵ This double subordination has been defined graphically as vertical subordination (European legislation - national legislation) and horizontal subordination (European legislation - agreements between the parties), see: the report prepared by the Economic and Social Committee (ESC) on the "Draft Law on workers’ rights to information and consultation in Community-scale undertakings and groups of undertakings" (EESC plenary session of 24 January 1996), p. 6.

⁶ The database could be found at: http://www.ewcdb.eu.

⁷ One of the changes included in Directive 2009/38/EC was that the parties must notify European workers' and employer organizations of the start and composition of bargaining commissions (Directive art. 5.2.c). However, this obligation is limited to formally communicating the beginning of negotiations, but not the result. Furthermore, it should be kept in mind that negotiations can last for a maximum of three years and thus, over such a long period of time, the conclusion of the negotiations may go unnoticed by the ETUI.

⁸ Barely 1% of the total has chosen to constitute specific agreements instead of an EWC, which is why we will generally speak about agreements constituting an EWC.
majority of these agreements have been reached in the metal and chemical sectors, which is not surprising given that these sectors have a strong history of union activity and are characterised by large-scale companies. If we look at EWCs according to the headquarters’ country of origin, it is also not surprising to see that the countries with the greatest number of EWCs are, in decreasing order: Germany, USA, France, and the UK. They are, clearly, countries with a large number of Community-scale undertakings.

II. The Spanish model of European Works Council

The content of Directive 94/45 was implemented in Spain through Law 10/1997, of 24 April, regarding workers’ rights to information and consultation in Community-scale companies and groups of companies. From that time on, representatives for workers and management in European-scale companies with their headquarters in Spain or with headquarters in a non-EU member state, but designating Spain as their headquarters in the EU, were able to create an EWC in accordance with Community regulations.

Of the 56 Community-scale companies in Spain identified by the ETUI, only fourteen have reached agreements to incorporate an EWC that have been published in the Official State Gazette (BOE, using its acronym in Spanish). Without a doubt, the results are disappointing. Such a small number of agreements may be explained by the low number of Community-scale companies in Spain. Spanish companies tend to internationalise their activity towards Latin America due to reasons of cultural affinity. However, it does not explain why large Spanish companies with offices in European States have taken so long to constitute an EWC. Perhaps it is due to the mistrust and lack of knowledge regarding this institution.

Of the fourteen agreements published in the BOE, the first was approved almost at the same time the Directive was implemented, signed by Repsol on 16 July 1997 for a period of two years and to be automatically renewed at the end of each period. The creation of this EWC is of particular interest, as it is the only one to be included within a Spanish framework agreement. This means that this agreement was only negotiated by the most representative unions on the national level, who also have majority representation in the different Spanish works councils. Section 17 of this agreement contains regulations regarding information and consultation procedures on the European level.

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9 Law 10/1997, of 24 April, was subsequently amended by Law 44/1999, of 29 November, so as to adapt its content to the extension of Directive 94/45/EC to the United Kingdom; and again by Law 10/2011, of 19 May, to incorporate the amendments set out in Directive 2009/38/EC.

10 In the implementation of Directives 94/45 and 2009/38/EC, Spanish legislators introduced an additional requirement. Law 10/1997, of 24 April, article 13, referring to article 90 of the Workers’ Statute, establishes that the agreements must be presented to the competent labour authority for their registration, filing, and publication in the BOE. This requirement is fully consistent with the regulations regarding Spain’s collective agreements for general efficiency or erga omnes. However, four companies have reached agreements to constitute an EWC which have not been published in the BOE: Grupo Gestamp (29 January 2015), Grupo Ferroatlántica (4 February 2014), Grupo AMADEUS (25 May 2013) and Grupo Campofrío (4 March 2009). Publishing the collective agreements, as established in article 90 of the Workers’ Statute, aims to guarantee that general knowledge of the terms agreed upon by the parties is made available to third parties, without official publication depriving the agreement of effectiveness. Several legal rulings have been made along these lines: Ruling of the National Court of Spain dated 29 October 1998 (Proc. 77/1998) Court Opinion no. 4; Ruling of the High Court of Justice of Madrid dated 14 September 2012 (R. 4089/2012) Court Opinion no. 25; Ruling of the High Court of Justice of Asturias dated 3 June 2003 (R. 2968/2001) Court Opinion no. 2.

11 Other factors that may explain low numbers of EWCs in Spain are: the structure of Spanish business, with a high number of SMEs that have fewer than the 1,000 worker cut-off established by the Directive; the strong reticence of Spanish management to give up, even indirectly, some control over its companies to the workers’ representatives; and the lack of tradition and initiative of Spanish unions in defending the creation of EWCs in Spain. While these factors seem to be confirmed by the actors involved in EWC constitution themselves (unions, management, and institutional representatives), others, such as the economic cost of implementing this measure, are not supported by empirical data. In this regard, see: ALBALATE, Joaquín Juan, “La implantación de los Comités de Empresa Europeos en España”, en Revista Española de Investigaciones Sociológicas, núm. 124, 2008, pp. 177-207, p. 193 et seq.

12 Agreement published in the BOE on 10 December 1997 (BOE 295). Several updates have been published since then: Agreement dated 12 November 2001 (BOE of 29 November, no. 286) and Agreement dated 30 May 2011 (BOE of 18 July, no. 171).
Later came agreements at GE Power Controls Ibérica, Praxair Group, Tafisa Group, Banco Bilbao Vizcaya Argentaria Group, Saica Group, Santander Group, AXA Group, Roca Corporación Empresarial, Abertis Group, and, the most recent, Prosegur Group, Schreiber Foods and, the most recent, IAG International Group. Additionally, six other EWCs have been constituted but not published in the BOE at Gestamp, Ferroatlántica, Amadeus, Campofrio Groups., NH Hoteles and Coca-Cola Iberian Partners.

Each of these agreements was influenced by the context in which it was negotiated, and by each company's own business culture. This means that some have incorporated interesting solutions or alternatives to problems related to articulating worker representation on a European scale, while others have simply limited themselves to transcribing the content of the Directives and Law 10/1997. However, by analysing all of these agreements, some general conclusions can be drawn and we can even formulate a general paradigm of Spanish EWCs.

The analysis of the agreements has taken into consideration twelve variables: the type of EWC; the number of representatives who comprise it; the criteria for distributing representation among the different States where the company operates; the existence (or lack thereof) of a select committee; the formula chosen for designating representatives to form part of the EWC; the requirements that representatives must meet to be on the EWC; the appointment (or lack thereof) of substitutes; the possibility of the company's management determining representation beforehand; the EWC's operational costs that are to be assumed by the company; the number and types of meetings to be held; if there is a confidentiality obligation; and, finally, the topics subject to information and consultation. These variables will allow us to perform an in-depth examination of the reality of EWCs in Spain and determine their common characteristics.

III. Content and characteristics of the EWC constitution agreements in Spain

In accordance with the methodology described above, we will examine below the agreements subject to Spanish law, both those published in the Official State Gazette and those not.

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13 Agreement dated 26 November 1999 (BOE of 21 December, no. 304). The aforementioned agreement is no longer in effect as a new regulation was agreed upon between the workers' representatives and headquarters, now located in Hungary. The group, now called GE Consumer & Industrial, updated the EWC for the last time on 14 September 2007.

14 The Praxair Group's headquarters are located in the US. The US parent company designated Praxair Spain as the central office for the purposes of constituting the EWC. The EWC was finally constituted through an agreement dated 4 April 2000 (BOE of 21 June, no. 148). It was then updated through an agreement dated 4 May 2004 (BOE of 1 June, no. 158).


16 Agreement dated 14 November 2002 (BOE of 10 January 2003, no. 9). This Agreement went out of effect after the acquisition of Altadis by Imperial Tobacco in 2010. The new group that arose from the acquisition renegotiated the information and consultation procedures based on the pre-existing agreement at Imperial Tobacco and created a new agreement, which went into effect on 30 March 2011, effective retroactively from the date of purchase, 14 November 2010. However, as the Altadis agreement was published in the Spanish Official State Gazette and it contains interesting advances compared to other Spanish EWCs, we will analyse this agreement.

17 Agreement dated 3 June 2004 (BOE of 3 August 2004, no. 186).

18 Agreement dated 21 June 2004 (BOE of 24 August, no. 204).

19 Agreement dated 16 March 2005 (BOE of 30 May, no. 128).

20 Although the AXA Group's central headquarters are located in France, the EWC constitution agreement was published in Spain. Agreement dated 6 October 2005 (BOE of 7 June 2006, no. 135).


22 Agreement dated 23 July 2012 (BOE of 21 September, no. 228).


25 Agreement dated 27 de April 2017 (BOE 16 of June 2017, no. 143).


27 It has already been mentioned that publishing the agreement in the BOE is not a requirement for said agreement to be valid (see footnote 10). In that regard, based on this analysis of the EWCs, the agreements' publication in the BOE or lack...
a) Type of EWC: The majority of Spanish EWCs have been based on a French model of representation. That is, almost all of the agreements include a mixed composition of company and worker representatives, with the exception of GF Power, Roca, Abertis, Prosegur, Campofrío and Ferroatlántica.

The decision of the parties to choose the French model or the German (EWC comprised solely of workers) is not insignificant, as the French model has more similarities to the dominant representation model in Spain. Those companies with EWCs inspired in the German model, in general, have more complex regulations that provide a greater guarantee in terms of worker representation. On the contrary, those agreements that call for mixed councils have chosen more conventional regulations, which cover the necessary minimum, but whose usefulness is doubtful.

b) Number of representatives: Unlike Spanish companies' national councils, in Community-scale companies the number of worker representatives is small. The number of representatives comprising the EWCs barely exceeds a dozen members on average, in companies where the workforce often exceeds 5,000 workers. On the contrary, in Spain, for the national works councils, a company with a workforce of 5,000 workers should have a council consisting of 29 representatives; the number of representatives could be as many as 75 for companies with very large workforces.

The average number of representatives on the Spanish EWCs is even far from the minimum of 30 representatives set out in the subsidiary provisions in the Annex of Directive 94/45, to be applied in lieu of an agreement between the parties. The formula that Spanish companies have chosen to use more closely follows the criteria that were set out in the Annex of Directive 2009/38/EC. These criteria stipulate that one representative be chosen per portion of employees employed in that Member State amounting to 10%, or a fraction thereof, of the number of employees employed in the entire workforce. This regulation tacitly reduces representation to a mere dozen representatives.

The significant difference between the number of participants on the national and Community councils may perhaps be explained by the goals of each entity. The national councils are a negotiating entity, designed to serve as a counterweight to the employer's decisions. Whereas the EWCs, in principle, only aim to correctly transmit information and consultations on a transnational level. The nature of this second task, much more limited and simple than the first, is what allows the EWCs to have a smaller number of members. In reality, just one member in each State would be sufficient to communicate Community-level information to the national councils.

Thereof does not imply differences in terms of content and characteristics, with one exception: training. While of the published agreements, only five of twelve state that the company will assume the training costs for representatives, in the unpublished agreements the majority (three of four) state that the company will assume said costs. However, this sole difference between the published and unpublished agreements is easier to explain if we keep in mind the date the agreements were adopted. Almost all of the most modern agreements include the representatives' right to training; this can be explained by the fact that as the EWCs have evolved, it has been seen that the representatives require specific technical, legal, and economic training, as well as language training, in order to be able to satisfactorily complete their work. Therefore, the most modern agreements have adapted to this need.

For example, the BBVA group, with more than 32,000 workers, has an EWC consisting of 8 representatives; the Santander group, with more than 68,000 workers, has an EWC with 10 representatives; Prosegur, with more than 17,000 workers, also has a council of 10 workers; Praxair has more than 2,900 workers and its EWC consists of 12 members; Ferroatlántica has a 12-member EWC; Saica, with more than 5,400 workers, has an EWC with 14 representatives; the Abertis group's EWC consists of 17 workers who represent a total of 8,700; the agreement no longer in effect at Altadis provided for 17 representatives for 13,800 workers; the Amadeus group's agreement establishes an EWC with 20 members for a workforce of 6,205; Gestamp's agreement stipulates that 21 members must represent 18,840 workers. As an exception, AXA group's EWC has 50 members to represent a workforce of just over 57,500.

The number of members on the works councils is determined in accordance with the scale set out in article 66.1 of the Workers' Statute: workplaces with more than 3,000 workers shall have 25 council members; 27 representatives for 4,000 workers; 31 for 6,000; 33 for 7,000; 35 for 8,000, etc.

If the EWC had one representative for every 10%, the maximum number of representatives on the council would be 10. However, since each fraction may also increase the number of council members, it may be the case that a company has small workforces and workplaces in several States, so they would have to choose more than 10 representatives since they had 5% of their workforce in different States.
c) Criteria for distributing the number of representatives among the different States: In this case, the Spanish EWC prototype favours proportionality in the distribution of council members.

The agreements perform a proportional distribution using three formulas. Only one agreement, for the company Saica, opts for a purely proportional distribution; that is, dividing the number of representatives by the workforce and assigning transnational representatives based on that calculation. The rest have adopted a proportional distribution based on a scale of the number of workers or a percentage of workers employed in each State.31

Proportional distribution makes representation of States with a smaller number of workers difficult; they may not obtain representation on the EWC. This problem does not exist in those agreements that determine the States’ representation based on a linear formula, assigning the same number of representatives to all States, or discretionally,32 assigning a different number of representatives to each State. However, linear and discretionary amount representation over-represents States with fewer workers, at the expense of States with larger workforces.33

Proportional systems attempt to prevent under- and over-representation by reserving a fixed representation for all States. This minimum representation may be establishing one representative for each State in which the company operates, or setting minimum joint representation for all States that do not reach the first threshold on the distribution scale.34

The AXA group’s agreement offers an interesting solution somewhere between the others, with the advantages of the two models, a limitation on the number of workers, and a correct articulation of the mechanisms of workforce information and consultation which, although in the minority, should be extended to other agreements. The agreement stipulates that only those States in which the group employs more than 150 workers will have the right to name representatives. For those States that do not reach this cut-off, they have created the figure of indirect representative. That is, a direct representative, elected by another State, is in charge of indirectly informing the workers in another State who do not have representation. The interesting part of this solution is that the agreement itself establishes that these indirect representatives are entitled to meet with the national representatives of the countries that they indirectly represent twice a year. Therefore, this agreement includes effective, directly enactable mechanisms that allow the entire company workforce to be adequately represented.

Lastly, only two agreements have established additional representation for those States in which the company’s headquarters is located. AXA’s agreement assigns three additional worker representatives to the State where central headquarters is located,35 while Abaris’ agreement only assigns one. However, while these types of agreements are the exception, it should be noted at this time that they are examples of what should not be done. In proportional agreements, there is no reason that justifies additional representation for the State where the headquarters is located.

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31 Agreements that use a distribution based on the percentage of workers: Abertis, Roca, BBVA, Campofrío, Gestamp and Tafisa. On the other hand, agreements that distribute representation based on the number of workers: AXA, Santander, Praxair, Amadeus, Schreiber Foods and IAG International Group.

32 The agreements made by Prosegur, Altadis, GE Power, Repsol and Ferroatlántica set the number of representatives assigned to each State without referencing any criteria used for the distribution. However, a higher or lower number of representatives seems to coincide with those States in which the company has a higher or lower number of workers employed, or in which the unions are more organised in the company.

33 This imbalance in favour of States that employ a lower number of workers is diminished in discretionary assignment of representatives. Although not explicitly stated, distribution involving a discretionary number of members from each State for the EWC tends to assign more representatives to States in which more workers are employed and, therefore, establishes a de facto hidden proportional distribution.

34 Abertis, Gestamp and Roca recognise one representative from each State. BBVA, Tafisa, Praxair and Amadeus recognise one representative from each State that employs at least 100, 100, 40, and 20 workers respectively. Finally, Santander's agreement establishes a scale with a first threshold of 500 workers. In principle, the States in which the group employs fewer workers would not have representation. However, the agreement stipulates that between all of them, they shall designate a common representative.

35 Despite AXA’s central headquarters being located in France, their agreement was published in the Spanish BOE. Therefore, the three additional representatives for the State where the headquarters are located are awarded to France.
d) Select committee: Directive 2009/38/EC included for the first time the provision that the agreements constituting the EWCs could include the creation of a select committee. The incorporation of this body intended to guarantee that the regular activity of the European Works Councils was coordinated and efficient, and that consultations could be performed as quickly as possible in exceptional circumstances. The subsidiary requirements set out in the Annex of the Directive stipulate that the select committee should not consist of more than five members. Spanish legislators developed this measure through article 19.2 of Law 10/1997. The subsidiary regulations applicable in Spain establish that if the number of European Works Council members is greater than twelve, they must choose a select committee consisting of three members. This rule seems to be counter-intuitive, as in EWCs with fewer than 12 members it should not be necessary to constitute a select committee.

As this characteristic was incorporated in Directive 2009/38/EC, its presence in the Spanish EWCs is inconsistent. In general, the earlier agreements subject to Directive 94/45 do not include a select committee. However, the majority of earlier agreements that were later revised and the second-generation agreements, which are subject to the regulations arising from Directive 2009/38/EC, do include this entity. Five agreements break this general rule: the first-generation agreements made by GE Power, Saica, Axa and Campofrío include the figure of a select committee, even before the EC regulation expressly included it in its articles. This measure was not impossible, as the EC regulation was only of subsidiary application. On the other hand, the second-generation Prosegur agreement does not include a select committee, probably due to the low number of members of the plenary EWC, comprised of just ten members.

Therefore, the majority of the EWCs in Spain have chosen to include this body so as to bolster the effectiveness of transnational worker representation.

e) Choosing EWC representatives: Almost unanimously, the process for choosing representatives for Spanish EWCs refers to the subsidiary regulation in each State. In this way, the workers' representatives, chosen in compliance with the general rules set out in Spain, will be chosen in a second election from among the Spanish representatives on workers' committees, or from among the trade union delegates. The choice will be made by an agreement between those union representations that together make up the majority of the work council or councils and personnel delegates, as applicable, or by majority agreement between said members and delegates.
Interestingly, only one agreement does not follow this general rule: the Abertis agreement. This agreement states that the Spanish representatives shall be elected by the most representative union organisations in the Spanish national sphere that have a minimum of 20% of the representation in the Abertis group, from among those members elected to the work council, the personnel delegates or the union representatives.41

The Campofrío and IAG Group agreements also include an exception to the general rule, although of less importance than the exception in the Abertis agreement in terms of union participation. This agreement states that the representatives shall be chosen by the representatives on the national works councils and by union organisations established in the company. If there is no agreement in place, the representatives will be chosen in proportion to the distribution of the national councils, or by the union organisation with the greatest representation in the sector in that State if there are no works councils. The IAG agreement asserts that the national workers’ representatives have to elect the European representatives. If there are no national representatives, it is the workers who have to elect these European representatives.

So, the Campofrío and IAG agreements are exceptions to the general rule and they create a general fixed norm with regards to elections for all States. This fixed norm for regulating the election of workers' representatives helps to stimulate corporate culture within the group and boosts the visibility of the workers' transnational representatives.

These regulations are one of the few examples in which, to a lesser or greater extent, unions are allowed to directly intervene. This general exclusion is due to the fact that European management organisations, despite the unions' demands, refused to give them a more prominent role. This stance has been followed by companies when drawing up their agreements, giving the unions no role or recognition.

f) Representative requirements: Regardless of how the EWC members are chosen, all of the agreements have established that the candidates must be employees at the company or group where the transnational worker representation body is to be established.42 However, almost all of the agreements are silent with regards to additional requirements that the workers must meet to be eligible. Therefore, in these cases, each national delegation must respect the regulations in their home State that govern the requirements that workers must meet in order to be elected as representatives by their colleagues.

However, some agreements have included some specific requirements. The agreements for the AXA and Prosegur groups have expressly stipulated that employees must have worked at the company for a minimum of six months in order to be elected to the EWC. With this rule, the companies are extending a requirement from Spanish law, article 69.2 of the Workers' Statute, to all of the States in which the group operates, even if there is no such requirement in these other States. Similarly, the Campofrio group agreement stipulates that an employee must have worked for the company for a year in order to be chosen for the EWC, while Praxair requires two years. The regulations regarding worker requirements to be eligible for the EWC are much stricter at the Tafisa group. Tafisa requires workers who wish to be part of the group's EWC to have worked at group companies continuously for at least three years. By virtue of the collective autonomy that governs the agreement between the parties, the inclusion of a minimum time at the company impedes application of the subsidiary rules in each country.

union confederations in the company or group. When there is no union representation, the union organisations that signed the national collective agreement that applies to the company and the company's central management will come to an agreement over how to create a system that will allow workers to be represented (art. 6 of Italian Legislative Decree no. 74, dated 2 April 2002, regarding all'istituzione di un comitato aziendale europeo o di una procedura per l'informazione e la consultazione dei lavoratori nelle imprese e nei gruppi di imprese di dimensioni comunitarie). In France, the representatives shall be chosen by union organizations from among the workers' representatives in the company or workplaces (arts. L 439-19 Loi n° 96-985 du 12 novembre 1996 relative à l'information et à la consultation des salariés dans les entreprises et les groupes d'entreprises de dimension communautaire, ainsi qu'au développement de la négociation collective).

41 Representatives from other States shall be chosen by unions or by personnel representation bodies, depending on the laws in each State.

42 The agreements thus follow the subsidiary rule set out in Art. 17.1 of Law 10/1997.
Therefore, in the case of Tafisa, Spanish workers must have worked at the company for three years, and not the six months required by Spanish legislation.43

g) Substitute representatives: almost all of the agreements provide for the election of substitute representatives for cases in which the original representative cannot fulfil his or her main obligations,44 which are usually limited to attending the annual EWC meeting.

The figure of a substitute in worker representation bodies is a strange institution in Spanish regulation, but is very useful for a transnational body. Including a substitute is beneficial in a representation model as limited as the EWC. Essentially, the activity of the transnational workers' representatives is limited to the annual meeting with the company's central management. Therefore, if one of the representatives were missing at these meetings, it would endanger the effectiveness of informing and consulting the workers. This situation does not occur in worker representation on a national scale, where the representative's activity is carried out in a less concentrated period of time.

In almost all of the agreements, the substitute's purpose is limited to substituting the main representative in those cases in which he or she cannot perform his or her functions. Thus, we should ask ourselves what requirements the substitutes must meet and what guarantees protect them. Some agreements explicitly require the substitutes to meet the same requirements as the main representatives, but even these agreements are silent on their guarantees. Given the nature of the substitute institution, the most appropriate approach would be to grant them the same guarantees as the main representatives, while they must also meet the same requirements. Otherwise, it could be the case that those who are designated as substitutes, who would be seen as potential transnational representatives for the workers, would not be protected equally.

Only one agreement confers an additional function upon the substitute beyond substituting the main representative. We would like to highlight it as a recommendable practice that should be included in all Spanish agreements. The AXA agreement establishes that for meetings which take place outside of the country in which the headquarters is located, the substitutes may attend the annual meetings held in that State and participate, but not vote. This is a simple way to facilitate coordination between main representatives and substitutes and to strengthen the EWC's activity.

Other agreements only ensure that the substitutes receive copies of the minutes from the meetings.45 This obligation is interesting because it means that the substitutes are informed and familiar with all that they need to know in case they one day need to attend a meeting, but it would have been better to allow the substitutes to participate in all the meetings as listeners.

h) Composition of employer representation: it would be expected that in a transnational body created to provide information to workers and seek their opinion, which generally meets annually, that the agreements constituting said bodies would also contain rules or regulations governing the presence of employer representation at these meetings. However, the reality is that, regardless of whether the council follows the French model, with simultaneous worker and employer participation, or whether it follows the German model and consists exclusively of the workers, the agreements do not contain specific rules regarding the composition of the company's managerial representation. The only reference that is generally made in these agreements is that the number of management representatives cannot exceed the number of worker representatives.

Two agreements have included provisions regarding managerial representation, but they are not very ambitious. The Amadeus group ambiguously stipulates that the management shall be represented by members of the management with the appropriate decision-making

43 The eligibility requirements differ from one State to another. For example: Greece requires workers to be at the company for a minimum of two months; Belgium, Austria and Germany require six months; France, the Netherlands, Romania and Luxembourg require at least one year of service. The periods, as well as additional requirements set out by some legislatures, such as the worker's minimum age or type of contract that they must have to be eligible, can be found in a table prepared by the ETUI, see http://www.ewcdb.eu/show_pdf.php?document=9963ori_EN.pdf [January 2015].

44 Only the Repsol and Campofrío agreements do not mention this figure.

and representation level within the company’s organisation chart and who are duly authorised. The Ferroatlántica group establishes that the managerial representation will consist of the General Production Manager and/or the Managing Director. The Director may be assisted in all meetings or may delegate his/her presence to three people who he or she considers to be fully authorised to participate in the meeting. Although setting minimum guarantees to regulate the presence of the managerial representation at the EWC is a good approach, the Ferroatlántica group does it in such a broad way that the regulation is essentially meaningless, since it allows the company total freedom in designating their representatives.

In addition to the Ferroatlántica and Amadeus group EWCs, three other exceptions can be mentioned as more suitable formulas that should be adopted by future EWCs. First, the GE Power agreement stipulates that the company’s representatives shall be the CEO and the European Director of Human Resources. Both may be substituted, and both may be accompanied by other company employees who have technical knowledge related to the agenda of each meeting. Second, the agreement that regulates Roca’s EWC goes even further and states that the managerial representatives shall include, at least, the Group Manager, who will also preside over joint meetings, three members of human resources management, and two members of management who oversee operations in the production or sales departments. Finally, the Schreiber Foods agreement designates the CEO and two Regional Directors of Human Resources as the enterprise representatives. Moreover, the European Director of Human Resources will chair the meetings along with the President of the EWC.

Given the control that the EWC may exercise, it is a very positive step that the company specify which managerial representatives will attend council meetings. This ensures that the meetings will always have sufficient participation and that the management is not making it more difficult for the EWC to receive the appropriate information by sending second- or third-tier managers to the annual meetings.

i) EWC operational costs: the distribution of the costs associated with the EWC is one of the aspects that should be regulated by the constitution agreements. This may be one area of the agreements where the greatest dissimilarities can be found. However, there may be some overlap.

In Spain, almost all companies’ central management assumes the costs of simultaneous interpretation at meetings between worker representatives and central management, and even covers the translation of working documents. However, some agreements limit the number of languages for interpretation/translation.46

Furthermore, although when the Directives were being negotiated business organizations did everything in their power to avoid including as an imperative right the payment for external consultants, in practice, the agreements that do not include a clause that allows workers’ representatives to appoint an advisor are in the minority; only three agreements (Campo-frío, Ferroatlántica and Roca) do not mention this issue.

In the rest, they generally recognise the right of the parties to name at least one external consultant, provided management is informed in advance, with the management assuming the economic cost. However, some agreements, such as that of Altadis, have gone even further, stipulating that the council shall have a maximum budget of 18,000 euros for experts. Up to four consultants may be appointed, two for Spain and two for France.

Santander’s agreement is also interesting, as it provides for the appointment of an external advisor, but also includes the possibility of naming up to three internal consultants from the national representatives, who would participate in the EWC meetings but would not be able to vote.

Generally speaking, expenses arising from EWC activity, such as expenses for meals, daily allowances, etc., are dealt with similarly in the different agreements. The common practice is for the company to assume the costs of transportation and lodging. With regard

46 The Abertis, Santander and Saica agreements limit translation to three languages. The Roca agreement mentions translation to the languages that are strictly necessary. The IAG agreement establishes English as the main language, but with the possibility of translating into Spanish when necessary.
to other expenses, several agreements state they will cover reasonable expenses. This is a nonspecific legal concept that will allow all ordinary expenses for the correct functioning of the EWC to be covered by the company. The AXA agreement is the only one that differs from this general criterion. The parties set an annual budget of €85,000 to cover the costs associated with the EWC.

Although not in the majority, ten agreements recognise the right of the workers’ representatives to have training paid for by company management. This training may be on legal/economic knowledge, languages, or both. The management of a transnational company entails highly complex issues that may not be easy to understand or master for the average representative. For example, dealing with a transnational business group's financial statements may require a high level of accounting knowledge that perhaps not all representatives possess. To this we must add a lack of knowledge of the company's native language, which can make the task of the workers' representative even more difficult. Therefore, including regulations regarding training should be considered a good practice and it should be included in other agreements.

j) EWC meetings: The regulation of the EWC meetings is also an important issue for the effectiveness of the worker representation bodies. If more meetings are held and workers' representatives are more involved, workers will have greater control and the information and consultation work will be more effective.

Across the board, the negotiators have opted for annual council meetings; the most sparing agreements have chosen to hold a single annual meeting, while others have chosen two sessions. In some cases, additionally, the agreement includes the possibility of holding an extraordinary meeting if the parties so agree under extraordinary circumstances. As a mechanism for increasing flexibility regarding the necessary agreement between the parties in order to call an extraordinary EWC meeting, some instruments have opted for allowing the workers' representatives to meet without the presence of company management when the latter do not consider an extraordinary meeting to be necessary.

A minority of agreements have set the interval in which a meeting must be held between the workers' representation and the company management. This requirement certainly eliminates the uncertainty regarding the meeting and makes it impossible for the party calling

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47 Article 5.7 of the Agreement stipulates: “The G.E.W.C. Secretariat shall have an annual budget of € 85,000 to cover all costs (excluding contributions covering 50% of the compensation of the Secretary’s assistant) relating to the Secretariat’s operations and meetings (meetings, travel and interpretation expenses, committee expenses and experts) [...].”

48 The agreements that expressly recognise training to be paid for by company management are: Prosegur, Abertis, Axa, Altadis, GE Power, Amadeus, Gestamp, Ferroatlántica, Schreiber foods and IAG Group.

49 The Repsol, GE Power, Praxair, Saica, Santander, BBVA, Roca, Abertis, Prosegur and Schreiber Foods agreements call for a single meeting.

50 In this sense, art. 4.3 of the Repsol Agreement “[...] Exceptionally, a meeting separate from the annual meeting may be held, provided that Management and workers’ representatives agree that it is necessary.” and art. 4.b) of the Saica group Agreement “Exceptionally, a meeting other than the annual meeting may be held, provided that both parties agree that there is an objective need to hold one. This extraordinary meeting may be held either during the European Works Council plenary session or between the Group Management and the Select Committee, as circumstances dictate.” The Roca Group Agreement goes a step further and allows for an extraordinary meeting whenever one of the parties requests it, art. 6.4.1.2: “The Forum, to be convened by its Chairman at the venue appointed by the latter, shall meet once per year and on an extraordinary basis whenever one of the parties, Management or Coordinators [the workers’ representatives name three coordinators as permanent spokespeople with the company management], so request should exceptional circumstances arise. [...]” Some agreements, such as that of the Praxair Group, have established that extraordinary meetings may be held via teleconference, and that in-person meetings may then be held to follow up on the subject that originated in the extraordinary teleconference meeting, art. 6.8: “In the case of Exceptional Circumstances that are not included on the agenda for the annual meeting, the Management Representatives will communicate with Employee Representatives. This communication, Information and Consultation will be effective either through a meeting of the Employee Representatives or by a teleconference call. In the case of a teleconference each party will have the right to decide whether a physical follow-up meeting is required.”

51 “[...] Another meeting may be held by prior agreement of the parties, if circumstances exist that make it advisable. If no such meeting is envisaged, the trade union party may, after informing the Central Management, hold a second annual meeting in Madrid attended only by its members. [...]” This clause appears literally in art. 3 of the BBVA group agreement and in art. 3 of the Santander Group agreement.
the meeting, usually the management or the management after having consulted the workers' representatives, to do so when it is more convenient to their interests.52

The Abertis, Altadis and AXA group agreements provide improvements on the general regulations regarding the annual meetings mentioned above. The first states that the EWC will meet yearly with company management and that management must inform the Select Committee every semester and the EWC every year of all operational plans that may have an effect on group companies and their staff. Furthermore, in the event of exceptional circumstances, company management may call a meeting with the Select Committee or, depending on the importance of the issue to be discussed, the entire EWC.53 The Altadis Agreement establishes two annual meetings, one each semester.54 Finally, the AXA Group stipulates two annual meetings and the possibility of the workers' representatives requesting an extraordinary meeting in the event of exceptional circumstances. Company management will decide if this additional meeting should be held, explaining its reasoning in writing. Additionally, the agreement includes the possibility of holding an annual preparatory meeting in which the council members would visit the different States in which the group operates.55

Finally, just one agreement, that of GE Power, does not include the possibility of holding preparatory meetings for the delegation of the workers' representatives without the presence of company management. All the other agreements, both those using the French and German models, establish that the workers' representatives can meet behind closed doors immediately before meeting with central management in order to prepare for the meeting, agree upon stances, or answer questions before sharing information.

Three practices are exceptions to the general rule, those of the Abertis, AXA and Schreiber Foods groups, which allow for the holding of a private meeting attended by the representatives of the workers. The former includes the possibility of the workers' representation holding a private meeting after the meeting with company management. This is an interesting option, as it allows the workers' delegation to evaluate the objectives achieved during the meeting with management. The second exception is that set out in the AXA group's agreement. In this case, in addition to the preparatory meetings of the workers' representation before the meeting, a preparatory visit is established. This visit is not to be immediately before the meeting with management, but consists of a meeting during the quarter prior to the meeting with management. This visit allows for representative training and to promote knowledge of the reality of the company in the country in which the meeting will be held.56

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52 Art. 5 Prosegur Group Agreement: “The European Works Council will meet annually in the last quarter of the year on a call notice agreed by the Company, chair and secretary, who together will act as a standing point of contact”; art. 3 of the BBVA Group Agreement: “During the first four months of the year, the Works Council shall hold an annual meeting [...];” art. 6 of the Amadeus agreement states that the annual meeting will be held in November; art. 3.1 of the Tafisa agreement stipulates that the meeting will be held on the second Wednesday of October every year.

53 Abertis Agreement art. 6.1: “The meeting shall be convened by the Central Management at least 1 (one) month in advance, whereby the notice convening the meeting shall be accompanied by a report on the development and prospects of the activities of the Abertis group [...]. The Central Management shall inform the Select Committee on a semi-annual basis, and the EWC on an annual basis”; art. 6.2.d) “When exceptional circumstances occur or when decisions may be taken that have a considerable effect on the interests of the workers (whereby, such an exceptional situation includes, but is not limited to, relocation, closure of companies or collective redundancies of a transnational nature), which does not augur well for the annual meeting of the EWC, the Select Committee shall be entitled to be informed. The Select Committee shall moreover be entitled to meet, with the Central Management or any other more appropriate management, with prior request to the Central Management, so as to be informed and consulted about the aforementioned circumstances of an exceptional nature or which have a considerable effect on the employees. [...];” and art. 8 “If situations of an exceptional nature arise (as defined in Section 6.2.d) which can have important consequences for the interests of the employees, the Central Management shall initiate immediately a process of information and consultation for the EWC on the matter. An extraordinary meeting of the EWC shall accordingly be convened within 1 (one) month, in accordance with the procedure provided under Section 6.8 of this Agreement”.

54 Art. 5 of the Altadis Agreement.

55 The AXA group Committee establishes the existence of an EWC chair, composed of members of company management and of workers. Art. 5.2 of the Agreement.

56 The AXA group agreement contains some of the most exhaustive regulations regarding meetings of the workers' representation. It includes monthly meetings of the committee chair, which is essentially the select committee; preparatory meetings...
k) Confidentiality: All of the agreements contain specific provisions regarding the confidentiality obligations of the committee members. Additionally, several agreements contain provisions in which they explicitly state that the EWC's work will in no way limit the company's decision-making power. In other words, the agreements expressly recognise that the responsibility to provide information and consultation does not imply a responsibility to reach agreements.

Both provisions were strongly promoted by Community business organisations, distrust the limiting effects that the EWCs could have on their actions.

This obligation of confidentiality will persist even after the members' term on the committee ends.57

l) Topics subject to information and consultation: Directive 2009/38/EC innovated with regard to earlier regulation and included a definition of the transnational issues with regard to which the EWC could be informed and consulted. The definition was very generic,58 but was set up as a minimum that could be improved upon through negotiation between the parties. However, the parties have not broadened the scope of the issues that could be the topic of a negotiation in the framework of the EWC. In fact, some agreements expressly limit this possibility.59

The Directive states that transnational information and consultation with the EWC shall refer especially to the Community-scale company or group of companies' structure, economic and financial state, probable evolution of activity, production and sales, as well as the probable evolution of employment, investments, substantial changes that affect the organisation, the implementation of new work or production methods, production moves, mergers, reduction in size or closures of companies, establishments, or important parts thereof, and collective redundancies. This list, which does not contain a numerus clausus, has been included without hardly any modification in the majority of the Spanish agreements. Only a minority of the agreements have created a somewhat more specific list, although in practice this does not change much, as in no case is it a closed list.60 It should be mentioned that not all of the matters listed above, or those included in each agreement, shall be handled by the EWC, as they must also be matters of transnational scope. Otherwise, they may not be dealt with in the framework of the EWC.

In conclusion, if we had to describe the typical Spanish EWC, we could say that it follows the French model and has a small number of members and, therefore, differs from the habitual practices regarding the quantitative composition of workers' representation in Spain. EWC members are distributed proportionally among all States in which the undertaking or group of undertakings operates; the Spanish representatives, the result of this proportional distribution, are elected from among the Spanish representatives on workers' committees or union representatives and must meet the requirements set out in article 69.2 of the Workers' Statute in order to be selected. The same requirements andformula will be used to designate the substitutes for the main representatives.

for the EWC plenary meetings; two annual plenary meetings, which are held alternately in the company's headquarters and in the different States in which the group has companies; extraordinary meetings in the event of circumstances that greatly affect the interests and rights of the workforce; and finally, a preparatory meeting before meetings that take place outside the country where headquarters is located, so that representatives can better understand the company's productive reality in that country.


58 Article 1.4 Directive 2009/38/EC: “Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States”.

59 Along these lines, for example, the Prosegur agreement expressly states that the EWC shall not deal with matters that affect a single State or States outside of Europe. The BBVA agreement stipulates that matters that affect a single State must be resolved within the national structures and procedures. Finally, the Santander agreement states that the EWC shall not have authority over nor shall it deal with local or national matters subject to national legislation or Collective Agreements, nor over the rights of the Works Councils or union delegates, over co-management, compensation, work hours, wages or other benefits, nor any other matter regarding individual employees, as all of these matters should be dealt with within the structures, procedures and regulations that apply in each Group Company.

60 In this regard, the Prosegur agreement includes health and the group's environmental policy as transnational matters. The Abertis group includes work hours and health. The Saica group includes the group's strategic plan. Finally, GE Power includes environmental policy and training.
Despite the low number of representatives, the Spanish EWC prototype has a select committee so as to facilitate the effectiveness of its activity. The ordinary operational expenses of the select committee, as well as the plenary session of the EWC will be covered by central management. Ordinary expenses include simultaneous interpretation in meetings and translation of working documents, expenses for travel and daily stipends for the workers’ representatives at the annual EWC meeting and any extraordinary meetings that are called, as well as the costs of an external consultant, who may attend said meetings but may not vote.

EWC information and consultation shall be limited exclusively to transnational matters that affect the group or company. The workers’ representatives are subject to confidentiality.

IV. Conclusion

The constitution of EWCs in Spain has met with modest success. Only 17.8% of companies that could have established an EWC have effectively done so. Therefore, we are far from the European average, where half of companies have already implemented mechanisms to inform and consult with their workers.

Additionally, these agreements can hardly be called innovative; in general, they limit themselves to following the subsidiary scheme established in Community Directives and in Law 10/1997. Almost all of the texts are succinct, and in some cases only formally constitute the EWC without implementing any provisions beyond its establishment.

The lack of ambition in transnational bargaining between the parties can be evidenced by the fact that no agreement has tried to make use of the EWC as a space for supranational bargaining.

Thus, no agreement has chosen to configure the European area as a negotiation unit where the company’s work conditions can be discussed and agreed upon. In fact, it is just the opposite; some agreements expressly prohibit this possibility, as in the Saica Group agreement.61 The Community Directives and their national implementations only set subsidiary regulations for the parties, but said regulations could be improved upon or regulated in a different manner. Therefore, company management and workers’ representatives could have taken advantage of the negotiation for these agreements to implement Community-scale negotiation mechanisms, however rudimentary.

The agreements have also not included States outside of the European Union. Nothing prevents the negotiating parties from agreeing to a scope of application that extends beyond European borders. In this regard, Directive 94/45 could have been used to constitute information and consultation procedures in consonance with the company or group of companies’ real structure. That is, information and consultation procedures or EWCs could have been established that included all States in which the company or group of companies operated, regardless of whether they were European or not.

A less ambitious, although more reasonable option would have been to take into consideration at least those States that are candidates for European Union membership. However, not even this step was taken by the negotiation commissions. It is true that the European Union is not expected to grow in the short term.62 However, in the past, at times when it was easier to envision the incorporation of certain States, the negotiators did not choose to include a foresighted, expansive regulation. Along these lines, for example, in 2007 Roca had to adapt its EWC to the incorporation of Bulgaria and Romania to the EU, which had occurred that same year.

In conclusion, there is still room to encourage and incentivise Spanish companies to develop Community-scale information and consultation mechanisms. Without a doubt, the most interesting possibility would be for social agents to take advantage of the transnational bargaining made possible by an EWC in order to agree upon a common minimum baseline for the work conditions applicable in their

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61 Article 1 of the Saica group's EWC constitution Agreement states: “The SAICA European Works Council is a body that brings together the Group’s Management with its employee representatives in European Union Member States where the Group has companies in whose capital it has a 51% stake or more. […] Under no circumstances shall the SAICA European Works Council act as a negotiating body”.

62 Candidate States are: Albania, the Former Yugoslav Republic of Macedonia, Iceland, Montenegro, Serbia and Turkey, Bosnia and Herzegovina and Kosovo are recognised as potential candidates.
workplaces. However, a first and commendable step would be for negotiators, instead of choosing an agreement model that limits itself to transcribing the content of the Law and Directives, to choose to incorporate and develop the more progressive practices mentioned here within the agreements analysed – those experiences which have been highlighted by this study as the most inspirational and ambitious in constructing the most mature and effective transnational model of worker representation.
The contract-of-employment test renewed
A Scandinavian approach to platform work

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Abstract: Platform work blurs the scope of labour law and challenges the contract-of-employment test, threatening effective labour law protection. This article analyses this challenge from a Scandinavian perspective, where the contract-of-employment tests share common features and where a core common challenge is the ambiguous nature of worker freedom: When does the freedom to choose tasks and hours indicate autonomy and when does it indicate (extreme) precarity?

As the criteria guiding the test leave this issue unresolved, the article argues that a renewal is required and suggests how it can be achieved. The purposive approach rooted in Scandinavian jurisprudence allows for both an individual and a market perspective, and provides a basis for a careful renewal of the test. The article concludes by suggesting new—or updated—criteria guiding the contract-of-employment test when dealing with platform work.

Keywords: platform work, crowdwork, contract of employment, concept of employee.

1. Introduction

This article builds on an understanding of platform work as work-intensive services for pay, generated through a digital platform acting as an intermediary that matches the supply and demand for such services using information technology.1 This includes both services provided digitally (online work) – such as translations or PowerPoint presentations – and services provided in a physical environment – such as transport or cleaning –, but excludes internal crowdwork.2

Platform work is performed within a triangular (or multi-angular) structure, involving the person performing work (the worker), the end user (the customer; private or professional) and the company or companies providing the digital intermediary service (the platform).3 A significant novel feature of platform work is the technology that matches supply and demand by connecting a large pool of workers to a large (indefinite) number of customers at high speed and with minimum transaction costs. This arrangement blurs the lines between a market and a hierarchy, and challenges the traditionally dominant form of hierarchy – the firm – as the effective organizing mechanism.4 It allows the platform to profit from organizing labour on a large scale, while apparently limiting legal responsibilities and the need for investments.

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1 This builds on the three central aspects of the ‘sharing’ or intermediary economy identified by Roverud et al. (2017): A digital platform acts as an intermediary, contributing towards matching complementary actors (suppliers and customers) who exchange different kinds of services. As indicated, the present work, however, focuses on work-intensive services for pay.

2 De Stefano (2016) distinguishes between crowdwork (work executed through online platforms) and ‘work-on-demand via app’ (traditional working activities offered and assigned through mobile apps). Prassl and Risak (2016) distinguish between external and internal crowdwork.

3 The Commission defines the term ‘collaborative economy’ with reference to the triangular structure, see COM(2016) 356 final.

4 Platforms can thus be seen as a new firm-market hybrid, see Sundararajan (2016), 77.
Thus, platform work challenges the legal framework, not just in labour law, but also in other areas such as tax and social security law, market law, competition law and consumer law. The contract-of-employment test plays a vital role when facing this challenge. The test classifies work relations with specific characteristics and attaches a distinctive set of legal consequences – a broad range of employer duties in different fields of law – to such relations. Applying the contract-of-employment test to platform work is therefore also a test of the legal framework’s ability to adapt to a novel work arrangement. As will be elaborated, as the test currently stands, when applied to platform work, a grey area threatens effective labour law protection. A pressing question therefore concerns how the contract-of-employment test should be applied to platform work.

The article analyses this question from a Scandinavian perspective. The aim is to contribute to a clearer distinction between platform employees and platform contractors. The article argues for a careful renewal within the current jurisprudential tradition and suggest renewed – or updated – guiding criteria.

The chosen focus for analysis is the platform–worker relation. This relation is a novel feature of platform work and it seems more representative of the fundamental conflict between capital and labour than the worker–customer relation does. As further analysis will show, the focus on this relation will, however, allow for a comprehensive approach to the complex structure of platform work.

The article starts by reflecting on the significance of the contract-of-employment test and by relating the challenges of classifying platform work to known grey-area problems, and concludes with a need to renew the test (section 2). Then, the Scandinavian approach is introduced (section 3). The common features of the Scandinavian contract-of-employment tests are presented and discussed in comparison with British law to highlight the specific challenges in the Scandinavian context. This section argues that from a Scandinavian perspective, the core common challenge of platform work is neither formal arrangements nor the triangular structure, but the ambiguous worker freedom this structure gives rise to. As the traditional criteria provide little guidance on this challenge, this section concludes that it is a requirement to renew the existing criteria.

The question of how to renew the criteria is discussed in the third part of the article (section 4). Building on the purposive element in the Scandinavian tests and the comprehensive approach to other triangular structures, the article argues for a broad purposive approach, including both the traditional perspective of the individual’s need for protection and a market perspective assessing the market role of platforms, while considering Scandinavian labour-market values.

In conclusion, the article suggests renewed criteria guiding the contract-of-employment test when dealing with platform work (section 5).

2. The challenges of classifying platform work

2.1. A necessary test

The contract of employment is a fundamental feature in labour law across jurisdictions. Statutory labour standards are predominantly framed as duties resting on the stronger party of the employment contract (the ‘employer’) to protect the interests of the weaker party (usually named the ‘employee’). The contract of employment therefore serves as a gateway to labour law protection. This reflects the classic rationale of labour law; legal protection aimed at redressing the inherent power asymmetries in the employment contract. Consequently, the legal test classifying this contract, making the distinction between employees and independent contractors, plays a key role in determining the scope of protection. It also forms a vital connection between individual and collective labour law. The individual contract of employment is a legal basis for collective autonomy, as the fundamental function of collective labour law is to align the power asymmetries in the individual relation.
Identifying such a contract is, however, not necessarily crucial to all aspects of labour law protection. Protective rules may apply to other work relations than the contract of employment, reflecting an expanded and nuanced protective rationale. Depending on the jurisdiction, certain aspects of statutory protection may apply to work relations without a contractual basis and to other types of contracts or work relations. Even genuinely independent contractors may be covered by specific protective rules. Although the entity responsible for providing such protection may be named the ‘employer’, the duties conferred to the ‘employer’ are not inextricably related to a contract of employment. Some employer duties may apply to other work relations and serve to align other positions of power. Consequently, the assumption of a conceptual ‘link’ between the contract of employment and the concept of the employer is debatable.

That being said, the contract of employment is still the cornerstone of, and the main gateway to, labour law protection, as it generally triggers a full range of statutory employer duties providing protection for the individual. Furthermore, the contract of employment has important functions in other fields of law. In tax and social security law, insurance and tort law, a contract of employment produces specific legal consequences for both parties in relation to the government and to other private actors. Furthermore, the contract-of-employment test shares important features with key concepts and distinctions in other fields of law such as the concept of an undertaking in competition law and the classification of services in market law.

This brief account illustrates the key role of the contract-of-employment test in the current legal framework: While the contract of employment triggers a distinctive legal regime protecting the weaker party, contracts for services operate under the fundamentally different rules of civil and commercial law, basically leaving independent contractors to protect themselves through individually bargained contractual provisions. The contract-of-employment test is therefore in some sense necessary: The distinction between employees and independent contractors is deeply entrenched in the existing legal framework both on the national and EU level, and both from an individual and a collective perspective. From a practical perspective, this is not likely to change. Although the foundation and conceptual framework of labour law is under continuous debate, it is hard to imagine the contract of employment losing significance anytime soon.

One perhaps obvious point of departure is that platform work cannot be classified as such. Platform work is heterogeneous. Platform models, terms, conditions and types of work vary, and platform workers do not share the same characteristics. It is therefore necessary to draw a distinction within platform work, separating platform employees from platform contractors. This is where the contract-of-employment test is challenged.

2.2. The grey area

The challenge of classifying platform work is recognised by the European Commission and national governments. Ideally, the contract-of-employment test should draw the distinction in a clear...
and operational manner, providing fairness and predictability for everyone involved. When faced with platform work, the test fails this challenge and a grey area remains.

Grey-area challenges are nothing new. One known problem concerns ‘sham’ or disguised employment contracts; subordinate, dependent work with the formal appearance of autonomous work. In principle, this is an enforcement issue. Yet it is related to the legal nature of the contract-of-employment test, as vagueness and a lack of clear guidance can facilitate and perhaps encourage sham arrangements.

Second, work relations with both subordinate and autonomous features do not fit the binary ‘all-or-nothing’ logic. This is both a scope issue and an issue of what the protected-status entails. Discussions on intermediary categories and more nuanced protection for employees are efforts to respond to this challenge. One example is the concept of the worker in British law, connecting specific aspects of dependency with certain rights such as a minimum wage and working-time protection, but not with the full range of rights conferred to employees.\(^{17}\)

Employer-side fragmentation is a third issue. The contract-of-employment test, with its contractual basis, is challenged if several entities are involved. Who – of several possible entities – is the responsible employer? One type of fragmentation concerns triangular contractual structures of work such as agency work. Complex corporate structures are another manifestation. Fragmentation can potentially represent a scope issue depending on whether the contract-of-employment test allows for a comprehensive approach to complex structures. However, even if labour law protection is applicable, fragmentation challenges the allocation of employer duties.

Platform work combines these grey-area challenges with a potentially amplifying effect. The sham problem is highly relevant. Operating outside the scope of labour law is an essential part of the business model. Although heterogeneous, platforms generally base their activities on the assumption that labour law protection does not apply.\(^{18}\) Obviously, such assumptions should not be accepted as such. The judgment against Uber in the UK illustrates how platform work can be dependent work in disguise.\(^{19}\) This may illustrate the need to question platform models more broadly.

Furthermore, platform work typically has both autonomous and subordinated features. The workers are usually free, at least formally, to decide on the amount of work they do, what tasks to perform, and to choose the time and place for their work. The platform is often not directly involved during the work performance, the workers typically provide the necessary tools and equipment themselves and may also be allowed to hire employees or use subcontractors. Remuneration is apparently provided by the customer. The traditional dependent-labour characteristics (continuous personal work under supervision and control in exchange for remuneration) are therefore apparently lacking.

Yet the freedom of platform workers is ambiguous. The absence of the worker’s obligation to accept work is reflected by the absence of the platform’s obligation to provide work and pay, and the workers’ profit possibilities can be limited. Economic dependency can therefore be the harsh flip side of freedom. For workers operating alone, such dependency is, in reality, of a personal nature. Technology provides new means to control workers both as individuals and as a crowd. Work performance can be monitored online and control can be ‘outsourced’ to customers through rating systems.\(^{20}\) Consequently, the typical features of platform work can indicate both genuine autonomy and an extreme form of precariousness, or, in the words of De Stefano, ‘an extreme form of commodification of human beings’\(^{21}\).

\(^{16}\) 2016:86 (on the challenges for the taxi industry), Konkurrensverket Working Paper 2017:1 (on challenges for competition) and Skatteverket rapport 131 129 651-16/113 (on challenges for the tax system). In Denmark, see in particular Disruptionsrådet (The Disrupting Council) at https://www.regeringen.dk/partnerskab/

\(^{17}\) See also i.a. the ‘arbeitnehmerähnliche Personen’ in German law and the ‘para-subordinate’ in Italian law, see further Waas (2017), 251–274 and Ales (2017), 351–376.

\(^{18}\) For some examples, see Prassl and Risak (2016), 619. There are, however, examples of platforms treating their workers as employees, see, for instance, the Norwegian platforms WeClean and Foodora at www.weclean.no and www.foodora.no.

\(^{19}\) In the judgment of 10 November 2017 in Employment Appeal Tribunal, Y. Aslam, J. Farrar and others v. Uber, Uber drivers were classified as workers. The question of employee status was not at issue.

\(^{20}\) A crowd of workers seeking customers, combined with a high number of customers rating them, can ensure effective objective control over worker conduct, as emphasised by the Advocate General’s reflections in case C-434/15 Uber Spain, EU:C:2017:364, para 52.

\(^{21}\) De Stefano (2016), 477.
Lastly, fragmentation on the receiving end is a central aspect of platform work. The triangular contractual structure defines platform work and represents a clear split in employer functions. The platform–worker contract sets a framework for the specific exchange of work and pay. The corporate platform structure can represent further fragmentation, as different companies may be involved in recruiting and contracting with workers, and with the day-to-day management of the platform.\footnote{For instance, Uber drivers contract with the Rasier (based in the Netherlands) for the right to use software, while a national company, i.a. Uber Norway, recruits drivers and handles questions regarding performance etc., see Hotvedt (2016b).}

In addition, platform work also raises jurisdictional issues and questions related to the choice of law. These complexities accelerate when such issues are addressed in the contractual terms, presupposing that the workers are independent contractors.\footnote{For instance, the Uber-driver contract contains an arbitration clause and regulates the choice of law, see Hotvedt (2016b).} Such challenges are, however, not further elaborated in this article.

In sum, these aspects of platform work represent a serious threat to the effective application of labour law protection and to the contract-of-employment test as the legal instrument to ensure it. The threat needs to be addressed to guarantee effective protection for platform workers and to set the ground for fair competition.

3. A Scandinavian perspective

3.1. Introduction

It is important to address the challenge of platform work from the national-law perspective. Apart from the free movement and equality law, EU law has traditionally, for the most part, left it to national law to define the contract of employment.\footnote{As regards free movement, see i.a. case 75/63 Unger, EU:C:1964:19, and case 66/85 Lawrie-Blum, EU:C:1986:284. As regards equality law, see i.a. case C-256/01 Allonby, EU:C:2003:190. The traditional approach is reflected in case 105/84 Danmols, EU:C:1985:331, and the Transfer of Undertakings Directive (2001/23/EC) art. 2.1.d.} Recent jurisprudence reflects an increasing significance of EU law concepts.\footnote{See in particular case C-232/09 Danosa, EU:C:2010:674, case C-393/10 O’Brien, EU:C:2012:110, case C-229/14 Balkaya, EU:C:2015:455 and case C-216/15 Ruhrlandsklinik, EU:C:2016:883. For further discussion, see Kristiansen (2016b) and Hotvedt (2018).} Recent legislative initiatives from the EU may strengthen this tendency.\footnote{The Commission has proposed to replace the Written Statement Directive (91/533/EC) with a new directive on transparent and predictable working conditions, see COM(2017) 797 final. The proposed directive builds on the EU law concept of worker in order to ensure a uniform implementation, and it aims at strengthened protection for workers in non-standard forms of employment, i.a. platform workers.} However, EU law does not cover all aspects of labour law, and national law may set higher protective standards. The national contract-of-employment tests are therefore still important when determining the scope of labour law protection.

The idea of what constitutes a contract of employment in different national jurisdictions has a common basis. Notions of dependency and subordination, and the idea of the primacy of the facts, are central in most European jurisdictions. Still, as the test and classification practices vary from country to country, so do the problems related to them. A perspective combining jurisdictions where common features dominate, and where the challenges related to platform work are similar, seems a fruitful point of departure.

As elaborated in this section, the contract-of-employment tests in Scandinavian countries share important common features.\footnote{Källström (2002) and Nielsen (2016), 493.} Compared to British law, the challenges related to platform work are different and less threatening to the scope of labour law protection.

3.2. Common features of the Scandinavian tests

The regulatory approach in Scandinavia is basically jurisprudential.\footnote{Perulli (2011), 138–139, distinguishes between a jurisprudential and legislative approach.} The contract of employment is not defined in the legislation, there are no general statutory definitions of employee/employer,
and where definitions are given, they provide limited guidance. Instead, classifying the contract of employment has traditionally been left to jurisprudence. The test is a multi-factor test, requiring a broad assessment of the realities of the parties’ relations, guided by a list of indicators or criteria. The idea of coherency (a unitary concept) has been influential, providing a common basic understanding of the contract type. Yet coherency has not been fully achieved. In all three jurisdictions, there are variations regarding both statutory definitions and classification practices. Thus, although the contract of employment has common core characteristics, the classification of a given relation may depend on the field of law in question and the type of legal basis (statutory or collective agreement).

In Norway, the main legislative instruments on the individual and collective level (the Working Environment Act and the Labour Disputes Act) define the contract of employment indirectly by defining its parties. The employee (‘arbeidstaker’) is defined simply as any person performing service work and is instructed to do so by the other party (the employer) in return for remuneration.33 Despite this apparently coherent notion, classification practices in case law vary to some extent.34 The variations are related to the type of dispute, the parties involved and the purpose of the rules in question.35

Danish labour law does not provide any statutory definition of the employment contract (‘ansættelsesavtal’) or the concept of employee (‘arbejdstager’). The employee concept is explained in doctrinal work as a person who, on the basis of a contract, personally performs work for someone else and is instructed to do so by the other party (the employer) in return for remuneration.33 Despite this apparently coherent notion, classification practices in case law vary to some extent.34 The variations are related to the type of dispute, the parties involved and the purpose of the rules in question.35

Swedish labour law does not provide any statutory definition of the employment contract (‘anställningsavtal’) or the concept of employee (‘arbetskärgare’). A broadly termed definition was, however, introduced in the act implementing the Written Statement Directive in 1993, where employees are defined as ‘persons who receive remuneration for personal services in an employment relationship’.36 The preparatory works illustrate the tension between the idea of a coherent concept and varying distinction and classification practices. The definition was intended to correspond with the definition in tax legislation and provide general guidance; yet the need for an independent assessment was underlined.37 As no uniform definition has been developed in case law, classification practices will, to a certain degree, depend on the rules in question.38

Furthermore, the contract-of-employment tests in all three countries are based on largely similar criteria. This can, at least in part, be explained by a common doctrinal basis. The nature of the contract of employment described by the ‘founding father’ of Norwegian labour law, Paal Berg, and some decades later, by Axel Adelcreutz, has influenced all three countries.39 Adelcreutz’s approach to the employment contract as a social form of cooperation prepared the ground for the broad assessment of the circumstances in the individual case, focusing on particular criteria.

29 Lov 17. juni 2005 nr. 62 om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven) § 1-8 (1) og lov 27. januar 2012 nr. 9 om arbeidstvister (arbeidstvistloven) § 1 (a).
30 Lov 29. april 1988 nr. 21 om ferie (ferieloven).
32 For further references, see Hotvedt (2016a), 146–151 and 358–365.
33 Inghammar (2017), 680. The landmark case NJA 1949 s. 768 set the basis for a coherent concept.
34 Inghammar (2017), 681 and AD 1981 nr. 105.
35 Källström and Malmberg (2016), 29–33.
36 The directive (91/544/EEC) was implemented by Ansættelsesbevisloven, consolidated by Lbkg nr. 240 af 17 March 2010.
37 Kristiansen (2016a), 21–22.
In Norwegian law, the criteria indicating a contract of employment are repeatedly cited in preparatory works and by the Supreme Court:

— the worker is obliged to stay in service to perform personal work and cannot use substitutes on his/her own account;
— the worker is obliged to submit to the employer’s supervision and control of the work;
— the employer provides the work location, machines, tools, work materials or other equipment necessary to perform the work;
— the employer bears the risk for the work result;
— the parties’ relation is relatively stable and is terminable with notice;
— the worker mainly works for one employer.\(^{40}\)

Also in Swedish law, preparatory works and government documents list the following criteria to indicate that a person is an employee if he or she:

— is personally obliged to perform the work, whether it is stated in a (written or oral) contract or could be presumed by the parties to the contract;
— has himself or herself, personally or practically personally, performed the work;
— is at the disposal (of the employer) continuously for work arising within the business of the employer;
— has a contractual relationship with the other party which is of a continuous, or of a ‘more lasting’, character;
— is prohibited, under the contractual arrangement or as a consequence of the conditions of work (time or capacity for other work), from undertaking similar work on behalf of someone else;
— is, for the performance of the work, subject to the employer’s instruction and control in relation to how, where and when to carry out the work;
— has to use the machinery, tools or material provided for by the other party (the employer);
— is compensated for direct expenses, such as travel costs;
— is remunerated for the work effort, at least partially, by a guaranteed salary;
— is, economically and socially, in a similar position to an employee.\(^{41}\)

As regards Danish law, Hasselbalch summarises the following main criteria:

— the degree of the employer’s right to direct and control the work performed by the person in question (subordination);
— the arrangement of the financial relationship between the parties (including tax law issues and the worker’s entrepreneurial risk);
— the obligation to carry out the work personally or the right to have someone else perform the tasks;
— the personal relationship between the worker and the employer, including the place of work; and
— the worker’s social and occupational position, especially whether the worker is primarily considered to be comparable with an employee or a self-employed worker.\(^{42}\)

All lists include criteria pointing to the obligations that make the contract fundamentally asymmetric and a basis of personal dependency: a continuous relation of personal work under subordination. Other criteria concern the distribution of economic risks between the parties and type of remuneration, and aim at revealing the ‘real’ nature of the relation: whether the exchange, in reality, is one of personal labour or a specific result that can be achieved without personal subordination. The lists also include criteria that describe the duration and/or stability of the relation, its economic importance for the worker and a ‘social’ assessment. These criteria target relations of actual economic dependency. In sum, the criteria therefore aim at identifying different kinds of dependency, both personal and economic, both contractual and actual.

Lastly, the norms guiding the overall assessment are similar, while not necessarily identical. The tests require a facts-oriented, dynamic, individualised and purposive assessment based on, but not restricted to, the listed criteria. The broad- and facts-based nature of the assessment is expressed by the

\(^{40}\) Ot.prp. nr. 49 (2004–2005) s. 73 (author’s translation). The list is cited by the Supreme Court in Rt. 2013 s. 354, para 38, see also Rt. 2013 s. 342 and HR-2016-1366-A.


criteria themselves. The assessment is not limited to contractual obligations, practices are relevant, and when considering the nature of contractual obligations, the focus is on the actual performance.\(^{43}\) The assessment is dynamic and takes account of practice developments between the parties.\(^{44}\) An individual approach is reflected in the relevance of criteria indicating economic dependency and the assessment should (in principle) include all the (relevant) circumstances in each specific case.\(^{45}\)

The purposive approach is significant. In all three countries, variations in definitions and classification practices are closely related to the purpose of the relevant legal framework.\(^{46}\) The purposive element is considered stronger in Denmark and Norway compared to Sweden.\(^{47}\) Recent developments in Norway indicate a strengthened purposive element.\(^{48}\) The Supreme Court explicitly regards their ‘methodological approach’ a purposive one, and the Court has repeatedly stated that the purpose of the labour law legislation is to provide protection for those who need it.\(^{49}\) This approach has justified extensive applications of the contract-of-employment test in recent jurisprudence.\(^{50}\)

### 3.3. Scandinavian tests compared to British law

A brief comparison with British law will shed further light on the distinctive features of the contract-of-employment tests in Scandinavian law. The comparison will reveal that the Scandinavian tests are better equipped to deal with the challenges of platform work. It will also serve to identify a core common challenge for the Scandinavian tests when dealing with platform work.

Already at the point of departure, the British common-law approach to identifying a contract of employment is distinctively different from the Scandinavian approach. British law allows for a spectrum of tests and criteria to be considered. In modern case law, however, the *mutuality-of-obligation* test dominates compared to other relevant tests (the control-, integration- and economic-reality tests), and is, according to Prassl, ‘by far the most prominent in practice today’.\(^{51}\) The mutuality-of-obligation test represents a strong focus on the exchange of promises regarding the employer’s obligation to provide work and the employee’s obligation to accept work. In case law, the obligation to provide and undertake work is considered ‘the irreducible minimum of mutuality of obligation necessary to create a contract of service’.\(^{52}\) As described above, the Scandinavian tests reflect a broader and more facts-oriented approach.

Several other differences add to the impression of a British test with a stronger emphasis on formal contractual arrangements and bilateral exchange and – consequently – a narrower understanding of the contract of employment.

One difference concerns the ability to reveal a ‘sham’. The formal classification of the contract is clearly relevant in British law and may be regarded as ‘strong evidence’ of the real relationship.\(^{53}\) In contrast, the Norwegian Supreme Court regards the formal status of the contract (as a contract for service) as a matter of *no* significance in the contract-of-employment test due to the protective purpose of the rules in question.\(^{54}\) The other Scandinavian traditions consider this as a factor of limited importance. The facts revealing the ‘real’ contractual realities are generally more significant, otherwise it would undermine the protective purpose.\(^{55}\)


\(^{44}\) Källström and Malmberg (2016), 28 and Hotvedt (2016a), 375.

\(^{45}\) This is elaborated in section 4.1.


\(^{48}\) Hotvedt (2018), 59.

\(^{49}\) Rt. 2015 s. 475, para 65, Rt. 2013 s. 354, para 39, and HR-2016-1366-A, para 59.

\(^{50}\) In Rt. 2010 s. 93, the purposive approach led to employee status in the context of work injury insurance for a man who worked for a company while also being the only shareholder, CEO and chairman of the board. In Rt. 2015 s. 475, the purposive approach led to consider a partner in a law firm as an employee in tort law, making the firm liable for the partner’s negligence.

\(^{51}\) Prassl (2015), 30 and Deakin and Morris (2009), 137–143.


\(^{53}\) Deakin and Morris (2009), 127–128.

\(^{54}\) Rt. 2013 s. 354, para 37.

The next related difference is the approach to sham contractual terms. As observed by Deakin and Morris, British case law gives recent examples of an ‘extremely strict view [where] there must be a finding that, at the time of the contract, both parties intended [the term] to misrepresent their true contractual relationship’.\(^56\) This subjective and bilateral approach to a sham may be somewhat modified by more flexible interpretations.\(^57\) In comparison, the Scandinavian approach is fundamentally objective, focusing on whether the formal arrangement is reflected in the practical realities or not.\(^58\)

There are also distinct differences in the framework of contractual law. In British contract law, mutuality – reciprocal promises and consideration – is necessary to establish a contractual bond. The focus on the exchange between two parties underpins the idea of a bilateral employment relationship mutuality – reciprocal promises and consideration – is necessary to establish a contractual bond. Conduct more consistent with an intention to contract than an intention not to contract is insufficient. A contract can only be implied when a necessity test is met:

...no such contract should be implied on the facts of any given case unless it is necessary to do so; necessary, that is to say, to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.\(^60\)

Scandinavian contract law provides a more flexible framework. Contractual obligations can be based on the justified expectations (‘berettigede forventninger’) of one party.\(^61\) A contractual bond is thus based on a broader assessment, considering not just the parties’ expressed will and conduct, but also taking power asymmetries and societal values (protecting the weaker party) into account. The threshold for implying a contractual bond – and contractual terms – is therefore to some extent adaptable to the type of contract in question, potentially responding to the protective purpose related to a contract of employment. Not surprisingly, behaviour implying a contract of employment – such as performing and receiving work – can be sufficient to establish a contract of employment.\(^62\)

These observations may explain the distinctively different approaches to the types of challenges related to platform work in Scandinavian law compared to British law.

First, the Scandinavian tests are better equipped than the British ones are to face the challenge of shams. The closer scrutiny of formal contract classifications and expressed terms should make it easier to question platform workers’ formal status as independent contractors, and the contractual terms offered to them. Second, casual work arrangements, work with both dependant and autonomous features, are treated differently. Third, the tests reflect different approaches to employer-side fragmentation, in particular, the triangular contractual structure of agency work. The Scandinavian tests are clearly more inclusive than the British tests when faced with both causal work arrangements and agency work. In sum, the contractual framework of employment contracts seems less of a ‘straightjacket’ for the scope of labour law in Scandinavian law compared to British law. This will be explained in more detail.

As regards casual work arrangements, the mutuality of obligation leaves British law generally excluding. The mutuality-of-obligation test rests on the exchange of mutual promises of future performance – the employer’s obligation to provide work and the employee’s obligation to accept work – as an inherent part of an employment contact, as a second level of obligation, adding to the first level of the exchange of work for remuneration.\(^63\) Obligational mutuality to maintain the employment relationship could serve as a basis for certain rights and obligations within the employment contract (as implied terms

\(^{56}\) Deakin and Morris (2009), 129, with reference to Consistent Group Ltd. v Kalwak, [2008] IRLR 508, para 51.

\(^{57}\) See in particular the Protectacoat Firthglow Ltd v Szilagyim [2009] IRLR 365, cf. Deakin and Morris (2009), 129.

\(^{58}\) Inghammar (2017), 678, Källström (2002), 85. Hasselbalch (2013), 34, Kristiansen (2017), 143 and Hotvedt (2016a), 365–385. This, however, does not exclude a strict approach to attempts to circumvent employer responsibility, see i.a. Källström and Malmberg (2016), 31, who especially underline the importance as regards the circumvention of collective agreements.

\(^{59}\) Prassl (2015), 18–19.

\(^{60}\) This citation from The Aranis [1989] 1 L.L.R 213 is repeated in case law concerning employment, see i.a. James v London Borough of Greenwich [2008] EWCA Civ 34, examined below. See further Prassl (2015), 88–90.

\(^{61}\) Hotvedt (2016a), 299–301, with further references to Norwegian, Swedish and Danish law.


\(^{63}\) Deakin and Morris (2009), 138.
or as a normative basis for statutory requirements). In British law, however, the mutuality-of-obligation test assumes the second level of obligation to be a precondition for a contract of employment, and, hence, for employment protection. Without a mutual obligation to provide and accept work, casual work arrangements are not likely to be considered contracts of employment. So-called zero-hour contracts, for instance, are therefore likely to be excluded from employment protection in British law.

Mutuality of obligation also has an excluding effect on agency work. The agency–worker relation is typically not a contract of employment in British law, as such reciprocal obligations are usually lacking. The control test has also failed, as case law has focused on the agency–worker relation separately and has not taken the triangular structure into account. Furthermore, an (implied) contract of employment in the worker–end user relation is hindered by the framework of contractual law, more precisely by applying the ‘necessity test’. As the worker’s service to the end user and the user’s payment via the agency were explicable by the triangular contractual structure (genuine express contracts between the worker and agency, and agency and end user), an implied contract was not justified as necessary. Paradoxically, the court took account of the triangular contract structure in this regard.

In sum, British law seems generally dismissive of the idea of a contract of employment in the casual and triangular arrangement of platform work. The Scandinavian approach, on the other hand, is more promising.

Agency workers are generally considered to have employment contracts in Scandinavian law. Categorically sanctioned restrictions on the use of agency workers were liberalised in all three countries in the 1990s. Although agency work challenges the notion of a bilateral employment relationship, it is broadly accepted as a (specific) type of employment contract. The problem of the triangular structure is therefore mainly an issue of the allocation of employer responsibilities, and not a scope issue. In Denmark, however, one particular scope issue remains. The specific employment-protection statute for white-collar workers does not apply to agency workers. The allocation issue is, at least in part, solved by statutory intervention. The agency is generally considered the employer as the employee’s contractual counterparty, while specific employer duties are assigned to the end user. There are also distinct differences as regards the nature and degree of the end-user’s employer responsibility in Scandinavian countries.

Norwegian law assigns the broadest responsibility, as the duties of the end user relate not just to health and safety and discrimination, but also to working time, pay and employment protection. The end user is under joint liability for the agency’s obligation to provide pay. Of particular importance is the ‘bridge’ between restrictions on temporary work and the end-user’s employment-protection responsibility: Restrictions on the use of temporary employment contracts also apply to the use of agency workers, and if the restrictions are not respected, the worker is entitled to claim a regular, open-ended employment contract with the end user.

Notwithstanding such differences, the acceptance of an employment contract in the agency–worker relation reflects a comprehensive approach to triangular contractual structures. The relation between the worker and end user legitimately affects the classification of the agency–worker relation. The triangular contractual structure of platform work is therefore not an insurmountable obstacle to the contract-of-employment test in Scandinavian law. Norwegian case law gives recent examples of such a comprehensive

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64 Ibid.
68 This can explain why the Uber lawsuit, Y. Aslam, J. Farrar and others v. Uber, concerned the status as a ‘worker’ not as an ‘employee’.
69 On Swedish law, see Selberg (2017), 62, on Danish law, see U.1999.1870S and Kristiansen (2016a), 23, on Norwegian law, see Hotvedt (2016a), 144 and LF-1999-216 (Norway), where the existence of a contract of employment was undisputed and the case concerned the allocation of employer responsibilities.
71 Lag 2012:854 om uthyrning av arbetstagare 1 §, 11 § (Sweden), Lov nr. 595 af 12.6.2013 omvikarersretstilling ved udsendelse af etvikarbureau (Denmark), WEA §§ 14-12 and further, § 2-2, § 13-2 (Norway).
72 WEA § 14-12c.
73 WEA § 14-12 (1), cf. § 14-9 (1) litra a–e. The most liberal basis for temporary work, § 14-9 (1) f, does not apply to agency work.
approach to other triangular contractual structures.74 When applying the test to the platform–worker relation, a comprehensive approach would, by analogy, allow for the subordination and control of the worker–customer relation to affect the assessment of the platform–worker relation when facilitated by the platform.

As regards casual work arrangements, the Scandinavian approach is clearly less excluding than the British approach. Due to the broad and facts-oriented nature of the test, a mutual obligation to provide and accept work in the future is not a necessary prerequisite. However, an ambiguous approach to workers’ freedom to accept or decline work and specific tasks is present. On the one hand, an obligation to stay in service is a criterion of central importance, and stability and continuity are relevant. On the other hand, the purposive approach (considering social factors) favours including casual formal work arrangements. This ambiguity is illustrated by Norwegian case law. The Supreme Court regarded a ‘loose connection’ as a strong argument against an employment contract, as it left the worker without the duty of performing personal work in the regular sense.75 A more recent case, however, reflects a more nuanced view. In Rt. 2013 s. 354, the Supreme Court recognised the need for protection arising from a casual work arrangement as relevant in the contract-of-employment test. Still, the Court did not question the traditional criteria – neither the ‘duty to stay in service’ nor the stability of the relation.

The case concerned a worker providing support services for a family with a disabled child. The services were granted by the local government, and the worker entered into subsequent short-term contracts, formally framed as contracts of service. The contract defined the support-service hours but left it to the worker (and the family) to decide on the time and place for work, and how the work was to be performed. After a close assessment of the traditional criteria, the Court concluded the worker had a contract of employment with the local government. When considering the control criteria, the Court assessed how, in reality, the worker had little influence over how the work was performed.76 Interestingly, the Court also emphasised that a short-term contract without a right to renewal and future work weakened the worker’s bargaining position, and continued:

*Therefore, there is a relationship of dependency and subordination, which is a fundamental feature of contracts of employment.*

A similar argument surfaced when considering the stability of the relation. Four subsequent contracts of two months’ duration provided sufficient stability to weigh in favor of a contract of employment, and the right to terminate the contract at any time was not a determining counter-argument. In passing, the Court mentioned that this ‘might as well’ illustrate the worker’s precarious position.78

Swedish law reveals a parallel ambiguity. On the one hand, work defined as a predetermined limited task and the right to decline work are considered strong arguments against a contract of employment.79 On the other hand, the ‘social criteria’ focus on dependency due to precarity and the value of the freedom to decline work for an economically dependent worker have been seriously questioned.80 In Denmark, the ambiguity is sharply illustrated by the partial employee status of agency workers. The lack of a duty to perform work at the request of the employer is the reason why agency workers are not granted statutory employment protection.81

Fragmentation due to the complexity of corporate platform structures is clearly challenging in the Scandinavian context. Relatively speaking, this challenge is still less threatening, as it mainly concerns the allocation of responsibility (effectiveness) and not the existence of an employment contract (scope). Furthermore, the response in Scandinavian law seems divergent and a common approach is thus less suitable.82 This challenge is therefore not pursued in the present article. That being said, due to a more
flexible contractual-law framework and the purposive element, there is considerable potential to challenge the corporate veil in the platform context.

In Norwegian law, for instance, contractual obscurity as to who is the contractual employer is solved by a purpose-oriented and openly functional approach. Even though the contract’s formal identification of the party is the starting point, case law also considers whether this corresponds (to a reasonable degree) with the allocation of employer functions. Furthermore, there is a distinct doctrine on joint employer responsibility, merging corporate- and contractual-law arguments with the protective purpose of labour law. The doctrine represents a ‘second step’ in allocating employer duties. If responsibility for the contractual employer (the ‘first step’) does not correlate reasonably with the actual influence on the employment relationship, the question of responsibility for other entities is considered more closely. The prevailing line of argument in case law to form the basis for joint responsibility is a combination of a close integration of the relevant entities, by ownership or otherwise, a contractual basis for certain employer functions and the actual exercise of managerial powers.

In conclusion, the ambiguity of freedom in platform work can be regarded as a core common challenge for the Scandinavian contract-of-employment test.

3.4. A required renewal

As explained above, the Scandinavian contract-of-employment tests reflect an ambiguous approach to the freedom of platform workers. The current criteria do not guide the distinction and leave the fundamental question unresolved: How can the test separate cases where worker freedom indicates autonomy from cases where it is a hallmark of dependency and precarity? To provide a fair and predictable scope for employment law, the test should guide this distinction in a clear and operational manner. When it does not, the test does not really address the need for protection related to platform work.

Consequently, a renewal is not just needed, it is required. A requirement to adapt the criteria to the changed realities of work stems from the test’s legal nature. Three arguments support this claim and explain why a renewal within the current jurisprudential approach, without statutory efforts, is preferable.

First, the test’s jurisprudential basis makes it flexible and adaptable. This approach has been maintained despite significant changes in the labour market and after careful consideration of alternative approaches such as detailed definitions and new intermediary categories. The prevailing argument is that a flexible test is the best way to adapt to changed realities and new forms of work. More detailed statutory definitions would leave the test more static and make labour law more vulnerable to circumvention. New intermediary categories could increase uncertainty and complexity without solving the pressing issues. As stated in the preparatory works of the WEA, the test should evolve to reflect changed realities:

Even more importantly, there should be room for developing the concept [of employee], corresponding to new ways of organising work and new work relations. This development can and should happen in jurisprudence. The Committee finds that the criteria and overall assessment applied by the courts, to a sufficient degree, respond to the need for flexibility and predictability. The Committee, however, expects future court decisions to reflect further developments in the labour market.

Secondly, the criteria are not legally binding as such. The criteria are empirically-based indicators of a contract of employment, derived from its usual characteristics. In Norway and Sweden, the criteria were

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83 See Hotvedt (2016a), 426–440 for further references.
84 See in particular Rt. 2012 s. 983, Rt. 1990 s. 1126 and Rt. 1989 s. 231. See also Hotvedt (2016a), 441–463.
85 ILO Recommendation 198 (2006) concerning the employment relationship reflects a responsibility to review national law or practice to ensure a clear and effective scope for labour law protection.
86 This is explicitly stated regarding Norwegian law in Ot.prp. nr. 49 (2004–2005), 73 and regarding Swedish law in Adelcreutz (1961), 217.
87 Preparatory works to WEA 2005 discussed and rejected an intermediary category in Norwegian law, see NOU 2004:5, 153–157, 163. See a similar assessment as regards Swedish law in Ds 2002:56, 128, 133–134.
89 NOU 2004:5, 163. Author’s translation, emphasis added.
listed in preparatory works decades ago to describe the typical employment relationship at that time.\textsuperscript{90} The lists are not non-exhaustive, as reflected in the varying formulations in legal doctrine and in jurisprudence emphasising other factors. The criteria are simply tools to help apply the underlying norms to the practical realities, based on what has been the usual characteristics of a contract of employment. It follows that changed modes of work – like platform work – give reasons to consider supplementing with new criteria.

Thirdly – and perhaps most importantly – the \textit{purposive approach} requires a continuous review of whether the traditional criteria provide guidance that helps fulfil the purpose of the legal framework.\textsuperscript{91} If taken seriously, the purposive approach implies that the criteria must change if they no longer reflect the purpose.

The purposive approach, however, also provides guidance on \textit{how} to renew the criteria. Renewed criteria can be derived from a \textit{broad purposive approach}, by considering both the needs of the individual and the platforms’ market role, and by including Scandinavian labour-market values.

4. A broad purposive approach

4.1 The individual perspective: Providing labour law protection for those who need it

Thus far, the purposive approach has mainly focused on the \textit{individual} need for protection. The Norwegian Supreme Court regards the purpose of labour law as providing protection for \textit{those who need it}, and the main purpose is similarly phrased in the other Scandinavian countries.\textsuperscript{92}

This individual perspective is expressed by criteria pointing at individual characteristics, in particular, criteria concerning economic dependency and social factors. In principle, the overall assessment include all relevant circumstances in the individual case.\textsuperscript{93} Case law shows that individual factors can be the determining argument. In a series of cases on hairdressers’ employment status, the Swedish Labour Court found the duration of the relation and even the workers’ age to be important factors.\textsuperscript{94}

An individualised approach has been suitable to address and provide fair results in individual borderline cases, in particular, work formally framed as separate independent contracts, that in reality amount to stable, full-time work for one employing entity. Yet, such an approach is less suited to addressing the challenges of platform work, where the need for protection is related to the business model and to the \textit{lack} of stability it represents. Empirical studies in Scandinavia indicate that platform work is often performed occasionally.\textsuperscript{95} The work is, however, not necessarily marginal and ancillary to other sources of income. How much work each worker undertakes, how long the relation lasts and how much the worker depends on this income, can vary considerably between workers on the same platform.\textsuperscript{96} To provide a clear and predictable scope for employment law, the distinction needs to be made between platform models rather than between individual workers. An individual economic-dependency perspective is thus not well suited as a decisive factor.

Another aspect of the individual perspective, however, is highly relevant to platform work. As platform workers generally have the freedom to choose their tasks, hours and places of work, control of

\textsuperscript{90} In Norway, a list was first introduced in preparatory works to Lov 14. november 1947 nr. 3 om ferie (The Holiday Act 1947). The Swedish multifactor test was introduced in the preparatory works to Lag (1976:580) om medbestämmande i arbetsslivet (Co-determination Act 1975), see Inghammar (2017), 685–686.

\textsuperscript{91} This is an important task for both jurisprudence and legal doctrine, see i.a. Ds 2002:56, 128, 131.

\textsuperscript{92} Källström and Malmberg (2016), 29, emphasise the individual’s need for protection (‘skyddsbehovet’) as the starting point of the assessment. Hasselbalch (2013), 70, explains the protective purpose as partly preventing the parties from disturbing the statutory level of social protection and partly preventing the employer from abusing the power asymmetries vis-à-vis the employee.

\textsuperscript{93} Inghammar (2017), 687, refers to NJA 1949 s. 768 as the ‘break-through’ case of a social concept of the employee in Swedish law, see further Adelcreutz and Mulder (2013), 59–60.

\textsuperscript{94} AD 1978 nr. 7, AD 1979 nr. 12 and AD 1982 nr. 134. See further Inghammar (2017), 687. Rt. 1968 s. 725 is an example from Norwegian jurisprudence, see further Hotvedt (2016a), 386–390.

\textsuperscript{95} Dølvik and Jesnes (2017), 22–26.

\textsuperscript{96} For evidence in a Norwegian context, see Jesnes et al. (2016), 31.
their work performance seems a particularly important indicator of subordination. As explained above in regard to agency work, the Scandinavian contract-of-employment tests allow for a comprehensive approach to supervision and control in triangular contractual structures. The perspective of the individual worker and the focus on the need for protection justifies this approach.

Consequently, when considering subordination in the platform–worker relation, customer control should be part of the picture. Norwegian case law already gives several examples of a parallel assessment in other triangular work arrangements. The fact that work performance was supervised and controlled by the end user and not by the alleged employer was not decisive in the eyes of the Supreme Court, as the worker would otherwise be left in a void, without employment protection. Thus, ‘outsourcing’ supervision and control to another party should not result in the worker falling outside the scope of labour law protection. Platforms usually have rating systems, facilitating work performance being reflected in the customer’s rating of workers. If platforms use ratings to sanction worker behaviour, it is arguably an indirect form of supervision and control. Therefore, the more the platform lets the ratings affect the worker’s opportunities to work via the platform, the stronger this indicates subordination.

To summarise: The individual perspective is a basis for a comprehensive assessment of the supervision and control of work performance in platform work. The assessment should include both supervision and control by the platform (direct control) and customer supervision and control when facilitated and actively used by the platform (indirect control). If the platform monitors worker performance and lets customer ratings affect the worker’s position, it is a clear indication of subordinated work.

4.2. The market perspective: The market role of platforms

The purpose of the regulatory framework is not solely to protect the individual worker. As indicated in the introduction, the contract of employment has a key function in labour-market regulation. A broad purposive approach could – and should – include the platform’s market role to protect this function.

A certain market perspective is already included in the Scandinavian contract-of-employment tests. Several criteria concern the distribution of economic risks by focusing on which party bears the investment costs (by providing tools and materials, and a work location) and the risk for the work result etc. However, these criteria may be misleading when applied to platform work. In a traditional two-party relation, the focus is on the distribution of risks between the worker and the alleged employer. The triangular platform model, however, allows platforms to profit directly from the services provided by workers without investing in equipment etc., and without accepting the risk for the work result vis-à-vis the worker. The criteria are thus less fit to guide the distinction between different platform models. They also leave the test open for evasion, as platforms can effectively avoid indicators of a contract of employment via unilaterally-set conditions. The criteria need to reflect the triangular platform model and take the varying market role of platforms into account.

Platforms generally provide an intermediary service of digitally connecting workers and customers. Typically, platforms see themselves as mere intermediaries, providing only such information society services. Yet the degree of involvement in the underlying service varies across different platform models. Some platforms are deeply involved in defining, organising and controlling the underlying service while others are not. As the degree of involvement relates to variations between platform models, not between individual workers, it could be an operational parameter in the contract-of-employment test. Important indicators of such involvement are platform influence or control on the type, quality and price of the service, and on other contractual terms in the worker–customer relation.

Such criteria seem highly relevant in a labour law context, as it sheds light on worker freedom in the triangular model of platform work: The more the platform is involved in providing the underlying service to the customer, the more the worker acts on behalf of the platform, and not as an independent operator vis-à-vis the customer. Platform involvement in defining the nature of the service, price and

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97 Rt. 2013 s. 354, Rt. 2013 s. 342 and HR-2016-1366-A.
98 See in particular Rt. 2013 s. 354, para 49.
other terms also adds to the worker’s economic dependency vis-à-vis the platform as it limits the worker’s possibilities for bearing risks and attaining profits. The criteria are well in line with the concept of worker in EU law. The Commission regards platform involvement as indicative of subordination, and distinguishes between situations where the platform determines the type of work, remuneration and other working conditions from situations where the platform merely processes pay from the end user.99

Similar criteria are relevant in market law, when classifying platform services to determine the relevant set of market rules.100 The main instrument in EU secondary legislation, the Services Directive, gives precedence to provisions governing specific aspects of access to, or the exercise of, a service activity in specific sectors if they conflict with the Directive, i.a. the E-Commerce Directive, with specific provisions concerning information society services.101 Conversely, services in the field of transport are exempt from the Directive and subject to specific provisions.102

The Commission considers the level of control or influence over the underlying service to be of significant importance for market law classification and has highlighted three key criteria: whether the platform sets the final price, whether the platform sets other terms and conditions in the worker–customer relation and has ownership of key assets used to provide the service.103 The Court of Justice of the European Union (CJEU) has recently, in two cases concerning the Uber-platform, ruled that provisions for information society services do not apply if the service is ‘more than an intermediation service’ by being ‘inherently linked’ to the underlying service, making the intermediary service an ‘integral part of an overall service whose main component’ is the underlying one (in these cases, transport).104 When finding an inherent link the CJEU noted that those drivers would not be led to provide transport services to those customers without the use of the platform.105 The CJEU also emphasised that ‘Uber exercises decisive influence over the conditions under which that service is provided by those drivers’, and pointed to involvement in the price and quality of the service.106

Furthermore, platform involvement in the underlying service affects platform liability. The E-Commerce Directive limits liability for providers of information society services for content they do not control.107 Even if the Directive applies, the liability exemptions may not apply if the platform has an active role in determining the content of the underlying service.108

An autonomous labour law with a distinctive normative base and independent concepts has been, and still is, of vital importance to justify labour standards and labour law institutions.109 The contract-of-employment test should thus not depend on market-law classifications.110 Autonomy does, however, not imply insulation.111 It is recognised that labour law classifications influence market law classifications.112 A specific opposing influence is not necessarily detrimental. Rather, including market considerations that shed light on important aspects of worker freedom can help fulfil the purpose of labour law.

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100 Platforms are generally service providers under EU law as most platforms charge a fee for the contracts they mediate, and even if it is free, they can make money from publicity or the secondary use of the users’ data, see Hatzopoulos and Roma (2017), 95.
101 The Services Directive (2006/123/EC) art. 3(1) gives precedence to i.a. the E-commerce Directive (2000/31/EC), which builds on the definition of ‘information society services’ in Directive 98/34/EC.
102 The Services Directive art. 2(2) d. The distinction between transport and other services is also significant in the EEA agreement. Transport is not regulated by the general provisions of freedom of services (EEA art. 37 ff) but by specific provisions (EEA art. 47 ff, cf. art 38).
104 Case C-434/15 Uber Spain, EU:C:2017:981, para 37, 40 (emphasis added), and case C-320/16 Uber France, EU:C:2018:221, para. 21, 22.
105 Case C-434/15 Uber Spain, para 39, and case C-320/16 Uber France, para. 21.
106 Ibid.
107 The E-Commerce Directive arts. 12, 13 and 14.
109 Different aspects of autonomy are explored in Bogg et al. (2015).
110 Section 3.3 illustrates how notions of contractual law, in particular, the mutuality of obligation and the ‘necessity test’ limit the scope of labour law protection in British law.
111 Other fields of law such as human rights law and discrimination law have undisputedly served to develop (and expand) the protective rationale of labour law. Recent literature also provides fruitful perspectives drawing on commercial and EU market law, see i.a. Bogg et al. (2015), parts III and IV.
The Advocate General’s opinion in case C-434/15 Uber Spain reflects how the classification issues in market law and labour law are interrelated but not interdependent. First, he assumes that platform involvement in the underlying service indicates a contract of employment, since it can serve the same purpose of managing workers as traditional means of control do:

While this control is not exercised in the context of a traditional employer–employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders. (Para 52)

Then, he explicitly refrained from concluding that market-law classification should determine labour law classification:

The above finding does not, however, mean that Uber’s drivers must necessarily be regarded as its employees. The company may very well provide its services through independent traders who act on its behalf as subcontractors. The controversy surrounding the status of drivers with respect to Uber, which has already resulted in court judgments in some Member States, is wholly unrelated to the legal questions before the Court in this case. (Para 54)

The last quote may reflect a remaining challenge: Even if platform involvement in the underlying service is accepted as relevant guiding criteria, these criteria must be aligned with other criteria indicating autonomy for platform workers. One might face the argument that workers’ freedom to choose tasks and hours are the determining characteristics even when the platform is deeply involved.

In other words, there is a missing link. A legal argument is needed to bring the platform-involvement criteria to the centre of the test and to make them more important than the (ambiguous) freedom of platform workers. The last section suggests that Scandinavian labour-market values can serve as this missing link.

4.3 The Scandinavian labour-market values

The Scandinavian labour-market values give normative support to shifting the platform-involvement criteria in the underlying service into the centre of the test when dealing with platform work.

The Scandinavian labour-market model is, in comparative terms, characterised by strong labour-market actors enjoying a high degree of collective autonomy with a high level of social protection for the individual. The interplay between state and labour-market actors is close and coordinated:113 The legislator leaves key labour law issues to collective bargaining and the labour-market actors have a strong influence on legislative processes. Thus, the labour-market actors execute important regulatory functions regarding labour law protection. Statutory labour law and regulation by collective agreements interact on both a practical and normative level. This close cooperation also extends to broader issues of welfare protection and economic policy. Assigning regulatory (and political) power to the labour-market actors is an institutional arrangement of the Scandinavian labour market, making the cooperation between the state and labour-market actors an essential part of the societal model.114

There is, however, not a unitary Scandinavian (or Nordic) model. There are significant differences, i.a. regarding the degree of regulatory powers conferred to the labour-market actors. In Denmark, their regulatory powers are the broadest, as collective agreements are the primary regulatory instrument, and statutory protection is scant and scattered. The state and the dominating labour-market actors share an understanding of collective agreements as preferable to statutory protection, and legislative efforts are usually only activated when the labour-market actors agree on the need and content of such protection.115 In Sweden, statutory protection is more developed, and provides i.a. employment protection and co-determination standards with a general scope. Still, as many labour law standards can be derogated

113 Evju (2010), Bruun et al. (1990).
114 Evju (2010), see in particular 3, 5–6.
by collective agreements and important issues such as the minimum wage are not regulated, collective agreements are considered the main regulatory instrument. The statutory approach is more significant in Norway. However, Norwegian labour law legislation leaves room and leverage for collective agreements. There is no statutory minimum wage, and co-determination standards and regulations on working time allow certain derogations via collective agreement.

Despite such differences, the Scandinavian societal model presupposes and underpins the key functions of the contract of employment: It is the basis for the labour-market actors’ institutional role. The regulatory framework, both statutory and collectively bargained, relies heavily on the contract of employment as a tool to regulate the labour market, distribute welfare rights and obligations, and provide economic stability. Hence, the contract of employment is a key instrument to ensure that labour-market involvement triggers responsibility for labour-market risks. To fulfil these functions, the contract of employment must be the dominating form of organised work both on the societal and company level.

Ensuring that labour-market involvement is followed by responsibilities for welfare protection and protecting the contract of employment as the main form of organised work are therefore fundamental Scandinavian labour-market values. They are legal values as they are presupposed by, and inherent in, the legal framework. The purposive approach to the Scandinavian contract-of-employment test provides a legal basis for their relevance when applying the test.

In Norway, these values are explicitly and authoritatively expressed. Government documents and preparatory works clearly state that labour-market regulation aims at ensuring the contract of employment (in its regular form, a direct, two-party, open-ended contract) as the dominating form of organised work both on the societal and company level. This has served to justify both purposive interpretations of casual terms of employment and statutory interventions to ensure effective employment protection in triangular and casual working arrangements such as agency work and on-call work.

These values would be threatened if the platform–worker relation is not recognised as a contract of employment where the platform is actively engaged in the labour market via its deep involvement in the underlying service.

In short, Scandinavian labour-market values imply that platform involvement in the underlying service is a key parameter when applying the contract-of-employment test, and is more significant than the (ambiguous) freedom of platform workers to choose their tasks and hours.

5. Conclusion: Renewed criteria … and?

In conclusion, a broad purposive approach combining the individual and the market perspectives and including Scandinavian labour-market values can clarify the distinction between platform workers and platform contractors by renewing the criteria guiding the contract-of-employment test.

This article suggests that the test should focus on the platform control of work performance (directly and indirectly, via the use of customer ratings) and platform involvement in the underlying service (influence or control of the type and quality of service, price and other contractual terms vis-à-vis the customer).

These criteria indicate both personal subordination and economic dependency. They enhance consistency with EU law and market law without depending on them. The criteria seem to provide a clearer distinction regarding the diversity of platform models, while not getting lost in the diversity of workers. Last, but not least, they protect the key functions of the contract of employment in the labour market.

Implementing renewed criteria is primarily a task for the judiciary, yet a renewed test is not sufficient. To provide effective labour law protection, the test must be applied and enforced in practice. Bringing a case to trial is a risky, costly and timely operation. Contractual clauses on arbitration, the choice of law and confidentiality can further discourage platform workers. Relying on union support...
seems risky, as unions face particular problems organising platform workers. Thus, it may be time to consider, in cooperation with the social partners, a separate institution for the cheap and speedy legal determination of employment status: An Employment Status Board. In Scandinavia, there are already several boards etc. which are competent in deciding specific labour law-related issues, so why not on the key issue of employment status?120

Such an institution could be well suited to addressing the grey area, bringing the platform models out of the shadows and ensuring a predictable legal framework for the future.

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120 One Norwegian example is Tvisteløsningsnemnda, which decides on disputes concerning working time, parental leave, the extension of part time work etc., see WEA § 17-2. Another is Diskrimineringsnemnda, which decides on complaints regarding discrimination, see Lov 16. juni 2017 nr. 50 om Likestillings- og diskrimineringsombudet og Diskrimineringsnemnda (diskrimineringsombudsloven).

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