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Can a Basic Income Make the Digital Revolution More Sustainable and Inclusive?

Abstract: We are currently unsure whether the digital revolution will herald the end of work or whether it represents another evolutionary phase, similar to previous industrial revolutions. However, the changes in work brought about by AI and automation are already exerting negative impacts on both employment and people's income. In this context, this article delves into the potential role of social law in mitigating these adverse effects. With this objective in mind, the author advocates for a departure from our current model of social inclusion in favour of broader income support mechanisms. The author expounds on how a universal basic income could contribute to steering the digital revolution with the aim of facilitating a more inclusive and effective transition into the digital era.
Keywords: digitalization, income, social law, universal basic income, work

Introduction

Throughout history, concerns about job losses to technology have been recurrent. In recent years, these concerns have gained traction, as many academics and analysts argue that 'this time is different'. AI and robotics are now seen as threats not just to routine jobs, but also to non-routine and even creative occupations. The number of 'techno-pessimists', who predict a bleak future with unprecedented mass job destruction, is rising (Brynjolfsson & Mcafee, 2014; Sung, 2018). Among them are Frey and Osborne (2017, p. 254), whose prediction that 47% of total US employment is at risk of automation (over an unspecified number of years) went viral on the web, creating much concern.

However, there are still some 'techno-optimists', who argue that automation will merely transform jobs rather than entirely replace them (De Backer et al., 2018; Jäger et al., 2018). According to these optimists, predictions about the end of work fall into the 'lump of labour fallacy', which falsely assumes that there is a fixed amount of work in an economy. They argue that techno-pessimists fail to consider that technology is creating new jobs and professions (for instance, big data architects or computational linguists) and that many jobs cannot be wholly automated.

Currently, it is challenging to determine whether we are approaching the end of work or merely another evolution akin to previous industrial revolutions. However, some pessimistic predictions are manifesting:

1. While an era of technological unemployment may not be imminent, structural unemployment caused by automation is evident. This shift is not as pronounced when examining unemployment rates alone, but becomes evident when considering the decrease in working hours, particularly in developed countries. This trend is accentuated by the increasing casualization of work; involuntary part-time, fixed-term contracts and on-call jobs are on the rise (Susskind, 2022).
2. The availability of employment opportunities is also impacted by growing skill mismatches. Technology often demands new skills that many displaced workers lack (Guo et al., 2022).
3. To date, automation has largely amplified work pace and surveillance. Algorithmic management paves the way for aggressive managerial tactics, leading to worsening work conditions, including wage reductions (Adams-Prassl, 2022). A corresponding adverse effect arises from competition between humans and robots, where humans accept inferior working conditions to deter employers from automating processes.
4. While automation boosts productivity and profits, the distribution of the wealth generated from it has been lopsided (Prettner and Strulik, 2020). Major corporations are reaping the primary benefits, exacerbating income inequality (Eubanks, 2018).

All these factors undoubtedly have a detrimental effect on workers' incomes. This leads to heightened economic insecurity for many, exacerbates inequality and social injustice, and restricts freedom.

The purpose of this paper is to explore the role that social law might play in mitigating the effects of automation, with the goal of fostering a more inclusive and effective digital transition. To this end, I posit that our current, long-standing, work-centred model of social inclusion should be replaced by broad-based income support mechanisms such as a universal basic income. I will argue that introducing such a basic income could be pivotal, not only in providing a social safety net, but also in encouraging dignified and more productive employment in the era of digi-

tal transformation. I will then delve into the political feasibility of such basic income proposals in my conclusions.

1. Moving beyond the 'work–social insurance' combination

In response to the challenges presented by the digital revolution, there is a pressing need to redefine the predominant twentieth-century model of social inclusion. Historically, particularly in developed countries, the state has perceived work as the primary avenue for social inclusion. Engaging in productive employment has been both a right and a duty. Consequently, social protection has predominantly targeted those incapable of working, often through contributory and conditional social insurance schemes (Dumont, 2022). Reciprocity remains central to welfare interventions, with most schemes requiring beneficiaries to work or actively seek employment in exchange for benefits. Especially in developed nations, non-contributory social assistance typically supplements social insurance, serving to bridge its shortcomings; it compensates for the state's inability to guarantee employment for all. In essence, the model for social inclusion is heavily anchored around the working individual.

This model was effective during eras dominated by standard industrial employment (with stable, full-time positions). However, it has proved glaringly insufficient in addressing the nuances of open and flexible economies, particularly those transformed by the digital revolution. Today, it is evident that employment is not universally accessible, despite concerted efforts by numerous national governments. Employment strategies, workfare policies, and public work programmes often fall short of their objectives. More often than not, they inadvertently push individuals into unstable employment, hindering their job search or training opportunities (see below). Concurrently, social protection systems are failing to shield a growing number of vulnerable individuals. Deficiencies in coverage, exacerbated by poor coordination among fragmented social security schemes, are becoming more pronounced. This primarily affects individuals from the middle class, who often do not qualify for social assistance but cannot afford social insurance either. The pandemic revealed the vast numbers exposed to economic downturns, with many inadequately covered by either social insurance or assistance schemes. This group includes independent contractors, individuals who have resigned voluntarily, first-time jobseekers, and precarious workers with limited contributory records.

A paradigm shift in our approach to social inclusion is imperative. The focus should shift from work – and wage-centric strategies to broader income support schemes, where basic security is not tied to employment status. John Rawls, in his later writings, advocates for a 'social minimum' to be universally provided, irrespective of contributory history (Rawls, 2001). True freedom – enabling individuals

to make informed decisions about their lives and achieve comprehensive social, political, and moral inclusion – can only be realized through ensuring income security.

2. Which instruments? Guaranteed minimum income v. universal basic income

Income support can manifest through various mechanisms: negative income tax, tax credits, subsidized food and vouchers, guaranteed jobs, employment and workfare policies (Gentilini and Grosh, 2020). However, two of the best-known non-contributory tools designed to combat poverty are the guaranteed minimum income (GMI) and the universal basic income (UBI). GMI offers means-tested and conditional benefits aimed at providing working-age households with adequate income to stave off poverty. In contrast, UBI is extended unconditionally to all members of a particular political community. Thus, it is not dependent on an individual's income level, employment status, or other metrics typically used to determine eligibility for social security benefits.

While variations of GMI are prevalent across Europe and globally, UBI remains a fascinating theory. It has only been implemented to some extent in places like Alaska and through certain local and temporary pilot programmes (e.g. Finland, the Netherlands, Scotland, Ontario, South Korea, and several cities). Yet these pilot initiatives have not provided decisive evidence supporting or refuting the merits of UBI, primarily because many were not appropriately structured to address relevant concerns about basic income policies or to corroborate the benefits that UBI proponents espouse (Chrisp and De Wispelaere, 2022).

The well-known Finnish experiment is a case in point (Hiilamo, 2022). Targeting only those on unemployment benefits, it existed within the ambit of an already generous social security system. A glaring shortcoming was its pronounced emphasis on 'activation', mandating recipients to accept job offers or risk benefit withdrawal. Such conditionality deviates from genuine basic income policies and essentially compromised the experiment's outcomes. Similarly, the Alaska Permanent Fund does not epitomize true UBI. The distributed sum, although spread evenly among the populace, does not satisfy basic needs (constituting no more than 7% of an individual's annual income) and lacks consistency (Zelleke, 2012). In contrast, the Ontario Basic Income Pilot Project closely mirrored UBI principles; the sole deviation was reducing the benefit by 50 cents for every dollar earned via employment. Yet this did not negate the results. The pilot demonstrated tangible improvements in participants' physical and mental health and overall well-being, without inducing mass job abandonment. On the contrary, most beneficiaries continued working; a minority scaled back their working hours for family care or training pursuits (McDowell & Ferdosi, 2020).

Despite the Ontario pilot's revelations, the majority of experiments which have been conducted remain inconclusive regarding the paradigm shift under discussion, as could be anticipated. Thus, the discourse around UBI remains predominantly theoretical, although insights supporting UBI can be gleaned from other methods of distributing monetary support, many involving GMI. These experiences underscore how, in contrast to the universal and unconditional payments which UBI proposes, means testing and the imposition of conditions often lead to negative incentives to work, potentially fostering deceptive behaviour (such as engaging in simultaneous undeclared work); steep administrative costs and consequent burdens on claimants; the stigmatization of recipients, which jeopardizes social cohesion; low take-up rates in many countries as a result of stigma, complexity, fear, and even ignorance; and pressure on people to take precarious and low-paid jobs that are often not in line with their skills (Standing, 2017, pp. 193–196; Van Parijs & Vanderborght, 2017, pp. 7–9).

Undoubtedly, arguments against UBI are numerous. Foremost is the seeming paradox of allocating money to everyone and not solely to the poor, unlike with GMI. However, there is a long history of strong moral and economic arguments which can provide justification for this. UBI, more than GMI, serves as an instrument to actualize social justice. As Thomas Paine articulated in the late 18th century, UBI offers a means to equitably distribute profits that come from communal resources (Paine, 1797). Contemporary economists like Guy Standing emphasize UBI's function in compensating everyone for their contribution to the global economy (Standing, 2017, pp. 44–45). Just from being active on the internet and social networks, people bolster the earnings of big tech. We all contribute to the creation of a kind of-collective intelligence that is exploited for the profit of a few. Philippe van Parijs has intriguingly assumed that we owe a great deal of what we earn to the inventiveness of other people, including our predecessors, more than to our own efforts (so-called social inheritance) (Van Parijs & Vanderborght, 2017, pp. 4–28). We also owe it to external circumstances, such as the school we attended, the boss and the people we had the chance to meet, knowledge of the right first language, and so on. Such variables support the case for redistributing a portion of our 'unmerited' earnings within our political community.

In playing its distributive function, UBI is able to deliver positively to society, the labour market, and the economy. From a social perspective, its universality amplifies solidarity, entailing a sense of belonging to a community and overcoming the social stigma of subsidies for those living on welfare. It also realigns intra-household power dynamics by channelling funds to individuals rather than only to breadwinners. Concerning labour markets, UBI's non-selectivity and its obligation-free structure empowers individuals, boosting their capacity to make free decisions. This empowerment is pivotal in counteracting the adverse ramifications that minimum-income schemes typically inflict upon labour markets. Means testing gives

disincentives to work: it is not convenient to take up jobs when there is a unit-by-unit replacement of benefits within the total household income, which can result in net income reductions when job-related expenses (e.g. commuting and meals) are accounted for. Furthermore, accepting a job may also not be convenient, considering the complex administrative procedures to re-claim benefits once the worker becomes unemployed again. Conversely, if the benefit is for everyone, independently of the level of household income, people are more likely to accept jobs without fear of losing the benefits; this avoids the so-called unemployment trap. Its opposite, the employment trap, is nullified by the unconditional nature of UBI – without any employment prerequisites or clauses regarding availability on the labour market (Van Parijs & Vanderborght, 2017, p. 64). Individuals can refuse or quit bad jobs and can decide to look for another job or invest in skill enhancement. Moreover, they might opt for unpaid yet productive engagement within their home or community. Young people, upon finishing their education, are not constrained to gaining an income; they can explore unpaid internships or further education.

From economic and public-finance perspectives, a basic income is simpler, cheaper, and faster to manage than a minimum income or other means-tested and conditional tools, so entail huge savings in state budgets (Dumont, 2022, pp. 304–308). It boosts the purchasing power of people on low incomes, with a positive impact on aggregate demand and thus GDP. This, though, is the main argument against UBI: as one can easily imagine, this revolves around its economic viability. The estimates are staggering, and emphasize its utopian nature. However, perhaps this problem should not be overestimated, as it could be temporary; in the medium to long run, UBI has the potential to pay for itself due to the economic growth it could stimulate. Additionally, improvements in people's health and well-being associated with UBI, as evidenced by the Ontario pilots, could reduce spending on health and social services (Ferdosi et al., 2020).

Nonetheless, researchers have presented several ways to ensure a UBI's sustainability (Ter-Minassian, 2020), including savings on the administration of means-tested programmes, cutting regressive policies (such as fossil fuel incentives), introducing new taxes (such as a carbon tax, a land value tax, wealth and inheritance taxes, a tax on financial transactions, or a tax on robots), and primarily, increasing income tax rates for each income bracket. Such an increase would likely be marginal in developed countries (around 2–3%) and considerably higher in developing countries, given their tendency towards low taxation even for high incomes.

A significant dilemma concerns the possibility of utilizing the resources allocated to existing public assistance and social insurance programmes. Should the current welfare budget be distributed across the population to ensure a basic income or be added to it? In the former scenario, many individuals might end up worse off, as they would receive less income than they currently do through welfare benefits. Adding current welfare benefits to a basic income could prove too costly and pos-

sibly excessively generous, not aligning well with the goals of UBI. Hence, it seems more appropriate to consider a partial basic income, set below the poverty line, which could be supplemented with certain welfare benefits (such as state pensions and housing benefits). In other words, as proposed by some, it should function as an unconditional safety net, replacing only existing benefits that are lower than it, especially social assistance programmes. It could be then complemented by insurance benefits and other conditional non-contributory supplements (Van Parijs & Vanderborght, 2017, pp. 167–170).

This combination is a way to achieve truly universal coverage, in terms of liberating people from need. Unless its amount is set above the poverty line, which might render it unsustainable for public budgets, a basic income alone is insufficient to ensure that the neediest individuals receive the support required to address their wider range of vulnerabilities and necessities. It is not worth establishing a level of UBI benefits based on individual need, as this would convert UBI into a means-tested benefit, thereby forfeiting the advantages, primarily its simplicity, that its universality affords. However, this does not preclude the possibility of complementing it with more tailored interventions for those in more dire circumstances.

3. A new paradigm for social inclusion: UBI and the right to work

There are numerous arguments to suggest that UBI could be the most suitable welfare programme to effectively support people's income, especially in light of the digital revolution. Building on these considerations, we can now delve into the aforementioned paradigm shift for social inclusion. As previously emphasized, governments tend to emphasize work (at any cost) as the means to promote social inclusion, considering social security as a residual option only for those unable to xwork or to find employment despite their efforts. This underlying assumption places great importance on work, as it not only provides individuals with their livelihood but also bestows essential values such as a sense of accomplishment, belonging to society, freedom, self-esteem, and the approval of others. In essence, it upholds human dignity, which is often denied to those dependent on welfare and can lead to feelings of humiliation. Job creation programmes and workfare policies have been grounded in this strong preference for work, operating under the assumption that any form of employment is preferable to relying on subsidies. Nevertheless, these programmes have historically failed to yield significant results. Predictably, the employment they have offered has often been temporary, characterized by low wages and unfavourable working conditions that frequently did not align with the skills and aspirations of the workers. This situation is very far from the self-esteem and freedom that work is meant to provide. Such programmes ended up being as degrading as living on welfare, resembling a form of coerced employment or forced labour. From an economic

standpoint, conscripting poorly motivated workers under unfavourable employment conditions often resulted in negative net productivity (Standing, 2017, pp. 203–207; Van Parijs & Vanderborght, 2017, pp. 46–48).

The importance of the values associated with work is undeniable. However, what seems increasingly inappropriate is the persistence of a 20th-century work-centric ethic that asserts that productive employment is the only acceptable means of contributing to society – especially when such employment fails to provide an adequate income, leading to frustration and humiliation. This stance lacks support from a suitable interpretation of the right to work. A glance at the definition outlined in Article 23(1) of the Universal Declaration of Human Rights suffices: 'Everyone has the right to work, to free choice of employment, to just and favorable conditions of work, and to protection against unemployment.' Hence, the right to work must be guaranteed, based on two conditions: firstly, a free choice of employment. This entails the right to have a job rather than facing unemployment, obliging governments to do their utmost to promote or create employment. It also encompasses the freedom for individuals to select their occupation without constraints or coercion. Given the growing significance of unpaid work activities in the economy and in society, a broad interpretation of 'employment' should encompass domestic work within households and voluntary work (Collins, 2017, p. 31); insisting solely on market-paid activities as being work seems illogical. As Standing (2017, p. 157) highlights, a parent caring for his/her children is performing as much 'work' as someone being paid to care for another's child. Furthermore, new work models arising from digital technology, where distinctions between paid and unpaid work activities are becoming blurred, are on the rise (contributing to the blurring of traditional boundaries between paid and non-paid work activities). The second condition is the right to just and favourable conditions of work, which encompasses the right to non-exploitative work, fair wages and suitable working conditions (such as reasonable working hours, appropriate leave, and a safe work environment).

Some scholars have cautioned against a tension which exists between these two aspects of the right to work (Collins, 2017, p. 24). More precisely, this tension lies between the government's duty to ensure employment opportunities, often referred to as the 'quantitative dimension' of the right, and the obligation to ensure decent working conditions, which can be labelled as its 'qualitative' dimension. As already emphasized, when employment strategies are designed to compel individuals into work, the likely outcome involves a reduced unemployment rate accompanied by precarious, low-paid, and poor-quality jobs. This situation can lead to distortions in the labour market, as the influx of inexpensive labour prompted by employment programmes exerts downward pressure on wages and working conditions. Moreover, coercing people into accepting jobs they dislike and/or are not proficient in does not contribute to the development of a healthy economy or productive businesses.

To maintain favourable working conditions and promote the necessary re-skilling demanded by the digital transformation of work, the 'quantitative' dimension of the right should be detached from the unrealistic goal of full employment. Instead, the focus should shift towards strategies that enhance people's employability and efficiency in the labour market through active labour-market policies. Conditions should also be relaxed, in line with the proposed broad interpretation of the term 'free choice of employment'. People should have the freedom to wait for fulfilling job offers or to prioritize training or activities outside the marketplace over undesirable paid work. A rewarding job performed under decent conditions is the only type of work with the potential to bolster the freedom and self-esteem it is intended to provide; dignity should not only be linked to the traditional notion of work carried out for pay in the marketplace. Household work, community service, training and education, and even leisure can serve as sources of self-esteem and dignity. UBI can offer substantial support for the realization of such a right to work. As previously mentioned, regular payments can provide people with the necessary time to search for new employment, engage in education and training, or even participate in household work. UBI can also enhance the 'qualitative' dimension of the right to work: when individuals have the power to reject undesirable jobs, their bargaining position vis-à-vis employers becomes stronger. This is likely to result in higher wages and improved working conditions.

Here a second significant counterargument against UBI arises: recipients of unconditional cash payments might opt to remain inactive rather than participate in work or training. However, this notion is not substantiated by research; findings from pilots and even common sense suggest otherwise. For instance, as observed in a research paper by Jones and Marinescu (2022), Alaskans work at roughly the same rate as in comparable states; part-time employment even witnessed a 1.8% increase. The explanation is quite straightforward: welfare can only provide payments to meet individuals' most basic needs. If they desire more, as they typically do, or seek the self-fulfilment that work can offer, they must engage in employment. Even when individuals are not motivated by income augmentation, they are likely to participate in productive activities in a broader sense, such as education, childcare, and community engagement, which also benefit society and the economy.

Conclusions: Primarily a question of political backing

The introduction of a basic income presents itself as a potential solution to address the challenges brought about by AI and the automation of work; it could even be the sole solution if predictions regarding mass unemployment become true. It undoubtedly stands as a revolutionary and potentially utopian idea. Yet history has witnessed the realization of numerous revolutionary policies that once seemed

impossible. Consider, for instance, the first compulsory old-age social insurance programme implemented in Germany in 1889, devised by Chancellor Otto von Bismarck.

Arguments against UBI are often rooted in ideological and preconceived viewpoints. Affordability emerges as one of the strongest counterarguments, yet it is a hurdle that can be overcome, particularly if we contemplate a partial basic income coupled with some means-tested welfare benefits. In essence, affordability is primarily a political issue. Politicians have traditionally displayed limited interest in advocating for UBI policies, possibly because the positive outcomes are observable only in the long term, extending beyond the scope of the next election cycle. Hence the benefits need to be convincingly presented to the public. Taxpaying voters typically exhibit a greater propensity to accept welfare when conditions are attached. However, surveys and analyses indicate that UBI gained unprecedented traction in the aftermath of the pandemic: the substantial unconditional payments provided by governments to alleviate the economic shock showcased some of UBI's advantages. Surveys and analyses conducted during the pandemic revealed that many individuals who were not previously in precarious situations and whose income was jeopardized by pandemic-induced shocks shifted their preference towards the notion of a universal social safety net encompassing the entire population (Nettle et al., 2021). A YouGov poll conducted in late 2020 found that approximately two-thirds of respondents across six European countries were in favour of UBI (We Move Europe, n.d.). However, as the acute phase of the pandemic ended and economic activities went back to normal, support for UBI waned.

This decline is somewhat expected, as taxpaying voters are more inclined to endorse welfare with conditions and tend to favour existing social policy arrangements over untested new ones (Weisstanner, 2022). Consequently, the pandemic relief efforts themselves did not transition into sustained basic-income schemes. Nevertheless, the global experience of COVID-19 could potentially make the eventual adoption of UBI more plausible. This moment in history might be opportune for taking a decisive step in this direction, especially considering that while pandemics are rare, similarly disruptive impacts on employment could arise from the digital transformation of work.

However, it is crucial to recognize that a 'one size fits all' approach is unsuitable for UBI, given the vast diversity in economies and welfare programmes across countries. Future research, tailored to the specific characteristics of each state, is essential for refining the optimal design of UBI, encompassing factors such as benefit levels, financing mechanisms, and its interaction with other welfare benefits. Experiments may also be significant, but they should be meticulously constructed so as to address the questions and doubts surrounding UBI. As advocated by Standing (2017, pp. 276–282), a pilot programme should be devised to challenge the hypotheses and biases frequently raised against UBI. It should incorporate key elements to

circumvent the shortcomings encountered in previous pilot initiatives; for instance, it should be universally and sufficiently substantial, extended for an adequate duration without alteration once launched, and maintain a relatively consistent sample. Additionally, random control groups should be used.

Last but not least, a robust argument in favour of UBI merits serious consideration. Given the looming threat of automation, do we have superior alternatives? Driverless cars and delivery robots are undergoing extensive testing in California, and they are set to replace taxi drivers, Uber drivers, and similar roles. The grim reality is that widespread labour displacement is imminent. Thus swift action is imperative, and we need to act promptly before it is too late.

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From Discrimination to Dismissal: Navigating Obstacles on the Path to Workplace Justice

Abstract: This article explores the challenges faced by employees in the Czech Republic when seeking legal redress in cases of discrimination and unfair dismissal. It emphasizes the importance of accessible legal recourse as a means to rectify individual grievances and reinforce equitable employment practices. In the context of discrimination, the article discusses challenges such as low awareness of anti-discrimination rights and the ancillary nature of sanctions. Recommendations include aligning the Anti-Discrimination Act with the Civil Code, empowering NGOs or the Ombudsman to initiate lawsuits in the public interest, and raising awareness among potential victims. In the section on unfair dismissal, the article outlines the complex process involved in disputing terminations from an employee's perspective. It discusses obstacles such as complex, costly, and lengthy legal procedures and the requirement for reinstatement. These challenges contribute to the low number of employment lawsuits in the Czech Republic. Recommendations for improvement include enhancing the visibility of court actions, providing free or subsidized legal advice, shifting the focus of lawsuits towards monetary compensation, promoting mediation, and expediting proceedings. The article identifies common challenges in discrimination and unfair dismissal cases in the Czech Republic, highlighting the need for reforms to improve access to justice, reduce financial barriers, expedite legal proceedings, and enhance the dissuasive impact of remedies. These reforms are seen as essential for creating a fair and equitable workplace environment for all employees in the country.
Keywords: discrimination, judicial redress, labour law, unfair dismissal

Introduction

In the vast legal landscape that governs the relationships between employers and employees, one right stands as a cornerstone upon which the principles of fair-

ness, dignity, and justice are built: the right to judicial redress (Pichrt, 2021, p. 322). This right plays a significant role in the assessment of the power imbalance between employers and employees (Hardy, 2021, p. 134; Waas, 2021, pp. 225–226). This fundamental entitlement takes on heightened significance in situations of discrimination and claims for unfair dismissal, circumstances that often leave individuals not only without their livelihood but also facing a profound violation of their basic human dignity. These instances, fraught with a profound imbalance of power, underscore how it is essential to have an accessible legal recourse (Husseini & Kopa, 2021), which is a mechanism that not only serves to rectify individual grievances but also strengthens the legal architecture that supports equitable employment practices and a fair workplace environment.

The intricate interplay between employment opportunities and legal safeguards has never been more pronounced than in our era of global connectivity and complex, multifaceted work arrangements. Within this dynamic, employees can find themselves in vulnerable positions, particularly when confronted with unfair dismissal or discriminatory practices that damage their well-being and future employment prospects. Such actions, often concealed under a veneer of corporate decision-making, not only shatter individual careers but also undermine the societal values that promote inclusivity, respect, and equality in the workplace.

In this area, the legal system plays a paramount role as the ultimate arbiter of justice, stepping in to correct the inequities that individuals cannot combat alone. The courts serve as a place where aggrieved employees can challenge the might of corporate entities and seek remedies that the internal mechanisms of the workplace may not provide. This judicial oversight is crucial, for without it, countless individuals would be left to the mercies of opaque administrative processes and potential corporate malpractice. However, the mere provision of this right within statutory frameworks is not an end in itself; it is the beginning of a complex and often challenging journey that requires the navigation of legal nuances and procedural intricacies (Tomsej, 2023a, pp. 69–119). Herein lies the heart of this discussion: the necessity to not only preserve the right to judicial redress but also to ensure its accessibility, its effectiveness, and its responsiveness to the evolving challenges of the modern workplace (Tomsej, 2020, p. 45).

This article will concentrate on exploring the boundaries of judicial redress, particularly through the lens of the Czech Republic, a nation where the incidence of lawsuits concerning employment and discrimination remains notably low.[1] The first section of the article will look at discrimination lawsuits, highlighting and analysing several frequently debated impediments that claimants encounter in their pursuit of justice. The next section will move to an examination of claims for unfair dismissal,

1 The Czech Republic is surely not the only country suffering with this problem; similar situations can be seen in many other countries. See e.g. Punta (2021, p. 248).

dissecting the potential barriers that may impede them and exploring the nuances that make these cases particularly complex in the Czech legal system. The concluding part of the article will synthesize the discussions from the preceding sections, offering a variety of insights drawn from the analysis, and will present overarching conclusions. These reflections will not only underscore the critical aspects of the current judicial approach but will also offer proposals for enhancing the accessibility and effectiveness of legal remedies in employment disputes within the Czech Republic and potentially beyond.

1. Discrimination

In the Czech Republic, the legal framework for discrimination lawsuits is primarily governed by the Anti-Discrimination Act. This 2009 act must, however, be read together with the 2014 Civil Code, which provides more detail for awarding damages, including compensation for non-pecuniary damage (Pichrt, 2021, pp. 580–581). Under Section 10 of the Anti-Discrimination Act, the primary means of compensation for discrimination cases is an injunction to cease discriminatory practices and provide rectification. A second layer consists of the award of reasonable compensation, which can often take a non-monetary form, such as an apology (Tomsej et al., 2023, pp. 206–215). Monetary compensation is also possible under the Civil Code, although non-pecuniary damages can only be claimed as a subsidiary remedy. The Anti-Discrimination Act (Section 10(2)) specifies that if none of the available forms of redress appear adequate, victims of discrimination have the right to seek monetary compensation for non-pecuniary damages, particularly in cases involving significant harm to the victim's reputation, dignity, or social status due to discrimination (see also Tomsej, 2022). While the wording of this provision might imply that monetary compensation is reserved for exceptional cases, recent case law tends to favour this over non-monetary satisfaction (Judgment of the Czech Supreme Court 2020). Moreover, prevailing opinions suggest that the Act should be interpreted in line with the Civil Code, which gives preference to monetary compensation for such claims (Pichrt, 2021, pp. 580–581).

The determination of the amount of compensation for non-pecuniary damages is left to the discretion of the judges, and there are no prescribed minimum or maximum awards or guidelines for calculation. Research by the Czech Ombudsman suggests that typical awards range between EUR 1,000 and 4,000. However, monetary compensation was only awarded in 17 out of 59 cases where it was claimed for (Office of the Public Defender of Rights, 2020). According to the same research, the number of discrimination claims raised before courts remains low; in the period between 2015 and 2019, only 90 lawsuits were observed by the Ombudsman (Office of the Public Defender of Rights, 2020).

Whether sanctions under the Anti-Discrimination Act are effective, proportional, and dissuasive is a cause of increasing concern. Both the Racial Equality Directive and the Employment Equality Directive mandate that Member States ensure that sanctions for violating principles of non-discrimination are not only effective and proportionate but also sufficiently dissuasive.[2] Furthermore, case law from the Court of Justice of the European Union has established additional criteria, specifically relating to procedural effectiveness and equivalence.[3] In a previously published paper, I highlighted where the enactment of these mandates could be significantly enhanced, particularly in the contexts of the Czech Republic, Slovakia, and Poland (Office of the Public Defender of Rights, n.d.). The existing legislation which enacts the ancillary nature of these sanctions can be one of the key factors; to address these issues, the Czech Ombudsman (Office of the Public Defender of Rights, 2018) recommended amending the Anti-Discrimination Act to replace the provisions on this subsidiary nature with a reference to the Civil Code, but this change has not been implemented. As regards effectiveness, the Ombudsman has recently put forth a set of recommendations for lawyers representing victims of discrimination, with a view, among other things, to bolster the effectiveness of discrimination lawsuits. This guidance particularly encourages the pursuit of monetary compensation, advocating the use of strategic litigation to challenge the notion that such claims are merely subsidiary.

While it could be contended that the language of the Anti-Discrimination Act is a primary obstacle to its enforcement, the problem seems to be more pervasive. Awareness of anti-discrimination statutes appears to vary significantly across society. Ironically, those most susceptible to discrimination are often the least informed about the rights they possess and the procedures available for redress, rendering them more defenceless. For certain bases of discrimination, such as disability or sexual orientation, victims might refrain from seeking justice due to apprehension over negative media coverage and the potential public exposure of their status, which could result in further stigmatization. Regrettably, there appears to be a lack of initiatives to address this issue (Tomsej, 2022, p. 63). One viable approach to enhance the enforcement of anti-discrimination laws could be to empower NGOs or the Ombudsman to initiate an *actio popularis*, lawsuits filed in the public interest. Although there have been two proposals advocating for this measure in recent years, neither has been successful (Tomsej, 2022, p. 65).

2 See also the UN Convention on the Elimination of All Forms of Racial Discrimination, Article 6; the UN Convention on the Elimination of Discrimination against Women, Articles 2(b) and 2(c); the UN Convention on the Rights of Persons with Disabilities, Article 13; the European Convention on Human Rights, Articles 1 and 13; the Treaty on the European Union, Article 19; and the Charter of Fundamental Rights of the European Union, Article 47.

3 See Judgments of the Court of Justice of the European Union 2013, 2014, 2015, January 2016, October 2016, and 2017.

The ongoing challenges in the enforcement of the Anti-Discrimination Act in the Czech Republic underscore the pressing need for systemic reform. The current legislation's ambiguity, particularly concerning the subsidiary nature of monetary compensation for non-pecuniary damages, contributes to its ineffectiveness. Furthermore, the lack of awareness in society about anti-discrimination rights and procedures exacerbates the vulnerability of those the Act is designed to protect. To address these shortcomings, legislative amendments are crucial, particularly in aligning the Anti-Discrimination Act with the Civil Code to ensure clarity in compensation claims. Additionally, creating a more informed public through awareness campaigns and educational programmes could empower potential victims with the knowledge they need to pursue justice. The role of NGOs and the Ombudsman should also be increased, potentially through allowing an *actio popularis* to advocate more forcefully on behalf of those facing discrimination.

2. Unfair dismissal

The termination of an employment relationship can be a contentious issue, open to challenge by either the employer or the employee (Pichrt, 2021, p. 322). This section looks at the intricacies of the process surrounding unfair dismissal disputes, with an emphasis on the employee's standpoint, although it can be noted that similar principles apply in less common instances where employers contest a termination initiated by employees (Labour Code, sections 69–72). Both employers and employees have the right under labour laws to challenge the termination of employment.

When an employee disputes a dismissal, they must first assert to the employer their intent to continue the employment relationship and request the allocation of work (Labour Code, section 69(1)). It is imperative for subsequent legal proceedings for the employee to have evidence of the employer's receipt of this notification to prove that this procedural condition was fulfilled. If this step is not taken – for instance, if the employee disagrees with the dismissal but prefers finding a new job over reinstatement – then they will forfeit any claims to salary compensation (Tomsej, 2023a, pp. 169–171). An employer can respond by retracting the termination or proposing an out-of-court settlement, potentially with a severance package (Tomsej, 2023a, pp. 169–191). If a resolution is not reached amicably, the employee must file a lawsuit within two months of the employment termination (Labour Code, section 72). The claim should detail the reasons the dismissal is believed to be invalid, provide evidence, and request that the termination notice is declared invalid. There is a nominal fee for the lawsuit submission.[4]

4 Currently CZK 2,000, which is approximately EUR 40.

After evaluating the lawsuit, the employer's response, and reviewing any proposed evidence, the court will issue a verdict. If the court rules in favour of the employee, it will declare the termination invalid, and the employer is obliged to reinstate the employee (Tomsej, 2023a, pp. 169–171). Complications can arise if the position has been eliminated or filled, or if the employee has secured new employment. Under such circumstances, a mutual agreement is typically sought, as neither party will prefer to continue the employment relationship under strained conditions.

Besides job reinstatement, an employee insisting on continued employment is entitled to compensation for the period they were effectively unemployed due to the unfair dismissal (Tomsej, 2023b, pp. 35–67). This compensation, however, is determined in separate proceedings, following the resolution of the dismissal's validity. If the employer refuses to pay, the employee must pursue a new legal claim for compensation, keeping in mind the three-year statute of limitations. The court has the discretion to limit compensation, potentially reducing it to a sixth of average monthly earnings, considering factors like alternative earnings during the dispute period. Czech law is, however, very restrictive in the exercise of this option.

The annual number of employment lawsuits filed in the Czech Republic remains remarkably low, with fewer than 2,000 cases recorded each year (Ministry of Justice, 2022). This statistic is particularly striking when considering the nation's sizable workforce of over 5 million employees, which underscores the relatively stable and harmonious labour relations within the country. The low number of employment lawsuits filed in the Czech Republic can be attributed to a combination of factors that collectively create a significant deterrent for employees seeking legal redress in the workplace (Pichrt et al., 2017, pp. 6–7). These factors encompass a range of legal, financial, and procedural challenges, making the pursuit of employment-related litigation a less attractive option for workers. First and foremost, one of the key reasons for the low number of lawsuits is the difficulty of accessing the court system; navigating the complex legal process for employment disputes can be a daunting task for the average employee. The need to adhere to strict protocols and a short time limit can discourage many individuals from initiating legal action. This complexity may discourage employees from pursuing their grievances through the legal system, especially when they lack legal expertise or resources.

Another significant barrier to the initiation of lawsuits is the high cost associated with legal proceedings. While it was noted above that the court fee is not prohibitively high, the total costs, including lawyer fees, can significantly exceed an employee's budget. Moreover, Czech procedural laws contain an additional financial consideration – the principle that whoever wins in a lawsuit is eligible for compensation for the costs of the proceedings, including legal fees. This provision can act as a considerable deterrent for employees contemplating legal action.

The duration of legal proceedings is another significant factor. According to available statistics, it often takes more than a year for a first-instance court to reach

a decision in a labour law case; when considering the possibility of appeals, the entire legal process can easily extend to three years or more. This prolonged period of legal uncertainty can leave employees feeling insecure about their career prospects for a long time. The emotional toll of protracted litigation may also discourage individuals from pursuing their cases, with some opting to seek new job opportunities instead. Furthermore, the requirement for employees to request a return to the workplace from which they were fired can act as a disincentive; although part of the legal process, this may not always align with an employee's preferences or interests. It may discourage individuals from pursuing legal action, particularly if they have little desire to return to an environment where they faced unfavourable conditions or discrimination.

The low number of employment lawsuits in the Czech Republic is the result of a combination of barriers and challenges that deter employees from seeking legal remedies in the workplace. The difficulty of accessing the court system, high costs, the limited availability of legal support, prolonged legal proceedings, and the requirement for reinstatement at the workplace all contribute to a system where many employees choose alternative means to resolve their disputes. These factors highlight the need for reforms and improvements in the accessibility and affordability of the legal process for employment-related issues, ensuring that employees have a fair and equitable means of addressing their concerns. To address these challenges, a multifaceted approach can be adopted to create a more accessible and efficient system for resolving disputes. One significant improvement could involve enhancing the visibility of court actions and legal procedures related to such disputes (Vosko et al., 2021, p. 165). This can be achieved through comprehensive awareness campaigns, easily accessible online resources, and clear, user-friendly guidelines on how to initiate proceedings. By making information more transparent and readily available, individuals would be better informed about the process, thus fostering greater understanding and confidence in seeking legal redress when necessary.

Moreover, a crucial step in improving access to justice for employees could involve extended access to free or subsidized legal advice and assistance. Many potential litigants are deterred by the high costs associated with hiring legal representation; if employees were able to access competent legal counsel at little to no cost, they would be more inclined to pursue their grievances through the legal system, thus levelling the playing field and ensuring that justice is accessible to all, regardless of financial means.

Another significant reform could centre on modifying the legal framework to shift the focus of employment lawsuits. Currently, the system includes the possibility of reinstating employees to their previous positions, which may not always align with their preferences or with practical considerations. To address this, the legal system could be adjusted to prioritize monetary compensation for aggrieved employees. This adjustment would streamline the legal process, reducing its complexity and

allowing for quicker resolutions, making the system more attractive to employees seeking redress.

Expanding the options for mediation and out-of-court settlements is another essential aspect to improve the situation. Mediation can offer a quicker and less adversarial route to resolving disputes, and employees should be encouraged to explore this alternative before resorting to litigation. Promoting mediation and settlement negotiations could lead to swifter resolutions, reducing the emotional toll on both parties and alleviating the burden on the court system.

Lastly, increasing the speed and efficiency of legal proceedings is crucial. Statistics indicate that it takes more than a year for a first-instance court to decide on a labour law case, with the potential for a longer timeline due to appeals, creating significant uncertainty for employees. Streamlining the legal process, setting clear timelines for resolution, and implementing measures to expedite proceedings could enhance the overall effectiveness of the system considerably. By improving visibility, providing accessible legal advice, shifting the focus of lawsuits, promoting mediation, and increasing the speed of proceedings, the Czech Republic can create a legal framework that encourages employees to seek redress when faced with workplace issues. These reforms would not only empower individuals to assert their rights but would also contribute to a more fair and harmonious labour environment within the country.

Conclusions

In examining two critical aspects of employment law in the Czech Republic, discrimination lawsuits and unfair dismissals, it becomes evident that there are noteworthy similarities in the challenges and limitations faced by employees seeking redress within the legal framework. Both kinds of case are governed by distinct legal provisions in the Czech Republic. In discrimination cases, the Anti-Discrimination Act and the Civil Code provide a basis for awarding damages, including non-pecuniary damages, while in unfair dismissal cases, labour laws outline the procedures and remedies available to employees. A common thread in both areas is the issue of access to justice. Employees often encounter difficulties in navigating the complex procedures and protocols involved in pursuing litigation. Whether it is the intricate process of filing a discrimination complaint or the requirements for contesting an unfair dismissal, the complexity of the legal system can act as a significant deterrent.

Financial barriers also feature prominently in both areas. High legal costs and the lack of affordable legal representation can discourage individuals from pursuing their claims. In discrimination cases, the uncertainty regarding the possible amount of monetary compensation further compounds these financial concerns. Similarly, employees who initiate unfair dismissal claims may face the risk of bearing the de-

fendant's legal costs if their case is unsuccessful. Another challenge shared by both types of claim is the issue of timeliness. Lengthy legal proceedings can be emotionally draining and leave employees in a state of uncertainty for extended periods, and delays in resolving cases can hinder the effectiveness of the legal system as a means of addressing grievances.

Moreover, the principle of dissuasiveness is not fully realized in either context. The existing legal frameworks do not consistently provide strong deterrents against discrimination or unfair dismissals. Monetary compensation often falls short of adequately addressing the harm and humiliation suffered by employees. In both areas, there is room for improvement in terms of procedural effectiveness and equivalence. Ensuring that the legal system is accessible, efficient, and provides equitable remedies for aggrieved employees is essential to addressing these issues effectively.

In conclusion, while discrimination lawsuits and unfair dismissals represent distinct areas of employment law, they share common challenges that impact employees seeking justice within the Czech legal system. Addressing these challenges, such as by improving access to justice, reducing financial barriers, expediting proceedings, and enhancing the dissuasive impact of remedies, is essential to creating a fair and equitable workplace environment for all employees in the Czech Republic.

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The Right of Trade Unions to Information in the Era of the Fourth and Fifth Industrial Revolutions

Abstract: The dynamic technological transformations that are taking place in the third decade of the twenty-first century, described as the Fourth and even Fifth Industrial Revolutions, pose significant challenges for community partners who act in labour relationships. Transparency and the related right to information are some of the factors that define a democratic state under the rule of law. This also applies to labour relationships as widely understood. The regulations of collective employment law grant various rights in this respect to entities that represent staff, who may, among other things, demand information on the use of artificial intelligence by the employer in the work environment. In the Polish labour law system, the widest scope of competences in this regard is granted to trade unions. This article focuses on the legal and functional aspects that are related to the transfer of this type of data.
Keywords: artificial intelligence, Fifth Industrial Revolution, Fourth Industrial Revolution, right to information, trade unions

Introduction

The dynamic technological transformations (Świątkowski, 2019) that are taking place in the third decade of the twenty-first century, described as the Fourth or even Fifth Industrial Revolutions, pose significant challenges for community partners who act in labour relationships. From a broad social, economic, and technological perspective, the Fourth Industrial Revolution is defined as an extensive digitisation that leads to the automation and robotisation of processes in industry, services, and administration through the implementation of advanced IT systems, the Internet of Things, data analysis, and artificial intelligence (Schwab, 2016; Popławski & Bajczuk,

2019; Wodnicka, 2023, p. 49 ff.). On the other hand, at the core of the Fifth Industrial Revolution (Furmanek, 2018, p. 277 ff.; Zamorska, 2020, p. 7 ff.) are cognitive technologies that enable machines to perform tasks which were previously reserved for humans (Bytniewski & Marcin, 2016). These technologies allow smart humanoid robots to cooperate in harmony with workers in the application of artificial intelligence. As such, a certain type of bridge between machines and humans is created, leading to deeper integration between people and machines that employ machine learning. In industry, in particular, we are witnessing direct cooperation between human workers and artificial intelligence that controls autonomous or semi-autonomous equipment.

The common denominator of the Fourth and Fifth Industrial Revolutions is the rapid development of artificial intelligence programs that affect both data processing and the communication between employees and equipment. It is obvious that in employment relationships, both these 'revolutions' intertwine, creating a new quality not only in terms of technology but also in social, economic, and psychological aspects. In industrial relations, in particular, in the very near future, tedious, repetitive actions will be taken over by robots that will sometimes have humanoid traits, while workers will be able to focus their professional activity on tasks that require creative thinking (Binek, 2020, p. 23 ff.; Potocka-Pasionek, 2022, p. 106 ff.).

Artificial intelligence plays a special role in shaping post-industrial relations in the era of the Fourth and/or Fifth Industrial Revolution (Chłopecki, 2021; Świątkowski, 2021a, p. 2 ff.; Tegmark, 2019, p. 60; Zalewski, 2020, pp. 3–5). However, it does not have a single well-established definition; instead, it may be understood in arious ways (Boden, 2020, pp. 33–34; Zalewski, 2020, p. 3 ff.). In general, artificial intelligence (Bytniewski & Marcin, 2016, pp. 7–15; Płocha, 2020; Stylec-Szromek, 2018) is sometimes defined as a special type of software that enables computers to perform actions that are usually in the human domain, in particular those that require human intellect or logic to be applied. This technology emerges at the meeting point of information technology with neurology, psychology, and cognitive sciences. Its aim is to teach machines to engage in behaviour similar to humans, based on models of knowledge that enable understanding, drawing conclusions, and acting, as well as diagnosing and solving problems. AI enables vast amounts of data to be organised and analysed, not only in industry and services but also in administration. Skilful application of artificial intelligence in widely understood labour relationships contributes to improvement in work efficiency and the quality of services. It also often enables employment-related expenses, including social expenditures, to be optimised.

No definition of artificial intelligence has been provided so far in Polish labour law (Płocha, 2020). A definition was formulated in Art. 3 item 1 of the draft Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending

Certain Union Legislative Acts (European Commission, 2021).[1] The provision is of a general nature and provides a definition of artificial intelligence based on reference, defining it as software that is developed with one or more of the techniques and approaches listed in Annex I to the Regulation. Since the definition is a blanket one, it is not overly precise as regards its subject, but, on the one hand, it seems sufficiently flexible not to limit the development of technology and, on the other hand, it introduces important limitations to the application of AI in the form of a list of enumerated prohibitions. Two provisions banning certain uses of AI, specified in Art. 5 items (a) and (b) of the cited Regulation, seem to be extremely important for entities that function in labour law relationships, as they prohibit:

- the placing on the market, putting into service or use of an AI system that deploys subliminal techniques beyond a person's consciousness in order to materially distort a person's behaviour in a manner that causes or is likely to cause that person or another person physical or psychological harm; and
- the placing on the market, putting into service or use of an AI system that exploits any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, in order to materially distort the behaviour of a person pertaining to that group in a manner that causes or is likely to cause that person or another person physical or psychological harm.

Both these provisions may also apply to practices that are used by employers. Therefore, information on the applied mechanisms of artificial intelligence is of key importance for representative entities that operate in the workplace and whose task is to protect the rights and interests of workers (employees). This study reflects on the issue of the right to information about new technologies from the perspectives *de lege lata* and *de lege ferenda*.

1. The right of trade unions to information

In a subjective approach, an important issue is the question of which representative bodies may demand information on the application of AI by an employer. Trade unions should undoubtedly be included in this category (Nowik, 2022, p. 122 ff.). From the point of view of Art. 28 of the Act on Trade Unions, workplace trade unions have this right. This refers specifically to all trade unions that have the right to information pursuant to Art. 25(1) item 1 of the Act on Trade Unions. Analogous information-related competences are granted to inter-company trade union

1 On the legal regulation of artificial intelligence in the European Union, see European Commission (2020). Also see Florczak (2022, pp. 167–168); Mazur (2020, p. 13 ff.); Stylec-Szromek (2018, p. 501 ff.); and Świątkowski (2021b, p. 113 ff.).

organisations, which is derived explicitly from Art. 34 of the Act on Trade Unions (Baran, 2019, p. 238 ff.).

In the axiological sphere, the right of trade unions to information originates from Art. 61 of the Constitution of the Republic of Poland, as transparency is one of the factors that define a democratic state under the rule of law. This also applies to the widely understood labour relationships. Therefore, the provisions of collective employment law grant various rights in this matter to bodies that represent employees – not only trade unions, but also non-trade union participation bodies such as workers' councils (Baran, 2019, pp. 538–539) or special negotiation teams that operate on the union level. In practice, however, the competences of trade unions related to obtaining information are crucial. Polish legislation is characterised by a pluralism of normative regulations, both objectively and subjectively (Baran, 2023, p. 174 ff.). In this context, it is thus worth considering the extent to which trade unions have a statutory right to obtain information of the kind of technological nature that shapes the Fourth or Fifth Industrial Revolution from the employers in whose workplaces these unions are operating.

The provisions of Art. 28 of the Act on Trade Unions are of fundamental importance in this matter in the Polish collective employment law system. The provision stipulates that at the request of a trade union, the employer shall provide information necessary to conduct trade union activity (Baran, 2023, pp. 177–178). Further items contain examples of the specific categories of information that the trade union may obtain. In a holistic interpretation, this provision also applies to any information of an organisational or technological nature. The proposed interpretational option is justified in *lege non distinguente* argumentation. This normative context refers to data that concern the advanced technologies applied by the employer.

The analysis of the issue of the right to information related to technology should begin with the conditions of work and remuneration that are specified in Art. 28 item 1(1) of the Act on Trade Unions (Baran, 2023, p. 178). New technologies, including generative artificial intelligence, robotisation, and related automation, shape new working conditions to a large extent, and they may be used to perform a variety of tasks, either as part of whole technological processes or for specific types of work which are dangerous, tedious, or onerous. Thus, workers who used to perform these tasks may be transferred to perform easier, more interesting duties that at the same time require more creativity or additional professional skills. In this context, it is undoubtedly the case that trade unions should be aware of the extent to which new technological solutions will modify the working conditions of the employees and which will affect their salaries. Generative artificial intelligence that forces employees to cooperate with smart machinery will, in particular, undoubtedly contribute to improving workers' qualifications and thus will directly influence their level of education. The consequences of this phenomenon will affect not only working conditions, but also salaries and, as a result, will lead to a new shape for their objective struc-

ture, such as pay scales. This refers not only to the transformation of financial benefits that are part of the basic salary, but also various additional elements of remuneration, such as various technology allowances (e.g. an allowance for knowledge of AI algorithms). In this normative light, it is doubtless the case that information about the applied technological instruments that are characteristic of the Fourth or Fifth Industrial Revolution, in terms of the work and remuneration conditions of employees, is necessary to effectively protect the rights and interests of employees as part of trade union activity. However, it is worth noting here that such information must be on a super-individual level and that it can never contain data that refer to a specific individual.

In practice, the issue of providing trade unions with detailed information on specific software, algorithms, and other technological instruments that shape work and remuneration conditions is a problem. In my opinion, the employer is not obliged to disclose this type of data, in particular information on the software used, as it may constitute a company secret that is protected by trade secrecy. Nevertheless, the employer has a statutory obligation to define the specific consequences of the application of such technological means for specific groups of employees, both in organisational and technological terms and in terms of finance.

Essentially, information on the operations and financial standing of the employer connected with employment, and changes foreseen in this respect, should be provided at a similar level of detail to trade unions under Art. 28 item 1(2) of the Act on Trade Unions (Baran, 2023, p. 179). However, the realisation of this item in practice seems particularly complex, as it is extremely difficult to foresee the consequences of the application of AI, robotisation, or automation to the economic and financial standing of the employer. *Natura rerum*, data related to it will be speculative, as no employer is able to precisely define the consequences of technological progress from a long-term perspective, particularly in the conditions of a globalised, competitive market. Considering the difficulties related to providing this type of information, it should be emphasised that the employer should prepare comprehensive information for trade unions in good faith, including both the positive and negative effects of the technological solutions implemented.

Widely understood new technologies that are characteristic of the Fourth and/or Fifth Industrial Revolution affect and will continue to influence the level and structure of employment, not only on the whole labour market, but also at a specific employer. They will play a major role especially for those sectors and groups of workers where professional duties may be relatively easily automated or robotised. The influence of artificial intelligence applies to all grounds of employment, starting from the recruitment of employees to terminations. As far as recruitment is concerned, the use of artificial intelligence brings a variety of problems and threats (Otto, 2022, p. 145 ff.). From the point of view of trade unions, the issue of the criteria used in recruitment is of vital importance. If these criteria are not transparent, this may lead

to discrimination against applicants or new staff members. Knowledge of recruitment mechanisms and systems is therefore crucial for trade unions. Another aspect of the issue is the process during which algorithms make decisions while screening documents provided by applicants. Also in this matter, knowledge of the principles and operating standards of the software used by the employer is indispensable, as defined in Art. 28 item 1 of the Act on Trade Unions.

The introduction of the new technological solutions that are characteristic of the Fourth and/or Fifth Industrial Revolution evokes a natural fear of redundancies and unemployment among workers. Its origins are similar to the fears expressed by the Luddites during the first Industrial Revolution, who feared the use of machinery. Personally, I have no doubt that the implementation of new technologies will result in a variety of fluctuations on national and regional labour markets, and also in the employment structure of specific employers. In the near future, various groups of employees will likely suffer from redundancies for technological reasons. The currently developed form of generative artificial intelligence and related robotic technologies will probably help automate simple tasks, which now tend to consume even several dozen per cent of employees' time. One of the consequences of their introduction may be collective redundancies at employers who operate not only in industry and services, but even in public administration as widely understood. Thus, it seems natural for trade unions to be particularly interested in information about changes in employment structure that result from the implementation of new technologies; this focus is justified both socially and axiologically. An example of such a situation is the consequences of introducing automated control systems in transport (e.g. in rail or road traffic).

In the normative aspect, the right to information in this matter is governed to the widest possible extent by Art. 28 item 1(3) of the Act on Trade Unions, which obliges the employer to provide information on the state, structure, and proposed changes in employment as well as actions aimed at maintaining the current level of employment. The scope of these data should be as detailed as it is possible to foresee the consequences of the introduction of new technologies for the level and structure of employment at a workplace. There will naturally be some estimates. The disappearance of jobs that require low qualifications carries the risk of negative consequences for those employees who perform simple work, with collective redundancies being a result. In such an event, the employer is obliged to notify both the trade unions and the district employment office about the redundancies. The detailed obligations of the employer are provided explicitly in Art. 2 item 3 of the Act on special principles for terminating employment with employees due to reasons not attributable to employees (Baran & Lekston, 2019, p. 628 ff.). If artificial intelligence, robotisation, or automation is applied, the notification should precisely identify the groups of employees who are at a risk of losing their jobs and specify the size of and criteria for the planned redundancies, as well as their sequence. Having this kind of information allows the

trade unions to start consultations and thus to mitigate the most distressing effects of planned redundancies for technological reasons. This refers in particular to launching potential training programmes, which will allow participants to become employed in the post-industrial economy, and voluntary departure schemes.

Pursuant to Art. 28 item 1(4) of the Act on Trade Unions, the right of trade unions to information also includes any actions of the employer that might cause significant changes in work organisation or in the basis for employment. It is obvious that the new technologies used in the Fourth and Fifth Industrial Revolution lead to such changes. The progressing unification of manufacturing and service equipment with the virtual world, which is shaped by digital technologies and in particular generative artificial intelligence, directly affects workers' competences, both professionally and socially. The appropriate preparation of employees for performing work under conditions of rapid technological transformation should consist in offering them correctly prepared and conducted adaptation training. Trade unions should play an important role in shaping the model of the post-industrial education of workers. Information on the related actions of the employer is thus important from the practical point of view, as it allows employees to remain competitive on the labour market under conditions of high demand for digital skills. The process of acquiring new skills in order to perform a different job (also known as reskilling) or acquiring additional skills (upskilling) is important for the functioning of the employee on the competitive labour market. In this respect, information provided to trade unions is doubtless indispensable for performing their fundamental duties of protecting and defending the interests of workers.

2. The right of trade unions to information on new technologies *de lege ferenda*

In the conditions of technological expansion that are characteristic of the Fourth and/or Fifth Industrial Revolution, the Ministry of Digital Affairs (Sejm, 2022) approved an amendment to the Act on Trade Unions concerning the right to information, adding point 5 to Art. 28 item 1. Pursuant to the draft, an employer would be obliged to provide the trade union with information on the parameters, principles, and instructions that are the basis for the functioning of algorithms or artificial intelligence systems which may influence work and remuneration conditions, access to employment, and maintaining employment, including profiling. The draft was assessed positively by NSZZ Solidarność (Sejm, 2022) and the Chief Labour Inspector. However, the latter pointed to certain disadvantages of the draft, such as the lack of a definition of artificial intelligence and the fact that the notions of parameters, principles, and instructions that are the basis for the functioning of algorithms were not explained (Opinion of the Chief Labour Inspector, 2022). I share these reservations;

in particular, I have some doubts concerning the objective scope foreseen in the draft. The parameters, principles, and instructions that refer to the functioning of artificial intelligence may be part of the employer's knowledge, for example concerning an increase in work efficiency, and may be protected by employer or business secrecy. In my opinion, the proposed point 5 of Art. 28 item 2 of the Act on Trade Unions is redundant in Polish employment law, as it repeats the existing standards of Art. 28 of the Act, thus creating a legal mechanism beyond the real need and thereby violating the universal directive of Ockham's razor, which states that *entia non sunt multiplicanda praeter necessitatem*. This view is justified by the fact that the other items of the analysed provision allow trade unions to obtain the necessary information about the influence of the application of artificial intelligence on work and remuneration conditions, the level of employment and the ability to maintain it, and profiling. Even more, they allow trade unions to obtain information on other modern technologies used by the employer. As a result, the provisions of the Act on Trade Unions that exist *de lege lata* are holistic, so it is not necessary to supplement them. All information that is necessary for trade union activity should be provided by the employer to the workplace or inter-company trade union organisation, pursuant to Art. 28 item 1(1–4) of the Act on Trade Unions.

A serious problem with obtaining information, not only about new technologies used by an employer, is how it may be obtained. A disadvantage of Art. 28 of the Act on Trade Unions is the fact that it does not precisely specify the grounds for a refusal to provide trade unions with necessary information or the legal mechanisms of maintaining confidentiality. Therefore, *de lege ferenda*, I would like to propose introducing regulations that would release the employer from the obligation to provide information, including information on new technologies used, if this might interfere with company activities or expose the company to severe damage. In practical labour relationships, this threat should be objectified, for example, in a situation that involves a serious risk that the trade unions might disclose the data on new technologies to unauthorised persons or third parties. This kind of legal mechanism would reduce the occurrence of industrial espionage or unfair competition activities. If the employer refuses to disclose data that are necessary for the trade union to conduct its activities, the competent body of the trade union should have the possibility of applying to the labour court for an order to provide information. These types of cases should be dealt with under the nonprocedural procedure regulated by the Civil Procedure Code. If information is provided, in particular information concerning new technologies characteristic of the Fourth or Fifth Industrial Revolution, the employer should be able to reserve its confidentiality when forwarding it to a statutorily authorised body of a company or an inter-company trade union organisation. This will make it possible to limit the transfer of technologically sensitive data, at least formally.

Conclusions

In conclusion, it should be stated that the systems of artificial intelligence used by an employer are particularly important among the information obtained by trade unions on new technologies that are used in the Fourth or Fifth Industrial Revolution. The information obtained may be used by trade unions only for the purposes related to their organisational activities, for example during negotiations with the employer. The provisions concerning the use of these data by trade unions may be defined in collective agreements, including collective labour agreements and the by-laws of the work establishment. Work regulations seem to be particularly predisposed to defining standards for the use of software related to artificial intelligence. On the one hand, they allow its use by the employer to be regulated in a flexible manner, while on the other, they enable trade unions to exercise reasonable control with respect to protecting the interests of workers and applicants. This type of normative mechanism ensures homeostasis in labour relationships as far as the use of new technologies in the era of the Fourth and Fifth Industrial Revolutions is concerned.

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Collective Bargaining in Technology-Based Employment

Abstract: New technology has profoundly influenced the world of work. The use of technology brings advantages for all – employers, workers and their representatives – but also some risks and hazards for working people. Despite technological development, workers still need effective protection that will ensure safety and sustainable development. The legal framework for this protection, both at European and national levels, is still under construction. An important role in filling the regulatory gap may be also played by collective bargaining. Moreover, modern technologies open up new possibilities for social partners to build their capacity and organize the process of negotiations. However, collective bargaining in the area of tech-based work remains *in statu nascendi*. This article analyses the need for and the advantages of collective protection in tech-based employment, its role in improving working standards and the influence of new technology on industrial relations.
Keywords: collective bargaining, digitalization, new technology, workers

Introduction

New technology has profoundly influenced the world of work. Widespread use of artificial intelligence (AI), including algorithms, and remote communication methods (tech-based work) have been changing the nature of work and relationships between traditional actors (De Stefano, 2019). Technological development entails certain advantages for employers, workers and their representatives. However, it has also resulted in new hazards and threats, in particular for workers and trade unions. The law cannot keep pace with technological development (Davidov, 2016, p. 3; Salvi del Pero et al., 2022, p. 20); the result is an evident regulatory gap in setting up working conditions with the use of modern technologies and regulating industrial relations. To bridge the gap, various actors (including policymakers/legislators and social partners) at various levels (global, regional, national) should address the question how employment and working conditions that are strongly influenced by technology can be controlled in such a way as to prevent an imbalance between the protection of workers per se and the power of employers/contractors. A follow-up question is what roles and competences should be given to the various actors to achieve this goal. First answers can be sought in scholar proposals (discussed in the text), but also in legislative initiatives[1] and the activities of social partners (European,[2] international, national) undertaken in recent years (e.g. Boto 2022). In this contribution, attention is focused in particular on the possibilities and instruments that should (continue to) be associated with collective bargaining in its various dimensions.

1 Artificial Intelligence Act. European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9–0146/2021 – 2021/0106(COD)). P9_TA(2024)0138. https://www.europarl.europa.eu/doceo/document/TA-9–2024-0138_EN.pdf; Proposal for a directive of the European Parliament and the Council of 9 December 2021 on improving working conditions in platform work ('draft directive on platform work'). COM(2021) 762 final. See the latest Council's proposal: https://data.consilium.europa.eu/doc/document/ST-10107–2023-INIT/en/pdf (accessed on 25 September 2023). Directive adopted by the Parliament on 24 April 2024. The Spanish *Ley Rider* recognized the employee status of platform workers (Perez del Prado 2021, 1–5) while the French Law of 8 August 2016, No. 1088 (Prassl, Laulom, Maneiro Vazquez 2022, 77) and the Italian Law of 2 November 2019, No. 128 (Eurofund 2021) provided for protective measures in specific areas for workers performing tech-based work including platform work. European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).

2 On 20 June 2020 European social partners concluded Agreement on Digitalization ('FA'), https://www.etuc.org/system/files/document/file2020–06/Final%2022%2006%2020_Agreement%20on%20Digitalisation%202020.pdf (accessed on 25 September 2023).

1. Is collective bargaining needed in tech-based employment?

New technology is increasingly used in the process of work: organizing it, assigning tasks and setting up schedules, as well as evaluating workers. Due to the use of remote communication methods, work can be performed outside the employer's premises. The use of technology may be beneficial for both employers and workers: new technology, including digital devices and tools in workplaces, may contribute to increasing productivity (e.g. increasing the pace of work) and improving work organization (e.g. a better allocation of tasks) and quality of services. Finally, new technologies may reduce the costs of work. Technology may also improve the quality of jobs and the situation of workers. Digital instruments may reduce fatigue and stress, support decision-making processes and reduce safety risks (Krämer & Cazes, 2022, p. 24Lane, Williams & Broecke, 2023). However, technological development cannot eliminate all risks arising in the sphere of work. Moreover, it generates some new hazards and challenges which were previously absent or not as prominent (De Stefano, 2019, pp. 3–4). Furthermore, technological development contributes to the diversification of the labour market. Tech-based work is often performed either under atypical employment contracts (fixed-term, part-time or outside the employer's premises) or as a part of non-employee forms of employment (civil law contracts, self-employment) (European Council, 2023). In some member states their right to bargain collectively has been questioned (Biasi 2018; Gyulavári 2020; Ratti, 2022).

Technological development has not improved the bargaining position of workers. On the contrary, interaction with technologies may increase workers' dependency. Employers can abuse their position when setting up working conditions (Krämer & Cazes, 2022, p. 24; Prassl, 2018, p. 52 ff.). They can try to transfer some costs (e.g. tools, energy) and risks (e.g. the consequences of an inability to perform work) to workers. The same is the case for numerous self-employed people who are economically dependent on their contractors (Prassl, 2018, p. 52 ff.). Moreover, technology may boost the exercise of managerial power by the employer (De Stefano, 2019, p. 9). Some employers use algorithms in order to improve their services to users and consumers as well as the production processes also to assign tasks or evaluate performance, in a way that changes the paradigm and converts the employment relationship from *l'obligation de moyens* to *l'obligation de résultat*. Monitoring and other forms of surveillance by the employer may invade employees' privacy (De Stefano, 2019, pp. 3, 10–15; Ponce del Castillo, 2020, pp. 10–11). The increase of the employer's managerial powers entails limiting the sphere of freedom and democracy in the workplace (Davidov, 2016, pp. 81–85).

Tech-based work also entails some specific hazards to workers. It may cause isolation, insecurity and physical or mental risks (ILO, 2022). For instance, the pace of tech-based work governed by algorithms can be dangerous for workers (Barthès & Velicu, 2023). The border between working time and personal life, in particular for

those working outside the employer's premises, can be blurred (European Framework Agreement, 2020).Unfortunately, the use of algorithms does not guarantee equal treatment of workers, especially when technology is applied in a non-transparent way (Adams-Prassl et al., 2023, p. 152; Klengel & Wenckebach, 2021, pp. 159–160; Salvi del Pero et al., 2022, p. 17). As a result, the use of new technologies may lead to a deterioration in the working conditions and well-being of workers in some areas. Moreover, it can affect various fundamental rights of working people and the principle of non-discrimination, even unintentionally (see Ponce del Castillo, 2020, p. 6). The technologization of work may even entail the exploitation of workers (Prassl, 2018, pp. 68–69) and the dehumanization of work (De Stefano, 2019, p. 4 ff.). Finally, new technologies have been changing the nature of work and the skills that are required from workers; they must retrain or upskill to keep their jobs or find new ones (OECD, 2023). Last but not least, the use of technology may invade workers' privacy.

Regardless of technological change, human dignity must remain the foundation of the legal system and in particular labour law (Davidov, 2016, pp. 59–62). The law, including labour law, should contribute to the realization and expansion of the sphere of (real) freedom of workers (Langille, 2011, p. 101). The workplace and decision-making processes may not be de-humanized (ILO, 2022). The legal framework should support the development of a human-oriented approach to the integration of digital technology into the world of work; therefore, the use of technology should be controlled by humans (De Stefano, 2019, pp. 30–31; European Framework Agreement, 2020). The draft directive on platform work aims at human control and increasing transparency while using technology in employment (Arts. 6–12).

Algorithms and other digital instruments are not autonomous beings (at least for now) but rather tools used by employers; employers decide the ways in which digital instruments are implemented. Moreover, employers benefit from the use of new technologies: they improve the organization of work and may contribute to an increase in profits. At the same time, the use of technology poses certain risks that should be borne by the entity that organizes and benefits from the process (*cuius commodum, eius periculum*). The use of digital instruments cannot exclude the employer's responsibility (De Stefano, 2019, p. 30), e.g. for occupational health and safety (European Framework Agreement, 2020). The use of new technologies does not justify a change in the paradigm of the relationship connected with the transfer of costs and risks to workers, and individual workers are not able to protect themselves against abuse and hazards arising from their work environment. An intervention aimed at restoring social equilibrium seems to be necessary, and in particular, fundamental workers' rights should be safeguarded (De Stefano, 2019, pp. 4; 23–27). In that respect, the question arises what legal instruments should be used to ensure that the protection does not disrupt the tech-based economy but also efficiently supports working people in exercising their rights and freedoms. In particular, the issue of interaction between legislation and collective bargaining appears.

There is no single European model of collective bargaining. The scope of the freedom of social partners and the level of statutory interference vary. The relationship between law and collective bargaining is different in systems based on freedom of association (British collective *laissez-faire*, German *Tarifautonomie*, Dutch, Italian and Nordic models) compared to that in regulated systems, which entail intensive state intervention (Belgium, France). Moreover, there are significant differences as regards the actual bargaining position of national social partners and the coverage by collective bargaining.[3] The real capabilities of social partners must be taken into account when creating adequate protection for those working with technology. Moreover, national systems differ in terms of their personal scope. A problem in this respect is the potential conflict between collective bargaining and (EU) competition law.[4] In some countries, only employees are authorised to engage in collective bargaining and to conclude collective (labour) agreements, benefitting from 'immunity against cartel prohibition.'[5] However, the situation has been changing in recent years. The European Union has slightly modified its approach, aiming to open the possibility for non-employees to bargain on the conditions of work (European Commission 2022). Following this development, numerous member states have recognized the right to collective bargaining of various groups of people who perform work outside the employment relationship. Collective bargaining for non-employees, due to limited statutory protection, can play a significant role.

2. Advantages and challenges for collective bargaining as a tool in creating a legal framework for tech-based work

There are various reasons why collective bargaining may be an important element in building up a legal framework for tech-based work. Compared to legislation, collective bargaining offers a greater flexibility and proximity to the process of work, which may be particularly important when regulating new phenomena that elude traditional legal institutions.

Social partners can react faster, taking into account specific consequences of technologization in the world of labour. Moreover, autonomous standards may be tailored to the needs of specific sectors, companies and establishments (Gyulavári & Kártyás, 2022, p. 101). Workers use new technologies and are affected by their functioning every day; they understand the ways in which technology works and what consequences it may entail in their daily activity. Therefore, social partners acting

3 https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/collective-bargaining-coverage (accessed on 11 February 2024).

4 Raised in EU law and practice but affecting directly national law. E.g. Jaspers, Pennings, Peters (eds), *EU labour law*, section 7.5.4.

5 In a series of decisions of the ECJ from ECJ, (Albany), 1999 to ECJ (FNVKIEM) 2015).

together can come up with adequate and pragmatic solutions which on the one hand are adjusted to the needs of employers and on the other meet the interests of staff alike – flexible but fair (Krämer & Cazes, 2022, p. 9; OECD, 2023). Solutions proposed by social partners can contribute to a better allocation of tasks, increased competence development and work capacities, the reduction of exposure to harmful working conditions and, as a result, increased productivity on the one hand and the well-being of workers on the other (European Framework Agreement, 2020). Moreover, by participating in the digital transformation, workers can learn about planned solutions and present their own proposals; this will make new solutions easier to accept and may increase efficiency (Barthès & Velicu, 2023; OECD, 2023). Last but not least, resorting to collective bargaining means permeating the ongoing transformation, heavily influenced by technology and the managerial prerogatives of companies, with democratic elements (Davidov, 2016, pp. 56, 86–90). It may help to overcome the domination of those who apply technology and a lack of democracy at the workplace. Consequently, collective bargaining may contribute to a fair digital transition and a fairer society (Barthès & Velicu, 2023; Krämer & Cazes, 2022, pp. 27–28). It also constitutes the possibility to strike a balance to the various groups of workers, in particular the people working in precarious circumstances. However, the promotion of collective bargaining in the context of technological transformation faces certain challenges and limitations. Some of them are caused by a changing position of collective bargaining itself some are specific to tech-based employment.

Collective bargaining in various countries is undergoing a crisis. The processes of flexibilization and decentralization have been strengthened, at least in some areas, by the global economic crisis. The result is a decreasing number of and shrinking coverage by collective agreements. The traditional social model based on sectoral (branch) collective agreements has been endangered, in a raising number of countries (Laulom, 2018). Additional problems have been provoked by new technologies: tech-based work is usually dispersed and atomized (Roşioru, 2022, pp. 137–138, 142–144; Rotila, 2019, p. 156). Moreover, in many cases, trade unions have not yet adopted an adequate or efficient strategy of representation for the tech-based economy (Roşioru, 2022). As a result, new forms of representation (ad hoc committees, cooperatives, etc.) have appeared (Boto, 2022, pp. 9–12; Lamannis, 2023, pp. 12, 19) although till now not widespread. Their position towards employers is, however, weaker than the position of traditional representatives (trade unions), who use their experience, knowledge and resources. Another problem concerning e.g. platform work is the identification of an entity which could be treated as the employer and, consequently, as a party to collective bargaining (Roşioru, 2022, p. 143). The fundamental task of workers' representatives is to identify real employers and to encour age/force them to be involved in collective bargaining. At the same time, the lack of technology-related knowledge leads to information asymmetries between employers and workers' rep-

resentatives and increases the imbalance of power (Krämer & Cazes, 2022, pp. 9–10, 25, 38).

The number of collective agreements dealing with technological issues has increased in recent years (Krämer, Cazes 2022, 35–36; Boto 2022; Lamannis 2023, 14 et seq.). However, the development of collective bargaining is not uniform in terms of bargaining level and territorial scope. Most of the reported collective agreements were concluded in large companies. Collective agreements negotiated at industry or cross-industry level are rather rare if not absent. The awareness of tech-based collective bargaining is greater in Western European countries and almost non-existent in Eastern Europe (Voss, Riede, 2018, pp. 20–21). To summarize, collective bargaining for tech-based work is still *in statu nascendi*. It does not constitute a comprehensive system and it covers only a limited number of workers in specific areas. If policymakers actually strive to rely on collective bargaining as an important element of the digital transformation, they should support social partners' capacity and promote social dialogue. However promising this approach of social partners might be, it is more likely and desirable for now that the state take responsibility for ensuring the exercise of fundamental workers' rights. If there is insufficient regulatory capacity on the part of social partners, the task to establish a legal framework for tech-based work must be carried out by means of legislation. The Social Pillar adopted by the EU in 2017 takes the same direction (European pillar of social rights, Principle 8), a tendency that has been strengthened by the adoption of the Minimum Wage Directive (Directive 2022/2041, Article 4).

3. The role of collective bargaining in tech-based economy

Social partners may support the adaptation of digital instruments so as to ensure respect for human dignity, fundamental rights and essential workers' interests, and to humanize the process of work. Collective bargaining in various areas (such as remuneration, access to professional training, career building, working environment or mental health) may contribute to abiding by the principles of fairness by protecting workers against unfair bias, unequal treatment and discrimination: a 'trustworthy use of AI' (ILO, 2022; Salvi del Pero et al., 2022). To achieve these objectives, collective bargaining could cover such topics as forms of employment, equal treatment, the organization of work, occupational health and safety, wages, professional training, and data and privacy protection. The scope of regulations and the detail of provisions may vary. Some collective agreements are called 'staircase agreements', since they provide a basic protection standard and leave the door open for further improvement (Lamannis, 2023, p. 37 ff.). Anti-discrimination provisions are among the most popular in collective agreements (Lamannis, 2023, p. 27). Another topic

covered by collective bargaining in a tech-based economy could be social insurance (ILO, 2022, p. 90).

As regards the organization of work, collective bargaining may contribute to implementing the principle of human control over technology. For instance, social partners may set up rules concerning the use of algorithms in managing workers, in particular in the recruitment process, distributing work (assigning tasks), specifying the criteria of workers' assessment, professional promotion and terminating employment relationships (ILO, 2022, p. 92; Krämer & Cazes, 2022, p. 36). The result should be greater transparency in the use of technology (Lamannis, 2023, p. 27; Ponce del Castillo, 2020, p. 11). Collective agreements may also provide for human intervention if workers disagree with decisions made with the use of AI (European Framework Agreement, 2020; Ponce del Castillo, 2020, p. 11) and may require employers to involve workers (or workers' representatives) in preparing algorithmic management and to inform them about the mechanisms applied (Barthès & Velicu, 2023; ILO, 2022, p. 93; Krämer & Cazes, 2022, p. 36). Another topic affected by technological development is data and workers' privacy protection; collective agreements may deal with the principles of using monitoring, cameras, etc. (ILO, 2022; Krämer & Cazes, 2022, p. 36), including the use of cameras in teleworking as well as specific standards on the 'processing of personal data of employees' (European Framework Agreement, 2020).

In the absence of an appropriate legal framework, collective bargaining has a key role to play in ensuring safe working conditions for workers. Social partners may identify hazards in a tech-based economy (not always identified by the law), in particular in the area of human physical integrity and psychological safety challenged by new technologies (European Framework Agreement, 2020). Collective agreements may provide for procedures aimed at verifying technologies (and making changes if they work in an inappropriate way) (Barthès & Velicu, 2023), other preventive measures or 'alert and support' procedures, as well as guidance addressed to employers and workers (or their representatives) (European Framework Agreement, 2020).

A relevant topic of collective bargaining, also for those who are not employees, is working time. Collective agreements may clarify the concept of working time or the time for which the worker is entitled to remuneration, e.g. the waiting time of delivery riders. At the same time, minimum working hours can be guaranteed to limit the risk borne by workers (Lamannis, 2023, pp. 42–43). To prevent overload, a maximum number of services (e.g. deliveries) per hour can also be provided for. Collective agreements may also protect the workers' right to be disconnected, contributing to real exercise of the right to be offline and restoring the boundary between work and private life (ILO, 2022; Lamannis, 2023, p. 27). Furthermore, collective bargaining allows for the development of various forms of flexi-time (ILO, 2022): variable working hours, working-time accounts or longer reference (calculation) periods of working hours. Thanks to the involvement of workers' representatives, flexible working time

can be implemented in a reasonable way. Working-time provisions may contribute to a better work–life balance (Voss & Bertossa, 2022, p. 16).

Next, collective bargaining can adapt rules about pay to the characteristics of technology-based work, which is important due to the lack of balance in bargaining power. To protect workers' interests, time-based remuneration may be implemented, instead of piecework pay (Lamannis, 2023, p. 43). For instance, collective agreements concluded for platform workers provide for hourly minimum rates, bonuses and allowances, taking into account such factors as difficult working conditions or night or weekend work (ILO, 2022). The Italian Law No. 128 requires collective agreements to be concluded for platform workers who are not employees for remunerated night work, weekend and holiday work, and work during unfavourable weather conditions, which should be at least 10% higher than the standard pay (Eurofund, 2021). Social partners may also guarantee that workers do not bear the costs connected with the performance of work (tools and equipment, electricity, the internet, etc.). Collective agreements may oblige employers either to reimburse workers or to pay them lump sums for the use of private tools.

A key element of digital transformation is professional training. Social partners should focus on high-quality and effective training, understood as training responding to the identified needs of employers and workers. They can also specify the skills and qualifications relevant to specific jobs and sectors, including identified future skills and qualifications. Training programmes should prepare workers to use new technologies, as well as to reskill and upskill and to improve their employability (Barthès & Velicu, 2023). Potential topics of collective bargaining are, *inter alia*, preparing training plans and strategies, financial support, the numbers of hours for training, special bodies and procedures dealing with training and the principles of apprenticeships and traineeships, as well as the certification of skills (ILO, 2022).

Since technological development entails the liquidation of numerous, usually low-skilled, jobs (see OECD, 2023), collective agreements may also improve the stability of employment and increase workers' employability. The idea is to mitigate the consequences of restructuring enterprises and to enable workers to find further employment. Collective agreements may provide for procedures intended to inform workers about technological changes and to prepare them for restructuring (e.g. by organizing professional training aimed at reskilling). Some collective agreements provide for special bodies (committees) to deal with adaptation processes (ILO, 2022). Social partners may be involved in creating new jobs, and collective agreements may also mitigate redundancies treated as a last resort (Voss & Bertossa, 2022, pp. 13–14).

Despite its social importance, collective bargaining in a tech-based economy encounters some legal obstacles. In some jurisdictions, the right to collective bargaining for tech-based workers who are not employees (i.e. self-employed, formally independent contractors) has been challenged. Although the right to collective bargaining by the self-employed has been recognized by the ILO and the Council

of Europe in EU law, it has been confronted with economic freedom and competition law (e.g. Deskalova, 2021; Gyulavári, 2020; Jaspers, Pennings and Peters 2024). This confrontation may lead to restrictions on collective bargaining for non-employees. There are various ways to resolve the problem of collective bargaining for tech-based workers. First is to recognize an appropriate (e.g. employee) legal status of tech workers either by law, as for example under the Spanish *Ley Rider* (Perez del Prado, 2021), or by case law, as in Great Britain[6] or in the Netherlands[7]. Second, there is a tendency towards recognizing the right to collective bargaining of some groups of the self-employed or other non-employees, e.g. working in conditions similar to employees and who are economically dependent (European Commission, 2022). In some sectors (e.g. platform work), collective agreements have been already concluded for all workers (e.g. delivery riders), irrespective of their legal status (ILO, 2022). In other cases, existing collective agreements have been extended to workers without employee status (Lamannis, 2023, p. 21).

4. The influence of technological development on unions' activities in collective procedures

Technological advances offer new opportunities for the development of collective bargaining.

Technological advances can be used in both building the capacity of social partners (in particular trade unions) and developing social dialogue. However, the chance is often a challenge for trade unions. They frequently find themselves at a crossroads, necessitating a metamorphosis to enhance their appeal and accessibility to the modern workforce (Unterschütz 2019, pp. 226–232). The concept of a 'smart trade union' has been discussed and implemented (Roşioru, 2022). The modus operandi of contemporary labour associations ought to be multifaceted, mirroring the intricate mosaic of today's employment paradigms and business structures. Trade unions may use technology to reach potential candidates, to attract them and to organize union activity (Krämer & Cazes, 2022, p. 37). However, while certain associations endeavour to adapt and navigate through this novel paradigm, others remain in the exploratory phase, searching for innovative solutions (Roşioru, 2022, pp. 136–137). To protect workers; rights in tech-based employment trade unions have to adopt strategies and

6 Supreme Court Supreme Court of the *United Kingdom*, 19 February 2021, (*Uber BV v Aslam)*. UKSC 5 (75). See about this case J. Adams-Prassl, Uber BV v Aslam, Work relations …. cannot safely be left to contractual regulation, *Industrial Law Journal*, Vol. 51, No. 4, December 2022, p. 955–966.

7 Supreme Court The Netherlands 24 March 2023, (*Deliveroo*). ECLI:NL:HR:2023:443; High Court Den Haag 9 July 2013, (*FN V Kunsten).* ECLI:NL:GHDHA:2013:5381; High Court Den Haag 1 September 2015, (*FN V Kunsten*). ECLI:NL:GHDHA:2015:2305.

operation methods adjusted to technological development, e.g. by identifying entities being real employers and by enforcing them to be involved in collective bargaining.

Furthermore, technology may transform collective bargaining procedures to make them more efficient and user-friendly. Digital instruments may serve as effective catalysts for intra-union activities, including articulating and developing strategic blueprints for negotiations. Next, they may facilitate contacts between unions on the one hand and employers and their organizations on the other (Krämer & Cazes, 2022, p. 40), convening meetings and other forms of social dialogue and negotiating and concluding agreements. A plethora of specialized software platforms offers many ways of facilitating discussions and meetings. Organizers today are able to fix engagements in a way that notifies participants instantly, with the proposed appointment seamlessly integrated into digital systems found in mobile devices. These programs are characterized by the ease with which they can facilitate discussion and the documentation of developments. Modern electronic platforms also enable the automatic generation of meeting transcripts, attendance records, and secret ballots. Workers such as platform workers may also use new technologies to organize industrial action in a way adapted to the nature of their employment (Rotila, 2019, pp. 176–178). For example, in some cases, delivery riders, rather than stopping work, refused to accept or execute orders processed by a platform. Spatial and temporal constraints, traditionally seen as impediments to discussion, are mostly removed with the advent of state-of-the-art remote communication. Meetings with stakeholders can now take place irrespective of geography or time differences; even when there are significant time lags, the use of remote connectivity can ameliorate the problem.

However, the implementation of technology in collective bargaining is only at an early stage. It is rather a challenge and future chance than everyday life of industrial relations. The first successes in using the technology reveals the possibilities but have not change the reality of industrial relations to a greater extent.

Conclusion

Technological development has brought some opportunities for all: employers (organizing the process of work), workers and their representatives (applying technological advances). At the same time, the technology deepens some existing problems and brings new challenges in the work environment. Technology increases the dependency of workers (technological domination and surveillance), may limit the sphere of freedom and democracy and entails some physical and psychological risks for working people (blurring borderline between work and privacy). Despite technological development, workers still need effective protection that will ensure their safety and sustainable development.

Both legislators/policymakers and social partners have a crucial role to play by creating an appropriate legal framework adjusted to the reality of tech-based work. In order to ensure effectiveness, optimal performance and adaptation to the ever faster technological change, it is paramount to wisely divide the work between the legislature and social partners. Flexibility of and in regulation is crucial, which means that the task may not be left to the legislature alone, as developments are too rapid. It is still the traditional responsibility of the national state to facilitate and to create the institutional structure(s) for tailored answers to the challenges and to guarantee minimum social protection or to fill the gaps that social partners are not able to bridge. Smart use of technological tools is and should be part of this strategy. Social partners should participate in the technological transition. However, their role will depend on how they adjust their structures and strategies to the changing environment.

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Lack of Transparency in Algorithmic Management of Workers and Trade Unions' Right to Information: European and Polish Perspectives

Abstract: The 'black box issue' is one of the biggest problems with algorithmic management. The lack of transparency in the operation and decision-making of AI is of greatest concern to those whose data is being processed (including employees). Trade unions, as the organisations that most represent the interests of workers, can play a big role here; however, they need to be empowered. There is a lack of legislation at EU and Member State level to set norms for this issue; the only country that has already introduced such legislation is Spain. The draft Polish regulation refers to the Spanish solutions and seems to be very interesting. It introduces the possibility for trade unions to obtain data from an employer on the operation of AI in relation to the algorithmic management of employees. The authors present this regulation against the background of EU recommendations and previous Polish legislation on the employer's obligation to provide information. They also identify elements that need to be refined during the parliamentary process in order to make the regulation more effective in protecting workers' rights.

Keywords: AI, algorithmic management, black box, trade unions

Introduction

The algorithmic management of employees is becoming commonplace in many companies and is evident at every stage of the employment relationship. At the recruitment stage, employers may use an ATS (Applicant Tracking System) to automate the entire employee sourcing process. AI-based systems are used to determine work standards, give instructions to employees and also to control the proper performance of work. Finally, AI enables the optimal selection of employees for redundancy. The variety of tasks performed by AI, as well as the ubiquity of its use in the management of employees, has raised questions about the subjectivity of AI on the employer's side (Stefański, 2022, p. 99).

Algorithmic management has many advantages and allows employers to make significant savings. However, it is not without drawbacks. The literature points to a number of legal issues relating to many aspects of algorithmic management, including algorithmic discrimination (Adams-Prassl et al., 2023; Gyulavári & Menegatti, 2022, p. 271). This can arise from the inappropriate design of algorithms by their developers, who incorporate their personal beliefs and stereotypes into the algorithms they develop (De Stefano, 2018; Otto, 2022). It can also be caused by differences in the data available to AI (Dastin, 2018). Another major concern is the threat to fundamental rights (Otto, 2019), including in particular the employee's right to privacy, e.g. through the collection of large amounts of data about him/her and the use of this data in making employment-related decisions (Aloisi & Gramano, 2019; European Commission, 2017), as well as the extension of employer surveillance into the domestic sphere of employees, e.g. in the case of remote working (Ajunwa et al., 2017, p. 772).

1. The black box problem

A key problem in algorithmic management is the issue of the black box – the lack of transparency in the data processing and decision-making carried out by AI. AI operates according to implemented rules and instructions that are very difficult to review and understand, both for those using it and, more importantly, for those whose data is being processed. As pointed out in the literature, this lack of transparency is a 'design feature of the technology and as such not a remediable flaw' (Roßnagel et al., 2019, pp. 5–14).

Sometimes solutions are proposed that are based on a different approach and allow stakeholders to interpret the results of AI, which may avoid the black box problem (Rudin, 2019, p. 206). However, this is not an ideal solution and still needs to be refined. The difficulties are compounded when we consider that a feature of AI is its ability to learn deeply. This means that millions of pieces of data are fed into an algorithm, which then identifies correlations between certain features to produce results.

However, this process is largely closed and poorly understood, both by the programmers dealing with the data and, of course, by the users. It should also be remembered that most AI applications rely on neural networks, which are difficult to decipher. In addition, AI applications are usually based on the recognition of abstract patterns; these then form the basis of decisions that affect a particular person, but are not themselves related to that person. Such a person will be treated by the AI system according to a statistical average.

There is no doubt that the people in the most difficult situation are those whose data are processed and who do not know how the algorithm works and on what criteria it bases its results. An employee whose data has been processed and as a result of which a decision has been taken regarding his/her employment has little chance of obtaining information about the design of the algorithm or how and why a particular decision has been taken. And yet these decisions may be of existential importance to these individuals. For example, they may involve a refusal of employment or the termination of an employment relationship, which may result in the loss of resources needed to support a family. Lack of access to such information can mean that certain employee rights become illusory. This is particularly true of an employee's right to appeal a particular decision (e.g. dismissal). Unfortunately, such information is also not often available to other parties; the State Labour Inspectorate of Poland can be mentioned here, as can the courts that decide on labour disputes. However, the role of trade unions, set up to represent the interests of workers, appears to be crucial.[1] In order to be able to fulfil their role, they need to have adequate information on the functioning of AI.

2. The role of trade unions in ensuring transparency

Trade unions have crucial responsibilities, which play a role in regulating working conditions in areas where AI and algorithmic management are present (De Stefano, 2018). Unions concerned with the processes of an algorithmic rule should be able to take on new skills, in addition to their traditional competencies (such as the realisation of the right of employee participation and conducting collective bargaining and collective disputes), so that there is the possibility of performing social control of algorithmic management using AI technology (Nowik, 2022, p. 122).

It is important to agree on appropriate principles for trade unions and employers to work together on the introduction and use of AI systems. Therefore, any initiative that serves this purpose should be welcomed. One example is the European Social Partners Framework Agreement on Digitisation (EU Social Dialogue Resource Centre, 2020). Although this document is only a joint declaration, and AI issues are only

1 Other institutions for representing the interests of employees, such as works councils or European works councils, should also be included in this group.

one element of it, it is nevertheless welcome that such an agreement has been reached. With regard to the implementation of AI, several conditions are highlighted; the use of AI systems:

- should follow the 'human in control' principle;
- should be safe, i.e. should prevent harm. A risk assessment, including opportunities to improve safety and prevent harm such as for human physical integrity, psychological safety, confirmation bias or cognitive fatigue, should be undertaken;
- should follow the principles of fairness, i.e. ensuring that workers and groups are free from unfair bias and discrimination;
- needs to be transparent and explainable, with effective oversight. The degree to which explanation is needed is dependent on the context, severity and consequences. Checks will need to be made to prevent erroneous AI output.

Regarding the transparency of AI systems, the Agreement states that '[i]n situations where AI systems are used in human resource procedures, such as recruitment, evaluation, promotion and dismissal, performance analysis, transparency needs to be safeguarded through the provision of information. In addition, an affected worker can make a request for human intervention and/or contest the decision along with testing of the AI outcomes.'

The fundamental condition for implementing the transparency principle is to provide trade union activists with access to reliable information about the AI model's operation, including information on the training procedure, the training data, the machine-learning algorithms and testing methods for validating the system. The key issue is the scope of the information on algorithmic management processes that should be provided to trade unions.

3. The legal basis for ensuring transparency

Transparency as a requirement for AI is indicated in almost every document on ethical and trustworthy AI. However, both at European and Member State level, there is no legal basis for verifying transparency. There are a number of legal instruments in EU law to help prevent the misuse of algorithmic management, the most important of which are the GDPR and Directive 2002/14/EC. Their role is important, but they seem insufficient given the specificity of algorithmic management. This problem has already been noticed by EU institutions; in the White Paper 'On artificial intelligence: A European approach to excellence and trust', announced in February 2020, the European Commission noted that workers and employers are directly affected by the design and use of AI systems in the workplace. It also recognised that the involvement of social partners will be a crucial factor in ensuring a human-centred approach to AI at work (European Commission, 2020). A similar position is expressed

in the European Parliament Resolution of 20 October 2020 with Recommendations to the Commission on a Framework of Ethical Aspects of Artificial Intelligence, Robotics and Related Technologies (European Parliament, 2020), which stresses that candidates and employees should be duly informed in writing when artificial intelligence is used in recruitment procedures and other human resources decisions, and how, in such a case, a human assessment can be requested to reverse the automated decision. The European Parliament also underlines that artificial intelligence, robotics and related technologies must not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations arrangements in Member States, in accordance with national law and/or practice, or affect the right to negotiate, to conclude and enforce collective agreements or to take collective action in accordance with national law and/or practice.

The role of trade unions is also recognised in the European Declaration on Digital Rights and Principles for the Digital Decade, proclaimed by the European Parliament, the Council and the Commission (European Commission, 2023, pp. 1–7), which is the latest and most important European document on digital rights. The declaration highlights that trade unions and employers' organisations play an important role in digital transformation, particularly in relation to the definition of fair and just working conditions, including with regard to the use of digital tools at work. These documents reflect the views of European authorities and set the direction of EU policy on AI. For this reason, their importance and relevance for future legislative action should undoubtedly be recognised. However, they cannot be considered as standards of European law.

In April 2021, the Commission presented its AI package, including inter alia a proposal for a regulation laying down harmonised rules on AI (European Commission, 2021) and a relevant impact assessment. In September 2022, the Commission adopted a proposal for a directive on liability for artificial intelligence (European Commission, 2022). In the first of these, it is indicated that AI systems used in employment, worker management and access to self-employment, notably for recruitment and selection, for making decisions on promotion and termination, for task allocation and for the monitoring or evaluation of persons in work-related contractual relationships, should be classified as high risk, since those systems may appreciably impact the future career prospects and livelihoods of these persons.

Despite the ongoing legislative work, the above proposals are still drafts and not binding law. Although changes in the field of artificial intelligence are progressing very quickly, the new European standards for it will not come into force immediately. It is expected that regulations at the EU level will not be issued before 2025 (Salis-Madinier, 2021, p. 10). At Member State level, it is difficult to see any legislative action to regulate AI in labour law and, in particular, to introduce transparency principles for algorithmic management. Many governments highlight the need

to evaluate the current legal framework and to adopt new EU-level legislation to guarantee a binding regulatory framework for the successful uptake and deployment of AI (Van Roy et al., 2021, p. 15).

Sometimes the opacity of algorithmic operations is equated with the threat of discriminatory practices – hence the idea of introducing anti-black-box solutions into anti-discrimination law. One example is the idea of introducing a presumption of algorithmic discrimination. In German legal doctrine, it has been suggested that the principle that the use of non-transparent algorithms should be sufficient grounds for discrimination should be introduced into the General Equal Treatment Act. In such a situation, it would be up to the party using AI to disprove this, e.g. by disclosing the technical and organisational measures taken to avoid discrimination (Martini, 2019, p. 361). Such solutions can be considered but should not be the only legislative activity in this area. The problem of lack of transparency is not only related to discrimination; other fundamental interests of workers are also at stake. Therefore, regulation to combat black boxes should be holistic and cover the entire field of labour law (as well as other areas of law). Other countries, such as Italy, are also attempting to strengthen worker protection in algorithmic management (Agosti et al., 2013).

One of the few regulations already in place to address the problem of AI's lack of transparency is the regulation adopted in 2021 in Spain (Gobierno de España, 2021). The provision states that '[t]he Council of Workers (of a company) shall have the right, at the appropriate interval, to: be informed by the company of the parameters, rules, and instructions on which algorithms or artificial intelligence systems that affect any decision-making that may have an impact on working conditions, access to and maintenance of employment are based, including profiling'. This regulation is the first step towards ensuring employees' right to information about the algorithms used by their employer. Despite its shortcomings, it has been highly praised in doctrine as a first and ambitious solution (Villarroel Luque, 2021, p. 27).

A similar solution is being considered in Poland. The draft amendment to the Trade Union Act stipulates that the information that an employer must provide to trade unions will include an item on 'parameters, rules and instructions on which algorithms or artificial intelligence systems are based, which influence decision-making and which may affect working conditions and remuneration, access to and retention in employment, including profiling' (Sejm, 2022). The Polish Parliament is currently working on this project. This provision seems to fit in with existing legal solutions on trade union powers. At the same time, it allows for the introduction of controls on the use of AI in employee management.

It is worth noting that the introduction of an information requirement is an important step, but not enough. At this point it is worth considering whether the introduction of the new regulation is consistent with employers' existing information obligations. Currently in Poland, the most general scope of an employer's informa-

tion obligation results from Art. 28 of the Trade Union Act 1991. The employer's obligation to provide specific information to the trade union has a strong axiological justification: it is the recognition that this obligation is one of the fundamental elements of the actual functioning of social dialogue in the workplace, i.e. the implementation of the constitutional principle. The limits of this obligation are determined by the scope of competences of trade union structures, which refers both to the necessary minimum of information that must be provided and to the indication of what information is not covered by this obligation (Szmit, 2019).

Art. 28 of the Trade Union Act stipulates the employer's obligation to provide trade unions with any important information at their request if it is necessary to conduct union activities. This information concerns working conditions and remuneration principles, the employer's activities and economic situation related to employment and expected changes in this respect, the status, structure and expected changes of employment, as well as activities aimed at maintaining the level of employment or activities that may cause significant changes in the organisation of work or the basics of employment. However, the legislation does not oblige the trade union to justify this application, although, if the requested information cannot be justified by any purpose of union activity and thus clearly exceeds the statutory obligation to inform the union, the employer may refuse to provide it. However, the employer runs the risk of incorrectly assessing the union's request. Therefore, it can be briefly stated that the employer is obliged to provide the trade union with all information necessary for the latter to conduct its activities and at the same time is not obliged to provide information that is not necessary for this activity (Florek, 2010). The legislation does not formulate a closed catalogue of information that the employer is obliged to provide to the trade union. The union may also request other information if it is necessary to conduct its activities; this may include, for example, information on the mechanisms of operation of company funds, mechanisms for regulating the social and welfare status of employees and retirees, or information on the employer's collection of trade union fees (Wujczyk, 2019, p. 208).

At this point, a practical problem arises regarding the lack of any clarification of the limits of this obligation, which means opening a wide field for conflict, because it can be safely assumed that the employer will strive for the narrowest possible understanding of the concept of 'information necessary to conduct trade union activities, while trade unions will interpret the same phrase as broadly as possible' (Szmit, 2019, p. 39). Information is necessary if it enables trade union structures to represent and defend the rights and the professional and social interests of working people (which is the purpose of trade union activity, resulting from Art. 1 of the Trade Union Act), within the framework of specific powers and competences granted to them (Wujczyk, 2007, pp. 135–136).

The question that needs to be answered is: What if the information is covered by a trade secret? If this information is provided as part of negotiations on the content

of a collective labour agreement, the matter seems clear. Pursuant to Art. 241(4)(2) of the Labour Code of 1974, representatives of trade unions are obliged to not disclose information obtained from the employer that constitutes a trade secret within the meaning of the provisions of the Act on Combating Unfair Competition of 1993. However, there is no express regulation that would entitle the employer to refuse to provide the information or even prohibit trade unionists from disclosing it to the staff. The solution is to apply by analogy the provisions of the Act on Informing and Consulting Employees of 2006, which regulates the principles of transferring secret business data to the works council. This would mean that trade union members would be obliged to not disclose information obtained in connection with their function, pursuant to Art. 28 of the Trade Union Act, if that information constitutes a trade secret, in respect of which the employer has stipulated the obligation to keep it confidential. This obligation would also exist after ceasing to hold office, but for no longer than three years. Additionally, a similar application of the provisions governing the supplying of information to a works council would allow the employer, in particularly justified cases, to not provide the trade union with information the disclosure of which could, according to objective criteria, seriously disrupt the activities of the enterprise or plant concerned or expose it to significant damage (Wujczyk, 2019, pp. 208–209).

The obligation of confidentiality for trade union activists as employees may result from Art. 100(2)(4) of the Labour Code, the obligation to keep information confidential if its disclosure could expose the employer to damage. Disclosure of such information may result in the act being considered a serious breach of employee duties, which may constitute the basis for immediate termination of the employment contract due to the employee's fault. The employer may also treat the disclosure of a secret as an act of unfair competition, which is considered to be the transfer, disclosure or use of someone else's information constituting a business secret or its acquisition from an unauthorised person if it threatens the significant interests of the entrepreneur. Committing such an act may give rise to criminal liability, because whoever discloses to another person or uses in his/her own business information constituting a trade secret, contrary to his/her obligation towards the employer and if he/she causes serious damage to the entrepreneur, is subject to a fine, restriction of liberty or imprisonment for up to two years. An employer who has suffered damage as a result of the disclosure of trade secrets by an employee may also seek compensation from the employee for the damage suffered (Żołyński, 2014).

Conclusions

The obligation to provide information on algorithmic management should not be objectionable. However, there are concerns about the implementation of this ob-

ligation. Employers using algorithms very often point out that the design and operation of algorithms are covered by trade secrets or copyright. Algorithms used in human resource management can lead to more efficient work, better collaboration between employees and their teams, and increased quality and productivity. All this can affect a company's market position and should be kept secret, therefore legislation should take this into account. One solution could be to oblige trade union activists to keep secret information that could have a negative impact on the company's situation. It seems that the solution adopted in Article 241(4) of the Labour Code can be applied here, obliging trade union representatives not to disclose information received from the employer that constitutes a trade secret within the meaning of the provisions on combating unfair competition.

Another problem is the quality of the information provided. It is clear that not all users, including trade unions, have the knowledge to understand how the algorithms work. However, the information provided to trade unions does not have to be about the technical features of the software; the employer should give them feedback that allows them to understand the decisions made by the AI. This will enable workers to draw the appropriate conclusions and possibly appeal the outcome, if separate legislation provides for a right of appeal (Nowik, 2022, p. 131). The explanation should be provided in an understandable written or visual form, adapted to the stakeholder's level of knowledge. For a non-expert user, the explanation is best presented using natural language – both verbal and written – and indicating which data features and algorithmic functions led to the decision. The drafters of the Polish law are therefore to be commended for having identified the black box problem in the working environment. However, during the parliamentary process, it would be worthwhile refining the provisions that have been drafted.

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Collective agreements on working conditions of solo self-employed persons: perspective of EU competition law[1]

Abstract: The 2022 Guidelines of the European Commission on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons apparently introduced a fresh approach towards collective agreements in a gig economy era. The main aim of this paper is to discuss whether the 2022 Guidelines are an appropriate tool to address the problems of solo self-employed persons (i.e. persons who are not in a formal employment relationship and who rely primarily on their own personal labour to provide services) from the perspective of EU competition law. To this end, we first present key competition problems related to collective agreements (section 1). Second, we analyse the regulatory framework for exemptions from competition law, with a view for a potential exemption relevant for collective agreements, as well as an approach to collective agreements in EU case law (sections 2 and 3). Third, the background for adopting the Guidelines, and their goals,

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is analysed (sections 4 and 5). Fourth, the Guidelines are discussed in more detail in sections 6 and 7 from the perspective of exemptions from Art. 101(1) TFEU. Finally, we examine the relationship between the Guidelines and a proposal for a platform work directive. The article attempts to verify the hypothesis that the Guidelines may be considered a pseudo-development.
Keywords: collective bargaining, competition law, digital platforms, solo self-employed persons

Introduction

Broadly defined as an economic system that uses online platforms to digitally connect on-demand freelance workers with customers or clients to perform fixed-term tasks (Duggan et al., 2021, p. 1 ff., and the literature quoted there), the gig economy has definitely generated as many chances and opportunities for economic and social development as it has problems of a social and legal nature. The latter can hardly be solved by existing 'traditional' regulations that were in fact adopted to respond to problems and conflicts in an 'analogue' economy. The appearance of digital platforms was crucial for the market for services, as they totally changed the structure of the process of service provision. A direct horizontal relationship between a service recipient and a service provider has been replaced by a more complicated structure involving two relationships: one between a digital platform and a customer or client and the other between the platform (acting as a supplier of orders) and a service provider. One of the key problems is the nature of the latter relationship: Is it employment or a classical business-to-business contract? An answer to this question is crucial not only for labour law, but also for competition law. The 'Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons' (European Commission, 2022, pp. 2–13), adopted by the European Commission in 2022, seem at first glance to introduce a fresh approach towards collective agreements in a gig economy era. By analysing existing case law, the background for adopting the Guidelines, the Guidelines themselves and their relationship to a proposal for a platform work directive, this paper aims to discuss the appropriateness of the Guidelines as the Commission's reaction to the problems of solo self-employed persons (i.e. persons who are not in a formal employment relationship and who rely primarily on their own personal labour to provide services) from the perspective of EU competition law. Taking into account a wide range of potential measures at the disposal of the Commission (block and individual exemptions, former case law, regulations and directives of labour law), we intend to check if 'regulating' the issue through guidelines in the area of competition law was the best regulatory choice to eliminate the potential risks resulting from EU competition law for the collective bargaining of solo self-employed people working for digital platforms. Whereas some authors have assessed the Guidelines as an important achievement (Giedrewicz-Niewińska & Kurzynoga, 2023, p. 18; Giovannone, 2022, p. 228; Mella Méndez & Kurzynoga, 2023, p. 206; Rainone, 2022,

pp. 15–16), this article attempts to verify our hypothesis that they may be considered a pseudo-development from the perspective of solo self-employed persons, as well as in regard to the consistency of EU competition law. The research methods employed here include, first, a doctrinal legal method (to systematically analyse the relevant provisions and the case law involved) and, second, systemic and teleological approaches.

1. Collective agreements in EU competition law: Key issues

Art. 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'. On the one hand, if persons working through digital labour platforms are deemed workers (not undertakings), their collective agreements would probably be covered by an exemption from the operation of Art. 101(1) (Buendia Esteban, 2022, p. 476, and the literature quoted there; Schmidt-Kessen et al., 2020, pp. 11–12). On the other hand, the extensive definition of the notion of an undertaking – as a 'generic EU legal concept' (Cengiz, 2021, p. 80), covering any entity engaged in economic activity regardless of its legal status and the way in which it is financed (Judgment of the Court of Justice of the European Union 1991, para. 21) – implies the broad application of EU competition rules to collective bargaining for self-employed persons (Schiek and Gideon, 2018, pp. 18–19) as a '[r]elabeling[,] […] not a free pass to restrict competition' (Schmidt-Kessen et al., 2020, p. 15). This, in turn, may result in treating collective agreements as anti-competitive agreements, prohibited, albeit not without exceptions, by Art. 101(1) TFEU. At first glance, this compromises the fundamental right to collective bargaining and leaves self-employed persons in a vulnerable position, without bargaining power.

The right to collective bargaining is protected, as a fundamental right, in most of the constitutions of the Member States and at the European and international levels (EU Charter of Fundamental Rights, Arts. 28 and 31; ECHR, Art. 11). The conclusion of collective agreements is also an objective of the TFEU (Arts. 151 and 155), allowing the improvement of workers' employment conditions; to achieve this goal, collective agreements are in fact frequently considered a more efficient tool than a legislative act (Monti, 2021, p. 2). It is important to point out, however, that the provisions of the Treaty on employment (Arts. 145–150 TFEU) and social policy (Arts. 151–161 TFEU) are related to the notion of a worker, while economic activities carried out by the self-employed fall into the field of industrial policy (Art. 173). And as has already been alluded to (Opinion of Advocate General Wahl, 2014, paras. 41–42), Art. 173 TFEU, unlike Arts. 151 and 155, does not encourage the self-employed

to conclude collective agreements, because 'the ways in which the professional activities of those two groups are organized and exercised differ profoundly' (Opinion of Advocate General Wahl, 2014, para. 43): a self-employed person must assume the commercial and financial risks of the business and is not subordinated to the employer.

2. The regulatory framework for exemptions from competition law

The questionable assessment of collective agreements reflected in a juxtaposition of social and industrial policy goals raises the issue of potential exemptions from competition law. As the complex variety of exemptions is offered, various legal classifications are developed. Exemptions to competition laws, including exemptions from the prohibition of anti-competitive agreements, can be classified into: (1) public policy-based exemptions that reflect a belief that (i) competition laws cannot be properly applied to certain conduct because of conflicting policies about the intended reach of those laws; and that (ii) the free-market principles of competition laws should be secondary to other regulatory or economic goals, especially where there is a relevant regulatory authority charged with monitoring the market and marketing practices (e.g. labour or agriculture organisations, insurance, certain aviation agreements); (2) special industry exemptions where the broader public-policy goals do not seem to justify the protection given (McDonald & Miller, 2011). *Largo sensu* exemptions to competition laws can be classified into (Orlanski, 2011, pp. 28–42):

1. exemptions concerning regulated activities, typically applicable to infrastructure industries where there is a specific regulatory agency controlling and enforcing the regulations (which in fact should not be considered an actual exemption);
2. particular exemptions for certain industries, based on political, social, cultural, historical or other non-market-based circumstances (e.g. shipping liner companies, certain air transport agreements);
3. particular exemptions for certain collective activities and associations, often linked to a certain type of industry, and usually where they are viewed as having benefits or low risks of harm;
4. a general category of exemptions based on market or economic rationale (block exemptions on the basis of Art. 101(3) TFEU);
5. on-demand discretionary exemptions;
6. other direct governmental interventions in the economy.

From the perspective of Art. 101(1) TFEU, block exemptions are of particular importance. The EU legislature chose to give effect to competition rules in EU primary law by way of the Council's regulations or directives (Art. 103 TFEU).

The Commission may adopt block exemption regulations, however, only with the authorisation of the Council (Art. 105(3) TFEU). Regulations, which are by their nature binding, do not have merely the 'decorative' effect of defining existing law (Frenz, 2016, p. 420). A system of such 'safe harbours' strikes a balance between legal certainty for undertakings and reasonable protection of competition. As for the grounds for exemptions in Art. 101(3) TFEU, its broad interpretation allows undertakings to rely on either explicit justifications set out in this provision or other objectives of the Treaty which in turn gives them a wide range of justifications, including aspects related to, for example, environmental protection or general welfare (Frenz, 2016, pp. 537–539). Nevertheless, legislating in the form of a regulation is only reasonable if there is something that needs to be regulated (Frenz, 2016, p. 419).

Soft law is a different type of an instrument. It has no binding legal effect for either national authorities and national courts or for the EU courts (Judgment of the Court of Justice of the European Union 2012). Soft law only provides information on the Commission's administrative practice in the interpretation and application of law for undertakings, authorities and courts. However, although the authorities and courts of the Member States must not simply ignore soft law issued by the Commission, because of their duty of sincere cooperation, they are not bound by it (even though they must give reasons for any divergences, which can be judicially reviewed) (Opinion of Advocate General Kokott, 2012).

3. A case-law approach to collective agreements in competition law

In its well-established case law, the Court of Justice ruled that agreements concluded within the framework of collective bargaining between employers and employees need, in certain circumstances, to be exempted from the application of EU competition law. In *Albany* (Judgment of the Court of Justice of the European Union 1999, C-67/96), the Court of Justice ruled that subjecting collective agreements to competition law would seriously undermine the social-policy objectives contained in those agreements; collective agreements concluded 'in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of [Art. 101(1)] of the Treaty' (Judgment of the Court of Justice of the European Union 1999, C-67/96, para. 60). The case concerned Dutch pension legislation, allowing the Minister of State to make an affiliation to a supplementary pension scheme, created by a collective agreement, compulsory for the textile sector. This type of agreement would not be caught by the Art. 101(1) prohibition if two conditions were met: if the agreement were the result of social dialogue and if it intended to improve the employment and working conditions of workers (Ichino, 2001).

Subsequent application of the *Albany* exemption by the Court of Justice confirmed that agreements that ameliorate the employment and working conditions of employees are exempted from competition law. Examples include, in particular, *van der Woude* (Judgment of the Court of Justice of the European Union 2000), concerning a collective agreement establishing a healthcare insurance scheme for the hospital sector, *Brentjens* (Judgment of the Court of Justice of the European Union 1999), regarding a collective agreement creating supplementary pension schemes, and *Drijvend* (Judgment of the Court of Justice of the European Union 1999), concerning a compulsory affiliation to a sectoral pension scheme. However, in *Pavlov* (Judgment of the Court of Justice of the European Union 2000), regarding a compulsory affiliation to a supplementary pension scheme, the Court decided that self-employed medical specialists should be considered undertakings and that the *Albany* exemption could not apply.

Furthermore, the exemption of collective agreements from the application of EU competition law was discussed in *FNV Kunsten* (Judgment of the Court of Justice of the European Union 2014). The Court ruled that agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Art. 101(1) TFEU (Judgment of the Court of Justice of the European Union 2014, para. 23). According to the Court, the essential feature of the employment relationship is that 'for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration' (Judgment of the Court of Justice of the European Union 2014, para. 34). However, service providers are formally independent economic operators in relation to their principal, so they are, in principle, 'undertakings' within the meaning of Art. 101(1) TFEU, even if they are in fact 'false self-employed', as the relationship with a supervisor resembles employment (paras. 27 and 31). The Court held that collective agreements covering false self-employed workers would also fall within the exemption from Art. 101(1) TFEU, as such individuals are 'in a situation comparable to that of employees' (para. 31). This stance was applauded by some as it enforced the principles of solidarity and labour protection (Ankersmit, 2015), and criticised by the others for establishing a vague test of little or no use for new forms of work (Daskalova, 2017; Pennings 2015). Advocate General Wahl went a step further and, drawing parallels with American solutions which provide an explicit antitrust exception for labour unions, suggested that the *Albany* exemption should be extended to collective agreements concluded by trade unions representing both employees and self-employed persons, to avoid the risk of 'social dumping' (where, without an agreement, workers could be replaced by self-employed persons at lower cost) (Opinion of Advocate General Wahl, 2014, paras. 84–100). The Court did not, however, follow this proposal.

In a digital economy, labour relationships have totally changed, and the classic distinction between a worker and a self-employed person has become blurred, so the situation requires a fresh look at the existing case law. At the same time, whether the traditional goals of competition law (economic efficiency and consumer welfare) are its sole objectives has been challenged, in and outside the EU (see below).[2] A new approach to collective agreements in the context of digital platforms seems to be a challenge in this regard.

4. The background for adopting the Guidelines

The appearance of new forms of labour relationship resulting from the specific nature of digital labour platforms has raised many concerns related to the proper classification of natural persons delivering services as 'traditional' workers or independent contractors (Koutsimpogiorgos et al., 2020, pp. 529–530; Stojković & Ostojić, 2021, pp. 269–281). A lot of effort has been put into adapting well-known labour-law conventions, including regulations on collective agreements, to the new economic conditions of a digital environment (Unterschütz, 2020, pp. 80–94). The issue has been a subject of interest for international organisations (e.g. OECD, 2020), national authorities and trade unions (Ranaraja, 2022, pp. 60–89).

EU institutions have also become involved in a process of creating regulatory proposals for the gig economy. In a 2017 resolution on a European Agenda for the collaborative economy, the European Parliament called on the Commission 'to publish guidelines on how Union law applies to the various types of platform business models' (European Parliament, 2017, para. 40). In January 2021 the Commission informed the public for the first time about its initiative called 'Collective bargaining agreements for self-employed – scope of application of EU competition rules' and asked for primary feedback on a presented roadmap. The Commission announced a public consultation on the draft document. As a result of the public consultation, held from March to May 2021, the Commission gathered 310 pieces of feedback, the majority of them (199) coming from EU citizens, with 40 opinions from trade unions and only 2 by public authorities.

On 9 December 2021 the Commission adopted a communication on an approval of draft Guidelines (European Commission, 2021a) as a part of a package of three regulatory proposals related to platform work, including a proposal for a directive on improving working conditions in platform work (the Platform Work Di-

2 Outside the EU, the New Brandeis movement in the USA suggests that antitrust law should not be limited to the lessons of the Chicago School of economics (Khan, 2018), while in the EU the dominant view has been that EU competition law has multiple goals besides economic efficiency and consumer welfare, such as, for instance, the improvement of the internal market (Andriychuk, 2017). Cengiz (2021) even suggests a shift from consumer welfare to citizen welfare.

rective) (European Commission, 2021d). In a Communication titled 'Better working conditions for a stronger social Europe: Harnessing the full benefits of digitalisation for the future of work', the Commission highlighted that '[f]or self-employed people, an additional obstacle to collective bargaining arises from the current interpretation of EU competition law' (European Commission, 2021b, p. 4). The starting point for the Guidelines was a statement that 'people working through digital labour platforms cannot usually negotiate collectively to improve their working conditions without the risk of infringing EU competition law' (European Commission, 2021b, p. 4). The second round of public consultation lasted until 24 February 2022. Some entities that submitted responses contested a proposal of merely introducing an exemption from Art. 101(1) TFEU for agreements for solo self-employed people: the Confederation of German Employers' Associations, noted that '[e]xtending the possibility of negotiating collective agreements to self-employed workers is counterproductive. The initiative risks blurring the lines between [the] rights and obligations of self-employed and employed workers […] There is no need to change the existing EU competition rules to allow self-employed workers to participate in collective bargaining or wage agreements' (European Commission, 2021c). A few organisations expressed their doubts on guidelines as a regulatory measure and proposed a directive as an appropriate regulatory tool (European Commission, 2021e). The final version of the Guidelines on collective agreements was adopted on 20 September 2022.

5. The goals of the Guidelines

The Guidelines aim at setting out 'the principles for assessing', under Art. 101 TFEU, 'agreements between undertakings, decisions by associations of undertakings and concerted practices' (in the meaning of Art. 101 TFEU), 'concluded as a result of collective negotiations between solo self-employed persons and one or several undertakings ("the counterparty/ies"), concerning the working conditions of the solo self-employed persons' (Guidelines, para. 1). Counterparties – as explained in para. 2(b) – are 'undertakings to which the solo self-employed persons provide their services', so digital platforms shall be treated as counterparties.

Taking into account that the issue of an application of competition rules to agreements on collective bargaining (collective agreements) seemed to have been ruled over by the Court of Justice in the past (see section 1 above), it is striking that the Commission decided to go back and to 'regulate' this issue by way of soft law. Despite the fact that the Guidelines establish the rules for the application of competition law to collective agreements, it is clear from the very beginning of the document that competition rules are treated as a tool to achieve goals other than just protecting the internal market in its economic dimension. The Commission explicitly refers to the social aspect of the internal market (the social market economy declared by Art.

3(3) TEU) by also underlining the Union's objective of facilitating dialogue between social partners, expressed in Art. 152 TFEU, and invoking Art. 28 of the Charter of Fundamental Rights of the European Union that recognises the right of collective bargaining and action (Guidelines, para. 4). The Guidelines evidence a serious shift in EU competition law: it is no longer only about the economy and efficiency, but also about social goals and fairness, as was confirmed by Commissioner Vestager, who does not see efficiency and fairness as two opposing objectives for competition enforcers (Vestager, 2022). The Commission seems to follow a path identified by Gerard a few years ago: '[I]nstead of weakening legal certainty, the candid exposure of the fairness rationale underlying competition principles […] might increase the predictability of individual assessment by shedding light on some of the variables capable of affecting outcomes' (Gerard, 2018, p. 212).

The issues of collective bargaining and collective agreements have been vigorously discussed in recent years in the context of the development of digital platforms (see section 2 above); the Commission also notices the trend, saying that 'certain solo self-employed persons may not be entirely independent of their principal or they may lack sufficient bargaining power' and '[r]ecent labour market developments have contributed to this situation, notably […] the digitalisation of production processes and the rise of the online platform economy' (Guidelines, para. 8). Nevertheless, even if the Guidelines constitute a part of a digital labour package (Cauffman, 2022), and the online platform economy is mentioned as a background for this 'soft' legislative activity by the Commission, the Guidelines do not seem to focus specifically on economic and labour relationships with digital platforms. Only one subsection of the Guidelines (sec. 3(3), paras. 28–31) is dedicated to solo self-employed persons working through digital labour platforms, and very few examples contained in the Guidelines refer to relationships with platforms.

Still, what can be seen as a contribution of the Guidelines to legislation on the online platform economy is the definition of a digital labour platform. In the Commission's view, this is any natural or legal person providing a commercial service which meets all of the following requirements: (i) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application; (ii) it is provided at the request of a recipient of the service; and (iii) it involves, as a necessary and essential component, the organisation of work by individuals, irrespective of whether that work is performed online or in a certain location (Guidelines, para. 2(d)). In the meaning of the Guidelines, the definition of a digital labour platform is limited solely to 'providers of a service for which the organisation of work performed by the individual, such as transport of persons or goods or cleaning, constitutes a necessary and essential, and not merely a minor and purely ancillary, component' (para. 30).

The direct goal of the Guidelines is to explain how the Commission will apply EU competition law (para. 10). The Guidelines do not affect definitions of workers

or self-employed persons in national law; they are also 'without prejudice to any subsequent interpretation of Art. 101 TFU by the Court, in relation to agreements entered into within the framework of collective bargaining' (Guidelines, para. 11, sentence 1). The Commission states that the Guidelines do not affect the application of EU competition law as set out in Article 42 TFEU and the relevant EU legislation in relation to the agricultural and fisheries sectors (Guidelines, para. 11, sentence 2). The Commission also declares that the Guidelines clarify 'a) that collective agreements by solo self-employed persons who are in a situation comparable to that of workers fall outside the scope of Art. 101 TFEU; and b) that the Commission will not intervene against collective agreements of solo self-employed persons who experience an imbalance in bargaining power vis-à-vis their counterparty/ies' (Guidelines, para. 9).

Bearing in mind the legal nature of the Guidelines (as a soft law, non-regulatory act), their scope and their aims as declared by the Commission, it is doubtful whether they are an appropriate tool to solve the core problem of the blurred distinction between employees and the solo self-employed in order to eliminate the possibility of applying Art. 101(1) TFEU to collective agreements by the latter.

6. Safe harbours for collective agreements established by the Guidelines

The Guidelines define a 'collective agreement' as 'an agreement that is negotiated and concluded between solo self-employed persons or their representatives and their counterparty/ies to the extent that it, by its nature and purpose, concerns the working conditions of such solo self-employed persons' (para. 2(c)). In fact, the scope of 'exemption' is narrow, limited solely to agreements on working conditions. The Guidelines apply both to negotiations and the conclusion of collective agreements. All forms of collective negotiations can be covered by the Guidelines, no matter whether they are conducted through social partners or through other associations or if they are direct negotiations by a group of solo self-employed persons or their representatives (para. 14). The Guidelines do not cover any agreements 'outside the context of negotiations (or preparations for negotiations) between solo self-employed persons and their counterparty/ies to improve solo self-employed persons' working conditions' (para. 17). In the context of the narrow scope of the Guidelines, it has also been asked in the literature why they only ensure access to collective bargaining and not to other key collective labour rights, such as the right to strike (Buendia Esteban, 2022, p. 485).

A certain degree of coordination of approaches is allowed on both sides (the solo self-employed and their counterparties), as far as is necessary and proportionate for the negotiation or conclusion of the collective agreement. It is worth noting that in the final version of the Guidelines, the Commission gave up additional explana-

tions regarding agreements of solo self-employed persons on a collective (coordinated) refusal to supply labour. In the draft Guidelines, the Commission declared a positive attitude towards such agreements, even if they may cause competition concerns; if these agreements on a coordinated refusal to supply labour are necessary and proportionate for the negotiation or conclusion of the collective agreement, they should be treated in the same way as the collective agreement to which it is linked (or would have been linked, in the case of unsuccessful negotiations) (draft Guidelines, para. 16). Elimination of the 'exemption' towards these agreements should be considered a step back in improving the position of solo self-employed individuals vis-à-vis digital labour platforms, for example, although such agreements could still be treated favourably in individual antitrust assessments.

The Guidelines introduce two approaches to collective agreements in the context of an application of Art. 101(1) TFEU. According to the first approach, which can be call d a 'non-application approach', some collective agreements just fall outside the scope of a prohibition provided for in Art. 101(1). Section 3 of the Guidelines introduces that approach towards agreements entered into by solo self-employed persons as being in a situation comparable to that of workers, regardless of whether the persons also fulfil the criteria for being false self-employed persons. The Guidelines identify three categories of solo self-employed persons who presumably are in a situation comparable to that of workers: 1) economically dependent solo self-employed persons, 2) solo self-employed persons working 'side by side' with workers, and 3) solo self-employed persons working through digital labour platforms. Economic dependency, defined as a situation where a solo self-employed person earns, on average, at least 50% of their total work-related income from a single counterparty, over a period of either one or two years (para. 24), does not constitute a necessary condition for being 'in a situation comparable to that of workers'. The categories of solo self-employed persons identified in Section 3 of the Guidelines are separate, individual categories, although they can overlap. Specifically, the Guidelines do not presume that self-employed persons providing their services at the demand of a digital labour platform are economically dependent in the meaning of the Guidelines. As a consequence, regardless of their economic (in)dependency, a collective agreement between solo self-employed persons and digital labour platforms on working conditions falls outside the scope of Art. 101(1) TFEU (Guidelines, para. 31). The final version of the Guidelines lacks a reservation that was added in the draft document: according to para. 31 of the draft Guidelines, 'collective agreements between solo self-employed persons and digital labour platforms that *by their nature* and *purpose* aim at improving working conditions fall outside the scope of Art. 101 TFEU, *even if the self-employed persons in question have not been reclassified as workers by national authorities/courts*' (emphasis added). That statement seemed to reflect a rationale for this provision in a more convincing manner.

The second approach towards collective agreements declared by the Commission in the Guidelines can be termed 'the adverse *de minimis* rule'. Section 4 of the Guidelines points to collective agreements of solo self-employed persons that the Commission will not intervene against because of the imbalance in bargaining power between these persons and their counterparty/ies. The parties to collective agreements may not bear any resemblance to workers; however, they still cannot be considered as equal partners to their counterparties, e.g. digital labour platforms, because of their lack of sufficient bargaining power to influence their working conditions. An imbalance of bargaining power is to be presumed in two cases: 1) where solo self-employed persons negotiate or conclude collective agreements with one or more counterparties that represent the whole of a sector or industry, 2) where solo self-employed persons negotiate or conclude collective agreements with a counterparty whose aggregate annual turnover and/or annual balance sheet total exceeds EUR 2 million or whose staff headcount is equal to or more than ten persons, or with several counterparties which jointly exceed one of these thresholds (para. 34). The Commission makes a reservation that other situations can also be identified as showing an imbalance between solo self-employed persons and a counterparty (para. 35). Additionally, it declares that it will not intervene against collective agreements relating to working conditions that involve categories of solo self-employed persons to which national legislation applies in pursuing social objectives and either (a) granting such persons the right to collective bargaining or (b) excluding collective agreements concluded by self-employed persons in certain professions from the scope of national competition law (para. 36).

7. The relationship between the Guidelines and a proposal for a Platform Work Directive

As stated above, the draft Guidelines were part of a package that included a proposal for a Platform Work Directive, now (12 April 2024) awaiting to be formally approved by the European Parliament during the 22–25 April 2024 plenary session and by the Council. Therefore the question arises as to how and to what extent these two documents (the Guidelines and the draft Platform Work Directive) relate to each other. Is it possible that, due to their relationship, the Guidelines will become superfluous after the adoption of the Platform Work Directive and its implementation? On the whole, it can be noticed that they only overlap to a small extent. The draft Platform Work Directive has a range of scopes, aiming to tackle a wide range of problems connected to platform work (Rosin, 2022, p. 478). In turn, as is also stressed above, the Guidelines are not demonstrably focused on work through digital labour platforms but on solo self-employed persons, including those contracting with the digital labour platforms through or to which they provide their labour.

This may be the reason why these documents have only one definition in common, i.e. the definition of a digital labour platform. This term is defined by the Guidelines in accordance with the draft Platform Work Directive, therefore the Commission will consider the need to update the definition in the Guidelines if the definition in the adopted version of the Platform Work Directive differs materially from it. The remaining definitions in the Guidelines ('solo self-employed person', 'counterparty', 'collective agreement') are not defined in the draft Platform Work Directive. The Platform Work Directive, once adopted and implemented domestically, will introduce a rebuttable legal presumption that the contractual relationship between a digital labour platform that controls the performance of work and a person performing work through that platform is an employment relationship. To this end, such a relationship needs to meet at least two criteria from a list of five. Harmonisation in this matter is likely to affect neither the soft law safe harbour based on the 'non-application' approach nor 'the adverse *de minimis* rule', unless the Guidelines are amended. The soft law safe harbour for solo self-employed persons working through digital labour platforms seems completely independent of whether, as a result of the correct determination of their employment status, they are recognised as workers or not (the false and genuine self-employed persons working through digital labour platforms). Solo self-employed persons working through digital labour platforms are considered as such in a situation comparable to that of workers, on the basis of Section 3 of the Guidelines.

Certainly, both documents revolve around the improvement of working conditions (explicitly mentioned in the title of the draft Platform Work Directive, so directly aimed at by it, and indirectly by the Guidelines, which are intended to make solo self-employed persons bargain over the improvement of their working conditions more courageously). Collective agreements 'exempted' by the Guidelines are only those concerning the working conditions of solo self-employed persons. Both documents leave this concept open. Only the Guidelines exemplify types of working conditions, mentioning the following in paragraph 15: remuneration, rewards and bonuses, working time and working patterns, holiday, leave, physical spaces where work takes place, health and safety, insurance and social security, and conditions under which solo self-employed persons are entitled to cease providing their services or under which the counterparty is entitled to cease using their services. In the public consultation on the draft Guidelines in 2022, some organisations proposed a further extension of the 'exemption' e.g. Bolt proposed group purchasing arrangements for essentials such as bike or car maintenance service contracts. However, this was not picked up by the Commission. The Guidelines include nine examples; taking their content into account, one may assess these as too simple, or even simplistic. The example 'non-exempted' agreements either are not between solo self-employed persons and a platform or do not obviously relate to working conditions (e.g. an agreement which divides the territory of a city between three platforms

as a market-sharing agreement). The example 'exempted' agreements clearly relate to working conditions. If economic life is not able to bring more sophisticated facts, the meaning of the Guidelines can be called into question.

Conclusions

Solo self-employed persons are generally considered as undertakings for the purposes of competition law, mainly Art. 101(1) TFEU, so the prohibition on anti-competitive agreements applies to any form their collaborations may take. The growth of the gig economy has created a tremendous demand for service providers and has totally changed labour relationships in markets; digital platforms have based their economic activity on solo self-employed persons, who in many cases are in a situation comparable to employees. In order to counteract anti-competitive conduct among the solo self-employed, who are expected to collude against digital platforms, the Commission decided to intervene by adopting a soft law act. The Guidelines constitute a part of a digital labour package, but they try to respond not only to problems characteristic for digital platforms, but also to a broader problem of false self-employment in relationships outside the gig economy. But even though the Guidelines define safe harbours for collective agreements by the solo self-employed, they do not bring anything new. The exemption of agreements for false self-employed persons (in a situation comparable to that of workers) from competition law does not in fact raise any doubts, in the light of the CJEU's attitudes in *Albany*, *FNV* and *Pavlov*. A potential exemption of collective agreements entered into by self-employed persons, recognised as undertakings in the light of Art. 101 TFEU, depends on the subject matter of the agreements (if they concentrate on working conditions, there are no competition concerns) or on the imbalance of power between the digital platforms and the solo self-employed. Summing up, the Commission created soft law safe harbours for collective agreements that would be attacked by hardly any competition authorities, leaving aside any clarifications for more complicated problems such as agreements on a refusal to provide labour or agreements on tariffs that are desirable from the perspective of equal treatment (Pennings & Bekker, 2023, p. 52).

In the light of the above considerations, the Guidelines may be considered a pseudo-development, as they do not solve any crucial problems that could not be addressed with simple references to the established interpretation of Art. 101(1) or previous case law; a much more active contribution of competition law to the realisation of social objectives could be expected (Schömann, 2022, p. 9). It seems that legal certainty could be better served if the harmonised criteria for an employment

relationship defined by the future Platform Work Directive were also used for the purpose of defining self-employed persons benefitting from exemption legislation when being party to collective agreements on working conditions with platforms. Further exemptions that go beyond these could be provided for in a regulation, mainly with the purpose of improving legal certainty resulting from its binding legal effect for national authorities and courts. Certainly, the Guidelines have a practical and symbolic significance (Daskalova, 2022; Rainone, 2022, p. 15), and they contribute to reducing legal uncertainty, although it is still not completely removed (Pennings & Bekker, 2023, p. 52). Consequently, the Guidelines cannot be regarded as an appropriate tool to address the legal challenges related to labour relationships in the gig economy that may appear in the area of competition law.

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The Obligations of the Employer in the Implementation of Remote Work: The Examples of Slovakia, the Czech Republic and Poland

Abstract: This text analyses the legal aspects of teleworking in Slovak labour law and remote working in Czech and Polish labour law. The text shows how Slovakia, the Czech Republic and Poland have used their experiences of employment during the COVID-19 pandemic in different ways. The basic difference is already apparent in the notions of remote working, teleworking and working from home. There are also some differences in the regulation of employers' obligations related to the implementation of remote working. The legal regulation of remote working is in its formative stage, as evidenced by recent Polish and Czech labour-law changes. The analysis of the legal regulations of the three countries shows that remote working is a challenge. It is legitimate to analyse different legal solutions and share experiences between the countries. The text analyses the latest legal developments.

Keywords: agreement on remote work, employer's obligations, remote work, telework, work–life balance

Introduction

Remote work, thanks to its flexibility and the possibility of combining professional and private life, has nowadays gained worldwide importance. It has become clear that this form of employment is not only a temporary phenomenon, but is becoming a permanent part of the modern working environment (Krasnitskaya & Khvatsik, 2020, p. 195). This is also why the legal regulation of remote work in Poland, the Czech Republic and Slovakia has been subject to changes. With developments of regulation come new questions and challenges for employers, who must ensure that their employees' remote work is efficient, safe and in compliance with labour-law standards.

The research methodology adopted here is based on analysing the normative material of Slovak, Czech and Polish labour law; the research relies on the method of interpretation of laws in force. Special attention has been paid to issues such as the definition of remote working and the employer's obligations related to its introduction. The objective of the research is to conclude whether COVID-19 has brought about changes in telework regulations and whether these are beneficial for employees.

1. The concept of remote work in Slovakia and related obligations of the employer

The Slovak Act No. 311/2001 Coll., the Labour Code as amended (the Labour Code), does not contain a definition of remote work. If we understand remote work as a term denoting a form of work in which employees perform work completely or partially outside their employer's workplace, the Labour Code recognizes two institutes governed by the same legal regime, namely domestic work and telework. In both cases, it is work that could be performed at the employer's workplace but is performed regularly from the agreed place of work outside the employer's workplace, within the scope of the established working time, or part of it. As follows from § 52 para. 1 of the Labour Code, the difference between the two types of work lies only in the fact that in the case of telework, the work is performed using information technology, which regularly involves the electronic transmission of data at a distance.[1] However, according to § 52 para. 2 of the Labour Code, telework is not considered work that the employee performs occasionally or under extraordinary circumstances with the consent of the employer, or after agreement with him/her, at home or a place other than the usual place of work, provided that the type of work that the employee performs according to the employment contract allows this; this separates so-called 'home of-

1 Since domestic work and telework are covered by the same legal regime, and given the focus of this article, we will only use the term telework for these relationships.

fice' work from telework. The decisive criterion for assessing whether it is telework or standard work, and whether the employer has allowed a so-called 'home office', will be a factual examination of whether the performance of work outside the employer's premises takes place 'occasionally or under extraordinary circumstances', and especially the wording of the employment contract itself. Because it is impossible to enter the employee's household without his/her consent, the employer cannot order the performance of telework unilaterally, and the application of the legal regime of telework requires an explicit agreement in the employment contract (Dolobáč, 2017, pp. 193–200).

One of the conditions of telework is that it must also be possible to perform this work at the employer's workplace. However, such legislation may cause some problems in practice. During the COVID-19 pandemic, the number of employees performing telework increased significantly, forcing employers to adapt their work environment, and some employers even shut down their physical workplaces as they were no longer needed. Here the question arises as to what legal regime to apply if the employer reduces his/her workplaces to an absolute minimum so that practically there is no longer a permanent workplace but only a virtual address. In that case, theoretically, it could not be telework.

An employee's household can be considered as any agreed place of work outside the employer's premises. If the employee not only performs telework, both the place of performance of regular work and of telework should be specified in the employment contract. This is a very broad definition of the term 'household' of an employee since it can be not only any agreed place of work outside the employer's promises within Slovakia but also abroad (Barancová, 2022, p. 9).

In the case of telework, the employee does not have to work from home the entire working time, but an element of regularity, rather than randomness, is required to preserve the feature of telework. The occasional performance of 'home office' work is therefore not telework; it is not covered by the rights and obligations established for telework and does not have to be agreed upon as such in the employment contract. Regularity of work is preserved even if it concerns the performance of work in a lower extent than agreed if the work is carried out in this way regularly every week.

Working time for telework can be organized in two ways: it is organized by the employer in the form of either fixed or flexible working hours. This method brings increased demands on the employer, who must monitor and record the length of working hours, overtime, work on holidays or night work. However, upon agreement with the employee, it is also possible for the employee to organize working hours directly him/herself. In this case, the employee can choose whether to schedule regular working hours throughout the week or can prefer flexible working hours. However, the choice of the method of scheduling working time does not release an employee from the obligation to inform the employer about the time and scope

of the telework. If the employee schedules his/her own working time after agreement with the employer, in such cases, according to § 52 para. 7 of the Labour Code:

- the provisions on the schedule of designated weekly working hours, continuous daily rest and continuous rest during the week do not apply,
- provisions on shortages do not apply, except for shortages for which the employer is responsible,
- the employee is not entitled to wage compensation in the event of important personal obstacles at work, except in the event of a leave of absence due to the death of a family member,
- the employee is not entitled to wages for overtime work, wage concessions for work on holidays, on Saturdays or Sundays, or for night work, or wage compensation for the performance of difficult work, unless the employee and the employer agree otherwise.

The possibility that the employee schedules his/her own weekly working time gives the employee more control over when and how s/he works, which gives him/her more flexibility in the organization of work. The restrictions mentioned reflect the difficult possibility of checking compliance with working hours by the employer (Dolobáč et al., 2023, p. 270), but even in this case, employees must comply with the restrictions regarding the maximum weekly working time and minimum rest, which are established by applicable legal regulations. This means that employees cannot work for an unlimited time and must have sufficient time to rest between shifts, as the necessity of observing the legal limits of weekly and daily working hours is also required by the jurisprudence of the Court of Justice of the EU (see Judgment of the Court of Justice of the European Union 2019; Judgment of the Court of Justice of the European Union 2022).

With the rapid progress of information technology, the development of work tools can harm the personal time and private lives of employees (Krause, 2018, p. 224). Therefore, the Labour Code, in § 52 para. 10, introduces the right to disconnect, consisting in the fact that a teleworking employee has the right not to use work tools for the performance of telework during his/her continuous daily rest and continuous rest in the week (if s/he is not ordered to or has agreed to work on standby or as overtime during this rest), when taking leave, on a holiday when work was cancelled, and when there are obstacles at work. Refusal to work when using the right to disconnect must not be considered a violation of work discipline.

Control of telework is also problematic: how should the employer control the performance of the work if the employee performs it outside the employer's premises? According to the current legal situation, the employer does not have sufficient legal options to enable such control. According to Slovak legislation, the employer could proceed following § 13 of the Labour Code, which allows exceptions to the right to personal privacy, but such interventions by the employer can only

be carried out based on legality, legitimacy and proportionality, and when the employer's notification obligation is fulfilled towards employee representatives and employees themselves. To protect private life, the employer must have the employee's consent to visit his/her household, at a previously agreed-upon time and with prior notification. This is also why in practice, some employers are content with just checking the employee's work results.

The area of health and safety at work is also related to this issue. Even when the employee is teleworking, the employer cannot get rid of his/her obligations in the field of health and safety at work, although in practice, this situation encounters several problems (for the issue of health and safety at work for teleworkers, also see Žuľová, 2017, pp. 93–95). The Labour Code and other labour regulations do not specify in detail how employers should fulfil their obligations in connection with safety and security; moreover, the actual space for this fulfilment and control is very limited – especially when employees schedule their own working time. This problem is even more important because the violation of health and safety rules at work, as well as in the performance of telework, can lead to occupational accidents, which will create complications in practice.

The performance of telework brings additional obligations for employers compared to the performance of work at the workplace. These obligations are mainly related to the employee's technical and software equipment and data protection during data transmission, but also relate to the relationship of the teleworker towards other employees. In particular, the employer must take appropriate measures to install and regularly maintain the technical and software equipment necessary for the performance of telework, except in cases where the teleworking employee uses his/her own equipment. This obligation on the employer is related to the legal nature of dependent work as work that is performed at the employee's expense (Barancová et al., 2022, p. 587). However, if the employer cannot fulfil this obligation for various reasons, s/he can agree with the employee on the use of his/her own technical equipment and software. This in itself does not mean that the employer is obliged to provide monetary compensation for the employee's use of their own work equipment, as this requires a special agreement, according to § 145 of the Labour Code. Based on such an agreement, the employer is obliged to pay only the proven increased costs of the employee connected with the use of his/her own equipment and objects necessary for the performance of telework. The employer does not have an obligation to reimburse costs for telework if the employee uses these funds at work without the employer's consent. The agreement according to § 145 of the Labour Code can therefore be understood as the legal basis for monetary compensation for wear and tear to the employee's funds in the performance of work, which in practice is often used in the form of providing a lump sum, without a need for the employee to prove the amount of increased costs.

As part of the obligations in providing technical and software equipment to employees for telework, the employer is also obliged to inform the employee about

the purposes for which and to what extent s/he can use that equipment and software. S/he is also obliged to warn the employee about the potential consequences of violating these restrictions. Telework increases the requirements on ensuring secure communication between the employee and the employer during the electronic transfer of data, as this data may include personal information or sensitive data concerning the employer. Therefore the employer is obliged to ensure that security measures are observed when transferring data and that unauthorized third-party access to this information is prevented. The employer must also consider options for securing the employee's data, either through special software solutions, special hardware, or a combination thereof.

Likewise, the employer is obliged to take measures to prevent the isolation of home-working employees or teleworkers from other employees. The employee's right not to be isolated is matched by the employer's obligation to prevent isolation and if possible to allow the employee to enter the workplace to meet with others in person. The employer also has obligations corresponding to the right of a teleworking employee to extend their qualifications. At the same time, the extension of the employee's qualifications can take various forms, and can be carried out not only face to face but also digitally. Finally, the legislation on telework also enshrines the prohibition on discrimination against a domestic worker or a teleworker in the same way as for an employee who works in an employment relationship under standard conditions at the employer's workplace.

2. The legal regulation of remote work in general in the Czech Republic

Czech law does not define remote work, domestic work or telework. In general, remote work is understood as a form of dependent work where an employee performs his/her work completely or partially outside the employer's workplace; whether the work is performed in the employee's house or some other place is irrelevant. Compared to Slovak law, Czech legal regulation does not define telework and does not regulate the particular working conditions of employees performing their work using IT. The performance of dependent work is regulated by the Act No. 262/2006 Coll., Labour Code, as amended (the Labour Code). Dependent work is defined by § 2 (1) of this Act as work carried out within a relationship of hierarchy between the employer and employee, in the employer's name according to the employer's instruction, and that is performed in person by the employee for the employer. If the activity of a natural person for another natural person or legal entity fulfils the four characteristic features of dependent work, it shall be performed among others at the employer's workplace or some other agreed place. One of the conditions of performance of dependent work is that the work is carried out at the employer's workplace or some other agreed place. According to § 3 of the Labour Code, depend-

ent work may be carried out exclusively within a basic labour relation unless regulated by other statutory provisions.[2]

It should be highlighted that the Labour Code in force until 30 September 2023 exclusively regulated remote work performed under the condition that it was carried out outside the employer's workplace within working hours organized by the employee himself/herself. In the past, several draft proposals for detailed regulation of remote work and telework were prepared but not adopted (Komendová, 2015, pp. 15–21).[3] In the opinion of some experts, remote work should be left, on the freedom of agreement, as a fundamental principle of private law (Tkadlec, 2020, p. 10). It was only in September 2023 when the Parliament approved a draft proposal for an amendment of the Labour Code, including more precise rules for remote work; the new regulation entered into force on 1 October 2023.[4]

3. New regulations on remote work in the Czech Republic

3.1. Written agreements on remote work and the employer's rightto order remote work

As has been mentioned, remote work can be performed exclusively based on the condition that an agreement between the employer and the employee is concluded. Legal regulation in force until 30 September 2023 did not require any formal conditions for agreement on remote work. In practice, many employers enabled their employees to perform remote work, in particular domestic work, based on an informal agreement with the employee concerned. From 1 October 2023, a written agreement on remote work with each employee is mandatory. The written agreement shall be concluded even in cases when remote work is only performed occasionally (Labour Code § 317, para. 1). Compared to the original draft proposal, no obligatory essentials of this agreement are stated by law,[5] and it can be terminated by a written agreement concluded by the employer and the employee or by a notice of termination; in this case, the notice period is 15 days. However, it is possible to agree on different periods (longer or shorter), provided that it is the same for both parties within basic labour relations.

2 Legal regulation in force recognizes three types of basic labour relations: an employment relationship, a labour relation established by an agreement on work performance and a labour relation established by an agreement on working activity. The latter two are called labour relations on work performed outside an employment relationship.

3 The last proposal for adoption of rules regulating domestic work was proposed in 2016.

4 The amendment of the Labour Code was published in the Collection of Laws as Act No. 281/2023.

5 According to previous draft proposals, the agreement on remote work should include, for instance, how the employer assigns the work, how s/he checks the work performance or how s/he assures health and safety at work.

One of the significant changes in the regulation of remote work relates to th employer's right to order employees to perform remote work under particular circumstances, such as a situation consisting of measures adopted by a public authority for public health protection. Remote work ordered by the employer may last only for a strictly necessary time if the nature of the work to be performed allows it and on condition that the place of performance of the remote work is suitable (Komendová, 2020, pp. 41–49).[6] It should be noted that the Czech legal regulation in force until 30 September 2023 did not state the employer's right to order remote work even during the epidemic situation caused by COVID-19 (Komendová, 2020, pp. 41–49).

3.2. Regulation of costs for remote work

The second significant amendment of legal regulation concerning remote work consists in the regulation of reimbursement for the costs of working remotely.[7] The employer is obliged to reimburse utility costs to an amount proved by the employee. The legal regulation enables the conclusion of an agreement between the employer and the employee stipulating that the employee is entitled to a lump sum instead of the actual utility costs.[8] The employer's obligation to reimburse the costs of remote work corresponds to the condition of dependent work stated in § 2. (2) of the Labour Code mentioned above, which is the performance of dependent wok at the employer's cost. It should be highlighted that the reimbursement of costs for remote work was one of the most criticized points of the draft proposal for amendment of the Labour Code proposed by the Ministry of Labour and Social Affairs. Due to criticism by employers' representatives, the final wording of the Labour Code amendment enables the conclusion of an agreement in writing which stipulates that no costs will be reimbursed.

3.3. The employer's obligation to allow remote work

As has been mentioned, the Czech legal regulation in force puts remote work exclusively under an agreement concluded between the employer and the employee. However, the amendment of the Labour Code that entered into force on 1st October 2023 lays down special protection for certain categories of employees. In fact, the main reason for the adoption of the Labour Code amendment was the implementation of the Directive of the European Parliament and of the Council (EU) 2019/1158 of 20 June 2019 on Work–Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU (Work–Life Balance Directive). Article 9 of this Directive,

6 If remote work is ordered by the employer, the employee is obliged, at the employer's request, to specify a suitable place of performance for remote work or to inform the employer that no such place is suitable.

7 See § 190(a) of the Labour Code.

8 This lump sum shall be specified by an Ordinance of the Ministry of Labour and Social Affairs. It is supposed to be approximately CZK 4.50 for each hour of remote work.

named 'Flexible working arrangements', states the obligation of Member States to take necessary measures to ensure that workers with children up to a specified age (at least eight years) and carers have the right to request flexible working arrangements for caring purposes. Flexible working arrangements shall include, besides flexible working schedules and a reduction in working hours, remote working arrangements (Recital to the Work–Life Balance Directive, point 34). The duration of such flexible working arrangements may be subject to reasonable limitations (Waddington & Bell, 2021 pp. 508–528).

It should be noted that the Labour Code amendment that entered into force on 1st October 2023 was adopted to implement the Work–Life Balance Directive. The new wording (§ 241(a)) lays down the employer's obligation to provide written reasoning for a decision not to provide remote work for employees who are parents or carers. The categories of employees entitled to the employer's reasoning for such a decision are as follows:

a) Apregnant employee,

b) An employee taking care of a child under nine years old,

c) An employee who on his/her own takes long-term care of a person who under the Act on Social Services is considered as a person being dependent on another individual's assistance, and such dependency is grade II (dependency of medium seriousness), grade III (serious dependency) or grade IV (full dependency).

It should be noted that the original draft proposal for the Labour Code amendment was even more strict; specifically, it contained the employer's obligation to comply with an employee's request for remote work under § 317 unless this is prevented by serious operational reasons.[9] However, this wording was finally refused, with the reasoning that it is not necessary to provide employees with such a high level of protection. The new legislation stating the employer's obligation to provide written reasoning for his/her decision not to provide remote work is considered rather controversial. Employers' representatives argue that all employers (both natural persons and legal entities) have the obligation to take into consideration the requests of employees taking care of children or another person, even in cases where it is obvious that it is not possible to enable them to transfer to remote work. There is strong criticism from the employers' side as regards the obligation to provide written reasoning for a decision not to provide remote work; most consider the new obligation an administrative burden.

9 Such an obligation is laid down by § 241 of the Labour Code as regards an employee's request for part-time work or any other suitable adjustment of weekly working hours.

4. The concept of remote working in Poland and employers' related obligations

4.1. The concept of remote working

Remote working is a new form of work organization in the Polish legal system; in April 2023, it appeared in the Polish Labour Code in place of telework. The concept of remote work has a legal definition in Article 67(18) of the Labour Code; according to this provision, work may be performed, in full or in part, at a place named by the employee, which may be the employee's place of residence, and at a time agreed upon with the employer, in particular with the use of means of direct communication over a distance. The parties may already agree on remote work at the time of the establishment of the employment relationship or during employment. Remote working shall be performed based on an employment contract.

As can be seen from this definition, the location of the remote work should be chosen by the employee, but s/he should always agree on this choice with the employer. This seems justified only because the employer has legal obligations related to remote working. For example, the place of remote working is relevant for assessing whether the employer can effectively carry out controls (Skreczko, 2023, p. 34). Agreement on the place of work is also relevant for determining the rights and obligations of the parties in the case of business trips, because the place of remote work determines where the business trip starts. This leads to the conclusion that the place of work should be specific, and means indicating the exact address of the place from which the employee works. The literature rightly emphasizes that the establishment of a specific place of work is important from the perspective of safe and hygienic working conditions (Prusik, 2023, p. 51) because, before remote working is allowed, the employee declares that safe and hygienic working conditions are ensured at this workplace. The employee's statement can only be verified if the employer knows the address at which the employee works.

It also follows from Article 67(18) that an employer cannot impose the place of work on an employee, especially if it involves the employee's home (Jaśkowski & Maniewska, 2023, art. 67(18)). Legal regulation protects the employee against such action by the employer. Firstly, the regulation prohibits the termination of the employment contract for refusal to agree to work remotely in the course of employment (Article 67(19)). Secondly, legal regulation prohibits discrimination against employees who refuse to work remotely (67(29)). The provisions of the Labour Code do not introduce specific regulations regarding the duration or period of remote working. It is therefore possible to introduce a hybrid way of working, partly remote and partly in a workplace. The rules for the introduction of a hybrid way of working are determined by the employer, in agreement with the employee. It is worth noting that

the Polish legislature has not yet regulated the right to disconnect (Miernicka, 2022, p. 123).

4.2. The employer's obligations regarding the implementation of remote working

The employer is obliged to determine the specific rules for remote working. The ways to define these rules are an agreement between the employer and the trade union organization, remote working regulations issued by the employer, an order of the employer or an agreement between the employer and the employee. If there are no trade unions at the employer or it has not been possible to negotiate an agreement, the employer is obliged to issue remote working regulations (Article 67(20) of the Labour Code). Remote working regulations shall be introduced by the employer after consultation with employee representatives and selected by the procedure adopted by the employer. The legislation does not indicate which specific entities have the right to consult on remote working; it should be agreed that these may be participatory bodies elected by the workforce or designated by the employer (Baran, 2022, p. 23). For example, this body could be an employee council.

The content of both the agreement and the regulations should primarily specify the group of employees covered by remote working (inter alia, by indicating specific positions). The identification of a selected group of employees entitled to remote working must not violate the principle of equal treatment in employment. In addition, rules should be established for the employer to cover certain costs: the employer is obliged to a) cover costs related to the installation, servicing, operation and maintenance of work tools, including technical equipment, necessary for the performance of remote work, b) cover the costs of electricity and telecommunication services necessary for the performance of remote work, and c) cover costs other than those mentioned above, but only directly related to the performance of remote work (Article 67(24) of the Labour Code). It is worth noting that work materials and tools may be provided by the employer, or rules may be established for the use of the employee's own materials and equipment.

If remote working is introduced at an employer, it is also necessary to adapt data protection provisions to the changing legal situation accordingly. To this end, the employer shall set out the procedures for the protection of personal data and provide, where necessary, training and instruction in this regard (Article 67(26) of the Labour Code). The agreement or regulations should also include the principles of control by the employer, which concerns the performance of work by the remote worker, safe and hygienic working conditions and compliance with security and information protection requirements, including procedures for the protection of personal data (Article 67(28) of the Labour Code) (Naumowicz, 2020, p. 28). Inspections shall be carried out in consultation with the employee at the place of remote work during the employee's working hours. The employer shall adapt the manner of inspection to where the

remote work is performed and the type of work. The performance of the inspection shall not violate the privacy of the employee performing the remote work or of other persons, nor impede the use of the home premises as intended. Any deficiencies noted during the inspection shall be remedied by the employee within the specified period. The employer may also revoke consent to remote working.

The rules according to which the employer controls the employee should not only refer to the place where the remote work is performed. They may also consist, in particular, of the use of such methods of control as email monitoring, videoconferencing (teleconferencing) and sending information to the employer on the facts and manner of performing tasks. The principles of control should preserve proportionality in the means used to the objective pursued and the provisions on the protection of personal data (Miłosz & Świątek-Rudoman, 2019, p. 32).

Before allowing remote working, the employer has a specific duty to assess the occupational risks and to inform the employee of the assessment. In addition, the employer should obtain documented confirmation from the employee that s/he has read the assessment that the remote workstation is organized in such way as to ensure safe and hygienic working conditions (Article 67(31) of the Labour Code). 'Occupational risk' is understood as the probability of the occurrence of undesirable work-related events causing losses, in particular, the occurrence of adverse health effects in employees as result of occupational hazards present in the work environment or through the way the work is performed.[10] This therefore requires a thorough examination and assessment by the employer of what in the workplace can cause harm to employees (Prusik, 2023, p. 219). It is worth emphasizing that, according to the Polish Labour Code, the occupational risk assessment should take into account not only the impact of remote work on the eyes or the skeletal-muscular system, but also the psychosocial conditions of this work. The literature, for example, points to the risks arising from the alienation of the worker from their team and their lack of contact with colleagues or superiors (Prusik, 2023, p. 219). Based on this assessment, the employer will have to establish rules for the safe performance of remote work and familiarize the employee with them.

An order to perform remote work is provided for emergencies, such as, for example, a state of emergency or a state of epidemic emergency. Furthermore, it may be issued during a period when it is temporarily impossible for the employer to ensure safe and hygienic working conditions at the employee's current workplace due to force majeure. The admissibility of issuing the order is subject to one further condition, which is the submission of a declaration by the employee that s/he has the premises and technical conditions to perform remote work. The form in which this declaration is made can be either on paper or electronically. The statement must be made imme-

10 Rozporządzenie Ministra Pracy i Polityki Socjalnej z 26.09.1997 r. w sprawie ogólnych przepisów bezpieczeństwa i higieny pracy (Dz. U. z 2003 r. Nr 169, poz. 1650 ze zm.).

diately before the order to perform remote work is issued, which makes it impossible to receive such statements 'in advance' (Sobczyk, 2023, art. 67(19)). It is worth noting that the employer must make a reasonable request to the employee to make the above statement. As noted in the literature, the Labour Code does not oblige the employee to make this statement (Jaśkowski & Maniewska, 2023, art. 67(19)).

Conclusions

Slovakia, the Czech Republic and Poland are all coping with the complexity of regulating remote work in the evolving landscape of modern employment. While there are positive aspects to these regulations, such as providing flexibility to employees and employers, there are also clear challenges and shortcomings that need to be addressed. In Slovakia, issues related to the organization of working hours, performance monitoring and health and safety at work have been highlighted as areas of concern. To ensure the successful implementation of telework, employers must establish clear internal policies and procedures that align with EU laws and case law. Furthermore, certain categories of highly autonomous employees should be allowed to telework without undue legal complications. The Czech Republic, on the other hand, has recently amended its regulations on remote work, stating the obligation for employers and employees to formalize remote work agreements. However, the legislation lacks specific provisions related to health and safety for remote workers, as well as the employee's right to disconnect, which are addressed in the legislation of many other EU Member States.

Remote work is a new form of work organization in the Polish legal system, regulated only after three years of its use in practice during COVID-19. Remote work replaced teleworking, which was quite rarely used by employers before the pandemic; they more often used outsourcing or self-employment than a telework contract. The Polish legislation has specified what remote working is. This solution should be evaluated positively, as there is currently no international definition of remote working and it is sometimes equated with telework; the Polish legislation makes a distinction between these concepts, with telework being closely related to the use of information technology and digital devices, and remote work being any work performed remotely. Currently, Polish law only regulates remote working. The *de lege lata* benefit for the employee is that remote work is voluntary. Moreover, the definition of remote work does not indicate any specific type of work that can be performed. Therefore, remote work may not only include work using new technologies for remote communication, but can also include small-scale production work. However, a disadvantage of the current state of the law in Poland is the lack of an employee's right to disconnect.

In light of these observations, it becomes clear that the countries discussed here can benefit from continually improving their labour laws to take into account the changing nature of work in the digital age. Balancing the needs and rights of both employers and employees is a complex task, but one that is crucial for creating a sustainable and harmonious work environment in the modern era. It is hoped that future legislative developments will take into account these considerations to ensure the well-being and productivity of the workforce in Slovakia, the Czech Republic and Poland.

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Remote Work Regulations in the EU, Poland and Kosovo with Some Considerations from the Perspective of the GDPR

Abstract: The purpose of this article is to conduct a comparative analysis of remote work regulation in the EU, Poland and Kosovo, also with consideration of issues related to the processing of personal data during remote work. The authors aim to assess the specificities, strengths and weaknesses of both regulatory models, from the point of view of actual and future legal developments. Additionally, given the early stage of regulation, they seek to explore the applicability of EU experiences to Kosovo and to identify potential vulnerabilities that may arise under EU regulation. In this context, they aim to determine whether EU solutions should be considered as models for implementation in both Poland and Kosovo, as well as to analyse the risk of overregulation, which could impede certain employees from exercising their rights to remote work and potentially lead to inequalities in employment. The objective of the regulation should be to strike a balance between protecting personal data and ensuring equality in the workplace. Therefore, the authors try to answer the question of whether the protection of personal data could be subject to an abuse of rights by employers, who might use it as a pretext to deny certain groups of employees the opportunity to work remotely, which is particularly pertinent for individuals with special needs.

Keywords: data protection, GDPR, new technologies, remote working

Introduction

The COVID-19 pandemic not only accelerated the process of informatization, but also changed attitudes toward the daily use of modern technological solutions. As a result, the importance of flexibility and adaptability in organizations has been highlighted. This situation demands outside-the-box and non-standard measures, extending beyond traditional methods associated with working at a place designated by the employer, typically the company's headquarters; in fact, computerization initially enabled the development of telework. With the increasing significance of remote work, new challenges for the protection of personal data are systematically emerging and cannot be overlooked in the context of a rapidly changing work environment. Indeed, the protection of personal data during remote work is a key issue aimed at not only effectively ensuring the privacy of employees, but also raising awareness of the need to comply with data protection regulations at both European and national levels.

It is worth noting an emerging interpretive problem in Poland regarding the need to distinguish between the terms 'telework' and 'remote work'. Before the COVID-19 pandemic, these terms were often used interchangeably in the national literature. Currently, it is increasingly emphasized that the two concepts are not the same (Dolot, 2020, p. 36; Krysiński, 2020, pp. 1–174). What is not in doubt is that the common element of both is that the work is performed outside the employer's premises. In the Polish Labour Code (PLC) (1974), the provisions allowing work to be provided outside the employer's premises were introduced in 2007 (Act on Amending the Labour Code and Certain Other Acts 2007). At the time, the legislation emphasized that the determinant premise for telework was electronic communication within the meaning of the Polish Act on the Provision of Services by Electronic Means (art. 67^5, § 1 of Polish Labour Code), in effect until 2023). According to art. 2, § 5 of the Polish Act on the Provision of Services by Electronic Means (2002), means of electronic communication are technical solutions, including data communication devices and cooperating software tools, which enable individual communication at a distance when performing data transmission between data communication systems, and in particular electronic mail (Wiśniewski, 2014, pp. 83–84). The 2023 Polish legislation defines remote as work that can be performed wholly or partially at the place indicated by the employee and agreed with the employer, including at the employee's home address, using means of direct communication at a distance. For this reason, we assume that the concept of 'remote work' will be conceptually broader compared to 'telework' (Muster, 2022, pp. 33–35). We agree with the thesis that the main difference between remote work and teleworking is that remote work does not require the transmission of work results via electronic communication, and therefore the term can be more widely used than telework (Prasołek & Kiełbratowska, 2020, p. 1; Vartiainen, 2021, p. 1 ff.).

On the other hand, current legislation in Kosovo does not define remote work. The term is used for the first time in Kosovo government decisions related to COVID-19 measures (Republic of Kosovo, 2020). However, forthcoming changes to the Labour Law are expected to regulate remote work, and therefore lessons learned from EU Member States could be applied, with adjustments, to Kosovo's conditions.

Within the context of remote work, this article explores legislative solutions from the EU, Poland and Kosovo on important aspects related to the protection of personal data in remote working environments. We pay attention to both the social and the technological conditions that have influenced the increased risk of privacy violations, as well as the way this issue is regulated in national legal systems. In our opinion, the popularization and increasing prevalence of remote work results in a need to verify, update and sometimes implement solutions to ensure the security of processed personal data. The first impetus in the EU Member States to introduce appropriate solutions at the legislative level was the enactment and subsequent entry into force of the European Regulation on the Protection of Individuals Regarding the Processing of Personal Data and on the Free Flow of Such Data (European Parliament, 2016). It seems that the second critical moment in building and developing awareness of the need to ensure the security of processed personal data was the COVID-19 pandemic, which resulted in increased use of modern methods of remote communication. Analysing the risks accompanying remote work, as well as highlighting practical solutions, can contribute to a better understanding of the challenges faced by both employers and employees. The following research methods have been used while working on this article: interpreting the applicable laws to determine how the principles of the protection of personal data during remote work are governed; the analytical method, applied to the relevant state of knowledge in the body of legal science; and the empirical method, based on the observation and analysis of practical issues arising from the authors' professional experience and their cooperation with Polish and Kosovar organizations dealing with the issue of protection of personal data.

The rationale for the choice of this study's subject is, first of all, the fact that we are dealing with Poland, which has been a Member State of the European Union since 2004 and so is directly obliged to apply the General Data Protection Regulation (GDPR), and Kosovo, which is not an EU Member State but has transposed the GDPR. Moreover, in our opinion, comparing the rules on the possibility of remote work and the protection of personal data in both countries is interesting, because both countries have their own cultural, social and legal contexts, and their comparison in the context of remote work and the protection of personal data can help understand how different societies and legal systems deal with the issues in question. By comparing the regulations in place in the two countries, it is possible to identify differences in priorities, regulations and practices. In addition, a review of the solutions introduced in Poland regarding remote work and issues associated with the pro-

tection of personal data in case of remote work can provide a stimulus to initiate work in identifying patterns and good practices worth implementing in Kosovo's case. A comparison of legislative solutions adopted in the Polish and Kosovar legal systems can lead to increased awareness and an exchange of knowledge of and experience in different approaches, which in turn can be particularly valuable in the context of cooperation and information exchange.

1. The protection of personal data with a focus on remote work: Regulatory perspectives in the EU, Poland and Kosovo

The EU GDPR is the key regulatory framework on the protection of personal data within the EU, and as a regulation is directly applicable by EU Member States, including Poland. The GDPR provides a comprehensive framework to ensure the protection of individuals' personal data and applies to the protection of such data in the process of remote work. Existing obligations for data controllers and processors also apply to remote work, however include additional technical measures and safeguards considering the risks that may arise due to the nature of remote work. By implementing these measures, controllers reduce the risks of data breaches and improve the privacy and security of data and legal compliance, while facilitating remote work arrangements. It is important for controllers to establish comprehensive policies and procedures to protect personal data effectively.

Kosovo has signed a Stabilization and Association Agreement (Council of the European Union, 2015) with the EU and is in an early stage of the EU integration process. At least from the regulatory perspective, Kosovo provides similar protection of personal data as the GDPR does. Its legal framework on Protection of Personal Data (Law on Protection of Personal Data 2019) is harmonized with the GDPR and the Law Enforcement Directive (European Commission, 2022, pp. 31–32). The Kosovo Information and Privacy Agency is mandated to supervise the implementation of a legal framework for the protection of personal data; however, its human resources and other capacities are still too limited to properly supervise and advise on implementation of this modern legal framework.[1] Despite some progress identified in recent years (European Commission, 2022, pp. 31–32), the practical implementation of a legal framework on the protection of personal data is facing various challenges. Employers are obliged to handle personal data in compliance with the requirements of the Law on Protection of Personal Data, which is applicable to remote work too. Art. 31 of the Law provides the same protection as art. 32 of the GDPR regarding the security of processing personal data. The data controller

1 Statement from the commissioner in a public presentation with Civil Society Organisations and businesses representatives in Peja, 27.07.2023, organized by Platforma CIVIKOS.

or processor shall undertake all necessary risk assessments and implement measures based on its nature and risks to maintain data security and to prevent infringement of personal data. Among these measures is the confidentiality of data, which may be secured by encryption (Law on Protection of Personal Data, art. 31). Furthermore, data controllers and processors shall have internal data protection policies in place that include cybersecurity, and proper instruction to employees to keep personal data safe (art. 23, § 2). Since teleworking and remote work includes ICT, some aspects of the protection of personal data on electronic communications are also covered by the Law on Electronic Communications (2012).

2. EU trends on regulating teleworking and remote work

The principal reference for telework regulation at the European Union level remains the 2002 Framework Agreement on Telework (European Trade Union Confederation, 2002), which was established through collaboration among cross-industry social partners in Europe. The agreement aimed to grant teleworkers equal legal protections while defining telework parameters within the workplace, aligning with the needs of both employers and employees (Social Dialogue Committee, 2006, p. 4). According to this agreement, 'telework is form of organising and/or performing work, using information technology, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis' (European Trade Union Confederation, 2002, art. 2, pp. 50–51). According to a 2008 European Commission report on the implementation of Framework Agreement on Telework, the majority of national regulations had already adopted key principles, such as defining telework, equal treatment for teleworkers, determining employee status, the voluntary nature of telework, the employer's responsibility for equipment and associated expenses, and the employer's obligation to ensure teleworkers' health and safety, data protection and privacy rights (European Commission, 2008, pp. 50–51). Notably, several aspects covered by this agreement, such as the protection of personal data, have been improved at EU level since then, especially related to the GDPR. According to Eurofound (the European Foundation for the Improvement of Living and Working Conditions), there are five main elements of telework, deriving from the EU Framework Agreement on Telework: 1) telework is understood as a work arrangement instead of a labour contract, and only employees with an employment contract are covered; 2) telework entails the use of ICT for the purpose of work; 3) only telework that is carried out on a regular basis is covered; 4) telework is exclusively understood as ICT-enabled, covering only those stationary jobs that could also be performed at the employers' premises; and 5) telework may include several alternative workplaces to the employer's premises (Eurofound, 2022, p. 17). The increase in telework during COVID-19 compared

to preexisting trends had a direct impact on new legislative initiatives among many EU Member States, introducing reforms in their national legislation (Eurofound, 2022, p. 11). These legislative initiatives were focused, among other things, on increasing flexibility in work arrangements, defining teleworking, defining the rights and obligations of parties in the new working environment including telework, the organization of work and working time, compensation for the cost of telework, and employment conditions; issues related to the digitalization of work and, to some extent, the protection of personal data, privacy and surveillance were among the core issues of these legislative initiatives (Eurofound, 2022, p. 12). EU member countries have used different terminology to define various aspects of working remotely; however, the term 'telework' is most widely used, before and during COVID-19 (Eurofound, 2022, p. 6).

The process of the computerization of society, which has been progressing for years, creates new conditions and opportunities for action in the economic environment, as well as placing new requirements on all participants in economic transactions. The rules of everyday functioning are changing, which is also noticeable in the labour market. Among other things, the nature of work and its forms are changing. The use of computerization tools and the experience of representatives of areas where modern technology is used regularly reflect the changes in the labour market. New forms of recruitment, the use of cloud technologies and artificial intelligence systems are currently being implemented. Freelancers and gig-workers are replacing full-time employees, while outsourcing, outstaffing and crowdsourcing are replacing departments and divisions of companies (Yashchyk et al., 2021, p. 157). For example, these changes mean that employees have more and more flexibility in scheduling their work and, most importantly, the location from which it is provided. The COVID-19 pandemic has changed the opinions of employers who were quite sceptical about the possibility of remote work by employees before 2020. It is now recognized that the provision of remote work has many benefits – from reducing the employer's costs to optimizing working hours and balancing them with leisure time (Ferdou et al., 2021, pp. 1–21; Sullivan, 2012), while increasing the competitiveness of job offers.

Since 2020, remote work has become very popular. In many companies, this model was also in place before the pandemic. According to a survey by Polish employers, after the outbreak of the COVID-19 pandemic, the percentage of Polish employers with a negative attitude toward performing work duties from home decreased from 27.6% to 11.7%. As many as 92% of entrepreneurs declared that the effectiveness of remote work is good or very good. However, 37% of employers indicated that such a system is detrimental to the integration and cooperation of teams, while 16% of respondents pointed out that the process of recruiting new people is difficult. The October 2021 survey showed that employees had a positive attitude toward this solution; as many as 84% of respondents said that a positive consequence

of working from home was the lack of a commute. The biggest downside of working remotely was considered by 57% of respondents to be the lack of opportunity to meet new people joining the company (Polish Agency for Enterprise Development, 2021, pp. 5–7). An interesting study carried out in 2020 by Jonathan Dingel and Brent Neiman examined the potential for remote work in various occupations; according to this study, 37% of employment positions in the US have the potential to be performed entirely from home, with variations observed across different job categories (Dingel & Neiman, 2020, pp. 1–8). The jobs of managers and educators, computer-related jobs, finance, law and similar positions are largely able to be done from home, while farming, construction, production and similar workers cannot work remotely. According to their analysis, extended to 85 nations, economies with lower incomes tend to have a smaller proportion of jobs suitable for remote work.

The study commissioned by the Polish Agency for Enterprise Development shows that in 2020, the countries with the largest number of workers performing their tasks remotely were Finland (25.1%), Luxembourg (23.1%) and Ireland (21.5%). The fewest remote workers were in Bulgaria (1.2%), Romania (2.5%) and Croatia (3.1%). In Poland, the percentage of people working from home was 8.9%. This result was below the EU average, which was 12% in 2020. According to Eurostat data, in 2020 the percentage of women working remotely in most EU countries was higher than the percentage of men, the difference ranging from -2.1% to 5.8% (Polish Agency for Enterprise Development, 2021, p. 7). This data is provided by way of example to emphasize the need to increase awareness of how to ensure the security of processed personal data when working remotely, which is becoming increasingly popular.

3. The admissibility of remote work in Poland and Kosovo

It is evident that COVID-19 had an impact on the increase in remote work, and at the same time raised numerous inquiries about teleworking worldwide. Among other things, these inquiries are related to the impact of remote work on different categories of employees as well as on issues about the protection of personal data, which are the focus of this paper. Poland and Kosovo are no exceptions, although there are differences between them regarding the regulatory framework, both in defining remote work and the protection of personal data in remote work. Allowing an employee to provide work remotely provides employers with employment opportunities for people from groups characterized by a certain isolation from society, for example people with disabilities, single parents caring for young children or people living at a great distance from the main centres of professional and social life. For such people, the development of information and communication technologies is extremely important for social integration. Employing such people with the possibility

of remote work de facto opens up the possibility of working from any place where there is access to the Internet (Isăilă, 2012, pp. 1006–1009; Yashchyk et al., 2021, p. 159).

In Poland, the possibility of remote work existed in practice in a few areas. Although remote work had been gaining popularity in recent years, before the pandemic, it remained rare for most workers. Only 1.9% of respondents worked remotely 100% of the time (5 days a week), while 4% of respondents did it most of the time (3–4 days a week). For 1–2 days a week, 16.8% of respondents worked remotely, and 43.4% sporadically (single days a month), with as many as 33.9% not working from home at all (Dolot, 2020, p. 36). Due to the fact that as of 20 March 2020, a state of epidemic was in effect in Poland in connection with COVID virus infections, announced by the decree of the Minister of Health (Ordinance of the Minister of Health on Declaring an Epidemic State in the Territory of the Republic of Poland 2020), we had a de facto lockdown.

Ad hoc changes due to the pandemic naturally generated the need for an immediate response by employers. In order to eliminate the threat of the spread of the pandemic, an increasing number of employees provided work from their places of residence. This was possible because functioning technological solutions and the appropriate competence of the workforce very quickly allowed a transition from the 'traditional' work model to a remote model (Muster, 2022, p. 30). Further factors supporting a willingness to provide remote work were, on the one hand, the fear of losing one's job and, on the other, the fear of contagion.

In Poland, until July 2023, the possibility of providing work off-site existed de facto in three regimes. First, since September 2007, it was telework, as was mentioned above. The permissibility of its performance was conditioned on the use of electronic means of communication clearly defined by Polish legislation. The realization of telework did not de facto apply to situations where an employee worked remotely only from time to time; as a rule, telework was permanent, not incidental. The terms and conditions of such work were established in agreements between the employer and the company's trade union, or, if there was no such organization at the workplace, in the telework regulations.

Second, it was possible to work remotely under the provisions of the so-called 'anti-crisis shield'. After the outbreak of the pandemic, the Polish legislature decided to introduce provisions on remote work performed at the behest of the employer. According to the original wording of art. 3 of the Act on Special Solutions Related to the Prevention, Counteraction and Suppression of COVID-19, Other Infectious Diseases and Emergencies Caused by Them 2020 (the so-called 'anti-crisis shield'), in order to counter COVID-19, an employer could instruct an employee to perform the work specified in the employment contract for a specified period of time outside the place of its permanent performance. On 31 March 2020, the indicated wording was amended by specifying that the employer's authorization covered not

only the period of the state of epidemic emergency or the state of epidemic declared due to COVID-19 but was also valid for a period of three months after their revocation. However, this regulation was repealed by the Labour Code Amendment Act (Act on Amending the Labour Code Act and Certain Other Laws 2022), which came into effect on 7 April 2023. The premise for such remote work was that the employer could, by unilateral agreement, instruct the employee to work in such a way, which is different from other types of remote work, in which the employee's explicit consent is required. An example was the possibility of remote work for those in quarantine. With the Anti-Crisis Shield Amendment Law (Act on Amending Certain Laws in Connection with Countering COVID-19 Emergencies 2020), art. 4(h) was added, so that as of 29 November 2020, during a period of a declaration of an epidemic emergency or a state of epidemic, employees under mandatory quarantine could, with the consent of their employer, perform the work specified in the agreement remotely and receive remuneration for it.

Third, in the period up to 7 April 2023, several questions were raised about the performance of remote work outside the two indicated regimes for reasons other than to counter COVID-19. The art. 22, § 1 of the PLC specifies that through the establishment of an employment relationship, the employee undertakes to perform work of a certain type for the employer, under his/her direction and at a place and time designated by the employer, and the employer undertakes to employ the employee for remuneration. This means that the employer may have agreed either at the conclusion of the employment contract or during employment (in the form of an amendment to the terms and conditions of the contract) that the work will be performed at a specific location that is not the employer's premises. In fact, until the pandemic, the implementation of a so-called 'home office' was not the rule but rather the exception. In practice, it meant that the employer agreed that work could be performed from location agreed upon with the employer for several days a week or a month.

For this reason, in 2023 an amendment to the PLC was enacted to make these regulations a permanent part of the Polish legal framework. The provisions related to remote work, among other matters, are affective from 7 April 2023. In the current state of the law in Poland, work may be performed wholly or partially at a place designated by the employee and agreed with the employer on a case-by-case basis, including at the employee's home address, using means of direct communication at a distance (art. 67, § 18 PLC). At the same time, the legislation specifies that remote work may be performed on an occasional basis, at the request of the employee submitted on paper or electronically, for not more than 24 days in a calendar year (so-called occasional remote work). In addition to the general rule, the Polish legislation stipulates in section 3 that remote work may be performed at the direction of the employer during a state of emergency or a state of epidemic emergency, and for a period of three months after their cancellation, or during a period in which

it is temporarily impossible for the employer to provide safe and hygienic working conditions at the employee's current place of work due to force majeure. However, this is conditional on the employee making a paper or electronic statement immediately prior to the order that s/he has the premises and technical conditions to work remotely. This statement is important, because if the premises and technical conditions change, making it impossible to work remotely, the employee shall immediately inform the employer; the employer then immediately revokes the order to work remotely. In this situation (i.e. working remotely on instruction), the employer may at any time revoke the instruction to work remotely, with at least two days' notice.

The PLC has set out in great detail the rules for remote work, including occasional remote work (art. 67, § 20 and § 33), the rules for filing a request to stop remote work and restore previous working conditions (art. 67, § 22), the employer's obligations and the employee's rights in the case of remote work (art. 67, § 24 and § 30), the rules for conducting inspections at the place of remote work (art. 67, § 28) and rules on occupational health and safety (art. 67, § 31). Detailed rules on the possibility of remote work are set out in an agreement between the employer and the company's trade union or unions. However, if there are no company trade unions at a given employer, the employer shall determine the rules for performing remote work in the regulations after consultation with employee representatives selected in accordance with the procedure adopted by the employer.

The regulation of the possibility of remote work in Poland was undoubtedly the result of the regulations introduced incidentally during the COVID-19 pandemic. Consequently, after the amendment of the PLC, we are dealing with three types of remote work: a) total, which is the solution most similar to existing telework; b) partial, which is the equivalent of remote work introduced during COVID-19 and the various forms of hybrid work that have appeared on the labour market in recent years; c) occasional, which is the equivalent of the so-called home office benefit used in some companies, i.e. work provided from home at the request of the employee in connection with his/her private need. It should be clearly emphasized that an employee may not start performing remote work arbitrarily; this constitutes a violation of the employee's duties and may result in consequences against the employee.

The Kosovo Labour Law of 2010 does not regulate remote work, therefore no definition of remote work is provided under the Kosovo legal framework. A draft labour law prepared in 2018 provides a definition of remote work and some basic provisions on regulating it, but it is still under discussion by the government. Although not specifically tailored to remote work, the provisions of the current labour law have to be implemented accordingly to remote work situations. In practice, many companies in Kosovo provide the possibility of remote work to some employees, such as those providing online services, including call centres, ICT services, etc. In many cases remote work is also provided for companies outside the country. The COVID-19 emergency raised the issue of remote work when the government

of Kosovo introduced COVID-19 measures in March 2020, among others ordering public-sector employees and private companies to work from home when possible. During this emergency only a limited percentage of businesses and public institutions carried out their activity on their premises, and only for specific activities.

Although businesses and employees were not prepared for an immediate change to remote work, there is great potential for it (Fetoshi, 2021, p. 57). According to several UNDP studies on the socio-economic impact of COVID-19 in Kosovo, conducted in 2020 (UNDP Kosovo, 2020) and 2021 (UNDP Kosovo, 2021), only a limited percentage of businesses allowed their workers to work remotely, and the percentage decreased as COVID-19 measures gradually eased. In March 2021, around 6% of respondent businesses declared that all their employees were working from home, while only 3% reported that some employees were working from home. Household surveys in the same study reiterate these results, with about 2% reporting working part or full time from home (3% of women, 1% of men). Remote workers faced challenges, including higher workloads, simultaneous caregiving for family members and multitasking. Women experienced more difficulty, with 54% having increased workloads and caregiving, compared to about 40% of men. At the same time, about 35% of women more commonly suffered from a lack of a suitable space for a home office, compared to 19% of men facing the same challenge. It is also interesting to read that most remote workers (54%) expressed a preference to not continue working from home after COVID-19. A larger percentage of women (38%) compared to men (22%) would prefer to continue working remotely (UNDP Kosovo, 2021).

The Kosovo Government approved a concept document on regulating the field of employment relationships in 2018 (Government of Republic of Kosovo, 2018). This was the first time a Kosovo government policy included regulation of telework, which was proposed to be regulated based on the ILO Convention (Government of Republic of Kosovo, 2018, p. 19). Based on this concept document, a draft of the Labour Law has been under preparation in government since 2018, which for the first time provides a definition of remote work and some basic provisions on regulating it. The draft provides two definitions, of 'home work' and of 'telework'; the main difference between these definitions is related to the use of information technology in the case of telework (Government of Republic of Kosovo, 2018, art. 3). Based on the draft, an employer is required to implement several measures to support telework effectively, including: a) providing, installing and regularly maintaining the necessary hardware and software for telework; b) ensuring the security and protection of data used in telework, particularly concerning software applications; c) informing the employee of any restrictions on the use of hardware and software, as well as outlining the consequences for any violations of these restrictions; and d) undertaking proactive steps to prevent isolation among employees engaged in home work or telework, and making sure that working conditions for such employees do not place them at a disadvantage when compared to their counterparts

working at the employer's physical premises. However, some provisions look discriminatory to remote workers, such as provisions on the modification of weekly working time and the daily and weekly rest periods that do not apply to remote workers (art. 30, para. 1.1), and provisions providing that remote workers shall not be entitled to allowances for night work or for working during weekends and national holidays (art. 30, para. 1.3).

4. Instruments for the protection of personal data relevant in the process of remote work

When it comes to legal instruments, the GDPR is the primary legal instrument on the protection of personal data applicable directly by all EU Member States, including Poland, and is also transposed and is applicable in Kosovo (Law on Protection of Personal Data, art. 1, § 2). Art. 24 of the GDPR outlines the responsibilities of data controllers to ensure that they implement appropriate technical and organizational measures to maintain the security of the personal data they process. In this context, the GDPR promotes data security and accountability among controllers by requiring measures such as pseudonymization, encryption, regular evaluation of data-processing effectiveness, and ensuring personnel are trained and aware of their obligations. Therefore, data controllers must be proactive and making continuous assessment of the privacy impact of technology (Hendrickx, 2022, p. 39). This includes adoption of internal policies and implementing measures which in particular meet the principles of data protection by design and data protection by default (GDPR, Preamble, par. 78). Analysing the principles of remote work, it should be noted that in practice, the employer and the employee communicate using tools that enable remote communication, which include business email, telephones, electronic systems or instant messaging (in particular Microsoft Teams, Skype and Zoom), as well as the company intranet. These methods of communication are usually equivalent to each other, and the employer has the right to require the employee to turn on their camera when contact is made using instant messaging. With the replacement of the traditional model of performing employee duties with remote work, the use of technologies that enable the identification of individuals based on their individual physical, physiological or behavioural characteristics is increasingly observed (Kupiec, 2020, p. 90). Biometrics, however, are most often used to ensure security at a university by, for example, controlling access to premises where personal data is processed (Kupiec, 2020, p. 91; Lewandowski, 2017, p. 159). The primary obligation of the employer is to make the employee aware that, when performing remote work, s/he should use personal data from the contents of the documents only for the purpose for which it would be used at the employer's premises. In addition to the obligations arising directly from the type and nature of the work, the employee is also obliged to take care

of the equipment entrusted to him/her, including protecting it from destruction, loss or access by third parties, and s/he is also obliged to ensure safe conditions for the processing of personal data and other information of the employer. This necessitates attention to raising employee awareness, as failure to do so can significantly jeopardize information security (Riberio, 2021, p. 245). In this regard, the provisions of the applicable national legislation, as well as regulations internally adopted by the employer, are updated. Crucial here are the provisions of art. 32 of the GDPR, according to which the controller and the processor shall implement appropriate technical and organizational measures to ensure a degree of security corresponding to the risk. In this regard, it is important to properly conduct a risk analysis and assessment procedure. It is incumbent on the employer to ensure that appropriate tools are in place to ensure security when processing data in a remote environment. It is crucial that internal security procedures do not differentiate in terms of importance between the principles of protecting data processed during work in employer's premises and remote work (Riberio, 2021, p. 248).

When analysing the technical and organizational safeguards that should be implemented, it should be noted first of all that it is an employee's fundamental duty to protect the data transferred to him/her in accordance with the employer's protection rules. This is because the employee is obliged to secure the data transferred to him/her against access by third parties, which applies to both data processed in electronic form and in the form of traditional documents. All data and information contained on computer media used by the employer may not be collected, reproduced or distributed by the employee without the employer's express consent. Indeed, it is important to emphasize that employee awareness of the need to protect personal data is key to improving security when providing remote work, and a strong technical infrastructure is essential (Borkovich & Skovira, 2020, p. 234). At the same time, the employee should undertake not to copy, share, transmit or process the data without the express consent of the employer. It also seems reasonable to introduce a general prohibition on taking original documents outside the employer's premises, and in the case of defining the need for access to paper documents, the employee should make a request to the employer to be able to copy them and take them to the place of remote work. The rationale for doing so is for the employer to have full control over which documents are off-site; taking them away without permission in writing or in an email not only results in an increased risk of a data security breach, but also directly exposes the employee to liability. It is also good practice for the employee to prepare a summary of the documents after they have been copied, including which documents were copied and in what number. In turn, after the employee has used the copies, it is necessary to destroy them using a shredder provided by the employer. At the same time, employees should be encouraged to automatically save and store their documents and data in a common area rather than on personal

computers. Organizations should have a backup solution and match the frequency of backups to the need for data security (Riberio, 2021, p. 253).

A safeguard that is not only important organizationally but also technically is for employees to limit the number of documents they possess to those that are necessary. At the same time, it is reasonable to introduce internal regulations in which the employee undertakes that when transporting documents to the place where remote work is carried out, s/he will take special care not to lose them. In particular, it should be forbidden to leave documents in the means of transport (such as a car) without adequate protection against their loss or access by outsiders. At the same time, when working remotely, the employee should undertake that s/he will keep the documents only for the period of time necessary for the performance of a specific task, and that s/he will secure the data at the place of remote work (e.g. keeping the documents in locked desk drawers or cabinets, observing the 'clean desk' rule and protecting the documents from being seen by unauthorized third parties, including family members), as well as that s/he will return the provided documents to the headquarters. Indeed, it should be forbidden to throw documents into the waste bin at the remote work place.

From the perspective of data protection, it is also important that the employee clearly and explicitly undertakes to secure equipment and documents from access by third parties during and after remote work. Internal regulations put in place by the employer may boil down to setting specific conditions for the performance of remote work from the perspective of security and the protection of information and personal data (Enisa, 2020). Neither the Polish nor the Kosovar legislation address how this protection is to be implemented. The provisions of both the GDPR and national regulations are general; this in turn makes it incumbent on the employer in each case to individually determine the rules that an employee should be required to follow when processing personal data during remote work.

Taking into account the observations of Polish and Kosovar employers, as well as other entities that process personal data, it is possible to identify examples of solutions that can be successfully applied to secure personal data processed remotely. Among such examples are a prohibition on undertaking remote work in public places, such as cafes, restaurants or shopping malls, where outsiders could hear snippets of business conversations or see pieces of work being performed, a ban on the use of public Internet access points, a prohibition on the use of external data storage media not permitted by the employer, a prohibition on sharing devices and equipment used to work remotely with others, such as household members, a prohibition on installing other programs and applications on the devices by oneself without the prior approval of the employer, a prohibition on using publicly available file transfer and sharing tools (such as Dropbox, weTransfer or Google Drive) without prior approval, an obligation to ensure that household members and other outsiders present at the remote work site do not have access to the work being performed,

in particular by properly positioning the computer screen or smartphone and ensuring that documents are worked on in such a way that their contents cannot be viewed, an obligation to use only business software provided by the employer, an obligation to comply with the information security rules established by the company for the exchange of information outside the company domain, an obligation to ensure the confidentiality of the content of teleconference or videoconference conversations, as well as to obtain permission to record the image or voice of the participants, an obligation to report any occurrence of loss, destruction or theft of equipment, documents or other information carriers to the employer and the Data Protection Officer (Specialist) on the day of the incident, and an obligation to report any suspected breaches of the protection of personal data, such as printouts left unattended, undestroyed documents, keys left in a door, leaving a workstation unsecured, sharing data with an unauthorized person, etc. These examples make it possible to create a catalogue of desirable behaviours during the remote processing of personal data.

From the perspective of the effective implementation of the principles of secure processing of personal data during remote work, it seems reasonable that the employer has the right to control compliance with the principles of information security and the protection of personal data (Newlands et al., 2020, pp. 1–14). This control may manifest itself as a) establishing a video connection in order to verify the manner of organization of the place of remote work in terms of securing the confidentiality of information and personal data; b) taking a photo of the room where remote work is performed in order to verify the manner of organization of the place of remote work in terms of securing the confidentiality of information and personal data; c) periodically checking practical knowledge of the regulations on information security and the protection of personal data; d) using the forms of monitoring specified in the work regulations, adequate to the specifics of the performance of remote work; and e) verifying the security of access used.

Summarizing the above considerations, it should be assumed that in the case of the provision of remote work, the employee has the same obligations to ensure the security of personal data relative to work provided in a workplace. In turn, the employer has a special obligation to equip the employee with the necessary tools, which will have security features at a level appropriate to the personal data processed (Ahmad, 2020, pp. 1–4). A mere instruction to work remotely, while establishing that the employee will carry it out on his/her own private equipment, does not remove the employer's responsibility, because it is important to apply adequate technical and organizational measures that would prevent a breach from occurring. According to art. 32, § 2 of the GDPR, the controller, in assessing whether the degree of security is adequate, shall in particular consider the risks inherent in the processing, in particular those arising from the accidental or unlawful destruction, loss, modification, unauthorized disclosure of or unauthorized access to personal data transmitted, stored or otherwise processed. For this reason, an employer deciding to popularize the possi-

bility of remote work in their enterprise should update their solutions on the protection of personal data, and often should remodel the organization of work.

Conclusions

Computerization has had a positive impact on breaking down geographical barriers, with key benefits that are of considerable importance from the perspective of the subject of this study. First, the Internet and the use of modern methods of long-distance communication, including the popularization of tools for holding online meetings via video conferencing in real time, make it possible to communicate regardless of distance. As a result, cooperation among those using these solutions has been strengthened. Second, available digital tools (such as cloud computing and collaboration platforms) facilitate the collaboration of several people on a single task, project or document. In such a situation, it is not necessary to meet directly in one place, which results in substantial strengthening of the teams of people working together. This also has a positive effect on increasing the availability of people who are authorities in a particular field. Third, informatization has sectoral effects on specific areas of functioning, which, together with the development of modern technologies and popularization of the use of available solutions, have a positive impact on eliminating accessibility barriers for people at risk of geographical, social or fiscal exclusion.

The comprehensive digitization of society, analysed from the perspective of changes in the labour market, means that there is a gradual overcoming of gender inequality. Among the benefits of implementing such a model of work is the possibility of creating equal opportunities in the labour market for people representing different social groups (Yashchyk, 2021, p. 159). Performing job duties remotely also provides greater accessibility to people who are specialists in a narrow field, who would be less available if they could only provide work in one place with a specific employer. On the other hand, however, employers must ensure balance and equality for employees in accessing remote work opportunities.

Regarding the context in Kosovo, the country will use the advantage of the experience of EU Member States on regulating remote work. While some basic regulation on defining remote work is necessary to strike a balance between promoting flexible work arrangements and protecting the rights and well-being of employees, the government should be careful not to overregulate. Particular attention should be given to non-discrimination towards remote workers regarding their employment rights. Any form of regulation should also be adaptable to changing technology and work trends. A particular focus should be given to the protection of personal data tailored for remote work.

The advent of remote work further underscores the imperative of data security and accountability, necessitating shared responsibility between employers and employees, as well as clear guidelines and monitoring mechanisms. Ultimately, while remote work presents unique challenges, it does not exempt employers from their duty to uphold data-protection standards. Instead, it necessitates a proactive approach to adapt organizational practices and technologies to evolving regulations and the dynamic nature of remote work environments. The GDPR stands as a cornerstone in the protection of personal data within EU Member States and is also applicable within Kosovo's legal framework. Art. 24 of the GDPR delineates the obligations of data controllers, emphasizing the implementation of robust technical and organizational measures such as pseudonymization and encryption. To comply effectively, organizations must align internal regulations with GDPR requirements, particularly focusing on art. 32 to mitigate risks inherent in data processing. On the other hand, employees must also uphold these standards, ensuring the protection of entrusted data and equipment.

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Control of Remote Workers by Means of Artificial Intelligence

Abstract: Remote work, by its very nature, is characterised by the performance of the duties of the employment relationship, in whole or in part, at a place chosen by the employee, at a time agreed upon with the employer. Despite the fact that the employee performs his/her work outside the employer's place of business, he/she remains under the employer's control. The issues under consideration here are the scope of this control and the manner in which it is carried out. In my deliberations, I focus on control performed with the use of algorithmic technologies, in particular artificial intelligence, for which a Regulation of the European Parliament and of the Council Laying Down Harmonised Provisions on Artificial Intelligence (Artificial Intelligence Act) was adopted on 23 June 2023.
Keywords: algorithmic management, artificial intelligence, remote work

Introduction

By its very nature, an employment-based job is characterised by the employee's subordination to the employer, which means that the employer is entitled to give instructions to the employee, who is obliged to perform work under the direction of the employer and at a place and time designated by them. The essential expression of the employee's subordination to the employer is his/her dependence regarding the object of performance, whereby the employer indicates the tasks to be performed, specifies the manner in which they are to be performed, as well as the methods and means by which they are to be performed (Judgment of the Supreme Court 2015). A characteristic feature of contractually subordinated work is the possibility of specifying the employee's duties on a daily basis and, in particular, of determining the activities falling within the scope of the agreed type of work and the manner

in which they are to be performed (Order of the Supreme Court 2020). The employee's subordination does not mean constant supervision by a superior over the activities performed; it is sufficient to determine the tasks and the time of their performance and, upon completion, to check the quality and punctuality of the work performed. A remote employee who performs his/her work, in whole or in part, at a place of his/her own choosing, each time agreed with the employer, has more freedom to organise his/her work and to shape his/her work schedule and working hours. However, he/she remains under the employer's control, which can be carried out in the traditional way by inspecting the employee directly at the place where he/she performs remote work. Nowadays, in the era of digital transformation, control carried out with the use of artificial intelligence is becoming increasingly important. The subject of the subsequent discussion will be issues concerning the inspection of employees working remotely. This atypical form of employment for workers was first introduced into Polish legislation by the Act on Specific Solutions Related to Preventing, Counteracting, and Combating COVID-19, Other Infectious Diseases, and Emergency Situations Caused by Them of 2 March 2020. As remote work proved to be a beneficial form of employment for both employees and employers, it was permanently incorporated into the Labour Code by the Act on Amending the Labour Code of 1 December 2022 and Certain Other Acts. The discussion below will focus on the scope of control over an employee performing remote work, as well as the principles and methods of its implementation, with particular emphasis placed on algorithmic technologies, which significantly facilitate the monitoring of employees working remotely but at the same time carry certain risks for employees.

1. Guidelines for conducting inspections

According to the wording of Article 67(28) § 1 of the Labour Code, the subject of the employer's control may be the following three areas: 1) performance of remote work, 2) occupational health and safety, and 3) compliance with security and information protection requirements, including procedures protecting personal data. The scope of the inspection is decided by the employer; its subject may be all or some of the spheres indicated by the legislation.

When carrying out the inspection, an employer should comply with the rules set out in any agreement concluded with trade unions, the regulations on remote work and, in the absence of the company's own employment regulations, in the remote work order or agreement concluded with the specific employee. The employer's right to control extends to all employees carrying out remote work, regardless of whether the remote work was entrusted at the start of the employment relationship or during it. The place where the work is performed is also irrelevant; it only influences the manner in which the inspection is carried out. In the case of work carried out

at the employee's place of residence, the inspection activities undertaken by the employer must not violate the privacy of the employee or other persons nor impede the use of the home premises in a manner consistent with their purpose (Article 67(28) § 2 of the Labour Code). The caveats provided for in Article 67(28) § 2 of the Labour Code indicate that the employer's inspection should be limited to the place where the employee actually performs his/her professional duties. Furthermore, it is necessary to carry it out in a way that is least onerous for the household members. In view of the principle of proportionality that applies to the employer, an inspection carried out with the use of modern technology is most convenient. The restrictions indicated do not bind the employer when inspecting remote work carried out away from the employee's place of residence. In such a case, the employer, exercising his/her managerial powers, has the possibility of carrying out the inspection under the rules applicable to all employees.

According to Article 67(28) § 1 of the Labour Code, the inspection is carried out in consultation with the employee at the workplace and during working hours. This provision is mandatory, which means that it cannot be violated even with the consent of the employee (Sobczyk, 2023, para. 2). The exact date of the inspection is agreed upon with the employee, which means that the employer cannot arbitrarily set the date. Bearing in mind that remote work is generally carried out at the employee's place of residence, the requirement to agree on the date on which the inspection is to be carried out is intended to prevent an unexpected surprise visit which could cause disruption to the family life of the employee and his/her household members. The employee, on the other hand, may not deprive the employer of the possibility of carrying out the inspection by persistently not agreeing to it. Such behaviour, violating the employer's basic right, could give rise to the application of certain disciplinary measures provided for in the labour-law provisions (Kuba, 2014, para. 3(6); Wujczyk, 2012, para. 23).

If the inspection reveals deficiencies in compliance with rules and regulations on occupational health and safety of which the employee has been informed, or with procedures on the protection of information, including procedures on the protection of personal data, the employer may either set a deadline for rectifying the deficiencies or withdraw consent for remote work (Article 67(28) § 3 of the Labour Code). Consent for remote work may be withdrawn as soon as the deficiencies are discovered, even if it was possible to remedy them within a certain period of time, or at a later date if the deficiencies are not remedied within the agreed period of time. Withdrawal of consent implies that the employee has to start work at a place and time set by the employer; in this case, no two-day notice period is stipulated. As a result, the employee may be obliged to start work immediately at the place designated by the employer. An employee who refuses to stop working remotely or who takes up traditional work in violation of the deadline set by the employer risks certain negative consequences under labour law, ranging from a disciplinary penalty to termination

of the employment relationship in exceptional situations, even under a disciplinary procedure.

The actions set out in Article 67(28) § 3 of the Labour Code, i.e. setting a time limit for the rectification of the identified deficiencies or revoking the consent for remote work, apply to employees who originally performed their employment duties in a traditional manner (at the employer's place of business) as well as those who switched to remote work during their employment. In the case of an employee who has been working remotely from the very beginning, a breach of the employee's duties entitles the employer to take action that may be taken in relation to employees in general: the employer may apply a disciplinary penalty or terminate the employment relationship. However, the employer cannot decide on a cessation of remote working on his/her own. A transition to the traditional way of performing work can take place by agreement between the parties or by way of a change notice (Article 42 of the Labour Code). Deficiencies identified in the course of inspections also entitle the employer to apply disciplinary measures covering all employees, i.e. imposing a disciplinary penalty or even terminating the employment relationship in specific situations.

2. The right to remuneration for the time of inspection

Against the background of the provisions on remote work, the question arises of whether the employee retains the right to remuneration for the time of inspection. According to Gładoch, 'the time of inspection should be treated as a time of not performing work, for which the employee is not entitled to remuneration, unless the employer adopts a different solution favourable to the employee' (Gładoch, 2023, p. 106). It is worth noting here that, in accordance with Article 128 § 1 of the Labour Code, working time is not only the time during which the employee actually performs the duties arising from the employment relationship, but also periods of non-performance of work during which he/she remains at the employer's disposal at the workplace or at any other place designated as the place of work. Being at the employer's disposal means the state of being physically present in the workplace or another place which the employer intends to designate for the performance of work. It is also important that the employee has a real opportunity to perform work and fulfil the employer's instructions, as well as that he/she demonstrates readiness in this respect, i.e. that he/she is willing to start work immediately. If, due to an inspection carried out directly at the place of work, the employee working remotely is unable to fulfil his/her duties, he/she remains at the disposal of the employer. As a result, the period of inspection should be classified as working time, for which the employee is entitled to appropriate remuneration (Sierocka, 2023, p. 65); this applies in particular to short-term inspections. According to Mądrala, in the case of longer visits caused

by deficiencies on the part of the employee, the right to remuneration may be disputed (Mądrala, 2023, pp. 113–114).

3. Methods of conducting oversight

The oversight of remote employees can be carried out through conventional means, namely through visits to the work site. In this manner, the employer primarily monitors workplace safety and hygiene. Performing work at a place chosen by the employee does not exclude the employer's responsibility for the state of health and safety at work (Article 207 of the Labour Code). The employer's obligations related to the protection of employees' life and health are reduced to a certain extent by waiving requirements which are impossible to implement in relation to remote work (Dzienisiuk, Skoczyński, & Zieliński et al., 2017). The necessity of ensuring safe and hygienic working conditions for remote workers entitles the employer to control the employee with regard to compliance with the health and safety rules and regulations in force at the given workplace.

Remote work performed by a designated employee may also be subjected to traditional forms of monitoring, the purpose of which is to determine whether the tasks entrusted to the remote worker are performed in a timely, reliable manner in accordance with the employer's rules and expectations. In the course of the inspection, the employer assesses the quality and efficiency of the remote work. The actions taken by the employer serve the purpose of considering whether the employee performs the employment contract diligently and scrupulously. Through direct oversight at the location of work, the employer may also observe the employee's adherence to requirements regarding safety and information protection, including procedures for safeguarding personal data. With regard to the latter, the essence of the inspection is to obtain information as to whether the employee who performs remote work complies in particular with the rules provided for in the Personal Data Protection Act of 10 May 2018 and in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing 95 Directive/46/EC (General Data Protection Regulation). The employer's actions also serve to protect company confidentiality.

In the era of the Fourth Industrial Revolution (Schwab 2018, p. 26 ff.; Stelina, 2023, p. 123), which is characterised by the unification of the real world of machines with the virtual world of the internet, information technology, and people (Wodnicka, 2021, pp. 50–51), the monitoring of work execution and adherence to principles regarding safety and information protection, including personal data, is increasingly conducted through automated monitoring and decision-making systems. Among ac-

tivities categorised as algorithmic management (Nowik, 2020, p. 269 ff.), artificial intelligence (AI) holds a fundamental significance.

Artificial intelligence is framed conceptually in various ways. For instance, John McCarthy coined the term as being 'the science and engineering of making intelligent machines' (McCarthy, 2007, p. 2). Elaine Rich characterises it as 'research aimed at creating computers with abilities where humans are currently superior' (Rich, 1984, p. 1). Some argue that artificial intelligence is the 'study of mental abilities through computational models' (Charniak & McDermott, 1985, p. 6). Defining artificial intelligence necessitates acknowledging that it goes beyond being a computer program with a decisive computational speed advantage over humans (Betlej, 2019, pp. 192–205). AI is characterised by (1) learning, understood as the ability to acquire relevant information and the principles of using it; (2) reasoning, the ability to apply acquired rules to achieve approximate or precise conclusions; and (3) iteration, the ability to modify processes based on newly acquired information (Gasparski, 2019, p. 255). As a result, AI activity is comparable to the functioning of the human brain (Kalisz, 2020, p. 159).

Artificial intelligence enables employers to monitor employees' productivity and efficiency. Through applied algorithms, employers have the ability to determine whether work is being carried out in a timely manner, in line with directives, and whether employees are effectively utilising their working hours (Nowik, 2020, p. 270). Therefore, the employee may be required to log in to the company's IT system at the start of work (which makes it possible to measure working time), to check his/her email at specified intervals (Mitrus, 2009, p. 167), and to provide periodic reports on the activities undertaken. Artificial intelligence swiftly analyses and processes various types of data and information provided by the employee (Eager et al., 2020, p. 15; Więckowska, 2022, p. 244 ff.). Based on the outcomes, the employer gauges the quality and quantity of the employee's work and their commitment to fulfilling professional duties, which is significant, for instance, in the context of their compensation. Modern technologies enable employers to conduct an objective, precise, and unbiased assessment of an employee's work, skills, and contribution, devoid of human emotions and prejudices (Otto, 2022, p. 147). Additionally, artificial intelligence also facilitates the evaluation of employees' creativity, their capabilities, and their aptitude for creative thinking and planning (Bąba, 2020, p. 17).

Artificial intelligence also poses distinct risks. For instance, it can steer employers towards making decisions that infringe upon employees' rights, which is often attributed to the malfunctioning of the AI system. Instances may arise where applied algorithms rely on erroneous or inadequate data, resulting in, for example, unequal treatment of workers. A noteworthy case is that of Amazon, which developed an artificial intelligence algorithm for recruitment purposes, aiming to identify the best candidates for employment. However, the use of inappropriate methods led to discrimination against women (Pfeifer-Chomiczewska, 2022, p. 63). Similar risks may

manifest for remote workers, with software errors or the application of algorithms based on improper parameters potentially leading to an inaccurate and unreliable assessment of their work. Employers should provide employees with the opportunity to challenge opinions and conclusions generated by AI; this should apply not only when the assessment of a remote worker is flawed but also when such an assessment is fundamentally correct. However, such practices remain in contradiction with social principles. Artificial intelligence lacks empathy and emotions; given this, evaluations of an employee's achievements, work outcomes, or behaviour based on algorithms may require adjustments due to the particular circumstances of each employee. Hence the final judgement should always rest with humans. A review within the employer's competence or as designated by them holds particular significance if AI reports serve as the basis for terminating an employment contract or applying any disciplinary measures to a remote worker. Additionally, it is crucial for employees to trust the actions taken by artificial intelligence. To foster this trust, employees should be informed about the parameters subject to analysis and the algorithms used by their employer.

The use of modern technologies also brings the risk of personal data and confidential corporate information being exposed or lost. This threat can be instigated by the malicious activities of malware, often developed with the integration of artificial intelligence; such programs exhibit the capability of dynamically altering their code, making them undetectable to antivirus programs or users until the moment of a deliberate attack (Adamczyk et al., 2019, p. 2003 ff.; Kalisz, 2020, p. 164). In light of the risk of fundamental rights violations acknowledged and protected by European Union law, particularly the privacy and dignity of employees, non-discrimination, and workers' rights, the Artificial Intelligence Act was enacted by the European Parliament and Council on 23 June 2023. This regulation establishes harmonised provisions concerning artificial intelligence and amends certain legislative acts of the Union. Negotiations with Member States are currently underway (Bujalski, 2023). According to the document, three categories of artificial intelligence are envisaged: unacceptable risk, high risk, and low or minimal risk. It is concluded that artificial intelligence systems used in the areas of employment, workforce management, and access to self-employment, in particular for the recruitment and selection of candidates, promotion and termination decisions, the assignment of tasks, monitoring, or evaluation of persons in contractual employment relationships, should be classified as high risk, as these systems may significantly affect the future job prospects and livelihoods of these persons (recital 36).

According to the adopted document, high-risk artificial intelligence systems must comply with certain standards that relate to data and its management, documentation and logging of events, provision of information to users, human oversight, reliability, accuracy, and security. In particular, such systems are required to provide a certain degree of transparency; users should be able to interpret the results

of the system and use them accordingly (recital 47). It is further stipulated that high-risk artificial intelligence systems should be designed and developed in such a way that individuals may supervise their operation (recital 48). The regulation adopted by the European Parliament is the first AI document in the world, therefore it is impossible to assess how effective its provisions will prove to be in practice.

4. Monitoring of business email

An instrument used to control an employee performing remote work is the monitoring of company email, which may be conducted through the utilisation of artificial intelligence. Thanks to cutting-edge technologies, the employer can monitor both the quantity and the content of messages incoming to and outgoing from the employee. In accordance with Article 22(3) § 1 of the Labour Code, the employer is entitled to utilise monitoring of official email provided it is necessary to ensure work organisation, enabling the full utilisation of working time and the proper use of tools provided to the employee. The condition of necessity is fulfilled when the employer demonstrates that both objectives indicated in the provision can only be realised through the monitoring of business email (Kuba, 2019, p. 31; Łapiński, 2020, pp. 52–53). Monitoring of business email does not entitle the employer to violate the secrecy of correspondence and other personal rights of the employee. Thus the legislation recognises the primacy of the rights guaranteed by the Polish Constitution (Article 49) over the employer's interest. Consequently, even if the employer prohibits the use of business email for private purposes, he/she does not have the right to read the private correspondence of an employee who has not complied with this prohibition.

The employee should be informed of the monitoring of his/her email two weeks before it is initiated, in a manner customary for the employer concerned. It is possible to send a suitable letter to each employee, to place a relevant notice on the noticeboard, and/or to provide information in the form of an email. In the case of newly hired employees, information on the implementation of email monitoring should be provided in writing before the employee is allowed to work. In the notice, the employer must indicate the purpose of the monitoring and the manner in which it is to be carried out, as well as its scope. With regard to the latter, it is necessary to specify the level of detail of the monitoring; the employer should clarify whether the object of the monitoring will be only basic information on the senders and addressees of messages, the dates of sending and receiving the correspondence and its topics, and/or whether the content of individual messages will also be reviewed. As there are no reservations in the Labour Code as to the tools the employer may use for this purpose, various organisational and technical solutions, including those using artificial intelligence, are admissible. Information related to the monitoring of business email is laid down in collective agreements, work regulations, or in a notice

if the employer is not covered by a collective agreement or is not obliged to lay down work regulations. The employer is obligated to visibly and legibly label the monitored email boxes.

The provisions of the Polish Labour Code are in line with the guidelines of the European Court of Human Rights. In accordance with the views of legal academics and commentators, as well as an established line of judicial decisions of the Court, it is emphasised that national authorities should ensure that the introduction of measures by an employer to monitor correspondence and other communications, regardless of the extent and duration of such measures, is accompanied by adequate and sufficient safeguards against abuse. To this end, it is necessary to notify an employee of the monitoring of his/her correspondence and other communications. This kind of notification should be clear about the nature of the monitoring and should be done in advance, with the employee being warned about the extent of the employer's monitoring and the degree of interference with privacy; moreover, the employer should provide legitimate reasons justifying the monitoring of the messages and access to their actual content (Judgment of the European Court of Human Rights 2017).

Conclusion

The performance, in whole or in part, of work at a location chosen by the employee does not deprive the employer of managerial powers. In particular, the employer is provided with the right to inspect work performed remotely. Among the methods of controlling the employee, control carried out with the use of modern technologies, especially artificial intelligence, is a particularly convenient instrument. By reducing the time needed for data processing and analysis, algorithmic management makes it possible for the employer to make quick and, in most situations, accurate decisions. Inspections with the use of modern technology are, as a rule, also convenient for the employee; unlike a traditional inspection, which involves observing the work directly at the place where it is carried out, an algorithmic inspection interferes little with the employee's family life, or not at all, and, moreover, provides greater choice as to where to fulfil the obligations arising from the employment relationship. The employer may, for example, accept the performance of work abroad. However, the potential threats associated with the implementation of artificial intelligence must not be overlooked. Erroneous algorithms can lead to an improper assessment of an employee's performance and a violation of their rights. Furthermore, there is a danger of leaks of sensitive data and confidential corporate information. Modern technologies employed for monitoring remote employees are susceptible to attacks by malicious software, causing the loss of corporate data.

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The Challenges of Algorithm Management: The Spanish Perspective[1]

Abstract: This paper focuses on how Spain's labour and employment law is dealing with technological disruption and, particularly, with algorithm management, looking for a harmonious equilibrium between traditional structures and profound changes. It pays special attention to the different actors affected and the most recent normative changes.
Keywords: algorithm management, artificial intelligence, digitalization

Introduction: The challenge of AI regulation

Digitalization is changing the economy, our societies and our daily life, and it is having an especially significant impact on employment and working and social conditions. In fact, it is one of the major concerns and study targets in the framework of the initiative and activities promoted by the International Labour Organization regarding 'The Future of Work'. In this context, Spain shows important strengths, as it is dealing with the challenge of digitalization with very good data on some crucial points (European Commission, 2020), particularly according to the European Economy and Society Index (DESI). Hence the country ranks 11th out of 28 EU Member States, a position better than Germany, Austria or France, and above the European

1 This paper is part of the projects 'Cambio tecnológico y transformación de las fuentes laborales: Ley y convenio colectivo ante la disrupción digital' (RTI2018–094547-B-C21) and 'Gestión algorítmica e igualdad de oportunidades en la empresa (AlgoEquality)' (TED2021–130325A-I00).

average in most of the factors analysed. The country ranks second in the EU on digital public services thanks to its well-timed implementation of a 'digital-by-default' strategy throughout its central public administration. Additionally, it achieves fifth position in the area of connectivity because it is one of the top performers in the roll-out of very high-capacity networks as well as in the take-up of ultrafast broadband connections. Spain is one of the first countries to deploy a 5G network, which covered more than 80% of the population by the end of 2023 Finally, the country's score is in line with the EU average regarding digital integration. Whereas, generally speaking, Spanish businesses take advantage of the opportunities presented by digital technologies, SMEs have yet to fully unlock the potential of e-commerce.

One of the reasons which explains these good results is the determined position of different actors over time, which has meant not only the development of a strategy focused on digitalizing Spain before and faster than its neighbours, but creating valuable alliances with the private sector. The government is implementing its national artificial intelligence (AI) strategy and is currently working on a national strategy for digital skills to ensure that all citizens, with a special emphasis on workers, women and the elderly, reach the required level of digital skills needed to conduct their lives and work in today's society and labour market. Judges are dealing with digitalization by interpreting and adapting the current legal system to the emerging new reality. Finally, social partners are both negotiating with the government and considering new laws and collective agreements.

This paper focuses on how Spain's labour and employment law is dealing with the technological disruption and, particularly, with algorithm management, looking for a harmonious equilibrium between traditional structures and profound changes. It pays special attention to the different actors affected and the most recent normative changes. In order to achieve this aim, the article is organized as follows: after reviewing the first answers given by courts to the challenges derived from algorithm management, it analyses how the law is trying to give an appropriate legal framework. The paper finishes with some conclusions for future normative developments.

1. The 'prehistory' of AI regulation

As with other manifestations of digitalization, such as platform work, the first legal treatment of AI was delivered by the courts. The judgment from the Las Palmas court of 23 September 2019 received high media coverage (Cortés, 2020); it declared that the replacement of an employee by a bot should be considered unfair dismissal. The company justified the termination, among other reasons, on the basis of objective reasons of a technical nature. Since this software was capable of taking on the work of 2.45 persons, operating 24 hours per day, 7 days a week and 365 days per year, it became a business-opportunity tool.

In the court's opinion, this argument was not sufficient. The judgment controversially considered that dismissal for objective reasons (which means lower compensation) is a privileged and exceptional way to end an employment relationship, which is only justified when the company is experiencing prior difficulties or problems. Without the prior existence of an adverse situation, a dismissal for objective reasons cannot be justified as fair, since this would involve minimizing the right to work and employment law as a whole, making way for a prevailing right to freedom of enterprise – and competitiveness. As a consequence, the use of bots to increase competitiveness by reducing costs could produce a reduction in the workforce only if the maximum dismissal compensation is paid, which means it is considered as unfair dismissal. The judgment, which was not appealed, was rather controversial; even considering as acceptable its purpose of protecting employees against the impact of digitalization, some authors have wondered if this may be effective or, on the other hand, if this reasoning could 'stem the tide' (Mercader Uguina, 2019).[2]

However, this was not the first time that Spanish courts faced difficulties derived from a dismissal caused by a technological tool. In the judgment delivered by the Superior Court of Galicia on 19 July 2016, the court declared unfair dismissal because no connection was found between the technical cause – 'the implementation of the electronic clinical record' – and the decrease in activity that would determine a need to proceed with the dismissals, among other factors analysed. The reasoning is very similar to the one provided by the Superior Court of Castilla y León in its judgment of 23 March 2005, according to which it was not proven that the installation of a new computer system would produce an effect of sufficient importance to justify the dismissal. In spite of the fact that few judgments have been delivered in the lower levels of the judicial system, those that have emerged show the aim of trying to disincentivize dismissals produced by technological systems by imposing the maximum legal cost. As was mentioned before, some authors consider that this strategy cannot produce a sufficient effect to avoid this risk.

At the level of the Supreme Court, two cases must be highlighted. One is the so called 'Skill Competence Matrix' case (Judgment of 25 September 2018), in which the Supreme Court had the opportunity to analyse the suitability of an application that weighed three variables when selecting people to stay in the company (or being fired) in a case of collective dismissal: a polyvalence index (40%), the number of operations with aptitude (40%) and the number of certifications (20%). Despite the fact that 17 of the 25 workers affected by the dismissal were affiliated with the union CCOO, the court understood that there was no discrimination since the company not only gave credit to the existence of economic and productive causes (which would be sufficient by themselves), but also to objective, reasonable and non-arbitrary selection criteria, all of them guaranteed by the use of the algorithm.

2 'Poner puertas al campo' in Spanish.

On the other hand, in the *Ericsson* case (Judgment of the Supreme Court 2021), the Supreme Court declared the existence of a violation of the right to strike because, through an electronic tool located in Romania, the company assigned tasks to other workers as a way to cushion the effect of those who were on strike. According to the court's opinion: automation makes it more difficult to explain why tasks could be assigned to people other than those who, logically, were in the 'automated' assignment system. In addition, it is proved that, from the beginning of the strike, the work was dispatched to another unusual collaborative company, with the result that, in the three cases expressly indicated in the text of the appealed judgment, there was an assignment of tasks clearly different from the one that would have resulted if part of the workforce had not been on strike.

Therefore the main lesson that can be obtained from the Supreme Court is that, so far, AI tools are generally considered an objective managerial instrument, both in favour of or against companies' interests.

2. The beginning of history

The regulation of AI has been described as multilevel governance based on three main pillars: AI, platform work and data protection regulations (Baz Rodríguez, 2022). It is multilevel as the EU, national governments and even collective bargaining are involved. It is based on these three pillars because even though a comprehensive regulation of AI is now being discussed (the EU's AI Act is the prototypical example), previous experiences in the regulation of both platform work and personal data are not the only steps on the path of AI regulation, but are useful tools even when new standards emerge. The case of data (including personal data) is probably the clearest and most important example, as 'without data, the development of AI and other digital applications is not possible' (European Commission, 2020, p. 4).

2.1. AI regulation derived from platform work

Concerning platform work, the so-called Spanish 'Riders Law' (Ley 12/2021) focuses on two main issues.[3] On the one hand, it sets a rebuttable presumption of the existence of an employment relationship for delivery riders. It presumes, unless proven otherwise, the existence of an employment relationship between those who provide the services of delivering and distributing products in exchange for remuneration and employers who exercise the business powers of organization, direction and control indirectly or implicitly through a digital platform or through the algorithmic management of the service or the working conditions. This means the explicit translation of the general presumptions of Spanish employment law to this activity.

3 Analysed from a comparative perspective by Aloisi (2022, pp. 4–29).

On the other hand, it regulates the use of algorithms for all kinds of employees; this is another type of protection which emerges in the debate about platform work but which extends its influence to all employees. The Riders Law introduces a new article, article 64(4)(d) of the Workers' Statute (the Spanish Employment Law, WS), which states that employees' representatives have the right, among others, 'to be informed, by the company, of the parameters, rules and instructions on which the algorithms of artificial intelligence systems are based, [and] that affect decision-making that may involve working conditions, access and maintenance of employment, including profiling'.

Even though it is not explicitly mentioned, this is not only a right for workers' representatives, but an open call to social partners to regulate algorithms by collective bargaining, highlighting its importance in the governance of the AI phenomenon (Miranda Boto & Brameshuber, 2022). It is actually already possible to find an example that has taken up the challenge: the collective agreement for Takeaway Express Spain, SL (Just Eat) (SIMA-FSP, 2021) combines the classical content of this type of agreement, the adaptation of traditional rules to the particular circumstances of platform work (such as salary, working time, prevention of occupational risks, etc.) and new clauses concerning digitalization. Focusing on the latter, two areas must be highlighted: firstly, individual digital rights, which are a set of rights related to digitalization recognized for each individual worker, including the right to disconnect, the right to privacy when using company and personal devices, the right to privacy when using video surveillance and sound recording devices, the right to privacy when using geolocation, the right to human intervention and the right to be informed about working digital tools (and, particularly whether one is talking with a chatbot or a human).[4] Secondly, regarding collective digital rights, based on the above-mentioned article 64(4)(d) WS, the company guarantees the right of workers' representatives to be informed on the use of algorithms and AI systems when they are used to take decisions for human resources and industrial relations issues if they affect working conditions, job access and employment stability, including profiling. Specifically, the company is obliged to provide information on both the parameters and data and the rules and instructions that feed the algorithms and/or AI systems. In particular, and in relation to the activity of the delivery staff, the company shall facilitate relevant information used by the algorithm and/or AI systems concerning the organization of staff activity, such as the type of contract, number of working hours, time preferences and previous deliveries. The company shall not provide information regarding the algorithm and/or AI system that is protected by current regulations. The right of workers' representatives to be informed shall be conducted

4 All conversations will be recorded and accessible for a period of three months and will later be deleted. Those conversations conducted by a chatbot may not be used to sanction a person (article 68(f) *in fine*).

by the 'Algorithm Commission' ('Comisión Algoritmo'), which is formed of two members of each party.

Nevertheless, Spanish collective bargaining is not characterized by innovation, so the government is determined to encourage and help collective bargaining to develop these tasks. Recently, the Ministry of Labour has published a guideline on 'algorithmic information in the workplace' (Ministerio de Trabajo y Economía Social, 2022). Its content can be summarized as follows: firstly, it provides definitions for algorithms, automated decision-making systems and 'black boxes', and explains how these tools are being used in the workplace. This information is provided from a general and simplified perspective in order to make it more comprehensible for citizens. Secondly, it shows algorithmic information as being both an employees' right and a company's duty. This right/duty is divided into two types: on the one hand, the individual approach, which is based on article 22 GDPR,[5] includes the obligation to provide information in favour of workers who are subject to a decision based solely on automated processing, including profiling, without human intervention. It clarifies that the company shall provide information on 'the existence of automated decision-making, including profiling, referred to in article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject. (article 14(2)(g) GDPR)'. Besides the right/duty to be informed, article 22 GDPR sets the obligation of human intervention as a general rule. Concerning this issue, the guideline clarifies that 'human intervention must be significant, in the sense of being performed by a person with competence and authority over the decision and who values all available information. When human intervention is limited to replicating the decision made by the algorithm, it cannot be understood as a significant human intervention; this process should be treated as a fully automated decision process.'

On the other hand, the collective approach, which is based on article 64 WS, includes the obligation to provide information about the algorithms of artificial intelligence systems that affect decision-making and that may affect working conditions, access and maintenance of employment, including profiling. This obligation concerns all companies but can be different depending on the circumstances. Where the company has a workers' representative, both the individual and the collective approach is included; otherwise, it refers only to the individual duty.

Thirdly, the guideline includes the kind of information that must be provided, distinguishing the two approaches mentioned above. The individual approach takes into consideration the content of articles 13(2)(f), 14(2)(g) and 15(1)(h) GDPR, so information must refer to 'the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged

5 Articles 13(2)(f), 14(2)(g) and 15(1)(h) are also mentioned.

consequences of such processing for the data subject'. The collective approach refers, again, to article 64 WS, so the information provided must include 'the parameters, rules and instructions on which the algorithms of artificial intelligence systems are based, [and] that affect decision-making that may affect working conditions, [and] access and maintenance of employment, including profiling'.

The guideline clarifies that, in any case, the information obligation derived from articles 13(2)(f), 14(2)(g) and 15(1)(h) GDPR and 64(4)(d) WS cannot be interpreted as a business obligation to facilitate the algorithm source code. Additionally, it also mentions that, whereas information delivered to the individual worker must be related to automated decision-making without human intervention, information provided to workers' representatives does not have any restrictions.

Despite these different approaches, the guideline states that information can be joined. As a consequence, companies are obliged to provide information in seven areas. Firstly, they must provide information on the use of algorithms or artificial intelligence systems to make automated decisions, including profiling, identifying the technology and the management decisions concerning persons with respect to whom such technology is used. This includes the use of algorithms or AI systems to make automated decisions concerning workers or job candidates; the use of algorithms or AI systems for profiling; human-resource management decisions taken by using algorithms or AI systems; the type of technology used by the algorithm, including black-box and machine-learning algorithms; the specific software or product used and, if applicable, if it has any type of certification, the supplier company and if the company has made any changes to the product; and the degree of human intervention in decisions taken by algorithms and automated decision systems, including profiling, and particularly the competence, qualification and status of the human who can deviate from the decision adopted by the algorithm.

Secondly, meaningful, clear and simple information about the logic and operation of the algorithm, including its variables and parameters, must be provided. Taking into consideration the interpretation delivered by the Spanish Data Protection Agency, this would include

a) In the case of profiling, the type of profiles produced by the algorithm (articles 13(2)(f) and 14(2)(g) GDPR).

b) The variables used by the algorithm in the information or factors it uses to make decisions or profiling, including whether any of these variables are personal data.

c) The parameters used by the algorithm for automated decision-making, including the relative weighting of each variable in the model for decision-making, as well as any change to these parameters that modifies the behaviour of the algorithm.

d) The rules and instructions used by the algorithm, that is, the programming rules (either those expressly programmed or derived by automatic learning of the algorithm itself) leading to decision-making.

e) Training data and, where appropriate, validation data and its characteristics; reference to information about the logic of the algorithm (articles 13(2)(f), 14(2)(g) and 15(1)(h) GDPR) and 'instructions' (article 64(4)(d) Workers' Statute must be interpreted in the sense that it also includes the training data and, where appropriate, validation data, since these also influence its logic or algorithm instructions. Therefore, the company must report on the training data and, where appropriate, validation data; the data's quality, in the sense of being adequate, pertinent and not excessive, according to the purpose for which it was obtained; and the type of patterns identified in the training data.

f) In the case of profiling, the accuracy or error metrics in automated tasks (classification, scoring, regression, ordering, etc.) of the people in the different profiles.

g) The audits or impact assessment carried out by the company or a third party regarding the algorithm or the automated decision system used.

Thirdly, information on the consequences that may arise from the decision adopted through the use of algorithms or automated decision systems must be provided. This includes the consequences that the decision adopted by the algorithms or automated decision systems can have on the person; that is, what the consequences of the decision in terms of access to employment, maintenance of employment or determination of working conditions could be. The legal representation of the workforce must also be provided with information regarding the impact that decisions taken by algorithms or automated decision systems have in terms of equality and non-discrimination between women and men.[6]

Fourthly, the guideline sets out that, according to the current regulation, there is no obligation to negotiate the algorithm. Nevertheless, it also highlights that there is also no restriction or limit; on the contrary, it considers the introduction of a clause that determines the obligation to negotiate, or a responsible-use test (as is suggested in the Joint Declaration on Artificial Intelligence by the European Social Partners in the Insurance Sector) to be an improvement, as is the right to ask for information from the person in charge of supervising the algorithm. Setting this as a general rule, the guideline considers one exception only: negotiation procedures legally guaran-

6 This is the interpretation derived from article 64(3) WS, which recognizes the right of workers' representatives to gain access to information regarding the application of the right to equality and non-discrimination between women and men, as well as from article 7 Royal Decree 901/2020, referring to the assessment in the context of elaboration of an equality plan.

teed, such as those related to collective redundancies, temporary layoffs, geographical mobility and substantial modification of working conditions. The reason is that if the algorithm (totally or partially) determines the result of these procedures, it will need to be included in the negotiations because, otherwise, they would be (totally or partially) emptied of content.[7]

Fifthly, the guideline suggests that there is an obligation to consult on the introduction of an algorithm for the purposes of human resources management. This obligation is based on article 64(5) WS, which sets out the right of representatives to be informed and consulted 'on all the decisions of the company that could cause relevant changes in terms of the organization of work and employment contracts'. Additionally, section (f) of this article establishes that representatives shall have the right to issue a report, prior to execution by the company, on the 'implementation and review of work organization and control systems, working time, establishment of bonuses and incentives and job evaluation'.[8]

Sixthly, the guideline considers that article 35(3) GDPR sets the obligation ofimpact assessment concerning the design and implementation of an algorithm in two circumstances: on the one hand, automated decision-making, and on the other, the use of new technologies or an innovative use of new technologies, including the use of technologies on a new scale, for a new purpose or in combination with others, in a way that involves new ways of collecting and using data with a risk to persons' rights and freedoms. An impact assessment is compulsory if processing is likely to result in a high risk to the rights and freedoms of natural persons. This obligation is not extended to algorithmic auditing, except for occupational risk prevention and gender auditing.

Finally, the guideline includes an algorithmic information tool, which is a set of questions to be answered when fulfilling business obligations on information.

2.2. AI regulation derived from data protection legislation

Finally, as was mentioned before and as can be clearly deducted from the previous analysis, data protection is a key area when regulating AI. In this sense, the so-called 'Mercadona Case' (Judgment of the Provincial Court of Barcelona 2021) is, without a doubt, an essential reference. The case refers to a supermarket's desire to establish a facial recognition system as a result of a criminal judgment that had

7 Nevertheless, in the *Ericsson* case, the Spanish Supreme Court set out that the only requirement is providing information about the existence of the algorithm and its use, not the negotiation of the algorithm itself.

8 This is based on article 4(2) Directive 2002/14/EC. Adams-Prassl (2022, p. 44) suggests the same strategy at European level: 'the introduction of algorithmic management should, in principle, be caught within the scope of Directive 2022/14, as such a move can be characterized as a "decision likely to lead to substantial changes in work organisation", thus requiring both information and consultation on this point'.

convicted two people as perpetrators of an attempted crime of robbery with violence and, as an accessory penalty, had prohibited them from accessing a shopping centre. The shopkeeper argued that such a system was necessary, given that it was practically impossible for the company to ensure compliance with the accessory penalty, as the workers could not be aware of all the people entering the supermarket. For these reasons, the company urged that it be allowed to use a facial recognition system to detect the entry of the two convicted persons into the supermarket's establishment.

The aforementioned judgment expressed serious doubts about the legality of the requested measures from the point of view of data protection regulations, given that these processing operations require special categories of data, as is the case for biometric data, for which consent must be explicitly obtained, which did not seem feasible. The judgment additionally stated that the Spanish Data Protection Agency (SDPA) had ruled, in response to a consultation by a private security company, that the regulatory framework dedicated to regulating this type of processing is insufficient and that the approval of a regulation with the status of law is necessary. Finally, it concluded that the Court cannot agree that the measure in question is protecting the public interest, but rather the private or particular interests of the company, since […] it would be violating the appropriate guarantees for the protection of the rights and freedoms of the interested parties, not only of those who have been convicted and whose prohibition of access is their responsibility, but of the rest of the people who access the aforementioned supermarket.

The judgment therefore dismissed the appeal lodged by the legal representation of the supermarket.

If we focus on the resolution issued by the SDPA (PS/00120/2021), which was the basis of the judgment, additional relevant information can be obtained. This SDPA procedure was initiated by its director in light of the news published in the media about the implementation of facial recognition by the supermarket. From their preliminary investigation, it was concluded that the supermarket company processed personal biometric data (article 4(14) GDPR) for the purpose of identifying a specific person solely from among several others, subject to the guarantees of article 9 GDPR. The processing not only occurred in relation to the identification of criminal convicts, as a consequence of the restraining order imposed on them in a criminal judgment, but also concerned any person entering one of the company's supermarkets (including minors) and its employees. The data processing included the collection, matching, storage and destruction, in the case of negative identification (after 0.3 seconds from data collection), of the biometric image captured of any person entering the supermarket.

From the SDPA's perspective, it could be concluded that this would be an indiscriminate and massive facial recognition system, since depending on the biometric data, other data of the subject could be derived, such as their race or gender (even from fingerprints), their emotional state, illnesses, genetic defects and characteris-

tics, substance consumption, etc. The following conclusions in particular could be obtained from the SDPA's resolution (Mercader Uguina, 2022, p. 98): (i) facial recognition systems are not mere video-surveillance systems, therefore require legitimate bases for processing that go beyond those established in article 6 GDPR, and therefore must be processed within the framework of the exceptional regime provided by article 9 GDPR; (ii) the characteristics of these systems and the kind of data impose a strict and reinforced compliance with the obligation to provide information as set by article 13 GDPR; and (iii) it is essential to consider the risks to workers' rights in the preparation of the impact assessment, as in article 35 GDPR.

The same interpretation was delivered in the recent resolution of 2 February 2022 (CNS 2/2022) of the Catalan Data Protection Authority (DPACAT). In its report, the DPACAT responded to a consultation raised by a local council on the possibility of installing a system in the workplace to control staff members' presence by means of facial recognition. This consultation concluded that: the consent of the staff concerned cannot be considered an adequate base for the implementation of a time and attendance control system using facial recognition. Such a monitoring system would need a specific legal or collective agreement provision, or where appropriate, a provision in a collective contract,[9] circumstances which do not appear to be present in the case analysed. In any event, prior to the implementation of such a system, it is necessary to carry out a data protection impact assessment in the light of the specific circumstances in which the processing is carried out to determine its lawfulness and proportionality, including an analysis of the existence of less intrusive alternatives, and to establish appropriate safeguards.

The metrics of people, biometrics, is one of the areas in which the present and future development of algorithmic systems as instruments of labour control can be most clearly seen. Facial recognition is a good example of the issues that this reality is beginning to produce in the world of work (Mercader Uguina, 2022, p. 99).

Conclusions: Some lessons from prehistory and the beginning of history

From this very short description, some lessons can be learnt. Firstly, the introduction of a new workers' right to be informed about AI devices used in their company that affects working conditions opens the possibility of its regulation by collective bargaining. Nevertheless, the poor results traditionally obtained by collective bargaining mean that additional tools are required to help social partners in the negotiations, such as the above-mentioned guidelines, and/or to extend regulation to other areas. Spain's experience shows that, despite classical rules being used, legal certainty requires the adaptation of consultation procedures, particularly in the case

9 Whereas the Supreme Court and SDPA mentioned the law as the only way to regulate facial recognition, DPACAT considers the possibility of including collective bargaining as well.

of collective redundancies, geographical and functional mobility, substantial modifications of working conditions and transfers of undertakings. Alternatively, the right of workers' representatives to be consulted when an AI device with effects on working conditions is introduced can be a useful way of covering this normative loophole. Additionally, this would strengthen the call for collective bargaining to regulate these issues. In any event, 'negotiating the algorithm' (De Stefano, 2019) the introduction of new technologies at the workplace and the future of work. This debate has concentrated, so far, on how many jobs will be lost as a consequence of technological innovation. This paper examines instead issues related to the quality of jobs in future labour markets. It addresses the detrimental effects on workers of awarding legal capacity and rights and obligation to robots. It examines the implications of practices such as People Analytics and the use of big data and artificial intelligence to manage the workforce. It stresses on an oft-neglected feature of the contract of employment, namely the fact that it vests the employer with authority and managerial prerogatives over workers. It points out that a vital function of labour law is to limit these authority and prerogatives to protect the human dignity of workers. In light of this, it argues that even if a Universal Basic Income were introduced, the existence of managerial prerogatives would still warrant the existence of labour regulation since this regulation is about much more than protecting workers' income. It then highlights the benefits of human-rights based approaches to labour regulation to protect workers' privacy against invasive electronic monitoring. It concludes by highlighting the crucial role of collective regulation and social partners in governing automation and the impact of technology at the workplace. It stresses that collective dismissal regulation and the involvement of workers' representatives in managing and preventing job losses is crucial and that collective actors should actively participate in the governance of technology-enhanced management systems, to ensure a vital "human-in-command" approach."","DOI":"10.2139/ssrn.3178233","event-place":"Rochester, NY","genre":"SSRN Scholarly Paper","language":"en","number":"3178233","publisher-place":"Rochester, NY","source":"Social Science Research Network","title":"'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection","title-short":"'Negotiating the Algorithm'","author":[{"literal":"De Stefano, V."}],"issued":{"date-parts":[["2018",5,16]]}}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} is a key aspect, but it requires legal and technical support, keeping in mind it is not a panacea.

From an individual perspective, it is necessary to extend the right to be informed to all kinds of AI interventions, not only those which are automated. This would provide this right the same scope as is recognized on the collective side. The individual right to be informed must be based not only on the data protection right, but on the principles of transparency, explicability and responsibility that should govern AI regulation in all areas (European Parliament, 2022). These principles permit an ex-

tension beyond the limits of data protection. Concerning limits from this particular perspective, who must be covered and how (workers, self-employed people or intermediate subjects) is still open to discussion (Prassl, 2018, pp. 129–131).

Finally, concerning data protection, recent cases show that additional regulation is needed for these kinds of high-risk intervention using AI. It is necessary to open the debate about whether collective bargaining is a good tool to solve high-risk cases or, otherwise, if they must be limited to the action of law. In all circumstances, in order to make collective bargaining a useful and effective tool to regulate algorithm management, it is necessary to provide technical support. It is true that parties must procure their own assistance, but public administration is in a good position to facilitate it by providing new electronic tools, publishing guidebooks or financing part of that technical help.

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The Legal Situation of Operators of Essential Services and Digital Service Providers in the Provisions of the Act of 5 July 2018 on the National Cybersecurity System

Abstract: The Act of 5 July 2018 on the National Cybersecurity System and its accompanying executive regulations have introduced into Polish law the provisions of the Directive of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (UE) 2016/1148. The fundamental reason for these regulations was to establish a coherent system to ensure the cyber security of the Republic of Poland with accordance to standards adopted for European Union Member States. This paper presents the legal situation of operators of essential services and digital service providers that was created by the provisions of the ANCS. The ANCS not only identifies operators of essential services, digital service providers, and their assigned obligations, but also addresses the competent authorities' tasks of supervising, inspecting and imposing penalties within the cyber security system. The findings, assessments and conclusions presented here are based on the interpretation of the provisions of the ANCS and are supported by prominent claims of academic representatives. The analyses contained within this paper aim to show that despite the comprehensible and contemporary ratio legis – which falls within the framework of pursuing the state of digital safety – the provisions of the ANCS require adjustments that acknowledge the legal situation of operators of essential services and digital service providers.
Keywords: cybersecurity, digital service providers, inspection, obligations, operators of essential services, penalty payments, supervision

Introduction

The Act of 5 July 2018 on the National Cybersecurity System (the ANCS) and its accompanying executive regulations have introduced into Polish law

the provisions of the Directive of the European Parliament and of the Council of 6 July 2016 Concerning Measures for a High Common Level of Security of Network and Information Systems across the Union (the NIS Directive). The fundamental reason for these regulations was to establish a coherent system to ensure the cybersecurity of the Republic of Poland, with accordance to standards adopted for European Union Member States. This national cybersecurity system, established by the provisions of the ANCS, aims to implement a nationwide cybersecurity strategy that provides undisrupted essential and digital services, assumes an appropriate level of security for network and information systems used in these services and ensures the appropriate handling of any incidents. The legislature's intention is followed by coordinated risk-management measures that include identification of any risks of incidents (such as cyberattacks or cybercrises) to prevent, detect, handle and minimise their impact on the cybersecurity of the state and its citizens (Dysarz, 2019a; Hydzik, 2019; Radoniewicz, 2019a).

The ANCS carries out its assumptions through constitutional, material and procedural regulations that create a relationship between the subjects found within the cybersecurity system. In doing so, it draws a clear distinction between two subject categories: 1) operators of essential services and digital service providers, and 2) competent authorities (relevant state authorities of cybersecurity). It is particularly under the provisions of the ANCS that operators of essential services and digital service providers are responsible for the effective functioning of the national cybersecurity system; these subjects are particularly obliged to initiate safety measures to prevent, detect and handle incidents within the scope of removing any cybersecurity risks and restoring a state of safety (Wajda, 2020; Wilbrandt-Gotowicz, 2019).

This paper presents the legal situation of operators of essential services and digital service providers that was created by the provisions of the ANCS. The ANCS not only identifies operators of essential services and digital service providers and their assigned obligations, but also addresses the competent authorities' tasks of supervising, inspecting and imposing penalties within the cybersecurity system. The findings, assessments and conclusions presented here are based on an interpretation of the provisions of the ANCS and are supported by the prominent claims of academics. The analyses aim to show that despite the comprehensible and contemporary *ratio legis* – which falls within the framework of pursuing a state of digital safety – the provisions of the ANCS require adjustments that acknowledge the legal situation of operators of essential services and digital service providers.

1. The identification (status) of operators of essential services and digital service providers

In order to adopt the objectives and assumptions of the provisions of the ANCS, it is crucial to identify the meaning of 'operator of essential services' and 'digital service provider'. The legal identification of an operator of essential services is contained in Art. 5, sec. 1 of the provisions of the ANCS, according to which an operator of essential services is:

- a subject listed in Annex 1 to the ANCS, which contains both listed types of entities that can be qualified as operators of essential services and the division of activities into sectors and subsectors, which include energy, transport, banking and financial market infrastructures (specified in the annex as a single sector), the health sector (healthcare), drinking water supply and its distribution, and digital infrastructure;[1]
- a subject in possession of an organisational entity within the Republic of Poland;[2]
- a subject that has been identified as an operator of essential services by a competent authority: pursuant to Art. 5, sec. 2 ANCS, the competent cybersecurity authority issues a decision to recognise an entity as a provider of essential services if a) the subject provides an essential service understood in terms of Art. 2, item 16 ANCS, i.e. a service that is essential for the maintenance of critical societal and/or economic activities included in the Annex to the Regulation of the Council of Ministers of 11 September 2018 regarding the list of critical services and the thresholds of significant disruptive impact for the provision of critical services, b) provision of this service depends on information systems understood in terms of Art. 2, item 14 ANCS, i.e. information and communication systems referred to in Art. 3, item 3 of the Act of 17 February 2005 on Informatisation of the Activity of Entities Performing Public Tasks together with digital data processed there,[3] c) an incident under-

1 Types of entities include those engaged in the extraction of minerals such as natural gas, crude oil, hard coal and lignite within the energy sector, subsector mineral extraction, or national banks, credit institutions, branches of foreign banks and credit institutions, cooperative savings and credit unions within the banking sector (Wąsowicz, 2019a). It is worth mentioning that the listing of a given type of entity serves only as an indication of possibly acknowledged operators of essential services and does not automatically define them as such (Sejm, 2018, p. 22).

2 The regulations of this act have exclusively domestic applicability (Wajda, 2020, p. 15).

3 According to Art. 3, item 3 of the Act of 17 February 2005 on the Informatisation of the Activity of Entities Performing Public Tasks, a teleinformatics system is a set of cooperating computer devices and software programs that enable the processing, storage and sending and receiving of data through telecommunications networks using an end-user device appropriate for the given type of telecommunications network, as defined by the provisions of the Act of 16 July 2004 – Telecommunications Law.

stood in terms of Art. 2, item 5 ANCS, i.e. an event that has or is likely to have an adverse effect on cybersecurity,[4] would have a material disruptive effect on the provision of the essential service by that operator – according to Art. 5, sec. 3 ANCS, the significance of the disruptive effect for the provision of the essential service is determined by the thresholds of significance specified in the Regulation of the Council of Ministers of 11 September 2018 regarding the list of critical services and the thresholds of significant disruptive impact for the provision of critical services (Wilbrandt-Gotowicz, 2019, pp. 79–99).

The provided definition is open-ended in the sense that it does not directly pertain to any specific subject, thus does not definitively determine the status of the operator of an essential service. It does, however, present the identification of the operator of an essential service as dependent on the assessment of a competent authority meant to implement premises provided by the provisions of the ANCS.[5] Consequently, it is the competent authority that undertakes specified formal measures. Considering that the operator of an essential service is not directly designated by the force of law (even if it meets criteria mentioned in the definition), the identification of its status results from an act issued by competent cybersecurity authorities,[6] i.e. an administrative decision to identify a given subject as the operator of an essential service (also known as the identification decision) (Wajda, 2020, pp. 14–17; Wilbrandt-Gotowicz, 2019). This solution can raise some doubts, since identification decisions:

- are issued by competent cybersecurity authorities, listed in Art. 41 ANCS with a division into individual sectors, meaning that identification of operators of essential services is dispersed, conducted on a sectoral level and carried out independently by competent authorities;[7]
- are issued in administrative proceedings initiated *ex officio*;
- result from competent cybersecurity authorities recognising the subject as fulfilling the premises provided by the ANCS that validate this status;

4 According to Art. 2, item 4 ANCS, cybersecurity is understood as information systems' resilience to actions that may compromise the confidentiality, integrity, availability and authenticity of the data processed or the related services offered by these systems.

5 The constitutional and substantive prerequisites are referred to in Art. 5, secs. 1–2 ANCS.

6 Decisions on the identification of operators of essential services are issued by the competent authorities of cybersecurity, listed in Art. 41 ANCS, on a sector-by-sector basis, which implies a decentralised way of identifying operators of essential services that takes place at sector level and is done independently by the individual competent authorities (most often the respective ministers).

7 The competent authority is, in principle, the minister responsible for a particular sector. Only in the case of banking and financial-sector services is the competent authority not the Minister of Finance but the Polish Financial Supervision Commission.

in other words, they result from the assessment of the authority on whether the requirements of the operator of an essential service are met;[8]

- are independent and specific determinations that settle the status of a particular entity providing a specific essential service;[9]
- are constitutive decisions, meaning they confer the status of an essential service provider and consequently determine compliance with the obligations specified by the ANCS (Chałubińska-Jentkiewicz, 2019; Wilbrandt-Gotowicz, 2019);
- are subject to immediate execution (Art. 5 ANCS); this signifies that the identification of an entity as the operator of an essential service takes effect from the date of the delivery of the decision;[10]
- when issued, impose an obligation on the authority to submit an application for the inclusion of the entity in the list of critical service operators maintained by the minister responsible for informatisation (Art. 7, secs. 1–6 ANCS).

The above leads to the conclusion that the status of an operator of an essential service is in fact authoritatively, constitutively and with immediate effect decided by the competent cybersecurity authorities.[11] This decision is based on an independent assessment of whether the constitutional and material premises expressed in Art. 5, secs. 1–2 ANCS have been fulfilled. It is worth noting that decisions on identification taken by the cybersecurity authorities may be contested, and the entities recognised as operators of essential services in the grounds for appeal raise precisely the errors in the authority's assessment of the existence of the premises expressed in Art. 5, secs. 1–2 ANCS.[12]

8 In accordance with Art. 5, sec. 6 ANCS, and in relation to an entity that no longer fulfils the conditions referred to in Art. 5, secs. 1–2, the competent cybersecurity authority decides whether to cancel the identification of an operator of an essential service.

9 If a given entity meets the qualification requirements for more than one provided service, the identification decision should pertain separately to each of these services (Chałubińska-Jentkiewicz, 2019).

10 Decisions regarding the identification of operators of essential services are subject to appeal in accordance with the provisions of the Act of 14 June 1960 – Administrative Procedure Code (APC). The decisions on identification are also subject to the appropriate extraordinary procedures of administrative proceedings provided for in the APC.

11 As already indicated, an administrative decision can be immediately enforceable.

12 Entities recognised as operators of essential services can appeal the decisions on identification taken by the cybersecurity authorities; however, it is important to note that in the case of a decision made by the competent minister or the Financial Supervision Commission (as supreme authorities within the meaning of the APC), the entity may optionally apply for reconsideration of the case or may immediately file a complaint with the Voivodship Administrative Court in Warsaw (Wąsowicz, 2019a; Wilbrandt-Gotowicz, 2019). See Judgment of the Supreme Administrative Court 2020; Judgment of the Voivodship Administrative Court in Warsaw 2019; Judgment

A digital service provider is defined by Art. 17, sec. 1 ANCS as:

- a legal entity or an organisational unit lacking legal personality;
- an entity that has its registered office, management or a representative with an organisational unit on the territory of the Republic of Poland;
- an entity that provides at least one of the digital services listed in Annex 2 to the ANCS, namely: a) an online marketplace, understood as a service that enables consumers or entrepreneurs to conclude agreements electronically on the website of the online marketplace or on the entrepreneur's website which uses services provided by an online marketplace, b) a cloud processing service, understood as a service enabling access to a scalable and flexible set of computational resources used by multiple users, c) an Internet search engine, understood as a device that allows users to search all websites or websites in a specific language by providing a keyword, phrase or other element, after which the search engine provides related results;
- an entity that is neither a small nor a micro-enterprise as referred to in Art. 7, sec. 1, items 1–2 of the Act of 6 March 2018 on Enterprise Law (Etel, 2014, pp. 69–83).

The definition of a digital service provider is also open-ended: it neither pertains directly to a specific entity nor recognises the status of the operator of an essential service, but it specifies the constitutional and material criteria significant for such identification, which makes it an analogous solution to that presented in Art. 5, sec. 1 ANCS. However, in the identification of a digital service provider, the ANCS provisions do not mention an administrative decision of the authority responsible for cybersecurity.[13] Therefore, obtaining the status of a digital service provider occurs *ex lege* once the constitutional and material premises are fulfilled. Consequently, the entity is obliged to independently assess the criteria from Art. 17, sec. 1 ANCS and identify itself as a digital service provider.[14]

This solution may be motivated by, for example, the large number and diversity of digital service providers, as well as the diverse impact of their activities on cybersecurity; the burden on cybersecurity authorities to issue identification decisions for them as well (as specific and individual acts) would be significant. Nevertheless, it raises some doubts. Self-assessment of the criteria from Art. 17, sec. 1 ANCS as-

of the Voivodship Administrative Court in Warsaw August 2020; Judgment of the Voivodship Administrative Court in Warsaw September 2020; Judgment of the Voivodship Administrative Court in Warsaw October 2020; Judgment of the Voivodship Administrative Court in Warsaw 2021.

13 There is also no list of digital service providers similar to the list of operators of essential services mentioned in Art. 7 ANCS.

14 This stance arises from the consequences of acquiring the status of a digital service provider in the form of the assigned obligations and supervisory powers of the authorities responsible for cybersecurity (including inspections and administrative fines).

sumes awareness, knowledge, skills and experience of the entities, which are necessary for proper identification and important in the context of the consequences, i.e. responsibility for the implementation of the obligations assigned to digital service providers; as a result, it must be assumed that not every entity will correctly perform self-identification. On the other hand, self-identification cannot exclude cases in which cybersecurity authorities may simply be unaware of the existence of the entity and its status as a digital service provider; as a result, they will not effectively exercise their powers and authority or take effective cybersecurity measures.

2. Obligations of operators of essential services and digital service providers

Correct identification and, consequently, obtaining the status of an operator of essential services or a digital service provider carries far-reaching effects for the entity, as it leads to being bound by the obligations specified in the ANCS. In the case of an operator of essential services, the provisions of the act establish specific obligations and also specify deadlines for their fulfilment. Therefore, within three months from the date of receiving the identification decision (Art. 16, item 1), an operator of essential services is required to:

a) systematically assess the risk of an incident occurring and manage that risk (Art. 8, item 1);

b) handle any incidents (Art. 8, item 4);

c) designate a contact person for the entities of the national cybersecurity system (Art. 9, sec. 1, item 1);

d) ensure that the user of the essential service has access to knowledge about cybersecurity threats in order to understand and apply effective ways of protecting him/herself against those threats within the scope of using the provided essential service, and to make it accessible particularly by publishing information on this topic on their website (Art. 9, sec. 1, item 2);

e) provide the competent cybersecurity authority with information indicating in which Member States of the European Union the entity has been recognised as the operator of an essential service and provide the date of termination of the essential service, no later than three months after a change in these data (Art. 9, sec. 1, item 3);

f) provide the competent cybersecurity authority, the relevant Computer Security Incident Response Team (CSIRT) (the CSIRT Ministerstwa Obrony Nardowej (Ministry of National Defence) (CSIRT MON) (Art. 2, item 2 ANCS), the CSIRT Naukowa i Akademicka Sieć Komputerowa

(Scientific and Academic Computer Network) (CSIRT NASK) (Art. 2, item 3 ANCS) or the governmental CSIRT (CSIRT GOV) led by the Head of the Internal Security Agency (Art. 2, item 1 ANCS), and the sectoral cybersecurity team with the data of the person responsible for maintaining contact with the entities of the national cybersecurity system, including his/her name, telephone number and email address, within 14 days from the date of his/her appointment, as well as with information on changes to-these data within 14 days from the date of the change (Art. 9, sec. 2);

g) provide the handling of the incident (Art. 11, sec. 1, item 1);

h) provide access to information on recorded incidents to the relevant CSIRT (MON, NASK or GOV) to the extent necessary for the performance of its tasks (Art. 11, sec. 1, item 2);

i) classify the incident as 'serious', based on the thresholds for assessing an incident as serious (Art. 11, sec. 1, item 3);

j) report serious incidents promptly, but not later than within 24 hours of their detection, to the CSIRT (MON, NASK or GOV) (Art. 11, sec. 1, item 4);

k) cooperate in the handling of a major incident or a critical incident with the relevant CSIRT (MON, NASK or GOV), providing the necessary data, including personal data (Art. 11, sec. 1, item 5);

l) remove any vulnerabilities and inform competent cybersecurity authorities on doing so (Art. 11, sec, 1, item 6);

m) deliver reports on serious incidents to the sectoral cybersecurity team in electronic form (provided they have been established) (Art. 11, sec. 3, item 1);

n) cooperate with the sectoral cybersecurity team at sector or subsector level during the handling of a serious or critical incident, providing the necessary data, including personal data (Art. 11, sec. 3, item 2);

o) provide the sectoral cybersecurity team with access to information on recorded incidents to the extent necessary to perform its tasks (Art. 11, sec. 3, item 3); and

p) appoint internal structures responsible for cybersecurity or entering into a contract with a cybersecurity service provider (Art. 14, sec. 1).

Within six months (Art. 16, item 2) of the date of the identification decision being served, an operator of essential services is obliged to:

implement technical and organisational measures that are appropriate and proportionate to the assessed risks, taking into account state-of-the-art knowledge, including maintenance and safe operation of the information system, as well as phys-

ical and environmental security measures. These should consider access control and the ensuring of a secure and continuous supply of services vital for the provision of the essential service. Additionally, they must implement, document and maintain contingency plans that enable continuous and undisturbed provision of the essential service, ensuring the confidentiality, integrity, availability and authenticity of information. Finally, they must place the information system that provides the essential service (Art. 8, item 2) under continuous monitoring;

a) collect information on cybersecurity threats and on the vulnerability to incidents of the information system that provides the essential service (Art. 8, item 3);

b) apply measures to prevent and limit the impact of incidents on the security of the information system that provides the essential service, using mechanisms that ensure confidentiality, integrity, availability and authenticity of data processed in the information system, providing software updates and protection against unauthorised modifications to the information system and taking immediate action upon discovery of vulnerabilities or cybersecurity threats (Art. 8, item 5);

c) employ communication devices that enable proper and secure contact within the national cybersecurity system (Art. 8, item 6);

d) develop, apply and update documentation on the cybersecurity of the information system that provides the essential service (Art. 10, sec. 1);

e) establish supervision of the cybersecurity documentation on the information system that provides the essential service, to ensure that documents are accessible only to persons authorised by their tasks, to protect documents from misuse or loss of integrity, and to mark subsequent documentation in order to identify any changes applied to it (Art. 10, sec. 2);

f) maintain cybersecurity records of the information system that provides the essential service for at least two years from the date of its decommissioning or the termination of the essential service, taking into account the provisions of the Act of 14 July 1983 on the National Archival Resource and Archives (Art. 10, sec. 3).

Finally, within one year (Art. 16, item 3) of the date of the delivering of the identification decision, the operator of essential services is obliged to conduct a security audit of the information system that provides the essential service (Art. 15).

The obligations of a digital service provider, on the other hand, are set out in Art. 17, secs. 2–3 and Art. 18, sec. 1 ANCS.[15] Under these provisions, a digital ser-

15 In Art. 18, sec. 1, items 1–7 ANCS, the legislation provides a catalogue of tasks and accompanying activities that a digital service provider is obligated to fulfil in relation to handling an incident. This catalogue is exhaustive and comprehensive. The tasks specified in the subsequent provisions,

vice provider is obliged to take appropriate and proportionate technical and organisational measures, as set out in the Executive Regulation of the Commission (EU) 2018/151 of 30 January 2018 Establishing the Rules for Applying Directive (EU) 2016/1148 of the European Parliament and of the Council with Regard to Further Specification of the Elements to Be Taken into Account by Digital Service Providers Concerning the Management of Existing Risks to the Security of Network and Information Systems, as Well as Parameters for Determining Whether an Incident Has a Significant Impact (Executive Regulation 2018/151), to manage the risks faced by information systems that provide the digital service; these measures ensure the appropriate level of cybersecurity in the face of risk and take into account a) the security of information systems and facilities, b) incident handling, c) the provider's business continuity management to deliver the digital service, d) monitoring, auditing and testing, e) state-of-the-art knowledge, including compliance with international standards specified by Executive Regulation 2018/151 (Art. 17, sec. 2). The digital services provider is also obliged to take measures to prevent and minimise the impact of incidents on the digital service in order to ensure the continuity of that service (Art. 17, sec. 3), and to detect, record, analyse, classify and report incidents, including (Art. 18, sec. 1):

a) performing activities to detect, record, analyse and classify incidents;
b) providing, to the extent necessary, access to information for the relevant CSIRT (MON, NASK or GOV) on incidents classified as critical by that CSIRT;
c) classifying incidents with significant disruptive effect;
d) reporting incidents with significant disruptive effect immediately, and no later than 24 hours from the moment of detection, to the relevant CSIRT (MON, NASK or GOV);
e) providing the handling of both a significant and a critical incident in cooperation with the relevant CSIRT (MON, NASK or GOV) by providing necessary data, including personal data;
f) removing any vulnerabilities as referred to in Art. 32, sec. 2 ANCS; and
g) transferring to the operator that provides the essential service through another digital service provider information about an incident which affects the continuity of provision of the essential service by this operator.[16]

i.e. in Art. 18, secs. 2–5 and Art. 19 ANCS, serve as an elaboration or clarification of the obligations listed in Art. 18, sec. 1 (Taczkowska-Olszewska, 2019b).

16 Regarding the obligations of digital service providers, the provisions of the ANCS do not, in principle, specify deadlines for their fulfilment, with the exception of Art. 18, sec. 4 ANCS.

It is noticeable that the obligations mentioned above are quite diverse.[17] The ANCS provides organisational, informational, supervisory and auditory obligations, as well as obligations related to the handling, reporting and eliminating of incidents. On the one hand, they encompass preventive and monitoring activities aimed at ensuring and maintaining a level of security and minimising the risk of incidents, ultimately ensuring the provision of services in a safe digital environment. On the other hand, they focus on taking responsive actions – ones that identify (detect), investigate and inform – as well as removing and neutralising the disruptive effects of incidents by ensuring their proper handling (Taczkowska-Olszewska, 2019a).

In the form of obligations, the provisions of the ANCS introduce and impose specific measures and actions for both operators of essential services and digital service providers by outlining the foundations for comprehensive actions in the sphere of cybersecurity. One could argue that they even enforce a continuous activity of a particular kind or an ad hoc activity, i.e. incidental actions following the identification of specific circumstances or events. These obligations correspond to the needs, goals and assumptions behind the enactment of the ANCS: they enhance cybersecurity in the digital sphere, minimise the risk of incidents and limit their adverse effects. Having acknowledged this, it is difficult to question the validity of the ANCS obligations. Nevertheless, it is important to note that adhering to these obligations demands a substantial commitment of organisational, personal and financial resources, applicable to both essential service operators and digital service providers. These should be considered as regular (rather than occasional) operating expenses (Krawczyk-Jezierska, 2019). Expert knowledge, skills and broad experience are also necessary to fulfil these obligations, which impose complex and intricate actions within the realm of digital services – this realm not necessarily being the primary objective of the subject's enterprise. The fact that the provisions of the ANCS are not always precise and allow interpretation further complicates the legal situation. Moreover, they often use general clauses, vague terms or evaluative expressions. For this reason it is possible for an obliged subject, acting in good faith, to interpret and perform his/her duties differently from what is expected by the authorities responsible for cybersecurity (Besiekierska, 2019; Piątek, 2020; Siwicki, 2019).

3. Supervision, inspection and penalty payments

Considering the above, it would be advisable to pay attention to the rights of competent authorities in terms of supervising, inspecting and imposing penal-

17 The significance, scope, and strategic dimension of essential services (compared to digital services) mean that a digital service provider has to fulfil fewer obligations than an operator of an essential service.

ties within the cybersecurity system.[18] Pursuant to Art. 53, sec. 1 ANCS, supervision of the implementation of obligations on the operator of an essential service or a digital service provider is carried out by:[19]

- the competent minister for informatisation, concerning the fulfilment of requirements by internal structures responsible for cybersecurity and appointed by the operator of an essential service. The entities providing cybersecurity services, pursuant to Art. 14, sec. 2 ANCS, are obliged to a) meet the organisational and technical conditions that ensure the cybersecurity of the operator of an essential service, b) have the means to provide premises for incident-handling services, which are located in secure sites free from any physical or environmental threats, and c) apply safety measures to ensure the confidentiality, integrity, availability and authenticity of processed information, taking into account personal safety, operation and the architecture of the systems (see Art. 14, sec. 1);
- the competent authorities for cybersecurity, within the scope of a) performance of the statutory duties of the operator of an essential service that counter cybersecurity threats and report serious incidents, b) meeting security requirements for digital service provision by a digital service provider, as specified in Executive Regulation 2018/151, and carrying out statutory obligations of reporting significant incidents.[20]

The competent authorities are authorised by their supervisory role to conduct inspections on the operator of an essential service and a digital service provider (Art. 53, sec. 2, item 1). These inspections employ the provisions of Chapter 5, Art. 54 of the Administrative Proceedings Code, as well as the provisions of the ANCS that specify the powers of the person conducting the inspection (Art. 55), the obligations of those being inspected (Art. 56), evidentiary procedures (Art. 57) and inspection-related matters such as the protocol (Art. 58) and post-inspection recommendations (Art. 59). What is more, the authority responsible for cybersecurity, also serving

18 It is noteworthy that within this scope, the provisions of the ANCS are precise and specifically indicate supervisory authorities and their powers (Proć, 2020).

19 It is worth noting that Poland has adopted a decentralised model (defined by jurisdiction on the subject matter) of supervision and control over operators of essential services and digital service providers. It is therefore worth considering whether the fragmentation of enforcement among multiple competent authorities will be sufficiently effective (e.g. as in the case of establishing a specialised central authority) (Dysarz, 2019b).

20 It is worth noting that (based on Art. 53, sec. 3 ANCS) in the case of a digital service provider, the initiation of inspection measures or the imposition of a penalty payment occurs successively, i.e. after obtaining evidence that the requirements specified in Executive Regulation 2018/151 are not being met or that the statutory obligations of reporting significant incidents are not being fulfilled.

as a supervisory body, is obliged to impose administrative fines[21] on the operator of an essential service or a digital service provider in cases of non-compliance or improper execution of the obligations binding them.[22] The catalogue of infringements for which the ANCS provides sanctions, and the amount of payments that can be imposed by the authority on the operator of an essential service, is specified in Art. 73, sec. 1 ANCS in connection with Art. 73, sec. 3, items 1–11; these are fines of up to PLN 200,000, depending on the type and degree of infringement. On the other hand, with regard to a digital services provider, the issue is regulated by Art. 73, sec. 2 in connection with Art. 73, secs. 3–4; the possible penalties reach up to PLN 20,000 for each infringement, depending on its type and degree (Radoniewicz, 2019b; Wąsowicz, 2019b).

Moreover, the provisions of the ANCS establish discretionary measures for imposing a financial penalty, the application of which relies on the assessment of the authority competent for cybersecurity.[23] Therefore Art. 73, sec. 5 ANCS provides for a so-called increased financial penalty: if, as an outcome of the inspection, the competent authority for cybersecurity finds that the operator of an essential service or a digital service provider persistently breaches the provisions of the act, causing 1) a direct and serious cybersecurity threat to the order, defence and safety of the state, the public or human life and health, 2) risk of serious damage to property or serious impediments to the provision of essential services, then, under that provision, it may impose an administrative fine of up to PLN 1 million. It is worth noting that if the competent authority decides that the duration, scope or effects of the infringement support the case, it is additionally authorised to impose an administrative fine, even if the subject has already ceased to infringe the law or has repaired the damage caused (Art. 76). Additionally, the authority may impose an administrative fine on the manager of the operator of an essential service if it is found that he/she has not sufficiently fulfilled his/her obligations.[24]

It is difficult to undermine the fact that the imposition of administrative fines on the operator of an essential service or a digital service provider is justified by ANCS assumptions; apart from serving as repressive measures, fines have a preventive and educational character that aims to force the subject to fulfil its obligations (Banasiński, Nowak, 2018; Radoniewicz, 2019b). Nevertheless, it is worth mentioning that nearly all the fines provided by the Act are relatively indicated sanctions;

21 Subject to Art. 73, sec. 1, items 12–13 ANCS, in which the reason for imposing a financial penalty is the prevention or obstruction of the inspection (referred to in Art. 53, sec. 2, item 1 ANCS) and failure to carry out post-inspection recommendations (referred to in Art. 59, sec. 1 ANCS).

22 By virtue of Art. 53, sec. 2, item 2 ANCS with regard to Art. 73, secs. 1–4.

23 See Judgment of the Voivodship Administrative Court in Warsaw 2022.

24 Referred to in Art. 8, item 1, Art. 9, sec. 1, item 1 and Art. 15, sec. 1 ANCS. Article 75 ANCS stipulates that this penalty may be imposed as an amount not exceeding 200% of the monthly consideration of the manager of the operator of an essential service.

this means that only the upper limit of the amount of the penalty that the authority may impose for a given infringement is indicated. In the case of fines imposed on operators of essential services, the Act indicates only the lower limit.[25] This leads to the conclusion that the cybersecurity authority is able to impose a variable amount of penalty at its discretion, i.e. in a subjective manner. What is more, the authority responsible for cybersecurity may impose discretionary penalties that entitle it to make a decision on the basis of a subjective assessment of provisions that include undefined and imprecise premises.[26]

On the other hand, it is also worth noting that the catalogue of sanctions available to cybersecurity authorities is limited only to administrative fines; the current legislation does not provide any other, equal or more repressive and preventive, measures (administrative or even criminal).[27] Moreover, the amount of administrative fines, as defined in the ANCS, does not take into account the size of the entity or the scale of its activities, so in many cases it may turn out to be too low (and imperceptible) and, as a result, ineffective.[28] Considering this, sanctions in their current form may not be effective enough for the assumed (expected and desired) motivation of operators of essential services and digital service providers to properly fulfil the obligations imposed on them.

Conclusions

It is not an easy task to clearly assess the contents of the ANCS which shape the legal situation of operators of essential services and digital service providers. Questioning their legitimacy is not the solution; the enactment of this regulation expresses the current needs, goals and objectives of the legal system. The provisions of this act improve the security level of the digital world, reduce the risk of incidents and limit their disruptive effects. However, what is additionally worth paying attention to is the legal position of the operator of an essential service and a digital service provider, to whom the regulations may be seen as significantly inconvenient and impenetrable. The measures employed to settle their status may result in confusion

25 The legislation does not provide a minimum monetary sanction in the case of penalties imposed on digital service providers.

26 See Art. 75, sec. 5 and Arts. 75–76 ANCS, which use the phrases 'persistently', 'a direct and serious threat', 'risk of serious damage to property or serious impediments', 'sufficiently fulfilled obligations' and 'the cybersecurity authority considers that the duration, scope or effects of the infringement endorsed the case'.

27 Doctrine and practice indicate the need to expand the catalogue of sanctions and introduce criminal liability for key service operators and digital service providers (Radoniewicz, 2019b).

28 Doctrine and practice propose linking the amount of administrative fines to the size of the entity and the scale of its activities, for example, by setting them as a percentage of the violator's turnover (Radoniewicz, 2019b).

and surprise, caused both by identification decisions and by the *ex lege* manner of acknowledging such a status (as the term 'self-identification' exemplifies). Awareness, precision and lack of ambiguity are particularly important when the subsequent status of the operator of an essential service or a digital service provider binds the subjects by obligations that require a constant commitment to provide for organisational, personal and financial resources. Due to the complexity of these regulations, their proper implementation requires expertise, skills and experience. Equally important are the far-reaching supervisory powers of the competent authorities within the cybersecurity field, particularly the power to impose mandatory and discretionary administrative fines when an operator of an essential service or a digital service provider fails in performing its obligations.[29]

Particular imprecisions and uncertainties within the ANCS provisions additionally complicate the legal situation of the operator of an essential service and the digital service provider. The regulations often employ general clauses, vague terminology or evaluative expressions, since they allow discretionary powers to the cybersecurity authority. This can be seen both in the identification of the entity's status and in the recognition of its obligations and their further implementation, as well as in the procedure of imposing and deciding on the amounts of fines.

To conclude, in light of the above, the provisions of the ANCS that shape the legal situation of operators of essential services and digital service providers require corrections, which should aim to improve the quality of the regulations (by making them more precise and specific, limiting the use of general clauses and vague or evaluative expressions and limiting the discretion of cybersecurity authorities), to improve and possibly standardise identification rules and to take into account the possibility of adapting obligations to the size and scale of the entity's activity. Nevertheless, reforms must not overlook the effectiveness of cybersecurity measures. Therefore they should be preceded by an analysis of the effectiveness of the adopted protection model (centralisation of the authorities responsible for cybersecurity may need to be considered) and the expansion of the catalogue of sanctions should also be analysed as well as their adjustment to the size of the entity and the scale of its activities.

Changes to the provisions of the ANCS are most likely to appear, first and foremost with regard to the implementation of the provisions of the NIS Directive 2 and the Security Act into the national legal system. Unfortunately, the direction of the amendments that are already drafted and envisaged is not in line with the needs presented above. It assumes an equalisation and tightening of the obligations on operators of essential services and digital service providers instead, while at the same time increasing the supervisory powers of the authorities competent for cybersecurity, including an extensive catalogue of penalties.

29 On the other hand, the catalogue of sanctions available to cybersecurity authorities is limited, and the amount of administrative fines may turn out to be too low (imperceptible) and ineffective.

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Trade Secrets in the Digital Age: How Do the Measures Provided for in EU Law Face the Challenges of Protecting an Employer's Trade Secrets against Unauthorised Acquisition, Use and Disclosure by Its Employees?

Abstract: One of the natural consequences of the development of technology is that an entrepreneur's confidential information, including trade secrets, is commonly stored in electronic files. This form of information storage inevitably entails challenges in the area of its protection. The coronavirus pandemic has drastically accelerated the process of dissemination of new models of employment, in particular remote (distance) work and cloud working, and has made the protection of an entrepreneur's secrets against unauthorised use even more complicated. This is due to the fact that in such models of employment, employees obtain access to their employer's data remotely, which may decrease the employer's level of control. To remedy this, employers may undertake various steps aimed at ensuring that their secrets are well protected; however, such actions may affect the free movement and mobility of workers. The purpose of this article is to verify how, in these circumstances, the measures provided for in EU law face the challenges of protecting an employer's secrets against unauthorised use by employees and how they define the scope to which they can be applied without the abuse of employees' rights and unjustified restrictions on their mobility. For that purpose, the author analyses in particular Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against Their Unlawful Acquisition, Use and Disclosure. This research is based mainly on the dogmatic method of analysis.
Keywords: Directive (EU) 2016/943, employees, employment relationship, trade secrets

Introduction

Confidential information, including trade secrets, is a determining factor as regards competitiveness and innovation-related performance in the market. The summary of responses gained by the European Commission in the course of a public consultation on protection against the misappropriation of trade secrets and confidential business information, launched on 11 December 2012 and closed on 8 March 2013, shows that 65% of companies that participated see a strong positive influence for trade secrets in the areas of, amongst others, research and development, the exploitation of innovation, and the innovative and competitive performance of SMEs (European Commission, 2012, p. 3). Interestingly, as many as 53% of respondents indicated that the most typical perpetrators of trade secret misappropriation were former employees (European Commission, 2012, p. 13).

The fact that so many respondents considered departing employees to be the biggest threat to trade secrets should not, however, be a surprise. Employees get access every day to various types of their employer's data, including trade secrets and other confidential information. Such access is a natural consequence of the employment relationship, as it would be irrational if the employer denied the employee information necessary to perform certain tasks but still required the job to be done properly. If the employer decides to provide an employee with information that is necessary for the proper performance of their entrusted duties, such sharing can be defined as intentional. Simultaneously, the employee may also get access to data that are not necessary for him/her to perform his/her assigned duties; this may happen by accident (e.g. if the data were in a message that was sent to him/her accidentally), as a consequence of faulty protection of data (e.g. when the employee uses an opportunity to see data that were improperly protected against unauthorised access) and as a result of a breach of the duty of confidentiality.

Recently the protection of employers' confidential information has become even more challenging. The reason for this, amongst others, is connected to the two factors. First of all, as a result of the development of technology, an entrepreneur's data are more and more commonly stored in electronic files. This form of information storage inevitably entails challenges in the area of its protection. Secondly, the coronavirus pandemic has drastically accelerated the process of dissemination of new models of employment, in particular remote (distance) work and cloud working; this has made the protection of entrepreneurs' secrets against unauthorised use even more complicated, because in these models of employment, employees obtain access to their employer's data remotely, which may decrease the employer's level of control.

The key EU legal act which deals with the issue of entrepreneurs' confidential information is Directive (EU) 2016/943 of the European Parliament and of the Council on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against Their Unlawful Acquisition, Use and Disclosure, which was adopted on

8 June 2016 and had to be transposed by EU Member States by 9 June 2018. It is binding not only on EU Member States but also on Iceland, Lichtenstein and Norway, as it was included in the European Economic Area (EEA) Agreement by Decision 91/2019 of 29 March 2019. Directive (EU) 2016/943 harmonised in many ways issues connected to trade secrets protection. However, it does not contain any specific rules dedicated solely to the protection of trade secrets gained by an employee in connection with employment relationship. Nevertheless, its preamble proves that EU legislatures were aware of possible conflicts between a legitimate interest in the protection of an employer's confidential information (freedom of establishment) and employees' legitimate interests in being able to change jobs (free movement and mobility of workers). The need to show 'special diligence' in cases concerning labour mobility has also been stressed by the European Court of Human Rights (Judgment of the European Court of Human Rights 2006, para. 42).

The purpose of this article is to verify how, in these circumstances, the measures provided for in EU law face the challenges of protecting an employer's secrets against unauthorised use by employees, and how they define the scope to which they can be applied without the abuse of employees' rights and unjustified restrictions on their mobility. For that purpose, the author analyses Directive (EU) 2016/943 in particular. The research is based mainly on the dogmatic method of analysis.

1. The definition of trade secrets in Directive (EU) 2016/943

Directive (EU) 2016/943, in its Article 2(1), defines a 'trade secret' as information which meets all of the following requirements:

a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

b) it has commercial value because it is secret;

c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.[1]

In accordance with Directive (EU) 2016/943, the requirement of secrecy shall be understood in a way that information shall not be generally known amongst or readily accessible to persons within the circles that normally deal with the kind of information in question. Article 2(1)(a) of the Directive also emphasises that a single piece

1 These requirements recall the criteria of 'undisclosed information' contained in Article 39(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); the wording of them is identical (at least in the English versions).

of information, as well as the precise configuration and assembly of its components, may constitute a trade secret.

Directive (EU) 2016/943 attaches commercial value to the confidential nature of information in question. It requires that information shall have commercial value due to the fact that it is secret. It should be noted that this requirement has not been transposed by the EU Member States uniformly: there are countries that copied this criterion from the Directive and require that information has to have commercial value resulting from its secret nature, and countries where the requirement of commercial value is not linked to the confidentiality of information (e.g. Poland[2]). Such an approach taken by national legislatures shall not be deemed as contrary to the Directive, due to fact that this legal act sets a minimum standard, from which EU Member States can deviate to incorporate stricter measures (minimum harmonisation).

The assessment of whether information has economic value should be made using objective criteria. In particular, the mere belief of an undertaking that particular information has economic value does not constitute sufficient basis for it to be protected as a trade secret (Du Vall & Nowińska, 2013, p. 198; Korus, 2002; Korycińska-Rządca, 2020, p. 132; Michalak, 2016, p. 402; Nowińska, 2018, p. 233). Simultaneously, the concept of economic value should be interpreted liberally in order to allow for it to include information having at least minimal economic value (Korycińska-Rządca, 2020, p. 132).

An undertaking that wishes to protect information as a trade secret has the greatest impact on the fulfilment of the last condition, i.e. the requirement of taking reasonable steps to keep information secret. In fact, the burden of meeting this condition rests entirely with the undertaking that holds the trade secret. In Poland, the threshold established in case law in this regard is relatively low, as courts usually assume that any actions which demonstrate that the information is confidential is enough and that, in specific circumstances, the obligation to maintain secrecy may be determined by the nature of the information itself, combined with the level of professional knowledge of the persons who came into possession of it (Judgment of the Supreme Administrative Court 2023). In the literature, it is emphasised that taking actions to maintain confidentiality of information is not only aimed at meeting the requirement of secrecy but also demonstrates the undertakings' will for the information to be protected as a business secret (Będkowski-Kozioł, 2014, pp. 208–209). This requirement can be considered from two aspects: in relation to the undertaking's employees and in relation to third parties. In relation to employees, the employer shall inform those who have access to the information about its secret nature, as well as taking appropriate organisational actions to keep it secret (Sołtysiński & Gogulski,

2 In accordance with Article 11(2) of the Act of 16 April 1993 on Combating Unfair Competition, '[a] trade secret shall mean technical, technological, organisational information or other information of economic value.'

2019, pp. 443–445), in particular limiting access only to a narrow circle of employees, obliging employees who have access to such information to maintain confidentiality, introducing access control to rooms where documents containing trade secrets are kept, limiting access to such information located on computers and monitoring or establishing other technical safeguards (Będkowski-Kozioł, 2014, pp. 208–209; du Vall & Nowińska, 2013, pp. 190–191). The actions taken in relation to third parties may include concluding confidentiality agreements or appropriate marking of disclosed materials containing confidential information (Będkowski-Kozioł, 2014, pp. 208–209; Sołtysiński & Gogulski, 2019, p. 444). The assessment of this requirement should be made taking into account the circumstances of the specific case, such as the size of the enterprise (Sołtysiński & Gogulski, 2019, pp. 444–445; see also Michalak, 2006, pp. 131–132; Wojcieszko-Głuszko, 2002, p. 74 ff.), the character of the secret data, the economic purpose of the legal transaction, the circumstances surrounding the contract and the principles of social coexistence or customs (Sołtysiński & Gogulski, 2019, p. 444; Traple, 2003, p. 8).

Article 2(1) of Directive (EU) 2016/943 does not give any example of information that may be a trade secret. Irgens-Jensen (2023, pp. 501–509) rightly points out that the Directive's threshold for information to qualify as a trade secret is low. In practice, a trade secret may include information of very different natures, amongst others:

- undisclosed know-how and business information;[3]
- technological information;[4]
- ideas, plans and concepts;
- the result of marketing research;
- the composition of the product;
- the name, price and date of sale of the product or a list of customers,

provided, however, that such information meets all three requirements stipulated in Article 2(1) of the Directive (EU) 2016/943 (on the meaning of trade secrets by national courts, see Irgens-Jensen, 2023, pp. 501–509).

2. The distinction between 'trade secrets' and 'skills and knowledge'

The broad understanding of 'trade secret' ensures the protection of a wide range of information, the confidentiality of which is important for the competitiveness and innovation-related performance of the undertaking who holds the secret. In this sense it ensures freedom of establishment as well as protection of the employ-

3 This can be implied from the title of Directive (EU) 2016/943 as well as from motive 14 of its preamble.

4 This can be implied from motive 14 of the preamble to Directive (EU) 2016/943.

er's right to privacy, which is safeguarded under Article 8 of European Convention on Human Rights signed in Rome on 4 November 1950 (on the issue of protection of entrepreneurs' rights, see Wiśniewski, 2023, pp. 11–33). Simultaneously, such an approach may hinder the free movement and mobility of workers, as employees may be afraid that their skills and knowledge learned during their employment constitute trade secrets which they will not in fact be able to lawfully use anywhere else, because it is unlikely that they will obtain the employer's consent to do so (Irgens-Jensen, 2023, p. 509).

The EU legislature was clearly aware that the protection of trade secrets required by Directive (EU) 2016/943 may lead to collision between freedom of establishment and the free movement and mobility of workers (see recital 13 of the preamble). In recital 14 of the preamble to the Directive, it is indicated that the definition of 'trade secret' excludes, amongst other things, the experience and skills gained by employees in the normal course of their employment. This distinction, however, is not explicitly repeated in the definition of 'trade secret' contained in Article 2(1). In the literature, it is emphasised that experience and skills are inseparable from the employee (Kolasa, 2018, p. 77) and that they cannot be recorded or disclosed to another entity in the form of a description, plan or drawing (Sołtysiński & Gogulski, 2019, p. 436 ff.). Consequently, it is indicated that experience and skills do not constitute 'information' as indicated in Article 2(1), and therefore they cannot be qualified as a trade secret (Domeij, 2020, p. 166; Kolasa, 2018, p. 77).

The intention of EU legislation to exclude employees' experience and skills gained during their employment from the definition of a trade secret is clear. It is also supported by Article 1(3)(b) of Directive (EU) 2016/943, which states that the Directive shall not offer any ground for limiting employees' use of experience and skills honestly acquired in the normal course of their employment. Interestingly, in Sweden the distinction between trade secrets and skills and experience, as provided for in recital 14 of the preamble to Directive (EU) 2016/943, has been explicitly expressed in Section 2(2) of the Act on Trade Secrets (SFS 2018:558), whereas other EU Member States have decided not to include such a distinction directly in the provisions of law.

The literature emphasises that in the process of assessing whether the 'information' in question constitutes a trade secret or the individual experience and skills of the employee, it may be helpful to take into account not only the character of the information but also such factors as whether the information is recorded in the form of a document or electronic file, whether is only in the employee's mind or whether it is possible to identify the information and carve it out from the individual experience and knowledge of the employee (Sołtysiński & Gogulski, 2019, pp. 443–445). It might also be useful to take into consideration the employee's position, as the scope of confidentiality obligations is often wider in the case of technical and research and development staff than for technicians or engineers in production de-

partments (also see the Judgment of the Court of Appeal in Kraków 2013; Michalak, 2006, p. 83; Wojcieszko-Głuszko, 2002, p. 133 ff.). Nevertheless, drawing a clear line between what is undisclosed know-how and what constitutes the individual experience and kills of the employee may be very difficult in practice (Sołtysiński & Gogulski, 2019, p. 436 ff.).

The practical difficulties with making a distinction between a trade secret and the experience and skills of the employee have led to differences in the approaches of national courts in different jurisdictions as to the manner by which they safeguard the interests of employees in dispute with their employers, who claim that the use of certain information obtained by the employees in the course of their employment was unlawful. National courts in some EU Member States (e.g. Poland), despite the existing practical difficulties, follow the approach supported by the wording of the Directive that the individual experience and skills of employees are excluded from the definition of 'trade secret' and as such are not protected as a trade secret. Consequently, they focus on the distinction between trade secrets and the experience and skills gained by employees in the normal course of employment. Nevertheless, analysis of the jurisprudence indicates that it is very difficult to assess whether information constitutes a trade secret or the employee's experience and skills. In other EU Member States (e.g. Germany, France and Sweden), national courts assume that such a distinction between these categories is almost impossible to draw, and instead of making attempts to do so they focus on the weighing of interests (see Irgens-Jensen, 2023, p. 510). Regardless of the approach, the assessment of whether the employee may use certain information for purposes other than their job within the employment relationship in connection with which it was gained is difficult and is subject to a high risk of error. This risk may be even higher if the employee is the one to make the assessment on his/her own, as s/he may not have full knowledge of the importance of the information. At the same time, any mistakes in the assessment process which result in unlawful use of a trade secret by the employee are to be borne by them. At least some of the difficulties in this area may be solved by signing a confidentiality agreement stipulating precisely which information constitute the employer's secrets.

3. Lawful and unlawful acquisition of trade secrets by the employee

In accordance with Directive (EU) 2016/943, the acquisition of a trade secret shall be considered lawful, in particular, when the trade secret is obtained by any practice[5] which, under the circumstances, is in conformity with honest commercial practices (Article 3(1)(d)) and to the extent that such acquisition is required or al-

5 Other than those expressly stipulated in Article 3(1)(a)–(c) of the Directive.

lowed by EU or national law (Article 3(2)). In Articles 4(2) and 4(4), the Directive stipulates circumstances under which the acquisition of a trade secret shall be considered unlawful. These provisions state the rules that shall be applicable, regardless of who the acquirer of trade secret is. The Directive does not oblige EU Member States to provide for any special rules applicable for the assessment of whether an acquisition of the employer's trade secret by an employee was lawful. Therefore, the acquisition of the trade secret by the employee shall be considered unlawful in the following situations:

– if the trade secret was acquired by the employee without the consent of the employer who is the holder of the trade secret, whenever such acquisition is carried out by unauthorised access to, appropriation of or copying of any data carrier containing the trade secret or from which the trade secret can be deduced, provided that this data carrier is lawfully under control of the employer;
– if the trade secret was acquired by the employee without the consent of the employer through any other conduct which, under the circumstances, is considered contrary to honest commercial practices (Article 4(2) of the Directive);
– if the employee at the time of the acquisition knew or, under the circumstances, ought to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully.

From these provisions it can be implied that whenever an employee acquires an employer's trade secrets with the latter's consent, the acquisition shall be considered lawful. Such consent can be both express or implied (i.e. when access to certain trade secrets is justified due to the position held by the employee or duties assigned to him/her).

Undoubtedly, one of the challenges connected to the employment relationship is the protection of confidential information against unauthorised acquisition by employees. It should be taken into consideration that an employee who is a part of the employer's organisation may have an opportunity to get access to certain data more easily than a third party. To ensure that information is protected as a trade secret, the employer shall take reasonable steps to reduce the risk of unjustified acquisition of the secrets by an employee (i.e. acquisition of the secrets on the occasion of an employment relationship). As was indicated above, taking such steps is crucial for fulfilling the requirements of being a trade secret. These actions may be challenging, especially when the employer's database is electronic and available for employees remotely. The fact that an employee who should not have access to certain information is able to obtain it may rise doubts as to whether such information constitutes a trade secret within the meaning of Article 2(1) of Directive (EU) 2016/943.

However, it shall not prima facie mean that such information is not a trade secret. Polish case law proves that such assessment is made on a case-by-case basis. For example, the Supreme Court has classified transferring the employer's documents from its server to the employee's private email as a violation of basic employee obligations arising, amongst other things, from the rules protecting trade secrets and not as a circumstance that constitutes an obstacle to recognising the information in question as not being a trade secret (Judgment of the Polish Supreme Court 2019).

The general circumstances stipulated in the Directive under which the acquisition of a trade secret is considered unlawful are broad enough to cover situations whenever an employee, through his/her actions, gains access to trade secrets that s/he should not have access to, in particular if such acquisition is carried out without the employer's express (or implied, i.e. resulting from the position held or assigned duties) consent or even his/her knowledge.

4. Lawful and unlawful use and disclosure of trade secrets by the employee

In accordance with Article 3(2)(d) of Directive (EU) 2016/943, the use or disclosure of a trade secret shall be considered lawful to the extent that such use or disclosure is required or allowed by EU or national law. The Directive does not oblige EU Member States to provide for any special rules applicable for the assessment of whether an employee's (or ex-employee's) use or disclosure of their employer's (or former employer's) trade secret was lawful. In accordance with the requirements of this Directive, the use or disclosure of the employer's trade secret by the employee (or ex-employee) shall be considered unlawful in the following situations:

- if such a trade secret has been acquired by the employee (or ex-employee) unlawfully (Article 4(3)(a) of the Directive);
- if the employee (or ex-employee) has broken their duty not to use or limit the use of the trade secret, regardless of the source of such an obligation (i.e. whether it is a contractual obligation or an obligation arising from law) (Article 4(3)(b)–(c) of the Directive);
- if the employee (or ex-employee), at the time of the acquisition, use or disclosure, knew or, under the circumstances, ought to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully (Article 4(4) of the Directive).

Consequently, it is implied that, in accordance with the approach taken by the Directive, whenever an employee uses or discloses their employer's trade secrets in connection with the employment relationship and for the sole purpose of performing their assigned duties properly, such use or disclosure shall be considered lawful. The same relates to a situation in which the employee (or ex-employee) uses a trade

secret for other purposes or discloses it to any third party with the employer's consent.

On the contrary, if the employee obtained the trade secret lawfully in connection with the employment relationship, the assessment of whether the subsequent use of such a secret was lawful depends on the fact of whether this former employee, at the time of the use of it, was bound by a confidentiality agreement or any other duty not to disclose the trade secret or limit the use of it. The Directive does not, however, stipulate when such other duty may exist nor how long it applies. An analysis indicates that EU Member States have not addressed this shortcoming of the Directive uniformly. On the one hand, there are countries like Germany and the Scandinavian countries where the courts establish, on a case-by-case basis, an implied duty of confidence, provided, however, that a weighing-up of interests favours the employer (see Irgens-Jensen, 2023, p. 499). On the other, in the case of Poland, an employee is under a statutory obligation to keep any information secret if the disclosure of it could expose the employer to harm (Article 100(2)(4), Labour Code 1974). This obligation is not limited only to trade secrets within the meaning of the Directive but goes far beyond. A similar approach is also taken in English and American jurisprudence (cf. Sołtysiński & Gogulski, 2019, p. 454 ff. as well as the literature indicated therein). Interestingly, in Poland, before the transposition of the Directive, it clearly resulted from the law that the employee was under an obligation not to transfer, use or disclose a trade secret during their employment and for a period of three years from the termination of the employment relationship, unless the contract provided otherwise or a state of secrecy ceased (Article 11(2), Act on Combating Unfair Competition 1993 in the wording in force till 4.9.2018). Although the rule expressly indicating the length of the former employee's duty of confidentiality was convenient – especially from the employee's perspective – it was not in line with the Directive and therefore was repealed. Due to this, it is recommended that the scope of the duty of confidentiality is established in a non-disclosure agreement signed by employer and employee (Nowińska, 2022, p. 261). Nevertheless, even if the parties conclude such an agreement, the provisions of it may be controlled by a court in proceedings regarding claims arising from an alleged breach of the duty of confidentiality. In such proceedings the court shall carry out an examination on a case-by-case basis, particularly if the contractual obligation of the former employee did not restrict their mobility.

5. Protection of trade secrets v. the mobility of workers

Article 6(1) of the Directive obliges EU Member States to provide for the measures, procedures and remedies necessary to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of trade secrets. In accordance

with Article 7(1), they shall be applied in a manner that is proportionate, avoids the creation of barriers to legitimate trade in the internal market and provides for safeguards against their abuse. Such measures, procedures and remedies shall also be provided for against an employee (or ex-employee) who has unlawfully acquired, used or disclosed the secrets of his/her employer (or ex-employer) and should allow the employer to obtain redress for the unlawful acquisition, use or disclosure of their secret. Simultaneously, the Directive imposes on EU Member States an obligation to ensure that competent judicial authorities may, upon the request of the respondent, apply appropriate measures where an application concerning the unlawful acquisition, use or disclosure of a trade secret is manifestly unfounded and the applicant is found to have initiated the legal proceedings abusively or in bad faith (Article 7(2) of the Directive). This solution may be seen as protection of the employee (or ex-employee) against initiation of proceedings abusively or in bad faith.

Conclusions

The analysis contained in this paper leads to the conclusion that the Directive obliges EU Member States to provide for measures, procedures and remedies in order to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of trade secrets. The requirements for these measures, procedures and remedies are generally common, regardless of who the trade secrets' holder is and who acquires, uses or discloses them. Although the Directive highlights the potential conflict between the employer's interests and the mobility of workers, and expresses the EU legislature's intention to exclude the individual experience and skills gained by employees in the normal course of their employment from protection as a trade secret, the only real difference made in the Directive in the cases regarding the protection of trade secrets in connection to an employment relationship is that the Directive enables EU Member States to limit the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of an employer's trade secret where they act without intent (Article 14(1) of the Directive).

What can be assessed positively is the fact that the Directive obliges EU Member States to ensure that a respondent is able to request a competent judicial authority to apply appropriate measures in cases where an application concerning the unlawful acquisition, use or disclosure of a trade secret is manifestly unfounded and the applicant is found to have initiated the legal proceedings abusively or in bad faith. This may be an important tool to prevent employers attempting to use measures and legal procedures adopted to protect trade secrets as a threat, in order to force an employee not to change their job or to prevent a former employee from using their skills and knowledge gained in the normal course of employment somewhere else.

Simultaneously, the analysis indicates that there are challenges and difficulties with the protection of trade secrets in connection to the employment relationship for both parties. From the employer's perspective, the roots of potential difficulties with the protection of trade secrets in connection with the employment relationship is that the model of the protection of trade secrets required by the Directive is based on the assumption that the owner of a trade secret shall manifest his/her intention to maintain the secrecy of information that s/he wishes to be protected as a trade secret by his/her actions. Consequently, the burden of taking reasonable protective steps is carried by the owner of the trade secret – in this case by the employer. This means that the employer shall identify the potential risks connected to the protection of the secret in the organisation and shall take reasonable steps (e.g. organisational and technological) to minimise the risk that secrets will be acquired by those employees that do not need them, as well as to make sure that employees who have access to the secrets are aware of their confidential nature and that they know exactly which information may or may not be disclosed. Any omissions in this regard may result in a refusal to protect the employer's information as a trade secret.

From the employee's perspective, the main difficulties are connected with the practical difficulties in drawing a line between what is a trade secret and what are individual experience and skills. It should be taken into consideration that any mistakes in the assessment in this regard which lead to the unlawful use of a trade secret are to be borne by the employee. The approach taken by the national courts of some EU Member States, concentrating on weighing the interests of the employer and employee rather than on making this distinction in practice, is an interesting way of combating this problem. However, a state of uncertainty remains on the employee's side as to the possibility of using certain information.

Taking into consideration the complexity of the issues connected to trade secrets, it is doubtful whether it would be possible to remove these difficulties through legislative changes. It seems that the existing shortcomings of the Directive in this regard are being addressed by national case law. This method is, however, subject to the risk of discrepancies between the approaches taken in different countries. The simplest solution to combating or at least reducing these shortcomings, especially in connection to the employment relationship, could be a confidentiality agreement signed between the employer and the employee, which precisely stipulates what information, in the case of the particular employer, is a trade secret, what actions connected to such information shall be taken by the employee (in particular how the employee shall protect the information and how and when s/he can use or disclose it) and what actions are forbidden. Such an agreement could be amended, if needed. The practice of signing such agreements could also be helpful for employers in the process of proving that they took reasonable steps to keep information secret.

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The Impact of the DAC7 Directive on the Functioning of Platforms and Platform Operators, from the Perspective of the Legal Model of Their Collaboration with Individuals

Abstract: In order to achieve the main objective of sealing the tax system, Council Directive (EU) 2021/514 of 22 March 2021 Amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation (DAC7) introduces an obligation to report income obtained by sellers via a digital platform in one of the Member States. However, the implementation of the provisions of DAC7 in the field of reporting also has non-fiscal consequences. The DAC7 Directive interferes in the way sales platforms function, imposing additional obligations on them which are closer to models of cooperation in employer–employee relations than in B2B relations.
Keywords: administrative cooperation, B2B relations, DAC7 Directive, obligations, platform operators

Introduction

Council Directive (EU) 2021/514 of 22 March 2021 Amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation (DAC7) is an important instrument for the implementation of EU fiscal policy and corresponding national policies. Its importance stems from the fact that it complements the rules aimed at taxing entities operating by means of cooperation with platforms

through which the consumer can purchase goods or services. This type of activity has become extremely popular in recent years; it is enough to mention the success of platforms such as Uber, Allegro, Bolt, Amazon, AirBnB, etc. An important problem in the exchange of information about traders operating through such platforms is that sometimes they cannot be individually identified, and the relationship with the requested information can only be described on the basis of a common set of characteristics. However, the implementation of the provisions of DAC7 in the field of reporting also has non-fiscal consequences. It turns out that the business model of sales platforms does not necessarily provide for the possibility of fulfilling reporting obligations, which should de facto be fulfilled by individual entrepreneurs as well as by individuals selling their services and goods through these platforms. DAC7 thus interferes in the way sales platforms function, imposing additional obligations on them which are closer to models of cooperation between employer and employees than in business-to-business (B2B) relations.

It is also worth mentioning that platforms are commonly used by micro-entrepreneurs who on some grounds decide that they do not want or cannot have the status of employees but decide to run individual business activity. The reasons for doing this can be a desire to use a more independent form of cooperation with a platform, a wish to undertake business risk in exchange for larger possible incomes and the flexibility offered by cooperation with such platforms, but also the fact that market conditions prevent them from taking advantage of profits stemming from employees.

1. Purpose of the Directive

Broadening the tax base and tightening the tax system are instruments for the implementation of values fundamental to the financial-law system, implemented according to the principles of equality and universality (Brzeziński, 2015, p. 10; Gomułowicz, 2005, p. 481; Gomułowicz & Małecki, 2010, p. 119). Activities in this area are also positively perceived by the public, which criticizes a situation in which certain groups of entrepreneurs enjoy unjustified tax privileges. The sale of goods and services through sales platforms is becoming an increasingly common phenomenon, and the number of entities offering their goods or services is growing as fast as demand for them. However, the flexibility and reduction of administrative obligations, which are two of the main advantages of this method of sales, pose a challenge to the fiscal systems of the countries in which these services and goods are offered. The answer to these challenges is assumed by the EU legislature to be Council Directive (EU) 2021/514 (p. 1), together with the Polish act implementing this Directive (Bill Amending the Act on Exchange of Tax Information with Other Countries and Certain Other Acts), which at the time of writing functions as a draft presented by the Ministry of Finance.

The Directive, in addition to achieving the main objective of sealing the tax system, introduces an obligation to report income obtained by sellers via a digital platform in one of the Member States (DAC7 Directive, Preamble, Recital 13). It also sets a whole range of other objectives that this main objective is intended to pursue, including the extension of the information obligation. This obligation is to be applied both to operators operating across borders and to those cases where the activity is not cross-border (DAC7 Directive, Preamble, Recital 10). It is also intended to cover operators who are not resident nor registered in a Member State, do not have their management in a Member State, or do not have a permanent establishment in a Member State, referred to in the Directive as foreign platform operators operating in the Union (DAC7 Directive, Preamble, Recital 14). The obligation to register foreign platform operators prevents unfair competition by certain market players taking advantage of the lack of access to fiscal information (DAC7 Directive, Preamble, Recital 14).

In general, the obligations of digital platform operators to provide information to Member States' tax authorities relate in particular to information on income from commercial property activities, services provided in person and sales of goods, as well as the rental of means of transport. As already mentioned, the scope of information concerns B2B activities, and thus the obligations arising from the directives do not cover activities carried out by the seller as an 'employee' of the platform operator, although of course in such a situation (DAC7 Directive, Preamble, Recital 18), reporting obligations will arise from other legal titles, for example from the fact that in such a situation the operator is a payer of income tax.

Undoubtedly, an interesting regulatory aspect, which is a kind of challenge for all tax systems and which the Directive tries to deal with, is obtaining information from platform operators outside the EU. The existing instruments in this area are international agreements (bilateral and multilateral) on the exchange of tax information. With regard to these instruments, the Directive, while confirming the obvious fact that such agreements fall outside the competence of the EU and are concluded by Member States exercising their tax sovereignty, suggests the possibility of determining the equivalence of the information instruments contained in these agreements with the instruments introduced by the Directive.

A separate category of objectives adopted by the Directive are those relating to minimizing the possible negative effects of the introduction of the regulations; of course, we are talking primarily about the increase in the administrative burden imposed on platform operators. The Directive indicates that reporting rules should be effective on the one hand and simple on the other (DAC7 Directive, Preamble, Recital 9); the stated aim of the Directive is certainly not to increase the administrative burden on entrepreneurs. Recently, we have seen a whole range of legislative actions taken by EU bodies aimed at reducing administrative burdens, in particular those imposed on micro-, small and medium-sized enterprises. For this reason,

the discussed regulation declares considerable openness to other, equivalent solutions, in particular with regard to platform operators who, due to their non-EU residence, are subject to other, locally appropriate obligations in the field of reporting the income of entities cooperating for fiscal purposes, in particular in situations where, on the basis of bilateral or multilateral agreements, such exchanges are carried out between countries inside and outside the EU's jurisdiction. At this point, it is worth noting that the problem DAC7 is trying to solve is a common problem that occurs in many jurisdictions, and highly developed and developing countries generally use various instruments to solve it.

Such openness is implemented in many ways; one of the most important is the recognition of international standards for the provision of information regulated by DAC7 as equivalent (DAC7 Directive, Preamble, Recital 21). The OECD's 'model rules for reporting platform operators to rapporteurs in the sharing economy and gig economy' (model principles) play a huge role here (DAC7 Directive, Preamble, Recital 16). Another manifestation is the already mentioned openness to bilateral and multilateral solutions within the framework of cooperation between EU Member States and non-EU countries in this area. However, the objectives declared in the Directive regarding the non-imposition of additional bureaucratic burdens on entrepreneurs do not change the basic facts, which clearly indicate that there is an additional obligation imposed on certain categories of entities, that the implementation of this obligation will be subject to control procedures and that the amount of personal data that digital platform operators will have to administer is increasing, as well as a whole range of other additional burdens which result for platform operators.

2. The importance and forms of transnational administrative cooperation in the field of taxation with a focus on information exchange

The European legal and justice areas function not only thanks to the European legislatures or courts; one of the most important elements is the proper cooperation between various administrative entities of the EU and the Member States. It is important that this cooperation has not only a vertical dimension but also a horizontal one; it has both institutional as well as procedural aspects and can be identified in EU law and also in national laws of Member States (Wróbel, 2017, p. 424). It is also one of the Treaty obligations introduced by art. 4(3) of the Treaty of the European Union (Sydow, 2004, p. 72). The introduction and further deepening of the administrative cooperation of the EU Member States results most importantly from the need to facilitate the exchange of information between EU bodies and Member States' authorities; this is vitally important for implementation of the *acquis communautaire* (Brodecki, 2009, p. 200). Administrative cooperation in the EU is conditioned

by multiple factors, including various institutional structures in the Member States, attempts to achieve the consistent application of EU law by national administrations (Biernat, 2000, p. 27) and supporting entrepreneurs by eliminating double administrative obligations, amongst others.

The basic premises connected with the development of administrative cooperation in the field of taxation stem directly from the fiscal risks connected with globalization. The mobility of the workforce, an increasing ability to choose preferential tax jurisdictions and the digitalization of processes of sale for goods and services result in increased possibilities for tax evasion but also the risk of double taxation (Ciobanu, 2017, p. 62). Those motives brought the OECD as well as the EU to the idea of undertaking legislative action providing a fair imposition of taxes upon taxpayers, their incomes and assets, while avoiding tax evasion, double taxation and the protection of the legitimate fiscal interests of states. In order to achieve these goals, Directive 77/799/CEE of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation has been adopted by the Council. This instrument was repealed in 2011 by Directive 2011/16/EU of the Council on Administrative Cooperation in the Field of Taxation, better reflecting the current fiscal challenges of the globalization.. This Directive aims at creating an efficient environment for collaboration between EU countries, as well as mitigating the negative fiscal effects of globalization.

The dynamics of the changes in the global economy and its environment (including the outbreak of the COVID-19 epidemic) resulted in a need to implement several changes to the Directive, which took the form of the following amendments:

a) Council Directive 2014/107/EU of 9 December 2014 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation (pp. 1–29);
b) Council Directive 2015/2376 of 8 December 2015 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation (pp. 1–10);
c) Council Directive 2016/881 of 25 May 2016 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation (pp. 8–21);
d) Council Directive 2016/2258 of 6 December 2016 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation (pp. 1–3);
e) Council Directive 2018/822 of 25 May 2018 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation (pp. 1–13);

f) Council Directive 2020/876 of 24 June 2020 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation (pp. 46–48);

g) Council Directive 2021/514 of 22 March 2021 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation (pp. 1–26).

3. Obligations arising from the Directive 2021/514 and their impact on the functioning of entrepreneurs

The primary recipients of the obligations arising from Directive 2021/514 are platform operators.[1] According to the bill, these are entities that contract with sellers to make all or part of a platform available to them. An entity includes legal persons, corporations and legal arrangements such as partnerships, trusts and foundations (DAC7 Directive, Annex V, sec. 1(c)(1)). The obligations arising from the Directive apply to platforms from both the European Union and outside it.[2] A platform is any software, including a website or a part thereof or applications, including mobile applications, accessible by users and allowing sellers to be connected to other users for the purpose of carrying out a relevant activity (DAC7 Directive, Annex V, sec. 1(a)(1)),[3] directly or indirectly, to such users. It also includes any arrangement

1 A reporting platform operator means any platform operator, other than an excluded platform operator, who is in any of the following situations: 1) resident for tax purposes in a Member State or, where such a platform operator does not have residence for tax purposes in a Member State, fulfils any of the following conditions: a) it is incorporated under the laws of a Member State; b) it has its place of management (including effective management) in a Member State; c) it has a permanent establishment in a Member State and is not a qualified non-union platform operator; 2) neither resident for tax purposes nor incorporated or managed in a Member State, nor has a permanent establishment in a Member State, but facilitates the carrying out of a relevant activity by reportable sellers or a relevant activity involving the rental of immovable property located in a Member State and is not a qualified non-union platform operator (DAC7 Directive, Annex V, sec. 1(a)(4)).

2 A 'qualified non-union platform operator' means a platform operator for which all relevant activities that it facilitates are also qualified relevant activities and that is resident for tax purposes in a qualified non-union jurisdiction or, where such a platform operator does not have residence for tax purposes in a qualified non-union jurisdiction, it fulfils any of the following conditions: a) it is incorporated under the laws of a qualified non-union jurisdiction; or b) it has its place of management (including effective management) in a qualified non-union jurisdiction (DAC7 Directive, Annex V, sec. 1(a)(4)).

3 The term 'relevant activity' means an activity carried out for a consideration and being any of the following: 1) the rental of immovable property, including both residential and commercial property, as well as any other immovable property and parking spaces; 2) a personal service; 3) the sale of goods; 4) the rental of any mode of transport. A 'relevant activity' does not include an activity carried out by a seller acting as an employee of the platform operator or a related entity of the platform operator (DAC7 Directive, Annex V, sec. 1(a)(8)).

for the collection and payment of a consideration in respect to a relevant activity. At the same time, the Directive clarifies that the term 'platform' does not include software that exclusively allows any of the following, without any further intervention in carrying out a relevant activity:

a) processing of payments in relation to the relevant activity;

b) for users to list or advertise a relevant activity;

c) redirecting or transferring of users to a platform.

The draft bill presented by the Ministry of Finance ensures compliance of the definitions in Polish regulations with the definitions in Directive 2021/514. A very similar approach has been adopted by, among others, Italy (art. 2(1)(a) Recepimento della direttiva (UE) 2021/514), Germany (art. 1(3) Gesetz zur Umsetzung der Richtlinie (EU) 2021/514) and Latvia (art. 2(1) Ministru kabineta 2023). It is worth emphasizing, however, that the definitions proposed in the draft bill are often not coherent with the Polish legal system. This may undoubtedly raise some doubts in the future, as the draft act contains phrases that already have definitions in the provisions of other Polish legal acts (CCI France Pologne, 2023, p. 2; Związek Przedsiębiorców i Pracodawców, 2023, pp. 4–6; Rada Podatkowa Lewiatan, 2023, pp. 2–4). It is therefore not surprising that a number of postulates have appeared regarding the definition of a platform. For example, Grant Thornton (pp. 1–2) proposes a narrow definition of the concept of 'allowing sellers to be connected to other users for the purpose of carrying out a relevant activity', and that the definition itself should only cover digital platforms allowing sellers to have direct contact with users and therefore should not refer to entities that sell, among other things, goods on websites, but which act as intermediary entities.[4] Izba Gospodarki Elektronicznej (2023, p. 3) proposes that the definition of a platform should limit the seller's connection with the user only to direct variant. Additionally, Polskie Stowarzyszenie Wynajmu Krótkoterminowego (2023, p. 3) has proposed clarifying the definition of a platform in such a way that it would 'prevent persons operating in the grey zone from making cash transactions and avoiding taxation'.

The first part of entrepreneurs' obligations is related to the due diligence procedure; their purpose is to identify platform users. The platform operators are obligated to collect and verify the necessary information on all sellers operating on and making use of a specific digital platform.[5] The data that the platform operators must collect includes (DAC7 Directive, Annex V, sec. 2(b)(1–2)):

4 Intermediary entities are, for example, agents or commission agents.

5 The reporting platform operator may rely on a third-party service provider to fulfil the due diligence obligation, but such obligations shall remain the responsibility of the reporting platform operator. This means that using the services of an external service provider does not exclude the operator's liability for improper performance of these obligations (DAC7 Directive, Annex V, sec. 2(h)(1)).

a) for each seller who is an individual and not an excluded seller, their first and last name; their primary address; any Tax Identification Number (TIN) issued to them, including each Member State of issuance, and in the absence of a TIN, the birthplace of the seller; their VAT identification number, where available; their date of birth;

b) for each seller that is an entity and not an excluded seller, their legal name; their primary address; any TIN issued to them, including each Member State of issuance; their VAT identification number, where available; their business registration number; the existence of any permanent establishment through which relevant activities are carried out in the Union, where available, indicating each respective Member State where such a permanent establishment is located.

Additionally, the report indicates, among other things, the Financial Account Identifier, the total consideration paid or credited during each quarter of the reportable period and the number of relevant activities in respect of which it was paid or credited, and any fees, commissions or taxes withheld or charged by the reporting platform operator during each quarter of the reportable period, etc.

In a case where a seller is engaged in relevant activity involving the rental of immovable property, the reporting platform operator shall collect the address of each property listing and, where issued, its respective land registration number or equivalent under the national law of the Member State where it is located (DAC7 Directive, Annex V, sec. 2(e)). Where a reporting platform operator has facilitated more than 2,000 relevant activities by means of the rental of a property listing for the same seller that is an entity, the reporting platform operator shall collect supporting documents, data or information showing that the property listing is owned by the same owner.

A reporting platform operator shall report the required information with respect to the reportable period to the competent authority of the Member State, no later than 31 January of the year following the calendar year in which the seller is identified as a reportable seller.[6] A reporting platform operator shall also provide the information to the reportable seller to whom it relates, no later than 31 January of the year following the calendar year in which the seller is identified as a reportable seller (DAC7 Directive, Annex V, sec. 3(a)(1)). This is another example of the increase in reporting obligations imposed on entrepreneurs in the EU. What is more, the reporting platform operator shall determine whether the information collected is reliable, using all information and documents available to them in its records or in any electronic interface made available by a Member State or the Union free of charge to ascertain the validity of the TIN and/or VAT identification number (DAC7 Directive, An-

6 If a reporting platform operator fulfils any of the conditions in more than one Member State, it shall elect one of those Member States as the one in which it will fulfil the reporting requirements.

nex V, sec. 2(c)). Therefore platform operators are not only obliged to collect data about their users, but also to verify it later. The difficulties in such data verification include incomplete or outdated information on publicly accessible databases or problems in contacting platform users and a possible lack of response. As rightly noted in the media, '[t]he platform vendor's data must be pre-processed and converted into a specific file format (e.g. XML or JSON) before it can be shared with the tax authority. It must be validated using internal or external services' (Eclear.com, n.d.a).

Platform operators will begin to collect a number of pieces of unique information (sensitive personal data) about their users for the purposes of reporting. In this context, it is undoubtedly worth remembering the obligations arising from the General Data Protection Regulation (GDPR). The reporting platform operator is in this respect the controller, within the meaning of the GDPR. Platform operators will be forced to adapt their existing procedures related to the protection of personal data as a result of obtaining new data. Therefore, the reporting obligation also involves obligations in the field of cybersecurity and data protection. In this respect, there is also the problem of the adequate protection of the collected information or its subsequent archiving. Platform operators will therefore have to identify sellers and activities falling within the scope of Directive 2021/514, as well as checking how accurate the collected data is. This will force them to reorganize work among current employees or hire new employees (e.g. data analysts, data scientists or data engineers). There is a need to train employees or introduce technical solutions that will improve the collection of the required information (for example by the introduction of an algorithm enabling automatic data collection). Undoubtedly, the Directive also affects platform operators as employers.

Reporting platform operators are also obliged to keep records of the steps undertaken and any information relied upon for the performance of the due diligence procedures and reporting requirements and adequate measures to obtain those records. Directive 2021/514 indicates that such documentation and records should remain available for a sufficiently long period of time, and in any event for a period of not less than five years but not more than ten years following the end of the reportable period to which they relate (DAC7 Directive, Annex V, sec. 4(b)). In Poland, in accordance with the draft act, a five-year period is planned in this respect. This also forces platform operators to train existing employees or hire new people.

The reporting platform operators are additionally required to register with the competent authority of any Member State when it commences its activity. The Member State of single registration shall allocate an individual identification number to the reporting platform operator and notify it to the competent authorities of all Member States by electronic means (DAC7 Directive, Annex V, sec. 4(f)(4)). This forces platform operators to register again and obtain an additional number. The new obligations also involve the need to change or supplement existing regulations and conditions for the provision of services on digital platforms. This also

forces platform operators to inform their users about the new obligations and the related need to make changes to the regulations. The new obligations force platform operators to reorganize their work and properly prepare their employees.

4. The consequences of imposing reporting obligations in the era of a more flexible labour market and reorientation towards B2B models

Changes in the labour market have been noticeable for several years. Recent years have brought a rapid digital transformation and the related development of remote work. The pandemic undoubtedly played a very important role in this respect; work models can now be fully in an office, hybrid (in which case, as an 'office-first' or a 'remote-first' hybrid) or fully remote (Ernst & Young, 2021, p. 16). The report 'The Reimagined Workplace 2023: Striking a Delicate Balance' states that '56 per cent of workers continue to work a hybrid or fully remote schedule, while 73 per cent of respondents report difficulty enticing workers to return to the office. In addition, 68 per cent of organizations are considering or implementing strategies to increase on-site work' (The Conference Board, 2023, p. 2). Remote work has become so natural and desired by employees that 'getting workers to return to the office was the second most difficult objective respondents reported, exceeded only by finding qualified workers' (The Conference Board, 2023, p. 3). In this respect, it is enough to mention the problems of employers such as Amazon, Apple or Twitter (now X). We are also facing major changes in the labour market due to the development of AI technology, which has significantly accelerated in recent months. It is already expected that some professions will cease to exist, some will change significantly and new professions will be created.

Noticeable changes in the labour market are also the result of the emergence of a new generation of employees. There are more and more people on the labour market who value independence, flexibility and the ability to combine private and professional life. An Ernst & Young report indicated that '[e]mployees in some markets are moving at record levels in anticipation of opportunities for flexibility, choosing to work new schedules and in new locations on a temporary basis to spend time with family, learn new things or explore new places. Key word searches have increased significantly for remote work' (Ernst & Young, 2021, p. 3). In this regard, it is worth remembering the so-called gig worker, i.e. an independent professional, and people working in flexible forms of employment, often in occasional jobs. What is important in the context of this article is that they are often online platform workers; a digital platform has become a place that connects customers with providers of services (Cohen & Muñoz, 2016, p. 77), therefore the self-employed are becoming an important element of the functioning of digital platforms (Todolí-Signes & Tyc,

2016, p. 197). Digital platforms enable the creation of a labour market that in social sciences and the media 'is referred to as [the] "Uber", "on-demand", "sharing", "peer-to-peer", "1099", "digital" or "gig" economy' (Todolí-Signes & Tyc, 2016, p. 197).

Therefore, there is a question as to how far the new obligations of platform operators and the related consequences will affect the users of digital platforms, who, as we have already mentioned, are often self-employed. The new obligations affect digital platforms related to personally provided services, the rental of property, parking spaces, or means of transport, or the sale of goods. As a result, they affect employees or self-employed people operating or offering services on such digital platforms. The reports will include data about users of digital platforms (including self-employed people) and the amount of income they achieve. Transactions and income earned by users of digital platforms will certainly become more transparent to tax authorities (Eclear.com, n.d.b). Additionally, strengthening co-operation between tax authorities across the EU will help fight tax evasion, tax avoidance and tax fraud more effectively. Users and sellers using digital platforms can expect more inspections by tax authorities to check the correctness of tax settlements. At this point, it is worth considering whether this will discourage a large group of platform users (including self-employed people) from using them. Will it discourage these types of entities from undertaking such activity, and to what extent will it be consistent with current trends in the labour market? Is it consistent with the current reorientation towards B2B models? It cannot be denied that some have used the current lack of reporting on the part of platform operators, and the lack of subsequent information to the relevant tax authorities, to their advantage for the purpose of tax optimalization or even tax evasion.

In the case of platform operators, there is another interesting thread. The platform operator, previously acting as an employer and the payer of contributions for its employees, must assume a similar role in relation to users of digital platforms, including the self-employed. This will certainly force them not only to change the regulations of the digital platform and signed contracts but also its organizational structure. At this point, it is worth considering whether this is actually the role that platforms should play and whether it is consistent with the original purpose of creating platforms. The answers to such doubts will certainly be revealed over time by practice and the approach of both platforms and administrative bodies to the challenges posed by the DAC7 Directive.

5. Examples of types of activities where implementing the Directive will be a technical challenge

According to the Preamble of Directive 2021/514, the reporting obligation should also extend to those platform operators that perform commercial activity in the Un-

ion but are neither resident for tax purposes nor incorporated or managed, nor have a permanent establishment in a Member State ('foreign platform operators'). Therefore, the obligations arising from the Directive apply to both EU and non-EU platform operators. We have already established that digital platforms can be connected with different sectors; therefore, the Directive applies to digital platforms offering:

a) the rental of immovable property, including both residential and commercial property, as well as any other immovable property and parking spaces (e.g. AirBnB, Booking, Bookabach);

b) a personal service (e.g. Freelancer, Upwork, Useme, Fiverr, Handy, Wolt, Glovo, Pyszne.pl, FlexJobs);

c) the sale of goods (e.g. Vinted, OLX, Allegro, eBay, Amazon);

d) the rental of any mode of transport (e.g. Lyft, Uber, Sidecar, Bolt, Turo, Click&Boat).

It is noticeable how different these types of activities are, but also how broad the categories are. For example, as 'personal service' we can include text proofreading, copywriting, accounting services, manual labour, etc. Consequently, the obligations arising from the DAC7 Directive will affect a large group of entities. Each of these digital platforms is an example of a potential "digital platform" within the scope of DAC7 reporting obligations, so must therefore:

- determine the approach to new responsibilities;
- hire or retrain employees;
- design and implement the necessary digital solutions;
- design and implement a data management strategy;
- carry out activities related to the due diligence procedure;
- perform user verification;
- prepare and submit a report to local tax authorities (in Poland: Krajowa Administracja Skarbowa – KAS).

Undoubtedly, platforms that have previously collected information about their users, sellers and transactions will have an easier time. Currently, the challenge in their case will be to properly organize this data, complete it and then verify it. Platforms that have not collected this type of data so far, or have only collected it to a very limited extent, will have to face the need to collect it. In their case, there will be a need to build the entire infrastructure related to the collection of user data (from regulations and principles, through GDPR, storage and archiving, to digital security).

It seems that digital platforms related to sales in particular will be problematic (e.g. Vinted, OLX, Allegro, eBay, Amazon). On the one hand, there are additional

exclusions,[7] but on the other, many of the platforms are not addressed to professionals but to ordinary users selling their private property; in the case of selling private items, there are additional exclusions. In the Polish legal system, we are dealing with so-called occasional sales – personal income tax will not apply if the sale covers items that were purchased more than six months ago, and the sale cannot take place in connection with a business activity. This can certainly cause additional confusion.

6. Does the Directive go against trends in modern models of business functioning, such as the shared economy and flexible forms of employment?

Platforms are commonly used in the so-called sharing economy. This innovative sector, which has very dynamic growth, is based on a philosophy of sharing as an alternative to classical private (exclusive) ownership (Paczkowski et al., 2020, pp. 62–63). The 'sharing economy promotes its values by indicating that it can help to use unused resources valuing what is common, shaping trust. [The] shared economy is promoted with slogans defining it as sharing, in a situation where two or more people can enjoy the benefits of owning things, instead of distinguishing, property. Sharing defines something as ours' (Belk, 2007, p. 127). Platforms in the shared economy take on the role of an intermediary, whose task is only to facilitate access to underused and undervalued goods and services (Lobel, 2016); they put themselves in the role of a technology provider (Polkowska, 2019, p. 225) and not, for example, an entity employing employees providing services to consumers. The benefits in terms of reducing labour costs, as well as the responsibility associated with the sale of goods or services, seem obvious in this model and, according to many, are the real reason for the spread of this economic model.

From the perspective of values protected by labour law, the activity of platforms leads to a degradation of the status of the employee, an increase in precarity and a deterioration in the stability of employment (Hauben & Lenaerts, 2020, pp. 4–5). From the perspective of tax law, platforms avoid the status of a payer, leaving the issues of tax settlements to cooperating entities, thus limiting their own costs and legal risks. On the other hand, it is impossible not to notice that the sharing economy model may be a conscious choice for some cooperating with platforms and constitutes an attractive alternative to labour law, which definitely does not keep up with modern life trends (Srnicek, 2017, p. 82), in particular in the case of employees looking for the most flexible forms of employment.

7 An excluded seller is a seller for whom the platform operator facilitated fewer than 30 relevant activities by means of the sale of goods and for which the total amount of consideration paid or credited did not exceed EUR 2,000 during the reporting period.

In the context mentioned above, the DAC7 Directive seems to be a legal instrument which goes against the trends of the sharing economy. It increases obligations, administrative burdens and finally also costs on the side of the platforms, putting them in a specific, quasi-paternalistic position towards the entities cooperating with them. However, one sometimes cannot escape the impression that identifying platforms as responsible for the actions of the entities which cooperate with them can in fact show the real balance of power and the inconvenient truth about the sharing economy – namely, that it is an economy which puts platform operators in the position of 18th-century tycoons, who were unbound in any way to social obligations towards the masses who were working on raising the status of their companies to the position of economic superpowers.

Conclusions

The DAC7 Directive seems to be an effective instrument for fighting tax evasion and introducing basic equality principles to the tax system of EU Member States, as well as broadening the tax base. This is important for various reasons, including increasing revenues required for implementing ambitious EU policies in the social or environmental spheres, eliminating the grey market and satisfying people's sense of justice. It is supposed to efficiently meet the challenges of globalization in the fiscal sphere. In meeting those goals, vertical and horizontal cooperation between fiscal administrations is needed, together with additional obligations which the platform operators have to fulfil in order to remain in conformity with the new laws. These obligations include due diligence procedures in identifying platform users, as well as reporting the taxable income flows connected with using the platform. The additional obligations which are put on the platform are not neutral to the functioning of the platform operators; they are an actual cost which the operator has to bear, either in the form of staff costs or software costs connected with preparing the required reports. Objectively, however, it seems that the proportionality principle between the additional obligations, the measures implementing them and the goal has been maintained. The DAC7 Directive also shows the challenges which changing models of employment pose to the fiscal systems of EU Member States. On the other hand, one cannot escape the impression that to some extent, by subordinating individual service providers or sellers to the platform operators, the DAC7 Directive goes against trends in the modern economy, especially the sharing economy. It may also indicate the need for a deep reform of the fiscal structure, towards indirect taxation, as a simpler way of raising fiscal revenues with a lower risk of tax evasion.

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Commercialization of the Results of Research Carried Out by Public University Employees Working Remotely: *de lege lata* and *de lege ferenda* Conclusions[1]

Abstract: This study analyses the acquisition and commercialization of rights based on the results of scholarly activity carried out by employees of Polish public universities under the Act of 20 July 2018 – the Law on Higher Education and Science and their objects of commercialization. In addition, it is considered whether the institution of remote work introduced under the Act of 1 December 2022 amending the Labour Code and Some Other Acts is a tool that assists employees and universities in the process of the commercialization of knowledge in the digital age, facilitating the development of an innovative and entrepreneurial university, or, on the contrary, whether it may generate difficulties and costs for both parties to the employment relationship, i.e. the university as an employer and its employees.
Keywords: commercialization, innovative and entrepreneurial university, results of research activity carried out by employees, remote work

Introduction

One of the fundamental barriers hindering the enhancement of the process of commercialization and the transfer of research results from public universities to the economy is the so far relatively low level of experience of cooperation between

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science and businesses in Poland (Salamonowicz, 2016, p. 334). It seems that the fact that many public universities have adopted the traditional Humboldtian university model as the model for their operation, which is the opposite of an innovative, third-generation university, does not help to improve the commercialization process. The European scientific community has been debating the adoption of the optimal and most appropriate model of university operation for many years. In general, this discourse is mainly focused on two models, the traditional Humboldtian model of the university and the model of the third-generation university, referred to as the entrepreneurial and innovative corporate university (Makieła, 2017, pp. 35–36).

The concept of the university which was proposed by Wilhelm von Humboldt in the early 19th century is represented by the Humboldt University of Berlin, which he himself established. Humboldt's traditional model of the university assumes broadly defined university autonomy, freedom of learning and teaching, and public funding. This model emphasizes the importance of academic freedom and its independence from politics and the economy. Thus, the university in this model remains independent from external influences, political as well as economic, and focuses its efforts on cognition (study) and teaching. The university in the Humboldt model is considered as a source of knowledge that it shares with society, wherein the university does not need to justify its value and importance (Rutkowska-Sowa, 2019, pp. 3–4).

In contrast, the third-generation university model assumes that universities should adapt to changing social and economic conditions. This means that they should strive for the practical use of scientific research, which is to be manifested, among other things, in the transfer of research results to the economy and cooperation between universities and the business world (Makieła, 2017, p. 36). Undeniably, the adoption of exactly this model of the university contributes the most to the process of commercialization and the transfer of scientific results from the university to the economic and social environment. According to Wissema, the development of universities in the 21st century will depend on their ability to convert themselves into international centres of technology transfer. At a minimum, such a centre should consist of a traditional university research and development centre, research units of cooperating companies, independent development and research centres, facilities for technology start-up companies, a wide variety of financing institutions and a number of professional service providers (accountants, management consultants, marketing consultants, intellectual property specialists, etc.). As Wissema points out, the concept of an international centre of technology transfer is not new; examples include, among others, Stanford University and the Massachusetts Institute of Technology in the USA, as well as the Catholic University of Leuven (KU Leuven) in Belgium, with its Leuven R&D commercial branches and IT IMEC science park (Wissema, 2005, p. 40).

Under the third-generation university model, ambitious technical universities and university departments of sciences have considered technology commercialization as a third objective, alongside two previous others, i.e. scientific research and education. The adoption of this objective is connected with the creation of new scientific facilities and the establishment of a centre responsible for commercialization, which is a basic condition that must be met if a university intends to become a centre for the exchange of know-how and the transfer of knowledge to the economic environment. Third-generation universities should have centres of technology transfer, dealing with selling know-how to large corporations, small and medium-sized enterprises and start-ups (Wissema, 2005, p. 44).

The solution to the problems faced by Polish universities related to commercialization and the transfer of scientific research results from universities to the economy is not facilitated by the weak position of Poland within the European Union in terms of innovation, which is confirmed by official statistics issued by the European Commission. According to data from the European Innovation Scoreboard of 2022 and 2023 (European Commission, 2023), Poland is ranked in the weakest group of so-called emerging innovators, fourth from last, ahead of Latvia, Bulgaria and Romania. In 2022, Poland reached 60.5% of the EU average, an increase of 4.3% compared to 2021 and an increase of 11.3% compared to 2015. This innovation ranking shows that Member States fall into four groups: innovation leaders (performance above 125% of the EU average), strong innovators (performance in the range of 100–125% of the average), moderate innovators (70–100% of the average) and emerging innovators (below 70% of the average). According to this ranking, the best performer in the EU in 2023 was the Netherlands, which beat the leader of the previous few years, Sweden. It follows from this that the strongest innovators and leaders are mainly present in Northern and Western Europe, while most moderate and emerging innovators are in Southern and Eastern Europe.

The purpose of this study is to analyse the model of the acquisition and commercialization of rights based on the results of scientific activities carried out by the employees of Polish public universities under the Act of 20 July 2018 – the Law on Higher Education and Science and their object of commercialization (P.S.W.N.). In addition, the study considers the issue of whether the institution of remote work, introduced under the Act of 1 December 2022 amending the Labour Code and Some Other Acts, is a tool to facilitate the process of the commercialization of knowledge in the digital age for employees and universities and the development of an innovative and entrepreneurial university or, on the contrary, whether it may generate difficulties and costs for both parties, i.e. for the university as an employer as well as for its employees.

1. The results of research activity carried out by employees as the object of the commercialization process in public universities

The substantive scope of scientific activity is defined in Article 4(1) of the P.S.W.N.: scholarly activity includes scientific research, development work and artistic creation. For the purposes of this study, we will only deal with the first two elements, i.e. scientific research and development work. The term 'scientific research' can be defined as a special form of intellectual work which involves the search for a solution to a problem in the field of science or technology by means of a scientific method (Niewęgłowski, 2019, p. 67). The legislation divides scientific research into two groups: basic research and applied research (Article 4(2) P.S.W.N.). Basic research is understood as empirical or theoretical work aimed primarily at acquiring new knowledge about the fundamentals of phenomena and observable facts, without focusing on direct commercial application. In contrast, applied research refers to work aimed at acquiring new knowledge and skills focused on developing new products, processes or services or their significant improvement.

Scientific research should address a clearly formulated research problem: original, theoretically significant and socially important. At the same time, the solution to this problem must be found with the use of research techniques that are appropriate to the nature of the problem (Szydło, 2022, p. 52 ff.). First and foremost, scientific research should be characterized by independence and originality (cf. Leszczyński, 2020, p. 25 ff.); independence means a lack of strict subordination to the instructions of superiors or others during the pursuit of the research work. Scientific research should be created as part of an inventive activity and, consequently, it should be accompanied by a smaller or larger margin of creative freedom, depending on the specifics of the subject (Niewęgłowski, 2019, p. 68). The concept of creativity has not been defined, but in the doctrine of copyright law, creativity is treated as the opposite of imitation or the mechanical application of certain rules (Błeszyński, 1988, pp. 31–32; see also Machała, 2013, p. 123 ff.). Thus, it should be assumed that research work of a routine nature, based on the mechanical execution of orders and the implementation of instructions, does not bear the character of scientific research, as it is not creative. Originality is defined in the Polish language as peculiarity, uniqueness, something distinctive in its realm and unconventional (Szymczak, 1984, p. 544). Originality in relation to a work is generally recognized in copyright doctrine as a subjectively new product of intellect (see, among others, Barta & Markiewicz, 2005, pp. 67–68; Błeszyński, 1988, p. 34; Poźniak-Niedzielska, 2007, pp. 16–17). It can be assumed that originality in scientific research refers to its novelty and is the effect of the researcher's independence as a creator and his/her creative activity.

The legal definition of development work is contained in Article 4(3) of the P.S.W.N.; it is activities involving the acquisition, combination, development and use of currently available knowledge and skills, including IT tools or software,

for production planning and the design and creation of altered, improved or new products, processes or services, excluding activities involving routine and periodic changes even if such changes are improvements. Thus the purpose of development work is to plan production and design and create altered, improved or new products, processes (technologies) or services (see, among others, Judgment of the Supreme Court 1980 and Judgment of the Supreme Administrative Court 1998). Development work falls into the category of creative work, which implies the requirement of a certain level of novelty associated with the absence of routine (Balicki et al., 2021, Nb 3; Jakubowski, 2023).

The regulation contained in Articles 154–157 of the P.S.W.N. applies to the results of research activity carried out by public university employees. Pursuant to Article 153, the provisions of Articles 154–157 apply to the results of 1) scientific research being an invention, utility model, industrial design or integrated circuit topography, and a bred or discovered and developed plant variety, 2) development work created by an employee of a public university in the course of the performance of their duties resulting from the employment relationship and the know-how related to such results. Under Article 153, the above provisions apply to the results of research activity carried out by public university employees who are employed under a contract of employment for a definite or indefinite period and that have been created as a result of the performance of duties within the employment relationship. This applies to employees who are academic teachers employed in a group of research staff and to research and teaching staff within the meaning of Article 114(2–3) of the P.S.W.N. This regulation does not apply to the results of the scientific activity of persons employed under civil law contracts, for instance a contract for specific work, a contract of mandate or a contract for the provision of services similar to mandate.

An issue that needs to be resolved, which is not clearly and explicitly presented by the representatives of Polish doctrine, is the precise definition of what is included in the concept of scientific research results. Ambiguous statements on this issue are made by, among others, Czarny-Drożdżejko (2016, p. 89 ff.), Czub (2016, p. 62 ff.; 2021, p. 88 ff.) and Salamonowicz (2014, p. 1175 ff.). A literal interpretation of the provision of Article 153 of the P.S.W.N. clearly shows that the concept of scientific research results includes industrial property rights (regulated in the Act of 30 June 2000 – Industrial Property Law (P.W.P.) and is an invention, utility model, industrial design or integrated circuit topography or a bred or discovered and developed plant variety governed by the provisions of the Act of 26 June 2003 on the Legal Protection of Plant Varieties.[2] Thus, scientific research results refer to the industrial property rights of employees, created in a public university. Consequently, the rules for the commercialization of the employees' research results are regulated in Articles 154–157

2 The issues of intellectual property rights are related to intellectual property cases settled by common courts; see Niewęgłowski (2022, p. 11 ff.).

of the P.S.W.N. Importantly, in Article 153 of the P.S.W.N., the legislator excludes from commercialization the results of scientific research that are works, including as scientific works or computer programs, and objects of related rights within the meaning of the Act of 4 February 1994 on Copyright and Related Rights (Pr.Aut).

2. The model of the acquisition and commercialization of the rights to the results of scholarly activity carried out by employees

Referring to the model of the acquisition and commercialization of the rights to the results of scientific activity carried out by employees under Articles 154–157 of the P.S.W.N., it is important to emphasize that these provisions do not apply to the results of scientific activity carried out by employees that are works or objects of related rights or rationalization projects. This means that the rules for the acquisition of derivative economic rights by the employer in employees' works are governed by the general provisions contained in Articles 12–13 of the Pr.Aut. The rights of universities with respect to scientific publications created by employees, in terms of priority of publication and rules of use, are regulated in Article 14 of the Pr.Aut. (Czarny-Drożdżejko, 2016, pp. 96–97). However, it should be noted that under this article, a university does not acquire copyright to scientific works created by an employee but only absolute and economic rights to the first edition of such works . On the other hand, the original acquisition by the employer of copyright in computer programs created by an employee is regulated in Article 74(3) of the Pr.Aut. In turn, the rules for the acquisition of the rights to employees' rationalization projects that are not patentable inventions, utility models, industrial designs or integrated circuit topographies are set forth in Article 7 of the P.W.P.

Moreover, object-related restrictions in terms of the statutory course of acquisition and commercialization are included in Article 154(5) of the P.S.W.N. This provision excludes the application of Articles 154(1–4) and 157 of the P.S.W.N. in two cases, where the research was conducted: 1) under an agreement with the party financing or co-financing such research, providing for an obligation to transfer the rights to the research results to that party or to an entity other than the contracting party; 2) with the use of financial resources that are granted or used under rules which specify a different way of using the research results and the related know-how than what appears in the Act.

With regard to the issues concerning the commercialization of the results of scientific activity in public universities, which are not regulated in Article 158, Chapter 6 of the P.S.W.N., the legislation refers to three acts regulating individual rights to intangible property which are to be applied directly, i.e. the Act on Copyright and Related Rights, the Act on Industrial Property Law and the Act on Legal Protection of Plant Varieties. The provisions of Articles 154–157 of the P.S.W.N. regulate issues

related to the remuneration of employees differently, including their share in profits from the commercialization of the results of scientific activity. The lack of a regulation referring to the above-mentioned acts would also result in their application due to the binding principle of *lex specialis derogat legi generali*. For this reason, I believe that despite the fact that the Act of 27 July 2001 on the Protection of Databases is not mentioned in Article 158 of the P.S.W.N., its provisions are applicable to databases created as a result of scientific research or development work (see Jędrzejewski, 2019, Nb 3).

The essence of the commercialization model provided for in Articles 154–157 of the P.S.W.N. is the introduction of a statutory three-month time limit, within which the university should decide about the commercialization of the results of the scientific activity after being informed by the employee about them. The time limit begins to run when an employee submits a declaration of an interest in the transfer of rights to the results of scientific research and related know-how; this follows from Article 154(2)(sentence 2) of the P.S.W.N., which stipulates that the three month time limit runs from the date in which an employee submits the declaration (otherwise see Ożegalska-Trybalska, 2015, p. 82). With regard to the legal nature of the so-called decision of the university about commercialization, it should be stated that it does not have the character of an administrative decision. It does not bear the characteristics of an official act and, consequently, the legislator rightly did not provide for an appeal procedure or other appeal measures. Therefore, the employee is not entitled to any appeal measures against this so-called decision to administrative bodies. In this regard, I share the unanimous position of doctrine representatives (Ożegalska-Trybalska, 2015, p. 82; Salamonowicz, 2014, p. 1175 ff.).

The decision about commercialization mentioned in Article 154(1) of the P.S.W.N. is not of a legal-formative nature; therefore, it is not the source of rights to the results of scientific activity of public university employees. However, the adoption of a decision on commercialization by the university within the statutory three-month period is a sort of confirmation of the university's original acquisition of the rights to the results of employees' scientific activity. Thus, as a consequence of the decision on commercialization, the university acquires the right to obtain a patent for an invention, a protection right for a utility model or the right to register an industrial design. The adopted solution does not, in principle, modify the general rules for the acquisition of industrial property rights included in Article 11(3) of the P.W.P., which provides for the original acquisition by the employer of the rights to obtain a patent for an invention, the right of protection for a utility model and the right to registration for an industrial design, unless the parties have agreed otherwise (see Ożegalska-Trybalska, du Vall, 2017, pp. 537–538).

On the other hand, if a public university decides not to commercialize, or after the ineffective expiry of the three-month time limit, the university is obliged within thirty days to make an offer to the employee of concluding an agreement

on the transfer of the rights to these results, or the know-how related to these results, together with the information, publications and ownership of the media on which these results and know-how were recorded, as well as technical experiments that the employee transferred under the obligation resulting from Article 154(6)(2) of the P.S.W.N. The offer made by the university concerns an unconditional and paid agreement, wherein the remuneration payable to the university for the transfer of the rights may not exceed 5% of the average remuneration in the national economy in the previous year, as published by the President of the Central Statistical Office. The agreement should be made in writing, as otherwise it may be null and void, and should not contain any additional conditions. Under Article 86(e)(2) of the previously binding Law on Higher Education, the remuneration for a university cannot be higher than 10% of the minimum remuneration as of the effective date of the agreement. However, it seems that *de lege ferenda* consideration could be given to not charging the employee with the obligation to pay the university for the transfer of the rights, especially since it is the employee who is faced with the many tasks connected with the implementation of the process of commercialization if the university is not interested in it.

I fully approve of the solution adopted in Article 157 of the P.S.W.N., analogous to the content of Article 86(h) of the previously binding Law on Higher Education, which is an expression of respect for the autonomy of the will of the parties in the sphere of labour law. Under this provision, a public university and an employee may, in a manner different than was statutorily envisaged, contractually determine the rights to these results or the manner of their commercialization. However, I believe that it would be encouraging *de lege ferenda* for both parties to significantly extend the scope of the autonomy of the will of a university and an employee to include, for example, issues concerning the distribution of profits from commercialization.

3. The performance of scientific activity by university employees in the course of remote work with reference to the process of the commercialization of research results

Remote work is a relatively new institution, since Chapter II(c), comprising Article 67(18)–(34), was introduced to the Labour Code (K.P.) by the Act of 1 December 2022. Amending the Labour Code and Some Other Acts, the provisions of which came into effect on 7 April 2023, while the regulations on teleworking were repealed. The legislator rightly decided to introduce regulations concerning remote work as a permanent solution to the Labor Code, and not just for the duration of the pandemic, in effect of the postulates brought thereon by both employees and employer organizations.

The provisions regulating remote work contained in the Labour Code are applicable to universities because, by virtue of Article 147(1) of the P.S.W.N., the provisions relate to matters concerning the employment relationship of university employees that are not regulated by the Act. The provisions of Article 147 apply to both public and non-public universities and apply directly, not respectively. This is further confirmed by Article 5 of the K.P., which defines the relation between the provisions of the Labour Code and other acts that specifically regulate the employment relationships of certain groups of employees. Article 5 of the K.P. indicates that the K.P. may be applied directly to the extent not regulated by pragmatic considerations, including the Act on Higher Education and Science (cf. Maniewska, 2023; Nałęcz, 2023; Resolution of the Supreme Court 2009; Sobczyk, 2023). The non-K.P. provisions take precedence over the provisions of the K.P., while the provisions of the K.P. apply to these employment relationships alternatively, i.e. to the extent not regulated by the non-K.P. provisions.

Within the context of the process of the commercialization of the results of scientific activity carried out by university employees through remote work, a fundamental question arises as to whether the regulation on remote work applicable to universities may facilitate and improve this process and whether it will enable employees to both carry out their teaching remotely and simultaneously carry out scientific activity in other Polish and foreign universities, the results of which may be commercialized and then transferred from the university to the economy and, consequently, may contribute to the development of an innovative and entrepreneurial university. The legislature introduced the concept of remote work in Article 67(18) of the K.P., defining it as work performed wholly or partly at a place designated by the employee and agreed with the employer, including the employee's place of residence, in particular by means of remote communication. It follows from the literal interpretation of this provision that a necessary element of this concept is the performance of work 'at the place indicated by the employee and agreed with the employer'. The introduction of the rule according to which the place of remote work should be indicated by the employee and agreed with the employer entails that this place will always be the subject of a mutual agreement between the parties to the employment relationship (Explanatory Memorandum). The legislation combined remote work with a designated place in the factual, real sense rather than a place in the virtual sense. This is a particularly unfavourable solution for university employees, who, while carrying out various projects related to the commercialization of knowledge, will not be able to change their place of work, which is often necessary when working with foreign partners. This is not solved by the admissibility of an agreement between the parties that remote work will be performed at different locations, about which the employee will inform the employer each time, since the employee's absolute freedom to choose the place of remote work is excluded (i.e. without agreeing this place with the employer) (Suknarowska-Drzewiecka, 2023, point 7). Performance of work

by a university employee outside the place agreed upon with the university constitutes a breach of employee duties. In particular, it hinders or prevents an employer from carrying out controls at the place of remote work, as stipulated in Article 67(28) of the K.P. For this reason, Article 108(1) may apply, which provides for a disciplinary penalty or even the possibility of termination of the employment contract without notice at the fault of the employee, under Article 52 of the K.P.

The performance of remote work by employees is associated with an extensive catalogue of obligations imposed on an employer, i.e. also on universities. Therefore, universities may possibly not be interested in the performance of remote work byemployees due to the number of obligations imposed, including the duty to cover a number of related costs, except in cases where a university will be forced to consider an employee's request pursuant to Article 67(19)(6) of the K.P. Namely, the university as an employer is obliged, among other things, to determine the rules for performing remote work in the manner indicated in Article 67(20) of the K.P., and to implement the obligations referred to in Article 67(24) of the K.P., i.e. provide the employee working remotely with the materials and tools, including technical devices, necessary to work; install, service and maintain the tools, or cover necessary costs connected with their installation, service, exploitation and maintenance; cover the costs of electricity and telecommunication services necessary to work remotely; cover other costs directly related to the remote work; organize any training and technical assistance necessary to perform this work; draw up information on health and safety rules for working remotely (Article 67(31)(5)(2) of the K.P.); develop procedures for protecting personal data (Article 67(26) of the K.P.), etc. All this entails that by agreeing to the performance of remote work, the university as an employer will, in fact, face various kinds of difficulties, rather than convenience. In view of this, the questions posed in the introduction of this study should be answered in the negative, because the institution of remote work regulated in this form in the Labour Code will not contribute to the improvement and enhancement of the process of the commercialization of the results of scientific activity carried out by employees.

Conclusions

The regulation set forth in Articles 154–157 of the P.S.W.N. specifying the course and rules of commercialization applies to the results of scientific activity carried out by public university employees as a result of the performance of their duties under the employment relationship. The concept of scientific research results comprises industrial property rights, which are inventions, utility models, industrial designs or integrated circuit topographies as well as a bred or discovered and developed plant variety (an object restriction), whereas publications and objects of related rights are not covered by this concept. What is more, this regulation concerns the results

of scientific activity carried out solely by employees who are employed under a contract of employment in a public university and must be the result of the performance of duties within the employment relationship (a subject restriction).

It does not seem reasonable to extend the three-month time limit for a university to take a decision on commercialization, all the more because this is intended to 'discipline' a university as well as to improve the commercialization process. Apart from this, the time limit starts to run not from the date of the university being provided with information about the results of scientific activity, as claimed by some representatives of the doctrine, but from the date on which an employee submits a declaration of interest in the transfer of rights to these results, which he/she can submit within fourteen days of providing the university with the information about these results.

We could consider *de lege ferenda* the postulate of not burdening an employee with the obligation to pay remuneration to a university for the transfer of rights to the results of scientific activity when the university has not taken a decision on commercialization, and the amendment of Article 154(3) of the P.S.W.N. in this respect. This is even more reasonable because an employee in such a case is left on his/her own, and if he/she commercializes the results of his/her scientific activity, he/she will be obliged to share the profits from the commercialization with the university, according to the rules set forth in Article 155(2) of the P.S.W.N. I believe that it would also be reasonable *de lege ferenda* to extend the scope of the autonomy of the will of universities and employees with respect to forming not only the rights to the results or the manner of their commercialization, as provided in Article 157 of the P.S.W.N., differently from what is envisaged, but also the rules on the distribution of profits from commercialization between universities and employees.

Furthermore, it should be emphasized that the improvement and enhancement of the process of the commercialization of the results of scientific activity, and the ensuing development of third-generation universities in Poland, requires a significant increase in cooperation between the spheres of education, science and business. Innovation and competitiveness in modern economies depend more and more on the ability to build partnerships between universities and businesses (Cyran, 2015, p. 23). Cooperation between business representatives and the scientific community is also an opportunity for Polish enterprises, which frequently lag behind technologically and organizationally, particularly small and medium-sized enterprises.

I believe that for the reasons provided in this study, the institution of remote work regulated in the Labour Code will neither contribute to the enhancement and improvement of the process of the commercialization of the results of scientific activity carried out by employees, nor will it facilitate the creation of international centres of technology transfer, which are the essence of the third-generation university. It seems that as far as universities are concerned, regulations on the performance of remote work should be much more flexible, i.e. supporting greater mobility of employees and the development of international cooperation with partners from foreign

universities, within the scope of the commercialization of the results of scientific activity and their implementation into the economy. Special provisions on remote work in the course of the employment relationship between universities and their employees could be introduced into the Law on Higher Education and Science. In particular, it is important *de lege ferenda* to disconnect remote work from the place where it is performed by a university employee, without the obligation to agree on the place of work with the university each time. .

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The Digitalisation of Tools for Workers' Representation in Europe and Spain: A First Approach

Abstract: The unstoppable digitalisation of work also brings with it alterations at the collective level of labour relations. On the one hand, the dispersal of the workforce entails the breaking of traditional ties of proximity, which engendered solidarity among workers. On the other hand, however, new technologies can contribute decisively to the development of representation activity, also being a fruitful field for collective bargaining. Through a synthetic examination of comparative law, several of these possibilities are presented, and how they fit with Spanish law is analysed. Among the subjects addressed are digital tools that can favour tasks in representation. In addition to the legislative dimension, the study takes into account the latest developments in jurisprudence and collective bargaining.
Keywords: collective bargaining, digitalisation, information and consultation, telework, workers' representatives

1. A world of work that is becoming digitalised… and individualised?

Recent data indicate that the world of work is digitalising by leaps and bounds, and not only in mechanical production processes. During the lockdowns resulting from the pandemic, about 40% of people started teleworking (Eurofound, 2020); by 2021, the number of such people had more than doubled, compared to 2019. Technological improvements alone could trigger this centrifugal momentum. Sometimes they also join forces with the personal preferences of individuals, who see teleworking

as a better way to reconcile their work activity with their family responsibilities. In this last aspect, the gender dimension is particularly important, since women are more likely to be teleworkers (Casas Baamonde, 2021; Maneiro Vázquez, 2023).

In many cases, there is a certain non-economic cost. Consider the direct clash that digitalisation creates with the right to rest time, by the possibilities of communication through new technologies being made omnipresent: this has led to the emergence of the right to disconnection. This is an area where the European Parliament, in its resolution of 21 January 2021 (European Parliament, January 2021) along with other proposals, has called on social partners to take action within three years. The high political value of this measure should be seen in the light of the fact that it is one of the very few occasions on which the Parliament has used the mechanism of Article 225 TFEU, which allows it to act as a legislative initiator, breaking the Commission's monopoly.

From this perspective, the 2020 European Framework Agreement on Digitalisation does not avoid the risks for workers that arise from flexible work organisation introduced by digitalisation. The text gives employers responsibility for health and safety and contains a catalogue of measures that national social partners can incorporate into their practices. These include respect for working time, the creation of working-time rules, including the avoidance of out-of-hours contact, the private use of digital tools during working time, the rationalisation of working hours, compensation for extra work and the prevention of isolation at work.

Other dangers are less obvious but equally harmful. For example, the rise of teleworking brings with it the rise of digital surveillance tools, a subject that has been widely studied. The walls of the home, which the liberal state worked so hard to build, may thus be shaken by corporate interests. Where is the capacity of workers' representatives to control these home searches, as in the case of physical searches? In this sense, the above-mentioned Framework Agreement focuses on the control exercised over workers. In itself, it can be seen as a development of the General Data Protection Regulation, which in its Article 88 empowers collective bargaining to adopt more specific rules to ensure the protection of individuals' rights. The measures envisaged here are more restricted: the focus is on workers' representation, which should be allowed to deal with issues such as data, consent, privacy and surveillance. In addition to this, workers' representatives should be provided with digital tools to fulfil their roles in the new scenarios. A final caveat is the need to collect data only for specific and transparent purposes.

In addition to the above, teleworking brings with it a loss of proximity and personal relationships with the rest of the workforce, especially when the whole working day is spent in this way. It has even been argued that digitalisation brings with it 'a trend towards the individualisation of the employment relationship and a re-commercialisation of the employment relationship' (Martín Artiles & Pastor Martínez, 2022). This situation is further accentuated when telework takes on transnational

dimensions or is carried out through digital platforms, the modality known as crowdwork, in which physical contact is non-existent. This consequence undoubtedly has repercussions in the field of collective representation, whatever the proportion of this way of working is. It is 'a kind of disaggregation that translates into a manifest rupture of the unity of collective action that is linked to an ongoing process' (Mercader Uguina, 2020, 17). The problems that have been detected in the field of digital platforms and that have been an obstacle to the emergence of effective interlocutors are now also being transferred to ordinary labour relations. Indeed, many issues concerning the representation of workers in a digitalised world of work remain unresolved, or even unasked.

This problem exists in a work environment that is no bed of roses. At present, the representation of workers in the Member States of the European Union does not, on the whole, seem to be going through a particularly positive period. On average, there is currently only representation at workplace or company level in three out of ten European companies with more than ten employees (Eurofound, 2020). In some cases, this is due to a lack of tradition, such as in Estonia, Hungary or Ireland, but in others it is due to a decline in the importance of social partners, such as in Poland. In addition, a possible intensification of the weight of very small enterprises will make it particularly difficult to apply not only the more traditional model of collective labour relations, but also the new realities that are becoming a trend in some industrial relations models (Cruz Villalón, 2017). On a complementary level, the collective problems in so-called 'network companies' are not minor (Molina Navarrete, 2019). If we add to these statements the growth of economically dependent self-employment, clearly favoured by digitalisation, the scenario appears dark.

However, in contrast to the risks listed above, which largely affect the individual, there are also potential advantages at the collective level which arise from digitalisation, both for teleworkers and non-teleworkers. Participation in trade union elections could be encouraged if digital voting channels were created, for example. In the same vein, representation meetings, whether formal assembly meetings or not, could attract a larger audience if conducted digitally. The replacement of information distributed on paper by its digital equivalent is already a reality; in many EU Member States, such measures are beginning to take shape. The promotion of industrial democracy is not just a value in itself but can improve business productivity. In the words of the European Parliament (December 2021), 'the voice of workers must be a key component of the Union's efforts to ensure sustainable and democratic corporate governance and due diligence on human rights, including labour rights, climate change and the environment, as well as to reduce the use of unfair practices, such as labour exploitation and unfair competition in the internal market'.

In this regard, the existence of permanent, smoothly implemented information and consultation mechanisms can provide companies with a privileged information channel on their internal problems. This was highlighted by the 'fitness check' carried

out by the European Commission (2013) on EU legislation on information and consultation. In assessing the results of the implementation of the provisions of Directives 98/59/EC, 2001/23/EC and 2002/14/EC, the Commission document was very positive in its findings. According to the text, these mechanisms not only increase trust and partnership but mitigate conflicts in the company, involve employees in decision making and improve performance at the workplace. Moreover, they also lead to better management and, it is worth stressing, help in the anticipation of change. Doctrinally, it has been pointed out that workplace democracy is conducive to business innovation (Acharya et al., 2013). Given the many challenges facing businesses today, from the energy crisis to climate change, an ongoing practice of information and consultation can serve businesses as another tool with which to address these issues.

2. Digital tools and modes of employee representation: A brief comparative overview

The first aspect that this paper will address is the way in which employee representation is adapting to the digital environment, trying to determine which of the tools that have emerged with the digitalisation of work can be of benefit. Some of these already existed before the pandemic, others have emerged or have become more widespread, hand in hand with teleworking, motivated by Covid-19. The structure here will look at office work and teleworking, starting with the latter, taking into account its topicality, and the explicit recognition of rights in this field.

Recent evidence on the implementation of telework shows that there is no valid general formula for recognising rights linked to representation for all Member States. This is to be expected, as collective representation takes many different forms in Member States, reflecting different regulations, practices and even work cultures. However, such studies confirm the critical role of social dialogue and collective bargaining in the regulation of telework at company level (Eurofound, 2022). For this to be realised, however, representative bodies need to be in place. In countries where there is a decline in representation within companies, as is found in Poland – a paradigmatic case within the EU (Madrzycki & Pisarczyk, 2023) – the task becomes impossible. The opportunity for modernisation that was forcibly brought about by the pandemic dissipates in these scenarios. This does not seem to be the case in the Spanish legal system, which reacted explicitly in this matter, as will be seen.

In neighbouring countries where representative structures are consolidated, experience shows that significant progress is being made. It should be noted that about half of the EU Member States took legislative action on telework during the pandemic. Collective bargaining and the involvement of representatives in such a scenario have an important role to play in protecting workers; digital media will be

a decisive tool for this. According to the most comprehensive analysis (Eurofound, 2022), in countries where social dialogue is weakened, the resulting protection will be lower, in contrast to those that enjoy a high level of social involvement. The digitisation of collective practice itself can be an incentive for improvement in this respect.

The comparative analysis carried out for this paper indicates that some Member States, although of course not all of them, have started to implement measures which adapt modes of representation to the digital age, organised around the harmonised notion of information and consultation. Some are moving towards teleworking, others are opting for more general regulation. Although the pandemic was a catalyst which greatly accelerated these practices, there were already interesting precedents. In France, for example, it had already been possible to organise works council meetings by videoconference since 2015, if the collective agreement so stipulated. It was during the pandemic that, in most cases, the French legislature intervened urgently to allow the continuity of collective relations through digital tools (Ordonnance n° 2020–1441 2020). Some of these measures were, admittedly, temporary, but others have endured in law.

In Germany, Covid-19 led to the adoption of changes concerning this digital representation. The changes were implemented through the *Betriebsrätemodernisierungsgesetz*, which altered the *Betriebsverfassungsgesetz*, the central regulation on employee representation. The main aim of the reform was to enable various bodies to meet for necessary decision making and to make remote participation possible (Betriebsverfassungsgesetz, Art. 30(2)). Another important point was the relaxation of the rules of procedure by allowing the use of electronic means, not only paper. Despite having been adopted in reaction to the pandemic, these rules are still in force.

In other countries, such as Estonia, the Netherlands or Portugal, legislatures adopted similar rules facilitating digital meetings, and even the effective implementation of information and consultation rights through these tools. In Estonia in particular, such meetings have become the norm, and are no longer an exception due to the health emergency. In Portugal, as of 1 January 2022, the law recognises the right of workers' representatives to use a digital bulletin board (Código do Trabalho, Art. 465(2)), a space within the company intranet where representatives can share news, communications, information or other texts on trade union activity and the socio-economic interests of workers. The right to use mailing lists for the dissemination of this information to teleworkers is also recognised (Código do Trabalho, Art. 169(3)). The same right to a digital bulletin board has been established in the collective agreement of the Italian postal service (*Poste Italiane*) of 2021, a sign of the usefulness of collective bargaining in this field in the face of the law's silence.

An additional aspect of the French legislation is also worth mentioning: all information provided to workers' representatives in companies with more than 50 employees must be stored in a database (the *Base de Données Économiques, Sociales*

et Environnementales) (Code du travail, Arts. L. 2312–18, L. 2312–36 and L. 2312–21). In companies with more than 300 employees, this database must be in digital format.

In other countries, however, such as Austria and Romania, there are no specific rights similar to these, but neither are there legal obstacles to their implementation. In the cases indicated above, it has been the courts that, interpreting the existing rules, have ruled positively on the feasibility of using digital tools for the development of collective bargaining or consultation with representation.

3. Digital media and methods in the field of workers' representation: The situation in Spain

The above is only a non-exhaustive sample of good practices in comparative law. As is always the case with such a presentation, it should be read with caution. Some of the major novelties are already familiar in the Spanish legal system, others are received with scepticism and some arouse interest.

It should be noted that, in Spain, Law 10/2021 of 9 July on Remote Work has given significant weight to the collective dimension. It has done so in such a way that 'it has standardised remote work and collective bargaining as an essential institution of labour law, a sign of identification of this legal territory and of its demands for self-regulation and self-government in its constitutional significance […] The most innovative aspects of the new regulation are really entrusted to collective bargaining' (Casas Baamonde, 2020, p.1433). Within this framework, Article 19 expressly regulates the collective rights of remote workers, including teleworkers. Individual rights are not the subject of this paper, however, and the focus of the analysis will shift to the impact that this provision, and others in the same law, have on the representation of workers and their working environment at the digital level.

In this piece of legislation, three different aspects must be distinguished. In the first section, equality in collective rights is recognised, 'a neutral recognition, insofar as it does not provide more powers than those already recognised by legal and conventional rules' (Rodríguez-Piñero Royo & Calvo Gallego, 2020, p.1468), in connection with the establishment to which they are attached. The most relevant aspect for this study of this first section of the article is precisely this link with the workplace, in its dimension as an electoral unit. As has been pointed out (Cordero Gordillo, 2022), a unilateral affiliation made by the company can lead to problems when calculating minimum thresholds, a certain corporate gerrymandering that would allow some people to be excluded from the electoral process or, on the contrary, to dissolve them into a unit that is irrelevant to their interests.

The creation of an electoral college through collective bargaining, on the basis of the general provisions of Article 71 of the Estatuto de los Trabajadores (ET), has been

a matter of debate in the doctrine since before digitalisation burst onto the labour market. An examination of the reality shows that, unless there is an error or omission, no collective agreement in Spain includes this possibility. The requirement in Article 71(1) ET that a hypothetical new college be created 'according to the professional composition of the sector of productive activity or of the company' seems to be a severe obstacle. The very little case law on the subject has only pointed out that the "fringe agreement"[1] is not an appropriate tool for this creation, as it deals with 'a matter which, by its very nature, can only be regulated by a unitary agreement for the whole company' (Judgment of the Supreme Court, 2004). Once the source of such a regulation is known, the possible debate moves on to the basis of the novelty. The simple fact of working remotely does not seem to be a sufficient reason to justify the creation of the specific electoral college. Digitalisation would be a simple 'how' that does not alter the 'what' that is at the basis of the creation of this differentiated college, that is in any case 'almost unheard of in practice' (Cabeza Pereiro, 2009, p. 120).

Irrespective of this possibility, the provision gives collective bargaining an important role in guaranteeing these rights in the absence of even subsidiary indications in the legislation (Domínguez Morales, 2021). One of these may be the introduction of agreed criteria for the said affiliation (Cordero Gordillo, 2022), which would eliminate unilateralism. Unless there is an error or omission, little has been done in this respect, except in the collective agreement of the company Financiera El Corte Inglés, EFC, SA (Convenio Financiera, 2021), which, in its article 44.8, states that 'unless expressly agreed otherwise, teleworking staff must be assigned to the same workplace where they carry out their face-to-face work'. The solution probably responds to the circumstances of the aforementioned company, but it is not exportable as a general rule; in any case, it is a first step. All in all, this seems to be an area in which collective bargaining can bear considerable fruit, including in terms of personnel management and not only in terms of security. The price is, of course, the acceptance of the curtailment of corporate unilateralism.

In turn, the second section of the provision recognises powers for workers' representatives that are perfectly in line with the contents set out in the framework of comparative law and which, as has been pointed out, 'in reality means recognising rights that Spanish labour legislation had not hitherto provided for' (Rodríguez-Piñero Royo & Calvo Gallego, 2020, p.1469). It is an open clause referring to 'the elements necessary for the development of their representative activity'. Article 19.2 specifies two of these elements, which in any case constitute an open list: 'access to communications and electronic addresses for use in the company' and 'the implementation of the virtual bulletin board'.

1 A fringe agreement ("*convenio franja*") is a collective agreement aimed at a group of workers with a specific professional profile.

The reference in the Law 10/2021 to the use of these means only if they are compatible with remote working has been noted with concern (Domínguez Morales, 2021). What interpretation should be given to this indication? In order to give substance to this provision, the most reasonable interpretation is not to restrict its use excessively. There is already sufficient case law from the courts on the use of these means outside the field of teleworking that can be easily transferred to this field.

Another possible area for future disagreement is who should bear the cost of implementing these rights. These differences are already apparent in the doctrinal treatment of the issue, divided between those who argue that it is not possible to claim the creation of this IT infrastructure from the employer (Cordero Gordillo, 2022) and those who see it as feasible (Nieto Rojas, 2020). If, again, one accepts the validity of the existing doctrine for ordinary work for the field of telework, the question seems to be resolved.

From a subjective point of view, it is also necessary to point out that the literal wording of the provision limits the right to elected representatives, not to trade union officers. It has been argued, however, that the right also belongs to sections of the most representative trade unions or those that have a presence in elected bodies (Cordero Gordillo, 2022). It does not seem that this issue will be the subject of particular controversy, and this interpretation is likely to be successful in practice.

Finally, the third paragraph of Article 19 of Law 10/2021 has content which, from a digital point of view, is differentiated into two parts. Firstly, it seeks to guarantee the effective participation of remote workers in collective activities. Here, the provision of means for the organisation of video meetings for workers' representatives can easily be accommodated.

In principle, the wording of the text of the Workers' Statute does not seem to allow online assemblies to be held, as its Article 78 restricts them to the workplace. However, the new legal text, as a subsequent and special law (Casas Baamonde, 2020), could cover them. Moreover, it would oblige the employer to provide the necessary means for this participation to take place. The use of a video-call system and the provision of a webcam would, in principle, comply with this requirement. However, the question arises as to what would happen in the case of a workers' representative who is not able to operate such a system. It can be assumed, in any case, that the general requirements for face-to-face meetings regarding quorums, time limit, etc., remain in force in this form.

Secondly, it should be noted that the guarantee is at the same time a limitation. What is protected is the exercise of the right to vote in works councils' elections. The limit derives from the requirement that such participation must be 'in person', according to the wording of the text. This is certainly a paradox as it requires travel, which, in some cases, does not fit well with the philosophy of remote working and does not in any way encourage greater participation. A recent judgment of the Audiencia Nacional has underlined, *obiter dicta*, the need for a literal inter-

pretation of this requirement (Audiencia Nacional, 2022). This situation has been criticised; Domínguez Morales (2021, p.150) states that 'all or most of the stages that the electoral procedure goes through could evolve towards digitalised elections in which physical presence at the workplace is irrelevant'. Undoubtedly, this indication of the necessity of being present in person has to be criticised.

The range of issues resulting from Law 10/2021 is thus set out, in more or less detail. What happens in this collective dimension to the rest of the jobs, where remote work is not carried out at all or only in an insignificant part of the working day? What happens in companies where face-to-face activity is maintained? Some of the points raised above will now be analysed: the virtual bulletin board and some common aspects of the practice of employee representation.

The use of email has already been extensively studied, including from the perspective of data protection, so it will not be dealt with here. In any case, due to its special connection with the matter under discussion, the Supreme Court's ruling of 21 April 2017 should be included here. In it, confirming the ruling of the Audiencia Nacional, it proclaimed the uselessness of email as an appropriate way to carry out the necessary consultations in a procedure of substantial modification of working conditions, 'without actually carrying out that process in which opinions are contrasted and assessed jointly among all the interlocutors who in the end may reach an agreement or disagree with the measure proposed by the employer' (Judgment of the Supreme Court, 2017). Email is therefore a tool for information, both for the company and for workers' representatives, but not for consultation.

As is well known, the recognition of some of these rights has its origins in the courts and in collective bargaining. It has been pointed out, on the one hand, that Law 10/2021 does not alter the outlook in any way: 'this obligation to provide digital means to make representation effective cannot be applied in generic terms, that is, it cannot be extended to staff who do not work remotely, in which case the case law on the use of company technology for the purposes of communication between representatives and those represented will continue to be applicable' (Domínguez Morales, 2021, p.152). On the contrary, it has been argued that 'this differentiation would not make sense, nor would it correspond to the practice of labour relations in Spain' (Rodríguez-Piñero Royo & Calvo Gallego, 2020, p.1469). In the absence of a pronouncement by the courts in this respect, the expansive option seems more in line with social reality and the objective of promoting collective activity defended in this paper.

As for the use of a virtual bulletin board in the first place, the legislation is silent on this issue. However, collective bargaining, prior to the Italian example mentioned above, had already pronounced on this issue. In any case, there are not many collective agreements that provide for the possibility of using a virtual bulletin board, not only in the case of telecommuters.

These include, but are not limited to, the most recent agreements: the Alicante provincial agreement for retailers, wholesalers and exporters of footwear, leather goods and travel goods (Convenio Minorista Alicante, 2020); the Nortegás Group agreement (Convenio Nortegás, 2020); the state-wide agreement for veterinary centres and services (Convenio Veterinaria, 2020); the agreement of Hermandad Farmacéutica del Mediterráneo, SCL, for work centres in Alicante, Almería, Barcelona, Madrid, Málaga, Murcia and Valencia (Convenio Farmacéutica, 2021); the state-wide agreement for the insurance, reinsurance and mutual insurance companies sector (Convenio Seguros, 2021); the state-wide agreement for the travel agencies sector, for the period 2019–2022 (Convenio Agencias, 2022); and the agreement for the offices and firms sector in the autonomous community of Madrid 2022–2024 (Convenio Oficinas Madrid, 2022). The sample is not particularly great, but it shows concrete achievements in very different realities. In any case, it should not be ruled out that the concession allowing the use of this type of board is being granted through unpublished or informally concluded company agreements, taking into account the purpose of the regulation and social reality (Nieto Rojas, 2022).

As for databases, such as the one mentioned above in relation to French legislation, Spanish law, whether statutory or bargained, does not contain any mention of them or anything similar. Perhaps this is due to the legislature's recognition that workers' representatives have sufficient capacity to be the custodians of what has been received. The rights to information would therefore be short-lived, and the custody of the materials received would belong to the representation. At this point in Spain, there would not be a right in principle to a retroactive request for information.

This scenario, which makes sense when there is continuity, fails, however, when there are major changes in the composition of representative bodies. And if these changes are accompanied by a certain amount of bad faith, a situation may arise in which the new employee representation lacks the necessary background to implement its role. In this case, which differs from the one described in the previous paragraph, a French-style database could make sense. It must be acknowledged, in any case, that it has not been possible to locate any judgment in which this question has been raised before the Spanish courts, but it could happen.

It is obvious that this is not a priority issue in a possible future reform. Its economic cost is anyway negligible once the use of the company intranet by workers' representatives has been enabled. For this reason, it seems most appropriate to propose the inclusion of a database as a possible part of collective bargaining *ad futurum* and not to consider any legislative amendment necessary.

To close this section, it is worth noting the interesting idea of using the popular application Bizum (Domínguez Morales, 2021) to collect dues. Given the anecdotic nature of the use of this tool, it seems even more appropriate for contributions to resistance funds, as already put into practice by the trade union CCOO in a recent strike, as well as by other organisations (Comisiones Obreras de Andalucía, 2021).

Conclusion

All that has been discussed in this paper is only a sample of the challenges facing workers' representation in a decade of digitalisation. Many of the issues have been merely sketched out and would merit study in a monograph, as is evident from the increasingly abundant Spanish literature on the subject. The aim here is to offer a synthesis of the situation, using comparative law as a possible guide. However, it is clear that the problems in the collective dimension of digitalisation do not end here. The previous sections have described laws and collective agreements, mentioning good practice and judicial pronouncements. In this closing section, a doubt concerning territory will be added to this catalogue of rights: in which jurisdiction, with which applicable law, can and should rights be applied? The existence of multinational companies and the very phenomenon of transnational teleworking make this reflection indispensable in a world such as the digital one, which blurs borders. Most EU Member States take into account the size of the workforce when creating representative structures or assigning functions to them. What happens in the case of multinational companies or those where part of the workforce voluntarily chooses to work from another country? Do they still form part of the electorate? What happens in the case of work on digital platforms where there is a real transnational diaspora and the only connection is digital? What happens if the thresholds for representation in various states are exceeded as a result of workers' movements? It is difficult to argue that the rights to information and consultation, enshrined in Article 27 of the Charter of Fundamental Rights of the European Union, can be called into question simply because work is carried out through electronic means.

Another possible line of research concerns the subjective scope of these rights: to what extent are self-employed workers, especially those who are economically dependent, likely to benefit from the protection described above? Most international texts recognise the extension of collective rights to atypical work, insisting in many cases on the necessary protection of new forms of work. However, the real extension of the rights to information and consultation is not clear. Some supranational pronouncements have pointed to the possibility that these groups may benefit from collective bargaining. Will the greater right and not the instrumental right be extensible? This question is particularly relevant in cases of economic dependence with considerable integration in the productive dynamics of the contracting party. It is an issue that has not yet been dealt with extensively by the doctrine and offers a new challenge to the delimitation of the boundaries of labour law, in this case in its collective dimension.

But beyond these possibilities, and finally focusing on existing regulation in Spain, the great challenge is the development of collective bargaining. The theoretical proposals made in this paper, or in future ones, are minimal compared to the effective contributions that productive interaction between social partners can bring.

To achieve this objective, a change is needed, not of a legislative nature but of mentalities. It is necessary for both sides of the social dialogue to conceive of the existence of a new model that brings us closer to other realities where it has generated prosperity: an implementation of information and consultation rights and of collective bargaining that brings collaboration and productivity, to the benefit of companies and workers.

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Resolución de 3 de agosto de 2020, de la Dirección General de Trabajo, por la que se registra y publica el Convenio colectivo estatal de centros y servicios veterinarios. (Boletín Oficial del Estado, 219, 69559).

Resolución de 30 de septiembre de 2021, de la Dirección General de Trabajo, por la que se registra y publica el Convenio colectivo de Hermandad Farmacéutica del Mediterráneo, SCL, para los centros de trabajo de Alicante, Almería, Barcelona, Madrid, Málaga, Murcia y Valencia. (Boletín Oficial del Estado, 246, 125298).

Resolución de 5 de marzo de 2020 de la Dirección Territorial de Economía Sostenible, Sectores Productivos, Comercio y Trabajo la que se dispone el registro oficial y publicación del Convenio Colectivo provincial de comercio minoristas, mayoristas y exportadores de calzado y artículos de piel y viaje (Boletín Oficial de la provincia de Alicante, 52, 2525/2020, 1).

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